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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 593)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

SUPREME COURT OF THE UNITED STATES

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vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH I. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, *Petitioner,* vs. PARAMOUNT PICTURES, INC., *et al.*, *Defendants.*	Equity No. 87-273.

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D.J.,
Constituting a Statutory Court.

New York, October 8, 1945, 10:30 a.m.

APPEARANCES:

For the Government:

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(2)

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George A. Raftery, Esq., of Counsel.

(2-A)

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Arthur F. Driscoll, Esq., and
George A. Raftery, Esq., of Counsel.

FITELSON & MAYERS, ESQRS.,
Attorneys for American Civil Liberties Union;
Harold J. Sherman, Esq., of Counsel.

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(3)

Mr. Wright: If the Court please, do you wish us to proceed with the opening statement? I had understood there was a motion. I did not know whether that was to be disposed of first.

Mr. Proskauer: Mr. Wright, we cannot hear a word you say. It may be important at some stage of the case to hear you clearly.

Mr. Sherman: If your Honors please, and with Mr. Wright's permission, I represent the American Civil Liberties Union. On its behalf, I ask for an order granting leave to

intervene in this case for the purpose of presenting argument and the filing of briefs as amicis curiae at a time to be fixed by this court following the close of the evidence in the trial herein.

The pivotal issues of this case relate to an extraordinary medium of theatrical art and communications in the form of motion pictures. They are, therefore, of paramount sociological importance and vitally affect the constitutional rights and interests of the general public. Accordingly, I respectfully submit that the American Civil Liberties Union, as representative of the general public, should be granted an opportunity to be heard on the merits.

Mr. Robert L. Wright of the Department of Justice has already indicated his consent to the granting of this motion. (4)

Mr. Davis: If the Court please, I was waiting to hear whether the Government had anything to say on this motion. If it has not, on behalf of the defendants and all the defendants, we object to any such intervention. We take for granted, and we think we may safely take for granted, that the public interest is adequately represented by the Department of Justice.

With great respect to the Civil Liberties Union, which I understand is a body of worthy gentlemen, whose intent is to protect the constitutional rights of those who have no other advocate, I suggest to the Civil Liberties Union that they had better devote their energies to their main purpose instead of standing forward as a substitute or auxiliary in a Government suit such as this.

Judge Hand: We will reserve decision on this motion.

Mr. Caskey: On behalf of Twentieth Century-Fox Film Corporation and National Theatres Corporation, we wish to file a preliminary brief, in answer to the brief which the Government submitted on September 20th. I ask leave to hand it up.

Judge Hand: All right.

Mr. Seymour: I also have a short preliminary memorandum on behalf of the Paramount defendants which has been

handed to the Government, and I would like to file it.
(5)

Judge Hand: All right. Mr. Wright.

THE GOVERNMENT'S OPENING.

Mr. Wright: If the Court please, this suit is the twelfth in a series of fifteen cases brought by the United States against the major motion picture companies, charging them with violations of the antitrust laws. All of these suits were filed during the period from 1928 through 1939. This was filed in 1938.

It charges that five integrated groups of corporations engaged in production, distribution and exhibition of films, exercise arbitrary control over the entire industry through agreements with each other and with the other major distributors, and that each of these producer-distributor-exhibitor combinations is illegal in and of itself.

The other Federal suits that were filed before and after this one dealt with specific film distribution abuses practiced on a national scale, or with local exhibitors in particular localities.

This suit is the first and only one of the series which attacked the legality of the basic nation-wide control over the production, distribution and exhibition of films which the five principal film distributors enjoy through their ownership of the five largest theatre circuits in the country.

The determination of the issue of the legality of that
(6)
control was postponed in 1940 when these five theatre owning distributors, known in the trade as Fox, Loew, Paramount, R.K.O. and Warner, respectively, consented to the entry of a decree against them in this case which went into effect for a three-year trial period. That decree set up a nationwide arbitration system to handle trade practice complaints brought by small exhibitors. It left these defendants in control of their theatres, with the proviso that they should

not engage in a general program of expanding their theatre holdings during this period, and that the Government would not press its demand for the dissolution of these integrated units during the same period.

At the end of the three-year period the defendants' control——

Judge Hand: What do you mean by the integrated units?

Mr. Wright: The five companies, combinations referred to in the complaint as producer-exhibitors—Fox, Loew, Paramount, R.K.O. and Warner.

At the end of this period the defendants' control over all three phases of the business remained substantially untouched by the relief granted in the consent decree. There were prolonged negotiations for a new decree, which broke down over this theatre divorcement issue, and that issue is now again before the court for disposition, together with (7)

the issue as to what injunctive provisions are necessary to give relief against such specific practices by or of the distributor defendants—that is, including Columbia, United Artists and Universal, which do not own theatres—such practices as the court may find to be illegal.

The amended complaint filed in 1940 and the trial brief filed by us last month, I think sufficiently describe the practices that are brought into question, and the existing combinations that are alleged to be illegal per see, and the general theory of the plaintiff's case.

All that I shall attempt to do here is to outline the proof that plaintiff will offer and the general plan of procedure that will follow in offering it.

Now first, let me say that the plan tentatively announced last J[illegible]t the pre-trial hearing, of presenting the Government's case in documentary form, will be followed. We shall not call any complaining witnesses as part of our prima facie case, although it may be necessary in some instances to call a witness to identify and describe certain tabulated material if its anthenticity is disputed by the defendants. How-

ever, the major part of our case will consist of documents prepared by the defendants themselves for the purpose of this case, or documents kept in their files in the ordinary course of their business; and, of course, as to those docu-
(8)
ments the only question for the court as to admissibility is relevancy and materiality.

This method of presentation has been made possible by very comprehensive use of discovery procedure, supplemented by information voluntarily supplied by the defendants and their counsel. As the court was previously advised by letter, we supplied counsel for the defendants on September 1st with a list of identified documents on which we would rely. I believe the court already has mimeographed copies of that list which were furnished at that time; and I should like to now submit a printed copy, which is a copy of the mimeographed list with some supplementary material added, and which also has——

Judge Hand: Haven't we got those?

Mr. Wright: You had that before in mimeographed form only.

Judge Hand: I see.

Mr. Wright: This contains in addition to what was in the mimeographed copy a table of contents at the beginning, and also an index at the end; and then beginning at page 111 we added a supplemental list of data which was identified after the September 1st list was served, and that supplemental list of documents appears at pages 111 through 116, and the index is found at page 117, at the end.

Now you will note that that list carries a detailed de-
(9)
scription of each identified document opposite the exhibit number for identification listed largely in numerical order. However, I think the table of contents and the index alone are sufficient to indicate the general character of this documentary proof and its general relevance to the issues that are raised.

We shall offer first the interrogatory answers of the defendants which were filed in 1939, as supplemented by further answers and admissions of fact filed in 1946. The 1939 answers give a detailed account of the corporate structure of the defendants, their principal stockholders and creditors, and the corporations in which they own stock interests; and answers of this type are grouped generally under the heading "Organization" in this list of exhibits. They also contain data as to the corporate history of each of these defendants, which is listed in the interrogatory answers and in this list under the general heading "History."

At that time they also supplied data on their production activities designed to show the extent to which production talent of various kinds and equipment was interchanged among the defendants, and the extent and character of the physical production facilities that were possessed by each. Those are contained in answers grouped under the general heading "Production."

Then under the heading "Distribution" each defendant (10)
supplied data as to each feature picture released by it during the 1936-1937 season, which was the last full motion picture season preceding the filing of the suit. That data shows the national gross film rental received for each feature released and the total number of domestic exhibitions for each feature.

The individual film rentals paid for these features by all of the theatres in selected cities—New York, Philadelphia, Kansas City and Atlanta—is also found in these answers, together with the actual dates that the pictures played. Those four cities were selected to give a variety of so-called metropolitan areas from the standpoint of both size and location, and to cover areas of which one or more of the major distributors have held a dominant theatre owning position.

Thus, in New York, the prior run theatres are principally controlled by R.K.O. and Loew. In Philadelphia they are controlled by Warner; in Kansas City by Fox; in Atlanta

by Paramount. So that the four cities cover the activities of the five producer-exhibitor groups.

These answers also contain a detailed statement of the names and locations and seating capacities of all the theatres in which each of the defendants had a financial interest, and those in which they had pooled interests with other defendants or outsiders.

(11)

In the four cities just referred to, information was also furnished as to the particular runs—that is, the playing positions—of the affiliated theatres in those areas. By "affiliated theatres" I mean those in which one or more of the producer-exhibitor defendants had a financial interest.

And the data in those interrogatories also shows the extent to which the pictures of each other and of the other distributors were used in these theatres, together with data as to the admission prices charged, the program policies, and the clearance provisions which were applicable to those theatres.

The principal purpose of that detailed information in those four cities was to show the pattern of feature film distribution in metropolitan centers where the defendants operate theatres, in full detail.

I have some charts here which give a better picture of the kind of information that is contained in those detailed answers than I can supply orally; and if the court will take time to examine them, I think an understanding of this data will be helpful.

Mr. Proskauer: May we inquire what is being tendered to the court?

Mr. Wright: There are copies which will be given each of you.

(11-A)

I think you have before you a chart headed, "The Record of Exhibition of Warner Brothers The Singing Marine" in Philadelphia, Pennsylvania. That is a chart which was prepared from data in these interrogatory answers which is in-

tended to give a picture of the manner in which films are played off in a metropolitan area of that kind.
(12)

On this chart, for the purpose of locating the various theatres, you can see that the city has been divided into nine areas, which are shown on the map at the bottom of the fourth column, and it has a letter designation for each area, beginning with South Philadelphia in the first column, then downtown, which I think in Philadelphia is referred to as the central city, and then the various suburban areas in the town.

We have attempted to show the approximate size of the theatres involved by the length of the bar which bears the theatre's name. The depth of the bar indicates the period of time during which the picture was played, and you will see the dates in the lefthand column show the time of the year; and each weekly interval is broken by these double lines, which indicate Saturdays and Sundays. Those days have a special significance in this business because they are the preferred days of the week and exhibition on those days generally means as much in terms of gross revenue as the rest of the week together.

Down in the lefthand corner of these blocks you will find the film rental paid by the theatre and in the righthand corner the evening adult admission price appears. The shading on the blocks indicates affiliation or non-affiliation, that is, those which are shaded are all theatres of Warner and those which are unshaded are the theatres of independent
(13)
opposition.

This pattern of distribution in the town, that is shown for this one picture here, is fairly characteristic of the exhibition of all pictures in that normally you have an exclusive first-run in the area in a downtown theatre, such as you have here of the Fox, for a substantial period of time, usually a week or more, and then the continuation of the exhibition, perhaps, in another theatre in what is termed a

move-over or continued first-run. Then when the film, after an interval of usually three weeks from the conclusion of the first-run in Philadelphia, moves into the neighborhood theatres, you find the so-called key theatres in each of the neighborhoods playing the film simultaneously. And then it moves on into the remaining theatres in the neighborhood, usually with an interval elapsing between each of the ensuing runs.

Of course, these intervals that appear on here are not haphazard. Those are fixed by the clearance provisions in the licenses which the distributor makes with the owner of the prior run theatres.

The admission prices, of course, are also regulated to the extent that a minimum is usually provided in the license agreement. Of course, the film rental that any of these theatres can pay is dependent on the length of time that the picture plays, and the seating capacity, and the admission
(14)
price charged by the theatre, and you will note from the chart that the admission price is very generally a function of the playing position, that is, the first-run house that has the earliest exclusive run charges the highest price, and the prices decrease as the freshness of the film decreases.

And you will note from this that, in terms of film rental, the first-run pays many times what the next succeeding runs pay and that, under this system of distribution, your total film rental that comes out of the area—total film revenue—is largely concentrated in the early runs of the film.

Judge Hand: Is this film something produced by Warner or by any of the people?

Mr. Wright: This film happens to be one that was produced by Warner, that is to say, "The Singing Marine," and, of course, in the case of a Warner film, you will have a higher concentration of film revenue in the Warner theatres than you would in the case of any other distributors, but the general pattern remains the same.

For the purpose of comparison, I have another chart here of the RKO film of "Shall We Dance?" which was also a gen-

erally high-grossing picture, and you can see that there are differences in the particular theatres which play, although substantially the same general pattern of prior run exhibition (15)
in the Warner houses is maintained. You have your downtown first-run there in the Stanley; then what is known as a move-over or continuation of the run in the Carlton; and then it moves into the Earl for another five or six days; and then goes out into the neighborhood first-runs which play the film——

Judge Hand: This "Shall We Dance?" starts in a Warner theatre?

Mr. Wright: Yes. Again, all of the shaded theatres there are Warner theatres, and the white, the unshaded, theatres are independent. And you will note the same general pattern occurs, in that your admission prices constantly become less, the playing time in the particular theatre, that is the length of the run, becomes less and, of course, the film rentals also become less. So that you have a similar concentration of revenue in your early runs, and again those intervals of runs are fixed by the clearance and run provisions of the license agreements which the exhibitor, in this case RKO, made with Warner as a theatre operator.

We have a number of these charts but none of them is really evidentiary material; that is, the evidence is really contained in the interrogatory and will be tabulated, but I merely offer these for purposes of illustration.

There is one other, I think, for Philadelphia that might be of interest to the Court, which shows what happens to 16
a film which is not a first class box office attraction, that is, a low-grossing film.

I remember in the argument of the Goldman case, one of the judges wanted to know what happened to a film in Philadelphia that did not get a first-run in one of the downtown theatres. Well, the answer given was that it always gets a first-run somewhere, which is true, but this shows

that where your film gets its first run, not in a downtown house, but in the neighborhood, such as here, of course, the possibilities of realizing film rental almost vanish. For example, this particular film, which was a low-grossing film nationally, not a good box office attraction, found its first run in this neighborhood house, which paid a rental of $250 as compared with the five or six or eight thousand dollars paid by those first runs in the downtown houses.

And then, of course, it did not have the benefit of the first-run clearance that your downtown houses have and simply went into the remaining neighborhood theatres at extremely low rentals, so that the performance in town was comparatively negligible in terms of box office return and film rental return to the distributor, which in this case happened to be Universal.

These contrasting charts merely illustrate the importance of first-run playing time in the downtown first-run (17)
theatres. You see, those downtown theatres play films for periods of anywhere from a week to five or six weeks, with the result that they use a comparatively small number of films each year and there are always more films available for exhibition than there is available playing time in your downtown first-run houses, with the result that a selection has to be made by the first-run exhibitor as to which films get into the downtown houses and which are sloughed off into the neighborhood theatre, such as this one does.

Of course, the effect of this system of release is to make the position of the first-run exhibitor in an area of this kind of extreme importance in determining the success or failure of the films that come into the town.

Mr. Proskauer: Would your Honors permit me to ask Mr. Wright to speak louder so that we may hear him a little better? We have, really, very great difficulty in following him.

Judge Hand: Yes, speak louder.

Mr. Wright: I will do the best I can. Perhaps if I face this way a bit it might help.

Mr. Caskey: Thank you.

Mr. Wright: This same pattern that is illustrated by those charts generally prevails down through smaller communities, the main difference being that you do not, of course, have as many theatres and you do not have as (18)

many simultaneous runs in your neighborhood houses, but you still have your first-run downtown and then a second or third. In the case of Kansas City, one of the other towns studied, I believe both the second and third-runs are exclusive.

We have a chart for Kansas City here which will show the essential difference.

Judge Hand: Mr. Wright, who suffers if one of these films does not get into the downtown theatre?

Mr. Wright: Why, I don't suppose anyone suffers but—principally—but the distributor. In the most cases, they are films which are not as good, not as generally attractive to the public, although, of course, there is no way we can evaluate. In this case we cannot attempt any evaluation of these films in any other terms than what they actually produce at the box office. There are no standards, I think, by which any of us can judge them accurately esthetically and, of course, what they do at the box office is inextricably wound up with what happens to them in these situations.

Judge Hand: The person that would suffer in these Philadelphia cases would be Warner, if the film, did not get a good run, I mean in a downtown theatre?

Mr. Wright: No, Warner, of course, is in a position to take care of its own films very nicely by control of the downtown in the first two or three runs in the town. I don't (19)

think that Warner has any problem in Philadelphia. The distributor who faces the difficulty there is principally the

distributor who has no theatre interests of his own, is in no position to exchange reciprocal advantages with Warner.

Judge Hand: If he wants to put some other film on of his own.

Mr. Wright: I think perhaps your Honor may be confusing the terms distributor and exhibitor. The distributor is the party who rents the film for exhibition; the exhibitor is the person who operates the theatres and pays the distributor the film rental.

Of course, as far as Philadelphia is concerned, Warner is in the dual position of exhibitor, which controls the prior-run theatres, and a distributor which, of course, distributes many first-run films.

Judge Hand: That is what puzzled me.

Mr. Wright: Well, that is a characteristic situation in the great majority of the metropolitan centers of the country, that is, one or more of these producer-exhibitor combinations does have operating control of the prior-run theatres and, of course, also distributes films in the area as a distributor and, of course, the essentially monopolistic character of the arrangement, in so far as the distributors are concerned, that is, your non-theatre-owning distributors, is the arbitrary ability that that situation gives to the producer-exhibitors
(20)
to exclude the films of the non-theatre-owning distributor, to favor the films of each in so far as——

Judge Hand: That is the injury or the principal injury or one of the principal injuries that you are talking about——

Mr. Wright: Yes.

Judge Hand:—that the independent cannot get in his film?

Mr. Wright: Well, he gets it in only to the extent that he is able to make an adjustment with his producer-exhibitor competitor and if he lets him in, to the extent that he lets him in, he has a right; if he chooses to exclude him, he is out.

That is, of course, only one aspect of the kind of exclusion that we are dealing with. In so far as the independent exhibitor in the town is concerned, his playing position of his theatre, that is, the kind of theatre he can determine, or kind of theatre he can operate, is, in large part, a product of the agreements that the distributors make with him—in Philadelphia, Warner, for example, that is a producer-exhibitor, operating theatres there—because his playing position is dependent upon such clearance and other run terms as any distributor makes in his agreements with Warner as a theatre operator. And he finds himself frequently excluded,

(21)

as these charts indicate, from the prior, earlier runs which are the lucrative part of the exhibition business as well as the most lucrative part of the distribution end.

There is another aspect of the producer-exhibitor's control over the independent theatre operator situation, which we have emphasized in the brief there, and that is the fact that his admission prices are also controlled by the agreements that are made by him with the distributor whose films he licenses and also by the agreements which the same distributor makes with Warner because, in fixing his playing time, if he has to play, let us say, seven days or fourteen days behind a Warner house, which is charging 25 cents or 30 cents, that, if course, puts an automatic ceiling on the price he can charge because he cannot get more and probably not as much for a later exhibition of the film in the same area as Warner has gotten for the prior exhibition. So, the maximum price restriction in his contract, simply virtually puts him at a fixed admission price level, and your whole price structure, your admission price structure, in any particular area is, of course, closely geared to the run and clearance structure which, in turn, is determined by your license agreements between all the distributors and the operators of the prior-run theatres.

As I say, the pattern, of course, varies from city to city

(22)

but I think you will see that on this—you have there the record of exhibition of "Road to Glory" of Twentieth Century-Fox in Kansas City?—you will note there, of course, you have your long first-run downtown of a week or more, then you have a considerably greater interval before the second-run. In that case there is, I believe, a 39-day lapse between the time it went into the Plaza for a second-run and then to the Appollo for a third-run, and then, about four weeks later, the film went into the independent houses.

Again, generally speaking, as the size of the town decreases the length of the clearance of the first-run over the succeeding runs tends to increase and that is illustrated by what happens at Atlanta.

That is a chart of two pictures that were placed on one chart. There is no attempt there to divide the town into areas. You will note that the chart, on the right, is one of a popular picture which had its first run for a week in the Grand Theatre, an affiliated theatre there, paying a rental of $3000-odd and then, on the second-run, an independent house paid film rental of $75 and there was an interval of clearance there between the first and second run of a little more than 60 days.

Judge Bright: That $3190 is a fixed rental or percentage?

Mr. Wright: Generally a percentage. That figure is

(23)

obviously one which was determined on a percentage basis, and the majority of your first-run film rentals will be computed that way.

And in the Atlanta situation the only affiliated houses are the first-run theatres there, that is, they control no other runs, but in terms of what comes out of the town, even though they have only one run, the first run in that town, the tabulations of the figures for all the theatres and all the features show that they still took out of Atlanta about 70 per cent of the total film rental that came out of the town—came out of the first-run theatres which were in affiliated hands. Generally speaking, you get about the same figure for all these towns in which the producer-exhibitor defendants

operate theatres. The same would be true of Philadelphia, Kansas City and New York, somewhere between 65 and 70 per cent of the total rental coming out of the area will go through the affiliated houses.

Of course, in each case the control of that much rental, the larger the city the more of the earlier runs that you have to control in the form of theatre operations but, as is shown here, even a city as large as Atlanta, it is possible to control 70 per cent of the film rental in the town simply by the operation of the first-run theatres alone.

True, of course, the use of your clearance provisions is (24)
as shown. In this case you have a 60-day clearance before any of the independent theatres in town can show the film. The result is there is very little value in the films when they get them.

As I say, we obtained in the '39 interrogatories very elaborate data of this character covering all the runs of the particular features in these five selected cities, but on the basis of that experience we found that you could account for the great majority of the film rental in these towns by merely either first-run, in the case of smaller towns, or first and second in slightly larger ones, or perhaps the first five in the large centers, such as New York. So that in securing additional information this year, in preparation for the trial of the case, we sought to cover the last motion picture season preceding the trial, which was the 1943-1944 season. I don't know whether I mentioned it, but a motion picture season ordinarily begins at September 1 and lasts for a year. In covering that season for the trial, we served additional interrogatories, in which we attempted to cover all the cities over 25,000 population. We got four selected features, one from each of these distributors, the first-run rentals in all towns over that size, then in cities over 50,000, the first and second-runs; in cities over 200,000, the first, second and third runs; and in Chicago, Philadelphia, Detroit and Los (25)
Angeles and in each of the five boroughs of New York City,

we picked up the first five, or the first four runs.

Then, instead of using a city by city comparison, we got the national gross rentals for each of these pictures for the 1943-1944 seasons broken down by exchange areas. There are about 31 or 32 of those in the country for each distributor. So that we were able to make comparisons between the total revenue that came out of the prior runs in these cities of more than 25,000 with the total revenue and the total number of exhibitions in the areas in question.

Now, of course, we are able to make comparisons as to the first-runs with the 1936-1937 data, and I think the results may be generalized by saying that at least as much of a concentration of revenue in prior affiliated runs occurred then as before the suit was filed, if not more. For example, if you chart these early runs for which we got data on the 1943-1944 season, here is what the Warner picture for that season in Philadelphia looks like.

(26)

This trial is limited to the first four runs, because that was all the data we got in the 1943-1944 answers, but you can see by running the film at the Mastbaum, which appears to be misspelled on there—it is spelled with one "u" in it—for a period of almost six weeks, a very large theatre which had formerly been closed but was reopened, a $35,000 film rental was realized, which was about thirty times as much as it got in any of those succeeding neighborhood runs, which are, of course, much the same as they were during the prior season.

For comparative purposes we made a 1943-1944 chart of Kansas City and Atlanta. I believe you have there the record of exhibition of a picture released by Loew's, "As Thousands Cheer", in Kansas City. In that case, in the Kansas City chart, on Loew's, you will note—

Mr. Caskey: Just wait a minute, Mr. Wright. We don't see, to be furnished with what you are talking about.

Mr. Wright: I think you are one chart behind.

Judge Hand: You said Loew's Kansas City, didn't you?

Mr. Wright: Yes, "Record of Exhibition of Loew's 'As Thousands Cheer', Kansas City, Missouri."

Judge Bright: You may have one in Philadelphia and one in Kansas City.

Mr. Wright: I am sorry our number system seems to have gone wrong. But you have there the "Record of Loew's 'As Thousands Cheer' in Atlanta, Georgia"?

Judge Bright: Yes.

Mr. Caskey: No.

Judge Bright: And in Philadelphia.

Mr. Wright: The Philadelphia chart shows I think substantially the same pattern as the chart for the Warner picture there. You have a long first-run in the Stanley with about $35,000 rental, in this case ten or twelve times as much as what was paid by the neighborhood runs, and in this case you have a first-run in Germantown by an independent theatre, the Erlanger, playing simultaneously or what is called day and day with the Warner Brothers Orpheum Theatre, but otherwise substantially the same pattern as in the case of the Warner picture.

And I think you also have there the same picture, Loew's "As Thousands Cheer," in Atlanta. There you will note again that it has its first-run in an affiliated house for more than a week, then a move-over at what is called the Grove Theatre there, and after a lapse of about sixty days goes into a second-run at the Independent Plaza, and at the affiliated Gordon again with your first and move-over run rental totaling about a thousand dollars, and your second-run paying $425 and $280—I should not have said a thousand; I should have said $10,000 for the first-run and move-over, and a (28)
total of about $700 for your second-run.

Of course, we again obtained for the 1943-1944 season total revenues of each of the things that the distributor defendants released during that season, and for comparative purposes we set up in a table called Appendix A of the trial

brief at page 35—you have our trial brief there, by the way?

Judge Hand: Yes.

Mr. Wright: If you will turn to page 35, if the court please, you will see a tabulation at the bottom of the page for the 1936-1937 season which gives the various numbers of features released by the defendants classified in accordance with total gross returns from all domestic theatres, and you will notice there that for the most part less than fifty per cent grossed more than $500,000.

Now if you will turn over to page 36, at the top of the page is a similar tabulation for the 1943-1944 season, in which you will see that the total number of features released by most of the defendants is substantially less, but the number in the higher grossing brackets substantially increased, so that the net result of the change during the period was that you had an even greater concentration of revenue in relatively few features than you had before, although even in the 1936-1937 season it was true that perhaps half of

(29)

the total film rental you get from all your features would come from less than twenty-five per cent, those in the higher grossing bracket.

So the effect of your whole system of release is one which tends to concentrate film rental in a relatively small number of features, and again to concentrate the returns in your prior runs in metropolitan communities. These selected cities, for example, New York, I think contributed 12 or 13 per cent of the total revenue that came out of the United States—considerably more, of course, than its population proportion would suggest; and the same thing is true of Philadelphia and down the line.

Judge Hand: Now, in Philadelphia, does Warner own these downtown theatres, as you call them?

Mr. Wright: Yes, own or lease. That is, they operate them.

Judge Hand: Yes?

Mr. Wright: Yes, with the exception of, I think you will find, the Arcadia on one chart, a downtown theatre which is in independent hands, but which plays on a second-run basis.

Judge Hand: In that way they determine what films may be shown at them?

Mr. Wright: Yes. They, of course, control the program policy of the theatres.

(30)

Judge Hand: Whether they are their own or somebody else's?

Mr. Wright: That is right, your Honor. Now, in order to demonstrate the stability of the prior run preference that the defendants exchange among themselves in the metropolitan theatres—in the metropolitan centers where they operate theatres, we obtained additional data in 1945 in the form of admissions of fact which show the first-run distribution of the theatres released by all of the defendant distributors during four selected seasons in the 92 cities with populations of more than 100,000. The seasons selected were the 1936-1937 season, which was the last full season before the suit was filed; the 1939-1940 season, which was the last full season before the decree was entered; the 1941-1942 season, which was the first season in which the new method of selling provided by the degree was used—that is, in that season sales in small blocks were used instead of in season groups as in prior years; and the 1943-1944 season, which is the last one before the trial.

Now the information that is contained in those admissions has been summarized at pages 17 to 19 of the trial brief. You will find that in tabular form. That is the brief itself, not the appendix.

Now that table of tabular material which you see at pages

(31)

17, 18 and 19, I do not think is quite adequately explained in the brief itself. The cities in the lefthand column are the 73 cities which we claim in our complaint were those in which the defendants had theatre operating monopolies and are

listed in the descending order of size. The names at the head of the column will be each of the defendants as a distributor. That is, in the column opposite "Chicago," for example, the Warner films had their first-run in Paramount Theatres; the Fox films in the first-run theatres of Paramount; Paramount in Paramount; Loew in Paramount; RKO in RKO; United Artists in Paramount; Universal in RKO; Columbia in Paramount, and so forth. The footnotes are also misplaced in that column. The number 6 should be up above where it is after the words "Fox & Independent." Where we have the symbol "&" it means that first-run pictures were split. Then the footnote 7 should be one space above where it is, and where we have a dash it indicates that the first-run theatres were pooled between the exhibitors named. That is, they are operated under a common management arrangement.

Judge Bright: Well, what is a first-run theatre?

Mr. Wright: What is a first-run theatre, of course, is determined as a matter of agreement by the licensing agreements that are made with it, by the distributors' pictures (32)
which it shows. That is, the agreement between the operator——

Judge Bright: Does the distributor determine which is the first-run theatre?

Mr. Wright: For his particular pictures, yes, he makes of course agreements with whatever exhibitor he deals with to show his pictures first-run in the town.

Judge Bright: Does some higher authority than the distributor determine which is first-run?

Mr. Wright: Nobody does it alone. It is only done by agreement between the distributor and the operator of the theatre that is used as his first-run outlet. That is, the thing that gives the theatre a first-run status is, of course, an express agreement between the theatre owner and the distributor that the exhibitor in that area will have the first and exclusive showing of the picture in that particular area, with a specified clearance over the subsequent exhibition of the

film in other theatres in the area. That, of course, is always a matter of express agreement between the distributor licensing the film and the first-run theatre operator.

Judge Bright: Is there anybody over the distributor who determines which are the first-run theatres?

Mr. Wright: Well, if you mean any administrative or (33)
other trade authority, no. They are determined by agreement between the distributor and the first-run theatre operator.

Now of course under your system of distribution here, the status of your theatre as a first, second, subsequent run, is a function of the agreements that are made between the distributors whose pictures are played there and the owner or the operator of the theatre, in every case. And your first-run exhibitor, however, exercises a substantial control over the other operators in the town because the agreement he makes with the distributors, which gives his first-run status, also controls the terms under which the picture is going to be made available to subsequent run competitors.

As I say, we obtained this data of first-run distribution which is reflected in these tables for the 1943-1944 season for four seasons covering that period from 1936-1937 through 1943-1944, and it will appear from an examination of that data that there was a considerable degree of stability in this first-run distribution pattern. There were some changes during the period but not very many, and the net effect of the bringing of the suit, of course, and the decree did to some extent loosen the control of the major producers as demonstrated by that pattern, but it left it essentially and substantially the same in 1943-1944 as it was in 1936-1937.
(34)

Now we think the interrogatory answers and the admissions of fact that are described, give a very comprehensive picture of the extent of the actual control of the domestic film market exercised by the first producer-exhibitor defendants. That, however, is of course only a part of o[illegible]ase,

which is concerned with the quality of that control as well as its quantity.

Now in order to show the quality or character of the control, we shall offer the various forms of agreement under which and by which it is maintained. Of course of primary importance are the printed forms of license under which the films of all the defendant distributors are generally made available for exhibition in theatres. Those are the agreements which fix the terms I have just discussed with your Honors.

Now we have printed a set of those sample forms in this Appendix B. We took the feature form that each distributor used for the 1935-1937 season and printed it in full. The principal reason for doing that is that they cannot be read otherwise. These agreements are one-page agreements in which the back page is covered with type much finer than you will find in the ordinary insurance policy. It takes about 25 of these pages to print one of those.

(35)

Now we took one form for each distributor for that 1936-1937. and printed it in full here; and then we also took a sample form for the 1943-1944 season, and instead of printing it in full just printed a summary indicating changes, if any, from the former 1936-1937 agreement; and then we also added in this appendix, in addition to the table of contents, a schedule of similar provisions showing where they will be found in the appendix.

Now we have provided an analysis of those forms at pages 9 to 12 of the trial brief, and I am not going to attempt to repeat that analysis here, except to point out that there have not been any substantial changes in the basic provisions of these forms concerning run, clearance and minimum admission price-fixing during this period, and, of course, those are the provisions by which the extensive control of film revenue that I have just been referring to, and illustrated in these charts, is maintained.

We will also supplement these general forms of agreement with specific examples of executed agreements under which the defendants, distributors, have licensed their films in the so called affiliated or producer-exhibitors' theatres. Some of these have been summarized in Appendix A of the trial brief, but we shall offer additional agreements covering similar situations for both the 1936-1937 and 1943-1944 seasons, so (36)
that the court will have a basis for determining or for comparing agreements of that character for those two seasons.

In general, we believe that a comparison will show that their courser has been a tendency on the part of the defendants since the filing of this suit, to be somewhat less explicit in the later agreements as to the minimum admission price fixing and in the clearance restrictions, but essentially they are similar to the earlier agreements and contain the same profit-sharing features and privileges which tend to give each of these defendants vested interests in promoting the business of these affiliated theatres as against independent opposition.

Now the extent of what we call cross-licensing among these defendants is, we think, well covered by the admissions of fact, and the only purpose of these representative agreements is to indicate the general character of the agreements by which the cross-licensing pattern is established and made effective.

We have also covered the extent of the use of express clearance and minimum admission price provisions in the licenses among the defendants in the answers we got to the 1945 interrogatories.

Interrogatory 6, for example, asked them to set forth such provisions which had been expressly incorporated in their (37)
license agreements that they made in all the towns of over 25,000 population for the 1943-1944 season. So it will be unnecessary, of course, to introduce the agreements themselves for that purpose. And interrogatory No. 48, I believe,

of the 1939 answers, gives similar clearance data in interrogatory form for the four selected cities of the 1936-1937 seasons for comparative purposes.

Now in addition to that license agreement material, we will also offer agreements now in effect or recently terminated between the defendants with respect to the operation of theatres owned by one and operated by another, under which there is generally a profit-sharing arrangement. In this case we expect to offer agreements in substantially all possible combinations of two or more producer-exhibitor defendants, whereby either one leases a theatre to another or else they operate all the theatres in a certain situation through a corporation in which they each own stock interest, or where they simply have an agreement where they pool the operating policies and profits of the theatres in a particular area.

Now we have also, of course, shown in the admissions of fact, the situations in which the films released by one or more of the defendants are split between the theatres operated by two or more upon an arbitrary basis, which amounts to a pooling of the product rather than a pooling of the (38)
theatre operations or pooling the profits. Of course agreements of that kind are not significant in themselves except as evidence of an intention of the producer-exhibitor defendants to operate upon a non-competitive basis vis-a-vis each other. Of course in any event, the profit-sharing provisions of their film licenses make competition between them for each others films without point.

Now the interrogatory answers and admissions of fact are largely limited to data as to the extent and character of these defendants' control in towns over 25,000 population. Of course they do operate in several hundred towns of smaller size; and in order to complete the picture of their control of theatre operations, we had the Federal Bureau of Investigation make a survey this summer of approximately five

hundred of these smaller towns in which the defendants operate theatres, primarily to determine in which of those towns they owned or operated all of the theatres, those in which they owned or operated all of the first-run theatres, and the number of theatres which were being kept closed in those towns.

This data, together with the additional information as to the general character of those theatres in the towns, and their program policies and admission prices was tabulated, and a separate form for each town made, and those forms
(39)
were submitted by us to counsel for the respective defendants who operated in the town.

We have not yet been advised as to the extent to which the defendants are willing to concede the accuracy of this data. Some of them, I understand, are still engaged in checking it. But since all of these facts in this survey are of an objective nature, and about which there obviously cannot be any real dispute, we think any corrections in these reports that the defendants desire to make, can be made by stipulation, and the court can have the benefit of this survey without the necessity of calling as witnesses the agents who made them.

This data, we believe, will show that more than 300 of these towns where they operate, one defendant owns all or has an interest in all the theatres in the town; that in 70 or 80 more of them they had all of the first-run theatres, and that there were a substantial number of theatres at least owned by these defendants which were closed at the time of the survey and which had been kept closed for substantial periods of time. That data, of course, does not prove the existence of monopoly power by itself, but it does show the extent to which the power demonstrated by other proof has been used to achieve what are known as "closed situations." That is, theatre operating areas where there is no theatre
(40)
operating competition of any kind. And it also shows the

extent to which that control has enabled them to maintain idle excess theatre capacity in those so-called closed towns.

We also have additional data as to prior periods as to closed theatres in the 1939 interrogatories, but, of course, this is the survey which furnishes the up-to-date material in that regard.

Now we expect to show through this data described, the interrogatory answers, the admissions of fact, the express agreements that the defendants made with each other and their general forms of licensing and this F.B.I. survey, that each of these defendants has violated the act, and that the five producer defendants are illegal price-fixing combinations in and of themselves.

However, we shall also bring to the court's attention additional data which we believe is primarily relevant on the issue of the form that relief from these violations should take. This is largely in the form of administrative and judicial decisions and public records. For the most part it simply records the past performance of the defendants themselves in various situations where the restraint of trade was charged and proven, and is reflected in administrative and judicial decisions and proceedings to which they themselves or their predecessors were party defendants or respondents. (41)

In the cases where the proceedings are officially reported, there is, of course, no occasion for us to offer the reports in evidence. However, in such matters as decisions of the arbitration of the appeal board, and the arbitrators' awards under the consent decree, which are matters of public record but are not officially published or kept as a part of the records of this court, we shall offer a record of these decisions in evidence to be sure that they are properly incorporated in the record that is before the court. As to these decisions of the appeal board, we shall offer all of those, even though we will call specific attention to only a part, as that body of decisions represents the official record of complaints made against the defendants since the suit was filed which have

been considered both by an arbitrator and by the board of review of the arbitrator's findings. In our view that is usually reliable data as to the general scope and character of the specific competitive problems which are continuously arising in the industry, and forms a concise and informative record of such problems for the use of this court, and relieves this court of the necessity of performing the detail fact finding functions that have already been performed by arbitrators and the board in considering such complaints.

We think the material that we shall offer concerning the past attempts made to control competitive abuses in the (42)
industry by various judicial, administrative procedure, while at the same time permitting the producer-defendants to retain joint control of it, will show that there are no adequate judicial means for permanently regulating the exercise of such control in the public interest.

Now, if it should be thought desirable merely to regulate that control instead of abolishing it, the decision to undertake a program of that kind is probably one for Congress rather than the courts. The only final judicial solution of this problem that is permissible under the Sherman Act is one which will create or attempt to create, an industry structure in which the forces of competition, rather than a system of administrative control, will be used to protect the public interest. The justification for the rather radical departure from the ordinary judicial procedure as represented by the arbitration system set up in the consent decree is that it was expressly given a temporary status and was placed under ultimate judicial control, so that it could be used as a means of aiding ultimate judicial solution of the problem.

Therefore we submit the arbitration experience to the court primarily as a guide to relief, although it does also show the existence and continuance of illegal practices by the defendants since the decree was entered.

(43)

Now in conclusion I should like to say that we will do everything we can to speed judicial determination of this theatre divorcement issue. Since the last decree was entered there was an expansion of theatre holdings by Fox and Paramount in, I believe, about to the extent of five per cent, between eight and ten per cent of the holdings of each, and the situation has become particularly urgent again by reason of the relaxation of controls over new theatre construction which has resulted in renewed threats of expansion by affiliated circuits in areas where they now operate. We do not want to jeopardise an early decision on the merits by devoting the court's attention to a preliminary motion for an order prohibiting further theatre acquisitions by the defendants during the pendency of the trial. And if reasonably expeditious procedure can be followed here, I do not believe that will be necessary. We think the divorcement issue may be disposed of rapidly, as its determination depends, as we see it, simply on an estimate of the legal consequences of facts which are essentially beyond dispute, and that the applicable legal principles are well established.

It seems to us that whatever factual defense is offered will necessarily take the form of confession and avoidance, in which the defendants offer additional facts by way of explaining rather than rebutting the facts offered by us which,

(44)

of course, have been largely furnished by them.

We, of course, appreciate the extent to which the defendants have cooperated with us in enabling us to make a documentary presentation of this case. We shall, of course, cooperate with them in return in any way that we can to relieve them of the necessity of calling witnesses to establish facts which nobody is interested in disputing in any event. A large part of the testimony that they will offer will probably be regarded by us as irrelevant and immaterial, but we do not propose to take up the time of the court with any extensive arguments over their admissibility, and it probably

ought to be in the record for purposes of final disposition in appeal, and we can, of course, protect our legal position simply by formal motion to strike, and that is the course that we shall probably follow. In short, we shall do everything that we can to expedite the presentation of the defendants' case as well as of our own in order to see that there can be a prompt disposition of this extremely vital issue.

Judge Hand: Judge Goddard suggests that you talked about the five defendants here. What about the others?

Mr. Wright: You mean the non-theatre owning defendants? I do not think we have neglected them entirely. In our brief you will find we have summarized agreements that (45)
they have made. They are parties here, as we point out in the brief, not because we regard them as integral parts of any of these five combinations but because they have made illegal agreements with those five principal defendants which have the effect of discriminating against independent theatre operators, and that is why they are in the case.

Mr. Seymour: Do your Honors want to proceed now with the defendants' openings, or do you want to recess?

Judge Hand: I should think we had better proceed with the plaintiff's case.

Mr. Proskauer: Your Honor, it is the unanimous feeling of counsel for the defense here that if we could open now, it would make very much clearer to your Honors what the issues are really to be and would greatly facilitate you in passing on the plaintiff's case.

Judge Hand: All right, go ahead, Mr. Seymour.

DEFENDANT PARAMOUNT'S OPENING.

Mr. Seymour: If your Honors please, because the Paramount defendants are named first, I am going to make the first opening on behalf of defendants, and because so much of the Government's case is torn from its context—they point

to charts and figures but they do not tell you anything about the industry or these practices, or how they grew up, or (46).
how these defendants became owners of theatres—that it seems to us essential to supply that context. It is true that many of these facts are undisputed. It is also true that all the inferences are disputed, and so as the first counsel to open I must give your Honors some detail of the industry, and I hope you will be patient with me if I take a little longer. My distinguished colleagues won't take as long, and therefore you can look forward to hearing them.

This is the trial of certain issues in this case reserved by the Government in the Consent Decree signed by Judge Goddard in 1940 after extensive negotiation between the defendants and the Department of Justice and full hearing before the Court. By that decree the Government agreed not to institute proceedings for divorcement of the theatre interests of the five defendants who were parties to the decree until three years after the entry of the decree. That period expired in 1943, and the present proceedings are brought to try the issues and to procure such divorcement. It is useful to note, however, that certain of the provisions of the decree are still in effect. One of the practices in the industry originally complained of was the granting of clearance between theatres. Clearance is defined in the decree (footnote 1, Sec. VIII) as "the period of time, fixed by agreement (47)
between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres." At this time the Government apparently still questions some aspects of that practice. You will note that there was a good deal of reference to clearance in Mr. Wright's opening, and many of these charts are constructed with reference to periods of clearance. Yet in the Consent Decree it was expressly recognized that clearance was essential in the business of distributing and exhibiting motion pictures, and the

decree set up an elaborate arbitration procedure under which theatre operators could obtain redress where they objected to the clearance theretofore granted over their theatres by one or more of the consenting defendants. Provision was made for arbitration tribunals, set up under the supervision of the American Arbitration Association and the Court, and an appeals board to which appeals from these tribunals would go. Under the decree there have been over four hundred arbitrations and over a hundred appeals. The appeals board has been continuously constituted of distinguished members of our Bar who have rendered a great service to the industry and the public. Apparently the Government plans to offer the decisions of the appeals board (48)
and to refer to certain of those decisions. At one time Government counsel indicated that they would be offered for the purpose of showing law violation through granting unreasonable clearances since the date of the decree. When the offer is made, counsel will have occasion to point out that the decisions are not admissible on any such theory, that they are only relevant to questions as to the sufficiency of the arbitration procedure provided in the decree to redress alleged grievances. Of course, as the decree shows, the arbitrators and appeals board were not deciding questions of violation of the Sherman Act. The criteria in the decree for their determination were quite different. We shall be glad to have the Court examine all of the opinions for the limited purpose for which they are relevant, because it will become apparent from them that the arbitration procedure set up under the decree was a most progressive development in providing a forum for the relatively prompt settlement of disputes in an area which is necessarily the subject of much difference of opinion.

As we discuss this subject of clearance, it will be readily apparent to the Court that this matter is one peculiar to this industry and that it cannot be dealt with properly or adequately by court proceedings, and that courts are not

equipped to deal with it, certainly not as well equipped as
(49)
the arbitration machinery that has been set up under the decree. It will become apparent, furthermore, that the broad remedial provisions have been generally effective and that very slight modifications would meet the few observations about it which have been made by the appeals board in their decisions. We believe the Court will thus find it unnecessary to concern itself with questions of clearance, that matter having already been adequately dealt with in the decree entered upon the consent of the Attorney General and the defendants who are parties to it. This being so, much that is said in the Government's brief and opening seems irrelevant. It is clear that the propriety of agreements for reasonable clearance was definitely determined by the decree. It was not an issue reserved by the Government for later trial. By the decree the Government conceded that some clearance is essential—there were no "ifs" and "buts" in the concession. Similarly, the decree recognizes the relevancy of admission prices to clearance since they are taken into account by an arbitrator determining its reasonableness. It cannot now be properly claimed that clearance agreements are per se illegal as price fixing devices, and that all such agreements must therefore be outlawed. Yet, as we shall see, the Government relies heavily upon clearance, not simply unreasonable clearance,
(50)
but all clearance granted to affiliated theatres, to bolster its claim of nation-wide monopoly of exhibition.

Your Honors may have noted on some of these charts that Mr. Wright handed up, that many of them deal with a period prior to the date of the decree. They deal with pictures in 1936 and 1937 and clearances then prevailing. Of course the decree since that time has provided the forum in which the propriety or reasonableness of any of those clearances could have been determined.

(51)

Certain other provisions of the decree will be mentioned during the trial but it is unnecessary to comment on them now.

In its present presentation—

Judge Hand: Is it a fact that much of the litigation before this Appeal Board is over clearances?

Mr. Seymour: Yes, that is the bulk of the work of the arbitration machinery and the Appeals Board. And the theatre comes in and says that it wants to get clearance changes and is heard, and sometimes they win, sometimes they lose, and then it goes to the Appeals Board where the results are as expected with an Appeal Board of review, sometimes they win, sometimes they lose. But the point is that they have a forum and they resort to it.

In its present presentation of the reserved issues upon which the Government asks the Court to grant the drastic relief of severing the defendants' interests in exhibition from their interests in the production and distribution of motion pictures, the Government has chosen to rest its case on relatively narrow grounds. In its request for divorcement against Paramount, the Government asks the Court to direct that Paramount dispose of its investments in exhibition companies carried on Paramount's books at over $63,000,000. The sole basis of this severe and perhaps fatal amputation is a claim that the defendants which have an interest in motion picture

(52)

theatres have combined and conspired to monopolize the domestic motion picture market. This claim is not based upon any assertion of an agreement or conspiracy made at any particular time by any of these defendants. No such proof is even hinted at. It is based rather upon a melange of unrelated facts, unjustified additions of unrelated theatre holdings, unrevealing statistics and isolated examples of license agreements which we will show are clearly authorized by the copyright law and essential to this business.

By taking the largest and most successful producers, who also own interests in theatres, the Government isolates large

units for attack but, since none alone is large enough, or powerful enough, for its purposes, they are arbitrarily lumped together and then their separate and independent operations are submitted to statistical analyses of dubious quality as if they were all one. This is the fatal weakness in the Government's case. For when the case is over the Court will be completely satisfied that the defendants' operations are independently conducted under conditions of most vigorous competition from the beginning of production to the last exhibition.

No artful labelling of completely independent transactions as "cross-licensing" can serve to manufacture a combination or conspiracy where none exists. It will, I think, (53)
be undisputed that any of the contractual arrangements which are woven together to make the Government's case, stem from lawful practices in the industry adopted independently long before any of the defendants had any interest in theatres, and, furthermore, that precisely the same practices occur in the dealings of these defendants and other producers and distributors of motion pictures with operators of theatres in which the defendants have no interest at all. In other words, the licensing procedures which are here challenged are precisely the same in dealing with theatres in which the defendants have no interest and whether or not the licenses are made by these defendants or by producers and distributors which are not defendants in this suit. So there is no genuine relationship between the practices challenged and affiliation of theatres with any of the defendants which could possibly justify the extinction of each defendant's right to own and operate or to have financial interest in the operation of theatres. We believe that the Court will be satisfied not only that the charge of combination or conspiracy is without substance, but that this industry is competitive in the highest degree, that these defendants—far from combining and conspiring together—are and always have been engaged in the most vigorous competition with

each other. It will be apparent, furthermore, that the public has benefited enormously through the independent competi-
(54)
tive operations of these defendants in the constant development of better motion pictures, and that the relief demanded by the Government would confer no public benefit but on the contrary be most injurious to the interest of the public. Examination of the Government's brief shows no concern for this large public interest but only a response to the complaints of some exhibitors and producers who hope to obtain competitive advantages over these defendants. Attempts to fit the competitive facts in this infinitely complex industry into the traditional compass of a monopoly or of a price fixing combination or conspiracy must fail.

Since the Government rests its case on the claim of combination or conspiracy between the defendants who own interests in theatres, it is hardly necessary to say that of course it could not be claimed that the mere ownership of interests in theatres by any one defendant alone was in itself a violation of law. The right to integrate the various functions of a business from manufacture to sale of the product (in the absence of illegal steps or a result of running afoul of such decisions as that in the Aluminum case) was established as long ago as the decision in the United States Steel case and in other decisions following it.

It is beyond question that no defendant with an interest in theatres has more than a very small fraction of the
(55)
total motion picture theatres in the United States. For example—and I don't remember that Mr. Wright even told your Honors this morning the total number of theatres in the United States—for example, out of about 17,000 theatres in the United States Paramount has some interest in under 1,600, or about 9 per cent, and out of this number Paramount has stock control amounting to more than a majority in corporations operating only about 500 theatres, or something less than 3 per cent of the total theatres. The percentage of

theatres in which other defendants have interests is still smaller. Thus it is apparent that the mere size of any of these defendants or the position in the exhibition field of any of them standing alone is not subject to attack. It is only by the wholly unjustified tacking together all of the various and varying interests of all of the defendants who have any conceivable interest in theatres that the Government is able to arrive at anything more than a very small percentage. But even taking all the theatres in which all the defendants together have any interest whatsoever, the total number is only approximately eighteen per cent of all of the theatres in the United States. Whatever the statistical approach to this unjustified conglomeration, the percentage of the exhibition business actually enjoyed by all the theatres in which the several defendants are interested, falls far short of any percentage which could represent monopoly of motion picture exhibition.

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Despite allegations of the complaint of monopoly in production and distribution, the Government does not now press those claims. And indeed it could not, for it will become apparent as the case proceeds that in production as well as in exhibition, and indeed in all phases of the motion picture business, the defendants are in intense competition with each other, as well as with the several producer defendants who do not own theatres and a great number of so-called independent producers. As a matter of fact there has been and continues to be a consistent growth of both independent producers and independent exhibitors. Not only has there been a growth in the number of independent producers and independent exhibitors, but each of them has been earning more and more profits. It is perfectly apparent that the Government cannot claim that the activities of these defendants stifle the entry of new talent and capital in the production, distribution or exhibition of pictures. The developments in this industry are inconsistent with any theory of monopoly.

We are dealing here with an infinitely complex industry, serving an enormous number of people every day with a product of superlative excellence. It is estimated that more than 85,000,000 people see exhibitions of motion pictures weekly in approximately 17,000 theatres located in 9,000 different com-
(57)
munities. American films lead not only in this country, but in most of the countries of the world where in normal times over $100,000,000 was paid annually for the privilege of exhibiting American films. The importance of a strong industry to the United States in the period of international affairs which lies ahead needs no emphasis. The amputation proposed by the Department of Justice is hardly conducive to that end.

It has long been recognized how important are pictures in educating all the peoples of the world to our democratic way of life and how important our pictures are in international commerce. It has been said that trade follows the motion picture. Foreign governments have recognized this and have not only placed trade barriers against our motion pictures but have subsidized their own producers in efforts to offset our supremacy in the world markets.

For a proper appraisal of the Government's claims it is necessary to examine the history of the industry and the background of its present structure and practices. The outstanding fact in this industry from its beginning has been the intense competition which prevails in it. This industry has grown from the most primitive sort of entertainment thirty-five years ago, to its present superb service without the air of a protective tariff or other Government assistance
(58)
and solely as a result of talent and enterprise in the various companies and in the several phases of their activities, and the intense competition that has steadily improved the quality of pictures throughout the history of the industry. In order for the industry to supply the necessary pictures to the 17,000 theatres in this country, to assure the widest

access of the public to their exhibition, it has been necessary for each of the companies to set up or arrange for most elaborate machinery to assure each theatre of continuous service. This service must punctually supply motion pictures on precisely the day on which they are to be exhibited in each theatre throughout the United States, so that the exhibits may, with reasonable certainty, plan their play dates, their programs and their advertising. The competition offered by each of the distributors, whether a defendant or not, to supply this demand by licensing as many of its pictures to as many of these theatres without exception at such prices as it may receive is tremendous. Under the spur of this competition producers have spared no effort to perfect the quality of the dramatic productions which they produce.

The best pictures often cost several million dollars to produce and additional amounts to distribute, and the constant increase in the cost of pictures, responsive to public demand for constant improvement, is a basic economic fac-
(59)
tor in this industry which explains many of the practices questioned by the Government and the reasons why those producing such expensive pictures must have at their disposal means for assuring adequate returns to make such productions feasible and profitable. One of the summaries to which the Government referred this morning indicates the increasing return of the more expensive pictures and it would be rather natural to assume, I should suppose, that better pictures and more expensive pictures brought a larger return than what those charts indicate. Most of the things of which the Government now complains are simply methods, which we will show to be proper, of assuring such returns.

The Government seeks to make much of the fact that admission prices charged by exhibitors usually vary with the run or time when the picture is shown in a community and of the fact that a provision for minimum admission prices is generally found in license contracts made between the defendants and exhibitors. It will become apparent that

these admission prices in reality are but a normal consequence of the economics of the exhibition business, that the actual prices charged are determined by the exhibitors themselves and not the distributors; that the public benefited rather than injured by the provisions for minimum admission prices, and that those provisions in no way offend the Sherman Act. (60)

At the outset, the business of production and exhibition of motion pictures must be distinguished from the business of selling gasoline, cardboard or any other ordinary commercial product. This business is primarily theatrical. It is not concerned with mere transactions in celluloid films; they are only the means of providing dramatic productions. The success of those productions depends not only upon the quality of the pictures but upon the public fancy and taste when the pictures are exhibited. This taste is subject to frequent changes affected not only by domestic and world events, but by many more intangible things. The films are merely mechanical instruments, conveying dramatic performances to the 85,000,000 people who see them weekly. The performances are staged and directed in a studio with the hope that their effective presentation to the public will return a profit to all those concerned in production, distribution and exhibition. Such a business is highly speculative, just as the legitimate stage is. Those concerned in producing extremely expensive pictures of this speculative character necessarily require the full protection which the law allows. Counsel for the Government this morning neglected to mention the crucial fact in this business, the fact which is at the bottom of the licensing procedures and practices which he complains of, the fact that these films are all copyrighted. (61)

The first and crucial stage is copyright protection which covers the presentation of the dramatic performances recorded on films precisely as it covers other dramatic performances. Without such protection no one could afford to

expend the effort or cost involved in dramatic production either for the stage or the screen. The copyright statute clearly protects the exclusively right to copy the film and to use all or any part of it in the presentation of the dramatic performance so copied, and the statute also protects the exclusive right to that performance itself, and makes that right exclusive by whatever means it may be reproduced. Thus motion pictures are copyrighted and are exhibited in theatres under license agreements. There is a grant of a limited right to exhibit in each license contract, a right to exhibit the dramatic performance recorded upon the film upon specific days and to return the film immediately so that it may be licensed and exhibited by others in a most elaborate and complex method for providing all the theatres licensed with the films when they require them. So we are not dealing here with the sale of goods, but with licenses to perform copyrighted dramatic productions and bailment of positive prints which are the mechanical means for presentation of those productions upon the screen.

In striking contrast with the process of distributing or-
(62)
dinary articles of commerce by the sale of as many units as possible to as many customers as can be found willing to buy, the distribution of motion pictures without exception is only possible by licensing the single dramatic production for performance in one theatre in a community after another, the exclusive right of exhibition always being retained except as limited rights are granted out of it. That is a basic fact in this industry; it is a fact that has existed from the very beginning; it is a fact which applies not only to the activities of these defendants as distributors of motion pictures but to the activities of all distributors of motion pictures. The Government suggests that somehow there is something peculiar about the fact that all motion picture licenses proceed on the theory of copyright, and it seems not surprising that copyrighted articles are treated as such. The problem of providing the films by which such dramatic production are

produced on the screen, is at the basis of the practice in this industry of granting so-called runs. The prints of these films are expensive. It is this expense added to the expense of the original production which must be recovered before the producer can realize any profit, so it is essential for a producer to so handle the prints of these films as to assure that return and profit. In any exhibit of a motion picture in a theatre a positive print of the film must be furnished to the exhibitor and returned to the distributor for subsequent
(63)
license after it has been exhibited. The cost of each print in black and white runs from $150 to $200 per print. Prints in Technicolor cost from $700 to $900 each and sometimes more. The average film rental paid by a small theatre covers but an infinitesimal fraction of the cost of a single print. Whereas a large and well appointed theatre showing a picture on first run at an admission price of $1.00 or more may pay a rental of $150,000 or more, the same picture will later be licensed to another theatre for as little as $10 or $15 for a three day run at an admission price of only 10 cents.

The number of prints required for national distribution of each picture depends upon the number of theatres which must be served. Since these prints are fragile and are worn out in use they must be inspected after every exhibition. The slightest distortion of the sound track on the film will impair the sound effect.

The number of prints each film requires varies from 200 to approximately 350 per picture. The average print cost of every picture ranges between $30,000 and $40,000 and is often much higher. It is usual for all well managed companies to keep cost as low as consistent with good service and it is apparent that such cost can only be kept down by using each available print in successive exhibitions in different theatres as often as possible.
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The number of shipments required of the prints of the films produced by all producers runs into many millions a

year. It would obviously be impossible to operate such a business by providing a separate print for every exhibition. The cost of such prints alone would be prohibitive. So it is necessary for the prints to be distributed in successive runs and for each exhibition, whether first run or subsequent run, to realize the largest possible revenue for the distributors. It would be utterly impracticable for competing theatres to show the same pictures at the same time, as there would not be enough prints for that purpose and the value of the picture would be almost completely destroyed. Such a practice would drastically reduce the number of people who would see the pictures because the time of their exhibition in any community would be thus restricted. At the same time the respective values of each successive exhibition would be reduced and the distinction between them would be wiped out. Maintenance of this distinction, as we shall show, has definite advantages to the public.

The value of a picture to an exhibitor depends upon its freshness and its element of freshness determines the terms which the exhibitor is willing to pay to the distributor. The first-run exhibition ordinarily produces the highest revenue to the producer because the picture is then first available to

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the public, and it has the highest element of freshness. But the first-run exhibition is of great importance to subsequent-runs as well. Theatres showing the pictures first in the large cities spend large sums in advertising the films which they exhibit, they are commented upon in the newspapers and by word of mouth. Such publicity redounds to the benefit of all subsequent-run exhibitors by stimulating popular desire to subsequent runs. There is some analogy to dramatic producer and the exhibitor, but is also of great value and benefit to subsequent runs. There is some analogy to dramatac productions on the stage where the Broadway run is the most valuable, but the subsequent road runs are of importance. The success of the road run depends to a large extent upon the advertising and popularity of the Broadway showing. But the analogy is not perfect because whereas the stage

production on the road ordinarily has different and less prominent players, the motion picture is the same and provides identical entertainment for the public whether it is shown first-run at a relatively high admission price or at a later run for 10 cents.

In view of the importance of the first-run to a producer and exhibitor it is natural to find that the first-run of a picture goes to the best, most expensive and most luxurious theatre in the community. The Government attaches weight to the fact that in many of the large cities of this country (66)
theatres in which one of the defendants has an interest license the right to show many of the best pictures first-run. The evidence will show that this is because these theatres are the best available theatres in their communities. But the Government's picture of the situation as presented to the Court is by no means complete. In many of the cities where a defendant's theatre enjoys some product first-run there are theatres owned by independent exhibitors which have the right to the first-run of comparable product and in some communities all of the theatres showing films on first run are owned by independent exhibitors.

Whether or not a theatre has any affiliation with a defendant, it is equally necessary for the distributor to protect his revenue from each successive exhibitors so that he will be able to realize the largest possible revenue from first as well as subsequent-run exhibitions. The terms of the license contracts for first-run exhibition and subsequent-run exhibition are generally the same whether the exhibitor is affiliated with one of the defendants or not. There is nothing in the contractual provisions, of which the Government complains, related peculiarly or specially to the nature of any relation of any exhibitor with a distributor. The whole process of distribution and exhibition and the respective interests of the distributor and exhibitor therein are precisely the same whether the exhibitor is a so-called affiliate or a so-called independent.

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The success of any theatre (whether affiliated with a defendant or not) depends not only upon the right to exhibit during the period alloted for exhibition, but also upon assurance that the value of the right to exhibit shall not be destroyed by unfair competition of subsequent-run theatres charging lower admission prices. This assurance must extend for a reasonable time after the prior exhibition is ended. Obviously a theatre, operating at high cost and spending large amounts to exploit a picture first-run, cannot operate successfully and profitably exhibit pictures, for which it pays the higher license fees and charges higher admission prices, if theatres in the immediate neighborhood in competition with it, are able to advertise or show the same picture at the same time or a few days later for much lower admission prices. The same need for assurance against this type of unfair competition exists between subsequent runs. This so-called protection of the right to exhibit in an agreed sequence and under agreed conditions is known as clearance. Both the distributor and exhibitor have vital interests in reasonable clearance. The distributor provides for it in order to assure payment of the agreed license fees. The exhibitor must have it in order to enable him to meet the competition of subsquent-runs at lower admission prices and to pay the fees he has agreed to pay.

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Judge Hand: What has Appeal Board done about these clearance cases? Can you give us a little statement of it to show they handle them?

Mr. Seymour: I do not know that I can give your Honors the precise information, but my brother Caskey can because he studied this particularly, but what happens is that an exhibitor complains that clearance over his theatre is too long and he vouches in the other theatres that have clearance over his theatre and then, in accordance with the terms of the decree, which provide the various considerations which the Arbitrator is taking into account, the Arbitrator pro-

ceeds to decide whether his clearance ought to be reduced or whether it is all right, and then that decision can be appealed by either side to the Appeals Board.

Judge Hand: What sort of things do determine in the form of the decree?

Mr. Seymour: The decree lists the various considerations, such as admission price, character of the theatre, character of the operation, so on. They are all set forth in the decree. Those are the business considerations.

Judge Goddard: I would like to ask Mr. Wright, if I may, what is the Government's position as to clearance now? Before, the Government seemed to recognize that clearance was an essential feature of the business. The next question—perhaps I am ahead of it—is how the Government would

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regulate clearance, a matter that is determined by so many different elements?

Mr. Wright: Answering the questions one at a time, there is quite an important qualification, I think, that neither your Honor nor Mr. Seymour stated there. What we conceded was that reasonable clearance was essential.

Judge Goddard: You concede that?

Mr. Wright: At that time. And I would say that as of today, we still would not object to reasonable clearance as such, although there may be a difference in our concept as to what is reasonable and what is unreasonable. But that qualification was always there and still remains.

In so far as this question of how the problem of regulating clearance should be approached, as I say, the consent decree was an experimental effort to regulate it by a fairly complex administrative procedure, which was set up within the limits of that consent decree.

Judge Hand: Do you think they have done it badly?

Mr. Wright: Within the limits that we imposed, and that are inherent in such a system, I think they have done it well, but the job, in our opinion, just cannot be done effectively that way; that is, the only way in which you have a genuinely

competitive film distribution system, in our view, is to leave the determination of clearances to free competition and not
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have a system in which these producer-exhibitor defendants essentially administer it. Imposed on top of their administration was this consent decree system but, for reasons which are too complex to discuss here, the net result was—and which are discussed fully in the preliminary briefs that we filed on the motion for preliminary relief—the result of this arbitration system was simply to intensify clearance competition as among the lower runs, who follow the runs of the producer-exhibitor defendants, but it had no effect whatsoever in so far as disturbing the dominant run positions that these producer-exhibitors and defendants maintain in the cities referred to by our statistical data.

Mr. Seymour: I have the copy of the decree before me. Does your Honor want to have me read the various criteria? I mentioned some of them. The others are set forth—the business considerations which enter into the decision. What the Arbitrator did was to proceed to review the business judgment of the producers and exhibitors and correct it, as they thought differently about it. They were an objective method of review.

The precise amount of clearance is fixed by negotiation between the exhibitor and distributor, although of course once it is agreed to and in the absence of changed conditions, it is likely to remain substantially the same in succeeding
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seasons during which the exhibitor uses the product of that distributor. The arbitration system created by the Consent Decree is designed to and does provide ideal machinery for reviewing the business judgment exercised in agreeing upon such clearances.

The license fees charged by distributors for the exclusive privilege of limited exhibition granted in license contracts are ordinarily expressed in terms of a flat rental or a percentage of the gross receipts of the theatre from exhibition

of the picture. No exception can possibly be taken to either method of assuring compensation for the privileges granted by the producer pursuant to rights conferred upon him by the copyright law. Distributors, generally, believe that percentage rentals are the fairest method of obtaining a fair share of the rewards attributable to their products; they are also fair to exhibitors who thereby avoid high rentals on pictures whose box office results are disappointing. The terms of such percentages are matters of negotiation between the distributor and exhibitor, as are the terms of flat rental fees. Where a percentage return is provided for, the contractual provision giving the distributor the right to inspect the exhibitor's books is a necessary precautionary measure to assure full payment of the distributor's agreed fee. In the Government's brief, I want to comment on it briefly, although (72)
it was not mentioned in argument, they make some criticism of the reservation by the distributor of the right to make sure he is not cheated by the exhibitor. No evidence can be offered of abuse of such provisions which are universally used by distributors solely for their own benefit and protection and not for exchange of information with others. It is merely fanciful to suggest, as the Government does, that such provisions are used to exert pressure upon exhibitors for the sale of their theatres. If percentage arrangements are permissible, as we think they clearly are, it is surely not improper for the distributor to arrange assurances that the provisions are lived up to. It is hard to imagine a more proper provision than one for inspection of the books of the exhibitor.

Thus it is apparent that licensing according to runs with clearance provisions protecting the right of exhibition granted, are the necessary by-products of the copyright law and of the economics by which exhibition of pictures is carried on. The fact that Government counsel, unfamiliar with the practical problems of distribution and exhibition, think that the business might be conducted in another way hardly

justified interference with or penalties for the exercise of clear legal rights.

Of course, like all contracts, these license agreements (73)
may be said to involve restraints, but they are plainly reasonable and well within rights given by the copyright law as well as the general law. They lend no support to the claim of combination to monopolize which is the Government's case here.

It is the object of the distributor to select the best theatre whose operator is willing to deal for his product for first-run and to license it as widely in subsequent-runs as possible. In choosing its customers for first and subsequent-run, the distributor naturally tries to select the theatre for each run which he believes will best serve his legitimate business interests. In this process the distributor is exercising his normal and proper right to select his own customers for the presentation of his copyrighted dramatic productions. And I understood Government counsel to concede this morning, in answer to Judge Bright, that it was the distributor acting alone who made the decision on selection of first-run. The same thing applies on subsequent-runs. One of the complaints of the Government appears to be that the defendants who own interests in theatres often select the theatres of other defendants for the first-run exhibition of their pictures. The proofs will show that this selection is due to the superiority of the theatre selected and that it is not the product of conspiracy or agreement. Precisely the same criteria are used in selecting first-run outlets where no defendant owns (74)
any theatre or only some of them. If no defendant owned any theatre anywhere, precisely the same criteria would be applied and there would be precisely the same need for the same provisions of the license contracts, the arrangements for clearance, etc., to protect the distributor's revenue from each successive run. Indeed, it will become increasingly evident as the case proceeds that basically Government counsel want to see this business conducted in

some other way despite the fact that the very nature of the business requires precisely the methods which are here challenged. And it will, furthermore, be evident that those methods are quite unrelated to the interests of the defendants in theatres, and that these theatres are treated the same by other distributors as though they were owned by independents.

Whether owned independently or by defendants or by corporations in which defendants have a small or a large interest, all theatres exhibiting motion pictures in area are in competition with each other. The first-run theatres, how- defendants' several interests in theatres having first-run theatres but with all theatres in the community. A member of the public is always free to choose when, where and at what admission price he chooses to see a particular picture. It is the same picture whether exhibited first-run or at the last run. This competition is constant, goes on in the minds

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of the public every time they desire to see a picture. Thus defendants' several interests in theatres having first-run must be compared with the total theatres of all kinds and not considered as an unrelated market.

Although the Government now appears to abandon claims which it made in its Amended Complaint with respect to conspiracy to monopolize production, an appraisal of even its present case makes desirable some understanding of methods of production and of the intense competition which exists between all of these defendants and other producers at the production level as well as at the final level of exhibition.

I am sorry to be so long, but I think if I give you this background now it will save time later on, if you will bear with me. I think Judge Goddard may recognize that some of the material he is now hearing he heard from my distinguished colleague, Judge Thacher, five years ago. And I regret that other engagements prevent him from presenting this himself today.

The production of a motion picture does not begin in the studio. It begins in the acquisition of the story which is to be dramatized. There is the most intensive competition between each of these defendants with other producers for the acquisition of such stories, as has been repeatedly (76)

attested by newspaper accounts of bidding between various producers for desirable stories. When the story has been acquired, the script must be written. This task is performed by highly paid experts skilled in dramatic art. When the script is prepared, problems of casting begin, with emphasis upon the leading roles and consideration of the stars who can best fill the parts to the public's satisfaction. Occasionally, stars are borrowed or loaned to other producers to enable them to complete the desired cast. This is done where it is believed it will forward the interest of the star and benefit the producer, but the ultimate pictures produced are competitive. The practice is relatively universal and there is not the slightest basis for assuming that it affects the competitive relationship between the producers involved. After a cast is selected, the work of production begins; settings, costumes and stage properties must be produced with detailed historical accuracy. When all this has been done, rehearsals start. The production of silent pictuers was simple compared with the rehearsal of sound pictures. The latter involve the greatest perfection in speech, music and sound effects. Each day's work must be scrutinized during the night and only accepted as perfect when no flaws can be discovered.

No effort is spared in striving to produce the best picture. Each competitor strives to excel with varying degrees of (77)

success. Naturally, in the course of such competition some pictures of some producers do better than others. But it will become apparent that this fact, as well as the respective box office receipts, bear a direct relationship to the quality and showmanship of the production and the critical ability

to gauge the public taste at the time of exhibition. It has become the fashion, to which Government counsel and even defendants' counsel may occasionally succumb, to speak of the defendants in this case as if they were in one group and to call all other producers independents, as if they are somehow in a different category. The only sense in which that is true is that other producers, not defendants here, are independent of the Government's attempt to shackle their competitive abilities and destroy essential parts of their businesses. Each of these defendants is an independent producer, whether or not it has any interest in theatres. Outside of the defendants in this suit, there are many successful producers. They have produced a number of fine pictures in recent years, pictures which they have exhibited in theatres in which these defendants are interested as well as others. The non-defendant producers are amply financed and equipped to produce fine motion pictures. No one with talent and sufficient capital is excluded from production in this industry. Of course, there are failures in this as in any

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other industry. Absence of adequate talent or adequate capital may produce a failure. But nothing in the conduct of these defendants or in their interests in theatres operates to exclude or limit the opportunity of producers with the necessary talent and capital.

Some outline of the nature of the production and distribution organization of Paramount may be desirable. I am about to go into a treatment of this Paramount as a separate organization in this discussion. Would your Honors like to have me continue or would you rather recess now? I cannot finish before lunch, I assure you.

Judge Hand: We will take a recess until 2.10.

(Recess to 2.10 p.m.)

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AFTERNOON SESSION

Mr. Seymour: I am now going to discuss for a little bit the organization of the defendant Paramount so that your Honors will see how that company does its business.

The production department is located in Hollywood and is in charge of a vice-president of the company. Paramount is also presently planning to produce certain pictures abroad as it did before the war. There is a branch of the producing organization at the Paramount office in New York. At the present time there are approximately 3,349 people on the payroll in the West Coast studio. Paramount makes approximately 36 feature pictures a year. It has made a greater number in the past. War conditions compelled it to make a smaller number than theretofore. After a tentative program of production for a motion picture season (which begins September 1) has been set out, individual production is assigned to producers and producer-directors in the studio. The studio employs normally about 15 directors. A large staff of writers is retained from time to time. The program of pictures for any one year is released at the rate of about one picture a week starting September 1. To see the amount of planning which must go into an annual program and taking the program for 1945-6 as an example the normal process of production of that program would be as follows: In November, 1944, a meeting was held in Hollywood between the

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heads of the studio and the top executives of the company in New York, including the president and the heads of the foreign and domestic sales department, at which time the studio heads presented on paper the material available for the 1945-1946 program as to producers, producer-directors, directors, stars, players and writers. It was then determined how many pictures and plays would be needed for that program and the amount of money that could be expended in that production. The material on hand would be analyzed.

Out of this discussion there would be evolved a group of pictures totalling the number required, estimated to cost what would be spent and this would constitute the tentative program for 1945-1946.

Following this meeting, the schedule of production which I have outlined would be followed, with many changes during the course of production. The normal process of evolution of an individual motion picture is as follows: Paramount is continuously combing all sources of story material in all parts of the world for satisfactory stories. In its New York production department the company has a story staff of specially trained men and women who are working in connection with the Paramount studios and combing all story sources, outside of Hollywood. These include books, magazines, stage plays and hundreds of original stories. In Hollywood the story staff combs the sources of stories there. The stories so accepted are synopsized and analyzed. Upwards (81)
of 7,500 stories are thus handled annually. Stories which seem to have a germ of a picture in them are sent to the Hollywood studio's story head and the studio story head submits them to the head of the production department to be produced if they are recommended. Studio heads make the final decision. Once the story is bought it is turned over to the producer, whose duty it is to turn it into a picture. The studio writing department obtains a trained writer to adapt the story to the screen. When the script is completed the players are chosen and a director is selected. The financial department head estimates the cost. Then all the elaborate procedures for casting, costuming, settings and supplying music are invoked. After the picture is completed it is tried out in Hollywood. After the trial, changes are sometimes made. Thereafter a final "master" positive print is made and allotments of the prints are made to each Paramount exchange for release to each Paramount customer. The Paramount exchanges are wholly independent of those

of other companies. It is through the exchanges that the distribution of prints is made.

Every other producing company has a production organization somewhat similar to Paramount in the respects mentioned. Competition between these efficient business units is extremely keen all along the line from the search for story material to the evolution of the final picture. It is a continual race to secure good story material. There is the most
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intense bidding between companies for good story material and successful stage plays. There is, furthermore, the most intense competition for motion picture talent. Each company is feverishly hunting for new talent. A new player who makes a success on Broadway is immediately sought after by picture companies on competition. Actors' agents stir up the competition, keep it going. Once a player is signed up, there is constant competition to take him away from the studio which has him under contract. The competition for writers, directors and skilled technicians is keen.

The technical and other difficulties of production are enormous, quite aside from the highly speculative nature of the business. Weather, temperamental difficulties of stars, are among the daily problems in producing a picture.

Success in this industry is not merely dependent upon the ability to make fine pictures, but it is primarily conditioned upon an uncanny judgment in the selection of pictures which will appeal most strongly to the patrons of theatres at the time when the pictures are released for exhibition many months after they have been selected for production. The ability to anticipate public taste in a picture is the only way to success, although, of course, the expenses incurred in this procedure are also of importance. The genius of successful showmanship is the best guide to success and sucessful
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producers do not neglect any possible indication of trends in the public taste and interest and in the types of motion picture plays which audiences most enjoy. Actual box office

receipts in typical theatres located in representative communities record the results of success and failure in producing pictures months before their exhibition and it is of the utmost importance to the producer to have intimate and accurate knowledge of the general public reaction to the various pictures as soon as they are shown upon the screen.

The integration of theatres with production affords an accurate teaching experience as the basis for evaluating future products. It makes the producer directly responsible to the audiences for whom the pictures are made.

The judgment of executives long experienced in wrestling with this problem in all three branches of the industry is brought to bear upon it; public taste in current news, in types of fiction, in plays and in the personalities on the stage and screen are important materials to be considered in determining the trends in public taste in these dramatic performances. Sensing these trends involves an intimate understanding of human nature and long experience in judging the feelings, thoughts, tastes and desires of people; it is the one essential quality of successful showmanship. Thus the most vital problem of all is to decide what pictures to

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produce in order to capture the interest and satisfy the general tastes of the theatre-going public. These are the qualities which each company seeks to have in its executive leadership. These are the qualities which enable companies to compete successfully with each other. These are the qualities which cannot be monopolized.

Prior to the consent decree, pictures were released for exhibition during annual seasons commencing in September, but the program then released had been under consideration and in production for many months. The interest of the public was under constant consideration. By May or June the program of production proceeded to a point at which it fairly evaluated the pictures that were to be offered for exhibition. A convention was then held of those who were to engage in the distribution of the pictures for the coming season to commence the following September.

The purpose of these Conventions was to furnish all available information regarding the pictures to be released and to inspire enthusiasm in those who were to distribute them. Theoretically, the selling campaign commenced immediately after the convention, but under the spur of competition, pictures were often licensed for exhibition several months before the convention was held.

Each distributor endeavored to hold its convention and to commence its selling campaign before its competitors. (85)

These efforts among distributors to begin the licensing of pictures for exhibition at the earliest possible moment evidenced the sharpness of the competition in which they were engaged. When the conventions were over the salesmen returned to their firm exchanges and solicited exhibition contracts within the territories of their exchanges. The salesmen in the ordinary case negotiated directly with the exhibitor and endeavored to arrange the best possible contracts. If the exhibitor was willing to license the pictures on terms the salesmen approved, the exhibitor signed an application which, if ultimately approved by the branch manager, the district manager and the home office, was accepted and executed by the company and a contract thus executed was returned to the exhibitor. In this process of distribution there was intensive competition between all of the distributors in licensing the pictures to exhibitors.

Since the consent decree, that is, since the selling season of 1941-42, pictures have not been licensed by a season's output but instead, pictures have since that time been licensed in groups not to exceed 5. Under this system of selling, national annual conventions became not only unnecessary but meaningless, for the problem of selling became more intensified and the competition greater, since the selling job had to be done, not once a year to an exhibitor, but the exhibitor had to be sold each group of not to exceed 5 pictures as they (86)

were finished, and were trade shown in the respective exchange districts.

Instead of holding annual conventions, therefore, it has become necessary to hold frequent sales meetings regionally throughout the country, several times a year, in order to acquaint the sales personnel with the character of the motion pictures in each group as they were produced, and the policy of the company in licensing them to the exhibitors. Paramount has independently continued this practice of trade showing despite the fact that the provisions of Section III and IV of the consent decree lapsed by their terms several years ago.

As I have already indicated, this method of selling under the consent decree has not lessened competition between the various motion picture distributors but has in fact intensified that competition, and the keenest competition and rivalry exists with each group of pictures.

The process of providing necessary prints to the 10,000 or more theatres which Paramount supplies requires the maintenance of a national system of distribution through which Paramount competes with other distributors in its effort to license theatres.

And your Honors will have in mind that this figure of 10,000 theatres is to be compared with the figure I gave you this morning, the 200 to 350 prints which have to serve the

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10,000 theatres in a series of runs.

Paramount's distribution department has under its supervision 31 film exchanges covering varying amounts of territory which are selected for convenience in servicing the customers in an area. These exchanges are located in the most important centers. The Paramount exchanges are wholly independent of the exchanges of other distributors and compete actively with other exchanges. Each film exchange is under the direct supervision of a branch manager who is directly responsible to the district manager in whose district his exchange is located. There are four division managers and the general sales manager who have their offices in New York. Prior to the consent decree, there were three

division managers, however, under the method of selling under decree which required sales in groups of not more than five, the sales force was augmented and also a fourth division manager was added because the number of transactions was multiplied many times. It is impossible for the general sales manager personally to approve or reject every license contract that is made. Such authority is delegated to the division managers within their respective divisions. The task of solicitation is primarily imposed upon the salesmen of each of the film exchanges.

In their effort to sell Paramount pictures these salesmen constantly meet competition of all other distributors, including the other defendants in this action. Each company pub-
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lishes in various forms advance announcement of its pictures and pursuant to a practice which arose in conformity with the provisions of the consent decree which have now lapsed, pictures are trade shown by most of the defendants. Competition in licensing pictures has always been vigorous and each of the companies jealously guards all information with regard to their own negotiations with exhibitors. There is no limitation whatever on the freedom of any one of them imposed by any others by agreement or otherwise, and there is no exchange of information between them which can influence their individual action as competitors in the business of licensing pictures.

It is natural since all of the distributors are dealing in the same type of business with similar problems and having similar rights under the copyright laws that many of the contractual provisions used by them should be similar. As the proper amount of clearance between given theatres became established and each exhibitor became accustomed to a certain amount and to insist on the same clearance that he was able to secure in his dealings with each distributor, it was natural that the clearances which he obtained from those that he dealt with should generally be similar. Obviously no exhibitor would willingly subject himself to a

shorter clearance in favor of a competitor than he had before
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or than he could get from any distributor. Conversely no subsequent run new exhibitor would accede to a longer period of clearance in favor of his competitor than he bargained for and received from another distributor. Such similarities cannot be regarded as significant of conspiracy. Under the circumstances, they are entirely consistent with independent dealing which we shall show is the fact.

With respect to the provision in contracts fixing a minimum admission price for exhibition of the particular pictures licensed, these provisions are indispensable to the protection of the revenue of the distributor. They apply only to the showing of the copyrighted pictures licensed to an exhibitor by the distributor with whom the license is made.

And I want to explain that a little more fully, because Government counsel have simply seized upon it as an alleged price-fixing scheme without any reference to the economics of the business or to the fact that we are dealing here with a copyrighted product.

The license fees which any exhibitor pays for a picture licensed are predicated upon the conditions then in the area in which the theatre is located, and the minimum admission prices inserted in the contracts are, as the Government concedes, generally those which are then currently being charged by the exhibitor and those which he fixes.
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Obviously if, while the license agreement is in effect, the prior run exhibitor lowers his admission price below a certain figure, he thereby affects the admission prices which a subsequent run exhibitor is able to obtain, for, as the Government concedes, the later run usually must and usually does charge a lower admission price. If the prior run admission price is lowered, the subsequent run must lower his admission price and cannot afford to pay that which he has agreed to pay, and will in consequence be obliged to ask the

distributor with whom he has contracted for a reduction in the license fees which he has agreed to pay.

Conversely, if the subsequent run reduces his admission price below the minimum specified in the contract, he thereby injures the prior run as well as those who have runs subsequent to his own and all are therefore obliged to lower their admission prices, and they in turn are unable to pay the licensee fees which they have contracted to pay.

Therefore it is abundantly clear that for the protection of the distributor's license fees, the distributor must insist that the rules of the game shall not be changed during the game—that is, during the relatively short period covered by the sequence of exhibitions of a particular picture in a particular competitive area.

It is essential to the satisfactory operation of the exhibitor's own business to have an established admission (91)
price. No exhibitor would on ordinary bookings have a different admission price for the pictures of one company from that of any other. He, not the producer, really fixes the admission price. The inclusion of the same price in license contracts from different producers is no evidence whatever of agreement or concert between the producers. It merely reflects, of course, the standard procedure of the particular exhibitor.

The economics of the business which require and justify the provision for minimum admission price are simple. The producer wishes to receive the highest possible revenue from each run, and is, of course, entitled to try to receive it. The exhibitor must have reasonable assurance against unfair competition in lower admission prices from subsequent runs. If an exhibitor who pays, say $5,000, rental for a film and whose admission price is 75 cents, does not have reasonable assurance that a subsequent run exhibitor will not be able to exhibit at the same time or shortly after him at such a lower price as will entice away his patronage and make it impossible for him to pay the higher rental which he has

agreed to pay. Accordingly, the exhibitor is interested in making sure that the subsequent-run exhibitor will not exhibit at a cut-throat low price. Only by knowing that the (92)
producer will deal with the subsequent-run on a basis of a reasonable minimum price consistent with the customary practice and the relatively lower value of the subsequent-run, can he with confidence undertake to pay the rental asked by the distributor. Incidentally, it must be noted that in all cases the license contracts merely fix the minimum price. No contractual provision inhibits any maximum which the exhibitor desires to charge. Furthermore, as in the case of other license provisions, the existence of defendants' interests in theatres have nothing whatever to do with this requirement. The same requirement is contained in license contracts to exhibitors unaffiliated with the defendants. If the defendants owned no theatres at all, the economics of the business would require that the exclusive rights granted by the copyright law be protected, by such reasonable provision, against destruction.

It is argued by the Government that provisions in first-run license for minimum admission fees and clearance enables the theatres somehow to control the admission prices and business of subsequent runs, and by tacking the business of independent theatres to the business of affiliated theatres, the Government seeks to inflate the percentage of business actually enjoyed by affiliated theatres. Such an attempt must fail for it is bottomed upon specious reasoning. Theatre operators determine their own admission prices. They do (93)
so, whether they are affiliated or not, and whether they are operated first or subsequent-run, with an eye on what their competitors customarily charge. The price charged by a subsequent-run operator is not fixed by any agreement between the distributor and the first-run operator, but is fixed by the subsequent-run exhibitor himself with the view of making it low enough to induce patrons to wait until they can see the picture in his theatre. Ordinarily this price will be less

than charged by the first-run but under some circumstances a subsequent-run operator can and does charge as much as, or even more than, a first-run. No ceiling prices are fixed by contract. The only real ceiling that may be said to exist is due to the economic fact that an exhibitor showing the product after it has lost some of its initial freshness and drawing power, ordinarily must charge less for the opportunity to see it. The only floor on prices is determined by the copyright owner in the lawful exercise of his right to license his product upon such terms as will ensure him a reasonable reward for his copyright. These are some of the considerations which point up the fallacy of the Government's claim that first-run theatres control more than their own business, and which show the futility of the Government's attempt to inflate the alleged monopoly of affiliated theatres to include independently owned and operated subsequent runs.

In addition to negotiating license contracts, it is the function of each film exchange when the release dates are known to book the pictures for exhibition on specific dates in each of the theatres where they are to be exhibited. Because of the limited number of prints which can be made available to each of the film exchanges, and because of the necessity of spacing prior and subsequent exhibitions, the booking procedure becomes highly technical and it is the function of the film exchange to arrange these bookings in theatres with which they have contracts so that these contracts may be fulfilled in all details with respect to the length of runs and clearances. The booking schedules must be so arranged and delivery dates so fixed that the exchange will be able to deliver the picture on the date fixed for its exhibition and to carry out fully the arrangements for the delivery of the prints and for their immediate return to the exchange after exhibition for repair and inspection before delivery to another exhibitor. There is no time for any print to be idle, they are constantly in motion, on exhibition or under repair.

Having dealt with production and distribution it is now appropriate to describe the theatres in which Paramount has some interest (which investments the Government asks the Court to strip away) and to review briefly the history of
(95)
this integration between production, distribution and exhibition. In the course of this review it may be noted that not only is there no justification for the Government treating the theatres in which Paramount has some interest as lumped together with the theatres in which other companies have an interest, but it is even improper to lump together the theatres in which Paramount has an interest. The Government sometimes describes such theatres as if Paramount owned or controlled a vast circuit of over 1,500 theatres. This is completely contrary to the fact. In the following history it will become apparent that Paramount got into the exhibition business as a competitive measure and that when the Government urges that it should now be forced out of that business it is seeking not to advance competition, but to stifle Paramount's ability to compete.

As of March 31, 1945 Paramount had some financial interest in companies having interests in approximately 1,500 theatres. They are located in approximately 44 states. Of the theatres in which Paramount has any interest, there are only about 500 in which it has an interest representing more than 50 per cent of the voting control. The theatre investment is of very substantial importance to the company, being carried on the books at approximately $63,000,000. Paramount's return from its investment in the companies
(96)
operating theatres is important as well as is its revenue from production and distribution. This business fact requires of this company miscellaneous services in the operation of theatres if the company is to survive. These theatres are not maintained or operated as instruments of monopoly. They are business responsibilities in which the stockholders of Paramount are intimately concerned. The executives of the

operating companies are bound to so operate and manage these properties that they will produce the largest revenue by providing the best entertainment in competition with theatres of comparable quality, many of which are owned by other defendants in this case, but others of which are owned by those in no way connected with the case. The Court will recall that the total number of theatres in which Paramount has any interest amounts to less than 9% of the total theatres in the United States.

It might be well to say here again that the Government's attack on theatre ownership is not based upon any concern for the general public for whose entertainment or edification pictures are produced. It is based solely on the relatively unimportant segment of theatre competitors of the theatre-owning defendants who would like to see these defendants out of exhibition competition. It must be apparent that such a result would very surely deny to the public pictures (97)
of the quality now produced for which the theatre-owning defendants now have some assurance of a market, justifying such substantial speculations.

Paramount has recognized from the start the necessity of procuring the most able and competent showmanship in the management of theatres in which it is interested and has been keenly aware of the fact that the successful operation of a modern picture theatre is primarily dependent upon the showmanship and ability of the local managers and co-owners to operate their theatres in the manner most satisfactory to their local patrons. Since Paramount emerged from its reorganization in this Court in 1935, and even before that time, beginning in 1932, the activities of the home office in respect of the operation of theatres have been completely decentralized and placed in the hands of local managers and operators. In most cases, these local operators own substantial financial interests in the owning or operating companies, or having profit sharing management contracts

which give them incentive to produce results from their operations without regard to what other Paramount associates do. There are only two theatres, the Paramount Theatre in New York, and the Nawman Theatre in Kansas City, which are managed and operated from the New York office. All other theatres, including those in which Paramount owns the entire interest, are operated by local operators who are re-
(98)
sponsible for the operating policies of the theatres under their control. These men are given entire freedom in negotiating exhibition contracts with the salesmen of the various distributors including those of Paramount and are permitted to buy pictures for their theatres quite independently of each other and of the home office, predicated upon their local needs and the public tastes in their communities, and their ability as business men to make the best bargain for the pictures they need in order to operate their theatres successfully. This fact is persuasive evidence that no such combination or conspiracy as the Government suggests would or could exist.

The wholly owned theatres, that is, the theatres operated by companies which are wholly owned, unquestionably assure Paramount an important outlet for its product. The circumstance that other producers license their pictures to these and other theatres in which Paramount has an interest can give rise to no inference of monopoly or conspiracy. Every producer attempts to license his pictures for exhibition in the best theatres, and where Paramount or another defendant has the best theatre it is natural that other producers should license their pictures to them just as they license to the best theatres owned by non-defendant exhibitors.

With respect to the theatres operated by companies in
(99)
which Paramount owns not more than a 50 per cent interest, the management of those companies is, in fact, controlled not by Paramount but by the local men, usually those owning the remaining financial interests. This results in many

cases from the continuation of the same management which had made the operation successful before Paramount invested in it, and it is a part of the Paramount policy of assuring successful local operation. In such cases the responsibility for management usually falls upon one who may be fairly described as in a position like that of a managing partner, active in preserving his own interests, knowing the demands of the local community, interested primarily in local operation. Such operators conduct their business with little regard and almost no consultation with Paramount and the policies of local exhibition, including the negotiation of license contracts, are in such cases left entirely to the managing partner. Of course, Paramount pictures are usually shown in such theatres, and the favorable opportunity to show Paramount pictures was undoubtedly a consideration in Paramount's acquisition of an interest. But such local managers, deeply concerned with their own economic interests, would have no motive for participating in a combination or conspiracy with other producers of which Paramount and not they would be the beneficiaries. Indeed, their sepa-
(100)
rate interests are quite inconsistent with any such combination or conspiracy. Nor are they interested in the operation of other theatres in other areas in which Paramount may have an interest. It is apparent, therefore, that such theatres cannot be lumped together with other Paramount theatres in which still others have interests, let alone lumping them with theatres of other defendants. We shall show that, in fact, there is no relationship between the licensing policy of theatres associated with Paramount in different sections of the country, that only the business interests of the theatres and their actual operators dictate the degree to which and the terms on which the pictures of other producers are licensed. There is no discernible nor possible pattern of conduct which can give rise to an inference of combination or conspiracy among the defendants.

Of course, in such cases, Paramount maintains a general fiscal supervision of the companies in which it has less

than a majority interest, through its theatre department. The New York office of Paramount has a statistical department, an auditing department, tax department, real estate and insurance departments, and other similar departments unrelated to management of the theatres. In some cases an executive in the theatre department is an officer or a director of the theatre-operating company or an intermediate holding company. They, of course, sometimes attend meetings
(101)
of stockholders and directors. But their function is not one of intimate control of management. It is one of advice and such financial supervision as is necessary to protect Paramount's investment against loss. While the theatre department often receives summaries of exhibition contracts which the local operators have made for the films of other distributors, it does not receive the contracts as such. Information regarding the contracts of such theatres with other distributors is confidential and is not made available to the distribution department. This is because of the keen rivalry between the departments in the Paramount organization.

The Government says it is not concerned with and will offer no proof of how any defendant interested in theatres came to have any of its present interests, and seeks this decree of divorcement without regard to any elements in that history. We think it important to indicate in a general way how the present business units organized. When that history is examined, it will be found that Paramount's interests in theatres were acquired in competition and for competitive purposes, and that throughout its history it has been, as it is today, engaged in most vigorous competition with its co-defendants all along the line.

The Paramount organization was not planned or created in advance; it is a natural business growth considered essential to business success, developing as a result of the various
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vicissitudes through which the business has passed.

I am going to save your Honors, if you will permit me to, the reading of a number of pages of the manuscript, which I would like to hand to the reporter, so it may be in the record, which deals with the early history of the Paramount Company and traces the development of feature pictures in the United States. Mr. Adolph Zukor, who at one time was president of Paramount and who is now chairman of the board, was the father of feature pictures in this country, and I have devoted a few pages here, which I will be glad to save your Honors listening to at this time, by putting them in the record, as to the development of feature pictures and the early history of Paramount, if I may have the Court's permission to hand four or five pages to the reporter. You will be able to take them in more painlessly at a later time.

(The matter referred to by Mr. Seymour is as follows:

In 1906, following early developments of "peep-shows" and nickelodeons by Edison and others, Mr. Adolph Zukor, former President and now Chairman of the Board of Paramount, and the organizer and creator of its predecessor, acquired his first interest in a theatre in association with William A. Brady. Brady and Zukor acquired a store on the south of Union Square and constructed a Pullman car

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inside, charged admission to people who came in and were privileged to sit in the observation end of the car and observe on a screen, about 20 feet beyond, pictures of passing scenery as if they were moving through the country. Zukor tried to interest producers in supplying similar travelogues, but they were too busy making inferior product. By 1907 or 1908, the so-called "chase" pictures had lost their appeal.

At that time Zukor and Brady had leases on about 14 nickelodeons and faced the necessity of going out of business or procuring better pictures. As none were available in this country, but better ones were made in Europe, Zukor procured from abroad a three-reel picture consisting of a hand-colored film of the Passion Play at Oberammergau. This film was exhibited in Newark and ran successfully for four

months, and thereafter ran in the Zukor and Brady theatres in New York. As a result of this experience, Mr. Zukor was persuaded that people would be interested in novels and plays and stories on the screen. He had no experience in production and no thought of producing pictures, but when he approached the American producers he could not arouse any enthusiasm. They uniformly expressed the belief that people would never sit through pictures that ran three, four or five reels.
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After futile efforts to persuade them that they were wrong, Zukor then went into the vaudeville theatres where chase pictures were then used to empty the theatres. As a vaudeville operator, he was associated with Mr. Loew, who at that time had a number of vaudeville theatres. In 1910, the Zukor and Brady theatres and the Loew theatres were merged in what was then known as Loew Enterprises, in which Mr. Zukor obtained a stock interest. He then devoted himself to a study of motion pictures, traveling through Europe, and observing audiences to verify his judgment of their interest in long, better-quality film.

In 1911, he determined to present successful plays in motion pictures. Sarah Bernhardt had in the meantime appeared in Paris in a stage play called "Queen Elizabeth", and Zukor was informed that she would be willing to sell the picture rights for $35,000. Although the price was considered almost prohibitive, Zukor paid it, procured the picture, and booked it for exhibition. He had to book it in a legitimate theatre because there were no ways of distribution then which were not monopolized. He booked it at a theatre in New York and one in Chicago. It was a great success. The first successful feature picture in America. At that time what there was of this industry was completely monopolized by the Motion Picture Patents Company, a patent pool, and its affiliate General Film Company, neither of which had any
(105)
connection with the present defendants or their predecessors.

The system was that there was a patent pool which licensed the patented projector, refusing to license unless films

were also licensed from it. There was a group of all the producers at that time operating, and there was a distributing company, the General Film Company, and the arrangements were such that no one could produce a picture, no one could distribute it, and no one could license it because of these illegal tying clauses to each step in that process by which every exhibitor who dealt with the General Film Company was restricted to the exhibition of those pictures alone which were distributed by the distributing company. This monopoly was so secure that it resisted all initiative in the improvement of pictures. It refused to distribute the new and superior films introduced by Zukor. Thereupon Zukor set out to improve the art against the resistance of monopoly and he broke it down, and eventually they could not do without his pictures. His first act was to organize a company which is a predecessor of the defendant Paramount. A brief history of this company shows that on June 1, 1912, Famous Players Film Company was organized by Mr. Zukor in association with Daniel Frohman and Edward S. Porter. Frohman was a well known producer and Porter was a director of motion pictures who had been associated with Edison. The plan of this company was to present successful plays with famous stars on the screen. The first picture was "The (106)
Prisoner of Zenda" with J. K. Hackett. General Film Company at first declined to license this picture, but when it was shown at the Lyceum and was a great success, General Film Company changed its tune and sought to license the picture. The license was granted which permitted such exhibition by exhibitors using patented projectors and Zukor distributed the picture not through the General Film Company but through states rights' distributors for a flat sum in each territory. Thus you see the breaking of a monopoly by the sheer quality of the product.

The company continued to make pictures in which were starred James O'Neill, Mrs. Fiske, Mary Pickford, William Farnum and John Barrymore, among others. These pictures

were all distributed in the same manner through state rights' buyers. Several other companies followed his example and commenced production and distribution of similar pictures. The influence of the General Film Company was still present. Many exhibitors were fearful that the General Film Company would refuse to supply them with any pictures if they leased from other companies, and it was only by virtue of the policy of the new producers who had entered the field to supply a sufficient quantity of pictures to meet their cus- (107)
tomers' needs that the more progressive exhibitors were encouraged to break away from the General Film Company and contract for the better pictures which its competitors were offering. These companies were able to furnish a dependable supply of 52 pictures a year, which was only sufficient for a few theatres which ran the same picture for a week. A much larger group of theatres could only be won by better pictures if they could be supplied with two pictures a week, since their neighborhoods would not support the same picture for an entire week.

It became increasingly evident that a comprehensive and coordinated distributing organization was necessary.

In 1914 Paramount Pictures Corporation which was organized by State Right Distributors but was not connected with the present defendant or its predecessors, was organized as a distributing company because of dissatisfaction with existing methods. In May, 1914, this distributing company entered into individual contracts with Famous Players, the Lasky Company and the Bosworth Company for a five-year period whereby the distributing company distributed their product through the United States. Each of the producers was obligated to supply a specified number of pictures, in all totalling 80. It was contemplated that the distributor would make up the difference from other producers, so that there would be a full program of 104 a year by acquiring pictures elsewhere.

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On March 1, 1915, these contracts were extended for a period of 25 years, but there had been a considerable amount of friction between the producing companies and the distributing company. As a result and in order to bring about a closer union in the interests of the producer and distributor and to protect the interests of the former, Famous Players in 1916 agreed to purchase 50 per cent of the stock of the distributing company. As the business developed and particular stars obtained a large following, some of them refused to permit their pictures to become a part of the distributing program. The distributing Paramount organization required exhibitors to take all its product, good, bad or indifferent, and stars, such as Mary Pickford, were unwilling to make pictures to be distributed by Paramount because the method of leasing 52 or 104 pictures annually at a flat price per picture prevented payment to them measured by the box office receipts of their own pictures. The most prominent stars at that time were insisting upon a share in these receipts. Furthermore, they felt that their own dramatic performance if sold as an item of a program for which the exhibitor paid a flat sum per picture regardless of merit would be impaired in sales value.

To meet this situation, Famous Players organized Artcraft Pictures Corporation. Its object was to create a

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trade-mark denoting pictures of the highest grade which should be released to exhibitors without requiring them to take any other pictures. Among the Artcraft stars besides Mary Pickford were Douglas Fairbanks, William S. Hart, George M. Cohan and others.

About this time, Famous Players-Lasky was incorporated and acquired the stock of Famous Players Film Company, Jesse L. Lasky Feature Play Company and Bosworth, Inc. and its affiliate Morosco Photoplay Company. The reasons for the organization of this corporation were numerous. Its constituent units were not in competition with each other

in the distribution of pictures but were severally under contract with Paramount Pictures Corporation to furnish the latter with a certain number of pictures a year. Each company was independently operated, whereas the best interests of the producers and distributors required that their activities should be coordinated to the end that pictures provided by them would as a whole constitute a diversified and balanced program.

On the artistic side, consolidation appeared to offer great possibilities by giving the directors, scenario writers, camera men, and others, a greater field of selection and a maximum use of the talent of each individual. The consolidation did not have the effect of lessening competition between the companies since they were not in competition.
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Famous Players purchased the remaining stock of Paramount Pictures Corporation, the distributing company, in 1916, and by early 1917 had acquired all of it. The companies were formally merged in December, 1917. During 1916, in addition to Paramount, there were many other companies engaged in distribution.)

Mr. Seymour: Now I am going to pass to the conditions which gave rise to the entry of Paramount into the exhibition business. From the very beginning of this industry the tendency to organize chains of theatres was prevalent. This movement developed greatly in 1910, 1911 and 1912, and was very general by 1919. Not only was there concentration of theatre interests in chains, but a number of theatre owners consolidated their purchases by entering into booking arrangements for a whole group of theatres. Thus we find that the concentration of theatre ownership through chains and booking arrangements antedated the acquisition of theatres by any of the defendants and it cannot be doubted that this method of theatre organization would have persisted even if the defendants had acquired no theatres or if they were now to dispose of them. There are now approximately 100 chains of theatres in the United States in which defend-

ants have no interest. Their existence is recognized in the Consent Decree. Nothing which happens in this court can affect these chains.

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When these consolidations and combinations of theatres were well established in all principal cities in 1917, First National Exhibitors Circuit, Inc. was formed. It was to enable Paramount's predecessor to survive this competition, that compelled Mr. Zukor to put it into the theatre business.

The First National organization was composed of 29 signatories, representing 23 distinct interests, which among themselves controlled the purchase of film by a very large number of the leading theatres throughout the United States.

The activities of this organization and its original franchise holders were not long limited to a combination for cooperative purchasing of pictures for exhibition in the best theatres in the principal key cities throughout the country and general distribution through exchanges located in these cities of the pictures so purchased. As a matter of fact, the First National group actually purchased but two finished pictures in the open market, soon finding that that method would not supply its theatres even when those pictures were combined with other state rights pictures. It would not supply these theatres who joined in this combination with a satisfactory program of good pictures on a reasonably definite schedule. This group, representing all of these theatre outlets, thereafter, within three months after its organiza-

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tion, began an aggressive program of negotiation for contracts with well-known stars and directors then in the employ of other producers for the exclusive production of numbers of pictures to be delivered in schedules extending over a period of years.

As Paramount pictures were then generally recognized to be the best on the market, its stars and directors had come to be best known. Accordingly, representatives of First National began to negotiate with most of these stars and direc-

tors notwithstanding their unexpired contracts with Famous Players-Lasky (Paramount's predecessor). The stars were told that they would make more money and have greater freedom if they formed their own distributing companies and distributed through First National. Offers of substantial financial assistance were made to them. Among the stars of Famous Players with whom such negotiations were had were Mary Pickford, Jack Pickford, Norma Talmadge, Tom Meighan, Cecil DeMille and Wallace Reid. Mary Pickford, Famous Players' greatest star and then the outstanding star in the industry, was enticed away by First National. Other stars were also taken away by fantastic inducements.

The purchase of pictures in the open market as well as the making of the contracts with stars and directors for the production of pictures was in each case submitted to a vote of the First National theatre owners who were franchise hold-
(113)
ers, and the approval of two-thirds was required for purchase. When such approval was obtained all franchise holders were bound to take all the pictures purchased and to bear their proportionate share of the cost of production. The cost was distributed among the several franchise holders in proportions agreed upon the time of organization. Such franchise holders then had the right, within his territory to do what he saw fit with each picture. In practice each holder ran the pictures in his own theatres and then distributed them among other distributors in his territory who paid him for the privilege. So not only the member theatre owners of this group were bound to take all the pictures that the group produced, and to share the cost of them, but that was spread down through these leading theatre owners into the territories in which they individually operated, 23 of them covering the whole of the United States and the movement began to tie up not only the members of this group but to bring into it every other important theatre that they could get to take a sub-franchise. Eventually a central office was organized and the distributing offices of the group came

under centralized control. A system was developed for making sub-franchises and requiring the sub-franchise to assume part of the cost.

In 1917 the First National distributed two pictures, in 1918, sixteen, and in 1919, twenty-five. Its various members (114)
had in their exchanges many additional pictures which when added to the First National pictures by the end of 1918, furnished a program of at least one picture a week and by 1919 the First National Company itself had announced that it had contracts indicating that with the aid of the outside pictures purchased by its several members, it would be able to distribute a program of approximately sixty pictures in 1920. The program was actually released by it. Its avowed intention was to distribute enough pictures to supply all the time of all the theatres of its members which changed their program once a week.

Many of the theatres owned by First National franchise holders had for a long time prior to 1918 exhibited a large number of Paramount pictures. While many of them continued, even after the organization of First National, to endeavor to purchase some Paramount pictures, substantially all the First National members gave preference to the First National pictures in which they had made a considerable investment. The natural result was the gradual cutting down of Paramount pictures in those theatres. This was furthered by vigorous, hostile attacks upon Mr. Zukor and Famous Players (Paramount's predecessor).

A few of the members while giving First National pictures preference continued to take a substantial number of Famous Players-Lasky pictures and paid reasonable prices (115)
therefor. Many others while continuing to take Paramount pictures insisted upon prices which Famous Players were not satisfied with and on which it could not make a profit. Others refused to accept the prices which Famous Players deemed fair, then failed to play the pictures contracted for

and ultimately boycotted them, actively engaging in propaganda to spread the boycott to all the pictures in their territories. Thus by 1919 Famous Players faced this situation: a group of owners of the best theatres in the large cities of the United States, many of whom had been its best customers, had combined together for cooperative buying and had expanded into an organization at first loosely knit, but rapidly growing more centralized, distributing throughout the United States a substantial number of pictures pursuant to a publicly announced policy and had threatened to distribute sufficient pictures to take the entire time of the former Paramount customers. The inevitable result was to exclude all Paramount pictures from their previous market in the first-run theatres owned or controlled by First National. In addition to the direct loss of revenue from rentals, the indirect loss of rentals of smaller theatres in surrounding territory, due to a failure of adequate exploitation, was inevitable unless Paramount took steps to protect its market.

Within a comparatively short period of time after its
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organization, the twenty-nine franchise holders of First National, subfranchised about 3,300 exhibitors controlling more than 4,000 theatres throughout the United States.

Mr. Zukor early saw this result and in 1917 endeavored to make a working arrangement with First National as a booking office to book cooperatively pictures in its several theatres, including Paramount pictures. He continued in this effort and endeavored to persuade First National to cease trying to steal his stars and directors. Not only had they taken away some, but they were destroying the morale of the rest, whose demands for higher salaries very much increased the cost of the pictures and therefore increased film rentals which had to be secured. These efforts were unavailing. First National boasted publicly that they had Famous Players-Lasky whipped and up a tree. Mr. Zukor was opposed to Famous Players expanding into the exhibition field, feeling

that it was better for each element of the industry to specialize, but he and his directors nevertheless saw that unless the exhibitors took a similar view, Famous Players would be compelled against its will to enter the field of exhibition as a means of self-preservation. At this time outside of small interests in two theatres in Ohio, Paramount had no interest in theatres. But the First National movement was growing, the propaganda against Famous Players-Lasky (Paramount) was growing, and faced with this situation Paramount be-
(117)
tween 1919 and 1923 acquired an interest in theatres and theatre circuits involving some 300 theatres in order to secure an outlet for its pictures. The purpose of this acquisition was not to monopolize, but to survive in the business of producing and distributing motion pictures. Thus the very integration now attacked had its origin in competition and not in monopoly.

I am going to be through in about five minutes.

In 1921 the Federal Trade Commission instituted proceedings against Famous Players (the predecessor of Paramount) and its affiliates and officers, charging a conspiracy to unduly hinder competition in production, distribution and exhibition of motion picture films and to control, dominate and monopolize the motion picture industry. The petition sought an order from the Commission directing the Famous Players group to divert themselves of all interests either direct or indirect which they might have in theatres or to divest themselves of interests in producing companies. After an investigation which continued for over four years and upon a record consisting of over 17,000 pages, the Commission issued an order directing the respondents to cease and desist from acquiring theatres and also prohibiting certain trade practices. The Commission filed a petition for enforcement, but withdrew its complaint as to theatre acquisition and in considering that case the Circuit Court of Appeals in
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this circuit held:

"1. That there is free competition among producers and distributors for the distribution and marketing of their pictures;

"2. There is a lack of monopolization by the respondent, and in fact lack of ability to achieve a monopoly;

"3. There is a state of free competition in the industry sufficiently shown to negative the finding of the Commission that the respondent dominates the industry."

Thus it has been judicially determined in this circuit that at least as late as January 1, 1926 Paramount's predecessor was not guilty of the matters principally charged in this suit. Following this initial acquisition Paramount's predecessor acquired other interests often in competition with other defendants or independent chains. The purpose of these acquisitions was to assure further outlets for its product to enable it more effectively to compete with other producer-exhibitor defendants, to prevent its being frozen out from the acquisition of theatres by its competitors and to furnish an additional source of revenue for the stockholders. There was no purpose to monopolize, there was no monopoly and nowhere is there evidence that as a result of this acquisition a conspiracy or combination to monopolize was cre-

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ated. The acquisitions made down to the year 1930 were considered by Judge Caffey in the Quittner case, in this District, involving a charge of national conspiracy to monopolize, and he there found, and stated in his oral opinion dismissing the complaint, that there was a complete absence of evidence of conspiracy to monopolize and ample evidence of intense competition. Evidence of such conspiracy or combination is equally lacking now, and it will be abundantly clear that there is intense competition in this industry.

Under its former name Paramount Publix Corporation, Paramount was adjudicated a bankrupt in this court early

in 1933. Its affairs were placed in the hands of trustees in bankruptcy and thereafter upon the enactment of Section 77B a petition was filed under that section and reorganization proceedings were instituted. The corporation was finally reorganized under the present name and its assets were turned back to it in June, 1935. Many of the theatres of the Paramount Publix Company were integreated and were also reorganized during this period and many of the theatres belonging to these theatre companies were dropped during the process of this reorganization. In such situations the trustees under the supervision of this court determined what action should be taken to protect the interests of Paramount in its theatres and such steps as were taken with the
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approval of the court after proper proceedings for their consideration by creditors and others interested. Since Paramount has emerged from the reorganization there have been some changes in the theatre holdings, none of which have resulted from any attempt to monopolize and the aggregate of which, through no stretch of the imagination, can be called monopoly.

It is Paramount's position that there is and has been no combination or conspiracy to monopolize, that the Government's proofs will fail completely to show law violation and that, at the end of the case, the court should find that Paramount and its competitors are free to continue the competition which has created so many public benefits. That result will continue to assure the public of increased improvements in pictures, any other would seriously prejudice Paramount's ability to continue to do so. There will be found to be no basis whatever for hamstringing Paramount in its competitive position or denying to it the opportunity to exhibit its pictures in its own theatres or to continue its interest in the theatres through which it is rendering the public distinctive service.

I must thank the Court for its great patience, and I am sorry I had to read and be so long about it.

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DEFENDANT LOEW'S OPENING.

Mr. Davis: If the Court please, may I inquire at what hour the Court is going to adjourn, so I may cut my cloth accordingly?

Judge Hand: Half-past four.

Mr. Davis: I appear in this case for Loew's, Inc. and for the subsidiary corporations who, by the bill of complaint, are identified with it. These are, chiefly, Marcus Loew Booking Agency, which is a 100 per cent owned corporation and a mere operating department and some 50-odd minor corporations which hold title to real estate, on which are situated theatres that the Loew's Incorporated owns and operates. It is a corporation organized under the laws of Delaware and has 22,600 stockholders, more or less, and something like thirteen or fourteen thousand employees.

So far as the major corporation knows, no officer and no stockholder owns any stock in any of the other corporations here at bar; nor, so far as Loew's, Inc. knows, do any of the officers or stockholders of the other corporations here at bar own any stock in Loew's. There are no directors in Loew's who are common to any of the other defendants at bar. There are no officers of Loew's who are common to any of the other defendants at bar. So far as corporate organization, ownership and identity are concerned, there is no contact whatever between Loew's and the other defendants at bar.

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For that defendant, I propose, without wearying the Court more than may be necessary, to state what I believe the charges the Government brings against us, and the answers to those charges which we will undertake to support by proof. I say the charges which I believe the Government brings against us. Ever since this suit was brought, there has been a constant effort on the part of these defendants, by motion, by interrogatories, by argument, to get from the Government a clear-cut statement of what it was we were

charged with and what the Government believed we were guilty of. I say that has been continuous. It has. His Honor, Judge Goddard, knows that we have pounded on the door of the Court more than once on that subject.

Therefore, I confess I have a feeling of disappointment that my brother Wright, in his opening statement this morning, did not help us to clarify these issues by a succinct statement of just why the Government thought the Act had been violated. Instead, he threw himself back upon the trial brief after reading and re-reading the trial brief, through.

Confessing my own obtuseness, I find myself still in doubt as to just what the concrete issue is that the Government wishes to lay before your Honors.

I shall have something more to say about that trial brief
(123)
in a moment, but it is perfectly obvious that certain, fundamental fallacies underlie the Government's position, and the first is the one referred to by my brother Seymour. The Government builds up a statistical monopoly here by a process of addition, and having added together all the corporations that all these defendants own, it says, "Look what a large block of corporations there are embraced in this monopoly!" Having added together all the revenues that all of these corporations receive from all their activities, he says, "Look what a preponderating monopoly there is in this industry!"

The same basis of addition could build up a charge of absolute monopoly in any industry, if you took all of its units and brought them into your equation.
(124)

If United States Steel, the Bethlehem, the Republic, Youngstown, the National and whatever, were all added together as to output, as to revenue, as to customers, you could prove by that simple process of addition that they had a one hundred per cent monopoly in the United States. If they were combined, that testimony might be relevant. But if they are wholly independent and separate units, that total

means nothing on earth. It is only fit for statistics in the National Year Book to prove what the national output is.

I object also to the implication which the Government attaches to the word "independent." It speaks throughout its brief, its statistics and its argument, of the five defendants here at the bar and the independents. Now we contend that if the word "independent" is to be applied according to its meaning, every one of these defendants is just as much an independent as Joe Zilch, who owns a theatre down the street; and unless the word "independent" is understood in a purely symbolical and hypothetical sense, as indicating those who are outside of the bill of complaint and those who are within it, we shall object to its use.

I object also to the use of the word "affiliates" in the Government's brief and in much of its statistical tables. Corporations are spoken of as affiliates. Affiliates of whom? Affiliates of Warner's? Affiliates of Loew's? Affiliates of (125)
Paramount's? We are not told that. If they had contact with anyone of the corporations named in the bill of complaint either by ownership, either by contract, either by license, they are identified as affiliates not of the affiliator, if I may coin that word, but of this entire group at which the complaint is aimed.

And before I get to the trial brief, I want to say one more thing. I really do not understand the easy and somewhat cavalier method in which counsel for the Government brush aside the consent decree in this case as a mere three-year experiment which has outlived its life, and which he would lead the court to believe is no longer a subsisting order of this tribunal. Now nothing could be more mistaken than that. In June 1940 we began the trial of this case. It was opened in solemn form, and I fancy that most of the counsel at this table will run the risk of repeating some of the things they said on that occasion.

In November 1940, after a long and protracted and very diligent conference between counsel for the defendants and

counsel for the Government, a consent decree was offered to the court. It was signed. It became operative and is just as alive today as it was when his Honor, Judge Goddard, put the judicial signature on it. It is going to crop up again (126)
in this case from time to time; and perhaps digressing from the discussion of my particular and individual client would not be a waste of time, if we stop and think what that consent decree had in it, I will make that summary just as brief as I can.

It had 23 paragraphs. The first was a declaration of jurisdiction. The second was an announcement of the consent of the parties. The third was a paragraph requiring trade showing which was to be inoperative, that requirement, if there were no decree against the three without—what we without reflection call the minors—within a specified time; for the minors feeling themselves wrapped around with a robe of perfect innocence that no charge could penetrate, refused to consent to anything, and left the five majors who are represented up and down this table to make a consent decree which put upon them certain requirements as to the conduct of their business, not shared by any other person in the industry. We consented to that, and we did so for the obvious reason that we wanted peace. We wanted peace from the Government if we could get it; and we also wanted peace from the multitude of claimants in these seventeen thousand other theatres who were bombarding us with their complaints of mistreatment of this sort and of that. (127)
We wanted peace from them by giving them a tribunal to which they might resort without any other formality or delay attendant upon a trial in court. I venture to say that no decree was ever negotiated with a more earnest effort on the part of the parties to it to solve the difficulties attendant upon the industry and to quiet the complaints by which it was beset.

Clause three, requiring a trade showing of films expired when there was no decree against the non-assenting defendants.

Block booking, say more than five features at one time, expired for the same reason, there having been no decree against the minors within the time specified.

Section 4, forbidding the forcing of shorts, so-called—and I take it your Honors at this time are sufficiently expert in the industry to know what that means—that is still in force. We cannot force the purchaser of our films to take undesired shorts, and any contract to that effect is arbitrable.

Section 5 of the decree forbids overall contracts which cover a territory larger than the individual exchange by which they are negotiated. Each of these producing companies has exchanges throughout the country who are really their sales agents. We have 32 such in Loew's, Inc., and this provision makes it mandatory that contracts made by those exchanges shall not run outside their territorial limits. (128)

The obvious effort was to forbid a nation-wide sale of film. That is still in force.

Clause 6 of the consent decree commands the defendants to sell to anybody, everybody, any applicant, on some run. We can no longer say to a theatre, "We won't sell you at all." Some run on the film we must give him. That is still in force. And if we decline to offer him the run to which he might fairly aspire that is an arbitrable question.

Section 7 of the decree deals with offensive films and gives the purchaser the right to return them if they are found to be offensive to public morals or taste in the locality in which they are exhibited. That is still in force.

The provision for the arbitration of clearance in paragraph 8 is still in force, and the declaration of this court stands today as firmly as when it was first given, that clearance reasonable as to time and area is essential in the distribution and exhibition of motion pictures. What is reasonable as to time and area is made arbitrable, but the practice of clearance, I respectfully submit, is the law of this case.

Section 9 of the consent decree forbids the arbitrary refusal to deliver films in order to expose the unfavored purchaser to discrimination, and the refusal is made arbitrable. (129)

Section 10 of the decree forbids the refusal of a requested run unless after arbitration it is shown to be properly requested.

Section 11 forbids new acquisitions of theatres within the three-year limit, which has expired by lapse of time.

Section 12 provides for a conditional release of these earlier clauses as to trade showing and block booking if prior to June 1, 1942. Universal, United Artists and Columbia are not brought under the same restriction.

Section 13 declares that the operation of the decree covers only the Continental United States.

Section 14 preserves to the producer the right to road show his pictures.

Section 15 declares that the decree shall not relate to franchises entered into prior to June 6, 1940, all of which have practically expired now by lapse of time.

Section 16 provides that nothing shall be a violation of the decree unless a refusal to arbitrate or perform.

Section 17 preserves to the defendants the right to license their own theatres for the exhibition of any or all pictures which it may distribute.

Section 18 gives to the Department of Justice the fullest right to inspect the books, records, correspondence and so forth of the defendants, and to interview their officers and (130)

employees. The learned Attorney General was kind enough to praise us for the cooperation we have given the Government in its preparation of this case. No request which they have made for information has ever been refused, and at considerable cost and expense to ourselves. We have assembled all of the statistical information they might desire. But perhaps we should not assume too holy an attitude in that respect, for we have signed a decree which gives

the Department of Justice entire right at its discretion to demand just that thing.

Section 19 of the decree gives us the right, unhampered, to select our own customers and make our own trades with them. That is still in force.

Section 21 of the decree is a self-denying ordinance by counsel for the Government and on its behalf which provides that for the period of three years it will bring no action for divorcement of the defendants' theatres. That is not a limitation on the life of the decree. It does not make it a purely experimental decree to operate for three years and no more. It is a self-denying ordinance by the Government for that length of time, and obviously the time has expired.

Section 22 sets up an arbitration system with complete machinery, an administrator, local arbitrators, a court of appeals for arbitration, which the Government to the contrary notwithstanding, we believe—and in that we think we would be supported if there were any way to canvass (131)

them—the vast majority of the industry we believe, have been a helpful and a wise and a prudent solution of the individual problems with which this industry is surrounded.

And then finally we come to Section 23, where jurisdiction is retained enabling any of the parties to this decree to apply to the court at any time more than three years after the date of its entry for any modification thereof.

Now manifestly the Government does not choose to take that route. Manifestly it does not want to endeavor to improve this decree. Manifestly it does not want to inquire what imperfections, if any, are to be found in the machinery it sets up. Not at all. The Government has a hobby here and it is determined to ride it to the end, no matter what may be the effect upon the industry; and with great respect, no matter what distortion of fact may be necessary to support it. The Government's hobby is that a cure-all for all the troubles with which this industry has been afflicted is to cut off production of films from their exhibition, and when that pana-

cea has been applied, then peace is to reign. And the 17,000 theatres throughout the United States are going to find (132)
themselves treated with such equal justice that there will be nothing left to complain about, and theatres A, B and C on the same street will cheerfully accept whatever they are able to bargain with the defendants for, and there will be no longer a complaints that theatre A gets the film before theatre C.

Well, I don't know of any similar instance, if your Honors please, where a Sherman Act case has been brought against a whole industry with a blunderbuss charge that everything is so wrong that the structure of the industry, as my brother Wright says, must be compulsorily altered.

In the steel industry, if you please, to go back to that for an illustration, the United States Steel Company may produce as much as it pleases. It must not be permitted to have its own showrooms and sell. Henry Ford may pour out automobiles as fast as his striking workmen will permit, but he must not have his own showrooms and he must not make his own retail sales. All that must be committed to somebody else, otherwise you would have a monopolization in the industry.

Loew's, Incorporated may turn out, as it believes it does —and I suppose all of our clients have the same feeling—the best films that are produced in the United States. They cost us about $1,700,000 now on the average to produce. But it (133)
must not show them. It must take that film and announce that on such a day this film is going to be ready for public exhibition. I don't know whether my brother wants competitive bids for it; I don't know whether he wants it sent to every city in the country so that everybody may exhibit it at the same time; but the one thing that Loew's must not do is to show that film in its own theatres.

And the second thing which is almost equally reprehensible by the Government's standard is that it must not

permit any of these other defendants to show it in their theatres; and about that I want to have something to say in a moment. That is the panacea, the mustard plaster, if I may become colloquial, that the Government wants to apply to this industry, in a sincere effort—and we give them credit for sincerity—in a sincere effort to protect the country against monopolistic practices.

Now I say we have got to go back to the trial brief for our idea of the Government's theory. As I read that trial brief—and I have read it and reread it and read it again, in an earnest effort primarily on my own behalf, then on behalf of my clients, and now, I hope, on behalf of the court, to see if I could get at the skeleton of this thing. What were the specific issues concerning which the Government had accumulated this vast amount of literature and statistics with (134)
which it now promises to regale the court? They say in opening that the main question—and they say this again in closing—Can the requirements of the Sherman Act as applied to the producer-exhibitor defendants be satisfied without divesting them of their theatres?

Now what are the respects in which it goes on to describe the Sherman Act as violated? The first appears early in their brief. A concerted monopolization by the five majors and the three minors which justifies divorcement. Now the word of course there that is material is the word "concerted." It is concert of action at which the Sherman Law aims. It is combinations, contracts, conspiracies, at which the Sherman Law is aimed, and if we are going to prove a concerted monopolization it must be not a matter of accident but a matter of will and intent participated in by these accused defendants.

We deny it. We say there is no such concerted monopolization; we say there is not an industry in which the units are more at large or freer, or less subject one to the will of the other; that the Government on that point must utterly

fail. Even if it prevailed there is still a vast gulf between their complaint of monopolization and their proposed remedy of divorcement between exhibition and production. (135)

They must show at some stage of the case that production on the one hand, exhibition on the other, and the two combined are the source of the monopoly which, in the second place, they must prove to be the result of some concerted action.

Now the next thing which I extract from this trial brief is the alleged existence of certain local monopolies. Having charged a concerted monopolization industry-wide and the country over, they then charge local monopolies. They say that these occur in 73 cities of over one hundred thousand population, and that in those 73 cities this monopolistic combine has taken to itself all of the first-run theatres with their large revenues. I pause a moment at that charge, because unless I am mistaken as to the future progress of this case, it is just there that the largest draft is going to be drawn upon your Honors' time and patience. If these monopolies are to be considered one by one, it is as one by one that they must be proven, for the proof of a local monopoly in Bangor, Maine, affords no room for inference, much less proof, of the existence of one in San Antonio, Texas; and therefore we shall demand that instead of confronting us with a mere catalogue of towns, the situation in each of these towns shall be inquired into to determine whether the Government's statistics which are confined to these five defendants, do or do (136)

not exhibit a monopoly in that area.

Let me say in passing, as far as Loew's Incorporated is concerned, we have exhibition theatres in but 26 of these 73 cities, and in not one of those cities in which we are exhibiting do we exhibit without active competition. In twelve of the cities out of our twenty-six we are confronted by first-run theatres from anywhere from one to three of our co-defendants, and in 14 of them we are confronted by first-run

theatres owned by wholly independent—meaning *extra* suit—owners.

Now, how can it be said that we monopolize 73 cities? And if we are going to be charged with that, we shall ask the Government to come forward city by city and prove it.

Then we come to the question of trade practices. That is the third thing which I extract from this trial brief. Trade practices—and I have catalogued 7 of them which are mentioned in the brief. They object to our license agreements, and call attention to the fact that in many of their clauses—the clauses in the license agreements—are with many of the corporations very much the same. So they are. I don't know of any industry which does not show a marked tendency to formalize and standardize particular contracts. Indeed, in some industries it is commanded by law, as in the insurance (137)
industry, railroad shipments, and there is hardly an industry where the tendency—and I think it may be ascribed either to the astuteness or to the indolence of their lawyers, I don't know which—but for one reason or another they have a tendency to standardize forms. But when your Honors come to look at those of these defendants, you will find that in material respects there is no harmony between them at all.

Then the objection is that we fixed prices. Of course we do. We have something to sell. I go into my shoemaker's and ask the price of a pair of shoes, and it is five dollars. He has fixed the price on that pair of shoes and I pay it. It is a price-fixing transaction, and, indeed, I know of no commercial transaction which is engaged in for profit and gain that has not an element of price in it. And so as copyright owners we say to these licensees, "We expect to receive such a percentage of your gross receipts, and because we expect to take our profit out of your gross receipts, we want some sort of a governor as to the way in which those gross receipts shall be earned and computed." We have a perfect right to say, "We will take so much of the gross receipts provided it is based on a charge of 75 cents per head of the

people who come into the theatre." And on that we are willing to stand with the Government in dispute and contro-
(138)
versy until—well, we know what the longest time is. That is the time to which I was referring.

Now they next object to the practice of first-runs, and they say that that is an evil. The value of the films, says the Government's trial brief, inevitably decreases in proportion to its lateness. One would think so. It is not at all surprising. There is more money made in the first-run theatre than there is in the tenth, because human nature has that indescribable curiosity that makes it want to see something as soon as it is out, and before anybody else has shown it. But I wonder if my friend has forgotten the original complaint, not the amended complaint, but the original complaint filed by the Government in this action. Let me read paragraph 120 on page 61 of that complaint:

"Metropolitan first-run theatres, sometimes referred to in the industry as metropolitan de luxe theatres, supply a market for motion pictures which is of vital importance to their profitable exhibition and subsequent exploitation. By their exhibition in these theatres, coupled with the various forms of advertising that accompany such exhibition, such theatres promote and control the value of pictures to subsequent run exhibitors. The owners of subsequent run theatres as well as the public are thereby made conscious of the existence of particular motion pictures. The reaction of
(139)
audiences to the exhibition of pictures in metropolitan de luxe theatres is largely determinative on the popularity and success of pictures on subsequent run. Furthermore, a large part of the gross revenue from the exhibition of a picture is derived from the first-run exhibition in metropolitan de luxe theatres."

And so say we all of us.

Clearance I have touched on. Minimum admission prices I have touched on; and the price-fixing I have alluded to.

Now they say there are certain interparty agreements. To show you the sort of—it is very hard for me to pare down my vocabulary to the limits of parliamentary etiquette—to show you the sort of shall we say facts and figures which are presented by my friend's schedules in his trial brief: I am on the proposition now that there are certain interparty agreements, that these five have grouped together and bound themselves one to another by agreement which destroys the freedom of action in the motion picture field. And in the Government's trial brief, page 17, there are three pages, or is it four, devoted to a catalogue of towns in which some of these malicious defendants had licensed films to each other. It bears the flaming legend: "The division of major first-run (140)
films during the 1943-1944 season among the theatres of the producer-exhibitor defendants and independents in the 73 cities with over a hundred thousand population in which the defendants are charged with monopolizing theatre operations is shown in the following table."

Well, I am not going to go over this. I just want to start with the top line. New York, New York. When we get to Loew's, Loew's is charged with a division of major first-run films in New York with Loew's, itself, and Paramount and an independent. Now, if Loew's had made a bargain with Paramount and an independent that nobody else should get any of its films, and it would whack up on the even, that would be one thing. But when we get to the facts of that particular entry, the division with Paramount, listed, solemnly listed, here as a division of films and evidentiary of master agreements, is one single film of Loew's leased to the Paramount Theatre in the past ten years.

Now is it any wonder that we want to look at these tables our friend is presenting with so much aplomb and so much assurance?

And then they close with the assertion which brings me to the last thing I want to say, that all defendants are parties to a general price-fixing combination, which, of

course, we deny, and that each producer-defendant is an ille-
(141)
gal monopoly *per se*. Well, that puts us to our trumps. The Government having failed hypothetically to prove that there is any contract between us, then proceeds to attack us on the theory of divide and conquer, and hang us one by one. Well, if we are to be hung one by one, and are to be tested, each one of us as a monopoly *per se*, then it does impose upon the defendants, as your Honors can see, a very considerable responsibility to detail their history, to describe their practices, to exhibit their assets and to show just what they have individually done. I regret to say that is going to take time. We might perhaps stand on the proposition that the Government could not prove it. It may be at some stage of the case we will urge that proposition on your Honors. But if we are not successful in our initial approach, it stands to reason, of course, that we will take no chances, and your Honors may be confronted by a good deal of proof on that subject.

What will it show as to Loew's, in brief? And I am not going into detail. It will show that it sprang from Marcus Loew's Penny Arcades in New York which began in 1903. It was not until 1920 that it went into the making of pictures, when it bought the Metro Corporation. By common consent, the corporation was making very bad pictures. Then it bought the Goldwyn Corporation and the Mayer in-
(142)
terests. It now conducts its own studios in Culver City, California.

How many theatres does it own? Remember that the primary charge here is a monopolization of first-run theatres. There are in the United States, according to the last figures from the Government's trial brief, exactly 17,640 motion picture theatres. Loew's owns 129 the country over. The greatest concentration of ownership is in the City of New York where it owns sixty theatres. The historical result of the origin of Loew's was when Marcus Loew began buying up derelict legitimate theatres, and by the time he went into production

had 56; and I might say in passing we have fewer theatres today than we had when this suit began. We own 129 theatres. Sixty of them are in New York City, quite a large group. How does it compare with the total of the theatres in New York City? There are in New York City 658 motion picture theatres. And if your Honors do not believe that there is competition in motion pictures in New York City and in the motion picture business, I must respectfully invite you to imitate the late and beloved John Finley and take a voyage on foot around the Island, then I think you will answer by perversion of the Christopher Wren motto, "Si quaeris testimonium circumspice."

I was amazed to hear my friend say that Loew's and RKO
(143)
monopolize the first-run pictures in New York. That was certainly an inadvertence. He could not have meant that.

Mr. Wright: I think what I said was prior, not first.

Mr. Davis: Prior to what?

Mr. Wright: I think the word I used was prior rather than first.

Mr. Davis: All right, make it prior. I will accept prior. I do not stiggle at the adjective at all: Go up Broadway some nights when the lights are bright. What do you see on this matter of monopolization? You will see burning brightly the lights at Loew's Capital, Loew's Criterion, at RKO's Palace, at Fox's Roxy and Rivoli in which it owns an interest, at Paramount's large Paramount, and a share in Rivoli; at Warner's Hollywood and Strand; at the Rockefeller Music Hall; at the Globe, the Gotham, the Victoria, the Rialto, the Ambassador, the Winter Garden, and the Republic, owned by so-called independents, and every one of them first-run theatres on Broadway. And if your Honors are willing to accept the theory that there is no competition between them, then I can only say that you would not agree with the ordinary Broadway visitor. Out of that sixteen, Loew's owns two. Two out of the sixteen. Yet we are charged with a

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monopoly in the first-run theatre business in the City of New York.

How about production? According to the Government's trial brief, seven of these defendants, Universal not being yet tabulated, produced in 1943 and 1944 211 feature pictures.

Loew's produced 33 out of that 211, or something like ten per cent. I don't know how much the figures of Universal would deflect that.

(144)

I have noted the local monopoly, and I shan't repeat what I said there about joint ownerships. There are 11 theatres in Buffalo, in which we own 43⅓ per cent interest. We took it in payment for an overdue debt for films. There was one in New Orleans, in which we own only 66⅔ per cent, and one in Denver, in which we have 50 per cent. Those are our joint ownerships the country over. I haven't in my note before me the name of the owner of the remaining interest. That is what is charged to us, joint ownership of theatres.

If your Honors please, I could go on and talk at greater length.

What is the nexus between the Government's complaint and its proposed remedy? On what does it rely to prove the sort of combination and conspiracy that the statute denounces? There is but one bond among these defendants, and that the bond of a common industry and nothing more. There is no contract between the so-called offensive trade practices, theatre ownerships, because if these theatres were owned, every one of them, by a single as yet unnamed individual, the same questions, distribution of films, clearance of films, first run of films, of payment for films, would be exactly what they are today, and there is no possible contact between the revenues derived by one of the defendants and the revenues derived by any other or the reveune derived by the industry

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as a whole.

There is an old saying, "Common danger draws people together." We have seen that in the national and international political world. It is just as true in the judicial world. And, for the moment, there is a good deal of solidarity among these defendants, and sympathetic feeling, if you please, but there has not been, until this common danger descended upon them, and there won't be tomorrow or, at least, after what we hope will happen, a dismissal of the Government's complaint. It is only that sort of common interest that draws them together in the slightest, and we shall defy the Government to prove anything more than that in the nature of a combination, conspiracy or contract.

And I want to say one word more. I speak for Loew's now, and without any desire to disturb this harmony to which I have alluded or to cast any reflection upon any of my co-defendants, we shall demand to be judged for ourselves alone and we shall insist that the vague charges against us cannot be supported by attempted proof of actions by others unless the prerequisite of a combination between us is supplied. We don't want to make of this case simply an exercise in the law of evidence, and I hope we shall not be called upon to weary the Court with too many objections, but we shall, I respectfully submit, sternly insist on the observation of the rules, that testimony is admissible only against those to whom it applies.

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DEFENDANT TWENTIETH CENTURY-FOX FILM CORPORATION'S OPENING

Mr. Caskey: If the Court please, I and my associates represent Twentieth Century-Fox Film Corporation and National Theatres Corporation.

Twentieth Century-Fox Film Corporation is engaged in the production and distribution of motion pictures. It is a publicly-owned corporation, its three classes of stock being traded in on the New York Stock Exchange. No individual or corporation owns any considerable percentage of any class of stock. So far as we know, no one interested in the ownership or management or profits of any other motion picture company has any interest in its stock. It has no

managing officials in common with any other company. Its board of directors is not interlocking with any other company's.

It has three principal subsidiaries: First, Movietone News makes and distributes the Fox Movietone News, two issues each week, and a number of short subjects; second is Roxy Theatre, Incorproated, of which it owns all the common stock and a minority of the preferred stock, and that corporation leases and operates the Roxy Theatre at 50th Street and Seventh Avenue, in New York; the third subsidiary is National Theatres Corporation, subsidiaries of which are engaged in operating motion picture theatres in the western states of the country. It has some seven principal operating subsidiaries and, all told, has approximately 550 operating theatres. Twentieth Century-Fox, as (147)
its name implies, was founded by William Fox. Mr. Fox had been engaged in the show business in New York since at least 1905. By 1912 the feature motion picture had been imported into the United States, when Mr. Zukor, with Louis Marcanton brought Sarah Bernhardt's picture to this company, the first four-reel picture.

By 1915 a substantial number of feature length motion pictures were being made in this country and Mr. Fox, who then had three relatively insignificant companies, decided to combine them into one. He had, first of all, a corporation called "Box Office Attractions Film Rentals." The significance of that title is that that exactly described what it was doing, it was renting motion pictures made by others to exhibitors in and around New York. He had a company called the William Fox Vaudeville Company, which was operating certain small and not deluxe vaudeville theatres in which motion pictures were also exhibited. And he had a company with quite an impressive name entitled, "Wonderful Plays and Players Company." He merged those three and formed Fox Film Corporation in 1915.

He sent an agent to Europe, where the art of making motion pictures was then more highly developed than it was

in this country, and that agent, Mr. J. A. Gordon Edwards came back to this country and produced the first Fox picture. It was entitled, "Life's Shop Window," and it cost $4,500 to make. It was a success. And with the money (148)
which he made on that picture, he made a picture based upon Kipling's "Vampire."

So much for that point. The fact is that commencing in

Judge Hand: I don't want to foreclose you, but—

Mr. Caskey: I will be glad—

Judge Hand: (Continuing)—but it seems to me you are getting genealogical, and I warned everybody against that. We are not going to listen to a lot of genealogy.

Mr. Caskey: No, but I think it is important to show; and the point I want to make is that in the early days of the motion picture industry, when Mr. Wright has said there was prosecution, charging monopoly, and has referred to the Motion Picture Patents case, I think it is important to show, as we will by evidence, that this company was not a part of any such combination but was an opponent and an enemy of that combination and that it succeeded in developing into one of the major companies in the country in a competitive manner, and that is the sole point, showing that in this period from 1915 to 1929, when the financial crisis stopped the expansion of the theatre acquisitions by these companies, that this company grew by intense competition.

So much for that point. The fact is that commencing in 1915 until the present time, the company has annually produced a considerable number of motion pictures, some of high quality but not all. Its annual production is approximately 10 per cent of the total number of pictures which are produced in any year. Its volume of revenue, which it derives (149)
from licensing those pictures, is probably somewhat higher than that percentage, but is not substantially greater.

It occupies a position in the industry which is substantially proportionate to the number of pictures which it produces.

As to its theatre ownings: As I have stated, in the very beginning Mr. William Fox had an interest in motion picture theatres, and in the early twenties, after the war, Fox Film Corporation commenced to acquire theatres. It had these few in New York. It next went to Philadelphia, then to Oakland, California, and then to Chicago, acquiring a few theatres in those four important cities of the United States, New York, Chicago, Philadelphia and Oakland.

In 1925 it purchased an interest in a California corporation, West Coast Theatres, which had been formed by others and which at that time was an existing group, or, if you will, circuit of theatres. I emphasize that because the acquisition at that time was of a minority interest in an already existing circuit of theatres.

In due course, Fox lost the theatres in Chicago because it could not successfully operate them and pay the rather large acquisition cost which had been insecurely financed.

When Fox acquired the minority interest in West Coast Theatres, the majority of the stockholders banded together

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prevent any of them selling out to Fox, lest it gain control. And their organization was a corporation known as Wesco Corporation.

In 1928 that corporation was acquired by Fox and it thereby acquired all of the stock of West Coast Theatres. During those years, in which it had only a minority position, and in which the majority had banded together, that circuit had grown so that it had approximately 200 theatres. From 1928 until Christmas of 1932 there were continued acquisitions of theatres in that group, so that by that time there were nearly 500 theatres in that circuit of theatres.

But by that time it had become extremely unprofitable. During the year 1932 the company lost seven million dollars, and, in addition, was forced to borrow several million dollars to meet capital charges. The result was that in 1933 each of the principal subsidiaries went into bankruptcy and there they remained until 1935.

In 1934 Wesco was reorganized. Its creditors decided to take stock for their indebtedness, and since there were only two, all the other claims having been acquired, Fox Film Corporation became a 42 per cent stockholder and the Chase National Bank the majority stockholder with 58 per cent.

And then Wesco changed its name to National Theatres Corporation, and proceeded to acquire from the various trustees in bankruptcy certain desirable assets either in the
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form of individual theatres or in the form of stock of operating companies.

Thus, from the summer of 1935 down until the summer of 1943, Fox had a 42 per cent interest and the Chase National Bank had the majority and controlling interest of 58 per cent, and all of the theatres in which Fox had any interest were in this corporate organization except the Roxy Theatre in New York, which was first acquired in 1937.

In 1943 Fox acquired all of the Chase Bank's interest and National became a wholly-owned subsidiary.

Inasmuch as the charge, as I read it, is not only a combination to monopolize, but a consummated monopoly as to the individual defendant, I think it important to discuss briefly, and it will be brief, the three divisions of the industry, and to show that this company has neither monopoly nor the capacity to achieve such a monopoly.

I think it conceded, although it was once otherwise charged, that standing alone the company has no monopoly of production. That it can have none becomes self-evident when you inquire into what is required to produce a motion picture.

Judge Hand: Well now, I thought,—perhaps I am wrong,—that was conceded—

Mr. Caskey: If it is conceded—

Judge Hand: (Continuing)—as you say:
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Mr. Caskey: If it is conceded on the record by Mr. Wright—

Judge Hand: —that the evil was in the combination which he says exists because of certain inferences that he draws from certain facts, I do not see now how this growth of Fox Film in 1920 or some other time—what it had years ago—has anything to do with the case. I always suspect the genealogical treatment as cumbersome and useless. I do not see what it has to do with the case as presented by anybody. If it does, why, of course, we want to hear anything you have to say, but we don't want to mix ourselves up and waste time in the case with this kind of remote stuff. It seems to me remote. Maybe I am wrong about it.

Mr. Caskey: Well, sir, we, of course, defer to your judgment. It has seemed to us that we should not leave the case simply in the posture of these statistics which have been complied and make no reference to the circumstances under which these theatres have been acquired and the manner in which they are being operated and the effect of that operation upon the public interest.

As has already been pointed out, the combination, so far, is sought to be established, not by evidence, but by addition, and we are met with the proposition that we have combined to monopolize in New York City because we have the Roxy Theatre, which is in competition with Loew's Capitol and (153)

with Paramount's Paramount, and with Warner's Strand and RKO's Palace, as well as a large number of independently-owned theatres. It is to meet that suggestion, that the mere fact that there are in the United States these cities where two or more of us operate and that there are some situations in smaller communities where our theatres are either all of the first-run theatres or of all the theatres, that we thought it important to call to the Court's attention how it was that these theatre circuits came into existence; that they came into existence in the natural evolution of the business and not by any agreement, division of territory or even deliberate choice, but just as the business grew.

It is our understanding that if the acquisition of theatres was by a lawful means and if there has been no exclusion

from competition, then their ownership is not illegal, whether that owner be also engaged in other aspects of the motion picture business or not.

But coming now to the question of production, I understand now from Mr. Wright's muted words that it is conceded on the record that this company, at least, has itself no monopoly of production of motion pictures and no capacity to monopolize that business, and that that issue, therefore, is out of the case.

Certainly if that is true, if, as far as production is concerned, there is no claim of individual monopoly, it must be
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true as to the distribution of motion pictures.

As it has been explained to you, motion pictures are distributed in the sense that the positive prints, which are shown in the theatres, are kept in offices located in the principal cities of the country, sent to the exhibitor and returned. The facilities are readily available to anyone: There is nothing peculiar about them. The exchange itself is merely an office, like any other industrial corporation would have. There are in this country 11 corporations, eight of which are defendants, which have such a system of national distribution.

In the distribution of motion pictures, Twentieth Century-Fox serves more than 13,000 theatres in the United States. There are various statistics given as to the number of operating theatres, fluctuating somewhere between 16,500 and 17,500. Of those, at least 13,000 regularly show pictures made by this defendant, and not more than 550 of those 13,000 are theatres in which it has any financial interest.

The word "integration" has been used in argument today, but the fact is that 90 per cent of the people who go to motion picture theatres to see a Fox picture, see it in a theatre which is not owned or operated by any Fox interest. There is no vertical integration, as that phrase is sometimes used. There is, however, and only that, the ownership of these 550 theatres. In these 73 cities which are listed, Fox

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has a theatre in only 15. In one City, Detroit, it has only one theatre. It has all the first-run theatres in only one of these 73 cities, and that is in Wichita, Kansas, which is getting pretty far down the list. It does not have all the theatres, of course, in any of the cities. In these 14 cities in which it has theatres, first-run, it is in direct and active competition. In some of those cities that competition is from others of these defendants. In others, the competition is from some one or more of these defendants and an independent theatre operator. The situation in New York has been described. It follows the pattern throughout the country. For example, in Kansas City. Fox has a theatre, first-run—two theatres, first-run—one a little one and one a big one. Loew's has a theatre. Paramount has a theatre in which it has an interest. RKO has a theatre in which it has an interest. Those theatres directly compete with each other for the patronage of the people in Kansas City and surrounding country. Each tries to get the person who wants to go to the movie to come to its theatre and that, as we understand it, is the essence of competition.

There was handed to your Honors this morning a chart—the copy of which I have has a 25 in the upper righthand corner—showing the record of exhibition of "Road to Glory" by Twentieth Century-Fox in Kansas City. I think it typical of the method of distribution of motion pictures in that city.

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The first thing that is to be noted is that there are 30 theatres listed on the chart—this one had 25 in ink—there are 30 theatres in Kansas City which played the picture "Road to Glory". The last exhibition, in the National Theatre, was the identical picture shown in the first exhibition at the Uptown theatre. I call your Honor's attention to the progression of the picture through the town. At the Uptown, and it is called the Uptown, because it is not in the business part of Kansas City, but is out at 35th and

Broadway, the picture paid a film rental of $1,600 and the public paid 40 cents to see the picture. Five weeks later the picture played for two days in the Plaza Theatre. The Plaza Theatre is one of the outstanding theatres in America. And then it played for five days in the Apollo Theatre and the film rental was considerably less. From the Plaza, however, it was $123 for two days, and at the Apollo $141 for five days. The admission price to the public was less. And then as we go down, we see that it was exhibited in so-called independently-owned theatres and in theatres affiliated with Twentieth Century-Fox at progressively lower film rentals and at progressively lower admission charges. And it is of the utmost significance that the film rentals which these independent exhibitors paid for the privilege of exhibiting this (157)

picture were in almost every instance less than the affiliated theatre. Thus, the Lindbergh Theatre, paid $45 for the privilege of exhibiting the picture and the affiliated Rockhill Theatre, which showed it six weeks later, paid a higher film rental, and so on down the list.

The chart shows that there is a fair decrease in film rental paid as the exhibition becomes later and as the admission price charged the public becomes less.

This case involves, in addition to the assertion that there is no competition among the affiliated theatres where they operate, a consideration of three practices. The first practice is called cross-licensing, although these words have nothing to do with the practice. It is a fact that most of the theatres which National operates, in addition to showing the pictures produced by Fox, show pictures made by others of these producers and distributors. The reason for that is simple. Fox itself does not make enough pictures of a sufficient quality to occupy 365 days of screen time anywhere except in New York, Chicago and Los Angeles, certainly not in the smaller cities, and so, the theatre operators must get motion pictures from other producers.

It is also a fact, of which there can be and should be no dispute, that they pay a large share of the money which

they pay in film rental to the eight defendants. That, of course, is because in 1938, when this case was started, the
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plaintiff joined as defendants every one who was in the business, but it is also true that they pay to the five companies which have motion picture theatres a large percentage of their film rental. The reason for that is not because the pictures of other companies are excluded, but because the pictures of the five pictures at the box office are capable of running for the longest period of time and bringing in the most money.

As has already been said, most pictures today, certainly in the key centers, in the larger cities, are licensed on percentage and they are exhibited as long as they can be properly exhibited. And so it is the picture, the quality of the picture, that determines how long it will run and what moneys it will bring in and not the name of the company which produced it or the fact that it does or does not have any theatre affiliates.

I have about ten minutes more and I will be finished.

Judge Hand: All right, go ahead and finish.

Mr. Caskey: But there is no conditioning of the licensing of pictures of other companies in the theatres of National and with the other affiliates of these producers licensing the picture. There will be no proof whatsoever on that. The fact is that as far as National is concerned, its pictures are licensed or bought, if you will, in the seven regional division
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offices in Kansas City, in Milwaukee and so on. The buyer, when he sits down to negotiate with a salesman from Loew's has no knowledge of whether the Loew Theatres have or have not bought Fox pictures, and if he did have any knowledge it would be that they had not bought very many because the fact is, as we set it out in our brief, that National has paid Loew's year in and year out, 7, 8, 9 and 10 times as much money as Loew's Theatres pay Fox.

Now, there is a very simple explanation for that, and that is that the Loew Theatres play their own pictures in

their first-run theatres throughout the country and that they do not use Fox pictures in New York, but, nevertheless, it is conclusive proof that there is no form of conditioning. National does not buy or refrain from buying dependent upon what the theatre affiliates of the other producer does or does not do. They buy pictures in order to exhibit them, in order to serve the public and make a profit.

This word "cross licensing" is just an epithet; it has nothing to do with the motion picture industry.

The second charge is the charge of price-fixing. It is perfectly true that in the ordinary practice there is an agreement between the distributor and the exhibitor as to the minimum price that will be charged to the public for admission during the exhibition of the picture. We think it perfectly lawful, because the film rental is predicated upon those receipts, whether it be expressed in terms of actual

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per cent, 30, 35 or 40, as it frequently is, or whether it be commuted into a fixed flat rental of $1,000 or $2,000 or $5,000. It is also undoubtedly true that the price fixed for the first runs affect the price which other theatres in the community may charge. As the chart on Kansas City indicated, when the first-run theatres back in 1936 were charging 40 cents, the price of the other theatres tended to be lower, but there is not to our knowledge any agreement that fixes the maximum price that any subsequent-run theatre may charge. There is no ceiling, as the word was used, imposed by contract. If there is any ceiling, it is a ceiling imposed simply by the economics of the situation, and there are innumerable exceptions to that. The ceiling, as we will establish, if evidence is required, is pierced in many, many situations because fundamentally the capacity of the patrons to pay is what determines the film rental.

We are all familiar with the example here in New York of the Plaza Theatre which is, although a subsequent-run theatre, a theatre which charges a very high admission price

because it caters to a group of patrons who can pay that price.

In addition to this, and this is the final charge, plaintiff has made the charge that there is a profit-sharing arrangement in the exhibition of motion pictures. The charge has no factual support. Motion pictures, when licensed on percent (161)
age are licensed for a percentage of the gross receipts, not of the net. It is true that in many instances the contracts provide that the higher the revenue the greater the percentage, just like income taxes; but it is, still just like income taxes, a tax on the gross. The revenue comes out of the box office dollar, of course, but it is not profit, and there can be no reason for the plaintiff to use the word "profit" or to use the word "partnership," except to try to spell out by the use of that word a combination which does not in fact exist.

We think that on the whole case, there will be no proof of conspiracy or combination to monopolize. We think that the individual situation of the company engaged in production and distribution and in the ownership of these comparatively few theatres is no violation of law. * * *

(Adjourned to October 9, 1945, at 10:30 a.m.)

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New York, October 9, 1945;
10.30 o'clock a. m.

Trial resumed.

Mr. Proskauer: Mr. Leisure will speak next for the defendants.

Judge Hand: All right.

DEFENDANT'S RKO'S OPENING.

Mr. Leisure: I do not know how many of the defendants are going to make opening statements. I know that my associate, Judge Proskauer, is going to follow me, and in order that they may better regulate the schedule, I may say now that I intend to take less than thirty minutes of the time of the Court.

If the Court please, we represent the following RKO defendants. These defendants is named in the complaint are Radio-Keith-Orpheum Corporation, which is solely a holding company; RKO Radio Pictures, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, engaged in the production and distribution of pictures; RKO Proctor Corporation and RKO Midwest Corporation, both subsidiaries of RKO, Radio-Keith-Orpheum Corporation, engaged in the operation of motion picture theatres.

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Keith-Albee-Orpheum Corporation, named as a defendant in the complaint, was dissolved in June 1944. At that time it distributed its assets, consisting of stock in certain theatre operating companies, to B. F. Keith Corporation, a theatre operating corporation which is 99 per cent owned by the Radio-Keith-Orpheum Corporation.

I shall confine myself to outlining briefly the position occupied by RKO in relation to the Government's charges in

this case. These charges are, first, that the RKO Company, as an integrated unit, is an illegal monopoly. Second, that the RKO defendants have combined and conspired with all the other defendants, but principally with the other four integrated defendants, to monopolize the domestic theatre market and to discriminate against independent exhibitors in violation of the Sherman Act. Third, that RKO and the other defendants have combined and conspired to fix the admission prices in motion picture theatres throughout the United States in violation of the Sherman Act.

Now taking up the first contention of the Government. RKO is both the youngest and the smallest of the integrated companies. In its conception it was envisaged as a medium for bringing to the public a varied amusement program, to include motion pictures, radio and television. Like many other enterprises launched in the late 1920s, RKO perhaps has not wholly materialized all the visions of its founders; (164)

but the suggestion that in 18 years against the keen competition of larger and older companies it has achieved a nation-wide monopoly, is incredible.

As this Court knows, the United States Supreme Court had decided that whether an integrated combination unreasonably restrains commerce in violation of the Sherman Act depends, first, upon the purpose for which it was formed; and, second, upon the results of its operation. Unless the Government can show that RKO merely as an integrated company was organized to restrain and monopolize commerce, or has, in fact, unreasonably restrained or monopolized commerce, it must fail in its first charge. I have reference to the Appalachian Coal, the Standard Oil and the American Tobacco Company cases.

Now, what does the history of this company show was its primary and controlling purpose?

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RKO was formed in 1928. It was not formed primarily to secure theatre outlets for a production company nor to secure a film supply for a group of theatres. It was formed by Radio Corporation of America, which at that time was engaged in the keenest of competition with Western Electric Corporation for customers in the field of sound motion pictures. Both RCA and Western Electric had developed and were heavily interested in competing devices for recording sound on motion picture films, and for its reproduction in theatres.

Western Electric, through its subsidiary Erpi, had obtained a head start on RCA by licensing its recording equipment to virtually all the large motion picture producers, and by licensing its reproducing equipment to most of the motion picture theatres in the United States. So that by 1928 there were virtually no motion picture producers left to which RCA could license its recording device, and very few motion picture theatres to which it could sell or license its sound reproducing device.

To meet this well established competition, it acquired a small producing and distributing company, known as FBO. This company, by change of name, is the present RKO Radio Pictures. As an outlet for its sound reproducing equipment, and also for its sound pictures, RCA acquired the Keith-Albee-Orpheum's circuit of vaudeville theatres. This

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circuit was made up of large, well equipped vaudeville houses located in a number of the larger cities throughout the country. Each was feeling the competition from motion picture houses, however, in the cities where it was operating. The following year the newly formed RKO acquired the fine vaudeville houses of the Proctor group and others in New York City, and in certain of the larger cities in upper New York State.

In the following year, 1930, it acquired a few vaudeville and motion picture theatres in Cincinnati, Columbus and Dayton, Ohio.

During this early period, the primary hope of RKO in the operation of these theatres was the promotion of a successful circuit showing a combined program of vaudeville and pictures.

The exploitation of motion pictures was used primarily as a means of increasing the patronage of the vaudeville houses. Gradually, however, it became apparent to the executives of the company that the success of this theatre chain was going to depend more and more upon the motion pictures offered to the public.

The effort to keep vaudeville alive finally failed and today RKO's circuit is a motion picture circuit.

The facts which I have very briefly outlined cannot be disputed. Contrary to the Government's contention that the (167)
RKO theatre chain was built up for the purpose of monopolizing the exhibition of motion pictures, these facts will clearly establish beyond any dispute that the basic chain upon which RKO still depends was built up as a vaudeville circuit, and was acquired by RKO in the hope that such a circuit could remain in existence when its vaudeville presentation was supplemented by the exhibition of motion picture films.

Clearly, the purpose in integrating these theatres with a production company was not to obtain a monopoly either in the production, distribution or exhibition fields. Nor was that its effect. On the contrary, it brought a small production and distribution company into competition with the larger and already established production companies, and in the exhibition field it brought a group of finely equipped theatres in the larger cities into competition with motion picture theatres then existing in those very same cities.

The result of this integration was to promote rather than to restrain competition in the production and exhibition of motion pictures.

Let us see what has become of this integration as of today, seventeen years later. We have the same production and distribution company, now re-named RKO Radio Pictures.

It has no monopoly of the production of feature pictures. (168)

In the 1943-1944 season it produced only seven per cent of the features produced in the United States. And it has no monopoly of stars or feature players. We shall show that it has extremely few such persons under contract to it. It relies principally on those stars and feature players which it obtains in competition with all other producers.

What about the distribution of motion pictures? Neither has it any monopoly in the field of distribution. It distributes only seven per cent of the feature pictures offered by all distributors. It has not, as the Government charges, closed its own distribution facilities to those producers who have no distribution outlet of their own. On the contrary, independent producers, both large and small, avail themselves of the distribution facilities of RKO.

The Government's figures will show that in the 1943-1944 season 18 per cent of the pictures distributed by RKO in that season were independently produced pictures, and these pictures accounted for 30 per cent of the domestic revenue received from all features distributed by RKO in that season.

We shall show that not only is RKO dependent on independent producers for a substantial part of its business but that it is and for years has been engaged in the keenest of (169)

competition with the other distributors for the right to distribute feature pictures produced by independent producers. For example, RKO, after intense competition with other distributors, secured the distribution rights to Walt Disney's famous technicolor animated cartoons. A few years later one of these defendant distributors secured the distribution rights of a Disney picture from RKO. RKO now has the Disney pictures back again.

Again, RKO was the first to distribute the independently produced March of Time, but Twentieth Century-Fox has now outbid RKO for these distribution rights, and now distributes that feature picture.

But what of the Government's charge that RKO, as an integrated company, has a monopoly of first-run exhibition? Twelve years ago, starting after RKO became an integrated unit, it operated approximately 150 theatres. Today it operates but 107 theatres. The net effect of the last twelve years of RKO theatre operations has been a decrease in its theatre holdings of approximately 30 per cent. This fact alone, it seems to me, refutes the assertion that RKO now has or ever has had a monopoly control of exhibition.

Of these 107 theatres which RKO owns or operates today, 72 are the very same theatres that it purchased from the Keith-Albee-Orpheum and Proctor and other vaudeville in- (169-A)
terests between 1928 and 1930. Acquired at that time to afford a show case for RKO's product in 34 of the major population centers, they continue today to serve that purpose.

Of these 107 theatres, 32 are subsequent run. So that from the standpoint of any alleged nation-wide first-run theatre monopoly, RKO owns and operated but 75 first-run theatres in 18 of the 48 States, and the District of Columbia, in the territory between here and San Francisco. (170)

These theatres represent less than 4 per cent of the total of theatres claimed by the Government to be affiliated with all of the defendants. They represent less than three-tenths of one per cent of the total of theatres in this country.

Now the Government has selected 73 cities which it names in its complaint having a population of 100,000 or over as its testing ground of nationwide monopoly. According to the Government's figures, RKO has no theatres whatever in 46 of these 73 cities. It has theatres in but 27. In 10 of these 27 cities RKO operates in first-run competition with an independent exhibitor or exhibitors. In 21 of these 27 it operates in first-run competition with theatres affiliated with one or more of the other defend-

ants. In every one of the 27 cities it competes with other theatres operating on some run.

And from the viewpoint of dollar business done by RKO theatres, the picture is no different. During 1944 RKO theatres collected admissions of $35,000,000. Compared with the Government's estimate of a total of one billion dollars in theatre admissions paid in 1944, the RKO theatres' percentage of 3.5% certainly does not look like a monopoly of the exhibition business.

Judge Hand: What do you understand to be the Government's theory on which they assert there is a monopoly? Of course, the case is not as simple as your argument would
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indicate. They have some other theory based on conspiracy, or something else, being responsible; in other words, for the acts of all the others.

Mr. Leisure: That is one of the points, if your Honor please. I am addressing myself now to the complaint and the trial brief and the statement in Mr. Wright's opening. I have not come to the other two points yet, and I will endeavor to answer your Honor's questions in those two points.

Judge Hand: All right.

Mr. Leisure: Mr. Wright's statement yesterday was that each of these producer-exhibitors is a combination illegal in and of itself. I am addressing myself as to that with respect to RKO in discussing this first point.

To summarize briefly, we will show, that RKO as an integrated company came into existence through force of competition; that the effect of its coming into existence has been to bring about greater competition in all three fields in which it is engaged. It has no monopoly, nor has it the power to effect a monopoly in any one of these three fields.

As a producer and distributor it produces and distributes but 7 per cent of all the features produced and distributed. It has not used its control of its own distribution facilities to bar independent producers from access to the

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market. On the contrary, a substantial proportion of the pictures which it distributes are independently produced, and a still more substantial proportion of the annual return on the features which it distributes is represented by independently produced product,—product for which it actively competes in the open market.

In the exhibition field its 78 first-run theatres constitute less than one per cent of all the theatres in the country. It participates in the total theatre receipts of the country to the extent of less than 3.5 per cent.

RKO has not in fact eliminated or restrained, nor as a single integrated unit has it the power to eliminate or restrain competition in any of the three fields in which it is engaged. So much for the Government's first charge against RKO.

I now turn to the Government's second basic charge, namely, that RKO has combined and conspired with the other defendants to restrain and monopolize the production, distribution and exhibition of motion pictures. The Government does not claim that it has any direct evidence of such combination or conspiracy. There is no suggestion in the trial brief or in its appendices that there is any actual overt combination or conspiracy between RKO and the integrated defendants. It is not claimed that RKO has at any time combined or conspired with any other defendants in any conferences, meetings or agreements to restrain or

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monopolize interstate commerce. And the complete absence of any corporate connection between RKO and the other integrated defendants is clearly demonstrated by the plaintiff's description of the corporate structure of the integrated defendants in the Government's trial brief, at pages 5 and 6, and the Appendix A, pages 1 to 8.

RKO is not asserted to have any interest in Fox, Loew's, Paramount or Warner. None of these companies is asserted to have any interest in RKO. So far as their corporate

structure is concerned, therefore, each of the integrated defendants is a separate and distinct entity and should be treated as such. The most that the Government claims is that certain conduct claimed to be both common to and unique with the five integrated defendants will support an inference which it will ask this Court to draw, that these defendants have agreed to combine and conspire together.

Thus, the Government asserted that the defendants have conspired to monopolize the production of motion pictures. It asserts that the integrated defendants have tied up the majority of stars, feature players, outstanding stories and other items essential to production; that while they have freely exchanged such stars, stories, etc., among themselves, they have refused to make them equally available to non-intgrated defendants or producers.

The Government has admitted, however, that it intends to

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offer no proof of any such activities, but instead intends—and I quote—"to argue from all the facts" that such a conspiracy exists. But in its trial brief the Government appears to have receded even further from this original position, because nowhere in the trial brief does it so much as mention, much less argue, about a monopoly of production or distribution.

So far as RKO is concerned, we do not expect to rest merely on the Government's failure of proof. We intend to show affirmatively, first, that independent producers have increased and prospered, and that their product is in active and unrestrained competition with us. Second, that RKO does not rely for its production activities upon any engrossment of its own of stars and feature players, or upon any understanding with the other producers. On the contrary, RKO obtains the stars and feature players necessary to its production in competition with other producers, both integrated and non-integrated, both defendants and non-defendants in this case.

As to distribution, as I have already indicated, RKO distributes a substantial proportion of the pictures of producers

who have no distribution outlets of their own, and is in active competition with all of the other defendants to secure the right to distribute such pictures.

Let me summarize: RKO is in active and unrestrained
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competition in both the production and the distribution of motion pictures. No inference of combination should be drawn in light of that competition.

In its original complaint, paragraph 86, the Government spoke of this as a "nationwide monopoly". In its amended complaint, paragraph 163, it describes this as a monopoly in 80 per cent of the cities with populations of over 100,000. But in its trial brief, page 21, it redefines it as a monopoly in 80 per cent of the towns where the integrated defendants control two or more theatres.

Basically the Government's theory of concert of action as to exhibition is this: The theatres affiliated with each of the integrated companies need product. As to this the defendants are surely no different from other theatres in the United States. But since each of these theatres is affiliated with a company which has product to offer, the Government argues that an RKO theatre, for example, can and does obtain a Paramount or a Warner product in competition with a non-integrated theatre by being able to assure Paramount or Warner that when Paramount or Warner need product in theatres, they may count on RKO to give their theatres preference over non-affiliated theatres competing with them. This is the same theory, let me state, that the Government applied to alleged monopoly of production but which charges, in that field at least, it has now apparently abandoned.
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Originally the Government flatly asserted that one producer-exhibitor defendant licensed its films in theatres of another such defendant on the condition that the latter would in turn license its films in theatres affiliated with the former. In reply to interrogatories, however, the Government admitted that it had no such proof, and it refers to no such

proof in its trial brief. Instead it now relies on what it calls "cross licensing" as showing concert of action between these defendants. It admits that this—and again I quote—"is not cross licensing in the usual sense." And indeed it is not. The Government charges that when Paramount, for example, licenses an RKO theatre, it does so under a contract whereby Paramount receives a percentage of the RKO theatres' gross receipts. When RKO licenses a Paramount theatre it is under a like form of contract. This, according to the Government, gives each licensor "a share in the theatre operating profits" of the other, with the result that each of these integrated units has a "vested interest in promoting the business of the theatres affiliated with each other at the expense of independent competitors."

To put it in plain English, the Government now charges that since a percentage contract gives each integrated defendant an interest in the "theatre operating profits" of the

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other, it is to the interest of each to deal with the other rather than with non-integrated exhibitors.

As to this charge we expect to show that RKO's license contracts give it no interest whatever in any theatres' operating profits. We shall also show that RKO's use of percentage contracts is by no means confined to theatres affiliated with its co-defendants, but that it employs the same form of licensing no differently and to no less extent in licensing unaffiliated theatres.

Again the Government seeks to infer concert of action from the asserted tendency of theatres affiliated with these several defendants to exploit from year to year the same lines of product. We shall show, in the case of RKO, that precisely the same pattern is followed by independent theatres. Beyond this, however, we shall show that the desire of every theatre operator to retain the same product lines from year to year is not attributable to conspiracy or agreement between competitors but is the inevitable result of competition between those engaged in supplying the public with any

service,—in this case, regular entertainment at an established price.

Then, finally, the Government charge that RKO has conspired with the other defendants to fix admission prices in theatres throughout the country. As to this last and final charge by the Government, we flatly deny the charge. We expect to show affirmatively that RKO fixes the admission
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prices of no theatre either acting individually or otherwise.

DEFENDANTS WARNER'S OPENING.

Mr. Proskauer: May it please your Honors, it falls to me to be the anchor on the team of the five theatre-owning defendants. Your Honors have been so patient in listening to Mr. Davis and my other youthful colleagues in their clear presentation of a large area of this case, that I realize that that throws on me an obligation to this Court to be brief and to be non-repetitious. I assure your Honors I shall endeavor to carry out that obligation to the Court.

The interruption by Judge Hand of my colleague, Mr. Leisure, leads me to grasp the metal. I suppose no one within the sound of my voice would contend that there is the slightest suggestion on the Government's part here that any one of these defendants individually is engaged in an illegal monopoly. The gravamen of the Government's case—and I like to meet situations head on, with your Honors' permission—is in this charge that collectively we have in some way conspired to make ourselves jointly a monopoly; and the two big issues in this case are, first, whether there is the slightest tangible proof of the existence of that conspiracy without which the Government's case must totally fail; and, second, and no less important, whether this so-called integration—
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which is nothing but a high-falutin phrase meaning that we all own theatres and produce pictures—whether that is a con-

tributing cause to any alleged monopoly, and whether its removal is necessary and useful, or, on the contrary, destructive of a great industry and absolutely destructive of a great public interest. And it is to those fundamentals that I shall address myself.

In the few remarks that I shall make I take for my text these words of Justice Holmes: "General principles do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than an articulate major premise." And when I heard my good friend, the Assistant Attorney General, yesterday mouthing these platitudes from a series of charts, statistics—and I must respect the amenities as Mr. Davis did, and I won't refer to blankety-blank statistics—but I will show your Honors in the evidence that we shall adduce not only that those statistical statements are in themselves half-truths when one put flesh on the skeleton which the Government has produced in this courtroom, but I will show you further, and the evidence of the defendants will show you further, that when you look at this whole picture and disassociate yourselves from the spell of the legalism which characterizes the ardor with which the Government advances what Mr. Davis characterized as a fad or a hobby, and bring to this case that experience, that knowledge of the

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subject matter which you will get from oral evidence, and that common sense which we have every right to believe will be exercised by this Court,—that no matter whether you find an abuse here or an abuse there, in 25 years of the history of the most complicated and difficult industry that any court has even had to examine into, you will never say that a sound judgment requires you to strike down that industry by throwing it into chaos with a decree that wrecks the whole structure of the industry as it has existed with the approval of the Government for a quarter of a century.

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Now I shall advance these theses: there is no combination or conspiracy here. On the contrary, this so-called integre-

gration is necessary, appropriate and beneficial to the public in the production of moving pictures, in exhibition and in distribution. I shall respect Judge Hand's aversion to genealogy, but to some extent I will refer to it merely to demonstrate certain definite propositions of fact which have legal significance. I shall use it to point a moral, not to adorn a tale. And let me say at the outset for what purpose I shall refer briefly to the history of the Warner Company. My friend Mr. Leisure referred to the Steel case. There the great issue was whether integration was illegal per se, and the issue that arose between the minority and the majority of the court was whether that integration came into being as a benevolent and natural evolution or whether it suddenly sprang into being as an instrument of oppression. That was the dividing line between the majority and the minority opinions, and I propose, by reference to the history, to show you that we come in the prior category.

Secondly, I shall refer to the history because it is a part of the Government's bill that we fall within the ban of Section 2 of the Act. Judge Hand will recall, and I am sure you others will, that in the Aluminum opinion Judge Learned Hand wrote, in order to fall within Section 2, the monopolist
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must have both the power to monopolize and the intent to monopolize.

Therefore, I address myself first to the question, did we get these theatres, we producers, to get the power to monopolize? Did it give us the power to monopolize? Did we do it with the intent to monopolize?

As I review these facts briefly, which I shall show, I shall claim to have demonstrated to your Honors that integration was born not in agreement, not in conspiracy, it was born in trade warfare and has remained to this day an element not of agreement but of dissension, of fight and of competition.

Let me point that briefly from the history of the Warners. They started back in 1915 running a couple of Nickelodeon

theatres in a small Pennsylvania town. When it got to 1916, they began to produce pictures in a small way. There were giants in the land in those days, my friend's client here, Famous Players and all those other great companies which had reached enormous stature in the production and exhibition of motion pictures, and exactly the same structure existed with one possible exception, that the theatre owning had not yet reached the proportions which it has reached today, but as to clearance, as to run, as to all those other factors of the industry which are utterly indispensable, and the Government recognized it in the consent decree, to the (183)
administration of this industry, the conditions were the same.

And Warner nearly went on the rocks. And what saved them? The same thing that saved every competent competitor that entered into this field, showmanship, vision and ability, which can no more be monopolized than can the free air of heaven.

We reviewed this history in a trial before Judge Nields —not an antitrust suit, a different type of case. And I shall read one or two of his observations on this as the most summary way of putting it to your Honors. They had the showmanship to show a picture at the right time in the right place to get the public imagination, and that was the dramatization of Judge Gerard's book, his years in Germany, and from the moment they did that, all the powers of Famous Players Lasky, all the power of Fox, all the power of these giants in the industry could not keep them down, any more than today you can keep down Walt Disney, or Selznick, or Monogram, or Republic, or all of these independents, and I am using that word with the same apology which Mr. Davis made for it, the apology for the Government, any more than you could keep down these companies that, while this suit has been pending, have invaded the field as competitors to us in the production line and given us the fight of our lives to hold on.

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Those non-theatre-owning three defendants! Why, if the Government proceeded on the theory today on which it joined them before, we would have a number of other defendants who follow exactly the same practice in the administration of the distribution and production of pictures other than ownership and who, your Honors, the records will show, and I shall refer to some of the figures very briefly, knowing your Honors do not want to carry a lot of statistics to your chambers with you, they will show that these companies, so far from being ruled out as competitors in the production field, have waxed strong until there are new giants in the land.

How did we come to get these theatres? And did we get them as a means of monopoly? Or, to use Judge Learned Hand's phrase, "with the intent to monopolize"?

We got down into the '20s and then Warners did another one of those things which makes monopoly or conspiracy to monopolize an impossibility in this industry. They made practicable, commercially, the scientific investigations which were the basis of the talking picture. And on a night in 1926—I am not going to refer to many pictures by name, but one will stand out—there was thrown on the screen in the City of New York "The Jazz Singer," the first talking picture. And how did our giant friends receive that? They had stars used to making silent pictures, they had machin-

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ery for making silent, not for making talking pictures. It cost, in those days $2,500 to install in any theatre the necessary apparatus to exhibit a talking picture—$25,000 I should have said, your Honors, a little zero does not make much difference; it is nothing—$25,000 to put the apparatus in any one theatre, and here were these Warner Brothers, who literally had given their life for this, because it is of record that Sam Warner, who developed it, died as the lights were flashing on the screen of the "Jazz Singer." With this priceless contribution to the public, they were unable to show it because they did not have any theatres in which to show it.

Now, your Honors, to show you that I am not talking rhetoric, we got an opportunity to buy the Stanley chain of theatres—the Stanley Company. The Stanley Company owned a chain of theatres, the most important of them chancing to be located in the City of Philadelphia. The Stanley owned a third of that First National Pictures Company, that my friend Mr. Seymour told you about, that again was born, not in conspiracy, but in warfare, started on the producers by the theatre owners of the country. And First National had a studio of decent proportions where the Warners had not, and an overture was made with us to go into the chain of operations by which we ultimately acquired the Stanley

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stock including those theatres and this studio, and I leave it by giving your Honors just these words of Judge Nields, which I shall prove, "this company had to enter the theatre business or retire to a subordinate position." There was only one large chain of theatres not controlled by competitors and we bought it, and that, says the Government, is conspiracy to monopolize. And Judge Nields said, to save ourselves from destruction, we bought this chain of theatres, used it to fight those who were fighting us in our endeavor to put talking pictures on the screen, and ever since have been engaged in active, open and bitter competition with every one of the other defendants in this case.

That is all the genealogy in which I shall indulge.

I say to your Honors that there is no monopoly of production. I shall not indulge in any lengthy diatribe about what we do individually, because I have recognized, frankly, that the gravaman of this is conspiracy; but in passing, I remark that in the years 1943-1944, the last for which statistics are available, we produced 4 per cent of the 442 features released, 7 per cent of those released by all the defendants, 14 per cent of those released by the five producer-defendants, and all the defendants together produced but 60 per cent of the features released in the United States. And these five alleged malefactors—malefactors because they own

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theatres—produced what? Just 35 per cent of the features released in the United States, and yet my friend puts in these charts, which until you get them in perspective, are just as misleading as though they were actually false.

I have told your Honors of little men who have been able to rise to the top in this industry, and I illustrated it, and I am now talking to the legal proposition that whether you take us alone or as alleged conspirators, it is not only not a fact that we monopolized in production but we cannot.

Where do we get the material of production? We go to the stage and get a play. Anybody else can. We go to the street. Stars? Do we pick them from heaven when they have risen at their zenith? We get them the way anybody else gets them. We got Bette Davis, now getting thousands and thousands of dollars a week, when she was an actress getting $400 a week. We got Errol Flynn, whom I think even this sedate court must know of—I am at a little disadvantage because, when I tried that case before Judge Nields, I found he was a moving picture expert, he knew who the stars were, and who the producers were, and the date of production of every picture that was ever referred to, and I am shifting my point of approach—these people talk as though you could go and make an agreement that you are
(188)
going to corner the star market—we picked Errol Flynn out of a place where he was getting $150 a week. If my recollection serves me, even Mr. Davis client had the astuteness to go to a litle music hall somewhere on the continent of Europe and pick Greta Garbo from a vaudeville stage. That is the way the star system is made, and that is why people like Selznick and Disney—perhaps I have got the wrong ones for the particular point, but that type of independent producer—could always go and break down any alleged monopoly in the stars who go so much into the importance and the profitability of these moving pictures.

I am a little confused at times by the variances between Mr. Wright's bill and his mild utterances in this courtroom.

This bill is replete with allegations of improper trade practices, muzzling competitors, and there are just little references to them in his brief. I do not like to be wholly silent about them and yet I don't want to burden your Honors with meeting a man of straw, so I refer to but one of them. He talked at some length that we built up this monopoly on production, and I am talking about production now, by a process of exchanging stars and exchanging materials. Well, your Honors, the practice of exchanging actors is as old as the theatrical business. My astute young partner here dug
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out for me last week, and wanted me to urge it on you, but I won't, the fact that Covent Gardens and Drury Lane exchanged players back in the eighteenth century, but we don't have to go that far back on the ox. But what is the truth here? We have a lot of players under contract, and each of them has some kind of specialty. At one moment we are not showing a screen play which requires that particular man, and we exchange actors. When I say "we", whom do I mean? Do I mean Paramount, and RKO and Loew's? Not at all. I mean everybody in the industry.

And I just give you this much figure to point my statement, that there isn't the slightest discrimination against the so-called independents in this practice, that they participate in it and are the greatest gainers by it. Of 66 players that we had under contract in 1931, and I am going back to the time when these allegations were made, and the figures are about the same up to now—in the four years from August 31, 1938, we asked the loan of 79 players from other majors. How many of them do you think we got? Four. In the same period we gave or lent players 44 times out of 184 requests. We asked independent producers for a loan ten times, and we got it once. They asked us 65 times, and we gave them 13.

Now those are not just paper statistics. I am making a
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distinction between two kinds of statistics. I am showing to your Honors that there is nothing in that of the Government's.

And then my friend talks about the terrible exchange of the use of materials and equipment. Judge Goddard may recall that when we opened this case before, we showed that those things were so important that Universal lent us a pair of pants for $3.75, Selznick lent us a corset for $6.00; we lent Fox a battleship for $.50, and paid Paramount $1.20 for the use of some pushcarts. I am not trying to meet that issue by just ridicule; I am telling your Honors the evidence will show that it is the most arrant de minimis. Let us go on: I have shown you how the little man always comes up. He has come up. "Gone With the Wind," Selznick; Walt Disney; Charlie Chaplin; the screens are alive today with the production of men who have the showman's instinct which, if it is exercised, will build a path to his door despite every alleged conspiracy, alongside of which the path to the man who built the mouse trap is nothing but a rough mountain trail, because never forget, your Honors, that despite what Mr. Wright told you yesterday, there is the greatest shortage possible of high grade features, and everybody clamors for them. I shall say something about that in another connection in a moment, but let me register this point at this moment, (191)
that nobody who ever produced a decent picture had the slightest difficulty in getting it shown.

I have been a little harsh, perhaps, and I think not unduly so, in talking about Mr. Wright's charts. I have got some here myself. The chartist movement affects us all. Let me illustrate a litle what I am saying. Here he produced yesterday a chart headed "Exploitation of Universal's Luckiest Girl in the World," and it is a beautiful chart, and what it shows is that that play got no first-run in the City of Philadelphia, about which I shall have something more to say in a moment. And the inference he asks your Honor's to draw from that is that Warners had conspired in some way to keep Universal from showing the Luckiest Girl in the World in Philadelphia, and, therefore, it got no first-run showing. Well, your Honors, I am going to show you the

worthlessness of that paper evidence. I am going to show you it is waste paper, because the Luckiest Girl in the World was so rotten that she was lucky to get shown in any ten-cent theatre. I don't mean to be offensive to my friends of Universal over there, but I think they will agree with me that rarely was a worse picture put on the screen than that picture, and yet it is soberly offered here in the form of a grandiose chart to show that the reason it was not shown (192)
first-run in Philadelphia was that Warners were conspiring against another one of these co-defendants to not show it first-run when the real fact was that nobody wanted to see the picture.

I have said here in my notes the independent producer has always been given distribution and that competitively. We will show that. Walt Disney! Did we ever shut him up? No, RKO produced his pictures or did—distributes them. Selznick! Did we crush Selznick when he did Gone With the Wind? Not at all. Loew's distributed his picture for him. And when he did Rebecca, did we dominate him? Not at all. He got a better bid from United Artists and he went and distributed it through them. Harold Lloyd through Paramount. Why, your Honors, I won't pile Pelion on Ossa. I will show you that no independent distributor in America, and there won't be any evidence to contradict it, ever had the screen blocked off from him by a refusal to show his pictures. And the reason for that is not that we are so lily white and pure. The reason for it is enlightened self interest. And that enlightened first interest is that we need good pictures so badly that we would be cutting our own throats to close avenues of exhibition to any man who could make a good picture.

My friend is a great manufacturer of categories. This (193)
case is built for the Government on the artificial creation of categories that practically and factually do not exist. What do I mean by that? Mr. Davis talked yesterday about

the way we are always described in antithesis to the independent, first-run category. What is this first-run business? A moving picture has to have a first-run, and we show this by evidence, in one of these magnificent metropolitan theatres or nobody makes any money out of it, neither the producer nor the little exhibitor for whom Mr. Wright's heart is so profusely pleading. That little man gets the benefit of all the advertising, all the publicity and all the acclaim that comes to a moving picture when it is shown up here at an independent first-run theatre like the Rockefeller Theatre or at one of our own first-run theatres. And so it goes all over the country.

And the real situation, your Honors, is just this: the public gets what it wants to pay for. The little man on the Bowery does not sell a jewel like Tiffany's, and he cannot, and reasonable competition does not require that the Government should intervene and see to it that he should. The analogy is even more favorable to us because the truth is that by this system of using these first-run theatres as media for the exploitation of the picture and as a source of recoupment for us, fairly certain recoupment to us of the enormous
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outlay for these pictures, whose costs now run up into the millions where they used to be in the hundreds of thousands, the little exhibitor gets the benefit of that and there isn't a man, woman or child in the United States who, during the last twenty years, has not been able to see for ten or twenty cents every moving picture that is produced in the United States, no matter how expensive it was to produce or to exhibit.

There is a public interest in that and I am going to show you in just a few moments how that public interest will be stricken down if the Government in this case should get the extreme of its demands.

So much for production. Exhibition, and I have turned over to exhibition, I am talking about these first-run theatres: we have no monopoly either alone or in combination.

We own 3.2 per cent of the theatres in the United States, 6 per cent of the seating capacity; we own no theatres in 29 States; we have a concentration of theatres in one local area that is, as I explained to you in our genealogy. We happened to get these Philadelphia theatres. And we own 23 per cent of the theatres in New Jersey and 16 per cent of the theatres in Pennsylvania. Others have given you the statistics, which I will not repeat, showing that in combination we are not a monopoly, but again I want to grasp the metal. Let us go right ahead on this Philadelphia situation (195)

about which my friend makes a great deal. When we acquired those theatres, the Government brought a Clayton law suit against us back in 1929, I think it was, or somewheres thereabouts. It must have been a little later because I was retained in it and I came back to practice in 1930. It was somewhere around there. They investigated the situation, and what did they do? They discontinued the suit. What have we done with those theatres? Have we increased them? Not at all. We have got fewer theatres in the area now than we had then, and the competition that arose has been enormous and successful.

My friend is going to say, "How about the Goldman case?" And your Honors will be referred to the opinion in the Goldman case. The record in this case will not be the record in the Goldman case. For myself and for my colleague, I say, *peccavi,* we made a great mistake in the Goldman case. We believed there was still such a thing as *stare decisis,* and we found there wasn't. The District Court in an exactly similar case held that on that kind of showing there could be no inference of conspiracy from the failure to take the stand, and Judge Kilpatrick decided that case in our favor. The Circuit Court reversed, basing its reversal substantially on the ground that the inferences undenied gave a basis for a claim of conspiracy.

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Conspiracy to what? I will show you in this case that those inferences will be squarely denied. It was a most peculiar situation, which I will not take your time to go into now, but to assure you that when it is explored you will find that it has no relevance to a general nationwide conspiracy such as here alleged; and even then, if they call my friend Goldman to the stand, I will show from his lips that under the conditions of alleged monopoly which he claimed existed, he had an open fight with us, built up a chain of theatres in Philadelphia and in the surrounding country out of which he was making approximately a quarter of a million dollars a year net profit. That is the kind of monopoly we have been running over there. And all these Philadelphia figures which are thrown in our teeth because of that coincidence that this Stanley Company happened to be concentrated in that area, all of them are subject to the inexorable course of events which there is no conspiracy or agreement either to block or which any such conspiracy or agreement could block.

To Goldman we have already lost the key theatre, the Carlton Theatre, in open fight. He has taken it away from us, and two important second-run theatres. He is operating a first-run theatre, and the Fox Theatre, which is one of our old first-run theatres which we had under lease, that is gone too; so that nature is taking care of this situation, I respect-

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fully submit, much better than the Government or a court decree can take care of it.

Now, I want to address myself to this conspiracy thing for a moment: What are the Government allegations? What are the Government allegations of fact from which it wishes you to draw the inference of conspiracy? They say, "You are cross licensing." I am not going to repeat what my friends have said on that subject, but I am not content to let it go at that. When Whitney Seymour told your Honors yesterday that his local theatre managers, when they had pictures had no idea in the world what Paramount was leas-

ing to anybody else, perhaps it sounded incredible. It happens to be true. More than that is true. Warner's theatre department, the department that operates theatres, is run as a completely separate entity from the department which leases films to other people. They have no connection with each other whatever. That sounds incredible. Well, let me give you, as a member of this chartist movement, one or two figures which demonstrate that it is true. If Mr. Wright could show that there was, in the vulgar parlance of us non-Government attorneys, what is called back scratching, and that we share profits in the sense that we say to Paramount, "You license this to us and we will license this to you," and there is some proportion between them, then I would have something to fear; but if I can demonstrate that is utterly (198)
untrue, I have knocked the props out of the whole basis of the Government's contention.

Let me give you just one or two figures out of a great many here. There is no pattern whatever in the film rental paid by Warner from which a combination can be inferred. Last year we paid Mr. Davis's client $3,800,000 for film rentals for our theatres. How much do you suppose Loew's paid us? $200,000. Here in the year 1931 we paid Paramount 5.6 per cent of our film rentals. In another year we paid them 16 per cent; and it varies year by year so that there is no relationship whatever or uniformity in the pattern.

Nowelet us put another acid test to it. There is no pattern from which combination can be inferred in film rentals by a comparison of what one company pays us and what we pay them in any year. I am just going to take one or two of a whole mass of these things to illustrate what will be indubitably proved here. In 1944 we collected from Paramount 17 per cent of the billings. In 1934 and 1935 we collected from them only 9.8 per cent. I read this. The percentage of Warner theatre films rental paid to Loew's in 1937—I take that not as a typical year but as an extreme year to make my point, assuring your Honors that it shows the lack of pattern

for every year—we paid Loew's 19.8 per cent of our film rentals. We got from them 7/10ths of one per cent. And you
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can take that—and I want to make this clear not in the specific figures but in its real import—you can take that by seating capacity, by film rental; you can weight it any way you please; and I said to your Honors that we shall show without fear of the slightest possible contradiction that there is no relationship whatever in any one year between the film rentals we paid in to our competitors and the film rentals they pay us. And when I have shown that the base is gone from the inference sought to be drawn from these tabulations of Mr. Wright's.

There is no uniformity in the method of sale. We sell in certain blocks. They sell differently.

There is no uniformity in the time of the contracts for exhibition we make. We may make a contract with Loew's to get their product for a year; and they make one with us for three years. I do not state that as a fact, but merely as an example of what the facts themselves will demonstrate when I put these contracts in evidence before you, and I leave that subject with the assurance to your Honors that there is a complete absence of any lack of pattern from which this inference of conspiracy can be drawn.

Mr. Davis wants me to make it clear this matter of gross payments for the aggregate on individual films licensed and not arbitrary percentage splits. I think that has been made abundantly clear to your Honors, and I state it in quotation from my young friend.
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Now, something has been said about these Appeals Board decisions, and I am going to talk about them as bearing on this evidence of conspiracy and as bearing also on this question of the character of relief which is the sole issue in this case—I overstate that—which is by far the chief issue in this case. I have never known any judicial adventure to result so successful as has the machinery to which Judge

Goddard affixed his signature in that consent decree. We are told that there were certain defects in it, and perhaps there were, and we were hopeful that when those hearings were ordered by Judge Goddard before the Appeals Board, that any little defects or any big defects, if you please, could be corrected. Certainly we stood ready to correct them to put this industry on a practicable basis. But we are met by the suggestion that nothing will do excepting to kill the goose that lays the golden egg, strike down the industry. And one reason for that, as suggested by Mr. Wright's opening yesterday where he referred to these Appeal Board decisions, was that they showed us to be somewhat infamous, when nothing is further from the truth.

I will just give you in about two sentences the experience of Warner before those Appeal Boards. We were parties to 75 complaints as distributor and about 10 as theatre exhibitors. In the 10 cases we were charged with unreasonable (201)
clearance. In one of those cases the reduction of clearance ordered was two days, and the maximum reduction ordered in any case was seven days.

Now, Mr. Wright said that showed we were still engaged in illegal clearance. What the decree says is that reasonable clearance is recognized as valid, and because honest men may differ as to whether clearance is too long or too short by two days, and the Appeal Board finds against us to the extent of two days or seven days, Mr. Wright says that that shows you are criminals because you are indulging in unreasonable clearance.

Your Honors, I do not have to labor that proposition to this Court. The mere statement of it shows the utter confusion in deciding in a complicated situation that most difficult of questions—what is reasonable? What on the one hand, and on the other hand that quasi criminal, utter disregard of the decencies which inhere in a charge of violation of the Sherman Act.

Now, how did we fare in these other cases? We sell to 14,000 theatres in the United States. There were reductions

against us in 50 cases in four years out of 14,000 theatres. Does that show this criminal, this quasi criminal approach which Mr. Wright asks this Court to infer from a series of papers that your Honors when you come to consider them, (202)
in the light of these facts you will regard most of them as wastepaper.

Now, I see Judge Hand looking at the clock, and I do not blame you. I am going to come to a speedy conclusion. I want to talk about this ultimate relief of the Government's. These theatres provide a sure outlet for pictures and thus make it possible for us to spend these millions. What is going to happen if you take that away from us? But Mr. Wright says we will have a fine competitive system. Well, that fine competitive system, I will show you by evidence, is not necessary to competition, and in the form in which he puts it will strike down necessarily the quality of these pictures. What does that mean from the public point of view?

There is one phase of this case that has never been referred to. The evidence in this case will show that these companies break about even on their domestic business. I do not mean that to be taken literally, but by and large. The profit comes in the foreign trade, and in a normal pre-war year these companies brought into this country an average of $100,000,000 a year—in return for what? Materially a few pieces of film. There is not another industry that the imagination can conceive of that has fed into this country so much money for so little. And today we are standing with our backs to the wall fighting discriminatory legislation in Great Britain, in France, in Czechoslovakia particularly, (203)
and practically in every country in the world whose governments are trying to drive out the American film. And what is it that enables us, if anything, to hold the fort? It is the quality of our pictures. It is the ability that the ownership of these theatres gives us to take the risk of putting $3,000,000 or $4,000,000 into a production like "Gone With

The Wind." And strike that down and this industry—your Honors, this is not rhetoric—strike that down and this industry is sunk.

I shall show you many another public disadvantage. It is through the ownership of these theatres that we put out what I will call for want of a better word public relations pictures, like Disraeli, Pasteur, Zola, Mark Twain. It is through these theatres that we are able to test the popular imagination, and these theatres gives us no domination as to what should be shown. Your Honor asked the question yesterday, Who determines what should be shown? The answer to that question is the public determines it. We can no more flaunt public opinion and live than we can jump in the middle of the sea and survive. We are responsive to public taste, and these theatres give us the opportunity to feel that out, to test out and to produce these picures which has made this industry one of the greatest national assets in America in relation with the foreign world, and given to the American public for nominal cost the greatest possible (204)
development of an amusement industry that the mind of man can conceive of.

And why does he want to strike it down? I use a phrase that has the tang of the street but is made respectable by Dean Wigmore's use of it. In referring to a certain rule of evidence he used the phrase "mumbo-jumbo." I should like to link that to what my brother Davis said yesterday. We get this lingo about an integrated industry, about the evils of integration. And when you ask yourselves what is the practical good to come of this, is it going to cure clearance evils, is it going to cure the problems of distribution, is it going to do anything to ruin these companies, forcing them to sell their theatres to people who never buy them, unless they can tie up with contracts for exhibition on any fair terms? What is the good of it? If you find, as we think you will not, but as we concede you may, that in this area or in that, either geographical or industrywise there is some

evil to be corrected, correct it. Correct it directly by the power of this Court. But when my friend Mr. Davis said yesterday in answer to that motion to intervene of that Civil Liberties Union, that the Attorney General represented the public here, the thought flashed across my mind that in a very real sense, your Honors, we represent the public here. We know the public. We have served the public. And I leave this case for evidence with your Honors with the as-
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surance that as surely as I stand here no decree of a court would ever work more irreparable public injury than if ou yielded to the wiles of the Government's proclamations based on this paper case.

DEFENDANT COLUMBIA'S OPENING

Mr. Frohlich: May it please the Court, I represent the Columbia Pictures Corporation and a number of subsidiaries which I shall refer to throughout as Columbia. Columbia has a unique position in this suit, because it owns no theatres. It has never owned a theatre and never proposes to own a theatre. There is no need for going into the genealogy of Columbia. It is a producing company. It came along in 1920 on a shoestring, and by the genius, the ability and the industry of its executives it found its place in the sun and embarked upon an activity that has been successful for over twenty years.

It first did nothing but produce pictures. And it found out after a few years that if any company in this industry proposes to produce pictures in quantity it must acquire a distributing organization. There is no such thing as producing pictures in quantity without your own distributing organization. In the old days, when Columbia was in its infancy the practice was to sell your pictures by state rights. There were men and corporations who divided up territory

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between themselves; they purchased your picture for X dollars; and if you were very fortunate you could get the balance of your purchase price after the picture was shown. There was a group of them down on 45th Street, they occupied the whole building, which was known as the House of Forty Thieves. That is the way the distribution of pictures was being done in the old days, and necessity and business requirements compelled Columbia, as it had compelled all these other companies, to finance itself and to open its own distributing organization. And it did so in 1929. It opened up thirty-odd exchanges throughout the country, hired exchange managers, salesmen, and embarked upon the distribution of these pictures.

It today is engaged in the production and distribution of its pictures and nothing more. And when the Government brought this suit in 1938 there was no doubt that the Government intended to seize the entire industry and reorganize it upon its own conception of what should be done. It brought the suit against eight defendants, five defendants who owned theatres, three who did not. For some reason that I can't understand, it excluded two other companies that, like Columbia, also had their own distributing organizations. It excluded all independents, although for many years there have been important and successful independent producers in America. Sam Goldwyn has been nothing more

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than an independent producer, distributing one year through one organization, one year through another, and a producer of marvelous pictures. Selznick is another. Chapman is another. I could give you names here by the dozen. No one was brought in but these eight companies.

Well, perhaps the Government needed these eight companies because the complaint as originally drawn was most comprehensive. It alleged a monopoly in production, in distribution and in exhibition. And if your Honors will be good enough to look at page 61 and page 75 of the amended

bill of complaint you will find those pages replete with allegations of monopoly in production and distribution.

Mr. Wright was asked yesterday twice whether he proposes to pursue those allegations in this case, and he was silent. If I can take that silence on Mr. Wright's part as evidence that he will produce nothing in this case on the question of monopoly in production or monopoly in distribution, then why, I ask, is Columbia Pictures in this case? Why is the United Artists in this case or the Universal, three companies that own no theatres?

Even under the complaint as drawn there was no attempt to allege a monopoly against Columbia in production. The charge was that Columbia, a reluctant conspirator, had lent itself to the other defendants in enabling them to carry out a monopoly in production. But that is out of the case now. (208)

There is no claim here, as I see it, of monopoly in production, nor is there any claim of monopoly in distribution. So, so far as Columbia is concerned this company is forced to come into court and go through the expense and burden of a long trial, when the opening statement of counsel and the trial brief of the Government clearly indicate that there is nothing on which Columbia can be held.

Now, Judge Hand yesterday asked Mr. Wright, What have you got against Columbia here? And he was told there were some contracts that were illegal. Well, let us see from the Government's own documents what is alleged to be illegal on the part of Columbia. The Government in its trial brief, which apparently has completely abandoned the complaint, lays a great deal of stress and importance on this schedule that Mr. Davis picked apart yesterday on pages 17, 18 and 19. And that schedule purports to show that in 73 large cities in the United States of over 100,000 in population these defendants in the years 1943 and 1944 rented their pictures for the most part to each other, to so-called affiliated theatres, theatres owned by the five theatre-owning corporations.

Now, if we are going to have a trial by statistics, it seems elementary to me that we ought to have a trial by honest statistics, and this schedule which was very artfully drawn purported to show that a large percentage of Columbia pic-
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tures were rented to affiliates, thereby proving, according to the Government's theory, that Columbia was a co-conspirator and had lent itself to whatever conspiracy it proposed to prove.

Well, to begin with, the Government's arithmetic is bad. It computed the number of instances where Columbia had sold to the independents in those 73 cities as 19. Actually there are 22. And in one instance it had sold to both an affiliate and to an independent, supplied its product. Actually there were 23 instances out of 73 in these large cities—and mind you they are large theatres, large seating capacity—and Columbia is entitled to get whatever revenue it can from its pictures, the best revenue it can—about 31½ per cent. But that is not the truth in this statistic. Here is what actually happens. In these 73 cities 33 are closed cities. We call them closed—and your Honors will get that definition throughout the trial—a closed town, a closed situation, because the affiliated company's theatres are the only first-run theatres in those cities. I have either got to show my picture in an affiliated theatre in those 33 cities or I can't show it at all as a first-run. The other remaining 40 cities are competitive. There is an independent and there is an affiliate theatre. I have my choice.

Now, what did Columbia do? Those 23 instances that
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I talked about were in the 40 cities where the showing is competitive; so out of 40 competitive cities this company showed its product in 23, or 57½ per cent. Now, that is far from a showing of conspiracy. If Columbia is to be charged with being a conspirator on the brief of the Government certainly a showing that it exhibits 57½ per cent of its product in these competitive situations, where it should

get the largest revenue, has great significance, because it shows that Columbia was not aligned with any group; it was free to do as it pleased; if it preferred to sell the independent, it did so; and it did do so, and the Government's figures showed that it did do so.

Judge Goddard: Mr. Frohlich, what do you mean by "independent" here?

Mr. Frohlich: Well, as I gather in this case—the Government may mean one thing and I may mean another—but I am using the word independent in contradistinction to a theatre which is owned by one of the five defendants in this case. Any theatre not owned by them I have to call an independent, and it is an independent. Call it what you will. I call it independent. But the point is that theatres which are owned by people not interested in this litigation, no defendants here, these theatres have been given opportunity to receive pictures from Columbia.

So far from showing Columbia to be a conspirator, the (211)

Government's trial brief shows that Columbia has behaved as well as any company in this business has behaved, and the proof will bear that out.

And I will show you how the proof will bear that out, because this is not the first time that Columbia has been subject to trial by the Government. Your Honors will recall that Mr. Wright in his opening statement pointed out that when this suit was brought in 1938 three companion suits were brought against large circuits of exhibitors. One was down in Tennessee against the Crescent Circuit; one was in Oklahoma City against the Griffith Circuit, and one was in Buffalo against the Schine Circuit.

Now, those cases came to trial. The Crescent case was tried before Judge Davies in Nashville in the Summer of 1941. Columbia was one of the defendants in that case. And after the consent decree had been signed, the Government was kind enough to eliminate the five theatre-owning defendants out of that case. They were in all the cases; all eight were in

all these cases. So there remained no one but these three so-called minor defendants, Columbia, Universal and United Artists and the local circuit.

Now, in the Crescent case there was proof taken the entire Summer, and Columbia was dismissed at the end of the Government's suit, and Judge Davies in his findings said some very interesting things about Columbia that I think
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this Court ought to know, because so far as Columbia is concerned the picture is a healthy one and has been throughout these twenty years, and now has received judicial sanction, and I think it will have some bearing upon Columbia in this case.

And Judge Davies said in the Crescent towns, including towns in which indepndent operators were in competition with some of the independent exhibitors that the defendant Columbia invariably leased its product to such independent exhibitors. And further on he finds: The course of conduct of the defendant Columbia during the period in question showed a willingness on the part of such defendant to rent or lease its product freely to independent exhibitors in all of the Crescent towns, including all competitive towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina upon a fair competitive basis as between independent exhibitors themselves and independent exhibitors and defendant exhibitors.

Here is a case where the court took testimony for an entire Summer and came to the conclusion that Columbia's treatment of exhibitors throughout these States mentioned, at least, was fair and honorable and decent.

Now, the Griffith case has been tried. The Government of its own volition dismissed Columbia, United Artists and Universal out of that case. The Griffith case is still being
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tried.

In the Schine case Columbia was dismissed by the Government's own volition, its own motion, dismissed out of that case; and we must assume, your Honors, that if the Govern-

ment dismissed Columbia, Universal and United Artists out of those remaining two suits, it could reasonably anticipate that the same result might take place there as took place in Tennessee.

Now, so far as the figures are concerned on income, I have obtained these figures for one year, 1943-1944, because Mr. Wright has said that in that year these defendants in their income from the leasing of product apparently got so much from the affiliated that surely there must be a conspiracy, and he is trying to have this Court draw that inference. Now let me give the actual figure in Columbia. Here in that season in 1943-1944 Columbia's domestic gross income was $23,154,292. Almost 24 million dollars. Its income from all of the five theatre-owning defendants in this case was $5,836,000, or about 25 per cent. Is that a showing of a conspirator? Is that a showing of a company brought in charged with a violation of the Sherman Act? I have never seen anything like it, and I am going to ask this Court at the proper time to dismiss Columbia out of this case, because no proof can be offered under the pleading, under the trial brief, and no proof can be offered that he has any force or probative value (214) here to show that Columbia belongs in this case.

DEFENDANTS UNIVERSAL'S AND UNITED ARTISTS' OPENING.

Mr. Raftery: May it please your Honors, I want to speak for the remaining two defendants: As regards Universal, there have been some changes in the corporate structure since we were here in 1940; so in line with Mr. Wright's suggestion Mr. Schimel and Mr. Wright or his associates may sit down and straighten out the new names and the changes in the Universal defendants.

United Artists Corporation, the other defendant, remains the same corporatewise.

Following up what Mr. Frohlich has said, we do not know why we are here. In 1941 or 1940, at the time of the consent decree, we meant so little then to the Government that they went on with this elaborate consent decree and this arbitration system and all the other things and were very happy to leave us out of it. They did, however, keep us in Nashville for eight weeks, and at the close of the trial, as Mr. Frohlich says, Columbia was let out; Universal was let out; United Artists was held in in Rogersville, Tennessee, a town of 1600 population, over some pictures that involved, I think, exactly $72. They were held in in Athens, Alabama, on a transaction that involved a theatre that had a large (215)
pot-belly stove at the end of it and it ran like a bowling alley back and forth in a store. The Court did not even assess costs against United Artists. So that entire litigation resulted when the Schine case came on, they dismissed at the opening, and then they dismissed out in Oklahoma, the remaining case.

Now, what is the situation regarding these two defendants? Mr. Wright in his opening stressed divorcement. Your Honor asked him the question as to what he had against the other three defendants. And he stated some illegal contracts. In his trial brief he refers to us once on page 8. He then goes on to talk about the type of exhibition license agreement that is used by all the companies. That is, that we license pictures to theatres; we receive a percentage of the gross or a flat rental; we give clearance; we license a specific run. In other words, that all eight companies, and the companies that Mr. Frohlich referred to who are not parties here —and I presume he referred to Republic and to Monogram and to P.R.C., three other national distributors—license pictures the same way.

Now, the licensing of pictures is show business. You are dealing with an article that the public taste and fancy ultimately is going to determine as to its success. There is no difference today in the licensing of a motion picture than

there was in the handling of legitimate shows in the days
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when all of us knew the theater a little better. When the Ziegfeld Follies played on 42nd Street where you now have flea circuses and a few other things, Mr. Ziegfeld would book his show into the New Amsterdam Theatre; he would possibly receive 75 per cent of the gross receipts; he would determine the admission price that all of us paid to go in that theatre, whether we sat on the lower floor or sat up on the top balcony. On Saturday night he took out of the box office his percentage of the receipts; he determined the advertising that appeared in the theatres; he was a real joint venturer with the theatre owner in the operation of that theatre while his play was at that theatre, and the same with every other play in the City of New York. That play played in no other theatre in America while it played at that particular theatre. Mr. Seymour hinted yesterday it might go out on the road. Well, it might go out with the same cast, or possible Will Rogers' horse could not travel and would not go with it. Its admission prices were determined when they ultimately got out there. Its advertising was handled, and ultimately the percentage of the receipts came. Of course, it might strike a theatre somewhere along the line where the owner of the theatre would say, instead of giving him his 80 per cent which he got on the road, I will give you $5000 for the two performances Wednesday matinees and evening flat.
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Now, what happens with a picture? Now, all this comes to whatever charges there are of price-fixing and everything else. Mr. Ziegfeld took the entire risk of loss in the production of that play. David O. Selznick takes the entire risk of loss when he produces a picture. Universal takes the entire risk of loss when it produces a picture. So when the picture is available, if you have got three or four million dollars invested, or got a million dollars invested, you go out and book your picture in exactly the same way. These exhibitors that own theatres, whether they are the big five or some of the group that belong to some of the trade associa-

tions that I have seen representatives of sitting in the back, they not one of them assume any part of the risk of loss in the manufacture of that picture.

So what happens? You have a distributing organization. And that distributing organization, once it gets the print starts with that first run whether it is New York or Minneapolis or San Diego, or wherever it opens. Now, you just can't let that picture go into that theatre. You have got to put it in, and you have got to service that picture from the day it gets in there until you are able to take your percentage out of the box office at the close of the engagement.

The distributor has an elaborate advertising department. (218)

It has road men, field men that go out and publicize the picture in the locality where the picture shows. It contributes by contract to the advertising of the particular engagement; and as Judge Proskauer said, you can't live without this first run. That is where you get back the big revenue that makes it possible to spend the amount of money to give quality at the theatres.

Now, United Artists right now has two pictures coming in, each with a negative cost in excess of four million dollars. You just can't by any rule of thumb send those pictures out. You have got to send them out the same way you send a road show, the same way you send any attraction, whether Barnum & Bailey Circus, or anything that caters to the public taste and fancy. We are dealing with one of the most perishable items of merchandise known, and that is the type of merchandise that you have got to put out to the public, and you have got to advertise; you have got to stay with it; you have got to control, and your control is to see the proper advertising in the newspapers, the proper billboards, the proper ballyhoo in order to bring out your percentage. And what good is your percentage if you don't have a box office price that the picture is going to be exhibited at? For instance, Gone With The Wind was mentioned a half a dozen times today. When that picture went out it had a box office price of $1.10, which was a higher price than the prices before.

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The same thing applied in the vaudeville days. In vaudeville you had the B. F. Keith theatres which showed the best vaudeville. The vaudeville that was shown at the Palace Theatre had the same exclusivity that has resulted in run, in clearance, in every practice that is found in these contracts that Mr. Wright says are predatory practices.

Now, what about United Artists and Universal? Each company is entirely different from the other. United Artists Corporation produces no pictures. It is a mere distributing organization. United Artists Corporation founded in 1919 has never produced a picture. It is a mere distributing organization and has offices throughout the world and is engaged in that practice everywhere. When I was down here with Judge Goddard in 1940 we had 13 producers. Today we have 19. In addition to taking on a great deal of British product, which is now playing at the Winter Garden on Broadway, and which up until two weeks ago was a legitimate theatre and is now a motion picture house again.

The United Artists Corporation under contracts that have all been submitted to Mr. Wright does not control the product it handles for the 19 producers except in part. We solicit one of Mr. Seymour's client's theatres. We bring the contract back. We then have to submit it to the owner of the picture

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for his approval or rejection. All our pictures are sold individually one at a time, and each picture is owned, as a rule, by a different producer at the time solicited. Very rarely do we have two pictures with one producer to offer to any customer. So we have instead of any suggestion of conspiracy, you have a theatre owner, a middle man distributor, and in the last analysis, the producer. The owner of the picture decides whether he wants it to play in that theatre or not. There are 19 of those producers at the present time, and they have 19 representatives, and we have to go through that formula in handling that particular type of business.

United Artists, so as to have the record clear, does own some stock as an investment in one theatre in San Francisco

and two in Los Angeles. But the independent—and I am using "independent" in the Frohlich sense—that operates those theatres has a contract where we have nothing to say about the management, the booking, the operation, and further, there is no obligation on his part to play our pictures. It is an investment.

Universal, on the other hand, is an entirely different type of distributor. In these mechanical things that I have talked about—that is, making the pictures and the prints and the selling and whatnot—there are many things in common of necessity, just like we have a number of things in common
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with the other defendants here. That company is the oldest defendant here. It was in the theatre business once about 1925. We went into greater detail about it on the other hearing. It got out of the theatre business in 1929. It had the same management from 1912 to 1938 and since 1938 it has had an entirely new management. That company either produces or has produced for it by independent producers—again no affiliation—a group of pictures every year. Since 1938 its success has been phenomenal. It had very, very trying times before 1938 but under the new management it has prospered and continued to prosper.

As regards these charts that are to be offered, I say you can prove anything you want to prove with charts in this lawsuit; but the one thing that is fundamental in this business is the quality of the merchandise you are handling. I remember at a meeting where one man said there is nothing in the motion picture business that can't be cured by good pictures.
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I won't go as far as Judge Proskauer to admit that Universal picture was the worst picture ever made. I think there have been many more just as bad. However, there is another chart he brought up on United Artists. On one side he had a very successful picture and on the other he had another picture, I forget the name, something about an elephant, but there it was and he put them both on the same

chart. I guarantee that we can take that chart and we can offer it for some purpose that will be very helpful to every defendant in this lawsuit.

The charts prove nothing.

You will remember, particularly Judge Goddard, on the day the consent decree was offered here, practically all the independent exhibitors were here in one form or another, protesting against it. They were not interested in clearance, they were not interested in run. It all went back to the same bugaboo we have heard from the beginning. We start out to sell the pictures to get the highest prices that we can for our commodity. They start in to buy them as cheaply as possible. They also want to be relieved of the obligation of playing what they think are bad pictures, and they want to play only the good pictures on terms that they like.

If this Court, or some omnipotent court, could solve that problem, then instead of them making a lot of money as they are today, they would all make a lot of money quicker

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and all the producers would go broke sooner. That is the real, underlying economical principle that is behind this flood of complaints that I know Mr. Wright gets from the disgruntled in the industry.

I read in some paper here of the industry not long ago that they had a meeting of one of the exhibitor associations. They said, "Let us definitely go on record and not pay percentage anymore to any of these distributors."

Again, and finally, this is the position that we are in: We are brought down here to court; we have had to prepare information that high (indicating), which we have done, and we didn't do it because of anything in the decree, as Mr. Davis said yesterday. We do take a bow for having done it. We did it without any compulsion. We have tried to cooperate with the Government in every respect, yet I am very much afraid that we will have to sit here for weeks and weeks without being mentioned even as defendants. We are not interested in the divorcement issue, and the Government does not want any divorcement against us.

Now, I know it is a late date, but if there could have been some kind of a severance or agreement worked out so that the group here would only be required to come down here on the one day when they intend to put in their case against us, for about 30 minutes, it would be a tremendous help to us in this instance.

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We sell the market as we find it. Mr. Frohlich said, we sell these theatres because they are closed and the only customers. We sell every theatre we can possibly sell, whether it is affiliated or unaffiliated. That is the sole crime the Government charges us with here. If we had refused to sell them we would have been in conspiracy of some kind; having sold them, we are condemned.

We submit that the Government should be required, before they go into their proof in this case, to state the issues as far as the three non-owning-theatre members are concerned. If they will give us those issues, which they never have, not even in this trial, we will meet them and gladly.

Judge Hand: Mr. Wright, what do you say about these three independents? It seems to me it is pretty slim. That is just my own individual attitude in the matter without much information, I admit.

Mr. Wright: If the Court please, they are unquestionably in a dual position in the suit, where they do exactly as Mr. Raftery says, they sell this market, which we say is a monopolistically controlled one, as they find it. However, in the course of selling that market, they have made agreements with the affiliated companies which we say control that market, which are, in and of themselves, we say, an unreasonable restraint of trade. And on the basis of those

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dealings they are clearly not entitled to a clean bill of health in the case, that is, they have persistently violated the Sherman Act in our view in the course of their dealings with these other defendants, and that, of course, we propose to show by showing what that course of dealing was over a

period of time and samples of the agreements by which it was carried out.

I might say that none of them is quite as lily white as this presentation here would have led you to believe. In the Goldman case, for example, there is what Mr. Frohlich referred to as a closed market, all the first-run theatres in Philadelphia being owned by Warner. What happened when somebody tried to come into that closed market with an independent theatre suitable for first-run theatre? Did United Artists or Universal or Columbia sell it? No, they refused, along with the other five theatre-owning distributors, to make any first class films available for his theatre in exactly the same way that the five theatre-owning distributors did. And it is on the basis of conduct of that sort that they clearly cannot be split out of the case prior to a full hearing, if the ultimate relief that is granted in the case is to give proper regard to all of the elements in the industry.

Judge Hand: We will take a recess until 2.10.

Mr. Proskauer: Could we take up with the Court this suggestion of——

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Mr. Wright: I think it is a little premature. Wait until we get into our presentation.

Mr. Proskauer: Pardon me, your Honor.

Judge Goddard: What is that? Is that anything for us?

Mr. Proskauer: There has been some talk between Government counsel and ourselves about advising the Court that we would probably unite in asking for a recess of the trial after the Government's direct case is in, and I was asking my distinguished adversary whether he wished to bring that subject to the Court's attention now.

Mr. Wright: I think it is a little premature at this time, before we actually outline our presentation.

(Recess to 2.10 o'clock p.m.)

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AFTERNOON SESSION

Mr. Wright: If the Court please, before actually offering the documents I would like to outline how I think we can best use this list of exhibits.

Do each of your Honors have your copy there? If not I have some extra ones here.

Mr. Davis: I can't hear you, Mr. Wright, I am sorry.

Mr. Wright: I will stand over here.

The caption on the document is "Government's Exhibits for Identification."

Judge Hand: I see.

Mr. Wright: If the Court please, that document that you have in your hand is a printed copy of the mimeographed list that was served on September 1st in accordance with the arrangement that was made at the pretrial hearing in July with some supplementary material added. That is, the numbers 1 through 323 are those which were on the mimeographed list, and then you will note that a supplemental list has been added of material which was identified after the September list was served.

Now, in connection with physically incorporating this material in the record, I had suggested by letter to counsel for the defendants that in so far as material furnished by them was concerned that the most expeditious way would be

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for each of them to have a copy of the documents referred to which represented a document produced by them for marking and physical incorporation in the record, so that they would be satisfied that the copy that went in was a true copy of the record in question. And as I see it, the actual marking of the documents in inclusion in the record need not be done in the presence of the Court at all. That would largely be, I suppose, a clerical task that can be performed outside the courtroom. As I see it, the function that will have to be done here is the actual ruling on the admissibility of the exhibits

as they are outlined. We, of course, have brought down copies of all the exhibits referred to, and if there is a controversy that arises as to the accuracy of our description here, or as to what is in the exhibit, of course, they are here and available for the Court's examination. But it is not my intention to hand these up back and forth, document by document, because I think this list does contain a sufficiently complete description to enable the Court to rule from the list itself.

Now, in order that the list shall be most useful to the Court and to the defendants as an index and digest of the Government's case, I think the numbering that appears on the list here should be preserved. That is, when the document goes in evidence, simply leave the same number on it and strike off the marks for identification, so that this will (229)

continue to be an accurate index and list of the Government's exhibits in evidence. In the event that anything is withdrawn or excluded, it can simply be marked off here accordingly, and it may leave some gaps in numbering, but I think that we will still have a much more accurate and convenient record of identification if it is done that way, rather than trying to fill in the gaps by re-numbering subsequent exhibits. And I should like to proceed in that fashion if that is agreeable to the Court.

Mr. Davis: If the Court please, I have every sympathy with Mr. Wright's desire to expedite the manner in which he introduces his proof. I do not think I understand what it is he wants to do. Exhibit No. 6 on his list here, for instance, is interrogatory 50-A addressed to Loew's. Now, if that is to be in evidence I think it must be put in the record right now in the presence of the Court. I do not understand that we propose to build up out of the presence of the Court a synopsis of exhibits which the Court will then treat as having been introduced before it. It seems to me clearly the basis for anything he wants to extract from these interrogatories is the tender of the interrogatory and the answer to it, which,

of course, pro tanto, constitute an admission on the part of the answering defendant, and is admissible in evidence against it. But we shall do very much, I think, if we will proceed in the customary order than if we try to short-circuit it. (230)

Mr. Wright: I was not suggesting any short circuiting in the offering. I think what I am trying to do will be perfectly clear as soon as I start to do it.

We shall follow the order of the outline in my opening statement of offering the documents, and, for example, we shall first offer now the documents that are identified on this list as answers to interrogatories by the defendants and their admissions of fact. Those are described on the list here at pages 1 through 97, and the numbers that they carry for identification are 6 through 150 inclusive. I shall, of course, offer these at this time, and I assume that the court will make a ruling on each of the identified exhibits.

All that I am merely suggesting is that, in order to make the ruling, it is not necessary to pass the exhibits back and forth physically at this time or even to have them physically marked simultaneously with the ruling; that that may be done outside the presence of the court.

Judge Hand: Why isn't that so?

Mr. Davis: I do not see that that is possible at all. I think the exhibit has to be separately offered and has to be separately marked. If there is an objection it will have to be ruled on as such. I do not think the court, if an exhibit be offered before it, which bore the number 9 and which pur- (231)

ported to be a list of Paramount theatres, would, in such a contingency, rule thus and thus. I do not know any way in the world in which these exhibits can be made part of the record unless they are offered seriatim; not that "I offer exhibits identified as number 6 and number 123," but offer it seriatim. It may not require any of this deprecated passing backwards and forwards. We won't ask counsel to turn around and show them to us one by one. I really don't know

any way to try a documentary case except to tender the document and have it marked in or out of the case, as the case may be.

Judge Wright: Have the defendants copies of all these?

Mr. Caskey; No, sir.

Mr. Wright: Now just a minute. As far as the interrogatory answers that I have just offered, the defendants all have copies of those, because those are copies of answers that they themselves furnished.

Mr. Davis: Wait a moment. You mean they have answers of their individual responses?

Mr. Wright: Yes.

Mr. Davis: We have no answers of each others responses, which is what I take it Mr. Caskey means.

Mr. Caskey: That is correct.

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Mr. Wright: As to that, that is true.

Mr. Caskey: We have never seen them.

Mr. Wright: I think the thing will shake itself as we actually proceed.

Judge Hand: You proceed.

Mr. Wright: With reference to item marked number 6 for identification, listed on the first page, and number 7, those may be marked as withdrawn because we find on checking that they are duplicated in Exhibit 48, that is, they appear later on as a part of another exhibit. So 6 and 7 may be marked withdrawn.

Mr. Davis: Are they withdrawn or simply not offered?

Mr. Wright: That is a distinction that escaped me. They are both, I should say; they are withdrawn and not offered.

Exhibits 8 and 9 we offer in evidence. What they are is apparent on the description there.

Mr. Caskey: May we see them, please?

Mr. Raftery: May it please the Court, when Mr. Wright says they are offered, they are offered against which defendants?

Judge Hand: They are offered against which defendants?

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Mr. Wright: Today, if the Court please, everything that we offer will be offered against all defendants. Of course its admissibility as to those who did not furnish it will depend, I suppose, on an ultimate decision as to whether or not there is a conspiracy, but the only determination that needs to be made now is whether it is admissible against anybody for any purpose.

Mr. Seymour: What about exhibit 1? I assume that will be the first one offered.

Mr. Wright: I said in my opening statement we would proceed to offer first the interrogatory answers and the admissions of fact, and that is why we are proceeding in this way.

Mr. Raftery: On behalf of the defendants Universal group and United Artists Corporation, we object to the offer just made as not binding on either.

Mr. Frohlich: The same objection is made with respect to Columbia.

Mr. Caskey: May we have an opportunity to examine them?

Mr. Wright: Certainly. Examine them at any time.

The Court (Judge Hand): We will admit it and give you an exception. Of course, if it is not connected, if it really is not connected in the end, there is no proof of this conspiracy, why, it won't count.

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Mr. Proskauer: May it be understood—

Judge Hand: We are not really going to have all these different objections. It seems to me it would be intolerable.

Mr. Proskauer: In line with what your Honor is saying, may it be understood that these objections inure to the benefit of all the defendants, so that we won't have to repeat them.

The Court (Judge Hand): I don't see why not.

Mr. Proskauer: And that we are reserving our objection to all of these things on the fundamental ground that there is no proof of conspiracy which makes them relevant or compe-

tent against any other defendant than the one who is claimed to have made the admission.

Judge Hand: Yes.

Mr. Proskauer: And in that connection may I also suggest to your Honor that, of course, the alleged description of these interrogatories appearing in the copies, "Exhibits for Identification," we do not acquiesce in. They are not the exhibits themselves. They contain language of characterization and I should think we ought to be entitled to have it clearly understood that what is being offered is Interrogatory 50-A and Interrogatory 52.

Mr. Wright: That is quite right.

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Mr. Proskauer: And nothing else.

Judge Hand: That is true, of course.

Mr. Wright: The only purpose of the description is for identification only. It obviously does not constitute evidence of any kind in itself.

(Government's Exhibits 8 and 9 for identification received in evidence.)

Mr. Wright: Next, we shall withdraw and not offer Exhibits 10 and 11, as they are contained in Exhibit 118 for identification.

We shall offer Exhibits Nos. 12 and 13 for identification, the National Theatres lists.

Mr. Caskey: With respect to Exhibit 12 for identification, a substitute copy has been submitted to counsel, showing the current position of theatres operated by National Theatres Corporation, and we think that should be offered either with the proposed exhibit or in substitution therefor.

Mr. Wright: In due course, the current list will be offered. This answer gives the picture as it was in 1939. We are offering both.

Judge Hand: Overruled. Exception.

Mr. Raftery: Mr. Wright, that is 12 and 13?

Mr. Wright: 12 and 13.

Mr. Davis: May I ask whether the stenographer is mark-
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ing these?

Mr. Wright: They are already labeled for identification.

Mr. Davis: No, but they do not bear the stamp of the clerk as having been made a part of the record.

Mr. Wright: The clerk, I suppose, will stamp them as they are laid out here.

Mr. Caskey: If your Honors please, I should like to be heard on this matter. We have been unsuccessful litigants in a case in Chicago in which a controversy arose as to whether or not the document had been admitted into evidence and I feel we would not discharge our duty to our client unless the particular and precise document that is to go into evidence is currently marked by the clerk or by the stenographer, so that there can be no question as to what is in this record and what is not in it; and we are interested in saving time, but we are also intersted in the proper representation of our client and in making a record here that we can understand. I respectfully request that these documents to go into evidence be marked.

Mr. Wright: They all have the numbers marked on there and I think the only further marking that needs to be done is the striking off of the words "for identification."
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Mr. Caskey: They should certainly bear some other symbol than that.

Mr. Wright: We shall withdraw Exhibits 14 and 15.

(Government's Exhibits 12 and 13 for identification received in evidence.)

Mr. Wright: We shall withdraw Exhibits 14 and 15 as they are duplicates contained in Exhibit No. 100 for identification, and will also withdraw Exhibits 16 and 17 because they are contained in Exhibit 97 for identification; and we shall withdraw Exhibits 18 and 19 because they are contained in Exhibit 88 for identification.

And we shall next offer the exhibit number——

Judge Goddard: How many has the clerk marked?

Judge Hand: He has marked only four.

The Clerk: That is all that were admitted.

Mr. Wright: Four are offered and in evidence. We shall next offer Exhibit No. 20 for identification, which is described there on pages 5 and 6, interrogatory answers of Fox, numbered 1 to 20 inclusive, filed in 1939.

Mr. Caskey: Now, with respect to this offer, since the date of the compilation of that answer, the certificate of incorporation has been amended so as to restate the purposes of the corporation, and I hand to Mr. Wright an amended answer and ask that it either be marked as a part of the

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exhibit or in substitution for it.

Mr. Wright: I would suggest that these two sheets that Mr. Caskey handed me——

Mr. Davis: Mr. Wright, we cannot hear a word you say.

Mr. Wright: I think the best thing to do with these two sheets that Mr. Caskey has handed me is to merely mark them Exhibit 20-A for identification and to have them offered and admitted with 20.

Judge Bright: Why mark them for identification?

Mr. Wright: Well, in evidence as 20-A. Then I suppose a note should be made on the list as to what 20-A is, amended certificate.

(Government's Exhibit 20 and 20-A for identification received in evidence.)

Judge Hand: What is it, an amended answer?

Mr. Wright: it is simply an amendment to the certificate. The charter is only a part of the interrogatory answers that are contained in Exhibit 20.

Mr. Caskey: Mr. Wright, how much have you offered, all of 20?

Mr. Wright: Yes.

Mr. Caskey: Is it your purpose that twenty-four documents are to have the same exhibit number?

Mr. Wright: They were given the one exhibit number (239)
because they were all given to us as one document. We have marked the interrogatory answers as we found them in this documentary form in which they were filed. That is why those twenty-four answers are given one number, otherwise it would mean tearing the answer apart.

Mr. Davis: They ought to be physically affixed to each other.

Mr. Wright: They are physically affixed.

Mr. Caskey: In that connection, then, we have what we understood to be in pursuance of the Government's request, prepared supplemental answers to these interrogatories, bringing them down to date. I had not anticipated that they were to be offered in bulk, but if they are, we are prepared to hand to counsel the amended answers in bulk.

Mr. Wright: I think we have on this list, if the Court please, both the 1939 answers and then later the 1945 supplementary or amended answers, and I think we can take care of that at the proper time.

Mr. Caskey: This is different material.

Judge Hand: They are under these sub-numbers?

Mr. Wright: They supplement, I take it, the information that was contained in this Exhibit 20 with reference to the (240)
matters covered by these interrogatory numbers here. That information was asked for in 1939.

Judge Hand: You mean they are on this page 113 or 114?

Mr. Wright: Oh, no.

The Court: On that list, where are they?

Mr. Wright: If the Court please, those 1945 answers occur later on, in the list. We grouped in the list for convenience all of the 1939 answers first. Then the 1945 answers appear in the list substantially further along. I don't think it makes any difference whether or not these 1945 supplements are offered directly following this material or at a later time as long as they are clearly identified.

Judge Hand: You mean they appear on page 10?

Mr. Wright: Page 10 contains the 1945 answers of Fox as to certain distribution data, and then there is an admission of facts but then over on page 14——

Mr. Caskey: Oh, Mr. Wright, you could not have listed it because you never had it. We haven't been able to get it ready over the week-end.

Mr. Wright: Quite obviously it is not on our list then. We did have answers on the National Theatres organization listed on page 14 there.

Judge Hand: It is going to be bad for the stenographer (241)
to be taking down all these current remarks here that are qualified by something else. Why don't you straighten out your record?

Mr. Wright: I think the best way to straighten out the record would then be to have these documents he has just handed me marked, and I will read the description into the record as they are marked. This 20-B——

Mr. Davis: You have offered 20, and 20 has been marked?

Mr. Wright: 20 and 20-A have been offered and received. 20-B——

Judge Hand: These are to be 20-B?

Mr. Wright: I was going to mark them as they are physically separated here, giving each one a separate designation. 20-B is a supplemental answer dated September 27, 1945, by Fox to Interrogatory 2.

(Marked Government's Exhibit 20-B in evidence.)

Mr. Wright: And 20-C is a two-sheet schedule which supplements the Fox answer to Interrogatory 2.

(Marked Government's Exhibit 20-C in evidence.)

Mr. Wright: And 20-D is a three-page supplement dated September 27, 1945, by Fox to Interrogatory No. 3.

(Marked Government's Exhibit 20-D in evidence.)

Mr. Wright: Then E will be a two-page supplement bear-
(241-A)
ing the same date, by Fox, to Interrogatory No. 4.

(Marked Government's Exhibit 20-E in evidence.)

Mr. Wright: F is a four-page supplement filed by Fox, bearing the same date, to Interrogatories 5, 6 and 7.

(Marked Government's Exhibit 20-F in evidence.)

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Mr. Wright: And 20-G is a supplement bearing the same date by Fox covering interrogatories 8, 9, 10 and 11.

(Marked Government's Exhibit 20-G.)

Mr. Wright: 20-H will be a supplement consisting of two pages by Fox to interrogatories 12, 13 and 14, same date.

(Marked Government's Exhibit 20-H.)

Mr. Wright: 20-I is a two-page supplement by Fox of the same date to interrogatories 15 and 16.

(Marked Government's Exhibit 20-I).

Mr. Wright: 20-J will be a single-page supplement, same party, same date, to interrogatory 17.

(Marked Government's Exhibit 20-J.)

Mr. Wright: 20-K, a single-page supplement of the same party, the same date, to interrogatories 18 and 19.

(Marked Government's Exhibit 20-K.)

Mr. Wright: 20-L is a two-page supplement by the same party, same date, to interrogatories 20, 21, 22, 23 and 24.

(Marked Government's Exhibit 20-L.)

Mr. Wright: Now, the next item on the list there, 25, 26 and 27, we shall not offer at this time because I think most of the data that is contained there on which we will need to rely is reflected in later supplemental theatre lists that were

filed in 1945. You will note that what this is is a series of
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monthly reports indicating changes, and I do not think it is necessary to show all the monthly changes in the record. We will simply show the situation at the end of the period and at the beginning.

Judge Hand: What are these, 25, 26, 27 and 28?

Mr. Wright: Those are monthly reports on the Fox Theatre position which were submitted pursuant to the consent decree which showed the changes monthly. I say, I do not think it is necessary to encumber the record with the monthly changes because we do have a 1945 list which shows the net results, so I am not offering those at this time. There may be a specific report or so that we might wish to offer later on.

Mr. Caskey: I think your Honor said 28 also. I think the documents not offered only go through 27.

Mr. Wright: That is right, 25, 26 and 27 are the ones not offered.

We will now offer 28 and 29, which are described at the top of the page there.

Mr. Caskey: I have with respect to 28 and 29 the supplemental answers and the same information for the years since 1939.

Mr. Wright: I do not recall that we asked for those.

Judge Hand: 28 is admitted and 29 is admitted.

(Government's Exhibits 28 and 29 for identification received in evidence.)

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Mr. Wright: I take it that this is material to the defendants' desire to have in the record at some point anyway, and if they do we might as well put it in now as far as I am concerned.

Mr. Proskauer: Do not attribute that desire to me.

Mr. Davis: Or me.

Mr. Wright: I think it would be best to defer offering this material that has just been handed to us because it may be that we may not want to use it.

Mr. Caskey: The point, your Honor, is that he is offering answer to interrogatory 25 which shows certain data as to motion pictures produced from the years 1930-31 to 1937-38, and he terminates his offer of proof seven years ago. Now, if it has any relevancy at all, we think that at this time and in the same place in the record there should be evidence as to the relative cost of the pictures which have been produced during the last seven years.

Mr. Wright: If the defendants wish to put it in I will be glad to put it in here. It is simply a matter of convenience.

Judge Hand: Put it in.

Mr. Wright: These, I take it, Mr. Caskey, are supplements to 30, are they not, rather than 28 or 29?

Mr. Caskey: No, sir, they are exactly the same material (245)
as with respect to interrogatory No. 25——

Mr. Wright: 28 is the exhibit under discussion.

Mr. Caskey: That is right, feature pictures grouped into four categories by the years, showing the title, stars, and names of distributor.

Mr. Wright: All right. The Fox supplement to interrogatory No. 25 for the 1938-1939 season will be marked Exhibit 28-A.

(Marked Government's Exhibit 28-A.)

Mr. Wright: And for the 1939-1940 season it will be marked Exhibit 28-B.

(Marked Government's Exhibit 28-B.)

Mr. Wright: And for the 1940-1941 season, Exhibit 28-C.

(Marked Government's Exhibit 28-C.)

Mr. Wright: And for the 1941-1942 season, Exhibit 28-D.

(Marked Government's Exhibit 28-D.)

Mr. Wright: For the 1942-1943 season it will be marked Exhibit 28-E.

(Marked Government's Exhibit 28-E.)

Mr. Wright: And for the 1943-1944 season it will be marked Government's Exhibit 28-F.

(Marked Government's Exhibit 28-F.)

Mr. Wright: And for the 1944-1945 season—it seems to me we are getting into the future here—mark that 28-G.

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(Marked Government's Exhibit 28-G.)

Mr. Wright: Then we will offer also 29, which is the answer of Movietone News, a Fox subsidiary.

Judge Bright: We have had marked 28 and 29 here.

Mr. Wright: 28 is the answer to that interrogatory 26 that was filed by Twentieth Century-Fox Film, the parent; and 29 is the answer to the same interrogatory filed by Movietone News, Inc., its wholly-owned subsidiary.

Judge Hand: You are marking these A, B, C, D and so on under 28, aren't you?

Mr. Wright: Those were the supplements.

Judge Hand: Yes, I know that.

Mr. Wright: But now I am back on the regular list here. 28-G was the last supplementary one.

Judge Hand: That is the last I have got.

Mr. Wright: Well, I am now offering 29, which is the answer of Fox Movietone News to interrogatory 26.

Judge Hand: You also offered 28^1, didn't you?

Mr. Wright: 28 itself, yes. That was offered and received.

Mr. Caskey: Mr. Wright, how do we distinguish between the two number 28's?

Mr. Wright: That really should not be. The 28^1 should appear only in the footnote there, and really not with the 29. I think that is an error in the way the list is set up. If you

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will just strike out 28^{-1} I think you will solve the problem.

Mr. Caskey: Does 29 now consist of both the answers of Fox and the Movietone News showing the number of sound stages——

Mr. Wright: 28 is the answer of Fox to that—contains the answer of Fox to interrogatory No. 26; and 29 contains the answer of Movietone News to the same interrogatory.

Judge Hand: So 28[1] goes out, does it?

Mr. Wright: Yes. I think that notation there, although Fox's answer to 26 is included in 28.

Judge Hand: 29 is received.

(Government's Exhibit 29 for identification received in evidence.)

Mr. Wright: Next we will offer Exhibit 30 for identification; and I should say Exhibits 30 through 39 are all Fox's answers concerning distribution of Fox features filed in 1939, and we will offer those as a group.

Mr. Proskauer: May it please your Honors it is my desire to lodge special objection which will be typical to Exhibit 30. I am embarrassed by the offer of a lot of things together, but I am confining my attention for the moment to Exhibit 30. That purports to be a list of feature pictures distributed by Fox during the 1936-1937 season with total film rentals received and information about five pictures for Atlanta, Kansas City, Philadelphia and New York. (248)

I am objecting to that on the ground of irrelevancy as well as incompetency, as far as we are concerned. It is on that kind of isolated, unrelated information that these charts have been built up, and I am making the point substantively and not technically. A case cannot be built up by that process of selectivity and then base a lot of charts on that kind of partial information.

Judge Hand: Overruled.

Mr. Caskey: I press the objection with such ability as I have: These pictures and these cities were arbitrarily selected by the Government. As far as the reasons for the selection of the five pictures out of a list of 60 which we distributed that year we don't know. Nor do we know why they picked the four cities. But it must have been in the

hope that some picture would be developed out of that material which would then be said to be typical of the whole. We do not believe it is typical of the whole, and we think it should not be received without at least preliminary proof that it is.

Judge Hand: Overruled.

Mr. Davis: So that I may keep my notes correctly, do I understand that Mr. Wright is introducing as one exhibit what is identified on this list by identification 30 to 37?

Mr. Wright: No indeed, Mr. Davis. I merely offered 30 through 39 together, because they all are Fox's answer to the '39 interrogatories relating to the distribution of its pic-
(249)
tures. They are separately numbered and will go in as separate exhibits.

Mr. Davis: I misunderstood you. I thought you were offering them in bulk. And they preserve, do they not, at the hands of the clerk the same numbers that they were given when marked for identification?

Mr. Wright: Precisely.

Mr. Proskauer: By confining my objection, as I did, to Exhibit 30, I hope it is clearly understood that I am not waiving it as to the remainder of these exhibits which Mr. Wright is offering in bulk. It goes to all of them.

(Government's Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 for identification received in evidence.)

Mr. Wright: Then we shall offer Nos. 40 and 41, 42 and 43, which are 1945 answers of Fox relating to the distribution of its films for the 1943-1944 season.

Mr. Caskey: I think we will make speed if we go a little slower. 40 is offered?

Mr. Wright: Yes.

Mr. Caskey: Now, there is no objection. But when it comes to 41 there is an objection.

Mr. Wright: Well, let us consider that separately. Then 40, I take it, is admitted.

Judge Hand: Yes.

(250)

(Government's Exhibit 40 for identification received in evidence.)

Mr. Wright: I offer 41.

Judge Hand: Now I understand that 30 to 40 inclusive are offered and we have admitted?

Mr. Wright: Yes.

Judge Hand: All right. Go ahead.

Mr. Wright: I am now offering 41, and Mr. Caskey wants to make an objection to that interrogatory.

Mr. Caskey: This is objected to on the ground that—I will state first what it is. This is a chart, a series of charts prepared at the Government's request showing the first-run exhibitors; there are separate sheets for each city in the United States having a population of 25,000 or more, showing with respect to one picture the first-run exhibition in all of those cities, one picture. Then with respect to a portion of the cities, the first and second runs. With respect to another group of cities, the first, second and third runs; and finally with respect to four cities, the first, second, third and fourth runs. Now, we apprehend that from this limited amount of material some inference of pattern of distribution of all of our pictures in the United States, the entire United States, will be made. I think it is not competent for that purpose; there is no basis for the selection of 25,000, utterly arbitrary; there is no basis for the selection as to first runs,

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second runs, third runs and fourth runs. It is purely arbitrary. It is a purely arbitrary demand made upon us. We think that this material will not furnish any basis for any statistical study that will be trustworthy.

Judge Hand: Overruled.

Mr. Caskey: And I call attention to the fact that the picture that was selected was deliberately selected as the one which had had the greatest revenue-producing quality; so that on its very face it is an arbitrary selection.

(Government's Exhibit 41 for identification received in evidence.)

Mr. Wright: I will now offer—

Mr. Davis. What is the last tender?

Mr. Wright: 41.

Mr. Davis. That has been admitted?

Judge Hand: Yes.

Mr. Wright: Yes.

We will next offer 42 and 43, which are material of the same class as 41, separately bound.

Mr. Caskey: No. 43 is not.

Mr. Wright: That is correct. 42 we will offer. It is the same class of material as 41, separately bound.

Mr. Caskey: Same objection.

(252)

Judge Hand: Overruled.

(Government's Exhibit 42 for identification received in evidence.)

Mr. Wright: And I will offer 43—

Mr. Caskey: Just a minute, Mr. Wright. 41 and 42 are exactly the same thing subdivided into two volumes, is that correct?

Mr. Wright: I think so, right.

And we now offer 43, which is information furnished by Fox of a slightly different character. It is described in the exhibit. It deals with film rentals paid during the 1943-1944 season, and receipts from theatre admissions during approximately the same season.

Mr. Caskey: Well, the vice of this printed book—it has an alluring attractiveness but it is just plain wrong. The exhibit, as I recall it, is the film rental paid by National Theatres Corporation during the year 1944. My memory may be at fault. I think not.

Mr. Wright: The description may be inaccurate, but whatever it is it speaks for itself. It states film rental payments made by National Theatres Corporation in respect to

theatres in which it or its subsidiaries own a financial interest or in which it or its subsidiaries negotiated film licenses, including shorts and newsreels for 53 weeks beginning December 26, 1943, and ending December 30, 1944; and that (252a)
replies to interrogatory No. 12. And interrogatory No. 13 covers the same period; so it is true that that description in the list is incorrect in referring to the season. It should refer to approximately the fiscal year 1944, which is a few months difference on each end from the 1943-1944 season. (253)

Judge Hand: What are you talking about, Interrogatory No. 13 now?

Mr. Wright: 12 and 13, both. The period covered by the answer is actually from December '43 to December '44, instead of as suggested in the description, September 1, 1943 to September 1, 1944.

Mr. Davis: Did I hear correctly that that exhibit was of the National Theatres?

Mr. Wright: Yes, that is correct.

Mr. Davis: If so, then I wonder what is the reason for the substitution of the words "Theatres in circuits affiliated with Fox"? Why don't we use the theatres to which the exhibit refers?

Mr. Wright: I suppose that is a matter of artistic language. Actually I suppose National Theatres may be fairly described as a theatre circuit affiliated with Fox, since Fox owns 100 per cent of it. But obviously we are not offering the description. We are offering the exhibit.

Mr. Proskauer: As I understand it, this column headed "Description" is not going in evidence at all?

Mr. Wright: Of course not.

Mr. Proskauer: It is just a shorthand method of identifying an exhibit, which is the only thing before the Court?

Judge Hand: That is true. (254)

Mr. Wright: Exactly.

Judge Hand: 43 is received.

(Government's Exhibit 43 for identification received in evidence.)

Mr. Wright: Then I shall offer No. 44, which are admissions of fact furnished by Fox in 1945 which relate to the distribution of the films first-run in the cities over 100,000.

Mr. Caskey: There again, Mr. Wright, the description—is this only for four seasons?

Mr. Wright: The seasons in question are 1936-1937; 1939-1940; 1940-1941; 1941-1942, and 1943-1944. This is a shorthand description there which is somewhat less accurate than what I just stated.

Mr. Caskey: Well, I can't read shorthand, but the description here would seem to embrace something more than what is being offered.

Mr. Wright: I think it is perfectly clear from the exhibit itself.

Judge Hand: It is received. Now what next?

(Government's Exhibit 44 for identification received in evidence.)

Mr. Wright: We will also offer 45, which is the portion of the 1939 answers of Fox which deal with the history of the development of the business.

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Any objection?

Mr. Caskey: None.

(Government's Exhibit 45 for identification received in evidence.)

Mr. Proskauer: Your Honors, I do not want to be overtechnical here, but Mr. Wright addressed a general question to this table, "Any objection?", and Mr. Caskey answered "No." I do not want to have any misunderstanding about it that I am reserving my objection, which is fundamental, and which the Court has taken under advisement, overruled,

and I am not repeating it with respect to each one, but I do not want to be put in a position as though I were waiving it.

Mr. Wright: No question about that.

29, I believe, which appears next on the list here has already been offered and received, the Movietone News answer.

Mr. Caskey: Now, Mr. Wright, when you introduced that I understood you only introduced that much which related to sound stages. We did not see the exhibit you handed up, so I don't know.

Mr. Wright: Well, let us take a look at it. 29 actually contains in it as a single document the answer of the Movietone News Interrogatories 25 through 38.

Mr. Caskey: How much is being offered?

Mr. Wright: We offer the entire exhibit.

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Mr. Davis: This is another 29? Are you still on it?

Mr. Wright: That is Exhibit 29 for identification.

Judge Goddard: You have two exhibits for identification marked 29?

Mr. Wright: No, there is only one exhibit, your Honor; it appears twice on the list because it refers to different interrogatories. I think the reason it was listed twice there was because whoever was making up the list was trying to preserve a sequence of separating or putting the production answers after the history answers, and where he had an exhibit that contained both types of information, he broke the list here, although the single document which contained both types of information was not broken. It just consists of one exhibit.

Judge Hand: Now, Interrogatory 26 has already been offered. Interrogatories 27 and 8 have not been, as far as I can see.

Mr. Caskey: What he has handed me are answers to Interrogatories Nos. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39.

Judge Bright: All by Movietone?

Mr. Caskey: All by Movietone and all in evidence quite unbeknown to me. They are not listed in this book.

Mr. Wright: Well, if there is any objection to any of the other parts of the answer going in, I suppose that can be
(257)
removed. But, in any event, we are perfectly willing to offer the exhibit as it is containing those answers, and the list here should be corrected to show what it does contain. I think the reason those are not listed is that most of these answers are of a negative character, and that is why I think we listed them the way we did. That is, the answers to 30 through 39 are simply, say, none in each case, and that is why I think they were omitted from the list.

Judge Bright: How about the answer to 29, answer to Interrogatory No. 29?

Mr. Wright: The answer to Interrogatory No. 29?

Judge Bright: Yes.

Mr. Wright: As contained in Exhibit 29?

Judge Bright: Yes.

Mr. Wright: It simply says, "State the approximate number of persons now employed by defendants and its subsidiaries in the production of motion pictures within the United States." The answer is, "Approximately 150 persons are now employed by defendant in the production of motion pictures."

Judge Bright: Well, are you offering that?

Mr. Wright: We are not offering in evidence any more than the answers which are listed here, but they are of so little significance that it does not make any difference so far as we are concerned for the purposes of the record whether
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all of the answers go in or not. We simply did not want to mutilate the document as it came to us, because I assume that the defendants might be interested in having that other data in the record that is here. But as far as what we would rely on, we would rely only on the part of the answer that appears in the list here.

Judge Bright. What are you offering?

Mr. Wright: We are offering the exhibit as it now stands with the complete——

Judge Hand: What exhibit, 29?

Mr. Wright: Exhibit 29 which contains the answers of Movietone News to Interrogatories 25 through 39 inclusive.

Judge Bright: Then we will have to change the book to add 29 to 39 inclusive, page 14.

Mr. Wright: Yes, it should be changed to note that it does contain that additional data in it, although, as I say, it was omitted from the description because there is no particular significance in it.

Judge Hand: I do not understand what you are talking about. You are putting in 29, and what does it contain? It has already been put in, hasn't it?

Mr. Wright: 29 contains the answer filed by Movietone News, Inc.

Judge Hand: Just a minute. 26 has already gone in. I mean the answer to Interrogatory 26 has already gone in? (259)

Mr. Wright: That is right. But that is contained in this Exhibit 29 which also contains the answer of the same company Movietone News to interrogatories Nos. 25 and 39 inclusive.

Judge Hand: 25 and 39?

Mr. Wright: 25 through 39 inclusive.

Judge Hand: Mr. Caskey, is this all right as far as you are concerned?

Mr. Caskey: Yes. I was just surprised it was in evidence. We have no objection. Mr. Wright says the answers to the interrogatories show that the company has not engaged in the practices which we are charged with, and for that reason it should go in evidence.

(Government's Exhibit 29 for identification received in evidence.)

Mr. Wright: Before we leave 29 I think this supplementary answer of Movietone News furnished by Mr. Caskey

should be marked and is offered as 29-A. That contains supplementary answers by that company to interrogatories 28, 29 and 30 as of September 27, 1945.

(Marked Government's Exhibit 29-A.)

Mr. Wright: Then we will offer the corporate chart of National Theatres Corporation's holdings, which has been marked as Exhibit 21 for identification. Now, that is the answer to interrogatory 17 of the '39 interrogatories.
(260)

Mr. Caskey: May I see that a minute, Mr. Wright?

Mr. Wright: Yes.

Mr. Caskey: This is the 1939 list. Now, you have been furnished with an up-to-date one.

Mr. Wright: We are offering with that No. 22 for identification which, I believe, is the list furnished with your letter of June 26, 1945, which states that is correct as of May 15, 1945.

(Government's Exhibits 21 and 22 for identification received in evidence.)

Mr. Wright: Then we are offering 23 and 24 for identification which are also National Theatre's answers showing the theatres in which it had formerly had an interest and in which the interest had been discontinued. 23 relates to the wholly-owned, and 24 to the pooled theatres.

Mr. Caskey: This is 1939 again?

Mr. Wright: That is correct.

(Government's Exhibits 23 and 24 for identification received in evidence.)

Mr. Wright: Now we will begin on the Loew answers to the 39 interrogatories.

Judge Hand: Just a moment, if you please.
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Mr. Wright: I will first offer Exhibit 46 for identification, which contains the answers of Loew to interrogatories 1 to

24 inclusive, largely being concerned with the organization of the company.

(Government's Exhibit 46 for identification received in evidence.)

Mr. Davis: There is genealogy in this, if the Court please, but we don't object to it.

Mr. Wright: The only reason we offer it is because it is in a very convenient form and would probably be offered by the others anyway.

Judge Hand: I think it will probably be like a great deal of this stuff, like most of the stuff, for instance, in the Aluminum case, covering whole walls of the courthouse, and nobody ever looked at it.

Mr. Wright: Of course we hope that fate won't befall most of this material. We have stripped down this case quite materially to what you see here; that is, we are not offering by any means all the documents that are available.

We will also offer No. 47, which is Loew's 1945 supplement to interrogatories 15, 17 and 18.

Mr. Davis: May I see that a moment? You offer these schedules with the covering letter, I take it?

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Mr. Wright: Yes.

Mr. Davis: 15, 17 and 18, is it?

Mr. Wright: 1945 supplement to 15, 17 and 18.

Mr. Davis: Yes.

(Marked Government's Exhibit 47 in evidence.)

Mr. Wright: Then we will offer No. 48, which contains interrogatory answers to Nos. 55, 56, 57, 58, 51 and 53.

Mr. Davis: Will you wait just a moment, Mr. Wright?

Mr. Wright: Surely.

Mr. Davis: They are all a part of the same answers to interrogatories? You are just offering separate answers?

Mr. Wright: They are all contained in one exhibit, which is marked No. 48 for identification.

Mr. Davis: I understand: You are offering the answers to Interrogatories 55, 56, 57 and 58 in that exhibit?

Mr. Wright: And 51 and 53.

Mr. Davis: 51 and 53.

(Marked Government's Exhibit 48 in evidence.)

Mr. Wright: We will withdraw Exhibit 49, which there again is monthly theatre reports, and will offer No. 50, which covers Loew production answers for 1939.

Mr. Davis: Is that in a separate answer to interrogatories, separate interrogatories, or is it contained in this——
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Mr. Wright: 50 contains the answers to 25 through 39 inclusive.

(Government's Exhibit 50 for identification received in evidence.)

Mr. Wright: Then we shall offer exhibits containing the Loew answers with respect to distribution, which were filed in 1939 and which are marked 51 through 55 inclusive. I believe all contain similar material. 51, I think, is somewhat—I will offer 51 first. That contains the answers to Interrogatories 40 through 46.

Mr. Caskey: We have the same objection that we urged with respect to the Fox answers, to similar questions, that they are not representative and typical.

Mr. Davis: We join in that motion.

Judge Hand: Overruled.

(Marked Government's Exhibit 51 in evidence.)

Mr. Davis: Just a minute, Mr. Wright, will you please. My attention has been called in connection with the tender of Exhibit 50, which, you said, contained answers 25 to 39 inclusive. I am reminded it does not contain all of them; the description is inaccurate.

Mr. Wright: My description may be inaccurate, my oral one, but I see that the list itself does not list a part of it; that the only interrogatories which are in 50 are those which
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are in the list here. I can check that in a moment. I think the mistake was mine but I will clear it up in a moment.

50 contains the answers to 25, 26, 27, 28, 29 and 30, which are not mentioned on our list——

Mr. Davis: You have offered them, nevertheless.

Mr. Wright: 31, 32 and 33 are also contained there. 34, 36 and 37.

In this case our offer is confined to the data, I think, which is listed on the list. If the defendants wish to have the other data that is contained there actually received in evidence, we have no objection. Again, the only reason these answers were listed was because those are the only ones in the exhibit upon which we would rely, but we have no objection to the——

Mr. Davis: I haven't any choice, Mr. Wright, as to what is offered and what is not offered, if I understand distinctly just what is offered. I don't want any dispute hereafter as to what is in and what is out of the record.

Mr. Wright: Yes.

Mr. Davis: And I am not suggesting to you that you include or omit.

Mr. Wright: I simply wanted to avoid, if I could, physically mutilating the interrogatory in the form in which we

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got it from you, because I assume that you might wish to have the other data contained in the answers that we do not specify in our printed list.

Judge Hand: Are you offering the answers to 29 and 30?

Mr. Wright: No, we are not. We are only offering the answers that are written on here.

Judge Hand: All right. So you are offering as 50, the answers to interrogatories 25, 26, 27, 28, 31, 35, 38 and 39?

Mr. Wright: Correct.

Mr. Davis: Very good.

Judge Hand: That is received.

Mr. Wright: 51, I believe, we covered. 52, 53, 54 and 55 are all answers to interrogatories 48, which happened to

be separately bound, and each one relates to a different city. We will offer those together.

(Marked Government's Exhibit 52 in evidence.)

Mr. Wright: We are offering 53, 54 and 55 also.

(Marked Government's Exhibit 53 in evidence.)

Mr. Davis: It is Mr. Caskey's objection, in which we join, that they are selected cities and have no bearing and relevance to the overall picture the Government asserts.

(Marked Government's Exhibits 54 and 55 in evidence.)

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Mr. Seymour: Mr. Davis has made an objection to this exhibit, and I want it perfectly clear that any objection made by any defendant will be deemed made by all and the ruling applicable to all, because I should object to this as well as many others.

Judge Hand: I think that will save time and preserve your rights. Of course it is my practice, and has always been, to admit everything in a suit of this sort unless, as they used to say in the elevated railroad cases, it was more than five blocks from the Bowery.

Mr. Wright: Then we will offer 56 for identification, which are Loew's 1945 answers to the 1945 interrogatories 1 through 13—which are, as stated on the list there, 1, 2, 3, 4, 5, and 12 and 13.

Mr. Davis; For the season of 1943-1944?

Mr. Wright: It all relates to 1943-1944.

(Marked Government's Exhibit 56 in evidence.)

Mr. Wright: Then we will offer this Exhibit 57, which are also all Loew's answers to the 1945 interrogatories, which have been subdivided into 38 subnumbers in accordance with the volumes in which, I believe, they were furnished to us and which are described here on pages 21, 22 and 23 inclusive.

Mr. Davis: Have you that document before you?

Mr. Wright: Here they are. Each one bears the number 57 and then a dash. Here is 57-1.
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I want to correct the record, if I said 38. There are 49 of those volumes, 57-1 through 57-49. I think there is one for each State and the District of Columbia.

Judge Bright: That covers pages 21, 22 and 23 of your printed book?

Mr. Wright: Yes, sir.

Mr. Davis: If the Court please, there are schedules which apparently were prepared by my clients for our use and for delivery to the Government in answer to its request. They were delivered, I think, with the understanding that any errors which might be discovered on a rechecking could be corrected, and I should not want to be textually bound by them; but I should also say that anybody who wants to go through these particular exhibits and extract the juice from them has quite a few days' work ahead of him.

Judge Hand: Yes.

Mr. Wright: As far as any of these exhibits are concerned, at any time that an error appears, they can, of course, be corrected.

Judge Bright: Is there any juice in them?

Mr. Davis: I think most of them, your Honor, are thoroughly barren of juice but I do not want to commit myself
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even on that.

Mr. Wright: Next we will offer—

Mr. Davis: Where are we now?

Mr. Wright: No. 58.

Mr. Davis: Gone through that schedule on page 22, have we?

Mr. Wright: That is right.

Mr. Davis: That is the one the clerk is working on now?

Mr. Wright: That is correct.

Mr. Davis: Then what about 57-4?

Mr. Wright: That is already covered.

Mr. Davis: That is all in that encyclopedia that you have there?

Mr. Wright: That is quite right.

(Marked Government's Exhibits 57-1 to 57-49 inclusive in evidence.)

Mr. Wright: The next exhibit—

Judge Bright: It is 58, isn't it?

Mr. Wright: 58 we are now offering, the admission of facts furnished by Loew, covering the 1943-1944 season.

Mr. Davis: That is 58?

Mr. Wright: That is 58.

Mr. Caskey: Four seasons?

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Mr. Wright: That is correct.

Mr. Davis: How many of those are there? The clerk seems to have quite—is that all one?

Mr. Wright: That is all bound in.

Mr. Davis: I noticed the clerk running his fingers through it, counting them.

Mr. Wright: Of course, I do think there is no need to have the marking done here in the presence of the Court. I think maybe that could be handled outside.

Judge Bright: Your printed book covers more than four seasons, doesn't it?

Mr. Wright: The description there says seasons 1936-1937 through 1943. That is not strictly accurate. There are four seasons covered. The first one is 1936-1937, the next is 1939-1940, the next is 1941-1942, and the last is 1943-1944, and that applies to all the admissions of fact for 1945 wherever you see them in the list.

Mr. Davis: That is in this volume which you marked Exhibit 58?

Mr. Wright: Correct.

Mr. Davis: Maybe the Court might want to see that and see how illuminating it is.

(Marked Government's Exhibit 58 in evidence.)

Judge Hand: We now come to whatever Paramount may contribute to its destruction.

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Mr. Wright: The first item is No. 59, which details the facts about its organization.

Mr. Davis: What are we on, Paramount?

Mr. Wright: That is one that I do not think can destroy it.

(Marked Government's Exhibit 59 in evidence.)

Mr. Wright: 60 and 61 fill in, I think, the other organization interrogatories in the '39 answers as described on page 25, and 62——

Judge Bright: You are offering 60 and 61?

Mr. Wright: Yes, we are offering 59, 60, 61, 62 and 63, which cover the Paramount 1939 organization answers.

(Government's Exhibits 60 and 61 received in evidence.)

Judge Hand: I do not know that it is worth wasting time, but I would join Judge Bright in his inquiry as to what in the world we care about the current indebtedness of Paramount?

Mr. Wright: I don't——

Judge Hand: It is a hard question for you to answer, I know.

Mr. Wright: I would say the reason that is in there is because, again, we wanted simply to avoid any questions that might be raised by tearing apart these things in the form that they were given to us and it was data that we had asked

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for, and it is contained in here with other relevant data, and to us it seemed that we would be less open to criticism if we simply offered it as it had come to us.

Mr. Proskauer: On the contrary, we gave you what you asked for and did not admit it was relevant. I think it is wholly irrelevant.

Mr. Wright: There may be, of course, much of the material which is in here which may never be referred to in the course of argument or briefs.

Judge Hand: That is always so, unfortunately. It isn't true——

Mr. Proskauer: Your Honor means it is always so in one of these Government antitrust suits.

Judge Hand: It isn't true only of them, you will admit, in your large experience.

(Marked Government's Exhibits 62 and 63 in evidence.)

Mr. Wright: Then we will offer 64, which is Paramount's supplementary answer as to its subsidiary corporations as of 1945.

(Marked Government's Exhibit 64 in evidence.)

Mr. Wright: And 64 and 66, which are also answers to 1939 interrogatories, showing the discontinued theatre interests.

(Marked Government's Exhibits 65 and 66 in evidence.)

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Mr. Wright: Then we will withdraw the offer of 67, 68 and 69, the monthly theatre reports.

Mr. Davis: Where are we now, Mr. Wright. Pardon me.

Mr. Wright: We are on page 26 and we have just withdrawn offering Exhibits 67, 68 and 69 for identification.

Mr. Davis: I am glad I got there in time. Everything before that has been offered?

Judge Hand: Wouldn't like you to tempt them to offer it, you know.

Mr. Wright: Then we will offer the Paramount production answers of 1939 which are in these volumes marked for identification as 70 and 71 and 63.

Judge Bright: You are offering 63——

Mr. Wright: Yes.

Judge Bright: And 70 and 71?

Mr. Wright: Yes.

Mr. Seymour: If the Court please, I would like to raise a question about some of these three exhibits, because, while I realize your Honors will take the evidence probably, I wondered whether we could not get some little slicing down of the material. These three exhibits relate in whole or in part to production activities, and it was pointed out to your Honors in the opening that, whereas the complaint talks a

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good deal about a charge of conspiracy with respect to production, there wasn't anything about that in the trial brief. If the Government has abandoned that claim, why should we load the record with exhibits on that subject? If the Government still presses the claim, we need to know that. And may I through the Court ask your Honor to ask Mr. Wright to state whether or not that charge of conspiracy with respect to production is still in the case?

Mr. Wright: If the Court please, certainly the evidence of what was done with respect to interchange of talent, equipment and other phases of production material is in the case. We do not claim that that interchange of production facilities is evidence in itself, that these people have together monopolized production. We do think the evidence of interchange of stars, talent and equipment is relevant and significant as showing the essentially non-competitive nature of the relationship between them; that is, it does have evidentiary value on the issues in the suit.

The Court: We will admit it.

Mr. Seymour: There is just one other question that I would like also to raise on Exhibit 63 in this group of three. That contains Paramount answers as to the cost of producing short subjects and newsreels from 1930 to 1938. Now that

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material was obtained by the Government before the consent decree. The consent decree, in Section 4-B, a provision is still in effect, enjoins these defendants from forcing shorts or news reels. This material was relevant to the original

charge. It seems to me to be out of the case in the light of the continuing provision of the decree. And I raise that question only because if that sort of thing could be eliminated at this stage, it would lighten the load a little bit; but if the Government counsel still wants to press it, I simply call attention to the fact that it seems wholly irrelevant in view of that provision.

Mr. Wright: Its only relevance, if the Court please, is this: this material does not prove any forcing of shorts, news reels, in itself. It simply gives a picture of the extent to which that phase of the business figured in the overall Paramount business and how it compared with the feature film business, which is the main subject of the suit.

Judge Hand: It is very hard for the Court safely to rule out things, and safer to let them in, but I do think sometimes, and I think probably in this case, you ought to take a little more risk in your case than you seem inclined to. After all, things that are so remote that we would probably pay no attention to them, and you haven't it in your brief, why (275)
should they be in here? I really am putting it up to you. I would think they only cumbered the record.

Mr. Wright: If the Court please, as to that Exhibit 63, I do not think that some of this material is particularly vital to the case but it does contain material which we do think is relevant and rather than tear the answer apart, I would rather put it in this way, so that in case it is necessary to rely on it, it will be there. I do not think there is going to be any encumbrance in so far as the work that your Honors will have to perform is concerned.

Mr. Proskauer: Your Honor, not in the form of objection to evidence but following Mr. Seymour's question, I am wholly at sea as to whether the Government is pressing in this courtroom what some of the court and some of my colleagues understood they were withdrawing and that was a claim that there was a conspiracy in regard to production. Mr. Caskey was arguing yesterday and your Honor sug-

gested that was not the Government's claim, yet when the question is put to Mr. Wright here a few moments ago, we don't get an answer to the question which your Honor put to him, and it makes a very great difference in the time we are going to consume in our defense here. I should like to know if the Court thinks it is a reasonable request, whether

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Mr. Wright claims that by this evidence of exchange and any other evidence he has, there has been a conspiracy to monopolize production, as distinguished from exhibition? It would seem to me, your Honor, that if he could answer that question yes or no, we would know what we have got to do in presenting our defense. We do not know at this minute.

Mr. Wright: If the Court please, I can only state what I did before, that we do not argue or won't attempt to prove any conspiracy to monopolize production as such. However, it is perfectly clear that the monopolization of a market, the theatre market, in the distribution facilities, does have an effect on production and does give these people a control over production of films that they otherwise would not have. And we also, I repeat, offer the material as to the interchange of production facilities as merely some evidence of the essentially non-competitive relationships that prevailed between the major producer exhibitors.

The Court: We will receive it. You have gone through to 71, haven't you?

(Marked Government's Exhibits 70 and 71 in evidence.)

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Mr. Wright: Then we will offer in evidence the distribution answers of Paramount filed in 1939, which are contained in volumes marked for identification as Exhibits 72 through 79.

Mr. Caskey: We have the same objection to these as to 41.

Judge Hand: Are you making an objection?

Mr. Caskey: Yes, we think this is the same type of material for Paramount as 41 does for Fox, and we have that special objection.

Judge Hand: Overruled. You are offering 71, 73——

Mr. Wright: 74.

Judge Hand: (Continuing) 75, 76, 77, 78 and 79?

Mr. Wright: Correct.

Mr. Seymour: Of course, here is a whole group of exhibits, 73, 74, 75, 76, 77, which deal with the matter that I just mentioned before, shorts and newsreels. It seems to me to be taken care of by the decree, and why it should be dumped into the case at this time, when none of it can show any possible violation of the decree, I cannot imagine.

Judge Goddard: Mr. Wright, the question I was going to ask you before Mr. Proskauer spoke was, Do you claim Section 4-B of the consent decree has been violated?

Mr. Wright: No. This material as to shorts and newsreels is not offered to show evidence of forcing of those newsreels. It is offered to show the relationship between (278)

the defendants in handling feature films also carries over into shorts and newsreels. It is a relatively unimportant part of the business but still a part of the business which is the subject matter of the lawsuit, that is, the interchange of license fees among these different groups does extend to shorts and newsreels as well as to feature pictures, and we are simply showing here what the general facts are with respect to that phase of the business. It is not an important one, admittedly, but it does have relevance.

Judge Hand: Well, you know, it is a troublesome thing, this attempt to put everything in as background, which is constantly done. Of course, when we are engaged in a jury trial we have to sit up and take notice and rule it out or rule it in and not just slop along, and I am afraid we are slopping alone a good deal here; but if you insist that it is relevant and important, we are going to let it in. I think that is, really, on the whole, mainly your responsibility, as

to whether you want to put in a lot of things here which you admit haven't any very direct bearing and probably will not be alluded to or considered. That is what you have almost said to me.

Mr. Wright: That is virtually what the fact is. I cannot tell at this time how much importance ultimately might be attached to some of those figures on shorts and newsreels.
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As of now, I think it would be very little, but in making my record, it seems to me that I am entitled to that much protection, provided we can do it without unduly burdening the Court. Where this material is contained in these answers with this relevant material, I do not see any advantage, really, for the Court or anyone else in separating it out physically, as long as we have separated it out here descriptively, so it can be conveniently disregarded.

Judge Hand: There is this advantage, that if you put this thing in, you are certainly tempting strongly the defendants to put in a lot of evidence to answer it. It either has no purpose, or, if the inferences which you intended to give rise to are incorrect, it will be answered by testimony. That is the very sort of thing that makes these cases so horrible.

Mr. Wright: If the Court, please, we have made—

Judge Hand: I do not see why you should put in evidence here which you can hardly see any relevancy to and say, practically, to the judges, "Well, you should worry."

Mr. Wright: We have made, I think, a very sincere and a quite unusual effort, if the Court please, in organizing this material in this form, to make the handling of a record like this as expeditious and as convenient as possible.

Judge Hand: That is very good, and we appreciate it very much, but why should you put in stuff you cannot see
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the relevancy of?

Mr. Wright: Well, I say that I think it is relevant to show the full relationship among the defendants of the busi-

ness they do with each other, whether it is done in the form of newsreels and shorts as well as features. In terms of dollars and cents it is a relatively unimportant part of the business but it is a part of it, and if we arbitrarily excluded it, I would always be subject to the charge, I suppose, that I had only given the Court a part of this picture of the relationships between the defendants without giving all of it. It just seems to me it is something that shapes itself down in the end without great inconvenience to anyone providing that the material is so segregated so that it can be dealt with effectively in the briefs.

Judge Bright: Isn't it your main contention that the violation of the Sherman Act is in the licensing, distribution and exhibition of features?

Mr. Wright: That is quite correct, your Honor. That is the backbone of the business.

Judge Bright: These are not features.

Mr. Wright: These are simply these one-reel fill-ins.

Judge Goddard: Shorts.

Mr. Wright: Or newsreels, which are used to supplement a feature program in theatres.

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Judge Bright: There is no subsequent run of these, is there?

Mr. Wright: They do have runs, but they aren't of the same significance as feature runs. There is no question about that.

Judge Hand: What are these things you are objecting to?

Mr. Seymour: Well, I was raising the question, not as an objection.

Judge Hand: The numbers of the exhibits?

Mr. Seymour: I called your Honor's attention to the fact that Exhibits 73, 74, 75, 76 and 77 related to newsreels and shorts, and they also happen to relate to one season, 1936-1937, before the date of the decree, and then some of them run afoul of the other objection made here, that they were selected by cities and they just are samples of the kind of irrelevancy as to which one can almost put one's fingers on

the fact that they haven't a thing to do with the case at any stage.

Mr. Goddard: I would let him save it for rebuttal, if he needs it.

Judge Hand: We will exclude 73, 74, 75, 76 and 77. As Judge Goddard says, if you can do anything with those in rebuttal, we may consider them.

It also goes back to some other exhibits. What are they? (282)

To the shorts you mentioned before.

Mr. Seymour: I raised the question first, I think, on Exhibit 63.

Judge Bright: Wasn't Exhibit 40 part of it, too?

Mr. Caskey: 30 is the first one involved, page 7: Answers to interrogatories 41, 42, 43, 44, 45 and 46. I move to strike it out.

Judge Hand: Motion granted.

Mr. Seymour: And the same objection applies to Exhibit 63 with respect to interrogatories 27 and 28, which are in that exhibit—the second Exhibit 63, appearing on page.

Mr. Davis: If the Court please, for fear that I might be losing something, I should like to move to strike out Exhibit 51, produced by the plaintiff, Nos. 41, 42 four——

Mr. Wright: Wait just a minute. 51——

Judge Bright: Yes, 51 has features in it in answer to interrogatory 40.

Mr. Davis: Yes, and I am moving to strike out the answers from that exhibit, the answers to interrogatories 41, 42, 44, 45, 46, relating to shorts and newsreels.

Judge Hand: You also include 43?

Mr. Wright: You want to include 43 and 44.

Mr. Davis: Didn't I name 43 and 44?

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Judge Hand: No, you skipped them.

Mr. Davis: There is almost as much trouble to picking these out as to let them ride, but I am not going to have it

charged that I have fewer objections on this record than anybody else. I amend my motion to read the answers to interrogatories 41, 42, 43, 44, 45 and 46; and Exhibit 56, the answers to interrogatories No. 4, No. 5—I think that's enough.

Judge Hand: Granted.

Mr. Seymour: One of my brethren on the other side says that as to 63, interrogatories 27 and 28, it is not clear that that was within your Honor's ruling, but it raises the same question. It is the second 63 on page 27, interrogatories 27 and 28.

Mr. Wright: Those are stricken out.

Judge Hand: You want to strike out the answers to 27 and 28, do you?

Mr. Seymour: 27 and 28. They fall in the same category.

Judge Hand: All right, granted. Now we come to 78.

Mr. Wright: No; I think the offer under consideration, if the Court please, is Exhibit 72, the answer to interrogatory 40, which deals with features. 41 and 73 were stricken. I don't think 72 has been ruled on yet, has it?

Judge Hand: 72 does relate to features.

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Mr. Wright: Yes.

Judge Hand: That is extant.

Mr. Wright: Then 73 through 77 were excluded, and the next offer is——

Judge Hand: 73 to 77 are excluded.

Mr. Wright: The next offer is 78 to 79, which relate to features.

Mr. Seymour: They are subject to the selectivity objection which has been made before in connection with an earlier exhibit, and I assume that in addition to preserving the objection as to each defendant, where one makes it, that if an objection is once made to a type of exhibit, it may be deemed to continue to the same type later on, so we do not have to repeat them. This objection as to 78 and 79 has already been made to earlier exhibits but not as to these.

Judge Hand: That is overruled.

(Government's Exhibits 78 and 79 for identification received in evidence.)

Mr. Wright: Then we will offer Paramount '45 distribution answers, which are contained in Exhibits 80 through 83.

Mr. Seymour: The answers to interrogatories 4 and 5 in Exhibit 80 fall under the ruling just made as to newsreels and shorts, and they should be excluded.

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Judge Hand: That is right, they are, and 80 is otherwise admitted.

(Government's Exhibit 80 for identification received in evidence.)

Judge Hand: 81 is admitted.

(Government's Exhibit 81 for identification received in evidence.)

Mr. Wright: And then 82, your Honor.

(Government's Exhibit 82 for identification received in evidence.)

Judge Hand: 83 will be admitted.

(Government's Exhibit 83 for identification received in evidence.)

Judge Hand: 84, too.

(Government's Exhibit 84 for identification received in evidence.)

Mr. Wright: And I will offer 85, which finishes up Paramount.

Judge Hand: That is a sad looking sort of exhibit, 85. In what year does that begin?

Mr. Wright: That is an answer to the interrogatories that were served in 1939.

The Court: Well, I know, it might be in answer to anything. What has it got to do with the case, other than a terrific amount of genealogy?

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Mr. Wright: It simply is a history prepared by the defendants of the corporate continuity there, that is, shows how Famous Players-Lasky then became Paramount Publix, and that became Paramount Pictures, and it shows the acquisition of other producing companies and distributing companies going back, I think, as far as 1917. It is simply a summary statement of the growth of these companies and these circuits.

Judge Hand: We will let it go in.

Mr. Wright: I assume it is the sort of thing that the defendants themselves wanted to get in eventually anyway.

Judge Hand: Very well.

(Government's Exhibit 85 for identification received in evidence.)

Mr. Proskauer: It is genealogy.

Mr. Seymour: If your Honor please, I wonder if I could address the Court for a moment on a question that Judge Proskauer mentioned earlier today? We have gotten through 85 exhibits in pretty good time, and I would like to raise with the Court the question of whether we might arrange to have a recess in this case after the Government has completed its case, to enable the defendants to sift and prepare their case in the light of the case as it has gone in.

Judge Hand: I do not see why you should, as far as I am concerned, at all. The case has been in course of preparation,

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in a sense, for years and you had an absolute notice of what the Government was going to do. You knew all about this thing weeks ago.

Mr. Seymour: Let me say this, if your Honor please. This is of importance to us, and I would like to lay our problem before you. It was only when we got the Government's trial brief that we had any real indication as to the scope of the

case as it would be submitted to the court. True, we had had various versions of the case before, running all over the lot, including this charge of conspiracy to monopolize production, as to which I yet don't know what the Government's position is. Throughout the summer, throughout the period since we appeared before your Honors in July, my colleagues have been largely engaged in preparing this vast amount of material which is being dumped in. Your Honors see that the material consists of answers made in 1939 and then a great series of answers made in 1945. And the fact is, and I am sure this applies to every company that throughout the summer and right up until this very moment, most of the time of defendants' counsel and their associates and their assistants has been taken up in that way, and I think Government's counsel are entirely aware of that situation.

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Now, the fact is that it was not until September 20 when we got the Government's brief that the precise nature of the case that we would have to meet became clear. From the opening yesterday of Government's counsel it was not made more lucid for us, and in view of that situation it has been impossible to do the kind of sifting and winnowing of the oral testimony that we would ordinarily have done by this stage of the case.

Now, last week we met with Government counsel and discussed the trial procedure, and at that time it was my understanding that Government counsel indicated that subject to the Court's approval he would have no objection to a reasonable recess at the close of the Government's case to enable us to get our material in shape for expeditious presentation to the Court.

Now, the reason I raise this question is because just as I was required to open first, at great length, and a great burden to the Court, I shall be required also to go forward first with my oral testimony. My witnesses are scattered all over the country, as your Honors can see by the location of the various aspects of the business. Some of the officers of the company who would have to be called are now in Hollywood; and

what I should like to ask—and I think Government counsel will not object, and I hope it won't burden the Court—would be a reasonable recess when we get to the end of the
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Government's case; and at this rate I anticipate the exhibits will all be in within the next couple of days. You see, we are not standing in the way. Indeed, we are doing everything we can toward lightening that load.

Judge Hand: You knew pretty well what you had to meet, and you knew it was going to be documentary, and I think you have had all Summer to do it as well as years before. We cannot give our lives to this kind of a case, and if my life is as long, in spite of my age, as I hope it may be, I have no intention.

Mr. Seymour: If your Honor please, we have no desire to burden you in this respect, and I would not suggest and I do not suggest a long recess; but I suggest——

Judge Hand: What do you mean by "long"?

Mr. Seymour: Well, I would like myself to have, say, three weeks at the conclusion of the Government's case.

Judge Hand: It throws off the schedule of all the Judges here. That is not your fault. The Government got an expediting certificate which made it mandatory for the Court to furnish three judges. Now, how it expedites anything to tie up three judges in this kind of a case I leave to philosophers, casuists, metaphysicians and astronomers. But they are within their rights, and that has been done. Now, we are just not going to break up all our judicial affairs here in
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the Second Circuit for this case.

Mr. Seymour: Well, we have no desire to do it.

Judge Hand: I knew you have no desire to; of course you are excellent fellows and fine lawyers, but you have a program which leads to that.

Mr. Seymour: Well, I would be hopeful, if your Honor pleases, that the time spent in such a recess would be usefully spent in organizing the material in the light of the Government's case as it actually goes in, in the light of your

Honor's rulings on that evidence, which would enable us to put it in more expeditiously than if we have to get rushed into it without adequate time to visualize it; and I think that situation applies to every defendant in this case, and I think the Government understands it.

Mr. Proskauer: Would your Honors permit me to suggest how this matter first came up? In conference with Mr. Berge and Mr. Wright last week when we explained that the elevator strike was the climax of our difficulties in getting ready here, it was suggested by Mr. Berge that the Government would like to facilitate us by stipulating some of our evidence. Now, I do not want to mislead the Court, and I do not know to what extent we will be successful in the endeavor to stipulate evidence. But, personally, I am urging that that be done. I have some sales resistance on the part

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of some of my clients, and I want to be frank with the Court. But we then had a kind of lawyers' understanding,—not a stipulation—that subject to your Honors' approval we were going to try to shorten this case in the ultimate by taking some such adjournment as Mr. Seymour has suggested to your Honors after the Government's case was in, and that instead of applying for an adjournment at the outset. So we are not coming in here with a situation where we are just asking for delay. We are not. I really believe that keeping in mind your Honor's perfectly sound suggestion that the Court cannot give its life to this case, that we shall be saving some years of your Honor's valuable life if you will give us a short adjournment after the Government's case is in. I am satisfied from our talks with Mr. Berge and Mr. Wright that there is a reasonable possibility—which I can't give the Court as an assurance—that we may shorten some of the oral evidence in this case; and I am sure Mr. Wright will correct me if I have in any way deviated from a very meticulous account of what happened in our conference.

Mr. Wright: If the Court please, we have told counsel at that conference, and will repeat today that we would agree to any plan of procedure which would shorten the disposition of the case and get a speedy determination of this issue.

Now, at that time we told them that as far as calling
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witnesses is concerned, particularly when we are talking about their executives, there is no need as far as we are concerned to call any of them here to the witness stand; that if they will put what they want to say in affidavit form we would stipulate that they would testify in accordance with that affidavit, because we know pretty well what they can testify to. They have testified in a number of other cases; they know how far they can go, and we do not need any cross-examination in order to control that sort of testimony. We can, if necessary, of course, in rebuttal, in so far as the defendants' executives are concerned, call them under Rule 43(b) if necessary. But I merely point this out to say that while we have no objection to any continuance which will expedite the presentation of their defense, we do feel that as a condition to the granting of such a continuance there ought to be some kind of definite commitment as to the expedited procedure that is going to follow the continuance. That is, there should be some assurance that the interval will without question be used to streamline the presentation of their defense, and that we just do not have an interval where they come in at the end of the period and they start offering witnesses.

Mr. Seymour: I do not see how such a condition can be well agreed to at this stage. It seems to me, as I have said
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to the Court, what we want the time for is to get our defense organized so that we can put it in most expeditiously, and we hope that will save a lot of time. To what extent we can work out any dispensing with oral testimony is a matter that would have to be explored during that period. Your Honors will immediately recognize that substantial oral testimony will have to be offered anyway, probably, and it is just a matter of the extent.

Judge Hand: You go on with your offers in the case.

Mr. Wright: The next series of interrogatory answers are those of RKO. The first is numbered 86 for identifica-

tion and covers their answers to interrogatories 1 to 24, dealing with the organization of the companies, the inter-corporate relationships; and we will offer with that 87, which is the 1945 supplement to that data.

(Government's Exhibits 86 and 87 for identification received in evidence.)

Mr. Wright: Then we will offer their tabulations of theatre interests which are found in 88 and 92.

(Government's Exhibits 88 and 92 for identification received in evidence.)

Mr. Wright: We will withdraw the offer of the theatre reports marked for identification as 89 and 90. Those are both withdrawn. 86 is already in evidence.

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Judge Hand: What have you done with 86?.

Mr. Wright: That is already offered and in under a prior description there. This is really just a note.

No. 91 we will offer, the answer of RKO, the holding company. It is simply necessary to make intelligible the answers of the other defendants referred to there.

(Government's Exhibit 91 for identification received in evidence.)

Mr. Wright: Then we shall offer the 1945 answer of RKO which takes care of interrogatories 1 through 5 inclusive of the 1945 data. That is contained in No. 93 for identification.

Mr. Leisure: Just a moment. With respect to 93, if the Court please, 4 and 5 in that exhibit have to do with shorts and newsreels. We presume the Court will rule the same.

Judge Hand: Yes. We will exclude 4 and 5.

(Government's Exhibit 93 for identification received in evidence.)

Mr. Wright: We will also offer 94 which contains RKO 1945 distribution data furnished in response to the 1945 interrogatories 6, 7, 8, 9, 10 and 11.

(Government's Exhibit 94 for identification received in evidence.)

Mr. Wright: 93 I think is already offered.
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And 95 is the RKO admission of facts.

(Government's Exhibit 95 for identification received in evidence.)

Mr. Wright: And we offer the history data contained in 91. That exhibit with reference to the distribution data also contained in the same exhibit was previously offered there at page 37. We offer the data described on pages 40 and 41 which are also contained in Exhibit 91; that is, the answers to interrogatories Nos. 45, 56, 57 and 58.

Then 96 is the answer of Keith-Albee-Orpheum Corporation, an RKO subsidiary, which covers interrogatories 1 through 24.

(Government's Exhibit 96 for identification received in evidence.)

Mr. Wright: Then we offer 97 relating to KAO discontinued theatre interests.

(Government's Exhibit 97 for identification received in evidence.)

Mr. Wright: And 98, the answers of KAO to 55, 56, 57 and 58.

(Government's Exhibit 98 for identification received in evidence.)

Mr. Wright: And we will also offer 99, which covers the RKO-Midwest answers to interrogatories 1 through 24.
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(Government's Exhibit 99 for identification received in evidence.)

Mr. Wright: And 100 which covers its discontinued theatre interests.

(Government's Exhibit 100 for identification received in evidence.)

Mr. Wright: Then we will also offer the production answers which are listed on page 47 there as contained in Exhibit 99—that is, the answers to 25 to 28 inclusive, interrogatories 31, 35, 38 and 39.

Then we will offer 101 which is the historical data furnished by RKO-Midwest in response to 55, 56, 57 and 58, and contains negative answers on distribution.

(Government's Exhibit 101 for identification received in evidence.)

Mr. Wright: Then we offer 102, which is another RKO subsidiary, Pathe News, Inc.'s answers to interrogatories 1 through 24—

Mr. Leisure: If the Court please, again that has to do with news pictures, and I assume the Court's ruling would be the same. We object to it.

Judge Hand: Where does that appear?

Mr. Leisure: Exhibit 102.

Judge Hand: Yes, I know. But the fact that it does not relate to features.

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Mr. Leisure: It is listed as a Pathe News pictures, and they are listed here on page 48, Exhibit 102.

Judge Hand: Is that right, Mr. Wright?

Mr. Wright: I think counsel's statement is correct that Pathe News was primarily a distributor of newsreels. I am not sure, but it is just my recollection at the moment that they did not engage in other production-distribution activities.

Mr. Leisure: You mean a producer, Mr. Wright, I take it. It is a producer of newsreels, there is no question about that.

Mr. Wright: Exclusively?

Mr. Leisure: Shorts. They are not feature pictures, the same as these other shorts you were talking about.

Judge Goddard: In the same class as a short.

Judge Hand: Exclude 102.

Now 103.

Mr. Wright: That can also be wihtdrawn. That refers to Pathe News.

Mr. Leisure: 103, if the Court please, also applies to Pathe News, and 104.

Mr. Wright: I assume the same ruling will apply to 103 and 104 as applied to 102.

Then we will offer 105, the RKO-Proctor answers to interrogatories 1 through 24.

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(Government's Exhibit 105 for identification received in evidence.)

Judge Hand: It has come to adjournment time now, and we shall adjourn to tomorrow morning at 10.30.

(Adjourned to October 10, 1945, at 10.30 A.M.)

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New York, October 10, 1945;
10.30 o'clock a.m.

Trial resumed.

Judge Hand: We have decided that the public interests are sufficiently represented by the Government of the United States and that there is no reason for the intervention of the American Civil Liberties Union. Therefore, their motion to intervene is denied.

You may proceed.

Mr. Wright: If the Court please, I think when we adjourned yesterday we had offered Exhibit 105 for identification, which is described at page 51 of the list there, and I don't think—apparently it was admitted, so that our next exhibit will be 106, which relates to RKO-Proctor.

Judge Hand: We had not marked the exhibit as admitted. We had admitted it, however.

Mr. Caskey: What was that?

The Clerk: Exhibit 105 is received in evidence.

Mr. Caskey: That is the part described on 51 and 52?

Mr. Wright: Correct.

Mr. Caskey: But not the part on 53?

Mr. Wright: The part on 53 is merely a reference to what

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105 shows.

(Government's Exhibit 105 for identification received in evidence.)

Mr. Wright: Then 106, I take it, is also admitted.

(Government's Exhibit 106 for identification received in evidence.)

Mr. Wright: And 107 is next offered, the RKO——

Judge Hand: Have you offered 106?

Mr. Wright: Yes, I understood that had been offered and received.

(Government's Exhibit 107 for identification received in evidence.)

Mr. Wright: Then we offer 108, the answer of RKO Radio Pictures, Inc.

(Government's Exhibit 108 for identification received in evidence.)

Mr. Wright: And 109.

Mr. Leisure: As to 109, if the Court please, interrogatories 41 and 42, having to do with shorts and news-reels, should come out.

Mr. Wright: I don't believe they are——

Judge Bright: 109 does not mention that.

Mr. Wright: That is correct.

Judge Hand: All it says here is that it is not engaged in exhibition.

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Mr. Wright: I think he is referring, your Honor, to the notation at the bottom of page 57, where the answers to 41 and 42 are also in 109, and those, I suppose, will be excluded under the previous ruling.

Judge Hand: Yes, excluded as to 41 and 42.

(Marked Government's Exhibit 109 in evidence.)

Mr. Wright: Then we offer 110, described on page 56.

(Government's Exhibit 110 for identification received in evidence.)

Mr. Wright: As to 111——

Mr. Leisure: Just a moment. 27 and 28 have to do with shorts in that exhibit.

Mr. Wright: Those, I take it, are excluded.

Judge Hand: Excluded, 27 and 28.

Mr. Wright: Then 111, there is a similar exclusion as to Nos. 43, 44, 45 and 46, I presume.

Judge Bright: You offer the balance?

Mr. Wright: Yes, we offer it, what is on here——

Judge Hand: You offered 40?

Mr. Wright: Yes.

(Government's Exhibit 111 for identification received in evidence.)

Mr. Wright: And we offer 112, which is the RKO answer to interrogatory 48.

(Government's Exhibit 112 for identification received in evidence.)

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Mr. Wright: And we also offer these four answers relating to historical data which appear in 109, already admitted, I believe.

As to 113, that deals with the activities of the Van Beuren Corporation, which I believe produced only short subjects, is that correct?

Mr. Leisure: That is correct.

Mr. Wright: And I suppose that under the Court's prior ruling that would be excluded.

Judge Hand: Excluded. That is all of 113?

Mr. Wright: Yes.

And the same would apply to 114, 115, all the data described on page 61.

That brings us to Warner. We offer No. 116, which contains the answer of Warner to interrogatories 1, 2, 3, 4, 9, 10, 11, 12, 13; 15(a), (c)-(g); 16(a), (c)-(g); 17 (a), (c), (e) and (f); and Nos. 18, 19, 20, 21, 22 and 23. Those answers are described on page 62 and 63 and the top of 64.

Mr. Davis: Mr. Wright, will you tell me the difference between 116 and 118?

Judge Hand: Has the stenographer got it right?

(Record read.)

Judge Hand: So, everything in 116 is submitted?

Mr. Wright: Yes; those are all listed on those three (302) pages.

(Government's Exhibit 116 for identification received in evidence.)

Mr. Wright: Then we are offering 117, which is really a supplement to the answer to interrogatory 2 which was separately bound and so was given an additional exhibit number.

(Government's Exhibit 117 for identification received in evidence.)

Mr. Wright: Then we will offer No. 118——

Mr. Caskey: The document that bears No. 117 contains a great many other things than the answer to interrogatory No. 2(a). Now, the procedure we are following is for the clerk to mark the face of the document, with the result that there is physically handed to the clerk and to the Court papers which apparently are not in evidence, without any indication as to what is in evidence and what is not in evidence; and I am sure there will be no mechanics whereby appropriate page reference in the stenographic minutes can be readily made available when cross-examining as to these physical documents. I submit the orderly procedure is that the only thing that should be handed up is what is offered and to be marked in evidence. As to mutilation of the document, there is nothing to that. Let the Court just have possession of the things that are offered in evidence.
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Mr. Wright: If the Court please, all that we are offering of this 117 is the answer to 2(a) which is contained in this

117 along with others. Now, I think as to the record of what is in evidence or not, you have that in the record which we are making on the list as we go along, and I do not think that there is any difficulty there at all.

Judge Hand: I should think that was all right. It may take a nationwide survey to find out what is in the physical exhibits, but I think we can probably take care of it.

Judge Goddard: Looking over it how can you tell what is in evidence and what is not?

Judge Hand: It is so stated, as I understand it, that only the part that is in answer to interrogatory No. 2(a) is in evidence; isn't that so?

Mr. Wright: That is correct, your Honor.

Judge Hand: Haven't you stated that in your offer?

Mr. Wright: I stated that in the offer, and the list will have a record which shows that that is the only part that is admitted.

Mr. Caskey: The difficulty is that the Court may pick up Exhibit 117 with this gray guide book, which we have already demonstrated is full of errors, in order to ascertain what is in the record.

Now, it seems to me the mechanical work of keeping

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the record correct should be done by the counsel who has the burden of submitting the documents. This is not any surprise. It is not something that the Court has excluded on it. He is offering a document to which there are physically annexed many sheets of paper, and he only intends to offer some. I do not think we are adequately protected.

Judge Hand: I do not think you need fear our over-reading these exhibits.

Judge Goddard: The list shows what was offered.

Mr. Wright: Yes.

We are now on 118, I believe. 117, I believe, was admitted as to the answer to interrogatory No. 2(a). 118 is the answer of Warner which contains its answers to 5, 6, 7, 8 and 14, all of which are being offered, with the answer to 15(b), 16(b), 17(b) and (d), which are also contained

in the exhibit and being offered, and which are described on pages 62 and 63; and also the answer to 51 and 53 are contained in the document marked 118, and the offer includes all of those answers.

Mr. Davis: Before that is admitted, if the Court please, may I ask counsel for the Government to what issue in this case is the fixed indebtedness of Warner relevant? 118-5 is the fixed indebtedness of Warner; No. 6 is the current indebtedness of Warner; and I have some curiosity to know what relevancy those data have to the Government's com-
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plaint.

Judge Hand: I think your question probably is impossible to answer by the Government.

Mr. Wright: If the Court please, I am inclined to agree with you. The reason there is because at the time those interrogatories were originally framed they were designed to disclose whatever cross relationship might appear as the result of indebtedness, one to another, or the holding of bond issues as well as stock obligations. Now, the net effect is purely negative, and it is not of great concern whether they go in or not; but we felt that they were a part of this data that they had supplied, and therefore should go in.

Judge Hand: I think you had better leave that out then. The difficulty that we find with your whole position here is that you have practically come in and said that what you objected to was this monopoly in exhibition of pictures. And yet you are fussing around and fussing around with all kinds of things that are so remote that they are apt to encumber the record a great deal on both sides, and neither you nor anybody could definitely point out what bearing they have. You just make general statements that you are entitled to the whole picture, and it is the same kind of talk about background and vague stuff that comes into every long case. I am not criticizing you personally. I think you
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have done a great deal to abbreviate your part in this pres-

entation of evidence, but I do not see why you are putting a lot of this stuff in. It has not been made clear to the three of us; we do not understand it.

Mr. Wright: Well, I think at any point where we do come upon evidence of that character, then, if your Honors feel that way about it, that it should be excluded. Let us cut it down right now and eliminate those parts.

Judge Hand: Why not exclude those?

Mr. Wright: I assumed it was simply a picture that I thought the defendants would want to get in anyway, and I thought it would expedite things if we put it in along with the other data which we rely on which are contained in the same documents, that is all.

Judge Hand: If the defendants want to put this stuff in you might as well put it in. I do not care anything about the order of proof.

Mr. Davis: If we want to put it in we will do it when we put in our case. I haven't the faintest idea that we will put in any of this.

Now, I suggest if these inquiries are directed to disclose whatever cross interests there might be or cross ownership in these companies, if they disclose anything of that sort the Government doubtless is entitled to put it in for whatever it may be worth. But what in the world is the use of

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putting in sheet after sheet after sheet which does not disclose anything of the sort?

Judge Hand: I do not understand that they claim, except by your alleged co-action that there is any such interest.

Mr. Wright: I am perfectly agreeable, your Honors, and I am going to point out the items under 118 that are listed there as the answers to 5 and to 6, which takes care of the current indebtedness item, and I am perfectly agreeable to doing that with reference to the similar answers to 5 and 6 in the other material that was offered.

Mr. Davis: Let me ask the next question——

Judge Hand: Just a minute. What are you consenting to have stricken out?

Mr. Wright: Wherever answers to interrogatories 5 and 6 of the 39 interrogatories—that is, where Nos. 5 and 6 appear, I assume they will be stricken.

Mr. Caskey: Mr. Wright, will you concede that as to Twentieth Century-Fox Film Corporation and National Theatres Corporation that no fixed indebtedness of either company is held by any defendant in this case?

Mr. Wright: That is certainly my impression.

Mr. Caskey: Well, do you concede it?

Mr. Wright: I would want to look at the particular record. I do not know offhand. I assume that it is the fact. (308).

But, in any event, in so far as these answers are concerned in the 39 interrogatories, 5 and 6, may go out wherever they appear here.

Mr. Caskey: Would you have——

Judge Hand: Just a minute. Let us not have all kinds of interruption here about other things. I want to know about 118. Is it all to go out?

Mr. Wright: No.

Judge Hand: Only 5 and 6?

Mr. Wright: 5 and 6. Those were the points raised as to fixed and current indebtedness.

Mr. Davis: Before we stop at that point, No. 7 calls for the 20 largest stockholders of Warner. I should like to ask the Government whether they contend that any of those 20 largest stockholders of Warner are also in the list of stockholders of the other defendants.

Mr. Proskauer: What is the point of it?

Mr. Davis: Just a minute.

Mr. Wright: I do not think we make any such contention. I think that is largely evidence which would have significance in dealing with the problem of relief. I think it would be a fact that the Court would wish to be aware of in determining what specific kind of dissolution relief

there should be in the case. On the issue of liability I do not think it is important.

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Judge Hand: I think that is too vague now. 7 and 8 are excluded.

Mr. Davis: Now may I ask as to 116-9, securities of other defendants held by Warner. Does the Government contend that there are any securities of other defendants held by Warner?

Mr. Wright: As I recall, those answers are negative, and again——

Mr. Davis: If they are negative what is their pertinence here?

Mr. Wright: I would assume that those were facts which they would be interested in showing. If they have no interest in having them in I would say again we can exclude those.

Judge Hand: All right, excluded by consent. What next? 9, 10, 11 and 12; is that true, Mr. Wright?

Mr. Wright: 9, 10, 11 and 12. That I think may also apply to the answers to those same interrogatories by all defendants.

Judge Bright: By all of the defendants? You say that may go out as to all of the defendants in the exhibits previously offered?

Mr. Wright: Yes. They have been offered and received here answers of the other defendants to those same interrogatories which are similarly negative in effect, and in so

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far as we are concerned they may be stricken.

Judge Hand: I am sorry to spend time doing it, but I think the way to make your record now is to make it right, to have excluded by consent, go right through and find out what they are, and we will mark them.

Mr. Wright: All right. I think they first appear on page 5; if you will simply run a line from 5 through 12, I think that will take care of the situation.

Mr. Davis: If the Court please, isn't there a shorter cut here which candor would dictate? Instead of sifting through this haystack, will not the Government concede of record that in these interrogatories there is no showing whatever of joint or partial ownership by one of these defendants, or the officers of these defendants in any other?

Judge Bright: Or any common director or officer.

Mr. Davis: Nor a common director nor a common officer. Now, a concession of that sort would take a lot of this straw off.

Mr. Wright: Surely. That is true as to the various defendant groups. In some cases there are two or more defendant corporations in the same group, such as Fox and National Theatres, both are defendants, and, of course, there are interlocking officials and stock ownership there; but as between the eight groups of defendants, I think it is quite true

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that there are no common officers; there is no common stock control, although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others.

Judge Bright: Well, do your exhibits show that?

Mr. Wright: Our exhibits do show, I think, the facts that I have just stated, yes.

Mr. Proskauer: I can't hear you, Mr. Wright.

Mr. Wright: The answer is yes.

Mr. Proskauer: Do the exhibits show any kind of common stock ownership?

Judge Bright: Why not take one at a time? Are there any common officers in the eight groups of defendants?

Mr. Wright: No, not that I know of.

Judge Bright: Are there any common directors in the eight groups of defendants?

Mr. Wright: There are not.

Judge Bright: Are there any bondholders——

Mr. Wright: I think not.

Judge Bright: ——common to the eight groups of defendants?

Mr. Wirght: No.

Judge Bright: Now, how about the stockholdings of any character?

Mr. Wright: As to the stockholdings, I assume, while
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I am not prepared to state that officials of the various companies may own listed stocks, and probably do, in those of some of the others, I do not think there is any contention that in any event any of them hold a sufficient stock interest to exercise control through that stock interest over the other group.

Judge Hand: Now, you are making a statement, as I understand it, that you do not know anything about it. You think it is possible that it exists. That is the last qualification.

Mr. Wright: I think it quite obviously does, yes.

Judge Hand: Quite obviously does?

Judge Bright: Do your exhibits show it?

Mr. Wright: The reason for my statement is that we have asked the various companies in getting up-to-date data as to executives' theatre holdings, and they have furnished us with letters giving the extent of those theatre holdings. Now, in each case there has been excluded such holdings as they had in listed stocks of corporations which operate theatres. I assume the reason for that exclusion is that there are such holdings. We do not attach any significance to them.

Mr. Proskauer: May we not have it stated, then, with your Honors' permission, that there is no contention on the part of the Government that there is any common stock
(313)
ownership between these eight groups that has any significance in this case?

Mr. Wright: Well, there is ownership of stock in corporations in which two or more of these groups have a common interest; there is no question about that. Counsel's suggestion goes much farther than the facts.

Judge Bright: You mean in theatres?

Mr. Wright: Theatre-operating corporations also. There are some corporations some of which are listed in our brief in which two or more defendants own stock interest.

Mr. Proskauer: With that exception what is the answer—let me put it to Mr. Wright—what is the answer to my question?

Judge Hand: Well, with that exception he concedes there is no common stock interest——

Mr. Wright: Interlocking stock interest, that is right.

Judge Hand: Interlocking stock interest.

Mr. Wright: That is right.

Mr. Davis: I assume, of course, that the statement that there is common stock interest will not float out in a void like that; that when he comes to those theatre-owning corporations in which there is some measure of joint interest, that will be definitely proven by the Government.

Mr. Wright: I think the best way to determine what
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the proof shows is to go ahead with the proof.

Judge Hand: All right.

Mr. Davis: That does not satisfy me, if the Court please. Go ahead with the proof to put in a haystack on the theory that somewhere somebody will find a needle in it? I would much rather have the needle produced.

Judge Hand: He will have to produce it as part of his case. Now go ahead. He has not pointed it out yet.

(Government's Exhibit 118 for identification received in evidence.)

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Mr. Wright: 118, as I understand the ruling is received with the answers to 5, 6, 7 and 8 excluded, and I think——

Judge Bright: I did not hear what you said, Mr. Wright.

Mr. Wright: As I understand it, 118 has been admitted for the answers that are described on pages 62, 63, 64 and 65 except that the answers to 5, 6, 7 and 8, appearing on page 62, have been excluded.

Judge Bright: I thought 9, 10, 11 and 12 were excluded.

Mr. Wright: And 9, 10, 11 and 12 are contained in one exhibit, exhibit 116. Those are also excluded.

Mr. Seymour: May it be assumed, if your Honors please, that similar interrogatories also admitted will fall under the ruling so that we won't have to worry about those now remaining in the record? There were interrogatories offered before and marked and I am trying to indicate to my clients which ones they were, but I thought, to save time, we would just have it understood they were excluded.

Mr. Wright: That is entirely agreeable.

As to 118—by the way, we are withdrawing the theatre reports listed on 65, numbered 121, 122 and 123.

Judge Hand: Those are withdrawn?

Mr. Wright: That is right, withdrawn.

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Judge Bright: Where is that?

Mr. Wright: Page 65, Nos. 121, 122 and 123. And I should like to call attention to a correction in the list there. For 118 you find interrogatories 51 and 53 listed. Also included there should be 50A and 51, which are the theatres disposed of.

Mr. Davis: What page are you on?

Mr. Wright: And 52. I am on page 65.

Judge Hand: 51 is there, isn't it?

Mr. Wright: I beg your pardon. 52. 50-A and 52 are the two that should be added there.

Judge Hand: How about these 1945 answers on page 64?

Mr. Wright: We are now offering 119, which contains the 1945 answers to——

Judge Bright: Mr. Wright, before you get to 119, at the bottom of page 65, there are two interrogatories under 118, one of which includes short subjects.

Mr. Wright: That I assume may go out under the prior ruling.

Judge Bright: Do you wish to have 25 go in? Do you wish to have the answer to interrogatory 25 go in?

Mr. Wright: That goes in.

Judge Bright: And the answers to 27 go out?

Mr. Wright: Correct.

It is also true that the answers to interrogatories 31, 35,
(317)
38 and 39, that appear on page 66 as being contained in 118, are also offered, I believe, in evidence. Those relate to production.

(Government's Exhibit 119 for identification received in evidence.)

Judge Hand: I thought you said that you regarded that —perhaps I am mixing it up in this complex case—that the loaning of personnel is very small, proving nothing.

Mr. Wright: Well, no, if the Court please, I said I did think it had evidentiary value on the issue of the extent——

Mr. Proskauer: I don't hear that. I cannot hear a word.

Judge Hand: He said he did think that it had evidentiary value on the issue, I suppose, of cooperation?

Mr. Wright: Precisely.

Judge Hand: All right, let it go.

Mr. Wright: The next is——

Judge Hand: 119 on page 64.

Mr. Wright: That has been offered and, I think, received. It was marked by the clerk.

Mr. Davis: "Capital Invested." What is the significance of that 119 15(a), (c)-(g) "Capital invested."

Mr. Wright: I think the caption in the printed list "Capital Invested" is not quite specific enough. Actually what
(318)
it does is to bring the answer to interrogatory 16, that was filed in 1939, down to date.

Judge Hand: What has this to do with anything? You have conceded that there was no common ownership.

Mr. Wright: If the Court please, I suppose it is still a part of our case to show what the corporate structure of these groups is and to show what, if any, changes have occurred since 1939, just so the Court has before it some

reasonably accurate picture of the corporation it is dealing with. That is all that this does, is bring that prior information in 15 and 16 and as to——

Judge Hand: All right, go ahead.

Mr. Wright: (Continuing)—corporate information down to date. It does show the——

Judge Hand: We will admit this one.

Judge Bright: 119 and 120, is that what that refers to, Mr. Wright?

Mr. Wright: That is correct, your Honor. Those——

Judge Hand: That covers everything, doesn't it, in this bracket under 1945 answers?

Mr. Wright: That is correct.

And I think the next thing that we can do are the 1939 distribution answers of Warner, which are contained in this Exhibit 124. That contains the material that is described there on pages 66 and 67, and I suppose the answers (319)

to 41, 42, 44 and 45 will be excluded in accordance with the Court's prior ruling.

Mr. Davis: Exhibit 144?

Mr. Wright: 124 is the number of the exhibit.

Mr. Davis: I didn't hear it.

Judge Bright: 43 is short subjects.

Mr. Wright. 43 also, I beg your pardon.

Judge Bright: How about 46?

Mr. Wright: That should go out also.

(Government's Exhibit 124 for identification received in evidence.)

Mr. Wright: We will offer 125, which are the Warner 1945 interrogatory answers, covering questions 1, 2, 3, 4 and 5.

Judge Bright: 4 and 5 are short subjects and newsreels.

Mr. Wright: 4 and 5 may be stricken.

(Government's Exhibit 125 for indentification received in evidence.)

Mr. Wright: Then we will offer 126, the answer to interrogatory 6.

(Government's Exhibit 126 for identification received in evidence.)

Mr. Wright: And 127, the answer to No. 7.

(Government's Exhibit 127 for identification re-
(320)
ceived in evidence.)

Mr. Proskauer: Mr. Wright, with the Court's permission, when it comes to 127 and 128 exhibits, it is very important that I should make clear that your description is not before the Court because of a flagrant error in describing "The most profitable 1943-44 feature," where the question is "The feature with the greatest number of bookings." That distinction is very significant in certain aspects of this case.

Mr. Wright: That is quite correct. The actual feature selected is the one which had the greatest number of domestic billings in each case. The words "most profitable" were used as a shortened expression. It may not be accurate. I might say that at the time this list was submitted to the defendants, we wrote them we were going to have this printed for the benefit of the Court and themselves and suggested that if there were any descriptions or changes they wanted made before the list was printed, we would have been glad to incorporate them, so that the responsibility for such matters as this, I think, rests on both sides.

Mr. Proskauer: I trust your Honors will draw no inference in this case, from the observation of my adversary just made. If they want to get into a controversy about what occurred extrajudicially with reference to these descriptions, I am advised by my associates that we suggested a number of corrections, which were not made, but I do not

(321)
see any point in pursuing that or having this question raised here.

Judge Hand: All right.

Mr. Wright: The next offer is the answers to interrogatories 8, 9 and 10, which appear in Exhibit 128.

(Government's Exhibit 128 for identification received in evidence.)

Mr. Wright: This answer to 11, which is described on page 69, also appears in Exhibit No. 126, which has already been offered and received and is offered as a part of that exhibit. And the same is true with reference to the answers to Nos. 12 and 13, which are contained in 125 and 129, the admissions of fact.

Judge Hand: Mr. Wright, has this 126 (11) already been offered?

Mr. Wright: That is offered. 126 contains the answers to both 6 and 11 and both are offered and, I believe, have been received. The same is true as to 125, which contains the answers to both interrogatories 4, and 12 and 13.

Then we offer the admissions of fact, which are marked as 129.

(Government's Exhibit 129 for identification received in evidence.)

Mr. Wright: And the answers to 55, 56, 57 and 58, which appear in 116, are also offered, and, I believe, that has been
(322)
admitted.

That brings us to the answers of Columbia, the first of which is No. 130.

(Government's Exhibit 130 for identification received in evidence.)

Mr. Wright: And I assume that that No. 5 may also——

Judge Hand: We had a talk last evening, Mr. Wright, after our session, in regard to these independents and it is all right to put these things in now, so far as they conform to the rules that we have been applying in the other exhibits, but you have absolutely got to show something more definite than you have about these independents or we shall dismiss, in regard to them, on their motion; and that is for you to show at the time, but it is utterly unclear to us now what they have to do with all this.

Mr. Wright: We certainly would expect you to dismiss them if nothing more were offered than their interrogatory answers. This is merely background.

Judge Hand: All right.

Mr. Wright: I take it the answer to 5, contained in No. 130, would be excluded in accordance with the prior ruling because it relates to indebtedness, and that would also apply to No. 6, No. 7, No. 8, No. 9 and No. 10.

Judge Goddard: Are these to be excluded?

Mr. Wright: As I understood the prior ruling, yes. (323)

11 and 12.

Judge Hand: How about 131, 6 there?

Mr. Wright: That would go out also.

Judge Bright: Did you say 9 and 10 also?

Mr. Wright: 9, 10, 11 and 12.

Then we offer 131, which contains the answer to interrogatory 14 on gross income.

Judge Hand: 15 goes out under your stipulation; doesn't it?

Mr. Wright: Yes, I believe that 15 through——

Judge Hand: Also 16, 17 and 18?

Mr. Wright: I believe that all the information all the way from 15 through 24 may go out from 130.

(Government's Exhibit 131 for identification received in evidence.)

Mr. Wright: And we are offering the rest of the data on pages 72 and 73, which appears in their answer to 130.

Mr. Caskey: Mr. Wright, will you state now what in 130 you have offered, beginning on page 70?

Mr. Wright: The answers to No. 1, 2, 3, 4, 13, 51, 53——

Judge Bright: 14 is in too, isn't it, Mr. Wright?

Mr. Wright: 14—I beg your pardon. That is another exhibit, that is in No. 131.

Judge Hand: It appears that you have got it listed here, (324)
so I have marked it admitted.

Mr. Wright: It is admitted but in Exhibit 131 instead of 130.

Judge Hand: What is admitted between 4 and this 131-14, anything?

Mr. Wright: 13.

Judge Hand: I marked it excluded.

Mr. Wright: I think it may be excluded.

Judge Hand: I think it ought to be.

Mr. Wright: Then, after 14, the answers that appear on 72 and 73, I can read them.

Judge Goddard: The answer to interrogatory 27?

Mr. Frohlich: I object to it—on page 72, with reference to shorts.

Mr. Wright: All right, that may go out.

Judge Bright: 27 and 28——

Mr. Wright: 27 and 28.

Judge Bright: (Continuing)—they are excluded?

Mr. Frohlich: And 22, 23 and 24, I think are out. We have no connection with any——

Mr. Wright: They are already excluded.

Judge Bright: They have been excluded.

Mr. Wright: The next exhibit is 132.

Judge Bright: On page 73, in evidence are the answers to 31 and 35?
(325)

Mr. Wright: I beg your pardon?

Judge Bright: On page 73, the answers to interrogatories 31 and 35 are introduced in evidence? Have you offered them?

Mr. Wright: Yes, that is correct.

Mr. Frohlich: And I understand they are subject, your Honors, to the same objections that were made heretofore and the same ruling?

Judge Hand: Yes. We have admitted that sort of evidence in all cases.

Mr. Wright: And 132 is the next exhibit offered, which contains the answers to 38 and 39 and also the answer that is listed there to 40(a), (b), (d), (e) and (f).

(Government's Exhibit 132 for identification received in evidence.)

Mr. Wright: 40(c) should also appear as admitted as part of Exhibit 130.

And the next exhibit is 133, which contains the Columbia answers to 40(g) to (j).

Mr. Frohlich: Same objection, if the Court please, that the choice of those two cities by the Government is not a true picture of the activities of this defendant.

Judge Hand: Overruled.

Mr. Proskauer: Your Honors, may I call attention to a curious situation in which we find ourselves with respect to (326)
these interrogatories? We have never seen them. The interrogatories of the five defendants have been exchanged among one another very lightly, but the interrogatories and the answers thereto of these three so-called independent we have never seen and we haven't the remotest idea what is in them, excepting as we may infer it. The point of my rising is to urge that the Government physically offer these interrogatories and at least furnish us with access to them or copies of them, otherwise we are just in the dark as to what is going in here.

Mr. Wright: Certainly there can be no question about their access to them. I do not believe we have extra copies in either case. I think probably the defendants who fur-

nished them themselves will have extra copies which they would be willing to make available, and, of course——

Mr. Raftery: We are in the same position. We have never seen any of the evidence that went in yesterday, and I think——

Mr. Proskauer: Your Honors will glean from that what the degree of cooperation is in the moving picture industry. The five main defendants never let one another see their interrogatories until, oh, some time quite recently. We have never seen the three, and the three have never seen ours, but it is all in the pot now.

Judge Hand: If you are as unsophisticated and innocent as your remarks indicate——

(327)

Mr. Proskauer: I am.

Judge Hand: (Continuing)—why, you will have to establish a clearing house for information among the independents and yourselves.

Mr. Proskauer: We are just that unsophisticated. But what is happening here is, evidence is being offered which we haven't seen, and I wish some assurance from the Government that at least we will have access to it.

Mr. Wright: You have that assurance.

Judge Hand: Of course they have access, and, of course, the query might arise whether anybody has ever seen them.

Mr. Proskauer: And that gives rise to the speculation as to whether the Court is ever going to see them.

Judge Hand: I am very skeptical about that—long exhibits!

Mr. Wright: We will next offer the five volumes marked 133-1 through -5, which are the answers to interrogatory 48, which are separately bound.

(Government's Exhibits 133-1 through 133-5 for identification received in evidence.)

Mr. Wright: Then that brings us to 134. We offer 134, the answer relating to Philadelphia——

Mr. Frohlich: Philadelphia, Mr. Wrght?

Mr. Wright: That is your Philadelphia answer.

(328)

(Government's Exhibit 134 for identification received in evidence.)

Judge Hand: 41 and 42 go out?

Mr. Wright: Right; also the items at the top of page 75, the answers to 43, 44, 45 and 46. The schedule G referred to on page 75 and the other answer to 48, I believe, is physically incorporated in Exhibit 133, already admitted, and is offered as a part of it.

The information listed there on page 76 as to 133-1, 2, 3, 4 and 5 is already in.

134 is in.

135 is a supplement to the New York City answer, which we will now offer.

(Government's Exhibit 135 for identification received in evidence.)

Mr. Wright: And we will offer 136, their answer to the first 1945 interrogatory.

(Government's Exhibit 136 for identification received in evidence.)

Mr. Wright: 137.

(Government's Exhibit 137 for identification received in evidence.)

Mr. Caskey: May I see 138 before it goes in?

Mr. Wright: Yes, indeed.

Your Honors, will note that that statement of film rentals

(329)

includes only Fox, Loew, RKO and Warner. As I understand it, a later statement was furnished for Paramount, after this list had been made up.

Mr. Caskey: It is objected to on the ground of competency; not the best evidence, no foundation for its admission has been laid.

Judge Hand: What is this?

Mr. Caskey: It is a hearsay statement by somebody.

Mr. Wright: The statement is as follows: "Columbia's answer to interrogatory"——

Mr. Caskey: Just a moment, Mr. Wright? Will you hand it up instead of reading it into the record, until it is ruled on?

Judge Hand: What is this statement in pencil here, "Paramount five largest"——

Mr. Wright: That is additional data that was to come. I think that is all that note means on there.

Judge Hand: Who furnished this?

Mr. Wright: The defendant Columbia.

Mr. Caskey: We have no information as to how they classified those theatres, what theatres Columbia consider affiliates of Fox or not. This is testimony by some unknown person that some theatre affiliates are defendants.

Judge Hand: Overruled.

(Government's Exhibit 138 for identification received in evidence.)

(330)

Mr. Wright: No. 4, which is the answer to interrogatory 4, which is part of 138, I assume is excluded?

Judge Hand: 4 and 5, is that right? 4 and 5 go out?

Mr. Wright: That is right.

No. 139 is next. Those are the answers of Columbia to 1945 interrogatories, 6 through 11.

(Government's Exhibit 139 for identification received in evidence.)

Mr. Wright: The answers to interrogatories 55, 56, 57 and 58 that were a part of 130 are already in evidence, I believe, and are offered.

As to United Artists, the first is No. 140 for identification, containing the answers to No. 1, 2(a)2, and 3 to 24 inclusive——

Judge Hand: Now, 3 goes out, doesn't it?

Mr. Wright: Well, no, I do not think that 3 does. I think what we excluded heretofore was 5, 6, 7, 8, 9, 10, 11 and 12.

Judge Bright: And 13?

Mr. Wright: 13, 14 and 15 I believe stay in.

Judge Hand: What have the answers got to do with it?

Mr. Wright: Well, again it is information as to the management and character of the company. It happens to be a

(331)

closed corporation controlled by——

Judge Hand: What have the answers got to do with it? Well, all right, let it stay.

Mr. Wright: We will have agreements in evidence here later, and I suppose it is important to show who these people were.

Judge Hand: All right.

Mr. Raftery: Mr. Wright, are you leaving in 13 or excluding it? You excluded it as to Columbia. I just thought I heard you say you are leaving it in.

Mr. Wright: If it was excluded as to Columbia it should be excluded here.

Judge Bright: You did exclude it as to Columbia.

Mr. Wright: Then it is out here.

Judge Hand: 13, 14 and 15 are in?

Judge Bright: 13 is out.

Mr. Wright: And I believe 16 through 24 may also go out.

Judge Hand: 14 is admitted?

Judge Bright: 14 and 15 are in.

You offered 14 and 15 and excluded 16 to 24, is that right?

Mr. Wright: Correct, your Honor. And we also offer the negative data that is contained in the answers to interrogatories 51 and 53, and 25 to 28, 31, 35, 38 and 39, and

(332)

also contained in 140; and we also offer the answer as to distribution of features in interrogatory No. 40(a), 40(b), 40(d), 40(e) and 40(f), also contained in 140.

(Government's Exhibit 140 for identification received in evidence.)

Mr. Wright: Then we offer United Artists' answers, No. 141, the 1939 distribution data, which should exclude, I believe, No. 42, No. 43, No. 44, No. 45——

Judge Bright: And 46 on the next page?

Mr. Raftery: How about 46, Mr. Wright?

Mr. Wright: And 46.

(Government's Exhibit 141 for identification received in evidence.)

Mr. Wright: Then we will offer 142, the answer to 48 with respect to Kansas City.

(Government's Exhibit 142 for identification received in evidence.)

Mr. Raftery: United Artists wants to preserve a general objection to this limited evidence.

Judge Hand: All right.

Mr. Wright: Then we will offer 143. They are 1945 answers to questions 1 and 2.

(Government's Exhibit 143 for identification received in evidence.)

Mr. Wright: And 144——

(333)

Mr. Caskey: May I see that, please?

Mr. Wright: You want to see 144 or 143?

Mr. Caskey: 144.

(Exhibit 144 for identification handed to Mr. Caskey.)

Mr. Wright: They are the '45 answers to questions 3, 4 and 5. I take it 4 and 5 will be excluded.

Mr. Raftery: Mr. Caskey, even though you are looking at it, we trust you will treat those rentals as confidential.

Mr. Caskey: I make no such representation. If it is admitted in evidence, I assume it is in evidence for whatever purpose, but I object to it. At considerable effort the defendant National Theatres Corporation prepared a chart showing the amount of moneys which it paid to United Artists, and that is in evidence as Exhibit 43. Now, this purports to give a figure on a somewhat different basis. The figure is different by the extent of some $50,000. We did not prepare it, and we object to it on the ground that it is incompetent.

Mr. Wright: That 144 also contains——

Judge Hand: Well, we will receive that.

Mr. Wright: —the answers to interrogatory 7, which we are also offering. That is described on page 83.

(Government's Exhibit 144 for identification received in evidence.)

Mr. Wright: This data that is listed here is not having (334).
been furnished, I believe, is either to be furnished, or some of it has been furnished since the list was printed and will be given a later number and offered later.

Mr. Raftery: I did not quite hear that.

Mr. Wright: I said I understood that some of this data that were listed here as not having been furnished when the list was made up will subsequently be furnished and will, of course, be given a later number and offered.

We offer 145, which is the United Artists' admissions of fact.

(Government's Exhibit 145 for identification received in evidence.)

Mr. Wright: And we are also offering that part of 140 already received which gives the answers to interrogatories 55, 56, 57 and 58.

Judge Hand: How about No. 6?

Mr. Wright: That is merely an informative statement.

Judge Hand: Have you offered it?

Mr. Wright: No, we have not.

Judge Hand: Oh, it is merely an informative statement in this record?

Mr. Wright: That is all.

Judge Hand: All right. Now, 7 is in, is it?

Mr. Wright: Correct.

(335)

Mr. Raftery: Mr Wright, you also stated that you have since received——

Mr. Wright: At least a part of it, yes, and it will be numbered and subsequently offered.

Mr. Raftery: Thank you.

Judge Hand: You mean as to 6, the material you are talking about?

Mr. Wright: Yes, that that data has subsequently come in and will be numbered and offered.

Judge Hand: Then you had better just strike out 6, hadn't you?

Mr. Wright: It means nothing. It may be stricken out.

Judge Hand: As much stuff as means nothing may be excluded. We are in favor of excluding it.

Mr. Wright: The only purpose of putting it there was to explain the absence of the material.

Judge Hand: Oh, it was all right at the time. Now, 8 to 13 I have marked admitted, is that right?

Mr. Wright: No, there is nothing offered there, because it had not been submitted or marked. That again is just an informative note there on 8 to 13.

Judge Hand: All right. Shall we strike it out?

Mr. Wright: That is agreeable.

Mr. Raftery: Is 12 offered or withdrawn, Mr. Wright? (336)

Mr. Wright: 12?

Mr. Raftery: On page 84.

Mr. Wright: Your answer to 12?

Mr. Raftery: Yes.

Mr. Wright: No, that has not been offered.

Judge Hand: When are you going to offer that?

Mr. Wright: Well, as soon as we have the rest of the United Artists——

Judge Hand: Do you think it can go in here?

Mr. Wright: I do not think we have all of the United Artists' material yet that was to be furnished in response to interrogatories. We have almost all of it. As soon as we get it all we will offer it.

Mr. Raftery: The answer to 12 was none, and the answer to 13 was zero.

Mr. Wright: That is right. I was mistaken. These interrogatories were in general terms. 12 and 13 were submitted to all eight defendants, but they obviously have application only to the five theatre-ownnig defendants.

Judge Hand: Now, you come to 140, don't you?

Mr. Wright: That, as I say, that exhibit has already been admitted and we are offering these answers to 55, 56, 57 and 58, which are a part of that exhibit.

And that brings us to Universal, I believe. The first exhibit is 146, which I think should have excluded from it 5, 6, 7 ,8, 9, 10, 11, 12 and 13.

(337)

Judge Hand: 1, 2, 3 and 4 go in?

Mr. Wright: That is correct.

Judge Hand: The others are out?

Mr. Wright: Yes.

Then on page 86 the data that goes out, I believe, is 16 through 24.

Judge Hand: How about 14?

Mr. Wright: 14 we offer.

Judge Hand: Admitted. 15 is excluded, isn't it?

Mr. Wright: 15 I think in this case shows an interest in a production subsidiary which is one of the group of corporations that make it up. I think it should be in.

Mr. Raftery: What you are talking about is one of the affiliated defendants of Universal? That is one of Universal's own companies?

Mr. Wright: Yes.

We are also offering the answers to 51 and 53 contained in the same exhibit, and 25, 26, 31, 35, 38 and 39.

Judge Hand: All the rest after 26 go out?

Mr. Wright: No. Just 27 and 28 go out. 31, 35, 38 and 39 are in. Then down at the bottom of the page of 146, 41 and 42 would be out.

Mr. Raftery: As to 40 we want to preserve the general (338)
objection as to limitation.

Judge Hand: Overruled.

Mr. Wright: I haven't got to that exhibit yet. Still on 146, the items on page 88, all of which relates to shorts and newsreels, I assume are out.

Judge Hand: 41 and 42 are out.

Mr. Wright: 41, 42, 43, 45 and 46 are out.

Then as to the data in 146 which appears on page 89, we are offering that. That is, the answers to 55, 56, 57 and 58.

Judge Bright: Do you offer the answer to 48 on page 88?

Mr. Wright: We have not come to——

Judge Bright: That is 146.

Mr. Wright: That is in a separately numbered exhibit. 146-2 is a different exhibit from 146.

(Government's Exhibit 146 for identification received in evidence.)

Mr. Wright: The next one we will offer is 146-1 which appears on page 87.

Mr. Raftery: That is the exhibit as to which we wish to preserve the general objection.

Judge Hand: Admitted.

(Government's Exhibit 146-1 for identification received in evidence.)

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Then we shall offer 146-2 which appears on page 88 and contains the answer to interrogatory 48 that Judge Bright just referred to.

(Government's Exhibit 146-2 for identification received in evidence.)

Mr. Wright: And then we offer 147, the Universal admissions of fact.

(Government's Exhibit 147 for identification received in evidence.)

Mr. Wright: Then we offer 148 which relates to one of the Universal subsidiaries, Big U Film Exchange. I think there the data as to 5, 6, 7, 8, 9, 10, 11, 12 and 13 may go out.

Mr. Raftery: In fairness to Mr. Wright, there has been a corporate change in the intercompany relationship between Universal and Big U. Before the day is out we will submit to you a document showing that corporate change. Big U, I understand, is now out of existence.

Mr. Wright: All right.

Mr. Raftery: There has been an amendment of the charter of the parent company and some kind of a merger—I do not know what it is, but we will give it to you.

Mr. Wright: Whatever it is it will be put in the record.

Mr. Raftery: That is right.

(340)

Judge Hand: Now, Mr. Wright, what are you putting in here of 148?

Mr. Wright: The reason we put this in——

Judge Hand: No. What is it you are putting in?

Mr. Wright: 1, 2, 3 and 4, and No. 14. The rest I think may be excluded.

Judge Bright: You mean 15 to 24 is out?

Mr. Wright: Yes.

Judge Hand: Also 5 to 13 are out?

Mr. Wright: Correct.

Now we are offering the parts of 148 containing the answers to interrogatories 51 and 53 relating to theatre interests. The production answers are negative, and I think those may be excluded. Those are the answers to 25 to 28 inclusive, Nos. 31, 35, 37 and 38.

Judge Hand: Excluded?

Mr. Wright: Yes.

The history part down at the bottom of the page, the answers to 55, 56, 57 and 58 are answered. They are in 148.

Judge Bright: I did not hear what you said.

Mr. Wright: We are offering the answers to interrogatories 55, 56, 57 and 58 that are contained in 148 described at the bottom of the page there.

Judge Hand: What are you doing with 146, 146-1, 146-2, interrogatories 40 to 46 and 48?

(341)

Mr. Wright: Those interrogatories have already been offered. This is merely an explanatory note to the effect that those answers cover the distribution activities of this Big U Film Exchange as well as of Universal Film Exchanges, Inc. That is the only purpose.

Judge Hand: You may leave it in or strike it out.

Mr. Wright: Well, I think the note is just there for informative purposes.

Judge Hand: All right. Now, 148.

Mr. Wright: That is offered as to 55, 56, 57 and 58, and also as to 1, 2, 3, 4, and 14, and 51 and 53, which were previously covered.

(Government's Exhibit 148 for identification received in evidence.)

Judge Hand: Next is 149, page 92.

Mr. Wright: I now offer 149.

Judge Hand: What part of it? There are all kinds of subdivisions.

Mr. Wright: We can strike out 5, 6, 7, 8, 9—well, in this case the picture is incomplete if you strike out 9, because I think this is the holding company that does hold stock in other defendants which are part of the Universal group.

Judge Bright. Strike out 5 to 8 inclusive?

Mr. Wright: Yes. 10, 11, 12 and 13 may go out. 15 (342)
I believe should stay in as it shows the interest in certain subsidiaries.

Judge Bright: Is 14 in too?

Mr. Wright: Yes, 14, 15 and 16——

Judge Hand: You want 9, 10 and 11, do you?

Mr. Wright: 9 is in. 10, 11, 12 and 13 are out. 14, 15, 16 and 17 takes care of the Universal subsidiaries. Those should be in. Then I think the answers 18 through 24 may go out.

We are also offering——

Judge Hand: Now wait a minute, Mr. Wright. With respect to 149, 1 is admitted; 2 is admitted; 3 is admitted; 4 is admitted; 5, 6, 7 and 8 are excluded; 9 is admitted?

Mr. Wright: Yes.

Judge Hand: 10 excluded?

Mr. Wright: 10, 11, 12 and 13 are excluded.

Judge Hand: Yes, 10, 11, 12 and 13 are excluded. How about 14?

Mr. Wright: 14, 15, 16 and 17 admitted.

Judge Hand: And the rest excluded?

Mr. Wright: That is correct.

Mr. Raftery: Mr. Wright, you used the expression "Universal group." What you meant were the Universal subsidiaries.

Mr. Wright: Yes.

(343)

Mr. Raftery: And this offer of 9 and the others is merely to show the company relationships to its own subsidiaries?

Mr. Wright: Correct.

Then we also offer the negative statement as to theatre interests appearing in 149. That is in answer to interrogatories 51 and 53. The item at the top of page 94 is merely an explanatory note, and that is true of the next item under distribution. We are offering the history answers under 149. That is, 55, 56, 57 and 58.

(Government's Exhibit 149 for identification received in evidence.)

Mr. Wright: Then we are offering Exhibit 150, which is the answer of Universal Film Exchanges, Inc., except that I believe the answers to questions Nos. 5, 6, 7, 8, 9, 10, 11, 12 and 13 may go out there. 14 which appears at the top of page 96 I think should be in. I believe the rest may go out.

Judge Hand: 14 should be in?

Mr. Wright: Yes.

Judge Hand: The rest out?

Mr. Wright: Yes, 15 to 24 inclusive, out.

(Government's Exhibit 150 for identification received in evidence.)

Mr. Wright: Then we are also offering the negative statement as to theatre interests appearing at the top of page 97.

(344)

That is, the answers to interrogatories 51 and 53 which are part of 150. The next items are merely explanatory notes down to history, and we are offering the answers to 55, 56, 57 and 58 which appear in 150.

Now, on this list there are further interrogatory answers listed which came in at a later date and are included in the supplemental list. I think most of those are in Exhibit No. 349 which may as well be offered at this time. That is an

admission of fact which came in from Columbia. It appears on page 115 of the list you have there. That 349 is additional interrogatory data received from Columbia, and I understand their data is still incomplete, but further data will be numbered and offered as received.

Mr. Frohlich: Mr. Wright, I understand that our admissions of fact are complete.

Mr. Wright: For the whole 92 cities? I thought we just got them for the 73 cities, and then you were going to give us the other 19.

Mr. Frohlich: The 92 you have got there.

Mr. Wright: All right, if they are there, they are there. They are all offered.

Judge Hand: You had better not have that statement of yours in there, because if you find that it is borne out afterwards, why, you can correct it, but there is no use of having something in there that might mislead somebody.

(345)

Mr. Wright: I think that is quite correct. I may as well verify this now. (Counting.)

Mr. Frohlich's statement appears to be correct. There are 92 covered there.

(Government's Exhibit 349 for identification received in evidence.)

Mr. Wright: Then the remaining interrogatory answer material that is identified on this list I think appears in Exhibit 359, which was supplemental data received with respect to National Theatre holdings. I think, however, that letter, in turn, has been superseded by a later list, and we should probably offer the list instead of this reconciliation letter.

Mr. Caskey: That is correct.

Judge Hand: Then you do not offer 359? You withdraw it?

Mr. Wright: I withdraw 359. I was just going to suggest assigning the same number for convenience, if you have that theatre list here. (Conferring with associates.)

My associate has called my attention to the fact that the newest and superseding list has been given a number that we had not reached, and it will be offered in due course. But this 359 is withdrawn.

360, I believe, gives supplemental data on the Paramount interrogatories; and the same is true of 361. These relate to theatre interests written in response to efforts or (346)
letters on our part made to reconcile certain discrepancies. They really supplement the Paramount information as to theatre ownership. We offer those, 360 and 361.

Judge Hand: They both relate to theatre holdings?

Mr. Wright: 360 relates to Paramount theatre holdings; and 361 supplies data with respect to license fees paid by certain Paramount theatres and theatre grosses which had been omitted from prior interrogatory answers.

(Governments Exhibits 360 and 361 for identification received in evidence.)

Mr. Wright: Then 362 contains answers of Universal to 1945 interrogatories, one through 5; and I assume under the Court's prior ruling, Nos. 4 and 5 relating to shorts and newsreels would be excluded. The rest is offered.

Mr. Caskey: If your Honors please, this is objected to on the same ground; lack of competency. There is a discrepancy of $300,000 betwen this evidence tendered without any support and Exhibit 43.

Judge Hand: Overruled.

(Government's Exhibit 362 for identification received in evidence.)

Mr. Wright: I believe that completes the sworn interrogatory answers on the printed list. There also are some additional answers to interrogatories that were propounded (346a)
at the time the suit was filed, informally, which I should like

to offer next. Those are listed here. The first one is No. 151, which appears on page 98.

(347)

Judge Hand: What about these 150, 155, 156, 157 and 158, were they excluded or admitted?

Mr. Wright: No. 150, 155, 156, 157 and 158, as I understand it, were offered and admitted.

Judge Hand: I suppose they would be. Same thing.

Mr. Proskauer: What did you say, Mr. Wright?

Judge Hand: Now, 151, you have come to, haven't you, page 98?

Mr. Wright: That is what is currently being offered together with 152, the letter of transmission. That is a list of Paramount theatre holdings by States and by years, from 1932 through 1938.

(Marked Government's Exhibits 151 and 152 in evidence.)

Mr. Wright: And 153 is, I believe, a similar tabulation covering the period 1933 through 1938, submitted by National Theatres Corporation, and 154 is a list of National Theatre holdings, dated November 30, 1937, which was also submitted——

Mr. Caskey: May I see that, please?

Mr. Wright: Yes, surely.

Mr. Caskey: This, your Honors, we are constrained to object to. Not in answer to any interrogatory. We have no copy in our files.

While the gray book indicates it was furnished by Fox, and that may be true, we certainly have no knowledge what-

(348)

soever of that fact. It is also wholly immaterial inasmuch as it duplicates other more reliable data, and we object to it on the ground of competency and on the ground of materiality.

Mr. Wright: We certainly withdraw it, if there is any question at all as to who furnished it. I had supposed there was no doubt on that score.

Judge Hand: Withdrawn.

Judge Goddard: What is that?

Judge Hand: 154.

Mr. Wright: Then we will offer No. 156, the Warner Theatre list as of 1945, together with 157, which is a supplementary letter referring to the list.

Judge Hand: 156 and 157?

Mr. Wright: Yes.

(Government's Exhibits 156 and 157 for identification marked in evidence.)

Mr. Wright: And we will also offer 158, the RKO list, as of December 31, 1944, with a supplementary letter from RKO's counsel referring to that list.

(Government's Exhibits 158 and 159 for identification received in evidence.)

Mr. Wright: We are now offering, if the Court please, No. 160, which is listed here as Fox's list of theatres as of July 1945. That should be changed to "as of August 1, (349)
1945," which is the last list submitted and which we substituted for the July list.

Mr. Caskey: It should also be changed to "National's list of theatres."

Mr. Wright: All right. National is one hundred per cent owned by Fox.

(Government's Exhibit 160 for identification received in evidence.)

Mr. Wright: Then 161 is the Paramount 1945 theatre list.

(Government's Exhibit 161 for identification received in evidence.)

Mr. Wright: It is being offered with 162, which is a supplementary letter from Paramount counsel, referring to the list.

(Government's Exhibit 162 for identification received in evidence.)

Mr. Wright: And 163 is the Loew 1945 list of theatre holdings.

(Government's Exhibit 163 for identification received in evidence.)

Mr. Wright: The next general category of documents that I would like to offer——

Judge Goddard: The next is 155.

Mr. Wright: 155 are these reports which we will deal (350)
with later because there is still a matter of controversy as to how far they are willing to go in admitting them. I would rather next proceed to the offer of license agreements.

The license agreements begin on page 100, the first number there being, I believe, No. 172. These 1936-1937 agreements were not in our possession when the list was prepared. These summaries and our data came from agents' work sheets who had examined them in the companies' files, and so we have asked them to produce the documents themselves, and have to rely on their copies for the actual introduction of the material in evidence.

Have you 172?

Mr. Seymour: Are you offering 172?

Mr. Wright: Yes.

Mr. Seymour: If your Honors please, it seems to me again we are getting into an area of matter of such doubtful materiality and relevancy that perhaps we can save our

selves some time and some of the record by considering it. Here is an agreement made in 1927 which expired in 1937, between two of the defendants, that is, between Loew and the predecessor of the defendant Paramount. There is no proof and will be none that such agreements have been made since 1937 because it is simply an expired agreement. Under the consent decree, while that provision was in force, this
(351)
method of selling pictures could not be followed. It is true that provision has lapsed but, in the absence of some evidence of the continuation of such franchises or such agreements, it would seem to me that expired agreements were pretty immaterial.

Finally, there cannot really be any question about the legality of franchises aside from this consent decree. Because I think about 1936 or 1937 the Government itself in a suit in this court insisted that two of these defendants give ten-year franchises, and this was a ten-year franchise to certain theatres in St. Louis as a condition of dismissal of the Government's suit. That is United States v. Warner Brothers. Both the granting of a franchise and the dismissal were approved by Judge Knox. So it seems to me this sort of stuff is just encumbering the record.

Mr. Wright: If the Court please, this agreement is, of course, the very stuff of which the case is made, the agreements made between these various producer-exhibitor defendants. While it is true that this agreement expired with the 1936-1937 season, it was an agreement which functioned over this ten-year period and is one of those which help to set the pattern that we are now concerned with and clearly——
(352)

Judge Hand: We will admit it.

Mr. Gillespie: Your Honor, we note a similar objection on behalf of Loew's.

(Government's Exhibit 172 for identification received in evidence.)

Mr. Wright: We next offer 173, which is——

Judge Hand: The same objection is made to 173 and it is overruled.

Mr. Seymour: It applies to the next few exhibits, and may it be deemed to apply to all of them, that is, your Honor's ruling apply to all of them, so I won't have to repeat the objection?

Judge Hand: Yes. Are all these exhibits of the same nature on pages 100 and 101; and exhibit numbers for identification 193 and 194 on 102?

Mr. Wright: That is correct. Insofar as they are all film license agreements made between two or more of the defendants in the case, that is right.

Judge Hand: They should be admitted, I should think, and marked, subject, of course, to these objections.

Mr. Seymour: There is one other question that is not really an objection. I just want to mention it now so your Honors will note it. The heading at the top of page 100 is, as called by the Government, "representative agreements." There is no basis for that characterization that I know of. It

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is just an argument and I hope your Honors will treat this like the other descriptive materials——

Judge Hand: Oh, yes.

Mr. Seymour:——as a mere contention. If they are representative, then there must be proof of others.

Mr. Proskauer: In that connection, your Honors, you will observe, when you come to the Warner licensing agreements, that they are for short periods, one year, two years. They are not at all of the same pattern as the ten-year licensing agreements and, in truth, there is no representative master licensing agreement. When you look at these you find that they all differ.

Mr. Wright: It is perfectly agreeable to me to strike the word "representative" from the list. It obviously——

Judge Hand: Granted.

Mr. Wright:——is not evidence anyway. The purpose of the word "representative," in the first place, was merely to indicate to the Court that these weren't all of these agreements that were made between the defendants.

Judge Hand: Oh, yes.

Mr. Wright: But a selected sample.

Judge Hand: You offer 174, 175, 176, 177, 178, 179, 180,
(354)
181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193 and 194?

Mr. Wright: Correct.

Judge Hand: All right. They are admtited subject to these objections.

Mr. Caskey: My objection to 178 is to the description, not as to the document. The document relates to a franchise to one theatre in Portland, Oregon, in which a subsidiary of Paramount, then in bankruptcy, had an interest. It was leased by Fox West Coast, or a subsidiary thereof and, as a part of the lease, with the approval of the bankruptcy court, the franchise was entered into, and I think that is scarcely to be gleaned from the description of Exhibit 178 in this gray book.

Mr. Wright: The description is for identification purposes only, and obviously the exhibit speaks for itself.

Judge Hand: Are they marking these?

The Clerk: I don't have them.

Mr. Wright: Have you these agreements that we have just referred to? They were to be produced by the respective defendants. We notified them, of course, and agreed that as between themselves, either party to the agreement could produce it that it was convenient for. I do not know that the time of the Court need be taken up with the actual marking,
(355)
if they haven't them here, for example, ready to go in.

Mr. Proskauer: Have you copies?

Mr. Wright: I do not think, as far as I know, that we have copies in our possession of any of these unless they have been made within the last few days.

We do not have 174. Have you got one?

Mr. Proskauer: I have a photostat of 175. We are looking for 174.

Mr. Wright: These may as well be marked.

Mr. Seymour: Here is 174.

Mr. Wright: Here is 174, to be marked.

Mr. Proskauer: You have a copy of 174, have you, Mr. Wright?

Mr. Seymour: Yes, I gave it to him.

Mr. Proskauer: Very good.

(Government's Exhibits for identification 172, 173, 174 and 175 received in evidence.)

(355-A)

Mr. Wright: I believe 172, 173, 174 and 175 are marked 176, we have no copy of.

Mr. Seymour: We have no copy of that.

Mr. Wright: How about RKO?

Mr. Leisure: We have no copy.

Mr. Seymour: We are told that was burned up in a fire of the RKO warehouse.

Mr. Wright: As I understand it, then, neither defendant has a copy of the document described as Exhibit 176 for identification, neither RKO nor Paramount?

Mr. Leisure: Nor the Government.

Mr. Wright: In that event I suppose we will have to offer the agents' worksheets of the summary of the agreement which was made by them when they examined the originals. I will note that as missing.

Judge Bright: 176 is missing?

Mr. Wright: 176.

Mr. Seymour: May we see what you are having marked?

Mr. Wright: 176, as I understand it, the defendants say they are unable to produce, that is, neither Paramount nor RKO can locate the agreement.

Mr. Seymour: Are you marking anything?

Mr. Wright: The ones that have been marked in evidence are 172, 173, 174 and 175.

We now would like to offer 177 and 178.

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Judge Goddard: They are offered and received?

Mr. Wright: They are all offered and received. It is simply a question of marking, as I say. I believe that that has to be done in the presence of the Court.

Judge Hand: That is true. I always fear when we leave you people for a minute that you won't be sawing wood and getting your record in, and we propose to have this thing go just like that. We are not going to stand any other system here. Ties up too many judges.

Mr. Wright: There are limits to the extent to which we can organize this thing. We did not have the agreements. We asked for them and asked to have them produced.

Judge Hand: Do not discuss it now. Go ahead and put in your proof.

Mr. Wright: Has Paramount 177, 178 and 179?

Judge Goddard: I think it is 176 you were looking for?

Mr. Wright: 176, they tell us, they cannot find; that neither party has any record of it; they think it is burned up or something.

Will anybody who has a copy of any of these agreements come forward, and see if we can get the others marked? This is 177.

(Government's Exhibit 177 for identification received in evidence.)

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Mr. Caskey: Have you 178?

Mr. Wright: I would like a copy, if you have it.

Mr. Proskauer: May I suggest to your Honors while we are marking those, that I don't want the Court to get the impression that these are general licensing agreements between these two companies covering their entire area. For

example, 178 is an agreement between Paramount and Fox West Coast relating to one theatre in Portland, Oregon.

Judge Hand: I know; I understand.

Mr. Wright: 178, the last one.

(Government's Exhibit 178 for identification received in evidence.)

Judge Hand: You have 178 and you are marking it?

The Clerk: 178 is marked.

Mr. Wright: Has anyone 179?

(Government's Exhibit 179 for identification received in evidence.)

Mr. Wright: 180. Have you it there? He says you have 180.

Mr. Caskey: 180? No, sir, we haven't 180.

Mr. Wright: Have you made a search for it or is it just——

Mr. Caskey: Of course, Mr. Wright, we have spent six months making a search for documents in this case for you. These are ten years old.

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Mr. Seymour: Why don't you pass that for the present?

Mr. Wright: All right. How about 181?

Mr. Gillespie: Mr. Wright, Loew's does not have 181. I understood Warner was to produce 181.

Mr. Wright: Is it just a misunderstanding as to who was to produce it, or has neither one of you got it?

Mr. Proskauer: I want no suggestion that we haven't produced what we were expected to. On the 1st of October, 1945, we addressed a letter to your associate, Mr. Lasser, enclosing copies of every exhibit that we were supposed to produce. They were 175, 191, 194, 259, 266 and 271.

Mr. Wright: The situation on 181 is what, Loew's has not been able to locate a copy of such agreement?

Mr. Gillespie: That was not marked on my list as one we were to furnish. I think we have the agreement, but it was just not, as I say, marked as one we were to furnish. Apparently there was a misunderstanding on that.

Mr. Wright: Then either one or the other of you will be able to furnish it? I suppose it will be marked when furnished.

Mr. Proskauer: We will make a search for it. If we can find it, of course, we will produce it.

Mr. Wright: How about 182?

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Mr. Gillespie: We have 182.

Mr. Wright: May we have it?

The Court: What is this, 181?

Mr. Wright: 181 they are searching for, and 180.

(Government's Exhibit 182 for identification received in evidence.)

Judge Hand: 183——

Mr. Wright: And 184 and 185 and 186. Those are also RKO agreements. Do you have those?

(Government's Exhibits 183, 184 and 185 for identification received in evidence.)

Mr. Wright: And 186, have you that?

Mr. Gillespie: Here is 186.

(Government's Exhibit 186 for identification received in evidence.)

Mr. Wright: 187?

Mr. Gillespie: 187.

(Government's Exhibit 187 for identification received in evidence.)

Mr. Wright: And 188.

Mr. Thompson: We have not been able to find in the files of Loew anything which conforms to the description of 188.

We have not been able to find any record of any such corporation in the files of Loew's, Inc. as this Anchor Theatrical Corporation. We don't know what the license is, we don't (360)
know what the corporation is.

Mr. Caskey: Your ignorance is shared by us.

Mr. Wright: Before we leave this agreement, as I understand it, according to the summary which is contained in this appendix A and picked up on the F. B. I. worksheets, that covered the exhibition of Fox Films in the Fox Palace and Capitol Theatres in Washington, D. C. for that ten-year period. As I understand it, neither Loew nor Fox has any agreement which covered the exhibition of Fox Films in those theatres during that period?

Mr. Caskey: Certainly we didn't—I didn't make the search personally, but we are told this thing does not exist, and it doesn't ring with me. I know the operator of the Fox Theatre, the Capitol Theatre, in Washington and nothing about Anchor Theatrical Corporation approaches it.

Mr. Wright: Have you in your possession agreements which relate to the licensing of Fox films in those theatres, the Fox Palace and Capitol in Washington, D. C. for that period?

Mr. Caskey: Undoubtedly there are some agreements. Whether they are franchises or not, I don't know. We could find out. But I am certain that there has been no franchise, as you know, for that theatre since 19—since we compiled the list which we furnished you in 1940, this theatre has not been franchised. The theatre changed hands back in 1936. (361)
Before that——

Mr. Wright: Which theatre?

Mr. Caskey: The one that is in the union—now called the Capitol, then called the Palace.

Mr. Wright: I think in that case we again will have to rely on the agents' worksheets who made the examination

and took this data from the agreements that they examined in the files of the company in 1937.

Judge Goddard: What company did they find it in?

Mr. Wright: I believe that the examination at that time was made of the contracts. The contracts were then, I believe, furnished for inspection by the distributor company in each case and that the contract examined by the agent would have been one furnished by Fox Film.

Mr. Caskey: Didn't they photostat it at that time?

Mr. Wright: I think they may have photostated some of those and made the examination from photostats. We shall certainly do everything we can to locate a photostat, if there is one.

Mr. Caskey: I call the Court's attention, for the sake of the record, to the fact that Exhibit 187 relates to one theatre in the City of Los Angeles.

Judge Hand: 188, you haven't found. Now 189.

Mr. Caskey: We have it. Have you it?

Mr. Whittlesey: Yes.

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(Government's Exhibit 189 for identification received in evidence.)

Mr. Wright: has Fox or RKO 190?

(Government's Exhibit 190 for identification received in evidence.)

Mr. Wright: 191 and 192. Does Fox or Warner have those?

We have a phototsat of 191 to be marked.

(Government's Exhibit 191 for identification received in evidence.)

Mr. Davis: What became of 189 and 190? Did they go in?

Mr. Wright: They did. And 192, does Fox or Warner have that?

Mr. Caskey: We have it.

(Government's Exhibit 192 for identification received in evidence.)

Mr. Wright: 193 is, I believe, withdrawn. That is a duplication, I think, of 194. We offer 194, which is the agreement between RKO and Warner, dated August 31, 1945, for two years.

(Government's Exhibit 194 for identification received in evidence.)

Mr. Caskey: What exhibit are you withdrawing?

Mr. Wright: 193 is withdrawn.

(363)

Judge Hand: Now you have everthing in in that section except 176 and 180, 181 and 188.

Mr. Wright: Correct.

Judge Hand: And that is all.

Mr. Wright: Correct.

Judge Hand: And you propose to supply them by oral testimony or other documentary evidence?

Mr. Wright: That is correct, your Honor.

Judge Hand: We will take an adjournment until quarter past two.

(Recess to 2.15 P.M.)

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AFTERNOON SESSION

Judge Hand: Proceed.

Mr. Caskey: If your Honors please, Mr. Wright has handed me what purports to be a photostatic copy of an agreement dated August 16, 1935, between Fox Film Corporation and United Theatre Enterprises, Inc., covering the Rialto, Capitol and Ritz theatres in Macon, Georgia; and it has every appearance of genuineness, and except for the notation on the front cover, which obviously is not part of the

document itself, there is no objection. I would like to have that deleted.

Judge Hand: What is this, Mr. Wright?

Mr. Wright: This is No. 180, if the Court please, which appears on page 100 of the list. It was a document that neither of the defendants who were involved were able to locate, and we were able to locate a photostatic copy in our files.

Judge Hand: It may be admitted.

Mr. Wright: The part that Mr. Caskey does not like is a notation "Covers entire circuit" up at the top, which I just struck out in pencil.

(Government's Exhibit 180 for identification received in evidence.)

Mr. Wright: In order that there won't be any delay in producing this other material and having it marked, we shall (365)
now offer consecutively the agreements which are identified here as 195 through 274. Mr. Raftery, I believe, has 195 and 196, and he says he wants to make a speech about them.

Mr. Raftery: I do not want to make a speech. I want to call your Honors' attention to the language at the head, "Representative Master Licensing Agreements" on page 102. We don't produce either of the agreements with any representation that they are representative of anything except what is in the agreements. Now, as to the first agreement——

Judge Hand: Well, that is merely in this pamphlet?

Mr. Raftery: That is right.

Judge Hand: Why don't you strike out "Representative"?

Mr. Wright: As I said before, the only purpose is to indicate that those are not all of the agreements of that class that these people made. "Selected" is just as good a word.

Judge Hand: It seems to give them so much pain——

Mr. Wright: I am willing to have it stricken.

Mr. Raftery: Now, as regards 195, the description says "Dated February 3, 1928, for 10 years." That agreement,

by its terms, expired in 1937 in the middle of the year, but the contracting party, Publix Theatres Corporation, went into bankruptcy in late 1932 or early 1933, and the contract expired, as a matter of fact, in 1933.

(366)

Judge Hand: Yes, I understand that.

Mr. Raftery: Now, because of the remoteness of it we wish to object to its introduction in evidence, as it has nothing to do with anything that has happened since early 1933, 12 years ago.

Judge Hand: We will admit it.

Judge Goddard: This had to do with a situation that existed before the bankruptcy, is that right?

Mr. Raftery: That is right. And also that is a printed copy not executed. The executed copy is not in existence, and where there are blank signatures not filled in in print, the parties mentioned never joined in the agreement.

Judge Goddard: They never did join?

Mr. Raftery: Mr. Chaplin never signed it.

Judge Hand: Then does that get in, Mr. Wright?

Mr. Raftery: All the other parties signed it. It was operative as to all of the parties whose printed signatures show in the agreement. This is a contract where United Artists agreed to license 15 pictures a year to the Publix Theatres mentioned therein, and it required the individual approval of the owner of each of the pictures. When the agreement was presented to Mr. Chaplin he would not approve, so his pictures were not included.

Judge Bright: All the others were?

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Mr. Raftery: Yes.

Mr. Wright: The fact that he did not approve appears on the face of the agreement, because there is no showing of any signature on his part.

Judge Hand: All right, we will admit it.

(Government's Exhibit 195 for identification received in evidence.)

Mr. Wright: The other United Artists agreement in that group there, 199, has also been produced by Mr. Raftery, and that will be marked accordingly.

(Government's Exhibit 199 for identification received in evidence.)

Judge Hand: What about these prior ones?

Mr. Wright: Now, the Columbia agreements, Mr. Frohlich, have you 196 and 197?

Mr. Frohlich: We haven't got them.

Mr. Wright: You were not able to locate them?

Mr. Frohlich: I looked for them and have not been able to locate them.

Mr. Wright: Has Paramount got a copy?

Mr. Seymour: We have not yet been able to locate a copy. We shall continue our search, and suggest you pass it.

Mr. Wright: Is the same true as to 197?

Mr. Frohlich: Yes.

Mr. Wright: Is that true as to Paramount?

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Mr. Seymour: Just a moment. Yes, the same observation. I suggest you pass that for the present.

Mr. Wright: 197 we will pass.

Now, 198.

Mr. Frohlich: 198 Mr. Marcus has.

Mr. Wright: I think we also have those beginning with 200 there, don't we? Let us have those while you are looking for 198.

These agreements beginning with 200 are pooling agreements relating to the operation of theatres.

Judge Hand: How about 199?

Mr. Wright: We are supposed to have a copy of it which we have not been able to locate.

Mr. Bright: 199 has been marked.

Mr. Wright: Oh, yes, 199 is in. It is 198 that we have not been able to locate.

Judge Hand: You haven't got 198?

Mr. Wright: We think we have it here, but we have not given it to the clerk for marking yet.

And I am now offering 200, a copy of which we have.

(Government's Exhibit 200 for identification received in evidence.)

Mr. Wright: And 201. 201 consists of three pieces, all marked with that number.

(Government's Exhibit 201 for identification received in evidence.)

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Mr. Wright: We are now offering 202.

Mr. Leisure: In this case too, if the Court please, the heading may be misleading to the Court. It says "Theatre Pooling Agreements between the Producer-Exhibitor Defendants" and so forth. This agreement with Skouras is not between any of the other defendants at all, and the heading as it reads there is very misleading.

Mr. Wright: The heading includes their theatre-operating affiliates, and we believe other proof will show that Skouras and Randforce are operating affiliates of RKO through a minority interest.

(Government's Exhibit 202 for identification received in evidence.)

Mr. Wright: We offer 203, which is in two parts.

(Government's Exhibit 203 for identification received in evidence.)

Mr. Wright: And 204 is also in two parts and is offered.

(Government's Exhibit 204 for identification received in evidence.)

Mr. Wright: 205 is offered.

(Government's Exhibit 205 for identification received in evidence.)

Mr. Wright: 206 is offered.

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(Government's Exhibit 206 for identification received in evidence.)

Mr. Wright: Then we offer 207.

(Government's Exhibit 207 for identification received in evidence.)

Mr. Wright: Then we offer 208.

(Government's Exhibit 208 for identification received in evidence.)

Mr. Raftery: Are you putting in 208?

Mr. Wright: Yes, it just went in.

(371)

Mr. Raftery: I want to call this to the Court's attention and ask Mr. Wright for a concession, that the United Artists Theatre Circuit is in no way connected with the defendant United Artists Corporation, nor have we any interest in it, nor has it any interest in us. The only thing in common is the same name, United Artists.

Mr. Wright: That is correct.

Judge Goddard: Has United Artists Theatres Circuit, Inc. any relation to other defendants?

Mr. Wright: Yes, there is a relation to the defendant Fox through Joseph Schenck and also to the other defendants, that is, through stock ownership, and also to other defendants through so-called pooling agreements, which will later appear.

Mr. Caskey: If your Honor please, Mr. Joseph Schenck, as I understand it, from 1935 until fairly recently was a stockholder in Twentieth Century-Fox, having a considerable block of stock but nowhere approaching any substantial interest, and he also, I am informed, has some stock in this corporation called United Artists Theatre Circuit, Inc., but that is the only conceivable affiliation, and I submit that

meets no legal test, and I am sure Mr. Wright will not contend that the defendant Twentieth Century-Fox exercises any control, participates in the management or has anything whatsoever to do with this corporation.

(372)

Mr. Wright: Our contention will be that Mr. Schenck is an important part of the Fox management and is also president of this Theatre Circuit in addition to the stock interests involved, and, as I have said before, there will be other proof which connects this Circuit with the other defendants in the form of pooling agreements between them.

Mr. Davis: Between all the other defendants?

Judge Hand: That is admitted.

Mr. Wright: Loew, for one. I am not sure how many others.

Mr. Davis: Wait for the proof!

Mr. Wright: The next is 209, which is in two parts.

(Government's Exhibit 209 for identification received in evidence.)

Mr. Wright: These next numbers have not yet been supplied to us. 210, has Loew a copy of that, or Paramount? Loew-Lucas-Jenkins agreement.

Mr. Seymour: As to 210, in response to your request, we have no copy of it. Paramount has no interest whatever in its operation, and I think it must be included in your list by inadvertence. Paramount has an interest in Lucas and Jenkins in other connections. It has none whatsoever in this Rhodes Theatre. It is a wholly independent operation of Lucas and Jenkins. We have no copy of it and I think it is immaterial and irrelevant in the case.

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Mr. Wright: Has Loew a copy of it?

Mr. Thompson: We cannot find any such agreement. The facts of the situation are that a wholly-owned subsidiary of Loew's owns 50 per cent of the stock of the corporation called Rhodes Theatre Operating Corporation. The other 50 per

cent of that stock is owned by three individuals, not owned by any corporation.

Mr. Wright: Who are the individuals?

Mr. Thompson: I don't think I have the names of those individuals, but the record shows that the lease of the Rhodes Theatre was assigned to that corporation. There is no operating agreement for that theatre. It is just operated by this corporation in which Rhodes owns 50 per cent.

Mr. Wright: I understand that; I simply wanted to identify the partners who own the other 50 per cent. I understood that to be the Lucas-Jenkins interests. Perhaps I am mistaken.

Mr. Seymour: I am told that is not the fact.

Mr. Wright: If it is not the fact we should have whatever the facts are, I suppose.

Mr. Thompson: I don't have the names of the other stockholders here. If we have that information, I shall be glad to furnish it.

Mr. Wright: Mr. Marcus calls my attention to the fact that he is under the impression that your interrogatory an-

(374)

swer shows that the theatre is operated for you and the other 50 per cent holder by Lucas and Jenkins, is that correct?

Mr. Thompson: Not by Lucas and Jenkins. I understand that some Lucas and Jenkins organization operates the theatre, but as to——

Mr. Wright: We will withdraw the number here, and if they can simply furnish us with a statement as to who the other interest is, why, that is agreeable to us.

Mr. Davis: Why don't you, Mr. Wright, if I might suggest, you have in Loew's answer to interrogatory 58, let us turn to that? It is in evidence. Let us see what it says.

Judge Hand: What do you propose to do?

Mr. Wright: As I say, I withdraw the number there and I suppose whatever facts appear in the interrogatory answer appear, and Mr. Thompson's statement is satisfactory, provided it will be supplemented with a statement as to who the

owners of the other 50 per cent interest in the company that operates the Rhodes Theatre are.

Judge Hand: All right, 210 is withdrawn.

Mr. Wright: Have you 211, Mr. Davis?.

Mr. Seymour: May I see that, Mr. Wright?

Mr. Wright: Yes. We will offer this agreement, 211.

Mr. Davis: If the Court please, with reference to this proposed Exhibit 211, agreement between Loew and Skouras Theatres Company, I wish to point out that, as I am in-

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formed, Skouras Theatres Company is not a defendant here, nor an affiliate of any of the defendants. It seems to be a third person pure and simple.

Mr. Wright: We will show the facts as to Skouras Theatres Corporation. It is true it is not a defendant. It is a company which operates theatres which is partly owned by RKO, partly by executives of the Fox Film Company. And those facts will appear in the course of the evidence.

Judge Hand: Admitted.

(Government's Exhibit 211 for identification received in evidence.)

Mr. Wright: Going back to item 210, I notice that in the answer to the interrogatory that is in evidence here of Loew's, that is, Exhibit No. 48, that the page dealing with the Rhodes Theatre, there is the statement made as to Loew's interest: "Nature and extent of interest? 50 per cent leasehold. Name of corporation through which interest is held? Rhodes Theatre Operating Company." And then at the bottom is a notation, Operated by Lucas and Jenkins. Now, am I to understand that is incorrect?

Mr. Thompson: It is not operated by Lucas and Jenkins as a corporation, but I understand the officers of this operating company are connected with Lucas and Jenkins and they do the operating of this Rhodes Theatre.

Judge Bright: What interrogatory was that in answer

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to?

Mr. Wright: It is in Exhibit 48. The answer to interrogatory 40, I believe, giving the theatres that Loew had in Atlanta and the nature of the interest.

Loew, I believe, was to produce the numbers marked 212. 213, 214 and 215.

I will offer 212.

(Government's Exhibit 212 for identification received in evidence.)

Mr. Wright: And then, I believe, you have 213 and 214, Mr. Thompson?

We are now offering 213 and 214.

(Government's Exhibits 213 and 214 for identification received in evidence.)

Mr. Wright: And you have 215, Mr. Thompson, or do you have that, Mr. Seymour, Loew's Paramount?

Mr. Seymour: I am told that there is no agreement such as is described under your 215. There is no agreement between Loew and Paramount.

Mr. Wright: There is a lease of the theatre from Loew.

Mr. Seymour: Not from Loew to Paramount.

Mr. Wright: From Loew to Balaban & Katz.

Mr. Seymour: No.

Mr. Thompson: There is a lease of a theatre in Oak Park,
(377)
a subsidiary of Loew's, to Essaness Theatres Corporation. That is the operator of the circuit of theatres in Chicago. That lease was assigned to another corporation and is operated by that corporation. There has never been a lease to Balaban & Katz, nor any agreement with Balaban & Katz, or with Paramount, about that theatre.

Mr. Wright: What is the name of the last corporation to whom the lease was assigned?

Mr. Thompson: Oak Park Amusement Corporation.

Mr. Wright: That is the corporation, is it not, in which Paramount is interested?

Mr. Thompson: I know of no Paramount interest.

Mr. Seymour: That is certainly misdescribed.

Mr. Wright: In any event, there is no agreement answering the description and we will withdraw that item.

Judge Bright: Which one is that?

Mr. Wright: 215.

Judge Hand: Withdrawn, 215.

Mr. Wright: Then the Warner-Loew leases that are marked 216 and 217.

Mr. Proskauer: Mr. Wright, I cannot hear a word. I am sorry to keep repeating that. Are you offering 216 and 217?

Mr. Wright: Yes. Those, I believe, you or Loew were (378)
going to furnish.

Mr. Proskauer: We have already furnished them. We have given them to you.

While counsel is locating those leases, your Honors, I suppose they may be fairly admissible because they are a transaction between two co-defendants, but they are nothing like a pooling agreement. It is just two leases by which they really exchanged two theatres in Wilmington, Delaware.

Judge Hand: Have you them here?

Mr. Wright: Apparently we cannot locate ours. If either of you gentlemen have your copy here, will you let me have it?

Mr. Thompson: We have 217.

Mr. Wright: May we have that? You haven't 216?

Mr. Thompson: I have not.

Mr. Proskauer: I shall be perfectly glad to look up and see if we can find another copy, but I wish the record to distinctly show that we did furnish it.

Mr. Wright: If you say you did, I assume you did.

(Government's Exhibit 217 for identification received in evidence.)

Judge Hand: Have you marked 216?

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Mr. Wright: They have not located a copy yet.

The next is 218, a Paramount-Warner agreement. Does Paramount or Warner have that?

I have sent upstairs for 218. We apparently have that.

I will now have 219 marked, which consists of two parts.

Mr. Davis: What happened to 218?

Mr. Wright: We sent upstairs for it.

(Government's Exhibit 219 for identification received in evidence.)

Mr. Wright: 229 is another Loew-Warner agreement.

Mr. Proskauer: Have you it, Mr. Wright?

Mr. Wright: If you gave it to us, we should have it.

Mr. Proskauer: I hold in my hand the receipt signed by your associate, Mr. Lasser, for all these documents for which you are now calling on me. If there is any question about it, here is it.

Mr. Wright: Does that include 221 and 222 and 223?

Mr. Proskauer: The answer is yes, it does.

Mr. Wright: and 224 and 225?

Mr. Proskauer: The answer is, yes.

Mr. Wright: Here are 221 and 222. Apparently we haven't been able to locate 220.

(Government's Exhibits 221 and 222 for identification received in evidence.)

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Mr. Proskauer: In order that there may be no question of the accuracy, this receipt recites that the originals were received for photostating and return. And after a lapse of time, the originals were returned to us, but we have not produced them in court because we assume, of course, that you have the photostats.

Mr. Wright: That is a reasonable assumption. That applies to 223, 224, 225, 226——

Mr. Proskauer: The answer is yes.

Mr. Wright: —227, 228, 229 and 230, is that right? I mean, those are all, you say, delivered by you to us?

Mr. Proskauer: The answer to that question is yes.

Mr. Wright: They may be being photostated. We will offer 231.

Mr. Proskauer: What is the present offer, if you please?

Mr. Wright: 231.

Mr. Seymour: You are skipping for the moment, Mr. Wright, 223 to 230?

Mr. Wright: That is right, we are searching for those documents.

(Government's Exhibit 231 for identification received in evidence.)

Mr. Davis: That is the lease from Loew to Fox, under (381)
which Fox operates the Warfield Theatre?

Mr. Wright: That is correct.

Then this Fox-Paramount agreement 232, that we will ask to have marked.

Mr. Seymour: I suppose, your Honors, on this exhibit and on certain others to follow, will take notice of the fact that the agreements in question were made by trustees in bankruptcy of this court while the Paramount was under the jurisdiction of the court here.

(Government's Exhibit 232 for identification received in evidence.)

Mr. Wright: And we will also offer 233.

(Government's Exhibit 233 for identification received in evidence.)

Mr. Wright: As I understand the situation as to 234, we are in error there because the corporation named "Paramount Theatres, Inc." had nothing to do with Paramount, is that correct?

Mr. Caskey: That is correct, and the original leases were exhibited to Mr. Marcus and he agreed with our contention.

Mr. Wright: We withdraw that then. 235 is offered to be marked.

(Government's Exhibit 235 for identification received in evidence.)

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Mr. Wright: And 236.

(Government's Exhibit 236 for identification received in evidence.)

Mr. Wright: As to 237, we were naive enough to assume that because Fox and RKO each owned 50 per cent of the Main Street Theatre in Kansas City that there was probably some written agreement in that connection. However, we are informed that no written agreement was made in connection with the acquisition of those interests, so we will merely offer, in lieu of what is described there, using the same numbers, 237-1 and 237-2, the reports in which Fox reported that it acquired a 50 per cent interest or, rather, National Theatres acquired a 50 per cent interest in the Main Street Theatre on December 23, 1942, and RKO reported the acquisition of a beneficial undivided one-half interest in the fee of the same theatre on January 19, 1943, together with the statement that it was not now being operated. The date of this is February 8, 1943. And there are no present plans for its operation; as I understand it, it is still closed.

Mr. Davis: Report to whom?

Mr. Wright: Reports from the defendants named to the Department of Justice pursuant to the provision of the consent decree—Section 11, I believe.

Mr. Caskey: May I see that?

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Mr. Wright: Certainly.

Mr. Whittlesey: If the Court please, with respect to this matter of an agreement between Fox and RKO with respect

to that theatre, Mr. Wright stated that there was no written agreement entered into. I would like to point out that on August 31 we advised the Department of Justice that there was no agreement of any sort entered into between Fox and RKO with respect to that theatre, not merely no written agreement.

Judge Hand: What is this, 238?

Mr. Wright: 237 is that number. It is in two parts, 237-1 and 237-2.

Judge Hand: You are talking about the second part?

Mr. Wright: 237-1, I believe, is the report from Fox; 237-2 will be the report from Loew, both covering this 50 per cent interest in the Main Street Theatre.

Mr. Caskey: Now, the objection to counsel's language is to the fact. What we acquired and what the exhibit shows we acquired was an undivided one-half interest in the fee simple title.

Mr. Wright: I thought that was what I stated.

Mr. Caskey: If your Honor please, to make the statement that they acquired a 50 per cent interest we think is misleading. The building was owned by a number of heirs, and

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we bought from one heir an undivided one-third interest in the fee; from another heir, an undivided one-sixth interest; and at a later time RKO, without our knowledge, bought other interest; so as a result we are tenants in common, and the use of a 50 per cent interest might be misleading.

(Government's Exhibit 237-1 and 237-2 for identification received in evidence.)

Mr. Wright: We next offer 238 and 239 which appear to be in fact bound together as one agreement. Both exhibit numbers appear on it, however.

(Government's Exhibits 238 and 239 for identification received in evidence.)

Mr. Wright: If we may go back to 216, we have located that, and I hand it to the clerk for marking.

(Government's Exhibit 216 for identification received in evidence.)

Mr. Wright: Then I have also located 218, which I will hand to the clerk to mark.

(Government's Exhibit 218 for identification received in evidence.)

Mr. Wright: 219 is in. I offer 220.

(Government's Exhibit 220 for identification received in evidence.)

Mr. Wright: We have located the Exhibits 223 through
(385)
230 which were not available before, which I have now handed to the clerk for marking.

(Government's Exhibits 223 through 230 inclusive for identification received in evidence.).

Mr. Proskauer: What are you offering, please?

Mr. Wright: I just handed the clerk the documents which had previously been offered but not located. 223, I believe, through 230. Those were the documents you had delivered to us for photostating.

Mr. Proskauer: I do not want to take the time urging the objection of relevancy, but in several of those cases the other party to the agreement is a complete independent, in every sense of that term.

Mr. Wright: I can only say that that is a matter as to which we differ with Judge Proskauer.

Now, that brings us up to 240, which is contained in an envelope, and I will ask to have that marked in evidence.

(Government's Exhibit 240 for identification received in evidence.)

Mr. Proskauer: In connection with the Exhibit 230, just for the sake of getting it all in one place, may it be noted that that terminated last week and is no longer in existence.

Mr. Caskey: In the same connection, I showed Mr. (386)
Marcus when we came down that the sublease of the theatre in Idaho Falls, which is 236, when it expired a subsidiary of National negotiated a lease directly with the landlord, and is no longer an assignee of any lease from Paramount. The relationship is directly between the landlord and the National subsidiary.

Mr. Wright: 241—

Judge Goddard: How about 240?

Mr. Wright: 240 has been received and marked. We now offer 241.

(Government's Exhibit 241 for identification received in evidence.)

Mr. Wright: I now offer 242.

(Government's Exhibit 242 for identification received in evidence.)

Mr. Wright: We now offer 243.

(Government's Exhibit 243 for identification received in evidence.)

Mr. Wright: We offer 244.

(Government's Exhibit 244 for identification received in evidence.)

Mr. Seymour: If your Honors please, as to the group of exhibits going in now, it seems to me again there is a wholly gratuitous use of the word "representative" in the title. They (387)
are stated to be representative film licensing agreements. Now, the fact of the matter is that the Government for purposes of its own called on the defendants to produce certain

license agreements, which we produced, and having produced them they then undertook to characterize them. Now, the characterization ought to be withdrawn. They are certain documents.

Judge Hand: That is a matter of argument.

Mr. Seymour: I do not want the Government's characterization to be constantly before your Honor when there is no basis for it.

Judge Hand: I know, I know.

Mr. Proskauer: The word "representative" causes us no grief, except that we are always pained by inaccuracy.

Judge Hand: You will probably argue it early and late and get it into our heads finally.

Mr. Proskauer: If I may offer an amendment, we will argue it thoroughly and briefly.

Mr. Wright: We offer Government's Exhibit 245 in evidence.

(Government's Exhibit 245 for identification received in evidence.)

Mr. Wright: We offer 246.

(Government's Exhibit 246 for identification received in evidence.)

Mr. Wright: We offer 247, 248, 249 and 250, which are (388)
all contained in this red envelope.

(Government's Exhibits 247, 248, 249 and 250 for identification received in evidence.)

Mr. Wright: The last one that went in, your Honors, was 250. Now we offer 251.

(Government's Exhibit 251 for identification received in evidence.)

Mr. Wright: We offer 252.

(Government's Exhibit 252 for identification received in evidence.)

Mr. Wright: We offer 253.

(Government's Exhibit 253 for identification received in evidence.)

Mr. Wright: And we offer 254, 255, 256 and 257.

(Government's Exhibits 254, 255, 256 and 257 for identification received in evidence.)

Mr. Wright: We offer 258.

(Government's Exhibit 258 for identification received in evidence.)

Mr. Wright: We offer 259.

(Government's Exhibit 259 for identification received in evidence.)

Mr. Wright: 259 is apparently in two parts.

We offer 260, 261, 262 and 263, which are all contained in this folder.

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(Government's Exhibits 260, 261, 262, and 263 for identification received in evidence.)

Mr. Wright: We offer 264, 265, 266 and 267, which are all contained in this envelope.

(Government's Exhibits 264, 265, 266 and 267 for identification received in evidence.)

Mr. Wright: We offer 268, which belongs in that same group, Columbia contracts.

(Government's Exhibit 268 for identification received in evidence.)

Mr. Wright: Then the United Artists agreement, 269, 270, 271, 272, 273 and 274, which are all contained in this one envelope.

Mr. Raftery: Mr. Wright, a point of information. Is this "agreement" or "agreements" in those United Artists? Is there more than one agreement?

Mr. Wright: I will have to look at the exhibit.

Mr. Raftery: Suppose you let me look at them. I have not seen that group of agreements recently.

Mr. Wright: Yes (handing).

(Government's Exhibits 269, 270, 271, 272, 273 and 274 for identification received in evidence.)

Mr. Wright: That brings us to the printed license forms. The Fox forms are 275 and 276 for identification. These are the forms which have been printed in full in Appendix B. (390)

Mr. Proskauer: Mr. Wright, will you tell me why you are offering these?

Mr. Wright: I just explained to the Court that these forms were those that were printed in full in Appendix B.

Mr. Proskauer: These are undoubtedly forms that the defendants used in making contracts with people indiscriminately. But if I may ask, what is the relevancy of it?

Mr. Wright: These forms, I suppose, are the best evidence available of the general method of doing business and the manner in which films are made available.

Mr. Proskauer: But there is a charge here of violation of the Sherman Act. What is it in those forms that you claim?

Mr. Wright: There are a number of similarities, for one thing, which we have pointed out in the schedule in the appendix to B, and there are other provisions which are of very dubious legality in and of themselves. I do not think there is anything to be gained by making an argument on the forms at this time. I think it is perfectly apparent that you cannot consider in any event the legality of what has been done here without knowing what the forms of agreement used in carrying on the business are.

Judge Hand: Are these the same forms as are found in Appendix B?

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Mr. Wright: Precisely.

Mr. Caskey: That is true as to 275. 276 is not an agreement but only someone's rather imperfect summary of one.

Mr. Wright: That is correct, but the somewhat imperfect summary is in Appendix B.

(Governments Exhibits 275 and 276 for identification received in evidence.)

Mr. Wright: I think Loew was to produce the forms referred to there. Have you the Loew forms, 277 and 278?

Mr. Davis: Your Honors, again, I ask whether these forms are introduced—I am speaking now of the Loew forms 277 and 278—are introduced as substantive proof of violation of the Sherman Act; and if so I should like to ask again what the clauses are which, assuming that the Court agreed with the Government, the Government would wish to enjoin the further use of. I think we are entitled to that.

Judge Hand: These things may have a bearing or they may not, we cannot tell. They attempt to show a method of doing business, and they may have some bearing on the case, or they may not. We will admit them.

(Government's Exhibits 277 and 278 for identification received in evidence.)

Mr. Wright: 279 and 280, the Paramount forms, are next offered.

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(Government's Exhibits 279 and 280 for identification received in evidence.)

Mr. Wright: We offer 281.

(Government's Exhibit 281 for identification received in evidence.)

Mr. Wright: Mr. Phillips calls my attention to the fact that in the listing of the Paramount form for the 1943-44

season at page 108 there is a typographical error there. The correct number of the form is not Form A340 A-3 but should be Form 4340 A-3. That is Exhibit 280.

The next number I think is 282, the RKO 1943-44 form.

(Government's Exhibit 282 for identification received in evidence.)

Mr. Wright: Then we will offer 283 and 284, the Warner forms

(Government's Exhibits 283 and 284 for identification received in evidence.)

Mr. Wright: We offer 285 and 286, the Columbia forms.

(Government's Exhibits 285 and 286 for identification received in evidence.)

Mr. Wright: We offer 287 and 288, the United Artists forms.

(Government's Exhibits 287 and 288 for identification received in evidence.)

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Mr. Wright: Now I will hand the clerk 290. We are looking for 289.

(Government's Exhibit 290 for identification received in evidence.)

Mr. Wright: I am informed that we have now been able to locate a photostat of No. 188, and we have the agent here who made the examination and who can identify the photostat; and, I suppose, inasmuch as the claim has been made as to that agreement that it just was not simply a question of not being able to find it, but that they did not know that any such agreement was in existence—since they made that claim, we had better have the agent identity the exhibit.

Judge Hand: Show it to them.

Mr. Caskey: Show it to us.

Judge Bright: Show it to Fox and Loew.

Mr. Caskey: There is no question but what this is Mr. Michel's signature and that he was a vice-president of the company at the time; and the O. K. of the initials of the secretary of the company. You do not have to call any witness to prove that.

Judge Hand: All right. Admitted.

(Government's Exhibit 188 for identification received in evidence.)

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Mr. Wright: No one has been able to locate 181 yet, I take it, and as we have not—I don't know whether Loew or Warner have. That was one you said you were still searching for this morning.

Judge Hand: Have you got the copy of this?

Mr. Wright: We have not.

Judge Bright: 176 is still open.

Mr. Wright: 176 is still unaccounted for. I thought perhaps the defendants might be able to locate a copy during the recess. We have not yet been able to.

I take it the situation as to those listing licenses is the same as it was when we left it this morning, and we will endeavor to see if we can locate a copy.

Judge Hand: Have you got 289 here?

Mr. Wright: No, we are still making a search for that.

I do not think there is much more we can do on the license agreements at this time until they have been located.

Judge Bright: Isn't it printed in full in the appendix?

Mr. Wright: I believe it is.

Judge Hand: Page 180 of the appendix.

Mr. Wright: I do not know whether Mr. Schimel has had an opportunity to check or have compared that form as it appears in our appendix with the form itself——

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Mr. Schimel: I gave a set of forms to Mr. Marcus at noontime. I will get you another set.

Mr. Wright: All right, we will put it in tomorrow if we can't locate it today.

That brings us, I believe, to the Appeal Board decisions. Now, you will find two recent ones given the numbers 291 and 292, and then the first 106 are contained in five volumes numbered 1 to 5 inclusive, which appears on the first page of the list here, and those volumes I think are in the possession of the clerk, because that material was identified——

Judge Goddard: They are in chambers. They were offered on a motion.

Mr. Wright: Yes, they were identified and offered, those numbers 1 to 5.

Judge Hand: What are you referring to now?

Judge Goddard: Appeal Board decisions.

Judge Hand: You mean 291 and 292?

Mr. Wright: And I am also referring to Exhibits 1 to 5 for identification which are listed on the very first page.

Mr. Seymour: I would like to be heard on that offer, if your Honors please.

Judge Hand: All right.

Mr. Wright: I might say that in this connection I do

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not like to encumber the record with the material that is in printed form that is on file at the Arbitration Association. If it were understood that the decisions may be referred to by either party without physical incorporation in the record, then I do not suppose it is necessary; but we offer them to remove any question as to judicial noticeability.

Mr. Seymour: May I inquire of Mr. Wright through the Court for what purpose they are offered?

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Mr. Wright: They are offered, as I stated in my opening statement, primarily as the best available collected data we have as to what the practices of the five consenting defendants have been since the decree was entered; and it represents the Board's findings in a great variety of factual

situations, involving complaints of various character that arose under the decree.

Judge Hand: And they are all clearances?

Mr. Wright: No, if the Court please, they are not all clearances.

Mr. Proskauer: 90 per cent of them.

Mr. Wright: Some of them refer to what are called some run complaints, refusal to license on any terms, some refer to an attempt to secure a specific run, a Section 10 proceeding. I believe proceedings under Sections 6, 8 and 10 of the decree, or perhaps 9, too, account for all of them.

Mr. Seymour: Now, if your Honors please, in order to have it perfectly plain as to the basis on which these decisions are received, Mr. Wright gave various reasons for their receipt in his opening, and before Judge Goddard on the motion for temporary injunction he offered these decisions as evidence of violation of law, and we objected to them. We think that they are admissible only for a very limited purpose, and for that purpose we would like to have them admitted; but we would like to make sure they are not

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admitted for such a broad purpose that they put burdens upon us which should not properly be put upon us.

First, plainly they are not evidence of violations of law, nor of conspiracy, nor of combination. The Appeals Board was deciding certain questions in an arbitration proceeding under standards laid down in the decree and they were not deciding any questions of violation of law, and so, for that purpose, they are plainly inadmissible.

Second, Mr. Wright rather indicated in his opening that he thought they might constitute findings of fact for this case; in other words, that your Honors could, in lieu of making findings yourselves as to any of these facts, somehow, take the Appeals Board findings. For that purpose we think they are inadmissible too. They were decisions under the decree, on the basis of which they were made and on the basis of which they were litigated. They are not findings in a Sherman Act case and could not be accepted as such.

Those two broad categories are categories in which we think they would be inadmissible.

We think that they are admissible for the limited purpose of showing how the decree worked, so that your Honors may know how effective, and how very effective, this arbitration system, set up by the decree, has been; and for that purpose we will urge your Honors to consider all the decisions and not any selected decision, but that is a very limited purpose. What I say to your Honors is, that if they (398)
be received, they be received for that very limited purpose.

Mr. Raftery: May I ask Mr. Wright a question? Did I understand him correctly? You are only offering the Board of Appeal decision against the five defendants and not against the three?

Mr. Wright: We offer everything we offer against all defendants.

Mr. Raftery: Then I am going to file a formal objection on behalf of United Artists and Universal. We were not parties to the arbitration system. We were not parties to the decree. We never participated in any of these proceedings. We object to their admission against Universal and United Artists.

Mr. Frohlich: On behalf of Columbia Pictures Corporation I make the same motion that Mr. Raftery has just made for the other two independent defendants.

Mr. Davis: The statement by Mr. Wright brings me to my feet because I want to formalize the objection of Loew's, Inc. to the admission of these documents. We object, first, that they are no evidence in this hearing of the facts which are recited by the Appeal Board. Those facts that are material in this case must be proven entirely independently.

We object, in the second place, and here I meet the last statement of Mr. Wright, that they are introduced against all the defendants, we object to the introduction against (399)
Loew's, Inc. of any arbitration proceedings to which it was

not a party. It does not, from our point of view, matter at all what the arbiter or court might have done with any one of our co-defendants, and any decision to which we are not a party we object to on that ground.

We object in the third place, because, and I shade a little with my brother on this question, I am not sure that they are even admissible in order that the Court may inform itself of the manner in which the Appeals Board has gone about its duties. If the Court feels it important at any stage of the case to inquire into the activities of the Appeals Board, they are a source of information, but I do not think they are competent as evidence in this case for any purpose. I should like to make that formal on behalf of Loew's, Inc.

Mr. Proskauer: Your Honors, I would like——

Judge Hand: I think we will exclude this evidence for all purposes.

Mr. Wright: If the Court please, I would like to be heard on that because this is an extremely vital matter. We have here records which were made by these defendants themselves in a tribunal that was set up by this Court for the express purpose of exploring the facts of these complaints and finding what the facts were making a record of them and giving appropriate relief. Now, if these decisions are not evidence of the facts concerning what these

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defendants have done since this consent decree was filed, I cannot conceive of anything that would be.

Certainly there could be no more futility or no more futile procedure devised than for us to bring before this court the same complainants who have offered testimony in these proceedings, which have been heard by these agents of the court, and findings made, in proceedings where the defendants were present and had the opportunity to cross-examine, argue, appeal, or what you will. Certainly the system that was set up here cannot have the slightest justification; and we will move to set it aside as of any time that

the Court should hold that the record that it builds is not even available for this Court in determining what ultimate disposition should be made of this lawsuit.

That, I submit, is a ruling that would knock the props right out from under the system set up here. There is no excuse for its functioning at all if it cannot at least make a record which can be used by this Court in determining the ultimate disposition of the suit. There is no possible constitutional authority for it, I would say. There may be serious objections on that ground as it is, but to assume that you can have a system working extrajudicially in this manner, set up by decree, and that the Court under that decree cannot even look at it, is, I submit preposterous.

Mr. Proskauer: May I be heard briefly on this? This is (401)

the first time I ever heard the *in terrorem* argument used for the admission of incompetent evidence.

If Mr. Wright wishes to move with respect to the arbitration system, that is his business. I suggest that it has nothing to do with the question of the admissibility of these decisions.

This decree provides, consent decree, that "nothing in it shall be an admission with respect to the allegations of the petition, nor an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of the statute."

I agree entirely with my brother, Mr. Seymour, that your Honors have a right to look at these documents to determine the working of the decree, but to say that when we go into an arbitration proceeding, as to whether a clearance is reasonable or unreasonable, and the arbitrator awards a clearance of two more or three more days, that that is evidence, competent evidence, of a violation of the Sherman Law, is to defy every rule of evidence.

Judge Hand: What is this provision of the decree?

Mr. Caskey: Page 2 of appendix C.

Mr. Proskauer: In one case the arbitrators refused to receive a decision of the Court on the Sherman Law question because they said they weren't concerned with that, (402)
that they weren't deciding whether a thing violated the Sherman Law; they were deciding the thing the decree told them to decide, which is an entirely different thing.

Mr. Wright: There isn't any question about that.

Judge Hand: To what extent have these arbitration decisions done anything except decide about clearance?

Mr. Wright: They have decided questions of fact raised in proceedings involving not only clearance, but, as I have pointed out, demands for run where the claim is that there has been a violation of Section 6.

Judge Hand: What is that?

Mr. Wright: Section 6 is also printed in here at page 8. It is a provision which says that:

> "No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on film run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for such theatre will have the effect of reducing the distributor's total film revenue in the competitive area"——

Judge Hand: That is a long thing. Can't you summarize it? What is the effect of it?
(403)

Mr. Davis: It is the refusal of any and all runs to an applicant.

Mr. Wright: The purpose of the provision is to prevent what had happened in the past, that is, a refusal to serve an exhibitor on any terms, simply to protect his opposition from

competition. It is a form of extreme clearance. Unreasonable clearance may be severe where they won't license him films unless he plays six months after the first run. These situations that are covered by 6 are situations where he would simply refuse to sell pictures on any run at all, no matter how late he wanted to play them.

I don't quite understand your Honors' concern about whether or not they are all clearance or covered other complaints. I submit they would be equally admissible even if they were confined to clearance complaints. There is nothing sacrosanct about the facts developed in the course of clearance complaints. They are still facts which are of importance to this Court in determining what it is going to do with this litigation, even if they arose in the course of arbitrating clearance or any other kind of complaint.

Mr. Proskauer: May I suggest, your Honor, that the fundamental vice in the Government's position here is that it disregards the rule of competency of evidence. They want you to say that because an arbiter may have said in a little case to which I was not a party, or perhaps Mr. Davis's client

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was not a party, that there was an unreasonable clearance exacted of a man, and he made certain findings in that, that that is binding on us as evidence of a violation of the Sherman Law. No such question was ever submitted.

Mr. Wright: No such claim is made.

Mr. Proskauer: I beg your pardon?

Mr. Wright: I say, such claim is not made.

Mr. Proskauer: Then they aren't evidence of anything.

Judge Hand: Then what is the claim that is made?

Mr. Wright: The claim for them is that they are evidence of the facts adduced; whether or not those facts constitute a violation of the Sherman Act is, of course, a matter for independent determination by this Court. The arbiters were not applying the criteria of the Act, admittedly; they were applying the criteria established in the decree itself, and, in so far as those facts are concerned, even if those facts they found

were not conclusive, they are, at least, prima facie evidence which, if these defendants chose to do so, it seems the most that they could say would be that they have an opportunity here to rebut such facts as have been found in those proceedings, but, to say, your Honor, that they aren't even prima facie evidence of the facts found is simply to ignore entirely the relation between this Court and this arbitration system and these arbitrators. It would be just as though this Court
(405)
were to say that it even could not look at the recommendations of a special matter that it had appointed to hear and determine a case and make recommendations. That is virtually what these defendants are saying here, is that you cannot consider what the Court's own agents have done in determining what these facts were, and I say that it is inconceivable that you could justify the continued existence of this arbitration system at all if you were to exclude its operation from the scrutiny and review of this Court in that manner.

Judge Goddard: Upon what theory would you submit, Mr. Wright, the findings in a case in which a defendant was not a party? How could that bind somebody who was not a party?

Mr. Wright: Obviously, as to those not parties to the proceeding there could be nothing binding in what occurred here except in so far as it might be tied up through a finding of conspiracy as between the defendants, just the situation you have with respect to any other facts that individually concern a defendant, they do not, of course, bind another unless you have a tie-up; but clearly the objection——

Mr. Davis: I just want to allude to the last remark of Mr. Wright's. Unless these are admissible on this trial, not as proof of what the arbitrators did, not as proof of the relief which they afforded, but as proof of what the parties
(406)
did, as recited by the arbitrator, then he says, unless they are admissible for that purpose, he is going to make the

bold step of moving to dispense with the entire arbitration system.

I do not understand that the arbitral system was set up for the purpose of furnishing evidence on some other trial, whether on the part of the Government or anybody else. I understand the arbitral system was set up to give relief between contending parties, and, indeed, it is so informal in character that under Section 6 of the rules providing for the procedure at hearings, it is recited that "The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." The arbitrator's preface reads, "The facts seem to me to be so and so."

But never before have I heard it soberly suggested that such a finding in another proceeding, where those facts might or might not be proper subject of inquiry, that such a finding could be introduced as substantive evidence.

Judge Hand: Well now, suppose his finding is against your client and your client has consented to arbitration, what about it then, and the Appeals Board has, we will say, affirmed or modified or done anything with the arbitration?

Mr. Davis: As between myself, my client and the complainant, that finding of the arbitral tribunal, by our mutual

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consent, is binding upon us, but that in another suit between my client and the Government of the United States, or whomever, the recitals made by the arbiter can take the place of proof of fact, is to me a proposition so astounding that it is difficult, really, to answer it.

Mr. Proskauer: May I suggest, your Honors, that the very analogy which Mr. Wright uses in his argument points the distinction? He said that this would be just as though your Honors ruled out the report of a special master. On the contrary, if you appoint a special master, it would be in the action in which the trial was being had. He would be hearing the issues on that trial, he would be bound by

the rules of evidence, and he would make a report to your Honors. Here we have, not an arbitration between us and the Government of the United States, we have an arbitration between us and an individual complainant. The arbitrators are enjoined not to respect the usual rules of evidence; they are to take into consideration all business considerations, with certain exceptions; they are not concerned in any decree with the question of law violation. I am talking now about those to which I was a party, because I do not think there is any real distinction. If these arbitrators in the course of a proceeding, to which we might send some young man to take care of, an arbitration between us and John Smith out in some little town, as to whether a two-day clearance or a

(408)

ten-day clearance was reasonable, write some finding of fact as between us and that man, surely the mere fact that this arbitration proceeding flowed from a judgment in United States v. Paramount, does not make the Government a party to that proceeding, or doesn't make that finding evidence on the trial of the main issue in this case. And to point that, I pose this question to your Honors: Suppose we offered those arbitration proceedings in evidence as an estoppel against the Government, as to such findings as were made in our favor? Why, there isnt a man within the sound of my voice who wouldn't say that is preposterous, and I respectfully suggest it is just as preposterous for the Government to urge these arbitrators' reports as a judicial finding against us, as having the sanctity of the judgment of a court so it could be offered in evidence.

Mr. Wright: Let me go back just a minute to how this decree came about and how the system was set up. Here we were, settling this case in November, 1940, on an admittedly impermanent basis. We were setting up this procedure for a trial period with the express understanding that when we got through with that period it might be necessary to go ahead and try the case anyhow.

In making this agreement, we set up a system whereby these complaints could be litigated without exposing these

defendants to the liability of contempt proceedings in the
(409)
first instance. We knew that the provisions of the decree, which we were attempting to enforce here, were going to be given nationwide application.

What it would have meant, if we had not set up that arbitration system, would have been to devise some system of reference to a master or otherwise for the purpose of hearing the numerous complaints that were going to be brought.

We agreed that we would set it up on a basis where those complaints could be heard in an arbitration forum and there would be no contempt except for a violation of an arbitrator's award.

That system was set up, with the express approval of the Court, the American Arbitration Association designated to perform the function of furnishing the panels of arbitrators and conducting the hearings in the first place, and an appeal board was also especially appointed by this Court for the purpose of granting such review as the parties thought necessary. There again, as a means of relieving this Court from a review function of that character, that job was delegated to these agents especially appointed for that purpose.

Judge Hand: They were final. We had no control over it.

Mr. Wright: They were made final, that is correct, without further review here, with this limitation, that the arbi-
(410)
tration system, as such, was not made final and it was expressly understood by everybody who agreed to that decree that the matter would be up for review at the end of the three-year period. We don't——

Mr. Davis: I challenge that.

Mr. Wright: Just a minute. We do not agree with the defendants' contention at all that they are now entitled to continue this arbitration system indefinitely, as a matter of right. It has only been continued since the expiration of the

three-year period, according to our position, by the failure of either party to move to set it aside. Any time that either party moves, under the decree, as we read it, the Court would have no discretion but to set it aside.

Judge Hand: Do you think they could introduce the decisions of this Appeal Board and bind the Government?

Mr. Wright: Well, clearly——

Judge Hand: Wait a minute. As to the facts in the case?

Mr. Wright: Clearly, prima facie, yes. Those facts are established in the course of a mechanism to which we were parties in the sense that we consented to have the thing done that way, even though we weren't parties to the individual proceedings. Clearly, that is the whole difference in the point of view in this arbitration system. The defendants seem to regard it as something that was simply set up as a

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matter of their convenience to operate wholly outside the judicial framework as a means of disposing of some troublesome complaints that they had.

The only justification the thing has is as a law enforcement device. That is all this suit covers. That is the only jurisdiction this Court has. And the only jurisdiction that the whole system itself derived is from this Court's function, as the agency engaged in making effective the Sherman Act.

They just cannot have their cake in that respect and eat it too. They did get a very wide immunity from contempt proceedings for these continuing violations of these practices that were prohibited in the decree, and we were willing to give them that as the price of convenient administration, but certainly we never supposed that we were not going to have available, for the purpose of the tribunal which created the system, such evidence as it develops as to what was occurring during this trial period.

Judge Bright: You are not precluded from the evidence; you are precluded from adjudications upon the evidence, if this objection is sustained. They are adjudications made between other parties, not between you and a party, but be-

tween a complaining theatre operator and one of these defendants. Suppose it had been private litigation between the same two defendants, would you be able to introduce (412)
the case on appeal in that private litigation in this case as proof of the facts in that case?

Mr. Wright: That, I think, is an entirely different question, I would say. Probably not. But this is not private litigation. This is public litigation. This is part of a system of public law enforcement. The United States may not have been a party to these proceedings in that it did not go in and actively represent these exhibitors, although I think we did intervene in some proceedings, but the whole theory on which the system was set up was that it was a means of law enforcement, and that the exhibitors by litigating these complaints in these forums would achieve the purposes of the Act.

Those proceedings are an integral part of this one right here. You cannot separate them out and look at it as though these were just proceedings comparable to the triple damage suits to which the United States was not a party. We are a party to this suit, party to this system, and we have to be. There is just no way it could be properly set up and function except in the framework of this suit.

Mr. Leisure: If the Court please, I do not think we need to rely on it—I agree thoroughly with my distinguished associates, Judge Proskauer and Mr. Davis, that there can be no possible reason for offering this evidence in another action, and I agree with Judge Bright, it is just as if it were (413)
offered in another private litigation—but from time to time here we are held responsible for something that was done by some predecessor in corporate office, and I am afraid that my brother Wright finds himself in that same position here, because the Government did agree in this decree to certain things, and one of those things was that the evidence should not be used subsequently. Let me just read to you from the

first paragraph in the decree, which has already been mentioned:

> "Neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree"—

Now, clearly, the arbitration provision was one of the requirements in the decree—

> "shall be used as evidence subsequently."

So Mr. Wright, if we did not have a body of evidentiary law to rely on would find himself out of court on this particular issue.

Mr. Wright: I participated in the negotiations of this decree myself and I have never heard such a distortion of plain language. What that refers to clearly is the fact that when we provided in this Section 6 that they should not license, or not refuse to license, a run on some terms, that that provision was not to be construed as an adjudication that they had unlawfully refused it or unlawfully engaged in that

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practice in the past, and the same thing, of course, applies to all the other prohibitions that were contained in the decree. Those prohibitions which provided arbitration procedure were not in themselves were to be taken as an admission that they had engaged in the practices which were prohibited. There isn't any question at all about that, but it is perfectly clear that nothing in that first paragraph or anywhere else in that decree ever suggested that this Court would not be able to examine what has been done in the course of carrying out this decree, in determining what ultimate disposition of the suit should be made.

Mr. Leisure. We have no objection to that, but when the issues are totally different, and the issue is one of a violation of the antitrust law as between other parties, certainly there can be no reason for urging it to be offered her in a different forum on a different issue. I have never heard of such a suggestion as that before in court.

Mr. Raftery: Judge Goddard asked Mr. Wright the specific question, how can these proceedings be binding on any party to this action who was not a party in the arbitration proceeding, and Mr. Wright answered your Honor, and I think, if I remember correctly, he stated he did not believe they could be binding. I therefore, on behalf of Universal and United Artists, defendants, enlarge my previous objection to cover that ground, and also, the evidence he seeks to
(415)
offer against us is hearsay, and I ask for a specific ruling as to these two defendants.

Mr. Frohlich: Columbia joins in that motion.

Judge Hand: Whatever be the decision as to these other defendants, I should think it was clear as to the independents, and I am perfectly sure we would all sustain your objection. I am not so perfectly sure about the others.

Mr. Seymour: May I just suggest this, that if your Honors consider the matter further, perhaps overnight, my position, which I hope I made clear at the outset, is the same as Mr. Davis's as to the inadmissibility of this material as evidence either of a violation of law or a substitute for facts in this case. My point was that it might be admissible, as to which he disagreed, for the very limited purpose of showing how the decree had worked. That would not permit any of these decisions to be offered as a substitute for calling the complaining witness in this case. That is what the Government is trying to get by, that is what it is trying to do, is to use one of these decisions instead of individuals and shift to the defendant some burden, whether or not they were in the case, some burden as if that case had been this case. As to that we are all in accord that it is not admissible, but it may be, I think, and Mr. Davis does not, it may be admissible for a severely limited purpose, and when your Honors come to consider that, I wish you would consider
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whether it could be admitted for a severely limited purpose which would not cast upon us indirectly the burden.

Judge Hand: How many of these decisions are you trying to get in?

Mr. Wright: We relied in our trial brief—I think we quoted from, in our appendix C, a relatively few. Again, the only reason for offering all was, simply that was the complete picture that was made in the course of these proceedings and was material which the Court should have access to. So far as what we would specifically rely on, there would probably be very little of it.

Judge Bright: What do you say, again, they were relevant to prove?

Mr. Wright: I say they are proof, at least prima facie, of the facts which are there found.

Judge Bright: Of the facts testified to by the complainants?

Mr. Wright: Facts of all kinds. Facts, I mean, findings——

Judge Bright: You are chiefly interested in the facts testified to by the complainants?

Mr. Wright: We are interested in those as well as other facts which were produced by the defendants in the form of their testimony, or license agreements or whatever the arbitrator had before him.

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In so far as the facts he found may be relevant here, we say that those decisions are prima facie evidence of those facts. Obviously, they aren't any evidence in themselves that the law has been violated. The arbitrator's consideration of certain facts as being relevant in that proceeding is not necessarily binding on your Honors, and, of course, is not binding at all on your Honors' consideration of what place, if any, those same facts have in this proceeding, but my point is that you cannot in any event shut your eyes to the facts there found in so far as those facts may be relevant to the issues that you are here to determine, and that, of course, includes relief as well as liability.

Mr. Davis: May I say just a word to straighten out what looks like a difference of opinion here at counsel table? My friend, Mr. Seymour, suggests that there are certain aspects in which these might be considered by the Court. I agree. What is that aspect? Not an aspect which is presented before the Court at this time at all. Mr. Wright suggests that the consent decree was limited in life to a three-year trial period. Nothing of the sort. It is as alive, as vital a decree today as it was when it was entered. It is binding, until modified, on the parties to this litigation, both the Government and the consenting defendants, not on our friends in the outer fringe. It provides on its face that the Court retains jurisdiction to modify that decree. If my
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brother Wright were here on a motion to modify that decree, by altering or abolishing arbitral clauses, it might be competent and your Honors might be interested in looking at these decisions, not to determine whether the facts they contained were true or false, but whether the arbitrators and the Board of Appeals were discharging their duties in an impartial and in an effective manner. That is all there is in it, but Mr. Wright is not here in that posture at all. He is here asking for relief.
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He is here asking for relief outside the decree, beyond the decree, without reference to the decree, based upon what he believes to be a substantive violation of the Sherman Law by these defendants; and in enforcing the Sherman Law, of course, he is enforcing or seeking to enforce a highly penal statute. Now, I take it that there is no precedent in the trial of a criminal charge under Anglo-Saxon jurisprudence for attempting to prove that somewhere else the accused has committed another crime. The only exception, if I remember my Hornbook Rules of Evidence, as to that rule is that you may prove the commission of another crime where the crime charged requires some special skill, as forgery; and to prove the capacity of the defendant to commit forgery you may be

permitted to introduce other forgeries that he has committed. But certainly it cannot help on this trial in the least to show that at another place, before a non-judicial tribunal, between other parties, a charge was made and certain facts were adduced

Now, I cannot amplify that. I am tempted to say that much just to show that my brother Whitney and I have not entirely ceased to touch elbows with each other.

Mr. Proskauer: May I suggest one consideration in line with what has been suggested here. We go before an arbitrator—and I had one in which I was a party—and we litigate such question as was litigated in the arbitration I have (420)

before me. "There being sufficient competition to sustain clearance, the question remains as to the length of clearance which will not be unreasonable." And that complainant testified in that case, and I cross-examined him on just one thing, and that is what was within the purview of the arbitration subject to the highly restricted provisions and restricting provisions of the decree. Indeed, I had not cross-examined him at all practically on the other phases of these things which would affect an ultimate finding of fact as bearing on the Sherman Law. Doesn't that bring into the highest relief that the endeavor—and I am raising this now on fundamental considerations of the basic laws of evidence—that the contention that a finding of an arbitrator in a proceeding between me and John Smith on a highly restricted question of clearance cannot possibly be used in a litigation between the United States Government and myself, and that you might just as well say that the Government could go out and put in evidence of a finding of a court of record, if you please, in a case between me and a stranger; and when my friend used the phrase that my colleague on my left had distorted this decree in reading it, I find no suggestion of distortion. I too participated in the drafting of this decree, and nobody ever dreamed that this arbitrating tribunal was

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to do anything more than to settle disputes between contending claimants for clearance and the like. That is what it did, and such findings of fact as it has made were binding in that arbitration proceeding were stipulated not to be binding, as we read this decree, in this case; and on the basic rules of evidence would be wholly incompetent.

Judge Hand: We will consider this question overnight, and you can go on with the next point.

I just want to ask you this, Mr. Wright: These Appeal Board decisions cover 291 to 298, do they not, and 1 to 5, all those volumes?

Mr. Wright: There are five volumes numbered 1 to 5. Then there are two decisions, 291, 292, and we are offering the six awards that are designated there as 293 through 298. Those are not decisions of the Appeal Board. Those are decisions or awards of the arbitrator where no appeal was taken. As we see it, there is no difference in admissibility. The only difference is one of weight. Obviously we would say that the Appeal Board decisions would be given more weight than arbitrators' awards because of the review, but that they are equally admissible.

Mr. Davis: Let me understand. Are these offered to prove that such and such awards were made, or are they offered to prove the facts that the arbitrators recited?

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Mr. Wright: They are offered for both purposes.

Mr. Davis: We object.

Mr. Seymour: One further vice, I should think, in this last group is that they are only a few of 400 arbitration decisions. Now, the Appeal Board decisions are offered in bulk, but here are six selected out of 400, which would give a very distorted view.

Mr. Wright: As far as we are concerned, the defendants can select such as they want to offer, and offer them with the same effect as the ones we selected would have.

Mr. Proskauer: Your Honors, that sounds generous, but we are not making a bargain here; we are objecting to evidence that is incompetent.

Mr. Wright: May I say one thing more about Mr. Davis's last remarks about our operating outside the decree. We cannot try this case without reference to the consent decree and what has gone before. We are not attempting to. In effect any judgment that is rendered here necessarily takes the form of a modification of that decree. There is simply no escape from that fact, and there is no suggestion in anything that we have done or said that we intend to follow any other course.

Mr. Raftery: Mr. Wright, are you offering the arbitration decisions against these defendants (indicating).

Mr. Wright: I repeat for the purposes of the record, the (423)

offer is made generally as against all; and, its ultimate weight, of course, whether or not it is given effect against——

Judge Hand: Well, we will exclude them against your defendants.

Mr. Schwartz: That includes mine also?

Judge Hand: Yes, the independent defendants.

Mr. Wright: If the Court please, I think your Honor accepted Mr. Frohlich's characterization of his defendants a little too quickly. We object to the term. Those people are not called independents in the trade, and I think they are major companies. I just wanted to be sure.

Judge Bright: You called them the three minors.

Mr. Wright: I just wanted to be sure that we did not have an independent adjudication.

Mr. Raftery: I thought the record showed we were now called minors.

Mr. Wright: I take it the ruling is also reserved on these, 293 through 298?

Judge Hand: Yes.

Judge Goddard: When you speak about an arbitration award, do those include any facts, or merely findings?

Mr. Wright: They are in the form usually of an opinion with findings. It simply states what the arbitrator found and what he did. That is what the award consists of.

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Judge Hand: Now, we have got through 300.

Mr. Wright: Through 298, I believe.

Judge Hand: Oh yes.

Mr. Wright: Now, 299 is a document that is offered merely because it throws additional light on the Supreme Court decision. Ordinarily you would have the decision in that case below in the district court reported. In this case the district court decision is unreported because there was no opinion filed. All the court did below was to file findings and conclusions.

Judge Hand: Well, did it go up to the Supreme Court?

Mr. Wright: Yes.

Judge Hand: Well, you may put that in.

Mr. Proskauer: Your Honors, one moment, if you please. We have no objection to the Court looking at anything on the theory of stare decisis to enlighten itself, but he is offering in evidence—and I do not think your Honors apprehend this—findings of fact and conclusions of law.

Judge Hand: I do not think he is. We shall not consider it for anything except for such bearing as it has on the Supreme Court decision.

Mr. Proskauer: Then it is not evidence.

Judge Hand: Not really. But what harm does it do to make it an exhibit?

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Mr. Seymour: The difficulty with it is, my client, Paramount, was a party to that suit, and was dismissed by the Government.

Mr. Proskauer: So were we.

Mr. Seymour: And so was Judge Proskauer's, and so were some of these others. Now, the findings are offered as if they were binding—

Mr. Wright: I submit that it can be stipulated that the Court may take judicial notice of these documents. I do not care about offering it, but it is not reported, and the only way I can bring it to your attention is by offering it.

Mr. Proskauer: We will stipulate the Court may take judicial notice of any document of record which throws light as a matter of law on any reported decision.

Judge Hand: This is not received as competent evidence. It is received as a legal document that may serve to interpret a decision of the Supreme Court.

Mr. Schwartz: May I ask your Honors to ask Mr. Wright if the findings as to Columbia Pictures are included in that?

Mr. Wright: I believe they are.

Mr. Schwartz: You know, we were dismissed.

Mr. Wright: Yes. That appears quite plainly.

(Government's Exhibit 299 for identification received in evidence.)

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Judge Hand: Now, 300.

Mr. Wright: 300 is a document of a different character. This is also unreported material. It is a report of the special master that was rendered in a criminal contempt proceeding brought by the United States against—

Judge Hand: Well, what became of it?

Mr. Seymour: It was never confirmed by the District Court.

Mr. Wright: The suit was settled as a part of the settlement of this litigation in 1940 while the case—

Judge Hand: We won't receive any such thing as that. That is absurd.

Mr. Wright: Well, if the Court please—

Judge Hand: Oh no.

Mr. Wright:—I think it is relevant data. If you will let me finish, that decree in which that proceeding occurred is tied to this one in that it was also modified as a part of this same settlement of this suit here and of the contempt proceeding. This decree, the Balaban and Katz decree—

Judge Hand: We are not going to receive any report of a special master that was not confirmed, even if we could receive it had it been confirmed. Objection sustained. Now go on.

Mr. Wright: The other documents are decrees which were

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entered against one or more of the defendants in other jurisdictions, and there were original decrees, and then there were modifications entered in each case at the time that this decree was entered.

Mr. Davis: What is that evidence of?

Mr. Caskey: Objected to.

Mr. Raftery: If your Honors please, isn't there some provision in the Sherman Act that you cannot admit consent decrees in other proceedings?

Judge Goddard: They are not evidence in treble damage cases.

Mr. Davis: I ask again, what are these decrees evidence of here?

Mr. Wright: I submit, if the Court please, they are evidence of the scope and effect of the consent decree which is of record in this case. At the time that decree was entered these decrees here were modified on the condition that certain provisions there were suspended while the provisions and this decree remained in effect. I think it is necessary to understand the operation of this decree to have those decrees in evidence.

Mr. Caskey: Mr. Wright, I am sure that you are in error with respect to 301. There may have been a modification of 303 but it is not my understanding that there was any modification of 301, and it is objected to.

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Mr. Wright: As I understand it, 301 is the 1930 consent decree against West Coast Theatres. Then 303, I believe, superseded that, and then that was modified, in turn, by 304. I think all three are necessary to show what happened.

Mr. Caskey: Now, if your Honors please, on this matter of modification: In the consent decree that was entered in the Paramount case there were certain provisions for arbitration of runs, and it was provided that that complainant in those arbitrations might not be one who had an interest in more than six theatres. In order to arbitrate you had to have five or less theatres, and this modification that is talked about simply eliminated that requirement as to arbitration for first and second runs in southern California. That is all that is involved in these other proceedings. Now, there are many other clauses in these decrees that have no relevancy to that point whatsoever.

Mr. Seymour: I should suppose that a consent decree by its own terms was inadmissible as evidence of anything. I have not looked at this particular one, but its ordinary recital is that consent is on condition that it should not be used as evidence in any other proceeding. Now to have it offered as evidence of something is completely defeating that provi-

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sion. The decree in Southern California in 1930 does not prove anything about 1945, I submit.

Mr. Davis: The thing I am puzzled about, your Honor, is why in the world this Court, which already has received a fair quantum of documentary evidence, should be invited to take decrees of courts in causes that are not related to this; and presumptively I think counsel would be compelled to examine these decrees and find out, if they can, what that litigation was under which they were entered, and their scope; and for the life of me I do not see how they throw the slightest light on the interpretation of the consent decree in this case. Counsel seems to think that whenever there has been any litigation in which the names of any of the defendants at this table have been mentioned, ipso facto he is entitled to introduce it in evidence. Not cite it to the Court as authority, if you please, but to make it a part of his evidentiary case. I do not understand that.

Mr. Wright: If the Court please, that again we have offered in evidence only because we have referred to them, and we assume that they would not otherwise be judicially noticeable, because they are entered in a court in another jurisdiction. Now, if it is understood, again, that these may be referred to by this Court, we have no desire to have them physically incorporated in the record.

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Judge Hand: All right, they may be referred to. They are not marked in evidence. That is what? 301 to 305?

Mr. Wright: And the same thing applies all the way through, 306 to 311. Those are pleadings——

Mr. Davis: Now wait a minute.

Mr. Proskauer: That is going a little to fast for us, your Honor. I have never heard of anybody offering in evidence a criminal indictment returnable against Warner Bros. in Missouri on January 11, 1935.

Judge Hand: Neither did I. I think it is absurd. You cannot put such stuff in.

Mr. Proskauer: Particularly in view of the fact that the jury returned a verdict of not guilty.

Mr. Wright: That fact was pointed out in our Appendix C in which we made reference to the proceeding. Again, the only reason for including it here is that we had to refer to it, and we did refer to it, and I suppose——

Judge Hand: Why did you have to refer to it?

Mr. Wright: Well, we think it is a legitimate part of the history of the proceedings that have been brought in prior cases which this Court should consider in determining what ought to be done here.

Judge Hand: You mean to say a criminal information that resulted in a verdict for the defendant?

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Mr. Wright: There were a series of three cases. We did not offer that as proof of any violation by them. We simply recite the facts as to what had happened in prior proceedings brought by the United States; and having recited those

facts, inasmuch as there was a question about judicial noticeability of the material, we felt bound to include it in this offer. Now, again, I do not care to have it in the record, providing——

Mr. Davis: Where do you recite the facts, Mr. Wright?

Mr. Wright: We referred to that material in Appendix C.

Judge Hand: They are withdrawn then. 306 to what?

Mr. Wright: 311.

Mr. Proskauer: What is the ruling? Did your Honors rule?

Judge Hand: They are withdrawn. Now, what next?

Mr. Wright: I think that the Federal Trade Commission material should also be withdrawn. Those are reported decisions. There is no problem of judicial notice there involved, 318 through 323.

Judge Hand: Withdrawn?

Mr. Wright: Yes.

Now, as to 312 through 317, that is material, again, which

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we referred to in describing the past efforts that had been made by the Government to regulate certain problems in the industry. I do not think it would be judicially noticeable unless brought to the Court's attention in this form.

Mr. Proskauer: Why should the Court's attention be called by way of evidence to a report which Mr. Clarence Darrow made criticizing the Code of the NRA No. 124? What proof is that against us that after the NRA established a code for this industry Mr. Clarence Darrow did not think it was right?

Mr. Davis: What proof is the NRA itself?

Mr. Wright: Both the Board and the NRA did have an official status. I think it is a matter of interest as to what those officials did at that time in connection with the industry problems.

Judge Hand: What about 312?

Mr. Wright: 312 is the NRA Code.

Judge Hand: What about 313?

Mr. Wright: I do not think those amendments are of any significance. We can withdraw 313.

Mr. Davis: I should like to ask for what purpose counsel is offering the NRA Code 312?

Mr. Wright: Again, we have referred to the Code in our appendix describing the history of prior efforts made by the
(433)
Government to regulate competitive abuses in the industry. Having referred to it, we felt bound to offer it in this form.

Mr. Proskauer: Counsel's argument is that he referred to something and therefore he has a right to put it in evidence.

Judge Hand: He admits that it is not admissible, as I understand it. He merely wants to refer to it as contemporary economics or legal theory, or whatever you choose to call it, as a basis for making an argument; isn't that it?

Mr. Wright: Quite right, merely material which the Court should take notice of.

Judge Hand: You can do that with anything.

Does that apply to all of these?

Mr. Wright: That applies right straight through 312, 314, 315, 316 and 317. We merely referred to those documents and felt bound to bring them to the Court's attention in this way.

Judge Hand: If you want to furnish some of those things, I should think they would be very limited indeed. To give us some information for a brief, I should think they would be all right.

Mr. Wright: That was the only purpose. We had included references to them in our trial brief, in Appendix C,
(434)
and it seemed to us that having done that we were bound to bring them officially to the Court's attention. Now, again, we do not care whether they are incorporated physically as evidence, as long as they are noticeable.

Judge Hand: I would really rather personally have you make these arguments yourself, where you can make some

statement about their background than to have this enormous list of what they said in the Oregon Law Review about it. This kind of business that a good many judges put into their opinions I do not think should be there.

Now, it is past the time for adjournment, and we will pass on this question of the arbitration and the Appeal Board tomorrow morning.

What more have you?

Mr. Wright: Now, as to the FBI reports, I should like to say what has been done and what we are trying to do. As I say, we had the FBI agents make an inspection of these 400-odd towns, I believe, and observe the theatres that were operating there; and then they prepared a report on each town which gives the name of the theatres, the name of the operators, the general age and condition of the theatre, its policy, whether first-run or otherwise; its admission prices, and the number of changes per week.

Now, we are not interested in offering all of that detailed data. After we had done that we submitted it for checking

(435)

by the defendants as to each town. Our primarily purpose in having the report made was to get a definite check on the situations where the defendants owned or operated all the theatres, and those situations where they had all of the first-run theatres, and those so-called closed situations where they also were maintaining closed theatres. For our purposes we are perfectly willing to offer a summary of those facts and it will make unnecessary to have the detailed reports introduced. We simply had the agents record at the time they made the report this other information.

Judge Hand: Have they seen all this?

Mr. Wright: Yes. The particular defendant who operates in each town has seen the report which was made on his town. The others have not been exchanged.

Mr. Caskey: Let me say that the information falls into two classes: As to our theatres, the information furnished by the FBI is inaccurate in many substantial respects. We

went to the expense of having prepared ourselves similar information which we have tendered to the Government. If they want to put that in, of course, there will be no objection. If they do not want to put it in we shall object to the FBI reports, as to the information. As to the theatres not operated by us, we have indicated to the Government our ob-
(435a)
jection. Substantially speaking, it is wholly inaccurate, and we have so indicated to the representatives of the Government.

Judge Hand: We will have to meet that tomorrow. You had better confer and see what you can agree on to shorten this.

(Adjourned to October 11, 1945, at 10:30 a.m.)

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New York, October 11, 1945,
10.30 o'clock a.m.

Trial resumed.

Judge Hand: You go on with your offers.

Mr. Wright: If the Court please, in connection with the offer of these Appeal Board decisions that were made yesterday, I think——

Mr. Proskauer: Mr. Wright, we cannot hear you.

Mr. Wright: I beg your pardon.

In connection with that offer I want to say that I think that I was largely at fault in the manner in which that was presented to you, by offering all these decisions en masse, when actually we only intend to rely for our purposes on a limited number.

The reason I did that was that I had assumed from what had occured on the hearing on the preliminary motion last March that there was no question at all between the defendants and ourselves as to the admissibility of the decisions for some purpose. I assumed that the difference between us was purely a question of the weight and significance to be accorded them. But in view of the position that was taken yesterday that they are not admissible for any purpose,

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in order to present the issue clearly and sharply, I shall limit our offer to the following numbers, which are those digested in our appendix C.

Judge Hand: Wait a minute.

Mr. Wright: If you will turn to the first page of the list here I will identify those.

Judge Bright: What pages do they start on?

Mr. Wright: If you will turn to page 1 of our list of exhibits I will identify the particular numbers that are contained in each exhibit to which our offer is now limited.

Mr. Proskauer: Your Honor, for the defense, we do not see the limitation of the offer to certain decisions changes the rule of law.

Judge Hand: Of course, that is perfectly true, but we will take care of that in one way or another when the time comes.

Mr. Davis: I also want to say that there has not been the slightest change on my part as to my objection, because in the tender of these before Judge Goddard the same objection was made, pressed, for the same purpose, and was not passed upon. They were simply offered before Judge Goddard for identification.

Judge Hand: Yes. He said it was not passed on.

Mr. Wright: No question.

Judge Hand: Now go on.

(438)

Mr. Wright: The exhibit No. 1 for identification which contains the decisions 1 to 23, our offer is now limited to Nos. 10, 12 and 18 contained in that volume marked for identification as Exhibit 1.

Judge Bright: Are they digested in your Appendix C?

Mr. Wright: They are digested in our Appendix C.

Judge Hand: 10, 12——

Mr. Wright: And 18.

If you want to see how this ties into Appendix C, your Honors will note that on page 61 of the Appendix C we have there listed a table of the Appeal Board decisions there and awards that were digested; and then on page 62 there is a subject matter index, and the digests follow.

Now, as to Exhibit No. 2 for identification, Volume II, our offer is now limited to the decisions numbered 24, 27, 35 and 40 contained in that volume.

And as to Exhibit No. 3 for identification, our offer is limited to decisions Nos. 52, 58, 61, 63, 65, 66, 67, 68, 70, 71, 72 contained in that volume.

Mr. Davis: Will you give it to us again, Mr. Wright? I did not quite follow.

Mr. Wright: 52, 58, 61, 63, 65, 66, 67, 68, 70, 71 and 72.

As to Exhibit No. 4 for identification, our offer is limited to the decisions in that volume numbered 85 and 87.

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As to Exhibit No. 5 for identification, our offer is limited to decision No. 104.

Then, of course, we have also offered the two additional decisions specifically numbered which appear in the list for identification at page 108 as Exhibits 291 and 292 for identification, and the awards which are identified as 293 through 298 inclusive.

Judge Hand: Let us see. What are you reading from now?

Mr. Wright: I am reading from our list of exhibits, page 108.

Mr. Seymour: It seems to me, if your Honors please, that this selective process destroys the only possible basis for relevancy which I suggested yesterday, that is, if you look at the whole body of decisions. Now it is apparent that the selective process is designed, not to show the working of the system, but to show facts in particular cases, and thus points up the objections which have been raised.

Judge Hand: You may show the working of the system by introducing more, if you want to.

What is this at 108 that you said you——

Mr. Wright: I say there are two additional decisions identified there as 291 and 292, which we are also offering.

Judge Hand: In other words, those are subsequent to these volumes?

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Mr. Wright: Quite right. They are numbered in chronological order.

Then we are also offering the awards which are identified there as 293 to 298, all of which are also digested in our Appendix C.

Judge Hand: Well, we have had extreme doubt about this thing, these offers, but the rules of evidence are getting to be very much liberalized, and it is possible at least that under the peculiar circumstances of this case, where this tribunal set up by the court under a stipulation of these

parties, that these awards and decisions, where the defendants had a chance to examine, or offer proof, or cross examine the complainants in those cases, may be thought to somewhat resemble the case of an auditor's report. Of course they are not like an auditor's report, the analogy is rather remote, and yet they slightly resemble it. And the parties here have consented to this mode of settling certain disputes, and the decisions may have some prima facie weight, not as to the violation of the Sherman Act, for the decisions did not purport to determine that, but as to the facts found in these cases. We shall admit this evidence and, of course, it is subject, like anything else, to motions later made to strike out.

Mr. Davis: May I ask whether your Honor's ruling goes so far as to admit against any defendant any one of these (441)
arbitrations to which that particular defendant was not a party?

Judge Hand: Yes.

Mr. Schwartz: If your Honors please——

Judge Hand: These other people would never sign up; they never agreed to this arbitration at all. We have excluded it against them. We are admitting it against the others. Of course there will have to be a proof of conspiracy to have anything decided against A any good against B. We realize that. It is subject to motions to strike out that may hereafter be made, if counsel are so advised.

Mr. Proskauer: Will you permit me to ask whether your ruling goes so far as to admit these as evidence of facts stated to be found in these arbitrators' opinions or decisions?

Judge Hand: Prima facie, yes.

Mr. Raftery: Merely to straighten the record, your Honor, when you said "these other people," you mean the non-consenting defendants?

Judge Hand: Yes.

Mr. Wright: If the Court please, before offering any more evidence at all, I would like to take a few minutes to go into

the Government's legal theory of the case which I neglected completely in my opening. I devoted myself solely to the factual presentation. The defendants, however, did not
(442)
neglect their legal theories, and the result has been that, I think, the speed and the manner in which the documents have gone in, have deprived us to some extent of the opportunity that would normally occur to explain the significance of that data in some detail as it went in.

I should like at this time to refer to a couple of Supreme Court decisions and what we say they hold, and what our view is as to the law that is applicable to the activities of these defendants in this case, because I think that is essential to an understanding of how this evidence fits in.

I am very much afraid that I have given the Court the impression that we were just dumping material in here without reference to the specific issues, and I would like to correct that ~~mistake insofar~~ as I can in a few minutes of statement.

The fundamental law that we say is applicable to the activities of these defendants is found in, really, two decisions of the United States Supreme Court, both of which are cited in our brief. The first was the case of Interstate Circuit v. United States, which is reported at 306 U. S., and the other is United States v. Crescent Amusement Company, decided at the last term of court, reported in 323 U. S.

The situation examined in the Interstate Circuit case was this: that was a suit brought by the United States under the
(443)
Sherman Act against the same defendants, the distributor defendants that are here before you, and the Interstate Circuit, Inc., a distributor circuit in Texas, affiliated with the defendant Paramount.

The charge that was made in that suit was that all these defendants had conspired with each other as distributors and with Interstate as an exhibitor, to grant to Interstate Circuit, in the agreements they made with it, certain discrimina-

tory privileges which deprived Interstate's smaller independent theatre opposition of an opportunity to compete with Interstate in showing their films.

The specific restrictions that were attacked were minimum admission price restrictions and prohibitions against double features; that is, at the beginning, or, at least, the 1935-1936 or 1936-1937 season, the circuit informed each of these distributors that they could not or would not license their films for first-run exhibition at a 40-cent admission price in the first-run houses which Interstate operated in the principal cities of Texas unless the distributors agreed that those same films would not be shown subsequent run in houses which were in opposition to Interstate Theatres, at a price of less than 25 cents, 25 cents admission, evening, adults; and that they would also agree that these features which Interstate exhibited in its first-run houses at 40 cents would not be exhibited subsequently as part of a double (444)
feature program.

Those two restrictions were put into effect in this territory in which Interstate operated theatres, Interstate and its affiliates, one of which was called Texas Consolidated Theatres, where it was a dominant exhibitor, that is, it had all the first-run theatres in most of the large cities of Texas, and it had a number of second-run theatres in those towns, and it had a large number of first-runs in other smaller towns in Texas and New Mexico. The restrictions in question were put into effect in certain of these cities and not in others by all of these defendant distributors. As to another group of cities, they were put into effect only by the distributor Paramount.

That case, in the trial court, was decided in this manner: the trial court found that there was a conspiracy among all these distributors to put into effect these restrictions in the towns where they all did put them into effect; and that the competitive effect of the restrictions was to lift up the admission prices of some of these independent competitors who

had ben charging 15 cents and 20 cents, to the 25-cent price that the Interstate's own second and subsequent-run theatres had been charging, so that the price differential that had theretofore existed was taken away from the independents.
(445)

The trial court, as I say, found that there was a conspiracy among the distributors and Interstate which violated the Act, but it found in addition that in the situations where there was no conspiracy among distributors but in which Paramount alone imposed these restrictions, that the agreements by which those restrictions were imposed were also invalid in and of themselves, and enjoined their enforcement.

That case was appealed to the Supreme Court by the defendant Interstate Circuit and the distributor defendants, and the questions raised there were these: first, they contended that there was no evidence of conspiracy to justify the lower court's findings because it was based upon uniform conduct rather than express agreement among them.

Next they raised the question that clearly as to the agreements which Paramount alone made, the District Court's judgment was erroneous because there was no conspiracy between Paramount and another distributor to impose them; and absent such a conspiracy, there could not be any violation of the Sherman Act, because under the Copyright Law a distributor acting singly could impose any kind of restrictions he pleased on the exhibition of his product in competing theatres.

Now there also was a third point that in any event the
(446)
restrictions imposed were not unreasonable, because, in fact, they simply reflected the business judgment of the distributors to the effect that the most profitable way to exploit the territory as a whole was to impose these restrictions, and that the results shown in the form of added revenue justified that judgment, in that the imposition of the restrictions did result in all of the distributors getting more overall film rental out of the territory, and that therefore

there could be nothing unreasonable about imposing restrictions of that character in any event, no matter how it was done.

Now, when it came to the Supreme Court, those points were all urged and all decided adversely to the contentions of the appellants. The court held that there was sufficient evidence of a conspiracy among all the distributors to impose the restrictions, where they did all impose them, and sustained the injunction as to them.

It also sustained the trial court's action as to the agreements which Paramount alone made in the other Texas and New Mexico towns; and in that connection it discussed, of course, the rights that the Copyright Law gives to a distributor as such, and they said that under the Copyright Law the distributor has no unqualified right to impose any restrictions that he pleases in the distribution of his product; that the privileges granted by the Copyright Law are subject

(447)

to the restrictions of the Sherman Act, and that where even one distributor makes an agreement with one exhibitor which has the effect of unreasonably restricting the terms on which that exhibitor's competitors can show or exhibit that distributor's films, is a violation of the Sherman Act.

Now as to the third point about the reasonableness of the restriction, the Court simply pointed out that there was a public interest at stake under the Sherman Act in the form of a competitive pricing of pictures in competitive theatres which did not give way before such financial advantages that might adhere to the distributors in adopting a non-competitive method of pricing pictures—that is, bringing these independents up to the admission price level of Interstate Circuit.

That case, I think, was a landmark for this reason, that prior to that time the last Supreme Court case involving these same distributors were those which were contained in cases which came up in 1930. They are both reported in 282 U. S., I believe. They were cases in which the United

States attacked certain uniform practices that all of them were then engaged in. In one case the provisions that were uniformly incorporated in the license contracts that these defendants made generally with exhibitors which compelled them to assume contracts of other exhibitors when they
(448)
acquired theatres, were brought into question. In the other case, the so-called uniform compulsory arbitration clause was brought into question. And the proof consisted in each case of showing that these eight were the dominant distributors in the field, and in that case I believe they all expressly agreed to use these uniform provisions and did use them, and the arbitration in those cases I think was carried out by so-called local film boards of trade, evidence as to which was also introduced in those cases.

And the decision in the District Court was a split one. Judge Thacher, I think, sitting, held that in the one case the provisions were reasonable, and dismissed the bill, and in the other sustained the position of the United States. In any event they were both appealed, both coming up together, and in both the Government prevailed; that is, the decision dismissing the bill was reversed, very short opinions being written by Mr. Justice McReynolds, which simply pointed out that uniform action of that character, regardless of the reasonableness of the provisions refute alone, was a violation of the Act.

Now, as I say, prior to the Interstate case, that case had been regarded as establishing the doctrine of uniform action
(449)
by express agreement to impose restrictions which, even though they might be reasonable in themselves, would amount to a violation of the Act; and after that case, after the Interstate Circuit case, of course, the defendants, as we shall show, did continue to use similar forms of agreement and uniform action to a large extent, but not by express agreement with each other, and these particular provisions were abandoned. I believe you will note that those for the 1936

1937 season which are printed in Appendix B, contain an optional arbitration clause, for example.
(450)

Judge Bright: What was the case in 282?

Mr. Wright: There are two cases. One is entitled Paramount-Famous Players Lasky Corporation, et al. against the United States, 282 U. S. 30. The other is—I thought they were both listed——

Judge Bright: Are they both in the same volume?

Mr. Wright: No, they have different captions. Oh yes, the other is United States v. First National Pictures, Inc., et al. 282 U. S., 44. They are both listed in our table of cases at No. 4.

Judge Bright: None of those cases involved this question of divorcement of exhibition?

Mr. Wright: No. The only question that was raised there was uniform practice of incorporating these compulsory provisions in licenses with exhibitors generally.

And I might add that the Interstate Circuit case did not involve the divorcement issue as such. Although it appeared in the record that Interstate Circuit was an affiliate of Paramount no point was made of that in the presentation of the case or the decision of the Court.

Now, that case, as I say, was finally decided in 1939. There were two appeals that were sent back for findings the first time. The final decision is the one we have referred to here. That was after this suit had been filed and before this consent decree was entered. And that case led directly to
(451)
the filing of the Crescent Amusement Company case, which is the other decision that I want to refer to.

In 1939 after the Interstate Circuit case was decided, the Department then proceeded to file three actions against the same distributor defendants and so called independent circuits located in various parts of the country, of which the so-called Crescent Circuit was one, which operated in towns in Kentucky, Tennessee and Alabama. And the charges as originally made in those three cases, as I say, involved not only the circuits but these defendants, and they each alleged

a general conspiracy among the distributors to conspire with each other to grant various discriminatory privileges to the Circuits in question, which suppressed the ability of their independent competitors to operate in competition with them.

Judge Goddard: What is the title of that?

Mr. Wright: United States v. Crescent Amusement Company.

That was the third of those so-called independent circuit cases to be filed, but the first to be tried.

It was tried in 1941 after the consent decree was entered here; and as I believe as someone else has pointed out, pursuant to the consent decree we dismissed from the suit the distributors who had consented to the entry of the 1940 decree in this suit, and the suit went to trial against the

(452)

Circuit and the other three distributors, the non-theatre-owning distributors, Columbia, United Artists and Universal.

But I also want to point out that at the same time this dismissal was made of these other distributors, the complaints were amended so that the charge of conspiracy among di tributors was completely eliminated, and the suit went to trial on the claim that there had been a conspiracy among the exhibitor defendants to monopolize exhibition in this area, and a series of separate conspiracies among the exhibitor defendants and each of the remaining distributor defendants to unreasonably restrain——

Judge Hand: This is the Crescent case you are talking about?

Mr. Wright: This is the Crescent case I am referring to.

(Continuing) —unreasonably restrain the competition of the independents.

Now, in this case, in the Crescent case, we broadened the prayer for the kind of relief which we had sought in the Independent Circuit case. Instead of merely attacking one form of discrimination which we alleged and proved to have resulted from the use of so-called circuit buying power, we

attacked the exercise of the power as such for the purpose of injuring independent competitors.

Judge Bright: What do you mean attacked the power as
(453)
such?

Mr. Wright: I think the term "circuit buying power" probably needs a word of explanation. That is a shorthand expression for describing the power in licensing films which resides in any aggregation of theatres which includes within it a number of so-called closed situations. For example, Interstate Circuit's monopoly power, as clearly pointed out in the Supreme Court opinion, rested on its possession of first-run monopolies—principally in the possession of first-run monopolies in several large cities in Texas, and, of course, these other extensive theatre operations.

The fundamental theory on which we attacked the exercise of that power in the Crescent case was exactly this, that in dealing with a circuit of theatres, a combination of exhibitors, if you please, which possesses monopoly power, a distributor does not have the right to do exactly as he pleases; that in making agreements with such a circuit he must, under the law, give due regard to the competitive effect that those agreements will have; that is, the effect that agreements he makes with the circuit will have upon the abiilty or inability of the independent theatres operating in opposition to the circuit to show his films in competition with the circuit theatres.

Now, the form of the use of that power in the Crescent case covered a much wider variety than the Interstate Cir-
(454)
cuit case. There the types of discrimination were not limited to such clearance restrictions as were involved in the Interstate Circuit case, but they also invited refusals to deal at all with competitors of the circuit for the purpose of protecting the circuit from independent competition.

They also embraced situations of this kind, where the independent was enjoying a run of the distributor's product

and the run was arbitrarily taken away and placed in a circuit theatre without giving the independent any opportunity to even negotiate with the distributor for a continuation of the run in his theatre.

Now, these precise forms of the discrimination I think are well summarized in the findings and conclusions of the Court below, which are quite elaborate, and which I offered here the other day; but it is sufficient to point out that that suit did cover the whole ambit of discriminations of that character in its proof, and it also, by way of relief, not only sought to enjoin the mere continuance of such practices—the relief gotten in the Interstate Circuit case—but sought at least partial dissolution of these circuits themselves; and the relief granted by the lower court included partial dissolution of the circuit in addition to enjoining the circuit, or the members of the circuit, from continuing to make the discriminatory licenses with the distributors which they had done in the past.

(455)

Now, the form that dissolution took in that case was to order the principal defendant, Crescent Amusement Company, to divest itself of stock interest which it held in other corporations engaged in exhibition also which had been associated with it in buying these films, and which formed the buying combination which was able to induce the distributors to deal or not deal with the independents in opposition; except on terms which would not permit them to compete.

Now, that case also contained considerably broader relief in injunctive form than merely restraining specific practices. It went so far as to enjoin the exhibitors individually from conditioning in their film licenses with these distributors the licensing of films in so-called closed towns upon the execution of licenses in so-called competitive situations. That, of course, is the principal vice of these aggregations of buying power combined into these circuits. The distributor in order to get into the closed towns will generally find that

he has to discriminate against the independents in the situation where there is opposition, and the independent of course, is whipsawed between the distributor's to get the revenue out of the closed towns and his circuit competitor's desire to see that he is reduced to an inferior position. So that he is in a position where his competitive position is resolved entirely without reference to his legal situation at all, what (455-A)

kind of an operation he has in the town vis-a-vis the circuit theatre in the town, but is ultimately determined simply in terms of what the distributor gets out of his circuit as a whole, which, of course, is always many times what would be available from any small operator in a particular town. (456)

Now, that case, as I believe Mr. Frohlich pointed out, resulted in a dismissal as to two of the distributor defendants. The third, United Artists, was found by the District Court to have unlawfully combined with one or two of these exhibitor defendants in specific situations and was, accordingly, enjoined.

When the case went up on appeal, neither United Artists nor the Government appealed from that part of the decision. I might add there was one other phase of the decree which was considered by the Supreme Court and which I would like to call to your attention. In addition to this partial dissolution, the Government had asked the District Court to enter an order which would prevent these exhibitors from any further acquisitions at all unless they first made an affirmative showing to the Court that the effect of such acquisitions would not be to restrain competition unreasonably. The District Court declined to give that relief but merely——

Judge Hand: The Crescent case?

Mr. Wright: This is still the Crescent case, your Honor.

The District Court in that case, instead of that provision, merely enjoined the exhibitor defendants from acquiring any theatres by coercive means.

That case was appealed by both the exhibitor defendants
(457)
and the United States. Their appeal challenged the whole case with particular emphasis on challenging the propriety of the divestiture relief. Our appeal was, of course, limited to the refusal to grant the relief against further acquisitions in the form that we had sought. Both of those appeals were decided in the Supreme Court in favor of the Government. The divestiture provisions and all the other injunctive provisions of the decree below, which were before the Court, were upheld and the Court also held that the Government was entitled to the kind of provision that it had sought with respect to further theatre acquisitions and ordered that the decree below be modified accordingly to provide that these should be no further acquisitions by these defendants except and in so far as they might first affirmatively demonstrate to the satisfaction of the Court that the effect of such an acquisition would not unreasonably restrain competition.

The principal significance of that case, as we see it here, is that it for one, showed that the Supreme Court appreciated the fact that you cannot effectively deal with combinations of this kind merely by provisions which tell them not to do in the future what they have done in the past. The other significance of the decision, as we see it, is that it again reiterated and gave point to the proposition that one distributor may be a party to a combination in restraint of trade
(458)
even though no other distributor is a party to such a combination; that in this case, of course, in many instances the particular discrimination has not been uniformly indulged in by all but was confined to two or three or even one.

And that decision merely carried along the doctrine first announced in the Interstate Circuit case in that connection.

Those cases, I think, are especially significant in dealing here with this question of the liability of these so-called three minors or independents, or little three, or whatever you choose to call them. They do not, as we see it, have any

unqualified right to sell this market that we have been attempting to describe here in statistical terms, as they find it; that in selling that market, in making restrictions with those who dominate that market as a result of possessing a theatre monopoly position in certain towns, they are, like anyone else, bound to consider the effect of the agreements they make up the other competitors who are in opposition to those with whom they make these agreements containing terms which expressly restrict the opportunities of these other competitors in showing their films.

To get down to a specific case, here is one of the agreements that was not offered yesterday because I believe it (459)
could not be found. It is No. 196 for identification. I will offer it and I would like to call attention to certain provisions.

Mr. Schwartz: Have you a copy of that, Mr. Wright?

Mr. Wright: I think that is the copy you gave us. I don't think we have another one. We will have it photostated.

Mr. Proskauer: Are you offering something?

Mr. Wright: I am offering 196 for identification.

Mr. Raftery: May it please the Court, in fairness to all our positions here, I don't want to interrupt Mr. Wright in the middle of his testimony, but I think, and I submit, that he should finish his argument before he goes back to offering evidence again.

Judge Hand: I think he should too. I hesitated a great deal, really, to let you start in and talk after you had made this long opening. We cannot go on and talk, talk, talk. We get no picture ourselves.

Mr. Wright: I was merely attempting to illustrate the argument with a concrete piece of evidence.

Judge Hand: All right.

Mr. Wright: If the Court doesn't wish to have that done, I don't do it.

Judge Hand: You had better get through your talk and get through with it quickly and go on with your evidence.

(460)

Mr. Proskauer: Does your Honor care to have any comment from the other side on the argument?

Judge Hand: No, I don't think so.

Mr. Proskauer: We will wait to shoot until we see the whites of their eyes.

Mr. Raftery: And our silence will not be construed as agreeing with them?

Judge Hand: I know; we will avoid estoppels.

Mr. Wright: I have no desire to discuss that document if your Honor doesn't wish to hear it. I was challenged the other day to point to certain provisions which we thought were illegal.

Judge Hand: Are you through with your argument?

Mr. Wright: Why, I have nothing more that I want to press upon the Court at this time.

Judge Hand: That is all right. Then go on putting in your evidence. We will receive this 196.

(Government's Exhibit 196 for identification received in evidence.)

Mr. Frohlich: May I see it, if your Honor please?

Judge Hand: Yes.

Mr. Wright: Then we have also located a copy of 198, which I will offer.

Judge Hand: How about 197?

Mr. Wright: 197 I don't think has yet been located.

(461)

Mr. Raftery: May we see 198?

Judge Bright: Is 196 in your Appendix B?

Judge Goddard: Yes, page 102—Government's Exhibits for Identification.

Judge Bright: But, I mean, is it in your appendix? Is that 196 printed out in full in your appendix?

Mr. Wright: I don't think so. All the agreements that we are offering—none of the executed agreements are printed in full in Appendix B. Appendix B is confined to printed

forms of agreement. In Appendix A we abstracted some of the licensing agreements made between the defendants which are listed there, I believe, at pages 37 through 51.

Judge Bright: In what appendix?.

Mr. Wright: Of Appendix A. That is, there is a digest, a summary.

Judge Bright: What pages were they?

Mr. Wright: It begins at page 37, the caption there; the first agreement digested appears on 38 and continues through page 50.

Judge Bright: Your Appendix B, which purports to set out license forms of two different periods, 1936-1937 and 1943-1944——

Mr. Wright: That is correct.

Judge Bright: This one apparently is the 1936-1937 sea-
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son, 196. Is it in this book?

Mr. Wright: Exhibit 196 is an executed agreement for that season for the parties named here. The printed form of license applicable to that agreement is in Appendix B but the agreement itself, of course, contains special provisions which are not incorporated in the printed form, that is, it has typewritten additions. Those are what I was going to call the Court's attention to.

Judge Bright: Appendix B contains just samples, not executed agreements?

Mr. Wright: That is correct.

Mr. Raftery: May it please the Court, may I ask Mr. Wright if Exhibit 198 was part of the record in the Interstate case?

Mr. Wright: I assume that it probably was, yes, that agreement was part of it.

Mr. Raftery: The agreement was? Well, under those conditions, the defendant Universal wishes to object to the introduction here. This is a matter that has already been litigated and is not part of this litigation. There has been

a decision on this contract. Whatever the result is has been judicially determined and is no part of this action.

Judge Hand: What about that?

Mr. Wright: If the Court please, in so far as the facts contained in this agreement appear in the Supreme Court (463)

opinion, there would be no occasion for offering it, but I don't believe that the Supreme Court or the District Court decision undertakes to describe or summarize the agreements involved in sufficiently elaborate terms to give your Honors a comprehensive picture of what this agreement provides. We offer it not only to bring down—of course, the provisions with respect to admission prices are those discussed in the Interstate Circuit case, but we also offer it for the purpose of showing the method that was used of determining film rental, which I believe is not, for example, discussed in that case at all.

Judge Hand: We will admit it.

Mr. Davis: May I ask your Honors? Mr. Wright said something which I did not catch, referring to pages 37 to 59, is it?

Judge Hand: Of what?

Mr. Davis: Of Appendix A. In what connection were those pages referred to?

Mr. Wright: I think I answered a question of Judge Bright's as to whether in that appendix we had abstracted all of the agreements which we were offering and I replied that we had abstracted only samples.

Mr. Davis: There wasn't any intention to offer those abstracts in lieu of the agreements themselves, I take it?

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Mr. Wright: No.

Mr. Schwartz: May it please the Court, on this Exhibit 196, which Mr. Wright offered on behalf of Columbia Pictures, in which he indicated that that apparently came from our files, I am advised it does not bear our markings. I would like the opportunity, after we compared it with whatever

records we have, should it develop not to be an office copy or require some change, to be permitted to do so.

Mr. Wright: Surely.

Judge Hand: Oh, yes.

(Government's Exhibit 198 received in evidence.)

Mr. Wright: We also offer the Universal license form for the 1936-1937 season, which is Exhibit 289 for identification, which was not located yesterday.

(Governments Exhibit 289 for identification received in evidence.)

Judge Bright: You will have one exhibit on page 102, No. 197.

Mr. Wright: That is still missing. Neither Columbia, Paramount nor ourselves have yet been able to locate it.

If the Court please, with reference to these tabulations that are described on page 114 of our list of exhibits and numbered 337——

Mr. Proskauer: Please let us hear you, won't you? Because I want to hear what you say about those.

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Mr. Wright: I am sorry.

I want to call your Honors' attention to the tabulations which have been marked for identification as 337, 338, 339 and 340, and tell your Honors what those are.

Judge Hand: Are you offering these now?

Mr. Wright: Yes, but with an explanation that I would like to make.

Judge Hand: All right. What about these prior ones?

Mr. Proskauer: Are you making an offer? We cannot know what you are doing, Mr. Wright.

Mr. Wright: Yes, I am.

As to the prior exhibits, there is another problem which I will get to in a moment. I would like to first discuss the situation as to these four.

Mr. Seymour: May I see that, Mr. Wright?

Mr. Wright: Yes, you may.

Judge Hand: What is this, 337, 338, 339 and 340?

Mr. Wright: That is correct, your Honor. What those are are mere mathematical tabulations of data which was furnished by the defendant Paramount in answer to interrogatories filed in 1939.

We submitted those tabulations in the form that they are here to the defendant Paramount and we submitted similar tabulations to each of the defendants with respect to their
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data in the hope that an agreement would be reached as to the approximate correctness of the mathematics in question.

I have some doubt as to whether it is necessary to actually incorporate data of this kind in the record as an exhibit. I suppose we would be perfectly free to put in brief form, or any other, whatever tabulations we made of data in evidence.

Judge Hand: Don't talk about your doubts. If you want to offer it, offer it.

Mr. Wright: I am.

Judge Bright: Is there an objection?

Mr. Seymour: If your Honors please, as I understand it, after we had checked the figures in a preliminary way, spot-checked them, we advised the Government that a spot-check indicated substantial accuracy, there was a conference of counsel, counsel for one of the defendants and Government counsel, and at that time his attention was called to various errors and inaccuracies in the chart applicable to everyone; in other words, not an error merely applicable to one company, although there were perhaps errors of that kind. In view of the fact that further study of this tabulation indicates that the matters to which the Government's attention was directed at that conference, which occurred in July, I think of this year, I must object to this chart because while

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many of the figures are accurate, the Government has undertaken to include certain theatres as affiliated which are not affiliated, and has undertaken to treat certain runs as preferred, which is just an artificial segregation, apparently, and so I cannot concede that it is accurate in all respects and therefore I object to it.

Judge Hand: These are your own office figures aren't they?

Mr. Seymour: They are made up by the Government from our answers to interrogatories, and it is the tabulation which we object to. Our answers are in.

Judge Hand: You mean that it is the characterizations——

Mr. Seymour: That is right.

Judge Hand: —in the tabulation that you object to rather than to the figures themselves?

Mr. Seymour: Well, it is the——

Judge Hand: Of course we have nothing to do but to admit the figures. If you cannot agree on them and you want to call attention to a mistake, and it is important at all, afterwards, why, that is part of your case.

Mr. Seymour: It is not just a matter of the figures being right and the characterizations being wrong. If it were, I would just point out the characterizations, but the Govern-

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ment has taken figures which we have furnished and then thrown them into categories which we challenge and that obscure the true statistical picture.

Mr. Proskauer: Would your Honors let me call your attention specifically to this——

Judge Hand: Yes.

Mr. Proskauer: —so you will see we are not trying to keep this extra illustrated edition from being submitted here on any technical ground.

I hold in my hand a letter from the Assistant Attorney General, chief of the New York office, Lawrence Apsey, under

date of July 24, enclosing a copy of a memorandum of a conference that we had on this subject.

The charts applicable to us, we advised the Government in that conference, were open to the following objections, and this is the Government's summary of the conference: 1, they use the words "all preferred runs." We challenged that and asked them, in order to make it perfectly clear what they meant, to head it, "First, second and third runs," and then we would agree on that score. In one footnote on one of our exhibits they have done that; in headings they have preserved the other category which, for reasons that will appear here, is entirely misleading.

The second thing that the Government summary of that
(469)
conference called attention to was that we called attention to the figures as broken up between affiliated and unaffiliated. We inquired as to which theatres the Government auditor considered in each of these categories. The Government replied it had its own list and it was not available at the conference. The Government auditor indicated, for example, that in New York City certain named circuits might be included among the affiliated group. We pointed out that unless there was an agreement as to which theatres were affiliated or unaffiliated, there could not be any agreement as to the accuracy of a chart purporting to divide receipts between affiliated and unaffiliated theatres.

The next thing that happened was the Government auditor actually stated to us that in computing revenue from first-runs in New York City that they had included revenue derived from Brooklyn on such pictures as had been exhibited in New York City and Brooklyn on an overlapping day. He did not know whether the same method of computation had been followed in all instances and we observed that this method does not accurately reflect the first-run revenue.

The next thing that happened was this, on one of these charts they illustrate a lot of lump sum deals purported to be covered by interrogatory 48. They cover theatres of a
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particular exhibitor located both in New York and outside of New York but with no breakdown of the lump sum as between theatres. The Government auditor credited the entire lump sum to the revenue derived from New York within New York City, and we respectfully observed that the figures on the chart to that extent did not reflect New York City revenues.

And the last one was Warner's answer to interrogatory 48 designated the first and second and third runs respectively in each city on the basis of the play date instead of on the basis of availability dates, as were presently used in Warner's answer to the Government's additional interrogatories. However this was done, the second and third-run revenue figures appearing on the chart would not reflect the true revenue from these runs and would therefore form no accurate basis for comparison.

That is the last we heard from the Government. We have spent years of mantime and tens of thousands of dollars of money trying to agree with the Government on these things, yet since July 1945, when they tendered us these charts and we called their attention to specific things like this, they do nothing and come in here and calmly offer the charts. We are going to object to them for that reason, your Honors.

Judge Hand: Of course, this kind of objection, how far
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it affects the particular exhibit you propose to offer, I don't know, but this kind of an objection in itself is a sound one. We are perfectly satisfied to take any kind of tabulations you choose from the testimony, but the tabulation must within itself disclose what it refers to and not be filled with characterizations of your own, from which we cannot identify the theatres or the particular facts.

Mr. Wright: There is no question about that whatsoever, your Honor.

Judge Hand: I think this is the kind of thing you ought to have agreed on and got into shape. This just confuses us. We won't know whether it is——

Mr. Wright: I will read what is on these exhibits that I just offered. This exhibit that we prepared was submitted to Paramount and that this is what their counsel had to say about it on July 13, 1949, "A spot"——

Judge Hand: 1945?

Mr. Wright: 1945, it should be. It says "1949." "A spot check of the figures on this sheet has been made by Paramount Pictures, Inc., as a result of which it does not propose to object to the tabulations upon the ground of inaccuracy, but it reserves its right to object to their relevancy and materiality, and Paramount Pictures, Inc. also reserves the (471a)
right to offer tabulations of its own concerning the same subject matter, in accordance with the letter of Simpson, Thacher & Bartlett to Wendell Berge dated June 20, 1945." (472)

Now, I thought that that took care of these particular tabulations. It now appears—and no counsel has suggested this to me heretofore—that he does not wish to stand by the representation that was made at that time.

As far as inaccuracy is concerned, I would say at any time, certainly, if a mistake is discovered, it should be corrected, regardless of whether or not somebody had stipulated before that it was correct. But that really is not his basis of objection now. The mathematical computations are just as correct as they ever were.

Now I agree that insofar as the——

Judge Hand: If you described a thing—I think that was embodied in his objection—if you described a corporation or theatre or anything else as an affiliate, that is merely your description, and we do not know its relation at all, and we not only do not know that but do not know which one it is, why the thing, you see is just all balled up.

Mr. Wright: I quite agree, and I suppose that the only cure for that situation is to submit in each case a statement of—and these should be obtainable from the work sheets, of course—a statement of the theatres which were

classified as affiliated in making up the charts. That is the only way I know how to resolve that controversy.
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Mr. Proskauer: If Mr. Wright would follow the suggestion contained in this correspondence and give us modified sheets or agreements, and make an agreement with us of what he means by affiliated theatres——

Mr. Wright: We do not proposed to tabulate the figures in the way the defendants wish to tabulate them.

Judge Hand: No, there is no reason why you should. I agree with you, Mr. Wright. But there is reason why the exhibit should within its four corners, explain to us what it refers to.

Mr. Wright: As I say, if the Court please, insofar as this chart and all of these charts are concerned, I know of no way to resolve that except to submit to your Honors with the charts a list of those theatres, naming them by name, which were regarded by us as affiliated for the purpose of the chart.

Judge Hand: Have you got such a list?

Mr. Wright: We can prepare them from the work sheets and submit them, and that I think is the thing to do in the event of any question over affiliation here or non-affiliation which, on the basis of the statement here, we do not suppose Paramount intended to raise.

Judge Hand: What about that, Mr. Seymour? What do you suggest?

Mr. Seymour: here are various difficulties which Judge
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Proskauer has outlined. Anything which will enable us to try to agree would be helpful, but the things that Judge Proskauer's associate suggested to Mr. Wright's associates last summer have not been done. They should have been done before this. We will go along with any method of getting these things correct, but the Government has simply stood adamant that its method of doing it is the only way to do it; and we cannot agree that it is correct or permit them

to go in, and give your Honors the impression that they are correct. Now, any procedure by which we can get together on a revision of these things is all right, but that should have been done. It was in July that counsel told Mr. Wright's associates what was wrong with these charts. I am personally a little embarrassed about it because we said in the first instance that the figures, our spot check of the figures, showed them to be correct; and it was only after that or very shortly after that that these errors in the headings came to general attention, but it was immediately after that that counsel for one of the other defendants told Mr. Wright that that same difficulty pervaded all these tabulations, told him it pervaded their tabulation, and it also pervades all the others.

Mr. Wright: In view of what has been said, I see nothing to do except to go over the chart heading by heading to de- (475)
termine what has to be done to resolve the conflict. Now it seems to me on the affiliation question that can be handled by submitting a list of the theatres which we used as affiliated——

Judge Hand: Yes, you could do that.

Mr. Wright: Now, I might as well take them up one by one. The first heading, "Number of National Exhibitions." I take it there is nothing wrong with that?

Mr. Leisure: If the Court please, it seems to me that this would be better: we are not involved in this particular chart, but the ruling made may cover charts we are interested in. Instead of Mr. Wright just drawing a statement from his work sheets and submitting them to the Court, I do not see why we should not follow the orderly Procedure that is followed every day in the courtroom, and take his work sheets and mark them for identification, and then we can tell and the Court can tell what he draws his conclusions and his inferences from. I do not want some statement that he draws from his work sheets submitted to the Court.

Mr. Wright: I might say that at the time we submitted the charts we also made work sheets on which they were

based available in our New York office here for examination, and nobody came down to look at them.

Mr. Leisure: If your Honor please, it is a long time, and (476)

you know something of the difficulty about making things available when the Government has it. When you go there, they are some place else, or some other defendant has them. Why should not they be marked today for identification so they will be equally available to all of us.

Mr. Wright: That is perfectly agreeable to us.

Judge Hand: All right. Go on with your work sheets.

Mr. Proskauer: If the Government will take up the specific objection raised and discuss it with us in an endeavor to avoid burdening the Court with all this terrible detail, I think that would be better. It is our desire to do that as far as we possibly can.

The Court (Judge Hand): You do not seem to be able to agree about things. I should think you ought to be able to agree on some form of statement here, and then make your law points about it.

Mr. Caskey: If your Honor please, one reason we cannot agree is that the issue is one of the ultimate issues to be decided. Now in New York there are three circuits of theatres involved. One is the RKO Circuit, which is clearly affiliated, no question about it. And the revenue derived from RKO should be classified as affiliated. Now the next circuit is the Skouras Circuit, which we say is not affiliated, and which the Government says they will prove is affiliated. And the (477)

third circuit is the Randforce Circuit, which we say is not affiliated and the Government says is affiliated. Now, all we want is that the chart which shows revenue from affiliated theatres shall show to your Honors how much of it is RKO, which is without the realm of dispute, how much of it is Skouras, which is in the realm of dispute, and how much of it is Randforce, which is in the realm of dispute. Then if your Honors——

Judge Hand: You are clearly entitled to that.

Mr. Caskey: Well, that is what they won't do, and that is what the fight is about.

Mr. Wright: If the Court please, that is not correct that we won't do it. I say I think the only way to resolve that question——

Judge Hand: Maybe it is not correct that you won't do it. It is correct that you have not done it, and here you are going on in this very long trial, and you ought to have ironed this thing out, I think.

Mr. Wright: I submit we did the best we could to do it. Now what he is proposing is to have us recompute the whole chart in the manner he says it should be done. Now I am perfectly willing to submit a list of the theatres which will disclose themselves which have been included in what we call affiliated theatres and which have not. But I submit that (478)

if he wants to compute separately the rental of the theatres which are involved in these various degrees of affiliation, he is perfectly free to do that.

Judge Hand: I really do not see, Mr. Wright, any difference. You could do it by one exhibit or you could do it by four or five, as long as the Exhibit tells on the face of it what it is doing.

Mr. Wright: That is right. I think that is correct.

Judge Hand: Your exhibit could cover the whole crowd, everybody, and maintain, if they are maintainable, your contentions, or maintain, if they are maintainable, their contentions or the contentions of some of them.

Mr. Wright: But I am just pointing out that counsel is apparently now taking the position that he will not agree to the correctness of the figures even if we submit with the chart a list of the theatres which we included in the affiliated rental.

Judge Hand: I do not so understand.

Judge Bright: I thought counsel wanted you to break them down into three subdivisions, as far as RKO is concerned, and put them under your claim of affiliated theatres.

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Mr. Proskauer: What is the objection to your putting in your list of theatres, A, theatres we consider to be affiliated, like RKO; B, Skouras; and, C, Randforce?

Mr. Wright: There is not any objection to that. That affiliation, of course, appears from other evidence; once you have the name of the theatre, you have the extent of its affiliation.

Judge Hand: Now you are arguing as to whether you have proved your case as to affiliation. That is in question.

Mr. Wright: I assume that it is, but I say the proof as to the extent of the affiliation is nothing about which there is any controversy. The only controversy is as to whether or not these minority interests do amount to affiliations as the defendants use the term.

Judge Hand: Of course.

Mr. Wright: I say——

Judge Hand: The inference, at least, is in question. Why don't you get up an exhibit that discloses the figures on the basis of affiliation and non-affiliation?

Mr. Wright: That is exactly what we did here. Now if we have to further and re-compute——

Judge Hand: No, on the basis of what you claim to be affiliation and on the basis of what they claim to be affiliation.

Mr. Wright: I am perfectly willing to have their figures

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submitted simultaneously on the basis of what they claim to be affiliated, but in order for us to make both tabulations it means that we have to go ahead and redo the charts completely, and figure totals in their categories, which is a very difficult, laborious piece of work.

Mr. Davis: May I suggest, your Honors, that I think we are all overlooking a little bit what the evidentiary status of these charts is. Now, there is a custom, and a very laudable custom, of shortcutting testimony by putting in summaries; and counsel have a perfect right to offer a summary. But

it is not primary evidence at all until it is accepted by the opposing party. We have a perfect right to say we do not accept your summary. Then the burden is obviously upon the person who offers it to introduce the person who made the summary and ascertain in what manner he made his computations, and from what sources. That would entitle us, if we chose to, to insist that these charts were not evidence at all, and the person who prepared them be put on the witness stand and cross-examine as to his sources. That is a laborious process but one to which we are perfectly entitled, and in the absence of it, these charts cannot be thrown at the Court with the airy statement that it is for us, if we see anything wrong about them, to introduce evidence.

Mr. Wright: Now——

Mr. Davis: Just a minute, Mr. Wright.

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Now, that is where we are. Now, we are perfectly willing to have these charts reformed in the particulars which Judge Proskauer says we pointed out in writing as long ago as last July, but we are quite within our rights in objecting to their introduction in their present form.

Mr. Wright: I do not think there is any question about what Mr. Davis says, your Honors. We have Lieutenant Borwick, the man who supervised the preparation of these charts, here, and we shall be glad to have him put on the stand and have him identify what he did with his worksheets, and he is subject to cross-examination. It seems to me, however, that that is a very laborious, needless method of getting at the result.

Judge Hand: I think so, too, but you can't substitute for that laborious method a method which you are using now of putting in stuff that we cannot tell anything about and that the other people dispute.

Mr. Wright: I repeat that I have only offered these agreements on the basis of a stipulation which has been repudiated. Now, that I can't——

Mr. Seymour: Now, I cannot let that statement stand unchallenged. I have explained to your Honors the situation. Mr. Wright says that we are repudiating a stipulation. I do not think we are at all. He was advised last July of these general errors within a period of a few days of the
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date of this stipulation; and, furthermore, we reserved in our stipulation the fact that there were inaccuracies here. Now, my objection goes along with that of other defendants to similar charges, and I certainly do not want to be put in a position of repudiating a stipulation or anything of that kind. The Government has known for months what the position of the defendants was.

Judge Hand: Well, we shall undoubtedly sustain the objection as to all these exhibits until they are clarified and the items are segregated, I think you should do it by agreement, without any question. You can agree, not as to conclusions but as to a form which will show what is affiliated and what is not affiliated. If you go over them, it won't require any expert testimony or anything else.

Mr. Wright: Let me suggest this, your Honors. We have Lieutenant Borwick here with his work papers, and I suggest that we can sit down with a chart with such people they wish to designate, and we can have a conference and prepare a statement, and if we are able, iron it out. And if we can't resolve the question in that way, then I suppose we would be put to the task of putting the witness on the stand and having him testify as to what was done.

Judge Hand: Now, assuming you can do that by cooperation, what more have you got?

Mr. Wright: In addition to the charts which are listed
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here, all of which, I suppose, could be handled the same way as these that have just been offered, we obtained a series of letters from persons affiliated with the defendants either as partners or managing officers or employees with respect to certain theatre holdings of theirs, and we have submitted

those letters to all of the counsel, and asked if they would stipulate that these persons, if called, would testify to the facts shown in the letters. The facts in the letters simply show the relationship between these persons and one or more of the defendants, and describes the extent of their theatre interests.

Mr. Davis: Do any of these letters come from Loew's, Mr. Wright?

Mr. Wright: I beg your pardon?

Mr. Davis: Do any of these letters come from Loew's?

Mr. Wright: I am not sure whether we have one from a Loew executive or not. I believe a statement as to theatre holdings, if any, of its executive officers was to be furnished. I do not think we have yet received it.

Mr. Proskauer: Mr. Wright, will you let us look at the letters you want us to stipulate to?

Mr. Wright: May I continue with what I was saying? As I was saying, we submitted the letters to counsel for the defendants, and we would have been advised, I believe, by four of them that they would stipulate that if called as witnesses the writers of the letters would testify to the facts

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contained therein, subject to a great many objections that they would want to make on the grounds of relevancy and materiality.

Mr. Proskauer: I am inspecting them, your Honor. I think I am going to be able to say Yes.

Mr. Caskey: What are you offering, Mr. Wright?

Judge Bright: Why don't you make your offer and then we will know whether there is an objection or not?

Mr. Wright: Yes. I shall offer the exhibits marked for identification as 350 through 356, and also 165 through 170.

Mr. Proskauer: That is, 350 to 360 inclusive?

Mr. Wright: No.

Mr. Proskauer: 350 to 356 inclusive?

Mr. Wright: Yes.

Mr. Proskauer: As to these letters, as far as I am concerned, I am advised that we have already stipulated in

writing, and therefore we stipulate here that the signers of these letters, if called, would testify to the facts contained in the letters.

Judge Hand: All right. They are admitted.

Mr. Seymour: I was waiting for Judge Proskauer to finish. As to 168 and 170, I think probably those exhibits ought to be withdrawn. The Government must have been (485)
under a misapprehension as to the relationship of Paramount to the author of those letters. There is no relationship now. I would be perfectly willing to stipulate that if called they would testify as in the letters, but since the testimony would be plainly immaterial because there is no relationship, I think they ought to be withdrawn.

Mr. Wright: I agree.

Mr. Seymour: So 168 and 170 ought to be withdrawn.

Mr. Wright: Yes.

Judge Bright: They are withdrawn, Mr. Wright?

Mr. Wright: Correct, your Honor.

And I will offer just 165 to have it marked.

(Government's Exhibit 165 for identification received in evidence.)

Mr. Wright: 166 is offered.

(Government's Exhibit 166 for identification received in evidence.)

Mr. Wright: And 167 is offered.

(Government's Exhibit 167 for identification received in evidence.)

Mr. Wright: 168 is withdrawn.

Judge Hand: Now, you have 169 and 171, haven't you?

Mr. Wright: 169 is being marked.

Judge Bright: Which one are you introducing?

Mr. Wright: 169.

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(Government's Exhibit 169 for identification received in evidence.)

Mr. Seymour: I would like to see 171.

Mr. Caskey: That is not being offered, is it?

Mr. Wright: 170 is withdrawn.

And I shall offer the others covered by the stipulation which begin at 350, which is on page 115 of the list of exhibits.

(Government's Exhibit 350 for identification received in evidence.)

Mr. Wright: And I will also offer 351.

(Government's Exhibit 351 for identification received in evidence.)

Mr. Wright: 352 is offered.

(Government's Exhibit 352 for identification received in evidence.)

Mr. Wright: 353 is offered.

(Government's Exhibit 353 for identification received in evidence.)

Mr. Wright: 354 is offered.

(Government's Exhibit 354 for identification received in evidence.)

Mr. Wright: And 355 is offered.

(Government's Exhibit 355 for identification received in evidence.)

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Mr. Wright: 356 is a negative letter. I shall withdraw that.

Mr. Caskey: Let me see it, please.

(Letter handed to Mr. Caskey.)

Mr. Wright: I think those are all of those, if your Honor please. I think that accounts for all of the letters of that character that are on the printed list.

Judge Bright: On page 114 there are two there, 341 and 342.

Mr. Wright: Those letters, if the Court please, 341 and 342, those relate to charts again. Those are not of this class, and I think should be taken up with the other chart procedure.

We shall next offer two exhibits which set forth the holding of United Artists Theatre Circuit, Inc. as of March 30, 1940, and March 1, 1945, respectively. The March 30, 1940 list is marked for identification as No. 358, and the 1945 list is marked for identification as No. 164.

Mr. Proskauer: What is being offered?

Mr. Wright: These are statements which were furnished to us by counsel——

Mr. Proskauer: May we see it?

Mr. Wright: (Continuing) ——by counsel for United Artists Theatre Circuit, Inc. which sets forth the holdings of the corporation in theatres as of the dates mentioned.

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Mr. Leisure: Is that 164 you are offering, Mr. Wright?

Mr. Wright: 164 and 358.

Mr. Leisure: Now, as to 164, and the other one also, that is a statement made on behalf of a corporation which is not a party to this action and is not charged as a co-conspirator of the defendants in this case. We object to it on those grounds.

Mr. Proskauer: I am advised that United Artists Theatre Circuit, Inc., of course, has no relationship to any defendant in this case, that the name is just a coincidence. We cannot consent to admit these because we do not know a thing about it, and because it indulges in such loose characterization that it is going to result in embarrassment. Here is a heading "Skouras Theatres". What that means,

I don't know. Here is a heading "Randforce Theatres." What that means I don't know. If you get this clarified so as to make clear exactly what it meant we shall seriously consider agreeing on it with you.

Mr. Wright: If the Court please, these exhibits I just offered were also submitted to counsel for the defendants with a request for a stipulation that if the representative of the United Artists Theatre Circuit, Inc. were produced here he would testify to those——

Mr. Proskauer: I don't know what you are saying. (489)

Mr. Wright: (Continuing) —that he would testify to those facts that are set forth.

Now, these United Artists Theatre Circuit, Inc. theatres and Skouras theatres are those as to which there is a dispute between ourselves and counsel for the defendants as to whether they are or are not affiliated with defendants. All we offer are, of course, the facts showing the extent and character of the affiliation, and the Court may judge for itself how they should be treated.

Mr. Caskey: The facts as testified to by whom?

Mr. Wright: The facts as to——,

Mr. Proskauer: Not as to what.

Mr. Wright: (Continuing) —the facts as to the connection between United Artists Theatre Circuit, Inc. and Mr. Joseph Schenck of Twentieth Century-Fox Film, I believe, are set forth in Mr. Schenck's letter which is marked in evidence as Exhibit 166. The facts as to the United Artists Theatre, Inc.'s connection with the defendant RKO, I believe are covered in the interrogatory answers of RKO, from which it appears that they are jointly interested with this circuit in a combination referred to as Metropolitan Playhouses, Inc. The extent to which this United Artists Theatre Circuit, Inc. is engaged in joint operations with the theatre operations with the defendant Loew, I believe, appears in the agreements which have been offered in evidence as No. 214.

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The facts as to joint theatre operations of United Artists Theatre Circuit, Inc. and Fox I believe are contained in exhibit numbers 239 and 238.

The facts as to the association of the Circuit with Paramount I believe are set forth in Exhibit No. 208.

Mr. Caskey: What Mr. Wright has done is to avoid answering the questions as to who is testifying to the facts purported to be stated in Exhibit 164. He has stated that certain things are already in the record. If they are, then nothing is needed. The question is on the competency of this document which, according to my recollection, has never been submitted, although I confess there has been such a welter of material that I am unable to say what has and what has not been submitted to us.

Mr. Wright: The data was submitted to us with a covering letter dated July 27, 1945. This relates to both exhibits which is signed by Mr. William P. Phillips, Jr., who I believe is the vice-president of United Artists Theatre Circuit, Inc., and he is the one that supplied that information in response to our request.

Mr. Proskauer: Let us see that letter.

Mr. Davis: He is not testifying here, is he?

Mr. Wright: When we submitted the data we asked for a stipulation.

Mr. Proskauer: Will you let me see the schedules re-

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ferred to in this letter?

Mr. Wright: Those are the exhibits for indentification we have just been examining.

Mr. Caskey: None of our side of the table have ever seen these before.

Judge Bright: Didn't you say that you had a stipulation that if Mr. Phillips were called he would testify to these things?

Mr. Wright: Apparently we have not. We had submitted these for the purpose of avoiding the necessity of calling a

witness to testify to those facts. Now we are, of course, dependent upon such a stipulation for the competency of the data.

Mr. Proskauer: I want your Honors to understand that this is just as foreign to us as anything can be. We have no connection with this situation; we do not know the people; we do not know Mr. William E. Phillips of the United Artists Theatre Circuit, Inc., and we have never seen these documents.

Mr. Wright: I would concede, your Honors, that obviously the documents are not admissible in the absence of a stipulation that Mr. Phillips, if called, would testify to the facts stated therein.

Judge Hand: They are excluded.

Judge Bright: Why not withdraw the offer, and if you want to renew it later, do so?

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Mr. Wright: I think we shall want to call the witness to establish the facts, and the same thing, I think, applies to an exhibit marked for identification No. 357, which I understood had also been submitted which sets forth the Skouras Theatres Corporation theatre interests as of March, 1939; and I would, of course, only offer this on the assumption that there would be a stipulation that if called, Mr. George Skouras, the president of the corporation who furnished the date, would testify to the facts therein stated, if called as a witness.

Mr. Leisure: May we see the exhibit? We may interpose no objection.

Mr. Wright: The accompanying letter which goes with that is this letter of March 6, 1939, signed by Mr. Skouras (handing).

Mr. Leisure: This was submitted in 1939. What the facts are today, I don't know, but subject to correction we will have no objection to it.

Mr. Wright: I think we got a letter as to the present date.

Judge and. That is 357?

Mr. Wright: That is 357.

Judge Hand: Admitted.

Mr. Wright: I understand, if the Court please, that the
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facts as to the Skouras Theatres holding as of 1945 are contained in the document we offered as Exhibit 164, the statement furnished by United Artists Theatre Circuit which owns an interest in the Skouras Theatres Corporation.

Judge and: I thought that had been withdrawn.

Mr. Wright: That has been withdrawn. I am just explaining that I think we do have that data, and we do propose to offer the 1945 situation.

Mr. Proskauer: If instead of calling it "Skouras Theatres" you would really state who owns them and which Skouras has an interest in them, we would get along very much better. The difficulty here in just calling them affiliated theatres, or Skouras theatres, or some such thing, gives a wrong impression.

Mr. Wright: We did not prepare the chart.

Mr. Proskauer: Neither did we.

Mr. Wright: There is no question that the words "Skouras theatres" refers to "Skouras Theatres, Inc."

(Government's Exhibit 357 for identification received in evidence.)

Mr. Wright: I think, if the Court pleases, that that disposes of virtually everything on the list here except the F.B.I. reports which were given the number 155 for identification.

Judge Goddard: We have the supplementary list.

Mr. Wright: Oh, has that been handed to your Honors? I did not realize you had the supplementary list. If you have that there we may as well dispose of those.
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Mr. Wright: There are on that list additional letters to which I think the same stipulation applies. No. 363 I offer.

Mr. Proskauer: Is this all one?

(Government's Exhibit 363 for identification received in evidence.)

Mr. Wright: And number 364.

Mr. Proskauer: May we see them, what they are?

Mr. Wright: Yes, indeed.

Mr. Proskauer: One request we have to make is to please be advised of what is being offered and to get a look at it.

Mr. Wright: You have a copy of this list, I take it?

Mr. Proskauer: The list does not mean anything. The document does.

Mr. Wright: That is true.

Mr. Proskauer: I cannot find it in my heart to object to any letter signed by Dwight, Harris, Koegle & Caskey.

Mr. Caskey: That is not what it is described as. I call your attention to the fact that the thing being handed to the clerk is not what is described on the piece of paper your associate gave me. If you will look at the letter, it may not be what you want.

Mr. Wright: Let us take a look at it.

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Mr. Proskauer: May I see 363, so we can know what it is?

Mr. Wright: You are quite right, that is incorrectly listed. The letter 364 is from Dwight, Harris, Koegel & Caskey; and the date is correct, but it refers to stock ownership of Joseph H. Moskowitz and not Darryl F. Zanuck.

Judge Hand: Nobody has objected to it so far as I know. Go on with your next offer.

(Government's Exhibit 364 for identification received in evidence.)

Mr. Davis: Have you offered 363?

Mr. Wright: Yes. 365 are additional answers.

Mr. Seymour: May we see those, Mr. Wright? We have never seen them.

Mr. Wright: They have only been received by us within the last day, I believe. They are the remainder of the Universal answers to our 1945 interrogatories 6 to 11. 365 and 366 are Universal answers to our 1945 interrogatories 12 and 13. 367 is a letter of the character covered by a prior stipulation. That is from Gordon, the president of Jefferson Amusement Company, to Paramount.

Mr. Davis: What does he say. What is the letter about?

Mr. Seymour: With respect to Exhibits 365 and 366, if

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your Honors please, they are answers of the defendant Universal to some interrogatories which none of us have ever seen before, and that is not a ground for exclusion, but I think it ought to be plainly understood that we should have an adequate opportunity to make corrections.

Mr. Wright: No question of that.

Mr. Seymour: Because they report on theatres alleged to be affiliated with us and we haven't any idea whether they are right or wrong.

Mr. Wright: We will offer 368, which is another——

Judge Bright: Have 366 and 365 been marked?

The Clerk: No, your Honor, not yet.

Mr. Wright: 365.

(Government's Exhibit 365 for identification received in evidence.)

Mr. Wright: 366 is next.

(Government's Exhibit 366 for identification received in evidence.)

Mr. Wright: Then 367 and 368.

(Government's Exhibits 367 and 368 for identification received in evidence.)

Mr. Wright: We will offer 369, which is additional interrogatory data furnished by United Artists.

(Government's Exhibit 369 for identification received in evidence.)

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Mr. Wright: And the same thing applies to 369—1-2-3-4-5.

Mr. Proskauer: What are those?

Mr. Wright: Those are United Artists answers to, or contracts which were furnished to us by way of answer to Interrogatory 6. Instead of answering the interrogatory in the form in which the other defendants answered it, they simply handed us photostats of the contracts in question.

Mr. Davis: You are offering them?

Mr. Wright: We are offering them.

Mr. Davis: Just for the record, your Honors, so there won't be any mistake hereafter, in point of avoirdupois, we concede now that the weight of evidence is with the Government.

Mr. Raftery: And they extracted it from the minor's files. There are $800 worth of photostats there. The only reason I am pointing it up in that manner is to show the nature and extent of furnishing of contracts in an effort to answer these interrogatories.

(Government's Exhibits 369-1 to 369-5 inclusive for identification received in evidence.)

Mr. Wright: The list that has been handed to your Honors and to counsel again appears to be incorrect. The next item there should bear the number 369-6 instead of 369-5,

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and 369-6 is part of the same United Artists material.

(Government's Exhibit 369-6 for identification received in evidence.)

Mr. Wright: And 370, if the Court please, which we are offering, is the up-to-date information as to the Universal's corporate structure, which Mr. Raftery referred to yesterday and which he furnished us.

(Government's Exhibit 370 for identification received in evidence.)

Mr. Raftery: And I presume it is received with the deletions that were made by your Honors as to the other defendants. You will remember you eliminated the number of stockholders and twenty largest stockholders. While this document was being prepared, we were working under the old ruling.

Judge Hand: Yes.

Mr. Raftery: So it is received, I presume, with the deletions.

Judge Hand: That is true.

Mr. Wright: Correct. That, I think, takes care of the list of documents with the exception of the F. B. I. reports, and in accordance with your Honor's suggestion I spent last night checking that data with Mr. Caskey and Mr. Pride as to Fox. We have had others checking the data with the other defend-
(499)
ants who operated in the towns in question and I think that this afternoon we will be able to read into the record the facts upon which we have been able to agree, and those reports can be offered as to which there is no dispute. And that, I think, will virtually complete our presentation, subject to picking up such odds and ends as additional interrogatory data that was to be furnished but in some instances has still not come in.

Mr. Proskauer: Do we have to come back for these F. B. I. reports this afternoon? We have given you, as I understand it, our corrections to a number of things in these reports, all of us.

Mr. Wright: I said that we would put in the data that was agreed upon this afternoon.

Mr. Davis: I am frank to say I never even heard of these F. B. I. reports, and I haven't seen any of them, and I want to know just what they are and how they are made up and what they deal with.

Mr. Wright: I will be glad to explain. These reports are simply one for a town. They originally covered, I think, about five hundred odd towns in which the defendants operate theatres, almost all of which are under 25,000 in

population. A sample form has the heading at the top, the name of the town, what State; then under the theatre column
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are listed the names of the theatres in town, under the names of owners, whoever owns or operates; date of acquisition; date built; seating capacity; class of feature; class of films displayed; and general location; the run, whether first or subsequent; evening adult admission price; and the extent of operation; that is, either full time or otherwise; the number of program changes.

As to this data, as I say, we assembled it primarily for the purpose of showing in which towns that the defendants operated in there were no independent theatres, and, second, for showing the towns in which there were no independent first-runs, even though there were independent theatres, and, third, the data as to theatres kept closed by the defendants in the closed towns. That is the data that we are principally interested in.

For our purpose, a summary may be furnished listing that data, and I think will shorten the amount of material in the record. We collected the other information I submitted because we thought, as long as they were going into the towns, they might as well do the complete job and have anything the defendants might wish as well as what we might wish to offer, but I don't want to encumber the record with the entire reports, if we can simply read in or furnish a list which will take care of the points that I just
(501)
mentioned.

Mr. Davis: You are not asking us to stipulate the accuracy of the facts on each one of these reports. Here is the sort of thing. One has just been handed me: Town, West Reading; State, Pennsylvania; Fabian Theatres (bought out Wilmer-Vincent, Inc. in June 1944) and Loew's; date acquired, 1939; date built, 1939; number of seats, 754. Class of theatre, 1st. Class of films, A-B once or twice weekly as second film of double feature—once a

week normally; location, 603 Penn Avenue, West Reading, Pa. Serves high-class area; evening adult price, 29 cents plus 6 cents tax (raised in late 1944 from 25 cents plus 3 cents tax); extent of operation, 365 days per year; no other theatre in West Reading; Pennsylvania; theatres closed or converted to commercial use, S. W. Reiff (deceased); when closed or converted, 1912 or 1913. Building no longer standing."

Now, what has that accumulation of data indicated here to do with this case?

Mr. Wright: If the Court please, I have just pointed out that I do not propose to offer that accumulation of data. All that I am interested in showing is those three facts, the situations where the defendant has all of the theatres, the situations where it has all the first-run theatres, and the (502)

names and locations of the theatres that are closed in the closed towns. We collected this other data and submitted it largely for our own purposes, and as far as we are concerned we have no desire to reach any stipulation at this time as to all these details that are contained in the reports. We do want to offer the data I have just referred to in summary form.

Mr. Davis: The highly illuminating fact which I gather from this painful assemblage is that West Reading, Pennsylvania, has only one theatre and that Loew's has an interest in it. I am not able to perceive what it has to illuminate the issues which are supposed to be tried here, and for my part I am not going to assent to these F.B.I. reports.

Mr. Wright: If the Court please, the only purpose of the offer is to give an accurate description of the actual competitive situation in these towns in terms of whether or not there is opposition and whether or not there is first-run opposition. Those we think are relevant facts in measuring the actual buying power that each of these circuits has and shows what their competitive position is.

Judge Hand: Can't you get into a stipulation about anything about it?

Mr. Wright: We have stipulated.

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Judge Hand: We cannot sit here just to hear talk about your desire to prove things that you say exist and their refusal to let you prove them in that way.

Mr. Wright: We do have stipulations, your Honor, as I understand it, with Fox, Warner and Paramount, which were those principally involved. Mr. Davis's company is involved, I think, in possibly one or two situations covered by the reports, and not of any great significance.

Judge Hand: You can probably prove those aliunde, can't you?

Mr. Wright: I beg your pardon?

Judge Hand: You can probably prove those facts, if you want to, aliunde—outside of this F. B. I. report?

Mr. Wright: I think so.

Judge Bright: Prove it by the F. B. I. operator, by oral testimony.

Mr. Wright: That is right.

Mr. Seymour: The point I am going to press this afternoon, when the matter comes up, is the question of the materiality and the relevancy of the proliferation of this case into local areas.

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As your Honors will recall, the Government's brief mentions 73 large cities and they say that there is a monopoly there because some of the defendants have interests in theatres there or operates theatres there, and then they pass to the group of cities, all cities over 25,000 in population, and they say in somewhat around 150 out of the total number of cities there is some kind of monopoly there, that is, monopoly in those cities, and they have a very fancy theory for it, your Honors will recall. What these F. B. I. reports are going to do, and we are agreeing to the facts, in so far as we knew them, so there won't be any dispute about it—now they are going to take this into every hamlet in the United States under 25,000 population, where there is a

theatres situation they want to mention. It I total that number, we have got 73 little lawsuits, perhaps out of the 73 cities; and then we have 150 little lawsuits out of cities over 25,000, and for my part, it seems to me that is almost enough. So, this afternoon, when they come to take up little towns in Alabama and things of that kind, I am going to urge your Honors that that total number of lawsuits, 250, or whatever it is, is almost enough for our purposes unless we can find some way to get the Government perfectly clear that we are not going to have to litigate or discuss situations in those individual cities. That is what I pretty much
(505)
fear, by the Court receiving any more detailed evidence of that kind.

Judge Hand: What about that, Mr. Wright?

Mr. Wright: As far as we are concerned, we do not propose to attempt to break the case down into any more than one lawsuit. We do not offer this evidence for the purpose of showing a particular competitive discrimination in any particular one of these situations. We simply think that it is relevant data on what we conceive to be the fundamental issue in this case and that is the power and extent of the control that these defendants exercise over the film market, the domestic film market, and we think it is an essential part of any estimate of that power.

Judge Hand: Why don't you omit this stuff that Mr. Seymour has just referred to, very small stuff? It hasn't much to do with the case?

Mr. Wright: I would agree that we would still have a case without it. I offer it simply, as I say, to complete the description of the extent of the control that these people have over the market.

Judge Hand: I understand there isn't any objection except by Mr. Davis, whose client is only affected in a very few cases, two or three cases—

Mr. Wright: That is right.
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Judge Hand:—to the competency of this proof.

Mr. Seymour: Well, your Honor, I think that will be the situation. We have reached an agreement, as I understand it, last night, through some of Mr. Wright's colleagues and some of ours on the Paramount situation. Until they actually go in, I am not sure that they will represent precisely the agreement, but that method of procedure is entirely agreeable to us, if you want to take it. I won't make an objection on the ground of competency, if it is in accordance with the agrement reached last night. As to relevancy, that is something else.

Mr. Proskauer: There is another thing, I submit, in fairness that Mr. Wright should do. He just told me that his FBI reports show that these defendants owned theatres in about 400 or 300-some-odd of these little towns out of 500. On the 500 that he examined, my comment was, "You must have picked those 500 pretty selectively."

Mr. Wright: My answer was that we did.

Mr. Proskauer: Yes, you did. That is as false a picture of this country as anybody could give, and it is just going to throw on us the burden of showing by record evidence what the situation is really throughout the country and not going through the process of selecting 500 towns out of all the thousands of little towns in the United States and tendering them to the Court as a national picture.

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Mr. Davis: May I just go back to my West Reading, which has been handed to me? And it arouses my intense interest because I would hate to see the worthy citizens of West Reading in the grasp of the cruel monopoly. And the F. B. I. has made its report, "Fabian Theatres (bought out Wilmer & Vincent in June, 1944) and Loew * * * Walter Vincent now chairman of board of Fabian Theatres, which reportedly was negotiating to buy out Loew interest about six months ago." Somebody has just handed me a notation on that, "Not true, that Fabian was negotiating for purchase of Loew interest. This theatre was consistently losing money because of late run. It is a fifth-run theatre, after Reading,

Pennsylvania. Because of unsuccessful operation, theatre was lost to an independent on September 1, 1945."

This theatre was never operated by Loew and it is the only theatre in the barren waste of West Reading, Pennsylvania.

It is true that in 1912 or 1913, one S. W. Reef, who has been gathered to his fathers, had a theatre, which was closed and the building is no longer standing. I don't know whether this monopoly is responsible for that destruction or not.

If Mr. Wright wants to use these F. B. I. reports, so far as my client is concerned, if he will sort out of this (508)

accumulation all those which refer to situations in which Loew's, Inc. is involved, we will look them over and if we agree with the report of the F. B. I., the report which the F. B. I. agent has given, we will put it in. If we do not, we are not going to, unless the Court commands us, to let this go in and put us to counterproof to correct what is reported by the F. B. I. agent.

Mr. Wright: If the Court pleases, I have already pointed out I did not propose to offer that report for any such purpose.

Judge Hand: We will have to adjourn now. We will adjourn to 2.20, and see if you cannot get these things in shape.

(Recess to 2.00 p.m.)

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AFTERNOON SESSION

Mr. Wright: If the Court please, I spent the noon hour arranging these reports in an attempt to reading in the data that we want or regard as relevant without encumbering the record with the reports themselves.

What I have done is to take the Warner situations, for example, which have, I understand, been checked by them,

and eliminate those as to which there was still any doubt or disagreement. And then I propose simply first to read the names of the towns in which, according to the report, there are no theatres other than those in which Warner has a financial interest.

Mr. Proskauer: I have a suggestion to make about this, your Honors, that I have not had finally checked by all my colleagues but which I think ought to appeal to everybody. As far as I am concerned I want to let these reports go in evidence for whatever they may be worth, if Mr. Wright will stipulate that the 500 towns with a population between 5000 and 25,000 which were investigated by the FBI, were chosen by him because of information that one or more of the five defendants owned theatres in those 500 towns; and that as to the other 6200 towns, none of the defendants owns or operates any theatre whatever. That is the fact. Now, if he will put that in we shall facilitate his putting in what he has got on the 500 towns.

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Mr. Wright: I do not think there is any question about that. These were, of course, selected because the defendants owned theatres in those towns.

Judge Hand: All right. Are you satisfied?

Mr. Wright: Yes.

Mr. Seymour: On that same line, because of the concern which I expressed to your Honors this morning of being burdened and having to burden the Court with treatment of these selected towns in any respect in our proof, I wonder if Mr. Wright, along the same line, won't concede what is also undoubtedly the fact,—that the so-called affiliated theatres in the towns to which he refers are the best physically and the best operated theatres in those towns?

Mr. Wright: We will concede nothing of the sort. We do not think it is a fact.

Mr. Seymour: Now, you see what that does, if your Honors please. That means that we have to face the possibility of dealing in our testimony with the several hundred

towns which he is going to mention in this group, because it is his theory that somehow the circumstance that there is an affiliated theatre in those towns and that there are few, if any, competitors in some of them, is somehow relevant to this case.

Now, for my part, Paramount has interests in theatres in 44 states. To deal with that kind of a problem I have got
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to call a great many witnesses who can testify to the local situation, and therefore I must press my materiality and relevancy objection to this whole thing. If your Honors should overrule it I will facilitate the going in of the evidence; but to burden your Honors with this additional group of several hundred towns seems to me quite futile. It does not certainly, since it is obvious that there are so many towns where the defendants own or have interest in no theatres—it certainly does not prove a pattern or monopoly in all towns under 25,000.

Mr. Wright: If the Court please, the material is not offered for that purpose. We have shown, of course, by the theatre lists and other data all of the towns in which all of the the defendants and their affiliates own theatre interests. Obviously they have no interests in any other towns. All that this data is offered to show is the competitive situation, if any, in the smaller towns as to which we have no other data than the fact that they have theatres there.

Now, Mr. Seymour, neither he nor anyone else is going to have to call any witnesses before this Court to prove anything he wants to prove about the character or quality of those theatres that they own. It is the kind of thing that there obviously cannot be any dispute about, and as far as we are concerned, we think it is relevant and immaterial in
(512)
any event. I simply decline to make the stipulation that he suggested because I do not believe what he stated to be the fact is the fact. If he wishes to make that proof as part of his case, he obviously does not need to call any witnesses to do it as far as we are concerned.

Mr. Seymour: If I do not have to call any witnesses, why don't you concede it? I have got to have either witnesses or a concession, it seems to me, if this material is to go in.

Mr. Wright: You will, I think, have to furnish something comparable to the data that we furnished that you would be willing to submit which you claim established that fact that you assert; and if you did, we would certainly agree that no one needed to be called to the stand to testify in accordance with the representations that you desired to make as to theatre quality in those specific situations.

Mr. Seymour: The difficulty, you see, is you can have a concession about quality and quality of operation, but you can't deal with that statistically; and if Mr. Wright thinks that I am going to undertake to fight him with equally dull statistics on this issue, I am certainly not. You cannot put theatre operation into statistics. A simple concession—and I think it is undoubtedly true that after your Honors familiarize yourselves with all the facts in each one of these things (513)
you would come to that conclusion—is the simple way to do it; and if he does not want to make it, that leaves me with this burden, and therefore I press that objection.

Mr. Caskey: Your Honors, when we come to the list that is going to be submitted as to National which we agreed upon, there are two aspects to it which seem to us to make it wholly immaterial. A considerable number of the so-called towns on the list in which it is said that National has the only theatre or the only first-run theatre are, in fact, suburbs of Los Angeles.

They may be political subdivisions and have a separate count in the census, but it is just exactly as if he were establishing that National had the one and only theatre in Spuyten Duyvil, and we think it is wholly immaterial. The second is that in a large number of them, we have the only theatre in town, the town being in many instances 2000, 3000 or 4000 people. I don't suppose there could be any contention that, having the only theatre in a town in which no one else

had ever attempted to open a theatre, is a violation of any law, but they put them all on the same sheet of paper, and we press the objection as to the immateriality of that kind of testimony.

Judge Hand: We will admit it.

Mr. Proskauer: That is on the understanding that Mr.
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Wright has stipulated what I understood him to stipulate, namely, that in approximately 6200 towns in this category of population no defendant operates or owns or has any interest in any theatre.

Mr. Wright: The facts as to what towns of that size are not in are apparent from a comparison of the census figures with the answers. I don't know whether it is 6200 or some other number.

Mr. Proskauer: Subject to correction.

Mr. Wright: But it is taken subject to check with such data as is available.

Judge Hand: All right.

Mr. Wright: With respect to Warner I merely wanted to read into the record the names of the towns which have been checked as being towns in which they have the only theatre or theatres.

Mr. Proskauer: I understood you were offering the papers in lieu of taking the time to read it.

Mr. Wright: No, I am not offering the papers. The only data I am offering is the town list.

Mr. Seymour: The what?

Judge Bright: Offering the town what?

Mr. Wright: Just the names of the towns. The theatres that are in the towns appear and are described in the interrogatory answers and the other lists which we have previ-
(515)
ously offered. There was no point in duplicating that data here, as I see it.

Mr. Proskauer: May I make this clear, with the Court's permission, that when we matched these reports, we checked

them only with reference to the fact that we had a theatre in the town. We made no check as to whether there was any competing theatre in the town and, in that respect, we want our freedom to show there may have been, if that develops.

Mr. Wright: Yes.

Judge Hand: That's all right.

Mr. Wright: The Warner towns in which, according to those reports as of the checking so far made, indicates that the theatres in which Warner has an interest are the only theatre or theatres operated in the town, are as follows.

Mr. Seymour: Will you state the population as you go along?

Mr. Wright: No, I cannot. I don't have it. I assume that the Court will take judicial notice of the census figures as to any town that is mentioned.

The towns in Connecticut are: Derby and Manchester;

In Maryland, Frederick;

In Massachusetts, Amesbury, Clinton, Newburyport, Waverly, Woburn;

In New Jersey, Beverly, Bordentown, Bridgeton, Clementon, Collin, Collingswood, Cranford, Dover, Milburn, Millville, Moorestown, Mt. Holly, Nutley, Pennsgrove, Pleasantville, Ridgewood, Riverside, South Orange, Swedesboro, Woodbury. That completes New Jersey, I believe.

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In New York those towns are: Batavia, Medina, Wellsville.

In Pennsylvania, Ambler, Bala-Cynwyd, Brookville, Donora, Dormont, Elkins Park, Etna, Gettysburg, Greensburg, Jenkintown, Lansdawne, Palmyra, Prospect Park, Punxsutawney, Red Lion, Ridgeway, State College, Tarentum, Titusville, Tyrone, Warren, Willow Grove.

In Virginia, Clifton Forge, Lexington.

In West Virginia, Martinsburg.

In Wisconsin, Delavan and Lake Geneva.

In the following towns, according to the reports so far checked, there are independently owned theatres which are operated, however, under an operating agreement with the Warner theatres in the town. Those are what are

colloquially known as the pool situations. This is where all the theatres in town are under the operating agreement:

Bloomfield, New Jersey; Jamestown, New York, and Harrisonburg, Virginia.

I think that completes the Warner offer.

As to Paramount—

Mr. Seymour: I wonder if it would be agreeable to the Court and counsel if, as he calls the name of the town, I give
(517)
the population by the 1940 census, subject to correction? I have a list of them.

Mr. Wright: Entirely agreeable.

Judge Hand: This is Paramount?

Mr. Wright: This is Paramount as to those situations which I understand have been checked.

Mr. Seymour: And it is also true, Mr. Wright, that in many of these places, perhaps in all of them, the theatre is owned by a corporation in which Paramount has, in many cases, well under a hundred per cent of the stock.

Mr. Wright: Yes, I believe the precise extent of the stock interests appear in other interrogatory answers.

The Paramount situations in which there are no theatres other than those in which Paramount has a financial interest are, beginning with Alabama, Auburn.

Mr. Seymour: 4652.

Mr. Wright: Chickasaw.

Mr. Seymour: 1530.

Mr. Wright: Jasper.

Mr. Seymour: 6847.

Mr. Wright: Selma.

Mr. Seymour: 19,834.

Mr. Wright: Troy.

Mr. Seymour: 7055.

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Mr. Wright: As to Arkansas, Conway.

Mr. Seymour: 5782.

Mr. Wright: Dardanelle.

Mr. Seymour: 1870.

Mr. Wright: Fayetteville.
Mr. Seymour: 8212.
Mr. Wright: Jonesboro.
Mr. Seymour: 11,729.
Mr. Wright: McGehee.
Mr. Seymour: 2663.
Mr. Wright: Newport.
Mr. Seymour: 4321.
Mr. Wright: Smackover.
Mr. Seymour: 2235.
Mr. Wright: Springdale.
Mr. Seymour: 3319.
Mr. Wright: Stuttgart.
Mr. Seymour: 4628.
Mr. Wright: Van Buren.
Mr. Seymour: 5422.
Mr. Wright: Connecticut, Norwalk.
Mr. Seymour: 39,849.
Mr. Wright: And Florida, Cocoa.
Mr. Seymour: 3,098.
Mr. Wright: Clearwater.

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Mr. Seymour: 10,136.
Mr. Wright: Deland.
Mr. Seymour: 7,041.
Mr. Wright: Eustis.
Mr. Seymour: 2,930.
Mr. Wright: Hollywood.
Mr. Seymour: 6239.
Mr. Wright: Melbourne.
Mr. Seymour: 2622.
Mr. Wright: Mount Dora.
Mr. Seymour: 1880.
Mr. Wright: New Smyrna Beach.
Mr. Seymour: 4402.
Mr. Wright: Georgia, Buford.
Mr. Seymour: 4191.

Mr. Wright: Elberton.

Mr. Seymour: 6188.

Mr. Wright: Waycross.

Mr. Seymour: 16,763.

Mr. Wright: Kentucky, Fulton.

Mr. Seymour: 3308.

Mr. Wright: Maine, Bath.

Mr. Seymour: 10,235.

Mr. Wright: Ft. Fairfield.

Mr. Seymour: 2693.

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Mr. Wright: Houlton.

Mr. Seymour: 7771.

Mr. Wright: Orono.

Mr. Seymour: 3702.

Mr. Wright: Rockland..

Mr. Seymour: 8889.

Mr. Wright: And Massachusetts. The first is Allston.

Mr. Seymour: Isn't that a suburb of Boston or a part of Boston?

Mr. Wright: It is listed here as a suburban situation. I assume it is a suburb but apparently a separate census entity.

Mr. Raftery: If the Court may permit a former resident, it is a part of the City of Boston, Allston.

Mr. Wright: If it is included in Boston, we will withdraw it.

Mr. Seymour: You withdraw it, so we do not have to have any conference.

Mr. Wright: I will withdraw it.

Brighton.

Mr. Seymour: That is also a part of Boston.

Mr. Wright: East Milton.

Mr. Seymour: Are you withdrawing that?

Mr. Wright: Yes.

Mr. Seymour: East Milton is a part of Milton.

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Mr. Wright: I will withdraw that.

Hyde Park.

Mr. Seymour: That is part of Boston. Is that withdrawn?

Mr. Wright: Yes.

As I understand it, what you are saying is that these are not separate entities, recognized by the Census Bureau?

Mr. Seymour: That is my understanding of it, and that is subject to correction.

Mr. Wright: We are withdrawing those subject to correction. The line we used was simply the census classification.

Natick.

Mr. Seymour: 13,851.

Mr. Wright: Needham.

Mr. Seymour: 12,445.

Mr. Wright: Norfolk Downs.

Mr. Seymour: Part of Quincy. Is that withdrawn?

Mr. Wright: That is withdrawn.

North Attleboro.

Mr. Seymour: 10,359.

Mr. Wright: Northampton.

Mr. Seymour: 24,794, and there appears to be one theatre in which Paramount has no interest in that town.

Mr. Wright: Then it should not be in this list. If that

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is the fact——

Mr. Seymour: It is also subject to correction, but do you withdraw it?

Mr. Wright: —it should be withdrawn.

Newton.

Mr. Seymour: 69,873.

Mr. Wright: Roslindale.

Mr. Seymour: That is part of Boston and is withdrawn?

Mr. Wright: Withdrawn.

Wollaston.

Mr. Seymour: Part of Quincy, and it is withdrawn?

Mr. Wright: Withdrawn.

Michigan, Birmingham.

Mr. Seymour: 11,196.

Mr. Wright: Minnesota, Fairmont.

Mr. Seymour: 6988.

Mr. Wright: And I have some more in Florida here. Arcadia.

Mr. Seymour: 4055.

Mr. Wright: Bartow.

Mr. Seymour: 6158.

Mr. Wright: Bradenton.

Mr. Seymour: 7744.

Mr. Wright: Ocala.

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Mr. Seymour: 8976.

Mr. Wright: Palm Beach, or West Palm Beach I believe it is. I think it is called in here Palm Beach and West Palm Beach.

Mr. Seymour: They are covered by the census separately.

Mr. Wright: I take it the theatres in both communities are all affiliated with Paramount, that's right?

Mr. Seymour: That is correct.

Mr. Wright: Well, that statement will cover it.

Mr. Seymour: Are you going to put it in?

Mr. Wright: Yes.

Mr. Seymour: The population of Palm Beach, I suppose taken at the least favorable time, is 3747; West Palm Beach, 33,693.

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Mr. Wright: Plant City.

Mr. Seymour: 7,491.

Mr. Wright: St. Augustine.

Mr. Seymour: 12,090.

Mr. Wright: Sanford.

Mr. Seymour: 10,217.

Mr. Wright: Sarasota.

Mr. Seymour: 11,141.

Mr. Wright: Vero Beach.

Mr. Seymour: I can't give you the population. That is not on the list in here. I will undertake to supply the population at a later date.

Mr. Proskauer: May I suggest that in phrasing the concession before I was guilty of an inadvertence. I said towns between 5,000 and 25,000. It should have been towns of under 25,000 population, because some of them are smaller than 5,000. I assume we can agree on that, with the Court's permission?

Mr. Wright: Yes.

Mr. Seymour: Where are we going now, Mr. Wright?

Mr. Wright: Winter Haven.

Mr. Seymour: 6,199.

Mr. Wright: And Winter Park.

Mr. Seymour: 4,715.

Mr. Wright: Here are more in Minnesota: Moorehead.

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Mr. Seymour: 5,491.

Mr. Wright: St. Cloud.

Mr. Seymour: 24,173.

Mr. Wright; And in New York: Owego.

Mr. Seymour: 5,068.

Mr. Wright: And Waverly.

Mr. Seymour: 5,450.

Mr. Wright: And in Mississippi: Columbus.

Mr. Seymour: 13,645.

Mr. Wright: Tupelo.

Mr. Seymour: 8,212.

Mr. Wright: West Point.

Mr. Seymour: 5,627.

Mr. Wright: And in North Carolina: Canton.

Mr. Seymour: 5,037.

Mr. Wright: Chapel Hill.

Mr. Seymour: 3,654.

Mr. Wright: Goldsboro.

Mr. Seymour: 17,274, and there appears to be another theatre there.

Mr. Wright: In that case it should not be on. In this list there are three theatres all operated by North Carolina Theatres.

Mr. Seymour: Chapel Hill has a theatre in which Paramount has no interest.

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Mr. Wright: That also, according to the report that was submitted and I understand checked, has all three operated by North Carolina Theatres.

Mr. Seymour: Will you bear with us just a moment? You go ahead with this subject to correction, if you will.

Mr. Wright: Lexington, North Carolina.

Mr. Seymour: 10,550.

Mr. Wright: And Greenville.

Mr. Seymour: 12,674.

Mr. Wright: And Hendersonville.

Mr. Seymour: Hendersonville?

Mr. Wright: Yes.

Mr. Seymour: 5,381.

Mr. Wright: And in North Dakota, Minot.

Mr. Seymour: 16,577.

Mr. Wright: And in Pennsylvania: Bloomsburg.

Mr. Seymour: 9,799.

Mr. Wright: Carlisle.

Mr. Seymour: 13,984.

Mr. Wright: Danville.

Mr. Seymour: 7,122.

Mr. Wright: Dickson City.

Mr. Seymour: 11,548.

Mr. Wright: Dunmore.

Mr. Seymour: 23,086.

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Mr. Wright: Duryea.

Mr. Seymour: 8,275.

Mr. Wright: Forest City.

Mr. Seymour: 4,266.

Mr. Wright: Hawley.
Mr. Seymour: 1,778.
Mr. Wright: Honesdale.
Mr. Seymour: 5,687.
Mr. Wright: Jersey Shore.
Mr. Seymour: 5,432.
Mr. Wright: Kingston.
Mr. Seymour: 21,679.
Mr. Wright: Luzerne.
Mr. Seymour: 7,082.
Mr. Wright: Mauch Chunk.
Mr. Seymour: 3,009.
Mr. Wright: Northumberland.
Mr. Seymour: 4,469.
Mr. Wright: Pittston.
Mr. Seymour: 17,828.
Mr. Wright: Pottsville.
Mr. Seymour: 24,530.
Mr. Wright: Sayre.
Mr. Seymour: 7,569.
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Mr. Wright: Sunbury.
Mr. Seymour: 15,462.
Mr. Wright: And Towanda.
Mr. Seymour: 4,154.
Mr. Wright: And again in North Carolina: Goldsboro.
Mr. Seymour: 19,037.
Mr. Wright: And in South Carolina: Abbeyville.
Mr. Seymour: 4,930.
Mr. Wright: Anderson.
Mr. Seymour: 19,424.
Mr. Wright: Darlington.
Mr. Seymour: 6,236.
Mr. Wright: Greenwood.
Mr. Seymour: 13,020.
Mr. Wright: South Dakota: Madison.
Mr. Seymour: 5,018.

Mr. Wright: Huron.
Mr. Seymour: 10,843.
Mr. Wright: Watertown.
Mr. Seymour: 10,617.
Mr. Wright: And in Tennessee: Kingsport.
Mr. Seymour: 14,404.
Mr. Wright: And in Texas: Anahuac.
Mr. Seymour: 1,003.
Mr. Wright: Arlington.
Mr. Seymour: 4,240.
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Mr. Wright: Corsicana.
Mr. Seymour: 15,232.
Mr. Wright: Eagle Lake.
Mr. Seymour: 2,124.
Mr. Wright: Eastland.
Mr. Seymour: 3,849.
Mr. Wright: Mercedes.
Mr. Seymour: 7,624.
Mr. Wright: McAllen.
Mr. Seymour: 11,877.
Mr. Wright: Nederland.
Mr. Seymour: 2,500.
Mr. Wright: Paris.
Mr. Seymour: 18,687.
Mr. Wright: Port Neches.
Mr. Seymour: 2,487.
Mr. Wright: And in Vermont: Barre.
Mr. Seymour: 10,909.
Mr. Wright: And Rutland.
Mr. Seymour: 17,082.
Mr. Wright: And in Virginia: Charlottesville.
Mr. Seymour: 19,400.
Mr. Wright: Exmore.
Mr. Seymour: 932.

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Mr. Wright: Hilton Village.

Mr. Seymour: 1,673.

Mr. Wright: And Phoebus.

Mr. Seymour: 3,503.

Mr. Wright: That covers all those that have been checked.

As to Fox, the following are towns in which it has been agreed that Fox has an interest in all of the theatres in the town.

Mr. Caskey: Why don't you just mark it in evidence? I have got the population figures, and during recess we can just mark the population figures in?

Mr. Wright: I think that is all right.

Mr. Caskey: Will you just look at the first page, Mr. Wright? Santa Barbara has a population of more than 25,000 and should come off the list.

Mr. Wright: That should remain on the list, with that qualification.

Mr. Caskey: No. This is only a list of 25,000 or less.

Mr. Wright: I take it there is no dispute about the fact that in Santa Barbara the only theatres in the town are three Warner and two Fox. Now, if there is a dispute about that fact, we don't offer it; if there is not, we do offer it.

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Mr. Caskey: I am perfectly willing to concede that there are two Fox theatres, to the extent of my knowledge.

Mr. Wright: Do you concede there are three Warner theatres?

Mr. Caskey: Just a minute. The figure is 34,958.

Mr. Wright: You say you have a list with the population figures on it?

Mr. Caskey: Yes.

Mr. Wright: As to Fox, we will simply ask to have marked this list on which Mr. Caskey has noted the population figures for each town, with the exception of a few which are listed as being in the Metropolitan Los Angeles area.

We can mark that as Government's Exhibit 371 for identification.

Mr. Caskey: Mark it in evidence.

Mr. Wright: That is agreeable. It will be received, I take it.

(Marked Government's Exhibit 371.)

Judge Bright: What is it a list of?

Mr. Wright: That is a list of Fox towns which have been checked so far by the defendants and found to be towns in which all of the theatres are those in which Fox has an interest. That is, towns of less than 25,000. The list as it went in excludes Santa Barbara in which that situation pre-
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vails, but is a town of over 25,000.

Mr. Caskey: Now, Mr. Wright, will you stipulate in connection with this that in all the other towns in which Fox operates, a list of which has already been marked in evidence, that there are independent competing theatres?

Mr. Wright: We shall not so stipulate. As I understand it, there are a number of situations where our reports have shown that the town was a closed town, where there has not been a satisfactory reconciliation of the discrepancy.

Mr. Caskey: Well, how many are there of those?

Mr. Wright: I do not know how many there are, but there are number.

Mr. Proskauer: We shall endeavor to narrow the area of difference if you will tell us how many you claim.

Mr. Wright: He knows how many we claim. You have the data.

Mr. Caskey: Four or five towns? We have got it right here. How many are there? You count six? I will take your count. I am not asking for a concession; I am asking for a stipulation that in all the other towns in which Fox or National has theatres except those on this Exhibit 371 and six unidentified ones there is competition.

Mr. Wright: We will give you no such stipulation.

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Mr. Caskey: There are other theatres operating.

Mr. Wright: There are other towns in which no survey was made in which I think there is no operating competition. There are towns of more than 25,000 in which there is no independent competition.

Mr. Caskey: We are trying to narrow the ambit of this case, and so far unsuccessfully. Will you make it under 25,000?

Mr. Wright: I repeat that our reports, in so far as I know, I have no assurance that they cover all of the towns under 25,000 in which Fox operated. There certainly can be no dispute about the facts. If you can make available to us the data on those towns, we shall be glad to stipulate it with you as to any town where you operate.

As to RKO and Loew we have received no checked reports, and we think the situations of that character in which they are involved are not sufficiently consequential to make that proof at this time anyway. We will rest on what we have offered.

Judge Hand: All right.

Mr. Wright: My associate calls my attention to the fact that the situation in the record as it now stands as to Exhibits 48, 88, 97, 100, 106, we should state that the offer of the interrogatory answers which are contained in those exhibits should include the answers to 50-A, 52, which were inad-

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vertently omitted from the descriptions opposite those exhibits.

Judge Bright: 50-A and what?

Mr. Wright: The answers to 1939 interrogatories, 50-A and 52. That applies to Exhibit 48. 48 as it stands merely refers to 51 and 53. These two numbers should be added. And the same thing applies to 88.

Judge Bright: What is the next one? 48. And what is the next?

Mr. Wright: 88.

Judge Hand: 50-A and 52 added to 88?

Mr. Wright: Yes. That is on page 36, and they should also be added to 100, which appears on page 47, and 106, which appears on page 53 of the list.

Judge Bright: The same interrogatory answers to each one of these, is that right?

Mr. Wright: 106 was already in evidence, but only as to 51 and 53. We are now including 50-A and 52.

Judge Bright: Is that the last one?

Mr. Wright: Yes. I am also informed that the defendants will now stipulate to certain testimony of Mr. Phillips, which would make competent the exhibits identified as 164 and 358, which were the statements of the theatre holdings of the United Artists Theatre Circuit, Inc., providing we agree that he would also give testimony which they have written (535)

out here which they apparently desire to have in; and with the understanding that that is, of course, their testimony and not offered by us, I have no objection to adding that to the stipulation as to what he would say, if called.

Judge Hand: This is 164 and 358?

Mr. Wright: Yes. I believe the stipulation is as follows: That if called to the witness stand Mr. Phillips, the vice-president of United Artists Theatre Circuit, Inc., would state that these two schedules, 164 and 358, are accurate statements of the holdings of that corporation in subsidiary corporations and in theatres as of March 30, 1940, that being 358; and March 1, 1945, that being 164, respectively.

Judge Hand: 164?

Mr. Wright: Yes. And that if further called as a witness —presumably as a witness for the defendants—

Mr. Caskey: Or on cross-examination.

Mr. Wright: (Continuing)—he would testify that United Artists Theatre Circuit, Inc. is a holding company organized for the purpose of investing its funds in the stock of theatre-owning companies; that it does not and never has operated any theatre, and that it does not and never has had any facilities for operating theatres. I suppose that means operating them directly, because as the chart shows, it does appear that it holds substantial interest in operating companies.
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Mr. Proskauer: I suggest that either Mr. Wright is going to take our stipulation or he is not. I don't know what these interpolations are, partly because I can't hear them. But we have done everything to facilitate him in this. This company has never owned any theatres or operated any theatres.

Mr. Wright: That he would further testify that United Artists Theatre Circuit, Inc. acquired its stock interest in Metropolitan Playhouse, Inc.—that is one of the companies referred to in the schedule—and thus indirectly its stock interest in Skouras Theatres Corporation and Randforce Amusement Company—that interpolation is the witness's and not mine in a 77B proceeding in this Court with the approval of Judge Mack.

That he would also testify—and as to this I have some doubt as to precisely what is meant—I think we ought to understand each other on this: that its affairs are separately conducted by its own board of directors, and that none of the defendants participate in the management of United Artists Theatre Circuit, Inc.

Now, I take it this is not intended to contradict the other evidence in the record that Mr. Joseph Schenck does act as the president of the United Artists Theatre Circuit, Inc., and that he is also associated with Twentieth Century-Fox; nor is, it, I suppose, intended to contradict the evidence we have offered as to the extent of the agreements which have
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been made between this defendant and other defendants.

Mr. Proskauer: Your Honors—

Judge Hand: I do not see any propriety in your talking about what they intend and all that by stipulation. If you are putting in a stipulation, put it in.

Mr. Wright: All right.

Judge Hand: That is a matter of argument.

Mr. Wright: That he would also testify that to his knowledge United Artists Theatre Circuit, Inc. has not conspired or combined with the defendants, or any of them, to restrain or monopolize interstate trade or commerce.

Well, we will stipulate that if permitted to testify in those terms, which calls for a conclusion—

Mr. Proskauer: I don't know what you are saying, Mr. Wright? Are you agreeing to it or not?

Mr. Wright: We agree that as to that statement that he would so testify.

Mr. Proskauer: That is all we are asking for.

Mr. Wright: (Continuing) —if permitted over our objection, that such testimony as that is irrelevant, incompetent and immaterial; because the conclusion he is attempting to draw is one for the Court and not for him.

Mr. Rafftery: Mr. Wright, purely for the record, we did not consent over here. You said the defendants consented. (538)

At the opening of your statement of concession you said the defendants had consented to the introduction of the two exhibits and the making of that stipulation. Will you please eliminate us from your statement of concession, because we did not consent from over here. We never heard of it until just now.

Mr. Wright: I suppose the stipulation is not worth much if you gentlemen desire to contest the facts that are stated there.

Mr. Proskauer: Well, as to the five of us we will stipulate that on cross-examination Mr. Phillips would testify to what is on that sheet.

Mr. Wright: That has already been done.

Mr. Proskauer: I did not know what you meant by saying calling him as our witness, or objecting to something as irrelevant. We made a concession that we will let you put in that evidence as to what he would testify to if you would concede that on cross-examination he would testify to what is on that sheet of paper.

Mr. Caskey: Mr. Wright, I should have called to your attention—and I apologize to you—that at lunch time I made some pencil corrections in the corporate names on those schedules which may not have been called to your attention, but which I am sure are accurate.

(Government's Exhibits 164 and 358 for identification received in evidence).

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Mr. Wright: At this time I should like to rest our case subject to those qualifications that we shall of course continue to search for and attempt to locate I think one or two missing contracts and offer them when located. We shall also, of course, expect to incorporate in the record when produced some interrogatory answer data that has still not yet been furnished to us by the various defendants.

In so far as the charts are concerned that were marked in evidence, we shall follow the procedure suggested by your Honors, and in the event that an agreement can be reached, as I think it can, we shall also offer those. In the event an agreement could not be reached, we would have to call, I suppose, Mr. Borwick with his worksheets and have that testimony; but I think that in accordance with the Court's suggestion we can work out agreement on the mathematics of the charts and the descriptions that are contained in them.

Now, by attention is called to the fact that 181 has just been located, and we will ask that that be marked in evidence.

Mr. Proskauer: What is 181?

Mr. Wright: That is a license agreement for the exhibition of Loew pictures in Warner theatres.

(Government's Exhibit 181 for identification received in evidence.)

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Mr. Wright: My attention is called to 171, which we will withdraw at this time.

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And I also call attention to the fact that we have requested data from other so-called Paramount partners similar to that contained in the letters already received as Exhibits 167 and 169, and we should like, of course, to eventually incorporate that, as received, under the same kind of stipulation that the existing exhibits went in.

Mr. Seymour: It is correct, Mr. Wright, that the request for that information was made by you of the local companies, and you are waiting on them and not on us.

Mr. Wright: That is quite correct. We wrote them direct for that data and we have not received responses from some.

Judge Hand: Subject to these items, you close?

Mr. Wright: Right.

Judge Hand: Counsel were anxious to have time to get themselves together and organize for the defense. We think that three weeks is altogether too much, and we give you until a week from Monday at ten-thirty, and then go on full blast. So that we will adjourn now until the 22nd of October at ten-thirty a.m.

Mr. Seymour: May it be understood, your Honors, that when we come back we may then make any motions on the record we may want to make with respect to this case?

Judge Hand: Oh, yes, you may make any motions to reserve your rights. We will undoubtedly require you to go

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into your full case. As to your case, Mr. Raftery, we are not so sure.

Mr. Raftery: May we make our motions on the return day?

Judge Hand: You may do so the same day. Probably the Government can make clear just what their contention is as to whether we should require you to put in evidence or not.

Mr. Schwartz: May I make a further request of your Honors? In view of the fact that it is rather unclear as to

the position that the Government puts us in at the moment, if there is any brief or memoranda to be submitted by the Government, could we get a copy of it in advance so we could meet the issue squarely and save a lot of time?

Judge Hand: Do you want to submit any?

Mr. Wright: We should be glad to submit one if the Court desires it, and I will cover any specific points that you have in mind.

Judge Bright: I would like you to state exactly what you claim is shown by these exhibits. We haven't seen them. We haven't the slightest idea what you are driving at because we haven't read anything yet.

Mr. Wright: That is quite right. I was speaking with respect to United Artists, Columbia and Universal. (542)

Judge Bright: I would like you, on the whole case, either to make an oral statement, or submit some memorandum, just so we will know what you claim you have proved.

Mr. Wright: Our trial brief, I think, does in large part cover that, but I will be glad to furnish such supplemental argument as you desire.

Judge Bright: I think oral argument would do the trick, if you should be able to make an oral statement as to what you claim you have proven by this evidence at the time the motions are made.

Mr. Wright: Surely.

Judge Bright: Further briefs won't help us a whole lot.

(Adjourned until Monday, October 22, 1945, at 10:30 a.m.)

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New York, October 22, 1945,
10:30 o'clock a.m.

Trial resumed.

Judge Hand: You may proceed.

Mr. Proskauer: If your Honor please, before we proceed, may I avail myself of the opportunity to correct certain information contained in these F.B.I. reports which were made at the time we stipulated. We have carefully checked them, and I desire to record the following as our position after checking.

We do not concede that Waverly, Massachusetts, is a town of 25,000 or less. It is not listed in the Almanac and is, we believe, merely a suburb of Boston.

We do not stipulate that there is any such town as Collin, New Jersey. We know of no such town and none appears in the Almanac.

We do not stipulate that Bala-Cynwyd, Elkins Park or Willow Grove, Pennsylvania, are such cities since they are not listed in the Almanac, and we believe them to be suburbs of Philadelphia.

As to Amber, Jenkintown, Lansdowne and Prospect Park, Pennsylvania, we concede that they are towns listed
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in the Almanac, but we add that we believe them to be suburbs of Philadelphia, and that the theatres in Philadelphia take clearance over them.

As to Etna, Pennsylvania, we concede that it is a town listed in the Almanac, with the qualifications that it is part of the metropolitan area of Pittsburgh, over which Pittsburgh takes clearance.

As to Beverly, Bordentown, Bridgeton, Moorestown, Mt. Holly, Pennsgrove, Riverside, Swedesboro and Woodbury, New Jersey, we did not concede when we checked the Government's reports, that Warner had any theatres therein, and

we do not concede it. We will, however, concede the fact that these theatres in these towns are operated by Atlantic Theatres, Inc., which has the sole right to manage them and purchase film therefor; and that Warner Bros. owns fifty (50%) per cent of the stock of Atlantic Theatres, Inc.; that the other fifty (50%) per cent is owned by Mr. and Mrs. Benjamin Amsterdam, who are not connected with any of the other defendants.

As to Delevan and Lake Geneva, Wisconsin, we did not concede when we checked the F.B.I. reports that Warner has any theatres therein. These theatres are owned and operated by Standard Theatres Company, in which Warner owns no stock whatsoever. We do not concede that we have an arrangement by which we get 25% of the profits of the operation of these theatres.

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The rest of my memorandum from which I am reading relates to certain other towns as to which Mr. Wright made an inquiry of us, but which I understand he has not yet put in the record; so I will reserve those.

Mr. Frohlich: May it please the Court, is it in order for the defendant Columbia to make its motion at this time to dismiss?

Judge Hand: Yes.

Mr. Frohlich: I should like to make that motion in some detail, if I may.

Judge Hand: Have you concluded your case?

Mr. Wright: If the Court please, we have, subject to the reservations that I made before. We have some additional material that has come in by way of supplementing what is already in the record, that is, answers to interrogatories that were not completed before, and there will be some of that material that will still come in from time to time. We can put in what we have.

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Judge Hand: Oh, we cannot keep this case open forever, to let material come in. You don't mean to say you are desiring to keep it open to put in material whenever you get anything? If it was important enough that might be done in any case, but we cannot have an everlasting performance here.

Mr. Wright: The sole reservations that I made——

Judge Hand: Never mind what you made.

Mr. Wright: Your Honor ——

Judge Hand: The question is, are you ready to proceed or rest? You have to do one or the other?

Mr. Wright: We are willing to rest on the material that is in the record, but, in fairness to the defendants who have furnished the interrogatory data, where they desire to furnish additional or corrected data, we have always had an understanding that we would make the addition or correction as it was presented to us. There are some of them who still haven't completed either getting the data or making such checks as they felt they ought to make, and that was the purpose of the reservation.

We also have this problem of these missing agreements which the defendants were not able to locate, and we haven't been able to find any copies, and as to those we have had to have the worksheets of the F.B.I. agents involved photostated, and are submitting those worksheets in the hope that (547)

a stipulation may be reached on those without the necessity of getting the agents, one of whom is some distance from the courtroom.

And, of course, as to the tabular material, we tried to follow your Honor's suggestion and submit that in revised form for further checking.

Judge Hand: You have had a whole week to further complete your case and we have to insist on termination.

Go ahead, if you have anything you want to introduce.

Mr. Wright: I have this morning the two documents that supplement Exhibit No. 230. That was the Warner lease of a Fox theatre in Philadelphia. The only document

that was marked was the lease made in December, 1944, which was terminated this summer. I have asked the Warner's counsel to furnish, and they have agreed to have incorporated in the exhibit the preceding lease.

Judge Hand: It was marked by us as in here. What are you doing here?

Mr. Wright: I beg your pardon?

Judge Hand: It is marked by us in our record as in already.

Mr. Wright: Yes, I am adding to the document that is in these other two documents that I will now describe. (548)

Mr. Proskauer: Prior leases that expired?

Mr. Wright: Yes.

Mr. Caskey: May I see them?

(Mr. Wright hands papers to Mr. Caskey.)

Mr. Wright: The lease dated July 28, 1936, and an extension agreement, dated July 31, 1939.

Mr. Proskauer: I don't know why you want to encumber the record with a lot of old expired leases.

Mr. Caskey: No objection, except as to materiality.

Judge Hand: Haven't you got masses of stuff in here that, if in your position is correct, sufficiently establishes it?

Mr. Wright: That is correct, your Honor, but in this case the document we were interested in was the one that I have just offered here and not the one that was actually produced. That is, the one I am now offering is the one that is tied to the Fox franchise in Philadelphia and that is the lease that I had inadvertently supposed we got the other day. We did not get that; we got the later lease. And I wanted to put in the one I intended to have in, that is all.

Judge Hand: All right.

Mr. Caskey: What numbers will they bear?

Mr. Wright: I suggest that these be marked 230-A and B respectively, that is, the July 28, 1936, document A and (549)
the extension of July, 1939, being marked 230-B.

(Marked Government's Exhibits 230-A and 230-B.)

Mr. Wright: And we also had marked for identification a letter from United Artists, dated October 17, 1945, bringing up to date the data as to the officers and managers of the corporation, which is marked for identification as 372, and we also had marked letters received from a couple of affiliates of Paramount, showing the relationship between those companies and the defendant Paramount, one of them dated October 4, 1945, from North Ohio Theatres Corporation, marked for identification as 373, and Publix Rickard Nace, Inc., marked for identification as 374, dated October 6th.

Mr. Seymour: May I see those?

Mr. Wright: Yes (handing).

Mr. Seymour: All right, Mr. Wright.

Mr. Wright: We will offer these with the understanding that the defendants are agreeable to making the same stipulation with respect to these letters as the others, in order to avoid calling the witness to testify to what is in the letter.

Judge Hand: Where are they on the printed list?

Mr. Wright: These are not on the printed list that your Honors have there, because it did not come in until after that was made up.

Mr. Proskauer: The only thing I could hear was the (550)
"stipulation." If I am going to stipulate something, I want to know what it is that I am stipulating.

Judge Bright: Is that the stipulation, that they are received subject to correction, if the information is not complete?

Mr. Wright: Surely.

Mr. Caskey: That is 373 and 374?

The Clerk: 372, 373 and 374.

(Marked Government's Exhibits 372, 373 and 374 in evidence.)

Mr. Wright: If the Court please, we were also in the process of attempting to work out further stipulations with

the defendants with respect to this data which was given by the F.B.I., but, in so far as we are concerned, it is not essential to our prima facie case, and we are content to rest without it. I assume if the parties desire to have it incorporated in the record at a later date, we can put it in.

Judge Hand: In other words, they will really come in either in their case or in rebuttal?

Mr. Wright: Or in rebuttal.

Judge Hand: All right, plaintiff rests.

Mr. Frohlich: If the Court please——

Judge Hand: I should not make any protracted motion here, because I do not believe it is in the slightest degree (551)

likely, after going over these decisions, that we are going to dismiss at this stage of the case. If you want to make a formal motion, all right, but we are not going to dismiss now.

Mr. Frohlich: I should like to make a formal motion on behalf of Columbia Pictures Corporation to dismiss.

Judge Hand: All right.

Mr. Davis: If the Court please, on behalf of Loew's, Inc., I wish to present a formal motion to strike out so much of the testimony as does not relate to Loew's, Inc. on the ground that to this time there has been no showing of any conspiracy, concert, or agreement between the parties. I will not argue it and present it in writing and will pass it to the stenographer to be incorporated in the minutes.

Judge Hand: Yes, all right.

(Mr. Davis's motion will be found at the end of the day's proceedings.)

Mr. Seymour: May it please the Court, I have a motion to dismiss the petition in so far as it asks for the relief reserved and also to strike, and I would like leave to hand it to the stenographer and have it copied in the record because I rather assume your Honors will reserve decision on these motions at this time.

Judge Hand: Yes.

Mr. Proskauer: Your Honor, to save time, may it not be
(552)
understood that each of the defendants severally makes the corresponding motion in its own behalf inter alios mutatis-mutandis; that is, we move to strike all the evidence that does not relate to Warner Brothers on the ground that there has been no conspiracy proven, and we join in the motion presented by Mr. Davis and the motion presented by Mr. Seymour, making it severally on behalf of our respective clients.

Mr. Raftery: For the sake of the record, I join, first, in the motion to strike. Now, formally, I want to move to dismiss the complaint or the petition as to Universal Pictures Company, Inc. on the undisputed evidence that that company is not engaged in any business but production; it is not engaged in distribution; it is not engaged in the theatre business; and there is no proof of any kind against Universal Pictures Company, Inc. That is separate and apart from the distributing defendant which is before this Court. As to that defendant I press the motion to dismiss.

Judge Hand: We will reserve decision on all these motions.

Mr. Raftery: And as to the defendant Universal Film Exchange and Big U I move to dismiss on the grounds that the plaintiff has failed to prove facts sufficient to constitute a cause of action.
(552a)

I make the same motion as to United Artists Corporation on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action.
(553)

Judge Bright: Mr. Wright, do you claim in this case any monopoly or restraint of trade in production?

Mr. Wright: To this extent only, that the effect of this market control which is, we say, made effective through distribution practices and theatre ownership of these defendants, does, to some degree, restrict production opportunities.

That is, the production situation is this, as we see it, and that is that anyone who wants to produce a picture and has got money to finance it, and a story and star, and can get a major release, can make the picture; but that the releasing system is such, the market is so controlled, that the producer, even the so-called independent producers, are dependent upon a major release in order to return the cost of an expensive picture. And to that extent we say the facts we have shown with respect to this market control do restrict producers' opportunities as well as those of distributors and exhibitors.

Judge Bright: Well, what evidence is there in the case that there has been any such thing as that occurring at any time during the period which you have covered by your evidence?

Mr. Wright: Well, there is no evidence as to a specific competitive injury to a particular producer. I simply say that as a matter of argument we would urge that one of the

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effects of market control of this kind is necessarily—that is, in and of itself—the very existence of the control does limit the opportunities of so-called independent producers.

Judge Hand: How does that make this particular independent producer a co-conspirator?

Mr. Wright: I did not allege that independent producers were co-conspirators. By "independent producer" now I am using the term to refer to somebody who puts his money into a picture and acts independently of any distributor or exhibitor in that respect.

Judge Hand: Which one of these is such?

Judge Bright: Universal is only engaged in production.

Judge Hand: All right, Universal. How do you hook up Universal?

Mr. Wright: Well, the producer, Universal, is hooked up, I believe, through one hundred per cent stock ownership with the Universal distributor. That company is a part of a group of corporations that form what we have referred to here as the Universal defendants. Universal is no sense an inde-

pendent producer in the sense that I was using the word—that is, a producer who is independent of any of these major distributors in his production activities. And we say that even as to those who are independent through absence of any
(555)
stock affiliation or ownership affiliation, they are dependent on these eight major companies for a release of their product to the extent that they want to make pictures which require large investments and need to be exploited in the metropolitan centers in order to return the cost and a profit.

Judge Bright: Well, you allege in your complaint a combination in restrain of trade and a monopoly in production.

Mr. Wright: Yes.

Judge Bright: And a similar thing in distribution?

Mr. Wright: Yes.

Judge Bright: And a similar thing in exhibition?

Mr. Wright: Yes.

Judge Bright: Now you say that inasmuch as there are restraints of trade and monopolies in exhibition and distribution, that ipso facto that creates a monopoly or restraint of trade in production?

Mr. Wright: Ipso facto we say it does create at least a restraint. It does not create a monopoly to the extent that nobody else can produce pictures, because other people do produce pictures.

Judge Bright: It is a fact, isn't it, that there is real competition in production?

Mr. Wright: There is competition to this extent: there
(556)
is competition, as outlined in the opening statements, with respect to story properties, for example. I do not think there is any question about that. Various producers bid in opposition to each other for those literary properties. To a lesser extent there is competition in signing up talent, although that is to some extent nullified by an exchange of so-called production talent among the producers. But there is no question but what there is a marked difference in the extent

and character of the control which the defendants here are able to wield over production and the extent to which they control distribution and exhibition. But their control of distribution and exhibition does have restrictive consequences in the production field.

Judge Bright: Well, you say does have? Or might have? Which do you mean?

Mr. Wright: Does, definitely. I mean it does exist. You have this market control existing, and it has continuously existed for a substantial period of time. So, as I say, in order to exploit this market, your producer, whoever he may be, is forced to rely for an outlet on these distribution companies.

Judge Bright: Has that in any way restricted production so far as any specific evidence is concerned?

Mr. Wright: Well, if you are talking in terms of
(557)
numbers of pictures produced, I suppose the evidence shows that there has been a lesser number released. However, it is purely a matter of argument as to what you attribute the release of a smaller number of features to. Simply concentration on high quality, high cost of pictures is one explanation of it. But I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors.

Judge Bright: Or has not?

Mr. Wright: Or has not, yes. If he can make——

Judge Hand: Now, is Universal put in here because it is a producer or because it controls a distributor?

Mr. Wright: Because of its affiliation with the distributor, Universal Film Exchanges. It is part of that combination.

Judge Hand: In other words, as a producer there is no case against it?

Mr. Wright: Separately, no. That is quite right. Separately considered there would be no case against it.

Judge Hand: Separately considered?

Mr. Wright: But it is a part of ——

Judge Hand: Why don't you answer the query? As a producer there is no case against it?

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Mr. Wright: That is correct, yes, sir.

Judge Hand: All right, that clarifies some part.

Judge Bright: That applies to all of the producers as such?

Mr. Wright: Yes, considered individually.

Judge Bright: Well then your case is aimed at distribution and exhibition in combination?

Mr. Wright: Quite so.

Judge Bright: Practically entirely, isn't it?

Mr. Wright: The other is merely an effect of what we have proved as to this, because they have a distribution monopoly, and restraint of trade does have an adverse effect, we say, on production activities, but that is the extent of the claim.

Judge Hand: It would have an adverse effect you would say against others than any particular defendant; it would have no adverse effect against them?

Mr. Wright: That is correct.

Judge Bright: If I understand you, if I wanted to produce I would hesitate to do it, anticipating that I might not get a market for my films; is that the idea?

Mr. Wright: I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of these companies to release that film for you. But you do have a limited number with whom

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you can bargain, and you are dependent on one or more of them for the terms on which you release it. I would suppose that you as a producer would conceivably be better off if the distribution market were such that it were not con-

trolled by eight companies. If you had twenty or thirty possible distribution outlets, I would assume that your production opportunities would be somewhat more competitive than they are today.

Judge Hand: Then you could not have any case, for instance, against Paramount as a producer; the case that you would have as regards Paramount would be the attempt of the other producers to restrict Paramount, and vice versa, the interlocking business. You could not have any case against any individual as a producer?

Mr. Wright: Quite right.

Mr. Raftery: If your Honors please, I did not want to press my motion or argue my motion, but this last colloquy brings me back to asking your indulgence for five minutes.

There is no more evidence in this record against any one of these three distributor defendants—and I refer to Universal, Big U, and United Artists as individuals—and that is the only way we can be classed in this lawsuit—than there is on the production issue.

Mr. Wright has put in evidence nothing but two blank
(560)
forms of contract, some individual contracts with some of the individual exhibitors, showing that United sold pictures, we will say, to Warners or some of the others at a price, at a film rental; some of the contracts carried clearance, others did not. There is no proof in the record that the clearance was reasonable or unreasonable. There is no proof in the record that the price was right or wrong. They are just bare skeletons, as one of your Honors remarked the first day, and I challenge Mr. Wright to show your Honors any one way where any contract offered in evidence comes within the Interstate case, the Crescent case, U. S. v. Paramount, or U. S. v. First National.

He told us on Thursday morning, October 11th, that those four cases were the milestones. In the Interstate case there was a specific finding of conspiracy among everybody. In

the Interstate case, Justice Stone, who wrote the prevailing opinion, said in effect that any one of the distributors could have put any one of the restrictive provisions in that contract that O'Donnell secured down there, provided they did it separately and independently. He also said in reference to the Paramount-Texas Consolidated affair—that is where Mr. Wright argued there could be a separate conspiracy; that is where they were discussing copyright—and in that said, granted that Paramount could have used that clause, if they

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did it by virtue of their copyright. He says they did not. They did it because they were forced to do it by the O'Donnell letter. That case is based entirely on conspiracy and monopoly.

In the Crescent case there is nothing in that but the trial of some situations that none of these defendants were involved in, and it is res adjudicata as to that, and that is out of this case.

In U. S. v. Paramount, tried in this court, the bill of complaint charged that the defendants formulated, adopted and agreed to use exclusively a standard form of contract with compulsory arbitration provisions. The answer admitted that charge. And on that and on that alone, Judge Thacher found conspiracy, an agreement to use exclusively compulsory arbitration; and the arbitration decision is based on that.

In the Credit Committee case it was a similar bill and answer trial, with an admission of conspiracy, and Judge McReynolds in the Supreme Court held that was against the law.

There is not one bit of evidence in against these little three, and as I pointed out on the opening day, we are being subjected to sitting through this entire trial with the hope that somehow during the trial Mr. Wright will supply some

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evidence against us; and I must press our motions at this time or ask Mr. Wright, and I challenge him, to produce one

bit of evidence that bring us within any of those four cases which he says are the milestones.

Judge Hand: What about the Goldman Theatres case?

Mr. Raftery: In the Goldman Theatre case, if your Honors will look at the opinion, Judge Kirkpatrick found that there was a theatre called the Erlanger Theatre, run by a man named Goldman, and that each of the defendants refused to sell him any pictures.

The second finding was that if the theatre had been run by Warners and not by Goldman, they would have sold pictures to that theatre; and they held it was a discrimination; and that has nothing to do with the case here. It has been litigated, it has been tried, the Government appeared as amicus curiae in it, and there was the matter of assessing damages.

Now in that case you had a specific finding of agreement not to sell. There is no evidence in this record of that kind; there has not been one bit of evidence put in here that any exhibitor or any member of the public has been affected by anything done by any of the companies represented at this table; and that is the reason that we feel that Mr. Wright should point up to this court where we come under any of these cases, where we have violated the law, other than dropping in eight hundred contracts as to one defendant, a few hundred as to another, none of which contain any of the provisions that have been condemned in any of the judicial decisions. And that is the reason we feel that a great injustice is being done to these smaller defendants, being compelled to go through this long and protracted trial, with no proof by the Government as to any law violation by any of us.

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Mr. Proskauer: May I suggest, your Honors—you mentioned the Goldman case——

Judge Hand: I am going to suggest—I will begin with Mr. Seymour—that there be a little discussion in answer to Mr. Wright's argument of the Interstate case, the Crescent case, the Goldman case, and also with regard to price fixing. This may be obvious to you, but I should like to hear what

you have to say about cases like Bobbs-Merrill v. Straus, where they fixed a price on the resale of books. Now this does not fix any price, of course, in one sense.

Now go ahead, Mr. Seymour, if you have anything you want to say.

Mr. Seymour: Your Honor asked me some questions which I cannot answer at the moment, but I will do my best.

The Interstate case I think is correctly analyzed by Mr. Raftery when he says that depended upon a conclusion of a
(564)
specific conspiracy. There there were identical letters sent out by a dominant exhibitor, and no explanation of those letters; and the court concluded that there was a conspiracy. That was the situation in a circuit down in Texas——

Judge Hand: What is that, Interstate you are talking about?

Mr. Seymour: United States v. Interstate, and I think that case depends on these particular facts, depends upon the finding of conspiracy; and as I read the majority opinion, it squarely reserves the right of the copyright proprietor to protect himself as a matter of individual action. And that is what this case will show.

Now, as far as Crescent is concerned, Paramount was not a defendant, was excused, although originally named was excused, and nothing in that case can operate as a finding or determination against Paramount. That was a local——

Judge Hand: Well, I do not think that makes any difference. It is a precedent, you know. He was suggesting it was res adjudicata.

Mr. Seymour: The essential basis of that case is the evidence which the court relied on for its findings of the improper exertion of buying power by an independent circuit proprietor. That is an independent circuit, a circuit not
(565)
affiliated in any way with any of the defendants in this case.

Judge Bright: Why was Paramount excused in that case? Because it consented to the decree in this case?

Mr. Seymour: It is my impression, if your Honor pleases, that that case was pending when the consent decree was entered, and at that time Paramount and the other defendants who participated in the consent decree were dropped.

Judge Hand: You are talking about Crescent, I think, and not Interstate.

Mr. Seymour: I am now talking about Crescent, because I think the Interstate case depends upon the particular facts in the light of a particular conspiracy which the court inferred from the fact that the defendants did not explain why it happened.

Now in the Crescent case, first Paramount, and certainly these other defendants were not in the case during the trial and did not get heard.

Judge Bright: That is, the five majors were taken out because of the filing of the consent decree in this case?

Mr. Seymour: That is my understanding.

Now that case is a case involving an independent circuit, not theatres affiliated with these defendants, and it depends upon the particular facts found in that case with respect to the abuse of the buying power by that independent circuit. (566)

In other words, that independent circuit used certain methods which the court found justified relief, but that defendant is in no way connected with any of these defendants, and none of them are chargeable with what it did. So that case, I think, depends upon its particular facts, and points up the fact that in competition with the theatres of Paramount, or in which Paramount has an interest, there are a number of independent circuits in this country having, as the Crescent case shows, great power, a power which they are quite prepared to use to make the problem of distribution of pictures and the problem of protecting the revenue of the exhibitors and producers, extremely difficult. If anything, that case is an argument against any such relief, to hamstring the producers and exhibitors, as the Government asks in this case.

Now the Schine case, recently decided by Judge Knight is a case of the same character. In that case Paramount was excused as a defendant upon the entry of the consent decree, and the case depends upon particular practices by an independent circuit, a circuit not in any way connected with these defendants; and your Honors will see from these two cases, Crescent and Schine, the sort of problems that the distributors meet; and there are at the present time some hundreds of circuits—some of them are not as large as Crescent and Schine—but hundreds of circuits, and the problems
(567)
that the distributors have, to sell their pictures and make a fair revenue in the teeth of such problems as are presented in the Schine and Crescent cases.

Now I am not prepared to discuss the Bobbs-Merrill case at the moment. I would like to say generally that it is our position——

Judge Hand: Well, that was the beginning of all this stuff in copyright. That is where they sued Bobbs-Merrill and Scribner in two cases for tie-in contracts really. It was the predecessor of the Patents case, the Motion Picture Patents case.

Mr. Seymour: I think there was a sale involved in those transactions.

Judge Hand: Yes.

Mr. Seymour: There is no sale involved here. The problem here under the copyright law is the right of the copyright proprietor to grant a limited right of exhibition under a license, he retaining his full copyright rights, but subject only to that limited grant; and we will satisfy your Honors, I think, as to the reason for the various protections that have been included in license contracts since long before any of these defendants had any interest in theatres.

Now the ones principally challenged here are——
(568)

Judge Hand: Oh, yes, that is perfectly true, but you have not really yet pointed out to me why there should be

a difference between a license and a sale. In other words, everybody thought this was true, in the case of a sale. Those cases turned up, and those cases were to the effect that they could not control—well, subsequent events, after they had parted with their title. Now here they let a man exhibit their film with an upset price. Supposing instead of having an upset price they simply had a royalty, just a straight royalty, with no maximum-minimum or anything else—that would certainly be all right, wouldn't it?

Mr. Seymour: Well, I would think it would, and I think that——

Judge Hand: Well, I do not think anybody would claim that was not all right, unless there was some general conspiracy.

Mr. Seymour: I am sure that is so, and this is, in substance, another way of fixing the reward, and I can show your Honors that.

Now I think the difference between the problem here and the problem in the Bobbs-Merrill case, without attempting to analyze it at length, because I am not prepared to do it—I think the essence of that case is, there was an attempt to control the price beyond the first sale.

(569)

In other words, the same problem met in the General Electric case, which is still good law.

Judge Hand: Oh, yes, of course, that is perfectly true. This, of course, is an attempt to control the price of admission after the first exhibition.

Mr. Seymour: Now let me explain that to your Honors because I do not know that it has been made clear. First, it is not an attempt to control the admission price after the first exhibition.

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Judge Bright: Isn't it, in effect, an attempt to do that by applying clearance and these run rules so that subsequent sales or subsequent licenses will be at a price that is impliedly fixed?

Mr. Seymour: I do not think so, if your Honor pleases. It is true that by reason of the aging process of films, the subsequent-run exhibitors are unwilling to pay and are unable to pay as high a revenue as the first-run exhibitor, and in a sense that is a result of the fact that a first-run was granted an exhibitor, and was protected by clearance. But there is no relationship between the first and second-run licenses. In other words, there is no license for first-run and the second run and the third run which attempts to control it. They are separate license contracts, each protecting the legitimate interest of the distributor in the revenue from that picture on that run.

Judge Bright: Well, it protects the exhibitor, too, doesn't it?

Mr. Seymour: There is no question about that fact.

Judge Bright: In other words, the first-run man will be expected to be protected by clearances or runs which are subsequent to his?

Mr. Seymour: There is no question about the fact that the clearance provision which gives the first run clearance over a subsequent run is a provision in which the first-run (571)
exhibitor has an interest. But the main interest in the clearance provision is the distributor's interest in insuring himself the largest possible revenue.

Now, with this copyrighted article, he is entitled, staying within the law, to get an assurance of the largest possible revenue for his copyrighted work he can get; and I submit that the method used, the reasons for which we may develop by testimony in this case, the method used of providing a run, first, second or third, and licensing so that the distributor receives either a flat rental—which is really like the royalty which you suggest—or a movable rental—which is the percentage arrangement—is a proper method for him to get the reward for his copyright.

Now, the clearance provision, which was specifically recognized in this consent decree as a necessary element in the sale of pictures is a protection to the copyright proprietor for

the revenue which he can receive first run. Now, the fact that it is incidentally of value and importance to the first-run exhibitor does not affect its legality; and despite the observations in the dissenting opinion, U. S. v. Interstate, it seems to us that the majority opinion does not strike at the right to have reasonable clearance arrangements. And this consent decree squarely recognized it; and the Fourth Circuit, in
(572)
the Westway case, which is cited in the brief, has indicated that the Interstate case—Judge Chesnut's decision which was upheld in the Fourth Circuit, indicated that the Interstate case does not touch this situation.

Now, we will develop, I think, through evidence that through the protection of the distributor's revenue, which he has to have in order to get his money back on his pictures requires these protections, and that they are individually arranged.

Now, the essential part of the Government's attack here is some theory of conspiracy; that they are arranged by conspiracies between the distributors. Now, that is not the fact, and we will show it to your Honors. Each one of these contracts is separately made by the distributor and exhibitor.

Judge Hand: of course, they have made a claim that is greater than that. They have made a claim under the Interstate case that you simply cannot use a copyright this way in such licensing agreements, and that is what prompted me to ask these questions. My mind is extremely fluid in regard to this complex situation, which is very complex, but I am sure it is going to be decided on some of these general principles and not whether Brookline is part Boston or is still an independent town, and all that detail that you are talking about.
(573)

Mr. Seymour: I think it will, too.

Judge Hand: That will do nothing in the end but take up time.

Mr. Seymour: I think when your Honors have heard the testimony as to how these contracts are made and why they are made this way, you will be satisfied that they are made to protect the revenue of the copyright owner, and that this is a legtimate protection, and I do not think that the Interstate case stands in the way of it for a minute.

Judge Hand: Of course, Mr. Seymour, with an equal zeal they argued all these things, that they were necessary protections, those old tie-in contracts, to carry out the rights of a patentee, to carry out the rights of a copyright owner. Scribner and Bobbs-Merrill said that it was absolutely horrible to have R. H. Macy & Company dumping their books on the market so cheap that it would spoil their original sales. As a matter of policy you are getting fairly close, I think. (574)

Mr. Seymour: I think not, if your Honor please, and I hope the virtue of our position won't——

Judge Hand: It is something that intellectually puzzles me somewhat. Now, as I remember it, in this Goldman case they laid a great deal of stress—this is on an entirely different point, but the Third Circuit laid a great deal of stress—that has not gone up yet—on the current practices of the defendant.

Mr. Seymour: The Goldman case is another case which depends upon the particular fact in that case, and Judge Proskauer, whose client, Warner Brothers, was particularly involved, will, I am sure, be glad to discuss that with your Honor, but I just want to say this: our zeal in defense of this system which has been in effect since at least 1916 or 1917 in this industry, ought not to be taken against us, because other counsel were equally zealous when they were wrong. This case is squarely within, by analogy at least, United States v. General Electric, which has withstood every effort of the Government to cut to down.

Mr. Proskauer: May I say a word to try to meet what is in your Honor's mind as a source of puzzlement? I take now for my text a note in the Government's brief, "Even if

individual control by a single distributor of admission prices for its own pictures were justifiable as a privilege impliedly
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enjoyed by a copyright owner under the Federal Copyright Act, statutory immunity for price-fixing cannot save a price fixing combination."

Without making any concession that is my idea of the law.

Mr. Wright: I don't think you read the full note, did you? You left out the last part.

Mr. Proskauer: I am sure I read all that was essential. If your Honors think I did not, I apologize. "Even if individual control by a single distributor of admission prices for its own pictures were justifiable as a privilege impliedly enjoyed by a copyright owner under the Federal Copyright Act, statutory immunity for price-fixing cannot save a price fixing combination which operates both within and outside the statutory authorities."

I believe I read all that was essential in that note the first time, and it is not my habit to misstate anything to a court.

What is this price fixing talk that has been injected into this case? Let us forget copyright for a moment. If I have a boxing kangaroo, I suppose that I am entitled to show that boxing kangaroo all over the United States for a percentage of the gate receipts and to fix the gate receipts. Here, instead of having a boxing kangaroo I have a copyrighted motion picture. I am entitled to show it. I am entitled to take
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a percentage of the profits, of the take at the gate, and I am absolutely entitled, in the absence of conspiracy, to fix the price which is to be charged to compensate me and be the basis of my percentage.

The Macy case is not in contradistinction to that. What the Macy case held was that if I publish a book, and I sell that book, not licensed, sell it, and I have no more interest in what my vendee does with that book, that is, no more direct

interest, that I cannot arbitrarily say to him, "I forbid you to sell that book for what you please."

And when your Honor suggested tentatively, as you did a moment ago, that perhaps there wasn't any distinction between the license and the sale, I think practically your Honor overlooked the enormous area of difference between the conduct of a man who sells a book and who is not directly interested in what the book is resold for, and a man who does not sell a motion picture but licenses the production of it on a percentage basis and is directly interested.

I have talked practically. Now I will talk legally. The distinction that I have made practically is absolutely carried out in the General Electric case, to which my colleague, Mr. Seymour, referred. The distinction between a resale and a license has a legal foundation and it has an enormous practical foundation; and I suggest that when we develop this case the real issue here will be on the Government's tender of the argument that we were guilty of a conspiracy. If we were not, that is the end of price-fixing, as we see it. If we were, that brings on more talk and I am going—I can hardly envisage a finding that we were, because, as Mr. Seymour has indicated, the proof will negative any thought of a conspiracy.

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That brings me to the next step in what was suggested by your Honor's observation, the Goldman case. Let us assume arguendo that I was all wrong on this price fixing. I could conceive—I could conceive—if you find that, of your enjoining us from doing whatever everybody has done in the theatre business, in the motion picture business, in every kind of exhibition business for a hundred years, that is licensing for exhibition with a percentage and a provision for what should be charged to the public. I could conceive of the remote possibility of your Honor's enjoining that, but my friend comes along and says, "no, no, no, we don't want that. We want a complete divorcement of theatre ownership from production," and that is burning down the house to

roast the pig, as I said in my opening before Judge Goddard.

Coming to this Goldman case, I would be less than candid with this Court if I did not admit that in a number of local situations there had been decisions against these defendants. I would be less than candid if I did not direct your Honors'
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attention to the enormous difficulties in the practical operation of this business. No matter how lily-white one tries to be, we have been subject to the depredations of the Schines and the Interstate Circuit and the Crescent people, coming down on us with their enormous buying power and coercing us into doing things that the courts have held were wrong.

The only case of all these in which the gravamen of the offense was not such as to make us victims rather than perpetrators of wrong is the Goldman case, and I am going to be frank to admit that, let us assume we were all wrong in the Goldman case, and I do not believe we were for reasons that I shall suggest to you, here is a purely local situation growing up out of a history that I indicated in my opening I am going to develop to your Honors by testimony, here is a theatre which a man named Goldman buys, leaving our employ, Warners' employ, where he had an enormous salary, and he goes out and starts in opposition to us and he buys an old theatre, that had been erected in the heyday up on West Market Street—and your Honors must pardon me for a little detail here because the Goldman case was on the front page of the Law Journal, by strange coincidence, and I am sure it must be in your Honors' minds.

Judge Hand: That Erlanger Theatre in Philadelphia you are referring to now; aren't you?
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Mr. Proskauer: Yes, I am referring to that. West Market Street was a street that backs up on the Pennsylvania Railroad embankment, and years ago there was a plan to take down the embankment and West Market Street was going to blossom, and two great theatres were erected there, the Erlanger, which is now in the sticks, in a theatrical

point of view, and the Mastbaum, which our people built. We built also the Erlanger in combination with other people and we gave it up to the mortgagee, losing some four or five hundred thousand dollars and abandoned it years ago. That is what we thought of that theatre.

Now, Goldman comes along in the war period and he says, "I have got this theatre and I am going to every company around and I am going to demand that you take your pictures away from the theatres where you have been showing them for years and give them to me," and every single theatre-producer refused to do it, and the Court inferred, the Circuit Court did, from that unanimity that we had all agreed to boycott Goldman.

Judge Hand: Has anybody applied for a writ in that case?

Mr. Proskauer: We are about to do it, and we are debating whether to apply for a writ before or after the fixation of damages, your Honor. We have got a practice question there.

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Judge Hand: I see.

Mr. Proskauer: But we are certainly, as we are now advised, intending to apply for a writ.

Judge Hand: I suppose they would not be very likely to grant it until the case was completed.

Mr. Proskauer: That is what is bothering us, your Honor, and I think that is what we shall have to do.

Judge Hand: Yes.

Mr. Proskauer: But I am not going to ask you to overrule the Goldman case; I am going to ask you to assume arguendo the correctness of the holding in the Goldman case as applying to a most peculiar, separate and unique situation, and it may well be that you will say,—I don't know, I am going to argue against it,—Warners ought not to own all those theatres in Philadelphia. As a matter of fact, we don't have them all now. You may say, "Well, you did wrong when all of you separately say you won't

sell Goldman, a poor victim of a conspiracy,"—who admitted he was making a quarter of a million dollars a year by the organization of this fight on his former employers, Warner Brothers. You may say that and you may say that the Court was right in saying that in this local area relief should be given, but again I venture to suggest that the gap between that and the Government's position, that there is a general,

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nationwide conspiracy, where territory is carved up by agreement and where these theatres are used for some sinister purpose, and, therefore, we must be absolutely destroyed by this theory of divorcement, the gap between that is as wide as the gap between heaven and earth.

Judge Goddard: Mr. Wright, you referred to clearance quite frequently, and I am not sure that I understand just what the issue is as to clearance. In article VIII of the consent decree the Government stipulated or conceded that clearance, reasonable as to time and area, was essential to the moving picture industry. Is it the Government's position now that that is wrong, that it is not essential, or is it the Government's position that it is essential but that these defendants have violated it by imposing clearances that were not reasonable as to area and time?

I don't want to take a lot of time, but if I could get simple answers to that, it would help me.

Mr. Wright: Yes; well, I think that our contention is that the clearance has been abused, that these defendants have so organized the clearance structure that it no longer has any real purpose of protecting copyright privileges, but is organized for the purpose of protecting theatre operating profits and, of course, the ownership of the five principle distributors of the five largest theatre circuits has weighted the

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practice in favor of the device as a theatre operating profit protection rather than as a copyright protection. That is the essential thesis, I think, of the case.

Judge Hand: That is the kind of extremely vague argument that leaves me very cold. It is terribly vague. You say that it is not done to protect the copyright, but it is done more in the interest of the exhibitors. How in the world am I going to tell that, and how does that kind of argument spring from anything except a general attitude? If you read it, you would find a great deal of parallel cases, and a great deal of interest, in the book called "This Age of Jackson," where they thought for years that everything was a monopoly—everything was a monopoly—and objected to it on that ground.

I think it may be that under an extension of these decisions about sales and tie-in contracts, that this may be illegal; but to say that it is not a protection of the copyright, I must say, seems to me very unreasonable.

Mr. Wright: I would say that, of course——

Judge Hand: And I should think it was a very great protection to the copyright. Of course, when I first became district judge, I was catapaulted right into Victor Talking Machine v. Straus; I wrote the opinion in the Circuit Court of Appeals here in the Motion Picture Patents case, which was a case of infringement invalidating contracts on a dif-

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ferent ground, not a violation of the Sherman Act, and we went under the Clayton Act, and great lawyers and great judges—in Bower v. O'Donnell and in the other case, where Judge Holmes was always for the patent owner and for the copyright owner—were on the other side. These arguments now are not foreign to those. Those cases and the copyright cases may not be conclusive at all on this case, and I do not suggest that they are, but that kind of consideration was in the air, but I do not see how you can claim that this is not an important protection of the copyright. The copyright will become, undoubtedly, almost worthless, or worth little, if there is no protection as to the price paid on other runs. Won't that be so?

Mr. Wright: Let me say this: When I said that the restrictions were not within—were not for the purpose of advancing the copyright, I meant that they are not within the limits that the courts have said the copyright owner may go.

It is true, perfectly true, that the owner of the copyright may decide that the most satisfactory way to exploit a particular area is to do it through a theatre operating monopoly; that is, it may be perfectly true that a theatre operating monopoly in an area, providing that the copyright owner gets a satisfactory percentage of the monopoly profits in the area,
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may be the best financial deal that the copyright owner can make in the area, that is, that that kind of system of copyright restriction will yield him more money than any other system. And in that sense those restrictions are protecting his copyright, but I say that that kind of use of copyright or patent restrictions is one which the courts, for at least the last six or seven years, have been unwilling to tolerate, and that the argument I am making for it does not require any extension of existing doctrine at all; that that falls squarely within this line of both copyright and patent cases, which hold that you cannot use your copyright or patent restrictions for the purpose of bolstering up somebody else's monopoly merely because it is more profitable for you to market your product through that monopoly, and that is our position. It is a question of law there rather than fact. We could never, as your Honor suggests, hope to show that these restrictions were not profitable to the owner of the copyright. Certainly, the way these people have the industry organized and the use of these restrictions, it is perfectly rational from the standpoint of yielding the maximum profit to the distributors. It does, however, have competitive effects which the courts have been unwilling to sanction.

Judge Hand: Do you claim that such restrictions violate
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the law if the copyright owner is not combining consciously

with other people who have obtained a monopoly? You are putting him in the position, aren't you, of a kind of contributory infringer or something? Of course, he cannot be a contributory infringer because he owns the copyright.

Mr. Wright: I think the difference between the defendants and ourselves on this combination question is this: We say that in order to show a law violation in the use of these restrictions, we have only to show a combination between the distributor and the holder of an exhibition monopoly. They say that the distributor, acting apart from other distributors, can impose any restrictions he pleases and that he cannot be guilty of conspiring or combining with a theatre operator or group of theatre operators for the purpose of unreasonably restricting the competitive opportunities of that theatre operator's theatre opposition in showing the films. That is where the fundamental difference, as a point of law, is between us.

Mr. Proskauer: Your Honor, may I get a clear understanding of that? It would help us very much.

Judge Hand: Let the stenographer read it.

(Record read.)

Mr. Raftery: I do not concede that, your Honor. That
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is not the difference between Mr. Wright and these defendants here. The difference between——

Judge Hand: We cannot have everybody hopping up. Are you through, Mr. Proskauer?

Mr. Proskauer: I am going to be through by asking your Honor one question and then I am going to turn it over to Mr. Davis. I would like your Honors to inquire whether Mr. Wright has any authority to the effect that a license without conspiracy, which fixes the prices at which exhibition is to be had for percentage, is, ipso facto, illegal? Is there any authority that he can cite for that proposition of law?

Mr. Wright: We have never offered such a proposition of law. The vice in these agreements is that they do not

merely get together with a theatre owner and fix the terms on which he shall exhibit their pictures, but at the same time they make restrictive agreements which determine the terms on which that theatre owner's competitor may exhibit the film, and that those are the restrictions which bring them into conflict with the law, and that even if they do not agree with another distributor to impose restrictions of that character, if it appears from the restriction, from the nature of the restrictions themselves, that they were imposed for the purpose of preventing this subsequent exhibitor from com-
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peting on fair terms with the owner of the first run, that then there is an unlawful combination right then and there between the distributor and that prior run exhibitor with whom he makes the agreement that restricts the terms on which he shall do business with the subsequent run.

Judge Goddard: Mr. Wright, in the absence of combination, is clearance illegal? Have you changed your position?

Mr. Wright: No, I was just stating that we do not make any claim of illegality in the absence of combination, but we differ as to who may be parties to the combination. We say you can have an illegal combination——

Judge Goddard: You still contend that clearance is essential, providing it is reasonable as to time and area? If you can give me a direct answer to that it will help me, please.

Mr. Wright: We are not here, if the Court please, to determine the facts as to what is essential or what is not essential to any particular form of exploitation of the market. I think what we are here for is to determine what is legal and what is illegal. It is perfectly true that if you are going to have a system of staggered runs and clearances, you have to have clearance agreements, but in our view you do not need the network of restrictions that you have got
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now in order to have a market in which you have some clear-

ance restrictions; that you cannot have clearance restrictions and at the same time have a competitive market, a market in which clearances are freely negotiated, which we say you haven't got now.

Judge Hand: Mr. Wright, when you read over those minutes I think you will come to the conclusion you did not give a very direct answer.

Judge Bright: Could you be more concrete?

Mr. Wright: Let me give a concrete example of the circumstances under which I think you could say that clearance restrictions are reasonable. If, for example, you have a situation where you say you want—it is publicly desirable, let us say, to have the film shown in the same area at staggered admission prices, beginning at 50 cents and going down to 10 cents——

Judge Hand: I do not know what you mean by desirable. Desirable to whom?

Mr. Wright: To the public, let us say.

Judge Hand: I know, but the public has no right. Now, the public has no desire.

Mr. Wright: Desire to the distributor. Let us assume that a distributor, exploiting a particular market——

Judge Hand: You are talking about the matter as though the law had some control over what a copyright

owner charged for a license. It has no——

Mr. Wright: It has no control over what he charges for a license fee. The Sherman Act does modify the copyright law to the extent that it does impose limitations on the kind of restriction agreements he can make with the persons to whom he grants licenses.

Judge Hand: Yes, because of the effect upon third parties—

Mr. Wright: Yes.

Judge Hand: (Continuing)—and through combinations.

Mr. Wright: Yes, that is correct.

Judge Hand: It makes no difference, in other words, how desirable or undesirable it is to the public in the par-

ticular case, if these other factors are not involved, to have a cheap film or not. The public has no right to have a cheap film.

Mr. Wright: The only rights that the Sherman Act guarantees the public, as I see it, is to have a competitive distribution of films.

Judge Hand: That is true.

Mr. Wright: And that, of course, is the issue that is raised here, whether there is a free competitive market or whether the market is arbitrarily controlled by combination among these defendants in the suit.

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Mr. Davis: If the Court please, I rise to call the first witness. I haven't taken part in this discussion this morning, although I have found it extremely interesting, but there is one thing I want to say before I call my witness: The stubborn refusal of the Government to state its position in this case, and I use that word advisedly, the stubborn refusal to state its position is only equalled by the equally stubborn misrepresentation of the position of the defendants. I was astounded when my friend said that the defendants contended that a copyright owner was privileged to make any contract he pleased, and that that was our position. Now, of course, no such position has ever been maintained by any counsel in this case, and, I hope, by no informed counsel in any other.

There are two guiding principles here, and I suggest them and then I am going on to what is my immediate duty. I think you will find the cases fall into this partition: The owner of a patent or of a copyright monopoly is supreme within the borders of his grant, and whenever he oversteps the borders of his grant and seeks the use of monopoly to grasp upon it a monopoly outside of his grant, the action is illegal; and, second, that so long as he stays within the borders of his grant, he may use any means not forbidden by law to reap the reward of his monopoly which the grant promises to him.

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That is the acid test in all these cases and I do not think you will find any decision which challenges either one of those principles. That is our position here, and we maintain that we have, in these contracts and in our conduct, stayed strictly within the limits of our copyright grant and that the means we have taken to reap our reward are not forbidden by any law of the United States.

Having said so much, because I did not want this debate to go on without my participation, having said so much, I want now to call the first witness for the defendants.

It has been agreed that we will put our cases in, our full cases, in the rotation we have previously observed. I have a witness on behalf of Loew's, Inc., whom I want to examine on some general subjects which will interest all the defendants alike. Therefore, we have arranged that I shall call my witness and examine him. I will then modestly retire, without closing the case on behalf of Loew's, Inc. and my brother Seymour will take the field for the Paramount.

I call Mr. William F. Rodgers.

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WILLIAM F. RODGERS, called as a witness on behalf of the defendant Loew's, being first duly sworn, testified as follows:

Direct Examination by Mr. Davis:

Q. Where do you live, Mr. Rodgers? A. in Rye, New York.

Q. What is your occupation? A. I am general sales manager and the vice-president of Loew's Inc.

Q. What are your duties as the general sales manager of Loew's, Inc.? A. General supervision of all license agreements, and the operation of our branch offices throughout the United States and Canada.

Q. Do you have anything to do with the management of theatres? A. No, sir.

Q. Do you have anything to do with the purchase of films for exhibition in their theatres? A. No, sir.

Q. How long have you been in the motion picture business? A. Thirty-five years.

Q. Will you give us a brief summary of the experience you have had in the motion picture business? A. Well, I was employed in 1910 by the General Film Company, and several years later I left to go with a Mutual Film Corporation, and in both capacities I was more or less employed as a clerk. I later came back to the General Film Company as a branch manager, in Albany, I believe.

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For a short period of time I was also with the Triangle Film Corporation, and again in, I should say 1915 or 1916, in that neighborhood, I returned to the General Film Company as sales manager of the company, and in 1917 I went with the Goldwyn Company.

During a period of 1917 and 1918 I was away from there and for a short period of time I worked on special duties for Famous Players-Lasky, and returned to the Goldwyn Company in 1920, and I have been there ever since, that is, the Goldwyn Company merged with Metro in 1924, but with either one of the two companies, I have been continuously employed since 1920.

Q. That makes a total span of how many years? A. Thirty-five.

Q. In short, you practically grew up with the business, I take it? A. That is right, I have had a great deal of experience.

Q. We have used a great many terms here which I think all of us understand, but I want to have definitions of them on the record, so I will begin with definitions. What is a

feature film? A. We consider a feature film as a subject that is in excess of 4000 feet.

Q. Regardless of topic? A. Regardless of topic, would be considered a feature subject.

Q. What is a short? A. A short subject is 2000 feet or
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less, as a general thing. In some cases they have made what they call streamlined features, from 4000 or less, but we confine a short subject to, generally speaking, 2000 feet or less.

Q. What is a newsreel? A. A newsreel is a subject dealing with topical subjects of the day and, generally speaking, is less than a thousand feet in length.

Q. What is a trailer? A. A trailer is a method that is used in advertising advance entertainment. Some people refer to it as "Coming Attractions." It is a film that is shown on the screen indicating the future entertainment of that particular theatre.

Q. They come on the screen as "Next week so-and-so"? A. That's it.

Q. And it has a scene or two? A. Sometimes; sometimes it is entirely in text.

Q. They are used purely for advertising purposes? A. Advertising purposes.

Q. Rather than for exhibition? A. Yes.

Q. What do you mean by general release? A. General release is a period of time when a picture is generally available to the more important places to commence its exhibition.

Q. Who fixes the time of the general release? A. In my company, I do.
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Q. What is a trade showing? A. A trade showing is the result of the consent decree, in that we trade-show for the benefit of our customers each picture before it is offered to be licensed.

Judge Bright: Features?

The Witness: Each feature picture; not the short subjects.

Q. What is a road show? A. A road show is generally considered a picture that has the majority of seats scaled at a dollar and ten, or a dollar and twenty cents or better at night, for adult prices.

Q. What is meant by "preferred time"? A. Well, preferred time is the days of the week where the theatre most generally does the greatest business.

Q. What are those days? A. They differ in different parts of the country and differ in different cities and differ in different neighborhoods. Sometimes Monday and Sunday are better; other times Friday and Saturday are. It depends entirely on the locality.

Q. And the habits of the people? A. And the habits of the people.

Q. What is meant by a test run? A. A test run is in an effort to determine a fair exhibition value from a distributors' viewpoint of a particular picture. We test them in a number of cities before we are in a position to determine (596)
the extent of drawing power.

Q. What is meant by a franchise? A. Generally speaking, a franchise is intended to cover an agreement for a period of longer than a year.

Q. What is meant by a blanket deal? A. Generally speaking, again, a blanket deal is considered one that embraces a number of theatres on one form of contract.

Q. Consolidate the revenues for the purpose of fixing price? A. Well, it consolidates revenues in a good many theatres. Of course, it isn't always for all the theatres involved. Sometimes it is only for a given number of theatres involved.

Q. Will you tell us just what the machinery is by which you make a sale of these, or license of these films? A. Would you like me to give you the general organization and structure of our company?

Q. Yes, general organization and structure. A. Well, we have, first, of course, our main offices here in New York, and we have 32 branch offices or exchanges, as we call them, in the more important cities in the United States, and in those offices we employ a branch manager, assistant manager, an office manager, a number of clerks, number of shipping clerks, people to inspect film, exploitation men, and salesmen; and each three or four of those offices are under the supervision of a district manager; and each four or

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seven of those offices is under the supervision of a sales manager. Our sales managers, with the exception of the one in New York City who supervises New York, make their headquarters in the field. For instance, our West Coast sales manager makes his headquarters in Los Angeles; we have one in the South who makes his headquarters in New Orleans, and another one in Pittsburgh who makes his headquarters there and supervises the adjacent area; another one in Chicago and so forth.

When our films are trade-shown our salesmen are routed to various sections of the individual area, in which office they represent, and they contact the theatre owners in that area for the purpose of securing license agreements.

Our district managers, plus our branch managers, solicit the business of people who we call office accounts. Those, generally speaking, are those located in the larger cities or the more important accounts of the particular office; and if the assistant or the sales manager is needed, he also participates in the negotiations and representation of our product.

And those contracts or license agreements, when they are completed, are forwarded to New York for approval or rejec-

tion. There aren't, however, many rejections. They usually are accepted on the basis of the field man's recommendations.

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Q. Does all this organization act under your instructions? A. Yes.

Q. And report to you? A. And report to me.

Q. How are the films made available to the exhibitor? A. Well, that depends largely on the locality of the exhibitor, the type of theatre he has, where he is located, and his ability to pay. I said his locality, but we try, in so far as it is practicable, to negotiate what we call first runs, second runs, third runs, and so forth, in the order of their importance.

Q. I am coming to that in a moment. What I was really after was the distribution of prints and their rotation? A. The distribution of prints, of course, is one that is handled by a booking clerk. We have a number of booking clerks in our offices who supply the prints, the positive prints, that is, to the theatres with whom we have license agreements, depending upon the availability of the picture to that particular theatre.

Q. How many prints, exhibition prints, are made of each feature picture? A. That depends entirely upon the picture. We have some of which we ordered as low as 200 prints, and on some pictures, such as Gone With the Wind, we have ordered as high as five hundred. I should say, generally speaking, a fair average for our company is 300, 350.

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Q. Are they delivered from the exchange to the exhibitor? A. Yes, sir.

Q. And then returned by the exhibitor to the exchange? A. At the completion of their engagement, for examination.

Q. And then after examination they are returned, and they are delivered to some other exhibitor? A. Booked to another theatre.

Q. So that a number of films rotate throughout your entire sales area? A. Yes, sir.

Q. You spoke of runs. What are runs? A. Well, runs——

Q. In the language of the trade? A. Sir? I did not hear that.

Q. What are runs in the trade language? A. Runs is a sequence with which the positive prints are delivered. A run is either a prior period to another theatre or a subsequent period to another theatre. The whole run of the picture is the sequence with which the positive print is supplied.

Q. How are runs classified? A. Generally speaking, according to the ability of a theatre to pay, its locality; number of matters are taken into consideration. I will get to that in a moment. There are first runs, second runs, third runs, fourth runs; how many more? A. Sometimes they go up to 18 or 20, depending again on the size of the city. I couldn't tell you offhand how many runs are involved in the

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metropolitan area here in New York, but I should venture the suggestion there are at least twenty or twenty-five runs.

Q. During the period of first-run, does any other theatre show the picture? A. Generally speaking, not in that particular city, no, sir.

Q. The same is true as to the second-run, no later runs show the picture in that locality? A. Later runs do not show the picture in the particular city while the second runs are playing.

Q. How many theatres does one positive reel of film serve in the course of the season? A. One print of a positive subject, it depends—you cannot do that by a general rule. It depends entirely on the territory. Take, for instance, in Texas, we can get many more runs for a picture because they are shown less frequently and the wear and tear is less great. In New York, where there are theatres which open early in the morning and play until early the next morning,

with the consequent wear and tear, the call for stock is much more acute; you do not get as many runs in New York. I haven't, frankly, averaged it for some little time, but the last time I did I think we got on the average of 35 runs, 35, 40 runs for a picture.

Q. What is the cost of such a positive film, the cost of making them, not the cost of production? A. That again (601)
depends on whether it is black and white or if it is in technicolor.

Judge Bright: By 35 runs, you mean 35 exhibitions?

The Witness: No, I would say 35 runs. Sometimes a theatre in New York, for instance, may run eight or ten times a day and run it for four days, but I consider myself if a theatre plays our picture three days, I consider that one run. So on the average of 35 engagements, I might say.

Q. I was asking you the cost of making one of these films? A. The cost depends on black and white or technicolor. If you order all prints that are required, or generally all that you need, the positive print of black and white approximates about a cent and a half a foot, whereas, in the case of Technicolor, it is approximately 5½ cents or five and a fraction a foot.

Q. Do you negotiate with your theatres the run which they are contracting to play? A. Either I or one or my immediate assistants do.

Q. Is that reached as a result of agreement? A. No, we generally discuss each individual theatre alone, individually, wherever it is located, except I may decide to renew an agreement that had been going on for the last six months or a year, and I will say, "Let us do the same way for the future," but, generally speaking, each theatre is considered separately.

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Q. I mean, is the particular run the subject of final agreement between the exhibitor and yourself as the sales agency? A. Yes.

Q. Do you determine, you or your organization determine, what you are prepared to offer to the exhibitor? A. That is, our theatres in our company, you mean, or generally speaking?

Q. Yes, in your company. A. In my company I am the one that determines that in negotiation with our theatre people.

Q. Why is this system of runs necessary in the industry? A. As I have viewed it over a good many years, it is the only basis on which you can afford to invest the tremendous sums that today are invested, and have been for many years, in motion picture production. There must be a priority of run, otherwise, if pictures were shown simultaneously, such as they were many, many years ago, there would be no possibility of grossing the large amount of money that is necessary to gross today to warrant the investment that is made in our pictures.

Q. Why should that be so? A. Well, in the first place, there are many, many communities who cannot afford to charge an admission price such as the admission price that is charged by the larger theatres, and in the days when all theatres charged very, very modest sums and pictures were

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shown simultaneously in all different types of theatres, you did not gross as much per picture in those days, as a result of those matters, as you now spend for a matter of footage in the production of pictures. In other words, I remember some of the most successful short subjects that were made, many, many years ago, that grossed in those days, and we thought was very great, $20,000 a picture. Well, $20,000 for a picture today would not hardly give you time to turn

around. And that sort of thing was abandoned many, many years ago, because, with the increase of the cost of production, it was necessary to seek other means, other avenues of return, to justify that cost, cost of ever increasing demand for better stories, better writers and everything else that goes to make up production, and from that developed the runs.

Q. When was the practice of runs started? A. Runs with priority over each other, or one subsequent to another, I should say, must have started in the neighborhood of twenty—some twenty-four, twenty-five years ago—23, somewhere in that neighborhood.

Q. Have they been continuously employed since that time? A. Yes, sir.

Q. I asked you the reason for adopting this system of runs. Has the habit of the public anything to do with it? A. Well, the habit of the public has this much to do with it. (604)

As I say, first, they live in neighborhoods many of which could not support a theatre that charges as much as the downtown or larger theatres. Then, in addition to that, the public, if all runs were shown at the same time, would miss a picture that they were particularly interested in and it would be gone, whereas today there is a staggered number of runs and if a person missed a picture in one particular theatre, he can usually find it in another for a good long time to come. And then again it would be impossible, practically, to supply any larger number of runs simultaneously.

Q. Is there anything in the eagerness of human nature to see a thing first? A. Very definitely.

Q. There are people who will pay money for that privilege, aren't there? A. There are.

Q. What are the factors that dictate the selection of theatre A for a first-run or theatre B for a second, or theatre C for a third? A. There are a great many factors that have

to do with that. There is locality, management, showmanship ability, location, their price of admission, length of run —there are so many, many factors you take into consideration.

Q. I want to read to you from the consent decree, Section 10, Paragraph C, and ask you to follow this closely. This section provides that "In determining whether the exhibitor's

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complaint"—that is, as to a run—"is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres, the seating capacity of each said theatres; the capacity of each for producing revenue for the distributors; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability for exhibition of the distributor's features and the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres, and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."

Do you consider all these factors in deciding a run? A. I certainly do, but I think that is a very, very proper way to consider it, too.

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Q. Are there any others that occur to you which are omitted from that catalog? A. I don't remember.

Q. I notice the last thing in that catalog of factors is the distributor's prior relations with each of the two theatres involved. How does that enter into the subject? A. From our point of view that enters into it with me very strongly.

Q. How so? A. Well, we have had many, many years in which to finally determine on the best runs for our product and the best outlets for our pictures. We have given all these matters due and careful consideration that you have cited there, and when a man who has been dealing with us for a period of years qualifies under all of those, I see no reason for considering changing him. And therefore the man who has been a customer of ours for a period of years has a very good standing in our eyes.

Q. Do you negotiate this question of runs theatre by theatre? A. Our company does, yes, sir. Our representatives, rather.

Q. Do you negotiate with theatres owned by any of the co-defendants in this case? A. Yes, sir.

Q. Do you apply to the theatres owned by your co-defendants, or by the co-defendants at bar—do you apply the same criteria that you do to theatres owned by independents? A. Yes, sir.

(607)

Mr. Wright: If the Court please, I think that question calls for a conclusion that the Court rather than the witness would find from testimony as to what was actually done in those situations. I do not think it is proper for this witness to make the statement in that form.

Judge Hand: Overruled.

Mr. Davis: Will you read the question and answer?

(Question and answer read.)

Q. Do you give any preference to any theatres owned by the co-defendants because of their ownership? A. No, sir.

Mr. Wright: Same objection.

Q. Do you have any agreement, contract, understanding or concert of action with the defendants, the co-defendants, or any of their officers or agents with reference to the runs that should be given to any particular theatre? A. No, sir.

Q. Is that an entirely independent determination on your part and on the part of your company? A. Entirely on my part.

Q. What is clearance? A. Well, clearance is linked up very closely with the matter of runs. There are some places where the sale of the run suffices; whereas in other cases the matter is defined as clearance, and sometimes they are used together. Clearance is the period of time elapsing between one showing and another, or one engagement and another, I should say. Sometimes it is measured from the

last exhibition day of a prior run. Some specific period, depending upon the individual situation involved.

Q. What is the reason for it? A. Well, the reason has been established, again over very many years. Generally speaking, clearance for a certain period is given to a theatre who plays prior and is in a position to pay greater returns to the distributor than the succeeding runs. Therefore it is felt by us as a distributor that he should be given a certain amount of priority. That priority differs, depending entirely on the situation involved or the locality involved, I might say. It runs from six days to three months, depends

entirely on the theatre and its location, its operation, and all of those other elements that you have just recently read.

Q. Why should it be a matter of importance, the exhibitor holding the first-run, that the second-run should not begin for a specific period after his run was ended? A. Well, if you did not give a reasonable period of time, that second-run house would be advertising the product while the first-run house is playing it. In addition, the run that followed the second-run house would be advertising the picture before the second-run played it or while he was playing it; and as you go down in the sequence of runs, each theatre has the period of time, or each group of theatres sometimes has the

(609)

period of time elapsing between one showing and another; and only in that way are you able to handle their collective business with the limited number of prints that you can afford to buy.

Q. How long has that system of clearance been in use? A. For approximately the same period of time that the runs have been in use, 20 to 25 years.

Q. Well, do you and your organization determine the amount of clearance to which your customer theatres are entitled? A. Yes, that is determined by us but is brought about by negotiation and the consideration of a great many elements. Again, the type of theatres and a great many other things.

Q. Well, let me read you again from paragraph 8 of the Consent Decree, and I will ask you to follow this closely:

> "In determining whether any clearance complained of is unreasonable, the Arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

"(1) The historical development of clearance in the particular area wherein the theatres involved are located;

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"(2) The admission prices of the theatres involved;

"(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

"(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

"(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

"(6) The extent to which the theatres involved compete with each other for patronage; and

"(7) All other business considerations, except that the Arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres."

Do you consider those factors in determining upon clearances? A. They were considered in determining clearance.

Q. Are there any others which occur to which are not included in that list? A. I could not recall any at the moment, no, sir.

Q. Do you, in fixing clearance, disregard the fact that

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the theatre involved is affiliated with one of these co-defendants or with a circuit of theatres? A. I do, yes, sir.

Q. Is that negotiated theatre by theatre? A. Theatre by theatre.

Q. And on the merits of the particular theatre involved? A. And on the merits of that particular theatre. In fact, all of our negotiations are by individual theatres.

Q. Is there any agreement, or has there been any agreement between yourself, your organization, or Loew's, Inc. with any of the defendants in this case as to the time or place of clearance, or the grant itself of clearance to any particular theatre? A. No, sir.

Mr. Wright: If the Court please, that calls for a conclusion that can only be drawn from the evidence in the case as to what was done in these situations, what these agreements are. I do not think this witness is competent to give that answer.

Judge Hand: Overruled.

Q. Now I come to contracts, Mr. Rodgers: You told us what franchises are. A. Yes.

Q. Are there any franchises outstanding between Loew's Inc. and any exhibitor? A. No, sir.

Q. Has Loew's ever indulged in granting franchises? A. Yes, sir, but not lately.

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Q. Can you tell me in its entire history how many franchises Loew's has granted, how many to the defendants or corporations affiliated with them, and how many to independent exhibitors? A. Well, I had that record prepared a short time ago. I believe altogether——

Q. I will let you refresh your memory. You say that was prepared by your direction? A. Yes.

Judge Bright: What did you say a franchise was?

The Witness: A franchise was an agreement to supply the product for a period longer than one year, usually two years or longer.

A. (Continuing) Well, we had had franchise agreements with those who are affiliated with the defendants, a total of 46 for less than five years, during the history of our company; with six that we had made for a period of ten years; and seven we had made for five years, or a total of 59 such franchises. And to the individuals or so-called independents during a similar period we had granted 154 franchises. In other words, a total of 213 of which those associated with the defendants had 59.

Q. And all those have now expired? A. They are all expired.

Q. Are you granting franchises currently? A. No, sir.

Q. Why not? A. Well, the consent decree prohibits it.

Q. Well, explain just how and why the consent decree

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prohibited franchises? A. Well, I might add to that the consent decree did prohibit it. Whether it does or not at the moment, I am not prepared to say definitely, but we have respected the terms of the consent decree which require us to trade show each picture before it was offered to be licensed. So, therefore, for the most part we are offering to license to theatres but four and five pictures at a time because that is as many as we can get together at one time.

Q. Well, the franchise is a contract entered into before the pictures are made? A. Yes.

Q. And cover the output or a portion of it for a certain future period? A. Generally speaking, the output for a period.

Q. So if you trade show, of course you can't contract for pictures that are not yet in being? A. Yes, sir.

Q. Now, franchises aside, what is your other form of contract? A. We have a form that we call license agreement which applies to each group of pictures as they are offered; or if we sell an individual picture, it applies to that. And as I say, generally speaking, they are now offered either individually or in groups of four or five pictures at a time.

Judge Hand: Why do you offer them in groups of four or five? I suppose you do not offer more perhaps because of the provisions of that decree?

(614)

The Witness: Well, I must show them first, and I can't get more than four or five together, as a general thing, to trade-show, and therefore I am limited in the number of pictures I can sell.

Judge Bright: Well, you are limited to five anyway, aren't you?

The Witness: Well, we were limited to five, but to be frank with you, I think that there was some misinterpretation that we always felt we were limited to the number that we could show; so therefore, for my company, when we were in a position once or twice to show 10 or 12, we offered the 10 or 12, but after they were trade-shown we gave a cancellation privilege on those.

Judge Hand: This is all a mystery to me. Why do you have four or five instead of one?

The Witness: Well, to be frank with you, that is more for our customers' convenience; and so many theatres play so many pictures, that it is very difficult for them to buy small quantities at once. They would rather buy larger quantities.

Q. Why? A. Well, in the first place they seem to think, I believe, that they can buy them cheaper, No. 1; and secondly, and of equal importance, is that it permits them to have a sort of a sense of security; if they would have a year's

(615)

product at one time it would relieve them of the necessity for buying each month or each two months.

Q. Well, if they get a group of five, do they like to buy them in groups in order to secure certain exhibition time

for their threatres? A. Well, they don't care particularly about buying them in groups, but they would certainly rather buy five than they would one, because the transaction would be just multiplied five times, and they must make their bookings in advance, and they like to set their bookings as far as they can. So the theatre owner would rather buy in the larger group.

Q. I show you what purports to be an exhibition contract, Metro-Goldwyn-Mayer Pictures, distributed by Loew's, Inc., form No. 1221-15M-3-45, and ask you whether this is the current form of contract license that you are employing? A. Yes, sir, that is the current form of contract form that we are using at the present time.

Mr. Davis: I offer that in evidence. I think that will be Loew's Exhibit 1, will it not?

Mr. Wright: We have no objection, but if there are any differences of substance between this form and the one we offered for the 1943-44 season, I think they ought to be pointed out.

Mr. Davis: I am not sure whether there are any or not. I have not compared them. The shorter is somewhat abbreviated, and I do not accept the sum-

(616)

mary which is in your exhibits.

Mr. Wright: May we have copies?

Mr. Davis: They are all copies.

Q. Why this different coloring, Mr. Rodgers, on these? A. They all go to different departments. One copy after it is approved goes to a sales manager, possibly; another one goes to a district manager; one goes back to the branch; and, of course, the theatre owner must get his copy, and that is the reason they are all different colors.

Judge Bright: Are they all identical?

The Witness: They are all identical, yes, sir.

Mr. Davis: I shall ask to have the white one marked in evidence, as I want to ask some questions about it, and perhaps your Honors would be content with a pink, a yellow and a green.

(Marked Defendant Loew's Exhibit L-1)

Q. I notice on this exhibit, Mr. Rodgers, a series of squares marked "Top Bracket", "2nd Bracket", "3rd Bracket", "4th Bracket" and "5th Bracket." What is the meaning of those? A. Well, in those spaces are inserted at the conclusion of negotiations the prices that had been agreed upon to be charged for pictures that would be designated in any one of five brackets. We classify our pictures in five different brackets.

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Q. You classify them from what point of view? A. From their ability to draw at the box office, which is determined after our test runs.

Q. Are you always right about it in your classification? A. No, sir. We sometimes err, not often.

Q. Does the bracket in which the picture is entered have anything to do with the price you charged for it? A. Yes, sir; we charged that price that is in that bracket. If we designate a picture in the second bracket, that is the price that is charged as film rental, or the terms that are charged.

Q. What do you do if it proves that your prophecy was wrong and the picture does not belong in as good a bracket as you gave it? A. We move it into the bracket where it does belong, immediately.

Q. On your own motion or on an application of the exhibitor? A. On our own motion when we know it; but when we don't know what the receipts were, an application on the part of the exhibitor will straighten it out immediately.

Q. Now, I notice to the right of this exhibit what is called a sliding scale table. Will you explain that to me? A. Well, a sliding scale is a percentage arrangement whereby our percentage of the gross receipts in that particular theatre is measured by the amount of business that the
(618)
theatre does. We will agree with the theatre owner to start off at a certain figure, and before we can earn any more money the gross receipts must increase, and as they increase our percentage of the gross increases.

Q. I was a little ahead of my story. You have license fee or rental or minimum guarantee; you also have license fee, percentage of all gross receipts. Which of those methods, or both, do you employ? A. We employ them both. As a matter of fact, we have no fixed policy. We have a very flexible policy. We prefer to play on a sliding scale. If that does not suit the pleasure or convenience of our customer, we will play on a guarantee with the sharing arrangement, or in some instances we will even play on a flat rental if we can get enough.

Q. What proportion of your contracts are on a percentage of gross receipts? A. Well, that would be pretty hard to answer unless you call for specific pictures. I would say there are some pictures in which we have a participating arrangement with every theatre we do business with, without exception; and there are other instances where I would say the smallest percentage of theatres play flat rental. The largest percentage will have some kind of a participating arrangement.

Q. What is the reason for playing some pictures flat rental and others on percentage? A. Well, for the most
(619)
part the most successful pictures are those which cost the most; and I have never found it possible to get in the way of a flat rental a sufficient price that would assure me of

having at least an opportunity to handle the picture profitably. But by handling it on percentage, we have an opportunity to share if the picture develops that particular type of gross; and then, in addition to that, we have a chance to profit if the gross receipts so justify.

Q. Is there any advantage to the exhibitor in fixing compensation on a percenage rather than a flat rental basis? A. I think there is a very definite advantage to the exhibitor.

Q. What? A. Well, in other words, he pays what he figures to be a fair proportion of receipts if the picture develops. In our sliding scale it is most advantageous to the theatre to play on that basis because he rarely, if ever, can be hurt under such arrangement. He buys pictures at a minimum percentage term and does not increase them unless the gross receipts of the theatre are materially increased; so it is particularly to his advantage.

Q. Now, I find on this exhibit in red ink a special offering of a picture called "Weekend at the Waldorf." How does the offering of that picture differ from the five that are in the group named at the top of the exhibit? A. That is (620)
one where we want participating arrangements everywhere, and that is sold independent from the group entirely. It is not necessary for them to buy it in order to get the group, nor is it necessary for them to buy the group in order to get that one.

By Judge Bright:

Q. There is some reason for that, isn't there? A. You mean both in the same contract?

Q. Some reason for putting "Weekend at the Waldorf" in red ink. A. Well, the reason for that is, again, respecting the consent decree or its provisions. This was a special picture on which we wanted participating arrangements, and I wanted specifically to call to the attention of the trade, and

for Mr. Wright's information if it fell into his hands, that we would not use an individual picture to sell a group, nor were we using the group to sell an individual picture. Each had to stand on its own merit. And the reason I put them in the same sheet—this was made up several months ago, this contract, four or five months ago—was at that time in an effort to conserve paper. Otherwise I would have had two separate contracts. That is the reason for it being in red ink.

Q. Was the reason because of the fact that this particular picture is shown in Radio City? A. It had not been (621)

contracted for at that time in Radio City when this contract was made up, but I knew it would be contracted for specially, and it deserved unusual terms.

By Mr. Davis:

Q. Who prepares this form of contract? A. Well, I supervise it. It is done in our office here in New York by various associates of mine, but the authorship of that particular arrangement, I suppose, is mine.

Q. Do you, or has any officer of your company, any agreement, contract or understanding with the co-defendants or any of their agencies for the employment of a common form of contract? A. No, sir.

Q. Has there ever been any such agreement so far as you know? A. Not for many, many years, not since Judge Thacher's decision, no sir. There was a uniform contract at that time.

Q. It did exist, did it not, prior to 1928 in the trade conference era? A. Yes, in which exhibitors and distributors participated, but not since that time.

Q. And they participated in the trade conference under the aegis of the Federal Trade Commission, isn't that so? A. I believe so, yes.

Q. Since that time there has been no agreement on uniformity? A. None whatever.

Q. Now, I notice a line on this exhibit "Net Admission
(622)
Prices Per Person—Orchestra—Balcony—Children under 12—Matinee—Evening—Adults and Children of 12 and over."

What is written into that when the contract is complete? A. Well, inserted there are the admission prices that the theatre owners give us as their minimum prices for each particular period of the day, or the division, as you cite, between adults and children. That is the prevailing price, the minimum price that the exhibitor is charging at the time that agreement is negotiated.

Q. Do you fix that minimum or does the exhibitor fix that? A. Oh, no, I do not fix that. The exhibitor fixes that. That is his price.

Q. He prices the theatre and his admissions and you write it in accordingly? A. Yes, sir.

Q. Has he the power to increase such price if he wants to? A. Yes, indeed he has.

Q. Does that occur from time to time? A. I am sure that it does; a number of instances.

Q. Have you looked up that question with particular reference to the film "As Thousands Cheer" to ascertain how many theatres exceeded their minimum admission? A. I could not tell you, but I am sure it must be hundreds.

Q. Well, I show you a memorandum and ask if that refreshes your recollection. How many theatres showed "As
(623)
Thousands Cheer" (handing paper)? A. I believe in the neighborhood of fifteen-thousand-some-hundred theatres.

Q. How many first-run? A. Well, I have not segregated it by first-run, Mr. Davis. I could not tell you how many first-run. That has always been a difficult question for me to define, how many first-runs are there really.

Q. Well, we will have something more on that later. I am asking you now by way of illustration in how many cases did the exhibitors exceed their minimum prices? A. 346 cases of the number of contracts that we had of record; it was 346 cases that increased their admission prices.

Q. Out of how much? Let me see that memorandum a moment. A. Out of an examination of 3600 theatres.

Q. Yes. These figures are taken, are they not, from those of the 416 cities with more than 25,000 population? A. Yes, sir.

Q. Showing 3631 theatres? A. That is correct.

Q. And among those theatres you have reports of admission prices of 3237? A. Yes.

Q. And in 346 of that latter number they exceeded the admission price? A. Than had been provided for in the contract, yes, sir.

Q. How many such license contracts are made by Loew's, Inc. in the course of a season? A. Well, we do business

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and we sell approximately—well, we sell as low as 7000 contracts and as high as fifteen-thousand-some-hundred.

Q. How many theatres are there in the United States? A. Approximately 17,000.

Q. Well, while we are on that, what is the Film Daily Year Book? A. The Film Daily Year Book is a publication that is issued once a year by the publishers of the Film Daily.

Q. Is it regarded as a reliable publication? A. Yes, sir.

Q. Is it a current reference book in the trade? A. Yes, for very many topics.

Mr. Davis: Well, I should like to offer as an exhibit a reprint of pages 7 and 8 of the Government's trial brief with an added column of the number of theatres taken from the Film Daily Year Book. I offer that in evidence.

Mr. Seymour: Of course, I assume that for the most part these exhibits offered by individual defendants are not exhibits as against their co-defendants. I do not make any objection to this. The exhibits will have individual numbers; they are offered in support of the individual defense of the case.

Mr. Davis: I can assure you that I have no malicious purpose toward any of my co-defendants. Indeed, if any of them told me that this exhibit was in

(625)

any respect harmful, I would not offer it. Just so much concert of action in this case.

Mr. Proskauer: I desire to embrace the offer of concert. This exhibit can certainly be offered on my behalf.

Mr. Wright: I do not think we have any objection to the exhibit as such. I might say we don't have the same confidence Mr. Davis has as to the reliability of the Film Daily figures. Our experience is that many are not accurate.

Mr. Davis: I have proved that that is a recognized and respectable publication.

Mr. Wright: For the purposes of this exhibit the figures there seem to be roughly correct.

Mr. Davis: I offer that in evidence.

Judge Hand: Received.

(Marked Defendant Loew's Exhibit L-2)

Mr. Davis: Your Honors will notice that it raises the previous estimates of the theatres in the United States to 18,076.

By Mr. Davis:

Q. I believe you said, Mr. Witness, that you had nothing to do with buying films for exhibition in the Loew theatres? A. That is correct, I do not.

Q. Did you mean to include films which Loew's itself
(626)
producers in that statement? A. Well, even in that position, I am a seller to Loew's theatres, not the buyer for them.

Q. Do you have to negotiate with the Loew's theatres as if you were a stranger? A. Yes, sir.

Q. Who is on the buying end of that proposition? A. There are two gentlemen, Mr. Joseph Vogel and Mr. Charles Moscowitz.

Q. They each have an organization, I suppose, to assist them in buying? A. Yes, sir.

Q. And you sell your Loew's pictures to them as if you were selling to a stranger? A. Yes, sir.

Q. Do you find them hard traders? A. Sometimes.

Q. Do you in selling your pictures to Loew's theatres inquire what pictures Loew's are buying from other producers? A. No, sir.

Q. Do you in negotiating your contracts with third parties or with the co-defendants pay any attention to what they are buying from Loew's? A. No, sir.

Q. I mean what they are selling to Loew's. Of course you would pay attention to what they are buying if you are selling to them. A. Oh yes.

Q. But do you pay any attention to what they are buying from others? A. I have no interest in that.

Q. Do you make the licensing of a film to a theatre
(627)
affiliated with any of the co-defendants dependent as to price, terms or duration on what that co-defendant may be licensing to you? A. No, sir.

Mr. Wright: If the Court please, that again calls for a conclusion that I do not think he is competent to draw.

Judge Bright: Is all of this licensing throughout the United States cleared through your office?

The Witness: Yes, sir.

Q. Could you tell me how many such contracts as this I have just exhibited are executed in the course of a season? A. Well, for an individual picture I should say we execute as many as fifteen-thousand-some-hundred agreements, and in a group of pictures probably the same number, but cancellation privileges would bring it down to eighty-some hundred or seventy-five hundred, or maybe lower.

Q. How many such groups do you sell in the course of a season? A. Well, last year we had about 30 pictures of which about a half dozen were sold separately. We must have had six groups, at least, and six individual sales, a terrific amount of transactions.

Q. Well, my mental arithmetic is not good enough. How many separate contracts would that add up to? A. If I had six groups of 15,000, that would be 90,000; and if I had six more individual sales, approximately, that would be (628)

another 90,000, or 180,000 transactions on those alone, on feature attractions alone.

Q. That is pretty astronomic. A. Yes; and don't forget we have newsreels and short subjects and trailers.

Q. Are they separately negotiated? A. Yes.

Q. You spoke of cancellations. What cancellations are customary? A. Well, it depends on the situation. The cancellations when we sell more than five pictures in a group is fixed. Where we sell five pictures in certain localities we permit elimination if we are satisfied that they cannot absorb that many, or that there were particular pictures in a group that would not be suitable for the theatres buying them. That is the reason for the fluctuation of the number of pictures sold or played eventually.

Q. Do you have many cancellations or applications to cancel? A. There are many eliminations, yes, sir.

Mr. Davis: Now, I am going on to another topic. Perhaps your Honors will want to adjourn now for lunch?

Judge Hand: We will adjourn until 2:15.

(Recess to 2:15 p.m.)

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AFTERNOON SESSION

Mr. Seymour: May it please the Court, before the witness resumes there is one procedural problem which I should like to mention: The Government has offered, and there have been received, a number of license contracts between defendants and theatres in which other defendants have an interest. Now, we have examined the contracts which concern Paramount pictures or theatres in which Paramount has an interest, and from our examination they appear to be just standard contracts. But they are very voluminous. Now, I think that it is a situation in which the interest of the Court and counsel would be served by having the Government furnish us with a sort of informal bill of particulars as to what it is about those contracts that they rely on. I realize that ordinarily those things are done before trial; but it has only arisen by virtue of the fact that they were offered during trial; and I should like to have a statement which we could rely on as an indication of what the Government counts upon in those contracts as helping its case. And just as Mr. Wright said this morning when Mr. Davis handed up the new contracts that he would like to know what the differences are, we should

like to know what it is that the Government relies on. Perhaps Mr. Wright will agree to do that and we won't have to bother the Court with it.

(630)

Mr. Wright: If the Court please, we are not going to limit ourselves in any way at this time. We rely on every piece of printing that is in any of these contracts that were offered in evidence. I can see no occasion for us to tell counsel that they can ignore at this time any part of it.

Judge Hand: All right.

Now we shall proceed.

Mr. Davis: Mr. Rodgers.

WILLIAM F. RODGERS, resumed the stand. *Direct Examination continued by Mr. Davis:*

Q. I think we were discussing the subject of minimum admission prices which you told us were those prices named by the theatre itself written into the contract. What is the reason for writing any admission price into the contract? A. Well, it has a contributory reason as to the availability of pictures in many places. It is one of the considerations we give as to when pictures can be made available; and the theatre owner in specifying the price of admission expects to get his availability in many cases based upon the price of admission that he charges.

Q. Does it have any effect upon the revenue of the distributor? A. A great deal; a great deal of effect, because it stands to reason in most cases the more the admission price is charged the greater the receipts.

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Q. How long has the practice of naming minimum admission prices in the contract prevailed? A. Well, I feel that

the run and the clearance and the admission price, they all have such a close relation one to the other, that they commenced to be generally operative, as I said this morning, somewhere in the neighborhood of 20 years ago, 22 years ago, I can't recall exactly when; somewhere in that neighborhood.

Q. Now, it has been suggested that the provision in your contract for an audit of the exhibitor's receipts is put in for some purpose other than to protect your revenue. Is that true? A. Well, that is put in for specifically the purpose of protecting our revenue. As a matter of fact I believe that there is some clause in our contract to the effect that the theatre owner is merely the custodian of the receipts, and we want the privilege of verifying that.

Q. Do you maintain a corps of auditors for that purpose? A. We don't have a corps of auditors specifically for that purpose, but we use our auditors for that in connection with other auditing work that they do around the country.

Q. Do your auditors, when sent to the theatre, audit the general business of the theatre or only your particular contract? A. They only have a right to audit, as I understand it, the pictures played under the sharing arrangement.

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Judge Hand: This kind of thing, Mr. Davis, does not impress me at all. The charge of the Government is that they audited these reports. If these contracts are valid, they certainly have a right, a perfect right to do that; and if they are invalid, they are invalid.

Mr. Davis: And, of course, we heartily agree with that.

Judge Hand: I do not see what it has to do with the case.

Mr. Davis: And perhaps I am over-anxious in refuting a charge which seems to me to be absurd on its face, but in the trial brief the Government charges we used this system of auditing to secure information

about the business of the theatre with our competitors and in that way to promote the general conspiracy that is charged, and I am simply trying to negative that insinuation.

Judge Hand: I suppose it is all right.

Mr. Davis: But I shan't waste any time on it.

Judge Hand: But I think it is an awfully far-fetched argument.

Mr. Davis: I never heard of any man making a contract of this sort who did not reserve the right to see whether he was being cheated, such being human nature.

Q. Do you, as a result of these audits, procure any information relating to the business of your co-defendants, com-
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petitors or other persons than the theatre involved? A. No, sir, never.

Mr. Davis: We will drop that subject there.

Judge Bright: You limit the audit solely to the purpose of the one picture or one series of pictures in which you are interested?

The Witness: We limit the audits to only pictures which are played under the participating arrangement. Sometimes we——

Judge Bright: What do you mean by "participating arrangement"?

The Witness: Percentage arrangement, or a dollars and cents guarantee, with the sharing arrangement beyond a certain figure.

Judge Bright: Only for pictures licensed for that theatre?

The Witness: Yes, sir, only of our own pictures.

Judge Bright: Not others'?

The Witness: No.

Judge Bright: You have no right to audit anybody else's pictures?

The Witness: No, sir, none whatever. Nor do we have a right to audit our own pictures under the——

Judge Bright: You exercise the right to audit nobody else's picture receipts?

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The Witness: No, sir. In the first place, they wouldn't permit me to, and we have no interest in it.

Q. Let us go to theatre ownership for a moment. How many theatres does Loew's, Inc. own, if you know? A. I don't know how many we own. I think we operate in this country in the neighborhood of 130, 135, or something like that.

Q. You don't own the fee simple of all that you operate? A. No, sir, but I am acquainted with the structure under which we operate them.

Q. Are their locations so shown in the document which has been admitted in evidence as Loew's L-2? A. Yes, sir.

Q. That is approximately correct, as far as location? A. That is approximately correct.

Q. Is there any agreed division of territory, so far as exhibition is concerned, or sales either, between Loew's, Inc. and any of these co-defendants?

Mr. Wright: May it please the Court, we have the same objection we made before, that that is a conclusion for the Court rather than this witness.

Judge Hand: Overruled.

A. No, sir.

Q. Do your theatres always exhibit your own Loew's films? Put it this way: Do Loew's theatres always exhibit

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Loew films? A. With one exception.

Q. What is the exception? A. The exception is in Niagara Falls where we have an interest in a theatre in Niagara Falls but our product is played in the theatre of an independent exhibitor.

Q. Do Loew films fill up playing time of all the Loew theatres? A. No, sir.

Q. Is there room for playing other films? A. Yes, sir.

Q. Are they licensed from third persons? A. Licensed from the other companies in the business, or the distributors.

Q. Who has the supervision of that licensing? A. Mr. Joe Vogel and Mr. Moscowitz.

Q. What is the difference between their respective spheres? A. Mr. Joseph Vogel has charge of all our out-of-town theatres excepting the—he has charge of all the out-of-town theatres including the Capitol Theatre here in New York, whereas Mr. Moscowitz has charge of all the metropolitan theatres, those that are in this metropolitan area in Greater New York.

Q. What is the general character of the theatres owned by Loew's, Inc.? A. They are very fine theatres.

Q. What reason is there for a producer of films owning his own theatres for exhibition purposes? A. I can only speak for our own company. I say that in our connection that the reason we have theatres in the many places we do

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is that we use them as show windows and use them as test spots for the establishing of values of our various pictures.

Q. And what do you mean by "show windows"? A. Well, a show window, I consider a show window is an important theatre in an important city in any particular geographical area and, generally speaking, after we test a picture in a given number of spots or localities, I should say, then we are in a position in the more lucrative territories of this country to use our own theatres as show windows where our own pictures can be played first and in that way establish their values.

Q. How does the playing of your pictures first in your own theatres establish their value? A. Well, it is a generally well known matter, if the picture does well, it is generally known throughout that particular area; and by the same line of reasoning, if it does poorly, it is known even quicker. But then, it gives us in New York a better idea as to the cross-section value of the picture; where it is shown in so many different sections, we know very well about what the value will be for that picture for all of America.

Q. Do you make first-run contracts with any of the theatres owned by the co-defendants here at the bar? A. There are a number of first-run contracts made with them, yes.

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Q. Do you make first-run contracts with wholly independent theatres? A. Yes, in many sections.

Q. And you exhibit first-run in your own theatres? A. Yes, sir.

Q. First-run theatres play at the highest admission rates, do they? A. Generally speaking that is always true.

Q. Do they customarily produce the quickest and largest share of your revenue? A. First-run theatres that we have at Loew's, yes.

Q. Let me ask, what is the overall cost, annual cost, of maintaining your distribution system, of which you are the head? A. Well, our field forces for the last year have cost us on an average of $115,000 a week. I believe the overhead for our New York office is somewhere between five and six million dollars a year. I don't know the exact figure now.

Q. It is substantial? A. Substantial, yes, very.

Q. You were asked by the Government in its interrogatories to name the film for the season 1943-44 which received the largest number of contracts. A. Yes, sir.

Q. You named, I believe, the film "As Thousands Cheer"? A. Yes, sir.

Q. And the Government asked you for further information as to the revenue derived by its exhibition. Have you caused to be made or caused to be made under your direction
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a chart showing the revenues derived from the exhibition of that film and the ownership and class of the theatres from which they were derived? A. Yes, sir.

Q. I ask you to look at the two charts, which I will identify as L 3-a and L 3-b, and ask if those are the charts which you caused to be prepared? A. Yes, sir, these are the charts.

Mr. Davis: Before offering these in evidence I should like the Court to look at these, which I hand to the bench, in order that I may explain the purpose for which they are being offered. These are charts L 3-a and L 3-b. They are an exhibition of the data which the Government requested and put in evidence by its Exhibits 57-1 to 57-49.

The first of these charts shows the overall take of that picture of $3,537,588. Midway of the chart there is a black line marked "Cost of negative, prints, advertising, royalties and trailers, $2,016,000." That is the cost of making that picture. It includes nothing for distribution, nothing for overhead, but is the manufacturing cost of the film, prints, royalties and trailers. And until that line has been crossed the company is out-of-pocket.

The Government asked us for the revenue from the first-runs in all cities with a population of 25,000 and
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over, 416 in number. That is the first column to the left of the chart. It is in red because it has not yet reached the cost line.

It asked us for revenue from second-runs in all cities with population of 50,000 and over. That is shown in the second column.

After the first column has been added, then this bit of information raises it a little further, cumulatively.

It asks us for revenue from third-runs in all cities with population of 200,000 and over. That is the third column. And after counting the column 2, you will see that there is a small addition to that column, still below the cost line.

Revenue from fourth-runs in all cities, New York, Chicago, Los Angeles, Philadelphia and Detroit, with population of a million and over, and the fourth-run adds something to this mounting column in the fourth line.

Then the fifth line is not in response to the Government's requests, but is our own statement of the entire revenue derived from that film, $3,537,000. Your Honors will note that it does not cross the cost line, and the first-run, second-run, third-run and fourth-run have been played in these cities named. Our fourth column includes the play everywhere, our total take.

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Now, if your Honors will look at the second chart, L 3-b, you will find the breakdown on each of these columns showing the sources of this revenue. The first column, revenue from first-runs in all cities with population of over 25,000, amounts taken from Loew's own theatres, Fox, Paramount, RKO, Warner and independents, are all shown in that column. It will appear that the largest revenues, as might be expected, were from Loew's own theatres; second, by reason of their number, was from Paramount's theatres; and the third was from the independents who paid us more than either Warner or RKO or Fox.

In the second column, revenue from second-run in all cities with population of 50,000 or over. Your Honors will notice that here the independents spring to the top of the sum, $81,000 from the independents

in that second-run, $59,000 from Loew's own theatres; and the next is Paramount's theatres, with $37,000.

Then we come to the revenue from runs in all cities with a population of 200,000 and over. Again Loew's own theatres are the most productive—no, here the independents have even gone beyond Loew's, $59,000 from the independents and only $51,000 in Loew's own theatres.

And then we come to revenue from fourth-runs in all cities with population of over a million. And here

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the independents are $55,000, and the next one is Warner's with $18,000.

Then we come to the fourth column, which represents our total take, and your Honors will find that these first, second, third and fourth-runs and the sums contributed by the co-defendants' theatres have not yet pulled us out of the red.

And we then find that with the small amount from Paramount and a smaller amount from Warner, and $1,288,000 from the independents, we finally made our profit.

I offer that in evidence, and I shall argue from it that if Loew's, Inc. is engaged in a conspiracy to suppress and militate against all independent theatres, it is very clear that Loew's, Inc. is industriously endeavoring to cut off its own nose to spite its face, for were it not for the independents, this $3,537,000 could never have been earned, or the two million spent on this picture could never have been retrieved.

I offer these exhibits.

Mr. Wright: If the Court please, we, of course, obviously cannot examine this witness on the charts. He did not prepare them. He had them prepared. Now, all we want with reference to these charts is the same opportunity we gave the defendants with respect

to ours, to check the data. Otherwise I should think
(642) they might go in. But at this stage it seems it is a little premature to admit them until we have had an opportunity to check.

Mr. Davis: Of course there is no objection in the world to that, your Honors. Counsel may examine the chart as much as he pleases, and if he is not satisfied with Mr. Rodgers' statement that it was prepared under his direction, I am perfectly willing to produce the hands that drew the lines, and the accountants who entered the figures.

Judge Hand: We will admit it. Of course, you can check it by getting the data.

Mr. Wright: I should like to point out, your Honors, as far as this cost data is concerned, that is something that——

Judge Hand: What is that?

Mr. Wright: I just wanted to call attention to the fact that the charts do contain something more than a recap of material that is in evidence.

Mr. Davis: Yes.

Mr. Wright: There is cost data on there for which there is no underlying evidence; and we would at least want the opportunity to check with someone who prepared the cost data as to what some of these costs might represent.

Judge Hand: You will have that.

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Mr. Davis: You will find on that chart not only is the cost data not included in the interrogatories which were put to us and filed, but the fourth column, the total receipts and their division is not so included. The chart is independent evidence as to those topics, and I have had the witness verify them.

(Marked Defendant Loew's Exhibits L 3-b and L 3-a.)

By Mr. Davis:

Q. Do you remember how many theatres exhibited "As Thousands Cheer" in the United States? A. Well somewhat better than 15,000; 15,000 and some hundreds. I don't recall the exact figures.

Q. Well I am afraid that you are about 19 theatres out. A. I see.

Q. I show you a memorandum purporting to give the figures and see if it refreshes your recollection as to the number of theatres in which "As Thousands Cheer" was shown. A. The statement shows 14,981 theatres. This I had prepared.

Q. Will you break it up into theatres owned by the co-defendants, each one of them, and by the independents? A. Loew's played the picture in 145 theatres; Warner's 339; Paramount, 932; RKO in 22; the Fox West Coast in 405, or a total of 1843. And non-defendants was 13,138, a total of 14,981.

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Mr. Davis: I offer that sheet of paper in evidence.
Mr. Wright: There is no objection.
Has that exhibit a number or a letter?
The Clerk: Not as yet.
Mr. Wright: We have no objection to it.
Judge Bright: That will be Exhibit L 4.

(Marked Loew's Exhibit L 4.)

Q. Mr. Rodgers, we have been confronted by the Government with a request for information as to the first-run theatres in 92 cities in the United States having a population of 100,000 and over. Laborious as it may be, I want to take up

each one of those cities with you and ask you who runs your films first-run in that city, why the particular theatre in that city that does so is chosen by you as a first-run theatre. Have you got a list of those theatres in front of you? A. No, sir.

Q. I am not asking you to verify the list at this time but simply to guide your recollection. In Akron, Ohio, which theatre runs your film first-run? A. Loew's theatre.

Q. Is that your own theatre? A. Yes, sir.

Q. Is it your custom when you have a theatre to run your films in it first-run? A. Generally speaking, with the one exception I mentioned the other moment.

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Q. What other theatres in Akron run films first-run? A. There are three others, the Colonial, the Palace and the Strand.

Q. By whom are they owned? A. The Colonial by the Shea operation; the Strand by Warner Bros., and the Palace by Mr. Katz.

Q. Which theatre in the city has the largest seating capacity? A. Loew's theatre.

Q. Are the other three in competition with Loew's on the first-run? A. Very much so, yes, sir.

Q. Do you license any later runs in Akron? A. Yes, sir.

Q. The City of Albany: What theatre in Albany runs your films first-run? A. The Palace and the Grand.

Q. By whom are they owned? A. They are operated by Fabian.

Q. How long has he been a customer? A. Well, I should say for at least 10 or 12 years.

Q. Besides those two theatres, are there any other first-run theatres in Albany? A. Yes, there are three others: The Strand, the Ritz and the Leland.

Q. By whom are they owned? A. The Strand and Ritz are owned by Warner Bros., and I believe the Leland is also operated by Warner's, but I am not sure.

Q. Do they compete with the theatres which you license first-run? A. Yes.

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Q. What is the largest theatre in Albany? A. The Palace.

Q. Is that your first-run theatre? A. It is one of them.

Q. How do the seats in that theatre compare with the next largest? A. They are much larger, I guess nearly twice as many as in any other theatre in town.

Q. Atlanta, Georgia: What is your first-run theatre in Atlanta, Gergia? A. Loew's Grand theatre is the first-run theatre for us there.

Q. I am reminded I did not ask you whether Fabian was an independent theatre in Albany? A. Yes, he is independent.

Q. Then we pass on to Atlanta, Georgia.

Mr. Davis: I apologize to your Honors for this if this is going to be a tedious journey, but I do not know any way to avoid it. That is, as long as the Government confronts us with these innuendoes.

Q. What is your first-run theatre in Atlanta? A. Loew's Grand Theatre.

Q. Is that your own theatre? A. Yes, sir.

Q. How many other first-run theatres are there in Atlanta? A. Six other first-runs.

Q. By whom owned? A. Well, Fox owns one—well, Publix, rather, the Publix-Lucas-Jenkins organization own

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the Fox; they own the Paramount; they own the Capitol and the Roxy. There is a Rialto Theatre operated by W. T. Murray; and there is a Rhodes Theatre there that is operated by us as a move-over or carry-over theatre.

Q. Explain what you mean by a move-over. A. Well, when we finish playing the picture at our Grand Theatre we

move a great many pictures into the Rhodes where there is a continued engagement, continuous.

Q. Do the other theatres in Atlanta compete with yours? A. Yes, sir, they all compete.

Q. How does your Loew's Grand in Atlanta compare in size and equipment and character with the other theatres? A. Well, except for size we consider our theatre the best outlet for us in Atlanta. It is smaller than the Fox and smaller than several others.

Q. To whom do you license first-run in Baltimore, Maryland? A. The Loew's theatres, the Loew's Century, and we play some pictures in the Valencia.

Q. What other first-run theatres are there in Baltimore? A. There are six other theatres.

Q. Who owns them? A. Mr. Mechanic owns the New Theatre; Mr. Schanberger the Keith's; Mr. Rappaport the Hippodrome; Mrs. Hicks operates the Little Theatre and the Mayfair Theatre; and Warner Bros. operates the Stanley Theatre.

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Q. Do those theatres all compete with your theatres in Baltimore? A. Yes, sir.

Q. What is the largest theatre in Baltimore? A. The Stanley Theatre is the largest. Ours is next.

Mr. Wright: If the Court please, he apparently has this written out in the sheet, and I suppose if they want to have it marked as an exhibit we could stipulate that he would testify in accordance with the sheet there. It would save some time.

Mr. Davis: Well, this sheet which I and the witness have in our hands gives the names of the theatres, the towns, the name of the operator in each town, and the number of seats in each theatre. It does not describe the theatres and it does not say what is done

about second or subsequent-runs. Now, I am willing to put this in provided I can get a stipulation that the theatres in which we license our films first-run are the best and most suitable theatre in that particular locality; second, that where there is more than one first-run theatre where we have a theatre, the others are competing with us for the public patronage——

Mr. Proskauer: More than one first-run.

Mr. Davis: More than one first-run theatres.

Mr. Wright: I——

Mr. Davis: Just a moment, Mr. Wright. I am not finished.

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Mr. Wright: Well, you have gone far enough to make it apparent that there won't be any stipulation.

Mr. Davis: That puts me to my proof and I shall proceed as long as I and the witness and the Court hold out.

Q. Baltimore, Maryland. A. Yes, sir?

Q. Have we left Baltimore? A. We are going from Baltimore.

Q. Birmingham, Alabama: Whom do you license first-run in Birmingham, Alabama? A. The Publix-Wilby interests.

Q. Who are they owned by? A. I believe they are in some way associated with Paramount.

Q. How many theatres have they in Birmingham? A. Four.

Q. Are there any other first-run theatres? A. The Empire operated by Mr. Merritt.

Q. Is that independent? A. Yes, sir.

Q. Do you license first-run to all the Publix-Wilby theatres? A. Yes, some of our pictures play in all of them.

Q. What is the largest theatre in Birmingham? A. The Alabama.

Q. What is the seating capacity of the Alabama? A. 2,552.

Q. What is the seating capacity of Mr. Frank Merritt's Empire? A. 924.

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Q. What theatres do you consider best adapted for first-run use in the City of Birmingham? A. The Alhambra particularly.

Q. Alhambra? A. And the Lyric and Ritz. But the Alhambra is the place where we seek to put most of our pictures.

Q. Read that again. A. The Alabama, excuse me.

Q. Yes, that is better. A. My eyesight is getting poor, I guess.

Q. Do you license second, third and fourth-runs in Birmingham, Alabama? A. I don't know just how many runs we license there but we license in addition to the first-run.

Q. I wish if I ask you about any first-run in any city you tell me whether that is your exclusive exhibition there or whether it is followed by other theatres licensing second, third and fourth-run.

Boston, Massachusetts. A. We play our product in our two theatres, Loew's State and Loew's Orpheum.

Q. What other first-run theatres are there in Boston? A. There are the Metropolitan, the Paramount, the Fenway, the Boston, the Memorial, the Translux and Majestic; and in Boston, incidentally, we market our pictures to a number of subsequent-runs.

Q. Do they compete with you? A. All of them.

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Q. Why do you license first-run to Loew's State and Orpheum? A. Because we think they are the best theatres for our purposes in Boston.

Q. Any subsequent-runs licensed in Boston? A. A great many.

Q. Bridgeport, Connecticut. A. In Bridgeport, Connecticut we have four theatres. Loew's operates the Poli, Majestic,

Globe and Lyric, and our product plays in all of them. In addition to that the Warner Bros. operate a theatre there, and there are a number of subsequent-runs to whom we supply our product.

Q. Do you license your own theatres there first-run? A. Yes,

Q. What is the largest theatre in Bridgeport? A. I believe the Poli is the largest one there.

Q. That is your theatre? A. Yes.

Q. The Loew's theatre? A. Yes.

Q. Buffalo, New York. A. Buffalo, New York, Loew's operates the Shea's Buffalo, the Great Lakes and the Hippodrome Theatre, to whom we sell our product.

Q. Any others? A. In addition there are two other theatres, the 20th Century and the Lafayette.

Q. Owned by whom? A. One is operated by the Buffalo 20th Century, Inc., and the other by Basil Brothers.

Q. Are they both independents? A. I believe they are.

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Q. Do they compete with Loew's theatres? A. All of them.

Q. Any subsequent-runs in Buffalo? A. A great number of them.

Q. How do those theatres, as theatres in point of seating capacity and character compare with the other theatres? A. They are the best.

Q. Cambridge, Massachusetts. A. In Cambridge, Massachusetts, there are two first-run theatres there, the Central Square, operated by M. & P., and the University Theatre operated by Stanley Sumner.

Q. Are they independent? A. No. M. & P. is operated by them for Paramount, and the University is an independent to whom we sell our product.

Q. You sell to the independent, do you? A. Yes, sir.

Q. Camden, New Jersey. A. Camden, New Jersey, there are three first-run theatres operated there now, the Savar

operated by an independent, Sam Varbalow, and the Grand and Stanley operated by Warner Bros. We sell them both.

Q. You sell both, Varbalow and Warner Bros.? A. Yes.

Q. Is Varbalow an independent? A. Yes, sir.

Q. Any subsequent-runs in Camden? A. Quite a few, yes, sir. We sell them all or as many of them as we can.

Q. Now, I would suggest that we may make speed, Mr. (653) Rodgers; you understand what the questions are that I am trying to get here, and if you will without waiting for a question go down the list and tell us about the towns as we come to them, and if I find anything omitted I will ask you a question, and we will make some time that way.

Canton, Ohio is the next one. A. Canton, Ohio, there are three first-run theatres there, the Palace operated by an independent; the Ohio, operated by Warner Bros., and Loew's Theatre operated by us. We sell Loew's Theatre, and there are a number of subsequent-run houses there to whom we also sell our product.

Q. All right. Charlotte, North Carolina. A. Do you want me to go forward with the list without you calling the names, or would you rather call the names?

Q. I will call the names? A. All right. In Charlotte, North Carolina, there are three first-run theatres there, the Carolina, the Imperial and Broadway. They are all operated by—I see it says amusement companies, but, in fact, I think they are controlled by the Kincey interests who are an affiliate of Paramount; and we sell our first-run pictures to each one of the three theatres.

Q. You sell to each one of those theatres? A. We sell our pictures to all three, not to each three. There are a few subsequent-runs in the city to whom we also sell our product. (654)

Q. When you say sell your product, you mean license your product? A. Lease it, yes, sir.

Q. Lease it. Now, Charlotte. A. That was Charlotte.

Q. That was Charlotte. Chattanooga. A. In Chattanooga there are two first-run theatres also operated by the Wilby interests, associated, I believe, with Paramount, namely, the Tivoli and the State, and we sell to either one or both of them.

Q. Are there any other theatres in Chattanooga that would be entitled to claim first-run? A. There is no other first-run there, but there are a few subsequent-runs, and we offer our product to them too.

Q. Chicago, Illinois. A. Chicago, Illinois, there are a number of first-runs there. I think McVicker's is operated by Johnny Jones; the Apollo, Chicago, Garrick, by Balaban & Katz; Roosevelt and State-Lake and United Artists, by Balaban & Katz, to whom we sell our product first-run. There is also the Wood's Theatre operated by the Essaness Circuit; the Oriental by a Mr. Costello; the Palace by RKO. There is a World Playhouse operated by a Mr. Vicedomini; and the Grand Theatre is operated by RKO. We sell, as I say, or lease our product to the B. and K. interests for playing in a number of their theatres. Wherever in our opinion the picture is most suitable, that is where we sell it or lease (654a)
it. There are many subsequent-run theatres in the City of Chicago to whom we sell our product.

Q. Who are B. & K. affiliated with, if anyone? A. B. & K. are affiliated with Paramount.

Q. How do their theatres compare with the other first-run theatres you have named in Chicago? A. Generally speaking they are by far the better theatres.

Q. I can't hear you, Mr. Rodgers? A. I say generally speaking they are by far the better theatres.
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Q. For how long have you been selling them or licensing them? A. For many years. Many years. Certainly beyond 10 or 15—20 years, I guess.

Q. Has their handling of your film been satisfactory? A. Yes, sir.

Q. Any subsequent runs in Chicago? A. Quite a number of them.

Q. Cincinnati, Ohio. A. Cincinnati, Ohio, there are eight first-run theatres there, Palace, Albee, Capitol, Lyric, Shubert, Keith, Family and Grand, and they are all operated by the RKO Midwest Corporation.

Q. Do you sell to all of them? Do you license to all of them? A. Well, we license to all of them one way or another. They have a different sort of arrangement in Cincinnati than they have in most cities. They carry over from one theatre to another, and it is not uncommon for our pictures to be played first-run in a majority of those theatres.

Q. Are there any other first-run theatres in Cincinnati? A. No, sir.

Q. Do you license subsequent runs in Cincinnati? A. Quite a few, yes, sir.

Q. Cleveland, Ohio. A. In Cleveland, Ohio, there are seven first-run theatres, of which we have three, State, Stillman and Ohio Theatres; Warner Bros. operates the Hippo-

drome and the Lake, and the RKO Theatres are Palace and Allen.

Q. Do you license there to Loew's, Inc.? A. We license to Loew's, Inc.

Q. How do those theatres compare with the theatres of the other companies? A. We consider them best for our purpose.

Q. Are all of those theatres that you have named in competition? A. All of them, yes, sir.

Q. Subsequent runs? A. Yes, sir.

Q. Columbus, Ohio? A. In Columbus, Ohio, we operate two theatres, Loew's Ohio, and Loew's Broad, to whom we sell our products, to either one of the two, and in addition to

that the Palace and Grand Theatres are operated by the R. F. Keith Company or the RKO.

Q. Do you sell to them? A. No, sir.

Q. Are they in competition with you? A. Directly, but we do sell a number of subsequent runs.

Q. Dallas, Texas? A. In Dallas, Texas, there are six first runs, all operated by the Interstate Theatres; Majestic, Palace, Capitol, Rialto, Melba and Tower Theatres, and we sell to them, or lease to them, and they are also licensed, like in Cincinnati, that is, in some cases they move from one house to another.

Q. Is Interstate Theatres an independent chain? A. No, (657)
sir.

Q. Who owns it? A. Associated with Paramount.

Q. Are there any other first-run theatres in Dallas? A. No, sir.

Q. Do you license subsequent runs in Dallas? A. Yes, sir, quite a few.

Q. Dayton, Ohio? A. In Dayton, Ohio, we have one theatre, Loew's, to whom we lease our product. There is also an independent operation there, the Victory Theatre, and, in addition, State, Colonial and Keith that are operated by RKO Midwest Corporation.

Q. Do you license them? A. No, sir.

Q. Are they in competition with you? A. Directly.

Q. Any subsequent runs in Dayton? A. Quite a few.

Q. How does your theatre in Dayton compare with the others? A. I consider it the very best theatre there.

Q. Denver, Colorado? A. Denver, Colorado, we sell our products, or lease it to the Orpheum Theatre. There are in addition to the Orpheum, the Denver, Paramount, Esquire, the Alladin, and the Rialto, all operated by the Fox West Coast; and in addition to that there is a Denham Theatre there, independently operated.

Q. Who operates the Colorado Orpheum? A. We sell to the Orpheum Theatre, we lease our products, and it is operated by the RKO, but our company has an interest in it.

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Q. Mr. Rodgers, Judge Proskauer is very much averse to that word "sell" as being legally incorrect. If you can, call it "license" hereafter. A. I shall use the word "license."

Judge Hand: A very alarming word, Mr. Witness. It gets right into the copyright cases.

Mr. Proskauer: The word is not so alarming as the fact would be. As long as it is not a fact I don't mind the word, but I don't want him using the wrong word.

The Witness: Well, it couldn't be sold.

Judge Hand: I suppose you are only interested in this from the literary point of view.

Mr. Proskauer: I am deeply interested in the purely legal problem which your Honor expressed this morning.

Q. How does the Orpheum Theatre in Denver, which you license first run, compare with the other theatres there? A. Compares very well. I consider it the best theatre there.

Q. Is it in competition with the other theatres? A. Yes, sir.

Q. Any subsequent runs in Denver? A. A number of subsequent runs.

Q. When I say "any subsequent runs" I mean any subsequent runs licensed by you, of course. A. Yes, sir, we

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license a number of runs there.

Q. Des Moines, Iowa. A. In Des Moines, Iowa, there are four first-run theatres, three of which, the Des Moines, the Paramount and Roosevelt are operated by the Tri-States, I would say an affiliate of or associated with Paramount, to whom we license our pictures; and there is another theatre

there, an RKO Orpheum Theatre, to whom we do not license our pictures.

Q. How do the Tri-States theatres compare with the Orpheum? A. I consider them the most outstanding theatres there.

Q. How long have you licensed to them? A. Sir?

Q. How long have you been licensing to the Tri-States? A. Oh, at least 15 years or more.

Q. Been a satisfactory account? A. Yes, sir, very.

Q. Detroit, Michigan. A. In Detroit, Michigan, there are seven first-run theatres there, the Fox operated by the Fox-Michigan Corporation, the Adams, operated by the Adams Amusement Company, and there are the Michigan, United Artists, Palms State and Broadway Capitol, operated by the United Detroit Theatres, who I believe are in some way associated with Paramount and to whom we license our product; there is also another theatre there, the Downtown Theatre, which I see is listed here as owned by Howard Hughes.

Q. How do the theatres to whom you license your product (660)
first-run in Detroit compare with the other theatres that have first-run? A. I consider them the best theatres there.

Q. How long have you had that account? A. Oh, many years. At least 15, 20 years.

Q. Do you license any subsequent runs in Detroit? A. Yes, quite a number.

Q. Duluth? A. Duluth, Minnesota, there are four first-run theatres there. Norshor and the Garrick, operated by the Minnesota Amusement Company, and the Lyric also operated by that company, to whom we license our products; and then there is another theatre there, the Granada, owned by a Mr. Blackmore, to whom we do not license our product.

Q. How does Mr. Blackmore's theatre compare with the three theatres of the Minnesota Amusement Company, to

which you license? A. I do not feel that it compares at all to the theatres that we play in.

Q. That is a two-headed reply. You say it does not compare at all? A. In other words——

Q. Does it compare favorably or unfavorably? A. I should say that I feel that our outlet is the best to be had.

Q. How long have you had that account? A. Also for many, many years.

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Q. Elizabeth, New Jersey? A. In Elizabeth, New Jersey, there are three first-run theatres, operated by the Skouras interests in one case, operating the Liberty Theatre; and Warner Bros. operating the Regent and Ritz. We license our product to the Ritz and Regent—Ritz or Regent, I might say, both of whom compare most favorably with any other theatre in town.

Q. Are they better theatres for your purpose than the Skouras Liberty? A. I should say by far, yes, sir.

Q. Erie, Pennsylvania. A. In Erie, Pennsylvania, there are three first-run theatres, one of which is operated by the Shea interests, which is called the Shea Theatre; the other theatre, the Warner is operated by Warner Bros. and I believe also their theatre is the Colonial. We divide our product first-run and license there to both Warners and to Shea.

Q. Shea is an independent? A. Yes.

Q. Who owns the Colonial? A. I believe it is operated by Warner. I am not certain of that.

Q. Are the Shea and the Warner theatres in competition? A. Very much so, yes, sir.

Q. Fall River, Mass? A. In Fall River, Mass., there are three first-run theatres, the Durfee, Centre and the Empire, which are operated by an independent operator, Mr. Nathan Yamins, and we sell or lease our products, I should say, to

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one of the three.

Q. I see you are catching on. A. Rapidly.

Q. Are there any other first-run theatres there, except Mr. Yamin's? A. No, sir. He operates all first-run theatres there.

Q. Any subsequent runs there? A. Yes, a number of subsequent runs.

Q. Do you license them? A. We do, yes, sir.

Q. How do those subsequent-run theatres compare with Mr. Yamin's? A. Well, Mr. Yamins owns some of the subsequent runs but they are not suitable for first-run houses.

Q. Flint, Michigan? A. In Flint, Michigan, there are four first-run theatres there, Capitol, Regent, Palace and the Garden, operated by the Butterfield interests, to whom we license our product.

Q. Is Butterfield Theatres affiliated with any of the defendants? A. I have never actually known them to be. I have never had any contact at all with anyone else except Beatty, although I have been told at one time or another that there are others of the defendants who had interests in the theatres, but I do not know it for a fact. I deal only with the general manager and president of that company.

Q. Has that rumor that some of the defendants might be interested in Butterfield had anything to do with your licensing? A. None whatsoever.

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Q. You negotiated direct with Butterfield? A. Yes, sir.

Q. Fort Wayne, Indiana? A. In Fort Wayne, Indiana, there are five first-runs, the Emboyd, Paramount, Jefferson, Palace and the Wayne, four of which are operated by the Harrison Theatre and Realty Company, to whom we license our products.

Q. Is that an affiliate or an independent? A. They are independent, to the best of my knowledge.

Q. Who owns the Wayne? A. A gentleman by the name of Pete Mallers, to whom we do not license our product.

Q. Is he an independent? A. Yes, sir, he is.

Q. How does his theatre compare with the theatres of the Harrison Theatre & Realty Company? A. It doesn't compare at all. Very small in its capacity.

Q. Fort Worth, Texas? A. In Fort Worth, Texas, there are three first-run theatres, the Worth, Hollywood and the Palace, all operated by the Interstate Theatres, who, I believe are associated with Paramount, and to whom we license our product at first-run there.
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Q. Are there any other first-run theatres in Fort Worth? A. No, sir, but there are subsequent runs to whom we license our product.

Q. You license subsequent runs in Fort Worth. Gary, Indiana? A. In Gary Indiana there are the Palace and the Gary and the State. The latter theatre is operated by the Publix-Great States, to whom we license our product; and at the moment I cannot recall the name of the owner of the Palace or the Gary, which is listed here as affiliated. I cannot recall his name but we do not license our product to him.

Q. Why do you sell to Publix-Great States there instead of to the Palace and the Gary? A. It has been a very good outlet for us for a good many years. We feel under the circumstances it is the best outlet for us.

Q. It is not as large a theatre as the Palace, is it? A. No, it is not near as large, but we believe we can get a better representation by longer playing time, and the account has been very satisfactory over the period of years.

Q. How long have you had that account? A. Many, many years. I couldn't tell you, Mr. Davis; I don't know, but a good many years.

Q. Grand Rapids, Michigan. A. In Grand Rapids, Michigan, there are five first-run theatres operated by the But-
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terfield interests, the Majestic, Keith's, Regent, Center and

Kent, and we license our product to the Butterfield interests for showing in those theatres or in one or all of them.

Q. Is it shown in all five theatres? A. Not necessarily, unless it is moved from one to the other occasionally, but, generally speaking, it is shown in but one of the five.

Q. Are there any other first-run theatres in Grand Rapids? A. No, sir.

Q. Any second runs? A. A number of second and subsequent runs, to whom we license our products.

Q. How do those second and subsequent-run theatres compare to the Butterfield Theatres? A. There is none of them that can compare.

Q. In size, equipment or location? A. No, sir, can't compare at all.

Q. Hartford, Connecticut. A. In Hartford, Connecticut there are eight first-runs, of which our company operates two, Loew's Poli and Loew's Palace; there is also a theatre called Dow's Theatre, operated by a Mr. Dow, I suppose—I don't know him. Mr. E. M. Loew operates a theatre; Warner Bros. operates a theatre, the Regal; and the Harries Bros. are listed as operating the State; and the Strand is also operated by Warner Bros.

Q. Do all those first-run theatres compete with yours? (666)

A. Yes, sir.

Q. Do you show first-run in any theatres in Hartford except your own? A. No, sir.

Q. Are there any subsequent run licenses in Hartford? A. Yes, sir; and to whom we license our product.

Q. Houston, Texas. A. In Houston, Texas, there are four first-run theatres, of which one, Loew's State, is operated by us and to whom we license our product; the other three theatres, the Majestic, the Metropolitan and Kirby, are operated by the Interstate Theatres.

Q. Do you license in Houston, any theatre except your own, first-run? A. We have licensed a few pictures to Inter-

state Theatres there when our theatre is congested in bookings, but not many.

Q. How does your theatre in Houston compare with the Majestic, Metropolitan and Kirby? A. We think it by far the best theatre in Houston.

Q. Any subsequent runs licensed in Houston? A. Yes, sir, quite a few.

Q. Indianapolis, Indiana. A. In Indianapolis, Indiana, there are five first run theatres, which we operate one, Loew's Palace; and in addition to that there is a Circle, Indiana and Lyric Theatres, operated by what is known as the Fourth Avenue Amusement Company, but which, in reality, I believe, is associated, partially, with Paramount—I am not

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sure of this; and then there is the Keith's theatre there operated by RKO. We sell or lease our product only to Loew's Palace Theatre.

Q. Any subsequent runs? A. Yes, we sell—or lease our product, yes, to a number of subsequent runs.

Q. Jacksonville, Florida? A. In Jacksonville, Florida, there are four first-run theatres—no, I see there are five here, four of which are controlled by the Florida Theatres Company affiliated, I believe, with Paramount. That is, Florida, Palace, Arcade and Temple Theatres; and also the St. Johns Theatre, operated by what is listed as the St. Johns Operating Company; but is, I believe, Mr. Zeid, an independent operator. We lease our product to the four theatres, Florida, Palace, Arcade and Temple.

Q. How do those four theatres compare with the theatre of the St. Johns Operating Company? A. I consider them most superior.

Q. What is their relative seating capacity? A. Well, the Florida seats 2100, the Palace 1800, the Arcade 1100, the Temple 889, and St. Johns 900. We do not play many of our pictures in the Temple Theatre.

Q. How long have you had that account? A. For very many years.

Q. Are there any other second-run licenses? A. Quite a number, yes, sir; to whom we license our product.

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Q. Jersey City? A. In Jersey City there are three first-run theatres, the Loew's Journal Square, operated by our company, and the State, by the Skouras Company, and the Stanley by Warner Bros. We license our product to our own theatre.

Q. Any subsequent runs? A. Yes, a number of them to whom we lease or license our product.

Q. Kansas City, Kansas. A. In Kansas City, Kansas, there are two first-run theatres there, the Granada and the Electric Theatre.

Q. I am going back to Jersey City for a moment. Are Skouras and Warner in competition with your theatre there? A. Yes, sir, definitely.

Q. Go ahead to Kansas City. A. In Kansas City, Kansas, in that situation the Granada and the Electric Theatres are first run. One is operated by what is known as the Fox Midwest Theatres, Inc., and the other the Electric Theatre Company. I believe that they are the same operators that operate both theatres.

Q. Which one do you license? A. We license to the Fox Midwest Theatres there.

Q. You aren't sure that they are both operated by the same operator there? A. I am not sure at the moment now, but Fox Midwest Theatres has been our account for many years and I am inclined to think they are both operated by

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the same people, although of that I am not certain.

Q. Kansas City, Missouri. A. In Kansas City, Missouri, there are seven first-run theatres, of which we operate one, the Midland Theatre, to whom we license our product. The

others, the Uptown, Esquire, Fairway and Tower Theatres, are operated by Fox Midwest Theatres. The Newman is operated by the Paramount Kansas City Operating Corporation and the Orpheum is operated by the RKO Orpheum. We do not license except to our own theatre in Kansas City.

Q. How does your theatre compare in size? A. In size——

Q. And availability, to the others? A. In size it is a great deal larger. In all ways, it is the finest theatre in Kansas City.

Q. You license subsequent runs in Kansas City? A. Yes, sir, quite a few.

Q. Knoxville, Tennessee. A. There are four first-run theatres there, the Tennessee, the Riviera, the Strand and the Bijou, operated by the Publix-Wilby, associated, I believe, with Paramount, to whom we license our product. There are no other first-runs there that I know of.

Q. Do you license subsequent runs in Knoxville? A. Yes, sir.

Q. Are there any other theatres in Knoxville adapted

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to be first-run theatres? A. Not that I know of, no.

Q. Long Beach, California. A. In Long Beach, California there are seven first-run theatres, of which Fox Westcoast controls four, the West Coast, the United Artists, the Imperial and the Long Beach. There are three that are listed as operated by Milt Arthur, State, Cabart and Rivoli. We sell or lease, rather, our produce to the Fox Westcoast Theatres.

Q. Is that an old account? A. Very old.

Q. How old? A. Well, we have been leasing to them even prior to the time the Fox Westcoast operated the theatres. We leased to them when they were more or less independent many years ago.

Q. How do their theatres compare with the three theatres owned by Milt Arthur? A. We consider them the best theatres there.

Q. Do you license any subsequent runs in Long Beach? A. Yes, a number of them.

Q. Los Angeles, California. A. There are a number of first-run theatres in Los Angeles. I would have to count them. There are listed here twenty theatres in Greater Los Angeles, of which the Fox West Coast operated the Loew State, Grauman's Chinese, Uptown, Carthay Circle, United Artists, Four Star, Fox Wilshire, the Ritz, the Los Angeles, the Orpheum, Egyptian; RKO operating RKO Hill Street, (671)
the Pantages; Milt Arthur operates the Paramount in Los Angeles and a Paramount in Hollywood; Warner Bros. operate Warner Bros. Theatre in Los Angeles, and the Warner Bros. Hollywood Theatre, as well as the Wiltern Theatre in Los Angeles; Galston & Sutton operate the Hawaii; and Mr. Popkin has the Million Dollar, the Vogue and the Pan-Pacific.

Loew's product is licensed to Fox Westcoast and played in several theatres simultaneously, sometimes the Los Angeles, the Egyptian and Uptown, at other times Loew's State, Chinese and United Artists.

Q. Is Loew's State owned by Loew's, Incorporated? A. The building is, yes, sir.

Q. Under lease to Fox Westcoast? A. Yes, sir.

Q. How do the theatres you have named of Fox Westcoast compare with the others on your list? A. How many?

Q. How do they compare with the others on your list? A. We consider them the best outlet there.

Q. Is there competition among all these first-run theatres in Los Angeles? A. Very keen; very keen competition, yes, sir.

Q. Is there any subsequent run out in Los Angeles? A. There are a number of subsequent runs to whom we license our product there.

Q. Louisville, Kentucky. A. In Louisville, Kentucky, (672)
there are six first-run theatres. There are the Rialto, Strand and Brown, operated by the Fourth Avenue Amusement Company; Loew's United Artists Theatre, operated by our company; and the Mary Anderson and the National operated by the Peoples Theatre Company.

Loew's product is licensed to Loew's United Artists Theatre and occasionally, and I think frequently, carried over, I think, to the Brown Theatre there, in which we have an interest.

Q. What is the best theatre in Louisville? A. Loew's United Artists, by far.

Q. Do these theatres compete? A. They all compete, yes, sir.

Q. Any subsequent runs in Louisville? A. Yes, sir; we sell—lease subsequent runs there.

Q. Lowell, Massachusetts. A. In Lowell, Massachusetts, there are three first-run theatres, operated by Mullen & Polinski, I believe, for Paramount, or in association with Paramount. They operate the Strand and the Merrimac Square. RKO operates the Keith Theatre. We license our product to the Strand or Merrimac.

Q. How do they compare as theatres with RKO Keith Theatre? A. Very favorably, very good theatres.

Q. How long has that been your account? A. Many years.
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Q. Memphis, Tennessee. A. In Memphis, Tennessee, Loew's operate two theatres there, the Loew's Palace and the State theatres, to whom we license our product. And in addition to them there are two theatres operated by the Malco Theatres, Inc., the Strand and the Malco, who, I be-

lieve, are associated with Paramount; and Warner Bros. operate a theatre there, the Warner Theatre.

Q. How do the Loew Theatres in Memphis compare with the other theatres you have mentioned? A. I consider them the best theatres there.

Q. Do the other theatres compete with Loew's in Memphis? A. Yes, sir.

Q. Miami, Florida. A. In Miami, Florida, there are four theatres listed as first-run, the Capitol, Miami, Paramount and Olympia. The Capitol and Miami are operated by the Wometco Theatres, and the Paramount and Olympia are operated by Paramount Publix. The Capitol and Miami are independent theatres. The Paramount and Olympia are operated by associates of the Paramount, to whom we license our product.

Q. How do the Paramount theatres compare with those of the Wometco? A: I consider them superior theatres.

Q. The fact that they are owned by Paramount, does that have anything to do with your selection of those theatres for first-run? A. Nothing whatever to do with it. We have

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been selling them for many years and I believe, in one instance, before Paramount had any interest there.

Q. Milwaukee, Wisconsin. A. In Milwaukee, Wisconsin we have six first-run theatres there, the Wisconsin, the Palace and the Strand, that are operated by the Fox Wisconsin Amusement Corporation; and Warner Bros. operate three theatres, the Warner, Alhambra and the Riverside. We license our product to the Fox-Wisconsin Amusement Company.

Q. How old is that account? A. That also is an account of many years' standing.

Q. How do the theatres of the Fox-Wisconsin Amusement Company compare with the theatres of Warner Bros. in Mil-

waukee? A. I would say they are both on a par, as they both operate very good theatres.

Q. Are they competing? A. Very much so.

Q. Any subsequent-run license in Milwaukee? A. Yes, we license a number of subsequent-runs there.

Q. Minneapolis, Minnesota. A. In Minneapolis, Minnesota, there are eight first-run theatres, all operated by the Minnesota Amusement Corporation, the Radio City, State, Orpheum, Gopher, Aster, Century, World and Lyric, and our product is licensed to play in one or several of them. Sometimes they carry over our pictures there from one theatre to another. There are no other——

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Q. Any other first-run theatres in Minneapolis? A. There is no other there. There is none of the subsequent runs that would merit first-run consideration. However, we sell a number of subsequent runs there, or lease them.

Q. Nashville, Tennessee. A. In Nashville, Tennessee, there are four first-run theatres, of which Loew's Inc. operated one, Loew's Vendome, to whom we license our product, and there are three other theatres operated by the Crescent Amusement Company, the Paramount, the Knickerbocker and the Princess, to whom we do not lease our product.

Q. Do they compete with Loew's Vendome? A. Very much so, yes, sir.

Q. Newark, New Jersey. A. In Newark, New Jersey, Loew's operates—there are five first-run theatres, of which Loew's operates one, Loew's State, to whom we license our product. There are the Paramount and Adams theatres, operated by Adam Adams; Proctor's Palace, operated by RKO; and the Branford Theatre operated by Warner's. We do not license our product to anyone there excepting to Loew's, although we do sell a number of subsequent runs.

Q. How does Loew's Theatre in Newark compare with the theatres in these other persons' names? A. Very good

theatre and compares very favorably; in fact I should say it is about the best theatre there.

Q. Are they all competing? A. Yes, sir.

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Q. New Bedford, Massachusetts. A. In New Bedford there are four first-run theatres, the State, Empire, New Bedford, operated by Harry Zeitz, and the Olympia Theatre operated by Mullin and Pinanski who, I believe, are associated with Paramount. And in that case we license our product to both interests.

Q. To what? A. We license our product to both interests.

Q. Is Harry Zeitz an independent? A. Mr. Zeitz is an independent.

Q. New Haven, Connecticut? A. In New Haven there are five first-run theatres, of which Loew's Inc. operates three, Loew's Poli, Loew's College and Loew's Bijou theatres. There is a Paramount Theatre there operated by M. & P., who, I believe, are associated with Paramount; a Roger Sherman, operated by Warner's. We license our product to our own theatres, the Poli and the College and the Bijou.

Q. How does the Poli compare with the other theatres in New Haven? A. The Poli is very good. As a matter of fact the Poli Theatre there is the largest theatre in the city.

Q. M & P and Warner theatres compete with your theatres? A. They are also good theatres but we think we have the best for our purposes there.

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Q. New Orleans, Louisiana. A. In New Orleans, Louisiana, there are six or seven I should say, first-run theatres, the Saenger, Tudor and Globe theatres, operated by the Paramount-Richards organization; we have the Loew's State theatre which we operate; there are two theatres there, the Orpheum and the Liberty, operated by Singer, who, I believe, is associated with RKO; and there is a Center Theatre, which operates spasmodically, operated by a Mrs. Lazarus.

We license our product to our own theatre, Loew's State, which is by far——

Q. How does your theatre compare with all the others you have named? A. I think it is the best theatre there. I think they are all the best theatres, generally speaking, except when I say there are some of them that are on a par.

Judge Bright: Even then you are being modest.
The Witness: Slightly, yes, sir.

Q. Do the other theatres compete with yours in spite of all your superiority? A. They all do, yes, sir.

Q. Any subsequent runs in New Orleans? A. Yes, we sell some subsequent runs there, or lease them, rather.

Q. New York. A. New York City, there are a great many first-run theatres. Those that are considered first run, I should say, are sixteen or seventeen in number.

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Name them. A. Seventeen, I believe. The Astor is one. I just don't know the name of the people that are operating that now. We used to operate it. The Ambassador Theatre in New York also is a new one, new addition for first-run motion pictures too. Then there is the Roxy, operated, I believe, by people associated with the Fox Company. The Globe and Gotham, operated by Brandt. Rialto, by Arthur Mayer. Music Hall, Radio City Music Hall Corp. I believe Mr. Rockefeller has something to do with it, but it is operated by the Radio City corporation. The Capitol Theatre, which we operate. The Hollywood Theatre of Warner's. Strand Theatre of Warner's. The Rivoli Theatre, I believe, is operated, partially at least, by Paramount. And the Paramount Theatre, operated by it. And then we have the Loew's State, and we have the Criterion Theatre. In addition to that there is a Victoria, operated by the same people whose name I don't know, that are operating the Astor Theatre. Then there is a Republic Theatre that, I think,

Brandt operates in conjunction with the Republic Company. And there is the Winter Garden Theatre, that I believe the United Artists now have something to do with as a first-run outlet.

So far as our product is concerned, we license it to a number of different theatres, Radio City Music Hall playing some, and playing one right now as a matter of fact and the
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Capitol Theatre plays a number of our pictures.

Q. The Capitol is yours? A. So do Loew's State and Criterion.

Q. The Capitol, Loew's State and Criterion are yours? A. Yes, sir.

Q. What other persons other than your own theatres, outside of Radio City Music Hall, do you license? A. We have played some pictures with the Globe and Gotham operated by Mr. Brandt.

Q. Is he an independent? A.* I believe we did sell one picture to the Paramount Company and that was about a year or two ago, for the Paramount Theatre, and we might have sold one to the Republic, but we have sold a number of first-runs, or licensed a number of first-runs, in the City of New York to different interests.

Q. You don't make a practice of running your pictures the first-run in any theatre except your own in New York, do you? A. Well, we play a great many pictures at the Radio City Music Hall—I say a great many; as many as playing time permits, but there is by far more of our product played in the theatres that we operate, like the Capitol and the Criterion and the Loew's State. By far the majority of our pictures find their way to those theatres.

Q. Are all those theatres located in the Broadway dis-
(680)
trict? A. They are all located in the downtown district, yes, sir, not all on Broadway, but they are all in the vicinity.

*See p. 549 for correction.

Q. Is there any competition in the theatre business on Broadway? A. I should say plenty.

Q. Any competition in the motion picture business among these theatres on Broadway that you have named? A. They are all in competition with each other.

Q. What would you say as to the relative excellence of the Capitol, Loew's State and Criterion compared with their competitors on Broadway? A. Well, I measure their value to us as a distributor in ability to give us film rental and, under those circumstances, I would say the Radio City and the Capitol are both the theatres that draw off the greatest revenue to us.

Judge Bright: You consider the value of a theatre by its revenue-producing ability?

The Witness: Generally speaking, yes.

Judge Bright: That is, the amount of money that they can produce determines whether they are of greater or of lesser value?

The Witness: Generally speaking, and it generally follows that they are so much better theatres.

Judge Bright: You mean better theatres in equipment?

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The Witness: Better equipment, better seating capacity as a rule, but the final measuring stick is usually where you can get the most revenue.

Q. Do you license any subsequent runs in the City of New York? A. A great number, yes, sir.

Q. Any idea how many? A. I should say five or six hundred, I guess.

Q. Let us go to Norfolk, Virginia, leaving New York for further and later consideration. A. Norfolk, Virginia, we have Loew's State Theatre there; and there are also two the-

atres, the Norva and Granby, that are owned, I believe, by the Fabian interests; there are three theatres there operated by Mr. Wilder, known as the Newport, Colley and the Centre theatres.

Judge Bright: The Fabian Theatres own the complete interests in the theatres?

The Witness: To the best of my knowledge, they do. In this particular situation there is some sort of pooling arrangement, with which I am not wholly familiar with our Company in this particular place, where, in addition to Loew's State, we also play in some of the Fabian theatres there which were formerly owned by Wilmer & Vincent, which, to my knoweldge, was wholly independent.

Judge Bright: Was that the same Fabian you mentioned in Albany?

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The Witness: Yes, sir, but that is a separate, I believe, a separate corporation because Fabian has operated those theatres in Albany for many years, whereas in these theatres in Norfolk, and I believe he is also interested in Richmond, he just acquired the entire interest, or part interest, in Wilmer & Vincent's, within the last year. He was never operating there up until a year ago.

Q. Who do you license in Norfolk? A. Who do we license? We license the Loew's in Norfolk.

Q. Is Wilder an independent? A. Yes, sir.

Q. Does he compete with you? A. He does.

Q. Does Fabian compete with you? A. Yes, sir.

Q. Any subsequent runs in Norfolk? A. Quite a few to whom we license our product.

Q. Oakland, California. A. In Oakland, California, there are eight first-run theatres, Fox, Paramount, the Orpheum,

Grand Lake and the Franklin, operated by Fox West Coast, and in addition to that there are three others, the T & D, Esquire and Roxy, operated by a Mr. Blumenfeld.

We license our product to the Fox West Coast Theatres.

Q. Is Blumenfeld an independent? A. Yes, sir.

Q. How do the Fox West Coast theatres compare with the three managed by Blumenfeld? A. Generally speaking, they are very superior.

Q. How long have you had that Fox Westcoast account?

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A. Many years.

Q. Been a satisfactory account? A. Very.

Judge Bright: How do you know what film rentals the other theatres draw off?

The Witness: Well, you cannot tell what they draw off but I know from my dealings with individuals such as this, for instance, when you ask me that specific question, I can tell you that in Fox West Coast Theatres in Oakland, if I license a picture to be played first-run there, and the picture shows any merit at all, it is not very difficult for me to persuade the Fox West Coast people to play that picture in another theatre or to hold it another week, whereas my experience with other people is not the same, whether the picture is doing well or not. Your greatest problem with a great many individually operated theatres is to get them to play pictures for as long as the picture deserves. They like to get new pictures and change very frequently, and whereas in these particular theatres as in a good many others——

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Judge Bright: What experience—taking that particular one there—what experience have you had with Blumenfeld?

The Witness: None whatever, except in the other neighborhood theatres, where he buys or leases our product, I have murder on earth sometimes to get him to give what we think is proper treatment to our pictures in those other theatres, and I have no reason to believe he would treat me any different in Oakland than he treats me in neighborhood theatres where I deal with him.

Judge Bright: Do you sell him all subsequent-run pictures?

The Witness: I try to; at least we license them in other theatres.

Judge Bright: Do you license any first-run pictures in any of his theatres?

The Witness: No, sir, but he has a number of neighborhood theatres in Oakland and San Francisco to whom we license pictures—to him and to his interests.

Judge Hand: To what do you attribute this, the fact that Blumenfeld is a hard trader and Fox an easier trader?

The Witness: I would say they are both very hard traders, as far as that is concerned, but between the two I usually can iron out any differences that might exist with the Fox people, whereas I am not always so

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sure—take, for instance, you mentioned this particular case here in San Francisco. I was——

Mr. Davis: A little louder.

The Witness: I was in San Francisco here just two or three weeks ago and one of the purposes that brought me there was to try to make a deal with Blumenfeld and some of his associates in some of his theatres, and his associates had not bought our pictures for six or eight months. So it finally developed that I ended up having to sell some one else where Mr.

Blumenfeld's theatres are operating, and now I do not know that I am going to do much business with Blumenfeld in those theatres at all. In other words, you don't have a dependable outlet, whereas in the Fox Company, I may squabble with them frequently, but no matter what the differences are, they are usually ironed out.

Q. Were you selling the Fox-West Coast in Oakland before Blumenfeld came on the scene? A. Oh, yes.

Q. Fairly treated by the Fox-West Coast? A. Were we fairly treated? Yes, sir.

Q. How do their theatres in Oakland compare with the Blumenfeld theatres? A. For the most part they are much larger and better operated theatres.

Q. Oklahoma City, Oklahoma? A. In Oklahoma City there are six first-run theatres, the Criterion, Midwest, Lib-

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erty, Tower, the Warner and the State. The first four theatres are listed here as Standard Theatres—the first five theatres—and the last one, the State, operated by Mr. Noble, who I believe is an independent but whom I do not know. We lease our product to Joe Cooper there, who is associated with, I assume, with this Standard Theatres, but I know he is associated with the Paramount Company.

Q. How do the theatres in Oklahoma City, operated by Standard, compare with the theatre operated by Noble? A. With one exception, they are of larger seating capacities, and certainly much better theatres.

Q. How long have you had that Standard Theatre account in Oklahoma City? A. Well, I have dealt with them—as I say, I know him as Joe Cooper—Joseph Cooper—and I dealt with him, at least our company has, for these many years, at least 15, 18, 20 years at least.

Q. Has it been a satisfactory account? A. Yes, sir.

Q. Omaha, Nebraska? A. In Omaha, Nebraska, there are four first-run theatres, three of which are operated by Tri-States, the Orpheum, Paramount and the Omaha. Tri-States, I believe, is associated with Paramount. Then there is another theatre, the Brandeis, operated by RKO. For many years we have licensed our product to the Tri-States, Mr. Abe Black.

Q. How do the Tri-States Theatres compare with the
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Brandeis, operated by RKO? A. They are much larger and much better theatres.

Q. Do the RKO theatre and Tri-State theatre compete with each other? A. Yes.

Q. Have you subsequent runs in Omaha? A. Yes, we have quite a few.

Q. Paterson, New Jersey? A. In Paterson, New Jersey, there are four first-run theatres operating there, three of which, the Fabian, the Garden and Rivoli, are operated by Warner Bros. The U. S. Theatre is operated by Adam Adams, who, I believe, is in some fashion associated with Paramount. We divide our product there. We license part of it to Adam Adams and the other, remaining part, to Warner Bros.

Q. Do you divide it on any fixed percentage or just as the trade works out? A. No, I think one-third of the product goes to Adam Adams and the other two-thirds go to Warner Bros.

Q. How are those fractions arrived at? A. In this particular case it was brought about by a very great difference of opinion between Warner Bros. and ourselves about 12 or 14 years ago. We had a rather serious disagreement and we sold Adam Adams, who was operating that theatre at that time, part of our product, and some little time later we reached an understanding with Warners and then com-
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menced to supply them, too, but we never felt like withdraw-

ing our support from Adam Adams, because he came to us when we needed him, and that is how it came about.

Q. Peoria, Illinois? A. In Peoria, Illinois, there are three first-run theatres there, the Madison, the Palace and the Rialto, operated by the Great States Amusement Corporation, which is associated with Paramount, and to whom we license all our products first-run.

Q. Those are the only first-run theatres in Peoria? A. Yes, sir.

Q. Have you any subsequent runs there? A. There are a few to whom we license our product.

Q. Philadelphia, Pennsylvania? A. Philadelphia, Pennsylvania, there are listed ten first-run theatres there, of which eight are operated by Warner Bros., the Aldine, Boyd, Capitol, Earle, Fox, Mastbaum, Stanton, and Stanley, to whom we lease our product. The Studio and Erlanger are listed as operated by William Goldman—no, the Studio by William Goldberg and the Erlanger by William Goldman. We don't license our product to either one of them.

Q. How big is the Studio? A. The Studio Theatre is a very small-theatre. I imagine it is a theatre that plays mostly foreign pictures.

Q. Listed as having 398 seats. A. Very small, yes, sir.

Q. What is the biggest theatre in Philadelphia? A. The

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biggest theatre is the Mastbaum Theatre.

Q. How many seats? A. 4800 seats.

Q. How does that compare in size and capacity with the Erlanger [illegible]. Well, it compares much better. The Erlanger is only 1[illegible], but, incidentally, we do not sell the Mastbaum Theatre, in Philadelphia. We have always considered it off location and for many years we did not sell it and haven't sold it lately, but we licensed our product for showing in others of the Warner theatres.

Q. You don't license the Mastbaum? A. No.

Q. What are the Warner theatres you license in Philadelphia? A. We play some pictures in the Aldine, the others in the Boyd.

Q. How big is the Aldine? A. 1297 seats.

Q. How big is the Boyd? A. 2338. The Aldine Theatre is what we used to call a real run theatre. They put a picture in there and they will keep it for weeks and weeks, if the business merits it. The Boyd is a rather expensively operated theatre and they will keep it for a limited period of time. The Stanley Theatre has been more or less of a two or three weeks and maybe sometimes four weeks. The Earle Theatre is a week-stand house. Largely, the Fox was, I believe——

Judge Bright: How long did the Erlanger operate?

The Witness: The Erlanger has not been operating

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for many years. That is one of the bases of these suits that was spoken of this morning. It has been closed for many years. It just opened lately, I believe. I think it was open last week, or it was due to open, someone told me, for a particular picture, but it has been closed for a long time, for some years.

Judge Bright: Hasn't it been operating during this litigation?

The Witness: No, sir, except maybe for an occasional legitimate show which would go in there, but not with pictures. It has not been operating to the best of my knowledge.

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Q. You license the Aldine, the Boyd and the Capitol. What others in this list? A. The Earle, the Fox, the Stanton and the Stanley.

Q. Why don't you license to the Mastbaum? A. Well, we did many, many years ago license the Mastbaum, and then

business got so bad they closed the Mastbaum. It was a very, very expensive house. Well, we considered it to be very badly off location, so when they opened it we would not license out pictures there. We confined the licensing of our pictures to the other theatres in which we had had more favorable experience, and have not, since the theatre opened, renegotiated any deals with them at all for the Mastbaum Theatre.

Q. How does the location of the Mastbaum compare with the Erlanger? A. They are very close together. They are just within a block or two blocks of each other on Market Street.

Q. Is what you say about the Mastbaum being off location equally applicable to the Erlanger? A. I would consider so, yes, sir.

Mr. Proskauer: One block further up.

The Witness: Yes, in the same neighborhood.

We have never licensed any picture to the Erlanger Theatre.

Q. Are there any subsequent-runs licensed in Philadelphia? A. Yes, quite a few.

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Q. Pittsburgh, Pennsylvania. A. In Pittsburgh, Pennsylvania there are nine first-run theatres, of which the Loew's Company operate Loew's Penn, to whom we license our product. In addition to that there is the Harris Theatre operated by the J. P. Harris Theatre Corporation; the Harris-Senator Theatre operated by the same company; the Fulton, operated by the Fulton-Shea Theatres; the Stanley, Warner and Ritz Theatres, operated by Warner Bros. The Barry Theatre, operated by the Varsity Amusement Company, and the Art Cinema by Morris Rubin.

Q. How many of them are independents? A. Sir?

Q. How many of these you have named are independents? A. I would consider the Harris and the Senator and the Fulton to be independent, and the Art Cinema. I do not

know who the Varsity Amusement Corporation is. It operates the Barry Theatre.

Q. Whom do you license in Pittsburgh first-run? A. We license to Loew's Penn Theatre there and also to Warner Bros'. Stanley Theatre.

Q. How do they compare in size with the other theatres in Pittsburgh? A. They are the two largest theatres in Pittsburgh.

Q. Very much the largest, aren't they? A. The largest, yes, sir.

Q. Are there any subsequent-run theatres licensed in (693)
Pittsburgh? A. Yes, a number of them to whom we license our product.

Q. Portland, Oregon? A. In Portland, Oregon, there are eight first-run, six of them operated by the Hamrick-Evergreen, associated with the Fox West Coast. That is the Paramount, Orpheum, Oriental, Playhouse, Music Box and Mayfair theatres. We, however, sell to the J. J. Parker Theatre interests who operate the Broadway and United Artists theatres there.

Q. Are they independent? A. They are independent.

Q. Now, Hamrick-Evergreen is Fox West Coast, is it? A. Yes, sir.

Q. Any subsequent runs at Portland, Oregon? A. Quite a few, and we license our product to them.

Q. Providence, Rhode Island? A. In Providence, Rhode Island, there are six first-run, of which we operate Loew's State Theatre there. There are three independent operations operated by Ed Fay, the Majestic, Fay's, and Carlton Theatre. There is the Strand Theatre operated by an Ed Reed, and the Keith-Albee Theatre operated by RKO.

Q. Do you license only your own theatres first-run? A. No; we have occasionally carried over some of our product for a continued first-run to Fay's Carlton Theatre, in whom we have an interest.

Q. How does your theatre there, Loew's State, compare
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with the other theatres in Providence? A. We have by far the largest theatre there, and as such I consider it by far the best.

Q. Are there subsequent-runs in Providence? A. Yes, quite a few to whom we license our product.

Q. Reading, Pennsylvania. A. In Reading, Pennsylvania, there are six first-run theatres, of which we operate one, Loew's Colonial Theatre. In addition to that, Wilmer & Vincent operate the Embassy and Ritz; Jay Emanuel operates the Astor and Park; and Warner Bros. operate the Warner. We license only to Loew's Colonial Theatre there.

Q. Are there any other theatres in competition with you in Reading? A. They are all in competition with us.

Q. Do you license any subsequent-runs in Reading? A. Yes, sir, quite a few.

Q. Richmond, Virginia. A. In Richmond, Virginia, there are six first-run theatres of which we operate Loew's Theatre there. Morton Thalheimer operates the Byrd, State and Capitol there. The Fabian interests operate the National and Colonial. We license our pictures to Loew's, but they are shown also at the National and Colonial because of an interest we have in the operation of the Fabian theatres there.

Q. What is the best theatre in Richmond? A. Sir?

Q. What is the best theatre in Richmond? A. Well, our
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theatre I consider by far the best.

Q. Are the other theatres in competition with you? A. They are all in competition with us.

Q. Do you have any subsequent-run licenses in Richmond? A. We sell quite a few, yes, sir.

Q. Rochester, New York. A. In Rochester, New York, there are six first-run theatres, the Capitol, the Palace, the Century, the Temple and the Regent, and we operate the

Loew's Rochester Theatre there to whom we lease our product. The Palace is operated by the RKO, and I believe the Schine interests operate the Century and Temple. I am just not sure which are the names of the theatres he operates, but our product is entirely leased to Loew's Theatre.

Q. How does Loew's Theatre in Rochester compare with the other theatres? A. Our theatre is by far the largest, and I consider the best.

Q. Do the other theatres compete with you? A. Yes, they all do.

Q. Do you have any subsequent-runs in Rochester? A. Quite a number, yes.

Q. St. Louis, Missouri. A. In St. Louis, Missouri, there are seven first-run theatres, of which we operate two, Loew's State and Loew's Orpheum. The Fanchon & Marco interests operate the Ambassador, the Fox, the Missouri, the St. Louis and the Shubert.

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Q. What is the Dayton Theatre Company? A. Dayton Theatre Company is our company, or, at least, it is a subsidiary of our company, but we operate the theatres, Loew's, Inc.

Q. Do you operate Loew's State and Loew's Orpheum? A. Yes.

Q. Do you license first-run only to your own theatres? A. Only to our own theatres.

Q. Are there any subsequent-runs licensed in St. Louis? A. A number of subsequent-runs licensed there, yes.

Q. Do the other first-run theatres compete with your State and Orpheum? A. They all do.

Q. St. Paul, Minnesota. A. In St. Paul, Minnesota, there are six first-runs, of which five of them are operated by the Minnesota Amusement Company, associated with Paramount. They are the Paramount, Orpheum, Strand, Tower and Riviera theatres; and the World Theatre is operated by

the Berger Amusement Company, an independent. We license our product to the Minnesota Amusement Company.

Q. What is the seating capacity of the Berger Amusement Company theatre, the World? A. It seats 800.

Q. And what is the seating capacity of the Paramount? A. 2,362; and then the Orpheum, 2,183; the Strand, 759, and the Tower 1,040, the Riviera 1,306.

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Q. How long have you been licensing the Minnesota Amusement Company first-run in St. Paul? A. For many years.

Q. How long? A. For many years.

Q. Has it been a satisfactory account? A. Very

Q. Do you know whether they were there before the World Theatre was built or not? A. I am sure they were there before the Berger Amusement Company operated the World.

Q. Are there any subsequent-runs licensed in St. Paul, Minnesota? A. Quite a few, yes, sir.

Q. Salt Lake City, Utah. A. In Salt Lake City, Utah, there are six first-run theatres, the Centre, the Utah, the Capitol, the Studio and the Marlo, all operated by the Intermountain Theatres, which is affiliated or associated in some way with Paramount, and to whom we license our product. There is also an independent operation there called the Uptown, operated by Mr. Lawrence.

Q. How does the Uptown Theatre operated by Lawrence compare with the Intermountain theatres? A. It is much smaller than the better theatres of the Intermountain, although they have one theatre that is just a very small theatre, a move-over.

Q. How long have you seen licensing the Intermountain? A. Sir?

Q. How long have you been licensing the Intermountain? A. For many years. As long as I have had anything to do with it.

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Q. Do you know whether they were on the ground before the Lawrence Theatres came? A. Oh yes, I am sure they were.

Q. Have you any subsequent-runs licensed in Salt Lake City? A. Yes, sir, a few.

Q. San Antonio, Texas. A. In San Antonio, Texas, there are five first-run theatres, all operated by the Interstate, associated with Paramount. They are the Majestic, the Aztec, the Texas, the Empire and the Prince, to whom we license our first-run product.

Q. Are there any other first-run theatres in San Antonio? A. No, sir.

Q. Do you have any subsequent-runs licensed there? A. Yes, sir, quite a few of them.

Q. Sacramento, California. A. In Sacramento, California, there are six first-run operating there, three of which are controlled by the Fox West Coast, the Senator, Alhambra and Capitol, to whom we license our product; and there are three operated there by Blumenfeld, the Tower, Esquire and Times.

Q. Is that the same gentleman you were talking about some time ago? A. Yes, sir.

Q. All right. What do you do in Sacramento? A. We do very well there. I consider our outlet there is the most desirable and by far the best operation.

Q. You license to the Fox West Coast, do you? A. For

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many years, yes.

Q. You license all three theatres, the Senator, Alhambra and Capitol? A. Well, we license the three theatres on a carry-over basis; they don't play simultaneously, but our product plays in one of the three depending on the pictures. We naturally would rather play them in the Senator and Alhambra rather than in the Capitol. That is where most of our pictures go.

Q. How long have you been licensing the Senator, Alhambra and Capitol? A. For many years.

Q. Is it a satisfactory account? A. Yes, sir.

Q. San Diego, California. A. San Diego, California, there are listed now 10 first-run theatres. Seven of them are operated by Fox West Coast and three by an independent. The three, I imagine, formerly owned by Mr. Mertzger, called the Spreckels, Broadway and the Tower. The Fox West Coast operations include the Fox, State, California, Adams, Orpheum, Mission and the Balboa, and they are by far the better theatres of the city.

Q. How long have you been licensing them? A. For a good many years. As far back as I can remember.

Q. Are there any subsequent-runs at San Diego? A. Yes, there are quite a number to whom we license our product.

Q. Were you licensing first-run theatres before Fox came (700)
into San Diego? A. Yes, sir.

Q. Who owned the theatres then? A. Well, there was a group owning them; I believe Gore, Turner & Dahnken had something to do with it, and a number of different individuals. There was a company—I forget what the name of it was—but they operated a number of theatres in Los Angeles and in the environs.

Q. I am speaking of San Diego now. A. I know, but in Southern California they operated in a number of places there.

Q. Is the same thing true of Sacramento, that you licensed first-run the Senator, Alhambra and Capitol before they were taken by Fox West Coast? A. I do not know that all three of them were built at the time that Fox West Coast acquired them, but it had been any one of the three, if not two of the three before Fox West Coast acquired them. We had them as a very definite customer in Sacramento, yes, sir

Q. Now, San Francisco, California. A. In San Francisco, California, there are ten first-run theatres, of which Fox West Coast operates the Fox, Paramount, Warfield, St. Francis, State, to whom we license our product first-run. There is also the Golden Gate Theatre operated by RKO; and Blumenfeld operates the Orpheum, United Artists, Esquire and Tivoli.

Q. How do the theatres operated in San Francisco by
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Fox West Coast compare with the theatres operated by RKO and Blumenfeld? A. Well, generally speaking they are superior in seating capacity, so far as one is concerned, and generally speaking they are equally as good as the one that RKO operates, and Blumenfeld also operates a very good theatre in the Orpheum Theatre. But I should say that the Fox West Coast for our purpose at least is the best outlet.

Q. Were you licensing the Fox, Paramount, Warfield, St. Francis and State before Fox West Coast acquired them? A. Well, there was a time—our company owned the Warfield Theatre, and there was a period of time when we operated the Warfield Theatre; and I do not think we did so well with it, and we later leased it to the Fox West Coast. So, therefore, for some time we were playing our product in our own theatre.

Q. How long have you been licensing to those Fox West Coast Theatres in San Francisco, licensing first-run? A. I could not answer you definitely on that, because I did not have charge of the West Coast when this transaction happened; but to my knowledge it has been going on for at least 12 or 15 years.

Q. Has it been a satisfactory account? A. Yes, sir.

Q. Are there any subsequent-runs licensed in San Francisco? A. Yes, we licensed a number of subsequent-runs
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there.

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Q. The Fox Theatre belonging to the Fox West Coast at San Francisco is very much the largest theatre in the city, isn't it? A. That is true; a huge place, 4,651 seats.

Q. Scranton, Pennsylvania. A. In Scranton, Pennsylvania, there are four first-run, the Strand, Comerford, Capitol and State, all operated by what we know as the Comerford-Publix, associated in some fashion with Paramount, and they are the only first-run there, and we license our product to them.

Q. There are, you say, no other first-run? A. No, sir.

Q. Are there any theatres in Scranton, Pennsylvania, of such size, capacity and equipment as would entitle them to play first-run? A. No, sir; I would say no.

Q. Seattle, Washington. A. In Seattle, Washington, there are eight first-run theatres of which the Fifth Avenue, the Paramount, the Music Hall, the Orpheum, the Blue Mouse and Music Box are operated by the Fox West Coast Theatres to whom we license our product. There is also an independent operation there called the Palomar operated by J. Danz Circuit, and the Liberty is operated by Jensen-Von Herberg, to whom we do not license any pictures first-run there.

Q. How do the theatres operated in Seattle by the Evergreen Theatres Corporation compare with the Danz theatre and the Jensen-Von Herberg theatre? A. They are far superior.

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Q. Do you have any subsequent runs licensed at Seattle? A. Yes, quite a few.

Q. How long have you been licensing the Evergreen theatres? A. For many years.

Q. Has it been a satisfactory account? A. Yes, sir.

Q. Somerville, Massachusetts. A. Somerville, Massachusetts, there are five first-run theatres, the Broadway and Teele Square, operated by Mr. Viano; the Capitol and Ball

Square operated by M & P, who are associated with Paramount; and the Somerville theatre operated by Mr. Viano. We sell or lease, I should say, our product to the M & P interests, either the Capitol or Ball Square. The theatres are very superior and they have been a very fine account.

Q. Is Viano an independent? A. Yes, sir.

Q. You say the M & P theatres are superior in quality? A. Yes, sir, in capacity.

Q. South Bend, Indiana. A. South Bend, Indiana, there are three first-runs there, the Colfax, the Palace and the Granada. They are operated by the Great States Amusement Company, I believe their name is, and they are associated in some way with Paramount, and we license our product to them. There are no other first-run theatres there.

Q. Are there other theatres in South Bend which by their quality, location or equipment, would be entitled to be

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considered first-run theatres? A. No, there are not.

Q. Do you have any subsequent runs licensed in South Bend? A. We do license subsequent-run accounts there, yes.

Q. Spokane, Washington. A. In Spokane, Washington, there are four first-run theatres, the Fox, Orpheum, State and Granada, all of which are operated by Fox West Coast to whom we license our product. There are no other first-run theatres there.

Q. Are there any other theatres in Spokane which by their quality, character and location, are entitled to be considered as first-run? A. No.

Q. Do you have any subsequent runs licensed in Spokane? A. Yes, sir.

Q. Springfield, Massachusetts. A. Springfield, Massachusetts, there are six first-run theatres; the Palace is operated by my company; the Paramount and Broadway theatres are operated by the Western Massachusetts organization, which is in some way associated with Paramount; and the

Capitol and Art theatres are operated by Warner Bros.; and an independent operation called the Bijou, operated by A. Anders. We license our product to our own theatre there.

Q. How does your theatre compare in size and quality with the other theatres? A. It is by far the best theatre
(705)
there.

Q. Is there competition among them? A. Yes, sir, keen.

Q. Do you have any subsequent-runs licensed in Springfield, Massachusetts? A. Yes, sir.

Q. Syracuse, New York. A. In Syracuse, New York, there are six first-run theatres there, the RKO Keith operated by the S.K.E. Company, which is in some way identified with RKO; the Paramount, the Eckel, the Empire, likewise operated by them, I believe; and we operate two theatres, Loew's State and Loew's Strand theatres.

Q. To whom do you license your first run? A. We license our pictures to our own theatres there, which, incidentally, are by far I should say the best theatres in the city.

Q. Is there competition with the other first-run theatres? A. Yes, sir.

Q. Are there any subsequent runs in Syracuse? A. Quite a few, yes.

Q. Tacoma, Washington. A. In Tacoma, Washington, there are five first-run theatres, the Roxy, Music Box and Blue Mouse, operated by John Hamrick Theatres, but they are in fact associated with Fox West Coast; and then there are two independent operations, the Rialto, operated by Mrs. Moore and Mr. Ousley, and the Riviera by Barovic, whom I don't know. We license our product to the John Hamrick
(706)
Theatres, and have for a number of years.

Q. Are you sure that Fox West Coast has an interest in the John Hamrick Theatres? A. I would not swear to it, no, sir, but I am reasonably sure.

Q. I find a disposition here at this table to dispute you about that? A. Maybe they know better than I do; I am only assuming.

Q. Maybe we had better put that down at tentative. How long have you licensed to the John Hamrick Theatres in Tacoma? A. For many years.

Q. How do their theatres compare with the others? A. Much better theatres.

Q. Have you any subsequent runs licensed at Tacoma? A. Yes, sir, quite a few.

Q. Tampa, Florida. A. In Tampa, Florida, there are four first-run theatres, the Tampa, the Strand, the Park, and the Florida. There is also an individual theatre there, the State, operated by an individual, Mr. Gore. We lease our product to the Tampa, the Strand and the Park.

Q. Is Gore an independent? A. Yes, sir.

Q. Who owns the other theatres? A. Well, there is a Florida Theatre that is operated by the Florida Theatres Company, and the other three are operated by the Florida Theatres Company, who, I believe, are associated with Paramount.

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Q. How do those theatres compare with the Gore theatre? A. Much larger and much better. They are larger and better.

Q. Toledo, Ohio. A. In Toledo, Ohio, there are seven first-run theatres, the Paramount and Princess, I believe operated by Balaban & Katz; there is Loew's Esquire and Loew's Valentine operated by our company; and there are three theatres, the Granada, Rivoli and Pantheon, operated by Mr. Skirball.

Q. Are they independent? A. Mr. Skirball is independent; Balaban & Katz I imagine are associated with Paramount.

Q. Whom did you license in Toledo? A. We license our products to Loew's theatres in Toledo; that is, the Valentine and the Esquire.

Q. Now the Valentine and the Esquire in Toledo are not as large as the Paramount of Balaban & Katz, or the Rivoli of Skirball, are they? A. That is true, they are not as large. We have owned, however, the Valentine Theatre—at least the Valentine Theatre—for a long time before the Paramount was ever built, and I believe before the Rivoli was built. (708)

Q. And you license to them because you own them? A. Yes. We have had this Loew's Valentine for a good many years, and within the last few years also acquired the Esquire. So we figured that between the combination of what we have we are better off than we would be with either a larger seating capacity house and certainly one that cost as much money to operate as the Paramount does.

Q. Are there any subsequent runs licensed at Toledo? A. Quite a few, yes, sir.

Q. Trenton, New Jersey. A. In Trenton, New Jersey, there are seven first-run theatres, the Mayfair, the Stacy, the Lincoln, the Capitol, the State, the Trent and the Palace. The Lincoln, Capitol, State, the Trent and the Palace, are operated by RKO; the Mayfair and Stacy are operated by Mr. Hildinger. We license our product to the RKO interests there.

Q. How do its theatres compare with the Hildinger theatres? A. They are by far the better theatres.

Q. How long have you licensed RKO at Trenton? A. We licensed to Trenton before RKO operated there; we licensed to an independent who disposed of his interest or part of his interest to RKO. For many years we have sold those theatres.

Q. It has been a satisfactory account? A. Yes, sir.

Q. Tulsa, Oklahoma? A. In Tulsa, Oklahoma, there are (709)
four first-run theatres, the Ritz, Orpheum, Majestic and Rialto, operated by an independent named Ralph Talbot, to whom we license our product. There are no other theatres there; no other first-run theatres there.

Q. Utica, New York? A. In Utica, New York, there are three first-run theatres, the Avon, Olympic and Stanley. The Avon and Stanley are operated by Warner Bros., and the Olympic by C. C. Gordon. We license our products to the Warner interests, and there are no other first-run theatres there.

Q. How do the Avon and Stanley compare with the Olympic Theatre? A. They are superior in every way.

Q. Washington, D.C. A. In Washington, D.C. there are seven first-run theatres, Loew's Palace, Loew's Capitol, Loew's Columbia, which are operated by our company. The Earle and Metropolitan are operated by Warner Bros., Keith's, operated by RKO; and the Little Theatre there, which is more or less of a revival theatre, operated by Mrs. Miller.

Q. How big is that? A. 290 seats.

Q. Very well. To whom do you license in Washington? A. We license our products to Loew's Theatres there.

Q. First-run? A. Yes, sir.

Q. How do the Loew's Theatres compare with those of Warner Bros., RKO and Mrs. Miller? A. Well, the two of (710)
our theatres are by far the largest theatres there and the best theatres in Washington. Our Columbia Theatre does not compare with some of the others, but the other two, the Capitol and the Palace are very fine theatres.

Q. Do the Earle, Metropolitan and RKO Keith's compete with you? A. Yes, sir.

Q. Are there any subsequent runs in Washington? A. Yes; we lease a number of subsequent runs there.

Q. Wichita, Kansas? A. In Wichita, Kansas, there are five first-run theatres, the Miller, the Orpheum, the Palace, the Wichita, and the Sandra, all controlled by Fox-Midwest, and to whom we license our products, and there are no other first-run theatres there.

Q. Are there any subsequent-runs? A. Yes, sir, quite a few.

Q. Wilmington, Delaware? A. Wilmington, Delaware, there are five first-run theatres, the Rialto, Aldine, Queen, the Warner and Grand Opera House. The Rialto is owned by an individual, Mr. Belair; the Aldine is operated by us; and the Queen, Warner and Grand Opera House are operated by Warner Bros. We license our produce to our own theatre and do not to the others, and there are no other first-run theatres there.

Q. How does your theatre compare with the others? (711)

A. It has the largest seating capacity and I believe the nicest theatre there.

Q. Do the other theatres compete with you? A. Yes, sir.

Q. Are there any subsequent runs in Wilmington? A. A few, yes, sir.

Q. Yonkers, New York? A. In Yonkers, New York, there are two first-run theatres, Proctor's, operated by RKO, and Loew's Yonkers, operated by our company; and we licensed our product to the Loew's Theatre; and there are no other first-run theatres there, or none competent to be a first-run.

Q. How does your theatre compare with Proctor's? A. It is larger by far, and a better theatre.

Q. Youngstown, Ohio? A. In Youngstown, Ohio, there are first-run theatres, the Warner, the Paramount, the Park and the Palace. The first three are operated—there is some sort of pooling arrangement between Warner and an inde-

pendent, the Shea interests, to whom we license our product. The Palace Theatre is operated by Mr. Printzen to whom we do not lease our product.

Q. You license Warner there, do you? A. We license Warner and Shea.

Q. How do their theatres compare with the Palace operated by the Pallmerco? A. Well, the Warner Theatre is a much larger theatre than any of the others, and, generally (712)

speaking, with the carry-overs and so forth, I would say that it is superior to the Palace.

Q. How long have you been licensing Warner at Youngstown? A. We have been licensing either Warner or Shea in Youngstown for many years.

Q. It is a satisfactory account? A. Yes, sir.

Q. Any subsequent-runs licensed at Youngstown? A. Yes, sir.

Mr. Davis: That completes the grand tour, but I have a few more questions before the bell rings.

Q. Are there any localities in the United States, Mr. Rodgers, where one or more of the defendants here other than Loew's are operating theatres but in which Loew's licenses all of its product to an independent? A. Oh yes, a number of those places.

Q. Are there any cases where Loew's would divide its product between an independent and one of the defendants? A. There are quite a few of those, too, yes, sir.

Q. Can you tell me how many localities there are where the defendants have theatres but Loew's licenses all its products first-run to an independent? A. I believe there is slightly somewhere in excess of 100 such places.

Q. Can you tell me how many places there are where both independents and defendants have theatres and Loew's di-

vides its product between them? A. Well, there are thirty
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some places that I know of where we so divide our products.

Mr. Wright: May I make a suggestion? It would save some time, I think, for the cross-examination tomorrow if we could have a list of those hundred places where you say the independents are licensed and the thirty where the product is split.

Mr. Davis: We will furnish a schedule of that.

Q. You can supply such a schedule, can you, Mr. Rodgers? A. Yes, sir.

Judge Hand: Do these 93 cases cover the cases or most of the 73 cities in the Government's trial brief?

Mr. Wright: He covered, I believe, the entire 92 with populations of over 100,000.

Judge Bright: How about the 73 that are on your pages 17 to 19 inclusive?

Mr. Wright: Those are included, and he covered 19 more that also have more than 100,000 population as per the 1940 census.

Mr. Davis: Covered all those as to which an interrogatory was addressed to us and which have been introduced in evidence. That was for 72 and 73, and this is 92, the tour we have just taken.

Judge Hand: In other words, these 20 towns more or less are things that have been added because of information you have given since?

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Mr. Davis: Added to the schedule which was in the trial brief. I do not know whether the information is later or earlier, really.

Judge Hand: All right.

Mr. Davis: It is an overlap of something like 20 towns.

Now, at the moment I think I have nothing more to ask Mr. Rodgers; but if any of my colleagues at the table have anything to ask him, I shall put him in their hands before I turn him over to Mr. Wright.

Judge Hand: We shall adjourn until tomorrow morning at 10:30.

(Adjourned to Tuesday, October 23, 1945, at 10:30 o'clock a.m.)

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Mr. Davis: The defendant, Loew's Incorporated, without waiving its right to offer evidence in the event this motion is not granted, moves pursuant to Rule 41(b):

1. To dismiss the petition, filed herein on July 20, 1938, and the amended and supplemental complaint, filed herein on November 14, 1940, in so far as the Government seeks the relief prayed for in paragraphs (2), (3), (4), (6), (7), (8), (10) and (11) of Section VIII of said petition and in paragraphs (2), (3), (5), (6), (7), (8) and (9) of Section VIII of said amended and supplemental complaint, on the ground that upon the facts and the law, the plaintiff has shown no right to such relief or any part thereof.

2. To strike, as to the defendant, Loew's Incorporated, the following exhibits, portions of exhibits and evidence from the record on the grounds hereafter specified:

APPEAL BOARD DECISIONS

(1) So much of Exhibit 1 (Appeal Board Decisions, Volume 1) as is composed of Appeal Board Decisions numbers 18, 35, 40, 58, 61, 66, 67, 70, 71, 72 and 87, and Exhibit 292 (decision No. 111), it appearing on the face of said decisions that neither Loew's, Incorporated, nor any corporation or agent

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in any way controlled by Loew's Incorporated, was a party to the proceedings referred to therein, and upon the further ground that the plaintiff has failed to connect either Loew's Incorporated or any corporation or agent controlled by Loew's Incorporated with any of the parties to said proceedings and that the

plaintiff has failed to establish by said decisions, or by any other proof or inference, any combination or conspiracy to which the defendant, Loew's Incorporated or any corporation or agent controlled by Loew's Incorporated is a party.

20TH CENTURY-FOX FILM CORPORATION

(2) Exhibits 12, 13, 20-24, 28-45, 160, and all subletters thereof, on the ground that said exhibits being concerned with the organization and business of the Fox Film Corporation are not competent evidence as against the defendant Loew's, Inc., the plaintiff having failed to establish either by this evidence or by any proof or inference any combination or conspiracy to which the defendant Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

PARAMOUNT

(3) Exhibits 8, 9, 59, 60-66, 70-73, 78-85, 161, 162, 373 and 374 (same reason as Fox).

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RKO

(4) Exhibits 86-88, 91-101, 105-112, 158, 159 (same reason as Fox).

WARNER

(5) Exhibits 116-129, 156 and 157 (same reason as Fox).

COLUMBIA PICTURES.

(6) Exhibits 130-139 (same reason as Fox).

UNITED ARTISTS CORPORATION.

(7) Exhibits 140-147 (same reason as Fox).

BIG U FILM EXCHANGE.

(8) Exhibit 148 (same reason as Fox).

UNIVERSAL CORPORATION.

(9) Exhibits 149-153 (same reason as Fox).

MISCELLANEOUS.

(10) Exhibits 164-167, 169, on the ground that the said exhibits show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

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LICENSE AGREEMENTS.

(11) Exhibits 174, 175, 177, 178, 179, 180, 189-192, 194-196, 198-209, 218, 219, 221-227, 229, 230, 232, 233, 236-242, 244-246, 251-261, 263, 265-268 and 271-274. Said agreements show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected with said agreements, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

"REPRESENTATIVE" FORMS OF FILM LICENSES.

(12) Exhibits 275, 276, 279-290, said agreements show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the

defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

UNREPORTED DECISIONS AND CONSENT DECREES.

(13) Exhibit 299, upon the ground that said ex-
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hibit shows on its face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

ADDITIONAL INFORMATION SUPPLIED BY DEFENDANTS—OTHER THAN LOEW'S.

(14) Exhibits 350-355, 357, 358, 360-362, 364-374, said communications from counsel for other defendants show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected with said communications or the subject matter thereof, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agent controlled by Loew's, Inc., is a party.

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Mr. Seymour: The Paramount defendants, Paramount Pictures, Inc. and Paramount Film Distribut-

ing Corporation, pursuant to Rule 41(b), and without waiving their right to offer evidence in the event these motions are not granted, make the following motions addressed to the petition and the amended and supplemental complaint and to the exhibits and evidence offered by the plaintiff, upon the grounds hereinafter set forth.

1. Said defendants move to dismiss each and every allegation of the petition and the amended and supplemental complaint not connected with or having to do with the issues disposed of by the Consent Decree entered herein on or about November 19, 1940, on the ground that upon the facts and the law the plaintiff has shown no right to the relief sought or any part thereof.

2. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the petition filed herein July 20, 1938, or in paragraphs (5), (6) and (7) of Section VIII of the amended and supplemental complaint filed herein November 14, 1940, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

3. Said defendants move to dismiss the petition

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and the amended and supplemental complaint in so far as the plaintiff seeks thereby to separate or divorce the production or distribution of motion pictures by these defendants or either of them from the exhibition of motion pictures by Paramount Pictures, Inc. or by any corporation all or any part of the stock of which is owned or controlled by Paramount Pictures, Inc.,

on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

4. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to dissolve any corporation in which Paramount Pictures Inc. directly or indirectly has any stock interest, or to dissolve any corporation in which Paramount Pictures Inc. has directly or indirectly any stock interest, and which is engaged in the exhibition of motion pictures, or owns directly or indirectly any stock interest in any corporation so engaged, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

5. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to dissolve or break up any circuit of theatres in which Paramount Pictures Inc., or any corporation in which it has directly

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or indirectly any stock interest, has any interest, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

6. Said defendant moves to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to require Paramount Pictures Inc., or any corporation in which it has directly or indirectly any stock interest, or any circuit of theatres in which Paramount Pictures Inc., or any such corporation or circuit is interested, to divest itself of any or all of its or such corporation's or such circuit's interests, direct or indirect, in motion pic-

ture theatres, on the ground that on the facts and the law the plaintiff has shown no right to such relief or any part thereof.

MOTIONS TO STRIKE EXHIBITS NOT RELATED TO PARAMOUNT DEFENDANTS.

The defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation move to strike, as to them, the following exhibits and evidence from the record upon the grounds hereinafter stated:

1. That portion of Exhibit 1 (being Volume I of the Appeal Board Decisions) constituting Appeal Board Decisions Nos. 10 and 18:

The foregoing motion to strike is made upon the ground that it appears upon the face of each of said

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Appeal Board Decisions Nos. 10 and 18 that neither Paramount Pictures Inc. nor Paramount Film Distributing Corporation were parties to the arbitration proceedings in which such decision was rendered, and that there is no proof in the record connecting either of these defendants with any of the parties to such arbitration proceedings; that there is no proof of any combination or conspiracy to which these defendants are, or either of them is a party and that none of said decisions tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

2. Exhibits 12, 13, 20(a)-20(1) inclusive, 21, 22, 23, 24, 28, 28(a)-28(g) inclusive, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

Of the foregoing Exhibits 12, 13, 14, 15, 16, 17, 18 and 19 consist of theatre lists purporting to show the theatre interests of defendants Loew's, Warner Bros., National Theatres, and R.K.O. respectively.

Exhibits 12, 13 and 20-45 referred to above were offered by the Government as being list of National's theatres and "Fox's Answers to the Government's Interrogatories."

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These defendants move to strike these Exhibits 12, 13 and 20-45 upon the ground that there has been no proof connecting defendants Paramount Pictures Inc. or Paramount Film Distributing Corporation, or either of them, with defendants Twentieth Century Film Corporation or National Theatres Corporation or any of their subsidiary or affiliated companies; and no proof tending to show any combination or conspiracy between these corporations or any of them and the Paramount defendants or either of them; that none of said exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

3. Exhibits 46-58.

These defendants make the same motion with respect to these exhibits offered under the heading "Loew's answers to the Government's Interrogatories."

4. Exhibits 86-114.

These defendants make the same motion with respect to these exhibits offered under the headings "Answers of R.K.O., K.A.O., R.K.O. Midwest, Pathe
(725) News, R.K.O. Proctor Corporation, R.K.O Radio Pictures Inc. and the Van Buren Corporation to Government's Interrogatories."

5. Exhibits 116-129.

These defendants make the same motion with respect to the exhibits offered under the heading "Warner Bros. Pictures Inc. answers to the Government's Interrogatories."

6. Exhibits 130-139.

These defendants make the same motion with respect to the exhibits offered under the heading "Columbia's answers to the Government's Interrogatories."

7. Exhibits 140-145.

These defendants make the same motion with respect to the exhibits offered under the heading "United Artists' answers to the Government's Interrogatories."

8. Exhibits 146-150.

These defendants make the same motion with respect to the exhibits offered under the heading "Answers of Universal Pictures Company Inc., Big U Film Exchange Inc. and Universal Corporation to Government's Interrogatories."

9. Exhibits 153, 154, 156-160 and 163, being theatre lists of other defendants offered under the headings of "Tabulations of Theatres" and "1945

Theatre Lists" and Exhibits 164 and 166 offered under the heading "Information as to Theatre Interests and

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Extent of Affiliation of Defendants, furnished by Non-Defendants."

These defendants move to strike these exhibits on the ground that there has been no proof connecting these defendants or either of them with such evidence and no proof of any combination or conspiracy to which they are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

10. Exhibits 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193 and 194 offered by the Government under the heading "Representative Master Licensing Agreements between Five Producer-Exhibitors Covering the 1936-37 Season."

These defendants move to strike these exhibits upon the ground that they are agreements to which neither of these defendants is a party and that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party, and that this evidence and these agreements do not tend to establish any such combination or conspiracy; and on the further ground that there is no

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proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any

part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

11. Exhibit 199 offered under the heading "Representative Master Licensing Agreements for the Exhibition of Films Released by United Artists, Universal and Columbia Pictures in Theatres of the Producer-Exhibitor Defendants during the 1936-37, 1937-38 and 1938-39 Season." This Exhibit 199 is described as "United Artists pictures in Fox theatres."

These defendants move to strike this exhibit upon the ground that neither of them is a party to the agreement; that there is no proof of any combination or any conspiracy to which these defendants are or either of them is a party; that such agreement does not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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12. Exhibits 200, 201, 202, 203, 204, 211, 212, 213, 214, 216, 217, 219, 220, 223, 228, 228, 229, 230, 231, 235, 237, 238 and 239 offered under the heading "Theatre Pooling Agreements between the Producer-Exhibitor Defendants and Their Theatre Operating Affiliates, Now in Effect."

These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has

been no proof connecting these defendants or either of them with such agreements; and no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

13. Exhibits 245, 246, 247, 248, 249, 252, 253, 254, 256, 257 and 258 offered by the plaintiff under the heading "Representative Film Licensing Agreements between the Producer-Exhibitor Defendants Governing Feature Films Released During the 1943-44 Season."

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These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has been no proof connecting either of these defendants with any of said agreements; and no proof of any combination or conspiracy to which these defendants are or either of them is a party; that these exhibits do not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

14. Exhibits 259, 260, 262, 263, 264, 265, 266, 268, 269, 270, 271, 272 and 274 offered by the plaintiff under the heading "Licensing Agreements between United Artists, Universal, and Columbia, and the Major Producer-Exhibitor Defendants Covering Feature Films Released During the 1943-44 Season."

These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has been no proof connecting these defendants or either of them with any of said agreements; that there has

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been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that these exhibits do not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

15. Exhibits 275, 276, 277, 278, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290 offered under the heading "Representative Printed Forms of Feature Film Licenses Used and Supplied by the Eight Distributor Defendants."

These defendants move to strike these exhibits upon the ground that there has been no proof connecting these defendants or either of them with any agreement of these forms or of any of the terms thereof; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these forms of agreement

tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove

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any such monopolization attempt or combination or conspiracy.

16. Exhibit 298 offered under the heading "Consent Decree Arbitration Awards Where No Appeal Taken."

These defendants move to strike this exhibit upon the ground that neither of these defendants was a party thereto; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that this exhibit does not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

17. Exhibit 299 "Findings of Fact and Conclusions of Law in United States v. Crescent Amusement Co."

These defendants move to strike this exhibit upon the ground that the facts found are not *res judicata* and cannot form the basis of or constitute evidence of another proceeding; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that such exhibit does not tend to prove any such combination

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or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

18. Exhibits 312-317 constituting the N.R.A. Code, the Bertrand Report, etc.

These defendants move to strike these exhibits upon the ground that they are incompetent, irrelevant and immaterial or hearsay and upon the ground that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

19. Exhibits 355, 356, 357, 358, 362, 364, 365, 366, 369, 370 and 371, being letters from counsel for other defendants and answers of Universal and United Artists to the Government's further Interrogatories.

These defendants move to strike these exhibits

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upon the ground that they are not binding upon them; that there has been no proof or combination or conspiracy; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these de-

fendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

MOTIONS TO STRIKE EXHIBITS REFERRING TO OR CONNECTED WITH PARAMOUNT.

The defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation move to strike, as to them, the following exhibits and evidence from the record upon the grounds hereinafter stated:

1. Those portions of Exhibits 1-5 inclusive comprising Appeal Board Decisions Nos. 1, 10, 12, 24, 27, 35, 40, 52, 58, 61, 63, 65, 66, 67, 68, 70, 71, 72, 85, 87, 104; all of Exhibits 291 and 292; and all of Exhibits 293-297 (the foregoing exhibits constituting selected Appeal Board Decisions and decisions of Arbitrators in proceedings in which one or both of the Paramount defendants were parties).

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These defendants move to strike these exhibits on the grounds that (a) they do not constitute evidence of the facts found; (b) they do not constitute evidence of any violations of law; (c) they are hearsay; (d) such exhibits and the evidence therein contained are irrelevant and immaterial to any of the issues in this case; (e) such exhibits and the evidence therein contained are irrelevant and immaterial to the issues of divorcement and dissolution; (f) there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of said exhibits tends to prove any such combination or conspiracy; and on the further ground that there

is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

2. Exhibits 8 and 9 (being respectively described as "Paramount's theatres" and "Paramount's pooled theatres").

These defendants move to strike these exhibits upon the grounds (a) that the evidence contained in these exhibits, being lists and other information with respect to theatres in which Paramount was directly

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or indirectly interested as of the date of said exhibits, to wit, 1939, is irrelevant and immaterial to any of the issues in this case; (b) that such exhibits and the evidence therein contained are irrelevant to the specific issues of divorcement and dissolution; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

3. Exhibits 59-63, 65 and 66, offered under the heading "Paramount Answers to Government's Interrogatories—Organization—1939 Answers."

These defendants move to strike these exhibits on the grounds that (a) they do not contain any evidence or facts relevant to the present issues, but merely speak as of the date of such exhibits, to wit, in 1939; (b) they do not contain evidence relevant or material to the issues of divorcement and dissolution;

and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove

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any such monopolization attempt or combination or conspiracy.

4. Exhibit 64, offered under the heading "Paramount's Answers to the Government's Interrogatories —1945 Answers."

These defendants move to strike this exhibit on the ground that it is irrelevant and immaterial to any of the issues in this case, and to the issues of divorcement and dissolution, being merely a list of all corporations, whether engaged in production, distribution or exhibition of motion pictures or not, in which Paramount Pictures Inc. has any stock interest whatsoever; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

5. Exhibits 63, 70 and 71, offered under the heading "Paramount's Answers to the Government's Interrogatories—Production—1939 Answers."

These defendants move to strike these exhibits upon the ground that (a) they are irrelevant and immaterial to any issue in this case; (b) that they are irrelevant and immaterial to the issues of divorcement and dissolution; (c) and on the further ground

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that there is no proof that either of these defendants

has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

6. Exhibits 72, 78 and 79, offered under the heading "Paramount's Answers to the Government's Interrogatories—Distribution—1939 Answers."

These defendants move to strike these exhibits upon the ground that (a) they are irrelevant and immaterial to any issue in this case; (b) that they are irrelevant and immaterial to the issues of divorcement and dissolution; (c) and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

7. Exhibits 80-83, offered under the heading "Paramount's Answers to the Government's Interrogatories—1945 Answers."

These defendants move to strike these exhibits upon the grounds that they are irrelevant and immaterial to any issue in this case and are irrelevant and immaterial to the issues of divorcement and dissolution,

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being merely lists of Paramount's feature pictures released and film rentals received in certain selected cities without any basis being laid for the selection of such cities or for the selection of the 1943-4 season, and the cities selected have been arbitrarily so selected simply upon the basis of population; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopo-

lize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

8. Exhibit 84, offered under the heading "Paramount Answers to the Government's Interrogatories —Admission of Facts—1945."

These defendants move to strike this exhibit on the ground that it is irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being merely Paramount's admissions of facts with respect to first-run distribution in certain cities arbitrarily selected by the plaintiff upon a basis of population, without any basis being laid for such selection, and upon the ground that they state facts with respect to certain arbitrarily selected motion picture seasons,

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without any basis being laid for such selection; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

9. Exhibit 85, offered under the heading "Paramount's Answers to the Government's Interrogatories —History—1939 Answers."

These defendants move to strike this exhibit upon the ground that the evidence therein contained is irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize,

or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

The foregoing exhibits are simply statements as to the history of Paramount and of its acquisition of certain other producing, distributing and exhibiting companies or stock interests therein. In view of the fact

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that the plaintiff does not complain that any of these acquisitions were illegal, this evidence is wholly irrelevant and immaterial.

10. Exhibits 151 and 152, 161, 162, 165—167 and 169, offered under the headings "Tabulations of Theatres Owned by Paramount Prior to 1938," "1945 Theatre List Furnished by the Producer-Exhibitor Defendants" and "Information as to Theatre Interests and Extent of Affiliation with Defendants Furnished by Non-Defendants."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and are irrelevant and immaterial to the issues of divorcement and dissolution, being simply lists of theatres in which Paramount had some interest as of arbitrary dates and letters from companies in which Paramount has some stock interests, without any basis being laid for the selection of dates or the selection of corporations; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

11. Exhibits 172, 173, 174, 175, 177, 178, 179 and 180, offered under the heading "Representative Mas-

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ter Licensing Agreements between the five Producer-Exhibitors covering the 1936-1937 season."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being simply certain licensing agreements, without any basis being laid for the selection thereof and no proof that they are representative or typical, and without any basis being laid for the selection of the period covered thereby; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

12. Exhibits 195, 196 and 198, offered under the heading "Representative Master Licensing Agreements for the Exhibition of Films Released by United Artists, Universal and Columbia, etc."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues of this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being simply certain agreements for the ex-

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hibition of pictures in arbitrarily selected theatres in which Paramount has directly or indirectly some stock interest, without any basis being laid for the selection of such agreements, or any proof that they are representative or typical, and without any basis

being laid for the periods of time covered thereby; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

13. Exhibits 205, 206, 207, 208, 209, 215, 218, 221, 222, 224, 225, 226, 232, 233 and 236, offered under the heading "Theatre Pooling Agreements, etc."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and upon the ground that they are arbitrarily selected agreements, without any basis being laid for the selection, and there being no proof that they are representative or typical, and upon the further ground that there has been no proof of any combination of conspiracy to which these defendants are or either of them is a party, and none of these agree-

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ments tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

14. Exhibits 240, 241, 242, 243, 244, 250, 251, and 255, offered under the heading "Representative Film Licensing Agreements between the Producer-Exhibi-

tor Defendants Covering Feature Films released During the 1943-1944 Season."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and upon the further ground that they are arbitrarily selected agreements covering arbitrarily selected theatres and theatre situations without any basis being laid therefor; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or

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combination or conspiracy.

15. Exhibits 261, 267 and 273, offered under the heading "Licensing Agreements between United Artists, Universal and Columbia and the Manager-Producer-Exhibitor Defendants Covering Feature Films Released during the 1943-1944 Season."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and that they constitute arbitrarily selected parties for an arbitrarily selected season, without any basis being laid for any such selection; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

Colloquy

16. Exhibits 279 and 280, offered under the heading "Representative Printed Forms of Feature Licenses."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement, and that they constitute mere forms of agreement used in arbitrar-

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ily selected motion picture seasons; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

17. Exhibits 350-354, 360, 361, 363, 367 and 368, being letters from various companies in which Paramount has some stock interest.

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and that they constitute merely letters from arbitrarily selected corporations, without any basis being laid for such selection, and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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New York, October 23, 1945;
10.30 o'clock a. m.

Trial resumed.

WILLIAM F. RODGERS, resumed the stand.

Direct Examination continued by Mr. Davis:

Q. Referring to the list of towns which you discussed on yesterday; Mr. Rodgers, are there any corrections or additions you want to make to what you said on that subject? A. There are several corrections that I would like to make. I would like to apologize for three errors that have been called to my attention. One of them was in, I believe, Tacoma, where I had listed as John Hamrick Theatres as being associated with the Fox West Coast, whereas I find that they are independently operated by John Hamrick; another instance I mentioned in Indianapolis, where I believed that the Paramount Company were interested in theatres, I find that they are operated by an independent, Harry Katz; and in the case of Cambridge, Mass., instead of——

Q. Just a moment, about Indianapolis. A. Sir?

Q. Does that refer to the theatres that are listed here under the name of Fourth Avenue Amusement Company?

(747)

A. That is in Indianapolis, yes.

Q. Those are operated by an independent? A. Harry Katz, yes. And in Cambridge, Mass., where I inferred or stated that the house was operated—we sold first-run to Mr. Sumner up there, I find that that is a second-run in that vicinity. So those three corrections I should like to make.

Q. Do you sell any first-runs in Cambridge, Mass.? A. Yes, sir, we sell it to M. & P.

Q. Do you sell to M. & P. first-run at the Central Square and to S. Sumner second-run at the University? A. Yes.

Q. Have you any other corrections you want to make? A. Not that I know of, no.

Q. You told us that there are 101 towns and cities in which you sold first-run to an independent although there was an affiliate competing in that town or city. A. Yes; I said in the neighborhood of a hundred.

Q. Have you prepared a list of those towns and cities? A. Yes, sir.

Mr. Davis: I offer in evidence schedule of the cases of our product to independent in opposition to co-defendants; and another tabulation, cases where Metro product is divided between independents and co-defendants. Copy has been furnished to the Government.

(748)

Mr. Wright: We have no objection.

(Four sheets marked Defendant Loew's Exhibit L-5.)

Q. Have you prepared or caused to be prepared under your direction from the books of the company tables showing the division of total domestic feature film revenue received by Loew's from all exhibitors for the fiscal years 1936 to 1944 inclusive, showing the proportion of the receipts taken from Loew's own theatres, from Fox, Paramount, RKO and Warner respectively, and from non-defendant theatres? A. Yes, sir, I have.

Q. Do you identify this as such a tabulation (handing to witness)? A. Yes, sir, I identify it.

Mr. Davis: I offer that in evidence. Perhaps your Honors will want to see it at the bench.

(Marked Defendant Loew's Exhibit L-5.)

Q. There is one phrase which I find here from time to time that you did not define yesterday. What are key runs? A. Well, key runs, according to my ideas, are the more important localities in each exchange area from which following runs key from. I don't know offhand how many there are, but we don't use numerals, we don't use even populations, but what we consider as important communities or important cities or towns in each geographical branch territory are considered by us as key runs. And then——
(749)

Q. Just a moment. Let me understand you. Is a town accepted as a key run or are theatres accepted as key runs? A. Well, I more or less consider the theatre as the key run, for the reason that we are doing business with a certain theatre; but on the other hand, if I were doing business with another theatre, the probabilities are I would consider the town or locality, just as I do in larger cities; I will consider runs after the so-called second-runs, what we call key runs. The next important runs after the second-runs in large cities are called key runs.

Q. What is the significance of the words "key run"? A. Well, "key" means important to me; from which centers or from which theatres important revenue is received.

Q. And what use is made of that importance? A. Well, they all go to help us determine the eventual value of a picture, its exhibition values.

Q. Then they are important from the standpoint of the drawing power of the film? A. Exactly, sir.

Q. Are all your feature pictures, newsreels and shorts copyrighted before they are released? A. Yes, sir.

Q. You showed us yesterday on the form of contract a line where the films were allocated to brackets, first, second, third, and so forth, which you told us was your estimate at the time of the release of the drawing power of the film.
(750)

You also told us that when you were mistaken in that it was afterwards corrected. Is that your general policy? A. That is a published policy of ours, yes, sir.

Q. Who determines when those corrections shall be made? A. I or one of the sales managers working with me, or our district managers, or even our branch managers have full authority in the field to adjudicate those designations at any time that they are satisfied that they should be changed.

Q. Have you given sales managers any general instructions to that effect? A. Yes, sir; we published such instructions.

Q. How have you published such instructions? A. In our house organ and in various talks and communications we have had with our field office.

Mr. Wright: If the Court please, I suppose we might as well have the instructions rather than his testimony as to what is in them.

Mr. Davis: I was about to offer them, Mr. Wright.

Mr. Wright: All right.

Mr. Davis: I was just edging up to it.

Q. I show you a magazine bearing the title "The Distributor" dated July 12, 1945, and ask you what this is? A. That is an issue of our house organ, "The Distributor," dated July 12, 1945.

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Q. I notice on pages 6 and 7 of that magazine the 2-page spread headed "The M-G-M Policy." Did you formulate that? A. Yes, sir.

Q. Did you issue that to your distributors and sales managers and salesmen? A. Yes, sir.

Q. Does it express the policy of Loew's, Inc. with reference to the subjects with which it deals? A. It does.

Mr. Davis: I offer that in evidence.

Mr. Wright: If the Court please, it is obviously a self-serving statement prepared for the purposes of the suit.

Judge Hand: We will admit it.

Mr. Davis: I admit the self-serving character.

(Marked Defendant Loew's Exhibit L-6.)

Q. You told us yesterday about this rotation of films. I want to make that perfectly clear. After the film has been exhibited by the theatre to which it is licensed, what becomes of it? A. After it has completed all of its exhibitions, I assume?

Q. Well, after it has completed its several contracts, what does the exhibitor do with it when his contract term has expired? A. He returns it to our branch office or exchange, as we call it.

Q. What does your branch office or exchange then do with it? A. Well, we keep film for a period of years for (752)

emergency purposes, but it is all maintained in our exchange for at least two to two and a half years; and they keep all positive prints there returned by the last exhibitor that has played it under the terms of his contract.

Q. What happens when the film is finally worn out? A. Well, at the time the film is finally worn out they are all mutilated and returned—generally speaking I imagine they are returned to the manufacturer or someone else who can salvage something from the positive stock, the nitrate of silver, or whatever ingredients there are; but they are all mutilated.

Q. Why is that? A. So there is no chance of their falling into unauthorized hands.

Judge Bright: Mr. Davis, in this Exhibit L-5 there are some statements or columns headed "Saenger Replacements" and "Theatre Service Replacements."

Mr. Davis: I do not hear your Honor.

Judge Bright: In this Exhibit E there are columns headed "Saenger Replacements" and "Theatre Service Replacements." Will you explain those, please?

Mr. Davis: I will ask the witness to explain that.

The Witness: These are places where they have sold in opposition to the theatres that are now controlled by the Saenger interests.

(753)

Q. And who are the Saenger interests? A. Sir?

Q. Who are the Saenger interests? A. They are associated with Paramount.

Q. And these theatres that you have listed here are theatres competing with the Saenger interests? A. Yes, sir.

Q. And you are selling to them now in preference to the Saenger? A. Yes, sir.

Mr. Davis: Does that answer your Honor's question?

Judge Bright: Then there is another column right underneath that.

The Witness: The "Theatre Service Replacements"? Well, the Theatre Service is an organization that is booked by the Saenger people. How much interest they have in it, I don't know, but they did handle all the bookings; and if you do business in the theatres that they operate you do it through the Saenger Company; and not being able to do business with the Saenger Company in any of their holdings, these are the theatres that we sold against those theatres that are considered the Theatre Service Company, I believe. And we have sold them in opposition to the Theatre Service Company, the Theatre Service booking organization. I just don't know what the correct corporate name is.

Judge Bright: And there is another.

The Witness: There is another one here called the

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United Theatre Replacements. Now, the United Theatre Replacements is also an organization that is controlled by the Saenger Company in New Orleans, and these are the theatres that we sold in opposition to the ones that the United Theatres booked or handled.

Q. Can you tell me, Mr. Rodgers, whether the Theatre Service is connected with Paramount? A. Well, the Paramount representative handles all of the business for the Theatre Service. I don't know to what extent they are associated with Paramount, but a Paramount representative in their offices handles the business completely.

Q. But you know nothing of the relationship between them? A. No, sir.

Mr. Davis: Are there any other questions on this?

Judge Bright: No.

Mr. Davis: Do any of my colleagues want to ask the witness any questions?

Mr. Seymour: I have a few.

Cross Examination by Mr. Seymour:

Q. Mr. Rodgers, with reference to this last matter that you just mentioned where you referred to Theatre Service and United Theatres in New Orleans, you said the Paramount representative bought for those theatres. A. E. V. Richards, yes, sir, is the supervising representative there.

(755)

Q. Mr. E. V. Richards is connected with the Saenger Circuit? A. Yes, sir.

Q. Paramount has an interest in that, but do you personally know of any interest that Paramount has in this United Theatres or Theatre Service? A. No, sir.

Q. So that was just your own inference; you had no basis for saying that Paramount's representative bought except that it was Mr. Richards, who is also interested in the Saenger Circuit? A. That is right.

Q. Now, I have a couple of other questions: Where does the Loew distribution department negotiate for the licensing of Metro pictures in theatres in which Paramount has an interest? A. In the various territories where their representatives are located.

Q. That is, those negotiations are conducted in the field? A. Yes, sir.

Q. And, for example, in connection with the theatres managed by M. & P. in New England, are those negotiations conducted in the offices of the M. & P. in Boston? A. Either in their office or ours in Boston, yes, sir.

Q. And, for example, in connection with United Detroit Theatres, are the negotiations conducted in Detroit? A. Always.

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Q. So that in each case of the licensing of Metro pictures in theatres in which Paramount has an interest, the negotiations are conducted at the office or in the city where the operator or manager of the group of theatres is, is that right? A. That is correct.

Q. They are not conducted at all through the Paramount theatre department? A. No, sir.

Q. Are the negotiations for the exhibition or the licensing of Metro pictures in theatres in which Paramount has an interest conducted by representatives of the distribution department under your general supervision? A. Either general representatives or myself, yes, sir.

Q. At the time of those negotiations, that is, negotiations for the exhibition of Metro pictures in theatres in which Paramount has an interest, do you have any knowledge or information as to negotiations or arrangements for the exhibi-

tion of Paramount pictures in theatres in which Loew has an interest? A. None whatever.

Q. Do you know with whom Loew negotiates for Paramount pictures in Loew theatres? A. I couldn't answer that definitely, no, sir. I don't know.

Q. By whom are those negotiations for Loew conducted? A. By either Joseph Vogel or Charles Moscowitz.

Q. Are those gentlemen in the Loew theatre department? A. Yes, sir, both of them.

(757)

Q. Do you have any connection whatever with those negotiations? A. None whatever.

Q. Is there any relationship whatever between the negotiations or arrangements for the showing of Paramount pictures in Loew theatres and the licensing of Metro pictures to theatres in which Paramount has an interest?

Mr. Wright: If the Court please, that is much too broad for him to answer, as to whether there is any connection whatever.

Mr. Seymour: This is a factual matter in which the Government——

Mr. Wright: It is simply his conclusion, and the conclusion which the Court can draw.

Judge Hand: Yes, there are a good many conclusions on both sides. Go ahead and answer it.

A. No, sir.

Mr. Davis: Any other questions?

Mr. Caskey: I have a few.

By Mr. Caskey:

Q. Mr. Rodgers, you testified yesterday that you license your pictures in Kansas City, Missouri, to the Midland Theatre? A. Yes, sir.

Q. Does that theatre take clearance over the theatres in Kansas City, Kansas? A. Priority? Yes.

Q. Your theatre in Kansas City, Missouri, plays ahead (758)
of the theatres in Kansas City, Kansas? A. Yes, sir.

Q. Have you informed yourself since yesterday as to whether Fox Midwest has any interest in the Electric Theatre in Kansas City, Kansas? A. No, I have not. I neglected to do that. My attention was called to the fact that there was an error made but I did not get a chance to investigate it.

Q. Where is Kansas City, Kansas? A. It is right across the river from Kansas City, Missouri.

Q. And the so-called first-run theatres in Kansas City, Kansas, are within a mile of the Midland Theatre? A. Very close.

Q. In referring to Denver, Colorado, you have referred to certain theatres as being operated by Fox Midwest Theatres. Do you know who the operator is? A. Yes, Mr. Ricketson.

Q. That is Frank H. Ricketson, Jr.? A. I believe that is his name.

Q. You have known him for some years? A. Many years.

Q. To your knowledge he has the operation of the theatres in Denver? A. All that area, yes, sir.

Q. And has an office in Denver for that purpose? A. Yes, sir.

Q. Do you know the name of the corporation? A. I couldn't tell you the name of the corporation, no. I mean, (759)
I don't recall it.

Q. You testified that the Orpheum was the best theatre in Denver. Are you familiar with the Denver theatre? A. I have been in it.

Q. And the Paramount theatre? A. Yes, sir.

Q. If Mr. Ricketson were to testify that in his opinion they were the best theatres in Denver, would you be disturbed? A. Not at all. They may be for his purposes, but I consider the Orpheum as best for ours.

Q. The Denver and the Paramount are large de luxe theatres? A. Very good theatres.

Q. Centrally located? A. Yes, sir.

Q. In Detroit are you familiar with the Fox Theatre? A. Yes, sir.

Q. What class of theatre is it? A. It is a beautiful, fine theatre.

Q. And comparable to the Michigan Theatre? A. Yes.

Q. In Spokane, you said that three theatres were operated by Evergreen and that there was a theatre called the Granada, which was not of the same class?

Mr. Caskey: I would like to have these marked for identification as Fox Exhibits A, B, C and D.

(Marked Fox Exhibits A, B, C and D, respectively, for identification.)

(760) Q. Calling your attention to Fox Exhibit A for identification, the Fox Theatre in Spokane, is that the largest theatre in Spokane? A. I believe so.

Q. And it is the theatre in which the best Loew pictures are played first-run? A. Yes, sir.

Q. Will you look at the picture of the Granada, whatever legend it bears? A. Yes.

Q. Have you ever played any pictures in the Granada? A. I cannot recall that we have, but I couldn't say definitely.

Q. From your experience in the motion picture business are you able to say without having played any pictures in the Granada, whether the revenue possibilities of a picture played in the Granada are equal to those of the Fox? A. That is quite obvious, that they could not be.

Mr. Caskey: I offer in evidence the photographs of the four theatres in Spokane.

Mr. Wright: If the Court please, I see no reason why the record should be encumbered with photographs of this character. There isn't any dispute about the fact that there are different kinds of theatres in all of these cities, some of them big and large, some of them small, and they all have different appearance. I haven't the faintest idea of what that proves.

Judge Hand: What, really, is the object of piling in this stuff?

(761)

Mr. Caskey: I do not propose to pile it in, but the object is to answer the inquiry which Judge Bright made yesterday as to whether or not an experienced distributor could know the revenue possibilities of a theatre, which he had not exhibited any pictures in, and I want to show that from the very appearance of the theatres that anyone would know that the Fox Spokane is infinitely superior to the Granada Theatre. I do not propose to have an illustrated book of every theatre in the United States, although that in itself might be instructive.

Judge Hand: Not for me. I think we will rule these things out. I think we are getting the case too complex and burdensome for anybody. Things like this we will never look at, you know. I can give you that firm assurance if you want it—the three of us.

Mr. Caskey: If Mr. Wright will give me the firm assurance that he will never contend that the Granada Theatre is a satisfactory outlet for Fox Pictures, I will be content.

Judge Hand: Does he make any such contention?

Mr. Caskey: I don't know.

Mr. Wright: If the Court please, I expect to develop through cross examination that the question of what is a satisfactory outlet has very little to do with the physical characteristics.

(762)

Judge Hand: You do not have to develop cross examination just to investigate, just for fun. There is no pleasure for us in it.

Mr. Wright: I say, I think I can persuade——

Judge Hand: Unless you have some definite purpose in it. I deprecate enormously this building up of records in cases of this type. I have said so times without number. We will exclude this.

Q. Mr. Rodgers, in licensing pictures to theatres operated by Fox West Coast Theatres Corporation, with whom do you deal? A. We deal with a number of individuals.

Q. Principally? A. Well, you have zone managers in various sections.

Q. I am talking now about Fox West Coast Theatres, the California—— A. That is, the California structure entirely?

Q. Yes. A. My original negotiations were first with Charles Skouras.

Q. And then with whom? A. With various of his associates, with Zabel and others.

Q. In the licensing of Metro pictures to the theatres of the Fox West Coast Theatres, has Mr. Skouras or his associates ever conditioned or attempted to condition the licensing of the Metro pictures upon the Loew theatres licensing the Fox pictures? A. No, sir.

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Q. Have you ever attempted to condition the licensing of Metro pictures to the Fox West Coast Theatres——

Mr. Wright: Same objection to this line of inquiry that we made before. He is talking in terms of conclusions that the court has to draw.

Judge Hand: Overruled.

Mr. Caskey: I am sorry, I did not finish my question.

Q. (Question read.) —upon Fox licensing its pictures to the Loew theatres? A. I have nothing whatever to do with that, no sir.

Q. Has the subject ever been discussed? A. Never.

Q. Is the same true as to the National Theatre groups which are operated out of Seattle? A. Same answer would apply there.

Q. And Denver? A. Yes, sir.

Q. And Milwaukee? A. Yes, sir.

Q. And Kansas City? A. Same thing.

Q. In negotiating the licensing of your pictures, have you ever conditioned the licensing of the pictures to the California group upon any or all of the theatre groups in Seattle, Denver, Milwaukee or Kansas City licensing the pictures? A. To the contrary, deal only for the individual territory individually.

Mr. Wright: Same objection.

(764)

Q. And has any one of those groups conditioned the licensing of Metro pictures upon your licensing the other groups? A. No, sir.

By Mr. Raftery:

Q. Mr. Rodgers, there are eight distributor defendants——

Judge Hand: Wait a minute. Are there any more of the so-called——

Mr. Van Bergh: I have two questions for the Warner.

By Mr. Van Bergh:

Q. Mr. Rodgers, approximately how much film rental did the Warner theatres pay Loew in the 1943-44 season? A. I can't remember that exactly.

Q. Would it refresh your recollection if I suggested the figure of $5,800,000?

Mr. Davis: Where is the exhibit? I think we have that exactly.

A. It might.

Q. Would you say approximately that was in the range? A. I couldn't say that because I deal with a lot of figures and I would have to see.

Judge Hand: I thought you had an exhibit stating it.

The Witness: But I think that was by years, over a period of years.

(765)

Judge Hand: The clerk says it has not been received. I thought it was in evidence.

Mr. Davis: I offer it.

Judge Hand: All right, received.

Mr. Davis: If the clerk will give it a number, so Mr. Van Bergh can refer to it.

(Marked Defendant Loew's Exhibit L-7.)

Q. Mr. Rodgers, Loew's Exhibit L-7 indicates that the figure is $3,731,208. So it is approximately $3,700,000. A. But I understood you to say five million.

Q. That is right, I did say that. A. Because I didn't think so, but I was hopeful that I would be agreeably surprised.

Q. Mr. Rodgers, approximately how much film rental——

Judge Bright: Is that for any one year?

The Witness: 1943-44, $3,731,000.

Q. Will you tell us approximately how much film rental the Loew theatres paid to Warner in the same year? A. I haven't the slightest idea.

Q. Would it surprise you if I told you $200,000? A. I haven't any feeling in the matter because I don't know.

Mr. Van Bergh: All right, thank you; we will prove it some other way.

Judge Bright: Mr. Rodgers, in your licensing practice with the defendants, do you use the same

(766)

form of license that you do for independents?

The Witness: I should say yes, sir, in most cases, if not in all cases. There are some times when there are a number of theatres that are operated by the defendants in any area, we may use this one form of contract and have annexed to it the various theatres represented, but in all cases we use our same form of contract with the defendants as well as the individuals.

Judge Bright: Has that been so over the period of the last ten years?

The Witness: Yes, sir.

Judge Bright: That there is a uniform license agreement which is used for all theatres?

The Witness: Yes, sir.

Judge Bright: No matter with whom they are affiliated?

The Witness: That is true, yes, sir. I might add there, with the exception of our own theatres. We do not always execute agreements block by block with our own theatres, but with all the defendants and all the individuals we use the same style and form of contract.

Judge Bright: Who determines whether a theatre shall be a first-run, a second-run or subsequent-run pictures?

The Witness: Well, generally speaking, our branch

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managers and district managers in the field, and it has been more or less historical, except for new theatres that come on the picture. Very little clearance or availability has been changed over a period of years.

Judge Bright: Who determines it where there is any question about it?

The Witness: Generally speaking, our branch managers make their recommendation to the district manager, and if there seems to be the slightest question about it at all, the district manager will take it up with the sales manager and, if necessary, bring it to my attention for decision.

By Mr. Leisure:

Q. Mr. Rodgers, you testified yesterday concerning the licensing of certain of your pictures in RKO theatres, did you not? A. Yes, sir.

Q. In doing so, with whom did you deal? A. Well, I personally haven't dealt very much with RKO in the last several years, but my assistants deal with a Mr. Mirich.

Q. In licensing these theatres of RKO, were they ever conditioned in any way upon the showing of RKO pictures in theatres owned either by Loew's or theatres affiliated with Loew's? A. No, sir.

Mr. Wright: Same objection.

Mr. Leisure: That is all.

(768)

By Mr. Raftery:

Q. Mr. Rodgers, in addition to the eight distributors here, national distributors, are there any other national distributors in the United States? A. Yes, sir.

Q. Will you name them? A. I believe Monogram Distributing Corporation, or Distributing Company; there is a P.R.C. Distributing Organization; and, in addition, a Republic Distributing Organization. I don't know their corporate names, but they are the principal three.

Q. They are generally known in the trade as Republic, Monogram and P.R.C.? A. Yes, sir.

Q. And each of those companies have studios in Hollywood? A. Yes, sir.

Q. Republic has a large studio at Studio City, isn't that right? A. Yes.

Q. Modern, large studio? A. It is not as large as ours but it is large.

Q. We will admit yours is the largest. Now they have a national distributing organization, have they not? A. Yes, sir.

Q. Have had for many years? A. For some years, yes, sir.

Q. They are affiliated with a laboratory? A. That I don't know.

Q. Well, you have heard of Consolidated Laboratories? (769)

A. I have heard of them but I do not know it to be a fact.

Q. It is generally considered in the trade that they are affiliated in some way with a laboratory, is that right? A. So I have heard.

Q. And they produce a great number of pictures at Studio City and distribute them nationally? A. More than we do, yes.

Q. And more than United Artists, is that right? A. Yes.

Q. And more than Universal? A. That I don't know.

Q. Well, as many as Universal? A. I should say approximately, anyhow.

Q. And they license the exhibition of their pictures in competition with your pictures? A. Yes, sir.

Q. To these defendants and to independent exhibitors? A. They are in open competition with us, yes, sir.

Q. And they use generally the same manner of means of distribution that you described yesterday to Mr. Davis? A. I should say generally, yes.

Q. They have a sales manager, Mr. Grainger, have they not? A. Yes.

Q. Mr. James Grainger, well known in the trade, is he not? A. Very well.

Q. Been in the business as long as you have been? A. Longer.

(770)

Q. In addition to that, P. R. C. have a studio in Hollywood, have they not? A. Yes.

Q. On Santa Monica Boulevard? A. I have never been in it but I know where it is.

Q. You know where it is, and it has been there a good many years, that particular studio? A. I don't know whether they have operated it a good many years but it has been there for a long time.

Q. And they distribute pictures nationally? A. Yes, sir.

Q. And sell them to the affiliated and non-affiliated? A. Yes, they sell them all over.

Q. And the same applies to Monogram? A. Yes.

Q. They have a studio, have they not? A. They do.

Q. Produce pictures? A. Yes.

Q. And distribute them nationally? A. Yes.

Q. Exchanges all over the country? A. That is true.

Q. In addition, you have other distributors in this country besides the eight here and the three you just mentioned? A. I don't think we have other national distributors.

Q. Well, they may be regional? A. That is true.

(771)

Q. That is, they operate in part of the United States? A. Yes.

Q. But the pictures get circulation throughout the entire United States, do they not? A. I imagine they do.

Q. And numerically they handle a great number of pictures? A. Well, I could not say that, Mr. Raftery, because I have not looked into the number that they handle; whether there is a large number or a small number, I do not honestly know.

Q. Well, yesterday you mentioned a Mr. Blumenfeld in answer to or in colloquy with Judge Bright. Mr. Blumenfeld is an exhibitor operating in opposition to Fox West Coast? A. That is true.

Q. And in your opinion Fox West Coast is a better customer for you? A. That is true.

Q. Now, some here may not share that opinion with you, is that right? A. Definitely.

Q. Well, Judge Proskauer's client might not share that opinion with you? A. Maybe not for their purpose, I don't know.

Q. Well, you will admit Mr. Blumenfeld is a good showman? A. Very good showman.

Q. And he gives Fox West Coast good, stiff competition wherever he operates? A. Good operator.

(772)

Q. And you have no quarrel with any of these defendants who prefer to do business with Mr. Blumenfeld? A. I have no quarrel with anyone.

Q. In this license agreement that Mr. Davis handed you yesterday, is that a license where you license the exhibition rights to a theatre exclusive in that theatre? A. That license agreement covers the license agreement to exhibit the picture in that theatre and that theatre alone, yes.

Q. And that exhibitor cannot sell or assign that license to anybody else, can he? A. Not without our approval, I don't believe.

Q. So when you make a license agreement for the exhibition of your picture in the Capitol Theatre in New York City under the agreement that was put in here yesterday, that picture must be exhibited in the Capitol Theatre and in the Capitol Theatre only? A. Yes, sir.

Mr. Raftery: That is all.

Cross-Examination by Mr. Frohlich:

Q. Mr. Rodgers, would you please define block-booking? A. Well, we have got away from block-booking for so long that I hesitate to define it other than to say that it has generally been accepted as the sale of a season's output of pictures at one time. However, that is not booking; that is licensing; but it has been referred to as block-booking. (773.)

Q. Now, you have been in this business for about 30 years, haven't you? A. 35.

Q. 35? A. Yes, sir.

Q. Can you tell us when block-booking began to be indulged in by these companies? A. Well, my first experience in selling a number of pictures at one time was with the Goldwyn Company in 1917, I believe, when I first went with them. At that time, as I recall, we sold in two fashions: We planned to make 26 pictures in a year, and we would sell either a six month's supply or a year's supply; 13 or 26 pictures. Prior to that time we used to sell pictures in the old General Film Company per day or per week; but my first experience in selling a group of pictures at one time was in 1917, I believe.

Q. Didn't you state-right your pictures in the early days? A. I was never identified with the state-right organization, but there were others who did, yes.

Q. Well, don't you know that most of the companies who made their pictures in quantities did state-right their pictures for many years? A. No, I don't know that.

Q. Do you know when the practice of state-righting ceased? A. I could not tell you that either.

Q. Did Goldwyn state-right his pictures at any time? A. At the inception of the Goldwyn Company before he had

(774)

commenced his distributing company he had gone into the producing of pictures, and I believe that he had made an arrangement with Jones, Linnick & Schaefer for the distribution of his products in the midwest area, and he had made another arrangement with Alfred Weiss for the distribution of pictures in New York State; but that was as far as he ever went in the state-right field, and they were never supplied; but he made some sort of an arrangement whereby they came into his distributing company which he later formed, and he never supplied pictures under a state-right basis.

Q. Did Metro-Goldwyn-Mayer sell its pictures in block for an entire season to the exhibitors of the country? A. Yes, sir, for many years.

Q. And that took place all the way down to 1940 when you had the consent decree, isn't that right? A. Yes, sir.

Q. Did you find that a profitable method of exploitation of your pictures? A. We have been profitable for many years.

Q. You made a lot of money with it, didn't you? A. Well, I don't know what you call a lot of money. We were profitable.

Q. Well, you found it an excellent method of disposing of your product each year, didn't you? A. It served its purpose then, yes.

(775)

Q. Have you found the new system of selling pictures in blocks of five more profitable than the old system of book-blocking? A. Well, I can't answer that, whether it has been more profitable or not. I am not prepared to say. We happen to be more profitable. I don't know whether it is attributable to that.

Q. Did you find any complaints from the exhibitors with your five block pictures since 1940? A. They complained very bitterly, yes, sir.

Q. Did your exhibitors complain more bitterly since 1940 with your five block pictures than they did with your block-booking prior to 1940? A. Well, I could not say that, no; they have complained a good bit over many years about many matters, and this is another subject on which they can complain; but whether it is more or less I am not prepared to say.

Q. Would you say, Mr. Rodgers, that block-booking was a very healthy and acceptable form of exploitation of pictures over the years? A. Yes, it was very good for those years, yes.

Mr. Frohlich: That is all.

Mr. Davis: Just one correction in the record, if your Honor please: I find on page 475 of the printed stenographic record a question and answer which in some way got off the rail. I read the question:

(776)

"Q. What other persons other than your own theatres, outside of Radio City Music Hall, do you license? A. We have played some pictures with the Globe and the Gotham operated by Mr. Brandt.

"Q. Is he an independent?" and then the answer is not relevant.

Mr. Davis: What is your answer to the question of whether Mr. Brandt is an independent?

The Witness: Definitely, yes.

Judge Bright: Page 475?

Mr. Caskey: Page 679 of the typewritten record.

Mr. Davis: You may inquire, Mr. Wright.

Judge Hand: What is this correction?

Mr. Davis: I could not get an answer to a question which was responsive.

Judge Bright: What is the question?

Mr. Davis: The question is whether Mr. Brandt is an independent, and then the answer which the record shows does not refer to Mr. Brandt at all. I am just simply trying to get an answer to that question: Is Mr. Brandt an independent? It is folio 679, page 475 of the printed record.

Judge Hand: Yes, I see it. What is his answer?

Mr. Davis: His answer is ——

The Witness: Definitely yes, he is.

(777)

Cross-Examination by Mr. Wright:

Q. Mr. Rodgers, there were some of those definitions that were given yesterday that I would like to get cleared up; You defined a road show, I believe, as one where the charge was a dollar or more, $1.20? A. For the majority of seats at evening performances.

Q. Of course, all of these theatres on Broadway that are playing first-run charge more than that, do they not? A. Well, I believe they are at the present time, but that has only been of short duration.

Q. But those are not road shows? A. No, sir.

Q. The real definition of a road show is that it is a special showing which takes place without reference to the rights of the subsequent-run exhibitors; isn't that correct? A. Well, the subsequent-run exhibitors have no right in the picture until it is leased to them.

Q. Well, a road show is a special first-run showing that takes place prior to the time that you put the picture into regular release into first-run theatres, is that correct? A. It is a special showing, yes, sir.

Q. Your testimony, I believe, was, in response to Mr. Frohlich's question, that your company along with the others sold an entire season's product in a block before it was pro-

duced up until 1940. That was up until the 1941-1942 season was it not? A. Whenever the consent decree became effective, (778)
whenever that was.

Q. You called that old method of selling—it was known as blind selling and block-booking, isn't that right? A. Well, it was defined by some as that, yes.

Q. Well, the exhibitor never saw the pictures until he bought them, or never had an opportunity to see them, with some exceptions, is that right? A. Lots of them had the opportunity if they wanted to, but they did not go.

Q. And the only season in which you were compelled by decree to sell in particular blocks or to trade show was the 1941-1942 season, was it not? A. If that is the year when the consent decree become effective, yes.

Q. I say, that insofar as its requirements were concerned, that applied only to the year 1941-1942? A. Is that when it became effective?

Q. As far as you know. A. Yes.

Q. And since the subsequent seasons you have pursued that method of selling voluntarily, have you not? A. That is correct.

Q. And you have, then, sold in those blocks simply because you found it more profitable to do business that way, isn't that right? A. Not necessarily.

Q. Well, in any event—— A. We have sold that way.

Q. You have sold that way? A. Yes.

Q. And not through any compulsion that is in the decree? (779)
A. No, except that we wanted to respect it. Why?

Q. No, I did not say why. A. I thought you did.

Q. You do not mean to suggest that there was any provision compelling you to sell that way? You merely wanted to continue the practice that you had been forced to adopt for the one season, isn't that right? A. There was nothing to compel us to do so lately, that is true.

By Judge Bright:

Q. You mean that since the decree went into effect you have been confining your block selling, or so-called block selling, to five or less pictures? A. Yes, sir.

Q. There has been no blind selling? A. There has been no blind selling at all.

By Mr. Wright:

Q. And your trade showing of the films before they are released since the 1941-1942 season has been voluntary on your part also, isn't that correct? A. That is true.

Q. And would you say the system has proved in practice perfectly workable and profitable as far as you are concerned? Is that right? A. Yes.

Q. And do you recall the dire predictions that were made at the time it was first suggested that you abandoned season block booking?

Mr. Davis: That is objected to. I do not think we need to go into the dire predictions.

(780)

Judge Hand: No.

Mr. Wright: I think it is significant that this witness's company and this witness himself at that time suggested—made this same sort of suggestions that are being made now, that if you changed that method of doing business it was going to be unworkable and the industry could not possibly function. Now he has made the same suggestions about this loss of theatres.

Judge Hand: Well, he may answer that, but I do not think his criticisms at one time and those which he has now have any bearing on these issues.

Mr. Wright: Read the question.

(Question read.)

A. Yes, I recall it, but I do not ever remember saying that I considered it would be unworkable as you expressed it. It is workable, but it is a great hardship on everybody in the business.

Q. Well, your organization filed a brief, did it not, before the committee that was holding hearings on legislation to abolish blind selling and block-booking, do you recall that?

Mr. Davis: Objected to.

Judge Hand: Sustained.

Q. Now, I do not believe you defined, did you, on your direct testimony what is called a move-over first-run? (781)

A. I don't recall that it was asked, no.

Q. What is a move-over or continued first-run? A. Well, a move-over first-run is a picture that has been playing at one theatre that is moved into another theatre for a continued run.

Q. That is, there is no interval of clearance elapsing between the two runs? A. Not as a move-over.

Q. And your practice today and for the last couple of years has been to move pictures over rather freely in the metropolitan centers from one theatre to another, isn't that correct? A. In a number of places, yes.

Q. Without any clearance intervening at all? A. So long as the admission prices in the second theatre are identical to the first.

(782)

By Judge Bright:

Q. Is a move-over from a first-run theatre still considered a first-run? A. It is, generally speaking, operating as a first-run theatre, but it is moved in.

Q. Does not prolong the time of the second-run theatres to show the picture every time there is a move-over? A. It

prolongs the showing or defers the showing until after the conclusion of the second theatre. If a picture is to be played four weeks in one theatre, it would not become available to the next run until the period after its conclusion. So whether it shows one week in one or three weeks in another, the picture is not delayed.

By Judge Hand:

Q. So it is really all a first-run? A. It is all a first-run.

Q. Even though the time of the two theatres aggregates the same as in one? A. The time in the two theatres sometimes might aggregate more than would be in one, but very often it would not; but that practice has been going on for many years in many places.

By Judge Bright:

Q. You figure the beginning of clearance time from the end of the move-over period? A. Yes, sir.

By Mr. Wright:

Q. Mr. Rodgers, I call your attention to the provision (783) in this 1943-1944 license agreement of yours that is in evidence as Exhibit 278, the provision that reads:

> "If the run herein granted is other than first, Distributor always retains the right, without violating any right of Exhibitor hereunder, to exhibit or license for exhibition any or all of said pictures as a 'continued first run (i.e., a run immediately following conclusion of the initial first run and prior to any run except first, with admission prices not less than those of the initial first run) and in such case Exhibitor's availability as to any pictures so exhibited is to be postponed accordingly, and any clearance herein

provided over the theatre wherein such 'continued first run' occurs automatically modified to authorize such 'continued first run' in such theatre."

Do you remember when it was you first put that provision in the license agreement? A. I haven't got the slightest idea, no, sir.

Q. Do you know it was not in the 1936-1937 agreement? A. It was not? I don't know.

Q. Don't you recall that the provision was inserted as a result of complaints made by subsequent-run exhibitors about the practice of moving over the films in the first-runs from one theatre to another, extending the playing time and (784)
postponing their availability? A. To be frank with you, I don't remember having ten complaints in five years.

Q. Do you remember that such complaints were made? A. Oh, there may have been, but not numerous.

Q. You have heard the term "milking" a picture? A. Sir?

Q. You have heard the term "milking" a picture used in the trade? A. Yes, sir.

Q. And it was suggested that by this practice you were milking the picture of its value by exhausting the exhibition possibilities in those move-over runs before it got down into the subsequent-runs, isn't that right? A. Well, the term milking a picture does not necessarily apply to move-over theatres. It has been used very often where runs in an individual theatre have been extended. They talk about milking a picture when a man plays a picture for a week when he usually plays it only for four days.

Q. But, in any event, there were exhibitors who somehow did not understand that this additional run was just like a first-run and was not actually an additional run at all, according to your ideas, isn't that right? A. I don't recall who they were, but there may have been some complaints, but not many.

Q. And that problem was resolved by incorporating this provision in your license, isn't that right? A. Well, that I (785)

could not say, Mr. Wright. I don't know whether that was the cause of it.

Q. Then I notice this other agreement that was offered here as Defendant's Exhibit L-1. That represents the latest revision of your license contract, does it? A. Yes, sir.

Q. It has the date marked 1945. Is that when it was revised? A. Yes.

Q. Do you know what the purpose or occasion was for revising the agreement at that time? A. Well, the theatre owners at many times have asked us for a shorter form of contract, and we have been working on it for a good many years. I have been trying to persuade our legal department to take out all paragraphs they did not consider absolutely necessary to properly protect us, and that is the result of it, as far as I know.

Q. Well, do you know what particular changes were made, if any? A. I could not tell you that, no, sir.

Q. I will call your attention to one particular phrase which was omitted from your 1943-1944 agreement, Exhibit 278. The last sentence states of the provision entitled 10th Clearance and Run:

> "If clearance is granted hereunder against a specified theatre or theatres indicating it was Distributor's intention to grant such clearance against all theatres in the immediate vicinity of Exhibitor's theatre, then (786)
>
> unless otherwise provided in the Schedule such clearance shall be deemed to apply to and include any theatre hereafter opened in such vicinity."

Mr. Davis: Is that 1944?

Mr. Wright: Yes.

Q. You recall that was dropped out of the 1945 revision, Defendant's Exhibit A? A. No, sir, I don't recall it.

Q. You don't know why it came out of there or how? A. I personally participated very little in the reduction of that license form.

Q. This revision was a straight lawyer's job, is that right? A. Well, it was not entirely a straight lawyer's job. My associates, some of them, participated in discussions with our attorneys; but as to the elimination of a particular clause, I could not tell you why it was.

Q. Now, in your direct testimony I believe you referred to clearance as the interval of time that elapsed between the two or more runs? A. That is right.

Q. Now, in so far as it is necessary to establish an interval of time between runs, you do not need any agreement with the first-run exhibitor to do that at all, do you? A. Well, the first-run exhibitor will usually discuss with you what period of clearance he thinks he is entitled to before it is shown in other theatres.

Q. I understand that, but you as a distributor, in so far

(787)

as you may find it desirable to stagger runs and protect your revenue in the area by proper staggering, you can stagger those runs on the basis of what you call open booking, with no clearance agreements whatsoever, isn't that right? A. We have some agreements with open booking as runs get later, yes, where two theatres will play the pictures simultaneously, or, at least, they have the same opportunity.

Q. And an example of that, I suppose, is Baltimore where after you get through with your pictures in your first-run theatre and a move-over in your other theatre, it goes into 15 or 20 theatres simultaneously on second-run, doesn't it? A. No. We have a second-run theatre in Baltimore, and the clearance, incidentally, is very short.

Q. What is the theatre you refer to as your second-run theatre? A. The Parkway.

Q. So that you in Baltimore play a first-run at what theatre, usually? A. Usually at the Valencia, and Century.

Q. And then a move-over at the Century? A. We don't always move over; but then we play at the Parkway second-run, but we have to play in a very limited time because we have leased, as a general thing, pictures to be played in the neighborhood theatres 21 days after the conclusion of the downtown first-run.

Q. So, then, after you get through with the move-over
(788)
first-run and the second-run at the Parkway, then they go into 15 or 20 theatres simultaneously? A. To a number, yes.

Q. And those are all independent theatres? A. In different areas, that is right.

Q. Those simultaneous runs? A. Yes.

Q. And you have as between those theatres what you refer to as open booking, isn't that right? A. Well, some of them do not compete with each other. They are in different zones. They have an availability of blank number of days after the conclusion of first-run, and they do not always have any relation with others. I do not say that we have any contracts that I know of that has so-called open bookings for 15 or 20 runs there, no. I would say they are due a certain time and they all have the same availability.

Q. Just give me a definition of open booking? A. Open booking is usually confined, generally speaking, to two theatres who are not, maybe, in direct competition but who are reasonably close to each other, and the picture is available to both of them at the same time. But that is usually confined to two theatres, when you refer to the term "open booking."

Q. I am just trying to get what the term means. And you do have the practice of having open booking in some of
(789)
those situations where the prints become available to both

at about the same time, and sometimes you move a print into one theatre first, and the next time it may go into the other theatre first, so neither has a fixed playing position in reference to the other. That is what open booking does? A. They have the same opportunity to book at the same time, and if we have the prints available they will get them at the same time.

Q. Yes; and I say, in that case, there is no clearance which gives one a fixed position over the other? A. That is correct.

Q. Now, booking I don't think has been defined. Perhaps you had better tell the Court what booking is as distinguished from licensing, or what you call selling. A. The booking of attractions after we receive the license agreements and the complete approval is had and they become a matter of record, we have in our exchange offices or branch offices, as they are sometimes termed, and dependent upon their size, anywhere from two to eight people who are engaged for the purpose of booking the picture to the theatres in accordance with the provisions in the license agreement. And very often they will send notices to the theatre that a picture is available at a certain time, and the theatre will then come in and book a picture at a time when he can best use it within that period that it is available; or he will write

(790)

in. For as brief a description as I could give, I could more or less liken it to the same manner in which many years ago bookers routed vaudeville acts. We routed them all over the country in different theatres. I think we could give an act 30 or 40 weeks in New York by routing it to different theatres. The same thing is followed in booking of motion pictures.

Q. And these so-called bookers of yours in the exchange keep a chart, do they not, not only of the first-runs as they play in your theatres, but the first-runs in all of the theatres

in the area, isn't that right? A. Well, they don't necessarily keep a chart of the first-runs in the area that are not playing our pictures. Their charts are maintained only for the pictures of ours that are leased.

Q. Well, for purposes of determining what the most advantageous times are to date or what you call setting in these pictures, it is necessary for your booker to know not only what Loew pictures are coming off the first-run, but when and what pictures of other distributors are coming off the first-run; is that right? A. No. I don't believe there is a single chart in any one of our offices maintained by a booking clerk that shows any such data.

Q. Well, whether there is a chart or not, I say, isn't it a fact that your booker in order to do his job properly has to know not only what pictures of yours are being shown first-
(791)
run, and when, but the first-run play dates in the area for the other distributors' films? A. How can—— I was just about to ask you a question. But you are asking me.

Q. Can you answer that yes or no? A. I will say no, that we do not maintain such records in our exchanges, or the bookers.

Q. I did not ask you whether you maintained a record. If you will listen carefully to the question—— A. Give it to me again.

Q. Isn't it the fact that the booker in your exchange, in order to do his job properly, has to know and observe not only when and what pictures of yours are played in the first run theatres in the area, but when and what pictures of the other major distributors are played in the area? A. No, he does not have to know that.

Q. You say that is not a fact? A. No.

Q. Now, you gave a rather extensive testimony or explanation here as to what you call first-run theatres in these 92 cities of over 100,000 population. I don't believe you de-

fined first-run theatre. Can you do that for us, as you used it? A. A first-run theatre?

Q. Yes. A. A first-run theatre, in my opinion, is any theatre that plays pictures first-run in its individual community.

(792)

Q. Plays anybody's picture first-run? A. Yes, I would say anybody's. I am talking about my own principally.

Q. Well, in this list that you gave us, then, you included theatres, did you, that played any product at all for the first time in the City? A. Played any product at all for the first time in the City, yes.

Q. All of the theatres in the cities named which played anybody's pictures at all for an initial exhibition in the town were included in the names you gave us of the first-run theatres in these towns? A. Oh, no. There are a lot of pictures that would never see the light of day for first-run in a number of the first-run theatres. You know that.

Q. Yes. That is what I am trying to get at. That is, what the basis of the selection of these particular theatres that you did include in the list was. A. I believe those theatres want to play the best motion pictures they can get.

Q. Those are the theatres which played the best pictures on the first-run? A. Yes, sir.

Q. That was the basis for your selection, is that right? A. They are theatres which play the best pictures first-run, yes, and maybe some of the poor ones; I don't know.

Q. Well, the Little Theatre that you gave us there in Washington has not played a first-class major picture on

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first-run in ten years, has it? A. It has not played any of mine, I hope.

Q. Why did you put it in the list as a first-run theatre? A. Because it is so considered. It plays some of the small pictures or some of the inconsequential pictures, I suppose, but it is listed as a first-run theatre and is so considered.

Q. Listed by whom? Where? A. Well, our records in New York would indicate that it was considered a first-run.

Q. Well, were you just testifying from some records that you had in New York or from any personal knowledge that you have about the theatre situation there? A. I was testifying principally from the records that I had in New York plus the knowledge that I have gained over a period of a good many years.

Q. As a matter of fact, you did not include in the list a Warner Theatre, the Ambassador, which plays many first-class major pictures, and first-run, did you? A. I never considered the Ambassador to be a definite first-run theatre in Washington.

Q. Well, the Ambassador actually has, in the last five years anyway, played more, or has played a substantial number of first-class major pictures, and first-run, hasn't it, simultaneously with the downtown play dates in the Warner theatres? A. It has not played any of ours first-run.

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Q. Your list was not limited to the list which played your pictures first-run; that is right, isn't it? A. The list may not have been, but I was trying to establish the fact that we selected the first-run theatres where we thought we had the better opportunities for return——

Q. I understand that, but you went further than that, and you undertook to name the other first-run theatres in the town, whether they played your pictures or not; that is correct, isn't it? A. The other recognized first-run theatres, yes, sir.

(795)

Q. I am just trying to find out why you excluded the Ambassador and included the Little in your statements? A. Don't the Ambassador play also some single pictures?

Q. I suppose they do. A. That is not a customary thing, however. I would not class a theatre that played first and second, when they could get an occasional picture, first-run.

I don't consider that a first-run theatre. Certainly I would never seek that as a first-run outlet.

Q. Then you excluded from your tabulation those theatres which do not play first class pictures on first-run as a regular full-time policy, is that right? A. No, sir, I didn't exclude anything from that list. I listed the record that we maintain shows the recognized first-run theatres in all of these cities and the Ambassador is not a recognized first-run theatre in the City of Washington.

Q. What made the Little recognized first-run, according to your testimony? A. Because it has always been considered, and I suppose it plays such pictures as it can get first-run.

Q. It played constantly foreign pictures and three, and four and five-year old reissues? A. If I had a few foreign pictures and the possibilities were limited, sir——

Q. Can you just answer the question? A. I don't know what they play. I don't keep a record of their entertainments.

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Q. Without knowing what they play, you cannot give any accurate classification as to whether or not it is an accepted first-run theatre in the trade, can you? A. Wouldn't you believe, or haven't I got a right to believe that our representatives in the field know what is a first-run theatre and what is not?

Q. I assume your representatives in the field might know.

Judge Bright: How do you get the reports?

The Witness: They are all sent to us by our branch offices in the field. Most of our representatives have been stationed in the individual area over many years.

Q. I have understood you were testifying here about something you knew. I suppose if your representatives in the field want to testify, they are available, isn't that right? A.

If I don't know fairly well, I have been fooling somebody for a long time.

Q. There are a very substantial number of theatres on that list that you gave us which you know as a fact never have or don't now play any regular run, regular first-run of first class pictures in those towns, is that right? A. Mr. Wright, what do you refer to as first class pictures? I consider every one of the theatres that are listed on there as being first-run theatres. Now, what they play, I have no
(797)
knowledge of because I couldn't attempt to keep such a record. I only know of their record as first-run theatres.

Q. In other words, you are just giving us what your records in the exchange show, is that right? A. Plus my knowledge, yes. I possibly don't know every little theatre all over the country.

Q. You don't know anything about what the actual playing policy of the Little in Washington is, is that right? A. No, sir, I couldn't tell you that.

Q. Do you know anything about what the playing policy of the Little Theatre in Baltimore is, that you gave us as a first-run theatre? A. No, sir, I don't know what they play.

Q. You answer the same as to the Mayfair in Baltimore? A. Would be the same. I don't know. It would be the same as it relates to any first-run theatre in Baltimore. I don't keep track of their entertainment.

Q. And this Downtown Theatre in Detroit, you know as a matter of fact that theatre has never had a run of first-run pictures there, is that right? A. Not for some time. Been closed. Been closed for most of the time—for a number of years.

Q. Why did you put that on the list? A. Because I had a letter from Mr. Balaban inquiring for our first-run the other day, and said he had taken the theatre over and a
(798)
brother of one of the officials of the firm wants first-run there.

Q. You put it down as a first-run prospect? A. Not a prospect for me. It is a first-run theatre now.

Q. You mean when somebody takes it over and says that he wants first-run, then it becomes a first-run theatre? A. I believe he notified me it had been so established and that he was seeking first-run.

Q. That State Theatre you named in Hartford, Connecticut, what first-run pictures did that theatre ever play? A. I believe some years ago it played some of ours. Did not do so well.

Q. How long ago? A. A good many years ago.

Q. Why was it put on the list as a first-run theatre now? A. Because I believe it is. So it has been reported to me as a first-run theatre. It has had a varied career.

Q. You haven't any idea as to what, if any, first-run product it has had? A. No, I haven't checked into it.

Q. You gave us two theatres in Louisville there, Mary Anderson and the National. A. Yes.

Q. Do you know anything about the playing policies of those theatres? A. I don't know what product they play, no.

Q. You know as a matter of fact that they don't have any regular first-run of any major product, is that right? (799)

A. No, I don't know that is a fact.

Q. Your knowledge is completely negative on the subject? A. On that, indeed it is.

Q. And in Philadelphia you gave us the Studio as a first-run theatre. Do you know what they play? A. No, I don't.

Q. And the Erlanger, I believe you already testified, was another closed theatre you gave us. A. Closed for a good many years, but I believe is open now. I don't know; I have heard it was.

Q. You gave us the World at St. Paul. Do you know what product, if any, that plays? A. No, I have been told that it plays foreign pictures and reissues and so forth, but

I personally haven't any knowledge of what they play regularly.

Q. A theatre that plays foreign pictures and reissues is not what you would term a regular first-run theatre, is that right? A. I wouldn't sell it unless I had that particular type of product to sell. It is first-run to somebody.

Q. In that tabulation you gave us yesterday as to this number of theatres that lifted their admission price on this "As Thousands Cheer," I believe there were 300-odd out of 3000? A. I believe that was the record, yes.

Q. Did you make any check to see which of those were

(800)

first-run theatres? A. I couldn't tell you that, no. I simply asked to have a statement made up that would show me the number of theatres that increased their admission price beyond the price provided for in the agreement. I did not attempt to differentiate between first, second and third.

Q. As a matter of fact, all those were first-runs, were they not? A. I don't know. I merely asked for the numerals. I haven't asked for the details.

Q. The other data is readily available, if you wanted to get it? A. Oh, the data is available, yes.

Q. On this question of what a satisfactory first-run outlet is, that is never solely determined by a consideration of the size or physical characteristics of the theatre, is it? A. Of the size? Not necessarily, no.

Q. That is, you have many situations where you may have a small theatre and if you can get sufficient playing time in it, you can make more money than you would ever get in a big theatre with less playing time, isn't that right? A. There may be such situations. A lot of things depend on it, however.

Q. There are other situations where, because of a low operating expense, a theatre may be able to pay you much more in first-run revenue than another theatre which, perhaps, has a flossier set of ushers, more expensive equipment

and a fancier marquee, isn't that right? A. The additional
(801)
expenses don't usually come from those reasons. It is many other reasons.

Q. I understand that, but it may be worth more to you than a high expense theatre which has a much finer appearance? A. Might be. There may be some situations.

Judge Bright: Isn't your take figured on the gross?

The Witness: My take is figured on the gross.

Judge Bright: What has expense got to do with it?

The Witness: The expense has got this much to do with it. Very often, if you are dealing with a theatre that has an unusually high expense, possibly an over-financed theatre, where the rent is high and their equipment is very expensive, and a charge-off, they are hardly in a position to pay you market terms and they want to buy pictures, because of their condition, at less than market terms because they cannot afford to pay the customary terms because of their high operating expense. So, as Mr. Wright pointed out, there are some theatres—we own a very small theatre in Toledo, Ohio, where our operating expense is not too high—but I can do better with our own theatre, as I tried to explain yesterday, than I could do with the Paramount Theatre in Toledo, which has an unusually expensive operation and seats many
(802)
more people. I would rather do business with our own theatre in that case, where I would eventually do much better in the net result.

Judge Bright: You mean you could make a better deal with the lower-priced theatre than the higher expense theatre?

The Witness: Very true, over-financed and over-expensive theatre. I might be able to do just as well with something not too expensive.

By Judge Bright:

Q. Who determines what percentage you will get from any particular theatre? A. Well, we usually have a general policy. For instance, as I explained yesterday, we have a sliding scale. If I have a sliding scale that develops as the gross develops, for me to get an increased amount of revenue, a normally-operated theatre would have that scale developed in the proper order, whereas a fellow who has a very expensive theatre will object to the jumps of one percentage to another. He says, "You should leave a wider gap between 27½ and 30 per cent, or 30 per cent and 32 per cent," and in a theatre such as we operate in Toledo, as I say, it has been a very lucrative outlet for our product.

Judge Hand: All you mean is, really, there are situations where the exhibitor is in such difficulty, financially or otherwise, that he cannot and won't

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make the conventional trade with you?

The Witness: There are——

Judge Hand: And therefore you might do better with another exhibitor, yourself in your own theatre, or some other exhibitor who hadn't the apparent potentialities?

The Witness: That is correct, sir.

By Mr. Wright:

Q. And I suppose it is true that even where the same percentage terms are granted, you may get more out of the small theatre, if you play the picture there for a longer period of time, is that right? A. That, of course, would have to be specific, Mr. Wright. I couldn't answer that in a general way. I would have to know. Do you have any particular place in mind. I certainly couldn't hope to get as much money out of ten weeks at the Little Studio Theatre in Philadelphia as I could get out of the Stanley in two.

Q. But if you have a 1000-seat theatre and a 2000-seat theatre, you can get much more out of three weeks in the 1000-seat theatre than you can get out of one week in the 2000-seat theatre, isn't that right? A. You would have to talk——

Q. Same admission prices and same terms? A. You would have to talk to me specifically on that. I couldn't answer that.

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Q. That is a possibility? A. Could be a possibility. I couldn't say it was or it was not until I knew what you were talking about or where you were talking about.

Q. In any event, playing time is a function of your profit possibilities? That is one thing that determines how much revenue you can take out of any first-run theatre, is how much playing time your pictures get, isn't that right? A. Playing time is the most competitive thing in this business today.

Q. But can you answer the question? A. Playing time is very important to us, very necessary, to get the best we can.

Q. The answer to my question is yes, isn't it? A. Well, I would have to ask you to read the question again.

Q. (Read.) A. That is one thing, yes, sir.

Q. And how much playing time is available to you in first-run theatres depends, of course, does it not, on what other product the theatre has available, right? A. I don't know whether it depends on what other product it has available or not. I know that when we have a product to lease we want it played in certain theatres, I would rather feel that the other product that is leased at that theatre depends entirely on what they have left after they play ours.

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Mr. Davis: Will you raise your voice a little? We cannot hear you very well.

Q. I understand that is the arrangement you prefer but, as a matter of fact, how much playing time you line up with depends, at least to some extent, on what other comparable pictures are available to the exhibitor, isn't that right? A. Not necessarily the case. In the majority of places where we operate, and the types of theatres that I assume you are talking about, we have what are commonly known in this business, as you know, as hold-over figures. In other words, our picture can play at the Radio City Music Hall as long as the first four days reach a certain amount of money. The same holds true with our Capitol Theatre. So we won't go into a theatre of that type, in a good many other first-run theatres, for a given period of time. It depends on the public's support of the picture.

Q. Can you tell the Court just how you use this sliding scale formula of yours, that is, when you make a deal with an exhibitor, as I understand it, you have an option there, he can either buy on a flat rental—that is, in the exceptional case, a fact? A. Very small cases—small theatres.

Q. And the other alternative is that he can give you a minimum guarantee against a fixed percentage of the gross? A. No, I don't particularly care about the guarantee against

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the fixed percentage, but in some small situations, where it may work a hardship on the theatre to pay our terms in the way of percentagewise, we have agreed to take a flat amount of money, $50, we will say for illustration, and divide all the excess receipts beyond an agreed amount.

Q. And those are situations where you fill in on your columns—in those situations you fill in, in column 3 on your form there, a flat figure, which is a guarantee against a percentage of the rental, is that right? A. Well, I don't have many guarantees, Mr. Wright, against a percentage, no, sir. I have a guarantee rental with an excess receipts arrangement, but I don't have many guarantees against a fixed percentage.

Q. I am afraid I don't understand the difference. You have a guarantee and then you have a certain overage, which is dependent upon what the picture grosses, is that right? A. Yes.

Q. And that overage is determined on this sliding scale of percentages, that is, it always slides up with the increase in receipts, does it not? A. That is a different type of deal entirely than the sliding scale. The sliding scale is predicated upon a figure that is agreed to by which we get a given percentage and before we can earn a larger percentage, the gross receipts must go up, and we agree with the theatre

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owner the different grosses that must be reached before our percentage can increase.

Q. Yes, I understand that, but you have on your column here headed "Sliding Scale Terms" spaces headed "When gross receipts per unit of playing time equal or exceed a certain amount." What is that figure that you inserted in there as a figure per unit of playing time? How did you arrive at that? A. A unit of playing time is this, that generally speaking in situations in this country, where theatres are open seven days, there are ten units charged, the assumption being that three units of the ten represents about the amount of business that a man does on Sundays, two units represents what he does on Saturdays, and one unit for each of the other five days of the week. So, therefore, when a unit figure is arrived at, it is set in that column——

Q. And that unit figure is a flat amount in dollars? A. That is true, and we get a certain percentage up to that figure and then beyond that it improves as the scale provides.

Q. How do you determine that unit figure? A. By negotiation.

Q. And that negotiation involves a consideration of what factors? A. Well, it involves, usually a factor— that is de-

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termined by the gross receipts, that we have a record of, that the theatre is doing with our pictures; and in other cases, where we have authenticated the operating expenses of the theatre, we have no hesitancy in making a deal based on the man's cost of operation.

Q. So that your unit or control figure there is closely related to his expense of operation? A. In some instances; in others, no. Some people won't let us audit expense, they won't tell us what the expense is.

Q. Your contract gives you the right not only to audit the gross receipts but to go in and audit his expenses, if his agreement with you is such that his film rental is computed in terms of profit as well as mere gross, isn't that right? A. Any contract that has anything to do with expense, we reserve the right to verify it, yes, sir.

Q. In negotiating in the past these percentage deals for a sharing of proceeds, after the gross reached a fixed amount, you always fixed that so-called split or control figure with reference to what the operating expenses of the house were, isn't that right? A. Very often what he told us they were.

Q. In any event, you did not expect to share 50-50 with him until he had at least gotten his expenses back and some, or usually some profit, isn't that right? A. That is true, but they aren't subject to audit. That is not subject to audit.

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Q. I suppose that depends on the terms of the agreement? A. Exactly.

Q. You spoke of this competition between these affiliated theatres in these towns you named. You did not mean to suggest by that that there was any competition between them in so far as licensing of your films was concerned, did you? A. No, no, I wouldn't suggest that.

Q. And I take it you don't know enough about their operating policies, or such other films as they license, to have any very accurate idea as to the extent to which they might com-

pete with each other otherwise? A. No, I only know that every one of the theatres that we operate are operated in cities where there is keen comptition, but I do not keep a record of what the other theatres play, nor do I know what they lease.

Q. You only know that there are other first-run theatres there? A. Yes.

Q. That is what it comes down to? A. That I know.

Judge Goddard: Mr. Wright, just what do you mean by "affiliated theatres"?

Q. I take it in response to the last question you understood the term affiliated as referring to those affiliated with one of the defendant distributors here, is that right? A. I understood it as that, yes.

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Q. In this question of selecting these so-called move-over or continuous first-run outlets, many of those theatres are of the character we were discussing where they are rather small and have a low operating overhead, isn't that true? A. No, not necessarily. Some of them are, but that is not the rule by any means.

Q. In those situations where you license your first-runs, that you described in your direct testimony, to these first-run theatres in the 92 cities where there were two or more of them, your films were generally licensed on what you call an "or" basis, is that right? A. That is true.

Mr. Dennis: On what basis, Mr. Wright?

Mr. Wright: "Or".

Q. That is, you license them for such and such a theatre or the next one or the next one, so the exhibitor may play the film in any one or all three or four, as the case may be, is that right? A. We usually don't incorporate "or" unless the theatres are more or less comparable.

Q. In most of those situations you regard them as comparable for your first-run purposes? A. That is usually a negotiation. We are selling now by group, as to the manner in which our pictures will be played and what theatres they will be played in. I could cite you any case that you could ask me about in most any of the important cities, but I would

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not give a "or" to be played in any theatre they wanted to. Some of them are too small to give the proper presentation, first-run, or first showing, to one of our more important pictures.

Q. That Columbia Theatre that you used regularly as a move-over out in Washington for your pictures, that is a small and not particularly prepossessing theatre, isn't it? A. Yes.

Q. When you compare it to the other first-run houses? A. Very great grossing possibilities. Doesn't cost so much as the Capitol.

Q. I understand that, and that is the kind of theatre I was referring to, small in size, and with low operating expenses and does not compare in appearance or appointments and front with your other houses. A. Yes.

Judge Bright: Is the dollar value to you the determining factor in your definition of a first-run theatre?

The Witness: It is a very important one, one of the most important. However, it is not the final, but it is most important. There are sometimes when people have offered us unusual terms hoping we would give the pictures and sometimes they might not be financially able to carry on, and it was just done with the thought of taking pictures away from an estab-

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lished customer, hoping that you would be selfish

enough to pick it up, but generally speaking the determining factor, and the largest contributing factor, is the amount of revenue we can earn as film rental.

Q. In your list of these first-run theatres, you did not mean to suggest, did you, that there were no other theatres than those that you named on the list which might have been suitable for the so-called move-overs or continued first-runs? A. No, I did not list those at all.

Q. For example, in Providence, I think you testified that you moved over pictures into a theatre that Mr. Fay has there? A. One of them, yes. He did. I haven't looked at the records lately.

Q. I believe you testified you also had an interest in that theatre? A. Some sort of an interest, our theatre department has. I don't know the extent of it.

Q. That is an interest in the operating profits of the theatre? A. Yes, and I guess the losses.

Q. Yes. A. Yes.

Q. And those profits and losses would be the profits and losses on all the pictures that that theatre played in addition to just those of yours? A. I should assume so. I am not in a position to testify on that, though, because I don't know.

Q. That is, these move-over houses, in which you say you
(813)
had an interest in these various situations, do not play your pictures exclusively, they also play pictures of other distributors? A. Yes.

Judge Bright: Mr. Wright, in your use of the words "affiliated theatre" do you mean other than theatres in which the particular defendant has a stock interest, or is it broader than that?

Mr. Wright: No. As the witness and I have been using it, as I understand his testimony here, it in-

cludes those theatres in which one or more of these defendants has some kind of direct or indirect stock interest, actual interest in the profits of the house.

Judge Bright: Stock interest—any interest?

Mr. Wright: Yes, whether the interest—of course, in some cases it might be held by virtue of a pooling or operating agreement where the defendant receives a share of the operating profits by virtue of such an agreement without actually owning stock. In either case, I think we would both agree that those theatres would be classified as affiliated with the defendant in question.

Judge Bright: Is that the sense in which you have used it?

The Witness: I tried yesterday in my testimony to refer to them as associated with one of the defendants because I am in no position to know what financial

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interest they have in any other theatres; but I consider them associated with one of the defendants when it is necessary for me to deal with them in order to secure representation.

Judge Bright: Is it necessary for you to deal with the defendant?

The Witness: Yes, representative of the defendant.

Judge Bright: Of the exhibitor?

The Witness: Yes. As I illustrated here, in New Orleans between the United Theatres and the Theatres Service, whether Paramount has or hasn't any interest in those theatres, I am in no position to know, but I know if I want representation in them I have got to deal with the man who represents the Paramount Company and in those offices, so I consider them associated with Paramount. Whether they are affiliated through stock interest or not, I have no knowledge.

Q. Getting back to this Providence situation, that theatre of Mr. Fay's, prior to the time you had acquired an interest in it, was not used by you as a move-over for your first-runs in Providence, was it? A. No, sir.

Q. And it is only since you acquired the interest in the theatre that your pictures have been made available to that theatre on a move-over basis? A. That is true.

Q. And the same thing is true, is it not, with respect to these similar situations you described, I believe, in Richmond (815)
and Norfolk, where you move over some pictures into some theatres that Fabian operates? A. I don't know that they move over as much as the product is, in some fashion, divided. We try to supply the pictures in any one of the theatres where we think the best results will be had.

Q. The product there is played in those theatres under a sort of pooling arrangement, isn't that right? A. I believe it is. I don't know the financial structure. I don't know the details other than we have interests there. Whether it is pooling or what it is, I don't know.

Q. You know you have a share—— A. We have an interest of some——

Q. —in the profits? A. —description.

Q. And that Rhodes Theatre in Atlanta, I think you testified that you operated it, the interrogatory answer says that Lucas & Jenkins operated it; I think Mr. Thompson said here in court it was operated by officers of Lucas & Jenkins. Do you know just what the relationship between your company and the Rhodes is? A. Well, if I testified yesterday that we operated it, I did so in error. I know we are interested in it and I don't believe that we have anything to do with the operation. I think that Lucas & Jenkins operates the theatre. I don't think we have anything to do in the operation.

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Q. You share in the profits? A. Oh, yes, we have an interest in the theatre, definitely.

Q. And that share in the profits that you have, through operating agreement, includes, of course, such profits as are derived from the exhibition of films other than yours there? A. I should assume so.

Q. That is not limited to those pictures that you move over? A. Naturally.

Q. As in the case of the Providence theatre, it was not given the privilege of showing your films on a continued first-run until after you acquired an interest in the theatre? A. Never had any carry-over until after we acquired an interest, that is right.

Q. The same thing is true with respect to the Brown Theatre in Louisville, which you referred to? A. We have some sort of interest there too.

Q. An interest in the profits again? A. Profits or operation—I don't know—profit and loss—I don't know what it discloses.

Q. In many of those situations that you covered in your direct testimony, where you now sell certain theatres on first-run, you did not sell them when they were in independent hands, did you? Do you recall any of those instances? A. You would have to recite a specific instance. I couldn't deal generally with it. Sometimes we did, yes; other times,

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possibly, no. I don't know.

Q. Let us take the Minnesota Theatre up there in Minneapolis. Do you recall that? That is now named, I think, on your list as the Radio City Theatre. A. Yes.

Q. Changed the name? A. Yes.

Q. Originally built there by Paramount as a very large, de luxe first-run house? A. Yes.

Q. And then you recall that Paramount gave it up and it passed into the hands of bondholders? A. Yes.

Q. That was after the 1936-37 season and following the 1936-37 season it was one of your first-run outlets there? A. Yes, it was operating for a while first-run.

Q. And then after the bondholders took it over it was never offered any pictures by you for first-run exhibition, was it, during that period? A. No, because we never thought it was justified. As a matter of fact, I was never very happy with it when Paramount had it and very often refused to play pictures there. It was a bad location, high overhead, and while it was operated by bondholders, the business was very poor there.

Q. Then again, when Paramount took it back, however, and renamed it the Radio City, since that time your pictures have been playing there first-run?. A. The business is very good in Minneapolis now, yes, sir—in that theatre, unusually good.

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Q. And substantially the same thing occurred with respect to the Oriental Theatre in Chicago? A. Oriental Theatre in Chicago?

Q. Yes. A. With the possible exception of "Gone With The Wind," I don't remember ever dealing with the Oriental first-run in Chicago—for many years—at least not since I have had anything to do with it.

Q. And the Oriental, prior to that, and while it was being operated first by Balaban & Katz back there in, let us say, the 1936-37 season, was licensed for first-runs of your pictures along with the other Balaban & Katz Loop houses, wasn't it? A. I don't think Balaban & Katz were operating that theatre in 1936, as fa as I can recall.

Q. When they last did operate it, before the bondholders took it over, it was licensed by you for first-run along with other B. & K. Loop houses? A. I don't recall that because I did not occupy my present position prior to 1936, and I didn't have anything to do with Chicago prior to that time.

Q. You know the Oriental Theatre? A. Very well—oh, very well.

Q. That was the newest, next to the largest and probably the best located of all the first-run theatres in the town, isn't that right? A. It is a very fine theatre.

(819)

Q. You say you did license Gone With The Wind there? A. As to one or two theatres, yes, we licensed.

Q. You licensed on a day and date in the Oriental and the Wood's? A. That is right.

Q. That is a term that means you—that is a term that you use that means simultaneous showing first-run? A. That is simultaneous showing. It is different than equal availability.

Q. You did not offer it then until after you had been unable to agree with Balaban & Katz on terms for the picture, isn't that right? A. That is correct.

Q. That was the only reason that it was made available to the Wood's and the Oriental? A. That is true.

Q. And it did have a very long run at the rather small W od's, did it not? A. Very long run.

Q. Paid you a very handsome—— A. Long run in both of them.

Q. Paid you a very handsome film rental? A. Very substantial.

Q. Are you familiar with the Main Street Theatre in Kansas City? A. No, not that I know of, not for years.

Q. Used to be operated first-run there as part of the Paramount, when the Paramount-RKO-Fox pool was functioning there, is that right? A. Yes, but I don't believe

(820)

that theatre compares in any way at all with the Midland Theatre.

Q. Regardless of how it compares with the Midland, it was operated as a first-run theatre by the Fox-Paramount

RKO pool at the time the first-run theatres other than yours were pooled out there? A. I don't recall that. That was also, I am sure, before I had charge of Kansas City.

Q. Then when the pool dropped it and Mr. Shineberg got hold of it, do you recall that efforts were made to negotiate with your company for films for it? A. Never since I have been in my present position do I ever recall having anyone try to lease pictures for it first-run in Kansas City.

Q. In no event did you offer any films to the Main Street, and it is now, you say, closed and it has been closed for some years? A. I wouldn't offer any pictures. Our own theatre requires them.

Q. The theatre is now closed; you understand that it has been closed for some time? A. That I don't know offhand, no.

Q. There is a theatre in Omaha called the Town Theatre run by Mr. Goldberg out there, which is perfectly suitable, physically, for move-over or continued first-runs, isn't it? A. I don't know that it would. We recently made a deal with Mr. Goldberg for the use of our pictures in one of his other
(821)
theatres down there and he isn't doing so well.

Q. My question is with reference to the Town. A. I don't know that it would be desirable. Omaha is rather limited in its possibilities.

Q. In any event, you have never offered any pictures to the Town for move-over or continued first-run? A. I doubt very much if I would approve it if it was even suggested.

Q. Then this policy you have adopted of only putting move-over runs in the theatres in which you have an interest, have you followed that same policy in dealing with theatres of the other defendants?

Mr. Davis: Excuse me a moment. It may be because I did not hear something that passed, but I don't remember that statement by the witness.

Ms. Wright: Perhaps I misunderstood the witness.

Q. I understood you did have the policy, in so far as move-overs of your pictures from your own first-run theatres were concerned, not to move them over to another theatre unless you had an interest in that theatre or an operating profit interest, is that right? A. I did not say that we had a policy in that direction.

Q. That has been the practice? A. I will tell you very frankly, I would not do it. If I was requested for a move-

(822)

over, if we did not have an interest in the theatre, I would not grant it.

Q. And it has been your practice to grant them only where you do have—— A. Wherever our company owns it or operates it or has an interest, that is a different thing.

Q. That same practice has been extended, has it not, to theatres in which the other defendants are interested with respect to the showing of your pictures? A. To my knowledge we have not granted any move-over rights to anyone unless they were interested with the first-run there, yes.

Q. Specifically in Philadelphia, back several years ago, your pictures used to move over, or sometimes have the initial exhibition, in the Keith and the Carlton Theatres there, isn't that right? A. A few of them did, yes.

Q. And then do you recall when it was that Warner lost those theatres and Mr. Goldman took them over? A. A couple of years ago, I believe.

Q. And after Warner lost its interest in them and Mr. Goldman took them over, then you did not make your pictures available for a move-over run at those theatres, did you? A. We never had a steady move-over with either one of the theatres.

(823)

Q. Can you just answer the question?

The Witness: Read the question.

Q. (Read.) A. No.

Mr. Davis: I submit he has answered and the answer is responsive.

Q. And you in fact inserted a 14-day clearance between the Warner first-runs and the runs of your films in the Keith and Carlton, is that right? A. No, sir.

Q. You did not? A. No, sir.

Q. You did not license your films to him at all? A. Oh, yes.

Q. For the Keith and Carlton? A. Yes.

Q. On what terms? A. 7 days after.

Q. The clearance interval was 7 days? A. That is true.

Q. And your license agreements required him to charge the same admission price as Warner did for the first-run? A. No, he offered that. They were his admission prices. We did not require them.

Q. The admission prices that went in the contracts that you made with him, stipulated as minimum prices, were the same that Warner was getting for the first-run, is that right? A. They were his minimum prices, yes, sir.

Q. Then you sold a run to Warner immediately behind him at a 10-cent lower price, isn't that right, 10-cent lower admission price? A. Must have been at least 7 or 14. I don't

(824)

know what their admission prices are.

Q. Perhaps more than that. Perhaps a 20-cent differential. A. How much differential?

Q. In any event, you sold Warner a run immediately following Goldman with no clearance interval, is that right? No question about that? A. I could not say that to be a fact. There was no change in the runs between the first-run in Philadelphia, the Keith and Carlton, and the following runs

in Warner's. There was no change, generally speaking, in those runs after Goldman took those theatres.

Q. Can you answer this question yes or no? Did you or did you not make pictures available for Warner Downtown Theatre immediately following the conclusion of the Goldman run in the Keith or Carlton? A. We made it available following. Whether it was immediately or not, I am not prepared to say.

Q. That you don't know. And you know also, do you not, that the admission price that Warner's was required to charge for the following run was very substantially lower than what Goldman was required to charge for the preceding run? A. I cannot help but not answer the question the way you propound it. We did not require anybody to charge any particular admission price, Warner's or Goldman.

Q. I take it your contract does? You do not have any
(825)
doubt about it? A. It is not what I require of them. It is their prevailing admission prices.

Q. You do know that the admission price that was incorporated as a minimum in your contract for the Warner following run was substantially less than the price at which—— A. No.

Q. —it was incorporated in the Goldman contract? A. I don't know that it was substantially less. I am willing to assume it was less but I am not willing to say it was substantially less because I don't believe it was.

Q. As far as immediately following over, a picture goes from one house to another without clearance, there isn't any practice or policy that you have that requires any common interest in those circumstances in the two houses? A. For moving over pictures? We haven't granted any. We haven't granted any.

Q. I did not say for moving over pictures. I said, with reference to licensing immediately succeeding runs, you do

not have any practice or policy that requires the holder of the immediately preceding run to have an interest in the operation of the immediately succeeding run; that is correct, isn't it? A. No, we have no such policy.

Q. Of course, you have many runs here and in Chicago where they follow immediately with no clearance and they are opposition theatres, there is no unity of interest at all? (826)

A. I don't know that they follow immediately but they follow each other. I don't know whether they have interests or not. It depends on the way they are booked.

Q. You don't care? A. I am not interested.

Q. I think you said something in your direct testimony about staying with this Adams Theatre in Paterson, New Jersey, to the extent of one-third of your pictures and——

A. That is right.

Q. —you said you had originally sold that account as the result of some difference of opinion between you and the Warner Circuit back there in the early '30s? A. Yes.

Q. And at that time you were out of the whole circuit, is that right? A. Yes.

Q. Philadelphia as well? A. That is true.

Q. You were then playing pictures in Philadelphia in the Chestnut Theatre Opera House? A. One of the Chestnut Theatres, yes.

Q. And then you said the succeeding season you and Warner resolved your differences of opinion and you were back in the circuit? A. Yes.

Q. Is that right? A. I don't know whether it was the succeeding season. I think it was the same season we straightened out our differences.

Q. You mean you had not played off the full season before (827)

you got together? A. That is correct.

Q. But in any event, such pictures that had been released while the break was on, Adams had played all of those, hadn't he? A. Adams had? As far as I can recall, yes.

Q. Then when you got back together with Warner's, you have allocated ever since one-third of the season's product to Adams and two-thirds to Warner's, is that right? A. I believe that is the division, one-third and two-thirds, yes.

Q. And you make that division—when you have these so-called splits—mechanically, how is it determined who gets which of the pictures in the split? A. It is usually arranged between the theatres. One time one theatre will make up a list and divide it in three and give it to the other fellow to select. Next time, the other man will make up a list of three and give it to the competing theatre to select.

Q. You call that one making the split and the other making the selection? A. That is right. That is the way it is usually divided.

Q. In this last exhibit that you offered, where you gave us this substantial list of towns, on the last page there, which are labeled Saenger Replacements and Theatre Service Replacements, those towns are all towns in which you

(828)

formerly sold the so-called Saenger Circuit or the theatres for which Mr. E. V. Richards negotiated licenses? A. That is right.

Q. And Mr. Richards has been for many years one of the directors of Paramount? A. Yes, I believe he is—I don't know whether he is a director, but he has been over there for a great many years.

Q. And as to many of these theatres, as I understand it, you say you have no knowledge as to the extent to which the Paramount Pictures Corporation itself was interested; you only know that the situations are those in which Richards negotiated the licenses? A. That is correct.

Q. And as a matter of fact, none of these independent theatres that are on that page there as having been sold in opposition to Paramount were offered any of those pictures until after you and Mr. Richards had been unable to agree to terms for his circuit, isn't that right? A. We wouldn't offer them to the theatres directly. Never dealt with the theatres direct, but these people we never offered, that is true, until after——

Q. Until—— A. —we fell out with Richards.

Q. —you broke with Richards, and your break with Richards extended to the entire circuit for which he bought? A. That is true.

Q. Have you had any negotiations with Richards since
(829)
about getting back together? A. No, sir.

Q. And Richards is also the operator of the first-run theatres there that are associated with Paramount, is that not right, New Orleans? A. I believe he is, yes.

Q. And at the time you had this break with him do you recall what, if any, suggestion was made as to whether or not you could get together if he operated the Loew Theatre there or permitted to operate your theatre? A. No such suggestion was ever made to me.

Q. You never discussed that with him? A. Never.

Q. I see you list on here as independent for Albany the Fabian Circuit, is that right? A. I consider it an independent, yes, sir.

Q. Fabian, of course, is actually an operating partner of yours in a number of situations, theatre operating partner? A. Not there, he is not. He is in Richmond and Norfolk.
(830)

Q. And in Albany I see you have under the heading, "How long since?" "Always." As a matter of fact, for many years your first-run account was what was then called the RKO Warner pool, isn't that right? A. I can't recall

whether we dealt with the RKO Warner pool; I don't think so. We had as an outlet Warner for a while in Albany, but for many years it has been Fabian.

Q. Well, you may have licensed the pictures, or negotiated with the representative of one company or the other, but you knew, did you not, that the first-run theatres there were pooled in a joint operation? A. That is possible, but it is so many years ago that I hesitate to express myself as to what was the pool, because I have been dealing with Fabian directly for many years.

Q. And you don't know what Fabian's relationships with the RKO theatres are there, do you? A. No, I don't know what his relationship is, except that I know that they have nothing to do with the buying of pictures there; nothing whatever.

Q. The buying of your pictures? A. That is right.

Q. Now, apart from this sell-away from the Richards circuit that is indicated on the last page or on the last two pages of your last exhibit here, which occurred, I believe—in 1942 or 1943? A. About three years since we have been dealing with him.

(831)

Q. Apart from that, can you point to any one of these situations on this chart where you took or where you transferred a product from an affiliated operator to an independent? A. Of course, I don't have the chart in front of me, but offhand I happened to think of Atlantic City.

Q. Look at it (handing). A. Thank you. I happened to think of Atlantic City, where a good many years ago we used to sell Warner pictures there and we took them away and sold them to the other people down there.

Q. That was at the same time that you were out of the Warner circuit in Philadelphia and in Paterson, isn't that right? That is, you were unable to make a deal with Warner——. A. We used to divide our product; we used to

give Warner some and give the independent some; and at the time we had our differences, we gave the independent all and never took it away from him.

Q. And he has managed to keep all? A. Yes. And I recall—I don't know whether it is here or not; I guess it is somewhere—in Camden, New Jersey, we used to sell Warner all of our product there, and some of it goes now to the Savar Theatre, I believe.

Q. That occurred at the same time, did it? A. No, I don't think the Savar Theatre at that time was built in Camden. In fact, I am sure it was not.

Q. Well, when did that happen? A. Oh, that must have (832)
been twelve, fifteen years ago.

Q. I do not see that in your list. A. I certainly overlooked something there. I don't see Camden either.

Q. Well, my question was confined to what you have got on your list? A. Yes. We took product away from the Paramount organization in New Bedford, Massachusetts. We used to supply all of our product to Paramount there.

Q. I don't see that on the list either. A. Oh, yes. That is divided.

Q. Where is it? A. On the first page, opposite Boston. We used to do business with Paramount completely in Portland, Maine, and took our product away from them and gave it——

Q. Now, wait a minute. This Boston situation, you are talking about a split there, aren't you? A. Yes, Paramount used to have it all.

Q. And then you gave half to Harry Zeitz? A. Harry Zeitz, yes, sir.

Q. Any others? A. Yes. We just finished taking some away from Paramount in Taunton, Massachusetts.

Q. I am talking again about the list here. Now you say in Portland you also gave half to another independent?

A. Yes. We took half of it away from Paramount and gave it to an independent. And in Taunton——

Q. What were you going to say about Taunton? A. I (833)
say we just completed arrangements to take part of it away from Paramount in Taunton, Mass., and give it to an independent.

Q. That was pursuant to the settlement of a suit brought against you for treble damages and an injunction under the Sherman Act was it not? A. Not so far as my company was concerned. We had agreed to do it several months ago before any suit was filed or threatened to be filed.

Q. Well, in any event, he did not get any of your pictures until that suit was dismissed and settled, isn't that right? A. Well, if he did not, it was his own fault. He has had a contract for some of our pictures for months.

Q. Just answer the question. A. Well, he could have. He had a contract for them. Now, we took pictures away from Warner Bros. on this particular list in Olean, New York, I believe, and gave it to an independent there.

Q. Olean, New York? What is that under? A. That is on the first page. That is opposite Buffalo.

Q. When was that, you say, twenty years ago? A. I don't know how many years ago, but a good many.

Q. Well, it says twenty here. A. That was not twenty years ago. It could not have been twenty years ago. It was during the—I should say twelve or fifteen years ago.
(834)

Q. You think this is an error here? A. I know it is.

Q. That is during the same season when you were out of the Warner circuit generally, is that right? A. That is true.

Q. Any others? A. We must have taken away from Warner in Chillicothe, Ohio.

Q. Chillicothe? That is opposite Cleveland? A. Cincinnati.

Q. That was half, was it not? A. Yes, sir.

Q. That again was one of those situations where you sold the entire product to Meyers, while you were having this difference of opinion with Warner, and then when you got back together he kept half? A. That is right, but we had previously sold it to Warners.

Q. Before you had the difference of opinion? A. Yes.

Q. Any others? A. Well, we took product away from Warners in Bayonne, New Jersey.

Q. That was at the same time when you were out of the circuit? A. Yes.

Q. That is, when you went back to Warner you left half with the independent and gave half to Warner? A. Well, not immediately. The major part of it, if not all, with the independent for at least one year, and sometimes two; and then later we divided it between the independent and Warner; but we had originally taken it away from Warner. The

(835)

same condition applies to a number of these other places that are listed here.

Q. Well, can you name them? A. Well, there is Lancaster, Pennsylvania. Warner had had it. In Shenandoah, Pennsylvania, we took half of our product from the Comerford-Publix interest.

Q. You just have prior to 1930-1931. Do you know when that happened? Have you any personal knowledge as to the circumstances there? A. I could not tell you offhand, no, sir.

Q. Any others there that you know about? A. Here is the Shea interest, and we divided our product there, one-third I think to Warners and two-thirds to Shea, as I recall. We used to do business with Warners completely there.

Q. That was prior to the time you had that break over the circuit? A. Yes. The same thing applied to Morgantown, West Virginia, New Kensington, Pennsylvania. I believe in Wheeling, West Virginia, there was a time when we dealt

entirely with the Rex Theatre, with whom Paramount was associated, but we later divided the product there, I believe.

Q. You don't know the circumstances surrounding that, do you? A. No, except that we decided to take half of it
(836)
away from the Rex Theatre and give it to the Osborne interests.

Q. You do not know why? A. No, I can't tell you offhand why.

Q. Any others? A. They are all that I can recall at the minute.

Q. Now, wherever the situation is first-run or second-run, it has been so noted here. I take it this list means if there is no run designation, that means it is subsequent run, it is not first or second, is that right—you just have a dash on the run? A. Well, there is no run designated in the contract, I suppose. It can be first or second run, depending on the situation. It can be either construed as what it says or just with no particular runs considered.

Q. Mr. Rodgers, you also testified in the Schine case in Buffalo. Do you recall that, last fall? A. Yes.

Q. And you gave testimony similar to what you have given here about dealing individually with theatres? A. Yes.

Q. And you recall that you were asked whether you had written a letter to Mr. Dickinson about the Palace Theatre there at Lockport? A. I recall such an instance, yes.

Q. You testified to writing the letter? A. I think I testified that I did write such a letter.

Q. And I will read this paragraph and see if you recognize that as what you wrote:
(837)

> "In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport as well as other situations, and as we are hardly in a position to fore-

go or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests will be best served by giving them such consideration."

That was part of the letter that you wrote? A. I believe, substantially, that was the letter. Was there any other testimony I gave in connection with that same letter?

Q. Yes. I believe you testified, did you not, that after Mr. Dickinson received the letter he came to see you and was somewhat abusive to you because you were not going to stay with him in Lockport; isn't that right? A. It was more or less—I think that I must have testified that we always considered him a very undependable man. There was justification. I think I attempted to justify the reason for writing the letter.

Q. Now, as to what you must have testified——

Mr. Wright: I move to strike that out. That is not responsive to any question I asked him.

Judge Hand: Motion granted.

Q. That Palace Theatre business was unquestionably the (838)
best theatre in Lockport, wasn't it? A. Structurally, yes.

Q. And it was one of those situations where you had sold him the first-run when you had a disagreement with the Schine circuit, is that right? A. That is true.

Q. And when you got together with the Schine circuit again you took the pictures away from him with no further opportunity for negotiation; that is what happened, isn't it? A. That is correct.

Mr. Wright: That is all.

Judge Hand: We will adjourn until two-fifteen.

(Recess until 2:15 p.m.)

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TRANSCRIPT OF RECORD

(Pages 594 to 1050)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO-PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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AFTERNOON SESSION.

Mr. Davis: I understand, if the Court please, it is suggested that we change our system of numbering the defendants' exhibits, which I think is a very happy suggestion. Our exhibits so far have been numbered Loew's adphabetically A, B, C; and I will ask the clerk and the reporter to begin those again with L-1, L-2, and so on.

Judge Hand: I think that is better.

Mr. Davis: Otherwise we are going to run clear ont of the alphabet several times over, I think.

Yesterday in examining Mr. Rodgers I used a list of first-run theatres in 92 cities in the United States, having a population of 100,000 and over. I have not yet introduced that list in evidence. I shall do so later. We are checking it, and I presume Mr. Wright will want to check it before it is introduced.

That is all for the present witness, Mr. Wright.

ADOLPH ZUKOR, called as a witness on behalf of the defendant Paramount, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. Mr. Zukor, are you Chairman of the Board of the defendant Paramount Pictures, Inc.? A. Yes.

Q. And how long have you been chairman of the board?

(840)

A. About ten years.

Q. And during that period what have your duties been? A. I have been out in California for about—up to the end of 1938. After I returned from California I took a trip and

visited the various branches of our organization throughout Europe and Australia and South America.

Q. And more recently have you been—— A. More recently I have been in the home office and have acted more in an advisory capacity.

Q. Now, prior to 1935 when you became chairman of the board, were you president of Paramount? A. I was president of Paramount.

Q. And had you been president of Paramount and its predecessors back to 1912? A. From 1912 to 1935 I was president of the company under different names.

Q. And what were your duties as president? A. I was the chief executive of the organization.

Q. Now, when did you first have any connection with the motion picture business? A. As a producer in 1912.

Q. Prior to that time had you had some other connection? A. Prior to that time I was interested in motion picture theatres and vaudeville theatres.

Q. Now, wasn't your first connection with the motion picture business, as such, 1906? A. As an exhibitor, yes, sir. (841)

Q. Now can you tell us briefly what sort of pictures were exhibited at that time? A. At that time we had exhibited mostly single-reel pictures produced by different organizations, maybe ten or twelve individual organizations. Shortly thereafter there was organized what they called the Patents Company, which I think embraced about ten individual producers who released their product under the General Film Company.

Q. Well, dealing with the period before that, what was the general type of these one-reel pictures? A. Well, they were mostly comedies, very few that had a story to tell, because most of the pictures would not run over fifteen minutes.

Q. And were there some so-called "Chase" pictures among them? A. Well, they were mainly comedy pictures, and we also used "Chase" pictures. As a matter of fact the pictures were then used at the closing of a vaudeville show. At the end of a vaudeville show they put on a picture, and the audience knew the show was over and they moved out.

Q. Now, dealing with the places where pictures were shown, were many of those so-called nickelodeons? A. Yes, they were called nickelodeons, store shows.

Q. And the average place where the pictures were shown was in a store, a remodeled store? A. Yes, mostly in a remodeled store, anywhere from 150 to 300, 350 seats.

(842)

Q. Now, you had some interest in such a remodeled store in 14th Street, did you? A. Yes, I did.

Q. What was the nature of that exhibition place? A. Well, in that place we showed pictures and vaudeville. We had four acts of vaudeville and one or two reels of pictures that constituted the show.

Q. Was that the place where you had the theatre set up like an observation car? A. No. The observation car preceded this arrangement.

Q. Tell us about that. A. When I first started in pictures, showing pictures, which was in 1906, we had obtained the rights to the Hale storing car, which was a car very much like an observation car today on a train, and it was equipped with all of the rocking, and the bell, and everything that looked like or created an illusion that you were traveling through the country; and on the farther end of the car where there was a screen, we showed travelogues, and it created an illusion that you were traveling and observing the scenic beauties of the various countries that we were able to obtain pictures of to show.

Q. Now, shortly after 1906 did you became associated with Marcus Loew in connection with some theatres? A. I

became associated with Mr. Loew. I leased a theatre, the Bedford, in Brooklyn, in association with William A. Brady,
(843).
who was also a legitimate producer of drama. He was associated with me in the Hale enterprise, and in association with Mr. Brady we took a lease on the Bedford Theatre. Subsequently Mr. Loew took over Mr. Brady's part of the Bedford; and so we became associated in the Bedford Theatre. That was our first joint venture in operating theatres generally.

Q. And then you continued for a relatively short time, interested with Mr. Loew, and subsequently in the Loew enterprises, and that terminated sometime around 1912 or 1913, is that right? A. I had been associated with Mr. Loew up to about 1911 as an officer.

Q. But after that you had no further association with Mr. Loew? A. I had no association except that I had stockholdings in the company which I disposed of a short while after.

Q. So that at or about that time you ceased any relationship to Loew or Loew enterprises? A. Yes.

Q. Now, when did you first begin to produce pictures? A. In 1912.

Q. How did you happen to get into that business? A. Well, I had watched the audience reaction to pictures, and I found that whenever there was a picture shown of two reels or more that had a story to tell, that the audience was very much fascinated and very much interested; and I had an idea
(844)
that if we were able to obtain pictures with a story and with a good cast, that the audience would prefer a good motion picture to the ones that were then in existence.

Q. Now, had there been several longer foreign films imported into the United States? A. Yes. One in particular that comes to my mind was the Passion Play that was produced in France by Pathe that I—and of course we bought

the pictures outright at that time—and I had shown the Passion Play for the first time in a store show in Newark; and the response from the audience was so good and so great, that I then and there made up my mind that there is definitely room for better pictures, feature length pictures in the motion picture theatre.

Q. Now had you arranged to produce abroad a picture called Queen Elizabeth, with Sarah Bernhardt? A. That came at the end of 1911 when they were making or planning to make this picture in France; and I financed the picture, or a good part of the picture for the American rights to Queen Elizabeth, which was enacted by Sarah Bernhardt.

Q. Now in 1912 you formed Famous Players? A. In 1912 I formed Famous Players.

Q. And you became president? A. Yes, sir.

Q. And what sort of pictures did Famous Players produce? A. Famous Players produced their feature pictures, (845)
and our first picture was the Prisoner of Zenda, in which we starred James K. Hackett.

Q. Was Famous Players the first company in the United States to produce feature pictures? A. To my knowledge, yes, sir.

Q. And you continued as president of Famous Players and its successors right down to 1935, when you surrendered the presidency of Paramount? A. I did.

Q. Now shortly after Famous Players began to produce feature pictures, did other companies come into the field and begin to produce feature pictures? A. Oh, quite a few.

Q. And were there a number of other companies producing feature pictures between 1912 and say 1917 or 1918? A. A great number.

Q. Now, what was the general source of material for pictures, for feature pictures at that time? A. Well, Famous Players concentrated on famous players and famous

plays. We had endeavored to obtain the rights to make into picture shows or plays that had been presented on the stage, and we obtained in many cases the stars who had made the play famous.

Q. So that in general you were producing pictures made from stage plays with the stars who had made the plays famous? A. Yes.

(846)

Q. Were you also developing some stories of your own? A. We had developed stories and also stars of our own.

Q. Now, was Mary Pickford one of the stars that you developed? A. No. Mary Pickford was on the stage in a play called The Good Little Devil, if I am not mistaken, and that was produced by David Belasco. We had obtained the rights to that play and also the services of Mary Pickford to enact the leading role in that play.

Q. Now after that did Mary Pickford continue to play in pictures for Famous Players? A. After that Mary Pickford continued and remained with Famous Players for a number of years.

Q. Was Mary Pickford perhaps your most famous star? A. She was the most famous star in the business.

Q. Did Famous Players have other stars by 1918 or 1919? A. Yes; we had developed many other stars during that same period.

Q. Now, at that time, that is, in the period between 1912 and shortly thereafter, how were pictures that you produced distributed? A. The first year we were in business—I think in 1913 we made thirty pictures; and these thirty pictures we sold to State-right buyers throughout the country.

Q. Did those State-right buyers eventually form Paramount Pictures Corporation? A. They did.

(847)

Q. That is a different company from the present Paramount Company, isn't it? A. Yes.

Q. And some time after the formation of that company did Famous Players acquire some interest in it? A. After they were formed we acquired an interest in it.

Q. And Paramount Pictures Corporation distributed the pictures produced by Famous Players? A. Yes.

Q. And also certain other producers? A. Other producers.

Q. Now, shortly after Famous Players was organized, did that company merge with the Jesse L. Lasky Company? A. Yes.

Q. Was that also a producer? A. A producer of pictures. Their pictures also went to the Paramount Pictures Corporation which was the distributing company.

Q. And the result of that merger was the formation of the Famous Players-Lasky Company? A. Yes, sir.

Q. Now after 1912, and dealing with the period down to 1918 or 1919, had the number of exhibitors increased? A. Very materially.

Q. And had there been fine theatres prepared primarily for the exhibition of motion pictures? A. Yes. After we began to make feature pictures there were quite a number of theatres built throughout the country exclusively for pictures.

(848)

Q. And were there some very large theatres in the principal cities of the United States? A. Well, theatres seating a thousand and over, was considered at that time a very, very big theatre.

Q. Was there also a development of exhibition in smaller cities in the country? That is, were new exhibitors coming into the field? A. All through the country, yes.

Q. Now dealing with that same period, that is, 1912 to 1918 or 1919, was there a constant increase in the cost of making pictures? A. Constantly increased cost. From the technical point, we had to improve our quality, as well as the additional cost of stars and director, and so forth.

Q. Were stars' salaries going up during that period? A. Yes.

Q. And had circuits of theatres, circuits of motion picture theatres developed during that period? A. Well, circuits developed right through the time when there were more than one or two or three theatres in a particular locality or in a section, that were owned or controlled by the same people.

Q. And there were circuits of theatres from the very beginning of your interest in production, were there? A. There were circuits of theatres that were devoting their playing time to vaudeville and gradually turned to pictures; so the very same circuits that had played vaudeville and pictures, (849)
eventually played pictures only.

Q. Now, dealing with the period 1917-1918, at that time did Famous Players-Lasky, Paramount producer, have any interest in theatres? A. Prior to 1917, no.

Q. Now when was Associated First National formed? A. Either in 1916 or 1917, as best as I can recall.

Q. Was that an organization of exhibitors originally? A. That was an organization of exhibitors.

Q. Can you tell us something about the importance of the original exhibitor organizers of First National? A. Well, they had controlled at that time the best theatres throughout the country, and they joined hands and organized the First National. First they organized to buy pictures and gradually developed into financing and producing pictures on their own.

Q. That is, one of the purposes of this First National organization was to acquire pictures for its members, first by financing others and later by producing its own? A. That is right.

Q. Now, did that organization make any attempt to take stories away from Famous Players-Lasky? A. Yes, sir. Made

an attempt and succeeded, like in the case of Mary Pickford, where they had offered her so much more money than we had paid her at the time that we lost her services.

Q. Did they succeed in taking away any other stars? (850)

A. They had taken quite a number of stars. I don't remember. They took Norma Talmadge, I recall, and Milton Sills, and many others; some from us and some from other companies.

Q. Were they negotiating with other stars? A. Yes, as far as I know they had been negotiating with all of the other stars.

Q. Now at that time I think you said that Mary Pickford was the outstanding star in the motion picture industry? A. In the industry, yes.

Q. Did the taking away of such stars as Mary Pickford and others present any particular problem to Famous Players in connection with the marketing of its pictures? A. Well, it did create a situation whereby the publicity and the propaganda that was handed out, that eventually Famous Players would be losing all of their principal stars and they would be practically out of business.

Q. Was there any situation created in New York for Famous Players at about that time? A. Yes, there was a situation created here in the Strand Theatre in New York, which was built—which to my recollection was the first theatre devoted entirely to pictures, and it was largely due to the fact that I had prevailed on Mr. Mark, who built the theatre, that we are making the type of pictures that could stand by itself without any additional attraction, if he devoted the (851)

Strand Theatre to a picture policy, that we would supply the pictures, and told him what we had in mind and what we were doing then; and they decided to devote the policy of that theatre to pictures. And about—I think it was in

1917, in the fall of the year—Mr. Mark notified me that he was not going to play any more of the Paramount pictures—or, rather, the Famous Players at that time—because he had joined the First National and would play their pictures.

Q. What did you do about that? A. Well, we had no other choice; but we looked around and we finally acquired an interest in the Rivoli and Rialto, so we could retain a show window on Broadway for our product.

Q. Now, were there meetings of exhibitors that you heard about, First National exhibitors, held all over the country? A. Well, one time I recall that the First National happened to have a meeting in Los Angeles, and I was there at the same time, and I told them that I did not think that it was a good plan that they are following by trying to take away stars from producers and making big offers and going to the producing end of the business, because it would eventually bring about a situation where the producers, in order to protect their own business, they would have to go and get theatres so as to create a permanent outlet for their product.

(852)

Q. Did the First National pay any attention to your arguments? A. None at all. None whatever.

Q. I was thinking, were there meetings of exhibitors elsewhere in the country, which you heard about, where attacks were made upon Famous Players-Lasky? A. There was education, not all through the country, I don't necessarily say by First National or their group, but up to the time that the First National decided to sub-franchise smaller exhibitors throughout the country, in smaller communities, up to that time we felt that we would be able to cope with the situation, but when they began to sell sub-franchises throughout the United States, and within a short period they boasted that they had 3,500 additional exhibitors hooked up with the First National franchise, then we began to feel the competition very keenly.

Q. That is, in addition to these major exhibitors in the major cities, they had sub-franchised some 300 or 3500? A. Up to that time.

Q. (Continuing) Exhibitors in smaller cities?. A. That is right.

Q. Which bound them all to buy First National rather than Paramount or Famous Players-Lasky? A. That is right.

Q. Did you hear anything about the consequences of that development on Famous Players distribution in the South? A. Yes.

(853)

Q. From whom did you hear it and what did you hear? A. S. A. Lynch, who represented us in the South, came to see me and told me that he is having a hard time in selling the product in the South.

Mr. Wright: If the Court please, I think this is not only irrelevant, immaterial, as I think the rest of it is, but wholly incompetent as to what Lynch told him at that time.

Mr. Seymour: I do not deny that it is hearsay, if there is objection to it, but it was the purpose of this, of course, to show how Paramount happened to get into the theatre business and this is one of the factors. It is technically objectionable and I won't press it.

Judge Hand: It certainly is.

Q. As a result of conversations which you had with Mr. Lynch, who was distributing Famous Players products in the South, did you discuss with your fellow directors in Famous Players the question of having Famous Players acquire an interest in theatres? A. I did.

Q. At that time what was the First National program of production, do you remember? Were they looking toward a program of producing a number of pictures a year? A. They had.

Q. Did they contemplate producing as many as 50 pictures a year? A. That was the general impression.

(854)

Q. And at that time how many changes a week were they leading exhibitors of the country making? A. About once a week.

Q. And the smaller exhibtors? A. Smaller, twice a week; and further, down the line.

Q. What would have been the effect on Paramount's or Famous Players' opportunity to license its pictures of having the major exhibitors exhibit First National pictures, 50 pictures, and the smaller exhibitors exhibit 50 pictures? A. If we couldn't have an outlet in the first-run houses throughout the country, we wouldn't be able to recoup the cost of the negatives let alone make a profit; but we could not exist without first-run representation.

Q. Would that also have affected your revenues in subsequent runs? A. It definitely did.

Q. Would it have had any effect upon your ability to retain your few remaining stars? A. It did.

Q. Did you at or about this time that you had this meeting with the exhibitors in Los Angeles, which you told us about and where you did not get anywhere, did you at that time believe it would be desirable for producers and distributors to stick to production and distribution? A. Yes.

Q. And not go into exhibition? A. Yes, I did.

Q. And you were unable to persuade the exhibitors of

(855)

that? A. That is right.

Q. And did you then or shortly after change your own view on that subject? A. Well, I have.

Q. I think you told us that you did discuss the question of having Famous Players acquire an interest in theatres with your directors? A. Yes.

Q. Was it also discussed with others? A. In the organization?

Q. Yes, and outside. A. Well, it was generally talked about. It was not——

Q. What was the upshot of your discussions and your consideration of the problems which Famous Players was faced with at that time? A. Well, after Lynch had represented Paramount down South and he came up and told us about the difficulties he had in selling the product the same as in the past, then we agreed to go in jointly and buy theatres in the South. That was our first, as I recall it.

Q. You did decide to acquire some interests in theatres? A. We did.

Q. Then the first effort in that direction was with Lynch in the South? A. Yes.

Q. Was Southern Enterprises formed? A. So Southern Enterprises was formed and Lynch owned 50 per cent and we had the other 50 per cent.

(856)

Q. That was sometime around 1919, 1920? A. 1919, yes.

Q. And that company acquired theatres in the South? A. It did.

Q. Were those theatres just first-run theatres in large cities? A. No, they were all kinds.

Q. Some of those theatres were in smaller cities? A. Yes.

Q. Was there any particular reason for acquiring an interest in theatres beyond the first-run theatres in the large cities? A. Yes, because there were sub-franchise holders in the smaller communities and they had offered quite a resistance to buying our pictures.

Q. Did you consider it important to retain your market not only in the big cities, but also in some of the smaller cities? A. Yes, sir.

Q. At about the same time did you acquire some interest in theatres in New England? A. Yes, we did.

Q. From whom was that interest acquired? A. Mr Black, Alfred Black, I believe it was. He had a number of

theatres in New England and we acquired 50 per cent interest in his chain of theatres.

Q. Did they include some theatres in smaller places, too? A. Mostly.

Q. As to both Southern Enterprises and the Black Circuit subsequently you acquired the balance of the interests
(857)
of the other owners? A. That is correct.

Q. Who managed the theatres in the South? A. Mr. Lynch managed the theatres in the South and Mr. Black managed the theatres in New England.

Q. Did you about the same time arrange to acquire an interest in a theatre in St. Louis? A. Yes; there was a theatre being built in St. Louis and we acquired an interest in that theatre.

Q. Was there a First National franchise owner in St. Louis? A. Yes, there was a First National franchise holder in that same neighborhood, to whom we couldn't sell any of our product.

Q. Were there some other theatres at about the same time you acquired an interest in? A. He had some interests in some other theatres, and I think we were negotiating to acquire them but we could not get together with his associates and I don't think we had acquired any other interests to the best of my recollection.

Q. Around 1925 or 1926 Paramount acquired an interest in some other theatres, did it not? A. Yes, sir.

Q. Did any information come to you as to the activities of any of the distributor competitors of Paramount in that regard? A. Yes; at that time there were other producers actively engaged in acquiring theatres throughout the country.

Q. Did you learn of their activities? A. Yes.
(858)

Q. Did you compete with them for acquisition of interest in some of these theatres? A. We felt that we had been com-

peting with them before, when we acquired circuits, yes.

Q. What was your interest in acquiring circuits in competition with the other distributors? A. We acquired the interest in the circuits because we wanted to perpetuate our outlet for the product, mainly.

Q. From 1925 or 1926 on, for several years, Paramount continued to acquire some interest in theatres in various sections of the country? A. Yes, sir.

Mr. Wright: What was that last date mentioned?

(Record read.)

Mr. Seymour: "on", until about 1929.

Q. Was there also some acquisition after 1929, Mr. Zukor? A. Yes, I believe so.

Q. In connection with Paramount's acquisition in theatres was there ever at any time any agreement or understanding with others, with other distributors or producers as to the territories in which Paramount should acquire its interest in theatres? A. No.

Q. In addition to acquiring an interest in existing theatres, did Paramount also build some theatres? A. Yes.

Q. And in 1919, when you decided that Paramount—Famous Players then—should acquire some interest in the-

(859)

atres for the reasons you stated, did you then have in mind acquiring the particular theatres in the particular areas which Paramount eventually acquired over the entire period? A. No, we had no such policy.

Q. Was each of the problems of acquiring an interest in a circ[illegible] and what kind of interest to acquire and where it shoul[illegible], a matter decided on the merits when the problem arose? A. Definitely on the merits.

Q. And sometimes Paramount acquired a 50 per cent interest, and sometimes it acquired a 100 per cent interest? A. Yes.

Q. And sometimes it acquired less than 50 per cent interest, is that right? A. That is right.

Q. Generally, what was the purpose of acquiring an interest in theatres? A. The main reason was to have a permanent outlet for our product, and, of course, while we acquired theatres, we were careful to see that we should make our investment so the investment in itself would also bring a return.

Q. When Paramount first went into the acquisition of theatres, or at any later time, was any one of these acquisitions for the purpose of monopolizing the exhibition of motion pictures in the United States? A. No, sir.

Mr. Wright: If the Court please, that is obviously incompetent. He is incompetent to testify in those terms.

(860)

Judge Hand: It doesn't have very much weight, that kind of testimony.

Q. Do you consider that at any time Paramount did monopolize the exhibition of pictures in the United States? A. No.

Mr. Wright: Same objection.

Q. From the beginning of the theatre acquisitions, Mr. Zukor, did Paramount set out to be the largest company in the motion picture business? A. Our aim was to be the best company, make the best pictures.

Q. But in 1919 you did not set out to reach a particular size or —— A. No.

Q. (Continuing)—or reach a particular interest in theatres? A. At any time.

Q. From your observation of the industry from 1912 on, Mr. Zukor, has the production of motion pictures been highly competitive? A. Highly competitive at all times.

Q. Are there new producers of motion pictures constantly coming into the field? A. All the time, every year.

Q. Are there more new producers today, more new independent producers—and I use that in the sense of being not defendants in the suit—are there more today than there were even ten years ago? A. There are quite a number of independent producers today, and I cannot make the exact comparison as to how they compare in numbers, but there (861)
were, each year, quite a number of independent producers that came into the business.

Q. Has Paramount's interest in theatres in any way interfered with the opportunities for new producers?

Mr. Wright: If the Court please, that is again a question he is not competent to answer.

Mr. Seymour: This is the dean of the business and I think he is the man who can tell us about it.

Judge Hand: I do not know that it does any harm. It doesn't do any good, to let him make such a general observation as he may.

Mr. Seymour: We will prove the rest of it. These are the dean's observations and we will call the other members of the faculty before we get through.

Q. From your observation has distribution of motion pictures always been highly competitive? A. Yes.

Q. And would you say that the exhibition of motion pictures has always been highly competitive? A. Yes.

Q. Is Paramount in competition with, not only the other defendants in this case, but with all independent producers and distributors and exhibitors? A. In competition with the industry, yes, sir.

Q. At all levels? A. In all branches.

Q. Do you consider that Paramount's interest in theatres

has had any effect on its ability to produce fine pictures? (862)

A. A great deal.

Q. Would you explain that? A. Well, due to the number of pictures—number of theatres that we have, we are sure of our outlet, that we can exhibit our products, we are able to invest in the best type of pictures, that cost the most money, as we have a definite, certain outlet, for our product.

Q. How does the cost of feature motion pictures today, average cost of feature motion pictures today, compare with what it was when you first went into the business? A. When we first started in it the cost of a negative ran between 40 and 60 thousand dollars, and gradually each year thereafter increased and it continued to increase up to today, so that a first class picture today, with known stars and known directors and a good story, will run anywheres from a million and a half to two million dollars in cost.

Q. And do some pictures run more than that? A. Some pictures run even over three million dollars.

Q. From your experience in the business do you consider the production of the motion picture a speculative or a risky matter? A. It is highly speculative.

Q. Have you any interest in any other producer, exhibitor or distributor of motion pictures? A. No.

(863)

Q. Prior to the time, that is, in 1919, when Paramount, or Famous Players, first acquired any interest in theatres, were pictures distributed on the basis of successive runs? A. We sold our pictures then as a season's output at one time.

Q. But were the pictures shown in successive runs, that is, first-run in the large theatres? A. First-run was then in vogue just the same, where the best theatre in the community was the first-run house and showed the picture first before

any other smaller community, or smaller theatre in the same community, showed the picture.

Q. Was there also something which, whether it was called clearance or not, was clearance as we know it today between runs? A. I am not so familiar with the clearances, with the distribution end of the business, but I feel that there was always a difference between the first-run. There was a lapse of time between the first and subsequent runs. Just what they consisted of or whether it was organized all through the country on the same basis or the same way, I don't know.

Q. What is your best recollection as to whether prior to 1919 some pictures were licensed to exhibitors on a percentage basis? A. Yes, there might have been a few, far between, that were percentage.

Q. But there are more now than there were then? A. Oh, (864)
yes, have a great many.

Q. What is your best recollection as to whether prior to 1919 there was any reference in license contracts to admission fees? A. The admission fee we had in the very beginning. When we started to make feature pictures, we had a clause that they would have to charge ten cents, I believe, instead of five cents.

Q. And had the admission fee matter been familiar in show business long before motion pictures were produced? A. Oh, yes.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution and exhibition of motion pictures in the United States?

Mr. Wright: The same objection.

A. No.

Mr. Wright: Same objection we made before to that question, as calling for a conclusion. It is for the Court rather than the witness.

Judge Hand: Overruled.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms?

(865)

Mr. Wright: Same objection.

A. No.

Judge Hand: Overruled.

Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films

licensed and before such films have been completed or trade-
(866)
shown? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any
(867)
of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-distributor with respect to run, clearance, license fees or any other terms of licensing? A. No, sir.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two

or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other? A. No.

Mr. Seymour: I am awfully sorry that these questions are so elaborate, but they are designed to negative the charges in the complaint which the Government has not abandoned, and I am asking the questions.

Mr. Wright: Can't we stipulate that some representative of each defendant would take the stand and negative the charges in the complaint in the terms of the complaint? I suppose that would take care of it for all defendants at once.

Judge Hand: Why isn't that so?

Mr. Seymour: Well, I would like to run through these and then I would be willing to consider it. I have only a few more of them.

(868)

Judge Hand: All right.

Mr. Seymour: Then I would be willing to consider such a stipulation rather than burdening the Court with asking other witnesses from our company these questions, but I would like to think about it.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where

theatres affiliated with defendants or any of them are located? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to
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control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of

motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

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Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No.

Mr. Seymour: You may inquire.

Mr. Wright: Are there any other defendants who wish to inquire?

Mr. Seymour: Does any defendant wish to examine Mr. Zukor?

Mr. Caskey: We are content.

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Cross-Examination by Mr. Wright:

Mr. Wright: I simply want to make a motion for the record first to strike out all of Mr. Zukor's testimony as either irrelevant and immaterial or incompetent. I assume that will be overruled.

Judge Hand: Motion denied.

Mr. Wright: I just want to ask a couple of questions.

Q. On that ten-cent admission that you talked about back in 1919, that was just a printed restriction in the form that was of general application, isn't that right? A. That was prior to 1919. In 1919 the admissions were much higher. When I referred to insisting on a ten-cent admission, that was in the beginning, 1913 and 1914.

Q. It was not until much after 1919 that you fixed admission prices for particular runs—graduated them in accordance with the runs? A. That was to have been higher than ten cents, because admission prices have gone up gradually.

Q. Yes, but I say, it wasn't until several years after 1919 that the present practice of fixing a different admission price for different theatres arose, isn't that right? A. I don't recall just when that was.

Q. You don't know when? A. No.

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Q. I believe you said this ownership, the acquisition as far as Paramount, stopped in about—that is, by 1929 or 1930 you had pretty much the pattern of theatre control that you have now, is that right? A. That is right.

Q. As a matter of fact, it was about 1930, was it not, that you reached an agreement with Warner Bros. to stop invading each other's theatre-operating territories? A. We never had such an agreement.

Q. Do you remember what happened then, that prior to 1929 and 1930 you had been moving into areas where Warner was operating and Warner had been moving into some of your areas? A. We have never had any agreement with anybody where we would go or where we would buy theatres.

Q. Yes, but I think you did not get the last question.

(Last preceding question read.)

The Witness: No doubt we had, because we did not stop to figure whether Warner was in any area or was not.

Q. Then after 1930 you did not move into areas where Warner was operating and they did not move into yours, did they? A. That I don't know.

Mr. Wright: That is all.

Redirect Examination by Mr. Seymour:

Q. You do know, Mr. Zukor, that there was never any agreement with Warners or anybody else about where you or they should operate or what you or they should do? A. Not as far as we were concerned.

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Q. You never made any agreement with Warners or anybody? A. I never made an agreement with anybody.

Q. There was no agreement not to go into any territory where Warners had theatres or for Warners not to go into territory where Paramount had theatres or an interest in theatres, is that right? A. That is right.

(Witness excused.)

Y. FRANK FREEMAN, called as a witness on behalf of defendant Paramount, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. Mr. Freeman, are you connected with the defendant Paramount Pictures, Inc? A. I am.

Q. What is your connection with that company? A. I am a vice-president and, until October 1944, I was in charge of studio operations in Hollywood.

Q. Is your headquarters still in Hollywood? A. Yes.

Q. You have come on here for the trial? A. Yes.

Q. Are you still generally familiar with the developments in the studio? A. I am.

Q. You were head of the studio from what year until 1944? A. December, 1938, until October, 1944.

Q. When did you first enter the motion picture business? A. 1914.

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Q. Will you tell us briefly about the nature of your connection with the business from 1914 to 1922, when you left it for a time? A. First connection was manager of a theatre, Fitzgerald, Georgia; later I became associated with Mr. S. A. Lynch in the operation of motion picture exchanges in Atlanta, Georgia; later in the development of theatres; I assisted in the acquisition of theatres in the Southern States. Subsequently, general manager in charge of distribution of Triangle Pictures. And then later associated with Mr. Lynch in the operation of the business of Southern Enterprises in the South. I severed my connections in December, 1922, was not in the motion picture business from that time until 1933.

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Q. I will come to that. I just want to ask you this: Southern Enterprises was the organization which Mr. Zukor has just mentioned in which Mr. Lynch and his colleagues and Paramount had a 50-50 interest, is that right? A. Yes.

Q. And prior to that time, prior to 1919 you had been working with Mr. Lynch distributing Paramount's, or, as they were then called, Famous Players Pictures in the southern territories, is that right? A. That was true up to 1917.

And from 1917 until 1919 I was in New York having the distribution of Triangle Pictures.

Q. You came to Paramount in 1933? A. Yes.

Q. And in what capacity did you come? A. To work in connection with real estate.

Q. Did Paramount go into receivership in 1933? A. Yes.

Q. And subsequently into bankruptcy? A. Yes.

Q. And it came out of bankruptcy or out of reorganization in 1935? A. Yes.

Q. And what were your duties between 1933 and 1935? A. During 1933 I continued to work in connection with real estate properties and reorganization of the various properties that were then in receivership under the trustees in bankruptcy of Paramount-Publix.

In 1934 I served under the trustees as head of the New York office Theatre Division and continued in that capacity
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until the reorganization of Paramount in 1935, and thereafter, until 1938, I worked as vice-president in charge of theatre operations for Paramount Pictures, Inc.

Q. And then in 1938 you went to Hollywood in charge of the studio? A. Yes.

Q. And between 1935 and 1938 what was your official title? A. Official title was vice-president in charge of theatre operations.

Q. Were you also a director. A. I was a director, yes.

Q. I would like you to tell us something about the studio or production department of Paramount. First give us a general notion of its organization. A. The Paramount Studio in Hollywood is composed of a plant covering approximately 30 acres of ground, 240 or 250,000 square feet of stage space, 18 stages; executive buildings; mechanical equipment; technical buildings of various kinds; and an organization of people, actors under contract to Paramount, directors under contract to Paramount, producers under con-

tract to Paramount; story properties that have been acquired by Paramount over many years; and a personnel organization of departments, department heads, people working under them. It employs——

Q. Tell us a little about them. A. It employs at its peak about 3500 people.

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Q. Tell us about the general type of departments. A. Well, the talent department makes deals on contracts with personalities. The legal department handles all of the legal phases of the work. The story department supervises the acquisition and purchase of story material for making motion pictures. The executive producer supervises the creative talent and the casting and the final decision of certain scenes and things that go into the pictures, and approval of scripts.

Also in the story department the supervision of the writers takes place.

The so-called back lot where the physical operation is carried on is under the head of various departments, the production department, the camera department, the sound department, the wardrobe department, many groups, all headed under the one general manager in charge, or vice-president in charge of operations.

Q. Did you tell us how extensive the studio was, how much land it covered? A. I made that statement at the beginning, it covered approximately 30 acres of ground.

Q. Now, can you tell us approximately what sort of an investment the studio represents? A. It represents over the years an investment of millions of dollars.

Mr. Wright: If the Court please, I do not see how this is material, but if it is it seems to me it can cer-

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tainly be put in in the form of a statement, without taking the time to getting it in this way.

Mr. Seymour: Well, I am going as fast as I can, if your Honors please; but the Government's charge and its failure to respond to suggestions to facilitate this have required us to go forward, and I think it will be more revealing to the Court to have it adduced by oral testimony. When we reach a point where I think we can properly stipulate, we will certainly try to do it.

Judge Hand: Well, go on.

Q. Now, how is a production program planned, Mr. Freeman? Tell us with whom it is discussed and what period is covered and what ingredients go into the planning of a program. A. We generally have a meeting in New York. I come in from the Coast, meet with the president of Paramount, with the head of the sales, distribution department, head of the foreign department, the advertising manager; and we discuss on a broad scale as to the total amount of investment we think we can make in a completed group of pictures for that year. And having determined that as a base, we then try to see what number of pictures we can make for that total sum of money. That is determined by the personalities available to us, the story material available, the capacity of the studio to make the pictures; and I go back to Hollywood with that as a general outline, and then we try

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to fit in what we have there to that program, knowing that it is not humanly possible for any studio to sit down 12 months ahead and plan and know what it will make within the 12-month period. Things happen, events occur, personalities are unavailable; it continuously changes. It is not anything that can be done upon a formula basis, like you can plan a production schedule of mechanical things.

Q. What problems of trying to appraise the public taste over a period of time are involved in planning a program? A. We try at our first meeting to get all of the information

we possibly can from the sales and distributing department to help us on the type of picture we will make by having them tell us the types of reception of types of pictures by the public, and the personalities in those pictures, and all the information we possibly can obtain from them in that respect.

Q. Have there been any special problems, for example, during the war years in trying to plan a program? A. Well, the problem during the war years has been that a great deal of material has naturally been available to the studios from the things that happened during the war. Producers have taken ideas and made pictures around them; they have seized upon stories that have human interest—

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Q. Can you give us any recent examples of that? A. Well, Paramount has one in the story of Dr. Wassel, which came from a radio speech by the President of the United States praising the great character of this man down in Java. We heard it over the radio, and within 24 hours we started the production of a motion picture, which had not been planned; and that is one of the things that I say you cannot plan ahead 12 months ahead. You are changing all the time.

Q. Does the unexpected success of a new play or new book, or something of that kind, affect the program? A. A story or a book may come out with very popular appeal; and if you are fortunate enough to buy that on the competitive market, why, you go ahead and make a motion picture out of it. A stage play may be produced that is very successful, and we attempt to buy that and make a picture out of it; and we would have no knowledge of that in January of any year when it might not occur until May or June or in the latter part of the year.

Q. Can you tell us just a little about how you budget your program? A. I stated that we try to arrive in the first

instance at a total budget for the entire production schedule, based upon past experience of the possibility of revenue from the program, and from that point we try to break that down into the number of pictures we can make based upon the
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material and the personalities and the capacity of the studio to do it.

Q. How does the present year's production of Paramount compare with its production before the war? A. Before the war Paramount produced between 55 and 60 pictures annually. At present they are producing between 28 and 30 annually.

Q. And what is the chief reason for that difference; or what are the chief reasons? A. Well, one of the reasons is that during the war there has been our inability to get materials to make pictures; restrictions. The second reason is that prior to the war we made more cheaper pictures than we have made since 1938.

Q. Does the fact that some of the stars are in the service affect that too? A. To some extent, yes, but not to any great extent. It restricted us in maybe strengthening our pictures to the degree we would like because of our inability to have these stars.

Q. Has there been an increase in the cost of pictures since you first went to Hollywood in 1938? A. Yes.

Q. Can you give us an idea as to the general increase and perhaps how the highest cost pictures compare over that time? A. At present it costs 100 to 150 per cent more to produce a top bracket picture than it cost to produce in 1937-38.

Q. Can you give us some figures, so we will have that in
(883)
mind? A. A picture that we could make in the top bracket with top stars and personalities for a million, 1,150,000, will cost now from two and a quarter to three million dollars.

Q. Does Paramount make several pictures costing a million or more each year, in each year's program, or a number? A. Do we make?

Q. Yes. A. Yes.

Q. Can you give us some rough idea of the overall cost of a program? A. The cost of the program in 1944 to Paramount Studio was $28,000,000.

Q. Now, where do you get your story material for pictures? A. We have a story department that reads all of the material available in the field of literature, books, magazines. They keep us advised as to those stories which offer possibilities of pictures. They are further read and discussed.

Q. Can you give us any general impression as to how many stories are examined by the story department annually? A. I think in the Paramount studios it ranges from six to ten thousand annually; some years maybe a little higher than others.

Q. Now, are new novels and plays a source of material? A. Yes.

Q. Can you tell us something about how they are ac-

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quired and whether there is competition for them? A. In general a book or story—the handling of the sale of that by the author is handed over to an agent employed by the author. The agent is familiar with all of the producer companies and the producers that work for them, and he starts his approach by going to them all, submitting the story generally, developing a bidding contest, using all of the tricks of the trade that he can to sell it to the highest bidder for the highest price he can obtain for it.

Q. Does that include producers that are not defendants in this case? A. Yes.

Q. And the final upshot or the price which the agent arranged and which the author gets is the result of competition among all of them, is that so? A. Yes.

Q. Can you give us some idea of the range to which those prices sometimes reach? A. Well, in stage material it ranges from $350,000 to $500,000.

Q. Have you had any recent experience in the kind of prices that competitive bidding brings about for Paramount? A. We have paid as high as $450,000 for a stage play, for the rights to make a motion picture from a stage play.

Q. How about novels and other stories? A. We have paid as high as $150,000 for novels, books.

Q. Now, in general, as to the material which is avail-
(885)
able, like stage plays, novels, stories, and so on, where the author still has rights—are they acquired on a competitive basis? A. Yes. I know of one deal made for a stage play very recently which gives a substantial advance against 50 per cent of the entire profits of the production. That also happened.

Q. Now, tell us something about development of new talent in the motion picture industry. What efforts are made with respect to new talent, actors, actresses, writers and so on? How are they discovered and brought along? A. Actors are found in one of several ways: They come from the stage, radio, and then from small community playhouses; and in some instances with no experience whatever. Now, when you find a person on the stage or in radio who has had the experience in the theatre world, that person is also represented by an agent; they have already engaged an agent, and an agent represents them. So he presents them to you. Even though you might have seen them on the stage and say, "I like that person," or "He offers possibilities in pictures," you would make your deal with the agent.

Q. Does the agent go around from one producer to another? A. The agent immediately, even before you see them, possibly, has contacted studios and tried to find out the market price for the person and to sell that person to

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the studio that can pay the most money and offer the chances of developing this particular person.

Q. Now, do you have a department or members of your organization who are seeing stage plays and observing the developments in radio in an effort to find new talent? A. Yes.

Q. And usually before you deal with them the agent appears and begins the process of competitive bidding, is that right? A. Yes.

Q. Now, does that apply to writers as well? A. That applies to writers who in their contact with the studios are represented by the agents. The field from which you find writers is not the same. You will find sometimes a person who has written a book that has been successful, and you sometimes have young people from colleges, and you place them in a training school. Those people are not represented by agents in the beginning.

Q. Does Paramount have a staff of writers at the studio? A. Yes.

Q. And do you employ special writers on special projects from time to time? A. Yes; and also under long term contract.

Q. Now, tell us something about the competition, if there is some, for the acquisition of directors' service and the services of technicians of various kinds. A. There is complete

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competition among all the studios for any of the highly trained personnel in the technical fields, and also for directors whose contracts may be expiring at any studio or at any producer. All of those people are represented by agents, and the agents immediately approach all studios and all producers to make the very best deal for his client that he can possibly make.

Q. Why is there that competition among the studios? A. Hollywood attempts to produce around 400 to 425 pictures annually, and the personalities, the creative talent that is available makes it necessary to get these people in order to try to produce the best pictures.

Q. Now, I asked you about new acting talent and how it was obtained. I want to ask you something about stars and those who are not only the outstanding stars but perhaps the subsidiary stars. Having gotten a star under contract, take a star who has not yet proven himself or herself in pictures, what happens? A. You try that person out in parts that you think are suitable; you start a publicity compaign to create interest on the part of the public in that particular personality; and if you find the reception on the part of the public good, why, you continue to bill that particular personality and place him in more important parts in the next picture; and using all of the showmanship that

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you have at your disposal you try to develop him to the point where the public will be interested in going to see a motion picture that he might have a part in.

Q. Now, if you get a young actor or actress under long term contract, I assume the starting salary is rather smaller than that of an established star. Does the actor or actress continue to work at the contract rate through the life of the contract? A. No.

Q. What happens? A. At any point where there is any evidence whatever of success after the first newspaper critic says, "This girl or this person looks fairly good," the agent comes in to see you the next morning, and he says, "Now, based upon this, this is not a fair salary," although you may have had them under contract possibly no more than six or eight months or one year which has gone by. And it has been a practice in the industry that that contract is renegotiated. A person who had a starting salary of $150 a

week, and proven that they had box office value, you would then make a new contract, and possibly the new salary would be $500 a week starting, $750 for the next year's option; $1000 for the succeeding year, and so forth.

Q. Why do you revise these contracts when you are not obligated to? A. In order to keep making motion pictures.

Q. Now, what happens when a contract with a star,
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whether revised or not, is about to run out? Is there any effort made by other studios to take the star away? A. Every effort that is possible is made by all studios to engage that star to work for them if their contract has expired with any other producer.

Q. How about before it has expired, before the contract has expired? Is there effort by other studios and other producers to arrange for the star to come to them after the termination of the contract? A. Yes.

Q. Can you give us any examples of that? A. I can give you of my own knowledge an example that Paramount had with Fred MacMurray.

Q. What happened there? A. He was under contract with Paramount and had a year and a half to go, and he made a deal with Twentieth Century-Fox and started working for them at the expiration of his contract.

Q. Did they offer him more money, better terms? A. Yes.

Q. Has that happened to Paramount with other stars? A. It has happened; it has been tried, but sometimes we were successful in beating them.

Q. Sometimes the other producer is able to take him away and sometimes you are able to meet the terms? A. That is right.

Q. Now, is there any limitation on that kind of competi-
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tion as to what producers try to take other producers' stars away from them? A. No, sir, not that I know of.

Q. And does that kind of competition occur not only between defendants who have an interest in theatres but also with defendants who have no interest in theatres, and also with producers who have not been joined by the Government in this case? A. It occurs with all people that make motion pictures in Hollywood.

Q. And are independents constantly trying to take stars away from Paramount and other companies? A. Yes. That is, I want my answer to be, when their contracts with Paramount have expired.

Q. I understand that. I am not talking about an attempt to break contracts but an attempt to get them away at the end of the contract term. And those negotiations begin before the end of the contract term, do they not? A. Yes.

Q. Now, in recent years has there come to be an increasing practice, or, at least, an increasing attempt by stars to reserve their rights in contracts with studios to make pictures away from the studios? A. Yes.

Q. And does that happen with high-priced stars of all the studios or most of the studios? A. It does with all of the high-priced stars at Paramount, and, I understand, it happens at the other studios.

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Q. And, generally what you have testified here about the competitive situation for talent and material and so on, is, from your observation, applicable to all the studios, isn't it? A. Yes.

Q. Now, where the star reserved the right to play a picture away from the studio, does she also sometimes reserve other rights? Does she reserve rights in connection with any occasions when her services may be loaned to another studio, some right to approve material, and so on? A. If a star is important enough in their position in the industry, where any studio would take them, they will possibly insert a provision in their contract that if they are loaned out to any

other producer, that they shall have the right to approve the story, the director, and maybe some other things.

Q. Now, we will come to that a little later, I think. A. Where they make an independent picture on their own, why, they have all of their rights; they just reserve the right to make an independent picture. When I say "independent picture," I mean to make a picture on their own under no control or direction of the studio to whom they might be under contract.

Q. Now, does Paramount from time to time have occasion to obtain stars and featured players and personalities from other producers? A. Yes.

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Q. And what are the reasons for doing so? A. We make 30 pictures a year in which there are two to eight parts, you might say, in each picture; sometimes more. It is impossible for any one studio to carry on its payroll enough people that would be available for all of those parts. It just is not possible to do it.

Q. So what do you do when you need a star of that kind? A. We attempt to contact free-lance people—when I say "free-lance people", I mean people who are under no contract with any studio, to work for anyone—find out if they are available, make a deal with them if we can, and, if not, if there is some personality under contract to a producer or to a studio in Hollywood, we attempt to negotiate for borrowing that particular personality to play the part in the picture.

Q. Is the term borrowing and lending used for that in the language of the business? A. Those are the phrases used in Hollywood, or the terms.

Q. Now, do other producers from time to time have occasion to borrow stars, personalities and other talent from Paramount? A. Yes.

Q. And is that for the same reason that you suggested as to why Paramount sometimes does it? A. Yes.

Q. What is the basis, when Paramount borrows stars or personalities, upon which the arrangements are worked out (893)
with the studio from which the borrowing occurs? A. The present arrangement is that the studio will simply say, "We will permit this person to work in your picture for a given number of weeks for so many dollars." If it happens to be a greater number of weeks, or if they happen to use the person a greater number of weeks, then we specify in the contract that for each additional week you use them you pay the pro rata amount for that additional week.

Q. Is the consideration for borrowing and lending always the payment of such much in cash? A. Not always, no.

Q. What other kinds of consideration are sometimes used? A. Sometimes there is a possibility of a personality involved at the borrowing studio that the lending studio might desire to obtain for a part in the picture. So negotiations take place as to whether you will loan back that personality in return. It sometimes happens that a studio wants to acquire from you story material that you have and you have not found any way to make a motion picture out of, and they think they can, so they would say, "If you will sell us that story, then we will loan you this personality." It is strictly a competitive trading proposition.

Q. Why is a studio willing to lend its stars, aside from these things you just mentioned where they borrow a star in (894)
return or get some other consideration in the story field, perhaps? Why are they willing to lend a star and receive cash for the star's period of being loaned? A. Well, in some instances the studio finds it impossible to use all of their available talent all the time that it is available to them under contract with a personality, and yet they have an obligation to pay that personality whether they use them in pictures or not. If an important part comes along with some good story

at another studio, directed by an important director, produced by an important producer, or if it comes along from an independent producer in that field, the studio that has that contract with this particular personality would feel they were recouping a certain sum of money that they had to pay out; they would be advancing the career of this personality and thereby selfishly helping their own position in creating a more valuable asset for the production of pictures. It might be that in the hope that at some subsequent time, having done that, that the studio might loan you a personality when you needed him in a motion picture. I think those are the major controlling reasons.

Q. How is the amount to be paid for the borrowing of a star worked out? Is that a matter of negotiation? A. Yes. I will speak for the Paramount Studio: In the loaning of a

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star, if we had a contract with star X to pay them $100,000 per picture, and a producer wanted to borrow that star, and if in that year we had made, say, two pictures, could not make the third but had to pay for the third, it would cost that studio $100,000. If, however, we had not made but one picture with that star a year, and still had to pay the total sum of $300,000, we would charge $133,500 so as to distribute the write-off of one picture among the pictures that are made—I mean $150,000.

Q. You would try to get back at least the amount that you have to pay the star? A. Yes.

Q. And sometimes something more? A. Yes. With stars under weekly contract, and we have allocated two pictures annually to that star, we generally charge about one-third of the total annual salary.

Q. Now, does the studio have an interest in the vehicle in which the star is to be used by the borrowing studio? A. No.

Q. Is the lending studio interested in not having the star's value reduced, but enhanced? A. Yes, interest in hav-

ing it enhanced, and definitely interested, of course, in not having it reduced in any way.

Q. Now, have there been occasions that you perhaps can mention when the reputation of a star has been enhanced in
(896)
the hands of the borrowing studio? A. Well, I can go back and look over loans that have been made and things like that. I don't happen to remember offhand——

Q. Let me just mention a couple and see if it refreshes your recollection—— A. I will say that we have borrowed people whose reputations, I think, have been tremendously enhanced by their use in the pictures. I will cite the example of Ingrid Bergman playing the part of Maria in For Whom the Bell Tolls.

Q. From whom was she borrowed? A. She was borrowed from Selznick.

Q. And is he an independent producer, not a party to this suit? A. Yes.

Q. How about John Wayne? A. I think the part we gave John Wayne in Reap The Wild Wind, the Cecil B. DeMille production, took him out of the category of more or less in the cheaper type pictures and placed him at one of the top—not one of the top, but way up in the list of leading men in Hollywood.

Q. And who was he under contract to? A. Republic Studios.

Q. Is that an independent producer not a party to this suit? A. I understand they are not a party to this suit. They have a studio.
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Q. Are they an independent producer in that sense? A. Yes.

Q. Was Wayne under contract to Republic at the time his value was enhanced by Paramount's exploitation? A. Yes.

Q. And did he go back to Republic and make pictures for them? A. Yes.

Q. Now, is Shirley Temple another example of the advantages to the lending studio of lending a star whose reputation increased during the period? A. That happened before I went to Hollywood, but Paramount borrowed Shirley Temple from Twentieth Century-Fox when she was practically unknown and gave her a part in Little Miss Marker that overnight made her a top-ranking personality in the industry.

Q. Now, do you know, or, to your knowledge, has there ever been any agreement or understanding amongst the defendants to restrict the borrowing or lending of stars to the defendants in this case? A. I know of no such understanding.

Q. Did you ever hear of any such understanding? A. I have never heard of any such understanding.

Q. As a matter of fact, is borrowing and lending limited to the defendants in this case? A. It is not.

Q. Now, have you had occasion to loan stars to a number of producers who are not defendants in this case as well

(898)

as to defendants in this case? A. Yes.

Q. And have you had occasion to borrow stars from a number of producers who are not defendants in this case? A. Yes.

Q. And isn't it the fact that the practice of lending and borrowing exists in the industry quite indiscriminately without regard to any question of whether a defendant has an interest in theatres or whether he is a defendant in this case, or anything else; it is just the practice between all the producers, isn't it? A. That is right.

Q. Now, can you give us some examples in recent years in which you have borrowed or lent stars from or to independent producers having no interest in this case? And I

will let you have this list before you in case you want to refresh your recollection, with the Court's permission (handing).

Will you give us the name of the star and the name of the borrower or lender, the independent producer——

Judge Hand: He has got a long list there. He may familiarize himself with it. Why do you want him to read all of it?

Mr. Seymour: This list includes all borrowings and lendings. Now, the Government's theory, although I cannot tell from day to day whether they are

(899)

still standing on it, is that there was some kind of a restriction to have this practice between defendants. Now, I am not going into the extent to which it was done between defendants. There is no doubt it was done between defendants; but I am going to ask Mr. Freeman to cite instances of the catholicity of the practice, showing it was done between all producers, which I think can hardly be disputed. So I am not going to have him read the whole list, Judge Hand.

A. We in general have loaned our stars and personalities to all producers; and if you want me to—

Q. Give some examples. A. Nils Asther was loaned to Republic Pictures Corporation.

(900)

Mr. Wright: Does the list have the dates on there, and does it also have the information of the distributor who released the picture in question?

Mr. Seymour: I am not sure of that.

Mr. Wright: Why not put the whole list in with that data?

Mr. Seymour: We haven't got the names of the distributor; we have got the name of the independent producer who borrowed or loaned.

Mr. Wright: Well, it would be easy enough, I suppose, to add to the list the name of the distributor.

Mr. Seymour: I am not going to ask him to prove the whole list but just a few examples of borrowings or lendings to independent producers; and then if at a later time you want to put it in, we will supply the information.

A. (Continued) We loaned Barbara Britton to the Bogeaus production for a part in "Captain Kidd." We also loaned her to the Crosby Productions, which was an independent picture producer under the direction of the Crosbys. We loaned Robert Benchley to an independent production, Abbott-Solomon-Buchman, which was the name of the company producing it. Also Robert Benchley to the Abbott-Herbert Corporation. These were independent pictures produced under the direction of Jack Skirball, at one time (901)

associated with Frank Lloyd. We loaned Robert Benchley to the Manhattan Productions, the same group. We loaned Rod Cameron to Republic Pictures Corporation; Johny Coy to the Felix Young Productions, an independent producer; Richard Denning to Republic Pictures Corporation: Ellen Drew to Republic Pictures Corporation; Ellen Drew to the California Movie Company, which was an independent production; Ellen Drew again—no, I believe that was radio; I don't believe that was a picture—Ellen Drew to London Studios for a part in a picture. Albert Dekker to Republic Pictures Corporation; Albert Dekker a second time to the Republic Pictures Corporation. Virginia Dale, Republic Pictures Corporation. Yvonne De Carlo to the Cardinal Pictures Corporation, all of these independently-produced pictuers. William Demarest to the Cinema Artists Corporation. Carl Esmond to Sam Wood Productions. Barry Fitzgerald to B. G. DeSylva Productions. Preston Foster to Edward

Small Productions. Preston Foster to Edward Small Productions a second time; Betty Field to Lester Cowan Productions; William Holden to Principal Artists Syndicate for a picture; Susan Hayward—

Q. I think that is enough. There are other examples of lendings and borrowings? A. Yes, a great many.

Q. And those happen to be largely lendings that you refer to? A. Where we have people under contract to Paramount who have been loaned to others.

(902)

Q. Loaned? A. Yes.

Q. Now, have you borrowed some? Have you borrowed some from independent producers? A. Yes.

Q. I do not know that you need to go into detail, but, in any event, is it true that the practice of borrowing and lending stars prevails in Hollywood between all producers, independent, non-theatre-owning, and producers who have an interest in theatres? A. Yes.

Q. And is the practice, would you say, indiscriminate among them? A. Yes.

Q. Now, also are there ocassions when Paramount rents either out or in equipment and props and costumes and things of that kind? A. Yes.

Q. Is that also done indiscriminately among producers? A. Yes.

Q. Is there any agreement or understanding to limit that practice to the defendants in this case? A. No.

Q. Can you give us an idea as to approximately how many independent producers there are in Hollywood at the present time? A. I think there are about 40, making all types of pictures. I mean by that, from the very cheapest westerns to the very highest price A-pictures.

Q. And that does not include the defendants in this suit? A. No.

(903)

Judge Goddard: How many elsewhere?

Mr. Seymour: Sir?

Judge Goddard: You confined your question to Hollywood. How many other independents are there?

Mr. Seymour: That is a good question, Judge Goddard.

Q. Are there other independents outside of Hollywood producing pictures? A. As far as I know, with very, very few exceptions, all pictures that are made in America are made in Hollywood; that is, except the so-called industrial films and pictures of that type.

Q. Now, as a matter of fact, is there an organization of 24 independent producers? A. The Association of Independent Motion Pictures Producers, headed by Mr. Donald Nelson, I understand has 24 members. I only know that by a statement made by Mr. Nelson.

Q. Is there also another organization of so-called independent producers containing a somewhat smaller number? A. There is the Society of Independent Motion Picture Producers composed of the group that produces the smaller bracket western pictures and action type pictures, generally released through P. R. C.

Q. Are there substantially more independent producers in Hollywood today than there were when you went there in 1938? A. Yes.

(904)

Q. Would you venture an estimate as to approximately how many more? A. A good many more, several times more than the number that were producing independently when I first went there.

Q. That has been a development of the last several years? A. Since I went to Hollywood in 1938.

Q. Now, are some of those independent producers very successful? A. Yes.

Q. Have some of them produced some of the most successful pictures of recent years? A. Yes.

Q. Can you mention some of the pictures produced by independent producers? A. Selznick produced "Gone With the Wind"; "Since You Went Away"; "I'll Be Seeing You"; "Rebecca"; two or three other very important pictures. Sam Goldwyn has produced several very important pictures, the last one being with Danny Kaye, "Up in Arms" and one with Bob Hope, "The Princess and the Pirate"; and two or three with Gary Cooper that were very, very successful.

Q. Now, are the pictures of the independent producers widely distributed? A. Yes.

(905)

Q. Is there a constant demand for the pictures produced by independents as well as others? A. Yes.

Q. Do you know of any instance where an independent producer of a good picture has had difficulty in getting his picture distributed? A. I do not know of any, no.

Q. Do you know of any picture, having merit, produced by an independent producer or anyone else since you went to Hollywood, which did not get distribution? A. I don't know of any.

Q. Has Paramount from time to time distributed pictures produced by independent producers? A. Yes.

Q. Has Paramount ever refused, so far as you know, to distribute a picture of an outside producer which it could obtain on satisfactory terms? A. Not that I know of, but there have been independently produced pictures that we have been asked if we would meet certain terms, and we have said no.

Q. That is the reason I asked you. The terms were unsatisfactory? A. That is right.

Q. And those pictures were distributed by other distributors, is that correct? A. Yes.

Q. Going back, Mr. Freeman, to the period when you were associated with Mr. Lynch, did you learn of the development of Associated First National? A. Yes.

Q. And can you tell us your contact with the development (906) of that organization? A. I don't quite understand your question. My contact with the development of the organization?

Q. Let me put it this way. Did you learn of the formation of First National? A. Yes.

Q. And at that time you and Mr. Lynch, or Mr. Lynch's organization, were engaged in distributing Famous Players pictures in the South, is that correct? A. Yes.

Q. And did you learn of the banding together of the principal exhibitors of the United States to form First National? A. Yes.

Q. And did you learn of the development of sub-franchises by these exhibitors, bringing in some thousands of smaller exhibitors over the United States? A. Yes.

Q. And did you have occasion to discuss the impact of that development on the distribution of Famous Players pictures with First National franchise holders? A. Yes.

Q. Was there an occasion when you went to New Orleans and had a discussion about it? A. Yes.

Q. Will you tell us when that occurred? A. In March of 1919.

Q. Will you tell us what happened on that occasion? A. Well, we met with several of the First National Franchise holders, holding franchises in the Southern States. The Southern States I refer to are Texas, Oklahoma, Arkansas, (907) Mississippi, Louisiana, Georgia, Florida, Alabama, Tennessee, North and South Carolina. We generally referred to them as the eleven Southern States. And at this meeting there were, in addition to the principal franchise holders,

Mr. Hulsey, being the franchise holder of the States of Texas, Oklahoma and part of Arkansas, and Mr. E. V. Richards, representing the Sanger Amusement Company, that held franchises for Mississippi and Louisiana. There were present——

Q. First National franchises? A. First National franchises. (Continuing) —representatives of some then forty or fifty exhibitors. And they, at this meeting, asked our interests, S. A. Lynch Enterprizes' interest, asked Mr. Lynch and me if we would be willing to join in, that they were planning to organize a booking and buying company, meaning by that a company that would buy pictures for a given theatre and also that they would book that picture to the theatre, and that their plan was that each theatre who joined the organization would pay five per cent of its gross receipts into the organization for management, for buying the pictures and for services to be rendered, and that the organization would serve any of its members who might be involved in a situation, to go in, and if necessary, take over his theatre and run it for him until it could be put back on a profitable basis. They said they held franchises for First National Pictures in the States of Texas, Oklahoma and Delaware, (908)

Arkansas, Mississippi and Louisiana, and that they would like for the Lynch Enterprises to place the theatres that were then operated by the Lynch Enterprises, amounting to some fifteen or eighteen, into the organization and for the Lynch Enterprises to own this company along with Mr. Hulsey, Mr. Richards and two or three other important exhibitors in the territory, and the details to be further discussed and worked out, but the Lynch Enterprises would manage the business in Georgia, Florida, North and South Carolina, and Tennessee.

At that time we had a contract with Famous Players-Lasky for the distribution of Paramount pictures and we

told them that we had, and we told these people that we had an obligation to Paramount to protect the outlet for Paramount pictures in that territory and that we certainly would do everything in the world we could to preserve and protect that against any competitive organization; and we felt under the situation of what was developing there that our obligation was to go and disclose it to Paramount, and tell them, and we intended to do that. If Paramount did not feel there was any threat to their future in this, that, after a frank discussion with them, we would come back and we might discuss some plan further, but until we had a chance to talk, (909)

we would refer it to Mr. Adolph Zukor, we would not want to make any further commitment.

Q. Did you after that meeting go with Lynch to see Mr. Zukor in New York? A. Yes.

Q. Did you report the meeting to him? A. Yes.

Q. Did you express any views to him about what Paramount ought to do? A. We told him that, insofar as the interests that we represented, the Paramount interests in the South, we felt it was a direct threat to its future; that these were exhibitors that controlled practically all of the important theatres in the territory, that is, in the Southwest territory, Texas, Oklahoma, Arkansas, Mississippi and Louisiana, and that if they should decide they did not want to play Paramount pictures, there would be no outlet for them in that territory.

Q. Was it shortly after that that Mr. Zukor advised you that Paramount had decided to acquire an interest in the atres down there? A. We first talked with Mr. Zukor. He said he wanted a few days to give the matter consideration and discuss it with his associates. Very shortly after the first meeting he notified us that he would be interested, that Paramount would be interested, in joining with the Lynch enterprises in the organization of a company.

(910) Mr. Wright: All this conversation is improper. I have not objected to it because I wanted to get it over with, but if he can just say what happened there, it seems to me——

Mr. Seymour: It is almost over. Relax, it is almost over.

Q. Shortly after that, Southern Enterprises was formed with the Lynch interests having a half interest and Paramount having a half interest; is that right? A. Yes.

Q. What happened in the Hulsey area—where was he a First National franchise holder? A. He had the franchise for Texas, Oklahoma and part of Arkansas.

Q. What happened to Paramount or Famous Players pictures in his area? A. He had associated with him in the territory several very important exhibitors operating—I say important exhibitors—operating in the larger cities and he threw out all Paramount pictures in the important cities of Texas, Oklahoma and Arkansas.

Q. So there was a time when Paramount pictures could not be shown in those important cities, is that right? A. Yes, sir.

Q. At or about that time did Southern Enterprises acquire an interest in some theatres in that part of the South? A. Yes, through a subsidiary corporation that they organized, known as Southern Enterprises, Inc. of Texas.

(911)

Q. I want to ask you a little about the theatre department of Paramount, Mr. Freeman. When you went to Paramount in 1933, had decentralization of theatre operation already taken place? A. Yes.

Q. Perhaps I should have asked you first, what was the method of operating theatres in which Paramount had an interest when you came to Paramount in 1933? Were they

operated centrally or were they operated locally? A. They had been operating centrally in New York, controlled and operated out of New York. I wasn't any part of that. I wasn't there, but that had been their method of operation.

Q. When you got to Paramount, how were they being operated? A. Mostly by receivers.

Q. But at least they were being operated largely by receivers on the ground, isn't that so? A. Yes.

Q. Where they weren't operated by receivers they were being operated by their local managers? A. Yes.

Q. I would like to have you tell us a little bit about the period when you were at Paramount in New York and while you were in charge of the theatre department as to the independence of the theatre department from the distribution department. Was the theatre department advising the distribution department as to the film deals made by theatres in which Paramount had an interest through their local (912)
managers? A. No, they were not.

Q. Was the distribution department advising Paramount —advising the theatre department as to the film deals which the distribution department was making in theatres in which Paramount had no interest? A. No.

Q. Did it keep the theatre department advised as to the film deals which were being negotiated or made with the theatres in which other defendants in this case had an interest? A. They did not.

Q. Would you as a director of Paramount have occasion to consider whether you thought it was desirable for Paramount to have an interest in theatres? A. I did not quite understand.

Q. You were a director of Paramount for a time? A. I was a director of Paramount, commencing December 7, 1935.

Q. Are you still a director? A. Yes.

Q. As a director of Paramount and an officer of Paramount, do you believe it is desirable, from Paramount's

point of view and the point of view of Paramount's stockholders, for it to have an interest in theatres? A. Yes.

Q. Why? A. I feel that it offers the best chance of an outlet for pictures in different territories. It offers a chance to not be shut out by any combination that might want to restrict you from showing any, as happened to us in Dallas,
(913)
Texas. And it gives to the distributing department a very direct knowledge of public appreciation of certain types of pictures, or dislike of certain types of pictures which the distributing department can convey to the studio and be helpful in deciding upon the production program. That is particularly helpful where the company must produce twenty-five motion pictures a year. It is much more necessary than it would be if I only had to make one motion picture, in which I could take all the elements of gamble on it. I have to follow through with a program of two pictures a month. And it is very important to the manufacturer to have knowledge that in going forward with that program that there is some protection to the gamble. The independent producer who makes one or two pictures, may take one or two gambles a year. I have to take, as head of the studio, twenty-six gambles, because every picture is a new formula; it is not tried or proven by the performance of the preceding picture. It is the only business, I think, that the product is manufactured out of human beings. The assembling of those human beings, to bring them together, and the making of the picture, is a very, very uncertain, unknown thing. It makes no difference how many known factors you may have to go into it, it may still prove very unprofitable.

So with that outlet there available to you, you at least
(914)
have some protection.

If I may, without any discussion of the other man's motion picture, cite the example of one of the finest motion

pictures ever made in the industry, picture called Wilson, I assure you that that is a very, very unsuccessful picture from the standpoint of its commercial value but it is one of the finest pictures the industry has ever made.

Now the fact that that would have, through ownership, some chance of an outlet, to at least carry on, would encourage the man who was producing that picture to go forward with it, and that happens all the time in the production of pictures, and I definitely feel that the interest of the producer and the distributor and the exhibitor can successfully be tied up in the ownership of the outlet for the product.

Q. You believe that Paramount has used its theatre interests to monopolize exhibition in the United States?

Mr. Wright: Same objection.

Mr. Seymour: Mr. Wright has an objection and my witness has hesitated to answer. Your Honor overruled the objection before.

Judge Hand: You may answer that, if you want to.

Q. (Continuing) You may answer.

Judge Hand: It is a general thing.

A. No, I don't think that Paramount has tried to monopolize.

Mr. Seymour: Now, Mr. Wright, I am prepared to stipulate with you that, if put to this witness, the questions negativing the conspiracy charge in the complaint, which I have put to Mr. Zukor, would be answered by him in the negative, and on the basis of that stipulation I will not put the question to him.

Mr. Wright: That is stipulated.

Mr. Seymour: And you may now inquire.

The Court: We will now adjourn until tomorrow morning at ten-thirty.

(Adjourned until Wednesday, October 24, 1945, at 10:30 a. m.)

(916)

New York, October 24, 1945, 10:30 a.m.

Trial resumed.

Judge Hand: Proceed.

Mr. Wright: If the Court please, I think there is a correction that should be made at page 819 of yesterday's typewritten transcript on the cross-examination of Mr. Rodgers. You will note the question at page 819 in the middle of the page reads:

"Q. You did not offer it then until after you had been able to agree with Balaban & Katz on terms for the picture, isn't that right?" I think the question should be "until after you had been *unable* to agree."

And then the next question reads:

"Q. The only reason that it was made available to the Wood's and the Oriental?"—it should include the words "That was the only reason that it was made available to the Wood's and the Oriental."

Mr. Gillespie: It seems reasonable to me.

The Court: How should the first correction read?

Mr. Wright: The question as it now reads is: "Q. You did not offer it then until after you had been able to agree with Balaban & Katz on terms for

(917)

the picture," and it should read, "unable to agree,"

Judge Goddard: "unable" instead of "able"?

Mr. Wright: Yes.

Mr. Caskey: I might say, if your Honors please, that we have been from time to time suggesting corrections to the record to the stenographers, mostly of a grammatical nature, and at some convenient time we shall consult with the Government on those and have them made in the copies which your Honors are receiving.

Judge Hand: All right.

Mr. Caskey: They are not of sufficient importance to call to your attention specifically.

Mr. Wright: All right.

Y. FRANK FREEMAN, resumed the stand.

Mr. Wright: Have you gentlemen any other questions of Mr. Freeman?

Mr. Gillespie: I don't think so.

Judge Hand: All right, Mr. Wright.

Cross Examination by Mr. Wright:

Q. Mr. Freeman, can you tell us just what a producer of motion pictures is, as you have been using the term? A. A producer of motion pictures, as we use the term in Hollywood, is the man who supervises the development of the (918)
story, the selection of the story from which the picture is to be made; also supervises the selection of the cast, and the designing of the sets, the costumes for the people, and as a supervisor of the complete production of the picture.

Q. In other words, the actual producer in every instance, I suppose, is an individual? A. Yes, sir.

Q. And the Paramount Pictures Company has under contract to it a substantial number of people that are called producers, executive producers, or associate producers? A. Yes.

Q. Titles of that kind? A. Yes.

Q. And those people have contractual arrangements with you; some are on a straight salary and others on a salary and percentage of profits of the pictures that they produce? A. All of the producers that work for Paramount are on a straight salary, not participating.

(919)

Q. Then there are some producers who produce on the Paramount lot, that is, you make your production facilities available to, where you finance the production and share in the proceeds? A. There is one such producer on the Paramount lot, in which we finance the production. There are other producers in the same category, but we don't finance.

Q. I was just wondering where you draw the line here as to what you call an independent producer. This producer on the Paramount lot, whose productions you finance, that is Mr. DeSylva? A. No, we don't finance Mr. DeSylva Mr. DeMille.

Q. Mr. DeMille? A. Yes.

Q. Mr. DeSylva was one of your salaried producers until quite recently? A. He was the executive producer until about a year ago—the first of this year.

Q. And I think he was one of those that you referred to as an independent, that is, according to your definition he became an independent when he set up his own unit although he continued to release through you? A. I consider Mr. DeSylva an independent producer.

Q. And you consider him independent because you say you don't finance his productions although you make production facilities available to him, is that right? A. Yes.

Q. And you don't share in the profits of the production? A. We do.

(920)

Q. You have a percentage of the production profits as well as such profits as you make through distributing the picture? A. We have a distributing arrangement for the picture and then a share of the profits after all costs have been paid out of production.

Q. Are there any other of these producers you have referred to as independent which release pictures through you under a similar arrangement? A. Mr. Wallis—Hal Wallis

sections of the country who are not connected by any over-all organization; and the manufacturer of a picture will sell
(931)
outright the rights to distribute his pictures, say in Georgia or North Carolina, to an individual distributor in that section. He will also sell the rights to distribute, say any in Texas, Oklahoma and Arkansas to another State's rights distributor, who distributes pictures in that territory. They are not connected through any central organization; they are all individuals who operate on their own in that particular territory.

By Judge Hand:

Q. Do they still exist? I thought they did get into an organization, according to some of your testimony. I may have misunderstood it. A. No, there are a great many State's rights exhibitors today handling pictures, buying reissues from people, new issues that are made, principally the cheaper budgeted pictures, Westerns and what we call action type pictures that are sold to those State's rights distributors. I would think that there are from one to three of those State's rights exhibitors in each territory.

By Mr. Seymour:

Q. Do you mean distributors? I think you said exhibitors, Mr. Freeman.

Judge Bright: He said exhibitors once or twice. He meant distributors.

The Witness: I am sorry. I meant distributors
(932)
in the different divisions of territory.

By Judge Hand:

Q. The division of territory you refer to is what, a State or a subdivision? A. It is an exchange center; it is a ter-

ritory that is generally covered out of a central exchange, and that is pretty well defined in the national set-up.

By Judge Bright:

Q. They are not connected with any of these defendants or any of the national distributors? A. They are not connected with any of these defendants or any of the national distributors.

By Mr. Seymour:

Q. It is another method of distribution? A. Yes.

Q. And are some of the national distribution organizations the outgrowth of original State's rights distribution? A. I think the P. R. C., Monogram and I think Republic is an outgrowth.

By Judge Hand:

Q. That is what I thought you said yesterday, didn't you? A. I did not, no.

Mr. Seymour: What he was talking about yesterday, Judge Hand, was First National——

Judge Hand: Who did say that? Didn't some witness say that?

(933)

Mr. Seymour: I understood yesterday that the testimony dealt with the Associated First National, which was an organization of original State's rights distributors in the First National organization. Now that was not the end of States' rights development.

Judge Hand: I see.

Mr. Seymour: And that has been going on constantly, is still in effect, and there is nothing in the world to prevent its growth.

Mr. Caskey: I have one matter that I cannot believe is really in dispute, but because it is incorporated in Appendix A of the trial brief at page 35, I should like to ask a question.

Recross Examination by Mr. Caskey:

(936)

Q. It appears, Mr. Freeman, that Paramount maintains an exchange in Atlanta, Georgia. Is that the natural distribution center of that portion of the United States? A. Yes.

Q. And is the same true as to Charlotte, North Carolina? A. Yes.

Q. And New Orleans? A. Yes.

Q. Dallas? A. Yes.

Q. Oklahoma City? A. Yes.

Q. And those exchanges were maintained in those distribution centers since your connection with the motion picture industry? A. I think possibly Charlotte was opened as an exchange center after my connection, and possibly Oklahoma City; I am not sure. They have been maintained for a long period of time.

Q. They are the natural distribution centers of the country? A. In that particular section of the country in which they are located, yes.

Q. And that would be equally true of Post Toasties? A. Of what?

Q. Of any commodity that is sold generally through the United States? A. Yes.

Mr. Caskey: That is all.

Mr. Seymour: Thank you, Mr. Freeman.

(937)

Mr. Seymour: I will call Mr. Reagan.

CHARLES M. REAGAN, called as a witness on behalf of the defendant Paramount, being duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. What is your present position with Paramount? A. Vice-president in charge of sales for the United States and Canada.

Q. And are you also a member of the board of directors? A. Yes, sir, I am.

Q. And how long have you been vice-president in charge of sales? A. Since May of 1944.

Q. What are your duties in that office? A. I am responsible for the distribution and merchandising of Paramount Pictures throughout the United States and Canada.

Q. And are you also a vice-president of Paramount Film Distributing Corporation? A. Yes, sir.

Q. And does Paramount Pictures, Inc. and Paramount Film Distributing Corporation distribute pictures? A. They do.

Q. And one operates in some States and the other operates in other States, is that right? A. That is correct.

Q. So they are both engaged in distribution in the same way but in different parts of the country, is that right? A. Yes, sir.

(938)

Q. And your testimony will apply to the distribution by both companies? A. Yes, sir.

Q. Now, when did you first enter the motion picture business? Will you tell us briefly about your experience in the business down to the time you became vice-president in charge of sales? A. I entered the motion picture business in 1920 as a salesman in the Cincinnati exchange for Paramount; in 1921 I was made sales manager of that exchange. In 1922 I was sent to Minneapolis as branch manager of

—releases through Paramount but not under exactly the same terms as the DeSylva arrangement.

Q. Of these 40 producers out there that you referred to as independent, how many of those 40 release their pictures through one or more of the defendants here, do you know? A. One or more of the defendants?

Q. Yes, the defendant distributors in the suit here. A. I would suppose about 12 or 14 of them. Just as a rough estimate. I haven't checked that.

Q. Do you know? A. Well, I can name those that I know.

Q. Which are those? A. Selznick, International Pictures, Preston Sturgis, Hunt von Stromberg, Lester Cowan, Eddie Golden, Edward Small, Charlie Rogers—did I name von Stromberg?

Q. Yes. A. Ben Borgeaus Productions. That is offhand.

Judge Bright: What did you say they did?

The Witness: They released through the different

(921)

corporations in this case. That was the question asked me.

Q. Yes. This comparison you made between the 40 that are there now, that you say is substantially larger than the number there were when you went out there in 1938, as a matter of fact, of those 40 the only three which have any distribution facilities of their own—national distribution facilities—are Republic, Monogram and P. R. C., isn't that right? A. They are not defendants in this suit?

Q. I say, of these 40 producers that you named as independent, there are only three of those, that is, Monogram, Republic and P. R. C., which have any national distribution facilities of their own? A. I didn't name Republic, Monogram or P. R. C. I didn't mention those.

Q. I thought you had referred to them as independent producers in discussing this loaning and borrowing of talent. A. My understanding of the question was, those companies that were not defendant to this suit. Republic, as I understand it, is not a defendant, and they were considered in the independent group. I did not name them in that——

Mr. Wright: Will you read the last question?

(Question read.)

A. In so far as I know, those that I named haven't any national distribution arrangement of their own. They distribute through other distributors.

(922)

Judge Bright: Except the three mentioned?

The Witness: Except those three mentioned.

Judge Bright: Do I understand you to say that the other 37 distribute through some one or more of these defendants?

The Witness: Yes, one or more of these defendants or through the group that were excepted, Republic, Monogram or P. R. C.

Q. You don't know which ones distribute through which, other than those you named? A. I can give you, from my memory, the best information I have. Selznick distributes through——

Q. Yes; I say, other than those you covered in your statement. A. That is right.

Q. In any event, all of these producers of pictures out there, whether they are under contract to you or whether they free-lance, or whatever the arrangement they make for distribution, have a very vital interest in the way that their films are distributed and exhibited, isn't that right? A. I suppose they do.

Q. And the manner in which the films which these producers make are distributed and exhibited determines, in very large measure, does it not, the financial success of his pictures? A. I would answer that by saying that that contributes to it, and also the value of the product that he has
(923)
made, whether it has box office value or not.

Q. Yes, but apart from the question of such intrinsic box office value as the picture might have because of its quality, its box office performance also depends in very large part on the kind of exploitation it gets in distribution and exhibition, isn't that right? A. That certainly is a help to the success of the picture.

Q. That is, whether it gets into the key runs or not, and when it gets in, and how much playing time it gets in key runs, those are—— A. Those are contributing factors to the success of the picture.

Q. Now, the question as to what kind of exploitation any particular picture gets is largely a matter of agreement, then, between the distributor and the exhibitors who show the picture, isn't that right? A. No, that is not entirely correct. The kind of exploitation and the publicity campaign nationally is one that is arranged between the producer of the picture and the distributor of the picture. The local campaign, where the picture is exhibited in any community, is of course one that is worked out between the distributor and the exhibitor.

Q. When you make a contract with a producer to distribute his pictures, you just make a contract to distribute them and that is as far as the contract with him goes, isn't that right? A. Oh, no.
(924)
Q. That is, you don't—— A. No, he imposes all kinds of —I am speaking now of the contract that we have for distribution.

Q. Yes. A. And from information of others. (Continuing) All kinds of conditions for the method and manner in which his picture will be sold, the terms, the amount of money to be spent in exploitation, his right of sitting in on the advertising campaign and approving the class and type of advertising that shall be issued on the picture; and in many instances, actually approving the individual contract that is made with the exhibitor for the exhibition of his picture.

Q. Yes, I understand that, but I say, assuming he does have the power under your distribution contract to approve or disapprove the particular terms or licenses that you, as a distributor, make with the various exhibitors, it is never determined what kind of play-off the picture is ultimately going to have until after the license agreements are made between you as the distributor and the various exhibitors that show the picture, isn't that right? A. I don't make those contracts, Mr. Wright. I am not in the distributing end and I could not answer just the type of contract made between the distributor and the exhibitor.

Q. You were yourself in charge of the exhibition
(925)
field at one point? A. That was back in 1938. I did not make the contracts for the playing of the pictures in the theatre.

Q. In any event, there is a struggle which goes on in the course of releasing the picture between the distributor and exhibitors, on the distributor's part to secure a certain amount of playing time in certain theatres, and as to which differences of opinion arise between the distributor and the exhibitor, isn't that right? A. Yes.

Q. Those are ultimately resolved in the terms of the contracts that are made between the exhibitor and the distributor? A. Continuous struggle.

Q. And your situation is, of course, always that your producer feels that he ought to have extended playing time

in all of your key runs and that the picture ought to be held in there as long as it is making any money at all, isn't that right? A. That is correct.

Q. And your exhibitor, of course, may have different ideas and wants to pull or take out the picture and put in something else that he thinks may make more money before the other picture has played as much time as the producer thinks it ought to? A. That is generally a conflict between the two. What all the reasons are——

Q. Yes, you have a constant struggle over this question of what kind of playing time, but that is whether they get (926)
the preferred days, the Sundays, Saturdays and the holidays, or whether it is played at some other time? A. It is always a point at issue.

Q. How those issues are resolved, of course, always has a very important effect on the box office results of the picture over-all, isn't that right? A. It has an effect on it. The problem is not as much of a problem in the case of important box office pictures because the holiday dates and all are covered generally by the arrangement of the runs. It becomes a problem in the towns farther down the line, where they play split week, and two or three days instead of a whole week.

Q. Roughly, the situation that you have today with your smaller number of features and your greatly extended playing times in the first-runs is simply that you have a glut of features in your first-run situations, key situations, and you have an acute shortage in your subsequent-runs, isn't that right? A. I am not entirely familiar with that. I am not handling distribution. I can't answer that, Mr. Wright. (927)

Q. You don't know what the facts are as to that, then, at all? A. I do not.

Q. But, in any event, the success or failure of any of these producers who make pictures depends ultimately on

the consistency with which he can get in box office returns, the cost and the profit on the picture, isn't that right? A. I think the success or failure is dependent on his ability to create a box office picture, to build something that the public is interested in, and will pay to go to see.

Q. And in that connection the pictures that have the greatest appeal or that you are interested in marketing are those which have a nation-wide box office appeal for all ages and levels of education and experience, isn't that right? A. I should think that is correct, yes.

Q. In other words, you don't waste any time discussing terms with some producer who is simply seeking to reach a limited portion of the market, who might wish to make a picture that appealed, let us say, to a certain section of the country? A. I do not quite understand your question about wasting time. We would discuss with any producer the distribution of his picture, if it had what we considered material in it or box office value, public appeal. I would not know how to distinguish between wasting time with one or another.

Q. Well, of course you understand that there are and may be wide differences in the box office appeal of any par-

(928)

ticular picture in various geographical areas and various age levels, and perhaps in various educational levels? A. There is a wide difference of appeal, yes.

Q. And as I say, you do not offer distribution facilities except to such pictures as you believe have the broadest possible appeal, isn't that right? A. It would be, certainly, the first consideration to make the test, because the distributing company is interested in making money and distributing pictures from which they can get the broadest distribution and make a financial gain, make a profit out of it. That is their purpose and that is their job.

Q. And your distribution and marketing system is so set up, however, that you do not afford the facilities to some-

body who may want to reach a particular segment of that whole domestic market?

Mr. Proskauer: I object to that, your Honor. It is speculative.

Judge Hand: I think we shall sustain that objection. I do not see that it has any pertinence. Why in the world should this company be regarded as a humanitarian trying to exploit pictures that only appeal to a small class and are not much profitable. It is merely absurd, unless you can show that there is a conspiracy to exclude those people. There is no such law in the world.

(929)

Mr. Wright: If the Court please, I think it is quite apparent that one of the purposes of the Act, one of the purposes of competition, is to assure an opportunity for doing business in divers ways, and the opportunity for divergent methods of expression.

Judge Hand: We will sustain this objection. Go on with your next question.

Q. You say all of these films, of course, are copyrighted? A. I said that?

Mr. Caskey: What was that?

Mr. Seymour: We could not hear your question.

Q. I say everything you make is copyrighted, isn't that correct, all films? A. All films that Paramount makes are copyrighted. I suppose the others are.

Mr. Proskauer: May we have a stipulation as to something we have all tacitly assumed, that substantially all, or, in fact, all the films and motion pictures are copyrighted? I suppose we can agree on that, Mr. Wright?

Mr. Wright: Yes. I merely wanted to point out the copyright issues as a matter of course.

Q. It is, is it not, as far as you know? A. It is in the conduct of Paramount business.

Q. You referred, I think, in your direct examination to each film representing some new formula. Now, so far as copyright is concerned, you get a copyright whether you (930)
use the same formula seven times or whether there is any particular freshness or originality or anything else in it or not; isn't that right?

Mr. Proskauer: I object to that as irrelevant.

Mr. Caskey: I object to it.

Judge Hand: Yes. I do not see any use in putting things like that in the record.

Mr. Wright: That is all.

Redirect Examination by Mr. Seymour:

Q. Just one question: Do some of the independent producers that you mentioned distribute through Republic, Monogram and P. R. C.? A. Yes. Wait a minute. You say the ones that I mentioned?

Q. In the group of 35 or 40 which you did not name but which you gave the number of yesterday—— A. They do.

Q. Do a number of those distribute through Republic, Monogram and P. R. C., which are not defendants in this suit? A. Yes.

Q. Do others distribute through so-called State's rights distributors? A. A few, yes.

By Judge Bright:

Q. What are State's rights distributors? A. State's rights are defined as individual distributors in the various

Judge Hand: I apparently misunderstood.

Mr. Seymour: It was not the end of that method. It is here, and there is nothing to stop its growing to any extent, or any kind of distribution growing to any extent.

Any other questions of Mr. Freeman?

By Judge Bright:

Q. Do these State's rights distributors distribute any of the product of the defendant producers? A. No, not unless there had been some deal to sell some of them an old picture that they reissued.

May I say that we recently sold to a man by the name of Harry Sherman, who is an independent producer——

Mr. Proskauer: A distributor?

The Witness: An independent producer.

A. (Continuing) —a series of Western pictures that had (934)
previously been produced by him for our company. They had been played in all of the theatres available throughout the country, and we sold him back all of our rights, copyrights and everything in those pictures. Now he expects, as I understand it, to sell those pictures to these State's rights distributors. In other words, he paid so much in a lump sum for the whole; he expects to take each individual picture and sell to the State's rights distributor in Atlanta, Georgia, that territory, for X dollars; he expects to sell to the State's rights distributors in New England, that territory, for X dollars; in Chicago, that territory for X dollars, and of course, out of it all, to make a profit for himself. He has nothing then to do with the distribution or handling of it in any way. He has passed his rights to that picture in that given territory to these State's rights distributors.

Q. Are any of the pictures produced by Paramount that still are owned by Paramount, distributed through State's rights distributors? A. No.

Mr. Seymour: Are there any further questions of Mr. Freeman?

The Witness: May I qualify my last answer and ask, would that mean pictures that have been reduced to 16 millimeter size and have been licensed to independent distributors? Paramount does license pictures in 16 millimeters to a separate distributor who

(935)

handles such products in schools and churches and clubs and other places, not in theatres, however.

Q. What do you mean by a separate distributor? A. Not connected with Paramount in any way.

By Mr. Proskauer:

Q. Or with any of the other defendants? A. Or with any of the other defendants. It is strictly an independent distributor, but he can only distribute the pictures in 16 millimeter size.

By Judge Bright:

Q. What are they, original features reduced from 35 to 16 millimeter? A. Yes, pictures that have already been released in 35 millimeter size through the theatres, and they have played through most of the theatres in the country; and then he has the license arrangements to distribute those pictures in the United States, as I say, in certain localities where there are not theatres, in churches and clubs, and places of that kind.

Mr. Seymour: Anything else?

that exchange. In about 1926 I was made district manager with supervision of the Cincinnati, Indianapolis and Louisville exchanges; and in 1932 I was made district manager with supervision of the Chicago, Milwaukee, Detroit and Indianapolis exchanges.

In 1934 I came to New York as division sales manager. That position I held until 1941 when I was made assistant general sales manager and continued in that capacity until May of 1944 when I got my present assignment.

Q. And in 1944 you succeeded Mr. Neil Agnew who had resigned? A. Yes, sir, I did.

Q. And who is no longer connected with Paramount? A. No, sir, he is not.

Q. Now, will you tell us about the organization of the

(939)

distribution or sales department of Paramount? A. The distribution organization is headed by myself as general sales manager. We have divided the country into what we call four divisions, which are supervised by four division sales managers; a further division of ten districts, each of which are supervised by a district manager. There are 31 branch exchanges, each of which are supervised by a branch manager. Those exchanges vary in size; and the number of salesmen employed in each exchange varies from about two to about seven.

Then in each exchange we have a booking department that books the pictures to the exhibitors with whom we do business.

We have an accounting department which arranges for the collection of the film rental that we earn.

We have a shipping department which ships the pictures to the theatres with whom we do business; and we have an inspection department which inspects the films after each engagement has been completed. If the films are found not to be in first class condition, they are put in first class con-

dition before they go out for another engagement, so that the print is at all times in a first class condition before it has another exhibition or another engagement.

Q. Did you tell us how many exchanges there were
(940)
altogether? A. Yes, sir, I told you there were 31.

Q. Now, do those 31 exchanges handle only Paramount release pictures? A. Yes, sir, they do.

Q. Do they have any relationship or connection with the exchanges maintained by other distributors? A. No, sir, they do not.

Q. Does Paramount distribute the pictures of any other defendant in this case? A. No, sir. We have a shipping station in Butte, Montana, which is not an exchange. There we handle the physical shipment of pictures for United Artists.

Q. That is just at Butte, Montana, as a matter of shipping? A. Yes, sir.

Q. That is the only place in the United States where you handle the pictures of any other defendant, and that is just a matter of the shipment? A. Yes, sir.

Q. And there are no salesmen employed in connection with the Butte, Montana, shipping station? A. There are none. It is just a shipping station.

Q. Now, was there a time when Paramount had more than 31 exchanges? A. Yes, sir. At one time I believe we had 36 or 37 exchanges.

Q. And why was the number reduced? A. The number was reduced because we felt that we could adequately sell and service the accounts with whom we did business with a
(941)
lesser number of exchanges.

Q. Now, have the existing exchanges been maintained for a long period of time in the same cities where they are now located? A. Yes, sir.

Q. And can you tell us the basis for selecting the city where a particular exchange is located? A. Well, those cities were selected because they were, we believe, the best locations from which to adequately sell and service our accounts.

Q. Now, your paramount consideration is both to send salesmen out to get in touch with the theatres and handle the films back and forth, is that right? A. Yes.

Q. And it is the combination of those two considerations in a central place which dictated the selection of the city for the exchange? A. Yes, sir.

Q. Approximately how many theatres does Paramount license pictures to? A. Well, it varies, dependent upon the box office quality of the picture. I should say from about 8000 to 14,000 or 14,500.

Judge Bright: What was that question?

(Question and answer read.)

Q. Approximately how many accounts are served by each exchange? A. Well, they vary in number, depending upon the size of the exchange. Our smallest exchange serves ap-
(942)
proximately 150 accounts, and our largest in excess of 700.

Q. Now, I wish you would tell us the physical method by which films are handled through a typical exchange, beginning with the assignment of prints. A. The number of prints that are assigned to an exchange is dependent upon, both the quality of the picture and the number of accounts in that exchange. Do you mean——

Q. Well, I would like to have you trace the method, the physical method of exchange operation, beginning with the assignment of prints and how they are handled in the exchange, in shipment to the customer, return to the exchange, inspection and so on, so we can have a better idea of how it is done. A. The number of prints, as I said, varies de-

pending on the quality of the picture and the number of accounts in the exchange. After a picture is licensed to a customer, it is then booked to the theatre in which it is to play. After the booking has been made it is shipped——

Q. What does "booking" mean? A. The booking means the play date that the picture will play in the particular theatre.

Q. That is, the license does not fix the play date ordinarily? A. Not ordinarily.

Q. The play date is fixed by booking after the license is made? A. That is correct.

(942-A)

Q. The license merely provides that the exhibitor is to get the picture for exhibition on certain terms? A. Yes.

Q. And then the picture is booked by the booker for the particular play date by discussion with the exhibitor? A. Yes, sir, that is correct.

Q. Then the exhibitor indicates when he would like to play that picture, and it is booked on that basis? A. That is correct.

(943)

Q. And then the films are shipped from the exchange? A. After the booking has been made, the picture is shipped to the theatre in which it is to play. After this engagement is completed, it is returned to the exchange where it is inspected in order to make certain that it will be in first class condition before it goes out to the next theatre in which it is to play.

For instance, it may be found that the print has been damaged. If that occurs, the damage is corrected as a result of the inspection, the damaged part is replaced and the print is brought up to first-class condition so that it will be ready for its next engagement.

Q. Are the films inspected after every engagement? A. Yes.

Judge Goddard: Would you tell us what determines what picture a certain theatre will get and what determines which run they will get?

Mr. Seymour: I am coming to that, if your Honor please. I am going to develop that at length, if I may do it a little later on.

Judge Goddard: Yes, I will just withdraw the question.

Q. You have the film coming back for inspection. Is it immediately shipped out again? A. Well, during its early pe-
(944)
riod of release, I should say for the first 12 or 14 months, it is pretty much in use either in the theatres or in the time it takes to be shipped to and from the theatres.

Q. So that throughout the period of greatest playing time for the picture, the picture is either playing in engagement or in transit or under inspection? A. Yes, sir.

Q. Almost continuously? A. Yes, that is right.

Q. Is it quite a problem to see that the limited number of films get around to all the theatres when they are supposed to get there? A. Yes, sir, it is.

Q. How do you ship them to the theatres and how are they returned? A. We ship principally either by parcel post or by express or by film trucking companies.

Q. And is it necessary to use whatever method will get them there on time? A. We use the fastest method that we can, because the prints are in such great demand that we try and reduce to a minimum the shipping time to and from the theatre.

Q. Are they then returned in the same manner? A. Yes, same way.

Q. How many prints are made by Paramount of pictures which it produces and distributes? A. They vary in number, again depending upon what we believe to be the box office quality of the picture, from about 150 to 325.

Q. That is of each picture? A. Yes, sir, of each picture.

(945)

Q. Whatever the number of prints is, that particular picture has to serve from 8,000 to 14,000 theatres? A. That is correct.

Q. Approximately what is the cost of each of these prints, just the negative cost? A. You mean the positive print cost?

Q. Positive print; I beg your pardon. The cost of the positive print. A. The cost varies, depending upon the length of the picture, whether it is in black or white or whether it is in technicolor. I should say a black and white print costs on an average of about $125 to $150, and a technicolor picture from $500 to about $750, depending upon its length.

Q. Of course, that cost hasn't anything to do with the cost of production? A. Nothing at all.

Q. That is just the cost of the print? A. Cost of the positive prints.

Q. Why is the number of prints made so limited? A. Well, the number of prints that are made is limited for two reasons, or, rather, for several reasons. First, the cost of the prints, plus the cost of production, plus the cost of distribution, are an influencing factor in the profit that we make from that picture. Then also, the number of prints is limited because the film rental that we earn or that we receive in many theatres does not cover but only a small fraction of

(946)

the actual cost of the print itself. We could not afford to make a great number of prints, because the income—or greater number of prints than we do, because the income that we get from them, as I say, in many instances, is limited to just a fraction of the actual cost of the print itself in the particular engagement.

Q. Would you say a majority of all the theatres you serve pay, in film rental, very much less than the cost of a single print? A. Yes.

Judge Bright: How many theatres will one print serve?

The Witness: One print will serve from——

Judge Bright: I mean, how many engagements?

The Witness: I should say from about 45 to 60.

Q. Was there a time when a single print served even fewer engagements? A. Yes, there was such a time, but as a result of improved projection, as a result of the improvement in the stock of the prints themselves, the number of engagements that they serve has been increased over a period of years.

Q. What is the approximate life of a print? A. That depends on how much it is used, of course, but I should say on the average of about 18 months to two years.

Q. Will you tell us in a general way about the current

(947)

cost of production of Paramount pictures, that is, the production of an average picture, or even an average top picture? A. Well, production costs vary. We make pictures for as little as $150,000 in negative, and we make them for as much as three and a half million dollars, negative.

Q. In recent times, at least, Paramount has been making more and more of the very expensive pictures? A. We have been, yes.

Q. Has the cost of production of pictures generally been rising? A. Pardon me?

Q. Has the cost of the production of pictures been going up? A. It has been, yes, sir.

Q. Is the cost of Paramount pictures today, cost of production, greater than it was even a few years ago? A. Much greater.

Q. Do you have any part in the planning of a production program? A. Yes, sir, I do.

Q. What part do you play? A. Well, when our program for a season is discussed, I sit in on those discussions with

Mr. Balaban, president of our company, the head of our production department, the head of our foreign department, and, as best I can, I give my ideas with respect to the number of pictures that I believe that our company should produce, also the type of pictures that I believe the market can best absorb, the casting of the pictures; I am often asked my
(948)
opinion as to whether a story should be bought or a play should be bought; all the things that go to determine what type of program we should have.

Q. Why do you have contributions to make on those subjects? A. I am supposed to know something about what the public wants in the way of entertainment, what type of entertainment that is most acceptable to them.

Q. Why do you have something to do with suggestions about casting? A. Because that would be an influencing factor in the determination of pictures that would be most acceptable to the public.

Q. How do you learn about questions of casting in connection with your work? Do you learn about the appeal of particular stars? A. Well, of course, that is part of my job.

Q. Does a program have to be planned a long time ahead? A. Yes, it is planned a year, a year and a half ahead, as nearly as we can plan that far in advance.

Q. And after program discussions, eventually a tentative program is worked out? A. Yes, sir.

Q. And then there are changes made from time to time for some of the reasons Mr. Freeman mentioned yesterday? A. Yes, sir, that is correct.

Q. Are you consulted from time to time as to possible changes in the program? A. I am consulted almost every
(949)
day, or at least several times a week.

Q. In connection with the distribution of Paramount pictures, are sales conventions held? A. We hold sales meetings, small sales meetings, two or three times a year.

Q. Has there been any change in the nature of the sales meetings of Paramount since the consent decree went into effect? A. Yes, sir, there has been.

Q. Will you tell us what the system was immediately before the consent decree went into effect and what the system is now? A. Prior to the consent decree, when we sold a year's group of pictures at one time, we usually held a big sales convention, what we called a national sales convention, and we had present at that convention our bookers, and our salesmen, and our branch and our district managers, and our division managers, and home office officials along with production officials, and that was a very important affair, because it was at that time that we attempted to enthuse them to sell the pictures that we had decided to produce for the next year to our own people, so that they in turn could go out and sell them to our customers, and we stressed that very greatly.

Q. You talk of selling to the customers, is that right? A. I mean licensing.

Q. That is the license contract. And you use the word "sell" in the sense of persuading them to license? A. Yes. (950)

Judge Bright: Were these sales meetings attended only by employees of Paramount, or were there outsiders there?

The Witness: Generally only by employees of Paramount.

Q. I think what Judge Bright wants to ask you is whether representatives of other distributors were present? A. Oh, no, sir. Only our own people.

Judge Bright: No exhibitors?

The Witness: Very seldom. Once in a while we would invite an important exhibitor or a few important exhibitors.

(951)

Q. These sales meetings, I suppose, occasionally had social aspects? A. Yes, we tried to entertain the boys and enthuse them all we could.

Q. Has there been a change in that system of conventions since the consent decree? A. Yes, there has been a change because we no longer sell an entire season's product at one time. We sell only a limited number of pictures, maximum of five at a time, and as a result, we have meetings two or three times a year, and we have smaller meetings, rather, regional meetings, where we can go out and discuss our problems more intimately than we used to do in the old days.

Q. Those regional meetings are still attended only by Paramount people, is that right? A. Yes, that's so.

Q. And you don't have any joint sales meetings with other distributors? A. No, sir, we do not.

Q. Whether they are defendants in this case or anybody else? A. We couldn't do that.

Q. You regard your distribution activities as—— A. As pretty—not pretty much. It is our own affair.

Q. Prior to the consent decree, how was the date for the sales conventions determined? A. Well, as soon as we had our production program in shape so that we could discuss it with our sales department, we then set a date for our convention and we set that as early in the season as we could.

(952)

Q. Why was that? A. In order to enable us to beat our competitors, well, to the punch, I guess you would call it.

Q. Who are your competitors? A. All of the distributing companies who distribute pictures.

Q. Including the defendants in this case and others? A. Yes.

Q. Did the date of the sales conventions tend to creep up earlier and earlier as a result of that? A. We tried to make it as early as we could and each year we tried to hold it earlier so we could get started before our competitors got started.

Q. What was the theory of that? How did it help to hold your convention earlier? A. The more sales we could make prior to those of our competitors, the better off we were, we had that much behind us.

Q. Was the selling or the licensing of the pictures started immediately after the convention? A. Generally, but it became so highly competitive that the time came when we even started to sell our year's product before we had our convention.

Judge Bright: Were your pictures in being at the time of these conventions?

The Witness: No, they were not. They were not

(953)

completed. The plans were for the number of pictures that we would distribute and most—many of the titles were made, some pictures were cast and some were not, but we got to the point where, without even waiting for having our program complete, we would go out and start to sell our pictures and sell them to whoever we could based on the past experience they had had with Paramount pictures and the faith they had in the ability of the company to make good pictures.

Q. So that before the decree you would go out and try to license on the basis of a year's program? A. In most cases.

Q. Since then you have been licensing in not more than blocks of five, is that right? A. That is right.

Q. There has been a trade showing of the blocks which were being licensed in blocks of five? A. We trade-show them before we——

Q. You continue to follow the requirements of the decree, though its requirements are no longer effective? A. Yes, sir, that is true.

Q. Do your salesmen in the exchanges work on fixed salary only or do they receive any other compensation? A. No, they get salary plus their expenses and then our salesmen also participate in what we call an incentive plan. (954)

Q. Does that operate so that the better showing of the exchange, the more participation they have? A. Yes, sir, that is right.

Q. Does the showing of the exchange depend upon all the transactions in the exchange area? A. The better the result is that they have with Paramount pictures, the more incentive money they earn.

Q. Does that apply to license fees or rentals received from independent exhibitors and also from theatres in which any defendant has an interest? A. Yes, sir, from all the license fees that come into an exchange.

Q. Do you still have sales drives? A. Yes, sir, we have just completed one.

Q. What is a sales drive in your business? A. Well, a sales drive is a drive where we try and improve the business that we are doing.

Q. Do you have a Paramount sales drive or is there a joint sales drive by all the distributors? A. Oh, no, we have one of our own.

Q. Do the other distributors have drives of their own? A. Yes, sir.

Q. What type of improvements do you seek to work in your business by these sales drives? A. We try to improve our film rentals as a result of the sales drives. The more pictures we can license, the more playing time that we can
(955)
secure for our pictures, the better the result is for us and the more detrimental to our competitor.

Q. What is the effect of a successful sales drive, does it tend to take business away from your competitors? A. Yes, the more playing time that we can get during that period from a theatre, the less is available to our competitor.

Q. By "competitors" you refer to all the distributors? A. All the distributors.

Q. Does your department have anything to do with the advertising and exploitation of Paramount pictures? A. Yes, sir, we do.

Q. What does your department have to do with that? A. Well, the advertising and exploitation department is under my supervision.

Q. Does Paramount do any advertising itself of Paramount pictures? A. We do.

Q. Will you tell us how and why Paramount does the advertising? A. We do it because we try to establish the picture. We try to create a desire on the part of both the public and the exhibitor for our pictures and to stimulate the desire on the part of everybody to want to see the picture.

Q. What form of advertising does Paramount use? A. Well, we advertise in magazines, we advertise by way of
(956)
radio, we advertise by way of billboards, we advertise in the trade papers.

Q. Much of that advertising is quite unrelated to the showing of a picture in any theatre? A. It is what we call a national campaign, prior to the time that the picture goes into release.

Q. And following such advertising of the salesmen of the Paramount exchanges engaged in procuring licenses for the pictures so advertised? A. Yes, sir.

Q. And following the advertising, the pictures are exhibited, is that right? A. That is correct.

Q. Do the other distributors also advertise? A. They do.

Q. Is there any joint advertising by the distributors about all their pictures? A. No, sir, there is not.

Q. Can you tell us approximately how much Paramount spends in the type of advertising that you have referred to annually? A. This year we will spend about three million dollars.

Q. Do you have anything to do with the advertising done by exhibitors of Paramount pictures? A. Yes, sir.

Q. And what do you have to do with that? A. Well, we have what we call cooperative newspaper advertising campaigns.

Q. Will you explain that? A. I mean by that—perhaps I can best illustrate it this way: A theatre has an advertis-

(957)

ing budget of, let us say, a thousand dollars a week, which they normally spend on advertising a picture. We will go to that theatre and say, "We would like you to spend an additional thousand dollars over and above what you normally spend. If you will do that, we will share part of the cost of that additional expenditure." That is usually made in the form of newspaper advertising and that is what we call cooperative advertising.

Q. And the result of that is more extensive publicity for Paramount pictures? A. Surely.

Q. Is that system of cooperative advertising confined to first-run exhibitions? A. No, sir, it is not confined to first-runs. We do that with all types of theatres.

Q. Is cooperative advertising arranged only with theatres in which Paramount or some other defendant in this case

has an interest? A. No, sir, it is arranged with not only the theatres in which the defendants and this company have an interest but independent theatres as well.

Q. Worked out with Paramount customers indiscriminately, is that right? A. Yes, sir.

Q. I guess you have given us an example of how that works. Why does Paramount engage in cooperative advertising? A. Because we hope to help establish the picture throughout the United States and create a desire on the part of the public to want to see it.

(958)

Q. Does it have any effect on the gross of the particular theatre in which the advertising is done? A. It not only helps the gross in the theatre in which the campaign is used but it also helps to establish the picture in the surrounding territory.

Q. Do the subsequent exhibitors benefit from that advertising? A. Oh, yes, of course they do.

Q. And does Paramount benefit from the advertising? A. Yes, sir.

Q. How are the amounts contributed by Paramount to the cooperative advertising determined? A. They are determined by negotiation between our sales representative and the exhibitor.

Q. Aside from the cooperative advertising, is it customary for first-run exhibitors to spend substantial sums on advertising? A. Yes, sir, they do.

Q. Do they usually spend somewhat more on advertising than subsequent-run exhibitors? A. Oh, yes, they spend much more. For instance, we play a picture in—well, I will use as an illustration the Rivoli, and they spend $35,000 or $40,000 in advertising before the picture even opens, and then ten, twelve, fifteen, eighteen thousand dollars a week during its engagement. There isn't any subsequent-run exhibitor that spends that much money.

Q. Do you consider that the advertising of the first-run,
(959)
whether cooperative or not, benefits the subsequent-runs? A. It does if it is a good picture, they get the benefit of the word-of-mouth advertising as a result of it.

Q. What is the effect on the business of the theatres showing Paramount pictures of the advertising done by those theatres? A. It improves our film rental.

Q. Does it tend to draw patrons from other theatres to the Paramount theatres to see those pictures? A. Yes, sir—we hope so. Spend a lot of money on it.

Q. Do you do advertising for the Paramount pictures and do the exhibitors do advertising on precisely the same basis, whether there is a first-run competitor affiliated with one of the defendants in this case or not? A. Will you repeat that question?

Q. In a community where there is a theatre operated on a first-run policy, in which one of the other defendants in this case has an interest, does the theatre in which the Paramount pictures are shown advertise extensively? A. Yes, sir.

Q. Is there any diminution of the advertising expenditures where there is competition from a theatre in which one of the other defendants in this case has an interest? A. There is not.

Q. I would like you to tell us the functions of the
(960)
various members of the distribution department, beginning with the salesmen, in connection with the licensing of Paramount pictures. A. Well, the salesman is responsible for the licensing of our pictures generally with the smaller accounts in the exchange territory in which he is employed, he calls on those accounts, endeavors to make contracts or, rather, applications for contracts. After he does, the contracts or the applications are submitted to the branch man-

ager for his consideration. If they meet with his approval, they are then sent to the district manager for his consideration, and so on up the line until they get to the division sales manager, at which time he either approves or rejects them, depending upon whether they meet——

Q. And they may be disapproved at some stage along the line where the higher officer determines that the proposed terms are not satisfactory? A. They may be disapproved by the branch manager, the district manager or the division manager.

Q. Generally speaking, do these applications for licenses, or these proposed contractual terms, come to you for approval? A. Not generally, no, sir, unless——

Judge Bright: Is there a regular form of application for license signed by the exhibitor?

The Witness: Yes, sir.

(961)

Judge Bright: In that form does he state the preference he has, what he wishes, when he wishes to show the picture or what he wishes to pay for it?

The Witness: He states what he is willing to pay for it, yes, sir.

Judge Bright: Does he state whether he would like any particular run or any particular clearance or any particular show date?

The Witness: The play date is not stated, generally, in the contract.

Judge Bright: I am talking about the application.

The Witness: Well, I call it an application. Perhaps that is confusing to you. We call it an application for contract until it has been approved, but that is really the same as a contract.

Judge Bright: It is made on the form that is ultimately approved as the license form?

The Witness: Yes, sir.

Judge Bright: There is no separate paper——

The Witness: No, sir, there is not.

Judge Bright: —called an application?

The Witness: No, sir, it is the same.

Judge Bright: And on that he lists the pictures that he would like to show?

The Witness: The pictures that we license, the

(962)

titles are listed, and the terms that he agrees to pay are also listed.

Judge Bright: He can choose some of those pictures but he does not have to choose all of the five?

The Witness: We try, usually, to sell all the five. Sometimes we sell less than that.

Q. I show you, Mr. Reagan, this white form which has at the bottom "Exhibitor's Copy", Form 4B40A5, and ask you whether that is the form of contract or license agreement now in use by Paramount? A. Yes, sir, it is.

Q. What you described as the application is a blue copy of that same form, having merely the red legend "Exhibitor's Copy of Application for Contract" printed across its face? A. That is correct.

Q. In all other respects it is the same, is that right? A. Yes, sir.

Mr. Seymour: Just so the record will be clear, I am going to offer the white copy as Paramount's Exhibit 1 and furnish a copy to Mr. Wright and I will hand up to the Court copies which are identical except for a difference in color and the fact that in the lower lefthand corner they are for a different part of the business, but in other respects they are identical.

(Marked Defendant Paramount's Exhibit P-1.)

Q. After the license contract has been approved by the
(963)
member of the Paramount distributing organization who finally approves that contract, what is done with the exhibitor? A. He is notified of the approval.

Q. And he receives back, does he, a copy of the license agreement? A. Yes. That is how he is notified, with a copy of the agreement that he signed.

Q. Do the branch managers, district managers, division managers and general sales managers occasionally conduct negotiations in the licensing of a Paramount product? A. Not occasionally, but often.

Q. I beg your pardon? A. Not occasionally, but often.

Q. Can you tell us why some accounts are negotiated with by persons other than salesmen in the distributing organization? A. Well, a salesman may negotiate with an account and not be able to make a satisfactory deal and, in that event, the branch manager may try and make the kind of deal he believes we are entitled to, or a district manager may do that, or the division manager may do that. Then there are some accounts that it is the responsibility of the branch manager to license our pictures to. Other than that, it is the responsibility of the district manager or the division manager, as the case may be.

Q. Generally speaking, unless the reason for the negotiation is some breakdown by somebody down the line in
(964)
negotiations, the particular member of the distributing organization who is to do the negotiating is determined by the importance of the account, isn't that so? A. That is true.

Q. Is the importance of the account in any way affected by the question of whether the account represents theatres in which another distributor has an interest? A. No, sir, it is not. Determined by the value of film rental that we receive from each account.

Q. Who negotiates for the licensing of Paramount product in theatres in which the defendnat Loew has an interest? A. Mr. Hugh Owen, one of our division sales managers, and myself.

Q. With whom are those negotiations conducted? A. Well, for the theatres that Loew operates outside of the City of New York, Mr. Owen negotiates with Mr. Joseph Vogel; and for the theatres that Loew operates in the City of New York, Mr. Owen and myself negotiate with Mr. Charles Moscowitz.

Q. In that connection do you have any negotiations with Mr. Rodgers, who was here as a witness? A. No, no. He is a distributor.

Q. Do you have anything at all to do with him in connection with negotiations? A. No, sir, do not.

Q. At the time of the negotiations with Loew for the (965)
licensing of Paramount pictures to the theatres in which Loew has an interest, do you obtain any information as to the negotiations or arrangements which Loew has made or may be making with theatres in which Paramount has an interest for the exhibition of Metro pictures in those theatres? A. No, sir, I do not.

Q. I will develop that further. Is there any relationship at all between your negotiations or that of your colleagues with Loew for the licensing of Paramount pictures in Loew theatres and the negotiations or arrangements which have been made or are being made for the licensing of Metro pictures in theatres in which Paramount has an interest in both? A. No.

Mr. Wright: We have the same objection we made heretofore to that sort of testimony as calling for his conclusion, a conclusion which the Court should draw.

Judge Hand: Overruled.

Q. Who negotiates for the licensing——

Judge Bright: Did he answer the question?

The Witness: No, sir, I started to answer.

Q. Let us be sure. What is your answer? A. No, we don't. I am not interested, Mr. Seymour, in what Loew does with their pictures in Paramount theatres. My interest is in distributing Paramount pictures to the best advantage possible so that we can get the maximum return for those (966)
pictures. That is my only interest.

Q. I shall come back to that subject. Who negotiates for the licensing of Paramount pictures in theatres in which the defendant Fox has an interest, Twentieth Century-Fox? A. Mr. George Smith, another one of our division sales managers.

Q. Do you know where he conducts those negotiations and with whom? A. He conducts them with the heads of the various Fox companies in the cities in which they have their headquarters.

Q. Do you know whether or not when those negotiations are conducted the Paramount representative has any knowledge or information as to negotiations or arrangements for the exhibition of Twentieth Century-Fox pictures in theatres in which Paramount has an interest? A. He has no information. He is not interested.

Mr. Wright: If the Court please, I do not see how this witness can testify to what Mr. Smith's information was or what Mr. Smith was interested in.

Judge Hand: No, I do not see how he can either.

Mr. Seymour: He is in Mr. Reagan's department.

Q. Do you sometimes participate in those negotiations? A. I do, occasionally.

Mr. Seymour: We can call all these witnesses, if we have to call them.

(967)

Judge Hand: Perhaps you can get a stipulation. I am afraid you will have to call them if you cannot, because I do not see how a statement of some supervisor as to what somebody knows or doesn't know is competent. It probably isn't competent and if it is competent, it has only the slightest weight.

Mr. Seymour: I won't press that question, in view of the objection.

Q. Mr. Reagan, when negotiations are conducted by Mr. Smith with representatives of Twentieth Century-Fox do you have any information as to negotiations or arrangements which are being made or which have been made for the exhibition of Twentieth Century-Fox films in theatres in which Paramount has an interest? A. I don't have any information, and I am not interested.

Q. So far as you know, does Mr. Smith have any such information? A. No, sir.

Q. Do the results of those negotiations come to you for final approval usually? A. Yes, sir.

Q. At the time of that approval do you have any knowledge or information as to the negotiations or arrangements for the showing of the Fox films in theatres in which Paramount has an interest? A. I don't have. I don't care, Mr. Seymour. All I am interested in is my own pictures and getting the best results we can for them. That is my only

(968)

interest.

Q. So far as you are concerned, is there any relationship between the arrangement with Fox for showing Paramount pictures and whatever arrangement there may be for the showing of Fox pictures in theatres in which Paramount has an interest? A. No, sir, I am not concerned with that.

Q. Who negotiates for the showing of Paramount pictures in theatres in which Warner has an interest? A. Mr. William Erb, another one of our division sales managers.
(969)

Q. Do you know with whom he conducts the negotiations? A. Mr. Clayton Bond.

Q. And where are they conducted? A. Here in New York.

Q. And after negotiations are concluded do they come to you for final approval? A. Yes, sir.

Q. At the time of those negotiations and your final approval thereof, do you have any knowledge or information as to the negotiations or arrangements which may be under way or which may have been made for the exhibition of Warner pictures in which Paramount has an interest? A. I do not.

Q. So far as you are concerned, is there any relationship whatever— A. I don't care; I am not interested.

Q. (Continuing)—between the arrangements made between Paramount and Warner and the arrangements, if any, which Warner may have made with various theatre-operating companies in which Paramount has an interest? A. I have no interest in that.

Q. Now, who negotiates for the showing of Paramount pictures in theatres in which RKO has an interest? A. Mr. Hugh Owen.

Q. And with whom are those negotiations conducted? A. Mr. Harold Marish.

Q. And after they are completed are they generally sub-
(970)
mitted to you for approval? A. Not generally in that instance because the business that we do with RKO is not sufficient volume to make it very important.

Q. In any event, so far as you have any connection with it, do you have any knowledge or information as to negotiations or arrangements which may have been made or are

in the process of being made for the showing of RKO pictures in theatres in which Paramount has some interest? A. No, sir, I do not.

Q. And so far as you are concerned, is there any relationship whatever? A. None at all. It is none of my business.

Q. Now, don't you make an effort to ascertain that the rentals paid to Paramount by the theatres in which other defendants in this case have an interest will bear some kind of relationship to the rentals which may be paid to those companies by theatres in which Paramount has an interest? A. Well, I would like to know, but I don't know how to do it, because if I found any of the companies paying better terms than I am getting for my pictures, I would like to sell them at better terms, too.

Q. Do I understand you to say that you do not have any information on the subject as to what terms or arrangements may have been made by the theatres in which Paramount has an interest with those companies? A. I do not have.
(971)

Mr. Wright: Excuse me. May I have the previous answer read?

(Previous answer read.)

Q. Do you mean by that, Mr. Reagan, if you could find out what United Detroit, for example, a company in which Paramount has an interest, was paying for the exhibition of Loew pictures, it puts you in a better position to try to get a higher film rental from United Detroit on Paramount pictures? A. If they were paying more money I would certainly try to get more myself, yes, for my pictures.

Q. Are you able to get the information as to arrangements or negotiations by the theatre operating companies in which Paramount has an interest with any of the other defendants in this case? A. No, sir, I am not.

Q. Have you tried to get such information from the Paramount theatres department? A. Yes, sir, I have.

Q. Does the Paramount theatre department furnish you any of that information? A. They do not.

Q. Now, it seems odd to one unfamiliar with the business as to why there should be no exchange of information between the distribution department and the theatre department. And I wish you would explain that to us. A. Well, Mr. Seymour, in the first place, I am responsible for the distribution of Paramount pictures at our company. The head of our theatre department is responsible for the operation

(972)

of those theatres. I am not interested in what the results are as far as the theatre operation is concerned, and he is not interested in what my results are; but I am interested in obtaining the best results possible as far as the distribution of my pictures are concerned.

Q. Do you have an incentive compensation which is affected by the success of the operation of the distribution department? A. We do, yes.

Q. Do you personally have? A. I do have. The better results I can get on Paramount pictures the more my compensation amounts to.

Judge Hand: What you are saying now does not seem so very convincing, because you just said before that you would like to know these things and have tried to get them and could not. Now you say you have no interest.

The Witness: Well, what I mean is this, sir: My interest is to do the best I can so far as the distribution of Paramount pictures is concerned. That is the only interest I have. Now, if I could improve the distribution of Paramount pictures by learning the terms that companies in which Paramount are interested are paying for competitors' pictures, and those terms are

higher than my own, I certainly would like to have that information in order to improve my own terms.

Judge Hand: Well, that is what I thought.

(973)

Mr. Seymour: If your Honors will bear with me just a moment—unfortunately I cannot prove all this through one witness—I shall establish that the film transactions, the film licenses to the theatres in which Paramount has an interest are entirely negotiated and arranged in the field by the local operators of those theatres, with which Mr. Reagan has no connection and to which he has no access. I know the difficulty of understanding such an elaborate method of doing business, but I am satisfied myself that even where the theatre department and the distribution department are in the same company and they deal in the same office building, which is not the case with Paramount, there is the great secrecy between the two departments; and I am told that has always been so in the business.

Q. Is that your experience, Mr. Reagan? A. Yes, sir.

Mr. Wright: Well, if we are going to have testimony, it had better be from the witness.

Mr. Seymour: I think that is right, Mr. Wright; I am not going to imitate you on that score.

Judge Hand: Yes. Strike that out.

Mr. Seymour: That was an explanation and not testimony, of course.

Q. Now, are there other accounts with Paramount customers where the negotiations are conducted by division man-

(974)

agers in the first instance, in addition to the accounts which you have mentioned? A. Yes, sir, there are.

Q. And are those accounts the accounts of exhibitors which have no connection with any defendant in this case? A. Yes, sir; they are independent accounts where the film rental involved is important enough for the division manager to conduct the negotiation.

Q. Now, can you mention some of the accounts which are handled by division managers? A. Well, starting from the west and coming east, the Gibraltar Circuit, which operates theatres in New Mexico and Wyoming and Colorado, negotiations are conducted by Mr. Smith, one of our division managers.

Mr. Wright: What was the name of the circuit? I did not get it.

The Witness: Gibraltar.

In St. Louis, Fanchon & Marco, an independent account, who operates the first-run theatres with whom we do business in St. Louis—Mr. Smith always conducts those negotiations. Mr. Donoghue, who supervises the territory in the Middle and Southwest, he conducts negotiations with Robb & Rowley, an independent circuit; Griffith Bros., an independent circuit; and Mr. Owen conducts negotiations with all of the independent circuits in New York, and many others I don't happen to recall.

(975)

Q. Why are the negotiations with those circuits or exhibitors conducted by division managers? A. Because the amount of film rentals that we receive from those circuits is of sufficient importance to justify their handling it.

Q. Is that the sam reasons for the negotiations by division managers with Loew's, and RKO and Fox and Warners which you have referred to? A. It is.

Mr. Seymour: Now I am going to pass, Judge Goddard, to the subject you raised before.

Q. Are negotiations with an exhibitor usually conducted on the basis of a particular run? A. Yes, sir.

Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes.
(976)

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that he would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiation based upon experience we have had with the particular theatre with whom we are negotiating.

Q. Is there any minimum which you expect to get by way of film rental in any of these theatres? A. Well, we have a minimum that we authorize our salesmen to negotiate for, and they negotiate and try to make a deal for terms that are better than that minimum, but they can't make a deal when they can't get at least the minimum.

Q. That is a restriction on the salesmen's authority? A. Yes.

Q. Now, have you had the experience at one time or another with most of the exhibitors?

The Witness: Will you repeat that question?

(Question read.)

The Witness: I don't understand it.

Q. Has the Paramount distribution department had experience at one time or another with most of the exhibitors? (977)

A. Yes, sir, I think we have.

Q. What are the various kinds of terms on which Paramount licenses its pictures? A. Well, we license them on straight percentage terms, flat rental terms, guarantee and percentage terms.

Q. What is a flat rental term? A. A flat rental is a definite price or a certain number of dollars that an exhibitor pays for a license for a picture.

Q. Are some pictures licensed for first-run exhibition on a flat rental basis? A. Yes, sir.

Q. And are some pictures licensed on subsequent-runs on a flat rental basis? A. Yes, sir.

Q. And there are some pictures which are licensed in the earlier runs on a percentage basis which are licensed in later runs on a flat rental basis? A. Yes, sir.

Q. Well, what is the general nature of the percentage contract or license? A. Well, a percentage contract is a contract where we receive as film rental a percentage of the gross receipts that the exhibitor takes in at the box office.

Q. Now, are there various variations of the percentage arrangement? A. There are.

Q. Including guarantee and percentage? A. Guarantee and percentage is a contract where an exhibitor agrees to pay,

let us say, a price of $1,000 plus a share in the receipts in
(978)
excess of a certain figure.

Q. Now, when you have a percentage arrangement or any variation of a percentage arrangement, do you consider that Paramount is sharing in the profits of that theatre? A. No. The variations that we might have—for instance, we might make a deal for a picture at, let us say, 25 per cent of the gross receipts until such time as a splitting figure is reached and that splitting figure is arrived at by applying the 25 per cent of the receipts plus the overhead of the theatre, plus a certain amount of profit, and then in excess of that splitting figure we share in an increased amount of the receipts.

Q. Do you consider that makes Paramount a sharer of profits with that theatre?

Judge Hand: That is a most objectionable question.

Mr. Seymour: I won't press it.

Judge Hand: "Do you consider".

Mr. Seymour: My difficulty, if your Honor please, is that we have got such an amorphous case to meet.

Judge Hand: All right, but do not ask questions like that.

Mr. Seymour: Perhaps I ought not to add to its amorphous character.

Q. Are you familiar with leasing transactions in which the rental is determined by percentage of the gross receipts
(979)
of the business?

The Witness: Will you repeat that, please?

(Question read.)

Q. Leasing of real estate. A. I know there are many forms of leases made, dependent upon the business that a company does——

Mr. Wright: I assume that is within the Court's judicial notice.

Judge Hand: What is that?

Mr. Wright: I assume it is within the Court's judicial notice that there are other forms of agreement where percentages of the receipts are shared.

Mr. Seymour: If the Court is satisfied and it is within the Court's notice, I am satisfied.

Judge Hand: I am satisfied to hear this answer to this question.

Judge Bright: Read the question.

(Question read.)

A. Yes, I am. I know there are many instances where the rental is dependent upon the basis of the gross receipts that the business does. That is a common practice.

Q. Do you know whether or not in the Paramount Building in New York there is such a lease —— A. I know we have a lease with the Walgren Drug Company, or the drug-store in our building, and the rent that they pay is dependent (980)
upon the amount of business that they do, the gross receipts.

Q. Will you explain what is meant by a guarantee against percentage arrangement? A. That is where an exhibitor agrees to pay a certain amount of money against a percentage of the gross receipts. For instance, a guarantee may be $1,000 against 30 per cent of the receipts, and if the receipts amount to $10,000, he would pay $3,000, $2,000 more than the guarantee.

Q. Now, does Paramount license many of its pictures on one or another of these variations of the percentage basis? A. We do.

Q. And does Paramount prefer to license its pictures generally on a percentage basis? A. We do.

Q. And does it have percentage license agreements with exhibitors in no way connected with any defendant in this case? A. We do.

Q. Does it have a number of such license agreements? A. Yes, sir.

Q. Does it also have percentage agreements with theatres in which defendants in this case are interested? A. Yes, sir.

Q. Does the type of arrangement, whether it is percentage or flat rental, or a particular variation of percentage, have anything to do with the question of whether a theatre is an independent, owned by an independent exhibitor or one (981)

in which the defendants in this case have an interest? A. It does not.

Q. What determines which form of rental term is the one that shall be included in the agreement? A. Well, that is determined by our desire to make a deal that we believe is the most fair, is the fairest with the theatre we are doing business with, and any of these types of agreements can be made in order to accomplish that purpose.

Q. Do you try to work it out with the particular theatre or with the particular exhibitor? Is that right? A. That is correct.

Q. And there are all kinds of transactions with exhibitors who are independent and exhibitors who have some connection with a defendant in this case, is that right? A. That is right.

Q. And the deals are indiscriminately negotiated on the best basis that you can make, is that right? A. That is right.

Q. Now, how does the distribution department determine the precise percentage terms on which it desires to license a picture? A. How do we determine?

Q. Yes. A. The precise percentage terms are determined by negotiation.

Judge Bright: Don't you have any minimum requirements?

(982)

The Witness: We have, yes.

Q. Generally speaking you try to get at least a certain minimum, I suppose? A. We have made all kinds of deals, but we try to obtain a minimum, a minimum percentage of the gross; but we deviate from it sometimes.

Q. Why is it that Paramount licenses some of its pictures on a percentage basis and others on a flat rental basis? A. We would like to license them all on a percentage basis, but we can't successfully do that.

Judge Bright: Why?

The Witness: Exhibitors object to percentage because they generally have to pay more money for film rental than on a flat rental.

Q. Why do you consider a percentage arrangement desirable from the point of view of the distributor? A. Because that is the fairest method, in my opinion, in which to license pictures.

(983)

Q. Why do you say that? A. Well, you may sell a picture flat rental, and the flat rental price may be low or it may be high. In other words, you may have misjudged the grossing possibilities of the picture; the exhibitor may be hurt or we may be hurt, depending on what price you finally arrive at, flat rental price.

Q. Do you consider that the percentage arrangement gives the distributor a reward for the license measured by the quality of the picture? A. That is the best measure, yes

Q. Is there a relationship between the quality of the picture and the box office performance? A. There certainly is.

Q. Do you consider a percentage arrangement fair from the point of view of an exhibitor? A. Yes, sir.

Q. Why? A. Because if you were to sell an exhibitor a picture flat rental, you may oversell it or you may undersell it. If you sell it percentage, you get only what he agrees is a fair percentage of his receipts for the film rental for that picture.

Q. Now is there a term in the business known as preferred playing time? A. There is.

Q. What is that? A. Preferred playing time are those days in the week in which the exhibitor does the most business, Saturday, Sunday, holidays.

(984)

Q. Does that vary somewhat with particular localities, or is that generally so? A. It is generally Saturdays, Sundays and holidays.

Q. Now in the negotiation of film license contracts, is the preferred playing time an important factor? A. It is very important.

Q. And when Paramount representatives are negotiating license contracts, what part does that preferred playing time have in their negotiations? A. Well, they endeavor to license pictures, if they are sold under a percentage, or guarantee and percentage, to include the preferred playing time, because their film rental is based upon the gross of the picture, and the gross will be better if it receives preferred playing time than it would if it receives what we call off playing time.

Q. Do the salesmen or representatives of the Paramount distributing organization find that representatives of other distributors are seeking to obtain similar preferred playing time? A. Yes, sir.

Q. And when the Paramount representative learns that representatives of other distributors are seeking to do it,

does the Paramount representative then defer to them? A. We try to sell our pictures on preferred playing time because that is where we get the best results, and we try very hard to do it because that plays an important part in the film
(985)
rental that we earn.

Q. What is extended playing time? A. Extended playing time is the time that is in excess of the initial engagement of a picture. For instance a picture may be sold to play seven days with a provision that if it grosses a certain amount of money in the first three or four days it is extended for another seven days.

Q. Is the distributor interested in trying to get extended playing time? A. Very greatly, because again that determines the film rental we will earn.

Q. And is whether he gets it or not usually affected by the quality of the picture? A. It is.

Q. And is the arrangement to try to make a provision for extended playing time one of the terms in the negotiation of many film rentals? A. It is an important consideration, yes.

Q. And in that respect are the Paramount distribution representatives meeting similar demands of representatives of other distributors? I mean, finding similar demands from other distributors with the same exhibtor? A. Preferred playing time is an important factor for everybody distributing pictures because it has a great influence on the film rental that they earn.

Q. Now, do you make license agreements with exhibitors who have no connection with any defendant in this case,
(986)
involving terms for preferred playing time and also extended playing time? A. We do.

Q. And do you also make agreements on those subjects with theatres in which the defendants in this case have an interest? A. Yes, we do.

Q. Are they standard terms which you try to get where you can from any exhibitor? A. Yes, sir.

Q. Now, do you find, Mr. Reagan, that there is or is not competition in the distribution of pictures?

Mr. Wright: That is objected to, if the Court please. I do not see that it advances any of the issues to have him give his opinion.

Judge Hand: We will take it.

Mr. Davis: May I hear that question, Mr. Reporter?

Q. (Question read.) A. There is very keen competition.

Q. Will you tell us something about that competition and why it exists? A. Well, in our business the number of customers to whom we can license our pictures is limited by the number of theatres that are in operation or in existence. Our business is not like any other business where the market is as wide as you can make it. Our market is restricted only to the theatres that are being operated. Those theatres have only a certain amount of playing time. They also have only a certain amount of preferred playing time, and we try very

(987)

hard, as do our competitors, to sell those theatres, to sell our pictures for as much of the playing time as we can get, and for as much of the preferred playing time as we can get, because that is where our income from film rental must come from; and the competition for playing time, preferred time, and for the licensing of pictures in those theatres is very keen.

Q. Now, in those respects are you constantly meeting competition from other distributors? A. You bet we are.

Q. And is there any difference between the quality of competition so far as the Paramount distribution department is concerned, whether the competition is from the distribution

department of one of the defendants or from another distributor? A. They all try just as hard as we do to get as much of the playing time and as good terms as possible.

Judge Hand: What have you to say about the returns for distribution where it is played in theatres of Paramount and other theatres?

The Witness: I don't believe I quite understand.

Judge Hand: Well, who fixes what the film belonging to or licensed by Paramount, will get when played in its own theatres?

The Witness: We negotiate for the license for those pictures with the heads of the various operating

(988)

companies, just the same as we do with a competitor. As a matter of fact sometimes the discussions or the arguments that we have are more keen with them than they are with theatres in which we have no interest.

Mr. Seymour: I was going to develop that a little further a little later on, if your Honor please.

Judge Hand: All right.

By Mr. Seymour:

Q. Now I would like to have you tell us upon what basis Paramount distribution department decides upon what run it will license or negotiate for the licensing of its pictures; and I would like to have you tell us as fully as you can the various factors which enter into that decision? A. Well, there are a number of factors that enter into that consideration. First, the size and location of the theatre; the exhibitor operating the theatre; his ability as a showman to produce the maximum film rental income possible. For instance, there may be a theatre that, let us say, has a thousand seats, operated by an exhibitor that, in our opinion, is not as good a showman as another exhibitor who operates a theatre that

has eight hundred seats. We may decide that we want to sell the theatre that has 800 seats because we believe we can earn more film rental in that theatre than we could in the theatre that has a thousand seats.

(989)

Q. How could that be so, Mr. Reagan? A. It can be so because the ability of the showman in operating the theatre of 800 seats is better than the ability, or he has greater ability than the exhibitor operating the theatre which has 1000 seats, as a result of which he gets in more gross at the box office. All of our experience in the business based over a period of years, the experience of our salesmen, our branch district managers, division managers and myself, we apply in trying to determine what run, or whether we will sell one theatre a first-run as against another theatre; and it is pretty hard to put into words all of those factors. I have given them to you as best I can.

Q. Now do those factors particularly apply to the choice of a customer who will be licensed on the basis of a first-run? A. They apply to all customers, whether it is first-run or any run.

Q. Are there any other factors that are particularly applicable to the selection of a first-run customer? A. Well, a good first-run customer, a showman, can help us a lot in establishing the Paramount pictures that he plays throughout the entire territory. If he is a good showman, properly advertises and publicizes our pictures, it helps us throughout the country; and we are desirous, of course, in getting the

(990)

best showmen that we can, particularly for those first-run theatres, keeping in mind the size of the theatre, the location of the theatre, the appointments of the theatre, and all of the factors that enter into consideration.

Q. Now, of course, generally, or perhaps universally, Paramount's pictures are licensed to the theatres in which Paramount has an interest? A. Yes, sir.

Q. And the first-run showing of Paramount pictures where there is a Paramount theatre qualified for first-run exhibition, is in the theatres in which Paramount has an interest? A. Yes, sir.

Q. Now, from your experience are the local operators of those theatres generally what you would call good showmen? A. I think that the Paramount operators across the country generally are the finest operators of motion pictures in the country. I believe as a group they are the finest, best qualified.

Q. Now it has been developed in the evidence here that in some cities, aside from the theatres in which Paramount has an interest, theatres in which other defendants have an interest, exhibit Paramount pictures first-run in different cities, and also—and I will develop that further—in other cities independent exhibitors have Paramount pictures first-run, and in some of those cities there are theatres affiliated (991)
with a defendant who do not get Paramount pictures first-run. Now, in all those cities what is the basis of the selection of the customer who is to have the first-run? A. Well, the thing we are after is the most film rental possible, and that is the basis on which we determine who we are going to do business with.

Judge Goddard: A little louder, please.

The Witness: Do you want me to repeat that?

Judge Goddard: No, I heard that, but speak a little louder.

Q. Now, are you always able to license your pictures in every respect to the best theatre? A. No, we do not always have the ideal situation. There are some times when we can't license our pictures in what we consider the best theatre in

the town, and in that event we do the next best thing. We take the theatre that is next best if we can license our pictures there, and sell them to that theatre.

Q. Now, in making the selection of the theatre to which Paramount pictures are to be licensed first-run, do you apply any different criterion to the theatres in which the defendants in this case have an interest, than you do to theatres in which no defendant has an interest? A. No, sir, we do not.

Q. We will develop that further later on. Now generally (992)

speaking, are the rentals received from customers exhibiting first-run, higher than those received from subsequent run theatres? A. Much higher.

Q. And why is that? A. Well, because the first-run theatres gross substantially more money than the subsequent runs; they are bigger theatres; generally they are better theatres, as a result of which they gross more money, and we earn more film rental.

Q. Now, would you give us some rough idea of the variations between the rental received by Paramount for films in a large first-run theatre or exhibitor on a first-run, and the film rentals received on a late run of the same picture? A. well, we may earn $100,000 or $150,000 as film rental for a picture in a first-run; and that same picture in a subsequent run may earn as little as ten dollars. As a matter of fact, the same print for which we earned the $150,000 may be licensed to an account from which we receive a film rental of ten dollars.

Q. When you first came into the motion picture business do you recall whether pictures were being licensed on successive or different runs? A. Yes, sir, they were.

Q. And was there clearance of one run over another? A. Yes, sir.

Q. Now I wish you would explain why it is that pictures are licensed on successive runs; and then I will ask you to

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explain why clearance is included in the license agreements? A. Well, pictures are licensed on successive runs, because that is the way in which we can get the most film rental out of a picture. You could not play the same picture in all of the theatres in a locality at the same time, because I do not think it would be good showmanship, in the first place—I mean by that that if you were playing the same picture in all of the theatres in an area at the same time, it may happen that on a particular night there is a big event that is taking place; the President broadcasting or something of that sort, and people don't want to go to the theatre that night, and your gross receipts are affected, which in turn affects the film rental.

There is also another factor. If you license the picture to play in all theatres in the area at the same time, I think you would dilute the gross from the receipts of each of those theatres or at least in some of them to the point where it would not be profitable for them to play that picture. You would spread that gross over too many theatres at the same time.

There is another factor: you do not have enough prints and it is not economically sound to buy enough prints to exhibit pictures in all theatres at the same time.

Q. What would happen if you tried to do that, tried to

(994)

make enough prints for simultaneous exhibitions? A. Well, every exhibitor would want to play the picture at the same time; you would have to have twelve thousand or fourteen thousand prints, which you cannot do.

Then there is another factor: By selling pictures on different runs, the first-run may charge an admission price of let us say 75 cents; and there are a certain type or class of people who are willing to pay 75 cents for the privilege of seeing that picture first. There are other people who may

not want to pay 75 cents but would pay let us say 50 cents, because while they do not want to see it first, they do not want to wait until it gets to the tail end of the run and pay 20 or 25 cents. So the question of admission price is a factor because the people can see the picture at varying admission prices when varying runs are sold.

(995)

Q. And do you consider that the system of successive runs gives the widest possible opportunity for public patronage of the picture? A. It does, yes, sir, I am sure of it.

Q. Does it, therefore, give the widest possibility of film revenue to the distributor? A. Yes, sir, that is so.

Q. Are films distributed by all the distributors on the basis of successive runs? A. Yes, sir, they are.

Q. That includes all the distributors who are parties to this suit and all other distributors, does it? A. Yes, sir.

Q. What is clearance? A. Clearance is the period of time agreed upon between the exhibitor and the distributor that intervenes between the completion of the showing of a picture in one theatre and the beginning of the showing of the same picture in another theatre.

Q. Between whom is clearance agreed upon? A. Between the exhibitor and the distributor.

Q. And is it confined, the system of, or the custom of having a clearance provision in a license contract, confined to clearance of first-run over second-run or does it prevail through many or most of the runs? A. Through most of the runs.

Q. How is clearance determined? A. It is determined by negotiation between the exhibitor and the distributor and it is the result of the experience that we have had in the busi-

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ness over a period of many years.

Q. Now, as a matter of fact——

Judge Bright: How can that be determined between the exhibitor and the distributor? If that is so, how can it be based upon your experience over many years?

The Witness: It is the result of the experience that we have had over a period of many years, and what we have determined between the exhibitor and the distributor.

Judge Bright: Then you, after an experience over many years, the distributor, fixes the clearance?

Mr. Seymour: Perhaps I can clear that up.

Judge Bright: Let him clear it up.

The Witness: We agree upon it with the exhibitor. We don't fix it, no, sir. We agree with him on the period of clearance and that is the result of what we believe will return to us the best film rental or the greatest amount of film rental from all the theatres in a given area.

Judge Bright: No, but if an exhibitor says he would like seven days clearance, not more than seven days clearance over a prior run, and your experience is that he must take not less than fourteen or twenty-one days, there isn't much he can do, is there?

The Witness: Well, I should say most—I shouldn't say most—all exhibitors will take as much clearance as they can get one over the other because they are

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interested in the business they do in their theatre, and we grant the clearance that we believe is fair to these exhibitors with whom we are doing business in order to get the maximum film rental out of a picture in each of those theatres.

Judge Goddard: The prior theatre wants a long clearance?

The Witness: The prior theatre wants as long a clearance as he can get.

Judge Goddard: The subsequent ones want short ones?

The Witness: The subsequent one wants as long a clearance as he can get over the succeeding theatre.

Q. And your interest in clearance is to protect your revenue in all those runs? A. I want to get the most revenue I can for a picture from all those runs.

Judge Goddard: I want to ask this question: There is no uniform standard, as far as you know, that can be applied——

The Witness: No, sir.

Judge Goddard: —to clearances?

The Witness: There is not.

Judge Goddard: It depends on the elements of each particular situation?

The Witness: Yes, sir, each situation you must consider as and of itself and based upon the experience

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that we have had in business, we arrive——

Judge Goddard: All the different factors?

The Witness: All the different factors.

(Continuing) —we arrive at the clearance.

Judge Bright: You mean it differs in different localities?

The Witness: It differs in different localities and differs in different theatres in the same locality.

Q. You don't mean to say, Mr. Reagan, of course, that every time there is a negotiation for a film license of a block

of pictures the subject of clearance that that theatre is to take over other theatres is negotiated anew? A. No, I don't mean that because the clearance you have agreed upon is understood; unless either the exhibitor or the distributor wants to change that clearance, you assume and he assumes that the clearance will be the same as it was at the time the last sale was made.

Q. In other words, once having been negotiated it continues until one or the other of the parties—— A. Until one or the other wants to change it.

Q. And there is a difference in interest in the period of clearance between the exhibitor and the distributor, is there? A. There is always—not always, but generally, many instances, difference, yes.

Q. The distributor would like to protect his revenue all (999)
the way along and the exhibitor would like to protect the one film in which he is interested? A. Yes. We want to get the most we can in film rental out of all the theatres in a given area and, in order to do that, we sit up and try and agree with each of the exhibitors with whom we do business upon clearance that we believe is fair and that will return to us the greatest amount of film rental, whereas from the exhibitor's standpoint, he is interested in only getting as much clearance as he can over his succeeding run because he has no interest in the succeeding run. We do have.

Q. It has been stated, and perhaps there is evidence in the case on this, that frequently, and perhaps in most cases, the clearance granted by one distributor to a theatre is identical or nearly identical to the clearance granted by another distributor to the same theatre. First, is that a result of any agreement or understanding between the distributors?

Mr. Wright: Same objection.

A. No, it is not the result of any understanding or any agreement but in practice here is the way it works out: If we

agree with an exhibitor and believe that, let us say, seven days clearance is the proper clearance for that theatre to have over the succeeding run, and we have done that based
(1000)
upon the experience that we have had in the business of the theatre, considering all the factors that we are familiar with, if it is best for Paramount pictures playing in that theatre, it would pretty generally follow that it would be best for the other distributors' pictures too because that is the thing that has been proven to be right over the period of time.

Q. How would they find out about it? A. I beg your pardon?

Q. You do not furnish copies of your license contracts to the other distributors. How would they find out what clearance Paramount granted? A. Let us say we were doing business with an exhibitor and we agreed upon a seven-day clearance over the succeeding run. Then one of the competitors came in to sell pictures and he wanted 14 days clearance. Of course, the exhibitor would say, "Well, I buy Paramount pictures with a clearance of seven days, and if you don't sell me your pictures with the same clearance, I am not going to buy them."

Q. Would you say that the uniformity in the clearance is, then, the result of ordinary competitive negotiation? A. Yes, it is.

Q. And once having been established in license agreement, it continues sometimes for a long period of time? A. Yes, sir, that is right.

Q. And have clearances been modified from time to
(1001)
time? A. They have.

Q. As a result of agreement between exhibitor and distributor? A. Yes, sir.

Q. And have clearances been modified in a number of arbitration cases under the consent decree? A. Yes, sir, they have.

Q. Where the clearances have been modified under the consent decree have the resulting clearances been uniform? A. Yes, sir, that is the case.

Judge Goddard: What do you mean by that, resulting clearances uniform?

Mr. Seymour: Well, the natural consequence of an award, reducing clearance, is to reduce the clearance as far as all distributors are concerned. In other words, if——

Judge Goddard: As to that particular theatre?

Mr. Seymour: As to that particular theatre—uniform as to that theatre.

Judge Goddard: Yes.

Mr. Seymour: That is all I want to make plain, and that is inevitable in the operation of competition and of a system for reviewing the results of competition, I think.

Q. Mr. Wright asked Mr. Rodgers yesterday a question——

Judge Hand: Is that true even though the returns

(1002)

and the success of the picture are entirely different?

Mr. Seymour: Well, you see, the clearance arrangements are made between them before the success of the picture is determined and that is the arrangement upon which the film is licensed. I think I will develop also in a moment the exhibitor's interest in the uniformity, but I would like to ask this question.

Q. Mr. Wright suggested to Mr. Rodgers yesterday that the distributor could get the same film revenue and would be just as well off if, instead of providing clearance in license contracts, he just licensed runs in accordance with his own

whim but on the same basis as they are now licensed with the period of clearance in between but without saying so. Have you any comment to make on that? A. I don't think you could. I don't think you could license the pictures that way because when an exhibitor agrees to pay you certain terms or certain film rentals, one of the considerations for making that agreement is that he knows that there will be a certain period of time between the time he completes his engagement of that picture and the time it starts in another theatre, and that is an important factor. There is lots of money involved in those license agreement, and I think—and I am sure he would not just let you say, "Well, I am going to sell you this (1003)

picture first-run and then you go ahead and do what you want to after you get through with that." He wants to know how long—in addition to licensing the picture first-run, he wants to know how long a period of time is going to elapse between the time he finishes and when it is made available to the run that plays it after him.

Q. In your opinion would the exhibitor pay as much film revenue if the question of how soon after him a competitor theatre would play were left to the whim of the distributor? A. No, sir, he would not, because that is an important part of the consideration.

Q. Why is that so? A. Because his ability to pay is based upon the amount of business that he does and if he is charging, let us say, 75 cents admission for a picture and the subsequent-run theatre, the theatre that follows, charges 50 cents, the period of time that intervenes between the time that he finishes and the time that the other man starts determines how many people are going to wait to see the picture at 50 cents and how many are going to see it at 75. His gross is affected. In turn our film rental would be affected if that clearance were left just to the whim of ourselves.

Q. In the cases where there is a difference in clearance granted by particular distributors, have you any experience

as to whether the subsequent-run exhibitors would prefer to
(1004)
have a clearance over other theatres identical? A. Will you repeat that, please?

Mr. Seymour: Strike out that question and let me put it this way:

Q. From your experience in the business, is there an advantage to a subsequent-run exhibitor in having the clearance of all pictures which he exhibits identical in the immediately preceding run?

Mr. Wright: I do not think he is in a position to speak for the subsequent-run exhibitor, as to what advantages he may have. You have never been one, I take it?

The Witness: No, I have not.

Mr. Seymour: I think from his experience in the business he can give us an answer. The weight is for the Court.

Judge Hand: I will sustain the objection.

Q. Where there is a difference in clearance of the prior run, that is, one distributor grants seven days, one distributor grants 14 days, one distributor grants 8 days, so on, would that have any effect on the steady flow of pictures to a subsequent-run? A. Yes, it would. If the pictures became available at different times to a subsequent-run exhibitor, it may be difficult for him to book his theatres. He may not have an even flow of pictures.
(1005)

Q. Does the distribution department of Paramount advise the distribution department of any other defendant in this case as to the terms or provisions of the license contracts which it makes with any exhibitor? A. No, sir, we do not.

Judge Bright: Does the question of clearance in any way depend upon the quality of the picture to be exhibited?

The Witness: No, I would not say it would, sir. Depends on the other factors that I have mentioned Clearance, once it is agreed upon, we go along on that clearance unless somebody is dissatisfied or we are dissatisfied. In that event, we then sit down and discuss it, but the same clearance generally applies to all pictures, whether it is one of our best pictures or whether it is one of our lesser pictures.

Judge Bright: Are your license contracts uniform in every instance?

The Witness: Yes, sir.

Judge Bright: Makes no difference whether it is between the independent and the defendant producer——

The Witness: No, sir, none whatever. Same license.

Judge Bright: The same license in every instance for all pictures?

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The Witness: Yes.

Judge Bright: And for all theatres?

The Witness: Yes, sir.

Q. That is, the basic agreement is the same; there is a variation in terms, of course? A. The terms, yes.

Judge Bright: I mean, the printed portion of your license agreement.

The Witness: That is the same with all.

Mr. Seymour: I am coming to another subject, if your Honors are ready to recess.

Judge Hand: Yes, we will adjourn until 2:15.

(Recess to 2:15 p.m.)

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AFTERNOON SESSION.

CHARLES M. REAGAN resumed the stand.

Direct Examination continued by Mr. Seymour:

Q. Mr. Reagan, when we were discussing clearance, you gave an example of the negotiation with an exhibitor which as I remember it, you put somewhat this way: if Paramount should agree to a seven-day clearance and another distributor should come in and offer a fourteen-day clearance, the exhibitor would say, "Why should I take a fourteen-day clearance when I can get a seven-day clearance from Paramount?" Now I should like to have you tell us whether you intended to put the example that way, and correct it if there was an inadvertance in it? A. I meant the reverse. I meant if he could buy other companies' pictures with a fourteen-day clearance he would not buy mine if I were only willing to grant a seven-day clearance.

Q. And that is, of course, because the exhibitor wishes to get as long a clearance as he can? A. As he can, yes.

Q. Now let us assume that as to the prior run exhibitor, in the case of distributor A, there is a fourteen-day clearance, and in the case of distributor B, there is a twenty-one-day clearance in the license agreements, so in that case there

(1008)

happened to be a difference, in the case I have put; and when distributor B comes to negotiate with a subsequent run exhibitor, will the existence of that different clearance on the prior run have any effect in his ability to negotiate with the subsequent run? A. Well, in that case, if somebody is granting 21-day clearance, some of the other distributors are granting 21-day clearance, and I only want to grant 14, then he won't want to buy my pictures.

Q. No, I am talking now about the subsequent run exhibitor. A. I don't believe I followed you there.

Q. Let me make my example clearer. Suppose as to a first-run or any prior run there is a difference in the clearance granted by two distributors. Distributor A grants 14-day clearance and distributor B grants 21-day clearance. Then the two distributors negotiate separately with the exhibitor having the next run. Would the fact of difference on the clearance in the prior run affect the ability of the distributor to negotiate for a license contract with the subsequent run? A. No, I do not think so.

Q. Would not the subsequent run exhibitor be inclined to refuse to buy the product of the distributor who sold him subject to a longer clearance than the other distributors? A. Yes, that is right.

Q. In that sense it might have some effect on creating

(1009)

similarity in the clearances granted on the earlier runs, is that so? A. Yes.

Q. And that would be as a result of competitive negotiations? A. Yes, sir.

Q. Now does Paramount include in its license contracts a reference to the minimum admission price to be charged by the particular exhibitors licensed? A. Yes, sir, we do.

Q. Now, do you know approximately how long in the business provision for minimum admission prices have been included in some license contracts? A. Well, it has been ever since I have been in the business.

Q. That is at least since 1920? A. Since 1920, yes.

Q. Have you from time to time during your connection with Paramount had occasion to negotiate with exhibitors the terms of license contracts? A. Yes, sir.

Q. And in the course of those negotiations has the question of minimum admission price come up? A. Yes, sir.

Q. Now, who is it, as a matter of practice, who actually determines the minimum admission price which is to be included in such license contract?

Mr. Wright: If the Court please, I should think he should be confined to what actually happened relative to this, rather than his conclusions as to how these things are determined.

(1010)

Mr. Seymour: He has stated he participated in such negotiation.

Judge Hand: I will allow it.

The Witness: Will you repeat that question, please.

Q. (Question read.) A. The exhibitor.

Q. Is it a special admission price in connection with the particular license which he determines, or is it his regular admission price? A. It is the admission price that he regularly charges.

Q. And that is ascertained and included, is it? A. Yes, sir.

By Judge Bright:

Q. Well, does that fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir.

Q. What do you mean by influence? A. Well, I would not sell an exhibitor who was charging an admission price of let us say 25 cents a first-run if I thought that the first-run admission price should be higher, 40 or 50 cents; or I would not permit or I would not sell an exhibitor who was charging 25 cents with clearance over another exhibitor if the other exhibitor charged the higher admission price, in most instances.

By Mr. Seymour:

Q. Why are you interested?

(1011)

Mr. Seymour: I do not mean to interrupt you, Judge Bright.

Judge Bright: No, no interruption.

Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures.

Q. That is the thing which you get a percentage of? A. Yes, sir.

Q. When translated into gross receipts at the box office? A. Yes, sir.

Q. Now, is it a part of a license contract with Exhibitor A on a prior run what Exhibit B on a subsequent run shall charge as admission price?

Mr. Wright: If the Court please, that is an extremely general term. I submit that those contracts themselves show exactly what the situation is there.

Judge Hand: I think they really do. That is a conclusion that you are asking for that you can argue in support of from the contract. It depends on your view of the law how you would answer that.

Mr. Seymour: No, not this question I think, if your Honor pleases. I do not want to labor it, but the Government has made some selection among license

(1011-A)

contracts. Now as we know here, there are thousands of license contracts every year by each company, and what I am asking generally is this, whether there is a reference in the contracts to the admission price to be

charged by a subsequent run. I do not believe there is any contract in evidence which contains it, and I am merely asking that generally.

Judge Hand: That question you may ask, whether there is a reference in the contract.

A. No, sir, there is not.

Judge Bright: It is only with reference to the particular exhibitor?

The Witness: Yes, sir, that is correct.

(1012)

Q. Is the admission price to be charged by a subsequent exhibitor an element in the negotiations with the prior run exhibitor? A. No, sir.

Q. From time to time are there special attractions which are licensed with a provision for a higher admission price than regularly charged by the exhibitor? A. Yes, sir.

Q. In the case of Paramount how often has that happened, say, in the last five years? A. Let's see. We have had three pictures, "For Whom the Bell Tolls," "Northwest Mounted Police," and "Reap the Wild Wind," which we licensed at prices, admission prices, that were higher than the theatre normally charged, and that has been in the last several years. I don't know just exactly when.

Q. Were there any special qualities about those pictures which induced you to ask that the theatre exhibit them at a higher admission price? A. We thought so.

Q. What were they? A. They were highly successful box office attractions and they were very costly pictures. We felt that we were justified in asking for increased admission prices on those subjects.

Q. Were they different in length from the ordinary feature picture? A. Yes, they were longer than the ordinary feature length picture.

Q. Can you tell us how much longer? A. Well, an ordi-

(1013)

nary feature length picture runs from about 60 to 90 min-

utes. In the case of "For Whom the Bell Tolls," it was 2 hours and 37 minutes, I believe.

Judge Bright: Full performance?

The Witness: Yes, sir.

Judge Bright: Did those extra admission prices apply in the case of third, fourth or fifth runs?

The Witness: Yes, sir; it applied in the cases of all runs.

Q. That is, you tried to get a higher film revenue and to get it asked them to charge higher admission prices? A. Yes.

Q. In those cases why was Paramount interested in having the exhibitors charge a higher admission price? A. Because it would improve our film rental returns.

Q. How is the admission price to be charged on such special attractions negotiated? A. By agreement between the exhibitor and the distributor.

Judge Bright: Did I understand you to mean that the same scale of admission prices was made mandatory on all of the runs?

The Witness: We sold those pictures for increased admission price whenever we sold them, yes, sir.

Judge Bright: Were they the same increase on all runs?

(1014)

The Witness: Well, in the case of "For Whom the Bell Tolls," we released that picture at increased admission prices and whoever played it, played it at a minimum admission price of 75 cents matinee, and 75 cents and $1.10 at night.

Judge Bright: On any run?

The Witness: Any run, yes, sir, until we released it at regular prices a year later.

Q. That is, this was a special opportunity to show it in advance—— A. Yes, sir.

Q. (Continued) —at increased admission prices, but if the exhibitor preferred to wait and take it at regular run, then he exhibited it at his regular admission price? A. That is correct.

Mr. Seymour: One of my colleagues, Judge Bright, is anxious that you should have heard that last question and answer, and if you did not, I would like to make it clear. I wonder if the stenographer will read it.

(Question read.)

Judge Bright: How is it that in my case I paid only the regular admission price when I saw it?

Mr. Seymour: That is the distinction.

The Witness: "For Whom the Bell Tolls"?

Judge Bright: "For Whom the Bell Tolls." I thought they were giving me a special price.

(1015)

Mr. Proskauer: Would your Honor let me suggest that we cannot quite hear Judge Bright over here and we want to get in on these questions.

Judge Bright: I will try to keep my voice up.

Judge Hand: This is a confession.

Mr. Proskauer: I want to hear Judge Bright.

Judge Hand: Apparently extorted because of the examination.

Q. Do exhibitors generally, in your experience, ordinarily charge the same admission price over a long period of time? A. Yes, sir, they do.

Q. And do you know why that is? A. Well, that is because they have found that the admission price that they were charging——

Mr. Wright: If the Court pleases, for him to tell us what these exhibitors have found is not competent.

Mr. Seymour: A man who has been in the business for 25 years.

Judge Hand: What is the question?

(Question read.)

Judge Hand: We will allow that.

A. They do it because they have found that the admission price that they are charging is the most profitable at which they can make the most profit for their theatre.

Q. Would there be difficulties created in that business (1016)
if they changed their admission prices from picture to picture, or repeatedly? A. I think the public would object because they would not know what price they had to pay when they came to the theatre. I think a theatre can be most successfully operated by charging the same admission price generally.

Q. Is there any difference in that regard whether an exhibitor is a so-called independent operator or whether the exhibitor is a theatre in which one of the defendants in this case has an interest? A. No, sir.

Q. It is said that it frequently happens that the minimum admission price in contracts with a particular exhibitor, from several distributors, refer to the same admission price. Does that result from any agreement or understanding between the distributors? A. No.

Mr. Wright: Same objection.

Judge Hand: Same ruling.

Q. What is the cause of that similarity? A. I believe the reason is the same that I just gave, he has found that the ad-

mission price he is charging is the one that he can most profitably operate his theatre at.

Q. Occasionally it appears that the admission price in a particular license contract is left blank. Can you tell us why that is? A. Well, it is probably——

(1017)

Mr. Wright: That is far too general. In some cases it may be left blank with a purpose, I suppose, in others it may be through inadvertence, but I do not think he is competent to give testimony in this general form as to what happens in unspecified instances.

Mr. Seymour: Let me pin it down a little more closely then.

Q. It appears that in some of the Paramount license contracts occasionally the blank for admission prices is not filled in. Why does that occur? A. Well, it is either through inadvertence or anxiety on the part of the man making the deal to get the contract signed and get them out of the way and behind him, and he knows there would be no change in the admission price, otherwise he would be told so.

Mr. Wright: I move to strike out as to what he knows. This witness cannot know that.

Judge Hand: Yes, I will grant that.

Mr. Seymour: May I understand how far your Honor's ruling goes? Does it go to the whole answer?

Judge Hand: What he knows.

Q. As a matter of fact, is there a discussion or a negotiation with respect to the minimum admission price on each occasion when a new license contract is negotiated by Paramount? A. No.

Q. Why not? A. Well, because they know the same ad-

(1018)

mission prices will apply.

Q. Do the license contracts generally contain any reference to a maximum admission price? A. No, sir.

Q. Do the exhibitors from time to time have a higher admission price than the one included in the contract? A. Yes, sir, oftentimes charge a higher admission price than the minimum specified in the contract.

Q. Is that so of first-runs and also on subsequent-runs? A. That is true of all types of runs.

Q. If the exhibitor is charging more than the minimum in the contract, is that his decision or the distributor's decision? A. It is his decision.

Q. From your experience in the business is it generally true that the first-run theatres in a particular area have about the same admission price? A. Yes.

Q. And is it generally true that the various subsequent-runs have about the same admission prices in the same area? A. Yes, in the same area, that is true.

Q. Does that result from any agreement or understanding between the distributors? A. No.

Q. Can you tell us how that general situation comes about? A. Well, one exhibitor will decide to charge a certain admission price and if the theatre is being successfully operated, the others pretty quickly copy it.

Q. Do you consider that the distributor has any business
(1019)
interest in the admission price to be charged by an exhibitor to whom he licenses his pictures? A. Yes, sir.

Q. What is the interest? A. Well, our film rental income is directly affected by the admission price that he charges.

Q. Does that apply only to percentage pictures or licenses made on a percentage basis? A. It would apply to all pictures.

Q. Why does it apply to a flat rental picture? A. Because the flat rental price is based on what we believe the

theatre will gross, or a percentage of what we believe it will gross, and if we are wrong in our belief, the admission—pardon me, will you read the question again, please?

(Question read.)

A. (Continuing.) —because the flat rental price is based upon what the exhibitor believes he will take in at the box office.

Q. What effect would it have from the distributor's viewpoint if the prior-run theatres in a given area were to—the prior-runs with which he deals—were to lower their admission prices? A. Well, it would not only affect the film rental income in those theatres, but it would also affect, finally affect, the film rental income in the subsequent theatres, because if the prior-run theatres reduce their admis-
(1020)
sion prices, then the subsequent theatres could not continue to charge the admission prices that they have been charging.

Q. How would that affect the revenue of the distributor? A. Well, because the revenue is dependent upon the gross receipts that the theatre takes in.

Judge Bright: Are your flat rentals based on admission prices?

The Witness: No—you mean the rental that we charge for flat rentals?

Judge Bright: Fixed rentals.

The Witness: They are not based upon the admission prices—yes, they are specified in the contract, too, the admission prices that they charge on all pictures, flat rental or percentage, minimum prices.

Q. Do you charge a different rental on the same picture in the same locality to a theatre that has a 15 cents admission and one that has a 25 cents admission? A. No, sir.

Q. Then—— A. Because, if we are right, or if we know the gross of the theatre, what we believe the gross to be, that would be the determining factor of what the film rental we would charge would be.

Judge Bright: In other words, you charge as much as the tariff will permit?

The Witness: That is correct.

(1021)

Judge Bright: Regardless of admission price?

The Witness: Yes, sir.

Q. And you attempt in your flat film rentals to get as much as you can based upon your estimate of what the—— A. Picture will gross.

Q. (Continuing) —the picture will gross in that theatre? A. Yes, sir.

Q. Is the gross in part dependent upon the admission prices of the theatre? A. Yes, it is.

Q. Let us assume that instead of the prior-runs reducing their admission prices, with the consequences you mentioned on the distributors' revenue, the subsequent-run exhibitors substantially reduced their admission prices, would that have any effect on the distributors' revenue? A. It would have.

Q. And why? A. Well, the differential in admission prices between the various runs is an influencing factor upon the film rental income that we earn, and if subsequent-runs reduced their admission prices too greatly, it would then affect the gross of the prior-runs and our film rental in those prior-runs would be reduced.

(1022)

Q. Now, does the restriction or the provision for minimum admission price in license contracts extend beyond the showing of the particular pictures licensed? A. No, sir.

Mr. Wright: It seems to me, if the Court pleases, this is entirely argument that is being put in the

mouth of the witness here as to how far the contract extends.

Mr. Seymour: I am asking about the generality of agreements in these provisions rather than putting in thousands of them.

Judge Hand: All right.

Q. Is there any restriction in the agreements on the ability of the exhibitor to revise his prices downward, if he wishes to, his admission prices downward if he wishes to after the expiration of the license? A. No. After that particular contract has been completed he can.

Q. After a picture is played do exhibitors from time to time ask the Paramount distribution department for adjustments? A. They do.

Q. Is that a relatively common occurrence? A. Quite common.

Q. Can you tell us why such requests are made and what disposition is made of them? A. Well, an exhibitor will play a picture or pictures, and after he has played them tell us that the result is not profitable to him and ask for an adjust-
(1023)
ment in terms; and if we feel that that is the case we make an adjustment.

Q. Why do you make such adjustments? A. Because we think that it is the right thing to do; that an exhibitor is entitled to it; we want to keep him for our customer.

Q. Do those requests for adjustment come from independent exhibitors? A. Yes, sir.

Q. Do they also come from time to time from theatres in which a defendant has an interest? A. Yes, sir.

Q. Do you treat such requests on any different basis depending on the theatre interest involved? A. We do not.

Q. And, as a matter of fact, you have regular forms for applying for modification of agreements, have you not? A. We do.

Q. Does it occur occasionally that after a license contract is made the exhibitor asks to have some pictures cancelled out or removed from the agreement? A. It does.

Q. Why does that happen? A. Well, it can happen because after he has bought the picture he does not believe that it will do business for him, and he asks that we cancel it; or, in the instance where after he has bought it he feels it is not the type of picture that is suitable for showing in his theatre, without regard to the profit element, he will ask that it be cancelled.

Q. And how do you dispose of such requests? A. Some-
(1024)
times we cancel and sometimes we do not, depending on the circumstances.

Judge Hand: I do not see what this is all about. Is it just to show that Paramount is a lovely fellow to its customers?

Mr. Seymour: I am trying to show, if your Honor pleases, contrary to the contention of the Government, the ambit of which I have difficulty in appraising, that Paramount treats all its customers alike; that there is no element in this case which could give rise to an inference of combination or conspiracy; and your Honors realize, I think, the undisclosed, or, at least, undefined character of this charge; and I therefore have to hit it from as many angles as I can. I realize it is burdensome, but I shall proceed as rapidly as I can.

Q. Is there any difference in the consideration given to such cancellations depending on the source of the request? A. No, sir, there is not.

Q. Do requests for cancellations occur as frequently now as they did before the consent decree? A. No, sir, I do not believe they do.

Q. Why is there a difference? A. Well, because they have an opportunity to see the pictures now before they buy them. They did not before the consent decree.

Q. Does it sometimes happen that in some situations you split the product between two exhibitors? A. We do.

(1025)

Q. And in some situations that is between two independent exhibitors? A. Yes, sir.

Q. And in some between two theatres in which defendants have an interest? A. Yes, sir.

Q. And in some with a theatre which is an independent, and the other being a theatre in which one of the defendants has an interest? A. Yes, sir.

Q. Why is product split? A. Product is split because we want to get the maximum returns for each of our pictures; and if we can get more money by dividing the pictures between two theatres or two or more theatres than we can by playing all of it in one theatre, we do that.

Q. Is that the only reason? Does the fact of whether a defendant has an interest in a theatre or not affect whether you split your product? A. No, sir.

Q. Does Paramount have in effect any franchises at the present time? A. I do not believe we have any in existence now.

Q. What is a franchise? A. A franchise is an agreement for the licensing of our pictures for a period of time.

Judge Bright: For what period of time?

The Witness: For more than a year.

Q. It has been suggested that there are four Paramount franchises still in effect. Does that refresh your recollection? A. I had forgotten those. There are a few. I had forgotten

(1026)

that there were any.

Q. Was there a time when Paramount made a large number of franchises? A. Yes, sir, there was.

Q. And why were franchises made? A. Well, we made franchises a number of years ago because it assured us of an outlet for our product in those situations where we made them, and the more selling that we could complete and get behind us the better off we were.

Q. It provided an assured outlet for a time, is that right? A. Yes, sir.

Q. Now, were franchises made with exhibitors who had no connection with any defendant? A. They were.

Q. Were they also made in some cases with theatres in which Paramount had an interest? A. They were.

Q. Were they also made in some cases in theatres in which one of the defendants in this case had an interest? A. They were.

Q. Did the fact of whether a defendant in the case had an interest or not determine the policy as to whether a franchise would be issued? A. It did not.

Q. Do you know whether, in fact, there were more franchises made with exhibitors in which no defendant had an interest than with those in which a defendant had an interest? A. There were many more franchises made with independent exhibitors than there were with exhibitors who are

(1027)

connected or who are defendants in this case.

Q. Has a recent search of the files indicated that there were approximately 157 franchises made—— A. There were 157 franchises made with independent exhibitors——

Mr. Wright: Haven't you got a list that you can put in? We can't cross-examine him.

Mr. Seymour: I am just going to ask him the number, and I will give you the list to cross-examine from, Mr. Wright, if you like.

A. (Continuing) There were 33, I believe, with companies with which Paramount is affiliated, and I think there were

13 with companies that are affiliated or were affiliated with the defendants in this case.

Q. And with respect to the franchises to independent exhibitors, were some of those made to so-called independent circuits, including a number of theatres? A. There were.

Q. And some made to exhibitors with one theatre? A. There were.

Q. Now, did Paramount discontinue the making of new franchises some time before the entry of the consent decree? A. We did.

Q. Will you tell us why that occurred?

Mr. Wright: How about when, first?

Q. Well, can you tell us when? A. Well, it has been, I should say, eight or ten years ago. I do not believe we made (1028)

any franchises over that period of time.

Q. Well, anyhow, sometime before the consent decree? A. Yes, sir.

Q. Why did Paramount decide generally not to grant further franchises? A. Well, we found this to happen: When we made a franchise that covered a period of time, if the terms were favorable to the exhibitor, of course, he continued to play pictures; and if the terms were unfavorable to him, he had the pictures under franchise but he would refuse to play them, and all we could do was to adjust the terms of the franchise to meet with his satisfaction, or to his satisfaction. And with the increased cost of production and the additional expense in making of pictures, we found that it was unprofitable to continue franchises, and we therefore discontinued making them.

Q. Now, does Paramount license some of its pictures under so-called master contracts? A. We do.

Q. What is a master contract? A. A master contract is a contract that lists the terms on which pictures are sold for a number of theatres.

Q. And are master contracts made with groups of theatres unconnected with any defendant in this case? A. They are.

Q. And are they also made with theatres in which defend-
(1029)
ants have an interest? A. They are.

Q. Is the question of who owns the theatre the determining factor in whether a master contract would be used? A. No. A master contract is used only as a matter of convenience by putting the terms for a number of theatres on one contract rather than making separate contracts for each of those theatres.

Q. Now, the things which are attached to the master contracts are so-called deal sheets, are they? A. Yes, they can be deal sheets, the regular contract form applies, and you attach to them the terms that you list on a deal sheet, or on a separate sheet of paper, whichever is most convenient.

Q. And they are really riders to the contract? A. That is all.

Q. And there are contracts with all kinds of riders, is that right? A. All kinds of riders and with all types of exhibitors.

Q. Do you consider that there are any favors granted in the licensing of Paramount pictures to the theatres in which any defendant in this case has an interest——

Mr. Wright: I submit, if the Court please, it does not make the slightest difference what he considers are favors. What were granted and what were not is shown by the transactions which occurred between
(1030)
them. If he wants to show them, I do not see any reason why he should not show it.

Judge Hand: Overruled.

Mr. Seymour: I do not believe I finished my question.

(Question thus far propounded read.)

Q. (Continuing) —in which the other defendants in this case have an interest——. A. No, sir, I do not.

Mr. Seymour: I had not finished.

Q. (Continuing) —which are not granted to the theatres owned or operated by independent exhibitors? A. There is not any difference.

Q. Now, does Paramount license its pictures to the theatres in which Paramount has an interest? A. We do.

Q. And are those pictures licensed to those theatres on terms which are called a formula deal? A. They are.

Q. And are those terms, the formula deal terms, worked out with all the companies in which Paramount has an interest? A. No, not all the companies.

Q. Now, is that formula deal term merely a convenient method for determining the rental to be received from those theatres? A. It is.

Q. And can you tell us generally the way that is worked out? A. Well, it is worked out in this way: Prior to the year that we sold a formula deal we found out what percentage

(1031)

of our national gross that we received for film rental from a particular Paramount affiliate was; and let us say that was one per cent of our national gross; to that one per cent we added an increase; and then for the first year of the formula deal they paid us that increased percentage of our national gross for the Paramount pictures in that circuit.

Q. Do you consider that that method of computing the film rental gives Paramount a fair film rental? A. Yes, sir, I do.

Q. Do you consider that it gives Paramount a higher film rental than it could get on another basis? A. I believe I have gotten higher film rentals as a result of the formula deal than I could have gotten if I had sold my pictures at regular percentage terms.

Q. And are the terms of that deal negotiated annually with the operators of those theatre companies? A. They are.

Q. Now, do you have a somewhat similar basis for computing film rentals in connection with certain theatres in which Fox has an interest? A. We do.

Q. And why were those arrangements made on that basis? A. Well, they were made because after a protracted period of negotiation that I had, and Mr. Smith, a division manager who handles the sale of our pictures to the various Fox affil-
(1931a)
iates, also had, and we were unsuccessful in making a deal, we finally worked out the formula deal with the Fox affiliates, which is similar to the deal which we have with our own.
(1032)

Q. Do you consider that you get a satisfactory film rental that way? A. I am sure in the case of the Fox affiliates that I could not have gotten the percentage of increase over the past several years for my pictures by selling them at straight terms than I got by selling them under the formula deal.

Q. Now, in the distribution of Paramount pictures, do you usually sell or license from year to year to the same customer? A. We do.

Q. And is that true of the licenses granted by Paramount for first-run exhibition and also for licenses granted for subsequent run exhibition? A. It is.

Q. Why is that so? A. Because over the period of years we have found that the exhibitors that we were doing business with are, in our opinion, the exhibitors who can return the best film rental possible in each given situation for the Paramount pictures.

Q. Would it be practicable or desirable as a matter of distribution, where you have a satisfactory customer, to shop around and offer Paramount pictures on the same run to all the competitors or some of the competitors of that theatre? A. Would it be practicable or would it be possible?

Q. Or desirable. A. No, it would not.

Q. Why not? A. Well, I do not want to sell my pictures
(1033)
on the same run to every exhibitor because I do not think I

can get the maximum returns for my pictures by selling them that way.

Q. Isn't it possible in a given situation that you would leave an old customer and perhaps get some other theatre to bid a higher film rental for a particular block of pictures? A. Oh, I am sure I could do that, but if I did, and finally the stronger exhibitor bought the pictures, he may not be able to pay for them what he agreed to pay; he is simply bidding for them in a market that would give the pictures, and then after he got them he may not be able to play them at the price he agreed to pay.

Q. Do you find that by sticking to an old customer that you get better exploitation for Paramount pictures? A. I think—I don't think, I know—the customers that I do business with, I am confident that I get the best treatment that is possible for my pictures in each of the situations where I sell them.

Q. Now I should like to put to you a question which Judge Bright asked Mr. Rodgers yesterday or the day before, and see what your answer will be, and I am sure Judge Bright will correct me if I haven't got the question quite right. How can you tell in a given situation where you have a first-run customer whether some other theatre in that

(1034)

area would not pay you higher film revenue unless you negotiate with that theatre? A. Well, we have been doing business for a matter of—I have been doing business for a matter of twenty years selling pictures or distributing pictures, and I believe I pretty well know what a theatre can afford to pay for pictures; and while I do not do business with all of the theatres in the United States, I believe that my sales department also knows what a theatre can pay and what they can't pay; and we select our customers based upon what we believe will get the best results on Paramount pictures.

Q. But how do you know you could not get better ones by negotiating with some other theatre if you have not negotiated with them?

Mr. Seymour: I think that was the essence of Judge Bright's question.

Q. (Continuing) Is it because you can tell by looking at the theatre and your general experience? A. Well, we have had a lot of experience in this business and we should know what a theatre can pay and what a theatre can't pay for pictures. We believe we do.

Judge Bright: Doesn't that apply to the other distributors as well?

The Witness: I think it does. Then there are some theatres I would like to play my pictures in and can't

(1035)

get in, and so I do the next best thing, take the next best theatre in which I can get it in; and I think the same thing applies to other distributors. I am sure it does.

Q. Could you offer your pictures or offer to license on the basis of competitive bidding effectively? A. No, I know we could not.

Judge Bright: Why not?

The Witness: Because I think an exhibitor might —not might, but would be willing to give more for pictures than he could afford to pay, and once he had the pictures under contract he could not play them, and I would finally be in a position where I would not get my pictures played in the situation where I had sold them, because the man who bid the highest—it would be an unprofitable arrangement from his standpoint and for mine, simply getting the pictures

and then not being able to play them; buying them for more than they are worth.

Mr. Seymour: Have you any further questions, Judge Bright?

Judge Bright: No.

By Mr. Seymour:

Q. What is a circuit? A. A circuit is a group of four or five or more theatres.

Q. Under common ownership and management? A. Yes. (1036)

Q. Are there a number of circuits of theatres in the United States? A. There are.

Q. Which are not connected with any distributor? A. There are.

Q. Tell us approximately how many? A. Oh, there are hundreds. I do not know exactly.

Q. Several hundred? A. Several hundred. I do not know the exact number.

Q. And are some of those circuits composed of twenty, thirty, fifty and some more than a hundred theatres? A. There are.

Q. Are there also a number of theatres independently operated who do their buying and booking through a common agency? A. There are.

Q. Now, when you came into the business were there a number of independent circuits? A. There were.

Q. And has the number grown since you have been in the business? A. Yes. There are more today than there were then. There are more independent circuits now than there were when I came into the business.

Q. What is a buying combine? A. A buying combine is a group of theatres that have gotten together and appointed one man to do their buying and booking.

Q. Do you know how many such buying combines there are in the United States? A. I think about fifty.

(1037)

Q. And those are unconnected with any distributor? A. What?

Q. I am talking about buying combines which are unconnected with any distributor? A. They are not connected with any distributor.

Q. Have you had any experience or dealings with these buying combines? A. Yes, sir, I have.

Q. Have there been occasions when the members of such combinations agreed collectively not to deal for Paramount pictures? A. There have been.

Q. Can you tell us something about those occasions? A. Well, I recall the Cooperative Circuit in Detroit, which is a buying combine made up of more than a hundred theatres, refusing to buy my pictures about three years ago because I wanted percentage terms on a limited number of pictures, and they refused to pay it. I did not sell them for about a year or a year and a half.

Q. Have you had any experience with exhibitor groups combining and refusing to buy or license Paramount pictures? A. I have.

Q. Can you give us some examples of that? A. Well, subsequent run exhibitors in the city of Minneapolis came in to see me, or appointed a committee to come in to see me several years ago, and said they were not going to do any business with us because we asked percentage, wanted to sell

(1038)

our top pictures on percentage, and they wanted to know if we would not change our policy; and if we would not change they were not going to buy Paramount pictures.

Q. And did they fail to buy? A. They did not buy for some time. Since then they have bought a limited number.

Q. Have you had any other experiences of that kind in recent years? A. We had an experience in Philadelphia several years ago where a group of subsequent run exhibitors complained that we failed to deliver a picture on one sea-

son's contract that they said we had completed and should deliver, which was not the fact. They said if we did not deliver it they would not do any business with us, or if we did not make an adjustment in their contract they would not do any business with us, and they did not for about a year.

Q. Do you consider that it is important to Paramount's business, and particularly to its distribution business, to have some interest in theatres? A. I do.

Q. Why? A. Well, it gives us an assured outlet for our pictures; it gives us the opportunity to advertise and exploit those pictures; it is sort of a show window for us; and it also enables Paramount as a company to make profits out of the operation of those theatres.

Q. Do you know what the total number of theafres is (1039)
in which Paramount has some interest? A. I think between fifteen and sixteen hundred.

Q. And do you know how many theatres there are in the United States? A. About seventeen thousand.

Q. So that Paramount has an interest in somewhat under ten per cent of the total theatres in the United States? A. That is correct.

Q. Now, we were talking this morning about the fact that in distributing Paramount pictures you do not get any information as to what kind of negotiations or arrangements are being made by the theatres in which Paramount has an interest; and I want to ask you some questions on that subject: is the distribution department at Paramount wholly separate and distinct from the theatre department? A. It is.

Q. Do you receive from the theatre department details or information with respect to the film deals negotiated or made by theatres in which Paramount has an interest? A. I do not.

Q. Do you receive from the theatre department any extracts or abstracts of contracts made by the theatres in which

Paramount has an interest with other defendants for the exhibition of their pictures in those theatres? A. No, sir, I do not.

Q. Is there communicated to you by the theatre department or by the operating heads of the theatre operating companies, the terms upon which they have licensed pictures of any other distributor? A. They do not. There is none.

(1040)

Q. Does the distribution department or any member of it communicate to the theatre department information as to the film deals made on Paramount pictures in the territories in which other distributors have theatres? A. We do not.

Q. Now do you receive from the theatre department telegraphic reports showing the grosses on certain motion pictures played in certain theatres in which Paramount has an interest? A. We do.

Q. Do you receive those regularly? A. Daily.

Q. Do those reports contain any information as to the terms on which the theatres have licensed the pictures shown? A. They do not.

Q. And can you tell us generally the nature of the information contained? A. It lists the name of the city, the theatre, the picture, the gross receipts on the picture by days, and a comparison of the gross receipts between that day and the same day a year ago.

Q. Now, some of those pictures are pictures produced by other distributors? A. They are.

Q. And are you at the time you receive those, licensing

(1040½)

pictures in competition with those pictures? A. I am.

Q. Why are you interested in receiving those reports? A. Because it enables me to find out not only what my own pictures are grossing, but also what my competitors' pictures are grossing.

(1041)

Q. In those selected theatres? A. In the theatres listed on that schedule.

Q. Why are you interested in the grossing results of the pictures of other distributors? A. The more I know of the grossing possibilities of my competitors' pictures, I think the better qualified I am to make the proper deals for my own pictures.

Q. Are those the only reports you receive from the theatre department? A. That is the only report.

Q. Is information of that general character available in the trade press? A. It is.

Q. Why don't you get it from the trade press? A. Well, I can get it faster because these are daily reports and they are more accurate than the information I would get from the trade papers.

Q. Have you any personal interest in theatres? A. I have not.

Q. Have you any financial interest or any other kind of interest in any other producing, distributing or exhibiting company? A. I have not.

Q. Do you ever discuss with the sales or distribution representatives of any other company the terms upon which you have or are licensing the exhibition of Paramount pictures to any exhibitor? A. No, sir, I do not.

Q. Have you discussed with the sales or distribution

(1042)

representatives of any other company the exhibitors whom you will or have or have not licensed on Paramount pictures? A. I do not.

Q. Do you consider the terms upon which you license Paramount pictures a business secret of Paramount? A. It is a business secret of our own company.

Q. Does it sometimes happen that a picture which hasn't had a high production cost is a great box office success? A. It does.

Q. Does it sometimes happen that a very expensive picture is not a box office success? A. That happens also.

Q. Can you give us some examples of those two things in Paramount? A. Well, I think of a picture called "High, Wide and Handsome", which we released a few years ago, and which cost us $1,800,000 and it grossed less than a million dollars. I think of another very expensive picture called "Angel", which was very disastrous at the box office and very unprofitable to us, and I think of a picture that was comparatively inexpensive, "Going My Way", which cost about a million dollars and grossed about seven million in this country.

Judge Bright: That is because Bing Crosby was the star?

The Witness: Not because Bing Crosby was the star. He has been a star in a number of our pictures, (1043)

but we have never had a picture in which Crosby appeared that grossed half of that money. It was because of the picture itself, popular appeal.

Q. Has it been the practice of Paramount to distribute pictures produced by independent producers? A. It is.

Q. How do you define independent producer? A. An independent producer is a producer who makes pictures independently but has no national distributing facilities for the distribution of those pictures or of the pictures that he makes.

Q. Such a producer distributes through some other distributing organization? A. Yes.

Q. Can you give us some examples of pictures produced by independent producers which Paramount has distributed in recent years? A. Well, we distributed the Harry Sherman pictures, which were the Hopalong Cassidys, that were independently produced. We distributed a picture called "Jamaica Inn", which was independently produced in England and distributed by us in this country. We at present

distribute the Pine Thomas pictures which are independently produced. We also distribute the Hal Wallis pictures, which are an independent production, and the Buddy DeSylva pictures, which are also independently produced.

(1044)

Q. In your observation is there competition among the various distributors for an opportunity to distribute a high quality independently produced picture? A. Keen competition for that opportunity.

Judge Bright: Do you call all those pictures you just mentioned high quality pictures?

The Witness: They aren't all high qualities, no. The Harry Sherman pictures, Hopalong Cassidys, were made—they are Western pictures of good quality but they cannot play the A theatres or the better theatres, of course, in the United States.

Q. They are good Western——

Judge Bright: They play in most of the double feature picture theatres?

The Witness: No, they play a lot of theatres that play single feature too but they play on the weekends, Friday or Saturday, when the youngsters are out of school and have a chance to see them.

Q. The "Beachcomber," which you mentioned, Charles Laughton—— A. I did not mention the "Beachcomber." I had forgotten it. I mentioned "Jamaica Inn." "Beachcomber" [redacted] also a picture which we distributed, which was independently produced.

Q. Was that the Charles Laughton picture? A. Yes, sir.

Q. Do you remember whether Paramount distributed a

(1045)

picture about the Mississippi called "The River"? A. We did.

Q. Was that a high quality picture? A. Yes, that was a fine quality picture.

Q. Did you distribute a picture called "The City That Stopped Hitler"? A. We did.

Q. Who was that produced by? A. I think it was produced by the Russian Government.

Q. That was a picture about Stalingrad? A. Yes.

Q. Now, in the average large size community, where there are some theatres operated on a first-run policy and other theatres operated on various subsequent runs, do you consider that all those theatres are, to a degree, in competition with each other? A. I do.

Q. Why do you think so? A. Well, they are all in competition with each other because they are showing the pictures and the customers go to one or the other. They may go to a theatre that charges 75 cents—first-run theatre—one time, next time they may go to the second-run that charges 50 cents; another time may go to a one that is a subsequent-run, that charges 35.

Q. They have their choice among the theatres and the admission prices and the pictures? A. That they want to pay, to see them at.

Q. From your observation and experience is there any

(1046)

separate group of the population which is a definite first-run market and only sees pictures first-run? A. No, sir, I don't think there is.

Q. Any member of the public sometimes goes to first-run, sometimes later runs, and so on? A. I think that is so.

Q. Does Paramount sometimes license its pictures on what is called a move-over run? A. We do.

Q. What is a move-over run? A. A move-over run is a run where the engagement is started in one theatre and then moved to another theatre at which the same admission price is charged.

Judge Bright: Another theatre of the same owner?

The Witness: Yes, sir, the same owner, always the same owner.

Q. Why is that? A. Well, because the man who buys the picture first-run does not want to share that first-run engagement with somebody else. He wants it for himself. And the reason for the move-over is because he may play the picture first in a big theatre where the overhead is very high and then, as the gross begins to go down, he moves it to another theatre where the overhead is lower and completes the engagement there.

(1047)

Q. You said "always the same owner." I suppose that was another way of saying "same operator"? A. Yes.

Q. Two theatres may possibly be in different ownership but operated by the same hands? A. Yes.

Q. Does Paramount have any policy that it will only grant a move-over to a theatre in which it has an interest? A. No, we sell move-overs wherever we think it is to our advantage to do so and where it will improve our film rental.

Q. Are some of those move-overs licensed to independent exhibitors? A. They are.

Q. And are they sometimes licensed to exhibitors in which a defendant has an interest? A. Yes, sir.

Q. And are they sometimes granted to a theatre in which Paramount has an interest? A. Yes, sir.

Q. It has nothing to do with it; the question of whether a move-over is granted is unaffected by precisely who owns the theatre as long as the second theatre is operated by the same person or interests as the first theatre, is that right? A. That is, as long as the admission price is the same.

Judge Bright: Does the move-over have to occur in the same time period as mentioned in the original

license or is there additional time given for that purpose?

The Witness: You could really call it an extended
(1048) run except it is moved from one theatre to another because of the difference of the overhead in the second theatre.

Judge Bright: I don't mean that. You license A for a first-run on a picture in a particularly named theatre?

The Witness: Yes, sir.

Judge Bright: You permit a move-over, however. Has he got to move it over within the period of time that he is permitted to exhibit under that license or is additional time given to him?

The Witness: In the original instance we may sell a picture for its engagement in one theatre for, let us say, 14 days. The business is good. He wants to move it over to the other theatre for a continued run. We agree to do that.

Judge Bright: After the 14 days?

The Witness: Immediately following the 14 days.

Judge Bright: What effect does that have on the clearance as against a second-run?

The Witness: There are some instances where the clearance applies after the completion of the original engagement in the first theatre. There are some instances where it applies after the completion of the
(1049) engagement in the move-over.

Judge Bright: When is it determined that he may move over?

The Witness: When?

Judge Bright: When is this additional time given to him by which he may take advantage of this move-over?

The Witness: He may do it on any picture that the business justifies.

Judge Bright: During the period of operation of the first showing? What I am getting at is, what effect does it have on the second man, does it just postpone his opportunity to exhibit?

The Witness: It may postpone it. In some instances the clearance starts from the completion of the move-over; in others, it starts from the completion of the original engagement.

Judge Bright: When is that determined?

The Witness: Determined at the time the contract is made.

Q. And the subsequent-run exhibitor, who knows what clearance he is subjected to from the other theatres, knows that the picture may be moved over? A. Depending upon its box office success or appeal.

Q. And the move-over feature—the theatres operating on a move-over policy in a particular community are well known in the trade, are they not? A. They are established, yes, (1050) sir, they are established.

Q. So it is no surprise to the subsequent-run exhibitor when the first-run exhibitor, having a right of move-over, actually exercises that right? A. No, he knows that picture will be moved over whenever it has sufficient box office strength to justify the move-over.

Judge Bright: Does that apply only to first-run theatres?

The Witness: Yes, we have move-overs only in first-run theatres.

Judge Hand: Do you have simultaneous exhibitions of first-runs in different regions?

The Witness: Well, we have simultaneous engagements, for instance, in Los Angeles. We have our pictures play simultaneously between the Paramount Los Angeles and the Paramount Hollywood.

Judge Hand: At the same time, I suppose, they are exhibited in the East?

The Witness: It may be at the same time, it may be earlier or later, depending upon how pictures become available for booking and for how long they run.

Judge Hand: So "first-run" is really a relative term that relates to regional exhibitions?

The Witness: The first exhibition in each city,

(1051)

that is the first-run.

Judge Hand: Yes.

Q. There is a difference between, or there may be a difference between, an extended run and a move-over, isn't that so, Mr. Reagan? A. An extended run is where you sell a picture, let us say, for seven days in a theatre, the business is good, and the exhibitor decides to play it for 14 days. That is an extended run.

Q. But that is played in the same theatre? A. Played in the same theatre.

Judge Bright: There the same question arises again, what effect does that have on the next fellow, second-run, on the subject of clearance? He buys his picture to have 14 days clearance?

The Witness: He buys the picture following the completion of the first-run showing.

Judge Bright: Can he go on 14 days after the completion of the first-run showing or after the end of the extended term?

The Witness: No, after the completion of the first-run showing, although there are cases where because

—no, I don't think there are any extended run engagements. I was going to say that I think there are instances where the clearance starts—no, it couldn't be with an extended run. It is after the completion
(1052)
of the engagement. In an extended run engagement clearance applies——

Judge Hand: After completion. Clearance applies at the end of the extension; it begins to run at the end of the extended run?

The Witness: Yes, it begins to run.

Q. Does the subsequent-run exhibitor, who knows what clearance he is subjected to and negotiates his film rental with the distributor with that knowledge, also know that his clearance may start at the end of an extended run? A. He does.

Judge Bright: Suppose he has booked that picture?

The Witness: He could not book it until after he receives a notice of availability and a notice of availability cannot be sent out until they know when the engagement will be completed in its first-run showing.
(1053)

Q. Isn't it the fact that every exhibitor is desirous of extending the run of the picture on which he is doing good business? A. Yes, of course, the longer a picture runs, whether it is first-run or irrespective of the run, the better result he will get.

Q. And that would apply to the subsequent run exhibitor? A. Any run.

Judge Bright: Can a subsequent run exhibitor run longer?

The Witness: Yes, you can sell a subsequent run exhibitor—you may sell him three or four days, five

or six or seven. He will run the picture for whatever length of time business justifies.

Mr. Seymour: I have to emulate my distinguished friend, Mr. Davis, and take you on a short national tour. I won't take you as far as he did.

Mr. Davis: I did not catch the result in which I was being so flattered.

Mr. Seymour: I said I was not going to take the Court on quite as extended a tour as you did.

Judge Bright: He wants to retill your soil.

Mr. Seymour: I am going to plow only the north forty, though.

Mr. Davis: There is no copyright on mine, Mr. Seymour.

Q. I want to inquire, Mr. Reagan, about the 92 cities (1054) with populations of over 100,000, and I will first eliminate 48 of them. Is it the fact that in 48 of those cities Paramount licenses Paramount pictures first-run to theatres in which Paramount has an interest? A. Yes, sir, that is correct.

Q. And do you consider that those theatres are the best or comparable to the best theatres in those cities? A. They are certainly the best from our standpoint.

Q. Are there any of Loew's theatres in those cities? A. Yes, sir.

Mr. Seymour: There seems to be some difference of view about the respective qualities.

Just for the record, I am going to read into the record the names of the cities which will be excluded from our tour because theatres in which Paramount has an interest are the theatres which Paramount licenses first-run there:

Atlanta, Ga.
Birmingham, Ala.
Boston, Mass.
Buffalo, N. Y.
Cambridge, Mass.
Charlotte, N. C.
Chattanooga, Tenn.
Chicago, Ill.
Dallas, Texas
Des Moines, Iowa
Detroit, Mich.
Duluth, Minn.

(1055)

Flint, Mich.
Fort Worth, Texas
Gary, Indiana
Grand Rapids, Mich.
Hartford, Conn.
Houston, Texas
Jacksonville, Fla.
Kansas City, Mo.
Knoxville, Tenn.
Los Angeles, Cal.
Lowell, Mass.
Memphis, Tenn.
Miami, Florida
Minneapolis, Minn.
Newark, N. J.
New Bedford, Mass.
New Haven, Conn.
New Orleans, La.
New York, N. Y.
Oklahoma City, Okla.
Omaha, Nebraska
Paterson, N. J.
Peoria, Ill.
Rochester, N. Y.
St. Paul, Minn.
Salt Lake City, Utah
San Antonio, Texas
San Francisco, Cal.
Scranton, Pa.
Somerville, Mass.
South Bend, Ind.
Springfield, Mass.
Tampa, Fla.
Toledo, Ohio
Worcester, Mass.
Yonkers, N. Y.

Q. In the remaining 44 cities out of the 92 having a population of over a hundred thousand, in some of those cities the theatre which licenses the first-run of Paramount pictures is a theatre in which one of the defendants other than Paramount is interested, is that correct? A. Yes, sir.

Q. And in some of those cities the theatre is independently operated, is that correct? A. Yes, sir.

Q. I am going to take you through those cities. Are you generally familiar with the first-run accounts, Paramount first-run accounts, in those cities? A. I am.

Q. Starting with Akron, Ohio, will you tell us who the first-run customer is and why that customer was selected? A. Well, in the case of Akron, we presently split our product between Loew's and Harry Katz. Until a few years ago we sold all our pictures to Loew. We weren't satisfied with the playing time that we were able to get for our pictures, as a (1056)

result of which we took half the product away from Loew's and sold it to Harry Katz. I believe at present that by splitting our pictures between Loew's and Harry Katz, which is the Loew Theatre and the Palace Theatre, it is the best outlet for Paramount pictures in Akron, Ohio.

Q. Is Katz an independent operator? A. Yes, sir, he is.

Q. Who is your first-run customer or customers in Albany, New York? A. In Albany we split our product between the Palace Theatre, which is operated by Fabian, and the Strand Theatre, which is operated by Warner. We would prefer to sell all our pictures to Fabian because he has the biggest theatre. We couldn't do that, though, so we did the next best thing, we sell half of them to Fabian and the other half to Warner, who has the second best theatre.

Q. Does it sometimes happen that a customer is only able to buy half your product because of other circumstances? A. That is the instance here.

Q. How about Baltimore, Maryland? A. In Baltimore, Maryland, we divide our product between the Stanley Theatre, which is operated by Warner Bros., and Keith's Theatre, which is operated by Mr. Schanberger.

Q. Is Schanberger an independent operator? A. He is. (1057)

Q. Will you tell us why the product is divided there? A. Because in the case of Baltimore I believe we get the best results for Paramount pictures by splitting our product between the Stanley and the Keith theatres.

Q. Bridgeport, Connecticut. A. In Bridgeport, Connecticut, we sell our product to Warner Bros. and they play Paramount pictures on a day and date basis between the Warner and Merritt theatres. "Day and date" means that they play at the same time in each theatre.

Q. Camden, New Jersey? A. In Camden, New Jersey, we sell our pictures to Warner Bros. there. They have the most desirable theatre in town, the largest.

Q. Canton, Ohio. A. In Canton, Ohio, we sell our pictures to Loew. There again Loew's have the biggest theatre and a theatre that, I believe, can gross the most money for Paramount Pictures. Therefore we do business with them.

Q. Cincinnati, Ohio. A. Cincinnati, Ohio, we at present sell our pictures first-run to RKO, who operate the Palace, the Albee, Capitol, Lyric, the Shubert, Keith, the Family and the Grand theatres.

We previously sold our pictures in Cincinnati to a gentleman by the name of Libson, who was an independent exhibitor. A number of years ago he made a deal with RKO for an interest in the theatres and continued to operate (1058)
them for them. During all that time we have done business with the same theatres, first when he operated them as an independent, secondly when he operated them for RKO.

Q. Columbus, Ohio. A. In Columbus, Ohio, we sell our pictures to Loew's there in their State, Stillman and Ohio theatres. These theatres were previously—wait, I am wrong. In Columbus, Ohio, the names of the theatres are the Ohio and the Broad. Those theatres were formerly operated by a gentleman by the name of Billy James, an independent exhibitor, and we did business with him until such time as he disposed of his theatres to Loew's and then we continued to sell our pictures to Loew's in the same theatres in which they had been exhibited prior to the time they took over their operation.

Q. Will you give us the next city on your list? A. You skipped Cleveland. In Cleveland we sell our pictures to Loew's, who operate the State, Stillman and Ohio theatres. The reason for selling Loew's there is because they have the biggest theatre in town, the State; they have two very fine theatres in the Stillman and the Ohio. We feel we get fine representation for Paramount pictures in those theatres.

Q. Denver, Colorado. A. No, the next is Dayton.

Q. Dayton, I am sorry. A. In Dayton we sell our pic-
(1059)
tures to RKO, who operate the Keith, Colonial, and State theatres. These theatres were also operated by Mr. Libson prior to the time of the sale of his interest to RKO, and when they were operated by him we did business with him, and when he sold his interest to RKO and operated for them, we continued to do business with him for the RKO interests.

Q. Denver, Colorado. A. In Denver, Colorado, we do business with the Denham theatre.

Q. Is the Denham an independently operated theatre? A. That is an independently operated theatre, operated by a gentleman who in my opinion is one of the best showmen in America.

Q. Are there theatres in which other defendants have an interest? A. There are.

Q. Which exhibit first-run in Denver? A. There are.

Q. Why do you sell or license your product first-run to the Denham? A. Well, originally Paramount operated the Denver and the Paramount theatres in Denver. During our bankruptcy we lost those theatres. Their operation was taken over by a gentleman who was operating one of the other theatres there at the time, the Aladdin. The terms he offered us for our pictures were such that we were unwilling to accept them. The Denham Theatre was then operating on a legitimate policy. Mr. Cochrell, who is the exhibitor

(1060)

presently operating it, went in and took it over. We started to do business with him and we have done business ever since, and he is one of the most satisfactory accounts we have, in addition to which the revenue that we earn from that theatre is very fine.

Q. That is not the largest theatre in Denver? A. It is not the largest theatre but in my opinion, by a wide margin, is the best operated, in addition to which we get longer runs there than we would get or we could get if we played our pictures in the other theatres, and by virtue of the longer run we get as much film rental as——

Q. That is an example of what you stated this morning where you might take a smaller theatre but because of the showmanship and skill of the operator, you believe it would be a better account for you, is that right? A. That is it.

Q. How about Elizabeth, New Jersey. A. In Elizabeth, New Jersey, we sell our pictures to Warner and Skouras.

Q. Erie, Pennsylvania. A. In Erie, Pennsylvania, we sell to Warner Bros. They have the biggest theatre there, the best.

Q. Fall River, Massachusetts. A. In Fall River, Massachusetts, we sell Yamins.

Q. Is he an independent operator? A. He is an independent exhibitor, yes.

(1061)

Q. For Wayne, Indiana. A. In Fort Wayne, Indiana, we sell our pictures to the Harrison Theatre and Realty Company. They operate all of the first-run theatres in the town with the exception of one, a very small one, which has a seating capacity of 575.

Q. That operator is an independent exhibitor? A. That is correct.

Q. Indianapolis. A. In Indianapolis, we sell our pictures to the Greater Indianapolis Theatres, which is an in-

dependent operation, operating the Circle and the Indiana and Lyric theatres. The Indiana is the largest theatre in town, the Circle is next to the largest; the Lyric is a Move-over house.

Q. The defendant Loew has a theatre there, first-run theatre, has it not? A. Yes, sir.

Mr. Davis: Best theatre in town?

The Witness: I don't think so.

Q. But you sold the independent competitor of Loew's? A. I sold these theatres in Indianapolis before Loew came in to the town, and have continued to sell them since.

Q. The Lyric, which is one of the theatres that you license there, is an independently operated move-over house, is it not? A. That is correct.

Q. And that is an example of your licensing for move-over to independent exhibitors? A. We license move-overs (1062)
to anyone.

Q. Jersey City. A. In Jersey City, we divide our pictures between Warner Bros. theatre, the Stanley, and Skouras, who operates the State. The Stanley is the largest theatre in town by about a thousand seats. The State is the fourth largest.

Q. Kansas City, Kansas. A. In Kansas City, Kansas, we sell our pictures—license our pictures to the Electric Theatre, which is an independently operated theatre and the largest in Kansas City, Kansas.

Mr. Caskey: May I interrupt there just a moment. The Electric is the theatre that Mr. Rodgers testified about as possibly having some connection with the National subsidiary in Kansas City, Kansas. You know it to be independently operated?

The Witness: It is operated by the Rubel interests, and a gentleman by the name of Baker operates

it, been operating it for a number of years. It has no connection with National Theatres at all.

Q. Does the defendant Twentieth Century-Fox have an interest in a theatre in that city? A. They have an interest and operate the Granada Theatre in the same city.

Q. But you license the Electric? A. Yes.

Q. Long Beach, California. A. In Long Beach, California we license our pictures to the Fox Westcoast, who (1063)

operate the West Coast, United Artists, Imperial and Long Beach. The two best theatres in town are the West Coast and the United Artists. That is where we try to play all our pictures that we can.

Q. Louisville, Kentucky. A. Louisville, Kentucky, we license pictures to the Rialto and Strand Theatres, which are operated by the Fourth Avenue Amusement Company, an independent exhibitor.

Q. Does the defendant Loew have a theatre in Louisville? A. Yes, sir, they do.

Q. But you license to the independent? A. I do, because I am sure in the case of Louisville that the Fourth Avenue Amusement Company, on the Rialto Theatre, gross more money than Loew's does, and I get more film rental out of it.

Q. Milwaukee, Wisconsin. A. In Milwaukee we are presently licensing our pictures between the Wisconsin, the Palace and the Strand theatres, all of which are operated by Fox-Wisconsin Amusement Enterprises. Prior to the time that the Palace was leased to the Fox-Wisconsin Amusement Corporation, we licensed our pictures in the Palace, which was then operated by an independent exhibitor.

Q. Nashville, Tennessee. A. In Nashville, Tennessee, we license our pictures in the Paramount and Princess Theatres, (1064)

which are the two largest in town, operated by the Crescent Amusement Company.

Q. Is that an independent operator? A. That is.

Q. Does the defendant Loew's have a theatre there? A. They do have.

Q. Norfolk, Virginia. A. In Norfolk, Virginia, we license our pictures to Fabian Theatres. Used to be operated by Wilmer & Vincent. We licensed to Wilmer & Vincent when they were operating them, and when Fabian took them over we continued to do business with them. That is the Norva and Granby Theatres.

Q. The defendant Loew's has a theatre there? A. They have, that is correct.

Q. You license the independent. A. We do and have been for as long as I know.

Q. Oakland, California. A. In Oakland, California, we license our pictures to Fox Westcoast. They operate the Fox, which is by far the finest theatre in the city of Oakland. As a matter of fact, it is one of the finest theatres in the United States. They also operate the Paramount, which is the next best theatre in town. They operate the Orpheum and they operate the Grand Lake. We license our pictures in Oakland to Fox Westcoast because they operate the best theatres in town and the biggest theatres in town, and I am sure also we get a better film rental return from them than if we sold them to anyone else.

(1065)

Q. Could you tell by your general familiarity with conditions there, knowing these theatres that you do license first-run, that the Blumenfeld theatres would not be able to pay as good revenue, without negotiating with Blumenfeld? A. You bet I could.

Q. How could you tell that? A. Well, the Fox Theatre seats 3,300 people; the Paramount seats 3,400 people; the Orpheum seats 2,500 people, and the Grand Lake seats 2,200 people. The theatres operated by Blumenfeld seat 1,075, 1,300 and 2,800.

There are no finer theatres in America than the Fox and Paramount theatres in Oakland. They are magnificent buildings, magnificently built and constructed and Blumenfeld's theatres cannot compete by way of gross with either the Fox or the Paramount, I am sure.

Q. Philadelphia. A. In Philadelphia we license our pictures to Warner Bros., who operate the Aldine, the Boyd, the Capitol, the Earle, the Fox, the Mastbaum, the Stanton and the Stanley.

Q. Pittsburgh. A. In Pittsburgh we license our pictures to Warner Bros.—we split between Warner Bros. and Loew's. Part of them play the Warner Bros. Stanley, Warner or Ritz theatres.

Q. Portland, Oregon? A. In Portland, Oregon, we license
(1066)
our pictures to the Hamrick-Evergreen Circuit who operate the Paramount, Orpheum, Oriental, Playhouse and Music Box theatres. Prior to the time that Paramount was leased to Hamrick-Evergreen, we sold our pictures to this theatre when it was operated as a Paramount theatre by one of the Paramount affiliates or subsidiaries. We lost it in the bankruptcy and we have been doing business since that time with Hamrick.

Q. Providence, Rhode Island? A. We sell our pictures in Providence to the Strand Theatre, which is operated by a gentleman by the name of Silverman. We have been doing business with Mr. Silverman for, well, ever since he has had the theatre, 20 years or more.

Q. Is he an independent exhibitor? A. He is.

Q. Does the defendant Loew have a theatre in Providence? A. They do.

Q. Does the defendant RKO have a theatre in Providence. A. They do.

Q. Reading, Pa. A. In Reading, Pa. we sell—license our pictures to Fabian, that is, in the Embassy and Ritz Theatres.

these theatres were formerly operated by Wilmer & Vincent, an independent exhibitor, or exhibitors, and when they were operated by them we also licensed our pictures to those houses.

Q. Is Fabian an independent? A. He is.

(1067)

Q. Does the defendant Warner Bros. have a theatre there? A. They do.

Q. Does Loew's have a theatre there? A. They do.

Q. Richmond, Virginia. A. In Richmond, Virginia, we license our pictures to the National and Colonial Theatres which are operated by Fabian Theatres, previously having been operated by Wilmer & Vincent. We licensed our pictures to Wilmer & Vincent when they operated the houses and have continued that since Fabian took them over.

Q. Does the defendant Loew have any theatre there? A. They do have.

Q. St. Louis, Missouri. A. In St. Louis we license our pictures to Fanchon & Marco. They operate the Ambassador, the Fox, Missouri, the St. Louis and the Shubert theatres.

Q. Is Fanchon & Marco an independent? A. They are.

Q. Does the defendant Loew have theatres in St. Louis? A. They do have.

Q. First-run theatres? A. They do have.

Q. Sacramento, California. A. In Sacramento we license our pictures to Fox West Coast, who operate the Senator, the Alhambra and the Capitol theatres, best theatres in town.

Q. San Diego. A. In San Diego we license our pictures to Fox West Coast, who operate the Fox, the State, the

(1068)

California, the Adams, the Orpheum and the Mission.

Q. Seattle. A. In Seattle we license our pictures to Evergreen Theatres Corporation, who operate the Fifth Avenue, the Paramount, the Music Hall, Orpheum, the Blue Mouse and the Music Box.

Q. Evergreen is a company in which Fox has some interest? A. They do have, yes.

Q. Spokane. A. Spokane, we license our pictures in Spokane to Evergreen Theatres Corporation also. They operate the Fox, Orpheum and the State theatres.

Q. Syracuse. A. In Syracuse we license our pictures to RKO, who operate the Paramount, the Eckel and the Empire.

Q. Tacoma, Washington. A. In Tacoma we license our pictures to Mrs. H. T. Moore and Mr. J. Ousley, who operate the Rialto Theatre.

Q. Are they independent? A. They are independent, yes. We used to sell Mr. Moore before he died and since his death we have continued to sell his widow.

Q. Trenton, New Jersey. A. In Trenton we license our pictures to RKO, who operate the Lincoln, Capitol, State, Trent and Palace.

Q. Tulsa. A. In Tulsa we license our pictures to Ralph Talbot, who operates the Ritz, the Orpheum, Majestic and Rialto theatres.

(1069)

Q. Utica. A. In Utica we license our pictures to Warner Bros., who operate the Stanley and the Avon theatres.

Q. In Washington, D. C. A. In Washington, D. C. we divide our pictures between Warner's and Loew's.

Q. Wichita, Kansas. A. In Wichita we license our pictures to Fox Midwest, who operate the Miller, the Orpheum, the Palace, the Wichita, the Sandra and Boulevard.

Q. Wilmington, Delaware. A. We license our pictures to Warner Bros. in Wilmington, who operate the Queen, the Warner and the Grand Opera House.

Q. Youngstown, Ohio. A. In Youngstown we license our pictures to the Palace Theatre. It is operated by Mr. Ed Printzsen.

Q. Is he an independent operator? A. He is.

Q. Is there a Warner Theatre in Youngstown? A. Yes, sir, there is.

Q. Speaking generally, do you consider these first-run customers that you have mentioned to have the best theatres or theatres comparable with the best in the several cities involved? A. I do.

Q. And do you consider them in each case the best outlet for Paramount pictures first-run? A. Yes, sir, I do.

Q. Is your choice of which outlet to license first-run determined or influenced by the question of whether any
(1070)
defendant in this case has an interest in it? A. Has nothing to do with it.

Q. In all these cities are there also a number of other theatres in addition to the first-run theatres? A. Yes, there are.

Q. And are all the theatres in the town in competition, or in the city in competition? A. They are.

Q. And in most of these cities are there other first-run theatres which are in competition with the theatres showing Paramount pictures first-run? A. There are.

Q. Dealing with the theatres in cities with populations under 100,000, would you say generally that the theatre selected by Paramount for exhibition first-run was considered by it to be the best outlet for Paramount pictures? A. I would.

Q. And generally would you say that that theatre was the best theatre or comparable with the best in that city? A. Well, it is either the best or comparable with the best or the best that we could do.

Q. In any of those cities of any size, leaving aside theatres in which Paramount itself had an interest, was the theatre selected as the first-run outlet because any defendant had any interest in it? A. No, sir, they were not.

Judge Goddard: In any theatre owned by Para-
(1071)
mount, average theatre in a large city, how many pictures are used a year?

The Witness: In a theatre owned by Paramount?

Judge Goddard: Yes; take any one of the large cities, what is the average number of pictures?

The Witness: Well, it may run—it depends on the size of the city.

Judge Goddard: Take Oakland, California, which you have just been describing, those are——

The Witness: Those are operated by Fox West Coast.

Judge Goddard: Take a city where Paramount operates.

The Witness: Say Detroit?

Judge Goddard: All right.

The Witness: The United Artists theatre there is operated by——

Judge Goddard: No, in a theatre, how many pictures do you run in a year?

The Witness: In one theatre?

Judge Goddard: In one theatre.

The Witness: In the Michigan Theatre I should say 40 pictures.

Judge Goddard: 40 pictures, and of those 40 how many are made by Paramount?

The Witness: Probably 20.

(1072)

Judge Goddard: Who produces the others, any one company or, if not one company, how do you select the pictures?

The Witness: I don't know how they select the pictures that are used outside of our own. That I have nothing to do with.

Mr. Seymour: I will have a witness, Judge Goddard.

Judge Goddard: You see what I am getting at?

Mr. Seymour: I will have a witness who can answer that question, yes.

Judge Bright: Are these 92 cities about which you have just been talking the same 92 that the Government picked out?

Mr. Seymour: Yes, they are just selected on the basis of population.

Judge Bright: Your tabulation does not agree with the Government's, does it, on any particular theatres in which you play Paramount pictures?

Mr. Seymour: I think so, because what the Government did was to take 73 cities out of the 92.

Judge Bright: I have been watching this tabulation in the Government's brief and it does not check at all with some of this testimony.

Mr. Seymour: Well, I have not compared it precisely. We were on the same 92 cities but the Government has limited itself to 73 selected cities. Some (1073) of my cities, obviously, are not in the Government tabulation because they aren't within the tabulation.

Judge Bright: Some of the cities which you mentioned, which are in the Government's tabulation, do not show the same outlets for Paramount pictures first-run.

Mr. Seymour: I am sorry to say I have not compared them but I will.

Judge Bright: I have been watching it as we go along. There were a number of instances where I found there was a difference.

Mr. Semour: My own preference as to who is probably right about it is the man who is in charge of distributing.

Judge Bright: I didn't ask you that.

Mr. Seymour: No. I will make a check. I haven't followed it, I am sorry to say. I was examining from a different list and I haven't personally checked the

two, but if we can throw any light on corrections, we would like to do it, as I am sure Mr. Wright would like to do.

Judge Bright: I was wondering whether you were giving your testimony as of a different date. The Government is the 1943-44 season. I did not know whether you were questioning at the same season.

Mr. Seymour: My own is current but the information ought not to differ.

(1074)

Mr. Davis: I should like to ask whether I am mistaken in thinking that Government tabulation contained in their trial brief has never yet been offered in evidence in this case.

Judge Bright: I just referred to it. I read it like I did the other.

Mr. Wright: If the Court please, the tabulation is merely a summary of the data contained in the admissions of fact which are in evidence and which each of these defendants undertook to state. It is first-run outlets for the 1943-44 season. That material is in evidence. I think that your Honor may be confused by the fact that the outlet here in the tabulation merely shows the name of the distributor who is affiliated with the particular exhibitor who has the first-run account. There may be a different name for the exhibitor.

Judge Bright: In some——

Mr. Wright: Which would not appear here.

Judge Bright: In some instances you put down one of the defendants when this gentleman testifies that his outlet is an independent theatre.

Mr. Wright: Could you——

Judge Bright: I did not mark it, but there were half a dozen at least.

Mr. Wright: They should be the same except in
(1075) so far as a change may have been made as of now and the 1943-44 season.

Mr. Davis: I think we are prepared to say, if the Court please, that even if there is no conflict, and there is some conflict between the testimony and the summary, the testimony itself amplified and added to the summary. Your Honors may recall that in opening the case I called attention to the statement about New York in that summary, which said the Loew's in New York divided their product between themselves, Paramount and an independent, and I pointed out what has since been shown by testimony, that the so-called allocation to Paramount consisted of one single film sold during a period of some ten years, and I argued then, and we shall at a later time argue again, that the Government's summary is both inaccurate and, by reason of its generality, misleading.

Mr. Seymour: Now, Mr. Wright, in order to give you an opportunity to cross-examine Mr. Reagan while his testimony is fresh in your mind, I suggest that we stipulate as we did yesterday, that if I put to Mr. Reagan the questions negativing conspiracy, which I did put to Mr. Zu or yesterday, he would answer in the negative and that that stipulation shall have the same force and effect as if he so testified.

Mr. Wright: Entirely agreeable.

Mr. Seymour: You may examine.

(1076)

Mr. Caskey: I have a few questions.

Mr. Seymour: Oh, wait a minute, Mr. Caskey wants to examine first.

Cross-Examination by Mr. Caskey:

Q. Mr. Reagan, are you familiar with Kansas City, Missouri? A. Yes, sir.

Q. Theatres in Kansas City, Missouri? A. Yes, sir, I am.

Q. Your first-run is licensed to which theatre? A. Paramount's first-run?

Q. Yes. A. To the Newman Theatre.

Q. That is operated by whom? A. Paramount.

Q. Second-run is licensed to whom? A. I don't recall the name of the theatre.

Q. The Plaza Theatre? A. Yes; that is correct.

Q. Do you know the Plaza Theatre? A. Yes, sir.

Q. What kind of a theatre is it? A. It is a fine theatre in the neighborhood section of Kansas City, the Plaza section.

Q. And adjacent to a large number of private residence and apartment houses? A. That is correct.

Q. Now, you recently produced a picture entitled "Going My Way", did you not? A. Yes, sir.

Q. And you played it first-run at the Newman Theatre? A. Yes, sir.

Q. When did the operator of the Plaza Theatre know (1077)

when it could play that picture? A. After it had completed its engagement at the Newman Theatre.

Q. The picture played a week at the Newman Theatre. When was it decided to play it for a second week? A. When?

Q. Yes. A. Well, when that picture started to play at the Newman Theatre they knew they were going to play it for more than one week.

Q. All right. But what I am getting at is, is it not a fact that in a theatre like the Newman the decision to extend the run is made each week, depending upon the success of the picture? A. Depending upon the gross that the picture does.

Q. And a picture may run two weeks, three weeks, four weeks, or five weeks, or, in the case of "Going My Way" six weeks; is that right? A. That is correct.

Q. And until it has completed its engagement its availability to the second-run theatre cannot be determined? A. That is correct.

Q. And that is true whether the second run operator is a subsidiary of National Theatres or is an individual? A. That is correct.

Q. It is no different in Kansas City than any place else? A. No, sir.

Q. Now, do you consider that the Plaza Theatre is in (1078)

competition with the Newman Theatre? A. Yes, sir.

Q. It is a fact, is it not, that a great many people went to the Plaza Theatre to see "Going My Way"? A. Yes, sir.

Q. Even though you had exhorted them to come downtown to the Newman Theatre to see it there? A. That is right.

Q. Now, I want to ask you a question about the exploitation of pictures in connection with the testimony you gave as to selling pictures to the highest bidder. Are you familiar with the Fifth Avenue Theatre in Seattle? A. Yes, sir, I am.

Q. What kind of a theatre is it? A. It is a fine theatre, well located.

Q. How is it operated? A. Well operated.

Q. Do you know the Fox Theatre in Spokane? A. I do.

Q. What kind of a theatre is that? A. A fine theatre.

Q. How is it operated? A. Well operated.

Q. They are both operated by subsidiaries of Evergreen? A. That is correct.

Q. And those are the two largest theatres in the State of Washington, are they not? A. That is correct.

Q. Now, tell the Court what effect, if any, the exploitation, advertising and handling of your pictures in those two

theatres have upon your revenue from the picture from your other accounts in the State of Washington? A. Well, (1079)

it enhances our revenue or improves our revenue any time we can play a picture in the Fifth Avenue Theatres in Seattle and the Fox Theatre in Spokane, because if the picture can play in those houses it has established the picture in the surrounding territory.

Q. And it is of benefit to you to play "Duffy's Tavern" in the Fifth Avenue Theatre in the revenue that you will receive from Wenatchee? A. That is correct.

Q. Now, I asked Mr. Rodgers yesterday a series of questions regarding this theory of cross conditioning of licenses, and I should like to shorten it as much as I can, but I want to ask you the question: With whom do you deal——

Mr. Wright: I will stipulate that he will give the same answers.

Mr. Caskey: You will stipulate that if the same questions were put to Mr. Reagan in regard to the licensing of Paramount pictures and the fact of non-conditioning, he would testify in similar manner?

Mr. Wright: Yes.

Q: That is true, is it not, Mr. Reagan?

Judge Bright: What is true?

Mr. Caskey: That there is no conditioning one on the other?

A. There is not, no, sir.

Mr. Caskey: I accept the stipulation.

Mr. Proskauer: Can't we have it understood that (1080)

that answer of Mr. Reagan applies to all the co-defendants?

You did not condition your licensing of pictures to any defendant on whether they licensed to you?

The Witness: We did not, no, sir.

Mr. Caskey: One other question, Mr. Reagan.

By Mr. Caskey:

Q. Do you know what the clearance between the Newman Theatre and the Plaza Theatre in Kansas City is? A. I believe it is 28 days, although I am not certain.

Mr. Caskey: That is all.

Mr. Seymour: Anybody else?

(No response.)

Mr. Seymour: Mr. Wright, the witness is yours.

Cross-Examination by Mr. Wright:

Q. You are familiar, are you, Mr. Reagan, with the agreement that has been put in evidence here as Government's Exhibit 243, an exchange of letters between Mr. Moskowitz and yourself regarding the terms under which Paramount pictures were played in the Loew Metropolitan Circuit here? A. No, sir, I am not.

Q. You had better take a look at it (handing exhibit to witness). A. Yes?

Q. Now, this series of documents that have been marked as 243 have been identified as the agreement under which your 1943-1944 pictures were exhibited in the Loew New (1081)
York Circuit. That is correct, isn't it? A. Yes, sir.

Q. Now, I shall call your attention to the date—or I will ask you to read it to the Court so they can understand what the agreement says there, calling the date to their attention. A. It is dated May 17, 1945. (Reading):

"The following confirms the settlement agreed upon between us.

"For the Circuit"—

Mr. Seymour: What kind of procedure is this, Mr. Wright? If you have got a document that you want to offer, offer it.

Mr. Wright: The document is in evidence. I propose to examine him on it.

Mr. Davis: What is the document, Mr. Wright?

Mr. Wright: Exhibit 243 in evidence.

Mr. Seymour: And I think it might be easier for you to read it.

Q. Go ahead, Mr. Reagan. A. (Continuing reading):

"Season 1940-1941, as per contracts in existence with the three lowest grossing pictures on the long-half as the reversion pictures.

"Seasons 1941-1942, 1942-1943 and 1943-1944, the long-half film rentals are settled on the following formula:

(1082)

"Combination of two pictures starting at 30% for the two pictures and graduating up allowing the Exhibitor 25% of the film rental as profit at all times until the Distributor has 40% of the gross as film rental, the balance of the gross divided 50% to the Distributor and 50% to the Exhibitor.

Where the second feature is that of another Distributor, the same method was used and then the actual cost of the second feature deducted from the total film rental, except for TWO YANKS IN TRINIDAD, SINTOWN, BEAUTIFUL BUT BROKE, where the costs used are amounts agreed upon between us, the balance being Paramount film rental.

Where Screeno and Vaudeville were involved, the costs of these items were deducted from the gross be-

fore computing the film rental. In the instances of Equal Billing Shows, these were computed as agreed upon and are shown on various schedules rendered.

In the instance of any 'B' picture played with some other company's 'A' picture, agreed film rental is $20,000, less $100.00 for the Century Theatre and

(1083)

$300.00 for the Ziegfeld Theatre, if played after these theatres were closed. 'C' Pictures—$8,000.00 except those played after the Century Theatre closed in which $50.00 was deducted for each picture.

State Theatre—Season 1940-1941, as per contract in existence. Seasons 1941-1942, 1942-1943 and 1943-1944 figured on the following basis: Twenty-five per cent of the receipts after deducting the actual cost of the stage show, stage hands and musicians until such time as the Exhibitor has 50% of the film rental as profit, the balance of the gross divided 50% to the Distributor and 50% to the Exhibitor. If, however, at 25% the Exhibitor does not get 50% of the film rental as profit, in that case it reverts down to a point where the Exhibitor has 50% of the film rental as profit, but in no event does the Distributor receive less than 20% as film rental.

Embassy Theatre—Season 1942-1943, at the agreed figure—$5,783.42.

Advertising—Reimbursement of $19,397.22 for extra advertising.

By the foregoing, settlement is made for all prior years to and including 1943-1944, it being understood however, that as to the years 1942-1943 and 1943-1944, the settlement is subject to your approval of the figures submitted for those two years.

(1084)

The summary sheet covering the four years is attached hereto.

Upon receipt of your confirmation of this letter, we will promptly forward check for the amount due you."

Judge Bright: What does all that mean?

Mr. Wright: That is what I want to examine the witness on.

Mr. Seymour: It obviously means a settlement of a controversy. I do not see what it has got to do with this case.

By Mr. Wright:

Q. The date of that letter is May 1945, is it not? A. Yes, sir.

Q. So that it was not until 1945 that you had reached any final determination with the Loew's organization as to the terms on which they had been playing your pictures in the Metropolitan Circuit, or for a four-year period, is that right? A. For the years mentioned, that is correct.

Q. And as to that 1943-1944 season, you had been continuously negotiating with them about the playing of those pictures in the circuit for how long?

Mr. Proskauer: Your Honor, I object to that question as incompetent, and for this reason: he imports into it the concept that there has been no prior agreement about playing pictures. If you will look at this

(1085)

correspondence, anybody looking at it will know that a controversy had arisen as to some prior agreements, and that they were settling the controversy; and yet these questions are framed in such a way as to give the impression to the Court that this was the first time they had ever agreed on anything.

Judge Hand: I will overrule your objection. Let him answer if he can.

Mr. Wright: Will you read the question?

(Question read.)

A. There had been a dispute with Loew about the terms under which they would play Paramount pictures. When I took over my present position——

Judge Goddard: Could you sit back and speak up so we can hear better?

The Witness: Pardon me.

A. (Continued) When I took over my present position in May of 1944, I found that the agreement had not been completed because the question of expense figures were involved, and the audit which our company was making of the expense figures submitted by Loew was not finished for a long period of time. I think it took them about a year and a half to complete the audit.

By Judge Hand:

Q. Whose pictures were being played? A. Paramount (1086)
pictures in the Loew houses.

Q. All right. They were played under some thing which purported to be a contract, were they not? A. For the season 1940-1941, a contract had been completed and agreed upon, and for the succeeding seasons I don't know—— I think in one instance a contract was signed but it was subject to a review after the audit was finished, or to final settlement; rather. This was a very involved situation in so far as I was concerned. I not only had to make the deal for the current season's product, but I had to settle the deals that were incomplete because of the prior seasons because the audit had not been finished.

By Mr. Wright:

Q. My question called your attention specifically, Mr. Reagan, to the 1943-1944 season. Now, it is the fact, is it not, that prior to the date of that letter there was no written agreement of any kind between you and Loew with respect to those 1943-1944 pictures? A. I can't answer that without checking my files, Mr. Wright.

Q. Well, I had previously asked you if that exhibit contained the agreement which was made with respect to those pictures. Now, are there any other documents or aren't there which are part of it? A. I do not believe there are.

Q. Well, then, the answer to my question, the previous question, is Yes, isn't it; there was no prior agreement in (1087) writing? A. For 1943-1944?

Q. Yes. A. I don't believe there was.

Q. And those pictures for the 1943-1944 season began to be released when? A. To Loew's probably about the first of 1944.

Q. I mean released generally, for general exhibition? A. In October of 1943.

Q. And then they were played here in New York as they were released by your Paramount Theatre first-run? A. Yes, sir.

Q. And then they were held up in so far as any further exhibition in New York was concerned during the time of these negotiations, isn't that correct? A. Yes, sir; we were negotiating continuously and we did not release the pictures to the succeeding runs during the period of our negotiations.

Q. So from the period of September, 1943, until May, 1943, none of your 1943-1944 releases were made available for exhibition to any subsequent-run exhibitor in the New York Metropolitan area, is that right? A. No, I do not think that is correct, Mr. Wright. You say from the period of

September, 1943, until March of 1945, none of the pictures were played in the Loew Theatres, or were they made available to any of the subsequent-run theatres?

Judge Hand: And then what? What is your argument?

(1088)

Mr. Wright: I am simply pointing out that without any written agreement at all the relationships between Paramount and Loew are such that the entire availability of pictures to other exhibitors in the area is entirely dependent on Loew's and Paramount's negotiations with each other, and that until such time as they see fit to get together a deal, the entire distribution of the films in the area is blocked, and is controlled by them.

Judge Hand: Are you claiming now that there was a particular conspiracy between Paramount and Loew that did not involve the other people?

Mr. Wright: Oh, if the Court please, in each particular——

Judge Hand: How can they tie up all the other people because of this kind of a pre-existing conspiracy?

Mr. Wright: I just wanted to show that it is implicit in the nature of the prior-run arrangement that they make with each other that where there is a delay of this kind, or one of them does not choose to exhibit the pictures in their theatres, they simply do not become available to competitors; that by their agreements they actively and effectively control the entire subsequent exhibition of the film in the area; and that that control is arbitrarily exercised.

Judge Hand: We will now adjourn until tomorrow morning at 10.30.

(Adjourned to October 25, 1945, at 10.30 a.m.)

(1089)

New York, October 25, 1945;
10.30 o'clock a. m.

Trial resumed.

CHARLES M. REAGAN, resumed the stand.

Cross Examination Continued by Mr. Wright:

Q. Mr. Reagan, you testified yesterday with reference to this Loew agreement marked in evidence as Exhibit 243. After that agreement was signed, then the 1943-44 pictures began to play in the Loew or Metropolitan Circuit here? A. No, sir. What is the date of the agreement?

Q. May 17, 1945. A. The 1943-44 season's pictures, the play-off was completed in February of 1945.

Q. When did the play-off of the 1943-44 pictures begin? A. I cannot give you the first date but I would assume along in October or November of 1943.

Q. In the Loew Circuit? A. Yes, sir.

Q. As of that time, while they were playing off, there then was no written agreement covering the terms on which they played at all, is that right? A. No, sir, there was no written agreement for the reason that the audit of the ex-

(1090)

pense figures had not been completed and we therefore could not complete our agreement until after the audit had been finished.

Q. And the terms of the agreement as finally reflected in these attached sheets were simply that you got so much playing time in the Loew Circuit here in exchange for a share of the profits of the Loew theatres in exhibiting the pictures, isn't that right?

Mr. Seymour: I must object to that as wholly argumentative.

Judge Hand: Let me hear the question.

Q. (Read.)

Mr. Seymour: Your Honors will recall that when I asked whether there was any profit-sharing, Mr. Wright objected to it. He is trying to interpret the arrangement.

Judge Hand: His objections were addressed to questions of yours which called for very sweeping conclusions. This is pretty well limited to a particular thing. I will allow it.

Mr. Proskauer: Your Honor, may I suggest that the vice in that question is the use of the words "profits of the theatres." The exact method of compensation is defined in the agreement and it was profit on the exhibition of certain pictures, not of the theatres. There wasn't any pooling, as I read those agreements.

Judge Hand: That is a matter of argument.

(1091)

Mr. Wright: The question is——

Judge Hand: Go on, go on.

Q. Will you answer the question? A. Will you read the question?

Q. (Read). A. No, sir.

Q. I call your attention to this first column on the sheet, which lists the names of the features, is that right, that are licensed? A. Yes, sir.

Q. And the next column with the words "Number of Tenths" underneath it, what does that indicate? A. That is playing time.

Q. The number of tenths assigned after the name of each feature then represents the total playing time that was assigned to each feature in the circuit, is that right? A. That

is the amount of playing time that we were successful in obtaining on each of the pictures, yes, sir.

Q. Then the next column is headed "Gross Receipts." That represents gross receipts of the circuit in exhibiting this particular picture? A. Yes, sir, that is correct.

Q. Then the next column "Vaudeville Deduction," that represents the expenses of—a deduction for such expenses as were incurred in showing vaudeville in connection with the features? A. That is correct.

Q. The next column is headed——

(1092)

Judge Goddard: Mr. Wright, I have difficulty in hearing you over here. Will you bear that in mind, please?

Mr. Wright: I shall speak louder.

Q. Then the next column headed "Net Receipts" represents the gross less the vaudeville deductions? A. That is correct.

Q. And the next column entitled "House Expense", that represents the actual operating expenses of the circuit in playing the picture, is that correct? A. That is correct.

Q. Then the film rental, that represents what? A. That is the film rental that we received based upon the terms for which we had sold our pictures.

Q. And those terms are the terms set forth in the letter agreement here which describes the computation of the film rental as an amount which enables the exhibitor to earn a certain profit, is that correct? A. It enables the exhibitor to earn a certain profit to a point where we then get an increased percentage of the gross for film rental.

Q. And then your next column after "Film Rental" is headed "Tax." What does that mean? A. That is City of New York tax.

Q. Is that an allocated portion of the taxes imposed by (1093)
the City on the theatres? A. That is, I believe, the gross sales tax.

Q. Imposed on the film rental? A. I am not sure whether it is on the film rental or whether it is on the admission.

Q. Well, you don't know whether you are referring to a tax on admissions there or on film rentals? A. No, sir, I don't know which that is.

Q. Well, in either event the figure opposite the picture is the amount of the tax allocated to the particular picture in the circuit's theatre? A. It is the amount of the tax that has to be paid on the particular picture, yes, sir.

Q. Then this next column headed "P. & L." What is that? A. That is the profit or loss that Loew made on each of the pictures that were licensed to them.

Q. And then the column headed "Percentage of Combined Film Rental as Profit." That means what? A. That shows the profit that they made.

Q. And then your next column headed "Percentage of Film Rental to Gross"? A. That shows the film rental that we earned based upon the deal that we made.

Q. And the "Cost of Second Feature"—what is in that column? A. That is what the cost of the second feature amounted to.

Q. That was where they played a double bill, and that (1094)
was what was paid for the second feature, and that was deducted from the film rental, is that right? A. Yes, that is right.

Q. Now, when you make a deal with an independent exhibitor—first, tell us how you use the term "independent exhibitor"? A. Independent exhibitor is an exhibitor who is not affiliated with any of the defendants in this case nor affiliated with any of the companies who produce and distribute pictures.

Q. Now, the average independent exhibitor is an operator of a few theatres, one to we will say four or five? A. Yes, sir.

Q. And in dealing with that exhibitor you deal with him on your standard form of contract which requires him to play the pictures licensed in a particular theatre at a particular time, isn't that correct? A. In a particular—well, it may be one theatre or two theatres. There may be a choice of theatres in which you can play the pictures.

Q. But ordinarily your agreement will provide the particular time that the film plays and the theatre in which it plays, is that right? A. Yes.

Q. And the admission price at which it will play? A. Yes, that is correct.

Q. And in connection with this agreement which I just handed you, Exhibit 243, there are no restrictions in that agreement as to what admission price Loew would charge in any theatre in that circuit, is there? A. There were no admission prices included in the agreement, because we assumed and knew they would be the same as they had been charging at the time the last contracts were signed.

Q. I didn't ask you why. I just asked you what the fact was. If you will just confine your answer to the question it will go faster. Now, there was also no requirement that Loew play any one of these pictures that are named here in any particular theatre in the circuit at any particular time, is that right? A. At the time the bookings were submitted we then considered whether the playing time was satisfactory and whether the list of theatres in which they wanted to play the pictures met with our approval.

Q. So that you just arranged the play dates as a matter of booking convenience between your booker and their booker, is that right? A. Oh, no, sir. We argued about the playing time and the theatres in which the pictures would play.

Q. In any event, all of the theatres in the circuit played those pictures before they were exhibited by any independent exhibitors who were operating theatres in opposition to any of the Loew theatres, isn't that right? A. They played them
(1096)
prior to the time that the theatres over which they had clearance played them, yes, sir.

Q. Well, there is not any clearance specified in this agreement at all, is there? A. No, sir, there is not.

Q. And such clearance as the Loew theatres got, then, was simply the product of the booking arrangements made between your booker and the Loew's bookers? A. No, sir. It was the clearance—they got the same clearance that had been in effect.

Q. You mean that priority that they enjoyed had been well established over a long period of time? A. We had agreed with them on the clearance that they would receive, yes, sir.

Q. And that, of course, is also true of the division of film products in the New York metropolitan area between the Loew Circuit and the RKO Circuit, isn't that right?

The Witness: Will you please repeat that question?

Q. (Read.) A. I don't believe I understand it, Mr. Wright.

Q. Well, you are familiar with the term the "Loew split"? Do you know what that means? A. Loew split?

Q. Yes, what is the Loew split in New York?

Mr. Goddard: You mean L-o-e-w split or l-o-w?
Mr. Wright: L-o-e-w.

(1097)

A. I don't know, sir.

Q. You never heard that term used in the trade? A. I know that the pictures that we sold to Loew are the pictures that—well, I don't know whether you would call Loew's the Loew's split or not, but that is whom we sell pictures to.

Q. Just answer my question.

Mr. Wright: Read the question again.

Q. (Read.) A. Some pictures in the subsequent-run houses in New York are sold to Loew and some are sold to RKO.

Q. And which are the companies that are in the Loew split?

Mr. Proskauer: I object to that as incompetent. It is assuming that there is something known as a Loew split or that it has any special significance.

Judge Hand: Overruled. We will give him a chance on cross-examination.

A. We sell pictures to Loew's subsequent-run theatres; Metro sell pictures to the Loew subsequent-run theatres; United Artists sell pictures to the Loew's subsequent-run theatres. I believe Columbia sells some pictures, and I also believe Universal does too, but I am not sure about the last. (1098)

Q. Half of Universal, isn't it? A. I am not sure about that.

Q. And then the RKO split consists of what? A. I don't know. I know they play RKO pictures, and I know they play Fox. I don't know what else they play.

Q. And Warner and half of Universal, isn't that right? A. Yes, they play Warner. I am not sure about the Universal.

Q. And as I understood your prior testimony, you do not contend that there is any competition whatsoever in so far

as licensing your films are concerned among the theatres which are affiliated with the defendants, isn't that right? A. That is right.

Mr. Davis: Read that question. I missed part of it.

Q. (Read.)

The Witness: I don't believe I understand what you mean, Mr. Wright.

Q. What did you mean when you were talking about competition in your direct testimony?

Mr. Seymour: He talked about it in a lot of connections. I think he ought to specify.

The Witness: If you will be more specific I will try to answer.

Judge Hand: Overruled. Let him answer.

(1099)

The Witness: I don't know what you mean, Mr. Wright.

Mr. Wright: Will you read the last question?

Q. (Read.)

Mr. Leisure: When was he talking about it? The witness testified a full day. I don't know what Mr. Wright means.

Mr. Davis: I submit, your Honors, that where the witness asks the examiner to explain his question, it is the duty of the examiner to make his question plain to the witness if he wants an answer.

Mr. Wright: I am asking him to explain his direct testimony.

Q. Now, you are unable to explain what you meant when you used the word competition in your direct testimony; is that correct?

Mr. Seymour: If your Honors please, that is a very objectionable question.

Judge Hand: I will sustain that objection. You have got to point out what you are driving at. I don't know, and none of the Court knows.

Q. It is a fact, is it not, Mr. Reagan, that there is no effort made by the operators of theatres which are affiliated with one or more of these defendants to bid in opposition to one another for the privilege of licensing the exhibition (1100)
of the films you distribute in their theatres? A. Well, I know that some of the defendant companies would like to play Paramount pictures——

Q. Well, would you just answer the question? A. I am trying to.

Mr. Wright: Well, listen to it.

Read it again.

Judge Hand: Let him try to answer it and then go after him again if you are not satisfied. Go on.

A. (Continuing) I know that some of the defendant companies in this suit would like to play Paramount pictures and have tried very hard to license them; but we have not in many instances sold pictures to them because we prefer to do business with the customers who we are at present selling.

Mr. Wright: Now read the question.

(Question read as follows: "Q. It is a fact, is it not, Mr. Reagan, that there is no effort made by the

operators of theatres which are affiliated with one or more of these defendants to bid in opposition to one another for the privilege of licensing the exhibition of the films you distribute in their theatres?")

Mr. Wright: You can answer that yes or no, can't you?

A. No, that is not the fact, no, sir.

(1101)

Q. Now, in licensing films here in New York City, can you recall any time when the RKO Circuit made you an offer of any kind for the exhibition of your films in that circuit instead of in the Loew Circuit? A. No, sir, I cannot.

Q. Now, is the national gross of film rental that you receive on a picture a business secret?

Judge Hand: Are you arguing, really, that RKO did not come into the Loew Circuit at all? I do not understand you.

Mr. Wright: I am arguing, if the Court please, that there is a set pattern of distribution as among these defendants in which there is no room for competitive negotiation at all; that it is cut and dried and set——

Judge Hand: All right. You are arguing that RKO did not come in and obtain licenses at all for their theatres in the Loew Circuit?

Mr. Wright: No. If the Court please, each of them has a circuit in the New York Metropolitan——

Judge Hand: All right, that may perhaps be true of the others. Are you arguing what I have just suggested?

Mr. Wright: Frankly, I did not quite understand what you suggested.

Judge Hand: Are you arguing that RKO will
(1102) not ask for or obtain Paramount pictures within the Loew Circuit for exhibition within the Loew Circuit?

Mr. Wright: Well, the asking, if any, would be for the exhibition of the pictures that the Loew's Circuit now uses, for exhibition in the RKO Circuit. The two circuits both operate in the same area here in New York; and I am suggesting that not only Loew but RKO and Paramount all understand perfectly well how and which is to play the pictures of each major distributor.

Now please read the last question.

(Question read as follows: "Q. Now, is the national gross of film rentals that you receive on a picture a business secret?")

A. We don't like to have it generally known, no, sir.

Q. Well, if an independent exhibitor came up and asked you for a statement as to exactly what any one of your pictures grossed in the United States, would you tell him? A. It would depend upon who it was. I might and I might not. I have in many instances, yes, sir.

Q. Would you give him an audited statement? Would you? A. Oh, no, I would not do that.
(1103)

Q. Generally, those gross figures are certainly not revealed by you as a matter of course to the trade press or to anyone else, are they? A. Not as a matter of course, no, sir.

Q. What are these telegraphic reports you get as to the grosses in certain theatres of other distributors' pictures? A. What are they?

Q. What theatres do you get those from? A. That is a list of theatres in which Paramount has an interest.

Q. What are the theatres, where are they, how many are there? A. I can't tell you the number, but they are pretty well scattered all over the country.

Q. Does it vary, does the list vary from day to day or week to week or have you a set group? A. No, the list is the same.

Q. Can you give us the list? You have a record of it somewhere, haven't you? A. Yes, we do have.

Q. Could you produce that for us? A. Yes, sir.

Mr. Seymour: If you will bear with me just a moment I will give you a copy of the form.

Mr. Wright: I don't want a copy of the form. I want a copy of the list of the theatres. You understand.

Mr. Seymour: It is on there. Bear with us just a moment.

Q. While he is looking——

(1104)

Mr. Seymour: Just take a second.

Q. What do you do with those figures after you get them? A. I look at them, familiarize myself with the gross of all the pictures included in the list.

Q. Then what do you do with them? A. I send them to my division managers.

Mr. Seymour: I hand Mr. Wright a copy of the form.

Mr. Wright: Have that marked with the next plaintiff's exhibit number. Mark it as 375 for identification.

(Seven sheets marked Government's Exhibit 375 for identification.)

Q. You say after you have looked at the data on the list there—that is filled in and telegraphed to you daily, is that right? A. It is not telegraphed to me. It comes to me daily. It is compiled by the statistical department.

Q. And it is given to you; you get a report for each day's play? A. Yes, I get one of these every day.

Q. For every day in the year? A. Yes.

Q. For how long has that been going on? A. I have gotten these lists ever since I have been in New York.

Q. That is, you got them as a division manager here? A. Yes, sir.

Q. Before you became the general sales manager? A. (1105)
Yes.

Q. Then you turn them over, you send them to the division managers? A. And they go to file.

Q. Then they are sent to the files, is that right? A. Yes.

Q. When was this formula deal that you described in your direct testimony first worked out with the theatres in which Paramount is interested? A. I believe it was the 1940-41 season.

Q. That was at the time Mr. Agnew was general sales manager? A. Yes, sir.

Q. And which are the companies that you do business with on that formula deal basis? A. I do business on the formula deal basis with some of our own theatre affiliates and I also do business on the formula deal basis with the various companies that comprise the Fox circuit of theatres.

Q. Any others? A. No, sir, that is all.

Q. Which are the affiliates of yours that you do business on that basis with? A. I can't give you that from memory, but I can get the information for you.

Q. You have a list of those corporations that you could give us? A. Yes.

Q. A sample of that deal is this agreement that has been marked in evidence here as Exhibit 241 between your company and Evergreen Theatres Corporation? A. Yes.

Q. That is a Fox affiliate? A. Yes, sir.

(1106)

Q. And that is one of the Fox affiliates you refer to. Do you recall when it was that you first began to use that formula deal with Fox. A. I think that was in 1940-1941.

Q. You have used that with them ever since? A. Yes, sir.

Q. As I understood you, in originally negotiating that deal how was it that you arrived at the particular percentage formula that you used? I will withdraw that. Perhaps to make it clearer you had better read one of those agreements to the Court so they will have some idea of what is in there. I think it is only a page long, isn't it? The one I am going by, I think, is the first. A. Want me to read the whole thing?

Q. Yes, read whatever there is. A. "Agreement made this 5th of June"——

Judge Hand: Isn't that a very cumbersome way of presenting something?

Mr. Wright: It is rather difficult——

Judge Hand: Can't you state what it is without contradiction with the other people?

Q. What you have there is, isn't it, a sliding scale agreement whereby the exhibitor pays to you a stipulated percentage of the national gross of the feature as rental for the use of the films for a certain amount of playing time on certain runs in his circuit, isn't that correct? A. That is right, except the sliding scale feature, it is an actual percentage, a

(1107)

definite percentage of what we gross on a picture nationally.

Q. Yes, and the fixed percentage, then, also varies in accordance with the national gross, that is, you have a higher fixed percentage if you have a higher national gross and a lower fixed percentage if you have a lower national gross, isn't

that right? A. We have three diffrent percentages, depending upon the type of picture.

Q. I understand you have, even on the one picture there, your agreement provides for a variation in the fixed percentage of the gross that the circuit pays depending upon what the picture does nationally, isn't that right? A. No, the fixed percentage is the same.

Q. I call your attention to page 3 of the agrement here, where it says, "No. 1: In excess of $1,250,000, the exhibitor shall pay as a license fee for such photoplay .74778 per cent of such total license fees; 2, equal to or in excess of $500,000, but not in excess of $1,250,000, the exhibitor shall pay as a license fee for such photoplay .70115 per cent of such total license fee; 3, if less than $500,000 the exhibitor shall pay as a license fee for such photoplay .65431 per cent of such total license fee."

Well, now, the first figure referred to in each case there is the national gross of that particular picture, isn't that right? (1108)

A. That is correct.

Q. And the percentage that is paid does decrease as the national gross decreases, isn't that right? A. That is right. I misunderstood your question. This percentage of .74778 applies on any picture that grosses in excess of this amount.

Q. That is, you apply the same formula to all pictures, isn't that right, that you license? A. Yes, sir, that formula that percentage may change from time to time and does.

Mr. Caskey: May I hear that last answer?

(Record read.)

Mr. Caskey: On each picture? This contract is for one picture, Mr. Wright.

Mr. Wright: There is no question about that. I am asking him whether he uses the same formula that

is in that contract for each picture or whether he uses a different formula each time for each picture.

Q. What is the fact of that? A. We may use the same percentage for five or six or ten pictures, and we may change the percentage.

Q. That is, you handle them in brackets, is that right, one set of percentages for one group and then a different one for another group? A. Yes, sir.

Judge Goddard: You mean group of pictures or

(1109)

distributors?

The Witness: No, these are pictures, individual pictures released by Paramount.

Judge Goddard: Yes, I understood that, but when you referred to group, you referred to group of distributors or group of pictures?

Mr. Wright: No, group of pictures.

Judge Bright: As I understand it, that is the rental price for those particular pictures in this particular circuit in place of a percentage of the gross of the exhibitor?

The Witness: No; in place of the percentage of the gross of a picture for each theatre, we agree upon them paying a percentage of what we do nationally for each theatre that is included in this deal, from what we do nationally. Let me start over and see if I can make it clear. If we gross a million dollars on a picture nationally, the theatres that are included in this contract pay us a percentage for those theatres of whatever their share of that million dollars is. Is that clear?

Judge Bright: That is in place of their paying a percentage of their particular gross in each theatre?

The Witness: Yes, sir, they pay what we can do nationally on a picture, they pay a percentage of that.

Judge Hand: So, instead of having a percentage

(1110)

on the transaction with that particular exhibitor, you allocate the burden among all the exhibitors?

The Witness: They pay——

Judge Hand: You fix some kind of percentage or percentages of the——

The Witness: Of our national gross.

Judge Hand: Yes.

Q. Now, under that agreement, of course, there is no final settlement on the picture until perhaps two years or a year and a half after the picture is first released and played, isn't that right? A. No final settlement, no, sir.

Q. Because you provide for an audited statement there at the end after all runs have been exhausted throughout the country? A. We furnish a statement showing what we finally gross on a picture.

Judge Bright: There is no way of anticipating it?

The Witness: Yes, they pay—we estimate what we thought we grossed at the time they begin to play the picture, and if that is $20,000, they pay that $20,000 over a period of 17 weeks, and then when we finally furnish a certified statement of what the gross is, we adjust the payment upward or downward.

Q. In so far as determining what the film rental is for any particular theatre in the circuit, that is something that is never ascertainable until long after the picture is played,

(1111)

is that right? A. Well, I cannot ever tell what film rental is charged to any individual theatre.

Q. That is right, even when you finish, you simply have —— A. They pay me based upon a percentage of what I do nationally with the picture.

Q. And how that rental is allocated among the various theatres in the circuit, I suppose, is entirely a concern of the exhibitors? A. Yes.

Q. You have nothing to do with that? A. Yes, I don't know how they do that.

Q. In that series of contracts you have there for the 1943-1944 season on this formula deal, what, if any, provisions are there as to when and at what admission prices the circuit plays those films? A. I am not sure without looking at the contract. (Examining papers.)

Wil you ask that question again, please?

(Question read.)

A. Well, the question of when they will play them is governed by this clause, "The clearance and availability with respect to the theatres licensed hereunder shall be the same as are in effect at the date hereof unless otherwise noted on schedule A attached hereto."

(1112)

Q. All that you have on Schedule A is just the name of a run opposite the theatres, is that right? A. It says that the clearance and availability shall be the same as is in effect at the time the agreement is signed unless we change it by a notation on Schedule A, which is attached.

Q. I understand that. Now will you look at Schedule A and answer the question I just asked you? A. Schedule A does not list the clearance and availability.

Judge Bright: I thought the question was first aimed at the admission price.

Mr. Wright: That is also included in my question.

Q. I take it there is nothing there refers to what admission prices shall be charged? A. There is nothing in the contract with respect to admission prices but, again, the same admission prices apply, it is understood, that were in effect at the time that the contract was signed.

Q. That is simply an oral understanding between you and Fox? A. It is oral, if it is not in here.

Mr. Seymour: Do you mind inquiring, just so the Court will know—you haven't shown the Court the exhibit—whether the standard regular form of contract is annexed to those papers? It is, isn't it?

Mr. Wright: Yes.

Q. I take it every time you make a deal with anybody you always annex the standard form and then superimpose (1113) whatever——

Mr. Seymour: I mean Paramount standard form.

A. It is a part of this contract, yes.

Q. No question about that, but in the standard form there are no minimum admission prices filled in, are there? A. No, there is not.

Q. And I take it whatever is in the printed form is, of course—which may be in conflict with whatever you have got in the typewritten rider—is superseded by the rider? A. That is correct.

Q. In selling the opposition to that circuit, the independent opposition, that standard form is used and you fix the minimum admission prices and the times when those pictures are to be played by the opposition, isn't that right? A. Well, in many instances the admission price is included, in some it is left out.

Q. When it is left out, you expect them to maintain——. A. The same admission prices.

Q. —the customary price? A. That they have been charging, as we do in the case of Fox.

Q. In the case of Fox, however, in the event that they decide for some reason or other to lower the admission price or change the policy, there is nothing in the contractual relations between you as expressed in that exhibit which would

(1114)

prevent them from doing so, isn't that right? A. There isn't anything in this contract that would prevent them from doing so, but if they were to do so, and it was injurious to our business, we certainly would stop it.

Q. That would be done by agreement with Fox? A. We would try and get them to correct it immediately, and if they did not, we would not continue to make a deal where we thought our business was being injured.

Q. And the extent to which corrections are made, I suppose, is just like any other modification that you may make in any—or any adjustment of any agreement—comes down to a matter of, ultimately, the bargaining strength of the parties, does it not? A. It is a matter of negotiation, yes, sir.

Q. What happens under that form of agreement if during the time it is operative Fox picks up some new theatres or, let us say, drops some? A. Well, if they add theatres, we increase the percentage. If they drop some, we decrease the percentage.

Q. On that again, although you have nothing about that in the agreement itself, that is just your practice? A. Yes, because these agreements only cover one, two or three pictures—five at the most.

Q. Yes, but they are effective for a period of as long as a year and a half, isn't that right?

Mr. Caskey: That is objected to, if your Honor

(1115)

please.

Judge Hand: Overruled.

Judge Bright: Did you answer?

The Witness: Will you read the question?

Q. (Question read.) A. No, they are effective only for the period of—only for the pictures included in each agreement.

Q. But in order to liquidate the contract, that cannot be done until after the period of at least a year and a half, isn't that right? A. The final settlement cannot be made——

Q. Yes. A. —until after eighteen months.

Q. There is one other thing I want to call your attention to on that agreement: will you look at the schedule, there in the first-run theatres in Seattle. A. Yes.

Q. That lists how many theatres where the picture can be played first-run in Seattle? A. Fifth Avenue, one; Paramount, two; Orpheum, three; Palomar, four; Roosevelt, five; Music Box, six; Blue Mouse, seven; Music Hall, eight. That is for the first-run and the move-over.

Q. Yes; and according to that agreement the picture can be played by Fox in all of those eight or any one of them before it becomes available to subsequent-run exhibitors, isn't that right? A. It could play in any of them or in the (1116)

move-over, yes, sir.

Q. Or in all?

Mr. Caskey: Just a moment, please. Will you read the previous question and answer.

(Question and answer read.)

Q. Or in all? A. Yes, sir, it could play in all of them, but it would not be practical.

Q. Well, I suppose that would depend upon what Fox wanted to do with it, isn't that right? A. It would depend upon the box office drawing power.

Judge Bright: You mean play in all of them simultaneously or consecutively?

The Witness: They could play simultaneously or they could play on a move-over policy.

Q. And the judgment as to what should be done there is Fox's, not yours, isn't that right, according to the agreement? A. Yes, that is correct.

Mr. Wright: Will you mark this for identification with the next Government exhibit number?

(Marked Government's Exhibit 376 for identification.)

Q. I will hand you this list marked Government's Exhibit 376 for identification, with the heading "Paramount Franchises with Exhibitor," and the date, October 1, 1945, prepared by Charles Brouda, and ask you if that is the list you used to refresh your memory in testifying yesterday (1117)
about what franchises had been made with independents and what with affiliated companies? A. I was advised that the number that I gave yesterday of franchises that had been made was the correct number. Whether that was prepared from this list, I don't know.

Q. Who is Mr. Brouda? A. Mr. Brouda works for—he is a lawyer, I believe.

Mr. Seymour: He is in the legal department of Paramount, Mr. Wright.

Q. You were not given the data as to which particular accounts were supposed to be independent and which were supposed to be affiliated; you were just given numbers and you testified as to the numbers, is that right? A. Yes; I was assured that those were the numbers, yes, sir.

Judge Hand: Do you and the defendants differ seriously as to this particular thing you are on now?

Mr. Wright: I do not see how there can be any particular difference of fact. I was going to offer it in evidence but first I wanted to simply clear up some apparent discrepancies as to theatres which are listed here as independents, which is difficult for us to understand why they were classified as independents, in view of Paramount's or an affiliate's or another distributor's interests which are involved. That is what I wanted to ascertain. There is no need to bother the witness with
(1118)
it if we can do it some other way.

Mr. Seymour: Of course we are perfectly willing to sit down with Mr. Wright and his staff and go over the thing and get an agreement on the correct facts. These were prepared from the files by a lawyer from the legal department, which we have made available to Mr. Wright. There is no mystery about it at all.

Mr. Wright: I submit this all could have been avoided if we did not have the witness put on here to testify to things about which he obviously does not have any firsthand knowledge. He undertook to make some sweeping statements about the franchises, and I wanted to get the correct facts in the record.

Judge Hand: Can it be avoided now, or do you want to examine him?

Mr. Wright: My only purpose in examining him is simply to show that he did not know what he was talking about. If that has been established, we are perfectly willing to sit down and go over the list and get an accurate list put in.

Mr. Seymour: I hardly think that when a witness is told by the fellow who prepares a list, how it adds up, that you can say that the witness does not know what he is talking about.

By Mr. Wright:

(1119)

Q. Well, you had no knowledge, did you, at the time you gave the testimony as to what the precise interest in the theatres involved in those numbers were or were not, isn't that right? A. I was informed that we had a certain number of independent franchises, a certain number——

Q. And that is all you were told about? A. I did not have the detail, no, sir.

Q. Now, as to this testimony that you gave with respect to your present first-run outlets in these cities over a hundred thousand population, were you testifying there from any personal knowledge or was that again just a question of repeating something that had been told to you by the Legal department? A. No, I know the situation pretty well in those towns of a hundred thousand or over.

Q. Well, calling your attention to the town of Yonkers, New York, I think you testified that was one of the towns, you stated, which was among those which were excluded because you licensed a Paramount theatre there, is that right? Do you recall that? A. Yonkers was one of the towns, I believe, in which Paramount is interested.

Q. I call your attention to the admission of facts which was previously—first, has there been a change there between the 1943-1944 season and now? A. I am not sure about that. I do not believe there has been.

Q. Well, your admission of facts has this statement as to

(1120)

1943-1944:

> "32 feature motion pictures were licensed to RKO-Proctor Corporation for exhibition first-run in Loew's Yonkers Theatre."

Is that right, or is there an error here? A. I can't answer that without examining my records.

Q. I take it then that none of the testimony that you gave can be regarded as—certainly not as accurate as records that you have got available in the New York office; isn't that right?

Mr. Seymour: I object to any such question as that. If there is any error about Yonkers, I take the responsibility, because I excluded arbitrarily certain ones in asking him about this yesterday, and I read a list which I believed to be correct. If there is a difference on Yonkers, we will straighten it out; but to base what a lawyer excluded from examination—to base on that a statement that he did not know what he was talking about on anything, seems to me slightly extreme.

Q. As I recall the testimony, you read into the record the list of towns in which you said you licensed Paramount theatres; that is, those affiliated with Paramount, isn't that right? A. Yes, sir.

Mr. Seymour: I read into the record the list.

Q. Did you have any independent knowledge on that, or
(1121)
was all you knew about it that that was the list that was supplied by counsel; is that right? A. That was the list of theatres which was supplied by counsel in which we were interested.

Mr. Caskey: Just a moment. I call your Honors' attention to the fact that in the trial brief on page 6 it is stated that Paramount has an interest in a theatre in Yonkers.

Mr. Wright: Do you want to testify?

Mr. Caskey: That is a statement by the Government.

Judge Hand: If there is nothing more going to be done about this, all right. But if you have got something here that you know can be straightened out by a little work between you, what is the use of taking pages of the record showing that some witness does not know all the details which were stated? What is it for, to discredit him generally as to his other conclusions, or what?

Mr. Wright: No. I want to get the facts into the record. Now there were a number of discrepancies between his testimony and our data, based on these admissions of fact, some of which Judge Bright noted. I wanted to get the facts in the record. I had assumed that the most accurate data the company had with respect to this first-run distribution was what they furnished us in the form of admissions of fact. Now

(1122)

he has testified to certain data which was reported to us in the admissions, and there are discrepancies; and I do not like to take up the time of the Court and the witness in straightening out discrepancies; I would be glad to do it with counsel; but I do not like to leave the record in a position where he has given this positive testimony as to what happened there, if it is understood we are going to be furnished with an accurate list as to what this first-run distribution is——

Mr. Seymour: I do not understand why all this fussing around. I excluded arbitrarily 48 cities because I was advised in those 48 cities Paramount licensed theatres in which it had an interest, first-run. Yonkers was one of those cities. I examined the witness about 44 cities. I did not examine him about the 48. If there is a dispute between the Government and ourselves as to one of those cities or several of those cities as to which I excluded, I will sit down and talk

about it; but we do not need to take your Honors' time, which we know is precious, arguing about it here.

Mr. Wright: There are discrepancies as to other cities about which he testified.

Mr. Seymour: Why don't you ask about those?

Judge Hand: Go on.

Mr. Wright: I have no desire to ask about it; but if counsel insists I do it that way, I have no alterna-
(1122-A)
tive.

Mr. Seymour: I have just suggested the opposite.

Mr. Wright: Now, will you supply us with an accurate list of the information that was testified to yesterday in all of the cities?

Mr. Seymour: We will reverify the information which was testified to yesterday, and if there is any change we shall advise you.
(1123)

Judge Hand: Now, we have been going an hour and a half, and a great deal of time has just been occupied by this thing which, as I understood, you were going to correct if there was any correction to be made yesterday, and we are getting kind of sick of this futility, because it won't do anything except to show that there may be some mistakes which you apparently mean to agree about. We cannot just sit here and listen to stuff which makes a confused record which you cannot understand at all except when you go over it say it is inconclusive as to everything.

Mr. Wright: I agree with your Honor; but when a witness is put on the stand to testify to these generalities, and counsel refuses to produce the records instead of the witness's testimony, it leaves us, as I say, no other alternative.

Judge Hand: No. He did not refuse to produce.

Mr. Seymour: There is no such thing. Your Honors have a ton of stuff.

Judge Hand: Don't get up and argue about that. If you are going to make this adjustment, why, make it. If not, let him go on and just drag around here about what this witness has said, and we won't have any idea about anything except that this is an uncertain and changing world.

(1124)

Mr. Seymour: I want to assure your Honors that we are ready to sit down and discuss this, as we have spent the bulk of our time for the last year trying to help the Government out on its side of the case.

Judge Hand: I don't doubt your diligence.

Mr. Wright: We have no further cross-examination.

Redirect Examination by Mr. Seymour:

Q. With reference to this Fox agreement about which you were examined, Mr. Reagan, will you tell us the situation that existed as between Fox and the Paramount distribution department at the time the agreement was worked out originally?

Judge Bright: That is this formula?

Mr. Seymour: That is right.

A. I had been negotiating with the various Fox companies trying to work out a satisfactory deal for my pictures. Those negotiations had gone on for a matter of months. As a matter of fact, I made a trip to all of the Fox division offices where I had meetings and tried to sell my pictures; and I was unsuccessful in making the kind of a deal that was satisfactory to me; and finally I hit upon the idea of working out a formula deal with them the same as I had

worked out with some of my own theatre affiliates, and finally was successful in doing that.

(1125)

Q. Now, do you consider that that formula deal gives Paramount as good or a better film revenue from various groups of Fox theatres as you could have worked out on an individual basis?

Mr. Wright: If the Court please, that is wholly immaterial what he considers in that connection.

Judge Hand: Let me hear the question.

(Question read.)

Judge Hand: Overruled. Let him answer.

A. I do not think I could possibly have gotten the film rentals that I am getting under this formula deal by selling the Fox affiliates under straight terms or percentage terms. I have gotten the highest percentage of increase in my film rentals from the Fox Circuit since this formula deal has been in effect of anybody with whom I am doing business.

Q. Now, at the time the formula deal was originally negotiated on the first group of pictures, did you have any knowledge or information as to what negotiations or arrangements were being made all over the country by the theatres in which Paramount had an interest for the showing of Fox pictures? A. No, sir, I did not.

Q. Did any such negotiations or arrangements at any time have anything to do with the fixing of the percentage or any other phase of the formula deal with Fox? A. It

(1126)

did not.

Q. Now, Judge Hand asked you a question about the formula deal, and I want to be sure that you answered it completely. I think Judge Hand understood that the effect of this percentage arrangement with Fox might somehow

burden other exhibitors so that in some way they were carrying a part of the Fox rental. Now, is that the effect of the formula deal? A. Oh no——

Mr. Wright: If the Court please, that is a pure matter of argument as to what the effect is.

Mr. Seymour: I think when the Court asks a question I should try to help get an answer.

Judge Hand: Overruled. Go ahead.

A. (Continuing) No. The income from the Fox theatres or the film rental from the Fox theatres that were earned is dependent upon what we gross in the other theatres in the United States. It has nothing to do with anything other than that.

Q. So that if a picture is more successful nationally you get more out of Fox? A. That is correct. The more I can gross on a picture nationally the greater the film rental is that I get from Fox.

Q. Now, do you think that the percentage that you fixed in the formula deal represents less than Fox's normal or fair share of the total national gross? A. Well, it represents a (1127)
substantial increase over what I was getting prior to the time that I made the formula deal.

Q. Does it have the effect of in any way burdening or putting any special handicap on other exhibitors? A. No, sir, it does not.

Judge Hand: I do not see why you necessarily get more than you would get under a straight percentage deal.

The Witness: Well, actually that is what has happened because if a circuit of theatres paid me a certain percentage of my national gross on a picture prior to the time that I made the formula deal, when

I made it I increased that percentage. Let us say it was one per cent. When I made the formula deal I increased that to more than one per cent. Then the more that I could get for my pictures nationally, the better my film rental income is, the greater the film rental is from Fox; and that has been a very substantial increase, better, I am sure, than I could have gotten if I had sold Fox at the normal or straight percentage terms.

Judge Bright: Does this formula deal only apply to this Evergreen Circuit?

The Witness: No. We sell the formula deal to all of the separate affiliates of Fox, of which there are about five, I believe.

Q. And a separate formula deal with each one? A. Yes; (1128)
we do have a separate percentage.

Q. And a separate contract with respect to each group of pictures? A. The percentage is different, and the contract is separate with each affiliate.

Q. And in each case the regular form of Paramount license contract is included among the papers making up the final terms? A. Yes, sir, that is correct.

Judge Bright: How did you arrive at the percentages of those film receipts which you apply to the several formula contracts?

The Witness: Well, for instance, let us take as an illustration the Evergreen Theatres: If they had paid me for my pictures the season prior to the time I made the formula deal one per cent of my national gross on those pictures, I used that one per cent and added an increase to it, and then they were to pay me that increased percentage of what I did from that

time on, what I did with my pictures, what I grossed with my pictures from that time on.

Q. Now, turning to the Loew papers that Mr. Wright examined you about: Are they before you? A. No, sir, they are not.

Judge Bright: What is Exhibit 376?

Mr. Wright: That was a list of Paramount franchises prepared by Mr. Brouda dated October 1, 1945.

(1129)

Judge Bright: May I see it?

Mr. Wright: Yes (handing). I do not think that is in evidence. It is merely for identification, as I understand it.

Mr. Seymour: We are to check it over with Mr. Wright.

Judge Hand: Oh yes.

Q. Now, are you familiar with the developments and course of negotiations with Loew which resulted in the letter or agreement which is marked in evidence as Government's Exhibit 243? A. I am.

Q. And will you tell us what those developments were and what the negotiations were that led up to the making of that agreement? A. We were dissatisfied with the film rental income that we were getting from the Loew theatres in New York. The terms that we had been receiving for our pictures we were not satisfied with. Loew contended that they could not pay more. We insisted that they should pay more, and finally we began an examination of their books to determine their expense. That audit covered a long period of time.

Q. Do you remember who conducted the audit? A. It was conducted by us by some of my statisticians or auditors.

Q. Does that relate only to the New York City theatres? (1130)

A. Yes, sir.

Q. And did you insist on that audit? A. I did, because the point at which they were willing to pay me an increased percentage of the gross receipts for film rental was too high—I thought it was too high. They said they could not lower it because their expense amounted to so many dollars. I said, "Well, then, let us audit the expense and see whether the figures that you use are correct." That audit started in December of 1931.

Q. Not 1931. A. Pardon me?

Q. Not 1931. A. 1941, excuse me. It ran until some time in 1944. We were completing the play-off of the 1943-44 pictures. We had still not settled all of our differences, and I said, "Gentlemen, we are not going to play any more pictures starting with the 1944-45 season without our having an agreement on the terms on which those pictures will play settled before we begin to play them."

We began our negotiations—and we still had the settlement to make of these previous years—we began the negotiations in the fall of 1944, and I submitted to Mr. Moscowitz, the buyer, a proposition for my pictures.

Q. Now, was that proposition accepted by Mr. Moscowitz? A. It was not.

Q. Was that submitted in writing? A. It was.

Q. And the upshot was finally the agreement that is in (1131)

evidence, is it? A. No; this agreement covers the pictures that had played in the circuit prior to the 1944-45 season.

Q. Oh yes. A. I had to make this settlement also because the question of the point at which we would get an increased percentage was in dispute, and that could not be determined until after the audit was completed.

Q. Was there a time, then, when you refused to allow Loew to show Paramount pictures? A. There was a period

from the completion of the pictures in the 1943-44 season, which was in January of 1945—that is, when the last picture started to play in the Loew Circuit from the 1943-44 season—until May of 1945 before a picture for the 1944-45 season started to play.

Q. I show you this document dated October 26, 1944, and ask if this is a copy of the proposal which you made to Loew at that time in connection with the proposed adjustment? A. It is.

Mr. Seymour: I offer that. I am sorry I haven't got any copies, but I will provide the Government and the Court with copies tomorrow, if I may.

Is there any objection, Mr. Wright?

Mr. Wright: Do you mind if I finish reading it?

Mr. Seymour: No.

Mr. Wright: I have no objection.

(1132)

(Marked Paramount's Exhibit P-2.)

Q. Now, following the making of the settlement agreement with Loew's, which is in evidence, and to which is annexed one of the standard forms of Paramount contracts, did you in June 1945 complete negotiations and execute contracts for the showing of Paramount pictures in Loew theatres in New York? A. We did. I do not think it was June, though. I think we completed our negotiations in May for the first combination.

Q. But was the result of that 12 contracts involving individual pictures for exhibition in the Loew theatres? A. Yes, sir.

Q. And aside from any reference to the particular picture, and perhaps special terms, is this contract with refefence to "Frenchman's Creek" in the same general form as the remaining contracts? A. It is.

Q. So that it would be a fair sample of the remaining contracts? A. Yes, sir.

Mr. Seymour: I offer that.

Mr. Wright: May I ask why these were not produced with the others when we asked for the contracts for the 1943-44 season?

Mr. Seymour: These are not for the 1943-44 season.

Mr. Wright: Oh, these are for the 1944-45? I beg your pardon.

(1133)

Mr. Seymour: I am only offering one of them. They are all substantially alike. If the Government wants us to offer all of them or offer the rest, we would be glad to do so.

Mr. Wright: We have no objection to this going in. We would like to look at the others, of course.

Mr. Seymour: Yes. We will provide copies for the Court and the Government tomorrow, if the Court please.

(Marked Defendant Paramount's Exhibit P-3.)

Q. So there won't be any doubt—I may have made a misstatement when I asked the question, Mr. Reagan—these are contracts for individual pictures of the season and not for the season, isn't that so? A. They are for individual pictures released during the season.

Q. During the season? A. Yes.

Q. But they do not cover a full season? A. Oh, no, they cover individual pictures.

(1134)

Q. Has Paramount considered from time to time whether it would be desirable for it to exhibit its pictures in some other theatres than the Loew Theatres? A. We have.

Mr. Wright: If the Court please, I think that is objectionable. I do not see what materiality it has

here as to what he considered or he did not consider in that connection.

Mr. Seymour: I think it is very material. With this contract being offered and the imputation that somehow there is something peculiar about it, it seems to me the business judgment of Paramount as to why it did what it did is relevant.

Judge Hand: Overruled.

The Witness: Will you read the question?

(Question read.)

A. We have.

Q. From what point of view was that question considered by Paramount? A. From the point of view of where we could get the most film rental.

Q. Did you reach any conclusion on that subject? A. We did.

Q. What did you conclude? A. We concluded that we could get more film rental for our pictures by selling the Loew theatres than we could by selling anyone else.

Q. Why did you feel you could not get as substantial

(1135)

film revenue from other theatres as you could from Loew? A. Because there isn't any other combination of theatres that can gross as much money or pay as much money for film rental as the Loew group in existence in New York. We investigated the situation very thoroughly, we made a number of surveys, made trips around the City of New York, Mr. Owen, our branch manager, Mr. Randall, and myself, trying to find out and learn if there was a possibility of selling our pictures any other way or any way that would return a greater film rental than we got from Loew. We came to the conclusion that there was not because we not only would lose the Loew business, but if we tried to replace that business with other theatres that we are now serving, we would lose that business also.

Q. Referring to the period when you refused to release pictures to Loew, while you were still negotiating settlement, why didn't you release those pictures subsequent-run without prior showing in Loew theatres? A. Because I was negotiating with Mr. Moskowitz from day to day and hoped to conclude our negotiations, and I did not want to lose that revenue.

Q. Could you have received anything like the substantial revenue if you had released them on second-run or subsequent-run? A. No, sir, we could not.

Q. You said, I think, and the papers indicate, that there (1136)

was no written agreement for the 1943-44 season? A. That is correct.

Q. Was there any oral agreement? A. There was an agreement that we would make a deal based upon the results that came from the audit which would enable us to determine the place at which we would get—the point at which we would get an increased percentage.

Q. In the meantime, they simply played the pictures? A. Played the pictures and made a payment on account.

Q. That was subject to final adjustment in connection with the final audit or after the final audit, is that right? A. Yes, sir, that is correct.

Q. Have there been occasions when you had disputes or controversies with independent exhibitors? A. There have been.

Q. When you have allowed them to play the pictures pending final adjustment of your controversy or your disputes? A. Yes, sir.

Q. Has that happened frequently? A. Yes, it happens every day.

Q. Was the general nature of the arrangement for film rental with Loew a percentage to a split? A. It was.

Q. And the dispute was as to where the split should come? A. That is correct.

Q. Are percentage arrangements with split used by Para-
(1137)
mount in distributing its pictures to independent exhibitors? A. They are.

Q. And are they also used for licensing its pictures in theatres in which other defendants have an interest? A. Yes, sir.

Q. Are they common percentage arrangements? A. Yes, sir.

Q. Do other distributors also distribute on the basis of a percentage to a split? A. Yes, sir.

Q. You were asked something about what Mr. Wright described as Loew's split in New York. Is it correct that—have you heard that term used in connection with the fact that the product of some distributors is played in Loew's theatres? A. Some is played in Loew's, some played in RKO.

Q. So far as Paramount Pictures are concerned, are they played in Loew theatres? A. They are.

Judge Bright: In Loew's theatres only?

The Witness: Yes, sir.

Judge Bright: In Greater New York?

The Witness: Yes, sir; or there may be an isolated instance where we play pictures in an RKO theatre.

Q. That does not apply to all runs, does it? A. You mean are Paramount pictures only played in Loew theatres?

Q. Yes. A. Oh, no.

Q. They are only played in Loew theatres on what run?
(1138)
A. They play in Loew theatres following the completion of the first-run in New York and Brooklyn.

Q. And then in—— A. Then they play in subsequent-theatres following that.

Q. And they play in all sorts of subsequent-run theatres? A. All that we can sell.

Q. So it is only that intermediate run, or whatever you call it, in which they are played only in the Loew theatres? A. We sell to Loew rather than to RKO, who is Loew's competitor for those runs.

Q. Is the selling or the licensing of Paramount pictures to Loew in that particular run, or those particular runs, and the licensing of the product of other distributors either to Loew or to RKO, the result of any understanding or agreement between the distributors? A. No, it is not.

Mr. Wright: Same objection.

Judge Bright: There must be an understanding between some of the distributors, isn't there?

Mr. Seymour: It is the result of an understanding between——

Judge Bright: I am asking him.

The Witness: Only—I don't know what the understanding is with respect to the others. I know in our case we would prefer to sell Loew's because we think we can earn more film rental there.

(1139)

Judge Bright: As the result of an understanding because of this so-called Loew split in Greater New York.

The Witness: You have to sell either Loew or RKO. Some sell Loew.

Judge Bright: Why do you have to sell?

The Witness: Because there are no other theatres that can return the revenue that those two groups of theatres can return.

Judge Hand: Well, you have an understanding that this will be your course of business with Loew?

The Witness: Well, I have tried to sell Loew because I think we can get more film rental selling Loew than I could if I sold RKO.

Judge Bright: What has this so-called Loew's split go to do with that?

The Witness: I don't know. I don't know what points.

Q. What I was inquiring about—I am afraid I did not frame my question correctly—was this: Is the fact that Paramount licenses its pictures to Loew in the runs in which it licenses them a result of any agreement between distributors other than Paramount and Loew? A. No, sir, it is not.

Q. Well now, is it what I understand to be the fact that following the run of the Paramount pictures in Loew the-
(1140)
atres, they are shown in all kinds of subsequent-run theatres in New York? A. Yes, sir, that is correct.

Q. Is that true of the other pictures which play in Loew theatres, as far as you know? A. Yes, sir.

Q. And is it at that stage, when they are playing in the subsequent-runs indiscriminately, among all kinds of theatres, that they are described as the Loew split, meaning that they were pictures that played in the Loew theatres? A. That is a good description, yes, sir. It did not occur to me. Pictures that played the Loew theatres are talked about as the Loew split, by the subsequent-run exhibitor, and the pictures that played the RKO theatres are talked about as the RKO split by the subsequent-run exhibitors.

Q. Have you ever heard the expression used in that connection before I used it? A. Yes, sir. That did not occur to me. That is correct.

Q. Judge Bright asked you yesterday about extended runs, and I would like to be sure that we have got that adequately covered so that his question is answered. What type of pictures are usually played on extended runs? A. The most successful box office attractions.

Q. What is it that determines whether a picture shall have extended run? A. Its gross at the box office.

Q. Does the playing, from your experience in the busi-
(1141)
ness, does the playing of a picture on an extended run have a detrimental or a beneficial effect on the subsequent-run exhibitor? A. Well, a picture——

Mr. Wright: If the Court please, he is not competent to give testimony as to what it does to the subsequent-run exhibitor. He is not a subsequent-run exhibitor and has no interest in it.

Mr. Seymour: I think he can give it and your Honors can weigh it.

Judge Hand: Overruled.

A. A picture that has an extended-run in the first-run theatres also does a better business in the subsequent-run theatres because the pictures that do well first-run also do well in the subsequent-run, because they are successful box office attractions.

Q. Is it usual for the first-run theatre playing on an extended-run to continue its advertising during the period of the run? A. They do.

Q. And does the advertising by the first-run benefit subsequent-runs? A. Yes, sir, I believe it does. I am sure it does.

Q. Would the continuance of the advertising over a longer period benefit them more greatly? A. The longer the first-run, the more successful the picture is in the subsequent-runs.

(1142)

Q. Is it your observation that the more people who see pictures or who see advertising about pictures, the more that want to see them? A. More that want to see them.

Q. I asked you yesterday, Mr. Reagan, about the special attractions which had been distributed by Paramount at

advanced admission prices, and you mentioned, I think, "For Whom the Bell Tolls," "Reap the Wild Wind"—— A. And "Northwest Mounted Police."

Q. (Continued) ——and "Northwest Mounted Police." And I think I asked you a general question as to whether—or perhaps Judge Bright did—as to whether the same advanced admission price was required of all theatres, whatever their run, and was there any difference in that regard as between those pictures. A. Well, in the case of "For Whom the Bell Tolls" it played at an admission price of 75 cents for matinees and 75 cents and $1.10 at night wherever it played. That was in a limited number of first-run theatres. It did play in a few subsequent-run theatres, but not many, a few here in New York and I think a few in Los Angeles.

In the case of "Northwest Mounted Police" and "Reap the Wild Wind," the admission prices were increased about 10 to 15 per cent in each theatre over what they normally charged.

(1143)

Q. So that the existing differential between the admission prices for various runs was maintained but there was some slight advance in admission prices all along the line? A. That is correct.

Q. And eventually all those pictures were played at regular admission prices? A. They were. They were all released at regular admission prices after the advanced admission price engagement.

Q. Could you tell us approximately how many pictures the average first-run theatre in the average city requires for an annual program? A. Well, that varies depending upon the size of the city. Depending upon the size, they may use 104 pictures, they may use 70, or may use 50. In an important city, probably one picture a week or fifty a year, or two.

Q. There are some theatres like Paramount in New York which play a picture for a number of weeks? A. Well, they only use 10 or 12 pictures a year.

Q. But dealing with smaller communities than New York, even communities of 500,000 or so, does the first-run theatre usually play for more than a week on the average, first-run? A. Well, again, that depends upon the size of the city. It may be——

Q. In any event—— A. A theatre may play five or six (1144)
pictures a year for a period of two weeks and the rest for a week in a town of 500,000.

Q. In any event, is it fair to say that many first-run theatres require 52 or more pictures a year? A. Many of them do, yes, sir.

Q. And some require substantially more than 52? A. That is correct.

Q. How about subsequent-run theatres, on the average do they generally require substantially more than 52 pictures a year? A. They do.

Q. Do many of them require more than 104 pictures a year? A. Some of them make two changes, three changes a week; some of them run double bills, requiring 156 to 204 pictures a year.

Q. Do you know what is the largest number of pictures distributed annually by any distributor of quality pictures in the United States at the present time? A. Well, we distributed 27 last year. I should say that 35 or 40 would be the maximum any of the——

Q. Is it the fact, then, that with few exceptions, no first-run or subsequent-run theatre could exist on the product of any one distributor? A. That is correct.

Q. I want to ask you just one question about Exhibit 243. There is a column on it headed "House Expense." Does that mean all overhead items, do you know? A. Yes, sir, it does, means the operating expenses of the theatre.

(1145)

Mr. Seymour: Judge Proskauer got me to ask that question. Now he would like to clear it up, so I will let him inquire.

By Mr. Proskauer:

Q. That means but the actual out-of-pocket operating and running of the theatre; it does not include such items as rent or anything of that sort? A. It does include rent.

Q. It does include rent? A. It includes everything except the film rental. This is the house expense exclusive of film rental.

Q. Then you have an item there of taxes. Does that include any general taxes, or does that just refer to taxes on amusement? A. Yes, that is the New York—I am not sure whether it is a New York sales tax on admissions or whether it is on film rental.

Q. But it does not mean any such thing as real estate taxes? A. No.

Q. Or general corporate taxes or anything of the sort? A. No.

Mr. Seymour: I have no further question.

Mr. Wright: I have just one question.

Recross Examination by Mr. Wright:

Q. Did I understand you to say, Mr. Reagan, that if a picture is played first-run, let us say, for six weeks and

(1146)

then moves into a second-run house for a run of one week, that the second-run will make more money than if the picture had played, let us say, one week in the first-run before it moved into the second run? A. The more successful a picture is——

Q. See if you can just answer that yes or no.

Mr. Seymour: I do not think the witness should be confined to yes or no.

A. I can't answer it just yes or no without explaining it.

Q. Answer it first and then explain it.

Mr. Wright: Will you read the question?

(Question read.)

Q. (Continued) That is, more money in the second-run exhibitions? A. No, I don't think it would, but——

Q. Would not make as much, would it? A. But there is more to the answer than that, if you will let me make it.

Q. Go ahead. A. Let us take a picture like "Going My Way." It played, for instance, in the Paramount Theatre ten weeks. That was a very long engagement of that picture yet that picture in the subsequent-run theatres in New York was one of the best gross pictures that they have ever had, and, generally speaking, the longer the run—the more successful a picture is in the first-run, the longer the run, the more successful it will be in the runs that follow, because it is a better box-office attraction.

(1147)

Q. All you are saying is that the better box-office attractions do better everywhere and they are played longer in the first-runs as well as in all runs, is that right? A. They do do better everywhere, yes, sir.

Q. But you have had, have you not, a number of complaints from subsequent-run exhibitors in many situations where they objected to the fact that you have virtually exhausted the patronage for a picture in a town by continued first-runs and move-over first-runs before they ever got it? A. Yes, they would like to play them only about a week or four days, the shorter the better, because they would get—they think they would do better with it. I don't agree with that in many instances.

Mr. Leisure: May I ask the witness a question?

By Mr. Leisure:

Q. Just one point, Mr. Reagan, on cross-examination that is not quite clear in my mind. Whenever you have a known, established customer, is it customary for an opposition theatre, which has sufficient product for its own operation, to bid for product you offer to your regular customer? A. No, it is not customary, no, sir.

Q. And would your answer to that question be the same or different whether or not the theatre was a so-called affiliate or independent theatre? A. It would be the same.

(1147-A)

Mr. Leisure: Thank you.

(Witness excused.)

Mr. Seymour: Would your Honors give me a couple of minutes before I call the next witness?

Judge Hand: Yes.

(Short recess.)

(1148)

LEONARD H. GOLDENSON, called as a witness on behalf of the defendant Paramount, being duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. What is your position with Paramount? A. I am vice-president in charge of the theatre department.

Q. Are you a member of the bar? A. Yes.

Q. And when did you first come to Paramount? A. In early 1933, just at the time they went into receivership.

Q. You have been with Paramount ever since? A. Ever since.

Q. Will you tell us the various positions you have held? A. When I first went with Paramount I was sent up to New

England to take charge of the reorganization of the corporations in which Paramount had an interest, and after several years I worked together with the administrators of that business. I believe I stayed there until about the middle of 1937, at which time Mr. Frank Freeman asked me to come to New York to act as his assistant, which was about the middle of 1937.

Q. Mr. Freeman who has testified here was then head of the theatre department? A. That is right. He left the theatre department in the latter part of 1938 to take charge of the production and I succeeded to his position at that time and have remained in that position since.
(1149)

Q. And are you also a director of Paramount? A. Yes, sir.

Q. Will you describe generally the nature of Paramount's interest in theatres? A. Paramount is interested in corporations that have theatres in approximately 40 states. This is through stock ownership in these various corporations. That interest varies from as low as 12½ per cent up to 100 per cent. In this way Paramount has an interest in approximately 1550 theatres, of which I would say approximately 500 are in corporations in which Paramount has better than a 50 per cent interest, and the remaining theatres are in corporations in which Paramount has a 50 per cent or less interest.

Q. Do you know the approximate amount at which the investments of Paramount in these various companies are carried on Paramount's books? A. Yes, it is approximately $63,000,000, I believe.

Q. How are the companies in which Paramount has the interest which you have generally described operated? A. They are operated by local theatre executives who have the complete charge of the operation of those theatres. In the case of where Paramount has less than a hundred per cent

interest in those corporations, those local executives generally speaking own the remaining portion of the stock. In the case of where Paramount has a hundred per cent interest
(1150)
in those corporations, the local theatre executives have management contracts under which they share in the profits of those corporations.

Q. So that successful management increases their reward? A. That is right, sir.

Q. Generally speaking, are the managers or operators of theatre-operating companies in which Paramount has a 50 per cent interest or less the people who operated and managed them before Paramount had any interest? A. I think in every instance that is so, yes.

Q. Are those managers or operators for the most part old hands in the theatre business? A. I think most of them were pioneers in the business.

Q. Are many of them men who have been in the business for 25 years or more? A. I would say the very minimum 25 years.

Q. Do some of those operators or managers go back to the days of Associated First National? A. Go back long before them, I would say.

Q. In New Orleans Paramount has a 50 per cent interest in the theatres in which Mr. Richards and his group are the other 50 per cent owners? A. We have a 50 per cent interest in a corporation called Paramount-Richards Theatres with Mr. Richards——

Q. And Mr. Richards and perhaps others have the other
(1151)
50 per cent? A. Mr. Richards and I think three or four other people in his employ have the remaining 50 per cent, yes, sir.

Q. Is Mr. Richards the gentleman who was mentioned here by Mr. Freeman as a First National franchise holder in that area? A. That is right, sir.

Q. That is, he was a First National franchise holder? A. Was at that time, as he testified.

Q. With respect to the companies in which Paramount has more than a 50 per cent interest, including those in which it has a hundred per cent, where did Paramount procure the managers or operators who are presently managing and operating those Companies? A. I think in every instance most of those men were or have been with our company for a great number of years, long time before the reorganization of Paramount, and when Paramount was decentralized back in early 1933, at the time of the receivership, most of those men were sent by the trustees in bankruptcy or their advisers to these various areas throughout the country to become the local theatre executives in charge of those particular corporations, at which time they received contracts for the full right to manage those corporations and receive a percentage of the profits together with a fixed salary as their compensation and, I think, generally speaking, those

(1152)

contract arrangements have remained in existence ever since.

Q. Are those theatre operators or managers in the companies which we are now talking about, that is, where Paramount has more than a 50 per cent interest—— A. Oh, yes, I thought——

Q. —are they experienced theatre men? A. Oh, yes, most of them, I believe, have been in the business over 25 years. I don't know of a man who is the head of any of our theatre companies that has not been in the business over 25 years.

Q. Do you know the theory on which the theatre operations were decentralized? A. Well, I came into Paramount just at the time that Paramount went into bankruptcy, and having been in one phase of it, I know that the centralized system of operation was a complete financial failure. Paramount was in bankruptcy, and the trustees and those who

immediately preceded the trustees realized that the only way to try to overcome this was to completely decentralize the theory of operation of Paramount theatres.

What had been the trouble, I believe, was that Paramount was trying to operate their theatre operations on a national standard policy or formula. That policy, if it were used in the Paramount Theatre in New York, they were trying to use that same policy in a small town of five or six thousand. Well,
(1153)
that just wouldn't go. As an example, in a small country town of three or four thousand people, you might have, if you put a tuxedo on the manager and dressed the ushers up with ushers' uniforms, and it happened to be a farming community, the farmers coming into town, they just wouldn't go into the theatre, they would be ashamed to go in, seeing this manager and the people dressed up that way. So business suffered in small town operation.

When Paramount was decentralized, what happened was that these local theatre executives, living in the communities, getting to know the communities, knowing the habits of the people, they were able to talk to people as they came into the theatre, got to know them, and as a result the theatres became part of the communities and in that way, I believe, Paramount's interest in theatres started to make money.

Q. Are all the operating companies in which Paramount has an interest operated locally? A. Every situation except two theatres. Those theatres are the Paramount Theatre in New York, which almost exclusively runs Paramount pictures, and the Newman Theatre in Kansas City, which runs almost all Paramount pictures, except that it runs, I think, some Warner pictures, I think maybe as much as half of the Warner pictures.

Q. Aside from those two, every theatre in which Para-
(1154)
mount has an interest is operated by a local manager? A. Entirely.

Q. Do you consider the local management or operation the desirable method for the operation of those theatres? A. I certainly do. After all, the motion picture business is show business and show business requires a man to have knowledge of the local tastes, the local habits of the local people, know how to advertise pictures so as to appeal to those local tastes and those local habits, and that will vary in different sections of the country. And in that way, I think, our local theatre executives, knowing those habits and those customs and knowing about the nature of the communities where they live, they can, with the greatest amount of efficiency, accomplish the purposes.

Q. What matters are left to the local management for complete decision? A. All matters of operating policy are left with the local management. They have the full right to pass upon all advertising; they have the full responsibility to set all admission prices; they have complete authority and responsibility for the booking and buying of pictures; they have the full responsibility for the hiring and firing of personnel, and to make ordinary repairs to theatres.

Q. With respect to the local operating policy of the character which you have mentioned, I am not sure, Mr. Goldenson, how about licensing pictures? Did you mention that? (1155)

A. Yes, they have the complete right and responsibility, if it is a hundred per cent interest, they have by the management contract; and in the cases of less than a hundred per cent, it is generally original agreements that were made with them or by management contracts. They have the complete right to manage all theatres and buy all pictures.

Q. Does Paramount in any way interfere with the decisions of local management with respect to those operating policies? A. They do not.

Q. Does the theatre department in any way interfere with them? A. It does not, sir.

Q. If I understand you, those questions are left to local management, even where Paramount has a hundred per cent of the stock? A. Absolutely right.

Q. Will you describe generally the nature of your duties as vice-president in charge of the theatre department? A. As vice-president, the theatre department and I are obligated to look after Paramount's investment in these theatre corporations. That is done by constantly consulting with these various local theatre executives, and we have submitted to us by these local theatre executives the following things: Any capital expenditures that they recommend to be made

(1156)

are submitted to us for our approval; any new leases or the extensions of old leases; the purchase of any properties or the conversion of leases to fees, or the borrowing of any money.

That always originates with these local theatre executives and then, after they have arrived at their own conclusions as to whether they want to do anything, they submit it to us for our approval, and if it meets with the approval of the theatre department, we then ordinarily, maybe immediately or later, ratify at a meeting of the board of directors their actions in making such capital expenditures or leases or extensions of them.

Q. And if I understand you, there are operating policies which are left entirely to local management, and matters of investment or substantial expenditures which are submitted to Paramount? A. That is right.

Q. Is that distinction maintained whether or not Paramount has a hundred per cent interest or a 50 per cent interest? A. It is the same irrespective of the interest.

Q. Are you an officer and director of many of these theatre-operating companies? A. I think I am an officer and director of almost every one, yes, sir.

Q. Are other members of the theatre department officers and directors of some of the companies? A. Yes, sir.

Q. Can you tell us how the officership and the board (1157)

is generally divided in companies where Paramount has a 50 per cent interest or less or more than a 50 per cent interest? A. In cases where Paramount has less than a 50 per cent interest, the board is usually constituted of the members of the theatre department, of less than half of that board. As a matter of fact, in some cases, where we have less than half the interest, we don't have any members on the board. In the cases of where we have a 50 per cent interest in the corporation, generally speaking, half of the board is made up of members of the theatre department, and where we have better than a 50 per cent interest I would say, generally, we have a majority of the board of directors of those corporations.

In every case, I believe, the local theatre executive is the president of that corporation and, generally speaking, the vice-president is either myself or a member of the theatre department, and the treasurer is a member of the Paramount theatre department. I think the secretary is selected locally by our theatre associates.

Q. Is any member of the distribution department or its general sales department or sales department an officer or director of any one of these companies? A. They are not, sir.

Q. Do questions of local operating policies come up at meetings of the boards of these companies? A. No, they (1158)

don't. I think that policy was set at the time of the reorganization of Paramount. It was, I believe, established by Mr. Freeman and has been adhered to ever since by we members of the theatre department, that is, that only matters of capital expenditure and leases, extensions of leases,

borrowing money and matters of that nature come to the attention of the board. All other matters of operating policy, such as buying of films and booking of films and the advertising policy and all those things are handled by the local executives.

Q. Of course, you are aware, in general, of the extent of expenditures for those matters? A. Oh, definitely. We know every bit of expenditures.

Q. But the decision as to the policy is left to the local management, is that right? A. That is right, sir.

Q. I wish you would describe for us the personnel and divisions or departments of the theatre department. A. The theatre department has one man who is generally in touch with the theatre executives in the northern portion of the United States, has another executive who is generally in touch with the local theatre executives in the southern portion of the United States, and those two executives together with myself travel throughout the United States almost constantly with the view of looking firsthand to see whether (1159)
these theatre properties are properly maintained and operated.

In addition, we have the director of the Paramount Theatre in New York, who is trained in stage presentation, who is an expert on it, and he is available for advice and consultation at the instance of any of these local theatre executives at any time. We have a man who is trained in maintenance and construction, who is constantly visiting factories, manufacturing plants, with the view of studying the trend in construction and maintenance and he is available at all times to these local theatre executives, if they want to use his services for the purpose of suggesting ways to improve the theatre construction and maintenance. We have a man who is trained in finance and taxes and who is head of the theatre auditing department. We have a man who is an

expert in insurance, who is available to these local theatre executives, if they wish it. We have a man who is an expert in candy merchandising, who is available to these local theatre executives, if they wish it. We have a man whom we consider an expert in real estate matters who is available at any time if these local theatre executives should care to call on him for advice or consultation. I think by and large that is all.

(1160)

Q. Is there a lawyer connected with it? A. Oh, yes. We have a man who is very well trained in all theatre problems who is available for consultation or advice at all times.

Q. And he is separate from the general legal department? A. Yes, he is separate from the general legal department.

Q. Now, does the theatre department participate at all in the negotiations by these local theatre companies for the licensing of film of any distributor? A. They do not, sir.

Q. Between whom are the negotiations conducted for the licensing of Paramount pictures in the theatres owned or operated by those companies? A. They are conducted by the local theatre executives with the various distributors that happen to have——

Q. I am asking now about Paramount first. A. They are conducted by the local theatre executives with the Paramount distribution department. That would be through their local representatives in that particular exchange area where their theatres happen to be, or, I suppose, with a district or division or general sales manager.

Q. Does the theatre department participate in those negotiations for Paramount pictures? A. No, it does not, sir.

Q. Now, with respect to the pictures of other distributors, where are those negotiations conducted? A. They are

(1161)

conducted in the exchange areas where these local theatre executives have their main offices.

Q. And they are conducted between representatives of the several distributors and the local theatre operators? A. That is right, sir.

Q. Does any member of the theatre department have anything to do with those negotiations? A. None whatsoever.

Q. Does anybody else connected with Paramount have anything to do with those negotiations? A. None whatsoever.

Q. Now, by whom are questions as to such licenses—that is, the licenses of any distributor—decided as far as the theatre companies are concerned? A. By the local theatre executive in charge of those operations.

Q. Does the theatre department give any instructions to the local theatre operator as to what films he shall license, as to what distributors he shall deal with, or as to what terms he shall license pictures upon? A. It does not.

Q. Now, in the course of the negotiations between the local theatre operator and any distributor, does the theatre department participate in any way in those negotiations? A. No, sir.

Q. Is there any procedure that you know of by which

(1162)

any one group of theatres owned by a theatre operating company in which Paramount has an interest, exchanges information with another group of theatres in which Paramount has an interest, as to pending negotiations or film licenses with any distributor? A. There is not.

Q. As a matter of fact, is there any relationship whatever between the terms negotiated by a particular group of theatres in one company in which Paramount has an interest for the films of any distributor other than Paramount and the terms or contracts of any other group of theatres with that distributor? A. No. As a matter of fact I think they vary to a very great extent.

Q. That is, you say there is a variation between the terms arranged by one group of theatres with a distributor and another, is that so? A. That is right.

Q. Now, can you tell us how you know that? A. Well, our theatre auditing department gets in every week for purposes of certification, all the expenses of each respective theatre, and the grosses on each respective theatre, and in this way we know how much is being paid for film, and in that way I can tell whether the terms vary from circuit to circuit or from theatre to theatre; and they vary from circuit to circuit and they vary from theatre to theatre.

Q. That is, sometimes the theatres in one company vary (1163)
among themselves as to the terms with the distributor, is that right? A. That is right, sir.

Mr. Seymour: My brother Phillips thinks I misspoke myself. May I have the last question read?

(Last question read.)

Q. Now, does the theatre department regularly furnish to the theatre operating companies any information which may be of use in their decisions as to license negotiations or what pictures they ought to play? A. Yes.

Q. And what is the nature of that information? A. When pictures first break in theatres in which Paramount is interested throughout the United States, they break, ordinarily, I would say, in key spots geographically; the local theatre operator will send in to us how the picture did, namely, whether it did very good business or a good business or mediocre business or a poor business. It will also advise us as to audience reaction, whether the audience reaction was good, whether its box office appeal was to adults or to children or to women or to men, or to the family trade, or to general appeal. And sometimes they will set forth the nature of the

type of campaign that they used in the selling of that picture; as an example, we may get that report in from the field and send it out, and in one instance I can recall, or a few instances, Mr. Reagan used High, Wide and Handsome yes-
(1164)
terday as a picture in which Paramount had an investment of a million eight, and they lost money. Yet some of our associates, I can remember one in particular, Mr. Hudson, who is in charge of United Detroit Theatres, saw that the audience reaction to that picture was good even though it was not doing business; so he hit upon a different campaign than Paramount had used, or the theatres that had played that picture had used. He decided to sell it in the financial pages of Detroit to the financial people as to the tremendous investment in a picture; in the society pages and in the women's pages he sold it to the women; in the sports pages—there was a tremendous fight in there—he tried to sell it to the male audience because of the tremendous fight that appeared in that picture. Now, notwithstanding the fact that that picture did badly throughout the United States, according to Mr. Reagan, we know that Mr. Hudson did much greater in proportion than any place in the United States. So that brings up the fact that men who are trained showmen can see these things and use them to try to help those pictures at the box office.

Q. Now I understand that you get reports in the theatre department from the theatres in which a picture plays in which comment is made upon it in the respects that you mentioned? A. Yes, that is right, sir, and transmitting.——
(1165)

Q. And then you transmit that report to the other theatre operating companies for their information? A. That is right, sir; and then in addition——

Q. Now wait just a minute. Is this a copy, or is this one of such reports as you send it out (handing)? A. That is right.

Q. Now there is one reference on there I wish you would explain. The word "good" is opposite the entry which says, "Possibilities in second or subsequent run." What does that mean? A. Well, if the picture generally has an appeal to family trade, or has got a general appeal, the local fellow will figure that that picture has very good possibilities in second or subsequent runs, and he will so state that. And then when this goes out to the field the bookers see how the picture played in a given area, and they will take that into consideration in arriving at their independent judgment.

Mr. Seymour: I offer that in evidence. I am sorry I haven't got copies, but I shall supply them as promptly as I can.

Mr. Wright: Are you going to offer a copy of the form on which the information comes in, or is that the form that is already in evidence?

Mr. Seymour: No, this is something different. I
(1166)
don't know in what form it comes in. This is the form in which it goes out.

Q. And this contains the information that is received from the field? A. Yes. This is just as it comes in from the field, and as it comes in we send it out to each of the theatre corporations in which we have an interest.

Mr. Wright: We have no objection.

(Marked Defendant Paramount's Exhibit P-4.)

Q. Now, in addition to receiving information which is sent out on forms like Exhibit P-4, do you also receive telegraphic information as to the gross business done by pictures in certain cities in the United States? A. Yes, sir.

Q. And after receipt of that information, is the form of which a blank copy is Government's Exhibit 375, made up? A. That is right.

Q. And then after it is made up is it sent out to the field? A. It is sent out to the head of each of these local theatres, or executives.

Q. What is the purpose of having that report made out and sent out to the theatre operators or managers? A. When a booker gets that he sees the kind of business the picture has opened to; it shows a comparison of what a similar day did in a previous week or previous year, and he can judge as to the box office value of that attraction; and, accordingly, he knows exactly how to book the picture. He sees what the (1167)
grosses are in different sections; he may know that certain sections are somewhat comparable to his, and then he will book it accordingly, to his best judgment.

Q. I notice there is a reference in the report to the temperature on that particular day. A. There is not in that report. I looked for that but I do not find it in that, sir; but there is in our regular reports.

Q. In your telegraphic report? A. In our telegraphic report, the weather the previous day.

Q. What has that got to do with it? A. Well, if on a particular day there happened to be a strike or happened to be a storm or happened to be a cold weather spell, and say a picture in town X at a given theatre opens to $2000, and say it should have opened ordinarily at $4000, there may have been extenuating circumstances. So before booker will come to an independent judgment as to that picture on its opening date, he will look and see what the weather report was, or whether there was a strike, or what the conditions were. There may have been a circus in town, may have been a fair, or circumstances of that nature.

Judge Hand: We will now take a recess until two-fifteen. Tonight we shall adjourn at four o'clock.

(Recess until 2:15 p.m.)

(1168)

AFTERNOON SESSION.

LEONARD H. GOLDENSON resumed the stand.

Direct Examination continued by Mr. Seymour:

Q. Just before the recess, I was asking you about the reports which you mentioned and which are in evidence, which are received and furnished. Now the information is received from Paramount theatres in which Paramount has an interest? A. That is right.

Q. And is furnished to theatres in which Paramount has an interest? A. That is right.

Q. Now, is any of that information received from any other distributor? A. No, sir.

Q. Is any of that information furnished to any other distributor? A. No, sir.

Q. Does the information which is received and furnished, of the character which you have referred to, give any information as to the terms upon which any theatre has obtained the pictures which it is playing and which it has referred to?

Mr. Wright: I think he has already answered that question, if the Court please.

Judge Bright: Doesn't the exhibit show what information is furnished?

Mr. Seymour: What I am asking about is information with respect to terms, if your Honor pleases.

(1169)

Mr. Wright: He is calling now for a conclusion. I think the witness already covered it.

Mr. Seymour: If it is a conclusion, that is one objection; but on the ground that it is already covered, I do not think that is so.

Mr. Wright: We object on both grounds.

Judge Hand: Overruled. Go on.

A. It does not contain any terms.

Mr. Wright: What was the answer?

(Answer read.)

Q. Now as to Exhibit 375, which are the so-called telegraphic reports, they do not include reports from all theatres in which Paramount has an interest, do they? A. No. They contain reports from certain key theatres throughout the United States. I would say 175, 200; I have never counted them, but I imagine about that.

Q. Now, are the film license agreements made by the operating companies with distributors, furnished to the Paramount theatre department? A. Contracts? No contracts are furnished to the theatre department.

Q. So far as you know, are they furnished to any other department of Paramount? A. They are not.

Q. Now, after license agreements have been made, do you receive from any of the theatre operating companies abstracts or summaries of any of the provisions of the agree-
(1170)
ments? A. In some cases in theatres where we have a hundred per cent interest we do receive some summaries, but it is not as a general practice or a general rule. In the cases where we have less than a hundred per cent, I do not know of any cases where we have ever received the abstracts.

Q. Now, does the theatre department furnish such abstracts to any other department of Paramount? A. We do not, sir.

Q. And, of course, not to the distribution department? A. Certainly not.

Q. Does the theatre department make any effort of any kind to see to it that the operating companies deal on the same terms or on any particular terms with any distributor? A. We do not, sir. The film buying and the booking is done

exclusively by the theatre operators, by the theatre executives in the field, and we have nothing whatsoever to do with that. That is entirely their jurisdiction and their responsibility.

Q. What is the relationship between the theatre department and the distribution department? A. Two separate departments.

Q. Do you furnish the distribution department in any shape, manner or form, with any details as to film license agreements made by the theatre operating companies? A. We do not, sir.

(1171)

Judge Bright: Do you have any such information in your department?

The Witness: The only time that we have such information is from some of the hundred per cent theatres; we may get some summaries of contracts that may have been made, but outside of that, generally, we do not have them.

In the reports, audit reports that come in each week, that cover each of the items of expense in each theatre and the grosses, in those reports we know what they have paid for film. Now, in some cases they may set forth in those reports whether the pictures played on a percentage or a flat split. If it played percentage, they might compute what the final percentage was. In other words, if a picture was 35 per cent to split and that split had earned sufficient to get it up to 37½ per cent, they may just indicate the 37½ per cent of the gross that was paid for the picture, but we do not know exactly what that contrac was but we know simply what the sum total of film rental was.

Q. So you can figure out a term from that report? A. That is right, only in that way.

Q. Do you receive from the distribution department any information as to the terms upon which Paramount licenses its pictures in theatres connected with any other defendant or with independent exhibitors? A. No, sir, we never get
(1172)
such information.

Q. Do you receive any information regularly, even as to the terms on which Paramount distribution department licenses to theatres in which Paramount has an interest? A. Oftentimes I never know even how Paramount licenses to its own theatres. It may be, if I am talking to a theatre associate and he says he has just made a deal for a picture with Paramount, I might find it out that way, but as a practice, no, there is no information that comes in as a regular practice.

Q. You occasionally ascertain that in informal discussions with theatre operating companies, that is, as to the terms on which they do get Paramount pictures? A. That is right.

Q. But there is no regular interchange or no formal interchange of information with the distributing department? A. That is right, sir.

Q. Do you have any information at all as to the terms on which Paramount Pictures are licensed to other defendants in this case? A. No, sir.

Q. Do you make any attempt to see in any fashion whatever that the theatres in which Paramount has an interest pay license fees to the other distributors with any relationship whatever or any connections whatever, with the license fees which other defendants in this case pay to the Paramount distribution department? A. No, sir. In the first
(1173)
place, I don't have any idea what other companies pay to Paramount distribution, so I wouldn't know that. And in the second place, I have nothing to do with the buying of

pictures. That is handled exclusively by the theatre operators in the field. As to both of those things, I would know nothing about it.

Q. You mentioned the fact that you receive from the theatre operating companies weekly reports in the theatre department as to their operations? A. That is right, sir.

Q. That shows the various details of their operations, is that right? A. That is right.

Q. But in respect of film licenses, only the percentage appears? A. Or, if it is a flat rental, it might be there just in dollars. I can't always tell.

Q. Is any of the information received by the theatre department in those weekly reports furnished to the distribution department? A. No, sir.

Q. Do you feel free to furnish such information to the distributing department?

Mr. Wright: If the Court please, I object to how he feels. I do not see that has anything to do with it, any relevance.

Judge Hand: Overruled.

A. I could not and would not furnish that information to
(1174)
the distribution department. If the distribution department got that, they would be the profits that the theatres were making and they are liable to use that information to try to get greater film rentals. We happen to have interests in corporations where men have stock interests in those corporations and if Paramount would use that information against these theatre corporations, those men would suffer as a result, in their profits, and in our hundred per cent situations the men have profit-sharing contracts, and if Paramount was to use that information against those corporations, the men would get less in the way of a profit-sharing contract, so we, in the theatre department—I happen to be a director of every

one of these theatre corporations, I happen to be an officer, and I stand in the position of a fiduciary. If I were to give that information over to Paramount distribution, it could be used against the best interests of those corporations and I would be violating my duty as an officer as well as a director of those companies, and that is my responsibility as head of the theatre department, not to divulge any of that information.

Q. Have you ever been told by any of the theatre operating companies that you were not to disclose that information? A. Why, certainly. As a matter of fact, our theatre executives in the field would not send that information in (1175)
if it were ever divulged.

Q. For those reasons the fact is you give no information to the distribution department? A. Absolutely not.

Q. Mr. Rodgers, when he was on the stand, made reference to the Theatres Service Company and United Theatres, Inc., in New Orleans, and stated that it was his impression that Paramount had some interests in those companies. Does Paramount have any interest in those companies? A. No, sir.

Q. Mr. Richards, in acting for those companies, is he representing Paramount? A. No, sir.

Q. Mr. Richards has interests separate and apart, theatre interests separate and apart from his interest in Paramount-Richards? A. That is right, sir.

Q. And are those companies private enterprises of his? A. Yes, sir.

Q. Do those companies buy and book films for theatres in which Paramount has an interest? A. No, sir.

Mr. Wright: What was the preceding question? What was referred to by "those companies"?

Mr. Seymour: The companies that I am referring to, Mr. Wright, are Theatres Service Company and United Theatres, Inc.

Q. What is the interest of Paramount in Paramount-Richards? A. Fifty per cent.

Mr. Seymour: Now I am going to take the balance
(1176) of the tour of the 92 cities, which Mr. Goldenson is prepared to testify about, and I will do it as rapidly as I can.

Q. I am sure there will be no objection to your having a memorandum before you to refresh your recollection. I am going to ask you now about the cities in which Paramount has an interest, cities over a hundred thousand population, to which the Government has referred, where Paramount has an interest in a theatre or theatres operated on a first-run policy. Are you familiar with the theatres in those cities? A. Generally, I am familiar, yes, with most of these theatres.

Q. I wish you would proceed with the 48 cities alphabetically by States, indicating which theatres, operated on a first-run policy, are theatres in which Paramount has an interest, and describing the theatre and appraising its quality vis-a-vis the other theatres operated on a first-run policy in that city. A. Birmingham, Alabama. Paramount is interested in a corporation that has the Alabama Theatre, 2567 seats; the Lyric, 1192 seats; the Pantages, 2038 seats; the Ritz, 1479 seats; and the Strand, 799 seats. The Alabama Theatre is one of the finest theatres I believe in the Southeast. The opposition theatres that are on a first-run policy are the Empire, which has 960 seats; the Galax, which has 800 seats, and the Royal, which has 400. The Alabama and the Pantages are more than two and a half times as large as the next of the opposition theatres.
(1177)

Q. Would you say that those were the best theatres in Birmingham? A. Yes.

Q. Now, how many other theatres are there in Birmingham in which Paramount has no interest? A. There are 20 other theatres in which Paramount has no interest. That is, besides those three theatres that are in a first-run position.

Q. That is right. So there are other first-run theatres in Birmingham operated by other interests, and there are also 20 subsequent-run theatres operated by other interests? A. That is right, sir.

Q. And would you say that all the theatres in Birmingham are in competition? A. Yes, sir.

Q. Now will you go on to Hollywood or Los Angeles? A. In Hollywood, California, we have an interest in a company that has the Paramount Theatre, Los Angeles, which has 3,387 seats, and the Paramount Hollywood, which has 1451 seats. I would say that the two theatres in which we are interested are at least comparable to the best theatres in Hollywood and Los Angeles.

Do you want me to name all the competitive theatres?

Q. I do not think you need to. There are a number of other theatres operated on a first-run policy, is that right? A. That is right; and there are about 209 theatres in addi-

(1178)

tion to that which are on a subsequent-run policy.

Q. And Paramount has no interest in those 209 theatres? A. They do not.

Q. Are all the theatres there in competition? A. Yes, sir.

Q. Now, of course, as to all these theatres which you are mentioning, unless you make an exception they are the theatres enjoying the first-run of Paramount product? A. Yes.

Q. In those localities? A. That is right, sir.

Q. Now, will you go on down the list, if you please. Take San Francisco. A. In San Francisco, Paramount is interested in the Fox Theatre, which has 4,651 seats; the

Loew's Warfield, which is 2,669; the Paramount, which is 2734; the St. Francis, which is 1495, and the State, which is 2315 seats. In my opinion, the Fox, the Warfield and the Paramount are the three of the finest theatres in San Francisco. There is opposition on a first-run policy, the Golden Gate Theatre, which has 2800 seats; the Esquire, which has 1,008 seats; the United Artists which has 1465 seats, and the Orpheum, which has 2,440 seats. I would say the other theatres are nice theatres and well located, but I feel that our theatres are at least as good if not better than the competitive theatres.

Are these theatres actually operated by Paramount? (1179)

A. No, they are not; they are operated by Fox-West Coast. Paramount operates no theatres. They only operate the Paramount, in New York City and the Newman, in Kansas City, Mo. None of the theatres I mentioned are operated by Paramount. They are operated by the local theatre operators.

Q. They are not operated by Paramount theatre operators? A. No, they are operated by Fox-West Coast.

Q. Now, how many other theatres are there in San Francisco in which Paramount has no interest? A. 75 other theatres.

Q. And are there other theatres operated on a first-run policy in San Francisco? A. Well, I already named the Golden Gate, the Esquire, the United Artists and the Orpheum.

Q. And are all the theatres there in competition with each other? A. Yes.

Q. Now will you go on down the list. Take Hartford. A. In Hartford we are interested in a corporation that has the Allyn Theatre, which is 1998 seats. In addition there is the Poli Theatre——

Q. I do not know that you need to mention the others. I think it will take too long. There are other theatres operated on a first-run policy in Hartford? A. That is right.

Q. And in addition there are other subsequent-run theatres? A. Yes, there are nine other subsequent-run (1180)
theatres. I would say our theatre is not as large as some of the other theatres, but I think its appointments are just as good, if not better, and I think it is well located.

Q. Is it comparable in quality? A. Comparable in quality.

Q. And are all the theatres there in competition? A. Yes, sir.

Q. New Haven. A. In New Haven we have an interest in a corporation that has one theatre there with 2,348 seats called the Paramount Theatre. There are four other theatres that are on a first-run policy. Do you want me to name those theatres?

Q. I do not think you need to bother with the names. There are also other theatres in New Haven on a subsequent-run policy. A. Yes.

Q. How many? A. There are 14 other theatres on a subsequent-run policy. In Hartford I failed to mention——

Q. You did mention. A. Did I?

Q. Now, are all those theatres in competition? A. Yes, sir.

Q. Do you consider the theatre in which Paramount has an interest there comparable with the best theatres in town? A. I do, sir.

Q. Jacksonville, Florida. A. Paramount is interested in (1181)
a company that has the Florida Theatre, which is 2,185 seats; the Arcade, which is 1,115 seats; the Palace, which is 1,314 seats, and the Temple, which is 889 seats.

Q. Are they the best theatres in Jacksonville? A. In my opinion they are the largest and the best theatres in Jacksonville.

Q. And is the Paramount also interested there in some subsequent-run theatres? A. Yes. We have seven subsequent-run theatres there.

Q. And are there also subsequent-run theatres in other hands? A. Yes. There are six subsequent-run theatres in competitive hands.

Q. And is there another first-run theatre there operated on a first-run policy? A. Yes. The St. John's Theatre, which has 815 seats, is on a first-run policy and in competition.

Q. Are the theatres in which Paramount has an interest the best theatres in Jacksonville? A. That would be my best judgment, yes, sir.

Q. Now, Miami. A. In Miami we have two theatres, the Olympia, 2125 seats, and the Paramount, 1134 seats. In my opinion those two theatres are better than any other theatres in the town of Miami. In competition with those two theatres of ours there are two theatres on a first-run policy in the hands of competitors, namely, the Capitol with 1234 (1182) seats, and the Miami with 472. Paramount has an interest in a corporation in addition which has an interest in five subsequent-run theatres, and I believe there are 19, or I think 18, other subsequent-run theatres in the hands of independents.

Q. Are all the theatres there in competition? A. They are, sir.

Q. Tampa. A. In Tampa, Florida, we are interested in a corporation that has an interest in the Park Theatre, 1281 seats; the Strand, 742 seats; the Tampa, 1554 seats, and the Victory, 1381 seats.

Q. Are there other first-run theatres in Tampa? A. Yes. There is the State Theatre with 604 seats and the Lincoln Theatre, which caters to colored patronage, with 800 seats.

Q. Are the theatres in which Paramount has an interest there the best theatres? A. In my judgment they are.

Q. And are there a number of subsequent-run theatres in which Paramount has no interest? A. There are seven subsequent-run theatres in which Paramount has no inter-

est; but in addition we have four theatres ourselves that are subsequent-run.

Q. When you say "we have four theatres ourselves," you mean—— A. The corporation in which we are interested.

Q. And are all the theatres there in competition? A.
(1183)
Yes, sir.

Q. Atlanta, Georgia? A. In Atlanta, Georgia, we are interested in a corporation that operates four theatres there called the Fox, which is 4500 seats, and by far the largest theatre in that whole area; the Capitol Theatre, 2100 seats; The Roxy, 2500 seats, and the Paramount, 2476. There is in competition on the first-run policy the Grand Theatre, 1850 seats——.

Q. I do not think you need to mention the others. A. All right.

Q. There are four other theatres operated on a first-run policy in competition? A. That is right, sir.

Q. Now, are there other subsequent-run theatres in Atlanta? A. There are 43 other subsequent-run theatres in Atlanta in which we have no interest.

Q. And are all those theatres in competition? A. They are all in competition.

Q. In Chicago? A. In Chicago we have an interest in a corporation which operates the Apollo Theatre, 1340 seats; the Chicago, 3872; the Garrick, 980 seats; the Roosevelt, 1535 seats; the State-Lake, 2684 seats, and United Artists, 1736.

Q. Are there other theatres in Chicago operated on a first-run policy? A. There are.
(1184)

Q. And how many additional theatres or subsequent-run theatres is Paramount interested in in Chicago? A. 39 subsequent-run theatres.

Q. And how many other subsequent-run theatres are there in Chicago? A. There are 185 other subsequent-run theatres in which Paramount has no interest.

Q. And are all those theatres in competition? A. They are, sir.

Q. Now, referring to the theatres operated on a first-run policy, are they the best or comparable with the best theatres in Chicago? A. In my opinion they are at least as good, if not better, than the competitive theatres.

(1185)

Q. Peoria, Illinois. A. In Peoria, Illinois, we are interested in a corporation that operates three theatres that are on a first-run policy: The Madison Theatre, 1797 seats; the Palace 1816 seats and the Rialto 1560 seats.

Q. Are they the best theatres in Peoria? A. In my opinion they are, sir.

Q. Are there any other subsequent-run theatres in which Paramount has an interest? A. There are three.

Q. And are there subsequent-run theatres in which Paramount has no interest? A. There are seven subsequent-run theatres in which Paramount has no interest.

Q. And is there competition between those theatres? A. Yes, sir.

Q. Indiana. Gary. A. Gary, Indiana, Paramount is interested in a corporation that operates two theatres, named the Grand, 600 seats, and the State, 1200 seats.

Q. Are there other first-run theatres in Gary? A. Yes, sir, there are. In the case of Gary I would say our State Theatre, although not equal in size—the competitive theatre is much larger—I think our theatre as far as appointments is just as good if not better than the competitive theatre.

Q. Now, are there other subsequent-run theatres in Gary in which Paramount has no interest? A. That is right, sir.

(1186)

Q. How many? A. Eight subsequent-run theatres in which we have no interest.

Q. Are all the theatres in Gary in competition? A. Yes, sir.

Q. South Bend. A. Paramount has an interest in a corporation which operates three theatres: The Colfax, 2069; the Granada, 2387, and the Palace, 2977 seats.

Q. Are they the best theatres in South Bend? A. In my opinion they are, sir.

Q. Are there subsequent-run theatres there? A. Yes, sir.

Q. Does Paramount have an interest in any of them? A. In one.

Q. How many others are there? A. There are nine others.

Q. Are all those theatres in competition? A. Yes.

Q. Des Moines, Iowa. A. In Des Moines, Iowa, we are interested in a corporation which operates the Des Moines Theatre, 1679 seats; the Paramcunt, 1708 seats, and the Roosevelt, 600 seats.

Q. Is there another theatre in Des Moines operated on a first-run policy? A. Yes, sir.

Q. And are there subsequent-run theatres in Des Moines? A. Yes, sir.

Q. In how many does Paramount have an interest? A. They have an interest in seven.

(1187)

Q. In how many does it have no interest? A. Eleven.

Q. Are all those theatres in competition? A. Yes, sir, they are; and I would say our theatres are as good as if not better than the competitive theatres.

Q. Now, New Orleans, Louisiana, what are the theatres in which Paramount has an interest? A. Paramount has an interest in the Sanger Theatre, which is 3430 seats; the Tudor, which is 710; the Globe, which is 474, and Loew's State, which is 3294.

Q. Are there other theatres operated on a first-run policy in New Orleans? A. Yes.

Q. And are there a number of subsequent-run theatres? A. Yes, sir.

Q. How many subsequent-run theatres? A. 64.

Q. Does Paramount have any interest in them? A. They do not.

Q. And are all the theatres there in competition? A. Yes, sir.

Q. Are the first-run theatres in which Paramount has an interest there the best or comparable to the best theatres? A. In my opinion they are better than any competitive theatres.

Q. Now, Boston, Massachusetts. A. In Boston Paramount is interested in a corporation that operates the Metropolitan Theatre, 4267 seats; the Paramount, 1797 seats; the (1188)
Fenway, 1382 seats; the Scollay Square, 2542 seats, and the Olympia, 1912 seats.

Q. How many other theatres operated on a first-run policy are there in Boston? A. The records here show that there are 11 other theatres operated on a first-run policy.

Q. How do the theatres in which Paramount has an interest compare with the other theatres operated on a first-run policy? A. In my judgment the Metropolitan Theatre in Boston is the largest and best theatre in the entire New England; and the other theatres that are operated by the corporation in which Paramount has an interest are at least comparable if not better than any of the competitive theatres.

Q. Are there a number of subsequent-run theatres in Boston? A. Yes, sir.

Q. Does Paramount have an interest in some of them? A. Yes.

Q. And are there 22 in which Paramount has no interest? A. There are 22 in which Paramount has no interest.

Q. And are all the theatres in competition? A. Yes, sir.

Q. Now will you tell us about Cambridge? A. In Cambridge, Massachusetts, Paramount is interested in a corpo-

(1189)

ration that operates the Central Square Theatre, which has 2123 seats.

Q. Is there another somewhat smaller theatre operated on a first-run policy there? A. There is the University Theatre, which is a very nice theatre, but I think our Central Square is larger and better.

Q. Are there subsequent-run theatres in Cambridge? A. Yes.

Q. And is Paramount interested in any of them? A. Yes, they are interested in one.

Q. How many others are there? A. There are five others in which Paramount has no interest.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Lowell. A. Lowell, Massachusetts: Paramount is interested in a corporation that operates the Strand Theatre, with 1637 seats, and the Merrimac Square Theatre, 1640 seats.

Q. Is there another theatre operated on a first-run policy in Lowell? A. Yes.

Q. How many subsequent-run theatres are there there? A. There are five subsequent-run theatres there in which Paramount has no interest.

Q. Are all those theatres in competition? A. Yes.

Q. New Bedford. A. New Bedford: Paramount is interested in a corporation that has the Olympia Theatre, 2472 seats. There are three competitive theatres in the town

(1190)

operating on a first-run policy.

Q. How does the Olympia compare with the other theatres operated on a first-run policy? A. In my opinion it is a very much larger one than any of the other theatres, and in my opinion better located and better appointments.

Q. Now, are there subsequent-run theatres in New Bedford? A. Yes. We have one. We have an interest in the

corporation which operates one subsequent-run theatre, and there are six subsequent-run theatres in which we have no interest, Paramount has no interest.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Somerville, Massachusetts. A. Somerville, Massachusetts: Paramount is interested in a corporation that operates the Capitol Theatre, which has 1735 seats, and the Ball Square, which has 1248 seats.

Q. Are there other theatres there operated on a first-run policy? A. There are.

Q. How do the theatres in which Paramount has an interest compare with them? A. They are very much larger and in my opinion are much better.

Q. Does Paramount have an interest in any subsequent-run theatre? A. Yes, two.

Q. Is there another subsequent-run theatre? A. Yes.

Q. Are all those theatres in competition? A. In my judgment, yes.

(1191)

Q. Springfield, Massachusetts. A. Paramount is interested in a corporation that operates two theatres, the Paramount Theatre, with 2758 seats, and the Broadway with 1765 seats.

Q. Are there five other theatres operated on a first-run policy in Springfield? A. There are, sir.

Q. How do the theatres in which Paramount has an interest compare with them? A. In my opinion the Paramount Theatre is by far the best. It is certainly the largest and in my opinion it has got the best appointments and as good if not better location than the other theatres.

Q. Now, are there subsequent-run theatres in Springfield? A. Yes, sir.

Q. In how many has Paramount an interest? A. One.

Q. And how many others are there? A. There are five others.

Q. Are all the theatres there in competition? A. Yes, sir.

Q. Worcester. A. In Worcester we have an interest in a corporation that operates one theatre there, the Capitol Theatre, 1884 seats.

Q. And there are four other first-run theatres in Worcester? A. Yes, sir.

Q. And how many subsequent-run theatres? A. There are five subsequent-run theatres in which we have no

(1192)

interest.

Q. And how does the theatre in which Paramount has an interest compare with the other first-run theatres? A. Our theatre is not as large as the two other theatres in the town named the Poli or the Elm Street, but in our opinion our theatre is comparable to in appointments and certainly I think it is a better location than any of the other theatres.

Q. Are all the theatres there in competition? A. Yes.

Q. Detroit, Michigan. A. Detroit, Michigan: We are interested in a corporation that operates four theatres. The Michigan Theatre with 4029 seats; the Broadway Capitol with 3367 seats; the Palms State with 2967 seats; the United Artists with 2018 seats.

Q. And are there several other theatres operated on a first-run policy in Detroit? A. There are three others.

Q. How do the theatres in which Paramount have an interest compare with those? A. In my opinion our theatres are comparable to the other theatres in the town. The Fox Theatre is a little larger, I think a thousand seats larger, but our Michigan Theatre in my opinion the appointments are as good if not better, and I think it as well located as the Fox Theatre.

Q. In how many subsequent-run theatres in Detroit does Paramount have an interest? A. 13.

(1193)

Q. And do you know approximately how many other subsequent-run theatres there are in Detroit in which Para-

mount has no interest? A. Approximately 124 in which we have no interest.

Q. Are all those theatres in competition? A. Yes.

Q. Now, Flint, Michigan. A. In Flint, Michigan, we are interested in a corporation that operates four theatres: The Capitol with 1951 seats; the Palace with 1390 seats; the Garden with 917, and the Strand with 1076.

Q. Now, those theatres are owned, are they, by the Butterfield Circuit? A. They are, sir.

Q. What is the extent of Paramount's interest in the Butterfield Circuit? A. We have 25 per cent interest.

Q. How do those theatres compare with the other theatres in the town? A. Yes, they compare very favorably. As a matter of fact, they are the best theatres in the town.

Q. Now, does the Butterfield Circuit have an interest in other theatres there? A. Yes, four subsequent-run theatres.

Q. And how many in which the Butterfield Circuit has no interest? A. There are 13 other theatres in which the Butterfield Circuit has no interest.

Q. And are all those theatres in competition. A. Yes.

Q. Grand Rapids, Michigan. A. We are interested in

(1194)

a corporation there that operates four theatres: The Regent, 1829 seats; the Majestic, 1135 seats; the Kent, 1081, and the Center, 872.

Q. Are those theatres also owned by the Butterfield Circuit? A. They are.

Q. Are those the best theatres in Grand Rapids? A. Yes, sir.

Q. How many subsequent-run theatres are there also owned by Butterfield? A. Six subsequent-run theatres.

Q. And how many are there in which Butterfield has no interest? A. There are 18 other theatres in Grand Rapids in which Butterfield has no interest.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Duluth, Minnesota. A. Paramount is interested in a corporation that operates four theatres in Duluth, Minnesota: The Norshore, 1209 seats; the Lyric, 1053 seats; the Garrick, 963 seats, and the Strand, 475 seats.

Q. Are there other theatres operated on a first-run policy in Duluth? A. Yes, sir.

Q. How do the theatres in which Paramount has an interest compare with the others? A. They are by far the best theatres in the town, much larger, better appointments, and better located.

Q. And are there six subsequent-run theatres in which Paramount has no interest? A. That is right.

(1195)

Q. Are all those theatres in competition? A. Yes, sir.

Q. Minneapolis. A. Minneapolis, Paramount has an interest in a corporation that operates seven first-run theatres: The Radio City, 4013 seats; the State, 2288 seats; the Century, 1632 seats; the Lyric, 1078 seats; the Gopher, 1028 seats; the Aster, 797 seats, and the Orpheum, 2832 seats.

Q. Are there any other theatres regularly operated on a first-run policy in Minneapolis? A. Yes. There is the World which operates on a policy I think of foreign films.

Q. A much smaller theatre? A. Yes.

(1196)

Q. And are there other subsequent-run theatres in which Paramount has some interest? A. Yes, eight.

Q. How many are there in which Paramount has no interest? A. 45.

Q. Are all the theatres there in competition? A. Yes, sir.

Q. St. Paul. A. In St. Paul, Paramount has an interest in a corporation that operates 5 theatres, the Paramount, 2362 seats; Riviera, 1268 seats; Strand, 755 seats; Tower, 1046 seats; and the Orpheum, 2183 seats.

Q. Is there another theatre there which shows some pictures first-run? A. Yes, I think the World.

Q. Is that also largely engaged in showing foreign films? A. I believe so, yes.

Q. Are there some subsequent-run theatres in St. Paul in which Paramount has an interest? A. There are five in which we have an interest and there are 31 in which we have no interest.

Q. Would you say all the theatres there are in competition? A. Yes, sir.

Q. Kansas City, Missouri. A. Paramount is interested in a corporation that operates the Newman theatre, 1914 seats.

Q. How many other theatres operated on a first-run policy are there in Kansas City? A. I believe there are seven.

(1197)

Q. How does the Newman Theatre compare with the other theatres operated on a first-run policy? A. I don't think the Newman Theatre is as large, but I think it is the best located theatre in Kansas City. I am certain that the appointments are comparable with the best.

Q. Does Paramount have an interest in any subsequent run theatres in Kansas City? A. They do not.

Q. How many other subsequent run theatres are there? A. 56 subsequent run theatres in which we have no interest.

Q. Are all the theatres there in competition? A. Yes.

Q. Omaha, Nebraska. A. Paramount is interested in a corporation which operates three theatres, namely, the Omaha, 2500; the Orpheum, 2975; the Paramount, 2750.

Q. Is there another theatre operated on a first-run policy in Omaha? A. Yes.

Q. How do the theatres in which Paramount has an interest compare with that? A. They are by far larger. Their appointments are in my opinion as good, if not better, and I think they are better located.

Q. Does Paramount have any interest in any subsequent-run theatre? A. No.

Q. How many other subsequent-run theatres are there? A. 25.

Q. Are all the theatres there in competition? A. Yes.

(1198)

Q. Newark, New Jersey. A. We have an interest in a corporation that operates two theatres, the Paramount, 2000 seats, and the Adams, 1917 seats.

Q. Are there several other theatres operated on a first-run policy in Newark? A. Yes, there are three others.

Q. How do the theatres of Paramount compare with them? A. Our seating capacity is not as large as the other three but I think the appointments are at least as good, if not better, and I think the location is as good if not better than the other theatres in town.

Q. Does Paramount have an interest in any subsequent-run theatres in Newark? A. They do not.

Q. How many subsequent-run theatres are there? A. 46 others.

Q. Are all those theatres in competition? A. Yes.

Q. Paterson, New Jersey. A. We are interested in a corporation that operates the United States Theatres, 1487 seats.

Q. Are there four other theatres operated on a first-run policy there? A. There are.

Q. How does the theatre in which Paramount has an interest compare with them? A. I do not think it is as large as two other theatres, but I think it is comparable in quality as well as location.

Q. Does Paramount have any interest in subsequent-run

(1199)

theatres there? A. No, sir, it does not.

Q. How many others are there? A. There are five subsequent-run theatres, in which we have no interest.

Q. Are all the theatres there in competition? A. Yes.

Q. Buffalo. A. In Buffalo, New York, we are interested in a corporation which operates three theatres there, namely, the Buffalo, the Great Lakes and the Hippodrome. The Buffalo has 3489 seats; the Great Lakes 3028 seats, and the Hippodrome 2089 seats.

Q. Are there other first-run theatres in Buffalo? A. Yes, sir.

Q. And how do the theatres in which Paramount has an interest compare with them? A. Our theatres are by far the largest, and in my opinion the appointments are as good if not better and certainly as well located as any other theatre.

Q. Does Paramount have any interest in subsequent-run theatres in Buffalo? A. They do, sir.

Q. How many? A. Six.

Q. How many other subsequent-run theatres are there in Buffalo? A. There are 49 others.

Q. Are all the theatres there in competition? A. Yes.

Q. Brooklyn. A. In Brooklyn we have an interest in a corporation that operates three theatres, the Paramount with 4156 seats; the Strand with 2911, and the Fox with (1200)
4060.

Q. Are there other theatres operated on a first-run policy there? A. Yes, sir.

Q. How do the theatres in which Paramount has an interest compare with them? A. The Paramount and Fox are by far much larger. I think the appointments are as good if not better than their competitors.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Manhattan, New York. How many first-run theatres in Manhattan does Paramount have an interest in? A. Paramount is interested in corporations which have two theatres in New York, the Paramount with 3664 seats, and the Rivoli with 2092 seats.

Q. Are there some 15 or so other theatres operated on a first-run policy in Manhattan? A. Right.

Q. Are there a number of subsequent-run theatres? A. Yes, sir.

Q. Does Paramount have any interest in any of the subsequent-run theatres? A. They do not.

Q. Are all the theatres in and around Greater New York in competition? A. They are, sir.

Q. I should say in Manhattan and Brooklyn, that is? A. Yes. Well, the theatres you mention are just Manhattan. I assume that is what you mean.

Q. Rochester, New York. A. In Rochester, New York, (1201)
we are interested in a corporation that operates four theatres, the Century with 2250 seats; the Regent with 1600 seats; the Palace with 3000 seats, and the Temple with 1000 seats.

Q. Is there another theatre in Rochester operated on a first-run policy? A. Yes.

Q. How do the theatres in which Paramount has an interest compare with it? A. Not as large as the opposition theatre but I believe as good in appointments, certainly, and well located.

Q. Does Paramount have an interest in any subsequent-run theatre in Rochester? A. One.

Q. How many others are there? A. There are 32 subsequent-run theatres.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Yonkers. A. We are interested in a corporation that operates two theatres, namely, the Proctor's, which is—no, I beg your pardon. The other one is a subsequent-run. You want only the first-run.

Q. That is right. A. One theatre, Proctor's, which has 2043 seats.

Q. Is there another theatre operated on a first-run policy there? A. Yes, sir.

Q. Which one has the first-run of Paramount's product? A. I believe Loew's have the first-run of Paramount product. (1202)

Q. Does Paramount have an interest in one subsequent-run theatre? A. Yes.

Q. Are there eight others? A. Yes.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Charlotte, North Carolina. A. In Charlotte, Paramount is interested in a corporation that operates four theatres there, the Carolina with 1450 seats; the Imperial with 946 seats; the Broadway with 1103 seats, and the State with 645 seats.

Q. Are those the best theatres in Charlotte? A. Yes.

Q. Are there any other theatres comparable with them? A. No, sir.

Q. Is Paramount interested in one subsequent-run theatre there? A. Yes, sir.

Q. How many other subsequent-run theatres are there there? A. There are seven subsequent-run theatres in which we have no interest.

Q. Are all those theatres in competition? A. Yes.

Q. Toledo, Ohio. A. In Toledo, Ohio, we are interested in a corporation that operates two theatres, the Paramount with 3408 seats, and the Princess with 940 seats.

Q. How many other theatres operate on a first-run policy there? A. Five other theatres.

Q. How do the theatres in which Paramount has an interest compare with them? A. Our Paramount Theatre by (1203)
far is the largest and the best theatre in Toledo.

Q. Paramount is not interested in any subsequent-run theatre there? A. No, sir.

Q. How many subsequent-run theatres are there? A. 21.

Q. Are all the theatres there in competition? A. Yes, sir.

Q. Oklahoma City. A. In Oklahoma City, Paramount is interested in a corporation that operates five theatres first run, the Criterion with 1397 seats, the Tower with 919 seats, the Midwest with 1474 seats, the Liberty with 1308 seats, and the Warner with 1849 seats.

Q. Is there another theatre there operated on a first-run policy. A. Yes, sir.

Q. How do those theatres in which Paramount has an interest compare with the other theatre. A. In my opinion they are bigger, better, finer appointments, and better located.

Q. Does Paramount also have an interest in five subsequent-run theatres? A. Yes, sir.

Q. How many other subsequent-run theatres are there? A. There are 18 other subsequent-run theatres in Oklahoma City.

Q. Are all those theatres in competition? A. Yes, sir.

Q. Scranton, Pennsylvania. A. In Scranton, Pennsylvania, we are interested in a corporation that operates four (1204)
theatres, namely, the Strand with 1542 seats; the Comerford with 1600 seats; the State with 920 seats, and the Capitol with 1770 seats.

Q. Are those the best theatres in Scranton? A. Yes.

Q. Is Paramount also interested in some subsequent-run theatres there? A. Yes, we have an interest in seven subsequent-run theatres.

Q. How many other subsequent-run theatres are there? A. There are four others in which we have no interest.

Q. Are the Scranton theatres owned by the Comerford Circuit? A. Yes, sir.

Q. What is the extent of Paramount's interest in the Scranton theatres? A. We have a 50 per cent interest in the common stock. The preferred stock is owned by Mr. Frank Walker, M. E. Comerford, and M. B. Comerford Estate—

they are both estates, and Frank Walker is living, and they have an A preferred stock and until that is paid off they have a majority of the board of directors.

Q. Chattanooga, Tennessee. A. We have an interest in a corporation that operates three theatres, the Tivoli with 1781 seats, the State with 856 seats, and the Rialto with 800 seats.

Q. Are those the best theatres in Chattanooga? A. Yes, sir, by far.

Q. How many subsequent-run theatres are there? A. (1205) There are 12 subsequent-run theatres.

Q. Does Paramount have any interest in them? A. They do not.

Q. Are all the theatres there in competition? A. Yes, sir.

Q. Knoxville, Tennessee. A. Knoxville, Tennessee, we are interested in a corporation that operates three theatres, the Tennessee with 1996 seats, the Riviera with 1012 seats, and the Strand with 799 seats.

Q. Are those the best theatres in Knoxville? A. In my opinion they are by far the best.

Q. Does Paramount have some interest in subsequent-run theatres there, and, if so, how many? A. Five subsequent-run theatres.

Q. How many other subsequent-run theatres are there? A. There are nine other subsequent-run theatres in which we have no interest.

(1206)

Q. How about Memphis? A. In Memphis we own 50 per cent of the stock of the corporation that operates there. Mr. M. A. Likeman is the theatre operator.

Q. Will you go through these Texas cities? Dallas. A. In Dallas, Paramount is interested in a corporation that operates six first-run theatres, six theatres in which there is

a first-run policy, the Majestic with 2,415 seats, the Palace with 2,332 seats, the Melba with 1,841 seats, the Tower with 1,295 seats, the Rialto with 1,332 seats, the Capitol with 1,052 seats.

Q. How do those theatres compare with the other theatres in Dallas? A. By far the largest and the best.

Q. And is Paramount also interested in 11 subsequent-run theatres there? A. They are, sir.

Q. How many other subsequent-run theatres are there? A. There are 29 other subsequent-run theatres in which we have no interest.

Q. Who operates the theatres in Dallas? A. Karl Hoblitzelle and Robert J. O'Donnell. They own 50 per cent of the stock of the corporation operating these theatres and Paramount owns the other 50 per cent.

Q. Fort Worth. A. We are interested in a corporation that operates three theatres, the Worth, with 2,358 seats, the Hollywood, with 1,700 seats, and the Palace with 1,468 seats. (1207)

Q. And how do those theatres compare with the other theatres in Fort Worth? A. By far the biggest and the best.

Q. Is Paramount also interested in some subsequent-run theatres there? A. They are.

Q. How many? A. Nine.

Q. How many others are there there? A. 13 in which we have no interest.

Q. Are the Fort Worth theatres also operated in the same way as the Dallas theatres? A. Yes, sir.

Q. Houston. A. In Houston we have an interest in a corporation that operates four theatres operated on a first-run policy, namely, the Majestic with 2,081 seats, the Metropolitan with 2,320 seats, and the Kirby with 1,464 seats, and the Iris with 1,069 seats.

Q. Is there another theatre operated on a first-run policy in Houston? A. Yes, sir.

Q. How do the theatres in which Paramount has an interest compare with it? A. The Majestic and Metropolitan, in my opinion, are not quite as large as the competitive theatre, but, in my opinion, as good, if not better as far as appointments and location.

Q. Does Paramount have some interest in subsequent-run theatres there? A. Yes, sir.

Q. How many? A. 16.

Q. How many others are there? A. There are 27 others (1208)
in which we have no interest.

Q. Are the Houston theatres also operated on the same basis as the other theatres? A. By Mr. Hoblitzelle and Mr. O'Donnell.

Q. And Paramount's interest is 50 per cent. San Antonio. A. In San Antonio Paramount is interested in a corporation that operates four theatres on a first-run policy, namely, the Majestic with 3703 seats, the Aztec with 2433 seats, the Texas with 2752 seats, and the Empire with 1497 seats.

Q. Are those the best theatres in San Antonio? A. In my opinion by far they are the best theatres.

Q. Does Paramount have some interest in subsequent-run theatres there? A. Yes; 11 subsequent-run theatres.

Q. Are there other subsequent-run theatres there? A. There are eight other subsequent-run theatres.

Q. Salt Lake City, Utah? A. In Salt Lake City we are interested in a corporation that operates four theatres on a first-run policy, the Utah, with 1823 seats, the Centre with 1627 seats, the Capitol with 1200 and the Studio with 350 seats.

Q. Are there other theatres in Salt Lake City operated on a first-run policy? A. Right.

Q. How many? A. There are four.

Q. Does Paramount have any interest in subsequent-run
(1209)
theatres there? A. They do not—wait a minute. We have one that is a subsequent-run theatre.

Q. Are there other subsequent-run theatres there? A. Yes, there are seven other subsequent-run theatres in which we have no interest.

Q. Are all those theatres in competition? A. Yes, sir.

Q. I have asked you about whether these theatres in various cities were in competition, and I want to be clear as to the sense in which you used that. Are all motion picture theatres in a general area in competition? A. In my opinion they are, yes, sir.

Q. In what sense? A. In the sense that when a patron decides to go to a place of amusement, he or she has a choice. They can go to a theatre in a downtown area that is on a first-run policy, where the admission price is high and where they have an opportunity of seeing the picture first. Generally speaking, that theatre is much larger than any other theatre in town and its appointments are much better.

Or they have a choice of waiting 28 days, or whatever the clearance happens to be in a given situation, and going to the next house where the admission price may be only 50 cents, where the appointments in the theatre are very good, very nice, might be in their particular neighborhood and they might not want to go downtown. Or they can wait until it gets into the next subsequent-run house, which may
(1210)
be 35 cents, where the house won't be a large as the two previous houses, where the appointments may be not quite as good, but yet be very nice, where they have everything that the first-run theatre has except that they do not have the, possibly, the size, as I said, and do not have, maybe, the fine appointments. Or they can wait for another subse-

quent run, I mean, go to another subsequent-run where the admission prices are 25 cents.

So that a patron going to seek amusement can go to a cross-section of any type of theatre at any price that will fit their pocketbook on that particular evening, or any program that will fit their taste that particular evening. There may be a picture playing in a first-run situation that has a star they don't like, or probably a story or picture they don't like, so they may, though they want to go to the first-run, they may decide to go to another one.

So you are always in competition, and every theatre, in my opinion, is always in competition with every other theatre for that particular patronage.

Q. Is there in your experience a segment of the population which is a separate, first-run market? A. I don't think so. I don't think so at all. As a matter of fact, I would say the depression—the period in which we rode through the depression—proved anything but that. Where people did

(1211)

not have the money in their pockets, the subsequent-run theatres did a greater business in proportion than any other theatres, because people were waiting to get it at a cheaper price. They could not afford to pay the higher prices. As a matter of fact, most of the theatres that went into bankruptcy during the depression period—my experience, I remember,—were first-run theatres, because they had terrifically high costs, they had many millions of dollars in those first-run theatres, because they built luxurious palaces for the tastes of the people, but the people didn't have the money during that period. So the subsequent-run theatres benefited.

Q. My brother Phillips asked me to ask you whether there aren't many subsequent-run theatres with admission prices under 25 cents? A. Oh, yes, they are run as low as ten cents, I believe.

Q. Dealing generally with the cities under 100,000, are you generally familiar with the quality of the theatres in which Paramount has an interest in those cities? A. Yes, I am, generally speaking.

Q. Would you say that the theatres in which Paramount has an interest in those cities, operated on a first-run policy, were the best or comparable to the best theatres in those localities? A. That would be my judgment.

Q. Do the theatre-operating companies in which Para-
(1212)
mount has an interest make a consistent effort to keep their theatres up? A. They do, sir. We spend a tremendous sum of money. I know I have to approve each year a tremendous sum of money for expenditures on those theatres, and it has been, I know, the policy of these theatre operators, who are operating these theatres, to want to keep their theatres ahead of the standard of the times, because, generally speaking, you will find that in small towns today merchants and everybody are alert to constant changing of construction and maintenance of properties, and our people, being in the local areas, can judge how the merchants are improving their store fronts and their places of business. So our people want to do the same with respect to their theatres and, as a consequence, we spend millions of dollars a year in maintenance of those theatres.

Q. For example, is air conditioning installed in many of those theatres? A. I think by far the vast majority of our theatres have air conditioning.

Q. The distinguished counsel for the Government read into the record one day week before last the names of a number of towns having population of 25,000 or less, in which he stated that Paramount was interested in all the theatres in each of those towns. Some of those towns had a population of under a thousand, some of them were up close to

twenty-five thousand. Do you know whether in many of
(1213)
those towns there is only one theatre? A. Yes.

Q. And in others there are only two theatres? A. Yes, sir.

Q. And in others, in a few others, there are more than two theatres? A. That is right, sir.

Q. Is there any rough gauge by which one can approximate about how many theatres a town can support? A. I couldn't do it on the basis of theatres, but I could do it on the number of seats in a town.

Q. Is there any rough gauge for that? A. Yes. Generally there has grown up in the business a formula that there generally should be one seat for every ten people living in the town. There are exceptions to that, of course. Say a town is a good show town, they would want to have a greater ratio of seats to patrons because the people have a tendency to want to go to pictures more often. If it is a poor show town, your ratio may be different, it may be 1 to 15 or 1 to 20.

You have situations in some towns, such as are called summer towns or winter towns, where the people go for vacations. There you have got to keep off season a lot of extra seats in order to accommodate during the season the number of people that flow into those towns.

You have your large metropolitan areas throughout the United States where the people like to trade in those metro-
(1214)
politan areas, so when they come to town, they get tired in the evening, and they like to go to the moving pictures, and so, as a result, you have to have, perhaps, there a larger ratio of seats to the patrons than you would in a small town, as an example, where the patrons are drawn out of small towns, to go to the larger trading area, so certain small towns need a lesser number of seats to the total number of patrons.

But by and far we use the standard of 1 to 10, and then we have to use the exceptions for areas in a given situation, and I think people that have been years in the business can determine that pretty well. You know what towns are good and what are bad.

Q. There are all kinds of variations depending upon the locality as to how many theatres the town can support, but if there is a town of, say, 5,000, just a typical town with no special qualities one way or the other, and it has one theatre with 500 seats, is it likely that that town would provide a comfortable income to another theatre? A. I wouldn't think so. I would—certainly from an economic standpoint—would not want to do it myself.

Q. Are there some towns in the group that the Government read in which are in the South? A. Oh, I think, if I remember correctly—I went over the list the other day—I think a lot of them are in the South—the greater proportion

(1215)

of them were.

Mr. Seymour: You may examine, Mr. Wright.

Mr. Frohlich: I should like to ask a few questions.

Cross-Examination by Mr. Frohlich:

Q. Mr. Goldenson, what is the Florida Theatres, Inc.? A. Florida Theatres, Inc. is a corporation, the stock of which Paramount owns 100 per cent, in Florida.

Q. That is known as the Sparks Circuit? A. Formerly was the Sparks Circuit. Paramount bought out Sparks' interest.

Q. And did the Paramount have an interest in this Sparks Circuit as far back as 1936? A. Paramount has had an interest in that circuit since 1933, that I know, when I came into Paramount. I do not know how much before that.

Q. You testified a little while ago that down south they have colored theatres and white theatres. A. They do, sir. Not always, but sometimes.

Q. In many of the states? A. Many towns.

Q. That is true in Florida, isn't it? A. I think so.

Q. There has been put in evidence in this case a contract for the exhibition of Columbia Pictures Corporation pictures signed by the Florida Theatres, Inc. on December 1, 1943. It is Exhibit No. 267. I will show you this exhibit and ask you (1216)

to be good enough to look at the list of 43 theatres which are covered by that contract, and tell us, if you please, which of those cities named in that group contain only one theatre. A. Well, Arcadia, Florida, contains one theatre; Bartow contains two; Bradentown contains two; Clearwater, two; Cocoa, one; Daytona Beach, I think about five; Deland contains one; Delray Beach contains one; Dania, one; Eau Gallie, one; Eustis, one; Fort Lauderdale, five; Fort Myers, three; Fort Pierce, one; Fort Pierce, I think, has a new theatre building—no, I think Fort Pierce has only one; Gainesville, three; Hollywood, two; Jacksonville I have already mentioned in my testimony; Jacksonville Beach, we don't have an interest in the operation, but there is one at Jacksonville Beach; Lakeland has one; Lake Worth has two; Melbourne, one; Mt. Dora, one; New Smyrna, one; Ocala, three; Orlando has about five; Lake Wales has two; Palatka, two theatres in town Palm Beach has two theatres; Palmetto has, I think, three theatres there; Plant City, two theatres; St. Augustin, two; St. Petersburg, approximately six or seven; Sanford, two; Sarasota has two; Stuart has one; Tallahassee, three; Tampa has about, I would say, ten—I am guessing on Tampa; West Palm Beach, I think, has about five; West Tampa, we don't operate there, so I couldn't (1217)

tell you; Winter Haven has two; Winter Park has one; Ybor Beach, one; Ybor City, three. Paramount has no interest in Ybor City. In addition to that, there are certain colored theatres operated in these towns which I know nothing

about, in the sense that we do not operate any in these towns, so I cannot answer that problem, but I am talking about the theatres here.

Q. Isn't it true that in 37 of these 43 cities you have just mentioned, Sparks Circuit owns all of the theatres in the town? A. That is not so.

Q. Well, how, in what respect am I wrong? In how many towns does the Sparks Theatres own all of the theatres? A. I would say 32.

Q. So that any distributor who wants to show his pictures in 32 of these cities would have to make a contract with the Sparks Circuit? A. In 32 of the cities, yes.

Q. Does Sparks own any theatres in Miami or Miami Beach? A. Yes, Florida Paramount Enterprises does.

Mr. Seymour: Would anybody else like to ask any questions? Otherwise I am through, Mr. Wright.

(1218)

Cross Examination by Mr. Wright:

Q. Mr. Goldenson, in giving this testimony about first-run theatres, how did you use the term? A. The theatres operating presently on a first-run policy.

Q. By a first-run policy you mean exhibition of what product on first-run? A. I would say pictures of all distributors that are available in the given area for the first-run showing.

Q. Did you in your testimony classify as first-run theatres which had no regular first-run of major product? A. I may have. I will go over the list and tell you specifically, sir.

Q. Can you name any particular theatres that fall in that category? A. Of course, I would like to know what you mean by first class product. The P. R. C., who release their pictures, every picture that they have is called a first class product.

Q. I said major product. A. What do you mean by major product?

Q. I take it as the term is understood in the trade, to mean product released by one or more of these defendants, does it not? A. Well, I don't know. If you will tell me what it is, then I can answer it better. Is that what you mean?

Q. What does "major product" mean as it is used in (1219)
the trade in your experience? A. I would say any product that is sufficient to play in good theatres, yes, would be a major product.

Q. For the most part that is the produce released by the eight defendants in this case? A. I think so. I generally think so, although the Republic and a few other distributors have come along in recent years and, in my opinion, are making much better pictures than they ever have.

Q. How many would you say that Republic released during 1943-1944 that you exhibited in your key first-run theatres? A. Oh, I would say five or six, probably.

Q. Five or six pictures? A. I would think so.

Q. In your first-run, key first-run theatres? A. Yes.

Q. Can you name them? A. Not offhand. I will check it and give it to you, sir.

Q. And Monogram? A. Monogram has had, I would say, about four or five this last year, "Dillinger" or "These Are Your Children." I know of two others I cannot think of the title; say possibly four or five.

Q. In the 1943-1944 season? A. Oh, 1943-1944 season? No, I would have to check back for the 1943-1944 season. I gave you 1944-1945.

Q. And P. R. C.? A. I will check the records and see. Very simple.

Q. So in your classification then you have included what (1220)
you call opposition first-run theatres, theatres which had no

regular run on first-run product other than let us say Republic or Monogram or P.R.C., is that right? A. There may be a few included of that nature, but, generally, the opposition theatres that I set forth here played the products of—certain major companies' products.

Q. Can you give me the names of those that fall within the P.R.C., Republic and Monogram class, names and locations of those? A. When you say that you want to have the names, do you want me to pick out a theatre that is competitive theatre and eliminate the other competitive theatres?

Q. No, I just want to know the names and locations of the theatres you have described as opposition or competitive first-runs, who had only a regular first-run of the product of one or two or all three of those companies. A. I would say this, if that is what you wish, I will go back and give them to you. In Hartford, the Poli, the Palace, Strand and Regal, and E. M. Loew's operating the theatres, operates with major companies' products. The State Theatre has Monogram, P.R.C. and Republic, as I see it here.

Q. If you have them on the chart, can we just have the chart marked, and that will take care of it? A. Yes, I think that would be the simplest way.

(1221)

Mr. Wright: Would you mark that with the next plaintiff's number?

Mr. Seymour: I think it ought to be said that that chart does not include product which is playing in theatres in which Paramount has an interest. Only the product that played in the other first-run theatres.

Mr. Wright: I understand that.

Mr. Seymour: Of course, that is only in the 48 cities about which I examined Mr. Goldenson.

Mr. Wright: Surely.

(Marked Government's Exhibit 377 for identification.)

Q. This chart, I take it, also contains a statement of foreign pictures only wherever the theatre that you have treated as a first-run theatre shows only foreign pictures, is that right? A. I think they put an asterisk on the two theatres I referred to as exhibiting only foreign pictures and there may be a statement that that is so.

Q. Those are the only ones that you indicated? A. I think so. That is, the only ones that are marked, and I am talking from memory when I say that is so. They may be running other first-run pictures which at the moment I am not aware of.

Q. This chart, does this make any attempt to indicate which of the so-called competitor first-runs are independently operated and which are operated by affiliates? A. I think (1222)
it does but I am not sure. I didn't notice that particularly.

Mr. Seymour: It is just a memorandum to refresh the witness's recollection.

Mr. Wright: We will offer the chart.

Mr. Caskey: Objected to as far as containing any information as to theatres operated by National. That has been put in. We have never seen this. It purports to give seating capacities and pictures played in our theatres.

(Government's exhibit 377 for identification received in evidence.)

(1223)

Q. I will hand the chart back to you and ask you to just indicate or name the first-run theatres listed on there which you regard as independently operated. A. As independently operated?

Q. Yes. A. In Birmingham, Alabama, the Empire, the Galax and the Royal are independently operated.

Q. Well, just take whatever ones there are all the way down. A. In Hollywood and Los Angeles, California, I

regard the Hawaii, Hollywood Music Hall, the Tower, the Elite, the California, Esquire and Grand as independently operated.

Mr. Seymour: Let us define that term. You mean by that, Mr. Wright, operated by somebody who is not a defendant in this case or affiliated with any of the defendants?

Mr. Wright: That is right, not a defendant or affiliated with one of the defendants in the suit.

The Witness: Well, I heard here in the testimony United Artists had an interest. I thought Blumenfeld operated those four theatres, but if you mean United Artists as one, you mean to eliminate that? I don't know.

Q. Well, I really want to get your best information as to which, if any, of the first-runs that you have on the list are operated by interests which are not affiliated with one of the defendants in the suit, that is all.

(1224)

A. Well, in San Francisco, the Esquire, United Artists and Orpheum.

Q. Are these Blumenfeld theatres? A. Blumenfeld theatres.

In Hartford, Connecticut, the State and E. M. Loew's Theatre.

In New Haven—nothing in New Haven.

In Jacksonville, St. Johns.

In Miami, the Capitol and Miami.

In Tampa, the State.

In Atlanta, the Rialto, the Cameo.

In Chicago, the Wood's, the Oriental.

In Gary, Indiana, the Palace and the Gary.

Judge Bright: These are all independent?

The Witness: These are independents, no affiliation with the defendants.

In New Orleans, I understand the St. Charles is operated by Harry Brandt, which is an independent. By the way, that is not on this chart. I notice that they have left it off, but I understand that the St. Charles is operated by Harry Brandt, an independent.

Q. Is that something new that has developed? A. I think he took it over a few months ago. They must have left it off this chart.

Q. I meant you to confine your answers to what you have (1225) on the chart there so we can see from your answers what the independent theatres had in the way of product. A. All right. Now, in Boston: The Majestic, the Tremont, the Gayety; The Translux, which is, I believe, called the Park—was called the Park; they may have changed it to Translux; the Laff Movie.

Q. Who is the independent that operates those? A. I think that Lieberman and Brandt work or have some kind of an arrangement between the Majestic, the Tremont and the Normandy, but I don't know whether they are joint operators or whether they are individual operators; I don't exactly know; and the Translux is operated by Dave Stoneman and his son Harold Stoneman.

Q. Is that a newsreel theatre? A. No. It was a newsreel, but they operate on a first-run policy, what are known as action pictures.

Now, the Gayety I think is a "sensational" house that operates first-run sensational pictures. I think E. M. Loew operates that.

Q. What do you mean by sensational pictures? A. Oh, you get certain pictures that are blown up, as "Why Children

Leave Home," and that type of picture, generally speaking, that by innuendo there is an inference——

Q. You mean sex pictures? A. Well, I would say that, yes.

(1226)

Q. Any others? A. That is all there.

In Cambridge, the University Theatre. That is operated by an independent.

Q. The University, I take it, has what you call a mixed policy? A. They have a mixed policy. They play Warner's, half of RKO, Universal, Columbia and United Artists first-run at Cambridge.

Q. They play some second-run? A. Yes. I think we have to once in a while in some situations where we do not have enough product. That is not unusual if there is a shortage of product.

Q. Go ahead. A. New Bedford: The Empire, the State and the New Bedford, that is operated by a Mr. Zeitz. By the way, the names of these independents are not on here. I am just reciting those by memory, you understand.

Q. I understand. A. Because you said to repeat what is on here.

Q. I merely wanted you to confine yourself to the theatres that are listed here. A. All right. Then the Broadway, the Teele Square and the Somerville theatres in Somerville.

Q. Who has those? A. Wait a minute. I will think of his name.

I can't offhand think of it, but it is an independent.

(1227)

In Springfield: The Bijou and the Court Square is E. M. Loew's; those are two.

In Worcester: The Plymouth.

In Detroit the Adams—I mean the Downtown and Adams, or maybe it is only the Downtown. I don't know if Fox has an interest in the Adams Theatre in Detroit or not.

If they do, that is excluded. If they do not, they are both independent.

In Duluth: The Granada and the Lake.

In Minneapolis I think I have already mentioned the World on foreign pictures, and in St. Paul, the same thing.

In Buffalo the Twentieth Century and the Lafayette. I think Basil operates the Twentieth Century and Max Yellen —Max Yellen operates the Century and Basil operates the Lafayette.

In New York—that is Brooklyn—no, I mean in Manhattan, I beg your pardon. In Manhattan, well, there is the Victoria, the New York, the Central, the Rialto, the Astor. —wait a minute. Would you consider Mr. Sam Goldwyn a part of these defendants?

Q. No. A. Mr. Selznick a part of these defendants?

Q. No. A. They operate this theatre. Radio City Music Hall.

(1228)

Rocester, no.

Toledo: The Granada and the Esquire.

Q. Who has those? A. As I remember, Jack Skirball has that—not Jack Skirball; his brother;—I forget his name.

In Oklahoma City, the State. Dent operates that.

In Salt Lake City, the Uptown, the Rialto, State and Lyric.

Q. Is that all there are? A. That is right.

Q. And then, I take it, wherever in your testimony you did not refer to any other first-run theatres at all, that means there are no first-runs there other than those in which Paramount has interest; is that right? A. There are no other first-run theatres that the defendants in this case are interested. You asked me that—as I understood it, what you wanted was the opposition theatres except those that the defendants were interested in.

Q. I am not referring to the testimony you just gave on cross-examination. I am referring to your testimony on direct examination where in certain instances you did not say anything about whether there was any other first-run theatres or not. Now, in those instances where you did not mention the existence of other first-run theatres, the only first-run theatres in town were those in which Paramount
(1229)
was interested, isn't that so? A. That is right, sir.

Q. Now, when you compared these theatres and compared them in groups, you meant, did you, that the theatres in which Paramount had an interest collectively considered were better than other theatres in the town? A. No. What I did was, I took the best theatre that was in the town and compared it with the best theatre that we had in the town, and on that basis made the comparison.

Q. Now, on these reports, this Exhibit P-4 of the defendants, this, as I understand it, is the report that you sent out to the theatres in which Paramount is interested as to how pictures of other distributors did in your theatres. That merely says "Sections of U.S.A. Played"; then "East", "Middlewest" and "Southwest" and it gives general areas. Those reports do not come in to you in the same general terms as that, do they? A. No. They come in from, say, five or six geographical areas. The picture opens in a theatre, and each of the managers of those theatres will send that report in without saying what theatres it played in. The report goes back out to the field showing that that particular area has played the picture.

Q. Well, the report he sends in shows what? A. Shows everything but the area, and whether it did above average
(1230)
or below average or fair or good business.

Q. Well, it names the theatres involved, does it? A. I presume that in some cases it does and in some cases it does not, for the reason that when it comes in the probabilities are that we know that it has only played in one spot in that area, and he would not have to say so; but generally I imagine it does, yes.

Q. Then in addition to these reports which you receive and then send out in this form marked P-4, as I understand it you receive—what is it, daily or weekly—— A. No, we get that sometimes a week or two after the picture has opened in a given house, and the manager has had a chance to talk to the patrons as to their reaction to the picture, what their reaction to the picture was; they talk to various cross-sections of people, and they get their reaction, and then assemble his advertising material so as they can see in there what type of advertising campaign he will use.

Q. Now, will you let me finish my question before you give the answer? I say, in addition to this report, the reports which come in and go out in this form P-4, you, as I understand it, receive daily or weekly reports of the actual receipts and expenses including film rental of the theatres in which Paramount is interested? Those are different reports? A. You are confusing two things. We get a daily

(1231)

telegraphic report, which I think was put in here this morning. In addition to that we get a weekly report, an audit report of all the items of expense in a given theatre, its gross and its P and L, which go to our theatre auditing department for verification.

Q. Have you got a copy of the form of report that you get that information on? A. It can be furnished to you. If it is not here I am sure that Mr. Seymour can take care of it.

Q. And that you get weekly? A. Yes, sir, that is right.

Q. From all of the theatres in which you have an interest? A. Yes.

Q. Now, as to those theatres or as to the compensation for these services that you render to those theatres in which you have an interest,—how is that handled? How is Paramount compensated for the services you rendered? A. Back in the reorganization days, at the time that the trustees decentralized these operations, they set up maybe a flat amount. I believe our New England theatres send in $200 a week, and maybe another circuit sends in $300 a week; but it is on a non-profit basis. They try to estimate what the cost of these services is in the home office, and that is what they pay for it. I mean, there is no set basis. It just happened to be arbitrary amounts at that time, I suppose what the trustees and

(1232)

their advisers thought could be set up, and it has been continued virtually ever since.

Q. Well, it bears in most cases, does it not, a fairly close relation to a fixed proportion of the gross receipts? A. No, it does not, sir, because all of them are flat rentals. By flat rentals I mean it is just a flat sum that the trustees agreed on at the time.

Q. Well, that is done pursuant to a contract between Paramount and these people? A. That is right.

Q. Have you got a form of that contract? A. I am sure that that can be furnished if it has not been.

Q. And all of these people that you refer to as local operators is each himself the operator of quite a substantial circuit of theatres, isn't that right? A. Not in every case. We have varying situations. In Newark we have a man by the name of Adam Adams who operates the Paramount Theatre in Newark and the U. S. Theatre in Paterson. In Ogden, Utah, we have an associate, a local theatre operator, who operates only in Ogden, Utah. He happens to operate two theatres there. In other words, it is varying. Some have larger numbers of theatres, others small. You understand in most of these situations these people grew up in the busi-

ness and Paramount acquired an interest in those theatres from those people who grew up in those areas.

(1233)

Q. In most of the situations your local partner or representative, as you call him, does have a circuit of theatres, isn't that correct? A. In some cases, yes.

Q. It is true in most, isn't it? A. No, not in most. I would say there are a great number where they only operate in a given town.

Q. Well, in those cases where they do have a circuit of theatres, the operations frequently extend over quite a wide area; maybe two or three states, isn't that right? A. In some cases it may be so, yes.

Q. And the people who actually locally manage the theatres, that is, the theatre managers in the towns involved, have nothing whatsoever to do with the buying of the theatre, is that right? A. That is right, sir.

Q. The film buying in each case is handled by this local representative who has his percentage contract with you? A. That is right. In the case where the man has an interest in the corporation, by the man who has that interest in the corporation.

Q. Yes; and in some cases, such as with Mr. Richards in New Orleans, in making film deals he may include with the theatres in which you are interested a substantial number of others in which he has an interest but Paramount does not, is that right?

Mr. Seymour: I object to that as hypothetical.

(1234)

What he may do seems to me utterly hypothetical. There is no evidence on it.

Judge Hand: I will allow it.

A. I can't answer that, Mr. Wright, because we have a contract with Mr. Richards that came into effect at the time that the Paramount-Richards Theatres were in receivership

under which there is specifically excluded his interest in these two corporations; so he buys specifically for Paramount-Richards' so far as we are concerned.

Q. And you don't know how many other theatres may be thrown into those deals, is that right? A. Well, certainly as far as Paramount-Richards' contract is concerned, it is only as to Paramount-Richards' theatres. That is all we are interested in and that is all we know. I have never seen anything else.

Q. And the reports you get are confined to the performance of the theatres in which Paramount itself actually has an interest? A. That is right, sir.

Q. Now, these local representatives are loosely referred to in the trade as Paramount partners? A. I think sometimes they are referred to as that.

Q. Although in some cases they may be partners in that they have 50 per cent and in the others you own a hundred per cent of their corporation, but they simply have a sharing

(1235)

management agreement, is that right? A. I think in the trade they call them partners, whether they are a hundred per cent or 50 per cent.

Q. And in either event you have regular meetings of all of those people in which they all get together with you, is that right? A. That is right?

Q. And at those meetings you frequently have a representative of your sales department, or usually? A. We have had meetings of the sales department; we have had our production department there; we have had our advertising department; we have had a great number of executives of Paramount. We usually have our legal counsel, who wants to come down, Mr. Keough; we have a number of people.

Q. There is regular contact maintained among all of the partners and all the other departments of Paramount? A. Yes, in this sense, that if a person has a good advertising campaign on a picture and we hear about it, they send it in

to us and we send it out to the field so that the others can take advantage of it if they wish. Or if one circuit happens to be making better progress, let us say, in the construction of theatres or maintenance of theatres, or doing things of that nature, and he informs us of it, we send that information out to all the partners, so to speak.

Q. Now, I believe you mentioned that one of the matters (1236)

that comes before the boards of these corporations in which you always have an approval of in New York is this question of capital expenditures? A. That is right.

Q. That is a little bit wider than that, isn't it? How about if they want to acquire a theatre where there may be no capital expenditure involved? A. I stated this morning that we approve all acquisitions of fees for leases or the extensions of leases. I already stated that in my testimony.

Q. I apparently did not understand you. A. Yes.

Q. Well, in any case anywhere where there is a theatre acquisition, that has to be approved by you, is that right? A. Oh, yes, that is right, sir.

Mr. Wright: That is all.

Redirect Examination by Mr. Seymour:

Q. Now, at those meetings which Mr. Wright asked you about, Mr. Goldenson, is there a discussion as to the negotiations or the terms which the various theatre-operating heads are having or have made with other distributors? A. Never——

Mr. Wright: If the Court please, I submit he is in no position to answer as to what is discussed between 20 or 30 people at those meetings.

Mr. Seymour: Well, now, you developed he is there, and I think he ought to know.

(1237)

Judge Hand: Overruled.

A. (Continuing) It never has been discussed.

Mr. Seymour: Now, I neglected, I am sorry to say, when I had him on direct to ask my friend, Mr. Wright, to stipulate, so that I would not have to take the time to put them to him, the same thing that we stipulated on the last witness, that if asked Mr. Goldenson would answer in the negative the questions negativing conspiracy which I put to Mr. Zukor, with the same force and effect as if they were asked.

Mr. Wright: It is so stipulated.

Judge Hand: We will take a recess until tomorrow at 10.30.

(Adjourned to October 26, 1945, at 10.30 a. m.)

(1238)

New York, October 26, 1945,
at 10:30 o'clock a.m.

Trial resumed.

Mr. Wright: If the Court please. I have these two exhibits here that have been marked for identification, Government's Exhibit No. 375, the telegraphic report form referred to in the testimony of Mr. Reagan and Mr. Goldenson; and Government's Exhibit No. 376, the list of franchises which has now been corrected; and I will offer these two in evidence.

(Government's Exhibits 375 and 376 for identification received in evidence.)

Mr. Seymour: I now call Mr. Keough.

AUSTIN C. KEOUGH, called as a witness on behalf of the defendant Paramount, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. What is your position with Paramount, Mr. Keough? A. I am a member of the board of directors, vice-president, secretary and general counsel of the corporation.

Judge Goddard: A little louder, please.

Q. Will you speak up? A. I am sorry. I am a member of the board of directors and the executive committee, vice-
(1239)
president, secretary, and general counsel of the corporation.

Q. Now, how long have you been with Paramount? A. Since August 1919.

Q. Can you tell us about the various positions that you have held since you have been with the company? A. In

August 1919, I joined the corporation, which was then known as Famous Players-Lasky Corporation, as a member of the legal department under Elek John Ludvigh, who was general counsel. I continued in that position until about 1925, when I also became an officer and counsel to Publix Theatres Corporation, which was then newly created, a wholly owned subsidiary of Famous Players-Lasky Corporation. I continued to be a member of the legal department of the parent company and counsel for Publix Theatres Corporation until January 1932, at which time I became general counsel of the parent company, a member of the board of directors, and secretary of the company.

I continued as a member of the board of directors until sometime in 1935, when I ceased to be a director until about 1937, and I was reelected. I continued to hold the office of secretary and general counsel from 1932 to the present time.

Q. Speaking generally, what has been the nature of your duties? A. Principally, that of legal counsel; largely however, (1240) that of executive of the parent company and of its wholly owned and partly owned subsidiaries.

Q. Now, prior to coming with Paramount or Famous Players-Lasky—and I shall use the word Paramount for convenience—had you had experience in the motion picture industry? A. I had.

Q. And when did you first become connected with the industry? A. In 1916 I was in the office of the law firm of Konta & Kirchwey. That law firm was counsel to Lewis J. Selznick and Selznick enterprises, and his various moving picture companies; and a little later counsel to Select Pictures Corporation, which Mr. Selznick's companies or Mr. Selznick owned half in stock, and Famous Players-Lasky Corporation owned the other half. During the period from about the fall of 1916 until May of 1918, I spent about half of my time attending to the affairs of the Selznick group of moving picture companies——

Q. As counsel? A. As counsel.

(1241)

Q. Did there come a time in the history of Paramount when there was a change in the method of operation of the theatres in which Paramount had an interest? A. There did.

Q. And when was that, approximately? A. There were two periods of change. Orginally, Paramount acquired interest in theatres 100 per cent and also acquired interest in theatres or corporations that held and operated theatres 50 per cent or other percentages.

Q. That is in some it had acquired 100 per cent and in some 50 per cent? A. Yes. The management of the 50 per cent companies was in the hands of the local individuals who owned the stock.

Then, between 1925 and 1929 or 1930, the company began to acquire those interests, those outstanding interests, for itself, so in many cases it became the entire owner of these corporations.

Then there was a change back in about 1930, 1931, going through 1932, 1933 and 1934.

Q. Prior to 1931, as Paramount increased its interest in the companies in which it had 50 per cent interest in, was the operation of the theatres in those companies largely supervised from New York? A. It was.

Q. Then did there come a change in that regard about 1931 and following that? A. Yes, principally in 1932.

Q. What was the nature of that change? What were the

(1242)

reasons for it? A. The nature of the change was a sending of the management—both authority and responsibility for the theatres—to the field, whether the manager was a 100 per cent employee of a 100 per cent company, or whether he was a part owner in the corporation, and more and more during that period, and the following year, 1933, Paramount brought into co-ownership of corporations theatre men, many of whom had formerly created the theatres themselves, some

of whom had been out of the business for years, and some of whom had stayed in the business. So, there was a sharp change in 1933 in what we generally called decentralization of management and operation.

Q. From that time on have the local managers, both in connection with the 50 per cent-owned companies and the 100 per cent-owned companies, been determining the operating policies of those companies? A. They have, I think, with no exception.

Q. Can you tell us why that change was made in 1931, 1932 and 1933? A. The change was made as a result of a business decision reached that that was much the more efficient way of managing these many theatres which had local problems which ought to be solved promptly and by people that knew the local situation and not wait until facts had come to New York and gone through—among a board of people, some of whom had never seen the theatres. That was (12[illegible])

the reason why we started sending back, or decentralization of management.

There was an additional reason for that that had to do with the financial condition, the bankruptcy and receivership.

Q. We will come to that. Since that time those companies have been operated locally? A. They have.

Q. Are they operated separately by their local managers without relation to each other? A. They are operated separately unless a given company is a subsidiary of another company.

Q. Yes, of course. A. And then they are operated as a unit.

Q. What I mean is, there is no relationship between the operation of the Interstate Circuit or the Interstate Theatres in Texas and the operation of the United Detroit Theatres in Detroit? A. None whatsoever.

Q. Or between any of the other companies except as they have a subsidiary relationship? A. That is right.

Q. As they do in some particular areas? A. For example, in Texas, Interstate Circuit, which is the name of a corporation in which Paramount has a 50 per cent interest, is managed by its local officers. Also in the State of Texas there is another company in which Paramount has a 50 per cent interest in which the Interstate stockholders have no (1244)
interest. That company is managed by its local officers and they have no connection with each other whatsoever—they almost don't talk to each other.

Judge Hand: What is that Interstate that was in the litigation in 306 U.S.?

The Witness: That is the corporation that I have just referred to, the Interstate Circuit, Inc., which is a Delaware corporation, operating in Texas and operates in the principal towns of Texas—has theatres in the principal Texas towns. That is the company that Paramount has a 50 per cent stock interest in.

Q. That is managed locally? A. Yes, sir.

Judge Bright: What is the other corporation that you mentioned in which Paramount has a 50 per cent interest?

The Witness: The Jefferson Amusement Company.

Judge Bright: That is also in Texas?

The Witness: That is also in Texas. That is in East Texas.

Q. After the decentralization of the operation of these theatres, were management contracts made with the local managers of the hundred per cent companies under which they shared in the profits of the enterprise, of the company?

A. In a great many instances they were. Perhaps not in all.
(1245)

Q. But the general policy was to assign duties to the local manager and give him a share in the profits of the enterprise? A. Yes.

Q. As compensation? A. Yes.

Q. And of course, in the 50—— A. Shares in the profits of the particular enterprise that he was responsible for.

Q. Yes, the particular company. And, of course, in the other companies where Paramount had a 50 per cent interest, the other interest shared by reason of their stock ownership? A. Well, they sometimes shared by reason of management contracts because they devoted their time and energies and they were rewarded for that as anyone else acting as an employee would be rewarded in addition to their stock interest.

Q. And those contracts were made between the particular theatre-operating company and the local operator? A. They were.

Q. In the course of your duties did you participate actively and intimately in the receivership and bankruptcy proceedings of Paramount? A. I did.

Q. In those proceedings was the relationship of Paramount to theatres in which it had an interest changed in many respects? A. It was.

Q. I wish you would tell us, if you will, about the financial difficulties, the receivership proceedings and the bankruptcy proceedings, and how they affected Paramount's interests in theatres.
(1246)

Mr. Wright: If the Court please, I do not understand the relevancy of this. I do not understand the purpose of this testimony. I do not see what the receivership difficulties have to do with any of the issues that we are trying here.

Mr. Seymour: It will be developed, if your Honors please, that many of the present relationships to theatres resulted from those proceedings; that Paramount in those proceedings lost many theatres in which it had an interest; that there were local proceedings over the United States which affected theatre interests; and at the same time, one of its competitors, at least, and perhaps more, were operating profitably, going ahead, while Paramount and some of these other companies were in great distress, a very strange form of combination in conspiracy, and I think we are entitled to develop that.

Judge Hand: Go ahead, and see what it is.

A. In January 1932 the parent company, then known as Paramount-Publix Corporation, went into equity receivership in the United States District Court for the Southern District of New York. It stayed in equity receivership until some time in March of—1933, I should have said was the (1247)
date. In March 1933, when it went into voluntary bankruptcy, three trustees were elected. It stayed there in voluntary bankruptcy until June 1934 when, upon the passage of 77B of the bankruptcy law, it was one of the first companies to petition for reorganization.

At the beginning of Paramount's receivership, Paramount had a number of wholly-owned subsidiaries engaged in producing pictures and distributing pictures. They also had a large number of wholly and partly owned subsidiaries that owned, leased and operated theatres in various parts of the country. Some of those theatres were, financially, in good shape; most of them, due to the depression, were in bad shape.

One of the largest of the subsidiaries, Southern Enterprises, went into bankruptcy on its own voluntary petition

on the very day that Paramount-Publix went into equity receivership. That company had either directly or through subsidiaries the holdings not only in the eleven or so southern states but in other states, middlewest and elsewhere.

Publix Theatres Corporation had, for several years, been a managing organization that united the operations of these wholly-owned companies, kept books for them, negotiated film contracts and whatnot. That company, while it never
(1248)
went into bankruptcy or receivership, was hopelessly insolvent.

Upon the going in of Paramount into receivership, the receivers found that, owing to ancillary receiverships throughout the country, they were threatened with loss of control of their film exchanges; they found that their studio, many of whose contracts were held directly by artists, writers and whatnot directly with Paramount, those contracts were being jeopardized, they were losing them—the artists were going to our competitors. Our competitors were encouraging, if not spreading, the rumor that Paramount was all through and not a good company to work for and "you had better come and work for another company," meaning themselves.

Our theatres were the subject of a series of individual bankruptcies or receiverships.
(1249)

That very chaotic condition first led to the voluntary bankruptcy to bring the management of Paramount all over the United States into the hands of this court and the three trustees; and during the period of the bankruptcy and the reorganization, which ended in 1935, the trustees in bankruptcy, their counsel, I and others of the executives who were directors and officers, counsel, of the wholly owned and even partly owned subsidiaries, tried to save for Paramount the various assets that the Paramount organization as a whole had, whether they owned them direct or whether they owned them

through their subsidiaries, against the bankruptcy and receivership proceedings and attack and disintegrating influences.

In the course of that we lost theatres; we lost theatres to non-affiliated companies—I don't recall whether we lost any to so-called affiliated companies; I think we did, a few—we had to reorganize the various theatres by bringing into co-ownership individuals, because the bondholders, preferred stockholders and others of those separate corporations insisted upon it.

We had a thoroughly decentralized management. And we had a sharp business difference in the point of view between the advisers of the trustees and the management, as to whether or not the Paramount organization should get rid (1250)

of theatres, because these theatres were expensive; they were geared high in overhead charges; and at that time the studio seemed to be making a little money on the product it was turning out, which we of the management felt was rather inferior product at the moment under bankruptcy conditions. I for one held the view, and expressed it, that if the theatres were not preserved to Paramount during the period when we were trying to recover and reorganize, that when we got all through there would not be very much to reorganize; other people would have the theatres and we would not have the theatres, and we would start from a very disadvantageous position in the manufacture of pictures, principally in getting talent. As a result—

Q. Will you explain why that would be so? A. Excuse me, I didn't hear that.

Q. Will you explain why that would be so? Why would you have difficulty in getting talent? A. If our competitors were not in financial difficulties, or, at least, those who were not in the courts—and most of them were not, regardless of whether they had financial difficulties or not—most of them

were not in the courts. RKO was in the courts at that time, but Warner Bros. was not; Metro certaintly was not, they were very, very prosperous. Columbia was not; Universal was not; United Artists was not; Twentieth Century-Fox was not. It might well have been but it was not. It had
(1251)
an interest with the Chase National Bank which made it unnecessary for it to go into bankruptcy. We were sitting there in bankruptcy, and agents and others were pointing out to our artists: "this is a bankrupt concern; you have got no future; go with a solvent one."

Now we had to stem that tide of competition for our people. We had to stem the tide also of competition for the screen time that our distributing agencies were seeking in competition with the others; and the same story, certainly in the early days of Paramount's bankruptcy and receivership, was bruited about among the exchanges.

I speak of firsthand knowledge because I came right upon it in connection with these ancillary receiverships. And the fact that we were losing the theatres that we had was also an argument made.

Now if we lost the theatres, the next step was—well, that was the best proof that their argument was right; we were just on our way out.

So the whole thing in the opinion of the management, which I shared, and in which I was one of the spokesmen, was that the interest of Paramount, the reorganization, was best served and vitally served by reorganizing or having the trustees, who had no money, to allow the distributing com-
(1252)
panies that had funds, to use those funds to finance the preservation and the retention of theatres.

We did that, and we finally in a couple of years came out and reorganized in very good shape.

Q. Where did the distributing company get the money?

A. Through the distribution of pictures, what we call film

entals, which came in. We were making a profit. What as left over after we sent the weekly pay check to Holly-ood we were able to use for the purpose of making sure at we had a home.

Kansas City was one of the cases, I remember, in which ere was severe competition to try to get our Kansas City eatres away from us; and our landlord wanted a hundred nts on the dollar, and he got it.

Q. Now as a result of all those proceedings, Paramount st some theatres and also changed its relationship to its terests in some of the theatre operating companies, is that rrect? A. It did, yes.

Q. In some where it had acquired a hundred per cent, a rtion of its interest went back to the original management to others, and Paramount thereafter was only a 50 per nt stockholder, is that right? A. That is right.

Q. And that happened, for example, in connection with e Comerford Circuit that was mentioned here yesterday, s it not? A. It did.

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Judge Bright: What circuit?

Mr. Seymour: Comerford.

Q. And did it happen in connection with others? A. Yes, happened in connection with the Comerford Circuit, the terstate Circuit, the Texas Consolidated Theatres, the A. Blank group of theatres known as Tri-State; various es. The Western Massachusetts theatres, which we owned undred per cent, we wound up with a 51 per cent stock erest.

Q. In the course of those proceedings was there conten-n that the Paramount Theatre in New York should be d or disposed of? A. Yes, there was.

Q. And was there discussion of that before the Judge in rge of the proceedings? A. Well, there was a hearing

on the reorganization of the Paramount Building in this District Court, a bankruptcy proceeding or a reorganization proceeding. As a matter of a fact I had to be a witness in it.

Q. Was that before Judge Coxe? A. That was before Judge Coxe.

Q. And what were the contentions about that? A. Well, some of the creditors said that the real estate was bad; that we ought to get rid of it, because there was a big mortgage on it held by the public, and that it was a white elephant and we ought to get rid of it and sell our pictures—I don't (1254)

know where we were going to sell them, but, anyway, sell them—well, anyway, get rid of the theatre and move over to Tenth Avenue and get some offices much cheaper.

We presented the evidence and the opinion that that theatre was strategically necessary for Paramount; we were not interested in the Paramount Building; that went up 29 stories; but we were interested in the Paramount Theatre. And with the change and improvement in business from the deep depression onward, why we stopped losing money, and we had better management, and we made some money. Well, the future has borne out our predictions. From that day to this it has been prosperous.

By Judge Hand:

Q. Wasn't there some litigation over that theatre? A. The Paramount Theatre?

Q. Yes, in the District Court. A. No. There was a reorganization proceeding.

Q. Oh, yes. Of course I know about all those. A. But I know of no litigation over the Paramount Theatre.

Q. There was no question of preferential payments or anything like that? A. Not of the Paramount Theatre. The trustees of Paramount-Publix brought a lot of suits into this

court, under the authority of the court, against the old directors and the banks and so forth. Those were all disposed
(1255)
of as part of the reorganization which was approved in this court.

Q. I didn't mean that. I think I am mixing it up with something else, but in one of those cases at that time I remember I was in a position of dissenting in the Circuit Court of Appeals. A. Well, it did not apply to Paramount; I don't remember what it was. I don't remember any dissent in the Court of Appeals in any Paramount proceeding.

By Mr. Seymour:

Q. Now, in the course of those proceedings, were there any developments in connection with Paramount's interest in theatres on the West Coast? A. Yes.

Q. What were they? A. The proceedings primarily had to do with the theatres Paramount owned in San Francisco, which some years before they had leased to Fox West Coast I think it was; and that situation had to be reorganized. Fox West Coast was in bankruptcy, and we had to reorganize mortgages; and in one case one of the local real estate men, a man named Lurie, stepped in; he had a ground lease; and he just grabbed it, and we had to deal with Mr. Lurie thereafter. Those proceedings, those reorganization proceedings went through the courts out there and went through this court in the bankruptcy proceedings.

Q. Were there certain agreements made with Fox West
(1256)
Coast which were approved in the course of those reorganization proceedings? A. Yes, there was.

Mr. Wright: If the Court please, is there going to be any contention made here that because an agreement has been approved by a bankruptcy court, that it can't violate the Sherman Act?

Mr. Seymour: I do not think I would go that far. But I think the fact that the court dealing with the proceedings, and intimately familiar with the problems, permitted a transaction with the Fox West Coast, is some indication that the Government's attack on the transaction is as frivolous as it otherwise appears to be. Is that a fair statement?

Mr. Wright: I take it that Mr. Keough by his testimony is not going to attempt to show that any question as to the effect of those agreements from the standpoint of the antitrust laws, was even brought to the bankruptcy court's attention. Is that right?

Mr. Seymour: Yes, Mr. Wright.

By Mr. Seymour:

Q. Now, were various other agreements with respect to theatres and Paramount's interest in theatres, and so on, passed upon by the court in those proceedings? A. Yes.

Q. And were there arrangements made for local operation of the various theatre companies, and for the disposition (1257)
by Paramount of some of its stock interest in those companies, matters which were disposed of and passed on in the course of those proceedings? A. Yes, in several cases and in the most important of the cases. They had to be. They were assets of the Paramount bankruptcy or reoganization estates, and this New York bankruptcy court had to pass upon them, give their consent to the transaction, whatever it was.

Q. You were one of those who in the course of the proceedings took the position that Paramount should retain an interest in theatres? A. I was.

Q. And you have indicated your basis for that view? A. Yes.

Q. And eventually that view prevailed, did it? A. It did.

Q. And since that time Paramount has continued to have an interest in theatres? A. Yes.

Q. Have there been some changes since that time? A. Yes.

Q. Is it still your view that Paramount needs an interest in theatres? A. It is.

Q. Will you tell us why? A. There are two reasons why Paramount—and I do not single out Paramount from any other producer or distributor of pictures—needs theatres: one purpose is to do that kind of exploiting of pictures which (1258)
requires the spending of a considerable amount of money in advertising, and a process called exploitation, which goes beyond just putting advertisements in the newspaper, which has to do with running the picture as long as the public will patronize it; going through a process where perhaps the exhibition is on a dollars and cents losing basis for a time, or even throughout the entire run of the picture; a presentation of that picture in its most attractive form to the public, where a private enterpriser or exhibitor just would not want to do it, would not want to take on the risk—let somebody else do it. Now that is one purpose.

Q. Will you explain why that exploitation is important? Is it important beyond the effect in the particular theatres which exploit it? A. Oh, the whole purpose of that kind of exploitation is to make the picture favorably known to the public over the wide area not only served by that theatre, but the inhabitants of which hear about the success of the picture. Furthermore, that kind of success is an inducement to exhibitors to buy and book that picture. And when I say buy, that is a trade term. They buy nothing except a license to acquire that picture and exploit it, and give it better time if it has succeeded. Success breeds success. They want the successful.

(1259)

Now, there is a bit of a gamble in that, just as there is a gamble in making the picture at all. That is one purpose of a producer or distributor having theatres that he can count upon, know that they are available when he needs them.

The other purpose grows out of the ordinary dealings between exhibitors and distributors, and that is to have the assurance that the product you make—you spend large amounts of money upon them; you risk your judgment, your showmanship judgment, and ideas of what the public will like against dire predictions to the contrary, even in your own studio or your own sales organization, to say nothing of critics and whatnot; and exhibitors, they are always skeptical about things. Now, you make these pictures at a risk. It is not one picture you make. You make a program. You have to make a program to operate a studio. A big studio has to make a considerable number of pictures; a little studio may make a few pictures; but the trade needs a lot of pictures coming regularly, steadily. In order to be sure that you have got a market for those pictures you must be protected against what we have found from experience is the desire of many exhibitors to shut a particular distributor out at a particular period of time, maybe not for just a few pictures but for a

(1260)

season's product in order to bid down the terms, whether the terms be flat rentals, whether the terms be percentage, whether the terms be the extent of the playing time, the effort of the distributor being to get as favorable representation as possible, and the effort of the exhibitor to buy as cheap as possible.

Now, in that conflict it has been found from time to time that over considerable areas exhibitors may say, "We don't want the product." They may be quite honest in their point of view; but since there are a considerable number of these groupings, that always have been since I have been in the industry, of exhibitors, if these various exhibitors should feel

about Paramount pictures, for example, a season of Paramount pictures—if enough of them feel the same way about them, try to get them, we think, too cheaply,—well, the whole enterprise is in peril. Well, that exhibitor is not farsighted. He is not thinking of what is going to happen to Paramount, because in the meantime he has got plenty of other products competing to get that time from Paramount. He has got the product of eight, nine, ten companies, depending upon when it is. I mean, over the period I have been connected with this business, the distributors have grown from small stature, small companies, to large companies; and those that were
(1261)
large, like Paramount, the one back in 1918 and 1919, it was the leading company, almost so far out, it almost had no second; it went down; it went into bankruptcy; it struggled back. Today we think it is fair to say we occupy one of the foremost positions. All that has happened.

Now, these various companies, their distributors try to get that precious playing time that we would like away from us; and if an exhibitor does not take our picture, and if enough of them do not take the picture—and a studio can't always be sure that everything it is going to make, or even the majority of things it is going to make, are going to be financially successful. They make terrific efforts to make the best kind of pictures, but they don't always make money.

That is why we believe it is vital for those two purposes for our company particularly to have these theatres.

Now, one other by-product that comes from that is a knowledge of what the public at a theatre thinks about, what their reaction is; how they patronize a theatre; what little things you may do will improve the appeal. That information, if we get it very quick and can pass it on to our distributor company and our studio—and we do it through passing out
(1262)
among the audiences cards and ask them what they think about it,—"What is your opinion about these pictures?"—that is when they are new—all of those things are advan-

tageous. But that, as I say, is a by-product. The two fundamental necessities, as I see it—as I see it and my associates—for having theatres are the two I mentioned.

Q. Now, as long as you have theatres and feel that you have to have them, do you also feel that you should attempt to see that they are operated at a profit to Paramount? A. I think that is obvious. We spend a great deal of our stockholder's money and we want to make a return on that money. (1263)

Q. I wish you would tell us—you have said something about it—I wish you would tell us somewhat more about the relative relationship in size, success, failure and difficulties of the various distributors through the 20s and 30s, if you can. You have told us how Paramount went into bankruptcy. A. Starting in about the year 1913,* Paramount, by concession of the trade, was preeminently first in pictures that it made and in stars that it had. There were other companies actively competing with it, the so-called Big Four, Vitagraph and Selig and a couple of other names there.

Mr. Proskauer: Will you keep your voice up? I heard the word "Vitagraph", and I want to hear it all.

A. (Continuing) There was a Big Four, which then consisted of a company called Vitagraph, and Selig, and Spoor* and Essanay. They were independent studios that marketed their products through one distributor of their own. And there was the Universal Pictures Company. There was the Fox Film Company and, of course, there were a great many state-right companies, Mutual Film Exchange, and along about that time First National was formed. I think there has been some testimony here about it and I won't go into detail. It was formed, it acquired stars of Paramount and stars of others; it took Charlie Chaplin, for example, away from Mutual.

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*See correction made by witness at printed record page 2486, *infra*.

(1264)

Q. That was formed by exhibitors? A. Yes, it was formed by exhibitors, the principal exhibitors in the United States, ones with the finest theatres, most desirable customers of everyone, particularly of Paramount.

Fox Film Corporation continued to be in existence and Universal continued to be in existence, and there was a company called Metro Pictures Corporation. There was a company called Goldwyn. Samuel Goldwyn, who originally was connected with Famous Players-Lasky Corporation, formed his own company, produced pictures, quite early in the game, 1919, I think, and at all times he made fine, important pictures. He had some arguments with his associates and he got out of that company and that company then, well, along about 1922 or so, went in with the Metro Pictures Corporation, became Metro-Goldwyn, and a man named Louis Mayer, who was a producer, joined this group, and that company became—was acquired by Loew's, Inc.—they were theatre people.

Q. Do you remember about when that was? A. Somewhere in 1922 or '23, somewhere along there.

Q. Do you know whether Paramount had been licensing pictures to the Loew Theatres before that happened? A. Yes, sir, they had.

Q. Go ahead. A. Then along about 1923 there came—oh, there was a company called Warner Bros., Warners, which was quite a small company. It did state-right business.

(1265)

Then there was a company that was formed along about 1923 called Columbia Pictures Corporation. I forget the name of its predecessor company, but it was a small company.

Along about 1920 or '21 one of the impressive companies was formed, United Artists Corporation, which was formed

by the then four greatest stars in the business, Mary Pickford, Charlie Chaplin, Douglas Fairbanks and the great director, David Wark Griffiths. They went together to make their own pictures, produce their own pictures, and they produced them separately but they marketed them or distributed them through this corporation, United Artists Corporation. They got other stars to join the United Artists Corporation. In starting, they figured their pictures were so great, so fine, their personalities were so compelling that all they needed was the product of these four supreme artists to fill any theatre for a year. Perhaps they would have if they had continued to make pictures, but Mr. Chaplin made one picture one year and he didn't make another for two or three years—whenever he felt like it—and Mary Pickford made a few pictures, and Fairbanks hopped from one great production to another. They took a long time to make pictures. And the result was that that organization found that they needed more pictures to supply the time of their customer (1266)
theatres, so they went out and got other stars. Some of them they took from Paramount. For example, they took Gloria Swanson right away from Paramount at a fantastic salary bid.

That went on during this whole period of time, and Universal, which was one of the—originally one of the great, great large companies, became less; United Artists came up; Paramount began to go down a bit and then up a bit; Metro started to climb and has been climbing ever since. And that was about the number of large companies which shifted their position during the 20s, all more or less affected by the terrible depression of the early—1932, 1933. The depression was not effective upon the moving picture industry until 1931. 1930 was the banner year of the picture business for everybody.

Those Warner brothers I mentioned, the Warner brothers in 1927 took sound. Sound had been offered by its dis-

coverers and perfecters to Paramount and offered to Metro and offered to the other companies and they didn't see it; it was just a gadget and they weren't interested in it. Warner Bros. took it and Warner Bros. made a terrific success of it, and then everybody wanted it and Warner Bros. was a year ahead of everybody else. Warner Bros. had both sound pictures and silent pictures, so they went out and they
(1267)
bought First National and they bought theatres and what-not.

Q. Will you bring it down to about the time of Paramount's greatest difficulty? Were any of the other companies in difficulties and were some of the other companies prospering? A. Well, Metro definitely was prospering, Fox Film Corporation was in difficulties—its size, its theatres; Warner Brothers were in difficulties—those difficulties did not lead to the door of the bankruptcy court in either case; Universal had difficulties and the trade papers predicted bankruptcy and going out of business, and then there was a change in management. Mr. Laemmle sold out, Mr. Bob Cochrane got out, and there was new management, a new surge of blood, and now, today, Universal is one of the foremost companies in the business.

Judge Hand: I think this enormous amount of relation of the existence of these people between wind and water is not very illuminating to me. There is no doubt there was a great deal of competition and a great deal of struggle. There isn't the slightest doubt about it. The question is whether there was, in this field, a ganging up against independents. No doubt that they were competing all the time.

Mr. Seymour: And they are still competing.

Judge Hand: And that they would take anything
(1268)
away from each other that they could.

Mr. Seymour: That is right.

Judge Hand: It doesn't prove your case or prove theirs.

Mr. Seymour: It is rather odd, of course, there is no indication in the Government's case as to when they claim this combination and conspiracy arose, but it would seem that it must have some relationship to the time that these companies got interests in theatres, because it is monopoly of theatres that they charge, a conspiracy to monopolize theatres.

Judge Hand: These gentlemen are so accurate that they may have attempted to appeal to a diversified mentality.

Mr. Proskauer: I might suggest I do not know what independents we are charged with ganging up on. Are we charged with ganging up on independents——

Judge Hand: I did not say you were ganging up on anybody, but that is the problem.

Mr. Proskauer: I could meet the problem better if somebody would state it to me. Whom am I charged with ganging up on, independent theatre owners or independent producers or what? I do not know at this minute, after hearing the Government's case.

(1269)

Mr. Seymour: I won't try your patience beyond a couple more questions, then I am going to turn to another topic.

Q. Can you tell us something about the growth of independent producers since the period that you have been talking about? We have had some testimony about it and I wonder if you can add anything to it? A. Over the entire period of 1919 or, rather, from 1917, when I first became acquainted with the situation down to the present time, there

have been independent producers in the business, many of them active and prosperous. The independent producer usually is the best and most talented man, whether he be a producer or a director or sometimes a writer, or sometimes a star, man or woman, and for one reason or another, good to themselves, they go into independent production and nobody has any interest in their venture except as they perhaps provide financing for them.

Those people seek outlets, somebody to distribute the picture. There are eleven different national distributors today and some state rights—state righters—and the people of the kind I am speaking about, the best, look for the best facilities, the best distributing organizations. There is competition for their services, to distribute their pictures.
(1270)

Some companies have a policy that they would rather handle their own. Paramount at various times has handled a great many independent productions. It varies from time to time. Now at the present time there are as many, if not more, independent producers actually producing pictures as there have been at any time within my memory.

Q. Mr. Freeman said there were about twice as many today as there were ten years ago. Have you any impression about that? A. I don't know whether it is twice as many. Certainly a large number. Today you have prosperity. There are more people making pictures. You also have tax questions, which is an explanation why there are independent producers in greater numbers today than formerly.

Q. Can you tell us anything about the development of Republic, Monogram and P. R. C.? A. Only that over the last several years, from being originally a state-right group of organizations, they became national organizations and they have been spending more money. They used to make cheap pictures, Western pictures, little pictures, and now they are making Westerns and cheap pictures and good

pictures. Republic is spending considerable sums of money in the pictures they make and in the advertising they give to them and because the pictures are better, have more substance, more appeal to them, why, they get played in theatres
(1271)
where they did not get them played before. That has grown in the last several years.

Mr. Seymour: I am going to turn to the subject of film license contracts.

Q. Mr. Keough, before you came to Paramount, were you familiar, as a result of your professional work, with the general nature of film license contracts in the industry? A. I was.

Q. Have you caused a search to be made among the old contracts in the Paramount to ascertain whether certain provisions which are now included in Paramount contracts were used in film license contracts prior to 1919? A. I have.

Mr. Wright: If the Court please, I submit we ought to have those contracts. If this is going to be testimony based on what he discovered, we ought to have those contracts.

Mr. Seymour: I am asking generally, and I will give you the contracts, if you want to examine them.

Mr. Wright: I should think the best evidence would be the contracts themselves. If you have any old contracts, let us have them marked and offered. I have no objection to their going in but I do object to Mr. Keough's just characterizing them without the contract itself being before the Court.
(1272)

Judge Bright: The question now is, has he made a search.

Judge Hand: Overruled.

Q. Do you want the question, Mr. Keough?

Judge Bright: He said he has.

A. I said I had made a search or caused one to be made.

Q. As a result of your experience and as a result of the search which you have made, can you tell us whether prior to 1919 films were licensed by Paramount on runs? A. They were.

Q. Was there in the industry and in the Paramount contracts referred to what is now known as clearance? A. Yes, under the term "protection."

Mr. Wright: If the Court please, I submit we ought to have, if he has them, if he was able to find any, copies of the contracts he is talking about.

Mr. Seymour: If your Honor please——

Mr. Raftery: Your Honor, the miners over here want to object to any interrogation until Mr. Wright points out to this Court what the provisions of these contracts are that he claims are violative of the Sherman Act. If Mr. Wright will point those out, we don't care how much more there is.

Judge Hand: Overruled. He is objecting to the

(1273)

fact that he is not confronted with the contract that they are talking about.

Mr. Seymour: If your Honors please, I am only going to develop now the fact that historically the various provisions that we have discussed were used, and I will make available to Mr. Wright, for purposes of cross-examination, the examples that they use, but I don't want to put them in the record because I think the record is quite sufficiently burdened and I don't think there is any objection to a general question about the use of terms.

Colloquy

Mr. Wright: I don't desire to cross-examine on the subject, if we can simply have the best evidence of the history that he is trying to offer, which I suppose is the contracts themselves.

Mr. Seymour: I am merely now showing the use of these provisions in the industry prior to 1919.

Judge Hand: Haven't you such a contract here?

Mr. Seymour: Yes, I have.

Judge Hand: There is no reason why you shouldn't show it to him, and you do not have to produce them indefinitely, and Mr. Wright won't want you to.

Mr. Seymour: I am trying to develop two things, first, the general use of these terms in the industry and, secondly, that they were used in Paramount contracts. The general use I cannot give him anything

(1274)

on. That is Mr. Keough's experience.

Judge Hand: You may show him your contract.

Mr. Seymour: What is the question, Mr. Reporter?

(Question and answer read.)

Judge Hand: Do you have it there?

Mr. Seymour: I have it.

Judge Hand: You may show it to him.

Mr. Wright: Have it marked.

Judge Bright: Your first inquiry was with reference to runs?

Mr. Seymour: That is right, and he answered that question. Now I am asking him about what is now known as clearance. And does your Honor insist that we must offer the contract in order to get that question answered? I don't mind doing it, but I hate to encumber the record.

Judge Hand: If the other side wants you to do it, I think you should. I think he is making a fair preliminary objection.

Mr. Seymour: Let me just get the witness to identify it.

Judge Hand: I don't think it is very important, provided he sees it.

Mr. Wright: I agree with your Honor, but I haven't seen any yet.

Judge Hand: Haven't seen any?

(1275)

Mr. Wright: No, none of these have been offered to me for my inspection.

Q. Will you pick out any contract which contains reference to the requirements for protection which is dated prior to 1919? A. There is a contract of August 1, 1917, between a Boston exhibitor and Paramount Pictures Corporation for the run of a picture at the Exeter Street Theatre in Boston, which contains a protection clause in so many words.

Mr. Seymour: I offer it in evidence.

Mr. Wright: I think some time may be saved if you will go on to something else and give us these during the recess and give us a chance to examine them.

Mr. Seymour: I think, I must say that I think my general questions might have been answered. I offered you an opportunity to examine the contract and you refused it and press your objection.

Mr. Wright: You mean you offered it just now?

Mr. Seymour: Yes, of course.

Mr. Wright: I say, if I am going to have to examine each contract here as they are offered, it will take time. I am suggesting that if you want to save time, you have them identified and go on to something

else, and we will give you the answer to the question as to whether there is any objection after we have read them.

(1276)

Mr. Seymour: I don't mind at all, if your Honors should not mark them at this time. We will have it marked for identification under an offer in evidence. Mr. Wright has forced this procedure and now apparently he wants to be prepared to play it both ways.

Mr. Wright: If the Court wishes to sit here while I examine the contracts, I suppose there is nothing else to do. I was simply suggesting a means of saving time.

Mr. Seymour: I think the way to save time is not to make the objection. Then that contract is marked for identification but is offered in evidence and if you have an objection to make, I suppose in due course you will make it?

Mr. Wright: Yes.

(Marked Defendant Paramount's Exhibit P-5 for identification.)

Q. Was protection the name then used in the business to describe what is now clearance? A. It was.

Q. Do you know what protection meant at that time? A. Protection meant what clearance means today. Identical concept. It was called protection until about 1935, then it was called clearance.

Judge Hand: What is all this to show anyway, to show an ancient custom of the ville?

Mr. Seymour: Yes.

(1277)

Judge Hand: I think there is much too much fuss made about it all around. If this thing is in the agree-

ment, why do you fuss about it, Mr. Wright? I do not see that it prejudices your case.

Mr. Wright: I don't think it does either.

Judge Hand: All right.

Mr. Wright: Having read it, I have no objection to it going in, but I do like to have the opportunity to see what goes in before it goes in just as a matter of course.

Judge Hand: All right, it is received.

(Defendants Paramount's Exhibit P-5 for identification received in evidence.)

Q. Prior to 1919, did Paramount use a form of application for license? A. It did.

Q. And in some, at least, of those applications was there a reference to a minimum admission price by the theatre? A. There was a form provided for the insertion of that—of those terms in the printed form.

Mr. Wright: Excuse me. What period is being covered here?

Mr. Seymour: Prior to 1919.

Judge Bright: Prior to 1919.

Q. I show you this agreement dated June 24, 1918, and
(1278)
ask you if that contains a reference to minimum admission prices?

Mr. Wright: Again, I think the form should be identified and offered in evidence, if you want to establish what is in it.

Mr. Seymour: I am going to offer it. I first have to have it identified. I am trying to please you in every way I know how.

A. This form contains a space to be filled in with reference to minimum and maximum admission prices.

Q. That particular copy of form does not have the actual figure in it? A. It does not.

Mr. Seymour: I offer that in evidence.

Mr. Wright: No objection.

(Marked Defendant Paramount's Exhibit P-6, in evidence.)

Q. Were motion pictures licensed prior to 1919 on a percentage basis? A. They were.

Q. And since 1919, down to date, has Paramount licensed motion pictures on the basis of runs? A. It has.

Q. Has Paramount provided for clearance in license contracts? A. It has.

Q. Has Paramount had provisions in its license agreements with respect to minimum admission prices during all or most of that period?

Mr. Wright: What period is this?

(1279)

Mr. Seymour: Since 1919.

Mr. Wright: I submit, if the Court please, that is entirely too broad. He is asking for what has happened over a period of 26 years here, with respect to admission prices.

Judge Hand: Read the question.

(Record read.)

Judge Hand: I will allow the question.

A. It has.

Judge Hand: You can direct his attention to particular things on cross-examination or suggest some definite limitation in his examination, but there is no use in interrupting over these things. We are not a jury here and are not affected by unverified or unverifiable general statements.

Mr. Seymour: If your Honor please, this gentleman has been counsel for the company since 1919.

Judge Hand: That I know. I think it is perfectly good prima facie evidence.

Q. Has Paramount since 1919 and does it today license many of its pictures on a percentage basis? A. It has and it does.

Q. And are there various varieties of percentage terms which are used? A. There are.

Q. Is one of the terms which is used a so-called per-
(1280)
centage to a split? A. It is.

Q. So far as you know, do all distributors in the business, and have they since the early days that you spoke of, without regard to the individual variations between the form of licenses, licensed pictures on runs with clearance, with reference to minimum admission prices and on percentage bases? A. Confining my answer to the companies which are the defendants in this case, I would say the answer is Yes to each of the questions you put. I don't remember whether I ever knew anything about every other distributor in this business, state-righters—I have seen some of them—I don't know everything about the other three, but I know something about them, I have seen some of their contracts.

Q. Do you know whether today the other distributors who are not defendants in this suit distribute their pictures and license them on the basis of run, clearance, minimum prices, sometimes on percentage contracts, sometimes on flat rental? A. They do, at least as to some of their products.

Q. I show you copy of Exhibit P-1—the actual original is out at the photostaters, and ask you, is that the license agreement which is now in use by the Paramount in licens-

ing its pictures? A. It is, in so far as its feature motion pictures are concerned.

(1281)

Q. Of course, there are terms and sometimes riders and so on attached to particular licenses; but that is the general form used for licensing feature pictures? A. It is.

Q. Who drew it? A. I did.

Q. Does that represent any change over the form that was in use prior to the adoption of that form? A. It does.

Q. Did any other distributor have anything to do with the form of the present contract, P-1? A. No, sir.

Q. Was that drawn entirely in the Paramount legal department by you and with the aid of associates? A. No, it was not. It was drawn by me solely.

Q. I show you this document, which has in the lower left-hand corner, "Form 4440-A-1," I think, and ask you if that was the license contract which was in use just before the present contract? A. It was.

Q. Do you know for how long a period that form was used? A. About 1937 or '38, this form.

Mr. Seymour: I offer that. I will get you other copies, but I am afraid you will object if I don't——

Judge Bright: Is that form one which is in one of these exhibits for the Government?

Mr. Seymour: Yes.

Mr. Wright: We have no objection.

Mr. Seymour: I do not know that there is any use of duplicating it, as a matter of fact. Let me see if

(1282)

I can identify it.

Judge Bright: Has it been introduced in evidence by the Government?

Mr. Seymour: I guess it has. Will you bear with me just a moment?

Mr. Wright: That is 280.

Mr. Seymour: That is a different form.

Mr. Wright: He testified there had not been any changes since 1938. I assume this is the same as that.

Mr. Seymour: I am sure it is as to body, but the top was different.

Judge Bright: What was that number?

Mr. Seymour: The exhibit in evidence is No. 280.

Judge Bright: 280, that is in this book?

Mr. Seymour: Yes. It states at the top, printed, "Seasons, 1943-44." The one I am now offering is Season 1944-45, but I think that is the only change, and I will ask that from the witness.

Judge Bright: I understood him to say that that was the form which was in use from about 1938 until the last exhibit, P-1.

Mr. Seymour: Yes.

Q. Can you tell us whether the designation of the season is the only change that was made after 1943 in that form, so far as you know? A. Without examining every form that (1283)
we had for feature pictures, I can't tell whether the schedule set up and the description of the season did not vary, perhaps it did. Also, it may be that here and there, purely for styling, and not change of substance, there may have been a slight change, but the bulk of the contract, what is printed on the reverse side, has been the same in text and substance from 1937 or 1938 down to 1945.

Q. Subject to correction, based upon possible minor differences in forms, Government's Exhibit 280, which is for the season 1943-44, is the same as the one for the 1944-45 season and for seasons prior to 1943 back to about 1937, is that right? A. Yes.

Q. Can you tell us who prepared the form, this Exhibit 280? A. Louis Phillips and some associates under my general jurisdiction and approval.

Q. Who is Mr. Louis Phillips? A. A lawyer of this bar, a member of the legal department of Paramount Pictures, assistant general counsel of the company.

Q. That form was then prepared wholly in the Paramount legal department? A. It was.

Q. Did any other distributor have anything to do with the preparation of that form? A. I never heard of it, and I am perfectly satisfied that nobody did have anything to do with it except Mr. Phillips, his immediate associates in (1284)
the department and myself.

Q. Is that form the result of any agreement or understanding between the distributors? A. Not at all.

Q. Is your present form, P-1, the result of any agreement or understanding among the distributors? A. Not at all.

Q. Can you tell us in general what the nature of the changes was between P-1 and Government's Exhibit 280, without going into details? A. In general, my effort was to throw out every word that I could possibly throw out and get it on a short piece of paper, with most of it on one side of the paper, and make it as large and readable type as I could find. I even picked out a very clear type instead of a rather blurred type formerly used, leaving in only those things which appeared to me to be standardized with us, about which some argument would be raised if they were left out, leaving out nothing that was a clause that favored or was a protection to the distributor—to the exhibitor and throwing out several things that I thought were just law and we did not need. My whole effort was not to change the contract but to simplify it and get it down to a place where both the salesmen and the exhibitors would like it and we could do business.

Q. In preparing that simplified form, which is P-1, did you have any other form which you yourself had prepared, which you used as a model? A. No, I did not. I had a form (1285)

which Mr. Phillips and some of his associates had prepared as their idea of the simplification. It was not radical enough for me, so I started from scratch.

Q. Had you yourself in your early days with Paramount prepared a relatively simple license form? A. Yes, I had, back in 1922, before the first so-called uniform contract, gone through the same operation.

Q. Was this simplification that was made in the current form a simplification in the direction that your original simplification had gone? A. Yes, but it was not quite as good. My original one was much simpler. (1286)

Q. In the late '20s or the mid-'20s, were there discussions which resulted in the adoption of a uniform contract among distributors? A. There were.

Q. Will you tell us how those discussions arose and who participated, and what the upshot was? A. Prior to 1923 or 1922, while there was general similarity among the contracts used by the various distributors, each company and its lawyer used different language and they put a lot of stuff in there; whenever a new problem arose there would be a new clause written; and they got very complex; and while the subject matter of the trade was about the same, no one would know whether they were having the same yardstick for conduct, which the exhibitor wanted, without studying it very carefully and having a lawyer read it. And there were complaints from the exhibitors about that.

There was a further complaint from the exhibitors. The practice had grown up in the industry for a number of years of requiring the exhibitor to make a cash deposit upon the execution of a contract. Originally that cash deposit was

to make sure that he paid for a particular picture, a particular contract; and later on it went for more contracts, and again those terms, those deposit clauses, were of infinite variety. The exhibitors did not want the cash deposits, and they sought to have the States pass laws against them, and they succeeded; and that brought about another change in contracts.

(1287)

There was considerable annoyance on the part of the exhibitors, and then they had one large national exhibitor organization, known as the Motion Picture Theatre Owners of America. When the Motion Picture Producers and Distributors of America was incorporated in 1922, and Mr. Will H. Hays became its president, this exhibitor organization approached him and asked him if he would not bring about——

Mr. Wright: If the Court please, I think we can have what was done here; that would be sufficient, instead of all that conversation.

Judge Hand: Sustained.

Q. Leave out the conversations between the exhibitors' organization and Mr. Hays, and tell us what developed. Following such conversation something happened? A. The exhibitors' organization approached Mr. Hays. Mr. Hays did nothing but bring distributors and exhibitors together. They appointed committees; they labored over what they call a uniform contract, for many months. They produced a very long and complex document. That document eliminated completely a cash deposit clause and substituted for it a machinery for arbitration.

Mr. Wright: Excuse me. Have you got a copy of this thing you are talking about now?

The Witness: I have, or counsel has

(1288)

Mr. Wright: Would you have that marked or let me look at that?

Mr. Seymour: I do not mind your looking at it, Mr. Wright, as you have looked at almost everything else I have had.

Mr. Wright: Well, it will make it easier to follow his testimony.

Mr. Seymour: Yes, but I do not want to put in any more of these long contracts with small type if I can help it. If you want to put it in, because your eyesight is better than mine, you can.

Judge Hand: You ought to have a typewritten rider like the insurance policies have, which would contain the main meat in the cocoanut.

Mr. Seymour: Yes. The present contract is really very simple.

Judge Hand: Do you mean it is very simple?

Mr. Seymour: Well, it seems to be.

Judge Hand: Well, may be. All these things get worse and worse and finally they get to be like trust indentures for bond issues. Nobody knows what is in them or understands them.

Mr. Davis: Swager Sherley used to say that the modern trust indenture represented all the crystallized fears of three generations of lawyers.

(1289)

Judge Hand: That is a fine definition. They are crystallized all right.

Mr. Seymour: I have now handed Mr. Wright the contract form which Mr. Keough was discussing.

Q. So will you proceed, Mr. Keough? A. That form having been formulated by committees of exhibitors and their lawyers, the distributors, eight or nine of them, and

their lawyers, it was put into effect, and it was by agreement among the distributors the only form that was used by the eight principal distributors. That is the form that Judge Thacher and the Supreme Court said was illegal to use by agreement.

Q. That was primarily because of the arbitration provision? A. Primarily because of the arbitration provision and the sanction behind the arbitration——

Mr. Wright: I do not think we need——

Mr. Seymour: Mr. Wright, I am not going to go any further about that.

Mr. Wright: I must object to a testimonial interpretation of the decision.

Judge Bright: I suppose we could read that. That is not in fine print.

Judge Hand: There were two of them, weren't there? 282 U. S. you are talking about?

The Witness: Yes. One had to do with the con-
(1290)
tract and the other had to do with a credit committee, which had nothing to do with the contract.

Q. Now, was there a Federal Trade conference held in the '20s? A. If you will permit me to say that prior to the Federal Trade conference you are talking about, in the year 1926, there was a modification of that particular form that I have testified to of 1923, requested by the exhibitors, the net effect of which was that the form contained a warranty that it had every one of the clauses that were in the uniform contract in it, and that there were pointed out any other clauses, so that the exhibitor might clearly know what his contract was without having to read everything in there.

Q. Now, in addition to the standard or uniform form in 1926, did Paramount also have a form of its own? A. It did.

Mr. Wright: May I see that last?

Mr. Seymour: I will let you look at both of them, Mr. Wright (handing).

Q. Will you proceed chronologically with the development of that——

Judge Hand: This form you have in evidence?

Mr. Seymour: I have not offered it. I will be glad to. If your Honor would like to have it in I shall be glad to offer it.

(1291)

Judge Goddard: If you are going to discuss it, I think a copy would be helpful.

Judge Hand: This is the particular form, as I understand it, that has been declared illegal. I think we ought to have it before us.

Mr. Seymour: I shall be glad to offer it. I offer a copy of the 1923 form, and hope the Court won't have to look at it.

Mr. Wright: We have no objection.

Mr. Proskauer: May I suggest that when it was observed that the court held that the contract was illegal, the illegality was not in the contract, the court held; it was in the fact that it was a uniform contract arrived at—

Judge Hand: I understand.

Mr. Davis: The vice in that contract was that it provided that if any member failed to submit to arbitration, or perform his arbitral award, then the other contracting party would deny him films. In other words, they virtually boycotted the non-observers. That is what brought it down.

Judge Hand: Yes.

(Marked Defendant Paramount's Exhibit P-7.)

Judge Bright: What is that?

Mr. Seymour: That is the 1923 agreement. Now I offer a copy of the agreement which has been referred

(1292)

to as having been prepared in 1926, the standard exhibition contract.

(Marked Defendant Paramount's Exhibit P-8.)

Q. Of course, Mr. Keough, these agreements were used by each company individually in dealing with the exhibitors to whom it licensed product, isn't that so?

Mr. Wright: If the Court please, he is not competent to give any testimony of that kind.

Mr. Seymour: Of course he is.

Judge Bright: I did not quite get the testimony as to the 1926 agreement. What was that?

The Witness: The 1926 agreement was a modification of the 1923 agreement asked for by the exhibitors in order to include a warranty by the distributor that the contract contained all of the agreed upon clauses of the 1923 contract, and that if there were any additional clauses, they must be pointed out so that the exhibitor could see what the distributor had put in a contract which he thought was the normal, usual, standard contract.

Q. And they were to be pointed out in a document annexed to the agreement? A. Part of the agreement. It says so right in the form.

Q. In the schedule? A. In the schedule. You have got to put it in the schedule.

Mr. Seymour: I also offer a copy of the non-stand-

(1293)

ard form of Paramount license agreement as used in 1926, which the witness referred to.

(Marked Defendant Paramount's Exhibit P-9.)

Q. Did the Federal Trade Commission have anything to do with the 1926 agreement?. A. No.

Mr. Seymour: It has been pointed out to me that there is an unanswered question. May we have the unanswered question read?

Judge Hand: Yes.

(Question referred to read as follows:)

"Q. Of course, Mr. Keough, these agreements were used by each company individually in dealing with the exhibitors to whom it licensed product, isn't that so?"

Mr. Seymour: There cannot be any doubt about that. I should think the lawyer in the official position he was should know about that.

Judge Hand: Very well. Will you answer that?

A. So far as Paramount was concerned, the contract was used by the Paramount salesmen, sales managers and so forth, to write the particular individual deal for Paramount pictures, that they negotiated with their various customers, the exhibitors, and that ended it. There was no connection with what any other company did in using the same general form. It had chiefly to do with mechanics and legal consequences, not dollars and cents terms, or anything else.

(1294)

Q. Now you have covered 1926. Will you bring us up to the next-stage? A. Following the decision of the Supreme Court of the United States, the so-called standard contract was discontinued as a standard contract, and all the things it had to do with were out. So until the year 1928——

Q. Mr. Keough, I think your chronology is a little confusing. You are going back now to 1928. A. I had not been to 1928. I did not think I was.

Q. All right. The Supreme Court decision was after 1928? A. There was a period of time between the banning of the uniform standard contract and the bringing into existence of a form as the result of a Federal Trade Commission conference, and during that interval Paramount—and I presume the other companies—used their own form; and you have that as an exhibit, Paramount's form which was used in the meantime.

In 1928 the Federal Trade Commission assembled a trade conference by its invitation, held here in New York City. Commissioner Abraham F. Meyers presided. Distributors, exhibitors, producers and the members of the public were represented at that meeting.

As a result of the discussions that took place in New York, a committee was appointed which—I think it was in (1295)
the year 1928, following those meetings in New York—repaired to Chicago, a committee of exhibitors and distributors. Originally the exhibitors and distributors would not allow a lawyer in the meeting, as I recall it, but they finally got in, and they produced a contract which is the longest contract known to the picture industry. Not only one page was necessary, they had to have half another page.

*Now that contract, having been worked out by this committee, was recommended for adoption by the distributors in dealing with their exhibitors. It is sometimes referred to in the trade as the 5-5-5 contract. It was, I believe, on its face, an optional contract. That is, they did not have to use it, but it was desired that they did use it. It had also an optional arbitration clause right in the face of the contract, and the arbitration clause is optional with the exhibitor. And of course it was optional with the distributor. If the ex-

*See correction made by witness at printed record page 2487 *infra*.

hibitor wanted it and the distributor did not want it, why it did not go in. So that contract was put into effect—I am wrong about the length of that; it was the later contract—the 1928 contract was the standard contract resulting from the Federal Trade Commission conference——

Mr. Wright: Can't we have those identified so we know which ones he is talking about? I mean by numbers.

Mr. Seymour: Mr. Wright, I will be right up with you.

(1296)

The Witness: There it is.

Mr. Seymour: I offer it in evidence.

Mr. Wright: I still don't know which ones he was talking about.

Mr. Seymour: This is the 1928 agreement.

The Witness: And on the face of it is described so.

(Marked Defendant Paramount's Exhibit P-10.)

Q. Now, did Paramount use that standard form in licensing its pictures from time to time? A. They used that form sometimes; it used its own form sometimes during the period from 1928 to 1934.

Q. That is, there was a separate Paramount license agreement which was also used from time to time by Paramount during that period? A. That is right.

Q. Different? A. Well, it was different in some respects.

Q. I beg your pardon? A. It was different in some respects from the so-called 5-5-5 contract.

Judge Bright: The 5-5-5 contract is Exhibit P-10?

Mr. Seymour: Yes.*

Mr. Caskey: Mr. Seymour, would you ask him what 5-5-5 means?

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*See clarification of Mr. Seymour's answer at printed record page 2487-88 *infra*.

Q. Mr. Caskey would like to have you tell him what 5-5-5 means, Mr. Keough? A. It was a shorthand descrip-
(1297)
tion of the committee that was made up. There were five men representing the exhibitors, who were independent; five who represented affiliated exhibitors; and five represented distributors.

Q. Now was there any development with respect to license contracts under NRA? A. There was.

Q. And what was that? A. Following the establishment of the Code Authority for the motion picture industry under NRA, a committee was appointed under that authority to develop a contract which was to be standard in the licensing of pictures. That contract was the longest of the contracts, and it was used by Paramount, and I think most of the companies, until the NRA was declared unconstitutional.

Q. Did the exhibitors have any part in the negotiations leading up to that form? A. They did.

Q. Was that a result of conferences under the NRA? A. it was.

Q. And was there a committee on which the exhibitors were represented which dealt with the question? A. Yes.

Mr. Seymour: I will offer that in evidence.

Mr. Wright: No objection. I notice this refers to the 1935-1936 season.

(Marked Defendant Paramount's Exhibit P-11.)

Judge Bright: We seem to be getting into the
(1298)
three generations in other theatres.

Mr. Seymour: Yes. Well, we are pretty nearly through with that.

Q. Mr. Wright calls my attention to the fact that this contract refers to the 1935-1936 season. Was it used for a brief

*See clarification in printed record page 2488 *infra*.

time after the end of NRA? A. I do not know that it was used. It was printed up in this form before the Supreme Court had declared the whole NRA law unconstitutional, and therefore it had some of these forms and it might have been that it was used to contract for a few showings until they got a new start of a different contract. I think probably that is what happened.

Mr. Wright: Well, that 1935-1936 form was the one that was used during the 1933-1934 and 1934-1935 season?

The Witness: Oh, yes.

Judge Hand: What is this, the NRA form?

Mr. Seymour: The NRA form.

Q. Now, following the discontinuance of the use of the form which is in evidence as P-11, has there been any uniform contract for the distribution of motion pictures?

Mr. Wright: If the Court please, I think that is a conclusion that this witness should not be permitted to draw. It can only be determined by an examination of the forms used as to the extent or non-extent of uniformity.

Mr. Seymour: It is a question of fact.

(1299)

Judge Hand: Overruled.

A. No, there has been no uniform contract. Paramount has drawn its contract without regard to anybody else's contract. We endeavored to preserve so much of the text and substance of the prior form that the exhibitors had indicated approval of as we could. Now, if others did substantially the same thing, well I don't know it.

Q. Is there not any agreement or understanding among the defendants or with any other distributors, as to the use

by Paramount, or, as far as you know, any other distributor, of a standard or uniform contract, license contract? A. There is not. I speak for Paramount. I know nothing about anybody else.

Judge Hand: Well, you must know the contracts where your theatres are exhibiting other people's pictures? A. They bear only very general relationship with each other, general similarity; because they all have to deal with the same subject matter; but the various companies, their salesmen or their counsel, decide what will be the most attractive as a sales instrument for their company, or what the company needs for its protection. They vary.

Q. Would you tell us generally, Mr. Keough, how that license form is used? A. Speaking about Paramount?

Q. Paramount. A. After the Paramount sales representative, whether he be a sales manager or divisional manager

(1300)

or branch manager, has reached a stage of agreement on the pictures to be licensed to the particular customer, and the terms thereof, these printed forms are generally used to put those terms down. And if the general form has not enough space on it to write all the terms that they have negotiated, they use an extra form or they use a piece of paper; or if they are dealing with perhaps a circuit, a large number of theatres, they might write it up separately, and then refer, as part of the contract, to the Paramount's form, whether it is the form that we now use that I drew, or the longer one; but that form as to the mechanical terms, I will say, the forms that represent the legal rights of the parties as distinguished from the dollars and cents terms, and pictures and clearance and what not—that forms part of their contract either by actual physical incorporation, reference; or some-

times the deal is made orally. There is such a thing in this business as spot booking. A fellow calls up and he wants a picture in a hurry. There is no contract that is executed for it. You trust him. He gets the picture, he sends in a check for it, he has got a credit, and you get no signature out of him. You may make some kind of shorthand memorandum in the exchange, but the terms on which that is done, if not articulated and expressed, as far as the exhibitor understands, because he has dealt with us, are our contract. (1301)

Q. Now, I would like to ask you about some particular provisions of the Paramount license contract which you have and with which you are familiar. First, why does the contract contain a provision for minimum admission prices? A. Are you speaking of the current contract or all the contracts that I have been testifying to——

Q. Such a provision has been in the Paramount contracts for many years, has it not? A. There used to be a——

Judge Hand: He has asked you a question. Answer it directly.

The Witness: I am trying to.

Judge Hand: He asked "has it not".

Q. Hasn't such a provision been in the Paramount contracts for many years? A. I think I can answer that yes.

Q. What is the reason for it? A. The reason is twofold: In the early contracts—and I speak of contracts that went back to 1918, 1919, 1920, which dealt with flat rentals—there was a minimum admission of 10 cents. That had nothing to do with the percentage. That had to do with the prestige of the picture. 10 cents was the very minimum admission price, and if the exhibitor wanted to have a Paramount picture he would charge at least 10 cents for it and as much more as he wanted. When Paramount entered into a per-

(1302)

centage contract with an exhibitor, its reward for making the license depended upon the amount of money that was taken in. Now, if the exhibitor in negotiating said he could afford to pay a certain percentage but not another percentage, and he could afford a certain split but not another split, based upon what his policy was, what his admission prices were, what his take was, — that was one of the terms, one of the representations that were written down into the contract. So that after the contract was made Paramount could get an accounting of so many dollars on the basis of what the exhibitor said that he was going to produce, not some other figure that he decided to change in the middle of the engagement. So that the form of contract from the early one to the present time, whether it is percentage or flat rental, has a provision in which the exhibitor agrees to charge certain admission prices as the minimum. Sometimes those blanks are filled in; sometimes they are not filled in. Sometimes they are not filled in because—well, the exhibitor is charging, say, 25 cents, and you do not need to put in a 10-cent minimum because you know what he is doing. Usually they are filled in where you have a percentage engagement. Where you have a flat rental engagement they may or may not be filled in. Now, that is the reason for putting them in the contract.

Q. Do you consider that the provision for a minimum

(1303)

admission price is a necessary protection to the copyright owners? A. Absolutely.

Q. Now, reference has been made here to the fact that in the license contracts, including the license contracts of Paramount, there are provisions for auditing the exhibitor's books in connection with percentage contracts. Did you have anything to do with the inclusion of those provisions? A. I did. Those contracts I drew and passed upon and approved

Q. What was the purpose of them? A. To make sure we were getting an honest count, an honest report.

Q. Was it used for any other purpose? A. Not that I ever heard of.

Q. And is it only as to the exhibition of the distributor's own pictures? A. Yes.

Q. Have you had any experiences with exhibitors who have not returned the full amount of revenue which they should to the distributor? By "returned," I mean paid. A. Very considerable experience.

Q. Is the right of audit any protection against the exhibitor in that respect? A. That right of audit has actually disclosed, where no other means is available, the complete misstatement or misrepresentation to Paramount of the actual business done on which we should have had an accounting, and on which we did not get an accounting, or (1304)

we got a false accounting. The audits disclosed that. Sometimes the audit was one that we got because the exhibitor honored the clause and permitted it; and other times we had to go to a court of equity to get it, and did.

Q. Now, do you remember that at about 1936, Mr. Keough, there was a suit in this court entitled United States vs. Warner Bros., involving a charge with reference to St. Louis? A. Yes.

Q. In connection with the discontinuance of that suit by the United States, did the Attorney General insist that certain defendants in that case grant 10-year franchises to exhibitors?

Mr. Wright: If the Court please, I do not understand what the relevance of this line of inquiry is. The facts of the settlement, I suppose, are of record here in the court and judicially noticeable.

Mr. Proskauer: I can't hear you, Mr. Wright.

Mr. Hand: I will allow it.

A. He did.

Q. And did certain of the defendants in that case grant such 10-year franchises? A. They did.

Q. Did Paramount grant a 10-year franchise? A. It did not.

Q. Did Paramount decline to do so? A. It did.

Q. And was that suit discontinued after certain of the (1305)
defendants had granted franchises as requested by the Attorney General? A. One event followed the other. It was discontinued.

Q. Mr. Keough, from time to time since your connection with Paramount began, Paramount has acquired interests in groups of theatres, sometimes known as circuits, has it not? A. It has.

Q. Now, do you know whether or not in connection with such acquisitions it has met competition from other distributors?

Mr. Wright: If the Court please, that is a conclusion that is entirely too general for him to draw. He can state what the facts were in connection with the acquisition but not a conclusion of this sort.

Judge Hand: Read the question.

(Question read.)

Mr. Seymour: I am going to follow it with a little detail.

Judge Hand: Overruled.

A. I do know some instances.

Q. Now, can you mention any circuits for which Paramount negotiated sometimes successfully and sometimes unsuccessfully where other distributors were also attempting to obtain an interest in the circuit? A. I recall that in the

middle '20s there was a Sachs Circuit of theatres in Mil-
(1306)
waukee, and Paramount was very much interested in acquiring either an interest in the circuit, or the circuit. It had no theatres there. And we did not acquire it. A competitor—I don't remember now which one of the companies, Warner's or Fox—got it in competition. They outbid us. We wanted it and did not get it. That is one.

Q. Now, can you tell us about any others where perhaps you were able to get the circuit? A. The Comerford Circuit is another I know of. Mr. Comerford and his associates, because of old——

Judge Goddard: A little louder, please.

A. (Continuing) —because of old friendship with Mr. Zukor and Mr. Sidney R. Kent, desired in 1930 to sell their business, and they wanted to sell it to Paramount, and Paramount wanted to buy it, and Warner Bros. wanted to buy it, and we prevailed in that competition. We got the circuit. And one other instance which comes to my mind has to do with the theatres in Minneapolis and St. Paul where the Fox Theatre Company, I think it was, William Fox's Theatre Company made an effort to buy the circuit of Ruben & Finkelstein, and they wanted Paramount to give up, in order to allow them to do it, to give up some management veto we had or approvals we had of the principal downtown
(1307)
theatre that showed Paramount pictures. We did not do it, and Fox did not get the theatre, and we did.

Mr. Wright: May we have the date on that?

The Witness: It was around 1929. I think it was in 1929.

Q. How about the Kunsky & Trendle Circuit? A. Well, personally I have no knowledge of that. It is hearsay.

Q. How about the Blank Circuit? A. Again I was informed. I personally did not know about the Blank Circuit.

Q. Did you know anything about any of the theatres in Florida? Was there any competition there that you know of? A. Well, there was competition for the acquisition of E. J. Sparks' interest whom we bought out. He owned half of the company, and we met competition in buying that half.

Q. Competition from one of the other distributors in this case? A. Yes.

Q. How about the Saenger Circuit in New Orleans? A. Yes. There was at least one company, one of the large distributing companies, with theatres, that was eager to acquire the Saenger Circuit, when Paramount acquired it instead.

Mr. Wright: Can we have the dates on all of these?

(1308)

Mr. Seymour: The interrogatories give you the dates.

The Witness: The Sachs that I gave you was somewhere in the middle '20s, 1925 or 1926; and the other one was 1929; and the one from Mr. Sparks was about 1935 or 1936. It was at the time that—oh, wait a minute. It was after the consent decree. Sparks had been our partner at the time. It was either in 1940 or 1941 that we bought him out in competition.

Mr. Seymour: You may examine, Mr. Wright.

Cross Examination by Mr. Wright:

Q. That Saenger Circuit acquisition that you referred to, that was at what time? A. The year 1929.

Q. That was 1929? A. Yes.

Q. Now, this competition that you were referring to in connection with the Sparks Circuit, you say that occurred in 1940 or 1941? A. Yes.

Q. That was the situation where you owned how much? A. We owned half.

Q. You owned half of the Sparks Circuit? A. Yes.

Q. And you say there was competition between you—— A. To buy the other half.

Q. — and another distributor to buy the other half? A. Yes.

Q. That is, one of the other distributors wanted to be-
(1309)
come a partner with you in the circuit—— A. Wanted to buy Mr. Sparks' interest.

Q. And you were in competition with him for the privilege? A. Yes.

Q. What distributor was that? A. Either Fox or Warner.

Q. Well, do you know? A. Well, I don't remember at this moment.

Q. Well, as a matter of fact, you don't have any personal knowledge, do you, of the dealings between Sparks and either of them, do you? A. Well, I happened to have been intimately engaged with the whole negotiation. No, I did not talk to any Warner Bros. man who came in in my presence and said "I will offer you."

Q. What was at stake was the acquisition of an interest by another distributor in the circuit in which you already had at least a negative control, isn't that right? A. We had a negative control only as far as acquisition of theatres. We had no negative control whatsoever as to the operation of the theatre. By the very structure of that company that was in Mr. Sparks' hands, and had anybody bought that, they would have been sitting in Sparks' position.

Q. Now, that first license agreement that was offered here—I think it is identified as P-5—which is the 1918 agreement, I see the protection provision that you referred to is
(1310)
added there in typing. There is no agreement, is there, that

you can point to in the printed provisions which provides for any protection or clearance? A. Not in the exhibit, and I don't know whether there is in any of the others. I don't know.

Q. I take it the exhibit, the printed form, is the form of license agreement that was customarily used at the time, is that right? A. That is my information. There are tens of thousands of those papers filed in the warehouse, and that happens to be one out of several that we found. As far as that printed form is concerned, there is no provision for clearance; it does not say clearance; it does not say protection. It is written in there in type.

(1311)

Q. I say, and the printed form that you have identified here is the form of agreement that was customarily used in licensing your pictures at that time, isn't that right? A. It was the printed form that was customarily used.

Q. Yes? A. Yes.

Q. I think you referred to one form that was not marked here. You said in connection with your testimony on this P-10, which I think is—that is the agreement you were using in 1926, or would that be 1928? I see it has a rider on it relating to sound. A. May I look at it?

Q. Better look at it, yes. A. This is the 1926 form which was a modification of the 1923 form. It is still in use in 1920—whatever that date is.

Q. You referred to another form which you said Paramount also used at the same time but I don't believe it was marked. What was the difference, if any, between the other form you referred to and this one? You said you sometimes used this and you sometimes used another, which was not marked.

Mr. Davis: Will the record show which forms Mr. Wright is referring to?

A. Here is the form that I referred to as having been used and at the top of the printed form, instead of the words "Standard Exhibition Contract" are the words "Exhibition
(1312)
Contract", which was intended to indicate it was not standard, and I don't know exactly, without comparing them, what the differences were. There probably weren't very many.

Q. You don't know what if any—whether any were of substance at all? Do you know what the purpose of having the two forms was? A. No, I don't. I don't remember what that was.

Q. Sometimes you used one and sometimes the other without any particular reason? A. No, I think there was a reason at that time. That 1926 contract is the one that was stricken down by the Supreme Court. Now, at some time, either immediately following that—we put this other form into use and obviously that was not in the year 1926 because in the year 1926 we were using uniform or standard forms of agreement, and we did so until the Supreme Court told us that we shouldn't do it.

Judge Hand: That is P-8?

Mr. Wright: No, the one I was just asking him about was not marked at all. He had referred to it in his testimony, and that one I have in my hand. That he said is similar to P-10, which is described as the 1926 agreement.

Q. You were not licensing sound pictures, were you, in 1926? A. No.

Q. I wonder if this form you have, marked P-10, that you
(1313)
referred to as the form of that date, is not actually a later form? A. No, the form P-10 is the form adopted in 1926 and continued to be used from 1926 through the years until the

Supreme Court said that the use of this contract, with its arbitration clause, which is Article 8, was illegal. Now, we used exactly the same form but we dated it according to the year of the release and we printed the number of the different —this form was used in 1926, 1926-27, 1927-28, and you will find sound probably came in in 1927.

(Marked Defendant Paramount's Exhibit P-12.)

Judge Bright: Which is P-12 now, this one that was used at or about the same time?

Mr. Wright: No, I had it marked so that we could know.

Q. This agreement that has just been marked for identification as P-12 is the agreement which you used following the court decision which superseded that P-10 that Judge Bright had? A. That is right. The arbitration clause is entirely different and the sanctions behind the arbitration clause were missing.

Q. Then the form that you have there, marked as P-12, continued in effect until this form P-11 was introduced during the NRA period, is that right? A. No.

(1314)

Q. Was there an intervening one there? A. The 555, which is Federal Trade Commission, succeeded this in 1928.

Q. Can you tell me which one of these followed the use of the form marked P-12? A. P-8——

Q. P-8? A. No, I am wrong. Not here. Not here. I don't see it among these papers at all.

Q. We will pass that for the moment. Can you recall when you first started to use clearance provisions which referred to the prices to be charged by theatres other than those which signed the license in question?

Mr. Seymour: I object to that as assuming something that, as far as I know, is not in evidence.

Mr. Wright: There are a very great number of them in evidence in the form of answers to the interrogatories and in actual agreements in evidence.

Mr. Seymour: I think you ought to direct the witness's attention to any particular one because I do not know of any such. Perhaps there are.

Judge Hand: Overruled, go ahead.

Q. Generally, I am referring to the situation which says the first-run shall have so many days clearance over 30-cent theatres and so many over 40-cent, that sort of thing.

Mr. Seymour: That is not what you said in your question.

(1315)

Mr. Proskauer: Not at all.

Judge Bright: Re-ask the question, will you, and then we will get it the way you want it.

(Record read.)

A. I can't fix it without some reference to something but my impression, subject to my checking up on myself, is that somewhere in, oh, around the, say, year 1924, 5 or 6, in certain places that became the nature of the clearance or protection agreement negotiated. From that it just grew. I don't remember definitely where the first instance was.

Q. You don't have any doubt, do you, that where the agreement says so many days over theatres charging a certain admission price that that refers not only to those which may belong to the first-run theatre operators but any theatres regardless of who operated by, charging this price, isn't that right? A. It certainly refers——

Mr. Seymour: May we have that question read because the distinction that Mr. Wright is blurring is important.

(Question read.)

Mr. Seymour: If your Honor please, I do not like to object to the question but there is obviously a difference between a situation where the contract requires a theatre to charge a certain price and where it says something will happen if it charges a certain price. Mr. Wright ought not to attempt to interpret

(1316)

that in his question. I do not object to his asking about the practice.

Mr. Wright: Frankly, I was a little shocked at the suggestion of counsel that there were no agreements in evidence which referred—in which there was first-run clearance which referred——

Judge Hand: Overruled, you may answer.

The Witness: Well, would you please read the question, after all this colloquy?

Q. I say, where——

Judge Hand: You don't gain anything by so many objections and so much colloquy. It is a waste of time. It can be straightened out on direct or in some other way, and I am getting sick of it.

A. Perhaps this will answer the question, if I understand it. When Paramount writes into a contract it makes with Exhibitor A a clearance provision that says Exhibit A will have so many days clearance following the end of Exhibitor A's run on that Paramount picture over any theatre charging an admission price of less than 25 cents, to take a

hypothetical case, if it is as broadly stated as that in the contract, that is typed out, written up by the salesman, not a lawyer, salesman, both the salesman and the exhibitor understand that Exhibitor A will have 30 days clearance on that Paramount picture over every theatre in the area that

(1317)

they regard as competitive to the first-run account which charges 25 cents. *In other words, Paramount thereby agrees that this first-run account of its choice, to whom it has granted the license, will not, after the conclusion of that run, exhibit or license the exhibition to any theatre that charges less than whatever that stated price is in an area. Now, sometimes they are meticulously careful and they describe the area; sometimes they do nothing about it, they understand what they are talking about.

Mr. Proskauer: Won't license it for the 30 days?

*The Witness: Won't license it within 30 days, within the 30 days stipulated clearance, to a tneatre which charges less than whatever the stated price is in that particular contract.

Judge Hand: We will take a recess until 2.15.

(Recess to 2.15 p. m.)

(1318)

AFTERNOON SESSION

AUSTIN C. KEOUGH, resumed the stand

Mr. Wright: We have no further cross-examination.

Judge Goddard: Mr. Seymour, are you going to give us any instances of where independents got theatres away from Paramount? You have given us instances of where some defendants did.

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*See clarification at printed record page 2488 *infra*.

Mr. Seymour: Your Honor means where there was competition between Paramount for acquisition of interest in a circuit, and the competitor was an independent circuit?

Judge Goddard: Yes.

Redirect Examination by Mr. Seymour:

Q. Do you know of any such, Mr. Keough? A. Well, I think I suggested one situation which was during our bankruptcy where we lost a circuit of theatres that we formerly had owned out through Indiana and Ohio, the so-called Fitzpatrick and McElroy Circuit, and we lost that and to an independent in competition with us.

Now, I will have to search my memory and records to see whether there are other instances. That occurs to me immediately.

Judge Goddard: Was that where the theatre was sold to a higher bidder?

The Witness: It was a circuit of theatres sold to a higher bidder, yes. We wanted the circuit, and we

(1319)

just did not have the resources to get it, and the independent who still operates it, I believe got it.

There was another one we tried to get after it. We had a theatre in Gary, Indiana, a very fine theatre, and there that was taken away from us in competition. We later, years afterwards, went into Gary, Indiana, with a theatre, and we have been operating it competitively with that; and the fact of that competition, and the whole background and history of that is of record in the courts, litigated, and the decision described and justified the situation and the competition. We lost out in competition. That was an independent.

Q. Mr. Keough, can you think of any instances where a theatre-operating company in which Paramount had an interest lost leaseholds or leases of theatres to independent theatre operators? A. Well, I don't like to mention the most recent one, the most recent of instances, which was referred to the other day, in Taunton, where Paramount's subsidiary had been the lessee for years of a certain theatre, where an independent bought the theatre in competition right from under them. That is a recent one.

Mr. Wright: Can you name that, please, so we know what you are talking about?

The Witness: Well, the theatre that I refer to is (1320)

the State Theatre, in Taunton, Massachusetts.

Q. The Strand Theatre, Mr. Keough. A. The Strand Theatre. That was it. The Strand, not the State. And that theatre was operated in competition. An independent got it away from one of Paramount's companies.

Q. Have there been other instances of that? A. Well, it is rather dim in my memory that there have been. I would have to go back and check my records, but I am very sure that there have been, yes.

Q. Now, with respect to the matter about which Mr. Wright was inquiring of you just before we recessed—that is, certain clearance terms which he referred to—have you participated in negotiations with exhibitors at which the clearance terms have been the subject of discussion? A. I have.

Q. And have you participated in negotiations at which clearance terms, such as those you were discussing with Mr. Wright have been discussed? A. I have.

Q. Can you tell us what the nature of those negotiations has been? A. First of all, there are those negotiations in which I participated in which Paramount, the distributor, was bargaining with an exhibitor, and from time to time

there had been different exhibitors, about the terms of the contract, one of the terms of the contract being the clearance
(1321)
which the exhibitor sought to obtain from Paramount and which Paramount argued about as to whether it should give it, whether it was reasonable and fair to Paramount and Paramount's other customers, and the factors brought out in that discussion as to the clearance requested and ultimately granted in the requested or some modified form was the relation between the admission prices of the theatre that had the prior run and the theatres that had, or would, or might receive the next run or runs, and the bearing of a time element on the value of the contract sold to the prior run, I mean, the good will that went with the license, the prior run's ability to get the most out of the showing, in order to give Paramount what Paramount was insisting should come out of that showing, whether it was on a flat rental or whether it was on a percentage or a combination of both.

The discussions concerned a request by the prior exhibitor for a longer period of time to elapse between the finish of his exhibition and the start of any other exhibition at certain admission prices. The higher the admission price, the less time they thought was necessary; the lower the admission price, the longer they thought they would get.

In those discussions, and they were discussions, arguments and negotiations in which I participated, they finally came to a conclusion that a certain thing was all right and a
(1322)
certain thing was not all right, and would not go for it, Paramount would not go for it. That is the way they wound up.

Q. In the course of those negotiations were the terms of the license to the prior run conditioned on Paramount exacting any particular admission price or any admission price minimum from the subsequent-run exhibitor?

Mr. Wright: It is pure argument. I don't think it is a proper question.

Judge Hand: Overruled.

A. No, there was no argument about what Paramount should require of any subsequent run. The whole position was that if Paramount elected to sell a second-run or a subsequent-run, where the first admission price was, say, 50 cents, or 40 cents, well then, one lapse of time seemed reasonable; if it was 25 cents, another lapse of time seemed reasonable; if it was at a great distance, the exhibitor sometimes said, "Well, we ought to have a clearance over that." And Paramount said, "No, we don't agree with you, and we won't grant it," or we did agree and we did grant it.

So it was only a question of what the time lapse would be in the event that Paramount made a sale. They were perfectly free to make a sale.

Q. After the decision of the Supreme Court in U. S. v. (1323)
Interstate came down, did you have occasion to consider whether the clearance provisions, about which you testified under examination by Mr. Wright, were proper in the light of that decision? A. I did.

Q. Did you reach a conclusion on that subject? A. I did.

Mr. Wright: If the Court please——

Judge Hand: I think I will sustain an objection to that.

Q. Did you give any instructions with respect to the clearance terms based upon the decision in U. S. v. Interstate? A. I gave some oral instructions. I don't recall whether I gave any written instructions to Paramount sales organization.

Q. Will you tell us what those instructions were.

Mr. Wright: We object to what internal instructions were given. I do not see how it has any bearing on any issue.

Judge Hand: I think that is proper. Go on.

A. I advised or instructed Paramount's sales organization that as long as Paramount, the distributor, determined by itself what it was willing to give in the way of clearance, it was perfectly proper to measure the clearance, and state it in its contract with its exhibitor, by the admission price which the exhibitor would charge, the subsequent-run ex-
(1324)
hibitor would charge, and I told them that the facts as were set forth in the Interstate case were a different set of facts, talking about Paramount itself fixing its own terms, even when they were requested, and all by itself, with an exhibitor, and I instructed them to act accordingly.

Q. Did you instruct them that the clearance might be measured by what the subsequent-run exhibitor was charging or what he agreed to charge?

Mr. Wright: I object to what instructions were given. I object to putting any more words in his mouth.

Judge Hand: Read the question.

(Question read.)

Judge Hand: We will allow that.

A. My instructions covered both. For example, in the ordinary exhibition of a picture, an ordinary Paramount picture, the exhibitor had his own stated standard admission price which he announced to the Paramount salesman, and if it was a percentage contract, it was fitted into that contract, and a clearance was measured in time by what some subsequent

competing exhibitor would charge. That was written in and that was his price. When there were specialties, pictures that were large in size, money and scope, and a peculiar kind of exploitation was planned for them, something like in former days they called a road show, where the picture was shown
(1325)
first in a limited number of theatres provided the exhibitor charged a higher admission price, then that was written into the contract. That price was not necessarily the price that the exhibitor then had in effect. It probably was not. If his price was 50 cents and the picture was to come to him in a limited period, say six months before the rest of all the first-run accounts, he got it, if he charged a dollar, for example, or 75 cents, or whatever it was, and if he did not want to charge that he did not get it then, and he got it later at his own admission price. Paramount then announced its policy and said, "If you want it on these terms, you contract with us to charge that admission. If you don't, why, you will have to wait until later."

Q. As a matter of fact, Mr. Keough, the consent decree in Section 8—the consent decree in this case—mentions the admission prices of the theatres involved as one of the elements in determining whether clearance is reasonable, does it not? A. Not only does, but, on the thing that I am speaking about, it speaks about special exhibitions, with or without the clearance terms.

Q. I neglected when you were in direct, to ask Mr. Wright to stipulate as he has in connection with the other witnesses, since Mr. Zukor, that if asked you would answer in the negative the questions negativing conspiracy which I asked Mr.
(1326)
Zukor. I assume Mr. Wright will stipulate, so I won't have to put those questions specially.

Mr. Seymour: Do you so stipulate, Mr. Wright?

Mr. Wright: Yes.

Mr. Seymour: And that stipulation as the same effect as if I asked the witness on the stand?

Mr. Wright: Yes.

Mr. Caskey: One question.

By Mr. Caskey:

Q. Mr. Keough, there is one question I want to ask you. As I understand it for some years there was included in the Paramount contracts a provision that the exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than 10 cents, was there not? A. Yes. (1327)

Q. And that clause was in the so-called standard exhibition contract of May 1, 1928? A. I think it was.

Q. Now, did that clause have anything to do with clearance or protection? A. No, I think I testified this morning that that had to do with prestige. That was a minimum 10 cents admission which we had in our Paramount contracts as early as 1919 or earlier.

Q. And subsequently to 1928 in some contracts that minimum was raised from 10 cents to 15 cents, was it not? A. In some Paramount contracts?

Q. Yes, sir. A. It may have been, I don't recall. I don't remember whether Paramount ever raised it to 15 cents as a minimum as a standard practice. I doubt it.

Recross Examination by Mr. Proskauer:

Q. Mr. Keough, in giving your testimony you referred to the introduction of talking pictures by my clients, Warner Bros. Do you remember that? A. Yes, sir.

Q. And that was in about what year? A. Around 1927. 1926 or 1927.

Q. Now, from your general knowledge of the industry I am going to try to elicit some things which I think are

not controversial, but I want to have them in the record. It was necessary in order to show a sound picture to have some special equipment in the theatre, was it not? A. It was.

(1328)

Q. And practically no theatres in the country, or, indeed, no theatres in the country at that time had that equipment? A. Well, when sound flashed upon the industry there was not any equipment in the theatres.

Q. Yes. Do you remember approximately what it cost at that time to put that equipment into a theatre? A. My recollection is that the cheapest form of equipment that was furnished either by the Western Electric Company or the Radio Corporation, RCA, was about $25,000. That is, the reproducing equipment.

Q. Now, at that time Warner's was still a small company, weren't they? A. Well, when they adopted sound they were a very small company, yes.

Q. And they had no theatres? A. No, not that I ever heard of.

Q. And in order to exploit sound, which you told us they were a year ahead of their competitors with, they had to get theatres to show those pictures in, didn't they? A. Well, there had to be theatres that were equipped with this rather expensive equipment in order that Warner Bros. who had the sound pictures could get a customer for them.

Q. Exactly. And the theatres that were owned by their producing competitors, like your company, they were not available for the exhibition of those sound pictures, were

(1329)

they? A. With a very few exceptions the theatres that Paramount was interested in, as well as the other theatres of the same quality and standing, had no such equipment, because at that time they did not believe that the thing was permanent. There was an exception, however, in the case of E. J.

Sparks' theatres in Florida, in which Mr. Sparks was the managing principal partner with Paramount. He had a vision. He rushed out and he got as many equipments he could in a few theatres—there were not very many of them—and he, I think, was the only one who had that vision that this was going to be something he could spend money on, and he did.

Q. Sparks had just a few theatres locally in Florida? A. He had a few theatres, but he was the only one I can think of who really was interested in sound at that time.

Q. And do you recall that it was at that time that Warner's went through with their transaction with First National and Stanley by which they acquired theatres? A. That was the time at which they got the theatres, yes; started to get them.

Mr. Proskauer: That is all.

Mr. Seymour: Are there any further questions of Mr. Keough?

Mr. Wright: I have some.

(1330)

Recross Examination by Mr. Wright:

Q. This situation that you spoke about at Taunton, Massachusetts, do you recall when you lost the lease on that Strand Theatre? A. Yes, some time back in the beginning of 1945.

Q. It was before that, was it not? It was the Fall of 1944, was it not? A. It may have been.

Q. And that was a theatre in which Paramount had been serving pictures to? A. That was one of two theatres in Taunton, Massachusetts, where Paramount's partly owned subsidiary had been the lessee of for a long number of years.

Q. Well, can you answer the question? A. Yes, I will answer the question. Paramount had shown in that theatre the less attractive of its pictures year after year in that Strand Theatre.

Q. First-run? A. First-run, yes.

Q. By the way, who was the lessee that took it over after you got it? A. Well, it probably has some corporate name, which I don't recall. Mr. Donald Jaycox was the personality, the owner, probably the stockholder.

Q. And then after he took over that theatre, did Paramount make any of its pictures available to him for first-run exhibition in that theatre? A. I don't think we did.

(1331)

Q. You know you did not, don't you? A. No, I don't know that we did not. I told Mr. Jaycox's counsel that he could hardly expect Paramount to supply him with pictures when he went in and took the theatre that we had a lease on and were perfectly anxious to renew on terms as good if not better than he offered——

Q. Well—— A. Please——

Q. I did not ask you for the conversation you had with counsel. If you will just listen to the question and then give the answer we will get along faster. The theatre then remained closed, did it not, for a substantial period of time after the lease had been acquired by Mr. Jaycox? A. The theatre was closed and repaired or redecorated or reconstructed, opened with one picture for about a week, then closed for some months.

Q. And that was when, when it was opened for a week and then closed? A. Well, in the Spring of 1945, and thereafter it was closed. I mean, don't hold me to a precise date. It might have been April, March, May; whatever it was.

Q. And do you know the reason why it was closed? A. I know the reason that was described to me by Mr. Jaycox's counsel, and that was that he could not get pictures.

Q. And you know, as a matter of fact, that it was not
(1332)
offered any pictures on first-run by the other major distributors whose product had played there when Mullin & Pinanski had it, is that right? A. My information is quite to the contrary.

Q. In any event, the theatre stayed closed. Then there was a lawsuit filed in which you were a defendant? A. That is right.

Q. And that suit named as parties your company and Mullin & Pinanski and the other major distributors. A. That is right.

Q. And then that suit was settled? A. It was.

Q. And under the terms of the settlement Mr. Jaycox was to have certain major product first-run in that Strand Theatre? A. As far as the immediate contracting for pictures was concerned, that is true. I don't remember just what product is being sold to him. Some of the product that is being sold to him as the result of that settlement was product that was offered to him before he even began his suit.

Q. In any event, as the result of the settlement he is now entitled to play certain product on first-run that was not available to him before? A. Well, he has contracts to them. I don't know whether he is entitled to play them. He is entitled to play what he has got contracts for.
(1333)

Q. Then I think you referred to this Gary situation where you say a Mr. Young obtained certain theatres which you had formerly operated. A. I did not name the man, but Mr. Young is the exhibitor in question.

Q. And then at a later time you, or, rather, Balaban & Katz went back into Gary, is that right? A. Balaban & Katz went into Gary and built a theatre or had a theatre built for it.

Q. And when was that? A. Oh, 1934, 1935; somewhere along there.

Q. And then do you recall that Mr. Young had a conversation with you and Mr. Barney Balaban as to what was going to be done with reference to a Paramount product in the town which he had been playing after you had the theatre there? A. I remember, yes.

Q. And do you remember that in that conference Mr. Young asked Mr. Balaban whether he could get the Paramount pictures, and that Mr. Balaban said he did not know, but probably not; that that was up to the theatre department in the distribution of pictures? A. Mr. Balaban——

Q. Just answer the question. A. Well, the answer is no.

Q. I call your attention to what purports to be a transcript of testimony or a page of the proceedings Paramount Pictures, Inc. et al. v. William Langer, et al., of June 18, (1334)
1938, and ask you to read page 997, and call your particular attention to the testimony near the bottom of the page.

Mr. Seymour: Whose testimony is it, Mr. Wright?

Mr. Wright: That is Mr. Keough's testimony.

A. I read what purports to be my testimony, transcribed in the so-called North Dakota case.

Q. That is what that is you have in your hands, yes. A. Yes, I recognize it. Where do you want me to start reading?

Q. I just want to call your attention to the part I just read to you; that is down the lower part of the page there; see if you still adhere to your testimony that that is not a correct version of the conversation you then testified to. A. (Reading.) "Again Mr. Young asked about the Paramount pictures, and he said he felt that Paramount shouldn't have come into the town and taken an interest in the other theatre"——

Mr. Wright: No. Let me have this.

The Witness: I am sorry.

Q. Is it not a fact that in that proceeding you testified as follows:

"The conference then broke up, and as it was breaking up, Mr. Young again asked Mr. Balaban whether he could get the Paramount pictures, and Mr. Balaban said he didn't know, but probably not, that that was

(1335)

up to the theatre department in the distribution of pictures."

A. It is not so that I so testified.

Q. That is not your testimony? A. That is not my testimony; and where "the theatre department" is transcribed in this record, it should have read—and I did so testify—"the distribution department."

Q. Other than that is that a correct statement as to what transpired at the meeting? A. Yes, sir.

Q. Did Mr. Young get the pictures? A. He did not.

Q. And they played at the Balaban & Katz house, is that right? A. They played at the house in which Balaban & Katz and an independent were the operators.

Mr. Wright: Will you read that last answer?

(Answer read.)

A. (Continuing) It was some Greek name, a man who was in the town already and who built this theatre, and who asked Balaban & Katz to take an interest with him. They did. That is the theatre.

Q. Balaban & Katz operated the theatre and he had an interest in it, is that right? A. No, I think he managed and

Q. What was the nature of the Balaban & Katz interest? A. A stock interest.

Q. Of how much? A. Maybe half. I don't remember what it was.

(1336)

Q. You don't remember what it was? A. Maybe two-thirds. It was a material interest.

Q. But after Balaban & Katz acquired the interest, whatever it was, from that time on the Paramount pictures were served to that theatre and not to Mr. Young, is that right? A. Oh yes, that is perfectly true.

Mr. Wright: That is all.

Recross Examination by Mr. Caskey:

Q. Mr. Keough, when you talked to Mr. Jaycox's counsel about this Taunton situation, did not his counsel tell you that Twentieth Century-Fox had offered to license to Mr. Jaycox exactly the same type of product for the Strand that had theretofore been licensed to the Paramount subsidiary?

Mr. Wright: That is objectionable. It is not competent for him to say what Mr. Jaycox's counsel said to him.

(1337)

Mr. Caskey: You brought it out, sir.

Mr. Wright: I brought out the fact of the terms of the settlement. That has nothing to do with prior conversation.

Judge Hand: Read the question.

(Question read.)

Judge Hand: You may answer.

A. Mr. Jaycox's counsel did tell me that.

Mr. Caskey: That is all.

Mr. Seymour: I have no further questions.

Judge Bright: Which theatre was it that was referred to in Gary?

The Witness: I think the name of the theatre was the Palace Theatre in Gary, Indiana.

Judge Bright: Was there some litigation about it?

The Witness: Yes.

Judge Bright: In the Federal Court?

The Witness: In the Federal Court, yes. There were two different lawsuits.

Mr. Seymour: In which the defendants prevailed, is that right?

The Witness: In both of them the defendants prevailed in the Circuit Court of Appeals.

Recross Examination by Mr. Davis:

Q. May I ask you a question, Mr. Keough: Do you know (1338)
whether or not before this conversation with counsel for Mr. Jaycox to which you just referred, Loew's, Inc. had already licensed Mr. Jaycox and contracts had been signed? A. No, I do not know that of my own knowledge.

Q. You do not know that? A. No, not of my own knowledge.

(Witness excused.)

Mr. Seymour: I will call Mr. Mullin.

MARTIN J. MULLIN, called as a witness on behalf of defendant Paramount Pictures, Inc., being first duly sworn, testified as follows:

Mr. Seymour: If the Court please, before I examine this witness, would it be agreeable to your Honors to recess at 4 today?

Judge Hand: Yes. I forgot to make an announcement. We are going to recess today at 3:20.

Direct Examination by Mr. Seymour:

Q. Mr. Mullin, are you vice-president and general manager of M. & P. Theatres? A. I am.

Q. Are you also vice-president of New England Theatres? A. I am.

Q. And are you an officer of a company known as Publix Notoco and president of its subsidiaries? A. I am.

Q. What is the business of M. & P. Theatres? A. It is a management company that manages a group of theatres in (1339)
New England.

Q. And New England Theatres is a company which owns theatres? A. It is.

Q. And is the stock of New England Theatres wholly owned by Paramount? A. It is.

Q. And does Public Notoco also own theatres? A. It does.

Q. And does Paramount have a 50 per cent interest in Publix Notoco? A. It does.

Q. And are the remaining stockholders of Publix-Notoco, with the exception of yourself and Mr. Pinanski people who have no connection with Paramount? A. They are.

Q. And then there are also subsidiaries of Publix-Notoco which own theatres, is that right? A. Yes, sir.

Q. And in those subsidiary companies Notoco has 50 per cent of the stock, is that right? A. Yes, sir.

Q. And the remaining 50 per cent is held by the people with no connection with M. & P. or with Paramount? A. Yes, sir.

Q. And New England also has certain subsidiaries in which there are stockholders with no connection with Paramount, is that right? A. Yes, sir.

Q. What does M. & P. stand for? A. Mullin and Pinanski.

Q. And does Mullin and Pinanski or M. & P. operate all the theatres in the group that I have just mentioned? (1340)

A. They do.

Q. Now, how are Messrs. Mullin and Pinanski compensated for their operating activities? A. Messrs. Mullin and Pinanski have a management contract, and their compensation is out of the profits of the theatres in which they operate.

Mr. Wright: Have you got a copy of the contract? Can't we have it identified?

Mr. Seymour: Mr. Wright, you are the most contract conscious man I ever saw. I will get it for you if you would like to see it.

Mr. Wright: It seems to me it would save time.

Mr. Seymour: I am just going to develop the fact that the upshot of all that is that Messrs. Mullin and Pinanski have an interest in the profits of the operation of those theatres.

Q. Is that right? A. Yes.

Mr. Wright: We haven't the faintest idea what the upshot of it all was without seeing the document.

Mr. Seymour: I will make it available to you, if you like.

Judge Hand: Well, he is going to make it available to you. Go on.

By Mr. Seymour:

Q. Now, how many theatres are there in the group (1341) operated by M. & P.? A. There are 94 theatres, 37 of them

that are owned 100 per cent by Paramount, and the balance in partnerships.

Q. In what states are those theatres located? A. The so-called New England States, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut.

Q. And how long have you been engaged with Mr. Pinanski in managing theatres in New England? A. I went to New England in 1931, and I have been there ever since; the latter part of 1931.

Q. When did you first become employed in the motion picture industry? A. I started in the Triangle Distributing Corporation in 1916; stayed there until 1919, when I went to Atlanta, Georgia, with Mr. S. A. Lynch, who organized the Southern Enterprises. I stayed there until 1925 when I came back to the New York office of the then Publix Theatres Corporation.

Q. That was a subsidiary of Paramount? A. Yes, sir.

Q. And you stayed there until—— A. I stayed there until 1929, when I went to Minneapolis to operate the circuit of theatres there; and from Minneapolis to Boston, where I have been ever since.

Q. Now, do you know where the negotiations for and the licensing of film for the theatres in the group which you have referred to was done prior to 1931 or 1932? A. It was

(1342)

done in the New York office of Publix Theatres Corporation.

Q. And did there come a change in that practice in 1931 or 1932? A. Yes, sir. In 1932 when Mr. Pinanski and I took over the operation of those theatres in New England, we started to do our buying and handle all our own records and so forth, in Boston; and have been doing so ever since.

Q. Now, were some of the larger theatres in New England in receivership up there? A. The largest circuit of theatres; the Olympia Theatre was in receivership or went into receivership in 1932. It remained in receivership for several years.

Q. That was a receivership proceeding in the State Court? A. In the Superior Court of Massachusetts, yes, sir.

Q. And Mr. Pinanski was one of the receivers? A. He was.

Q. Where are the negotiations for licenses for films from distributors other than Paramount conducted on behalf of the theatres which you operate? A. 60 Scollay Square, Boston.

Q. Whose office is that? A. That is the office of M. & P. Theatres Corporation.

(1342a)

Q. And with whom are the negotiations for the licensing of film conducted? A. The licensing of pictures is started by Mr. Stoddard, who is the chief film buyer for M. & P. Theatres, and who is in daily consultation with me on all film deals.

(1343)

Q. Before any film deal is closed, do you become familiar with it? A. Yes, sir, I do.

Q. Do you participate from time to time in the negotiations? A. Yes, sir.

Q. Do you license film from all the distributors? A. We do.

Q. With whom are your negotiations for the licensing of Paramount pictures conducted? A. Mr. Charles Reagan, general sales manager of Paramount.

Q. At the time you negotiate with representatives of Loew's, Fox, Warner or RKO, do you have any knowledge or information as to negotiations for, or film deals arranged for, the exhibition of Paramount pictures in theatres in which any of those distributors have an interest? A. We do not.

Q. Do you have any knowledge or information as to arrangements with distributors of pictures who do not have any interest in theatres may have conducted for the exhibition of pictures in the theatres in which defendants are interested? A. We do not.

Q. Is there any relationship whatever so far as you are concerned, between the terms of film deals negotiated for the theatres which you operate and any negotiations and/or arrangements which are made for the licensing or exhibition of Paramount films in theatres of any other defendant in (1344)
this case? A. Mullin & Pinanski are only interested in our own circuit. We have no knowledge of that.

Q. Does the Paramount theatre department supply you with any information as to the negotiations or film license contracts made by any other theatre operating company in which Paramount has an interest? A. No, sir.

Q. Does the distribution department of Paramount furnish you with any information as to the negotiations or arrangements for the licensing or exhibition of Paramount pictures in the theatres in which any distributor has an interest? A. No, sir.

Q. Does the Paramount theatre department or any other part of the Paramount organization participate in your negotiations with representatives of distributors? A. They do not.

Q. Other than Paramount? A. Other than Paramount.

Q. And I think you have told us that the negotiations for Paramount films are not with the theatre department but with the distribution department? A. Mr. Reagan, general sales manager, yes, sir.

Q. Do you transmit to the Paramount theatre department the details of the contracts or arrangements which you have for the exhibition or licensing of the films of any other distributor? A. No, sir; those records are all kept in Boston.
(1345)

Q. Does any official or employee of Paramount instruct, dictate or advise the terms of any film license contracts that you make or are to make with any other distributor? A. No, sir.

Q. Or as to who you are to deal with? A. No, sir.

Q. Or as to what pictures you are to license? A. No, sir.

Q. We have heard something about the way a film deal is negotiated from the point of view of a distributor. Are you an exhibitor? A. Yes, sir.

Q. Can you tell us, from the exhibitor's point of view, whether the negotiation of a film deal is a simple or complicated matter? A. Very complicated matter.

Q. Can you give us some idea of how long those negotiations take sometimes? A. Sometimes they take weeks.

Q. Do they take weeks with representatives of the distributors who are defendants in this case sometimes? A. Yes, sir.

Q. Is there any difference in the nature or quality or ardor of the negotiations for film licenses which you have with representatives of Loew's, Fox, Warner or RKO, and that with representatives of other distributors? A. No differences.

Q. Do you make a deal more quickly and more acquiescently when representatives of a distributor who is a defen-
(1346)
dant in this case is dealing with you? A. No, sir.

Q. Do you license the pictures of Loew's, Fox, Warner and RKO for all your theatres? A. No, sir.

Q. Are there theatres which are in the group you operate in which you would like to license Loew, Fox, RKO and Warner pictures, where you are unable to do so? A. A great many.

Q. In such cases do those products go to competitors of your theatres? A. Yes, sir.

Q. And are there cities in your territory in which you have a theatre and a defendant in this case has a theatre? A. Yes, sir, many of them.

Q. Do you operate some first-run theatres, so-called first-run theatres? A. Yes, sir.

Q. And do you also operate some subsequent-run theatres? A. Yes, sir.

Q. Where Loew's has theatres in towns where you operate, are Metro pictures ordinarily shown in Loew's theatres? A. Yes, sir.

Q. Where they do not have theatres, do they license those pictures to independent competitors of yours—— A. They do.

Q. —sometimes? A. In some situations. Some spots they split the product.

Q. Who determines the admission prices which you
(1347)
charge in your theatres? A. Mr. Pinanski and myself.

Q. When you negotiate a film license contract with a distributor, who tells the distributor what admission price is to be included in the contract as the minimum admission price for that theatre license? A. Generally that price is carried along. It is generally the same price that has been inserted from contract to contract. The distributor knows the price of the theatre that you are talking about and he generally has that inserted.

Q. Does the distributor tell you what price you are to charge? A. No, sir.

Q. Generally speaking, do you negotiate the clearance terms of your license contracts every time you make one? A. No, sir.

Q. Are they carried along from year to year? A. Carried along and generally understood.

Q. Once they are established? A. Yes, sir.

Q. And originally were they established as the result of individual negotiations with the individual theatres? A. I imagine so, before our time that they followed along the same lines.

Q. The clearance provisions were just continued as they were, is that right? A. Yes.

Q. Have there been some changes in them? A. There were considerable changes during the period of NRA, during
(1348)
the arbitration and clearance committee set-ups.

Q. Have there been some changes since? A. Several changes due to arbitration, yes, under the consent decree.

Q. Do you change the admission price of your theatres regularly? A. We do not.

Q. Do you adhere to the same admission price over a considerable period of time? A. Yes, sir.

Q. And from the exhibitor's viewpoint, why do you do that? A. We think that the admission price is an established part of the theatre and we prefer to have that policy kept in force than constantly changing it. We think the constant changing of it confuses the public, confuses our patrons.

Q. What, if any, problems would it create in your business *to change your admission price regularly*? A. Well, we think that if you constantly change your admission price that people who come downtown might come to your theatre this week and find that the price is 50 cents. They may count on just spending 50 cents and may only have 50 cents, and if they come down and find the price is 75, they may take exception to the theatre and not come back again. They may go to one of our competitors, may like it over there a lot better than they do one of our houses. We keep our established price. We don't like the constant changing of it. (1349)

Q. Is that in your experience generally so of exhibitors? A. That is generally so, yes, sir.

Q. Do you find in your business that the various distributors seek to license their pictures on what is called the preferred playing time? A. Yes, sir. It is one of constant arguing in the negotiation of a film deal, is the preferred playing time, and especially where you have theatre that has a policy of a Saturday-Sunday-Monday-Tuesday, which are the four big days of the week, and the so-called seven-tenths of a week on a tenths basis, the distributor is constantly striving for that playing time.

Q. Is that so of the distributors who are defendants in this case? A. Yes, sir.

Q. Do they attempt as against each other to get the preferred playing time in your theatres? A. They certainly do, yes, sir.

Q. Is that also true of distributors who are not involved in this case? A. Yes, sir.

Q. How much does M & P spend for advertising annually? A. We spend about $500,000 a year on the M & P Circuit.

Q. Is a substantial part of that spent in advertising the first-run theatres? A. In our first-run situations, a house like the Metropolitan Theatre, we spend an average of $2000 on a picture. When the same picture moves into Paramount (1350)
Fenway, which is a carry-over house, you would spend another thousand dollars; and if it was moved into the Modern and Scollay Square, you might have another $750 or $1000; and you would have about $4000 on that particular picture in the downtown first-run situation.

Q. As it moves into later runs, does your advertising on a particular picture tend to decrease? A. That same picture, if it goes into one of our 28-day houses, which is the clearance of downtown first-run against subsequent runs, we may spend as high as $200 in advertising it.

Q. How about later runs? A. If it gets down to one of the smaller, last runs, it might be $20, which might be the budget for that particular house.

Q. Why is there that great difference in the amount spent for advertising? A. We feel that the suburban house advertising is more of an informative nature because we feel the amount of money that we spend in downtown Boston has prematurely sold that picture, so when it gets to the 28-day suburban house, your advertising, such as trailers and one

inch in the newspaper and in window cards and so forth, is an informative sort of advertising.

Q. That is, the people know all about the picture and you just tell them where it is playing? A. Yes, sir.

Judge Bright: What do you mean by a 28-day house?

The Witness: For instance, the Metropolitan, Bos-
(1351)
ton, which is our first-run, by this clearance on the subsequent houses on 28 days, when it becomes available not only to our suburban house but to our opposition suburban houses in certain sections of Boston.

Q. 28 days is the clearance period? A. Yes, sir, 28 days is the clearance period.

Q. Are your license contracts with most of the distributors so-called master contracts? A. We have adopted on our circuit a policy of an individual contract for each individual picture for each individual theatre. We have that in effect at the present time with the exception of Warner Bros., from whom, last year, we bought on the so-called master contract. We used the one contract and deal sheets as we went along.

Q. That is, with other distributors you have an individual contract for each theatre? A. Yes, sir.

Q. You buy your films from all these defendants in this case? A. Yes, sir. We use everybody's pictures, independents' also.

Q. Do you license the pictures of distributors who are not defendants in this case? A. A great many.

Q. What distributors do you license from? A. P.R.C., Republic, Monogram, sometimes smaller independents or State right pictures. Anybody that has a picture we can use, we buy it.
(1352)

Q. Turning to Boston, how many theatres operated on a first-run policy are there there? A. Well, there is the Metro-

politan, Paramount-Fenway, Modern and Scollay, M & P operated; the Memorial and Boston, which are operated by RKO; the State and the Orpheum, which are operated by Loew's, Inc.; and there are some independently operated theatres, such as the Majestic, the Tremont, the Old South and the Normandy, that work under a vacillating policy, that is, a policy of both first-runs and subsequent-runs, revival pictures and, in the case of the Normandy Theatre, they have a policy where they use, as they call it, the laugh movie policy, with an occasional first-run going in with that.

Q. Which is the largest first-run theatre in Boston? A. The Metropolitan Theatre is the largest.

Q. How does that compare, aside from size—that is an M & P operated theatre? A. Yes, sir.

Q. How does it compare in general quality and size with the first-run theatres there? A. I think it is generally conceded in Boston that the Metropolitan Theatre is the finest and most expensive operation of theatre in New England.

Q. What product does the Metropolitan play on a first-run policy? A. Licenses Paramount, Warner, two-thirds of Fox, some Republic, some Monogram, and occasionally (1353)
whatever other picture we can buy that is open on the market. Last year we were able to buy three Columbias and one United Artists.

Q. Do you have in Boston some subsequent-run houses in which M & P is interested? A. Yes.

Q. Dealing with Boston generally, do you license the product of as many distributors as you can get in your theatres? A. Yes, sir. I think it is safe to say in our suburban houses we use practically everybody's product regardless of whether we get it downtown or not.

Q. Do you license the product of Republic, Monogram and P. R. C.? A. Yes, sir.

Q. What is the basis on which you license the pictures of so many distributors? Why do you have to do that? A. Well, last year we used 64 pictures at the Metropolitan Theatre. We have in addition to the Metropolitan Theatre the Paramount and Fenway, which many times have open weeks on account of not being able to carry over a picture—a picture does not pay the justifiable business on the carry-over—and we need pictures for those houses. It sometimes becomes necessary to take revival pictures and put them in those houses, with the shortage of product. We had two revival shows in the last eight weeks in the Paramount and Fenway, playing pictures that had been played before.

Judge Bright: Played before in the same theatre?

(1354)

The Witness: In the same theatre and around in other theatres. We bring them back. They had been pictures that had been shown all over before.

Q. Is it the general policy of most of the theatres in New England to play double features? A. New England is acknowledged as a general double feature situation. There are very few single features. There will be exceptions occasionally in situations like downtown Boston, where a picture may be so long that you are unable to put another picture with it, but it is generally a double feature situation.

Q. Do you use Monogram, Republic and P. R. C. pictures in many theatres outside of Boston? A. We use them in a great many situations, Hartford, Worcester; any place we can buy them we use them.

Mr. Seymour: I don't want to hold your Honors beyond the time you want to recess.

Judge Hand: How much more have you?

Mr. Seymour: Quite a good deal. I cannot finish.

Judge Hand: All right. We will adjourn until Monday morning at ten-thirty.

(Adjourned until Monday, October 29, 1945, at 10:30 a.m.)

(1355)

New York, October 29, 1945,
10:30 o'clock a.m.

Trial resumed.

MARTIN J. MULLIN resumed the stand.

Direct Examination Continued by Mr. Seymour:

Q. I had asked you before we adjourned, Mr. Mullin, whether the theatres which you operated licensed the pictures of Republic, Monogram and P. R. C. I think you said they did. A. Yes, sir.

Q. In some situations do you license that product first-run? A. Yes, sir.

Q. And in some situations do you license it subsequent-run? A. Yes, sir.

And do you use it in a number of theatres? A. A number of situations, yes.

Q. You told us on Friday that with the exception of Warner Bros., where you had a master contract, the film license contracts were made individually for each theatre? A. Yes, sir.

Q. And can you tell us why that is? A. Well, we have various corporations, various individual companies, and we prefer the individual contracts in the file of that individual company rather than having him on a master sheet.

(1356)

Q. Is that because in many of the theatre situations there are stockholders who have no connection with Paramount? A. Yes, sir.

Q. Now, do you have any knowledge or information in connection with your film deals with distributors as to what film deals are negotiated or are made by other theatre-oper-

ating companies in which Paramount has an interest? A. No, sir.

Q. Do you have any interest in that subject? A Not interested in any way.

Q. Why not? A. My compensation is derived entirely from the theatres that we operate, and I am interested in no other theatre and what any other theatres can afford to pay for film. We get our results from our own theatres and we are interested only in those theatres in so far as it applies to the individual film deals.

Q. I asked you on Friday whether there were theatres under your operation which were unable to license the product of Loew? A. Yes, sir.

Q. Are there theatres under your operation which are unable to license the product of other distributors? A. In many situations product is sold either to other theatres or operated by circuit theatres, or by individual, independent operators.

(1357)

Q. Is that true with respect to product of Fox? A. Yes, sir.

Q. Are there a number of theatres operated in competition to theatres which you operate which have the Fox product and you are unable to get it? A. Yes, sir; there are situations like Newport and Pawtucket and Woonsocket, Brookline, where the independent buys Fox pictures and we are unable to get them in those situations.

Q. Are there similar situations with respect to the product of Warner Bros.? A. Yes, sir, there are.

Q. And are there a number of those situations where independent competitors are able to get Warner and you are not? A. Yes, sir.

Q. Is that also true as to the product of RKO? A. Yes, sir.

Q. And are there a number of independent competitors in various cities who are able to obtain RKO product when you are not?

The Witness: I did not get that.

Mr. Seymour: Would you read that, Mr. Reporter?

(Question read.)

A. Yes, sir.

Q. Is that also true of Universal? A. It is.

Q. Is it also true of United Artists? A. Yes, sir.

Q. Is it also true of Columbia? A. Yes, sir.

Q. Now, are there situations in New England where you
(1358)
operate theatres where your theatre or the theatre in which you operate play second-run after an independent theatre? A. Yes, sir. We have a situation like—we have a second-run theatre in Portland, Maine, that plays product after the first-run theatre, which is independently operated. The first-run independent takes 30 days clearance over our house, which is the same clearance that we take over our own theatre. We have a situation like—Portland—in Quincy, we have two theatres in Quincy, and one in East Milton, both which takes its clearance of 14 days after Quincy, which is independently operated. We have a situation in Brookline where we have two theatres, the Circle Theatre in Brighton, and the Egyptian theatre, Brighton, which obtains its availability after Brookline. The independent theatre in Brookline takes a 7-day clearance over our theatres, which is the same clearance that we take over our own theatres.
(1359)

Q. Are these other examples? A. There are many other situations similar to that.

Q. Is it the fact that where a theatre which you operate plays second-run on a product which is exhibited on first-run in an independent theatre, the independent theatre takes clearance over your second-run theatre? A. Yes, sir.

Q. Generally speaking, is that clearance similar or the same as the clearance which your first-run theatre takes on the product which it plays over second-run theatres? A. That is true. Another situation is New Bedford, where we have one suburban theatre, independent has three, and they have downtown first-runs and we have one, they all take the same clearance over the subsequent-run.

Q. Does that apply to the product of all the defendants? A. Yes, sir.

Q. So that wherever you play subsequent-run or second-run following the independent exhibition, all pictures distributed by any defendant to independent first-run take clearance over your second-run? A. Yes, sir.

Q. I want to ask you whether there are situations in which you play second-run on the product of distributors who are not defendants in this case which are played first-run in independent theatres? A. Yes, sir, they take the same clearance. Same clearance as set up, generally, for everybody. If we play a Republic picture in downtown (1360)
Boston, at the Metropolitan Theatre, Republic grants the same clearance of 28 days, the same as the other companies do.

Q. In other words, where a product of a distributor not a defendant in this case is exhibited first-run in an independent theatre, that theatre takes the same clearance over a second-run theatre in which you are interested as on the product of any other distributor, is that right? A. Yes, sir.

Q. Do you find in negotiating film licenses with various distributors that they compete with each other for playing time in your theatres? A. Yes, sir, very substantially.

Q. Can you tell just how that works out and how you observe it in action? A. Well, it comes to the forefront many times on holidays when pictures are available for booking

and all the companies that you buy pictures from try to get that holiday date, to get the additional revenue that the holiday brings. That same thing is true in situations where you have a theatre that operates on what we call a long-half policy of Saturday, Sunday, Monday and Tuesday, and then Wednesday, Thursday and Friday, the companies are always trying to get in the long-half time because it means a larger return in revenue.

Q. Do they try collectively to get into that? A. No, sir.

Q. Or is it individual? A. It is always an individual
(1361)
problem. I don't think, when the Fox man is trying to get a holiday from me in Boston at the Metropolitan Theatre, that he thinks about anybody else but himself.

Q. When the Fox man is trying to get it, is somebody else also trying to get it? A. Yes, sir.

Q. Does that apply to distributors who are defendants as well as distributors who are not defendants? A. It applies to all of them. Republic is just as bad, as far as playing date time is concerned as some of the other companies.

Q. What do you mean by "just as bad"? A. Well, if Mr. Grainger of Republic has a picture that he thinks is entitled to the Metropolitan Theatre, he is on the phone constantly, trying to get that picture booked into the Metropolitan Theatre.

Q. Do you find the same enthusiastic desire for that preferred playing time among the various defendants. A. Yes, sir.

Q. Speaking generally, are the theatres which are operating under your management on a first-run policy in the various cities of New England, the best or comparable with the best theatres in those localities? A. We think so, yes, sir.

Q. Do you make an effort to keep your theatres up? A. We do.

(1362)

Q. When Mr. Goldenson was testifying Mr. Wright asked him about meetings of the operating heads of all companies in which Paramount has an interest. Have you attended such meetings? A. I have.

Q. When there are such meetings, do you go? A. I do.

Q. Can you tell us the general subjects that are discussed at those meetings? A. Yes, sir. We discuss at the so-called partners' meetings the problems that have been confronting our industry in the last four or five years; the matter of types of pictures that we were getting; personalities that were coming to the forefront; the matter of personnel in our theatres during wartime. A circuit like ours, for instance, we have about 350 men in the armed services. We discussed the problems of maintenance with the limited amount of maintenance equipment and supplies that were coming to us. We discussed television, the effect of it upon our business. We discussed unusual advertising campaigns that may arise from time to time. We discussed the proper merchandising of candy in our theatres. And I think that covers, in general, about the things that generally were discussed.

Q. How about war activities, such as bond drives? A. Various war activities, the bond drives, the March of Dimes, the Red Cross, and all the other drives, and the War Activities Committee, the booking of War Activities Films in all

(1363)

our theatres, the type and kind of film that was coming to us through the War Activities Committee, the length of it that we could work into our shows. Those were all subjects that were discussed at these various meetings that we had.

Q. At any meeting which you attended did you ever hear any discussion or mention of the negotiations or arrangements made by companies in which Paramount had an interest for the licensing of films of any defendant in this case? A. I did not.

Q. Did you ever hear any discussion or mention of the terms upon which, or the arrangements made by which theatre operating companies in which Paramount has an interest is licensing Paramount film? A. I did not.

Q. Are all those matters, matters which have never been discussed at any meeting which you have attended? A. They are. As I said, Mr. Seymour, we are not interested, insofar as our companies are concerned, in what any other partner of Paramount, or affiliates, pays to film companies for its film. We have in our circuit up there many, many people who are not interested in the film industry, and we therefore buy our film for the individual theatre based on the individual theatre's ability to pay, and I don't think that has any bearing on what a picture might cost in Texas or out in Chicago, and we have worked along on that basis. We
(1364)
feel if we did anything else we would be not true to the people that we represent in these various companies.

Q. Does that include the minority stockholders? A. Yes, sir, that does.

Mr. Seymour: You may examine.

Mr. Wright: Are there any other defendants who wish to question? I suppose we might as well have them, if there are.

Are there any other questions?

Mr. Proskauer: I would like to ask one question.

By Mr. Proskauer:

Q. Mr. Mullin, you described that in your area up there in New England that the clearance was not affected by the circumstance that a theatre was affiliated or unaffiliated. From your general knowledge and your other employments that you testified about, is that your observation as a general situation throughout the country?

Mr. Wright: That is objected to, if the Court please.

Judge Hand: You may answer.

A. Yes.

By Mr. Caskey:

Q. Mr. Mullin, you operate a first-run theatre in Providence? A. No, sir, we do not.

Q. In New Bedford? A. Yes, sir.

Q. Do you get Fox product there? A. We do not. The (1365)
independent opposition gets it.

Q. Do you play it second-run? A. Yes.

Judge Goddard: New Bedford?

The Witness: New Bedford, Massachusetts.

Q. I want to ask two questions about geography. How far is it from the Metropolitan Theatre in Boston to the Central Square Theatre in Cambridge? A. Oh, I would say it is from three to four miles.

Q. You operate two theatres first-run in Somerville? A. Yes, sir.

Q. Which of those is closer to Cambridge? A. Somerville is adjacent to Cambridge. You just go from one street to another in Cambridge and you are in Somerville. Somerville theatres get their clearance seven days after first-run Cambridge.

Q. Which theatre is closest to the Central Square? A. Which theatre? You mean of the Somerville theatres?

Q. Yes. A. I would say the Ball Square is the closest.

Q. How far is that? A. Less than two miles.

Q. The theatres in Somerville compete for part of the same patronage that the Metropolitan competes? A. Yes, sir.

Mr. Leisure: I have no questions.

Cross Examination by Mr. Wright:

Q. Mr. Mullin, in your testimony about runs and clearance, you did not mean to suggest that there were no situ-
(1366)
ations in which there were differences between the clearance that your theatres got and that independents got, is that right? A. I think, Mr. Wright, that the clearance is pretty generally set up on all getting the same availability. There are some differences. For instance, Lynn, the theatres in Lynn get the availability 21 days after Boston on all product except Metro, who gives us 28 days, but I think generally that in New England, around Boston, where our clearance was set up, that the clearance is pretty much the same for everybody.

Q. Let me call your attention to Middleboro, Massachusetts. Are you familiar with that situation? A. I understand that was in the arbitration.

Q. Do you remember that the question of clearance was arbitrated there, that is, Middleboro was being subjected to clearance 28 days after Boston, and had an arbitration proceeding, and then got a cut to 14 days as a result of an award? A. I think Middleboro's clearance was set up on Brockton and Taunton, and the objectio. of the man in Middleboro, Mr. Hudson, was that he was getting his clearance from two points and he only wanted his clearance from one point, which he was entitled to.

Q. In any event, after the award he got 14 days after Boston on all distributors except Paramount, isn't that right? A. I don't know just—I cannot remember just what
(1367)
the arbitration case was set up as.

Q. You remember that Paramount was excused because of its interest in the M & P theatres? A. Having a theatre in downtown Boston, I imagine so.

Q. And then after the award was made, although he plays all the other major product 14 days after Boston, he continues to get Paramount 28 days after Boston? A. I think that is probably so. That would be a similar case to the Lynn, where Loew had a theatre in Boston and got 28 days instead of 21.

Q. Do you recall that the same thing occurred, or there was a similar situation in Ayer, Massachusetts, where the independent there brought an arbitration proceeding, he gets his pictures seven days after Lowell from everybody except Paramount? A. I think that was an account of Paramount having theatres in Lowell.

Q. Yes, and then Paramount continues to serve him fourteen days after Lowell? A. I don't remember exactly what the judgment was but that was another case where Ayer was getting its clearance from two points, from Fitchburg and Lowell.

Q. I am not asking you, I am directing to not what the judgment was but to the fact that Paramount continued to serve him 14 days after Lowell while the other major distributors served him seven days, in accordance with the (1368)
award? A. I am not familiar with that.

Q. Mr. Mullin, what standards have you used in determining whether or not you are paying too much film rental in any particular situation? A. Where you have standards of periods of years of operation in that individual theatre, and if you are not making any money in the theatre, you know there is something wrong. It may not be film rental, it may be something else, but I think your experience in the business, and the deals that have been built up over a period of years, give you a pretty good yardstick as to what you should pay or should not pay.

Q. You don't think what comparable theatres pay would have anything to do with it? A. No, sir. I don't think so in any way, shape or form.

Mr. Wright: That is all.

Redirect Examination by Mr. Seymour:

Q. In these cases that Mr. Wright asked you about, where theatres in which Paramount had an interest were involved, the award did not run in connection with those theatres because of the provisions of Section 8 and Section 17 of the Consent Decree, isn't that so? A. I would imagine so, yes. (1369)

Judge Goddard: Mr. Seymour, just what did you mean by that question?

Mr. Seymour: Section 17 stems from the Arbitration Award under Section 8, the exhibition of Paramount or any other defendant's product in theatres in which that defendant has an interest; and I wanted to make it clear that there was such an exemption in these particular cases about which Mr. Wright inquired, which was a result of the terms of the decree which the Government participated in.

Judge Goddard: Article 17?

Mr. Seymour: Section 8 and Section 17. Of course, that is only the product of the particular company. If, for example, that theatre in which Paramount had an interest was playing the product of another distributor, who was a party to the decree, that product would be subject to the consequences of the award but not by express exemption consented to by the Government, but not Paramount product in theatres in which Paramount had an interest.

Judge Bright: I do not see that in Section 17, as you call it. What is the clause you refer to?

Mr. Seymour: I will call your Honor's attention to it.

Mr. Wright: If the Court please, there is no question about the exemption and the fact that Para-

(1370)

mount was not subject to the awards and was excused because it played the exemption. I thought I brought that out on the examination. I did not mean to suggest otherwise. I simply wanted to point out that although the clearance of the other distributors was cut by the award, Paramount continued to have longer clearance.

Mr. Seymour: Is that sufficient for your Honor's purpose, Judge Bright?

Judge Bright: Yes.

Mr. Seymour: Has your Honor before you Appendix C to the Government's brief?

Judge Bright: Yes.

Mr. Seymour: Mr. Caskey says that that provision is on page 12.

Now, my colleagues say that my description of the consequences of those provisions was unhappy; that rather than being exempted from the award the decree expressly provides that the clearance of such pictures are not arbitrable, which is perhaps the same thing in another form.

All right, Mr. Mullin. No further questions.

(Witness excused.)

(1371)

JOHN J. FRIEDL, called as a witness on behalf of the defendant Paramount, being duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. Mr. Friedl, are you president of Minnesota Amusement Company? A. I am.

Q. And are you also its general manager? A. Yes, sir.

Q. Where are your headquarters? A. In Minneapolis.

Q. Now, will you give us a brief outline of your experience in the motion picture industry? A. I entered the motion picture industry in the year 1916 and served in various capacities, as operator, doorman and assistant manager at various theatres until 1923, when I went to Dallas, Texas, and became manager of the Palace Theatre.

I served in that capacity for a year and a half, and then was appointed district manager of the theatres in Texas operated by Publix Theatres.

In 1929 I was transferred to New York and given supervision over the DeLuxe Theatres operated by Publix in the northeast. These included New Haven, Boston, Rochester, Buffalo and Toledo.

After about six or eight months in that position, I moved into New York and took over the supervision of the theatres operated by Publix Theatres in the southeast. Those were

(1372)

the theatres located in the States of Georgia, and Alabama, North and South Carolina, Tennessee and Florida.

In 1931 I returned to Dallas as division manager for the DeLuxe Theatres operated by Publix in the southwest; and in April 1932 I was transferred to Minneapolis as division manager of the Publix Northwest Theatres. These were operated by me under the supervision of Publix Theatres in New York.

On January 28, 1933, the Minnesota Amusement Company went into receivership, and at that point the entire authority for operating the theatres was transferred to Minneapolis, and I continued in charge of the theatres from that date through the receivership and up until the present time.

Q. That is the decentralized program which has been testified to went into effect with respect to the Minnesota

Theatres some time in early 1933, is that right? A. That is correct, yes.

Q. And since that time you have been in charge of the operation of those theatres, is that right? A. Yes, sir.

Q. Now, during the receivership what part did you play in their operation? A. I operated theatres for the receiver.

Q. Was that a Federal Court receivership? A. It was a Federal Court receivership, and ancillary receivers were (1373)
appointed in Wisconsin, North and South Dakota.

Q. And the receivers were under the jurisdiction of the District Court of Minnesota? A. Yes, sir. The Federal Court of Minnesota.

Q. Yes. Now, when did the receivership terminate? A. The receivership terminated in July 1935.

Q. In the course of that receivership did Minnesota Theatres lose some of its theatres? A Yes, it lost a considerable number of theatres.

Q. And were there some cities where it had theatres where it lost all the theatres? A. Yes, sir.

Q. What is Paramount's interest in Minnesota Amusement Company? A. Paramount owns all the stock of the Minnesota Amusement Company.

Q. And how many theatres are operated today by Minnesota Amusement Company? A. At the present time Minnesota Amusement Company is operating 94 theatres. Of that number six of them are closed and seven are operated by partners. So actually Minnesota is operating 81 theatres.

Q. Now, when you say operated by partners, do you mean that Minnesota has an interest in some theatres along with some outside stockholders? A. In several cases Minnesota owns a half interest in the operation in certain towns, and in those particular towns the partner handles the operation. (1374)

Q. And is the so-called partner there an independent stockholder having no connection either with Minnesota or

with Paramount or any other distributor? A. None other than the partnership we have in that particular town.

Q. Now, how does the number of theatres in which Minnesota Amusement Company is now interested compare with the number in which it was interested at the time of the receivership? Is it smaller? A. At the time of the receivership, which was in January 1933, Minnesota operated in about five towns which they are not operating in at the present time. I think there would probably be 23 or possibly 25 less theatres today than there were when the company went into receivership.

Q. Now, do you know when Paramount acquired its interest in Minnesota Theatres? A. Paramount bought the theatres operated by Finkelstein & Ruben in 1929.

Q. And prior to that time that group of theatres had been independently operated by Finkelstein & Ruben, is that right. A. Yes, sir.

Q. Speaking generally, was the number and location of theatres in 1929 at the time Paramount acquired its interest in Finkelstein & Ruben about the same as it was in 1933 at the time Minnesota went into receivership? A. No. I believe that Finkelstein & Ruben in 1929 were operating in a few more towns, and I believe they had a few more theatres than

(1375)

Minnesota had in 1933.

Q. But certainly Finkelstein & Ruben had at least as many, if not more? A. Yes, I believe there were more because at the present time there are substantially less towns and less theatres than there were in 1929 when Paramount took the interest.

Q. Now, are you employed by Minnesota Amusement Company under a contract which gives you an interest in the successful operation of that company? A. Yes, sir.

Mr. Wright: If the Court please, we would again like to have the contract.

Mr. Seymour: Just as in the case of Mr. Mullin, I shall be glad to make it available to you.

Q. And your compensation therefore depends at least in part and whether or not that company is operated successfully, is that right? A. Yes, sir.

Q. Now, is there an operating agreement between Minnesota Amusement Company and RKO with respect to a theatre in Minneapolis and St. Paul? A. There is.

Q. And how many theatres in which RKO is interested are involved in that operating arrangement? There is one RKO theatre in each town.

Q. Did you have anything to do with the making of the operating arrangement originally? A. Yes.

Q. And when was it made? A. It was made in St. Paul
(1376)
in May of 1936 and in Minneapolis in December of 1936.

Q. And in one case that was within less than a year of Minnesota's coming out of receivership, and in the other case just slightly over a year, is that right? A. Yes, sir.

Q. What was the economic condition of the motion picture theatre business in the Twin Cities at the time those agreements were made?

Mr. Wright: If the Court please, I do not see that that has the slightest relevance, what the economic condition was when those agreements were made.

Mr. Seymour: I think it is perfectly plain. I am going to establish that this operating arrangement was made because of the terrible economic conditions affecting motion picture theatres at that time; and the Government makes some undisclosed claim as to these arrangements, and I propose to establish that they are quite reasonable.

Mr. Wright: The agreement is still in effect today. What possible justification could there be in——

Judge Hand: Overruled.

Mr. Seymour: Mr. Reporter, will you read the pending question.

(Question read.)

A. We emerged from receivership in July 1935, and following that the conditions, particularly in the Twin Cities,
(1377)
were very, very bad. In both St. Paul and Minneapolis during the period 1935, the theatres, our theatres in those situations lost over $100,000 apiece. The condition continued to get worse, and it appeared that having emerged from receivership we were heading right back into it again, and possibly into bankruptcy and disintegration, and something had to be done. And it occurred to me that possibly some kind of an operating agreement might be developed with the Orpheum Theatres in the two towns which would enable us to meet this problem. The problem was aggravated because of the intense desire of each of us to correct the situation, we resorted to what might be called even hysterical efforts. In the instance of Minneapolis the Orpheum inaugurated stage shows. We, on the other hand, did the same thing. And here were two large theatres battling day in and day out with stage entertainment and losing substantial amounts of money. And as we continued it occurred to me and to the RKO people also that if this thing could be put on a sane basis, possibly we could solve the problem.

So an operating agreement was developed, and it anticipated these things, that first the terrific cost of these stage shows in two theatres week in and week out could be elimi-
(1378)
nated, and in place of that the quality of the stage entertainment could be improved, because under the new arrangement only occasional shows were booked, and those were shows with big and important names instead of the usual vaudeville type of show that had been running in the two theatres.

It also brought about a flexibility in booking so that the pictures could be booked in the proper theatres.

Then, in addition, it brought about a tremendous cut in expense. Unheard of sums had been spent for advertising by

both the Orpheum and our theatre, and under the new arrangement that advertising was tremendously reduced, particularly with respect to the newspapers and radio, and also possibly outdoor billing. And all in all it was the one and only solution that kept us in business in the Twin Cities during that very bad period.

(1379)

Q. Now, did those observations that you made apply generally to the operating arrangements both with respect to the Orpheum in Minneapolis and also with respect to the Orpheum in St. Paul? A. Yes.

Q. And as a result of the arrangements have the theatres subject to the arrangements been operated profitably whereas they formerly were operated at a loss? A. It brought about an immediate improvement.

Q. Now, as a result of the operating agreement, was there an increase in admission prices? A. No.

Judge Bright: What was this operating agreement? I do not know anything about its terms other than what he has just explained here.

Q. Would you explain somewhat more fully, Mr. Friedl, the nature of the arrangement?

Mr. Wright: I think it is in evidence, if the Court please.

Judge Bright: Yes, but there are 300 exhibits in evidence and we do not even know what is in them except as you have detailed them in the brief.

Mr. Seymour: The agreement is in evidence, and I was just inquiring generally as to the background.

Judge Bright: I should like to know something about the general features of it.

Judge Goddard: I would be interested too in know-

(1380)

ing what that agreement provided for.

Judge Bright: We have got a blind plaintiff's case here, with 300 exhibits that we have not had a chance to look at and have not been told what is in them. Tell us something about this agreement, will you?

The Witness: This agreement was made between the Minnesota Amusement Company and the RKO Theatres in St. Paul, and between the Minnesota Amusement Company and the Singer Minneapolis Corporation in Minneapolis.

Judge Hand: What is the Singer? Is that part of RKO?

The Witness: The Singer was a company in which an individual named Mort Singer owned a certain amount of stock, and the rest was owned by the RKO people.

Under the condition prior to the development of the agreement, the RKO Theatres had the product of RKO pictures, one-half of Warner First National pictures, all of Columbia, and a selection of Universal. We had the product of MGM, Paramount, Fox and half of Warner First National. We also had United Artists. And under that condition pictures played as they were purchased. The pictures under contract to RKO would all play the Orpheum, and the pictures under contract to us would all play our theatres. It was a difficult manner of booking, because with commitments to as many as three major producers, the

(1381)

Orpheum would find many pictures playing in the theatre which really did not belong there, and we had such a condition but it was not quite as aggravated.

And so under this arrangement the pictures were booked in the theatres operated by both the Orpheum and our company; and also the supervision of the theatres, the operating policies, were considered from the standpoint of the theatres as a group, and as a result of that expenses were reduced.

Q. And who actually supervised the management of the Orpheum and the other theatres? A. The Orpheum retained its identity as a Singer operation in Minneapolis and as an RKO oporation in St. Paul, but they did it in concert or in cooperation with our office and our district manager.

Judge Bright: Was there any pooling of the receipts or expenses?

The Witness: The arrangement was this: First, that all of the expenses would be paid for all of the theatres with the exception of rent and fixed charges. Over and above that the amount left was split, in Minneapolis, 28 per cent to the Orpheum, 72 per cent to Minnesota Amusement Company; and in St. Paul it was split 30 per cent to RKO and 70 per cent to Minnesota Amusement Company.

Q. How were these percentages determined? A. Sir? (1382)

Q. How were these percentages arrived at? A. Those percentages were arrived at by a calculation of figures which preceded the development of this operating agreement, which showed the return to each theatre over a period of time. I did not work out the figures, but that was the principle used.

Judge Bright: Now, did both of those circuits or those two companies own the theatres in both cities?

The Witness: Well, not all of them. In Minneapolis there is an independent operation, the Pantages. There is another one, the World Theatre; and in St. Paul there was the World, the Lyceum and the Garrick.

Q. Now, are there a number of independently-operated subsequent-run theatres in both cities? A. Yes, sir.

Q. Now, following the making of the operating agreement, and a result of that agreement, were the admission

prices in the Orpheum and other cities raised? A. They were not at that time, but they have been raised at one or two periods since then.

Judge Goddard: Mr. Seymour, would you tell me the exhibit number that this has reference to?

Mr. Seymour: Nos. 205 and 206.

By Mr. Seymour:

Q. There have been certain increases in admission prices some time after those agreements were made? A. Yes; and
(1383)
they were based on business conditions generally throughout the country. It occurred about the same time everywhere that theatre admission prices increased.

Q. Now, as a result of that agreement did the theatres involved play less pictures than before? A. No, they played approximately the same number of pictures.

Mr. Wright: If the Court please, I object to the form of this—"as a result of that agreement." He can say what happened, but I suppose the Court is just as competent as he is to judge.

Judge Hand: Yes. That may be stricken out.

Q. Following the agreement did the theatres play less pictures than before? A. No, I believe not.

Q. They played about the same number? A. About the same number.

Q. And since that time has the quality of the stage shows which are exhibited been improved? A. Considerably.

Q. Now, following that agreement has there been any change in the playing position of exhibitors? A. No, sir.

Q. Now, leaving the subject, where are the negotiations for licensing of films in the theatres operated by Minnesota Amusement Company, conducted? A Generally in my office in Minneapolis.

Q. And do you either participate or supervise those negotiations? A. I conduct most of the negotiations.
(1384)

Q. And do you finally approve any film license agreement? A. Yes, sir.

Q. And do you operate under master agreements from most of the distributors or under individual agreements? A. Well, both. We have master agreements with a number of companies.

Q. And you also have individual agreements for particular theatres? A. Yes.

Q. And do you license the pictures of all distributors? A. Yes, sir.

Q. Does that include distributors who are not defendants in this case? A. Yes.

Q. Now, at the time you negotiate with representatives of the defendants in this case who have an interest in theatres, do you have any knowledge or information as to negotiations or film deals which those distributors are arranging or have arranged with theatres in other companies in which Paramount has an interest? A. No, sir.

Q. Do you have any knowledge or information as to negotiations or arrangements made for the licensing of Paramount pictures in the theatres in which those defendants have an interest? A. No, sir.

Q. Do you have any knowledge or information as to the negotiations or arrangements of distributors not interested
(1385)
in theatres as to what negotiations or arrangements they may have with other companies in which Paramount has an interest? A. I do not.

Q. Is there any relationship whatever between your negotiations with the representatives of distributors and any negotiations or arrangements which may be made by Paramount or the other distributors with respect to other theatres? A. No.

Q. Does the Paramount Theatre Department supply you with any information as to the negotiations on license agreements of other theatre companies in which Paramount has an interest? A. They do not.

Q. Does the distribution department of Paramount furnish you with any information as to negotiations or arrangements which it is conducting or has made with theatres in which other distributors have an interest? A. No, sir.

Judge Bright: Do you know whether Paramount licenses independent theatres in the same circuits where you operate?

The Witness: Yes, they do.

Q. Does the Paramount Theatre Department aid or assist you in connection with your negotiations with any other distributor? A. No, sir.

(1386)

Q. Do you send to the theatre department extracts or abstracts of your film contracts with other distributors? A. No, I do not. I send to Paramount a weekly report of the weekly result.

Q. Of the operation of the theatres? A. Yes, sir.

Q. That is the report which Mr. Goldenson referred to when he was here, is it not? A. I believe so, yes.

Q. Does any official or employee of Paramount give you any instructions at all with respect to the film deals which you are to negotiate with other distributors? A. No.

Q. Does Paramount tell you who you shall deal with or who you shall not deal with, or as to what terms on which you should deal? A. Never.

Q. Does RKO interfere or give you any instructions with respect to the distributors whom you are to deal with or the terms upon which you are to deal? A. No, sir.

Q. Do you get from the Paramount theatre department reports as to the grosses on certain pictures in key theatres in which Paramount has an interest? A. Yes, I do.

Q. Do you also get from time to time reports as to public reaction to certain pictures? A. Yes, I get that from New York.

Q. Those are the reports which Mr. Goldenson referred to? A. Yes, sir.

Q. Is similar information, not in the same form, but
(1387)
somewhat similar information, available in the trade press? A. Yes, it is.

Q. What importance, or value to you, is that information? A. Well, it enables us, first, to determine at least in some measure whether the pictures are worth what the distributor is asking for them and also enables us to book them with greater intelligence than we could did we not have such information. It gives us the reaction to certain pictures that play in the large metropolitan centers early, and on the basis of that we can buy and book with greater effectiveness.

Q. Is the film negotiation, that is, the negotiation of the film license contract with the distributor, a simple or a complicated matter? A. It is a complicated, very complicated matter.

Q. Will you tell us some of the complications that may arise? A. Well, I believe you start at the point where the distributor makes every conceivable effort to get the maximum amount of money and the best possible playing time and the greatest amount of advertising for his picture. On the other hand, I believe that the exhibitor wants to buy the pictures as economically as he possibly can. And the conflict between the two is usually a very tedious proceeding and it is very tiresome and it sometimes takes quite a long time to settle.
(1388)

Q. Does it sometimes take weeks to work out a deal? A. There have been occasions where it has taken three or four weeks and sometimes longer.

Q. Is there any difference between the relative heat and intensity of the negotiations with distributors who have an interest in theatres and those who do not have an interest in theatres? A. No, they are all tough and they are all very difficult.

Q. Are all the distributors trying to get the best playing time for their pictures they can in the theatres you manage? A. Each and every one of them, yes.

Judge Bright: What effect has that desire on the negotiations between you and the distributor?

The Witness: Well, we sometimes don't always agree with the distributor on the terms he is asking for his pictures or the time he is asking for it.

Judge Bright: Why not?

The Witness: Because he may take the position that a certain picture is entitled to preferred or extended playing time, which means that it shall play in the better theatres over a Saturday and a Sunday and we may feel that it should play at the last half of the week, and that causes considerable discussion and argument.

Judge Bright: In other words, you have a dispute with him about the merits of the picture?

(1389)

The Witness: That is correct.

Q. Does that affect the terms which he will ask you to pay and which you are willing to pay, as well as playing time? A. It is very definitely a matter of terms, I believe, in all negotiations. It is my observation that the distributor expects to get the maximum amount for all of his pictures, and it is quite necessary for the theatre operator to combat that, if he intends to stay in business.

Q. Is the final negotiation ordinarily a result of compromise of those respective views? A. Yes, I believe so.

Q. Do you license the pictures of Loew, Fox, Warner and RKO for all your theatres? A. Yes, sir.

Q. That is, you have them in all the theatres? A. We have them in all of the towns. The pictures that we buy, some of them play in the A Theatre, so-called, the large theatre in town; some of them play in the second theatre.

Q. But there are theatres in which you are unable to license the product of some of those distributors, is that correct? A. That is correct.

Q. And in those theatres would you like to license the product of some of those distributors? A. Yes, in several instances I should.

Q. In those instances does the product go to your competitors? A. Yes, sir.

(1390)

Q. Are your competitors in some of these localities independent theatre operators? A. Yes, sir.

Q. Do you operate some first-run theatres and also some subsequent-run theatres? A. Yes.

Q. Who determines the admission prices which you charge in your theatres? A. Well, I believe I do.

Q. There is a provision in the license contract that you have with all distributors as to a minimum admission price? A. That is correct.

Q. Is that the price which the distributor tells you you must charge? A. No, it is—the price that is entered into the contract is in there as a matter of precedent. The prices have been generally established over a period of years. From time to time they have been increased and as that has taken place, all of the distributors have been notified, and the prices that are listed in the contracts are the established price of the theatre, and when those prices are changed, why, the distributors are notified.

Q. And the prices are established by you and your company and changed by you and your company? A. Yes.

Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture "Woodrow Wilson," and
(1391)
several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibitions? A. Yes, I think it applies in all cases.

Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the distributor and the
(1392)
producer. And in the secondary houses the prices are less.

Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct.

Q. And do some of the admission prices in your localities, where you are operating theatres, go down to as low as fifteen cents? A. Yes.

Q. Does it ever occur that theatres with a minimum admission price in their contracts, actually charge a somewhat higher price? A. That frequently happens, yes.

Q. Do your license agreements with distributors contain provisions for clearance? A. They do.

Q. Is that true both of first-run and also the subsequent-run showings? A. It applies almost entirely to first-run, and particularly to the A theatre operation.

Q. Is there any reference in the clearance provisions in your agreements to the admission price to be charged by the theatre over which your theatre takes clearance? A. Well, we believe——

Mr. Wright: Obviously, the agreements speak for themselves.

Judge Hand: Overruled.

A. We believe that price is one factor in clearance but it is not entirely the determining factor. There are other con-
(1393)
siderations that must be considered. For example, there must be considered the size of the theatre, the operating cost of the theatre, the capacity, the location and the ability of that theatre to deliver the maximum amount of return to the distributor and producer.

Q. I did not make myself clear to you. Your answer applies to the theatre which gets clearance? A. That is right.

Q. What I am asking you is whether there is any reference in your clearance provisions of your license contracts with distributors as to the admission price to be charged by the theatre over which the theatre licensed has clearance. A. I am afraid I don't understand.

Q. In other words, where a first-run theatre has a clearance over a second-run theatre, do your clearance provisions of your license contracts contain a reference as to the admission price to be charged by the second-run theatre? A. No, sir, definitely not.

Q. Is the admission price to be charged by the second-run theatre a part of any understanding or agreement with the distributors? A. Between him and the distributor or—

Mr. Wright: If the Court please, that is a pure conclusion and argument. The clearance on the first-run theatre is in evidence in the form of answers to interrogatories, asking to have it set forth. I submit the argument as to the significance of those can be (1394)

made by counsel.

Mr. Seymour: I am not asking for the significance. I am asking the question of fact. My first question is as to whether there is any reference to it in the agreement, and, second, is it a part of any understanding or agreement, if it is not in the agreement. Those are questions of fact.

Judge Hand: Overruled.

Q. Let me be sure I make my question clear to you: Is it a part of any understanding or agreement between your company and the distributor which is licensing your theatres first-run, as to what the second-run is to charge by way of admission price? A. No.

Q. Mr. Phillips say that that question should be expanded. Where you license second-run, is there any agreement or understanding as to the admission price to be charged by the subsequent-run exhibitor? A. There are no such references in the contracts at any point.

Q. Is there any such reference in any understanding or agreement that is not embodied in the contract? A. No, sir.

Q. Is the clearance that you get from various distributors generally the same for the particular theatre that you are licensing for? A. Generally, yes.

Q. Do you negotiate clearance every time you negotiate
(1395)
a license contract? A. That is correct.

Q. Is there an actual negotiation or does the clearance remain the same? A. Since clearance generally remains the same, then in such cases the usual clearance applies, but clearance is definitely a part of the negotiation at one point or another.

Q. Do you license the pictures of distributors who are not defendants in this case, like Republic, Monogram and P. R. C.? A. Yes.

Q. Do the clearances granted by those companies to the theatres in which you license amount to about the same or are they the same clearances as those granted by other distributors? A. Same clearance.

Q. Do you have situations among the theatres which you operate where independent operators play on an earlier run, pictures which you license on a run subsequent to theirs? A. Yes, that is true in the Twin Cities, where we have subsequent-run theatres and the independents and other circuit operators have subsequent run theatres, some of our theatres play ahead of the others, and some of the others play ahead of ours.

Q. Are there situations where an independent exhibitor plays product first-run which you play on subsequent-run, as in Duluth, for example? A. No, I don't believe so. There is a situation in Superior, Wisconsin, where a subsequent-run
(1396)
theatre plays ahead of—a subsequent-run independent theatre plays ahead of a subsequent-run downtown theatre operated by us.

Q. Where you play after an independent exhibitor, on whatever run you do play on, does the independent theatre take clearance over your theatre? A. Yes.

Q. Can you give us an example of that? How about St. Louis Park in Minneapolis? A. Well, the Minneapolis clearance is set on the basis of the picture playing in the Uptown Theatre 28 days after the close of its engagement in the original downtown theatre. I mean by that, that if a picture goes into Radio City and plays two weeks, 28 days after that two weeks it goes into the Uptown, even though it may be moved from Radio City to another theatre. Then the Uptown holds clearance of 14 days over St. Louis Park; St. Louis Park in turn holds clearance of a certain number of days over subsequent theatres which follow it; and so it moves on down the line, certain theatres have clearance over others, ours as well as the independents.

Q. In that situation there are some independents that hold clearance over your theatres? A. Yes.

Q. And there are also situations in which you take clearance over independent theatres? A. That is correct.

Q. Does the length of the clearance depend upon whether (1397)
the theatre having clearance is an independent theatre or one of your theatres? A. No, it has nothing whatever to do with whether it is a circuit theatre or an independent theatre.

Q. It is a question of the area, really, rather than—— A. Question of area, and the different factors that enter into it, and the ability of distributors to provide prints, because that is sometimes a very difficult problem where an area as large as Twin Cities subsequent-run area, is.

Judge Goddard: You say that there are independent theatres who have clearance prior to yours?

The Witness: Yes.

Judge Goddard: Is St. Louis one of them?

The Witness: St. Louis Park theatre. That is an independent operation.

Judge Goddard: Do you recall any other theatre, independent theatres, that have prior clearance to yours?

The Witness: Well, as the pictures play in the various clearance practice, the theatres like the Avalon, the Boulevard, the Nile, I believe, play ahead of our Nokomis Theatre and our Loring Theatre. Without consulting the record I can't tell you exactly how those things fit in, but the situation is that certain independent theatres play ahead of our theatres, and our theatres in many cases play ahead of the independents. In the case of the Uptown, which is first

(1398)

suburban run in Minneapolis, that plays first, and that has clearance over St. Louis Park, an independent operation, and that in turn has clearance over the others, both independent and ours.

Judge Bright: Those are subsequent-run theatres?

The Witness: Yes.

Judge Goddard: But you did refer to some first-run theatres, independent, which had prior clearance, did you not?

The Witness: No, I don't believe so.

(1399)

Q. There are several cities, like Duluth, where there is an independent first-run theatre? A. That is correct.

Q. Do you have subsequent-run theatres there? A. Yes, we have one subsequent-run house. I see; I understand what you mean. In those cases, yes, that is so, they have clearance over the theatres where we run subsequent-run.

Q. Let us see about that and make it clear. In Duluth there is a first-run independently-operated theatre? A. That is correct.

Q. And what is the product that that theatre plays first-run? A. That theatre plays the product of RKO and Columbia first-run.

Q. Do you play those products or some of them subsequent-run in Duluth? A. That is correct. We play them in the Strand Theatre.

Q. Does the theatre, that independent theatre which plays them first-run, take clearance over your Strand? A. Yes, sir.

Q. Do you in your first-run theatre, on the product played second-run, take a similar clearance over whatever second-run theatres there are? A. Yes, sir.

Q. Does that happen elsewhere? A. Yes, that condition exists in Superior, Wisconsin. It exists also in Sioux Falls, South Dakota.

(1399a)

Q. In Sioux Falls, South Dakota, is there an independent operator playing RKO product? A. There is an independent operator playing RKO product, Columbia product and Universal product, first-run.

Q. Do you play some of that product second-run? A. We play it in all theatres, Sioux Falls, second-run, and this house has clearance over us.

Q. Does your first-run house, on that product it plays, take the same clearance over the second-run which plays that product? A. Precisely same clearance.

Q. So, generally speaking, whether it is first-run, second-run or later run, independents take the same clearance over the later runs as theatres affiliated with Minnesota Amusement Company, is that right? A. That is correct.

Q. There is no difference in clearance based upon the fact of affiliation? A. That is right, no difference at all.

Q. From your general experience in the business, elsewhere in the United States, is that also true? A. Yes, sir.

Q. Does your company spend a substantial amount on advertising? A. We spend approximately $400,000 a year on advertising.

Q. Generally speaking, does the amount spent for advertising first-run prove to be more substantial than the amount spent on later runs? A. The majority of the money spent
(1400)
is confined to the first-run engagements, not only in the Twin Cities, but in the out-of-town situations.

Q. Why is it that so much more is spent on first-run? A. Well, the first-run engagement is, of course, in the theatre—is presented in the theatre that is the most expensive to operate. It pays the highest possible film rental and it reaches the greatest number of people. Therefore, the selling is geared to the first-run on the theory that after it has been sold to the public for the first-run, it is then presold for all subsequent-runs, and it requires nothing more than an announcement in the subsequent-runs to refresh the minds of the public that this picture is coming back.

Q. Where your company has first-run theatres, would you say generally that they are the best or comparable to the best theatres in those localities? A. In all of our situations our theatres are not only the largest in practically every city but they are by far the best theatres. They are well operated. They are operated in accordance with all the local laws and regulations and the regulations of the State. They are air conditioned, and we make it a very definite policy to keep our theatres, to use the phrase that we use, as clean as a battleship, and that is true up and down the line in the theatres that we operate.
(1401)

Q. Do you make constant improvements in your theatres? A. We make as many improvements as are necessary. We try to carry out a policy of improvements that at all times is in

the interest of the public, not only from the standpoint of comfort, but from the standpoint of safety.

Q. In Minnesota and Wisconsin and North Dakota, are there a number of circuits or theatres which are independently operated? A. There are quite few independent circuits. The Bennie Berger Circuit, I believe they operate, I would say, from 12 to 15 theatres; the Franklin Amusement Company, I should say, operates 16 or 18 theatres; Welworth Amusement Company, I believe they operate 15 or 16; the Baehr Circuit is an important operation—I imagine they have probably 18 theatres in probably 8 or 9 towns. They are fine properties.

Q. Do the theatres of some of those circuits operate in some of the localities where your company has theatres? A. Well, that is true. In the case of Sioux Falls, South Dakota, Welworth operates the opposition theatre.

Mr. Seymour: Any questions from the defendants?

Cross-Examination by Mr. Caskey:

Q. Mr. Friedl, you license the Twentieth Century-Fox product first-run in Minneapolis and St. Paul? A. Yes, sir.

Q. And Duluth? A. Yes, sir.

Q. With whom do you negotiate? A. I negotiate with (1402)

Moe Levy, the district manager of Twentieth Century-Fox in Minneapolis.

Q. Where do you negotiate? A. Generally in my office.

Q. In Minneapolis? A. Yes, sir.

Q. At the time of those negotiations, has Mr. Levy ever refused to license you Twentieth Century-Fox product unless the Paramount Distributing Company should license that product to theatres operated by National Theatres? A. Never.

Q. Have you ever refused to license Twentieth Century-Fox pictures unless Twentieth Century-Fox—unless Na-

tional Theatres would buy Paramount pictures in some of its theatres? A. I have not.

Q. Was the subject ever discussed? A. Never to my knowledge.

Q. You operate in Minneapolis a number of first run theatres, do you not? A. Yes, sir.

Q. It appears from the evidence already in this case that during the 1943-44 season you played the picture "Holy Matrimony" in the Century Theatre? A. That is right.

Q. Why was it booked to that theatre? A. Well, as I recall the circumstances, we felt that the Century, because of its location and background, was the proper theatre in which to play the picture.

Q. It appears from the evidence that the picture "Heaven
(1403)
Can Wait" played in the State Theatre first and then was moved over to the Century. Why was that picture so booked? A. What was the picture?

Q. "Heaven Can Wait." A. "Heaven Can Wait," as I recall, was previewed in the State Theatre and at a later date the picture was booked in that theatre and because of the business it did in its first week, it was moved to the Century for a second week.

Q. It appears that the picture "Bombers Moon" was played in the World Theatre. That is a much smaller theatre, is it not? A. Yes, sir.

Q. Do you recall the reason for that? A. I don't recall the particular reason. I don't believe that I ever saw "Bombers Moon", and I believe it was handled by our booking department and the Fox office and it was played in the World Theatre.

Q. It was not considered one of the top grossing pictures? A. No, it was not.

Q. It appears that the picture "A Tree Grows in Brooklyn" was played first in Radio City for a week and then

moved over for a week to the State Theatre and then for a week at the Century Theatre. Why was that booking made? A. Because of the size of the picture, its importance, and the business that it did. It played one week in Radio City and we felt that the picture was of such importance and was doing such an outstanding business that we would estab-
(1404)
lish a new precedent, which we did, by moving it to the State Theatre. That puts the picture in a better location and it enjoyed a fine week at the State, so we moved it to the Century for an additional week.

Q. Is the distributor, Twentieth Century-Fox, benefitted by the fact that you have a number of theatres in Minneapolis with different seating capacities? A. Yes, I believe so.

Q. Not all the Twentieth Century-Fox pictures are suitable for exhibition in the Radio City Theatre? A. No, they are not all suitable.

Mr. Seymour: Mr. Wright, they all yield to you, I believe.

Do you want this contract, by the way?

Mr. Wright: Yes, I want a chance to look at it.

Cross-Examination by Mr. Wright:

Q. Mr. Friedl, this agreement that you had with RKO in St. Paul and Minneapolis, is that still in effect? A. Yes, sir.

Q. The pooling operation?

Mr. Seymour: I object to the characterization of it.

Q. That agreement that you have with them is what is known in the trade as a first-run theatre pool, is it not? A.
(1405)
Well, we have always termed it an operating agreement.

Q. Can you answer the question? A. I believe it has been so referred to, yes.

Q. The agreement covered at the time it was made, and still covers, all of the first-run theatres in those two towns, isn't that right? A. That is correct.

Q. You were referring to these situations where you say you follow independents in, I believe, Superior and Duluth. I call your attention specifically to Duluth, where you say there is an independent theatre that has RKO and Columbia Pictures first-run. Do you have a first-run theatre there, too? A. Yes, we have several first-run theatres.

Q. How many? A. We have the North Shore and the Garrick, they are both first-run, and the Lyric, which is a move-over theatre.

Q. And you play the product of all the other distributors first-run and on move-overs in those three theatres of yours? A. We do.

Q. Then you say you also operate a subsequent-run theatre? A. That is correct, the Strand.

Q. The Strand; and is there any independent subsequent-run in the town? A. Any independent subsequent-run?

Q. Yes. A. Yes, there are either three or four subsequent-run theatres in Duluth.

(1406)

Q. When does this subsequent-run of yours play with reference to first-run? A. It plays, I believe, 45 days after first-run I am not absolutely sure of that.

Q. And it plays, does it not, all of the product that you play first-run there and on move-overs? A. Most of it, yes.

Q. As a matter of fact, it plays almost none of the product that plays first-run at the independent theatre, isn't that right? A. Well, I believe from time to time we play some pictures from the Granada Theatre, but that policy in Duluth has been changed from time to time because we have been in trouble in the Strand, and, if I might use the expression, we have kicked the policy around a little bit, and over a period of time, why, we have done one thing for a

while and then changed, and that would naturally affect the product.

Q. As a matter of fact, you know very well, don't you, that you don't play any regular second-run on RKO or Columbia in that subsequent-run house in Duluth and have never have—— A. Well,——

Q. (Continuing) ——while the independent has had the first-run, isn't that right? A. I don't believe it is.

Q. Do you know what the facts are? A. No, I don't. I don't know unless I check very carefully, but it seems to me that there have been occasions where we have played repeat (1407)
runs on the Granada from RKO and also Columbia.

Q. Do you have any knowledge as to what the clearance provisions are in the contracts that the first-run theatre has there with reference to subsequent showings in any other theatres in Duluth? A. Which theatre?

Q. The independent opposition first-run, the one that plays RKO and Columbia. Do you know? A. I presume they have the same clearance that we do.

Q. I say, do you know? A. No, I do not know.

Q. Is your testimony the same with respect to Superior, that is, do you know what product the first-run in Superior has, the independent? A. Yes.

Q. What are those? A. They have Columbia and RKO.

Q. And you have all the rest? A. Yes, sir.

Q. How many first-run theatres do you have there? A. We have two.

Q. Then you say you also operate a subsequent-run theatre in Superior? A. Yes, sir.

Q. And there is an independent subsequent-run? A. That is correct.

Q. As a matter of fact, you don't play there any regular subsequent-run of the product that plays the independent house first-run, do you? A. No, I don't suppose we play so much—play those pictures.

Q. Maybe an occasional picture? A. The pictures that
(1408)
are played in the East Superior theatre play ahead of the Capitol Theatre—the Princess Theatre, rather, downtown, and the Princess is our subsequent-run.

Q. What is the name of the independent first-run? A. The Beacon Theatre.

Q. Do you know what the clearance provisions are in the first-run contracts that the Beacon Theatre makes? A. As I said in the case of Duluth, I presume it is practically the same clearance that we have, but I don't know. I have never seen their contract.

Judge Bright: When you play a picture subsequent-run in your theatre, that has been played first-run in an independent, aren't you informed of the clearance provision in the first-run theatre?

The Witness: The clearance is pretty well established and it is pretty definitely followed in all those cases, and we do not pay a great deal of attention to what the other fellow's clearance is. We assume it is on the same basis as ours, because, in the case of the large cities, they couldn't very well have a certain length of clearance in one theatre and a different clearance in the other, because they have the problem of serving the subsequent-run theatres, and a great deal of confusion would result if the clearances were not the same in all instances.

(1409)

Q. Of course, I take it, Mr. Friedl, when you play a regular subsequent run of pictures you know from the times at which they are made available approximately what the clearance is, is that right? A. Yes.

Q. But where you just pick up a picture occasionally, or spot book, you would not know what, of any, regular clear-

ance arrangements had been made by that distributor with the first-run theatre you were following, is that correct? A. That is correct, but I imagine if the distributor had any clearance existing which would be affected by our purchase of that particular picture, he would advise us of it.

Q. Now, in the situation in Minneapolis, St. Louis Park, is that a suburb of Minneapolis or St. Paul? A. Minneapolis.

Q. And then you say after the picture has finished the first-run or the first engagement in a first-run theatre, then 28 days later they go into your Uptown? A. Yes.

Q. And that is true even though it may be moved over two or three times, is that right? A. No, that is not right. The clearance dates from the conclusion of the engagement in the first theatre. If it closes on a Thursday night in Radio City, 28 days from that time it opens in the Uptown regardless of where it may be carried over.

(1410)

Q. Yes, that is what I understood the situation was. So that no matter how many times they may be moved over, it still goes into your Uptown 28 days after the conclusion of the first engagement? A. That is right.

By Judge Bright:

Q. Is that generally so in all of the theatres in your circuit? A. Well, this is the only situation that I can think of that is set up just exactly in that way. In St. Paul the situation is different. It goes into a first suburban run 49 days after the close of the engagement down there.

Q. I mean the second showing, it starts to date from the end of the original showing? A. That is correct.

Q. And the move-overs have nothing to do with extending the period of clearance? A. That is correct in our situation. I do not know how that works elsewhere in the country, but that is the way it is handled in our territory.

By Mr. Wright:

Q. Then after the picture plays at the Uptown you say it has 14 days over an independent in St. Louis Park? A. That is what the clearance calls for.

Q. Do you have any theatres in St. Louis Park? A. No.

Q. And the other situations that you referred to where you said there were some independents that played ahead of
(1411)
your theatres,—now, were you referring to situations where there is open booking, where there is no clearance one over another; one may play first and then the other; or were you referring to definite clearance? A. Well, the clearance that is set up covers the city, and in that particular instance St. Louis Park has clearance over all of the——

Q. I am not referring to St. Louis Park; I am referring to the other situations you referred to on your direct testimony. You just named several theatres as sometimes playing pictures ahead of some theatres of yours. I am asking you if you were referring to situations where open booking prevailed or where there was actual clearance? A. Well, there is actual clearance because the theatres play the pictures on a given clearance break, and regardless of where they are located they have clearance over other theatres that follow them.

Q. Well, let me clear it up specifically: What were these other theatres that you named specifically as playing with or ahead of theatres which you operated in Minneapolis? A. Well, I will have to start with St. Louis Park because the clearance is dated from St. Louis Park.

Q. I say, apart from St. Louis Park. A. Well, the Nile Theatre, the Boulevard Theatre, the Edina Theatre played ahead of our operations. The Nokomis and the Loring, they
(1412)
also play ahead of a lot of other theatres.

Q. Where are those theatres that you named? A. Where are they? They are subsequent-run theatres in Minneapolis.

Q. Are they in one section or several sections? A. They are in several sections.

Q. Are the theatres that you operate that they play ahead of in the same section or different sections? A. One of them is in the same section and one of them is not.

Q. Which is the one that is in the same section as the theatres you say play ahead? A. The Nokomis.

Q. And what is the independent theatre or theatres that is in the same section there? A. The Nile.

Q. And you say the Nile takes clearance over the Nokomis? A. That is right.

Q. And do you know how much that is? A. No, offhand I don't know.

Q. Are you sure that there is any actual clearance there as distinguished from just—— A. I don't know that it is written clearance, but on the basis of the existing clearance that is the way it works out.

Q. You know that they do play some pictures ahead of your Nile, is that right? A. They play them all ahead of the Nile.

Q. And what the contract provisions are that determine that, you don't know, is that right? A. I don't know anything
(1413)
about the contract provisions of the Nile Theatre's negotiations except that I do know that a clearance is set up in the town and that is the way it works.

Q. How far down is that run? A. Which run?

Q. That Nile run. A. I think it is 56 days after downtown, it may be dated from the Uptown. It would then be 38-48—it would be 24 days after the Uptown.

Q. Now, in this operating agreement that you referred to with respect to Minneapolis—I believe that is in evidence here as Exhibit 206—there is a reference to an operating

committee consisting of yourself and a Mr. Ludwig representing Minnesota, and a Mr. Singer and Mr. Ames, representing Singer Amusement. Who is Mr. Ludwig? A. Mr. Ludwig was at one time my associate in the operation of the Minnesota Amusement Company theatres, and he left our employ some time back in 1936 or 1937.

Q. He was an employee of Minnesota Amusement Company at the time this was made? A. That is correct.

Q. And Mr. Morgan Ames: who is he? A. Morgan Ames was the general manager of the theatres operated by Mort Singer.

Q. Now, the agreement, I note, says at page 3—this is in the form of a letter from Singer, Minneapolis, to you, do you recall that? The form of the original agreement was a let-
(1414)
ter from Singer, Minneapolis, to Minnesota Amusement Company?. A. Yes.

Q. And do you recall that at page 3 it says:

> "Both you and the undersigned shall submit to each other at this time complete information as to all motion picture product which has been contracted for exhibition in the aforesaid theatres during the 1936-1937 playing season ending August 31, 1937, and the terms and conditions of all agreements with respect to the same."

Do you recall that? A. Yes.

Q. That was done, of course? A. Yes, it was.

Q. And do you also recall this provision that says:

> "The product of RKO Radio Pictures, Inc. shall be acquired through the undersigned for use in the aforesaid theatres on the same terms as such product shall be acquired by the companies affiliated with

RKO Radio Pictures, Inc., subject, however, in the case of each specific commitment to the approval of the operating committee."

Do you recall that provision? A. Yes, sir.

Q. And that was carried out? A. That was carried out for a brief period of time; and that reference was apparently put in there so that we would be protected and not be burdened with unreasonable film costs for RKO pictures. (1415)

Shortly after the operating agreement was set up, however, RKO requested that we take over the negotiation for all film, including that which they had previously contracted for as an individual situation.

Q. Well, you recall the next sentence there says:

"The product of Paramount Pictures, Inc. shall be acquired through you for use in the aforesaid theatres on the same terms that such product shall be acquired by companies affiliated through so-called partnership deals with Paramount Pictures."

Do you recall that provision? A. Yes.

Q. And that, I take it, was carried out? A. Just as the other was for our protection, that was for the protection of RKO.

Mr. Wright: If the Court please, when I can locate the clearance agreements that are in evidence which relate to his theatres there will be some further cross-examination. I do not know whether we can recess now, or perhaps if we adjourned for lunch and came back earlier there would not be any loss of time.

Judge Hand: Have you got those papers?

Mr. Wright: They can be gotten together. They are in evidence.

Judge Bright: A non-competitive area?

Judge Hand: What are the exhibit numbers, 205 and 206?

Mr. Wright: Oh, these agreements? I have these
(1416)
here. I was referring to answers to interrogatories which were also in evidence which set forth——

Mr. Seymour: If it would equally suit your Honors and Government counsel, if we could recess for a few minutes it would suit us better. Our problem is that we have great difficulty getting luncheon, and if we recess early and have to come back early, I am afraid we would be very much handicapped on our side of the table. So if your Honors would take a brief recess until Mr. Wright finds it, it would suit our convenience.

Mr. Wright: I think this could have been avoided were we told within a reasonable time that the witness would be called.

Mr. Seymour: Well, I only decided this morning that he would be a witness, Mr. Wright.

Judge Hand: All right. We shall take a short recess, five minutes.

(Short recess.)

Mr. Wright: Shall I proceed?

Judge Hand: Yes.

By Mr. Wright:

Q. Mr. Friedl, I call your attention to the clearance agreement entered into between your company and Loew's, Inc. with reference to certain pictures distributed during the 1943-44 season, which is in evidence here, in answer to an
(1417)
interrogatory——

Mr. Seymour: What is the exhibit number, Mr. Wright?

Mr. Wright: This is Exhibit 57-24; and the schedule of clearance I am referring to appears in typewriting on the second page.

Q. (Continuing) Now, this schedule of theatres up at the left hand there, those are your first-run theatres in Duluth? A. That is correct.

Q. Norshor and Garrick? A. Yes.

Q. And then that notation "Cloquet, Two Harbors" at the right of the phrase "14 days over," that refers to a couple of towns rather than to a specific theatre? A. Yes.

Q. And then the notation "When 25 cents clearance to be increased when price is less." Now, that means, does it not, that your theatres in Duluth take 14 days over them if they charge 25 cents admission price, is that right? A. Yes, I believe that this——

Q. A minimum price of 25 cents? A. Yes. I believe, however, that this was set up at the suggestion of the distributor.

Q. I am not asking you at whose suggestion it was set up; I am merely trying to find out what the agreement is. A. There it is.

(1418)

Q. There is no question, is there, in your mind but what if those theatres in Cloquet and Two Harbors charged less than 25 cents, then your clearance is automatically increased over them; is that right? A. That is right.

Mr. Caskey: Mr. Friedl, would you please talk up.

The Witness: Yes, that is correct.

Judge Bright: Mr. Wright, the same criticism was made of me, that when I am so close to the witness we get confidential; and the same situation exists when you get too close to him.

Mr. Wright: It is a little hard for me to question him without having him look at the exhibit. That is the difficulty. But I shall try to speak up.

Q. Now, I notice over there, further on on the list, you have a statement "56 days over," and then the names Dorick, Star, West, with a notation "When 25 cents." Those are subsequent-run independent theatres in Duluth are they not? A. Yes.

Q. And the phrase "When 25 cents" means, does it not, that they are only entitled to play within 56 days of your first run when they charge an admission of at least 25 cents? A. That is correct, in these particular instances.

Q. And then the following phrases there which state, "70 days over" those same theatres "when 20 cents" and "112 (1419) days over" over those same theatres "when 15 cents", mean, do they do, that if they charge those lower prices of 20 or 15 cents they cannot then play prior to either 70 days after first-run or 112 days, as the case may be? A. That is right.

Judge Bright: Are they the same named theatres, on those three?

Mr. Wright: Yes, there is a schedule of the three prices and three clearances for those three theatres.

Q. Now, could you tell me the theatres on the schedule there that are operated by you other than "Norshor and Garrick"? A. The Lyric?

Q. The Lyric? What else? A. Well, we operate in Superior.

Judge Bright: Keep your voice up, Mr. Friedl.

The Witness: We operate in Superior, and we operate the Strand.

Q. So that the four theatres that you operate are the Norshor, Garrick, Lyric and Strand, is that right? A. That is right.

Q. And the Lyric is what, the move-over house that you are referring to? A. Yes.

Q. That has the same clearance over subsequent-runs as the Norshor or Garrick? A. Yes.

Q. 35 days? A. Yes.

(1420)

Q. Then the Strand— A. You see, Mr. Wright, there are occasions where the Lyric instead of playing a carry-over picture will play a first-run picture, and this clearance is set up so that is taken into consideration when that happens.

Q. Now, the Lyric, as I read the schedule there, follows the first-run— A. No.

Q. —the Strand, rather, follows first-run by 49 days, is that right? A. Yes.

Q. And the earliest independent, however, which may play the picture follows by 56 days, does it not? A. That is correct.

Q. So the pictures, then, are played at all of your four theatres before they are permitted to be played in any of the independent subsequent-runs; that is, the pictures which you play in those theatres? A. That is correct. The Strand is a downtown theatre, and all of the factors of clearance indicate the soundness of that 56-day break.

Mr. Wright: I think that is all.

Redirect Examination by Mr. Seymour:

Q. Mr. Wright has directed your attention to what appear to be a few exceptions in and around Duluth to your testimony that your clearance contracts did not contain a reference to admission price of the subsequent-run. Now, do

you know whether there are any other exceptions? A. I know
(1421)
of no others. In some cases our clearance with Metro pictures differs from the clearance with other companies, and in this particular instance the admission price is mentioned, I believe, for the reason that under difficult competitive conditions price-cutting has resulted in the past, and a lot of the tricks that have been used by smaller theatres have been inaugurated, and I believe that the distributor was principally concerned in getting this in so that the situation just did not get out of hand so far as the subsequent-run theatres were concerned.

Q. So far as you know does that apply only to Metro in that area? A. To the best of my knowledge it does. I do not believe it is in the other—in the setup for clearance with the other companies.

Q. Now, you were asked by Mr. Wright with respect to the availability following a move-over in the Twin Cities; and if I understood you correctly, you said that the picture was available subsequent-run dating from the conclusion of the original engagement rather than the move-over, is that right? A. That is correct.

Q. Now, does that availability apply both to theatres operated subsequent-run by Minnesota Amusement and to theatres operated by independent operators? A. Yes, it does.

Q. So that the availability in connection with pictures
(1422)
which are moved over into other theatres of Minnesota Amusement dates from the conclusion of the first-run of the engagement as to all subsequent-run theatres, whether affiliated or not, is that right? A. That is correct, yes.

Q. Now, I think you said something about the need for booking by theatres on an availability which is the same for various distributors; and I wish you would explain that to us. Is it the desire of the exhibitor, and is it important from

the point of view of the operation of his business to be able to book pictures of all distributors upon a common or similar availability? A. Yes, it is. It is quite necessary. The clearance calls for the pictures to break at a certain date for the different theatres in the Twin Cities area, and this——

Q. When you say "break", do you mean that makes them available? A. It is important—they become available on the date set up in the clearance—and it is important that the exhibitor play the pictures on the date, the date of the clearance break, for his own benefit; and it is vitally important from the distributor's standpoint because he has a limited number of prints, and he has got to clear those prints and book them on the dates that are set up in the clearance so that he can use them elsewhere and get the utmost out of the prints in the various situations.

(1423)

Q. Now, there is a booker that operates for the exhibitor, is there? A. Well, the distributor maintains or has a booking department.

Q. That is in the distributor's own exchange? A. That is in the distributor's own exchange.

Q. And each distributor maintains a separate exchange? A. That is correct; and the manner in which they book the pictures—the independent theatres see the booker in each film exchange and set the dates on which these pictures are going to play and have those dates confirmed to them. In our case our booking department handles it for all of the theatres which we operate, but the confirmation comes from the booker in the film exchange.

Q. Now, is there any difference in the interest of the exhibitor whether he is affiliated or not in having the pictures of different distributors available to him at the same time or on the same availability date? A. Well, those pictures become available on the date of the setup in the clearance, and they become available not only for the affiliated theatres

for all of the other theatres who happen to be in that particular bracket.

Q. If an exhibitor had different availabilities on the pictures of different distributors, would that create any problems in the operation of his theatre? A. It would create a very difficult problem in the distribution of pictures. If
(1424)
clearance was set up on anything but an organized basis, and dates would be breaking at different times for different theatres, it would be an almost impossible situation from the standpoint of the distributors to distribute prints.

Q. How about the exhibitor? Would it create problems for him? A. Well, the exhibitor is naturally interested in adhering strictly to the clearance break that he gets. Because if he does not, if he falls behind his competition are playing ahead of him; so he has the very vital interest in it.

Q. When you say "clearance set up on an organized basis," do you mean simply the similarity of clearance? A. That is right, the clearance in the Twin Cities situations is the same with all distributing companies, and it has got to be that way in order for the pictures to flow properly.

Q. So far as you know does that result from any agreement or understanding among the distributors?

Mr. Wright: If the Court please, he has been offered here as a witness who knows nothing about what the distributors do for each other. I do not see how this advances the case.

Judge Hand: Overruled.

(1425)

A. Well, the clearance, so far as we are concerned, is negotiated individually with each distributor. This clearance, however, is a pattern that has developed over a period of years. It is discussed and it is agreed, and sometimes changes come about, but it is, after all, the development of

an arrangement that has existed for some time. It is based on precedent more than anything else.

Q. When you say it is discussed and agreed, are you talking about the operation of your company? A. Yes.

Q. And with whom is it discussed and agreed? A. With each individual distributor.

Q. Now, Mr. Wright asked you about some provisions in the agreement relating to the operation of the Orpheum theatres, and the provisions were those which dealt with the price of RKO pictures and the price of Paramount pictures. Now I should like to ask you this: In negotiating with RKO for RKO pictures, since the date of that agreement have you received any information as to the terms on which RKO pictures are played in other theatre-operating companies in which Paramount has an interest? A. No, sir.

Q. Do you ask RKO for that information? A. No, sir. Under this operating agreement and operating committee, it requires the approval of each party for any film negotiations conducted by the other. Originally when it was set up (1426)

RKO negotiated for the pictures of RKO, Columbia, Universal, and half of Warner's, and we negotiated for the balance of the pictures. Each at that time would submit the terms to the other. They would submit them to me and I would submit them to them for approval; and then later they requested that we take over the entire booking; and the only thing that happens there, when the deal is made I submit to them for their approval the terms agreed upon for the various pictures.

Q. And whom do you submit to, to the local theatre man? A. No, I submit it to the present members of the operating committee. Those which Mr. Wright read from the original agreement are different now.

Q. Now, with respect to the licensing of Paramount pictures, do you obtain any information or knowledge as to the

terms on which Paramount pictures are licensed in RKO theatres? A. No, sir.

Q. So that as a practical matter each of those film deals is negotiated on its own merits for your theatres or the theatres involved without regard to what is being done in any other operating company, is that right? A. That is absolutely so.

Mr. Wright: Pure argument, if the Court please.

Judge Goddard: Mr. Friedl, you have referred to the fact that the limited number of prints had some (1427)

relation to clearance; but it has no relation, has it, or, if it has any, it is little in connection with the length of the clearance, because I assume that during that clearance period the print is not used by anyone?

The Witness: Well, perhaps I can explain to you what happens in the Minneapolis area: When a picture is released and plays in the first-run downtown, and from the close of that period until 28 days later the prints are then booked by the distributor into some of the surrounding towns; and then when the surrounding towns have played those pictures during that 28-day period the prints then come back to Minneapolis where they are used for the various subsequent-run.

Judge Goddard: But during this 28 days the print is not used by anyone, is it?

The Witness: Yes, it is booked by the distributor to some of the theatres in the out-of-town situations.

Judge Bright: Some other area?

The Witness: Yes.

Judge Goddard: Some other area?

The Witness: Yes.

The Witness: I believe so; but I do not know to what extent or how far they go with those prints, but I do know they play them out of town and then bring them back.

(1428)

Judge Goddard: Beyond the limits of that area?

The Witness: Yes.

Judge Goddard: Thank you.

By Mr. Seymour:

Q. That is, they are not played in the area to which clearance applies? A. No, sir, they are not; they are played outside of that area.

Q. But the prints are not idle during that period? A. No, they are not.

By Mr. Caskey:

Q. They are played first-run in the other Minnesota and North Dakota and South Dakota towns during those 28 days? A. That is correct.

Q. Like Rochester, for example? A. Possibly; could be.

Mr. Caskey: That is all.

Mr. Seymour: Any further questions, Mr. Wright?

Mr. Wright: Yes, one or two.

Recross Examination by Mr. Wright:

Q. As to the print supply, of course, you exchange prints even between one exchange and another in order to fill certain dates. That is, you may bring in prints from some other area? A. That has happened a number of times where there is a shortage of prints, they borrow prints from other distributing branches.

Q. Now, this history of that clearance setup in Minne-

(1429)

apolis, which I believe you said was uniform—do you recall

that at one time there you had a six months clearance over every subsequent-run theatre there that charged 10 cents admission, didn't you? A. I believe there was some such arrangement. I don't recall distinctly what it was.

Q. And do you remember when it was that the clearance over the 25-cent theatres in Minneapolis was moved up from 28 to 56 days? A. No, I don't recall that.

Q. Well, you know it did happen? A. I don't remember that it happened.

Q. It happened before you went there—when was it that you went out there? A. In 1932.

Q. 1932? A. Yes. I don't recall what clearance prevailed when all of the subsequent-run theatres were charging 10 cents, but it was a situation that had no parallel anywhere in America, where all of the subsequent-run independent theatres charged 10 cents admission for pictures that were playing in first-runs for 40 and 50 cents.

Q. In any event, you don't have that 10-cent problem now, is that right? A. No.

Mr. Davis: I did not hear that last question.

(Last question and answer read.)

(Witness excused.)

Mr. Seymour: I have another witness. Would your Honors like to start with him now or would you like to recess?

Judge Hand: We will adjourn to 2.10.

(Recess to 2.10 p. m.)

(1430)

AFTERNOON SESSION

Mr. Seymour: If the Court please, I now have a copy of each of the Paramount exhibits for each member of the Court—I did not have them available the

other day—and I would be glad to hand them to the clerk to distribute them to your Honors.

EDWARD C. BEATTY, called as a witness on behalf of defendant Paramount, being first duly sworn, testified as follows:

Direct Examination by Mr. Seymour:

Q. What are your present business connections? A. I am president and treasurer of W. S. Butterfield Theatres, Inc. and Butterfield Michigan Theatres Company.

Q. Where are your headquarters? A. Detroit.

Q. How long have you been connected with those companies? A. Since 1927.

Q. When did you first have any connection with the motion picture industry? A. 1910.

Q. Between 1910 and your connection with these companies would you describe generally your experience in the business. A. In 1910 I started in small theatres, doing most everything around a theatre, serving in the capacity of treasurer, also doorkeeper and other odd jobs, and with the exception of one year I continued in that position until 1913,

(1431)

at which time I moved to Michigan, Saginaw, Michigan, and acted as assistant manager in Saginaw; then moved to Bay City for a year or so, and back to Saginaw. I then moved to Battle Creek in the general offices of the company then running those theatres.

Judge Goddard: A little louder, please.

Q. When was it you first became connected with the general office of the Butterfield Circuit? A. 1915.

Q. You remained with that circuit until the organization of the present companies in 1927? A. Yes, sir.

Q. Was the Butterfield Circuit operating a number of theatres in 1927? A. Yes, sir.

Q. And were those theatres which Mr. Butterfield, or the Butterfield Circuit, had built or acquired prior to 1927? A. Yes, sir.

Q. Did they include a number of vaudeville theatres? A. Yes, sir.

Q. Did they include some legitimate theatres? A. Yes, sir.

Q. Were those theatres gradually or eventually converted for the primary purpose of motion picture exhibition? A. Yes, sir.

Q. In the vaudeville theatres, did the Keith vaudeville play? A. Yes, sir, the Western office of Keith Vaudeville. (1432)

Q. In 1927 the new company was formed? A. Yes, sir.

Q. What was the name of that company? A. W. S. Butterfield Theatres, Inc.

Q. That is the company of which you are still president, of which you are now president? A. Yes.

Q. When did you become president? A. 1936.

Q. That company operates theatres in Michigan? A. Yes, sir.

Q. In addition to the theatres which it has a complete interest in, does it also operate some theatres where there are other stockholders having an interest? A. Yes, sir.

Q. Are those other stockholders persons unconnected with Butterfield or with any distributor of motion pictures? A. Yes.

Q. Was there another Butterfield Company formed in 1928? A. Butterfield Michigan Theatres Company.

Q. You are president of that company as well? A. Yes, sir.

Q. Does that company also operate theatres? A. Yes, sir.

Q. Does it have an interest in a theatre in which there are other stockholders? A. Yes, sir.

Q. Unconnected with the Butterfield interests or any distributor? A. That is right.

Q. When did Paramount first acquire an interest in W. S. Butterfield Theatres, Inc? A. January 1, 1927.

(1433)

Q. What was the extent of the interest which it acquired? A. 25 per cent.

Q. Does it still have that interest? A. Yes, sir.

Q. At or about the same time did B. F. Keith acquire an interest in that company? A. Yes, sir.

Q. What was the extent of its interest? A. 10 per cent.

Q. Is that interest still retained? A. Yes, sir.

Q. At that time was Mr. Butterfield friendly with the Keith interests? A. Very friendly.

Q. They were the same interests that had supplied his vaudeville acts? A. Yes.

(1434)

Q. Now, who owns the other 65 per cent of the W. S. Butterfield Theatres? A. Mr. Butterfield had a company called the Bijou Theatrical Enterprises Company, operating the theatres prior to the formation of the W. S. Butterfield Theatres, Inc. They own about 60 per cent, and 5 per cent is owned by various small stockholders connected with the organization.

Q. As to Bijou Theatrical Enterprises and the other small stockholders that you referred to, they are wholly unconnected with any distributor, is that right? A. That is right, yes, sir.

Q. And are you one of the stockholders? A. Yes, sir.

Q. Did Paramount acquire an interest in Butterfield-Michigan? A. Yes, sir.

Q. And what was the extent of that interest? A. 33⅓ per cent.

Q. And did B. F. Keith also acquire an interest in Butterfield-Michigan? A. Yes, sir.

Q. What is the extent of that interest? A. 33⅓ per cent.

Q. And who owns the remaining interest in Butterfield-Michigan? A. Bijou Theatrical Enterprises Company.

Mr. Wright: Did he give the dates when those were acquired?

Q. Were those interests acquired in 1928? A. Yes, sir. (1435)

Now, dealing with Butterfield Theatres, Inc., W. S. Butterfield Theatres, Inc., what representation does Paramount have on its board of directors? A. Two members of the board.

Q. Out of how many? A. Six.

Q. And has it had that same amount of representation since the beginning? A. Yes, sir.

Q. And what representation, if any, does the Keith interest have on this board? A. One member.

Q. Now dealing with Butterfield-Michigan, what representation does Paramount have on the board? A. Two members.

Q. And what representation does Keith have? A. One member.

Q. So that in both companies the remaining stock interests have 50 per cent of the board? A. Yes, sir.

Q. And has that been so since the beginning of those corporations? A. It has.

Q. Who manages and operates the affairs of the companies? A. I do.

Q. Who determines the operating policies of the companies? A. I do.

Q. Does that include determination as to the film licenses which are to be obtained and the terms on which they are to be obtained from the various distributors? A. Yes, sir.

(1436)

Q. Does Paramount interfere in any way with your decisions in that regard? A. No, sir.

Q. Does Keith or RKO interfere in any way with your decisions? A. No, sir.

Q. Do you play Paramount pictures in all the theatres? A. In all the towns but not in all the theatres.

Q. Do you play RKO pictures in all the theatres? A. I play RKO in all the towns but not in all the theatres.

Q. Now do you license the pictures of other distributors for the theatres under your supervision? A. Yes, sir.

Q. And do you license the pictures of all the distributors? A. Practically all of them, yes.

Q. Do you license the pictures of the distributors who are defendants in this suit? A. Yes, sir.

Q. Do you also license the pictures of distributors who are not defendants in this suit? A. Yes, sir.

Q. Do you license, for example, the pictures of Republic? A. Yes, sir.

Q. Monogram? A. Yes, sir.

Q. P.R.C.? A. Yes, sir.

Q. Where are the negotiations for the licensing of pictures of these distributors conducted? That is, all the distributors? A. The Detroit office.

Q. And are they conducted by you or under your supervision? A. Yes, sir.

(1437)

Mr. Davis: Where did he say they were conducted?

Mr. Seymour: Detroit.

Q. And is that at the office of the Butterfield Company? A. Yes, sir.

Q. Do you receive any instructions from Paramount or RKO as to what distributors you are to deal with? A. No, sir.

Q. Or as to the terms on which you are to license pictures? A. No, sir.

Q. Or as to the pictures you are to license? A. No.

Q. Do you receive from Paramount or anyone else any information as to the film deals it is negotiating or has arranged with the theatres in which any distributor has an interest? A. No, sir.

Q. Do you receive any information as to what film deals are negotiated or arranged between any distributor and any other theatres in which Paramount has an interest? A. No, sir.

Q. Or do you receive any information as to negotiations or arrangements made with other distributors for RKO theatres? A. No, sir.

Q. Is there any relationship whatever, as far as you are concerned, between the film deals you arrange for exhibition in the theatres under your supervision and the film deals made by other distributors elsewhere? A. No, sir.
(1438)

Q. How many theatres in all are the several Butterfield companies interested in? A. 116.

Judge Goddard: 116?

The Witness: Yes.

Judge Goddard: Will you speak a little louder, please.

Q. Now do your license contracts generally provide for clearance over theatres playing subsequent to yours? A. Yes, sir.

Q. Do you know of any license contract, or at least do you think of one now, which contains any reference to the admission price at which the subsequent-run theatres are to exhibit pictures subsequent-run following clearance in your theatres? A. No, sir.

Q. Do you have any master contracts with distributors? A. No, sir.

Q. Are each of the theatres generally licensed on individual contracts? A. Usually the contracts are made covering certain pictures for each town.

Q. But at least the contracts do not cover all the theatres in all the towns? A. No, sir.

Q. And they are limited generally to the theatres in a particular town, is that right? A. Yes, sir.

Q. Have you any franchise agreements? A. We have no franchise agreements at the present time. We have been (1439)
negotiating with one of the companies, Columbia I believe, for a two-year agreement; but there is no other agreement like that. They are bought from time to time.

Q. Now, prior to the time that Paramount had any interest in the Butterfield circuits, were the theatres in those circuits Paramount customers? A. Yes, sir.

Q. And are they showing Paramount pictures? A. For the most part, yes, sir.

Q. Did you have anything to do with the making of an operating agreement with respect to certain theatres in Grand Rapids, Michigan? A. Yes, sir.

Q. And when was that agreement made? A. 1933, the fall of 1933.

Q. Did it involve certain theatres in which RKO-Midwest was interested? A. Yes.

Q. How many? A. Two.

Mr. Wright: Excuse me. Are you talking about an agreement that is in evidence now?

Mr. Seymour: I think it is, Mr. Wright. It is one of yours.

Mr. Wright: Well, can we have it referred to by exhibit number?

Mr. Seymour: I will get the exhibit number, if I may proceed.

Q. And what theatres that Butterfield was interested in
(1440)
were involved? A. Three.

Q. And they were all in Grand Rapids? A. Yes.

Q. At the time of the agreement were both the RKO theatres in operation? A. No; one of them was closed.

Q. And at that time what was the general economic situation in Grand Rapids? A. Very bad.

Q. Did it differ from the economic situation generally, or was there any particular reason why it was bad in Grand Rapids? A. Well, the situation generally through Michigan was bad, and in Grand Rapids particularly. Grand Rapids is largely a furniture city, and the furniture business was down.

Q. Now, do you know what the status of the operation of the RKO theatres was in Grand Rapids at that time? A. Well, inasmuch as one theatre was closed, I think it was very poor.

Q. Do you know why it had been closed? A. A lack of business, I believe.

Q. And do you know how successfully the other theatre was operating? A. Apparently not very successful.

Q. Well, now, had both of them been operated as first-run theatres? A. The Regent Theatre had been operating as a first-run theatre, and the Keith Empress had been operating with various policies.

Q. Was the Keith Empress one that was closed? A. Yes.
(1441)

Q. It had been operating occasionally as a first-run theatre? A. I am not so sure, but it had vaudeville in it and it had had various types of picture programs, but I am not sure whether it ever operated first-run or not.

Q. How did the size of those two theatres compare with the size of the theatres in which Butterfield was interested? A. They were larger.

Q. Now, what was the reason for making the operating agreement? A. Well, to meet economic conditions, reduce expenses, and accomplish a much better operating set-up for the community, and generally for economy purposes.

Q. What economies were effected as a result of the operating agreement? A. Well, we were able to cut down the organization necessary to run the theatres; reduce advertising considerably; place the top pictures in a large house which accommodated the business to a better advantage, and generally to accomplish a more effective operation.

Q. Did you change the management of those theatres? A. Yes, sir.

Q. And manage them locally? A. Yes, sir.

Q. And were any changes made in the larger theatre as far as improvements were concerned? A. I believe we reduced the price and changed the equipment, brought it up to date; new projection equipment; new sound; and generally improved the entire equipment of the theatre.

(1442)

Q. And how about the other theatre? Were any changes made in that? A. We did practically the same thing in the other theatre, although not to such an extent.

Q. Was the upshot of that arrangement that the public got better facilities for seeing pictures in Grand Rapids? A. Very much better, yes.

Mr. Wright: That is objected to, if the Court please. I do not suppose we are convened here to determine whether it is rational or whether there are business savings in the elimination of competition. There is not any question about that. I do not think this is a proper subject for testimony at all.

Judge Hand: Overruled.

Mr. Seymour: I think it is. I think the question is whether or not there is any reasonableness——

Judge Hand: I have overruled the objection.

Mr. Seymour: My colleagues say, Mr. Wright, that the operating arrangement here is not in evidence.

Mr. Wright: Well, could we have it?

Mr. Seymour: If there is a written agreement, as I assume there is, we will get it for you.

(1443)

Mr. Seymour: I think I am through with my direct examination of this witness, but I would like to say this: I am prepared to call, if necessary, the operating heads of many of these companies in which Paramount has an interest. I have now called three, Mr. Mullin, Mr. Friedl and Mr. Beatty. If the Government will stipulate with me, on the details we will work out with them, that the other operating heads of these other companies would testify in accordance with the testimony that these gentlemen have given, that there is no relationship at all between the film deals made by their companies and film deals made either by the other distributors or by Paramount, I will dispense with burdening the Court with further testimony in that respect. I should be glad to have Mr. Wright tell us whether he is willing to make that stipulation.

Mr. Wright: I think there has been some variation here. I would suggest that if he has specific testimony he wants from these gentlemen, if he will just put it in affidavit form, as we told him before, we will be glad to stipulate they will testify in accordance with the affidavit. I would like to see precisely what he expects to elicit from them before I make any general stipulation.

Mr. Seymour: I said I would submit to Mr. Wright the precise form. These fellows are scattered all over the country, it isn't very practical to get

(1444)

affidavits, but I will submit statements of what they will testify. If Mr. Wright is agreeable, we will do that rather than call the rest of these gentlemen in from all over the United States to testify, when the substance of their testimony will be the same. I had assumed it would save the Court's time, and that was one of the things the Government was interested in, too, to have a stipulation as to their testimony, and I will submit to Mr. Wright the form of stipulation as to their testimony which I have in mind.

Mr. Wright: I see no occasion for having called any of them. We can do with these what I think we could have done with the others.

Mr. Seymour: As long as we can do it with these, that is what I am interested in now. Is that agreeable to the Court, if we can work that out with Government counsel?

Judge Hand: Yes, if you can.

Mr. Seymour: If we cannot, I will have a great many of them, and I hope to save your Honors that burden.

Judge Bright: He said something, that he saw no occasion for your calling any of them. That won't go in the stipulation, will it?

Mr. Seymour: No, no, that will not be in the stipulation.

Are there any questions from other defendants?

(1445)

Cross-Examination by Mr. Caskey:

Q. Mr. Beatty, do you license Twentieth Century-Fox pictures in most of the towns in which Butterfield operates? A. Yes, sir.

Q. With whom do you currently negotiate those license agreements? A. The exchange manager in Detroit.

Q. What is his name? A. Joseph Lee.

Q. In the course of those negotiations have you ever conditioned the licensing of Twentieth Century-Fox pictures in your theatres upon Twentieth Century-Fox licensing its pictures to other corporations in which Paramount has an interest? A. No, sir.

Q. Has Mr. Lee ever conditioned the licensing of the Fox pictures to you upon the condition that other corporations in which Paramount has an interest license the same pictures? A. No, sir.

Q. Do you discuss at the time of these negotiations whether or not the subsidiaries of National Theatres Corporation have licensed Paramount pictures? A. The only thing we discuss is the theatres in the towns under consideration.

Q. In Michigan? A. In Michigan.

Q. Is there any part of those discussions whether or not subsidiaries of National Theatres on the West Coast are buying Paramount pictures? A. No, sir.

(1446)

Mr. Wright: That is not testimony, if the Court please. He is just putting argument in his mouth.

Mr. Caskey: Sir?

Mr. Wright: I say that you are putting an argument in his mouth. That question didn't call for any testimony. Is there any part of those discussions?

Mr. Caskey: By "Is there any part of those discussions," I mean, any words said about the subject. It seems to me that is a question of fact.

Judge Hand: Go ahead, he may answer.

The Witness: Will you repeat the question, please?

(Question and answer read.)

Q. In the fixing of the prices which you will pay for Fox pictures, say, in Grand Rapids, is there any effort on your part to secure the same terms as the subsidiaries of National Theatres obtain Paramount pictures for? A. No, sir.

Q. Do you have any knowledge of that subject? A. No, sir.

Judge Hand: Any more questions on direct?

(No response.)

Judge Hand: Any questions, Mr. Wright?

Mr. Wright: Yes.

Cross-Examination by Mr. Wright:

Q. I understand you to testify that with reference to (1447)
these two corporations of the W. S. Butterfield Theatres, Inc. in which Paramount owns only 25 per cent and B. F. Keith owns 10 per cent, those two corporations had half of the directors, is that right, although between them they own only 35 per cent? A. One has two directors and one has one.

Q. And there are only six? A. That is right.

Q. Is there some agreement that covers that distribution of directorships there? A. I think so, yes, sir.

Q. Have you got a copy of that agreement or do you know what the agreement is? A. I am not very familiar with the agreement today because I haven't looked at it in ten years.

Q. There was an agreement made at the time the stock interest of Paramount and Keith were acquired? A. Yes, sir, I think so.

Q. Could you give us a copy of it? A. I think the counsel can secure a copy.

Mr. Seymour: I will endeavor to get a copy, Mr. Wright, if there is such an agreement.

Mr. Wright: After we have seen that agreement and the pooling agreement, which has been referred to, we might have some questions we would want to ask him. We have nothing more at this time.

Mr. Seymour: I will endeavor to get them for you and make them available as promptly as I can.

(1448)

Then, Mr. Beatty, you are excused provisionally subject to Mr. Wright's perhaps asking you something else after he has seen the agreements.

(Witness excused.)

Mr. Seymour: Subject to the stipulation which I mentioned, at the conclusion of my direct of Mr. Beatty and subject to certain other stipulations which I am going to try to work out with Mr. Wright, to relieve the Court of the testimony of other witnesses, including division managers in the distribution department, where Mr. Wright has been good enough to say he would stipulate, I am going to submit a form, and perhaps another stipulation or two, I am going to turn the further presentation of evidence over to counsel for one of the other companies. It is possible that before the case for the defense closes I may want to call another witness or two, but these stipulations I think will make that unnecessary. So your Honors will have a change in the direct examining. I am not quite sure who is going to follow me, but I guess he knows.

(1449)

Mr. Caskey: If your Honors please, I have stipulated with the attorneys for the plaintiff as to the testimony of Spyros P. Skouras and I should like to read at this time three pages of it:

"IT IS HEREBY STIPULATED between the attorneys for the plaintiff and the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called, Spyros P. Skouras would testify as follows:"——

Judge Hand: What is his name?

Mr. Caskey: Spyros P. Skouras.

Mr. Wright: Of course, if the Court wants it done this way, we have no objection, but the purpose of course in stipulating on our part was to save time, so it wouldn't be necessary to go through this procedure. If we are going to have this, I suppose we might as well have the witness on the stand.

Mr. Caskey: This has been put into question and answer form.

"Q. What is your name and address? A. Spyros P. Skouras. I reside at 2 Shore Road, Greenhaven, Rye, New York.

"Q. What is your occupation? A. I am president of Twentieth Century-Fox Film Corporation and have been since April, 1942.

"Q. How long have you been engaged in the motion pic-
(1450)
ture business? A. For more than 25 years.

"Q. What was your position immediately preceding your election as president of Twentieth Century-Fox Film Corporation? A. From 1935 to 1943, I was president of National Theatre Amusement Co., Inc., which performed supervisory services in the operation of the theatres operated by subsidiaries of National Theatres Corporation. I was also vice-president and principal executive officer of National Theatres Corporation.

"Q. State your experience in the motion picture industry. A. I commenced as an operator of a small theatre in St.

Louis with my brothers. By 1928, we had developed a number of first-run and neighborhood theatres in St. Louis and we sold our interests to Warner Bros. I came to New York as general manager of its theatre department, and continued as such until early in January, 1931. At that time, I left and formed a corporation in which a subsidiary of Paramount was to have the largest interest and which proposed to acquire and operate theatres along the Atlantic seaboard. Financial conditions in the country made that impossible, and in the fall of 1931, my brothers and I formed Skouras Theatres Corporation and leased or sub-leased from Fox Metropolitan Playhouses certain theatres in metropolitan New York. At that time, Fox Metropolitan was on (1451)

the verge of insolvency and its theatres were losing a great deal of money. In the early spring of 1932, I was employed by Wesco Corporation, with my brother Charles, to operate its theatres. During the spring of 1933, the principal subsidiary of Wesco went into bankruptcy and I continued on as an officer of Wesco Corporation, participating in the reorganization of the affairs of its subsidiaries until the company was reorganized and its name changed to National Theatres Corporation, about 1935.

"Q. Is Twentieth Century-Fox Film Corporation affiliated with United Artists Theatre Circuit, Inc.? A. No, sir. Twentieth Century-Fox has no financial interest of any kind in United Artists Theatre Circuit, Inc. It does not participate in the management of that company. The only possible connection is that Fox West Coast Theatres Corporation, a subsidiary of National Theatres Corporation, owns 70% of the stock of United West Coast Theatres Corporation, and a subsidiary of United Artists Theatre Circuit, Inc., owns the remaining 30%. United West Coast Theatres Corporation leases and operates a number of theatres in California. These theatres have been operated by affiliates of Fox West Coast

Theatres Corporation since the fall of 1931. They are now being operated by Fox West Coast Agency Corporation under a standard form of service agreement made between the subsidiaries of Fox West Coast and Fox West Coast Agency, a (1452)
service corporation providing various services incident to the supervision and management of operating theatres. The executive officers of United Artists Theatre Circuit, Inc., do not participate in the management of United West Coast Theatres Corporation.

"Q. Do you own stock in Skouras Theatres Corporation? A. I do. My brother Charles, who is now president of Fox West Coast Theatres Corporation, and my brother George, who is president of Skouras Theatres Corporation, and I own 50 per cent of the stock of Skouras Theatres Corporation. My brother George and I are directors. I am not an officer.

"Q. Who owns the balance? A. Metropolitan Playhouses, Inc.

"Q. Is Skouras Theatres Corporation affiliated with Twentieth Century-Fox? A. No, sir. The only connection is that Skouras Theatres Corporation has been, since 1931, licensed under a franchise to exhibit Twentieth Century-Fox pictures in the various theatres it operates in metropolitan New York. At the time this franchise was granted to Skouras Theatres Corporation, I was not an officer or employee of Twentieth Century-Fox or of National Theatres Corporation or any of its subsidiaries. This franchise will expire in 1948.

"Q. Do you own any stock in Randforce Amusement Corporation? A. No; and I may say, neither do my brothers. (1453)

"Q. Who owns the stock of Randforce Amusement Corporation, if you know? A. I do know. One-half of the stock of Randforce Amusement Corporation is owned by Samuel Rinzler and his associates. The other half is owned by Metropolitan Playhouses, Inc.

"Q. What interest does Twentieth Century-Fox have in Randforce Amusement Corporation? A. None—except, again, that Randforce has a similar franchise requiring it to play Twentieth Century-Fox pictures. In this connection it should be observed that many of the theatres operated by Skouras Theatres and Randforce were operated by Fox Theatres Corporation, and, in 1931, when the franchises were made, these theatres were the first neighborhood customers of Fox Film in metropolitan New York."

Mr. Caskey: And then, if your Honors please, there follows several questions paralleling those which were put to Mr. Zukor, denying explicitly the charges of the complaint, and with your leave I will simply have them copied into the stenographic record.

(The balance of the stipulated matter referred to is as follows:)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution
(1454)
and exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive basis? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any

of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license (1455)
any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of
(1456)
them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-exhibitor with respect to run, clearance, license fees or any other terms of licensing? A. No, sir.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures disturbed by the other? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation
(1457)
of competing first-run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run

affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from any unaffiliated exhibitor or to limit

(1458)

the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the opera-

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Supp. Ct.

Vol. III

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

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No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

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tion thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease (1458a)
theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(1459)

WILLIAM J. KUPPER, called as a witness on behalf of defendant Twentieth Century-Fox, being first duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Where do you reside, Mr. Kupper? A. 36 Sutton Place, Lawrence, Long Island.

Q. What is your occupation? A. I am employed by Twentieth Century-Fox Film Corporation as their general sales manager.

Q. What are your duties as such? A. I am in charge of and responsible for the sales of our merchandise in the United States and Canada to the theatres, and the operation of our distribution organization of 31 branch offices in the United States.

Q. Who are your superior officers, if any? A. Mr. Thomas J. Connors, who is vice-president of the company in charge

of distribution, world-wide distribution, Mr. Spyros Skouras, who is president, and also an executive vice-president, Mr. Michel.

Q. And another officer of the company has the supervision or distribution outside of the United States and Canada? A. That is correct.

Q. How long have you been engaged in the motion picture business? A. I was employed by Fox Film Corporation—if I may look back—on October 7, 1919, and I have been with (1460)
that corporation ever since through various positions.

Q. And you have not been employed by any other company in the motion picture business? A. No, this has been continuous service.

Q. Briefly, will you state the nature of that service? A. When I was employed on October 7, 1919, I was employed as a clerk in their contract department; and on June 12, 1920, I went to Dallas, Texas, as their assistant branch manager; on October 8, 1921, I became branch manager of our Washington, D. C., office; on January 14, 1922, I became manager at the Albany, New York, office at our branch office there; on June 10, 1922, I went to Charlotte, as branch manager there; on January 27, 1923, I became the branch manager at the Fox office in Pittsburgh, Pennsylvania; on January 19, 1924, I was transferred to the home office as assistant to the general sales manager at that time, who was R. A. White; on May 31, 1924, I went to Chicago and became the branch manager there; November 29, 1924, I went back to Pittsburgh as branch manager; on December 29, 1928, I was transferred to the home office again here in New York as special field representative, assisting the then sales manager, Mr. James R. Grainger; on January 26, 1929, I became assistant general sales manager; and on November 7, 1931, I became Western Division manager under Mr. John D. Clark, who was then the sales manager; on May 28, 1942,

(1461)

I was made assistant to Mr. Connors, who is the vice-president of Twentieth Century-Fox Film Corporation; and on August 2, 1943, I was made general sales manager for this company, which position I occupy today.

Q. What does Twentieth Century-Fox Film Corporation distribute? A. It distributes feature motion pictures; it distributes newsreels; it distributes short subjects; and it distributes the March of Time, which is a two-reel subject. It is all photographic film.

Q. Is the latter produced by it? A. No, it is not. Some of our short subjects are not produced by us either. They are produced by independent producers.

Q. Now, how many exchanges does Twentieth Century-Fox have in the United States? A. 31.

Q. In what cities are they located? A. Do you want the list of them?

Q. No; I don't mean by name, but what type of city? A. Well, New York City—well, the type of city is generally the most important distribution center in that State or area.

Q. And how was the number of exchanges fixed or determined? A. Well, they gradually grew; I mean they increased; a few of them were put on because the territory expanded and developed, and we thought it was important and

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necessary when we had more theatres come into an area, so we could properly service these accounts.

Q. Have the cities in which Twentieth Century-Fox's exchanges are now located been determined by any agreement with any other distributors? A. I don't know of any such agreement.

Q. And these cities in which you now have exchanges are the same ones that there were exchanges in when you came with the company? A. Not when I came. There are some additional ones than when I came with the company.

Q. Such as Oklahoma City? A. Oklahoma City, Charlotte, Memphis, Portland.

Q. Now, describe very briefly but clearly to the Court what an exchange is? A. Well, an exchange is our branch office from which we distribute our motion pictures for a given area or set-up area, and it handles all the physical work, the inspection, the shipping, and the selling for the area in which it operates.

Q. Who has the supervision of the exchange? A. Well, there is a branch manager who is directly responsible for the local operation.

Q. Now under him is a sales organization? A. Yes; and they vary in the size of the office from two men up to five, six or eight men.

Q. And then there are bookers? A. And there are bookers. (1463)

Q. And what does a booker do? A. Well, a booker is the man responsible for the work of definitely setting up the playing time that is agreed to between the exhibitor and the book. He is responsible to see that the pictures are booked and supplied to the account that licenses the film.

Q. Why do you use that word "book"? A. Well, he works from a big book, and I suppose it was just through custom that the name has developed; he has a master book that shows every day in the week, and the days of the month, and it goes on, and he works down from the number of prints he has, and it all runs in an order as the time is filled or it is booked up; and that is why they call it booked; that time is booked. And there is the time for shipping or reshipping of the film, and it all goes in there.

Q. That is, taking a specific picture like Nob Hill in an exchange like New Haven, there is a line for each print that the New Haven exchange has? A. That is correct.

Q. And across the page is a space for every day? A. Every day.

Q. And when the booker for the Bijou Theatre, the exhibitor, comes in, he agrees with the date on your book, is that right? A. That is right, and that is inserted in the book from thereon, and the billing and the shipping is made. (1464)

Q. Now, do you have a cashier department? A. Yes, sir.

Q. And do you have a shipping department? A. Shipping department.

Q. And an inspection department? A. And an inspection department.

Q. What authority in the licensing of motion pictures does a salesman have? A. Well, he has no authority to license them. He has the authority to go out and he does go out and solicits the license.

Q. Does each salesman in the Twentieth Century-Fox organization have a definite territory? A. Yes, pretty definite.

Q. And he calls upon the exhibitors in that territory? A. He does.

Q. He has the duty to negotiate for applications for license? A. That is correct.

Q. And when he has arrived at an agreement with an exhibitor, what does he do? A. He submits it to his branch manager for his approval or recommendation and whether or not he is satisfied with the negotiation.

Q. Now, assuming that the branch manager is not satisfied, what happens? A. Well, he is liable to reject the application and we never see it.

Q. Then what happens? A. Then the exhibitor would be resolicited again by the salesman or possibly by the branch (1465)
manager to get the terms that they want.

Q. They both get in a car and drive over to see him? A. They go by car or they could go by train, too, I suppose.

Q. But they do; I mean they renegotiate? A. Yes, they renegotiate.

Q. And then when there comes an arrangement that is satisfactory to the salesman and to the branch manager, what is done? A. He in turn submits it to his district manager, who will look the contract over and weigh it according to how he sees it. If he is satisfied with it, he will send it out to his sales manager. If he is not, he will reject it again.

Q. And assuming that he is satisfied and sends it to his sales manager, what is the procedure then? A. Then the sales manager will analyze it and study it and decide whether or not it is the right kind of a contract that we should accept in that situation.

Q. And if he is satisfied, what is done? A. He automatically accepts it and it is approved to the exchange or to the district office. It goes back through that route that I brought you up through.

Q. And in due course a signed copy is sent to the exhibitor? A. To the exhibitor. An executed copy is signed by an official of the company, or an officer of the company, I should say.

(1466)

Q. Now, has that general practice of negotiation and examination, renegotiation, submission, been carried on since you have been in the motion picture business? A. Generally; but when I started with Fox we did not have such a great organization. We did not have a lot of district managers or sales managers. It was done direct by the branch manager through the general sales manager.

Q. You say you have 31 exchanges. How many districts are there? A. I believe I have eleven.

Q. And have you some memorandum of it? A. Yes, I have a record of it here. Yes, I think it is eleven (consulting paper). Eleven.

Q. And how many division sales managers are there? A. I have four.

Q. Who are they? A. Well, in the East we have Mr. A. W. Smith; in the South we have Mr.—oh, Mr. Smith, incidentally, operates out of New York—we have Mr. Harry Ballance, who covers the six Southern offices and operates out of Atlanta; Mr. W. C. Gehring, who has the Central offices; he also operates out of New York. Mr. Herman Wobber, who has the six Coast offices, and he operates out of San Francisco.

Q. Mr. Gehring has been with the company how long? A. Well, I think Mr. Gehring was with the company when I came with the company, and worked in the Buffalo exchange. (1467)

Q. He was discharged earlier than you from the Army? A. I guess a few days, or a month maybe.

Q. And how long has Mr. Wobber been with the company? A. I think Mr. Wobber came with the company in 1932, about the time Mr. Kent came with the company.

Q. And for a period of ten years he was general sales manager? A. Yes.

Q. And Mr. Ballance has been with the company how long? A. Since about 1932 or 1933; I am not sure whether it is late 1932 or early 1933.

Q. And how long has Mr. Smith been with the company? A. Mr. Smith has not been there so long. I think it is going on four years.

Q. Now, do you and Mr. Connors and these four sales managers know personally a great many of the exhibitors of the country? A. Well, we know a lot of them. Whether you would call them a great many—we have met a lot of them.

Q. Sold a lot of them? A. Sold a lot of them.

Q. Been in their theatres? A. Been in a lot of theatres.

Q. What kind of a building is an exchange in? A. It is supposed to be a fireproof building, and they try to get a fireproof building. Generally it is an independent building. I know that our exchanges, buildings that we built or had

(1468)

built, had specially designed features that would protect our merchandise, good places to operate and work from.

Mr. Caskey: Would you mark this please for identification?

(Marked Defendant Twentieth Century-Fox Exhibit F-5 for identification.)

Q. Mr. Kupper, I show you a document marked F-5 for identification, and ask you if that contains a number of features which the company has released since 1929? A. I believe it is exactly the number; I have not checked it. It looks like it to me, like they are the exact numbers in each season.

Q. Now I notice that during the 1944-1945 season the number of releases was but 25, whereas in 1941-1942 it was 54. What is the reason for that decline in the number of pictures released? A. There are a lot of reasons; several of them anyway.

Q. Will you give them? A. In my opinion one was the fact that we had a war and we lost a lot of our talent, lost a lot of our technicians, plus the fact that there was a reduction in available negative that you could use to make positive prints of. Those are some of the reasons for it.

Q. Did the War Production Board impose restrictions on the amount of raw stock that could be used? A. Yes, sir.

(1469)

Q. And that directly affected the number of pictures which could be produced? A. I would say it did to some extent.

Q. Was there any agreement by you or by any officer of the company to your knowledge in fixing the number of pictures which would be released during any of these seasons with any other distributor? A. Not to my knowledge.

Q. You did not make any such agreements? A. I never did, no, sir.

Q. Now, in addition to the exchanges and the function of its representatives that you told us about, you have an advertising department, do you not? A. Advertising and exploitation department, yes, sir.

Q. What is their function? A. Their function is to build up the material, the advertising material; also work out these press books, and work out the advertising campaigns so the exhibitor can exploit and sell the pictures to the public.

Q. Now you have a certain amount of advertising to the exhibitors? A. Do we have a certain amount to the exhibitors?

Q. That is directed to the exhibitors primarily? A. Yes, directed to all the exhibitors.

Q. Where does that advertising appear? A. Well, it is made or at least worked out or through our exploitation (1470)
department and sent to our exchanges, and they in turn send it to all exhibitors who license our merchandise. It is done to help them sell the merchandise to the public.

Q. And when you release a picture like Nob Hill, you prepare a press book containing various appropriate advertisement to be inserted in the newspapers? A. They are all prepared in advance of our release, the sale and the licensing of the picture.

Q. Those press books are sent to the exhibitors? A. Sent to our exchange and given to the exhibitors.

Q. Do you also prepare sheets to be used in the lobbies? A. You mean lithographs?

Q. Yes. A. Yes, we do, and photographs as well.

Q. So-called stills? A. Stills.

Q. And those are sold to the various exhibitors? A. Sold at a very nominal price so they can sell and exploit the picture.

Q. And you also advertise in the trade papers? A. Yes, extensive.

Q. And do you advertise also directly to the theatre-going public? A. Either advertise or exploit, or at least we get it in various magazines so that it gets to the public in some way. We want the public to know we have got that picture.

(1470-A)

Q. There are a number of so-called fan-magazines in the country? A. Yes, quite a few.

Q. Are these some of those (indicating)? A. Yes, sir, I recognize all of them as such.

(1471)

Q. And do they have an extensive circulation? A. Great circulation. I am told that, at least, by our publicity department that they have a wide circulation.

Q. And you advertise in those magazines? A. We do.

Q. And you also attempt to have synopses of the forthcoming motion pictures printed in those magazines? A. Yes, sir, we like to have a very good story with pictures and everything else so they know what kind of a picture we have got. I mean the public.

Q. Now, do you also advertise in weekly magazines like Time or Life or Saturday Evening Post or Collier's? A. Yes, sir.

Q. Do you advertise on the radio? A. Yes, sir.

Mr. Wright: If the Court please, the purpose of this is not apparent to me. It seems to me it is completely irrelevant to any issue that is being tried.

Judge Hand: What is the purpose?

Mr. Caskey: The purpose of it is to show competition in the distribution of motion pictures to induce people to come to see our pictures in preference to somebody else's, which I suppose is competition.

Judge Hand: All right.

Q. Now, in addition to this type of advertising, do you have exploitation representatives in the field? A. Yes, we do.
(1472)

Q. Tell the Court about that. A. Well, in each district we try to maintain one or sometimes two or more men that would circulate around. I mean after we have licensed a picture for exhibition and the picture was dated and set in the theatre, our men went out and helped and try to exploit that piece of merchandise of ours and see that it was given all the exploitation possible so they could return the greatest gross in that theatre; and we thereby get a good and substantial film rental.

Q. Does the company participate in the advertising expense of the theatres? A. In some of them it does.

Q. How is that done? A. Well, generally through our exploitation, we have what we call a cooperative advertising campaign in which they were worked out—let us say a theatre has a budget of $500 to spend on a picture, and we think they ought to spend more. Well, they work it out and try to show him and convince him that he ought to spend $200 or $300 more, half of which we probably will participate in, or a third, and so on; and he will work out that additional campaign over and above what the theatre budget will allow or require.

Q. I now turn to the method of sales prior to the consent decree: Previous witnesses have testified to the practice in their companies of holding conventions. Did Twentieth Cen-
(1473)
tury-Fox hold conventions? A. As far back as I can recall they had a convention every year; sometimes two, but generally one.

Q. Aside from what Mr. Seymour referred to as the social activities, what occurs at those conventions? A. Well, there was a lot more than social activities with Fox. You would go there and you would listen to Mr. Fox or Sheehan or

whoever was in charge of production at the time tell you what we were going to make; and you sat there for days and argued about whether it was going to be good or bad, and what prices you thought you could get for it. And if they had something finished they would show it to you at the conventions.

Q. Now, at the time of these conventions did the publicity department have illustrated booklets referring to the coming year's product? A. Yes, sir. They generally had for each year, each season, a big book. Some were pretty expensive too, and some were very elaborate; and they were made, and that is when they were first put out; at least, they were put out simultaneous with our convention.

Q. I show you this book and ask you if that is the book that was used at the 1932 convention? A. Yes, sir.

Judge Hand: I fail to see what this is all about. I do not understand that Mr. Wright disputes that there was competition about those things you are talking about.

(1474)

Mr. Wright: There is not any question about that. In so far as pictures themselves are concerned, I suppose every picture that plays, whether it plays in theatres owned by the same exhibitor or in others, it is in competition for public patronage with every other picture, and that each distributor wants to get the most that he possibly can out of every picture that is exhibited, wherever it is exhibit d. I do not think there can be any question about that

Mr. Caskey: Well, is it also conceded that we are in competition with each other for the exhibitor's playing time?

Mr. Wright: No. When it comes to playing time, within very definite limits. There is no question, of

course, but what each distributor of these defendants would again like to have as much playing time in every theatre in the country as he can get; but when it comes to determine how that playing time is going to be allotted in the theatres in which they are interested, we say that that is a matter in which there are artificial restraints imposed.

Mr. Caskey: It is very difficult to get any concession except the most general one, and whenever we get to a specific problem we are met with this type of
(1475)
reply.

Mr. Wright: Well, why don't you take him into the playing time situation and develop what you want to develop?

Mr. Caskey: I am going to.

Then I will finish this with one or two questions:

Q. After the convention were these booklets sent to the exhibitors of the country? A. Yes, sir.

Q. And carried by the salesmen as they called upon the exhibitors? A. Until they wore them out, I guess.

Mr. Caskey: Now, will you mark this, please, for identification.

(Marked Defendant Twentieth Century-Fox's Exhibits F-6, F-7 and F-8 for identification.)

Q. I show you Defendants' Exhibits F-6, F-7 and F-8 for identification and ask you what they are. A. That is the form of contract which we used in our licensing of pictures, or the application of it, and later became the contract, for each of those seasons.

Q. What were those seasons? A. Well, one was the season 1929-30——

Mr. Wright: Could we have it hooked up with the number so we will know what he is talking about?

A. (Continuing) —F-6 this is. That is the 1929-30 contract (1476)
form; F-7 is the 1930-31 season, a copy of it at least; F-8 is the 1931-32 season.

Q. Now, were these all forms which were generally used in licensing motion pictures in those years? A. By our company, yes.

Mr. Caskey: I offer them.

Mr. Wright: We have no objection.

(Defendant Twentieth Century-Fox's Exhibits F-6, F-7 and F-8 for identification received in evidence.)

Q. Now, during those years, Mr. Kupper, the names of the pictures which you were licensing were specified on the contract, were they not? A. Yes, sir.

Q. With some slight description of either the star or the source of the projected motion picture? A. Yes, sir.

Q. And a definite program of pictures was licensed to the exhibitor? A. Yes, sir.

Q. At the time of the solicitation of the exhibitor, had those pictures been produced? A. All of them?

Q. Yes, sir. A. Very few in the early license agreements. They might have all been made by the time the license was made for the later ones. For some of the smallest license agreements they might have been made, because you run your pictures at least two years—at least that long—and you certainly license them by that time, and they would have been finished; but for the first early months there would be very few made.

(1477)

Q. And those contracts which were negotiated, say, in the summer preceding the beginning of the season, only a few pictures had been manufactured? A. That is correct.

Q. And did you find it possible to deliver the specific pictures which were enumerated in the contract? A. Well, I doubt whether you could tell yourself whether it was the same thing there or not.

Q. Now, when did Mr. Kent, come with the company? A. I believe it was in 1932.

Q. And what year's production did he first have responsibility for? A. Well, I am not sure. I think it was 1933.

Q. 1933-34 season? A. Yes.

Q. That is the so-called K-1 season? A. We designated that to officially stamp the first year he had something to do with the setting up of the production and the production budget.

Mr. Caskey: Now will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-9 for identification.)

Q. Is this contract F-9 for identification the form which was used in the 1933-34 season? A. It is a photostat of that contract, yes.

Q. And under that form there is no specification of the

(1478)

pictures to be released? A. That is correct.

Mr. Caskey: I offer it.

Mr. Wright: No objection.

(Defendant Twentieth Century-Fox's Exhibit F-9 for identification received in evidence.)

Q. Now, Mr. Kupper, in the 1941 season you began to sell under the consent decree? A. Yes, sir.

Q. And a new form of contract was prepared in that year? A. Yes.

Q. Do you know who prepared it? A. I suppose it was prepared by the legal department. I think you had a hand in it, didn't you?

Q. And recently the contract has been shortened and improved? A. Yes, sir.

Q. And both the shortening and the improvement was as the result of a suggestion of a salesman, was it not? A. That is correct, a salesman in Salt Lake City.

Q. And as the result of his suggestion you gave him a war bond as a prize? A. I did not. Mr. Connors did.

Q. I show you this magazine and ask you what it is.

Mr. Wright: Have you got the improvement there as distinguished from the publicity?

Mr. Caskey: It is right there, Mr. Wright, in the same size type that you use.

A. This is a house organ of our Twentieth Century-Fox
(1479)
Company. It is called the Dynamo. It goes out and keeps the boys advised of what we have got, and keeps our enthusiasm alive and tells the record of what they are doing generally.

Q. And this issue of April 21, 1945 contains a reference to Mr. Dugan's suggestion and the new form of contract? A. That is right.

Mr. Wright: Is the contract reprinted in full in here?

Mr. Caskey: The first page, and we will get you a copy of the other.

Mr. Wright: No objection.

(Marked Defendant Twentieth Century-Fox's Exhibit F-10.)

Q. F-10 is the 1945-46 contract, is it not, Mr. Kupper? A. That is correct.

Q. That is the one currently in use? A. That is the one currently in use.

(1480).

Q. Mr. Kupper, will you tell the Court——

Judge Bright: Are they marked for identification or are they marked in evidence?

Mr. Caskey: It was marked in evidence, I understood.

Judge Hand: As to these forms, the pictures are not listed?

The Witness: Well, when we—during the specific time—right after those long forms, where they had all the pictures on, we did much the same thing as to publicizing the pictures before we sold the exhibitors, and we would go out and sell them, but we would sell so many pictures, say a number in a group, we had maybe seven, we had maybe eight, and this one group had certain specified terms, and ten in the next group had certain specified terms and so on.

Judge Hand: Somewhere the names of the pictures appeared.

The Witness: Yes, they knew the names of the pictures. We gave them a list in the publication that we put out, but it was never definite, we could change the pictures where we wanted, and then later, when you came to the Consent Decree, after, we showed the pictures.

Judge Hand: Yes, that was block booking and you were limited by the consent decree to five.

(1481)

The Witness: That is right, sale of five. Then we showed those pictures and sold people, and the names of those pictures were given, at least those pictures that were licensed.

Q. Referring to F-9 in evidence, would this be filled out? Just give the Court an example of how a contract for a season's product would be filled out. A. Well, of course, the name would go up here and the date and so forth, and then we had——.

Judge Hand: This is before the consent decree?

The Witness: This is the one prior to the consent decree, yes, and we, at the same time—there would be eight pictures at such and such terms, right there, and then there would be another block.

Q. Such as what? A. Well, they would generally be our better and higher-priced and more attractive pictures.

Judge Bright: With the names of the eight pictures?

The Witness: No, just the numbers.

Q. Eight at 35 per cent? Is that high enough? A. We have had higher, too, and less, and then there would be ten varying prices, the prices were perhaps a little lower than that, and so on, until the whole contract was completed, and then the last group, we will say, remained there. We never knew definitely how many might be in there, because it would depend upon his selection. We offered so many pic-

(1482)

tures. That was for him. That is the general front of the contract.

Q. The exhibitor knew what he was going to get from the sales advertising material, such as this booklet that I am

holding and from your past performance? A. That is right, he had confidence in us. We made pictures for a number of years and we developed and we were growing all the time, we were making finer pictures all the time. He believed in us, and that is what we tried to do, to live up to that, what we put out.

Q. And if you told him that you were going to make three Will Rogers pictures in a year, you were able to convince him that those pictures should have the highest term? A. Yes. In those years, talking about Rogers, he was a pretty good star for us, so was Shirley Temple and other stars, too, but they were generally accepted as our top stars at that particular time.

Q. Referring to the present form, which I had marked as Exhibit F-10, when the application is taken from the salesman, these blanks are filled in, are they not? A. Yes, sir.

Q. With the names of specific pictures? A. Definite name of the picture that he selects out of that group, or all the groups that he so elects.

Q. From time to time you would have this form of con-
(1483)
tract printed up with the names of the pictures in print instead of being typewritten? A. That is right, have them by the thousands and sent them out in advance, and they can use them for any block, just inserting which block it is.

Q. You used this form, as I understand it, for the first sale in each season? A. Yes, sir.

Q. For the exhibitor? A. Yes.

Q. And the subsequent sales of the subsequent blocks is done by even shorter and simpler form? A. Much shorter form. It refers back to this form, where generally all the terms as to clearance and things of that nature are embodied in the first contract.

Q. Mr. Kupper, I wish you would tell——

Mr. Wright: Have you got the other form he is talking about, that he just testified about?

Mr. Caskey: I will get you one.

Q. I wish you would tell the Court when and how it is determined what pictures Twentieth Century-Fox will release? A. Generally,—last few years I have been associated in New York,—generally, the head of our company goes out to the studio, probably in December, January or February, and he would hold conferences with our production department, and they would discuss the budgets and what the production department has lined up in general as to what (1484)
they thought they should make or were making, and then it was determined whether that program would be suitable or whether it was what we wanted, and if there were any additions or changes made they were made there in those conferences.

Q. Do you participate in those? A. I have, but—in those particular ones, I did not participate very much. They were later ones in which I participated.

Q. You currently participate in these discussions? A. They ask for our opinion and advice as to what we think about future production.

Q. One of the duties of the sales manager is to estimate the expected revenue from the expected picture? A. We try to give them what we believe a picture can earn—at least keep the production department advised of what the possible, potential box office revenue will be from that type of picture.

Q. Am I correct that since the fall of 1941 all of the Twentieth Century-Fox pictures have been trade-shown-before they were licensed? A. Well, they were instructed, our branches were instructed, to trade-show every one, and

I am quite sure that they did, because they had to report to us that they did.

Q. As a matter of fact, you built up a system whereby they were required to report each trade showing, the number of people who attended, and so forth? A. That is correct.

Q. What number of pictures do you sell in the blocks? (1485)

A. Never more than five. As low as one. Sold individually, two and three.

Q. What is the current practice as to the number of pictures in a block? A. We have been running along pretty consistent with two and three.

Q. That requires a separate sale for each two or three pictures? A. It does.

Q. Do you know how many blocks you had in the 1944-45 season product? A. I think we had 11.

Q. That requires 11 separate negotiations with the exhibitors? A. Every block requires a separate negotiation. The salesman may get a small account that doesn't buy early in the season, he may sell two or three blocks, but he has to negotiate each block individually. He may negotiate for two, three or four blocks that are available for sale, that have been trade-shown—he may negotiate it with one sales talk.

Q. That of necessity is in the subsequent-run theatres? A. Subsequent-run, small towns, very small.

Q. How many operating theatres are there in the United States? A. According to the report I have seen from my contract department only this morning, there are over 18,400-some odd.

Q. 18,400 theatres today? A. That is what I believe to be the figure. I have it here, if I may use it.

(1486)

Q. Certainly. A. 18,468 active operating motion picture theatres.

Q. Does that include Canada? A. It does not include Canada.

Q. How many accounts does Twentieth Century-Fox sell? A. Sold as high as 15, almost 16 thousand, on some pictures.

Q. And as low as how many? A. Run pretty low, 5,000.

Q. Have you a schedule for the week ended October 13th or 20th? A. I haven't got it here.

Q. I will hand you this. For the 1943-44 season what pictures had the highest number of exhibitions? A. Well, in that year "Sweet Rosie O'Grady" was one of the high ones, 15,000.

Q. You may proceed. A. You want me to give you that?

Q. Yes. A. 15,527 actual bookings. "Heaven Can Wait" —of course, these pictures are not finished yet. That particular week, "Sweet Rosie O'Grady", first playing, was 22 more. It has been in release 104 weeks, that is, two years. Still playing.

"Heaven Can Wait" is released 112 weeks. As of this week, October 6th, we had played 15,004 contracts.

Q. And the same—— A. There is another picture, "The Sullivans", only released 83 weeks. Had played 15,640 contracts. Here is a picture called "Buffalo Bill," 72 weeks released, and has played about 15,582.

(1487)

Q. With respect to those four pictures were they generally licensed on percentage? A. Yes, generally.

Q. Just give us for those four pictures the number of bookings and the number that were on percentage. A. In "Rosie O'Grady's" case, I stated 15,527 played. Out of that there were 12,203 played on percentage, or a guarantee and a percentage, a participating amount.

In the case of "The Sullivans" played 15,640, 7,980 were played on percentage or participating arrangements; on "Buffalo Bill" it was 15,582 bookings to date, as of this date,

and we had played 11,404 on percentage or a guarantee and a percentage.

Q. Did you also release during that season a picture called "Dancing Masters"? A. I don't know whether that year. I don't see it on here.

Q. Have you got "Ladies in Washington"? A. "Ladies in Washington," yes, sir.

Q. How many bookings has that had? A. That had 9,651 bookings as of the week ended October 6, 1945, and at that time was released 69 weeks.

Q. How many on percentage? A. 1,145.

Q. What was the comparative quality of that picture? A. There was no comparison. This is not a picture in the category that I read off to you before. This was a smaller picture, and, I suppose, in the trade the term that would be used in the trade, it is a B picture.

(1488)

Q. The better the picture the more accounts it plays, generally speaking? A. Generally, yes.

Q. And the more percentage accounts it plays? A. Yes.

Q. Speaking of "Sweet Rosie O'Grady," did you have prepared a list showing the total number of bookings in the cities of the United States which have a population of 25,000 or more? A. I did.

Q. And did you have the film rental broken down by $100 classifications? A. Yes, sir.

(Marked Twentieth Century-Fox Exhibit F-11 for identification.)

Q. Mr. Kupper, what was the cost of one positive print of "Sweet Rosie O'Grady"? A. I think in the neighborhood of $300. It is a technicolor picture.

Q. Look at the exhibit. A. Oh, $344.29.

Q. And in those 412 cities, how many was the total number of exhibitions? A. 4,063.

Mr. Wright: Excuse me. Just a minute. These figures are already in evidence in the interrogatory answers. Are these supposed to contradict the figures you gave us in the interrogatory answers or expand them in any way, or are they just the same?

Mr. Caskey: Just the same, except I hope they are more understandable.

Mr. Wright: Have you a copy of it, so we can see what you are doing?

(1489)

Mr. Caskey: Let me ask him another question.

Q. How many of the engagements paid a film rental of $99.99 or less? A. Looks like 2,800-and-some-odd—out of the 4,000 you are talking about?

Q. Yes. And this list shows a classification by $100 amount of the film rental that we received? A. That is right.

Mr. Caskey: I will offer it.

Mr. Wright: We object to it until we have had a chance to look at it, and perhaps we may want to cross-examine on it.

Mr. Caskey: Seems hardly a valid objection.

Judge Hand: You object to it?

Mr. Wright: Yes.

Judge Hand: Have they already stipulated what it is?

Mr. Wright: There are certain data of the same character that was furnished us in the form of answers to interrogatories. It isn't clear to me just, without further examination, exactly what has been offered here, what it is supposed to show.

Judge Bright: Isn't it offered to show the rental does not pay for the cost of the print in some 2,000 houses?

Mr. Caskey: That is entirely correct, your Honor.

(1490)

This was prepared, I might say, by the International Business Machines Company.

Judge Bright: That makes it authentic?

Mr. Caskey: Tends to.

Mr. Seymour. We are all going to have some statistical material to offer at some time and I should think —I don't know about this particular one—we should offer them subject to correction. Let them go in and if there are any corrections to be made, let them be made.

Mr. Wright: Obviously it does not seem to me there is anything here which makes one difference one way or the other, but I do think, inasmuch as we have taken great pains to furnish the defendants with all the statistical material long in advance of offering any, as a matter of common courtesy, we should be able to receive in advance of an offer such statistical material as they want to put in.

Judge Bright: How does that prove——

Mr. Proskauer: It is very difficult for us to do that. In my case, I have had to request a vast amount of statistical material in the light of the way the Government's case went in, and we are doing the best we can. We are going to give them to Mr. Wright, but they are all practically just statistics, which are not contro-

(1491)

versial on that basis.

Mr. Wright: I did not hear your comment, Judge Bright.

Judge Bright: What proof is that of the absence or presence of combination or conspiracy?

Mr. Wright: I do not see that it affords any. It seems to me to be completely irrelevant, but I would object to it on that ground also.

Judge Hand: You have it already in in some form?

Mr. Wright: What we have in, as I understand it, is the total rental and the total number of exhibitions in these towns of this picture. We do not have in, as I understand it, the figure that he testified to as to the total number of those bookings which called for a film rental of less than $100. As I gather it, that is what it is supposed to contribute that wasn't in the record before.

Mr. Caskey: Shows the necessity for the staggering of runs and for clearance among a large number of accounts.

Judge Hand: We will admit the thing and you can correct it, Mr. Wright. I am not at all sure that it has any bearing on anything.

Mr. Wright: I do not think we have any interest in it, but it is a little difficult to say without seeing it.

(Defendant Twentieth Century-Fox Exhibit (1492) F-11 for identification received in evidence.)

Q. Mr. Kupper, what does the term first-run in Baltimore mean? A. It means the showing of our picture, first exhibition to the public in a theatre of our picture in that area, in that city.

Q. What does the term "second-run" mean? A. It means second showing of our picture in a theatre, showing it to the public.

Mr. Wright: May I have that last answer read?

(Answer read.)

Q. "A theatre"? A. "A theatre," yes, second-run. Second run is the second-run and follows the first one.

Q. Not the same theatre? A. Not the same theatre, no.

Judge Bright: Are there first-run showings simultaneously throughout the different parts of the United States?

The Witness: Very often, your Honor. First-run in this city, first-run in that city. Generally a first-run in every city, even small towns, like, there is a first-run in that town.

Judge Bright: When there is a first running of a picture in Radio City here in New York, are there other first-runs showing in other places?

The Witness: There have been, but, generally,
(1493)
Radio City would be the first run in the United States, but there have been pictures. If we take a picture in, like, the Roxy, which is a similar fine theatre as the Music Hall, we sometimes have the same picture, not the same print, a print of that same picture playing in Los Angeles, in Chicago, and playing in New York, too.

Mr. Caskey: I think I can clear that up for you.

Q. "State Fair" during the fourth week of release, Mr. Kupper, played in how many theatres? A. 318.

Q. Those were all over the United States?

Mr. Wright: Excuse me. Fourth week of release where?

The Witness: Well, it is from the time we tabulate and set it up as a released picture in our books. That would be the United States.

Judge Bright: They are also called first-runs, those 318 houses?

The Witness: I would assume that early in the game they would all the first-run bookings, yes, sir, in that particular week.

Judge Hand: When you talk about first run that run is the first that there is in a particular locality?

The Witness: That is correct, sir.

Q. And simultaneously with the showing in the Roxy in New York a picture may show in the Fox theatre in (1494)
Michigan, Fox theatre in Philadelphia and the New theatre in Baltimore, some theatre in Atlanta, and another in Kansas City? A. That is right, but it doesn't always follow that way. Sometimes we play—hold a picture and open it at the Roxy and nobody will get it until we sell it to the public, exploit it and let the world know what a great attraction it is.

Judge Hand: You don't call that first-run?

The Witness: Yes, sir, that is first-run. Might be a pre-release or advance.

Judge Hand: That is what you call it.

The Witness: Generally, but it is the first-run showing.

Q. Let us take an exchange area like New Haven, when the picture is released in New Haven Exchange Area, where is it shown first? A. Generally shown in the best theatre in New Haven or Bridgeport. Generally in New Haven is where they start.

Q. Where else? A. Then the other larger towns. May show simultaneously in Bridgeport, Hartford, towns like that, the larger cities. Only have three or four prints in the area and can only show in that many cities.

Q. At the same time that the picture is showing in New Haven and Bridgeport and Hartford, it may be showing in Denver and Pueblo and Colorado Springs? A. That is right.
(1494a)

Q. Tell Judge Bright under the pre-consent decree selling, you had a so-called national release date, did you not?

A. Yes, we had what is termed a national release. It is a fixed date on which we released the picture generally.

Q. And in those days you attempted to have a picture released, generally speaking, simultaneously all over the country? A. In each exchange area, yes, sir.

(1495)

Judge Hand: How can you have a pre-release in New York, Chicago and San Francisco at the same time?

The Witness: You may have it—well, you may have one generally pre-release showing.

Judge Bright: In how many theatres do you give pre-release showings?

The Witness: Well, you can't determine that. For instance, your Honor, we opened up our picture, this State Fair, we opened it up in Des Moines, Iowa, because the picture suited that locality. As a matter of fact, the author of the story, Phil Strong, came from out there. And we had a simultaneous showing in two theatres out there which was long before any other city in the United States—I mean, any general area, got it. Right on top of that, the very next day, what we did in that area, because of its suitability, we sent in and had 65 towns lined up. Well, there are no 65 big towns in Iowa, in the whole State of Iowa, or of the area of Nebraska, which adjoined it, but they played, as far as we could, down the line in the towns so they could get the benefit of all the ballyhoo, as we call it, exploitation. That, to me, would be a pre-release of that particular picture. We started that off, we launched it there. You take another picture, some of ours, the picture we are playing at the Roxy Theatre now. We opened it at the Roxy Theatre. It is now in its fifth week, and that did not

(1496)

play anywhere in the United States. We opened it

there; we wanted to exploit it, we wanted to sell it by radio and campaign it throughout, so the public would know what a great attraction it was, and the other theatres would know, and that is termed a pre-release sometimes.

Q. What did you do with "Captain Eddie"? A. We took it out to Columbus, Ohio, and opened it out there with a great big outdoor show, I mean we had Rickenbacker there, and a lot of exploitation, and had a lot of newspaper publicity, and we played a lot of towns out in that territory because it was suitable out there, he was well known out there, went through there. It was a pre-release. Happened to be in that area. That played even before New York, and a lot of cities more important and bigger and larger.

Judge Hand: It is beyond me to understand the difference between pre-release and first-run. I don't know that it is important. They seem, when they feel like it, to have an indefinite number of either at the same time.

Mr. Caskey: I think that is correct, sir, and I think that the only difference between pre-release and first-run is the amount of exploitation and fanfare that accompanies it.

Q. Mr. Kupper, how long has the system of successive runs been familiar to you? A. Since I have been with Fox. When I came with them there were still runs. That is 27
(1497)
years now, I think.

Q. Were they—— A. 26.

Q. — in the larger cities selling first-runs, second-runs, third-runs, and so on down the line? A. Yes, sir.

Q. And were those runs separated by an interval of time? A. Most of them always are.

Q. And the interval of time in those days was called protection? A. That is right.

Q. Today it is called clearance? A. That is right.

Q. How long has the industry practice of granting clearance to the prior run existed? A. I believe currently with the run idea. When that was set up, it automatically went hand in hand with it.

Q. Let us have a specific example, New York. Where do you play your Fox pictures first? A. Well, we play most of them, important ones, in the Roxy Theatre. They haven't the time to play them all so we sell them to various theatres. The last three years we sold some, three to the Music Hall, which is an independent operation, we also sold several to the Rialto Theatre, and we sold several to the Globe and the Columbia Theatre, the Victoria Theatre on Broadway.

Q. After they have their first engagement in the Roxy or some other Broadway theatre, where do they next play in the five Boroughs of New York? A. We play at the Albee Theatre in Brooklyn, is the next showing of our picture (1498)
from the Roxy or from most any other house that it mght be played first-run.

Q. How long a period of time elapses between the close of the Roxy or the other Broadway house and the Albee? A. About seven days, I think. Maybe fourteen, but generally seven.

Q. Following the exhibition at the Albee Theatre in Brooklyn, where are the pictures played? A. We then play a number of engagements simultaneously here in New York with the RKO Circuit.

Q. That is in Manhattan? A. In Manhattan, New York.

Q. And the Bronx? A. And the Bronx.

Q. And then the next exhibitions? A. They play subsequent-run houses, RKO houses, and I think in Brooklyn and Staten Island, possibly Long Island—Staten Island anyhow.

Q. Brooklyn and Queens? A. That is right.

Q. After the picture commenced to play in the RKO neighborhood houses first week in Manhattan, how long then is the picture exhibited in the various theatres in New York? A. How long is it exhibited?

Q. How many weeks? A. You mean following that?

Q. That is right. A. Generally seven days. Generally run seven days down the line. All runs generally go that way in New York. That is not true everywhere.

Q. About how long does it take to clear pictures through

(1499)

all the various theatres that play them in New York? A. They clear New York faster than they do most territories. I would say maybe seven or eight weeks.

Q. Referring to Exhibit F-10, I notice a space under the schedule headed, "Admission Prices Per Person, Excluding Taxes." In licensing motion pictures to exhibitors is it customary to have those spaces filled in? A. Our instructions are to the salesmen that they must fill it in. Sure, it is customary. Have had a clause for the admission price in contracts away back—I don't know, as far as I can recall. May not be in the same order, in the same set-up, but I remember the admission prices being on contracts for years.

Q. You license, you have already testified, a considerable proportion of your better pictures on percentage? A. Yes, we sell quite a few pictures on percentage. In fact we like to sell every theatre we do business with some pictures on percentage.

Q. Why is that? A. We like to know—we have a right under our contract, to get the box office statement. Know what the theatres can bring in on various types of pictures and we have a pretty good gauge on the business the theatre can do.

Q. Does the information you get when you license the picture on percentage help you in pricing the so-called flat

(1500)

rental pictures? A. Naturally, your better pictures are accustomed to earning, let us say, hypothetically, two thousand dollars. Well, as you graduate down, that is what your best pictures can earn, there is certainly some relationship between the box office value down to the next group, down to your last flat film rental, and you cannot expect a cheap B picture, like Ladies in Washington, to get $2000 if your fine pictures can only earn $2000 on percentage.

Q. Does the knowledge that the best pictures will earn $2000 on percentage aid you in the pricing of your pictures? A. I would say it does.

Q. When you negotiate a license with a first-run exhibitor, say in Baltimore, how is the admission price that is to be inserted in the contract to be agreed upon? A. Well, admission price, you generally know what the man is charging, he generally establishes his own admission price, and unless you are selling a picture that you are going to insist on getting an advance admission price for, you usually accept what he generally charges because he has established that as the best price that that area or that theatre can sell the merchandise to the public at, and we usually let his judgment guide us, his knowledge.

Q. You have an interest in that price? A. Oh, definitely.

Q. And an interest that it shall be the price which will

(1501)

attract the largest patronage? A. Yes, sir.

Q. One of my associates says the largest number of patrons at the largest price they will pay? A. Yes, sir, that is right.

Q. What exactly that figure is is ordinarily left to the judgment of the exhibitor? A. I would say in most every case it is that—most cases.

Q. In each of those cases the salesman and usually the branch manager, at least in the more important situations, is

familiar with the price which is being charged? A. I would say he is, yes.

Q. At the time the agreement is made with the first-run exhibitor, let us say for example Baltimore, as to the admission price that he will charge during the engagement of the pictures which are licensed to him, what agreement is reached with him as to what other exhibitors will have to charge when they play your pictures? A. I don't believe any.

Q. When you go to the second-run exhibitor in Baltimore, do you negotiate as to what admission price he will charge? A. No, sir—I mean that he will charge?

Q. Yes. A. Of course, you know it is the same thing as the first-run, you are interested in what he is going to charge you for your pictures, I mean, what he is going to sell them

(1502)

to the public for. It is the same situation right on down the line, on third, fourth and seventh runs.

Q. With each succeeding run you make that contract as to the admission price which that exhibitor will charge? A. Well, that is, you take the price that he has set up and established in his theatre, and that is what you agree is the admission price generally for what you are going to sell your merchandise in that theatre for.

Q. But at each level, at each run, you have an interest in the price which he will charge? A. Yes, sir, definite interest.

(1503)

Q. Because, obviously, 40 percent of 30 cents is greater than 40 per cent of 20 cents? A. Right.

Q. At each one of these negotiations is there any agreement reached as to what price you will require the succeeding run, the following run to charge? A. No, not that I know of.

Q. You haven't made any such agreement? A. No, sir.

Q. It appears in the evidence that in some of the cities of the United States the clearance provision will read something like this, 21 days over houses charging 35 cents, 35 days over

houses charging 30 cents, 42 days over houses charging 25 cents, 73 days over houses charging 20 cents. You know of such contracts? A. Yes.

Q. And you enter into those contracts with the first-run exhibitor, do you? A. That is what you agree that you are going to grant him, that clearance, that much between those specific price houses, which are less admission than you get from him.

Q. When you go to the second-run, having made such a contract with the first-run exhibitor, is there any maximum, is there any limit on the maximum price which that second-run exhibitor may charge? A. No. If he is playing my pictures on percentage, I would like him to charge even more than we agree to in the contract. We can get more.

Q. Taking my specific case, where the clearance with the

(1504)

first-run exhibitor reads 21 days over 35-cent houses, now, you go to negotiate with your first choice for a second-run exhibition? A. Yes.

Q. Is there any limitation on the maximum price he may charge? A. No.

Q. Charge 35 cents or any other price he wants to charge? A. If he can charge more, he may charge more. I wouldn't object.

Q. So far as you know, the first-run exhibitor wouldn't object? A. I don't believe he would. I think he would be very happy.

Q. But if the exhibitor wants to charge less than 35 cents, then you have to move his clearance back? A. If he reduced it, I would certainly move him back. You would have to move him back.

Q. If he wants to play 21 days after first-run he has to charge a minimum of 35 cents? A. That is right.

Q. And if he is not willing to charge that price and wants to charge 30 cents, then, in my example, he would play 42 days after? A. That is right.

Q. And if he wanted to charge only 20 cents, he would play 70 days after? A. 70 or 80, depending on what the figure is.

Q. In many other cities of the country the clearance simply reads, in the favor of the first-run, a specified number (1505)
of days over all other runs in the city, is it not? A. That is right.

Q. In granting clearance to the first-run theatre, is there any difference between the theatres which are operated by some one of the defendants in this case and theatres which are operated by what have been called independents? A. I missed the first couple of words of your question.

Q. (Read.) A. Oh, we treat them all alike, whether independent or an affiliated. The clearance has got to be worked out and settled and solved. There is no rule of thumb for any clearance anywhere and depends on the locality. Matter of negotiation.

Q. I show you several sheets which are in evidence as a part of Exhibit 41 and Exhibit 42. Calling your attention now to the City of Akron, Ohio, the first-run pictures are sold to an independent? A. Yes, sir, Shea Theatres. Used to be Pfeiffer & Shea.

Q. What clearance do you grant the first-run there? A. 42 days over subsequent-run, 30 days over Cuyahoga Falls, Barberton, Kenmore, and 14 days over Kent and Ravenna.

Q. Next sheet. A. This is Washington.

Q. Baltimore, Maryland. A. Baltimore, Maryland.

Q. Sell independent there? A. We do. Mr. Marcus Mechanic, who operates the New theatre.
(1506)

Q. You grant clearance? A. Yes.

Q. What is the clearance? A. First run in Baltimore, Maryland, 21 days over all subsequent run. Within 30 days of availability.

William J. Kupper—By Defendant—Direct

Q. And the next city? A. Camden, New Jersey.

Q. Whom do you sell there? A. Mr. John Varbalow.

Q. Is he an independent? A. Yes, sir.

Q. What is the clearance there? A. 14 days after—wait a minute. This is first-run Camden. Exhibitor to play pictures 14 days after first-run Philadelphia, 14 days clearance on all theatres situated at Camden, Gloucester, Cumberland, Burlington and Salem Counties, and the town of Hammonton, New Jersey.

Mr. Caskey: I have selected out of the exhibit, but I will not have read, but I would like the stenographer to copy it, the clearance in Canton, Ohio; Elizabeth, New Jersey; Erie, Pennsylvania; Fall River, Massachusetts; Fort Wayne, Indiana; Jersey City; Louisville; New Bedford; Providence; Reading, Pennsylvania; Richmond; Utica, Wilmington, Delaware; Nashville, Tennessee.

Mr. Wright: Excuse me. Is there anything you are asking him to copy that is not already in evidence in the interrogatory answers?

Mr. Caskey: I am asking him to copy from the interrogatory just the clearance so that it will be in

(1507)

the stenographic minutes and not buried in those enormous books where it is utterly inaccessible to anybody.

Mr. Wright: It seems to me it is hardly necessary for him to have them copied in the record. If he wants to use them in the briefs, he may call them to the Court's attention. They are right in evidence.

Mr. Caskey: I want examples in the stenographic minutes. I can either ask the witness specifically about them or I can have them copied, whichever you prefer, Mr. Wright. It is a matter of indifference to me.

Mr. Wright: I have no objection to having them copied. I am just making the suggestion to try to keep the record within bounds.

(The matter referred to is as follows:)

"Canton, Ohio. First run Canton, Ohio—Thirty (30) days clearance over second run Canton, Ohio.

Elizabeth, New Jersey. 14 days after first run Newark. First run in Elizabeth. 21 days clearance on all theatres in Elizabeth and Elizabethport. 14 days clearance on all theatres in the towns of Hillside, Westfield and Elmora. 7 days clearance on all theatres in the towns of Cranford, Lindon and Rahway.

Erie, Pennsylvania. First run, Erie, Pa. (28) days ahead of subsequent runs and Yesleyville 14 days ahead of Northeast, Girard, North Girard, Albion,
(1508)
Union City, Cambridge Springs.

Fall River, Mass. First run on release. 28 days clearance over Capitol. 35 days over Park and Strand. 90 days over Plaza and Royal.

Fort Wayne, Indiana. 1st run. 60 days clearance over 2nd run. 14 days clearance over Churubusco, Huntington, New Haven, Kendallville, Decatur, Columbia City, Garrett, Auburn, Bluffton, Albion, South Whitley and Hicksville, Ohio, providing played within 30 days after National release date. To be played at the rate of one per week as and if available starting approximatey September 1943.

Jersey City, New Jersey. Pictures to become available 7 days after completion of the first run New York City engagement. First run in Hudson County. 14 days clearance on all theatres in Jersey City.

Louisville, Ky. 1st run. 56 days clearance over subsequent runs. 14 days clearance over all towns within a radius of 25 miles. To be played at the rate of one per week, as and if available starting approximately 9/1/43.

New Bedford, Mass. 60 days over second run. 30 days over Fairhaven.

Providence, R. I. On release 21 days clearance over 1st run Pawtucket & Woonsocket; 30 days clear-
(1509)
ance over Empire, Columbia, Uptown and Liberty Theatres, Providence, also Centerdale, E. Providence, Mt. Pleasant, Riverside, Auburn and 50 days over Olympia Theatre, Olneyville, 30 days clearance over Hope Street Theatre, 1 day clearance over Wakefield, 14 days clearance over Palace-Arctic, Bristol, Warren, E. Greenwich, Foxboro, Mansfield and Attleboro.

Reading, Pa. 28 days clearance on all theatres in Reading. 7 days clearance on Pottstown, to play when and as available.

Richmond, Va. 1st run Richmond, Va. 45 days protection from last playdate, over all theatres in City of Richmond, Va., as available.

Utica, N. Y. 1st run—30 days clearance over subsequent runs in Utica, and within a radius of 15 miles of the Olympic Theatre.

Wilmington, Del. 1st run Wilmington, Del.—21 days clearance over all subsequent runs after second week.

Nashville, Tenn. 60-day clearance over second run."

Q. Now, in granting clearance to first-run exhibitors in the United States is there any distinction made by you between affiliated and independent exhibitors? A. No, sir.

Q. So far as you know, does every so-called first-run exhibitor take clearance over the theatres in his competitive area? A. They do.

(1509a)

Q. When you come to the second-run theatres, is there any distinction made as to affiliated or independent theatres in the granting of clearance? A. No, sir.

Q. So far as you know, do all the second-run theatres take clearance over subsequent-run theatres? A. I believe they do.

(1510)

Q. And in those towns where there are four runs, does the third run take clearance over the fourth run? A. Generally; and if you would go on to the seventh or eighth, it would be the same story. The fellow ahead wants his protection, he wants his clearance before the next fellow was going to play it.

Q. Now, Mr. Kupper, I want a word about the area over which clearance is granted. Do you know what the area of clearance is for the Music Hall or the Roxy? A. Well, the area varies. The Roxy and the Music Hall take a larger area than another theatre might take. They are palaces, they are show places, palaces, and by virtue of that alone they attract a greater attention and a greater public interest, and it naturally would spread out further than a small theatre.

Q. Now, the Roxy takes clearance directly or indirectly over all of New Jersey, does it not? A. I am not so sure that it takes all of New Jersey, but it takes it over a considerable part of New Jersey.

Q. It takes clearance over Newark? A. Yes, sir.

Q. And it gets clearance over all of the cities that Newark takes clearance over? A. Yes, that is right.

Q. It takes clearance to the east as far as Stamford? A. Yes, sir, it does, and out in Long Island, out through there; way out in Long Island it takes clearance over.

(1511)

Q. Do you know whether it takes it even over Suffolk County? A. I do not think it goes in through Suffolk County, but it does for Nassau County; I know definitely about that.

Q. Now, what is the justification for that extensive area of clearance? A. Well, first of all, they get a pretty good admission price, a much higher admission price than is generally paid by any other theatres in the country; and as I say, they are tremendous institutions, and they have been developed as such, just their appointments alone, and they generally have the first showing of a picture in there, they are entitled to that, and to get that; that is another means by which they can maintain that terrific high admission price, so we, in turn, can get a proper film rental, a film rental in keeping with the terrific costs that we have in production. Without being able to get that kind of revenue you would not be able to have that kind of pictures.

Q. Now, as to the extent in time of clearance, you testified, I believe, that the Roxy takes only 7 or 14 days clearance as far as time is concerned? A. That is what the contract specifies.

Q. I noticed in examining Exhibit 41 and 42 that in Baltimore the clearance is 21 days between first-run and second-run. A. Yes.

Q. Why should it be larger than it is between the Roxy

(1512)

and the Albee Theatre in Brooklyn? A. I will tell you, there is no rule of thumb on any of this clearance. It has all been worked out locally, and all these local conditions and the competitive situation have a lot to do with it; and each one is a separate problem of its own.

Q. It is also true, is it not, that generally speaking the periods of clearance are longer in the smaller cities than they are in the larger cities? A. That is correct.

Q. Is it true that the clearances in the middlewest, southwest, tend to be longer than they are in the east? A. Yes, much more.

Q. Why is that? A. Well, you know, the population isn't so great out there, and it is nothing uncommon for somebody in Oklahoma who lives maybe 40 or 50 miles away from Tulsa, Oklahoma, to drive in to see a picture. The form of amusement and entertainment is not like it is in a city like New York, or something of that nature; so they draw from a great area. They may be sparsely settled and may be small population, and the theatres that generally follow those are not such good theatres either, in those little communities, and they draw from them, naturally.

Q. Mr. Kupper, is it the practice in the motion picture industry for the distributor to grant clearance to a large town over theatres in a smaller town within a reasonable geographical area? A. Yes, especially if they are considered (1513)
competitive. And they generally are competitive.

Q. The theatre, the first-run theatre in the county seat down in Ohio or Missouri takes clearance over theatres in the smaller towns? A. Around that area, yes. It does not have to be a county seat. It can be a more important, a bigger situation, and it is going to take clearance over a smaller situation.

Q. Even though it is a separate political subdivision? A. Yes.

Q. A separate city? A. Yes.

Q. So you have the large showcase windows, like Roxy, taking clearance over a wide metropolitan area? A. Yes.

Q. Then you have clearance in each competitive area of the theatres over the other? A. Yes.

Q. And you also have clearance of the larger towns over the smaller towns? A. That is right.

Q. And was it the purpose of your company in 1940 in agreeing to Section 8 of the consent decree to create a

machinery whereby disputes as to the width of the area or the length of the time of the clearance could be settled by an outsider?

Mr. Wright: If the Court please, the decree speaks for itself. It is in the record. I do not think this witness's testimony as to its purpose adds anything.

Judge Hand: All right, I will sustain the objection.

(1514)

Q. Now I come to the problem of the selection of a customer: I believe you testified that in 1922 you went to Albany as branch manager? A. Yes.

Q. That was in the days of silent pictures? A. Yes, sir.

Q. When you got there was there a customer for Fox pictures already in existence? A. There was.

Q. Who was it? A. I think the man's name was Elliott, John Elliott. He had what was called the Clinton Square Theatre; it was an old church, renovated; an upstairs house, as a matter of fact. You had to walk up quite a flight of stairs, which is unusual for a theatre.

Q. How many first-run theatres were there in Albany in 1922? A. Well, I think there were three; maybe four. Four. I guess there were four.

Q. Now, what happened to Mr. Elliott's theatre? A. It was obvious it could not go on. It had to be torn down and rebuilt. He went out of business. He sold it and walked away from it.

Q. Then what happened? A. You mean with our product?

Q. That is right, Fox's product. A. We tried to get a new customer, and we did succeed in getting a new customer.

Q. Who was that? A. I believe we sold an independent fellow called Buckley, Chris Buckley. He had one and he

(1515)

acquired another theatre, Harmonis Bleecker Hall, and a theatre called Leland.

Q. How do they compare with the other theatres in the town? A. Well, the two houses were better, I would say, in those days that were owned by Moe Mark, the Strand, and I believe RKO or Proctor's had a theatre in there in those days, vaudeville and pictures.

Q. That was before RKO was formed? A. Well, before RKO; but Proctor's.

Q. Why didn't you sell your pictures to Proctor's or the Strand Theatre? A. I don't think we could. We tried, I know we tried to sell Moe Mark. I know I sold him my newsreels but I could not sell him my feature. I tried.

Q. He did not want to buy? A. No; he had enough product, product he liked better than mine.

Q. So you sold to Buckley and the Leland? A. That is right.

Q. Then what happened, if you recall? A. Well, later on Buckley, he sold his theatres to RKO—I think they were back in existence then—I think he sold them or made some sort of a pooling arrangement, and we continued supplying our product to them; and then—do you want me to go right on up to date?

Q. Yes. A. Then they made some sort of arrangement with a man called Fabian, who now operates the two the-

(1516)

atres up there, and I think he has got some arrangement with the two Warner houses; but the picture kept flowing right there, from the same customer, you might say, from the beginning, who just either pooled or sold it; but they went through those theatres; and we eventually got into better theatres by virtue of the development.

Q. And the customer whom you now offer your pictures to in Albany is the successor of Chris Buckley's operation? A. Well, we have a split of our product in Albany.

Q. Yes, I understand. A. I think we sell two-thirds to Mr. Fabian, who has the best house, incidentally, and one-third Warner's.

Q. But am I correct in saying that the customer that you now serve, at least the Fabian that you now serve, is the development right straight through from Chris Buckley? A. I would say that is the historical development right up to date.

Q. And generally speaking, has there been some such historical development in every city in the country? A. I would say so, yes, sir. I know as far as our company's pictures and product is concerned that is so.

Q. Now, without disparaging the product at all, in the early 1920s what was the relative standing of the Fox product? A. Well, it was not as good as some others and some were better than others. It was just one of those things. (1517)
We made a different type of merchandise. We made more of the action type, melodramatic type. We did not go in for the serious dramas in those days, although we had some. We did not have the star value that some of the other companies had. It might have been considered perhaps inferior than other products.

Q. And as you sold your product throughout the country were you able always to license it to the best theatre in the town? A. No, we were not.

Q. Or to get the highest terms from that theatre? A. No, sir, though we tried.

Q. Then what did you do with it? A. Sold it to the next best one we could sell, get our revenue back and make a profit for our company.

Q. Now, Mr. Kupper, it has appeared that many of these theatres in these larger cities play for at least one week. Are there any weeks of the year that are better than others in the motion picture business? A. Yes, sir, certainly there are. Any week that has got a holiday is better than any other week or some other weeks that have not got a holiday:

Q. And is the week that contains Columbus Day better than the succeeding week? A. If it does not have a holiday, yes, certainly.

Q. And if you have a picture of high quality, do you (1518)
attempt to secure bookings for that holiday? A. If it is released then, I do. I attempt to get the best time for every picture, but particularly when there are holidays I go out to get that, plenty of time in advance. I want to be protected. In other words, I want now to be set up for Christmas, not only Thanksgiving but Christmas. I am looking ahead for that week.

Q. There are none of your rivals in the courtroom, are there? A. Well, they are doing the same thing.

Q. Are there certain weeks in the year to be avoided? A. Yes, sir, definitely. Holy Week and the week before Christmas. They are two outstanding weeks to keep away from.

Q. And do you try not to have your better pictures shown those weeks? A. I try to and I avoid it if possible.

Q. Now, in the theatres which change twice a week, is there such a thing as preference as to what part of the week you will play? A. I have a preference.

Q. What is that preference? A. It is the weekend playing time, Saturday and Sunday playing time.

Judge Hand: We have had this and had this. What good does it do to keep repeating this?

Mr. Caskey: Well, the purpose of repeating it is that the charge is conspiracy and a combination to restrain trade; and each of us in the absence of some (1519)
concession from the plaintiff is under a duty to show that far from restraining trade we compete for it. I realize that it must have a very familiar sound by now.

Judge Hand: It certainly does.

Mr. Caskey: It is third-run, I realize, but it is equally true. And if you will recall just a few moments ago when I tried to get a concession, Mr. Wright too refused to make it as to the affiliated theatres. He still contended that the playing time instead of being competed for was divided or arranged in some manner that I do not quite comprehend. That is the reason and the only reason for the inquiry. If we have any limitation of issues, why, we can limit the examination.

Judge Hand: Go ahead.

By Mr. Caskey:

Q. Now, Mr. Kupper, does this competition or this seeking of preferred time apply in the cities in which National Theatres operates as to Fox product? A. Certainly it does.

Q. Do you attempt to get from the theatres of National preferred playing time? A. I attempt and I fight for it.

Q. And you get it? A. Not always. Sometimes. But I fight for it.

Q. Now, does the effort to get preferred playing time occur in the cities in which one of these defendants has all (1530)
of the theatres? A. Yes, sir.

Q. Does it occur in the cities in which more than one of the defendants operate? A. Yes, sir.

Q. Is there any distinction? A. No distinction whatever.

Q. And does it apply in theatres where your customers are so-called independents? A. It certainly does apply. It applies everywhere. I want important playing time and preferred playing time every time I can get it and as often as I can get it.

Q. And does the amount of preferred playing time that Mr. Friedl will give you in Minneapolis have any relation to the amount of preferred playing time that Mr. Fitzgerald will give the Paramount in Milwaukee? A. I would say none whatever.

Q. Did you ever hear of the suggestion before? A. No.

Q. In seeking preferred playing time from the Loew theatres in Columbus, is it measured by the preferred playing time which a subsidiary of National gives the Loew product in Los Angeles? A. I never heard of it being and never thought it was, and never knew it could be.

Q. It has never been discussed? A. Never.

Judge Hand: How much more have you got for this witness?

Mr. Caskey: Oh, considerable.

Judge Hand: All right. We will adjourn until tomorrow at 10.30.

(Adjourned to October 30, 1945, at 10.30 a.m.)

(1521)

New York, October 30, 1945, 10:30 a.m.

Trial resumed.

Mr. Whittlesey: If your Honors please, before Mr. Caskey continues with his witnesses, there is a development in the case of the RKO defendant which I felt I should advise the Court about at the opening of court. We are scheduled to go on with our witnesses immediately following the conclusion of the testimony for Fox. I understand that Mr. Caskey expects to finish some time today with his witnesses. Mr. Leisure, who is to conduct the defense for RKO, advises me this morning that he is in bed with a fever of 101 and will not be in a position to go ahead today, but hopes to be by tomorrow. So if it becomes necessary for us to go ahead today, I am afraid we will have to ask the Court's indulgence for a little more time.

WILLIAM J. KUPPER, resumed the stand.

Direct Examination Continued by Mr. Caskey:

Q. Mr. Kupper, I want to dwell for a moment on this subject of simultaneous first-run exhibitions throughout the country.

(1522)

(Defendant Fox's Exhibit F-12 for identification marked.)

Q. I hand you a schedule which is marked Defendant's Exhibit F-12 for identification, and ask you what that contains? A. It is the film rental that we earned on a picture

called a Tree Grows in Brooklyn, which played first-run and extended engagements in the 92 cities with a population of more than 100,000. It shows the exact revenue, it shows the percentage of the revenue.

Q. Does it show for each city the exact play dates when the picture played first-run in those cities? A. Yes, it does.

Q. If there was a move-over or carry-over, does it show the dates of that exhibition? A. It does.

Q. And the name of the theatre? A. The name of the theatre.

Q. Then it shows the precise film rental received? A. Right.

Judge Bright: Is this all first-run?

Q. Mr. Kupper, this is first-run only? A. First-run showing only.

Q. In the 92 cities with a population of 100,000 or more? A. That is correct.

Q. On the front of it is there a recapitulation of the revenue? A. Yes, sir.

Q. How much do you anticipate the total revenue from (1523)
all exhibitions in the United States in all theatres will be? A. $3,375,000—slightly better.

Q. How much has actually been received? A. As of the week ending October 13th—15th, I think it is.

Q. 13. A. 13, we have received $3,175,554.

Q. In the regular course of your business are you able to estimate the amount of additional revenue which will be received after October 13th? A. Yes, sir.

Q. And you estimate that as how much additional? A. About $200,000 more.

Q. In the aggregate, how much revenue was received from the first-run theatres in the 92 cities? A. $966,894.45.

Q. That is what percentage of the total anticipated domestic revenue? A. 28.62 per cent.

Q. That is slightly more than one-quarter of the total revenue you expect to receive? A. That is correct.

Q. Turn over to New York, and tell me how much revenue came from the Roxy Theatre? A. The Roxy Theatre opened its engagement on February 28th and played through April 10th, a period of six weeks. Our total film rental for that engagement was $175,300.

Q. Lumping the exhibition at the Roxy Theatre with the exhibition in those theatres operated by National, which played first-run, what was the total revenue received? It is on the recapitulation. A. I think it says it here, $416,704.15. (1524)

Q. What percentage of the National anticipated revenue is that? A. 12.34.

Q. The Roxy is sold separate from the subsidiaries of National, is it not? A. Yes, sir.

Q. How much of the revenue was derived from the first-run theatres operated by Loew? A. $72,919.18.

Q. That is what percentage of the National anticipated gross? A. 2.16 per cent.

Q. How much of it was received from theatres which are affiliated with RKO? A. $40,192.43.

Q. What percentage of the national anticipated revenue is that? A. 1.19.

Q. Treating together the various theatres in which Paramount has an interest, except those located in Oklahoma City, how much revenue was derived from those theatres? A. I think you also want to exclude Butterfield, too.

Q. Excluding the Butterfield circuit? A. $191,178.58. (1525)

Q. And treating that together for the purpose of this discussion, what percentage is that of the national revenue? A. 5.66 per cent.

Q. Now, what did you receive from the theatres in Oklahoma City? A. You are referring to Standard Theatres?

Q. Yes. A. $4,230.45.

Q. Who operates those theatres? A. Joseph Cooper. Standard Theatres Company.

Q. And what percentage of the national revenue was that? A. Less than one per cent, .12.

Q. 12/100ths of 1 per cent? A. That is right.

Q. Now, what did you receive from the Butterfield Circuit? A. $6,813.46.

Q. And what percentage of the national revenue was that? A. .20.

Q. 21/100ths of 1 per cent? A. That is correct.

Q. Now, what revenue did you receive from the Skouras Theatres that operate first-run in the 92 cities? A. $19,467.14.

Q. And that is what percentage? A. 57/100ths of 1 per cent.

Q. And then the Warner Theatres? What amount of revenue? A. $56,172.58.

Q. And what percentage is that? A. 1.66.

Q. And how much did you receive from first-run theatres (1526)
in which the defendants have no interest? A. $159,216.48.

Q. And what percentage was that? A. 4.72.

Mr. Caskey: I offer the schedule.

Judge Bright: Mr. Caskey, may I inquire just what the point of that particular exhibit is?

Mr. Caskey: As I understand it, sir, there is a charge of monopolization of the first-run theatres in these 92 cities, and the point of this exhibit is that the first-run revenue which we received from the theatres operated by the four co-defendants is only 11 per cent of our total revenue, the minimum.

Mr. Wright: We have no objection, providing, I take it, the whole exhibit here is being offered, not just the items you are questioning him about?

Mr. Caskey: The whole exhibit, yes.

Mr. Wright: No objection.

(Defendant Twentieth Century-Fox's Exhibit F-12 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification, please.

(Marked Defendant Twentieth Century-Fox's Exhibit F-13 for identification.)

Mr. Caskey: May I have your Honors' leave to have the stenographer copy the recapitulation into
(1527)
the stenographic minutes?

Judge Hand: Yes.

(Recapitulation referred to is as follows:)
(1528)

FILM RENTAL "TREE GROWS IN BROOKLYN"

FIRST RUN AND EXTENDED ENGAGEMENTS

92 CITIES WITH MORE THAN 100,000 POPULATION

RECAPITULATION

	REVENUE	% FIRST RUN REVENUE	% U. S. GROSS AT OCT. 13	% OF ESTIMATED U. S. GROSS
PARAMOUNT AFFILIATES	$191,178.58	19.77	6.02	5.66
SKOURAS THEATRES	19,467.14	2.01	.61	.57
NATIONAL THEATRES (Including Roxy-N.Y.C.)	416,704.15	43.11	13.12	12.34
LOEWS	72,919.18	7.54	2.30	2.16
WARNER BROS.	56,172.58	5.81	1.77	1.66
STANDARD THEATRES (PARAMOUNT-WARNER)	4,230.45	.44	.14	.12
INDEPENDENTS	159,216.48	16.47	5.01	4.72
R.K.O.	40,192.43	4.15	1.26	1.19
PARAMOUNT PUBLIX and R.K.O. (BUTTERFIELD)	6,813.46	.70	.22	.20
GRAND TOTAL	$966,894.45	100%	30.45%	28.62%

TOTAL FILM RENTAL TO OCTOBER 13, 1945 U. S. ONLY $3,175,554.00

ESTIMATED FILM RENTAL TO END OF LIQUIDATION PERIOD U. S. ONLY $3,375,554.00

(1529)

By Mr. Caskey:

Q. Mr. Kupper, have you caused to be made up a chart showing the days when "Tree Grows in Brooklyn" played first-run in the 92 cities? A. That is right.

Q. And that was made up from the data which is contained on Exhibit F-12? A. Yes, sir.

Q. I show you these four sheets marked Defendant's Exhibit F-13 for identification, and explain to the Court what it is. Just stand up and explain it. A. Well, it shows, as I mentioned, the opening date at the Roxy Theatre, which was March 28——

Q. February. A. It says March—I beg your pardon, February 28; and runs through the period to April 10th. Now, that was the first engagement we had, that opening date; and, incidentally, on every one of these sheets it will show all the other towns, giving their opening date. For example, the next line here following New York, the New York engagement, shows that in Chicago we opened the picture on March 17th and ran through April 25th.

Incidentally, in Boston it shows we opened the picture on March 15 and played through the 28th.

The next town shows New Orleans, we opened the 12th of April and played through the 20th. But what this shows is that while New York had started on the 28th of February, while it was showing there it also opened in Chicago, as I

(1530)

mentioned, on the 17th; and while it was playing in New York it also opened in Boston. It did not open on the exact same opening date as it did in New York, but it opened a few days later, or a week or so later. In Minneapolis it opened on the 16th, and so on down; in each town it shows

the opening date; and a great many towns were playing it while it was being played in New York.

Q. And wherever you draw a straight line down, each one of the red spaces it hits it shows a sumultaneous exhibition? A. Yes.

Judge Bright: These were all first-run?

The Witness: Yes. There are 92 towns that are mentioned in this complaint; and it is the history of the opening date and the sequences in which it played in those towns.

Judge Bright: Is that particular picture, Tree Grows in Brooklyn, a typical picture?

The Witness: Yes.

Judge Bright: Ilustrative of this situation?

The Witness: I would say so, yes. And that is an important picture.

Q. And by the first week of April 30 or 40 cities were playing the picture simultaneously? A. I did not count them up, but I can quickly. I would say so; about that many.

(1531)

Q. And some of the theatres which were exhibiting the picture at the same time that it was playing in New York were affiliated with the defendant Paramount on the first list? A. Yes, sir.

Q. And some with Loew's? A. Yes, sir.

Q. And some with independents? A. Yes, sir.

Judge Bright: Have you marked those that were played with independents?

The Witness: It is very easy. It can be marked.

Mr. Caskey: Well, let us do it right now.

Q. Pittsburgh. A. Independent. I will just put it alongside the name of the town.

Judge Bright: Put "Ind."

The Witness: Yes.

Q. Richmond. A. Independent.

Q. Miami. A. Independent.

Q. Norfolk. A. Independent.

Q. Trenton. A. Independent.

Q. Camden. A. Independent.

Q. Erie. A. Independent.

Q. Wilmington. A. Independent.

Q. Reading. A. Independent.

Q. Utica. A. Independent.

Q. New Bedford. A. Independent.

(1532)

Q. Fall River. A. Independent.

Q. St. Louis. A. Independent.

Q. Akron. A. Independent.

Q. Canton. A. Independent.

Q. Tulsa. A. Independent.

Q. Louisville. A. Independent.

Q. Indianapolis. A. Independent.

Q. Gary. A. That is not shown here. It is not specified. I do not know what the date is. It is left blank.

Q. Fort Wayne. A. Independent.

Q. Baltimore. A. Independent.

Q. Providence. A. Independent.

Q. Tacoma. A. Independent—independent, definitely.

Mr. Caskey: I offer Exhibit F-13 for identification in evidence.

Mr. Wright: I have no objection.

(Defendant Twentieth Century-Fox's Exhibit F-13 for identification received in evidence.)

Judge Hand: There was no such chart offered for Paramount, was there?

Mr. Caskey: Showing the Paramount theatres?

Judge Hand: Yes.

Mr. Caskey: Yes——

Judge Hand: No, I mean by Paramount.

(1533)

Mr. Seymour: No.

Judge Hand: Mr. Seymour says no.

Mr. Seymour: There was no such chart. But you will remember the testimony which was based upon an exhibit not showing the simultaneous first-runs, but the fact that Paramount Pictures were furnishing first-runs in a number of cities to independent exhibitors.

Judge Hand: Oh yes. I remember that. I should think it would be a good thing for the different defendants to have such a chart. It would be easy enough to get it up.

Mr. Seymour: If your Honor is interested in that we will do that.

Judge Hand: Mr. Caskey has got it here, and we can compare them.

Mr. Proskauer: I did not exactly get your Honor's suggestion.

Judge Hand: Well, I thought it might be well to compare these first-runs with independents and with the defendants. Mr. Caskey has introduced this chart. Nothing was introduced of that sort—that is, no chart like that—by Paramount. I suggest that it might aid us to have such charts introduced by the various defendants.

Mr. Davis: May I see Mr. Caskey's chart there, please?

(1534)

(Chart handed to Mr. Davis.)

Mr. Davis: Your Honor will remember that Loew's introduced a chart showing the derivation of revenue

on the typical film "As Thousands Cheer" showing how much of the first-run came from the defendants and the independents, and so on; but this chart, I take it, is a chart of time, not revenue; isn't it, Mr. Caskey?

Mr. Caskey: Yes, sir.

Mr. Davis: We shall be very glad to duplicate this.

Judge Hand: Of course, it is up to you whether you think it is worthwhile. I cannot remember very much of the details in this case. It is a complicated sort of case as to what has passed, and I certainly cannot foresee what is coming. I merely made this suggestion.

Mr. Davis: This is very easily done. We would be glad to do it.

Judge Hand: If you all made similar charts we could compare them.

Mr. Davis: I can see how that might save some confusion here. I may say that for our side—and I do not say this by contrast with any of my brothers—I am studiously endeavoring to compress the case I want to present into the smallest possible compass.

Judge Hand: Yes. Are you going on when Mr.
(1535)
Caskey finishes.

Mr. Davis: I won't be ready to go on immediately; but I will say that at the moment it is not my intention to call any other witnesses, but I have some documentary matters which I shall want to present. While, as I say, I do not expect to call any witnesses, I have a stipulation which I shall offer to Mr. Wright when I have completed it as to the testimony of a witness if he were called.

Judge Hand: Yes.

By Mr. Caskey:

Q. Mr. Kupper, returning for a moment to the subject of clearance, who determines the length of the clearance to be granted a prior-run exhibitor? A. Well, we determine that.

Q. And who determines the length to be granted to each succeeding run? A. We determine that.

Q. Who determines the area of the clearance? A. We determine that.

Q. Is clearance something that is sold? A. It is part of your negotiations; a definite part.

Q. Now, Mr. Kupper, it appears in evidence that subsidiaries of National Theatres Corporation licensed pictures from the defendants in this case. What are the National Theatres? A. The National Theatres are a company operating a lot of theatres that I assume belong to our company, (1536)
Twentieth Century-Fox.

Q. At one time it was known as Wesco? A. As Wesco.

Q. And one of its principal subsidiaries is Fox West Coast Theatres? A. Yes.

Q. The president of National Theatres is who? A. I thought Charles Skouras was president.

Q. Now, it appears in evidence that National Theatres licensed pictures, or its subsidaries do, for exhibition in their theatres from Loew's. Do you have any knowledge of the terms upon which those subsidiaries license pictures from Loew's? A. No, I do not.

Q. It appears that subsidiaries of National license pictures for exhibition in their theatres from Warner's. Do you have any knowledge of the terms under which those pictures are licensed? A. I do not have.

(1537)

Q. Likewise it appears that they negotiate and license pictures from RKO. Do you have any knowledge of the terms of those agreements? A. I do not have.

Q. Likewise it appears that those subsidiaries license and exhibit pictures of Paramount. Do you have any knowledge of the terms upon which those pictures are licensed? A. I do not have. However, it has been inferred to me that Paramount makes a different kind of deal than I make.

Q. In the course of the preparation for this performance, you have read Mr. Reagan's testimony? A. Yes, sir.

Q. When you negotiate a license of Fox pictures to Loew's, to the Loew's theatres, do you attempt to secure the same term as subsidiaries of Loew's pay Fox? A. I don't know what their terms are. How could I attempt? I attempt to sell my merchandise for the best price I think it is possible to get, not only with Loew, but with anybody else.

Q. It appears in evidence, Mr. Kupper, that you license the Fox pictures to Loew's for first-run exhibition in Worcester, and it appears in evidence that Loew's licenses to a subsidiary of National the Loew pictures for first-run exhibition in Milwaukee. Do you attempt to match those deals? A. No, sir. How can I match them, if I don't know what they are.

Q. Do you trade screen time in Milwaukee, which Na-

(1538)

tional gives Loew's, for screen time in Worcester, which Loew's gives you? A. No, sir.

Q. Is the length of time which a picture will play in a first-run theatre of Loew's in Worcester conditioned upon the length of time which National will play a Loew picture? A. Not to my knowledge.

Q. Have you ever conditioned it? A. I have never, no.

Q. Have you ever discussed the subject with any buyer of motion pictures for Loew? A. No, sir. In fact, I don't

know how long many of Loew's pictures play, or any of them. I don't watch how they book their pictures. I only watch how we book ours and see that I get as much playing time as possible in all situations.

Q. It has been suggested here that there is an exchange of screen time between the defendants. Have you made any such exchange? A. Never.

Q. Have you ever made any attempt to secure from Loew's for exhibition of the Fox pictures, approximately the same number of dollars that National subsidiaries pay to Loew's for the exhibition of Loew pictures? A. No, sir, and again, I never knew what they do. I don't know the dollars. All I was concerned about was getting as much revenue for my pictures as those theatres could afford to pay.

Q. Turning to Warner Bros., it appears in evidence that (1539)
you license the first-run of your pictures for exhibition in Cleveland to Warner Bros., and it appears in evidence that a subsidiary of National licenses Warner Bros. pictures for exhibition in its theatres in San Francisco. Are those two deals traded off against each other? A. No, sir.

Q. Is the screen time which you will receive from Warner in Cleveland matched by the screen time which National will give Warners in San Francisco? A. No, sir.

Q. Warners have a picture, I think, called Christmas in Connecticut. Do you attempt to sell a picture like A Tree Grows in Brooklyn to Warners for the same dollars, same terms that National buys the picture from Warners? A. No, I do not. We sell our pictures to Warners, they are on percentage, and I don't know what dollars it is going to bring until the engagement is over, and I don't know how Warners sell their pictures to the other people.

Q. Do you match off top grossing pictures against top grossing pictures? A. No, sir.

Q. Do you say to Warners, "If you will buy A Tree Grows in Brooklyn at 40 per cent of the gross, National will buy a Bette Davis at 40 per cent of the gross"? A. No, sir.

Q. Any such conversation occur? A. No.

Judge Hand: What is the use? This is nothing
(1540)
but reiteration of his generalizations.

Mr. Caskey: I think I can condense it then.

Q. If I ask you the same questions with regard to RKO and Paramount, would your answer be the same? A. It would.

Q. Now, Mr. Kupper, who negotiates license agreements on behalf of Twentieth Century-Fox? A. Well, our salesmen, our managers, our sales managers, our district managers.

Q. General sales manager? A. General sales manager.

Q. Mr. Connors? A. Mr. Connors.

Q. Are the customers allocated among those various individuals? A. Well, I wouldn't say they are allocated. Each salesman—let us review it from the salesmen on—each salesman has a given geographical territory in his branch and he is responsible for the negotiation and sale of our product there. I would say this, that beyond that point we would try to have the salesman or the sales manager or the branch manager, who is best fitted and perhaps has the best standing or acquaintance with an individual account, to negotiate. He has the better prospect and probably could do better. He lives with the situation, probably more intimate.

Q. Is it your endeavor to have the particular sales representative, whatever his position in the hierarchy, deal with
(1541)
the exhibitor whom you think can accomplish the best results? A. That is the general rule.

Q. I wish you would turn to the weekly schedule of revenue. Have you got the one there for the week ended October 13th? A. No, not with me. I got one over there (indicating).

Mr. Wright: Is this a proposed exhibit?
Mr. Caskey: No.

Q. During the week ended October 13th, what number of billings did you have in the aggregate on the 1945-46 product? A. 1,642.

Judge Bright: What do you mean by billings?
The Witness: You want me to answer that?
Judge Bright: Yes.
The Witness: Well, a billing is made from a booking or a run that has played that picture during the week. In other words, on the first picture there, there were 293 runs that played the picture, and they were billed. The billings come through and they are tabulated by our tabulating department which gives us an analysis of where this revenue comes from.

Q. During the same week, how many billings were there on the 1944-1945 product? A. 4,547.

Q. How many during that same week on the 1943-1944 product? A. 492.

(1542)

Q. The aggregate of those three figures is the number of theatres in the United States that played a Twentieth Century-Fox picture during that week? A. May not be all. There may be some more, some prior products, which we could have in our branches, which accumulated and work out. We don't take every picture out of release until it is worn out.

Q. But at least that number of theatres played a Fox picture during the week? A. That is correct.

Q. Turn to the 1944-1945 sheet and take the pictures that have been in release for about twenty weeks, and give us the number of billings during the week? A. Well, that is one,

22 weeks, say, a picture called Bullfighter; it is a comedy with Laurel and Hardy. 314 bookings.

Q. That means that 314 theatres played that picture during that week? A. That is what it means. The next one is 21 weeks, picture called Diamond Horseshoe, 402 bookings.

The next one is a picture called Where Do We Go From Here, 17 weeks in release, that particular week played 419 bookings.

Q. Turn to the 1945-1946 season. How long has A Bell for Adano been out? A. A Bell for Adano has been out for ten weeks. This is a little blurred, but I think it is ten weeks. It played during that week 293 bookings.

Another picture came out simultaneously with that (1543)
called Junior Miss, ten weeks of release, played 281 bookings.

Q. Just to emphasize it again, each one of these billings is the number of theatres in the country playing that picture during that week? A. That is right.

Q. Approximately what is the cost of a black and white print? A. You mean positive print?

Q. Positive print. A. Oh, around $150, somewhere in that neighborhood. It depends a lot on the length of all pictures what the cost will be, but somewhere in that neighborhood.

Q. Are war restrictions off now on the number you can print? A. Yes.

Q. How many do you print of a top picture? A. Right now I believe we are printing close to 350, if not 350, but not of all pictures. That is top pictures.

Q. What did you get down to during the war? A. Well, I think 285.

Q. That was the maximum on any picture? A. Yes, sir.

Q. What is the cost of a sepia print? A. That costs more. You are talking about technicolor?

Q. No, I am talking about brown. A. That costs more. I don't know the exact cost but it is a greater cost than the plain black and white.

Q. What is the cost of the Technicolor print? A. Well, (1544)

it runs, as I testified yesterday—a picture costs $344 and some odd cents to as high as—depending on the length again —$750, $800.

Q. Technicolor prints are produced by a corporation in which Fox has no interest? A. That is right.

Q. The laboratory is in—— A. In California.

Q. And it is operated by people with whom you have no interest? A. Yes, sir.

Q. How are the prints allocated among the country? A. You want me to give it to you by branch?

Q. Have you got that allocation there? A. Well, I have the approximate allocation in various degrees. I can give it to you roughly.

Q. Will you give us the allocation? A. Yes. I have here an allocation of when we had 329 prints, which were top subjects, making a few more now, we allocated originally for New York 22 prints; Philadelphia 14 prints; Pittsburgh 10 prints; Washington 9 prints; Albany 5 prints; Boston 14; Buffalo 6; New Haven 4; Atlanta 15; Charlotte 8; New Orleans 7; Dallas 14; Memphis 5; Oklahoma City 5; Chicago 11; Detroit 7; Milwaukee 6; Cincinnati 9; Cleveland 8; Indianapolis 7; Des Moines 6; Minneapolis 11; Omaha 5; Kansas City 10; St. Louis 10; Denver 6; Salt Lake 6; Los Angeles 14; Portland 4; San Francisco 10; Seattle 4.

(1545)

Q. How do you determine what number to allocate to each exchange? A. Well, we know what the prospects are in each situation. We have had these exchanges in operation a long time. We know what contracts we have had in the past. And we figure out and know about how many book-

ings a print can take, which generally averages I think with us around 45. That is not showings, that is bookings. Some bookings are a week, three days, two days, some two or three weeks, but we average them out as that many bookings. We also keep a number of prints as we call, in the home office in reserve, which we send around and use where they are needed in an emergency, or to start getting things rolling. For instance, New York, after you play your first-run, and then plays its run at the Albee Theatre, a great number of theatres then come in what we call New York City, then RKO theatres play simultaneously, so we have to have prints in reserve, so we call them in from branches to take care of those bookings in addition to the regular allotment of 22 that New York has. So let us assume they got all those 55 prints, or, approximately, say 40, if they only got 40, then they would be operating 62 or 65 prints, something like that at that particular time, and that would go on for a period of a few weeks. Of course, Brooklyn, the next place after New York plays, they start off the same way and so on. There

(1546)

are other cities like that too. When the product comes after the first-run, that is, clearance for the subsequent runs following, there may be some cities that may have five or six houses that might play seven-day runs. They all have to be supplied. Well, that branch's particular allotment there may not be able to take care of it, because they may play pictures out in the country, in the country area, I mean important towns but they are in the country area, so we have to be able to draw on our supply and help them during those periods, and that goes on in many cities.

Q. How do you determine the number of prints that you will manufacture? A. Well, that is, as I say—years ago we did not make this many, but as our business grew and our product grew, and we have studied the situation, we have

come to the conclusion that this is enough prints for us to handle our business, and I mean enough to be profitable to handle the business.

Q. I am reminded that when I asked you yesterday about the clearance which the Roxy Theatre took over metropolitan New York, I forgot to ask you whether on those pictures which you licensed the Music Hall, you granted the Music Hall the same clearance? A. I believe it is the same.

Q. Prior to the Consent Decree, did Fox license its pictures under franchises? A. We had some franchises, yes. (1547)

Q. What is a franchise? A. A franchise is a—after the negotiation is made, it is reduced to a franchise term and it is for a period of more than one year—some franchises for two, three, five years, some higher, ten years. It is a contract for a period beyond one year.

Q. Are many franchises in existence today? A. No, sir.

Q. For Fox? A. No, sir, not today.

Q. It is in evidence that Fox made a franchise in 1932 with the operator of the Capitol Theatre in Washington at or about—I have forgotten. What were the circumstances of the making of that franchise, if you remember? A. Fox had that at one time, in fact they built it, or had it built, or leased it from some company, or an affiliate of theirs, and we were in difficulty, at least our company, our theatre company was in difficulty, and they decided to lease it to Loew. In fact they were very bad times and we weren't doing good, the company was in trouble, and I think we had a lot of money, perhaps, up on lease, as I have been told, probably a quarter of a million dollars, and a quarter of a million dollars in times when we were having trouble, in difficult times, was a lot of money to help pay the help, so they made a lease with the Loew people to take over and operate the theatre. They were—they got the theatre, let us put it that way, and in making that lease we worked out a franchise that our pictures would continue to play in that theatre.

(1548)

Q. That franchise insured Fox that its better pictures would continue to play in that theatre? A. That is correct.

Q. It has been testified here that that is the best theatre in Washington. A. I think it is the largest and one of the best, if not the best.

Q. It is a very large, de luxe theatre? A. Yes.

Q. Did your company also make master agreements? A. We have had some master agrements.

Q. What is a master agreement? A. Well, a master agreement is a written document of a lot of the negotiations that were made in a deal that were reduced to writing and became part of the contract—became a contract.

(1549)

Q. Was the uniform or standard printed contract made a part of those master agreements? A. I believe they were in all cases.

Judge Goddard: I don't quite understand what a master agreement is.

Q. Describe it, Mr. Kupper.

Judge Bright: When was the first one made?

Q. (Continuing) Give us some specific example.

The Witness: The first one I ever made, your Honor, was with the buyer or the agent for Warner Bros. Circuit, and that took in quite a number of theatres, we negotiated over quite a period of time, and it was their idea that we ought to have something more than just what we had on our printed form and have it all reduced, so it was understandable. I remember we argued over points sometimes weeks before it was reduced to writing, so there would be no misundertanding. And that was the part of the whole

contract. As I say, it was all written up. It was a deviation and they would not accept just the regular form, I suppose, and they wanted something different, but, by the same token we also included and had it as a part of this that wherever there is any difference, I suppose, the master agreement would prevail or be the thing that was worked from.

Judge Goddard: Was there a master agreement in all cases or only in exceptional cases?

(1550)

The Witness: No, they were exceptional cases.

Judge Goddard: What is the reason for a master agreement?

The Witness: I could never understand any reason for it. Some buyers for some theatres, particularly Warner—I remember the man, Lakinson. I think it was his brain child, some new idea that he wanted to be built up. That is the first I ever came in——

Q. It is an agreement relating to a number of theatres, is it not? A. That is correct.

Q. Where the exhibitor has a number of theatres? A. That is right.

Q. And where you agree upon certain uniform terms for each of those theatres? A. That is right.

Q. For example, you agreed that the cost of a double feature not to exceed some specific amount may be deducted before computing the percentage? A. Those matters were all in there, yes.

Q. Or that the exhibitor might preview the picture on Saturday nights? A. That is correct, and beyond that it was used—then we made a deal sheet of what we agreed to on each individual situation, and rather than go through all of that for each house and put it up on each individual separate blank form, it was decided to put all these forms

(1551)

on these few, four or five, sheets of paper, whatever it was, that was to govern all of them. That is the principal thing beyond what the actual negotiated terms were for the picture in each house.

Q. Did you make those with independents? A. I think we did. I think we had a couple, but I am not positive. We had very few master agreements.

Q. Do you still make master agreements? A. No, I do not believe we do. In fact, I am sure we do not.

Q. Mr. Kupper, you have told us on several occasions about the New York situation. The Twentieth Century-Fox has an interest in Roxy Theatre? A. Yes, I understand they have a definite interest.

Q. And since 1937 you have licensed Fox pictures to it? A. That is right.

Q. What advantage has there come to Twentieth Century-Fox from exhibiting its pictures in the Roxy Theatre? A. Well, a great deal. It is a definite home for our pictures. It is our show window in this particular area and sometimes it reflects itself throughout the country, depending on when the picture plays.

Q. What picture are you currently playing? A. We are playing "The House on 92nd Street," in its fifth week. It terminates tonight, close of today's exhibition.

Q. Has that picture any nationally known stars in it?

(1552)

A. No, sir, it has not.

Q. Is it a picture made from any—— A. I would say there are names that are known nationally, but they aren't what you would term great box office stars.

Q. Betty Grable isn't in it? A. Oh, no.

Q. Is it made from any nationally known book or magazine article? A. No.

Q. What will the benefit be to Twentieth Century-Fox from the exhibition of that picture for five weeks in Roxy's? A. Well, first of all, I know it is definitely throwing off a terrific rental right from that theatre. Secondly, I know that the exploitation that was given it has gone clean around through this country. It has been surprising, the newspaper campaigns and the radio campaigns; and all the columnists have taken it up, they have studied it and have seen it. And it has sold that picture not only in New York but throughout the country not only to the exhibitors, but also to the public. They have heard of it, in other words.

Judge Bright: The appeal of that picture is not based on the stars that are in it?

The Witness: No, sir.

Judge Bright: Is it on the subject matter?

The Witness: On the story, yes, sir. It is intriguing and it holds you.

Judge Bright: That is about F. B. I. work?

(1553)

The Witness: It is a story about something——

Q. Is five weeks a long engagement in Roxy's? A. Yes, it is. Pictures don't all play five weeks there. Five weeks, I would say, is a good engagement at the Roxy, very good.

Q. In Kansas City, Missouri, where do the Twentieth Century-Fox pictures play first-run? A. Well, we play in two theatres day and date in Kansas City, Missouri, one theatre the Esquire, which is a downtown house, and it is a bandbox type of house, it is a small theatre, but it is well appointed, and we also play at the Uptown Theatre, which is a fine theatre, but it is in more of a residential district, it is away from the downtown business area. That is a large theatre.

Q. Simultaneously with those two theatres do you also play a third theatre? A. Yes, we do, but that is not in Kansas City. You asked me Kansas City, Missouri.

Q. Where is that located? A. It is right outside of Kansas City, across the border from Kansas City, out of the city environs.

Mr. Wright: May we have the name of that one?

The Witness: Fairview.

Q. Fairway, isn't it? A. Yes, Fairway.

Q. In the 14 cities other than Kansas City in which National has first-run theatres, and that is Spokane, Seattle,
(1554)
Portland, San Francisco, Oakland, Sacramento, Los Angeles, Long Beach, San Diego, Wichita, Denver, Kansas City, Kansas, Milwaukee and Detroit, do you license Twentieth Century-Fox pictures first-run to the National Theatre subsidiary? A. We do.

Q. And is the theatre in each of those cities in which the Twentieth Century-Fox pictures play either the best theatre in the city or comparable to the best? A. I would say yes in all cases, possibly with the exception of Kansas City, which I explained to you a minute ago. Downtown Kansas City we haven't got as large a theatre but it is a well appointed house, but between the two, the combination, I mean, the simultaneous run and showing, we have good representation. However, I don't believe it could throw off as much money as Paramount Theatre downtown, as an example, not as much, but the combined thing is not as good, but we have a very satisfactory engagement, arrangement for our product in Kansas City, I believe.
(1555)

Q. Now, in the other 14 cities that I read off, what is the situation? A. Well, in my opinion they are as good if not

better than any of the opposition. Certainly in most of them they are much larger.

Mr. Caskey: During the examination of Mr. Rodgers I had marked for identification and offered these beautiful photographs. They were objected to by Mr. Wright, and I have no desire to go contrary to your Honors' desires in the matter. We can illustrate the case by putting in pictures of the theatres in the 16 cities; but if Mr. Wright objects why, we will abide by the ruling.

Mr. Wright: It is just as objectionable now as they ever were.

Judge Hand: All right.

Mr. Caskey: I shall make the formal offer, and I shall ask the clerk to change the markings from F-A, F-B, F-C and F-3 to F-1, 2, 3 and 4 for identification.

(Markings changed as indicated.)

Q. Now, Mr. Kupper, whom do you license first-run in Boston? A. We split our product in Boston. We license two-thirds to what is known as the M. & P. Circuit, which is an affiliate of Paramount, and one-third to RKO's theatres.

Q. What is the character of the Metropolitan theatre? (1556)

A. Oh, it is a very beautiful, large theatre, well appointed. It is a palace, you might say, one of the best in the country.

Q. Of the pictures which you license to M. & P., are the best pictures played in the Metropolitan? A. Yes, sir.

Q. And from the Metropolitan are they moved over? A. They are moved over to the Paramount and Fenway; and also the Paramount and Fenway play some first-runs that are perhaps not suitable for the Metropolitan.

Q. Where is the Fenway? A. The Fenway is in Boston; not downtown. It is outside, the suburban area.

Q. One-third of your product you license to RKO? A. Yes.

Q. What theatres do they have? A. They have two theatres. They have the Memorial and the Boston Theatre. They are both large theatres. The Boston Theatre plays stage attractions a lot, but the Memorial Theatre is an out-and-out picture theatre, and we play there the better pictures that are on the license agreement.

Q. The Memorial is a memorial that the bondholders erected to Mr. Keith? A. I understood so.

Q. Where did you play the picture "Song of Bernadette"? A. In Boston we played "Song of Bernadette" in the Majestic Theatre which is now being operated by Mr. Harry Brandt, an independent; and I think we negotiated directly —I am sure we did—with the Shubert Enterprises who own (1557)
the theatre. We sort of leased the theatre, you might say.

Q. And showed the picture yourself? A. Yes, sir.

Q. How long did it run? A. 26 weeks.

Judge Bright: That was what you call a road show?

The Witness: That was on a road show basis, yes, sir. We were licensing the picture on a road show basis; that means an advanced admission over and above the general run.

Mr. Caskey: If your Honors please, I want to inpolate there; I do not think it is a matter of controversy. Until quite recently road show also connoted reserved seats or a restricted number of engagements; that is, one in the afternoon or one at night. Now, I think that since "Gone With The Wind" these pictures which have been exhibited at advanced admission prices have not had reserved seats, and they have usually been a continuous operation. I think that

has been the cause for some of the hesitancy in the definition.

Q. The "Song of Bernadette" showed at advanced admission prices, did it not? A. It did.

Judge Bright: Most of those pictures shown as road shows take up a whole session, don't they? They are longer than the average feature?

(1558)

Q. How long was "Song of Bernadette", Mr. Kupper? A. I do not recall the exact time. It was a long feature; more than the general.

Q. It was about 150 minutes, wasn't it? A. Something like that; close to two hours.

Q. How long was "Wilson"? A. That was over two hours.

Q. And that also was shown at an advanced admission? A. Yes.

Q. But it was shown on a continuous operating policy? A. Yes, sir, it was.

Q. No reserved seats? A. I don't recall any theatre having reserved seats, a reserved seat section where they played the picture.

Mr. Caskey: At page 26 of the Appendix C, in answer to Judge Bright's questions, a footnote to Section 14 of the consent decree, which is printed at page 26 of Appendix C, reads: "Road show is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at admission price of not less than one dollar."

Now, within the meaning of that definition neither the engagement of "Wilson" or "Song of Bernadette" was a road show.

Mr. Wright: Why can't we have the witness say what a road show is now?

(1559)

Mr. Caskey: He said so.

Judge Bright: I think he has defined it, hasn't he? It is a picture showing at an advanced price over ordinary admission.

The Witness: Well, it is a considerable advance over the ordinary admission price. I say that, your Honor, because very often we would have a contract, let us say, for 50 cents admission, but the exhibitor may charge 5 or 10 cents more; like we had some pictures, Rosie O'Grady, I know it played for more than what was stipulated in our license agreement. Well, that would not be construed as a road show; but that is an advance of the regular admission to the theatre. But generally, what he was talking about, the Song of Bernadette and Wilson, where we sold it, I would construe that as what we term road show engagements. We only showed to around 3000, I think, the first time with Song of Bernadette, at that advanced admission, $1.10; and Wilson I think we played to a little better than that; we played to around 4000; whereas a general run of the picture would go into 15,000. By that I do not mean we are not going to play to 15,000 or 16,000 on Bernadette and Wilson. We are going to do that on a second time around at the regular admission. In fact, we are well on our way with both of them with that accomplishment.

(1560)

Judge Hand: Mr. Caskey, what is the point of all this?

Mr. Caskey: On the admission price?

Judge Hand: Well, all this talk about road shows which is defined here in the consent decree. I do not know that the witness is so clear about it. I sometimes wonder who gets up these terms, because they

do not seem to be even understood by highly experienced men in the business.

Mr. Caskey: Oh, I am sure we attribute this definition to Mr. Wright.

Mr. Wright: I am equally sure that this definition that is in the decree has absolutely no relevance to the way they treat a road show now, and that they have changed the term to suit their own convenience.

Judge Hand: Well, equally it has no relevance to the case.

Mr. Wright: Only this, if the Court please: I think it is important to get it straight, because what it actually is, is simply another device for exhausting revenue from the picture before you put it into general release. What happens is that after the road show it does not become available to subsequent-run houses. They have a road show, and then they have the first-run, and then a kind of regular release.

Judge Hand: It would seem to me to be a shifting

(1561)

thing that nobody could define in any firm way that could be a continuous enduring definition.

Mr. Wright: I think it can be defined, but I will reserve that for cross-examination.

By Mr. Caskey:

Q. Well, in licensing the Metropolitan and Paramount and Fenway theatres in Boston, with whom do you deal? A. Mr. Marty Mullins, and he has an associate that handles his booking and buying department named Stoddard.

Q. And in licensing the pictures to Boston and Keith's Memorial with whom do you deal? A. We deal with Mr. Harold Mirisch.

Q. Now, Cambridge is a suburb of Boston? A. Yes, sir.

Q. And to whom do you license your pictures first-run in Cambridge? A. M. & P. Circuit.

Q. And do you know what theatre that is? A. Well——

Q. You can refer to your notes. A. Can I refer to them?

Q. Yes. A. I didn't know I could.

Q. Page 19. A. What page?

Q. 19. A. I will tell you quick (examining). Central Square Theatre in Cambridge.

Mr. Wright: If he has got his testimony written out, why can't we just have it read in?

(1562)

Mr. Caskey: What I would like to do, Mr. Wright, is to hand you a copy of the notes; and I shall bring out the highlights, which I must insist upon doing; and then I shall offer the remainder and let you cross-examine on the total.

Mr. Wright: An excellent idea.

Q. In Somerville whom do you license first-run? A. M. & P. Theatres.

Q. How long have they had those theatres? A. I do not think they have had them so long. I think there was an independent man at one time, and they leased it from him; I am not sure.

Q. And prior to the leasing of the theatre to M. & P., you licensed the same theatres for the same run? A. Yes.

Q. Was there any change in the run after M. & P. negotiated for it? A. No, sir.

Q. Where is Somerville? A. It is a suburb of the City of Boston. It follows Cambridge, I believe. Cambridge follows Boston first-run.

Q. And whom do you license in Lowell? A. Well, there are three theatres in Lowell. We license M. & P.

Q. Now, in Cambridge and Somerville and Lowell with whom do you deal in negotiating the license agreement? A. Mr. Mullins and Mr. Stoddard. We do it in Boston, at their office or our office.

(1563)

Q. Where are the payments for film rental made? A. To our Boston office from their office.

Q. And these four situations, Boston, Cambridge, Somerville and Lowell, are the only theatres among the 92 that are operated by Mullins & Pinanski, are they not? A. I think so, yes, sir. Of the 92 cities?

Q. Of the 92 cities, yes, sir. Lowell plays after Boston also, does it not? A. Yes, sir.

Q. Now, in Fall River, Massachusetts, whom do you license first-run? A. Mr. Nathaniel Yamins, who is an independent operator. He has been there for a great many years.

Q. Has he all the first-run theatres in Fall River? A. Yes, he has three, I believe.

Q. Are there subsequent-run theatres in Fall River? A. No, I do not believe there are. I think he has all the theatres.

Q. In New Bedford, Massachusetts, whom do you license first-run? A. A man named Zeitz. He has been our account. He has three theatres, one very good one, one not so good as the first one, and another, smaller house; but he has been an account of ours since the first time I went to Boston; I met him some 20 years ago; he was an account then and still it.

Q. Is there an M. & P.-operated theatre in New Bedford?

(1564)

A. Yes, sir.

Q. Do you license it? A. No, sir, we do not.

Q. In Providence, Rhode Island, whom do you license? A. We license our product to a man named Edward Fay. He is an independent operator. He has the Majestic Theatre, which is his best theatre, and in which we play all our important pictures; and he has another house which we moved over to. He has been an account of ours for more than 20 years too, incidentally.

Q. What is the name of that move-over house? A. I am trying to think of it.

Q. It was named for him, wasn't it? A. Fay's Theatre, that is it.

Q. What other first-run theatres are there in Providence? A. I know Loew's have a theatre up there; I believe Warner's have a theatre, or some other defendant here has a theatre.

Q. Do you license them? A. No, we do not. We license Mr. Fay.

Q. Whom do you license in Albany? A. I think I testified to that yesterday. We license our product to Mr. Fabian, and also to the Warner Bros. Mr. Fabian, I think has two-thirds and Warner's has one-third. That was the result of a historical background which I gave yesterday, from the Clinton Square to the Leland to the Fabian.

(1565)

Q. And as to the pictures that Fabian plays, with whom do you negotiate? A. We negotiate with Mr. Fabian. They have an office here in New York, and they have an office up in Albany too; but I think it is all done in New York.

Q. Mr. Fabian has his own office here? A. Yes.

Q. From which he negotiates license agreements? A. Yes.

Mr. Wright: Excuse me. On a situation like Albany, it is going to be the testimony rather than what is on here, is that right? You are not offering these printed sheets where you take him over it, or is he supposed to supplement that?

Mr. Caskey: This is the full text.

Mr. Wright: I see; but all you propose to put in the record——

Mr. Caskey: No, I am going to offer the full text too.

Mr. Wright: That goes in in addition?

Mr. Caskey: Yes, sir.

Q. Now, in Utica whom do you license first-run?

Judge Hand: That seems pretty odd. What do you do that for?

Mr. Caskey: Well, in order to save your Honors' time. There is a certain amount of background ma-
(1566)
terial which we think important to have in the record in view of the charge of combination, but the relating of which is not particularly interesting. We can go through it in detail, but I had hoped to shorten the Court's time some.

Q. Utica? A. At the present time we sell our product to Mr. Gordon who operates the Olympic Theatre. He is an independent exhibitor. Prior to that, years ago, we sold Mr. Nate Robbins. We had two theatres up there, and he was an independent exhibitor. And he sold to Warner's. And we sold Warner's subsequent to that for quite a while until—well, we had a disagreement; we couldn't get together as to terms; and we went out and solicited and worked up Mr. Gordon as an account. I think we gave him a franchise for a period of years, and he has had our product ever since.

Q. He has had the product for at least 12 years? A. Yes, at least that.

Q. And he plays all the Fox product first-run in Utica? A. That is right.

Q. Now, in Syracuse whom do you license first-run? A. Well, today it is the RKO people. That is licensed through the RKO booking office here in New York. Mr. Mirisch handles that. That is, he is the one we negotiate with. That started a long time ago. Schine was in there a long time
(1567)
ago, and we served him; and he, in turn, I think sold to Warner's, and they dropped the house, and somebody else got it back; but in the course of history it is the same houses we originally started with.

Q. Do you sell to Loew's in Syracuse? A. No, we do not, nor Warner's.

Q. Now, in Rochester whom do you license first-run? A. In Rochester it is RKO again; but here is a case where Comerford was there for many years; he was an independent operator; and he later became some sort of affiliate, or Paramount bought some interest in their circuit; but, anyway, they operated independently until they made some sort of an arrangement with RKO, but it is the same houses we originally sold our product to when we sold Comerford.

Q. Do you sell any theatres of Loew's in Rochester? A. No, we do not, though they are in opposition.

Q. In Buffalo whom do you sell first-run? A. Well, for years—right now we sell the Loew organization. They operate first-run theatres which we license. That is another case. For years we never had a very satisfactory outlet, and a man named Shea—it is not the same Shea we have been referring to in Pittsburgh; it is another man, Mike Shea, who was there for years, and he had some theatres, and Fox finally built a big theatre in there. Though he never operated it, he

(1568)

built the theatre; and I think we had Comerford take it over from the day it was completed until it was subsequently sold, or arranged a pool, and taken over by Loew; and we kept our product there ever since.

Q. The theatre that Mr. Fox built, or one of his companies, was the Great Lakes? A. Yes. In fact, they have got three big theatres up there. They have got the Buffalo, the Great Lakes and the Hippodrome, which is used for move-over and first-run, but the better pictures go into the Great Lakes and the Buffalo.

(1569)

Q. And is the Great Lakes comparable to the Buffalo? A. Yes, sir.

Q. Now, in addition to that, in Buffalo Basil Bros. operate there, do they not? A. Yes. They have a theatre—they

have two theatres there. A man named Yellen also operates a theatre. One is the Lafayette and the other is—oh, I can't think of it right now.

Q. The 20th Century? A. Yes, the 20th Century. And we serve Yellen. As matter of fact, we licensed Yellen the picture Wilson there.

Q. Now in Worcester, Massachusetts. A. In Worcester, Massachusetts, for years and years we sold Mr. Poli, who is an independent operator all over the State of Connecticut, and Massachusetts too. He is quite an independent, very aggressive, a very up-to-the minute exhibitor. He built a lot of fine theatres there. We sold Mr. Poli. And then Fox bought those theatres. That is my understanding, my belief, anyway. And, in turn, Loew got the theatres, or we lost them. Poli got them back, and then I think Poli made a deal with Loew; but we have always played in that theatre. We played it before we were associated with it.

Then there is opposition there. Hoffman, incidentally, is opposition, too, a lot of these towns; he was an independent exhibitor; and he sold to Warner Bros. He sold his theatres

(1570)

to Warner Bros. But we don't sell Warners in this situation. We sell the Loew people, and we do the negotiations with Mr. Vogel in his office here in New York.

Q. And the Fox Company which purchased these theatres from Mr. Poli was Fox Theatres Corporation, was it not? A. Yes, that is right. I believe that was the corporate name.

Q. It is not the present defendant? A. No, sir.

Q. It is a company that went into equity receivership in 1932. Do you know that, Mr. Kupper? A. I understand that is right.

Q. Now, the same situation as to Worcester applies in Springfield, Massachusetts, Hartford—— A. No, there is a little difference in Springfield. Years ago we had a theatre in Springfield and we did not have one in Worcester. It

was called the Fox-Nelson Theatre. Fox operated it a long time. It is not as good a house as Mr. Poli finally built in there and which eventually Fox bought. So after we bought the Poli theatre, we naturally would transfer our product to the Poli theatre; and it is now in the Loew's organization. But we played our pictures there for a great many years. We sell Loew in the situation.

Q. In Springfield? A. Yes.

(1571)

Q. And do you sell Loew in Hartford? A. Yes.

Q. And in New Haven? A. Yes, the same situation, the same story in Hartford and New Haven. We never had theatres there, but they were Poli, and then became Fox and then became Loew's. And again, I must say we played them before we ever had any interest in those theatres; and they are all fine theatres, all big theatres. Poli never built anything but good, fine, big theatres, to my knowledge.

Q. The same in Bridgeport? A. Yes; and in a number of these situations Warner is opposition, which I stated before, which we do not sell.

Q. So that is five of the cities where today you license to Loew's, the theaters are a part of the Poli Circuit? A. Yes.

Q. That is out of the nine cities having a population of 25,000 and more which you license, five of the cities are Poli towns? A. That is right.

Q. Now, whom do you license in Yonkers? A. At the present time RKO. There is also another interesting history to that town. We sold to two theatres which were independently operated. They were the Strand and the Hamilton theatres. I can't recall the man's name. It is probably on here—oh, yes, his name was Hamilton, and he, in turn, sold the theatres to a man named Walsh; and Walsh, incidentally,

(1572)

happened to be the mayor at one time of Yonkers, or the mayor at the time he bought them; and we continued to

supply our product there; and then RKO made a deal and took the theatres from Walsh; and we have continued to supply our pictures there. Loew is in opposition to us there, but we never sold Loew.

Q. In any of these situations where the theatre was operated by an independent and subsequently transferred to one of these defendants, did Twentieth Century-Fox have anything to do with the sale? A. Not to my knowledge.

Q. Now, in Newark, whom do we serve first-run? A. Let us see. We serve RKO today and Skouras Theatres. Originally we had a theatre there, too, the Terminal Theatre; and—I don't know what the year was, in the 1930s somewhere—a lease was made, or a deal was made with Skouras; he took them from the Fox Metropolitan Theatres—he took the Terminal Theatre, and he worked out some sort of a deal with RKO or Proctor Theatres that was operating, and our franchise gave him our pictures for the Terminal; but this Proctor's was a better theatre; and after he made his negotiations we were able to move our better pictures into the Proctor's and finally all of them, because the Terminal closed.

Now, Loew is also in that situation, and we don't sell them. Paramount and Warners, too.

(1573)

Q. Our customer has been the Terminal Theatre? A. Originally, yes.

Q. And that is the theatre in which Mr. William Fox has had an interest for many, many years? A. Yes. I think before he had a Fox Film Company he had a vaudeville circuit of theatres, and that was one of them.

Q. In Jersey City whom do you license first-run? A. The Skouras Theatres. That is George Skouras operation.

Q. Do some of the pictures play in the Stanley Theatre? A. Yes. I believe Skouras did make a deal there also with the Stanley Company so that they had a theatre whereby

they could put our better pictures in there, too, but originally it was with the Skouras Theatre, and he had a franchise for a number of years after he took the theatres over.

Q. In fact, that franchise is still in existence? A. Yes. I believe he has got seven or eight more years to go. Warner is in that situation and Loew's, too, but we don't license our products to them.

Q. Now, in Paterson, New Jersey, whom do you license? A. Well, three theatres, the Fabian, the Rivoli and the Garden. Those theatres were built and operated by Mr. Fabian, but it is the same family Fabian that we have been talking about here, but this was his father that originally built these theatres, and we sold him. Later on he sold them to—
(1574)
I guess the Stanley Company, or, at least, Warner Bros. finally got them; but we have been selling those theatres right along.

Q. That is, those theatres were built by Mr. Fabian, Senior? A. Yes.

Q. And the Fabian is named after him, and not after Si Fabian? A. That is right.

Q. And he sold the theatres to the Stanley Company? A. Well, I am not sure whether he sold them to Stanley, but I think they sold their theatres to Stanley, and then, in turn, Stanley sold to Warners'; but it is that period when they were out buying theatres and acquiring theatres. There is opposition in here, incidentally. Adam Adams has got a theatre there, in which Paramount has an interest; but we sell what is known as the Fabian theatres. We sell Warners.

Q. And we sold those Fabian theatres for a long time before Warners had any interest in them? A. Yes.

Q. Now, in Elizabeth, New Jersey, whom do you sell first-run? A. The Skouras Theatres, and they have an arrangement also, I think, with the Stanley Company. He

made an arrangement with the Stanley Company that we put our better product in the better theatre there. Originally it was a Fox theatre all the time, something like the Newark situation, it went way back in the history of our company.

(1575)

Q. And has it been of advantage to Twentieth Century-Fox, to Jersey City, Newark and Elizabeth, to have the pictures played in those theatres? A. Certainly. They were better pictures.

Q. Produced greater revenue? A. Produced greater revenue.

Q. Now, whom do you license in Trenton, New Jersey? A. Well, we have a split on the product there at present. There is a man named Hildinger who has got a theatre, and we also have RKO as a customer down there. Before RKO got in there there were two independent theatres, two independent people, exhibitors. One was named Hershfield and the other was Hildinger, and they had three theatres, I think, between them. The best theatre was the Lincoln Theatre; and there was the Stacy, and another house I don't recall. Anyhow, they had these three theatres. The State was the third theatre. And the better product of ours back in those days played in the Lincoln Theatre, and the other product, the Stacy and the State. Well, Hershfield died, and Hildinger took over the whole operation himself, and he, in turn, made some sort of arrangement and sold—let us say sold the Lincoln Theatre to RKO. Well, we, in turn, sold the product—we licensed the product that we were accustomed to license in the theatre to the RKO house. So we have got a split in the situation; but they are still the same

(1576)

theatres that we dealt with.

Q. And the independent that is left still has the pictures which he originally had in his theatre? A. Yes. He has what we consider his share of them.

Judge Goddard: They are first-runs, too?
The Witness: Yes, they are all first-runs.

Q. Do you know how that split is made? A. Well, they generally make them themselves, these exhibitors. They know what pictures we have, the pictures they are going to license, and one of them makes the split-up one time, and he offers it to the other one to select from; and the next time it comes around, he lets the other fellow make the selection and he gives the opposite man the first choice. It is a more satisfactory way and easier way. They try to be pretty fair about it, pretty honest.

Q. Now, in Camden, New Jersey, whom do you license first-run? A. We license Mr. Varbalow; he has got the Savar Theatre. He has been our account there for quite a while; but prior to that we sold the Stanley Company in Camden, and the Stanley Company sold their theatres to Warners some years ago. I think it was in 1933. We could not have a meeting of the minds with the Warner buyers—I know about this, because I was in on the negotiations, definitely; we could not get together with Warners, not

(1577)

only here but a lot of places—and we went to Mr. Varbalow. He had this Tower Theatre, a theatre that was not in downtown Camden; and we licensed our product to him and gave him a franchise; and when we gave him the franchise we had an understanding with him that he would build a downtown theatre, which he did; and we licensed our product there, and have continued to license it to this day.

Q. And he did build a new theatre? A. He did build a new theatre. That is the Savar.

Q. How does it compare with the other theatres in Camden? A. It is a very fine theatre. I think it compares equally with any of them.

Q. In Philadelphia whom do you license first-run? A. Well, right to this minute it is now National Theatres. We had licensed the Fox Theatre there which Mr. Fox built years ago. Prior to that time we shopped around, I guess you would say, from pillar to post. We never could get a satisfactory first-run there, and I know when I was in New York in the early days with the company we tried to work out some arrangements with the Stanley people to take the theatre over, so he could license and show his pictures in there, but it never worked out, and I think Fox decided to build a theatre, and he built a big theatre in Philadelphia and operated it. I guess the Fox Theatre Company operated
(1578)
it. That went on for quite a period of time. We licensed our pictures there. And they got in trouble; they got in difficulty, and the house was then leased, I believe, to Warner Bros. And with this lease, however, we protected ourselves that our product would play there in that theatre; and we also played in other theatres of Warners, equally as good as Fox's depending on which picture was suitable to which house; but our product played there continuously; and, as I say, it is only recently that the theatre is back in our hands; and we play our pictures there. We did play four or five pictures last year in the Karlton Theatre despite the fact that we have a license with the other theatre.

Q. Who operates the Karlton Theatre? A. That is an independent operation. Goldman, I believe.

Q. Now, in Scranton, Pennsylvania, whom do we license? A. As long as I can remember, in Scranton we licensed the Comerford Theatres. They have been there a great many years. In fact, they are the only theatres there, I think, and we licensed to John Nolan. He is their buyer.

Q. John Nolan used to be a Fox employee? A. Yes, he worked for us a long time ago. He was a branch manager for us in Buffalo. We had him in New York for a while, as a

special representative, and then we sent him to Australia, but he got sick out there, and when he came back he took a long
(1579)
time to recover, and he did not come back. He went with the Comerford Circuit.

Q. Those pictures were licensed to Comerford before Paramount had any interest in them? A. Yes.

Q. Now, in Reading, Pennsylvania, whom do you license? A. Well, we licensed Wilmer & Vincent, who was an independent operation. At one time we split our product there, when we had a lot of pictures, sixty-odd. We sold part to Wilmer & Vincent and part to Warners, and now we sell them all to Wilmer & Vincent. That came a little later on, when we had a little friction there which I was telling you about; we could not have a meeting of the minds; but today we sell all our product there. We also have sold some pictures to the Astor, which is an independent operation; but we sell them to Wilmer & Vincent who is in opposition to both Loew's and Warner and another independent.
(1580)

Q. Is Wilmer & Vincent's Embassy the best theatre in town? A. I would think so. I would say 24 or 25 hundred seats. And the other theatres are pretty good size theatres too.

Q. Is it as good a theatre as the Loew's Theatre? A. Well, I would say so.

Q. And Wilmer & Vincent is or was an independent circuit? A. Always has been to my knowledge.

Q. Did one of them die recently? A. Yes, a few years ago. Walter Vincent is still alive. Wilmer died. I knew him pretty well.

Q. And according to trade repute they have sold out some interest—— A. Just recently to Fabian.

Q. Do you know the details? A. No, I do not.

Q. Now, in Pittsburgh whom do you license first-run? A. Well, we have our product licensed to two independent accounts. The Shea interests have the Fulton Theatre, one theatre, and they get one-third of our product; and John Harris, who operates two theatres, the J. P. Harris Theatre, and another house called the Senator. Harris is the better of the two, and he plays our product. They both play our product on an extended run basis. The Senator is used as a move-over and also for the lesser product that we might supply them with or license them. There is a long history to
(1581)
that though. Am I supposed to recite it?

Q. I think we need not go into it. Now, this Shea, just again for the sake of the record, is no relation to the Shea in Buffalo? A. Not to my knowledge. This is a different Shea, Mort Shea.

Q. Mort Shea? A. Yes. He is dead too, incidentally. The circuit is operated by Grainger, Edward Grainger.

Q. And Edward Grainger at one time was eastern sales manager of Fox? A. Yes.

Q. And his brother was the general sales manager? A. Yes.

Q. The Fulton Theatre is no move-over theatre? A. No, it is not, but they play extended engagements, usually three or four or five or six weeks. They play them as long as the picture shows good strength.

Q. And J. P. Harris is likewise an independent? A. Yes.

Q. Now, in Erie, Pennsylvania, whom do you license? A. Well, we sell the Shea theatres. That is the same Shea we are talking about who has the Fulton Theatre in Pittsburgh. They are in opposition to Warner's out there. We have sold these theatres for a great many years. He is an independent. I know that definitely because I looked it up.
(1582)

Q. In Pittsburgh Warner's and Loew's both have theatres? A. In Pittsburgh?

Q. Yes. A. Yes.

Q. Now, down in Wilmington, Delaware, whom do you license first-run? A. We license the Rialto Theatre. A fellow named Belair has that theatre. Prior to that we used to sell the Stanley Company down there. They are all better theatres, incidentally, down there. Then when Warner got them, why, the time I am talking about when we had difficulty, we went to John Harris who had a theatre there, the same Harris who has got the Harris in Pittsburgh; and then he sold to Warner's; and we continued supplying Warner's—that is, the house that Harris had, which was formerly the Stanley house—until the time we had another disagreement and could not get together and could not have a meeting of the minds on the price; and we went out and solicited and worked up this account, the Rialto Theatre, run by Mr. Belair, and he plays our product exclusively in the town. We get long runs there. There is no question in my mind but that the Warner house there could throw off greater revenue, but we so elect to continue doing business with Mr. Belair.

Q. Mr. Belair plays Twentieth Century-Fox product almost exclusively? A. Yes. We license him all our product. I do not know of any other product that he has. I would (1583)
say that we consume all of his playing time.

Q. Now, that theatre takes clearance, I understand, over the whole State of Delaware. Do you know whether that is true or not? A. It would not surprise me. It is an important outlet, an important theatre, the same as the other companies do, I suppose, with their theatres for the same protection. I know what they do—Belair told me that—I would grant Belair that.

Q. As a matter of fact, there was an arbitration about that, wasn't there? A. Yes, I believe so, now that you call it to my attention.

Q. Now, in Baltimore who do you serve first-run? A. We serve the New Theatre; we license our product to them. It has been our account for a great many years. I remember when the theatre was operated by Charlie Whitehurst.

Q. How old is the New Theatre? A. The New Theatre, to my knowledge, is 25 years old or more.

Q. Where is it located? A. It is located on the main street in Baltimore, a very fine location. It is not the best house by any means, but it is a good house for our product; and we have got Loew there as opposition, and we have got two independents there as opposition too; but we have done business in this house for a great many years. Morris Mechanic is the owner and operator of it.

(1584)

Q. And he plays all Fox product? A. Well, he has been playing it all. Sometimes he can't absorb it all, but he has been playing—we consider him our first-run account there. Right now we are playing a picture with Loew because Mechanic is closing his theatre after our engagement of State Fair, which I think is in its fourth or fifth week by now, and rather than let our product back up, we made an arrangement with Loew's to play a few pictures which we are licensing now, and Mechanic is going to remodel his theatre. In fact, he told me he is going to put a considerable amount of money into it, because it has not been remodeled for a great number of years. He expects to make it the finest house in Baltimore.

Q. A quarter of a million dollars? A. That is what he told me.

Q. And he is independent? A. Yes.

Q. Of everybody? A. Yes.

Q. Now, in Baltimore there are very fine neighborhood second-run houses, are there not? A. Oh yes.

Q. And who are they operated by? A. There is the Durkee Circuit and some others.

Q. And, at least, the Ambassador Theatre and the Senator Theatre which Mr. Durkee has are two of the finest neighborhood houses in the country? A. I would think so.

(1585)

Q. Do you grant Mechanic clearance? A. We do.

Q. Over the Durkee Circuit? A. Yes.

Q. And, in turn, do you grant the theatres that you sell Durkee, license Durkee, clearance over other theatres in Baltimore? A. Yes, sir.

Q. Is Durkee an independent? A. Yes, sir.

Q. Now, in Washington I think you adverted to the fact that you license most of your product to what theatre? A. The Capitol and the Palace, right today operated by Loew's. Our better pictures will go into the Palace Theatre, and the Capitol today has an operation policy of some stage shows; and though we play important pictures in there, they only have the two houses, and you have to split your time up a little bit between both of them. At least we have two between both of them. As I say, we try to play our most important pictures in the Palace, and the others in the Capitol. That is where we play our pictures. The Capitol, of course, is the house that Fox had.

Q. That is in the National Press Club Building? A. Yes, sir.

Q. In Richmond, Virginia, whom do you license first-run? A. A man named Thalheimer. He has got a few theatres, and a few subsequent-run theatres too. Before he had these houses there was a man named Colter—Colter and

(1586)

Mrs. Thorpe owned the Bluebird Theatre. Thalheimer is a real estate man or a lawyer, or something——

Q. There is quite a difference. Which is it? A. Well, real estate. Anyway, he acquired this Bluebird from Colter & Thorpe, and that started him in the picture business; and then he has got some other theatres; the Byrd Theatre is

one of them; and we have supplied him right along. There was opposition right along even when we were selling the Bluebird. I think Wilmer & Vincent were in there. They took the theatre over from Wells, a fellow named Jake Wells, which was operated a long time ago by Harry Burnstein. Loew had a theatre there too. But ours is a very good outlet and is an independent account, and we do not sell Loew.

Q. Norfolk, Virginia. A. In Norfolk, Virginia, we sell the Granby Theatre. We have sold the Granby Theatre a long time. It is now operated by the Fabian, who just took it over from Wilmer & Vincent; but that has a history that dates back a long time. But we could not sell Wells, who later became Wilmer & Vincent; I sold his brother, who was Otto Wells; I sold him in Norfolk, Virginia, for a great many years; they, in turn, sold to Wilmer & Vincent; but it is the same house we had done business with. And then there is Loew's and there is an independent named Wilder, which we do not sell him.

(1587)

Q. Wilder has two or three theatres? A. Yes. And we do not sell him. At least, we don't sell him first-run.

Q. Now, in Charlotte, North Carolina, whom do you license first-run? A. We license the Kincey Circuit of theatres. They have three or four first-run theatres. When I first opened the Charlotte office for Fox they were there. It was not exactly Kincey in those days, but it was an affiliate down there, the Southern Enterprises, S. A. Lynch & Company, and they had opposition. We supplied our product around between them, and also a man named Craver had the Broadway Theatre, and it gradually became—both of them became the Kincey theatres, which is still the same theatres we licensed back in the early 1920's.

Q. With whom do you negotiate in licensing? A. That is done in Charlotte with Mike Kincey.

Q. Where are the license fees paid? A. In Charlotte.

Q. And that is the only theatre in these 92 that you negotiate with Mr. Kincey? A. In these 92 cities.

Q. Yes. Now, in Atlanta, Georgia, whom do you license first-run? A. Well, we sell Lucas and Jenkins who operate the Fox Theatre and the Paramount Theatre and the Roxy Theatre and the Capitol Theatre. They have opposition there. Loew's have a theatre there, the Grand. Years ago we never were so happy with our outlet in Atlanta. That is, we could not get along so well with Lynch, and we had to

(1588)

shop around and do the best we could until Fox finally built a big theatre there, the largest theatre in Atlanta, one of the largest in the whole south, the Southeast; and as I say, they got in difficulty and lost the house, and I guess Paramount wanted to have it; and Lucas and Jenkins have it; they are affiliated with Paramount—they are not affiliated—they operate for Paramount, but I always consider them an affiliate. But you might say our pictures went to the Fox when Lucas and Jenkins got it, and they are still there. I do not think we ever sold Loew a picture.

Q. And despite any protest by Mr. Rodgers, the Fox is the best theatre in Atlanta? A. Yes, in my opinion, yes.

Q. Whom do you negotiate with in licensing these pictures in Atlanta? A. Bill Jenkins. He has some other buyers, but Bill Jenkins is the man we do business with.

Q. Colonel Lucas is dead? A. Yes; he died a few years ago.

Q. And is Atlanta the only city among the 92 concerning which you negotiate with Mr. Jenkins? A. Yes, sir.

Q. Now, I want to take the three cities of Jacksonville, Tampa—the two cities of Jacksonville and Tampa. Whom do you license there? A. We license—I think it is called the Florida Theatres Company. It is an affiliate of Paramount, and we licensed those theatres long before Paramount was

(1589)

affiliated. They were operated and owned by Sparks, the same theatres. It was an independent account. He later sold some interest to Paramount, and it was operated by Frank Rogers. He was an old friend of mine. He was a salesman who grew up with Sparks. But they were always Sparks with me. And talking about this thing, I never considered him as Paramount, although they are affiliated, they were Sparks' theatres to me, as long as I can recall.

Q. And Frank Rogers? A. He is the general manager and his office is in Jacksonville, and we do our business with him down there.

Q. Now, in Miami whom do you negotiate with? A. We sell our pictures to an independent account, Wolfson and Meyer, Wometco Theatres. Here is another situation that goes back a long time where we never could get a satisfactory run there; I think it was Lynch again who had those theatres, the first-run outlet there, and Sidney Meyer went down there and opened up a theatre, the Capitol Theatre, and we supported him ever since. In fact, we gave him a franchise and encouraged him down there, so today he has got quite a few theatres. Meyers at one time worked for us as a branch manager, a salesman and a branch manager. This is going back a long time ago, even before the last war. I think he started with us before or during the last war. And he grew up, as salesman in Omaha, and finally became

(1589a)

salesman in Chicago, and sales manager of our company, and left, and went into business for himself, and went into Miami and opened up a first-run theatre there, and from there he has developed his interest down there. But our position is still there. There is Paramount down there, which we do not sell.

(1590)

Q. In Birmingham, Knoxville and Chattanooga, whom do you license? A. We license the Wilby Theatres, which

R. B. Wilby operates, and an affiliate of Paramount, but we have licensed these theatres a long time. As a matter of fact in Birmingham we used to sell Hoblitzelle, who is an independent exhibitor, and Wilby was an independent at one time too. Hoblitzelle, he had an interstate circuit of theatres, he called it, vaudeville houses, and he had his house in Birmingham, which he turned into a motion picture-vaudeville and picture house, and I think Paramount tried that along with Wilby, and it has been Paramount-Wilby affiliation in all three towns, but we served these houses even before that, as I say, when they were independent operators. Wilby has been an exhibitor down there as long as I can remember.

Q. With whom do you negotiate for these three cities? A. Wilby.

Q. Where are the license fees paid? A. Atlanta, Ga.

Q. Are these the only three cities that you negotiate for with Mr. Wilby? A. Of the 92?

Q. Of the 92. A. Yes, sir.

Q. I think I didn't ask you that question about Tampa and Jacksonville. Those are the only two you negotiate for with Mr. Rogers? A. Yes.

Q. Of the 92? A. Of the 92.

(1591)

Q. In Nashville, whom do you license first-run? A. Sudekum theatres. They have opposition. Loew's theatre, Orpheum theatre. We have served the Sudekum theatre for a great many years, Paramount Palace.

Q. You license no pictures to Loew's? A. No, sir.

Q. Sudekum, or Crescent Amusement Company, is an independent? A. To my knowledge, it is.

Q. Whom did you negotiate licenses with? A. I haven't done business with Sudekum in a little while, since the consent decree, but that is where our pictures played, but they were worked out down in Nashville.

Q. In New Orleans, whom do you license? A. We license our product to Saenger Amusement Company—Publix-Saenger, I suppose—which is headed by E. V. Richards, and we have done so for a great many years. We did it before, I guess, Richards became affiliated with Paramount, although they go back for quite a while, but they had the Saenger theatre—the Tudor Theatre and Globe Theatre. They have opposition down there. Loew's have a house. I think I heard some testimony that Paramount has an interest in it. And RKO operate two theatres down there. We have done business with Richards, Saenger & Company—Saenger-Richards it was years ago—we have done business with them a great many years, not only first-run New Orleans, but throughout their territory.

(1592)

Q. What kind of theatre is the Saenger Theatre? A. One of the finest theatres down there.

Q. Most of your product plays in the Saenger Theatre? A. Practically all our better products play there. We do play some pictures—we have played some pictures over in the Center Theatre, which is an independent operation, smaller pictures, but we always offer them, if we have them available. Saenger sometimes move over some of their pictures but they generally play first-run and complete their engagement in the Saenger Theatre.

By the way, we have sold a few pictures to Loew's when we had—not Loew's; I mean we didn't sell Loew's; we sold some, because we couldn't get together with Mr. Richards, to, I think, his competitor, Mr. Gaston Dureau. They played the picture at advanced admission. And we sold RKO a few pictures at the time we were licensing these pictures in groups, and they couldn't see the value of it, and we sold them away from them, but we generally go back, right back with the next block and offer it to Mr. Richards for the Saenger Theatre, because that is the better outlet for us.*

*See p. 1229 for corrections.

Q. Mr. Richards would not play at advanced admission prices? A. Would not play them from us. I don't know whether he has done it with anybody else, but he wouldn't do it from us.

(1593)

Q. And said so? A. Definitely.

Q. Is New Orleans the only city among the 92 in which you deal with Mr. Richards? A. Yes.

Q. Of course, Mr. Kupper, you deal with these various buyers for other cities under a hundred thousand population? A. Various buyers for other cities? Sure.

Q. In Memphis, whom do you license first-run? A. We license Loew's. They have two theatres there, the Palace and the State, and we play all our product there in the Palace and the State. You have opposition down there. You have Warner affiliation operating a theatre, we have Paramount, which is the Paramount Lightman. Before Loew's had it all, both the Palace and the State, Lightman I think had a Palace Theatre with Loew's and they had some sort of arrangement, and then Lightman gave it up and he took another house, the Orpheum, down in Memphis, and he has two houses, incidentally. When Lightman gave it up and Loew's got it, we just kept our product in both houses, State and Palace, and we have occasionally sold Lightman a few smaller pictures. He has a house that is suitable and adapted for them.

Q. Has Warner a house? A. Warner has a theatre. I don't think we have played in there. If we have, I don't recall it. I don't think we have played in there a long time.

(1594)

Q. You said the Loew's theatre had opposition. What do you mean by that phrase? A. Well, they have other first-run houses comparable to theirs that play their merchandise.

Q. In competition with them? A. In competition to them, yes, sir.

Q. In Louisville whom do you license first-run? A. Well, Fred Dolle is an independent operator and has been there as long as I can recall. We have served him a great many years, both there and in Indianapolis, incidentally. He has opposition there. He has got Loew's in opposition, and Warners I think. I think Warner has got an interest in a theatre there. At least they play their product in one theatre. I always thought they had. But Fred Dolle, he has been there. And there was another man there, Ike Libson. He was a good friend and account of ours in Cincinnati. But we sold Dolle there all the time and he has been sold there for years.

Q. In the evidence already there has been some reference made to the National Theatre in Louisville. Do you know it? A. Yes, I know the theatre. I have been there. I went out to see it. It has been a theatre that has changed hands a lot of times. In fact I was telling you about Ike Libson. He had it at one time and he paid the people he leased it from $20,000 to walk away from it. He couldn't operate it and he was a

(1595)

big, important exhibitor, operated a lot of theatres in Cincinnati. I know Fred Dolle, our present customer, an old customer, had it one time for a few weeks, and he walked away quick. It is in a bad location and the house is not in good shape. It is very close to the colored area in the town. In fact there are two first-run colored houses right within a block or so of this theatre, and I doubt whether anybody could operate it as a first-run theatre.

Q. Do you consider it a suitable outlet for Fox pictures? A. No, sir. I consider the outlet we have as good an outlet as we could get in Louisville. That is why they have been a customer and we have sold them so many years.

Q. In Cincinnati, to whom do you license? A. RKO, operating theatres there, but there again we have theatres that Ike Libson had for a good many years, whom we sold, and just through the course of events we have continued to

sell. They own the theatres they operate; that is, the first-run theatres. The Albee Theatre is the best but we try to play our pictures in the Keith following that, and then they have other houses they move over to, like the Lyric and so on, but that has been an old established account for a good many years down there.

Q. You knew Mr. Libson? A. I know him very well.

Q. Dealt with him before you ever sold to RKO? A. Yes, sir.

(1596)

Q. Youngstown, Ohio. A. In Youngstown, Ohio, we sell Shea—M. A. Shea. That is the same Shea that has the Fulton in Pittsburgh and the Opera House and so on, been an account for many years, and had the Park Theatre there. Then Warners went in there and they have a house there, which Shea operates with Warner, and their theatre, the Park; also another theatre there, Harry Cathone owns; I think somebody else has got it now. It is a good house but we have always dealt with Shea, which was our account a long long time ago, and we continued on through him.

Q. In Exhibit 12, which has been offered in evidence, we classified Youngstown as a Warner town. Do you consider that Warner Bros. is your customer in Youngstown? A. I never did, no, sir. I always considered it an independent operation which Shea operated, which Eddie Grainger operates today.

Q. You don't license your pictures in Youngstown to the Warner and Park theatres because Warners have an interest in the theatre? A. No, sir. We license them to Shea and Eddie Grainger, and, as I say, they have some pooling arrangement they make and we play our pictures in both theatres, but——

Q. You had no part in making the pooling arrangement? A. Nothing.

(1597)

Q. In Cleveland, Ohio, whom do you license? A. We license to RKO.

Q. Cleveland? A. In Cleveland, RKO operate the—well, they have the Hippodrome and the Palace. They are the two better first-runs. And they have a move-over theatre, the Lake Theatre. And they also have the Allen Theatre, which they operate. And Loew's have two or three theatres there. We sold a good many years ago the Hippodrome before they became a part of RKO—was an independent operation—we licensed our product. I think the name was Doty, the man that operated it, and there was a first-run theatre——

Q. He sold out to Warner Bros.? A. No, I don't think he sold to Warners. He sold to RKO, I think. It was RKO. In fact Warners have another in there—I think Warners have some interest in the theatres. In fact they operated the theatres for a time back, two theatres. They acquired it from RKO with some arrangement somehow. We have continued to supply these houses.

Q. Is the Hippodrome one of the best theatres in town? A. It has been for us for years. We have taken out a lot of film rental in that situation in the Hippodrome.

Q. That is Doty's original theatre? A. Yes.

Q. Canton, Ohio, whom do you license first-run? A. An independent exhibitor named Constant, who has got War-
(1598)
ners in there as opposition. In fact, we used to do business with Warners in this situation, and we couldn't see eye to eye one particular year and, well, we are out in the cold, you might say, there. Warner dropped one of the theatres, and Constant went in, this independent, and he opened a theatre and from then on we have been supplying Mr. Constant. We don't sell or license Warner; and Loew's have a theatre there, too.

Q. What is the comparative quality of the theatres? A. I think they are pretty equal.

Q. In Columbus whom do you license first-run? A.

Columbus we license our product to both Loew's and RKO.

Q. Do you split your product? A. Yes, we split our product.

Q. On the RKO split, where do the pictures play? A. They play in, I think it is the Palace theatre. Loew's play the Ohio and the Broad; RKO have two theatres. Here again is an old story, goes way back. I could bring you back to 1919, I guess, or 1920, right on up through. They were small accounts. In fact Neff was finally the last one that had been before he sold to RKO. Warner, I think, or somebody got him out, and RKO put the Palace theatre in there and we went and sold RKO because we could not get along very good with Neff, he could not see—he did not progress and advance with the times, keep abreast of the

(1599)

times at least, and he wouldn't give us the kind of runs we thought our product was entitled to. We made a deal with RKO in the Palace theatre. In fact, Neff didn't need it; he got plenty of product; he practically had an exclusive contract with Warner and he got along pretty well, but that is the history of Columbus. We split our product between the two of them.

Q. These are the only four first-run theatres in Columbus? A. That is right.

Q. Akron, Ohio. A. Well, Akron, Ohio, we sold our product there for a good many years to Shea, been our account, the only account. Loew's is in there with a theatre. This fellow Katz, Sam Katz, I think Sam Katz, he sold some theatres down there. He doesn't operate them. Somebody else operates them for him. Warner is in there, too. But we sell Shea, and have for the last seventeen or eighteen years, the Colonial theatre. I think we do just as well as they could do for us, I mean with Shea.

Q. In Dayton, Ohio, who is your customer for first-run product? A. Our customer is RKO, a subsidiary of this

defendant here, I guess you would call it. We have done business there a good many years with RKO.

Q. Don't cover your mouth. A. With RKO. I think Ike Libson was in the town at one time and he was our account
(1600)
and he sold RKO. That is how it became RKO, I mean I am not quite sure, but that is the story.

Q. Mr. Keyes has a theatre there called the Victory? A. He has a Victory theatre. I forgot that for the moment. He has the Victory theatre. We have sold him some pictures in there—two, in fact—only recently. We sold him two pictures but the revenue was not very much to speak of. Would not be a good desirable outlet for our pictures. That is, we could not get the revenue that the town should throw off, a town of that size, first-run.

Q. In Toledo, Ohio, whom do you license? A. In Toledo, Ohio, we sell a Paramount affiliation, Balaban & Katz, but it is operated independently and all our negotiations are made with the local manager down there, and our branch manager in Cleveland, but here is a situation, that for years we had an account that was a little ways out of town, we could not get downtown, did not have a desirable account down there, and we stayed with him until he just couldn't stand the gaff, let us say, and about 1929 we went and sold —they put in a theatre and we sold them. We have been selling them ever since.

Valentine is the Loew operation there. There is another independent there too, Skirball. We tried to sell Skirball but we couldn't do it, couldn't get the proper price. That was an independent. But we do sell Balaban & Katz, which
(1601)
is a single operation in that territory.

Q. As far as negotiations of license are concerned, this theatre is separate from all other Balaban & Katz operations? A. Yes, and it is done with our local manager in

Cleveland and their representative down there. I have never negotiated with the theatre. I know that is the history of it. It is done locally.

Q. Not in Chicago? A. Not in Chicago or New York, but right there in Cleveland, or Toledo, which ever they elect.

Q. In St. Louis whom do we license first-run? A. We license Fanchon & Marco. That is an independent operation, headed by Harry Arthur. I think it is Fanchon & Marco Theatres Corporation. They operate the Fox theatre and the Ambassador theatre, and they also have several houses, the Missouri theatre, which they use as a move-over, and Detroit, a move-over. I believe they still operate the St. Louis. Loew's is also in opposition in that town. They have two theatres.

Q. Mr. Harry Arthur has all the first-run theatres except the Loew theatres? A. That is correct. One of those theatres, incidentally, is a Fox—a house that Fox built—I mean William Fox—but we were in the town a great many years. We had a theatre there. I recall it distinctly. I think it was

(1602)

called the Liberty theatre, and, of course, that was in the early days when Fox went in there. It is away back in the 1900's. It couldn't develop into anything like what you have there today. But Paramount put in a theatre—Kopler is the fellow who put in the St. Louis theatre. He is an independent operator. And I know Skouras put in a theatre, when they were operating down there, the Ambassador theatre; Loew's had one; Fox had one, too, the biggest and best of them all. So we kept playing there, and I guess the only reason Fox went in was he did not think we were getting the proper representation or outlet.

Q. Mr. Kupper, you have mentioned that several times in the licensing of your pictures. It is from time to time necessary to have a controlled outlet for your pictures? A. Well, frankly, I would like to see Fox have one in every

key city in the United States. That is my personal opinion about it. To me it is very important.

Q. Do you think that you would get a better exploitation of your pictures if you did have one in every key city? A. I know where we have them we do, so I assume you would there, too.

Q. Was it true that in the late '20s, when Mr. Fox was building these large theatres, that you were having difficulty licensing pictures to the established theatres? A. Yes, (1603) sir.

Q. In St. Louis, you grant Harry Arthur clearance? A. Yes, sir.

Q. He has, incidentally, he has a lot of subsequent-run theatres in St. Louis, and the first-run houses grant a clearance over those houses, who in turn are granted clearance over other houses that follow him.

Q. Is there any difference in the way that Fox pictures play in St. Louis from the way they play in Boston? A. You mean as to clearance?

Q. Clearance, run, admission price? A. Clearance may vary, that is the only difference, but there is still the same principle and the same way that they are licensed. We license them all with the clearance. And their admission prices may vary. I don't know just what the admission price is in each of these houses you are talking about, Boston, New York. They may vary, but there is still an admission price and it is always taken into consideration, and the clearance is always a matter of consideration and a matter in the license.

Q. As I understand it, in St. Louis, aside from one theatre operated by Loew's, every other theatre in the city is an independently operated theatre? A. I think Loew had two theatres, Mr. Caskey. Yes, outside of those two, they are operated by Harry Arthur, or the Fanchon—I don't know

(1604)

the company name. I think it is Fanchon & Marco Theatre Company, or something, but Harry Arthur operates those theatres.

Q. The first-runs? A. The first-runs.

Q. Then on the second-run he has some first-runs, and Mr. Warrenberg has some second-runs? A. Yes, and Kineman follows him too. He has opposition too, as a matter of fact, in some second-runs, some sections.

Q. But aside from these two Loew's theatres in this great city of St. Louis, all the other theatres are independently operated and owned? A. They are independently operated by Harry Arthur. I don't know whether he owns them. He owns, he leases them, but operates them.

Q. That is first-run. I mean subsequent-run, there are also no affiliated theatres? A. No, there are not—not to my knowledge. I don't know of any.

Q. And the same pattern of clearance? A. Let us get that question correct. Affiliates—you mean of any of the defendants?

Q. The five defendants? A. They are affiliated with Arthur.

Q. That is right. A. He has got them.

Q. But not with any of the five defendants? A. No, sir.

Q. To your knowledge? A. That is right.

(1604a)

Q. Is the same method of distribution, as far as prior run, clearance and admission price, followed in St. Louis as is followed in say Boston? A. Yes, sir.

(1605)

Q. In Indianapolis, whom do you license first-run? A. An old established account, Fred Dolle, who operates the Fourth Avenue Amusement Company. He has the Circle and the Indiana—— I should put it the other way, Indiana and Circle. The Indiana is a little better theatre than the Circle,

although they are both fine houses, and there is opposition. He also has the Lyric Theatre. But prior to that, having the Circle or the Indiana; he had a house called the Apollo, where we served him for a great many years, and he acquired these theatres, Fred Dolle acquired this Circle and the Indiana, and which are better houses, I say, than the Apollo, that was torn down. Loew has an opposition out there.

Q. How long have we served Mr. Dolle? A. As far back as I can recall, in Indianapolis.

Q. In Indianapolis do you grant Mr. Dolle clearance? A. Of course we grant him clearance.

Q. And he has a prior-run to the other theatres in town? A. Yes, sir.

Q. Same pattern of distribution as in Boston? A. Yes, sir.

Q. Kansas City? A. Yes.

Q. Fort Wayne, Indiana, who is your first-run customer? A. Same customer we had for a great many years, an independent operation for a long time, I think the Quimby (1606) Estate. Fred Quimby used to head the company, Quimby Enterprises. He died. His widow still maintains the business. But there at one time I think he made some kind of deal with RKO, I think it was, but he got the theatres back, and we have stayed and played with his theatres for a great many years.

Q. You licensed the theatres before he sold any interest to any of these defendants? A. Yes.

Q. Thereafter he got the theatres back and you continued to license him? A. Yes; and when he didn't have them, we continued to license them.

Q. There is another theatre operates first-run in Fort Wayne, is there not? A. Yes, a small theatre, very small theatre. It plays westerns and anything like that. I would not consider it a comparable first-run theatre, five or six

hundred seats against theatres of 2,000, 2,800 or 1,800, things of that kind.

Q. South Bend, Indiana, whom do you license first-run? A. It is a Publix affiliate in South Bend, Indiana, been all along, as far as I can recall, and as far back as I can think, we have sold them.

Q. How far is South Bend from Chicago? A. Oh, not very far. Short ride on the train, short ride in an automobile, but I don't know exactly the mileage.

Q. Whom do you negotiate your license with for this (1607.)
theatre? A. That is done in Chicago with Immerman, who is the local manager, but generally, I think it is done with Frank Dromey, who is the head of the booking and buying department. That is done with our Chicago office.

Q. Gary, Indiana, whom do you license? A. Gary, Indiana, we have an independent account there. That has been for a good many years, as long as I can recall. In fact, when I was in Chicago, I think he operated a theatre there, I mean, when I was a manager in Chicago. A fellow by the name of Young has been operating there. And we have operated and sold our product up there all these years. They have opposition. Publix is in opposition. It is a Paramount affiliate.

Q. In Gary, are the theatres in Gary subject to the Chicago clearance or are they not? A. Yes, sir, they have been. I know they are now.

Q. In Chicago whom do you serve? A. Balaban & Katz theatres today, and they, of course, have some opposition in there. RKO is in the situation. But B. & K. operate, I think, the four theatres, the Chicago Theatre, to me, is one of the outstanding theatres in the country; they also have another house, State-Lake, which is not as large as the Chicago, but it is a very fine house and it is operated generally on a long-run policy. They had two other similar houses, the Roose-

(1608)

velt and the United Artists theatres, and I think that they have several other houses. They have the Apollo and the Garrick theatres. They were legitimate theatres that had been converted into picture houses. They have opposition. There is an independent house there, the Woods Theatre, operated by a man named Silverman, and that is right next door, I think, right close to the Garrick Theatre—Publix operation. As I say, RKO have two houses. They have one good-sized house and one smaller house. But we have been selling RKO for a long time. However, there was a period when we didn't. I mean, probably that was due to the quality of our product, I don't know, but we did not. We had a theatre there Fox was going to go into at that time, and to open; there was a theatre called the Monroe Theatre which was in a very poor location, in the financial district. Why they ever opened it there, I don't know. At night you can imagine how many people there would be, just like down in Wall Street, you can imagine how many people you are going to get downtown at night. In any event, that is where we had a theatre, and years later, when Grainger came in, about his time, we began to get proper representation from B. & K., who have been our account ever since.

Q. That proper representation with B & K was before Paramount acquired any interest in it? A. Yes, it was, I am quite sure it was.

(1609)

Q. The Balaban brothers built the Chicago Theatre before Paramount acquired any interest in it? A. Yes. I think that Balaban & Katz, they are the same Katz, but it is an old firm, they had the smaller theatre before they had the Chicago Theatre. Just three or four brothers, Balaban brothers, and they were all in together. In fact, they had First National at that time for a long time before Paramount had any part of it.

Q. They were one of the large franchise holders of First National? A. I would say so, yes, very important part of First National.

Q. The Chicago Theatre was built right after the last war? A. Yes.

Q. Opened in 19—— A. Was built when I got there, and I can tell you when that was, to give you an idea when it was built. That was 1924. I know it was built quite a while before that. I am sure it was around 1920, 1921, perhaps.

Q. In Peoria whom do you license? A. We license an affiliate of Paramount, Central States Theatres, and a man Rubin operates that circuit. In fact, he was a customer of ours not only there but several other towns long before he became affiliated with Paramount. Just one of the old stories, Rubin is a customer—the Rubin family.

Q. In Chicago do you negotiate for Chicago, South Bend and Peoria, among these 92 cities? A. Yes, sir.

(1610)

Q. With whom are those negotiations conducted? A. South Bend?

Q. South Bend. Mr. Dromey? A. Mr. Dromey or Mr. Immerman in the B & K office in Chicago.

Q. In Chicago? A. In Chicago. Mr. Immerman and Mr. Dromey. John Balaban at times was in on it, but the other two are generally the ones in Chicago, and Mr. Rubin for the Central States in Chicago.

Q. Mr. Immerman? A. I don't think he has anything to do with the Central States, Rubin and his brother operate them. He has another brother, too, who is out in the field, district manager out there, but they still maintain their operation of those theatres. I don't think they are a partner of B. & K. and Paramount.

Q. They operate themselves? A. To my knowledge they do. To my knowledge, I always figured they did, always believed they were doing it.

Q. You, in licensing to Peoria, deal with Mr. Rubin? A. That is right.

Q. For his theatre? A. That is right.

Q. The cities in Michigan which are operated by Butterfield in Grand Rapids and Flint, with whom do you deal? A. With Ed Beatty, who is the head of the Butterfield Circuit. He has a man named Lee Brooks, another fellow that used to work for us a great many years ago. This is the

(1611)

same story here. I have sold Beatty, and when he was—when Butterfield was alive and before Butterfield ever had any interest in it, when they were an independent operation, I always sort of considered the Butterfield Circuit operated by Ed Beatty a Butterfield circuit. I never think of it as Paramount or anybody else, or RKO or anybody else. I heard it testified here before I went on the stand that they had these interests. I am not surprised, I had heard it, but I never knew it to be so direct as I got yesterday, but together they were always Butterfield theatres and Ed Beatty operated them and he still operates them.

Q. In licensing your pictures to these first-run theatres in Flint and Grand Rapids, do you negotiate with any representative of RKO? A. Do we? No, sir. Done with Butterfield in the First National Bank Building in Detroit. That is their offices.

Q. And he is the boss? A. He is the boss. He is the president. He runs it and has been running it—ran it before Butterfield died; he is still running them.

Q. Taking the theatres in Minnesota, Minneapolis and St. Paul and Duluth, who is your first-run customer there? A. An affiliate of Paramount, Minnesota Amusement Company—I think that is the name—and John Friedl is in

(1612)

charge of the operation. They are our account in those situations.

Q. Does Mr. Friedl buy for these three theatres separate from any other so-called Paramount theatre? A. Buys our product separate and apart from anybody else, yes.

Q. There is opposition in Duluth? A. Yes, sir.

Q. Do you know the Granada Theatre? A. No, sir, I don't know it, sir. I haven't—I don't recall it, but I am sure it is not as big. It could not pay the rental we get there from the other people. I know the Norshor because I went up to see it open a long time ago. I don't recall it exactly. I know it is a beautiful theatre. I know it cannot compete in Minneapolis with the deals that these theatres make. We have two customers in Minneapolis. Let us take Minneapolis first. Years ago Pantages was our customer in the theatre there and Pantages was quite a theatre operator—he operated a chain of theatres—and then there was also Finkelstein & Rubin, they were an independent operation. They were the First National franchise holders out there, and well, we sold both of them, one time Pantages, another time Finkelstein & Rubin. Later on Pantages went out of the business, he got in personal difficulties of some kind, and, anyway, his circuit has evaporated. His son is still in business, I think he has a theatre out on the West (1613)
Coast somewhere, but the old man, he is gone; and now these theatres, which were Finkelstein & Rubin's——

Judge Hand: I think this is an awful lot of personal chatter mixed up with other things. Why can't you boil it down and not have whatever everybody was doing?

Mr. Caskey: Yes, your Honor.

Judge Hand: What became of people's fathers and all that kind of stuff.

Mr. Caskey: I do think this very directly tends to show why it is we license the theatres we do.

Judge Hand: I know, but it is too much.

Mr. Caskey: We will go along.

Q. In Des Moines who is your first-run customer? A. We sell the Paramount affiliated Tri-State Theatres, operated by A. H. Blank and Ralph Branton.

Q. What is the opposition there? A. They have opposition. RKO has opposition there. They have the Orpheum Theatre there. It is an affiliate of RKO. We sold Blank for a good many years.

Q. Whom do you deal with in licensing pictures there? A. Generally with Ralph Branton, or Mr. Blank, but Branton is generally the one that we negotiate most of our negotiations with.

Q. Where does he have his office? A. Des Moines, Iowa.

Q. In Omaha? A. We deal with the same outfit, Blank (1614)
and Tri-State Theatres and do our business with Branton out there, but it is done in Des Moines.

Q. What is the opposition? A. They have RKO in opposition there. I think there is another house in town operated —I know there is another house operated by a fellow named Goldberg. We don't sell him, we haven't sold him, but we have sold Blank a long time.

Q. Is the Town in your judgment a satisfactory theatre in Omaha, first-run? A. I think it is a very good theatre, but I don't think it can compare with the theatres we sell.

Q. As a matter of fact, you do license the Town subsequent-run at the present time? A. That is right.

Q. Des Moines and Omaha are the only two of these 92 cities in which Mr. Blank and Mr. Branton operate? A. Yes.

Q. Tulsa, Oklahoma, to whom do you license? A. We license Ralph Talbot, an independent.

Q. How long have you been dealing with him? A. A great many years. A great many years. In fact, he is the

only one there. He has two fine theatres, I mean first-run. He is the only first-run theatre operator there. He has two fine theatres, the Orpheum and Ritz; and he has the Majestic and Rialto, which he moves over to. The Majestic, he generally moves over to; the Rialto he generally plays lesser quality product. He has no subsequent-runs, but there are
(1615)
subsequent-runs in town. There is no opposition to him first-run.

Q. In Oklahoma City to whom do you license? A. We sell Joe Cooper's theatres there. That is Standard Theatres.

Q. That is the corporate name, but with whom do you deal? A. Generally with Joe Cooper, or he has got a manager now, who is back out of the Army, Pat McGee. He also has an office in Oklahoma City, and our boys transact a lot of business with them down there, but Cooper is the last word, as far as that is concerned; they have to take everything up with him, but he has been our account for quite a while.

Q. Was he the original account? A. No. The original account down there was the Liberty Theatre, which, incidentally, Cooper has got now, but that was a theatre that a fellow named John Sinopoulo owns, or owned in those days. I know it well because we served it out of Dallas. We did not have an office in Oklahoma City. There were three men in town you could sell, that were available for sale, if you could sell them. Sinopoulo had two theatres, he had one, the Liberty Theatre, which I remember, and another house; and then there was a fellow had the Empress Theatre, Tom Boland, who isn't there any longer. Sinopoulo then built what is now the Midwest. I guess it is as good as the Criterion. They are pretty much on a par, I know, in the reve-
(1616)
nue they pay on the pictures, and the Criterion was always Joe Cooper's theatre. And Sinopoulo, when he built this

Warner Theatre, Warners doing business with him, I mean, the Midwest Theatre, he lost it to Warner Bros., and I think he sold his interest to Warner Bros., and being our account, we continued to sell Warner Bros. until sometime that we couldn't see eye to eye, and then we sold it to Cooper. Incidentally he had two theatres way back in those days, the Capitol and the Criterion. The Capitol went out of business and became a commercial institution. So did the Empress, our affiliate. So today you have Cooper operating four or five theatres. He has the Criterion, the Midwest, which is a definite first-run for quality merchandise that he licenses. Then he has the Liberty Theatre and the Tower Theatre, which is a move-over from the Criterion or the Midwest. Then there is an opposition house there, the State Theatre, that I think a fellow named Dent put in there, which I don't sell. It is almost directly across from the Liberty, but it does not compare with either the Midwest or the Criterion, nor do I think the Tower, which is out in the suburban area.

Q. You have been in that theatre very recently? A. Yes, sir.

Q. Saw Mr. Wright there? A. I don't know whether I (1617)

saw Mr. Wright there. I saw a picture called G.I. Joe.

Q. In the Texas towns of Dallas, Houston, San Antonio and Fort Worth, whom do you license? A. We license our merchandise to what I call the Interstate Amusement Company, the head of which circuit is Karl Hoblitzelle, and the operating manager or general manager Bob O'Donnell. They are affiliated with Paramount.

Q. Were they always affiliated with Paramount? A. No. In fact, we sold them long before they were affiliated with Paramount. As a matter of fact, we came near acquiring those theatres way back, but they have been an account of ours; they have been an account of ours for a good many years. Prior, as I say, they were sold incidentally to RKO

at one time, and then they got the houses back and then operated them again for a while. Then they made some arrangement with Paramount. Paramount was in the town; I remember they were there, incidentally. They had the Palace, the Queen and another old theatre, and Interstate had the Majestic all the time. So today Hoblitzelle is in charge of the operation, is a partner with Paramount, as I heard, and they operate these theatres first-run. There aren't any other first-run theatres in Dallas, but he has opposition in Houston. Loew is in Houston. We have never sold them, incidentally. We sold these, which were an account, as I say, for years prior to Paramount becoming a partner. Now, of course, the

(1618)

product is used in both the A-houses, the Palace in Dallas, the Majestic in Dallas, the same way in Houston, and in the other towns.

Q. For years Paramount had theatres in these towns through a Southern Enterprise or some subsidiary? A. Yes, they had interests in the theatres, that were owned or operated there.

Q. And Hoblitzelle operated in opposition to them? A. Yes, sir.

Q. And in 1929 he made a contract to sell his interests to Fox? A. Around that date, I don't remember the exact date, but I know he was to do it and I know they had the papers drawn up, and I think they were signed, and then something happened and they were burned up and Fox got into difficulty—there was trouble, anyway. I was under the impression we were going to take him over. I was off on a trip.

Q. Subsequently he sold an interest to RKO? A. Yes, sir.

Q. And later to Paramount? A. Yes, sir.

Q. There is another circuit I am told operating in Texas called the Robb & Rowley. Do you know that? A. Yes, sir.

Q. They operate where? A. They operate in other towns in the State of Texas, quite a few towns, as a matter of fact.

(1619)

Q. Also in Arkansas? A. Yes, sir. I know he has—they have a partnership with Paramount in Little Rock, first-run theatres in Little Rock.

Q. With whom do you deal in licensing your pictures to Robb & Rowley? A. We sell them to Ed Rowley, who is operating head of the circuit, and he has a general manager named Jones. We do all our negotiation with them down in Dallas—you are talking about the Little Rock operation?

Q. No, I am talking about their whole operation. A. Their whole operation is done in Dallas with our local representative there.

Q. As far as you are concerned, is the Robb & Rowley Circuit any part of Twentieth Century-Fox? A. Never was, to my knowledge.

Judge Hand: We will take a recess now until 2.15.

(Recess to 2.15 p.m.)

(1620)

AFTERNOON SESSION

WILLIAM J. KUPPER, resumed the stand.

Direct Examination continued by Mr. Caskey:

Q. Mr. Kupper, who is your first-run account in Salt Lake City? A. It is called Intermountain Amusement Company. It is an affiliate of Paramount.

Q. What theatres do they have? A. Well, they have the Senate Theatre, the Utah Theatre, the Capitol Theatre, Lyric Theatre and Studio Theatre. There is first-run operation and move-over operation.

Q. Who is the operator in competition? A. I think it is Tracy Barham?

Q. Tracy Barham is the Intermountain representative? A. Yes.

Q. And who is the operator of the Uptown Theatre? A. Joe Lawrence. He is an independent operator. The house was formerly named the Paramount, which Paramount lost the lease on, and he picked it up and changed it to the Uptown.

Q. Does Mr. Barham negotiate or deal for any other of these 92 cities? A. No, sir.

Q. Only for Salt Lake City? A. Only for Salt Lake City, but he deals—well, not of these 92. That is the only one.

Q. Now, in Tacoma who is your first-run customer? A. (1621)
That is an independent operation. John Hamrick, and a man named Edress, who is partner, or something; and they have several first-run theatres there. They have been an account of ours for a great many years; they are the Roxy and the Music Box. They are both about the same, I think, in seating and appointments.

Q. Mr. Kupper, we have been discussing these 92 cities. When did you first become aware of the fact that there were 92 cities having a population of 100,000 or more? A. The last couple of weeks when you asked me to check it. I did not know the exact number; I knew there was a lot of them but I did not know there was 92.

Q. Do these 92 cities constitute any special or unique market in the motion picture business? A. Well, they are the largest cities in the United States. I think they would stand up as very unique and very important.

Q. And are the cities of 100,000 or 50,000 in their turn important? A. Yes, sir.

Q. And so on down the line? A. Yes.

Q. Now, in selecting the first-run customer in all the cities in the United States from 100,000 down, do you follow the same general principles that you have discussed with regard to these 92 cities? A. I would say so, yes, sir.

Q. Many of the customers are old accounts of yours? (1622)

A. Yes, sir.

Q. Operated by people who have grown up with you in the business? A. Yes, sir.

Q. Many of the theatres which are owned by one of these defendants are theatres which you served before any one of the defendants acquired an interest in them? A. I am sure there are some.

Q. In general, they are the best theatres in the town? A. I would say so, yes, sir.

Q. And in those situations where they are not the best theatres, they are theatres which have produced a satisfactory revenue for the company? A. I would say so, yes.

Q. Now, in each of these 92 cities, with the exception of Somerville, Massachusetts, do you sell other runs besides first-run? A. Yes, we do.

Q. Do you sell any operator in these 91 cities who wishes to license your pictures at fair terms and on a run which is available to him? A. Yes, sir.

Q. I have excluded Somerville because I understand that suburb has only two theatres, and they both play together first-run. A. Yes. You might say there is only one run in the town; no subsequent run.

Q. But there are many theatres in that area which are competitive? A. Yes, sir.

Q. And you serve those? A. Yes, sir. (1623)

Q. Now, in licensing your pictures how do you determine the amount to be charged to the exhibitor? A. Well, in the main our important pictures are played on percentage, and we have a pretty fair value. We know what the actual cost of the production was; we have previewed the picture ourselves, and from our knowledge of what a picture can do, or what we believe it can do nationally, we set—that is, Mr.

Connors and myself and our sales managers discuss and decide at about what level in our sales we should sell the picture, whether it be percentage to a split or whether it be flat rental.

Q. When you use the term "flat rental" what do you mean? A. Well, generally they are the smaller calibre pictures, and they don't throw off as great a revenue. They have not got the box office draw.

Q. I know it is obvious, but I want it for the record: What is a flat rental price? A. A negotiated, stipulated, definite rental.

Q. $100? $500? A. $100, $500, whatever it is agreed upon, it is definite and positive and that is all you are going to get.

Q. And what is a straight percentage deal? A. Well, a percentage of the gross receipts that comes into the box office of the theatre that is paid by the public.

Q. Regardless of how much or how little is taken in? (1624)

A. That is correct.

Q. And what is a sale on a percentage to a guarantee or against a guarantee? A. Well, that is where we have $100 guarantee against 35 per cent of the gross, for instance. That is a guaranteed film rental that we are going to get, again, irrespective of what goes in. Of course, if it goes over, you are going to get more; and if it does—well, take another example, a hundred dollar guarantee against a percentage to a splitting figure. Well, let us take 35 per cent of a thousand dollars, so that is the splitting figure; well, when it hits that you are going to get $350, and the guarantee didn't mean anything. But it is a protective measure for you; at least you know the least you are going to get.

Q. And you use these four methods of pricing your pictures throughout the country? A. Yes.

Q. Is there any distinction whether the particular ex-

hibitor you are negotiating with is affiliated with one of these defendants or is not? A. No.

Q. Now, there is some confusion in my mind about three terms: World premiere; pre-release; first-run. Will you clear them up for me? A. I will try to. A world premiere—and as an example I can cite one that is going on right now in Chicago—we have a very fine and very important picture,
(1625)
a very expensive picture, a picture which we know and believe—at least we believe—will be a great box office attraction. Incidentally, it is a picture involving two very prominent and artistic young ladies, the Dolly Sisters. One of the girls happened to marry a man named Netcher, which was quite a department store operated out there in Chicago, and we thought it would lend itself and have some advantage in the publicity, because, after all, she is more or less socially prominent, or, at least, the family is socially prominent, and it builds itself in Chicago. So we decided we would like to have a world premiere in Chicago, having these things in mind, and thought we could get, and did get, and secured the Chicago Theatre to operate—to release it, and licensed this picture for the world premiere. Now, we did not exhibit it or try to exhibit it in any other theatre before we established—we may have tried to negotiate for license, but we did not offer it or give a play date on it until after we had opened in Chicago.

Q. Now, did you have a band and parade, and the mayor throwing out a baseball? A. We had a tremendous campaign. We had some stars come in there, a number of them; one of the girls, particularly June Haver, who was in the picture, a very important part—she was one of the Dolly sisters; and we had the producer of the picture come there, who was a well known producer and theatrical man, George
(1626)
Jessel, and a number of other stars; and as they were met

we paraded them through the town, and the whole town turned out for them, even the mayor welcoming them to the city. Why, you could not get through State Street. They jammed them up and down. They had to have a motorcycle and a police escort to take care of these people. And, naturally, a lot of publicity emanated from there over the wires of the Associated Press to all corners of the country, and they all knew about it, and it was on the radio, and all of that, and that built it up. Now, that was a world premiere. That is show business.

Q. Now, this picture The House on 92nd Street, the exhibition at the Roxy, is, as a matter of fact, the first presentation anywhere in the world, is it not? A. Yes; but we did not do like we did in Chicago. We did not ballyhoo it to that extent. We did not advertise it as a world premiere.

Q. So that is just first-run? A. That is first-run.

Q. And what you referred to yesterday when you released the picture State Fair in a large number of Iowa towns following its opening in Des Moines was what you call a pre-release? A. Yes, they were all pre-released. And that is easily explained. That picture State Fair was set for release in October. I mean for the country. And we opened

(1627)

it up out there in September in all these towns.

Q. Now, one of the allegations of the complaint is that there is some affiliation between Twentieth Century-Fox and the Randforce Amusement Company. In your dealings with the Randforce, with whom do you deal? A. There are two men I deal with, Louis Frisch and Sam Rinzler.

Q. Are they officers or directors or employees of Twentieth Century-Fox? A. Not to my knowledge, no.

Q. Do you deal with anybody at Fox in licensing your pictures to Randforce? A. Do we deal with anybody at Fox?

Q. That is right. A. No, we deal direct with them.

Q. And do you deal with anybody at RKO in licensing your pictures to Randforce? A. No.

Q. Now, with regard to Skouras: You, of course, know that the three Skouras brothers have an interest in the theatre? A. In some theatres, yes.

Q. And when you deal with Skouras theatres, with whom do you deal? A. George Skouras, William White, and a man named Benes. They have offices in Broadway.

Q. Do you deal with anyone at RKO? A. For who? Skouras Theatres?

Q. Yes. A. No.

(1628)

Q. Do you deal with Mr. Spyros Skouras? A. No.

Q. Or Charles Skouras? A. No, not the Skouras Theatres you referred to in the metropolitan area, no. But we deal with Mr. Charles Skouras.

Q. And this chain of theatres, one operated by Skouras Theatres Corporation, and the other operated by Randforce —are they parts of the old Fox Metropolitan Playhouse? A. Yes.

Q. Which went into receivership in 1932? A. They are.

Q. Now, to use a colloquial phrase which we used here the other day, have you and these other defendants ganged up on the independent exhibitors of the country?

Mr. Wright: That is objectionable, if the Court please; pure argument.

Judge Hand: I will allow it.

A. Ganged up? What do you mean by ganging up?

Q. I assume it means joining with these other defendants to injure or impair the successful conduct of their business. A. Not in the least.

Mr. Caskey: Mr. Wright, I assume you will stipulate that if I propounded to Mr. Kupper the same ques-

tions which were asked of Mr. Zukor, that he will answer them in the negative?

Mr. Wright: Yes, indeed.

(1629)

Mr. Caskey: You gentlemen may inquire.

Mr. Seymour: I would like to ask one question.

Cross Examination by Mr. Seymour:

Q. Is there any relationship whatever between the licenses which Twentieth Century-Fox negotiates with the various theatre operating companies in which Paramount has an interest for exhibition of Fox pictures in the theatres operated by those companies, and any negotiations for licenses for the showing of Paramount pictures in any theatres in which Fox has an interest? A. No.

By Mr. Proskauer:

Q. Is there any relationship——

Mr. Wright: We will stipulate that he will answer no to the same question from all the other defendants.

Mr. Proskauer: It is stipulated that the witness will answer no to that question when propounded as to all the other producers and exhibitors.

Cross Examination by Mr. Erohlich:

Q. Mr. Kupper, I understand you testified that you had about 30 years experience in this business? A. I testified that I was employed by Fox Film, I think, October 7, 1919, and have been in constant service ever since with that company.

Q. Do you have a great deal of experience in selling pictures to the exhibitors? You did, didn't you? A. A great

(1630)

deal. yes, sir.

Q. And when you came to sell a picture to the exhibitor just what did you stress as your most important selling point? A. First of all, it is box office. I considered its box office potentiality.

Q. Well, let us break it down a bit. You were not just talking about box office potentiality when you saw Mr. John Smith who owned a theatre and asked him to buy a picture, did you? A. Well, first of all I decided that I thought I would like to sell that picture to John Smith, and then I went to work and used every bit of salesmanship I had in my possession to get the price that I wanted.

Q. Well, in your salesmanship what did you stress as the important element in your picture? A. Well, it could be the story; it could be the star value.

Q. Wasn't it as a result the star value of your picture? A. Well, when we had star value I guess I used that most, yes.

Q. And you used that for a great many years while you were selling your pictures in block? A. Yes.

Q. And did you use that after you sold your pictures in small blocks after the consent decree? A. Yes, sir.

Q. And you still use that today? A. Yes, sir.

Q. And that is really the chief element that you stress in trying to get your customers interested, isn't it? A. They are (1631)
all elements in what I consider box office potentiality.

Q. Now, in stressing the star value of your picture today is it necessary for you to sell your pictures in blocks of two, three or five, or could you sell your pictures as you did in the old days in a season's product? A. Well, I think I could, yes. Do you mean if I had no restrictions on me to hold me back or prohibit me from doing it? I think I could. I did it for years.

Q. So you can sell your pictures either way, under the old system of block booking, or the present system that you

employ of selling them in small groups? A. You are asking me if I or my company would have the ability to do it?

Q. Yes. A. I think we would. I think we could.

Q. Now, are you now selling your pictures in small groups? A. Yes.

Q. I understood you to testify yesterday that you were selling them in groups of two and three, as a rule? A. Yes. Yes, sir.

Q. And you have not gone back to the system of selling them in blocks? A. Blocks of two or three, or groups of two or three.

Q. When I speak of "block" I mean an entire season's product. A. No.

Q. You could go back to it if you had to or if you (1632)
wished to? A. I suppose we could, yes.

Q. But you prefer to sell in these small groups at the present time? A. Even though it makes a lot of work—it takes a lot more effort and a lot more work—I like it this way, and I think the exhibitors like it this way.

Q. And it takes a lot more money, doesn't it, in the way of expense? A. Yes, naturally.

Q. Your sales expense has increased substantially since the decree? A. Quite a bit, yes, sir.

Q. And if you did not sell a season's product in block your sales expense would be reduced? A. I did not hear that.

Q. If you went back to selling a season's product in block, your sales expense would be reduced, wouldn't it? A. I imagine it would, yes, sir.

Q. And you feel that you could do the same business with either method? A. I am not so sure of that. But I know we could sell the product. Whether we could do it as good that way as we do this way is something I can't tell you.

Q. As a matter of fact, the reason you have not gone back to the old system is because you are making more money with

the new system? A. Yes, I believe we are selling to better advantage.

Q. Do you have reports of your trade showings? A. Yes, (1633)
we do.

Q. And do you examine these reports from time to time? A. I have.

Q. And do you find that these exhibitors around the country go to these trade showings in large numbers? A. No, they do not. Very sparsely. I was very disappointed that they did not take more advantage of it.

Q. As a matter of fact, the exhibitor does not rely on the trade showing of a picture; he relies on the star, doesn't he, when he does business with you?

Mr. Wright: If the Court please, as to what the exhibitor relies on this man is not competent to testify.

Mr. Frohlich: This man is an expert.

Judge Hand: I am sure I do not know what it has got to do with the case, but I will allow it. Go on.

The Witness: The question again, please.

Mr. Frohlich: Will you read the question, please.

Q. (Read.) A. Well, if he cared much about the trade showing I think he would be there; so apparently it must be something else.

Mr. Frohlich: That is all.

Cross Examination by Mr. Raftery:

Q. Mr. Kupper, there has been some testimony here that there are approximately 17,000 theatres in the United States. Does that agree with your idea? A. I think I testified to (1634)
more than that.

Q. Well, you will admit to 17,000? A. Oh, yes.

Q. Well, they are divided into affiliated circuits, independent circuits, and individual operation? A. They are.

Q. And you have many individual operations where one exhibitor owns the one theatre; isn't that a fact? A. There are a lot of towns like that, small towns.

Q. And those are absolutely closed situations, are they not? A. Yes, sir; there is no opposition.

Q. And for the most part they are independent exhibitors? A. For the most part.

Q. The affiliated theatres are generally in the larger towns; isn't that a fact? A. Yes; but they are in small towns too.

Q. But for the most part, numerically, the great number of their theatres are in the larger situations? A. That is right.

Q. So, numerically, the independents far exceed the affiliated, isn't that right? A. In numbers of theatres, yes, sir.

Q. And since 1936 and 1937 this business has been a pretty prosperous business, hasn't it? A. I would say it has, yes, sir.

Q. Both in production and distribution and exhibition? A. I would say so, yes, sir.

(1635)

Q. And that same prosperity has extended through the operation of the independent accounts that you serve; isn't that a fact? A. I would say so, yes, sir.

Q. Have you heard of any theatres for sale around the country? A. Not very many; and I have not heard of any going out of business either.

Q. So when Mr. Caskey was talking about the ganging up situation, as far as you know, the independents have fared very well financially since 1936, 1937; isn't that the fact? A. I would think so. I believe so.

Q. Well, you know so from your own dealings with them, do you not; Mr. Kupper? A. I don't get around to as many small towns today as I used to; but it is my belief that that is the fact; and I hear from my salesmen that they are doing pretty well.

Q. And you have mentioned, I think, the name Nathan Yamins, did you not, this morning? A. Yes, sir.

Q. Operating independently in Fall River. A. Yes, he has been there a good many years.

Mr. Raftery: I should like to remind Judge Goddard that that was the man who swore to the affidavit before your Honor with the jurat at Palm Beach that cold winter's day when we were here.

Q. Now, about New York City: You have been selling (1635a)
pictures yourself around New York City a great many years? A. Yes, sir.

Q. Or either yourself or your associates or assistants have? A. Yes.
(1636)

Q. And you have had many first-run outlets in New York City? A. Quite a few, yes, sir. A number of theatres play first-run.

Q. Do you have many more first-runs today than you had back in 1936? A. Yes, sir.

Q. Now prior to 1930, when you were working for Fox Film as distinguished from Twentieth Century, the RKO Circuit operated a fair number of theatres in the subsequent runs here in New York City, did it not, Mr. Kupper? A. Yes, they did.

Q. And before that the name was known as Keith-Albee, was it not? A. Yes.

Q. And those theatres for the most part were vaudeville houses? A. Vaudeville, vaudeville-picture houses.

Q. And there were two classes, were there not; that is, like the Palace and the Riverside that played straight vaudeville and a newsreel, and those which played a combination vaudeville and feature pictures, is that right? A. Yes.

Q. And the Loew's circuit operated in a similar manner, did they not? A. Same manner.

Q. Except that the Loew's circuit were practically all combination theatres? A. They were.

Q. They did not operate straight vaudeville theatres? A. No, not like the Palace in those days. They generally (1637)
had vaudeville and pictures.

Q. And Loew's theatres long before RKO started featuring the picture, were featuring the picture equally with the vaudeville, were they not? A. Yes.

Q. And the Loew's theatres were the only people to play one picture with the vaudeville? A. That is right.

Q. There were no double features? A. Not in those days, not generally, no.

Q. And isn't it a fact that during that period, starting around 1924, 1925, up until sound came in and until sound took hold, the Loew's theatres generally played United Artists pictures, Metro pictures, and some Paramount pictures, in addition to vaudeville? A. That is right.

Q. So that United Artists was a customer of the Loew's Circuit way back in the silent picture days; isn't that a fact? A. I was always under the impression they used all United Artists pictures.

Q. Well, I will agree with you on that. And they used them back in the silent picture days and have used them ever since, isn't that a fact? A. That is correct. I think they have used them ever since. I have not checked but I think they have used them ever since.

Q. Well, you watch the metropolitan advertising in the dailies of the second and subsequent-run houses, do you not? (1638)

A. Yes, sir.

Q. Now, the RKO later took over the Keith-Albee; that is, it became known as the RKO operation? A. Yes, sir.

Q. And gradually they went second-run and began featuring feature pictures with the vaudeville, isn't that a fact? A. Yes.

Q. Now, all this time Fox pictures were playing primarily in the Fox houses in New York City with the second-runs, were you not? A. We were.

Q. You had the Audubon up on 168th Street, is that right? A. Yes.

Q. You had the Riviera at 96th or 97th Street? A. Up around there, yes.

Q. And you had theatres in Jamaica, Long Island? A. Yes; Academy of Music on Fourteenth Street.

Q. And you had them in Brooklyn? A. Yes; and Jersey.

Q. And after a time, either during bankruptcy or receivership or some other Federal court procedure, the Fox circuit disintegrated, did it not? A. It did.

Q. And ceased to be second-run competition here in this neighborhood? A. Well, some of them are still in that classification.

Q. What do you mean, in bankruptcy or second-run? A. That I don't know. I mean playing second-run, subsequent-run. But they are under different management. They (1639)

are not under Fox management.

Q. But there was a disintegration of that circuit? A. That is correct.

Q. So the phrase "Loew's split," referred primarily, did it not, to the pictures that played second-run or sub runs in the Loew's theatres; isn't that it? A. Yes, it is a term I

think that was coined by the exhibitors. They play the same pictures that Loew played. RKO had some other type of pictures, and Fox had some other; so they say they play the Loew's split or the RKO split, or they play some other split.

Q. Now, Mr. Kupper, don't you know that there is an economic reason that those terms exist? Isn't it a fact that there are sub-run theatres in New York, unaffiliated theatres, that follow either Loew or RKO, and certain of them will not follow or play the so-called Loew's split, isn't that correct? A. That is correct.

Q. And there are other theatres that won't play the so-called RKO split? A. That is right.

Q. And there is a big economic disadvantage between one and the other due to the fact that you have 40 RKO theatres as against about 60 Loew's; isn't that the fact? A. That is right.

Q. And you have to pick up your revenue from other sub-runs that are willing to play the so-called RKO split, isn't (1640)
that the fact? A. Yes.

Q. And those who play the Loew houses don't get as many sub-runs to follow, do they? A. I don't think they do. I don't know, but I don't think they do.

Q. Well, do you feel that you can pick up a sufficient amount of revenue to offset the difference between the 40 and 60 by playing the RKO split? Is that right? A. Well, I would not say that. I think we would be better off if we had the Loew split. They have twenty-odd more important theatres, and I think we would make a lot more money, and I think we would get a greater film rental out of the New York area than we do in the RKO split; but we can't sell them; and they have got enough product; and we have got to deal with RKO. But I personally would rather have the Loew's circuit as to revenue, total dollars, than the RKO, which I serve.

Q. Isn't that true in many competitive situations? A. What?

Q. Isn't that true in many competitive situations, you can't get the houses you would like to get into? A. Yes, I guess there are some situations like that, yes.

Q. In other words, there is so much playing time in each house? A. That is right.

Q. And if somebody else has it, you can't get into it? A. That is right.

(1641)

Q. Now you told us this morning something about the great advantage of having show windows or places where you could get your pictures open first-run; and I think an exhibit went in, and Judge Hand asked the rest of us to get something like it, showing how you open all these runs, day and date. Well, haven't you got a competitive advantage of being able to sell your own theatres and securing that day and date playing between here and Los Angeles, that a company like United Artists or Universal or Columbia haven't got? A. I should think we would get more sympathetic treatment.

Q. You heard of the picture called, "I'll Be Seeing You"? A. Who?

Q. "I'll Be Seeing You." A. Yes.

Q. You would say that was a fine picture, wouldn't you? A. I would say so, yes.

Q. And would it surprise you to know that that opened in a Fox West Coast theatre on Christmas Day, and we could not get a showing in New York until a week after Easter? A. It would not surprise me at all.

Q. In other words, you do run into these bottlenecks in playing time, do you not? A. Definitely.

Q. Well, would you say today this is an exhibitors' market? A. It has been for a long time.

Q. And the distributors, in competition with each other,
(1642)
are continuously fighting that exhibitor market; isn't that the fact? A. Yes, as long as I have been in the business we have been fighting it.

Q. And you have just as much trouble with our brethren here at the table as you do with the independents on the competitive feature, do you not? A. Yes, sir.

Mr. Raftery: That is all.

Mr. Seymour: May it please the Court, I haven't anything else to ask this witness, but Mr. Beatty, who was here yesterday, has been held over for Mr. Wright to decide whether he wants to cross-examine. I have furnished Government counsel with the documents he asked for yesterday. Mr. Beatty has a homing instinct and has an odd itch to get back to Detroit. I do not know if Government counsel will say they want to cross-examine or if they do not.

Mr. Wright: I have not had a chance to examine the documents, but just from looking at them, I think we want to put them in evidence; so if you want to explain anything you had better hold him over. I do not know that we want to cross-examine him, but we would want to put the substance of what is in here in evidence.

Mr. Seymour: If you say you don't want to cross-examine him, I want to tell him he is at liberty to go back to Detroit, which he wants to do more strongly than I would in his place.

(1643)

Mr. Wright: I do not see any reason why he cannot go, with the understanding that we will expect to offer what is in here. So if you have any explanation that you want to have him make, why you had better keep him.

Mr. Seymour: I haven't any explanations I want him to make. And you can offer the exhibit.

Cross Examination by Mr. Wright:

Q. Mr. Kupper, getting back to the routine business of selling films, it was not clear to me from your direct testimony as to just where the final approval of the Fox film contracts lies, whether that is in New York City or somewhere else? A. Yes; it is in New York City. There have been others—they have been approved in the field, but in the main the final approval rests in New York, where the application for contract becomes a final contract with the signature of an officer of our company making it so.

Q. These four division managers that you referred to, those division sales managers, I think you said one of them was located in Atlanta, one in San Francisco. After they approve or recommend, then those contracts which they approve come to New York, is that right? A. Yes.

Q. And are approved here? A. Yes.

Q. And if approved here, signed by Mr. Connors? A. They are executed here in New York too, yes, sir. (1644)

Q. By Mr. Connors, is that right? A. Yes, sir, or Mr. Michel. I think it is Mr. Michel, the executive vice-president.

Q. Well, either one, either Mr. Michel or Mr. Connors? A. They see that an officer of the company, that his signature goes on the contract.

Q. And in the course of selling to accounts that Fox serves, the salesmen in the exchanges have nothing to do, of course, with selling the so-called affiliated circuits, do they? A. No, I do not believe they do at all.

Q. And that is pretty much true of the branch managers also, isn't that right? A. That is not altogether true of the branch manager.

Q. Well, he may be called in for discussion, but actually he does not negotiate in any deal, does he? A. He helps to negotiate; he helps to formulate the sales with his sales manager or district manager. He works pretty hard on those accounts.

Q. But the principal function of the branch manager and the salesman is, is it not, to sell the independent accounts in the area? A. The principal function of the salesman is to sell those accounts in his area, which generally are independent situations, small towns, and subsequent-runs in cities; and the manager's responsibility is to see that they (1645)
are all sold, whether they are affiliated or whether they are circuits or whether they are independents.

Q. And you give the branch manager and the salesmen quotas, do you, for what they are supposed to do from these independents, from independent accounts? A. You do not set it up for independent accounts. We set it up for the whole territory.

Q. How do you set it up? A. Well, in our case we have over years of experience found out what a branch—what percentage of the United States it is that that branch does, and that is the yardstick. It is what they do, and that is worked out percentage-wise over the country; and then we, in turn, break it down. It is not drawn off from just the independents or just the affiliated or their circuits. It is the whole.

Q. So that you do set a quota for each branch, is that right? A. Yes, the percentage of the gross.

Q. And within the branch do you have any quotas fixed for any particular accounts, as distinguished from others? A. No, we do not.

Q. You do not break down your quotas—that is, your particular salesmen don't have quotas for their territories? A. They have a percentage the same as we do at National*

*Change as indicated at p. 1229.

for the branch. Each branch does it in turn for each salesman's territory.

(1646)

Q. Within the branch there are quotas for the salesmen's territories? A. That is right.

Q. And insofar as those salesmen are concerned, those quotas are independent account quotas, isn't that right? A. Yes, sir.

Q. And then, as I understand this progression of authority, anybody at any stage can always turn down an application, isn't that right? Of course the salesman, in the first instance, may not even take an application from the exhibitor? A. There is no sense in him writing it up if he has not got what he considers a fair and equitable proposition, because he knows he will be rejected.

Q. So he may reject—— A. He will walk away.

Q. —and the branch manager may reject; the district manager may reject; and the division sales manager, all may reject? A. Yes.

Q. And the only one that may approve is the New York office, is that right? A. That is right.

Q. Now, in the process of selling, do you, as a matter of fact, do what you call setting your deals or negotiating your deals with your affiliated circuits first; do you not? A. Well, I would not say that, no. I think a lot of our salesmen are out selling the subsequent-run accounts long before we complete negotiations with circuits or affiliated circuits. We do not wait for them.

(1647)

Q. Well, regardless of whether or not they are taking contracts from subsequent-runs, it always is a fact, is it not, that you just cannot or do not make pictures available to the subsequent-run accounts until you have arranged your terms with your circuits or others that play the prior runs in the so-called key spot; isn't that correct? A. That is

right. It is only natural. You would want to sell the first-run first, and then the subsequent-run from there on; but I thought you were talking about all salesmen.

Q. Well, I am talking about your general selling policy, I say it is a fact, isn't it, that before you would offer any run that is used by any key account, or before you make pictures available for exhibition following exhibition in those key theatres, you make your deals with your so-called key run accounts, is that right? A. First, yes, sir.

Q. Now these figures that you have tabulated here on this exhibit, F-12, Tree Grows in Brooklyn, these figures that you have were all equally available, were they not, in the interrogatory answers that were supplied as to the picture, Sweet Rosie O'Grady, that was given in answer to Interrogatories 6 through 11 inclusive? A. I assume so, yes. I don't know, though. I did not give any interrogatory answers.

(1648)

Mr. Caskey: We will have that chart tomorrow, Mr. Wright.

Q. I just wondered why a chart was made up on A Tree Grows in Brooklyn instead of Sweet Rosie O'Grady. Is there anything about this picture that you regard as more typical or more representative than the other one that was used in the interrogatory answer? A. I would not say it was. I was asked to get it.

Mr. Caskey: If I may iterpolate, the chart for Sweet Rosie O'Grady, which is a 1943-1944 picture, is being typed at this moment; and this is one that I picked out for 1944-1945 as being the same type of picture.

Mr. Wright: I was just trying to get at the basis for the picture.

Q. Now as I understand this chart that you have got marked F-12, all that this covers is simply the first-run exhibitions in these 92 cities of more than 100,000 population; is that right? A. Right.

Q. And of those, of the first-run revenue that you got from those 92 cities, as I understand your chart, only 16 and 47/100ths per cent came from theatres that you designated as independents here; is that right? A. Whatever it is, I don't recall now. If I can see it——

Mr. Wright: Give him a copy of it.

(Copy handed to witness.)

(1649)

A. (Continuing) Yes, sir.

Q. In other words, about 85 per cent of your first-run revenue in these towns came from affiliated—— A. No, sir, that does not say that.

Q. Well, 83.13 per cent came from Paramount, Skouras, National, Loew's, Warner, Standard Theatres, RKO and Paramount-Publix, is that right? A. Do you mean you are adding up everything but the independent?

Q. Yes. A. That is the first-run revenue out of these 92 towns, and it is broken down there, the percentage of them.

Q. Well, can you just answer the question? A. May I have the question again, please?

Q. (Question read.) A. Yes, first-run revenue in those towns.

Q. And this chart, of course, does not even purport to reflect the percentage of total revenue that you get out of those cities that was affiliated revenue or came from these companies as distinguished from what came from independents, isn't that right? A. No. It is the first-run revenue.

Q. You have in many of those situations a very substantial amount of subsequent-run revenue from affiliated houses, such as what you get from the RKO circuit in New York;

that, I take it, is excluded from this chart completely? A.
(1650)
That is right. They are both affiliated and independent. There is a substantial amount of both.

Q. Now this U.S. Gross, October 13, those percentages there represent the amount or percentage of business actually billed as of that date, is that right? A. That is right.

Q. Now this column that is headed, "Per Cent of Estimated U.S. Gross"—just what is that estimate and when was it—— A. Well, it was made the other day when we worked this chart out. As a matter of fact, we are always making estimates on our pictures, every quarter. In the years of our experience, we know what we have worked out, and drawn up tables—we have a tabulating department that can tell us almost to the dollar what the expectancy will be at any period of time.

Q. And, of course, you make an estimate at the time you first put the picture in release, is that right? A. That is right, we do.

Q. And you are able to estimate within a small percentage or so what it is going to gross at the time you put it into release, is that right? A. We form and we work out an estimate, yes, on all pictures, what we think they will do nationally.
(1651)

Q. But I say, the estimate you make at the time you release it turns out to be substantially what you realize when you finally get through with the runs; is that right? A. Well, most of them are pretty accurate. Some we go off on. We make mistakes; some we make a little more on, and some we make a little less on; but in the aggregate we are pretty close.

Q. And these percentages are also predictable as of the time that you start the release here, is that right, the percentage of the gross you are going to get from these various

interests that you have listed there? A. Well, I would say so, yes. It depends, of course, naturally, on the income at the theatre; I mean, the rentals they will take in as to what our percentage share will be.

Q. Now, you don't have any idea offhand as to how much of the total revenue that came out of these 92 cities named in the chart here came from affiliated theatres?

Mr. Caskey: I am going to have a table on that, Mr. Wright.

Mr. Wright: I just wanted to see if he knows offhand.

A. Offhand I don't know, sir.

Q. Now, I think you testified that at one time there you were out of the Warner circuit. That is, you were unable to (1652)

sell your films to the Warner Circuit anywhere in the country? A. Twice to my knowledge, twice that I have been negotiating with them, I have had to break off relationship, once for a short period, and finally we got together a little later——

Q. Well, the first time you refer to was the 1933-34, and the 1934-35 seasons, is that right? A. I can refresh myself on that. Somewhere around that time was the last time.

Q. 1933 and 1934 and 1934-1935, those seasons were the last seasons that you were out of the circuit, is that right? A. Well, I would not say were entirely out of the circuit. We did not sell them. I remember distinctly the last time because John Clark was then our general sales manager, and I, were negotiating, and I had been carrying the negotiations; and finally we had a showdown with their buyer, Mr. Clayton Bond, and it was in the Park Central Hotel, and it lasted almost one night, and we came to the conclusion that we just could not sell them; so we went out and sold the lot —either sold the lot or developed a lot of opposition; and

those accounts—we have never gone back to Warner's in those situations.

Q. Now, are those seasons you are referring to there the 1933-1934 and 1934-1935 seasons? A. Around that time.

Q. But you did not offer any of your pictures to any of
(1653)
those opposition independents until after you had broken with the circuit on the circuit deal, is that right? A. I don't believe we did as long as we were trying to negotiate with Warner's, or whoever it was—it was Warner's in this case —we certainly were not going to offer it to somebody else.

Q. Did I understand you to say that you stayed with each one of the independent accounts that bought your pictures in those seasons after Warner left you out? A. To the best of my recollection we have to this day where we established a new account.

Q. Don't you know, as a matter of fact, that there were a number of those situations where when you got back into the Warner circuit you took the product away from the independent who had it without any negotiations with him whatsoever? A. No, sir.

Q. You don't know that to be the fact? A. I do not know that, no, sir.

Q. Would you say positively that it is not a fact? A. I will say positively it is, that a great many of the accounts that we took away and sold—and I remember a lot of them——

Q. I am not talking in terms of many; I am talking in terms of any. A. That we did not stay with that independent?
(1654)

Q. Yes. A. I do not know of any that we took the product away from.

Q. Would you say that there were none? A. To the best of my knowledge there were not any. I don't recall them.

Q. How about Punxsutawney, Pennsylvania? Do you remember that one? A. I don't remember that one.

Q. Well, would you say that it is not a fact that you did take the product away from the independent there and give it back to Warner? A. I can't recall the individual situation. I remember Punxsutawney there.

Q. As a matter of fact, you don't know what was the correct situation? A. No, I do not know about that situation.

Q. And there are other situations that you do not know about? A. There may be, but I don't recall them.

Q. So, as you testify there now, you are not able to tell us the precise extent to which you took the product away from these independent accounts and gave it back to Warner, or the extent to which you did not; isn't that right? A. Well, I would like to refer to the record, but my best recollection is, a great many that we sold away, after we could not complete and work out our deal with Warner's, are still on our books, and still have used our product to this day.

Q. Now, can you answer my question? A. I have tried to. (1655)

Mr. Wright: Read it to him.

Q. (Read.)

Mr. Caskey: I submit he has answered the question.

Mr. Wright: That calls for a yes or no answer.

Mr. Caskey: It does not.

Mr. Wright: Can you answer it?

The Witness: Well, let me study the question once more, please.

Mr. Wright: Read it again.

(Question re-read.)

A. Well, I can't remember every town that we had sold away from Warner's right at this minute any more than I can tell you——.

Q. The answer to the question is no, isn't it? A. I will try and answer the question fairly and honestly. I don't like to answer yes or no, but I do not say that it calls for a direct one. I may be mistaken. But to the best of my recollection—and I am almost positive—that those that we sold away and established an account, the product still remains there.

Q. Well, you don't know. Is it right or isn't it right, do you know now, that you did not take any back, or what is the fact as to your present knowledge, not what you think? (1656)

A. I don't know of any that we took it away from them.

Q. And you don't know whether there were such situations or not, is that right? A. I did not know that there were any such.

Q. I say now, do you know whether there were or not? A. No, I don't know now.

Q. And it is also true, is it not, that in many situations instead of taking all of it back, you just told the independent that the product would have to be split with Warner in succeeding seasons? A. Well, I did not tell them that. I don't recall those situations at all I am talking about——

Q. Well, would you say there were none of those situations? A. No, there are situations where we split the product with Warner and an independent.

Q. And situations where the independent had bought all your product, and then when you went back into the circuit with Warner you told the independent that Warner would get half and he would get half from then on? A. Probably did in those situations; that is the way we carried on.

Q. And that was without any opportunity as far as he was concerned to negotiate for keeping all of it, isn't that right? A. There could be situations like that, yes, sir.

Q. And you just determined what the split should be
(1657)
and that Warner would have the other half, is that right? A. Well, it may be in a house that was not comparable by any means or stretch of the imagination that could support and handle that product, and naturally it was only a deal for a few pictures or a block of pictures, or, possibly, the product for that season; and we knew that sooner or later we might be able to work out a fair and equitable deal in those places.

Q. Now, with the exception of such independent accounts as may have been opened up as the result of this split that you had with Warner there in 1933, 1934 and 1935, can you point to any of those 92 cities that you covered where your product had played in an affiliated theatre and was then later offered to or played in an independent house on a regular first-run?

Mr. Davis: May I have that read?

(Question read.)

Mr. Davis: Does this relate only to the years 1933, 1934 and 1935?

Mr. Wright: No. I am covering the 92 cities that he testified to in his direct examination, and the period is the 1935-36 season to date.

A. Well, I believe Pittsburgh, Pennsylvania, is one where we definitely sold and have been selling the independent exhibitor. That is one of the 92.
(1658)

Q. And what was the affiliated house that you sold before you sold the independent? A. It was the Warner situation. They had the theatres, the other theatres.

Q. That is, you sold—this was the situation where you had sold Warner prior to 1933-34; is that what you are talking about? A. Yes; that is what I am talking about.

Q. Now, I called your attention specifically to situations other than those which opened up as a result of that split. In the last ten years from 1935-36 on, can you give me any situation in one of those 92 cities that you covered where you had made product available to an independent that was formerly played by an affiliated theatre? A. No, I do not believe so.

Q. Now, in those 92 cities that you covered, and confining yourself to this same period, 1935-36 to date, can you tell me any one of those situations where you had negotiations with two or more affiliated exhibitors for a first-run of your product? A. Two or more?

Q. Yes. A. Well, generally—there are some towns where we split the product between two affiliated, and there are some towns where we split it between an independent and an affiliated. What do you want me to answer?

Q. I want to get what the fact is. A. How do we sell them?

(1659)

Q. Other than the situations in which you have split the product between two affiliated first-runs on an arbitrary basis, there have been no situations in those 92 cities where you have negotiated with more than one affiliated exhibitor, isn't that right? A. Where we have split the product? Well——

Mr. Wright: Wait a minute now. Listen to the question.

Q. (Read.)

Mr. Davis: May I ask whether that means simultaneous negotiations?

Mr. Wright: I am talking about any time during the 10-year period.

Mr. Raftery: We are going to object to the use of the word "arbitrary."

Mr. Wright: Well, we will cover exactly what the nature of the split is later.

Mr, Raftery: We are going to object to this line of testimony for the reasons stated in our opening.

Judge Hand: Overruled. Go on.

A. Where there is an affiliated—where there are affiliated theatres, and there are two of them——

Mr. Wright: First, can you answer directly and then launch into your explanation.

Mr. Caskey: Let him answer.

(1660)

The Witness: I am trying, Mr. Wright, to the best of my ability; unless I don't grasp your question.

Judge Bright: Read it again.

(Question re-read.)

A. I believe that is correct.

Q. And where you had a split in those situations, those splits, as I understand it, have been made simply where you say that one gets a third and the other two-thirds, or one gets a half and the other gets a half, and it is determined on simply a basis where you say one exhibitor will sort out the pictures into two groups, and the other one makes the selection, is that right, or vice versa? A. That is right.

Q. So that in those situations the split that you make is in no sense the result of any competitive negotiations that you have with either of them; isn't that right?

Mr. Caskey: I object to that characterization of it. When there are two customers in a town and he sells to both, it is certainly competitive.

Judge Hand: Overruled.

Mr. Davis: May I have that question read?

(Question read.)

A. No, it is not right.

Q. Well, then describe these negotiations that you have with them that you regard as competitive. A. Well, we (1661)
have been selling—let us assume—we don't have to assume; take a concrete case, if you want, where we sold one of the affiliates a half of the product and the other one a half of that product: Our organization knows what we are going to release, and it is, as you say, and as I have said before, well set up, these pictures, and we know when we have trade-shown them—we can't sell them before we trade-show them—they are there, and they see them, and it is convenient to us, and it saves us a lot of dickering and argument, and they will divide as they seem to think and try to be fair on the splitting of it; and then when they have decided which it is, then we go and sell and negotiate direct with each one individually, separately and apart, at terms we think those pictures are worth for those theatres.

Q. The only negotiations you have are with reference to the rental terms on which the pictures in the particular split play, is that right? A. Yes, sir.

Q. You have no negotiations with reference to how much of the product shall be split and how the split shall be made, is that right? A. Well, we sit in on it; at least our representative knows what is going on; and I assume he will try to guide them right; and it would seem to me that they would both want to get the best of any attraction; they would like (1662)
the best pictures; but it don't work out that way. He has to be fair because he knows the next time they are going to make the split the other fellow will take the advantage.

Q. So it is worked out so that there is an alternative selection there which is not a subject of negotiation at all, is that right? A. Well, I would say that is correct.

Judge Bright: Who determines what the proportion of the split may be?

The Witness: Well, it is more or less handed down from our experience in selling the situation. As I say, when there was an equal split, there was never much trouble; and where you have one-third or two-thirds, even with independents or affiliated, that is a problem there, especially when you are only releasing a few pictures at a time.

Judge Bright: Who determines the split?

The Witness: We are supposed to determine the split, but we try to accommodate; we try to work with them and set it up so it will be fair for both; and I would say it is determined by the three of us, whoever is in the negotiation, or both parties to the negotiation.

Q. And in some situations you accomplish the same purpose that you do when you split the product by selling to a so-called pool of two or more of these affiliated theatres, isn't that right? A. Yes——

(1663)

Mr. Caskey: That question is objected to as to form.

Judge Hand: The witness says it is so. Objection overruled.

A. (Continuing) It will work out much the same way.

Mr. Caskey: The witness may have said he sold so-called pools, but I do not think he meant to say they accomplish the same result that was in Mr. Wright's question.

Q. Now, getting back to this question of a road show for a moment: As a matter of fact, a road show is a situation where you have a special showing in a theatre before it is done anywhere else in the area but where the picture does not become available to other theatres in the area at the conclusion of the showing, isn't that right? A. It is not run the same as the regular run-of-the-mill product, if that is what you mean.

Q. That is, when you have a road show you simply take over a particular theatre for an advance exhibition, and you have a high admission scale, and you generally share in the profits of the run, and you play it for as many weeks as you think it will stand up, and then when you are through with it it still has to go into what you call regular release before it become available to anybody else in the area, isn't that right? A. Not so.

(1664)

Q. Do you mean to say that if you have a road show exhibition of a picture in a particular area, and then you put it into subsequent-run houses before it has any regular first-run exhibition at the regular first-run prices? A. I didn't say that. I said the road show—for instance—let me give you the whole story: Let us take Song of Bernadette. We opened it here in the Rivoli Theatre. I forget how many weeks we ran, 18 or 19 weeks; it was a picture in which the admission price was increased; and we set up a definite admission for road shows on that particular picture, I think it was 85 cents minimum in the afternoon and $1.10 at night, or something of that nature, or 76 cents and $1.10, and we offered that picture following the road show at the Rivoli Theatre to all exhibitors in the City of New York who were willing to buy it and play it at that admission price. That was the established price we offered it as a road show, and that was the only way we would license it. We would not license it any other way unless we did get that admission

price; but it was offered for sale to all of them, and a lot of them played it following the Rivoli, and subsequent-run theatres.

Q. You mean in addition to a first-run road show you had a subsequent-run road show on that picture, is that correct? A. Yes.

(1665)

Q. And then after you got through with all these road shows, then you put it into regular release where it went into the regular theatres at the regular first-run prices, and from then on down in accordance with the clearance, is that right? A. We advertised at the time we solicited the licensing of the road show engagement that it would not be shown in any theatre in the United States for less than these admissions for at least one year.

Q. And it did not become available then to subsequent-run theatres on their regular policies until a later time when it was put into regular release through first-run theatres; is that correct? A. That is correct. If they had not so elected to play it on a road show basis at the prices we wanted, then it was not available to them until we had put it into general release at regular admission prices in the usual first-run manner, and from there on down in the area.

Q. After you get through with a road show, where you have a road show—I take it this table, this F-12 does not include any road show revenue. Was there a road show on Tree Grows In Brooklyn? A. No, sir.

Q. And such pictures on which you do have a road show, when you put it into regular release you then play it in the first-run theatres, is that right? A. Yes, sir.

Q. And on those first-run accounts that you referred to in your 92 cities, the affiliated first-run exhibitors that you

(1666)

named then have the privilege of playing the picture either simultaneously or successively in however many theatres

they have that are designated as first-run on your licenses, isn't that right? A. After we license them they can, yes.

Q. After they have had such first-run exhibition as those accounts give them, then they become available to later runs in the area, is that right? A. On a regular basis, yes.

Q. And do you call each time, even though the picture may have moved from one theatre to another, and it may actually be successive engagements—you don't count those as additional runs for the purpose of considering what run the subsequent independent operator gets it on, is that right? A. Are you talking about the difference between road show and the regular?

Q. No, I am talking about your continued first-runs. If you sell an independent exhibitor in one of those first-runs in one of those 92 cities a contract which says second-run in the town, actually he may not get the picture until it has been played on successive engagements in two or three or perhaps four of the affiliated first-run theatres first, isn't that right? A. Well, no. If he has got a definite second-run contract—unless I misinterpret your question again—he is

(1667)

going to get that picture second-run. Now, we have a first-run contract—let us say we have a license for first-run with an affiliate, and we license it for a theatre to play the picture, and we book it in that theatre—now, if you are referring to the fact that it was held over for a number of weeks——

Q. I am referring to the situation where he comes in and says, "Look here, I am supposed to have a second-run. Actually this picture has played two and three times ahead of me in these different theatres." And then you tell him, "Why, no, that does not interefere with your second-run; those are just continued first-runs or move-over first-runs; isn't that right? A. If they ask that question they would be told that, but we don't have it set up that way. They know what they are buying. They know what the first-run is and what the

move-over is, and if there is going to be a move-over, and they are sold accordingly.

Q. At the time the subsequent-run makes his contract with you and a price is filled in for the picture, there is nothing said in his contract as to how many times the picture can or cannot be played ahead of him on a first or move-over first-run, isn't that right? A. Well, I know he is going to assume there is only one run to be ahead of him, whether it is continued in one house or moved over to another. (1668)

Q. Can you answer the question?

Mr. Caskey: He did answer it, I submit.

Mr. Wright: Will you read the question, please.

Q. (Read.) A. There may be nothing said about it, but he knows the established principle and established business in the area, and he knows what transpires. He knows that he can't tell whether the picture is only going to play one week any more than we can. We assume that the picture will play maybe two or three weeks in a theatre, and it may only play one, or it may move to another house, or it may not move at all.

Q. So he does not know at the time he makes the deal with you how many times it is going to move over, does he? A. He generally knows because it is usually only the one move-over that you get. You do not move to a dozen.

Q. It all depends on what the first-run operator and you decide to do with the picture, isn't that right? A. I suppose it is what we negotiate or license to do, yes. He would know.

Q. And you put nothing in your contract which restricts you in any way from moving over the picture in just as many of these continuous runs as you want to have it in, isn't that right? A. We don't restrict ourselves, no. We ne-

gotiate, and you don't know as to what will make it available (1668a)
for a move-over and what will make a move-over.

Q. Now, in those 92 cities that you covered on your direct testimony, can you point to any situation there where an affiliated subsequent-run house plays a run of your films behind an independent who has a move-over privilege? A. Affiliated subsequent-run?

Q. Yes. A. I will look it up. I don't think there are any. (1669)

Q. You know there aren't any, don't you? A. I don't see them. I haven't got it through the list.

Mr. Caskey: Do you want to cross-examine or do you want to get the facts?

Mr. Wright: I want the facts, and I would rather have them from the witness, if he has got them.

A. (Continuing) Outside of Pittsburgh. I know our first-run account is an independent account. I know subsequent-runs there are a lot of Warner theatres.

Q. That is what I am asking you for. A. I am trying to get to that.

Q. In the situation where you have an independent, now, in Pittsburgh, does that independent first-run there have the privilege of moving over your pictures and does he move over your first-runs there to two or three theatres? A. The Harris Theatre, which is part of our product—licenses a part of our product, moves over—holds over, first of all, several weeks in the Harris Theatre. He can have a picture two or three weeks and then move it to the Center Theatre, which is his theatre.

Q. You have a move-over from the Harris to the Center in Pittsburgh, is that right? A. That is right.

Q. Before the pictures go into Warner second-runs, is that right? A. That is right.

Judge Goddard: That is an independent?

The Witness: Yes, sir, independent.

(1670)

Q. Do you have any other situations like that? A. Let us continue on in Pittsburgh. It just so happens the party that licenses the other part of our product does not have a move-over there, and he continues playing longer in the one house.

Q. Who is the other party? A. Shea Theatres, Fulton Theatre.

Q. So that is a split of your product there between Shea and Harris? A. Yes.

Q. Shea does not move over but you say the Harris house may move over before it goes into the Warner subsequent-runs? A. That is right.

Q. Are there any others in those 92 cities where that occurs? A. I think that is the only one.

Q. Well, take your time, look at it carefully. A. That is the only one that I see, notice.

Q. As a matter of fact, how many of those 92 cities there can you point to where there is a subsequent affiliated run of any kind that plays your pictures after an independent first-run? A. How many? Probably Pittsburgh is the only one.

Q. Do you find any others? A. Wait a minute. I think Miami might be an exception. I think we play some of them. I am not positive of that.

Q. In Miami your Wometco Circuit has your first-run?

(1671)

A. Yes, and may have subsequent runs.

Q. Your subsequent runs go to Wometco too? A. They go to them, too. I was wrong there. No, I do not believe there are any on this list.

Q. In those 92 cities, can you point to those cities in which an independent first-run that you license takes clearance over a first-run affiliated house in another city? A. I don't think so, no.

Q. I can give you one there. A. There may be one.

Q. Your Music Hall here in New York, of course, does take—— A. That is true.

Q. (Continuing) —clearance over some independent runs in some other cities? A. That is true.

Q. But apart from that, I mean, some affiliated runs in other cities, apart from the Music Hall. Can you give me a first-run independent theatre in any of those cities that takes clearance on your pictures over an affiliated first-run in another town? A. No, I don't believe so.

Mr. Wright: Have you one?

Mr. Caskey: We copied those clearance provisions in the record yesterday. I don't know where they are now.

Q. I think you referred in your direct testimony to these situations where the clearance that you have prescribes a subsequent-run for—or prescribes an admission price for certain subsequent-run theatres, and I call your attention to (1672)
one of them here, which is the clearance granted to Capitol Operating Company, Chester L. Stoddard, for the Capitol Theatre at New London. That is a Paramount affiliate. A. Yes.

Q. It says, "National release date." That means, I take it that it becomes available to this exhibitor when it is released nationally, is that right? A. I would say so.

Q. "30 days clearance in New London providing any subsequent-run house charges an admission price of not less than 25 cents for their entire orchestra at weekly night performances; if 20 cents, 120 days; if 15 cents, six months." Now, the statement as to the minimum adult admission prices, which are specified in the contract for the Capitol is simply none. Do you have any agreement in that situation with the Capitol as to what, if any, admission price it was

to maintain as a condition of having this clearance over these subsequent-run houses? A. I imagine we did. I don't recall it right now. I don't recall the contract. What is the year of the contract in reference to, as to clearance?

Q. That is for the 1943-44 season, your first group of pictures, I believe Bombers Moon, Heaven Can Wait, Holy Matrimony, and the same clearance appears as that which your picture Sweet Rosie O'Grady had when it played that (1673)

theatre. As a matter of fact, in dealing with this particular exhibitor, this Paramount affiliate, in virtually no case did you actually require the maintenance of a particular first-run price by that exhibitor, isn't that right? A. I wouldn't say that. I think we do generally watch that very carefully, and if it was not in the contract, I don't know why it wasn't put in, and, naturally, he should be, as far as I am concerned, he should be more concerned about charging a good admission and a right kind of admission, because he gets the greatest share of the income at the box office. I may contract for that picture 35 per cent, but he is going to get 65, so why shouldn't he want to protect the box office receipts?

Q. I am not talking about what he wants to do. I am talking about what you did. A. Well, that is what we did.

Q. In those cases where you neglected to insert any admission price restriction for his prior run, that was simply a matter of inadvertence, was it? A. I would say so, because I believe that our local representatives, who work out those contracts and work out those negotiations, know his admission price right along, and if he ever varied, they would have been the first ones to get in contact with him and see if there was any change and work it out again. I do not believe (1674)

any one of our offices don't know the admission price in those theatres, and they have it as a matter of record right on their booking books.

Q. No question of your knowing what the admission prices were. I am directing your attention now to what you required in the way of maintenance of prices by these affiliated first-run exhibitors that you do business with.

Mr. Proskauer: I am objecting to that as argumentative and repetitious.

Judge Hand: Overruled.

Q. (Continuing) As a matter of fact, in the great majority of the contracts you made with affiliated first-runs in this 1943-44 season you did not insert in the contract a minimum admission price that they had to charge; you know that? A. It should have been there. That is what the clause is put on there for and that is what the space is provided for and our instructions were it should have been on all contracts.

Q. As a matter of fact, you do give your first-run customers who happened to be affiliated with another distributor a great deal of latitude in the admission prices that they charge, isn't that right?

Mr. Proskauer: I object to that as incompetent and calling for a conclusion.

Judge Hand: Overruled.

A. We don't give them any more than anybody else, whether (1675)
they are independent or a small town or subsequent-run. They are all treated alike in that respect as any other.

Q. What you do, I take it, is reflected in the contracts that you made? A. Should be reflected there.

Q. In so far as you did not insert a minimum admission price requirement in the contract, then I suppose the maintenance of any price was simply a matter for further negotiation or adjustment between you and the exhibitor, is that right? A. It would be. I am positive——

Mr. Davis: Will you read that question?

(Question read.)

A. (Continuing) No, I assume that our branch knew and understood that the same price was going to be maintained that has been established in the theatre.

Q. That was, then, just an informal or implied understanding that customary prices would be maintained by those accounts where you omitted to state the minimum admission price? A. Yes; and I should think it would go even further. It would be more than an understanding. They would assume it was a fact and a part of the negotiations, part of the license, even though it might not be there.

Q. With reference to this 25-cent price that is specified for subsequent-runs there which follow 30 days, that, I take it, of course, is a minimum price, isn't that right? A. I (1676)
would assume so, yes.

Q. That is, 25 cents or more—if he charges 25 cents or more, he can play 30 days after first-run, is that right? A. Is that what it says?

Q. I will read it again. All it says is, "30 days clearance in New London providing any subsequent-run house charges an admission price of not less than 25 cents for their entire orchestra at weekly night performances; if 20 cents, 120 days." Now I take it means if his price goes down to 20 cents— A. He goes back.

Q. (Continuing) —he is shoved back to 120 days. But suppose he raises his price from 25 cents to 30 cents, then what happens? A. It would be a matter of negotiation with us whether he would think it good business on our part. I assume in that situation, I am not as closely familiar with it as perhaps I should be, but it would be up to us to decide whether it would be good business on our part.

Q. Actually, if he charges 50 cents, he still cannot play ahead of 30 days after this first-run, can he? A. It would be a matter of negotiation. I should think the first-run would be glad to have him go up in his admission. Certainly would be better for him.

Q. I understand he would be glad to have him go up in his admission, but he would not be glad to have him play within the 30-day period, would he? A. No, he would like (1677)

the given amount of protection, naturally, I would assume. He established that for the prior runs, were accustomed to getting it, and the public know about it, so he would naturally want that 30 days.

Q. Under this agreement I just read to you, he gets that 30 days protection whether the independent subsequent-run charges 25, 30 cents or 40 cents, is that right?

Mr. Caskey: That is objected to as purely speculative. There is no suggestion that in fact he did charge more or that he asked for anything. Mr. Kupper has repeatedly testified that if he did in fact charge the higher admission price, then the clearance would be a matter of negotiation, but how that negotiation would come out is purely speculative.

Judge Hand: Overruled.

Q. I am directing your attention to the situation under this particular contract, not under some contract that you may negotiate in the future.

Mr. Wright: Now will you read the question?

Q. (Read.) A. He gets that protection, because the next fellow cannot get it any quicker, unless he charges more than 25 cents.

Q. So, regardless of what he charges—— A. That is right, regardless of what he charges, that is written in the contract, he has got 30 days protection, any theatre charging (1678)
a certain figure there.

Q. Of course, when you are negotiating the contracts in the first instance, the admission price that he charges——

Mr. Proskauer: Mr. Wright, we cannot hear a word you say.

Q. (Continuing) When you are negotiating contracts in the first instance with any exhibitor, the price that he is charging or proposes to charge is an element in the negotiations, is that not right? A. Yes.

Q. And you recall that there have been systems of runs and clearances where the admission price actually did determine availability?

Mr. Caskey: That is objected to. Not any proof of any such thing in this case, that I know of.

Judge Hand: Overruled.

Mr. Caskey: Certainly should be made specific as to what he is talking about.

Q. Do you remember the question?

Mr. Wright: Will you read it?

The Witness: I think the question was—read it, it is easier.

Q. (Read.) A. Yes, there were.

Q. That was true in those early days in the 20s you were referring to where you say there were runs and clearances and anybody who wanted to charge a certain price could (1679)
have the picture on a certain run, isn't that right? A. Not anybody, no, but they were agreed upon, certain runs they

could play at a certain specified time if they would charge a certain admission.

Q. I call your attention to Kansas City prior to 1935. Now, it is a fact, is it not, that that was one of the last places or last areas in the country where the pictures were released on a basis so that anybody who charged a certain admission would get the films at the same time as anybody else who charged the same price, isn't that right? A. I believe Kansas City was one of the last areas that had such an arrangement.

Q. Then along about the year 1935 Elmer Rhoden, the Fox manager out there, decided that he did not like that system, isn't that right? A. I don't know whether he decided or whether we decided we didn't like it, as far as we were concerned, and changed it. I don't recall exactly now who was responsible for it, but I know it was changed.

Q. A request for the change came from Rhoden, did it not? A. Maybe it did.

Q. Rhoden didn't like the idea of these independent theatres playihg day and date with some of the subsequent runs that Fox was operating, isn't that right?

Mr. Caskey: That is objected to. That certainly

(1680)

cannot be competent testimony, whether Mr. Kupper——

Judge Hand: Overruled.

A. I don't know what Rhoden liked or didn't like. He didn't tell me about it.

Mr. Caskey: Have you a copy of Judge Otis's opinion to hand up, Mr. Wright?

Mr. Wright: I would be glad to have the Court read Judge Otis's opinion. I don't propose to examine the witness on it.

Q. Then, in any event, you had some consultations with Rhoden about setting up a new system of clearance in Kansas

City, is that right? A. Well, if we had consultations, we did—discussions, I will put it that way, probably about his clearance in all his theatres in the City from time to time. I don't know whether that is the date or around that period. We have had discussions on it, and I know a lot of local people have had discussions on it.

Q. When you got through with the discussions you came out with a clearance system something like this: where the pictures played first-run and then they went into a Fox house for an exclusive second-run, and then they went into another house, Fox house, for an exclusive third run, isn't that right, before they were released or made available to (1681)
any independent exhibitors in Kansas City? A. I think we did sell in that sequence to our own theatres first, yes.

Q. Not only you but all the other major distributors after the 1935-1936 season adopted this method of selling so that Fox would have an exclusive second and third-run in the town, isn't that right? A. Well, I don't know what they all did. It is a matter of record what they did, I should think, and if we did it, that is it; and if they did it, that is it.

Q. You know that is what you did anyway? A. I am pretty certain we sold that sequence of runs, yes.

Q. In which Fox had the second and third exclusively? A. Yes. I recall distinctly that we have sold Rhoden right along second-runs in the Plaza Theatre, even before this date you are talking about, and I also remember we sold him third-run.

Q. You know that Rockhill Theatre in Kansas City? A. I remember the name Rockhill.

Q. That was brought to the attention of the Court here on a chart. That was run by Rhoden for quite a number of years as a 15-cent house, wasn't it? A. I don't know. It may have been. I wouldn't doubt it. Probably was.

Q. And played, when it did, it played behind the inde-
(1682)
pendent Bijou there, that was charging 25 cents? A. It may have. I don't recall. Probably did, and that is what——

Q. Later on, in about 1940, you recall the admission price of the Rockhill was raised to 25 cents? A. I don't remember that, no, sir.

Q. You don't remember when it was? A. No, I don't remember. If it was raised, it was raised. I don't remember.

Q. You recall it was raised to 25 cents? A. Yes, I think it was. I am quite sure it was, now.

Q. Then when Rhoden or Fox changed the admission price of the Rockhill, then it took a very substantial clearance over the Bijou, isn't that right, and moved it up ahead? A. I don't recall exactly what it was. I am sure they must have taken some clearance.

Q. You remember moving it up, that was moved up ahead of the Bijou, and taking clearance over the Bijou after they changed the price? A. I don't remember, but it could be possible.

Q. Do you have any recollection on it at all? A. It is vague to me right now, very vague to me, but I do know the theatre, and I know we sold it a run. I can remember, I am pretty sure, it was a 25-cent admission. I recall that.

Q. You know that the run was moved up ahead of the
(1683)
independent 25-cent run? A. No, I don't know that. I would have to find out.

Q. I think you said in Kansas City you played your first runs there with Fox. In the Fox houses you have a simultaneous first-run in three different theatres sometimes, is that right? A. In Kansas City, Missouri, there are two. There is another house over the boundary. It isn't in Kansas City, Missouri. It makes three we play.

Q. What is that other house over the boundary? A. It is a house that has been opened not so long ago, and I haven't seen it myself. It is in the new area out there that has been developed since the war, quite a new, extensive area.

Q. What is the name of it? A. I think it is the Fairview.

Q. The Fairway? A. Fairway, or something like that. I haven't seen it. I haven't been there.

Q. That is just over the border in Kansas, but in a suburban area of Kansas City? A. Yes, that is right.

Q. That was where, in the same area, where Mr. Dickinson has his Dickinson theatre there, the Mission? A. I think he had the Mission out there. I don't know just where it is. I never did see that, but I know he had a theatre out there.

Q. And you recall when Mr. Dickinson built and opened (1684)
his theatre, the Mission, he had to play 56 days after first-run Kansas City, Missouri, didn't he? A. I guess he did. I don't recall; if that was the clearance, that is what it was. I don't recall offhand. I know he had to play some time.

Q. And his theatre is not far from the Fairway, is it? A. As I said, I haven't seen either one. I don't know the area myself. I only know what I hear about it, and I don't know. I guess it is a good theatre, but I don't think it is as good as this—one that could be set up as a first-run.

Q. What do you hear as to the distance between them? A. I think they are pretty close. I don't think they are so far apart.

Q. Your Fairway Theatre there today is playing these pictures at the same time as downtown, Kansas, while Dickinson follows downtown Kansas City after a very substantial interval of time; you know that, don't you? A. Yes, I know that, yes.

Q. When you gave this testimony about the history of all these first-run situations, did you mean to give the Court the

impression that during, let us say, the last ten years, or during this period you have covered, your product was being played in the same theatres all the time? A. I tried to give the impression to the Court that our accounts—I tried to tell
(1685)
the Court where the product was playing right now, and I tried to show the historical background, if it was the account. Certainly some of these theatres that we originally sold could have gone out of business but the same ownership might still be in these other theatres.

Q. The theatre situation is, of course, changed from year to year? A. Some places, and they don't change so very often.

Q. There are new ones built and sometimes some are dropped? A. You couldn't build so many in the last few years.

Q. You did not undertake to tell the Court, as I recall it, what happened to your pictures in the cases where theatres which had been using—had first-run, were either lost by the first-run account or dropped out of the first-run pool that was showing them? A. I tried to tell the Court and explain to the Court the exact situation as it existed, as I knew it.

Q. I did not see in your printed testimony or what you said on the stand any mention as to the Oriental Theatre there in Chicago. A. That is right, I gave none.

Q. It is a fact, is it not, that your pictures had been shown first-run in the Oriental when it was a Balaban & Katz house and after it ceased to be a Balaban & Katz house, they weren't shown first-run in the Oriental? A. I think there
(1686)
were some shown there. There weren't many; there were some played, I am quite positive. Had, I think, a vaudeville picture policy, though I am not sure now. That is going back to 1935. I was not responsible for that area at the time. I think it was 1935, right?

Q. I think it was about 1938 when Balaban & Katz lost its interest in the house. A. Well, somewhere in that neighborhood.

Q. Since that time you have not had any regular first-run of your pictures in the Oriental Theatre at all, have you? A. No, we have not.

Q. Although that is the newest and best located theatre in that town, isn't it, and the next to the largest? A. Yes, it is a large house and a well appointed house.

Q. And in many others of these situations—you neglected to cover in your little history there what happened to the Roxy in Atlanta during the 1938-1939 season. You recall that? A. Before I go to that, do you want me to finish Chicago?

Q. Was there something you wanted to say about Chicago that you did not say in your other testimony? A. No, but I do recall Balaban & Katz operated the Oriental for a while, but I do recall they did not work out and they dropped the house, and somebody else, Johnnie Jones, I think, as a matter of fact, I think wanted to buy our product but we had the

(1687)

established account in the situation, B. & K., who had other theatres and could absorb our product. We were satisfied to keep our account there with B. & K.

Q. In Atlanta, do you recall that Roxy Theatre? A. Yes, sir, I do.

Q. I think you described it as a smaller theatre there. Actually it has 2400 seats? A. The Roxy Theatre—is that the theatre, now, right near the big department store?

Q. It is in Atlanta. That is all I know about it. A. It is right between the hotel and that big department store. I know the theatre very well. As a matter of fact, a friend of mine owns the property. His name is Bob Meyers, and a big hotel operator. He came to me and asked me to help him and advise him after Lucas and Jenkins dropped the

theatre, and I helped him, and I sold him pictures, and then he decided to lease it back to Lucas and Jenkins, who had the lease originally, and I helped out and advised him and got him pictures, gave him some of our pictures, even though they were contracts.

Q. You advised him to lease it back to Lucas and Jenkins? A. No. I told him if he could get a good lease—he is not a theatre operator; he is a hotel operator. It is the only theatre, the only one, he ever had any interest in. He asked me for my advice, and he said he couldn't get the theatre leased. I said, "Run the theatre." I like to see competi-
(1638)
tion in those towns—any towns. I told him to go ahead and run it, "and I am sure you can get pictures. You may not possibly get all the best," but I got him some pictures.

Q. What were the pictures that you got him? A. Those that Lucas and Jenkins didn't run, or behind that. They weren't our top grade pictures, by any means.

Q. You got him pictures that the other first-run houses didn't want there? A. I gave him pictures, yes; those that were available, that they didn't use, I sold them to him quick.

Q. And not only that they did not use but that they did not want? A. All right, that they did not want, yes.

Q. And I take it those pictures of that quality were not enough to make his operation there a success? A. I don't know about that. He ran it until the time Lucas and Jenkins re-leased it at a great, substantial, increase in rent. I understand that he is now out of the theatre business again.

Q. You know he ran it unsuccessfully? A. No, I don't. I think he was doing pretty well. I think he was getting by all right, from what he told me.

Q. You knew that he could not get the quality of pictures for that theatre from you or any other major dis-

tributor? A. He wasn't going to get mine—I beg your
(1689)
pardon.

Q. Let me finish the question. A. All right, pardon me.

Q. You knew, as a matter of fact, that he could not get from you or any other major distributor the quality of pictures that he had to have to let him compete on an equal basis with Paramount? A. I did not know what he could get from any other distributor. I told him personally myself that he was not going to get ours, because I was going to continue selling the Fox theatre. What he could do with somebody else, I didn't know.

Q. What do you do, Mr. Kupper, when somebody wants to put a new theatre in, or does put a new theatre in one of these so-called established account situations? A. Well, sell him some run, if he wants to buy my product.

Q. "Some run"? A. Yes.

Q. That is, last run in the area, behind everybody else who is what you call established? A. Could be. If I have customers that take care of all the other runs, could be the last run.

Q. How about if he becomes affiliated, then what do you do? A. I think we would take it on the same basis.

Q. Do you recall, do you know the situation, in Engle wood, California? A. I know we have a couple of theatres out there.

Q. One of them you acquired in 1941, didn't you? A. I
(1690)
don't know the exact date.

Q. Fifth Avenue? A. I think so. Somewhere around that time. I know we acquired some theatre.

Q. When it was first built, the operator of that theatre tried to get a first-run in that area from you and you would not even negotiate with him, isn't that right? A. I don't remember. Didn't negotiate with me direct. May have tried

to negotiate with some representative of our company. I don't recall.

Q. You know you didn't make any Fox films available to him for first-run in that area at the time he first completed it? A. I don't think so.

Q. And then after he sold the theatre, or an interest in it, to Fox, then you made films available to him first-run there and for a move-over from the Fox first-run in that area, isn't that right? A. I believe we did.

(1691)

Q. When you talk about selecting customers and dealing the same way with affiliated houses that you do with independents, you don't mean that you make any of these deals blindfolded, do you? A. Blindfolded?

Q. You know who you are dealing with in each case and what his connections are, isn't that right? A. I should think we should.

Q. Part of your business to know that? A. Should know, yes.

Q. And who he is makes a great deal of difference in what you do, doesn't it? A. Sometimes I would say so, yes.

Q. And that may sometimes be a far more important factor than the physical characteristics of the theatre or theatres that he happens to be operating? A. I don't know about that.

Q. You know that is a fact, don't you? A. I don't think it is a fact. It might be.

Q. You remember what happened in Janesville, Wisconsin? A. In Zanesville?

Q. In Janesville. A. I think we had some theatres there and then lost them or they were taken over, but I don't remember.

Q. You had an account there that had the two largest theatres in the town, and then another theatre became affiliated with Fox, Fox had a 40 per cent interest and did the

(1692)

booking for it, do you remember? A. I don't remember it. If they had an interest in it, I would say we sold it.

Q. Yes. A. As long as we had to retain an interest or acquire an interest in a theatre, I should think we would sell our product there.

Q. You know that after Fox acquired a 40 per cent interest in the smaller and inferior house, then you sold that house, didn't you? A. If that is the case, we did.

Q. And continued to sell it? A. I think that is the case. I am not positive.

Q. And then finally Fox was able to buy the other two houses and you have what is called a closed town there? A. I believe it is. I believe we have all the theatres there.

Redirect Examination by Mr. Caskey:

Q. Mr. Kupper, in Boston, it appears from your testimony that approximately one-third of the product you sold to RKO and two-thirds you sold to M. & P. Who determined the division or proportion of one-third and two-thirds? A. We did.

Q. And in Albany there is a division of, I understand, two-thirds to Fabian and one-third to Warner? A. That is right.

Q. Who determined that proportion? A. We did.

Q. Calling your attention to Youngstown, Ohio, Mr. Wright asked a question whether you sold to the pool in

(1693)

Youngstown. There is a pool, as you understand it? A. Yes, between Shea and Warners.

Q. Who do you consider your customer? A. Shea.

Q. Do you sell to the pool? A. We sell Ed Grainger, who is head of the circuit there. We sell direct to him. We don't sell any pool.

Q. In each of these situations in which there is a pool prior to the arrangement between the exhibitors, you had an established customer? A. Yes, sir.

Q. And the customer made some arrangement in the community with other operators whereby your pictures were played in better theatres? A. That is true.

Q. That is true in Jersey City? A. It is true in most all of them. Even in Youngstown, which we just got out of, the Warner theatre is a better theatre than the Park.

Q. Why doesn't Shea have a move-over theatre in Pittsburgh? A. Well, I don't know why. He has none available as far as I can say.

Q. Do you grant Mr. Harris the privilege of a move-over and not the Shea interest? A. No, sir. If Shea had a house that you could move over into, we certainly would let him have it, too. He just doesn't have the theatre.

Q. And one of the requirements of a move-over is that it shall charge the same admission price as the house from (1694)
which it is moved? A. That is correct.

Q. And there is a limit in every community as to how long a picture can play at the advanced admission price? A. I think that is pretty well established.

Q. Today and for some years you have been selling your pictures in small blocks? A. Yes.

Q. And at the time that they are sold to the second and subsequent runs, have they been trade shown? A. Yes.

Q. And who the first-run account in the city is is well known in the trade? A. Yes, sir.

Q. And the number of theatres he has is well known? A. Well known and well established fact.

Q. So that when you sell second-run in Boston, the exhibitor knows in fact, first of all, that only the best pictures are going to be moved over? A. He knows that.

Q. And, second, he knows that, in fact, the only place they are going to be moved over from is from the Metropolitan to the Paramount and Fenway? A. He knows that.

Q. And at most the number of pictures that could be played on any theory of a violation of second-run contract would be two or three? A. That is right—with those that are moved over, if that is what you mean.

Q. Yes. Without making excuses, it is a fact that a great many of the records and reports and forms of the company have not been kept in precise and apple-pie order (1695) during the last few years? A. Definitely. The help situation has been terrible. And they come in and walk out on you. It is an awful problem, help today. You have a lot of inexperienced help. And we have lost a lot of good help who went into the services. We are behind, way behind, in a lot of our things, in regular ordinary things that we have had to let slide behind to take care of the more important things.

Q. Has any exhibitor in this country complained to you about the fact that the prior run affiliated theatres during the 1943-44 and 1944-45 seasons were charging too low an admission price? A. No, sir.

Q. Has any exhibitor who has followed one of these affiliated exhibitors, where the contract was not filled out with the admission price, been prejudiced or injured by the omission, say, to fill out the contract?

Mr. Wright: If the Court please, that is a legal conclusion that this man cannot possibly draw.

Judge Hand: Overruled.

A. I don't know of any.

Q. No one has complained? A. Not to me.

Mr. Caskey: I believe that is all.

By Mr. Proskauer:

Q. Just a question or two. You referred to the time in the middle '30s when you had a break with the Warners. (1696)
Do you remember that? A. Yes, I do.

Q. You did not sell them any pictures for two years approximately, wasn't it? A. I think something like that. Sometimes we did not sell them at all.

Q. Then you sold your pictures to other people? A. Yes, sir.

Q. And after about two years you began to sell your pictures to Warners again? A. Yes, sir.

Q. Is it a fact that after you resumed relations with Warners you continued relations with some of the people to whom you had—with whom you had made new relations after that break and, in some instances, you returned to your relations with Warner Bros.? A. I know there were a great many we retained our relationship with.

Q. With the new people? A. The new ones that we had established, and we even do today.

Q. And in some cases you resumed the old relationship with Warners? A. There may have been—yes, we did.

Q. So you determined that question on the basis of what was more advantageous to you? A. That is right.

Mr. Caskey: If the Court please, there are two specific situations which were called to Mr. Kupper's attention, that I am unfamiliar with. If overnight I find anything that should be inquired about, I will ask (1697)
Mr. Kupper to come back, but with that reservation I am through with him.

Now, Mr. Wright, I have in court Mr. A. W. Smith, Jr. Will you stand up, Mr. Smith? And I will

either call him, or, if you prefer, stipulate that if called, that he would answer the same questions which have been propounded to Mr. Zukor and Mr. Skouras in the negative.

Mr. Wright: So stipulated.

Judge Bright: Who is Mr. A. W. Smith?

Mr. Caskey: Maybe I had better ask him that question, at any rate.

Judge Hand: Can't you state that?

Mr. Caskey: Yes. Mr Smith is Eastern sales manager of Twentieth Century-Fox and has jurisdiction over the exchanges in the Eastern part of the country. Is there anything else you would like to ask him?

Judge Bright: What does that mean, Eastern part of the country?

Mr. A. W. Smith, Jr.: I have charge of sales in the following territories: New York, Washington, Philadelphia, Pittsburgh, New Haven, Boston, Albany and Buffalo.

Mr. Caskey: Anything else?

Judge Bright: I just wanted to know who he was.

Mr. Caskey: Mr. Connors——

(1698)

Judge Bright: Has that stipulation been made?

Mr. Caskey: The stipulation was made, with respect to Mr. Smith?

Mr. Wright: Oh, yes.

Mr. Caskey: Then Mr. Connors, the vice-president in charge of distribution, member of the executive board, and a director of Twentieth Century-Fox. May we have the same stipulation, Mr. Wright?

Mr. Wright: All right.

Mr. Caskey: Are there any questions the Court would like to ask him? He is here for that purpose.

I will have some more in the morning. This happens to be a convenient place to stop.

Judge Hand: You have what?

Mr. Caskey: I will have at least two witnesses tomorrow morning and I have several stipulations.

Judge Hand: We will adjourn until tomorrow morning at ten-thirty.

(Adjourned until Wednesday, October 31, 1945, at 10:30 a.m.)

(1699)

New York, October 31, 1945;
10:30 o'clock a.m.

Trial resumed.

Mr. Caskey: If your Honors please, Mr. Wright's associates have called my attention to page 1592 of the stenographic minutes, and we have agreed that the 14th line from the top should read—I shall read the whole paragraph—"By the way, we have sold a few pictures to Loew's when we had—not Loew's; I mean we didn't sell Loew's; we sold some, because we couldn't get together with Mr. Richards, with his buyer, Mr. Gaston Dureau."

Judge Hand: Wait a minute. "to, I think, his competitor" goes out?

Mr. Caskey: Yes, and the words "with his buyer" in their place.

And then the word "They" in the next line should be "Loew's." "Loew's played the picture at advanced admission."

And on page 1645, at the third line from the bottom, the answer should read, "They have a percentage the same as we have nationally for the branch.

I offer in evidence Exhibit F-5 for identification.

(1700)

Mr. Wright: No objection.

(Defendant Twentieth Century-Fox's Exhibit F-5 for identification received in evidence.)

Mr. Caskey: Referring to the testimony regarding the Capitol Theatre in New London, Connecticut, about which Mr. Kupper was examined, I wish to call the Court's attention that in evidence and on the same schedule that Mr. Wright read from appears the fact

that the Capitol Theatre charged an actual admission price exclusive of tax of 45 cents first-run in New London when exhibiting Bombers Moon, Heaven Can Wait, Holy Matrimony and Sweet Rosie O'Grady.

Mr. Wright, I hand you a form of contract which is used by Twentieth Century-Fox currently after the first block of pictures has been sold to the exhibitor.

Mr. Wright: That is the one gotten up by salesman Sanders? Won't you have it marked?

Mr. Caskey: I will offer it.

(Marked Defendant Twentieth Century-Fox's Exhibit F-14.)

Mr. Caskey: Plaintiff's counsel and we have stipulated as to the testimony of Mr. Joseph M. Schenck; and I hand the stipulation to the reporter and ask that it be copied into the stenographic minutes.

(1701)

(The stipulation referred to is as follows:)

"It is hereby stipulated between the attorneys for the plaintiff and the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that, if called, Joseph M. Schenck would testify as follows:

"Q. What is your name and address? A. Joseph M. Schenck. I reside at No. 720 North Foothill Drive, Beverly Hills, California.

"Q. What is your occupation? A. I am an executive in the production department of Twentieth Century-Fox Film Corporation.

"Q. How long have you been engaged in producing motion pictures? A. Since 1916.

"Q. When did you first have any connection with Twentieth Century-Fox Film Corporation? A. In

1935. I was one of the three stockholders of Twentith Century Pictures, Inc. which was producing motion pictures and releasing them through United Artists Corporation, of which I was also president. In August, 1935, Twentieth Century Pictures, Inc. sold all its assets to Fox Film Corporation, which changed its name to Twentieth Century-Fox Film Corporation, Mr. Darryl Zanuck, Mr. William Goetz and I received stock in exchange, and we entered into employment contracts, agreeing to supervise the production of motion pictures for the company. Shortly thereafter, I

(1702)

became Chairman of the Board of Directors. I am no longer an officer nor a director of the company and I have sold all of my stock. I am, however, still an executive in the Studio.

"Q. How long ago was United Artists Theatre Circuit formed? A. To my best recollection 1926.

"Q. That was shortly after you became president of United Artists Corporation, the distributor? A. I think a couple of years after that.

"Q. Who else was active with you in forming the United Artists Theatre Circuit, if anyone? A. Sidney Grauman, Lee Shubert, William Phillips, Mary Pickford, Douglas Fairbanks.

"Q. And you were the principal stockholder after it was formed, were you not? A. When it was first formed I think that Pickford and Fairbanks jointly had as much stock as I had and Sidney Grauman had as much as I did.

"Q. You owned a third approximately? A. No, less than a third. I think I owned one-fifth of that stock. But subsequently I bought Grauman out.

"Q. And when was that? A. Grauman had 80,000 shares and I think I had 80,000 shares and I bought him out because he got cold feet.

"Q. That was about when? A. He never oper-
(1703) ated—he was to operate the theatres, but he didn't wait that long.

"Q. This was right after the corporation was organized? A. Right. His chief reason was that he didn't want to leave California. He liked California too much.

"Q. What was the purpose of organizing the United Artists Theatres Circuit at that time? A. At that time there were but very few theatres in the United States that ran a picture longer than one week.

"Q. This was in 1926? A. 1926 I think, and if there were theatres there were so many pictures made by other companies that were also desirous of running their pictures longer than a week in a theatre that we did not get in often enough to those theatres that would run a picture more than a week.

"Q. When you say 'we' you are referring to the United Artists pictures? A. I mean the United Artists pictures, and we felt that we needed theatres that would be ready and willing to run our pictures for an indefinite period or at least as long as the public would patronize them in a paying mass, you might say. And we decided that we would build first-run theatres of a certain capacity, that capacity being between 1500 and 2000 seats, where we could run a picture or where we could exhibit a picture for a long run.

(1704)

"Q. How did you fix on that particular capacity of 1500 to 2000 as desirable for your purposes? A. Well, there was sort of an inclination at that time on the part of every exhibitor to have theatres of very large capacity, such as four or five thousand seats. In a theatre of that kind no picture could run more than

a week. You couldn't expect it. And their picture was exhibited with either vaudeville acts or stage show and we wanted our pictures to play without a stage show and without vaudeville acts and play in a theatre of such capacity that would permit a run of a picture for a long period of time, for a sort of a show window in many big cities for our product and to get a cumulative advertising and importance through the picture being a long-run picture.

"Q. Well, was it just from the standpoint of advertising value that you thought a long run in a smaller house was more desirable than a short run in a larger one, or was it a question of increased revenue? A. Increased revenue also because if a theatre runs a vaudeville show or a stage show with a picture a great deal of the receipts taken in at the box office go to pay for that stage show or vaudeville show of which we couldn't expect to get a percentage.

"Q. And after United Artists Theatres Circuit was organized it proceeded to acquire theatres of the type

(1705)

you have just described? A. Yes, sir.

"Q. About how many? Do you remember? A. 15 theatres.

"Q. Do you remember where they were located? A. Located in Los Angeles, San Francisco, Detroit, Chicago, Baltimore, Columbus, Portland, Seattle, Pittsburgh, Louisville, New York. That is about all I can remember.

"Q. Well, there was only one in each town that you went into though? A. Well, some towns we had more than one because we took a 50 per cent interest with another company in some of the towns.

"Q. And which towns were those? A. Like Baltimore and Columbus.

"Q. And whom did you take the interest with? A. With Loew Company.

"Q. And were there any other situations in which you were jointly interested with Loew? A. In New York, two theatres—the Rivoli and the Rialto—with the Paramount Company.

"Q. And these theatres that you acquired in the other towns were all named the United Artists Theatre in each case? A. In most cases they were named United Artists Theatres.

"Q. After they were acquired they then entered into long term franchises with United Artists Cor-
(1706)
poration? A. Yes, sir, ten-year franchise. That wasn't after but before we organized we made that or simultaneously with the organization of that theatre company we got that ten-year franchise because that franchise helped us to finance the acquisition of the theatres.

"Q. And this franchise gave the United Artists Theatres the exclusive right to the first-run exhibition of the United Artists pictures in the towns where they were located? A. Well, all of the producers of United Artists pictures with the exception of Charlie Chaplin, who did not subscribe to it.

"Q. Do you know what Mr. Chaplin's reasons were for not subscribing? A. I invited Chaplin to take an interest in the United Artists Theatres and he didn't want to do it. And I also wanted him—asked him to join that franchise and he refused to do that and I couldn't possibly give you his reasons for it because he didn't know them himself.

"Q. Can you give us the conversation you had with him as best you can remember on that subject? A. Charlie refused to sign any papers. He was per-

fectly willing to subscribe to it without putting his name on paper.

"Q. Well, he didn't say anything at the time in reference to why he would not put his name on paper? A. He signed a couple of contracts years prior to that and they did not turn out quite as good as he wanted

(1707)

them to turn out. In fact, he had them changed in the middle of the contract—improved them—and he made up his mind he never would sign any papers.

"Q. Wasn't there any discussion with him as to the desirability of United Artists producers entering the exhibition field? A. Oh, he approved of the plan. The plan was perfectly all right for everybody else but himself because he didn't want to commit himself to the future. At the time he thought it was all right, but he didn't know how it would turn out in the future, what changes would come about in the industry, and he didn't want to be committed to any permanent plan.

"Q. Are these franchises or the one franchise which controlled all of the situations, was that for a ten-year period? A. Yes, sir.

"Q. Did the United Artists Theatres Corporation execute a series of franchises with the United Artists Corporation or was there one franchise which covered all of the United Artists Theatres? A. One franchise.

"Q. There was a separate franchise executed with the United Artists Theatre in Chicago, wasn't there? A. No, there was no separate franchise.

"Q. You still have the same interest in the United Artists Theatres Circuit, now? A. Yes, sir.

"Q. And what if any changes have there been in

(1708)

the theatre holdings of the Circuit since that time? A. We expanded the Circuit.

"Q. In what way? A. By building a number of theatres in the State of California and by acquisition of a number of theatres in New York, Brooklyn, Long Island, and Jersey.

"Q. And when did this expansion and acquisition that you have referred to occur? A. We built the theatres in California I think in 1932 or 1933.

"Q. What part of California was that? A. In Northern and Southern California.

"Q. Do you remember the names of the cities? A. Los Angeles, San Francisco, Sacramento, Inglewood, Beverly Hills.

"Q. Were those first-run theatres? A. No, sir.

"Q. And these theatres you have referred to in Brooklyn and New York and that territory, when were they acquired? A. They were acquired in 1935, I think.

"Q. They were theatres which had formerly been part of the Fox Metropolitan Theatres Corporation? A. Yes, sir.

"Q. And were acquired on a sale of the assets in the Fox Metropolitan bankruptcy proceeding? A. I know that we have acquired them through a plan that was submitted to Judge Mack in one of these courts here and subsequently that plan was approved.

"Q. And the court you are referring to was the

(1709)

court that had the Fox Metropolitan receivership or bankruptcy, was it not? A. I think so.

"Q. Now, these were also subsequent-run theatres, were they not? A. Yes, sir.

"Q. What was the purpose of acquiring the subsequent-run theatres you have referred to? A. Originally our purpose in the acquisition of theatres was entirely different, as I recited. But then we had money

idle and we wanted to expand purely for the purpose of making money.

"Q. Whom do you refer to as 'we'? A. I mean the United Artists Theatre Circuit, Inc.

"Q. And the subsequent-run theatres that you acquired did not enter into any franchise arrangements with the United Artists Corporation? A. No, sir. The franchise for the United Artists pictures had expired about that time and has not been renewed.

"Q. Well, the franchise was made for ten years in 1926 and would have expired in 1936, and these acquisitions that you have referred to according to your testimony occurred before 1936? A. That franchise did not cover anything else but first-run theatres.

"Q. Yes. Are your associates in the ownership of the United Artists Theatre Circuit the same today as the ones you previously mentioned? A. I think there is a slight change in the stockholders. Gloria Swanson

(1710)

does not own stock. Miss Pickford is still a stockholder. Goldwyn is still a stockholder. I am a stockholder. Bill Phillips is still a stockholder.

"Q. Do any of the defendants in this suit have a financial interest in the United Artists Theatre Circuit today? A. No, sir.

"Q. What is the relationship between United Artists Theatre Circuit, Inc. and Metropolitan Playhouses? A. The United Artists Theatre Circuit, Inc. owns 50 per cent of the Metropolitan Playhouses, Inc.

"Q. What other corporations does United Artists Theatre Circuit, Inc. have an interest in? A. In the Robb & Rowley Circuit of theatres we have a 50 per cent interest.

"Q. Do you have any financial interest in any other motion picture enterprises besides Twentieth

Century-Fox Film and United Artists Theatre Circuit, Inc. A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution and exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competi-
(1711)
tive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate

the value and character of the films licensed and before such films have been completed or tradeshown? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defend-

(1712)

ants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not

(1713)

affiliated with any producer-exhibitor with respect to

run, clearance, license fees or any other terms of licensing? A. No, sir.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities

(1714)

and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

Stipulation as to Testimony of Joseph M. Schenck

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

(1715)

"Q. Has there been or is there to your knowledge an agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

Stipulation as to Testimony of Joseph M. Schenck

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(1716)

Judge Bright: Mr. Caskey, yesterday, you offered some forms of licenses, I think, that covered up to and including the 1933-1934 season?

Mr. Caskey: Yes, sir.

Judge Bright: Was the form of license from then on the same until the current license?

Mr. Caskey: No, sir. The form of license from the 1933-1934 season through the 1940-41 season was substantially the same. I make the reservation that there may have been changes of phraseology or grammar; but the form and the method of selling was the same. And then a new contract form was prepared for the 1941-1942 season, which is the first year of selling under the consent decree.

Judge Bright: Do we have that form?

Mr. Caskey: You have an excerpt—we have it here.

Mr. Wright: We put in evidence, if the Court please, the 1936-1937 form and the 1943-1944 form.

Mr. Caskey: That is right. Is that in evidence?

Mr. Wright: Yes.

Judge Bright: That is in your appendix.

Colloquy

Mr. Wright: The licenses themselves are in evidence——

Mr. Caskey: The 1943-1944 one is in evidence.

(1717)

There are a great many of them in evidence.

Mr. Wright: 1936-1937 is also in evidence.

Mr. Caskey: Sir?

Mr. Wright: 1936-1937 is also in evidence.

Mr. Caskey: That is right. And there is no change from 1941-1942 to 1943-1944.

Judge Bright: The reason why I asked the question was that in comparing in this appendix of the Government, in comparing your form for 1936-1937 and 1943-1944, there does not seem to be any provision in the 1943-1944 with reference to what will be done if an exhibitor reduces his admission. That is so far as this printed book is concerned.

Mr. Caskey: Suppose I get a copy for all the years and submit them at some convenient time. My recollection is that there is a penalty clause. My recollection is if he reduces the admission price he may be required to pay based upon a percentage of the agreed admission price; and he is subject to termination of the contract, and his clearance may be reduced.

Judge Bright: Well, I do not recall seeing that in this printed book in the 1943-1944 abstract.

Mr. Wright: My recollection corresponds with Mr. Caskey's. It may be that the summary in the appendix does not reflect it, but the agreement itself is in evi-

(1718)

dence as Exhibit 276, which is the 1943-1944 form, and No. 275 is the 1936-1937.

Judge Bright: We haven't had access so far to those forms. I was just reading out of your appendix.

Mr. Wright: Yes. It is possible our appendix was at fault in that respect, in not pointing out the provision of the agreement.

Judge Bright: I went over it hurriedly, when we were discussing admission prices during the taking of testimony, and I may have skipped it, but I did not see it.

Mr. Caskey: I am reading now from the 1943-1944 contract, which is Exhibit 276:

"The Exhibitor during the whole of the licensed exhibition period of the licensed pictures hereunder shall charge for admission per person to said theatre the following prices:

EVENINGS: Adults, Orchestra .. Balcony ..; Children, Orchestra .. Balcony ..

MATINEES: Adults, Orchestra .. Balcony ..; Children, Orchestra .. Balcony ..

"If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) to terminate the license of the picture then being exhibited, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such picture shall forthwith terminate and revert

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to the Distributor; or (b) provided the Exhibitor is granted herein a period of 'clearance' to reduce such period by not to exceed one-half in respect to each of the licensed pictures thereafter deliverable hereunder; or (c) provided no period of clearance is specified in the Schedule to withhold, for a period not to exceed sixty (60) days notice of the date when each picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such picture the 'run' thereof, if any, granted the Exhibitor,

shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the available date thereof upon the date or dates determined as provided in paragraph 7 hereof; if Distributor does not elect to terminate the license of the picture then being exhibited, as provided in subdivision (a) of this paragraph, the Exhibitor shall account for all admissions to said theatre during the exhibition of such picture on the basis of the admission prices hereinabove stipulated."

Judge Bright: That is on the face of it?

Mr. Caskey: Yes, sir.

Mr. Wright: If the Court please, you will note that those provisions he was reading are substantially the same as those set forth on page 52, at the end of the schedule, in the 1936-37 agreement. Then when we got over to page 60, where we summarized the changes in the schedule in the 1943-44 agreement, we simply noted the changes that were made and then

(1720)

we set up in the bottom, "Schedule is otherwise substantially the same except for substitution of the Consent Decree arbitration procedure." So I think the Appendix does correctly reflect the situation.

Judge Goddard: What does Mr. Schenck's testimony relate to?

Mr. Caskey: Mr. Schenck's testimony primarily relates to the reasons for United Artists Theatre Circuit, Inc.——

Judge Goddard: The reasons?

Mr. Caskey: The reasons why United Artists Theatre Circuit, Inc. built a number of medium sized theatres in various of the principal cities of the United States for the exhibition of United Artists pictures

on long runs, or released on longer runs than were then current in the industry. It gives the story of the ownership of United Artists Theatres Circuit, Inc., and as we believe, shows that it is not affiliated with Twentieth Century-Fox. It also details briefly the reasons why United Artists Theatres Circuit, Inc. acquired an interest in the reorganized Metropolitan Playhouses, which was in receivership in this court under Judge Mack's supervision. The reason given is that it was purely an investment.

I have here an affidavit of Felix A. Jenkins, the secretary of Twentieth Century-Fox, which Mr.
(1721)
Wright has agreed may be taken as testimony, and I will hand that to the reporter and ask that it be copied in the stenographic minutes as testimony and not as an affidavit.

Judge Goddard: What is his name and what is his official position?

Mr. Caskey: Felix A. Jenkins. He is the secretary and a director of the corporation.

Judge Goddard: Of Fox?

Mr. Caskey: Yes, sir. This has to do with the history of the company, the ownership of its stock, and it deals with its financial vicissitudes in the late '20s and early '30s, and it details the transactions in 1935 when the company purchased the assets of Twentieth Century Pictures and secured the services of Mr. Zanuck as the head of its production.

(The affidavit referred to is as follows:)

"State of New York, }
County of New York, } ss.:

"I, Felix A. Jenkins, being duly sworn, do depose and say:

"I am Secretary and a director of Twentieth Century-Fox Film Corporation. The corporation was organized under the laws of New York on February 1, 1915. Its original capital was $1,500,000, divided into 100,000 shares of $10 par value common stock and 5,000 shares of $100 par value preferred stock.
(1722)

Immediately upon its organization, Fox Film Corporation acquired the assets of Box Office Attraction Film Rental, Inc. and the stock of William Fox Vaudeville Company and the stock of Wonderful Play and Players Company, Inc. The first Board of Directors comprised John C. Eisele and Nathaniel King, both of the Newark investment firm of Eisele & King, Anthony R. Kuser, Thomas N. McCarter, William Fox, Charles S. Levin, Jacob G. Leo (Fox's brother-in-law) and Saul E. Rogers. Winfield Sheehan was general manager. This group managed the corporation until April 7, 1930.

"By June 17, 1919, the preferred stock of the corporation had been retired by redemption. On December 30, 1921, the board of directors approved the acquisition of a first run theatre in Oakland at an investment of between $250,000 and $300,000, and negotiations for the acquisition of a first run theatre in Philadelphia were discussed. These negotiations were unsuccessful and in 1924 a subsidiary commenced the erection of the Fox theatre and office building at Fifteenth and Market Streets in Philadelphia. On July 17, 1924, the directors authorized the acquisition of three theatres in Chicago from Ascher.

"On May 28, 1925, the capital stock was increased to 1,000,000 shares without par value and reclassified into 100,000 shares of class B common stock and

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900,000 shares of class A common stock. The class B common stock was given the sole right to vote except as otherwise might be provided by law. The previously outstanding 100,000 shares of common stock were surrendered in exchange for the 100,000 shares of new class B common stock.

"400,000 shares of the new A stock were listed. 235,000 shares were issued as a stock dividend and 165,000 shares were offered to stockholders at $43 a share, Eisele & King agreeing to purchase any shares not subscribed for by stockholders.

"On September 15, 1925, an agreement was approved with Adolph Ramish Inc. and Adolph Ramish for the purchase of 47,000 shares of West Coast Theatres, Inc., and an additional 6,000 shares at the price of $55 a share.

"On December 1, 1925, the acquisition of the preferred stock of Ascher Theatre Circuit for $500,000 was approved. The circuit embraced 19 theatres in Chicago and suburbs. The remaining stockholders of West Coast Theatres, Inc. formed a voting trust and transferred their stock to Wesco Corporation, in exchange for its voting trust certificates thus insuring that Fox Film Corporation could not buy control of West Coast Theatres, Inc.

"On March 5, 1928, all the stock of Wesco Corporation was acquired; 107,029 were purchased at $55

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per share, and 187,902 in exchange for 140,926½ shares of Fox Film's A stock. In addition, 1,620 shares were variously acquired bringing Fox's total interest to 100%. Fox Film then donated to Wesco its holding of 88,270 shares of the stock of West Coast Theatres, Inc. at the book value of $4,229,814.61 and Fox

Film's investment in Wesco Corporation was fixed at $20,570,267.97.

"In January and February, 1930, the financial affairs of the company were so precarious that a number of actions had been instituted for the appointment of a receiver. Various plans were negotiated for the refinancing of the company and there was much litigation. On April 7, 1930, William Fox sold all of the class B common stock to General Theatres Equipment, Inc. and a new management took over the affairs of the company headed by Harley L. Clarke, who became president.

"By certificate filed with the Secretary of State on April 17, 1930, the previously authorized 1,000,000 shares without par value were increased to 5,000,000 shares and reclassified as 100,000 shares of class B common stock and 4,900,000 shares of class A common stock. The certificate was pursuant to action taken on October 10, 1929, but the certificate was withheld from filing because the company could not at the time afford the payment of the large fee involved. It was filed April 17, 1930, which was the effective date of

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the refinancing that resulted from the retirement of William Fox from the company by the sale of his stock to General Theatres Equipment, Inc. on April 7, 1930.

"A part of the refinancing of this company in 1930 consisted in the issue of $55,000,000 of one-year notes. The bankers who had purchased them insisted upon their payment and additional financing was necessary. This consisted of the issuance of $30,000,000 of 6% convertible gold debentures and the sale of certain securities to a corporation known as Film Securities Corporation for a stated consideration of

$75,000,000, of which $28,000,000 was in cash and the balance in its class A common stock. The proceeds of these two transactions paid the $55,000,000 of one-year notes.

"In the fall of 1931, a new management was installed. Charles E. Richardson became treasurer of the corporation and on November 17, 1931, Edward R. Tinker, a former president of The Chase National Bank of the City of New York, became president.

"On March 22, 1932, Mr. Samuel Burns, the secretary and a vice-president, resigned. On April 1, 1932, Sidney R. Kent became executive vice-president in charge of operations. He later that year became president on Mr. Tinker's resignation.

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"On May 5, 1932, the capital of the corporation was reduced from $90,780,000 to $12,628,300, which was $5 per share multiplied by the 2,525,660 shares of stock outstanding. The result was the creation of a huge capital surplus against which reserves for depreciation were set up.

"In 1932, the company was adversely affected by a series of receiverships of related companies. On March 1, 1932, Daniel O. Hastings was appointed receiver of General Theatres Equipment, Inc., which at the time was the largest stockholder of the company. On May 18, 1932, a receiver was appointed of Roxy Theatre Corporation which was this company's first run account in New York City. On June 6, 1932, a receiver was appointed of Fox Metropolitan Playhouses, Inc., a company which operated theatres in metropolitan New York and adjacent territory and which played Fox pictures. On June 22, 1932, receivers were appointed of Fox Theatres Corporation. On December 31, 1932, Pacific Northwest Theatres,

Inc., a subsidiary of Wesco Corporation filed a petition in bankruptcy. On February 28, 1933, Fox West Coast Theatres the principal subsidiary of Wesco filed a petition in bankruptcy. About the same time Midwesco Theatres, Inc. and Midwest Theatres, Inc., subsidiaries of Wesco, filed petitions in bankruptcy.

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"In 1933, the financial condition of the company was so precarious that bankruptcy was imminent. The principal subsidiaries of Wesco were already in bankruptcy. In the spring of 1933, the holders of the 6% notes of Film Securities Corporation announced their intention to foreclose which, if consummated, as it was, would wipe out the value of the Class A stock which Fox Film Corporation had, and result in a loss of nearly $46,000,000. The company had outstanding debentures of $30,000,000 and bank loans in the amount of $12,000,000. It had been unable to meet the interest payable April 1, 1933. During May and June a reorganization was worked out. The creditors to the extent of $36,000,000 agreed to exchange their creditor claims for stock.

"By certificate filed with the Secretary of State on July 22, 1933, the class A stock was reduced by 5/6 or to 404,276-2/3 shares, and the class B common stock was reduced by 5/6 or to 16,650 shares, and the capital of the corporation was reduced to $2,104,633.33 or $5 per share for each of the 420,926-2/3 shares.

"Then by certificate filed the same day, the class A common stock was increased to a authorized 2,800,000 shares. The class B common stock remained at 16,650 shares and the capital remained at $5 per share.

"The principal creditors of the corporation, that

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is, the debenture holders and The Chase National Bank of the City of New York surrendered the obli-

gations of the corporation which they held for shares of class A stock. The increased stock was offered to the stockholders at $18.90 per share on the basis of 5 shares of new stock for each share then held. To the extent that the same was unsubscribed for by stockholders, the aforementioned creditors exchanged the obligations which they held for such stock at $18.90 per share. At the same time the investments which the corporation held in Film Securities Corporation and Wesco Corporation (now National Theatres Corporation) were reduced to a nominal book value of $1 each.

"In 1935, this company acquired the assets of Twentieth Century Pictures, Inc., a producing company owned by Joseph M. Schenck, Darryl F. Zanuck and William E. Goetz, and they entered into long term contracts for their services.

"On August 22, 1935, the class A common stock and class B common stock were eliminated and there were created 4,600,000 shares of new stock without par value of which 1,500,000 shares were preferred stock and 3,100,000 shares were common stock. The 2,800,000 shares of class A common stock previously authorized and the 16,650 shares of class B common stock previously authorized were by this certificate

(1720)

transmuted into new preferred stock and the common stock on the basis of ½ share of preferred stock and ¼ share of common stock for each share of class A stock issued or unissued and one share of preferred stock and ½ share of class B common stock, issued or unissued. The preferred stock was made convertible into common stock on the basis of 1¼ shares of common stock for each share of preferred stock.

"There were issued to the stockholders of Twentieth Century Pictures, Inc., 132,513 shares of pre-

ferred stock and 613,264¾ shares of common stock which was exactly one-half of the common stock outstanding at the time of the reorganization.

"In 1943, 10,000 shares of prior preferred stock of a par value of $100 were issued. The proceeds thereof and other funds of the company were used to acquire from The Chase National Bank of the City of New York the 58% of the stock of National Theatres Corporation which it had held since 1934, and National thus became a wholly owned subsidiary.

"In April, 1942, Sidney R. Kent died. Shortly thereafter, Spyros P Skouras was elected president of the corporation and Wendell L. Willkie, chairman of the board. Mr. Willkie died October 8, 1944.

"In 1943 and 1944, additions were made to the

(1730)

board of directors to elect the representatives of Massachusetts Investment Trust, a substantial stockholder, and representatives of Lehman Brothers which had underwritten the issuance of the prior preferred stock.

"No officer of Twentieth Century-Fox is an officer, director, or, so far as is known, a stockholder in any of the other defendants. No director of the company is an officer or director, or, so far as is known, a stockholder in any other of the defendants. No stockholder of the company owning any substantial number of shares of the stock of any of the three classes is, so far as is known, an officer, director or stockholder of any of the other defendants.

"To my knowledge, Twentieth Century-Fox has not conspired or combined with the other defendants in this case, or any of them, to restrain or monopolize trade and commerce."

Mr. Caskey: I yield now to Mr. Frohlich.

Judge Bright: Do I understand that the Fox case is now in?

Mr. Caskey: No, sir. We have testimony which we may adduce by stipulation of the comptroller, and we will have at least one witness from the Coast. As to National Theatres Corporation, we are engaged in all the periods when there is a recess in preparing

(1730-A)

stipulations that we are submitting to Mr. Wright, and we are making substantial progress there. I think we will have a stipulation of facts from each of the operating heads of the five principal divisions.

I think that is right, isn't it, Mr. Wright?

Mr. Wright: We have agreed that they would testify in accordance with their affidavits.

(1731)

ABRAHAM MONTAGUE, called as a witness on behalf of defendant Columbia Pictures Corporation, being first duly sworn, testified as follows:

Direct Examination by Mr. Frohlich:

Q. Where do you reside, Mr. Montague? A. New York City.

Q. What is your occupation at the present time? A. General sales manager.

Q. For whom? A. Columbia Pictures Corporation.

Q. How many years have you been engaged in the motion picture industry? A. Since 1908.

Q. Will you kindly give us your background and experience. A. In 1908 I opened a very small theatre in Weare, New Hampshire. I operated that theatre and some other theatres until 1923.

In 1923 I sold out the motion picture interest that I had and became what is known as a state-right distributor in Boston.

In 1929 we sold out the business of state-right distribution to Columbia Pictures Corporation, and since that time I have been associated with them, first as a district manager operating out of Boston, and then as a sales manager operating out of New York.

Q. Can you tell us something of the Columbia Pictures Corporation from the first days that you were acquainted (1732)

with that company? A. My first connection with the company was the purchasing of a picture called Innocents for the territory of New England, the six states. I undertook the distribution of that picture as a state-righter for Columbia Pictures. After that I continued to purchase state rights for New England from Columbia.

Q. Did you know the officials of Columbia Pictures in those days? A. Well, I got acquainted with them after my first contact with them.

Q. Was it a large company or a small company? A. It would be considered a small company.

Q. How was it selling its pictures? A. In those days it was selling its pictures through state-right operators throughout the United States—in fact, throughout the world.

Q. Was the method of state-right distribution prevalent throughout the motion picture industry in the early 20s? A. Yes; practically all of the pictures were distributed in the early 20s through state-right distribution.

Q. You yourself said you were a state-righter. Did you control certain territory? A. We had the rights of licensing the theatres on these state-right pictures in six states.

Q. Did other people in the state-right field likewise (1733)

operate in various territories throughout the United States? A. Yes, sir.

Q. So that if a man produces a picture and wanted to sell his picture and had no distribution organization of his own, he was compelled to go to the state-right people, wasn't he? A. Yes, sir.

Q. And he would have to parcel his product out in various territories throughout the country? A. Yes, sir.

Q. From the viewpoint of the producer and from your experience with the producer, was that a profitable operation for the producer? A. Well, to the best of my recollection it was profitable in some instances; unprofitable in others. It was not a certain operation; it was an uncertain operation.

Q. Did there come a time when there was a change in the method of distribution throughout the industry? A. Well, we know of one method of change known as the consent decree, which happened some few years ago.

Q. I am speaking of the early 20s. A. In the early 20s the state-righters would accumulate from one or more producers a program and then go out and try to sell that program in block.

Q. Did a time come when the producing companies—by the way, how many important producing companies were there in existence in the early 20s? A. I would have to refer

(1784)

to the records on that; I don't remember.

Q. Did a time come when those producers commenced to operate under a system of distribution of their own? A. Yes, sir.

Q. Had nothing to do with state-right? A. Yes, sir.

Q. In that way they contacted the exhibitor directly? A. Yes, sir.

Q. And sold their product to him without the intervention of any state-right? A. Correct.

Q. Did Columbia Pictures embark upon that method of operation? A. Yes, they embarked on what we might call the national distribution system in 1929.

Q. Do you know whether they required and obtained financing for that purpose? A. They did require and obtain financing for that purpose.

Q. A very substantial amount, wasn't it? A. In those days we would call it a substantial amount, yes, sir.

Q. Was it over a millions dollars? A. I believe it was over a million dollars.

Q. That money was required to organize the distribution system throughout the United States, wasn't it? A. It was required to buy out some of the state-righters and acquire a system of their own.

Q. And to substitute for state-right divigions exchange branches of their own? A. Yes, sir.

(1735)

Q. In how many cities of the United States, approximately, has Columbia branch offices? A. 31.

Q. And has had those offices for a great many years? A. Since 1929.

Q. After Columbia organized this distribution department, how did Columbia sell its pictures to the exhibitor? A. They had salesmen go out and made effort to sell the product of one year in a group sale.

Q. Was that known as block booking? A. It could be called block booking, yes, sir.

Q. Is that the same method of operation as Mr. Wright refers to in his complaint as blind selling? A. Yes, I think Mr. Wright refers to it as blind selling.

(1736)

Q. As a matter of fact, the exhibitor knew very well what he was purchasing when he made a contract for your year's product, didn't he? A. He knew fairly accurately what he was purchasing. His principal purchase, we always claimed, was the company he was buying from. He knew the history of that company, the type of releases it had, and that is why, in most cases, he decided to continue to do business.

Q. In selling your pictures in block, didn't you try to describe as adequately as possible the prospective pictures by the title of the picture, by the story, or play, or novel, and by the stars? A. We gave him all the information as accurately as possible that we had.

Q. And then when you went into production you tried to keep pace with that information and live up to it? A. To the best of our effort, sir.

Q. Have you been selling your pictures in that way from the early 20s down to the present time? A. Yes, sir.

Q. Are there other distributors in the United States who sell their pictures in the same manner? A. Yes, sir.

Q. Will you name them, please? A. Universal, Republic, Monogram, Producers.

Q. And from your experience with exhibitors, both as an exhibitor and as a produeer, do you find that that method of operation is satisfactory to the exhibitor? A. It is my

(1737)

belief it is the most satisfactory method of distribution to the exhibitor. By that means the exhibitor knows that he has a certain program that is his, he knows what price the pictures are coming to him at, and he feels that he is having some insurance as against his investment in brick and mortar, sir. We are quite certain that the majority of the exhibitors in the United States desire to buy that way.

Q. Is that method of operation vital and necessary for Columbia? A. It is absolutely vital and absolutely necessary, sir.

Q. Please state why. A. If we were to change our method of distribution to the so-called small group selling, which is used under the consent decree, we would find it absolutely necessary to change the whole financial base of our company. We wouldn't have—we do not have enough money to keep pictures in inventory, such as we would have to do, for any period of time. We find it absolutely necessary to turn our

pictures over as rapidly as possible, to send that money back to California so California can again invest it in pictures.

Q. Does the making of block contracts or bulk contracts insure a market for your product? A. We feel that it does, sir.

Q. Does it give you something on which you can base the gamble that you take in making pictures? A. It makes (1738) more certain the gamble, sir.

Judge Hand: How have you managed to get along in those four years of tyranny, or whatever there has been?

The Witness: We have got along very well.

Mr. Frohlich: We are not a party, your Honor, to the consent decree.

Judge Hand: That is true.

Judge Goddard: How large a block did your client sell?

Q. Tell the Court, please, how large a block of pictures you sell each year, approximately. A. Well, for the last few years it has numbered between 40 and 44 pictures, that we call features; we also sell westerns; we also sell short subjects, and we have serials.

Judge Bright: How many in a block?

The Witness: We try to sell all of the pictures that we have to all exhibitors. It is either all or part thereof.

Judge Goddard: That numbers some 40, you say?

The Witness: So-called features, as we call them, there are between 40 and 44.

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Judge Bright: During what period?

The Witness: Between the period of September and October 1st we expect to produce and release that number. Sometimes we fall a little short.

By Mr. Frohlich:

Q. In addition to distributing your own pictures, Mr. Montague, has Columbia from time to time distributed pictures of other producers? A. Yes, sr.

Q. Did Columbia at any time lend its distribution facilities or make them available, as such, to other producers? A. We never lend our facilities. We have released pictures for other producers.

Q. That has been by special contract? A. Yes.

Q. No other producer or distributor in this country has any access to your branch office? A. No, sir.

Q. Your salesmen? A. No.

Q. Or your employees? A. No.

Q. You distribute independently? A. Yes, sir.

Q. And you produce independently? A. Yes, sir.

Q. Have you any understanding, any arrangement, any contract with any other defendant in this case other than the occasional exhibition license contract that you have with his theatres? A. No, sir.

Q. I have prepared, Mr. Montague, a list of pictures—that is, a list of the number of pictures produced by outside (1740)

producers and distributed by Columbia from 1928 down to the present time. I show you this list and ask you whether this is a true and accurate list? A. We believe it to be true and accurate, sir.

Q. You had it prepared, as a matter of fact, at my request, under your direction, didn't you? A. Yes, sir.

Mr. Frohlich: I should like to offer that in evidence.

Mr. Wright: No objection.

(Marked Defendant Columbia's Exhibit C-1.)

Judge Goddard: How would you describe that exhibit?

Mr. Frohlich: It is the list of outside producers. May I hand it up to the Court?

Judge Hand: Yes.

(Exhibit C-1 handed to the Court.)

Q. In 1928, Mr. Montague, I see by this document that I am going to show you in a moment Columbia spent all told for this production $1,632,300. Of course, that amount has increased each year, hasn't it? A. Yes, sir.

Q. And have you at my request prepared from your books of account a list of the total expenditures each season by Columbia Pictures in its production? A. Yes, sir.

Mr. Frohlich: I should like to offer that in evidence.

(1741)

Mr. Wright: We have no objection.

Mr. Seymour: May I see it, Mr. Frohlich?

Mr. Frohlich: I will give you a copy, Mr. Seymour (handing).

(Marked Defendant Columbia's Exhibit C-2.)

Q. There has been some evidence here, Mr. Montague, in this case about borrowing and loaning players, artists, from one company to another. Have you prepared from data collected from the studio of Columbia Pictures—and, by the way, where is that studio located? A. In Hollywood, California, sir.

Q. Have you prepared a list of each and every artist and each and every company in the United States to whom Columbia loaned players and from whom it borrowed players down to the present time? A. Yes, sir.

Mr. Frohlich: I should like to offer this list, which comes in two portions, in evidence.

Mr. Wright: No objection.

(Marked Defendant Columbia's Exhibits C-3-A and C-3-B.)

Q. When Columbia borrowed a player from one of the major defendants in this case—and, by the way, what is your definition of a major defendant? Have you got any? A. No, sir.

Q. Well, what is your definition of an independent pro-
(1742)
ducer? A. One who has no connection with any other, sir.

Q. Now, when Columbia borrowed a player from a producer, an affiliated producer in this case, as appears by that list in evidence, did Columbia Pictures ever give any of its profits or undertake to give any of its profits to that producer? A. Whom we had borrowed the personality from?

Q. Yes. A. To the best of my knowledge, no.

Q. As a matter of fact, in instances where it borrowed a star, was Columbia unable to book its picture into the very theatre owned by the company from whom it borrowed the star? A. Yes.

Q. Can you give us one or two instances of that? A. Well, we can go way back to a picture with Clark Gable in it called It Happened One Night. We licensed that picture to Loew's Circuit and also to the opposition of Loew's.

Q. Now, the Loew's Circuit is the company owned by Metro? A. Yes.

Q. Which owns many theatres? A. Yes.

Q. And you licensed that picture to houses in opposition to Loew's. A. Yes, sir.

Q. And in many instances you did not license it to the Loew's theatres? A. In many instances we did not license
(1743)
it to the Loew's theatres.

Q. Now, as a matter of fact, does Columbia face competition from all of the defendants in this case? A. May I have the question repeated, sir?

Q. Does Columbia face competition from all of the defendants in this case? A. Yes, sir.

Q. Is the competition keen? A. Very keen.

Q. And constant? A. And constant.

Q. Are there many fine pictures produced by independent producers in the United States? A. I would say yes, sir.

Q. Have you at my request prepared a list of successful pictures, pictures that were successfully artistically and financially in recent years and which were produced by independents throughout the country? A. Yes, sir.

Q. I show you this list and ask if that is an accurate list of pictures of that kind? A. I believe it to be accurate, sir.

Mr. Frohlich: Any objection.

Mr. Wright: No. I would like a copy.

Mr. Frohlich: I will let you have one, Mr. Wright (handing).

(Marked Defendant Columbia's Exhibit C-4.)

Mr. Raftery: Mr. Frohlich, is the list confined to Columbia only?

Mr. Frohlich: Independent producers throughout

(1744)

the country.

Mr. Raftery: You have got United Artists pictures?

Mr. Frohlich: United Artists pictures, Universal pictures, and others.

Mr. Davis: That is, all but the five consenting defendants in this case?

Mr. Frohlich: That is right.

Q. I will show you a copy of this list, Mr. Montague, and ask you if you can go down the list and give us a half dozen instances of outstanding pictures, pictures of great appeal and great success. A. Am I supposed to stick to Columbia?

Q. No, keep away from Columbia as much as you can. A. 100 Men And A Girl, Universal. All Quiet on the Western Front, Universal. Showboat——

Q. All Quiet on the Western Front—that was the Erich Remarque picture of the book? A. Yes, quite so.

Algiers, by Walter Wanger, I see here. Modern Times and the Great Dictator, Charlie Chaplin. Edward Small, the Man In The Iron Mask. Howard Hughes, the producer, Scar Face. Selznick, the producer of Rebecca, Gone With The Wind. Harold Lloyd Corporation, The Freshman. Walter Disney, Snow White and The Seven Dwarfs. Samuel Goldwyn, Wuthering Heights, Stella Dallas, Dead End. (1745)

Hal Roach, Topper; Of Mice and Men. Gene Autry (Westerns) produced by Republic Pictures Corporation. That Hamilton Woman, produced by Alexander Korda. Frank Lloyd Productions, Howards of Virginia. Columbia: Here Comes Mr. Jordan; Penny Serenade; My Sister Eileen——

Q. Well, let us have others besides Columbia. A. I think I have gone over the list and I have given a few from each one of the producers.

Q. Now, in addition to the competition based by Columbia from independent producers in the United States, do you face competition by producers in foreign countries? A. Yes, sir.

Q. Whose pictures come over here? A. Yes.

Q. And are released in the United States? A. Yes, sir.

Q. I show you this list of foreign pictures which were distributed in the United States and ask you whether this is a farly comprehensive list of the successful pictures so released? A. Yes, I think it is.

Mr. Frohlich: I should like to offer that in evidence. Any objection, Mr. Wright?

Mr. Wright: What is this?

Mr. Frohlich: A list of foreign pictures released in the United States.

(1746)

Mr. Wright: Well, we have no objection.

(Marked Defendant Columbia's Exhibit C-5.)

Q. Will you be good enough to look at that list for a moment and just read off to their Honors a number of the outstanding and successful pictures on this list?

The Witness: May I have a copy of the list, sir?

Mr. Frohlich: Oh yes, I am sorry (handing).

A. Henry VIII; Maedchen in Uniform; Mayerling, 39 Steps; Pygmalion; The Lady Vanishes; Goodbye Mr. Chips; Count of Monte Cristo; The Scarlet Pimpernel; Pepe LeMoko; In Which We Serve.

Q. What have you found in this industry in the past 10 years with respect to independent production? Has it increased or decreased? A. Increased.

Q. Considerably so? A. Considerably.

Q. And have a great many important pictures been released in the United States as well? A. Not in the last few years, sir.

Q. But the increase has been with respect to domestic production? A. Yes, sir.

Q. And what would you say today is the state of affairs with respect to independent producers? Are there a great many more than there were in 1935? A. Yes, sir, and they seem to be growing all the time.

(1747)

Q. To your knowledge——

Mr. Wright: May I have that last question and answer read?

(Question and answer read.)

Q. To your knowledge has any independent producer in this country ever had any trouble or difficulty in having his pictures released or distributed throughout the United States? A. I know that they have all been distributed. I can't tell you just what difficulties they may or may not have in negotiating for that distribution, but they have all reached, to the best of my knowledge, the market.

Q. Do you know of a single producer who made any kind of a picture of any importance in this country who was unable to have it distributed in the United States? A. I do not know of one.

Q. In making your deal, Mr. Montague, with exhibitors, what is your primary objective, and what factors do you take into consideration in these negotiations? A. Well, our first interest is how much we can get out of a given situation or out of the territory as a whole. We in most cases attempt to license our film to what we call our old and standard accounts, be they so-called affiliated or independent. We are always anxious and seeking an increased market and to develop the market that we have on the highest terms that we can secure.

(1748)

Q. And to how many theatres at the present time do you sell your product? A. Well, we sell a major part of our program to something between 10,500 and 11,000 accounts in the United States. We have licensed certain pictures to as many as 13,700 theatres in the United States.

Q. That has been the exception, hasn't it? A. That was the exception, sir.

Q. And that, of course, was true only with respect to outstanding pictures? A. That was true with respect to one picture called Cover Girl.

Q. But aside from these exceptions, your general product is licensed to approximately ten or eleven thousand exhibitors? A. Correct, sir.

Q. And that means that you negotiate approximately 10,000 contracts a year, doesn't it? A. Oh, we negotiate a great many more than that, sir. We renegotiate with many houses for more pictures than they may buy the first time.

Q. And you carry on these negotiations each year, don't you? A. We carry them on each year, sir, in the main.

Q. Under your method of selling pictures, you have one sales campaign a year, do you not? A. We have what is

(1749)

called our major one sales campaign a year.

Q. During what period does that campaign take place? A. Well, the campaign will usually come out if it is on time somewhere between March and April.

Q. And then in conjunction with the campaign do you have sales conventions? A. Yes, sir.

Q. And is that held only once a year? A. Well, we may have what is termed a sales convention once a year. We may have other meetings during the year with various members of our sales force.

Q. And after your sales convention your salesmen are instructed to go out into the highways and byways and make the deals as best they can with exhibitors? A. Yes, sir.

Q. If you had to sell pictures in small blocks of two or three or five, wouldn't you have to go through that entire campaign many times a year? A. Well, if we had to sell them in groups of five we would have to go through that campaign eight or nine times a year, sir.

Q. Could you sell in small groups with the present sales force? A. We would have to augment our sales force considerably.

Q. And you would be involved in very substantial expense, wouldn't you? A. We would be.

Q. Now, in making your contract with the exhibitor do you treat affiliates and independents on an equal basis? (1750)

A. We do, sir.

Q. Do you give the same terms to the independent that you give to the affiliate? A. In many cases we try to get as good. In some cases we succeed and in others we do not.

Q. Let us take the specific term of selectivity. Just what is that? A. I beg your pardon?

Q. What is selectivity? A. It is where an exhibitor does not buy all the film that we have; where he has a selection out of the number that we might have.

Q. In other words, instead of taking your entire number of features he has a right to say, "I will take only 20 or 25," instead of the 40 or 45, or whatever it is? A. Yes, sir.

Q. Now, do you frequently give that to affiliates? A. Yes, sir.

Q. And do you frequently give that to independents? A. Yes, sir.

Q. Do you give the independents the same right of selectivity that you give the affiliated throughout the United States? A. As a rule the independent has a little edge on the affiliated. The affiliated run in the main more important pictures, and we try to be quite a bit more definite on those contracts.

Q. Now, how do you approach clearance when you negotiate your deals? A. Well, clearance is something we usually (1751)

find when we arrive there and we usually negotiate our deal within the clearance that we find.

Q. You don't in each instance, in every contract, attempt to set up a new clearance, do you? A. It would be impractical and impossible, sir.

Q. As a matter of fact, has not clearance been an established part of this industry for a great many years? A. It has. It was augmented back in the days of the NRA.

Q. And speaking of the NRA, you were, of course, with Columbia at the time the NRA came into existence, weren't you? A. Yes.

Q. Did the NRA have anything to do with the contract that Columbia uses for its licensing with exhibitors? A. Well, to the best of my knowledge at that time Columbia became part of the regulation in which the NRA tried to establish what was then known as the standard form of contract.

Q. And for whose protection was that? A. Principally for the exhibitors.

Q. Did Columbia, for one, attempt to comply with the regulation of the NRA in that respect? A. To the best of my knowledge it did, sir.

Q. Did the NRA have anything to do with the so-called admission price clause in the contract? A. Yes, it did, sir. (1752)

Q. Please tell us what. A. Well, after the NRA tackled the job of trying to set up a form of run and clearance in the various and many zones throughout the United States, it seemed to us who observed it carefully, they figured that the best way to do it was on some form of admission price, and they seemed to have tried to go along in that direction of established admission prices. I remember that particularly as to several arguments that came before us in the case of Los Angeles.

Q. There has been some testimony given in this case, Mr. Montague, about clearance hinging upon the admission charged by a subsequent-run theatre. Have you heard the testimony here in the courtroom? A. No, I did not, sir.

Q. Well, have you at various times in contracts with exhibitors who are affiliated with the five defendants here

given clearance dependent upon the admission price of second or third or fourth-run? A. I believe we have in some instances, sir.

Q. In other words, 30 days ahead of a house that charges 30 cents, 50 days ahead of a house that charges 25 cents—I am taking arbitrary figures—something of that kind. A. Yes, something of that kind.

Q. Have you also given that clearance to independents? A. We have given probably a like clearance to independents, yes, sir.

Q. I call your attention to the exhibitors in Malden, Massachusetts, Southgate California, St. Joseph, Missouri, and Akron, Ohio. Have you given those exhibitors who are independent exhibitors the identical form of clearance? A. I believe we have, sir.

Mr. Wright: What were the four towns again?

Mr. Frohlich: Malden, Mass., Southgate, California, St. Joseph, Missouri, and Akron, Ohio.

Q. Have you ever knowingly permitted any exhibitor in this country to over-buy your product? A. Not knowingly. It would be of no advantage to us to sell an over-buy situation.

Q. Will you explain to the Court what over-buy means? A. Well, over-buy is a term where an exhibitor has all the film he can use, a little more, and he still seeks more film on top of that.

Q. And what would be his purpose in seeking more film? A. Well, I would say in some cases they seek to do that to control the situation as to the film.

Q. And to keep film away from a competitor? A. It could be for that purpose, sir.

Q. And have you ever knowingly embarked on that kind of a contract? A. No, sir.

Q. Have the exhibitors in the country in the last ten years been successful, if you know? The exhibitors. A. The ex-

(1754)

hibitors have been very successful in the last ten years.

Q. And have made a lot of money in the last five years, haven't they? A. According to some of the Government statistics, I would say so, yes, sir.

Q. And they have increased their admission prices substantially, haven't they? A. Yes, sir.

Q. And do you know of any exhibitors who are anxious to sell their houses? A. No, sir.

Judge Hand: Why do you say block booking is so necessary for you? Is it because you do not own any theatres?

The Witness: Well, it could be one of the reasons, sir, and it is necessary because our type of program is the type of program that runs from the most expensive pictures down to what we call the B grades, the commercial grades of film. We would find it most difficult because of the numbers and the type of quality, and so forth, to continuously go back. We sell so many of these pictures to the small villages and hamlets all throughout the United States who cannot come to the market as often as they would like to. Now, we could not get there fast enough unless we augmented our sales force considerably; we would not have the money to wait, to hold this inventory on the shelves, so-called inventory, meaning these pictures, on the shelves, while we are waiting to get in

(1755)

there. Our particular company's success has been on the rapid turn-over of its pictures.

Q. Have you ever compelled an exhibitor to take your short pictures in order to obtain your features? A. No, sir.

Judge Goddard: I do not quite understand that. If you tell us that you sell your entire product at one time, that would include shorts and everything else, would it not?

The Witness: We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we succeed in doing that. It usually ends up with the exhibitor having a selective contract. He may or may not buy any shorts at all.

Judge Goddard: On an average how many pictures does the contract include, a block?

The Witness: Sir, on our feature program, meaning 44 pictures in that form, which excludes the Westerns, we average about 32 across the United States to an account.

Q. You do not condition the selling of features upon the taking of shorts, do you? A. No, sir.

Q. And if an exhibitor does not want your shorts you will sell him your features just the same? A. Yes, we will try to sell him the shorts; we will use all the salesmanship (1756)
that we have, if he uses shorts.

Q. But you have never withheld your features from an exhibitor because he would not use your shorts, have you? A. We could not afford to do so, sir.

Q. Have you ever had instances where your exhibitor has changed his admission price after he made his contract with you? A. Yes, sir.

Q. Have you had instances where the change was upwards and he increased his price? A. I believe so.

Q. Have you had instances where the change was downward and there was a decrease in price? A. I have heard of such instances, sir.

Q. Did you ever take any action with respect to an exhibitor who did that? A. No, sir, unless by the so doing of it he was interfering with the contracts, our licensing contract with the prior account.

Q. As a trade practice isn't it a fact that from time to time exhibitors come in to you and seek adjustments on their contracts? A. Well, they don't come in to me, Mr. Frohlich. They go to the various branches.

Q. When I say "you", I mean Columbia Pictures. A. Yes, sir.

Q. That is very prevalent, isn't it? A. So prevalent, sir, that we are through counting the changes by the week; we now measure them by the foot.

(1757)

Q. And do you accommodate these exhibitors and give them these adjustments? A. Yes, I would say it is an accommodation, sir.

Q. And do you treat the independent exhibitor as well as you do the affiliate on these adjustments? A. We give less adjustments, much less adjustments to the affiliate than we do the independent. Our records will substantiate that.

Q. Do you give all the breaks to the independent? A. If you want to call it breaks, yes, sir.

Q. Yes, that is what I want to call it.

(1758)

Judge Bright: Why is that?

The Witness: Well, we know pretty well—we will say that we know a little more about what the affiliate can take, and we follow them a little careful as to the gross of their theatres, but you take the mass of theatres in the small towns, we don't know too much about them. He comes in and says, "Such and such a picture played. I didn't do very well with it. You charged me too much for it." And he says, "We believe we should have an adjustment." We believe a certain amount of adjustments is a good idea because we believe we can get more good will with that. Now, when it comes to the affiliated, we don't have quite as much consideration, sir.

Judge Bright: You license largely on percentage licenses?

The Witness: No. Very largely on the flat side of our selling, whereby we sell a man a picture for $50 and he will come in and say, "I only took in $51. I think we should have an adjustment." We don't know whether he took in $51 or not, but we know our accounts pretty well. We have what we call a chronic complaining list. It is a common expression in the exchanges, that they keep a towel there so as to wipe up the tears of these fellows coming in. In other cases we have fellows who really need help, have hit hard times, or a picture didn't do good business, it hurt their
(1759)

Saturdays and Sundays if they played them, and they need help legitimately, and they get it, and we consider that part of our business.

Judge Hand: That would be almost like a trade discount.

The Witness: It is a trade discount, sir. I think it is almost taken in the mind of some exhibitors at the time they buy the contracts.

Judge Bright: Where you sell a block of pictures to one exhibitor, that is at the beginning of your season, isn't it?

The Witness: Yes.

Judge Bright: They buy blind as to some of them?

The Witness: Yes, sir, we got only a few films produced he can see. The rest of them are on description, and he really and truly buys on what we call past performance—what has Columbia's past performance been with that exhibitor over the period of years that we traded with him.

Judge Bright: Do you sell to these so-called majors, five majors, by block licenses?

Colloquy

The Witness: We sell them by block, sir.

Judge Hand: Right along?

The Witness: Right along. We have since our beginning and still do, sir.

Judge Goddard: Just the same, same as to the
(1760) independents?

The Witness: I did not get your question.

Judge Goddard: Are blocks sold comparatively the same size as those sold to the independents?

The Witness: Comparatively. In some of their big theatres we cannot sell as many. In some of the smaller theatres we can sell more because they can use some of what we call our B-grade films. If the theatre is such it does not use B-grade films, of course, we cannot sell them or license the film—that would be a better expression.

Judge Hand: If I understand the thing at all, to sell to an exhibitor a lot of 40 plays would be a perfect gamble as far as he is concerned as to half of the plays submitted?

The Witness: Well, sir, from your seat I can understand that you could think so, but a lot of these exhibitors would like not only to buy 44 but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, because they feel that is their measure of protection and they want it.
(1761)

Judge Hand: That is because, I suppose, then, that they have so many different theatres they can

place them. Supposing, for example, Paramount or Loew or Fox or any of these defendants, had but one theatre, one big theatre. They certainly wouldn't do it then unless they went into an absolutely blind gamble, would they?

The Witness: They wouldn't do it unless they needed the films that I had to offer. If they only had one theatre in a situation and they played only 52 pictures a week, I wouldn't have a chance, sir, to get in my group of pictures.

Judge Goddard: 52 a year?

The Witness: 52 a year. Pardon me. Correction. Thank you.

Judge Bright: You mean these men that want the block buying most are those that change their program oftenest?

The Witness: Yes. I think they want them most, probably, but the larger exhibitor needs it just as bad as the small one. He wants to know, because of competition, what pictures he is getting. At least we find it so from our own distribution. We have no trouble at all in distributing through block selling. In fact, we have attended meetings back there sometime ago where the exhibitors as a whole were meeting from all over the country, trying to get all these companies

(1762)

to plead—to get away from this so-called small group selling. They wanted to buy all; they wanted to buy their season's product from all the companies. They called them the umpty meetings at the time. I have forgotten just what umpty stood for, but it was a whole series of meetings, whereby they actually made a very strenuous plea——

Judge Bright: Exhibitors?

The Witness: Yes, sir. (Continuing)—to do away with this consent decree form of selling.

Mr. Wright: I think he means independent exhibitors, is that right?

The Witness: Independent exhibitors were there, and also affiliated, Mr. Wright.

Judge Bright: That demand or suggestion, you say, comes from the small town exhibitor more than the large one?

The Witness: It would come from small towns, and it would come from large ones, depending on the need of the film to the exhibitor, whether he had a competitor, whether he had a double feature policy, whether he had a single feature policy, whether he run three shows a week, changed three times a week, or whether he changed seven times a week. There are so many things that come into the individual situation as to why that particular exhibitor wants to buy that

(1763)

particular way.

Q. Mr. Montague, did you make up at my request a list of all the cities, up to 418, which have a population of 25,000 and over, and include in that list the name of the exhibitor, whether he is an independent or affiliate, how you sold to that exhibitor, in other words, did you sell to an independent in the town or an affiliate, whether it is a closed town of affiliates or a closed town of independents? A. I instructed such a list to be made, sir.

Q. And I show you this list and ask you whether this is the list that you made up? A. Yes, sir, this is the list we had made up, sir.

Q. When I use the expression "Closed town of affiliates" or "Closed town of independents", just what do I mean by

that? A. I assume you mean a town that has no competition, sir.

Q. In other words, if a city has, say, two or three affiliated theatres and no comparable independent theatre, would you call that a closed town of affiliates? A. Well, if there were other theatres there, I would not call it a closed town, sir. It might be closed as to a run.

Q. I am speaking of first-run. A. Yes, sir.

Q. Comparable theatres of first-run only, it would be a closed first-run. This list is related only to first-run the-
(1704)
atres? A. Yes.

Q. And would the same hold true of a situation where an independent owned all of the important theatres in the city? A. Yes, sir.

Mr. Frohlich: I should like to offer this list in evidence.

Mr. Proskauer: I would like to see it.

Mr. Frohlich: I have no copy of it.

Mr. Wright: I have no objection, providing we can have a copy before he leaves the stand.

Mr. Frohlich: I will be glad to leave the list with Mr. Wright when——

Mr. Wright: We might have to defer cross-examination.

Mr. Proskauer: May I take a look at it, with your Honor's permission?

Mr. Frohlich: I am sorry, if I have kept the Court waiting. I want to interrogate on this list.

Q. Mr. Montague, the counsel——

Mr. Proskauer: Mr. Frohlich, before you go ahead, may I suggest we get through with this? And I would like to ask you this question. Does Mr. Monta-

gue call a closed town one where there is competition between two different affiliated theatres for first-run? In Detroit you have that marked a closed town. In Detroit there is competition, isn't there, between
(1765) different affiliates first-run?

The Witness: The competition, I know, is between an independent and an affiliate.

Mr. Proskauer: But you have it marked a closed town on here.

The Witness: What town did you give me?

Mr. Proskauer: Detroit.

The Witness: No, you are absolutely right, there is competition in Detroit between the affiliates.

Mr. Proskauer: Between whom?

The Witness: Between Fox on the one hand, the Fox Theatre operated by National Theatres Company, I believe, or some other corporation—I can't remember the name of the corporation—and theatres operated by an affiliate of Paramount. That would not be a closed town as to first-run.

Mr. Proskauer: It is marked "closed" on this list that is tendered.

Q. Wouldn't it be closed so far as the independent is concerned? In other words, let me make this clear to you, Mr. Montague. Let us get this straight. If you go into a town and there is only one theatre there owned by an affiliate, or two theatres owned by two affiliates, or three owned by three affiliates, is that an open or closed town, as far as you are concerned? A. Open town.

Mr. Frohlich: Then this list isn't correct. Then I withdraw it.

(1766)

Mr. Proskauer: May I make a practical suggestion, with the Court's permission? Mr. Frohlich, obviously, in making up this schedule, there has been confusion in the use of the terms "open" and "closed." My suggestion is, you go over it overnight and re-tender it tomorrow, corrected to meet the various suggestions.

Mr. Frohlich: I shall eliminate from the list the column designated "Closed".

Mr. Wright: I might say we——

Mr. Frohlich: That is the only way I can do without——

Mr. Wright: (Continuing) ——we should like to have it as it is for purposes of cross-examination.

Mr. Frohlich: Now I am in a spot.

Mr. Caskey: Would you like to have it, even if it is inaccurate, Mr. Wright?

Mr. Wright: I said for purposes of cross-examination we should like to have it as it is, and it will appear to the extent to which it is accurate or inaccurate.

Mr. Proskauer: We are under the necessity of interposing an objection, which is not in any sense technical.

Mr. Frohlich: I should like to offer it now.

Judge Hand: Now?

Mr. Frohlich: Yes, and I am going to say to the

(1767)

Court I should like to offer it now and eliminate from the consideration of the exhibit the columns called "Closed" and "Competitive", becaues they seem to give rise to a lot of dispute here.

Mr. Proskauer: You will offer the list of accounts to which you sold?

Mr. Frohlich: I will ask the Court to consider only one column, that we sold, whether independent or affiliated.

Mr. Proskauer: We have no objection to a list of the accounts to whom he sells. Everything else is out of it?

Mr. Frohlich: I think that will eliminate all dispute then, your Honor.

Mr. Proskauer: It is clearly understood that the last two columns marked "Open" and "Closed"—and "Competition"—are not a part of the exhibit.

Mr. Frohlich: That is right.

Mr. Wright: That is not understood as far as the Government is concerned. We object to the exclusion of any part of the exhibit until it is apparent from what the witness has to say about it, as distinguished from counsel, as to what its accuracy or inaccuracy is.

Mr. Caskey: The witness has already testified.

Judge Hand: I will overrule your objection. I do not know any way of your compelling him to offer something that he does not want to offer.

(1768)

(Marked Defendant's Exhibit C-6.)

Q. For the information of the Court, Mr. Montague, what was that blue circle around the "I"? A. I would like to see them. I may be able to explain it. I haven't had it in my hands yet.

Q. Didn't you see it last night? A. Yes, sir, but I would like to see it again, if I may.

Q. I just want that for the information of the Court. You will notice wherever the letter "I" appears there is a blue pencil mark around it.

Judge Bright: I thought those columns were out.

Mr. Frohlich: Not that column, Judge Bright. The other two columns. This is the first column. There are three columns altogether. This is the first

column, showing selling to independent or affiliate. The other two columns have to do with closed situations. They are out.

Q. Have you in front of you, Mr. Montague, a list of the 92 cities that has been put in evidence in this case? A. I believe so, sir. I have this list here.

Q. I will have to go over this list with you, and I will try to make it as short as possible, and I want you to make your answers as brief as you can. Akron, Ohio, to whom do you sell there? A. First-run?

Q. I am speaking now only of first-run. To whom do (1769)
you sell there? A. The Akron Palace Theatre Corporation.

Judge Bright: Isn't that all in this list right here, to whom you sell? Isn't it all in this exhibit you just offered?

Mr. Frohlich: I was going to have him make some explanation of these theatres, of comparisons of theatres how long he has been selling, to whom, and why, and so on. I thought it might be helpful to the Court, instead of wading through a long exhibit.

If the Court feels that I shouldn't go into the 92 situations, I won't do it. I had some qualms about it, your Honors have heard so much about it.

Judge Hand: I should think you could do it in nucleus, asking general questions, and then I think it should be admissible, subject to cross-examination and motion to strike out.

Mr. Frohlich: I want to save time. I don't want to spend two or three hours on it.

Q. Mr. Montague, did you have a computation made of the list of 92 cities of 100,000 inhabitants and upwards, showing from 1936, '37, down to 1943-44 to how many independ-

ents you sold, to how many affiliates you sold each season? A. Yes, sir.

Q. I show you this chart or series of charts and ask you whether that truly represents the amount of sales to affiliates (1770).

and independents in these respective years based upon one inch for—I think that is the scale—one inch to eight cities? A. Yes, sir.

Q. That is correct, isn't it? A. Correct.

Q That has been done for each season down to the very last season, 1944-45? A. Yes, sir.

Q. And these figures show, down to the very theatre, just how many independents you sold and how many affiliates you sold in these 92 cities? A. Yes, sir.

Mr. Frohlich: I should like to offer this chart in evidence.

Mr. Wright: Let us see just what it is now. These charts that you have just identified, Mr. Montague. These are tabulations based upon the admissions of fact which you submitted and which are in evidence, are they?

The Witness: They are a compilation of our figures taken from our records. Whether they are in evidence here or not, I would sooner have the lawyer answer that.

Mr. Frohlich: The admissions of fact cover alternate seasons. These are for every season from 1936 down. They are based on the admissions of fact.

Mr. Wright: There is nothing in these computations that is supposed to contradict or alter anything that has been offered by way of admissions of fact?

(1771)

Mr. Frohlich: I am sure I can say no to that. They are entirely consistent with the exhibit that was

handed to you, Mr. Wright.

Mr. Wright: You have one blue column here on this first one. There is one of these for each season, is that right?

The Witness: Yes.

Mr. Wright: I notice, this 1936-37 season, you have a blue column, you have a figure 38½ at the top. What does that mean?

The Witness: Just what it says there, sir.

Mr. Wright: 38½ what?

The Witness: Theatres. For Columbia first-run accounts in cities over 100,000, season 1936-37, and that half was probably created by a split.

Mr. Wright: What you mean is that in 38 cities you sold the independents all of the Columbia product and in one more you split it between Columbia and an affiliated account?

The Witness: Yes, sir.

Mr. Wright: And then in 73 cities you sold the affiliated accounts exclusively, is that right?

The Witness: We sold 58—53½, which are not exclusive, but which were splits.

Mr. Wright: These figures refer to towns, 58½, 38½?

(1772)

The Witness: To theatres.

Judge Bright: To theatres?

The Witness: First-run accounts. An account is a theatre and not a town, sir.

Mr. Wright: You have one account in each of the 92 cities except where you split the product, is that right?

The Witness: We have a first-run account, and in this case there has been one account that we split the

product with an independent theatre, as we term an independent, and with an affiliated theatre.

Mr. Wright: Then isn't what I said correct, that this chart means that in 38 of the 93 towns you sold your pictures exclusively to an independent first-run account?

The Witness: Independent first-run theatre.

Mr. Wright: And in 53 you sold them exclusively to an affiliated first-run account?

The Witness: I don't like the word "exclusive", sir, because we don't sell exclusive. We sell it to first-run.

Mr. Wright: As far as first-run is concerned.

The Witness: Yes, sir.

Mr. Wright: Then in the other one town it was split between the two?

The Witness: Yes, sir, the product was split between the two.

(1773)

Mr. Wright: I don't quite understand. This says one inch equals eight scale. One inch scale what?

The Witness: One inch, I imagine, will equal—I am not too sure of this scale myself.

Mr. Frohlich: That means eight accounts.

The Witness: One inch to eight.

Mr. Frohlich: Eight accounts.

The Witness: Eight accounts.

Mr. Frohlich: One inch to each eight accounts.

Mr. Wright: We have no objection.

Mr. Seymour: May we see them, Mr. Frohlich?

Mr. Frohlich: I will have them marked first.

Mr. Seymour: I would like to see them before they are marked in evidence.

Mr. Frohlich: You want to see them first before they are marked?

Mr. Seymour: Before they are marked in evidence. I suppose, like other exhibits, these are offered subject to correction? This is just counsel's characterization——

Judge Hand: Yes.

Mr. Seymour: (Continuing)—of certain theatres being affiliated, and he may be wrong about it.

(Marked Defendant Columbia's Exhibit C-7.)

Judge Bright: What do you mean by "affiliates"?

The Witness: Affiliated is a term that we use

(1773a)

meaning that to the best of our knowledge a particular theatre is associated with a company that has distribution and production, or a company that is producing pictures, that has a theatre ownership of some theatre or theatres.

(1774)

Judge Bright: Not confined to the eight defendants here.

The Witness: We don't have any theatres. Columbia doesn't own a single theatre, or interest.

Judge Bright: It is not confined to the so-called five major defendants.

The Witness: Yes, we would call an affiliate one of the five defendants, namely, we call M-G-M, Metro-Goldwyn-Mayer; we call Paramount an affiliate; we call RKO an affiliate; we call Warners an affiliate, and we call Fox an affiliate.

Judge Bright: Are those the only five?

The Witness: Universal, to the best of our knowledge, does not have theatres, so we would not call them that. Republic, we don't believe—well, I think Republic has one theatre in New York, but we certainly would not classify them in the industry as an affiliate.

Judge Bright: I am trying to find out what you mean by an affiliate.

The Witness: A producer-distributor that has directly or indirectly some theatre connection.

Judge Bright: Are you referring to the producer-distributor and exhibitor in this case, or universally all over the United States, if there are any others?

The Witness: If there are any others, I am including them too, sir.

(1775)

Q. I neglected to ask one important question, Mr. Montague. Does Columbia own any theatres? A. No, sir.

Q. Did it ever own any? A. No, sir.

Q. Mr. Wright, Government's counsel, has had these defendants answer interrogatories or make admissions of fact with respect to 418 cities in the United States which have a population of 25,000 or over. Did you at my request have your department in Columbia make up a chart similar to the one just received in evidence, showing the number of accounts which Columbia has sold since 1936-1937, each season, down to 1944-45, to the independent theatre in these respective cities, also to the affiliated theatre in these respective cities? A. Yes, sir.

Q. I show you these charts and ask you whether these are the charts that were made? A. Yes, sir.

Mr. Frohlich: I should like to offer these in evidence.

Mr. Seymour: May we see them?

Judge Bright: Following up my last question to you, what do you mean by an independent?

The Witness: An independent theatre owner is one in our opinion that has no connection whatsoever with distribution or production. An independent producer is one who has no connection with theatres.

(1776)

Judge Bright: That does not help any. You are selling to independent theatre operators. Who are independent theatre operators?

The Witness: Who are independent theatre operators?

Judge Bright: Who do you refer to when you say you are selling to independents in these charts?

The Witness: We refer to an independent theatre in those charts as a theatre that we license our film to, that has no connection with any distribution or production, as far as our knowledge is concerned.

Q. And any connection with the five defendants in this case? A. Or any connection with the five defendants in this case that would be.

Judge Hand: That last, of course, identifies something. The first throws the whole case into confusion, as far as I am concerned. Mere unclassified confusion. What is the use of introducing such things and having such vague talk as this?

Mr. Frohlich: I thought the witness had testified as to what is an independent and what is an affiliated theatre, and I did not think there was any question about it.

Judge Hand: Absolutely vague. He sometimes says an affiliate is one of the big five, then he says anybody else. I did not think we were talking about anybody else except these five and the people that have been classified at different times as independents.

(1777)

Q. Do you know of any producer-distributor in the United States other than the big five in this case that owns any theatres? A. No, sir.

Q. When you speak of an affiliated theatre, are you confining yourself to theatres owned or operated by the big five defendants in this case? A. Yes.

Q. When you speak of an independent theatre, Mr. Montague, do you mean a theatre which is not owned or controlled or operated by the big five in this case? A. Yes.

Mr. Caskey: I would like to examine on the voir dire before these are received.

Judge Bright: Oh, dear, did you say?

Mr. Caskey: Voir dire is as close to it as I can get.

Preliminary Cross Examination by Mr. Caskey:

Q. Mr. Montague, taking the 1944-45 chart, how did you classify the first-run theatres in Jersey City, Newark and Elizabeth? A. The first-run theatres we sell?

Q. Yes. A. If we sold it to one of the defendants here, it would be called affiliated. If we sold it to an independent it would be in the independent column.

Q. Did you sell Skouras in those three cities first-run? A. I would want to refer to the record, sir.

Q. Do you know of your own knowledge whether the (1778)
Skouras theatres in Jersey City, Newark and Elizabeth, are included in these charts? A. I don't know, sir.

Q. What about the Robb & Rowley, do you know whether they are included as an affiliate or independent? A. To us Robb & Rowley would be included, as we understand it, as an independent.

Mr. Seymour: I assume these, if received, will be taken subject to correction, because it is his characterization which is being received.

Mr. Frohlich: Any further questions, Mr. Caskey?

Mr. Caskey: My objection to them is that they are lumping a great many things under one heading. It

may be that National Theatres are affiliated but they certainly are not affiliated with anybody else but National Theatres, and these picturesque charts may some day prove to be misleading.

Mr. Frohlich: I did not think there was any serious dispute in this case up to now as to what is an independent theatre in this case and what is an affiliate.

Mr. Caskey: Not in the least, but there is a dispute in my mind whether that kind of chart should come in which lumps National Theatres with the Sparks theatres in Florida in one basket.

Judge Bright: Does the chart show what theatres are lumped as independent or what theatres are

(1779)

lumped as affiliated, or is it just the statistical information as to the number they sold?

Mr. Caskey: The statistical information puts the theatres of all these defendants into one chart without any separation.

Judge Bright: Aren't you trying to get a shoe on your foot which may not fit? How do you know it includes theatres which you say are not affiliated, in the affiliated column?

Mr. Caskey: I don't know it, but I understood him to say that it did. I think the chart would be much more helpful if it showed each one of the defendants separately, at least indicating on the chart for each company the number of accounts. Then what the conclusion may be will be for argument and for the Court.

Mr. Frohlich: I offer the exhibit, your Honor.

Mr. Caskey: We have an objection.

Judge Hand: Received.

(Marked Defendant Columbia's Exhibit C-8.)

By Mr. Frohlich:

Q. Just a few general questions, Mr. Montague. There has been some testimony about Blumenfeld out in California. What cities does he operate his theatres in? A. He has quite a list of cities, Mr. Frohlich. I know of some of them offhand. I don't know all of them. I would want to refer to the list.
(1780)

Q. Has he any in Oakland? A. Yes, sir.

Q. San Francisco? A. Yes, sir.

Q. Sacramento? A. Yes, sir. Stockton.

Q. Does Columbia sell him? A. Yes.

Q. Are there affiliated theatres in those cities? A. Yes, sir.

Q. And has Columbia sold Blumenfeld for many years? A. Many years.

Q. Find him a satisfactory customer? A. A very satisfactory customer.

Q. There has been testimony in this case that Blumenfeld theatres have suffered by comparison with the affiliated theatres in the respective cities. What do you say on that subject? A. I am not an expert, sir, as to the qualifications as to whether one theatre has a better appointment than another, but I feel that as far as Columbia goes we can get more income out of the Blumenfeld theatres than we can get out of any other theatres in that particular zone. That is why we sell him or license our films to him.

Q. Even though Blumenfeld's theatres are smaller? A. Yes, sir.

Q. Less seating capacity? A. Yes, sir.

Q. Does he take all of your product or most of it? A. He
(1781)
takes most of our product.

Q. What would you say the affiliates in those cities would do with most of your product? A. I don't think that they

could use as much film. I don't believe they could run my important pictures as long as Mr. Blumenfeld can run them. Therefore it is our considered opinion that we are much better off selling Mr. Blumenfeld than we would to the affiliates.

Q. What is your general custom and practice throughout the country in respect to these affiliates and independents? Whom do you prefer to sell and whom do you sell most of your pictures to? A. We prefer to sell the accounts that we think we can get the most out of for our over-all program.

Q. Who are those accounts? A. In many situations they are the independent; in others they are the affiliates.

Mr. Frohlich: May I have about five minutes? I am trying to get some figures that will shorten this examination, and then I will be finished.

(Short recess.)

By Mr. Frohlich:

Q. Now, Mr. Montague, in 1943 and 1944, what amount did Columbia take in in the United States from the exhibition of its pictures in all theatres? A. Just feature pictures——

Q. Feature pictures only, nothing about Westerns or (1782)

shorts, just feature pictures? A. Approximately twenty millions of dollars.

Q. And how much of that twenty millions of dollars came in from affiliated theatres? A. I would say approximately one-third.

Q. About six million or seven million dollars? A. Yes, sir.

Mr. Frohlich: No further questions.

Cross Examination by Mr. Raftery:

Q. Mr. Montague, in response to one of Judge Bright's questions, you stated that your service that you sold in a group contract was needed in small towns where an exhibitor used a number of pictures, is that right? A. Yes, sir.

Q. Now, in your cities, including the 92, or the 482, or whatever they are, you have suburban runs, neighborhood runs, in addition to the first-runs downtown, isn't that right? A. Yes, sir.

Q. And how much of the country today is double feature? A. A good portion of it.

Q. Would you say 80 per cent? A. No, I would not say 80 per cent; maybe 75 per cent of it.

Q. Well, 75 per cent. That is numerically as well as territorially, is that right? A. Yes.

Q. And in those neighborhood runs and in those suburban runs they need many more pictures each week than (1783)
they do in the first-run downtown, isn't that right? A. Definitely so, sir.

Q. And it is very comparable to the number needed in the small towns? A. Yes, sir.

Q. And when you start out to sell your service, you have your salesmen's eye directed on those suburban runs, neighborhood runs, and small town runs, do you not? A. Yes, sir.

Q. And you seek to sell him the service that he needs to keep his theatre open, isn't that right? A. Yes, sir.

Q. And in the big towns in the first-runs, you supply a great deal of the features that are called second features, do you not? A. We supply a number of pictures that are termed second features.

Q. Yes. They will play one picture which they advertise as the first picture, isn't that a fact? A. Correct.

Q. Then they advertise the second feature? A. Correct.

Q. That is true in Boston, New York, and many other of the big cities, is it not? A. Where they have the double bill, yes, sir.

Q. Where they have the double bill? A. Yes.

Q. And when you talked about trying to sell an exhibitor as many pictures as you can, you and your associates analyze the needs of each particular theatre, isn't that right? (1784)

A. Correct, sir.

Q. And when you told Mr. Frohlich on this over-buying situation, you go into this account and try to sell him as many of the features as you—and when I say you, I mean you and your subordinates—feel that theatre needs to keep that theatre open? A. Correct.

Q. Now in New York City, where do you exhibit your pictures first run on the Island of Manhattan? A. Our first-run is with Radio City Music Hall, and we also play some first-runs in the Capitol, in the Criterion, in the Rialto, and the State theatre.

Q. Now the preferred first-run—and I am going to borrow Mr. Wright's term—preferred first-run—that is what? A. Radio City Music Hall.

Q. And how many pictures a year are you able to get exhibited in the present market in the Radio City Music Hall? A. In a good year it might be five to six.

Q. Well, by a good year, you mean good for you? A. Good for me, yes, sir.

Q. Well, in a good year, meaning the kind of a market we are in now, how many do you get? A. I think last year we have three or four pictures in Radio City Music Hall.

Q. In the 52-week period? A. Yes, sir.

Q. And how many weeks did those three or four pic- (1785)

tures play? A. One of them played six weeks; another one played six weeks; one played three weeks; I think one played either two or three weeks.

Q. That, I think, the Government has classified as an independent [redacted]e; isn't that right? A. Yes, sir.

Q. Th[redacted] operated by the Rockefeller interests? A. Yes, sir.

Q. Now, after you are able to place, we will say, your top pictures of that caliber—those are your top pictures, are they not? A. Yes, sir; part of our top pictures. We would say they are part of our top pictures.

Q. Well, as far as the Music Hall is concerned, the Music Hall considers them the top pictures that you have? A. Quite so.

Q. So then you start out and you try to place the remainder of what you call the top pictures, in your next best outlet, isn't that right? A. Yes, sir.

Q. First-run? A. Yes, sir.

Q. Now, where do you place those? A. Well, we may try to place them in the Roxy or the Capitol or the Criterion or the State or the Rialto, or any other theatre that we think may be available.

Q. Do you try the Globe occasionally? A. I beg pardon?

Q. The Globe. A. Yes, the Globe; but we have not played there a top picture for quite some time.

(1786)

Q. That is because United Artists have been using the playing time? A. Well, somebody else has been getting it. We have not.

Q. In the Gotham? A. We have not played a picture in the Gotham.

Q. In the Victoria? A. No, we have not played a picture in the Victoria.

Q. The Astor? A. No, we have not played the Astor for a long, long while.

Q. And then you have a great many pictures that never get a first-run in downtown Manhattan, isn't that right? A. Quite so, sir.

Q. And that is due generally in the great big cities, isn't it? A. Quite true.

Q. Now the pictures that play in a theatre like the Music Hall, do you have any trouble selling them to the independent accounts or the affiliated accounts that follow the Music Hall, outside of getting the price you want? A. They are under contract to these following theatres, probably prior to the time we play the Music Hall; so consequently we would not have any difficulty selling it. We do not have any difficulty dating them.

Q. Now let us come to that. You have sold your pictures in advance? A. Quite so.

Q. To, we will say, part to the Loew's circuit, and some (1787)

to Randforce—I am not saying the same runs; I am talking different runs—some to Skouras, some to Brandt; and we can go on and name many more accounts in the suburban areas of New York City. You have sold them in advance to those accounts, isn't that a fact? A. Yes, sir.

Q. And you have no trouble, you say, getting those Music Hall pictures dated and played and paid for in your sub runs? A. None whatsoever, sir.

Q. Now that equally applies, we will say, to the pictures that have had a run in the Capitol theatre? A. Yes, sir.

Q. Or the Criterion theatre? A. Yes.

Q. Now let us look at those pictures that have never had a first-run of that kind. Do you have any trouble getting those dated in the sub runs? A. Great trouble, sir.

Q. So a picture that has been established by a fine run in a fine theatre—that is the type of picture that will almost automatically date itself all the way down to that last ten-cent run; isn't that the fact? A. Quite true.

Q. And many times these ten and fifteen and 25-cent runs will book them back again; isn't that a fact? A. If we allow it.

Q. Now, you referred to, It Happened One Night. Has (1788)
that picture had more repeat books than any picture you ever released? A. Many more.

Q. Many? A. Yes.

Q. Not that picture was played first-run in the key cities, was it not? A. Yes, sir.

Q. It was moved over? A. Yes, sir.

Q. It had an extended first-run in most of the cities? A. In many of them.

Q. And had an extended move-over? A. In some of them.

Q. And perhaps was moved over again? A. And repeated and brought back several times.

Q. So you have heard the expression in the business, "There is no evil in this business that good pictures won't cure"? A. Yes, and I believe in that.

Q. And you subscribe to that? A. Yes.

Q. So in talking about this weeping towel that is kept in each exchange, that has to do with the pictures primarily that do not have the first-runs and the move-overs, isn't that a fact? A. They are not what we call in the business the "sock" pictures.

Q. In other words, Mr. Montague, you as the producer of these pictures—and I refer to these pictures as the pictures that don't have the first-run and are not known as the "sock" pictures—you assume generally the whole risk of loss (1789)
connected with that type of production, do you not? A. Yes, sir.

Q. And the exhibitor who exhibits these pictures, those are the pictures that he objects to playing, isn't that so? A. It is easily those pictures, sir.

Q. Now what are you talking about is equally true of the problems of your competitor, Republic, is it not? A. I would believe there is the same problem.

Q. And Universal? A. I would believe they too have the same problem.

Q. And also P.R.C.? A. Yes, sir.

Q. And Monogram? A. Definitely so.

Q. Now in connection with the various meetings you talked about with exhibitors, Mr. Wright stated that it was the independent exhibitors who objected primarily to the blocks of five or less; and I think you stated the affiliated exhibitors took part in those meetings? A. To the best of my knowledge they did, sir.

Q. Have these meetings been held since the entry of the consent decree? A. It was after the consent decree, to the best of my opinion.

Q. The meetings were with the distributors and exhibitors? A. At that time there was distributors and exhibitors, yes, sir.

Q. Was the distributors association represented? A. (1790)
Yes, they were all represented to the best of my knowledge.

Q. What are the two large exhibitors associations? A. Well, there is the Allied and the Motion Picture Theatre Owners of America.

Q. The Allied is the Abe Myers Association, so-called, is it not? A. So called, yes.

Q. And the M.P.T.O.A. was formerly headed by—what was his name, Kuykendal? A. Kuykendal.

Q. And that association had affiliated and non-affiliated members, did it not? A. At that meeting?

Q. No, I say Kuykendal, the Kuykendal association had affiliated members as well as independent members? A. Yes, sir.

Q. And the Myers association is composed entirely of independent exhibitors? A. I believe so, sir.

Q. But you have been active in that better relations between exhibitors and distributors personally, have you not, Mr. Montague? A. I have, sir.

Q. And Mr. Rogers of Metro? A. Yes, sir, and Mr. Depinet of RKO and Mr. Sears of Warner Bros. at that time.

Q. That is before he joined United Artists? A. That is right, sir.

Q. He never attended after he joined United Artists, is that right? A. To the best of my opinion, yes, he never attended.

(1791)

Q. So these groups met and discussed both blocks of five and the old system of selling, isn't that the fact? A. Yes, sir.

Q. And as I understood your testimony, each of the exhibitor groups were demanding a return to the old system of selling, isn't that right? A. Arguing for a return to the old system of selling.

Q. Rather than sell in blocks of five? A. In blocks of five, yes, sir.

Q. Did this group or either of them or both of them have a little squawk about having to buy pictures on percentage? A. Exhibitors have been more or less squawking about that ever since percentage was first brought up, I believe.

Q. And also the right to eliminate pictures. Wasn't that the second big squawk? A. Yes, that has been a bone of contention for many years, sir.

Q. So when you talked about your selective contracts, what you are trying to do is to meet by selectivity or right to eliminate the squawks of the exhibitors on the pictures they did not want to play? A. Yes, sir, as best we can.

Q. Now, when you told their Honors this morning that you averaged 32 pictures across the country, you, Columbia, would commit your entire program to an exhibitor and give

(1792)

him the right to eliminate, isn't that it? A. Correct.

Q. So as to the pictures he eliminated, as far as he was concerned, you assumed the full risk of loss in those pictures, isn't that right? A. Correct.

Q. Now, have you ever heard of any exhibitors in any of these meetings asking to continue the policy of selling in blocks or five? A. No, sir.

Q. Quite the contrary? A. Quite the contrary.

Q. Now, you are fairly familiar with the method of selling used by United Artists, are you not? A. Yes; I would say that I am reasonably familiar with it.

Q. You used to be a customer of United Artists years ago, did you not, Mr. Montague? A. Yes, sir.

Q. And you used to buy their pictures? A. Yes, sir.

Q. When you were an exhibitor? A. That is correct.

Q. And they sell pictures one at a time, is that a fact? A. They sold pictures in those days one at a time. And if there happened to be two that may have been released, I would try to buy two.

Q. But they sold them individually on individual contracts? A. Yes.

Mr. Wright: Aren't you going to have a witness of your own?

Mr. Raftery: I don't know.

Judge Hand: You are doing very well with this (1793) one.

Q. And they continued selling pictures individually for a great many years? A. I beg your pardon, sir?

Q. All through the years; isn't that a fact? A. I understand they continued to sell pictures individually.

Q. And are you familiar with the manner and method, generally, used by Universal in selling, are you not? A. Yes, sir.

Q. And they sell pictures in groups, don't they? A. Yes, sir, as we do.

Mr. Wright: If the Court is going to regard this as competent evidence of sales methods of these other people, we object to it. I do not think he is in a position to state what United Artists does with its pictures, how it sells, or Universal either.

Judge Hand: Overruled.

Q. You are in competition with both United Artists and Universal? A. In direct competition, sir.

Q. Now, Mr. Montague, I did not see those charts you put in, but I presume Boston was somewhere included in those fancy paintings? A. Yes, sir, they were included, sir.

Q. And for a great many years you sold your pictures first-run for exhibition in the Orpheum and the State theatres in Boston, did you not? A. We still do, sir.

Q. And you still do? A. Yes.

(1794)

Q. But you were not able to get them all played there, were you? A. No, sir.

Q. Loew's had their own product in those theatres, didn't they? A. They played their own pictures too in those theatres.

Q. And United Artists used to play in those theatres? A. Yes, sir.

Q. So between United Artists and Columbia and Loew's there was a scramble for the playing time of those theatres, was there not? A. Quite a scramble, sir.

Q. And in this present lush market we are in, bottlenecks have developed up there in the past couple of years, have they not? A. As they have in many other places.

Q. In many other cities? A. Yes.

Q. Now, when a situation like that develops, what do you do? A. Well, if we can't get our picture released fast enough

and we think there is a possibility of selling that particular picture that we need an immediate release on, we are very apt to go to the Loew organization and ask them to give up that picture from their contract and try to find another theatre, or do find another theatre.

Q. Well, up in Boston there was a theatre called the Trans-Lux Theatre, was there not, Mr. Montague? A. Yes.

Q. And it is still up there? A. Yes.

(1795)

Q. And a very good location? A. Excellent location in my opinion.

Q. And not a large seating capacity? A. Quite a small seating capacity.

Q. And when the bottleneck developed you played pictures in the Trans-Lux Theatre? A. We have been known to play pictures in the Trans-Lux Theatre.

Q. And good pictures?

Judge Bright: What do you mean by a bottleneck?

The Witness: Well, if we have three or four pictures waiting for release in the City of Boston, and our account, Loew's State and Orpheum theatres have a lot of pictures that they have not played that have been released before we released ours, that means we must wait our turn, at least, and our turn may not come for three or four or five months; and in that case we term that a bottleneck; and then we go and try to get them off the Loew's contract and try to find another theatre for them. That is so the subsequent-run theatres can get more of a regular play of our product.

Q. And that is the same reason the Tremont and the Majestic theatres, legitimate theatres in Boston, in the last couple of years have been converted into first-run motion picture theatres? A. Yes, sir.

(1796)

Q. And isn't your real reason for that, Mr. Montague, for that, selfishly to get your turn-over; isn't that right? A. Yes, sir.

Q. And secondly to take care of the subsequent runs who need pictures? A. Who need and whom we have an obligation to deliver pictures to.

Q. In other words, a picture will go into the Orpheum Theatre now in Boston and play three or four weeks where formerly it played one week; isn't that a fact? A. Yes. They played a great many more pictures for one week and a lot less pictures in the past for longer than one week than they do now.

Q. And the neighborhoods still change the pictures once or twice or even three or seven times a week, do they not? A. Yes, sir.

Q. And Boston is where the double bill policy was born, is it not? A. It has been so said.

Q. By exhibitors like you and other exhibitors? A. Yes, from Boston and all of the rest of the country too.

Q. And in those situations in the neighborhoods they need far more pictures per week than are being played downtown Boston first-run under the old setup; I mean without the Trans-Lux, the Tremont and the Majestic? A. Yes, they would not have enough clearance to the few theatres as they have now with the many theatres playing first-run.

(1797)

Q. Hasn't the situation even gotten to a point in the last couple of years where they are reshowing your pictures to take care of the second features in these double bill houses? A. Yes, sir; that was one of the reasons.

Q. And you have talked a great deal, Mr. Montague, about adjustments. Do you have much trouble with the towel on those top pictures we talked about? A. No, we have very little trouble with the top pictures; practically none at all.

Q. And it is these low bracket pictures, again, that are subject to adjustment, even over and above the amount of selectivity you allow these exhibitors? A. Yes, sir.

Q. So as Judge Hand remarked, even though your contract is signed, it calls for an obligation to play, say 32 out of 42, you may end up with a much less play-off than 32 out of 42? A. Yes, and a different price on some of the pictures than specified on the contract.

Q. Now, yesterday Mr. Kupper told us about these little towns where you have only one theatre. Do you have much trouble getting into those towns? A. They are the hardest towns to sell.

Q. In other words, that man has a complete monopoly in his own town in exhibition, is that right? A. Absolutely complete, sir.

Q. And he can leave you out any time he feels like? A. (1798)
Yes; and feels like it quite a bit.

Q. Now, you may run into that in the suburban and neighborhood runs in the city? A. Yes.

Q. Where you have one theatre in the neighborhood? A. Yes, sir.

Q. And you are left out of those situations quite frequently, are you not? A. Quite frequently.

Q. And, again, to go back to the larger towns, do you have trouble in this present market getting day and date from coast to coast? A. Very difficult.

Q. Well, let us take a picture like Kiss and Tell that is opening at the Capitol Theatre. Have you that dated pretty well across the country? A. No, we have not.

Q. I am talking only of first-runs. A. No, we have not got it dated. We are dating it very slowly because we think the picture will benefit by slow dating. By word of mouth it will spread as to the type of business the picture is doing.

Q. Let us assume that the picture is one you desire to get dated quickly. Have you been able in the present market to get quick datings across the country? A. No, we have not been able.

Q. You have none of these theatres to date them in for you? A. Yes, sir.

Q. Is that right? A. I beg pardon?

(1799)

Q. You have no theatres of your own to date them in? A. None whatsoever.

Q. So you take the market as you find it and try to get the most dates you can on your first runs and as soon as you can? A. Yes, sir.

Q. And that applies equally to the subsequent runs that follow down the line? A. Yes, sir.

Q. Now, these subsequent-run theatres have been very prosperous, have they not, during the past ten years? A. They have seemed to grow considerably in prosperity. They have been more successful year after year. In such situations as we play our pictures on percentage we naturally get a good feel of that group, because we participated in the group, and we have found over the period of the last few years we have been able to get increased prices on the so-called flat buy, from which we have a right to assume that the theatre has improved its business.

Mr. Raftery: That is all.

Mr. Seymour: I have a few questions.

Cross Examination by Mr. Seymour:

Q. I wish you would clear up for us just what you meant when you testified earlier that you considered certain theatres affiliated with major producers, and in particular reference to those charts which your counsel put in, will you

(1800)

define for us what you mean by an affiliated theatre? A. An affiliated theatre in our description is a theatre that to the best of our knowledge is in some way associated with a producer and distributor.

Q. That is in some way associated with a particular producer or distributor? A. Particular, yes, sir.

Q. You do not mean that it is associated with all the producers who have interests in theatres? A. Definitely not.

Q. Or with more than one of them? A. No.

Q. And so when in these charts or graphs that have been put in there are theatres described as affiliated, that is just the sum total of the theatres to which you sell which severally are affiliated with a particular producer, is that right? A. Yes, sir, severally.

Q. Now, for example, in those graphs that you put in, did you include the theatres which are operated by the Butterfield Theatre Company? A. We considered Butterfield in our listing as an independent, not an affiliated.

Q. Not an affiliated? A. No.

Mr. Seymour: I wonder if that clears up the question that was asked from the bench earlier about that matter.

Judge Hand: I think so. I think there was a misunderstanding between the witness and his counsel.

(1801)

Mr. Raftery: Or a misunderstanding between the witness and the charts. That is the reason I haven't any charts.

Q. Now, has the cost of your top pictures increased in the last ten years, Mr. Montague? A. Yes, materially.

Q. Can you give us some idea of what that increase has been? A. In the last ten years?

Q. Yes. A. Well, a top picture ten years ago would have cost in the neighborhood of approximately $400,000. A top picture today has cost us as much, with its prints and advertising, as two million three to two million four.

Q. Are you familiar with the negotiations which the sales department conducts with theatre companies in which Paramount has some interest?

The Witness: I did not get the first part of your question.

Q. (read.) A. Yes.

Q. And have you from time to time participated in negotiations with one or more of those companies? A. With some of them, yes, sir.

Q. Can you tell us where those negotiations are conducted? A. Well, in the localities in which the theatres are operated.

Q. And are they conducted by representatives of the exchanges or of the sales department at the principal office of (1802)
those theatre-operating companies? A. Yes, sir.

Q. They are not conducted with the Paramount theatre department? A. No, sir.

Q. Now, so far as you are concerned, or the Columbia sales department, is there any relationship whatever between the negotiations or licenses granted to one of those theatre-operating companies, such as Minnesota Amusement Company, and the negotiations or licenses for Columbia pictures to the theatres operated by another one of those companies, such as M. & P. in New England? A. No; the type of deals are quite different.

Q. Now, do you license Columbia pictures to all the theatre-operating companies or theatres operated by all the theatre-operating companies in which Paramount has an interest? A. No, sir.

Q. With respect to a particular theatre-operating company, do you license Columbia Pictures to all the theatres operated by that company? A. In some cases I think we do. Not in all the theatres. If those theatres are in competition with one another we would not lease our films in all.

Q. And in some cases you do not license to all the theatres, isn't that so? A. That is right, sir.

Q. And in many cases you license to competitors of theatres operated by one or more of those operating companies; (1803)
isn't that so? A. Quite true, sir. In New England I believe we only sell one or two situations to M. & P. where they have competition. We sell the independent so-called competition.

Q. And that is so elsewhere in the country? A. In many situations.

Q. Now, your counsel has asked you a number of questions about selling in blocks of five. Before the decree was entered and before your company concluded not to participate, were you generally familiar with the source from which the various matters covered by the consent decree came? A. Yes, generally speaking, I think I am acquainted with it.

Q. Am I correct in believing that the provision for selling in blocks of five was a suggestion of the Attorney General?

Mr. Wright: If the Court please, that is objectionable, where any particular thing came from. I think the decree speaks for itself as to what is in it. I do not see how it has the slightest relevance who suggested what.

Judge Hand: I will sustain the objection.

Mr. Seymour: That is all.

Judge Hand: Any more questions before the Government cross-examines?

(1804)

Mr. Wright: Yes, we will have——

Judge Hand: I mean before.

(No response.)

Judge Hand: All right, we shall adjourn until 2.15.

Mr. Seymour: Would your Honors give me a five-minute leeway, to come back at 2.20? I have to preside at a meeting.

Judge Hand: Yes. Somebody can take your place.

(Recess to 2.15 p.m.)

(1805)

AFTERNOON SESSION

Mr. Frohlich: Before proceeding, your Honors, may I ask Mr. Wright to stipulate with me that the witness, if asked, would answer in the same strain as the other witnesses, negativing the charges of conspiracy?

Mr. Wright: That is so stipulated.

Mr. Frohlich: Your witness.

ABRAHAM MONTAGUE resumed the stand.

Cross-Examination by Mr. Caskey:

Q. Mr. Montague, with whom do you negotiate film licenses for Randforce Amusement Company? A. Sam Rinzler.

Q. Do you negotiate with anyone at Twentieth Century-Fox for Randforce? A. No, sir.

Q. Do you negotiate with anyone at RKO for Randforce? A. No, sir.

Q. Do you regard Randforce an affiliate or independent? A. We consider Randforce an independent.

Q. Is the same true of the Skouras Theatres Corporation which operate in Metropolitan New York? A. We consider Skouras an independent.

Q. Do you know Si Fabian? A. Very well, sir.

Q. How long have you known him? A. Ever since I have been in New York, 12 or 13 years.

(1806)

Q. He operates theatres in Albany? A. Yes, sir.

Q. And, according to the testimony, now in Norfolk and Richmond, Virginia? A. Yes, sir.

Q. Is he affiliated with anyone? A. To the best of my knowledge, definitely, no. We consider him an independent.

Q. And he acts independently of everyone else? A. Absolutely.

Mr. Caskey: That is all. Thank you, Mr. Wright.

Cross-Examination by Mr. Wright:

Q. On this question of Mr. Fabian's status: You consider him an independent in Brooklyn, where he operates for the RKO-Paramount-Fox pool? A. We consider him as an independent, Mr. Wright.

Q. I mean, everywhere that he operates, regardless of whose theatres he is operating? A. We are not interested in whose theatres. We list him as an independent because he acts entirely independent of any so-called affiliate.

Q. I just wanted it clear that you regarded Mr. Fabian as an independent even in those situations where he is operating theatres which are owned by one or more of these defendants or their subsidiaries upon a basis where they share in the profits of the operation, is that right? A. We

understand there is a pool in Brooklyn, for which Mr. Fabian is the operator.

Q. Can you answer the question? A. I beg your pardon?
(1807)

Mr. Wright: Will you read the question?

(Question read.)

A. We consider him an independent, sir, in such situations.

Q. You do not, of course, sell Columbia pictures to everybody yourself, do you? A. No, sir.

Q. You have a sales organization. Can you just tell us what it consists of? A. We have a sales organization that consists of approximately 101 salesmen, 31 branch managers and eight district managers.

Q. And then, what is above the district managers? A. Then we have certain home office personnel that act as what we call circuit contacts and bigger contacts, which some of these men go out into the field and help negotiate and do negotiate.

Q. And who and what are they? Can you give us their names and titles? A. Yes; there is a Mr. Jackter, who is the assistant sales manager; Mr. Weinberg, who is one of those who goes out from the home office and acts and negotiates for us; and a Mr. Louis Astor; also a Mr. Max Weisfeldt.

Q. Those men are all in New York, is that right? A. Those men reside in New York and are part of the home office.

Q. The district managers—are they in the field here
(1808)
in New York? A. They are in the field. One of them is in New York in the New York branch.

Q. The others are in the field or in the areas occupied by the exchanges that they supervise? A. Yes, sir.

Q. And your solicitation of contracts, as far as independent accounts, is handled principally by the salesmen and branch managers in the first instance? A. Some of the independent contracts are handled by them. I have also been negotiating with many of the independents throughout the United States.

Q. Well, the ordinary routine in selling the independent account is that the salesman takes an application from them; then it goes in to the branch manager? A. In some cases the branch manager; many cases the district manager; and in some cases the home office contacts them.

Q. Well, whenever the solicitation is made and then the application is signed, then it goes first to the branch for approval or rejection? A. It goes first to the branch manager, yes, sir.

Q. And then to the district manager? A. In some cases to the district manager.

Q. For approval or rejection? A. For his opinion or approval.

Q. And then it comes to New York for a final decision before it is approved? A. Yes, sir.

(1809)

Q. And when the contract is approved some New York official executes it and returns it to the exhibitor, is that right? A. Returns it to the branch.

Q. Or returns it to the branch; and then the branch, I suppose, delivers it to the exhibitor in question? A. Yes, sir. It mails it probably in most cases.

Q. This method of selling that you use that is described as season block booking—you say you sell your pictures today pretty much as you have for the last ten years as far as season blocks are concerned? A. Yes, sir.

Q. And in addition to season blocks, of course, you also sometimes make franchises which extend for more than a season? A. Yes, sir.

Q. And you still make those today? A. Yes, sir.

Q. And in this process of selling your features, westerns, shorts, in fact, everything you have to offer, the effort of the salesman or individual who negotiates the account is always to include as much of the product as you have in the contract; isn't that right? A. Correct, sir.

Q. And, of course, as to what particular negotiations go on between a salesman or branch manager and any particular exhibitor, I suppose that is something that does not come to your attention? A. Well, not too much, sir. I have general knowledge of the type of discussion that may go on.
(1810)

Q. Well, the type of discussion that may go on and does go on is that it is sometimes indirectly suggested to the account that if he wants certain of the product he had better take some of the other, isn't that right? A. The conversation that goes on as to that point between the salesman and the manager—the salesman, you understand, Mr. Wright, is always very, very anxious to close a deal with a theatre. Once he has that closed up much of the responsibility is off of him as far as the selling of it goes; but not as far as the liquidating of the contract; that he must follow up. Now, very often the salesman may suggest to the branch manager that a certain portion of the program which the exhibitor offers to buy, he feels it is a fair representation in that house, and he suggests to the manager to take it; and the manager may differ with his opinion, or he may accede to it and say, "All right, let us close that contract."

Q. I am afraid you misunderstood the question. I was not referring to conversations between the salesman and the manager. I was referring to such negotiations or conversations that either the salesman or the manager may have with the independent exhibitor. A. I have a general knowledge of what that might be.

Q. And I say in the course of those conversations and negotiations it is sometimes suggested to the exhibitor, is it

(1811)

not, either directly or indirectly, that if he wants to buy certain of the product it would be advisable for him to buy some of the other which may not appear to him to be so desirable, because he may not have such an acute need for it; is that right? A. That is quite true. The exhibitor may want to buy less and we may want to sell more. He may want to buy just two or three pictures of the top, and we may think he has room in his theatre and we are seeking representation for more.

Judge Goddard: Suppose he says he won't take more than three or four, do you turn him down altogether?

The Witness: In some cases, yes, sir. It would depend on whether we had opposition or not. If we had some place that we thought we could do better by going across the street or in the adjacent town, or some place, the chances are we would go and try to sell that one, or more of it to the other fellow. If we did not have any opposition we would still try to talk him up to take some more film than just the top, because we would not afford to sell him just the top film.

Judge Goddard: Suppose you had none who would take them, and he would not take more than seven, or four or five, would he get them or not?

The Witness: In rare cases, yes. In general cases I would say no, sir.

(1812)

By Mr. Wright:

Q. Now, as far as what you term blind selling is concerned, you pursue the same practice there today that you have for the past ten years? A. Well, if you want to use

that term "blind selling", we do not agree with it that it is blind, Mr. Wright.

Q. What you would do is, you, at the time you have these negotiations for a season's deal, you tell the exhibitor the approximate number and kind of pictures that you think you are going to be able to release that year, isn't that right? A. Yes; we let out as much knowledge of the picture as we have.

Q. And he does not get any assurance when he signs the contract even as to how many you are going to be able to deliver, is that right? A. Yes, it may be we will not be able to deliver them all. Occasionally we deliver more. He bases his contact and the method under which he negotiates a contract with us on past performances. That is the basis. Therefore we say it is not blind selling. It is a continuance of an actual knowledge that a man has of our product and the kind of pictures we make.

Q. I understand. Well, of course, he considers your past performance. That is about the only thing he really has to go by in estimating what he is going to get under your contract for the ensuing year; that is right, isn't it? A. Yes. (1813)

We make a great deal of past performance. We are willing to have that past performance reviewed and so sell against it.

Q. You do not even name the title of the features in the deal that he makes, do you? A. In the contract we do not.

Q. And he does not even know with any degree of certainty how many are going to have which particular stars in them either, does he? A. Not on all of them, sir.

Judge Hand: What do you agree to do, to give him your output?

The Witness: That is right, sir; we agree to give him all or any part of it that he may buy and we complete negotiations for.

Q. Now, that again is the method of selling which you generally pursue with the smaller independent accounts, isn't that right? A. It is the same method whether they be small or big, sir.

Q. Well, as a matter of fact, in selling your so-called key runs, those people have never committed themselves to play any one of your pictures without having seen it first, isn't that a fact? A. That is not a fact.

Q. When you sell those runs before they book any of your pictures actually in there for an exhibition, they see it, don't they? A. After they have bought it.

(1814)

Q. Well, let us take one of these concrete situations where there is some first-run account that uses perhaps five or six of your season's output for first-run exhibition in the course of the year—— A. Are you talking about the Music Hall, sir?

Q. No, I am not talking about the Music Hall. A. You will find it very difficult to find any more.

Q. Well, you have some, let us say, that will not use more than eight or ten or 12 of your entire output for first-run exhibition in a particular large city, isn't that right? A. There would be some of them but not too many.

Q. Well, as to those, you make a deal for the season's product which simply gives them the privilege of selecting from your output eight, 10 or 12, or some other specified number that they think will be suitable for first-run exhibition in their theatres; isn't that right? A. We would give them the same rights we would give any other selective contract; no more and no less.

Q. Well, the amount of selectivity you give always depends, does it not, on the particular bargaining position of the fellow that you make the deal with; isn't that right? A. It always depends on the bargaining position of the fellow we make the deal with.

Q. Now, you have a situation where the first-run ex-
(1814a)
hibitor has enough product to play so that he does not need more than 8 or 10 of your pictures to exhibit on first-run in his theatres; you know of such situations as that don't you? A. Where I know there is competition I do not sell them if I can do better.

(1815)

Q. In those situations where you make a deal of that kind, the ten or twelve that are actually used and exhibited are not now and never were actually elected and dated in until the exhibitor had had a chance to see them, isn't that right? A. Mr. Wright, your question is very general. If you could name one particular theatre or group of theatres, I could give you your answers very much clearer. You are generalizing and it is very hard for me to answer.

Q. Can you think of a situation offhand? Let me take your Music Hall. A. Yes.

Q. Which uses five or six pictures selected from your annual output, or maybe three or four. None of those pictures is ever actually dated and committed, put into the Music Hall, until after the operator of the Music Hall has seen the picture, isn't that right? A. Mr. Wright, when you get to the Music Hall, I would like to explain to you that the Music Hall contract does not deal with pictures, sir. It deals with a number of weeks the Music Hall commits themselves to play against the contract. He also agrees in that contract that if he does not fill out those weeks, that he pays for the pictures at a certain stipulated price.

Q. You sell him so many weeks of playing time? A. I beg your pardon?

Q. You sell him so many weeks of playing time? A.
(1816)
Correct.

Q. The selection of the pictures that are actually used, if any, to fill that playing time, is not made now and it never has been until after the Music Hall has seen the picture in question, isn't that right? A. The contract is made prior even to the time we produce the pictures. The play-off of the contract, as far as the Music Hall is concerned, is based on whether or not he likes the picture. If he does, he will give playing time. If not, there is a cost to him, if he passes it up and doesn't fill out the 12 weeks of his contract.

Q. Exactly. A. Yes.

Q. But as to what is actually played, that is never determined until after he has seen the picture? A. After the sale is made and after he has seen the picture, yes, sir.

Q. And that situation is not unusual, is it, that is, where you contract with a first-run account for a certain amount of playing time; you do that in other so-called key situations? A. No. Very rare. I could not offhanded think of another situation that we sold on playing time, sir.

Q. Give me a situation, if you can think of one, where your first-run exhibitor that you sell is only committed to actually use the ten or twelve of your features. A. I cannot

(1817)

remember one offhanded. I would have to refer to my records, sir.

Q. How about 15 or 20, then? A. Yes, I think we could remember 15 or 20.

Q. Could you give me one of those? A. Well, for instance, I can remember that Loew's Theatre in Boston, trusting to my memory, sir, is approximately 25. They commit themselves to play 25 of our pictures in two theatres day and date in the city of Boston.

Q. As to those pictures that actually go in there, those are never selected, are they, until after Loew has actually seen the finished product? A. Well, they couldn't date them before I finished it and as soon as I get a print in New York

I am ready to screen it, and they have screening days over there and we send the picture and they look at it.

Q. And they screen it before they date it or put it in? A. Most of the key theatres in the United States do the same thing.

Q. That has always been true, not only today but in the past? A. Yes, sir. The key theatres——

Q. When you sold that kind of account? A. The key theatres in the United States usually see the picture before they book it but they have already bought it.

Q. You mean they have already made a contract which (1818)

permits them to select a certain number from all released, is that not right? A. Correct, but they must run those pictures that are on the contract.

Q. That is, they must—— A. Or pay for them.

Q. —either run or pay for a certain commitment? A. That is right.

Judge Hand: Does that mean all?

The Witness: If it be all, or if it be part. In the case of metropolitan New York, it is all, sir.

Q. Ordinarily the only situation where the selection would not be made from all subjects is where you have a split of your first-run, isn't that right? A. Mr. Wright, when I said all—you spoke of Loew's in Boston; I was now speaking of Loew's Metropolitan Circuit in New York—they buy all, they play all.

Q. Yes, but I think Judge Hand's question referred to what the selection was made from in any case; whether they select five, ten or fifteen, the selection is made from your entire season's product, isn't that right? A. It is made with the stipulation, Mr. Wright, they only have the right of elimination of a certain number of pictures that we designate

from the bottom of our program! There are all kinds of stipulations in these various contracts as to how they can eliminate, and that is why I would like to get down to a particular
(1819)
theatre. Then I can answer it intelligently.

Q. In selling your accounts, generally the principal thing, or, particularly your independent exhibitor, that he is interested in is the amount of film rental that he has to pay, isn't that right? A. Yes, all of them are interested in the amount of film rental they have got to pay. It is of great interest to them.

Q. Of course, what you attempt to do is to get the most film rental you can out of them for everything you have for sale? A. Within reason.

Q. And now and heretofore whenever you had a really top-notch picture that you knew would stand on its own feet, you have been accustomed to sell that picture individually under individual contracts, have you not? A. As a custom, no. It has happened twice in the history of Columbia.

Q. That picture "It Happened One Night," how was that sold? A. "It Happened" was sold in the group.

Q. You did not make individual contracts for that? A. No, sir, that was sold as part of a program and delivered as part of the program.

Q. Didn't your contract with Mr. Capra provide that you had to have—to sell that individually and have individual approval? A. No, sir.

Q. That happened with the later pictures that Capra
(1820)
made for you? A. It happened with one picture that Capra made later.

Q. Which was that? A. Lost Horizon.

Q. You sold that individually? A. Collective, in contract and out of the contract. Some of the exhibitors bought

it as part of the program, some of the exhibitors bought it separate and apart from the program.

Q. You have had what you call so-called specials, haven't you? A. Yes, but most of them have been in the program.

Q. What do you mean when you say "in the program"? A. In the contract that we make with the exhibitor before we produce our pictures, our program is those pictures that we make during X season, starting as of one date and finishing as of another.

Q. You have had some specials that you make a separate contract for with each—a contract separate and apart from the one you make for your season's product, isn't that right? A. We have had pictures that we have sold on a separate contract.

Q. Those pictures that you have sold on separate contract have always been outstanding box office attractions, isn't that right? A. Yes, in our opinion they have been.

Q. You have got as high film rentals for those pictures that you got for any you had? A. As high and in some (1821)
cases higher.

Q. I believe you said that at least in selling independents you sold most of your product on flat rental? A. Most of the independents buy on flat rental from us.

Q. But you always try to have some pictures which everybody buys on percentage, isn't that right? A. Only a very recent picture where we have insisted that that be bought on some sort of our participation.

Q. And the purpose of getting the independent in every case to license at least one picture on percentage is, I suppose, to give you a more accurate picture of what kind of business he can do than you could get any other way, isn't that right? A. Oh, yes, I get a much more accurate picture of it that way.

Q. How much film rental you can ultimately get out of him, I suppose, of course depends to some extent on his operating expenses and what he can take in? A. Well, in selling this picture we did not go into operating expense too definitely.

Q. And when you do sell those pictures on percentage you, of course, have the right to audit his books and to check the pictures? A. We have the right under the contract—it gives us a right of checking and auditing.

Q. And you do check his pictures, is that right? A. In some cases we do. In many cases we do not.

(1822)

Q. When you do, you use an agency called Confidential Reports, Inc.? A. We do now use that agency, yes, sir.

Q. That is, for how long have you been using it? A. Oh, since, I believe, last April or May.

Q. And that is an agency that was formed by your company and some of the other defendants in this case? A. Correct.

Q. Who were the other defendants?

Mr. Raftery: If your Honors please, there is nothing in the pleadings, there is nothing in the trial brief about that. Is Mr. Wright making an issue of the right to police these accounts? We could go on forever examining on this thing.

Judge Hand: Overruled.

Mr. Wright: What is your answer?

A. RKO, Paramount, Universal, United Artists and Columbia.

Q. And you have an agreement, do you, with those other defendants for the joint use of this particular corporation in checking pictures? A. We have an arrangement for this checking corporation to check such pictures as we want checked.

Mr. Wright: Will you read the question?

Q. (Read.) A. I don't know whether you would call it an agreement with the other four or whether we call it an
(1823)
agreement with the checking service itself.

Q. Anyway, you five—— A. We do not have an agreement with the other four. We have an agreement with Confidential Reports.

Q. You five are the sole owners of Confidential Reports, isn't that right? A. That is correct, sir.

Q. What the independent actually wants in buying film, in addition to the lowest film rental, lowest terms which enable him to pay the lowest film rental, I suppose, is the highest degree of selectivity that he can bargain with you for, isn't that right? A. Some of them, Mr. Wright, do not bargain for selectivity at all. They want all that I can possibly give them. Some of them would like to play less than we ask for and usually a compromise is brought about whereby we will have a meeting of the minds. You must understand, Mr. Wright, that the majority of these accounts we have been selling for years and years, ten, twelve years, and they understand us and we understand their requirements and, consequently, there is a meeting of the minds over a period of years of the development of the account, they with us and we with them.

Q. Of course, where he is short of pictures and is badly in need of pictures, there is no problem, you sell him all, but I am talking about the situations where he has some kind of choice as to product. Then I take it the thing that he
(1824)
tries to get from you is the privilege of selecting and exhibiting the best pictures that you have got rather than the poorest ones. He wants to eliminate the bad ones and to play only the good ones? A. No, that does not necessarily be right. If you will tell me of a theatre, particular theatre or theatres, I will be glad to answer you directly on it, but you are generalizing again, and these situations change

all over the United States. You have different problems—you might say a different problem with every account you sell and each one is treated as to that problem.

Q. What did you mean by the generalization that Mr. Raftery put in your mouth, that you assumed the risk of loss when you deal with these independents? What did that mean? A. I assume that Mr. Raftery meant that we produce 44 pictures and if a man buys 32 or 36 out of our 44, we do not have the advantage of the income from the balance of those pictures because he does not buy them and he doesn't play them.

Q. What you get out of him is a commitment in which agrees to pay you so much for so many pictures, isn't that right? A. Yes.

Q. In each case? A. Yes, sir.

Q. And as far as the failure of those pictures to draw, in box office returns, what you represented to him they (1825)

would at the time you made the deal with him is concerned, the risk of loss is his, not yours? A. The loss would be mine. I created the investment first, sir. I made the picture. If I didn't make it, I would certainly—couldn't lose. I am assuming in making it that he will buy it. If you are speaking of any one account, he may decide not to buy. And in a lot of cases, Mr. Wright, these smaller accounts, if you are referring to smaller accounts, they do much better with some things that you would call a poor picture than they do with some of the pictures that you would think is great entertainment to you. Why, I can take you to hundreds of accounts in this country that do a sensational business with a Western and you give them a picture as great as Song to Remember, if I may call that great, and they flop with it.

Q. Let us take a situation where he has bought all of your product and he has agreed to pay so much for it in dollars and cents, so much per picture, and if the pictures

that he plays or that you have sold him at those prices do not happen to be as good as he and you thought they were going to be at the time you made the deal with him, he is the one who is stuck on the contract, isn't he? A. If you want to call that stuck, but you will find out, if you will examine the records that he comes around and asks for a reduction and in the vast majority of them, he gets it.
(1826)

Q. Whether or not, of course, he gets a reduction depends on such good will as you may entertain for him, does it not? A. Well, if he is a responsible man, that has been doing business with us for years and so-called played ball with us and we with him, we believed him for years, and we believe him then, that it is necessary to help him.

Q. You don't hesitate to wave his contract in his face at the time he asks for it and tell him you are doing him a substantial favor by letting him off the hook? A. We don't wave the contract. It is seldom that a contract, after made, is ever taken out of the file and re-examined. It is rare.

Q. On this tabulation that was offered here as Exhibit C-6, can you tell me what, if anything, you had to do with preparing the table or the material that is in here? A. I was requested by counsel to prepare such a list. I had such a list prepared by those in our organization who had such information. Mr. Rose, who is sitting in court here, had quite a lot to do with the preparation of this.

Q. But this was prepared under your direction? A. Yes, sir.

Q. I notice in the last two columns, or before you get to the last two columns, you have a letter "I" or a letter "A".
(1827)
That indicates whether the account is what you call independent or affiliated?

Mr. Proskauer: It was my understanding, your Honors, that the last two columns were withdrawn from the exhibit on our objection. I am not sure

whether what Mr. Wright is reading is from that part or not.

Judge Hand: Is it?

Mr. Frohlich: They have been withdrawn. The last two columns are withdrawn and they haven't been physically X'd out or inked out, but they are not part of this exhibit.

Judge Bright: The column marked with the "I" and "A" is not part of the last two columns?

Mr. Frohlich: No, they aren't. May I show the witness a copy of this exhibit while he is being cross-examined?

Judge Bright: That is the column with the blue circles.

Mr. Frohlich: Yes, that is the first column, that is right. That stays in.

Q. As to the column which is marked "Closed" and which has X opposite the town, under the column "Closed", can you tell me just what was done in that connection, that is, what that X was supposed to represent at the time the table was prepared?

(1828)

Mr. Proskauer: Your Honor, I object to that. Those two columns marked "Closed were distinctly excluded from the exhibit on our objection.

Mr. Frohlich: And I take the same objection, your Honor.

Judge Hand: Sustained.

Mr. Wright: If the Court please, I submit that if I can establish what is represented here, and if what is represented is relevant, I am entitled to offer it myself and have it in evidence. It is wholly a question of finding out what was actually done and what this means, as I see it.

Judge Hand: I would drop that. I don't see why you want to do it that way. He has only offered a certain part. His exhibit does not include those columns.

Mr. Wright: That is quite right. His exhibit as it is now in evidence does not include the data shown in the last two columns. I wish to establish what this data shows in the last two columns. And if I can satisfactorily establish it and demonstrate to your Honors that it is relevant, I would then offer it and expect it to be received. We are dealing with facts here.

Judge Hand: Let me hear what your question is.

(Question read.)

Judge Hand: If you want to show that these towns that are closed are not closed, you may by your cross-examination, but not by marks on the exhibit that are not in evidence at all.

(1829)

Q. I take it, Mr. Montague, at the time the Exhibit C-6 was prepared, there was some discussion between you and counsel, or you and the people who got it up, as to what were referred to as closed situations, and what were referred to as competitive situations, is that right? A. To the best of my knowledge, Mr. Wright, counsel proposed that I draw such a list, and discussed it with me——

Mr Proskauer: Will you keep your voice up, please.

The Witness: Pardon me.

A. (Continuing) Proposed that we compile such a list, and this list was turned over to some of the clerks that handled—I believe it was turned over to those clerks that handled our possibility list; and on that possibility list there is a notation

as to what we call independent and what we call affiliated and what we call closed and what we call open.

Q. That possibility list includes all the towns in the United States, or just those that are on this Exhibit C-6? A. It includes all the towns in the United States, sir, and all the theatres that we have on record.

Q. So in preparing this table you simply took off the possibility list the names of the cities with more than 25,000 population? A. I assume so, yes, sir.

Q. And then also the name of the exhibitor? A. Yes, sir. (1830)

Q. As it appears on your list? A. Yes, sir.

Mr. Proskauer: I object to this an independent evidence against us. It may be perfectly proper cross-examination.

Judge Hand: Overruled.

Mr. Proskauer: The difficulty, of course, is, if I may be practical for just a moment, there is a confusion between the witness and ourselves which has developed here this morning as to what were closed towns and what were not closed towns in the terminology. I think a great deal of time might be saved if we had a talk with Mr. Wright about this document out of court in an endeavor to ascertain what the facts are.

Mr. Wright: I would prefer to talk with the witness about it in court.

The Court: All right. I overruled the objection.

Mr. Wright: Will you read the last question and answer?

(Last question and answer read.)

Q. And then the letter "I" was inserted where your possibility list showed the account that you were selling to be independent, and the letter "A" was put in there where the

accounts you were selling was an affiliated one, is that right? A. I would assume that is right, Mr. Wright. I am positive as to that.

(1831)

Q. Now calling your attention to the town, Philadelphia, where you have the name Warner under the exhibitor, and the letter A opposite it. Do you recall whether that was a town where you regarded any other exhibitor as a possibility for first-run exhibition there? A. I would call any other exhibitor that had a suitable theatre where my product is available, a possibility for first-run. If my product is not available, it still may be listed as a possibility, but I may not be able to sell them.

Mr. Frohlich: What season, may I ask, Mr. Wright, are you referring to?

Mr. Wright: The top one here is 1936-1937.

Mr. Frohlich: Were you referring to all of them or to the last one?

Mr. Wright: Well, let us take the last one to see where we are, here.

Mr. Frohlich: Have you a copy of that document before you? That is the document and these are the seasons first and last (indicating).

The Witness: Thank you.

Q. You have one of these for each season, is that right? A. Yes, sir.

Q. You had it prepared for each season? A. Yes, sir.

Q. Now then, in Philadelphia, in the 1944-45 season you

(1832)

had, did you, what you regard as another possible first-run account? A. Are you referring to any particular theatre or theatres, or just a company known as Warner?

Mr. Caskey: I can't hear a word of that.

The Witness: I am sorry.

A. (Continuing) I say, are you referring to any particular theatre or theatres, or to Warner? I see here "Warner." The exhibitor is Warner.

Q. Yes, I understand that. I am asking you whether or not your records as to possible first-run accounts in Philadelphia indicate that there was another possible first-run outlet there?

Mr. Proskauer: This schedule is a schedule of the accounts sold. Are you referring to some other schedule than the one in evidence?

Mr. Wright: I think the question is clear.

Mr. Caskey: I object to that. If you are examining the witness——

Judge Hand: Overruled.

Mr. Caskey: Just a moment, sir, if I may make the objection. He is examining this witness about some document that is up in Columbia's office that is not in court, and trying to get this witness to remember what is on this document not in court, and to state it orally. Now we submit that at the very least we

(1833)

have the right to have the document here in court so that we may cross-examine from it.

Judge Hand: Overruled.

Mr. Wright: Will you read the question?

Q. (Question read.) A. I assume that it would, if you are referring to the possibility list that we have in the home office.

Q. Yes. A. I assume that it would.

Mr. Davis: What do you mean by possibility list?

The Witness: A theatre that runs first-run pictures, and if we are considering first-run possibilities, that first-run theatre, whether we serve it or not, would be on that list.

Q. And that is true if it is actually suitable for first-run exhibition in your opinion, whether or not it is then actually playing first-run, is that right? A. I would not consider it suitable in a comparable way, no, sir. If you are referring to the same theatre that I am in Philadelphia——

Q. I was not referring to any theatre. I was referring to your record. A. I can't remember the record, sir. It is up at 729 Seventh Avenue, and that record has thousands of theatres on it.

Q. Could you produce for us without too much trouble the records which apply to these towns that you have got (1834)
tabulated here in this C-6? A. I imagine we could produce such a record.

Q. Let us say for the 1943-44 season? A. Yes, sir.

Mr. Frohlich: We will produce that.

Q. Now in these exhibits that you identified, which are supposed to chart your first-run accounts in the cities of 25,000 or more, I notice your charts in evidence as C-8 have notations at the bottom which run as follows:

> "This chart covers 384 cities excluding the following five in which there was no deal, 14 for which there is no record; 10 which are not in fact separate cities but in fact parts of larger cities."

Now I take it you have the names of the towns that are referred to there? Do you know what they are offhand? A. No, I don't know offhand, but, as I recall, we must have the names.

Q. But you can supplement what you have here with a list of the towns, the names of the towns that are referred to in the footnotes on each of those charts? A. Yes, sir.

Q. Now, Mr. Montague, in selling these so-called affiliated accounts in the towns over one hundred thousand that you have tabulated in these exhibits here, your Exhibit C-7, can you tell us whether or not you have negotiated in those towns where there is more than one affiliated exhibitor with more than one of those exhibitors during the past ten years? (1835)

A. That question is not quite clear to me, Mr. Wright.

Q. I will try to simplify it. In many of these towns, or in some of these towns, these 92 cities over a hundred thousand population, there are first-run exhibitors which may be affiliated with one or more of the defendants in this suit, isn't that right? A. Yes, sir.

Q. And in some of them there may be a first-run which is affiliated with one defendant, and another first-run which is affiliated with another defendant, isn't that right? A. Yes, sir.

Q. Now in selling those towns in the situations where there are two or more first-run theatres affiliated with two or more of these defendants, have you had any competitive negotiations for the sale or licensing of your films in those towns first-run as between those affiliated exhibitors? A. Occasion has arisen where we definitely have, yes, sir.

Q. Now, when and where? A. Well, at various times.

Q. Well, can you give the names of the towns involved? A. Well, I happen to particular remember in the case in New Haven, the theatre there that is affiliated with Paramount tried to buy our pictures or offered to buy some against our account, which we have had for many years, which first was Poli and now is operated by Loew. I know of that particular situation because it was brought to my attention.

(1836)

Q. When was it? When did that occur? A. There was a particular conversation as to that within two or three years.

I can't tell you whether it was three years ago or two years ago, but it was quite recent.

Q. You mean after the consent decree in this case or before? A. Well, if it be two or three years it would be after the consent decree.

Q. Now, what was it that occurred in that instance? A. In that instance it seems that the theatre that is associated with Paramount was short of pictures, and we had some particular picture, and they wanted that picture pretty badly to fill out some particular play data. I can't just remember the name of the picture, but I do remember the incident. And they did not get it because we had had the contract and we could not do anything about it.

Q. That was the situation where your pictures were committed to Warner—— A. Committed to Loew's.

Q. —or committed to Loew's, and Paramount wanted to pick up a picture to fill in with that was committed to Loew's and you were not able to release it, is that right? A. Yes.

Q. Now, any others? A. Well, I would not be able to stretch my memory because most of that would come through district men; but I know from time to time it has been called to my attention that there had been requests for pic-
(1837)
tures from so-called affiliates, one as against the other.

Judge Bright: You mean after your contracts had been made.

The Witness: Either after the contract had been made or prior to the making of the contract. You see, most of these contacts in our organization are conducted by district men. They are trained particularly to handle those accounts. Some of them are handled by the home office. So this negotiation would go on with the district man, and he, in turn, if there was a problem that he did not want to act on,

such as this, he then would refer it to us in the home office for final decision.

Q. Do you recall any other situations yourself? A. No, offhand I could not. If I had time to think I could, I am sure I could.

Q. Well, insofar as the negotiations for any regular first-run of your season's product is concerned, I take it there were none? A. No, I would not say there were none. I am trying to say I believe there were some.

Q. Where did that occur? A. I am trying to say if I had time, I believe I could get definite situations on this. I don't want to trust to my memory on this. I do remember some instances in the case of New Haven.

Q. That, as you remember, did not relate to the licensing (1838)
of the first-run season deal, did it? A. No; it was related to a picture.

Q. I say, other than these situations which relate to a single picture or a few pictures, don't you know as a matter of fact that there have not been any? A. No, I do not know that, Mr. Wright, and I am trying to think very hard, but I believe the story in New London would prove my case. I am not positive on the records, but I am almost positive there is where we did sell Paramount and we now sell Warner Bros. And I think that is on an entire year's product. I am almost positive, and I am sure I can dig up many more such cases if necessary.

Q. Well, will you see what you can do along that line when you bring this other data in? A. Yes, I will be glad to.

Q. Now, in those first-run situations generally, where Loew has a theatre, you sell Loew, is that right? A. No, that is not right, Mr. Wright.

Q. Where there is more than one affiliated house and there is a Loew theatre, can you point to any of those where you do

not sell Loew? A. Well, now, let me see. We sell Loew in Boston where there is an affiliate; we sell Loew half the product in Providence, and we have played some pictures in Providence and also in Boston with RKO.

Q. Those are pictures which Loew has released to RKO,
(1839)
isn't that right? A. No, sir, they are pictures that we requested Loew release to us and for us to sell to whomever we may desire to sell to.

Q. Well, in any event, before they were made available to RKO, you had to get your release by Loew, isn't that right? A. Yes, sir. Sometimes Loew released pictures to us in Boston to sell to the independent, at our request.

Q. Now, are there any situations you can recall where Loew has a first-run—— A. Well, have you a list there of the Loew situations? If you have that it would make it a little easier for me than to try to remember it.

Q. I don't think your charts show a breakdown as to which is which? A. If I had a list of the situations I could tell you immediately, sir.

Q. Here is your admission of facts. Now maybe that would help you (handing). A. I believe Loew has a first-run theatre in Cleveland. We sell to RKO, which is now in the pool with Warner Bros.

Q. You sell the RKO-Warner pool? A. Yes, sir.

Q. And you have sold them for the last what, ten years? A. Well, we sold RKO for many years, and then when the pool became effective we played with the pool. To the best of my knowledge Loew has an interest in a theatre in Denver, and we sell to the Fox affiliate.
(1840)

Q. You are referring there to the RKO Orpheum? A. Yes, sir. I believe that is the theatre.

Q. That is a theatre that is not operated by Loew; it is operated by RKO, isn't it? A. That is one of the defendants, sir. I thought you said any first-run——

Q. What I wanted to have you point out were the situations where Loew had a first-run theatre and where another defendant had a first-run theatre, and where you sold the other defendant rather than Loew—— A. I just named the spot——

Q. —such as Cleveland? A. Denver.

Q. Well, I take it in Denver what you referred to as a Loew operation is one that is operated by RKO in which Loew has an interest, is that right? A. Oh, we sell to the Fox affiliate there. We do not sell to Loew or to RKO. Loew has a theatre in Houston, I believe, and we sell to the Interstate circuit, an affiliate of Paramount.

Q. Well, the situation, whatever it is, as it exists today, is correctly reported in the admission of facts there? As to 1943-1944, have there been any changes from 1943-44 to now in the distribution of your product first-run among the affiliated first-run accounts in the 92 cities? A. There might be, Mr. Wright. I do not want to trust to my memory.

Q. You don't know? A. No, I do not know.

Q. Well, if there were, that would be reflected in this exhibit that you have given us here, C-6? A. I would

(1841)

assume so, sir. I am not completely familiar.

Q. Well, your C-6 gives your distribution as of 1944-45? A. Yes, I would assume so, sir.

Q. And I take it this is the latest information you have? A. Yes.

Q. Now in those first-run situations, I believe, as Mr. Raftery pointed out, your large city first-runs, you have a situation at the present time where you have what would be called a glut of pictures; that is, more being made available than is room for? A. I do not understand that question. Would you repeat it, Mr. Wright?

Q. I say, in the key metropolitan first-runs, the situation you have now is that there are more pictures available under contract for exhibition in those situations than there is playing time for, is that right? A. Metropolitan? What Metropolitan are you referring to?

Q. In large cities, cities over a hundred thousand. A. I don't know whether you were referring to metropolitan cities, or Metropolitan New York.

Q. No. A. There are more pictures than there are dates for first-run?

Q. Yes; generally is that situation true? A. I would think so.

Q. And in your subsequent runs the situation——

Mr. Davis: Occasionally we are able to hear coun-
(1842) sel, and occasionally the witness; but when they both speak at the same time we throw up our hands.

Judge Hand: Read the last several questions and answers.

(Record read.)

The Witness: More pictures available or more pictures under contract?

Q. Well, at the present time, pictures are what is known as backed up in those first-run situations, isn't that right?

Mr. Caskey: I object to the generality of the question, both as to the producer and the exhibitor. I think that any such testimony should be confined to specific cases. I am quite certain we can adduce testimony that even in Boston, where he talked about, there is no backing up on our product.

Judge Hand: Overruled.

A. Speaking of my product?

Q. Yes, as far as you are concerned. A. In some of the cities there is a backing up of our product, yes.

Q. And generally in the subsequent runs, shortage is the result of that, is that true? A. In some rare cases but not too many, because the subsequent runs can use pictures in many cases where the first run cannot use, so they are available without waiting for that first run.

(1843)

Q. Under your prevailing clearance system, though, insofar as those pictures are concerned, which are good enough for first-run exhibition, those simply have to wait until their turn in the first-runs before they can be made available for general release down through the subsequent runs; isn't that right? A. Correct, sir.

Q. Now I am going to call your attention to a specific situation in Salt Lake City, Utah. Your pictures there have played a number of years in the Paramount houses there? A. They have been sold to the Paramount affiliate for quite a few years, yes, sir.

Q. And there is an independent who has a couple of theatres there? A. There is an independent. I don't know just how many theatres he has.

Q. First-run? A. First-run.

Q. Now, in that situation it is the fact, is it not, although you have not had your pictures played off promptly in the Paramount houses, you have not made available to the independent any of those which have been backed up, have you? A. What made you think we had a back-up in Salt Lake City, sir? As I remember Salt Lake City, it has been playing our pictures very fast.

Q. You would say there was no time in the last year when you had pictures that might have been released for six months and not played there? A. I have no record of that,

(1844)

sir. I had no difficulty in play-off as I remember Salt Lake City.

Q. Well, do you know? A. To the best of my knowledge I should say there is no difficulty in getting our pictures played in Salt Lake City.

Q. Now I will call your attention to the particular picture, A Song to Remember. Do you recall that one? A. I recall the picture, Song to Remember, yes, sir.

Q. Do you know at what time you sold that to Paramount for in Salt Lake City?

Mr. Seymour: Mr. Wright, I hesitate to object. You are constantly referring to a sale to Paramount. The testimony, universally, and without dispute, shows that those theatres are operated by separate companies, and I think I shall have to ask you to put your questions in accordance with the undisputed testimony rather than try to give it a twist.

Q. Do you know what the name of the affiliate is there? A. No, I do not have it offhand. You say it is in the records there?

Q. Well, you did not have any trouble understanding what I was talking about, did you, when I said Paramount? A. I assumed that you meant one of these affiliated companies.

Q. The affiliated company that is your first-run account (1845)
in Salt Lake City.

Mr. Seymour: That is objected to, Mr. Wright.

Q. Now, can you tell me the terms on which you licensed that picture to the Paramount affiliate there? A. No, I could not unless I refer to the records, sir.

Q. You don't know what you got for it? A. No, I don't remember.

Q. Do you recall getting an offer for it from the independent there? A. Yes, I do remember getting an offer from the independent.

Q. Did you ever reply to his offer? A. I am quite sure I replied. I am positive I replied to that offer through my branch manager.

Q. Well, as far as you yourself are concerned, did you make any reply personally? A. I would have to refer to the records whether I wrote direct, but I do remember discussing the matter with the district man and the branch manager.

Q. Well, I am talking about with the independent? A. I did not talk with the independent. He did not talk with me, He wrote me, sir.

Q. And you know that you did not reply to his letter, isn't that right? A. I do not know that I did not, Mr. Wright. I would like to refresh my memory by looking into the files.

(1846)

Q. Well, have you ever offered him any pictures there? A. I am not sure whether we have or not.

Q. Well, do you know? Can you remember ever having offered him any? A. No, I do not know that we have.

Q. Now, in your dealings with the theatres that are affiliated with these defendants, you are still making franchises occasionally? A. Yes, sir.

Q. And in evidence here, I believe, is one that you made with Warner and one with the Evergreen circuit.

Mr. Frohlich: What is the number of that?

Q. I will show you this 265. That is a three-year deal, is it not, that you made in 1942, with the Evergreen Theatres Corporation? A. Yes, sir, we made a three-year deal.

Q. That is a Fox affiliate? A. That is, as far as I know, a Fox affiliate.

Q. And the date of that is November 23, 1942. And then I will show you this agreement dated May 18, 1944, which is marked as Government's Exhibit 266, and ask you if you recognize that as a three year deal you made with Warner? A. Two-year deal with Warners.

Q. What are the seasons involved? A. It seems to involve the season of 1944-45, and 1945-46.

Q. Doesn't that also cover 1943-1944? A. Yes, correct. You are correct, Mr. Wright.

(1847)

Q. So it covers the three seasons, 1943-44, 1944-45, and 1945-46, is that right? A. Yes, sir.

Q. Now that agreement, master agreement you have in your hand there, does not have attached to it, does it, all of the deal sheets which would show the precise extent of the coverage, isn't that right? A. No, sir; there is no deal sheet attached.

Q. And offhand do you know how much of the circuit that covers? A. No, I do not know offhand.

Q. Now, I want to show you this deal that was made for the 1943-44 season with the Sparks circuit, which is in evidence as Exhibit 267. That is, in general, the kind of a deal you have been making with that circuit for the last seven or eight years? A. No, sir, it is not.

Q. How does it differ from the prior one? A. Well, prior to this contract we sold this circuit on a flat basis, and here in this contract we have certain pictures playing in certain towns on percentage.

Q. Other than the fact that you got some percentage pictures in here, though, I mean the terms in general were the same as before? A. No, the terms are not the same, sir.

Q. Well, let me call your attention to this particular provision: "The exhibitor has the right to use each of the hereon mentioned features 85 times. It is understood and agreed

(1848)

that Exhibitor is to pay Columbia Pictures Corporation entire amount involved in each feature upon presentation and acceptance of the first play date on each feature. The exhibitor agrees to consume all runs on each feature listed hereon within a period of ten months from date of first run.

It is understood and agreed that these pictures are to be played in such theatres as they are now being served under current contracts."

Now that provision is a provision similar to one you had been incorporating in your Sparks deals for some time, is that right? A. Yes, sir; it might be, I am not sure.

Q. Now this contract simply lists under run and clearance provisions, forty-odd towns here with the statement, first and consecutive subsequent runs. Now that means, does it not, that the Sparks circuit could take your pictures and play them in each and every one of those towns on as many runs as they please as long as they stayed within that 85-time limitation, is that right? A. Yes; we know of the runs, of course, when we signed the contract.

Q. But as far as the contract is concerned, you simply gave him the privilege of showing the pictures, 85 runs in the forty-odd towns; and they could allocate and distribute the runs the way they pleased, isn't that right? A. Correct, sir. (1849)

Q. They had ten months to do that in, isn't that right? A. Ten months from the day they played the picture in the first situation, to complete all of their runs.

Q. So under this agreement that you made with the Sparks circuit, the pictures that were covered there—and I believe that covers your entire season's product, does it not? A. Yes, sir.

Q. None of those pictures could be made available or offered to any opposition theatre until Sparks got through with such runs as they wanted, isn't that right? A. I believe we sell a run in four or five, possibly six of the Sparks towns; and I do not recall any difficulty in those towns of Sparks holding up the party unreasonably as against these opposition theatres.

Q. Well, with that contract in effect, you could not sell any run in any of those towns of the kind that you normally negotiate for where you give the fellow a definite run or availability in the town or location where he operates, isn't that a fact? A. Those theatres would buy a run in some cases after Sparks theatres, and I believe in one or two cases before Sparks played all of his theatres in that particular town.

Q. Well, under the contract all you could do would be to sell him a run after Sparks; and when they got the pictures would depend on what Sparks decided to do under the con-

(1850)

tract, isn't that right, with his runs? A. If he acted in a reasonable way as regarding the contract, yes, but we force on dates on Mr. Sparks. If he tried to hold a picture back we would insist that he play it, or we may even assign it to him.

Q. I am not referring to what you would or might do; I am referring to what you do. There is no question, is there, but what you gave him the entire control of the runs of pictures in those towns for that ten-month period by that contract? A. He had ten months, a ten-months period in those towns to play the picture; ten months in all of the towns collectively, sir, not ten months in each town.

Q. I understand that. A. Yes, sir.

Mr. Proskauer: It was limited to 85 showings, is that right, Mr. Wright? I could not hear the witness.

Mr. Wright: Yes, 85 runs.

Mr. Proskauer: 85 exhibitions?

Q. Well, I take it the 85 showings means in substance 85 runs, is that right? A. Not necessarily. It depends on what you call a run.

Q. Well, what do you call a run? A. Well, as I remember this deal, I believe in one or two spots there is a run comes in before Sparks, one of the Sparks theatres. In other

words, Sparks might have three theatres—I am not positive (1851)
about this, but I have a slight recollection——

Q. Tell me what the 85 runs—— A. May I explain this?

Q. Tell me first what the 85 showings means?

Judge Bright: Does it say 85 showings or 85 times?

Q. Will you read that provision, Mr. Montague? A. (Reading.) "The exhibitor has the right to use each of the hereon mentioned features 85 times."

Q. Now what does that mean in terms of number of runs that he could have in each or all of these towns? A. He could have one run in each one of the theatres in those towns, but he could not have more than 85. He may acquire theatres, but this is restricted to the 85 because we know of these 85 theatres.

Q. Well, there is no limitation as far as number of theatres is concerned, is there? That is, if he wants to distribute the 85 this way, let us say, five runs in one—showing five times in one town and none in another, or two runs in one town and three in the other, under that contract he has a perfect right to do so, hasn't he? A. That was not the intention of the contract.

Q. What? A. That is not the intention of the contract.

Q. Is that what it says or isn't it? A. That is not the way the sale was made and it is not the way he played the pictures. (1852)

Q. What? A. It is not the way the sale was made, and it is not the way he has ever played the pictures.

Q. All I am trying to get at is what privilege the contract actually gives him. Now, is it not a fact that he can distribute the 45 exhibitions or the 45 times that he uses each of those pictures—I mean 85—among his theatres, all of his theatres in those towns, just as he sees fit? Isn't that the

privilege you gave him in the contract? A. That might be what the contract says, but it is not the way he operates, and therefore probably knowing the way he operates, we should have been more careful in specifying all the particulars. But we have been doing business with him; we know the way he operates; and probably the one who drew this contract was not very careful as to that point. We have had no trouble as to this matter at all.

(1853)

Q. When you do business with the ordinary independent exhibitor you sell him a specific run for a specific theatre under which he agrees and undertakes to play the picture at a particular time in a particular theatre at a particular admission price, isn't that correct? A. Not necessarily so, sir. We have "or" situations with the independent where he may have the right to play in this theatre, that theatre, or in the next one. Sometimes the "or" situation may run over four theatres. We have a lot of those, sir.

Q. I am talking about your normal situation where you are dealing generally with an independent, when you license him, you license him a particular run in a particular theatre at a particular admission price. That is normal, isn't that right? A. No, it is wrong. I am trying to say that the opposition to this man here in Miami does not do the way you are specifying. We sell the Wometco Theatres against Mr. Sparks, or what was known as the Sparks Circuit down there, and we do not sell him a specified theatre a specified picture at a specified price.

Q. I understand in selling Wometco and other circuits you may make the same kind of a deal that you made with Sparks here. I asked you as to your normal procedure in selling the ordinary independent account. As to that, sir, it is a fact, is it not, that you normally sell your independent

(1854)

a particular run for a particular theatre at a particular

admission price? A. Lots of the circuits, sir, are sold, and the independents, the ordinary way to sell them, we will say.

Q. Would you try and answer the question once more?

Mr. Frohlich: He has answered. I think he should be permitted to finish his answer.

Judge Hand: I think what the witness says is all right. You may probe him further about it, if you care to.

Mr. Wright: Will you read the question?

(Question read.)

A. Independents and so-called affiliated, too, we normally sell different than these, yes, sir.

Q. That Wometco you were talking about, that is one of those situations where you just give the product to Wometco for the first 140 days in Miami and then they move it around there as they like, and then it becomes available to the subsequent-run man, isn't that right? A. I just don't remember exactly, but it is done on a basis of difference, and, of course, we always claim we gave it to him, but he says we charged him too much for it.

Q. The same thing is done in the Paramount Circuit, which is the other major product there? Isn't that right? A. Paramount Circuit where?

(1855)

Q. Sparks in Miami. A. We don't sell Sparks in Miami.

Q. Do you know what the system of clearance that is employed there is? Isn't it the same as Wometco, where Paramount has pictures for the first 140 days and then after that they become available as subsequent-run?

Mr. Seymour: I must ask you to stop this practice of eliding your questions on this record.

And, if your Honors please, I must object to a question where Mr. Wright asks about Paramount

doing something, because the evidence is absolutely uncontradicted that these transactions in connection with the theatre are not conducted by Paramount, and there isn't any dispute about that in the testimony.

Judge Hand: Let him specify.

Q. The Sparks circuit. A. I am not familiar with the clearance set up in Miami.

Q. Getting back to this question of clearance generally, you say that you do not know what the clearance is that other distributors license their pictures at in a particular community? A. Oh, no, of course I do not, sir. I would not attempt to try to remember all the communities of the United States.

Q. I say, in a particular community. Let us take Buffalo, New York. Is it your testimony that you do not know (1856)

in Buffalo what the clearances which govern the distribution of films in that city are with reference to other major distributors as well as your own company? A. I have it on the record, sir, but I do not know it at this moment.

Q. You mean Columbia keeps a record of it? A. Oh, yes, yes, sir.

Q. You don't know what it is, is that right? A. No, I don't know.

Q. Do you recall what happened there in the Bailey Theatre situation in Buffalo? Are you familiar with that? A. Is Bailey the independent that has some theatres in opposition to Loew?

Q. That is right, in opposition to the Buffalo theatres in which Loew and Paramount are interested. A. I have some recollection on that, yes, sir.

Q. And you recall that the Bailey brought an arbitration proceeding there? A. Yes, sir.

Q. Because they were being held behind one of the theatres in which Loew was interested? A. Yes, sir.

Q. And that after the arbitration proceeding an award was entered, which said that the Bailey could play one day behind the Kensington Theatre. That was it, wasn't it? A. I am not familiar with that.

Mr. Proskauer: I would like to know what you are saying that arbitration award is.

(1857)

A. (Continuing) I am not familiar with that.

Q. You don't know what happened there? Don't you recall that prior to the time of that reward you were serving the Bailey Theatre there thirty days after first-run Buffalo, clear on Kensington? A. That could be true. I am certain.

Q. And then after that award came down you made the Bailey follow the Kensington on your pictures just as the other major distributors did, isn't that right? A. Do you know that to be so, Mr. Wright? You are telling me something. I don't know.

Q. I am asking you if it is a fact. A. I don't know, but I do remember one thing about the Bailey, Mr. Wright, I remember we did sell them Columbia pictures at different runs than they enjoyed for runs of the other companies, and this man in this Bailey Theatre, according to my memory, went on playing ours, we will say, first-run in that section and playing the others subsequent-run, and when we tried to get what we felt were reasonable terms for first-run in that situation, he refused to give it to us and said, "You are not entitled to any more than those I get from subsequent-run," and consequently we stopped selling him. Yes, sir, I remember that, and I don't remember selling it to anybody else, and I am not sure, but I think we are still out.

Q. Don't you recall that you declined to sell him except
(1858)
on the run after the Kensington? A. I was willing to sell him the same run as I had——

Q. Did you have these negotiations with him yourself? A. No, but this was called to my attention, an unusual situation, and that is why I have some recollection of it.

Q. What I want is exactly what, if anything, you said to the exhibitor who had the Bailey Theatre. Did you talk to him at all? A. Never met him in my life, Mr. Wright.

Q. You know, do you not, that you did refuse to sell him except on a run after the Kensington, isn't that right? A. Not to the best of my knowledge.

Q. You don't know that? A. I said, not to the best of my knowledge. My knowledge is that we offered him a run, the run that he enjoyed before, but we wanted some pictures on percentage and he said no.

Q. The transaction was handled by your branch manager? A. And district manager.

Q. You have no personal knowledge as to what the negotiations were between him and them? A. What has been reported to me.

Q. That is all you know? A. Yes.

Q. Is what your people reported to you? A. Yes, sir.

Q. When it comes to how Universal and United Artists sell pictures of course, do you know the extent to which Universal, for example, is still continuing to make franchises with defendants in this suit? A. No, I do not know to just
(1859)
what extent, but we and our men watch them pretty carefully. They are direct competitors of ours, and we watch them most carefully.

Q. If anybody was to give testimony as to what their particular selling policy was with reference to these defendants, I suppose it would have to be some representative of

that company rather than you, isn't that right? A. You would be the better judge of that.

Mr. Raftery: I object to that as speculative and argumentative.

Judge Hand: Overruled.

Q. The same would be true with respect to United Artists, you don't know? A. Only from very careful observation of a competitor, sir.

Q. The terms on which they dealt with the other defendants, isn't that right? A. I don't know the terms, sir.

Q. On this list of pictures that you gave us here, first you have a list marked as C-4 in which you have labeled "First Class Pictures Produced by Independent Producers." Under the heading "Columbia," all those titles were released by Columbia, isn't that right? A. May I see it, sir? Yes, I believe they were all released by Columbia.

Q. And then under the heading "Universal," those are pictures that were released by Universal? A. I would assume so, sir.

(1860)

Q. And the other headings you have, "Walter Wanger", simply indicates the producer, with no indication as to whom he released to? A. Correct, sir.

Q. The same is true for Chaplin, Major Pictures Corporation, Howard Hughes and Edward Small? A. Yes.

Q. Pickford, Lasky, Selznick, Harold Lloyd, David L. Loew, Walt Disney, Samuel Goldwyn, Inc., Principal Production, Inc., isn't that right? A. Yes, sir.

Q. As to those you have listed under Monogram Pictures Corporation, those were released by Monogram, were they? A. Produced by Monogram, but some of them have probably been released in state-right exchanges. I am not sure of that.

Q. What period of time did you cover with this list? A. Well, it is quite a period of time. I can't give you——

Q. How long? A. Over years, sir.

Q. How many years? A. Maybe eight or nine years or more.

Q. Then Grand National Pictures, that was distributed by a company of that name which is no longer in existence? A. I believe so.

Q. And the next, March of Time, Hal Roach, those you do not indicate who released them? A. No, just the producer. I don't know.

Q. Then those you list under Republic Pictures Corpora-
(1861)
tion, those were released by Republic? A. Or state-righters.

Q. You don't know which? A. I don't know which, because, I don't know, some of them might have been released before it took over the exchange.

Q. The remaining ones on the list, you don't know whom those were released by, isn't that right? A. No, sir, not here. The records would probably tell me.

Q. You have a note here, "See Schedules appearing pages 77 to 82 of the answer." What does that mean?

Mr. Frohlich: That answers your question, because it shows that this list covers a period of five years before this answer was drawn, and the answer was drawn in 1940.

Mr. Wright: All of these on Defendant's Exhibit C-4 that are included under the heading "See schedules appearing on pages 77 to 82 of the answer," those are already in your answer? Is this just a repetition of those?

Mr. Frohlich: I think it brings it down to date. Maybe it is repetitious; maybe it is some more, bringing it down to date.

Q. Mr. Frohlich says the period covered there is five years preceding the filing of the suit, is that so? A. It could be so.

Q. As to those produced since the filing of the suit, those appear on what you label here "Supplementing schedule" (1862) appearing at pages 77 to 82 of the answer? A. Well, that is just what it says.

Q. And as to those your testimony is the same as to those under Columbia, being released by Columbia? A. Yes, sir.

Q. And for those other Republic, by Republic; those under Universal were released by Universal; and the rest you do not have the names—— A. That is right.

Q. (Continuing) —of the parties who released them, is that right? A. That is right, sir.

Q. These pictures that you have introduced in evidence here as C-5 and you have labelled "Successful Foreign Pictures", do you mean pictures successful at the box office in this country? A. That is what I would call a successful picture, generally successful at the box office, of such theatres as played it.

Q. Of such theatres as played it? A. Yes.

Q. As a matter of fact, you have many pictures on there which had a very limited distribution in this country, haven't you? A. Yes, some of them had limited distribution. Some of them were successes in art theatres.

Q. The success in an art theatre is not a box office success, as you term it? A. Except in those theatres. Carnet de Bal, we happen to know, was a success in the art theatres, and was released for that purpose and not for what we call general distribution.

(1862a)

Q. Do you know what the American grosses of any of those pictures were? A. May I see them again? And I will try to refresh my memory. I do not see one called "The

Invaders." That is one I released myself when we grossed well over a million dollars with it.

(1863)

Q. Of those you have on the list, did you release any of them? A. Carnet de Bal, part of the release of that one. We brought it in here and then it was released through an independent.

Q. You mean you bought it and then turned it over to an independent? A. We were part of the production of the picture in France.

Mr. Proskauer: We cannot hear you.

The Witness: We were part of the production of the picture in France.

Judge Goddard: Does the Government contend the defendant limited the showing of pictures?

Mr. Wright: Oh, very definitely.

Judge Goddard: I understand the Government contends that they limited pictures to certain of the defendants, but did they generally limit the showing of a picture, do you contend?

Mr. Wright: Their marketing control has a definite exclusionary effect on any product. There is no question about that.

Judge Goddard: I should suppose it would be to their advantage to show the picture as much as they can.

Mr. Wright: I suppose that there are differences in the kinds of advantage to be gained by showing,

(1864)

let us say, some of these foreign pictures and some pictures which they produced themselves.

Judge Goddard: Then you do contend that they limited the showing of pictures generally?

Mr. Wright: Yes, they have a very tight control over what can be released in the way of box office returns of any picture in this American market.

Mr. Davis: I would like to ask if Mr. Wright contends that there is any picture, as to which he has any evidence, produced or to be produced, that shows that that picture was excluded from public exhibition in whole or in part. I ask the question definitely not as to his theories of what might occur, but what is the proof to support his theory on that subject.

Mr. Wright: There isn't any question but what we contend that there is an exclusionary effect as to every picture that is produced.

Mr. Davis: I am not asking what you contend. I am asking to what particular evidence can you point to support your contention.

Mr. Wright: I am just trying to get some evidence out of the witness here, if we may proceed. As I take it, his purpose in offering these pictures is to try and show that these foreign pictures received large box office returns in this country generally, even though they weren't produced or released by these de-

(1865)

fendants. That just doesn't happen to be the fact.

Mr. Frohlich: That was not my purpose in offering them, your Honors. My purpose was to show that there is a great deal of competition suffered by this particular defendant by reason not only of American pictures, made by independent producers, as well as pictures made by the affiliates, but even foreign pictures come into this country and are shown all over the United States and we have to compete with them. That was my only object in putting them.

Mr. Wright: He went so far as to label these "Successful foreign pictures."

Mr. Frohlich: Yes, they are.

Mr. Wright: I want to find out how much he knows about what success they enjoyed or did not enjoy.

Mr. Frohlich: Go ahead, I haven't any objection.
The Witness: What is the question, Mr. Wright?
Mr. Wright: Will you read the last question?

(Last question and answer read.)

Q. Is that the only picture on the list that you had anything to do with? A. On this list, yes, sir. To the best of my knowledge, reading this over, I cannot remember any other picture on this list.

Q. Just what was it you did in connection with the re- (1866)
lease of that picture Carnet de Bal? A. It was a picture done in French and the producer happened to be here at the time and he wanted an opportunity to release it to the art theatres of the United States. He felt, handled individually, he could do better than if we tried to handle it with all our other product, so arrangements were made whereby Mr. Goetz handled the picture himself.

Q. And you had nothing to do with releasing it? A. Nothing to do with it except we were used in an advisory capacity and we helped him on the art and various other things.

Q. As to the other pictures on that list, what, if any, firsthand knowledge do you have about what kind of distribution any one of those pictures got? A. I have quite a lot of knowledge on that, sir; in my experience.

Q. Do you know what they grossed nationally? A. No. A successful picture is not what it may or may not gross. A successful picture is one that generally plays in the United States a large number of theatres. That would be what I call a successful picture. I can't tell you the gross of any of these pictures. I don't know the gross.

Q. Do you know how many theatres any one of those played in? A. Not directly, but I will tell you whether or not they got what we called general distribution, sir.

(1867)

Q. Just go down the list and give me the approximate number of theatres that each one played in, if you know. A. I refuse to give it because I wouldn't know, I would be guessing, but I can tell you that Henry VIII was generally played in the United States; I can tell you Maedchen In Uniform was played considerably in the United States, and I would be very much surprised if it played less than six or seven thousand theatres, and probably played more; The Ghost Goes West, I happen to know a little about, but it was a successful picture, played a considerable number of theatres.

Q. Do you know who released it?

Mr. Frohlich: That was an Alex Korda.

Mr. Wright: I didn't ask him who produced it. I asked him whom it was released by.

A. I am not positive of this. We have records of it. Probably through United Artists.

Mr. Raftery: We will stipulate it was.

Mr. Proskauer: Mr. Raftery claims credit for it. He says United Artists did.

A. (Continuing) Mayerling, I know, had a lot of distribution in the United States; Rembrandt I don't believe got as much distribution as Mayerling had, but it was played around; Elephant Boy, I know, got distribution in the United States considerably; 39 Steps I know got a lot of distribution in the United States, successful picture.

(1868)

Q. When you say a lot of distribution, are you talking about five or six thousand? A. I would say six or seven, eight, nine thousand accounts in the United States—maybe six thousand, I don't know, but that would be what we call generally played.

Q. How many accounts do the best pictures that you may play? A. Best pictures?

Q. That you release. A. We sell a major part of our program between eleven and twelve thousand—between ten and eleven thousand, pardon me, and we have had some pictures play more than that, up to 15,000.

Q. So none of those pictures on your list ever compared even in the number of accounts that they played with your own best pictures that you released, isn't that right? A. Yes, but, of course, on the other hand my best pictures do not play as many accounts as somebody else's best pictures play, Mr. Wright.

Q. I understand that. A. That may be true of these too. We call these pictures successful foreign pictures. They got a successful run in the United States, most of them. Some of them not so successful.

Q. You mean a success for a foreign picture is one that does about half as much national business as one of your own

(1869)

pictures, is that a fair definition? A. I wouldn't say that, sir. I would say it gets as much run as the public want to give it. If the public wanted to buy that picture, it could have 15,000 runs in the United States.

Q. In any event, how much gross is actually realized on any picture depends to a very large extent how it is exploited and where it is played in addition to the bare number of exhibitions that it has, isn't that right? A. Exploitation is very important, sir, yes, sir.

Q. That is, the extent to which it gets into your so-called key first-run situations has a very substantial bearing on that fact, is that right? A. Yes, sir, you are right.

Q. And was to what happened in that regard with respect to any one of these pictures is something which I suppose only the records of the particular distributor who distributed

it would disclose, isn't that right? A. I imagine that would be the only way to get the actu——

Q. If you wanted to get the facts of what happened to the distribution of these pictures, that is where you would have to go, wouldn't you? A. Not where I would have to go. It is where you would have to go.

Q. If we wanted to get something more out of you than just generalities as to playing a lot of accounts or having dis-
(1870)
tributions, we would have to give you those records, wouldn't we? A. Yes, sir.

Mr. Wright: We have nothing more at this time. We would like to see those records that he is going to produce.

Mr. Frohlich: I will produce them in the morning, your Honors, and I will produce the witness too, so he may be interrogated on them.

By Mr. Seymour:

Q. Mr. Wright asked you about a situation in Salt Lake City. Can you tell us, do you recall why you continued to license your pictures to your customer there? A. Our customer in Salt Lake City is a very satisfactory account and we believe we get materially more out of our program as a whole selling it to him than we would to the opposition.

Q. Generally speaking, where you have a satisfactory customer, whether it is a so-called affiliated theatre or an independent exhibitor, do you continue to do business with that customer? A. Yes, sir.

Q. In New Haven, which I think Mr. Wright asked about, there are theatres affiliated with three different distributors, are there not? A. Yes, sir.

Q. And with which theatre do you do business, which one do you license your pictures to? A. We license our pictures to the theatre operated by Loew.

(1871)

Q. Do you go around annually to the Warner or the M. & P. theatre and see if you can license it to one of those theatres? A. Definitely not.

Q. Why not? A. Because we are very satisfied with our account there.

Q. Mr. Wright asked you something about Confidential Reports and I would like to ask you something about that since that was the first mention of the thing in this case. Your company contributes to that organization? A. Yes, sir.

Q. What does the organization do? A. It is a fact-finding organization dealing with the checking of percentage pictures.

Q. And it checks the records of exhibitors exhibiting the pictures of the distributors who contribute to its expenses? A. They send a man, in some cases it is a woman, to the theatre and that person stands, usually, in sight of where the tickets are being taken and checks the people that go in. Oftentime that checker will have a clock in his pocket or in his hand, as the case may be. Hourly he is supposed to go to the box office and ascertain the number of the ticket that has just been sold. Then he checks the day—the performance, and it may be matinee or it may be done hourly, or it may be matinee and evening. He checks and sees that the report that is sent to us by the theatre is in accordance with the check that he has made.

(1872)

Q. Do you get a report from the theatre on any pictures except your own? A. Absolutely not.

Q. Do you get a report from this checking organization on any pictures but yours. A. Definitely not. They only send to us such information that pertains to Columbia.

Q. Is there any method by which you obtain information as to the transaction between the theatre and any of the other companies who contribute to the expense of this organization? A. There is no method.

Q. Prior to the use of this organization—by the way, when did you begin to use it? A. I believe about last April.

Q. Prior to the use of this organization did you use a different organization? A. We used a different organization, sir, Ross Checking Service.

Q. What were the conditions which caused you to use the new organization? A. Well, certain information through certain suits, where exhibitors had been in and their books exposed, on the examination of those books by counsel, it brought out that the books and the reports that we had received from the theatre did not jell, so as to speak, they were different. There were inaccuracies and that went into—when we looked into it, we found out there were many such inaccuracies.

(1873)

Q. That is, a number of exhibitors kept false books? A. I wouldn't say their books were false, I have no knowledge of that, but I do say in many cases the box office receipts, signed by them and sent to us, was not in accordance with their books. It was for a lesser amount than their books exposed.

Q. Did the other organizat[illegible]at you used use checkers? A. I beg your pardon?

Q. Did the other organization which you used use checkers, checking the number of persons coming into the box office? A. The Ross Checking System?

Q. Yes. A. They were supposed to, sir.

Q. Did you find any cases where the checkers had been bribed? A. There were bribery cases, sir.

Q. Did you find any cases where exhibitors made a percentage deal with inspectors to pay them whatever amount

they could get away with in connection with their false returns? A. There had been false returns made of many kinds and types.

Q. Was it because of those circumstances that you joined in the formation of this new organization? A. Yes, sir.

Mr. Seymour: That is all.

Mr. Caskey: I have just one question.

(1874)

By Mr. Caskey:

Q. This Exhibit 265, Mr. Montague, contains the deal sheets, does it not? A. These are deal sheets, yes.

Q. And they are all the deal sheets? A. I would assume so, though I am not sure.

Mr. Caskey: That is all.

By Mr. Proskauer:

Q. Mr. Montague, I could not quite hear but I understood that you and Mr. Wright were having some colloquy about a theatre in Philadelphia that was in opposition to the Warner theatre there, and I thought I heard you say that you did not regard it entirely favorably. That referred to the Erlanger Theatre? A. Yes, sir.

Q. Just tell the Court what was in your mind as to that theatre. A. The Erlanger Theatre was a legitimate theatre that was taken over by a gentleman in Philadelphia, I think Goodman by name——

Mr. Frohlich: Goldman.

A. (Continuing)—Goldman, by name. Thank you for the correction. And he wanted pictures, solicited pictures for this theatre, first-run pictures. We considered it not the equal, and that our opportunities of income from that the

atre would not be the equal of Warner Bros., such theatres as we had been playing in, operated by Warner Bros. in Philadelphia. We thought it was off the beaten path, we did
(1875)
not think it had a clientele developed, and we feared if we treated seriously his request and entered into any negotiations that we would sacrifice a great sum of money.

Q. Would you say it is off the beaten path? It is way down on West Market Street, isn't it? A. Yes.

Q. And it is a block farther from the center of the theatrical region than even the Mastbaum? A. Yes, sir, which is also off the beaten path.

Q. And it is a fact that theatre had been dark, as we say in our amusement industry, for many, many years? A. Yes, sir.

Q. The Mastbaum had also been dark for many, many years? A. Yes.

Q. The Mastbaum was only reopened at the time that we had that wave of prosperity that came from the war in Philadelphia? A. Yes, sir.

Q. And the Erlanger Theatre had lain idle there down at the extreme end of Market Street, backing up on the railroad embankment for many, many years, had it not? A. Yes, sir.

Q. Closed, dark theatre? A. Closed theatre. Opened occasionally, as I remember it, for legitimate shows.

Q. You were asked a question as to whether you went out in various areas and got competitive bidding on your pictures. Do you remember that, some colloquy like that
(1876)
between you and counsel? A. No, I do not.

Q. You were asked whether in given areas you went out and tried to get bids on pictures. A. We don't try to go out and get bids on pictures.

Q. What would happen—I will put it this way to you: Is it feasible in your business to put pictures on the auction block and go out and say, "Who is going to make me the highest bid?" for pictures? A. No, sir.

Q. Tell me why not. A. We have a definite policy that at no time do we negotiate with two people. We find it absolutely necessary to have a continuity of releasing in a definite theatre, wherever we can possibly get it. That is not only for the benefit of Columbia but for the benefit of subsequent-runs in that situation. They too are interested in where you play your picture first-run. And what we have practiced over a period of years, and our records prove beyond a question of a doubt—and it is what we like, is to continue to play with the same accounts that we have played with over a period of years, if those accounts have been satisfactory to us. If they are responsible, and their responsibility has stood up over a period of years, we think that is good enough to go along with.

(1877)

Your Honors, in many cases we play in houses where we know we could get more money from an opposition, but because we have been playing in that house for a number of years, and we have sturdy friendship, we feel it is best to continue there, but we don't feel we have lost by that—maybe we do get a little loss on a picture or two, but over all our program we feel that is much the better policy. And we change our accounts—so few accounts are changed, I would say, rather, in a period of years, it is hardly noticeable on our records, and our records will support that beyond a question of a doubt.

Redirect Examination by Mr. Frohlich:

Q. Will you refresh your recollection, Mr. Montague, as I interrogate you, from this list of the 92 cities? I have just one general question. You were asked by Mr. Wright to give

instances where you sold away from Loew's to other affiliates. Will you be good enough to look at the following cities, Cleveland, Ohio,—— A. Yes, sir.

Q. Did you sell away from Loew's there? A. In Cleveland, Ohio, we sell the Hippodrome and Allen, Palace—Hippodrome and Allen Theatres, to the Keith Ohio Corporation, operated by RKO, in a pool with Warner Bros.

Q. Look at Dayton, Ohio. A. Yes, sir.

Q. To whom do you sell there? A. The RKO Midwest Corporation.

(1878)

Q. Has Loew's a theatre there? A. Yes, sir.

Q. Look at Houston, Texas. Has Loew's a theatre there? A. Yes, sir.

Q. To whom do you sell? A. To Interstate Circuit, Inc. of Texas, operated by a Paramount affiliate.

Q. Please look at Memphis, Tennessee. Has Loew's a theatre there? A. Memphis, Loew has a theatre in Memphis, Malco Theatres, Inc., operated by Lightman, M. A. Lightman.

Q. Affiliated with Paramount? A. Affiliated with Paramount.

Q. Please look at New Orleans? A. Loew has a theatre there.

Q. To whom do you sell? A. Theatre operated by RKO.

Q. Please look at Wilmington, Delaware. Has Loew a theatre there? A. Loew has a theatre in Wilmington, yes, sir.

Q. To whom do you sell? A. Warner Bros.

Q. Are there other instances on that list where you sell from Loew's to independents? A. Many of them.

Q. Would that be true in Atlanta, Georgia? A. Yes, sir.

Q. In Baltimore, Maryland? A. Yes, sir.

Q. Canton, Ohio? A. Yes, sir.

Q. Hartford, Connecticut? A. Yes, sir.

Q. New York City? A. Yes, sir.

(1879)

Q. Norfolk, Virginia? A. Yes, sir.

Q. Pittsburgh, Pennsylvania? A. Yes, sir.

Q. Richmond, Virginia? A. Yes, sir.

Q. Springfield, Mass.? A. Yes, sir.

Q. Toledo, Ohio? A. Yes, sir.

By Mr. Wright:

Q. When you say sold from Loew to independents in those towns you last mentioned there, did Loew ever play your pictures? A. Where?

Q. Any town, those last ones you mentioned. A. In any of these cities?

Q. Yes. A. To the best of my knowledge Loew never did play them. They may have played them in some, but to the best of my knowledge they never did.

Judge Hand: We will take a recess until tomorrow morning at 10.30.

(Adjourned to November 1, 1945, at 10:30 a.m.)

(1880)

New York, November 1, 1945,
10:30 o'clock a.m.

Trial resumed.

ABRAHAM MONTAGUE, resumed the stand.

Redirect Examination Continued by Mr. Frohlich:

Q. Mr. Montague, you testified yesterday regarding a situation up in Buffalo. Do you want to correct that testimony? A. The testimony that I gave as to the Bailey Theatre in Buffalo was the situation that happened in the Rivoli Theatre in Buffalo. Probably the reason——

Q. Let me interrupt you. Did you refresh your recollection from your records last night? A. I did, sir.

Q. Now, please go on with your story. A. My memory probably failed me a bit as to the Bailey. Both situations were in arbitration, I believe, at the exact same time; both were asking for a change of clearance; both of them were in competition with the Sheas theatres. The Bailey was in opposition to the Kensington, operated by Shea; and the Rivoli in direct opposition to the Roosevelt operated by Shea. So in that case the testimony that I gave as to the Bailey was actually the situation of the Rivoli.

Q. As a matter of fact, you never sold the Kensington nor the Roosevelt? A. No, we have not sold the Kensington

(1881)

for many, many years, and we still do not sell them; and we have not sold the Roosevelt for many, many years, and still do not sell them.

Q. Now, let me ask you whether there are instances, just a few, where you sold away from one affiliated theatre to another in some of the large cities included in that group

of 92 cities? How about Chicago? A. Yes, we sold from one affiliated to another.

Q. And who was the affiliated account. A. We used to sell originally RKO; we now sell B & K.

Q. That is Balaban & Katz. That is a Paramount affiliate? A. Yes, sir.

Q. How about Houston, Texas?

Mr. Wright: May we have the dates on those, and when?

Q. Can you give us the approximate dates or the year or the season? A. In the case in Chicago I would say, without examining the records, somewheres around between 1933 and 1935.

Q. Houston, Texas? A. Houston, Texas——

Q. Did you formerly sell the Loew account in that city? A. Yes, sir.

Q. And then a time came when you switched to the Interstate Circuit? A. Correct.

Q. That was a Paramount affiliate? A. Yes, sir.

(1882)

Q. Syracuse——

Mr. Wright: Wait a minute. That was when? Will you have him give the dates on those?

Mr. Frohlich: Yes.

Q. Will you give us the date? A. Well, I should say approximately between 1933 and 1935. I do not remember the exact y ar, but I would say in that period, within that period.

Q. Now, do you recall about Syracuse, New York? A. Syracuse, New York, we sold RKO and then switched to Loew.

Q. Now, how about New York City?

Mr. Wright: May we have the date each time?

Mr. Frohlich: Oh, yes. Will you give us the year of that in Syracuse?

The Witness: That occurred about the same period of time.

Q. How about New York City? A. In New York City we used to sell what is known as the Metropolitan group of theatres of RKO, and we ceased doing business with them in 1934, I believe, and started doing business with the Loew Circuit.

Q. Well, were there instances where you changed from an affiliated customer to an independent customer? A. Many such cases, sir.

(1883)

Q. Well, let me refresh your recollection. Do you recall Akron, Ohio? A. Yes, sir.

Q. Who is your present account there now? A. If you have the list, sir, I would like to have it.

Q. Suppose I give you the list and suppose you read off for the record just a few instances on the list. A. Our present customer is an account known as Chatkin & Feld.

Q. Independents? A. Independents. We formerly sold Paramount.

Mr. Wright: Can we have the date on that?

The Witness: I am afraid to trust my memory, sir, on these dates.

Mr. Wright: Can you give it approximately?

Mr. Frohlich: We can furnish the dates later on, Mr. Wright. We will look them up for you and furnish them.

A. (Continued) Duluth, Minnesota, we presently sell our pictures to S. J. Blacknow. We formerly sold to Paramount.

In Erie, Pa., we sell to Weschler, and we formerly sold to Warners.

In Long Beach, California, we sell to an account known as Milton Arthur, and we formerly sold to Fox.

In Miami, Florida, we sell to Wometco, and we formerly sold to Paramount.

(1884)

In Oakland, California, we sell to Blumenfeld, an independent, and we formerly sold to Fox.

In Oklahoma City, we sell—the name is incorrect here as to the owner—here it is Dent. I do not think it is one of the parties. We sell this theatre in Oklahoma. We formerly sold first run, Oklaboma, to the Paramount.

In Pittsburgh we sell to Johnnie Harris. We formerly sold first-run to Warner.

Sacramento, California, we sell to an independent, Blumenfeld. We formerly sold to Fox.

In Seattle, we sell first-run to Von Herberg, an independent. We formerly sold to Fox.

In San Diego, we sell to an independent, the Metzger Estate, and we formerly sold to Fox.

In San Francisco, we sell first-run to Blumenfeld, an independent. We formerly sold to RKO.

Q. Have there been instances, Mr. Montague, where one affiliated exhibitor tried to get your product away from another affiliated exhibitor? A. Yes, sir.

Q. Did that happen in New Orleans? A. Yes, sir.

Q. Can you tell us—will this document refresh your recollection? Just tell us what happened in those three cities? A. Well, I was approached by Gaston Dureau——

Mr. Wright: Can we have the date of that?

Q. Can you give us the approximate date? A. Well, I

(1885)

would say this was maybe some four or five years ago. I was approached by Gaston Dureau for our product for the Saenger theatre, or for part of our product for the Saenger theatre, and of course we did not enter into any negotiations because I did not want to change my customer.

Q. Who was the Saenger theatre? What company controlled the Saenger theatre? A. We call it the E. D. Richards Company, an affiliate of Paramount.

Q. A Paramount affiliate? A. Yes; that is in New Orleans.

In New Haven we have been approached by Warners for part of the product and we have also been approached by Paramount. In neither case did we enter into negotiations because we were satisfied with our account.

Mr. Wright: Have you got the dates, again?

The Witness: I would say within the last two or three years, Mr. Wright.

A. (Continuing) In Boston we sell to Loew and we again have been approached several times by M & P, an affiliate of Paramount, for first-run product in that city. And we did not enter into negotiations because again we were satisfied with our account.

Q. Can you say generally that there has been competition between the Big Five for your product in the cities from time to time? A. Yes, sir.

(1886)

Mr. Frolich: Your witness.

Recross Examination by Mr. Wright:

Q. With respect to these approaches you say that have been made in these cities at this time, there were, however, no negotiations, no discussion of terms, is that right? A.

We would not enter into negotiations, Mr. Wright, unless we had some reason for wanting to change.

Q. See if you can answer the question. A. I am sorry.

Q. I asked you if there were—whether it was a fact that there were or there were not negotiations? A. Maybe my interpretation of negotiations and yours might be different.

Q. There was no discussion of terms, is that right? A. No, sir.

Q. In none of those instances? A. In none of those instances.

Q. Insofar as the dates of these situations that you recounted, where you say the product went from an affiliated house to an independent, are concerned, I suppose if they occurred after the 1935-36 season, the shift, if any, would be reflected in this tabulation that you introduced in evidence here as Exhibit C-6, is that right? A. I would assume so.

Q. This, I take it, shows your customers in all of those towns? A. I would assume so.

(1187.)

Q. For the 1936-37 season through 1944-45? A. I would assume so.

Q. And in those occasions where you did make such shift, none of that product was offered to the independent until after it had been rejected by the affiliated circuit, isn't that right? A. No, that is not quite right, Mr. Wright.

Q. What is the fact? A. Well, I don't like to generalize because there were different facts in many of the cases. If you will ask of any particular one, or all, I will try to remember the situation.

Q. In any event, you did not get together as to terms with the affiliated circuit, and it was not until after you failed to get together that you made any offer to the independent is that right? A. In some cases, and in some cases we did not make offer at all.

Q. Do you know which those were now? Do you have any recollection on it? A. Well, in the case of M & P in Boston,

we broke over one picture called Lost Horizon, and when the next season's product came out, I did not offer that product to M & P. I went out and established new accounts.

Q. That is, you broke in a number of M & P situations? A. I broke in all the M & P situations.

Q. Do you remember when that was? A. I should say (1888)
about six or seven years ago.

Q. In that case the breaks, such as they were, would be reflected again in your Exhibit C-6, isn't that right? A. I assume so.

(Government's Exhibits 378 to 381 inclusive marked for identification.)

Q. I will show you these contracts between your company and the Bailey Theatre at Buffalo, New York, which have been marked for identification as 378 through 381 inclusive, and ask you if you recognize those as the contracts made with that theatre for the 1941-42, 1942-43, 1943-44, and 1944-45 seasons respectively? A. Yes, sir.

Q. I call your attention to the earliest contract here. I beg your pardon, I believe I gave you the wrong dates on those. These are 1942-43, through 1945-46 inclusive, that is right, isn't it? A. Well, schedule for the season 1942-43.

Q. Yes. That is the first one. A. That is the first one.

Q. And in that one the clearance provision on which you sold him, the only thing that it said there was "14 days clearance on Genesee theatre," is that right? A. Correct.

Q. That means he was given that season 14 days clearance over a particular theatre, that Genesee theatre, is that (1889)
right? A. Yes.

Q. In the succeeding seasons I notice the clearance reads, "Immediately after Shea's Kensington theatre, 14 days ahead

of the Genesee theatre," and that provision continued, did it not, in the succeeding three seasons? A. Yes, sir.

Q. As I understand your testimony, actually in none of those four seasons there had you actually been selling the Shea's Kensington, is that right? A. Correct.

Q. Do you know why that particular clearance was inserted in there? A. Yes, sir.

Q. Why was it? A. He originally, or, we will say, in 1942-43, had a clearance, and that clearance, we will say, was regulated only by the Genessee. In other words, the first-run contract, the Lafayette, I believe, carries a 30-day clearance, so he could run the pictures thirty days after, or he could run the pictures two months after. That clearance was set up, and we could have put a run in between it; in other words, we could have licensed another theatre in that town for a definite 30-day clearance, which might have been in competition with this one, and then we could have run the Bailey theatre after that theatre, and our obligation was only to keep the Bailey theatre ahead of the Genessee theatre. Now I assume that the exhibitor began to become conscious of this——

(1890)

Q. I am not asking you—— A. I am trying to give you the whole story.

Q. I am asking you if you knew what the circumstances were as to why you put that provision in there? A. I probably put it in at his request, sir.

Q. Do you know? Did you have any conversation with him about it? A. No, my—no conversation with him. My conversation was all with either the district manager or the branch manager, sir. My information comes from those two sources.

Q. As a matter of fact, the reason you put it in was, was it not, that you wanted to be sure that if you decided or were able to sell the Kensington theatre, that he would

have to follow, isn't that right? A. He would have had to anyway, according to the contract, Mr. Wright. His clearance was only based on the Genessee theatre, not on the Kensington.

Q. According to the contract that is in evidence here, or that is identified as 378, he did not have to follow the Shea's Kensington theatre in playing your pictures; did he? A. Does it say so there? I can't find it.

Q. Look at it. A. It said "14-day clearance on the Genessee theatre."

Q. And under that contract pictures became available to (1891)
him thirty days after the run downtown, and not after any run at the Kensington? A. I would assume only if I wanted to give him thirty days after. I had to give him——

Q. That is what you were giving him, isn't that right? A. Oh, that is what I did give him, yes, sir.

Q. Then in the succeeding seasons you say that you think you put in there "Immediately after Shea's Kensington theatre" at his request? A. After the decision of the arbitration, which I believe was set up by the Consent Decree.

Judge Bright: What does that mean?

The Witness: Maybe I did not make myself too clear.

Q. You certainly did not. A. I will try to, Mr. Wright. This Bailey theatre went to aribtration as to this clearance.

Judge Bright: Bailey was an independent?

The Witness: Yes, sir.

A. (Continuing) And according to the information I have, arbitration found for him and gave him a clearance immediately after the Kensington theatre. Now that established in my opinion a run for him which was quite definite.

Judge Bright: Who was operating the Kensington?

The Witness: The Kensington theatre is operated —we call it one of the Shea theatres, and I believe it is now operated by Loew's.

(1892)

Mr. Wright: It appears from the evidence in the record, if the Court please, that it is actually operated by Buffalo Theatres, Inc., one-third of the stock of which is owned by Loew's, and one-third of the stock is owned by Paramount, and one-third, I believe, was owned by Mr. Shea, and it was known as part of the Shea operations. That is why——

Judge Bright: Go on, Mr. Montague.

The Witness: When arbitration decided for him that he should have a run immediately after, naturally, we put it into our contract. That still gave us the opportunity of selling, if we could, the Kensington Theatre, and if we did, the Kensington Theatre could have run ahead of the Bailey Theatre, as found by the arbitrators. We could not succeed in making the sale in the Kensington, so our film is still being played, not held up in any instance, is still being played at the Bailey Theatre, and he is actually playing 30 days after the first-run, which is the Lafayette Theatre, in Buffalo.

Q. That is only because you still haven't sold the Kensington? A. Mr. Wright, if I could possibly sell the Kensington, I would, and in that case Bailey would run immediately after the Kensington.

Judge Bright: You mean by "immediately" without any clearance?

(1893)

The Witness: One day.

Judge Bright: One day?

The Witness: One day.

Judge Bright: After the termination of the engagement in the Kensington?

The Witness: Yes, sir.

Judge Bright: But he would still have to be 30 days behind the downtown theatre?

The Witness: Yes, sir, because that is in the downtown theatre contract.

Judge Bright: Would the Kensington also?

The Witness: Have to play 30 days, sir.

Mr. Wright: I did not hear the first question there.

(Record read.)

Q. That is, the Kensington would play 30 days after downtown; then he would play one day after the Kensington? A. It would be right; yes, sir.

Q. Not only in that case but in the ordinary case where you grant clearance to one theatre over another, you merely follow the pattern that is set by the clearances given by the other major distributors, isn't that right? A. By all distributors, sir, so-called major and those that we do not call major, such was Republic, Producers—and the other one skips my mind.

(1894)

Mr. Frohlich: Monogram?

A. (Continuing) By the way, they are growing into a major class, too, you know.

Q. When you grant it, you do not make any independent determination yourself as to whether it is reasonable or unreasonable, is that right? A. Well, we consider—if it is unreasonable, the exhibitor usually discusses it and it usually reflects in the price which we get for our film.

Q. Yes, but can you answer the question? A. May I hear that question?

(Question read.)

A. Correct, sir.

Judge Bright: You mean you take it as you find it?

The Witness: Yes, sir, we take the clearance as we find it.

Q. And in some cases you know it is unreasonable and you still go ahead and grant it, isn't that right? A. I wouldn't say that in some cases I know it is unreasonable and I still grant it. If the clearance interferes with my income, I believe it is unreasonable.

Q. You recall testifying in a pretrial deposition in this suit in April 4, 1940? A. I remember I did, yes, sir.

Q. And I will call your attention to a question and (1895)
answer that occurred then and see if you recognize it as correct. Do you remember you were asked, with respect to clearance, "But even if you thought it was unreasonable, in order to protect your revenue from a particular area, you might be compelled to sell him on those unreasonable terms anyway, isn't that right?" and you answer, I believe, was "We grant a lot of clearance in the United States to circuits, independent circuits, affiliated circuits and individual theatres, that we do not believe"—"that we don't believe is absolutely necessary as claimed, but we find that in most of those cases it is standardized and it is going on and we, Columbia, do not feel we are big enough or strong enough to change it and usually comes up against a situation as to whether or not we want to sell or not, but we haven't so much trouble. In fact, I am almost ready to say that we

are having more trouble today in setting clearances as between one independent against another as we have had in the case of one independent against a circuit. We find today that as a man acquires more theatres, an individual or a part of a so-called affiliated defendant here, he feels he is entitled as God's gift to more clearance. It is something that seems to grow as a weed in the garden of distribution, and we don't like it because I know when I had one theatre I was not nearly as fussy when I had three, and I guess
(1896)
that has gone down, down the line."

you recall having given that answer? A. Oh, yes.

Q. And that is a correct statement as of today also? A. I would not say it has changed the least bit, sir.

Mr. Frohlich: That is all?

Mr. Wright: That is all.

Mr. Frohlich: Are there any questions?

(No response.)

Mr. Frohlich: You may step down. Thank you very much.

(Witness excused.)

Mr. Frohlich: I have no further witnesses, your Honors.

Mr. Wright: If the court please, I do not believe I offered these exhibits which were identified. I offer them, and I take it there is no objection.

Mr. Frohlich: No objection.

(Government's Exhibits 378 to 381 inclusive for identification received in evidence.)

(1897)

Mr. Caskey: I call Morton Thalhimer.

MORTON G. THALHIMER, called as a witness on behalf of defendant Twentieth Century-Fox, being duly sworn, testified as follows:

Direct Examination by Mr. Caskey;

Q. Mr. Thalhimer, where do you reside? A. In Richmond, Virginia.

Q. What is your occupation? A. I am in the theatre and real estate business.

Q. What is the name of your corporation? A. The Neighborhood Theatre, Inc.

Q. Mr. Thalhimer, do you own any stock or other securities in any of the defendants in this case? A. No, sir, I do not.

Q. Does any of the defendants in this case own any stock or other securities in your corporation? A. No.

Q. Or have any profit-sharing arrangements with you? A. No, sir.

Q. You are an independent exhibitor? A. Yes.

Q. What theatres do you operate in Richmond, Virginia? A. We operate three first-run theatres: Byrd, State and Capitol theatres; one action house that is partly first-run and partly second-run, the Grand Theatre; and six subsequent-run theatres. I can give you the names if you wish them. Do you want the names of them?

(1898)

Q. Yes. A. The Venus, Ponton, the Westhampton, Bellevue and Ginter.

Q. Are there other first-run theatres in Richmond? A. Yes, sir, there are.

Q. Will you name them? A. Loew's, Inc. have the largest first-run theatre, and Fabian-Wilmer & Vincent have two first-run theatres and one action first-run and second-run combined; and also several subsequent-run theatres.

Q. I was going to ask you that. In addition to your six subsequent-run theatres, are there other subsequent-run theatres in Richmond? A. Yes, there are.

Q. Operated by whom? A. By Wilmer & Vincent-Fabian, and a man by the name of Ben Pitts, and by a Mr. Somer and by a Mr. Arcaro, of the white theatres; and then there are a number of negro theatres that are separate and apart, but they are also run independently by the Lichtman Circuit of Washington, D. C.

Mr. Caskey: Will you please mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-15 for identification.)

Q. Mr. Thalhimer, have you prepared a map of the City of Richmond showing the location of all the theatres in that city? A. Yes. I placed on this map of Richomnd the names and the ownership of the theatres in Richmond.

(1899)

Q. Now, in the downtown business area what theatres are located? A. Loew's, Wilmer & Vincent's Colonial; National and Park and the State and Grand theatres.

Q. Those are in the heart of the business section of Richmond? A. Yes, sir.

Q. Now, where is your Capitol Theatre? A. That is located about 30 blocks west in a residential area.

Q. And where is your Byrd Theatre? A. That is also in a West End residential neighborhood about 30 blocks west of the business area.

Q. Then your Westhampton Theatre is in the northwestern part of the city? A. Yes.

Q. And in the northern part you have the Ginter and Bellevue? A. And Brookland.

Q. And Brookland? A. Yes.

Q. And those are approximately how far from downtown Richmond? A. I would say two or three miles perhaps.

Q. And then over in south Richmond you have the Ponton and the Venus? A. Yes.

Q. And you have indicated by a legend the name of the operator of each of the theatres? A. Yes.

Mr. Caskey: I do not think it is necessary to offer it in evidence.

Q. Now, on first-run what product do you play? A. We (1900)
play Twentieth Century-Fox, RKO, Columbia and Universal.

Q. How long have you played product of Twentieth Century-Fox? A. Since we first started in business in about 1927, one year after we started in business.

Q. And when you started that was with what theatre? A. With the Capitol Theatre, as a first-run theatre, and the Venus Theatre in south Richmond, as a second-run theatre or sub-run theatre.

Q. Subsequently you acquired the State Theatre? A. Yes, sir.

Q. And that is downtown Richmond? A. Yes.

Q. And within a few hundred feet of the Wilmer & Vincent-Fabian theatres? A. It adjoins them. They are on either side.

Q. Subsequently you leased the Byrd Theatre? A. Yes.

Q. Now, in the neighborhood theatres what products do you play? A. We play all of the products.

Q. You play in your neighborhood theatres the product of Loew's? A. Yes.

Q. Which plays at the Loew's Theatre downtown? A. Yes.

Q. Do you play the United Artists product which plays at the Loew Theatre downtown? A. Yes.

Q. And do you play the Paramount and Warner product which plays at the Wilmer & Vincent theatres downtown? A. Yes.

(1901)

Q. In your first-run operation do you take clearance on your product over all the other theatres in Richmond? A. Yes.

Q. How long is that clearance? A. The clearance is 30 days on the two second-run theatres and 45 days on the balance of the sub-run theatres of the city.

Q. And does the Loew Theatre take clearance on the product that it exhibits over the theatres which you operate? A. The identical clearance.

Q. And do the Wilmer & Vincent theatres take the same clearance? A. Yes.

Q. With respect to the product they play? A. Yes, sir.

Q. What is your present admission price first-run in Richmond? A. 46 cents plus 9 cents tax. 55 cents gross for the first-run theatres.

Q. Who fixed that admission price? A. Well, we fixed it so far as our theatres are concerned.

Q. How did you determine that that was an appropriate price to charge the public? A. Well, trying to be brief about it, the original prices when we started in business was 50 cents as a first-run price, which had been established there for a number of years; and perhaps in 1933 they were reduced to 40 cents so the public would not have to pay 10 cent tax. That was at the time the Federal tax was only on admissions above 40 cents. And since the increase of the

(1902)

cost of operation the admission price is now fixed at 46 cents plus tax, which seems to be the price that is agreeable to the public and satisfactory in the operation of the theatre.

Q. In your business judgment is that the price which is best calculated to produce the largest gross revenue in your first-run houses? A. I think so.

Q. What do you charge in the subsequent-run houses that you operate? A. 29 cents, generally speaking, plus 6

cents tax. 35 cents. In both these cases, Mr. Caskey, I have only quoted you the adult night prices.

Q. Adult evening admission price? A. Yes, sir.

Q. And I will ask you whether or not in the industry when you refer to admission price, it is customary to quote the adult evening admission price? A. Well, I think so. I think I could give it to you for the children and matinees if you want it.

Q. No, that is unnecessary. Now, who fixes that admission price for those subsequent-run theatres? A. We fixed the admission price.

Q. You have a theatre in Richmond operated by Wilmer & Vincent playing 45 days first-run, which charges a higher price, have you not? A. Yes, sir.

Q. What theatre is that? A. That is the Carillon. They charge 33 cents plus 7 cents tax, or a total of 40 cents as

(1903)

against 35 cents in the other sub-run theatres.

Q. That theatre is out near your Byrd? A. Yes.

Q. Now, in your license contracts with Twentieth Century-Fox do you make an agreement as to the admission price which you will charge in your first-run houses? A. Yes, it is written in the contract as to the price that is to be charged.

Q. And is that also true in the subsequent-run? A. Yes, it is.

Q. Has Twentieth Century-Fox ever attempted to compel you to charge a higher or a lower admission price first-run? A. No.

Q. Has Twentieth Century-Fox ever attempted or compelled you to charge a higher or a lower price in your subsequent-run theatres? A. No, they have not.

Q. Have you determined those admission prices in the exercise of your own independent business judgment? A. Yes.

Q. Now will you tell the Court the reasons why you purchase clearance from Twentieth Century-Fox on its pictures?

Mr. Davis: Will you read that question, please?

Q. (Read.) Well, when we license pictures first-run they are shown in theatres which are very much more expensive theatres as to the land and building, generally speaking, than our sub-runs or our competitors' sub-runs. And this matter of clearance so far as Richmond was concerned was (1904)
in effect when we first went into business in Richmond. It was first written into our contract, so we were thoroughly aware of it, and it seemed perfectly normal and natural that it should remain that way. It protects our first-runs against our own sub-runs, and, of course, against our competitors' sub-runs.

Q. And did you build one or more subsequent-run theatres in Richmond knowing that their availability would be approximately 45 days after first-run? A. Yes, we did.

Q. Do you license some pictures on percentage? A. A good many.

Q. Do you license some on flat rental? A. Yes.

Q. Do you license some on some formula whereby the amount of the film rental varies or fluctuates with the amount of gross receipts? A. Yes.

Q. Explain to the Court, if you will, a typical arrangement of that type. A. Where it varies?

Q. Yes. A. Well, perhaps the most outstanding example is with Metro pictures, and what they call their sliding scale. For instance, if they would determine 40 per cent, the top business of a theatre on 40 per cent where the picture had been profitable for the theatre, 40 per cent film rental—we have a theatre, for example, to illustrate, in Petersburg, where $4000 a week's business was supposed to be tremen-

dously good—well, the week is divided up into ten units—
(1905)
three units for Sunday, two for Saturday and one for each of the other five days. Assuming that a picture plays a week, the units are not very material; but in smaller cities they often play part of a week. But if that picture reached $4000 on a Metro sliding scale, for example, our film rental would be 40 per cent, or $1600, which would mean that we would have $2400 left over as our part of the week's receipts. If, on the other hand, that picture in Petersburg was not as good as Metro thought it would be, and it only did, let us say, $2400 rather than $4000 for the week, that film rental would drop to 25 per cent under the sliding scale; so the film rental would only be $600. And when we deduct $600 from $2400, we only have $1800 left; so we are very much better off to pay them 40 per cent on a picture that does $4000 than we would be to pay them 25 per cent on a picture that does in the neighborhood of $2000 or $2500. So that the film rental is based on the ability of the picture to produce in the theatre, and it is based on our past experience.

We have the same thing with other contracts, and I think probably with Fox and Columbia and maybe RKO in which the picture—there is a reversion in the contract. If the picture does so much business, it is 40 per cent; if it does a lesser figure, it is 35 per cent; if it does a lesser figure,
(1906)
it drops to 30 per cent. I think that is due to the fact that even among great pictures they will do more business in one section of the United States than they will in another. For example, a picture exhibited south of the Mason-Dixon Line that glorifies Mr. Lincoln, or the northern idea of the Civil war, is very unpopular in our part of the territory; and we very often do not even play the pictures because the public won't come to see them. But that same picture in Boston territory might be a 40 per cent picture, whereas in our

territory if we played it at all it would probably not earn over 20 per cent.

Q. Mr. Thalhimer, do you consider those methods of buying or licensing film to be fair? A. I think they are very fair.

Q. How many first-run theatres do you have in Richmond? A. We have three first-run theatres, and the Grand Theatre, which is a first-run action house.

Q. Now, how do you play the pictures in those theatres? A. Well, those pictures vary in the method of playing, depending on what we consider the importance of the picture. For example, recently Fox's picture State Fair played day and date uptown at the Byrd and downtown at the State for one week. Then it played the following week day and date with the State downtown, the same theatre it started (1907)

in, and the Capitol. And then, if I remember correctly, we kept it another week in the Capitol. So it really had a total of five weeks' run, although over a period of three weeks. Now, our pictures vary first-run. One picture may play the Byrd by itself, and another may play the State by itself; another may play the Byrd and State day and date; another might play the Capital and State day and date; and a good many of them will carry over from the Byrd and State day and date to the Capitol.

Q. Are you able in your experience to book your pictures in a manner which enables you to operate your theatres on first-run which you believe will be most profitable to yourself? A. Yes.

Q. Now, you have talked about a carry-over. What is that? A. Well, a carry-over in our position is that if we play a picture at the Bryd and State, and the picture is doing a very good business, we would take it immediately at the end of its run in the Byrd and State into our smaller Capitol Theatre for an additional week.

Q. Now, this picture State Fair, as I understand it you ran it continuously for three weeks in three different theatres all told, making five weeks total exhibition, is that right? A. Well, yes, I think it is; but it was not continuous in all of those theatres for the period.

Q. That is right. But it had a first-run; it was playing (1908)

first-run in Richmond for three weeks consecutively? A. That is right. I think that is right, Mr. Caskey.

Q. Yes, I think you just so testified. Now, at the time that it commenced to play in the Byrd and State, you did not know whether it would play a second week, did you? A. Well, we thought it would because we look at our first-run pictures and study them; and while we do not always predict what the public wants, in this particular case we anticipated exactly what happened.

Q. But it is a fact that the subsequent-run exhibitors' in Richmond, including yourself, availability to play that picture was dependent upon how long you ran it first-run? A. Yes, that is right.

Q. And they could not book the picture or get a play date until it had been determined how long it would play first-run in Richmond? A. That is right.

Q. Wasn't that injurious to them? A. No, I do not think so.

Q. Was it beneficial to them? A. Well, we find in our own theatres,—which are the only ones I can speak about—that where a picture has a long first-run, where it is continuously in the same house, or when it is a carry-over, that when that picture reaches the sub-run theatres it does very much better business than the pictures that simply play a week. Now, that would be true of the Loew pictures in our (1909)

competitor's theatre. Loew very seldom carries over a picture, but they might take a picture in this very large house

and play it as long as three weeks. Well, when it finally gets to our sub-run theatres, that picture does better business in our sub-run theatres than the picture that Loew plays only one week; which probably is due to the fact that any picture which justifies a three weeks' run in a big house like Loew's is the kind of picture, where our neighborhood theatres are located, that people want to see. In other words, the long run is indicative of a good picture.

Q. Do you consider that you are injured or your business detrimentally affected if Loew's plays a picture like Week-end at the Waldorf for three weeks at their theatre in Richmond? A. No, we don't feel we are injured in our sub-run theatres.

Q. Do they exploit the pictures that they play? A. Yes, they do. They advertise them in the newspapers, radios, and exploit them thoroughly; which, of course, benefits the pictures when they reach us.

Q. Now, referring to advertising: What types of advertising do you do in your first-run theatres? A. We advertise in the newspapers, on the radio, in street cars; we exploit the pictures by every legitimate means we know, in cooperation with the manufacturers or retailers. We do everything

(1910)

we can to popularize the pictures, the stars and the directors of it.

Q. Do you know a phrase "cooperative advertising"? A. Yes, I do.

Q. Will you explain that to the Court? A. Cooperative advertising is where the owner of the picture allows us an extra amount of money which he contributes, the producer contributes, towards advertising the picture. It is an increase to our own regular advertising budget, and very often it is a sum that is equal at least to 50 per cent of our weekly budget; sometimes it is considerably more, depending on the importance of the picture.

Q. Mr. Thalhimer, when you play on percentage or under one of these formula arrangements, do you by contract give the distributor the right to check your picture? A. Yes.

Q. Do you object to checking? A. No; we like to be checked.

Q. Explain that to the Court. A. Well, in each theatre, of course, there is a cashier and a doorman and a manager——.

Judge Hand: What is the use of harping on this? If they have a percentage arrangement, of course they would have some way of checking. It would be natural.

Mr. Caskey: I should think so; but the allegation of the plaintiff's brief is that it is used for some sinister purpose, as I recall it.

(1911)

Judge Hand: Well, if you think there is anything in this kind of reiteration, go on.

Mr. Caskey: Well, let me just ask this question——

Judge Hand: It seems to me perfectly inevitable.

Q. Has the right of the Twentieth Century-Fox to check your pictures or to audit your books ever been used against you to your business disadvantage? A. No, sir.

Mr. Wright: Let him say what was done. That is a conclusion that can be drawn.

Judge Hand: Overruled.

Q. Now, you operate some theatres in Petersburg? A. Yes.

Q. Where is Petersburg? A. Petersburg is about 20 miles south of Richmond.

Q. And what is its approximate population? A. About 30,000.

Q. Do you have all the first-run theatres in Petersburg? A. We do now, yes.

Q. And do you play the product of all the companies? A. Yes, sir.

Q. Do you play pictures in Petersburgh on a clearance after Richmond? A. Clearance is immediately following Richmond.

Q. And that applies to the pictures which you play first-run in Richmond and to the pictures which other exhibitors
(1912)
play first-run in Richmond? A. Yes, sir.

Q. Do you want to play in Petersburg earlier than immediately after Richmond? A. No.

Q. Why not? A. Because people in Petersburg generally read the Richmond newspapers, and Petersburg gets the advantage of the first-run advertising and exploitation of Richmond; so to a very large degree it benefits Petersburg to play the way they are now playing, in my opinion.

Q. Do you find that the extended runs or the carry-over runs in Richmond adversely affect your patronage in Petersburg? A. I do not think so.

Q. They benefit it, do they not? A. I would rather be inclined to that thought, yes.

Q. Now, you have some theatres in the town of South Boston, Virginia, do you not? A. Yes.

Q. How big is South Boston? A. Oh, about 4000 people.

Q. How many of those theatres are presently operated? A. One. We had two theatres there. One is closed.

Q. Why don't you operate the other? A. We tried to, but it is very uneconomical.

I would like to correct one statement. South Boston's population is 5250.
(1913)

Q. It was your experience that you could not successfully operate two theatres in South Boston? A. Yes, it was.

Q. Mr. Thalhimer, in the operation of your theatres have you been adversely affected by the fact that the distributors from whom you license motion pictures also own theatres? A. No, sir, we have not been adversely affected in our company by that.

Q. Have you been adversely affected by the fact that one of your competitors in Richmond is a so-called affiliated theatre? A. No, we have not.

Q. To your knowledge, has that affiliated competitor attempted to buy away from you the product which you customarily use? A. No, I do not think they ever tried to buy our product; not that I know of.

Q. You have been playing Fox product for at least 18 years now? A. Yes.

Q. You are an old customer? A. I think so.

Q. Do you consider that it is appropriate that as each new block of pictures is produced and released by Fox, that they should first be offered to you? A. Yes, sir, I do.

Q. Why is that? A. Well, we have been their customer for a good many years continuously; we have endeavored over that period of time to promote their pictures, their stars,

(1914)

their directors, to the very best of our ability; we have paid them, generally speaking, what they have asked us for the pictures, subject to negotiations if the pictures had not turned out mutually satisfactory; and we could not go on and operate a first-run situation like Richmond if we did not know that we would have a continuous flow of product.

Q. In your business judgment have the defendants around this table ganged up to injure you?

Mr. Wright: Now, if the Court please, that is entirely improper.

Judge Hand: What is the question?

Mr. Caskey: That is the colloquial question.

(Question read.)

Judge Hand: Objection sustained. You ought not to take too seriously the characterization of—well, it was Judge Goddard's, really, and I took it over from him—of the claims of the Government. You have to defend yourself against them, but you cannot do it by asking questions like that.

Mr. Proskauer: I guess the policy seems to be to take your Honors seriously.

By Mr. Caskey:

Q. Mr. Thalhimer, in your judgment in the operation of your business in Virginia, would you be in any way benefitted by the divorcement of the theatres which Twentieth Century-Fox has an interest in from that company? A. No, we would not be benefitted.

(1915)

Mr. Caskey: You may inquire.

Cross-Examination by Mr. Raftery:

Q. Just one question to follow up what Mr. Caskey was asking you: Would you like to enter into a bidding contest with Loew's for Fox's first-run product in Richmond? A. No, sir, we would not.

Q. If the picture were sold on the auction block in that manner, could you, as an independent exhibitor, survive, or any independent exhibitor?

Mr. Wright: Now, if the Court please,——

Judge Hand: Objection sustained.

Mr. Raftery: That is his complaint in the Schine case.

Cross Examination by Mr. Davis:

Q. Mr. Witness, pictures never are sold on the auction block, are they? A. No, sir, they are not.

Judge Hand: I think defense counsel are getting more frivolous than I am.

Mr. Proskauer: I never heard the suggestion that your Honor was frivolous.

Judge Hand: I have heard it.

Mr. Proskauer: Well, I do not want to go down

(1916)

the peninsula, but I want to follow Mr. Raftery's lead, which is a good lead to follow, and I want to make his question that was incompetent, competent.

By Mr. Proskauer:

Q. What would be the effect on business if an attempt was made to sell pictures by putting them out and having competitive bidding on each picture or on each two or three pictures?

Mr. Wright: If the Court please, there is not anything to indicate that he would possibly know what the effect would be.

Judge Hand: I do not see that it is competent.

Mr. Proskauer: Your Honor, our difficulty is that it seems to us an absurdity, and yet we have indications that that is the Government's claim, that there is something sinister in the fact that we do not go around with every picture and say, "Who will give us the biggest percentage on this picture?"

Mr. Wright: To the defendants the whole theory of competition is absurd. There is no question about that. They simply do not believe in that. There is no use arguing over that.

Judge Hand: I will allow him to answer this question, if he can make any answer to it. It does not do much good to answer such a question practically yes or no, unless he has got some rationaliza-
(1916a) tion of it.

Mr. Proskauer: That is why I asked him a question that did not call for a yes or no, but called for a description of it.

Do you understand the question, Mr. Thalhimer?

The Witness: I would like to hear it again.

(1917)

Q. It has been suggested here that there is some reason why pictures should be offered generally around in competition and competitive bidding asked for from exhibitors like yourself. Will you tell the Court what in your judgment that would result in the market and whether it would be good or bad for you as an independent? A. We have three first-run theatres in the City of Richmond which we have to operate 52 weeks. We charge a uniform price for the 52 weeks of the year. When we get a picture like State Fair, which is, we will say, a very extra fine picture, the people will have to come. The next week it might be a very mediocre picture but the public pay the same 55 cents for 52 weeks in the year. We do not have a theatre as big as 2200 seats. Our largest theatre is 1350 seats. The net result of the sale of each picture on its merits would be that Loew's theatre with 2200 seats could and would buy all of the big pictures like State Fair, that type of picture, Dolly Sisters, and leave us to any picture—to run our theatre with lesser pictures both of the Fox product—product that we deal with, and the lesser pictures, the lesser product of the Metro product which would mean that the bigger the theatre the higher price perhaps they could pay and the smaller theatres

would have to operate, I think, with very much inferior product, and it would hurt the business materially.
(1918)

Q. Then you find that in order to serve the great runs of large but still smaller than the largest theatres, you have to be in a position where you can make permanent arrangements with the source of supply? A. Yes, sir.

Q. That is really the essence of what you are saying? A. I think it is, yes.

Q. And if you were to reduce the situation to where every producer had to go out and say, "Who will pay me the biggest price for this particular picture?" it would work very much to the disadvantage of independent operators like you? A. Yes, I think so.

Mr. Caskey: Mr. Wright.

Cross Examination by Mr. Wright:

Q. Mr. Thalhimer, were you served with a subpoena in this case? A. No, sir, I was not.

Q. You just came up here voluntarily by arrangement with the defense counsel? A. Yes, I was asked by Mr. Smith if I would come up, and I told him I would.

Q. Mr. Smith, who is that? A. Mr. A. W. Smith of Twentieth Century-Fox.

Q. Can you give us a general idea of how many theatres you have altogether and where they are, what your position is in the business generally? A. Our company and its subsidiary companies operate 29 theatres in the State of Virginia, ten of them in Richmond, five of them in Petersburg;
(1919)
the other towns are South Boston, Pulaski, Farmville and Arlington, Virginia, and Falls Church, Virginia.

Q. You have, do you, all of these theatres in those towns you have named other than Richmond? A. Generally, yes.

Not a hundred per cent, say. In Arlington we have some competition.

Q. There is another theatre there? When did that open up? A. Well, it is built there. Shirlington theatre.

Q. The what? A. Shirlington theatre.

Q. Has it opened? A. Well, it is about to open. It may be open. I am not sure.

Q. I mean, as of now, at least there are no competing theatres in any of your towns outside of Richmond, is that right? A. Well, we consider Arlington, Mr. Wright, a suburb of Washington, which it is, and we are in competition with the Washington theatres, which are first-run theatres.

Q. I understand that. A. And we are in competition with Alexandria, which has a certain clearance over our Arlington theatres. In the other spots we have no competition except the nearest large city.

Q. Yes. In this Richmond set-up you say you operate three first-runs there in which you play the features, and then you have another first-run where you play the Westerns, (1920)
is that right? A. Play the what?

Q. Did you say you had a first-run Western house? A. Yes, action house.

Q. Action is the name you employ? A. Yes.

Q. What are the other first-run theatres? You say Loew's and the others are pooled between Loew's and Fabian, are they not? A. They may be. I have no personal knowledge of the pool. I have heard of rumors that they were pooled.

Q. How many of those are there? A. There is Loew's and there is the Colonial and National, first-run theatres. And then they have a first-run action house, the Park theatre, which is similar in every way to our first-run action house, the Grand.

Mr. Davis: What do you mean by an action theatre?

The Witness: A theatre that generally plays Western pictures and melodramas and pictures with lots of action.

Q. So that the set-up you have there is that Loew's and Fabian then have three first-run houses and what you call an action house, and you have the same thing? A. Yes.

Q. And that major product is split there between your houses and the Loew and Fabian houses how? That is, what do they play? A. Loew's theatre has always played Loew's and United Artists, and the Wilmer and Vincent theatres have played Paramount and Warner Bros., and our theatres have played Fox and RKO, Columbia and Universal. (1921)

Q. And the have Loew, Paramount, Warner and United Artists then, is that right? A. Yes, our competition.

Q. They play the first-runs over there? A. Yes.

Q. They charge the same admission price as you do? A. Yes.

Q. In the first-run? A. Yes.

Q. Then there is one situation I think you mentioned there, where there was a subsequent run house that charge 40 cents. What theatre was that? A. Carillon.

Q. That is a Fabian or Wilmer and Vincent house? A. Yes, sir.

Q. That plays what, second-run of the pictures that play in the Loew and Fabian houses first-run? A. Plays sub-run.

Q. What is the difference? A. Well, there is very little difference, Mr. Wright, except that these two downtown action theatres, the Park or the Wilmer and Vincent and the Grand of our company, if they play any of the big pictures second-run, they can get them thirty days in back of the first-run, while all the other theatres in Richmond, which are sub-

runs, must wait 45 days. That is the reason I said the Carillon was a sub-run rather than a second-run.

Q. But it actually plays on second-run on pictures which (1922)
play downtown in the first-run in the Loew and Fabian houses? A. It plays sub-run on those pictures. In other words, those pictures that play the Loew and Wilmer and Vincent houses, may play the second run in their Park theatre before they reach the Carillon.

Q. That is, those action houses you referred to operate on a mixed policy? A. Yes.

Q. And they play Westerns first-run, then they may play a second-run on some of the pictures that come off the first-run houses? A. And if they want to play them, they play them before the Carillon or any sub-run theatre.

Q. This Carillon then plays what product, the same pictures that Loew and Fabian play first-run? A. Yes, sir.

Q. That theatre, is that in the same section of the town where any of your theatres operate? A. It is practically next door to our Byrd theatre, which is our largest first-run theatre.

Q. Your Byrd, that is in the same playing position on the product that you play first-run in your first-run houses? A. Our Byrd is a first-run theatre. It adjoins our Byrd theatre, which is a very important first-run theatre of ours.

Q. Your first-run theatres are divided between—that is, one of them is in the outlying section and two are downtown, is that it, or the other three? How are they distrib- (1923)
uted geographically? A. Well, the only downtown first-run theatre we have is the State theatre, and then the Byrd theatre is uptown, and the Capitol theatre is also uptown; the Grand theatre, the action house, is also downtown.

Q. I was wondering whether there was any—then you don't have any subsequent run house there that is in direct

opposition to that 40-cent theatre there, is that right? A. No, sir, we do not.

Q. And is there any immediate opposition to any of your subsequent-run houses?

Mr. Davis: What do you mean by immediate opposition?

Mr. Wright: Subsequent-run houses playing in opposition in the same neighborhood.

A. I would say the correct answer to that would be no. They aren't too close to each other. That Carillon theatre, for example, is within about twelve or fourteen city blocks from our West Hampton theatre, but they are in different residential areas and we don't consider it too close.

Q. Other than that subsequent house that you call the Carillon, that Fabian operates, there are then no other subsequent-run houses in the city but yours? A. Oh, no; the Fabians also operate the Lee theatre, which is a very fine (1923-A)

sub-run theatre, and Ben Pitts operates two sub-run theatres.

Q. The Lee theatre is where with reference to your theatres? A. The Lee theatre is about 1200 west, and their Carillon theatre is about 2800 west, and our Capitol theatre is about 2400 west.

(1924)

Q. That Lee Theatre charges what price? A. 29 and 6; same as most of the other sub-runs charge, 35.

Q. 35-cent price. This other fellow you named, that has two, he is an independent? A. Yes.

Q. Where does he play? A. What does he play?

Q. Where? A. Well, his theatres are spotted on that map in the section of the city known as Church Hill, which is generally in the eastern part of the city. The theatres that you have been talking about are in the western part of the city.

Q. You have no first-run or subsequent-run in the eastern part of the city? You have no theatres in that section of the city? A. No, he is nearest to our South Richmond theatres, which would be the closest to Mr. Pitts' East End theatres.

Q. Does he follow your theatres, or how does he play with reference to yours? A. All of the pictures are made available 45 days after the completion of their first-run to all these sub-runs.

Q. That is, you have open booking? A. They could be played day and date in the East End and the Carillon and in South Richmond.

Q. After the 45-day period? A. That is right.

Q. Those sub-runs all charge the same admission price except the Carillon? A. No, sir, we have a sub-run in South (1925)
Richmond, the Ponton, which charges 25 and 5. Our Ponton and Venus theatres are almost 100 feet of each other, and we play the better pictures at the Venus and the slough pictures at the Ponton, so the Ponton charges are 30 cents against 35 cents for the Venus. There is another independent theatre in the eastern end of the city that I forgot to mention, the Star theatre. That also charges 30 cents.

Q. He plays what kind of pictures? A. He plays the same kind of pictures as all the sub-runs, what he wants of them.

Judge Bright: Is there any difference in clearance on the 30- and the 35-cent theatres?

The Witness: No, sir, none that I know of.

Q. The pictures are made available to all the independent houses 45 days after first-run? A. I think that is so.

Q. In that case, regardless of the differentials there that you mentioned? A. I think that is so, yes.

Mr. Wright: If the Court please, my attention has been called to the fact that we have in the file some

correspondence with this witness, and I would like to look at it before completing the cross-examination. We were not notified that he was to be a witness, and I would like to have a recess or defer cross-examination,
(1926)
so I may look at that material.

Judge Bright: How long has that system of clearances existed there in Richmond, the one that you were speaking about, the 30 and the 45 days?

The Witness: To my personal knowledge, ever since I have been in the business, which is 19 years.

Judge Bright: Has there been any change at all in that time?

The Witness: No, sir.

Judge Bright: In any of the clearances?

The Witness: No, sir.

Judge Bright: They were established before you started theatre operation?

The Witness: Yes, sir.

Judge Hand: Would you like to have a little recess to look over the file now?

Mr. Wright: I would appreciate that, yes, your Honor.

(Short recess.)

By Mr. Wright:

Q. This question whether you can compete successfully or not depends, does it not, on who your competitor is, to some extent, isn't that right? A. I think so, generally speaking.

Q. You do not worry about competition in buying films
(1927)
or anything else, when you are dealing with somebody else approximately your own size or smaller, or someone who has

no assured film supply, isn't that right? A. I don't know that I fully understand your question.

Mr. Wright: Will you read it?

(Question read.)

Mr. Wright: "who has an assured film supply."

A. Speaking only for myself, we are not worried about buying film and never been worried about buying films.

Q. Never been worried about competition in Richmond? A. No, sir, we have never worried about our competition in Richmond.

Q. What is the name of the corporation you operate your neighborhood theatres there under? A. Neighborhood Theatres of Virginia, I believe. There are a number of subsidiary corporations that operate different theatres, Mr. Wright.

Q. Yes, but the one you use to operate the neighborhood houses in Richmond is Neighborhood Theatres, Inc., or do you have several subsidiaries that operate in Richmond? A. Several subsidiaries that operate in Richmond.

Q. Neighborhood Theatres, Inc. operates which of the theatres? A. Neighborhood Theatres, Inc. don't operate any theatres. Neighborhood Theatres of Virginia operates several of the first-run theatres.

(1928)

Q. What is the name of the corporation that operates your subsequent-run theatres in Richmond?—corporation or corporations. A. The State Theatre is operated by a company called Victor Theatre, Inc.; Venus Theatre is operated by the Venus Theatre, Inc., and there are a number of corporations.

Q. How about the Bellevue? A. The Bellevue is operated by a company, either the Bellevue or the Rappahannock Theatres, Inc.

Q. That is located on Rappahannock Street, is it? A. Yes.

Q. Do you recall a former employee of yours who organized what was called the Willow Corporation? A. Yes. I do.

Q. What was his name? A. His name was Elmer Bryant, or E. H. Bryant.

Q. He had also been employed by Loew's there at one time, too? A. Yes, he had.

Q. And do you remember back in 1940 the Willow Corporation started to erect or had actually erected another theatre on Rappahannock Street there near your Bellevue? A. Yes, I do.

Q. What was the name of that theatre? A. The Ginter.

Q. Then in 1940 they were in the process of erecting another theatre on Grove Street, near your West Hampton (1929)
Theatre? A. Yes, sir.

Q. And then there were plans under foot, were there not, by the Willow Corporation to put some other subsequent-run theatres in against the ones you operated there, isn't that right? A. There were very strong rumors to that effect.

Q. And you knew, did you not, that the Willow Corporation was being backed by Loew's and Wilmer and Vincent, isn't that right? A. Yes, I knew that eventually.

Q. As a matter of fact, you had consultation with representatives of Loew's Inc. and Wilmer and Vincent about that threatened invasion of your suburban territory there; do you recall that? A. Yes, I had several talks with their representative.

Q. And the upshot of those talks was that you paid them both a substantial sum of money, isn't that right?

Mr. Davis: What was that?

(Question read.)

A. The upshot of those talks was that we bought the assets of the Willow Corporation, if my memory serves me correctly, not for a substantial sum of money, as I recollect, but for the amount of money that they had invested in it, which was, from recollection, reasonably close to something under $14,000.

Q. What you did was that you paid Loew's $6,794.43 and $6,794.44 to Wilmer and Vincent, isn't that right? The (1930)
figures sound right to you? A. That is approximately $14,000, yes.

Q. And after you made those payments then the theatre construction ceased and that theatre was half completed, isn't that right? A. That is right.

Q. And then you have not been troubled with any competition from Loew's or Wilmer and Vincent in Richmond since that time, have you? A. We got as much competition as we have always had. They have always been our competitors.

Q. At least they have not made any further efforts to move into your neighborhood area? A. That is correct, sir.

Mr. Wright: I think that it all.

(Witness excused.)

Mr. Raftery: Stephen McGrath, called on behalf of United Artists Corporation.

STEPHEN W. MCGRATH, called as a witness on behalf of defendant United Artists, being first duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Q. Mr. McGrath, where do you reside? A. St. Albans, New York.

Q. How long have you been with United Artists Corpora-
(1931)
tion? A. 13 years.

Q. Judge Hand made a suggestion, during Mr. Caskey's examination of one of the witnesses, that each of the defendants prepare a chart similar to a chart that Mr. Caskey introdueed in evidence, where we would take what has been classified as the guinea pig picture and show the town, the state, the theatre, whether it is affiliated or independent, the film rental received and the play dates in the 92 situations that the Government has been talking about. By the way, Mr. McGrath, in the 92 situations furnished United Artists by the Government, there were actually 73? A. That is correct.

Q. So wherever we talk about 92, we mean 73? A. Correct.

Q. Did you at my request prepare such a chart? A. I did.

Q. And you are in charge of these records? A. I am.

Q. And this chart was prepared under your direction?
A. Right.

Q. I show you the chart and ask you if that is it?

Judge Bright: Will you tell us what Mr. McGrath's connection with United Artists is?

The Witness: Assistant contract manager.

Judge Bright: To contract what?

Mr. Raftery: All exhibition contracts.

(1932)

A. I prepared this list.

Q. That is the chart you prepared? A. Correct.

Mr. Raftery: I offer that in evidence.

Mr. Wright: Mr. McGrath, the figures here, are any of them different than those you supplied in response to the interrogatories——

The Witness: No, sir.

Mr. Wright: (Continuing) ——that the Government served?

The Witness: The schedules were prepared from the same records.

Mr. Wright: We have no objection.

Judge Bright: What is the name of the guinea pig?

The Witness: Stage Door Canteen.

(Marked Defendant's Exhibit UA-1.)

Mr. Raftery: I have a copy for the Court: I call your Honors' attention particularly to the film rentals.

That is all, Mr. McGrath.

(Witness excused.)

PAUL N. LAZARUS, called as a witness on behalf of defendant United Artists, being first duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Mr. Raftery: In connection with the last exhibit of the 73 situations, we played six independent and (1933) the balance were all played in affiliated theatres.

Q. Mr. Lazarus, where do you reside? A. I reside in Mahopac in New York.

Q. Outside of a few months in the year 1924, have you been with United Artists Corporation since it was formed in 1919? A. I have been with the company continuously except for a few months in 1924 and a part of 1925.

Q. You have held many positions with the company? A. I have, sir.

Q. And for the last dozen years you have been manager of the contract department? A. That is correct.

Q. And as such, every exhibition contract taken for the exhibition of United Artists pictures passes over your desk? A. Yes, or through my department.

Q. You also are the contact man between the sales department and the producers' representatives, are you not? A. That is correct.

Q. United Artists is engaged solely in the business of distributing motion pictures, is that right? A. Yes, sir.

Q. It produces no pictures? A. Produces no pictures.

Q. Merely to refresh your recollection I will ask you to refer to this and tell his Honors the names of the producers with whom we presently hold contracts or are distributing pictures for. A. David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, (1934)
Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Benenzal, Jules Levey, David Loew, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennett, Vanguard Films, Inc., Selznick International Pictures, Howard Hughes, Preston Sturges. Angelus Pictures, a corporation known as G.C.F., The J. Arthur Rank Pictures, California Pictures Corporation, Golden Pictures——

Q. That is Golden, isn't it, not Goldwyn? A. Golden, G-o-l-d-e-n. Golden Pictures, and Morey & Sutherland.

Q. Outside of Morey & Sutherland, all of those producers produce feature pictures? A. Feature pictures, yes, sir. (1935)

Q. During the period 1935-36 we distributed pictures for Samuel Goldwyn, did we not? A. Yes, sir.

Q. For Walt Disney? A. Yes, sir.

Q. And are they still producing pictures? A. They are still producing pictures but not releasing through United Artists.

Through whom are they releasing? A. I believe both of them are releasing through RKO.

Q. The pictures that we are handling at the present time, can you tell us whom some of the directors are that direct the pictures that we are handling? A. I am not quite certain whether all of these are in current release, but they are pictures that we have handled or that we are going to handle immediately.

Q. When you say "have handled" you mean during the past eighteen months and during the next eighteen months? A. That is correct.

Alfred Hitchcock, William Wellman, King Vidor, Sam Wood, Richard Wallace, Rowland V. Lee, Jean Renoir, Archie Mayo, Frank Tuttle, Allan Dwan, Edward Marin, Frank Lloyd, Arthur Lubin, Gregory Ratoff, Gabriel Pascal, David Lean, Douglas Sirk, Albert Lewin, Harold Schuster, Preston Sturges, Laurence Olivier.

Q. Can you tell us the names of the stars that have appeared in these current and immediately future pictures? (1936)

A. Ingrid Bergman, Gregory Peck, Joseph Cotten, Jennifer Jones, Shirley Temple, Jane Russell, James Cagney, Linda Darnell, Sylvia Sidney, Barbara Britton, Marie McDonald, Greg McClure, Dennis O'Keefe, Burgess Meredith, Claudette Colbert, Fred Allen, Don Ameche, Charles Laughton, Paulette Goddard, Randolph Scott, George Raft, Victor McLaglen, Betty Field, Zachary Scott, J. Carrol Naish, Marx Bros., George Sanders, Jane Powell, Constance Moore, Ralph Bellamy, Constance Bennett, Gracie Fields, Laurence Olivier, Vivien Leigh, Claude Rains, Rex Harrison, Constance Cummings, Harold Lloyd, Hurd Hatfield, Francis Lederer, Akim Tamiroff, Signe Hasso, Gene Lockhart, Ruth Hussey, Rhonda Fleming.

Q. To complete the record, will you furnish us with the titles of the pictures that we are handling and will handle in the next immediate few months?

A. Picture called Spellbound.

Q. That is opening today? A. Opens today. Story of G. I. Joe. Duel in the Sun. Whistle Stop. Diary of a Chambermaid. Young Widow. Blood on the Sun. Angel on My Shoulder. The Southerner. Getting Gertie's Garter. Abilene Town. Scandal in Paris. The Sin of Harold Diddlebock. Tom Breneman's Breakfast in Hollywood. A Night in Casablanca. Blithe Spirit. Henry V. Caesar & Cleopatra. The Outlaw. Captain (1937)
Kidd, Paris-Underground. There Goes Lana Henry. Bedside Manner. Guest Wife.

Q. All these pictures are known in the trade as independent productions? A. Yes, sir.

Judge Bright: What period did that cover, those lists you have just read off?

Mr. Raftery: It will cover about twelve months back and about twelve months forward.

The Witness: That is correct, pictures in release and to be released very shortly.

Q. We handle between 20 and 26 pictures a year, isn't that about right? A. When we have a good year, yes.

Q. And we have handled as low as four? A. That is correct.

Q. In this group you have mentioned, I notice a number of British pictures? A. Yes, sir.

Q. As a matter of fact, United Artists have handled most of the important British pictures with two exceptions? A. We have handled British pictures for a considerable number of years and there was a time when—he is today Sir—Alexander Korda was one of the owners of United Artists Corporation.

Q. On that list that Mr. Frohlich had yesterday, he had a picture called "In Which We Serve"? A. Yes, sir.

Q. And Mr. Montague was unable to tell Mr. Wright the gross, domestic, of that picture? A. I believe the domestic
(1938)
and Canadian gross was about $1,600,000; I believe that is close to it.

Q. We have handled a number of other important British pictures and are handling them now? A. That is correct.

Q. I believe Blithe Spirit? A. Blithe Spirit is an English picture. Henry V. is English made. Caesar & Cleopatra are English made.

Q. Those are handled for the—— A. J. Arthur Rank Company.

Q. The J. Arthur Rank Company that you mentioned on your last part of your list of producers? A. Yes, sir.

Q. Now, Mr. Lazarus, will you tell the Court the manner and method of handling the solicitation of an exhibition license application, and what happens to it once the salesman is fortunate enough to get an exhibitor's signature on one? A. When a salesman negotiates a contract or an application, rather, for the public exhibition of one of our pictures, that contract comes through to the home office. If it bears the approval of the local branch manager or the division manager—district manager—it then comes to New York and we go over that contract in the home office. If the contract is a very important deal I will discuss it with one of the divisional sales managers, and if there is an agreement by the home office sales staff that the contract is a good acceptable contract, we then submit it to the producer's
(1939)
representative in New York. Under our method of distribution, United Artists merely sells—negotiates the deals, but the contracts are finally subject to approval by the representative of the individual producer. He either approves the contract as we have submitted it, or he rejects the contract. If we feel that his rejection is open to question, we

will discuss the contract with him, but in the last analysis his decision is final. If the contract is rejected, it is returned to the branch and there is no deal.

Q. Mr. Lazarus, are you familiar with the provisions in the various distribution agreements that we have about the right of each producer to approve or reject his own contract? A. That is in our exhibition contract.

Q. But I say you are also familiar with the provisions in the distribution contract? A. In the distribution contract, yes, sir.

Mr. Raftery: With Mr. Wright's indulgence, I intend to put this contract in through the next witness, if I may be permitted to show it to the witness, so we can read into the record just the important parts, and perhaps not to have to put the whole thing in.

Q. I have here, Mr. Lazarus, a contract dated April 10, 1944, with Bing Crosby Productions, Inc., for the marketing of a picture called The Great John L, and I call your attention to the first two paragraphs under "United's obligations," and I will ask you to read those two paragraphs. They are very short. A. Under "United's Obligations," "United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United."

The second paragraph: "United will use its best efforts to procure prices, license fees and rentals in a fair and open market reasonably satisfactory to the producer."

Q. I call your attention to the provision on page 12 regarding exhibition contracts, and I ask you to read it into the record. A. "Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered herennder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to include more than one motion pic-
(1941)
ture on a contract, the producer authorizes United to market its product in accordance with that custom. In no event, however, shall any motion picture of the producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set out the respective license fees for each motion picture after the name of such motion picture.

"United agrees upon the written direction of producer that United shall market wherever permissible the motion pictures designated by the producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom."

Q. In the United States, on a few occasions, master agreements have been made with circuits both affiliated and unaffiliated, where in the original deal more than one picture has been included in the master contract? A. I believe, though, that those were all of the same producer. In other words, a deal, if my recollection is correct, I think that a deal
(1942)
—a master agreement that covered two or three or four pictures, those would be the pictures of the same producer, as, for example, Edward Small, where we distribute four or five

pictures made by Mr. Small in one season. I am not positive, I would have to search the record, but I don't think—I think we have an individual master agreement for each producer.

Q. Let us assume you do not, would you have individual deal sheets? A. We would have to have individual deal sheets and individual approval from any two producers who might have been on the same agreement.

Q. And you would submit to the producer's representative the deal sheets? A. For his—

Q. Which had his picture on? A. His picture only.

Q. For his approval or rejection? A. That is correct.

(1943)

Q. Now I call your attention to the next provision—that is the "Producer's Right of Approval of Exhibition Contracts," and I ask you to read the provision. A. "The Producer shall have the right to designate a representative for the territories hereinafter specified. The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	Central Location
United States and Canada	New York
British Isles	London
Australasia	Sydney

"Producer agrees that submission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

"If the Producer has designated such a representative for any such territory United shall submit for his approval or rejection each proposed written contract for the distrib-

(1944)

uting, exhibiting or marketing of such Producer's motion pictures or any of them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

"Should the Producer or its representative reject any such proposed contract the Producer or its representative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

"Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition or marketing of any motion picture in any specified theatre or situaton,

(1945)

United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval.

"The Producer agrees that United need not in any event submit contracts with exhibitors in licensed agency territories."

Q. Now, has this practice of producer representation been in the company since 1919? A. There has never been any deviation from that since the day the company was organized.

Q. Outside of the one picture that the company handled for William S. Hart, hasn't every picture had a producer's representative approve or reject every contract? A. Yes, sir.

Q. And that was in 1925? A. Hart?

Q. Yes. A. Yes.

Q. Now, at the time of the commencement of the company, you were distributing the releases of Miss Pickford, Mr. Chapman, Mr. Fairbanks and D. W. Griffith? A. That is correct.

Q. And ever since the commencement of the company, the company has tried to handle quality feature pictures as distinguished from program or second feature type pictures? A. Yes.

Q. Mr. Lazarus, how many exchanges do you maintain in the United States? A. In the United States we have 26 (1946)
exchanges. Six in Canada.

Q. Well, 26 in the United States? A. Yes.

Q. I think the testimony as to the other companies has been that they have 31 or 32. A. Well, there are several situations where other companies maintain exchanges in which we do not opearate an exchange. For example, Portland, Oregon; we serve out of our San Francisco and Seattle offices. We have no exchange in Portland, Oregon. We have no exchange in Oklahoma City. We have no exchange in Memphis.

Q. Albany? A. Albany and New York has no branch office. That is four. That is a total of 30. Some of the other distributors may have exchanges in places like Butte. There was a time when some of the distributors maintained an office in San Antonio; some maintained offices in Jacksonville. We do not.

Q. And each year you have handled somewhere in the neighborhood of 20 to 26 pictures? A. In recent years that has been so, yes.

Q. Do you as a general rule have a separate contract for each picture for each exhibition and each theatre? A. That is correct.

Q. Unless you make a contract like the 63 situation contract that is referred to in the Sudekam case? A. Yes, there are what are called blanket contracts which will cover all of

(1947)

the situations operated by an operator who has more than one theatre, or the other exception would be——

Q. But for only one picture? A. For only one picture, except, for example, at the present time, we are distributing and currently marketing two pictures for one producer. I am referring to It's In The Bag and Guest Wife. There the same producer had the pictures; so if we can sell both pictures it is O.K. with him to have us put them both on one contract; but that is exclusively within one producer organization.

Q. During the year on an average how many exhibition contracts would cross your desk? A. Well, we average anywhere from ten to twelve thousand contracts on a picture; and my mental arithmetic isn't very good, but multiply that by about 20, and that would be of a current season's release. Now, we do not stop selling pictures when the picture is a year old; so I would say that our contract department and my desk clears all of that volume of business.

Q. Three to four hundred thousand contracts? A. Three to four hundred thousand contracts.

Q. Each year? A. Each year.

Q. And that is domestic only? A. United States and Canada only.

(1948)

Q. You classify Canada as domestic? A. Domestic.

Mr. Raftery: Mr. Wright, will you make the same stipulation that if this witness were asked the same questions that, I believe, the first witness on the trial was asked as to conspiracy, he would give the same answers?

Mr. Wright: It is so stipulated.
Mr. Raftery: Thank you.

Q. Mr. Lazarus, within this past week has United Artists had five pictures showing first-run on Broadway? A. Yes, I believe we have.

Q. Guest Wife? A. Guest Wife; GI Joe is playing; Blythe Spirit is playing——

Q. Spellbound? A. Spellbound opens today. That is four.

Q. And at the Gotham. What is at the Gotham? A. Pardon me?

Q. What is at the Gotham? Paris Underground? A. Is Paris Underground still playing there? I knew it was in the house. I didn't know whether or not it had terminated.

Mr. Raftery: Are there any question?

Cross Examination by Mr. Proskauer:

Q. You had pictures showing first-run at five independent New York theatres in the last week? A. Yes, sir.

Q. Those are large Broadway theatres? A. Yes, they (1949)
are representative houses, representative first-run houses.

Q. And you sell first-runs to affiliated theatres also? A. Oh yes.

Cross Examination by Mr. Seymour:

Q. Do you license United Artists pictures to some of the theatre-operating companies in which Paramount has an interest? A. Yes, sir.

Q. Are you familiar with where the negotiations for those licenses are conducted? A. Well, I do not sit in on those negotiations myself but I know where the contracts come from to me. For example, any contracts for the Minnesota

Amusement Company come in from Minneapolis. Contracts for the Kincey Circuit will come in from the Charlotte office, and so forth.

Q. Do you know whether it is generally the fact that the negotiations for the licensing of United Artists pictures in such of the theatres of the various operating companies as do license United Artists pictures are conducted with those companies at their home offices?

The Witness: I did not quite get your question.

Mr. Seymour: Will you read that, Mr. Stenographer.

Q. (Read.) A. With those companies at their home offices? Yes, that is correct.

Mr. Raftery: Are there any other questions?

(No response.)

(1950)

Mr. Raftery: All right, Mr. Wright.

Cross Examination by Mr. Wright:

Q. Mr. Lazarus, you have in United Artists a general sales manager, do you not, or somebody in charge of sales? A. Yes, we have a general sales manager, Carl Leserman.

Q. And I suppose he is the man, is he not, who is in charge of the actual negotiation of contracts? A. Well, he does not actually negotiate many contracts. We have division managers, district managers, and a great—oh, the fewest—I would say that the fewest deals that have come into the home office are brought to Mr. Leserman's attention.

Q. Well, I just wanted to get what your sales setup was. You have your branch manager and your salesman in each of the branches? A. Yes.

Q. And then you have district managers over there too? A. District managers and division managers.

Q. And the district managers are in the field? A. Yes, that is correct.

Q. And each one has a group of exchanges under him? A. That is correct.

Q. And then you have division managers too? A. Yes.

Q. And those are here in New York? A. They are located here in New York.

Q. How many do you have? How do you have it divided
(1951)
up? A. We have three division managers here in New York.

Q. How do you divide your divisions? A. One of the division managers has supervision over the four southern offices. That is Charlotte, Atlanta, New Orleans and Dallas.

Q. Those are the four southern district offices? A. That is the southern district; and he also supervises our selling in Canada.

The eastern division manager has, I would say, roughly the branches located east of the Mississippi. That is not the exact setup, but that is roughly it.

Then we have another one who operates or supervises the branches in Chicago and the west.

Q. And on top of those is Mr. Leserman, the general sales manager? A. Yes.

Q. And he reports to whom? A. Well, Mr. Leserman's contact would be through me with the producer's representative.

Q. No, above him in the hierarchy in the company. A. Well, the hierarchy in the company would represent Mr. Sears, Mr. Raftery and the board of directors.

Q. That is, Mr. Sears is the vice-president in charge of sales? A. Yes, vice-president in charge of distribution.

Q. And Mr. Raftery is president? A. Mr. Raftery is president of the company.

Q. Now, in selling the independent exhibitors, that, I
(1952)
suppose, is principally done by the salesmen and the branch

managers in the branches as they solicit the business? A. Well, it all depends on the importance of the account, regardless of whether we would call it an independent exhibitor or what I have heard called an affiliated account, if the account is a sufficiently important account from the standpoint of revenue, then the district manager or the branch manager would handle it. The accounts of lesser monetary importance are handled by the salesmen.

Q. And I suppose the most important are the division managers? A. Well, they on occasion will go out in the field and negotiate with the district managers.

Q. Now, I think you gave us some figures on gross business on the picture The Invaders. Don't you have any breakdown in the United States? A. Pardon me, I didn't give you any figures on The Invaders.

Q. Oh, what was the picture? A. In Which We Serve. We did not release The Invaders. I know nothing about that.

Q. Well, you gave us a United States and Canadian figure. Don't you have your figures broken down between United States and Canada?

Mr. Raftery: To save time, may I interrupt? We did not distribute that picture in Canada, In Which (1953)

We Serve. I am sorry that he said that. That is the domestic figure.

Q. In any event, you also released, did you not, a number of others of those pictures on the list that Mr. Frohlich put in evidence the other day? A. Some of those picture we released, yes.

Q. And can you give us the domestic grosses on those pictures? A. No, sir, I can't from memory. They are available but I have no——

Q. I say, could you get that for us? A. They could be obtained, certainly.

Mr. Raftery: If you will give me the list I will phone up and get the figures.

Mr. Wright: Now, I shall ask to have this marked for identification.

(Marked Government's Exhibit 382 for identification.)

Q. I will show you this photostat of a letter from United Artists Corporation to Warner Bros. Circuit Management Corporation, dated September 30, 1936, and ask you if you recognize that as one of these so-called master agreements that were referred to on your direct examination? A. Yes, it appears to be a master agreement.

Q. And that covers all of your product for the 1936-37 season of all producers? A. Yes, with each producer's pictures stipulated by the producer named.

(1954)

Q. I will call your attention to these provisions on page 3 as follows:

"The following is our understanding with reference to the eight pictures designated at 35 per cent"——

Mr. Proskauer: Mr. Wright, I would like to hear this, please.

Q. (Continuing) "The following is our understanding with reference to the eight pictures designated at 35 per cent:

"We are to receive 35 per cent if any or all reach the average gross attained by the two pictures from Fox, two from RKO, two from Paramount and two from Warner Bros. nationally designated to play at 35 per cent during the season of 1936-37. On those pictures designated at 35 per cent we are to receive 50 per cent of the excess receipts over and above the aver-

age described above. On such of these 35 per cent pictures that do less than the above described average, the percentage is to be reduced down to the minimum of 30 per cent of the gross—in steps of one per cent of the film rental for each three per cent less than said average gross, computed in the same manner as the 30 per cent group outlined below."

Now, that refers to grosses throughout the circuit? (1955)

A. On those so-called yardstick pictures——

Q. Yes. A. Grosses for the same situations that we are selling for; I presume that is it.

Q. Well, your terms here just specify percentages and the agreement does not refer to any particular runs or theatres. I think the only agreement as to that is on page 4 here, is it not, with reference—— A. Well, as I stated before, Mr. Wright——

Mr. Wright: Let me finish.

The Witness: Pardon me.

Mr. Proskauer: Mr. Wright, is the paper you are reading from that letter that I handed Mr. Neisley yesterday or the day before? I can't hear you and I am trying to just identify what you are reading from.

Mr. Wright: The letter was obtained from Warner Bros. I do not know whether you handed it or someone else.

Q. I call your attention to this provision on page 4 with reference to playing time:

"It is understood that the eight pictures designated at the top terms are to have preferred playing time. Playing time for all other pictures is to be agreed upon between Mr. Bernhard and Mr. Schaefer in the event

the local representatives of United Artists Corporation and Warner Bros. cannot agree."

(1956)

Apparently this agreement simply left the actual determination of playing time with respect to amount of theatres to local representatives. A. Not the amount of theatres, Mr. Wright. It would leave the matter of whether or not a picture shall have preferred playing time or in situations where they have a flexible policy, how many days the picture shall play. If the local branch office and the local Warner bookers did not agree, then it could be referred to Mr. Schaefer and Mr. Bernhard.

Q. Well, I was trying to determine from the agreement the extent of the coverage there. I wonder if you could read it and tell me what theatres were supposed to be covered by the agreement? A. As I testified a little while ago, in the case of a master agreement of this sort, this is supplemented by so-called deal sheets broken down for each producer in which all of the theatres are listed, and the minimum playing time is included. So that this is merely a setting forth of the terms without the actual number of days to be played.

Q. I understand that merely sets forth the general terms, and it is to be supplemented by further specific agreements; but I wondered if you could tell me what the extent of the coverage in that general agreement before you is. That is, that is for the whole Warner Circuit. A. That is for the Warner Circuit.

(1957)

Q. And these percentages that are referred to in there are the percentages realized throughout the circuit, is that right? A. I believe it is a circuitwise percentage, although I am not sufficiently familiar with this particular deal at this late date to know whether this was situation per district or whether it was circuitwise. I would have to search a little further on that, Mr. Wright.

Mr. Wright: I don't think I will be able to finish with this witness before lunch.

Judge Hand: All right. We will take a recess until 2:15.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

PAUL N. LAZARUS resumed the stand.

Cross-Examination Continued by Mr. Wright:

Q. Now, Mr. Lazarus, this Exhibit 382 for identification, this master deal with the Warner Circuit I was examining you about before the recess, there is nothing unusual about that deal in so far as your dealings with the affiliated circuits is concerned, is there? A. I don't know what you mean by that, Mr. Wright.

Q. Well, you make similar master deals——

Mr. Davis: If the Court please, this confidential conversation does not get out into the room at all, and (1958)

I would be very happy if Mr. Wright would speak up.

Judge Hand: Yes. I think you will have to stand over there and make more noise, Mr. Wright. It is very difficult to hear you.

Mr. Raftery: Let us hear the question, please.

Q. (Read.) A. Well, this deal with the Warner Bros. Circuit in 1936 is not necessarily like any later deals that we have made with Warner's or any of the other circuits.

Q. I understand you have different terms, but even since then you have from time to time made master deals which cover the entire circuit—— A. We might have made master deals——

Mr. Davis: One at a time, please.

A. (Continuing) —that cover the entire circuit for one picture, for two pictures; but this is an old letter, and I, without going over it and comparing it with later deals, I would not want to make a statement of that sort.

Q. Let us take this Exhibit 272 that is in evidence. Those, I believe, are some deal sheets and relate to some 1943-44 pictures, are they not, that you licensed to theatres in Los Angeles, or Fox—— A. Well, you have got one—you have got two pages here of deal sheets that cover Stage Door Canteen, one picture.

(1959)

Q. In Los Angeles first-run, is that right? A. In Los Angeles.

Q. Now, there is also a reference to a letter agreement there with a 1943 date, do you see that? A. Yes.

Q. It refers to it as attached, but it is not attached? A. Yes, but that substantiates what I said before, Mr. Wright, that these letters of agreement are substantiated by individual deal sheets for individual pictures which must be approved by the individual producer. That is what this is.

Q. I understand that; but I say that letter agreement that is referred to there, that actually is a letter agreement outlining general provisions which cover all of the theatres in the Fox Circuit, isn't it?

Mr. Caskey: No.

Mr. Raftery: Just a minute. You did not get that from us, did you?

Mr. Wright: That came from you, that is right.

Mr. Raftery: From our files?

Mr. Wright: Yes.

Mr. Raftery: Or from Fox?

Mr. Wright: From you.

Mr. Raftery: And nothing else came but that?

Mr. Wright: That came without the letter agreement attached. What we asked for was your first-run

(1960)

deal with Fox in Los Angeles, and we got the deal sheets but we did not get the master agreement.

Mr. Raftery: I told you a few minutes ago that I was sending someone to phone to try to find the letter.

Q. Well, in dealing generally with the theatres that are part of the Fox Circuit in the last few years, you have been accustomed to work out a so-called master agreement with Fox West Coast Agency which covers the general terms that are applicable to the Fox theatres in Los Angeles, those in San Francisco and those in Denver, and even those in Kansas City and Wisconsin, isn't that right?

Mr. Caskey: Objected to as calling for the contents of some document that is not here.

Judge Hand: Overruled.

A. This particular set of sheets, Mr. Wright, for the Los Angeles exchange covers first-run and move-overs for Stage Door Canteen. I do not see any other Los Angeles runs on that on Stage Door Canteen.

(1961)

Q. I understand that.

Mr. Wright: Will you read the question again?

(Question read.)

A. What I get, Mr. Wright, are the individual deal sheets for the different parts of these different territories that you have mentioned. If there is a master agreement in existence covering that, reference would be made on the deal sheets to

that, and we would check it when the deal sheets are received, but I don't want to say offhand there is a letter of agreement covering all these things.

(Marked Government's Exhibit 383 for identification).

Q. Here is an agreement dated September 1, 1941, between United Artists and Fox-West Coast Agency Corporation, marked Plaintiff's Exhibit 383 for identification, and I will ask you to look at that and tell me if you do not recognize that as the kind of over-all agreement that you have been making with the Fox-West Coast Agency Corporation on behalf of the various Fox theatre operating affiliates. A. This is an agreement made for the theatres, according to this paper in the States of California and Arizona, which deal sheets are attached hereto and made a part hereof, so that the deal sheets must have been attached to this for this particular territory, and unless I see those—well, there are several pictures mentioned in here that are covered by those (1962)
deal sheets, and those deal sheets would list the theatres and so forth.

Q. This agreement also covers all the producers, does it not? A. The producers are given—I don't know whether that covers all the producers or not. There are several producers who are listed separately.

Q. Then this reference on page 6——

Mr. Caskey: Are you going to offer it, Mr. Wright?

Mr. Wright: I want to examine him on it first. We will offer it, if you want it.

Mr. Caskey: Wouldn't it be better if you offered it and let us see it first?

Mr. Wright: You may see it, if you like.

Judge Hand: Go ahead with your examination. If he wants to see it, of course——

Mr. Caskey: I haven't seen it.

(Mr. Wright hands a paper to Mr. Caskey.)

Q. Perhaps I misunderstood the agreement. I notice that on page 6a it refers to test situations in Kansas City, Milwaukee, St. Louis, St. Lake City and Denver, and then it has a list of control figures opposite individual towns in each of those exchange areas. Now, the rental terms set forth in the agreement are dependent, are they not, on what the picture does in these so-called test situations? A. I (1963)
would like to see that, Mr. Wright, before I answer the question, because I am not sure.

As I understand it, these control figures represent the gross that the picture is supposed to achieve at the box office for the playing time that is listed under the column "per tenth." And if my memory serves me correctly, there would be what was referred to earlier as a sliding scale, in the event that the picture exceeded or did not equal these control figures, so that the ultimate terms would be based on the box office performance of the picture up to a certain figure and down to a certain minimum.

Q. The rental that Fox paid, let us say, in the Los Angeles area, then, would be determined in part by the performance of the picture in the test areas listed there, isn't that right? A. Yes. Whether that would cover the area or the first situation, I don't recall. I imagine it would be the area.

Q. That was characteristic of your dealings with the Fox circuit in the last few years? A. I don't know whether we have that kind of deal at the present time or not or whether we have had it since. This was dated September 1941.

Q. You do not yourself participate in the negotiations?
A. No, sir.
(1964)

Mr. Davis: If you are through with them, may we see them, Mr. Wright? You are not using this now?

Mr. Wright: I am offering it in evidence now.

Mr. Davis: If you haven't offered them, I will see them later.

Mr. Wright: I offer in evidence the agreement marked for identification as 383 and the one that Judge Proskauer has——

Mr. Proskauer: Take it and give it back to me.

Mr. Wright: (Continuing)—382 for identification.

(Government's Exhibits 382 and 383 for identification received in evidence.)

Judge Bright: Are those the so-called master agreements, both of them?

Mr. Wright: Yes, sir.

Judge Bright: With which companies?

Mr. Wright: 382, I believe, is a master agreement with Warner—that is, United Artists pictures in the Warner circuit, and 383 is a master agreement with Fox-West Coast Agency Corporation.

Mr. Proskauer: Mr. Wright, when you are through with 382 will you let me take a glance at it?

Mr. Davis: I would like to see both of them.

Mr. Wright: I think that is all we have with this witness.
(1965)

By Judge Bright:

Q. Mr. Lazarus, was there any master agreement with any other of the affiliated theatre group besides Warner and

the Fox-West Coast? A. I couldn't answer that without looking up our records. It covers a long period of time, and I have no direct recollection.

Q. Have you any master agreements with any independents? A. At the present time we have no master agreement with any independent that I know of, although we sell on a similar basis to the independents, that is to say, the so-called sliding scale, where a picture is paid for on the basis of what it produces at the box office.

Q. Have you had any master agreements in the past with so-called independents? A. Well, if you consider a franchise as a master agreement, there have in the past been master agreements with a company down——

Q. I am talking about agreements like these last two exhibits. A. Yes. In Florida we had a master agreement with the Wometco Company operating in Miami and in Miami Beach.

Q. When was that? A. I think that has expired. That expired two or three years ago. It was for a period of two or three years, I believe. We had a franchise with the United Artists Theatre in San Francisco, which theatre we don't own, but that was the name of the theatre, United Artists Theatre.

(1966)

We had a franchise out there which has expired, and we had a franchise, I believe, in Portland, Oregon, with J. J. Parker. That has also expired. And that was for a number of pictures, for a season's product, or longer, and a similar agreement.

Q. Have you any of the licenses that were given to any independent theatres in the territory where Fox-West Coast operated during the period of this master agreement that has been offered in evidence? A. Well, I haven't any of those here, but, for example, I referred to Portland, Oregon. That is a territory in which Fox-West Coast or Fox Evergreen

operates. That is the territory up in Portland and Seattle. We had a franchise there with J. J. Parker, which was a master agreement. And Fox does not operate in Florida, of course. San Francisco, we had a first-run agreement with the United Artists Theatre in San Francisco. Fox operates in that territory.

By Mr. Raftery:

Q. That was with Herman Cohen? A. Herman Cohen was the man with whom the license—the franchise was entered into.

By Judge Bright:

Q. Have you any license agreements here that were in effect at the same time as this Fox-West Coast master agreement, or with reference to the same picture? A. I have (1967)
brought nothing with me. I don't know whether they are in evidence or not.

Mr. Raftery: The Government has put a whole group of them in evidence. I don't know the exhibit numbers and I haven't seen them. The Stage Door Canteen contracts are all in.

Judge Bright: What I am interested in finding out is whether or not rentals are similar to independents as they are under this master agreement with Fox-West Coast with reference to the same picture.

Mr. Wright: I think we can clear that up by further examination. What we have put in evidence, if the Court please, were the deals, were samples at least, for the 1936-37 and the 1943-44 seasons that this company had made with each of the affiliates. What we offered as to the independents was simply the standard form. I take it, or at least I understood from the witness's examination on direct that——

By Mr. Wright:

Q. In making your ordinary deal with an independent or small theatre operator, you simply write it up on your standard form of agreement and you sell him the picture for a particular run in a particular theatre at a particular admission price on either percentage terms or a guarantee against percentage or flat rental, isn't that right? A. I don't (1968)
recall giving that testimony.

Q. That is the fact, isn't it? A. Well, no, I don't remember that that question was asked of me. There have been cases——

Q. Is or is it not the fact? A. If you are saying generally, that is the fact generally, but there are exceptions as there were in the case of Portland, Oregon.

Q. I assumed that Judge Bright's question was addressed to the general practice.

Mr. Wright: Is that what you wanted?

Judge Bright: I wanted to see whether or not you gave the same terms to independents for this picture that you gave to the Fox-West Coast under this master agreement which has been offered in evidence here.

Q. Can you answer that question? A. I could not answer that question without seeing the documents.

Q. That is, the terms would vary from situation to situation—— A. The terms would vary——

Q. (Continuing) —depending upon the kind of deal that was made? A. The terms would vary, not only pictures, but in different situations. I could not answer the question without seeing the papers.

Q. I assume in no case would the deal made with the independent be conditioned as this one is upon the performance of the pictures in certain Fox theatres, isn't that right?

A. If it was with an independent, it would have nothing to do with performance in the Fox theatres.

(1969)

Q. It would be generally based on the performance of the picture in his particular theatre, is that right? A. That is correct.

Judge Bright: I did not have any idea that his payment of rental on an independent theatre would be based on performance in any other theatre.

Mr. Wright: I was simply pointing out what I regard as one of the unique features of this particular agreement.

You say you wish to know whether there were any similar rental terms given to an independent. I assume from the witness's answer that clearly as to that particular term that was not in any independent's contract.

Judge Bright: You mean the compensation here was based upon the performance in some key theatre in that exchange?

Mr. Wright: Well, a series of key theatres in several exchange areas. The performance there determined the classification of the picture, and that, in turn, determined how much film rental was to be paid.

Judge Bright: What I had in mind was whether or not if they say they are to pay 35 per cent of that return—that is, Fox West Coast is to pay 35 per cent of that return for the use of that picture, whether or not an independent showing the same picture on the same run was charged 35 per cent or more, or less.

(1970)

Q. Can you answer that?

Mr. Caskey: San Francisco first-run and Los Angeles first-run, Mr. Lazarus.

The Witness: I would not attempt to answer that question from memory, because I can't.

Mr. Caskey: Or Portland first-run or Los Angeles first-run.

The Witness: I could not do that without reference to my records.

By Mr. Wright:

Q. In any event, I take it, Mr. Lazarus, there is no attempt even at uniformity of treatment in percentage or rental terms as between affiliated theatres and independent theatres, isn't that right? A. We don't recognize any difference. I try to get as much revenue for each of our pictures as we can, Mr. Wright, regardless of who buys it.

Q. That is right. You get the best terms that you can from any independent that you do business with, or anybody else, and you may come out with results which vary widely from situation to situation, isn't that right? A. Yes. With us, exhibitors are exhibitors, regardless of whether they are independent or affiliated.

Q. And you do not have any standard formula on which (1971)
you would offer to sell the independents pictures in any particular situation, isn't that right? A. We have no fixed formula to begin with. When we know something about a picture, Mr. Wright, we try from all theatres to get the maximum that we can.

Q. Yes. You get just as much out of every one that you can, and I suppose how much you get out of any particular exhibitor depends on whatever bargaining strength he has got as against the bargaining strength you have got, is that right? A. No, it depends on what the picture does at the box office. That is what ultimately decides what we get; and even within one group of theatres, as you refer to them there, the results may vary widely from town to town.

Q. I think Judge Bright was referring to the question of the particular percentage that you get on a picture. That varies from account to account, isn't that right? A. You mean the percentage terms on which the picture may be sold to begin with?

Q. That is, you may charge one exhibitor 40 per cent for a picture that you charge another exhibitor 35 or 30 per cent for, isn't that right? A. That is correct, as between one exhibitor and another exhibitor.

Q. Yes. A. That is correct.

(1972)

Q. There is no uniformity of percentage terms? A. There is a uniformity in our effort to begin with before a picture has actually demonstrated its value at the box office. Then you frequently try to get percentage terms, which you can't get because the picture has not measured up to your requirements.

Q. And you always attempt to get the maximum percentage you can from everybody? A. Yes.

Q. And your results vary widely in that respect? A. Yes.

Q. And they vary in the bargaining power of the various exhibitors involved, isn't that right? A. No, they vary based on the box office results.

Q. I am talking about the amount of percentage. A. Well, the amount of percentage on a sliding scale varies, depending on the business that the picture does. I mean, if you have a contract like these contracts you have shown me, the percentage terms, the ultimate percentage terms will vary, depending on the business that the picture does.

Q. And it is also true that the actual percentage terms that you get from theatre to theatre vary widely? A. From theatre to theatre, they do vary.

Judge Bright: You mean what you get varies?

The Witness: What we get varies, and also on occasion the initial terms on a contract vary. There

are some theatres that you just simply cannot get the
(1973)
asking terms for, and there are some pictures which do not live up to your original estimate of their value, so that if we start out to sell a picture, for example, at 35 per cent of the gross, that does not mean that you are going to be successful in all situations in getting 35 per cent of the gross. In other words, it is not a matter of 35 per cent of the gross or we don't make a deal. Ultimately we try to sell every account that we can.

Mr. Caskey: Mr. Wright, are you sure that this page 6-A was clipped in the original?

Mr. Wright: As far as I know, this is the way it came to me. You, I assume, have the original copy, don't you? I would be glad to have that substituted for this.

Mr. Caskey: It is on different paper.

Mr. Wright: Why don't you get the original then. Let us withdraw it and put the original in if there is any question at all about its authenticity.

Mr. Caskey: I think we should.

Mr. Raftery: I haven't got the original.

Mr. Proskauer: May I ask a question, with your Honor's permission.

By Mr. Proskauer:

Q. I want to develop a little more what I understand was implicit in Judge Bright's questions. When you start
(1974)
out to sell a picture, you determine what percentage of gross you would like to get? A. That is correct.

Q. Now then, when the picture begins to be sold, you discover sometimes that in certain situations you can ask a

larger percentage, and sometimes you are unable to get the percentage you start out with, and you have to take a smaller percentage? A. That is correct.

Q. Now is that difference in percentage determined by the fact whether an exhibitor is an affiliate or an independent? A. No, sir.

Q. That has nothing to do with it, has it? A. No, sir.

Q. It depends on factors like these, does it not, the box office of a picture, the character of the theatre, the seating capacity of the theatre, and the general admission price policy of the theatre, and various other business factors of that kind? A. That is correct.

Q. And you do not make one price for an independent and another price for an affiliate? A. No, sir.

Q. You make different prices, depending on these other factors that I have imported into my questions? A. Yes; those factors all enter into the price you can get.

Q. Now, I want to refer for just a moment to this Exhibit 382. That is the kind of thing you refer to as a master agreement, isn't it? A. Yes.

(1975)

Q. Now, without going into all the general terms of it, I call your attention to this phrase on the last page: "Deal sheets are to be worked out in each individual situation."

Now, have you got that in your mind? A. Yes.

Q. And what this so-called master agreement does is it outlines a general plan on which pictures that are to be sold under it are to pay, and how they are to run, and certain other general terms that are to be applicable to all pictures sold under this agreement? A. Yes.

Q. But no picture is actually sold under the agreement until the deal sheet is signed? A. That is correct, and in our case until the producer has approved the deal; the producer for his own picture.

Q. In other words, the so-called master agreement is a kind of general chart which is made effective contractually when you actually sign the deal sheet and have it O.K.'d by your producer? A. Well, the deal sheets are a definite part of that because the master agreement does not give theatres, does not give playing time or any of those details.

Q. Yes, but when you sign the master agreement, you may sign that before any deal sheets are executed? A. The deal sheets are executed as a result of the master agreement. (1976)

Q. I am agreeing with you, but I want to get it clear on the record, because I know it, and I am not sure their Honors know about this. You ordinarily sign a master agreement in point of time before you sign the deal sheets? A. That is correct.

Q. And after you sign the master agreement nothing has really happened until you sign the deal sheets? A. That is correct.

Q. And then you take up the question of what particular picture and what particular run of that picture, and so forth, is to be brought under the master agreement and you determine that by executing the deal sheets? A. Well, I don't quite follow you, Judge Proskauer, in the matter of what particular pictures are to come under the master agreement.

Q. Well, I will leave that out. The master agreement sets forth certain pictures that are to come under it? A. That is correct.

Q. But in point of fact there is no actual contract with respect to that picture, no commitment, until the deal sheet is subsequently signed?

Mr. Wright: If the Court please, the agreement is there. It speaks for itself. It clearly on its face does commit the pictures to the circuit, the terms to be worked out in the form of deal sheets.

(1977)

Judge Bright: The terms are on the deal sheets.

Mr. Wright: The individual terms.

Judge Bright: As I get Judge Proskauer's inquiry, there is no specific knowledge as to just when the picture is to be played or how it is to be played until after the deal sheet has been executed.

Mr. Wright: That is right. All that the agreement does, right on its face, is to commit the pictures to the circuit. That, Judge, is done right in the master agreement. And the general terms——

Mr. Proskauer: I will call your attention to the terms of this agreement rather than have it argumentatively put in questions.

Judge Bright: That is the master agrement?

Mr. Proskauer: This is the master agreement, he said. It says, "I am reducing to writing the understanding of the discussion we have had concerning United Artists product for the year 1936."

Then it says: "There are 26 pictures covered" by it, and it lists the pictures.

Then it goes on to list under them the groups of pictures, say, six Wanger productions, two at 35 per cent, two at 30 per cent, and two at 25 per cent. That is typical of the various groups.

Then it goes on to set forth a schedule of how they

(1978)

are going to compute which pictures shall pay 25 per cent and which pictures shall pay 30 per cent, and which pictures shall pay 35 per cent, those terms having reference to the average gross attained by the picture in certain described situations.

Then it describes what is to be done about a double feature allowance on 35 per cent pictures, and a double feature allowance on 30 per cent pictures; and I

assume your Honors know what the double feature is; I do not think we have to go into that.

Then the double feature allowance on the balance of the project.

Then playing time. It is understood that eight pictures designated at the top terms are to have preferred playing time, and playing time for all other pictures is to be agreed upon between Mr. Bernhard and Mr. Schafer in the event that the local representatives of United Artists and Warner Bros. cannot agree.

Then it says deal sheets are to be worked out on each individual situation.

Q. Now, with that description to the Court that I have given, what is contained in the deal sheets that are subsequently worked out? A. The deal sheets show each situation, each theatre that is going to play the picture; the number of days; if the picture is to have preferred playing time that is so indicated; and I believe the terms are repeated on the deal sheet if the terms have been determined at the time the
(1978a) deal sheets are made out.

Judge Bright: Clearance and rental?
The Witness: Rent.

(1979)

Q. The clearances are generally understood, are they? A. Yes, they are understood, and they follow along our established custom.

Q. Now, you have told the Court, as I understand it, that you have made master agreements in some instances with independent? A. Yes.

Q. Does the fact that a theatre chain like these Warner theatres here is affiliated or not affiliated have anything to

do with whether you make a master agreement or not? A. No; we have made master agreements with independents.

Q. The situations in which you make master agreements are, generally, situations in which the customer has a number of theatres? A. Wometco Circuit has a number of theatres; in Portland, Oregon, there were several theatres involved in that deal, in the City of Portland——

Q. What I mean is this; You do not usually make a master agreement with respect to a single theatre? A. A single theatre? No.

Q. And the situations in which you make these master agreements are those in which the customer has a number of theatres, and you are trying to put down in writing a general understanding that will cover a number of theatres? A. That is correct.

Q. And that is to save the burden of putting into every (1980)

particular deal sheet all of these terms? A. That is correct.

Q. So you make the so-called master agreement; and then you consummate it by deal sheets with that customer with respect to each individual theatre? A. Yes, sir.

Q. And whether or not that customer is an affiliate or a non-affiliate does not enter into the picture at all? A. No.

Judge Bright: In answer to one of my questions when I asked you whether you made master agreements with independents, you said, "Do you mean franchise agreements?" Well, what is the difference?

The Witness: Well, that term of master agreement and franchise has been rather promiscuously used in the picture business. I mean by a franchise as you would mean by a master agreement, an agreement that covers more than one picture for perhaps one year or maybe for two years, if it is possible to sell the season's product in advance. It is a commitment prior to release of the pictures.

Judge Hand: Of course, franchise, I think, as it has been used here before, refers to the time contracted for and not the number of pictures.

The Witness: No, it would be for the period of time.

Judge Hand: Yes.

(1981)

Judge Goddard: How about the territory?

The Witness: Well, for a specific theatre or specific number of theatres.

Mr. Proskauer: Your Honors know, of course, that since the consent decree—I think this is not controversial—there have been no franchises issued since the consent decree.

Judge Hand: Yes, I know.

Mr. Wright: There have been no franchises made for the pictures of the five consenting defendants——

Mr. Proskauer: Yes.

Mr. Wright: There have been franchises made, however, on behalf of the theatres of those five consenting defendants with other distributors.

Mr. Proskauer: Yes. I meant exactly what Mr. Wright said, that the five consenting defendants have not made any franchises since the consent decree.

Mr. Caskey: Mr. Wright, I think this document is not an integral one. I am told that at your request the clerk clipped together certain papers, which I think on their face do not belong in it.

Mr. Wright: If there is any question at all about it I will withdraw it and you produce the original.

Mr. Caskey: Well, but do you understand it has to come from Los Angeles? This is the first request

(1982)

for it.

Mr. Raftery: We are trying not to go to Los Angeles. That is the first time I ever saw the document, and it is on this face not right, and we are trying to get it from uptown.

Mr. Caskey: In order that there will be no confusion in the record let us physically have this withdrawn.

(Government's Exhibit 383 for identification withdrawn.)

Redirect Examination by Mr. Raftery:

Q. Mr. Lazarus, Judge Bright asked you some questions about Stage Door Canteen's contract—I do not know the number of the exhibit—with Fox West Coast, first-run, Los Angeles. As a matter of fact, Mr. Lazarus, the photoplay Stage Door Canteen was not offered for sale to anybody until after the picture was completed and first exhibited in the Capitol Theatre, New York City? A. That is correct.

Q. That was contract No. 1? A. Yes, sir.

Q. And it was sold throughout the United States to approximately how many thousand accounts, do you know? A. I think it is about twelve thousand accounts now. I may be a little high, because our terms were a little stiff on that picture; but it would be something in the neighborhood of (1983)
eleven or twelve thousand contracts.

Q. And you sold that picture separately and individually to all the theatres that played it? A. Yes.

Q. And at varying terms? A. Yes, sir.

Q. What did you start out asking exhibitors for for that particular picture? A. What we started out to get?

Q. Yes. A. Well, we started out to get 50 per cent of the gross receipts.

Q. And did you succeed in getting 50 per cent? A. In some cases.

Q. As a matter of fact, what did the picture gross domestically? A. I think it was something like four million dollars, if I remember correctly.

Q. Will four million three refresh your recollection? A. Well, it was over four million, Mr. Raftery. I do not know the exact figure, the latest.

Mr. Proskauer: $300,000 does not mean anything in this business.

Q. And that picture later played pursuant to the contract that Mr. Wright has put in evidence first-run in the City of Los Angeles? A. Yes, sir.

Q. I show you Exhibit U-A-1 and call your attention to the City of Los Angeles. Will you please advise us at what theatres it played first-run and move-over, and what rentals (1984)
were paid by Fox or National Theatres, or whoever it is who runs those theatres, to United Artists? A. It played beginning July 8, 1943, at the Carthay Circle, the Ritz, Loew's State and Grauman's Chinese; and it played those theatres July 8 to the 14th, and we received the following film rentals from those four theatres:

Carthay Circle, $3,691.29; the Ritz Theatre, $3,836.18; Loew's State, $10,050.79; Grauman's Chinese, $6,081.57.

Then on a move-over beginning July 15th it played the United Artists Theatre on which we got a rental of $5,408.95; the Wilshire, on which we got $2,080.93; and the Four Star, which played a long move-over—it played from July 15 to August 25, giving us a rental of $7,262.92.

Q. Now, the picture played first-run in San Francisco, did it not? A. Yes, it must have.

Judge Bright: Would you mind telling me who owned or operated the seven theatres that you just referred to?

The Witness: Those theatres, I believe, are all operated by Fox West Coast. I am not positive of that without reference.

Mr. Raftery: Your Honor, we do not know the physical operator, but it played pursuant to the agree-
(1985) ment with the Fox West Coast Agency that was put in evidence here.

Mr. Wright: The one referred to here I don't think is in evidence. All that is in evidence are the sheets. The letter agreement that is referred to is not in evidence. That I understand is one of those you were looking for.

The Witness: Mr. Raftery, I don't find the San Francisco figures here. I don't know that—oh, wait, I beg your pardon, it is abbreviated.

It played the United Artists Theatre in San Francisco, and the run began July 15 and ended on August 22, giving us a film rental of $47,964.84.

Q. That was with Blumenfeld? A. Yes; that was the single theatre run with Blumenfeld.

Q. And you played Oakland? A. Yes. We played Oakland. We played the Paramount Theatre, Oakland, from August 12th to the 25th, to a film rental of $16,280.55; and then moved to the Franklin Theatre in Oakland, August 26th to September 15th, and we got a film rental of $3844.82.

Q. Blumenfeld, the independent, operates at San Francisco, is that right? A. Yes.

Q. And this Paramount house is a Fox West Coast house? A. Yes.

Q. And Blumenfeld takes clearance over Oakland? A. Yes.

(1986)

Q. Oakland followed San Francisco? A. Yes.

Q. How many contracts, if you remember, did you have on Stage Door Canteen? A. I think we had something over 12,000 contracts on Stage Door Canteen, but I am not positive.

Q. And those contracts will indicate the exact terms upon which each engagement was played? A. Yes, sir.

Q. And have you got those contracts available? A. We have them on file in our office.

Q. And they are open to inspection of the Government at any time they want to go up and look at them? A. Yes.

Q. Mr. Lazarus, there was a time in United Artists where the general practice was to license the exhibition rights before the pictures were actually available in the exchanges, isn't that right? A. Yes, sir.

Q. Now, at the present time and for some time past what has been the practice of United Artists generally? A. The practice generally on the part of United Artists in the last few years has been not to sell a picture until the picture was completed.

Q. Is it your practice to have test engagements of pictures before you determine the selling policy? A. Oh, we do that once in a while, but it is not our general practice.

Q. Well, is it the practice when you are in any way doubtful

(1987)

about the box office character of the picture? A. Yes; if a picture—if there is very much of a difference of opinion between the folks in the home office, we will play 10 or 12 engagements throughout the country to, as we say, get the feel of the picture so we know what kind of a picture we have from the standpoint of public reaction.

Q. And this selling after completion of the picture has added considerably to the cost of selling, has it not? A. Yes, because particularly with United Artists we get our pictures

delivered by our producers at irregular intervals. In other words, we can't start selling a picture until the producer tells us to go ahead, and they do not produce on a schedule, so that we have had periods of two or three months or four months, I believe, at one time, when we did not have a release; and then we will get two or three of them at a time.

Q. Have you such a consistency of releases that you can keep any exhibitor going in business? A. No, sir. We could scarcely keep ourselves going at times.

(1988)

Q. As a matter of fact, from Labor Day, 1943, until after Christmas of that year you did not have a single feature picture for release, did you? A. I don't remember that exactly, Mr. Raftery, but I know that for months on end we have been without a picture. We have re-issued pictures in order to keep the wheels turning.

Q. Have you ever stopped selling pictures? A. We stop selling a picture when—the only time we stop selling a picture is when the producer withdraws the picture from circulation. If he will permit us to continue the distribution of the picture, even after the terms of the distribution contract with the producer expire, we will keep on selling that picture.

Q. As regards these clearances Mr. Wright was asking you about, do clearances individually come to your attention? A. No, sir. They may or may not appear on contracts, but I never bother with the clearance. The only time a clearance will come to my attention is if there is something about the sale that is affected by a change in clearance. Then the branch manager submitting the contract, in order to explain why the contract terms may not look right in comparison with our records of previous selling in that situation, he may then explain that there has been a change in clearance, but otherwise I take it for granted that the clear-

(1989)

ance is in accordance with the established practice.

Q. It is the changes that come to your attention? A. That's all.

Q. These changes that have been brought about—by the way, you are not a party to the consent decree arbitration system? A. No, sir.

Q. When there have been changed made on the five or any one of them, by one of these arbitration boards, does that result in a change in your situation as regards clearance as a rule? A. Yes, I have had numerous letters from the branches in the last three years in which they have explained that a theatre clearance, that we had been working under for a previous period, whatever it may have been, was now changed as the result of an arbitration finding.

Q. So even though you were not a party—— A. Even though we are not a party to it, there is nothing we can do about it.

Q. If you want to sell that account you have to sell him with the new clearance? A. That is correct.

Q. In your company the sales managers has no power to approve finally a contract? A. No, there is nobody in United Artists Corporation to my knowledge who has any authority to approve a contract. That approval rests entirely with the producer or his representative.

(1990)

Q. And has to go through you and then to the producer? A. That is correct.

Recross Examination by Mr. Wright:

Q. With respect to clearance, what you do in connection with the clearance under which you are serving an exhibitor, after an award comes down as to the other distributors, it depends to some extent, does it not, on how much bargaining strength that particular exhibitor has, isn't that right? A. No; I don't recall a single instance, Mr. Wright, where

we have been able to operate in defiance of a changed clearance; at least, none has come to my notice at my desk.

Q. You don't recall now situations where a certain exhibitor, let us say, has insisted on your continuing to hold some smaller competitor 30 days behind him after there has been an award reducing the other distributors' clearance from 30 to 14 days? A. I know, I said, of no such case.

Q. Would you say that never had happened? A. No, I know of no such case. Those things only come to my attention when there is a change in clearance that affects our selling, and I wouldn't know.

Q. Don't you know it is a fact that in certain exceptional situations the exhibitor has been able to get from you and continues to get from you a longer clearance on your pictures than the arbitrator or the appeal board determined was reasonable upon the distributors' pictures that were arbitrated? A. I don't know of any such case, no, sir. (1991)

Q. You don't know whether there was or not? A. I don't know. No, I do not know. That is a phase——

Q. That can easily be established by simply an examination of particular contracts? A. Yes, if it exists, it exists, but I don't know of any such case.

Q. Getting back to this master agreement, as far as this particular exhibit 382 is concerned, even after you make the deal sheets, there is no final settlement of the rental under this deal, is there? A. The final settlement of the rental is dependent upon the performance of the picture.

Q. Not only dependent upon the performance of your pictures, but, under these provisions on the third page, it is dependent upon the performance of two pictures from Fox, two from RKO, two from Paramount and two from Warner in the circuit, isn't that right? A. It is still dependent upon the performance of our picture, Mr. Wright.

Q. Yes. A. Because I happen to know enough about those negotiations to know that in attempting to set terms with any—that is the Warner Circuit—in attemping to set terms with the Warner Circuit the matter of terms is always a matter that is open to dispute between the seller and the buyer, and, in order to establish whether or not the picture

(1992)

is entitled to top terms, when we are asking top terms for a picture, they agreed to use a standard, practically might be called a slide rule. They took from each of these companies mentioned in that top grossing picture, they averaged the results of those top grossing pictures, and if the pictures that we claim were top grossing pictures could achieve those grosses, then we got their top terms.

Q. I say, before it was determined what your final film rental was actually going to be, you had to determine what the performance or box office returns were in the Warner Circuit from those two pictures that were selected? A. Yes.

Q. For purposes of control from each of the other distributors? A. We had to prove it was a top picture. That is what is means, really. If we claimed it was a top picture, we had to prove it.

Q. The process by which you did it was to wait and see how its performance compared with that of the two pictures from each of the other four distributors named? A. That is correct.

Q. And then there was a final settlement on rental to you? A. That is correct.

Mr. Proskauer: May I ask the Court, is it perfectly clear to your Honors that the reference to the other producers here, as Mr. Wright's questions indicate, was merely to establish a criterion by which it

(1992a)

should be determined whether his picture was a top

bracket picture, in which event he was to get 35 per cent, or another bracket picture in which he was to get 30 per cent. If it did as well as the average of certain other pictures, then he was in the 35 per cent class. If it did not do as well, or did something else, then he was in the 30 per cent class.

(Witness excused.)

(1993)

HARRY J. MULLER, called as a witness on behalf of the defendant United Artists, being duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Q. Mr. Muller, you are the treasurer of United Artists Corporation? A. I am.

Q. And you have been for some years? A. Yes.

Q. Prior to that you were comptroller? A. That is correct.

Q. This morning I read from a document which I identified as the original contract between Bing Crosby Productions, Inc. and the United Artists for the distribution of John L. Are you the custodian of the records of United Artists Corporation? A. I am.

Q. I ask you if that is the original document? A. It is.

Q. Under which United Artists is distributing the Great John L.? A. It is.

Mr. Raftery: Mr. Wright, with your indulgence, instead of offering it in evidence, I am content with what was read into the record.

Mr. Wright: I think that is agreeable providing, of course, we have the right to read in, at some later

date, something that we might want to bring to the Court's attention.

(1994)

Mr. Raftery: Any time.

Q. Mr. Muller, in connection with the distribution of pictures by United Artists Corporation, have you the records showing the domestic results of distribution for the first 42 weeks of 1945? A. Yes.

Q. Without disclosing any figures, and subject to Mr. Wright checking them, if he wishes to, what have you to say as to whether this is the largest year United Artists has ever had since it was formed in 1919, using that period as the barometer? A. It is the largest year up to this date.

Q. In connection with your costs of distribution, have your costs been computed by you on the second sheet? A. Yes.

Q. By the way, that document you have before you is a document prepared every week and kept by you in the regular course of business, is it not? A. Yes.

Q. Has there been an increase in costs of domestic operation during this year over last year? A. Yes, sir.

Q. Is that cost substantial, I mean, the increase? A. A little over 10 per cent.

Q. What about last year over the year before? A. That also was greater than the year before.

Q. Has there been a progressive increase in the costs of domestic distribution of motion pictures during the past ten

(1995)

years? A. Yes, although in some years we may have had a reduction in costs.

Q. Those were the years that we might refer to as the lean years, when we did not have pictures? A. That is correct.

Q. But during the years we had the average number of pictures—— A. Costs have increased.

Q. Particularly as regards advertising, have advertising costs gone up? A. Yes, they have.

Q. And how does your advertising cost for the year 1945, to date, compare with the corresponding period of last year? A. It is up about 35 per cent.

Q. You have had wage increases due to union contracts and other things during the past year? A. Yes.

Mr. Wright: If the Court please, I don't understand the purpose of this. If it is to show what his profits are, I suppose we ought to have the profit figures themselves. I do not see what conclusion the Court can come to just from the statements about increases in costs and increases in gross. I don't see what relevance it has to any issue that is being tried.

Judge Hand: What does it have?

Mr. Raftery: It has this, to show that an independent producer, or an independent distributor, rather, has had to have increased grosses to meet in-

(1996)

creased costs and that this year is the biggest year in our history, rather than that we are passing out because of any squeeze. I will stop right here on that. I don't want to disclose these figures, to be perfectly frank with you.

Q. Mr. Muller, the United Artists Corporation has three stockholders, has it not? A. It has.

Q. You are the custodian of the stock ledger and the stock record book? A. Yes.

Q. It is not a public company in any way? A. It is not.

Q. And it operates not only in the United States but throughout the rest of the world? A. That is correct.

Q. Branch offices and subsidiary corporations throughout the entire world? A. Yes.

Q. It does not own any interests direct or indirect in any of the seven other defendants, does it? A. No, it does not.

Q. It is wholly independent of any one of them? A. Yes, sir.

Cross-Examination by Mr. Wright:

Q. Mr. Muller, you had or you recently acquired a half interest, did you not, in some theatres that are operated there in Los Angeles? A. Yes, we did.

Q. You made an arrangement; that is where Mr. Blumenfeld operates four theatres for you and that you have a half (1997)
interest in the operation? A. It is not quite a half interest.

Q. And those theatres, when were those acquired? A. I think it was last July.

Q. And you acquired those theatres for the purpose of getting an adequate first-run outlet for your pictures in Los Angeles? A. I don't know the purpose for which they were acquired.

Q. But since you have acquired them you have shown the United Artists pictures there first-run day and date in the four theatres, isn't that right? A. I presume so, but that is not my field.

Redirect Examination by Mr. Raftery:

Q. In connection with the theatres that Mr. Wright speaks about, Mr. Blumenfeld is the full and complete operator of those theatres, is he not? A. He is.

Q. You have nothing to do with the operation in any respect? A. No.

Q. You have no film commitments of any kind or character to those theatres? A. No.

Q. As a matter of fact, don't you know, Mr. Muller, that Spellbound, in addition to opening here today, is opening in the Fox West Coast house in Los Angeles tomorrow? A. I didn't know that.

Judge Hand: Any more questions of this witness?

Mr. Raftery: No.

(1998)

Mr. Raftery: May I ask Mr. Wright a question in private?

(Discussion between Mr. Raftery and Mr. Wright.)

Mr. Raftery: Mr. Wright has stipulated that if the president of United Artists were called to the stand he would testify in response to the, shall we call it, the Adolph Zukor questions in the same way that Mr. Zukor did.

I have some loose ends, but I will go ahead with Universal for the moment.

WILLIAM A. SCULLY, called as a witness on behalf of defendant Universal, being duly sworn, testified as follows:

Direct Examination by Mr. Raftery:

Mr. Proskauer: Your Honors, could I ask whether we are going to sit on Monday? There has been some talk around that we were not. I am not asking that we should not. I am just trying to find out whether we are going to.

Judge Hand: Oh, yes, we will sit on Monday.

Mr. Raftery: May I have five minutes, your Honor?

Judge Hand: Yes.

Mr. Raftery: Before I start on Universal.

(Short recess.)

Q. Mr. Scully, where do you reside? A. Forest Hills, New York.

(1999)

Q. Are you associated with the defendant Universal? A. Yes, sir.

Q. Will you tell their Honors in what capacities? A. I am the vice-president and general sales manager of Universal Pictures Company, Inc.

Q. Have you a similar position with Big U? A. Yes, sir.

Q. Will you tell their Honors the different functions of Big U and Universal Pictures Company? A. Big U is a separate company operating the New York exchange. The Universal Pictures Company, Inc. is the parent company that owns the Universal Film Exchanges, Inc. and operates 30 other exchanges in the United States.

Q. How many did you say Big U operated? A. One.

Q. Where is that located? A. At 630 Ninth Avenue, New York City.

Q. What area does that serve? A. New York and part of New Jersey.

Q. Where does Universal Film Exchanges function? A. In 31 branches throughout the United States.

Q. Located from Boston on the East to San Francisco on the West? A. Yes.

Q. And you have exchanges generally in each of the cities that the five defendants have exchanges in? A. Yes, sir.

Q. What does your organization consist of, I mean

(2000)

division manager, etc.? Will you break it down for their Honors? A. We have one assistant general sales manager, three division managers, nine district managers, 31 branch managers and 95 salesmen.

Q. Where are your pictures made? A. In Universal City, California.

Q. At the Universal Studios? A. Universal Studios.

Q. Who is in charge of the studios? A. Mr. Clifford Work.

Q. How many feature pictures a year do you generally produce? A. 45 to 50.

Q. Do you produce anything else? A. Seven Western pictures, four serials, 15 2-reel subjects, 30 single-reel subjects and a newsreel.

Q. How many issues of your newsreel? A. Two issues.

Q. Each week? A. Yes.

Q. Or 104 a year? A. Yes.

Q. How long have you personally been in the motion picture business? A. Since 1917.

Q. Where did you start in the motion picture business? A. I started as a salesman for Famous Players-Lasky in New Haven, Connecticut.

Q. In what other cities have you operated before you came into New York? A. I operated as a branch manager for Metro (2001) Goldwyn-Mayer in New York City.

Q. When did you join Universal in your present capacity? A. January 1, 1938.

Q. Approximately what was Universal grossing when you first joined the company per year? A. Domestic?

Q. Domestic only. A. Ten million dollars.

Q. Has the gross remained static during your tenure of office? A. No, sir.

Q. What has happened? Will you tell their Honors generally? A. We have increased our gross considerably each year up to the present year, or last year, when our gross was $31,000,000 domestic and Canada.

Q. Canada represents what part of that 31 million? A. About a million eight or nine.

Q. So, approximately, between 29 and 30 million dollars was your gross for 1944? A. Yes.

Q. Those figures are all a matter of public record, are they not? A. Yes, sir.

Q. What have you to say as to the quality of the product that you have been handling in relation to the product prior to the time you took the office as general sales manager? A. Our product has got better, we have made deals with different directors and producers to make top pictures, and each year we have been successful in making a little better (2002)
picture and that has contributed greatly to our increased gross.

Q. You have developed some of your own stars during this period, have you not? A. We developed personalities such as Abbott and Costello, a girl by the name of Montez, and another girl by the name of DeCarlo, and Deanna Durbin was making pictures for Universal when I entered the company.

Q. Has Miss Durbin's popularity increased since you entered the company? A. Yes, sir.

Q. Generally, you are making a better quality picture and have been making progressively better quality pictures, since 1937? A. Yes, sir.

Q. How do you generally license the exhibition of your pictures to exhibitors? A. We offer all our pictures to the exhibitor at one time together with our newsreel and short subjects, and we generally offer him 55 feature pictures, 7 Westerns and our shorts and newsreel.

Q. Do you offer them all on one contract or separate contracts or how do you offer them? A. We have 50 pictures offered on one contract and we have five pictures that we sell on separate contracts, two as specials and three as outside producers' productions. Our Westerns and shorts are all in the same contract as the 50 feature pictures and our newsreel is on a separate contract.

Q. You mentioned outside producers. You have heard (2003) the term independent producer used here several times. Do you have contracts with independent producers? A. Well, they are making pictures independent of our regular line-up of pictures, such as the Walter Wanger pictures and the Skirball pictures, that we call outside producer pictures or independent pictures because we sell them on a separate contract.

Q. Do you have a company called Mayfair or some name like that? A. The Mayfair Company made pictures for us, yes.

Q. In which Jules Levey was interested? A. Yes.

Q. These outside producers have a financial interest in these pictures, have they not? A. That is right.

Q. And they are sold separately from your group of 50? A. That is right.

Q. In this group of 50 how are the pictures generally set up or classified or how are they described? A. There are so many pictures of different stars, so many pictures listed as different titles, such as two Deanna Durban pictures, two or three Abbott and Costello pictures, two or three Montez pictures, two or three DeCarlo pictures, and there are titles listed as to what various pictures that we think we are going to make, and then we have some pictures listed, what we call marquee pictures.

Q. Describe the marquee pictures a little more fully. (2004) A. We call them marquee pictures and have the titles listed on them because we explain them to the exhibitors as pictures which some one personality is in, that they can put on their marquee to advertise it.

Q. Such as? A. Well, I can't think of any. I can't think of them. Such as the Andrew Sisters or people——

Q. Radio names, bands? A. Radio names or bands.

Q. Mr. Scully, in selling or licensing your pictures, you grant the exhibitor the right to publicly perform in his theatre the copyrighted subject that is in the positive print of the picture? A. That's right.

Q. And no right to assign that performing right to anybody else? A. That is right.

Q. And only in the particular theatre or theatres listed in the contract? A. That is right.

Q. You grant him no right to lease or sell or in any way dispose of any part of the tangible property, meaning the print, to anybody else? A. Right.

Q. When the exhibition is finished what must he do with the print? A. Return the print to the exchange.

Q. And in some cases do you direct him to ship it to another exhibitor? A. Some situations do, yes.

Q. In rural situations? A. Yes.

Q. Mr. Scully, did you cause to be prepared a schedule along the same lines that Judge Hand spoke to Mr. Caskey (2005) about in the 73 situations that were propounded to Universal? A. Yes.

Q. That was prepared under your supervision? A. Yes, sir.

Q. There is no difference, as far as you know, between this and what is contained in the file cabinets that Mr. Wright has here of the records that we previously gave him? A. No.

Mr. Wright: I just noticed for the first time that there are 73 in the United Artists. I thought you were going to prepare one for the 92, so it would be comparable. The other one covers 92, doesn't it?

Mr. Raftery: Mr. Wright, I have stuck to the papers you gave us and I explained this morning to the Court your 92 counted up 73.

Mr. Wright: I was not referring to what I gave you. I had understood Judge Hand's request applied to the 92 rather than 73, so that you would have a comparable group for each distributor. That is all. I was under the impression that you had furnished us figures for the entire 92 instead of simply the 73.

Mr. Raftery: We answered every question you asked us. I have never seen the other 19. If there is anybody will be good enough to give me the 92 with the other 19 cities, we will be glad to prepare that, but I have never seen the other 19 and I don't know

(2006)

what they are.

Mr. Wright: I think the interrogatory data that was sent you clearly set it forth, but if there is any question, it is the 92 cities of over 100,000 population as of the 1940 census.

Mr. Raftery: I am not going to study the atlas. I have studied everything but it.

You won't tell me what the case is about, so please give me the other 19 cities and I will get them.

Mr. Wright: My impression is that they have already been given you, but if you didn't get them, I will see you get a list naming them.

Mr. Raftery: You neglect two defendants. You gave us only 73.

Mr. Proskauer: Discrimination.

Mr. Raftery: I wish to offer these 73 in evidence and I will be happy to get the others, the 19.

Mr. Wright: We have no objection.

(Marked Defendant Universal's Exhibit U-1.)

Mr. Raftery: Your Honors, the guinea pig picture for Universal is Christmas Holiday, starring Miss Durbin.

Q. Mr. Scully, in New York City for the past several years, where have you generally licensed the exhibition of your photoplays first-run? I am referring to the Island of Manhattan. A. Criterion and the Rialto.

(2007)

Q. The Criterion Theatre is located where? A. On Broadway between 45th and 44th.

Q. There was a time, Mr. Scully, where Universal pictures were exhibited first-run in the Music Hall, was there not? A. Yes.

Q. Have you been able to get any of yours shown in the Music Hall? A. I think I sold them one picture.

Q. That is one in eight, going on nine years. So you play Criterion? A. Yes.

Q. Do you consider it a satisfactory first-run outlet for your pictures? A. Yes, sir.

Q. Would you prefer to play the Music Hall if you could get a sufficient number of your pictures played there? A. Well, primarily I am interested in getting money for the pictures and sometimes I think I can get more money out of my pictures at the Criterion than I could at the Music Hall.

Q. You get more of your pictures played at the Criterion, do you not? A. That is right.

Q. You get more than 12 weeks playing time a year in the Criterion, don't you? A. Yes.

Q. How many seats are there in the Criterion? A. I think there are some 2000—about 2000.

Q. It is a modern, up-to-date theatre. And no stage shows with your picture there? A. No.

(2008)

Q. Where do you exhibit your pictures generally in Chicago first-run? A. The RKO Palace.

Q. Do you show your pictures in any other first-run theatre in Chicago? A. Yes, we show some of our pictures in the Grand, which is operated by RKO. We have sold some of our pictures, I think, to the Oriental Theatre.

Q. But generally, your first-run customer is RKO? A. Yes, sir.

Q. Do you sell any pictures at all first-run to B. & K., Paramount affiliate out there? A. No, sir.

Q. Has this condition, as regards Universal's first-run in Chicago, prevailed for many years? A. Since I have been there.

Q. Philadelphia, who is your first-run account? A. Warner Bros.

Judge Bright: Who operate the Criterion Theatre?

The Witness: The Loew interests.

Q. It is an affiliated theatre? A. Yes.

Q. In fact, every account you have mentioned so far first-run is an affiliated account? A. Yes.

Judge Hand: RKO is, in Chicago?

The Witness: That is affiliated.

Q. Except the Oriental in Chicago? A. The Oriental is an independent theatre.

Q. And the Music Hall is classified as an independent theatre? A. Yes.

(2009)

Q. Now, in Detroit, Michigan, where do you exhibit your pictures first-run? A. At the Fox Theatre, and some we exhibit at the Adams.

Q. Is that also an affiliated theatre? A. The Fox theatre is, yes.

Q. How about the Adams? A. I think the Adams is an independent theatre.

Q. In Los Angeles, California, where do you generally exhibit your first-runs? A. We exhibit some to RKO and some to the Fox West Coast.

Q. You divide your product? A. That is right. We sell half to RKO and half to the National Theatres or Fox West Coast.

Q. Well, don't Fanchon & Marco operate a theatre called the Paramount out in that city? A. Yes.

Q. Is there some affiliation with Paramount, if you know, or are they independent? A. I don't know.

Q. Were Universal pictures at one time shown first-run in that theatre? A. Yes.

Q. And since you have been with Universal you have changed your account? A. No, we sold them some of our pictures.

Q. Do you still sell them some? A. No.

Q. When did you stop selling them? A. When we haven't been able to have our pictures played off by Fox (2010)
West Coast and RKO, the time we had sold all of our pictures to RKO, and we had a backlog of pictures sometimes, and we sold some to Fanchon & Marco at the Paramount theatre.

Q. Now, in Cleveland, Ohio, which company is your first-run account? A. RKO.

Q. You have been selling them for many years? A. Yes.

Q. Did you ever sell Loew's in that town? A. No.

Q. When Warners operated there did you sell Warners or did you sell RKO? A. Since I have been with Universal we have always sold RKO.

Q. In Boston, what is your first-run account? A. RKO.

Q. Do you sell Loew's any pictures up there? A. No.

Q. In Pittsburgh, Pennsylvania, what is your first-run account? A. We split our product in Pittsburgh, half to the Shea interests and half to Johnnie Harris.

Q. The Shea interests operate the Fulton Theatre? A. That is right.

Q. And Harris operates the Senate and the Harris theatre? A. That is right.

Q. And how do you divide your product, in what proportions? A. Half to each.

Q. To each account? A. To each of the accounts.

Q. I believe the testimony is that of those accounts are independent accounts? A. That is right.

Q. Now on this list, without going into any further great (2011)

detail, since you have joined Universal you have sold first-runs generally to the account mentioned after the name in each city? A. Yes, I would say so.

Q. Are there any situations there where there are divisions of product with other exhibitors, because this is applicable to the one picture, this particular list you are looking at? A. Well, in Los Angeles, as I said, we split our product.

Q. Well, that has been testified to, and also about Pittsburgh. Is there anything below that line where there are divisions of product that do not show on this exhibit? A. In Jersey City we split our product.

Q. With whom? A. Half to Skouras and half to Warner Bros.

Q. And Skouras has been classified here as an independent; is that the way you classify him? A. He is not on here.

Q. No. I say in this lawsuit, the George Skouras circuit has been classified as an independent? A. That is right.

Q. Is that the way you classified him? A. Yes, sir.

Q. You sell the product to him and half to Warners, who operate the Stanley theatre, is that right? A. Yes.

Q. Now, any other situations? A. Worcester, Mass., we split our product half to Warner and half to M & P.

(2012)

Q. Do you sell any to Loew's in Worcester? A. No. In Hartford, Connecticut, we split our product, half to Warner and half to an independent, E. M. Loew.

Q. At the Majestic theatre? A. That is right. In Los Angeles, California, we split our product half to Fox West Coast and half to Milton Arthur.

Q. Is Arthur an independent? A. Yes. In New Haven, Connecticut, we split half our product to M & P and half to Warner. In Springfield, Massachusetts, we split our product half to Warners and half to Mr. Andes.

Q. That Andes operates the Bijou theatre? A. That is right.

Q. And is he an independent? A. Yes, sir. That is all on here.

Q. Now these splits that you have been telling us about, have you been selling that way for several years? A. Yes, sir.

Q. As long as you have been with Universal? A. Yes.

Q. And the remainder, where you do not split, have you been selling those accounts for the last several years? A. Yes.

Q. Have there been any changes at all in those accounts that appear in the 73 cities we have been discussing? A. Well, there was a change in Los Angeles, where we had sold all our pictures to RKO, and now we sell half to Fox West (2013)
Coast.

Q. Well outside of Los Angeles? A. I think in Spokane we used to sell our pictures to Fox West Coast, and we sold it to an independent.

Q. And who is the independent? A. McBride I think his name is. I am quite sure that is it. In Reading, Pennsylvania, we used to sell our pictures to Warner and now we sell them to an independent.

Q. Who is the independent? A. J. Emanuel.

Q. What is his name? A. J. Emanuel. That is about all.

Q. Now, Mr. Scully, you told us you sold your pictures in blocks or groups. Do you have a sales convention each year? A. Yes, sir.

Q. When do you usually hold it? A. Between May and July.

Q. Now, before holding that convention do you visit Los Angeles and secure your line-up for the next season? A. Yes.

Q. And do you prepare press material and the other material needed to set up what your program is going to be for the following year? A. Yes.

Q. Where are these conventions usually held? A. Generally held in New York or Los Angeles or Chicago.

(2014)

Q. Do you hold national conventions? A. Sometimes.

Q. Or regional? A. Sometimes we hold regional conventions.

Q. Now, who attend these conventions? A. The sales department in addition to the bookers; and the executives of the home office.

Q. When you say the sales department, does that include all the salesmen, branch managers? A. Salesmen, branch managers, district managers, divison managers, and sales managers and bookers.

Q. Now, without going into any great detail, what happens at those meetings. A. There is an explanation of the pictures that we expect to make for the next year, and those that we are going to market for the coming season; and we generally explain each and every picture and give them as much knowledge of the story as we can, plus the personalities we expect to put in the picture; what we anticipate it is going to cost us and what we would like to sell our pictures for. And in addition to that we give them printed matter that they can explain to the exhibitors, who is in the pictures' and whether they are black and white or color, or anything that goes to help make the salesman—or generate a little enthusiasm in the salesmen to sell the merchandise.

Q. Do those meetings break down into smaller meetings?

(2015)

A. After the general meeting, there are generally smaller

meetings of the district managers with their various branch managers, or managers and salesmen.

Q. And then finally, branch managers with their sales force? A. That is right.

Q. Now, after this regional or national convention—depending on which the O.D.T. would let you have, what happens as regards selling? A. The salesman given the route would call upon various accounts, and they go around and solicit the exhibitors as to the product, and try to sell our product to each and every account that is a possibility; and I guess they do the best they can. Sometimes they are successful on the first call and sometimes it might take two or three different calls to sell an exhibitor. And they do that every day in the week, and they report back to the manager, and the next week they are sent out on a different route, or the same one.

Q. Each salesman has his own specified territory, does he not? A. That is right.

Q. And he has accounts he has to call upon and solicit for license application? A. That is right.

Q. Are these sales persons generally successful in selling all the product they offer to each individual exhibitor? A. No.

(2016)

Q. By the way when you joined Universal, how many accounts were Universal servicing? A. 7200 or 7300.

Q. And how many are you servicing now? A. Between 11,500 or 12,000.

Q. To go back to these applications that are taken, once a salesman takes an application, what happens to it? A. He submits it to the branch office, and the branch office makes up different forms and with a recommendation sends it to the home office for approval; and the contract is reviewed by the sales manager of the home office, and either approved or rejected, or sent back to the branch, the branch receiving two

copies of the contract if it is approved, and retaining one for their files and sending one to the exhibitor.

Q. Are contracts ever rejected by the home office? A. Yes, sir.

Q. Is that a regular practice? A. No, sir.

Q. In short, most that come in are accepted; is that right? A. Yes, sir.

Q. You have no producers' representatives to worry about? A. No, sir.

Q. Now in these contracts that come in generally, is there any selectivity as far as the exhibitor is concerned? A. Yes, quite a lot of exhibitors have selectivity. Most of the ex-

(2017)

hibitors insist upon right of cancellation of a certain group of our product, and the majority, I think ten or twenty per cent, where they buy all of our product, and a lot of exhibitors buy half of our product and some buy a little more.

Q. Is there any different norm as regards selectivity in relation to the affiliate and the independent? A. I don't understand what you said.

Q. Are there any different rules applied as regards the granting of selectivity to an independent or the affiliated theatres? A. No, sir.

Q. Do the independent exhibitors demand and receive the right of selectivity in your contracts? A. Yes, sir.

Q. Is it the infrequent thing or the rule as far as independents are concerned? A. Generally the rule.

Q. Does the same apply to the affiliated? A. Yes, sir.

Q. Do you see any great difference between any exhibitor in the demands he exacts of the distributor? A. I do not see any difference in those he wants from me.

Q. And gets from you? A. That is right.

Q. As matter of fact, Mr. Scully, the exhibitor is trying to buy as much of your product as he possibly can with as little obligation as possible to play it; isn't that the ex-

hibitor's desire? A. I would say that he buys our product as few as he can, so that he can have a greater selectivity of our pictures and play all the good pictures.

(2018)

Q. And he likes to pay you as low a license fee as he possibly can get away with; isn't that the fact? A. All exhibitors are like that.

Q. Now, have you had any resistance from exhibitors on selling a large group rather than selling a split-up number of small groups? A. No.

Q. What have you to tell this court about the general reaction of exhibitors to that method of selling? A. Well, the exhibitors like to be assured of a constant flow of pictures. Sometimes they cannot get all of the good pictures or buy all of the good pictures, and they like to buy as many pictures as they can, so if sometimes they didn't have a good picture they might play one that is not so good, and they generally like to buy as many as they can, and they generally contract for all your pictures, with the right to select what they think they can absolutely use.

Q. Well, have you had——

Judge Hand: What does that mean, that they want an option on the whole thing?

The Witness: That is right.

Judge Hand: And not to be compelled to take anything they don't want?

The Witness: They make as minimum a commit-

(2019)

ment for the pictures as they possibly can negotiate, with the understanding that they will use say half of your product or sixty per cent of your product; but they always have the opportunity of using them if they need them.

Judge Bright: Does your license agreement provide for such selectivity?

The Witness: We provide for it in the negotiation when we enter into the contract when the exhibitor wants to buy so many pictures——

Judge Bright: Is it in your contract?

The Witness: Selectivity?

Judge Bright: Yes.

The Witness: No. We give the man the right to cancel a certain percentage of the product.

Judge Bright: That achieves the same result, doesn't it?

The Witness: Yes.

Q. Mr. Scully, you mean it is not in the printed form, but selectivity may be typewritten in or written in in pen and ink by the salesman? A. That is right, when he is negotiating the deal.

Q. And each separate contract tells the extent of the selectivity the exhibitor has been able to bargain for, isn't that right? A. Right.

(2020)

Q. Now, as your product has improved in quality have you been able to better your position on selectivity? A. To some extent.

Q. To any appreciable extent? A. No, I would not say that.

Q. So notwithstanding the improvement in quality of Universal pictures, you still have the same demands for selectivity from all exhibitors, is that right? A. That is right.

Q. Now, in connection with 17,000 theatres—I think somebody has said——

Mr. Proskauer: Eighteen.

Mr. Raftery: Well, it has gone up to eighteen since I last looked.

Mr. Davis: It is still going up.

Q. Evidently there has been an increase in the number of theatres in this country during the period from 1936-37 up to 1944-45; and by "theatres" I mean motion picture theatres; isn't that right? A. There would appear to be, yes.

Q. Well, in a city like New York theatres that were formerly legitimate theatres are now motion picture theatres? A. Right.

Q. Such as the Winter Garden? A. Yes.

Q. The Gaiety? A. Yes.

Q. And others, isn't that right? A. Yes; and the Globe. (2021)

Q. Have there been many new theatres built since the beginning of the war? A. I don't think so.

Q. Whereby restrictions prevented the building of more theatres? A. Yes.

Q. But a great number of theatres are now opened that were closed prior to the period of prosperity we now have? A. Right.

Q. And of these theatres how many of the 17 thousand or 18 thousand theatres would you say are of a class, one theatre in one town or one theatre in the one neighborhood of a larger subdivision? A. I don't understand you.

Q. Well, let us take it this way: How many first-run theatres do you think there are in this country, important first-runs, in cities of 10,000 or over? I think the Government says there were four hundred and something in cities of 25,000 or over? A. Probably 2500.

Q. In other words, numerically a great many of these theatres are located in situations or towns where it is one theatre in the situation; isn't that the fact? A. Right.

Q. And that exhibitor in that situation has a call on the product of all these defendants and everybody else that exhibits pictures; isn't that the fact? A. Yes.

Q. Now, in those situations generally, how do you fare on selectivity or even getting into them? A. We sell less

pictures, of course, in those situations; and in a number of
(2022)
situations we do not even obtain representation.

Q. Are there any important situations in this country where you can't even get in that you can recall now? A. No.

Q. How about Mr. Sudekum? Have you been able to license your product to that circuit this year? A. No, sir.

Q. Last year? A. No, sir.

Q. The year before? A. No.

Q. How long has Sudekum left you out? A. I think about four years.

Q. Sudekum is classified as an independent in this case, is he not? A. Yes.

Mr. Raftery: I think the Government concedes that. Is that right?

Mr. Wright: Mr. Sudekum is what I would call a quasi-independent.

Mr. Proskauer: Wait a minute, let us not pass that with a jest. Mr. Sudekum is not connected with any of the five so-called major defendants.

Mr. Wright: He does operate the Paramount Theatre in Nashville on a profit-sharing basis with Paramount.

Mr. Proskauer: Well, that is one exception you can make.

(2023)

Mr. Seymour: Mr. Wright, so we won't have any matter on the record which we will have to correct later, I am told that the theatre which you refer to is merely leased to Mr. Sudekum. Is there any dispute about that?

Mr. Wright: As I understand it he leases it under an arrangement whereby he agrees to play Paramount pictures and he also gives Paramount a share in the profits of the operation generally.

Mr. Seymour: I assume that he pays rent for the theatre that he leases, yes.

By Mr. Raftery:

Q. And Mr. Sudekum operates a great many theatres down in Tennessee and the environs, doesn't he? A. Yes.

Q. And he has shown a single Universal picture in a great many years, has he? A. I think about four.

Q. I believe there is a man named Richards in New Orleans. A. Yes.

Q. And do you sell Mr. Richards any pictures? A. No.

Q. How many theatres does he operate? A. Oh, I think somewhere around 80 or 100.

Q. What is the name of his company? A. It was the Saenger Amusement Company, as far as I know.

Mr. Raftery: Well, to keep the record straight Mr. Seymour,——

Mr. Seymour: Publix-Saenger is the corporation

(2024)

in which Paramount has some interest—oh, I beg your pardon. Paramount-Richards.

Mr. Raftery: Paramount-Richards?

Mr. Seymour: Yes.

Mr. Raftery: And is part of that operation down there affiliated or not?

Mr. Seymour: The Paramount-Richards Company is one in which Paramount has a 50 per cent interest. Mr. Richards himself also, as I understand it, operates some theatres in which Paramount has no interest.

Mr. Raftery: And that, I believe, is called United something or other?

Mr. Seymour: There are two companies, as I understand it, the United Theatres and Theatres Service in which Mr. Richards is interested but in which Paramount has no interest.

By Mr. Raftery:

Q. Well, at any rate, in the theatres that Richards operates down in that New Orleans area, have you been able to sell him any Universal pictures for the past several years? A. Not for seven years.

Q. How long? A. Seven.

Q. And any representation you get down there you have to get from other sources? A. Yes.

Q. Are there any other situations that you can think (2025)
of now where you have been left out; and by "you" I mean Universal? A. Well, we were left out of the Schine Circuit, I think, we did not sell for one year. There was the Skouras Theatres in New York which we did not sell for one year; the Century Circuit in New York which we did not sell for one year.

Q. We have heard about the Schine and the Skouras. What is the Century Circuit in New York? A. That is a circuit run by A. H. Schwartz in Long Island.

Q. And where are their theatres located? A. In Long Island and Brooklyn.

Q. Are they representative theatres? A. Yes.

Q. Large theatres? A. Yes.

Q. And their circuit extends quite a bit out in Long Island, does it not? A. Yes.

Q. Do you know how many theatres they operate? A. Oh, I would say about 50.

Q. And have you had a run available for them for all those theatres of all your pictures? A. Yes.

Q. And they did not buy any? A. That is right.

Mr. Raftery: I have pretty well exhausted this particular point as far as this man is concerned.

Judge Hand: We will adjourn until 10:30 tomorrow morning.

(Adjourned to November 2, 1945, at 10:30 a.m.)

(2026)

New York, November 2, 1945,
10.30 o'clock a.m.

Trial resumed.

WILLIAM A. SCULLY, resumed the stand.

Direct Examination Continued by Mr. Raftery:

Q. Mr. Scully, when we adjourned last night we were talking about situations where Universal had been left out by exhibitors. Have you any other situation that you wish to call to the Court's attention? By the way, what is that paper you are looking at? A. List of our exchanges.

Q. Just the names of the cities? A. Yes. There is the S. & S. Circuit in Chicago.

Q. How long were you left out of the S. & S.? A. Three years.

Q. Is that a small circuit or a large circuit? A. They have about 80 to 90 theatres.

Q. No Universal pictures were exhibited in any of those theatres during that three-year period? A. No, sir.

Judge Bright: What was the reason for that?

The Witness: We could not negotiate a proper deal with the circuit.

(2027)

Judge Bright: Was there some fight on or something?

The Witness: No, just a question of trying to obtain the terms that we thought we were entitled to and we could not consummate the proper deal.

Q. Was there anything extraordinary in the demands that you were asking for your product? A. No.

Q. Any other circuits there or individuals? A. Cooperative Theatres in Detroit, Michigan, that we did not sell our pictures to for a year.

Q. The Cooperative in Detroit, is that a buying combine? A. Yes, sir.

Q. How long has that been in existence? A. I think, to my knowledge, 10 or 15 years.

Q. And what is the nature of the combine? A. They have a gentleman buying pictures for various theatres in Detroit, City of Detroit and outlying territories.

Q. How many theatres? A. Oh, probably a hundred.

Q. Hasn't there been a time in the history of that combine where the individuals who were buying had no interest of any kind of character in the theatres they were buying for? A. Yes.

Q. Haven't there been times when they have refused to pay you, grant you, any percentage terms for any of your pictures? A. Yes, sir.

(2028)

Q. And insisted on paying a flat rental only? A. Yes, sir.

Mr. Raftery: I would like a concession from Mr. Wright that the Government has never at any time taken any steps against that combine or any buying combine.

Mr. Wright: Up to the last three words there, you were all right. We haven't taken any steps against Cooperative. We regard the present suit as directed against the very largest buying combines in the industry.

Mr. Raftery: I would like——

Mr. Proskauer: Any other than this one, this alleged one.

Mr. Raftery: I would like a concession from Mr. Wright that he has never taken any steps against any

combine similar to Cooperative that exists in the United States, leaving out the five buying defendants here.

Mr. Wright: Well, I would say that the Schine, Crescent and Griffiths circuits all represent buying combines and in an intensified form.

Judge Hand: Why waste time on it, trying to get a stipulation like that out of him? Nobody would make that stipulation in his position.

Mr. Raftery: It is a very simple stipulation.

Judge Hand: All right, he wouldn't make it. It may be simple.

(2029)

Q. Are there other buying combines in this country besides Cooperative, similar to Cooperative? A. Yes; there is a Cooperative circuit in Pittsburgh; there is the Affiliated Theatres in Boston; there is the Allied, I think it is, Allied Theatre Company in Chicago.

Q. Mr. Scully, continue with the exhibitors or combines who have left you out.

Judge Bright: When you say "left out", you mean who refused to buy from Universal?

Mr. Raftery: That is right, although the product is available.

Judge Bright: Are these independent buyers?

Mr. Raftery: Yes, sir.

Judge Bright: Not affiliated?

Mr. Raftery: No, sir. The only affiliate we mentioned yesterday was Richards.

Judge Bright: What is your point in this proof?

Mr. Raftery: The point is that this is an exhibitor's market; they can buy or not buy from distributors as they see fit; that the product is available, and that it really is the fact that there is nothing that they can

complain of about any of the distributor defendants in the case, and I am confining it, when I say that, to the two that I represent. We have product and they won't buy it.

(2030)

Mr. Proskauer: May I suggest to your Honor in answer to your question that there is another aspect of this that we deem important. The only way we have of legitimately protecting ourselves against these buying combines is that, if we have our own theatres and they gang up on us, to use a conventional phrase, we can put the shows in our own theatres.

Mr. Raftery: I have only one or two more that I want to refer to.

Judge Bright: I am not trying to shorten the examination.

(2031)

Q. Is there any other one that you see there—not on your list, but if your memory is refreshed by looking at your exchange territory? A. Is there any other what?

Q. Independent situation where you have been left out by the exhibitor? A. Yes, at Fall River, Massachusetts.

Q. Who is the exhibitor in Fall River, Massachusetts, first-run? A. Mr. Yamins.

Q. What theatres does he operate in Fall River? A. He operates the Durfee, Capital, the Plaza and the Strand, and there are two other first-run theatres; I can't recollect the names of them. The Plaza and the Strand are two subsequent run theatres.

Q. Well, does he operate all the first-run theatres or did he operate all the first-run theatres in Fall River, Massachusetts, up till recently? A. No, there was one theatre that was in opposition there, called the Academy.

Q. What happened to the Academy? A. Mr. Yamins I think bought the lease on the theatre and closed the theatre.

Q. Well, after that he operated all the first runs? A. Yes, sir.

Q. Now, how many years did he leave you out of Fall River? A. Two.

Q. Now, have you been able to sell him the product up to this time? A. No.

(2032)

Q. What did you do? A. I tried to promote someone to take over the Academy theatre, and I was successful in having a man—I think he bought the building of the Academy Theatre—and when the lease runs out, Mr. Yamins' lease runs out, I think he will operate the Academy theatre.

Q. Now, whom did you promote to take the Academy theatre? A. Mr. Zeitz.

Q. Is he an independent exhibitor in Massachusetts? A. Yes, sir.

Q. Where does he operate? A. In Portland, Maine, and New Bedford, Massachusetts.

Q. Has he gotten possession of the theatre yet? A. No.

Q. Do you know when he is going to get possession? A. I think it is some time this August.

Q. Next August? A. Yes, next August.

Q. So up until next August you have no deal and have had no deal in the past two years in Fall River? A. No. I have sold my pictures in Fall River at the present time to Mr. Zeitz when he opens the Academy theatre.

Q. For exhibition next August? A. That is right.

Q. Universal has no interest in Zeitz, in the theatre property? A. No.

Q. Now, when you had your trouble with Richards down South, what did you do? A. I tried to sell as many theatres

(2033)

as I could, and in some situations I was successful in selling

second-run theatres pictures to play first-run. And where there was any opportunity of selling a first-run theatre pictures, I sold them our pictures.

Q. And you are still playing your pictures in those converted second-runs and third-runs and first-runs in that area? A. Yes, sir.

Q. Do you sell franchises, Mr. Scully? A. Yes, sir.

Q. I ask you to look first at the New Orleans sheet. Did you sell franchises generally in the New Orleans area to every theatre that you sold your first-runs to in opposition to Richards? A. I believe we did.

Q. Now will you tell the Court the reasons for selling the franchises to those theatres? A. The exhibitor in converting his theatre from second-run to first-run, wanted to be assured of product and wanted a steady flow of first-run product, and generally insisted that we sell him a two or three-year deal; and as we thought that that would be the best way to market our pictures to obtain revenue out of New Orleans territory, we sold him a two and three year deal for our pictures.

Q. Now, did these exhibitors expend moneys in improving their theatres to convert them from second or sub-runs to first-runs, as a general rule? A. I think so. Some exhibitors that had only one theatre were fortunate enough to convert

(2034)

something else into another theatre at certain times.

Q. Well, generally speaking, the Richards houses were superior to the houses that were down there when you got into your difficulty? A. That is right.

Q. And these houses were converted? A. Yes.

Q. And you sold them two and three-year deals to protect them on their new investment? A. That is right.

Q. How many franchises would you say you have made with independent exhibitors during the period you have been at Universal? A. Probably five hundred.

Q. How many of them are in effect today? A. I think they are all in effect.

Q. Now, do these documents contain a list of every franchise, as far as you know, that Universal has with both independent and affiliated exhibitors? A. Well, they are franchises in two and three-year deals.

Q. Now, in addition to the list you had in your hands, the remaining list contains the rest of the United States, does it not, by exchanges? A. I think so.

Q. That list was compiled under your direction? A. Yes, sir.

Mr. Raftery: I am going to offer it.

Judge Bright: This is just a list of franchises?

Mr. Raftery: It does more than that, your Honor. (2035)

It has the town and State; the theatre and circuit, signed by the name of the exhibitor; the date of the franchise; the length of the franchise; the starting year and the finishing year.

Mr. Wright: We have no objection. We would like a copy.

Mr. Raftery: Yes. I will give you the one I am using, Mr. Wright.

(Marked Defendant Universal's Exhibit U-2.)

Mr. Raftery: In addition the exhibit shows, if it is more than one theatre, it will say 8 situations or 18 situations, or how many theatres are covered by the document.

Q. Mr. Scully, I show you three sets of contract forms for two-year deals for Universal product for the year commencing 1942-43, and 1943-44, 1944-45, 1945-46, and 1946-47. Are these the forms used by your company on these two-year deals? A. Yes.

Mr. Raftery: I offer those, and by tearing them apart you can get a copy.

Mr. Wright: Thank you. We have no objection.

Judge Hand: What is this to show?

Mr. Raftery: Manner and method of selling the product.

Judge Hand: What?

(2036)

Mr. Raftery: It shows the manner and method of selling the Universal product.

(Marked Defendant Universal's Exhibits U-3-A, U-3-B and U-3-C in evidence.)

Q. Now this form of contract in this type of field is offered to affiliated exhibitors and independent exhibitors alike? A. Right.

Q. On your three-year deals that are included in that schedule, do you offer those to the affiliated and independent alike? A. Yes.

Q. Now, what type of exhibitor has availed himself more of the opportunity of buying your long-termed deals, the independent or the affiliated, numerically? A. Independent.

Q. In a much greater degree or—— A. Well, it would be, because naturally there are more independents than there are affiliates.

Q. In selling all exhibitors, whether you sell them a one-year deal or a partial deal, or any kind of a deal, do you discriminate in any way as between the affiliated and the independent? A. No.

Q. Your product is open for all? A. Yes, sir.

Mr. Raftery: You will concede that Mr. Scully will give the same answer to the Zukor question?

Mr. Wright: Yes, indeed.

(2037)

Mr. Raftery: Are there any questions here?

Mr. Seymour: Yes.

Cross Examination by Mr. Seymour:

Q. Mr. Scully, does Universal license its pictures for exhibition in some of the theatres operated by the theatre operating companies in which Paramount is interested? A. Yes, sir.

Q. Do you know where those negotiations for those film licenses are conducted? A. In the various offices of the fellows running the theatres.

Q. That is, in the field at the office of those theatre operating companies? A. Yes, sir.

Mr. Seymour: That is all.

Cross Examination by Mr. Davis:

Q. Mr. Scully, does Universal license films to Loew's first-run theatres in New York City? A. The Criterion theatre.

Q. The Criterion only? A. We have played some pictures in the Capitol theatre.

Q. What? A. We have played pictures in the Capitol theatre.

Q. But you regularly license to the Criterion, do you? A. Yes, sir.

Q. How many films a season? A. We don't have any number. They play all our good pictures.

(2038)

Q. Do you license them in groups or individually? A. We have an agreement with the Loew people that they play all our good pictures in the Criterion Theatre and, as the pictures come out, they play them.

Q. What clearance do you give to the Loew's Criterion over the next run? A. They have seven days clearance over greater New York and Long Island and New Jersey.

Q. Seven days? A. Yes, sir.

Q. Is the length of the clearance in your contracts with the Criterion dependent on the admission prices charged by the next run? A. No, sir.

Q. It is a flat clearance of seven days? A. Yes, sir.

Judge Hand: Mr. Wright?

Cross Examination by Mr. Wright:

Q. Mr. Scully, with reference to these license agreements that have been just offered here, there is in evidence, I believe, an agreement for the 1943-44 seasons previously supplied by your company. Now, as I understand it, it is your testimony that your regular method of selling films that season was on this two-year form, marked in evidence as U-3-A, covering the 1942-43 and 1943-44 seasons rather than on a form providing for the single season? A. No.

Q. You mean that when you do make a two-year deal as distinguished from a one-year, this is the form you gen-

(2039)

erally use, is that right? A. Yes, sir.

Q. Do you know whether there are any differences in the printed provisions here and those you use in the one-year form? A. When we make a two-year deal with an exhibitor, we use the contract of the current season's product, and when we make the additional year, we make it on that form.

Q. The difference between this form U-3-A and this Exhibit 290, which is in evidence as the 1943-44 form of yours, is simply that your U-3-A covers two seasons product and the 290 just covers one; otherwise is there any difference of substance in the provisions, do you know? A. This contract covers one-year product for the season of 1943-44.

Q. I say, other than the difference in season covered, can you tell us offhand whether there is any difference in the contents of the forms? That is what I am getting at. A. The only difference in the contents of the form, I don't think this has any printed matter on the back and this has.

Q. Then when you make——

Mr. Raftery: Mr. Wright, I think we can save a lot of time if you will just read the first paragraph.

Mr. Wright: I haven't seen the form.

Mr. Raftery: I did not, until five minutes ago.

(2040)

Q. Mr. Raftery calls my attention to the fact that these agreements for two years, that you refer to, are actually used as supplementary forms, that is, the exhibitor signs the agreement on a form such as 290 there, which has the printed provisions on the back, and then also executes one of these two-year forms, is that right? A. Yes.

Q. Did I understand you to say that you made your films available to all exhibitors without discrimination? A. I make my product available to a run to an exhibitor.

Q. Do you want the Court to believe that you make your product available to all exhibitors playing the same run on the same terms? A. No.

Q. In so far as the rental terms you make in your agreements are concerned, you vary them greatly, do you not? A. Right.

Q. That is, from every exhibitor you do business with on any run you try to get the highest terms that you can get out of him and the most film rental regardless of what terms you are selling his competitor on, isn't that right? A. Yes, sir.

Q. And you are frequently successful, are you not—— A. Sometimes.

Q. —in—just let me finish the question. A: Pardon me.
(2041)

Q. —in securing much higher terms and film rentals from independent exhibitors on a particular run than you do from the affiliated theatres which may be playing in opposition on the same run, isn't that right? A. I wouldn't say so, no.

Q. Would you say you had not? A. I don't think the independent exhibitors pay us any more for the same run than an affiliate does or would.

Q. You don't think so. Well now, do you know? A. No, I don't know, unless you are talking about something specific.

Q. Let us talk about something specific. A. All right.

Q. I call your attention to the interrogatory answers furnished by your company with reference to Philadelphia. You see the Model Theatre there, exhibitor, Warner Bros., which——

Mr. Raftery: We cannot even hear the name of the theatre.

Mr. Wright: The Model.

Q. —Warner Bros. played a fourth-run in Philadelphia on Christmas Holiday at a rental of $187.50, is that right? A. Yes, sir.

Q. That run began on September 19th or September 17th and then concluded on the 18th, right? A. That is right.

Q. Then I show you this fourth-run in the Ambassador of William Greenfield. A. Where is the run?
(2042)

Q. The run is up at the top. A. Oh.

Q. Paid you $321.91 for a run that began on the same day, September 17th, and continued through September 20th, right? A. Yes.

Q. And then there is a fourth run in the Oxford Theatre, Warner Bros. house, played September 19 and 20, film rental was $183.69, is that right? A. Yes, sir.

Q. Then you played a fourth run in the New Colonial from September 20 to September 23 inclusive and he paid you a film rental of $550.41, didn't he? A. Yes.

Q. Then you played a fourth run in the Warner Bros. Sedgewick Theatre, September 21 through September 23, and they paid you a rental of $100, did they not? A. (No answer.)

Q. And you also played a fourth run in the Liberty Theatre of Warner Bros., September 22 and 23, a film rental of $137.50, isn't that right? A. Can I see it a minute?

Q. Yes.

Mr. Raftery: Are those flat rentals, Mr. Wright?

Mr. Wright: It is a little difficult to say.

Q. Can you tell from looking at the rentals there whether they are flat or percentage? A. Yes.

Q. Which are flat and which were based on percentage? (2043)

A. Here is the Colonial Theatre. I would assume it is a percentage. Here is the Oxford Theatre. I would assume is percentage. Here is the Ambassador Theatre. I believe is percentage. And I think the other three are flat rental.

Q. In other words, you sold the Warner houses on a flat rental and you got percentage out of the independents, is that right, in that situation? A. No, we sold Warner on percentage too.

Q. On the fourth-run? Which was the fourth-run Warner, which was on percentage? A. The Oxford Theatre. I don't know whether it is on percentage or not. From the rental returns of $183.69, it would lead me to believe it was on percentage. I am not positive.

Q. Other than the Oxford, the other runs that were flat rental are the Warner runs, isn't that right? A. That is right.

Q. As a matter of fact, when it comes to percentage terms you actually get, in many situations, a higher percentage for the same pictures which independents play on a subsequent run in the same area than what you get from an affiliated exhibitor playing the pictures first run in the area, isn't that right? A. What area?

Q. Well, let us take——

(Discussion between Mr. Raftery and Mr. (2044)

Wright out of the hearing of the Court.)

Mr. Wright: Yes.

Mr. Raftery: I just wanted to make sure that all this stuff is in because I have no idea what went in in the wholesale offer in the early part of the case.

Mr. Wright: I would like to ask to have this marked for identification.

(Marked Government's Exhibit 384 for identification.)

Judge Goddard: Mr. Scully, does the seating capacity of a theatre enter into the amount of percentage?

The Witness: No.

Judge Goddard: In fixing the percentage?

The Witness: Does not enter into the amount of percentage. Seating capacity has a great deal to do with what film rental you are going to obtain because you have more seats with more people in it.

Q. I will call your attention to an agreement that is in evidence here as Exhibit 259, a memorandum of a three-year deal with Warner in Philadelphia, covering the 1941-42, 1942-43 and 1943-44 seasons. The terms stated there generally provide five pictures at 35 per cent, 2½ per cent off for double bill; 5 at 30 per cent, 2½ off for double bill, 5 at 25

per cent, 5 per cent off for double bill; balance commitment 20 per cent; if double bill, 15 per cent or flat rental; then the
(2045)
following terms to be negotiated and agreed upon between Mr. William A. Scully and our zone managers. That means between you and the Warner theatre managers in the various zones in which they operate? A. Yes.

Q. Now then, there is also a deal sheet attached here, is there not, signed by you and—can you read that signature? A. Mr. Hinchey.

Q. He is the manager in the Philadelphia zone? A. No, he was a film buyer.

Q. Film buyer for Warner? A. In the Philadelphia zone.

Q. Dated December 1, in which you then fixed the precise rentals for the first-run theatres in Philadelphia, is that right? A. Right.

Q. There you provide for five pictures to be played in the theatres listed there as the Warner first-run houses at rentals varying from 20 to 35 per cent, depending upon what they gross, is that right? A. That is right.

Q. As those were your first five top pictures, in the first bracket; those were the choice pictures of your season's release? A. Yes, sir.

Q. In selling those top pictures to the independents who played the second-run—— A. Just a minute.

Q. —or played subsequent-run—there are no independent second-runs in Philadelphia, or there weren't at that
(2046)
time? A. I think there is an independent second-run in Philadelphia.

Q. When you get down to wherever there were independents and you offered those top pictures to those independents, did you offer them any of your top pictures at 20 per cent of the gross? A. 20 per cent? No.

Q. Yes. A. No.

Q. You tried to get and, in most cases you did get, from 35 to 40 per cent of the gross, isn't that right? A. Subsequent-run exhibition?

Q. Yes. A. If I was, I was awfully lucky.

Q. On your top pictures. A. I don't think we got 40 per cent of the gross for subsequent-run theatres in Philadelphia.

Q. 35? A. Yes, might be.

Q. In any event, it was a higher percentage than what you were getting in some instances on your top pictures first-run, isn't that right? A. No, because I had an opportunity of earning 35 per cent for my pictures in first-run Philadelphia.

Q. I understood you had the opportunity. I say, the percentage that you got there varied from 20 per cent up to, what is it, 35, depending on what the picture did, isn't that right? A. That is right.

Q. In selling those subsequent-runs, is there any case (2047)

where you made a deal with a subsequent-run independent in Philadelphia where under any circumstances he would get that same top picture that you sold to Warner Bros. first-run for a rental, a film rental of 20 per cent? A. I might have sold it to him on a flat rental basis where he would get the film rental at 20 per cent.

Q. I am talking about the contract terms now. A. You mean on a percentage basis?

Q. Where you sold it on a flat rental basis, you would not know what percentage of his gross you got? A. Right.

Q. But I am referring where you sell on a percentage—where you sold on a percentage basis, where he agreed to pay you a percentage of his gross. A. Would we sell it for 20 per cent?

Q. I am asking you if you can point to any deal you actually made with an independent subsequent-run in Philadel-

phia where your contract said that he could have the picture or he would pay 20 per cent of the gross of the picture under any circumstances set forth in the contract. A. No.

Q. You referred to the so-called buying combinations—or, before you get to that, let us take this situation of Richards down there in New Orleans. Of course, the majority (2048)
of those theatres that Richards buys for are those in which Paramount doesn't have an interest; do you know that? A. Yes.

Judge Bright: "Doesn't", did you say?

Mr. Wright: Yes.

Q. That is, he himself operates as a buyer for a very large number of theatres in which he has varying interests himself, isn't that right? A. That I don't know.

Q. Well, he buys for 90 or 100 theatres down there, isn't that right? A. Yes.

Q. Or more than that. Then you say when you broke with Richards you broke with him for all the theatres he bought for, isn't that right? A. That's right.

Q. And then you say you were able to encourage some independent opposition. You did that by giving them franchises, is that right? A. Yes.

Q. And, as a matter of fact, you had to give them franchises, did you not, because they knew that if they did not have the franchise, any time you and Richards got back together again, they would lose the product you had given them without any opportunity for continuing the run at all?

Mr. Seymour: I object to what they knew. I think it is plainly incompetent.

Judge Hand: Overruled.

A. I don't understand what you said.

(2048a)

Q. It is a fact, isn't it, that in those cases the exhibitors were the ones who insisted on the term deal, that is, the term deals that you made, isn't that right? A. They insisted upon it, yes.

(2049)

Q. And the reason that they insisted upon it was that they knew, did they not, that no matter how much film rental they were paying you in a particular situation, that if you and Richards got together again over Richards circuit, you would take those pictures away from them without their being given any opportunity to negotiate for a continuance of the run, isn't that right?

Mr. Seymour: If your Honor please, that is certainly argumentative.

Judge Hand: It is improper in form. I do not know that it makes any difference——

The Witness: Shall I answer the question?

Judge Hand: Instead of saying "they knew" it might be framed to read "it would be possible for them to do so and so."

Mr. Wright: Let me put it this way:

Q. You knew, as a matter of fact, that if you had not committed yourself in those situations under a deal and Richards offered you for the Circuit more money than these particular independents as a group was paying, you would have taken the pictures away from them and given them back to Richards regardless of whether in any individual situation the independent was paying you better terms than Richards had or would or not, isn't that right? A. No, sir.

Q. Now, these buying groups that you spoke of, com-

(2050)

posed of independent exhibitors—have you any idea why

those groups were formed? A. To buy pictures easier and cheaper, I think.

Q. Precisely. And in each of those areas where those so-called buying combines operate there is, is there not, a very large affiliated circuit which in terms of buying power considerably exceeds any of the so-called independent buying combines; isn't that right?

Mr. Seymour: If your Honor please, I object to that as argumentative and incompetent. He has got a lot of conclusions in the question. He is just arguing his case.

Judge Hand: Of course, really all of this is argumentative.

Mr. Seymour: Well, it seems to me that had better be spelled out in a brief rather than in a question.

Judge Hand: It is not factual. You are making just arguments now and putting them in the form of questions. Lawyers often do that. And he refuses to answer very often in your favor.

Mr. Wright: I agree that it is argument, and the only reason that I went into it was that I felt that his direct examination was pure argument, and was permitted; and I thought we might hear some of the arguments of the other side; but it can well be de-

(2051)

ferred until after the witness is off the stand.

That is all.

Mr. Raftery: Just a few questions.

All of this is in evidence; we will save it for the brief, and we will try to find out whether the houses are percentage and what the contracts were, and so forth, and argue on the brief. However——

Judge Hand: Yes. Do not have such minutiae that nobody can understand it except a research man in a very limited field.

Mr. Raftery: We will accept a limit on the length of the brief.

Redirect Examination by Mr. Raftery:

Q. Mr. Scully, his Honor, Judge Goddard, asked you about the size of the theatre affecting the amount of percentage that you can get in a given situation. Can you get as high a percentage of the gross receipts from a theatre like the Music Hall, with a seating capacity of 6200, as you can in a theatre like the Criterion? A. If the picture earns it, yes.

Q. Well, that would come in the overage, wouldn't it, rather than in the initial percentage? A. That is right.

Q. In other words, the larger the theatre the lower the percentage starts, but your ability to earn comes from the (2052)
overage figure if your picture earns it? A. Right.

Q. Now, Mr. Wright tried to compare first-run exhibition terms with second-run exhibition terms. In your percentage deals over this period of years, what has been the number of pictures that you have been able to get percentage from exhibitors, generally, selling in the field? A. On an average, about ten.

Q. About ten pictures? A. Yes.

Q. Now, in the sliding scale percentage that appears here, where the amount of your earning depends on what the picture does in the box office, do you usually sell pictures in the second-run on sliding scale? A. Yes.

Q. Did you have any sliding scale deals at that time with other exhibitors, independent and affiliated in the subsequent-run? A. Yes.

Q. That is a common form of deal in the industry generally, is it not? A. Yes.

Q. In these theatres that are included on that list that Judge Proskauer has in his left hand, is there anything to indicate whether those theatres are directly competitive, that Mr. Wright asked you about? A. No.

Q. Is there anything to indicate the seating capacity or the ability to pay? A. I don't know. Let me see it, will you, Judge?

(List handed to the witness.)

(2053)

Q. These are merely answers to interrogatories where we are asked to tell the film rental we got in given situations, that is all. A. No, but it says in here that these theatres are fourth-run, and they are all marked fourth-run; but I see the Ambassador here, although it is marked fourth-run, it played on September 17th to 20th; and the Warner Liberty Theatre marked fourth-run played on September 22nd and 23rd. Now, it might have been fourth-run in a certain section or it might have been fourth-run in the City of Philadelphia. Now, one of these theatres might be at one end of the town and the other might be at the other, I don't know.

Q. And you have different numbers of playing days? A. That is right.

Q. Now, is there any way that your can compare film rentals from those documents as to whether one was fair film rental or an unfair film rental, or an adequate film rental? A. No.

Judge Bright: Well, he called your attention to the fact that you were charging 35 per cent on fourth-runs in those several instances as compared to 20 per cent on first-runs in the same city. Can you explain why that is so?

The Witness: Well, the 20 per cent on first-run in a city like Philadelphia is the starting point; if a

(2054)

picture grosses a certain amount of money we obtain 20 per cent; if it grosses a certain amount more, we get 25, 27½, 32½, or 35 per cent. When a picture grosses a certain amount of money in a theatre we get 35 per cent of the gross receipts. And when Mr.

Wright says that we are selling pictures at 35 per cent in subsequent-run, probably we are, I don't know, in Philadelphia. And when he asked me whether we sell pictures at 20 per cent to subsequent-runs in Philadelphia, I answered him no.

Judge Bright: Why did you charge more for fourth-runs than you did for first-runs? That I think was what his inquiry was directed to.

The Witness: We don't charge the fourth-run more. We have an opportunity of earning 35 per cent of the gross receipts in the first-run. It is a question of how much the picture takes in at the box office. If the picture is a quality picture and can gross at the box office, we get ourselves 35 per cent. If the picture is not quality and the people do not like it, and it does not take in any money, we obtain 20 per cent of the gross receipts, or 25, or 27½, or whatever it is.

Judge Hand: To what extent in Philadelphia do you sell first-run pictures to independents?

The Witness: We do not sell first-run pictures to independents in Philadelphia.

(2055)

By Mr. Raftery:

Q. Mr. Scully, in the downtown first-run area where these pictures play first-run Philadelphia, what type of theatres are they exhibited in? A. I don't understand what you mean.

Q. Are they large theatres or small neighborhood houses? What type of theatres are they? A. These?

Q. Where the first-runs are exhibited on your sliding scale contract? A. Pictures are exhibited at first-class theatres in Philadelphia, as good as there are in any other city.

Q. At the highest admission charge in the city, isn't that right? A. Yes, I would assume so.

Q. And your opportunity to earn the 35 per cent depends entirely upon the box office performance of the picture? A. That is right.

Recross Examination by Mr. Wright:

Q. I had this agreement identified. I hand you this printed document marked for identification as Exhibit No. 384, an agreement, between Universal Film Exchanges, Inc. and Fox-Midwest Amusement Corporation, dated January 16, 1939. That is apparently a two-year deal for the 1938-1939, 1939-1940 season. A. Yes, two years.

Mr. Wright: I will offer this agreement in evidence.

(2056)

Mr. Caskey: As I understand it, it is only the printed book that is offered and not the single attached deal sheet, and there is no objection.

(Government's Exhibit 384 for identification received in evidence.)

Recross Examination by Mr. Proskauer:

Q. Mr. Scully, I would like to clear up what seems to be a little confusion here: These papers that were referred to as being in my left hand contain the words "Christmas Holiday." Now, "Christmas Holiday" is the name of a film, is it not? A. Yes.

Q. It does not refer to a time? A. That is right.

Q. Now, Gerson Amusement Company, the New Colonial Theatre—that is an independent, is that right?

Judge Goddard: Is this Philadelphia, Judge Proskauer?

Mr. Proskauer: Yes.

A. I would assume so.

Mr. Proskauer: That is true, isn't it?

Mr. Wright: As far as I know, I think it is.

Q. Now, take this form here; that shows, doesn't it, that you leased Christmas Holiday to Warner Bros. for a first-run in the Savoia Theatre for—and I am reading from the column headed "Play date"—for the first, second, third, Theatre—that is an independent, is that right?

(2057)

Q. And for that they paid you $1,043? A. And 97 cents.

Q. All right, you can have the 97 cents. Now, when you came to the fourth-run you leased it for September 20, 21, 22, 23rd, four days, similarly, four days to Gerson Amusement Company at the New Colonial Theatre, and you got $550 for it? A. Right.

Q. So for a four day fourth-run you got from Gerson Amusement Company just about half of what you got from Warners for a five-days third-run, $550 in one case and $1,043.97 in the other? A. That is right.

Q. Now, then, when we come to this next sheet, those were both Warner Bros., so I will leave that one out. When you come to the Ambassador Theatre, that was an independent theatre, wasn't it, William Greenfield? A. Yes.

(2058)

Q. And you leased the picture for four days? A. That is right.

Q. And he paid you for that $321? A. That is right.

Q. Now, going back to that sheet that I skipped, when you leased to Warner Bros. at the Logan theatre for four days— A. Where?

Q. Right here, look at it, Warner Bros., Logan theatre, for four days, you charged Warner Bros. $557? A. This is a new sheet. I have not seen this before.

Q. Well, whether you saw it before or not, there it is. You charged Warners $557 for a four-day run of this picture fourth-run? A. That is right.

Q. And you charged Mr. Greenfield $321 for a four-day run of this picture fourth-run on this sheet? A. That is what they earned.

Q. What? A. That is what they earned, I think, on percentage.

Q. They were on percentage, were they? A. I think so.

Mr. Proskauer: I have just gone into these typical ones. We will take the rest of them up on briefs if there is anything to be said on that. I want to indicate to your Honors merely that in this examination we entirely overlooked in Mr. Wright's cross-examination the length of the run and the character of the ultimate return. That is all.

(2059)

Mr. Raftery: Wait. We have got to separate those things. Some belong to Mr. Wright——

Mr. Proskauer: Render unto Caesar the things which are Caesar's.

Recross Examination by Mr. Wright:

Q. Mr. Scully, you did not want the Court to understand, did you, from this recent examination, that you would never charge or never get from an independent more film rental for a following run than you get from an affiliated theatre for a prior run, did you? A. I don't know. What situation are you talking about?

Q. Well, as between runs, there are frequent situations where your affiliated house paid you less for a prior run in film rental than you get from an independent for a following run, isn't that right? A. Probably in some cases.

Mr. Wright: That is all.

Judge Hand: Any more questions of this witness?

Mr. Raftery: That is all.

Mr. Proskauer: I would like the Court's permission to call Mr. Benjamin Kalmenson—oh, have you something else?

Mr. Raftery: We are waiting for Mr. Caskey.

Mr. Wright: Of course, we might have some examination on that franchise list if we ever get a copy.

Mr. Raftery: You have got a copy.

(2060)

Mr. Wright: Well, we would not be able to do it now. I assume he will be available for further examination on this?

Mr. Raftery: I do not think you will want to examine him after you read it.

This document yesterday that got all mixed up here, nobody knows where it came from or what happened, but I just got word that one of the originals is on the way down. Now, it may require a detailed motion to strike out all of the evidence that Mr. Lazarus gave about the documents that Mr. Wright was examining him on.

Mr. Wright: We would, of course, expect the opportunity to examine him on the original document.

Mr. Raftery: We will bring him down for you.

Judge Hand: Is this the thing that is coming from California?

Mr. Raftery: No. His was coming from California, but I found one in New York. So outside of that I shall suspend now in favor of Judge Proskauer.

Mr. Proskauer: We will call Mr. Benjamin Kalmenson.

BENJAMIN KALMENSON, called as a witness on behalf of defendant Warner Bros., being first duly sworn, testified as follows:

Direct Examination by Mr. Proskauer:

Q. Mr. Kalmenson, where are you employed? A. I am (2061)
employed at Warner Bros. Pictures Distributing Corporation in New York.

Q. And that is the Warner company which licenses and distributes the motion pictures to exhibitors? A. Yes.

Q. What is your position with the company? A. I am the sales manager.

Q. So that in the general local parlance of the trade you are in charge of distribution at Warners? A. Yes, sir.

Q. How long have you been in that position? A. Since the latter part of October, 1941.

Q. And prior to that——

Judge Hand: Is this the main office supervisor of the whole business at Warner?

Mr. Proskauer: Yes.

Judge Hand: I see.

Q. You are the top of the distribution department? A. I am the general sales manager, sir.

Q. Before you became the general sales manager, what were you before 1941? A. I first entered the motion picture business in Pittsburgh as a salesman in the latter part of 1927. I remained in that capacity until about April 1930, when I was sent to Albany as the branch manager. I remained there until the latter part of 1931, when I was sent to Omaha as the branch manager; was there for a short period, as nearly as I can recollect, about four or five weeks,
(2062)
when I was transferred to Kansas City as the branch manager——

Q. Let me interrupt you a minute, Mr. Kalmenson. Mr. Wright interrupted me to ask you whether all these employments were with Warner Bros.? A. I started with First National Pictures and it became Warner Bros. when the companies were amalgamated.

Q. So it was always with some company or interest which either was Warner or subsequently became Warner? A. Yes.

Q. You have been a Warner boy ever since—— A. Ever since my start in the motion picture business.

Q. Go ahead. A. I was transferred in the latter part of 1931—as I repeat, I spent a short period as the branch manager in Omaha, and then was transferred to Kansas City for a very short time; and on or about January 1, 1932, I was sent to Pittsburgh as the branch manager. I remained in that position until some time in 1934, when I resigned from Vitagraph, Inc., and obtained a position with Warner Bros. theatres in the Pittsburgh area as their buyer and booker. I remained in that capacity for approximately two years, when I resigned that position and went back into Vitagraph, Inc., as their central district manager with headquarters in Pittsburgh.

Q. You were distributing again there? A. Yes.

(2063)

Q. So your excursus into the theatre business was a brief two years? A. Yes, sir. I stayed in Pittsburgh as a central district manager for less than a year—I don't remember offhand the exact time—when I was transferred to New York as the Eastern district manager.

Then in or about 1938 some time I became the Western and Southern sales manager; and in 1941, as I told you, I became the general sales manager, my present capacity.

Q. Now, will you tell the Court just how your sales department is organized and how you do your business? A. I have an assistant who is known as the assistant sales man-

ager. We have a Western and Southern sales manager, an Eastern sales manager, various and sundry clerical help and departments in the home office for the purpose of conducting distribution. Our field forces are made up of 31 branches throughout the United States, and 31 branch managers, with their individual sales personnel; and we have eight district managers in the United States.

Q. Now, all that organization functions for the purpose of selling pictures? A. Yes.

Q. And when I say selling pictures, of course I mean licensing them for exhibition? A. Yes.

Q. And you have to have, you find by experience in your business, that elaborate organization to go out and market your product among the exhibitors of the country? A. (2064)
Yes, sir.

Q. And the exhibitors of the country include affiliates and non-affiliates? A. Yes, sir.

Q. Now, since the consent decree, your general policy, I believe has been to sell your pictures singly? A. We started out marketing in groups of five or less, and in the last couple of years we have been selling on a single picture basis.

Q. That is, immediately after the Consent Decree your block booking was reduced to blocks of five? A. Five or less.

Q. Or less. And since the time you mentioned, you found it advantageous to sell your pictures singly? A. Yes, sir.

Q. I see Mr. Wright taking a note. I am sure he is going to ask you whether you have any master agreements of the kind described here yesterday where occasionally you make an over-all memorandum called a master agreement, which recites general terms that are imported into your deal sheets when you sell a particular picture. You do that on occasions, do you not? A. Yes.

Q. That is not very frequent, is it? A. There are some; not many.

Q. Without holding you to the exact figure, about how many master agreements would you say you had in the
(2065)
whole country at this time? A. I do not call them master agreements. We are marketing at this particular time, and for the last couple of years we market our pictures on a single picture basis. We find it necessary by reason of the fact that our printed form of contract has a very small space for additional clauses; we find it necessary to use a letter form to embody all the special agreements which might prevail in these individual situations. I do not call it a master agreement. It is a letter agreement for that particular picture.

Q. It was described here fully yesterday as just a statement of the general terms which do not ripen into a real sale until the deal sheet is made, and the deal sheet imports into itself these general terms that are in what we have been calling the master agreement? A. Yes, sir.

Q. And about how many of those do you have a year? A. To the best of my knowledge there would be very few. I would like to think there were less than ten or twenty.

Q. Now I will ask you a leading question, with Mr. Wright's permission, because I do not think it involves anything controversial, and we will get ahead. The way your pictures are sold—the salesman goes out to the customer, doesn't he? A. Yes, sir.

Q. And he takes from the customer what is called an
(2065-A)
application? A. Yes, sir.

Q. That application is the form of contract which is already in evidence here as Exhibit 284, I believe. Now after the customer, the exhibitor, signs this form, 284, what happens to it then? A. The salesman sends it to the branch, to his branch manager, who in turn submits it to the home office for approval together with his recommendation.

(2066)

Q. Yes, I notice on the form there is a space, "Warner Bros. Pictures Distributing Company by" with the legend, "The above signature of Warner Bros. Pictures Distributing Company is made only for the purpose of authenticating this application and is not an acceptance thereof," and then down on the bottom lefthand of the form there is the legend, "The foregoing application is accepted, Warner Bros. Pictures Distributing Company by (blank) General Manager of distribution." That last signature is the one that validates the contract? A. Yes, sir.

Q. And that signature is put on either by you or by one of your subordinates in the main office here in New York? A. Yes, sir.

Q. In fixing your prices, do you make any distinction between an affiliated or a non-affiliated exhibitor? A. No, sir.

Q. In fixing your clearance or any of your other terms, do you take into account in any way whether it is an affiliate or a non-affiliate? A. No, sir.

Q. Referring to clearance a minute, as a matter of fact, clearances have been pretty well set through the country for a great many years, haven't they? A. Yes.

Q. And they have been acquiesced in by exhibitors, producers, independents, affiliates and everybody until there has

(2067)

grown up a kind of system of clearance? A. Yes, sir.

Mr. Wright: I do not object to a moderate amount of leading, but I think it ought to be kept to the factual field.

Mr. Proskauer: I do not hear a word.

Judge Hand: Overruled.

Mr. Proskauer: Talk to me nicely, so I can hear you.

Mr. Wright: I said I did not object to leading——

Mr. Proskauer: Off the record, Mr. Davis said to me yesterday that he was a physical wreck from try-

ing to hear Mr. Wright. I have a stronger constitution and I am not a wreck, but it is an awful strain on you.

Judge Hand: I cannot help it. Go on.

Mr. Proskauer: I think it is a wonderful technique of Government counsel to wear us down.

What was the last question?

(Question and answer read.)

Q. What I mean is, save for the complaints that we have heard of here that came before the arbitral tribunals, you do not very often, or at least you most rarely ever have a question arise as to the negotiation of a clearance? A. Well, clearances have generally been established over a period of years. However, there does arise from time to time (2068)
some dispute about it.

Q. I know that, but those are rare, are they not? A. Yes, I would say they are rare.

Judge Hand: They may be relatively rare but they make up practically all of these arbitration disputes, don't they, before that arbitration tribunal?

The Witness: Yes.

Mr. Proskauer: Yes. Out of 18,000 theatres there were only about 400 of them. That is one of the things we are going to put in evidence in here in a little more detail on Monday.

Judge Hand: That is painful.

Mr. Proskauer: But your Honor is quite right, most of those disputes related to comparatively, as we shall show, trivial clearance disputes.

Judge Hand: You are trying to make us a sort of a court of appeal over that august board with its own system of reports and jurisprudence.

Mr. Proskauer: Oh, no, we are not going to appeal

from it. We have been delighted with what they did. We are going to show you that it was the greatest contribution to the stability and decency of this industry that was ever made.

Judge Hand: You may be making statements against interest now. You can't tell.

(2069)

Mr. Proskauer: I didn't hear you.

Judge Hand: You may be making a statement against interest now. You can't tell.

Mr. Proskauer: If I am, I will stand on it.

Judge Hand: All right.

Mr. Proskauer: But I am not.

Q. Some reference has been made here to the use of admission prices with respect to clearance. So far as you know, did you ever, since 1938, make a contract with any exhibitor in which you agreed that you would require a subsequent exhibitor to name any price?

Mr. Wright: If the Court please, I don't think a question like that is proper. The contract speaks for itself as to what the agreement was. If he wishes to elaborate on the form of the contract, all right.

Judge Hand: Overruled.

Q. Do you know of any instance since 1938 in which you ever had in any agreement a covenant on the part of Warner to require a subsequent exhibitor to charge any particular price? A. No, sir.

Q. It is a fact, however, is it not, that in certain portions of the country, particularly in the West, and to a comparatively small extent, contracts frequently refer in the clearance provision to a clearance over subsequent-runs that

(2070)

charge a certain admission price? A. Yes, sir, it is.

Judge Hand: Now you are showing or attempting to show that Warner is free from this alleged taint, is that right, that exists elsewhere?

Mr. Proskauer: No, there is no taint. Nobody, in our view, is tainted for this reason——

Judge Hand: I said "alleged." I am not asking you to admit that you are tainted or anybody else.

Mr. Proskauer: I am trying——

Judge Hand: Far from suggesting it.

Mr. Proskauer: I am trying to show a course of conduct, which I believe is entirely legal.

Judge Hand: No, but I thought you were showing that this situation, so far as you were concerned, was peculiar to Warner's, to some extent, that in the West they have another system.

Mr. Proskauer: Oh, no. No, your Honor, what I am proving——

Judge Hand: All right, then I misunderstood the purpose.

Mr. Proskauer: May I state exactly what I understand the witness's testimony to be? We never make a contract with an exhibitor by which we say we will require a subsequent exhibitor to do something.

Judge Hand: Yes, I understood that.

(2071)

Mr. Proskauer: Most of our contracts do not refer at all to subsequent admission prices as a criterion of clearance.

Q. That is true, isn't it? A. Yes, sir.

Mr. Proskauer: But in a small number of instances, particularly in the West, we sometimes refer to clearance as so many days over a subsequent-run house charging X cents admission.

Judge Hand: I understand.

Q. I have stated that correctly, have I not? A. Yes, sir.

Q. A very large proportion of these applications that come to the home office are approved, are they not? A. Yes, sir.

Q. Is it very rare that one is not approved? A. It is not rare. Some of them are rejected.

Q. How many times a year would you say you rejected it? A. Well, there——

Q. Oh, just roughly. A. It all depends on the picture. If we are having difficulty getting terms that we think we are entitled to and the boys seem to send in contracts that are objectionable, we send them back. There may be, in some instances, there may be a great number, at least first until we convince our boys as to just what we want them to do. Sometimes they go right through; some pictures go through with few objections.

(2072)

Q. Your criterion in accepting or rejecting one of these applications is whether you think a fair price and fair terms to Warner Bros. have been obtained? A. Yes.

Q. Do you ever accept or reject an application on any consideration that involves whether the theatre is an affiliate or an independent? A. No, sir.

Q. What criteria do you use in selecting the customers to whom you endeavor to sell? A. We try to select the best customer in every situation.

Q. There are many cities in which you cannot sell the best customer, aren't there? A. I would like to think that we find the best customer in every situation, at least for us.

Q. At least that is your endeavor? A. Yes, sir.

Q. Some reference has been made here to the possibility of going out and saying A would give you 30 per cent and B would give you 25 per cent and you want to sell to A. Is it a fact that the percentage is just one element, though an important one, in the advisability of the contract? A. Yes, sir, it is.

Q. The other considerations, as have been testified to here, are the character of the operation, showmanship of the exhibitor, the size and location of the theatre, its seatage and a number of other elements of that sort. That is correct, is it not. A. Yes, sir.

(2073)

Q. Do you receive any information whatever from your theatre department of Warner Bros. as to what pictures—as to the details of their contracts for the pictures they purchase? A. Do not.

Q. There was put in evidence here by some of the other defendants a form that seems to be usual in the trade, where you get from the theatre department just a list of what they are playing, in the form that I show you here.

Mr. Proskauer: (To Mr. Wright) Just the same as the others. I am not going to give you anything new.

Q. (Continuing) You get a form like that? A. Yes, I get this form.

Q. This also goes to the advertising and to the distribution department? A. I know that it reaches my desk. I don't know just who else in the company gets it.

Q. And through that you get a notion, do you not, of what the public is going to see in your theatres? A. Yes, it acts more or less as a guide as to the type of pictures that the public is accepting; gives you general information as to what business is being done in these Warner theatres.

Q. I put a very illuminating note on my memorandum here. It enables you to feel the public pulse? A. Yes.

Q. As to what they are going to see? A. Yes.

Q. Do you use it for any other purpose whatever? A. No

(2074)

other purpose—if our own pictures were playing on there and some other pictures were playing, it gives you some com-

parative idea of how your pictures compare in the classification against other pictures.

Q. Do you use the information on there as a criterion in determining whether you will sell your picture or not sell it to any given exhibitor? A. No, sir.

Q. Do you ever take into account in any way what other people are selling Warner's? A. No, sir.

Q. I mean, in the sale of your own pictures? A. No, sir.

Q. How many positive prints do you make of each picture? A. We use about 360 on our better pictures and it ranges down to approximately 175 on some pictures that we have had.

Q. I have a schedule, which I am going to put in later, which uses $130 as approximately the average cost of a black and white print. That is about right, isn't it? A. That is about right.

Q. Varies between $125 and a higher figure. How many accounts do you service, generally? A. Oh, some of our better pictures, a good many of them, we have averaged about 14,000 accounts.

Q. And you got to make these 350 prints stretch out among 14,000 theatres? A. Yes, sir.

Q. It has been testified here the positive print takes the

(2075)

cost of being sent to one theatre, then it is either sent back to the exchange, in turn to be sent to another theatre, reconditioned at the exchange—— A. Inspected.

Q. ——or in some instances it may be, on your direction, sent from one exhibitor directly to another, is that right? A. Yes, sir.

Q. But the essential thing is that you have got to stagger the exhibitions of these pictures so that your 350 prints will last for the 14,000 theatres? A. We allocate——

Q. I am using those figures arbitrarily. A. We allocate our prints into the various branches, sufficient to take care

of their needs consistent with the playing arrangements which prevail in those individual territories.

Q. With respect to your own theatres, where you show your own pictures in your own theatres—of course, Warner shows pictures in Warner theatres? A. Yes.

Q. How do you negotiate with the theatre department for the exhibition of those pictures? A. We sell them those pictures the same as we do everybody else.

Q. And you really have an arm's length negotiation with them? A. Yes, sir.

Q. And that has been going on ever since you have been sales manager? A. Yes, sir.

(2076)

Q. Do you find that the exhibition of your own pictures in your own theatres is of value by way of exploitation, advertising, development and general promulgation of the sales value of the picture? A. Very definitely.

Q. Does that redound to the benefit of both first-run exhibitors and all subsequent-run exhibitors? A. Yes, sir.

Q. Is that one of the outstanding advantages of your having your own theatres in key cities in which to show these pictures? A. That is one of the outstanding advantages, yes, sir.

Mr. Proskauer: We have been taking a tour here of 92 cities. I am going to try to avoid taking that tour, your Honors. And I would like, with your Honors' permission, if the record would show at this point that Government's Exhibit 129, which is our admission of fact, and the interrogatories 6 through 11 inclusive already contain the information as to what our first-run accounts are in all cities, including these 92 or 73, or however you figure it, and I am not going to burden your Honors with going around the whole lot.

Q. I will ask you this general question: In selecting the customer to whom you endeavor to sell your first-run product in these 92 cities, these 73 cities, or in any city, do you try to get the best available customer that will yield you (2077)
the best revenue? A. Yes, sir.

Q. And is there any other consideration taken into account by you or your department? A. No, sir.

Q. Have you ever used any scheme or device, clearance or anything else, to discriminate or monopolize against any independent exhibitor? A. No, sir.

Mr. Wright: If the Court please, I think there ought to be some limit on the extent to which the defendant's argument can just be put in the witness's mouth. I agree it does not make much difference one way or the other.

Judge Hand: Overruled.

Mr. Proskauer: Now will you stipulate the regular stipulation, that this witness, if asked, would testify as Mr. Zukor did, and as contained in Mr. Skouras's deposition or statement here, in denial of all conspiracy, agreement, and all the other terrible terms which are imported into antitrust cases?

Mr. Wright: So stipulated.

Mr. Proskauer: You may cross-examine.

Cross Examination by Mr. Wright:

Q. Mr. Kalmenson, there was one answer you gave that I did not quite understand, in which you said the exhibition of Warner pictures in your theatres was of some special benefit to subsequent-run exhibitors. Did I understand you correctly? A. I said that they were—what was that question again?

(2078)

Mr. Wright: Will you read the question?

Q. (Read.)

Mr. Proskauer: What he really said was the exploitation in the first-run theatres.

A. The ability to have theatres and play Warner pictures in them for the purposes of getting them established in territories is of benefit to Warner Bros. and all exhibitors, whether they be subsequent-run, or any particular area, or throughout the entire country.

Q. I just wanted to get what the precise benefit to the subsequent exhibitor was that arises from showing a Warner picture in one of your theatres as distinguished from another first-run theatre? A. The ability to exploit them in the manner that we deem best establishes the picture in that area for that subsequent-run exhibitor, so when he exhibits it, he cashes in on the manner in which we have established the picture.

Q. You establish and exploit your pictures in many areas in first-run theatres that you don't own or operate, isn't that right? A. Yes, that is right, but we cannot get the same cooperation in situations that we don't own or operate, as we do in Warner theatres.

Q. What has that got to do with the subsequent-run exhibitor? A. It establishes the value of the picture for all

(2079)

exhibitors, subsequent-run or otherwise, and that is what I understood to be the question.

Mr. Wright: Were you going to offer this (indicating)?

Mr. Proskauer: I had not intended to. I don't care one way or the other. It is just exactly like the other forms that were in evidence.

Mr. Wright: Do you want it marked with your number? I think it would be simpler. I would like to have it in.

Mr. Proskauer: I have no choice. If you want it in, you may mark it with my number.

Mr. Wright: I think it would be less confusing if we did make that W-1.

Judge Hand: Is this to be really marked as offered by you or by Judge Proskauer?

Mr. Wright: Well, I am perfectly willing to offer it. I just wanted to make it clear from the number that it was a Warner exhibit produced by Warner, that is all.

Judge Hand: I am not suggesting you offer it, far be it from me.

Mr. Wright: I understand that. Let us have it marked.

The Clerk: As a Warner exhibit or Government exhibit?

(2080)

Mr. Proskauer: Whichever Mr. Wright says.

The Clerk: Is it a Government exhibit?

Mr. Wright: All right, give it the next Government exhibit number.

(Marked Government's Exhibit 385.)

Q. This Exhibit 385, that is a form that you receive daily, is it not? A. Yes, sir.

Q. And the theatres that are listed on the form, those are not all of the theatres that Warner operates, is that right? A. No, sir.

Q. Those are selected, what you call key runs? A. Key, yes.

Q. I believe you testified on your direct examination you did not receive the information as to the details of the con-

tracts which Warner theatres made with other distributors. What is it you did receive with respect to those contracts? A. Just this—with respect to what contracts?

Q. The contracts that the Warner theatres make with other distributors. A. I don't receive anything in that connection in any shape, manner or form.

Mr. Proskauer: Except that exhibit.

A. (Continuing) This has nothing to do with contracts. This is simply—let me see if I understand you correctly, (2081)

Mr. Wright. Let us see what it says here. It says here, "Date October 29, 1945, Monday. In the Albany zone, the Strand Theatre in Albany played Uncle Harry as one feature and On Stage Everybody is the second feature. Current day's receipts were $601 and for the week it was $10,178," and shows the picture that played the previous week under the same circumstances, and its gross. There is nothing about any contracts in any shape, manner or form in connection with it.

Q. The information that is recorded on the report there marked in evidence as Exhibit 385, that is the only report—the only information you receive as to the terms on which the Warner Bros. theatres license the pictures of other distributors, is that right? A. This is what it says. This is a record of the theatre's receipts. No terms or anything there.

Mr. Wright: Would you read him the question again?

A. (Continuing) The questions don't fit in with this.

Q. (Read.)

Mr. Proskauer: I object to the question because it imports into it that this has information as to the

terms. I have no objection to a question, is this the only information you receive about what is being exhibited in Warner Bros.' theatres

(2082)

Judge Hand: All right. That is a valid objection. Your question could be modified.

Mr. Wright: That is agreeable to me.

Mr. Proskauer: That is what is bothering the witness.

Q. Is that right? A. This is the only information I receive with respect to these pictures in Warner theatres.

Mr. Wright: Would you read him the question as directed by his counsel, and then let us get a yes or no answer to that.

(Record read.)

Mr. Wright: That is the question you are to answer.

Judge Hand: He has answered it already.

Mr. Wright: That can be answered yes or no.

Judge Hand: No, he just doesn't have to answer it yes or no for some slavish tradition or reason. He has answered it clearly.

Mr. Wright: To me his answer was equivocal.

Judge Hand: I don't see why.

Mr. Wright: Would you read——

Judge Hand: If you want to probe him more on it, go ahead.

Mr. Wright: Would you read the prior answer that he made?

(Record read.)

(2082a)

Mr. Wright: I submit that answer——

Judge Hand: What his answer was is that this is the only information.

Mr. Wright: —is less extensive than the question. I wanted to get the question answered.

Judge Hand: Ask him about anything else, if you want to, besides the Warner theatres.

(2083)

Q. Is it or is it not a fact, Mr. Kalmenson, that you receive no other information from the Warner theatres as to what pictures they are playing than such as is contained on this Exhibit 385? A. It is.

Mr. Proskauer: Wait a minute. The question was, is it or is it not a fact, and I do not know what the answer means. Would you let me put a question?

The Witness: Let me clarify it.

Mr. Proskauer: Do you get any information——

Judge Hand: No, do not put questions for Mr. Wright.

Mr. Proskauer: All right, I beg your Honor's pardon. I wanted to help him.

Mr. Wright: That fault is mine there.

Judge Hand: That is old stuff.

Q. Is it a fact, Mr. Kalmenson, that the only information that you receive as to what pictures the Warner Bros. theatres are playing is the information contained in reports such as this one marked in evidence as Exhibit 385? A. I don't know as I understand you, Mr. Wright, but that form that was placed before me——

Mr. Wright: I do not see why that cannot be answered yes or no, if the Court please.

A. (Continuing) That form——

Judge Hand: Have the question read to the witness. It is perfectly capable of being answered yes or no.

(2084)

Q. (Question read.) A. That is the only information I get in those theatres.

Q. Can you just answer the question yes or no? A. I could if I understand it. I am trying to make sure there isn't something about the thing that isn't in accordance with the facts.

Mr. Wright: Will you read the question again?

Q. (Question reread.) A. Well, it is a general question. There are many other theatres. One picture, Warner pictures themselves, I get a report on every one of them, but that is the only report I get, that contained in that sheet, that contains other than Warner Bros. pictures in Warner theatres.

Judge Bright: Do you get any information from any other source?

The Witness: No, sir.

Mr. Wright: That is all.

Mr. Proskauer: That is all.

Mr. Seymour: I have one question.

By Mr. Seymour:

Q. Does Warner Bros. license its pictures for exhibition in some of the theatres operated by theatre operating companies in which Paramount has an interest? A. Yes, sir.

Q. Are the negotiations for those licenses conducted at the offices of those companies, as far as you know? A. They are, with one exception.

(2085)

Q. What is that? A. The Newman theatre in Kansas City, which I understand is negotiated for with Mr. Hyman in the New York office.

Q. In the course of those negotiations with the various theatre operating companies for the licensing of Warner Bros. films for exhibition in theatres operated by the several companies, do the negotiations or arrangements which the Warner theatres may have made or may be making for the exhibition of Paramount pictures play any part? A. No, sir.

JASON S. JOY, called as a witness on behalf of defendant Twentieth Century-Fox, being first duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Mr. Joy, where do you reside? A. 630 Warner Avenue, West Los Angeles, California.

Q. What is your present occupation? A. I am an executive of the Twentieth Century-Fox Film Corporation. I specifically have charge of all professional personnel at the studio with the exception of actors.

Q. How long have you been employed by——

Judge Bright: Exception of what?

The Witness: Actors and actresses, sir.

(2086)

Q. How long have you been employed by Twentieth Century-Fox Film Corporation? A. Since December 1932.

Q. Where is the studio of Twentieth Century-Fox located? A. At 10201 West Pecos Boulevard, Los Angeles.

Q. Will you describe the studio very briefly? A. The studio covers about 350 acres, situated a little west of Beverly Hills, between Santa Monica and Pecos Boulevard. It has 16 sound stages; it has administration buildings, departmental buildings and what we call a back block where our outside sets are erected and remain; it has a large lake and rail facilities, etc.

Q. Does Twentieth Century-Fox produce motion pictures at this studio? A. Yes, sir.

Q. Do you have under contract a number of producers? A. Yes, sir, we have sixteen producers under contract.

Q. Tell the Court what a producer is? A. A producer is a man whose responsibility it is to select material, story material, either in play form, story form, or original form, who is capable of supervising its writing, its adaptation to script form, who is competent to supervise the casting of the picture, and who can work with the various departments, wardrobe, set construction and the rest of them in the development of the physical aspects of the production of the picture, and who can supervise its direction, its editing, its (2087)

cutting, its scoring and final release, final form of release.

Q. A man who can start with an idea for a picture and end up with a finished product? A. Yes, sir.

Q. Who was the producer of The House on 92nd Street? A. Louis de Rochemont.

Q. He is the original producer of March of Time? A. He, as I understand it, he with his brother organized and originated March of Time. Louis came with us—Louis de Rochemont came with us—about a year and a half ago and his first picture was The Fighting Lady, which he made in cooperation with the Navy, and his second picture is The House on 92nd Street, which he made in cooperation with the F.B.I.

Q. Who is the producer of Dolly Sisters? A. Dolly Sisters was produced by George Jessel. That is his first production at the studio.

Q. How large a number of recognized producers are there in the industry? A. That is hard to say, sir, because I haven't tried to count them, but I should imagine that if there were fifty recognized producers that would be—if I should say fifty, that would be about correct.

Q. Is there competition between Twentieth Century-Fox and the other studios to employ these producers? A. There is always competition in Hollywood on almost every subject, sir, and that includes producers.

(2088)

Q. And have you under contract now producers who formerly were employed by other studios? A. Yes, sir.

Q. Are there producers now employed by other studios which at one time in the employ of Twentieth Century-Fox? A. Yes, sir.

Q. And these sixteen producers you do not classify as independent producers, do you? A. No, sir.

Q. What is an independent producer? A. In my view an independent producer is a man who is responsible to no one but himself, concerning the financing, the production, the story, the casting, its release. In fact he is the head of a separate company to produce a picture or a series of pictures without reference to anybody else.

Q. Do such independent producers from time to time use the studio facilities of some of these defendants? A. I understand so.

Q. These sixteen that we are talking about are in the employ of the company? A. Yes.

Q. Over them is whom? A. Darryl F. Zanuck.

Q. What is his title? A. He is vice-president in charge of production.

Q. Does he also produce certain pictures himself? A. Yes, sir.

Q. And assist in supervising the production of others? A. All the rest.

(2089)

Q. He was the producer of Wilson? A. Yes, sir.

Q. Does Twentieth Century-Fox have under contract to it directors? A. Yes, sir.

Q. How many directors does it have under contract? A. I think we have 25 directors who are under term-contract and we have three who are under one-picture contracts.

Q. Will you explain that latter phrase? A. Well, a term contract means that a man is available to us for any picture we want him to direct over a period of time. A one-picture deal or a two-picture deal, in this case each of the three is a one-picture deal, they are employed to direct only the picture for which they were employed to work for us. When that period is over they are free to go, unless we want to re-employ them, free to go to some other studio and do whatever they want to do.

Q. What number of recognized directors are there in Hollywood? A. I should say about 300.

Q. Is there competition between Twentieth Century-Fox and the other studios in securing the services of directors? A. Yes, sir.

Q. I hand you page 1935 of the stenographic minutes and call your attention to a list of directors which Mr. Lazarus testified yesterday were directing or producing pictures which were distributed through United Artists. Have any of those directors directed pictures for Twentieth Century-Fox? A. (2090)
Quite a number of them, sir.

Q. Such as whom? A. Alfred Hitchcock did Lifeboat; William Wellman did Thunderbird, and he did other pictures for us; Jean Renoir did Swamp Water; Archie Mayo was a contract director for us, and so was Frank Tuttle, and so was Allan Dwan, and so was Frank Lloyd and Gregory Ratoff. Harold Schuster made two or three pictures for us, the most notable one being The Wings of the Morning, which he made for us in England; and Preston Sturges made one picture for us early—I can't remember the name of it now.

Q. Are some of these directors who are now making pictures which are being released through United Artists so-called independent producers? A. Yes, some of them.

Q. They have developed or enlarged from the status of director to producer? A. Yes, sir.

Q. How many pictures a year in the current market does a director make? A. That depends, sir, on the type of picture, its budget, its shooting time, and its character. If, for example, you should consider Henry King, who made The Song of Bernadette, and then Wilson afterwards, you would consider that a director could make, probably half a picture a year, but if you consider a low budget picture, which has 18 or 24 or 30 days shooting, he might conceivably make four or five a year.

Judge Bright: What does the director do?

(2091)

The Witness: Your Honor, a director assumes command of the picture. He becomes associated with the picture about, usually about two or three months before the final draft of the script is finished. After the first rough draft of the script is finished, usually a director is assigned to it, so that he may then begin the process of the development of the various assistants that he needs, sets, wardrobe, all of the other departments, the mechanical and service departments, that have to come into the making of a picture. He also contributes toward the final draft of the script his own suggestions which are, of course, very important.

Once the picture gets on the stage he is in command. He decides what scenes he will shoot, what angles he will shoot, how the characters will deliver themselves. He looks at the first cut of the rushes—he looks every day at the previous day's rushes and decides on what various takes he will assemble through his cutting into the picture, and he has the first crack—excuse me—first opportunity at the rough cut of the picture before it is sent to his producer and

the executives of the studio, to help in final assembly of the picture. He is captain of his crew while he is in front of the cameras.

(2092)

Q. And in association with the producer and the executive producer, and possibly others, does he participate in the casting of the picture? A. Yes, sir, most definitely.

Q. Now, in addition to the producers and directors, does Twentieth Century-Fox have a stock company? A. Yes, sir.

Q. What is a stock company? A. In our parlance a stock company consists of any player who is under term contract. Now, by "any player", in our vocabulary is meant anybody from the very top star down to the least, most insignificant dance girl, boy or girl, who has just come in on a very small contract trying to learn the business of acting.

Q. That is, the word "player" is all-embracing? A. "Player" means anybody who is employed to stand in front of a camera.

Q. And what is the definition of "actor"? A. Same thing.

Q. Now, these actors or players, however, are classified, are they not? A. Yes, sir.

Q. And beginning at the top what is the first classification? A. We call them stars, either male or female. Then come feature players; then come bit players; then come specialists, dancers, or whatever specialty they may have; then come atmospheric people, extras—before atmospheric people, extras who are registered in scenes, and then the crowd, the atmosphere.

(2093)

Q. Mr. Davis wants to know where the Roman populace comes from? A. From Central Avenue, out our way.

Judge Hand: What is all this for, anyway, to show the difficulties or distinction between so-called art? What is it?

Mr. Caskey: It is to show the circumstances under which motion pictures are produced today, and the fact that these pictures of Twentieth Century-Fox are produced in competition with other companies; that there is no monopoly or attempt to monopolize with respect to any ingredient that goes into motion pictures.

Judge Hand: I do not think you have to go into all this detail to show that.

Mr. Caskey: I will roll along as fast as I can.

Q. Approximately how many persons are under contract at the present time? A. About 125.

Q. And have you the figures there for the past years? A. Well, they run about that——

Q. Some years? A. Yes, anywhere from 120 to 140 or 150.

Judge Hand: These extras and so-called atmosphere players are taken from a pool that any one of the producers can use?

The Witness: Yes, they are not under contract.

Our situation at the moment, we have 125 under

(2094)

contract, of whom around 10 to 15, depending on whose judgment it is, are stars; 110 to 115 are feature players, and stock; and then we employ on the average of 350 free-lance players who are under contract to no one, who are engaged picture by picture by studios. We have under contract 16 multiple non-exclusive players; by that I mean they are engaged to make feature pictures for us, but they may also work for other companies. And we have also four players who are under one-picture contracts to us.

Q. And this group of players under contract includes actors, feature players, specialists, and the like? A. Yes, sir.

Q. Are there other studios who maintain similar stock companies? A. Yes, sir.

Q. In addition to the stock companies maintained by Twentieth Century-Fox and the other studios, are there a large number of freelance players? A. Probably, of all kinds probably running up to ten thousand—well, no, about seven thousand freelance players.

Q. What is a freelance player? A. A freelance player is one who engages himself to a company for one picture and does not work under a term contract.

Q. Are there persons who are classified as stars? A. Yes, sir.

Q. Who are freelance? A. Yes.

(2095)

Q. Can you name a few? A. Many of those who were named yesterday in releases by United Artists are freelance players. Claudette Colbert, for example, and Ronald Coleman. I cannot think at the moment of a lot of important ones, but some of them are very important.

Q. Are there a substantial number of feature players who are freelance? A. A great many. A great many. There are more than those who are under contract.

Q. Now I call your attention to page 1936 of the stenographic minutes, and a list of the stars that Mr. Raftery assures us are going to play in forthcoming United Artists pictures or have played in very recent ones. Have some of those stars played in pictures produced by Twentieth Century-Fox? A. Gregory Peck was in Keys to the Kingdom; Jennifer Jones was in "Song of Bernadette"; Linda Darnell was in many of our pictures; she is under contract to us. Dennis O'Keefe is just finishing Doll Face for us; Claudette Colbert has worked in several of our pictures; Don Ameche

was under contract with us for a great many years; Charles Lawton has worked for us; Randolph Scott has been under contract to us; George Raft is under a one-picture contract with us; Victor McLaglen was with us for years; J. Carrol Naish has worked for us frequently; George Sanders has been under contract with us; Jane Powell has worked for

(2096)

us once or twice; Constance Moore worked for us; Constance Bennett has worked for us. I think she has a one-picture contract with us now. Gracie Fields was associated with us for years; Rex Harrison is just joining us from England; Constance Cummings has worked for us, and Francis Lederer, Signe Hasso, Gene Lockhart—the last two in The House on 92nd Street.

Q. Now, is there competition between Twentieth Century-Fox and any other studios producing pictures to place stars and feature players under contract? A. Well, the answer is yes, of course.

Q. Is there competition between Twentieth Century-Fox and the other studios to secure particular players for parts in particular pictures? A. Yes, sir.

Q. Is there competition among Twentieth Century-Fox and the other studios in the securing of special acts, name bands and the like for particular pictures? A. Yes, sir.

Q. Do you lend—as the phrase is used—some of these actors and actresses who are under contract to other studios? A. Yes, sir.

Q. Have you prepared a detailed schedule of that for the purpose of your testimony? A. Yes, sir.

Q. Do you lend them to studios which are affiliated with the defendants in this case? A. Yes, sir.

Q. Do you lend them to other producers? A. Yes, sir.

(2097)

Q. Independent producers? A. Yes, sir.

Q. Now, what is the basis for determination as to whether or not you will make a so-called loan of a star or feature player? A. If a person is available so far as work is concerned, and willing so far as his or her own career is concerned, and if the borrowing vehicle, the picture in which he or she is to go, will advance his or her career, or, at least, not hurt it, then we are disposed to loan anybody we have who do not deprive us of that privilege by their contractural relations with us. I think there are only two or three we have under contract whose contract says we may not loan them. But anybody else that anybody wants, if they can prove to us by their script, by the set-up, by the director they are going to use and the balance of the cast, and in any of the several ways that are important, and prove to us that this will will help our player and the player is available so far as work is concerned, and willing, then we are happy to loan our people, and it does not make any difference to us what the affiliation is of the borrowing people.

Q. And it is a fact that there are a considerable number of independent producers making pictures in Hollywood at this time who are dependent upon the borrowing of stars and feature players from Twentieth Century-Fox and other studios for the casting of their pictures? A. Yes.

(2098)

Judge Hand: They have their own studios?

The Witness: Your Honor, most of them do not. Most of them rent space in service studios, places that are available for them; and most of them, because they make only one picture at a time, or one picture occasionally, it is impossible for them to own the equipment that is necessary to make a picture, and it is equally impossible for them to employ and keep under contract the stars and the players that they need to make pictures with, and therefore they are dependent upon the freelance market in Hollywood, and their borrowing power from other established studios.

Judge Bright: Would you mind giving an illustration? I have just seen "Along Came Jones." That is an independent production?

The Witness: Yes.

Judge Bright: How was that handled?

The Witness: Well, I am not familiar with that. That was Gary Cooper's picture, wasn't it?

Judge Bright: Yes.

The Witness: I am sorry, your Honor, that I am not going to be able to give you the details that will be sufficiently clear——

Judge Bright: Well, is he a star?

The Witness: He is a star.

Judge Bright: Employed by any one of the

(2099)

defendants?

The Witness: No, sir, he is not. As I recall it—and I am not familiar with that particular situation—he made that in association with International and released it through RKO. I think that is right, sir, but I wish somebody who really knows would answer for me.

By Mr. Caskey:

Q. I notice on this list that you have recently loaned Joan Blondel for a picture. A. She was loaned to M-G-M, as I recall it.

Q. And do you recall the picture? A. She is still over there. That is 1945?

Q. 1945. A. We sent three people over for that particular picture; Tommy Mitchell, Joan Blondel and James Gleason.

Q. And are they stars or feature players? A. Well, it would depend upon who says so, they are either stars or feature players. Gleason obviously is a feature player. Sometimes Mitchell has the leading role, but usually we call

him a feature player, and so would we call Joan Blondel, although she would like not to have me say that.

Q. Her agent would say that she was a star? A. That is right.

Q. Now, I notice that you recently loaned Carol Landis for a picture. To whom was that? A. That is an Arnold (2100)
production, isn't it?

Q. Yes. Who is he. A. Arnold Pressburger; that is an independent producer, released through United Artists.

Q. Is she a star? A. Of a minor calibre. She is more than feature player.

Q. There are even graduations among the stars? A. Yes.

Mr. Davis: One star differs from another star in glory.

Mr. Caskey: And I think, Mr. Davis, you can give me the citation for that.

Mr. Davis: Certainly.

Q. Now is there any distinction as to whether the producer is affiliated or not affiliated with one of these defendants in coming to a conclusion as to whether you will lend a star or a feature player? A. No, sir.

Q. Do you also have under contract camera men? A. Yes, sir.

Q. And other technicians? A. Yes, sir.

Q. Do you secure the services of those men in competition with other studios? A. Yes, sir.

Q. Is it necessary to put a camera man under contract? A. In the business of making motion pictures, sir, the demand so far exceeds the supply of top flight people, that in order to be sure that when an important production is ready for the cameras, that we have a camera man who is skillful enough to handle that production, it has become necessary

for us to put cameramen under contract. I think we began
(2101)
that practice about three years ago.

Q. Twentieth Century-Fox also has on its lot various facilities which from time to time rents or loans to other producers, does it not? A. Yes.

Q. Will you describe some of those? A. Well, for example, we have a large lake on the top of our lot. It is the only lake of its kind in the business out there. We have some ships that actually float and are properly rigged, that are the only ships out there like that. We use our lake only once in a while. Anytime anybody wants to rent it from us when we are not using it, they are perfectly welcome to come, and our production department charges them the same rate that it charges a production of our own for the use of those facilities.

We also have a railroad station and some track and some cars of sorts that we use ourselves occasionally, and we rent those out.

We have the only street that looks exactly like a New England street, to a Westerner at least, and that is loaned out occasionally.

We do rent out our set facilities and we do go to other studios and rent their set facilities sometimes when they
(2102)
have things that we need. We do not, because of shortage of material and the availability of facilities—we are not able to rent out sound tracks—I mean sound equipment and camera equipment, and things of that sort, because we are down, as all the other studios are down, and will be until we get replacements.

Q. That is a war-time condition? A. That is right.

Q. Now, in lending or renting these facilities, is there any distinction made as to whether the lessee is an affiliated producer or unaffiliated producer? A. No, there is not. I

have not any figures here, but I imagine that we rent to the unaffiliated, so-called unaffiliated, much more than we do the affiliated, because they are without these facilities more often than the affiliated ones are.

Q. To your knowledge, has Twentieth Century-Fox ever withheld the use of any of these facilities to a producer who requested it? A. Not if they are available. No, sir.

Q. Do you ever withhold them for the purpose of hampering or impeding the production of another picture? A. No, sir.

Q. Mr. Joy, what are the sources of the motion picture story? A. Well, they come from all sources: the published play, or book, or story; the unpublished book or play or (2103)
story; an article, which is not fictional, or what we call an original.

Now a book or play needs no explanation. An unpublished book or play comes to us through, or is found by us, or is delivered to us by our story department, and the fact that it is not published or has not succeeded, does not necessarily mean that it is not good material for our purpose, because it may not have been well equipped for the stage, but by our process we may be able to make it into what we call a good story.

The story department—do you want me to continue?

Q. Yes, if you will, tell about the story department. A. Our story department, with offices in Hollywood, New York and London—and before the war they were in Paris, Budapest and Vienna, and other places—and will be again, I hope, bye and bye—we have about 35 people in Hollywood and in the New York offices, and a few of them are executives but most of them readers and researchers and analysts. In London we have three executives and ten readers.

Now the function of the story department is, of course, a very important function. In the first place, they are sup-

pose to know and catalogue every piece of printed matter in any language that is currently produced. Now the first reason for that—of course their records go back for years and years and years——

(2104)

Judge Goddard: Will you please speak just a little louder.

Mr. Caskey: Turn a little towards the court.

The Witness: I am sorry, your Honor.

A. (Continuing) The first function of the story department is to find material that we can use readily. The second function is to encourage and to direct the writings of important writers toward motion picture material.

The third function is to encourage unpublished writers, new authors, or authors that have had only one publication—encourage and help them in what they are preparing; and the fourth function—I think it might be called the fourth—is to guard ourselves against possible plagiarism suits; and the fifth is to encourage or help the adaptation of what we have purchased, getting it into channels in the studio so they can be transferred into script form.

Now on the subject of helping to guide new writers—for example, Centennial Summer, which we purchased a little while ago, by a man by the name of Idell—he consulted at long length with our people in the development of the story. There have been many instances of that. Then we engage noted writers to write a story specifically for us, not on salary, but which would be purchased when it is finished. We have a man by the name of Galligan, who is now writing a whaling story for us; we did employ John

(2105)

Steinbeck to write the Lifeboat story for us, and we are doing that sort of thing quite frequently.

Q. What do you do to encourage younger writers? A. We have writing scholarships which we have made available so far only to service men or ex-service men, and women, encouraging them by reason of the money grant to further their education and their experimentation and the development of their writing ability. I do not know exactly how these men are chosen, but they are chosen as a result of examination of material submitted.

Q. So that with respect to printed manuscripts, you from time to time purchase a published book; you from time to time assist or encourage a writer to write a novel which you think will have motion picture possibilities; and you stimulate the writing of material directly for your motion pictures? A. That is right. I did not cover the subject of originals.

Q. No, I have not come to that yet. A. Excuse me.

(2106)

Q. In preparation for your testimony today, did you cause to have an article inserted in the trade papers about the awards to service men? A. No, sir.

Q. Well, there is a reference to it there, is there not? A. Yes.

Q. That gives the details of the award? A. I notice $1500 is the award given.

Q. Now, in addition to these published books, are a certain number of motion pictures made from original stories? A. Made from original ideas.

Q. Original ideas, and written by—— A. By Staff writers.

Q. Under contract to you? A. Yes, sir.

Q. Give us an example of recently produced pictures? A. Well, when we call them original, we do not mean that the subject matter or the principal theme is original with us. We mean that we have taken a subject or a theme and have developed it ourselves rather than having bought something from somebody else.

Judge Hand: Are you responsible for the selection of them in your company?

The Witness: Am I personally, sir?

Judge Hand: Yes, sir.

The Witness: No, sir. Wilson is an example of what we call an original; Purple Heart is an example

(2107)

of what we call an original—if I may refer just a second I probably could give you many—Laura, was not; Take It or Leave It was; Something for the Boys—no. Molly and Me; the Bull Fighters; Billy Rose's Diamond Horseshoe; Nob Hill; Captain Eddie; the Dolly Sisters; The House on 92nd Street. That is all of this year.

Q. Well, that is enough to illustrate it. Now are these writers under contract, in part at least? A. Yes, sir. We have 28 under term contract; and we have 35 who are on special assignment, or they are on what we call a weekly basis. Now the people who are on contract are there for a year with options; the people who are on a week to week basis are there for just their assignment, and can be continued on with the mutual consent of the writer and the studio. Those who are brought in for one specific assignment usually come for a guaranteed number of weeks, and when that assignment is finished then they are either re-engaged for a new contract for something else, or they depart and go to some other studio.

Q. Now, is there competition between Twentieth Century-Fox and the other studios in the placing under contract of these term writers? A. I think that the most, or perhaps equal, almost, now, to the competition concerning actors and actresses, is the competition concerning writers. There is very keen competition.

(2108)

Q. Does that apply not only to the contract term writers but to the special writers you employ from time to time? A

Well, that is a little different. There are a great many very competent writers who do not desire to be under term contract. They would much rather work from picture to picture, because they have then the selection and refusal of the work they will do. There is a great deal of competition in the securing of these so-called term writers because they are in great demand by every studio; and there are relatively few of the thirteen hundred that are recognized as writers who are really outstanding writers in the freelance field. So that those twenty or thirty who are outstanding are always in demand, and therefore there is great competition to secure their services or in the securing of their services.

Judge Bright: Who wrote Wilson?

The Witness: Lamar Trotti wrote Wilson.

Judge Bright: Is he one of these freelancers?

The Witness: No, sir. He has worked for Fox and Twentieth Century-Fox since 1932. He is a Georgia boy who came up through the newspaper field and came into Fox as an assistant in the story department; his first story was with another writer, Dudley Nichols, called Judge Priest; and since then he has written Alexander's Ragtime Band; Young Mr. Lincoln; Alexander Graham Bell. He worked on

(2109)

Lloyd's of London, several other stories of that sort; and then two and a half years before Wilson was released he started to work on that.

Judge Hand: These were not preceded by stories?

The Witness: No, sir; although in all of them there is a very great deal of material, background material, research material.

Judge Hand: Oh, yes. We shall adjourn until two-fifteen. This afternoon we shall adjourn at three-thirty.

(Recess until 2:15 p.m.)

(2110)

AFTERNOON SESSION

Mr. Caskey: Mr. Raftery, you want to produce?

Mr. Raftery: In the United Artists testimony, Mr. Wright asked for the production of some grosses on foreign pictures that Mr. Frohlich had put in and I have already given the grosses. Is there anything you want? Do you want them in evidence or what do you want? I am not offering them.

Mr. Wright: Have we got a list of them? That's all right. We can put them in.

Mr. Raftery: You also asked for the contract for Stage Door Canteen. I have a copy which I assure you is a copy of the original, dated June 24, 1943, for the exhibition of Stage Door Canteen in the Los Angeles and San Francisco, California, exchange territories. The percentage terms stipulated are on a sliding scale, starting at 20 per cent low and going to 50 per cent. In that agreement it refers to a schedule —it refers to an agreement dated December 7, 1942, and I have also produced a copy of that.

Mr. Wright: Thank you.

Judge Goddard: With whom is the contract?

Mr. Raftery: Fox West Coast Agency Corporation, as agent.

The other controversy was this, and I think Mr.

(2111)

Wright and I have agreed on it. You will remember yesterday when Mr. Lazarus was on the stand there was a page 6a in a document which Mr. Caskey discovered was not really a part of the document. Well now, that is the fact, so Mr. Wright has asked for the production of all our contracts for that year with the various Fox companies. So I have produced first a document dated the 1st day of September 1941 be-

tween United Artists Corporation and Fox West Coast Agency Corporation. That is the document that had the erroneous page 6a in it, which Mr. Marcus tells me was not produced by United Artists but was given to the Government by one Eddie Small, who released pictures through United Artists. I also have——

Mr. Wright: Can we have that one marked?

Mr. Raftery: I will give you the whole book. This has nothing to do with that one.

I have an agreement here between United Artists Corporation, dated the 1st day of September 1941, between United Artists Corporation and Fox Intermountain Amusement Corporation; an agreement dated the same day between Fox Midwest Corporation and United Artists; an agreement dated the same day between United Artists and Evergreen Theatres Corporation; an agreement dated the same day between United Artists and Fox Wisconsin Amusement Corporation; and the deal sheets are all attached.

(2112)

And this is Mr. Muller's, the treasurer's, original.

Mr. Wright: I would suggest that we have this marked then with the number that was on the withdrawn exhibit, as Government's Exhibit 383, and we will offer this.

Mr. Raftery: Will you stipulate, Mr. Wright, that all testimony asked in reference to page 6a either by—or all questions asked and all answers given in regard to page 6a of the exhibit that is not in evidence be stricken?

Mr. Wright: I would agree that they be stricken but I would want to have the—that is, I think the substance of what we would bring out if you changed the examination in this way can be handled without

calling Mr. Lazarus back and examining him on the new exhibit that has been put in. Let us see if this won't do it. At page 1962, if my question is changed to read this way, instead of saying, "I notice that on page 6a it refers to test situations in Kansas City, Milwaukee, St. Louis, St. Lake City and Denver", if you substitute for that, "I notice that on page 6 it refers to test situations in the Los Angeles, San Francisco and Seattle exchange territories", then I take it his testimony would be in substance just as it is now, that there is no——

Mr. Raftery: I have no quarrel with that.

(2113)

Mr. Wright: —problem there.

Mr. Raftery: I have no quarrel providing it is also our understanding that if he were here he would testify—or, rather, that this contract has to do with theatres in that area that he is talking about.

Mr. Wright: Well, I think that clearly appears, as I say, from the subsequent testimony.

(Marked Government's Exhibit 383.)

Mr. Raftery: Are you going to offer those other contracts that we have produced?

Mr. Wright: Well, I wanted to see where they fit in. These, I think, should go with an exhibit that is already in evidence, and I was going to ascertain the number of that exhibit and offer these as A and B.

Mr. Raftery: That is all right, that is, with the deal sheets that you have already put in on the Stage Door Canteen.

Mr. Wright: Yes, it should be. It will be offered and given numbers A and B as soon as I can determine that number.

Mr. Raftery: Now, as to the rest of the examination, most of it was by Judge Bright, and I think that

the Court will stipulate with me that as to 6a, anything you elicited based on 6a may go out, as well as what Mr. Wright has talked about?

(2114)

Mr. Wright: Well, as I understand it, the testimony remains in the record as it is with that modification that I suggested?

Mr. Raftery: All right. As long as we have got the facts, that is all that matters.

Mr. Caskey: Now, I should like to have Mr. Wright stipulate with me that I may supply, without calling a witness, the actual percentage which was paid for first-run Los Angeles on Stage Door Canteen under this sliding scale arrangement.

Mr. Wright: Haven't we got that already in answer to interrogatory 6? We do have the actual rental.

Mr. Caskey: We have the actual rental, and I want to show the percentage.

Mr. Wright: The actual gross too.

Mr. Caskey: I think it was 37½ per cent, what it actually worked out to.

Mr. Wright: Well, we have no objection to that.

Mr. Caskey: May I recall Colonel Joy?

JASON S. JOY, resumed the stand.

Direct Examination continued by Mr. Caskey:

Q. Mr. Joy, what is the bargaining process for the acquisition of novels or the screen rights for novels? A. That

(2115)

depends in what manner they are brought to our attention or we find them. Normally literary agents handle literary properties, and unless a property is suitable only for one

company because they have the kind of facilities that that particular story needs to use, or because that company has a star or players that fit only the story, normally the literary agents solicit the interests of all of the companies. Now, they do that in New York if the literary agent is here by giving an early indication of the type of story that the author is writing and by sending galleys to the various story departments in New York who, in turn, make synopses of them and send them directly to the studios for consideration. If the literary agent has a partner or correspondent in Hollywood—and most of them have—the literary agents in Hollywood call upon the studio story departments personally and try by word of mouth as well as by the synopses which have been submitted to interest the various studios in this particular property.

Sometimes they have a beginning asking price for the property; more often they really throw it open to competitve negotiation. It is not quite bidding, but they will come to us and try to negotiate for a certain amount, and tell us that some other studio is interested in it also; and the result

(2116)

is that either a story is sold quickly for a reasonable price, or after consideration it is sold for a large, increased price.

Q. What have you been paying currently for motion picture rights of well known books? A. Well, they, of course, vary, mostly in terms of competition, and somewhat in terms of availability of studio facilities and personnel. We have recently purchased a play——

Q. Well, let us take books first? A. Well, a book, The Dark Corner, which is not yet published but will be, we paid $40,000 for; The Party Line, the story of a small town telephone exchange, a very simple story, $35,000; Honeyfogling Time, still unpublished, $140,000; Daisy Kenyon, still unpublished, $185,000; Black Rose, which is published and out, $87,000. For Razor's Edge we paid $250,000.

Q. That is the Somerset Maugham book? A. Yes, sir.

Q. And do these prices represent an increase over prices that were paid some years ago? A. Well, I could not say that there have been in times past very high prices paid for certain properties; but on the whole prices today are quite a good deal higher, the average price, the normal prices is quite a good deal higher than has ever been paid before.

Q. What do you attribute it to? A. Well, demand and
(2117)
supply. For example, we paid $50,000 for How Green Was My Valley in the early 1940s, and How Green Was My Valley probably was a little wider read than the Razor's Edge, but a very fine property, and turned out to be a very successful and interesting picture.

About the same time we paid $30,000 for Three Blind Mice, which was a successful play, and became a very successful property for us because we made it first as a straight picture and then later as a musical.

Q. You say that these books are priced according to the demand and the supply. What represents the demand? A. The demand is represented in this fashion: Normally there are anywhere between 425 and 450 to 500 pictures, feature pictures, made in Hollywood each year. If there are 25 very popular novels published each year, that would be a good many; so that you can see that the demand far exceeds the supply; and that obtains also in terms of plays and in terms of usable magazine stories.

And then there is another reason: The publishing business, the writing, the authorship and the publishing is delayed just as the making of the motion pictures is delayed. It takes time. The change in public demand for pictures comes rather quickly, particularly during a war period and as the war period ceases. And the great supply of stories
(2118)
pertaining to war itself are not now usable; so that such stories as we have been buying, and all other companies have

been buying, during the last six months, are all either, if they relate to war at all, they are about the consequences of war, or about some phases of war, without the battle and bloodshed, and so forth; but mostly they are about other things that pertain rather to the postwar period than exact demobilization and ceasing of hostilities, which makes a further lessening of the supply, and therefore the increased cost of purchase.

Q. You also produce motion pictures from stage plays? A. Yes.

Q. Current stage plays? A. Well, as current as this: I am not competent to give you the full explanation of the delays in production of stage plays. In some instances I know by hearsay mostly that if a play is purchased it cannot be released as a motion picture for a certain length of time after it has ceased its Broadway run, and so forth; so I imagine in most cases there is a considerable delay; but we have purchased The Late George Apley, for example; we paid $275,000 for it; and we purchased Chicken Every Sunday, for which we paid $275,000; and the last one before that was quite a ways—Something For The Boys—which is quite a ways back. We made Laura, the story, first, before it was dramatized; and we also made A Bell For Adano before it was dramatized.

(2119)

Q. What about Junior Miss? A. Junior Miss—you are quite correct—we paid $430,000 for Junior Miss, which has just been released.

Q. And you did not release it for exhibition in motion pictures until it had finished its Broadway run as a legitimate play? A. I imagine that is correct, sir. I say, I only know of this kind of agreements by hearsay.

Q. Now, what do you do with respect to scouting the plays? A. Well, we have, as I started to say this morning, we have a story department in Hollywood, and one here,

and one in London, and soon. From Hollywood we scout the minor productions, like the Pasadena Playhouse and the University and Little Theatre movements for original plays. We have here a group of people who look at every try-out, if it is within getting distance, Boston, Philadelphia, Washington, and so forth, and we have people who observe each play as it opens, and if they are uncertain they keep on going until they have satisfied themselves we ought to try to have it or not to try to secure it. And the same is true currently in London.

Q. And before the hostilities it was true in Europe also? A. Yes, in a good many places in Europe.

Q. Now, in scouting these plays and in purchasing the right to produce motion pictures therefrom, are you in com-
(2120)
petition with the other defendants in this case? A. Most evidently, yes, sir.

Q. And with other producers of motion pictures? A. Yes, sir.

Q. And has that competition been one of the factors which has increased the price of the material? A. Yes, sir, very definitely, sir.

Q. What are the principal sources of your actors? A. Well, the following are the sources—which is No. 1 and which is No. 2, and so forth, I don't know—I think the greater number, not the higher quality, but the greater number come from Little Theatre movements and from school plays and people who have had little or no real professional experience; and those people we take in on our stock contracts at a small amount of money and train them in our own school in diction, riding, walking, whatever the things are that are necessary to acquaint a person with motion picture technique, and use them as often as possible on the stages and in front of the cameras to get them used to it, and give them a line here and a line there, until finally, we hope, each one

we sign—that at least one out of each ten can become a star. I guess that is asking a little bit too much, but we do get a lot of useful talent out of that method.

Another method is the theatre itself, proven people or
(2121)
people who have come into the higher class of Little Theatre, summer stock, and so on, who come out for special parts; and another is the radio and show business generally, the entertainment business; and from all of these sources, I suppose, each company—at least I think probably our experience is that we actually sign up five or ten of really potentially fine people each year, and then maybe fifty or sixty are what we call hopefuls. When I say hopefuls, I mean the younger stock company people.

(2122)

Q. Is there competition among the various studios for the services of these people? A. I know that all studios have the same kind of organizations and go through the same motions and have the same successes and failures. There is a very decided competition, because in this also the demand is greater than the supply.

Q. Some of your principal actors come from the legitimate stage? A. Yes, sir. Sir Cedric Hardwicke did. Let me just look at a list here for a moment. Milton Berle came from vaudeville. Lloyd Nolan had stage experience. Jack Oakie had stage experience. Jack Benny came from radio.

Q. That is enough example. A. A good many of them did, of course.

Q. In the production of motion pictures, am I right in saying that the essential elements are a story, producer, director, cast and the mechanical equipment necessary for the photography of the picture? A. Yes, including the writer.

Q. The writer? I should have included the writer. A. Yes, sir.

Q. Does Twentieth Century-Fox have a control of the supply of any one of those elements? A. No.

Q. And is it in competition with all the other producers of motion pictures for those elements? A. Yes, sir.

(2123)

Q. What type of motion picture does Twentieth Century-Fox make? A. We make, at the West Coast we make only feature length pictures and those, I suppose today, they are divided about 20-10 between what we call high-budget pictures and low-budget pictures. Are you asking me concerning the type of story?

Q. Type of entertainment. A. Well, there is a changing formula. In the late thirties, for example, we were making —well, in 1936 and 1937 we were making what we call pretty much straight entertainment. Beginning about 1938 there came in some pictures that had to do with the war. I think the first was concerning the last war, called Lancer Spy. Then gradually as time went on and the interest of the country and the people of the country became more interested in war, more and more pictures concerning the war were made. In 1938 and 1939 we made Submarine Patrol, and in 1939-1940 we were commencing to get away a little bit from our biographical period, which we had been in for the last two years, that is, such pictures as "Young Mr. Lincoln," and "Alexander Graham Bell", and so forth, and by 1941 we were really at it as far as the war is concerned, Yank in the R A.F, Confirm or Deny, Remember the Day, To the Shores of Tripoli, and then This Above All.

In 1942-43, Little T[illegible], Berlin Correspondent, They Came to Blow Up Ame[illegible], Thunder Birds, and Immortal

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Sergeant. The Moon is Down, Crash Dive, Manila Calling, Fighting Chetniks, Margin for Error, Night We Raided Calais, and Bomber's Moon, but in that year came the first turn towards something else. We had two pictures that were

designed to give spiritual comfort to those who saw it, and one picture especially designed and tailored to help the people to commence to think about, to talk about and argue about the peace which was to come, two spiritual pictures, "The Song of Bernadette" and "The Keys of the Kingdom," and the picture designed to help influence people toward the development of a peace was "Wilson."

In 1944-1945 whatever reference to war we had was a sort of left-handed one. Something For the Boys was a story, a musical, how boys could be entertained near a camp; Sunday Dinner for a Soldier was a homey comedy, nothing about fighting; Colonel Effingham's Raid was about the difficulties of a retired soldier in a southern town during the war period. We had, however Bell for Adano, which is the aftermath of the war in Italy and designed to tell us or the audience how we were administering civilian affairs of a town in Italy, and we also had, belatedly, Winged Victory, which showed the training of our AAF boys in this country and a little bit of what they had to go through with when they got abroad.

(2125)

Now we are headed, I think, completely away, unless there be some comedy, I think we are headed completely away from war stories, my guess is, which is no better than anybody's else, irrespective of his experience in this business. How soon we will get back to it again, I don't know. After the last war it took a number of years. It may begin this year, although in the meantime there may be some comedy reference to it.

I think we are looking toward biographical pictures. I think we are looking toward pictures with some social significance and spiritual significance, not necessarily religious, although that is not a tabooed subject whatsoever.

Q. During the last ten years has the cost of producing motion pictures increased? A. Yes, sir, very much.

Q. Both in the aggregate as to the year's program and on the average? A. Well, in 1940 we produced 44 pictures for a total of $19,000,000. In 1943-1944 year we produced only 28 pictures for a total of $35,282,000. The cost of everything in pictures went up very rapidly beginning in about the end of 1941 or the beginning of 1942.

Q. It is a fact, is it not, that—— A. I just wanted to give you the comparison.

Q. Go ahead. A. In 1940 we had only five pictures that (2126)
cost a million dollars or more; and in the 1944-45 schedule we had seven that cost over two million and fourteen that cost over a million.

Q. Are these higher costs generally applicable to all the companies in the business? A. Yes, I am certain of that. I am certain it is. And I am certain that it is the result of a combination of all the various factors in motion picture making and not an extravagance on the part of the management at all. Our back lot, for example, costs, the back lot being those who work behind the cameras, like blacksmiths and electricians and so forth, our average hourly increase from 1941 through 1944 was 18 per cent. Our average take-home pay was 71 per cent higher among the crafts on the back lot. All of the items, from nails and lumber, up to the beads and jewelry that go into the making of pictures have increased tremendously. Our manpower has increased in price and is not diminished very much in number, if any, despite the fact we are making fewer pictures than we used to. We are making fewer because that is all we can make under the present restrictions.

Q. During the war and until very recently there were restrictions on the amount of raw stock that could be used? A. The raw stock, meaning film, on materials, meaning lumber and hardware and everything of that sort. For example,

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we were limited to $5,000 per picture set, I mean for sets for one picture we were limited to the expenditure of $5,000 on new material. We might use up any amount of our inventory, if we wanted to. Of course, they commenced to get pretty low before the war was over.

Q. During this period of the last five years has there been an increase in the number of independent producers? A. Very large number.

Q. Are there a considerable number of individuals who formerly were producers or directors under contract to Twentieth Century-Fox who are now independently producing pictures? A. Yes, sir.

Q. Will you give us a few of those names? A. William Goetz was the executive vice-president of our company. He is now the president or vice-president, I don't know which, of International, and we designate him as an independent producer, because he releases through another company. Nunnally Johnson is an independent producer, having made one or two independent pictures. Frank Lloyd is an independent producer; used to be a director for us; Jesse Lasky used to be a producer for us and now is an independent producer; Milton Sperling, while he is associated with Warner Bros., I understand has a completely independent unit. I am not certain about Mark Hellinger, whether he has an independent set-up at Universal comparable to Walter Wanger

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or not, but I think he has. And Harry Joe Brown, also a former producer of ours, is an independent producer.

Q. In addition to this group of men who have left Twentieth Century-Fox to produce pictures for themselves, are there numerous other independent producers in Hollywood? A. Many, many more.

Mr. Caskey: You may inquire.

Mr. Wright: We have no cross-examination.

Mr. Proskauer: I would like to ask just one question.

Cross-Examination by Mr. Proskauer:

Q. These conditions that you have described as to competition for books and plays and manpower, you know enough about the general business around Hollywood to know that applies generally to all companies just the same as it does to you? A. Yes, sir.

Q. And what you have given for your company is a fair picture of what exists for all these companies? A. I think so, Judge.

(Witness excused.)

Mr. Caskey: Mr. Wright, I understand one of your associates asked for a copy of the 1937-1938 contract, and while I am sure that you have a great many copies in your files, I will produce another one. I have nothing further.

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Mr. Proskauer: I can read in Mr. Warner's testimony that I have stipulated with Mr. Wright. Did you have something you wanted?

Mr. Whittlesey: No.

Mr. Proskauer: It is stipulated that Harry M. Warner, if called as a witness, would testify as follows and this stipulation is made with the same force and effect as though he had taken the stand and been sworn. That is correct, Mr. Wright, I take it?

Mr. Wright: Yes.

Mr. Proskauer: "I am the President and chief executive officer of Warner Bros. Pictures, Inc., and have held that position since the organization of the corporation on April 4, 1923.

"I have complete familiarity with the fundamental policies of said company and its subsidiaries since its inception.

"I deny that said company is or has at any time attempted to monopolize, or monopolized, any part of the motion picture business, or that it has contracted, conspired or combined with any person or persons, or company or companies, so to do. I deny each and every charge in the amended and supplemental complaint herein.

"In 1906, I and my three brothers, Sam, Albert and Jack, started showing pictures in a storeroom in New
(2130)
Castle, Pennsylvania. The room seated one hundred. The admission price was five cents. We started with $200.00 capital, but, despite what seemed to us exorbitantly high license fees which we had to pay for our pictures, we soon found ourselves making profit of about $300.00 a week.

"Subsequently, we went into the distribution of pictures, first at Pittsburgh and later at New York. We had our ups and downs but, on the whole, we were moderately successful.

"In 1916, my brothers, Sam and Jack, leased a small place in Hollywood and started production, while Albert and I arranged in New York for the distribution of pictures, including those of my brothers.

"The beginning of our success really dates from the year 1917, when we produced and distributed a picture from Ambassador Gerard's 'My Four Years in Germany'. It yielded a profit to us of $130,000.00. In those days, only a few of our pictures were of sufficiently high quality for exhibition in the best first-run theatres in the country, but many other of our pictures proved profitable despite their failure to

achieve exhibition in the best first-run theatres in the country because of their lower cost. The best first-run theatres will pay much larger film rental than a first-run of exhibition in a smaller theatre, but the cost of producing one of the very finest pictures such as are exhibited in the best first-run theatres is often today more than twenty times the cost of one of the large number of pictures which secure their initial exhibition in less pretentious theatres. As an example, our pictures today average a negative cost of approximately $1,000,000.00. Some of our pictures, however, cost several million, and some of them as little as $200,000.00. If the higher cost pictures are successful, they generally yield appropriately large revenues from exhibitors and at the box office, but the low cost pictures are also a fertile source of revenue, especially in the thousands of smaller theatres in smaller communities and at the subsequent-run theatres in the larger communities."

And as part of this, I am going to call your Honors' attention to some figures which show the enormous importance to use of the independent small theatres.

"On April 4, 1923, we transferred our entire business to a corporation known as Warner Bros. Pictures, Inc. in return for three-fifths of its authorized capital stock. Following incorporation, the business continued as a family affair and along the same lines as the partnership.

"Beginning in 1925, the Warners began the work

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of developing sound pictures under license and agreements from Western Electric, culminating in the production of such sound pictures as 'The Jazz Singer' starring Al Jolson in October, 1927, and the first 100% talking picture 'The Lights of New York' in the summer of 1928.

"We were at this point far ahead of any of our larger competitors in the 'know how' of making talking pictures.

"A serious difficulty, however, confronted us which we feared might prevent us from realizing a full financial reward on our development of the talking motion picture.

"Our pictures could not be exhibited in theatres which had not installed sound machines, the minimum cost of installation being at that time approximately $25,000.00 per theatre. Theatres were in those days hesitant to make this outlay because of the public prejudice which had theretofore existed to talking motion pictures owing to the inept and unsuccessful earlier attempts at sound pictures.

"The only way to solve the situation then confronting us seemed to be the rapid acquisition of a large number of theatres. We looked about to see whether, in return for stock in our company, we could acquire a ready-made chain of theatres in sufficient

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number to assist us.

"As luck would have it, the Stanley Company of America, with about 250 theatres situated principally in and around Pennsylvania and New Jersey, had just lost its chief executive, Stanley Mastbaum, and its directors felt that the company was in need of trained management to take his place. Negotiations were accordingly begun with the view to exchanging stock of Warner Bros. Pictures, Inc. for the stock of Stanley Company of America, a primary inducement to the substantial owners of Stanley Company of America being the experienced management which the Stanley theatres could secure if they were combined with the Warner organization.

"This transaction, consummated late in 1928, gave us 250 theatres which could be immediately equipped with sound installation. It enabled us to demonstrate to other exhibitors the advantages of sound installation. In the year and nine months immediately following, we likewise were fortunate enough to secure, in a similar fashion, several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country. In 1931, we had an interest in 591 theatres, the largest number of theatres in which this company has ever had an interest.

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"I deny that our theatres, or any of them, were acquired so as not to be in competition with the theatres of any other company, or that there was any agreement or understanding, express or implied, to any such effect. All our theatres were acquired in open competition with any other person or corporation, who or which might have desired to acquire such theatre or theatres. Some of the theatre circuits which we acquired in 1930 and 1931 were acquired in competition with competing companies producing motion pictures.

"Another advantage to our company as a result of the acquisition of Stanley Company of America was the acquisition of Stanley's one-third of the stock of First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures, which had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the purpose of acquiring film of first quality for exhibition in their own theatres, as well as for distribution by them to other theatres in respective territories in which they operated. The owners of Stanley were

unwilling to sell the Stanley theatres to us apart from Stanley's First National stock. Since all the stock of First National was subject to a voting trust, it was necessary for Warner to acquire more of the stock of

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First National if it was to be able to use the production and distribution facilities of First National Pictures, Inc. Accordingly, at or about the same time or thereafter, Warner purchased another one-third of the stock of First National from other First National stockholders, and, with its two-thirds' control, dissolved the voting trust. Subsequently, in 1929, Warner acquired the remaining one-third of the stock of First National from Fox. The acquisition of First National thus gave us increased facilities for the production and distribution of pictures, and enabled Warner immediately to double the number of pictures produced.

"The acquisition of First National was not for the purpose of suppressing competition in the field of production or distribution. Before the Government"—and I interpolate, the United States Government—"was fully apprised of the nature of the Stanley acquisition and the consequent acquisition of the stock of First National, it caused to be instituted a proceeding in equity in this Court under the Clayton Act, with a view to causing our company to surrender its interest in First National. After the facts were explained to the Attorney General's office, however, the Government discontinued this suit.

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"Since the peak of its acquisitions in 1931, the Warner companies have had no policy for the expansion of theatre holdings. Today, fourteen years later, Warner has an interest in 547 theatres, a net reduc-

tion of 44 since its peak holdings of 591 in 1931. Any theatres acquired since then were to protect our business and meet the varying economic conditions, shift of populations, or needs caused by obsolescence that have arisen with the changes over the last fourteen years. Some of the independent competitors of Warner have increased their theatre holdings more rapidly than Warner, and have acquired theatres which Warner had formerly operated. Three such examples in Philadelphia are: Goldman, our theatre manager in the Philadelphia district prior to 1933, at a yearly salary of $78,000.00, left our employ in that year (while his contract still had nine months to run) to go into the exhibition business, and has, since that date, acquired a chain of theatres in the Philadelphia territory which, as Goldman testified, have yielded him a profit of more than $100,000.00 a year, exclusive of the Keith, Karlton and Erlanger Theatres now to be mentioned. The first two are downtown theatres, formerly operated by Warner but which, while Warner was operating them, were acquired by Goldman in direct opposition with Warner. The Erlanger

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was a theatre in which Warner acquired a one-third interest through the Stanley Company of America, but which had proved so unsuccessful by 1931 that it was abandoned by its co-owners, and in 1932 Warner had paid $400,000.00 to be relieved of its obligation on the mortgage bond, abandoning the theatre. Warner could have re-acquired this theatre at any time after 1932 up to 1941 when Goldman leased it, and is now running it in competition with Warner. Incidentally, another one of Warner's best theatres in Philadelphia, which it had under lease from Fox since 1936, has recently been surrendered by Warner and returned

to Fox. Warner has never sought to acquire all of the best first-run theatres in downtown Philadelphia. They were all in common ownership at the time of the acquisition of the Stanley Company of America, with the exception of the Fox Theatre, which was rented from Fox in 1936 at Fox's request.

"The Government has, I am informed, charged that Warner conditions the licensing of its pictures to the other major defendants on the other major defendants license of their product to the Warner theatres. I deny any such conditioning of licenses.

"To make certain that the distribution and exhibition branches of my company would each operate at highest efficiency, and each respectively attempt to

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earn the greatest amount of money possible for the company—I have insisted that each department operate as a unit, separate and apart from the other department, and that if any question should arise which affected more than one department, the question should be cleared through me directly.

"Before our company acquired theatres, its profit came, generally speaking, from pictures which were not of a quality sufficient to justify what the Government describes as 'first run', or what might more accurately be described as a first run in the very best theatres in the downtown districts of large cities. As our quality improved, a large number of our pictures found initial exhibition in the very best theatres in the hearts of the centers of the population. But, with the increase in quality and the intense competition between producers, the costs skyrocketed and consequently we had to depend upon a greatly increased revenue to produce the higher quality pictures.

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"In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened (and did for a time) block our funds derived from exhibition in England and was only dissuaded from doing so by being convinced that the American companies could not continue to supply England with quality productions if their English revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing. The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production.

In this industry the public may see within a comparatively short time every picture at whatever price it prefers to pay and every exhibitor we license may exhibit the same pictures in its theatre at whatever price it prefers to charge depending upon its policy of

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operation and the price level to which it caters.

"Most of the seventeen thousand-odd theatres in the United States are able to license the same product within a comparatively short space of time at rentals below the cost of the positive price which they project on to their screens. Thus, a positive print of our picture which had the greatest number of book-

ings in 1943/44, 'Princess O'Rourke', cost about $130.00. Out of a total of 14,090 bookings, 12,926 were for an average price of $78.40, or substantially less than the cost of the positive print. These figures have been furnished to me as compilations from the Warner 1945 Answers to Interrogatories 6 through 11, submitted in evidence by the Government, and may be verified from said interrogatories. The remaining 1,164 bookings averaged approximately $943.

"This structure of the industry will, in my opinion, be jeopardized by divorcement of theatres from production, with hardship not only to our company but to the attendance of many millions who go to the motion picture theatres in the United States, and the approximately 15,000 independent theatres in this country."

Now the rest of this statement consists of a repetition, Mr. Wright, as you know, of the identical questions that appeared in Mr. Skouras's statement, and I am going to suggest to the Court, if Mr. Wright will

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consent, that the stenographer just copy those in without my burdening your Honors with listening to them.

Mr. Wright: That is agreeable.

(The questions and answers referred to are as follows:)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution or exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of

them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in (2142)
this case? A. No.

"Q. Has there been or is there to your knowledge any agreement of understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement among the defendants or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any them to condition the licensing of film in one theatre or group

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of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-distributor with respect to run, clearance, license fee or any other terms of licensing? A. No, sir.

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"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the others? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent run

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affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

"Q. Has there been or is there to your knowlegdge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any

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of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

(2146-A)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

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Mr. Seymour: Mr. Wright, we might perhaps at this point put in the stipulation in regard to Mr. Barney Balaban which I spoke to you about the other day.

Mr. Wright: I don't seem to remember about that.

Mr. Seymour: The questions negativing conspiracy. You said you would stipulate.

Mr. Wright: Yes, that is all right.

Mr. Seymour: It is stipulated that if called Barney Balaban, president of Paramount since 1936, would answer in the negative the questions put to Mr.

Zukor; and that this stipulation has the same force and effect as if he were actually called as a witness.

Is that agreeable, Mr. Wright?

Mr. Wright: Yes.

Mr. Proskauer: While we are in a stipulating mood, may we have the same stipulation as to our branch and exchange managers and our other officers?

Mr. Wright: Oh.

Mr. Proskauer: Well, you made the same stipulation with respect to the others.

Mr. Wright: We will discuss that question with you, but that has not heretofore been brought up.

Mr. Proskauer: I beg your pardon?

Mr. Wright: There is no point of trying to put in a wholesale group of stipulations. We have confined it heretofore.

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Mr. Proskauer: All right. Now, I think Mr. Niesley was going to offer that definition of Mr. Bernard. Are you ready to have that read in or do you want that to go in Monday?

Mr. Niesley: To go in Monday.

Mr. Frohlich: If the Court please, I have just completed the preparation of the line as to the picture Cover Girl for the season 1943-1944, which Judge Hand suggested early in the trial, giving the rentals received. I should like to offer it in evidence. I will give Mr. Wright a copy of it.

Mr. Wright: We have no objection.

(Marked Defendant Columbia Exhibit C-9.)

Mr. Proskauer: Mr. Wright, I am going to ask for a very innocent stipulation now, that the corporate name of the Vitagraph, Inc. has been changed to Warner Bros. Distributing Corporation, Inc., the same corporation with a changed name.

Mr. Wright: I believe that appears in the data you furnished on the supplementary interrogatories.

Mr. Davis: If the Court please, I have a stipulation in behalf of Loew's, but if the Court wants to recess at 3:30 precisely, I had better not begin it.

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Judge Hand: All right.

Now, are you all through except Mr. Leisure, practically? Is that your last?

Mr. Davis: No, sir. I have some statistical data and some exhibits I want to put in, and I want to call one very short witness on Monday.

Mr. Proskauer: We have some statistical data also, which we do not want to put in at this late hour.

Judge Hand: I think you have done wonderfully well. I think Mr. Wright started out with a splendidly abbreviated program, and you have all cooperated in shortening the case, which looks to me now as though it were nearly ready for rebuttal. Mr. Leisure's representative here, Mr. Whittlesey, says that he expected to take about a day.

Mr. Whittlesey: That is correct.

Judge Hand: Is that right?

Mr. Whittlesey: Yes. We will start on Monday.

Judge Hand: Will you be ready to go on?

Mr. Whittlesey: We will be ready to go on.

Mr. Seymour: And I shall have a very short witness, perhaps, Monday.

Judge Hand: I see. I am sure all of us here thank you very much, because I think in the end it will add to clarity and everything else.

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Now we shall adjourn to Monday at 10:30.

(Adjourned to Monday, November 5, 1945, at 10:30 a.m.)

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New York, November 5, 1945;
10.30 o'clock a.m.

Trial resumed.

WILFRED J. EADIE, called as a witness on behalf of the defendant Twentieth Century-Fox, being duly sworn, testified as follows:

Direct Examination by Mr. Caskey:

Q. Will you give the address of your residence to the reporter. A. 14 Overhill Road, New Rochelle.

Q. What is your occupation, Mr. Eadie? A. I am comptroller of Twentieth Century-Fox Film Corporation.

Q. Are you also a director? A. And a director.

Judge Bright: What did you say you were?

The Witness: Comptroller.

Q. How long have you been comptroller? A. Since 1932.

Q. Mr. Eadie, during the 1943-44 season how many pictures did Twentieth Century-Fox distribute? A. May I refer to my papers?

Q. Yes, indeed. A. Released 34 pictures.

Q. How are those pictures classified? A. 26 were produced by the corporation, one was purchased, one was distributed for an outsider, four were reissues and two were

(2151)

documentary films.

Q. What was the total negative cost of those 34 pictures? A. The pictures produced by the corporation itself cost $28,211,902.

Q. Will you speak louder? A. $28,211,902.

Q. What additional cost was there? A. Costs of distribution.

Q. How much were they? A. They were at least 13 million dollars.

Q. That gives you an aggregate of how much? A. Over 41 million.

Q. What was the domestic revenue from the United States on those pictures? A. 34 pictures in the United States, $40,657,152.

Q. Is it fair to say that the cost of producing and distributing the pictures in the United States does not equal the domestic revenue? A. The cost of the pictures exceeded the domestic revenue.

Mr. Davis: What was that question?

Mr. Caskey: Speak a little louder.

(Question and answer read.)

Q. Has that been true over at least the last nine years? A. Yes, sir.

Q. Mr. Eadie, have you prepared——

Judge Bright: When you say the United States (2152) that does not include Canada?

The Witness: No.

Q. (Continuing)—have you prepared a chart showing for the last nine years the number of pictures released by the company and the negative cost and the average negative cost? A. This chart covers ten years.

Q. Ten years?

(Marked Defendant Twentieth Century-Fox's Exhibit F-16 for identification.)

Q. This Exhibit F-16 shows the negative cost and the average negative cost during the last ten years? A. Yes, sir.

Q. And what is the increase in the average cost of the pictures? A. The season 1935-36, the average cost of a picture was $376,014; the season 1944-45, the most recent season, the average cost of a picture was $1,350,000, an increase of almost a million dollars.

Mr. Caskey: I offer F-16.

Mr. Wright: If the Court please, the purpose of the offer is not apparent to us. I do not see what this increase in costs has got to do with any aspect of the case or what this is supposed to prove.

Judge Hand: It may have some bearing on reasonableness, I don't know.

Mr. Caskey: Exactly.

Judge Hand: I don't know whether his claim is that he has to have theatres in order to get anything,
(2153)
really, out of it. It might be hard to demonstrate that in general, inasmuch as three of your independents make a lot of money here without any theatres.

Mr. Wright: Everybody likes——

Judge Hand: I don't know; it is just as clear to me as some of your evidence. That may be my own mental defect, and it may be the difficulty of the subject; it may be the fault of counsel; I don't know. I can't attempt to pass on that, but I will allow the exhibit to go in.

(Defendant Twentieth Century-Fox's Exhibit F-16 for identification received in evidence.)

Mr. Proskauer: We are going to have a similar schedule and when I put it in I will try to indicate to your Honor why it is important.

Judge Hand: I have doubt whether physically it will emerge.

Q. Have you also prepared a schedule showing the negative cost and the average negative cost over the last nine years and the domestic film rental from those pictures? A. Yes, I have.

Q. The revenue on the 1944-45 pictures has not yet been fully received, has it? A. That is correct.

Q. There is some slight revenue yet to be received on the

(2154)

1943-44 product? A. Yes, sir.

Q. What is the total amount of the domestic film revenue during those nine seasons? A. The total is $282,596,433.

Q. What is the cost of distributing those pictures in the United States? A. The cost is, at least, conservatively, 40 per cent, and that would equal $113,038,573.

Q. And leave how much? A. We have left $169,557,860.

Q. As against negative cost of how much? A. $215,944,644.

Q. So that the domestic revenue, after paying the cost of distribution, was $46,000,000 short of paying for the negative cost? A. Yes, sir.

Mr. Caskey: I offer F-17 for identification in evidence.

Mr. Wright: Same objection. There is no apparent relevancy that I can see in these figures. May I say this, your Honors, in elaboration of our objection, as I understand it, there is no suggestion in any of the proof that has been offered that these costs have not been passed on to the public, or that the distribution and production and exhibition of these pictures has not been enormously profitable to these companies. I just do not see where this leads.

Mr. Proskauer: That proof will be supplied by us.

(2155)

Judge Hand: That sounds as though there is a charge against Mr. Caskey of inadequacy.

Mr. Proskauer: That is the last charge you can levy against Mr. Caskey. I am sure he is going to supply it; but I am going to show that that with this enormous increase in cost, substantially none of it has been passed on to the public.

Judge Hand: I did not know you were going to take a competitive position, even among counsel. It is received.

(Defendant Twentieth Century-Fox's Exhibit F-17 for identification received in evidence.)

Q. Mr. Eadie, have you made an analysis of the sources of film rental, domestic film rental since 1933 as among Twentieth Century-Fox theatres, the theatres of the other four defendants, and independents? A. Yes, sir.

Mr. Caskey: Will you mark this for identification, please.

(Marked Defendant Twentieth Century-Fox's Exhibit F-18 for identification.)

Q. Will you describe to the Court Defendant's Exhibit F-18 for identification? A. This is an analysis of rentals, complete domestic totals from 1933 through 1944. It is analyzed between the amounts received from each of the defendant companies.

(2156)

Q. Now, taking 1944 for an example, the figure of $47,659,900 is what? A. That is the domestic revenue, total domestic revenue, including Canada.

Q. And the revenue on feature pictures alone? A. No; it includes features, shorts, news, advertising, accessories; total billings.

Q. And this is on a fiscal year basis, is it not? A. Yes, sir.

Q. And is not allocated to motion picture seasons? A. No, sir.

Q. But this is the way the records were kept in the office of the company? A. Yes, sir.

Q. Now, what percentage of that total domestic revenue comes from theatres in which Twentieth Century-Fox has an interest? A. 14.12 per cent.

Q. That is, treating the whole as a dollar, 14 cents comes from theatres in which Twentieth Century-Fox has an interest? A. Yes, sir.

Q. What percentage comes from the theatres in which Loew's has an interest? A. 1.26 per cent.

Q. That would be 1¼ cents? A. Yes, sir.

Q. What percentage from the theatres in which RKO has an interest? A. 5.52 per cent.

Q. And what percentage from theatres in which Warner has an interest? A. 4.82 per cent.

(2157)

Q. Now, at my instructions did you group together all of the theatres in which Paramount has an interest? A. Yes, sir.

Q. And treating them as one for the purpose of this chart, what percentage came from those theatres? A. 13.46 per cent.

Q. And what is the total then from the five? A. The total affiliated is 39.19 per cent.

Q. And eliminating Fox, the total is what? A. 25.07 per cent.

Q. So that of the domestic revenue, 25 per cent comes from theatres which are affiliated with one of the four defendants? A. Yes, sir.

Q. And 14 per cent comes from the theatres affiliated with Fox? A. Yes, sir.

Q. And the balance from all the other theatres in the country? A. Yes, sir.

Mr. Caskey: I offer that in evidence.

Mr. Wright: We have no objection to this exhibit.

(Defendant Twentieth Century-Fox's Exhibit F-18 for identification received in evidence.)

Mr. Seymour: May I see that, please?

(Exhibit handed to Mr. Seymour.)

Mr. Seymour: If the Court please, I think Mr.
(2158)
Caskey has made it plain in his interrogation of the witness that for the purpose of this statistical comparison he has treated all of the theatres in which Paramount has an interest together. The heading here is simply "Paramount," but on the basis of the testimony there are no payments from Paramount as such, but from these various theatre companies which are individually operated.

Judge Hand: This statement, as I remember it, is evidence of what you said in argument at the beginning, 40 per cent of the whole business as against the independents; isn't that so? Isn't what you said? Perhaps it is what the Government said. I had it in my notes somewhere.

Mr. Seymour: I think various percentages have been mentioned. I do not remember myself mentioning 40 per cent. The point I want to make plain is that this exhibit gives certain figures received from Paramount, which is merely a convenient label given by the witness and Mr. Caskey for that purpose.

Judge Hand: Yes.

Q. Mr. Eadie, do you know where the revenue that comes from the theatres associated with or in which Paramount has an interest is paid? Do you know where the company gets

the revenue? A. The bulk of it comes from Paramo nt in New York, but we receive it in exchanges throughout the
(2159)
country where Paramount have theatres or interests.

Q. And it is received at the various exchanges throughout the country? A. Yes, sir. This analysis is made up from the information that we have in our records that these are Paramount or Paramount-controlled theatres. I might add, that is the opinion of the exchange manager servicing these theatres throughout the country.

Q. And that is how the chart is made up? A. Yes, sir.

Mr. Caskey: Will you mark this, please, for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-19 for identification.)

Q. Now, Mr. Eadie, have you made a distribution of the revenue on these 44 pictures released during the 1943-44 season? A. 34 pictures in the 1943-44 season, analyzed in various ways on this schedule.

Q. First of all, what is the total film rental? A. $40,657,152. That is up to March 31, 1945.

Q. And that is from the United States only? A. Yes, sir.

Q. Now, taking it first of all by population groups——

Mr. Wright: Is this another chart?

Mr. Caskey: Yes (handing copy to Mr. Wright).

Q. How much of the revenue came from the theatres in the cities which have a population of 100,000 or more? A.
(2160)
A total of $18,329,890.

Q. And that is what percentage of the total revenue? A. 45.1.

Q. Now, how much of it came from the group of cities that had a population of twenty-five to a hundred thousand? A. $7,075,966; a percentage of 17.4.

Q. And how much of it came from the balance of the country? A. $15,251,296. The percentage is 37.5.

Q. Now, what percentage of that 40 million dollars revenue do you attribute to the affiliated theatres? A. About 40 per cent.

Q. And you have arrived at that 40 per cent on the basis of the calculations contained in Exhibit F-18? A. Yes, sir.

Q. The percentage on F-18 was 39.1 per cent? A. That was the maximum percentage, yes.

Q. And you have used 40 per cent here? A. Yes, sir.

Q. And applying the 40 per cent to the $40,000,000 figure, what dollar amount of revenue came from the theatres in which the five defendants had an interest? A. A total of $16,262,861.

Q. Now, are you able from your figures to distribute the revenue which came from the communities of less than 25,000 among the five defendants? A. In total, yes, sir.

Q. But can you distribute that among each of the de-
(2161)
fendants? A. No, sir, not within the time we had at our disposal.

Q. Now, of this $16,262,000, how much of it came from these cities which have a population of 100,000 or more? A. $11,425,754; a percentage of 28.1.

Q. Of the total revenue of the country? A. Yes, sir.

Q. And of that 28.1 per cent how much of it came from the theatres in which Twentieth Century-Fox has an interest? A. 10.3 per cent.

Q. And the balance of 17.8 per cent is derived from theatres in which the other four have an interest? A. Yes, sir.

Q. And what percentage was derived from the theatres which are classified as independent in those same 92 cities? A. 17 per cent.

Q. So that confining yourself to the 92 cities which have a population of 100,000 or more, 10.3 per cent of the total domestic revenue comes from theatres in which Fox has an interest? A. Yes, sir.

Q. And 17.8 per cent comes from theatres in which the other four defendants have an interest? A. Yes, sir, 17.8 per cent.

Q. 17.8 per cent? A. Yes.

Q. And 17 per cent comes from theatres in which none of the defendants have an interest? A. Yes, sir.

(2162)

Mr. Caskey: I offer Exhibit F-19 for identification in evidence.

Mr. Wright: There are a couple of questions I would like to ask him preliminarily before it goes in.

Preliminary Cross Examination by Mr. Wright:

Q. In preparing this exhibit identified as F-19, did you work from the interrogatory figures you had supplied the Government in the interrogatory answers as to the 1943-44 film revenue? A. Well, we worked from our books and records. I presume the other figures were taken from the same source.

Q. Well, what I am getting at is this: Is there any difference in this total that you have given us here for first-run revenue in the communities of over 100,000 population and the total to be derived from your interrogatory answers giving the same figures? That is what I want to know. A. Well, I can't say, sir. I do not have the other for comparison, but these figures are prepared from our books and records.

Q. Well, you did not make any check to see whether the data here corresponds with similar data derived from your interrogatory answers? A. No, sir.

(2163)

Q. This 40 per cent figure that you had at the bottom, as I understand you to say, you say that that was some kind of an arbitrary allocation you made in the first instance? A. We used a figure in excess of the highest figure shown by our analysis in order to be on the conservative side.

Q. This 40 per cent was for an arbitrary figure, is that right, the arbitrary percentage? A. Well, we were unable to determine the exact figure and that is within, I would say, one per cent of the correct figure.

Q. Then you took your 40 per cent figure and you applied that to what? What was the starting figure that you actually got out of the books? A. The total rental $40,657,152.

Q. That is your total rental as per your books? A. Yes.

Q. Then you made your best guess as to distribution between independent and affiliated theatres; that is, you assumed the percentage of 40 for the affiliated theatres, and a percentage of 60 for the independents, isn't that right? A. Not quite. We have a detailed analysis of the 38.2 per cent of the 40. That is a computed figure from the records. The estimate, the difference which we do not have analyzed, is 1.8 per cent of the total.

Q. Down to the communities of less than 25,000 the figures you have there represent actual computations from

(2164)

your records in all cases, is that it? A. Yes, sir.

Q. And it is only the communities of less than 25,000, then, where you made an arbitrary estimate of the percentage distribution, is that right? A. Yes, sir.

Q. Did you make any check in these figures as to the data as to the towns of 25,000 to 100,000 to see whether there was any variation between the percentage results you get here and the percentage results you would have from computations based on the selected pictures that were given in the interrogatory answers? A. I did not make a comparison between the interrogatory answers and this computation.

Q. That is, you know that you furnished in response to interrogatory answers your film rental on, I believe, a single picture for all of the towns of between 5,000 and over.

Mr. Caskey: No, Mr. Wright, we did not furnish that. You never asked for it and we never furnished any such thing.

Mr. Wright: No, I beg your pardon. That is right. On a single picture with respect to certain selective runs, that was what I believe you furnished.

Q. You made no computations, then, with respect to the total percentages of rental reflected in the interrogatory answers that you furnished, is that right? A. I did not refer to the interrogatories at all in making this schedule up. The (2165)

answers were both prepared from the same source. Whether they are the same material or not, I can't say—recall. We answered them both correctly to the best of our ability.

Q. In determining which theatres were to be included in what you term here Twentieth Century theatres, what criterion did you use, those that they controlled? A. Those are all the theatres serviced by National Theatres Corporation, and ourselves.

Q. That includes theatres for which they bought films, but in which they might not have a proprietary interest? A. Yes, sir. If the billing was made by the exchange to, and bill paid for by National Theatres Corporation, then it is in this group.

Q. As to the other defendants' theatres, what was the test that you used there in determining which theatres were included in that category? A. The same test.

Q. As to whom you billed for the product? A. Well, the determination of the classification of theatres was made by the manager in the exchange.

Q. Was a uniform criterion—were uniform criteria employed? A. Yes, I believe so.

Q. What was it? What did you tell him to do when he made the classification? A. We asked them for the analysis of the rentals by the affiliated companies.

Q. What was he supposed to do in determining which
(2166) theatres were supposed to be classed as affiliated and which not? A. Supposed to use his best judgment.

Q. Then you did not give him any set standard for making that determination, is that right? A. We simply asked him for the rentals and the theatres of the various affiliates.

Q. So that in situations where there might be a minority interest you don't know whether those are included in here or not? A. In all cases where we knew the pictures were being bought for or by Paramount, or, for example, they were in Paramount theatres.

Q. I am talking about a situation where Paramount or some other distributor might have a minority interest in certain theatres. Do you know how those were computed on your chart here? A. If the manager believed—if the exchange manager believed them to be Paramount theatres, they were scheduled as Paramount theatres.

Q. But as to what—how the judgment was exercised in any particular instance you don't know, isn't that right? A. No, sir.

Mr. Wright: If the Court please, on the basis of the witness's testimony I do not think we have here a very illuminating document on this question of affiliated and non-affiliated split of run.

Mr. Caskey: This represents, sir, what the company believes is the source of its revenue. The in-
(2167) structions, as Mr. Eadie has said, were, each exchange

manager was asked to classify the theatres in his exchange area as to the source of revenue, and if the exchange manager said that the Poli Theatre in New Haven is operated by Loew and Loew pays the film bill, it was treated as a Loew theatre. I submit there could not be any better basis of doing it. And it is inconceivable that the errors in classification should be of any consequence. It might fluctuate a tenth of one per cent or something. Substantially speaking, it is the only feasible way of making up the chart.

Direct Examination Resumed by Mr. Caskey:

Q. These classifications, Mr. Eadie, were all reviewed by the home office, where they not, as to the theatres in towns of 25,000 or more? A. Yes.

Q. And an I. B. M. card punched for every single theatre in these cities of 25,000, and more? A. Yes, sir.

Q. You have had occasion within the last week to review those classifications? A. Yes, sir.

Q. And do you believe them to be correct? A. I do

Judge Goddard: If the companies that operated the theatres were subsidiaries of Paramount, did you include them?

The Witness: Yes, sir.

(2168)

Judge Bright: In the Paramount column?

The Witness: Yes, sir.

Judge Hand: We will allow it.

(Marked Defendant Fox's Exhibit F-19.)

Q. The 1943-44 season, Mr. Eadie, have you prepared a schedule showing the ten pictures which grossed the most, the United States revenue and the average per booking? A. Yes, sir.

Mr. Caskey: I offer that.

(Marked Defendant Fox's Exhibit F-20 for identification.)

Q. Have you the Sweet Rosie O'Grady chart? A. No, I haven't.

Mr. Wright: We have no objection to F-20.

(Defendant Fox's Exhibit F-20 for identification received in evidence.)

(Defendant Fox's Exhibit F-21 marked for identification.)

Q. Mr. Eadie, have you prepared or caused to be prepared a chart analyzing the source of the film rental on Sweet Rosie O'Grady in the first-run and extended or move-over engagements in the 92 cities with a population of 100,000 or more? A. Yes, sir.

Q. This is similar in form to the chart which was prepared in reference to a Tree Grows in Brooklyn? A. Yes, sir.

(2169)

Q. What was your domestic film rental on Sweet Rosie O'Grady, total? A. To October 13, 1945, at which time it had completed most of its runs, $2,821,772.

Q. Of that sum what percentage was received from the first-run in these 92 cities? A. $775,334.

Q. That is what percentage of the total? A. 27.48 per cent.

Q. Of that how much was received from theatres in which Twentieth Century-Fox has an interest? A. 10.56 or $298,008.

Q. With regard to the Paramount affiliates, each of them is set forth separately on pages 1 and 2 of the schedule, are they not? A. Yes, sir.

Q. Treating them in the aggregate, what percentage came from those affiliates? A. 21.99.

Q. No, no—that is of the first-run revenue, is it not? A. Yes, sir.

Q. And of the total United States gross, 6 per cent, is it not? A. Total United States gross is 6.04 per cent, correct.

Q. And you have separately shown the Standard Theatres in Oklahoma City and the Butterfield Theatres? A. Yes, sir.

Mr. Caskey: I offer it.

Mr. Wright: No objection.

Mr. Caskey: They should check, Mr. Wright, with the answers to the interrogatories.

(2170)

Mr. Wright: Of course, you get a difference——

Mr. Caskey: That is right. Well now, Mr. Wright raises the point that the figure here is to October 13th, but I have already put in evidence the figure of March 31st, which is in the interrogatories; which is about $2,806,272. So that you will see there has only been $15,000 come in in the interval.

(Defendant Fox's Exhibit F-21 for identification received in evidence.)

(2171)

Judge Bright: F-21 does not include, in the recapitulation, any figures of Fox receipts?

Mr. Caskey: Yes, sir, National Theatres, including the Roxy, is the third classification.

You may examine.

Mr. Seymour: I would like to ask one question before Mr. Wright.

Cross Examination by Mr. Seymour:

Q. You were asked, I think, from what geographical source Fox received the film rental which came to it from

the various theatre operating companies in which Paramount is interested. Isn't the fact that those checks come in from the exchanges in the various areas where those theatre operating companies are located? A. Where the pictures are sold through an exchange area, yes, sir.

Q. They do not come in from Paramount, they come in from the theatre operating companies, isn't that so? A. Where the theatres are sold in the operating districts, yes, sir.

Mr. Caskey: I neglected to ask one question.

By Mr. Caskey:

Q. The Roxy theatre is operated by a subsidiary of Twentieth Century-Fox, is it not? A. Yes, sir.

Q. It does extensive advertising on the first-run of Twentieth Century-Fox pictures? A. Yes, sir.

(2172)

Q. I show you this memorandum and ask you if it is not the fact that on many pictures the amount spent on advertising by Twentieth Century-Fox is greater than the film rental? A. Yes, sir.

Q. What is the purpose of that expenditure? A. Well, we have to properly merchandise our product in the area and we spend a lot of money to get them off to a good start in our first-run theatres. It is the first-runs that sell the subsequent runs.

Mr. Caskey: You may inquire.

Cross Examination by Mr. Wright:

Q. I call your attention to this exhibit, F-21. That, I believe, shows, does it not, that more than 80 per cent of the first-run rental that came out of the 92 cities of more than 100,000 population was from affiliated theatres, isn't that right? A. 80 per cent, sir?

Q. Yes, more than 80 per cent, I said. More than 80 per cent of the total first-run revenue. A. I haven't made the addition.

Q. You can tell that—— A. (Continuing). Or calculation.

Q. ——by looking at it, can't you? A. The figures are there. If it is 80 per cent, it is unavoidable.

Q. Now, in this, do you attempt any computation as to the total percentage of first-run revenue that came out of (2173)
affiliated theatres, limiting the computation to the towns where there were affiliated theatres? A. I did not get your question, Mr. Wright.

Q. In many of these 92 cities, or in some of these 92 cities of more than 100,000 population, there are no affiliated theatres at all, are there? A. I don't know.

Q. What I wanted to know, if you have computed a figure which would show the extent of the total first-run revenue in cities of this size which came from affiliated theatres in towns where affiliated theatres were operated?

Mr. Caskey: Just a moment. As I understand it, there are only four such towns in the United States, and my addition shows that they accounted for $13,000 of this $775,000 revenue.

Mr. Wright: Can we have some testimony from the witness?

A. I did not compute those figures by themselves.

Q. But, of course—— A. I can't say from my own knowledge.

Q. —you know what the percentage of affiliated first run revenue would be, excluding those wholly independent towns? A. No, sir.

Q. You made no effort to compute the total affiliated rental that came out of any of these towns, is that right?

A. One schedule there, Schedule 3—I don't know what ex-
(2174)
hibit number it was—that shows first-run revenue there from affiliates and independents.

Q. Yes, I say— A. Total $92,000.

Q. —there is nothing on this exhibit or in any other computation you have offered that enables anyone to determine the total percentage of revenue that came out of any one of these towns that came from affiliated theatres, is that right? A. We took the 92 cities altogether. We did not pick out any individual cities. We have a computation of each of the individual cities, of course.

Q. You have no computation as to any individual city which shows the extent of the total revenue coming out of that situation, that came from affiliated theatres, have you? A. We have a complete analysis of all the figures that we have in here by towns, by theatres.

Q. Can't you answer the question? A. You are asking if I have—if I can recollect, as I understand it, any individual city results. I cannot.

Q. I am just asking you if you have made any computation as to the percentage of the total—of the total revenue that comes out of any of these cities that comes from affiliated theatres on all runs? A. I don't quite get what you are driving at, but this column shows all the rentals that came from all runs from all affiliated theatres in the 92 cities.
(2175)

Q. Which column? A. For 12 cities.

Mr. Wright: I think we have different exhibits in our hands.

Judge Bright: What is this column you refer to?

The Witness: I don't know what the number is, sir, but schedule 3. It is in evidence as an exhibit. This is the total——

Judge Bright: That is F-19.

Mr. Caskey: F-19 shows the very thing he is talking about.

Judge Bright: That is F-19 he is talking about.

Q. Certainly there is nothing in F-21 then to indicate the percentage of revenue that came out of any town that came from affiliated theatres on all runs, isn't that right? A. Is this the Sweet Rosie O'Grady analysis?

Q. I am talking about F-21, yes, Sweet Rosie O'Grady. A. I think the exhibit speaks for itself. I do not know just what you are driving at. The analysis is complete in the exhibit.

Q. Yes, I understand that, but apart from this exhibit, have you made any analysis to determine the percentage of the total revenue that you got out of any of these towns with more than 100,000 population which came from affiliated theatres, that is, all exhibitions in the town of the picture on all runs? A. The entire 34 pictures are shown on F-19. (2176).

Mr. Caskey: It is right here.

Q. That shows all the releases, not just one picture. F-19, as I understand it, does not undertake to show the percentage of revenue in any particular town that came from affiliated theatres on any picture or on a season's pictures, isn't that right? A. It shows the entire 92 towns.

Q. Yes. A. If you are interested in Philadelphia, Atlantic City, or some other town, we would have to compute it for you.

Q. That is what I am trying to get at, as to whether you have in fact made any computation which would show what the percentage of the total revenue in any particular town was that you got out of affiliated theatres in the town on all runs? A. We can get any—we have the cards punched for all

these things. We can get any information we require out of it in detail.

Q. Can you give us the percentage—let us take these 92 cities of more than 100,000 population. With respect to each of those cities, you can, then, give us, can you not, on this picture, Sweet Rosie O'Grady, the percentage of the total revenue in each of the towns in question that was derived from affiliated theatres on all runs, isn't that right? A. Yes, sir.

(2177)

Q. Could you supply——

Mr. Caskey: Just a moment. I do not think that is a proper question. If we want to put it in evidence, we will. If you want something, I should think you should request counsel to give it or subpoena it.

Mr. Wright: I think, in order that the Court may have a full picture, this Exhibit F-21 should be supplemented with a town-by-town breakdown which will show the situation as to affiliated and independent revenue in each place. This thing is highly misleading and shows only part of the picture because of its inclusion of areas where affiliated theatres do not even operate. Our contention, of course, is that this is a highly selective control, where both control of admission prices and film rentals is maintained by maintaining control in key areas, which in turn control other areas. Certainly, for our purposes and for the Court's purpose, I think the only analysis that is going to be helpful is one which will show the extent and nature and quality of the control in the specific areas in which these defendants operate theatres.

Judge Hand: Go on with your cross-examination.

Mr. Wright: As to these two charts, I have no further cross-examination, if counsel is willing to supply those figures.

Mr. Caskey: I suggest he cross examine the wit-
(2178)
ness and we will produce what we think is appropriate to our case. If you want something else, why, we will discuss it or you may subpoena it. It hasn't anything to do with conditioning of cross-examination.

Judge Bright: Before we leave that, Mr. Wright, on this F-21, the last column shows percentage of U. S. gross at October 13th. What is the basis of those percentages?

The Witness: That is a tabulation, sir, of billings, individual invoices. That means October 13, 1945, which was the latest available figures that have been tabulated on this picture.

Judge Bright: I still do not quite understand. Do you mean, taking the first line, Paramount affiliates, that they had 6.04 of the billings?

The Witness: Yes, sir. That means that the $170,527.06 in the first column represents 6.04 per cent of the total United States billings on Sweet Rosie O'Grady, which is the figure on the last line of the sheet of $2,821,772. So we received——

Judge Bright: So that particular column does not refer to dollars?

The Witness: No, that is a percentage of these dollars over here in relation to the total revenue from the United States, 6.04 per cent of $2,821,000 which
(2179)
came from Paramount affiliates in first-run situations. The total of that righthand column, sir, is 27.48 per cent, and that is total first-run revenue received in the United States from the exhibition of Sweet Rosie O'Grady.

Judge Bright: You mean the total of all your revenue.

The Witness: All first-run revenue, 27.48 per cent of the total revenue, $2,821,000, and of that $2,821,000 we got from first-run Paramount $170,000, or about six per cent. Is that clear, sir?

(2180)

Q. I think you answered one of Judge Bright's questions wrong. This percentage of gross does not refer to percentage of billings; it refers actually to percentage of dollar volume, isn't that right? A. Yes, sir, except our billings are dollar volume.

Q. Yes, but there is nothing on the chart to show the number of billings that the gross was represented by, in any event, is there? A. Not the number, no, sir.

Q. Now, this F-20—have you got that in front of you? That is the chart headed "Twentieth Century-Fox Film Corporation 10 Highest Gross 1943-44 Features as of March 31, 1945." A. Yes, sir.

Q. I notice the first picture you have there, Song of Bernadette—that picture was not generally released in that season at all, was it? A. No, sir; it was what is called roadshowed at advanced admission prices.

Q. These bookings that are listed there were all for road showings, is that right? A. Yes, or advanced prices, is the accurate term.

Q. Now, when you were referring in your testimony to what you call distribution costs, I take it those costs are not reflected in any of this tabular material that was offered, are they? A. I believe there is one schedule that shows it, sir (examining)—no, there is not. It is not shown anywhere.

(2181)

Q. I notice this F-17 which gives negative costs in domestic film rentals gives no data as to distribution costs at all.

Now, of course, you operate a world-wide distribution system, do you not? A. Yes, sir.

Q. That is, you distribute films or license them all over the world? A. Yes, sir.

Q. And this distribution cost that you are talking about, —that is simply an estimated allocation that you attribute to domestic distribution? A. It is a very conservative figure. It is quite a little bit below the actual by years.

Q. Well, just tell me how you arrive at this distribution cost figure that you were talking about. A. Distribution costs include such items as positive prints, advertising, cost of operating domestic exchanges; the sales departments; the accounting departments; the legal departments—all the costs of getting our revenue out of the pictures outside of the negative costs which terminate when the picture leaves the studio.

Q. You include in negative costs everything or all expenses that are incurred in connection with production of any kind? A. Yes, sir.

Q. How about your overhead costs? Where do those go, in your distribution or in your negative costs? A. Studio overhead goes in production costs and distribution overhead

(2182)

goes to distribution costs.

Q. Then how about your home office or your overall overhead? Do you allocate that? A. We consider that part of distribution.

Q. Well, that entire cost there goes into your distribution cost? A. Yes, sir.

Q. And then you make some kind of allocation, do you, to determine your domestic distribution cost as against your distribution costs in any other area? A. Yes, sir.

Q. Do you allocate your general overhead home office expenses there? A. Yes, we keep the foreign costs separate from the domestic.

Q. I say, what do you do with your home office overhead there? A. The domestic home office overhead is part of domestic distribution costs.

Q. Well, you have here in this country a home office which supervises the worldwide distribution, isn't that right? A. We have a separate foreign distribution company, and those costs are segregated and kept in the foreign costs.

Q. Well, that is wholly owned, is it not, by you? A. Yes, sir.

Q. So that you take your top company, home office overhead cost and you allocate all of that to domestic distribution, is that right? A. That part that belongs to domestic,
(2183)
yes, sir.

Q. Well, how do you determine which part belongs to the domestic and which part is foreign? A. Well, we have a foreign international corporation which is headed by a president and has a full board of directors and officers, and has its own expenses, including its own telephone bills, its rent, its light, depreciation of its equipment, all the expenses that apply to it.

Q. But all the costs other than those separately billed to that foreign corporation are allocated to domestic distribution, is that right? A. Yes, sir.

Q. Now, do you keep separate profit and loss figures for domestic performance of a picture as against over-all performance? A. Yes, sir.

Q. You do have those figures on every picture which would show a profit or loss on the picture? A. Yes, sir.

Q. And you do not publish in your annual statements, I believe, any profit or loss figures which attempt to break down distribution from production profits, is that right? A. No, sir, we don't analyze them that way.

Q. You simply figure on overall profit on your production and distribution activities? A. Consolidated, yes, sir.

Q. And how about your theatre operations? A. They are all consolidated in our published statements, sir.

(2184)

Judge Bright: Do you keep them separately?

The Witness: Oh, yes, we keep them separately; but Mr. Wright is talking about our published statements, and they are on a consolidated basis.

Q. In your published statements you consolidate all three, but for your own bookkeeping purposes you have a profit and loss statement on the production activity separate from the distribution of the film? A. Not a profit and loss statement. We keep the cost separately.

Q. The only separation is in cost, and when it comes to profit and loss, you simply have one figure for the picture which covers both your production and your distribution activities in connection with that pieture, is that right? A. On each individual picture?

Q. Yes. A. We make a calculation of our profit and loss on each individual picture, using an allocation, yes, sir.

Judge Bright: What do you mean by using an allocation.

The Witness: Showing our domestic costs and distribution, and our foreign costs and distribution, so we know what our foreign profits are and our domestic profits.

Judge Bright: Do you allocate your profits to the three branches of production, distribution and exhibition?

(2185)

The Witness: No, sir; we just allocate it to domestic and foreign distribution.

Q. And you make no profit allocation as between production and distribution on any picture, is that right? A. No, sir.

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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

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Q. But you have profit figures for each picture? A. We have a picture profit and loss report on each picture, yes, sir.

Q. I suppose you do not have any personal knowledge as to the extent to which these increased costs you have reflected here have been realized in the form of increased admission prices? A. No, sir.

Mr. Wright: That is all.

Redirect Examination by Mr. Caskey:

Q. Mr. Eadie, where are the books of National Theatres Corporation kept? A. The main books are kept in the home office in Los Angeles.

Q. And where are the subsidiary books kept? A. They have several division offices.

Q. Do you keep those books? A. No, sir.

Q. Do you supervise the keeping of those books? A. No, sir.

Q. Now, those books are audited by a firm of certified public accountants? A. Yes, sir.

(2186)

Q. What firm is that? A. Lybrand, Ross Bros. & Montgomery.

Q. And who audits the books of Twentieth Century-Fox? A. Touche, Niven & Company.

Q. Since you have acquired 100 per cent of National's theatres in 1943, has it been required that the company publish a consolidated statement? A. You mean National Theatres, sir?

Q. No. Did Twentieth Century-Fox publish a consolidated statement? A. Yes, sir.

Q. Who does the consolidating? A. It is under my supervision.

Q. From the reports of the two firms of independent accountants? A. Yes, sir.

Q. Now, there is just one other point I want to make perfectly sure about: Will you take Exhibits F-19 and F-21. On Exhibits F-21 the total revenue first-run in the 92 cities on Sweet Rosie O'Grady was what percentage of the total national revenue? A. 27.48 per cent.

Q. Now, what percentage of all 34 pictures was it as shown on Exhibit F-19—— A. 25.7 per cent.

Q. And the figure on F-19 of 25.7 per cent is the comparable figure to 27.48 per cent on the one picture Sweet Rosie O'Grady? A. Yes, sir.

Q. That was the highest grossing picture of the year of

(2187)

that season's release, or one of the highest? A. One of the highest.

Mr. Caskey: That is all.

Recross Examination by Mr. Wright:

Q. I notice when you include your entire 34 feature pictures there, you then get a lesser figure for total percentage of affiliation than you get from simply your higher grossing pictures? A. Will you just repeat that, Mr. Wright?

Q. Well, it is a fact, is it not, that on your higher grossing pictures you have a higher percentage of rental from affiliated theatres than you do on your low grossing pictures, is that right? A. I don't have those figures. I do not think it necessarily follows.

Mr. Wright: That is all.

Mr. Caskey: That is all.

Mr. Leisure: With the Court's permission I am going to call the president of RKO at this time.

Mr. Rathvon, will you please take the stand?

Judge Hand: Are you all right to go on, Mr. Leisure?

Mr. Leisure: Yes, sir. Thank you very much.

(2188)

NATHANIEL PETER RATHVON, called as a witness on behalf of defendant RKO defendants, etc., being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

Q. Your name is N. Peter Rathvon? A. Yes.

Q. Where do you live, Mr. Rathvon? A. Mamaroneck, New York.

Q. How long and in what capacities have you been associated with Radio-Keith-Orpheum Corporation? A. I first became associated with the company in 1936 when I was working on problems of reorganization on behalf of a banking group.

In July, 1939, I became a director of the company then in receivership, and also a member of its executive committee. I became chairman of the executive committee that same year.

In 1941 I became a vice-president of the company and in June, 1942, I became its president.

Q. Will you state the names and functions of the principal companies of Radio-Keith-Orpheum organization, please. A. RKO is primarily a holding company. Its distributing and producing function is primarily in one company known as RKO-Radio Pictures. The only exception to that is the production of our newsreels and certain shorts that are handled by a company or made by a company known as Pathe

(2189)

News, but they are also distributed by RKO-Radio Pictures.

There are several theatre-holding companies in the RKO group: They are B. F. Keith, RKO-Orpheum, RKO-Midwest and RKO-Proctor.

The actual physical operations are handled by three service corporations, one known as RKO Service, the other

RKO Film Booking, and the other, a vaudeville booking company of small importance.

Q. Will you please state what if any important positions you hold in the subsidiaries you have mentioned, Mr. Rathvon? A. I am president of the subsidiary B. F. Keith, and I am chairman of the board of all the rest of the subsidiaries.

Q. When was Radio-Keith-Orpheum organized? A. 1928.

Q. And what were the circumstances that led to the organization of RKO? A. RKO was created, really, as the result of the advent of sound in motion pictures. As early as 1926 there was a great deal of experiment in sound in motion pictures, and two of the companies that were active in that field were Electrical Research Products Company, a subsidiary of Western Electric, and Radio Corporation of America, known as RCA. Those were the two leading companies.

The first sound pictures made by Fox and Warner in 1926 used techniques controlled by Electrical Research (2190)
Products, generally referred to as Erpi. So that the early studio equipment was Erpi-equipped.

By the time Radio Corporation of America was ready to to enter this field a couple of years had gone by; and when they stepped out to market their Photophone process, they found that most of the studios in Hollywood had been pretty well equipped with the Erpi equipment, and they were in many of the leading theatres.

So they undertook to get into this field by acquiring production facilities that were not equipped and acquiring theatres. In other words they went into this field which was partially closed to them by going into the picture business.

Q. What steps were taken to secure production and distribution facilities? A. Well, the first step RKO acquired a producing distributing company. It was a company known as FBO Productions, Inc., organized in 1920. It was not an

important producing company. It made minor pictures. But it did have a distributing organization of about 34 exchanges, and that gave them a foot in the door of production and distribution.

RCA then set about acquiring a position in theatres, and to do this it organized Radio Corporation of America, the existing company. It exchanged its holdings in——

(2191)

Q. Radio-Keith-Orpheum, did you mean? A. Radio-Keith-Orpheum Corporation, I am sorry, sir, the company of which I am now president. And into that company they transferred this production and distributing company that they had acquired, FBO Productions, and then they set about acquiring theatres by exchange of stock. There was Keith-Albee-Orpheum Corporation, the vaudeville exchange, and there was an offer made to the stockholders of that company to exchange stock of RKO for their KAO stock. There was a similar offer made to another circuit, Orpheum Circuit, Inc., and by acquiring these groups of vaudeville houses RKO got into the exhibition field. And these vaudeville houses had a problem of their own at that time. With the advent of the bigger palace movie houses, vaudeville had started its decline. These houses had all been built for vaudeville; most of them had two balconies; and with sound coming in the vaudeville theatre was somewhat weakened; so it was a fairly logical combination, for a new company coming into the sound field to acquire the vaudeville theatres rather than any other.

Q. How many were acquired, Mr. Rathvon? A. Well, KAO, at the time of its acquisition, owned and leased close to a hundred theatres. It also owned entirely a subsidiary called B. F. Keith, which had an interest, a majority interest in 19 theatres, I believe, and a minority interest—that

(2192)

is, below 50 per cent—in 90-odd additional theatres. The Orpheum Circuit, the other one, had varying interests in a number of theatres scattered all over the United States.

After these acquisitions, which continued up to 1929, 1930, they took over another chain known as Proctor that had five big theatres in New York. They acquired theatres in the midwest, Cincinnati, Columbus, and Dayton.

Judge Hand: Does RKO own completely the Orpheum Circuit?

The Witness: The Orpheum Circuit has long since changed its form. At the time it acquired those original theatres Orpheum Circuit in its entirety was one of the companies taken over through exchange of stock.

Judge Hand: In the receivership?

The Witness: Yes, in the disasters of receivership that circuit was entirely broken up.

Q. What, if any, efforts did RKO made in those years to improve its production position? A. Well, it spent some seven million dollars on the production facilities it had acquired in Hollywood, and bought some additional facilities from Pathe Exchanges, Inc.; and at the cost of about five million dollars it acquired certain production assets from Pathe Exchanges, Inc., largely bought for the benefit of some star contracts.

(2193)

They also spent about eight million dollars on these vaudeville houses, rejuvenating them and equipping them with sound.

Q. Mr. Rathvon, what was the general nature of the theatres acquired by RKO in 1933? A. Well, with few exceptions they were the vaudeville theatres. They were generally large, well built theatres, well located, in large important cities; one or two to a city.

Q. Now, I believe you said in response to Judge Hand's question, or you intimated, at least, that RKO at one time was in receivership. When was that, please? A. RKO went into receivership in January 1933.

Q. And when did it come out, do you know? A. Not until January 1940.

Q. And was RKO named as a defendant in this case while it was in receivership? A. That is correct.

Q. What effect did the receivership have on RKO's production, distribution and exhibition of pictures? A. Well, all during the receivership RKO maintained its producing and distributing facilities just about as they were then they acquired them. It was in the theatre end that they lost during this period, lost some 57 theatres.

Q. Will you tell the Court briefly the extent and nature of RKO's present theatre operations? A. Yes. RKO today operates 106 theatres. 62 of these are so-called first-run (2194)
theatres. The rest are second or subsequent run. And of the 106, 72 were former vaudeville houses acquired in the early stages of the company.

Q. Have you had prepared under your direction a list of the theatres operated by RKO? A. I have.

Mr. Leisure: I ask to have it marked for identification, please.

Mr. Wright: Is this any different from the one that has already gone in evidence? We have a list of RKO theatres in. It may be confusing——

Mr. Leisure: I will just have it marked for identification at this time and use it in connection with the witness's testimony; and if it is already in, Mr. Wright, I assure you I shall not offer it again. But I am informed it is not in evidence.

(Marked Defendant RKO's Exhibit RKO-1 for identification.)

Q. Was that list prepared under your direction, and is that a correct representation of the theatres? A. Yes, I believe it is a correct list of the 106 theatres I mentioned.

Mr. Leisure: I offer it in evidence.

(Defendant RKO's Exhibit RKO-1 for identification received in evidence.)

Q. Mr. Rathvon, has there been or is there any agree-
(2195)
ment or understanding between RKO and any other defendant as to the cities or areas in which they should respectively acquire or operate theatres? A. There is not.

Q. From your activities in the discharge of your responsibilities, are you familiar with the general policies and practices governing the production and distribution and exhibition activities of the various RKO companies? A. I am; as director of each of the companies, I am familiar with it; and as chief executive officer of the company I am charged with the responsibility of seeing that those policies are carried out.

Q. Now, very briefly, Mr. Rathvon, will you just describe to the Court in general the organization and functions of the production department of RKO? A. Why, our production department, except for our newsreel and small amount of short production, is entirely on the Pacific Coast in Hollywood. It is under the direction of Mr. Charles Koerner, who is the vice-president of RKO-Radio Pictures, and he has complete charge of the production end of our business, typical of all companies, that goes from the beginning when you first purchase the story until the completed picture is finally delivered to the distribution department.
(2196)

Q. Will you also please briefly describe to the Court the organization and functions of the distribution department? A. Well, our distribution department is organized on a worldwide scale. We have separate foreign and domestic distribution departments. The domestic distribution de-

partment is under the supervision of Mr. Robert Mochrie. He has 34 offices under him, and he also has the offices in Canada. Each of those are in charge of a manager, with salesmen working under them. That department has the activity of exploiting and selling the pictures, handle the physical distribution of those to the theatres in which they are exhibited, and also is charged with the duty of collecting the rentals.

Q. Now, finally, Mr. Rathvon, will you just continue and describe to the Court the organization and functions of the theatre-operating companies? A. RKO operates its theatres in two main groups. Those in Greater New York are under the supervision of Mr. James Brennen, as general manager, and all theatres outside of that area are under the supervision of Mr. Sol Schwartz, as general manager of those theatres.

The booking of pictures into all theatres is conducted by our booking company, which is under the direction of Mr. Harold Mirish.

The physical operation of the theatres as distinguished (2197)

from booking, and so on, is under the direction of Mr. Wilbur England. The theatre operation, of course, includes the maintenance and the care of the theatre.

Q. Now, from your description of the RKO organization I gather that the production and distribution activities are not carried on by the same corporations that control the exhibition activities? A. That is right. There is one small exception. Our RKO Service Company does certain clerical work for the RKO-Radio Pictures, but with the exception of that small amount of clerical work, that is correct.

Q. To what extent do the producing and distributing corporations and the exhibition corporations have the same officers or personnel? A. Well, the offices are in the same building, 1270 Sixth Avenue, although the theatre-operating

departments are on different floors than the distributing departments.

Q. Are the physical offices of the theatre corporations and the offices of the production and distribution corporations the same? A. No, they are on different floors.

Q. I think you misunderstood my first question: I want to know about the officers of these different companies. A. (2198)
Oh, there is a number of executive officers who are officers of subsidiaries that have to do with the theatres and also with the subsidiaries that have to do with distribution and exhibition. RKO is not as large a company as some of the others, and at the top executive level there are four or five officers who hold office in the various subsidiaries. At the operation level, however, that is not so. The operating men in the theatre companies are an entirely distinct group from the operating men in the distribution organization.

Q. Will you tell us, Mr. Rathvon, if you know, the RKO policy with reference to the interchange of information between personnel charged with distribution and those charged with the theatre operations? A. Well, our policy is that there shall be no exchange of such information other than our daily theatre reports showing the amounts the pictures are grossing at given theatres at various dates. Daily theatre reports are available to the distributing organization.

Q. And do the executives have access to this information? A. Well, I, for example, have access to all information. As I said, there were several other executives that have that same privilege. Those executives, however, are not active operating men, and we look upon our use of this combined knowledge as important in policy forming, and it is not used in operation.
(2199)

Q. Well, does this executive access which you have described in any way affect the decision of the operating per-

sonnel of the distributing company as to the theatres it will license? A. It does not——

Mr. Wright: If the Court please, that is a speculative matter which I do not see that he is competent to answer.

Judge Hand: Well, I do not think it is very convincing merely because it comes from this source; but I will allow it.

Q. And does this executive access which you have described in any way affect the decisions of the operating personnel of the theatre companies as to the features they will license to RKO theatres? A. No, sir.

Q. Mr. Rathvon, can you give the Court any idea of the relative size of RKO in the motion picture industry? A. Yes, I can.

Mr. Leisure: Before you answer that, I am going to ask permission to have marked for identification a chart.

(Marked Defendant RKO's Exhibit RKO-2 for identification.)

Q. Mr. Rathvon, will you just tell us the source material of this chart? First tell us if it was prepared under your direct supervision? A. It was.

Q. And tell us the source material, please. A. Well, other (2200)
than the company's own records we used the Film Daily Year Book for 1945, which is a fairly well recognized source of general industry statistics.

Mr. Leisure: I offer RKO Exhibit 2 for identification in evidence, please.

Mr. Seymour: May I see it?

Judge Hand: Was RKO-1 for identification?

Mr. Leisure: RKO-1 was offered for identification and then admitted, your Honor.

Judge Bright: Has it been admitted?

Mr. Leisure: Yes.

Mr. Wright: I think, if the Court please, we put in evidence a list of the RKO theatres as of December 31, 1944, as Exhibit 158, and I do not know if there are any changes on this. If there are I suppose these ought to go in, but if it is just a duplication, it adds nothing.

Judge Hand: Did you say as of 1944?

Mr. Wright: We had previously offered and there had been received a list of RKO theatres as of December 31, 1944, as Exhibit 158, as supplemented by a letter from RKO's counsel dated July 13, 1945. Now, I do not know whether this is intended as a further supplement or not. If it is I suppose we ought to have it; but if it does not supplement anything that is already in evidence, it seems to me it just adds nothing to the record.

(2201)

Mr. Leisure: May I explain that?

Judge Hand: Yes.

Mr. Leisure: Obviously we are not going to offer anything that is already in evidence, Mr. Wright. The list which Mr. Wright refers to covers all theatres in which we have any interest whatever. Now, Mr. Wright and I have a little private feud on this question of affiliated theatres. Mr. Wright believes if I own 10 shares in General Motors I am affiliated with General Motors. I take the position I am a practicing lawyer and not affiliated with General Motors. His list covers every theatre that we have any interest in whatever. Our list merely refers to the theatres operated by us.

Mr. Wright: I think the list we put in is broken down so that it shows separately the theatres operated by RKO and then those in which they have other less direct interest.

Judge Hand: Can you do that, or have you done it?

Mr. Wright: I think it has been done in the list we put in.

Judge Hand: All right.

Mr. Leisure: The point I am interested in now with this exhibit and with this witness are the theatres operated by RKO, without any dispute as to stock ownership of 10 per cent or anything of that kind; so I think it is admissible.

(2202)

Judge Hand: All right.

Mr. Leisure: Now, Exhibit RKO-2 for identification has been offered at this time.

Mr. Wright: I would like to examine him on it.

Judge Hand: All right.

Preliminary Cross Examination by Mr. Wright:

Q. Calling your attention, Mr. Rathvon, to this RKO Exhibit 2 for identification, I notice under the heading "Features Released," you have a figure "Total Industry 442." Now, do you know what period of time that covers? A. That is in the calendar year 1944.

Q. Those are the features released during the calendar year, is that right? A. That is correct.

(2203)

Q. And when you say "total industry," does that mean total industry in the United States? A. That is the 442 pictures reported as features released within the United States that year by the Film Year Book.

Q. But you don't know whether those are—are those all features released by domestic distributors, is that it? Does it include features that might have been released and distributed in this country by foreign distributors? That is what I am trying to get at. A. I do not know of any foreign distributors that distribute pictures in the United States directly. I imagine if there are any such they would be part of the 442.

Q. This represents the total number of features actually distributed in the United States regardless of origin, is that right? A. That is what the Film Year Book says.

Q. This is simply taken from the 1945 Year Book, is not that right? A. That is correct.

Q. You did not make any investigation of your own to determine the accuracy or inaccuracy of those figures? A. I did not.

Q. This figure, film rentals received, that represents the film rentals received by whom, that $469,000,000?

Judge Bright: What was that question?

Q. Question read.) A. That represents the Year Book's (2204)
estimated film rentals received by the distributors who put out the 442 pictures mentioned in the first column..

Q. That again is just a figure taken from the Year Book. Have you got the page reference to the Year Book so that we can see where those things are? A. I don't carry a Year Book around with me, I am sorry.

Q. You don't know the precise part that came from? A. No.

Q. In any event, that was just taken from the Year Book and you made no—— A. All these statistics were taken from the Year Book and we take the book for what it is worth as a fairly well recognized source book for industry figures in our industry.

Q. But there was no attempt to check these particular figures? A. None at all, neither those figures nor the others that are cited from the Year Book.

Q. That is what I am trying to get at: those that come from the Year Book, these figures, theatres operated, in the third column there, 18076, that is also simply a Year Book figure? A. Your questions on any one of the columns are the same, as far as the Year Book, goes on all of them, just taken from the Year Book for what they are worth.

Q. The only figures that came from your records, as to which you had any firsthand knowledge, were these figures which are reflected by the red shaded portions of the chart, is that right? A. Yes.

(2205)

Mr. Wright: I must say, if the Court please, I do not know exactly what the purpose of this is. Our own experience is, in such checks as we have been able to make, that the accuracy of these Year Book figures is open to serious question. Now it may not be of significance in view of the purpose, but inasmuch as the purpose is not clear to me, I would press the objection.

Judge Bright: Are we going to have more accurate evidence upon this subject?

Mr. Wright: As to gross admissions and weekly average attendance, there are, of course—the situation, as I understand it, is this, as to gross admissions: of course you do have reasonably accurate figures, I think, in the Government entertainment tax receipts of over-all admissions, but there is no breakdown there as between motion picture theatres and other places of entertainment. I would say that insofar as I know, no one has assembled accurate figures on this question of the gross theatre admissions and weekly average attendance, total theatres operated and total film rentals received.

Judge Bright: We have had three figures already of the total theatres operated.

Mr. Wright: Yes. As far as I know, there are none—I have never seen any which, I think, are recognized as accurate. It is a constantly shifting total.

(2206)

It is very difficult to ascertain because houses are constantly being closed and opened.

Judge Bright: Have you submitted any proof on any of the five columns of this proposed exhibit?

Mr. Wright: I don't think we have. We have confined our proof, I believe, in each case to the actual figures produced by the various defendant companies.

Judge Bright: Does your proof show the percentage of each one of these five companies with reference to the totals in the industry on any particular item?

Mr. Wright: No, it does not.

Judge Bright: Does your proof show the totals of the industry in any of these items?

Mr. Wright: We have offered, I believe, no proof of industry totals. I think that is correct, your Honor.

Judge Goddard: Have you cited the Year Book at all as your authority?

Mr. Leisure: It has been constantly referred to.

Judge Goddard: Is that right, Mr. Wright?

Mr. Wright: Have I—

Judge Goddard: Perhaps you did not hear. I was asking you: my recollection is that the Government has cited the Year Book as authority for certain statistics.

Mr. Wright: As our record stands, I do not believe that anything we have in evidence is based upon

(2207)

Year Book figures. That is my impression.

Judge Goddard: Hasn't it, in the course of this litigation, been cited by the Government? I think so.

Mr. Wright: I don't recall, but we may have referred to it. As I say, we have never been able to obtain what we regard as accurate figures setting forth these over-all industry facts.

Mr. Leisure: I think in the constantly shifting total, such as opening theatres and closing theatres, you would never have any two figures that may agree, but may I ask a question which I think will fully clarify this question?

Direct Examination continued by Mr. Leisure:

Q. Mr. Rathvon, is the Year Book to your knowledge a book that is used constantly in your industry and regarded as a reliable book for the information which it is supposed to contain? A. It is.

Judge Bright: By whom is it published?

The Witness: It is published by the publishers of one of our trade magazines, Film Daily.

Judge Bright: Is it published by any of the dedendants here?

The Witness: No.

Judge Bright: Or by the group of them?

The Witness: No.

(2208)

Judge Hand: We will allow it.

(Marked Defendant RKO's Exhibit 2.)

Q. Addressing your attention to the column on your left, Mr. Rathvon, I would like for you to just start and explain to the Court what the column purports to show, giving the figures as you go down to the last figure, 91.6 per cent? A. The whole purpose of this chart is to show relatively the

niche that RKO occupies in this industry. I think whether the over-all comparative figures are highly accurate or not, they are certainly accurate enough to indicate broadly what RKO's activities are in relation to the whole industry.

We approach it first from the number of features, showing that RKO as a distributor, released 37 out of the estimated 442, or 8.4 per cent of all the features that were released, and that of the film rentals received, only 7.6 per cent went to RKO as a distributor.

Judge Bright: Do I understand that film rentals received column is film rentals received from features only?

The Witness: I am not quite sure whether those two figures are—if it isn't, it would include shorts, which is a relatively small item.

Judge Bright: Would it cover any of those Trans-Lux theatres where they have just news?

(2209)

The Witness: Well, if it includes what I have called shorts, it is news and shorts. I think that means the total film rentals received by the companies for features and shorts as well, but I don't know.

A. (Continuing) The remaining columns have to do with theatres. It shows that we operate 106 out of 18 thousand, or only six-tenths of one per cent of the total. Weekly average attendance: out of the estimate of 95,000,000, our weekly average is 1,844,000, and represents 1.9 per cent of the total. Out of gross admissions collected, it is 2.6 per cent of the total.

On the whole it shows that as a distributor we do around 8 per cent of the business, and as a theatre operator we do around in the range of one to two percent.

Q. Mr. Rathvon, the Butterfield companies have been mentioned here from time to time. Do any of the RKO companies own stock in the W. S. Butterfield Theatres, Inc.?

A. Yes. B. F. Keith owns ten per cent of the stock of that company.

Q. What is the business, please, of W. S. Butterfield Theatres, Inc? A. It operates theatres in Michigan.

Q. What is the interest of B. F. Keith in that corporation? A. It owns part of the common stock. There are three classes of common stock, A, B and C. The C stock,
(2210)
which represents ten per cent of the total, is owned entirely by our subsidiary, B. F. Keith.

Q. When did B. F. Keith Corporation acquire this stock? A. Oh, that stock was acquired before RKO came into existence. It was in that company at the time its stock was exchanged into RKO.

Q. Does B. F. Keith Corporation exercise any control over the operation of W. S. Butterfield Theatres, Inc.? A. None at all.

Q. Does B. F. Keith Corporation have any control over the management of W. S. Butterfield Theatres, Inc.? A. No.

Q. And does B. F. Keith elect any directors? A. C stock is entitled to one out of six directors. We have on the board a representative of RKO.

Q. Who is that? A. That is Major Leslie Thompson, who is head of our labor relations department. He used to be in theatre operations at the time he went on the board, but he has now been in charge of labor relations for a long while and we haven't bothered to make a change in the representation.

Q. Based on your experience, Mr. Rathvon, does the stock interest of B. F. Keith Corporation in W. S. Butterfield Theatres, Inc., give any advantage to RKO in licensing features for exhibition to the Butterfield Theatres? A. No.
(2211)

Q. The Butterfield Michigan Company has also been mentioned here. Do any of the RKO companies own any

stock interest in Butterfield Michigan Theatres Company? A. Yes, B. F. Keith owns 33⅓ per cent interest in that one.

Q. What is the business of that company, please? A. That also operates theatres in that general area.

Q. What is the interest of the B. F. Keith in that corporation? A. It has a stock interest of about one-third of the common stock. Both of those acquisitions came in connection with vaudeville booking arrangements back in the days when they were operated entirely as vaudeville houses and those securities were resting in the B. F. Keith Company at the time they became part of RKO.

Q. Again, as to this company, does B. F. Keith Corporation exercise any control over the operation of Butterfield Michigan Theatres, Inc.? A. None whatever.

Mr. Wright: If the Court please, I think we have an agreement there which sets forth the relations between the companies, which is the best evidence as to the existence or non-existence of control. A copy of that was given to us after Mr. Beatty of the Butterfield Corporation had testified, and I have sent for it now, but I think that agreement is the best evidence rather than these statements of this man as to what

(2212)

the control of the situation is.

Judge Hand: Probably it is. You are going to put it in, I suppose.

Mr. Wright: Yes, I was going to ask to put it in.

Judge Hand: Go on.

Q. Does B. F. Keith Corporation have any control over the management of Butterfield Michigan Theatres, Inc.? A. It does not.

Q. Does it elect any directors? A. It has a director, the same Major Leslie Thompson, who is on the other Butterfield board.

Q. Based on your experience again, Mr. Rathvon, does the stock interest of the B. F. Keith Corporation in Butterfield Michigan Theatres Company give any advantage to RKO in licensing features for exhibition in the Butterfield Theatres? A. No.

Q. There is another group that has been mentioned here from time to time, called the Metropolitan Playhouses, Inc. Do any of the RKO companies own any interest in that company? A. Yes, B. F. Keith owns a 20 per cent interest in that company.

Q. What is the business of that company, please? A. It is a real estate holding company, its real estate assets being theatre property.

Q. When did B. F. Keith acquire its interest in that (2213)
company? A. In 1935.

Q. Will you explain that to the Court, please, the circumstances under which that came about? A. Well, Metropolitan Playhouses is a company that grew out of the receivership of the Fox Metropolitan Theatres. It had been organized by Mr. [illegible]ck in 1928 and it had been a hastily organized circuit in this metropolitan district here in New York and shortly after 1929 and 1930 the circuit began to disintegrate. It never had any product other than the Fox and half of Warner, I believe, and half of Paramount, and their film rentals were not such that they could hold all of that product, as a result of which it was finally left just to the Fox product to support these expensive theatres, and the operation went into receivership.

After a period in receivership, it emerged as Metropolitan Playhouses, Inc. as far as the real estate holding end of it.

The operation of those theatres, however, during the receivership and afterwards, and I suppose before even the receivership, was in the hands of operating companies.

Metropolitan Playhouses emerged as the holding company of the theatres of that receivership, and RKO at that time acquired a 20 per cent interest—when I say "at that time", I mean when the receivership ended—pursuant to a
(2214)
contract we had entered into in June of that year, which was approved by the Court under the Metropolitan receivership.

Q. Again, based on your experience, does B. F. Keith exercise any control over the operation or the management of that company? A. No, but that is not an operating company.

Q. And does it have any directors? A. It has one director in nine. Our director is Mr. Malcolm Kingsburg, vice-president and treasurer of our company, who was formerly head of our theatre operations.

Q. There are two groups, Mr. Rathvon, whose names have been mentioned here from time to time, and that is Skouras and Randforce Corporation. What if any is the relationship between Metropolitan Playhouses, Inc. and Skouras Theatres Corporation and Randforce Amusement Corporation? A. Metropolitan Playhouses own 50 per cent interest in each of those companies.

Q. And would you tell us the business of Skouras Theatres? A. Well, it is a theatre-operating company whose activities are confined largely to parts of New York City.

Q. And the business of Randforce Amusement Company? A. It also is the same thing, only their theatres are largely concentrated in Brooklyn.

Q. Do RKO companies own any stock in the Skouras Theatres? A. No.
(2215)

Q. Do they own any stock in Randforce Amusement Company? A. No.

Q. By reason of its 20 per cent ownership of stock in Metropolitan Playhouses, does B. F. Keith elect any repre-

sentatives on the board of either Randforce or Skouras? A. No.

Q. Does B. F. Keith Corporation have any control over or voice in the management of the theatres operated by Skouras Theatres Corporation or Randforce Amusement Corporation? A. No.

Q. And based on your experience, Mr. Rathvon, does RKO Pictures secure any advantage in the licensing of its pictures to either Skouras or Randforce by reason of the fact that B. F. Keith Corporation has 20 per cent stock interest in the Metropolitan Playhouses, which in turn has a 50 per cent stock interest in Randforce and Skouras? A. No.

Q. Another company: Do any of the RKO companies have any interest in a corporation known as Affiliated Theatres, Inc? A. Yes, RKO-Orpheum has a 10 per cent interest.

Q. How did that come about, if you know? A. Well, that interest was acquired by the—it was an asset of the Mort H. Singer Theatres and it had been acquired by the theatre interests of that organization prior to that time, (2216)

and it came into our possession when we first acquired the Mort H. Singer Company. It is a very small item and it stands on our books at only between 7 and 8 thousand dollars.

Q. I neglected to ask you what the business is of that company. A. It operates six theatres in Sioux City, Iowa.

Q. Does RKO have its own first-run theatres in Sioux City? A. It does.

Q. Are the theatres operated by Affiliated Theatres, Inc. regular customers of RKO? A. No.

Q. Does RKO have any representation on the board? A. No.

Q. And do they buy our product either first or second-run, Mr. Rathvon? A. Not regularly. There have been a

few spot bookings in the last few years, the only transactions of any kind.

Q. Will you say that the stock interest of RKO-Orpheum Corporation in Affiliated Theatres, Inc. gave any advantage to RKO-Radio Pictures in the licensing of features distributed by it? A. Well, obviously not. They don't buy our pictures.

Q. Mr. Rathvon, from your account of the development of the RKO companies, it appears that RKO from its organization has operated as an integrated unit? A. That is correct.

Q. Based on your experience as president of the company, (2217)
does the fact that RKO operates as an integrated unit, including production, distribution and exhibition, offer any advantages which would not be present if the companies were separated? A. Offers very great advantages.

Q. Will you be good enough to outline the advantages to the Court which you have observed with particular reference to the operations of RKO? A. I will. The mere ownership of theatres by a producer distributor, regardless of whether those theatres are first-run or second-run, or any run, no matter what type of theatres they are, the mere ownership of them is a great safety factor and a great stabilizing influence in what is essentially a very hazardous and very speculative business.

For a number of years RKO has received about one-half of its gross revenue from theatre admissions. In good times and bad, a fair share of those theatre admissions have found their way through to net profits.

This theatre business is a stable, predictable retail business. In the last ten years the number of people who have attended RKO theatres, that is, our average admissions, has varied very slightly. In that ten-year period there has been no year when the number of admissions has varied five per

cent from the average. Therefore, the variation in net profits in the said years have been due to variations in admission
(2218)
prices or variations in film rentals, but in every year the theatres have been able to show substantial net profit from those admissions.

Production is entirely another story. With production, well, in 1936 RKO made two million dollars on about 18 million dollars worth of film rentals. Two years later, on a greater amount of film rental, it lost $570,000. In fact, in the five years from 1938 to 1942, inclusive, RKO lost four million —it was in the red constantly in those five years, and we lost five million dollars on our production-distribution operations, and yet in those very same five years we made nine million dollars profit on our theatre operations.

RKO never could have emerged from the receivership in 1940 if it had not have been for the theatres and the earnings of the theatres and the stabilizing influence they gave our operations. In fact, I am quite confident that RKO would have sunk back into receivership in 1942 if it had not been for the theatres, because in that year we had to pledge our theatre holdings to borrow three million dollars to keep on making pictures.
(2219)

That era of five years, when the theatres, so far as RKO are concerned, supported us, kept us out of receivership and kept us up, were not what you would call bad times in our industry. RKO was suffering particularly in those five years because, coming out of receivership, it had very few production assets, very few stars, and we were struggling to get back on our feet and get on a competitive basis.

The progress we have made in operation in the last few years has been made possible by the stability, and the confidence and the boldness that we could go ahead, because we had these theatre earnings to go on.

But every so often our industry does run into hard times when all production generally is on an unprofitable basis for a period of time. That has happened historically in the past. It is at times like that when the distributor producer knows that he is faced with a period when his production generally is going to be losing, that the stability and the strength of these theatre earnings are most important to him.

Every time we are prosperous in this industry and the revenue from our producing activity goes up, our production costs go right up along with it, and then when times aren't so good and the curve turns down and crosses this cost curve, why we are in trouble.

(2220)

There are many reasons why we cannot control cost with facility in our business. One is the fact that we make tremendous inventories ahead of the time they are going to be distributed. Most of the companies have pictures made now which will not find their way to the screen for eighteen months or maybe two years. So, in the first place, you have a high cost inventory, that is, high cost in relation to the time that is coming, when we go into one of these periods, I will say; and the things you have in production, you have laid out your costs way ahead of time, on even projected pictures you are in trouble because of the contract system that exists there on labor, and to a certain extent with stars and expensive people. And those pictures, each time one of these periods comes along, it may be said with us, we know we are faced with a situation where production is going to be a losing proposition. When those periods come, these independent producers can readily take cover and go out of business for a year or two because they have no responsibility to keep this flow of pictures going, but the so-called major companies, who are the backbone of this industry, they have just got to keep plugging along, and we cannot cut down on the number of pictures. The minute we slow down on the num-

ber we are in trouble because in bad times the playoff of the
(2221)
pictures are accelerated, run a lesser length of time in exhibition, so you need more pictures instead of less. You cannot cut down in quality in those periods because the motion picture goer is a shopper, he becomes more a shopper at the time when his dollar means more to him, but more importantly still, we cannot cut quality because we have to maintain these foreign markets of ours, and we must keep the quality up, to do that. This industry has enjoyed extensive revenue from foreign markets for so many years that our whole cost structure is based on the expectation of substantial revenue from abroad. For a number of years upwards of 30 per cent of our total revenues, I am talking industry-wise, and it is true of RKO, have come from foreign markets. When 30 per cent of any revenue or any business, of your gross revenue, comes from one source, all your profit and part of your costs come from that source.

So the stability and strength which our theatre ownership adds to us, to our situation, reaches even into the maintenance of these foreign markets and helps permit us to maintain the prestige of the American picture abroad.

So when these hard times come, it falls on the producer, and that is so. The exhibitor does not take up much of the slack or difference between the results of good times and the results of bad times. The exhibitor looks on what he receives
(2222)
at the box office as falling into three slots, first, to pay the cost of his operation, second, to pay his film rental, and third, to pay his profit. The only flexible thing in there, from the exhibitor's point of view, is the film rental, so when times are bad, it is the film rental that shrinks rather than the exhibitor's profit or the cost of his operation.

I have tried to present the situation from the purely broad point of view of ownership of theatres, regardless of what the location of those theatres are, the run of the theatres, or any-

thing of the kind, but when that theatre ownership falls into certain patterns, then it has got a greatly enhanced value to the producer-distributor who owns it.

One of those patterns is the RKO first-run pattern. There may be other patterns, where these extra assets that establish that pattern add extra dividends to the producing and distributing company that owns it, I don't know, but I do know that this RKO pattern is very valuable and enhances the value of our holdings to RKO, and that pattern is inherited from vaudeville. It is the chain of theatres located, well managed, big theatres located in big cities, one or two to a city. It is a thing that we have—that has been spoken of largely as a showcase operation. It is more than a showcase, it is a demonstration center of great importance to the pro-

(2223)

ducer-distributor. What happens in the first-run key city engagement tells the story of what happens in a great many engagements that follow that, and for that reason that key city engagement is a very important one. If the engagement is a success, the producer-distributor gets subsequent rentals that he is entitled to with a successful picture. The exhibitor can buy the picture with confidence because success has been proven.

If the effort is a failure, well, the exhibitor is the only beneficiary then because he finds ways not to buy the picture or he buys it on his own terms. This exhibitor is a pretty conservative fellow. The average exhibitor, he wants nothing but the so-called automatic picture, with two or three fine star names based on distinguished books and plays. The producer has learned that he can make only a few of those in a year and he cannot make the rest of his program a spurious facsimile of his good picture. He has to reach out and try, if he is going to hold his public, he has to take terrific gambles with new ideas. Always, the producer is the fellow who must

go out and gamble with something fresh or new to hold the motion picture public and keep up his attendance in our theatres. Constantly he must try to build unknown people into stars because there are not enough stars for our pictures. As a result of that, when we make pictures costing a million
(2224)
dollars and upwards, the gamble that you take when you make these guesses as to what the public wants, are always tremendous gambles. The producer has got to find out, at great expense, whether the public likes what he thinks they are going to like, and he may or he may not be right, but that is the gamble he takes.

Now, if the company that has taken those gambles, this producing company, has access on the terms of playing time and timing to these important first-run theatres, they have got something that goes a long way to mitigate that gamble.

In the first place, if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution and that is very important, because if you have an unsuccessful picture and your first-run exhibitor has no responsibility to you, you are foreclosed from that whole territory if you fail to get it into first-run theatres. So it is, for your unsuccessful pictures, it gives you a chance to get some revenue back because you forced it into the flow of distribution. On your more successful pictures, or on all pictures, these first-runs are of particular value in what we have come to call the setting up of the picture, establishing the prestige of the picture, getting it set for that territory.
(2225)

At least, if you can handle the exploitation, if you can time your releases and so on, you know that these gambles that you take won't bog down from poor timing and poor exploitation.

I have talked—answered at considerable length. I would like to give a few examples of the type of thing I mean.

Q. Will you please. A. That gamble that the producer takes and what it means. I will give a few examples. Walt Disney, up until some years ago, made nothing but so-called short cartoons. I know that they cost him around $50,000 maximum to make these cartoons. He conceived the idea some years ago that the public would like to see full length animated pictures and he found when he got making it that he was gambling a million and a half dollars—that is the alleged cost of the picture; I don't know what it actually was, but in any event RKO was his distributor, so we undertook with Mr. Disney to make that gamble a success. A great many of the exhibitors throughout the country, when they heard this picture was forthcoming, were quite sure that the picture public would not sit through a full length cartoon, but a very elaborate campaign was worked up, the whole thing was carefully set up and established, and I must say in that case it was not a hard case to convince the exhibitors after a few showings that the public was very much—very

(2226)

much wanted to see a full length cartoon, because it became the greatest grossing picture of its year.

Judge Bright: What was its name?

The Witness: That was Snow White and the Seven Dwarfs, the first Disney cartoon that was beyond one reel that was ever made.

A. (Continuing) I would like to give a less spectacular example of a very recent one in my immediate experience, to show another type of gamble we took. RKO has not got many stars. We have to reach around and find them where we can get them. We try to build them but that is a matter of great difficulty and takes lots of time, so we comb the field over sometimes behind some of the others.

There was a young, or a man in Hollywood named Dick Powell, who had had a career as a singing juvenile. He

played in musical pictures. He attained quite a degree of popularity and then his popularity waned and he was pretty well forgotten in Hollywood. I think he could have gotten in some job as a singing juvenile, but he conceived the idea that he could come back in an entirely different type, the so-called hardboiled Humphrey Bogart type. Well, who could tell? It required a gamble, and we decided to take the gamble with him and make the picture.

If we had announced the picture with Dick Powell the (2227)

public, in the first place, would have assumed it was a musical picture and, in the second place, they would have stayed away from it, so our whole campaign was based on the new Dick Powell. We did not depict him at any time without a gun in his hand, and we played this character up and advertised him, so on, until we created public curiosity as to what the new Dick Powell was. In our first-run we launched that with a handmade campaign, which we controlled, we launched that picture and it turned out, for its cost, a very successful picture, so much so that we have finished a second picture with Dick Powell and we think we have got a, not a great star, but a star that we can count on as a steady earning star for a long time to come.

I could give you a lot more examples but I think those two examples will illustrate what I am saying.

Q. You have laid great emphasis on the importance of the producer having control of the first-run for the purpose of setting up his picture, of establishing their prestige. To what extent do the early engagements contribute to the success of the picture? A. The early engagement contributes very greatly to the success of the picture, and I am thinking more of the exhibitor than I am of the public generally because the grosses these early exhibitions make are published (2228)

in trade papers and they are picked up all over the country

by exhibitors and the picture gets characterized as a big grosser, or a medium grosser, or some other kind of grosser. Exhibitors, like motion picture audiences, will hear a picture is good or they hear it is not good, and that tells whether or not, in their minds, as to what that picture is. So these early runs, particularly in their effect on the exhibitors of the country, are very important.

Q. To what extent does the national campaign and exploitation contribute to the success of the early engagements? A. Well, of course, the whole exploitation idea is to get people to know about your picture; they may not like it, but you get them to know about it. That is step number one, and your whole national advertising campaign is the first step in that thing, and you play it as far as you can up to what we call penetration, that is, the percentage of the movie going public that know about this thing, so your national campaign of advertising and exploitation in articles in magazines and everything else you can do carries you up to the point where the local campaign, the point where you hold your first exhibition, comes in. When they come in, they add the additional penetration on top of what you have built up on your national campaign. And our experience is you can build up more in local campaigning than you are

(2229)

able to build up in your national. In other words, the total amount of penetration you get will come more from your local campaign than from your national campaign. I am talking only of important pictures because those are the only ones we advertise extensively nationally.

As far as the less important ones go, they get all their penetration from the local newspaper campaign and local exploitation.

Q. What have you to say as to this; is local effort more effective where the early exhibition is in a theatre operated by RKO than it is in a theatre not affiliated with RKO? A.

It has been my experience, particularly when we have good pictures that require special handling, we do very much better in theatres operated by RKO. That Dick Powell picture I cited a little while ago would be a good example, where, in our own theatres, and with special effort, we do these things.

Q. Do you have any factual data, Mr. Rathvon, which confirms this? A. Yes, I have accumulated a great deal of data from time to time on the relative importance in relation to specific pictures and groups of pictures on this matter of penetration. In fact I have been at it for a long while. The story goes back to eight or nine years ago, when Dr. George Gallup conceived the idea that he might apply to the amusement business the ideas of market sampling that (2230)

he has used in other fields, and he experimented with this for a couple of years, and at the end of a couple of years he decided that it did have some valid application, and at that time RKO and Gallup got together and made arrangements whereby he set up a special organization known as Audience Research Institute, and we have been operating with them for over four years. It is an extensive organization; we spent a great deal of money on it. And at first we were concerned only with production items, things like the rating of stars, who were popular, who were becoming popular, and story tests, and trends of public taste in stories, but as time went on we got into marketing problems. As we got into the marketing problems we began to find these factors I have been talking about. We began to be able to evaluate them and we learned a lot, and the system that we have followed, which I think demonstrates not only the importance of first-run engagements, but demonstrates what it means when you have those first-run engagements or under arrangements with you that you can exploit the pictures the way you want to—I think an ex...nation of the results

of what we have done demonstrates that on a dollars and cents basis. In other words, we can show with our own exchanges and our own exploitation, and especially where
(2231)
we can accomplish results, that where a picture gets off to a mediocre—as against a picture that gets off to a mediocre start, outlets of different types, the results run into hundreds of thousands of dollars.

Mr. Leisure: I have some charts, Judge Hand, over back of those cases, and if we can adjourn now, it will save the time of the Court, I believe, if we get them out during the noon period.

Judge Hand: We will adjourn until two-ten.

(Recess until 2:10 p. m.)

(2232)

NATHANIEL PETER RATHVON, resumed the stand.

Direct Examination continued by Mr. Leisure:

Q. Mr. Rathvon, before lunch we were discussing the importance of key first-runs and the added importance of the runs in your own theatres. I think you said that you had certain factual data with regard to that? A. I have.

Mr. Leisure: I ask permission to have marked at this time a chart for identification.

(Marked Defendant RKO's Exhibit RKO-3 for identification.)

Q. Now, Mr. Rathvon, would you just please explain the type of information developed in this research? A. I had mentioned before the recess the use of the Audience Research Institute, this organization which we caused to be set up with Dr. George Gallup.

The purpose of this chart is to show how it works, because from the data that we gather we arrive at the conclusion of the importance of the key first-runs and also the importance of having those key first-runs our own first-runs.

In regard to every important picture we try to find out two factors, and it is on the knowledge of those two factors and the interplay of those two factors that we draw these
(2233)
conclusions.

The first of those factors we call "want-to-see". Want-to-see simply is the percentage of the movie-going public that wants to see a picture. Thus, if we say that the want-to-see of a picture is 72, it means that 72 out every 100 movie-goers want to the see the picture.

Now, after checking and testing hundreds of pictures over the last two years we find that the average want-to-see vote on A pictures, or the important pictures—let us take the top hundred of any given year which we test and study—is 72. That is the average.

Now, we arrive at this want-to-see by a very elaborate system of tests that begin way back when the picture is an idea, and go on through to the time when we show the picture actually to cross-section audiences. And it is the composite of all those tests that make up this final want-to-see, which on the average of these tested pictures is 72.

Now, that is only shown in the chart over on the left with the black, with the thermometer-like figure there, and the black shows the average, and the blue and the orange show two different types of want-to-see votes that we have taken.

We finally consolidate those into one on our ordinary study of this thing, but this chart was made up at a time
(2234)
when we were using two different ones that had not been consolidated.

In one system it arrived at a 73 and another at a 75 at that particular point. But this picture Enchanted Cottage we therefore knew was slightly better than the average on the basis of the public interest in the picture.

Now, the other factor that we strive to find out about every picture is this thing called "penetration", which I mentioned earlier, which is simply the percentage of the movie-going public who know about a picture at any given time. So if we say that the penetration at some given point is 25, we mean simply that 25 out of every 100 movie-goers know about the picture, can prove they know about it by identifying it.

Now, the penetration is the guiding star and the paramount figure all the way through in these studies. It obviously is never a constant figure, because as the picture goes on through its production and its distribution, and more and more of the public come to know more about it, the penetration figure is bound to rise. Therefore it is a moving figure. We are very interested in that figure from the very time we start a picture right up until we finish, because it shows how many people do know about it, and then in conjunction with the want-to-see we can tell pretty well the size
(2235)
of the audience we have to deal with.

Now, in this particular chart the green line is this penetration.

Now, I must first describe the heavy black line that is crossed by the green line, because a moving figure like penetration has got to be considered in relation to some constant point. In our early experiments we would use the date of release, the date a picture was released anywhere, and we found that that was not a satisfactory constant to use simply because pictures have their initial release in so many different ways. Some pictures are released in ten cities at once on their initial release; some in twenty; some in one. So in

the search for a constant we finally arrived at a point when a million people have seen the picture, that give us a fair comparison. In other words, all pictures can be considered as against that constant rather than the date of the initial release.

So you see on this particular chart we picked up the want-to-see line back several months before the picture was actually released.

Q. When you say "want-to-see line," do you mean the penetration line? A. I mean the penetration line. The want-to-see line I will not mention at this point. It is the green line (2236)

which is the penetration. At the time we picked it up it had a penetration, you can see, of one or two, meaning only one or two out of every hundred movie-goers at that point had heard of it. Probably at that time there had been some articles in fan magazines, and so on, so some of the more ardent movie-goers knew about it. And that line, therefore, did not begin to change until we got much closer to the time of release.

Now, you will notice it starts upward at a point where the red lines come in. Those red lines represent our national advertising campaign, and the height of each red line represents the circulation of the combined magazines used in any week. The first of those red lines was the first week we had any advertisements of those pictures, and if you will look at the key at the right, it tells in which magazines those advertisements appeared—Look and Movieland.

Q. Excuse me, Mr. Rathvon. Those are the red lines at the bottom righthand corner you are talking about? A. That is right. That is correct. Those lines of varying height——

Q. Represent national advertising? A. Yes.

Q. And is the key over on the right those typewritten numbers? A. On the right, and as to the media that we use in our ads; but right beside the red lines — a circulation indi-

(2237)

cation so that you will know what circulation was reached by the magazines at any given week.

You will notice in the first week with Look and Movieland we reached a circulation of about a little under two and a half million; the second week that we advertised, using five different magazines, that came above four million. The third week we hit a higher number with Collier's and Woman's Home Companion; and the fourth week the highest of all, with another combination. And then the rest of it, it shows the circulation reached.

Now, naturally, the penetration goes up under the impetus of this advertising; but the effort up to this point is national in its character. We have now reached or we have expanded our national campaign, and we have brought this picture up to a point where it is about to open in various cities.

In those cities we then start our local campaigns. As I testified this morning, on the strength of what we have learned from those studies, you get more penetration on the average out of your local campaigns than you do on the national campaign.

Now, the point at which the orange and purple lines begin on this chart is where the first showings took place. This picture opened between April 18 and April 26 in a list of cities that are shown here on the chart near the top, with a

(2238)

date, and those were the first-runs that opened the picture.

Now, the minute we have started to show this picture, our penetration, which up to that date has really represented the national effort, now breaks itself into two parts, because in areas where the picture has been shown we have naturally a higher penetration than for any areas where it has not been shown. Therefore we begin to show on our

chart, instead of one line for penetration, we now show two. The purple line at the top starting with the April 18th date shows what the penetration was in those cities where we had opened the picture. The orange line shows the situation in the rest of the country. The green line, or the point of starting of these other lines is simply a composite of those two.

Now, the important thing here is the fact that the national campaign had brought this picture up a little better than 25 before we had these first openings, and due to the strength of our local campaigns in the cities in which it opened, we opened with a penetration of 55. That shows where the blue line begins. Therefore we know that we accomplished about half of the penetration which we got when these pictures came into those first-runs by our na-

(2239)

tional campaign, and the remainder, the greater part is as a result of the local campaign.

I think that outlines the various features of this chart.

Q. Would you just tell us, Rathvon, now how this information is utilized in planning the distribution of RKO pictures? A. Yes. We utilize it, of course, in a great many different ways; but the principal way first is to check the potency of our national campaigns, and then we check whether our local campaigns are adding as much as they should to a picture, because penetration to us is the important thing.

I think I can illustrate that, I can show that best by using an illustration: We will assume a city with a hundred thousand movie-goers, and assume you have got a picture with a want-to-see of 80; you have got an important picture, because that is well above the average of 72; and we go into these first-runs and we find as we go in, let us say we have a penetration of 40. That means that only 40 out of every

100 movie-goers in that town know about it, and we know that 80 per cent of those want to see it.

So our theoretical audience is 80 per cent of 40 per cent of the hundred thousand movie-goers in that town. In other words, our theoretical potential audience is 32,000 people.
(2240)

I call it theoretical because many things affect it,—the weather, competing entertainment, the type of theatre that you are able to get in, and many other factors. It is only a theoretical.

But let us assume you have another picture with the same want-to-see of 80, the same number of people, but you are able to attain only a penetration of 20. That means only 20 out of every 100 know about it and only 80 per cent of those want to see it, so that you have a theoretical potential audience of only 16,000. Therefore you can see your potential audience is only half as great, and I think that illustrates as graphically as I can illustrate the value of penetration. And it is on penetration that our whole exploitation program is based.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: If the Court please, I am completely lost on this one. I haven't the faintest idea as to what this is offered to prove in relation to any issue in the case.

Judge Hand: I suppose it is the kind of theory that he was expounding before in his oral testimony.

The Witness: If the Court would permit me, I will elaborate that example I used and perhaps give a little better answer.

Mr. Wright: I take it there is no dispute as to the importance of control of these key first-run the-
(2241)

atres as between the defendants and the Government.

Judge Hand: Proceed, Mr. Leisure.

Mr. Leisure: Yes. I offered it.

Judge Hand: Oh yes, that is admitted.

(Defendant RKO's Exhibit RKO-3 for identification received in evidence.)

Q. Does the operation of showcase theatres by RKO make more effective its distribution activities based upon this extensive research, would you say? A. Very much so, yes. I can illustrate that by using again an example of the city with a hundred thousand movie-goers, and a picture that want-to-see indicates is going to be a very important picture. Now, let us assume that we spend a substantial amount of money on a national campaign, and let us assume, as we have to find out sometimes, that it was not a very successful campaign; that instead of attaining the average of 25, which is the average we hope to attain, we attain only an average of 15. Now, we know we should have 50 or 55 if we are going to do that picture justice, but we have only got an average of 15. That means when we turn to our local campaign we must put on special effort, because if we fall down on that we fall down on penetration, and our picture gets off to a bad start.

So the first thing that would happen is that one of our

(2242)

field exploitation men would go to the exhibitors of the first-runs where we expect to run this, and try to induce them, on the representation that this is an important picture, to assist him in developing a high local penetration on this thing.

Now, he may propose an early advertising campaign in newspapers; he may propose spending a lot more money; he may propose that an extra trailer run earlier, a teaser campaign, and various other showmanly activities to try to build up the penetration of the picture.

Now, if he goes with that picture into an exhibitor who is just taking a picture every week or two and is not particu-

larly concerned with it, he may get a very indifferent reaction to this urging of his to get this picture into the flow of things with the proper penetration. It will depend a lot on the type of exhibitor he is talking with. If he is a good showman and wants to cooperate he probably will; but if he is not, and he has got a fishing date, he probably won't. If he has to spend any money or work very hard about it, the chances are he will not cooperate.

And let us assume then that instead of attaining the 55 we could expect, we attain only 35. Now, it may appear a very tiny thing that the difference between the penetration of 35 and 50 in one key city first-run is not very many dollars, (2242a)
but that is the tiniest part of the damage that is done by not getting the penetration you should have, because right away that picture becomes characterized as a picture of the lesser type than it should be if you had the right penetration. (2243)

As I said this morning those figures in those key first-runs are published in the trade newspapers. They are picked up by exhibitors all over the country, and not only those exhibitors who play subsequent runs to this particular community, but first-run exhibitors in other communities come to characterize that picture on the basis of this first-run; and we have found time and time again that an indifferent exploitation in the early key runs can mean hundreds of thousands of dollars in the final gross of those pictures.

And when we can take them into our own first key runs and give them the proper exploitation, when we see a great gap coming between the penetration we have and the penetration we ought to have as we go into those key first-runs, why, we can turn our people loose and put on the proper exploitation campaigns to bring it up there.

Q. Now, Mr. Rathvon, you have told us the importance to the distributor of the key first-run showings from the

point of view of setting it up or establishing its prestige. Does the distributor expect any other value from that? A. Very much so. Besides the prestige and the setting up of the picture, the distributor is entitled to a substantial rental from his first-run.

Q. Could you give the Court any idea of what percentage of national gross of an average important picture comes from these so-called key first-runs? A. Well, I am not quite sure
(2244)
what "key first-runs" means for the purpose of your question. I have heard discussed here a group of 92 cities having population of 100,000 or more, and for purposes of convenience I imagine that is a suitable barometer of first-runs. Actually there are several cities in those, in that list of a hundred, that are not properly key first-runs. There are several cities there, such as Yonkers, New York, that are near great metropolitan centers that are not, for film purposes, considered key first-runs. On the other hand, there are great many smaller communities in less populous states that have not populations of 100,000, but are key first-runs for the purpose of selling our pictures. So I can't give you any very accurate figures on that. However, I can give you some figures along the general line that I think will illustrate very clearly the importance of that.

Q. What do those figures show, please? A. Now, these are figures that were primarily put together over the past by Audience Research Institute for other purposes than this, which I think serves to show the importance of this situation.

The average A picture, the kind I have been talking about here, Audience Reaction find has 18 million patrons. In other words, when you have got an average A picture, you can expect it will play to 18 million patrons——
(2245)

Mr. Wright: Excuse me just a minute. Now, if the Court please, we are going into a field where he

is simply retailing second-hand information as to something Audience Research has done.

Judge Hand: Well, I shall let him give his philosophy here. I think, however, he is doing it at great length, and it is really by way of argument——

Mr. Leisure: I will make it short, Judge Hand.

Q. This research you have discussed, do you use it every day in your daily work? A. Yes.

Q. And it contains facts that you rely on and you form judgments on? A. Definitely.

Q. Does it? A. Right.

Q. Will you continue, please? A. Of the 18 million patrons who see an average picture, four million of them see them at 110 theatres, at an average admission price of 65 cents. The other 14 million pay an average admission price of 38 cents, and see it in all the rest of the theatres in which it plays. It might be eight or nine or ten thousand theatres.

Mr. Wright: If these figures are offered for any purpose as being valid in themselves, we certainly object to them. The mere fact that they are figures in his files that he gets and he relies on does not make them competent evidence of the facts he is reciting

(2246)

here. If we are going to have those figures, and if they are important, they ought to put it in by the representative that compiled them.

Judge Hand: What about that, Mr. Leisure?

Mr. Leisure: Well, he is really giving the figures he relies on. He is not giving the figures as being facts. They are not offered for that purpose. He is merely showing the figures he relies on. We are not offering it as to the truth of the assertion as to

whether the figures are correct, so there can't be any objection to hearsay on it.

Judge Hand: Well, I should think that that would only be competent on cross-examination if you were attacking his testimony. I do not see why he should give the figures that he relies on. He does not know anything about them, whether he relies on them or not.

Mr. Leisure: Well, he is giving such figures as he relies on, and he is going to tell us now what he does as a result of that.

Now, I am not offering the figures as to the truth of the figures; I am not interested in that. He is merely telling us how he operates.

Judge Hand: I must say I do not see its relevancy.

The Witness: Well, if your Honor please, these

(2247)

figures show to me that 45 per cent of our film rentals come from 110 theatres, and those are, naturally, mostly the first-run theatres.

Judge Hand: Well, go on.

The Witness: I merely want to show that the first-run rental is the substantial rental as we get it, and that is the type of rental we should get; and these figures lead me to believe that 45 per cent of our total film rental in an important picture comes out of the first 110 theatres in which it is shown.

Judge Hand: Haven't we got exhibits stating all this kind of thing in evidence already?

Judge Goddard: This relates to your own pictures, does it not?

Mr. Leisure: Yes, we are talking about RKO. This is our first day in court, your Honor, and I do not think we have been able to give this.

Judge Goddard: I do not think this is in.

You have not put it in, Mr. Wright, have you?

Mr. Wright: If the Court please, we offered, of course, these interrogatory answers for the express purpose of showing the degree of concentration of revenue of each of these distributors in the first-run houses; and I certainly do not see what the advantage is in dealing with some other figures on which we have no check, where there is nothing in evidence——

(2248)

Judge Hand: I do not either.

Judge Goddard: These are his own figures on his own pictures.

Mr. Wright: We have the precise rental data on a selected feature for his company in the 1943-44 season.

Mr. Leisure: Perhaps I can ask a factual question that will clear it up, if the Court please.

Judge Bright: You mean, Mr. Wright, that your proof shows how much revenue they received from first-run and how much from subsequent-run on any particular one picture.

Mr. Wright: Yes; we selected the highest grossing, or I believe the picture with the maximum number of exhibitions for the 1943-44 season from each distributor, and then had tabulated the actual rental received from that picture in the first-runs in all cities of over 25,000 population, showing the particular engagement and the rental for each of those first-run engagements in all of those cities.

Now, we assume that that would give us a typical picture, and, as I understand it, there is no claim that the percentages that would be obtained from that sample are misleading. I take it there is no purpose in this, is there, to show the data that was offered in

(2249)

response to interrogatories is somehow unusual or not representative of what has occurred before or since?

Mr. Leisure: No.

Judge Bright: As I understand what he is testifying to now, he is comparing what he gets from first-run as compared to what he gets from subsequent-runs.

Judge Goddard: On RKO pictures.

Mr. Wright: I thought it was a little more than that. He was talking, as I recall, about the key. He said he got 45 per cent of his revenue from 110 key first-run theatres. Now, as I say, as to this one picture, we have the same data in more precise form; that is, showing exactly the first-run theatres in the towns of over 25,000 population.

Judge Hand: Yes, but have you got the subsequent-runs?

Mr. Wright: Only as it is reflected in the total. We have in evidence the total revenue received domestically from the feature from all runs. That is right.

(2250)

Judge Bright: I thought his information went a little further. You have a dollar value of the first run and he is saying it came from a limited number of theatres.

Mr. Wright: Our data also shows the exact distribution of that dollar value among the theatres which play it the first-run, and we also show the overall number, the total number of exhibitions and the total film rental received from all runs in the country. We are both aiming at the same goal, as far as I can see, proving the same thing, essentially, but it seems to me it makes a confused record if we get into these generalities when we have actual data in the record which is susceptible of more accurate analysis.

Mr. Davis: It seems to me a long time ago, but your Honors may remember that when I was introducing proof on behalf of Loew's I put in a chart

which showed exactly this distribution of revenues, which I take it is what this witness is now undertaking to do for RKO, and that chart showed the first runs, and the second and third and fourth, and the subsequent runs, if I can call it back to your Honors' memory, although, as I say, it seems to me a long, long time ago.

Judge Hand: Yes, painful end of it.

Mr. Leisure: Someone said, Judge Hand, this is the fifth run.

(2251)

Judge Hand: It has been suggested that equity is equality, or something like that, and I think we would need the same consideration, but do cut this short. It is very confusing with all these exhibits.

Mr. Leisure: I will do that.

By Mr. Leisure:

Q. Judge Bright just made a suggestion a moment ago, Mr. Rathvon, as to the first-run, and I want to ask you what percentage of your revenues do you try to get from your first-run theatres—in key cities, of course? A. Percentage of the total revenue that we get on the picture?

Q. Yes. A. We feel we are entitled to a very substantial part of our revenue. There is no one figure we shoot at. The point I have been trying to support here is simply that the key first-runs yield a substantial part of the revenue of any important picture. That is all I have been trying to support.

Judge Bright: There is no dispute about that, is there?

Mr. Wright: No, that is what we attempted to show in the first instance through the interrogatory data that we offered.

Judge Hand: It is reiteration.

Q. Mr. Rathvon, I want to take up New York in a minute but before we do that, you have described the key first-run
(2252)
theatres as the de luxe operations of showcase theatres designed to introduce your films and to draw a fair proportion of the revenue from any exhibit area. Are all your theatres key first-runs of this type? A. No.

Q. What, if any, are the notable exceptions? A. Our holdings in Cincinnati and in New York City.

Q. Taking up Cincinnati, would you describe the Cincinnati situation, please? A. In Cincinnati we own or operate nearly all of the first-run theatres and in the theatres which we own and operate the product of nearly all the major companies, or rather, I should say, nearly all the products of all the major companies are played by our theatres.

Q. Do you see any advantages to the RKO type of theatre operation from the ownership of these several first-run theatres in Cincinnati? A. Well, in our pattern of operation, with emphasis on this form of vaudeville setup, with one or two key theatres in each important center that we can get in, the Cincinnati operation is of no particular value to us. From my own point of view, I would rather have five or six of those theatres in some other cities where we are not represented as key first-runs.

Q. You said you would like to have them—how did you acquire them? A. That goes back to, again, before the be-
(2253)
ginnings of RKO when that central group of theatres in Cincinnati were in a single control.

Q. In other words, you inherited them? A. We inherited them in a compact group, handling the product of nearly all the companies.

Q. Coming back to the New York situation, I have some charts here.

Mr. Leisure: I would like to have them marked for identification if I may. There is really only one map, it being New York City.

(Marked Defendant RKO's Exhibit 4 for identification.)

Mr. Leisure: I have four maps there, if the Court please. It is really only one map, that being New York City, but we had to divide it into the four Boroughs where the theatres are located.

Q. (Continuing) Mr. Rathvon, would you just explain to the Court the sources of the information on this Manhattan chart? A. This map shows the location of theatres in New York City; the size of the circles indicating the theatres shows the run; the larger circle the first-run; next size circle, second, and so on. The color of the circles on the map indicates their ownership.

Q. This legend up here describes the different size circles, is that right? A. That is right.

Q. The larger circles indicate what, please? A. That is (2254)
the first-run, the Broadway first-run in New York; the next size, the second run; and then third and subsequent runs.

Q. What do the different colors indicate, please? A. The ownership of the theatres. In other words, the one at the top here is RKO, and the circles of that color are theatres which RKO operates in Greater New York; the next one is green, shows Loew's; next, Paramount; next, Warner; next, Fox; and then others. Those we classify as independent are shown in red.

Q. And the headings there on the left—— A. That is a key to indicate—there are numbers on those theatres and that key indicates the theatre, the size of the theatre also being indicated there.

Q. And this center part here, that is taken right out of Manhattan, what is that? A. That is the so-called Broadway district, where there is a concentration of New York first-runs.

Q. And you gave what the colors indicate? What the colors indicate, have you given that? A. That is correct. I went through those colors, and you can see them apply it there, as far as Broadway first-runs are concerned. I understand that the red——

Mr. Proskauer: Does red in the middle show independent first-runs in the Broadway area? Is that what you said?

(2255)

The Witness: Wherever red appears, it is an independent run; smaller red ones indicate subsequent runs.

Q. The double numbers, have you explained those? A. One is the key to the name of the theatre and the other is the number of seats of the theatre.

Q. Mr. Rathvon, you have indicated in each situation you attempted to have one theatre that accomplishes two things, one that gives you the prestige you want for your picture, and, second, that gives you the revenue that you want for that particular picture. Have you such a situation indicated there on Manhattan? A. Yes. It is a modification of what I have called the sample showcase formula, because it is obvious, as you get into larger and larger communities, a single theatre, showing a given run, will get a lesser percentage of the revenue from that larger area than will a theatre of comparable size in a smaller community, so that this single showcase theatre is subject to modification as you get into larger and larger communities. In fact, when you get into cities above two millions, if you hope that your

first-run will get anything like the revenue a first-run is entitled to, there has got to be substantial modification.

In the City of Los Angeles, a great sprawling city, spread over a wide area, with many centers of heavy population, it
(2256)
has taken an entirely different pattern from New York. There we have what we call multiple first-run; in other words, two, three, even four first-run theatres playing the same picture at the same time. In that way you not only build your picture, and set it up, as we say, but you get an adequate revenue from the size of the territory.

New York is very different from Los Angeles. Our first-run concentration is all in one spot, so we cannot have multiple first-runs in order to get the revenue. So Broadway has come to be a place where you set up the prestige and get the penetration on your picture but you do not, except in rare instances, get a revenue that means anything to you for this great first-run area. And RKO is a typical example because we have of all those Broadway houses just one. It is the Palace theatre, a house well located, but it is a former vaudeville house, has only 1667 seats, it has got two balconies, and we depend on that to set up our pictures. Occasionally we get a picture in another theatre of the same type, or once in a great while we get a picture in the Music Hall.

As far as Broadway is concerned, if you want revenue, you have but one chance to get it, and that is to play a considerable length of time in a very large theatre. If Radio
(2257)
City Music Hall, plays a picture for eight or ten or twelve weeks, the distributor gets a pretty substantial revenue out of it. Whether it is commensurate with the size of this great area, I don't know, but it is certainly a substantial revenue. Some of the other, bigger theatres, of course, will get some revenue. You can take some of the smaller theatres and play

two pictures for three or four or five or six months and you can get a fair revenue.

Two independent producers recently rented a theatre on Broadway in which they expect to show just four pictures a year, in the hope that they will get some revenue out of Broadway that way, expecting pictures to run a minimum of three months. RKO with its one little theatre, and having its full program showing, and being unable to get its pictures in the larger theatres—the Music Hall is our only chance and we have had one picture each year for the last two years there—we must use the Palace theatre and we cannot keep pictures there so long that we clog up the flow of our pictures. So as a result, we show our pictures there for two or three or four weeks and almost invariably we spend on advertising all the rental we get from that picture, and very often more. So that by the time our pictures move out of the Broadway first-run, we have gotten none, or substantially no revenue from them at all.

(2258)

So that in a place like New York, or, let us say, in New York, because there is no other place like it, Broadway sets your pictures up, gives you the prestige for all the rest of the territory, but there must be some way to get this quick, concentrated revenue which is customary in the first-run, and in New York that is done by this so-called second run. That second-run is a very fast playoff. A picture moves into this so-called second-run, either into the RKO group of theatres or into the Loew group, where they play only five, very seldom more than five, days, and then with the clearance of only seven days, sometimes five, some with no clearance at all, they move into the subsequent runs.

The situation on Broadway is complicated to this extent, that picture after picture runs for many weeks and they play off in odd ways. There may be weeks when no picture moves

out of Broadway; there may be other weeks when five or six have finished their Broadway run. Therefore, if they all move out of Broadway just as they finished, you would have six pictures, maybe, moving one week, two the next week, none the next and none the next. So that what happens, at least two a week are needed to flow out into this orderly second and subsequent-run setup, so that sometimes a picture will move right off Broadway into second-run; sometimes it will be held up for months before it moves, but

(2259)

Broadway, itself, is a sort of pool. The pictures play there, wait there, and then two a week move out into these runs, and once they have moved out into these runs they move into subsequent runs in a fairly orderly manner.

Q. And the blue dot represents the Palace? A. That represents our only Broadway theatre, which is the Palace.

Q. And the red ones represent the independents? A. That is right.

Q. And this is lower Manhattan and this is Upper Manhattan (indicating)? A. That is correct.

Q. And these small blue ones that you have here are your—— A. Those are the RKO theatres in our second-run group, showing their location on Manhattan.

Q. You have been testifying as to Manhattan. Does what you have said with respect to Manhattan, Mr. Rathvon, apply to the other boroughs in New York City? A. That is correct. The run pattern goes out through Brooklyn, the Bronx, Queens, Richmond, just the same as it does in Manhattan.

Q. And you try to accomplish the same pattern in exploitation in Brooklyn as you have described already in Manhattan? A. Yes. The location of the RKO theatres is interesting in that it also is a heritage of vaudeville and it also shows how it develops for the community. The greater

(2260)

number of those RKO theatres are former vaudeville houses. Vaudeville, just like first-runs today, in smaller communities, there would be just one in the communtiy non-competitively playing vaudeville. New York City was so large that it supported a group of vaudeville houses separated into the larger neighborhoods of New York, and that is the pattern of the RKO second-run chain. They are more or less strategically located. It is on the old vaudeville formula. Our 41 theatres that play this run are spread all through the Boroughs of New York.

Q. And I understand that the same testimony will apply to the other boroughs—— A. That is correct.

Q. —of the Bronx and Queens, is that right? A. Yes, sir.

Q. And the same designation as to coloring is true so far as the maps are concerned? A. That is true.

Q. The light blue is RKO. And this is the one of Queens. Your testimony applies the same as to that? A. That is correct.

Mr. Proskauer: I hope the Court can see red on some of those charts.

Judge Hand: What?

Mr. Proskauer: I suggested that I hoped your Honors would see red on some of those charts.

(2261)

Mr. Leisure: I offer the maps in evidence, if the Court please.

Judge Hand: They are admitted.

(Marked Defendant RKO Exhibit 4 in evidence.)

Q. Mr. Rathvon, are you familiar with the policies of RKO with reference to the distribution of features and short

productions which are produced by organizations which do not have their own distribution facilities? A. I am.

Q. Will you please state to the Court RKO's policy in this respect and indicate the extent to which this policy has been effectuated. A. Our policy has been to distribute for producers who have no distribution outlets of their own a very large number of the releases which we put out. For a good many years RKO itself has not produced the number of features which its distribution organization can well handle, and it has been our policy for many years to supplement our own production, our own pictures, with pictures of independent producers.

Mr. Leisure: I ask to have marked for identification a table.

(Marked Defendant RKO's Exhibit 5 for identification.)

Q. Will you just explain the table, Mr. Rathvon, please. A. This table shows over a number of seasons, total of nine seasons, the relative importance of the—in number of fea-

(2262)

tures and in rentals received—product handled for so-called independent or outside producers. Thus, in the season 1935-36 RKO released 43 pictures, two of which were from these outside, or, here called, non-integrated producers. The income from those two pictures represented 4.4 per cent of the total product distributed by RKO. That season's product, the whole thing, showed gross rentals of $14,598,000, and on those two pictures from outsiders, $662,618, or 4.3 per cent of the total revenue received from those pictures. Then, as you go on, from season to season, it shows in most seasons an increased number of independent pictures handled by RKO and an increasing amount of the total film rentals received being applicable to the product of these outside producers.

Q. Mr. Rathvon, in the fourth column you said that it was the total. You mean the total of RKO, don't you? A. Total from the rentals from the whole product.

Mr. Leisure: I offer the table in evidence.

The Witness: Those two dollar figures represent the division between RKO's own pictures and the outside pictures, the two dollar columns.

Mr. Leisure: Has that been received, your Honor?

Judge Hand: Yes.

Mr. Leisure: Thank you.

(2263)

(Defendant RKO's Exhibit 5 for identification received in evidence.)

Q. At the present time, Mr. Rathvon, are you distributing independent product? A. Yes, sir, at the present time we are distributing perhaps a little more product than we did in the 1943-44 season.

Mr. Leisure. I would like to have another chart marked, if I may.

(Marked Defendant RKO's Exhibit 6 for identification.)

Q. Will you describe this chart. A. This happens to be not a chart that was prepared for the purpose of this trial. It is a sample, in fact, it is the actual chart I used for my own purposes in watching monthly the division of the total revenues between the pictures we distributed for independents and our own pictures. And the whiter part of the chart represents the revenue in each month, that is, our own productions, and the upper part represents the productions of independents. This is really not a running chart; it could be shown better in columns than in this way, but each of the white cross lines is the end of a month. For instance, take

the very first line, January, 1944. In that month, of the rentals we received, 66 per cent came from RKO's own productions and 34 per cent from two productions of independent producers.

Now, the same goes, at varying rates; some months the (2264)
productions of independent producers account for almost half of the total rentals received—in fact, there is one month, April, 1945, when rentals collected in that month were in greater quantity for independent producers than for our own pictures.

Mr. Leisure: I offer the table in evidence. May that be received?

Judge Hand: Yes.

(Defendant RKO's Exhibit 6 for identification received in evidence.)

Q. Mr. Rathvon, will you tell us whether or not during the past ten years RKO could have operated as a distributing company using only its own product? A. It could not have operated successfully.

Q. Has this distribution of independent product been affected by the fact that RKO has theatre outlets of its own? A. In the competition to secure the desirable independent product for distribution, I think it has counted very substantially.

Q. I think you said that RKO distributed Walt Disney's pictures? A. It does.

Q. Would you just explain that, please? A. We have distributed the short product made by the Walt Disney Company for a great many years. They had previously been distributed by United Artists. When a given contract had (2265)
run out there, we got in competition and bid against United

Artists with Disney and finally persuaded him to give us his pictures, and we have distributed the shorts product ever since. We made also, at that initial time, a contract to distribute Snow White and the Seven Dwarfs. Since then Disney has made a number of feature length pictures, and in each case we have had a separate negotiation for it. We have been successful in all cases but one. One of their features they sold away from us to United Artists, but the next one, we won out, and we have distributed the Disney features ever since.

Q. What about Goldwyn products? Do you distribute them? A. We have distributed Goldwyn productions for the past several years.

Q. How did that come about? A. There again, they had been distributed previously by United Artists, and there again we competed for that product and, by offering very attractive terms, were able to procure it, and it means approximately three important pictures a year added to our distribution.

Q. International Pictures, Inc., do you distribute that? A. International Pictures is a very important independent producing company that was formed quite recently; been operating only a little over a year; but it was formed by important and experienced producers, and they have delivered some very important product. They make from

(2266)

somewhere, probably, from four to six pictures a year. I think to date we have distributed six pictures for them, and they have all been very important pictures. In that case we got the distribution contract with them at the time they organized; and I don't know how many companies competed for it. I know we had many meetings with them and negotiations, finally resulting in our getting the contract.

Q. As to the productions of Frank Capra? A. Frank Capra and two other important producers are in the process

—they just formed a new independent unit and have not yet delivered a picture. They are just getting ready to get under way. They expect to have about three pictures a year, too, and we have negotiated with them and have made an arrangement to distribute eight pictures for them.

Q. In addition to these productions, Mr. Rathvon, does RKO Radio Pictures distribute the releases of any other outside producers? A. Yes, several. Very often, or in almost every year, there will be some producer who makes a single picture and we will distribute for him. One producer, Mr. Sol Lesser, has a series of pictures known as Tarzan pictures. We have distributed those for several years. Then, Jesse Lasky now is making a picture, and that currently is a picture that is being made on our lot and we are going to distribute that one. Another picture of the same nature, that (2266a)
the producer is making only one picture, so far as we know, is a picture being made by a producer named Hakim, which, on our lot, is now being manufactured.
(2267)

Q. Have you lost the product of any outside producer? A. We have, yes. For seven years we distributed March of Time, and at the end of seven years, in a competitive effort with Twentieth Century-Fox, we lost the distribution of March of Time to Twentieth Century-Fox, and they have distributed it ever since, and I mentioned a Disney film that we failed to get, which went to United Artists. That was Victory Through Air Power.

Q. In the distribution of its pictures does RKO license films to independent first and subsequent-run theatres as well as to affiliated theatres? A. It does.

Q. Have you checked the principal sources of revenue from the various groups of theatres paying film rentals to RKO for features released during the season 1943-44? A. I have.

Q. What did that check reveal, please?

Mr. Leisure: I would like to mark at this time, if I may, another chart.

(Marked Defendant RKO's Exhibit 7 for identification.)

Q. (Continuing) Mr. Rathvon, this chart purports to be based on the answers to the Government's interrogatories, in which rentals from all theatres believed to be affiliated with any of the defendants either by direct ownership or through subsidiary corporations are lumped. Does that correctly re-
(2268)
flect the records of RKO as of April 26, 1945? A. As the sources of film rentals received 1943 and 1944.

Q. Will you just describe the chart, please? A. It shows graphically the source of film rentals; in other words, the blue part shows the amount of money and the percentage of the total for the period received from RKO; and similarly, by colors, are shown the source from the other defendants in this case; and the red shows the total of all the unaffiliated theatres. In the case of Paramount, of course it isn't from Paramount pictures, but from the companies in which Paramount has an interest, which we do business with; which is not all of the Paramount companies.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: We have no objection. I take it those are the same figures we put in Appendix A of our trial brief.

Mr. Leisure: That is correct, Mr. Wright.

(Defendant RKO's Exhibit 7 for identification received in evidence.)

Q. Mr. Rathvon, does RKO distribute enough features to occupy fully the playing time of the RKO theatres? A. It does not except in the case of perhaps two of our theatres.

Q. Why is that? A. Because pictures, except in very
(2269)
populous places, like our Palace theatre on Broadway, where you have long runs, the number of pictures we distribute in any one year will not fill the needs of the rest of our theatres.

Q. Could RKO profitably close its theatres when it had played all the RKO product? A. No, it would be very uneconomical to do it. In fact, in the past there have been times when RKO had theatres that had only its own product, when we did have to close them down for a period. Those theatres were always substantial losers when we had only the RKO product.

Q. In licensing films of other producers in RKO theatres, what policy does RKO follow? A. RKO tries to get the best pictures it can at the best rental, regardless of where they come from.

Q. In licensing those features, does RKO use product of other distributors that don't themselves have theatres? A. It does.

Mr. Leisure: I would like to have permission to mark for identification a table and chart.

(Chart marked RKO Exhibit 8 for identification; table marked RKO Exhibit 8-A for identification.)

Q. Will you describe the chart, please, Mr. Rathvon? A. This shows product exhibited in RKO theatres on the basis of number of billings, in our first-run and metropolitan
(2270)
circuits. The data here were taken from our own records, the records of our booking corporation, and it shows the number of feature billings in those RKO theatres. RKO played 2402, 23.1 per cent of the total; the combination of the other defendants played 3000, or 29.6 per cent total;

and other sources than the defendant companies, 47.3 per cent.

Q. You mean the integrated defendants? A. The integrated defendants, 29.6, that is, the integrated defendants other than RKO itself.

Q. Yes.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: If the Court please, these figures appear to be different from those previously furnished. I would like to examine into it before it goes in.

Preliminary Cross Examination by Mr. Wright:

Q. This statement at the top here, first-run and metropolitan circuit run, that includes what? A. That includes New York.

Q. You mean all that you have on the chart here are the— A. The combination of——

Q. The feature billings in the New York City first-run theatres, and what other theatres? A. This is the billing in all our first-run theatres, in our New York metropolitan circuit.

(2271)

Q. Have you got a list of those theatres? A. I have.

Mr. Leisure: I gave you one of those.

Mr. Wright: May we have that, so we will know just what is included?

Q. Are those the theatres that are named on this chart that is marked RKO Exhibit 8-A? A. That is correct.

Q. So this does not purport to be an analysis of the use of features of others throughout the circuit, but only in the theatres that are named on the list, RKO 8-A, is that right? A. Which is 90 plus per cent of our total circuit.

Q. When you say number of feature billings, that is substantially the equivalent of the number of engagements or number of runs that were played, is that right? A. I mean billings.

Q. Do you mean—— A. A billing results in a run.

Q. Do your percentages here refer to dollar revenue—— A. No.

Q. —or do they refer to the number of—— A. Showings.

Q. Showings? A. If you want to call it that.

Q. So your chart that you have here then indicates nothing as to the relative rental payments that were made on the billings, is that right? A. This particular chart does not show——

Q. This is purely nothing but the number of billings? (2272)

A. Billings.

Q. As a matter of fact, of course, when you get down there to Republic, Monogram and the others, the actual percentages of rental paid for those billings would be much smaller than the percentages there that you have got for the number of billings, would they not? A. Compared with what?

Q. I say, the percentage figure that you show, for example, from Monogram, of 7.9 per cent of the billings, if you were to give a figure which purported to show the percentage of total revenue of all these billings that was paid to Monogram, that would be a much smaller percentage than 7.9, isn't that right? A. It might not be as compared with Loew's, for example. If you were to ask me whether a single billing from Monogram gets a much smaller rental than a single billing from one of the integrated companies, I would say yes, but when the accumulation of billings becomes a great deal in number, I cannot say that the total of those—the numbers might not compare favorably with the lesser

number of billings that we have with some of the other companies. For example, Paramount had only 343 billings, Monogram had 817. I cannot say that—I would presume that we paid more to Paramount for 343 than to Monogram for the 817, but I would not presume we paid more to Paramount for the 343 than we paid Universal for 1718.

(2273)

Q. In any event, you have not attempted to make a comparison which would show the relative amounts of—— A. What disgharge——

Q. —money that were paid? A. Isn't shown in dollars.

Judge Hand: He has said that. This is the second or third time.

A. (Continuing) Shows you the playing time all our theatres were occupied with Monogram pictures, plus as many hours as some others.

Q. The number of billings is not necessarily a measure of playing time, is it? A. Doesn't necessarily measure the number of days of playing time.

Q. You may have one billing for—— A. Six days, another for five.

Q. So it does not reflect the distribution of playing time either? A. It reflects the distribution of playing.

Mr. Leisure: I offer the chart, if you please.

Mr. Wright: I think, if the Court please, it is misleading in its present form there. It is objectionable on that ground.

Judge Goddard: What is that, Mr. Wright.

Mr. Wright: I think it is objectionable as misleading. It does not give a true picture of the distribution of playing time or film rental among the

(2274)

companies covered there.

Mr. Leisure: We cannot give it all in one chart. We will cover it very quickly, I hope.

Judge Hand: All right.

(Defendant RKO's Exhibit 8 for identification received in evidence.)

By Mr. Leisure:

Q. Mr. Rathvon, from the figures you have just stated, I note that certain features distributed by Fox, Loew's, Paramount and Warner, are sometimes licensed for exhibition in RKO theatres? A. That is correct.

Q. In booking a picture distributed by Paramount, is there any understanding, express or implied, that RKO Radio Pictures will give any preference to a theatre affiliated with Paramount as against a competing unaffiliated theatre? A. There is not.

Q. Is the same true with reference to features which RKO theatres license from Fox, Warner and Loew's? A. That is true.

Q. When RKO, as a distributor, licenses a film for exhibition in a theatre affiliated with Paramount, is there any understanding, either express or implied, that the Paramount distributing organization will give preference to theatres affiliated with RKO on Paramount releases? A. There is not.

(2275)

Q. Is the same true of features licensed by RKO for exhibition in theatres affiliated with Fox, Loew's and Warner? A. That is true also.

Q. Mr. Rathvon, have you made any examination of the records of the RKO companies with particular reference to the charge made in the present case that RKO gives preference to the features released by other integrated companies, in consideration of an express or an implied agreement that those companies will give a reciprocal preference to RKO pictures? A. I have.

Mr. Leisure: I ask to have this chart and table marked for identification, please.

(Chart marked Defendant RKO's Exhibit 9 for identification and table marked RKO's Exhibit 9-A for identification.)

Q. Will you explain the chart? A. The chart shows graphically the data that is in the tabulation that goes along with it, and it is a comparison of the average per theatre rental received by RKO Radio Pictures, and as compared with the rentals paid by RKO theatres. It takes each of the companies separately. The tabulation itself shows the total dollars in each case of rentals received by RKO and the rentals paid by RKO, and the chart shows this on the basis of the average per theatre.

Mr. Leisure: I offer the chart and table in evidence.

(2276)

Mr. Wright: It is not at all clear to me from the witness's examination as to what this chart actually covers. I think I will ask him a question or two on it before it is received.

Preliminary Cross Examination by Mr. Wright:

Q. This average rentals received that you have in the first column there, that is in blue, has a figure, 43,020. How was that computed? A. That is the average rental received per theatre.

Q. You mean you took the total amount received from all of the RKO theatres and then divided it by the number of RKO theatres and got $43,020? A. That is right.

Q. And that was without reference then to how many pictures were used or what runs they were used on or any of those factors, is that right? A. Will you repeat that?

Q. (Question read.) A. The number of pictures used of course is important. The run is not important. It is average rental per theatre.

Q. And you used the rental per theatre—— A. If you would use some other column than the first, where RKO has dealt with itself, it would be easier to explain.

Q. Let us take the Fox column then. That figure, $4,335, I take it, was computed by taking the total rental that you received from 499 Fox theatres, and then dividing that figure by 499, is that right? A. That is correct.

(2277)

Q. And the same—— A. For the other figure we took the amount that 93 RKO theatres paid, $2,181,515, and found the $23,455.

Q. That is confined to feature rentals, is that right, in each case? A. As distinguished from short subjects?

Q. Yes. A. Yes, this——

Q. Does this include shorts and newsreels? A. Shorts, I am sure, are not included in this chart.

Q. Feature rentals only? A. Yes.

Q. But no attempt was made to give weight to the particular number of features used by any theatre or the run in which they were played, is that right? A. No, it is on the basis of the total number of theatres in each company as against the 93 in RKO.

Mr. Wright: I submit the chart has no meaning in this form.

Mr. Leisure: We have offered it in evidence.

Judge Hand: I do not understand you.

Mr. Leisure: And the table with it.

Judge Hand: What?

Mr. Leisure: We would like to have the table, 8-A and the chart offered together, if the Court please.

Judge Hand: Well, I don't understand what meaning it has.

(2278)

Judge Goddard: Mr. Leisure, I do not understand what relation the green has to a number. What is the significance of it?

Mr. Leisure: Well, they go together, if the Court please. You will look at RKO, and you see the green and the red there, and then you look at Fox. I think I will let the witness answer that, if I may.

Judge Goddard: There does not seem to be much relation there.

Mr. Leisure: That is what we want to show, if the Court please, that there is no reciprocity here——

Judge Goddard: I am not talking about reciprocity. I mean the relation between the green and the red, the numbers.

The Witness: Shall I try to explain that, Judge Goddard?

Judge Goddard: Yes, I wish you would.

The Witness: I would like to take that Fox, for example——

Judge Hand: I should think this whole business is getting very complicated—the multitudinous seas incarnadine, making the green ones red. It is a mess. Why can't this thing be stated without such detail?

Mr. Proskauer: Will your Honor let me make a suggestion as to the way I read this chart? The ob-

(2279)

jective, I take it, is to show that there is no back-scratching in the sense that that term has been used.

Judge Hand: Yes?

Mr. Proskauer: Now, if you offered in evidence merely the amount of rentals paid as against the amount of rentals received, you would be met with the objection that they did not signify much because it was a varying number of theatres. So the chart, which I have seen for the first time, obviously breaks it down into a comparison of theatre by theatre, and takes into account the varying number of theatres. And having done that, it shows a wide discrepancy

between what RKO got from us, for example, and what we got from RKO, theatre for theatre.

Judge Hand: Yes.

Judge Bright: Is that a correct statement of that, Mr. Rathvon?

The Witness: Yes.

Mr. Leisure: May I ask the witness just one question on that? I think it will clarify it for you.

Judge Hand: Yes.

By Mr. Leisure:

Q. Just take Fox alone, Mr. Rathvon, and just explain that without going through the other theatres? A. The total amount of money from Fox divided by the number of theatres that Fox had means that each of those theatres paid (2280)

RKO on the average $4,335. The total amount of money that RKO paid Fox for the showings in its theatres, in its 93, averages out $23,455 per theatre.

Q. So as Judge Goddard observed, there is not much relationship between those two, is there? A. Exactly.

Q. Mr. Rathvon, has there been or is there any agreement or understanding between any RKO company and any other defendant that RKO theatres will license the releases of such defendants for exhibition in RKO theatres on the condition, express or implied, that RKO features will be licensed for exhibition in theatres affiliated with such defendant? A. There is not.

Q. I have just one further question, Mr. Rathvon: In this case the Government seeks to have RKO divest itself of all of its theatres and to enjoin it from thereafter acquiring any theatre outlets. Based on your experience what effect would such action have upon the operations of RKO? A. Well, to cut us off completely from the ownership of theatres would weaken us very seriously. I have tried to show

that RKO has been dependent for its very existence in the past on its theatre ownership and the assurance of steady revenue from those theatres. Now, RKO is stronger now, but in the six years out of receivership it has made money on its production distribution activity in only three years, the (2281)
current year, and the two preceding years; and I doubt if we are so fortified with earned assets or earnings accumulated over these three years of high taxes to withstand another period that we are bound to face some day when production will no longer be profitable. And to foreclose RKO from theatre ownership entirely would not benefit anybody and would impair our company very seriously.

Mr. Leisure: Are Exhibits 8-A, 9 and 9-A received?

Judge Hand: Yes, they are all admitted.

(Defendant RKO's Exhibits RKO-8-A, 9 and 9-A for identification received in evidence.)

Mr. Leisure: Are there any other questions?

Mr. Proskauer: I just want to ask one or two questions.

Cross Examination by Mr. Proskauer:

Q. Mr. Rathvon, you referred to the fact that you got your pictures into the Music Hall once or twice a year, or something of that sort. A. We have had one last year and one the year before.

Q. And you referred to the fact that it was important for you to make a showing in these first-run theatres, entirely apart from the immediate revenue. Now, when you sell to one of these very big first-run theatres, the de luxe theatres, that have stage shows and all that sort of thing; do you (2282)
usually get, irrespective of the question whether it is affiliated or independent, do you usually get as big a percentage con-

tract as you sometimes get from subsequent-run theatres? A. You speak now of a big theatre in New York City?

Q. Well, I will start with the Music Hall? A. A good average run in the Music Hall in New York would not give you an amount of money equal to the total of the subsequent-run rentals.

Q. I am not talking about the amount of money; and I am directing your attention to a question that Judge Bright asked here the other day, as to why it was that in some cases a subsequent-run theatre would contract to pay a percentage that might be a higher percentage than a prior-run theatre paid. That does happen at times, doesn't it? A. I presume it does, yes.

Q. Now, take the Music Hall. Do you remember what percentages you get from the Music Hall? A. Well, the Music Hall has a peculiar way of licensing. They have a set amount, and then you split above a fixed amount.

Q. Exactly. You start at 15 or 20 per cent, which is it? A. I am not sure, but it is something of that kind.

Q. Well, it is a small percentage, like 15 or 20? A. The percentage from the Music Hall, in terms of percentage, could be termed less than of a subsequent-run that had a pic-

(2283)

ture on a straight percentage basis.

Q. Exactly. And the Music Hall has a big stage show? A. That is correct.

Q. And it is an enormous theatre? A. That is correct.

Q. A very expensive theatre to operate? A. Yes.

Q. But your gross money return out of it, in view of all that, may be much more even if you start out with a smaller base percentage? A. That is so, sir.

Mr. Proskauer: That is all.

Mr. Leisure: Any other questions?

(No response.)

Mr. Leisure: Your witness, Mr. Wright.

Cross Examination by Mr. Wright:

Q. This RKO Film Booking Corporation that you spoke of on your direct examination, which Mr. Mirish acts as the agent for—— A. Is the manager of.

Q. —is the manager of—that corporation, I think you referred to it as booking the films for the RKO theatres. Actually it also buys and negotiates the licenses for those theatres, does it not? A. That is correct, yes.

Q. And that film buying activity is something that you have nothing directly to do with at all, is it? A. I have nothing to do with the direct operation of picture buying. I am familiar with what is done.

Q. In so far as others tell you; but I mean, you have no (2284)
firsthand experience in the actual booking and buying of films; isn't that correct? A. I am not a booker or a buyer.

Q. And the same is true with respect to experience in either selling or licensing films on the other end as a distributor, isn't that right? A. That is equally true, that I am not a film peddler, but it is equally true that I am not a projectionist in the theatre booth either.

Q. I am not referring to what you were; I am referring to what your experience had been. A. Well, in my past experience I have never been in any of those capacities.

Q. You have never sold films or bought films; is that correct? A. That's correct.

Mr. Wright: Will you mark these for identification, please?

(Marked Government's Exhibits 386 and 387 for identification.)

Q. Now, I hand you this agreement marked Government's Exhibit 386 for identification and ask you if you rec-

ognize that as the agreement to which B. F. Keith is a party, relating to the Grand Rapids theatres which are operated by Butterfield Theatres Corporation? A. I have never seen this before, but I have no doubt that it is if you say it is.

Q. It was, I believe, produced by Mr. Seymour as (2285)
that agreement from the Paramount files. A. Well, it is dated the 24th of August 1933—I will read it if you like——

Mr. Leisure: No. We concede it is if you say it is, Mr. Wright.

Q. I just wondered, had you read that agreement before you testified here as to the relationship between RKO and Butterfield Theatres, Inc.? A. Is this agreement dating back to the vaudeville days when an agreement between Publix Theatres and——

Q. This is an agreement of 1933. A. —and B. F. Keith and Butterfield?

Q. Yes. A. I have not read it. I have had it described to me.

Q. I call your attention to this provision which is at page——

Mr. Leisure: Mr. Wright, may I ask, is that 1928 or 1933?

Judge Bright: 1933.

Mr. Wright: 1933.

Q. In this agreement at page 9, I call your attention to the provision which reads as follows:

"With respect to the booking and exhibition of feature motion pictures in the theatres, the MANAGER"——

I take it that refers to Butterfield——

(2286)

"agrees to book and exhibit therein, during the term of this agreement, such number of motion pictures distributed by RKO Distributing Corporation (or any corporation taking over the business thereof) and subject to such terms and conditions as are specified in Article 20 of an agreement made September 24, 1926 between Walter S. Butterfield, Famous-Players-Lasky Corporation, Balaban & Katz Corporation, Publix Theatres Corporation and B. F. Keith Corporation."

Mr. Proskauer: Did you say Warner?

Mr. Wright: What?

Mr. Proskauer: Did I hear the word Warner?

Mr. Wright: You did not.

Q. (Continuing) I will show you this agreement bearing that date to which those corporations are parties, which has been marked for identification as Exhibit 387— A. That is an agreement of December 24, 1926?

Q. Yes. A. That is the agreement I had in mind when I said I had not read it but I had it described to me. I was wrong when I said that about this particular agreement.

Q. Well, this agreement that I show you, you recognize that as the 25-year agreement that was made in 1926 and is referred to in that paragraph I just read?

Mr. Leisure: We concede that it is, Mr. Wright,

(2287)

if you say it is. Let us save some time.

Q. You say this agreement which is identified as Government's Exhibit 387 had been described to you? A. It had been described to me when I asked the question how we ever happened to own this Butterfield stock, that it was the result of a vaudeville booking arrangement with the then

owners of the theatres and Paramount-Publix. If there were other parties I did not know it at the time; and to me it is just an investment that I inherited, and what its history was in the past, I am afraid I am not very well qualified to testify on, because it has been nothing but an investment ever since I have had anything to do with RKO.

Q. And the relations between RKO and Butterfield as to management and film buying are set forth, are they not, more accurately in these two agreements rather than anything you testified to? A. No; what I testified to are what the conditions are now and have been for some time past in relation to it. I can testify from the time I became president of this company Butterfield has been nothing but an investment; we have done nothing about attempting to manage them or in any way have anything to do with their operation. To me it has meant nothing but an investment which I would like very much to sell if someone would offer the right price for it.

(2288)

Q. Now, I will call your attention to this paragraph 20 of the 1926 agreement marked for identification as Exhibit 387, which provides for the licensing of a certain number of films each year by a corporation, or released by a corporation designated here as P.D.C. or any corporation producing or distributing feature motion pictures substituted by Keith for said P.D.C. That, I take it, refers to the Producers Distributors Corporation which was at that time a distributor of the name of the distribution organization which was affiliated with RKO, isn't that right? A. No.

Q. Would you know what that did refer to? A. P.D.C.?

Q. Yes. A. That was a distributing organization which passed out of existence a long, long time ago.

Q. I understand. A. And to the best of my knowledge it was never owned by RKO, and as far as I know it was owned only by an individual named Jeremiah Milbank, but it is way

back in history and I do not know a great deal about it.

Q. Do you know what was done under this agreement with reference to designating a substitute for this P.D.C. pursuant to the terms of this agreement identified as Exhibit 387? A. Did I understand you to say that B. F. Keith had that right to designate?

Q. It is so set forth in paragraph 20 of this agreement. A. I must only answer on the assumption that if B. F.
(2289)
Keith had that right, at some stage they may very well have nominated someone as a substitute for P.D.C.

Q. Well, that would be at the present time RKO Film Distributing Corporation, isn't that right, or RKO-Radio Pictures, Inc.? A. No such relationship exists today, I assure you.

Q. Well, do you know, what, if any—— A. They may have designated it in the past, maybe for a time some distributing—maybe RKO Radio Pictures—I am testifying only to the time I have been associated——

Q. Just listen to the question. Can you tell what if any modifications have been made with respect to these two written agreements I am showing you here, 386 and 387 for identification, since they were executed? A. From the paragraphs you have shown me in this 1933 agreement, there obviously was a modification, and the paragraph you called my attention to indicated a continuation of the—I assume the provision you are talking about in that agreement for the length of this contract; and unless you point to me the term of that contract I would not be able to know how many years that is.

Q. Well, the contract will speak for itself as to the term. A. May I refer again to the paragraph you pointed out to me? Is this it (indicating)?
(2290)

Q. Yes. What I want to find out from you is what if any modifications have been made subsequent to the execution of

these agreements, if you know? A. This in itself appears to be a modification and extension.

Q. I understand. A. And it must have an expiration date, I assume, and I assume it expired. But what that expiration date is, I don't know.

Q. Well, this basic agreement here has an expiration date of 25 years from its execution. I take it you have no doubt that the basic agreement has not expired; is that right?

Mr. Proskauer: I object to that as a conclusion of law. Here are two papers in evidence——

Mr. Seymour: They are not in evidence.

Mr. Proskauer: — and he is continually examining this witness as to what the papers mean.

Judge Hand: Overruled.

A. This paragraph you pointed out to me seems to indicate that it carries forward into the provision of this contract the provision which is Article 20 of the earlier contract, which is the right to substitute, the right of substituting for P.D.C.

Q. And I call your attention to the fact that the earlier contract, marked for identification as Exhibit 387, says: (2291)

"The term of agreement shall be for a period of 25 years from and after January 2, 1927."

Now, may I ask you again, do you know what if any modifications in the terms of these two written agreements that are before you have been made since they were executed? A. I don't know of any other contracts modifying that term. All I can say to you is, what is stated there is not being carried out today. Whether there is a contract to carry it out still in existence, I don't know.

Q. And you don't know whether the reason why it is not being carried out today is due to some further written modification or not, is that right? A. That is right.

Mr. Wright: We offer these two agreements in evidence.

Mr. Seymour: If your Honors please, as far as the first one is concerned, which is the agreement with respect to the Grand Rapids operating agreement, which is relatively short, I have no present objection to it. The other document is a long printed document, and I object to it as irrelevant.

Your Honors will recall how this arose. Mr. Beatty, called by me as a witness, testified both as to the operating agreement in Grand Rapids and with respect to the way Butterfield was actually operating. He was president of the company. While he was on the

(2292)

stand Mr. Wright asked to have the agreements, and we produced them, and we held him in New York until Mr. Wright excused him, saying he did not want to examine him. Now, I think at this stage to have that long agreement received in its entirety is an unnecessary burdening of the record. If there are individual parts offered not in contradiction to the witness, but for another purpose, we won't object. But here is a lengthy document, and if it is going to be received now, then I am put to the burden of bringing that gentleman back, or somebody else, and I think it is unnecessarily encumbering the record.

Mr. Wright: If the Court please, you recall that I told Mr. Seymour in open court at the time these were produced that I proposed to offer them in evidence, and that if he desired any explanation of them from Mr. Beatty, he had better keep him here; but I, however, did not desire to cross-examine him on it.

Now, these agreements set forth the manner in which the Paramount, RKO and Butterfield interests were originally consolidated in that Michigan area,

and is, in my view, far better evidence of what the parties had in mind at that time and what they did than any possible oral testimony that could be elicited from either Mr. Beatty or Mr. Rathvon.

Judge Hand: Overruled.

(2293)

(Government's Exhibits 386 and 387 for identification received in evidence.)

Mr. Wright: I think that is all.

Mr. Leisure: That is all, Mr. Rathvon.

Mr. Leisure: This morning Mr. Davis was good enough to let me go ahead of him when he had some work prepared, and with the Court's permission I am going to let him proceed now with some charts that he has.

Judge Hand: Have you got anything more?

Mr. Leisure: Yes, sir.

Judge Hand: How much?

Mr. Leisure: I have another witness who will take almost as long as this witness. Then I will be through, except for some charts that I want to put in.

Mr. Davis: If the Court please, some time last week I introduced Exhibit L-7, which was a statement of domestic feature film license fees billed by Loew's to all exhibitors during the fiscal years 1936 to 1944, both inclusive. I now wish to withdraw the exhibit which was then admitted in evidence and substitute another exhibit of the same sort. I have found errors in the exhibit after it was filed. I withdraw the present exhibit L-7 and substitute this. The errors were in computation. There is no change in the form.

(2294)

(Statement referred to marked Loew's Exhibit L-7 in substitution for statement previously marked Loew's Exhibit L-7.)

Mr. Davis: I offer tabulation showing the feature film license fees paid by Loew's Metropolitan Theatres for the fiscal years ending August 31, 1931 to 1944.

Judge Hand: Have you examined it, Mr. Wright?

Mr. Wright: I am just looking at it now.

Judge Hand: Mark it for identification.

(Marked Defendant Loew's Exhibit L-8 for identification.)

Mr. Davis: Has that been admitted?

Judge Hand: That will be admitted. Received.

(Defendant Loew's Exhibit L-8 for identification received in evidence.)

Mr. Davis: I offer in evidence a tabulation showing the feature film license fees paid by all Loew theatres in the United States (including Buffalo theatres) for the fiscal years ending August 31, 1931 to 1944, showing what percentage of the total was paid to the defendants at the bar and to miscellaneous producers.

Judge Hand: Mark it for identification.

(Marked Defendant Loew's Exhibit L-9 for identification.)

Mr. Davis: I now offer a table showing in contrast total feature film license fees received by Loew's as a

(2295)

distributor from all domestic exhibitors, 1937 to 1944, and the total feature film license fees paid by Loew's as an exhibitor to all domestic producers in the same period.

I did this in order to show that there is no correlation between the receipts and the payments; and I might say also to prove that it is more blessed to receive than to give.

(Marked Defendant Loew's Exhibit L-10 for identification.)

Mr. Davis: At page 1117 of the printed record Mr. Caskey introduced a chart showing the simultaneous first-run release of the film to which it then related. Your Honors suggested that a similar table from the defendants might be helpful for comparison.

I offer a chart showing the first-run release of the film As Thousands Cheer beginning September 13, 1943. If your Honors will have those before you, I want you to note one striking phenomenon about it.

(Marked Defendant Loew's Exhibit L-11 for identification.)

Mr. Davis: I am offering it in evidence.

Your Honors will notice, with this chart before you, that the exhibition at New York began on September 13, 1943, and continued until November 21, 1943. That was a preliminary release showing at the

(2296)

Astor Theatre. General release came on December 23, 1943. And then you will notice a series of releases at or about the New Year, which indicates that those contemporaneous releases were shooting at the holiday trade. From then on it goes down, as shown by the chart.

I offer in evidence a chart showing the total operating theatres in the United States compared with Loew's total operated theatres from the years January 1, 1932 to January 1, 1945. I offer this chart to show the contrast between the acquisition of theatres

operated by Loew's and the growth of the theatres in the United States during that same period.

Mr. Wright: If the Court please, the use of these Film Daily Year Book figures for this purpose I think is particularly misleading. They do not indicate or even purport to indicate, as I understand it, theatre acquisitions by anybody. All that you have reflected is, I believe, only the reopening of certain theatres which were formerly closed, which, of course, is a natural phenomena when there is an increase in business prosperity generally. I do not see how these data that are reflected in the chart here are a proper basis for proving what Mr. Davis says they prove.

Judge Hand: Overruled. That is a matter of

(2297)

argument later.

(Marked Defendant Loew's Exhibit L-12.)

Mr. Davis: When the witness Rodgers was on the stand I offered in evidence a list of the first-run theatres in the 92 critical towns.

Judge Hand: Just a minute.

Mr. Davis: In examining the witness Rodgers about the first-run theatres, Loew's and others, in the 92 critical towns, I offered a list of the first-run theatres in those towns, with the statement of their respective seating capacities. It was agreed, as I understood it, or, if not agreed it was tacitly understood, that that list should be checked, and it was handed to Mr. Wright for that purpose, and I have had it checked myself. I wish to offer it with certain corrections. In the testimony the theatre Bijou at Knoxville was erroneously stated to be a first-run theatre. It is not. The Marlo at Salt Lake City was erroneously stated to be a first-run theatre. It is not. The Florida Theatre at Tampa was erroneously stated to

be a first-run theatre. It is not. The Capitol Theatre at Rochester we understand not to be a first-run theatre. The Downtown Theatre in Detroit was listed on that list as owned and operated by Howard Hughes. We now understand it to be operated by the Downtown Amusement Company. The Palace and Gary
(2298)
theatres at Gary, Indiana, were listed on the first list as affiliated. That is in error, as the names of the operators are Young and Boucher. The seating capacity of these theatres we have had checked by our district managers in the districts where the theatres are located. We now believe this seating list to be accurate. I offer that list.

Mr. Wright: We have no objection providing we can find out now, which we could not find out when Mr. Rodgers was on the stand, what definition of first-run theatre was used in making these classifications. That is, what the term "first-run theatre" means as applied to these theatres on this list. That is something we ought to know.

Mr. Davis: I think you will find all that in Mr. Rodgers' testimony. He identified these theatres and identified those which Loew's licensed to him.

Mr. Wright: If the Court will recall, at the time Mr. Rodgers testified we tried to find out what the basis of the selection was and we could not do it. As to whether or not he took as a first-run theatre those which had no regular first-run of any major product, or whether he did not. Now, I do not know as to this
(2299)
list. Some of these theatres, as far as I know, are not theatres which are first-run theatres according to our definition. That is, one which has a regular first-run of some major product. Now, I do not ask that he use our definition necessarily, but I just want to know

what definition was used in compiling the list, and what the term "first-run theatre" as it is used in the list means.

Mr. Davis: If there is one phrase in this case which up to this time seems to have not occasioned any dispute at all, it is what is first-run and what is subsequent-run. It did not occur to me that there is any room for dispute in the definition about that. And the witness took that as the list of the first-run theatres in these critical towns. I offer it.

Judge Hand: The objection is overruled. Received.

(Marked defendant Loew's Exhibit L-13.)

(2300)

Mr. Davis: At page 566 of the record the statement was made that in the 416 cities with more than 25,000 population As Thousands Cheer showed in 3631 theatres. The reports on the admission prices were available in 3237, and there are 346 cases where the minimum admission price was exceeded by the licensed theatre. Mr. Wright asked for a breakdown between first-run theatres and subsequent-run theatres, independent and affiliates, as to that increased price. I offer such a tabulation which shows that the first-run theatres which exceeded the minimum admission numbered 127; that the second and third and sub-run theatres exceeded the admission price—219 of them.

Judge Hand: Received.

(Marked Defendant Loew's Exhibit L-14 in evidence.)

Mr. Davis: Now, I hesitate to offer maps of New York after the splendid map which RKO has offered.

Judge Hand: I feared those blueprints when I saw them down there.

Colloquy

Mr. Davis: These have but one possible merit over those which have been offered by Mr. Leisure, and that is they are a little more compact and transportable. I offer a map of each borough of the City of New York showing the location of the Loew theatre and the location of all others. It is to demonstrate the fact that
(2301)
whatever else the citizens of New York may suffer from, they are not suffering from a lack of moving picture houses.

(Marked Defendant Loew's Exhibit L-15.)

Mr. Davis: I offer as an annex to those maps an index of the theatres owned by circuits other than Loew's in Greater New York, Long Island and New Jersey, with the numbers of the theatres.

(Marked Defendant Loew's Exhibit L-15A.)

Mr. Davis: Do your Honors wish to continue?

Judge Hand: No. Have you more of this documentary evidence?

Mr. Davis: I have one or two documents; and then I have a stipulation which I will want to offer.

Judge Hand: The clerk says that L-9, L-10 and L-11 were marked for identification only.

Mr. Davis: Everything that I have tendered I have offered in evidence.

Judge Hand: They are received in evidence.

(Defendant Loew's Exhibits L-9, L-10 and L-11 for identification received in evidence.)

Judge Hand: Now, what more is there if you can state it, before the defendants rest?

Mr. Frohlich: I have just one tabulation, your Honor, which will take just a few minutes.

Judge Hand: All right. Now, Mr. Leisure has a
(2302) witness?

Mr. Leisure: That is right, and then a witness with some exhibits, which will take, I think, a full day.

Judge Hand: You have two witnesses?

Mr. Leisure: One factual witness and one who will identify certain exhibits.

Judge Hand: Any other witnesses?

Mr. Seymour: I expect to have one or possibly two witnesses, relatively short; but there will be a lot of documentary stuff.

Judge Hand: You will have a lot of documentary matter?

Mr. Seymour: There will be some of this stuff. I have not any maps but I have everything else.

Mr. Proskauer: For Warners, your Honor, we are going to have a very small number of very clear charts. We are going to remember that it is more blessed to receive than to give. We shall also have a stipulation regarding one witness's testimony, and I think that is probably all excepting that we are all jointly thinking of offering some general tabulated evidence about the arbitration awards. We are trying to see if we can get them into some kind of tabular form. I am not sure whether we shall succeed or not, but I think that is about all we have to offer, and I suppose I could get through in an hour, assuming,
(2302a) as I have every reason to believe, that Mr. Wright and I are going to agree.

(Discussion off the record.)

Judge Hand: All right, we shall adjourn until Thursday at 10.30.

(Adjourned to Thursday, November 8, 1945, at 10.30 o'clock a.m.)

(2303)

New York, November 8, 1945;
10.30 o'clock a. m.

Trial resumed.

Mr. Raftery: Mr. Wright has asked for the production of documents in a letter; and there is Universal's contribution——

Mr. Seymour: I can't hear you, Mr. Raftery.

Mr. Raftery: Mr. Wright has asked us to produce a group of franchises and other documents from Universal; and I am delivering them with this admonition. These are current contracts in daily use. The Government is free to photostat them or do anything they want, but they have got to give them back.

And here is United Artists' contribution. Same conditions.

Mr. Frohlich: Mr. Wright has asked me to produce the franchises of Columbia Pictures Corporation. While the original franchises are scattered all over the country, we have a franchise book from 1935 down to the present; and I have compiled a list of all of the Columbia franchises both with independents and affiliates. I should like to offer that in evidence. I have given a copy to Mr. Wright. They go from 1936-37

(2304)

down to the present time, and some of them run as far as 1942, 1945, 1946 and 1947. There is no 10-year franchise; there is no 5-year franchise. There are two 4-year franchises to independents, and the rest are 2 and 3-year franchises.

Judge Hand: I do not see why they did not get these things before and put them in by stipulation. You do not want all these papers around.

Mr. Wright: He was offering this, if the Court please, as his exhibit.

Mr. Frohlich: Mr. Wright asked me for them, and I have produced them; and I would rather have them in the record than just informally handing them over to him.

Mr. Wright: What he is doing is making an offer in evidence of material that he furnished us at our request. We have no objection to its going in, but it is not at our insistence that this is being made a part of the record.

Mr. Frohlich: It is my responsibility, your Honors. I want to complete my record.

Judge Hand: Then you have nothing to complain of, being the one encumbering the record.

Mr. Frohlich: I am the guilty party; but I think I need it for my record.

Judge Hand: Maybe you do. Then do not lament

(2805)

over his building up the record.

Mr. Raftery: I will take mine back if he does not want them.

(Marked Defendant Columbia's Exhibit C-9).

Mr. Frohlich: When Mr. Montague was on the stand, the Court will recall that he testified in certain cities he sold away from affiliates to independents, and Mr. Wright asked for the dates. Well, I have obtained these dates. I have a short list here, which is one page. I should like to offer that in evidence. I will have a copy in a minute.

Mr. Seymour: May I see it?

Mr. Frohlich: Yes, I will give you a copy of it.

(Marked Defendant Columbia's Exhibit C-10).

Mr. Frohlich: Now, in answer to one of our interrogatories we gave the Government the gross income

from production and distribution of Columbia, and the net profits from 1935 down to 1938. And I want to supplement that with a brief statement of the gross income and the net profits down to 1944.

(Marked Defendant Columbia's Exhibit C-11).

Mr. Frohlich: Now, here I am offering in evidence a list of eight or ten independent circuits and the income which was derived by Columbia Pictures in 1943-1944 from those circuits.

(2306)

(Marked Defendant Columbia's Exhibit C-12.)

Mr. Frohlich: And at Mr. Wright's request, he has asked me to give him a detailed statement of the moneys received by Columbia from Paramount in 1943-44 which is one page and a half. I have compiled that. That represents a list of particular affiliates and the rentals received.

Mr. Seymour: May I see it, Mr. Frohlich?

Mr. Frohlich: Yes, sure.

(Marked Defendant Columbia's Exhibit C-13.)

Mr. Frohlich: I have no further offer.

Mr. Leisure: May we proceed now, your Honor?

Judge Hand: Yes.

ROBERT MOCHRIE, called as a witness on behalf of the RKO defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

Q. Your name is Robert Mochrie? A. Yes.

Q. And you live in Manhattan? A. Yes.

Q. Are you associated with RKO Radio Pictures, Inc.? A. Yes, I am.

Q. What is your position with that company? A. I am the general sales manager of RKO Radio Pictures, Inc.

Q. How long have you occupied this position? A. Since the summer of 1942.

(2307)

Q. Will you please state your general duties in this capacity, please? A. Yes. As general sales manager I am responsible for the sales and distribution of RKO pictures in the United States and Canada and of independently produced pictures in the United States and Canada.

Q. Distributing RKO pictures? A. Yes, sir.

Q. Will you please state your experience in the motion picture business, Mr. Mochrie? A. I started as a salesman in the Cleveland territory in 1925; and in 1926 became Albany branch manager for the same company, Producers Distributing Corporation; and in 1927, Pittsburgh branch manager; that company was merged into Pathe and I went for them to Philadelphia as branch manager in 1928; later they were bought by RKO and I remained as branch manager in Philadelphia for RKO-Pathe until 1932, at which time I became branch manager for Warner Bros.; and in 1934 I became assistant general sales manager for Warner Bros.; in 1937 I became southern district manager for United Artists; and in 1939 southern district manager for the present company, RKO, having authority over the southern branches of Oklahoma City, Dallas, Memphis, New Orleans, Atlanta and Charlotte; in 1940 I became eastern and southern division sales manager for the same company; and in 1942, general sales manager, which position I now occupy.

(2308)

Q. Was it in 1931 that RKO bought Pathe, did you say? A. Yes, sir.

Q. Would you just outline briefly the distribution department of RKO Radio Pictures, please? A. Yes. I have assisting me in the work two division managers, one in charge of the West and the other in charge of the East and South. Each of these men has under him four or five district managers out in the field, each district manager having two to four branches under his jurisdiction. There are 32 branches in all in this country and six in Canada. Now, each branch is operated by a branch manager and he has under him an office manager, handling the clerical work, who has a group of salesmen, who has a group of bookers, a cashier, and then there are, in addition, film inspectors and film shippers. And there are also, usually at the rate of one man per branch attached to these branches, field exploitation and publicity men and they are under the immediate jurisdiction of a director of field exploitation, Terry Turner. There are, as well, traveling auditors; and in the home office there are various service departments, mechanically serving the branches, and that is under my jurisdiction.

Q. Can you tell us approximately what the annual cost of operating the RKO distribution system is? A. It is somewhat in excess of seven million dollars, domestic distribution. (2309)

Q. Without taking time to go into it, Mr. Mochrie, at this time, are the mechanics of RKO distribution generally the same as has already been described by representatives of other companies here? A. Yes, sir, they are.

Q. Do you participate in planning the production program of RKO Radio Pictures? A. I do. The production is entirely headed up by Mr. Charles Koerner, who operates the studios and is responsible for the production of the pictures. From time to time Mr. Koerner confers with people in the East and we are able to furnish him at times with information in respect to star values, and type of story values, things of that nature, which we have learned from our work with the exhibitors who in turn are in immediate touch with the public.

Q. Mr. Rathvon, the president of your company, testified here Monday that in the 1943-44 season RKO distributed 32 of its own pictures and distributed six pictures produced by independent producers. Can you tell us how these six independently-produced pictures compared from the standpoint of popularity and revenue with the other pictures which RKO distributed in that season? A. Yes, I can. The average that season of all our pictures played was some 8000 engagements per picture. The average of the inde-

(2310)

pendently-produced pictures that season was some 10,000 engagements per picture. The engagement per picture is a mark of the volume of distribution obtained. In money that year, we grossed, in this country, in excess of a million dollars on 13 pictures. Of those 13 pictures, four were independently produced.

Q. You mean a million dollars each on the pictures? A. A million dollars each, of course.

The highest-grossing picture of the season was independently produced. It was Mr. Goldwyn's "Up In Arms", which grossed approximately two and three-quarter million dollars. The second highest-grossing picture that season was also independently produced, "Lady Takes a Chance", which grossed just a few dollars short of two million dollars. That is domestic gross.

Q. How many outside produced pictures did RKO distribute in the 1944-45 season? A. That season we distributed eight.

Q. How many pictures of its own did RKO distribute in that season? A. 22.

Q. Will you tell us how the eight pictures which you have just referred to compared with the other pictures distributed by RKO? A. Yes. There again the average of the eight pictures played two more engagements per picture than the average of our own 22. And in money, we had, that

season, 14 pictures each of which grossed in excess of a
(2311)
million dollars and six of which were independently produced. Also, the highest-grossing picture for the 1944-45 season was Princess and the Pirate, and the next highest was Casanova Brown. Casanova Brown was produced by International Pictures.

Q. Who produced Princess and the Pirate? A. Again Mr. Goldwyn—Sam Goldwyn.

Q. What has been the policy of RKO with reference to its willingness to distribute outside produced pictures? A. Why, we are very willing and, in fact, desirous of distributing independently-produced pictures. The criterion as to whether or not we will take on a picture, subject to being able to negotiate terms for the distribution of the picture, is the quality of the picture. If it is in our opinion desirable, with prospects of excellent grossing in the theatres, we are interested; if in our opinion it is not desirable, we are not interested.

Q. In this case the Government charges that RKO and the other distributor-defendants combined and conspired to monopolize the distribution of motion pictures and to exclude from that business independently-produced pictures. Has your company to your knowledge ever taken any such action? A. No, sir.

Q. It has no such understandings or agreements? A.
(2312)
None whatever.

Q. Have you ever discussed with any representative of any distributor-defendant whether RKO should or should not distribute a picture produced by an independent producer? A. No, sir, I have not.

Q. If in the 1943-44 season you had had no independently-produced pictures to distribute, would that have affected your competitive position? A. Yes, it surely would have.

Q. Would you just tell the Court how? A. Yes. In selling my pictures, I am competing, and did compete that season, with some companies who have a pretty large number of top quality A pictures. In obtaining the six pictures we did that year, of independent production, we materially added to the number of A quality pictures that our own studios produced, which, in an over-all sense, enabled us to contact, in our sales work, the exhibitors on a much more competitive basis as an important company, the source of quality pictures.
(2313)

By Judge Bright:

Q. On what is your compensation based in the distribution of pictures from other producers?

The Witness: Will you repeat that, sir?
Mr. Leisure: Will you please read it?
(Question read.)

A. The compensation is based upon the gross rentals we obtain from the theatres—that is, the gross business we do.

By Mr. Leisure:

Q. And you get a percentage, Mr. Mochrie? A. Yes, sir, we do. The percentage varies in accordance with the particular deal for the particular picture. There are all sorts of various arrangements, but it is based—it is a percentage in one way or another of the total business we get for that picture; the total money we get for that picture.

By Judge Hand:

Q. Do you say that is true whether the licensee is an affiliate or an independent? A. Well, the money that we get for the picture comes from all the theatres to whom we sell that picture, some of which theatres may be affiliated

and some of which may be independent; but it is the total money that we get from the picture from all sources.

By Mr. Leisure:

Q. And you get a percentage whether they are affiliated
(2314)
or not? A. Yes, of course. We get percentage on the total money. There is no distinction where the money comes from.

Mr. Leisure: That was Judge Hand's question, as I understand it.

The Witness: Yes.

Q. Now, does RKO offer the features which it produces in blocks of five? A. Would you mind repeating that?

Q. Does RKO offer the features which it produces in blocks of five? A. Yes, we do.

Q. Do you include pictures produced by outside producers in those blocks? A. Sometimes, yes, and other pictures are sold individually and separately.

Q. Why, Mr. Mochrie? A. It depends upon the distribution contract that we have with the independent producer. Some independent producers have a contract with us specifying that their pictures shall be distributed individually, sold individually, and others do not.

Q. Is RKO required to offer its own pictures in blocks of five? A. It was required under the consent decree; and when that provision of the consent decree no longer became operative, RKO continued to offer in blocks of five.

Q. Now, when RKO licenses its features in a block of five to a given theatre, are several films licensed simultane-
(2315)
ously or is each licensed separately? A. Well, the entire five may be licensed simultaneously, but each of the pictures is negotiated for separately. The negotiations take place

for each picture, although at one time the license may be made for the five pictures, or the application for license may be made.

Q. And how do you select the features to be included in such a block of five? A. Well, that is dependent first of all on the pictures, on what pictures are available from our studios that the studios have completed producing and have delivered us positive prints of; and then within that limitation we try to put together a balanced block; that is, balanced from the point of view of different stars, different types of pictures, a musical or a drama, and also different value pictures, balancing a high-cost production picture with a low-cost production picture, which, in turn, makes a well-rounded group to present to the exhibitor trade, with pictures of all sorts of use and all sorts of possibilities, for deluxe theatres and for the reverse.

Q. Now, when you have made up one of these blocks of five, is it your policy to insist that the exhibitor buy the whole block? A. Well, as a seller I make every possible effort to sell each exhibitor the entire block. I am very frequently unsuccessful in that, so that if the exhibitor for one

(2316)

reason or another will not buy five, I sell four; and if he won't buy four, I will sell three; and if he won't buy three, I will sell two.

Q. Could you illustrate that, Mr. Mochrie? A. Well, you can illustrate that by the results of the distribution of a picture. The first block in the 1943-44 season contained five pictures: Lady Takes a Chance, Fallen Sparrow, Adventures of a Rookie, So This Is Washington, and The Seventh Victim. Now, the best grossing picture of that group was Lady Takes a Chance and that picture played to 14,000 engagements in this country. The reverse of that is The Seventh Victim, the poorest grossing picture of the group, which played to only 6,250 engagements in this country; that is

less than half; and an intermediate picture, So This Is Washington, played 8500 engagements. That is, on the best picture we wrote many more contracts than we did on the poorest picture.

Q. Was that block typical of the 1943-44 releases as a whole? A. Yes.

By Judge Goddard:

Q. From your testimony it would appear you tried to sell a block of five and no more than five; but if the exhibitor won't take five you will sell him a lesser number, is that right? A. I do the best I can, sir.

Q. You do sell a lesser number? A. Yes, sir. That is (2317):

evidenced by the fact that I have endeavored to sell the five pictures to all the theatres that I can. In the case of the best picture I was successful in selling 14,000 theatres. In the case of the poorest of that block I was successful in selling only 6250 theatres. So there were many, many theatres that I did not sell that poor picture to.

A. But you do sell in less than blocks of five? A. Yes, I do, indeed. I sell as few sometimes as one of the five.

By Mr. Leisure:

Q. And you do not refuse—if I may supplement Judge Goddard's questions—you do not refuse to sell a theatre if it does not take the whole block of five? A. No, I do not.

Q. Now, does RKO trade-show its features making up a block before they are licensed? A. Yes.

Q. Will you tell us about RKO trade-showing, please? A. Yes. After the block is put together of the five pictures, we then arrange that each of the five pictures be screened in each of the exchange cities of the country, usually in a screening room in the exchange city; and the five pictures

usually are screened on two or three successive days. We advertise the place of the screening, the time of the screening and the date of the screening for each picture in the trade
(2318)
journals prior to the event.

By Judge Goddard:

Q. One other question I should like to ask you: In selling to independents or selling to affiliates, do you make any distinction between them whether you will insist on a block of five or not? A. None whatsoever, sir.

By Mr. Leisure:

Q. Mr. Mochrie, have you found trade showing beneficial to you as a distributor? A. Yes, I have.

Q. Will you explain, please. A. Yes. Up until the time I have trade-screened a block of five I do not have a contract on my books, which means that I have no contracts at the time my pictures are ready for showing to the exhibitors, and for exhibition in their theatres; that is, there are prints delivered in all the exchanges of the country, which means I start from zero, which, in turn, means the burden is placed where I think the burden should be. It is placed on the back of the producer of the picture. He knows that I have no contracts for his picture until such a time as that picture is shown the exhibitors of the country. I start from zero. And if he has made me a very fine picture, it means I will get very fine terms and very wide distribution; and if he has produced a poor picture, it means I will get poor terms and poor distribution; and it puts the burden on him to give me
(2319)
a quality piece of merchandise.

Q. Has RKO made any franchise agreements with any theatres since 1940? A. No.

Q. Does RKO-Radio Pictures give any pereference to RKO theatres for first-run of its features? A. Yes, sir, we do. We endeavor to place our pictures with RKO first-run theatres.

Q. And would you explain that, please? Why do you do that? A. Well, first of all, where there are first-run RKO theatres, those theatres exhibit the picture on such an excellent basis, and the theatres in themselves, in my opinion, are of such a nature that I receive the best possible immediate rental for the actual showing of the picture in that theatre. That is the first reason, although perhaps not the most important.

Secondly, I am able to place our pictures in RKO first-run theatres nearly as rapidly as I wish and as frequently as I wish, which insures an even flow of product moving through these large cities of the country. Through the theatres, and becoming available to the theatres of that territory in which that large city is located, both subsequent-runs and general towns around that city. That is very important, because that means I am assured of a constant flow of pictures to that territory, and so, a constant income of revenue. (2320)

Now, the other reason, which is perhaps even more important, is the great assistance I get from those theatres in the exploitation and publicity of my pictures. You see, at times we have not been able to compete as well as we would like to in obvious star value names in our pictures with other companies; and so we have deliberately practiced as a distributor to the very best of our ability the use of exploitation and publicity to make up for the shortage, at times, of star names; which means that in my theatres scattered in large cities across the country I have an exhibitor who will fully cooperate with me and give great assistance in that exploitation.

(2321)

I can give you a specific example right now: we recently produced a picture called Spanish Main, at a very high cost. The negative cost is in excess of two million dollars. Now that presented a task to get back moneys that would at least break even and perhaps return some profit to the company. So we planned on an elaborate and complicated magazine, comic sheet and national publicity campaign, and we timed that to reach a peak in early October, and then we picked October 12th, inasmuch as that would include a holiday, Columbus Day, as the time for releasing that picture in our theatres. We did that ourselves, the distributors, and asked those theatres to cooperate with us, which they did. So that Spanish Main blazed across the country in many of the great cities of the country on October 12th, and it did a very fine business indeed. It did such an excellent business that the entire trade, the other affiliated circuits, the independent circuits, the small independents, became aware that Spanish Main was an extremely successful box office picture. Now that will make my task immeasurably easier in getting high terms for the picture and in selling it quickly and widely and getting the best playing time from the theatres to whom I am selling.

Q. Any other example? A. I beg pardon?

Q. Any other example? A. Yes, and I hope it will come out as well or perhaps better. We have an important pic-

(2322)

ture coming up called The Bells of St. Mary's, with two important stars in the picture. Now that picture has been licensed to the Radio City Music Hall here in New York, and it will open in the middle of December. It is their Christmas picture. Now we have set it in all of our first-run theatres across the country to open on Christmas Day. Now that means that the picture—and we have timed our magazine advertising and our national advertising to coincide exactly with that releasing time; and that means that that picture will be launched with great emphasis across the

country in the key cities of the country; and if it be successful in those theatres, certainly the entire trade will immediately and quickly know of it.

At times we have reversed that procedure. At times we have had a picture which has not had any great publicity, or perhaps even great attractiveness in the eyes of the exhibitors, but which we have thought had excellent entertainment value, excellent audience value in the picture. The picture I mentioned before in the first block of 1943-44 program, Lady Takes a Chance, is a picture of that type. It was very highly entertaining but it had no prestige to it. So we did the reverse with that picture. We released that picture very slowly, and we staggered it in our theatres across the country so that it would play off slowly, and we would write our contracts at a slow rate until such time as

(2323)

through word of mouth and through similar means the trade, and, in turn, the public, would know of the value of the picture; and it worked very well. It was a very successful picture.

Q. What about Hitler's Children? A. Well, this may be lengthy, but that is another use made of our theatres——

Q. That was about the same? Then I will not go into that. It would be similar? A. Yes; but it is a specialized way of distributing pictures, and I must emphasize that it is necessary in my opinion to have theatres to use to achieve those results.

Q. Mr. Mochrie, are there instances where your pictures are not given their first-run showings in RKO theatres in cities where RKO theatres are located? A. Yes, there are.

Q. And why is that? A. Well, that happens when our theatres are unable to provide the length of playing time that we think the picture is entitled to. You see, there are only 52 weeks in a year for a theatre, and the theatre may have commitments to other companies which are releasing pic-

tures at the same time, and we may have a series of pictures, and the theatre may play a picture two or three or four weeks, and, hence, unless we were willing to wait for the release of a picture in that city for a considerable number of months, we would have no way of playing it in our own theatre. When that happens I sell the picture elsewhere. I
(2324)
have done that on several occasions, numerous occasions, in Chicago, where our Palace theatre has been unable to provide us with sufficient playing time, and I sell numerous pictures to the independent Woods theatre.

I have done it on occasion in Washington where our theatre, a long-run theatre, has been unable to provide time, and I have sold pictures on occasions to Warner Bros. for their Earle theatre.

I have done it in Boston. It is done from time to time when we have not sufficient playing time.

Q. Will you tell the Court how RKO goes about selling its first-run customer in cities where there are no RKO theatres? A. Yes. I try to sell the theatre which in my opinion will yield my maximum legitimate revenue on a permanent basis over an extended period of time.

Q. Now that is where there are no RKO theatres. How do you negotiate the licensing of RKO pictures in RKO theatres? A. Well, when I have a normal A picture, a cut and dried A picture, it is very simple. Over the period of years we have developed license terms for the showing of the picture, so that those normal A pictures automatically take those terms. When I have a picture that has abnormal value, either appreciably greater than normal or the contrary, appreciably less, then I have considerable negotiating.
(2324a)
I figure and I trade to get the terms I think the picture is entitled to, and the playing time it is entitled to. Sometimes that is a difficult process.

Q. Does the method which you have described in choosing customers—does that apply to the 92 cities in the United States having a population of over one hundred thousand? A. Except where my own theatres are, yes, sir.

(2325)

Q. Where your own theatres are, will you explain that, please? A. As I have explained, where we have first-run theatres, my object is to place our pictures in our theatres, and I do so.

Q. Does the same thing apply to other cities other than the 92 cities that you have mentioned throughout the country? A. It does.

Q. What is the basis of negotiation for both the 92 cities and the other cities throughout the country, would you just explain that, where you do not have theatres? A. I say, I endeavor to place my product, all my pictures, with the theatre which in my opinion will earn me maximum legitimate revenue. I am not always successful, but I endeavor to do that.

Q. What factors do you consider in determining the theatre that will bring you the maximum revenue? A. Well, sir, there are numerous factors, the size of the theatre, the location of the theatre, the general appointments and quality of the theatre, the available playing time in the theatre, and the exhibitor, the operator of the theatre himself, that is, his showmanship ability, to properly sell my picture to the public, and his repufation for reliability, a man on whom I can depend to carry out agreements.

Q. Does the suitability of a picture for exhibition, in a

(2326)

particular theatre ever enter into your determination in choosing your first-run customer? A. Would you mind repeating that?

Q. I asked if the suitability of the theatre ever entered into your determination in choosing your first-run customer? A. Oh, yes.

Q. For any particular picture, of course? A. Oh, yes, surely. If I have a low cost Western picture, I would not endeavor to place it in a large de luxe theatre that is accustomed to showing important A pictures. Wouldn't be good for him and wouldn't be good for me either.

Q. Can you give the Court any instances where these factors have been a reason for your choice of a first-run customer? A. Yes, and I think a good instance is Atlanta, Georgia. In Atlanta, Georgia, our first-run outlet is Lucas & Jenkins, that is the Paramount affiliated circuit, but we license the Goldwyn pictures to an independent theatre, the Rialto, a very small theatre. That theatre has somewheres around seven or eight hundred seats, whereas the Lucas & Jenkins theatres are very much larger. Now, that small Rialto Theatre will exhibit a Goldwyn picture for four or five or six weeks in its first-run showing, and I have found that that theatre throws off a rental for those Goldwyn pictures in excess of anything that those Goldwyn pictures prior

(2327)

to then obtained from the Lucas & Jenkins theatres. They pay a good rental for that picture.

Q. Do you attempt to sell RKO first-run pictures to the Rialto? A. No, I do not.

Q. Why? A. Because the Rialto Theatre could not only not take care of the 25 or 30 pictures of mine, it couldn't take care of even a small fraction of those pictures, perhaps not even one or two. You see, in a season, I sell the Rialto two or three Goldwyn pictures, which means that those pictures use up 10 to 18 or 20 weeks of the Rialto playing time, and the Rialto has commitments for other pictures. It plays all of the Columbia product, which means that after the Goldwyn playing time is deducted from the 52 weeks, there is left 35 or 40 weeks, and the Rialto uses that up with Columbia product. There is no playing time available for my

pictures, whereas Lucas & Jenkins can well absorb my 25 pictures and do absorb them.

Q. And has the size of the Rialto anything to do with the amount of playing time it can provide? A. Yes, surely. It has seven or eight hundred seats only, and if a picture of excellent value, that is, a picture that the public wants to see, plays in such a small theatre in a large city of the size of Atlanta, it will take a pretty long period of time before that
(2328)
theatre can take care of all the people who want to see it. That is responsible for the fact that a Goldwyn picture will run five or six weeks in that theatre.

Q. Would the size of the Rialto have any effect on your distribution of pictures to subsequent-runs? A. Well, it slows it up, takes five or six weeks for a good picture to play off there, which means I am delayed by that period of time in making that picture available to the subsequent-runs.

Q. How does the fact that a theatre is or is not affiliated with one of the integrated companies constitute a factor in your choice of customers? A. Will you please repeat that question?

(Read.) A. Has nothing to do with it.

Q. Based on your experience how do affiliated theatres in general compare from the standpoint of size, location and quality of operation with other theatres? A. In general, I would say that affiliated first-run theatres compare very favorably with all theatres in operating methods, in appointments, in size. Most first-run affiliated theatres are very excellent outlets; they are very excellently operated theatres.

Q. Do you always sell your pictures first-run in the largest theatre in a particular town? A. Usually, not always. Some-
(2329)
times the largest theatre is not necessarily the best place to get maximum revenue and sometimes I am unable to sell the largest theatre.

Q. Can you give us an example, please? A. Yes. In Buffalo we play our pictures first-run in the Twentieth Century Theatre. That is an independent operation. We have played those pictures in that theatre for the last five or six years. It is a good size theatre but by no means the largest. There are several Paramount affiliated theatres, first-run Buffalo, and we used to have them as our first-run account, and we found that for our pictures we were not getting the revenue we thought we were entitled to, and we left them and we placed our product with this independent Twentieth Century Theatre which, although it is not as large, provides us with all the playing time we require and moves our pictures in the manner we think they should be moved and gives us very excellent revenue.

Judge Bright: What do you mean by Twentieth Century, independent theatre?

The Witness: It is independently operated and owned.

Judge Bright: It is not affiliated with Twentieth Century-Fox?

(2330)

The Witness: No, sir. That is the name of the theatre, Twentieth Century. I think the corporate name is Twentieth Century Corporation of Buffalo, and the operator is a man by the name of Yellen, Max Yellen. Has nothing to do with Twentieth Century-Fox.

Q. Would Salt Lake City be another example of the same type? A. Yes. That would be even more pronounced. There again we sold the theatres affiliated with Paramount first-run up to five years or so ago, and there again we found that we were not getting the revenue which we thought we were entitled to and took our pictures away from them and we placed them in a theatre called the Uptown Theatre, operated by

Joe Lawrence. That theatre has, I think, 1200 seats in it—something like 1200 seats—and I think the Paramount affiliate has two or three theatres of around 1800 seats, but Joe Lawrence has provided us with sufficient playing time and a quality of play-off that gives us more revenue in my opinion than we could possibly get from the Paramount theatres.

Q. Is Lawrence an independent? A. Oh, yes.

Q. Is it or is it not your general policy to try to keep the same outlets from year to year? A. Yes, I do.

Q. Why? A. Well, for one thing, I have endeavored to have our distribution company have a reputation for reliability, and it doesn't jump around, it doesn't put an indi-
(2331)
vidual picture on the auction block. I know this, that if I have a good customer in a city, first-run, and he knows that he will receive my pictures block after block, and I know that he will play my pictures block after block, I have an excellent outlet. Sometimes I come with pictures that are not as good as I hoped they would be, or as my company, my producer hoped they would be, but I know that, having behaved myself with the customer, he will behave himself with me and he will play those pictures as they come out one after the other. I endeavor to keep him as a first-run account always, provided, Mr. Leisure, that he maintains in my opinion maximum revenue for those pictures.

Q. Is there any difference in applying that policy between towns where the first-run theatres are both affiliated and independent and towns where all the first-run theatres are independent? A. No, sir, there is not.

Q. Would you say from your experience that exhibitors have evidenced to you any interest in retaining a stable supply of product themselves? A. Oh, yes, yes, they have. They have just the same interest I have. They want to be assured of a stable supply and I want to be assured of a stable outlet.

Q. Where you have an established outlet for your product, is it usual for an opposition theatre to seek to buy your
(2332)
product? A. Not if I have a good outlet, not usually.

Q. Will you explain that to the Court, please? A. Well, it is a close business, people know what goes on in this business, and if competing theatres see RKO product playing regularly in a first-run theatre in a satisfactory manner, they know as well as I know that I am not going to leave that satisfactory first-run account. I won't leave them unless I can be very certain that a new account can pay me materially more revenue, not for one picture but on a permanent basis, and legitimate revenue.

Judge Bright: What do you mean by "legitimate revenue"?

The Witness: I mean, legitimate revenue, terms and rentals that will be profitable to him as well as to me. If I sell a man on fictitiously high terms, by any chance, and such terms are not profitable to him, that man is of no use to me as a customer.

Judge Bright: Don't the other theatres make any effort to get your product from the particular theatre that has been exhibiting it?

The Witness: Not if it is a good customer, not usually.

Judge Bright: I mean, don't the competitors make any effort to get your product——
(2333)

The Witness: I say——

Judge Bright: ——from your customer then established?

The Witness: I say, not usually. When people make an effort to get my product is when I am running into trouble with my own customer. When my

customer is not playing my pictures, or when my customer is paying me less rental than should be paid, that becomes known, It becomes known if I, in a certain city, have trouble and am dissatisfied with my present customer—that becomes known—and then most assuredly other people, almost in all instances, are very quickly on my doorstep telling me what terms and what moneys they can pay RKO.

Judge Bright: Then how do you handle that situation?

The Witness: I leave the customer, if I can be sure that this new fellow, who comes in, in my opinion, is a reputable man and has an excellent theatre whereby he, on a legitimate basis—I am sorry I used the word; perhaps it isn't right—but where he can show my pictures and give me high revenue and at the same time make money for himself. If he doesn't make money for himself, then I have trouble; he refuses to play the pictures and he refuses to pay me the terms I think I am entitled to, and when I have trouble, I look elsewhere for another customer or I

(2334)

find other people seeking me out to play my pictures, and that occurs very frequently. There is scarcely a month goes by that there is not some discussion in some place or another because of those reasons.

Judge Bright: I am wondering how the competitors of your customer find out if you are having trouble with your customer.

The Witness: I don't know, sir, but I can only hazard the guess that it is because it is a gossipy business and people usually know what goes on. It is their job to know what goes on. I know what goes and I presume other people know what goes on.

This whole distribution is a highly, in my opinion, is a highly competitive, fast-moving task, with lots of money at stake, and everyone has his eyes open and his ears to the ground, to know what is going on in all situations at all times.

Judge Bright: When you are having trouble with your customer, do you start to shop around for a new outlet?

The Witness: If he is a good customer and has been a good customer, and if I think that trouble is due to carelessness or something of that nature, I almost invariably go and talk with him, and I warn him. I tell him, "For heaven's sake, you are only headed for trouble if you keep on practicing the things

(2335)

you practice," and I don't want to leave him, if it can be avoided, but if, after a talk with him that way, for one reason or another, either because other distributors are putting more pressure on him for playing time, or through his greed, that he won't pay me the rentals I think I am entitled to, if for any of those reasons, after I wrestle with him, I cannot get any satisfaction, then I will most assuredly go seek someone else. I don't care who he is, big or little, affiliated or independent, if he tosses me around, I will find another outlet for my product.

Q. And you have given already as examples of that sort of thing Salt Lake City and Buffalo, where there was difficulty? A. Just for the reasons I have described, that we left those accounts in Salt Lake City and Buffalo and sought out another account.

Q. But following up Judge Bright's question, where you have a regular outlet and you have a satisfied customer and you are doing business with him regularly, is it usual to have

anyone else bid for your pictures in that kind of situation? A. No, sir, it is not.

Q. And you gave as examples Buffalo and Salt Lake City. Would Oklahoma be another example? A. Yes, that is a very curious example. We played our product first-run in Oklahoma City and in several other cities with Joe Cooper, a Paramount affiliate, and we were definitely dissatisfied and

(2336)

unhappy with the revenue and with the terms that Joe Cooper, in our opinion, furnished our product, and we went to his opposition, Louis Dent, an independent. That occurred about five years ago. We placed our product first-run Oklahoma City with Dent and have been playing those pictures ever since with Dent, but recently a peculiar thing has arisen. The business in Oklahoma City has boomed and pictures that formerly played three or four years ago for one week in Oklahoma City now play two weeks, so that I now find myself unable to get all the playing time from Dent's theatre. There again there are only 52 weeks in the year and he has other commitments, and I cannot get all the playing time I am entitled to, and I recently took the first two blocks of this current season's product and I went back to Cooper and I sold them to Cooper, but I will continue to sell my other blocks to Dent because Dent cannot absorb, in my opinion, all of my pictures but can absorb a large portion of them. I like Dent and I prefer Dent as a customer, but if he cannot use them all, I will then sell what is left to Cooper.

Q. Mr. Mochrie, is there any agreement between RKO and any other defendant in this case whereby RKO agrees that it will continue to service its present customers and will not entertain bids from others or seek other outlets? A. No, sir, there is not.

(2337)

Q. I believe you have testified that during the 1943-44 season RKO distributed pictures produced by independent producers? A. Yes, sir, it did.

Q. Who were the most important producers whose product was distributed by RKO during the 1943-44 season? A. Samuel Goldwyn and Walt Disney.

Q. Did each of these producers have the right to designate the theatres in which those pictures should be shown? A. No—Samuel Goldwyn did—Disney did not.

Q. Did each of those producers have the right to refuse to approve any license contract negotiated by you? A. Yes, they both did.

Q. During that season approximately how many contracts involving the product of these producers were made by you? A. I would say somewheres from 10 to 13 thousand contracts a picture.

Q. Can you tell us in how many instances they have instructed you to sell an account different from the account to which RKO was then regularly selling its own pictures? A. In the case of Goldwyn, under one per cent—somewheres between half of one per cent and one per cent. In the case of Disney, very much less, a very small fraction of one per cent.

(2338)

Q. Speaking for RKO, is an extended run something different from the first-run? A. In my opinion, it is not. I think that——

Q. Will you explain that, please? A. ——the term "extended run" is misused, and I do not think there is such a thing as an extended run. I play my pictures in a given city first-run. Now, I play that picture and the exhibitor shows that picture for as long a period of time as the showing is profitable to him. If it be a very successful picture, that the public wants to see in large numbers, it may run four weeks or five weeks or six weeks. If it be a less successful picture,

it will run one week and perhaps not even run one week, perhaps run a half a week. Some licenses I make with a theatre I make for one week, but the theatre grosses so much in that one week that I require of him—request of him, rather, and he usually agrees, to play it two weeks, and if it grosses very fine business the next week, he will play it three weeks, but in my opinion I have only a first-run. The first-run may be of a duration for as little as two or three days or it may be of duration for as much as five or six weeks, and the thing that determines that is entirely the box office quality of the picture. The man runs the picture as long as he can run it successfully and at a profit and I want
(2339)
him to run it as long as he can because the longer he runs it, the more rental I get.

Q. Mr. Mochrie, does the fact that the theatre is affiliated or independent have anything to do with the length of time that RKO will run a picture? A. No, it does not. I fight with them all to run them as long as I can get them to run them.

Q. What factors does RKO take into consideration in determining the length of clearance between theatres? A. It takes into consideration an amount of clearance between theatres in a city which in its opinion, and subject to a clearance condition that has built itself up in that city over a period of time, which in its opinion will yield it the largest revenue, taking all the theatres into account as a whole.

Q. Does the fact that a theatre is operated or controlled by an integrated company constitute any factor at all in deciding the clearance to be granted to it? A. No, sir.

Q. When you negotiate a license as between existing theatres, is there frequent occasion to give consideration to the existing clearance between them? A. Yes, sir, of course.

Q. Do you consider it anew each time that you make such license agreements? A. No, I do not. You see, the factors

(2340)

which determined originally, at some past time, the clearance as between two theatres, that is, the factors of size and location, and transit facilities between the theatres, the extent to which one theatre competes with another, the prices they charge, rentals they pay, all those factors originally, at some time past, determines the clearance between those two theatres and usually those factors remain stable from year to year.

Q. Then they do not come up even when you negotiate? A. No, sir, they do not. It is only when something is seriously deranged in those factors that the matter of clearance comes up again.

Judge Bright: Do you have any instances in your practice of clearances different in any particular city from those granted by your co-defendants in this case?

The Witness: Yes, we have. It isn't general or frequent but there are instances, yes.

Judge Bright: Can you think of one?

The Witness: I cannot out of my memory but, given time to look it up, I am sure I can find several.

(2341)

Q. Would Boston refresh your recollection any? A. Boston?

Q. Yes. A. No.

Q. In establishing or changing a clearance between one theatre and another, do you discuss with other distributors the clearance that they are granting? A. No, I do not.

By Judge Bright:

Q. Do you know what they are granting? A. I usually know, but I do not discuss that with other distributors. I am not interested in them.

Q. Do you discuss it with the customer? A. Very much so. The first thing he tells me is, "I want to buy your pictures on such-and-such clearance, because that is the clearance I get from this fellow, that company and the other company." If in my opinion I want different clearance from that, I have a considerable "rassle" with that man, if he gets the bulk of his product on one set of clearance, in persuading him to change. If I am determined enough that there should be a difference in clearance, I usually have to pay a penalty in getting lesser rentals than I could get for the normal clearance, or perhaps not selling him at all.

Q. Have you any specific instances of that? A. I think I could find them. I can't quote them out of my mind, sir. I know in my experience things of that nature have come up. (2342)

By Judge Goddard:

Q. Where you extend the first-run, doesn't the subsequent run holder object? A. When I extend?

Q. The first-run, yes. A. No. The subsequent run does not know how long a picture will run first-run. These days it never knows. A theatre may play one picture that is unsuccessful for a week, and Going My Way is the next picture, and that may run six weeks; and my good picture may follow Going My Way and it may run three weeks. The theatre runs that picture as long as it is profitable to him, and I wish him to run it as long as it is profitable to him, because the longer he runs it the more revenue I get. Now the subsequent run theatre is fully aware of that. He knows that that is practiced at all times; that is the common practice of the theatres.

There are very few theatres today left in this country that do not vary the length of the first-run. I mean in cities of any size. There are extremely few theatres that do not vary the length of the first-run; and I would have difficulty, I

think, in recalling any that play a picture, one picture after another for the same length of time. Your big Music Hall here in New York is evidence of that. It may play a good picture for ten weeks and a poor picture for two weeks. The Paramount theatre does the same. Our own Palace the
(2343)
atre. Sometimes I have had to take a picture out of the Palace theatre with only one week's showing, and I have lost money on it, but it has been an unsuccessful picture, no one has gone in the theatre, and it is taken off.

Q. Doesn't a subsequent run theatre have to know when it is going to get the picture? A. It knows it will get it so many days after the termination of the first-run, and that termination may occur seven days after it commences its engagement, or it may occur seven weeks after it commences its engagement. That is what I meant before, sir, when I said I do not think there is such a thing as an extended run. There is a first-run of varying duration of engagement.

Q. So the second-run man does not know when he will get the picture; is that right? A. He knows very well when he will get the picture—when it stops playing first-run.

Q. But he does not know the date? A. Surely, sir. As soon as the picture ceases its first-run——

Q. He knows there will be an interval of seven or fourteen days, whatever it is, but he does not know the date he will get the picture? A. At what time doesn't he know it?

Judge Bright: When he buys it.

The Witness: Oh, no.

Q. Is that right? A. Sometimes yes, and sometimes no.
(2344)
It depends, sir, on whether the license for the picture for the subsequent run is made prior to the first-run engagement or subsequent to the first-run engagement.

Q. What is the fact? Don't you usually make your subsequent run contracts before you make your first-run, or about that time? A. I would say, sir, there is no general pattern. Keep in mind that I do not have any contracts until I trade-screen pictures, and immediately after trade-screening I start releasing the picture; and I have to go out and in a very short period of time sell ten or eleven or thirteen or fourteen thousand contracts.

Q. I had the impression that when a distributor had a picture ready, he made the contracts with the first-run, the second run and subsequent runs all about the same time; isn't that so? A. No, sir; because my salesmen have so many accounts to cover, that sometimes they will see a man before the first-run picture plays and license the picture to him; and sometimes they won't see him until the first-run is playing, and license the picture.

Q. Generally, what is the practice? A. I would say, sir, there is no pattern. Under consent decree selling, sir, you are selling from hand to mouth. You are selling eleven or twelve or fourteen thousand theatres in a very short period of time after the picture has started its play in this country. It is not like the old selling where you sold in September for

a whole season's product and those pictures came out during the ensuing twelve months.

I have just started selling Spanish Main across the country, and I have to sell fourteen thousand contracts on that picture, and it has already started playing across the country, so you can appreciate that I sell in a very hurried manner; and whether that subsequent run is sold before the playing, during the playing or after the playing, I can assure you there is no pattern in the thing.

By Mr. Leisure:

Q. Mr. Mochrie, if I caught Judge Goddard's question, he would like to know whether in the majority of cases you

make your contract with the subsequent run while the first-run is being shown? A. Mr. Leisure, I can't answer that. Sometimes before, sometimes during, and sometimes immediately following.

By Judge Bright:

Q. Who is the one that determines whether or not there shall be what you say is not an extended run or a continuation of the original engagement? A. I negotiate that with the exhibitor. When I say "I", I mean my representative or myself negotiates that with the exhibitor while the first-run picture is playing. In some instances it is provided in the contract by what is called a holdover figure. That is, the license agreement with the first-run will say that if the pic-

(2346)

ture normally opens on a Thursday, if the gross receipts for the first Thursday, Friday and Saturday reach such and such a figure, that picture shall play for a second week and weeks thereafter provided the gross receipts for the first three days of each week reach such and such a level. That is a mark as to how many people are coming in to see the picture, how successful the picture is. And then I watch those grosses myself very carefully, or my men watch those grosses, because at all times I wish that theatre to show the picture for as long a time as possible; and if that picture—I recollect in Detroit where the same Spanish Main I mentioned opened last Friday. It did a very large business, and that particular license agreement had a holdover figure, if it grosses $18,000 on Friday, Saturday and Sunday, the picture shall play for a second week; and if it does $18,000 the second Friday, Saturday and Sunday, it shall play for a third week. Sometimes you don't have those agreements in the license contract, but, nevertheless, I know from experience what a very large gross is, and so does the exhibitor, and I phone him or contact him, however possible, and ask him to show that picture an addi-

tional week, because it is doing such a fine business, why should he take the picture off. It would be silly. He would be wasting the picture; he would be wasting good entertain-
(2347)
ment. If there are a large number of customers who wish to continue paying 75 cents, or whatever it is he charges in his theatre, to see the picture, why take the picture off? I think he would be very silly, very foolish.

Q. Who says whether he will or not? A. You negotiate with him. Sometimes the contract specifies it, as I have said——

Judge Hand: We are not talking about whether it would be an advantage. Judge Goddard is bothered by this: if they have no definite date, no day in a month for which that picture is ready for a subsequent run, how can any of these theatres that have arrangements for subsequent run, and are not first-run theatres, count on playing any picture? How can they tell when it will be released?

The Witness: I will endeavor to answer that——

Judge Hand: Is it because they have so many options, so to speak, that if they can't play A today, they may fill it in with B, C, D, E or F?

The Witness: Usually. Take New York, for instance, where there are eight or ten or twelve—I don't know exactly how many—first-runs. There are always pictures terminating the first-run in New York and becoming available to the subsequent runs, or any other city. I just mentioned Detroit. Now in Detroit I think there are five first-run theatres, and this week
(2348)
maybe two of those theatres will cease playing a picture, and next week one theatre, and the following week two more; but there are always theatres in the

cities ceasing to play a picture first-run, and that becomes then available thirty days later, or whatever the clearance is, to the subsequent run.

Judge Hand: So they cannot tell with any certainty about any given picture any length of time ahead?

The Witness: No, sir, not on a given picture, but they can tell with certainty that some picture will become available.

By Mr. Leisure:

Q. Following up Judge Goddard's question, by and large, the better the first-run or the extended runs, the more subsequent run playing time that you have, isn't that true? A. Would you repeat that, please?

Q. In other words, the better the first-run, the better the subsequent run? A. The better engagement the first-run, the more successful will be the subsequent run?

Q. Yes. A. That is indeed true. It is my experience that the longer a picture shows first-run, the more that picture grosses when it reaches the subsequent run theatres.

Q. And following up Judge Bright's question a moment ago, as a distributor are you generally familiar with the clearance granted by other distributors as between given (2349)
theatres? A. As a distributor, am I generally familiar with the clearance that that theatre grants other distributors, or has arranged with other distributors? Yes, of course I am.

Q. And did you make clear just why you are? A. I think Judge Bright asked me that.

Judge Bright: Yes, he told me.

Q. Then on that same subject, does RKO have any policy of adopting the same clearance as those granted by other

distributors? A. It may adopt the same policy or it may not adopt the same policy. We choose to do what is beneficial to ourselves.

Q. You have no agreements or understandings that you will adopt the same clearance? A. Oh, no, of course not.

Q. Could you explain to the Court why it is that in some situations the clearance granted by RKO to a prior run theatre is the same as the clearance granted by one or more other distributors serving the same theatre? A. Well, it occurs for the same reason we have just discussed. The clearance has been an outgrowth in time between those two theatres, and the exhibitor buys other products on such and such a clearance basis, and offers me such and such a clearance basis.

Q. Now, Mr. Mochrie, I wish to direct your attention to the subject of percentage contracts: RKO Radio Pictures (2350)
licenses pictures under so-called percentage licenses, and also under flat rentals, does it not? A. Yes, sir.

Q. Does RKO in using percentage licenses distinguish between so-called affiliated theatres and independent theatres? A. No, sir.

Q. Do these percentage licenses give RKO a share in the profits of a theatre so licensed? A. No, sir.

Mr. Wright: If the Court please, I submit that the licenses themselves are the best evidence. In this sort of inquiry here he is undertaking to give the contents of some unspecified contract.

Judge Hand: It is allowed. Go on.

A. (Continuing) I said, Mr. Leisure, no. There may be one or two exceptions from that, but the answer is no.

Q. What are those exceptions? A. The only instances that I can recollect where we license a theatre based upon operating cost to the theatre is two Broadway theatres first-

run, Harry Brandt's Globe theatre and the Capital theatre. I am not certain—I don't recollect certainly that the license was consummated with the Capital theatre, but I was prepared to negotiate with them on a basis that first moneys paid all theatre expenses and advertising expenses, and then the moneys that came in thereafter would be divided between the exhibitor and myself. I did consummate a deal like that with Harry Brandt for his Globe theatre. But
(2351)
with those two exceptions I can't recall where we have any profit licenses or licenses based on exhibitors' contracts.

Q. Is Harry Brandt an independent or an affiliated theatre operator? A. He is an independent. The Capital is a Loew theatre.

Q. And you are only speaking there: in describing that, of one deal and not of the regular course of business? A. No, I am describing one deal or possibly two pictures with Brandt, I don't recollect.

Q. Now, referring to the instances you just mentioned, Mr. Mochrie, did you in making these contracts, differentiate between theatres operated or controlled by integrated companies or other theatres? A No,——

Judge Bright: Why did you make that particular contract with him then?

The Witness: With Brandt?

Judge Bright: Yes.

(2352)

The Witness: I thought that that method would be the best method to give me the most revenue for that particular picture. The other forms of contract that we described, or that we discussed, rather, in my estimate would not have given me as much revenue. It was a matter of trading and negotiation, and I finally arrived on that in my belief that that way for the picture I was selling him I would get the most

rental. He is a very hard trader, and I was trading with him as hard as I could.

By Mr. Leisure:

Q. Does the quality of the picture have anything to do with whether it is licensed percentage or flat? A. Yes, it has a great deal to do with it.

Q. Will you explain that? A. You see, as a general policy I endeavor to sell as many of my pictures on a percentage basis to as many exhibitors as I can. Now, many exhibitors desire to buy the pictures on a flat rental basis, because in their opinion they would pay less in terms for the picture if bought flat than they would pay if bought percentage. So that if I have a successful, desirable picture, I have more chances of securing from this exhibitor a percentage contract than if I have a less successful picture, he opposing the idea of paying percentage at all.

Q. Now, some percentage deals provide that RKO will (2353)

get a certain percentage up to a certain amount and thereafter a different percentage, do they not? A. Yes, sir.

Q. Would you explain that a little more fully, please, sir? A. Yes. If I negotiate, for example, with an exhibitor on the basis of 35 per cent terms, and if I come to him with a picture which in my opinion is much better than the normal A picture, I will say to him, "I believe this picture will gross materially in excess of what your theatre is normally accustomed to gross, and for the amount in excess of what it is normally accustomed to gross your theatre has made very little contribution, and my picture has made the major contribution; that is, it is the quality of my picture that is responsible for that unusually high gross." And so I say to him, "There is a figure at which I should no longer continue to receive 35 per cent but should receive 50 per cent or 65 per cent or perhaps even 70 per cent."

Q. And is this so-called splitting figure in any respect based on the theatre's overhead or operating cost? A. No; it is a negotiated figure.

Mr. Leisure: I would like to offer, if the Court please, at this time in its present form, RKO's license agreement. May I have it marked, please, for identification?

(2354)

(Marked Defendant RKO's Exhibit RKO-10 identification.)

Mr. Leisure: I offer it in evidence.

Mr. Wright: No objection.

(Defendant RKO's Exhibit RKO-10 for identification received in evidence.)

Judge Bright: Does that differ in any respect from the sample copies which are in the Government's appendix?

Mr. Leisure: It is the latest form that we have, your Honor.

Judge Bright: You did not quite answer the question.

Mr. Leisure: Whether it varies from the one that is there, I am not really familiar.

Q. I notice that your present form of license provides, Mr. Mochrie: "If the operating expenses of a theatre is an element in computing the amounts payable to the distributor, the distributor shall have the right to examine such books and records relating to such expenses."

That is in paragraph 2 on the back page.

In how many of your licenses are the operating expenses of the theatre an element of computing the amount payable to RKO? A. I can't think of any with the possible excep-

tion of one or two theatres where our pictures are shown in
(2355)
conjunction with vaudeville and where the terms of the license agreement involve the cost of that vaudeville. In that case I want to be certain of the actual cost of the vaudeville. Other than that I can't think of any instances.

Mr. Wright: If the Court please, I do not think a question like that calls for what he can think of. There is available primary evidence as to what contracts had such terms and what did not; and if this is supposed to be competent proof at all, I would think that that would be the only way it could be made, by the production of at least an analysis of those contracts.

Judge Hand: Have you got such contracts in the case that differ from this?

Mr. Wright: Well, if the Court please, we offered certain contracts between RKO and the defendants which called for percentages and also provide, I believe, certain operating expense deductions. I am not prepared to say just which I think have these figures and which do not; but, in any event, the number of contracts which have those provisions is a matter that is susceptible to mathematical determination by someone in this witness's organization. If they want to examine the contracts and give the result of the examination, that is one thing. But to have the witness just sit here and say what he thinks generally about the thing, I do not see how this is competent.
(2356)

Judge Hand: What about this, Mr. Leisure?

Mr. Leisure: If your Honor please, there are some 100,000 contracts, and I have not asked him about the specific contracts. I have asked him about

anything unusual, and it seems to me the witness can testify to that. Now, if there is any question whatever about it we will make the contracts all available to Mr. Wright.

Judge Hand: I wonder if any of you know whether it adds anything to what is already in the case, because I would rather have you know it than to find it out myself. In other words, I am not interested in varieties of exhibits as an original proposition. You have probably gathered that.

Mr. Leisure: We have offered this as the present form of contract that is being used, your Honor, and I only wanted to call attention to this one provision in it. I will be glad to withdraw it——

Judge Bright: Well, as we are interested in knowing what difference there is, if any.

Mr. Leisure: I know of no difference, your Honor.

Judge Bright: Do you know, Mr. Witness, of any difference in this contract with the one before, this license agreement?

The Witness: No sir, but I would like to add, if I could, to my previous answer; if I qualified my

(2357)

answer I qualified it because, as Mr. Leisure said, we write 100,000 contracts a year, and I cannot swear that every one of those 100,000 contracts is in such and such a manner. But to the very best of my belief, and certainly my policy and my knowledge as general sales manager, we have not any contracts based on operating expenses.

Mr. Davis: May we have the original question that started all this?

(Question referred to read as follows:

"Q. I notice that your present form of license provides, Mr. Mochrie: 'If the operating expenses of a theatre is an element in computing the amounts payable to the distributor, the distributor shall have the right to examine such books and records relating to such expenses.'

"That is in paragraph 2 on the back page.

"In how many of your licenses are the operating expenses of the theatre an element of computing the amount payable to RKO?")

Mr. Wright: I submit, if your Honor please, that question can only be properly answered by someone who has examined the contracts they have made and made a tabulation to show how many there are.

Judge Hand: I think you are right.

Mr. Leisure: If your Honor pleases, I am not asking about any particular contracts; I am asking

(2358)

about a practice that he is familiar with, and he would know if there were any unusual circumstances in which this practice varied; and I do not think it is necessary to burden this Court. Perhaps we have overburdened it with the one contract. To bring 100,000 contracts into this courtroom——

Judge Hand: Well, go on. Do you really want to put this thing in or not?

Mr. Leisure: I would like to have it in, if the Court please.

Judge Hand: Well, I have no clear way of knowing why, but I do not know that it does any harm.

Mr. Leisure: I only attempted to show that we used in very limited cases, this audit right, and having it here in this place, it may be of convenience to the Court.

By Mr. Leisure:

Q. So much for percentage licenses, Mr. Mochrie. When do you use a flat rental for RKO pictures? A. When I can't sell percentage.

Q. And from the standpoint of your company, is a flat rental deal more or less desirable than a percentage deal? A. It is less desirable.

Q. Why? A. First of all—let me express it this way: whether the man pays me a flat rental or whether he pays me a percentage, he, in effect, is paying me some percentage (2359)
of the gross receipts of the engagement. If he pays me $50, $50 will represent some percentage of the gross receipts of the engagement. The reason why he does not wish to pay a percentage, such as 35 or 30 or 40 per cent, is that he feels that in paying me a flat rental he can pay me a lesser percentage than 35 or 30 or 40 per cent——

Mr. Wright: If the Court please——

Mr. Leisure: Just a moment.

Mr. Wright: The witness has just undertaken to state the reason why an exhibitor will not do something. He is not competent to say what reason is in the exhibitor's mind when he refuses to do anything or agrees to do anything.

Mr. Leisure: I think the witness is only stating a negotiation in which he participates.

Judge Hand: Go ahead. We will allow it. But this is getting very long. I wish you would close it up.

Mr. Leisure: We will go right along, your Honor.

The Witness: I had not finished the answer.

Mr. Leisure: Sir?

The Witness: I had not finished the answer.

A. (Continued) Now, that is the first reason I do not like flat rental contracts; and the second reason I do not like

flat rental contracts is that in many instances I may lose, but in no instances can I gain. If the picture involved grosses less money than anticipated, many exhibitors will
(2360)
come to me and ask for a reduction in the flat rental. But if the picture grosses much more than was anticipated, no exhibitor will come to me and offer me an increase in the flat rental. So there is nothing to gain and I have everything to lose.

Q. I assume all your pictures which you license are copyrighted? A. Yes, sir.

Q. The contract form used by RKO states:

> "If no admission price is written into the contract, the exhibitor shall charge not less than 10 cents in the afternoons and 15 cents in the evenings."

—Why is that provision printed in your license agreement? A. Because in our opinion to sell our pictures to the public for lesser admission prices than those admission prices would debase motion picture entertainment and would ultimately harm the exhibitor and harm us.

Q. Do most theatres charge an admission price in excess of 10 cents in the afternoons and 15 cents in the evenings? A. Yes, they do.

Q. In certain instances minimum prices are inserted in your contracts in a space provided for that purpose, are they not? A. Yes, sir.

Q. For what purpose is such a minimum price inserted? A. To maintain our revenue.

Q. Now, in determining whether you will insert a mini-
(2361)
mum admission price in your contract, do you take into consideration whether or not the theatre is an affiliated theatre? A. No, sir, I do not.

Q. And in licensing your pictures for exhibition in theatres affiliated with any defendant, do you agree in the contract, or agree orally, upon the admission price to be charged by subsequent-run theatres? A. No, sir, I do not——

Mr. Wright: The contract speaks for itself, if the Court please.

Judge Hand: Overruled. I think everybody has testified to this.

(2362)

Q. Now, there is a charge of reciprocity dealing between integrated companies in this case, Mr. Mochrie. The other day when Mr. Rathvon was on the stand we offered a chart in evidence purporting to show the lack of reciprocity, Exhibit 9. Judge Goddard pointed out that there did not appear to be much connection between the blue standard representing RKO and the red standard representing the other companies. Do you recall that? A. I have some remembrance of it.

Q. Now, that chart covered only one season. Let me ask you the general question: Have you ever licensed RKO pictures to theatres affiliated with an integrated company on the condition or understanding that that company license its pictures to any RKO theatres? A. Oh, no.

Q. Or on the condition or understanding that that company extend particular terms to any RKO theatre? A. No, sir.

Q. Does the fact that an integrated company licenses its pictures to any of the RKO theatres in any way affect your readiness to license your pictures to theatres affiliated with such an integrated company? A. No, sir.

Q. Or have any bearing on the terms which you will extend to theatres affiliated with such integrated company? A. No, sir.

Q. Mr. Mochrie, do you keep yourself advised of the
(2363)
terms upon which Warner Bros., for example, is licensing its pictures to the various RKO theatres? A. I do not.

Q. Have you ever informed yourself as to the terms that RKO theatres have been paying to Warner Bros., for example, for its pictures? A. I have not.

Q. Could you obtain that information from the RKO theatre department if you wished it? A. I don't know. If I pressed hard enough I suppose that I could, but I am not interested in it. I have got my pictures to sell, and they have got their troubles, and what they pay for Warners', I don't care.

Q. But you say you never have obtained that? A. No, sir, I have not.

Q. And would the same apply to the terms that RKO theatres are paying to the various other integrated companies? A. Apply to the terms they pay for anything or everything. That is their problem, not mine.

Q. Has any representative of the RKO theatre department at any time asked you to license RKO pictures or to extend particular terms on RKO pictures to theatres operated or controlled by another integrated defendant? A. No, sir.

Q. The other day here in court Mr. Wright asked a witness for instances where the distributor had sold its first-run to independent theatres, and that theatre took clear-
(2364)
ance over affiliated houses that played the film on subsequent runs. Does RKO sell any independent first-run theatres that take such clearance over second-run affiliated theatres? A. Many.

Q. Can you give us any example? A. Yes, I can. I can give the example of Buffalo, New York, where we play first-run in the independent Twentieth Century Theatre, and our

pictures play subsequent-run in the Shea theatres. I am not sure whether those are Loew theatres or Paramount theatres. Loew's do the buying.

I can give Oklahoma City as an instance that I mentioned before, where we sell our product first-run to Louis Dent, an independent, and the Cooper subsequent-run theatres, a Paramount affiliate, show our pictures.

I can give you Long Beach, California, as an example where we show our pictures first-run to the independent Milton Arthur, and the Fox subsequent-run theatres show the same pictures after that first-run.

Q. That would be, I think, enough examples, Mr. Mochrie. A. It occurs in many, many instances.

Q. Yes. In the course of the same examination Mr. Wright inquired whether there were any independent first-run accounts where the independent exhibitor operated two or more theatres and on occasion moved a film over from one to the other on a continued first-run. Does RKO license any

(2365)

independent first-run accounts that have theatres in which they move over the better pictures for extended first-runs? A. It does.

Q. Can you give us any example on that? A. Yes. In Portland, Maine, Ralph Snyder, an independent, plays our pictures, and the better pictures he plays first-run at the Strand Theatre with a move-over to the Empire. Mullins & Pinanski, a Paramount affiliate, play the same pictures subsequent-run in Portland.

In Long Beach, California, that I just mentioned, Milton Arthur on a good picture will play it day and date in two theatres, and move it over to a third theatre first-run, and then Fox subsequent-run theatres play the picture.

Q. That will be enough examples, Mr. Mochrie. Are you familiar with the features distributed by RKO during the 1941-42 season? A. Yes, sir.

Q. Was the play-off of the picture Suspicion typical of the results of your highest grossing pictures of that season? A. I would say yes.

Mr. Wright: What season is this?

Mr. Leisure: 1941-42 season.

Q. Was the play-off of Mexican Spitfire's Baby typical of the results of your lower grossing pictures of that season? A. Yes, sir.

(2366)

Q. And would the play-off records of these pictures be typical of the play-off of pictures of equivalent box office quality today? A. I think so, yes.

Q. Now, one more question, Mr. Mochrie, and I shall be through: You have been associated with distributors which have theatres affiliated with them and with distributors that have no theatres, have you not? A. I have.

Q. Based on your own experience, will you tell the Court what in your opinion would be the effect on RKO as a distributor if the company were to cease to operate theatres of its own? A. Yes. I think that if we ceased to operate theatres of our own, distribution would undoubtedly and surely and materially suffer. I have worked for distributors who had no theatres, and I have worked for distributors who had theatres affiliated with them, and I am very certain that the fact that RKO has first-run theatres scattered in these large cities across the country is of definite and material value to me as a distributor and enables me to secure larger revenue than I would otherwise.

Mr. Leisure: Judge Bright, over the noon hour I should like the privilege of checking this contract, and if I find it is similar to the one in evidence, I should like the opportunity to withdraw it, if I may.

Judge Bright: Surely.

Mr. Leisure: Are there any other questions?

Mr. Seymour: I have a couple.

(2367)

Q. Mr. Mochrie, does RKO license pictures to some of the theatre operating companies in which Paramount is interested? A. Yes.

Q. Where it does so license its pictures, do you know where the negotiations for the license are conducted? A. I do.

Q. Where are they conducted? A. They are conducted in the city in which that particular circuit has its offices.

Q. That is, they are conducted in the city where the head office of the theatre operating company is? A. That is correct.

Q. And for example, for United Artists, Detroit, that is Detroit? A. Conducted in Detroit; for Willoughby, it is conducted in Atlanta; for O'Donnell, it is conducted in Dallas, and so on.

Q. Is it conducted by the manager or the operator of that particular company on behalf of that company? A. The manager and/or his chief buyer—his buyer, his booker.

Q. Do you know where the payments for license fees by those companies are made? A. I do.

Q. Are they made by the theatre operating company? A. They are.

Q. That is, each theatre operating company pays for the pictures, the RKO pictures it licenses, is that correct? A. It

(2368)

does.

Q. Are those payments made by the operating companies from their offices? A. They are made from their offices to our particular exchange that serves that particular company.

Q. Do officers or employees of Paramount participate in any way in negotiations between RKO and those theatre operating companies? A. No, sir.

Q. For licensing of RKO pictures? A. No, sir.

By Mr. Proskauer:

Q. You describe your distributing organization, that you operated at an expense, you said, of approximately seven million dollars a year? A. Yes.

Q. Do the other chief defendants here all maintain similar kinds of distributing organizations? A. Yes, they all have exchanges and managers and so on.

Q. And they have salesmen and checkers and all the same kind of machinery that you described? A. Yes.

Q. Why do you have to maintain a large organization like that to sell pictures? A. Because I sell eleven thousand accounts and I have to have a wide-flung organization to sell eleven thousand accounts.

Q. Are the other defendants also trying to sell those eleven thousand accounts? A. Very much.

Q. And you are in absolute, keen, continuous competition all the time to sell those pictures? A. Yes.

(2369)

Q. And it is for that reason that you spend seven million dollars a year to maintain an organization to sell pictures competitively? A. Yes. Can't be done cheaply.

By Mr. Raftery:

Q. You know Abe Montague, don't you, Mr. Mochrie? A. I do.

Q. You have known him a good many years. A. I do.

Q. Do you consider him an able distributor of pictures? A. I think he is a very fine man and a very able distributor.

Q. Who do you think is the best man to decide the policy of Columbia as to the manner and method of selling? A. Of the actual selling?

Q. Yes. A. I would certainly say Abe.

Q. And the same applies to Bill Scully of Universal? A. I would say so.

Q. So your opinions as to the value of trade showing and that type of selling are expressed for RKO and RKO only, isn't that correct? A. That is correct.

Mr. Leisure: Any other questions? (No response.) Your witness, Mr. Wright.

Mr. Wright: If the Court please, there are a number of documents I will have to examine before I complete my cross-examination. If we could have a recess now, I think the whole cross-examination would be shortened.

(2369-A)

Judge Hand: All right. We will adjourn now until ten minutes before two.

(Recess until 1:50 p.m.)

(2370)

AFTERNOON SESSION

Judge Hand: The clerk says there was an exhibit marked 9 for Columbia and it should be 9-A. Is that your understanding?

Mr. Frohlich: Yes.

Judge Hand: Mark it 9-A.

Mr. Leisure: Judge Bright, on this contract, I have checked it over the noon hour and I find that this contract in July of 1945 was streamlined and revised, and the reason that we wanted to offer it at this time was that we thought the questions were im-

portant and, instead of having the questions refer to some prior contract, we felt they should refer to the contract which we actually use. However, I find that the changes in the streamlining did not affect the materiality of the contract for the purposes of this case, and since the record is rather large, I would like to withdraw it, with the Court's permission. The reasons we put it in are the reasons I have explained.

Judge Goddard: That is 10, isn't it?

Judge Bright: Yes.

Mr. Leisure: Your witness, Mr. Wright.

ROBERT MOCHRIE, resumed the stand.

Cross Examination by Mr. Wright:

Q. Mr. Mochrie, the negotiations with the independent exhibitors are generally carried on, are they not, by the sales-
(2371)
men and the branch managers? A. Depends on who it is. Some I carry on, some the division, the district manager, branch manager and the salesmen.

Q. I said generally. A. The small exhibitors, yes.

Q. In those negotiations at any time the salesman or the branch manager always has authority to refuse to take an application, isn't that right? A. Generally, yes.

Q. That is true all the way up the line until a proposed deal gets to you, isn't that right? It may be rejected at any stage but it may only be approved in New York, isn't that right? A. Yes, but if I may, let me explain the answer: Inasmuch as you said up the line. The contract applications go from the branch direct to the home office. They don't go through the district manager.

Q. I see. In this negotiating that goes on between your salesmen or branch managers and the ordinary, independent

exhibitor, there is no set price for each picture or set terms that are demanded or received, isn't that right? A. There is not a set price but there is a policy.

Q. Well, the policy I take it is to see that as many of the pictures in the block are sold as is possible, isn't that right, at the best terms that you can get? A. Not quite.

(2372)

Q. Well— A. The policy is, of course, to sell as many in the block as possible but the different pictures in the block have a policy, which I give to the salesmen, or to my people, as to the general classification of that picture.

Q. Let us take the specific situation where, let us say, the exhibitor might indicate to the salesman that he would like to buy two of the pictures and not the other three. Under those circumstances there might very well be a different price on the two that he wanted than if he bought the entire block, isn't that correct? A. I don't think so, no.

Q. Well, do you know? A. Yes, I do.

Q. What is the fact? A. The fact is this, that I have a policy for each picture of the block each time I release a block and the salesman in negotiating with the exhibitor endeavors to sell the exhibitor the five pictures and describes the rental terms he wishes for each picture. If he is unsuccessful in selling the five and, as you mentioned, ends up in selling three, those prices have been described to the exhibitor, and I believe—I don't sit in on all the salesmen's negotiations, but I say to the best of my ability, I believe—those prices are the same whether—per picture—whether he sells the three or the five.

(2373)

Q. Is there anything in your instructions to the salesman which prevents him from pricing the pictures differently depending on the number which are purchased in his negotiations? Is he bound in all circumstances to say, "Now, here is a 35 per cent picture. If you want this alone you

can have it for 35 per cent regardless of whether you take any more"? A. I think generally he would sell it that way.

Q. Well, that was not my question as to what you thought he would do. I am asking you what your instructions are. A. I have no instructions one way or the other. I describe a picture as a 35 per cent picture, and if he obtains 35 per cent terms for it we will approve the contract.

Q. As far as any instructions he gets from you, or any binding directions as to what the policy should be, he is perfectly free, is he not, to use such bargaining devices as he can to get that entire block sold, isn't that right? A. Certainly he is free to bargain as best he can; certainly he is free.

Q. In any event, the terms that you come up with on any particular deal that you make, I suppose is dependent ultimately on the bargaining strength of the parties involved, whoever they may be? A. Or the bargaining skill.

(2874)

Q. Yes. Now, I think you gave some direct testimony about not making agreements where you split profits. I will show you this Government's Exhibit 255, an agreement between your company and United Detroit Theatres for first-run exhibition of a picture in the Michigan; and I will ask you to read to the Court there the terms that you see at the top as to how the first-run rental is to be computed. A. It says: "Bride By Mistake, Michigan Theatre 30 per cent of gross receipts to 20,867 and 50 per cent of gross receipts thereafter."

Q. Then there is a further note, isn't there, about reversion? A. I beg pardon?

Q. Isn't there another line there about reversion to 25? A. Yes, sir. "If gross is less than 20,867 terms revert to 25 per cent."

Q. Now, that figure 20,867 is what you refererd to in your direct examination as a splitting figure, isn't it? A. It is indeed.

Q. Which you said is a matter of negotiation? A. Yes, sir.

Q. Now, just how is that splitting figure negotiated? A. I will tell you, because when I first occupied my job I negotiated several pictures with Earl Hudson who operates the Michigan Theatre, and so I know. I asked him for 35 per cent terms and was unable to obtain them, and he would not

(2375)

give me more than 30 per cent, but he said he would give me a split, and he said he would give me a split of 23 or 24 thousand dollars, and I asked for a lower split. I said with my knowledge of the grosses that this theatre has, that is too high a split entirely. However, we bickered around, and he said, "I will give you 20,867." I still wanted a lower one and could not obtain it, and I took the 20,867.

Q. As a matter of fact, that figure 20,867 is a figure at which you and he knew that the theatre there would be unable to earn a certain profit, isn't that correct? A. No, sir.

Q. You say it is not a fact that when you negotiate a split figure you attempt to determine the figure with some relation to what profit the theatre will earn when that gross has been reached? A. My attempt, Mr. Wright, is to get as low a split figure as possible. The theatre's attempt is to get as high a split figure as possible. The theatre man on many occasions says, "I cannot give you such and such a split figure because I do not have much profit. My overhead is too high. I cannot afford to give it to you."

But he says that to me. I do not know anything about the man's overhead; and if you will excuse me for saying so, in most instances I place very little reliance in his statement

(2376)

as to that. He is trading with me to get it high and I am trading to get it low.

Q. Well, in the course of your experience you have made it a point, have you not, to have a pretty accurate idea of how much a theatre has to gross on any business it does in order to make a profit? A. I have no source of information. I do not know how much it costs him to operate his theatre. I guess. I guess in the same sense that I would guess how much this courthouse costs.

Q. You make no effort to determine what the gross figure is which enables him to make a profit when you negotiate a split figure, is that right?

The Witness: Will you please repeat that?

Mr. Wright: Will you read it.

Q. (Read.) A. Of course not. I do not have to worry about that. He will take care of his own profit.

Q. I will show you this Exhibit 258, relating, I believe, to the exhibition of your pictures in some Fox theatres, and ask you to read to the Court the provision in the lefthand column there as to how the rental terms are to be computed.

Mr. Seymour: May we see that, Mr. Wright?

Mr. Wright: When he gets through with it.

A. You mean "20 per cent to 40 per cent plus 50 per cent in excess of 40 per cent sliding scale"?

(2377)

Q. Yes. Now, just how do you go about determining the actual rental under that formula? A. I am not certain but I think the 20 per cent to 40 per cent refers to a sliding scale. That is, if the picture grosses so much it pays 20 per cent. If it grosses more it pays 21 per cent, 22 per cent, and so on up to 40 per cent. And then I think that at the

40 per cent figure, if it grosses in excess of that, we shall receive 50 per cent of the moneys in excess of that figure.

Q. In other words, you have there a whole series of split figures, isn't that correct? A. You have what is commonly termed a sliding scale.

Q. And that sliding scale, I say, is in effect the use of a series of split figures or controlled figures? A. It is a series of figures after each of which the distributor shall receive a higher percentage rate.

Q. Now, is it also your testimony that in negotiating split figures and sliding scale deals of that kind, you make no attempt to determine what the profit of the exhibitor would be at the various sliding scale points? A. I would like to be able to say a plain no to you, Mr. Wright. If you will permit me I will tell you about it. I am somewhat familiar with this because the Fox affiliate or the Fox section here presented us with this type of deal two or three years ago. They stated that they would purchase my pic-
(2378)
tures on this formula, and although we were reluctant—specifically I was reluctant—to accept it immediately, I studied the formula that they presented me for each of these situations against the gross receipts that my picture had done in the past to determine whether in my opinion this was an advantageous formula. When I found that it was, and after I endeavored as a trader to obtain lower figures but was unsuccessful, I then said I would go ahead on that deal.

Judge Bright: Let me see that, will you, please.

The Witness: Yes, sir (handing).

Q. Then in each case you, of course, use whatever past experience your company has as to the expenses and profit possibilities of the theatre in negotiating the deals, isn't that right? A. I have no past experience as to expenses. The

only past experience I have is with the gross box office receipts of the theatre.

Q. Now, is it your testimony that RKO has never in the past negotiated license deals with theatres of another defendant in this case which were made expressly dependent upon the determination of house expenses? A. I stated, or I intended to state, and so state, that RKO does not negotiate deals in general based upon house expenses of the exhibitor.

Mr. Wright: Now, if you will just listen to the (2379)
question and see if you can answer it.

Q. (Read.)

The Witness: I do not recollect that that was my testimony——

Mr. Leisure: I submit the answer is responsive.

The Witness: —it may have been. I do not recollect that that was my testimony.

Q. Well, in any event, where you had negotiated such deals, or if it appears that you had negotiated deals in the past where the house expense has been revealed to you, then you have a pretty definite idea in negotiating any subsequent deal as to at what point the theatre will earn a profit, isn't that right, the gross figure? A. If the exhibitor revealed to me his house expenses I would have his word for it. I cannot recollect any instance where I have audited or caused to be audited his expenses to determine what they actually were.

Q. Well, you don't know, do you, as you sit there the extent to which RKO has in the past made the deals with any of these other defendants which involved a disclosure of house expenses as well as gross receipts? A. I know for the period of my incumbency in the job I now have, yes. I know that they have not.

Q. That is since what date? A. That is since the summer of 1942.

Q. You don't know about the prior deals? A. No, sir.

(2380)

Q. Calling your attention to your testimony about these independent producers you distribute for, which were the ones who have the right of license contract approval? A. In the season of 1943-44, Disney and Goldwyn. Since then we have acquired for distribution the pictures of International, so in the following season all three, Disney, Goldwyn and International.

Q. Perhaps I misunderstood you. I thought you said the picture "Lady Takes a Chance" was an International picture. A. No, sir, I did not.

Q. Did you— A. If I did say it, I beg your pardon, I had no intention of saying it.

Q. That was one of your own? A. No, sir, that was an independently-produced picture.

Q. It was an independently-produced picture, but one in which the producer did not have any right of approval or rejection of contracts? A. That is correct.

Q. What were the Goldwyn pictures that you said were played in the Rialto, the independent first-run in Atlanta there, instead of in the Lucas & Jenkins houses, where the rest of the RKO product played? A. Wonder Man, the most recent Goldwyn release; Princess and the Pirate; North Star; Up In Arms; Pride of the Yankees, I believe, and, I think, Ball of Fire, but I am not quite certain—that was released three or four years ago and I do not quite—

(2381)

Q. What was the first one that went in there? That is what I am trying to get at. A. I would say either Ball of Fire or Pride of the Yankees.

Q. That was during what season? A. Pride of the Yankees, I believe, was in the season 1942-43, and I am not

sure as to whether Ball of Fire was in that season or the preceding season.

Q. If I understand you correctly as to the relation between Goldwyn and yourself, the decision to play those pictures in the Rialto and not in the houses of the Paramount affiliate was Goldwyn's and not yours, isn't that correct? A. The initiation of playing the pictures in that Rialto Theatre was my own, following Goldwyn's refusal or statement that the revenue he obtained from Lucas & Jenkins was unsatisfactory, and he wished me to find another customer than Lucas & Jenkins. When he stated that he was entirely dissatisfied with Lucas & Jenkins as a customer and wished me to find another customer, I then came up with the Rialto.

Q. The Rialto then played the pictures and paid him for those first-runs much greater rentals than he had ever gotten out of the first-runs in the Paramount affiliated houses, isn't that right? A. It paid him greater rentals. I don't recollect how much greater, but I am certain they were greater.

Q. I understood you said, as to the RKO, the rest of the

(2382)

RKO product, you had no negotiations with the operator of the Rialto for first-run on any of those pictures, correct? A. I believe I have had none, but I am not certain whether my district manager has had any or not.

Q. And I think you said on your direct examination that you knew that he did not have enough playing time to give you any more money on any other RKO pictures than you were already getting, isn't that right? A. No. I said that he did not have enough playing time to make room for my pictures.

Q. Do you mean by that make room for all your pictures? A. I testified as to that. To repeat what I——

Q. As a matter of fact, the first-runs of the Paramount affiliate there do not give all your pictures first-run in one of their downtown houses, do they? A. No.

Q. And didn't during that season? A. No, and probably won't next season or any other season, because the first-run Atlanta is single feature, and I have some inexpensive B pictures that I do not believe that that type of theatre can afford to play first-run, and I don't much expect they will play first-run.

Q. Do you want to be understood as saying that you knew without any negotiations with the Rialto that the Rialto could not give you as much first-run playing time as the Paramount affiliates? A. I will go even further. I will say

(2383)

that they cannot give anything compared to the playing time I get from Lucas & Jenkins.

Q. And that is without having discussed with the Rialto people what playing time might be available to you and on what terms? A. Yes, sir, but I would like permission to go further with that answer. I distributed, as I testified this morning, United Artists pictures as Southern district manager and had my headquarters in Atlanta and was—and am very familiar indeed with the Rialto Theatre, and on numerous occasions, as United Artists district manager in Atlanta I tried to place pictures in the Rialto Theatre, screened them for the exhibitor, who is blind, but has a very keen sense of hearing and judges a picture by sound, and have been unsuccessful in selling him the pictures. I am very certain that the Rialto Theatre would not play a minor picture of mine any more than the Music Hall in New York would play a minor picture.

Q. I was not talking about minor pictures. I am talking about your top pictures. A. I have answered——

Q. Suitable for first-run exhibition. A. I have answered the top pictures by saying the Rialto does not have sufficient playing time to accommodate those top pictures.

Q. You determine that by observing the fact that the only first-run product that the Rialto had, in addition to the Goldwyn pictures, is product of Columbia, is that right? (2384)

A. Yes, indeed; and it is perfectly obvious to any picture man or film man that if a Goldwyn picture can run five weeks in the Rialto Theatre and the Rialto Theatre has all of the Columbia product under contract, that that Rialto Theatre has no open time for other pictures.

Q. How many pictures of RKO's, as compared to Columbia for that 1943-44 season, would you say were suitable for first-run exhibition, really top pictures? A. Suitable where?

Q. Well, that represent the first-run exhibition in Atlanta, let us say. A. To answer accurately, I would have to have a list of the pictures of both companies in front of me, but, offhand, for the season 1943-44, and eliminating the Goldwyn pictures, I would state roughly, or feel roughly, that it would be a standoff, that our product had about as much quality pictures in it as Columbia did.

Q. About how many of yours did you get exhibited first-run in Atlanta at the Paramount affiliates there? A. I would have to look up the figure. I can't recollect.

Q. Can you give us any rough idea, five, ten? A. I would have to look it up, but I am sure that it is a reasonable number.

Q. You cannot tell us what it is, whether five, ten, fifteen or twenty? A. No, I cannot. It is one of hundreds of accounts, and I can't remember what happened to my pictures (2385)

in the season 1943-44 in all the first-run accounts.

Q. Do you remember whether you sold that first Goldwyn picture that went into the Rialto for subsequent-run to Lucas & Jenkins? A. No, I do not.

Q. You say you don't know whether you did or not? A. I beg your pardon. I know that the course of the Goldwyn

pictures in that instance was this: The picture, the first picture, that I sold the Rialto Theatre, first-run Atlanta, I was unable to sell Lucas & Jenkins in any situation, so that would include their subsequent-runs, and it may be the second picture, but I do know that somewheres along the line I sell—now sell Lucas & Jenkins the Goldwyn pictures for their situations with the exception of the Rialto Theatre Atlanta first-run and with the exception of an indendent to whom I sell the Goldwyn pictures in Savannah and in Macon.

Q. That has only been true within the last year, has it not? A. I can't say, Mr. Wright. It wasn't true at the start. It is true now. Somewhere in between it became true.

Q. On this matter of how many times one of your first-run accounts plays a picture before it becomes available to subsequent-runs, I suppose that is almost always determined, is it not, by contract terms? A. Did you say how many

(2386)

times?

Q. Yes, as to the number of times that your prior run exhibitor may show the picture before it becomes available to a subsequent-run competitor, I suppose that is ordinarily a matter which is determined by whatever terms are written into your contract with the first-run exhibitor, isn't that right? A. I believe he shows it only for what I call one showing. He shows it for one first-run showing. He does not bring it back again.

Q. You have heard of situations, have you not, where your first-run account has the privilege of bringing back a picture he plays first-run and then repeating it before it is made available to a subsequent-run? A. I don't want to give incorrect testimony but I do not think I have heard of that, no.

Q. You have never heard of a situation, for example, where your first-run account has played a picture first-run for three days at a 35-cent admission and then brought it back later for a week's run at another theatre at a 15-cent

admission? Ever hear of that situation? A. I have not, no. I recall that we have sold some pictures to an independent opposition in the Saenger towns in Mississippi and Louisiana where we wrote contracts with the independent theatre wherein he agreed to play the picture one—the first engagement for so many days, and then he agreed to repeat the pic-
(2387)
ture within a two or three months period, again for so many days. Other than that, I cannot recall selling a picture to a first-run account wherein he had the privilege such as you just described.

Q. In any event, where you do give him the privilege, if the contract does give him the privilege of bringing the picture back and it contains no minimum admission price restrictions, there is, of course, nothing to prevent him from bringing it back and playing it at a longer time at a low admission price, is there?

Mr. Leisure: Just a moment.

A. I say, I don't recall any such contract.

Q. You are quite sure you never had such a situation brought to your attention? A. I would not swear to such a thing. As I said this morning, my company handled too many hundreds of thousands of contracts over a period of years for me to be certain of every one of those contracts, but, to the best of my belief, I cannot recall such a type of contract. I would not write it.

Q. Let me call your attention specifically to a situation in which you were involved, Macon, Georgia. Do you recall that? A. I recall that the Goldwyn pictures were sold in Macon, Georgia.

Q. You recall that Lucas & Jenkins operates the first-run theatres there in Macon? A. Yes, sir, I do.

(2388)

Q. And you recall there was a theatre there named the Bibb Theatre? A. That I am not certain of, but I recall there is an independent exhibitor there.

Q. And you recall that that exhibitor complained to you that he could not find out from you when your pictures were going to be available to him after Lucas & Jenkins got through with them, isn't that right? A. I don't recall that.

Q. Don't you know, as a matter of fact, that he complained specifically to you about the fact that Lucas & Jenkins had taken one of your top pictures and played it first-run for three days and then later brought it back and played it for a week at 15 cents, the same price that he was charging for subsequent-run product? A. No, sir, I do not, but I do have a recollection of an interval in first-run with that account. The account's name is Mrs. Weiss. And I recall selling her a Goldwyn picture first-run Macon, Georgia, and her refusal to play that picture for a reasonable number of subsequent days, stating that she had in the middle of the week either bank night or a stage attraction or something of that nature, and that she did not wish to play the Goldwyn picture with this already profitable change, and I finally agreed with her, that she could play first-run Macon, Georgia, the Goldwyn picture for so many days, then stop playing it and then continue playing it after that inter-

(2389)

val. That is about all the recollection I have there.

Mr. Wright: Mark these with the next plaintiff's numbers.

(Marked Government's Exhibit 388 for identification and 389 for identification.)

Q. I show you this Exhibit 389 for identification and ask you if you recognize that as a letter signed by you, dated August 6, 1940?

Mr. Leisure: Have you a copy of that, Mr. Wright?

Mr. Wright: No, we have not.

A. I do. I don't recollect it. I acknowledge it.

Q. Will you look at this copy marked Exhibit 388 for identification and see if you recognize that as the letter that you replied to by 389? A. I don't recollect the letter; I mean, I am not able to say whether this letter or another letter was received by me. I do acknowledge this letter as having been sent by me.

(2390)

Q. Well, read it and see if it refreshes your recollection as to what was occurring down there at Macon at that time? A. (Reading.) No, sir, I do not.

Mr. Wright: That 388 is a copy and obviously not admissable if the absence of a failure to produce the original on the part of RKO, and not having served them with a notice, I shall not offer it at this time.

Mr. Leisure: You have not offered it yet, have you, Mr. Wright?

Mr. Wright: No. I say I am not offering it because it is plainly a copy. I am asking you to produce the original.

Mr. Leisure: We make no point about the original. May I just ask the witness a question, Judge Hand?

Judge Hand: Yes.

Redirect Examination by Mr. Leisure:

Q. Mr. Mochrie, did you receive this letter? A. I do not recollect having received it.

Mr. Leisure: Could we make a search and get the original if there is one, Mr. Wright?

Mr. Wright: Surely.

The Witness: Mr. Leisure, I receive hundreds of letters a week, year in and year out, and I cannot remember receiving it, but the letter sent is obviously my letter.

Mr. Leisure: You see, your Honors, this is not a signed letter. It is a typewritten letter, and I would (2391) just like to make a search for the original.

Mr. Wright: I think we have nothing further with the witness at this time.

Judge Bright: Mr. Mochrie, in this Exhibit 258 to which you have already referred, you give the terms 20 per cent to 40 per cent plus 50 per cent in excess of 40 per cent. Then there are the words "Sliding scale S, B. Min is S. B. or D. B." What does that mean?

The Witness: I noticed that. I do not recollect, your Honor.

Mr. Wright: It is a single bill or double bill.

The Witness: Maybe someone would help me.

Judge Bright: He says single bill or double bill.

Mr. Wright: Is that what it is Mr. Mochrie?

The Witness: That is what it probably is. I am sure that would mean sliding scale, single bill, minimum is—oh—sliding scale, single bill, minimum is single bill or double bill. I think that last line means that we shall not receive less than twenty per cent, whether our picture was played alone or in conjunction with another picture. That is, minimum is single bill or double bill. I have tried to make that as clear as I can.

Mr. Seymour: Have you any further questions? I have a couple.

Mr. Leisure: I have no questions.

(2392)

Recross Examination by Mr. Seymour:

Q. In connection with the questions advanced this morning, Mr. Mochrie, about the exhibition of first-run I should like you to deal with that a little further: Is a first-run extended on all pictures? A. I have tried to make clear that I do not really know what you mean by extending a first-run. Poorer pictures run a short length of time first-run, and better pictures run a longer period of time first-run, because better pictures gross more in the theatres, and hence the theatre, whatever theatre it be, will run it longer because it grosses more money.

Q. So that there are a number of pictures which run a fixed number of days in accordance with the theatre's policy, and then in the run of that picture I suppose the subsequent run exhibitors know when that stops? A. Yes, indeed.

Q. And then there are some very successful pictures that play a more extended first-run, is that right; that is, a longer first-run? A. Will you permit me to say a little on this whole thing?

Q. Yes, indeed. A. Many contracts first-run, whoever the first-run may be, provide for a hold-over figure which I described this morning. That is, if the business for the first several days of, let us say, the week's engagement exceeds a certain amount, the theatre agrees that it shall play for

(2393)

a second week; or if it does that for a second week, the third week. There are not many cities in the United States that run pictures three, four, five or six weeks. There is a limited number of large cities which can do that. But it is customary in those large cities to have such agreements dependent upon the business the picture does.

Now then, the distributor likes that not only for the revenue which he receives through those additional weeks, but because by reason of the playing of additional weeks the

picture is very thoroughly advertised in that area, which the subsequent runs benefit by, which they do not pay for but which they benefit by; so that those subsequent runs know that if an excellent picture of mine runs in this large city four or five weeks, they know that that picture will do excellent business for them because of the large extent of the advertising such a picture has received during that period of time.

Q. Now, generally speaking, the subsequent runs in those cities play pictures for a shorter time than the first-runs, isn't that so? A. Oh, in all cities, of course.

Q. But aren't there some pictures of high quality and high box office success which are played longer by second and subsequent runs than their normal pictures? A. Oh, yes; you do not have to go any further than New York. A very fine picture of mine will play RKO subsequent run (2394)
theatres for a week, a less fine picture will play five days, and a poor picture will play two days.

Q. How about the runs after the second? A. The same thing applies.

Q. So if the picture is a success, first-run or later run, it will play longer than the average picture? A. The same thing applies more or less to all theatres in the United States, whether they be subsequent run or first run or what not. The bigger the gross by reason of the importance of the picture, the longer the theatre will show that picture.

Q. Now, how does the second run operate, the exhibitor? A. I beg your pardon?

Q. How does the second-run exhibitor ascertain when the picture will be available to his theatre, and when does he ascertain it with reference to the termination of the first-run? A. I will tell you: in any city, numerous pictures from numerous theatres come off of first-run; they complete their first-run. Now in the interval between their completion of

the first-run and the start of the subsequent runs, which is not singular but plural, many subsequent runs, in that interval, which is called the clearance interval there is a pool of pictures from which that subsequent run exhibitor can specify which pictures he shall play and when he shall play them.

(2395)

Q. By a pool, you mean that each exchange of each distributor has some pictures—— A. No, no. I used the pool as —it is a group of pictures.

Q. Mr. Wright uses it invidiously. A. I did not use it in any legal way. I use it as a group of pictures into which he can almost dip his hand and pick out that which will suit him best to run. Now, the size of that group or pool of pictures varies in various cities. For example, here in New York, in our own RKO circuit, sometimes I have to wait for a play date because our RKO theatres have numerous pictures available to them to play, and they choose to play someone else's before mine, and I wait; or they choose to play mine, and the other pictures wait. It is so in all cities.

Q. Does the subsequent run exhibitor receive from the exchange any notice of the availability of these pictures to it? A. Oh, yes. My exchange, of course, sends out availability notices. I do not know—I mean I don't know other exchanges' business, but it is trade practice. I am sure they do the same.

Q. So far as you know, the exchanges of other distributors do the same thing? A. Of course they would.

Q. So the exhibitor has a number of notices of availability on a number of different pictures from different distributors from which to choose? A. That is what I meant when I said

(2396)

he has a pool of pictures from which to choose.

Q. Is a subsequent-run exhibitor, be he second run or later, ever left high and dry—that is, without a picture—as

the result of the fact that a prior run plays a picture somewhat longer than is its normal practice? A. Oh, no, because while one prior run is playing a picture longer by reason of its great success, another prior run or several prior runs are throwing off less successful pictures which are becoming available to subsequent run. I never heard of a subsequent run dark house. I never heard of a subsequent run that does not have pictures from which to select.

Q. Normally, when does a subsequent run begin to advertise, by newspaper advertising and display advertising at the theatre, and trailer advertising in the theatre, the fact that a picture is coming to that theatre? A. After the termination of the first-run. You see there is that period of time which is clearance. The fact is, probably, that is one reason for clearance. There is that period of time in which the subsequent run, following the termination of the first-run, advertises the picture as coming to his theatre, he having selected that picture, the particular one, from the group of those available.

Q. And during that period he is able to take whatever steps he wants in order to assure public interest in connec-
(2397)
tion with that picture? A. Yes. And I think that that advertising is one reason he likes to follow a picture that runs a long time. He receives all of that free advertising of the picture itself. It is not advertised as coming to his theatre, but the picture itself is advertised to the people of that community.

Q. Just one or two other questions that I neglected to ask before. When RKO licenses pictures to the Butterfield company, with whom does it deal? A. Ed Beatty.

Q. Does RKO ever deal with Publix for pictures with the Publix theatres? A. No. Ed Beatty or his assistant licenses all pictures.

Q. In Detroit? A. I beg pardon?

Q. In Detroit? A. Yes, he has offices in Detroit.

Mr. Seymour: That it all.

By Judge Goddard:

Q. How is that group determined? Is it one of a block of five, or less than five? How does he know what group he is going to get his pictures from? A. I will tell you, sir. It is the pictures which come off of the various competing first-run theatres that have finished their engagements. I would illustrate here in New York. This week in New York City a picture may finish first-run from the Paramount, the Roxy, the Capitol, the Globe, the Rialto, or what not. I do not say they have finished, but I say that whole group of

(2398)

pictures finishes the competing first runs. And then the second run chooses which picture, if it has not already got it under contract, it shall contract for a run. But he has that group of pictures to choose from, not a group from one distributor, but a group from many distributors, and from many first-run theatres. I have tried to make it clear to your Honor. Perhaps my language is not as clear as it should be.

Q. It is not one of the five, not one of the group of five, or what? You say he may select any distributor's pictures. But how do you know he has a contract with another distributor? A. Oh, I don't know he has.

Q. How does he get the pictures if he has no contract? A. Places it under contract.

Q. Makes a new contract at that time? A. Makes a contract for the first time for the picture. Let me illustrate, if I may, sir. Let me illustrate the City of Detroit: the picture may finish this week playing the Michigan theatre first-run. That picture may be my picture, an RKO picture. A picture may finish the same week playing the Fox theatre first-run. That may be a Fox picture. A picture may finish

playing the United Artists theatre this week first-run. That may be a Metro picture. A picture may finish playing first-
(2399)
run at the State Lake theatre this week. That may be a Paramount picture. And a picture may finish playing the Downtown theatre first-run, and that may be a Republic picture. Now there are five pictures, sir, that have finished first-run. Now the subsequent run can choose to put under contract whatever of those five pictures he chooses to. He may choose mine and not choose the Metro or the Fox, or he may choose the Fox, because he thinks it is better than mine, and not choose mine. Sometimes I do not obtain from him a second run or a third run because my quality can't compete with the other fellow's, and the same thing happens to the other fellow.

Q. I still do not see by what right he can say "I will take this picture from Paramount" when he is your customer, unless you have an agreement with Paramount, or something of that sort. A. Oh, he is a free agent. He buys whatever picture he chooses to buy, the same as you would buy whatever suit of clothes you choose to buy.

Q. How is he assured he is going to get the picture? A. It is there for him. If he does not use it, who is going to use it?
(2400)

Mr. Seymour: Let me see if I can ask another question that will approach that matter from a little different angle and perhaps bring out what Judge Goddard has asked.

By Mr. Seymour:

Q. The ordinary second or subsequent-run theatre in New York uses approximately how many pictures a year? A. The ordinary second-run theatre in New York?

Q. Second and subsequent-run. A. Well, the ordinary second-run theatre in New York would probably use two pictures a week, being double feature.

Q. That is 104 a year? A. 104 pictures a year.

Q. Those are features? A. Those are feature pictures.

Q. Now, I suppose the number the subsequent-run uses varies. Can you state any average that an average subsequent-run theatre in New York would use? Would it be twice that number? A. Yes, it could be.

Q. There are many subsequent-run theatres in New York which change their programs twice a week? A. Yes.

Q. And sometimes they change them three times a week? A. Yes.

Q. And many that have double features? A. Yes, sir.

Q. And if they change their programs twice a week they would require 208 pictures a year? A. They would require four times 52, which is 208.

(2401)

Q. And if they change their programs three times a week they would require over 300? A. 6 times 52, which is 312.

Q. Now, how many pictures does any one distributor,—how many feature pictures does any one distributor make available in the course of a year? A. Well, I make available, as I testified this morning,—last year I made available 22 of my own and eight independents. I made available a total of 30 in a year.

Q. I think there is testimony here that Paramount in the last season made available something like 29 and other distributors make available somewhat similar numbers. A. Yes, they run about that.

Q. And some more? A. From 20 to perhaps 40.

Q. So in order to supply the needs of a second-run exhibitor or a subsequent-run exhibitor in New York, it is necessary for that exhibitor to contract with a number of distributors, is it not? A. Oh yes, of course.

Q. And he could not possibly obtain his supply of product from even any one, two, three or four distributors? A. That applies to the many, or, in fact, most of the subsequent-run theatres of America. They consume, most of those theatres, from a minimum—and there are not so many which use only 104—up to 312, and it might be a higher number. There
(2402)
might be some late runs which change every other day and bring back a lot of reissue pictures mixed in with new pictures.

Q. So that most of the subsequent-run exhibitors contract for the product of a number of distributors? A. Yes.

Q. And are free to make any choice they wish among the pictures made available to them by the procedure you have already mentioned? A. Yes, sir.

Q. So that a subsequent-run exhibitor—with particular reference to Judge Goddard's questions—might at the same time have under contract in order to supply his theatre for a particular week pictures of six different distributors; isn't that so? A. That is correct.

Q. And he might have bought a block of five or licensed a block of five from one distributor and perhaps from another in order to supply his theatre for a particular month? A. Oh, yes.

By Mr. Raftery:

Q. And he may have bought all the product of Universal and Columbia to fill the entire time if there should be a lapse? A. That is correct.

Q. That is one of the reasons Universal and Columbia are able to sell their entire program in advance to take care of the needs of these exhibitors, isn't that right? A. Yes, sir, it is.
(2403)

Mr. Seymour: I just want to ask you one more question.

By Mr. Seymour:

Q. Mr. Mochrie, the exhibitor has a so-called booking book on which he indicates when he would like to play these pictures, and communicates with the exchange and arranges to play them that way, subject to the arrangements with the exchanges, is that right? A. Yes, he does.

Q. With the various exchanges? A. Yes, he does.

Recross Examination by Mr. Proskauer:

Q. I would like to ask you just a question or two more about these longer first-runs: Does the subsequent-run exhibitor prefer the picture which has a longer first-run over the one that has a shorter first-run? A. I stated that before.

Mr. Wright: If the Court please, he is not competent to answer that question.

Judge Hand: I think he has been over it.

Q. When I say "does he prefer," I mean is it your experience in the trade that that is more eagerly sought after by the subsequent-run? A. He has found from experience that it will gross more business for him, and certainly he wants it.

Q. Now, he suffers for that the impossible inconvenience (2404)
of not knowing the exact date on which he is going to get that picture? A. I don't think he suffers at all. I think he is very glad to have a picture like that available to him.

Q. I used the wrong word——

Judge Hand: Yes.

Q. —but I am glad I used it because you have corrected me quite forcibly. A. I beg your pardon, sir; I did not mean to.

Q. I thank you. You do not owe me any apology. Now, as a matter of fact, he gets a notice of availability which is a regular form that goes out, doesn't it, as to when this picture is going to be available on this second-run? A. He does from me, yes.

Q. You know enough about the way other people do business to know that that is quite the general practice in the trade? A. Every company I have worked for has practiced it.

Q. So well in advance of the time this picture is going to become available to him he gets a notice that the picture is going to be available? A. Yes, he does.

Q. And then he gauges his trailers or his advertising on that notice of availability? A. That is correct.

Q. And meanwhile he has a general program for his theatre, as you have described? A. He does all that during (2405)
the clearance interval between the first-run and himself.

Mr. Proskauer: That is all.

Mr. Leisure: That is all, Mr. Mochrie.

Mr. Leisure: If your Honors please, that completes the witnesses that we are going to call from the industry. Mr. Wright has been good enough to stipulate with me the testimony of the head of our production department, so that we have not had to bring him here from California, and that will save considerable time, and at the appropriate time I would like the privilege of offering that affidavit.

We have a short accounting witness on some statistics, which I am going to ask my associate Mr. Whittlesey to examine on, but that will be very short.

JAMES D. MILLER, called as a witness on behalf of the RKO defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Whittlesey:

Q. Mr. Miller, where do you live? A. Bronxville, New York.

Q. What is your occupation? A. I am a certified public accountant.

Q. Are you the senior partner of James D. Miller & Com- (2406)
pany, certified public accountants? A. I am.

Q. Is your firm regularly employed by any company which is a defendant in this case? A. No.

Q. Was your firm retained by Radio-Keith-Orpheum Corporation to examine certain books and records in connection with the present case? A. Yes.

Q. Have you been in charge of that work? A. I have.

Q. In this connection did you make an examination of certain records to determine in what theatres each of the defendants in this case had some direct or indirect interest? A. Yes, I did.

Q. Will you tell us just what those records were?

Mr. Davis: May I hear the last question?

(Question read.)

Q. (Continuing.) Will you just tell us what those records were? A. They were lists of theatres compiled by each of the five producer-exhibitor defendants.

Mr. Proskauer: We cannot hear you, Mr. Miller. Will you please raise your voice.

A. (Continuing.) They were lists prepared by each of the five producer-exhibitor defendants that were submitted

to the Government. We got copies of them and worked from those copies.

Mr. Wright: If he is referring to exhibits in evidence, can't you tie them up so we will know what

(2407)

he is talking about?

Mr. Whittlesey: I do not know the exhibit numbers of all those lists, but the witness has just testified he used copies of the lists which each of these defendants turned over to the Government. If you will let me go a little further, I think we can develop this to your satisfaction.

Mr. Wright: All right.

Q. Using those copies of those lists which the various companies turned over to the Government, showing their theatre interests, did you prepare a composite list from all those five? Must have been five lists, isn't that so? A. Yes.

Q. And have you that composite list with you here? A. I have.

Q. May I have it? A. (Witness hands to Mr. Whittlesey.)

Mr. Whittlesey: I would like to have this marked.

(Marked Defendant RKO's Exhibit RKO-11 for identification.)

Judge Hand: Has Mr. Wright seen this thing, and does he dispute its correctness?

Mr. Whittlesey: No, Mr. Wright hasn't seen it, your Honor. I am going to offer it after it has been described a little more fully. I am trying to have it brought out now just exactly what we have here.

(2408)

Q. Mr. Miller, will you tell us what this list shows in some detail? A. Yes. It lists alphabetically by states and

by cities all the theatres in which any of these five producer-exhibitor-defendants have any interest.

Q. As shown by the copies of lists which I gave you, is that correct? A. It lists every theatre that is shown on those lists, and it shows also the seating capacity of those theatres, and it shows which one of these defendants has an interest in that theatre.

Q. Does it show, after the name of the theatre, anything as to the extent of the defendant's interest? First let me ask you this: Does it show, after the name of the theatre, anything to indicate which defendant or defendants have an interest in the theatre? A. Yes, it shows which defendant and the degree of interest.

Q. Will you tell me just what it shows as to the degree of interest? A. The degree of interest is the degree of interest which was set forth on these lists of theatres which we have received. There were only two of those lists that showed that degree of interest. That was RKO and Paramount.

Q. In other words, there are some cases where the degree of interest was not shown at all? A. That is right.

Q. You have the degree of interest on your list there, have you not? A. Yes, we have.

(2409)

Q. I would just like to come to that in a moment, but before doing so, perhaps you can answer this question: Are you familiar with a somewhat similar type of list which the Government prepared and set forth in Appendix A to its trial brief? A. Yes, I am.

Q. Can you tell us briefly how the list which you have here compares with the list which the Government set forth of theatre interests in its trial brief? A. Generally, it is in conformity. We show 20 theatres more in total than the Government list. As a matter of fact, our total is 32 greater. There are some clerical errors in the Government list that accounts for a difference of 12.

Q. In other words, the Government did not add up their theatres quite exactly on that list? A. That is correct, and, in addition to that, we have 20 more theatres.

Mr. Wright: What is the Government list referred to?

Mr. Whittlesey: Set forth in their trial brief, the affiliated theatres appendix.

Judge Bright: It this the list to which you are referring (indicating)?

The Witness: Yes, it is.

Judge Bright: On page 7 of the trial brief—pages 7 and 8.

The Witness: Of Appendix A.

(2410)

Judge Bright: No, not of Appendix A. This is the trial brief.

Judge Hand: Why don't you submit this brief to them and have the thing checked up? We don't love exhibits here a bit.

Mr. Whittlesey: I could avoid doing that. I will either submit it to him or put it in evidence. I am going to think, in just a moment, about submitting it. I want to get out here just what we had.

Judge Hand: You just put another thing in evidence, and I suppose we are the ones who should worry.

Judge Bright: That is not the list mentioned.

The Witness: The list starts on page 11 of the Appendix A of the trial brief.

Q. Mr. Miller, I believe you said that in some cases in setting forth the interests of the defendants in these particular theatres you did not have any information from the defendant in question but I gather you have set forth an interest of some sort after each one of them, is that correct? A. We have.

Q. When you did not have the information from the defendants, what did you do, so as to set forth an interest? A. We followed the Government Appendix A in the trial brief.

Q. When you followed the interest stated by the Govern-
(2411)
ment in its Appendix A of its trial brief, did you do anything on your list to indicate you were following the interest stated by the Government? A. Yes, there the interest is marked in blue.

Q. In so doing, would I be right in understanding that you were endeavoring to get this list worked up as nearly as possible in conformity with the list which the Government has used in its trial brief in this case? A. That is right.

Q. And I believe you have told us the extent to which it does conform, that there is a difference of about 20 theatres? A. We have, in the aggregate, 20 theatres more than the Government.

Q. When there has been any question as to the extent of interest to be stated, you have taken the basis set forth by the Government in its own trial brief, is that right? A. We have.

Judge Hand: What about this, Mr. Wright? Have you seen it?

Mr. Wright: I was just looking at it now.

Judge Hand: You have got it now?

Mr. Wright: Yes.

Judge Hand: I do not see what in the world is the use of correcting things in this cumbersome way. There is no use taking testimony in court unless there is a real dispute.

(2412)

Mr. Whittlesey: Perhaps I can clear that up, your Honor. We set out here to analyze the information

which the Government asked from us in the form of interrogatories and requests to admit facts. To do that we had to necessarily segregate the exhibitions between affiliated and unaffiliated theatres. That required, in turn, a study of the information given by each one of these five defendants to the Government with respect to their theatre interests. I might say this, that about the middle of September I suggested to the Government attorneys that we might speed up this process all the way round if they were to furnish to me their list. I shan't say they refused. I spoke to the attorneys here in New York. They said that their information at that time, and their lists and their accountants were in Washington. At that time we were closely approaching trial, so I had to go ahead with my own accountants here and do the best we could, using the same source of information as the Government had to build up the same thing. All I am endeavoring to bring out here is, what we are working from is as near as we could possibly get without seeing the Government's own list, by working from the same basis of classification of interest.

I am perfectly willing not to offer this and let Mr. Wright have it. I certainly intend him to have it, so
(2413)
he can check back what we have done here.

Mr. Wright: This is exactly of course what we ought to have in the record, but without any dispute, that is, there should be one list like this that is accepted as correct by everyone.

Judge Hand: Yes. What about that list?

Mr. Wright: I cannot check it as I sit here, of course, but the only thing I noticed about it, offhand, is, I do not see how the pool situations are treated. Maybe the witness will make that clear. Offhand it

does not appear to me where those pooled theatres are listed on this list.

Mr. Whittlesey: The witness will tell you, I believe, that he set forth opposite the name of the theatre the extent of interest that any company had in the theatre.

Mr. Wright: Of course, your Honors, there is no point in wasting time in court over it. It is obviously the sort of thing that we are both interested in having in the record in accurate terms, and I am sure we can do that.

Judge Hand: This, unless I am mixed up, which is quite likely, would furnish a list, if you agreed to it, that would be agreeable to all the five defendants.

Mr. Whittlesey: I don't know, your Honor.

(2414)

Judge Hand: Is that right?

Mr. Whittlesey: Of course, this represents our best efforts to work out the degree of interest that each defendant has in the theatre, but we cannot bind Paramount.

Judge Hand: Do you mean the other defendants have agreed with you?

Mr. Whittlesey: No.

Mr. Seymour: I have never seen it.

Judge Hand: Oh, you have never seen it?

Mr. Davis: I haven't seen it.

Judge Hand: I have nothing to suggest, only I do not like an independent performance unless it is absolutely necessary.

Mr. Whittlesey: Suppose we do this——

(2415)

Mr. Proskauer: Your Honor, I have never seen it, but I understand that they are just going to use this as a basis for some further testimony of this witness,

and I am perfectly willing to have this marked subject to correction, as far as we are concerned. We will go over it. And I suggest if Mr. Wright do that, we can go ahead.

Mr. Wright: That is agreeable to us.

Mr. Proskauer: Then mark it subject to correction.

Mr. Whittlesey: I will offer it subject to correction.

Judge Bright: Does that give the names of the theatres?

Mr. Whittlesey: Yes; perhaps I should show it to your Honor. It is indexed.

I offer this list, subject to correction.

Judge Bright: It has a little more information in it than there is in the Government brief.

Mr. Whittlesey: We think it is a more accurate job, but perhaps Mr. Wright won't agree.

Judge Bright: It gives the name of the theatre?

Mr. Whittlesey: Yes.

(Marked Defendant RKO's Exhibit RKO-11.)

Mr. Davis: May I see that, if nobody else is using it?

Q. Mr. Miller, did you make an examination of certain (2416) answers by RKO in response to the Government's request to admit facts in thise case and specifically those answers dealing with the first-run distribution of RKO's 1943-44 product in these 92 cities of over 100,000 population? A. I did.

Q. Can you tell me how many first-run exhibitions of RKO's 1943-44 product there were altogether in these cities of over 100,000 population, as shown by those answers to

the Government's request to admit facts? A. There were 3,614 first-run exhibitions. I would like to make clear that that is not exactly the number that was shown in the data submitted to the Government, but we have since provided the Government with all the corrections.

Q. I think you furnished me with the corrections, and I will have to give them to the Government shortly. Were those corrections substantial or to any great extent? A. No, they were not.

Q. Of that total of first-run exhibitions in the theatres in these 92 cities, were there theatres in which RKO or another defendant—how many were in theatres in which RKO or another defendant had an interest of 50 per cent or more? A. 2,317.

Q. And for the purposes of your analysis here, did you classify those exhibitions as in affiliated theatres? A. I did. I would like to qualify that answer just a bit. That will

(2417)

include exhibitions in theatres in which there might be a less than a 50 per cent interest, such as, well, for instance, Paramount has a lot of theatres in which they have a 50 per cent of a 50 per cent interest.

Q. But you classified even those, for the purposes of this job, as being in affiliated theatres? A. I did for this purpose, yes.

Q. How many of the total of 3,614 exhibitions were in theatres in which no defendant had any interest, or in which a defendant or defendants had a less than 50 per cent interest? A. That would be 1,297.

Q. For the purposes of this analysis you classified those as in unaffiliated theatres? A. Yes.

Q. Tell me one further figure: Of this total of 2,317 first-run exhibitions, which you say were in theatres which you classified as affiliated, how many of those were in

theatres operated by RKO itself? A. 822. I am talking now about exhibitions, not theatres.

Q. That is what I understood. Eliminating these 822 first-run exhibitions in theatres operated by RKO, what percentage of first-run exhibitions of RKO's product in 1943-44 was in theatres which you have classified as affiliated with other defendants and what percentage was in theatres which you have classified, as you have explained here, in theatres which were not affiliated? A. It was almost an equal

(2418)

division, 53½ per cent of the exhibitions were in what we term affiliated theatres and 46½ per cent in unaffiliated theatres.

Q. When you say "affiliated theatres," you mean theatres which were affiliated in accordance with your classification with other defendants than RKO, is that correct? A. That is correct.

Q. You said you eliminated these 822 exhibitions which were in RKO's own theatres. Why did you do that? A. Because we assumed in making these tabulations, and I think that was testified to by Mr. Mochrie today, that RKO gives first-run preference to its own theatres over all others, whether independent or affiliated.

Q. So for the purpose of determining the extent to which RKO favored or did not favor other affiliated theatres over independent theatres you entirely eliminated the exhibitions in RKO's own theatres? A. Correct. That is the only way we could get a true picture.

Q. I believe you also said a moment ago, in making up these figures you classified as exhibitions in unaffiliated theatres certain theatres in which a defendant or defendants had less than a 50 per cent interest, is that correct? A. That is correct.

Q. Of that total of 1297 exhibitions in unaffiliated theatres, how many were in these theatres in which defendants

(2419)

had less than a 50 per cent interest? A. There were 181 such exhibitions.

Q. Only 181 out of a total of 1,297? A. Well, out of a total of 3,614.

Q. Out of a total of 1,297 classified as independent? A. Yes.

Q. Did you make one more computation in which you took these 181 exhibitions in theatres in which defendants had less than 50 per cent interest and include those in the exhibitions in theatres in which defendants had a 50 per cent or greater interest? A. Yes, we made such a computation.

Mr. Davis: Why not say in that question, in which some one of the defendants had a 50 per cent interest?

Mr. Whittlesey: That would be correct.

Mr. Davis: We object to being grouped in whole.

Mr. Proskauer: We are just as choosey.

Q. What was the purpose of this computation you are speaking of now, Mr. Miller? A. The Government claims in this case that any theatre in which a defendant has any interest should be regarded as affiliated, so we made this calculation to go along with the Government on its definition——

Q. Theory.—— A. (Continued) —of affiliation.

Q. (Continuing) —of affiliation, I see. And going along

(2420)

on this Government basis of determining affiliation, how did your figures work out? A. 60 per cent of the first-run exhibitions were in affiliated theatres, and 40 per cent in unaffiliated.

Mr. Whittlesey: I would like to have this marked.

(Marked Defendant RKO's Exhibit RKO-12 for identification.)

Q. Mr. Miller, I show you this chart and ask you whether that correctly reflects the figures which you have just testified to? A. It does.

Q. I wish you would explain that chart a little more in detail to the Court, if you can. A. This chart deals with the distribution of RKO's entire product for the 1943-44 season, which included 38 features, 32 of which were of its own production, and six——

Mr. Davis: A little louder, please.

A. (Continuing) 38 productions, 32 of which were of RKO's own production, and six were produced by others. The chart is limited, however, to first-run exhibition. It is further limited to such first-run exhibition in the 92 cities, which according to the 1940 census, had a population of over 100,000.

Q. Mr. Miller, those were the 92 cities with respect to which the Government addressed requests to admit facts to RKO, is that correct? A. That is correct. There were 3,614 such exhibitions. The purpose of this chart is to show to

(2421)

what extent RKO's product was exhibited in affiliated theatres as contrasted with unaffiliated theatres. This deals with the allegation that RKO——

Q. I don't think we need that. Will you tell us what the blue section of the chart indicates. I wish you would take these various columns and describe them in a little more detail for us right now. A. The blue shows the number of exhibitions—that is, the blue block on the left shows the number of exhibitions—in theatres in which RKO had an interest of 50 per cent or more and in theatres controlled by RKO in which RKO and another defendant had an aggregate interest of 50 per cent or more; the middle column, the one in yellow, shows the exhibitions in theatres in which one or more of the

defendants, other than RKO, have an interest of 50 per cent or more; the last column on the right shows all other exhibitions; and at the top are shown the number of theatres—number of exhibitions in theatres in which one or more of the defendants had an interest of less than 50 per cent; and the bottom part, the exhibitions in theatres in which no defendant had any interest whatever.

Mr. Whittlesey: That is all for that chart.

Mr. Wright: Before it is offered I would like to ask the witness some questions about it.

Preliminary Cross Examination by Mr. Wright:

Q. How do you get this total figure of 3,614, your (2422)
affiliated exhibitions? A. We took the data that was submitted to the Government which showed the distribution of it——

Q. Have you a copy of the data that you worked from there? A. Yes, I have.

Q. That is the admission of facts showing the first-run distribution of 1943-44 product? A. Yes.

Q. Go ahead. A. This data that was submitted to the Government has a sheet for each city having a population in excess of 100,000, and on that sheet is shown the distribution of RKO's 1943-44 product, that is, 38 features. This shows what theatres that product was played in in that season.

Q. You have the same thing I have. Calling your attention specifically to Akron, Ohio, there—that is the first sheet which you have? A. Yes.

Q. I notice that that shows 18 pictures first-run at the Colonial Theatre, Warner-Shea, and then 18 to Harry Katz at the Palace, and then you have two licensed to R. Postman for first-run exhibition in the Norka Theatre. Under your

total exhibitions, then, for Akron, you took all of those, that is, total of 38, is that right? A. That is correct.

Q. And you made no effort to determine whether or not those exhibitions in the Norka, for example, were in a first-run theatre, is that right?

(2423)

Mr. Whittlesey: I believe, Mr. Wright, you requested us to give you the first showing of each picture in these particular towns. As you know, that is all the request to admit facts called for, and that is what the answers gave.

Mr. Wright: I will examine the witness and we will go on further.

A. This states that those two pictures were licensed in the Norka Theatre for first-run exhibition.

Q. And as far as you know, that simply meant that the exhibition in the Norka was the first in the town for those two pictures; Norka may have been a third or subsequent-run house as far as you were concerned, is that right? A. I have no information on that theatre except—no, I don't think I even have the seating capacity.

Q. You gave the same treatment to all of this data in computing your total number of exhibitions, is that right? A. Yes.

Q. You call them a first-run exhibition on your chart, even though they may have actually been exhibitions which are covered in a subsequent-run theatre with subsequent clearance to exhibit simply for the first time in the town in that house? A. I was concerned with first-run exhibitions. I was not concerned with the type of theatre it played in.

Q. Your chart, then, does not reflect at all the extent, or

(2424)

does not reflect accurately the extent to which RKO's product

was divided among the independent and affiliated first-run theatres in the town in question, isn't that right? A. It accurately reflects first-run exhibition.

Mr. Wright: Just read the question to him.

Q. Just answer my question.

Mr. Whittlesey: I think he has answered it.

(Question read.)

A. I cannot say yes or no to that because it does not tend to classify these first-run exhibitions as to types of theatres other than whether they were in affiliated theatres or unaffiliated theatres.

Q. Your chart on its face then does not even purport to show the division of the RKO product among the affiliated and independent first-run theatres in the town in question, isn't that right? A. It does not deal with theatres as to whether they are first-run theatres or subsequent-run theatres.

Q. That is, the slough product that might have gotten an exhibition anywhere, all those exhibitions of such product as may have been rejected by an affiliated theatre for first-run and then shown in some later independent house for its first exhibition, all of those are treated on your chart as first-run exhibitions, is that right? A. All I know is that we are dealing here with first-run exhibition.

(2425)

Mr. Wright: If the Court please, I think enough has been shown to demonstrate that the chart is clearly misleading in including as first-run exhibitions these exhibitions where a picture was not good enough to get a first-run in a first-run house, but, of course, found its way down into some house and actually got exhibited in the town for the first time anywhere. I submit that kind of chart shows nothing as to first-run distribution.

Mr. Whittlesey: May I ask the witness another question?

Direct Examination resumed by Mr. Whittlesey:

Q. Mr. Miller, I gather that what you have done here is to take the first-run exhibition in point of time of each one of these pictures in each of these cities, where the Government asked us to give information as to the theatres in which the pictures were first played? A. That is correct.

Q. And then having gotten that, and the name of the theatre in which the picture first played in the town, you have worked from there on the basis of these theatre lists which we have shown the Government here and divided that as between independent and affiliated theatres, is that correct? A. That is correct.

Q. So this is a division on first exhibitions of all product (2426)
as shown in our answers to Government's interrogatories in these 92 cities as between these various classes of theatres? A. Yes.

Mr. Wright: I might add, if the Court please, that our request was misstated inadvertently by Mr. Whittlesey. We did not ask for this data as to the first exhibtions of all product. We asked for a statement of the regular first-run accounts who had their product during that season. Instead of confining their answers to the regular first-run accounts, who played the regular first-run of their product, they added these other theatres which played any picture, or some of their pictures, for the first time in the town, which pictures haven't actually gotten an exhibtion in any first-run theatre anywhere anytime.

Mr. Whittlessey: In other words, you don't dispute, Mr. Wright, that those show first showing of those pictures in each of those towns, correct?

Mr. Wright: Why, no.

Mr. Whittlesey: It does show that, doesn't it?

Mr. Wright: Yes. I simply submit that has no meaning.

Mr. Whittlesey: I don't think that goes to the accuracy of the chart.

Judge Bright: The chart may be wrong then in calling it a first-run chart.

(2427)

Mr. Whittlesey: Your Honor——

Judge Bright: Call it a first exhibition chart.

Mr. Whittlesey: (Continuing.) —we can call it first exhibition chart. It certainly has been brought out here. Of course, we have no clear definition in this case as to just what is first-run or what is a first-run theatre beyond the time at which a given theatre is playing a picture in relation to the other theatres in that town. That at least is something that is perfectly clear and beyond argument. If the picture played first in New York at such and such theatre, that was certainly its first-run. The theatre in which it may have played may not have been what Mr. Wright would call, or somebody else would not agree or would agree was what was commonly called a first-run theatre, but if we get into dispute as to whether this house, that house or another house is to be called a first-run theatre, I think the length of this case would be vastly stretched out. We have to go by something definite in point of time, at least.

Mr. Wright: We were given by one of the defendants a list of what theatres purported to be the first-run theatres in these towns and, as I understood, the definition which was subscribed to by that defendant—Mr. Davis's clients, I believe, is the house that plays a regular run of somebody's pictures

(2428)

on first-run clearance; that is, where it has clearance over the other theatres in the town and actually controlled these subsequent exhibitions of the film in the town. Obviously, a theatre which merely exhibits a film for the first time in the town without any first-run clearance, which happens to be some 15 or 25-cent subsequent-run house, simply has the film first run because nobody else wants it, no first-run house wants to play it. That throwing of exhibitions of that kind into what it purports to show, first-run distribution of features, is inexcusably misleading.

Mr. Whittlesey: You see, your Honor, we are getting into this dispute as to what is a first-run theatre. I suggest, to meet the suggestion made by Judge Bright that, to eliminate that dispute here and get ourselves clean down to the question of time, that we leave out the word "run" here and call it "first exhibitions." That certainly would be in line with the witness's testimony, and I think that would eliminate the objection you have, Mr. Wright, would it not?

Judge Hand: Well, he would then say it had nothing to do with the case.

Mr. Wright: Precisely.

Mr. Whittlesey: He has not made that argument.

Judge Hand: And that he never made any such

(2429)

contention, and so on.

Mr. Wright: We have never contended that pictures which are not good enough for an affiliated——

Judge Hand: You make no claim such as this is introduced to meet?

Mr. Wright: Precisely.

Judge Hand: I do not believe he does.

Colloquy

Mr. Whittlesey: I think it does. We are trying to show, at least to the extent that he charges here that by conspiracy we are depriving independent exhibitors of access to our pictures—now, we are meeting that, first, by showing the extent to which we are giving our pictures for first showings to affiliated theatres on the one hand and independent theatres on the other. Now, Mr. Wright is coming back, without naming any theatre, without putting in any evidence—of course, he could put in evidence to contradict this chart if he wanted—and saying, "I believe in here there are some theatres that I would not call first-run theatres." It seems to me that is the thing for him to do, to put in evidence, if he wishes to attack this chart, but on the face of it, it is exactly what it states.

Judge Hand: But he has, by cross-examination of your witness, shown a lot of theatres here that do not come up, I should say, to any definition that has been given or any charge that has been made.

(2430)

Mr. Whittlesey: I think he has, with all due respect, I think he has indicated that in his opinion certain theatres are not first-run theatres, but he has offered no proof of that.

Judge Hand: I did not know but that anybody had a different opinion.

Mr. Whittlesey: We are simply showing the theatres in which these pictures first appeared in the town with respect to which Mr. Wright's inquiry has been directed. It is a clear fact.

Mr. Seymour: We are missing Mr. Whittlesey's words over here.

Mr. Whittlesey: Your Honor, I will go on to another chart. I think all that line of Mr. Wright's objection can be met.

By Mr. Whittlesey:

Q. Mr. Miller, did you make a study of RKO's answers to the Government's interrogatories covering first-run exhibitions of RKO's first block of pictures of the 1943-44 season in all cities having a population of 25,000 or more? A. I did.

Q. Was this analysis along the same lines as that which you have just described in connection with the first-run dis-
(2431)
tribution of RKO's product as shown in its answers to the requests to admit facts? A. Yes, except that in this instance we made a separate analysis for each one of the first-run distributions of the five pictures in the block.

Q. For the purposes of this analysis did you exclude exhibitions in theatres operated by RKO? A. Yes.

Q. Was that for the same reasons as you have given with respect to this analysis of the 92 cities? A. Yes.

Q. Again, did you prepare this analysis in two ways, first, in which you included in your classification of unaffiliated theatres those in which one or more of the defendants had less than a controlling interest, and, second, in which you took exhibitions in theatres in which one or more defendants had more than a controlling interest; or, take it the other way, in which you took those situations where the defendants had less than a controlling interest and included it with the theatres in which defendants had more than a 50 per cent interest, or one or more defendants? A. Yes.

Q. Will you tell us what your analysis shows as to the whole block of these five pictures on both of these two bases. A. On the first basis, that is, the one in which we treat the theatres in which one or more of the defendants had less than—had an interest aggregating less than 50 per cent as unaffiliated, on that basis about 52½ per cent of the exhibi-
(2432)
tions were in affiliated theatres and 47½ per cent in un-

affiliated theatres. On the second basis, that is, employing the Government basis of affiliation, that is, treating any theatre in which any defendant had any interest whatever as being affiliated, we find that 62 per cent of the exhibitions were in affiliated theatres and 38 per cent in unaffiliated theatres.

Q. I believe you stated that you took this analysis and broke it up on a picture by picture basis for each picture in the block, is that correct? A. That is correct, yes.

(Marked Defendant RKO's Exhibits RKO-13 and RKO-14 for identification.)

Q. Mr. Miller, I ask you whether these two tables marked Exhibits 13 and 14 for identification show on a picture by picture basis the distribution of the pictures in this block and the distribution of the whole block overall in accordance with the figures which you just testified to? A. They do.

Q. Will you describe those charts a little bit more in detail.

Judge Hand: Are the things you describe in this table I as first-run—does that mean the first showing in each theatre whether it was a first-run theatre or not?

Mr. Whittlesey: In answer to that, your Honor, I think we can state this, that the Government in

(2433)

addressing these interrogatories to us, in the case of the interrogatories stated that, for first-run, we were to show the first exhibition. In other words, there is no question that that was the definition of first-run for the purposes of the answers to the interrogatories, which are quite different from the request to admit facts.

Mr. Wright: This interrogatory that he is dealing with here, interrogatory 6, asked each defendant to list

the pictures in the first block for the 1943 season, with the name of the first-run exhibitor who played them and the names of the theatres that played them and a statement of the clearance that the theatre carried. Now, as I recall the answers, in some cases, the block was split because the first-run theatre would only play the better pictures in the block, and then the same thing happened as to the poorer theatres as happened to some of those listed in the admissions of fact, they would go into what is known as a slough house, and it will appear in the answer, of course, that in those cases they did not have first-run clearance, although they did get their initial exhibition in some other theatre, and you have the same——

Mr. Seymour: You are losing part of your audience, Mr. Wright.

Mr. Wright: (Continuing) —you have the same problem here that you have in connection with the admission of facts. If you want to get a picture of the

2434)

actual first-run theatres which played these pictures, you have to examine the answer as to the clearahce in which they played in the particular theatres which played the particular picture.

Mr. Leisure: If your Honors please, it seems to me Mr. Wright is being unnecessarily technical here. I think it must be clear to the Court that in any given situation in any city in the United States that the first time our picture plays, that is the first-run. I do not see why we should quibble about the use of a term of that kind. We have dealt on that basis with our interrogatories. It has been perfectly clear up to now. I don't see why we should quibble about it.

Mr. Whittlesey: I might add, your Honor, that all the Government requested us to do was furnish it the

first showing of each one of these pictures in each one of these towns all over the country, which is exactly what we have done.

I offer these two tables in evidence as Exhibits 13 and 14.

Judge Bright: How are they marked?

Mr. Whittlesey: 13 and 14.

Judge Bright: Table II is RKO 14?

Mr. Whittlesey: That is correct.

Judge Hand: I think we will admit both of these

(2434a)

things. I am not at all sure whether you are engaged in shadow boxing or what at the present time. I don't understand myself the definition of first-run, you are not agreed on it, or the complaint of the Government of your conduct.

(2435)

Mr. Whittlesey: Perhaps, your Honor, if the Government had given us——

Judge Hand: That is pretty bad after these days of trial. That is a fact; and it is an irritating fact, too.

Mr. Wright: If the Court please, we do not claim that in any event where an unaffiliated theatre does not want to exhibit one of these people's pictures or any other pictures first-run, that the picture is not made available to somebody for exhibition in the town. There is no suggestion in anything we have said in the complaint to that effect. I say now there is no dispute about that whatsoever. The thing, however, that determines whether or [illegible] can operate as a first-run theatre in a town depends, of course, on access to the choice product of some distributor and not simply the privilege of exhibiting such pictures as a first-run exhibitor rejects. That is the rea-

son why the distinction that I have been urging here is important as between mere initial exhibition of a theatre somewhere in the town and exhibition in an established first-run theatre.

Judge Hand: Proceed with this witness. I understood that you were going to be through; that it was a short witness, and that the evidence of Mr. Leisure would last a day. It has now lasted two days.

Mr. Whittlesey: Your Honor, before I do may I

(2436)

call your attention to one further point on this definition of first-run? Let us take the amended and supplemental complaint itself. First-run is defined as follows:

"The first exhibition of a motion picture in a given zone after national release."

Mr. Wright: Will you read the definition of first-run theatre that is in there?

By Mr. Whittlesey:

Q. Mr. Miller, I show you a chart and ask you if that also reflects the figures which you just testified with respect to the distribution of that first block in the 415 cities? A. It does.

Q. In other words, that states in summary form the summaries in these two tables, Exhibits 13 and 14 in evidence? A. It does.

Mr. Whittlesey: I would like to have that marked for identification.

Judge Bright: These Exhibits 12, 13 and 14 are in evidence now?

Mr. Whittlesey: That is what I understood.

The Clerk: Except 12, sir.

Judge Bright: Judge Hand has admitted 12, too.

(Defendant RKO's Exhibit 12 for identification received in evidence.)

Mr. Whittlesey: This will be marked 15.

(2437)

(Marked Defendant RKO's Exhibit 15 for identification.)

Mr. Whittlesey: I offer RKO's Exhibit 15 for identification in evidence.)

Judge Hand: All right.

(Defendant RKO's Exhibit 15 for identification received in evidence.)

Q. Now, Mr. Miller, did you make any study to show the comparative film rentals received by RKO on its first block of pictures in the 1943-44 season from theatres which you classified as affiliated on the one hand and theatres which you classified as independent on the other? A. Yes, I did.

Q. Did you make this study on the basis of first-run film rentals in the 92 cities of over 100,000 population? A. Yes.

Q. Where did you obtain the data for the film rentals on these pictures? A. From the home office records and exchange records.

Q. And are those records presently available here in New York? A. They are.

Q. Now again, in making this study, did you eliminate rentals from theatres operated by RKO itself? A. Yes.

Q. What was the purpose of making that elimination? A. We eliminated those in order to obtain a more accurate

(2438)

measure of the comparative desirability from a film rental standpoint of first-run exhibition in affiliated theatres other than RKO's own theatres with first-run exhibition in unaffiliated theatres.

Q. And when you are speaking of first-run, you are speaking of first exhibition as shown on the company's records, is that correct? A. Yes.

Q. Now, what did your analysis show with respect to these comparative rentals in these cities? A. It showed that the first-run exhibitions in the 92 cities of over 100,000 population on this first block of pictures in the 1943-44 season yielded an average of $1,558.87 per exhibition. And the independent exhibitions yielded an average of $1,221.41 per exhibition.

Q. Now, on these figures, were you characterizing as affiliated theatres only those in which the defendants other than RKO had an interest of 50 per cent or more? A. Yes.

Q. Now, taking the Government's basis in which you include as affiliated those in which the defendants, one or more, had an interest of any sort, how did your figures work out? A. That computation shows a slightly lower yield per exhibition. That is $1,528.03 for affiliated theatres and $1,195.37 for the unaffiliated theatres.

Q. Now in working up these figures, did you find it nec-

(2439)

essary to eliminate certain exhibitions? A. Yes, we did.

Q. What were those? A. Those were the exhibitions in which the rental was part of the lump sum, or was determined on a national gross basis.

Q. Why did you have to eliminate those in making these studies of comparative film rentals? A. Because there is no way to allocate a specific amount of rental to a specific exhibition in those two instances.

Q. Now did you find this type of contract to which you have just referred was made by RKO with affiliated theatres as well as unaffiliated theatres, or with both kinds? A. Well, that would be true of the lump sum contracts, but there was only one national gross deal and that was with an unaffiliated theatre, the Tivoli in New Orleans, La.

Q. That is, in this—— A. In this particular group.

Q. Of the first block in the 92 cities of 100,000 population or more, correct? A. That is correct.

Q. So I gather your study here was limited to those cases only where you could attribute a specific film rental to a specific theatre, right? A. That is right.

Q. And you worked your average film rentals from those figures? A. That is right.

Q. Now did you relate these rental figures to the average seating capacities of the respective affiliated and unaffiliated theatres concerned? A. Yes, we did.

(2440)

Q. And what did you find as to the comparative seating capacities in connection with these average rentals? A. We found that the average seating capacity of affiliated theatres—this is exclusive of the RKO theatres—from which the average rentals that I have just testified to were received—the average seating capacity was 1,979 seats, and the average seating capacity of the unaffiliated theatres was 1,605 seats. Now, we made another computation to show what it would be following the Government's basis of affiliation. That is, treating any theatre in which the defendants had any interest whatever, as affiliated, and we found that on that basis the average seating capacity of the affiliated theatres was slightly less. That is, 1,926 seats; and the average seating capacity of the unaffiliated theatres was about the same; that is, 1,607 seats.

Q. Now, how did the relative number of days played work out as between affiliated and unaffiliated theatres on this distribution in the 92 cities on the first block? A. The number of days played was just the same in the affiliated theatres and in the unaffiliated theatres.

Q. In other words, this difference of rental would not be attributable to longer playing time in one type of theatre or the other, is that correct? A. Correct.

Q. Now, did you make a similar analysis, Mr. Miller, with respect to all cities with a population of 25,000 or over? A. Yes, we did.

(2441)

Q. And that was just for the first block, is that correct? A. Yes.

Q. And did you set up that information in tabular form with respect to each one of the pictures in that block? A. For each one of the pictures and for the total.

Q. I see. Now I show you two tables, one entitled Table 1 and the other Table 2. Are these the tables of which you spoke? A. They are.

Q. And one is set up on the basis of affiliation where the only affiliated theatres included are those in which the defendants had a 50 per cent interest or more—is that correct? A. That is correct.

Q. And the other in which all degrees of interest were included as affiliated, right? A. That is correct.

(Marked Defendant RKO's Exhibits 16 and 17 for identification.)

Mr. Whittlesey: I offer RKO's Exhibits 16 and 17 for identification in evidence.

Mr. Wright: If the Court please, I have not even yet seen a copy of these last figures that he was testifying to in the 92 cities. I would like to ask him some questions about some of this material, but as to that 92 cities data, they have not even yet supplied me with

(2442)

any copy of the tabulation.

Mr. Whittlesey: No tabulation has been prepared on that. I asked the witness what he has found. Of course he has his own tabulations here and can furnish them to you. But I am not offering those as an exhibit. I am offering the over-all on all of the 415 cities as an exhibit.

Mr. Wright: There is no way we can examine him if we can't at least see what he is testifying from.

Mr. Whittlesey: His records are available and you can examine from those, Mr. Wright.

Judge Bright: What do you contend these Exhibits 16 and 17 show that are material to the issues here?

Mr. Whittlesey: Just this, your Honor: we are here charged with favoring affiliated theatres over independent theatres as the result of a conspiracy. The testimony of our witnesses in this case has been that to the extent that we do show our pictures just alone in affiliated theatres, it is not due to any conspiracy between us and any other defendant, but, rather, due to the fact that we find it better business in terms of dollars and cents; and I believe that Mr. Mochrie testified that by and large he gets better returns from affiliated theatres than from unaffiliated theatres. We are here simply taking the actual record as given to the Government on their request in the

(2443)

form of interrogatories to show in terms of dollars and cents that it works out that way. As a matter of fact all business experience, at least the experience of this company, shows we are getting on a theatre by theatre basis better rentals from affiliated theatres than independent theatres; and that to that extent, tends to offset the charge or to meet the charge that we are favoring affiliated theatres over unaffiliated theatres by virtue of the conspiracy to do so between us and the other defendants.

Mr. Wright: Mr. Whittlesey has again not stated to your Honor correctly what the witness has done here. As to these rental figures that are in these tables that have just been handed me, tables one

and two, which I believe are marked RKO's Exhibits 16 and 17, he is dealing with rental figures that were not supplied to the Government at all. The only rental figure that was supplied in the interrogatory answer was the rental received on the one selected picture of Lady Takes a Chance. As to these other figures, they are based on data which has never before been seen by or offered to us.

Mr. Whittlesey: Your Honor, all I can say to that is, of course we can't very well be, in proving our case here, limited simply to those figures which we furnished the Government at its request. The witness has stated the source of the figures which we have been putting in here, which is our own home office

(2444)

and exchange records which are available here for checking at any time. We naturally——

Judge Hand: Well, we will allow them.

(Defendant RKO's Exhibits 16 and 17 for identification received in evidence.)

Q. Now, the Government in its trial brief here charges that RKO employs percentage contracts in licensing theatres affiliated with other defendants as a form of profit-sharing between it and other defendants. Are you familiar with those charges, Mr. Miller? A. I am.

Q. Have you made any analysis to determine to what extent RKO uses percentage contracts in dealing with affiliated theatres? A. Yes, I did.

Q. And again, was this analysis based on RKO's answers to the Government's interrogatories covering the first run exhibition of its first block of '43-44 product in cities of 25,000 population and over? A. Yes.

Q. Now, where did you get the information with respect to the type of contract used in these first-run exhibitions? A. From the exchange and home office records.

Q. And, again, those are available here in New York? A. They are.

(2445)

Q. Now what did your analysis show with respect to the use of percentage contracts on this first block of pictures as between affiliated and unaffiliated theatres? And I think for simplicity, if you will limit yourself to what we call the controlled basis of affiliation—that is, where we are classified as affiliated, or you classified as affiliated theatres in which there is an interest of 50 per cent or more—— A. On that basis, the whole block of five pictures, about 43 per cent of the first-run exhibition played in affiliated houses on a percentage basis, and about 39 per cent played in unaffiliated theatres on a percentage basis.

Q. Now, did you make a further study to break that down to the case of where the percentage contract was what was testified to here this afternoon by Mr. Mochrie as a percentage to a split? A. Yes, we did.

Q. And, again, did you distribute the use of that type of contract as between affiliated and unaffiliated theatres in these cities? A. Yes, we did.

Q. And what did your figures show there? A. Well, in each instance the number of exhibitions played on that basis was slightly under 6 per cent in both the affiliated theatres and the unaffiliated theatres.

Q. In other words, there is very little difference between either? A. Very little difference.

(2446)

Mr. Davis: What per cent did he name?

The Witness: Slightly under six per cent.

Q. That is, of course, the average for the whole block? A. Yes.

Mr. Wright: Is he testifying to figures that are on these things that they are offering in evidence?

Mr. Whittlesey: He is, Mr. Wright. I have not offered them. I would like to ask him a few more questions.

By Mr. Whittlesey:

Q. Now, did you work out these figures again on the Government's basis of affiliation, that basis upon which in any theatre in which any defendant has any interest is classified as affiliated? A. I did.

Q. And did you work these figures out on the basis of each one of the pictures in the block as well as the whole block? A. Yes.

Q. The figures as to which you have just testified were the average for the whole block, is that right? A. That is right.

Q. When you say you broke it down for the various pictures on these two bases, is that set forth on these sheets marked Table 1 and Table 2? A. Yes.

Mr. Whittlesey: I would like to have these marked for identification.

(Marked Defendant RKO's Exhibits 18 and 19 for identification.)

(2447)

Q. Now I wish, Mr. Miller, you would take this Table 1 and briefly tell us how these figures operate and what is shown, if you will take one of the pictures first. A. Table 1 is on the basis, on our basis of affiliation. That is including as affiliated theatres only those in which one or more defendants other than RKO had an interest of 50 per cent or more. I will select the picture that had the widest distribution in the block. That is Lady Takes a Chance. There are two columns for that picture. The first one shows the exhibitions in the affiliated theatres, and the second column shows the exhibitions in the unaffiliated theatres.

Q. That is the total exhibitions, regardless of what the type of contract was used in each class of theatre, right? A. That is on the first-run.

Q. Right. A. The first line shows that there were 236 exhibitions in affiliated theatres and 195 in unaffiliated theatres of Lady Takes a Chance.

Q. All right. A. Now then, below that, we show how many of these exhibitions were on a flat basis. They were relatively small for this picture. They were slightly less than 13 per cent for affiliated theatres and slightly over 16 per cent for unaffiliated theatres.

Q. Now your next line deals with the number of these (2448) pictures in terms of percentage which were licensed on a percentage basis of any kind, right? A. Yes.

Q. And what does that show? A. That shows that over 87 per cent of the exhibitions were on a percentage basis——

Q. To affiliated theatres? A. In affiliated theatres, and about 83½ per cent of the exhibitions in unaffiliated theatres.

Q. Now let us take the percentages to a split type of contract——

Judge Bright: Can't we read this? Why waste the time of the Court?

Mr. Whittlesey: I am perfectly willing to offer them.

Judge Hand: This was to be a short witness. It is now two hours and a half.

Mr. Whittlesey: I can say this, your Honor, I am practically through with him except for one more set of charts.

I should like to offer those exhibits in evidence.

(Defendant RKO's Exhibits 18 and 19 for identification received in evidence.)

Q. Now, Mr. Miller, the Government has also stated in its trial brief here that the defendants have imposed high minimum admission price restrictions on unaffiliated subsequent run theatres so as to siphon off the admission price
(2449)
dollar into affiliated first-run theatres. Are you familiar with that charge? A. Yes.

Q. And have you made any analysis of RKO's answers to the Government's interrogatories in the light of that charge? A. Yes, I have.

Q. What sort of an analysis did you make? A. We selected the picture, Lady Takes a Chance, and we analyzed the contracts to ascertain just what minimum admission price requirements appeared on those contracts, and in doing so we took those exhibitions in which the subsequent run was in an unaffiliated theatre following a first-run exhibition in an affiliated theatre. And in doing this we limited it to those cities of 50,000 population and over; there happened to be 62 such cities——

Q. That was because the Government's interrogatories, so far as any run after first was concerned, started only with those cities of 50,000 or more, isn't that right? A. That is right.

Q. So you took each situation on these answers for this picture in which the subsequent run was an independent theatre and the prior run had been an affiliated theatre, correct? A. That is right.

Q. And what did your analysis show as to the minimum admission prices, if you can tell us briefly on that? A. Well, there were 470 such exhibitions, and more than half of those
(2450)
had a minimum admission price of 15 cents or less. There were only 8 that were over 40 cents.

Q. Now, to save time, Mr. Miller, I might ask you, did you prepare a table breaking down the use of these minimum

admission prices, and also set forth those figures in graphic form? A. I did.

Q. Is this the table? A. Yes.

Q. And is that graph the graph to which you refer? A. That is correct.

Mr. Whittlesey: I would like to have those marked for identification as RKO's Exhibits 20 and 21.

(Marked Defendant RKO's Exhibits 20 and 21 for identification.)

Mr. Whittlesey: I offer those in evidence.

Q. Now, Mr. Miller, did you prepare one final computation in which you took first-run in an independent theatre and subsequent runs also in an independent theatre and make a study to determine the use of minimum admission prices in that situation where both theatres were independent? A. Yes, we did.

Q. And did you set up your findings there also in the form of a table and a graph? A. I did.

Q. I ask you whether this table and this graph set forth your findings? A. Yes, they do.

Mr. Whittlesey: Will you mark these?

(2451)

(Marked Defendant RKO's Exhibits 22 and 23 for identification.)

Mr. Davis: May we have the question read?

(Question referred to read.)

Mr. Davis: Now may I inquire what is meant by the use of minimum admission prices in that question?

Mr. Whittlesey: I think I can clear that up for you, Mr. Davis?

Judge Hand: Speak up.

Mr. Whittlesey: Excuse me, your Honor.

Q. The price to which you refer here as a minimum admission price appeared in the exhibition contracts in question, did it not? A. Yes, it did.

Q. Was it the price filled in in the blank space on the contract? A. Yes.

Mr. Whittlesey: Does that answer your question?

Mr. Davis: I do not quite understand yet. You are asking on the basis of the minimum admission price, you are asking him to make some comparison between an independent first-run and an independent subsequent run. But what the comparison is you are making, I do not understand.

The Witness: It is a comparison of exhibitions in the affiliated theatres as compared with unaffiliated theatres. That is what the contracts show with respect to those different types of exhibition.

(2452)

Mr. Davis: Is it the number of contracts? Is it revenue derived?

The Witness: It is the number, the number of exhibitions.

Mr. Whittlesey: I offer RKO's Exhibit 20, 21, 22 and 23 in evidence.

(Defendant RKO's Exhibits 20, 21, 22 and 23 for identification received in evidence.)

Mr. Whittlesey: That is all.

Mr. Wright: It the Court please, there are a great many questions that I have about these exhibits, but I think they can best be answered outside of court, if it

is understood that we can recall him if we can't straighten out these things.

Judge Hand: We will make the ruling that they are admitted subject to correction.

Mr. Wright: There is just one thing.

Cross Examination by Mr. Wright:

Q. I think you gave some figures there for which there was no tabulation. Could we have a copy of whatever you testified from as to the 92 cities? You gave some percentages and I believe there was no tabulation offered in evidence which contained them. Can you give us a copy of the sheet that you were testifying from? A. That was from my working papers, but I can give you a copy or a digest of that.
(2453)

Mr. Wright: All right.

Mr. Rafferty: It is also understood that they are admitted subject to any other objection any other distributor may have?

Judge Hand: They are admitted subject to correction.

Mr. Rafferty: We are going to object generally there in addition.

Judge Hand: All right, you may do so.

Mr. Leisure: That is all, Mr. Miller.

(Witness excused.)

Mr. Leisure: We have an affidavit. With the Court's permission I will simply have it incorporated into the record in order to save time. That is all.

(2454)

(The stipulation referred to is as follows:)

"STIPULATION

"The undersigned hereby stipulate that Charles W. Koerner, if called to the witness stand, would testify as set forth in the attached affidavit, identified as Appendix A and the several exhibits attached thereto, identified as Koerner Exhibits 1 to 4, inclusive. Date: New York, N. Y., October 26, 1945.

(Sgd) Robert L. Wright,
Robert L. Wright,
Attorney for Plaintiff.

(Sgd) George S. Leisure,
George S. Leisure.

(Sgd) Donovan, Leisure, Newton & Lumbard,
Attorneys for Radio-Keith-Orpheum Corporation, RKO-Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO-Proctor Corporation and RKO-Midwest Corporation.

"AFFIDAVIT OF CHARLES W. KOERNER

STATE OF NEW YORK,
COUNTY OF NEW YORK } ss.:

"CHARLES W. KOERNER, being duly sworn, deposes and says:

"My name is Charles W. Koerner. I reside in Los Angeles, California, and am presently the vice-president in charge of production of RKO Radio Pictures, Inc., with

(2455)

headquarters in Los Angeles. Except for two years service during the first World War I have been in the motion picture business since 1915. From about 1919 to 1926 I was employed in the distribution of motion pictures, first for Universal and later for First National Pictures. Then I was employed in theatre operations from 1926 to 1931 by George Mann Theatres in San Francisco and from 1931 to 1942 by RKO. Since 1942 I have had my present position with RKO Radio Pictures, Inc.

"As vice-president in charge of production of RKO Radio Pictures, Inc., I determine our policies with respect to production and am in charge of the entire production activities of RKO Radio Pictures, Inc. The great majority of our productions are made at the main studio in Hollywood, which has 14 stages. In the Hollywood studio are located our executive offices, as well as the various departments necessary to conduct our production activities. These departments include departments for stories, scenarios, casting, research, architectural designing, dress designing, wardrobe, make-up, photography, sound, music, recording, dubbing and publicity, as well as the usual executive, accounting, budget, supply, transportation and legal departments. There are also a number of others which I have not enumerated.

"RKO's other studio, the RKO-Pathe studio located at

(2456)

Culver City, has less stage space but more area than the Hollywood studio and in which there are standing permanent sets which are used for outdoor scenes. In addition, we have in the San Fernando Valley a ranch of approximately 160 acres. There we also have standing sets such as western street scenes, small villages, etc.

"Competition in the field of production begins with the acquisition of story material. Let us take, for example, the competition between producing companies for story material

which can be utilized in the making of successful motion pictures. In order to explore and discover the kind of stories which lend themselves to successful pictures, RKO maintains both in its home office in New York and in the studio story departments whose function it is to obtain and review all story and dramatic material and to make recommendations concerning their acquisition to us. Such story departments are also maintained by our competitors in the continuous and aggressive search for suitable story material. It has been the experience of all motion picture producing companies that the type of story that carries the greatest appeal with the public is one based either upon a best selling book or upon a successful play. As the result of the keen competitive bidding for this kind of story the price ultimately paid by the successful bidder is very substantial. We have (2457)

recently completed a deal for the motion picture rights to *So Well Remembered*. James Hilton's recent novel, at a cost of approximately $300,000. I recall no best seller or successful play suitable for motion pictures which has not had the interest of two or more production companies.

"There is also competition for the services of stars and feature players. RKO maintains a constant search for new talent. We have a staff for this purpose with offices in New York and Hollywood. It is their duty to attend shows, be in contact with all agents and visit little theatres, summer stock companies, night clubs and other places where talent may be uncovered. We have expended over a period of the last five years several million dollars in getting such potential stars or feature players under contract and attempting to develop them into established motion picture personalities. During this period in spite of this large expenditure, we have succeeded in developing only two or three important players.

"There is also competition for every other type of creative personality in Hollywood, including directors, writers, cameramen, composers, musical directors, sound technicians, set designers, decorators, and dress designers.
(2458)

"We have three types of contract which we make with stars, feature players, directors, producers and other production personnel. The first type is the single picture contract under which the personality agrees to make one picture for RKO. The second general type is the multiple picture contract which may take either of two forms: A contract for two pictures to be produced within one year, or a contract for one or more pictures per year for two or more years. Usually these multiple picture contracts do not fully cover the personality's time and he or she is, therefore, free to make additional pictures for other producing companies when he or she is not working for RKO. Finally, we have term contracts which call for the personality's exclusive services for a fixed period. The multiple picture contract calling for one picture a year is the type most frequently used by RKO when contracting important personalities. The single feature contract is most frequently used by RKO in contracting with other players and with other producing personnel. We do not have any term contract with any player or producer of first importance. The only term contract we have with directors of such importance are two in number. We have only one term contract with a writer of first importance. The total roster of the players under term con-
(2459)
tract to RKO numbers 35 males and 15 females players.

"To supplement the production personnel which is under term contract to RKO, we have found it necessary to secure additional personalities through multiple pictures or single picture contracts with personalities in the free lance market, through the borrowing of personalities under contract to

other producing companies, and through the making of arrangements with other producing companies to share contracts for the services of personalities.

"A free lance player, writer, director, or other personality is a person who is not under a term contract to a producing company, but contracts from time to time with producing companies to participate in the making of a particular picture or pictures. RKO for many years has drawn heavily upon the free lance market in order to meet its production requirements. There are a substantial number of important personalities who are on the free lance market and in fact this market has shown a steady growth. The reason for this growth is that important artists are in demand at all times and do not need the security of a term contract. The personality is in a much better position to obtain a greater compensation for his or her services. It is not unusual for an important personality to receive $150,000 to appear in a single picture. We have paid this amount to Miss Rosalind Russell and there are many other who can (2460)

and do command extremely high compensation for an appearance in a single picture. An additional advantage to the artist in being a so-called free lance is the freedom involved. The personality can choose the kind and number of pictures which he or she desires to make. The artist can also demand and await the availability of certain directors, motion picture and still cameramen and other production personnel which the personality considers will contribute to the success of the personality's performance and that of the picture. With the competition of producing companies for the services of personalities, established personalities may go into the free lance market with the assurance that there will be continuous bidding for their services on very favorable terms.

"There are no precise statistics of the number of players, writers, and directors available in the free lance market, but there are statistics on the number of established personalities in the motion picture field and the number who are under exclusive contract to RKO, Fox, Loew's, Columbia, Paramount, Warner's and Universal. Therefore, the difference will represent the number of players, writers and directors who are either free lance or are under contract to producing companies not defendants in this action.

"Virtually all established adult screen players over 18 (2461) years of age are 'A' members of the Screen Actors' Guild. There were 2,109 in number as of September 21, 1945. Of this total, 1,844 were not under term contract as of October 1, 1945 to either RKO, Fox, Loew's, Columbia, Paramount, Warner or Universal. Of this 2,109, 1054 players were entitled to star or feature billing; and of the 1054 stars and feature players only 261 were under term contract to any of the above producing companies.

"Similar figures are available with respect to writers. Virtually all established screen writers are 'Active Members' of the Screen Writers' Guild. As of September 22, 1945 of the 952 Active Members of the Screen Writers' Guild, only 174 were under term contract to the seven companies which I have designated above.

"Similar figures are also available on directors. Virtually all established directors are 'Senior Director Members' of the Screen Directors' Guild. As of October 1, 1945 of the 222 feature motion picture Senior Director Members of the Screen Directors' Guild only 75 were under term contracts with the above designated companies.

"To supplement the personalities we have under contract we also, from time to time, contract for the loan of certain stars, feature players and other important production personnel. Such borrowings are also necessary where the proposed picture requires a particular personality or special

(2462)

talent which we do not have under contract or are unable to obtain in the free lance market, whereas some other studio might have a personality under contract who would be especially appropriate. Attached hereto as Koerner Exhibit 1 is a list of the borrowings by RKO since 1940. The fact that a producer from whom we borrow is a so-called major producer, or a so-called independent producer, does not constitute a factor in determining whether or not or from whom we shall borrow. Reference to this exhibit will show the fact that 62 loans have been made to RKO by major producers and 29 loans by independent producing companies from 1940 to 1945, but the loans which we have negotiated from independent producing companies have brought to us a substantial number of more important players for our top flight pictures. As for example: During the last year we borrowed from Selznick, whose company's name is Vonguard, Dorothy McGuire, the female star, and John Cromwell, director, in making the picture entitled 'The Enchanted Cottage', one of our most important productions. We are nearing completion of a picture entitled 'From This Day Forward' with Joan Fontaine as the female star, whom we borrowed from Selznick. We have just completed another important picture 'The Spiral Staircase' and to make this picture we borrowed from Selznick Ethel Barry-

(2463)

more and Dorothy McGuire, the female stars, Robert Siodmak, the director, Dore Schary, the producer, and Ronda Fleming, a featured player. We have started to shoot another of our top flight pictures entitled 'Notorious'. For this picture we borrowed from Selznick Ingrid Bergman the female star, and Alfred Hitchcock, the director. We have commenced another picture entitled 'They Dream Of Home', for which we borrowed again Dorothy McGuire and Dore Schary to produce. For another picture entitled 'All Kneeling' we borrowed from Selznick Alan Marshall for the male lead and Joan Fontaine for the female lead.

"Other producing companies from time to time have the same need for borrowing personalities as does RKO. Accordingly, we have had occasion to contract with other producers for the loan out of personalities under contract to RKO. When we receive a request for a contract for the loan out of a personality under contract to us, a very important factor in determining our action on the request, is whether the story or part is suitable for the personality and whether the personality wishes to be loaned. His value to us can be maintained and enhanced only if he is used in a proper part, in a suitable story, in a good production. Other factors considered include the ability of the borrower to pay a proper price for the loan out and his reputation for making good
(2464)
pictures. In determining whether we will make a loan out each deal stands upon its own merits and we do not consider as factors whether the producer requesting the loan out has made or may make loans to RKO, nor whether the producer's pictures are regularly exhibited in RKO theatres nor whether the borrowing producer is a major producing company or an independent producing company. The compensation to be received for loaning out a personality is not fixed by any formula, but by individual negotiation. The valuation is governed in the main by RKO's opinion as to the box office value of the person RKO is lending. This varies depending on the particular personality, but in any event RKO tries to obtain as favorable terms as possible when it loans out a personality and usually loans at a profit. RKO's determination of the price to be charged for a loan out is not affected by the fact that the producer is a major or an independent producing company. Attached hereto is Koerner's Exhibit 2, which is a schedule of the loan outs made by RKO to others of personalities from 1940 to 1945. This exhibit shows that during this period RKO has made 30 loan outs to major producing companies and 38 loan outs to independent producing companies.

"Also to supplement our available talent, we have made arrangements to share the services of certain players with (2465)
other producing companies, which arrangements are generally called talent sharing arrangements. A talent sharing arrangement comes about when one producing company which has the contract for the services of the particular personality feels that it cannot advantageously utilize the full services of this personality and is willing to permit another producing company desiring to utilize the services of that personality to participate in the contract. Attached hereto as Koerner Exhibit 3 is a schedule of the talent sharing arrangements in which RKO has participated during the past five years. In entering into such arrangements it is immaterial whether the other participant is a major producing company or an independent producing company, and, as the schedule shows, 12 of the 21 arrangements which RKO has made have been with independent producing companies. Furthermore, as the schedule shows, in 7 of these 12 arrangements the independent producing company had the contract originally for the services of the personality.

"In addition to making such personalities as we have under contract available to other producers on loan outs, we also make available to them studio space and sets which are not being used by us. In fact, production facilities and equipment of the RKO Pathe Studio at Culver City are almost constantly under lease to outside producers. Pres- (2466)
ently these facilities are being used by Sol Lesser, Edward Small and David Selznick, independent producers. When we have such space available we are prepared to lease it at a fixed rental to anyone who is able to pay that particular price, and in determining whether or not to make such a lease it is immaterial whether the lessee is a major producing company or an independent producing company. Attached hereto as

Koerner Exhibit 4 is a schedule of the leases of stage space and sets at the RKO main studio and ranch during the period January 1, 1939 to September 23, 1943. The record for the years given is typical and the pattern indicated thereby has continued. As the exhibit shows clearly the majority of these leases were to producing companies other than major producing companies.

"In addition to leasing studio space we frequently make contractual arrangements under which we lend out camera, sound and electrical equipment belong to RKO. In making these arrangements it is immaterial to us whether the other party to the contract is a major producing company or an independent producing company. During the period from January, 1938 to December 18, 1943 we made a total of 314 such rental agreements, of which 150 were to major producing companies and 164 to independent producing companies. The record for these years is also typical and the (2467)
pattern has continued.

"Due to disturbed conditions at our studios we have been unable to prepare a schedule of the leasing by RKO of production facilities and equipment of the RKO Pathe Studio during the last five years, and for the same reason have been unable to furnish recent detailed information concerning the leasing by RKO of stage space and sets at the RKO main studio, and of camera, sound and electrical equipment.

"The charges that RKO has participated in a combination or conspiracy to exclude independent producers from access to production personnel and equipment and that RKO has combined or conspired to monopolize the production of motion pictures are untrue. As a matter of fact, a number of men formerly connected with RKO have become and are now independent producers, including Jules Levy, David Selznick, Leo McCarey, Leo Spitz, Sam Briskin, Eddie Alperson, Eddie Small and Sol Lessor. The independent producers in

Hollywood have access to all the available stars, feature players and other production personnel in the free lance market and many of them have important personalities under contract to them. Furthermore, many important personalities have contracted with one producing company for their services with respect to one picture a year and are available
(2468)
to other producing companies, including independent producers, for the portion of their time not committed under contract. For example, RKO now has contracts with a number of important players for a single picture a year for a varying number of years, including, among others, such players as Ginger Rogers, Cary Grant, John Garfield, Myrna Loy, Paul Lucas, John Wayne, and Randolph Scott. On the average it requires from 10 to 12 weeks to complete the average important picture, thus leaving these personalities with approximately 40 weeks of each year when their services are available to producers other than RKO.

"To the best of my knowledge there is available to independent producing companies adequate studio facilities and equipment for the making of their pictures. I know of no instance where an independent producer or producing company have the ability and the other prerequisites to the production of marketable pictures has failed to secure needed players and other production personnel and studio space and equipment necessary to make its or his picture or has failed to obtain national distribution. RKO has consistently cooperated with capable independent producers in loaning to them personnel and leasing to them space and equipment and in distributing their pictures.

"The integrated organization under which RKO pro-
(2469)
duces, distributes and exhibits its pictures has many important advantages to the production activities of the company which make it the form of organization best adapted

to the successful operation of our company. It is highly essential that the studio have the advantage of theatre affiliations so that the proper presentation of its pictures is assured. This security of playing time allows the producing company to take certain risks in making new types of pictures with known personalities in unusual or new types of parts. Similarly, assured of the cooperation of the RKO theatres, we are encouraged to make pictures introducing talented but relatively unknown players, and thus to attempt to broaden the source of public entertainment and to increase the number of available artists. For example, our picture 'Days of Glory' was made with a completely new cast and brought to the screen for the first time Gregory Peck. This picture led to his appearance in 'Keys of the Kingdom' and 'Valley of Decision' and established a new star enjoying great public popularity.

"Another important advantage to the producer from integration of production and exhibition is the greater financial strength of the whole as a result of the stabilizing effect of theatre earnings. Production is the speculative phase of the motion picture industry, for it involves the investment of

(2470)

millions of dollars on features representing our judgment as to the box office attractiveness of a story and cast. The fluctuations of our production income are therefore quite substantial. The steady income from our theatres cushions these fluctuations, and tends to make the consolidated earnings of the company more stable.

"Through the RKO affiliated theatres we are assured of not only the prompt exhibition of our pictures but their exploitation in such a manner as to establish their popularity with the public and to assure their success generally. The availability of exhibition in RKO theatres gives us a direct indication as to public tastes and as to the trends in the types of pictures that are receiving public acceptance and

allows us to adjust our production plans in respect to such trends. Our theatres naturally play a wide variety of pictures, thus giving us a broad basis for judgment as to public trends.

"Each of the accompanying schedules has been prepared from the original books and records of RKO Radio Pictures, Inc. and the information incorporated in such schedules is correct.

(Sgd) CHARLES W. KOERNER."

(2471)

Judge Bright: Is that the end of the RKO case?

Mr. Leisure: We have a stipulation that we are discussing with Mr. Wright, and I think that will end our case.

Mr. Raftery: We still have to extend the 73 to 92. I have got practically all of it finished. I will have the whole of Universal finished in the morning, and I would like the privilege in the morning of putting in the 73 to 92. We have agreed on practically everything.

Judge Hand: All right.

Mr. Proskauer: Your Honor, we have—I hate to say it—but a few statistics. My charts, though, are going to be animated cartoons. I do not know whether your Honors want to start with them tonight or not. They won't take very long. And then tomorrow Mr. Seymour and I want to offer some evidence with respect to the arbitration awards and system. In addition to that I have a stipulation in Mr. Wright's hands which he has not had an opportunity to clear, but I am sure he will clear it, and I will have a brief statement to read.

Judge Hand: Has Mr. Caskey anything more?

Mr. Pride: We have some stipulations, your Honor, with respect to testimony of some of the National Theatres executives whom we have not called because we believe we can work it out with Mr. Wright. We have discussed it with him and we expect

(2471-A)

to have no further oral testimony along that line.

Judge Hand: I see.

Mr. Pride: I think we will have a few more exhibits.

Judge Hand: Very well. We shall adjourn until tomorrow morning at 10:30.

(Adjourned to November 9, 1945, at 10:30 a.m.)

(2472)

New York, November 9, 1945,
10.30 o'clock a.m.

Trial resumed.

Mr. Leisure: If your Honors please, yesterday, when the witness Mochrie was on the witness stand, Judge Bright asked the witness if he knew of any specific instances in which the RKO clearance varied as to first-run theatres from that of any other defendant and the witness replied he knew there were such instances, but without his records he could not specify them. I intended to have him supply us with a list of such theatres, but I find that that will not be necessary. It is already in the record, Judge Bright, in the 14 cases, appeal court cases, submitted by the Government. At least five of those cases that are in the record show that RKO's clearance varies from one or the other of the other defendants, so it will not be necessary to call anyone on that.

Those are the 14 clearance cases, and if your Honors wish to make a note of it, they are appeal court decisions 12, 24, 52, 104 and 109.

I indicated yesterday that we had some stipulations to take up with Mr. Wright, and there are two of those. I have tables here which I would like to

(2473)

offer in evidence showing, as to the Cincinnati theatres, the size and the data, and they are the same as Mr. Davis offered with respect to New York and the same as we offered with respect to New York. I would like to offer those, and I have taken them up with Mr. Wright, and I believe there will be no objection.

Mr. Wright: We have no objection.

(Marked Defendant RKO's Exhibit 24.)

Mr. Leisure: Also I offer a table showing the theatres operated by RKO, and it gives the state, the location, the theatre, the seating capacity and the acquisition cost and so forth. I have taken that up with Mr. Wright, and I believe there will be no objection to that.

Mr. Wright: Of course, as to this exhibit, it merely duplicates what is already in the record twice as to the theatres they operate. The only thing that this adds to what is previously in there is these acquisition costs, and I believe those are completely immaterial and irrelevant to any issue in the case. I just want to note that objection.

Mr. Leisure: The acquisition costs supplement Mr. Rathvon's testimony. That is why we are offering that.

(Marked Defendant RKO's Exhibit 25.)

Mr. Leisure: That finishes the case for RKO, if the

(2474)

Court, please.

Mr. Proskauer: Your Honors, I offer in evidence this diagram showing the dates of first-run exhibition of Warner's Princess O'Rourke in the 92 cities. That is in line with the other similar things. I do not like to regard Princess O'Rourke as a guinea pig, but this was our guinea pig picture.

I would like to, as I put these in, just briefly call attention to the significance here. This situation arose when there was a suggestion of holding back the pictures from independent distribution. This shows that our first showing was at an independent theatre in Buffalo, 20th Century Theatre in Buffalo. That is the red line. Again, red indicates an independent theatre.

Then, the next day we opened up at our theatre in Philadelphia. Some substantial time later, oh, a couple of weeks later, we opened it at the Strand in New York City, and, meanwhile, it was shown at the Metropolitan Theatre in Boston, at this independent theatre in Dayton, Ohio, at an independent theatre in Indianapolis, and your Honors can see from the coloring the way the independent showings were spaced in with these dark lines which are Warner theatres, and the green lines are affiliated theatres of other companies.

Judge Hand: What was the Boston theatre?

Mr. Proskauer: The Boston theatre is——

(2475)

Judge Hand: I mean, who owns it.

Mr. Proskauer: It shows on here, your Honor. I cannot answer it from memory. It was the Metropolitan Theatre in Boston, and that is an independent theatre and it opened there on the 28th of October, which was about two weeks after the first showing of the picture.

Mr. Seymour: The Metropolitan is an M & P. theatre, Judge Proskauer.

Mr. Proskauer: What does M. & P. mean?

Mr. Seymour: Mullin and Pinanski, which is a Paramount affiliate, if it is the Metropolitan you are talking about.

(2476)

Mr. Proskauer: I made a misstatement about Boston. It was not in that theatre at all. That did not show at the Mullin & Pinanski theatre in Boston until the 15th of December. The line that I should have described there was the State Theatre in Tampa.

Judge Hand: Yes, I think you called it Boston when you started.

Mr. Proskauer: No, that was Buffalo, your Honor.

Judge Bright: The initial showing you said was in Buffalo?

Mr. Proskauer: Yes.

Judge Hand: Oh, yes, the initial showing, but I thought you mentioned Boston.

Mr. Proskauer: No. My eye just did not take the line across. That is Boston (indicating) and it is shown as an affiliated theatre. This line here was an independent theatre, the State Theatre in Tampa.

Judge Hand: What was it?

Mr. Proskauer: The Buffalo theatre was the Twentieth Century, and it has been testified there was no connection with Twentieth Century-Fox.

Judge Hand: Yes, an independent.

(Marked Warner Bros. Exhibit W-2.)

Mr. Proskauer: Now, I offer in evidence a schedule which I am going to use as a basis for other

(2477)

schedules, so I am not going to burden you with very much attention to this schedule as such until I collate it with other schedules. This schedule is the total film rentals paid by Warner Bros. theatres for the years 1931 to 1945 inclusive, and I have said to Mr. Wright that they will all be taken subject to his check. They are taken directly from our books.

(Marked Warner Bros. Exhibit W-3.)

Mr. Proskauer: What I am endeavoring to do, your Honors, is not to burden you with a consideration of a lot of charts until I can show you what I believe to be their real significance.

Your Honors will notice on this chart, however, the variation from year to year in the percentage of our film rentals that we paid to other companies. For

instance, take Paramount. In 1931 we paid them 5.6 per cent of our revenue. In 1932 we paid them 14 per cent. When you get down to 1940 it got back to 11 per cent.

Take Loew's: We paid them 14 per cent in 1931, and it got up to 24 per cent in 1940, and it got back to 16 per cent in 1945.

While these percentages do not show huge variance, that means an enormous variance in money.

Judge Hand: That is, all others are independents?

Mr. Proskauer: All others are what we call the

(2478)

independents.

Judge Hand: Now, these are total film rentals for what kind of theatres? All theatres?

Mr. Proskauer: All Warner theatres. These are the film rentals we paid on all runs to the other companies.

Judge Bright: Just on features?

Mr. Proskauer: Oh, no, shorts and everything.

Now, the next chart supplements that by showing the total film rentals received by Warner Bros. for licensing their pictures in the United States and Canada.

(Marked Warner Bros. Exhibit W-4.)

Mr. Proskauer: Just preliminary and not by way of any accentuation, you will notice huge variances there. For example, Loew's paid [redacted] a percentage in 1931 of about three times what it paid us in 1945.

Mr. Davis: That is Loew's percentage of your total take?

Mr. Proskauer: That is right. There are similar variances all through.

Loew's got down to one-half of one per cent, and in another year they were up to 4.8 per cent; and

there are those variances which I cannot expect the Court to keep in mind but which I will advert to; but I am really offering this, as I said, as a basis for some

(2479)

supplemental charts that use both of these as a base.

The next chart I offer is the total film rentals received by Warner Bros. and its subsidiaries from all sources, both domestic and foreign.

(Marked Warner Bros. Exhibit W-5.)

Mr. Proskauer: When I come to brief I am going to ask your Honors to note in that chart the large percentage of our revenue that came from foreign sources, namely, 31.3 per cent for 1944; that we got from the affiliated Big Four, so-called, 19.4 per cent of our rentals. I am going to build up a picture of how deep our financial interest is in doing business with a great mass of independent theatres throughout the country.

Mr. Wright: Just one comment about this exhibit: I take it there is no dispute, is there, that when you go into the foreign field, of course, a substantial portion of your foreign revenue also comes from theatres in which these defendants are also interested——

Mr. Proskauer: I have never heard that and I have not the slightest information on it.

Mr. Wright: Well, you are aware of the fact that the other defendants have theatre interests all over the world?

Mr. Proskauer: Well, I will not make a concession on that, but I will do this with you: We will in the

(2480)

interval go over those figures and agree on them with you, and we will be glad to add as a supplemental schedule any portion of our foreign income that comes from affiliated theatres.

Mr. Wright: We had attempted by the pleadings to confine the case to what occurs in the domestic market here. Now, we do not have any interest in going outside; but if the defendants are going to be permitted to go outside the domestic field and offer foreign figures, then we are almost getting into another lawsuit. There ought to be some limit here.

Mr. Proskauer: Well, we are not so much concerned about getting into another lawsuit one way or the other, your Honors. I am offering this because, as I said in my opening, I am going to argue that this huge industry is in large measure dependent on its foreign business for existence, and that if anything is done here which destroys the quality of these pictures along the lines that have been developed, it is going to be a death blow to this industry. I do not want to argue my case fully now. If you have a criticism that this ought to show what of our foreign sales go to theatres that have some source or connection with affiliates, I tell you I am very glad to take that information and add it to this schedule.

(2481)

Mr. Wright: If that is counsel's defense, I submit it is a defense which really has nothing to do with the case that is before the Court.

Mr. Proskauer: Does your Honor want me to argue that now?

Judge Hand: Overruled.

Judge Bright: Judge Proskauer, I do not find that figure you just referred to which you were going to emphasize in your brief.

Judge Goddard: 31.3 per cent, isn't that it?

Mr. Proskauer: Yes, 31.3 per cent, foreign other than Canada, 31.3 per cent.

I offer in evidence a schedule showing comparatively for the years 1930 to the season of 1944 inclusive

the film rentals paid to Loew's by Warner's and the film rentals received by Warner's from Loew's and its affiliates. To that I should like to call attention: If you begin with the year 1931-32 you will see that we paid the Loew's in that year just short of 41 per cent less than we did the previous year. We got from Loew's 43.9 per cent, or just short of 44 per cent more than we did the previous year.

If you go to 1933-34, you see the amount we paid Loew's went up by 45½ per cent. The amount we received from Loew's went up only 14 per cent.

(2482)

If you go to the next year you will see that we increased what we paid Loew's by 3 per cent. They decreased what they paid us by 31 per cent.

The following year we paid them an increase of 22.7 per cent. They paid us a decrease of 62 per cent.

The following year we paid them 25 per cent more than they paid us the previous year. We got from them 18 per cent less.

The succeeding year had no significance. The figures were about the same.

When you come to 1938-39, however, we increased 13 per cent and they increased 22 per cent in what they paid us.

When you come to the following year, we paid them 25 per cent more and they paid us 35 per cent less.

When you come to the following year, we paid them 15 per cent less; they paid us 8 per cent more.

When you come to the following year, we paid them 6 per cent less; they paid us 7 per cent more.

The next year just about balanced.

But the following year we increased with them, what we paid them, 4 per cent; they decreased with us 10 per cent.

And there was a slight variance in the subsequent year.

(2483)

I am going to offer a similar schedule for each company. I am not going to burden you with an analysis now of each one of these, but I am offering it as a basis of proof of what I said in my opening that there is absolutely no pattern between what we buy from and what we sell to any other company.

(Marked Defendant Warner's Exhibit W-6.)

Mr. Proskauer: I am not going to burden you with comment on the other schedules, your Honor. I am simply saying we shall contend that they follow the same lack of pattern.

(Marked Defendant Warner's Exhibit W-7.)

Mr. Wright: Which companies are which numbers?

Judge Bright: Paramount is No. 7, and W-6 is Loew's.

(Marked Defendant Warner's Exhibits W-8 and W-9.)

Mr. Proskauer: The next schedule I offer is a computation of the average cost of each feature picture made by Warner Bros. for the years 1931 to 1945, and in parallel column for each year there is the average theatre admission price at Warner Bros. theatres.

Judge Hand: That is, every kind of a theatre?

Mr. Proskauer: All our Warner theatres.

(Marked Defendant Warner's Exhibit W-10.)

Mr. Wright: If the Court please, I submit that

(2484)

there is absolutely no relation or could not be whatso-

ever between the figures that are on the chart here. I do not see how this could possibly be accepted as proof of anything. If this is regarded as the proof that counsel was promising to the effect that costs had not been passed on to the public, there is only one way I know that could be made and that is by a showing as to profit margin. That material, material of this kind, cannot possibly establish the fact that such increases in costs that occurred were not absorbed by the consumer.

Mr. Proskauer: Your Honor, this chart shows that in 1931 our average feature film cost us $337,000 and our average theatre admission price was 35 cents. Skipping the intervening years, it shows that in 1945 our average feature cost was $1,371,000, or a little over four times, as I rapidly calculate it, what it was in 1931, and our average theatre price was 1.9 per cent higher than it was back in 1931.

Mr. Wright: Could we have a statement at this time as to how that average theatre admission price was computed?

Mr. Proskauer: It is stated on the schedule. The average admission price is determined by dividing the box office receipts by the attendance, the data given excluding admission taxes.

(2485)

Mr. Wright: That, I take it then, does not represent the average price at any particular theatre at all, is that right?

Mr. Proskauer: It represents the average admission price of all our theatres. If you want them theatre by theatre, we will be glad to supply it. I do not see how the Court would be much interested in that.

Mr. Wright: I suppose we can see the work sheets that were used?

Mr. Proskauer: Certainly. You have seen everything else we have. I don't see why you should not see those worksheets.

(Marked Defendant Warner's Exhibit W-11.)

Mr. Proskauer: For Mr. Seymour's benefit, I think I ought to state that when we use the words "Paramount Pays" we mean the whole Paramount group and not the Paramount Company itself.

Mr. Seymour: I thought I had established quite early in this case that wherever anybody said that, they could mean only that.

Mr. Proskauer: I was afraid of reprisals. I next offer in evidence a schedule of the percentage of Warner film costs paid to Warner's as film rental by the Warner Bros. theatres and theatres affiliated with the four major companies.

(2486)

The significance of that is that figuring in all that we charge our own theatres, and we charge them on the basis you have heard in the testimony, and all we get from the four major defendants, the average for eight years is that that constitutes 55 per cent of our film cost. I am not talking about overhead now, I am just talking about actual negative cost of the production of the picture, and that that is an indication of how much we rely on the independent trade, so-called, to sustain ourselves.

I next offer in evidence a comparison on the cost of a positive print of Princess O'Rourke, and the average film rental per booking. The source of that information is entirely answers to interrogatories with the one exception that we have used the figure $130 as the approximate cost of making a positive print.

(Marked Defendant Warner's Exhibit W-12.)

Mr. Proskauer: This analysis will show that of the approximately 14,000 bookings of that picture, 12,926 of them brought in an average film rental of $78.45, being just a little more than half the cost of the positive print, again showing the enormous dependence we have on the large independent business.

The next schedule simply states our profit of our company before federal income taxes, before foreign income film royalties received for American made

(2487)

pictures, discounts, bond discount, and losses on sales of capital assets, and what it shows is that excluding those other items until the year 1943, when we got into this enormous expansion of attendance at theatres due to the war, we were running in the red. If you excluded particularly our foreign income——

Mr. Wright: Just a minute. I submit, if the Court please, that to receive a series of figures like this, without the form of the statements themselves, which show how these profits were computed, is completely misleading and cannot be competent proof of these facts, even if the facts are material.

Mr. Proskauer: Obviously it is not competent if objection is made to it. I will call an accountant and show he took these figures from our books.

Mr. Wright: If the Court please, there are certainly published statements or statements which counsel has available that will show exactly what the division of profit was here and how these were computed, but to simply put in an overall statement——

Mr. Proskauer: I say these figures were taken from our published statements and modified on the basis of them as herein indicated except that our published

statements do not sometimes show separately stated these specific exclusions which appear on our books. You can send your accountants up to check this or

(2488)

you can refuse to take it and I will call an accountant and prove it.

Mr. Wright: We object to this very definitely in this form. This heading contains a whole series of conclusions as to which there is no possible check——

Mr. Proskauer: Tell me one——

Mr. Wright: —on the basis of the data that is presented here.

Mr. Proskauer: Tell me one conclusion that it contains. Let us analyze that, your Honor. Profit before Federal income taxes. That is no conclusion. We have taken our Federal income taxes——

Judge Hand: What he is really objecting to is, you have not laid any foundation for it.

Mr. Proskauer: I have not laid any technical foundation for any of these things. It is just a question of whether he wants to change the manner in which we are doing this work and making me call an accountant to prove to you this was taken from our books. I have such a man in court.

Judge Hand: Do you want him to do that, Mr. Wright, if he attempts this sort of evidence?

Mr. Wright: If he wishes to put in this sort of evidence, I say that he has got to make a proper showing of what this accountant did. He talks about this as "U. S. A. Production and Distribution Divisions."

(2489)

I do not know how those divisions are set up on what basis they decide they had a loss in America and a profit abroad. I hesitate to see the Court spend time on it, because I do not see how it can possibly affect the outcome of the case one way or the other.

Judge Bright: What is the significance of this proof? What is the purpose of it?

Mr. Proskauer: The significance of the proof is exactly the same as the significance of some of my other charts, and it is to show that, lacking the foreign film rental, that our production and distribution divisions operated at a loss, an actual loss.

Judge Goddard: In the United States?

Mr. Proskauer: In the United States, yes, sir.

Judge Bright: What significance would that have to prove that you did or did not violate the Sherman Act?

Mr. Proskauer: The suggestion that was made in our opening. It really goes in part, your Honor, to the remedy which the Government is seeking of divorcement, and it is a part of our contention that if you divorce these theatres for the reasons which have been set forth here, we are going to be put in a position where we in this country, are going to lose a large part of this foreign revenue, and that the consequence of that would be as shown on this schedule

(2490)

that we would be back, in normal years, in the red, excluding that foreign income.

Judge Bright: Assuming all that, would that be any excuse for violating the Sherman Act?

Mr. Proskauer: Not the slightest. It bears, however, on the question as to whether there is a monopolization, and it also bears very directly on the chief issue the Government tenders us in this case which is remedy. I am going to have more to say about that, your Honors, when we put in some of this arbitration testimony in a few minutes. We have got a consent decree here, and the working of that is important. We could not move to dismiss this bill, I take it, because there already is a decree. What the Government

is really doing is seeking a modification of that decree, that being a final decree, so that this question of remedy is of the essence in this trial itself.

Judge Bright: I have just been wondering whether or not that particular question might more properly come upon the termination of the decree, assuming you are bound to have violated the Sherman Act.

Mr. Proskauer: Let me say, in the almost unbelievable contingency, you should make such a finding, it still would do no harm, surely, to have this in the record, and on the basis of which we could argue before your Honors when you come to that point. I
(2491)
do not regard this as vital. It has been admitted with respect to other companies, Mr. Van Bergh reminds me.

Mr. Wright: If the Court pleases, if this is intended to show, as it appears to do on its face, that the Warner Bros. theatres' profits during this period, when you have these red figures, were used to subsidize their film production and distribution——

Mr. Proskauer: There is no such intent as that.
(2492)

Mr. Wright: (Continuing) As far as I am concerned, that fact simply lends strength and adds point to the necessity of the relief we are seeking in order that there can be a free competitive market for the distribution of films in this country; but if it is intended to show that there is some necessity to have a closed market in this country, in order to have a profitable exploitation of the foreign market, I submit that, in the first place, these figures cannot possibly demonstrate anything of the kind, and if they did, that the decision as to whether or not that closed market should be permitted here for that purpose is one which would have to be made by the legislative

branch of the Government and not the courts; that this is the kind of data that might be offered to a Congressional committee that was considering legislation to give these people a total or partial exemption from the Sherman Act in this country on the theory that that was desirable to protect the market abroad, but it just is completely outside any of the issues that are posed before your Honors by the pleadings in this case.

Mr. Proskauer: Your Honors, I am not accustomed to having my adversaries frame my contentions for me silently, and I refuse to be put in the position of arguing any such absurdity as has been put in my mouth.

This has, in addition to what I have said, a direct
(2493)
bearing on the issue of monopolization. You do not ordinarily have monopolies which operate at a loss. My friend in his argument just tacitly assumed these things about closed markets and all this shibboleth of the trust buster, which has been answered in testimony here. What kind of a monopoly is it in a domestic market where I can show that in this alleged monopolistic market from 1937 to 1942 inclusive we were actually in the red with respect to our domestic production?

Judge Hand: I am not at all sure that this is appropriate evidence at this time, but we are going to sustain this objection unless you lay a foundation.

Mr. Proskauer: I will call a witness.

Judge Hand: That is all right; it will go in then. It will go in with whatever consequences may result. We do not pay any attention to arguments to exclude it any more than we have in the past, but I think this objection is perfect.

Mr. Proskauer: So do I. I have not argued against it.

Why don't you take it subject to correction and modification, the way you have other schedules?

Mr. Wright: I will say this again, in order not to spend the time of the Court in having a witness develop from the stand what he did in getting at these
(2494)
figures, if we can have a comprehensive statement from him submitted to us in letter form or otherwise, and can be permitted to ask such appropriate questions as we desire to outside of the court and get the answers to them, then I have no objection.

Mr. Proskauer: All right. Mark it upon my assurance that you shall have such a letter before the sun sets tomorrow.

(Marked Defendant Warner's Exhibit W-13.)

Mr. Proskauer: My last exhibit that I offer, your Honors, I am offering, I must say frankly, following precedent. Everybody else has offered it and I do not think it is very important. It is just a statement of our theatre properties as at May 26, 1945, as they are carried on our books.

(Marked Defendant Warner's Exhibit W-14.)

Mr. Proskauer: Mr. Wright, may I read in Bernhard's statement, with your permission?

Mr. Wright: Certainly.

Mr. Proskauer: Mr. Wright has stipulated that Joseph Bernhard, if called as a witness, would testify in accordance with the statement which I hold in my hand, with the same force and effect as though he had been sworn as a witness and taken the stand and subjected himself to cross-examination.

(2495)

Judge Hand: What is the name?

Mr. Proskauer: Joseph Bernhard. I will read only a portion of this, your Honors, and then, if Mr. Wright is agreeable, let the rest just be transcribed into the record.

"I have been head of the Theatre Department of Warner Bros. Pictures, Inc. from December 18, 1931 until November 7, 1945. I have resigned that position as of November 7, 1945 having acquired a 50% interest in United States Pictures, Inc., engaged in the business of producing feature motion pictures. This corporation now has a contract with Warner Bros. Pictures, Inc. for the distribution of pictures to be produced by it.

"I have and have had complete familiarity with the fundamental policies of the Theatre Department of Warner Bros. Pictures, Inc. and its subsidiaries during my tenure of office.

"I deny that said companies or any of them have at any time during my connection with them attempted to monopolize or monopolized any part of the motion picture business or that they or any of them have contracted, conspired or combined with any person or persons or company or companies so to do. I deny each and every charge in the amended and supplemental complaint herein.

"When I became head of the Theatre Department

(2496)

Warner Bros. Pictures, Inc. and its subsidiaries had an interest in about 585 theatres located in 22 States and the District of Columbia. A substantial number of these theatres were situated in and around Pennsylvania and New Jersey. As a resident of Philadelphia for many years prior thereto I was generally familiar with the theatres in and about Philadelphia

and knew that prior to the acquisition of the stock of Stanley Company of America by Warner Bros. Pictures, Inc. the best downtown theatres suitable for motion pictures had been in the common ownership of Stanley Company of America for many years. In fact my best recollection is that Stanley Company of America had the best theatres most suitable for the exhibition of motion pictures as far back as the introduction of feature motion pictures in the industry and that Stanley Company of America had prospered under the able leadership of Jules Mastbaum, who died shortly before Warner Bros. Pictures, Inc. acquired the stock of Stanley Company of America.

"I deny that Warner Bros. Pictures, Inc. acquired an interest in any theatre during my tenure of office with the purpose of having theatres where they would not be in competition with the theatres of any other person or company, or that there was any agreement or understanding, express or implied, to any such effect. All our theatres were acquired in the open

(2497)

market and in most cases in open and keen competition. Some of such theatres were acquired in competition with competing companies producing motion pictures.

"Since I have been head of the Theatre Department I have had no policy for the expansion of theatre holdings. When I severed my connection with Warner Bros. Pictures, Inc., it had an interest in 547 theatres located in 18 states and the District of Columbia, a net reduction of 38. Any theatres acquired in the interim were to protect our business and meet the varying economic conditions, shift of populations or needs caused by obsolescence which had arisen with the changes over the years.

"I have read the testimony of Harry M. Warner, president of Warner Bros. Pictures, Inc. in this trial and state that any references therein to the theatre situation in so far as they occurred during my connection with the company are true.

"I have always operated the Theatre Department separate and apart from the Distribution Department of Warner Bros. Pictures, Inc. and have never allowed the operations of the Distribution Department to influence my judgment in the licensing of pictures for the Theatre Department. I have requested counsel in this case to collate from the Theatre Department and the Distribution Department instances which

(2498)

tend to show what I have just stated as a fact, which are attached hereto as Exhibit 'A'."

That exhibit I will ask to have offered as part of this statement and marked.

(Marked Defendant Warner's Exhibit W-15.)

Mr. Proskauer: I will refer to that in a moment, your Honors. (Continuing reading):

"I believe the information therein contained to be true but since I do not know all of this information of my personal knowledge I requested counsel for Warner Bros. Pictures, Inc. to make available to plaintiff's counsel the records of our company with respect thereto so that any inadvertent inaccuracy, if any, may be corrected.

"In my opinion the quality of motion pictures produced would be jeopardized by divorcement of theatres from production with hardship not only to the producers of motion pictures, of whom I am now one, but also to the public and to whomsoever may own or operate motion pictures in this country at the conclusion of this trial."

The rest of the statement consists of formal denials of the character that Mr. Skouras gave, and if it is agreeable to Mr. Wright and your Honors, I will just ask that that be spread upon the record.

(Balance of statement referred to is as follows:)

(2499)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution or exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

(2500)

"Q. Has there been or is there to your knowledge any agreement among the defendant or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or tradeshown? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

(2501)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-distributor with respect to run, clearance, license fees or any other terms of licensing? A. No, sir.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

(2502)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defend-

ants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

(2503).

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements

with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or
(2504)
monopolizing exhibition or distribution with respect to such theatre? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."
(2505)

I should like to call your attention to some of the situations shown in this exhibit. In 1930 and 1931 the distribution department did not license RKO New York Metropolitan theatres. The theatre department on the other hand licensed RKO pictures generally. The distribution department licensed Paramount affiliates. The theatre department did not license Paramount.

In 1932 the distribution department licensed Loew New York Metropolitan theatres. The theatre department did not license Loew's pictures until late in the season, when it licensed all or part of Loew's pictures in approximately 150 of the 250 theatres in which it played Loew's pictures in the previous year.

I do not want to read that whole thing, but it is with a reference to particular companies entirely cor-

roborative of the chart I read to your Honors which showed the lack of pattern and the variances in amount; and I shall argue that this schedule bolsters up and puts flesh on that schedule of figures that I gave.

I think that is all.

Mr. Raftery: I want to supply the difference between the 73 and 92 that were missing. It will only take a minute. I have got a witness here, but if we can dispense with the witness and allow me to testify as Judge Proskauer did, we can perhaps do it a little faster.

(2506)

Judge Bright: Judge Proskauer, is that the close of the Warner case?

Mr. Proskauer: You are referring to the specific Warner testimony?

Judge Bright: Yes.

Mr. Proskauer: I think it is. I am going to ask Mr. Wright to make some kind of general stipulation with me about witnesses not called.

Would you stipulate no inference is to be drawn from——

Mr. Wright: We certainly would not.

Mr Proskauer: You want me to call all my theatre managers from all over the country?

Mr. Wright: Any testimony you want to put in the record should be in the record. We won't do it.

Mr. Proskauer: All right. You have stipulated with other people that if subordinates were called they would give the same testimony as the superior gave.

Mr. Wright: We have made no such stipulation with anyone, and we do not proposed to make any.

Mr. Proskauer: I shall have to answer your Honor's question by saying I want to reserve judgment as to whether I have got to call all my exchange

managers and theatre managers from all over the United States.

Mr. Raftery: This is in reference to United Artists:

(2507)

In Exhibit 145, Government's Exhibit, Mr. Wright asked us about 92 cities but only supplied 73 that he wanted answers. We answered only 73. Since the date of our examination he gave us 19 cities, and there is the rest of 145.

In connection with United Artists Exhibit 1, the same situation applied, and we have now answered as to the other 19, which show that United Artists played Stage Door Canteen in seven independent situations in the 19 cities and 12 affiliated. And I merely want to add this as the last page of Exhibit UA-1.

Mr. Wright: That is agreeable.

Mr. Raftery: So it will be page 5 of that exhibit.

As regards the 92 cities, I have secured from Mr. Wright the Stage Door Contract which I believe Judge Bright was examining Mr. Lazarus about, which showed sliding scale percentage starting at 20 per cent, and going to 50 per cent on the first-run exhibitions in the Fox theatres; and I have picked out the situations where we had the sliding scale contracts both with independents and affiliated, and I have added one column in those towns. I had the witness here who made the computations, but Mr. Wright, I believe, will agree on them with me.

If your Honors will look at UA-1, in Los Angeles, California, we played an affiliated theatre, and according to the contract we got 20 to 50, and all it

(2508)

shows on UA-1 is the film rental without showing the actual percentage.

Now, in the Pathe Circle we received $3,691.29 for the first week's film rental, which represented 41 per cent of the gross receipts.

In the Ritz we received 39 per cent for one week.

In Loew's State, 42 per cent.; Grauman's Chinese, 36 per cent; the United Artists, which was the move-over, 48 per cent; in the Wilshire, a move-over, 27 per cent; in the Four Star, we played six weeks more on a move-over, and by weeks we got 35 per cent the first, 33 the second, 33 the third, 28 the fourth, 29 the fifth, and 23 the sixth.

The next situation is the Music Hall in Seattle, also an affiliated house, and also on this Stage Door Canteen contract. The first week at the Music Hall, 47 per cent; at the Paramount day and date, the first week, 38 per cent; it played a second week and we got 34 per cent.

At the Music Box we played four weeks on a move-over: the first week, 45; second week, 45; the third week, 40; 36 the fourth.

In Denver, Colorado, which are also National theatres under the same contract: The Esquire, 49 per cent; the Denver, 46 per cent; we then moved to the Aladdin and we got 45 per cent for a week; the second week of the move-over at the Aladdin, 25 per cent. The Rialto, 35 per cent; and then the Broadway for three more weeks, 39 per cent the first, 41 per cent the

(2509)

second, 41 per cent the third.

Now, Portland, Oregon, is an independent. We got 50 per cent the first week; 50 per cent the second week; 45 per cent the third week; and then we moved over to [illegible] independent's move-over house and got 35 per cent.

At Oakland, California, which is affiliated, at the Paramount we played two weeks; the first week 47 per cent; the second week 33 per cent.

At the Franklin we played three weeks on a move-over and got 33 per cent the first, 32 per cent the second, 27 per cent the third.

Now, San Francisco, California, is an independent. We played ten weeks. The first week, 50 per cent; 50 per cent the second; 45 per cent the third; the fourth week we got part 40 per cent and part 50 per cent. That is due to an overlapping of days. The next week we got 40 per cent; the sixth week 40 per cent; the seventh week 35 per cent; the eighth week 35 per cent; the ninth week 35 per cent, and the tenth week 25 per cent.

And in San Diego, which is affiliated, the first week 48 per cent in one house, the Fox; in the State, which played day and date, we got 45 per cent. We then moved over to the Orpheum, and we got 45 per cent the first week and 44 per cent the second week.

(2510)

At Long Beach, also affiliated, the first week 46 per cent, and then moved over to the Long Beach where we got 45 per cent the first week and 45 per cent the second week.

In Spokane, also a Fox affiliate, the first week 48 per cent; then moved over and got 36 per cent at the move-over house.

At Sacramento, also affiliated, we got 43 per cent in one house, the Senator, playing day and date with the Alhambra. They paid us 45 per cent.

Tacoma, an independent, the first week we got 50 per cent; then we moved to the Blue Mouse and we got 37½ per cent over $3,000. That is a split figure.

Then we played one extra day and got 25 per cent of the gross over $2200.

Mr. Wright: It says "under." Should that be "over."

Mr. Raftery: Oh, I am sorry. It is 25 per cent under, because it is only $83.

I won't bother offering those things I have read into the record.

Now, as regards Universal, I will be even more brief. Exhibit U-2 is the heaviest exhibit that either of these defendants have gotten into the record, and it is a list of all the franchises, and I am going to try to sum the whole exhibit up in one short sentence. We

(2511)

counted the franchises, and they total 770, not 500 as Mr. Scully testified. There are 770. There are 43 with affiliated and 727 with independent exhibitors.

Now to get back to the 19 cities——

Mr. Wright: Excuse me. Is that last in evidence? That is, isn't it?

Mr. Raftery: Yes. I just added them up.

Mr. Wright: Yes, I see.

Mr. Raftery: You can correct me on anything I say. But I took the holiday off and added it, and I think it is right.

Now, with regard to Universal Exhibit 1 where we answered 73, of the 19 additional which I want added as page 3 of U-1, we were only able to sell 18 of the 19. Do you remember the witness Scully said that Plam Beach Yamins would not buy his product up in Fall River. So we got 18 cities. Five we sold affiliated and 13 independent in the 92.

Mr. Wright: That will be the third page of U-1?

Mr. Raftery: Yes, the third page of U-1.

Now, as regards our exhibits, we are going to put them together and furnish the Court with a bound set of exhibits, and we won't discriminate. We will see that the affiliated get it as well as the independents.

(2512)

Mr. Davis: If the Court please, I want to read into the record a stipulation on behalf of Loew's Incorporated.

It is stipulated, that Nicholas M. Schenck, if called as a witness on behalf of Loew's Incorporated, would testify as follows, this stipulation being received with the same force and effect as if he had appeared on the stand and subjected himself to cross-examination:

"I am President of Loew's Incorporated and I have been President of Loew's since September 19, 1927. I was Vice-President of Loew's from the time it was organized in 1919 until I was elected President in 1927. As President I am the executive head of Loew's and have the general supervision of its business, including the production, the distribution and the exhibition of motion pictures in the United States. I own no interest either through stock or otherwise in any motion picture, producing, distributing or exhibiting organization other than Loew's, and I own no interest in any other form of theatrical enterprise.

"My first connection with the entertainment industry was in 1907, when I started with Mr. Marcus Loew in the business which ultimately became Loew's Incorporated. When I joined Mr. Loew he had a small organization which operated one or two vaudeville theatres and a few remodeled penny arcades where

(2513)

single reel motion pictures were exhibited. I started without any specific kind of work, practically as an

apprentice, learning the business. I continued to be associated with Mr. Loew in the operation of the Marcus Loew Booking Agency, which was organized in 1910, and of Loew's Theatrical Enterprises which was organized in 1911 to carry on Mr. Loew's various vaudeville and motion picture enterprises.

"Our business expanded slowly and in 1919, we had about 50 theatres, mostly in New York City and most of which at that time used vaudeville and feature motion pictures. We still had a rather small organization when we formed Loew's Incorporated in 1919. Mr. Loew was the first president of Loew's Incorporated and he held that position until his death in 1927.

"Ever since Loew's became a producer and distributor of motion pictures, its feature motion pictures have been advertised and known as 'Metro Pictures'. For a long time the three divisions of the business, producing, distributing and exhibiting were carried on by separate corporations; Metro-Goldwyn-Mayer Corporation made the pictures, Metro-Goldwyn-Mayer Distributing Corporation distributed the pictures, and Loew's Incorporated of which the other two companies were subsidiaries, operated motion picture theatres. While in 1936-1937, the corporate

(2514)

structure was simplified and the producing and distributing corporations merged into Loew's Incorporated, the three functions of producing, distributing and exhibiting were continued as completely separate units.

"As of August 31, 1944, the theatres in the United States in which Loew's had an interest either through ownership or leasehold had a book value, apportionable to Loew's interest, of nearly $69,000,000 and an assessed valuation so apportionable of about $57,000,000.

"There is not now and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Loew's Incorporated and any one or more of the defendants with respect to any of the following matters:

"(1) The restraining of competition among or between the defendants, or any of them, in either the production, or the distribution, or the exhibition of motion pictures.

"(2) The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor in the United States.

"(3) The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact

(2515)

of being a part of a circuit or because of the so-called 'affiliation'.

"(4) The exclusion of so-called 'independently' produced films from so-called 'affiliated' theatres.

"(5) The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"(6) The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres.

"(7) The use of first and other early-run so-called 'affiliated' theatres to control the film sup-

ply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"(8) The division of available films among theatres owned or controlled by two or more producers-exhibitor defendants.

"(9) The refraining from building, buying or offering to lease theatres in areas where they might compete with existing so-called 'affiliated' theatres.

"(10) The division of territory of the entire United States, or any part thereof, between the producer-exhibitor defendants for theatre operat-

(2516)

ing purposes.

"(11) The loaning and exchanging of production personnel and equipment among the defendant producers on uniform and non-competitive terms and excluding so-called 'independent' producers from access to such personnel and equipment on equal terms.

"(12) The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"(13) The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"(14) The film rental, whether flat or percentage, charged or to be charged by Loew's Incorporated to any theatre or theatres.

"(15) The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"(16) The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

(2517)

"(17) The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not."

(Mr. Davis: And I may say to the Court by way of parenthesis that those different acts which are charged are to be found in the bill of complaint and in the trial brief. The effort in this catalogue is to meet the specific charges of combination which were made against this defendant in those regards.)

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor, has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act."

(Mr. Davis: During which period I again say by way of parenthesis, as we all know, there was a considerable concert of action.)

"It is also stipulated that Mr. Schenck would testify as follows:

"Loew's has not prevented any defendant or any so-called 'independent' producer from competing with Loew's in the production of films.

(2518)

"Loew's has not prevented any defendant or any so-called 'independent' distributor from competing with Loew's in the distribution of films.

"Loew's has not prevented any defendant or any so-called 'unaffiliated' exhibitor from competing with Loew's in the operation of theatres.

"Loews' has never discriminated in favor of so-called 'affiliated' or so-called 'circuit' theatres and against 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

"Loew's never has conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's.

"No other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant.

"Loew's never has had and does not now have any agreement or understanding with any distributor with respect to the minimum admission prices which such

(2519)

distributor should insert in its licenses for any theatre or theatres not operated or controlled by Loew's.

"Loew's never has had and it does not now have any agreement or understanding with any distributor

with respect to the run which such distributor should grant for any theatre or theatres not operated or controlled by Loew's or the order or sequence of runs between such theatres."

(Mr. Davis: Follow me now, Mr. Wright, will you, because this is not in my memorandum.)

"It is further stipulated and agreed that if there were put to the witness Schenck the questions which were put to the witness Zukor as shown by pages 612, 617 of the printed record, and folios 864 to 870 of the stenographic record, he would answer each and all of those questions in the negative."

(2520)

I shall also read the following stipulation:

"IT IS STIPULATED that if Rudolph Berger, J. E. Flynn, E. K. O'Shea, J. J. Maloney and G. A. Hickey were called as witnesses on behalf of the defendant, Loew's, Inc., each would testify as follows, this stipulation being received with the same force and effect as if they had appeared upon the witness stand and submitted themselves to cross-examination"——

Mr. Wright: If the Court please, just a minute. I do not see anything in these written stipulations here about the same force and effect as if. As I read the stipulation——

Mr. Davis: To tell you the truth, it was not in my draft, Mr. Wright, but I heard each one of my more cautious and expert colleagues insert that, and I did not want to be submitted to an invidious comparison.

Mr. Wright I think that is a matter that you can argue, of course, but I think the stipulations ought

to be confined to the wording that was submitted to us when we agreed to accept them.

Mr. Davis: I am not sure that the phrase is necessary to give this stipulation effect, but its having been used without objection in all the other stipulations read, I submit I am entitled to it. That is the effect, that is the purpose of the stipulation, of course, to

(2521)

supply the presence of the witness.

Mr. Wright: There is no question about that. But nobody should be under any illusions that we will not argue from each of these stipulations that what is unsaid in those may be far more important than anything that is said.

Mr. Davis: Of course, I am not asking you to admit the truth of the witnesses' statements. All you are proposing to admit is that if the witness appeared in court he would testify to this effect.

Mr. Wright: This is what he would say, that is right.

Mr. Davis: And this stipulation, manifestly, has the same effect as if the witness had appeared and been sworn and been submitted to cross-examination. Now, that is a legal conclusion, but I really do not see any reason why it should not be made of record.

Judge Hand: I think that is all right. It has gone in for the others anyway, and it is its effect, I should say.

Mr. Davis: I shall now continuing reading this stipulation——

Judge Bright: Who were the four gentlemen?

Mr. Davis: I am about to state. Each witness testifies:

(2522)

"At the present time I am one of the five Division Sales Managers of Loew's Inc. I have been employed

by Loew's, Inc. or its predecessor organization, since the date set forth below following my name, and I have supervision of the Loew's exchanges in the cities likewise set forth following my name:

"*Rudolph Berger*	Feb. 6, 1924	*South*
		Atlanta
		Charlotte
		New Orleans
		Dallas
		Kansas City
		Oklahoma City
		Memphis
"*J. E. Flynn*	Feb. 19, 1918	*Midwest*
		Chicago
		Des Moines
		Milwaukee
		Minneapolis
		Denver
		Omaha
		Salt Lake City
"*E. K. O'Shea*	May 10, 1920	*East*
		Boston
		New Jersey
		New York
		Albany
		Buffalo
		New Haven
		Philadelphia
"*J. J. Maloney*	Aug. 21, 1922	*Central*
		Cleveland
		Detroit
		Indianapolis
		St. Louis

Cincinnati
Washington, D. C.
Pittsburgh

(2523)

"G. A. Hickey Oct. 13, 1917 *West Coast*
Los Angeles
Portland
San Francisco
Seattle.

"2. In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Loew's, Inc. and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated theatres.

(2524)

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres

on the same run as and in competition with so-called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Loew's Incorporated to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

(2525)

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor has regularly made in the course of its business

with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"3. It is also stipulated that each of said witnesses would testify that in the respective exchange areas over which he has supervision:

"A. Loew's has not prevented any defendant or any so-called 'independent' distributor from competing with Loew's in the distribution of films.

"B. Loew's has never discriminated in favor of so-called 'affiliated' or so-called 'circuit' theatres and
(2526)
against 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called affiliation.

"C. Loew's never has conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's.

"D. Loew's has no agreement or understanding with any prior run exhibitor, either a so-called affiliate or independent, fixing the minimum admission price which Loew's must insert in its license agreement with a subsequent-run exhibitor."

Mr. Davis: I also offer this stipulation:

"It is stipulated that Joseph R. Vogel and Charles C. Moskowitz, if called as witnesses on behalf of Loew's, Inc. would testify that they have been in the employ of Loew's, Inc. and its predecessors since October 10, 1909 and January 20, 1913, respectively; that both of them are presently vice-presidents of Loew's, Inc.; and that the said witnesses have between them the entire supervision and control of the 131
(2527)
theatres presently operated by Loew's, Inc. throughout the United States.

"It is further stipulated that each of said witnesses would testify as follows, with the same force and effect as if they had appeared on the witness stand and subjected themselves to cross-examination:

"1. There is not now, and to the best of my knowledge, information and belief, there has not been any contract, agreement, understanding or concert of action between Loew's, Inc. and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The exclusion of so-called 'independently' produced films from so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres.

(2528)

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The division of territory of the entire United States, or any part thereof, between the producer-exhibitor defendants for theatre operating purposes.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

(2529)

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor, has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"2. Loew's has not prevented any defendant or any so-called 'unaffiliated' exhibitor from competing with Loew's in the operation of theatres.

"3. No other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant.

"4. Loew's has no agreement or understanding with any distributor, either a so-called 'affiliated' or 'independent', fixing the minimum admission price which a subsequent run exhibitor of said distributors feature pictures must charge."

(2530)

Mr. Davis: I have under consideration, if the Court please, two or three more exhibits on the part of Loew's. I am not sure I shall offer them, but I am not prepared yet to announce that that is all of the Loew case.

Mr. Leisure: The affidavit just read by Mr. Davis brings up a question which I believe was clear in the record, and I still think it is. When Mr. Seymour read the long list of questions to Mr. Zukor, I understood Mr. Wright at that time agreed that all of the defendants would if asked that long list of questions on general conspiracy, would deny them. And I want the record to show that we have that same privilege with respect to Mr. Rathvon, Mr. Mochrie and Mr. Koerner.

I do not think there is any question about that, is there, Mr. Wright?

Mr. Wright: Not at all.

Mr. Leisure: The record so showed.

(2531)

Mr. Proskauer: Could we have a very short recess, your Honors? I want to clean up something with Mr. Wright. I think we can do it in two or three minutes, if I can talk to him. It may be necessary for me to write out something.

Judge Hand: Yes.

(Short recess.)

Mr. Seymour: May it please the Court, I am going to offer on behalf of my clients certain of the decisions of the appeal board set up under the consent decree, which haven't been offered by the other side. I am offering them for the limited purpose of showing the operations of the appeal board under the decree and some of the considerations in disposing of disputes which the decree provides, with the consent of both sides shall be submitted to the arbitration. The decisions that I am going to offer, and I am going to distribute copies to all members of the Court, are, and I will have them marked as one exhibit, 3, 9, 21, 29, 34, 40a, 51, 55, 57, 59, 61a, 62, 76, 89, 90, 91, 92, 93, 97, 105, and 113.

Those decisions have been selected because they illustrate certain important matters which the appeals board has considered and which we have discussed in the course of this trial with respect to clearance, and I would like to mention those just briefly, as a matter of convenience, at this point in the record.

(2532)

These are some of the things that the Court will see from these decisions: First, that most of the disputes about clearance are between independent exhibitors, one independent exhibitor wants to get a clearance of another independent exhibitor reduced.

Most of the litigants are independent exhibitors. Occasionally an affiliated theatre is involved, but, generally speaking, the contest is between independents. The Appeals Board decisions show the consideration given to the great variety of elements that enter into the original fixing of clearance between the distributor and the exhibitor; they show that great weight is given to the problem of the distributor in getting maximum revenue from a theatre and in granting clearance in the light of his maximum revenue, a matter which has been covered in the testimony; they show the importance to the exhibitor, when he has a high quality house, of getting adequate clearance to protect his exhibition of the pictures; they show how clearance is related to geographical areas. Where there is a metropolis surrounded by suburban areas, they show how it is even proper to have rather extensive clearance. These are generally in favor of independent exhibitors. Where there are subsequent-run theatres in large cities, they show that the geographical areas are often considered not to be

(2533)

so large as where the cities are of different character.

Several of these decisions show a matter which was adverted to by Judge Bright yesterday when a witness was on the stand, that is, that distributors sometimes grant different clearances; they show that where there is a difference in clearance, often the arbitrators look to the clearance granted by the majority of the distributors as perhaps the proper clearance, and the upshot of the decisions ordinarily is to bring those clearances into line, as they are in many places, without resort to arbitration.

Many of these opinions show the importance necessarily given under the decree to the admission

price charged by the theatre over which it has clearance, a factor squarely recognized as a proper consideration by the consent decree, to which the Government was a party.

Many of them show, or several of them show that where the distributor has a satisfactory customer, it is not arbitrary not to leave the customer, a matter which has been covered here in the testimony.

There has been testimony here about move-overs. Several of these decisions recognize the practice of move-overs, even among independents as well as others.

One of the opinions indicates that generally in the

(2534)

distribution of pictures there is no national release date; that pictures are released differently in different parts of the country.

One of the decisions shows that the thing the arbitrators were considering was quite a different thing than the problem of violation of the anti-trust laws, which we mentioned somewhat earlier, but I think the great importance of these opinions, aside from these particular things I have mentioned, is that when you see the various elements which the decree recognizes and which the arbitrators and the Appeals Board have considered, that it is a matter of business judgment in each case, depending on the local situation, problems affecting local theatres and local competitive conditions; the kind of business question which the decree recognized has to be settled by somebody reviewing business judgment, and you see in these opinions that frequently the arbitrator has reached a different conclusion on business judgment than the distinguished lawyers who were members of the Appeals Board appointed by the Court.

With that preview of what your Honors will find, I think you will find these very revealing on many of the matters we discussed in the case, and I now offer them as one exhibit. They can be conveniently referred to by a number under the exhibit number heading.

(2535)

(Marked Defendant Paramount's Exhibit P-13.)

J. NOBLE BRADEN, called as a witness on behalf of defendant Warner Bros., being first duly sworn, testified as follows:

Direct Examination by Mr. Proskauer:

Q. Mr. Braden, what is your position with the American Arbitration Association? A. Tribunal vice-president and executive director of the motion picture arbitration system.

Q. And you have been in active supervisory charge of the project of arbitration as set up under the consent decree in this case? A. Yes, sir.

Q. And that is since its inception? A. Yes, sir.

Q. Is there a special administrative committee of the Association that has supervisory charge with you of this? A. Yes, sir.

Q. And that committee is made up of Mr. Wesley A. Sturges, Mr. Herman Irion, James F. Hughes, Frances Kellor, S. Whitney Landon, Samuel D. Leidesdorf, John P. McGovern, Lee J. Eastman, and Paul Felix Warburg? A. Yes, sir.

Q. Will you tell us briefly how you set this machinery up and how you divided it? A. We were consulted first by the Attorney General's office and the attorneys for the distributor defendants in June, 1940, when the conferences were

on settling the previous motion picture case, and we first
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conferred, and in conference with the Attorney General's representatives and the attorneys for the distributors, formulated the rules which are part of the decree itself, and Judge Goddard signed the decree on November 22nd. We then proceeded in accordance with the direction of the Court to establish 31 arbitration tribunals for the arbitration of disputes between the exhibitors and the distributors, and I personally visited each one of the 30 cities outside of New York to establish those tribunals. In doing that we had a number of things to consider. Bringing in a new arbitration system into any city may arouse trouble, particularly with some of the bar associations, who are not too friendly to arbitration. The first thing we did was to call together a luncheon conference of about 10 leading citizens in each community.

Mr. Wright: If the Court please, I haven't any objection to having a statement here as to what has been done generally under the arbitration system but I really think it is unnecessary to go into the details of these luncheon meetings and who was seen here and there.

Mr. Proskauer: Oh, yes, we will make it very brief. I am in accord with Mr. Wright, that we don't want to go too far afield in it, but we believe it is essential to show the working of this arbitration system, and we believe that it may very well appear at

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some stage in the consideration of this case that great consideration must be given to any improvements that may be found vital or necessary in this arbitration system, and that the Court may in some form feel desirous and feel compelled to pass on that.

Q. If you please, make it as brief as you can. Do not go into too much detail. A. No. We consulted these leading citizens, ten at least in the community, in order to establish a proper panel of arbitrators. In each city we got nominees from the bar association, bankers and others, and we had their nominees fill out a questionnaire, and we had that checked by credit agencies and other sources. From that, a little over a thousand men were selected as the arbitrators in that system, the great majority of whom were members of the bar and had been nominated by the bar associations in all the 31 cities.

We selected an office and got a local representative, who was brought to New York and given a course of training of a week, under the supervision of Professor Sturges of Yale, and others, to enable him to properly administer his duties as clerk of the tribunal under the decree.

Q. To make it as brief as possible, you set up tribunals of this character in 31 cities? A. Yes.

Q. With the best arbitrators that you could find under this process that you have described to us? A. Yes.

Q. Did you have forms and such things prepared and

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make them available to all exhibitors generally through the country? A. Yes, we had prepared a complete set of printed forms, demand for arbitration, submission and so forth, so they were available to exhibitors to file cases. Then, in addition, I had the privilege of speaking at a number of exhibitor conventions and telling them how to proceed to file cases under the decree.

Judge Goddard: This was all after the decree?

The Witness: Yes, sir, from November 20th on. The offices were open on February 1st and two months before that we did all that, and subsequently I spoke to exhibitor conventions, after the decree went into effect.

Q. Your panel of arbitrators consists of 1,065 business and professional men, and 60 per cent of them you have described in an affidavit are leading members of the bar in the different communities? A. Yes.

Q. Have you have prepared—tell us about the Appeal Board. How did that function? A. The Appeal Board was appointed by Judge Goddard, and they had offices adjacent to ours in Rockefeller Center, and in cases in which an exhibitor or a distributor was not satisfied with the original arbitrators' award, an appeal was filed, and on the record and the briefs, the Appeal Board decided the issues.

Q. Can you tell us something about the cost of this arbi-

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tration process to complainants and to the defendants in this case, generally? A. Well, the decree provided for a $10 filing fee for the filing of the case, and then it permitted the arbitrator to receive $50 a day, and we had heard a great deal about small exhibitors, and we had also had a system of having volunteer arbitrators under our regular system of arbitration, so we persuaded the Government and the attorneys for the distributors to allow us to make the fee of the arbitrator $10 a day, so that there would be the minimum of expense to an exhibitor who sought to file a case. I did make an analysis sometime ago of the actual cost of a case, taking about 40 cases at random, and we found that an exhibitor's cost was about $48, if my memory serves me, for processing a case through arbitration.

Q. In order to avoid putting in a lot of schedules here, you have prepared schedules, and I am going to ask you whether this is substantially correct: There was a total of about 416 cases filed, as I understand it? A. Yes, sir.

Mr. Seymour: On appeal or filed?

Mr. Proskauer: All together.

The Witness: All together.

Judge Goddard: With the arbitrators?
Mr. Proskauer: Yes, with the arbitrators.

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Judge Goddard: Throughout the United States?
Mr. Proskauer: Yes.

Q. Of those, 301 related to clearance? A. Yes.

Q. 43 related to a question on some run? A. Yes.

Q. 21 related to a designated run? A. Yes.

Q. 19 related to clearance and some run; 20 related to clearance and a designated run; 4 to clearance, some run and designated run; three were some run and designated run; one was a charge of withholding prints; three were a charge of clearance and withholding prints; and one was a charge that they were forcing shorts, that is, forcing the exhibitor to buy shorts in some run and designated run; making a total of 116? A. 416.

Q. 416. Of those, 112 were disposed of by adjustment or settlement, and of those 112, 76 were clearance, 18 were some run, 7 were designated run, 6 were clearance and designated run? A. Three—excuse me, you are right.

Q. (Continued) Three were clearance and some run; and one each were withholding prints, and clearance and withholding prints; that left 283 cases, didn't? There seems to be a discrepancy of one there. A. There is one reopened case.

Q. We won't bother about that slight discrepancy. There were 283 awards made, as I understand it? A. Yes, sir.

(2541)

Q. And those were divided up: Relief was granted to the exhibitor in 142 clearance cases and denied to the exhibitor in 66 clearance cases? A. Yes.

Q. Relief was granted to the exhibitor in 9 some run cases and denied in 16 some run cases? A. Yes.

Q. Relief was granted to the exhibit in 6 designated run cases and denied in 7 designated run cases? A. Right.

Q. Clearance and designated run, relief was granted in 7 cases and denied in 8 cases; some run and clearance, relief was granted in 9 cases and denied in 4 cases; in one case relief was granted on a claim of clearance, some run and designated run and denied in two such cases; clearance and withholding prints, relief was granted in two cases and denied in two cases; and forcing shorts, some run and designated run, relief was denied, and there was relief granted to a some run and designated run case. When you come to the Appeal Board, there were 122 appeals filed? A. Yes.

Q. And they were divided, 91 as to clearance, 9 as to some run, five as to designated run, 8 as to clearance and some run, 4 as to clearance and designated run, 3 as to clearance and some run, and designated run, and 2 were as to some run and designated run. Now, the appellate tribunal handed down 114 decisions, and of those 114 decisions, 3 were disposed of by consent in some form or other, and of the other

(2542)

111, 65 granted some or all relief claimed to the exhibitor, and 46 denied relief to the exhibitor? A. That is right.

Judge Goddard: This covers the entire period since November, 1940, your figures?

The Witness: Yes, sir. It is really from February 1, 1941, when the operation started.

Q. I want to direct your attention for a moment only to those——

Judge Goddard: I would like you to bring out the effort that was made by this arbitration to avoid all possible delays. Can you tell us about that, so that prompt decisions might be had?

The Witness: Under the system there are certain rules under which each separate proceeding must be taken. There is a submission, filing of a demand, and

then time for intervenors to intervene, that is theatres that might have an interest. And then out goes a list of arbitrators, within seven days, and the arbitrators are duly assigned and then our clerk keeps after the parties to fix the date of hearing.

Judge Goddard: Those decisions were quite prompt?

The Witness: Yes; they had to be made within 30 days after the close of the proceeding.

Q. The thing has worked with great dispatch, has it (2543)
not? A. In many instances. There are times when there have been delays due to the engagements of counsel in various parts of the country, and that, but on the whole, it has been pretty prompt.

Q. It is a fact, is it not, that many of these disputes were between competing independent theatres? A. There had to be, of course, a distributor defendant to bring the suit on. There were independent competing theatres intervening as parties to the arbitration, and signing submissions to be bound by the decision.

Q. So what it came down to was that competing defendants were claiming that—the competing independents were claiming—that the distributor defendant ought to favor their claims rather than the other man's claims? A. Yes.

Q. And that is the form that many of these arbitrations took? A. Yes. The principal battle in the arbitration was generally between two theatres rather than between any theatre and distributor.

Q. I want to confine our attention for a moment to those arbitrations that were confined to clearance. You had this tabulation prepared? A. Yes.

Q. It appeared to you, did it not, that there were 183 arbitrations that could be put in tabular form? A. Yes, sir.

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Q. And then there were 54 remaining? A. In tabular form, but we did not have complete data.

Q. So that you made a subsequent schedule listing exactly what had happened in those 54? A. Yes, sir.

Q. And the first 14 pages of this printed document are a tabular resume—have I got the number right? A. First 14 pages is correct.

Q. Oh, yes, the first 14 pages are a tabular resume of the result of these clearance arbitrations under Section 8 of the consent decree as to those 183 arbitrations? A. Yes.

Q. And the remaining pages list what happened where you could not put it in tabular form as to the remaining 54 cases, with the exception of four that you omitted altogether? A. Yes.

Q. And you omitted those four because—— A. Of insufficient data in the New York files.

Q. You did not have sufficient data in your New York files to do it.

Mr. Proskauer: I would like to mark that schedule in evidence.

Mr. Wright, have you a copy?

Mr. Wright: What number are you giving it?

Mr. Proskauer: This is everybody's. I think it ought to be marked the Government's exhibit because

(2545)

this decree resulted from Government activity and it is the most creditable thing the Attorney General's Officer ever did.

Mr. Wright: We have no objection to the exhibit or having our number on it, but we don't want to be understood as having forced it on the Court at our instance.

Mr. Proskauer: Oh, no, we will mark it as a general defendants'. It ought to be marked Judge Goddard's Exhibit, really.

Mr. Wright: Mark it the next Government's exhibit number.

(Marked Government's Exhibit 390.)

Mr. Proskauer: Your Honor, seriously, those of us who have worked in this industry, we just cannot say enough as to what was accomplished by this thing Judge Goddard set up here, and, to strike it down, is a terrible thing.

I would like to read into the record, without offering it as an exhibit, the following analysis of these 183 tabulated cases.

In three cases, the clearances were eliminated, which were described as following some other city.

In five cases clearances were made to depend upon admission price charged by the subsequent-run.

Your Honors will find in the tabulation that we have set forth those five cases in which the arbitral

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tribunals look to the question of subsequent admission price, as they were authorized by the decree to do, as an essential and important element in fixing clearance.

In 10 cases we do not try to summarize because it is so complicated.

In the others, in 86 cases, no reduction of clearance was made. That was 30 per cent of the total.

The Witness: No; complete reduction of clearance was made.

Mr. Proskauer: The award reduced clearance by no days.

The Witness: The clearance was eliminated in 86 cases.

(2547)

Mr. Proskauer: No, you have that wrong. You are mistaken. That is the number of cases in which no reduction was made.

The Witness: All right.

Mr. Proskauer: Get that straight. In 86 cases, or 30 per cent of the total, no reduction in clearance was made.

In 77 cases clearance was reduced by from one to seven days. That is 28 per cent of the cases.

In 44 cases, clearance was reduced by 8 to 16 days. That is 16 per cent of the cases.

In 61 cases, clearance was reduced by 17 to 30 days, that is 22 per cent.

In 9 cases, clearance was reduced by 31 to 45 days. That is three per cent of the cases.

In four instances, clearance was reduced by more than 46 days, and that is one per cent of the cases.

Of the 86 cases I referred to, where there was no reduction of clearance, there were 30 situations where the clearance that the arbitrators refused to interfere with, was seven days; 25 where the clearance was 8 to 14 days; 15 where it was 15 to 30 days; 5 where it was 42 to 49 days; 6 where it was 56 to 60 days; one where it was 75 days; one where it was 120 days after first run; one where it was 130 days after first run; one where it was 150 days after national release date.

(2548)

That about covers everything.

With Mr. Wright's permission, I will mark in evidence this affidavit of Mr. Braden's—at least I will ask to have marked in evidence this affidavit of Mr. Braden's, which contains a number of the statements he has already made and a slight amount of additional tabular information.

(Marked Defendant Warner's Exhibit W-16.)

Mr. Proskauer: As an example of what I said about the subsequent run price, I would like to call attention to just one or two or these: we have here No. 93 F 43, man complains against a 49-day clearance, and the arbitrators reduced the clearance to 42 days, if complainant charges 25 cents admission, and that was affirmed by the appeal board.

Here is another one where a man—this is Lewis & Company, 91 F 43—complained of a 49-day clearance and the appeal board ruling is interesting: "In the event that complainant theatre charges an adult evening admission of 35 cents, the maximum clearance shall be 35 days after first-run Los Angeles," closing, "subject, however, to the Apollo's right to a prior run and to the provision that the Apollo may be given a clearance of seven days over complainant's picture, and then follows a number of other considerations. That will indicate, I think, to your Honors what a

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complicated matter this clearance thing can be locally and how that element of admission price is with everybody, independent and affiliate alike, an element as recognized by the consent decree.

That is all, Mr. Braden.

Mr. Seymour: I have a few documentary matters I want to deal with now.

Mr. Wright, when Martin J. Mullin was on the stand, called by Paramount, you asked him some questions in connection with two arbitrations in Massachusetts, one affecting the Middleboro theatre at Middleboro, Massachusetts, and the other affecting the Playhouse at Ayer, Massachusetts, and you indicated in your questions that because of the provisions of Section 17 of the Decree, Paramount was not only

excused from following the awards in those cases but had not in fact followed them, and perhaps neither you nor I had an opportunity to check up on the facts. Would you be prepared to stipulate now, subject to correction, to save encumbering the record with contracts, that in connection with both arbitrations, Paramount did in fact follow the terms of the awards after the awards came down, even though not obligated to do so by reason of Section 17?

Mr. Wright: That is not the fact as reported to us by the complaining exhibitors.

(2550)

Mr. Seymour: Then I will offer the contracts. I offer first, with respect to Middleboro, a contract dated November 19, 1941, and another one dated May 28, 1942, which I believe are both before the date the arbitrators' award became final.

Mr. Wright: We have no objection.

(Marked Defendant Paramount's Exhibit P-14.)

Mr. Seymour: I am sorry I haven't got copies because I did not think I would have to offer these, but I will supply them to the Court.

I now offer a contract dated January 5, 1943, which I understand was after the arbitrators' award became final, showing the change in the clearance.

Mr. Wright: You are offering one contract?

Mr. Seymour: Yes.

Mr. Wright: You have the other contracts, have you not?

Mr. Seymour: I can supply such other contracts as there were from that time on. I state, subject to correction, that that contract, in respect to the clearance, conforms to the award and that subsequent con-

tracts are in the same form. If you want to have me produce for your inspection subsequent contracts, I will do so, but it does not make that contract inadmissable.

Mr. Wright: There is a serious question because

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we sent out questionnaires to the complainants who had had awards, asking for this specific data, and this exhibitor reported on the questionnaire, as of this summer, that the Paramount clearance was the same that it had been before.

Mr. Seymour: I am offering a contract showing compliance with the award. I do not care what an exhibitor said in answer to a questionnaire and it does not affect that contract.

Mr. Wright: We have no objection to this contract going in but I am merely pointing out that, as far as we are concerned, it will be necessary to examine the sequence of contracts as to what was done since the award through this summer in order to determine the accuracy of inaccuracy of the representation made to us by the exhibitor.

Judge Hand: All right, it is admitted.

(Marked Defendant Paramount's Exhibit P-15.)

Mr. Seymour: I now offer two contracts, one dated November 27, 1944—both dated November 27, 1944, before the appeals board decision, affecting the Playhouse in Ayer, Massachusetts.

(Marked Defendant Paramount's Exhibit P-16.)

Mr. Seymour: I now offer a contract dated May 10, 1945, after the appeals board decision with respect to the Playhouse in Ayer.

(2552)

Mr. Wright: We have no objection but we likewise will want the other contracts made subsequent to the award.

Mr. Seymour: They will be made available.

(Marked Defendant Paramount's Exhibit P-17.)

Mr. Seymour: I want to offer a schedule prepared at Judge Hand's request in the course of the proceedings the other day, showing the play-off of one of the Paramount pictures, this picture being Let's Face It, and showing the staggered national play-off, indicating the theatres in which it played first-run, which are independents, and showing on its face, as the play-off went over the country, the independents and the other theatres had about the same general relation to it.

(Marked Defendant Paramount's Exhibit P-18.)

Mr. Wright: If the Court please, I should like to call your attention to the statement of clearance in the contracts that were put in evidence here as to Mr. Hodgson's situation at Middleboro: the contracts represented to be those prior to the award state this as to his clearance: first 14 days after first-run Boston; first after Brockton and Taunton.

After the award the contract P-16, which is supposed to state his clearance, he plays first after Brockton and Park, Taunton but not later than 14 days after

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first-run at Brockton or 28 days after first-run Boston, whichever is earlier. In other words, in the prior contract all he played was either—that is, after Brockton and Taunton, and 14 days after Boston; in the

later contract he follows Brockton and Taunton by either 14 days or Boston by 28 days.

Mr. Seymour: My point was not the details of the clearance. My point was that Paramount with respect to these contracts complied with the terms of the award despite the fact that it was not required to do so because of the provisions of Section 17.

Now I offer a schedule showing the number of prints of Paramount feature pictures allocated to the various Paramount exchanges throughout the United States during the 1944 season, and a portion of the 1945 season, down to the time when this schedule was prepared, which was early this year; and this shows the number of prints allocated to each exchange, the number of customers served by each exchange, indicating the great difference between the number of prints available to each exchange and the number of accounts and customers which each exchange had to service with those few available prints.

(Marked Defendant Paramount's Exhibit P-19.)

Mr. Seymour: Now I offer a schedule showing the

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total number of accounts to which Paramount features were licensed during the seasons 1938-39 through 1943-44, showing the variations in number of accounts from year to year.

(Marked Defendant Paramount's Exhibit P-20.)

Mr. Seymour: Perhaps I ought to state that an account does not necessarily mean only one theatre, but it is the account of an exhibitor in a particular locality. If he has several theatres it will still be one account.

Now I offer a schedule showing the total number of shipments of Paramount pictures by all its exchanges for each week from January 1938 to October 20, 1945, showing the variation in number of shipments week by week, and particularly the great increase of shipments during the period of sales drives which are indicated on the exhibit by the circling of the date of the week of the drive.

(Marked Defendant Paramount's Exhibit P-21.)

Mr. Seymour: Now I offer a schedule showing total United States billings on Paramount feature pictures for the seasons 1941-42, 1942-43, as of June 30, 1945, and 1943-44 as of July 14, 1945. The 1941-42 season is believed to be complete. The others would necessarily be incomplete because billings still continue for several years after a season.

(2555)

The lines on the schedule—perhaps I ought to offer it now and then I will explain the lines.

(Marked Defendant Paramount's Exhibit P-22.)

Mr. Seymour: The lines on the schedule indicate the blocks in which the pictures were licensed and show the variation in number of licenses or billings within each block. The last page, however, has a group of five pictures at the end of the page which were not dealt with as a block, the line being merely to segregate those from the former block. Those are all pictures which were licensed individually. For Whom the Bell Tolls, the last one, was one of those pictures mentioned here as having been licensed at an advanced admission price, and this represents the number of billings at the advanced price, it not having

been released for general exhibition during the season involved here.

Now, billing, as I think has been previously indicated during the trial, means an engagement. Occasionally, but very rarely, there are several engagements of the same picture in the same theatre, but this roughly indicates the total number of engagements in different theatres.

Now I offer a schedule showing for the calendar years 1940 to 1944, the feature film rental received by Paramount from theatres affiliated with Warner, Fox, Loew and RKO, compared with the feature film revenue received by Paramount from all other ex-

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hibitors. For the purpose of computing the percentage, Paramount pictures exhibited in the theatres in which Paramount has an interest have, of course been excluded from the percentage, although that amount is shown on the schedule. Obviously the comparison is between what is received from the so-called affiliated exhibitors and what is received from independent exhibitors. Paramount's dealings with its own theatres stand on quite a different footing, and this shows the percentage between the so-called affiliated theatres and the independent exhibitors.

(Marked Defendant Paramount's Exhibit P-23.)

Mr. Seymour: Your Honors will see on the basis of this computation as to 1944, Paramount received only 31-odd per cent of its film rentals on feature films from the distributor defendants who have an interest in theatres or from their theatres, and received 68 and a fraction per cent from other exhibitors.

Now, if your Honors want to recess, I have just got a few more which I will put in after lunch.

Judge Hand: Very well. We will adjourn until two-fifteen.

(Recess until 2:15 p.m.)

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AFTERNOON SESSION

Mr. Seymour: May I proceed?

Judge Hand: Yes.

Mr. Seymour: I have here four affidavits of the division sales managers of Paramount, Mr. George A. Smith, Mr. William H. Erbb, Mr. James J. Donohue, and Mr. Hugh Owen; and counsel for the Government has stipulated that if called they would testify in accordance with these affidavits with the same force and effect as if they were actually called; and I am going to turn those over to the stenographer and ask that they be copied into the record.

(The affidavit of George A. Smith is as follows:)

"George A. Smith, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. 108 East 38th Street, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. My first experience in the film business was in 1914 as assistant to the General Manager of the Pathe Exchange in New York City.

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I held this position until 1918 when I went into the Army. In 1919 I became General Sales Manager of Triangle Pictures, which position I held until 1920. In 1920 I became General Sales Manager of United Picture Theatres until 1921 when that company

went out of business. In 1922 I was employed by Paramount. In 1924 I became Branch Manager of the Milwaukee Exchange which position I held until 1927 when I became Branch Manager of the Cincinnati Exchange. In 1934 I became Branch Manager of the San Francisco Exchange and in January, 1938 I became Assistant District Manager having supervision over the Pacific Coast Area. In 1938 I became District Manager having supervision over the same area, which position I held until March, 1941 when I became Western Division Sales Manager for Paramount with headquarters in New York.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in the western part of the United States. The District Managers and the Branch Managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license

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agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the Exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those Exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibi-

tors for the licensing of Paramount pictures and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases.

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for

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exhibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last question? A. No. They are entirely beyond the function of the distribution department.

"Q. Are the various theatre companies associated with National Theatres Corporation among

the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. In conducting these negotiations do you deal with the heads of the various exhibition companies associated with National Theatres Corporation at their respective headquarters? A. Yes.

"Q. With whom are the negotiations conducted? A. Elmer Rhoden in Kansas City, Ed Zabel in Los Angeles, Milt Hossfeldt in Denver and Salt Lake City, Frank Newman in Seattle, Al J. Finke in Portland, and Richard Spier in San Francisco.

(2561)

"Q. Are the negotiations with each one of those gentlemen separately conducted and wholly independent of each other? A. Yes.

"Q. Is the licensing of pictures in the field with any of these companies dependent in any way upon the success or failure of negotiations with any of the other companies? A. No.

"Q. In negotiating with the representative of the various theatre companies associated with National Theatres Corporation do you have any knowledge or information as to whether or not Twentieth Century-Fox Film Corporation is negotiating to license or has licensed Fox films for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Is there any relation whatever between your negotiations for the licensing of Paramount pictures to and the licensing of Fox pictures for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures to the various theatre companies asso-

ciated with National Theatres Corporation unless and until any of the theatres in which Paramount is interested has offered or concludes licenses for the pictures of Twentieth Century-Fox Film Corp.? A. No.

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"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount. A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor? A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you

or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

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"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Sgd.) George A. Smith."

(The affidavit of WILLIAM H. ERBB is as follows:)

"WILLIAM H. ERBB, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where is your place of business? A. 1501 Broadway, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. I started in the motion picture business as a salesman in 1920 for the Superior Film Exchange in Philadelphia, Pa., which position I held until 1922. I joined Paramount in 1922 as a salesman in the New Haven Exchange. In 1924 I became Branch Manager of the Portland, Maine, Exchange and in May, 1924 I was made Branch Manager of the Boston, Mass. Exchange, which position I held until November, 1932 when I became District Manager of the

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Northeast part of the United States with head-

quarters in Boston. I held this position until June 12, 1944 when I became Eastern Division Manager for Paramount with headquarters in New York.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in Massachusetts, upper New York State, Connecticut, Philadelphia, Washington and Pittsburgh. The District Managers and Branch Managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures

(2565)

and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases.

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for exhibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last

(2566)

question? A. No. They are entirely beyond the function of the distribution department.

"Q. Are companies associated with Warner Bros. Pictures, Inc. one of the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. Are those negotiations conducted in association with Charles M. Reagan, the General Sales Manager of Paramount? A. Yes.

"Q. With whom are the negotiations conducted? A. Clayton Bond.

"Q. In negotiating with the representative of Warner Bros. to whom you have referred, do you have any knowledge or information as to whether or not that company as a distributor is negotiating to license or has licensed the films of its company for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Is there any relationship whatever between your negotiations for the licensing of Paramount pictures to companies associated with Warner Bros. Pictures, Inc. and the licensing of the pictures of that defendant for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures to companies associated with Warner Bros. Pictures, Inc. unless and until any of the theatres in which Paramount is interested has

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offered or concludes licenses for the pictures of that defendant as a distributor? A. No.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount? A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or

understanding with any distributor with respect to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor? A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

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"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Signed) William H. Erbb."

(2569)

(The affidavit of James J. Donohue is as follows):

"JAMES J. DONOHUE, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I

would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. 10 Gracie Square, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. My first connection with the motion picture business was with Paramount in 1925 as an assistant shipper in San Francisco. In six months I was promoted to assistant booker in the same office. One year later I was promoted to booking manager in that office and after two years I became a salesman. After having been a salesman for two years I was transferred to the Portland, Oregon Exchange as salesman, which position I held for about two years. From 1932 to 1934 I was branch manager of the Salt Lake City Exchange and from 1934 to 1937 branch manager of the Minneapolis Exchange. In 1937 I became branch manager of Chicago and held that position until 1942 when I was promoted to district manager in charge of Dallas, Oklahoma City and Memphis. In June, 1944, I was promoted to the position of Central Division Manager, with head-

(2570)

quarters in New York, which position I now hold.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in certain of the Middle West States as well as Dallas, Texas, Oklahoma City, Oklahoma and Memphis, Tennessee. The district managers and the branch managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and branch managers or district managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures and I also frequently assist branch managers and district managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to ne-

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gotiate licenses for and to distribute the pictures which Paramount releases.

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. I do not negotiate or have anything to do with the negotiating of any license for the exhibition of Paramount pictures in any of the theatres in which any of the other defendants are interested.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest

with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount? A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect to whether you or Paramount will or will not

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license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor? A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramaunt have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Sgd) JAMES J. DONOHUE."

Hugh Owen

(2573)

(The affidavit of HUGH OWEN is as follows:)

"HUGH OWEN, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. Hotel Pierre, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. From January 1924 until June 1927 I was employed as a Branch Manager respectively of the Charlotte and Cincinnati Exchanges. From 1927 until 1941 I was out of Paramount's employ and employed by Western Electric as District Sales Manager and United Artists Corp. as District Manager in the South. From January 1941 to June 9, 1944 I was employed by Paramount as District Manager and later as Eastern Sales Manager. From June 1944 until February 5, 1945 I was employed by Vanguard Films Inc. as General Sales Manager. Since February, 1945 I have been New York and Southern Division Manager of Paramount.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in New York and in the southeastern part of the United States. The District Managers and the Branch Managers of these exchanges are under my supervision and are immediately responsible to me for

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the conduct of these exchanges and for the licens-

ing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases?

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Para-

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mount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for ex-

hibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last question? A. No. They are entirely beyond the function of the distribution department.

"Q. Is Loew's, Inc. one of the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. Are those negotiations conducted in association with Charles M. Reagan, the General Sales Manager of Paramount? A. Yes.

"Q. With whom are the negotiations conducted? A. Joseph Vogel represents Loew's Inc. with respect to the theatres in which Loew is in-

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terested outside of the City of New York and Charles Moskowitz represents Loew's with respect to the theatres in which Loew's is interested in the City of New York.

"Q. Are the negotiations with Mr. Vogel and Mr. Moskowitz separately conducted and wholly independent of each other? A. Yes.

"Q. Is the licensing of pictures in the field where Mr. Moskowitz represents Loew's, Inc. dependent in any way upon the success or failure of

negotiations with respect to the field in which Mr. Vogel represents Loew's, Inc.? A. No.

"Q. Do you also conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which the defendant R. K. O. is interested? A. Yes.

"Q. With whom are those negotiations conducted? A. With Harold Mirisch, representing R. K. O.

"Q. In negotiating with the representatives of Loew's, Inc., to whom you have referred, or with the representative of R. K. O., do you have any knowledge or information as to whether or not those companies as distributors are negotiating to license or have licensed the films of their respective companies for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Is there any relationship whatever between

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your negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Loew's Inc. is interested or in the theatres in which R. K. O. is interested and the licensing of the pictures of either of those defendants for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures for exhibition in the theatres in which Loew's Inc. or R. K. O. are respectively interested unless and until any of the theatres in which Paramount is interested has offered or concludes licenses for the pictures of either of those distributors. A. No.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in

the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount? A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect

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to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor? A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Signed) HUGH OWEN."

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Mr. Seymour: In addition, although it is not embraced in these affidavits, I understand that Government counsel will stipulate that if asked the questions which were agreed to for Loew this morning on the stipulation read by Mr. Davis, that is, the questions negativing agreement, conspiracy or concert of action as to Paramount, that they would answer in the negative as the division managers of Loew answered the same questions in the negative on that stipulation; and also that they would answer in the negative the questions negativing conspiracy which were asked of Mr. Zukor.

I understand that is stipulated?

Mr. Wright: So stipulated.

Mr. Seymour: Now, I have an additional affidavit by Mr. James J. Donoghue which was submitted on the motion for temporary injunction in this case before Judge Goddard; and I should like to have that also transcribed because it is stipulated between ourselves and the Government that in addition to the testimony in the former affidavit referred to, Mr. Donohue would also testify in accordance with this affidavit with the same force and effect as if called. There is referred to in the affidavit an exhibit which I have offered separately as Defendant's Exhibit P-19, and, accordingly, that is no longer attached to the affidavit, since it is otherwise in the record; and I

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shall ask the stenographer to copy this affidavit into the record.

Mr. Wright: It seems to me that this last affidavit is already a part of the noticeable record of the Court in this proceeding. I do not think it needs to be physically recopied.

Mr. Seymour: I think it would be more convenient and accessible to have it in the stenographic transcript.

(The affidavit of JAMES J. DONOHUE is as follows:)

"JAMES J. DONOHUE, being duly sworn, deposes and says:

"If called as a witness for the defendants upon the Government's application I would testify as follows:

"I reside in New York City.

"I am at present employed by Paramount Pictures Inc. (hereinafter for convenience referred to as Paramount) in the capacity of Central Division Sales Manager, which division embraces the following exchanges of this company: Cleveland, Detroit, Indianapolis, Cincinnati, Chicago, Milwaukee, Minneapolis, Dallas, Oklahoma City, Memphis.

"I have been employed in the Distribution Department of Paramount or its predecessor companies for over twenty years. I began my career in the motion picture business with Paramount in 1925 as assistant shipping clerk at its San Francisco Exchange, a position which I occupied for

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six months. I was then promoted to the position of assistant booker in that exchange and held that position for one year.

"I was then promoted to be the booking manager at that exchange and held that position for two years. I then became a salesman and worked out of that exchange for two years, at the end of

which time I was transferred to the Portland, Oregon Exchange as salesman and worked there for about two years.

"In 1932 I was promoted to the position of Branch Manager of its Salt Lake City Exchange, a position which I occupied from 1932 to 1934. I was then promoted to the Minneapolis exchange as Branch Manager thereof and occupied that position from 1934 to 1937. In 1937 I was promoted to the branch managership of the Chicago Exchange and occupied that position until 1942. I was then promoted to be District Manager of the Dallas territory and had charge in that capacity of three exchanges, namely, Dallas, Oklahoma City and Memphis. In June 1944 I was promoted to the position of Central Division Manager, a position which I now hold. My superior in the Distribution Department of Paramount is Charles M. Reagan, its Vice-President and General Sales Manager.

"In my capacity as Central Division Sales Manager I have supervision of the exchanges

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named above and of the personnel thereof. Each of the ten branch managers of those exchanges and three District Managers are under my direct supervision and are immediately responsible to me for the conduct of those exchanges and the distribution of Paramount pictures in their respective territories.

"All license agreements that are solicited by the salesmen and branch managers of the various exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to these exchanges to see that our pictures receive

proper distribution and that the license agreements made are properly liquidated. The men under my supervision report to me any problems that arise and I assist them in their solution. I negotiate with many exhibitors and assist Branch Managers and District Managers in their negotiations for the licensing of our pictures to exhibitors, particularly the more important and also the more difficult accounts.

"I have read the application of the United States for an order enjoining the defendants from granting 'unreasonable clearance' in licensing feature films distributed by them, and I have read the memorandum in support of its application for temporary relief with respect to 'unreasonable clearance.'

"'Clearance' is the period of time (fixed by

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agreement between a distributor and an exhibitor) which must elapse before a picture may be exhibited in a theatre after the conclusion of a prior exhibition in another theatre.

"'Run' is the period during which a picture is actually exhibited or during which an exhibitor has the right under his license agreement to exhibit it.

"The subjects of run and clearance are very important and complex. A proper understanding thereof requires a knowledge of the motion picture industry and an explanation of the history, nature, character, necessity and the manner in which runs and clearance operate.

"From the very inception of feature motion pictures, pictures have been licensed for successive runs with clearance between the successive runs,

and in so licensing pictures, run and clearance are always among the elements considered in arriving at the license fee or the film rental, as it is sometimes called, agreed to be paid by the exhibitor to the distributor for the privilege of exhibiting the picture.

"I would testify that:

"Ever since I have been engaged in the business of distributing motion pictures, clearance has been a very important consideration in the licensing of motion pictures, from the standpoint of both the distributor and the exhibitor.

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"A feature motion picture is one of approximately 5,000 feet or more in length and tells a complete and continuous story which is depicted by projecting the imagines on the film upon the screen.

"Feature motion pictures are produced principally in California. Those produced and distributed by Paramount cost from $200,000 to $3,000,000 or more. These features are photographed upon what is known as a negative or a negative film. The production cost is frequently referred to as the negative cost.

"The negative film is developed in a film laboratory and as many copies of the negative are made or struck off as the producer believes it can economically make and serve to its customers or licensees properly. These copies are known as positives or positive prints.

"The average cost of a single positive print of a picture that is produced in 'black and white' varies from approximately $150. to $300. or even more, depending upon the length of the feature pic-

ture. The cost of a print in technicolor will average from $600. to as much as $850. or more, again depending upon the length of the print of the particular feature picture.

"The cost of these prints, whether in black and white or technicolor, represents the expense of the raw stock or film and the cost of developing or

(2585)

striking off the single print, exclusive of the cost of producing the negative.

"In normal times and in the absence of government restrictions the number of positive prints made by Paramount of a feature motion picture generally varies from approximately 190 to 325, depending upon the popular appeal of the particular picture.

"Under the latest regulations of the War Production Board the distributors, including Paramount, will be limited to a maximum of 285 positive prints on any single picture and may not produce more than that maximum number, regardless of how popular a particular feature motion picture might be.

"There are between 16,000 and 17,000 motion picture theatres in the United States. Paramount serves as many as 10,000 to 13,000 of these theatres. The number that it serves varies according to the popularity of a particular picture.

"These 190 to 325 positive prints which Paramount makes of a given picture are allotted among its 31 film exchanges located in the principal cities of the United States. The number allocated to each of these film exchanges is predetermined according to the size and importance of the area serviced by the film exchange and the number

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of accounts it will serve. Thus, for example, the film exchange at New York City will receive from 13 to 30 prints of a picture, the number depending upon the particular public appeal and the popularity of the picture. These will be used to serve the theatres in the New York exchange territory. The Boston film exchange receives between 8 and 14 prints; the Chicago exchange from 9 to 13, and so on. Each exchange will receive its allotment or quota of positive prints for the service of its customers.

"If called to testify, I would produce, for the purpose of illustration, a chart such as the one attached hereto marked Schedule A, which would show the total number of regularly assigned prints, the approximate number of accounts served by each exchange in the United States in respect of each of the pictures released by Paramount during the season 1943-44 and the pictures released so far during the 1944-45 season. This chart shows in addition the number of extra prints which are used to take care of 'peak loads.' These prints are kept in a central depot and are used to supply the various exchanges with some of these extra prints for temporary use in order to take care of those periods in a particular exchange when the bookings are particularly heavy and close together. These periods are referred to as the

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'peak load' periods. After these prints have served their temporary purpose they are returned to the central depot for temporary use in other film exchanges. Occasionally, in addition to these emergency prints, the film exchanges borrow prints

from one another to help out in emergencies, when none are available at the central depot.

"I would testify that ordinarily a positive print is used to serve from 35 to 50 theatres. After a theatre completes the exhibition of a picture the positive print thereof is returned to the exchange from whence it came. Before shipping the print to another exhibitor the print is thoroughly inspected by trained inspectors and necessary repairs are made so that when it is projected at the next theatre it serves the same purpose as a new print. This process is repeated after each subsequent use of the print in each succeeding theatre where the picture is shown.

"I would show as the reasons why no company produces as many prints as there are theatres desiring to show a picture so as to permit all theatres to show a picture at the same time—first, that the cost of making 10,000 to 13,000 prints would be between $1,500,000. and $3,900,000. for black and white prints, and from $3,000,000. to

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$9,000,000. for technicolor prints. No motion picture, however successful, could absorb so staggering a cost of prints besides the cost of the production itself. Hence, the number of prints must be limited if a motion-picture producer is to stay in business; second, about 75% of the motion picture theatres in the United States which Paramount serves, pay for the license to exhibit a motion picture which cost several millions dollars to produce without considering the cost of the positive prints, a sum less than the cost of a print and in many cases as little as $10. and $15. for a two day exhibition. Obviously, no producer could,

under these circumstances, supply a new print costing $150. to $300. in the case of black and white prints or $600. to $850. for a technicolor print, to each exhibitor. It is therefore necessary to use a print over and over again to get back the cost of the positive print alone; third, even if it were possible to have available a sufficient number of prints to enable a substantially larger number of theatres to play a picture simultaneously, good business judgment would dictate against such a policy and pictures would still be licensed upon the basis of successive runs with clearance periods between them.

"The full earning power of a picture could not be realized by one simultaneous exhibition of the

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picture in the 10,000 to 13,000 theatres located in various parts of the United States. If that were to occur, the motion picture public desiring to see a particular picture would all have to see it within the space of time that the picture was shown. The life of the picture would thus be very short and the public would have to view it within that short space of time or forever miss the opportunity to see it. Thus the earning possibilities of a motion picture would be limited since its potentialities would have to be tapped quickly and in a short space of time.

"All people cannot or do not wish to see a picture at the same time. Some would like to stay home and listen to the radio; others would like to attend a concert or play bridge or attend to some household or business duty. It is for that reason that it is more advantageous to the producer, the distributor and the exhibitor not to show a given picture simultaneously in all theatres, for the

patronage would be divided and the best results would not be obtained financially under such a condition.

"Moreover, all theatres are not of the same size, character, appointments and location, and are therefore not all equally capable of attracting patronage and earning revenue. The larger and more luxurious theatres, under conditions of simul-

(2590)

taneous exhibition, would attract the greatest amount of business with little or no business left for the smaller, less luxurious theatres competing with one another for the patronage of the public, for the same picture at the same time. Theatres located in the rural and remote sections of the country would know little about these pictures for they would not have had the benefit of the advertising and exploitation afforded to the picture by the exhibitors who exhibited them previously, and the picture would be gone and forgotten very shortly after its exhibition life started. No continued interest would be aroused by the continuity of advertising and exploitation which are afforded motion pictures by long, continuous and successive exhibitions.

"Another condition which might result if a large number of theatres were to exhibit a picture simultaneously, and thus create to a greater or lesser degree, a division of the patronage would be a tendency to make for smaller theatres and a shorter exhibition period. The tendency would also be toward less expensive and less attractive theatres.

"The cost of producing would have to be greatly curtailed and the outstanding pictures of today

which cost such huge sums to produce could not be made.

"For all of the foregoing reasons, experience

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has shown and sound economics demand a system of distributing motion pictures under which pictures would be shown successively in the theatres of a community rather than simultaneously. Thus the concept of run and successive runs had their beginning in the industry. The first time a picture is shown in a community it is 'first run.' Thereafter it is 'second run', 'third run', 'fourth run', and so on with each successive run.

"I would show the reasons why a distributor must and does give consideration to the choice of the theatres in which each run will be licensed. With the number of prints necessarily limited, the distributor must employ the ones it has wisely and in such a way as will make for the greatest return in revenue therefrom. To accomplish this, it must choose the exhibitor who has the largest, the best located and the best appointed theatres for showing the picture, so that the picture can be shown to the best advantage, can earn large sums at the box office and thereby pay the greatest revenue to the distributor. The picture, when shown for the first time, has the greatest amount of novelty and has the greatest amount of potential patronage.

"The public or a portion of the public is willing to see the picture while it is new and it is willing to pay a higher admission price for this privilege.

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Accordingly, the admission prices for the theatres showing the picture on the first run are generally

the highest and they generally decrease with each succeeding run.

"All of the members of the motion picture public are not willing to pay the same prices for their entertainment. Some prefer to see a picture while it is new, at a higher admission price, at the finest theatre. Others prefer not to see it in the large downtown theatres but prefer to see it in the later runs, closer to their homes, at lower admission prices.

"All theatres have not the same business potentialities. All are not able to pay the same license fee to the distributor. About 75% of the theatres in the United States individually pay license fees that are very much less than the cost of the positive print, not to mention the production cost. Some pay as little as $10 to $15 for the license to show a picture for two days and these theatres charge a very low admission price.

"The ultimate objective of the distributor is to distribute the pictures in such a manner as to be able to earn the greatest aggregate license fees from a community, and to achieve this result it must allocate its runs in each competitive area in such a manner as will be conducive to obtaining for the distributor the best results.

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"Since the first run generally is the most valuable run and an earlier run more valuable than a later run, it is important to have each run take place in the theatre or theatres which are capable of returning the greatest possible revenue from that run. Among the factors to be considered, as the proof would indicate, are seating capacity,

physical attractiveness, location, the available source of patronage, the policy of operation, the admission price charged, the showmanship and advertising put into a picture and the reliability of the exhibitor.

"The theatres showing a picture on the first and early runs spend considerable amounts of money to advertise it in newspapers, magazines, window cards, bill-boards in strategic locations and by other means to bring the picture to the attention of the public and to attract for it the widest patronage. This is not only of great value to the exhibitor who carries on such an advertising campaign but is of great benefit to the distributor because its revenue at that theatre will be increased by such advertising. Just as important as is this revenue, is the enhancement of the value of the picture for subsequent runs if it has a run at an important theatre and is properly and extensively advertised. The exhibitors who exhibit it on subsequent runs benefit from this advertising and the advertising by word of mouth from those who have

(2594)

seen the picture in the earlier run. Subsequent run exhibitors capitalize on this advertising and spend little money in advertising the picture themselves.

"I would testify along the foregoing lines to explain the concept of run and its significance in the motion picture industry. Run is the particular period of time during which the exhibitor has been licensed to exhibit pictures and his playing position in the sequence of runs. The net result of sequence of runs from the first to the last run is that some theatres will exhibit pictures ahead of

others. In the absence of further factors this would mean that immediately upon the conclusion of the exhibition of a picture on the first run, the second run would be entitled to commence the exhibition of that picture.

"For example, if theatre A, the first run theatre, exhibits a picture on Friday, Saturday and Sunday, theatre B, the second run theatre, would have the right under its license to commence exhibition of that same picture on Monday. Under such circumstances, the value of the first run to theatre A, as opposed to the second run for theatre B would not be appreciably greater. A substantial part of theatre A's potential audience would wait, knowing that the same picture would be seen the very

(2595)

next day at theatre B.

"To protect the exclusiveness for the limited period of the run licensed, there arose from the very inception of feature motion pictures the practice known as 'clearance' in the industry. By means of clearance the distributor agrees that it will not permit another theatre to exhibit the same picture until a specified time has elapsed after the conclusion of the prior theatre's run. It is one of the terms and conditions of the license agreement between the distributor and the exhibitor and results from negotiation between them.

"Clearance is of benefit to the distributor and the exhibitor. If the exhibitor is going to be able to pay the license fees which a distributor expects and should get from him for the earlier run, he must be able to earn it through the patronage which he can attract. His patronage will be less if a competing theatre shows the picture simul-

taneously, immediately after or soon after the completion of the prior run. This is true whether the picture is shown subsequently at the same or a lower admission price. But as is more frequently the case, the subsequent runs usually charge progressively lower admission prices down to as little as ten or fifteen cents. The exhibitor negotiating

(2596)

for a prior run, therefore, requests from the distributor not only priority of run but a reasonable period of clearance, that is, a period during which the picture will not again be shown in a competitive theatre. It is to the interest of the distributor to grant this clearance in order to enable the exhibitor to pay the license fees demanded.

"Frequently the license fees are predicated upon a percentage of the gross receipts. Sometimes they are a fixed flat sum of so many dollars. In the case of percentage, the distributor has a direct interest in the receipts of the box office, for his license fees are directly measured thereby. But even in the case of the flat sum, it represents a sum which approximates the earning potentialities of the theatre. If the theatre does not take in a sufficient sum at the box office the exhibitor will not be able to afford to pay the fixed sums which he has agreed to pay. Therefore the distributor is willing to grant clearance which in its judgment will enable its licensees to pay the agreed license fees.

"The appropriate clearance period is not capable of exact measurement. The exhibitor requesting it usually wants a longer period of time than the distributor is willing to give. The distributor is mindful of the revenue which it will

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earn from first runs but it is desirous also of earning the greatest amount of revenue from all runs so as to operate its business on a profitable basis. The loss from first runs resulting from too little clearance may not be recouped by the over-all revenue from the subsequent runs.

"Conversely, the added revenue gained from first runs, where a longer period of clearance is granted, may not compensate the distributor for the resulting loss from subsequent runs. Adjustment of clearance to derive the most revenue from both prior and subsequent runs involves the exercise of experienced business judgment. As in all such matters, there is of course room for honest error in judgment.

"Clearance which is too short can affect overall revenue as well as can clearance which is too long, and it will not do to over-simplify the problem by assuming that by denying the proper amount of clearance to the prior run the distributor will automatically recoup any resulting loss of revenue by a corresponding increase in revenue from subsequent runs. The revenue from subsequent runs in its totality may not be sufficient to compensate for the loss of the revenue of the prior run occasioned by or resulting from too short a period of clearance. The problem confronting the distributor is not a simple one.

(2598)

"In arriving at a judgment as to the appropriate clearance, there are taken into consideration the various factors which are enumerated in Section VIII of the Consent Decree, such as size, location, competition, film rentals, policy of operation

and others relating to the theatres involved. No one factor is controlling.

"Through the consideration of these factors the proper clearance is arrived at which will protect the value of the run licensed without unduly diminishing the value of the picture through the succeeding runs. It is to the interest of the distributor that the value of the picture to the succeeding runs be not unduly diminished because it requires the revenue not only of the prior but of the subsequent runs as well, to make the distributor's business a profitable one.

"Through the practice of runs and clearance in the industry the distributor is able to earn the greatest revenue and to enable it to pay the huge cost of producing worthwhile motion pictures. The exhibitor is able to operate his theatre profitably and to pay the license fees according to the run for which he has contracted.

"The foregoing testimony would show the mechanics of the business and some of the sta-

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tistics as to production cost of a picture, the cost of prints, the number thereof produced and the number of theatres served. It would show what all of this means to the public and the industry. It means this: A picture which cost $4,000,000 to produce can be seen on the earliest run at the large de luxe theatres at an admission price of from fifty cents to one dollar and on later runs in the same city at progressively lower prices down to as little as ten or fifteen cents. It means that the public in the most remote hamlet of the United States can see this great picture for as little as ten, fifteen, twenty or twenty-five cents. Without this sys-

tem of run and clearance such magnificent theatres as the Music Hall, Paramount and other theatres like them would not be possible.

"It means that each exhibitor can license this picture at the price within his reach so that he may exhibit it to his patrons at an admission price within their reach. This picture which cost so much to produce, the exhibitor may obtain for exhibition to his public for a fee of as little as $10 or $15. It would be impossible for the producer to produce such pictures were it not for the large sums paid by the prior runs for the privilege of showing the same picture, nor would it be possible to license them to the later runs for such trivial sums. It would not be possible for some people to see this picture at ten or fifteen cents if the patrons

(2600)

of the prior runs did not pay a much larger sum for the privilege of seeing the same picture earlier.

"All of these benefits to the public, to the exhibitor and to the distributor are made possible by exhibiting pictures on the basis of run and clearance. By this means the public is benefited because it is able to see the best and most worthwhile pictures costing millions to produce. They are able to see them at any theatre which they choose, whenever they choose, and at an admission price which is within the means of every economic level of the community.

"The Consent Decree provides that controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. The arbitrator takes into consideration the factors which are there enumerated and to which I have referred above.

"Since it is impossible to measure clearance with precision and since men in the industry who deal with the subject and are most familiar with it may have granted clearance which is too long in point of time or too extensive as to area, the arbitration machinery was devised so that an impartial arbitrator could review the business judgment of those who negotiated and granted such

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clearance.

"The arbitrator hears all of the facts and considers all of the factors involved in the particular case before him, and determines therefrom whether or not the clearance granted is too long as to time or too extensive as to area. His function is to review the business judgment of the men in the industry. From his determination an appeal can be taken to the Appeal Board. No machinery, in my judgment, could be set up which is fairer than that.

"The Government, however, in its application for temporary relief and in its memorandum submitted in support thereof claims that the Consent Decree fails to deal effectively with clearance problems or to give adequate relief, and refers to certain aspects in which Section VIII does not afford adequate relief. If called to testify I would deal with these matters as follows:

"AS TO THE GOVERNMENT'S REQUEST FOR A MODIFICATION OF SECTION VIII SO AS TO PROHIBIT CLEARANCE BETWEEN THEATRES NOT IN 'SUBSTANTIAL' COMPETITION.

"Clearance is a by-product of competition. Competition makes clearance necessary. They are therefore closely related.

"When a salesman or a Branch Manager negotiates a license agreement he does so with a gen-

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eral knowledge of the competitive situation that exists between theatres requesting clearance and the theatres over which clearance is requested. While they have a general knowledge of the extent of that competition, it is difficult for them to measure the extent thereof by any fixed standards. Competition may undoubtedly exist, and yet it is difficult to agree upon it as being intense or substantial or slight or negligible or in any other precise manner. The competition that exists varies to some degree. One theatre may be said to be more competitive to another than is a third theatre. One theatre may draw more patronage from the neighborhood of one theatre than from the neighborhood of another. Frequently the competition between two theatres in the same competitive area is one way, that is, Theatre A will draw some patronage from a wide area including the area in which Theatre B is located, and yet Theatre B will not draw patronage from the area in which Theatre A is located.

"Yet there can be no doubt that Theatre A and Theatre B are in direct competition. In such a case it is difficult to say to what precise degree they are competitive. How many people would one theatre have to draw from the neighborhood in which another theatre is located to make for substantial competition? How many patrons would

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theatres have to draw from one another to make the competition slight or negligible? This is of course difficult to say. Frequently it rests on judgment and opinion.

"Exhibitor A seeking the clearance honestly believes the competition is substantial. Exhibitor B believes it is either slight or negligible. There is honest room for difference between them. They are both actuated by self-interest and their conclusions may be somewhat influenced, consciously or unconsciously by their self-interest.

"The salesman's or Branch Manager's interest is somewhat different. He wants to give Exhibitor A the clearance that he believes it rightfully deserves and requires to enable it to pay the desired license fees. He is opposed to granting clearance which is too long because that would affect the revenue of the distributor from Exhibitor B and other subsequent run exhibitors.

"In the light of these considerations and the factors involved in determining the appropriate clearance to be granted, such as size, location of theatres, competition, admission prices, film rentals paid, policy of operation, and others, clearance is reached by agreement which fixes the period of clearance and the area. Such agreement represents the considered judgment of the parties deal-

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ing with the subject. It is based largely on opinion and in this realm, honest men my differ.

"When any exhibitor feels aggrieved by the clearance granted, the opportunity is afford to him of arbitrating the question before an impartial arbitrator and having his determination reviewed by an Appeal Board. In an arbitration proceeding the Arbitrator in the first instance and the Appeal Board on review, weigh all of the factors including the most important one, namely, competition and the elements which must be taken into considera-

tion to determine the extent thereof. Upon a consideration of all of the facts, a determination is made as to whether the clearance which was granted was either too long in point of time or too extensive in area.

"In my judgment, that is the ideal way in which the matter should be dealt with. It is not proper to remove clearance entirely where competition is found to exist, although it may not be 'substantial.' Where the competition is not substantial, the clearance should be less than what it would have been were the competition substantial, but where there is some competition there ought to be some clearance.

"The provisions of the Consent Decree are eminently fair and there is no basis for the modifica-

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tion sought by the Government, to eliminate clearance between theatres which are not in substantial competition.

"AS TO THE GOVERNMENT'S REQUEST THAT THERE SHOULD BE A PROHIBITION AGAINST THE GRANTING OF CLEARANCE BETWEEN TWO THEATRES CHARGING 'SUBSTANTIALLY' THE SAME ADMISSION PRICE.

"From the Government's viewpoint the admission price seems to be the only factor which it claims should be taken into consideration in determining clearance, but this is wholly arbitrary and unrealistic.

"Section VIII of the Consent Decree enumerates the factors to be taken into consideration in determining clearance. They are the proper factors. Price is only one of them. If that were to be

the only factor, it would be very detrimental to the exhibitor, to the distributor and to the public, besides which, it would be patently unfair.

"Let us take as one example, a 2000 seat theatre in a certain community. It is well located, modern, with fine appointments. It is a large theatre and to fill its 2000 seats, pay its overhead, pay the large license fees that it does for its pictures, and make a profit, it must draw a large patronage. It is located in a section of the city which has inhabitants of different economic levels. To fill its

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theatre it must draw from all of the different income levels. The exhibitor decides to charge 35 cents admission. He can operate successfully because, at that price, he can attract a large number of people and pay, let us say, $1,000. for the showing of a picture on a run ahead of his competitor.

"His competitor has a theatre of 500 seats. It is a nicely built theatre. It does not have the large overhead of the other theatre. It does not do as much advertising, and it does not need as much patronage. It caters to the inhabitants of the neighborhood in the higher income level, and the exhibitor who operates it also wishes to charge 35 cents. He pays, and only can afford to pay, $100. for the license to exhibit the same picture for which the competitor pays $1,000. The showing of the picture simultaneously will divert some of the patronage from the larger theatre to the smaller theatre.

"Is it fair to the exhibitor who pays $1,000. for a picture, to have a theatre nearby paying $100. show it at the same time? Some of the value of the picture for which the exhibitor of the larger theatre has paid so much is taken away by the smaller

theatre showing it at the same time and at the same price. The exhibitor paying the larger sum would not be able to continue to pay this sum if the smaller theatre plays the same picture at the same

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time. Therefore the distributor's revenue from the larger theatre would be jeopardized through the division of the patronage by the playing of the same picture at the same time by the larger and the smaller theatre.

"From the standpoint of the public, it would be benefited by a successive showing in these two theatres. Some people would not find it convenient to see the picture while it was showing simultaneously at both theatres. They might have the opportunity to see it at the first theatre, but if not, they might be able to see it later on at the smaller theatre. This is of advantage to the public.

"Moreover, the exhibitor of the smaller theatre is not obliged to charge the 35 cents which is the same admission price that the larger theatre is charging. He might charge 25 cents for a later showing but he chooses not to do so for he believes that he can draw the same amount of patronage at the higher admission price and make more money.

"Let us consider further what the effect would generally be if the Government's suggestion were put into effect, namely, that all theatres charging substantially the same admission price should all enjoy the same run, that is, play at the same time,

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or that they should have the opportunity to play the picture at the same time, that is, that they have equal availability for booking the picture with other theatres charging the same admission price.

"For example, Theatre A charges 35 cents and plays seven days ahead of Theatre B, the latter charging 25 cents. Under the Government's proposal, Theatre B should be able to play day and date with Theatre A, or at least have an equal availability to play the picture if it charged the same admission price as Theatre A. The effect of this would be that Theatre B could, by raising its admission price to 35 cents, play the same pictures at the same time as Theatre A. The public, which had previously had the choice of seeing a picture at Theatre A at 35 cents or at Theatre B seven days later at 25 cents if they preferred, would now have to pay 35 cents to see it at either theatre playing it at the same time, or not at all.

"It is difficult to understand how the Government which is seeking to protect the public interest, can seriously urge that the same price should entitle all exhibitors in a community to the same playing position. If this suggestion of the Government were to be adapted the tendency would be to increase admission prices. Moreover, as the number of theatres playing simultaneously in-

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creased, more positive prints would be required and the increased cost of distribution through the increase in the positive prints would be staggering.

"The Government suggests also that theatres charging the same admission price should have open booking with each other or equal avalability for exhibiting the same picture, so that the pictures released by a particular distributor may alternately be made available first to one theatre

and then to the other. In this way they would not have to be shown simultaneously at both theatres.

"This suggestion would be very disadvantageous to the exhibitors involved, to the distributors and to the public. This would work out as follows:

"Theatre A would play Picture One ahead of Theatre B and Theatre B would show it after Theatre A. Theatre B showing it later perhaps could not afford to charge the same admission price and would therefore probably charge less than Theatre A. On Picture Two, Theatre B would play ahead of Theatre A, and the price would be higher for that picture than for Picture One. Theatre A in this instance would play this picture after Theatre B. Theatre A's prices, under these circumstances, would have to be lower than the prices of Theatre B. There would therefore be an up and down change of prices with each succeeding picture. This would not be a sound busi-

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ness policy for either exhibitor A or B.

"In the illustration given, Theatre A would not want to follow Theatre B and Theatre B would not want to follow Theatre A, as is ofttimes the case in competitive situations. They each wish to play 'clear' pictures, i.e., pictures which have not been shown in the directly competitive theatres. If the same admission prices entitled each of them to equal availability, they would prefer to buy pictures clear of each other instead of following the other theatre. The result of this would be that in place of two runs which the distributor might have theretofore licensed, the new practice would result in a single run of a picture between these

two competitive theatres, with the resulting loss in revenue to the distributor and the loss of a second opportunity for the public to see the picture.

"From what I have already heretofore stated, it is clear that this arrangement would be detrimental to the public interest because of its tendency to increase admission prices and reduce the facilities for seeing a picture at more than one theatre in a neighborhood on successive runs.

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"AS TO THE GOVERNMENT'S CONTENTION THAT CLEARANCE SHOULD BE ADJUSTED ACCORDING TO PRICE DIFFERENTIALS IF THERE IS TO BE ANY PUBLIC JUSTIFICATION FOR CLEARANCE.

"The Government's contention, again, in this respect, is unrealistic and demonstrates a lack of appreciation of the problems involved in clearance.

"As has been pointed out above, price is not and should not be the sole criterion for determining whether there should be any clearance, and if so, the approximate period. Price is only one of the factors which should be taken into consideration. The provisions of Section VIII of the Consent Decree set out the proper factors and give the arbitrator and Appeal Board the right to determine the importance and the weight to which each of these factors is entitled. This is the fairest way that this problem can be dealt with, and clearance cannot and should not be determined by the sole factor of admission prices or admission price differentials.

"Moreover, no two localities are the same, and the factors determining the proper clearance have

different weight and different significance in each situation. Admission prices affect different theatres differently. One theatre is directly affected by what another theatre in the same locality charges, while another is not.

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"AS TO THE GOVERNMENT'S CONTENTION THAT RELIEF SHOULD BE GRANTED, EXPRESSLY DIRECTED AGAINST UNREASONABLE CLEARANCE ARISING FROM THE AFFILIATION OF THEATRES WITH A DISTRIBUTOR.

"The Government assumes that there is some system of 'cross-licensing' of pictures for exhibition at the theatres of each of the defendants. There is no basis for this assumption.

"The function of the Distribution Department of Paramount is to distribute the pictures which it releases. That is also my function. Our department has no concern with the matter of what pictures other than Paramount pictures will be shown at the theatres in which Paramount has a financial interest. In licensing Paramount pictures for exhibition in theatres in which other defendants are interest, I am not concerned whether or not that defendant as a distributor licenses its pictures to the theatres in which our company is interested or the terms on which they are licensed for exhibition therein. That is a matter entirely beyond the functions of the Distribution Department.

"I could therefore state unequivocally that there is no 'cross-licensing' of Paramount pictures with anyone. In dealing with the subject of clear-

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ance, affiliation plays no part.

"I consider the question of whether the clearance is reasonable or not, wholly independent of whether the theatre is or is not affiliated with any distributor. This is also true of the deals which I negotiate myself, as well as those which have been negotiated by other members of the Distribution Department and are submitted to me for rejection or approval.

"The Consent Decree has adequately safeguarded the matter of granting of unreasonable clearance to affiliated theatres. The arbitrators as well as the Appeal Board have ample power to reduce clearance when in their judgment such clearance as has been granted to affiliated theatres is too long in time or too extensive in area.

"In an arbitration proceeding under Section VIII its provisions enjoin the arbitrator to disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres. In other words, an arbitrator must, in determining the reasonableness of clearance, wholly disregard the fact of affiliation and he must determine the reasonableness or unreasonableness of the clearance granted as between the two theatres, based upon the inherent merits of the situation concerning those particular theatres without regard to the fact of whether or not they are affiliated with a distributor.

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"AS TO THE CLAIM THAT THERE SHOULD BE SOME PROVISION TO PREVENT UNREASONABLE CLEARANCE, RESULTING FROM CIRCUIT BUYING POWER OF INDEPENDENT CIRCUIT.

"I need only state here what I have said under the preceding subject in dealing with affiliated

theatres. The arbitrators, as well as the Appeal Board, have ample power under the Consent Decree, to deal and have dealt effectively with this matter and have reduced clearance wherever their judgment was at variance with the judgment of the men in the industry who negotiated such clearance.

"AS TO THE CRITICISM OF THE GOVERNMENT THAT A COMPLAINING EXHIBITOR IS SOMETIMES NOT AWARE OF CERTAIN CLEARANCES TO WHICH HIS THEATRE IS SUBJECT.

"The Government seizes upon the observation made by the Appeal Board in one case before it, that an exhibitor sometimes does not know of some of the clearances granted by the distributors against his theatre, since they are not contained in his contract but only in the contracts of the other exhibitors who are granted clearance over his theatre. The Appeal Board's comment was

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that this situation seemed unfair to them.

"Unfortunately, all of the facts as to the manner in which clearances are dealt with in contracts were not fully explained by pertinent testimony on the subject. If they had been, I am confident, there would have been no basis for criticism.

"The cases are rare indeed when an exhibitor does not know the clearances to which his theatre is subject. If he does not know, he soon learns this when he books his pictures at the various exchanges, and he learns from the various bookers the pertinent information. He also learns from observation, the manner in which and the time when his competitors book their pictures in rela-

tion to the dates which he gives for the exhibition of his pictures at his theatre. If he did not know in the first instance the clearances to which his theatre is subject, he has the opportunity the very next time he negotiates for pictures to deal with such clearances as he has observed exist and have been granted against his theatre. Often it would be very impracticable and difficult to insert the names of all theatres which are granted clearance over complainant's theatre, or to state the playing position of the complainant's theatre as being after specifically named theatres which have been granted clearance. Sometimes it is left out

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through oversight.

"The whole subject is magnified out of all proportion to the reality of the situation. . .

"AS TO THE GOVERNMENT'S CRITICISM THAT CLEARANCE CANNOT BE THE SUBJECT OF ARBITRATION UNLESS A CONTRACT IS IN EXISTENCE.

"The Government suggests that Section VIII is defective in that an exhibitor cannot arbitrate the question of the reasonableness of clearance to which his theatre is made subject, unless he is currently licensing pictures from the distributor granting the clearance over his theatre. As I have already pointed out, Section VIII sets out the factors which are to be considered in determining whether the clearance which has been granted is reasonable or unreasonable. This presupposes that a contract has been entered into. In the absence of a contract, the question of the reasonableness or unreasonableness of clearance cannot be determined because of the absence of the con-

tract terms, such as run, license fees, exhibition period and other terms. It is difficult to conceive how an arbitrator can deal with this subject unless he knows the terms which are important factors bearing on the reasonableness of clearance.

"An arbitration, in the absence of a contract might be wholly a waste of time because an exhibitor who obtained an award which fixed the

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maximum clearance that might be granted against his theatre might in spite of the award not enter into a contract with the particular distributor against whom he has brought an arbitration proceeding.

"As a practical matter, if the exhibitor is desirous of having maximum clearance determined by arbitration, he can proceed against any distributor with whom he has contracted. If an award is made, establishing what the maximum clearance should be, althought it would not be binding upon the distributor who held no contract with the complaining exhibitor, nevertheless that distributor would have to deal with the complainant upon the basis of the maximum clearance fixed in the award. To do otherwise and to impose a longer clearance would subject such distributor to a competitive disadvantage in dealing with the complaining exhibitor and other exhibitors who might be affected. If an arbitration award fixed fourteen days as the maximum clearance, and most distributors were dealing on that basis, any distributor who tried to deal on the basis of a greater clearance would be at a disadvantage because the exhibitors would refuse to deal except on the basis of the maximum 14-day clearance fixed in the award. If the distributor did not do so, and en-

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tered into a license imposing greater clearance, it is quite probable that it would be obliged to conform to the prior award by any arbitrator appealed to, since the finding as to what was reasonable in the case of other distributors would undoubtedly be adhered to unless special circumstances justifying the longer clearance were shown. The criticism is therefore without merit.

(Sgd.) JAMES J. DONOHUE."

Mr. Seymour: In addition I have a group of affidavits, some 19 or 20 in number from various other operating heads of the theatre operating companies in which Paramount has an interest. Rather than encumber the stenographic transcript with all of those affidavits, I would like to offer them in evidence as a group, with the same force and effect as if they were in the stenographic transcript.

Government counsel has kindly agreed to stipulate that if called each of those gentlemen would testify in accordance with his affidavit with the same force and effect as if called. So I would like to have these affidavits marked as a group as an exhibit and have only one of them copied into the record so that the general tenor of these affidavits—they are substantially similar—will be in the stenographic transcript.

(2618a)

Judge Bright: What is the tenor of it?

Mr. Seymour: Perhaps I might read one.

Judge Bright: I do not care about that. A brief statement will do.

Mr. Seymour: Well, they are brief. Let me read one and that will be the one in the record, and the rest will go in as exhibits, if I may.

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Mr. Seymour: This is an affidavit of Harry David.

"HARRY DAVID being duly sworn, deposes and says: If I were called as a witness to testify in this action and were asked the following questions I would make the following answers, with the same force and effect as if actually called as a witness.

"Q. Where do you reside? A. Cincinnati, Ohio.

"Q. How long have you been engaged in the motion picture exhibition business? A. Forty (40) years.

"Q. What is your present position? A. I am the general manager of Northio Theatres Corporation, which is interested in the operation of approximately sixteen (16) theatres in the States of Ohio and Kentucky.

"Q. What is the extent of Paramount's interest in the company to which you refer? A. Paramount owns 100 per cent of the stock.

"Q. Is a part of your compensation based upon the profits from the operation of the theatres which you have mentioned? A. Yes.

"Q. Where are the negotiations for licenses for films of distributors other than Paramount conducted on behalf of the theatres which you operate? A. Generally at the office of our company at Cincinnati, Ohio.

"Q. Do you conduct or supervise the conduct

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of those negotiations for your company? A. Yes.

"Q. At the time you negotiate with representatives of Loew, Fox, Warner or RKO, do you have any knowledge or information as to negotiations or film deals for the exhibition of Paramount pictures in theatres in which any of those distributors have an interest? A. No.

"Q. At the time you negotiate with representatives of distributors which do not have any interest in theatres do you have any knowledge or information as to arrangements which they have made with theatres in which defendants are interested? A. No.

"Q. Is there any relationship whatever between the terms of film deals negotiated for the theatres which you operate and any negotiations or arrangements for the licensing or exhibition of Paramount films in theatres of any other defendant? A. No.

"Q. Is there any relationship whatever between film deals of your company and film deals of any other company in which Paramount is interested? A. No.

"Q. Does any representative of Paramount participate or interfere in any way in your negotiations with distributors for the licensing of films to be used in theatres operated by your company or dictate or advise you as to the terms of any film license contracts that you make or are to make with any other distributor? A. No.

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"Q. Do you license the pictures of Loew, Fox, Warner and RKO for exhibition in all your theatres? A. Generally speaking yes, but there are expections.

"Q. Do you license the pictures of Columbia, Universal and United Artists for exhibition in all your theatres? A. Yes, generally speaking, with exceptions."

I might say those answers vary from operating company to operating company.

(Continuing reading):

"Q. Are there theatres which you operate in which you would like to license the pictures of the foregoing distributors where you are unable to do so? A. Yes.

"Q. In the cases referred to in the last question do the distributors mentioned license some or all of their pictures to theatres which are in competition with the theatres which you operate? A. Yes.

"Q. Do you license films distributed by Republic, Monogram and P.R.C. in some or all of your theatres? A. Yes, except for Republic."

And that answer varies with various companies.

(Continuing reading):

"Q. Where you operate a theatre on a first-run policy, is it the best or comparable with the best theatre in that locality? A. Yes.

"Q. Does your company follow a policy of

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keeping all theatres which you operate up to date in accordance with the needs of the community? A. Yes.

"Q. Who determines the admission price to be inserted in film license contracts with distributors

which contain a provision for minimum admission price, except in those instances where the pictures are special attractions like 'Gone With The Wind', which play at an advanced admission price? A. I do.

(Sgd) HARRY DAVID."

That is the general form of all those affidavits. There are some variations in the answers, but I have indicated where those variations appeared.

Of course, the extent of Paramount's interest varies in these different companies, as we have already brought out.

I would like to have this group of affidavits now marked as an exhibit, leaving that as a sample of the exhibit in the transcript.

(Marked Defendant Paramount's Exhibit P-24.)

Mr. Seymour: I am sorry to say I haven't an accurate count. There are around 19 or 20. There are one or two, or perhaps more, affidavits of the same kind which have not yet arrived in New York, and I would like to add those to this group as a part of this exhibit when they arrive, if Government counsel is agreeable.

(2623)

I have another group of affidavits, which I am not going to bother to read, which I would like to offer as one exhibit on the basis that, if called, the affiants would testify in accordance with their affidavits with the same force and effect as if actually called, a stipulation to which Mr. Wright kindly has agreed. These are affidavits dealing with the physical conditions of the theatres in which Paramount is interested in

various cities, having populations of between 25 and 100 thousand, of the United States, and which also describe the physical characteristics of the best independently operated theatre in those localities. There are 97 of these affidavits, and I would like the same privilege. There may be a couple more coming in, and I would like to add those to that exhibit when they come.

(Marked Defendant Paramount's Exhibit P-65.)

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Mr. Seymour: I have one more affidavit on a different subject, and Mr. Wright has stipulated that if called, this gentleman, Mr. Sam Dembow, Jr., would testify in accordance with this affidavit with the same force and effect as if actually called to the stand, and I think I would like to read this into the record, if I may:

"Q. Where do you reside? A. No. 1 Prior Manor Road, Larchmont, New York.

"Q. What is your present occupation? A. Presently I am the President of Golden Pictures, Inc.

"Q. Is that a motion picture producing company? A. Yes.

"Q. Have any of the defendants in this action a stock interest in that company? A. No.

"Q. How long have you been president of Golden Pictures, Inc.? A. I think it is about six or eight months.

"Q. Prior to that time were you employed by Paramount Pictures, Inc.? A. Yes, I left Paramount in November, 1944.

"Q. How long have you been in the motion picture business? A. Since 1913.

"Q. Will you kindly tell us of your start in the business? A. In 1913 I began to work for William Fox as a salesman. He was at that time distributing foreign subjects. Later he went into the production end of the business and subsequently the

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company was changed to Fox Films. I occupied an executive position with that Company and opened up probably 75 per cent of the exchanges which they had throughout the United States. When I left Fox in 1921 or 1922, I was Assistant General Sales Manager. I resigned to become the Pacific Coast District Manager for Goldwyn Pictures. I stayed with that company for a very short time."

Mr. Wright: I think it should appear that that is Goldwyn Pictures there, and on the other occasion that he is now employed by the Golden Pictures. I don't know whether that was clear to the Court. Those are different companies.

Mr. Seymour: I tried to make the inflection different but probably did not. They are different.

(Continuing reading) "Rothchild, who operated the theatres in San Francisco, was my first run customer and had taken a fancy to me, and I went over to him as General Manager of his theatres.

"Q. When did you first become associated with Paramount? A. I joined the theatre department of Paramount in 1925.

"Q. How long did you remain with the Paramount theatre department? A. From 1925 to 1935.

"Q. During that period what office did you hold? A. I was Executive Vice-President of Publix

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Theatres Corporation until 1932, when that corpo-

ration ceased to do business and I continued in the employ of Paramount Publix Corporation during the the period of its reorganization in the bankruptcy proceeding.

"Q. When you left Paramount in 1935, where did you go? A. I resigned from Paramount to become General Manager of National Screen Service, Inc.

"Q. How long were you with that company? A. About two and one-half to three years.

"Q. When you left National Screen Service, Inc., where did you go? A. I became Vice-President of Fanchon & Marco, Inc., in which company I had a financial interest. I resigned from Fanchon & Marco and sold my interest therein in 1939 and returned to Paramount in January, 1940.

"Q. When you returned to Paramount in 1940, what position did you occupy? A. I was one of the executives in the theatre department, of which Leonard H. Goldenson was the head.

"Q. Did you occupy that position until you left Paramount in November, 1944? A. Yes.

"Q. During the depression period, did the theatre operating companies in which Paramount had an interest occasionally make operating agreements, sometimes called 'Pooling Agreements', affecting one or several theatres in which Paramount had an interest and one or several theatres in which

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exhibitor had an interest? A. Occasionally such agreements were made.

"Q. Were such agreements occasionally made affecting a theatre or theatres in which Paramount had an interest and theatres in which an independent exhibitor had an interest? A. Yes.

"Q. Were such agreements occasionally made affecting a theatre or theatres in which Paramount

was interested and one or several theatres in which another defendant in this case was interested? A. Yes.

"Q. What was the reason for making such agreements? A. In the depression period theatres were having great difficulty making both ends meet and in handling the product available to them in such a way as to make the operation profitable. Theatre A would have available motion picture product of varying suitability. Some product was suitable for the patronage of theatre A. Other product was not suitable.

"Theatre B in the same city or town had the same problem. It was having difficulty making ends meet and the same difficulty with respect to the available product. If theatre A and theatre B were operated under joint management there would be more flexibility in the booking of the pictures which were theretofore available to theatres A and B. Some pictures would be more attractive to the

(2628)

patrons of theatre A while other pictures would be more attractive and suitable to the patrons of theatre B. Under joint management, the pictures most suitable for exhibition in theatre A would be booked in theatre A, whereas the pictures most suitable for theatre B would be booked there. The patrons of theatre A would like musicals and society dramas, whereas the patrons of theatre B might be better served and pleased with mystery pictures, action pictures and the like.

"In addition to this, economies could be effected in the joint operation in advertising, personnel and the elimination of efforts which were duplicated, and more efficient management could be accomplished.

"Operating agreements were therefore entered into in a few localities to stop the huge losses brought about by the depression and make for more economical and profitable operation of both theatres.

"Q. Were admission prices advanced following the making of such operating agreements? A. To the best of my knowledge, no. The purpose of making those agreements was not to raise admission prices.

"Q. Were the total number of pictures played, reduced, following the making of such agreements? A. To the best of my knowledge, no.

"Q. How many of such operating agreements affecting theatres in which a defendant has an in-

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terest are now in effect? A. I believe there are eight.

"Q. Which are they? A. There are such operating agreements"—I interpolate here, affecting the theatres in which Paramount has an interest, for clarity—"with regard to certain theatres in Rochester, N. Y., Minneapolis, St. Paul, San Francisco, Hammond, Indiana, Philadelphia and Brooklyn. In Yonkers, N. Y., a 50 per cent Paramount affiliate subleases its theatre to RKO Proctor Corporation at a rental based upon the net operating revenue of that theatre and a theatre which RKO Proctor Corporation owns in Yonkers. RKO Proctor Corporation operates both theatres.

"Q. Did the reasons which you have given for making operating agreements generally apply to these agreements? A. Yes.

"Q. Were the operating agreements to which you have referred which were made during the

depression, entered into in pursuance of a general policy of making such agreements? A. No. They were made on the basis of peculiar local conditions affecting the theatre business and the impact of the depression upon it in a few particular localities.

"Q. How did Paramount acquire an interest in Canal Realty & Improvement Co. which has a ground lease on the Loew's State Theatre in New

(2630)

Orleans and what is the nature of that interest?"

Mr. Seymour: I think rather than burdening the Court with this, I will have this copied into the record. This deals with a few theatre investments and other things of that kind which are mentioned in the Government's brief, and this affidavit explains them. So, from here on, I will let the stenographer copy it rather than take the Court's time to read it, if I may.

(The balance of the affidavit reads as follows:)

"A. Many years ago Paramount acquired an interest in Saenger Amusement Co., which had theatre interests in New Orleans and other places. One of the Saenger assets was a one-third stock interest in Canal Realty & Improvement Co. Klaw and Erlanger had a one-third interest in that company and Loew's had the remaining third. Later Loew's acquired Klaw & Erlanger's stock. For many years Paramount-Richards Theatres, Inc., in which Paramount has a 50% stock interest, has held this one-third of the stock as an investment, which gives Paramount a 16⅔ per cent indirect stock interest. Loew's has had the management contract and has operated the theatre. Paramount

has nothing to do with the operation of the theatre either directly or indirectly.

"Q. Does Loew license Paramount feature pictures for exhibition in Loew's State Theatre? A. To the best of my knowledge it does not.

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"Q. Have Paramount and Loew's stock interests in Buffalo Theatres, Inc., which operates certain theatres in the Buffalo area? A. Yes.

"Q. How were those interests acquired? A. Prior to 1934 Paramount and Mike Shea were the only stockholders in certain corporations which leased and operated certain theatres in Buffalo. Loew's was the landlord of one of those theatres—the Great Lakes. Those corporations were in default in rent when Paramount-Publix went into receivership. Paramount-Publix had guaranteed the rent of the Great Lakes, and as a consequence, Loew's had a substantial claim against Paramount. There being no money available to satisfy this claim and the claims of the other landlords for rent, Buffalo Theatres Inc. was formed to take over the operation of the theatres and the landlords, creditors and former stockholders of the lessee companies received stock in the new company.

"Q. Does Paramount operate these theatres? A. To the best of my knowledge Paramount has had nothing to do with the operation of the theatres since 1934.

"Q. What interest, if any, has Paramount in 423 South Broadway Corporation, which owns the Parkhill Theatre in Yonkers? A. Straham Theatre Corporation, in which Paramount has a 50 per cent stock interest owns 20 per cent of the stock of

(2632)

that corporation. RKO Proctor Corporation owns 30 per cent of the stock and Max Cohen 50 per cent.

"Q. Does Paramount operate this theatre? A. No. I am informed that the Parkhill is actually operated by a corporation in which Paramount has no interest.

"Q. What interest has Paramount in Standard Theatre Corporation which operates certain theatres in Oklahoma City? A. Paramount has a one-half interest in Criterion Theatre Corporation and the other half of the stock is owned by Joe Cooper. Criterion has a one-half interest in Standard Theatre Corporation, the other half being owned by Warner Bros.

"Q. Who actually operates the theatres? A. To the best of my knowledge, Joe Cooper has a contract with Standard whereunder he manages, buys and books. Paramount does not participate in any way in the actual operation of the theatres."

(Signed) SAM DEMBOW, JR."

Mr. Seymour: I would like to ask Mr. Wright to stipulate, subject to correction, that Paramount has an interest in theatres in 516 incorporated places in the United States out of a total of 16,752 incorporated places in the United States, according to the 1940 Census.

(2633)

Mr. Wright: Yes. I thought we were going to have this one master list, showing where everybody had theatres, and that that would take care of that. That was the list that RKO offered. I thought Mr. Phillips took it and checked it.

Mr. Seymour: We are in the process of checking it, but there is no dispute about those facts, is there?

Mr. Wright: Not as far as I know. There certainly cannot be any ultimately.

Mr. Seymour: All right. Now I offer, subject to correction, a list of 1,149 cities or towns in the United States with a population of over 5,000, according to the 1940 census, in which all the theatres are independently owned and operated.

Mr. Wright: No objection.

(Marked Defendant Paramount's Exhibit P-26.)

Judge Goddard: This is not 26. The affidavit was 26. Didn't you intend to mark that exhibit of Sam Dembow?

Mr. Seymour: I read that into the record, Judge Goddard, rather than having it marked as an exhibit.

(2634)

Mr. Seymour: In addition to the affidavits in the two groups which I have asked permission to supply, I have one affidavit on the way which deals with the Butterfield Theatres, and I am sure Mr. Wright will be willing to stipulate it when he sees it; and I should like leave to supply that as a stipulation with Mr. Wright when it is available.

May it be assumed that the silence of the Court permits me to supply that additional affidavit at a later date?

Judge Bright: We were discussing discrimination based on mere size against Elizabethtown, New York.

Mr. Seymour: I am sorry. Judge Hand knows so much more about it than we, that I am not pre-

pared to put in any direct testimony on that at this time.

I think with those additional affidavits that I have mentioned, that we will not have anything further at this time.

Mr. Proskauer: Your Honors, I think I have my stipulation with Mr. Wright now arranged in the way in which he is willing to take it:

It is stipulated that Roy Haines and Jules Lapidus, if called as witnesses on behalf of the defendant Warner Brothers Pictures, Inc., each would testify as follows, with the same force and effect as if they were

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called and subjected themselves to cross-examination:

Mr. Roy Haines would testify that he has been with Warner Brothers or its predecessors since 1919; that from 1919 to 1927 he was branch manager at Cincinnati; from 1927 to 1931 he was branch manager at Pittsburgh; from 1931 to 1933 he was central district manager; from 1933 to 1936 he was metropolitan New York district manager; from 1936 to 1937 he was eastern district manager; from 1937 he was eastern sales manager, including Canada; and from 1943 to date he has been the western and southern sales manager.

As to Jules Lapidus, he entered the motion picture business in 1921 as a Universal salesman in Pittsburgh; from 1922 to 1925 he was not in the motion picture business; from 1925 to 1926 he was salesman for Metro Pictures in Pittsburgh; in 1926 and 1927 he operated a theatre personally; from 1927 to 1937 he worked for Loew's as Metro salesman in Pittsburgh; from 1937 to 1939 he was a branch manager with the Grand National Company; from 1939 to 1940 he was a Universal branch manager in Pittsburgh;

from 1940 to 1942 he was Universal district manager; from September, 1942, he was a Warner metropolitan district manager in New York, and since February, 1943, he has been the Warner eastern sales manager.

"In my present position," Mr. Lapidus says,

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"I have supervision over eleven exchanges in the United States."

Mr. Haines says, "In my present position I have supervision over twenty-one exchanges in the United States."

Mr. Lapidus continues: "Thus, between Mr. Roy Haines and myself we have supervision over all Warner exchanges in the United States."

Each of them testifies as follows:

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Warner and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

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"The exclusion of so-called 'independent' exhibitors from operating first-run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent-run theatres on the same run as and in competition with so-called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Warner to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a

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so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not."

It is also stipulated that each of said witnesses would testify that in the respective exchange areas over which he has supervision:

A. Warner has not prevented any defendant or any so-called "independent" distributor from competing with Warner's in the distribution of films.

B. Warner has never discriminated in favor of so-called "affiliated" or so-called "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called affiliation.

C. Warner never has conditioned its granting a license for the exhibition of film distributed by Warner in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Warner a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by

(2639)

Warner, or in any way taken into consideration in licensing films to exhibitors any action of other producers in licensing its films to Warner theatres or to anybody else.

D. Warner has no agreement or understanding with any prior run exhibitor, either a so-called affiliate or independent, fixing the minimum admission price which Warner must insert in its license agreement with a subsequent run exhibitor.

Mr. Pride: Are you all through?

Mr. Proskauer: All through.

Mr. Pride: We would like to offer on behalf of National Theatres Corporation testimony of five of the principal executive officers of its operating companies. I have four of these here. A fifth is in transit by air mail from California, and I shall ask leave to put that in later.

This is stipulated testimony of Mr. Harold J. Fitzgerald, Frank L. Newman, Sr., Elmer C. Rhoden and Frank H. Ricketson, Jr. I would like to have those transcribed into the record; but I might say that Mr. Wright and I have the understanding, since he has not had full opportunity to go over all the statements, that he will advise us as to any supplements, changes or issues which he thinks are raised by them which should be either changed or supplemented; and I therefore suggest that the reporter withhold transcrib-

(2640)

ing them into the record until any questions concerning their contents are straightened out.

I should also like to offer as Fox Exhibit F-22 a list of franchises of Twentieth Century-Fox for the 1938-39 season which was the year in which it had its largest number of franchises. I have given Mr. Wright a copy.

(Marked Defendant Twentieth Century-Fox Exhibit F-22.)

Mr. Pride: We may have, your Honors, one or two other exhibits here which I would like to confer with Mr. Caskey about on his return, and I am certain we can straighten out their introduction then.

Judge Hand: All right.

Judge Bright: That completes your case?

Mr. Pride: Subject to that last reservation, sir, yes.

Judge Hand: Well, do I understand the defendants rest with the exception of supplying some of these supplemental things that you have indicated?

Mr. Seymour: Aside from those which I reserved, there is only one other problem, and it certainly does not prevent our resting. Because of the haste of the trial we, at least—and I suppose other counsel—have not had a chance to examine this record with care for possible corrections. In the event that there should

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be any interim at this time in the trial, we would like to examine it and attempt to agree with Government counsel on those corrections and make them physically in the printed copies of the records, which we now have available; and then we would like to furnish the Court with printed copies of the record with those changes physically made so that it will save your eyes in the reading of the stenographic transcript, and you won't have to look around for corrections. We shall also supply printed copies to the Government. If there should be a difference on any correction which we regard as substantial I should like to have the privilege of dealing with that. I hope we shall be able to stipulate all the corrections. Subject to that, as far as we are concerned, we rest.

Mr. Proskauer: I think we are all ready to rest, your Honors, with the understanding that if anything comes up hereafter which we think we omitted, it is not going to be of a fundamental character, and we may have the privilege of supplying to your Honors any little additions or inadvertences.

Mr. Davis: We rest with the proviso, as I stated this morning, that there are one or two exhibits I want to consider.

Judge Hand: Now, do you expect to print this

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record, all of you, get up a joint record?

Mr. Seymour: There is a print of the record which has been made contemporaneously, and it is that that we shall correct.

Judge Hand: That is what you wanted to fix up?

Mr. Seymour: Yes, and furnish the Court with copies as soon as those corrections have been made.

Judge Hand: I see; and that covers all the testimony of everybody?

Mr. Seymour: Yes, from the very beginning. It does not cover the exhibits, but it covers all the testimony.

Judge Hand: And the exhibits you are going to submit just as they are submitted ?

Mr. Seymour: Yes, unless some more convenient method occurs to your Honors. There are so many exhibits that the printing of them at this stage would be very burdensome.

Judge Hand: Oh, yes. I did not suppose you would want to print them, but are you going to bind them up separately and put them together?

Mr. Seymour: I think we ought to do something of that kind.

Judge Hand: Yes, I think that will simplify access to it.

(2643)

Now, Mr. Wright?

Mr. Wright: If the Court please, we have in process of preparation some rather elaborate motions to strike out a very large part of the testimony that has been received here in various forms. Now, as to much of it we do not desire to press it or be heard on it; it is largely for record purposes.

Colloquy

Judge Hand: Oh, yes.

Mr. Wright: But as to some of these matters we do have a problem, I think, which does require some ruling or some indication by the Court as to the significance that attaches to certain testimony which has been permitted to go in here in order that we can limit the scope of our rebuttal evidence.

Now, as to that we would like to be heard, and we would like to be heard before we engage in the presentation of rebuttal testimony.

I might say that in so far as we are concerned, in our view of the case as it now stands, there is not in this record competent defense testimony which creates any material issue of fact that this Court needs to determine. Now, we shall, of course, present our views in detail as to the various aspects of this testimony in the form of a written motion and will support it with a written memorandum. But I would like an opportunity at some point, or perhaps now, if the

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Court is willing to devote some time to it, to have at least some interchange of ideas in the form of argument between ourselves and the Court as to the significance, or, rather, lack of significance and lack of competency, as we see it, of some of the material which has been received.

Judge Hand: Well, you might go ahead.

Mr. Wright: All right.

Let me first say that as we view the case now, of course, we think that we are right back at the point where we started, in that the fundamental, important question that has to be decided here is one of law, and that that question is the extent to which the copyright law justifies or excuses the practices in which the defendants have concededly engaged.

Now, let me give what I think is the simplest form of analogy to the situation that has been presented here in another field. Let us assume that you have two distributors of a commodity, two national distributors, and each of them controls a group of retail outlets; and each of those distributors makes agreements with his outlets, under which the outlets act as agents for the sale of his product to the ultimate consumer, and under which agreements he stipulates the price, or a minimum price, at which the product is to be sold.

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Now, up to that point you have no Sherman Act violation, no title passing until the ultimate sale to the consumer.

Now let us assume further that just two of these national distributors, each distributing a competing product through its own outlets in this manner, makes agreements with the outlets of the other of the same kind and character in which distributor A agrees with the outlets of distributor B as to the ultimate price to be charged by those outlets—or the minimum price, if you prefer—for the product of distributor A, and distributor B makes agreements of a similar character with the outlets of distributor A in which he too fixes the ultimate price to the consumer of his product.

Now, on that state of facts there is simply no question but that each of those distributors is a party to a price-fixing combination which is illegal under the Sherman Act regardless of any claims of a stabilized against a chaotic market, or claims that it is the most profitable way to do business, because you clearly have the elimination of price competition between the competing products of A and B as a result of express agreements between them and their controlled outputs.

Now, even in the cases of patented commodities, if the Court please, similar arrangements to that have

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been found by the Supreme Court to be illegal, the latest example, I think, being the Masonite case cited in our brief, where agency forms of agreement were used to control the ultimate price of the patented hardboard that was involved in that suit.

So that the question that really arises in this case, where it is perfectly clear that under any view of this testimony each of these theatre-owning distributors has made such agreements with the theatre outlets of the other distributors which control or which determine the price at which they shall be made available to the public—whether price-fixing of that kind can be justified under the Copyright Law; that is, if it cannot be justified under the Copyright Act, it is perfectly clear, under the Supreme Court cases in which price-fixing was involved, that you can't possibly justify combinations of that character by any evidence as to alleged reasonableness of that method of operation.

Now, our prima facie case was directed at showing the extent and actual use of this power of concerted price control that these people admittedly possessed through their ownership of the five largest groups of theatre outlets in the country, and their practice of making agreements with each other in which they determined not only the price at which their film shall be exhibited but the terms on which the films shall be

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made available to competing exhibitors.

We in the interrogatory answers offered a detailed picture of distribution in certain selected urban markets as to the 1936-1937 season, showing exactly the

way in which the arrangements the defendants make with each other were used to concentrate the major share of the film revenue coming out of the area in the theatres which were controlled by the defendants; and in our later interrogatories we expanded the data to give a picture as to the 1943-44 season in all of the cities of over 25,000 population. As to those towns we put in the evidence which show generally the first-run accounts during that season of each of these distributors and the clearance and admission price restrictions which were contained in the argeements with those accounts; and then we also, as to a single selected picture for each distributor, put in evidence the actual film rental and play dates of that picture and the clearance that that particular picture got on its first-run exhibitions in all of the cities over 25,000. We offered the data as to the first and second-run exhibition of the particular picture, again showing the film rentals, play dates and actual clearance and admission price provisions involved in all of the cities over 50,000; the first three runs in those over 200,000,

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and the first four runs in the cities over one million, in the five boroughs of New York City.

Again we offered that data to show the manner in which this market control that is jointly possessed and exercised by these theatre-owning distributors was used to concentrate the available film rental revenue in the early runs in a very large majority of those communities in theatres in which they owned these financial interests.

The general purpose of that data, of course, was simply to show that not only did they have this power to control this mraket, which, of course, is shown by these statistics as to the extent and the nature of their

theatre ownership and their position as distributors in the industry, but that it had actually been used to give them a prior and a preferred position in the exhibition in the industry.

(2649)

Now, we also offered in evidence, largely on the issue of intent, the various pooling agreements which they had made with each other whereby they had actually consolidated certain theatre operations where they actually ran theatres in nominal opposition to each other, and in those agreements, some of which are digested but all of which will be digested for your Honors before we get through with the case, there are provisions, such as those confining the acquisitions of new theatres by either party to certain territories and provisions as to how product is to be distributed or divided, all of which indicate in express terms what we think would generally be inferrable anyway, that is, an intent as between these defendants not to operate theatres in competition with each other insofar as the business of licensing films is concerned.

Of course it is perfectly true that all pictures are in competition with each other for the customer's dollar and all theatres which are operated are in competition with one another for the customer's dollar in the sense that they do offer competing attractions, whether they are all owned by one operating group or by several, but I think it is perfectly clear, both from our testimony and from what has been put in here by the defense, that there actually is no competition between the theatres of these defendants when it comes

(2650)

to making film licenses or in determining the price at which the film entertainment is going to be made available to the public. And that basic fact, it seems to me, is beyond dispute on the record that we have here now.

Judge Hand: I think it is very hard for any of us to see how there is any violation in respect to production and why the whole thing does not come down to the arrangements for distribution and exhibition. You have almost admitted that—perhaps you haven't quite. I have never understood you to attempt to distinguish.

Mr. Wright: I have just attempted to point out that, as we view the case, it presents a problem in market control and the control of that market is largely determined by these arrangements that are made between companies acting as distributors and companies acting as exhibitors.

Insofar as the production end of the business goes, I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed. In other words, what Mr. Raftery says about "there isn't anything wrong with the industry that more good pictures would not cure" is probably largely true in the sense

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that, as this industry is organized, these defendants, of course, cannot possibly get hurt by a good picture. They want to do whatever they can to have as many good pictures made as possible because, in exploiting them through their theatres, they profit from good pictures, no matter who makes them.

The aspect of the market control, however, which has been proven, which does disturb some so-called independent producers, and of course there is no unanimity of opinion on this question, is the fact that any producer's picture of course may be made or broken by the exploitation that it gets in

the outlets which these people control, and that that control of the market in the hands of their competitors, of course, is a fact which does subject them to a serious competitive disadvantage. That is, as plainly as I can state it, what we think is involved here, insofar as producing pictures, as distinguished from distributing them and exhibiting them, is concerned.

Insofar as your independent exhibiting elements are concerned, of course there the immediate objects of all of these restrictive provisions which find their way into the license agreements which these people make with each other—and there let me say this, that it is perfectly true that in the areas, the limited number of areas, where these people do not operate theatres, the independent first-run theatres may and do

(2652)

receive privileges similar to those which these defendants receive in the areas in which they have concentrated their theatre operations. That, however, is a matter which is pretty much implicit, as we see it, in the possession of each of these distributors of large circuits of theatres; that is, each of them has a vested interest in what we call circuit discrimination, that is discrimination in favor of circuit theatres, as such, and that finds expression, as we proved in the Shine and Crescent cases, in dealing with large so-called independent circuits in the same way that it does with your affiliated circuits.

However, the problem that is presented here is different from that presented there in that in those cases they were simply dealing with the application of circuit buying power as such to the business of these distributors, whereas here, what you are dealing with is circuit buying power plus the affiliation of the dis-

tributors with theatres, which serve as conduits for the expressed agreements regarding discrimination.

Judge Hand: I do not understand what you are arguing, really, about. In these areas where independents have all the large theatres, are you picturing them as sort of contributory infringers? What are they claimed to be?

Mr. Wright: I am pointing out that I am making

(2653)

no claims as to the independents who operate in areas where these defendants do not operate; that they are able to take care of themselves by virtue of the absence of the affiliated companies.

Judge Hand: You are making no claim even against these defendants there?

Mr. Wright: Yes, that is right.

Judge Hand: Oh, I did not know you were not.

Mr. Wright: I merely wanted to point out that the discrimination as to independent exhibitors again is largely limited to the areas in which they are so unfortunate as to find themselves in opposition to the theatres which are affiliated with the defendants in this case.

Judge Hand: Supposing these five defendants are distributing their pictures in a place where the independents control all the theatres, what do you say about that? Are you making any claim against them in respect to that?

Mr. Wright: No.

Judge Hand: You are not?

Mr. Wright: No, we are not. We are merely——

Judge Hand: In other words, your claim there would be against the independents.

Mr. Wright: Well, if there were any claim——

Judge Hand: I do not understand where you are
(2654)
getting in this thing, it is so extremely complex. What I understand was, you said even in those places the same kind of thing happened and there was the same taint on the part of somebody or other.

Mr. Wright: Well, insofar as the general control of the price structure by these defendants, that is, in any area, that is, even in an area that is wholly occupied by independents, they use a price fixing provision in the agreements to control and protect the revenue from those areas.

Now, to the extent that they do that concertedly they are, I think, in violation of the law there, but not because the price fixing or the other provisions are applied in such way as to discriminate between independent outlets and their own outlets because they have no outlets of their own in that area, but simply as a per se violation of the Act.

Judge Hand: I thought you might be claiming that they were the same as these three here that never came under the consent decree.

Mr. Wright: In those situations I think they are in that same position where they do not operate theatres.

Judge Hand: No better and no worse.

Mr. Wright: That would be about the size of it.

Judge Goddard: Do you claim there is a monopoly
(2655)
in production? I don't think I understand your position.

Mr. Wright: I don't think we do.

Judge Goddard: I beg your pardon?

Mr. Wright: No, we do not. As to the areas in which they operate theatres, the discriminations there, of course, are limitless in variety. You have discriminations as to playing position, as to clearance terms, in the application of these minimum admission price restrictions and as to rental terms. Now it is in connection with that question of the nature and extent of discrimination in—as against independent exhibitors—in the areas where these people operate theatres that I would like to press such motions we have directed at some of this general testimony of sales managers who have gotten on the stand here and simply gotten away with saying "Well, we do not discriminate between affiliated and independent theatres."

I think it is a well established rule of evidence that anybody who wants to offer evidence as to facts, as distinguished from a general argument, is bound to produce and offer the best evidence at his command; that is, each of these sales managers, of course those companies have those license agreements in their files, they have elaborate data showing the terms on which they do business with independents and affiliated theatres. I do not say that anybody has to produce as primary evidence all or any part of the license agree-

(2656)

ments that he is talking about, or the original records which tabulate the material, but I do say that no proper foundation was laid here at any time to permit these sales managers to make the general statements that they did about the presence or absence of discrimination. You have seen how these people can tabulate and offer elaborate charts of any kind as to what they have done, and if they wanted to show, for example, that there was no discrimination in rental

terms, as to their theatres and the independent theatres generally, or in any particular area, it seems to me they were bound to at least offer to the Court some kind of factual summary statement of what the practice was and what they had actually done rather than just having some sales manager get on the stand and say that the practice is non-discriminatory, that we sell indiscriminately.

The Court: I thought you had complete access to their books and records and had seen whatever you wanted to and produced whatever you wanted to, and they were meeting this or attempting to meet it by some of this general testimony about their practice. If you have things in there which show that was not their practice, all right.

Mr. Wright: If the Court please, all that we attempted to do——

(2657)

Judge Hand: I suppose that you claim very earnestly that you have things in there which show that that was not their practice.

Mr. Wright: All that we attempted to do in the prima facie case was simply to indicate what appeared to be prima facie discriminations. Insofar as testimony is directed to the explanation or rationalization of any particular discrimination, we have no quarrel with it, but I do not believe that evidence of that character can be made or that the burden of going forward can be shifted by a party who has the evidence at his command, ignoring factual evidence and simply getting on the stand and giving a general conclusion as to a general practice.

Of course it is perfectly true if we want to go in and examine twenty thousand agreements; I suppose

we have the privilege of doing it, but I submit that it is extremely prejudicial to permit them to impose a burden of that character on us simply by having these men get on and say "We don't discriminate" without making any attempt to analyze or present a factual analysis of what they have got in their own files. I do not see that the mere fact of access through subpœna or otherwise is sufficient to excuse the reception of evidence from them in that form. Of course if all the evidence is received for is just general evidence of good intentions, then you do not have any

(2658)

problem of competency. Of course, it seems clearly irrelevant and immaterial, however. But if that kind of thing is to be accepted as competent evidence, and I do not think it can be without violating the established rules applicable to this court, we have a much different burden in determining what kind of rebuttal we ought to put in than, I think, we have as a matter of law.

I will say generally, on our rebuttal, as far as argumentative testimony is concerned, we do not propose to meet it with other argumentative testimony, we will argue the case ourselves, and insofar as any testimony that we do offer, we shall, I think, attempt to confine it to documentary form insofar as we can. But in determining the scope of that documentary testimony, that is, what and how many contracts to put in, we are faced, I think, with a problem that has been created here, and I think—in the first instance, I don't want to be misunderstood as thinking that there was any error in admitting it, to have it incorporated in the record, I think we all wanted to have in the record everything that these people wanted to offer, so that we would have a record on which there could be

final disposition, but I think the point has been reached where we pretty much have to know what, if any, significance the Court is going to attach to
(2659)
that kind of conclusory evidence which was offered and received without any proper foundation, as far as I can see.

Judge Hand: I do not see myself that it is tremendously important.

Mr. Proskauer: Your Honor, we cannot quite hear you.

Judge Hand: I am not tremendously moved myself by a lot of testimony from people from a company that they always give everybody an equal chance, and there was no preference there, and all that sort of thing, if you have some stuff which points the other way, and it is clear enough that is your burden, whether by oral testimony of documentary testimony or otherwise, it is certainly your burden, and you are merely objecting to our giving any weight whatever, or paying any attention, even though your testimony should prove to be weak, to general statements by their officials as to their practice. I rather think we could not do that; that that would be an erroneous ruling on the admission of evidence. I do not think, if you have a good case otherwise, by the practice which you have shown that they had actually from these documents, that they are going to meet it by coming in with testimony that they always were fair, non-discriminatory, and, in general, lovely fellows. But even so, if there is anything there in the way of
(2660)
doubt on either side in this testimony, I should think witnesses could be called to say what the practice was. Maybe your documents contradict it or seriously dam-

age it, but to say that what they were doing, that their custom in trading was non-discriminatory is incompetent for any purpose, I don't think it is. Do you?

Judge Bright: Is what?

Judge Hand: Is incompetent. I don't think that it is. No, we will have to let that stuff stand. I admit that there are many things here; for instance, dealing with these arbitration records, I have no doubt they would throw some light on the character of the litigation. What real evidential force they have, if any, I greatly doubt. And I know the only reason or the best reason I could give for letting in something which it is my almost invariable individual practice to let in, if there is any possible chance for its admissibility, in a suit without a jury, was based on the theory that it had some informative, if not evidential value—a little like an auditor's report; it was to aid the Court—that the parties were there and they were at liberty to overthrow it any one of them.

Mr. Wright: I think it is quite apparent, if the Court please, that we can call no witness who can

(2661)

testify to the general practice of any of these companies. We can procure certain license agreements which we will offer,——

Judge Hand: Yes.

Mr. Wright: —and which we think show some of these discriminations. There are, as I said, in our prima facie case a number of discriminations which haven't specifically been called to the Court's attention.

Judge Bright: We do no know what they are.

Mr. Wright: I beg your pardon?

Judge Bright: We don't know what they are.

Mr. Wright: I think we showed, for example, in the examination of one witness, as to the rentals which were paid for runs in, I think, third or fourth run Philadelphia, that there was no uniformity whatsoever as between the Warner theatres and the independent as to the rentals they were charging for the same run.

On this problem of comparison, again, I would—I attempted to follow your Honor's questioning and we are prepared to make any kind of specific comparison that the Court is interested in. There are, of course, many things that can be done along that line, compare prior runs with later runs or pictures on the same run, but in my view, what you come up with, I think, is a fairly obvious conclusion in the instance, that necessarily, when you make one of these deals, you discriminate in some respects every

(2662)

time you make a film license, and that the general testimony to the effect that "We don't discriminate" just has no meaning in the face of the fact that each of these is a bargained agreement and your terms will necessarily vary with the bargaining strength of the parties to the agreement.

That is, really, the question that, as I see it, we are faced with on rebuttal, is how far to attempt to elaborate on what seems to be, to us, an obvious fact or a fact which is inevitable in any consideration of the way the business is done, and I would like to direct any further evidence on that point into the precise channels, if any, that the Court has in mind. If we could be told as to what, if any, kinds of rental discrimination the Court is interested in, I shall attempt to make a comparative showing.

Judge Hand: You are almost making the argument, apparently, that to bargain at all is discriminatory. I don't understand it.

Judge Bright: I have just been wondering whether the Sherman Act prevents you from dealing with a man who has $50 on a different basis than one who has $5.00.

Mr. Wright: Not at all. I think not only is some discrimination implicit in every deal that is made but that discrimination which simply gives regard to the

(2663)

results from competitive bargaining on a theatre by theatre basis, does not violate the Sherman Act at all, and we do not make any such contention, but it seems to us, again, the testimony of these witnesses is so unlimited and so general in character that——

Judge Goddard: Most of these contracts, according to the testimony, as I recall, were made theatre by by theatre and not in groups, isn't that the testimony?

Mr. Wright: I think your Honor will find in the interrogatory answers many instances where the statement is made that they cannot tell us what the rental paid by a particular theatre was because there was either a flat rental deal for a large number or some formula deal where the rental has not yet been computed.

That problem of how far to go in putting into the record additional contractual material is one which I think we need some help on from the court. As the record stands, I do not know what significance the Court attaches to these statements that have been made at all. I would go further and I would say that insofar as our tabulations are concerned, tabulating this interrogatory material, we, again, want to limit what we offer insofar as we can to tabulations which

will satisfy the Court's curiosity rather than just give employment to ourselves.

Judge Bright: Don't you think the burden is on

(2664)

you to center your fire rather than to scatter it?

Mr. Wright: I agree that the burden is on us to center our fire but I say that the manner in which the defendants have been permitted to scatter theirs has really given us a burden that, as matter of law, we should not have.

Judge Bright: When you are trying to shoot at a flock of pigeons, you don't use a choked barrel.

Mr. Wright: That is quite true.

Judge Hand: I should think you ought to show or to have shown, whichever may be the case, in what way there has been discrimination and to what extent, that is your burden absolutely, and somebody has a right, who is an officer, to come back and say, "Well, in our negotiations we treated Trojan and Tyrrhenian without discrimination. The independents and the others were treated in the same way." Very likely that isn't so; you say that your evidence shows plainly that it isn't so.

Mr. Wright: That is right.

Judge Hand: That does not say that they cannot talk about it. There are lot of transactions here, doubtless, that may be entirely colored by their interest and wishful thinking, but are outside of completely recorded transactions that represented consummated deals. And you have, you believe, I imagine, a mass of documents and transactions show-

(2665)

ing that that is not so.

I cannot tell you, without considering the thing further, what weight is to be attached to anything. How can I? How can any of us? This is not a simple

case, it has complicated facts and varying agreements and all kinds of varying relations.

Mr. Wright: Of course I think, if the Court please, that it is simpler than it has been made to appear by the treatment which it has got from the defendants. That, of course——

Judge Hand: That may be so.

Mr. Wright: —is a problem we have in these cases. If the defendants can make the issues sufficiently complex, they generally prevail; if we can keep them simple, we prevail. What I am trying to do here is refrain, if I can, from further cluttering the record with elaborate documentary rebuttal testimony.

Judge Hand: I shouldn't think, if your evidence was good enough, that it was helped by mere weight of numbers. It is absolutely impossible for us to sit here and give any safe conducts as to what you should put in.

Mr. Wright: May I do this? We are preparing a motion to strike, which we shall want to file anyway, and I would like to submit with it a brief memorandum, if the Court would receive it, referring to authorities which I think can support the position that I

(2666)

took, but I would assume that in any event we would go ahead and prepare such rebuttal as we think we need, without waiting, that is, for the Court's ruling. We would, however, appreciate an opportunity to examine what has gone in here in considerable detail in order that we can cut what we will offer down to the very minimum that we think is essential to make a full case.

I do not know what your Honor's plans are as to when you want to sit. We could get this motion into your hands, I think, by the first of the week—motion and memoranda.

Judge Hand: I do not think we care anything about those motions. You ought to make them on account of your record, of course, but we are not going to spend time striking out this and striking out that. It is impossible. We would not add anything to the situation that would help any, before we got through.

Judge Goddard: Couldn't pass on it.

Judge Hand: No. I wouldn't spend much time on these motions, if I were in your place, except to make the kind of record which you think is proper in case you should not get what you wanted out of this court and should want to take an appeal.

Mr. Wright: Well, of course, I should like to say,

(2667)

for the most part, that is the——

Judge Hand: The defendants, of course, have made some motions already. Very likely they will make some more to the same desirable end.

Mr. Wright: What is the Court's pleasure as to when you would like to have us begin whatever rebuttal we have?

Judge Hand: When would you be ready to begin?

Mr. Wright: Your Honors, I take it, are not sitting Monday?

Judge Hand: No.

Mr. Wright: I would suppose we would be ready with something by the end of the week. I think there are some odds and ends to pick up too with some of these other things. Perhaps Wednesday or Thursday?

Judge Hand: Wednesday is all right. I don't want to really, push any of you here too much. You have collaborated splendidly in shortening this case. I don't want people sitting up all night and killing themselves, but, as I manifested at the beginning, I do not want this case to take the course of so many Sher-

man Antitrust Act cases take—just grevious, to everybody.

Mr. Wright: We don't want to do that either.

Judge Hand: No. you haven't. You have done awfully well.

(2668)

Mr. Wright: Can we proceed Wednesday with this understanding, that, of course, we have numerous matters to clear up as part of the defense case here, that we know we want to go ahead with now, and it may be that after we have those matters finished, we might ask for another short recess before actually closing, but I think we could use that time.

Judge Hand: Would you rather begin Thursday? Can you go right on then?

Mr. Wright: As I say, I cannot give the Court assurance now as to how long it will take us to make our final study of this record. I know that there are some things we can go ahead with next week. That is why I thought it might be desirable to use some of that time.

Judge Hand: We will adjourn until Wednesday at ten-thirty.

Mr. Proskauer: Your Honors, before we adjourn, I have sat silent a long time here. I don't want to go into a long recess with any impression in the Court's mind that our chief reliance in our testimony was on those general denials.

Judge Hand: I never supposed so. I take these recitals and affidavits, that people would testify to——

Mr. Proskauer: They are for the protection of our record.

(2669)

Judge Hand: They never did me any good, really, and I have them particularly in admiralty all the time.

Mr. Proskauer: Of course.

Judge Hand: We all know that. I suppose they have to make some kind of record—all of you do—lest acquiescence should be weighed against you.

Mr. Proskauer: I want to make it clear that our contention is that we have negatived conspiracy and shown there is no issue of fact here by very direct and specific evidence.

Mr. David: I want to also suggest that this is the first time I have ever heard, in a quasi-criminal case, where the defendants took the stand and, with uplifted hand, said "I am not guilty," the prosecuting officer move to strike his testimony.

Judge Hand: Wednesday at ten-thirty.

(Adjourned until Wednesday, November 14, 1945, at 10:30 a. m.)

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New York, November 14, 1945;
10:30 o'clock a. m.

Trial resumed.

Mr. Caskey: If the Court please, at the session on Friday Mr. Pride offered the stipulations of the four division managers of National Theatres Corporation, and, as I understand it, they were received subject to any suggestion which counsel for plaintiff might have. If there are none they can now be incorporated in the record.

Mr. Wright: Of course, as far as suggestions are concerned, our suggestions will take the form of a motion to strike a large part of that material, simply as we have before; but there is not any agreement between us as to what the affidavit should contain.

Mr. Caskey: And I now ask to have the stipulation of Charles P. Skouras, who is the president of National Theatres Corporation, a defendant in this case, incorporated into the record.

(The five stipulations referred to are as follows:)

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(The affidavit of HAROLD J. FITZGERALD is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding HAROLD J. FITZGERALD would testify as follows:

"I am a resident of Milwaukee, Wisconsin, having resided there all my life. I am engaged in the motion picture theatre business and have been engaged in that business continuously since 1915. I am now and since 1933 have been the president and operating head of Fox Wisconsin Theatres, Inc. (hereinafter referred to as 'Fox Wisconsin'), a Delaware corporation, having its principal office and place of business in Milwaukee, Wisconsin. All of the stock of Fox Wisconsin is owned by National Theatres Corporation, a defendant in this proceeding.

"Fox Wisconsin is interested directly, or through corporations the stock of which is owned by it, in the owning, leasing and operation of 66 motion picture theatres located in various cities and towns in the State of Wisconsin and in the upper peninsula of Michigan. All of such theatres are located in what

(2672)

is generally known as the Milwaukee Exchange territory, by which is meant that films are supplied to such theatres through the exchanges maintained by the respective distributors in Milwaukee.

"At the present time, 61 of these theatres are in active operation, 5 are not. For the most part, these 5 theatres are not being operated because various

physical deficiencies make them unsuitable for use as theatres.

"I am familiar with the allegations contained in the plaintiff's complaint herein.

"I. GROWTH AND DEVELOPMENT OF MOTION PICTURE THEATRE BUSINESS IN MILWAUKEE EXCHANGE TERRITORY UP TO TIME OF ACQUISITION BY FOX FILM CORPORATION OF THE PREDECESSOR OF FOX WISCONSIN.

"The development of the motion picture theatre business in Milwaukee, Wisconsin, as well as in most of the other larger towns in which Fox Wisconsin now operates, is linked with the story of two residents of Milwaukee—John E. and Thomas Saxe, who were pioneers in the exhibition business in the entire territory. These men had become interested in the business as early as 1904. Their entry into the business was through the acquisition of a nickleodeon in payment of a debt. They opened other five cent store front theatres. They were the first to open an enlarged type of theatre charging ten cents. They had confidence in

(2673)

the future of the business. They ploughed back into new and improved theatres the profits of their original ventures.

"I first became associated with the Saxe organization in about 1920. At that time the Saxe brothers were operating approximately 20 theatres in the City of Milwaukee and a few in other outside communities. For the most part these theatres had either been constructed by them or for them and represented the most advanced theatre operations in existence in Wisconsin. The theatres, of course, did not begin to compare physically with today's better theatres. For the most part they were relatively small and otherwise inadequate but they were the 'quality' theatres of that pe-

riod. Other theatres were in competition with them Some of such other theatres were being operated as units by several individuals.

"In the period between 1920 and 1927, there was great activity in the theatre field. The motion picture industry had developed by leaps and bounds. The quality of the product had immeasurably improved. The power to attract public patronage had greatly increased. These factors were reflected in elaborate plans on the part of existing theatre operators to enlarge and improve their theatres to satisfy public demand and to keep abreast of these developments. In
(2674)
the large metropolitan cities, such as Milwaukee, theatre construction was undertaken in a large way. This marked the beginning of the construction of the so-called 'de luxe' theatres, with large seating capacities, luxurious appointments and requiring very substantial investments.

"The Saxes were the leaders of this in Milwaukee. They entered upon the construction of such theatres as the Wisconsin (still the finest theatre in the State of Wisconsin). They likewise constructed the Uptown and the Garfield and arranged to have constructed for them the Oriental and Tower theatres. These 4 theatres were large de luxe neighborhood houses. Together with the Modjeska theatre they represented a group of superior theatres, each in a competitive neighborhood area of Milwaukee and each affording to the public theatre accomodations which were unequalled in neighborhood theatres in any city of comparable size in the country. Moreover, they also entered upon the construction of similar fine theatres in representative communities in the State.

"These theatres were built by the Saxe companies (or built by others for them on the basis of leases guaranteed by the Saxes) because of a definite realization that if they were to continue to have a profitable exhibition company it was necessary for them to keep abreast of the times. It was necessary for them

(2675)

to have fine theatre facilities to accommodate the public and to provide appropriate exhibition facilities for the productions that were then being distributed by the producing companies. If they did not supply these facilities, other progressive exhibitors would do so and relegate them to a position in which their business would be outmoded. The theatres in question were costly. It was necessary in a number of instances to finance them with bond issues which were generally distributed to local investors. The risks assumed were large. They were only assumed as necessary business measures required to keep pace with an expanding industry.

"This development in the theatre business was, of course, not confined to the Saxes. Other interests who had been engaged in theatre operation in Milwaukee and in other towns throughout the State likewise developed their properties. In all, from about 1920 to 1927 more than 43 theatres were built in the City of Milwaukee alone, most of them of substantial size. 16 of them had more than 1,000 seats and 7 of them had more than 1,500 seats. The great majority of them were built by individuals having no connection with the Saxes or any other circuit of theatres.

"Throughout this period the Saxe circuit devel-

(2676)

oped entirely on its own, with no financial assistance from any producer or distributor of motion pictures. Up to 1927 the only distribution company having any

interest in theatres in Wisconsin was Universal, which, as early as 1921, had acquired the Alhambra theatre in Milwaukee.* Universal had expanded its theatre holdings by acquiring several groups of theatres theretofore operated by certain individuals and it also built, or otherwise acquired, theatres in several other towns in the State, building a de luxe theatre in Kenosha, Racine and Sheboygan, respectively, the theatre in Racine and Kenosha being directly competitive with the Saxe operations in those communities.

"By 1928 there were 77 theatres in the City of Milwaukee, a number of which were being operated by the Saxes.

"In addition, the Saxes were also operating theatres in the Cities of Appleton, Beloit, Fond du Lac, Green Bay, Janesville, Kenosha, Marinette, Menasha, Neenah, Racine, Waukesha and Wausau. They had constructed the Capitol theatre, in Madison, with a seating capacity of 2,240. They had under construction a theatre in Kenosha and one in Oshkosh.

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"By reason of my connection with the Saxe company, I was familiar with the events and situations which led to the construction and acquisition of the Saxe theatres. I was general manager of the company from 1925. I can definitely state that the theatre construction which occurred in the period was occasioned solely by an endeavor on the part of the Saxe company to continue a profitable business, with the knowledge on its part that, unless it was successful in affording the public and the producers adequate facilities and

*This theatre had formerly been operated by the Saxes but Universal offered a greatly increased rental to the landlord and secured the property.

adequate outlets, the economics of the situation would destroy the enterprise. There was no thought or intention of creating a situation which would exclude competition or prevent others from engaging in the theatre business. The basic consideration was the maintenance of an established business along progressive lines.

"Beginning in about 1924, there became apparent the greatest interest on the part of distributors of pictures to secure a position in the exhibition field in Milwaukee.

"In so far as the Saxe theatres were concerned, there were many propositions submitted for the purchase of this circuit. Solicitations were made by brokers and promoters, some purporting to act for

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major producers or other large interests and some concealing their principals. In the period between 1925 and the end of 1927 definite negotiations were had with the following:

"William Fox, who was negotiating for the direct acquisition of the circuit through an agent, A. C. Blumenthal;

"Hayden, Stone & Co., bankers, who had financed Wesco Corporation, which was a holding company interested in many theatres on the West Coast;

"Paramount Publix Corporation;

"Balaban & Katz Corporation; and

"Ruben & Finkelstein, who operated theatres in Minnesota.

"Negotiations with Hayden, Stone & Co. for the acquisition of the circuit by Wesco Corporation resulted in the development of a formula for a sale in

the summer of 1927 and the agreement was closed December 1 of that year. The Saxe circuit was purchased by a company known as Midwesco, which was a wholly owned subsidiary of Wesco Corporation. The price paid was $900,000 in cash and 17,500 shares of the stock of Wesco Corporation, plus an option to the Saxe interests to purchase an additional 22,500 shares at $40 per share. In 1928 Fox Film Corporation acquired all of the stock of Wesco Corporation. At that time the stock held by the Saxes was exchanged, share for share, for the stock of Fox Film Corporation

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and a cash consideration of $100,000 was paid to the Saxe interests to cancel their option.

"As indicated by the foregoing, the Saxe theatres were, when they became affiliated with Fox Film Corporation in 1928, an established circuit of theatres, with the development of which the producing company had no connection. It was acquired by Fox Film Corporation in a highly competitive market.

"II. TRADE PRACTICES AND COMPETITIVE CONDITIONS UP TO TIME OF AFFILIATION.

"As stated above, I became general manager of the Saxe theatres in 1925. In this capacity I had supervision and control over all phases of the operation, including the licensing of pictures for the theatres. I was wholly familiar with the methods of licensing and the practices followed with respect thereto.

"In 1928 there was definite competition in the operation of first run theatres in Milwaukee. The Saxe circuit was operating two theatres, the Wisconsin and the Strand, as first run theatres. Universal was operating the Alhambra. The Riverside theatre, with a large seating capacity, had been built in 1926 and was

being operated by the Keith-Albee-Orpheum circuit, principally as a vaudeville theatre, but increasingly more as a motion picture theatre. The Palace theatre

(2680)

was also being operated by the Keith-Albee-Orpheum circuit as a vaudeville and motion picture theatre. The Garden theatre was being operated by an independent.

"The Saxes had, as stated above, constructed a number of de luxe first run neighborhood houses which were playing as first run theatres in their respective competitive areas, although in other neighborhoods there were first runs operated by two independents, as well as a neighborhood first run operated by Universal.

"The situation with respect to the licensing of films, and the runs and clearances involved, were much the same at that time as they are today. Without exception, at that time, the first neighborhood run was licensed by the distributors to the theatres which were the finest, most commodious, and most capable of producing revenue for the distributor in the particular zone involved. Then, as now, no question of affiliation or circuit connections determined that choice.

"As to the first run downtown theatres, the same situation existed. The entire system of licensing runs, with appropriate clearances attaching to each, is nothing new or unique. It existed then, as it does now.

"In licensing film at the time—and this was one of

(2681)

my principal responsibilities—I naturally endeavored to license the best product available to the extent necessary to supply the demands of the theatres. While the number of first run downtown outlets was fewer at the time then at present, partly because of the playing of vaudeville in the Riverside and the

Palace theatres and partly because the large Downtown Warner theatre had not been constructed, nevertheless the ability to secure film was predicated upon the physical characteristics of the theatre for which it was to be licensed, plus an ability to arrive at satisfactory terms with the distributor.

"Moreover, in so far as licensing provisions generally are concerned, the same procedures were in effect at that time as at the present. It was not uncommon for pictures to be licensed on a percentage-of-the-gross basis, although such contracts were not as generally used as at the present time. Then, as now, minimum admission price provisions were inserted in the film contract. Clearance was negotiated on the basis of the proper period of protection which the distributor and the exhibitor could agree upon for the particular competitive situation involved.

(2682)

"III. DEVELOPMENTS FROM 1923-1933—THE PERIOD FROM THE ACQUISITION BY FOX FILM CORPORATION THROUGH THE BANKRUPTCY AND REORGANIZATION OF THE MIDWESCO CIRCUIT.

"In the period between 1928 and 1933, a number of significant changes took place in this competitive area. At the time when the Saxe interests sold out to Midwesco, they had developed plans for the erection and acquisition of a number of other theatres, which plans were consummated. By 1933, Fox Wisconsin was operating three first run theatres in Milwaukee, the Wisconsin, the Strand and the Palace (which by that time was operated almost entirely as a motion picture theatre). The Riverside theatre was being operated as a motion picture theatre by RKO. The Warner company had entered into the exhibition busi-

ness in Milwaukee. It had erected the large 2,000-seat Warner theatre downtown, and had acquired a number of other theatres, both in Milwaukee and throughout the State. These Warner acquisitions represented purchases of certain theatres operated by Universal up to 1931, as well as acquisitions of other theatres from various independent operators. At the beginning of 1933 Midwesco had approximately 15 theatres in Milwaukee; Warner Bros. had approximately 10 theatres; RKO had one theatre; and there were 45 operating independent theatres.

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"Outside of Milwaukee, Midwesco had also carried out preexisting plans of the Saxes with respect to the construction and acquisition of new theatres, to the point where, by the end of 1932, Midwesco had or was interested in the operation of 42 theatres in other communities.

"In other words, it had a total of 57 theatres in the Milwaukee Exchange territory, as compared with 61 operating theatres today.

"Comment should also be made as to the development of the Warner company operation in the period between 1931 and 1933. Beginning in 1931, at a time when Midwesco was affiliated with Fox Film Corporation, the Warner company entered into vigorous competition with it in Wisconsin. In addition to the first run and the first neighborhood runs in Milwaukee, which are referred to above, it acquired first run theatres in direct competition with Midwesco in other Wisconsin cities, including first run theatres in Appleton, Kenosha, Racine and Sheboygan.

"Throughout 1932 Midwesco lost hundreds of thousands of dollars in the operation of its theatres. In this year it felt the full effect of the depression. Its

fixed charges, resulting from burdensome leases, par-
(2684)
ticularly those on the large de luxe theatres which had been built in the late '20s, and other heavy items of overhead, made it impossible for it to continue operations on its then existing setup. This was in spite of the fact that every effort was made to reduce its leasehold obligations and the fact that large additional capital sums were invested in the company. Accordingly, in February, 1933, it filed a petition in bankruptcy. In the subsequent reorganization of the company, now Fox Wisconsin Theatres, Inc., many important developments took place, some of which will be referred to later in this statement.

"IV. DESCRIPTION OF PRESENT CORPORATE STRUCTURE AND GENERAL BUSINESS PRACTICES OF FOX WISCONSIN.

"I now turn to a description of the existing structure and method of operation of Fox Wisconsin.

"I have stated above that all of the stock of Fox Wisconsin is owned by National Theatres Corporation, which also owns the stock of a number of other companies engaged in the operation of theatres. Fox Wisconsin, however, operates as a separate autonomous business entity. All of the directors except one are residents of Milwaukee, the directors being Charles P. Skouras, George H. Uihlein (who is not an officer or employee of either Fox Wisconsin or National The-
(2685)
atres Corporation), L. S. Clemons, an attorney in Milwaukee, E. M. Donnelly, the treasurer of Fox Wisconsin, and myself. The management and operations of the theatres of Fox Wisconsin are directly under my supervision and control, as are the general policies of

its operation. The executives of National Theatres Corporation, by reason of that company's financial interest in Fox Wisconsin, naturally pass judgment upon and exercise a certain amount of direction on all important financial transactions, such as new theatre construction, acquisitions, renovations or other large capital commitments.

"At the present time, Fox Wisconsin has 14 wholly owned subsidiary corporations and one 50% owned subsidiary. There are several reasons why it has this corporate structure. In the first place, with respect to the leases of certain theatres, it was considered desirable to insulate Fox Wisconsin against liability by having these leases held by separate corporations. This was done with the express understanding on the part of the lessors of the various theatres that the particular subsidiary to which the theatres were leased was alone responsible. In the second place, certain tax advantages could be realized under this corporate structure, all of which were expressly sanctioned by the Internal Revenue Code and have been approved by

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the Bureau of Internal Revenue. In the third place, in certain instances the lessor or owner of the theatre participated in the profits of the operation, either by way of additional rental or direct sharing in the profits. For this reason, it was desirable to have a separate corporate entity conduct the operation, and in certain instances this was done at the suggestion of associates who were interested only in their own theatres.

"One of the wholly owned subsidiaries of Fox Wisconsin is Fox Wisconsin Amusement Corporation. This is a service corporation for all of the theatres in which Fox Wisconsin and its subsidiaries are inter-

ested. Fox Wisconsin Amusement Corporation performs all of the activities incident to the actual operation of the theatres, including the licensing and booking of films, accounting, maintenance of the theatres, establishing of policies, planning and arranging for advertising, purchasing supplies, procuring and maintaining of insurance, and other similar functions. In the performance of these services it employs approximately 100 employees. It maintains offices in the Varsity Theatre Building in Milwaukee, where it has extensive office space comprising two floors of a modern building. It has a large projection room, where the motion pictures of all producers are screened, and
(2687)
various other facilities useful in the operation of theatres.

"Its organization is divided into various departments. One department is known as the Buying and Booking Department. It consists of 12 employees, including buyers, bookers, statisticians and experienced film clerks. The general function of this department is to negotiate licenses for the pictures to be exhibited in the theatres and to arrange for their booking (playing dates) after the films have been licensed. The personnel comprising this department is highly skilled and trained in this work. They must have special ability to judge the quality of such pictures. They must have a knowledge of the theatres operated by the company and the communities in which they are located. They must have an accurate evaluation of the tastes of the theatre-going public to which each theatre caters. In other words, to carry on their functions effectively they must know the box-office quality of each picture produced, gauging it in the light of the tastes of the public which patronizes

each theatre. For example, a 'crime' picture, such as 'Dillinger', would have little appeal in the Downer theatre in Milwaukee, which is situated in a fine residential section. The same picture would have great drawing power in the Riviera theatre, which is located

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in an industrial neighborhood. A so-called 'quality' picture starring Greer Garson, for example, would have no particular drawing power at the Miller theatre in Milwaukee, where action pictures have been established as having the greatest box-office appeal.

"A. *Business Practices Relating to the Licensing of Films.*

"In so far as concluding contracts for the exhibition of motion pictures in its theatres is concerned, Fox Wisconsin enters into film contracts for theatres in which it is interested and only those theatres.

"In the case of the companies which are parties to the Consent Decree, negotiations for license agreements occur with respect to each block of pictures offered by each such company. As to other producers, the negotiations generally relate to the entire season's product.

"Prior to the entry of the Consent Decree, substantially all distributors licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York, where negotiations were generally conducted with all the distributors for the licensing of pictures in all of the theatres in which National was interested. Licensing arrangements were then generally arranged at this central office. Even under this procedure, however,

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the licenses were made with respect to each individual theatre. In the latter part of 1941 there was a com-

plete decentralization of the so-called Buying Department of National Theatres Corporation.

"In certain instances a distributor, who is a party to the decree, may negotiate license agreements with another subsidiary of National Theatres Corporation before it conducts any negotiations relating to Fox Wisconsin's theatres. For example, a distributor might negotiate with Fox West Coast in Los Angeles with respect to theatres operated in Southern California. In the course of those negotiations, a general formula might be agreed upon for a particular group of pictures for exhibition in the theatres of Fox West Coast. This formula might provide for a film rental based upon certain percentages applicable to each picture, which percentages would apply to those particular theatres which played the pictures on a percentage basis, rather than on a flat rental basis. Later the general formula previously agreed upon for the Fox West Coast theatres might be adopted for Fox Wisconsin's theatres or might be used as a general basis for negotiation. Such prior arrangements which the distributor had effected with any of the other subsidiaries of National Theatres Corporation would, however, represent no binding commitment as far as

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Fox Wisconsin was concerned.

"Furthermore, as between Fox Wisconsin and the other operating subsidiaries of National Theatres Corporation, there is, of course, full exchange of information between the executives of the respective companies. This information relates to all matters which would be of mutual interest to the executives of these companies, including the terms upon which films have been licensed, the box-office value of particular pictures in particular territories, developments in theatre

maintenance and all new phases of theatre operations generally.

"When the representatives of the distributors and the representatives of Fox Wisconsin have arrived at a satisfactory agreement, the proposed contract is then submitted to me for my approval. No license agreement for films can be concluded without specific delegation of authority from me or without my express approval. In the negotiation of these licenses, separate consideration is, in practically all instances, given to each particular theatre in which Fox Wisconsin is interested and a separate and specific deal made on the basis of each individual theatre.

"Moreover, in a certain number of situations, Fox Wisconsin has associated with it individuals who participate in the profits of the operations of certain

(2691)

theatres which are owned by them or in which they otherwise have an interest. These individuals have no other connection or affiliation with Fox Wisconsin, or any other company engaged in the motion picture business. As to these theatres, these associates have the right to approve any film license agreements which are negotiated for these theatres. The only film deals which they would approve would be those negotiated solely for the best interests of their theatres.

"Fox Wisconsin enters into film license agreements with all distributors of worthwhile pictures, including a number who are not defendants in this case, such as Republic, Monogram, PRC and others. The general practice and procedures outlined above apply with respect to all negotiations.

"As to the terms upon which the pictures are licensed, there is no standard formula for every theatre, nor is there any standard formula applicable to each

theatre. As to certain of the theatres of Fox Wisconsin, all of the license agreements for those theatres provide for a certain fixed amount as film rental. However, these flat rental deals vary with respect to each company whose product is licensed, depending upon the quality of the product. For

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certain pictures one of such theatres might pay $100 flat rental, while for another picture it might pay $20. In a number of other theatres, the license agreements provide for film rental determined in one way or another by a percentage of the gross business done by the theatre. Here, again, however, there is no standard formula or arrangement which is applied to these so-called 'percentage deals.' They vary greatly in form and substance as to the particular distributors involved. With one distributor, the film rental might be predicated solely upon a specified percentage of the gross receipts. As to another distributor, the licence agreement might provide for what is called a 'sliding scale' arrangement, under which the percentage of the gross receipts to which the distributor is entitled would vary, depending upon the volume of business done by the theatre on the particular picture. Other formulae are also used. This all depends upon the particular negotiations with the particular distributor.

"All of these arrangements simply represent a measuring rod for the determination of the film rental which is to be paid. They are negotiated solely with an eye to arriving at a fair deal for both the distributor and the exhibitor. The various refinements which ofttimes are linked with a straight percentage deal are used only for the purpose of enabling the distributor

(2693)

to receive a higher percentage of the gross on pictures

which are outstanding box-office attractions and to reduce his percentage upon productions which have less drawing power than anticipated at the time when the license agreement was made.

"At the time when negotiations are had for the licensing of the pictures and the terms upon which they are to be licensed are under consideration, the matter of clearance is also considered. This element of any licensing arrangement is of vital importance to the distributor. It also very directly affects the exhibitor. If Fox Wisconsin at the Wisconsin theatre in Milwaukee undertakes to pay a distributor film rental based upon a high percentage of the gross receipts and proposes to charge 85¢ admission, it is certainly interested in the clearance which it will have on that picture over the first neighborhood run thereof which such distributor might license to a competing subsequent run theatre. The clearance, obviously, has a definite effect upon the capacity of Fox Wisconsin to secure patronage at its top admission price.

"Generally speaking, the actual negotiations as to clearance do not take place with respect to each block of pictures which is licensed. This is because of the fact that, once a fair and reasonable clearance has been determined upon by the distributor and exhibitor, it tends to become fixed and, in the absence of

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any changed circumstances or conditions, will ordinarily be the same in a series of contracts. There are exceptions, of course, to this.

"My attention has been directed to the claim of the Government that the distributor and the affiliated theatres agree upon clearance and minimum admission prices for the purpose of fixing the actual price which a subsequent run exhibitor may charge and that

such factors are agreed upon for the purpose of improperly subordinating the freedom of action of such subsequent run exhibitor. This I flatly deny. In instances where my company is operating a prior run theatre, I have no concern of any sort as to the maximum price which my subsequent run competitor charges. It is my desire that he charge a price which is as close to the price which I charge in the prior run as he considers feasible. Generally speaking, if my theatre operates first run and charges 60¢, the subsequent run exhibitor who plays 28 days after my first run theatre and charges 50¢ would be less competitive than a subsequent run which plays on the same availability but charges only 30¢.

"Consequently, not only have I never entered into any arrangements with any distributor which at-

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tempted to fix the maximum price of a subsequent run theatre but it would not be good business for me to do so.

"In connection with the licensing of films, there are certain other specific points which I emphasize.

"1. In licensing films for exhibition in Fox Wisconsin theatres, there is only one controlling consideration, namely, to secure adequate product on fair and appropriate terms.

"2. In negotiating for product with any one of the distributors which is also interested in theatres, Fox Wisconsin does not know and has not the slightest interest in whether or not Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

"No representative of Twentieth Century-Fox Film Corporation has ever indicated to me, directly or indirectly, that, in licensing film from other distribu-

tors, any consideration whatsoever should be given by me to whether or not Twentieth Century-Fox Film Corporation has licensed pictures to the theatres operated by such distributor.

"This company is interested in licensing pictures solely because of their value as box-office attractions and then only when it can secure them on proper terms. For example, when it negotiates with Loew's

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for the exhibition of Loew's product in its theatres, it does not know whether Twentieth Century-Fox has entered into any license agreement with Loew's for the Loew's theatres, or any of them. It does not know whether it is even negotiating with Loew's. If Twentieth Century-Fox has made such film contracts, Fox Wisconsin does not know of it nor of the terms which are contained therein. Furthermore, if Twentieth Century-Fox was wholly unable to license its product to any Loew's theatre for any reason whatsoever, it would not have the slightest effect upon the desire of Fox Wisconsin to enter into license agreements with Loew's. The same applies to any other distributor. Moreover, no representative of Twentieth Century-Fox Film Corporation has ever requested that he be furnished with the terms upon which I licensed pictures from all distributors, nor have I ever furnished such information to any representative of Twentieth Century-Fox Film Corporation.

"My own personal interests all impel me to act for the sole welfare and benefit of Fox Wisconsin. I have no connection with Twentieth Century-Fox Film Corporation. I do have an employment contract with Fox Wisconsin. The terms of my contract provide for

(2697)

a certain fixed salary, with a participation in the

profits of the company. I also am a stockholder in National Theatres Corporation. I am interested, therefore, from the financial standpoint, in promoting the best interests of my company. I am not concerned with the effect which the policies of my operation may have upon the distribution problems of Twentieth Century-Fox Film Corporation.

"My attention is also directed to the claim of the Government that, where two affiliated exhibitors are in competition with each other, such competition is purely nominal and not real. In so far as the situations in which Fox Wisconsin has such affiliated opposition, I unqualifiedly deny this claim. My company is in direct competition with theatres operated by Warners in a number of situations. In every respect, the degree of competition between us is as great as it possibly could be in all phases of the business.

"There certainly can be no doubt as to our competition for the patron's dollar. We each adopt every policy possible, consistent with good business, to secure patronage from each other.

"It is said by the Government that, over a period of time, the licensing of pictures in the theatres of affiliated exhibitors follows a certain pattern and that, season after season, the same product is licensed to the

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same theatres. I first point out that this is no phenomenon. There is nothing striking or unusual about it. There are certain practical aspects in the licensing of motion picture films which cannot be ignored. An exhibitor, in order to secure product away from another exhibitor, must be able to do two things, namely, provide adequate playing time on terms which will return more revenue to that distributor than he has been receiving and, at the same time, furnish ade-

quate facilities for the exhibition and exploitation of the distributor's product. A desire on the part of an exhibitor to corral all product available when he cannot properly exhibit all of the product will not enable him to secure all of it from a competing exhibitor who has had a satisfactory performance record with the distributors with whom he has previously dealt.

"I can best illustrate the point to which I refer by relating it to a specific situation, such as first run in Milwaukee. At the present time, there are six theatres operating on a regular first run and move-over policy in that City. Fox Wisconsin has the Wisconsin theatre, with a seating capacity of 2,778, and the Palace theatre, with a seating capacity of 2,438, both of which are operated as first run theatres. It also has the Strand, with a seating capacity of 1,200, which is operated as a move-over house. Warner Bros. op-

(2699)

erates the Warner theatre, with a seating capacity of approximately 2,000 seats, and the Riverside theatre, with a seating capacity of 2,300 seats, as first run theatres. It also has the Alhambra theatre, with a seating capacity of about 1,400 seats, which is operated as a move-over house. The Wisconsin, Palace, Warner and Riverside are fine, luxurious theatres. The Wisconsin and Warner theatres, in particular, may be properly described as show case theatres in that they are the finest in the entire area between Minneapolis and Chicago.

"For many years, the product of Twentieth Century-Fox has been licensed to Fox Wisconsin for first run exhibition in its theatres. Obviously, this is only natural in view of the interest which Fox has in the operation. There has, likewise, been licensed for exhibition in these theatres the product distributed by

Loew's, Paramount and Columbia. There has been licensed to the Warner Bros. theatres the product of Warner Bros. itself, together with the product of RKO, Universal and United Artists.*

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I submit that not only is there nothing unusual about such a situation but that it would be strange indeed if it were otherwise. It must be remembered that a theatre needs product as well as that a producer needs a satisfactory outlet for its pictures. As indicated above, the respective theatres of Fox Wisconsin and Warner Bros. would each provide adequate outlets for the films released by any one of the distributors. In the case of Fox Wisconsin, with the four products above named, and the products of certain independent producers, which it exhibits from time to time, it is able to operate its theatres on a policy which gives to the pictures which it licenses fair and appropriate playing time. By reason of this it is able to satisfy the revenue demands of the producers of the pictures which it exhibits. Under present conditions, moreover, where attractions have longer runs than has heretofore been the case, it has had an adequate supply of pictures for its theatres despite the fact that the programs of the various distributors have been curtailed during the war years.

"Now, under such conditions, Fox Wisconsin could not secure licenses for *all* of the pictures which are presently being licensed to the Warner Bros. theatres. From the standpoint of Fox Wisconsin, this would represent economic suicide. It could not, under any

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circumstances, afford to pay to the distributors now

*I have only referred to the distributors who are defendants. The product of other producers, depending upon its suitability for first run exhibition in these theatres, is also licensed by either Fox Wisconsin or Warners.

licensing product to the Warner Bros. theatres more money than they are now receiving and, at the same time, continue to pay the distributors whose pictures it presently shows. From the standpoint of the distributors who are presently licensing pictures to the Warner theatres, they would know that, if they licensed their product to Fox Wisconsin, they would not receive adequate playing time because of the number of films which Fox Wisconsin would then have under contract. They would also know that, over a period of time (not matter what the initial guaranteed rental to them might be), they would secure no benefits.

"In other words, if, as at the present time, they are securing fair and reasonable revenue and proper exploitation of their pictures in the desirable outlets afforded by Warner Bros., they have no particular interest in jeopardizing their present playing position.

"It must be apparent that, in a competitive situation such as this, there comes what may be called as 'saturation point' beyond which no exhibitor can profitably or effectively go. It would be folly for Fox Wisconsin, being able to negotiate for adequate product for its theatres, arbitrarily to set out to induce a particular distributor, say, RKO, to discontinue satisfactory business relations with Warner Bros. and license its product to Fox Wisconsin. It

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would be folly for it to take on product which it did not require, for which it would have to pay an exorbitant amount and which would only serve to complicate its operating policies and involve it in problems with the distributors whose product it had been exhibiting. Likewise, from the standpoint of RKO, it would be bad business for it to discontinue business

dealings with Warner Bros., if that company is affording it a desirable market for its pictures and assume the obvious risks incident to such a change of customers.

"Thus, so long as these various distributors are able to arrive at satisfactory terms for the licensing of their pictures to their present accounts, there is no good business reason for them to change. If, on the other hand, a distributor arrives at a stalemate with an exhibitor, or reaches the conclusion that its product is not being satisfactorily exploited and it is not receiving adequate revenue, there is another customer to which it can turn. There is another available outlet for its product with whom it can negotiate. In such a situation, it then might be able, by reason of terms which it would offer, to supplant a distributor who was then licensing that outlet.

"In the case of individual pictures, however, a dif-

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ferent situation exists. A recent example of this has occurred in the case of the picture 'Wonder Man', produced by Samuel Goldwyn. Prior to the release of this picture, the previous Goldwyn pictures had been licensed for exhibition first run in Milwaukee to Warner Bros. RKO, which distributes the Goldwyn pictures, and which also licenses its own product in the Warner theatres, could not arrange a deal with Warner Bros. on satisfactory terms. I was solicited by RKO and a proposal submitted to me for the licensing of this picture in Fox Wisconsin's theatres. Negotiations were concluded on terms satisfactory to me, the picture was licensed for exhibition in Fox Wisconsin's theatres and it is now being exhibited there.

"V. THEATRE SITUATIONS IN COMMUNITIES IN WHICH FOX WISCONSIN OPERATES.

"I now turn to a description of the competitive situation in the various cities and towns in which Fox Wisconsin operates.

"A. MILWAUKEE

"Pop. 1940 Census	587,472
Pop. Present (Est).	600,000

"1. *First run.*

"An adequate description of the first run situation in Milwaukee has heretofore been set forth. Certain
(2704)
it is that the theatres which do exhibit first run product are the finest theatres in the downtown section of Milwaukee. No exhibitor has claimed, to my knowledge, that he has available facilities to establish additional first run competition. The existing competition between Fox Wisconsin's theatres and Warner Bros. theatres is a very real one. The theatres which today operate on a first run policy would do so, and would be licensed by the distributors on that run, regardless of who owned them and whether or not that owner was affiliated with any distributor or not.

"With respect to the operation of these theatres, I am impelled to state that it is my definite opinion that Fox Wisconsin, because of its trained personnel, its experience in the exhibition business, its energetic and progressive showmanship, operates these theatres, as well as all of its theatres, in a manner which best serves the interests of the public as well as the interests of the distributors. It is my opinion that its operation is most efficient and is designed for the best exploitation of motion pictures.

"Furthermore, these first run theatres provide an adequate outlet for the pictures of all producers, in-

dependent and affiliated. There is no motion picture released, regardless of who produced it, which does not
(2705) secure a first run in Milwaukee's downtown theatres, if it is of a quality and calibre which merits such an exhibition.

2. *First neighborhood runs.*

First neighborhood runs in Milwaukee are licensed to a number of theatres, each of which is more or less in the center of a separate competitive area. These may properly be called first runs in their respective zones. They generally take clearance over subsequent runs in such zones. They are as follows:

	Seating Capacity		
Oriental—			
Approximately	2300—	Operated by	Warner Bros.
Garfield—			
"	1800—	"	" Fox Wisconsin.
Uptown—			
"	1800—	"	" Fox Wisconsin.
Tower—			
"	1600—	"	" Warner Bros.
Avalon—			
"	1200—	"	" an independent.
Modjeska—			
"	2500—	"	" Fox Wisconsin.
Paradise—			
"	1210—	"	" Fox Wisconsin.*

*Two small communities adjacent to Milwaukee, namely, Cudahy and South Milwaukee, also have theatres which could play off the same availability as the first neighborhood runs referred to above. These are the Majestic theatre (seating capacity 750) in Cudahy and the Garden theatre (seating capacity 405) and the Grand theatre (seating capacity 400) in South Milwaukee. These theatres are operated by independents. The policy of these theatres, however, has been to operate on a later availability than the other first run neighborhood theatres.

"Substantially all of the product of the distributors is licensed in these theatres. Regardless of ownership, they are the theatres in which any dis-

(2706)

tributor would prefer to have its product exhibited on this run. As indicative of this, the Oriental and Tower theatres have, over the period of the last ten years, been operated under several managements. During a substantial portion of the period the operation was in the hands of an independent. Yet there was no change in the run licensed to the theatres by the various distributors. During this period of independent operation there were, in the respective zones in which the Oriental and the Tower played first run, other subsequent run theatres operated by both Fox Wisconsin and Warner Bros. The fact of affiliated competition had nothing to do with the licensing of the product to the theatres.

"3. *Subsequent runs.*

"There are 68 theatres operating on such runs. 40 of them are being operated by independents. 6 are operated by Warner Bros. 22 of them are operated by Fox Wisconsin. All compete with each other as well as with all other theatres in Milwaukee.

"B. RACINE

"Pop. 1940 Census	67,195
"Pop. Present (Est.)	73,195

(2707)

"In this City Fox Wisconsin operates one theatre, the Uptown (seating capacity 1392), which plays third run on all product which it licenses, except one, which it plays second run.

"Warner Bros. operate three theatres on a first and second run policy. They are the Venetian (seating capacity 1963), the Rialto (seating capacity 1279) and the Badger (seating capacity 1001). These first run theatres of Warner Bros. are fine, well located, downtown theatres. Although Fox Wisconsin naturally would desire to improve the run which it has at the Uptown theatre, the location and other factors do not make it as desirable a theatre from the distributors' standpoint as either the Venetian or the Rialto. Consequently, Fox Wisconsin has been unable to license product on any more favorable run. I am convinced that the same situation would prevail if the first run theatres were operated by interests wholly unaffiliated with any distributor.

"In addition to the affiliated theatres in Racine, there are five other theatres operated by independents and having a seating capacity of between 750 and 1,000.

"C. MADISON

"Pop. 1940 Census	67,447
Pop. Present (Est.)	72,000

(2708)

"Fox Wisconsin is interested in the operation of four theatres in this City. Two of them the Orpheum (seating capacity 2244) as a first run theatre and capacity 1236) operate as first run theatres, playing pictures for one week. The product of Twentieth Century-Fox, Loew's, Columbia, United Artists, Universal, together with approximately one-half of the product distributed by Paramount and RKO, is exhibited on this run. Warner Bros. operate the Capitol (seating capacity 2246) and the Parkway (seating exhibit generally the product of Warner Bros., Mono-

gram, Republic and approximately one-half of the product of Paramount and RKO.

"Fox Wisconsin also operates the Madison Theatre (seating capacity 908) on a move-over and second run policy and the Strand (seating capacity 1352) as a second run house. Warner Bros. operate the Majestic (seating capacity 537) as a second and third run house, with the product which plays in the Capitol theatre first run. There is also the Eastwood theatre operated by an independent which exhibits the product of all of the distributors on a third and fourth run.

"The Fox Wisconsin Orpheum theatre and the Warner Bros. Capitol theatre are two of the finest theatres in the State of Wisconsin. They are modern, commodious theatres and afford to the theatre-going

(2709)

public of Madison as fine service as is supplied by any theatres anywhere in the United States. The fact of affiliation has nothing to do with the licensing of product to these theatres. They most certainly would be the most sought after outlets for the production of the distributors, regardless of ownership.

D. KENOSHA

"Pop. 1940 Census	48,765
Pop. Present (Est.)	53,765

"Fox Wisconsin has one theatre in this City, the Orpheum (seating capacity 1405). This theatre operates on a second run policy, licensing the product from all distributors. The first run theatres take 60 days clearance over this theatre.

"Pictures are licensed for first run exhibition in Kenosha to two theatres operated by Standard Theatres Inc. (which I understand is associated with

Warner Bros. in this operation), the Kenosha (seating capacity 2,000) and the Gateway (seating capacity 1,442). Both of these theatres are modern, up to date houses, well located and well suited to a proper exploitation of the product of the distributors. Here, again, while Fox Wisconsin very naturally would desire to improve its playing position, the distributors

(2710)

have taken the position that in their opinion they can obtain better results by licensing the product to the two Warner Bros. theatres.

"In this connection I should point out that Fox Wisconsin, in the period between 1933 and 1941, had no theatre in Kenosha. The Orpheum Theatre, which it now has, was operated by Warner Bros. up to 1941, at which time the owners became dissatisfied with their arrangements and negotiated with me to acquire the theatre. Fox Wisconsin did so, directly entering into competition with Warner Bros.

"In addition to the theatres above referred to, there are four other theatres in Kenosha which operate on a subsequent run policy, three of them being operated by independents and one by Warner Bros.

"The foregoing represent all of the cities in Wisconsin which are in the Milwaukee Exchange territory having a population of 50,000 and more. In only 2 of these 4 cities does Fox Wisconsin have first run theatres and in those there are competing first runs.

"Fox Wisconsin also operates theatres in 4 cities in this same exchange territory which have populations of between 20,000 and 50,000. These are Fond du Lac, Oshkosh, Janesville and Wausau. In these

(2711)

4 cities Fox Wisconsin operates or is interested in all of the first run theatres. There is independent subsequent run competition in two of such cities.

"In this same exchange territory there are 7 other cities with a population in excess of 20,000, in which Fox Wisconsin has no interest in theatre operations. These are Green Bay, Beloit, Appleton, Sheboygan, Manitowoc, Wauwatosa and Waukesha. In 5 of these 7 cities all of the theatres are operated by independents.

"Fox Wisconsin also operates theatres in 10 communities in the Milwaukee Exchange territory which have a population of less than 20,000. These are Beaver Dam, Marinette, Menasha, Port Washington and Stevens Point, in Wisconsin, and Hancock, Houghton, Iron Mountain, Laurium and Menominee, in Michigan. These communities vary in size from 3,500 to 15,000. In 3 of these communities there is only one theatre. They are Laurium, Menominee and Houghton, in Michigan. There never has been more than one and the size of the community is such that it could not support more than one. In 5 of them, namely, Hancock and Iron Mountain, Michigan, and Port Washington, Beaver Dam and Stevens Point, Wisconsin, there have never been more than 2 theatres and in 2 of these 5 communities which have 2 theatres

(2712)

only one is in operation, the other being antiquated and wholly unfit for use as a theatre. In the remaining town there is competition between Fox Wisconsin and two independent operators who compete with respect to all runs, as to the product of the defendants

in this case the Fox Wisconsin theatre generally licensing only Fox, Paramount, and one-half of Metro.

"Thus, while Fox Wisconsin has theatre interests in only 10 communities having a population of between 3,500 and 20,000, there are in the Milwaukee Exchange territory more than 50 other communities in this population range.

"Fox Wisconsin has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distributor or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

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"I also deny that Fox Wisconsin, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

"(Sgd) Harold J. Fitzgerald."

(The affidavit of FRANK L. NEWMAN, SR. is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this action, FRANK L. NEWMAN, SR. would testify as follows:

"I reside in Seattle, Washington, where I have lived continuously since 1932. I am now, and have been since 1907, actively engaged in the theatre exhibition business. I have operated theatres in St. Louis, Joplin, Kansas City, St. Joseph and Moberly, Missouri; Milwaukee, Wisconsin; Ft. Smith and Little Rock, Arkansas, and Los Angeles, California. Since 1932, I have been operating theatres in the States of Washington and Oregon.

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"In 1933 I became and am now President of Evergreen State Amusement Corporation, hereinafter called 'Evergreen', a Delaware corporation, organized on February 6, 1933, having its principal office in Seattle, Washington. I have been a director since 1936 and President since 1941 of Fox Pacific Theatres, Inc., hereinafter called 'Pacific', a Washington corporation, organized on April 2, 1929, having its principal office in Seattle, Washington.

"53.58% of the capital stock of Evergreen is owned by the defendant, National Theatres Corporation; 40% is owned by a corporation in which Mr. Al Rosenberg, Mr. Al Finke and I have an interest; 2.4% is owned outright by Mr. Rosenberg, Mr. Finke and myself and the balance is held by the general public.

"The capital stock of Pacific is owned 60% by National Theatres Corporation and 40% by De Luxe Theatres, Inc., a corporation in which Mr. Al Rosenberg and Mr. Al Finke have an interest. I have no interest in De Luxe Theatres, Inc.

"Both Mr. Rosenberg and Mr. Finke have been associated in an official capacity with Evergreen and Pacific since their respective incorporations.

"Evergreen operates, directly or indirectly, through its subsidiaries, 28 theatres in ten cities and towns in

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Washington and 11 in two cities in Oregon. Of this total of 39 theatres, Evergreen and its subsidiaries lease 33, own two in fee and have an interest in the four others through operating agreements with other exhibitors. One of its theatres is closed and has been closed for several years because of its bad physical condition. In addition to theatre properties, Evergreen leases office space in Seattle, has some warehouse facilities in Seattle and owns the fee of unimproved real property in Spokane and Vancouver, Washington.

"Evergreen owns stock in 19 subsidiaries. Fourteen are wholly owned and, in the remaining five, Evergreen owns 50% or more of the capital stock. All but three have an interest in theatre properties. Two of these three are inactive. The other is known as a service company and has no interest in any theatre property. Evergreen's exhibition business was organized so that its several theatre interests would be held by several separate corporate entities for the purpose of distributing the risk of liability, the risk of sectional business failure and for the purpose of availing itself of the tax advantages possible in a business structure with several distinct taxable organizations.

"Pacific leases and operates two theatres in Seattle and owns 50% of the stock of a corporation which

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leases and operates three theatres in Everett, Washington, and which leases a former theatre property in Everett which has long since been commercialized.

"Of the 44 theatres in Washington and Oregon in which the defendant, National Theatres Corporation, derives an interest through Evergreen and Pacific, National Theatres Corporation has a net financial interest of less than 50% in 28 and a net financial interest of more than 50% in 16.

"I am generally familiar with the allegations made by the plaintiff in its petition and with the evidence on which it relies and am aware of their bearing upon Evergreen's theatre business.

"HISTORICAL DEVELOPMENT OF EVERGREEN THEATRES

"A major part of the 44 theatres in which Evergreen or Pacific now have an interest were once part of a more widespread circuit developed gradually over a long period of years prior to 1926 by two men and their organization, C. S. Jensen and J. G. von Herberg.

"In 1926, Jensen and von Herberg had an interest in 33 theatres located in Astoria and Portland, Oregon; Butte and Great Falls, Montana; and in Bremerton, Olympia, Seattle, Sunnyside, Tacoma, Wenatchee

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and Yakima, Washington. During the period of their operation of this circuit, Jensen and von Herberg exhibited most of the product which they licensed on prior showings with substantial clearance over subsequent exhibitions.

"The theatres of Jensen and von Herberg were among the best in those communities in which they were located. In Seattle, the Coliseum, Liberty and Strand theatres and the Rex and Rialto in Bremerton were all operated first run by Jensen and von Herberg. These theatres were and still are, with the exception of the Strand, which has been dismantled and is no longer in existence, superior downtown theatres. At the present time, the Liberty and the Rialto are still operated as first run theatres and the Coliseum and the Rex are operated as second run theatres. Evergreen now has an interest in the Rialto, Rex and Coliseum.

"In August of 1926, after extensive negotiations with an individual named Frank E. Elson, Jensen and von Herberg sold all of their theatres in a group to North American Theatres, Inc., a Delaware corporation, hereinafter called 'North American', for a purchase price of approximately $1,500,000. The theatres thus acquired by North American were operated by it during the ensuing year in addition to nine others which were acquired at different intervals during that year. In the spring of 1927, North

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American had an interest in a total of 41 theatres.

"In 1927, negotiations commenced between Wesco Corporation, hereinafter called 'Wesco', and North American for the purchase of the latter's theatre interests. Pursuant to a written offer dated May 7, 1927 made to and accepted by Wesco, a sale was consummated on June 3, 1927. As a result of this transaction, Wesco acquired an interest in 41 theatres in 12 cities located in the States of Montana, Oregon and Washington.

"These theatres, with the exception of changes in theatres dropped or theatres added, were operated by a subsidiary of Wesco called Pacific Northwest Theatres, Inc., hereinafter called 'Northwest', and associated corporations from the time of their acquisition to the bankruptcy of Northwest.

"The years from 1924 to 1933 represented a period of great activity and change in the theatre business in the Northwest. Many of the theatres which are today the finest in their respective localities were constructed in those years. Several of the film companies entered the area for the first time and competed vigorously with each other for the acquisition of the best outlets for their respective product. Paramount built and opened theatres in Portland and Seattle. The Keith-Albee-Orpheum circuit acquired an interest

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in theatres in Portland and Spokane and built a new one in Seattle. Universal Pictures, Inc. became interested in many theatres throughout Washington and Oregon between the years 1924 and 1928. In 1928 in Seattle, for example, Universal was operating or had an interest in ten theatres. Local independent exhibitors intensified their activities. John Hamrick opened a new theatre in Seattle, the Music Box, in 1928, which he thereafter operated with first run product along with his Blue Mouse, which he had previously built and opened about 1920. John Danz greatly expanded his theatre holdings and, by 1930, had 17 theatres in Seattle.

"All of the intense and accelerated theatre activity in this period reached a climax at the time of the depression and its accompanying financial distress. None of the theatre interests acquired any of the film distributing companies in the last half of the

'20s were retained after their respective bankruptcies in the early '30s except those of Fox Film Corporation.

"In 1932, after I had become associated with Northwest and just prior to its bankruptcy, Northwest was operating or had an interest in subsidiaries operating 50 theatres. It was sustaining an average weekly loss of $30,000. It then became apparent that the competition between exhibitors, affiliated and otherwise, for the theatre outlets had resulted in

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investments and in lease requirements wholly out of proportion to what could be carried during times of business decline. In spite of efforts to bring about rental reductions to decrease operating costs, Northwest, in the latter part of 1932, found itself in an impossible position and, on its voluntary petition, was adjudicated a bankrupt on December 31, 1932, in the United States District Court for the Western District of Washington, Northern Division.

"In the reorganization that ensued and which resulted in the creation of Evergreen, I and my associates, Mr. Rosenberg and Mr. Finke, made substantial capital investments in order to make the reorganization possible. For this investment we received 40% of Evergreen's stock.

"Evergreen now has an interest in 24 theatres, which were previously operated by Northwest or its subsidiaries, and most of the 24 were originally a part of the Jensen and von Herberg theatre interests.

"Of the other 26 theatres in which Northwest had an interest prior to its bankruptcies but in which Evergreen does not now have an interest, 13 have been taken over and are operated today by unaffiliated exhibitors.

"Four of the former Northwest theatres in which
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Evergreen has no interest are no longer in existence.

"Most of the remaining nine former Northwest theatres in which Evergreen has no interest are located in the State of Montana and are, on information and belief, theatres in which Fox West Coast Theatres Corporation now has an interest.

"THE ORGANIZATION OF EVERGREEN AND ITS PRESENT METHOD OF OPERATION.

"I have heretofore described the extent of the stock interest of National Theatres Corporation in Evergreen and Pacific. Evergreen and Pacific, however, are operated as separate, autonomous business entities. The directors of Evergreen are, besides myself, Messrs. Al Rosenberg, Al Finke, C. R. Innis, A. M. Ahlskog, A. Shemanski, C. H. Howell and C. P. Skouras, none of whom, except C. P. Skouras, is associated with National in any official capacity. The directors of Pacific, besides myself, are Messrs. Al Rosenberg, Al Finke, C. R. Innis and C. P. Skouras. The executives and directors of National Theatres Corporation do not participate in the management or operation of the theatres of these two companies which are directly under the supervision and control of myself and Mr. Rosenberg and Mr. Finke, as are
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the general policies of the operation. The executives of National Theatres Corporation, by reason of that company's financial interest in Evergreen, naturally pass judgment upon and exercise a certain amount of direction on all important financial transactions, such as new theatre building acquisitions, renovations or other large capital commitments. Be-

yond this, however, they in nowise interfere or regulate the management of the company and I and my associates have complete authority and discretion with respect thereto. This applies with respect to the making of all contracts and other commitments relating to the operation of the theatres, including film license agreements. The assent or approval of National Theatres Corporation with respect to these is not required nor solicited, either before or after the making thereof.

"As previously indicated, I and my associates have a substantial personal interest in the stock of Evergreen which represents an actual cash investment in the business. When we undertook to make this investment and to take over the management of the operation, we insisted upon the greatest latitude in the formulation and execution of business policies. This control and responsibility was given to us and we have exercised it ever since, unhampered by any outside dictation.

"Evergreen has a wholly owned subsidiary, Ever-

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green Theatres Corporation, which is a service corporation for all of the theatres in which Evergreen and Pacific are interested. It performs all of the activities incident to the actual operation of the theatres, including the licensing and booking of films, accounting, maintenance of the theatres, planning and arranging for advertising, purchasing supplies, procuring and maintaining of insurance, and other similar functions. It maintains offices in Seattle and Portland.

"Its organization is divided into various departments. One department is known as the 'Film Buying Department.' It consists of a head film buyer and a number of assistants. (Mr. Frank X. Christie, who

is the head film buyer, has been associated with Evergreen since 1933, except for a period of time in which he was in the military service.) The general function of this department is to negotiate licenses for the pictures to be exhibited in the theatres and to arrange for their booking (playing dates) after the films have been licensed. The personnel comprising this department is highly skilled and trained in this work. Those who negotiate for the licensing of pictures must see all pictures which are produced. They must have special ability to judge the quality of such pictures. They must have a knowledge of the theatres operated by the company and the communities in which they

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are located. They must have an accurate evaluation of the tastes of the theatre-going public to which each theatre caters. In other words, to carry on their functions effectively they must know the box-office quality of each picture produced, gauging it in the light of the tastes of the public which patronizes each theatre.

"*A. Business Practices Relating to the Licensing of Films.*

"In so far as concluding contracts for the exhibition of motion pictures is concerned, Evergreen operates entirely independently. It makes film contracts for theatres in which it is interested and only those theatres.

"The general practice in the licensing of films is that as to each producing company, its local representative in its Seattle or Portland Exchange (as the case may be), together with the district manager, in some cases, as well as the division manager, in others, will sit down with the buyers of Evergreen and negotiate with respect to the pictures which the producer

then has available for licensing. In the case of the companies which are parties to the Consent Decree, these negotiations occur with respect to each block of pictures offered by each such company. As to other producers, the negotiations generally relate to the entire season's product.

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"Prior to the entry of the Consent Decree all distributors licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York where negotiations were generally conducted with all of the distributors for the licensing of pictures in all of the theatres in which National was interested. Even under this procedure, however, the licenses were made with respect to each individual theatre and each license agreement had to be approved by myself and my associates. In the latter part of 1941 there was a complete decentralization of the so-called Buying Department of National Theatres Corporation, and, as stated above, the licensing of film with the companies which are parties to the Consent Decree is done locally, that is—as far as Evergreen is concerned—in Seattle or Portland.

"In certain instances a distributor who is a party to the decree may negotiate license agreements with another subsidiary of National Theatres Corporation before it conducts any negotiations with Evergreen. For example, a distributor might negotiate with Fox West Coast in Los Angeles with respect to theatres operated in Southern California. In the course of those negotiations a general formula might be agreed upon for a particular group of pictures for exhibition in the theatres of Fox West Coast. This formula

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might provide for a film rental based upon certain

percentages applicable to each picture, which percentages would apply to those particular theatres which played the pictures on a percentage basis rather than on a flat rental basis. Later, when the negotiations with that distributor are conducted in Seattle, the general formula previously agreed upon for the Fox West Coast theatres might be adopted by Evergreen, or might be used as a general basis for negotiation. Such prior arrangements which the distributor had effected with any of the other subsidiaries of National Theatres Corporation would, however, represent no binding commitment as far as Evergreen was concerned.

"Furthermore, as between Evergreen and the other operating subsidiaries of National Theatres Corporation, there is, of course, full exchange of information between the executives of the respective companies. This information relates to all matters which would be of mutual interest to the executives of these companies, including the terms upon which films have been licensed, the box-office value of particular pictures in particular territories, developments in theatre maintenance and operations generally. As to film terms, National has one employee whose general function it is to maintain contact with its subsidiaries, secure information from them and acquaint them with such facts as might be helpful in their own negotiations.

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"When the representatives of the distributors and the representatives of Evergreen have arrived at a satisfactory agreement, the proposed contract is then submitted to me for my approval. No license agreement for films can be concluded without specific delegation of authority from me or without my express

approval. In the negotiation of these licenses separate consideration is, in practically all instances, given to each particular theatre in the operations of which Evergreen is interested and a separate and specific deal made on the basis of each individual theatre.

"Evergreen enters into film license agreements with all distributors of worthwhile pictures, including a number who are not defendants in this case, such as Republic, Monogram, PRC and others. The general practice and procedures outlined above apply with respect to all negotiations.

"As to the terms upon which the pictures are licensed, there is no standard formula for every theatre, nor is there any standard formula applicable to each theatre. As to certain of the theatres of Evergreen, all of the license agreements for those theatres provide for film rental of a certain fixed flat amount. However, these flat rental deals vary with respect to each company whose product is licensed, depending upon the quality of the product. For certain pictures

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one of such theatres might pay $100 flat rental while for another picture it might pay $20. In a number of other theatres the license agreements provide for film rental determined in one way or another by a percentage of the gross business done by the theatre. Here, again, however, there is no standard formula or arrangement which is applied to these so-called 'percentage deals.' They vary greatly in form and substance as to the particular distributors involved. With one distributor the film rental might be predicated solely upon a specified percentage of the gross receipts. As to another distributor the license agreement might provide for what is called a 'sliding scale' arrangement, under which the percentage of the gross

receipts to which the distributor is entitled would vary, depending upon the volume of business done by the theatre on the particular picture. Other formulae are also used. This all depends upon the particular negotiations with the particular distributor.

"All of these arrangements simply represent a measuring rod for the determination of the film rental which is to be paid. They are negotiated solely with an eye to arriving at a fair deal for both the distributor and the exhibitor. The various refinements which ofttimes are linked with a straight percentage deal are used only for the purpose of enabling the

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distributor to receive a higher percentage of the gross on pictures which are outstanding box-office attractions and to reduce his percentage upon productions which have less drawing power than anticipated at the time when the license agreement was made.

"At the time when negotiations are had for the licensing of the pictures and the terms upon which they are to be licensed are under consideration, the matter of clearance is also considered. This element of any licensing arrangement is of vital importance to the distributor. It also very directly affects the exhibitor: If Evergreen undertakes to pay a distributor a high guaranteed film rental plus a percentage of the gross receipts for a film license and proposes to charge a high admission price, it is certainly interested in the clearance which it will have on that picture over the subsequent run thereof which the distributor might license to a competitive theatre. Clearance obviously has a definite effect upon the capacity of Evergreen to secure patronage at its top admission price and be able to pay to the distributor a film rental commensurate with the granting by such distributor of the first run license.

"Generally speaking, the actual negotiations as to clearance do not take place with respect to each block of pictures which is licensed. This is because of the
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fact that once a fair and reasonable clearance has been determined upon by the distributor and exhibitor, it tends to become fixed and, in the absence of any changed circumstances or conditions, will ordinarily be the same in a series of contracts.

"Of course, the practice of granting clearance is not confined to communities where Evergreen is operating theatres or to Evergreen theatres themselves, and in many places where Evergreen has prior run theatres, they are operated in competition with the theatres of independent exhibitors having an identical run. For example, in Bremerton, Washington, the Roxy theatre exhibits first run the product of Columbia, RKO, Universal and Republic, and as to that product is granted generally the same number of days clearance over second run which the Evergreen theatres have on their product. The same is true of the Grand theatre in Bellingham, Washington, which is operated by an independent with the first run product of Columbia, Universal and Republic and one-half of Warner's.

"One of the outstanding facts which has characterized the development of clearance in communities throughout the Northwest has been the steady reduction in the number of days clearance granted to one theatre over another. In the last 15 years the first run clearance in Seattle, Washington, generally has been reduced by most distributors from 60 to 42 days, and
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furthermore, clearance is now computed in Seattle from a date not later than the fourteenth day of first

run exhibition, so that the availability of subsequent run theatres cannot be affected by first runs extending beyond two weeks. In Spokane, Washington, first run clearance has been reduced from 5 months to 50 days. In Bellingham, Bremerton, Olympia, Wenatchee and Everett, Washington, clearance granted to the first run theatres has been reduced from 5 months to 90 days. The figures on the foregoing number of days are averages.

"My attention has been directed to the claim of the Government that the distributor and the affiliated theatres agree upon clearance and minimum admission prices for the purpose of fixing the actual price which a subsequent run exhibitor may charge, and that such factors are agreed upon for the purpose of improperly subordinating the freedom of action of such subsequent run exhibitor. This I flatly deny. In instances where my company is operating a prior run theatre, I have no concern of any sort as to the maximum price which my subsequent run competitor charges. It is my desire that he charge a price which is as close to the price which I charge in the prior run as he considers feasible. Generally speaking, if my theatre operates first run and charges 60¢, the subsequent run

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exhibitor who plays 28 days after my first run theatre and charges 50¢ is less competitive than a subsequent run which plays on the same availability but charges only 30¢.

"Consequently, not only have I never entered into any arrangements with any distributor which attempted to fix the maximum price of a subsequent run theatre but I would be ill advised to endeavor to do so.

"In connection with the licensing of films, there are certain other specific points which I emphasize.

"1. In licensing films for exhibition in Evergreen theatres, there is only one controlling consideration, namely, to secure adequate product on fair and appropriate terms.

"2. Evergreen licenses films for the theatres in the operations of which it is interested—and only those theatres. The licenses for pictures are negotiated locally in either Seattle or Portland and no outside person or corporation has any authority to commit it to any license agreement. I and my associates have complete authority to negotiate the terms or to refuse to make any agreement with any distributor, regardless of whether or not it has concluded arrangements with some other subsidiary of National Theatres Corporation.

"3. In negotiating license agreements, Evergreen

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does not condition the licensing of the pictures in some of its theatres upon the making of a deal with the distributor for all of its theatres.

"4. In negotiating for product with any one of the distributors which is also interested in theatres, Evergreen does not know and has not the slightest interest in whether or not Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

"No representative of Twentieth Century-Fox Film Corporation has ever indicated to me, directly or indirectly, that in licensing film from other distributors any consideration whatsoever should be given by me to whether or not Twentieth Century-Fox Film Cor-

poration has licensed pictures to the theatres operated by such distributor.

"Evergreen is interested in licensing pictures solely because of their value as box-office attractions and then only when it can secure them on proper terms. When it negotiates with Loew's for the exhibition of Loew's product in its theatres it does not know whether Twentieth Century-Fox has entered into any license agreement with Loew's for the Loew's theatres, or any of them. It does not know whether Fox is even negotiating with Loew's. If Twentieth Century-Fox has made such film contracts, Evergreen does not know of it nor of the terms which are contained therein. Furthermore, if Twentieth Century-Fox was

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wholly unable to license its product to any Loew's theatre for any reason whatsoever, it would not have the slightest effect upon the desire of Evergreen to enter into license agreements with Loew's. The same applies to any other distributor. Moreover, no representative of Twentieth Century-Fox Film Corporation has ever requested that he be furnished with the terms upon which I licensed pictures from all distributors, nor have I ever furnished such information to any representative of Twentieth Century-Fox Film Corporation.

"My own personal interests all impel me to act for the sole welfare and benefit of Evergreen. I am not a stockholder of Twentieth Century-Fox Film Corporation and have no connection with that company. I am not concerned with the effect which the policies of my operation may have upon the distribution problems of Twentieth Century-Fox Film Corporation. Moreover, with respect to the runs which are licensed

to Evergreen, and particularly the first runs, I am able to negotiate them because of the character of the theatres involved and their capacity to pay proper revenue to the distributors. Evergreen's first run theatres are licensed on that run because of their superior construction, location, conveniences, seating capacity and other factors which make them superior theatres and which give to them superior public ap-

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peal. They do not secure such licenses because of any relationship with Twentieth Century-Fox Film Corporation or National Theatres Corporation.

"Furthermore, as to theatres in existence before Evergreen acquired an interest in them, they were operated as first run theatres throughout their entire existence, regardless of ownership.

"EVERGREEN'S THEATRES AND COMPETITIVE SITUATION IN EACH COMMUNITY WHERE THEY ARE LOCATED.

"Evergreen operates theatres in the following towns and cities in the State of Washington, showing the population of each for 1920, 1930 and 1940. The 1945 population is an estimate of the Census Board of the State of Washington.

	1920	1930	1940	1945
Seattle	315,312	365,518	368,302	470,000
Spokane	104,437	116,010	122,001	144,000
Bellingham	25,585	30,823	29,314	31,750
Bremerton	8,918	10,170	15,134	72,000
Aberdeen	15,337	21,723	18,846	19,500
Everett	27[illegible]	30,567	30,224	35,000
Hoquiam	10[illegible]8	12,766	10,835	11,500
Olympia	[illegible]	11,733	13,254	15,500
Vancouver	12,637	15,766	18,788	39,500
Wenatchee	6,324	11,627	11,620	13,000

Newman

"Evergreen also operates theatres in Portland and Eugene, Oregon, whose population for the years 1920, 1930, 1940 and 1944 (Estimate of the Chamber of Commerce in each city) is as follows:

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	1920	1930	1940	1944
Portland	258,288	301,815	305,394	415,000
Eugene	10,593	18,901	20,838	26,200

"The Evergreen theatres in Seattle, Spokane and Bremerton, Washington, and in Portland, Oregon, cities of over 50,000 population, will hereinafter be discussed in more detail.

Seattle, Washington

"Seattle now has a total of forty-nine theatres. Evergreen or Pacific has an interest in eleven. An independent exhibitor named John Danz has an interest in twenty. He is interested with Evergreen in the operation of four theatres in Seattle, three of which generally operate on a first run or moveover policy and the other one second run. Four of Seattle's theatres are operated by Jensen and von Herberg. The others are operated by unaffiliated exhibitors. No distributor other than Fox has any interest at the present time in any theatre in Seattle, Washington.

The theatres in which Evergreen and Pacific have an interest are the Fifth Avenue, Paramount, Orpheum, Music Hall, Blue Mouse, Music Box, Palomar, Roosevelt, Coliseum, Egyptian and Neptune. The Fifth Avenue, Paramount, Orpheum, Music Hall and Palomar are first run theatres. The Blue Mouse, Music Box and Roosevelt are moveover theatres. The Coliseum is a second run theatre and the Egyptian

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and Neptune third run.

"The Fifth Avenue (seating capacity 2,366) is one of the outstanding theatres in Seattle. It was built in 1926 and was opened on September 22, 1926, by North American Theatres, Inc., the corporation from which Wesco first acquired an interest in theatres in Seattle. The Fifth Avenue opened as a first run theatre and has always been operated as such.

"The Paramount theatre is the largest theatre in Seattle, having 3,049 seats, and was assessed in 1945, including land, building and equipment, for $278,060. (Under Washington law, the maximum assessed value is one-half the market value.) It was built in 1928 for the Paramount Company as the first run outlet for its product. Pacific Northwest Theatres, Inc. acquired a joint interest in this theatre in 1930, and Paramount ceased to have an interest in the theatre after 1933. It has always been operated as a first run theatre.

"The Orpheum theatre has 2,599 seats, was built in the year 1929, at which time it was an RKO theatre operated on a first run and stage show policy. RKO ceased to have any interest in the theatre after 1933, and in 1934 it was operated by an independent exhibitor. Evergreen acquired its interest in 1935. The theatre always played first run product, irrespective of ownership, as long as it has been a motion picture

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theatre. Its 1945 assessed value for land, building and equipment is $299,710.

"Evergreen acquired its interest in the Music Hall in 1935. It has 2,282 seats and in 1945 was assessed for $152,160. The theatre was built in approximately the year 1927 by an independent exhibitor and was

operated on a first run policy. Pacific Northwest Theatres, Inc. had an interest in this theatre between 1930 and 1933, and operated it under the name of Fox. Between 1933 and 1935, it was operated by an independent exhibitor, and in 1935 Evergreen acquired its interest. It has never been other than a first run theatre or first run moveover.

"The Blue Mouse (851 seats) was built in 1920 by an independent exhibitor and ever since its opening has been a first run theatre or first run moveover. Evergreen first acquired an interest in it in 1935. It was remodeled in 1939 at a cost of $13,071 and has a 1945 assessed value, including land, building and equipment, of $103,730.

"The Roosevelt was built in the year 1933. It has an assessed value of $78,950, seats 736 and is operated as a moveover theatre.

"The Palomar was built around 1915, has 1,437 seats and was assessed in 1945 at $104,000. During

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the earliest years of its operation, it played vaudeville primarily under the management of Alexander Pantages. During recent years, from about 1938, it has played first run product along with stage shows.

"All of the theatres which have been described in some detail above are centrally located in the downtown district of Seattle in the main theatre section.

"There is one other theatre in Seattle which plays first run pictures, the Liberty with 1,650 seats. Another, the Newsreel, plays first run newsreels and short product. Both are located in the downtown section and Evergreen has no interest whatsoever in either. The Liberty is located in an inferior part of downtown Seattle, four or five blocks away from the

main theatre district. It was one of the theatres acquired by Wesco in 1927 from North American, but by 1930 Wesco or its operating subsidiary had ceased to have any interest in the Liberty, and since that time it has been operated by the present exhibitors, Jensen and von Herberg.

"Ever since Jensen and Von Herberg resumed operation in 1930, the Liberty has had the first run product of Columbia and one-half of United Artists and in addition has exhibited the product of several of the independent producers. The Liberty charges the same admission price charged at the Evergreen first run

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theatres and has the same clearance over second run except that the Liberty clearance over second run commences with the close of the first run exhibition in the Liberty theatre no matter how long the Liberty's first run exhibition extends, whereas the clearance granted to Evergreen theatres dates from the fourteenth day of exhibition or the close, whichever is earlier.

"The subsequent run theatres in which Evergreen or Pacific has an interest are the Coliseum, Egyptian and Neptune. An interest in the Coliseum (1,957 seats) was acquired first by Pacific Northwest Theatres, Inc. in 1927 with the various other theatres acquired from North American Theatres, Inc. It was at that time and had always previously been a first run theatre. Evergreen obtained a lease in 1933 after direct negotiations with the landlord, and has since operated it as a second run theatre. The Coliseum was constructed in 1916, was reequipped in the years 1941 and 1942 at a total cost of $16,773.40, and has now a total assessed value of $283,150.

"The Neptune (968 seats) and Egyptian (1,263 seats) are operated as third run theatres. Both the-

atres are fine, neighborhood houses located about four miles from the downtown district in a residential section and business center in the University of Washington district. There are thirty-four other subsequent

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run theatres, all operated in competition with all of the Evergreen theatres. A large number of them are operated by John Danz who has more theatres in Seattle than any other exhibitor.

"Prior to 1934-1945, first run theatres in Seattle generally had a clearance of 60 days after first run closing over second run. Since that time, clearance has been steadily reduced, and at the present first run Seattle theatres generally have 42 days over second run exhibition; 63 days over third run; 80 days over fourth run. The number of days clearance over theatres playing subsequent to fourth run varies with the distributors. All clearance is computed from not later than the fourteenth day of first run exhibition, except in the case of the Liberty theatre.

"Spokane, Washington

"Spokane now has a total of 14 theatres, all of which are located in the downtown area except two. One of the two neighborhood theatres is the Garland which has been recently constructed by an unaffiliated exhibitor and is scheduled to open some time in November, 1945.

"Out of this total of 14 theatres, Evergreen has an interest in four, the Fox, Orpheum, State and the Liberty, all of which are located in the downtown business center. The first three are operated with first run

(2742)

product, the Liberty with second run.

"The Fox is by all standards of comparison the best and largest theatre in the city. It has 2,251 seats and in 1945 was assessed, including the land, building and equipment, for $213,400, which is $100,000 more than any other theatre in Spokane. The Fox was built in 1931 on land owned by Fox West Coast Theatres Corporation and is still owned by one of the subsidiaries of that corporation, from which the theatre is leased by one of Evergreen's subsidiaries. The Fox has always shown the best in first run product.

"The Orpheum has 1,272 seats and was constructed in 1918. In 1945 its total assessed value was $98,385. Up until about 1928 or 1929 it was operated by Alexander Pantages, primarily on a vaudeville policy. In 1929, an interest in the theatre was acquired by RKO and for about four years thereafter was operated by RKO with vaudeville and first run product. In 1933, upon cancellation of RKO's lease, a subsidiary of Evergreen negotiated a new lease with the owner and ever since the theatre has been operated with first run product.

The State theatre has fewer seats, 954, than Fox or the Orpheum. It is, nonetheless, larger in seating capacity than any theatre in Spokane operated by an unaffiliated exhibitor. The State was constructed in

(2743)

1916 and in the current year has an assessed value of $79,470. In its early history, the State was operated under the name of Clemmer, by an unaffiliated exhibitor, H. S. Clemmer, for many years one of the outstanding exhibitors in the business in the northwest. Universal had an interest in the State between the years 1928 and 1932, but the theatre was operated by Universal for a brief time only. During most of the time, the theatre was leased by Universal to and op-

erated by an unaffiliated exhibitor. Pacific Northwest Theatres, Inc. acquired an interest in the theatre in 1932 on a sublease from Universal. After the bankruptcy of Pacific Northwest Theatres, Inc., Evergreen negotiated a new and distinct lease with the owner of the State. The State, irrespective of ownership, has never played anything but first run product.

"An interest was not acquired in the Liberty theatre in Spokane by any Fox company until 1935. Prior to that time, it had a continuous policy of exhibiting first or second run pictures and had always been operated by independent exhibitors. Evergreen's interest arises out of an agreement dated March 31, 1935, between one of its wholly owned subsidiaries, Spokane Amusement Company, and Principal Theatre Company of Washington, a Washington corporation, in which Mr. Al Rosenberg and Mr. Al Finke and their associates are principal stockholders. As

(2744)

a result of this agreement, Spokane Amusement Company acquired a 50% interest in the Liberty and Principal Theatre Company of Washington acquired a 50% interest in Evergreen's Orpheum. Mr. Rosenberg and Mr. Finke have been associated with Evergreen since its organization, and it was only natural for their separate theatre interests in this city to have become associated with those of Evergreen.

"Spokane has always had, since 1926, not less than 13 theatres, and for most of the time three have played first run product. At the present time, in addition to the three Evergreen first run theatres, there is the Granada, which is operated by an unaffiliated exhibitor. The Granada, prior to 1934, was using first run product of Monogram, the second run of Universal and a third run of Warner Bros., United Artists

and RKO. From 1934-1942, it licensed for most of the time, the second run product of Warner Bros., RKO, United Artists and Universal. In 1942, the Granada became a first run theatre, having acquired first run product of Universal and part of Republic and of Columbia. The theatre itself is a relatively small one, having but 550 seats, as compared with the usual size of first run house. In 1945, the assessed value of its equipment was $2,000 as compared with $10,000 for that of the Fox and $3,100 for that of the State. The Granada charges the same admission price

(2745)

charged at the first run theatres operated by Evergreen, 70¢ gross. The Granada was built in 1912 and is older by a least two or three years than any of the Evergreen theatres.

"After the Granada became a first run theatre, the RKO product which it had been licensing second run was sold to the Post Street Theatres, which also plays vaudeville and repeat pictures and which is operated by an unaffiliated exhibitor. All of the third, fourth and fifth run product in Spokane is licensed in theatres of unaffiliated exhibitors.

"The clearance intervals generally applicable in Spokane are much less today than they ever have been. Prior to 1932, the first run theatres had a clearance of 150 days over any subsequent exhibition. This has been reduced from time to time to its present status of, generally, 50 days over second run exhibition.

"BREMERTON, WASHINGTON.

"Evergreen has an interest in four Bremerton theatres, the Admiral, Rialto, Rex and Bay. The first three are downtown theatres. The Bay, a suburban theatre, is located in the business center sometimes

called East Bremerton or Manette. The Admiral and Rialto are operated with first run product, the Rex
(2746)
and the Bay with second and fourth run. There are three other theatres in Bremerton, all of which are operated by unaffiliated exhibitors in competition with Evergreen. These are the Roxy (first run), the Tower (third and second run) and the Grand (third and fourth run).

"The Admiral, the Roxy and the Bay are all new theatres, having been constructed since 1940. Bremerton during the last five years experienced an extraordinary growth in population from 15,134 in 1940 to an estimated 72,000 in 1945. The new theatres have been built in response to the greatly enlarged demand for motion picture entertainment.

"The Admiral, which is an Evergreen theatre, has more than twice the assessed value of the theatre having the next highest assessed value. In 1945, it was assessed at $74,800. The next highest, the Roxy, was assessed at $32,100. The equipment in the Admiral alone is assessed at $15,000, whereas that of the Roxy is assessed for $5,500. The Admiral was constructed in 1942 and has 1,324 seats and is modern and luxurious in all its equipment and furnishings.

"The Rialto was built in 1917 and seats 777. Both the Rialto and the Rex (331 seats) were theatres originally acquired by Wesco from North American Theatres, Inc. in 1927 along with the Bluebird in Bremerton which closed in 1928, dismantled and no longer
(2747)
exists. Both the Rex and the Rialto were first run and second run theatres in 1926, and for a long time before and exhibited the first and second run product of Fox, Loew's, Paramount and Warner Bros.

"The Bay was built in 1945 at the suggestion of the United States Navy to provide a source of entertainment for the greatly increased population in East Bremerton. It was opened and has been operated by a subsidiary of Evergreen with second and fourth run product.

"The clearance applicable to all theatres in Bremerton is substantially the same, and its history shows a reduction in the number of days interval between exhibitions, which is consistent with the pattern of clearance history throughout the Northwest. Prior to 1934 and 1935, first run clearance over second run was generally 150 days, and now it is generally 90 days.

"Portland, Oregon

"Portland at the present time has altogether 52 theatres. Evergreen has an interest in nine of them. Four of the Evergreen theatres exhibit first run or product including one which plays short product and newsreels only. The first run Evergreen theatres in Portland are the Paramount, Orpheum and Oriental and the Newsreel. Three of Evergreen's theatres, the

Music Box, Mayfair and Playhouse, are operated as moveover theatres. All of these theatres are located in the central downtown district of Portland, except the Oriental which is located less than a mile from downtown, in a shopping area. In addition to the first run Evergreen theatres, there are two other first run theatres in Portland, the Broadway and the United Artists, which are both operated by independent exhibitors.

"The other two theatres in which Evergreen has an interest are the Liberty and the Hollywood which play respectively second and third run product.

"Four of Evergreen's theatres in Portland, the Hollywood, Newsreel, Liberty and Music Box theatres, were a part of the circuit acquired by Wesco in 1927 from North American Theatres, Inc., along with four others, the Broadway, United Artists, Highway and the State in which Evergreen no longer has any interest. The Broadway and United Artists are now operated by independent exhibitors in competition with Evergreen's first run theatres in Portland, and the Highway and the State, neighborhood houses, are operated as subsequent run theatres by unaffiliated exhibitors.

"The interests of Northwest or Evergreen in the rest of Evergreen's theatres in Portland were acquired generally in separate, independent negotiations with the respective owners or lessors.

(2749)

"The Paramount theatre is the best theatre in Portland. It has a seating capacity of 3,054, and in 1945 had a total assessed value of $422,605. The assessed value of its equipment alone amounts to $27,980. The Paramount was built in 1928 by Paramount as an outlet for its product. Pacific Northwest Theatres, Inc. first acquired an interest in the Paramount in 1931. The interest of Northwest was terminated in bankruptcy, and thereafter through direct negotiations with the owner, a new lease was acquired in 1933 by a subsidiary of Evergreen, which has operated the theatre ever since. The Paramount has always shown first run product before the acquisition of any interest by Northwest or Evergreen companies.

"The Orpheum theatre was built in 1912 and for many years was operated principally on a vaudeville policy by Alexander Pantages. Between 1927 and 1932 RKO operated the theatre and between 1932 and 1935, the Orpheum was operated for a time by unaffiliated exhibitors. Evergreen acquired its interest in the theatre in 1935, and continued to have an interest until 1940. In 1940, the theatre was operated briefly by an unaffiliated exhibitor. Later in 1940, the theatre property was sold, and a subsidiary of Evergreen thereafter acquired a lease from the new owners. The Orpheum has 1,732 seats and in 1945 was assessed
(2750)
for a total of $281,735. It consistently has shown first run product when operated as a motion picture theatre.

"The Mayfair (1,498 seats), formerly called the Rialto, was one of the theatres acquired and operated by Pacific Northwest Theatres, Inc. prior to its bankruptcy. The lease on the theatre was disaffirmed in bankruptcy, and thereafter, in 1934, a new lease was obtained by a subsidiary of Evergreen. The Mayfair was re-equipped in 1943 at a cost of $14,094, and was assessed in 1945 for $227,160.

"The Music Box has 895 seats and in 1945 was assessed for a total of $123,510. It was operated by Pacific Northwest Theatres, Inc. and earlier by North American Theatres, Inc., under the name, People's, as a first run theatre. In 1930, Northwest ceased to have an interest in the theatre. Evergreen reacquired an interest in 1935.

"The Playhouse theatre was for many years the outstanding legitimate theatre in Portland. Evergreen first acquired an interest in this theatre in 1935. It was assessed in 1945 at $68,750 and has a seating

capacity of 1,255. During most of the period of its operation as an affiliated theatre, the Playhouse has been a subsequent run theatre. At the present time, it is operated on a first run moveover policy. The

(2751)

great increase in population, and the presence of a vast number of service personnel in the last five years in Portland created a distinct need for additional first run theatres. It was for this reason that the policy of the Playhouse was changed.

"The Oriental theatre is a neighborhood theatre located less than a mile from the downtown business center. There is no other neighborhood theatre in Washington, Oregon and Idaho comparable with the Oriental, in size, facilities and in its beauty of decoration. It compares favorably with the finest of first run metropolitan theatres. The Oriental because of its luxuriousness, location and quality of its equipment draws its patronage from nearly all points in the city, as well as from the outlying towns. It was assessed in 1945 for $235,265 and has a seating capacity of 2,038. The theatre was built in 1928, and Evergreen first acquired an interest in it in 1935. Before an interest in the theatre was obtained by Evergreen, the Oriental exhibited first and second run product. From 1935 to 1944, the Oriental exhibited fourth run product. Thereafter, for the same reason which caused the changing of the Playhouse from a subsequent run theatre to a first run theatre, the Oriental commenced to play first run product. The fourth run product previously exhibited at the Oriental is now licensed to an independent exhibitor who operates the

(2752)

Bagdad.

"The theatres operated by independent exhibitors in competition with Evergreen theatres license the first run product of Loew's, United Artists, Universal and one-half of Warner Bros., charge identical admission prices and take the same clearance as the Evergreen first run theatres. The Evergreen first run theatres license the product of Fox, Paramount, Columbia, RKO, Monogram, PRC and one-half of Warner Bros.

"The Newsreel theatre, formerly the Rivoli, was acquired in 1927 by Pacific Northwest Theatres, Inc. along with the rest of the circuit operated by North American Theatres, Inc. The interest of the Fox defendants in the Rivoli did not survive bankruptcy. In 1939 through negotiations instituted by the owner, a subsidiary of Evergreen obtained a lease on this theatre. It was operated thereafter for a few years with second run product. Subsequently it was converted into a newsreel house.

"The Liberty theatre was formerly operated by Pacific Northwest Theatres, Inc. and earlier by North American Theatres, Inc. At the time of the bankruptcy of the former, the lease on the theatre was terminated and thereafter a new and distinct lease was obtained by a subsidiary of Evergreen. The Liberty in 1945 has an assessed value of $227,000 and a seating

(2753)

capacity of 1,832. It was built in about the year 1916, and for the major part of its existence has been a first run theatre. At the present time it is being operated with a second run product.

"The Hollywood theatre was likewise one of those in which an interest was acquired by Pacific Northwest Theatres, Inc. in 1927 from North American Theatres, Inc. The Hollywood is a neighborhood house

and like the Oriental is an unusually fine theatre with a fireproof structure, the finest of projection and sound equipment, excellent carpeting and interior decoration. The Hollywood has a seating capacity of 1,491 and in 1945 was assessed for $102,775. The fee of the Hollywood theatre is owned by a subsidiary of Evergreen, and is operated by another to which the theatre is leased. The Hollywood has for many years played third run product.

"Portland has an unusually high total theatre seating capacity for a city of its size, and for that reason, clearance and theatre playing time has been a problem of more than usual complexity for Portland exhibitors and distributors. Portland, with an estimated population now of 415,000, which is in excess of its 1940 population by more than 100,000, has a total theatre seating capacity of 46,363. Seattle, which is larger than Portland in population by 55,000,

(2754)

has about 6,000 fewer theatre seats than Portland. Thirty-three of Portland's fifty-five theatres are located in neighborhood areas, and the clearance problems have been especially difficult as to these thirty-three neighborhood theatres. Consequently, there has been almost continuous negotiation between distributors and exhibitors for a period of fifteen years. At the present time first run clearance is 42 days after the close of first run showing, or after the third week thereof, whichever is earlier. Up until 1940, first run clearance was not computed until after the close of the first run showing. As it stands now, first run exhibitions of longer than three weeks do not affect availabilities of subsequent run theatres. The following is

the availability generally applicable to each run after first licensed in Portland:

"Second run	42 days
Third run	56 days
Fourth run	70 days
Fifth run	77 days
Sixth run	84 days
Seventh run	91 days
Eighth run	126 days
Ninth run	161 days

These are not the precise availabilities in each case on the product of each distributor. The number of days varies. These figures represent the average number of days availability.

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"The fourth to the ninth run inclusive are all licensed to independent exhibitors.

"In addition to the theatres in the foregoing cities of more than 50,000 population, Evergreen or Pacific is interested in the operation of three theatres, two first and one subsequent run, in Bellingham, Washington, three, two first and one subsequent run, in Everett, Washington, two, one first and one subsequent run, in Vancouver, Washington, and two, one first and one subsequent run, in Eugene, Oregon. These four communities have a population of less than 50,000 but more than 25,000. In each, there are from one to three theatres operated by unaffiliated exhibitors in competition with the theatres of Evergreen or Pacific.

"In Bellingham, the competing, independent first run theatre, the Grand, is operated with the first run product of Columbia, Universal, Republic and one-half of Warner Bros. The other unaffiliated theatre exhibits the third run product of Columbia, Fox, RKO and Warner Bros., and spot books the product of Paramount.

"In Everett, the independently operated theatre, the Roxy, exhibits the first run product of Republic, the second run product of Warner Bros. and Universal, and the third run product of Loew's and Paramount.

(2756)

"There are two unaffiliated theatres in Vancouver, the Mission and the State. The Mission shows the first run product of Columbia, Republic, Universal and RKO. The State plays the second run product of Warner Bros. and the third run product of Columbia, Loew's, Fox, RKO and Republic.

"In Eugene, Oregon, three theatres are operated by unaffiliated exhibitors. For one, the Heilig, the exhibitor licenses the first run product of Columbia, RKO, Republic and Universal. Another, the Mayflower, is operated on a moveover policy with the same product which is licensed for the Heilig. The third independent theatre in Eugene exhibits the second run product of RKO and Universal and the third run product of Loew's, Fox, Warner Bros. and United Artists.

"Evergreen is also interested in theatres located in four towns in Washington with a population under 25,000 each. Evergreen has an interest in two theatres in Aberdeen, one of which has been closed for several years because of its poor physical condition. It also has an interest in one in Hoquiam, one in

Olympia and two in Wenatchee. In each of these towns, Evergeen's theatres are operated in competition with theatres of other exhibitors. In Aberdeen and Hoquiam, theatres affiliated with Warner Bros. compete with those of Evergreen. In Olympia and

(2757)

Wenatchee the competition is with theatres operated by independent exhibitors.

"Neither Evergreen nor Pacific has any interest in the theatres operated in Tacoma, Washington, a city with a 1945 estimated population of 139,000, or in Yakima, Washington, whose population in 1945 is estimated to be 33,400. Moreover there are 16 cities and towns in Washington and 17 cities and towns in Oregon with 1940 populations ranging from 4,000 to 25,000, in which neither Evergreen nor Pacific is interested in the operation of any theatre.

"Evergreen has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Evergreen or Pacific, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

(Sgd.) FRANK L. NEWMAN, SR."

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(The affidavit of ELMER C. RHODEN is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein, and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding ELMER C. RHODEN would testify as follows:

"ELMER C. RHODEN, being duly sworn, deposes and says:

"I am now, and since 1935 have been, the President and operating head of Fox Midwest Theatres, Inc. (hereinafter referred to as 'Fox Midwest'), a Delaware corporation, having its principal office and place of business in Kansas City, Missouri. All of the stock of Fox Midwest is owned by National Theatres Corporation, a defendant in this proceeding.

"Fox Midwest is interested, directly or through corporations the stock of which is owned by it, in the owning, leasing and operation of 128 theatres in the States of Missouri, Kansas, Illinois, Nebraska and Iowa. Of these theatres, 115 are open and 13 are closed. Most of these theatres are located in what is generally known as the Kansas City Exchange territory. By that is meant that films are supplied to such theatres through the exchanges maintained by the respective distributors in Kansas City, Missouri.

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"I have been associated with the motion picture business for a period of approximately 33 years. My first employment was with General Film Company as a shipping clerk in 1912 while still at school. In

1917, I became a salesman for General Film Company, working out of Omaha. In the fall of 1917, I went into the Army and, upon my return, became a film salesman for A. H. Blank, who had a theatre circuit and was a First National franchise holder. I was a film salesman in Omaha and eastern Iowa for the A. H. Blank Enterprises and came to Kansas City in 1920 as manager of the interests of that company in that area. During the next five or six years, I bought out Mr. Blank's interest and organized Midwest Film Distributors. I then acquired certain theatres and, in 1927, formed Midwest Theatres, Inc., an independent circuit which held leases on approximately 11 theatres at the time the corporation was formed. I entered into partnership with Mr. L. M. Miller, a prominent citizen of Wichita, Kansas, who at that time had a number of theatres. Additional theatres were acquired by our partnership. Our theatre interests were sold to a company controlled by Fox Film Corporation in October, 1929, in the manner more fully described hereinafter. I entered into a five-year contract with Fox to

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operate the theatres which we sold and any additional theatres which might be acquired in the territory.

"For several years I was President of the Film Board of Trade in Kansas City, Missouri.

"I am familiar with the claims made by the Government in its complaint and the contents of this statement will be addressed to them.

"THEATRE GROWTH AND DEVELOPMENT IN THE KANSAS CITY EXCHANGE TERRITORY PRIOR TO 1929—THE DATE WHEN FOX WEST COAST ACQUIRED INTERESTS IN CERTAIN OF THESE THEATRES.

"The acquisition of theatres in this territory by a subsidiary of Fox West Coast in or about 1929 came

at the conclusion of a period of theatre growth which was characterized in its later stages by circuit operations. The development of circuits was a natural incident of the development of the motion picture business. In the first place, the quality of product had considerably improved. The era of arcades and store exhibitions had come to a close. The enhancement in the artistic and cultural value of films created an increased popular demand for better and more expensive pictures. It became imperative for theatre operators to construct larger, more luxurious and commodious theatres, equipped with the latest improvements. The

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motion picture business was subjected at this point to the same familiar economic forces which inevitably condition any young industry, which is passing through the cycle of rapid development and expansion. The construction and operation of such ventures required larger units of capital than had theretofore sufficed to meet the needs of the industry. It was during this period that great activity developed in construction and expansion on the part of independent operators and distributors.

"The activities of my partner, Mr. Miller, and myself in the field of theatre construction and acquisition, more fully described later, were dictated solely by considerations such as those outlined above. We realized perfectly well that our survival in this business depended upon the construction and acquisition of theatres which would meet the exacting demands of the public and the needs of the distributors for appropriate outlets for the exhibition of their films. We were not motivated by any desire to stifle competition or to monopolize or attempt to monopolize. Our business activities were actuated solely by what we then considered to be and what I still regard as enlightened

self-interest. It was a choice either of meeting the growing competition or retiring from business. We chose the former course and availed ourselves of such
(2762)
legitimate means at hand as would insure the success of our business.

"Some of the more important historical highlights of the period just described were the following:

"As early as 1920, Mr. L. M. Miller, who was later to go into partnership with me, had several theatres in Wichita, Kansas. Mr. M. B. Shanberg had theatres in Hutchinson, Junction City and Salina, Kansas. Mr. Frank Newman already had built the first de luxe houses in Kansas City, Missouri, namely, the Newman, Royal, Regent and Twelfth Street theatres.

"In 1923 and 1924, an organization known as Capitol Enterprises, Inc., acquired about 15 theatres, of which 6 were in Kansas City. In 1924, while this circuit was still in process of creation, it was purchased by Universal. During the next few years, Universal acquired some additional theatres in Kansas City and others in Missouri and Kansas. In Kansas City, it built the Uptown theatre, which was subsequently acquired by Fox Midwest, as more fully described later. Early in 1929 Shanberg acquired all of Universal's theatres and this marked the end of Universal's theatre operations in this territory.

"The Paramount interests had already entered Kansas City. Some time in 1924 or 1925, they pur-
(2763)
chased the Newman and Royal theatres from Mr. Frank Newman.

"During this period, the Shanberg circuit also expanded rapidly. In addition to those theatres operated by Shanberg and those acquired from Universal, various other theatre interests were secured. At the

time of the sale to the Fox interests in the fall of 1929, the Shanberg organization was operating approximately 60 theatres in Missouri, Kansas and Iowa. Virtually all of these theatres were being operated under leases or other arrangements.

"In 1928 Woolf and Shanberg built the Midland theatre, one of the largest and finest theatres in Kansas City, Missouri. It was and is a de luxe, downtown theatre with about 3,600 seats. Within a year, it was sold to Loew's and is still operated by it under the name of Loew's Midland.

"At approximately this time, the so-called Miller and Rhoden circuit, in which I was a partner, was also established. Mr. Miller was a theatre operator in Wichita and had acquired several theatres there in addition to substantial investments in real estate which he held.

"In about 1925, I came into control of Mr. A. H. Blank's film exchange and, in partnership with L. M. Miller, began operating it as an independent exchange.

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The exchange had formerly been known as the Midwest Photoplay Company. Mr. Miller and I changed its name to Midwest Film Distributors, Inc.

"In 1926 we began acquiring theatres either in our own names or in the name of Midwest Film Distributors, Inc. Shortly thereafter, we formed Midwest Theatres, Inc. and turned over to it the theatres which we had acquired. Some of these theatres we owned, others we leased. By 1929 we were operating 37 theatres, of which 4 were in Kansas City, Missouri. The others were located in Kansas and Missouri.

"I attribute the expansion of the Miller and Rhoden circuit primarily to efficient management and operation; the favorable business standing and credit which we enjoyed, together with the substantial

amount of capital which was invested in our enterprises, and last but not least, the advent of sound pictures. The cash investment of Mr. Miller and myself in these theatres was in excess of one million dollars. In addition to this capital investment, we had assumed a number of obligations.

"We acquired many of our theatres, with the exception of those located in Wichita, from so-called independent operators. We were able to acquire these theatres not because of any particular advantages due

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to our ownership of other theatres, but, rather, because of a hesitancy on the part of many operators to make the substantial investments or commitments necessary to keep pace with the times. Particularly was this so with respect to equipping their theatres for sound. From 1926 to 1929, it had become apparent to me that sound pictures were supplanting the silents and that the latter would soon disappear. Independent operators in Kansas were doubtful as to what would be the effect of the transformation. Sound equipment was quite expensive and many of these exhibitors preferred to dispose of their theatres rather than to assume the risks of further investments.

"Meanwhile, theatre growth was not restricted to circuits but continued to advance under the direction of so-called independent operators, particularly in the large cities such as Kansas City, Missouri. That was true not only then but remains true today, as I shall point out more specifically when I come to discuss some of the particular communities in which Fox Midwest operates.

"Just as the exhibitors found it necessary to construct larger, more luxurious and commodious theatres to meet the current demands of the public and

the preferences of the film companies so, also, did the distributors vie with each other for the exhibition of

(2766)

their finer and more expensive productions in these better showplaces. In order to assure a sufficient number of outlets for exhibition of their pictures, they proceeded to acquire some of the finest theatres in the country.

"In 1928 and 1929, competition developed for the acquisition of various theatre interests in Missouri and Kansas on the part of the distributors. Circuits of theatres with whom distributors were negotiating also evinced an interest in acquiring our theatres. In the summer of 1929, one Max Kravetz, acting as an agent for a subsidiary of Fox Film Corporation, came to Kansas City to negotiate directly for the acquisition of theatres. He submitted a proposition to Mr. Miller and myself as to which he and I were not in complete agreement. Mr. Miller wished to sell because he believed that he had too much money tied up in theatre real estate in Wichita and was anxious to liquidate. After considering the entire proposition, I agreed to sell. In connection with the transaction I was employed to manage the operation of these and all other theatres which might be acquired in the territory.

"At the same time that Mr. Kravetz was negotiating with Mr. Miller and myself, he was also conducting negotiations for the acquisition of other theatres

(2767)

in this territory. I have previously described the development of the Shanberg theatre organization. At that time, it was interested in 61 theatres. Paramount, at the same time, was negotiating with Mr. Shanberg. Mr. Kravetz also submitted a proposition and was successful in securing the purchase of these

theatres. The total purchase price was in excess of $4,000,000, the payment of a portion of which was deferred over a period of time. Mr. Shanberg was employed at a substantial salary until such time as the purchase price could be paid in full, although, in 1931, his employment contract was terminated and the management of all the theatres vested in myself.

"Certain other acquisitions were made by the Fox subsidiary in the summer of 1929, including the Reid, Yemm and Hays circuit and the Fresina circuit, which were engaged in theatre operations in southern Illinois. Mr. Kravetz also had negotiations with other smaller exhibitors and acquired certain small groups of theatres as a result. As to these as well, the general competitive situation relating to theatre acquisitions hereinabove referred to, also existed.

"Upon the conclusion of these various transactions, the Fox subsidiary which took over the theatres had interests in about 150 theatres. As the operations

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of this new company developed, it early became apparent that it could not be profitably operated. From 1931 until 1933, when it went into bankruptcy, it continuously lost money. This was due in part to the inflated prices paid for the properties and the character of some of the properties themselves. A number of the theatres were simply not worth operating and some of them were abandoned. Other theatres had been closed at the time they were acquired and were not worth reopening. Because of unprofitable operations, it was necessary to close other theatres. General economic conditions had become steadily worse. All of the properties had substantial carrying charges, which represented a continual drain on the resources of the profitable theatres.

"In March of 1933, the Fox subsidiary filed a voluntary petition in bankruptcy. Its operations were taken over by trustees. The number of theatres which were operated by the trustees had diminished to 110 in 1933. In 1934 and 1935, 107 theatres were being operated. The reorganization of the company was completed in January, 1935. The reorganization plan provided for the complete payment of all allowed claims and the properties were vested in the present Fox Midwest Theatres, Inc.

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"TRADE PRACTICES IN THE MOTION PICTURE INDUSTRY IN THIS TERRITORY IN EFFECT UP TO 1929—THE YEAR OF THE WEST COAST ACQUISITIONS.

"During my association with the motion picture industry prior to the time when Fox Film Corporation made any of the acquisitions heretofore referred to, I became familiar with the manner in which films were licensed to exhibitors by the distributing companies and the conditions and circumstances of such licensing.

"Basically, the licensing of film and the fixing of runs and clearances were determined much the same as they are today. The same criteria which today determine the reasonableness of clearance, the relative priority of run to be accorded to any given exhibitor, or the terms under which pictures are to be licensed were substantially the same when the number of affiliated theatres was insignificantly few. These same standards continue to apply to individual situations today irrespective of the character of the operation, be it independent or affiliated. It has always been generally the fact that the largest, most luxurious and commodious theatres receive a prior run

over theatres which were physically less capable of affording the distributors a proper outlet for first

(2770)

showings of their finest pictures and providing the maximum amount of revenue which could be obtained. This is, and has always been true regardless of affiliation or non-affiliation.

"As a film buyer, I have always tried to obtain for my theatres, the best possible run of pictures at what I considered to be reasonable rentals. I did not always agree with the distributors on what was a reasonable rental or the run which was given to my theatre. In some instances, I was given a playing position which I would have preferred to improve. In other instances, I paid more for film than I should have liked to have paid. In almost all instances the result of the bargaining process which took place between distributor and exhibitor was a deal which represented a compromise of the individual interests of both.

"In short, the situation with respect to the licensing of film prior to the Fox acquisitions was the same as it is today. There were fewer 'percentage pictures' at that time but film rentals were often computed on such a basis. Provisions for minimum admission prices were also inserted in contracts between the exhibitors and distributors in those days. Clearance

(2771)

was then, as it still is, considered to be a vital and essential factor in the industry for the protection of both the distributor and the prior run exhibitor.

"DESCRIPTION OF PRESENT CORPORATE STRUCTURE AND GENERAL BUSINESS PRACTICES OF FOX MIDWEST.

"I have already stated that all of the stock of Fox Midwest is owned by National Theatres Corporation,

which also owns the stock of a number of other companies engaged in the operation of theatres.

"The business of Fox Midwest is carried on autonomously as an independent business enterprise. The management, operation and general policies of Fox Midwest are directly under my supervision and control. The directors of Fox Midwest are: E. C. Rhoden, Charles E. Shafer, J. C. Nichols, James M. Kemper, Herbert V. Jones and Charles P. Skouras. All of them except Charles P. Skouras are residents of Kansas City, Missouri. It is true that the financial interest which National Theatres Corporation has in Fox Midwest subjects the latter to a certain amount of direction by the former with respect to certain financial transactions, such as the construction of new theatres, improvements, acquisitions or other capital

(2772)

commitments. In every other respect, however, I am entrusted with complete authority and discretion in the management of the company.

"Fox Midwest Amusement Corporation was organized by Fox Midwest Theatres, Inc. as a service corporation designed to handle the many details of management incident to the operation of the theatres in this large territory. It has a total personnel of 1,982—102 of which are in the home office in the Uptown Theatre Building, Kansas City, Missouri. The remaining 1,880, including managers, are employed in the theatres themselves.

"Various departments of the organization have been created for the purpose of carrying out all functions incidental to the operation of the theatres. These include the licensing and booking of pictures, advertising, purchasing of supplies, auditing of accounts in the field, real estate and insurance, maintenance, etc.

"Most of the personnel in these departments are highly trained and have a specialized knowledge of conditions in this particular territory. This is especially true of the buying and booking department, the personnel of which see all pictures that are licensed

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by Fox Midwest for the purpose of evaluating and judging their comparative merits and quality. Their knowledge of the various communities in which Fox Midwest operates theatres and the local tastes and prejudices of their inhabitants must be fairly complete.

"Film license agreements are separately and independently entered into between Fox Midwest and each distributor from whom it licenses film. In many instances the bargaining process is quite protracted. It is and always has been considered of the utmost importance that any given distributor does not know the specific terms of any deal entered into between an exhibitor and another distributor. Accordingly, it has been the policy of Fox Midwest to treat such matters as confidential trade secrets in so far as it is within its power so to do. Similarly, I have no knowledge nor has any distributor at any time supplied me with any information concerning the film rentals paid by any theatre which is competitive with a Fox Midwest theatre. On the contrary, it is to the advantage of a distributor not to divulge such matters to us for the obvious reason that its bargaining position might be adversely affected if an exhibitor had specific knowledge of such matters. This is true whether the ex-

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hibitor be affiliated with a producer or not.

"It is quite true that certain features of the license agreements have become somewhat standardized be-

cause of long experience and usage in the industry. On the other hand, certain provisions of the license agreement which relate to the terms upon which specific pictures are licensed are determined wholly as a result of the bargaining process with each separate distributor. I may point out in this connection that even as between Fox Midwest and Twentieth Century-Fox Film Corporation, the producer-distributor with which Fox Midwest is affiliated, there is as much bargaining and haggling over the terms under which specific pictures are to be played at specific theatres as there is with other distributors. I recall many instances of important differences of opinion between Fox Midwest and Twentieth Century-Fox Film Corporation in connection with the licensing of its product and the specific film rentals to be paid therefor.

"It is also far from true that there is complete uniformity even on matters of form, although such uniformity as does exist is attributable, as I have said, to long experience and usage in the industry. In

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Kansas City, Missouri, for example, the availabilities of subsequent run theatres are usually set forth in contracts between the various distributors and the subsequent run theatres and are fixed with relation to first run downtown. Thus, theatre X will be given an availability of 56 days following close of exhibition at the first run downtown theatre. Loew's, however, fixes the availabilities of subsequent run theatres with relation to prior runs other than first run downtown. The availabilities of subsequent run houses stem from third city run in some of Loew's contracts. In some other instances the availability of a subsequent run theatre stems directly from the theatre playing immediately prior to it in the competitive zone. While this

difference in the manner of framing contracts is, of course, one of form only, it is cited to show that the distributor and the exhibitor each bargain for the express purpose of reaching a deal which will suit and serve his or its own individual interests best.

"Fox Midwest enters into contracts with the distributors only for theatres in which it is interested.

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"There are many occasions where a distributor may already have negotiated license agreements for certain pictures with another subsidiary of National Theatres Corporation before it does so with respect to the theatres of Fox Midwest. It sometimes happens, under such circumstances, that the agreement thus arrived at, particularly those provisions relating to terms, may be used as a basis for the negotiations with the distributor, relating to the theatres of Fox Midwest. It is in some instances even adopted by the parties in negotiating the deal for this territory. Under no circumstances, however, is Fox Midwest bound by any commitments so made by other subsidiaries of National Theatres Corporation, and all deals made with respect to the theatres of Fox Midwest are consummated with special attention to its requirements and needs.

"Before any license agreement becomes effective it must receive my approval. In the negotiation of film licenses in practically all instances, separate consideration is given to each particular theatre in which Fox Midwest is interested, and a separate and specific deal is made on the basis of each individual theatre.

"In most instances, the terms under which film is

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licensed to the Fox Midwest theatres vary with each picture, each theatre and each distributor. There is absolutely nothing uniform about this. The license

agreements covering certain theatres operated by Fox Midwest provide for the payment of flat rentals. These fixed rentals will vary in amount with each company, depending upon the quality of the picture licensed. In some other theatres the license agreements provide for the payment of film rental determined by a certain percentage of the gross business done by the theatre. These 'percentage deals', however, also vary according to distributor and the quality of the product. In some instances the license calls for the payment of a specified percentage of the gross receipts. In another a sliding scale is provided for under which the returns to the distributor will vary in accordance with the volume of business done by the theatre on the particular picture. The nature of the formula used depends entirely upon what the parties decide as a result of their negotiations.

"As to these 'percentage deals', the parties simply agree that the distributor is entitled to a rental which is to be measured by the gross receipts received at the box-office. This criterion is based upon the proposi-

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tion that the quality of a picture is determined by box-office grosses, and film rentals, to be fair to both distributor and exhibitor, should bear a definite relationship to the quality of the film.

"Two of the most important provisions in a license agreement are clearance and admission price. Both factors are important to the distributor and the exhibitor. A first-run exhibitor whose theatre represents a substantial investment, who has undertaken to pay a high guaranteed film rental plus a percentage of the gross receipts and who proposes to charge a high admission price, is entitled to the assurance that a reasonable period of clearance will elapse between the close of

exhibition of a picture at his theatre and the exhibition of the same picture in a subsequent run theatre which represents a smaller investment, charges a lower admission price and pays substantially less film rental to the distributor. Unless these considerations are accorded their proper weight in the licensing of film, it is obvious that the ability and capacity of the prior run exhibitor to secure patronage at its top admission price will be affected, with the result that (2779)
its contractual undertakings with the distributor will be placed in jeopardy.

"On the other hand, I have absolutely no interest in fixing the maximum price which a subsequent run exhibitor may charge. In fact, the higher he pegs it the better it is for the prior run exhibitor. For example, the first run theatres in Kansas City, Missouri, including the Fox Midwest houses, now charge a top admission price of 65 cents. Should a subsequent run exhibitor in that city raise its price to 65 cents, his theatre will become less competitive to the first runs than theretofore.

"I have never entered into any agreements or understandings with any distributor having the purpose or effect of fixing the prices to be charged by a subsequent run theatre, and there would be no business reason which would impel me to do so.

"Contractual provisions for clearance are usually not renegotiated each time the parties consummate a deal for a particular block of pictures. These items are agreed upon in the first instance, only after consideration has been given to numerous factors of business policy and local conditions, upon the basis of which definite clearances are fixed and are readopted in all future negotiations, unless specific conditions

or circumstances require a change. There are some
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instances where clearances in favor of Fox Midwest theatres have been eliminated or voluntarily reduced where it became clear that the length of the existing clearance was not justified in the light of current conditions.

"In entering into license agreements with the distributors, Fox Midwest does not condition the licensing of pictures in some of its theatres upon the making of a deal with the distributor for all of its theatres. It frequently happens that the parties are unable to negotiate an agreement for certain Fox Midwest theatres but succeed in arriving at a satisfactory deal with respect to other theatres. Where that happens, the pictures as to which a satisfactory deal has been made are licensed and exhibited by Fox Midwest and the distributor is free to make other licensing arrangements in those situations as to which it was unable to reach an agreement with Fox Midwest.

"When Fox Midwest negotiates with any distributor for the licensing of film, it does not know and has no interest in whether or not the Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

"Fox Midwest is interested in obtaining for its the-
(2781)
atres the best product available on reasonable terms. When it desires to exhibit in one of its theatres an outstanding attraction distributed by RKO, for example, it is not in the least concerned as to whether RKO has made an agreement for the exhibition of Twentieth Century-Fox pictures in RKO's theatres located in some other territory.

"My own personal, pecuniary interests impel me to act for the sole welfare and benefit of Fox Midwest.

I am not a stockholder of Twentieth Century-Fox Film Corporation and have no connection with that company. My employment is with Fox Midwest, and the terms of my contract provide for a certain fixed salary with a participation in the profits of the company. I am primarily concerned, therefore, in promoting the best interests of that company. I am not concerned with the effect which the policies of my operation may have upon the distribution policies of Twentieth Century-Fox Film Corporation.

"The Government claims that there is no real competition between theatres affiliated with different distributors in the same competitive area, and that such competition is artificial. My experience in Kansas

(2782)

City, Missouri, demonstrates that this is not true. The Fox Midwest first run theatres in Kansas City, Missouri are definitely in competition with the theatres operated by Loew's, Paramount and RKO for the same movie dollars. Each company adopts a policy which is designed to procure the largest possible patronage. Advertising costs alone, intended to bring people from all over the area into the downtown section to see first run pictures, run into many thousands of dollars.

"As to the licensing of film, the fact that over a period of time the same product is licensed to certain theatres in no wise disproves the competitive nature of the situation. Each theatre usually continues from year to year to exhibit the product of the company with which it has been doing business. For one exhibitor to obtain product previously and over a period of time used by another exhibitor would require that it be able to effectuate a deal with the particular distributor which would insure the latter a much greater return than it had theretofore received from its exist-

ing account. No exhibitor could possibly afford to buy up all available product, much less provide adequate playing time for its exhibition, especially now when attractions play on longer runs than has heretofore been the case. If a distributor is now securing

(2783)

fair and reasonable revenue and proper exploitation of its pictures in a desirable outlet, it has no particular interest in jeopardizing that position when no compensating advantages are offered. Where, however, a distributor is unable to reach a deal with an exhibitor or is in any other way dissatisfied with the account, it does have another available outlet with whom it can negotiate.

"What I have said with respect to film licensing practices applies whether or not the competing first run theatre is affiliated with a distributor or not. Examples of the continuation of the licensing of the same product to a first run theatre regardless of whether it is affiliated or independent will be referred to hereafter.

"Theatre Situations in Cities and Towns in which Fox Midwest Operates

"I now take up the more important situations in which Fox Midwest has an interest.

"A. *Kansas City, Missouri.*

"Pop.	1940 Census	399,178
"Pop.	Present (Est.)	462,493

1. *First Run*

(2784)

"In Kansas City, Missouri, there are 51 theatres, 6 of which have first run in the city. Three first run

theatres are operated by Fox Midwest and one each by Loew's, RKO and Paramount, respectively. There are 45 second and subsequent run theatres, 12 of which are Fox Midwest theatres.

"FOX MIDWEST'S THEATRES.

"Fox Midwest operates the Uptown, Esquire and Tower theatres in Kansas City proper. It also operates the Fairway theatre, located in the Fairway residential addition in Johnson County, Kansas, just a short distance across State Line Road which fixes the westerly corporate limits of Kansas City, Missouri. The Esquire, Uptown and Fairway theatres play the best pictures of Twentieth Century-Fox, Universal and Republic, first run day and date. The Tower theatre, operated by Fox Midwest, plays pictures of nearly all producers which are considered unsuitable for first run single feature showing at the other three theatres. These pictures are exhibited at the Tower on a double feature program, first run, in combination with vaudeville.

"The Esquire theatre is located at 215 E. 12th Street, Kansas City, Missouri. The theatre was re-

(2785)

modeled in August, 1938, and is in all respects a first class theatre. It has a seating capacity of 815. The theatre has all the latest improvements and accommodations in the way of equipment and appointments.

"The Esquire, when it was built in 1919, was known as the Twelfth Street. It later became the Downtown and eventually the Esquire. It was built by Richards & Flynn and intended as a first run outlet for First National. Fox Midwest acquired the theatre in 1936. It was renovated and its name changed to the Esquire in the summer of 1938.

"The Uptown theatre is located at 3700 Broadway. The theatre has a seating capacity of 2,043.

"It is a de luxe house in every respect, having been constructed in 1927 at a cost of nearly a million dollars. This theatre was built by Universal and leased to Shanberg. It was transferred to the Fox subsidiary in May, 1930, which later purchased the fee.

"The Tower theatre is located immediately adjacent to the Esquire on the east and seats 2,100 people. It is a modern, well-equipped and appointed theatre in every respect. The Theatre was built in

(2786)

1921 by the Pantages vaudeville circuit and opened with a combination of vaudeville and motion pictures. By 1929 it had become primarily a motion picture theatre. For some time prior to 1933 the theatre had been closed. In that year it was reopened by the Rewot Corporation, and the name changed to the Tower. Fox Midwest acquired control of Rewot, which also operated the Downtown, in 1936 and 1937 actually taking over the operation of the theatre in 1936.

The Fairway theatre was opened on June 12, 1942. It is located at 2600 West 52nd Street, in a section which has enjoyed rapid improvement and development during the past ten years. This area consists of the real estate subdivisions known as Mission Hills, Indian Hills Mission Woods, Fairway, Fieldton, Prairie Village, Westwood, Bryantwood, and Mission Highlands, and is a development of the J. C. Nichols Company, comprising a small portion of the elite residential area of the Country Club district.

"As a result of the congestion and substantial increase in movie attendance which was developing in

(2787)

the first run Uptown and Esquire theatres, I deemed it desirable to have another first run theatre to afford accommodations to the increased patronage in this growing area. I was also influenced by the wartime transportation problems affecting the residents of this section. It was finally decided to change the Fairway over to a first run day and date operation with the Uptown and Esquire on that product which played first run in those theatres, which was done on or about October 16, 1942.

"Although the theatre only seats 702, it is in every respect a fine house with all modern improvements and appointments.

"COMPETITIVE THEATRES.

"The RKO Orpheum theatre is located at 1212 Baltimore Avenue and has a seating capacity of 2,036. It is in every respect a de luxe theatre. It was originally designed to play vaudeville, which it did until 1928, when it closed. The Orpheum was reopened as a motion picture theatre in 1939 and has operated continuously as such since that time. It exhibits RKO and about one-half of Warner's product. Warners has no theatre in the Kansas City exchange territory.

(2788)

"Loew's Midland is located at 1228 Main Street and has a seating capacity of 3,573. It is the largest theatre in Kansas City and, for that matter in the Middle West. It was built in 1928 by the Woolf-Shanberg interests. In 1929 they sold it to Loew's and the latter has operated it since. It exhibits the product of M-G-M, United Artists and Columbia.

"The Newman theatre is located at 1118 Main Street and has a seating capacity of 1,917. It was

built by Frank Newman in 1919 and was the first de luxe movie theatre in Kansas City. It is still a fine, commodious, well appointed theatre and has always operated on a first run policy. It exhibits Paramount and about one-half of Warner's product.

"THE MAINSTREET.

"The Mainstreet theatre is owned by Fox and RKO and is now closed. Fox Midwest's one-half interest was acquired in November and December, 1942 and RKO's one-half interest was acquired in January, 1943. The theatre was built in 1922 at the southwest corner of 14th and Main Streets in Kansas City, Missouri, and has a seating capacity of 3,049. The original cost of the theatre was approximately $1,400,000. In 1926 it was valued at $1,083,000. There have been no extraordinary additional investments since that

(2789)

time. It was operated primarily as a vaudeville and stage show house by the Kansas City Junior Orpheum Company, a subsidiary of Orpheum Theatre & Realty Co. In about 1931 or 1932, it went over to a motion picture house and closed in July of 1938. It was again opened November 6, 1941, by one Albert Schoenberg in association with Will Harris, a vaudeville operator from Chicago, and Ralph Goldberg, an exhibitor in Omaha, Nebraska. The venture was unsuccessful and the theatre closed again on January 5, 1942. During that two-months period, the theatre operated under a combination policy of vaudeville and one feature film of lesser box office attraction.

"In 1936, the Mainstreet was included in a so-called pooling of all the downtown first run theatres in Kansas City, except Loew's Midland. This lasted

for approximately six months. I was chosen as the person to supervise the operation, including the Mainstreet. Despite the fact that the Mainstreet theatre had the very best pictures available from the major companies during this period, it did not bring in a large enough gross to make the house profitable, and in some weeks grosses dropped to less than $5,000. There was no vaudeville played in the Mainstreet at that time and it was operating on a straight motion
(2790)
picture policy. The theatre is located away from the heart of the downtown section and in a pawnshop, second-hand store type of neighborhood. Consequently, there was no drop-in or transit business.

"For many years prior to its acquisition by Fox Midwest and RKO, the Mainstreet was owned in fee by three separate interests.

"In 1942 a proposal was submitted to me for the acquisition of the fee to the Mainstreet on what I considered advantageous terms. At that time I had in mind the making of certain policy changes in the downtown operation. Accordingly Fox Midwest first acquired a one-half interest in the fee from the owners of that portion. Then the party who had undertaken to obtain the other one-half could not or would not do so and we subsequently discovered that this one-half interest had been sold to RKO for substantially more than Fox Midwest had arranged to pay. Prior to RKO's acquisition of this one-half interest, Fox Midwest commenced a partition suit against the then owner of the property. After RKO's acquisition an amended petition was filed and this suit is now pending.

"There can be no question but that the theatres which have the first runs in Kansas City, Missouri are by reason of their physical characteristics, equip-

ment, conveniences, appointments and locations pe-
(2791)
culiarly fit for first run exhibition. This was true when they were independently operated and it remains true today.

2. *Second Run.*

"Second run in Kansas City, Missouri, is shown at the Plaza theatre which is operated by Fox Midwest. The Plaza is one of the outstanding showplaces of the Mid-West from every point of view. It seats 1,861. It was built by J. C. Nichols Company in the Country Club Plaza district of Kansas City, Missouri. Originally, it was operated by Woolf & Shanberg. Fox Midwest acquired the theatre under lease from them in May, 1930. It charges an adult evening admission price of 55 cents, and plays the product of all major distributors.

"There is no subsequent run theatre in the entire territory which equals the Plaza either in its capacity for producing revenue for the distributors or in the quality of its physical characteristics and commodious appointments. It represents an investment in excess of $200,000 to build, and is the most desired and sought after outlet by all distributors for the second run exhibition of their pictures.

3. *Subsequent Runs.*

"There are 44 other subsequent run theatres in Kansas City, Missouri, 11 of which are operated by
(2792)
Fox Midwest. These subsequent run theatres themselves are in neighborhoods each of which is considered a separate competitive area. In Kansas City, Missouri, there are approximately nine such areas

or zones. In each zone the number of theatres varies from three to nine. In each of them the run which any given theatre has depends upon a number of factors, among the most important of which are the physical characteristics of the theatres themselves, their potential capacity to produce the greatest amount of revenue for the distributors and the amount of film rental which any given exhibitor is willing to pay for a given run within the zone. In two zones certain theatres operated by independent exhibitors have prior runs over theatres operated by Fox Midwest. Mr. Jay Means operates the Oak Park theatre which is first run in a zone with six other theatres, one of which, the Linwood, is operated by Fox Midwest. The Oak Park charges an adult evening admission price of 45 cents and has an availability of 49 days after downtown first run. The Linwood charges an adult evening admission price of 35 cents and has an availability of 84 days after downtown first run.

"In another zone, the Ritz, a subsequent run theatre operated by Dr. N. Zoglin, plays ahead of the Benton theatre, which is operated by Fox Kansas City Corporation.

(2793)

"Where Fox Midwest has first runs in the neighborhood zones, the theatres themselves are physically superior to other theatres in the zone and are capable of producing more revenue for the distributors.

"There are theatres which are not located within the city limits of Kansas City but which are contiguous to it and are operated by independents with no local subsequent run competition from Fox Midwest. The areas in which these independent operators are located are Liberty, Independence, Fairmount, Belton, Blue Springs, Grandview, Lee's Summit. North

Kansas City, Highway 40 and 71 By-Pass (Drive-in theatre), all in Missouri, and Olathe and Bonner Springs, Shawnee and Mission, in Kansas.

"My attention has been directed to certain testimony given by Mr. William Kupper on cross-examination, which appears in the transcript of the testimony in this case beginning with page 1679 of the stenographic record. This relates to certain changes made in 1935-1936 respecting clearance in Kansas City.

"Prior to the 1935-1936 motion picture season, the availabilities of subsequent run theatres in Kansas City, Missouri and the surrounding territory were based upon admission prices. This general system of clearance based upon admission prices had existed in the area since approximately 1929. Under that

(2794)

system, theatres located within the same block or within a few blocks of each other and highly competitive with each other had a day and date availability, when the same admission price was charged at both theatres. This worked a particular hardship to the better theatres which paid higher film rentals than some other theatres which charged the same admission price. The difficulty became acutely accentuated during the period of the depression when admission prices were greatly reduced and the better theatres found themselves playing day and date with most of the theatres in the city although paying much higher film rentals and having much larger operating expense. The film exchanges were having to supply an inordinate number of prints and the situation was generally unsatisfactory. It was further complicated by give-aways, bargain nights and other indirect reductions in price. It was felt that this system was undesirable from the standpoint of distributor and

exhibitor alike, and destructive of the business of theatres in close proximity with each other. Attempts to remedy the situation during the N.B.A. period were shortlived.

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"Changes were proposed to Twentieth Century-Fox Film Corporation in a letter dated April 30, 1935, addressed to Mr. Ward Scott, District Manager of Fox Film Corporation by myself as Division Manager of Fox Midwest Theatres, Inc. I proposed, among other things, that particular runs be licensed to subsequent run theatres in these competitive neighborhood zones. This proposal contemplated the establishment of the principle of zoning as a supplement to clearance, which had been in operation in Kansas City prior to 1929 and which has successfully operated in many other parts of the country. I also negotiated separately with each other distributor. Each determined to license its pictures in line with this general idea.

"The propriety of these new arrangements relating to clearance was challenged by Mr. Emmanuel Bolsky, and other independent exhibitors in Kansas City (including one Esterley who is hereinafter referred to), in a proceeding instituted in the United States District Court for the Western Division of the Western District of Missouri. After a full trial of the issues raised in that proceeding, the United States District Judge, Merrill E. Otis, dismissed the complaint, and in connection therewith made certain findings of fact bearing directly upon the legality and fairness of these new run and clearance arrangements

(2796)

as follows:

"'XXVI.

"'The respective contracts made by defendant, Fox Midwest Theatres, Inc., with the respective distributors were made for valuable consideration on what is known as a clear run basis, but the runs in all of the contracts acquired by defendant, Fox Midwest Theatres, Inc., for particular theatres were in some instances prior to and in other instances subsequent to runs acquired by other theatres named in the particular contract as competitive to such theatre.

"'XXVII.

"'The competitive areas suggested by defendant, Fox Midwest Theatres, Inc., in its negotiations for contracts in the year 1935 for the 1935-1936 season were not originated at that time, but were substantially the same as those designated by it in the preceding year.

"'XXVIII.

"'The theatres in Kansas City, Missouri, owned, leased or operated by subsidiaries of defendant, Fox Midwest Theatres, Inc., do not as a whole enjoy, by virtue of the said contracts made in 1935, or any of them, superiority of runs and

(2797)

clearances as compared with the contracts made by defendant, Fox Midwest Theatres, Inc., in 1934 for the 1934-35 season, but, on the contrary, have on the average runs which are inferior to those enjoyed under contracts made in 1934 as respects priority of runs and clearances.

"'XXX.

"'The defendant, Fox Midwest Theatres, Inc., so far as shown by the evidence, at no time entered into and at no time has ever engaged with the other defendants in any conspiracy, contract or combination in unreasonable restraint of trade or commerce among the several states, or of a monopoly, attempt to monopolize or combination or conspiracy to monopolize to an unreasonable extent any part of the trade or commerce among the several states, substantial or otherwise, and whether having as its objects and purposes the objects and purposes alleged in paragraph V of the plaintiffs' bill of complaint herein, or any other objects or purposes.

"'XXXI.

"'None of the plaintiffs has shown any damage

(2798)

or threatened damage by reason of anything done or threatened to be done by defendant, Fox Midwest Theatres, Inc., or any of the defendants.'

"Furthermore, in the testimony referred to, there is the suggestion that, as a result of this change is clearance, Fox Midwest received some special privileges with respect to second and third run in Kansas City. This is not the fact. Prior to 1935, the Plaza theatre, the character of which has previously been referred to, had for a number of years been licensed second run in the Kansas City area. The third run had also, prior to 1935, been licensed to the Isis or Apollo theatres. These theatres continued to have the same second and third run, respectively, which they

had theretofore enjoyed and the change in clearance had no effect upon this situation in any way.

"With respect to this situation, Judge Otis, in the proceeding referred to above, also made specific findings of fact directly related thereto, as follows:

"'XXIX.

"'Under the evidence in this case, there is no complaint made of the runs provided by any of said contracts made in 1935 for the Uptown Theatre, the Plaza Theatre, the Isis Theatre, the Apollo Theatre, the Warwick Theatre, the Lincoln

(2799)

Theatre or the Benton Theatre. All of said theatres have for a number of years enjoyed at least as good runs as any provided for them in any of the said contracts made in 1935.'

"The Fairway theatre was also mentioned in this testimony. I previously referred to it and its playing position, as well as the reasons it is being operated as it is at the present time.

"In this same testimony reference was made to the Rockhill and Bijou theatres in Kansas City and to the fact that there was a change in the playing position of these two theatres. The circumstances surrounding this are very simple and readily explicable. The Rockhill and Bijou theatres are located in a subsequent run neighborhood area and are competitive with each other. There are four other competitive theatres in this zone. The Bijou theatre had been closed on and off for a number of years when it was acquired by Mr. J. W. Cotter sometime prior to 1934. He operated it as a first run theatre in the zone, charging an admission price of 25 cents. The Fox Midwest Rockhill theatre played third run in the zone and charged 15 cents.

"In 1937 Mr. Cotter sold the Bijou theatre to one Esterley. Esterley operated another theatre in Kansas City on a low admission price policy of 10 cents or 15

(2800)

cents. After continuing Cotter's 25 cent policy for a short time Fox Midwest was advised that he had determined that it would be preferable for him to operate the Bijou on a subsequent run with lower admission prices and with consequent lower film rentals and that he proposed to discontinue buying the first run. Fox Midwest thereupon licensed the first run for the Rockhill theatre and increased its admission price from 15 cents to 25 cents.

"The change in the clearance situation which took place in the 1935-36 season, and which has previously been referred to, bore no relation whatsoever to this situation. In negotiating with the distributors during that season I indicated a willingness to license either first, second or third run for the Rockhill and made a specific offer as to film rental Fox Midwest would pay in accordance with the run which the distributors would license to the Rockhill. The various distributors refused to accept my offer to license a first run, but instead licensed it to the Bijou and the third run to the Rockhill.

"As to the question by the counsel for the plaintiff appearing on page 1682 of the transcript that when this change of run took place the Rockhill 'took a very substantial clearance over the Bijou,' the Bijou availability under its new playing position was no different from that which the Rockhill had when it played on a

(2801)

lower admission price. The Rockhill took no greater clearance over the Bijou than the Bijou had previously taken over the Rockhill.

"The seating capacities of the Rockhill and the Bijou theatres are 1,466 and 700, respectively. The Bijou is not located in a very desirable neighborhood. This is one of the reasons which contributed to the desire of its owner to play on a subsequent run at a lower admission price. It was likewise somewhat competitive with the Oak Park theatre, an independent operation which was playing first run in an adjoining zone. When the Rockhill licensed the first run in the zone instead of the third run it paid substantially higher film rentals.

"Thus the acquisition of the prior run by Fox Midwest came about by reason of the relinquishment by the operator of the Bijou of its first run in that neighborhood area.

"B. *Wichita, Kansas*

"Pop.	1940 Census	127,308
"Pop.	Present (Est.)	150,000

"There are 6 first run theatres in Wichita, Kansas, all of which are affiliated with Fox Mfdwest. They are the Miller (seating capacity 1,930), Orpheum (seating capacity 1,659), Palace (seating capacity 1,234),

(2802)

Wichita (seating capacity 906), Sandra (seating capacity 640) and Boulevard (seating capacity 972).

"The Miller, Orpheum, Palace and Wichita theatres were acquired by Fox in 1929 from Miller and Chambers. The Sandra was constructed in July of 1939 and subsequently sold to Fox Midwest. This theatre operates as a moveover. The Boulevard was opened in May, 1945, and is now playing first run pictures day and date with either the Orpheum or the Miller.

Rhoden

"Second run in Wichita is exhibited at the Uptown theatre (seating capacity 1,389), which is operated by Fox Midwest.

"There are 10 other subsequent run theatres in Wichita, all of which are independently operated. Since Fox Midwest made its initial theatre acquisitions in 1929, there has been a growth of independent competition in Wichita. As of January, 1930, Fox owned 5 of the 10 operating theatres in Wichita. At the present time it owns 7 of the 17 operating theatres in Wichita. In December, 1943, Fox Midwest acquired a theatre in Plainview located just outside of the southeasterly city limits. The availability of this theatre is subsequent to three independently operated subsequent runs.

"The first run theatres of Fox Midwest are in all respects the most suitable for first run exhibitions.

(2803)

"C. KANSAS CITY, KANSAS

Pop. 1940 Census	121,458
Pop. Present (Est.)	150,000

"Kansas City, Kansas, is located just across the Missouri River from Kansas City, Missouri. There are 14 theatres in this city, two of which are operated as first run houses, one by Fox Midwest and one by an independent.

"The Granada theatre (seating capacity 1,248) was built by Midwest Theatres, Inc., a Miller and Rhoden company, in 1929, prior to the time when our theatres were acquired by Fox Midwest. This is the only theatre operated in Kansas City, Kansas, by Fox Midwest. It has always been operated as a first run

theatre, and, in my opinion, is the most suitable theatre in Kansas City, Kansas, for this policy. At the present time, it exhibits the product of Twentieth Century-Fox, Loew's, RKO, Universal and United Artists, as well as the product of other so-called independent producers.

"The other first run theatre in this city, the Electric (seating capacity 1,500) is operated by Mr. Frank Grubel, an independent exhibitor. This theatre was constructed in 1906. Though it has been modernized from time to time and is suitable for first run exhibition in this city, it is not as modern, nor as desirable as the Granada theatre. At the present time the

(2804)

Electric theatre exhibits the product of Columbia, Paramount, Republic and Warner Bros.

"The first run theatres in Kansas City, Kansas, are in every respect superior to the subsequent run theatres and are the most suitable for first run exhibition.

"The 12 subsequent run theatres are all independently operated and are in no wise controlled by affiliated exhibitors. All of them vigorously compete with one another and with the first run theatres.

"D. TOPEKA, KANSAS

Pop. 1940 Census	77,749
Pop. Present (Est.)	80,563

"There are 13 theatres in Topeka, five of which are operated by Fox Midwest. Four of these theatres, the Grand (seating capacity 1,262), Jayhawk (seating capacity 1,344), Orpheum (seating capacity 690) and Gem (seating capacity 612) were acquired by Fox Midwest from Mr. Miller and myself in October of

1929. The Oakland theatre was acquired by Fox Midwest under a lease in May, 1940.

"The Grand, Jayhawk, and Orpheum operate on a first run policy, and exhibit the product of all distributors. The Gem plays second run.

"The first and second run theatres in Topeka, Kansas, are the best and most suitable for first and second run exhibition.

(2805)

The remaining eight theatres in Topeka are operated by independents and have seating capacities ranging from 300 to 600.

"The Oakland theatre, operated by Fox Midwest, plays a fourth run, subsequent to the independently operated Ritz, Cozy and Co-ed theatres, and on the same availability as the independently operated Dickinson, Glen, Princess, and Crystal theatres. Some theatres which had been closed at the time of the acquisition by Fox in 1929 have since opened and are being independently operated.

"E. SPRINGFIELD, MISSOURI

Pop. 1940 Census	70,514
Pop. Present (Est.)	72,000

"There are seven open theatres in this city, four of which are operated by Fox Midwest. Fox acquired the Gillioz (seating capacity 1,438) and Plaza (seating capacity 1,049) theatres from Woolf & Shanberg in 1930. The Plaza is now closed. The Gillioz is a first run theatre.

"The Electric (seating capacity 1,557) is a first run theatre which was acquired by Fox Midwest by lease in January, 1934. In 1939, Fox purchased the fee.

"The Kickapoo (seating capacity 820) formerly the Princess, is a first run theatre which was acquired

(2806)

by lease in June of 1937. In 1944 it was completely remodeled and renamed the 'Kickapoo'.

"The Landers (seating capacity 1,080) is a second run theatre which was acquired by Fox Midwest from the Ensley Barbour estate in December, 1942.

"The Mozark (seating capacity 700) and Granada (seating capacity 700) theatres are operated by the Griffith circuit and have a third run. The Granada was built by independent operators after Fox Midwest acquired its theatres in Springfield.

"The Mulliken (seating capacity 619) is operated by the Dickinson circuit. Its policy of operation includes the showing of triple features. The Mulliken plays fourteen days behind the Mozark and Granada, usually on a spot booking basis.

"The physical characteristics of the first and second run theatres operated by Fox Midwest are in every respect superior to those of the subsequent run theatres and they are the most suitable theatres for first run exhibition.

"F. *Springfield, Illinois*

Pop.	1940	75,503
Pop.	Present (Est.)	80,000

"There are seven theatres in Springfield, Illinois.

"Fox Midwest has only one theatre in this com-

(2807)

munity, the Lincoln (seating capacity 993) which exhibits the product of Fox, United Artists and some of the product of Republic first run. This theatre

was acquired from the Frisina circuit in 1930. It is a well equipped, well located theatre, in all respects suitable for first run operation.

"The Roxy theatre (seating capacity 1,000) is operated by the independent Frisina circuit and exhibits the product of Warner and Universal first run.

"The Orpheum (seating capacity 2,000) is operated by Publix Great States Theatres Corporation which, I understand, is affiliated with Paramount. It exhibits the product of Loew's, Paramount and RKO first run.

"The Senate (seating capacity 1,000) is operated by an independent and exhibits the product of Columbia first run.

"The Tivioli (seating capacity 650) is operated by Frisina on a second run policy as is the Strand (seating capacity 700) which is operated by the same interests which operate the Senate.

"The Esquire (seating capacity 800) is operated by Frisina as a third run theatre.

(2808)

"The foregoing represent the only six cities in the Kansas, Missouri, Illinois, Iowa and Nebraska territory having a population of 50,000 and more in which Fox Midwest has theatres. In three of these cities there is independent or affiliated first run competition with Fox Midwest. In the remaining three cities Fox Midwest has all the first run theatres. In all of these cities, there is independent subsequent run competition.

"Fox Midwest also operates theatres in six cities which have populations of between 20,000 and 50,000, in this same territory.

"In four of these cities, namely, Belleville, Illinois; Salina, Kansas; Sedalia, Missouri and Council Bluffs, Iowa, independent operators exhibit major product first run in competition with the first run theatres operated by Fox Midwest. In the other two cities, namely, Hutchinson, Kansas, and Joplin, Missouri, Fox Midwest operates the first run theatres but there is independent subsequent run competition.

"There are five other cities in the states of Kansas and Missouri having a population in excess of 20,000 in which Fox Midwest has no theatre interests.

"Fox Midwest also operates theatres in about 40 communities in this territory which have a population of less than 20,000.

(2909)

"In the Government's Exhibit 371 reference is made to only 13* communities in the states of Kansas, Illinois, Missouri and Iowa which come within this category** in which it is claimed that there are no independent theatres. Each of the other 27 has independent theatres in operation.

"While Fox Midwest has theatre interests in only 40 communities having a population of between 3,800 and 20,000 there are more than 87 other communities in the states of Kansas and Missouri alone which fall within this population range.

"An examination of the historical background of some of the towns in which there are no theatres in

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*This figure should be 12. The Government's designation of Fort Madison, Iowa as a town in which there is no independent competition is incorrect. The Iowa theatre (seating capacity 683) in Fort Madison is independently operated by Richard Gaston in competition with the Fox Midwest Strand and Orpheum theatres.

**Exhibit 371 purports to list all towns in the United States under 25,000 population in which there are no independent theatres but those towns listed under the states referred to in the text are all under 20,000.

competition with the Fox Midwest houses discloses that this was precisely the situation as it existed prior to the acquisition by Fox Midwest of any interest in those towns. In other words, the appearance of Fox Midwest on the scene did not, in these situations, diminish or eliminate competition. On the contrary, competition failed to develop in certain towns mainly

(2810)

because their populations were not sufficiently large enough to support a greater number of theatres. On the other hand, there are a number of towns in which there was no competition when Fox Midwest acquired an interest but in which independent competition subsequently developed. Furthermore, in the Kansas City Exchange territory there are a number of towns in which there is no competition within the town itself and in which the theatres are operated entirely by independents.

"There are a number of illustrations of the growth of independent competition in this territory which I could cite. Independent operators have also built up substantial theatre circuits. For example, in the past seven or eight years Mr. Dickinson has succeeded in building up a circuit consisting of 23 theatres located in the Kansas City exchange territory, including Kansas City, Missouri, itself.

"Fox Midwest has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of

(2810-A)

motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Fox Midwest, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes."

(Sgd) ELMER C. RHODEN.

(2811)

(The affidavit of F. H. RICKETSON, JR. is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, TWENTIETH CENTURY-FOX FILM CORPORATION and NATIONAL THEATRES CORPORATION, that, if called as a witness in this proceeding, F. H. RICKETSON, JR. would testify as follows:

"I am a resident of Denver, Colorado, where I have resided continuously since 1918, except for the period of approximately one year in 1931 and 1932. Since the year 1925, I have been continuously engaged in the motion picture theatre business. From 1935 to date, I have been President and a director of Fox INTER-MOUNTAIN THEATRES, INC., hereinafter referred to as 'FOX INTER-MOUNTAIN', a Delaware corporation, having its principal office and place of business in Denver, Colorado. The defendant, National Theatres Corporation, owns all of the stock of Fox Inter-Mountain.

"Fox Inter-Mountain has an interest, either directly or through subsidiary corporation, in 92

theatres* and 5 dismantled theatre properties located

(2812)

in various cities and towns in the States of Colorado, Idaho, Montana, Nebraska, New Mexico, Wyoming and Utah.

"I am generally familiar with the allegations of the plaintiff in this action.

"ORIGIN OF THE BUSINESS OF FOX INTER-MOUNTAIN PRIOR TO ACQUISITION BY AFFILIATE OF FOX FILM CORPORATION.

"A great many of the theatres now operated by Fox Inter-Mountain were originally part of two separate, independently operated groups of theatres, organized prior to 1929.

"One of the independent groups of theatres was organized and built up by three pioneers in the motion picture business in the Denver Exchange territory, Gus and Max Kohn, and Frank Fairchild. These three men began their theatre activities in 1909 and gradually acquired over the next twenty years a total of approximately 20 theatres located in five towns in Colorado, one in Wyoming and two in New Mexico. In all but one town the theatres operated by these individuals were the only theatre or theatres in the respective communities where they were situated.

"The theatres were operated by the Kohns and Fairchild until August, 1929, when they disposed of

(2813)

their interests to Fox Rocky Mountain Theatre Co., an affiliate of Fox Film Corporation.

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*Fox Inter-Mountain is also operating, under temporary arrangements with one exhibitor who is in the armed forces, 4 theatres in Colorado and 2 in New Mexico.

"The other independent circuit was developed by me and my associates between the years 1925 and 1929. Previous to 1925, I had been employed by the Paramount Company and worked for a time in its distribution department and for a time in its theatre department. After my employment with the Paramount Company ceased, I decided to enter into the theatre business for myself. Together with a partner, A. E. Dickson, I acquired an interest in a theatre located in Montrose, Colorado. During the next few years my associates and I acquired interests in theatres in several other towns in Colorado, Nebraska and Wyoming and by 1929, the theatre business under our management consisted of approximately 25 theatres located in Denver, Boulder, Delta, Montrose, Sterling and Walsenburg, Colorado, Sheridan, Wyoming and in Sidney, Nebraska.

"In all the towns in which I was operating theatres, with the exception of Denver, Colorado, there were no other theatres in these towns besides ours. Many of these communities were relatively small and could not then, nor can they now, support more than one or two theatres.

"In the 1920s there were many important changes

(2814)

in the motion picture industry. In that period not only the technique of exhibition was radically changed, but the public was demanding constantly greater service from the exhibitors. Many new theatres were built in Colorado, Wyoming and New Mexico in response to public demands for better theatre accommodations. I and my associates erected new theatre buildings of a modern type in some of the towns in which we were operating. Likewise, producing companies had begun to acquire theatre holdings in this

territory in order to have satisfactory outlets for their product. In the early '20s Universal had theatres in Nebraska as well as one in Denver. Paramount had an interest in theatres in Denver and other Colorado towns which it was using as an outlet for its product. RKO, or as it was known in those days, the Keith-Albee-Orpheum Circuit, was operating a theatre in Denver. In addition, there were several other independent circuits operating in the territory.

"In this same period sound pictures were introduced and exhibitors were faced with new conditions of radical importance. To equip a theatre with facilities for reproducing sound pictures was quite expensive. The cost of operating, and the cost of film, was rapidly increasing.

"Certain distributors in this period evinced an

(2815)

an interest in the acquisition of theatres. In August of 1929 negotiations commenced between me and representatives of Fox Rocky Mountain Theatre Co. for the purchase of the theatres in which I had an interest. In the same period representatives of Paramount also made an offer to me, as did certain other exhibitor organizations. I and my associates determined that the offer made by the Fox affiliate was the most desirable from our standpoint and the sale to Fox Rocky Mountain Theatre Co. was concluded in October, 1929.

"At approximately the same time that the above acquisition was made by Fox Rocky Mountain Theatre Co., arrangements were concluded for the purchase of the theatre interests of Kohn and Fairchild, hereinabove referred to, as well as the theatre interests of three other exhibitors in Western Nebraska, which theatres were part of the Denver Exchange ter-

ritory. Likewise acquired were theatres located in Wyoming which had formerly been operated by three other exhibitors. None of the theatre interests so acquired at that time was in competition with each other.

"After the acquisition of these two groups of theatres by Fox Rocky Mountain Theatre Co., I was employed by that company to supervise the operation of its newly acquired theatres in the territory served by

(2816)

the Denver offices of the distributors, which I did, and have since, with the exception of a brief period during 1931-1932.

"In 1932, the theatre business felt the full effects of the depression, both nationally and in the rocky mountain states. During that year, Fox Rocky Mountain Theatre Co. sustained large operating deficits, although substantial amounts of additional capital were invested in the operation. Many of its leases and other fixed obligations and commitments became too burdensome to enable it to carry them under existing business conditions. On March 8, 1933, the company was adjudicated a bankrupt in the District Court of the United States for the Western Division of the Western District of Missouri. From that time until its reorganization in 1935, its affairs were conducted by a trustee in bankruptcy. In the ensuing reorganization, which resulted in the formation of the present Fox Inter-Mountain Theatres, Inc., all of the allowed claims were paid and to a large extent the theatres theretofore operated under my supervision have continued as a part of the present Fox Inter-Mountain company.

(2817)

"DESCRIPTION OF PRESENT CORPORATE STRUCTURE AND GENERAL BUSINESS PRACTICES OF FOX INTER-MOUNTAIN.

"As previously stated, National Theatres Corporation owns all of the stock of Fox Inter-Mountain. National Theatres Corporation also has a stock interest in various other subsidiaries which are engaged in the motion picture exhibition business in other parts of the United States. Fox Inter-Mountain conducts its business, however, as a separate, local independent company.

"The directors of Fox Inter-Mountain are: F. H. Ricketson, Jr., Arthur H. Bosworth, Henry C. Van Schaack, I. Weiner and Charles P. Skouras. All of these persons reside in Denver, Colorado except Mr. Charles P. Skouras. Henry C. Van Schaack and Arthur H. Bosworth are not officers of Fox Inter-Mountain or officers or directors of National Theatres Corporation. As President of Fox Inter-Mountain, I am in charge of and supervise all of the general policies of its operation. Naturally, on account of its financial interest, National Theatres Corporation exercises a certain amount of direction over matters involving financial commitments of a capital nature, such as new theatre construction, acquisitions, improvements and the rehabilitation of theatre buildings.

"The actual operation of the Fox Inter-Mountain theatres is conducted through Fox Inter-Mountain

(2818)

Amusement Corporation, a wholly-owned subsidiary 'service corporation.' Among the services performed by Fox Inter-Mountain Amusement are: the licensing and booking of films, the necessary purchasing and

maintenance for each theatre, the obtaining and carrying of insurance, and the furnishing of general accounting facilities and other services incident to the operation of the theatres. The service corporation is organized with several departments, each of which performs and is responsible for one or more of the several functions of the corporation. It has a total of 83 persons employed in its various departments in the Denver office of the corporation and a total of 1,251 other employees who manage and maintain the theatres.

"The geographical extent of the area in which Fox Inter-Mountain has theatres has made necessary the operation of the theatres by districts. There are four geographical districts and over each is a district manager. One is the Denver city district; another the northern district, which includes towns in Northern Colorado, Nebraska and Wyoming; the third is the southern district, which includes towns in Southern Colorado and New Mexico; and the fourth is the Montana district, which includes towns in Idaho, Montana and Utah. Each of the district managers, except the district manager of Idaho, Utah and Montana, has his office in Denver. Fox Inter-Mountain maintains

(2819)

a separate office in Salt Lake City, where the manager of this district resides. This district is operated with a greater degree of autonomy than that which exists in the other districts.

"All licenses for motion pictures to be exhibited in Fox Inter-Mountain's theatres located in Colorado, Wyoming, Nebraska and New Mexico are entered into in the Denver Exchange territory. Separate consideration and negotiations are involved with respect to those theatres serviced out of the Salt Lake City Ex-

change territory and separate license agreements are generally made for these theatres. While the personnel of the film buying department furnishes services in connection with the film licenses for these theatres, as well as those served out of the Denver Exchange territory, the district manager of the theatres in Montana, Utah and Idaho generally participates in negotiations relating to films for these theatres.

"A. *Business Practices Relating to the Licensing of Films.*

"Fox Inter-Mountain licenses pictures only for those theatres which it operates.

"One of the departments of Fox Inter-Mountain Amusement Corporation is the film buying department, consisting of 9 employees, including buyers,

(2820)

bookers, statisticians and skilled film clerks. The chief function of this department is to negotiate and obtain licenses for the pictures which are to be exhibited in the various theatres of Fox Inter-Mountain and to arrange for the dates on which the pictures are to be shown. All of the personnel of the department must be highly trained and skilled. They must be qualified to appraise the quality of all pictures. They must know thoroughly all of the theatres in which Fox Inter-Mountain has interests and the communities in which such theatres are located. They must have an accurate knowledge of the public taste, and must be able to apply that knowledge with respect to each theatre in the locality where it is situated. Some pictures will inevitably be more popular in one community than they will be in another and the film buying department must decide when film are licensed

which pictures should play in which theatres in every situation in which Fox Inter-Mountain has an interest.

"The product is licensed from the distributing corporations which are parties to the Consent Decree in groups, generally containing five or less pictures, each as offered by the respective distributors. The product of each of the other distributors except United Artists is generally negotiated for and licensed on the basis of the entire season's product.

(2821)

"Prior to the latter half of 1941, almost all of the distributors offered and licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York, where negotiations were generally conducted with each of the distributors for the licensing of pictures for theatres in which National was interested. In the latter part of 1941, there was a complete decentralization of National Theatres Corporation's film licensing department. Thereafter, the licensing of films and the negotiations preliminary thereto have assumed a local character.

"In certain instances a distributor may have licensed its product to a subsidiary of National Theatres Corporation other than Fox Inter-Mountain before negotiations between Fox Inter-Mountain and that distributor have been commenced. In such an instance, a general formula may have been worked out between the distributor and the other subsidiary of National, and the formula might relate to the computation of film rental based upon certain percentages applicable to each picture, which percentages would be applicable to the theatres which play the pictures on a percentage basis, rather than a flat rental basis. Subsequently, this formula, worked out and agreed

upon by another subsidiary of National and a distributor, might be adapted to the theatres of Fox Inter-Mountain or it might suggest a general basis for ne-
(2822)
gotiations. However, Fox Inter-Mountain is not bound to adopt the formula or to follow any other method made by a subsidiary of National other than itself.

"Naturally, there is an exchange of information between the executives of the various subsidiaries of National Theatres Corporation. The information exchanged has to do with all phases of theatre operating business, such as the terms on which films are licensed, the box office possibilities of pictures, and methods and policies applied in the general management and operation of theatres.

"All license agreements which have been negotiated between the representatives of Fox Inter-Mountain and any distributor are either submitted to me for my approval or authority to execute the same must be specifically delegated by me.

"When film licenses are negotiated, each theatre in which Fox Inter-Mountain has an interest is generally given separate consideration and a separate, independent deal is made as to each such theatre.

"Fox Inter-Mountain endeavors to license all worth-while film product produced by all producers, including some which are not defendants in this case —Republic, Monogram, PRC and others. The film licensing procedures used by Fox Inter-Mountain with respect to these other producers are the same used in
(2823)
licensing films from the producers who are defendants in this case.

"There is no standard formula for determining licensing terms for every theatre in which Fox Inter-Mountain has an interest, and there is no standard

formula applicable to each theatre. Licensing agreements for some of the theatres of Fox Inter-Mountain provide for a payment of a specific, fixed amount as film rental. The flat rental to be paid under the license agreement with respect to such theatres inevitably varies with the distributor and with the picture. The film rental for certain pictures might be $100 and on others it might be $20. License agreements for other theatres of Fox Inter-Mountain may provide for a determination of film rental on the basis of a percentage of the gross business done by the theatre. As in the case of the flat rental, there is no standard formula for determining the percentage term which is applicable to every theatre or to any one theatre. The methods of determining the rental under these percentage rental terms will vary in many respects depending upon the particular distributor involved. A license agreement with one distributor might provide for a film rental based simply on a certain percentage of the gross receipts. A license agreement with another distributor might provide for what is called a 'sliding scale' arrangement, under which the per-

(2824)

centage of gross receipts which is to be paid as rental will be graduated in accordance with the amount of business done by the theatre on a particular picture.

"All of these various methods by which product is licensed for a theatre on a percentage basis simply represent a means of determining the amount of rental which the exhibitor should fairly pay. The various refinements which sometimes occur in license agreements calling for the payment of rental based on percentages are used solely for the purpose of enabling the distributor to realize a greater amount of return on pictures which are outstanding box office attrac-

tions, and to minimise his return on pictures which are not as popular and make less money than was expected at the time the license agreement was made.

"During the time when negotiations are going on between the representative of Fox Inter-Mountain and the distributor for the licensing of films, the subject of clearance is considered. My attention has been directed to the fact that the history, purpose and effect of clearance generally has been described in other testimony in this proceeding and I will not, therefore, discuss that phase of the matter in this statement.

"I do wish to point out, however, that clearance, while an important part of every film license, is not separately negotiated every time a film license is made.

(2825)

Once a fair and reasonable clearance has been agreed upon between a distributor and an exhibitor, it tends to become fixed and will ordinarily be the same in a series of license agreements in the absence of changed competitive conditions. There are exceptions, however, to this.

"I have been advised by counsel that the Government has made the contention that the distributor and the affiliated theatres agree upon clearances and minimum admission prices for the purpose of fixing the admission price which the exhibitors of subsequent run theatres can charge. This I deny as far as Fox Inter-Mountain is concerned. Where Fox Inter-Mountain has a prior run theatre, I have no interest whatsoever in what the maximum admission price might be at subsequent run theatres of competing exhibitors. In fact, it is preferable from the standpoint of Fox Inter-Mountain, that an admission price be charged at competing subsequent run theatres which, in amount, is as close to what is charged by a prior run

Fox Inter-Mountain theatre as the subsequent run exhibitor believes desirable.

"Therefore, not only have I never entered into any license agreements, contracts, understandings express or implied, with any distributor in an attempt so to fix the maximum admission price of a subsequent run competing theatre, but it simply would not be
(2826)
prudent to do so on my part from a business point of view.

"I desire to emphasize the following facts relating to the licensing of films:

"1. In licensing films for exhibition in Fox Inter-Mountain theatres, the controlling and only consideration is to secure adequate product on fair and desirable terms.

"2. In negotiating for product with any of the distributors who is interested in the operation of theatres, Fox Inter-Mountain and its executives do not and are not concerned with whether Twentieth Century-Fox Film Corporation has licensed its product for exhibition in theatres in which any such distributor has an interest.

"No representative of Twentieth Century-Fox Film Corporation or National Theatres Corporation has ever indicated to me directly or indirectly, that in licensing films from other distributors, consideration should be given by me to whether or not Twentieth Century-Fox Film Corporation has licensed pictures to the theatres operated by such other distributors. For example, when negotiations for pictures are conducted with Warners, Fox Inter-Mountain does not know whether Twentieth Century-Fox has licensed any of its product to Warners for exhibition in the-

atres affiliated with Warners. Moreover, it does not have any knowledge as to whether Twentieth Century-

(2827)

Fox is even negotiating with Warners, or as to whether a license agreement exists with Twentieth Century-Fox for Warners' theatres, or any of the terms of any such license agreement that might exist. If for some reason, Twentieth Century-Fox did not license its product to Warners' theatres, the desire of Fox Inter-Mountain to license Warner product for Fox Inter-Mountain theatres would not be changed. The same would be true in the case of any other distributor.

"Furthermore, I am employed under a contract by Fox Inter-Mountain, the terms of which require that I devote my full attention to the operation of Fox Inter-Mountain theatres in consideration of a fixed salary and a participation in the profits of the Company. I also own stock in National Theatres Corporation. All of my personal interests indicate, therefore, and the fact is, that I am not concerned with the effect which my policies of operation may have upon the distribution of Twentieth Century-Fox pictures in other theatres.

"Twentieth Century-Fox, by reason of its ultimate interest in the operations of Fox Inter-Mountain, as well as other subsidiaries of National Theatres Corporation, naturally offers its pictures to Fox Inter-Mountain for licensing in the Fox Inter-Mountain theatres, and all of such theatres license the product of this distributor. In connection with such licensing, however, there are often protracted negotiations as

(2828)

to the terms which the Fox Inter-Mountain theatres will pay to Twentieth Century-Fox, for Fox Inter-

Mountain and I, individually, have a very definite interest in procuring film service from this distributor on as reasonable terms as is consistent with the quality of its product.

"Furthermore, in view of the relationship referred to above, Fox Inter-Mountain naturally endeavors to give to the pictures of Twentieth Century-Fox, particularly in important first run situations, the best possible exploitation and treatment consistent with good exhibition policies.

"FOX INTER-MOUNTAIN THEATRES AND THE COMPETITIVE SITUATION IN THE COMMUNITIES WHEREIN THEY ARE LOCATED.

"A. Denver, Colorado

"The population of Denver in 1930 was 287,861 and by 1940 it had increased to 322,412. The estimated population of Denver in 1945 is 450,000, or more than 100,000 greater than it was in 1940. This is the only city having a population in excess of 100,000 in which Fox Inter-Mountain operates theatres.

"Denver has been the center of great war-time activity and, as indicated by the figures referred to above, there has been a great influx of population since 1942.

(2829)

"There are 38 theatres in Denver. Fox Inter-Mountain has an interest in 12.

"(1) First Run Theatres

"There are four large theatres operating on a first run policy in downtown Denver. Two of them are operated by Fox Inter-Mountain, one by RKO (in which operation I am informed Loew's also has an

interest) and one operated by an independent exhibitor. The latter two theatres are in direct and vigorous competition with the theatres of Fox Inter-Mountain. There follows a description of the theatres and the product licensed by them.

"The Denver theatre (2510 seats) is operated by Fox Inter-Mountain. It was constructed in 1927 by an affiliate of Paramount. Paramount's interest in this theatre was terminated in the bankruptcy of that company in 1932, and since that time Paramount has not had any interest in it. The Denver theatre is located in the heart of the downtown theatre section of Denver. It is a fine, up-to-date de luxe theatre, and, in my opinion, because of its location and modern conveniences, provides the best first run outlet for product in the city.

"The Paramount theatre (2,096 seats) is also one of Denver's finest theatres. It is located directly across the street from the Denver and was constructed in 1931. It is modern, commodious, up-to-date in

(2830)

every respect and can likewise be considered one of the de luxe theatres of this section of the country. It, too, was originally constructed by an affiliate of Paramount, but the interest of that company was also terminated in the Paramount bankruptcy.

"The product of Twentieth Century-Fox, Warner Bros., Universal, United Artists and Columbia is licensed for first run exhibition in these theatres. It should be noted that for a period prior to 1937 these theatres were operated by an independent exhibitor and during such operation substantially the same product now being exhibited first run in the theatres was licensed to this independent operator. The product licensed to these two theatres would, in my opinion,

be offered to them, regardless of affiliation, because they have the potential ability to pay the highest film rental and to afford to a distributor the best in the exploitation of its product.

"The RKO theatre, the Orpheum (seating capacity 2,596) is the largest theatre in Denver. It, too, is a fine de luxe theatre, having been constructed in 1931 by an affiliate of RKO. Originally it operated for a short while with a policy of vaudeville and first run pictures, but for the last ten years has operated substantially exclusively on a motion picture policy. This theatre has for a number of years been operated ex-

(2831)

clusively as a first run theatre and at the present time regularly exhibits first run product of RKO and Loew's.

"The Denham theatre (1,392 seats) is operated by an independent exhibitor, Mr. Dave Cockrill. While it does not have as large a seating capacity and is not as well located as the other downtown first run theatres, it is, nevertheless, well suited for first run exhibition and has all of the customary facilities and equipment of a first run house. The Denham regularly licenses the product distributed by Paramount and has done so for a long period of time.

"The three interests operating these four theatres compete with each other in every possible way consistent with fair business practices. No agreement or understanding of any kind exists between them with respect to the operation of their first run theatres.

"Fox Inter-Mountain is also interested in the Telenews theatre in downtown Denver, which theatre, however, exhibits only newsreels and short subjects. The product exhibited in the Fox Inter-Mountain

theatres in downtown Denver is also exhibited day and date in two other theatres operated by Fox Inter-Mountain, namely, the Esquire (742 seats) and the Webber (732 seats). This policy of day and date operation in these theatres was inaugurated during

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the war. The downtown theatres referred to above had been particularly congested with patronage, largely of a transient nature, partly by reason of excursions into Denver made by the many members of the Armed Services from nearby military camps and stations. Theatre accommodations were crowded, and transportation facilities were overburdened. For the purpose of relieving this situation the policy referred to above was adopted.

"The Aladdin theatre (1,376 seats) and the Rialto theatre (878 seats) are also operated by Fox Inter-Mountain theatres and are operated as moveover theatres. They charge the same admission price as the downtown theatres, but exhibit on such policy only the product exhibited in the Fox Inter-Mountain downtown first run theatres.

"(2) *Subsequent Run Theatres*

"There are 29 subsequent run theatres in Denver. Five of these are operated by Fox Inter-Mountain. The others are operated by independent exhibitors. With respect to three of the Fox Inter-Mountain theatres, independently operated theatres in competition with them regularly exhibit product on the same or on a prior run. All of these subsequent run theatres are in competition with each other, as well as with the first run theatres.

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"B. *Communities With A Population Less Than 100,000*

"Fox Inter-Mountain has no theatre interests in any of the cities of Colorado, Idaho, Montana, Nebraska, New Mexico, Utah and Wyoming having a population of over 50,000 but under 100,000.

"Fox Inter-Mountain is interested in the operation of theatres in three out of a total of eight cities in these states which have a population of from 25,000 to 50,000. It also operates theatres in thirteen cities out of a total of thirty-one located in the seven above states with populations ranging from 10,000 to 25,000. In the approximately 395 communities in these states having a population of less than 10,000, but more than 1,000, Fox Inter-Mountain has theatre interests in only eighteen*.

"*Colorado*

"There are two cities in Colorado with a population of more than 20,000 but less than 55,000. Fox Inter-Mountain has no interest in theatres in either city. Five cities have a population ranging from 10,000 to 20,000. Fox Inter-Mountain has a theatre interest

(2834)

in three of these, Boulder, Fort Collins and Trinidad.

"Fox Inter-Mountain operates the only theatres regularly operated in Boulder and in Fort Collins. In Trinidad, Fox Inter-Mountain has two theatres; one operates on a first run policy, the other on combined first and second run. There are two other the-

*Fox Inter-Mountain also operates theatres in three other towns of this population category but only on a temporary basis while the regular exhibitor is in the military service.

atres in Trinidad operated by independent exhibitors on a second and third run policy in competition with the Fox Inter-Mountain theatres.

"Colorado has 73 towns with a population under 10,000, but over 1,000. Fox Inter-Mountain has an interest in theatres in eight* of these towns. As indicated in the Government Exhibit No. 371 in this case, Fox Inter-Mountain operates all of the theatres in Del a, Durango, Leadville, Longmont, Sterling and Walsenburg. In 50 other towns in Colorado with a population under 10,000 but over 1,000, one exhibitor other than Fox Inter-Mountain, operates the only theatre or theatres.

"Idaho

"Idaho has seven towns with populations of from 10,000 to 26,000. Fox Inter-Mountain has an interest

(2835)

in three of these towns, Pocatello, Idaho Falls and Nampa. In Pocatello and Idaho Falls, the Fox Inter-Mountain theatres are operated in competition with the theatres of other exhibitors. In Nampa, Fox Inter-Mountain operates the only two theatres. Prior to the time when the theatres in Nampa were acquired by Fox Inter-Mountain, there were only two theatres in that community. The situation has remained unchanged.

"Fox Inter-Mountain has a theatre interest in one out of forty-five Idaho towns having a population under 10,000, but over 1,000. The three Fox Inter-Mountain theatres in this town, Caldwell, were acquired in 1937, two from the same exhibitor who had

*Fox Inter-Mountain operates theatres in two other towns of this category, but only on a temporary basis while the regular exhibitor is in military service.

previously operated the theatres with first and second run product. Idaho has twenty-nine other towns of less than 10,000 but more than 1,000 population in the Sale Lake City Exchange territory where one exhibitor operates the only theatre or theatres in the town.

"MONTANA

"Montana has two cities, Butte and Great Falls, of over 25,000 but under 50,000 population. In Butte, Fox Inter-Mountain theatres are operated in competition with the theatres of an independent exhibitor in both first and second runs. In Great Falls, Fox

(2836)

Inter-Mountain operates the first run theatres. There is subsequent run independent competition.

"Montana has four cities with a population of from 10,000 to 25,000, Anaconda, Billings, Helena and Missoula. Fox Inter-Mountain operates all of the theatres located in Billings, Helena and Missoula.

"Fox Inter-Mountain operates theatres in only one of forty-seven towns of Montana with a population under 10,000, but over 1,000, namely; Lewistown, where it operates all of the theatres. There are thirty-five other towns in Montana in the Salt Lake City Exchange territory of less than 10,000 but more than 1,000 population where the only theatre or theatres are operated by one exhibitor.

"NEW MEXICO

"Fox Inter-Mountain operates no theatres in any of the New Mexico cities having a population of over 10,000.

"Fox Inter-Mountain operates theatres in two* out of the forty-one towns in New Mexico having a population under 10,000, but over 1,000. As appears from Government Exhibit No. 371, Fox Inter-Moun-

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tain operates all of the theatres in these two towns, Las Cruces and in Las Vegas. The independent exhibitor from whom the theatres were acquired by Fox Inter-Mountain in each instance operated these theatres without competition. New Mexico has twenty-two other towns in the Denver Exchange territory of less than 10,000 but more than 1,000 population where one exhibitor operates the only theatre or theatres in the town.

"NEBRASKA

"Nebraska has two important cities, Omaha and Lincoln. Fox Inter-Mountain has no interest in any theatres in either.

"In the seven cities with a population of from 10,000 to 20,000, Fox Inter-Mountain has theatre interests in one town, North Platte. Here, the Fox Inter-Mountain theatres are operated in competition with the theatres of an independent exhibitor.

"There are 100 towns in Nebraska with a population under 10,000 but more than 1,000. Fox Inter-Mountain has interests in three of these communities, and, in each instance, the Fox Inter-Mountain theatres are the only theatres in the town. Further, in each instance, the Fox Inter-Mountain theatres were operated without competition by the exhibitor from

(2838)

whom the theatres were acquired. Nebraska has thir-

*Fox Inter-Mountain operates theatres in one other town of this category but only on a temporary basis while the regular exhibitor is in the military service.

teen other towns in the Denver Exchange territory of a population of less than 10,000 but more than 1,000 where one exhibitor operates the only theatre or theatres in the town.

"UTAH

"Fox Inter-Mountain Theatres operates two theatres in only one city in Utah, namely Ogden, which had a population in 1940 of 43,688. These theatres are operated in competition with theatres operated by an affiliate of Paramount.

"WYOMING

"Wyoming has four cities with a population from 10,000 to 25,000. Fox Inter-Mountain operates in three of these, Cheyenne, Rock Springs and Laramie, and in these three communities there are no other theatres, as appears from the Government's Exhibit 371.

"Wyoming has twenty-seven communities under 10,000 but more than 1,000 population. Fox Inter-Mountain operates in only four of these, and in these four communities there are no other theatres. Wyoming has twenty-three other towns between 1,000 and 10,000 population where one exhibitor, other than Fox Inter-Mountain, operates the only theatre or theatres.

"With respect to the foregoing general description

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of the competitive situation in the territory in which Fox Inter-Mountain operates, it should be noted that the territory comprises many sparsely settled sections in which small communities are separated from each other by wide distances. In many of these communities, as I have previously indicated, there is only one theatre and in others in which there are two theatres in existence only one is in operation. Because of

their size and because of economic conditions existing in them, it is not feasible to operate more than one theatre.

"As indicating that it is inherent in the nature of the business in these smaller communities than only one theatre can be operated, or that where there are more, they are operated by a single exhibitor, I have referred in the discussion of the competitive situation of Fox Inter-Mountain to the large number of communities in this territory in which all the theatre operations are conducted by a single, independent operator.

"In all of the communities in which it operates, competitively or otherwise, the theatres of Fox Inter-Mountain provide adequate and suitable accommodations for the public at fair admission prices; its theatres are well operated and well-maintained. In all

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competitive situations its theatres are either better than, or comparable with, competing theatres.

"Fox Inter-Mountain has not conspired or combined with, and has no agreement or understanding with any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Fox Inter-Mountain, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes."

(Sgd) F. H. RICKETSON, JR.

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(The affidavit of Charles P. Skouras is as follows:)

IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding Charles P. Skouras would testify as follows:

My address is 1609 West Washington Boulevard, Los Angeles, California. I am the president of National Theatres Corporation, one of the defendants in this case. I have held that office since April of 1942.

The directors of National Theatres Corporation are: Spyros P. Skouras, Charles P. Skouras, H. C. Cox, J. R. Dillon, E. G. Hines, Dan Michalove, W. C. Michel, Otto E. Koegel and Donald A. Henderson.

I am also the president of Fox West Coast Theatres Corporation (a wholly owned subsidiary of National Theatres Corporation), having held that office since its organization in the spring of 1933.

The directors of Fox West Coast Theatres Corporation, all of whom are residents of Los Angeles County, California, are as follows: Charles P. Skouras, John B. Bertero, George Topper, George Bowser, T. H. Sword and H. C. Cox.

I have been engaged in the theatre exhibition business continuously since 1912. I first became asso-

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ciated with National Theatres Corporation in January of 1932. At that time it was known as Wesco Corporation and was a wholly owned subsidiary of Fox Film Corporation, and I was employed to act as one

of the managers of the theatres in which it was interested.

DESCRIPTION OF NATIONAL THEATRES CORPORATION.

National Theatres Corporation is a holding corporation which itself does not operate theatres, but which owns the stock of other corporations which operate approximately 600 theatres, either directly or through subsidiaries, in the continental United States. Approximately 98% of the stock of National Theatres Corporation is owned by the defendant Twentieth Century-Fox Film Corporation. National Theatres Corporation now has five principal domestic subsidiaries. Each of these subsidiaries conducts its affairs independently of the others. Each has its principal office in the area in which it operates. Each has its separate president and operating head who has authority to direct and supervise its theatre operations and those of its subsidiaries. These five principal subsidiaries are as follows:

1. Fox West Coast Theatres Corporation, which, directly or through its subsidiaries (in a few of which

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it owns only an indirect minority interest) operates or supervises the operations of approximately 265 theatres in California and Arizona. It has its principal office in Los Angeles and a subsidiary office in San Francisco. I am the president and chief executive of this company. (For convenience, Fox West Coast Theatres Corporation is hereinafter referred to as "Fox West Coast" and any theatre in which it has an interest, direct or indirect, and which is supervised by it or a subsidiary, is hereinafter referred to as a "Fox West Coast theatre.")

2. Evergreen State Amusement Corporation, 53.58% of the stock of which is owned by National Theatres Corporation, is interested in approximately 44 theatres in Washington and Oregon and has its principal offices in Seattle, Washington. The principal minority stockholders, Messrs. Frank L. Newman, Sr. (president of the company), Al Rosenberg and Al Finke, are the operating heads of this company.

3. Fox Inter-Mountain Theatres, Inc., is interested in approximately 100 theatres in Wyoming, Colorado, Utah, New Mexico, Idaho, Montana and Nebraska. It has its principal offices in Denver, Colorado, and a subsidiary office at Salt Lake, Utah. F. H. Ricketson, Jr. is the president and operating head of this company.

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4. Fox Midwest Theatres, Inc. is interested in approximately 128 theatres in Missouri, Kansas, Illinois, Nebraska and Iowa and has its principal offices in Kansas City, Missouri. Elmer C. Rhoden is the president and operating head of this company.

5. Fox Wisconsin Theatres, Inc. is interested in approximately 66 theatres in Wisconsin and the upper peninsula of Michigan, and has its principal offices in Milwaukee, Wisconsin. Harold J. Fitzgerald is the president and principal operating head of this company.

National Theatres Corporation (which up to November 1934 was known as Wesco Corporation) acquired its interests in these five principal subsidiaries in connection with the reorganizations through bankruptcy proceedings of certain theatre operating com-

panies which were already established in their respective areas. Substantially all of the stock of these predecessor companies had been owned, directly or indirectly, by National Theatres Corporation prior to their bankruptcies.

National Theatres Corporation through National Theatres Amusement Co. Inc., its wholly owned service company, furnishes advice on financial, tax and fiscal matters but does not exercise any immediate supervision or control over the operation of the theatres of

(2845)

these five principal subsidiary corporations. Theatre policies, admission prices, methods of operation and the transaction of all matters pertaining to their operations are determined upon and conducted separately by the management of each.

National is consulted with respect to the financial advisability of the leasing, construction, improvements, acquisition of new theatres and commitments involving substantial obligations or expenditures. However, the respective executive officers of these five principal subsidiaries have complete authority, subject, of course, to the approval of their respective boards of directors, to enter into all contracts and commitments relating to the operations of the theatres operated by the companies they head, particularly with respect to film license agreements. Each of these five subsidiaries has its own film licensing departments. National Theatres Amusement Co. Inc. has one employee whose function it is to furnish advice and service to the film buyers for each of these five principal subsidiaries. None of such film licensing agreements are subject to National's approval, and none of them are ever submitted to it for approval.

While there is a continual exchange of information between the chief executive officers of the five prin-

cipal subsidiaries concerning all matters of common interest and pertaining to the exhibition business of

(2846)

these companies, including film license terms, nevertheless complete authority with respect to film licensing agreements rests with the chief executive officer of the respective subsidiaries.

Prior to the latter part of 1941 National Theatres Corporation, through a subsidiary company, did maintain a film licensing department in New York which conducted negotiations for film licenses on behalf of all of these subsidiaries, but since that time this practice has been abandoned. The film licensing has been decentralized and placed in the hands of the local companies at their respective offices.

FOX WEST COAST THEATRES CORPORATION

The remainder of this statement will be devoted to a discussion of the history, operating policies, practices and competitive situations of Fox West Coast Theatres Corporation.

History of Fox West Coast Theatres Corporation

The predecessor of Fox West Coast Theatres Corporation, namely, West Coast Theatres, Inc., was incorporated under the laws of California in December 1920, and was organized by four partners to take over the operation of nineteen theatres located in five cities

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in California, namely, Los Angeles, Venice, Pomona, Bakersfield and Taft. Prior to incorporation the business had been carried on by a partnership known originally as Gore Bros. & Lesser. In August of 1920 a new partner was taken in, Mr. Adolph Ramish, and

the name of the partnership was changed to Gore Bros., Lesser & Ramish.

"About two years after its organization the new company acquired from two pioneer exhibitors, Turner and Dahnken, about 16 theatres located in the principal cities of Northern California such as Oakland, Berkeley, Richmond, San Jose, Watsonville, Fresno and Salinas, and at about the same time acquired from them and their partner Langley about 16 theatres in Southern California, which, with the exception of three theatres in Riverside, were all located in the Los Angeles Metropolitan Area. By 1925 the new company had an interest in approximately 85 motion picture theatres and was operating in many of the important cities in California. In that year, 1925, the company floated a bond issue and secured funds to construct a group of de luxe neighborhood theatres which, for the most part, were located in the Los Angeles Metropolitan Area. Thus the Fox West Coast circuit was, to a great extent, built up under the management of the Gore Bros., Lesser and Ramish.

"In about 1926 Ra..sh sold his one-third interest

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to Fox Film Corporation. In about January 1927 the Gore brothers and Lesser sold their two-thirds interest to National Theatres Corporation which had been organized by Hayden Stone & Co. for the purpose of acquiring this interest in the West Coast circuit.

"In about April 1928 Fox Film Corporation acquired all the stock of National Theatres Corporation and thus secured a 100% interest in West Coast Theatres, Inc.

"Fox West Coast Theatres was adjudicated a bankrupt in the District Court of the United States

for the Southern District of California, Central Division, on February 28, 1933. On April 4, 1933, William H. Moore, Jr., Charles C. Irwin (who had no connections with the motion picture industry) and I were elected trustees of the estate of the bankrupt and we served in such capacities throughout the administration of the estate. The circuit was operated by the trustees from February of 1933 until February 2, 1935, at which time the assets of the bankrupt estate, consisting principally of the newly organized Fox West Coast Theatres Corporation, were purchased by National Theatres Corporation.

"Description of Fox West Coast Organization.

"The theatres of the various subsidiaries and affili-

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ates of Fox West Coast Theatres Corporation are operated through a subsidiary corporation called Fox West Coast Agency Corporation. The agency corporation maintains executive and accounting offices in Los Angeles, as well as executive offices in San Francisco. It has a large maintenance and repair division constantly at work keeping these theatres in first-class condition. It employs a group of experienced theatre operators to act in an executive capacity as district managers of the theatres in various administrative districts. It also employs a staff of experienced film buyers and bookers to license the pictures which are to be exhibited in the theatres it services, to arrange proper programs and playing dates and to see that the films are at the theatres at the proper dates. The agency corporation maintains two screening rooms, one in Los Angeles and one in San Francisco, where the film buyers, bookers, district managers and publicity department can screen pictures in

order to determine, from a 'box office' point of view, their quality and suitability for exhibition in the various theatres, the combinations of pictures that should be put together on double bills, and the type of publicity and exploitation that is likely to be most productive in securing good patronage at the theatres.

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"Licensing of Motion Pictures.

"Fox West Coast Agency Corporation has two experienced film buyers who are in charge of more than thirty employees in the film buying, booking and statistical department. These men are charged with the responsibility of seeing that suitable pictures are continuously available for exhibition in the theatres at film rentals which the theatres can afford to pay and still operate at a profit.

"Films are licensed from distributors upon a wide variety of terms. These terms vary extensively from distributor to distributor and often from picture to picture. Most of these variations arise for the fact that it is very difficult to determine in advance a picture's exhibition value, so that these men are continually negotiating with representatives of the distributors to arrive at fair film license payments. All of these various formulae are designed to correlate the price of the picture with the exhibition quality of the film. Such correlation would be relatively simply in theatres playing a single feature program because it could then be based directly upon the gross receipts of the theatre. However, when a theatre is using double features or accompanying the pictures with

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stage shows there is always room for argument as to how much of the business is dependent upon any par-

ticular feature. As a result, license fees and their methods of determination vary greatly from distributor to distributor and from picture to picture. Some pictures are purchased from some distributors upon a 'flat rental' i.e., a fixed number of dollars for the right to show a picture for a certain length of time. Others are based upon a percentage of gross receipts, others upon a combination of the two systems, such as a percentage of gross receipts with a maximum or minimum figure or a percentage which will vary on reaching certain agreed upon maximum or minimum figures. The formulae referred to are not all inclusive and there are other bases which develop in the bargaining between distributor and exhibitor.

"The Fox West Coast film buyers operate under my direct supervision, and on some occasions, particularly where large film rentals are involved, I participate in the film licensing negotiations myself. Film License agreements negotiated by the Fox West Coast film buying department are signed by it and, as stated above, are not submitted to or approved by National or its board of directors. Likewise, licenses made with distributors, other than Twentieth Century-Fox, are never submitted to or approved by that company. In

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no instance is there any correlation between film license payments made by Fox West Coast and whether the distributor receiving those payments is interested in theatres. In no case is there any consideration given by Fox West Coast in the licensing of film from any distributor, with or without theatre affiliations, to the distribution problems of Twentieth Century-Fox Film Corporation, and Fox West Coast has not concerned itself or been influenced by the status of any negotiations or the effect of any license

agreements between Twentieth Century-Fox Film Corporation and any other affiliated exhibitor.

"I have an employment contract with National Theatres Corporation calling for my employment as the chief executive officer of that corporation for a period expiring December 25, 1954. Under this contract a very substantial part of my compensation is based upon the profits of National Theatres Corporation, and I therefore have a large personal interest in the successful operations of National Theatre Corporation and its subsidiaries. Except for 300 shares of common stock owned by me and members of my immediate family I have no interest in the profits of Twentieth Century-Fox Film Corporation. I have no interest in the profits of any other defendant in this action. I and my immediate family hold 25 shares of the Class B stock of National Theatres Corporation.

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Each share of this stock receives the same dividend payable with respect to each share of Class A and is convertible into the Ordinary Class A stock. According to my information the remaining 15 outstanding shares of the Class B Stock are owned by the presidents of three of the other principal operating subsidiaries of National Theatres Corporation, namely, Messrs. Rhoden, Ricketson, Fitzgerald, or by members of their respective families. These 40 shares are convertible in the aggregate into twenty per cent of the equity stock of National Theatres Corporation. Hence, it would not benefit me or the other owners of the Class B shares to deviate from sound exhibition policies to assist the distribution department of Twentieth Century-Fox pictures. I do not do so and I have never been asked to do so.

"Our affiliation with Twentieth Century-Fox Film Corporation has never been of any significance in enabling us to negotiate more favorably than we could

otherwise do with any other producer or distributor of motion pictures. The ability of Fox West Coast to license the product for exhibition in its theatres is based primarily upon its successful exhibition in the past of pictures of the distributor in question; upon the fact that its theatres are designed and, accustomed to furnish the best accommodations to the public and the best outlet for the distributors' product on the

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runs on which they are licensed; and upon its reputation for efficient management and the consistent payment of fair film rentals. Affiliation with Twentieth Century-Fox Film Corporation does not assist or hamper Fox West Coast in any way in its negotiations for the pictures of other distributors; and in licensing pictures for exhibition in its theatres, Fox West Coast has never taken into account or considered, or been asked to take into account or consider, the effect of such licenses, or the terms thereof, upon the relations of Twentieth Century-Fox Film Corporation with the other defendants in this action.

"The variations in customer relationship in the various towns where Fox West Coast operates show that there is no relationship between the product exhibited by Fox West Coast and whether or not the distributors thereof are affiliated with theatre operators. Reference will later be made to specific situations which show that both Fox West Coast and its competitors exhibit the pictures of distributors, with and without theatre affiliations, on various 'run' sequences; in some instances the competitor having the first run and Fox West Coast having the subsequent run of the same picture, and in other cases the reverse being true.

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"Run and Clearance.

An integral part of the negotiations of film licenses is the determination of what run the theatre licensing the picture will have, how long it will have to wait after the picture is released before it can play the picture, and how soon the picture will become available to other competing theatres. However, once a theatre has licensed a run which proves to be profitable, it is usually to its best interests to endeavor to continue to license pictures on the same run unless the competitive situation changes considerably. It is also usually to the best interests of the theatre to secure substantially the same run from all of its suppliers, for it is hard to get a theatre's regular customers used to a variable playing policy. Consequently, Fox West Coast usually negotiates and endeavors to contract for substantially the same run of the pictures of the same distributors for which it has been contracting.

"Moreover, once the distributor has established a satisfactory customer relationship with a theatre, the distributor will desire to continue substantially the same relationship. Unless the theatre of its established customer has become obsolete or its location has become unsuitable, or for some reason its ability to pay satisfactory film rentals has become impaired, the

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distributor ordinarily does not change customers. The result of these economic considerations is that so long as the distributor has a satisfactory customer and the customer has sufficient pictures of box-office value at prices which he can afford to pay, an established distributor-customer relationship usually continues to remain fairly static.

"In negotiating for a particular run an exhibitor will also negotiate with the distributor for clearance to protect what he is contracting for, that is, the right in his competitive area to exhibit the picture at a certain time prior to the time that some competitor is privileged under his license agreement to exhibit the same picture. The clearance which the prior run exhibitor is granted by the distributor over the subsequent run exhibitor is dependent upon a number of factors having an economic bearing upon the extent of the competition between the two theatres, such as location, seating capacity and admission price. Once the clearance is granted to the prior run exhibitor over his competitor it usually remains constant so long as the economic factors upon which the clearance is based do not change, for in the absence of such change it is obvious that the extent of competition remains about the same.

"In licensing films from distributors Fox West

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Coast has never entered into any agreement or understanding with any distributor relating to clearance which had as its purpose any improper subordination of a subsequent run licensed to an independent exhibitor. It is only interested in securing from a distributor such proper clearance as the distributor is willing to grant to it. Furthermore, distributors with theatre affiliations and distributors without such affiliations grant to the prior run theatres of independent theatre operators the same clearances they grant to the prior run theatres of Fox West Coast in comparable situations and, conversely, the subsequent run theatres of Fox West Coast are subject to the same clearances as are the subsequent run theatres of independent theatre operators in comparable situations.

"Admission Prices.

"Fox West Coast has not entered into any agreement, plan or arrangement with any distributor to establish or fix the admission prices of any competing theatre. The admission prices charged in the Fox West Coast theatres are not determined for the purpose of fixing or affecting admission prices charged by its competitors, but are fixed in reference to the economic factors operating only upon its own theatres, including the price the public is willing to pay

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to see the picture, the type and location of the theatre, the service provided, and the economic influence of the admission prices being charged by competitors.

"Fox West Coast and, so far as I know, no distributor or competing exhibitor is concerned with what increases in admission prices an exhibitor may make over and above the minimum prices which he represented he would charge at the time he licensed pictures. The higher the admission price charged by a subsequent run, the less effect does it have on the prior run patronage. Consequently in situations where Fox West Coast has a prior run it would manifestly not be to its interest to limit in any way the right of the subsequent run to raise its admission price and it has never done so. In some instances Fox West Coast has found that, in some of its better theatres, it can secure higher admission prices than competitors playing similar runs, and sometimes even higher than competitors with earlier runs.

"It is only necessary to examine competitive admission prices to see there are no established scales or systems. For example, in the Los Angeles area all

of the first run theatres operated by Fox West Coast are charging an 85¢ admission price, while most of the first run theatres operated by others whether affiliated or non-affiliated are charging an 80¢ admis-

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sion price. A 60¢ admission price is charged in most of the Fox West Coast first neighborhood run theatres, although some charge a 55¢ admission price. Some of the similar first run neighborhood theatres operated by non-affiliated exhibitors also charge 60¢; others charge 55¢ and still others, in some suburban areas, charge 44¢ although exhibiting pictures at approximately the same time.

"If the comparison is carried down to the later subsequent runs the variations are even greater. For example in the area surrounding Westlake Park in the central part of Los Angeles, Fox West Coast's first neighborhood run charges a 60¢ admission price, and the unaffiliated second, third and fourth runs charge 44¢, 40¢ and 36¢ respectively. In the area immediately north of this Westlake Park area the independent first run charges 55¢, the second run 50¢, the third run 42¢, and the fourth run 25¢.

"In the area immediately west of this group the Fox West Coast first and second run charge 55¢. The other runs are operated by unaffiliated exhibitors at the following admission prices: the third run charges 50¢, the fourth run 35¢, the two fifth runs 40¢, the sixth run 35¢ and the last run 40¢.

"Relationship of Fox West Coast with Other Defendants.

"Fox West Coast leases two theatres from Loew's.

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It has an agrement with Paramount, providing for

the leasing of three theatres in San Francisco under arrangements whereby the latter participates in the profits from the operation of these three theatres and three other theatres in the same locality. These are the only instances in which any distributor, other than Twentieth Century-Fox Film Corporation, has any interest in theatres operated by Fox West Coast.

"Loew's

"The State Theatre, Los Angeles, and the Warfield Theatre, San Francisco, were leased by affiliates of Loew's in 1923 to a corporation owned jointly by Loew's and West Coast Theatres, Inc. In the early '30s this arrangement was terminated, and the two theatres were leased directly to Fox West Coast at reduced fixed rentals. Loew's only present interest in these theatres is that of a landlord entitled to receive a fixed monthly rental, commensurate with the true rental value of the theatres. For several years many outstanding pictures of Loew's have been given, and are now being given, their first run exhibition in the Los Angeles theatre, Los Angeles, in which Loew's has no interest whatever. In San Francisco many of the outstanding pictures of Loew's are exhibited first run in the Fox Theatre in which Loew's also has no in-

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terest whatever.

"PARAMOUNT

"In 1930 Paramount Publix Corporation, or an affiliate, was the operator of the State (formerly known as the California) theatre and the St. Francis theatre, in San Francisco, California. It also then had under construction a new theatre, the Paramount.

Under date of December 10, 1930, Paramount Publix Corporation and Fox Film Corporation entered into an agreement whereunder the former agreed to cause its appropriate affiliate to lease these three theatres to Fox West Coast at annual fixed rentals aggregating $450,000. As additional rental Fox West Coast was to pay to the landlord affiliate of Paramount 35% of the earnings of Fox West Coast from its first run operations in the cities of San Francisco, Portland and Seattle* in excess of its earnings from such operations for each preceding fiscal year commencing with the fiscal year 1931. None of the leases relating to the State, St. Francis or Paramount required to be executed under the terms of said agreement of December 10, 1930, were actually executed by Fox West Coast or any of its subsidiaries. In October, 1932, both Fox

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West Coast and Fox Film Corporation disclaimed any liability to Paramount arising out of or under the agreement of December 10, 1930, and each of them refused to make any further payments to Paramount, asserting, among other things that Paramount had committed certain violations of the agreement.

"On March 14, 1933, Paramount was adjudicated a bankrupt by the United States District Court for the Southern District of New York, and Charles D. Hilles, Eugene W. Leake and Charles E. Richardson were duly elected its trustees in bankruptcy. These trustees filed large claims against the estate of Fox West Coast Theatres, a bankrupt, and threatened legal proceedings against Fox Film Corporation. Protracted negotiations concerning the respective claims

*As part of the same transactions, provisions were made for the leasing of a Paramount theatre in Seattle and one in Portland at separately specified rentals. These leases have since expired.

of the parties took place between the trustees of Paramount, and trustees of Fox West Coast and representatives of Fox Film Corporation. These negotiations culminated in the execution of the agreement dated as of January 25, 1934 between the said Paramount trustees, Fox Film Corporation and Fox West Coast Theatres Corporation (Exhibit 232). This agreement of January 25, 1934, provided that it should not become effective until it was approved by the bankruptcy court having jurisdiction of the Paramount

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bankruptcy and by the court having jurisdiction of the Fox West Coast bankruptcy. This agreement was approved by both bankruptcy courts and became fully effective. Under the terms of this agreement, the appropriate Paramount affiliates agreed to and did lease the Paramount, St. Francis and State theatres to Fox West Coast at average fixed annual rentals aggregating $228,000 (that is, approximately $220,000 less than provided for in the December 10, 1930 agreement) plus 37½% of the net earnings from the operation of all theatres operated by Fox West Coast in downtown San Francisco. At the time of the execution of the agreement the only other theatres operated by Fox West Coast in downtown San Francisco were the Embassy, the operations of which were unprofitable, and the Warfield, which had made a profit of approximately $22,000 for the year 1933. The Fox theatre in downtown San Francisco was acquired in 1936 and the United Nations theatre was acquired in 1943.

"In short, the present arrangements under which Paramount participates in the profits from the operation of these Fox West Coast theatres in downtown San Francisco stem from an agreement which was en-

tered into by Fox West Coast because, as was aptly put by its trustees in their petition for approval of the

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January 23, 1934 agreement 'by the terms thereof there will be withdrawn claims asserted against said estate in the aggregate face amount of $10,818,754.31 some of which are duplications and/or amendments) . . .' and 'said rentals are at a figure which will permit said theatres to be operated at a substantial profit in the opinion of your petitioners . . .".

(2864)

RELATIONSHIP OF FOX WEST COAST WITH UNITED ARTISTS THEATRE CIRCUIT, INC.

"My attention has been directed to the claim of the Government that United Artists Theatre Circuit, Inc., which is not a defendant in this case, should, however, be considered as an affiliate of Twentieth Century-Fox Film Corporation; and in this connection reference has been made to the fact that Fox West Coast and United Artists Theatre Circuit, Inc. are interested in the operation of certain theatres in California.

"The only situations in which there is any connection between Fox West Coast and United Artists Theatre Circuit, Inc. are with reference to United West Coast Theatres Corporation, a company in which they are both stockholders and with reference to the United Artists and Four Star Theatres in Los Angeles, which are operated by Fox West Coast in conjunction with the State and Chinese theatres for the joint interest of Fox West Coast and United Artists Theatre Circuit.

"Prior to September of 1931 United Artists Theatres of California, Ltd. (a subsidiary of United

Artists Theatre Circuit, Inc., which I understand is not a producer or distributor of motion pictures) had acquired or constructed a group of 11 theatres located in several California communities. At that time it

(2865)

entered into agreements with Fox West Coast providing for the operation of these theatres, and certain Fox West Coast theatres in the same areas, by a new corporation called West Coast United Theatres Corporation. 75% of the stock of the new corporation was owned by Fox West Coast and 25% by United Artists Theatres of California, Ltd. This contract was made before I first became associated with Fox West Coast or National Theatres Corporation, before Mr. J. Schenck became associated with Twentieth Century-Fox Film Corporation, and before Skouras Theatres Corporation was organized. All of the theatres of the new corporation were operated by Fox West Coast's service corporation.

"When Fox West Coast Theatres went into bankruptcy in the spring of 1933 the United Artists Theatres of California, Ltd. terminated the leases of its theatres to West Coast United. The trustees in bankruptcy of Fox West Coast Theatres immediately opened negotiations with United Artists Theatres of California, Ltd. to reinstate the leases of these pictures. In September of 1933 a new agreement was entered into between Fox West Coast Theatres Corporation and United Artists Theatres of California, Ltd. and this new agreement was approved by the Bankruptcy Court having jurisdiction of the Fox West Coast bankruptcy. It provided for the organization of a new company to be known as the United

(2866)

West Coast Theatres Corporation. 70% of the stock of the company was to be and is owned by Fox West

Coast and 30% by United Artists Theatres of California, Ltd. There were leased to the new company substantially the same theatres that had formerly been leased to West Coast United. The theatres so leased to the new company are managed by Fox West Coast's service corporation. No executive of United Artists Theatre Circuit, Inc. or any of its subsidiaries is connected with the management of Fox West Coast or its service corporation, Fox West Coast Agency Corporation. The position of United Artists Theatre Circuit, Inc. in this situation is solely that of a minority stockholder having no direct voice in the operating policies of the theatres.

"Fox West Coast and United Artists Theatre Circuit, Inc. are also interested in the operations of five other theatres in Los Angeles. Arrangements with respect to these theatres are reflected in an agreement dated September 20, 1937. This agreement represents the extension (with some modification) of an original arrangement entered into in 1934, at a time when the affairs of Fox West Coast were being administered by its trustees in bankruptcy. At that time (as well as at present) Fox West Coast and United Artists Theatre Circuit, Inc. were each stockholders in the

(2867)

company, which owns the Chinese theatre in Hollywood Prior to 1934 and at the time of its bankruptcy on February 27, 1933 Fox West Coast had a twenty-five year lease on the Chinese theatre which was terminable as a result of its bankruptcy. In 1932 the Chinese theatre had lost more than $100,000 and the theatre did not operate during a substantial part of the year 1933. The bonds of the landlord corporation, in which Fox West Coast owned and still owns a 1/3 interest, were in default. It had filed proceedings under Section 77B of the Bankruptcy Act and there

was a possibility of complete loss of this property and the wiping out of the respective interests of Fox West Coast and of United Artists Theatres Circuit, Inc.

"United Artists Theatre Circuit, Inc., or a subsidiary thereof, was the lessee of the downtown United Artists Theatre which, as I recall, was also closed in 1933 during the time the Chinese was closed. Fox West Coast's 25-year lease of the Chinese had been extinguished and in order to continue the company's interest in the operation of that theatre and to save its investment in the property, Fox West Coast made arrangements with the other shareholder, United Artists, for Fox West Coast to operate the Chinese and United Artists theatres together with the State Theatre under an agreement whereby each would receive

(2868)

50% of the profits from the operation of those theatres. The Four Star Theatre in the Wilshire Boulevard district was already leased to United West Coast Theatres Corporation and provision was made that it might from time to time be included in the first run operating arrangement. At about the same time, in order to preserve the Fox West Coast investment in the Chinese, I made arrangements with several distributors for simultaneous first run exhibition at the State Theatre in downtown Los Angeles and the Chinese Theatre in Hollywood (which I will refer to in detail later) and under this arrangement pictures with the greatest box office appeal were given simultaneous showings while the United Artists Theatre afford an additional first-run outlet for pictures not suitable for such simultaneous exhibition. Except for the United Artists Theatre, United Artists Theatre Circuit, Inc. was not engaged in theatre operations in this area and had no suitable organization

or other facilities for operating its sole theatre; and hence it was desirous that Fox West Coast take over the management of the theatre. Accordingly, the original arrangement referred to above was effected under which United Artists Theatre Circuit, Inc. and Fox West Coast were each to receive 50% of the profits resulting from the combined operations of the four theatres referred to.

(2869)

"With respect to the operations of these theatres, the same situation exists as in the case of the theatres leased to United West Coast Theatres Corporation. They are managed and operated by Fox West Coast Agency Corporation and United Artists does not control or participate in such management and operation.

"Cities Where Local Monopolies Are Alleged

"The Government has charged Fox West Coast Theatres Corporation with maintaining local theatre exhibition monopolies in six cities with a population of 100,000 or over: Los Angeles, Long Beach, San Diego, San Francisco, Oakland and Sacramento. In all of these cities there are not only a substantial number of competing subsequent run theatres, but there are competing first run theatres operated by persons not affiliated with any motion picture distributor or producer. To demonstrate these facts I have considered in detail the competitive situation in each of these cities.

A.

"Cities Of Over 100,000 Population
Los Angeles

"The principal city in which Fox West Coast Theatres Corporation operates is Los Angeles, California.

(2870) There are approximately 222 theatres in the City of Los Angeles and 58 of them are operated by Fox West Coast.

"Description of Los Angeles

"The population of Los Angeles in 1920 was 576,673; in 1930 it was 1,238,048; and in 1940 it was 1,504,277. The 1943 population of Los Angeles has been estimated at 1,775,000. The old downtown shopping and business section is about six blocks long and four blocks wide, with its center along Broadway between Third and Ninth Avenue.

"Since about 1920 there has been a second downtown shopping area in the part of greater Los Angeles known as Hollywood, which is located about seven miles to the northwest of the old downtown Los Angeles section. Although it is within the City of Los Angeles it is in fact a separate community with its own main street along Hollywood Boulevard and its own shopping and amusement area.

"Los Angeles grew to its present size during the era of automobile transportation. The result is that it has no adequate public transportation system and residents of Los Angeles expect to travel from one part of the city to another in their own automobiles. As a result, the two downtown shopping areas in Hollywood and along Broadway have become very congested and they do not afford adequate parking

(2871) space for all the people who would normally desire to shop there. This has led to the development of a new shopping area along Wilshire Boulevard, south of Hollywood and west of downtown Los Angeles. This new shopping area runs from just east of Ver-

mont Avenue to Beverly Hills, so that it is about eight miles in length and only a few blocks wide. This area is not heavily built up like the downtown and Hollywood shopping areas, but it contains the largest and finest department stores in the City of Los Angeles. These stores are located from one to several blocks apart and are surrounded by large parking lots, so that prospective shoppers can drive to the stores in their automobiles and find convenient parking space right at the store. Within the last ten years this area has developed to such an extent that it really amounts to a third downtown section, or a third city within the Los Angeles metropolitan area. A new large shopping area is now developing in the southwest section of the city. The large department stores, most of which have already opened stores in two or more of the other three areas, are now acquiring additional sites in southwest Los Angeles. This illustrates the rapid decentralization trend of merchandising in the Los Angeles metropolitan area.

(2872)

"Description of First Run Exhibition in Los Angeles.

"When I joined Fox West Coast in 1932, it was already operating what I consider to be two of the finest theatres in southern California, namely, Grauman's Chinese theatre in Hollywood (2,048 seats) and State theatres (2,404 seats) in downtown Los Angeles. The Chinese was then the most famous theatre in the world. It had an international reputation for gala premieres of the finest pictures. The State is a big de luxe house located the corner of Broadway and Seventh, the busiest corner in Los Angeles. I consider that the finest theatre location in the city. Prior to the depression the Chinese had operated on a road

show policy, playing long runs at advanced admission prices, usually $1,50. In the early '30s Fox West Coast was unable to acquire suitable pictures to continue this policy, and the theatre was closed.

"I negotiated with Fox Film Corporation and Loew's, Inc. to license their pictures for simultaneous first run exhibition at the State and Grauman's Chinese theatres, and thus simultaneous first run exhibition in downtown Los Angeles and Hollywood was inaugurated.

"When the success of this type of simultaneous first run showings became apparent, other first run

(2873)

exhibitors over a period of time also adopted similar practices so that now RKO, Warners, Paramount and Blumenfeld all offer simultaneous first run facilities in downtown Los Angeles and Hollywood, competing with the first run theatres operated by Fox West Coast.

"As I have already indicated, in the late '30s and early '40s another major shopping area developed along Wilshire Boulevard in central Los Angeles. This area includes most of the better residential section of Los Angeles. Following the trend of merchandising in metropolitan Los Angeles, I negotiated with the distributors to license the Ritz, in central Los Angeles, for similar simultaneous first run exhibition. This also proved successful and Warners and Mr. Blumenfeld have opened first run theatres in this area, competing with the Fox West Coast first run houses.

"At the present time there are thus three areas in metropolitan Los Angeles which are treated for motion picture exhibition purposes as separate communities with separate first run theatres.

Charles P. Skouras

"(a) *Downtown Los Angeles*

"In the downtown Los Angeles section there are 9 first run theatres. Their operators, seating capacities and adult evening general admission prices are as
(2874)
follows:

Theatre	*Operator*	*Seats*	*Run*	*Admission Price*
State	FWC	2,404	1	85¢
Los Angeles	"	1,980	1	85¢
United Artists	"	2,100	1	85¢
Hillstreet	RKO-Pantages	2,916	1	80¢
Warners	Warners	2,500	1	80¢
Paramount	Fanchon & Marco-Paramount	3,347	1	80¢
Music Hall	Blumenfeld	902	1	80¢
California	Frank Fouce	1,900	1-Spanish	60¢
Orpheum	FWC	2,207	1,2 Vaudeville	98¢ to $1.20

"Fox West Coast's Theatres:

"The State theatre, one of the finest, has the best location of any theatre in Los Angeles. It is now exhibiting first run most of the pictures distributed by Twentieth Century-Fox and some of the pictures distributed by Loew's, RKO, Columbia, Universal, Republic and International Pictures, and Selznick International pictures which are distributed by United Artists. The Los Angeles theatre, another fine house, is excellently located about one-half block from the State. It is now exhibiting first run most of the pictures distributed by Loew's. The United Artists theatre is also a deluxe 'show case' type theatre and ex-

(2875)

hibits other pictures of the same distributors who license product to the State and Los Angeles and also some of the pictures distributed by Monogram and PRC.

"Competitive First Run Theatres:

"The Paramount, Warners, Hillstreet and Orpheum theatres are large deluxe theatres about equally suitable for first run exhibition. They are the finest houses in downtown Los Angeles except for the State, Los Angeles and United Artists. All these theatres are within a block or two of the center of the shopping district. The Paramount theatre exhibits Paramount pictures and some of the pictures distributed by Republic. The Warner theatre exhibits Warner pictures. The Hillstreet exhibits pictures distributed by Universal, Columbia and RKO, including pictures produced by Goldwyn, Walt Disney Productions and International Pictures. The Orpheum specializes in vaudeville and usually shows a single first run feature distributed by Monogram, Republic, or PRC. The Music Hall, while well located, is a long narrow theatre which does not have the same deluxe appearance or size as the others. It is now showing exclusively the first run of United Artists product. The California theatre is an older, poorly located house. It shows Spanish language pictures exclusively.

(2876)

"(b) *Hollywood*

"In Hollywood there are 8 first run theatres. Their operators, seating capacities, and adult evening general admission prices are as follows:

Charles P. Skouras

Theatre	Operator	Seats	Run	Admission Price
Chinese	FWC	2,028	1	85¢
Egyptian	"	1,535	1	85¢
Guild	"	968	1	85¢
Paramount	Fanchon & Marco-Paramount	1,500	1	80¢
Pantages	RKO-Pantages	2,812	1	80¢
Warners	Warners	2,756	1	80¢
Music Hall	Blumenfeld	500	1	80¢
Hawaii Music Hall	Blumenfeld	1,000	1	80¢

"In Hollywood the product of the various distributors is licensed to the same operators of these first run houses as in downtown Los Angeles, except that the pictures exhibited first run with vaudeville at the Orpheum usually do not receive a first run in Hollywood but are sometimes played first run at the Vogue. The Chinese usually plays the same pictures as the State, the Egyptian the same as the Los Angeles, the Guild the same as the United Artists, Warner's Hollywood the same as Warner's Downtown, the Paramount in Hollywood the same as the Downtown

(2877)

Paramount, the Pantages the same as the Hillstreet and the Hollywood and Hawaii Music Hall's the same as the Downtown Music Hall.

"The Chinese, Warner's Hollywood, Pantages and Egyptian are large deluxe theatres constructed for first run exhibition. The Hollywood Paramount and the Guild were constructed as legitimate theatres and they have been recently converted into motion picture houses. They are now good first run theatres, but not quite comparable to the other four. The Hollywood Music Hall and Vogue are well located and

have good appointments, but they are not large enough to provide as suitable first run facilities as the other first run houses. The Hawaii Music Hall is located the eastern end of Hollywood Boulevard, outside of the downtown Hollywood area.

"(c) *Wilshire District*

"In the Wilshire district there are now 7 first run theatres. Their operators, seating capacities, and adult evening general admission prices are as follows:

(2878)

Theatre	Operator	Seats	Run	Admission Price
Ritz	FWC	1,402	1	85¢
Carthay Circle	"	1,518	1 & M.O.	85¢
Four Star	"	900	1 & M.O.	85¢
Fox Wilshire	"	2,296	1	85¢
Beverly Music Hall	Blumenfeld	850	1	80¢
Wiltern	Warners	2,000	1	80¢
Uptown	FWC	1,800	1	85¢

"Pictures which receive their first Los Angeles runs in theatres operated by RKO and Paramount do not receive a first Los Angeles run in the Wilshire district. The other theatres play a first run of the same product which their operators are showing first run in Hollywood and downtown Los Angeles.

"With the exception of the big de luxe Fox Wilshire, these theatres are slightly smaller in size than most of the first run houses in Hollywood and downtown Los Angeles. Otherwise, they are comparable to the first run theatres in the other two areas. The Four Star and the Beverly Music are small de luxe

theatres like the Vogue and Hollywood Music Hall, while the others are large, fine theatres. The Carthay Circle, Fox Wilshire, Uptown and Wiltern were constructed for first run operation; the Ritz was con-

(2879)

structed as a de luxe neighborhood theatre and has been converted to first run since the outbreak of the war.

"Description of Subsequent Run. Exhibition in Los Angeles

"In Los Angeles neighborhood areas the first exhibition occurs 21 days after first run Los Angeles closing whether the first runs are affiliated or non-affiliated and whether the first subsequent runs are affiliated or non-affiliated. There are about 23 different Los Angeles neighborhoods each with theatres playing a 'first' subsequent run. Thirteen of these first subsequent runs are operated by Fox West Coast; 9 are operated by non-affiliated exhibitors; and in one area a first subsequent run theatre is operated by Fox West Coast and one is also being operated by Warner Bros. All of these first subsequent run theatres exhibit substantially all the better pictures distributed in Los Angeles, whether they have their first run in affiliated or non-affiliated theatres, and whether or not they are distributed by distributors who own theatres or distributors who do not own theatres. The second subsequent runs in each of these neighborhoods usually play 7 days after the first runs, the third play 7 days after the second, etc., and the

(2880)

distributors all license second, third, etc., subsequent runs in each neighborhood.

"There are approximately 185 of these neighborhood subsequent run theatres of which Fox West

Coast operates 32 (14 of which are 'first subsequent' run in their respective areas), unaffiliated theatre exhibitors operate 153, and Warner Bros. operate one. 18 of the 32 subsequent run theatres of Fox West Coast are operated second, third or fourth subsequent run.

"In Los Angeles the Fox West Coast subsequent run theatres exhibit not only the pictures of distributors which license first run to it but also the pictures of distributors which license first run to its competitors.

"San Diego, California

"San Diego had a 1930 population of 147,795, a 1940 population of 203,341 and an estimated 1943 population of 390,000. In San Diego there are 31 theatres. Fourteen of these are operated by companies affiliated with Fox West Coast Theatres Corporation. Seven San Diego theatres are playing first run and 5 of these 7 are affiliated with Fox West Coast. Three other theatres are playing a continued first run or

(2881)

moveover policy. Two of these are operated by Fox West Coast. Outside the City of San Diego but in the San Diego metropolitan area, there are 6 additional theatres, none of which are operated by Fox West Coast.

"There are two first run operators in San Diego, Fox West Coast and Gus Metzger. Mr. Metzger is not affiliated with any motion picture distributor or producer. He operates the first run Broadway (800 seats), Tower (600 seats) and Spreckles (1,800 seats) theatres, using all of the product of Universal and Columbia and about one-half of the Warner product. The product of Fox, Metro, Paramount, RKO and the

balance of Warner's is shown at Fox West Coast's first run theatres: The Fox (2,878 seats), the California (2,027 seats), the State (1,012 seats), the Adams (684 seats), the Loma (1,184 seats). All of the first run and moveover theatres in San Diego are in competition with each other.

"The Fox theatre is one of the largest and finest theatres on the Pacific Coast. The California, Orpheum, State and Spreckles are de luxe first run theatres. The Broadway, Tower and Adams are small theatres with excellent appointments. The Loma was erected within the last year. It is a good sized, de luxe, modern theatre and one of the best in town.

(2882)

"For subsequent run purposes San Diego is divided into three neighborhoods. The subsequent runs in each neighborhood have substantially the same availability as similar runs in the other neighborhoods. Fox West Coast plays the second, third and fourth runs in the downtown area and in the North Park area, playing both the pictures it has exhibited first run and those its competitor has exhibited first run. Non-affiliated theatres play similar runs in the South San Diego area. The first run theatres, both affiliated and non-affiliated, have the same clearance of 35 days over the theatres in the neghborhood areas. The non-affiliated subsequent run theatres in the suburbs, such as Oceanside, La Mesa, La Jolla, Linda Vista, Ocean Beach, Coronado and National City, play earlier than the subsequent run Fox West Coast theatres in the San Diego subsequent run areas.

"Long Beach, California

"The population of Long Beach in 1930 was 142,032; in 1940, 164,271. The Rand McNally 1945

Atlas estimates the Long Beach population for 1943 at 225,000. There are 20 motion picture theatres in Long Beach, 4 of which are operated as first runs and 3 of which are operated on a continued first run or moveover policy. Fox West Coast operates 7 theatres

(2883)

in Long Beach, 2 of which are first runs (West Coast, 2,072 seats, and United Artists, 1,242 seats) and 2 of which are moveovers (Long Beach, 1,164 seats, and Imperial, 856 seats). Of the other three theatres of Fox West Coast, one operates second run, one fourth run and one is a newsreel house.

"Cabart Theatres Corporation (under the management of Milton Arthur and not, so far as I know, affiliated in any way with any distributor) operates 5 theatres in Long Beach, 2 of which are first run (State, 1,356 seats, and Cabart, 950 seats) and one of which is a moveover (Rivoli, 1,100 seats). Cabart generally plays first run of the product of RKO, Columbia, one-half of Warner's and one-half of Universal. The product of the other defendant distributors usually plays first run at the Fox West Coast theatres.

"All of the early run theatres in Long Beach are well operated first class houses suitable for first run operation and there is active competition between the respective operators.

"First run theatres in Long Beach, both affiliated and non-affiliated, take 35 days clearance over Fox West Coast's second run Egyptian (1,080 seats) theatre and the subsequent run theatres customarily take

(2884)

7 days clearance over the next subsequent run. Fox West Coast's two subsequent run theatres, the second run Egyptian and fourth run Belmont (842 seats), play pictures which are played first run by Fox West

Coast and also those that are played first run by its competitors.

"San Francisco, California.

"San Francisco had a 1930 population of 634,394 and a 1940 population of 634,536. Because of war activity on the Pacific Coast, the city has had a very large transient population during the last several years. There are 82 theatres in San Francisco, 8 of which are operated by Fox West Coast. 10 San Francisco theatres are presently operating on a first run policy with the product of the distributor defendants. 5 of these theatres are operated by Fox West Coast; 1 is operated by RKO; and 4 are operated by J Blumenfeld. These theatres are all in the same competitive area and there is active competition between their respective operators.

"All of these theatres are large houses with de luxe appointments. The Fox, with 4,651 seats, is the largest and finest theatre in the West.

(2885)

"At the present time, these first run theatres are playing the product of the various distributors as follows: The Golden Gate theatre (2,825 seats), operated by RKO, is playing RKO product; the Orpheum (2,900 seats), Esquire (975 seats), United Artists (1,200 seats) and Tivoli (1,400 seats), all operated by Mr. Blumenfeld, are playing United Artists, Columbia, Universal, PRC and one-half of Monogram product.

"The product of Twentieth Century-Fox, Loew's, Paramount, Warners, Republic and about one-half of Monogram is exhibtied first at theatres operated by Fox West Coast: the Fox (4,651 seats), the Paramount (2,646 seats), the Warfield (2,656 seats), the St. Francis (1,455 seats) and the State (2,133 seats).

Charles P. Skouras

"Fox West Coast has only three other theatres in the City of San Francisco. One of these, the United Nations (1,149 seats) is a downtown theatre operating on a second run policy. The other two, El Capitan (2,574 seats) and the Rialto (1,530 seats) are large, fine neighborhood theatres which operate on a second run policy.

"The clearance granted to Fox West Coast's first run theatres over subsequent runs is no greater than that accorded to the competitive theatres operated by the Independent exhibitor, and the Fox West Coast

(2886)

second run plays no earlier than the non-affiliated second run.

"Oakland, California

"Oakland had a 1930 population of 284,063 and a 1940 population of 302,163. It is located directly across San Francisco Bay from the City of San Francisco and is located in the San Francisco metropolitan area. There are 38 theatres in Oakland, 8 of which are operated by Fox West Coast Theatres.

"There are 8 Oakland theatres which are operated first run, of which 5 are operated by Fox West Coast. All of these theatres are in the same competitive area, and their respective operators are in active competition with each other. They are as follows:

"The Fox (3,335 seats), Paramount (3,434 seats) and Orpheum (2,561 seats), operated by Fox West Coast, represent very large investments and are fine theatres with excellent locations in downtown Oakland. They are particularly desirable for first run exhibition and are undoubtedly the superior houses of the city. They are now exhibiting first run the pro-

ducts distributed by Twentieth Century-Fox, Loew's, Paramount, RKO and about one-half of the product distributed by Warner Bros. Fox West Coast's Grand Lake theatre (2,177 seats), located about a mile and a half out of the downtown section in one of the better

(2887)

residential sections, and Fox West Coast's Franklin theatre (836 seats), a downtown house, are operating on continued first run policies showing the pictures of these same distributors.

"Mr. Blumenfeld, the same exhibitor who has been referred to in connection with Los Angeles and San Francisco, operates the T & D theatre (2,760 seats) which is almost as large as Fox West Coast's first run theatres, but it is older, not so well equipped, and located a few blocks out of the better downtown amusement section. He also operates the Roxy (1,080 seats) and Esquire (1,370 seats). His theatres exhibit the first run product distributed by Columbia, Universal, PRC and approximately one-half of the pictures distributed by Warner Bros.

"Fox West Coast operates only three other theatres in Oakland. Two of these theatres, the State (1,524 seats) and the Senator (1,624 seats), operate on a second run policy. They are large de luxe neighborhood theatres comparable to or better than any other neighborhood theatre in the area. The third theatre, the Tower (600 seats), operates on a fourth run policy.

"In Oakland the subsequent run theatres of Fox West Coast exhibit not only the pictures of distributors which license first runs to it but also the pictures of those distributors which license their pictures

(2888)

first run to the competitors of Fox West Coast.

"Cities With Population of 50,000 to 100,000

"The Government has charged Fox West Coast Theatres Corporation with maintaining a theatre exhibition monopoly in six cities with a population between 50,000 and 100,000: Phoenix, Arizona; and Berkeley, Stockton, San Jose, Pasadena and Santa Monica, California. In all of these cities except San Jose and Pasadena there are competing first run theatre operators. I shall consider each of these cities in detail and indicate the competitive situation.

"Berkeley, California

"Berkeley had a 1930 population of 82,109 and a 1940 population of 85,547. Berkeley is part of the San Francisco metropolitan area. It is located across San Francisco Bay from the City of San Francisco about 8 miles to the northeast. It is immediately north of Oakland and geographically it constitutes the northern part of Oakland. There are 10 motion picture theatres in Berkeley, 4 of which are operated by Fox West Coast Theatres. There are 3 theatres in Berkeley now generally playing on first run policies. Two of these theatres are operated by Fox West Coast and

(2889)

one by J. Blumenfeld. All of these theatres are in the general competitive area and their respective operators are all in competition with each other.

"At the present time, the Berkeley theatre (1,400 seats), operated by Mr. Blumenfeld, is showing first run in Berkeley the product of the following distributors: Columbia, Universal, PRC and approximately one-half the product of United Artists. The pictures distributed by Twentieth Century-Fox, Loew's, Para-

mount, Warner's, RKO, Monogram, Republic and approximately one-half of United Artists are shown first run at the United Artists (1,642 seats) and Campus (1,191 seats) theatres of Fox West Coast.

"The United Artists, Campus, Berkeley, UC (1,498 seats) and California (1,410 seats) are all located a few blocks from each other in the principal downtown business district of Berkeley and they are all in the immediate vicinity of the campus of the University of California. In addition to these downtown theatres, there are 5 theatres in the suburbs of Berkeley, located in varying directions from one to three miles from the downtown area.

"All first run theatres of Fox West Coast and of

(2890)

Blumenfeld take the same clearance over second run theatres of Fox West Coast and of Blumenfeld. Fox West Coast's fourth run UC theatre plays the product of the distributors whose pictures are shown first run at the Fox West Coast theatre as well as those whose pictures are shown first run by its competitor. Fox West Coast's second run California theatre shows some of the pictures which were exhibited first run by its competitor, and the balance of the pictures shown first run by Fox West Coast's competitor are also shown second run by that same competitor.

"The United Artists theatre is the largest, finest and best appointed house in Berkeley. The California, UC and Berkeley are large de luxe theatres.

"Sacramento, California

"Sacramento, the capital of California, had a 1930 population of 93,750 and a 1940 population of 105,958. There are 18 theatres in Sacramento and one in North Sacramento. Fox West Coast operates, or is

interested in the operation of, only 5 of these theatres. Of the 5 first run theatres in Sacramento, Fox West Coast is interested in the operation of 3 and Mr. Blumenfeld operates 2. Mr. Blumenfeld also has an additional theatre, which operates first run a sub-
(2891)
stantial portion of the time.

"The Senator theatre has 2,100 seats and is the finest theatre in the Sacramento Valley. The Alhambra theatre is a 2,000 seat de luxe neighborhood theatre. Blumenfeld's best first run theatre is his 1,100 seat new neighborhood Tower theatre. His downtown Esquire and Times theatres have only 998 seats and 500 seats, respectively.

"Mr. Blumenfeld exhibits the first run product of Columbia, Universal, PRC and approximately one-half of Warners, while Fox West Coast exhibits the first run of the other defendant distributors.

"There is active competition between the first run theatres operated by Blumenfeld and Fox West Coast in Sacramento. Fox West Coast's second run Hippodrome (1,769 seats) and third run Rio (1,292 seats) show the pictures having their first run in their competitor's theatres as well as those having their first run in theatres in which Fox West Coast is interested.

"Stockton, California

"Stockton had a 1930 population of 47,963 and a 1940 population of 54,714. There are 9 theatres in Stockton, 4 of which are operated by Fox West Coast. There are 3 first run theatres in Stockton, 2 operated
(2892)
by Fox West Coast and one by Mr. Blumenfeld. The operators of these theatres are in active competition with each other.

"The Sierra theatre (615 seats) operated by Mr. Blumenfeld is exhibiting first run Columbia, Universal, PRC and about one-half of United Artists. Fox West Coast is exhibiting first run one-half of the United Artists pictures and all the product of the other defendant distributors. It also exhibits second and fourth run the product of all the defendant distributors including those having their first run in theatres operated by their competitors.

"Fox West Coast's first run California theatre has 2,170 seats. This is much the finest theatre in town, Fox West Coast's new Ritz theatre, with 926 seats, is also a suitable first run theatre. The subsequent run, State theatre, operated by Fox West Coast, has 1,500 seats and the non-affiliated, third run Stockton theatre 1,000 seats.

"Fresno, California

"Fresno had a 1930 population of 52,513 and a 1940 population of 60,685. There are 10 theatres in Fresno, 4 of which are operated by Fox West Coast and one of which is operated by Warner Bros. Two of the Fox West Coast theatres play first run, the

(2893)

Warners theatre plays first run, and Gerald Hardy's theatre, the Hardy, also plays some first runs.

"These theatres are all in the same competitive area and are in active competition. At its Wilson (1,897 seats) and Tower (930 seats) theatres Fox West Coast is playing the first run of the product distributed by Twentieth Century-Fox, Metro, Paramount, United Artists, PRC and three-fourths of RKO. The Warner theatre (2,173 seats) is playing the first run of Warners, Columbia, Universal, Republic and one-fourth of RKO. The Hardy theatre (1,336 seats) is

playing the first run of Monogram and the second runs of Republic and Universal.

"Fox West Coast's second run Kinema (1,282 seats) and third run State (1,279 seats) play second and third run pictures of all the defendant distributors, including those pictures which have had their first run at the theatres operated by its competitors.

"San Jose, California

"The population of San Jose in 1930 was 57,561 and in 1940, 68,457. There are 9 theatres in San Jose and 3 additional theatres in the suburbs. Fox West Coast operates 3 theatres in San Jose: the California (1,748 seats), Mission (1,178 seats) and Padre (998 seats). These theatres all operate on a

(2894)

first run policy, showing the pictures of all the defendant distributors. The California is the largest and finest theatre in town. The Mission is a good sized comparable house and the Padre a smaller de luxe theatre.

"Turner and Dahnken, Inc., acquired by Fox West Coast in 1923, operated first run a group of theatres in a number of cities in Northern California, and were exhibiting pictures first run at the Mission theatre in San Jose at the time their interests were acquired by Fox West Coast. The California was built in about 1925. The Padre was acquired in about 1936.

"Pasadena, California

"Pasadena had a 1930 population of 76,086 and a 1940 population of 81,864. Pasadena is a fashionable residential suburb of Los Angeles located about 10 miles northeast of downtown Los Angeles. It grew to substantially its present size in the 1920s, so that, in

comparison with other similar cities in the Los Angeles metropolitan area, its growth since 1930 has been comparatively slight. There have been no new theatres built in Pasadena since 1931.

"There are 11 theatres in Pasadena. Fox West Coast operates three of these theatres, the Academy (1,673 seats), United Artists (912 seats) and Pasa-

(2895)

dena (894 seats) on a first run policy. It operates two, the Tower (745 seats) and Uptown (910 seats) on a moveover or continued first run. All of these theatres are well maintained modern houses. The United Artists is the newest theatre in the city. Fox West Coast spent over $100,000 in the early '40s rehabilitating the Academy and Uptown theatres. The first run theatres are wholly adequate to serve the first run needs of both the distributors and the public. Their admission prices are no higher than those charged in other comparable situations like Long Beach and Santa Monica where Fox West Coast has first run competitors. Fox West Coast also operates four subsequent run theatres and there are two independent subsequent run theatres. All these Pasadena theatres compete with the theatres in the neighboring suburbs of Los Angles, such as Eagle Rock, High Park, Alhambra, El Sereno and San Gabriel.

"At the time of the acquisition by Fox Film Corporation of its interest in Fox West Coast, the latter was operating five theatres in Pasadena which had been constructed or acquired during the regime of the Gore Bros., Lesser, and Ramish.

(2896)

"Santa Monica, California.

"The population of Santa Monica in 1930 was 37,146 and in 1940, 53,500. Santa Monica is a suburb

of Los Angeles, located directly west of Beverly Hills and that part of Los Angeles known as Westwood. It is about 13 miles from downtown Los Angeles. It borders on the Pacific Ocean and, together with Venice, the suburb directly south of Santa Monica, constitutes the principal beach area for Metropolitan Los Angeles, as well as being a residential suburb.

"At the place where Santa Monica and Venice meet, there is quite an extensive amusement park, known as Ocean Park. There are 2 theatres in Ocean Park, one being on the Santa Monica side of the boundary line and the other on the Venice side. Ocean Park has always been treated for motion picture exhibition purposes as a separate community. The first runs in Ocean Park play seven days after first run Los Angeles and the first runs in Santa Monica play seven days after first run Ocean Park.

"There are 7 theatres in Santa Monica proper, 3 of them being operated by Fox Coast and 4 by operators not affiliated with any motion picture distributor. Three of these theatres operate on a first run

(2897)

policy. The non-affiliated Hitching Post (360 seats) plays western and action pictures distributed by Republic, Columbia, Universal, Monogram and PRC. The non-affiliated Majestic (647 seats) plays pictures distributed by Warners, Columbia, Universal, Monogram and PRC and approximately one-half the pictures distributed by United Artists. The Fox West Coast's Criterion (1,200 seats), which is the finest, largest and best located theatre in the city, plays pictures distributed by Loew's, Twentieth Century-Fox, Paramount and RKO and one-half the pictures distributed by United Artists. Substantially all these pictures play second run at the non-affiliated El Miro

(887 seats), third run at Fox West Coast's Wilshire theatre (1189 seats), fourth run at the non-affiliated Aero (650 seats) and last run or as revivals at Fox West Coast's Bundy theatre. The Bundy, a new, modern theatre with 912 seats, represents a substantial investment. The Hitching Post and Aero are smaller, inferior theatres.

"The operators of these theatres are all in active competition." Both Fox West Coast's third-run Wilshire theatre and its last run Bundy, as well as the non-affiliated second run El Miro theatre, play the pictures of those distributors whose pictures are exhibited first run by Fox West Coast and those whose

(2898)

pictures are exhibited first run by its non-affiliated competitors.

"Phoenix, Arizona

"Phoenix had a 1930 population of 48,118 and a 1940 population of 65,414. There are 11 theatres in Phoenix, 2 of which are operated by Fox West Coast, 6 of which are operated by an affiliate of Paramount and 3 of which are operated by persons having no affiliation with any motion picture distributor. Three of these theatres operate on first run policies, 2 others as moveovers or continued first runs and 2 others on mixed policies, partly first and partly subsequent run.

"The largest and finest theatre in Phoenix is the Fox theatre (1,796 seats), operated on a first run policy by Fox West Coast and showing first run pictures distributed by Twentieth Century-Fox and United Artists, some of the pictures distributed by Republic and PRC and about one-half the pictures distributed by Warner Brothers, RKO and Universal. Fox West Coast's new Vista theatre (730 seats) oper-

ates on a moveover policy, showing substantially the same pictures as the Fox on a continued first run. It opened in September, 1944, inaugurating the continued first run of these pictures and, thus, playing
(2899)
prior to Paramount's second and third runs. The Orpheum theatre (1,590 seats), operated by Paramount, shows first run pictures distributed by Paramount, Loew's, Columbia and about one-half the pictures distributed by Warner's, RKO and Universal. The Azteca theatre (950 seats), operated by an independent, shows first run of Spanish and Mexican pictures. The Phoenix theatre (755 seats), operated by another independent, shows first runs of Monogram and some other Western pictures, together with fourth and fifth runs of Paramount, Loew's, Twentieth Century-Fox and Warner Bros. The Rex (400 seats), operated by the same man who operates the Azteca, shows first run Western pictures and last runs of other pictures. All these theatres are in competition.

"C.

"Cities With Populations Between 25,000 and 50,000

"There are 12 cities in the State of California with populations between 25,000 and 50,000. I understand that the Government charges that in 8 of these cities theatre exhibition is dominated by exhibitors affiliated with motion picture distributors. The following analysis of the theatre situation in those 8 towns will demonstrate that this charge is without substance or
(2900)
significance.

"*Alhambra.*—Alhambra is a part of metropolitan Los Angeles, located immediately north of East Los

Angeles, immediately south of South Pasadena and immediately east of the part of Los Angeles sometimes referred to as El Sereno. Bordering Alhambra on the southeast are Monterey Park and Garvey and to the east is San Gabriel. Fox West Coast operates 4 theatres in Alhambra. These theatres compete with the unaffiliated theatres in El Sereno, East Los Angeles, Monterey Park, Garvey and San Gabriel.

"*Bakersfield.* Bakersfield is the principal city in the San Joaquim Valley. There are 8 theatres in Bakersfield and one theatre in Oildale, a contiguous suburb. Fox West Coast operates 5 of these 9 theatres.

"*Beverly Hills.* Beverly Hills is a part of metropolitan Los Angeles, being completely surrounded by the City of Los Angeles. Theatres in Beverly Hills are in competition with the affiliated and non-affiliated theatres in that section of the City of Los Angeles. There are 5 theatres in Beverly Hills, 3 operated by Fox West Coast, one by Warner Bros., and one by Mr. Blumenfeld. Two of these theatres, the Fox Wilshire and Mr. Blumenfeld's Beverly Music Hall, are playing first run in the City of Los Angeles. The others are playing Los Angeles neighborhood runs.

"*Huntington Park and Inglewood.* These towns are part of metropolitan Los Angeles. Huntington Park is located just east of south Los Angeles and Inglewood just west of south Los Angeles. This entire south Los Angeles area is built up residentially so that it is impossible to tell from its appearance where the political boundaries are.

"Fox West Coast operates one of the 4 theatres in Huntington Park and also operates the Lyric theatre in what is called Walnut Park, which is outside the Huntington Park city limits. Warner Bros. operate

a theatre in Huntington Park and two theatres are operated by unaffiliated exhibitors. These Huntington Park theatres compete with the theatres in south Los Angeles, almost none of which are affiliated with distributors. They also compete with affiliated and non-affiliated theatres in nearby municipalities forming a part of the same residential area, such as Bell, Southgate, Lynwood and the section of Los Angeles County immediately south and east of the city limits.

"Fox West Coast operates 5 of the 6 theatres in Inglewood, the other one being operated by an unaffiliated exhibitor. These Inglewood theatres com-

(2902)

pete with the theatres in south Los Angeles and with the unaffiliated theatres in Hawthorne and Lennox to the south.

"*Riverside and San Bernardino.* These cities are located about ten miles apart, about forty miles east of Los Angeles. The theatres in these cities compete with each other and with the non-affiliated theatres in neighboring cities like Colton, which is located directly between them, and Fontana, which is west of San Bernardino and northwest of Riverside. The Riverside theatres also compete with the non-affiliated theatres in Arlington to the south. In San Bernardino, there are 8 theatres, 5 of which are operated by Fox West Coast, one of which is operated by Warner Bros. and two of which are operated by exhibitors not affiliated with any motion picture distributor. In Riverside there are 4 theatres, or 5 theatres if the small theatre located on the stage of the Fox Riverside is counted as a separate theatre. One of these 4 theatres is operated by an unaffiliated exhibitor and the others by Fox West Coast.

"*Santa Barbara.* There are 5 theatres in Santa Barbara, one of which is operated by Fox West Coast and 4 of which are operated by Warner Bros.

(2903)

"D.

"*Cities of Less than 25,000 Population*

"I am informed that in Exhibit 371 the Government lists certain cities in California with populations of less than 25,000 where Fox West Coast is said to operate the only theatre or theatres in the town. Under ordinary circumstances, a theatre with a seating capacity of about 1,000 can alone adequately provide the facilities desirable for a community of 10,000 or less located outside a metropolitan area. Hence, in a small community, an established exhibitor giving good motion picture service will generally have the only theatre or theatres in such a town. Furthermore, this established exhibitor is usually the first to know whether his theatre has become inadequate to service the community because of the lack of sufficient seats, an increase in population, or otherwise. He is generally the first to provide more seats or better facilities for his community and, as a consequence, it will generally be found that, regardless of the fact of affiliation, the one or two theatres in a small city are owned by the same exhibitor.

"Fox West Coast is charged with having the only

(2904)

theatres in ten cities in California located outside the Los Angeles metropolitan area. Five of these cities are in Southern California and five in Northern California. There are 286 towns in California, excluding Los Angeles County, which have populations of less than 25,000 and also have motion picture theatres.

There are only one or two theatres in most of these towns and there are competing exhibitors in only twenty-five of them. Thus, Fox West Coast is charged with having theatres in only 10 of the 255 towns in California where there is only one motion picture exhibitor, namely, Banning, Fullerton, Pomona, Porterville, Redlands, Redwood City, San Carlos, San Luis Obispo, Tracy and Watsonville. A similar charge is made in Exhibit 371 with respect to 14 localities in the Los Angeles metropolitan area. Some of these localities are merely local names for parts of the City of Los Angeles and some of them are politically separate municipalities within the City of Greater Los Angeles. Theatres in all these communities compete with nearby theatres in other parts of metropolitan Los Angeles.

"Fox West Coast operates two theatres in the part of the City of Los Angeles called *Wilmington*. These theatres compete with the affiliated and non-affiliated

(2905)

theatres in neighboring sections of Los Angeles and in Long Beach, which is contiguous to this part of Los Angeles. The theatres in *Bell, Bell Gardens, Compton* and *Maywood* are all in the Huntington Park area. They compete with the independent theatres in Southgate and Lynwood, which are located between Compton and Bell, forming a part of a continuous residential area. They also compete with the non-affiliated theatres located in Downey to the west and Watts to the east and the affiliated and non-affiliated theatres in Huntington Park. The theatres in *Hermosa Beach, Manhattan Beach* and *Redondo Beach* compete with the unaffiliated theatres in El Segundo, Hawthorne Gardens, Torrence and Lomita. *North Hollywood* and *Van Nuys*, which is contiguous,

are each part of the City of Los Angeles. The Fox West Coast theatres there compete with the unaffiliated theatres in Burbank and the affiliated and non-affiliated theatres in Hollywood. *Ocean Park* is a name given to the amusement section comprising the southern part of Santa Monica and the northern part of the section of the City of Los Angeles sometimes called Venice. The theatres in what is called Ocean Park compete with the affiliated theatres in *Venice* and *West Los Angeles* and with the affiliated and non-affiliated theatres in Santa Monica and Culver City, all of which are a part of a single competitive area,

(2906)

and are also competing with other theatres in the western part of the City of Los Angeles. The two Fox West Coast theatres in *South Pasadena* compete with the affiliated theatres in Alhambra to the south and with the affiliated and non-affiliated theatres in Pasadena to the north and on the west with the theatres both affiliated and non-affiliated in that part of Los Angeles known as Highland Park. They also compete with the non-affiliated theatres in the part of Los Angeles to the southwest known as El Sereno.

"Statistical Data

"In 1930, that is, before I became associated with either Fox West Coast Theatres Corporation or National Theatres Corporation, Fox West Coast operated theatres in 62 cities in California. Today it operates theatres in 62 cities in that State. In the meantime, it has lost its theatres in 8 cities (Napa, Turlock, Azusa, Hawthorne, Norwalk, Downey, Burbank and Whittier) and acquired theatres in 8 different cities (Cleremont, Compton, Sherman, Manhattan Beach,

Maywood, Monrovia, Pacific Beach and San Carlos). In 4 of these there previously were no theatres, and new theatres were built by Fox West Coast. In the remaining 4 Fox West Coast acquired existing theatres.

(2907)

"In 1930 the company operated 51 theatres out of 181 theatres in the City of Los Angeles; today it operates 58 theatres out of 222 theatres in that City. The estimated increase in the population of Los Angeles today over that of 1930 is 500,000, or about 40%. There has been an increase of 41 theatres to service this additional population, of which 30 have been constructed and are operated by unaffiliated exhibitors.

"From the above, it can be seen that the small increase in the number of Fox West Coast theatres has no more than kept pace with the expansion of the population or the general development of theatres.

"In 1930 Fox West Coast operated the 'first subsequent run' theatres in 17 neighborhood areas of Los Angeles. Today it has the corresponding run in only 13 of these neighborhoods. In 1930 there were approximately 550 theatres in California to service a population of 5,677,251 and, in 1945, approximately 1,050 theatres to service an estimated population of 7,750,000. Thus, there has been an increase of about 500 theatres in 15 years to service this population increase of 2,000,000. In 1930 Fox West Coast operated 194 theatres throughout California; today it operates 257, or 63 more than it did in 1930. It thus appears

(2908)

that, while the number of theatres has almost doubled in the fifteen-year period, more than 400 of the 500 additional theatres are operated by other exhibitors.

Charles P. Skouras

"In the areas where Fox West Coast Theatres Corporation operates, there are other competing theatre circuits, and such circuits have been expanding rapidly. For example, the Blumenfeld circuit has grown from 7 theatres in 1932 to 35 theatres today. This circuit operates chiefly in Northern California and its principal theatres are generally in competition with Fox West Coast. In about 1932, Blumenfeld operated only one or two theatres in competition with Fox West Coast. Now he operates a number of first run theatres in competition with Fox West Coast in Los Angeles, San Francisco, Oakland, Berkeley, Sacramento and Stockton.

"Southern California Amusement Co., Inc. is an example of a similar rapidly growing-non-affiliated circuit in the Los Angeles metropolitan area. Although the owners of this circuit (Harry Vinnicof, J. Y. Berman and James Edwards, Jr.) operated some theatres in 1930, the circuit was not in existence then. This circuit now operates about 38 theatres in the Los Angeles metropolitan area.

"Fox West Coast has not conspired or combined (2909-2920)

with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres and other than the agreements with Loew's and Paramount referred to on pages 17-19 hereof.

Charles P. Skouras

"I also deny that Fox West Coast, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

(Sgd) Charles P. Skouras."

Koerner Exhibit 1

LOANS TO RKO RADIO PICTURES, INC., FROM OTHER PRODUCING COMPANIES OF PLAYERS AND OTHER PRODUCTION PERSONNEL DURING THE YEARS FROM 1940 TO 1945.

Name	Capacity	Producer Who Loaned	Picture
Howard, Mary	Actress	Loew's, Inc.	"Nurse Edith Cavell"
Howard, Mary	Actress	Loew's, Inc.	"Abe Lincoln in Illinois"
Hitchcock, Alfred	Director	Selznick	"Mr. and Mrs. Smith"
Hitchcock, Alfred	Director	Selznick	"Suspicion"
Vidor, Charles	Director	Columbia	"Tuttles of Tahiti"
Bari, Lynn	Actress	Twentieth Century-Fox	"The Gay Falcon"
Baxter, Anne	Actress	Twentieth Century-Fox	"Magnificent Ambersons"
Coles, Mildred	Actress	Warner Bros.	"Debutante Inc."
Coles, Mildred	Actress	Warner Bros.	"Hurry, Charlie, Hurry"
Coles, Mildred	Actress	Warner Bros.	"Lady Scarface"
Drew, Ellen	Actress	Paramount	"My Favorite Spy"
Fontaine, Joan	Actress	Selznick	"Suspicion"
Gilmore, Virginia	Actress	Samuel Goldwyn, Inc.	"Laddie"
Kelly, Nancy	Actress	Twentieth Century-Fox	"Parachute Battalion"
Parrish, Helen	Actress	Universal	"You'll Find Out"
Rogers, Jean	Actress	Twentieth Century-Fox	"Malvina Swings It"
Wyman, Jane	Actress	Warners	"My Favoite Spy"
Cregar, Laird	Actor	Twentieth Century-Fox	"Joan of Paris"
Hall, Jon	Actor	Samuel Goldwyn, Inc., Ltd.	"Tuttles of Tahiti"
Marshall, Alan	Actor	David O. Selznick Prods., Inc.	"Tom, Dick and Harry"
Mature, Victor	Actor	Hal Roach Studios, Inc.	"No, No, Nanette"
Montgomery, Robert	Actor	Loew's, Inc.	"Mr. and Mrs. Smith"
Morgan, Dennis	Actor	Warner Bros.	"Kitty Foyle"
Murphy, George	Actor	Loew's, Inc.	"Three Girls and a Gob"
Murphy, George	Actor	Loew's, Inc.	"Tom, Dick and Harry"
Murphy, George	Actor	Loew's, Inc.	"Mayor of Forty-Fourth Street"
O'Keefe, Dennis	Actor	Loew's, Inc.	"Thousand Dollar Marriage"
O'Keefe, Dennis	Actor	Loew's, Inc.	"You'll Find Out"
Preston, Robert	Actor	Paramount	"Parachute Battalion"
Tyler, Tom	Actor	Republic	"Valley of the Sun"
Whitney, Peter	Actor	Warners	"Valley of the Sun"
Meltzner, S. Lewis	Writer	Columbia	"Tuttles of Tahiti"
Elliot, Paul	Writer	Loew's, Inc.	"It's All True"
Waxman, Franz	Music Director	Loew's, Inc.	"Suspicion"
DeHavilland, Olivia	Actress	Selznick	"Government Girl"
Day, Laraine	Actress	Loew's, Inc.	"From Here To Victory"
Drew, Ellen	Actress	Paramount	"My Favorite Spy"
Hussey, Ruth	Actress	Loew's, Inc.	"Tender Comrade"

Name	Capacity	Producer Who Loaned	Picture
Hussey, Ruth	Actress	Loew's, Inc.	"Marine Raiders"
Randolph, Jane	Actress	Twentieth Century-Fox	"Curse of the Cat People"
Auer, Mischa	Actor	Twentieth Century-Fox	"Around The World"
Dekker, Albert	Actor	Paramount	"Once Upon a Honeymoon"
Fonda, Henry	Actor	Twentieth Century-Fox	"The Big Street"
Hall, Jon	Actor	Samuel Goldwyn, Inc.	"Tuttles of Tahiti"
MacMurray, Fred	Actor	Paramount	"Stand By To Die"
Murphy, George	Actor	Loew's, Inc.	"Navy Comes Through"
Neal, Tom	Actor	Columbia Picts. Corp.	"Behind The Rising Sun"
Wayne, John	Actor	Republic	"Free For All"
Allen, Louis	Director	Paramount	"Those Endearing Young Charms"
Berke, William	Director	William H. Pine Corporation	"Falcon In Mexico"
Cromwell, John	Director	Vanguard	"Enchanted Cottage"
DeHaven, Gloria	Actress	Loew's, Inc.	"Step Lively"
Hasso, Signe	Actress	Loew's, Inc.	"Johnny Angel"
Hayward, Susan	Actress	Paramount	"Deadline At Dawn"
LaMarr, Hedy	Actress	Loew's, Inc.	"Experiment Perilous"
Landis, Carol	Actress	Twentieth Century-Fox	"Having A Wonderful Crime"
Maguire, Dorothy	Actress	Vanguard	"Enchanted Cottage"
Raines, Ella	Actress	Universal	"Tall In The Saddle"
Young, Audrey	Actress	Paramount	"George White Scandals"
Quinn, Anthony	Actor	Twentieth Century-Fox	"China Sky"
			"Back to Bataan"
Young, Robert	Actor	Loew's, Inc.	"Enchanted Cottage"
			"Those Endearing Young Charms"
Joslyn, Allyn	Actor	Twentieth Century-Fox	"Bride By Mistake"
Louis, Lawrence	Actor	Monogram	"China Sky"
			"Back to Bataan"
Ephron, Henry and Phoebe	Writers	Twentieth Century-Fox	"Bride By Mistake"
Jarrico, Paul	Writer	Loew's, Inc.	"I'm Thinking Of My Darling"
Partos, Frank	Writer	Paramount	"East Wind"
Pierson, Louise Randall	Writer	Warner	"The Gibson Girl"
Solt, Andrew	Writer	Columbia	"Lena Storm"
Berry, John	Director	Paramount	"From This Day Forward"
Fontaine, Joan	Actress	Selznick	"From This Day Forward"
Partos, Frank	Writer	Paramount	"East Wind"
Solt, Andrew	Writer	F. R. Productions	"Thanks, God! I'll Take It From Here"
Stevens, Mark	Actor	Twentieth Century-Fox	"From This Day Forward"

Name	Capacity	Producer Who Loaned	Picture
Morgan, Frank	Actor	Loew's, Inc.	"Lady Luck"
Knox, Alexander	Actor	Columbia	"Sister Kenny"
Gleason, James	Actor	Twentieth Century-Fox	"Lady Luck"
Fleming, Rhonda	Actress	Vanguard	"Some Must Watch"
Driscoll, Bobby	Actor	Disney	"From This Day Forward"
Young, Robert	Actor	Loew's, Inc.	"Lady Luck"
Barrymore, Ethel	Actress	Vanguard	"Spiral Staircase"
McGuire, Dorothy	Actress	Vanguard	"Spiral Staircase"
McGuire, Dorothy	Actress	Vanguard	"They Dream Of Home"
Bergman, Ingrid	Actress	Vanguard	"Notorious"
Madison, Guy	Actor	Vanguard	"They Dream of Home"
Siodmak, Robert	Director	Vanguard	"Spiral Staircase"
Hitchcock, Alfred	Director	Vanguard	"Notorious"
Schary, Dore	Producer	Vanguard	"Some Must Watch" "They Dream Of Home"
Marshall, Alan	Actor	Vanguard	"All Kneeling"
DeCamp, Rosemary	Actress	Warner's	"From This Day Forward"
Morgan, Henry	Actor	Twentieth Century-Fox	"From This Day Forward"
Fontaine, Joan	Actress	Vanguard	"All Kneeling"

Koerner Exhibit 2

LOANS BY RKO RADIO PICTURES, INC., TO OTHER PRODUCING COMPANIES OF PLAYERS AND OTHER PRODUCTION PERSONNEL DURING THE YEARS FROM 1940-45.

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
David Butler	Director	Paramount	$4,166.66 per wk.	CAUGHT IN THE DRAFT	$4,166.74 per wk.; 12 wk. guarantee
Phyllis Brooks	Actress	Arnold Prod. Inc.	$750 per wk.	THE SHANGHAI GESTURE	$750 per wk., 6 wk. guarantee
Anne Shirley	Actress	Paramount	$600 per wk.	LITTLE MISS MUFFET	$1,666.66 per wk., 8 wk. guarantee
Sir Cedric Hardwicke	Actor	Charitable Prod. Inc.	$1,500 per wk.	LET THE RAFTERS RING	$1,500 per wk.
"	"	Walter Wanger	"	SUNDOWN	$750 for one day
Ruth Warrick	Actress	Edward Small	$400 per wk.	THE CORSICAN BROTHERS	4 wk. guarantee at $400 per wk. plus 3 weeks salary*
James Ellison	Actor	20th Century Fox	$750 per wk.	CHARLEY'S AUNT	$937.50 per wk., 8 wk. guarantee
Tim Holt	Actor	Universal	$480.76 per wk.	BACK STREET	$1,200 per wk., 2 wk. guarantee
Philip Reed	Actor	Edward Small	$500 per wk.	HELIOTROPE HARRY	$1,000 per wk., 2 wk. guarantee
Dick Hogan	Actor	Republic	$125 per wk.	RANCHO GRANDE	$250 per wk., 2 wk. guarantee
James Lydon	"	"	$300 per wk.	BOWERY BOY	4 wk. guarantee at $300 per wk. plus 3 weeks salary*
Charles Quigley	Actor	Crescent Pictures	$125 per wk.	SECRET EVIDENCE	$250 per wk., 2 wk. guarantee
"	Actor	Loew's, Inc.	$125 per wk.	A WOMAN'S FACE	$250 per wk., 1 wk. guarantee
James Craig	Actor	Loew's, Inc.	$300 per wk.	GAMBLER'S CHOICE	$1,375 per wk., 6 wk. guarantee
Robert Bice	Actor	Loew's, Inc.	$250 per wk.	DRAGON SEED	4 wk. guarantee at $250 per wk. plus 3 weeks salary*
George Cleveland	Actor	Frank Lloyd	$300-400 per wk.	THE SPOILERS	4 wk. guarantee plus 3 weeks salary*
William Terry	"	Principal Artists	$200 per wk.	FOR GOD AND COUNTRY	$41.66 per day

*An additional payment to RKO equal to 3 weeks salary of the person loaned.

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Robert Stevenson	Director	Selznick	$1,750 per wk.	JANE EYRE	$1,500 per week for 6 weeks $1,750 per week thereafter
Joan Davis	Actress	Universal	$3,500 per wk.	No Title	$3,500 per wk., 3 wk. guarantee
Ann Shirley	"	Chas. R. Rogers	$1,875 per wk.	POWERS GIRL	$1,875 per wk.
Robert-DeGrasse	Cameraman	Universal	$400 per wk.	PITTSBURGH	$425 per wk., 10 wk. guarantee
"	"	Hunt Stromberg	$400 per wk.	G-STRING MURDER MYSTERY	$425 per wk., 10 wk. guarantee
Frank Redman	"	Universal	$350 per wk.	PATRICK THE GREAT	$400 per wk., no guarantee
DeWitt Bodeen	Writer	Selznick	$175 per wk.	LIFE OF AN ACTRESS	$250 per wk., 2 wk. guarantee
Irving Phillips	"	Chas. R. Rogers	$300 per wk.	SONG OF THE OPEN ROAD	$400 per wk., 5 wk. guarantee
Frank Ryan	"	Samuel Goldwyn	$350-450 per wk.	TREASURE CHEST	$350-$450 per wk., no guarantee
"	"	Chas. R. Rogers	$450 per wk.	POWERS GIRL	$450 per wk., no guarantee
John Twist	Writer	Universal	$750 per wk.	No Title	$850 per wk., 3 wk. guarantee
E. E. Verdier	"	Chas. R. Rogers	$300 per wk.	SONG OF THE OPEN ROAD	$400 per wk., 5 wk. guarantee
William Cameron Menzies	Producer	Vanguard	$2,000 per wk.	SPELLBOUND and DUEL IN THE SUN	$6,833.33 for 10 days
Jacques Tourneur	Director	Universal	600 per wk.	CANYON PASSAGE	$2,666.67 per wk., 15 weeks
June Duprez	Actress	Popular Pictures	$300 per wk.	THEN THERE WERE NONE	$900 per wk., 10 wk. guarantee
"	"	Paramount	$300 per wk.	CALCUTTA	$1,000 per wk., 10 wk guarantee
Tom Conway	Actor	Nero Prod. Inc.	$550 per wk.	WHISTLE STOP	$2,000 per wk., 5 wk. guarantee
Robert Mitchum	"	Lester Cowan Prod. Inc.	$400-500 per wk.	GI JOE	$800 per wk., 5 wk. guarantee

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Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Frank Sinatra	Actor	Loew's, Inc.	$8,750 per wk.	ANCHORS AWEIGH	$8,750 per wk., 12 wks. guarantee
John Wayne	"	Loew's, Inc.	$6,250 per wk. for 12 wks., 13, 14, 15 wks. free	THEY WERE EXPENDABLE	$6,250 per wk., 15 wks. guarantee
Robert DeGrasse	Cameraman	Republic	$475 per wk.	No Title	$600 per week
Harry Wild	"	Int'l Pictures	$400 per wk.	No Title	1 day only
Ann Jeffreys	Actress	Monogram	$250 per wk.	DILLINGER	$1,000 per wk., 1 wk. guarantee
Emory Parnell	Actor	20th Century Fox	$250 per wk.	WILSON	$500 per wk., 1 wk. guarantee
"	"	Int'l Pictures	$300 per wk.	CASANOVA BROWN	$500 per wk., 10 day guarantee
"	"	Columbia	$300 per wk.	CRIME DOCTOR'S TRAP	$600 per wk., 3 wk. guarantee
"	"	Manhattan Prod. Inc.	$300 per wk.	IT'S IN THE BAG	$327 per day, 2 day guarantee
"	"	Warner Bros.	$400 per wk.	THE BIG SLEEP	$1,000 per wk., 1 wk. guarantee
"	"	20th Century Fox	$400 per wk.	COLONEL EFFINGHAM'S RAID	$750 per wk., 2 wk. guarantee
"	"	"	$400 per wk.	STATE FAIR	$1,000 per wk., 1 wk. guarantee
Lawrency Tierney	Actor	Monogram	$100 per wk.	DILLINGER	$500 per wk., 1 wk. guarantee
Aeneas MacKenzie	Writer	Edward Small	$1,000 per wk.	No Title	$1,000 per wk., 2 wk. guarantee
Herb Meadow	"	Mar's Film Co.	$400 per wk.	"	$400 per wk., 3 wk. guarantee
Paul Eagler	Process Cameraman	New World Prod.		HEART BEAT	1 day only
Lee Harline	Music Director	Universal	$450 per wk.	CHEERS FOR THE BOYS	$5,000 Flat

2132bb

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Lee Harline	Music Director	Paramount	$450 per wk.	ROAD TO UTOPIA	$750 per week, 3 wk. guarantee
Roy Webb	"	Republic	$500 per wk.	FIGHTING SEABEES	$1,000 per week, 1 wk. guarantee
"	"	Paramount	$500 per wk.	RAINBOW ISLAND	$750 per week, 5 wk. guarantee
"	"	Loew's, Inc.	$500 per wk.	SEVENTH CROSS	$750 per week, 6 wk. guarantee
"	"	Paramount	$500 per wk.	WELL GROOMED BRIDE	$750 per week, 3 wk. guarantee
"	"	Republic	"	LOVE, HONOR & GOODBYE	$750 per week, 4 wk. guarantee
Frank Gruber	Writer	Republic	$650 per wk.	No Title	$750 per week, 4 wk. guarantee
Frank Tarloff	"	Int'l Pictures	$300 per wk.	COUNTESS OF MONTE CRISTO	$300 per week, 4 wk. guarantee
Ernst-Matray	Dance Director	Chas. R. Rogers	$750 per wk.	REACHING FOR THE STARS	$1,000 per week for 10 weeks
Maureen O'Hara	Actress	Paramount	$2,210 per wk.	TOMORROW'S HARVEST	$2,812.50 per week, 3 wks.
Dooley Wilson	Actor	Vanguard	$600 per wk.	SINCE YOU WENT AWAY	$1,200 per week, 1 wk. guarantee
Theodore Tetzlaff	Cameraman	Columbia	$1,000 per wk.	No Name	$1,000 per week
Robert Bice	Actor	Loew's, Inc.	$250 per wk.	30 SECONDS OVER TOKYO	$250 per week, no guarantee
Gwen Crawford	Actress	Paramount	$100 per wk.	HERE COMES THE WAVES	4 wk. guarantee at $100 per wk. plus 3 weeks salary*
"	"	Chas. R. Rogers	$100 per wk.	BELLS OF ST. MARY'S	4 wk. guarantee at $100 per wk. plus 3 weeks salary*

*An additional payment to RKO equal to 3 weeks salary of the person loaned.

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Koerner Exhibit 3

TALENT SHARING ARRANGEMENTS

MADE

ETWEEN RKO RADIO PICTURES, INC., AND OTHER PRODUCING COMPANIES DUR-ING THE YEARS FROM 1940-1945.

Name	Capacity	Producer Sharing Services With RKO	Producer Having Original Contract
Andersen, Robert	Actor	Vanguard Films, Inc.	RKO Radio Pictures, Inc.
Avery, Bettye	Actress	Samuel Goldwyn, Inc.	Samuel Goldwyn, Inc.
Brind, Tessa	Actress	Vanguard Films, Inc.	Vanguard Films, Inc.
Cole, Janet	Actress	Vanguard Films, Inc.	Vanguard Films, Inc.
Day, Laraine	Actress	Loew's, Inc.	Loew's, Inc.
de Cordova, Arturo	Actor	Paramount	RKO Radio Pictures, Inc.
Henreid, Paul	Actor	Warner Bros.	Warner Bros.
Lee, Anna	Actress	United Producers Corp.	RKO Radio Pictures, Inc.
Mature, Victor	Actor	Twentieth Century-Fox	Twentieth Century-Fox
Moore, Gary	Actor	Vanguard Films, Inc.	Vanguard Films, Inc.
Murphy, George	Actor	Loew's, Inc.	Loew's, Inc.
O'Hara, Maureen	Actress	Twentieth Century-Fox	RKO Radio Pictures, Inc.
Oliver, Gordon	Actor	Vanguard Films, Inc.	Vanguard Films, Inc.
Peck, Gregory	Actor	Casey Robinson	RKO Radio Pictures, Inc.
Peck, Gregory	Actor	Vanguard Films, Inc.	RKO Radio Pictures, Inc.
Stevens, Mark	Actor	Twentieth Century-Fox	Twentieth Century-Fox
Terry, William	Actor	Principal Artists Productions	RKO Radio Pictures, Inc.
Thurston, Carol	Actress	Cecil B. De Mille Productions, Inc.	Cecil B. De Mille Productions,
Toumanova, Tamara	Actress	Casey Robinson	Casey Robinson
Turnell, Dee	Actress	Twentieth Century-Fox	RKO Radio Pictures, Inc.
Vila, Alberto	Actor	Paramount	RKO Radio Pictures, Inc.

Koerner Exhibit 4

SCHEDULE OF LEASES BY RKO RADIO PICTURES, INC. TO OTHER PRODUCING COMPANIES OF STAGE SPACE AND SETS IN MAIN STUDIO AND RANCH DURING THE PERIOD JANUARY 1, 1939 TO SEPTEMBER 23, 1943.

Name of User	Description of Stage Space and Sets Used	Rental Price
Principal Productions	Stage Space	$ 180.00
" "	" "	101.25
" "	Stage 2	242.35
" "	" "	127.50
" "	Dubbing Stage	37.50
" "	Stage Space	625.00
" "	" "	625.00
" "	" "	650.00
" "	" "	626.25
" "	" "	652.70
" "	" "	633.75
" "	" "	646.25
" "	" "	632.50
" "	" "	632.50
" "	" "	630.00
" "	" "	658.10
" "	" "	627.25
" "	" "	628.00
" "	" "	630.25
" "	Location Fee	300.00
" "	Stage Space	625.00
" "	Stage 2	100.00
" "	Stage Space	640.75
" "	" "	637.00
" "	" "	625.00
" "	" "	638.50
" "	Recording Stage	100.00
" "	Dubbing Stage	100.00
" "	Stage 2	100.00
" "	Stage Space	630.25
" "	" "	625.75
" "	" "	300.00
" "	" "	625.75
" "	" "	629.50
" "	" "	628.00
" "	" "	660.95
" "	" "	627.50
" "	" "	628.00

Name of User	Description of Stage Space and Sets Used	Rental Price
Principal Productions	Stage Space	$ 628.00
" "	Location Fee	303.50
" "	Stage Space	636.25
" "	" "	653.75
" "	" "	627.25
" "	" "	625.75
" "	" "	626.50
" "	" "	628.00
" "	" "	626.50
" "	" "	626.50
" "	" "	643.75
" "	Stage 2	195.00
" "	Re-Recording Room	75.00
" "	" " "	84.38
" "	Dubbing Room	37.50
" "	Stage 2	112.50
Walter Wanger Productions	Western Street	1,550.00
Columbia Pictures	Square of Midwestern Street at RKO Ranch	750.00
" "	French Street	1,250.00
" "	French Street	4,500.00
" "	Location Site—RKO Residential Street—RKO Ranch	750.00
Banner Pictures	"N. Y. Tenement Street"	1,000.00
Republic Productions	French Street	1,250.00
Reed Roland Productions	"Residential Street Set"	1,000.00
Paramount Pictures	Rental of "Hunchback Street"	24,450.00

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Mr. Caskey: I now ask to have the stipulation of Dan Michalove, vice-president of National Theatres Corporation, incorporated into the record. Mr. Michalove's affidavit deals with the operation of a theatre in Detroit and in Philadelphia.

(The affidavit of DAN MICHALOVE is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding DAN MICHALOVE would testify as follows:

"I reside at 300 Central Park West, New York City. I am a vice-president and a director of National Theatres Corporation, one of the defendants herein. I have been employed by that company, or one of its subsidiaries, in an executive capacity since 1938. I have been engaged in the motion picture exhibition business for over 25 years.

"National Theatres Corporation, in addition to the theatres operated by its five principal subsidiaries, is now interested, through two wholly owned subsidiaries, in the operation of two outstanding first run 'show case' theatres: The Fox Theatre in Detroit and the Fox Theatre in Philadelphia. These theatres were initially designed to operate with symphony orchestras and stage shows. Both of these theatres were

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originally constructed by affiliates of Twentieth Century-Fox Film Corporation not only to provide an adequate first-run outlet for its product, but also to

further the exploitation of its pictures. These theatres are important releasing points for the product of Twentieth Century-Fox Film Corporation not only in the city in which they are located but in all communities in the surrounding territory. In consequence, Twentieth Century-Fox contributes in large measure to the preparation and the expense of advertising and other exploitation material deemed desirable in the proper launching of its product in these two large theatres.

"Fox Theatre—Detroit

"The Fox Theatre in Detroit, Michigan, with 5,041 seats is the largest and finest theatre in the City of Detroit. It is operated on a first-run policy showing first run in the City of Detroit subtantially all of the better pictures distributed by Twentieth Century-Fox, Universal and Columbia. The Fox will occasionally also exhibit a first-run picture distributed by such other distributors as RKO and Monogram. In Detroit, National Theatres Corporation, through a subsidiary, also has a minority interest in the operations of the Adams Theatre (1,545 seats) which operates on

(2923)

a first run or continued first run policy showing pictures distributed by the same companies as those whose pictures are exhibited at the Fox.

"For a period of about seven years between 1931 and 1939 the Fox Theatre was operated by the Union Guardian Trust Company as Receiver. During this period it exhibited first run in the City of Detroit, the pictures of substantially the same distributors as those now being shown in the theatre. The Fox Theatre operates, and has always operated, in competition with the other first run Detroit theatres, and with the sub-

sequent run theatres in its area, its principal competitors being United Artists and Michigan Theatres.

"Fox Theatre—Philadelphia, Pa.

"The Fox Theatre in Philadelphia, Pa. is one of the largest and finest theatres in Philadelphia. It has 2,423 seats and is about the same size as the other principal first run theatres with the exception of the 4,700 seat Mastbaum. In the middle 1930's the Fox Theatre was leased to Stanley Company of America, which operated the theatre as a first run Philadelphia house until October 5, 1945, when its existing lease was terminated and the operations of the theatre were again taken over by a subsidiary of National Theatres Corporation. The Fox Theatre is now playing, first

(2924)

run in the City of Philadelphia the pictures distributed by Twentieth Century-Fox Film Corporation. The Fox theatre operates in competition with other first run Philadelphia theatres and with the subsequent run theatres located in the same area.

"Neither National Theatres Corporation, nor its subsidiaries operating theatres in Detroit and Philadelphia, respectively, have conspired or combined with, and none of them has any agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. None of them has any agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements each of such subsidiaries has made for the licensing of pictures in its theatre or theatres.

"I also deny that National Theatres Corporation, or its subsidiaries operating theatres in Philadelphia and Detroit, respectively, either individually or in conjunction or combination with any other person have engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which they or any of them compete.

(Sgd.) Dan Michalove."

(2925)

Mr. Caskey: In the course of the testimony the defendant Twentieth Century-Fox called its general sales manager, Mr. Kupper, and there were also present in court the vice-president in charge of production, Mr. Connors, and the eastern sales manager, Mr. Smith, and their stipulations were received orally. I have now stipulations from the other three division sales managers, Mr. Harry G. Ballance, who has the South; Mr. William C. Gehring, sales manager for the Central Division, and Mr. Herman Wobber, who has the West.

I ask to have these incorporated into the record.

(The affidavit of HARRY G. BALLANCE is as follows:)

"HARRY G. BALLANCE, being duly sworn, deposes and says:

"I have been employed by Twentieth Century-Fox Film Corporation or its predecessor since November 28, 1932 when I became southern district manager. On August 3, 1942, I became division manager for the southern division and on August 27, 1945, the southern division was made an entirely autonomous division.

"As such sales manager, I have direct charge of The Twentieth Century-Fox Film exchanges in Atlanta, Georgia, Charlotte, North Carolina, New

Orleans, Louisiana, Dallas, Texas, Memphis, Tennes-
(2926)
see, and Oklahoma City, Oklahoma.

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-
(2927)
called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearance in any city or area shall be set up or stated.

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"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for

the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting

(2929)

National theatres a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent', fixing the minimum admission price which Twentieth Century-Fox must insert in its license agreement with a subsequent-run exhibitor."

Jurat. signed HARRY G. BALLANCE.

(The affidavit of WILLIAM C. GEHRING is as follows:)

"WILLIAM C. GEHRING, being duly sworn, deposes and says:

"I have been employed by Twentieth Century-Fox Film Corporation or its predecessor since December 30, 1918, when I was engaged as a poster clerk in the Buffalo branch office. Since then I have been a salesman and an assistant manager in several exchanges, a branch manager in several exchanges, a home office representative with special sales duties in New York and on December 28, 1936, I was made central sales manager. On July 7, 1942, I became western sales manager and on August 27, 1945, I became sales manager for the central division.

"As such sales manager, I have the direct supervision of the Twentieth Century-Fox Film exchanges

in Chicago, Illinois, Detroit, Michigan, Milwaukee, Wisconsin, Cincinnati, Ohio, Cleveland, Ohio, Indian-
(2930)
apolis, Indiana, Des Moines, Iowa, Minneapolis, Minnesota, Omaha, Nebraska, Kansas City, Kansas, St. Louis, Missouri, and of all of the Canadian exchanges.

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-
(2931)
called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner

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or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the de-

fendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-

(2933)

exhibitor defendant upon such other defendant granting National Theatres a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent', fixing the minimum admission price which Twentieth Century-Fox must insert in its license agreement with a subsequent-run exhibitor."

Jurat. (signed) WILLIAM C. GEHRING.

(The affidavit of Herman Wobber is as follows:)

"HERMAN WOBBER, being duly sworn, deposes and says:

"At the present time I am one of the four Divisional Sales Managers of Twentieth Century-Fox Film

Corporation. I have been employed by Twentieth Century-Fox since November 12, 1932, when I became District Manager of the Pacific Coast Division. On June 6, 1938, I became General Sales Manager at New York City. On June 1, 1942, I left New York to become Western Division Manager and Pacific Coast District Manager. On September 14, 1942, I became Division Manager for the West Coast and on August 27, 1945, the Western Division was made a separate autonomous division.

"As Western Division Manager I am in charge of the Twentieth Century-Fox Film exchanges in Den-
(2934)
ver, Colorado, Salt Lake City, Utah, Los Angeles, California, Portland, Oregon, San Francisco, California and Seattle, Washington.

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres.

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"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres.

"The run gra ted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

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"The minimum admission prices inserted or to be inserted in license for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting National Theatres a license for the exhibition of

(2937)

films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent,' fixing the minimum admission price which Twentieth Century-Fox

must insert in its license agreement with a subsequent-run exhibitor."

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox Exhibit F-23 for identification.)

Mr. Caskey: I offer in evidence F-23 for identification, being a resume of the film rentals paid by National Theatres to several distributors of motion pictures from the year 1935 through 1944 in terms of percentage.

Mr. Wright: I take it on this Exhibit F-23 that the initials GWTW stand for the picture Gone With The Wind. The Court does not know that.

Mr Caskey: I will so stipulate.

(Defendant Twentieth Century-Fox's Exhibit F-23 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's

(2938)

Exhibit F-2 for identification.)

Mr. Caskey: I offer in evidence Exhibit F-24 for identification, being a schedule showing the earnings after taxes and dividends paid by National Theatres Corporation.

(Defendant Twentieth Century-Fox's Exhibit F-24 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-25 for identification.)

Harold J. Mirisch

Mr. Caskey: I offer in evidence F-25 for identification, an illustrated schedule prepared from Exhibit F-21 showing the relationship of the revenue derived from the first-run in the 92 cities compared with the total revenue in the United States on the picture Sweet Rosie O'Grady, and the distribution of that first-run revenue among nine groups of theatres, including five of the defendants. The phrase "National Theatres" embraces the Roxy Theatre.

(2939)

Mr. Caskey: I offer in evidence Defendant Fox's Exhibit F-26, which is again simply an illustration of the data already in evidence as F-19. It consists of three charts and is, I think, self-explanatory.

(Marked Fox's Exhibit F-26 in evidence.)

Mr. Caskey: Finally, I offer in evidence Defendant Fox's Exhibit F-27, two charts, showing the percentage of revenue derived from the five exhibitor defendants to the total revenue. This is predicated upon Exhibit F-18 already in evidence.

(Marked Fox's Exhibit F-27 in evidence.)

Mr. Caskey: The defendants Twentieth Century-Fox and National Theatres Corporation rest.

Mr. Leisure: If the Court please, we have three stipulations which we have taken up with Mr. Wright, general denials, with respect to Mr. Ned E. Depinet, Mr. Harold J. Mirisch and Mr. J. Malcolm Kingsberg, which we ask to have incorporated in the record.

(The stipulations are as follows):

"IT IS HEREBY STIPULATED, that if HAROLD J. MIRISCH were called as a witness in behalf of the RKO defendants in the above-entitled action, he would tes-

tify that he is, and since June 1942 has been generally in charge of the licensing of pictures for exhibition in theatres operated by Radio-Keith-Orpheum Corporation or its subsidiaries, and during said time has
(2940)
been generally familiar with the policies pursued by the RKO defendants in the licensing of pictures for exhibition in said theatres.

"APPENDIX A

"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

"1. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to enter into joint agreements with respect to a theatre where the film buying control or

proceeds from the operation thereof is divided be-
(2941)
tween two or more exhibitor defendants for the purpose of unreasonably restraining competition or monopolizing exhibition or distribution with respect to such theatre?

"4. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or in any city, town or competitive area therein?"

"IT IS HEREBY STIPULATED, than if NED E. DEPINET were called as a witness in behalf of the RKO defendants in the above entitled action, he would testify that he is, and since June 25, 1942 has been, president of RKO Radio Pictures, Inc., and that between January 14, 1932 and June 25, 1942 he was vice president of RKO Radio Pictures, Inc., and that during all of such time he has been generally familiar with the policies of RKO Radio Pictures, Inc. in licensing the pictures which it distributes.

(2942)

"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

"APPENDIX A

"1. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to license any pictures for exhibition in any theatre before the pictures have been purchased and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to condition the licensing of one or more films or group of films upon the licensing of another film or group of films?

"4. Has there been or is there to your knowledge any agreement or understanding between any RKO

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defendant or defendants and any other defendant or

defendants to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants to enter into long term franchises with circuits or theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres?

"6. Has there been or is there to your knowledge any understanding or agreement between any RKO defendant or defendants and any other defendant or defendants to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of a circuit?

"7. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant and any other defendant or defendants to favor, in licensing their pictures, the theatres in which the defendants or any of them have an interest as against the theatres of exhibitors in which none of the defendants has an interest either with respect to run, clearance, license fees, or any other license terms?

(2944)

"8. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to license pictures for exhibition in the theatres, or in any theatre, in which one of the defendants has an interest, on condition or in considera-

tion of such other defendant licensing its pictures for exhibition in a theatre or theatres in which RKO has an interest?

"9. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude independently produced motion pictures from theatres in which the defendants or any of them have an interest?

"10. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude non-affiliated exhibitors from the operation of competing first run theatres in cities and towns where there are theatres in which a defendant or defendants have an interest?

"11. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where affiliated theatres are located?

(2945)

"12. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to control the film supply, run, clearance and admission price of operators of unaffiliated theatres in the cities, towns or competitive areas where affiliated theatres are located or elsewhere?

"13. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants as to the terms upon which each or any of them would license its film to unaffiliated exhibitors?

"14. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor?

"15. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located

(2946)

in the same competitive area without competitive negotiations?"

"IT IS HEREBY STIPULATED, that if J. MALCOLM KINGSBERG were called as a witness in behalf of the RKO defendants in the above-entitled action, he would testify that he is, and since September 20, 1943 has been, vice president and treasurer of Radio-Keith-Orpheum Corporation (Delaware); that from April 26, 1934 until the corporation was dissolved on September 29, 1944, he was vice-president of Keith-Albee-Orpheum Corporation; that he is, and since January

18, 1940 has been, vice president of B. F. Keith Corporation; that he is, and since December 1941 has been, president of RKO Orpheum Corporation; that he is, and since February 17, 1942 has been, president of RKO Midwest Corporation; that he is, and since May 26, 1942 has been, president of RKO Proctor Corporation; and that during the time he occupied the positions above stated he was familiar with the policies of the RKO defendants in respect of the licensing of pictures in theatres operated by Radio-Keith-Orpheum Corporation or its subsidiaries.

"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

(2947)

"APPENDIX A.

"1. Has there been or is there to your knowlege any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or

defendants to enter into joint agreements with respect to a theater where the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of unreasonably restraining competition or monopolizing exhibition or distribution with respect to such theatre?

"4. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or
(2948)
defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or in any city, town or competitive area therein?"

Judge Bright: Is that your case, Mr. Leisure?

Mr. Leisure: Yes, sir.

Judge Hand: All the defendants then rest, is that right?

Mr. Seymour: I had certain reservations, your Honors will recall, to add a few affidavits and the problem of correcting the record, and those reservations persist, and, subject to them, I have rested.

Judge Hand: Are they on the wing now?

Mr. Seymour: I am told so.

CLERK'S COPY.

Vol. V

TRANSCRIPT OF RECORD

(Pages 2156 to 2544)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE]

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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Mr. Davis: If your Honors please, I expected this morning to have the additional statistics, but, due to the unfortunate death of the treasurer of the company, they have closed their offices, and that has put me behind, so I will not be able to present those statistics

(2949)

at this time.

Mr. Wright: If the Court please, I would first like to see that some corrections are made of record here with respect to exhibits. There were certain exhibits, that is, Nos. 72, 120 and 133 which have been stamped by the clerk as received in evidence, but the record transcript does not reflect them as having been received, and I think the transcript should be corrected accordingly. I take it there is no objection from anyone.

Mr. Proskauer: Probably won't be if you will talk so we can hear you.

(2950)

Mr. Wright: As to Exhibit 153, that is also marked as having been received in evidence. However, I do not believe it clearly appears in the record that it was received, and it should appear in the record as having been received.

Mr. Caskey: Just a minute, Mr. Wright. 72 is the first one?

Mr. Wright: 72. That appears at page 283 of the transcript; and 120 at page 318; Exhibit 133 at page 325.

Mr. Davis: Are you using the numbers now that are in your——

Mr. Wright: The typewritten transcript.

Mr. Davis: But not the numbers in your Government Exhibit list?

Mr. Wright: Yes, I am referring to the exhibit——

Mr. Davis: The same numbers?

Mr. Wright: Yes, the same numbers.

Mr. Caskey: As to those three, 72, 120 and 133, our records show they were admitted.

Mr. Wright: I do not think there is any question about it. And 153 is also marked as having been received and I think the record was ambiguous in that respect and it should clearly appear that it is in evidence. That I think is at page 348 of the transcript.

Mr. Caskey: We show it admitted.

Mr. Wright: There are a couple of errors in description in the list of Government's exhibits for iden-

(2951)

tification that I would like to call to the Court's attention at this time. The description as to 221, if you will turn to page 104 of the Government's exhibits for identification——

Mr. Davis: What is wrong about that?

Mr. Wright: 221 should have, in addition to the theatre names that you see there, added to it the Tower and the 69th Street.

Mr. Proskauer: Whatever the agreement shows, it shows. I haven't got it before me.

Mr. Wright: That is right, but this is just for your——

Judge Bright: They are all of Philadelphia?

Mr. Wright: — and the Court's convenience. (To Judge Bright:) Yes.

Then as to the following exhibit, 222, the description you see there should be stricken. That exhibit is a supplementary agreement between Paramount and Fox West-Coast, dated November 5, 1943, which supplements Exhibit 232, and if you will turn to page 102, Exhibit 200, at the bottom of the page, the theatre

names there, Crotona, Nemo and Park Plaza, those should be stricken, and the correct theatre names are Riverside, Colonial and 81st Street.

(2952)

Then I have some corrected data which has been furnished us by the defendants since our case was closed, which I should like to have marked and added. The first is an exhibit which I should like to have marked as 95-A, which corrects errors that appeared in Exhibit 95. That relates to RKO's interrogatory answers.

(Marked Government's Exhibit 95-A.)

Mr. Wright: And a supplemental answer to interrogatories 3, 12 and 13, submitted by Warner Bros., which modifies the data previously offered in evidence as Exhibit 125. I will ask to have that marked as Exhibit 125-A.

(Marked Government's Exhibit 125-A.)

Judge Bright: 125 was excluded, wasn't it?

Mr. Wright: I think not.

Judge Bright: Oh, I see. Part of it was.

Mr. Caskey: 4 and 5 were excluded, your Honor.

Mr. Wright: Yes, that is correct. What I have just offered relates to 3, 12 and 13.

And I have here supplemental interrogatory data furnished by Warner Bros., which I will ask to have marked as Exhibits 126-A and 126-B respectively; 126-A relating to Lawrence, Massachusetts, and 126-B relating to Columbus, Ohio, and Atlanta, Georgia, and Oakland, California, all of which supplement the data previously in evidence as Exhibit 126.

(2953)

(Marked Government's Exhibits 126-A and 126-B respectively.)

Mr. Wright: Mr. Davis has just handed me some corrections here. The first one, which relates to Exhibit 163, I will ask you to have marked in evidence as Exhibit 163-A.

(Marked Government's Exhibit 163-A.)

Mr. Wright: And this second letter also pertains to 163 and we will have that marked as Exhibit 163-B.

(Marked Exhibit 163-B.)

Mr. Wright: Then I should like to have marked and received in evidence as Exhibit 266-A, a supplementary agreement dated May 18, 1944, and letter attached, dated November 15, 1943, which extended the term of the franchise that is in evidence as Exhibit 266, one for Columbia pictures in the Warner circuit, extending it through the 1945-46 season.

Mr. Frohlich: May I see that, Mr. Wright.

Mr. Wright: The franchise in evidence is here as 266 and the supplement 266-A, you have there in your hand.

Mr. Frohlich: This extends it down to the 1945-46 season?

Mr. Wright: Through the 1945-46 season.

(Marked Government's Exhibit 266-A.)

Mr. Wright: And I have here the pages which

(2954)

were missing from Exhibit 272, which Mr. Raftery furnished. That is an agreement between United Artists Corporation and Fox West Coast Agency Corporation. I ask to have this marked as Exhibit 272-A.

Mr. Raftery: I gave you the whole file. Is that taken out of that, or what is it?

Mr. Wright: No, this relates to Stage Door Canteen.

Mr. Raftery: All right.

(Marked Government's Exhibit 272-A.)

Mr. Caskey: I would like to see it.

(Exhibit handed to Mr. Caskey.)

Mr. Caskey: Where is 272?

(Exhibit 272 handed to Mr. Caskey.)

Mr. Caskey: This is unexecuted and I have no knowledge of it.

Mr. Wright: I will withdraw it and go on to something else if there is any question about it.

Mr. Raftery: I want it in.

Mr. Wright: I say, I will withdraw it temporarily for checking and go on to something else if there is any question about what it is.

Mr. Raftery: When we produced the document we explained to the Court and to Mr. Wright that we did not have an executed copy, but we vouch for the authenticity of the copy; and we had an extensive examination of witnesses about the sliding scale on

(2955)

Stage Door Canteen, and those are the supporting documents. If Mr. Caskey can produce the original I shall withdraw the copy, but we want it in evidence.

Mr. Caskey: Well, go ahead, and we will look at 272.

Mr. Wright: Then I have here a letter agreement dated September 22, 1943, between United Artists and Loew's Inc., relating to the exhibition of a picture in the Loew's Greater New York Circuit, which sup-

plements Exhibit 270 in evidence, and I will ask to have this marked as 270-A.

Mr. Caskey: Is that one that I gave you?

Mr. Wright: That is my understanding.

Mr. Davis: Mr. Wright, the pencil notations on this are not part of the offer, are they?

Mr. Wright: I think those were on it when they were handed to me. I have no objection to their being erased.

Mr. Davis: I do not know where they come from and I do not know what they mean, but I do not think they ought to be part of the exhibit.

(Pencil notations erased.)

(Marked Government's Exhibit 270-A in evidence.)

Mr. Wright: Now I should also like to offer at this time, the correspondence which was identified

(2956)

while Mr. Mochrie was on the stand. I take it, Mr. Leisure, there is no objection to its not being the original?

Mr. Leisure: As to this letter, if the Court please, it is a typewritten copy, not a carbon copy, and the witness did not remember receiving it, and we have no copy or original in the file. Now, if Mr. Wright will endeavor to locate a carbon copy of some kind—I do not want to raise any technical objection. On the other hand, when the witness does not have any recollection of the letter in any way, and it is not even a carbon copy, it does not seem to me that it would be proper not to raise objection to it.

Mr. Wright: Well, I might point out that in Exhibit 389, which Mr. Mochrie signed, he did recall

writing that letter, and he refers there to his reply to Mr. Weiss' letter of July 24th. Now we can, I suppose, have Mr. Weiss give us a statement to the effect that this is a copy of the letter that he wrote on that day.

Mr. Leisure: I wonder if we can work it out outside the courtroom, Mr. Wright. I do not want to take the time of the Court, and I assure you I shall raise no technical objection. The only question, of course, is whether or not this reply you hold in your hand is the reply received by Mr. Mochrie, if he received one.

Mr. Wright: Mr. Mochrie's is the reply, and the
(2957)
carbon is the letter to which he replied.

Mr. Leisure: Oh, I see. I do not think we will have any trouble with it, probably, but I think we ought to discuss it outside the court, if you would like to. I won't raise any technical objection.

Mr. Wright: Then I will ask to have marked and offer as Exhibit 391, the copy of theatre manager's weekly reports referred to in the testimony of Mr. Goldenson but not produced at that time.

Mr. Seymour: May I see it, Mr. Wright?

(Reports handed to Mr. Seymour.)

(Marked Government's Exhibit 391.)

Mr. Wright: And I shall also offer in evidence as Exhibit 392, the list of grosses of foreign pictures released by United Artists Corporation which were on the list offered in evidence by Mr. Montague of Columbia as successful foreign pictures.

Mr. Raftery: Were those grosses?

Mr. Wright: Those were the grosses that you produced.

(Marked Government's Exhibit 392.)

Mr. Wright: I merely want to call the Court's attention to the fact that on that list of eleven pictures there is only one, In Which We Serve, which grossed in excess of $600,000, and only one other which

(2958)

grossed in excess of $500,000.

Mr. Raftery: Why don't you give the gross instead of saying in excess of $600,000.

Mr. Wright: I will read them all into the record if the Court wants to hear them.

Mr. Raftery: No. Just In Which We Serve.

Mr. Wright: In Which We Serve, the top figure is $1,514,000. Major Barbara at the bottom is $216,682.74. And I repeat, there are only two on the entire list which grossed more than $500,000.

Judge Hand: That is a kind of an argument just against bigness, as tending to show monopoly, I suppose.

Mr. Wright: Well, Mr. Montague, as you recall, offered this list of what he called foreign pictures which had been successes in this market. I attempted to show he did not have any knowledge of what they grossed at the time he was on the stand, and this I think confirms the fact.

I shall offer as Exhibit 393 a statement received from RKO as to theatre interests of its officials.

(Marked Government's Exhibit 393.)

Mr. Wright: And I offer as Exhibit 394, a list of franchises made by RKO which was furnished in response to our request for a list of franchises made

with the defendants at any time, which were more than ten years; those made since 1930 which were
(2959)
more than five years, and those made since 1935 which were two years or more.

(Marked Government's Exhibit 394.)

Mr. Wright: I shall also offer as Exhibit 394-A a letter from counsel for RKO adding one franchise to that list, and also noting that six of the franchises on the list have been extended through the season 1947-48.

(Marked Government's Exhibit 394-A.)

Mr. Wright: And as Exhibit 394-B, I offer the form of the extension in each case. The date of the extensions is April 22, 1942. That is since the date of the consent decree.

(Marked Government's Exhibit 394-B.)

Mr. Wright: And as Exhibit 394-C, I offer a letter from RKO counsel, setting forth agreements now in force between RKO theatres and Fox, Universal and Columbia, which extend through the 1947-48, 1945-46, and 1946-47 playing seasons respectively, the agreements which were with Universal and Columbia having been executed on January 19, 1942, and January 19, 1944, respectively.

(Marked Government's Exhibit 394-C.)

Mr. Wright: I shall also ask to have marked and offer in evidence as Exhibit 395, a franchise agreement between Fox Film, Keith-Albee-Orpheum Corporation, and RKO Proctor Corporation, by their agent RKO Film Booking Corporation, dated August 1, 1934,

(2960)

which relates to the pooling agreements in evidence as Exhibits 200, 201, in which certain RKO theatres were pooled with certain Skouras and Randforce theatres, and these agreements provide that the RKO books for all of the other theatres as well as the RKO theatres.

(Marked Government's Exhibit 395.)

Mr. Wright: And I shall offer in evidence as Exhibit 396 the list of franchises supplied by Loew's Inc. in response to the similar request to that which I just referred to as having been made from RKO.

(Marked Government's Exhibit 396.)

Mr. Davis: May I see that Exhibit 396, Mr. Wright?

Mr. Wright: Yes (handing).

Mr. Davis: You notice, of course, that all those franchises expired. There is nothing there which contradicts the testimony of the witness.

Mr. Raftery: Were those with respect to Loew's as a distributor or Loew's as an exhibitor?

Mr. Davis: Loew's as a distributor.

Mr. Wright: I offer as Exhibit 397 a statement or a stipulation between Paramount and ourselves which reads as follows:

"Towns in addition to those read into evidence in which there are no theatres except as indicated other

(2961)

than those in which Paramount has a direct or indirect financial interest. These towns have a population of less than 25,000 and comprise the balance of the situations in this category in which special agents of the Federal Bureau of Investigation under the

supervision of the Department of Justice conducted a survey. This includes only towns where there was an F. B. I. survey and only as to such of said towns as to which the parties have reached an agreement, as to the facts herein."

Then there is set forth the name of the town, the population, the Paramount theatres, and in each case Paramount has all the theatres in the town except where there is another theatre catering to colored or Mexican patrons, independently operated.

(Marked Government's Exhibit 397).

Mr. Seymour: These stipulations are quite correct but they are all subject to the objection of materiality and relevancy that I think I made when the original list went in.

Mr. Wright: Surely. And I shall offer as Exhibit 398 an additional list of towns in which Paramount has all of the first-run theatres.

(Marked Government's Exhibit 398.)

(2962)

Mr. Wright: I would like to have marked and I offer it it evidence as Exhibit 399, a document which represents the form of agreement used in making the so-called Paramount formula deals with the Paramount affiliates. This agreement, I think, has some special significance. I would like to call the Court's attention to precisely what is in it.

This document has, first, a list of the circuits which are parties to the deal, with a percentage key opposite each one, showing the percentage of the national gross of the feature pictures involved that each of the so-called Paramount partners in the deal is to contribute.

Of course these circuits listed in this first column are in some cases a hundred per cent owned, in some cases only fifty per cent owned, by Paramount.

Then the form of agreement I should like to read your Honors, with your indulgence:

"AGREEMENT made this day of as of by and between PARAMOUNT PICTURES INC. and PARAMOUNT FILM DISTRIBUTING CORPORATION (hereinafter collectively referred to as the 'Distributor'), parties of the first part, and" —in that case the exhibitor circuit is inserted— "a corporation, for itself and as agent for its subsidiary and affiliated corporations operating the theatres covered by this agreement (2963) (hereinafter collectively referred to as the 'Exhibitor'), parties of the second part.

"First: The Distributor, subject to the terms and conditions hereinafter specified, grants to the Exhibitor a limited license under the respective copyrights of the motion pictures licensed hereunder to exhibit in the theatres listed in the annexed Schedule 'A', hereby made a part hereof, for the respective runs designated therein, the feature photoplays which shall be generally released by the Distributors for exhibition in Motion Picture Theatres in the United States during the period commencing September 25, 1942 and ending September 23, 1943"——

Judge Hand: Were they theatres or subsidiary companies of Paramount or were they theatres of the other defendants?

Mr. Wright: The Schedule A attached lists and involves only the theatres of these various affiliates that are listed in this first page. The schedule——

Judge Hand: You did not exactly answer my question. I mean, were they theatres that were subsidiaries of Paramount or in which they had an interest, or were they theatres of the other defendants here that have been spoken of——

Mr. Wright: No.

Judge Hand: Roughly, as affiliates?

(2964)

Mr. Wright: These are all theatres in which Paramount has an interest and, insofar as I know, none of the other defendants is interested in the theatres covered by this agreement. They are, however, for all of the theatres—the theatres listed, of course, include theatres in which Paramount has varying degrees of interest from 100 per cent down to perhaps 15 or 25.

"Second: The term 'run' as used in this agreement shall be deemed to mean any of the following:

"1. The exhibition of one (1) feature photoplay at a single theatre for a consecutive number of days;

"2. The simultaneous exhibition of the same feature photoplay on the same days and dates at two theatres located in the same locality or town, charging the same admission prices, commonly referred to as a 'day and date exhibition';

"3. If after the exhibition of a feature photoplay at one theatre the said feature photoplay is moved over to another theatre within the same town or locality charging the same admission price for a continuous run, the exhibition at both theatres for the purposes of this agreement shall be deemed one run."

I merely call attention to these provisions because under this form of agreement the use and actual num-

(2965)

ber of exhibitions in these theatres on the schedule are left wholly flexible within the determination of the exhibitor and he is not restricted in the number of simultaneous first-runs or such moveovers as he may desire to use in any locality.

Judge Goddard: Does it contain a definition of first-run, whether it is the first time a picture is shown anywhere or first time shown in a certain locality?

Mr. Wright: I take it, clearly, the schedule when it says here, naming the theatres, "Town, Omaha; State, Nebraska; Run, first" means first-run in the City of Omaha; that is, the area is shown in each case with the statement of the run.

Judge Bright: Mr. Wright, isn't that provision about moveover the same as in the ordinary license agreement?

Mr. Wright: I beg your pardon?

Judge Bright: Isn't that provision in that agreement with reference to moveover practically the same as in your individual license agreements?

Mr. Wright: With this exception, here your individual license agreement generally covers or is limited to a particular group of theatres, and here you are extending that privilege of flexibility in runs over the entire country through this.

(2966)

Mr. Seymour: Oh, you are wrong about that, Mr. Wright. Each of these formula deal agreements is made with a particular theatre operating company and relates to the theatres in that locality. This moveover privilege is the same privilege that is given to independent exhibitors who have two houses under common ownership and who charge the same rices

in both houses. I don't think there is any doubt about that.

Mr. Wright: I think, as applied to an agreement of this type, there is a very obvious difference, when you consider what is being shown here in relation to the way the rental is being computed. In the ordinary license agreement you license a specific run or runs in particular theatres and the rental is made dependent on performance in those particular theatres, whether it be on one run or a series of runs, but in this case the exhibitors are given this complete flexibility of this type without any corresponding increase or decrease in license fee burden. Your license fee under this kind of deal is simply an allocation among these circuits of the total film rental burden and when you make a deal of that kind and at the same time give these people complete flexibility as to how many day and date runs they shall have or how many moveovers shall be had in any particular area, then it seems to me that practice in and of

(2967)

itself is a serious discrimination against a man who is bound to buy and pay for particular runs on the basis of what the picture earned in those runs.

Judge Bright: As I understand it, on this particular agreement that you refer to, the percentage of their rental is based on the national gross, whereas on the ordinary license agreement it is based on the gross of the particular theatre.

Mr. Wright: Yes.

Judge Bright: Might not the payment to be made by one of these circuits be more onerous in those instances than it would be if they had an individual license?

Mr. Wright: That is, I suppose, conceivable, but having been given these unlimited privileges there, without any increase in the license fee being made dependent upon the expansion or extension of that privilege, I think you would normally expect that the privilege would be used in the manner most profitable to the circuit.

Mr. Seymour: You will recall, if I may intrude, Mr. Reagan testified as Judge Bright's question indicates, that Paramount's distribution department considered that this method of getting compensation was better, from the point of view of the distribution department, than any other methods; that they got higher rentals this way. The rental this way is dependent upon the success of each picture.

(2968)

Mr. Caskey: Your Honors will recall in regard to subsidiaries of National Theatres Corporation, that Mr. Reagan specifically testified it was not an apportionment of any burden, but he first of all arrived at a figure which he thought he should get, he then increased that percentage, and then negotiated it out, and he testified categorically that the result which he received was greater than he would have received in any other manner.

In regard to the similar contracts for National, I think that Mr. Wright ought to temper the generality of his language. Take a specific case, Spokane, Washington. You can only have a simultaneous run or a moveover if you have got a theatre that can be operated on the same admission policy as your principal theatre. These contracts relate to two or three or one picture, so it is no privilege to go out and acquire additional theatres because they relate to pictures already made to play in theatres already in existence,

and you are definitely limited in your simultaneous first-run right or your move-over right by the facilities that you have and the number of people you can get to come to your theatres at the same admission price.

Judge Bright: As I understand Mr. Wright's position, it is that because of this liberal provision for

(2969)

moveover that, possibly, in a circuit where there are a number of theatres that these exhibitors would so manipulate the picture that they could earn much more than they otherwise could, is that it?

Mr. Wright: That is precisely it, and under an agreement like this without any corresponding increase in film rental.

Mr. Caskey: Yes, but the manipulation, if we may use that word of Mr. Wright's, you book the picture say in Spokane, into the Fox theatre, which is the best theatre in town, and now, if you have got a right to play it simultaneously in some other theatre you first of all have to have the theatre, and that theatre has got to be a theatre of sufficient attractiveness to the public so that people will come to it and pay the identical admission price that they will pay in the Fox theatre, and the same thing applies when you talk about a moveover, you have to move it over some place to a new theatre. So that in each one of these situations you are limited by the actual theatre situation as it exists from time to time, and I repeat the suggestion that I just made, that these are one picture or two picture or five picture deals and they relate to the immediate present and not some situation that may exist in the future.

Mr. Seymour: Of course there is one other observa-

(2970)

tion to be made, if I may. This privilege of moveover

being in the agreement, it must be assumed that in negotiating the percentage which was being charged to this particular exhibitor group, the privilege of moveover was taken into account in fixing the percentage so that the distributor got the benefit of the moveover privilege in increased rentals.

Mr. Wright: May I go on with the argreement and show how——

Judge Hand: Yes.

Mr. Wright: —the method operates?

> "Third: For the purposes of this agreement the following computation shall be made with respect to each feature photoplay aforesaid."

That covers all the features released during that season.

"There shall first be determined the sum equal to the total gross income derived by the Distributor from licenses for the exhibition of such feature photoplay in the United States (excluding income from army camps and income under this agreement and income under all similar agreements entered into between the distributor and theatre operating corporations which are directly or indirectly wholly or partly owned subsidiaries of Paramount Pictures, Inc.),"—that is to say, you take out of this preliminary computation the rentals paid by this list of Paramount affiliates

(2971)

who are parties to this kind of deal—"and which sum is hereinafter referred to as 'Figure X'." That is, the actual gross less the amount contributed by these affiliates who are parties to deals of this kind and less Army camp income.

"Figure X for such feature photoplay shall then be considered as that percentage of a 'Base Amount',

which Base Amount shall be 100%, less the sum of the percents shown in subdivision (a) next below in this agreement and also in all similar agreements entered into for such feature photoplay between the Distributor and theatre operating corporations which directly or indirectly are wholly or partly owned subsidiaries of Paramount Pictures, Inc."

That sum of percents referred to there is the sum of the percentage contribution of each circuit which, in this case adds up to a little more than a total of 20 per cent.

"The amount so ascertained by such a calculation with respect to Figure X is hereinafter referred to as the 'Base Amount'.

(2972)

"For the license herein granted to exhibit such feature photoplay, the Exhibitor agrees to pay as a license fee:

"(a) A sum equal to % of the Base amount."

And the percentage that is inserted in the blank there is the percentage listed here, that is, for Balaban & Katz that would be 2.45.

Judge Bright: What does that mean, two and a fraction per cent?

Mr. Wright: Yes, 2.45 per cent is the percentage figure for Balaban & Katz. Then there is a similar figure for each one of the circuits making a similar deal.

Judge Bright: Does Balaban & Katz have to pay 2.45 per cent of the gross in all of the theatres in that circuit?

Mr. Wright: No, two and a fraction per cent of the national gross figured according to this rather complex formula, which I will try——

Judge Bright: For all the theatres in that circuit?

Mr. Wright: Yes. What they pay for is the privilege of using the pictures in all the theatres of their circuit which are listed on Schedule A, there attached, on the runs named.

(2973)

Judge Bright: Are the number of times that they can move the picture in that particular circuit specified?

Mr. Wright: No, they are not. All that is specified on Schedule A is a series of runs in certain areas. Under that move-over day and date privilege they may have several first-runs simultaneously in the area or they may have a series of consecutive first-runs. There is no limit in the agreement as to the number of runs that they shall have. The priority is specified in the schedule by assigning to them first-run, or first and second run, or first, second and third, as the case may be, in the particular areas where they operate theatres.

Judge Bright: Are the deals attached to that kind of agreement, which specify the use of the film?

Mr. Wright: No, the deal is simply right here in the payment of, let us say, for Balaban & Katz, of 2.45 per cent of the national gross on the picture for the privilege of exhibiting it in the theatres listed on the schedule on the runs designated on the schedule. That is the deal. Of course, under that system you never have a particular rental for any particular theatre. You never know at any time what the film rental for any theatre in the circuit is. It is a blanket circuit deal.

Let me read further. It gives an example of how this computation is made.

(2974)

"For the license herein granted to exhibit such feature photoplay, the Exhibitor agrees to pay as a license fee:

(a) "A sum equal to % of the Base Amount." And in each case the amount filled in there is the percentage assigned to the circuit that makes the agreement.

"(As an example,"—this I am reading from the agreement here—"As an example, assume that the total gross income derived by the Distributor from licenses for the exhibition of Glass Key in the United States (excluding income excluded as aforesaid)"—that is, after you have excluded what these other circuits pay—"is the sum of $800,000 (Figure X), and assume that the total of the percentages shown in subdivision (a) above"—that is, the percentage assigned to the various circuits, which in this case totals something more than 20 per cent—"and in the like subdivision in all similar agreements"——

Judge Hand: Where do you get this from?

Mr. Wright: This I am reading from the agreement itself.

Judge Hand: This is from the agreement itself?

Mr. Wright: Yes.

Judge Goddard: Do you happen to have a copy of that agreement?

(2975)

Mr. Wright: This is the only copy I have—that was given to us.

Perhaps I had better start that again.

"(As an example, assume"—and again I am reading—"that the total gross income derived by the Dis-

tributor from licenses for the exhibition of Glass Key in the United States (excluding income excluded as aforesaid) is the sum of $800,000 (Figure X), and assume that the total of the percentages shown in subdivision (a) above and in the like subdivision in all similar agreements entered into for such picture between the Distributor and theatre operating corporations which directly or indirectly are partly owned subsidiaries of Paramount Pictures Inc. is 20%". Then this is the way the base amount is computed: You take 100/80ths of $800,000 and get $1,000,000, your base amount, and then your percentage in the case of Balaban & Katz of 2.45 is applied to $1,000,000, and your film rental would then be $24,500.

Judge Bright: What is the reason for the 100/80ths?

Mr. Wright: Well, what they do as a method of adjustment is, in the first instance, you see, they deduct the rentals that the parties to the formula deals pay and your 100/80ths adjustment is to put back into the final figure the amounts that they paid, dis-

(2916)

tributed in accordance with the formula assigning a given percentage to each one.

The agreement goes on to state:

"Such license fee shall be paid in the following manner.

"(1) Within seven (7) days after the date of general release as fixed by the Distributor in the United States of such feature photoplay, the Distributor shall estimate the Base Amount. The Exhibitor shall pay to the Distributor a sum equal to % of such estimate in equal weekly instalments"——

and again that percentage there is his percentage of the total burden there; Balaban & Katz would be 2.45——

"of 1/17th of such total on the first business day of each consecutive week following the date of general release, the first of which instalments shall be paid on the first business day of the second week of general release of such feature photoplay.

"(2) During the sixteenth week following the date of general release of such feature photoplay, the Distributor shall again estimate the Base Amount (hereinafter sometimes referred to as 'second' estimate), and a committee composed of Charles M. Reagan and Leonard Goldenson shall participate in computing such estimate."

(2977)

Those are, you will recall, the sales manager and the head of the theatre department of Paramount respectively.

"If the second estimate shall be greater than the first estimate, the Exhibit shall pay simultaneously with the seventeenth instalment payable hereunder a sum representing the difference between the amount payable in accordance with the first estimate and the amount payable in accordance with the second estimate. If the second estimate shall be less than the first estimate, the Distributor shall refund to the Exhibitor such sum representing any excess payment or reduce the amount of the last instalment, as the case may be."

That is simply a method of adjusting the preliminary payments as they go along playing the picture.

This third paragraph takes care of final adjustments:

"At the end of the eighteenth month following the

date of general release of such feature photoplay, the Comptroller of the Distributor shall make a final computation of the Base Amount, and shall certify such final computation to the Exhibitor. Not later than thirty (30) days after the determination of such final computation, the Exhibitor shall pay any additional sum required to be paid, or the Distributor

(2978)

shall refund to the Exhibitor any excess payment, as the case may be, as the result of such final computation."

I think it is apparent from the terms of the agreement that, of course, in certifying the final computation, not only is the national gross disclosed to each of these circuits, but the percentage allocations and payments made by each of them is disclosed to the other.

The agreement goes on to state——

(2979)

Judge Bright: What harm is there in that?

Mr. Wright: It simply, I think, contradicts this picture of the Paramount affiliates being operated as separate units which are not concerned with each others film licensing arrangements. Under this kind of deal they are necessarily all parties to the general scheme of allocation and get regular data which shows exactly the extent to which this film rental burden has been distributed among them.

As a matter of fact, I think the one obvious purpose of a deal of this kind is to afford a certain degree of protection to these various partners against film rental discrimination that might be based on the fact that Paramount had a greater interest in one than in the other. Under this system, where each is

allocated a fixed percentage, there is assurance to each, I suppose, that he will not be discriminated against by Paramount in the terms that he finally pays.

Mr. Seymour: All I want to observe is that this arrangement does not contradict to the slightest extent the testimony, which is uncontradicted and unimpeached and undisputed, that the film deals made by these various operating heads of the operating companies in which Paramount is interested with other distributors has no relationship whatever to what those distributors are doing in connection with

(2980)

those theatres. This has nothing whatever to do with that subject.

Mr. Wright: Let me read the next paragraph——

Judge Goddard: Do you contend, Mr. Wright, that a theatre wholly owned by Paramount, say, or one of the affiliates, receives better treatment than a theatre in which Paramount or one of the affiliates has a 25 per cent interest, for instance?

Mr. Wright: Under this kind of a deal I would say pretty clearly they would not. I am just suggesting that one purpose of this kind of arrangement is to satisfy the partner in whom Paramount may have only a 25 per cent interest that the film rental that he will be discriminated against as against some circuit in which Paramount might own 100 per cent, by simply taking the market and allocating it in this way and then paying off on the basis of the allocation instead of the performance in the individual theatres, that you have a completely non-competitive disposition of your rental——

Judge Hand: I really do not think I can sit here and hear an exhibit offered and endless argument about it as it goes on, endless argument and talk.

Mr. Wright: May I just read one——

Judge Hand: It gets so that it illustrates nothing to me and means nothing. Now, I imagine you want

(2981)

to have it mean something and to tell me what, but you certainly ought to point it out a great deal better than you do, or else offer it and let it alone.

Mr. Wright: May I then read one more provision and then tell you what I think it shows and drop it?

Judge Hand: All right, go on.

Mr. Wright: This provision——

Judge Hand: But I have been listening to this vague talk about three-quarters of an hour, and the case cannot go on in this way.

Mr. Wright: The succeeding paragraph in this final settlement states:

> "If the Distributor shall fail to license such feature photoplay to any representative circuit of theatres, in the United States to which the distributor licensed its 1940-41 season feature photoplays, there shall nevertheless be included in Figure X in the aforesaid final computation such gross income as would have been received from such circuit for such feature photoplay unless any sums received by the distributor from competitive theatres for the same runs of such feature photoplay. For the purposes of this agreement, the term 'representative circuit of theatres' shall mean

(2982)

> such circuit of theatres from which the distributor received $100,000 or more as license fees for the exhibition of its 1940-41 season feature photoplays."

Now, within that definition, if the Court please, are the circuits of theatres operated or affiliated with

the other defendants in this case; and I think it is highly significant that in working out this apportionment of film rental among these circuits in which Paramount is interested, they also take into account the question of what, if any, contribution has been made by all of the other circuits, including those in which the other defendants are interested.

Now, this goes on to say——

Mr. Proskauer: Does you Honor care to have any comment on that as we go along or would you prefer that we hold our fire?

Judge Hand: Hold it. I do not know what this means.

Mr. Seymour: I should like to state just a word about that, if your Honor pleases. It is a contract involving Paramount which is in question, and may I just comment so that the record will not have Mr. Wright's comment without any from me. What this provision obviously means is, and what it obviously states is, if on a particular picture any representative

(2983)

circuit does not license the picture—for example, there are many large independent circuits in this country which might not license this particular picture; there are other circuits including those affiliated with defendants which might not license it; and these Paramount companies, these Paramount operating companies, as we have sometimes called them, the theatre-operating companies with whom these agreements are made are not to be let off in their film rental because on a particular picture some other customer of Paramount has chosen not to buy, and therefore the amount that the other customer would have paid goes into the computation so that their rental is larger, and it has not anything to do with the question of affiliation.

Mr. Proskauer: Certainly we have nothing to do with it, these other companies. We know nothing about this.

Mr. Wright: The principal significance it has, so far as the Government is concerned, is that in certain instances in computing a final settlement of film rental it is again necessary to disclose to these exhibitors not only what the other Paramount partners may have paid for Paramount films but what deals were made with the other circuits in which these defendants are interested, as well as any other circuit which

(2984)

may have paid more than $100,000 in film rentals; and that the computation, the final computation of gross income is to be based or shall be determined by a majority of a committee consisting of—and that space is left blank, and we have asked to have the names of the committee involved, but I do not believe we have yet got them.

Could we have those now?

Mr. Seymour: I shall be glad to furnish them to you now if you like.

Mr. Wright: Why don't we have those names put in now?

Mr. Seymour: The names of the committee originally included in the agreements were Barney Balaban, Y. Frank Freeman, Neil Agnew, Austin C. Keough, Leonard Goldenson, Charles Reagan, Samuel I. Pinanski, Earl Hoblitzelle, R. B. Wilby and A. H. Blank. Neil Agnew, of course, is no longer a member of such a committee because he has been out of Paramount for some months.

Mr. Wright: We will offer the exhibit as——

Mr. Seymour: Have you made it clear, Mr. Wright, in connection with that offer that those lists

of theatres are the lists annexed to the various agreements? They are not all annexed to one agreement. I do not know that you made that clear.

(2985)

Judge Bright: List of theatres or list of circuits?

Mr. Seymour: No. There is, I understand, in the exhibit a list of circuits, so-called circuits, which is annexed to the document. The document is a form which was made originally with those various theatre operating companies which Mr. Wright has called circuits, and in addition we have furnished to the Government and the Government is now offering the list of theatres in each operating company which was annexed to the agreement as actually executed with that operating company. In other words, this is both a particular agreement, and all the exhibits annexed to all the agreements. They were not all annexed to one isn't that correct, Mr. Wright?

Mr. Wright: That is what I understand as to the theatre lists. However, it is my understanding that the first page of that exhibit setting forth the various parties and percentages is annexed to each.

Mr. Seymour: No, you are wrong about that, Mr. Wright. The top sheet, as I understand it, is a list prepared for your convenience of the companies with whom the formula deal was made——

Judge Hand: Now what in the world is this talk about? Here are two people arguing about what an exhibit shows, and one says it shows one thing and

(2986)

the other says it shows another. When you get all through with this talk what are we to think? We have got to look at the exhibit, I should think. I cannot have the thing go on this way.

Mr. Seymour: You are quite right, your Honor. Mr. Wright I did not think made plain what the contents of the exhibit was.

Judge Hand: And you tried to ask him something and he does not give a direct answer, and then the thing gets all mixed up. We are not just floating down the river.

Mr. Seymour: Well, let me state it, and then if there is any correction, let Mr. Wright make it, and that will be the description of the exhibit, because otherwise we will have a very confused record for your Honors.

The top sheet on the exhibit is a list of the theatre-operating companies with which formula deals were made and the percentage included in the several formula deal agreements with those several companies. The next part of the exhibit is a typical or a form of the formula deal agreement which was made with those many companies; and finally there are annexed lists of theatres which were taken from the various formula deal agreements with those various companies. One of those lists—that is, the theatres in a particular

(2987)

company was annexed to the particular formula deal of that company. They were not all annexed to one formula deal agreement made with all the companies as a part of one agreement.

Isn't that correct, Mr. Wright?

Mr. Wright: You gave it to us. I accept your statement as to what the fact is.

(Marked Government's Exhibit 399.)

Mr. Wright: I will ask to have marked as Exhibit 400 a tabulation that was furnished to me by counsel for Warner in explanation of the exhibit which was

offered in evidence here the other day as W-13. That was the statement which was put in purporting to show that the Warner domestic distribution and production business was operated at a loss except for the last two years. It was given to me with the statement that "We trust that you will keep this schedule confidential since it contains data which has never been disclosed."

Now, we have no desire to disclose it to other defendants. We do wish to disclose it to the Court.

Mr. Proskauer: Who sent you that? May I see the schedules?

(Papers handed to Mr. Proskauer.)

Mr. Proskauer: Well, I do not know that I have

(2988)

any power to keep Mr. Wright from offering it. The incident was when I put in a schedule, he asked me whether I would write him a letter showing how it was made, and I said he would have it before sundown on Saturday. He called me later and said he had not received it. It had been mailed Friday night. What I supposed I was giving Mr. Wright was the detail in that statement to enable him to check the accuracy of the schedule which was put in evidence. Why he wants to put this in in view of that situation, I don't know. He is perfectly entitled to comment and make any correction in our statement.

Do you claim that this is any way impugns the accuracy of the statement offered in evidence?

Mr. Wright: It simply explains how it was computed, and that we think is significant.

Mr. Proskauer: How? With your Honor's permission, what is the significance of it?

Mr. Wright: If the Court please, you will recall that the Exhibit W-13 showed a series of red figures

here which were supposed to be losses on U. S. A. production and distribution divisions in the years 1937 through 1942 inclusive. It shows profits only in 1943, 1944, for those divisions. Now, the manner in which that loss was arrived at is this: They first took

(2989)

the profit from the theatre divisions; then took the profit from the foreign division, including Canada, and then deducted those from profits before taxes and arrived at an alleged loss on the domestic U. S. A. production and distribution division.

Mr. Proskauer: That is right.

Mr. Wright: However, there is a footnote in each case which I think explains the accounting sleight-of-hand by which these results were achieved. The profit from foreign division, including Canada, is stated to be before intercompany film royalties payable for American-made pictures. That is without deducting anything for payments to the American company which produced and made the pictures on which the profit was earned. Then the footnote on the losses, the alleged losses in the U.S.A. production and distribution divisions says, "Before foreign intercompany film royalties receivable for American-made pictures." So that again that figure does not include what was paid on account of American production by the foreign distribution.

Mr. Proskauer: I will make a quick suggestion. Why don't you put in the two explanatory footnotes which are the things which you say show some sleight-of-hand? I am a pretty good accountant, I think, and I say they don't show any sleight-of-hand at all.

(2990)

Mr. Wright: As far as——

Mr. Proskauer: Put them in and let us argue it.

Mr. Wright: We desire to offer the exhibit in this form because it also shows separately the profits from the theatre division, and I think——

Mr. Proskauer: I withdraw all objection to it. Let him mark it.

Mr. Wright: ——the fact that the profits from the theatre division in 1944 were six times what they were in 1940, operating the same number of theatres I think tends to rebut the situation made in figures which were offered——.

Mr. Proskauer: Your Honors, can't I end this by withdrawing all objection to it and suggesting that he offer it, and challenging him to make good on his statement about accounting sleight-of-hand?

Judge Hand: It is admitted.

(Marked Government's Exhibit 400.)

Mr. Wright: I will ask to have marked with the next two exhibit numbers these two United Artists contracts. 401 is one with the Robb & Rowley Circuit for Stage Door Canteen. The other is for the Roxy Theatre at San Angelo, Texas, with an independent exhibitor named W. V. Atwell.

(2991)

Mr. Raftery: Is this rebuttal, Mr. Wright?

Mr. Wright: Yes, it is.

Mr. Raftery: Of what?

Judge Hand: That is a question of terminology. Go ahead, Mr. Wright. Proceed.

(Marked Government's Exhibits 401 and 402.)

Mr. Raftery: Is this part of what you got Monday?

Mr. Wright: Yes.

Colloquy

Mr. Raftery: I have got another bundle here that you asked for yesterday, whenever you want it.

Mr. Wright: Now, I simply want to call your Honor's attention to what is in them and the purpose of the offer. The circuit deal with Robb & Rowley for Stage Door Canteen marked in evidence as 401 shows the payment of the following flat rental license fees for the following runs in San Angelo: The first-run at the Ritz, $50; second-run at the Plaza, $30; third-run at the Angelos, $15; fourth-run at the Lyric, $12.50.

Mr. Raftery: What is the date of that contract?

Mr. Wright: That is dated May 1943.

Judge Hand: Where are these runs?

Mr. Wright: In San Angelo, Texas.

(2992)

Mr. Raftery: This circuit, by the way, is not a party to this action in any respect. It is an independent circuit.

Mr. Wright: The contract with the independent exhibitor operating the Roxy, the same picture, fifth-run—it says run, fifth, available 120 days after first-run, is $20 against 35 per cent of the gross. The guarantee is more than the circuit paid for either of the two preceding runs, and the percentage is included, which was not in any of the deals for the preceding runs.

Judge Bright: In the same town?

Mr. Wright: Yes, those are all in San Angelo.

Mr. Proskauer: The circuit was a non-affiliated circuit. Is that clear?

Mr. Wright: Well, the extent of the affiliation appears in the record. It is a circuit in which the United Artists Theatre Circuit owns a half interest, and which, in turn, is one in which Mr. Joseph

Schenck is interested; but for our purposes I do not think it makes any particular difference on this question of discrimination between the independent circuits.

Mr. Raftery: What is the discrimination, Mr. Wright? That is what I am trying to find out.

Mr. Wright: I think there is a very obvious film rental discrimination in that situation.

(2993)

Judge Bright: You mean the fifth run man pays more than the third and fourth?

Mr. Wright: Yes, sir.

Mr. Raftery: We contend all through we have got a perfect right to do it. There is no exhibitor here complaining. If the exhibitor has a complaint why isn't he brought here? They just throw the contracts in; we do not know the type of theatre; we do not know any of the circumstances. It is de minimis. That picture, according to the record, grossed four million dollars in the United States; and he comes in here with a $20 thing; and, we submit, it may be competent for some reason, but he is just attempting to burden the Court with a lot of misleading de minimis.

(2994)

Mr. Proskauer: Your Honor, the record in this case already shows that in numbers of cases independent theatres having a prior run paid less than subsequent theatres both percentagewise and in money. There is no criterion by which—and we shall argue this at length, your Honors; I am referring to it because Judge Bright has raised this question several times; this is not the time to do it in detail; but I want to register the caveat that there are many instances in which subsequent-run theatres are much

more profitable than prior-run theatres; can afford to pay a larger percentage rental; can afford to pay a larger lump sum rental; and that that situation does not turn on whether it is an affiliated or non-affiliated theatre; and we shall develop that in argument.

Mr. Wright: Now, if the Court please, I would like to say what we have attempted to do on this rental discrimination question. We took 26 theatres as to which there was material in evidence because they had been involved in the Appeal Board decisions where there were findings to the effect that the circuit theatres in—certain of these circuit theatres and the independent complainants' were comparable theatres, and there is, of course, a description of the theatre situation as it exists in the town in question; and we subpoenaed, or we asked by letter each of the defendants to produce the contracts made with those par-

(2995)

ticular theatres for two seasons, I believe the 1943-1944 and the 1944-1945 seasons. Now, those letters went out on November 3rd. The only companies that we have received the contract data from are United Artists and Universal, and as to those, as to United Artists, the one we received was so incomplete, that the only contracts which were furnished where the same picture was licensed to the independent opposition and the circuit theatre, were those which I have just offered.

Now, as I say, from the others, from six of them we have received none of the data, and we cannot go ahead with this film rental discrimination rebuttal until that material is in our hands. I had hoped that it would be available in time to put in today when I suggested that we reconvene today instead of later.

But judging from what has occurred, I now feel that we cannot complete that showing until some time next week, and we have some other data that we can put in this afternoon, but I would suggest a week's adjournment from today so that we might have that time to assemble this material we have asked for, and then I think we can put it in very quickly. But rather than attempt to struggle along here, getting material piecemeal and then offering it——

Judge Goddard: Mr. Wright, has anyone complained about that, any of the parties?

(2996)

Mr. Wright: You have before you——

Judge Goddard: Will you answer that yes or no? I want to make my question just as simple as possible. I want to know if either of the parties complained of that.

Mr. Wright: Not only this independent exhibitor but every independent exhibitor in the business complains bitterly about what we say is a well-established fact that there is discrimination in rental terms between the licenses made with independents——

Judge Goddard: I want to repeat my question, because I am going to try to get an answer.

Mr. Wright: Surely.

Judge Goddard: Did either of the parties to that contract complain about it?

Mr. Wright: Yes. I say that every independent exhibitor who is in opposition to a circuit complains that he is discriminated against in rental terms on the deals he makes and those that the circuit make. Now, prior to the time that these sales representatives took the stand here and said that there was no discrimination, these defendants had also taken the position that Mr. Raftery just now takes, that they

have a perfect right to discriminate against anyone and everyone in any way that they please; and that if that were the position now we won't spend time on this. But in view of the effort that has been made,

(2997)

it seems to me to mislead the Court as to what is the well established and known industry fact, that is, that your small exhibitor is constantly discriminated against in rental terms. I have felt bound to make additional license contract offers of this kind, and I submit that the question of discrimination would not be aided by calling someone to the witness stand and having him complain. The discrimination is shown by what was done and not by who may yell the loudest.

Mr. Raftery: If your Honor please, may I answer your question directly?

Judge Goddard: I should like to have an answer.

Mr. Raftery: We had no complaints on that contract. Secondly, Universal and United Artists have given Mr. Wright every document in our possession that he has asked for, with the exception of the latest which he asked for late yesterday, and here is another bundle (handing).

Now, Universal and United testified—first we put our distribution contracts in as to United. Our obligation is to get the most from every exhibitor we can get regardless of race, creed or color or affiliation. That is our obligation to our producer. And that contract goes back to him for rejection or approval. We do not have the final say. Mr. Scully says he tries to sell all his pictures on the highest terms, and each ne-

(2998)

gotiation is separate. Now, the fact that you are able to get $20 from an account, you are getting down to pretty near the last available dollar, because when you

get down to the twenties—we have one producer, by the way, who won't let us sell any exhibitor who pays less than $35. I suppose Mr. Wright says that is discrimination, but that man only makes one picture every five years, so we only have that headache once in five years. We contend we have a right to get as much as we possibly can from each account. We are selling him an intangible. We are not selling cotton shirts or even Bobbs Merrill books. We have that intangible, an exhibition right, a performing right, and that is all we license, and we say under the Interstate case, Justice Stone said that each of us acting separately and independently can exercise our monopoly of copyright in any way we see fit. Now, that is said in the prevailing opinion, Mr. Wright to the contrary notwithstanding. He said it both as to Paramount in its relations with Jefferson, and he said it as to all eight of us who were found guilty of conspiracy because of that O'Donnell letter. He said that if we had acted separately and independently we could have put either of the restrictions in the contract, but we did not. We acted as a result of the pressure of the O'Donnell letter. When he got to the Paramount Jef-

(2999)

ferson subsidiary, which Mr. Wright says is price fixing and discrimination, he said Paramount could have done it separately, but they did it not by virtue of the ownership of the copyright, they did it by virtue of the pressure of the exhibitor who had no interest in the copyright.

Now, we say loading the record with this sort of evidence does not help the Court in any respect in the issues involved as regards distributors as distinguished from exhibitors. We make no claim here

that we charge any man less than his competitor or more. We get all we can from every one of them. And just because Robb & Rowley did not pay as much as Mr. Wright thinks they should pay, that is the best we could get out of him.

Mr. Proskauer: Your Honor, I have no objection to the evidence, but we are not a public utility, and we have got a right to license our pictures as we please so long as we do not do it by conspiracy; and that is what the essence of this case is coming down to. While I have no objection to the evidence, I challenge the right of a quasi-judicial officer to come in here and say that every independent exhibitor is objecting to this thing. There is no such situation existing.

Mr. Frohlich: May I, if your Honor please, take an objection—I do object to this line of evidence

(3000)

offered by Mr. Wright. He has failed to make out a case, an affirmative case against at least these three defendants at this table. He now seeks afresh to make out a case against them on so-called rebuttal. Now, we brought our witnesses down. We tendered an issue to the Court. Mr. Wright is not trying to rebut evidence that we produced here; he is trying now for the first time to show some form of discrimination which he failed to show on his main case; and, technically, I think he is violating the rules of evidence, and I technically object, strenuously, to every attempt by Mr. Wright to follow this line of evidence.

Judge Hand: Overruled.

Mr. Davis: I should like to p. in an objection against the receipt of this evidence against Loew's, Inc., which is not a party to these exhibits.

Judge Hand: Overruled.

Mr. Proskauer: I suppose we all have that general objection all the time?

Judge Hand: Yes.

Now, what about these anticipated exhibits or wandering exhibits that Mr. Wright is talking about?

Mr. Davis: We were asked to exhume certain contracts. We have exhumed them and are ready to turn them over to Mr. Wright.

(3001)

We got our request yesterday at 2 o'clock, quite a lengthy request, and we have not found it possible in the intervening hours to have it together, but we hope to have it in time to serve Mr. Wright's purposes. We cannot produce exhibits as if you drop a nickle in the slot.

Mr. Caskey: If your Honor please, I think the question is much more serious than has been indicated. If we are going into any show of discrimination in film rentals in the selected situations that are dealt with in the Appeal Board decisions which were admitted provisionally, it may require the framing of a completely new issue. Now, I should not suppose that any of these defendants would want to rest the case on any such basis or any such narrow selection, and if there is going to be any attempt to show in isolated contracts without any oral testimony, without any complaint, without any proof as to what the effect of the film rental was on the theatre, no more proof except that some man paid 10 cents for coffee and another man paid 5 cents, of course——

Judge Hand: Have you got your papers here?

Mr. Caskey: No, sir. Our letter came yesterday afternoon at 4 o'clock. That is when we got it.

Mr. Wright: I think there were two letters. The one that came yesterday was the repeat request. The

(3002)

original was sent out on November 3rd.

Mr. Proskauer: Mine was not a repeat request. I got it at 3 o'clock yesterday. It was a request for some more information. We spend half our time trying to meet Government requests that come to us in letters in a form threatening subpoenas if we do not comply. We will give him all he has called for in the letter we got at 3 o'clock yesterday afternoon before sunset tomorrow.

Judge Bright: Have you any other rebuttal now, Mr. Wright?

Mr. Raftery: Excuse me. Here is another one I just found.

Judge Bright: Is there anything further now?

Mr. Wright: I think we can go ahead this afternoon. I wanted to put in some profit figures through an FBI agent who made an examination of the data on file with the Securities and Exchange Commission. Now, we can go ahead with that.

Judge Bright: With the exception of this additional information which you have just requested of the defendants, is that the end of the rebuttal?

Mr. Wright: Our rebuttal will also include a statement or an examination of our statistician who has been tabulating not only our material but examining the data that has been pushed in here today and recently, and charts and figures, and we shall examine

(3003)

him not only with respect to computations of his own but certain data which has been offered by the defendants; and with that plus the introduction of documentary material, that I think will complete our re-

buttal; and I do not think the time of presentation will be great, but we have not been able to get the statistician ready to testify because of these constant changes that have been made in the data he has been tabulating. He has to recompute every time one of these changes comes in; and, of course, as to the material which has come in, he has not even had a chance to look at it or examine it.

(3004)

Mr. Leisure: If the Court please, we received a letter from Mr. Wright yesterday at eleven o'clock, and working yesterday afternoon and last night we have the material, but if Mr. Wright is not going ahead—they are original documents and we would like the privilege of photostating them before we turn them over to him, if that is satisfactory to Mr. Wright.

Judge Hand: Well, I do not see why you did not give them notice long ago of this thing. You say you gave them all notice November 3rd?

Mr. Wright: We sent out that letter that I referred to here covering the 26 theatres on November 3rd, to each counsel for each distributor.

Mr. Caskey: Mr. Wright, have you got a copy of such a letter?

Mr. Wright: Yes, I think we have.

Mr. Caskey: I would like to see it. I have not gotten it.

Mr. Wright: Here is the form of the letter (handing).

Mr. Frohlich: We never got that letter, you know, Mr. Wright. You never sent it to us.

Mr. Raftery: So that the record will be straight as to what I have given you——

Mr. Wright: What?

(3005)

Mr. Raftery: I want the record to show what I have given you, because you have intimated that I did not give you everything. Under date of November 12th there was sent by mail to Universal a request for certain documents.

Judge Hand: Did you get a request on the 3rd?

Mr. Raftery: I gave him that stuff long ago, whatever he asked for. The big bundle——

Judge Hand: You mean he wanted more?

Mr. Raftery: Yes. This is the 12th.

Judge Hand: I see no reason why you did not have this thing out. You knew this case was marching along——

Mr. Wright: I said——

Judge Hand: Now wait a minute, please. This is rebuttal, you say, to show specific discrimination. Why didn't you ask them for it and get it before?

Mr. Wright: If the Court please, we did not know until the witnesses took the stand that the claim was going to be made that they did not discriminate as to film rentals in dealing with independents and circuits.

Judge Hand: I am surprised at that statement on your part, that you did not know their defense by this time or that that was one of their defenses.

Mr. Wright: We did send out the letter on November 3rd, and Mr. Raftery got the letter, and I did

(3006)

not say that he had not or that United Artists had not produced material. United Artists and Universal did produce material. It was the other six that produced none.

Judge Hand: Did you send it to them?

Mr. Wright: My understanding is that the same letter was sent out to counsel for each of the eight companies.

Mr. Proskauer: Your letter of yesterday repeated the letter of November 3rd, but added a mass of additional information you wanted.

Mr. Caskey: I have the letter. Let me read it. It relates to eight cities, not 23.

Mr. Wright: I said 23 theatres.

Mr. Caskey: All right, in eight cities. It says:

"Enclosed is a list of documents which we may desire to use in the presentation of rebuttal evidence in the above case. If you desire the issuance of a subpoena as a condition for their production, we shall appreciate your letting us know promptly."

Now those for those eight cities are available. Now yesterday there came the additional letter.

Mr. Raftery: I got two letters, and this is what I produced, Mr. Wright: On November 12th you asked for license agreements for Middleboro, Massachusetts, Brockton, and you also asked for the Playhouse,
(3007)
Ayer, the clearance, 1937-38 form of license agreement.

Now we have produced all we have got. We did not sell Brockton in any of those years, so we have no Brockton. We did not sell either of the theatres in Lowell, the Strand or the Merriman, so we have nothing for Lowell. We have produced Ayer, and at two o'clock the boy will be here with the additional back season stuff for Middleboro. Now this morning we get a letter of November 13th, and he wants the license for the Plaza theatre at Atlanta, for the exhibition of Stage Door Canteen. We phoned for that this morning as soon as we got it.

Judge Hand: Where is that?

Mr. Raftery: Plaza theatre, Atlanta. I don't even know the theatre. The other——

Judge Hand: Well, I am not going to see this thing go on as an examination before trial here during trial. This case has got to proceed, and we are not going to tie up three Judges here in trial to suit the convenience of anybody.

Why do you keep serving them with these papers?

Mr. Wright: If the Court please, that is the only way that we can assemble the data. We either give them the letter or serve them with a subpoena.

Judge Hand: I am not talking about that. I am talking about the late date at which it is done.

(3008)

Mr. Wright: Some of this matter—those two theatres he just referred to—was testimony which was developed in the course of cross-examination of defense witnesses about this question of whether or not certain of the distributors adhere to the same clearance as that granted by others.

If the Court please, the only way I know to resolve those questions is by the production of the agreements themselves, and we want to produce and offer the material as fast as we can get it, but it has not been possible to get out one letter which would cover everything. As we have checked the record there have been other agreements that we have decided that we would want. As we have made that check we have notified these people as to what was wanted. I want to proceed as expeditiously as we can, but I cannot do it without that material. I will say this——

Judge Hand: You have got to go to your limit, apparently, now. Why don't you go on with it?

Mr. Wright: I haven't even had a chance to examine it or look at it. I say, we could stop and examine——

Judge Hand: I have constantly told you to deal with each other across the table and not come into court in this way. You have had four days here.

Mr. Wright: If the Court please, there was no

(3009)

one available, I think, insofar as the defendants' offices were concerned, either on Saturday or on Monday.

Mr. Raftery: We were there all day.

Judge Hand: We will have to determine on some method of procedure now.

Mr. Wright: I say I can go ahead this afternoon with this summary of this SEC material, I propose to get that out of the way, but I am pointing out that I simply haven't been able to—Mr. Borwick hasn't been able to get his material ready simply because there has been no time for him to recompute this material and to actually examine the material which has gone in as a part of the defense, some of which has just been put in here now.

Judge Hand: We will adjourn until two o'clock.

(Recess until 2:00 p. m.)

(3010)

AFTERNOON SESSION

Judge Hand: Proceed.

Mr. Wright: Mr. Maloney.

JAMES J. MALONEY, called as a witness on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Wright:

Q. Where do you live, Mr. Maloney? A. New York City.

Q. And what is your occupation? A. I am a special agent, Federal Bureau of Investigation.

Q. You are also an accountant? A. That is correct, sir.

Mr. Proskauer: Mr. Wright, try to let us hear you, won't you?

Q. You participated, did you, in an examination of certain data filed with the Securities and Exchange Commission at the request of the Antitrust Division of the Justice Department? A. Yes, I did.

Q. The material examined was the statements, the financial statements, filed by seven of the defendants in this case? A. That is correct.

Mr. Wright: Will you mark this for identification.

(Marked Government's Exhibit 403 for identification.)

Q. I will show you this work sheet that has been marked for identification as Exhibit 403——

Mr. Seymour: May we have copies, Mr. Wright?

(3011)

Mr. Wright: Yes, but I am not sure that there are enough to go around.

Q. Now can you tell us what that exhibit that you have in your hand is? A. Yes. The amounts appearing on this exhibit which is entitled "Warner Bros. Pictures, Inc. Statement of Profit and Loss,"—the amounts appearing on this tabulation were obtained from the annual statements filed with the Securities and Exchange Commission, or, rather,

from copies of those statements which are on file at the New York Stock Exchange.

Mr. Proskauer: Mr. Wright, we won't make any question but what this is a collation of our reports on our profits made to the SEC. I do not know what the purpose of it is. We never claimed we were doing business at a loss.

Mr. Wright: We offer the exhibit in evidence.

Mr. Davis: Isn't it proper, your Honors, that they should say for what purpose this exhibit is offered? We have seen a quantity of exhibits go in without any knowledge of their relevancy. I think the time has come now that we should ask what the relevancy of these exhibits is to the case.

Judge Hand: Yes.

Mr. Wright: If the Court please, Warners offer testimony both as to certain rising costs, and then

(3012)

some other figures to the effect that certain domestic operations were unprofitable, and figures which, as I understood Mr. Proskauer's statement when they went in, were entitled to show that Warner Bros. Pictures, Inc., had absorbed these increases in cost and had not passed along to the public these increases.

Now this statement is offered to show that the profits after taxes of Warner Bros. Pictures since 1940 have increased very greatly, that these figures show not only that increases in cost have not been passed on, but that such savings as may occur from the integration of these businesses far from being passed on to the public have resulted in exorbitant and excessive profits to this defendant.

Mr. Proskauer: As I said, we do not want you to be put to the proof of the authenticity of the figures.

We are taking them subject to check and correction as far as we are concerned, your Honors. But what I am at a loss to know is how a statement of what our overall profit is in any way negatives the specific testimony we gave as to a breakdown of those profits or in any way tends to negative the evidence we gave that while our costs have gone up very remarkably, our admission prices have remained about static. What relation is there between the two things?

Judge Hand: I do not see myself.

(3012-A)

Judge Goddard: This includes foreign and domestic, does it not?

Mr. Wright: This is the consolidated statement of Warner Bros. Pictures. This includes the parent and all subsidiaries.

Judge Hand: Go ahead.

(3013)

Judge Bright: You say this is after taxes?

Mr. Wright: The net profit figures are after taxes.

Judge Bright: The statement does not show that.

Q. Is that correct, Mr. Maloney? A. Correct, the statement merely indicates that it is net profit.

Q. Did you make an examination with regard to the taxes paid by the same company since the excess profits tax has been in effect? A. The amounts of such taxes were obtained from the statements on file——

Q. Have you got a statement of those there? A. Yes, I have.

Q. Will you just——

Mr. Proskauer: Your Honors will find that this statement does not jibe with the one that was put

in this morning. The reason for that is that the one that was put in this morning was before taxes, and this one is after taxes.

Judge Hand: Now he is going to prove taxes.

Judge Bright: To testify to excess profits taxes.

Mr. Proskauer: I mean, federal profit taxes and income tax.

Q. Will you just read the data you have there, taken from the Securities and Exchange Commission reports, which show the extent of the excess profits taxes paid by this company? A. Yes. The amounts of excess profits taxes (3014)
applied only for the years 1941, 1942, 1943 and 1944. For those years the amounts were, for 1941, $7,150; for 1942, $4,000,000; for 1943, $9,990,000; for 1944, $9,135,000.

Judge Hand: Do you claim their rates were any higher during these times?

Mr. Wright: Oh, yes, indeed, if the Court please. The only way in which profits of this character could have been earned while the operation of the theatres remained at the same level, in number, would be by an increase in margin.

Judge Hand: I did not say anything about them remaining the same level in numbers. I don't know whether they did or not. I asked you whether you claim their charges were any more.

Mr. Wright: Yes, we do.

Mr. Proskauer: I have only to observe that there is no proof of that. The only proof in the case is what I put in.

Judge Bright: Do you mean by "charges were more" that the cost to the public was increased?

Mr. Wright: Yes, indeed.

Judge Bright: In what respect?

Mr. Wright: Admission prices .

Judge Bright: Doesn't the proof showed the ad-
(3015)
mission prices stayed about static during this period?

Mr. Wright: I do not believe that it does. What he offered was not a study of what had happened to admission prices; he merely took a net figure of so many admissions taken in, divided by the total number of people who attended theatres. I submit that that kind of an average does not give you any accurate picture at all as to what happened to the admission price level, and that these figures, and the figures we offered before, as to theatre operations show that—there is also in evidence that the number of theatres throughout this period, the number and character and location of theatres operated by Warner throughout this period, has remained substantially constant. Now, the only way, as I see it, in which you can account for the enormous rise in profits that occurred, and the excess profits that were earned is by increases in your margin between what was charged to the public and what it cost you to give what the public got. That is what these figures do.

Judge Hand: I do not see how that follows in the least. It may be a fact, but I do not see how it follows from that.

Mr. Proskauer: May I state that the evidence in this case shows the explanation, and that is, the enormous increase in attendances in theatres during the war period. The criticism of my figures is just base-
(3016)
less. I showed the average admission price in all theatres in the country, of ours, for a 15-year period. How to get it more fairly than to take the gross ad-

mission and divide it by the admissions to get the admission price, I don't know.

Judge Hand: How it proves anything but proves that people took in a great deal more money, or made a great deal more money, except possibly as some kind of a link in something else, I cannot imagine. That is why I am afraid to exclude it because it may be some kind of a link. I tell you it proves nothing in itself.

Mr. Wright: If the Court please, we would not have offered it had defendants not sought to go into the profit situation. In our view, in the first instance, the question of whether or not there has been a restraint here is not dependent upon a consideration of these——

Judge Hand: Now you are making an entirely different argument, if I understand you. You are trying to meet something else, you say, that they have gone into, which is, that they haven't—they have had a hard time and they wouldn't have got on without these arrangements, and now you say you meet that by proof that they earned a lot of money. Maybe it is so, and maybe their argument is no defense whatever to the suit for violation of the Sherman Act. I shouldn't wonder if both were true.

(3017)

Judge Goddard: Wouldn't the attendance figure throw some light on this?

Mr. Wright: Why, the attendance figures are in there, yes. I would submit that, regardless of whether or not your increase in margin is due to increased attendance or increase in admission price level, in either case it is perfectly apparent from the figures that we offer that the public absorbed your increased costs and that Warner Bros. operated with an excessive margin, as shown by the payments that were made.

Judge Hand: You mean you are now coming to some kind of argument like this, I should say—I don't know—that if they made more money, they should have reduced their rates?

Mr. Wright: If they had been in a competitive industry, that is——

Judge Hand: In other words, you do not show at all that their rates were raised by reason of conspiracy or anything else. You say they made so much money, that they should have lowered their rates.

Mr. Wright: That profits of this character——

Judge Hand: You see, this thing, well, it is like the old lines of Sir Edwin Arnold in "The Light of Asia,"

"They flash and vanish

(3018)

Bid them not to stay.
For knowledge brightens as they flee away."

These things just come across the screen and hit us with a new thought.

Mr. Wright: Let me say this, profits of this character could not have been earned under a competitive rate structure. That is the fundamental fact, I think, that emerges from these figures.

Judge Goddard: Mr. Wright, do the figures of the other affiliates and the independents also show an increase in profits during these years?

Mr. Wright: Yes. I was going to offer a similar statement for each of the other six defendants——

Judge Goddard: For the independents?

Mr. Wright: (Continuing) —which filed with the Exchange.

We have no profit data on independent exhibitors generally. I would assume that there may also have been substantial increases in profit there due to increased prosperity. However, they aren't——

Judge Hand: There you would argue that they would make them because of the conventional example of the confederates here, and, therefore, they charged more, otherwise they would have lowered them. Well, go on.

(3019)

Judge Bright: You offered that, did you not?

Mr. Wright: Yes, we offered it.

(Marked Government's Exhibit 403.)

Mr. Wright: I will ask to have this next work sheet marked as Exhibit 404 for identification.

(Marked Government's Exhibit 404 for identification.)

Q. Mr. Maloney, could you explain what that Exhibit 404 for identification, which you have in your hand, is? A. This exhibit, which is entitled "Twentieth Century-Fox Film Corporation and Wholly Owned Subsidiaries, Analysis of Income," reflects amounts of income and net profit, which were obtained from copies of the annual statements filed with the SEC, which copies are on file at the library of the New York Stock Exchange. It covers the period from 1934 to 1944.

Mr. Caskey: I want to examine on the voir dire before this is taken.

Mr. Wright: Go ahead.

Preliminary Cross-Examination by Mr. Caskey:

Q. Mr. Maloney, did you prepare this statement yourself? A. No, I did not, sir.

Q. You did not prepare it yourself? A. That is correct.

Q. Did you examine the basic data yourself? A. I did

(3020)

not examine them in detail: I observed them.

Q. Did you check this document against a basic data yourself? A. No, I did not.

Q. Do you know whether this statement, gross income from sales and rentals of film and accessories, is true or not? A. I know, sir, that it was prepared under my observation.

Q. Do you know it to be a fact that the amount of film rental for the year December 25, 1943, increased $90,000,000 over the previous year? A. Because the statement was prepared under my observation, I——

Q. You know that to be true? A. I know that the work of the man preparing it was accurate and to that extent I know that it is true.

Q. Don't you know that in fact in July, 1943, Fox Film acquired all the capital stock of National Theatres Corporation? You know that to be a fact? A. I believe you when you state it. I never heard it before in my life.

Q. Don't you know that for the year ended 1943 and the year ended 1944, in accordance with the requirements of the Securities and Exchange Commission a consolidated report was filed, lumping theatre admissions and film rentals for those last two years? A. As stated before, when you tell it to me, I believe you. I do not know it to be a fact otherwise. (3021)

Q. You do not make any representation to this Court that you testify that the film rentals of National Theatres Corporation increased from $67,000,000 to $154,000,000 from 1942 to 1943, do you?

Mr. Wright: Excuse me. Just a minute. Let me say this, if the Court please: If there is any question as to the authenticity or accuracy of any figure that is on here, I will withdraw the exhibit so that a proper correction can be made. There is no desire to have anything in here, on the part of either of us,

which does not correctly reflect what was reported to the Commission.

Mr. Caskey: I certainly think this is objectionable. The witness has not prepared it, he has not checked it. It is not in accordance with the evidence that has already been received. We object to it.

Judge Hand: Objection sustained.

Mr. Wright: I will ask to have this Paramount statement marked with the next exhibit number.

Judge Hand: This is another exhibit, Mr. Wright?

Mr. Wright: Yes.

(Marked Government's Exhibit 405 for identification.)

By Mr. Wright:

Q. Now, can you tell us, Mr. Maloney, what that Exhibit 405 for identification is? A. Exhibit 405 is entitled "Paramount Pictures, Inc. and Subsidiaries Consolidated, Analysis of Income Per Consolidated Statements of Profit and Loss." It covers the period from 1935 to 1944 and reflects amounts of income and net profit which were obtained from copies of reports filed with the SEC, which copies are in the library of the New York Stock Exchange.

Mr. Wright: We will offer this 405 for identification in evidence.

Q. One question: These net profits here are also after taxes, is that right? A. That is correct.

Mr. Seymour: Let me just ask a couple of questions:

By Mr. Seymour:

Q. What is the last column on this sheet? A. You mean the heading of it?

Q. No. What does it show? What period does it cover? (3023)

A. The fiscal period ended December 30, 1944.

Q. The last column? A. That is correct.

Q. What column contains the figures for the year 1940? A. For the year when?

Q. 1940. A. The column bearing the heading January 4, 1941.

Mr. Wright: May it be understood, if the Court please, generally as to each of these exhibits, if there is any figure in error on any of these, whether they have been received in evidence or not, it is of course subject to correction in accordance with the figures on file.

Mr. Seymour: I am sorry to say that I am not in a position to examine the witness in detail about this, but as long as it is taken subject to correction and subject to objection on the grounds of materiality and relevancy, if we have any corrections we shall supply them to Government counsel.

Judge Hand: All right. Admitted.

Mr. Seymour: Let me just ask one other question:

Q. The first column which covers the 1934 period is the period when Paramount was in bankruptcy, isn't that so? A. I believe that is the case.

(Government's Exhibit 405 for identification received in evidence.)

(3024)

By Mr. Wright:

Q. Now, as to Paramount, did you also make an examination as to the extent of the excess profits tax payments? A. Yes, we did.

Q. And what did you find there? A. According to the copies of the statements available at the New York Stock Exchange, the amounts of charges for excess profits taxes appearing in the statements for the following fiscal periods were as follows:

For the fiscal year ended January 3, 1942, $39,784;

For the fiscal period ended January 2, 1943, $4,340,796.63;

For the fiscal year ended January 1, 1944, $19,963,292.21;

And for the fiscal period ended December 30, 1944, $20,355,359.90.

Mr. Caskey: Will you state for the record the rates of taxation that were applicable during those years?

The Witness: That is not possible, sir. I don't know them.

Mr. Wright: Will you mark this with the next exhibit number.

(Marked Government's Exhibit 406 for identification.)

Q. Will you tell the Court what this Exhibit 406 for (3025) identification is? A. Exhibit is entitled "Radio-Keith-Orpheum Corporation and Subsidiary Companies." It reflects amounts of income and net profit or loss obtained from copies of statements filed with the SEC, which copies are on file with the New York Stock Exchange.

Q. And the net profits that are written in ink at the bottom there are—the first figure in parenthesis is a loss, is that right? A. That is correct.

Q. And the rest are net profits after taxes? A. That is correct.

Mr. Wright: I will say that we are not offering the part that is stricken out with the red pencil on the exhibit, and dividend payments. All we are offering is the analysis of income and net profits. We offer them in evidence.

Mr. Leisure: If the Court please, we object on the grounds of materiality and relevancy as to this exhibit.

Judge Hand: Overruled.

Mr. Leisure: And we ask that it be received subject to check and correction.

Judge Hand: Yes.

(Government's Exhibit 406 for identification received in evidence.)

Q. Did you also make an examination with respect to (3026)
the excess profits payments of RKO? A. Yes, sir, we did.

Q. And what did you find there? A. The amounts appearing as charges for excess profits taxes in the statements available at the New York Stock Exchange indicated that for the year ended December 31, 1943, the charge was $495,000; for the year ended December 31, 1944, the charge was $3,483,960.

Mr. Wright: Will you mark this for identification, please.

(Marked Government's Exhibit 407 for identification.)

Q. Would you tell the Court what Exhibit 407 for identification is?. A. Exhibit 407 is entitled "Loew's, Inc. Consolidated Analysis of Income as shown in Profit and Loss Statements." It covers the period from 1933 to 1944 and reflects amounts of income and net profit after taxes as

well as before taxes as obtained from copies of statements filed with the Securities and Exchange Commission, which copies are on file at the New York Exchange.

Mr. Wright: We offer that.

Mr. Davis: I object to that, if the Court please. I should like to ask the witness a question or two on preliminary cross-examination.

Judge Hand: Yes.

(3027)

Preliminary Cross Examination by Mr. Davis:

Q. Again, Mr. Witness, you did not prepare this yourself? A. No, I did not, sir.

Q. You did not examine the figures on which it is based? A. I did not in detail.

Q. You did not make the computations that it contains? A. I might point out, sir, no computations are involved in the schedule.

Q. There are no additions or subtractions in it? A. Well, except to the extent that it is necessary to add them to get this total. To that extent I did not make them.

Q. That is not a computation according to your conception? A. That is a computation.

Q. That you did not do? A. I did not.

Q. You did not verify this by any of the documents on which it was based? A. The original documents?

Q. The original documents. A. I did not.

Q. What is the name of the person who did do that work? A. If I may refresh my recollection?

Q. Certainly. A. The work of which you speak was performed by Special Agent Richard Trout of the Federal Bureau of Investigation.

Q. What is his occupation? A. He is a Special Agent of the Federal Bureau of Investigation.

(3028)

Q. How long has he been so employed? A. I am not aware, sir.

Q. Was he employed for this particular job and none other? A. Oh no, he was not.

Mr. Davis: Now, if the Court please, I object to this on several grounds which I shall state: The first is it is not verified by the person who made it, and in this respect it is quite different from a computation drawn from the books of a corporation kept in its regular course of business and made either by the person in charge of the books or by some other person whom he delegates and who acts under his direction. There is no showing whatever that this witness had any part in this computation or is competent to verify that. In the second place, I object to it because it is wholly irrelevant to this case.

By way of illustration, it is a matter of common knowledge that the petroleum industry has been very prosperous, and I assume that you could make a similar statement from the books of any petroleum company in the United States within the last five years and show a steady upward curve of profit. That, says Mr. Wright, could not occur in a competitive industry, and if you showed him the petroleum industry that all the companies were prospering, ipso facto,

(3029)

according to Mr. Wright's conception, you would have shown that there was some sort of conspiracy or combination among them, which is clearly an obvious non sequitur. The fact that there is profit here has nothing whatever to do with the alleged combination or restraint of trade on the part of these defendants. I submit that the suggestion that there is anything pro-

bative here eludes any possible reason. I object to the introduction of this exhibit.

Judge Hand: We will sustain the objection on the first ground. We have admitted other schedules despite the second ground, although their relevancy here I should think is very doubtful on that.

Mr. Wright: If the Court please, on that first ground, as long as they are subject to correction I see no reason why they should not go in. We have admitted a great mass of tabular material from the defendants here without insisting on examining the witness who prepared it.

Judge Hand: Well, you cannot have utterly different things in here. If they are so, I should think you had better withdraw it and find out about it. This witness manifestly is not qualified. They raise the objection. It may not be a worthy objection to raise if you can confer and straighten the thing out, but it is obviously a good one now. Of course, Mr.

(3029a)

Caskey's exhibit there stands in the same position exactly and was excluded on the same ground.

Mr. Wright: Will you mark this Exhibit 408 for identification, please.

(Marked Government's Exhibit 408 for identification.)

(3030)

Mr. Raftery: I won't object to it, Mr. Wright. Go ahead and offer it.

By Mr. Wright:

Q. Will you tell the Court what Exhibit 408 for identification is? A. Exhibit 408 is entitled "Universal Pictures Company, Inc. State of Consolidated Profit and Loss." It

reflects the amounts of profit and loss for the period from 1935 to 1944, as these amounts were obtained from copies of statements filed with the Securities and Exchange Commission, which copies are available at the New York Stock Exchange.

Q. Now the first four years' figures, those are losses? A. Those first four years are losses. The remaining years are profits.

Q. Those are profits after taxes? A. That is correct.

Mr. Wright: That is offered, and I take it there is no objection.

Mr. Seymour: May we see it?

Mr. Wright: Yes (handing).

(Government's Exhibit 408 for identification received in evidence.)

Q. Did you also make an examination of the Universal data on file with the Commission with respect to excess profit tax payments? A. Yes, we did.

Q. What did you find there? A. The amounts charged (3031)
for excess profits taxes for the year 1943 was not available at the New York Stock Exchange for the fiscal period ended November 1st, 1941. The amount charged was $711,000.

Mr. Raftery: What year?

The Witness: November 1st, 1941.

A. (Continuing) For the fiscal period ended October 31, 1942, it amounted to $3,181,000, and for the fiscal period ended October 28, 1944 it amounted to $6,897,900.

Mr. Wright: Will you mark that with the next exhibit number?

(Marked Government's Exhibit 409 for identification.)

By Mr. Wright:

Q. Now, would you state to the Court what Exhibit 409 for identification is? A. Exhibit 409 is a schedule consisting of two pages entitled "Columbia Pictures Corporation, Schedule of Profit and Loss." The schedule reflects the net profits of the company for the period from June 30, 1934, to June 30, 1944, and was obtained from copies of statements filed with the Securities and Exchange Commission, which copies are available at the New York Stock Exchange.

Q. Those net profit figures were also after taxes? A. They were.

Mr. Wright: I will offer it in evidence.

(3032)

Mr. Frohlich: No objection to this, Mr. Wright.

(Government's Exhibit 409 for identification received in evidence.)

Q. Now, did you also make an examination with respect to the excess profits payments of Columbia? A. That has been made. However, the figures are not presently available, Mr. Wright.

Q. You do not have the figure there with you? A. No.

Judge Goddard: What is the difference between the figures on this page which is attached and the main sheet? On the attached page there seems to be a different figure.

Mr. Wright: The main sheet, I believe, is the analysis of income, and there was not room, apparently, to put the net profit figure on that sheet, and so that was put on an additional sheet which is attached to the front here.

Q. Now did you cause to be prepared some charts which reflect the net profit figures after taxes that you have testified to here? A. Yes, I did.

Q. Do you have the Warner Bros. chart there? A. Yes.

Mr. Wright: I will ask you to have this chart of Warners marked with the next exhibit number for identification.

(Marked Government's Exhibit 410 for identification.)

Mr. Wright: We have no copies of this.

(3033)

Mr. Caskey: Aren't they based on excluded exhibits?

Mr. Wright: I do not think the Warners exhibit was excluded.

Mr. Seymour: May we look at that?

Mr. Wright: Yes. All that this does is put in graphic form what has already been received in evidence in precise detail.

Judge Bright: As to all of the companies?

Mr. Wright: No, that is just as to Warner. There is a separate one for each company.

Mr. Proskauer: It is a graphic illustration that we did better in the war years.

Mr. Wright: If you have the Warner work sheet there, this is simply a statement in chart form of the net profit figures that appear at the bottom of the work sheet. I think that is 403.

Will you mark these with the next four exhibit numbers?

Judge Hand: I do not know what your claim is about it. It has gone up and it has gone down here

(3034)

by strides.

Mr. Wright: I think the descent there, your Honor, is a plateau which is far in excess of anything which has appeared before——

Judge Hand: It is still in the highlands. Well, all right.

Mr. Seymour: May we see the rest of the chart, Mr. Wright?

Mr. Wright: Yes, as soon as they are marked.

Mr. Seymour: Of course there is no more objection to these graphs than there was to the original figures. Your Honors have overruled the objection to the figures. Now I suppose equally relevant would be graphs and charts showing the performance of American business generally through the war years; the increased consumption of agricultural products on the part of the average citizen, and perhaps quite a fancy array of those charts could be prepared too.

Judge Hand: Of course.

Mr. Proskauer: What this case needs is some charts.

Judge Hand: You could equally put in what some independent did in the way of increase in Montana.

Mr. Seymour: The only difficulty of course with that sort of thing is that the Government and not we are able to get that sort of information. This is

(3035)

public information which we provided the Government with.

Mr. Frohlich: I would like to call the Court's attention, if you please, to Columbia Exhibit No. 409, just put in evidence, and the Court will note that the profits appear from 1934 to 1944 and that from 1934 to 1937 the profits were a million, a million eight hundred, a million five hundred, a million three hundred, and then there were four bad years, and then during

the war period they ran up again to one million and six hundred, one million eight hundred, and two million dollars. With the exception of that last item of two million, the figures prior to 1938 were larger than during the war years, so that Columbia has had a stationary history for the past ten years. There has been no increase; on the contrary there has been a decrease for a four-year period.

Judge Hand: All right, we are going to let this thing in. It is a great deal safer to let in evidence of this sort. I do not see what in the world it proves, but it may connect with something.

Mr. Leisure: With regard to this graph, in order to clarify it as far as RKO is concerned, may I ask the witness a couple of questions?

Judge Hand: Yes.

Preliminary Cross Examination by Mr. Leisure:

Q. Mr. Maloney, I take it that this graph was prepared (3036)
from the figures that appear on the tables that have been offered heretofore, is that true? A. That is correct, it was.

Q. Would you mind picking up, please, sir, your table 406 for RKO?

Judge Hand: You mean for the purpose of making another graph like this, like this Warner one, like 410?

Mr. Leisure: 411 is the one I am addressing my attention to, and he says it was based on the figures in 406, the RKO figures.

Judge Hand: I haven't seen 406?

Mr. Leisure: Could you give the Court copies of the 406 one so they can see it, please, Mr. Wright?

Mr. Wright: I think your Honors have it.

Mr. Leisure: You have that? It is the last graph that I am addressing my attention to.

Judge Bright: We haven't copies of that.

Mr. Wright: He has the only copy, the one that is marked.

Q. Do you have before you, Mr. Maloney, 406? A. I do.

Q. I note down at the bottom you have stricken out by red pencil the next to the last line under "Net Profit or Loss," is that right? A. That is correct.

Q. And then below that you have written in, in ink, in place of $988,191.20, you have written in $695,416.20. That (3037)
makes a total difference of $293,785, does it not, Mr. Maloney? A. That is the difference.

Q. Would you mind telling us where you got the figures from which you wrote in? A. The figures appearing in ink are, respectively, the amount representing either net loss or net profit for that year. It is my understanding that the figures previously appearing, and which have now been crossed out, were those representing the net profit or loss before certain adjustments had been made to that amount.

Q. Those were the figures that were given by the SEC, were they not, the ones you have stricken out? A. May I ask which figures you refer to?

Q. The one just above the ones written in in ink. A. Both figures appear in the statements filed with the SEC.

Q. But what is the basis for the difference between the two columns, if you know? A. In detail, I don't know. In general I can state that it represents adjustments to income other than operating adjustments.

Q. Do those differences appear on the face of the chart here as to why those differences were made? A. You refer to the chart as being Exhibit 406?

Q. Yes. A. The differences do not appear on the face of 406.

Mr. Leisure: I move to strike it out. The chart

(3038)

is clearly erroneous if it does not show why these changes were made. I don't know how he computes this difference of $293,785 and it does not appear on the face of the chart. I move to strike out the chart on that basis.

Judge Bright: On none of the charts do any operating expenses appear.

Mr. Leisure: He changes the figures though, Judge Bright.

Judge Bright: I see that.

Mr. Leisure: And there is no showing here on what he bases it. We cannot check that.

Judge Hand: Well, I dislike to keep hearing and entertaining these motions, some of which I will have to, to strike things out. I do not think it is the way to do it. For reasons that we have already stated, or fears that we have already expressed, we think evidence of this sort should be admitted at this stage of the case. Now, when it comes to the details of it, and the correctness of it and the checking of it, that ought to be done between the Government and yourselves. There ought not to be questions raised by motions to strike out as a good motion disposing of this kind of thing.

Do you know anything about this?

Mr. Wright: Yes. If the Court please, the figure

(3039)

that was originally on there was not the final net profit or last loss figure, and I told them to get the final figure as it appeared on the SEC reports so that we would have comparable figures in each case, and, as I understand it, the figure in ink is the final figure as reported to the SEC, and that is why we drew the

line through the other figure and substituted the ink figure. There is no matter of computation involved there, as far as the witness is concerned. It is simply a question of copying what was on the SEC report.

Judge Hand: What about that, Mr. Leisure?

Mr. Leisure: If there is any way we can check how he got the second figure, we will be glad to do it.

Judge Bright: Aren't those your figures that you furnished the SEC?.

Mr. Wright: Yes.

Mr. Leisure: There is no showing on the chart where they came from. That is the point of my objection.

Judge Bright: He says they came from the SEC, your reports to the SEC.

Mr. Leisure: If we can check it there, it will be all right, but there is no showing on the chart where it did come from. That is the point of my objection.

Judge Bright: Well, he has testified where they came from.

(3040)

Judge Hand: Don't you know this thing yourself? Haven't you got data here or in your office or in the office of your client?

Mr. Leisure: The general counsel for the company says he does not think it is accurate, that is why I made my objection, and there is no showing on the chart as to where it came from.

Mr. Wright: If it is incorrect, it can be corrected.

Judge Hand: It will be received subject to a motion to strike, if it is found incorrect.

Mr. Wright: I would like to collect those——

Mr. Proskauer: Can't collect mine because I want to question the witness very briefly.

Preliminary Cross Examination by Mr. Proskauer:

Q. Are you an accountant? A. Yes, I am.

Q. Did you devise the form in which these exhibits were put in here? A. To a certain extent, I did.

Q. In notice on the RKO Exhibit No. 406 you showed as a separate item theatre admissions for the years 1940 to 1944 inclusive and you showed on the chart that RKO theatre admissions increased thirteen million dollars, in round numbers, in those four years; you note that, don't you? A. I do, sir.

Q. Why, in drawing up the Warner exhibits, did you not
(3041)
follow the same course but instead lumped film rental income, theatre admissions, sales, and incidental miscellaneous income? A. To the best of my recollection the detailed figures were not available.

Q. Have you got your work sheets there? A. Yes, I do, sir.

Q. Would you mind looking at them for Warner Bros. and tell me whether those do not show separately? A. Be glad to.

Q. Don't bother with that because we will supply them separately.

Mr. Wright: We will be glad to have the separately stated figures, if they are available. We would prefer it in that form.

Q. Look at your sheets. I also notice that on Exhibit 403 Warner Bros. exhibit, you do not show any expense whatever; you simply show income and then net profit. Have you got the expenses there? A. No, sir.
(3042)

Q. They showed on the statement, didn't they? A. Oh, yes, they did, sir.

Q. Why didn't you put the expenses on? A. We weren't interested in them for the purpose of this statement.

Q. Have you got the expenses there? A. No, we do not, sir.

Q. Don't you know that in the years in question, on our sheet, that there was a reduction of expense for interest of $2,700,000 a year? A. No, I do not know that, sir.

Q. Don't you know that in those years Warners had plowed back into paying off their bonded indebtedness enough money to reduce that expense by $2,700,000 a year? A. No, I do not, sir.

Q. Don't you also know that in the expense account there was a difference of a million dollars a year in depreciation charged off? A. No, I do not, sir.

Q. Have you got those in there? A. No, sir.

Q. As an accountant, do you think that was a fair way to prepare this chart? A. Yes, sir.

Q. You thought that the Court should be influenced to believe that these profits had been going up without any regard to the fact that a primary reason for that was a reduction of some $3,700,000 a year in these expense items? (3043)

A. I can only——

Q. Did you think that was fair? A. As you stated it, sir?

Q. Yes. A. As you state it, I do not.

Q. What is there about my statement of it that you think is inaccurate or unfair? A. I might say, sir, that the scrutiny of the available records at the New York Stock Exchange did not purport to be either an audit or a detailed examination of the results of the operations of any of the companies involved.

Q. What are you talking about, the New York Stock Exchange? I thought you said you got these from the SEC. A. I did not, sir.

Q. Have you got the Stock Exchange data? Have you got the Stock Exchange data there? A. With me? No, sir.

Q. Don't you know in the year 1929 our stock was currently selling at some substantial sum over $100 a share? A. No, sir, I do not.

Mr. Wright: I submit, if the Court please, this is not a proper cross-examination. I see no point in taking him into a field where he has not even been offered as having any knowledge.

Judge Hand: Overruled.

Q: I want to ask you one final question.

Mr. Proskauer: I indicate to the Court that I am

(3044)

going to supply this additional data.

Q. (Continuing.) If you are an accountant, I would like you to take our profit for the year ending August 31, 1944, and check my calculation, that it was approximately $142,000,000, yes, the gross income, not the profit, the gross income for the last year here. A. Don't have the figures.

Q. Have you got it there? A. I have in front of me Exhibit 403.

Q. Just tell me if my calculation is correct, that our gross business, so to speak, was approximately $142,000,000, that is, our income from royalties, rents, film rental and miscellaneous income and these other items on here, being the total amount of income that we took in from our business, was approximately $142,000,000.

Judge Hand: This is 1944?

Mr. Proskauer: That is right, sir. I am taking the last year.

A. The total income stated, including the total of the items under the caption "Other Income", amounts to approximately $142,000,000.

Q. And the profit was just under $7,000,000, wasn't it? A. The profit as stated——

Q. As you show it. A. (Continuing) —is $6,953,000.

Q. I want you to check my calculation that on a gross (3045)
of about $142,000,000, we earned $7,000,000 in round numbers, which was approximately 4.9 per cent. Perhaps I can help you by showing you my lead pencil calculation.

Mr. Wright: Obviously, counsel can make any calculation he pleases from the exhibit without——

Mr. Proskauer: What is it? This thing has been offered here to show some kind of swollen profits, and I am showing by this witness's mouth that we did business on a margin of less than 5 per cent.

Mr. Wright: You are not showing anything out of the witness's mouth that is not available on the face of the chart. I submit it is a waste of time.

Mr. Proskauer: I ask my right to show it out of the horse's mouth—the witness's mouth.

Q. See if I do not divide correctly, Mr. Maloney, will you? Is it Maroney or Maloney? A. Maloney.

Q. Mr. Maloney. A. Without reference to your division, it is approximately 4.9 per cent.

Q. You have confidence in my division. A. I do, sir.

Mr. Proskauer: That is all, sir.

Mr. Davis: If the Court pleases, your Honors have admitted all these other computations. I objected to the computation as to Loew's, perhaps in a spirit of some impatience, because I had sat here and seen a miscellaneous mass of irrelevant documents laid on the table and I had a hideous feeling that some day (3046)
somebody has to plow through them, and that possibly

that might even be myself. I was as much moved by consideration of my own convenience as the Court's in objecting to these documents. I think my objection was sound. I am delighted that your Honors ruled with me. I maintain my objection as to their relevancy, for if these documents showed that the companies had all lost money, I suppose that would be no defense to a charge that they had combined and conspired in the hope that they might make it, and I know of no reason why the two sides of that equation are not the same, that if they have made money, it is not proof that they combined and conspired in order to achieve that result. And I want to say before I conclude that I do not understand at all what idea is in Mr. Wright's mind when he says that they haven't passed along their profits to the public in the form of reduced theatre admissions. I say boldly for Loew's, Inc. that when we make profits, we used first to pay our fixed charges and the remainder belong to our stockholders and does not belong to the public at all, and there is no reason why our stockholders should be called on to pass on to the public the profits that have been earned on their investment. We are not a public utility. Our rates are not subject to regulation. We have a perfect right to charge any price that the public is willing to pay for its amuse-

(3047)

ment, and the only restraint on it is that if we charge too much, the public will turn their backs and find some other way to spend their leisure time, but certainly that is not a matter within the confines of the Sherman Act.

Having relieved myself to this extent, I withdraw my objections heretofore made to the admission of this as to Loew's.

Mr. Wright: I believe Loew's exhibit is already marked for identification.

Judge Hand: Yes, it is.

(Government's Exhibit 407 for identification received in evidence.)

By Mr. Wright:

Q. I will ask you the same questions with respect to this Loew Exhibit that I did the others, as to what, if any, examination you made with respect to excess profits payment by Loew's? A. The amounts of charges for excess profits taxes appearing in the copies of statements filed with the SEC were obtained.

Q. Can you tell us what they were? A. The amounts appearing as charges for excess profits tax were as follows: For the fiscal period ended August 31, 1942, $1,666,883.09; for the fiscal year ended August 31, 1943, $14,816,915.87; and for the fiscal year ended August 31, 1944, $4,428,273.79. (3048)

Mr. Wright: I will also have to ask to have marked for identification a graph which simply sets forth in graphic form the data that is recorded in Exhibit 407.

Mr. Davis: I want to ask the witness a question.

Judge Hand: 410 was admitted, wasn't it?

Mr. Wright: 410?

Judge Goddard: Yes.

Mr. Wright: I believe that is the Warner graph.

Judge Bright: Here it is up here.

Judge Hand: I do not think that Judge Proskauer objects to that any more than to anything else.

Mr. Proskauer: Oh, you mean that chart?

Judge Hand: Yes.

Mr. Proskauer: I am devout follower of the chartist movement.

Mr. Wright: I will ask to have the Loew graph marked as 415 for identification.

Mr. Proskauer: All I want to do is put in the data on here on a couple of sheets, showing our financial history since the year 1929.

Judge Hand: I suppose it shows a kind of Swing Low Sweet Chariot curve.

Mr. Proskauer: There is more than that. It shows what I intimated in my cross-examination, 1929 was our big year, and it also shows that the witness,

(3049)

with characteristic fairness in this case, deliberately omitted and that was what is shown in all these other things, the abnormal theatre attendance during the war period.

Mr. Wright: I will now——

Mr. Davis: Before you drop this line, I want to ask a question.

Preliminary Cross-Examination by Mr. Davis:

Q. In the chart 407, giving the profits of Loew's for the years from 1933 to 1944, do the receipts there include receipts from foreign as well as domestic business? A. If I may refresh my recollection a moment?

Q. Surely. A. I am very sorry I have to tell you that these documents do not indicate in sufficient detail to warrant my statement whether or not all foreign subsidiaries have been included.

Q. You do not know then whether they have been included, or if included, how much foreign business amounted to? A. That is correct, sir.

Q. On the next to the last line on this table you will find the line "Less provision for taxes." How does that line compare in amount with your statement of the excess profits taxes? A. Up until the fiscal year ended August 31, 1941, and

including that year, no statement was made by me as to the amount of taxes. With respect to the three years ended (3050)
August 31, 1942, '43 and '44, the amounts of taxes as stated in Exhibit 407 differ from the amounts as previously stated by me for excess profits taxes, and in each case the amounts appearing in Exhibit 407 are in excess of the amounts previously stated by me.

Q. Do you know what additional taxes are included in that excess? A. If I may observe for one moment, please. The entire amount of the excess is also federal taxes, presumably federal income tax. The prior statement made by me did not refer to income taxes.

Q. For the year 1942 what did you report for excess profits taxes? A. I stated that in the annual report filed for that year a charge appeared in the amount of $1,666,883.09.

Q. As against a total tax item of $9,704,001.40? A. That is correct.

Q. What did you report for excess profits taxes in 1943? A. I stated that the amount appearing as a charge for such taxes in the annual report filed was $14,816,915.87.

Q. Against a total tax of $23,731,916.66? A. That is correct, sir.

Q. For 1944 what excess profits taxes are on your statement? A. The amount appearing as a charge for those taxes for that fiscal year was $4,428,273.79.

Q. Against a total tax item of $15,161,968.69? A. That is correct, sir.
(3051)

Q. It is true, is it not, that on your table and on your chart, with the exception of the closing months of the year 1944, the year of highest earnings as the year 1937? A. It appears from the information available that the year in which Loew's, Inc. and its subsidiaries made the greatest net profit was the fiscal year ended August 31, 1944. No other information appears.

Q. Does it not appear from your chart that the year of highest earnings, except for the closing months of 1944, was the year 1937? A. I can only answer that question——

Q. Have you that chart before you? A. I know what is on the chart. I can only answer the question by stating that that particular type of chart, while I do not purport to be an expert chartist, that type of chart only reflects the points on it. The lines drawn between the points are not of significance.

Q. I can't labor the obvious, but it is very clear, isn't it, that there is a mountain peak on this chart in 1937 and a valley, the depth of which was reached in 1940? A. May take me a little longer because I only have the figur to look at.

Q. You may look at the picture. A. If I may.

Q. Although I think the picture speaks for itself in that regard, if it speaks at all. A. It appears that the lowest

(3052)

point of earnings was the year ended August 31, 1933.

Q. Isn't it a fact on your—lease the chart aside—on your table—I am only asking this question to put on the record what is perfectly obvious on the table itself—in the year 1937 the net profits were $14,333,716.70 and in the year 1944, $14,817,285.79? A. If I may correct your figures. The last one should be $14,517,285.79, that is correct.

Q. I am wrong, '517. So that there is a difference there of something less than $200,000 in those two years? A. That is correct.

Q. And those are the big years on the table? A. Those are the two highest points on the chart and the two biggest years in the table.

Mr. Wright: I will offer in evidence these graphs marked 410 to 414 inclusive, 410 being the one for Warner Bros., 411 RKO, 412 Paramount, 413 Columbia, 414 Universal, and 415 Loew's.

(Government's Exhibits 410 to 415 for identification received in evidence.)

Mr. Wright: Mr. Leisure has agreed that these exhibits, previously identified as 388 and 389, may be received in evidence.

Judge Hand. Is that the one——

Mr. Wright: This is an exchange of letters that

(3053)

was identified while Mr. Mochrie was on the stand. I won't bother to read them at this time.

Judge Hand: Have you mollified Mr. Caskey yet? If that were possible, you could say the house proceeds.

Mr. Proskauer: I have been trying it for years. I have been trying that in vain for years.

Mr. Caskey: If Mr. Maloney will come down to the office tomorrow, I will have the auditor of the company there and they can make up the chart, and if they agree on it, it may go in. I assure your Honor this is not a question of technicality. This is just plain wrong. The film rentals of Twentieth Century-Fox did not increase 90 million dollars in one year.

By Mr. Wright:

Q. Can you do that, Mr. Maloney? You can get over there tomorrow.

Judge Hand: It looks extravagant.

Mr. Caskey: If it did, they didn't tell their attorneys.

Judge Hand: We call that a sinister suggestion.

Mr. Wright: That is all, I think, Mr. Maloney.

Mr. Raftery: May I give you some more papers, Mr. Wright?

This is the letter that came this morning. He wanted the second-run contract for Stage Door Can-

(3053a)

teen in Atlanta, the Riviera Theatre in Los Angeles, Bard's Adams Theatre in Los Angeles, The Stage Door Canteen Sunset contracts in Cincinnati, and the contracts of the Fox West Coast Agency Corporation for sub-runs in Los Angeles. I have only a memo contract, which is a spot booking contract, and that's that.

Now, on Universal I have the rest of that stuff.

(3054)

Mr. Wright: If the Court please, with reference to working out an orderly procedure, I would like to say this: Of course, we can stand here and mark for identification material that is handed to us and just offer it, but I do not think that that makes the kind of a record that anybody wants in the case, and I should like to renew my request for a recess in the hope that we can gather together this contractual material and perhaps in some cases avoid encumbering the record with the actual contracts themselves at all; perhaps submit simply a schedule of rental terms or the clearance provisions or whatever it is we wish to establish in the particular case.

Judge Hand: What do you want, until Monday?

Mr. Wright: We would be able to go ahead Monday. I am hopeful that given a recess of that kind we could finish the whole presentation in a matter of about two court days. That is, of course, with the proviso that we actually have an opportunity to get at the material and organize it so it can be put in with the minimum delay.

Mr. Proskauer: Do not organize it the way you did these things here today.

Judge Hand: Now, where is this material? Does it have to be flown here from the West Coast? Or is it here?

(3055)

Mr. Wright: As I understand it, there are copies of all of these contracts at the home offices of the exchanges in New York.

Mr. Caskey: Let me understand these things, Mr. Wright. We certainly have not told you any such thing, and it is not correct. You asked for the 1941-42 contracts, which are not at the home office.

Judge Hand: When did you give notice to your principals there to get them?

Mr. Caskey: On the list that came out on November 3rd, they are here available. On the ones that came this morning, we called up; one of my associates called up during court, and this is dated November 12. They want license agreements for 1941-42. Those license agreements are in Ogdensburg.

Judge Hand: Ogdensburg, New York?

Mr. Caskey: Yes.

Now, I want to say to Mr. Wright one thing: There are two classes of data, really, that were asked for. One, as far as Fox is concerned, where the answers to certain of the interrogatories is deemed by the Government to be imperfect, we told Mr. Marcus on the 5th day of October that we could not supply the additional data, and no matter how many more letters they write the answer is still the same; so I

(3056)

do not want Mr. Wright to come into court next Monday or any other time and say we haven't got them, because that would be perfectly true, we haven't got them. We simply have not got the data. That may not be true as to some minutiae, but generally

speaking we have not got them. As to the contracts, we will start giving it to them as soon as the court adjourns and do the best we can.

Judge Hand: Now, as to the material in Ogdensburg; it either could be flown down from Burlington, or sent down by mail.

Mr. Caskey: Actually we have to send someone down to get it because there is no file clerk there.

Judge Hand: And then you have this West Coast stuff that is all here except what was asked for on the 12th; is that so; or is it all here anyway?

Mr. Caskey: Well, as I understand it, all contracts for the 1942-43 season and subsequently are here.

Judge Hand: So you have got everything but the material from Ogdensburg?

Mr. Caskey: That is right; and the material which is the alleged deficiency in the answers to the interrogatory.

Judge Hand: Could Mr. Wright go on without

(3057)

Ogdensburg? How about it? Does it amount to anything? Can't you agree on it?

Mr. Wright: I do not know what he is referring to offhand. I think it would not be of significance in itself.

Mr. Caskey: It is the license agreement for the 1941-42 seasons covering the exhibition of Fox pictures in the Middleboro Theatre, Middleboro, Massachusetts. Theatre, Brockton, and part theatre, Taunton; and the first-run exhibition in Boston for that season. That is what we haven't got. That is what is in Ogdensburg.

Judge Hand: Those things are in Ogdensburg?

Mr. Caskey: Yes, at the warehouse.

Judge Hand: That is a queer place to put them.

Mr. Caskey: That is where Fox maintains its plant where they reclaim the silver nitrate from the films, and we have a warehouse there. We had someone testify that there were over a hundred thousand of these contracts.

Mr. Seymour: I should like to report, if your Honors please, on the status of my pending request. We handed Mr. Wright this morning at the conclusion of the morning session photostats of 148 con-
(3058)
tracts that he called for. We will photostat and give him in the next few days the balance of all the contracts that he has called for, and we will then have complied with all his requests except one, and if we do not get any more requests he will be all right.

Now, the one that we cannot comply with is one for Paramount equivalent to the one Mr. Caskey has just mentioned. On Monday of this week one of Mr. Wright's associates asked two of my associates to get in touch with theatres all over the United States and find out admission prices charged several years ago and clearances in effect several years ago which are not in the contract; and we told him that it would take weeks to get that information; and they suggested that we might give it to them after the case was completed and then they could use it in their brief. Now, I am utterly unwilling to have the case proceed after the end of it in that way.

Judge Hand: You are entirely right. We are not going to have it, you can be sure of that.

Mr. Seymour: And so I am unable to supply that information. I want to give Government counsel notice now that we cannot procure and furnish that information within any reasonable time, and therefore

we decline to do it. We have given him all the in-

(3059)

formation presently available through the interrogatories and much additional information. That we cannot obtain and supply.

Mr. Wright: We are glad to find that out. I might say, your Honor, that this data that he is referring to now is interrogatory answer material which was reported to the Court as being ready to be handed over to us last July. It never was. If it is never going to be, that is all right. But he is not talking about any new request. That was material that was then to be given us and which we never got.

Now, I would agree with the Court there is no point in deferring any further or holding the case open to pick up any additional interrogatory data that was supposed to come to us before and never got to us. We will just have to work with what has now been given us. But as I pointed out, they have been in many instances giving us revised or different figures, which has involved our recomputing in each case tabulations that we have already made, and there is a substantial burden of tabulation imposed there by reason of changes that occurred since we recessed.

Now, we have not yet seen, if the Court please, even the defendants' complete case. As I understand from Mr. Seymour, he still has some more, additional, affidavits which he wants to get in, and, of course, we

(3060)

should have those too before we close our rebuttal.

Judge Hand: How about those?

Mr. Seymour: As I told your Honors, the affidavits which we propose to supply are with one exception in the same category as affidavits already in. There is one exception to that which I mentioned specifically. The minute those affidavits are in New York so that we

have them we will furnish copies of them to Mr. Wright and we expect to have them by the end of this week. The only other problem, as far as we are concerned, is this problem of corrections. It has been impossible to assemble proposed corrections and discuss those with Government counsel. That would need to be done.

Mr. Wright: I would assume, your Honors, that an adjournment to Tuesday would be safer than a Monday adjournment, and I am sure that we could use the time in shortening and getting together in that period the actual presentation.

Judge Hand: As I understand it, you have got three affidavits to be furnished by Mr. Seymour. Then you have got a checking up of this Fox business by Mr. Caskey. You have no more evidence, have you?

Mr. Caskey: No, sir.

Judge Hand: You have got the Ogdensburg ware

(3061)

house data. How many exhibits in that? Three or four?

Mr. Wright: I think there are only a couple of contracts involved there.

Judge Hand: A couple of contracts at Ogdensburg? Now, what else is there?

Mr. Wright: We have also asked for specific letters in addition to specific license agreements.

Mr. Proskauer: I can't hear you.

Judge Hand: He said, "We have also asked for some specific letters in addition to the license agreements."

Mr. Caskey: I may say as to one letter we have no copy of it and no knowledge that it exists, and our information is that it does not exsit, and I have no personal knowledge of the situation; but we will have no copy to furnish Mr. Wright; so if you are going to

offer secondary evidence you had better be prepared to go ahead on that basis.

Judge Hand: Well, what more is there? Secondary evidence that you have about this letter?

Mr. Wright: It may be necessary, of course, in the event that a letter we have requested is not produced where we only have——

Judge Hand: He says it won't be. He tells you it won't be.

(3062)

Mr. Wright: Yes. Well, in that case we shall attempt to get in touch with the party who can make an affidavit as to the copy and submit that to Mr. Caskey in an attempt to secure a stipulation which would make it competent if we need to use it. It seems to me it is the kind of thing there is no need to call a witness for.

Mr. Caskey: I certainly do not want to be put in a position where I am charged with delaying the case because I do not agree to some affidavit. If you have got competent evidence, put it in. I know nothing about it. It is a letter dated January 2, 1935, relating to Sterling, Colorado, which I understand has a population of 648.

Mr. Seymour: One of my colleagues asked me not to cut myself off from the possibility of sur-rebuttal if the Government should put anything by way of rebuttal in that we thought warranted it. We have not seen that yet and we do not expect to see it.

Mr. Proskauer: Your Honor, I do not think this warrants it, but I want to put in a couple of short schedules with the proof of what my cross-examination questions suggested.

Judge Hand: If we adjourn until Tuesday do you think you can finish the case on Tuesday and Wednesday?

(3063)

Mr. Wright: For our part we would make every effort to do just that.

Mr. Raftery: If your Honor please, that was the question I was going to ask, for a very selfish reason: I have got to go to England a week from Saturday, and I was going to suggest Monday instead of Tuesday, thinking of possible sur-rebuttal which might come from some of my learned colleagues. But I would hate to see it go over to Tuesday, because I have been for months trying to get passage, and I just had passage confirmed. It is very difficult to get over there, and I have got to go a week from Saturday. Now, I prefer Monday if we could go on Monday, and we would at least have three days instead of two before Thanksgiving.

Mr. Wright: We would like, of course, to accommodate Mr. Raftery in any way we could, and I am sure that if there were any occasion to put anything in that he wanted before we left we could work it out so that he would not be detained. But I do think that we would be put under a severe strain in getting this material ready by Monday, and I do not think there would be any net saving in time if we had to go ahead Monday instead of Tuesday.

Judge Hand: Well, my associates who are very

(3064)

Thanksgiving and family-minded and live in the provinces and go there are anxious to have the thing go on Monday lest it be hung over. They want to finish this thing by Thanksgiving; and your trip abroad points that way. I do not believe anybody will be much distressed, in the condition this case is in now, by the addition of these contracts in Ogdensburg, and so on.

In how large towns were these exhibits?

Mr. Wright: As I recall it, all that is involved in that Ogdensburg situation is an attempt to straighten out the testimony on cross-examination here. There was a difference or dispute as to whether or not the clearance given by the other distributors had been maintained by Paramount. The only way we could see to do it is to get the contracts of all distributors so you could compare them in that situation, and that is the way this Ogdensburg thing arose before and after.

Mr. Caskey: You mean we are asked to produce these contracts so that you can——

Mr. Raftery: Mr. Wright—excuse me, Mr. Caskey—here is the situation on Middleboro for Universal, and the other town of Ayers. I have held them back since 3:10 p.m., and I have not anything for the current season because he did not buy the product in Middleboro; and the theatre in Taunton you have

(3065)

asked for you have already got in the M. & P. franchise. So now you have got that to compare with the testimony.

Judge Hand: So Ogdensburg is cleared?

Mr. Raftery: Well, that is Universal. You can study those.

Mr. Wright: Certainly, your Honor, the absence of the Ogdensburg material would not prevent us from going ahead on Monday or closing the case on Wednesday. But we would like to have it if we can get it.

Judge Hand: Well, I think it is better to put this over until Monday. You are all of you going to be anxious to get away for Thanksgiving, and I think it is a wiser disposition of it, really. It makes no dif-

ference to me, of course, which you do, but I think we shall adjourn until Monday at 10:30.

Mr. Proskauer: Your Honor, could we use a few minutes here to discuss what we are going to do after the case is closed here? I should assume the Court would like an oral argument at some stage of the case.

Judge Hand: There is no doubt about that.

Mr. Proskauer: And my suggestion is—and I suggest this to the Court as a way which I think would be most helpful to the Court—if we could get Mr. Wright's brief and give our answer, and then have an oral argument, I think it would enormously reduce

(3066)

the area of conflict. We would know exactly what we are to meet, and if we could make some tentative arrangement at least as to how we are going to handle that, it would be a great comfort to those of us who have other court engagements that are waiting until we can give some word here.

Judge Hand: Well, when could you have your brief ready, do you think, Mr. Wright?

Mr. Wright: Well, if the Court please, I think to save time we would prefer an exchange of briefs. We have already filed a fairly extensive trial brief, and it seems to me that we could both exchange briefs, I should say, within 30 days after the close of the case, and then set the matter down for argument.

Judge Hand: I should think you had better serve a brief on them within two weeks after you have closed the case, and give them then ten days to answer that brief.

Mr. Seymour: It is awfully short, if your Honor please.

Mr. Raftery: Unfortunately I won't be back here until the 16th of December. I made sure I had passage back before I went over, and I certainly would not have any time to write a brief.

Mr. Proskauer: Your Honor, let me suggest how this case envisions itself to counsel. I anticipate we
(3067)
are going to get a brief from Mr. Wright charging us with high crime and misdemeanor in Ogdensburg, in that town with a population of 680, and a great many local situations.

Mr. Wright: That is quite wrong if that is what you are anticipating.

Mr. Proskauer: I am delighted to hear you say that. I do not know what else you have, but if you have anything else we are glad to get it. But the moment we know what there is there we have got to organize this material with reference to the specific charge. I should think we need two weeks——

Mr. Seymour: If your Honor please, if the Court feels they can indulge us, Mr. Wright may know what is in this great mass of documents, and he will probably point out what he likes about those or what strikes him as of some significance——

Judge Hand: I should think two weeks for him and two weeks for you——

Mr. Seymour: If you could give us any more time, your Honor, in view of the fact that we are going into that Christmas period——

Judge Hand: Well, I know that. Of course, I realize that you have all done very well in this case, but what are we going to do if we just have this case
(3068)
stringing along with three judges tied up here? We cannot take up other things while this is pending.

Mr. Proskauer: Your Honor, would you consider it fair to give Mr. Wright three weeks and give us three weeks and then let us appear whenever you say and argue? You do not have to bother about it

while we are briefing. I think we would all be much happier, and I am venturing to plead for my friend Mr. Wright over there.

Mr. Wright: I might say, your Honor, we have an argument set for December 6th in Buffalo in an attempt to dispose of objections which have been raised to findings and motions to modify the judgment in the Schine case, which I shall probably have to argue myself. I would find three weeks quite short, but I would prefer the exchange to save the time that way.

Mr. Proskauer: An exchange is wholly unacceptable to us. I do not want to write a brief and then find that I have not surmised the mysteries of Mr. Wright's mind.

Judge Hand: I rather think you need that time. What are you going to do about your briefs? Have separate briefs for everyone?

Mr. Proskauer: We are going to have separate briefs, your Honors, but I assure you we will confer and try to avoid duplication as far as possible.

(3069)

Judge Hand: I hate very much to do it because it is not at all agreeable to the Circuit Court of Appeals, this whole layout. They do not like it a bit, and they do not like the emergency certificate or anything about it. They are about as sore about it as anything you can imagine. It just takes men right out, takes three men out of the court, and leaves the situation with a huge amount of investigation and doubtless a long opinion to write weeks from now.

Mr. Proskauer: I can suggest a very short opinion, your Honor.

Judge Hand: We cannot tell you about this right now. We are not going to.

Mr. Proskauer: I have studied this situation pretty carefully in the last few days, and I am sure that ultimately we will save your time if we can get the Government's brief, giving them a reasonable time—I suggest three weeks—and giving us that time to meet it, and then coming before your Honors and arguing it out on those briefs. And if anybody wants to file a memorandum in reply, we can do it on the argument day, say, or just after the argument day. Sometimes things develop in the argument that one would like to file a brief memorandum on.

Judge Hand: I can be very sure of one thing,

(3070)

and that is that no matter what happens, except casualties like death, we are not going to postpone the final submission after the first of the year. I mean, the argument may be made the 2nd or 3rd of January, or something like that, but we are not going to just string this thing along. You know, it is really too expensive a way to do this, whether it is decided right or wrong. There has got to be some kind of arrangement so that the courts can do their business.

Mr. Proskauer: If Mr. Wright would file his brief by the 1st of December—well, we would like a Christmas holiday, but I suppose no lawyer is entitled to any holiday.

Judge Hand: I think in this case you had better try and finish before Thanksgiving, and then divide the time between that and—what is the 1st day of January?

Mr. Caskey: Tuesday, sir.

Judge Hand: Divide the time between the 2nd or 3rd of January in some way about the submission of briefs. That gives you about what you both think you need.

Mr. Proskauer: Which means we are going to be working during the Christmas holidays, and unfortunately that falls on the defense, which is a penalty we have to pay for their filing the certificate.

(3070a)

Well, your Honor will give us the final answer then when we meet next week?

Judge Hand: Yes. I think that suggestion, though, is about the best you can possibly do.

We will adjourn now to Monday at 10:30.

(Adjourned to November 19, 1945, at 10.30 a.m.)

(3071)

New York, November 19, 1945;
at 10:30 o'clock a. m.

Trial resumed.

Mr. Wright: If the Court please, I want to say first that those boxes of exhibits you see there around the witness chair are exhibits already in evidence. That does not represent the material we propose to offer; and I want to make a progress report on what was done during the recess to simplify the presentation.

We had two sessions with counsel, one on Friday afternoon with those who do not work Saturdays, and the other on Saturday afternoon with the others, at which we marked in the order in which we would present them and supplied copies of the material we propose to offer here which summarizes this material that is in evidence, and made available the witness who made the tabulations for such questioning as to how any of the charts were prepared.

We also have attempted to follow the Court's suggestion and have one master list of theatres in which all defendants have interests which all defendants agree to. Some have agreed to the figures in our ap-

(3072)

pendix as such; others with modifications, and others are still in the process of checking. I hope to have that disposed of at the end of the day.

Now, as to the contract material that we asked to inspect, such as that which was made available for inspection, we have prepared certain schedules on, and propose to submit those schedules with the supporting data today, and then offer tomorrow either

the schedules without the data—Mr. Shears, who was in charge of that, I believe can tell tell the Court exactly what the status of that is.

Mr. Shears: We ask that those schedules purporting to show rental discriminations be marked for identification.

Mr. Davis: May I interrupt, Mr. Wright. I want to get a modest offering off my back that has been around here for a week.

Mr. Wright: Oh, sure.

Mr. Davis: We introduced in evidence a schedule showing the amounts which we had paid for feature pictures exhibited in our theatres. That was in dollars. I now want to offer in evidence a schedule showing the films which were exhibited in our theatres and the source from which they came. I have photostats here, Mr. Wright, just received.

(3073)

(Marked Defendant Loew's Exhibit L-16.)

Mr. Davis: I also want to offer in evidence supporting that schedule a folder containing statements of all the films purchased or licensed to us from 1934 to 1945 inclusive in the 73 critical cities. I offer that in evidence. Photostats of this will be furnished as soon as we get them.

(Marked Defendant Loew's Exhibit L-17.)

Mr. Wright: I have not seen these, if the Court please. I assume they are taken subject to such correction as might be necessary on checking.

Judge Hand: Yes.

(3074)

Mr. Raftery: Your Honor, may I correct the record? You remember the two Stage Door Canteen contracts that Mr. Wright put in last week, and he

said that we sold the first-run in San Angelo, Texas, for $50. Well, on checking our records I find that the first-run was sold for 35 per cent of the gross and paid a film rental of $465. So I have listed each of the runs in the town including the run in question. The run in question was the fifth run and he paid $20 against 35 per cent of the gross. He paid us $3.05 overage, so we got $23.05. I would like to give Mr. Wright a copy of the schedule and I would like the Court, that is, I mean the clerk, to attach that to Mr. Wright's exhibit. And I also have the supporting memo contract for his inspection, showing we got 35 per cent of the gross first-run in that town.

Mr. Wright: There is a conflict between this schedule and the exhibit. The exhibit shows four runs at flat rentals ahead of the Roxy. Which is supposed to be correct?

Mr. Raftery: There are three ahead of the Roxy and one after the Roxy—$12.50 played after. Those are the play dates; that is the performance.

Mr. Wright: Thank you.

Mr. Raftery: Here is the other contract, 35 per cent of the gross first-run.

(3075)

Mr. Wright: We have no objection.

Judge Hand: Mr. Wright, can't you have this thing in once and have it right?

Mr. Wright: If the Court please——

Judge Hand: Or do you still dispute inferences to be drawn and things of that sort?

Mr. Wright: We would have been glad to submit this schedule in the first instance. We were only given those contracts that I put in there.

Judge Hand: I am not talking about your unfortunate position, due to ignorance or withholding some-

thing. I am talking about what the situation is here before us. I don't care anything about how it arose.

Mr. Wright: Well, I say, as far as we are concerned, on Mr. Raftery's statement, I take this schedule as a correct representation of what the situation is. I did not object to it. I assume it is correct.

Mr. Raftery: Mr. Clerk, it is 401 or 402, I don't know which. It is either one of those two contracts.

Mr. Wright: Is there any more defendants' material that was to be offered?

Mr. Seymour: Do I understand, Mr. Wright, that this gentleman is marking for identification some things you are going to furnish to us?

Mr. Wright: I don't think they need to be marked

(3076)

for identification but we have assembled in these folders with a schedule the documents which support the schedule, and those, I assume, can be checked. We could offer the schedule without offering——

Mr. Seymour: When are you going to make them available?

Mr. Wright: Right now. They should be checked I think here or upstairs.

Mr. Raftery: Mr. Wright, have you any of the stuff that he took from us on Friday? Have you anything for us?

Mr. Shears: I would like to have those marked for identification.

Judge Hand: Can it be ascertained with reasonable certainty whether you defendants have rested, or have rested subject to proceedings had and to be had and all kinds of reservations?

Mr. Proskauer: I have——

The Court (Judge Hand): Where is your case?

Mr. Seymour: I will tell you where mine is.

Judge Hand: We put it in, here a little, there a little, line by line, precept upon precept.

Mr. Seymour: I will tell you what my situation is for Paramount. I reserved the right to offer certain affidavits. There are still two to come. We hope they will be here by tomorrow. I thought I would put it

(3077)

in all at once. Subject to correction of the record, which I have already referred to, we have no evidence on our direct case.

Mr. Wright: If the Court please, we would like to see them today because in preparing our motion to strike, which we still haven't been able to complete because of this delay in presenting defendants' evidence——

Mr. Seymour: I have furnished the affidavits the moment they arrived in New York. I furnished several affidavits at the end of last week, when we were out of court, and we will furnish the others when they get here.

Mr. Wright: You are not referring then to any affidavits, copies of which haven't been given to us, is that correct?

Mr. Seymour: That is right.

Mr. Davis: For Loew's Incorporated, if your Honors please, we are through in chief. We reserve the right to offer material in sur-rebuttal, if it becomes necessary.

Judge Hand: Of course. You are through except for that.

Mr. Proskauer: I am through excepting I want to make good my threats to Mr. Maloney on my cross-examination of him, just strictly sur-rebuttal, and I may have another chart in what I think is strictly sur-rebuttal.

(3078)

Mr. Caskey: We rest.

Mr. Leisure: Mr. Davis's position covers our position.

Mr. Raftery: We rest subject to the fact that we got two more letters on Friday for about a hundred more papers. I have given him the papers and unless they come up with some tricks, like first-run San Angelo, we rest.

Mr. Proskauer: That reminds me, though, your Honor, that we also got gentle requests for a large number of papers on Saturday. There is quite a sick list developing from our assiduity in preparing the Government's case at the last minute, and I do not know what is going to develop from these new documents he has asked for. I reserve whatever may be necessary with respect to those.

(3079)

Judge Hand: Does the Government know? Of course, you can brood on the infinity of it forever, and it is pretty near infinity, this thing, and keep the thing at loose ends.

Mr. Wright: If the Court pleases, we are trying to cut down just as far as we can any further documentary material by this schedule procedure, and in so far as anything that hasn't yet been produced, of course, we cannot do anything about that. We are not going to attempt to do anything with any documents, in connection with which we requested inspection, beyond what has been done by Mr. Shears which I submitted to them this morning. So that is out of the way, as far as we are concerned.

Mr. Caskey: Mr. Wright, you hand me this letter——

Mr. Shears: Just a moment. I would like to make a statement on that paper, and it will clear it all up,

I am sure. These schedules which have been submitted to defendants, if your Honors please, are to be marked for identification only this morning. They represent tabulation of data taken from license agreements selected for the most part from Appeal Board decisions from towns in five states, New York, Louisiana, Texas; Washington, D. C.; and Kansas, Missouri. They were supplied in response to our requests of November 3rd and November 14th. They reflect the degree of cooperation of each defendant, some 100 per

(3080)

cent, some zero. From two defendants we have received no comparable material, or material so incomplete that no comparison could be made. The folders attached to each schedule contain the supporting license agreements that were made available to us.

Judge Hand: Is that statement of yours a mere statement of fact or a complaint, or what is it?

Mr. Shears: It is a mere statement of fact to explain the schedule.

Mr. Proskauer: I don't hear you.

Judge Hand: A mere statement of fact.

Mr. Shears: The folders attached to each schedule contain the supporting license agreements that were made available to us, and we would be glad to have each defendant check over his own material, either here or up in Room 1901. I shall offer these schedules without the supporting documents tomorrow at 10:30, to avoid encumbering the record.

It is submitted that the material received today is too late for these tabulations.

The balance of the license agreements supplied, we are returning. We have no attention to defendants adding any comparable material they may feel that we have overlooked.

Mr. Seymour: You are not going to compliment us by name for our cooperation?

(3081)

Mr. Shears: I would be glad to mention that RKO has given us 100 per cent cooperation and Columbia zero.

Mr. Caskey: I do not know what our percentage is, but I understand that——

Judge Hand: I take it we are to understand that is merely a statement of fact and not a complaint.

Mr. Shears: That is correct.

Mr. Caskey: Of course, as far as we are concerned, at 7 o'clock on Friday we had furnished the Government with 565 contracts. We had not furnished them with the contracts relating to New Orleans. They were told on Saturday that they could not be available until this morning. They were tendered this morning, about 10:10, and they were rejected. I offer them again, if they are wanted, but I assume that they are not.

Mr. Shears: I should like to state in answer to that that our letter of November 3rd requested the New Orleans material. I submit that is sufficient time to have submitted it for tabulation prior to this morning.

Mr. Frohlich: Let me say this about Columbia's alleged lack of cooperation. That is not the fact. We received a list from Mr. Wright a few days ago for about 50 contracts in these various cities. I came down and spent Saturday afternoon with Mr. Wright, all afternoon with him, and told him that of the fifty,

(3082)

Columbia only sold in 12 situations and it had only three contracts available and would be happy to give them to him, and he said, "You don't have to bother with it. I won't be able to use it."

Judge Hand: Why don't you tell me these things at the time of your argument?

Mr. Caskey: They were delivered, some on Thursday and some on Friday. We tendered them 565 contracts.

Mr. Proskauer: Your Honor, with all this talk of cooperation and non-cooperation, I think it is fair to say that it is quite outrageous for the Government to come to us at the last minute with this kind of request and then put in schedules, such as are going to be shown here, I understand, where they selected a few cities, and ask your Honor to draw inferences from those, when we got now the burden of showing that those are not typical, and we will show it.

(3083)

Mr. Gillespie: Your Honor, on behalf of Loew's I should like to state that by six o'clock last night, Sunday night, the Government had every document which was requested when this court adjourned last Wednesday. On Thursday we received a further request for contracts in some 60 cities. We have been working to get those together. We hope to have them some time today, or part of them some time today. But I do not want Loew's to be left out in the open with regard to the position they have taken about supplying these documents.

Mr. Proskauer: From Warner's they have had every document they called for.

Now, may we be informed what is being offered? None of us know. We don't hear you——

Mr. Wright: Nothing is being offered.

Mr. Raftery: Mr. Shears, could we now have back what you took and did not offer?

Mr. Shears: Yes (handing).

Mr. Raftery: I am sending these back, but I should like the Court to see what they did not use. They used, I think, two contracts in each batch (indicating).

(Marked Government's Exhibits 416, 417, 418, 419, 420, 421, 422 and 423 for identification.)

Mr. Caskey: Mr. Wright, we spent three long hours Friday afternoon assigning numbers to these exhibits.

(3084)

Mr. Wright: We will keep the same numbers, the same order, but the numbers will have to be moved up. I trust that won't be too much of an inconvenience.

Mr. Frohlich: Were those numbers, Mr. Wright, just read off the same numbers we had on Saturday?

Mr. Wright. No. These are the schedules that were just read in. The numbers on the exhibits we had Saturday will be moved up by 8 in each case. 416 will be 424, and so on.

Judge Goddard: What is that about changing numbers?

Mr. Wright: This is material not yet offered on which we are changing numbers. I numbered at the conference on Friday and Saturday the charts that we were going to offer consecutively with the next exhibit numbers. Now, this, having been identified in between, we will have to move those numbers up. That is something that I do not think concerns the defendants or the Court particularly at this time.

Judge Goddard: It is important to have these exhibit numbers right, because when we look for an exhibit and the number does not correspond——

Mr. Wright: We will have them right. This material that he is talking about is material which has not yet been identified.

(3085)

Judge Goddard: The clerk tells me that Exhibits 416 to 423 are schedules; is that correct?

Mr. Wright: Yes. Those are for identification.

Mr. Raftery: Excuse me, Mr. Wright: May I ask a question before you go into that? I worked yesterday examining all of that stuff. Isn't everything you are about to offer already in evidence? All those charts, doesn't that represent something that is already in?

Mr. Wright: I will see when I get to it. I have another document I want to offer.

Now, with reference to the work sheet that we offered while Mr. Maloney was on the witness stand, Fox has supplied us with a sheet which they say is correct, and we will ask to have that marked as Exhibit 404 in place——

Mr. Proskauer: Could we hear what it is that you are offering?

Mr. Wright: We will ask to have marked as Exhibit 404 a tabulation of Fox net profits that were submitted to us by Fox as being correct, which we are substituting for the one identified as 404 to which they objected.

Judge Bright: Have you extra copies of it, Mr. Wright?

Mr. Caskey: We will supply them. We have

(3086)

plenty, and I shall get them.

Mr. Wright: This is the only one that was given to us.

Judge Bright: We have copies of the other, haven't we, 404?

Mr. Wright: I believe you have the one that was marked 404.

I will ask to have marked as 404-A the graph that was prepared.

Mr. Caskey: The last, 404-A, is objected to.

(Marked Government's Exhibit 404-A for identification.)

Mr. Wright: I want to call the Court's attention—

Mr. Caskey: Put a witness on the stand. Don't testify yourself about it.

Mr. Wright: This 404-A is the chart or the graph which was prepared to fit the 404 that we offered. The only difference, if the Court please, between what we offered and what the defendants have offered here is on that figure for the last year; so we added a line to the chart which shows their figure with the dotted line for the last year, and ours is on the heavy line. The difference was accounted for by a charge of some $900,000 which they reported simply as a reserve for contingencies; so that——

(3087)

Mr. Davis: Who is this about?

Mr. Wright: This refers to Fox.

Mr. Caskey: I know of no principle upon which a chart can be put in evidence to reflect an exhibit which was excluded. 404 was excluded when the witness was on the stand. Now he offers what he says is a chart reflecting the excluded evidence; and I object to it, and I object to any offer without a witness who can be examined on it.

Mr. Wright: I will call Mr. Maloney——

Judge Bright: Isn't there a new exhibit offered now as 404 in place of the old one?

Mr. Wright: Yes.

Judge Bright: What is the difference between that and the one that was offered?

Mr. Wright: That was shown on this exhibit that I just had marked for identification, 404-A.

Judge Bright: There is an objection to the new 404?

Mr. Wright: No. His objection is to the graph. He supplied the new 404 himself.

Judge Hand: Do you criticize the new 404?

Mr. Wright: We accept it with the qualification that we think as to this one year where they show this $900,000 difference, our figure properly shows the net profit. They simply took a reserve for contingencies and deducted it from the net profit. I do

(3088)

not think it is really worth spending time on beyond attempting to clear up the discrepancy between the witness's work sheet and what is offered here as 404. This chart shows graphically what the difference is, that is all.

Judge Bright: What is the difference between the new 404 and the other 404?

Mr. Caskey: May I explain it, sir?

Judge Bright: Yes.

Mr. Caskey: In the old 404 the accountant had labeled the revenue from 1943 and 1944 as film rental when it was, in fact, not all film rental but also represented the theatre receipts of both the Roxy Theatre in New York and National Theatres Corporation. And our point, and the reason we are objecting to this chart is that from the period 1933 to 1942, inclusive, the figures are of Fox Film Corporation without any theatre interest being consolidated.

Now, in 1943 and 1944 the theatre interests are consolidated, so they are not comparable; and that is why we object to a chart that is predicated on something that is not in evidence.

Judge Hand: I never thought this thing out very much, but when he made that objection before I did not see why it was not right.

(3089)

Mr. Wright: Well, we are accepting his——

Judge Hand: All right, if you are accepting it what is the use of having about three or four exhibits in graphs in here when one is right?

Mr. Wright: I have no desire by this chart to do anything more than to show your Honors the difference between what we offered and what he offered and what we finally accepted.

Judge Hand: Why don't you withdraw one if it does not take something into account, and not leave it there to confuse us. You have to put this in so that the wayfaring man, even though a fool, may not err.

Mr. Wright: If the Court does not think the graph is helpful I will withdraw it.

Judge Hand: All right.

(Government's Exhibit 404-A for identification withdrawn.)

JAMES J. MALONEY, resumed the stand.

Judge Goddard: Mr. Wright, the original 404 was marked for identification?

Mr. Wright: That is right, and that is withdrawn.

Judge Goddard: And you have substituted another 404 for identification?

Mr. Wright: We are substituting this 404 in evidence supplied by the defendant Fox.

Judge Goddard: Has that been received in evidence?

Mr. Wright: Yes.

Mr. Caskey: Then 404, the old chart, should be physically destroyed.

Judge Bright: We have marked our copies "No value."

Judge Goddard: Will you have duplicates of this?

Mr. Caskey: Yes, sir, I will in an hour.

Mr. Wright: He is going to supply us with some.

Judge Hand: This is the original, isn't it?

Mr. Wright: Yes.

Direct examination continued by Mr. Wright:

Q. Now, Mr. Maloney, you also took from the SEC a statement of Fox, the excess profits figures that were recorded there. Can you just read those into the record? A. The amounts of excess profits taxes charged in the annual statements filed with the SEC for the years 1942, 1943 and 1944 appeared as, for 1942, $2,900,000; for 1943, $20,250,000; for 1944, $19,800,000.

Q. And when you were on the stand the other day I believe you did not have the Columbia figures. Could you read those in for the excess profits? A. Yes. The amounts of ex-

cess profits taxes charged on the annual statements of Columbia Pictures Corporation for the year 1942 appeared as $370,000; for the year 1943, $2,970,000; for the year 1944, $3,645,000.

Mr. Wright: That is all.

Cross examination by Mr. Caskey:

Q. Mr. Maloney, you know now to be a fact that during the last two years to which you refer the figures are the consolidated figures of Twentieth Century-Fox, including National Theatres? A. I was aware that the figures for all years were the consolidated figures as furnished by the corporation to the SEC.

(3092)

Q. Yes, but you knew that the corporations consolidated were different? A. The corporations consolidated were different, I believe, in each of the years.

Q. That is correct. So they are not comparable figures? A. The corporation had different subsidiaries during the various years.

Q. So the figures are not comparable? A. That I could not agree to.

Q. And have you ascertained since you are on the stand what the rates of taxation were? A. No, I have not.

Q. Or whether or not there were not sharp increases in the tax rate? A. No, sir, I have not.

Q. Or whether those figures for each of the years are based on comparable tax rates? A. I have not made any research of the income tax rates, sir.

Judge Hand: Mr. Stenographer, don't take this down unless somebody wants it.

(Discussion off the record.)

Judge Hand: Now let Mr. Wright briefly state his position in regard to this, and you answer it just as you have, Mr. Caskey. We have not had all this endless talk on the record. That will make a record.

Mr. Wright: Our position with respect to Exhibit 404 is that when read with Exhibit F-24, I believe it is, previously offered in evidence by Fox, it is the best available picture of the net earnings of both the

(3093)

Fox Film Corporation and its theatre operating subsidiaries during the period in question. It is perfectly clear that the 404, of course, does not reflect any profits of the theatre owning subsidiaries prior to 1942 except insofar as they appear in 404 as dividends paid

by National to Fox. That is because during that period National Theatres was a 42 per cent owned subsidiary of the parent Fox; beginning with 1942 when they had a 100 per cent interest in National Theatres; a consolidated statement was filed for both, and the net profits figures there for the last years on the chart are the net for the entire theatre operating and distributing and producing business.

Mr. Caskey: Have you got F-24, Mr. Marcus?

Judge Bright: Which do you want?

Mr. Caskey: F-24.

(Exhibit handed to Mr. Caskey.)

Mr. Caskey: If the court please, it was my position that the Exhibit 404 is not on a comparable basis, as Mr. Wright has now explained, from the first year through 1942. The statement is a consolidated statement of the income and profits of the Twentieth Century-Fox and its distribution subsidiaries. Commencing in 1943 and for 1944, it is a consolidated statement of Twentieth Century-Fox, its distribution subsidiaries, and in addition National Theatres Cor-

(3094)

poration, the Roxy Theatre, and De Luxe Laboratories.

Prior to 1943 the only income that is shown in the schedule from theatres is the income received as a dividend on the 42 per cent of the stock of National Theatres Corporation.

Now I have in my hand Exhibit F-24, and to make the figures at all comparable it will be necessary to subtract the amount of dividends and add to it the amount of net profits; and since this is an appropriate place, I might read into evidence the profit figures of National Theatres Corporation.

Judge Bright: Is that what F-24 is?

Mr. Caskey: Yes. 1940, two million——

Judge Hand: Reading from F-24.

Mr. Caskey: (Continuing)

	$2,033,000;
1941,	$2,404,000;
1942,	$3,402,000;
1943,	$4,490,000;
1944,	$5,156,000.

Mr. Wright: I take it those figures are all after taxes, just as the other figures we had?

Mr. Caskey: Yes. Now, the same argument that I make as to this, applies to the testimony of the witness as to the provision for excess profits tax. In the

(3095)

year 1942, it was $2,900,000. It jumped in 1943 to $20,250,000, and was slightly less, $19,800,000, in 1944. In both of those latter years there was, first of all, a higher tax rate than there was in 1942. Second, there was a difference in the method of computing the tax, because when Fox was consolidated with National it got the advantage of National's tax base, or the burden of it; and, in addition, the consolidation, the provision for taxes is for both companies and not just the distribution corporation.

Judge Hand: I think that explains it anyway. Personally I should not think that the figures were comparable, without your correction.

Now, is there any more from this witness?

Mr. Wright: Nothing more from this witness.

Mr. Wright: Now we have some additional exhibits necessary to complete material already in evidence, and I will now offer those. One is a rider

marked 182-A, which supplements Exhibit 182 in evidence, a contract between Loew and RKO.

(Marked Government's Exhibit 182-A.)

Mr. Wright: I will ask to have marked as 226-A an agreement dated September 1, 1938, between Paramount, Fabian Brooklyn Theatres, Inc., and Stanley Mark Strand Corporation, a franchise agreement which supplements an agrement in evidence as 226,

(3095-A)

which is the pooling agreement referring to the Brooklyn first-run theatres.

(Marked Government's Exhibit 226-A.)

(3096)

Mr. Wright: And I also ask to have marked as 232-A an agreement, a 20-year agreement, dated December 10, 1930, between Paramount Publix and Fox Film, which is referred to and supplements the agreement in evidence marked as Exhibit 232.

Mr. Caskey: Will you read me Mr. Wright's remarks?

(Record read.)

Mr. Caskey: I certainly object to any such characterization. No objection to the agreement as such, but this agreement was made in 1930, it was terminated by bankruptcy, and a new agreement was made with the trustee in bankruptcy. This does not supplement anything, except as an historical record.

Judge Hand: Overruled. This is an original sale that was presumed to continue through bankruptcy.

(Marked Government's Exhibit 232-A.)

Mr. Wright: We again have this problem as to Exhibit 272-A, which is supplemental pages that are,

according to United Artists, properly a part of Exhibit 272. We want it in the record. United Artists wants it in. Fox objected before, and I assume they object, but in view of the position of United Artists, I suppose it will, at least, be admitted as between United Artists and ourselves.

Mr. Proskauer: Could you tell us what you are offering?

(3097)

Mr. Caskey: Unsigned document. We certainly object to it. We have no copy of it.

Mr. Wright: This is the unsigned copy that was furnished to us by Mr. Raftery with the statement that it was an authentic copy of the agreement. We have no other copy.

Judge Hand: Overruled.

Judge Bright: That is the Stage Door Canteen.

Mr. Wright: That contract, I believe, refers to Stage Door Canteen.

(Marked Government's Exhibit 272-A.)

Mr. Wright: Your Honors will recall an Exhibit F-21 was offered by Fox, which showed certain rental tabulations, with respect to the film Sweet Rosie O'Grady in the 92 cities with more than 100,000 population. When the witness was on the stand we asked if he could supply figures as to the total rental in the towns in question and as to the total affiliated rental, and then we asked for that data, and we got, in this document which I will ask to have marked, I think, for convenience, as F-21A—is that agreeable, Mr. Caskey?

Mr. Caskey: Certainly.

Mr. Wright: (Continuing) —the statement that I submit by Fox giving total film rental for the picture in each of the towns. We were not furnished with a

(3098)

statement as to what the total affiliated rental was in each of the towns.

(Marked Exhibit F-21-A.)

Mr. Caskey: May I just place on the record this observation: F-21 shows that the total United States gross on Sweet Rosie O'Grady was $2,821,000, of which $775,000 was derived from the first run in these 92 cities having a population of 100,000 or more. This Exhibit F-21-A shows that the total revenue derived from all exhibitions in all theatres in those towns was $1,301,693.49, which means that $525,000 was derived from the second and subsequent runs in those towns, if my mathematics is correct. Those are copies of 404 (handing to the Court).

Mr. Wright: I also want to offer additional material that was received in response to, or in answer to, interrogations subsequent to the close of our case, which was used by Mr. Borwick in the tabulations that I am about to offer. The first is a letter from counsel for Loew's, Inc., containing supplemental data with respect to Exhibit 57, which is already in evidence, and I will ask to have that—I believe it is the second supplement—marked as Exhibit 57-B.

(Marked Government's Exhibit 57-B.)

Mr. Wright: And I am offering as Exhibits 139-A and B supplemental data furnished by the defendant

(3099)

Columbia, which supplements Exhibit 139 in evidence.

(Marked Government's Exhibits 139-A and 139-B.)

Mr. Wright: And I will ask to have marked as 57-A this folder marked 57-A, which contains addi-

tional answers submitted by Loew with a covering letter, which supplements Exhibit 57 in evidence.

Judge Bright: Mr. Wright, that 57 carried a number of subdivisions up to dash 38.

Mr. Wright: Yes, it was subdivided in numbers, I think one number for each town covered. These, I think, refer to additional towns. Instead of giving it an additional sub number, I just gave them A and B numbers.

Judge Bright: They do not supplement any one of those particular numbers?

Mr. Wright: No, that is right. It was a general supplement to the interrogatory data.

Mr. Davis, if the Court please, calls my attention to the fact that the covering letter in here refers only to the sheet relating to Portsmouth, Virginia. There are five other sheets in here, relating to New Orleans, Atlanta, Oakland, Columbus and Woodbridge, New Jersey, respectively, which are not covered by this letter, but as to which there is no question as to authenticity, so I am offering them also.

Mr. Davis: I think perhaps the only inaccuracy

(3100)

in the record, Mr. Wright, would be your statement that those are furnished in response to a later request. I imagine they went forward to you at the time of original delivery.

Mr. Wright: As to that, I am quite sure that these came in recently, and I will endeavor to locate the covering letter.

Mr. Davis: It doesn't make any difference when they came in, I have no objection to their admission, but I don't want the record to be inaccurate.

(Marked Government's Exhibit 57-A.)

PETER M. BORWICK, called as a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Wright:

Mr. Raftery: May it please the Court, may I now ask Mr. Wright a question? Are you about to offer what you exhibited to counsel on Saturday?

Mr. Wright: That is correct, plus, I think there were two or three of these tabulations which were not complete at that time and which——

Mr. Raftery: Which we haven't yet?

Mr. Wright: (Continuing) ——you may not have received yes.

(3101)

Mr. Raftery: But will you admit everything you are about to offer now is already in the record in those exhibits in some form or other?

Mr. Wright: With the exception of one or two of these tabulations, all of them are based upon material which is in evidence, that is, they represent either summaries or tabulations of that material.

Mr. Proskauer: Your Honors, I would like to get this clear. I understand that with the single exception that Mr. Wright made, none of this evidence is tendered as new evidence; it is tendered as a compilation of existing evidence, so we have a right to test it by its correspondence with existing evidence.

Mr. Wright: That is right.

Mr. Raftery: Plus the fact, if your Honors please, that we are contending that this is properly trial brief material and we are just wasting the time of the Court in putting in another volume of argument, because everything I examined yesterday is argument and everything he is about to offer, and take up perhaps

another day, is already in the record and is available for anybody to examine, and you can make whatever argument you want out of it. I spent the whole day yesterday going over every one of these documents and I cannot find one that is not already in the record. Now, he did not have the United Artists or Universal

(3102)

material complete, but everything he has in here of the United Artists and Universal is already in in documentary form. We submit that an offer of proof, or if he will concede that this is not evidence but argument, and put them in one after another—I object to the offer on the ground it is merely repeating what is already in.

Judge Hand: Well, of course, it is argument. The statements of all these tabulators that we have constantly in our litigation are nothing but computations that, if not disputed, or if the Court agrees with it, are supposed to help it to draw certain conclusions. It is not fact evidence of the ordinary sort, of course.

Mr. Raftery: There are very, very important errors in the record.

Mr. Proskauer: It was with that in mind that I wanted to get clear that this was not offered as independent evidence, but as tabulation of existing evidence.

Judge Hand: Yes.

Mr. Wright: Yes.

Mr. Proskauer: On which we shall have considerable to say in brief and argument.

Mr. Caskey: And on the cross-examination.

Mr. Raftery: That is what I was worried about.

Judge Hand: Won't you be able to stay your hand

(3103)

from that and submit some new tabulations?

Mr. Caskey: What is that number?

Mr. Wright: 416. I am having it marked as 424 because of the intervening exhibits.

(Marked Government's Exhibit 424 for identification.)

Mr. Wright: The copy that you have, I believe, is a photostat with pencil corrections.

Mr. Caskey: No pencil corrections on this.

Mr. Wright: Well, you were told what—your people were told what the corrections were.

Mr. Proskauer: Mr. Wright, we cannot try a case on the basis of what our people were told, and if you have any corrections to make on the exhibit, please make it on the record and tell us what you are talking about.

Mr. Wright: I am talking about the photostat that you have marked as No. 416, which has been marked for identification as 424.

Mr. Davis: Are there any corrections on that? I have a perfectly clean photostat.

(Discussion betweeen Mr. Wright and Mr. Davis, off the record.)

Q. First, will you state your name and address? A. Peter M. Borwick, Washington, D. C.

Q. You are a first lieutenant in the Army? A. That is

(3104)

correct.

Q. You are attached to the military government branch of the Army? A. That is correct.

Q. And you have been loaned to the Justice Department for the purpose of tabulating the interrogatory material supplied by the defendants in this case? A. Yes.

Q. And you were a civilian in 1940? A. That is correct.

Q. And at that time you were in charge of tabulating the material furnished by the defendants in this case in response to interrogatories served in 1939? A. That is correct.

Q. Then you again took up the work with reference to the 1945 interrogatories in July of this year? A. That is correct.

Q. And this Exhibit 416 for identification that you have in your hand there is one of those prepared by you? A. That is correct.

Mr. Proskauer: 416?

Mr. Wright: I beg your pardon; 424.

(3105)

Q. Are the figures that are reported there under the respective columns headed RKO; Fox, Warner, Paramount and Loew's, figures which were supplied by those defendants respectively in response to Interrogatory 12? A. Yes, sir.

Q. That is, there was no computation made by you as to those figures? A. Except for the percentages involved.

Q. You computed the percentages and then you put in a figure there that appears below the first five figures headed, "Total paid to Producer-Exhibitors"? A. That is correct.

Q. Those figures were supplied by an addition made by you and that term "Producer-Exhibitors" is one defined in the complaint as referring to the five groups, RKO, Fox, Warner, Paramount and Loew's respectively? A. That is correct.

Q. And in this case refers to rentals paid to them as distributors, is that right? A. That is correct.

Mr. Wright: We offer this 424 in evidence.

Preliminary Cross Examination by Mr. Caskey:

Q. Lieutenant, the figures that you have headed Fox are the figures of National Theatres Corporation, are they not? A. That is correct.

Q. And you did not include any of the figures for the Roxy theatre? A. If the report you gave us included the Roxy theatre, why was that figure included.

(3106)

Q. Do you know whether or not the Roxy theatre is included? A. Well, I can tell you by looking at the answer to Interrogatory No. 12.

Q. I show you my copy. A. I would say that if the Roxy theatre is not included in National Theatres, of course it is not included.

Q. Do you know whether it is or is not? A. I cannot say offhand.

Q. So that you have no knowledge then as to whether this total figure includes the Roxy theatre or not? A. I do not unless you so specify.

Q. Do you know—you made the chart—do you know whether it does or not? A. No, I do not.

Q. In addition——

Judge Hand: Is this thing going to be in dispute?

Mr. Caskey: Yes, sir.

Judge Hand: Wait a minute. Whether it includes it or not?

Mr. Caskey: Well, I do not see how there can be any question——

Judge Hand: Are you putting in evidence here by a witness who does not know what the exhibit includes?

Mr. Wright: It does not make the slightest difference for our purposes whether it is in or out. We merely took the figure given by them in response to

(3107)

the interrogatory and tabulated it here. I do not believe it was included. As far as we are concerned, it

makes no difference for our purposes whether you include it in the tabulation or whether you exclude it. The overall picture is unchanged.

Mr. Caskey: How can you say that, Mr. Wright, when you know the Roxy theatre plays only Fox product, and certainly pays a very large film rental during the year? The fact is that it is not included. There is no doubt of that.

Judge Hand: All right, if that is true, if it is incapable of refutation, it ought to be admitted here. Is it?

Mr. Wright: We concede it. Yes, it is not included.

Judge Hand: Then do not examine any more about this, or cross-examine.

Mr. Caskey: No, sir, I might lose my stipulation.

Judge Hand: And I presume you have some other fine points.

Mr. Caskey: I respectfully submit that is not even a fine point. I submit it is a very important point.

Q. Again, the figures as to National Theatres Corporation, as your footnote shows, do not relate to the 1943-44 product at all. A. Covers the period December 26, 1943, (3108)
to December 30, 1944, and includes shorts and newsreels, according to this footnote.

Q. And whether it includes 1943-44 product or not, do you know that except by inference? A. Well, the interrogatory asked rentals paid on features released during the 1943-44 season, and again we took the figures as you gave them to us and annotated them with proper footnotes to explain these particular figures.

Q. Yes, but now you take the first column, the RKO figure. That purports to represent, in the second column, the

amount which the RKO theatres paid to Fox on the 1943-44 season, is that right? A. That is right.

Q. $2,181,000 on the actual 1943-44 product? A. That is right.

Q. But the figure in the first column, under Fox, of $2,411,000, does not represent that at all, does it? A. Would you repeat——

Q. It doesn't represent what was paid to RKO on the 1943-44 product? A. Well, I have already explained it.

Q. Can't you answer my question yes or no? A. Well, I copied a figure as you gave it to me and with a proper annotation.

Q. Won't you say on the stand that this figure of $2,411,000 is not a comparable figure to the $2,181,000; won't you say that? A. No, I would not say it unless I knew exactly (4109)

what the content of that figure is, and if you in your answer to Interrogatory 12 did not give me the exact description of what that figure purported to be, then I cannot give you the answer.

Q. You know the $2,400,000 includes shorts and newsreels? A. That is right.

Q. And that the $2,181,000 does not include any shorts and newsreels? A. Apparently not.

Q. So to that extent they are not comparable? A. To that extent they are not comparable.

Q. You know that the Fox figure includes some figures which were released after October 1, 1944? A. I do not know that.

Q. Well, don't you know from the work that you have done in this case that the 1944-45 product was released commencing about September or October 1, 1944? A. Approximately.

Q. And don't you know from the work that you have done that the National Theatres played that product in the

fall of 1944 and paid for it? A. What product are you talking about?

Q. I am talking about the 1944-45 product that was played in September, October, November and December 1944. A. Yes, but on the other hand it excludes from that figure the product played the previous fall; in other words, if your (3110)
figure was comparable to the figure given by others, that is, you would have given us a figure on rentals paid for products released only between September 1, 1943, and September 1, 1944. However, since your figure begins on January 1, 1944, you have excluded from your figure the three or four months of 1943, so that what you leave off on one end you include on the other end.

Q. So it is fair to say that during the year from December 26, 1943, to December 30, 1944, that some of this rental relates to 1943-44 product? A. That is right.

Q. Some of it relates—— A. The bulk of it relates to 1943-44 product.

Q. All right. Some of it relates to 1944-45 product. A. A minor part of it, I would say, relates to the '44——

Q. But some of it? A. Well, some of it, or minor part of it, would be more precise.

Q. Do you know how much? A. No. If you give me the figures as to the number of features you released, I could tell you during that overlapping interval.

Q. Some of it relates to 1942-43 product? A. I would say a very small amount of it, if any.

Q. You asked me if I would give you the figures as to the number of features that Fox released. Haven't we both been talking about the product of RKO? Isn't that what we have (3111)
been talking about, the $2,400,000 figure? A. That is right.

Q. That Fox paid to RKO for exhibiting RKO pictures? A. That is right.

Judge Bright: When you get all through, how much difference does it make in whole percentage?

Mr. Caskey: I haven't any idea. I will ask the Lieutenant that if he knows.

The Witness: I cannot give you a very precise answer because we do not have the figures except for this period.

Judge Bright: Do you claim it makes any material difference?

The Witness: I personally don't believe that it makes any material difference.

Mr. Caskey: Well, I can only say, generally speaking, that film rentals have increased. I think that the company paid, in general, a higher film rental in October 1944 than it did in 1943, but what I am objecting to and want the record to show is that we are not comparing two identical things.

Judge Bright: What I want to know is whether it makes any difference.

Mr. Caskey: Well, in the aggregate I have no doubt that the $25,000,000 figure for the year 1944 is higher than the '43 figure.

(3112)

Judge Bright: How much?

Mr. Caskey: Maybe two million dollars. I can find out exactly.

Judge Bright: Two million dollars additional in the three months that he has excluded from the one end to the other end?

Mr. Caskey: No, I say the whole year, because 1944 was the largest grossing year the theatres had.

Judge Bright: You mean two million dollars that you got more than is shown on this, or two million dollars less, or two million dollars more than you have paid RKO, or two million dollars less?

Mr. Caskey: What I mean is that I think that we paid at least two million dollars less for the 1943-44 product of all the companies that we paid during the fiscal year 1943-44.

Judge Bright: You are only comparing the two columns, the ~~RKO~~ column and your own?

Mr. Caskey: That is the only one I have shown on cross-examination.

Mr. Wright: May I say something here, if the Court please? When these interrogatories were propounded, in order to make it possible for them to answer them in the simplest way, we gave them an option to either give us the figures which would exactly cover the season or, if their books were kept on another basis,

(3113)

to give us the figures as per their books for the closest available period. That is the reason for these discrepancies and I submit the different periods are, of course, accurately covered here in the footnotes. There is no question as to what is involved, and, in view of the manner in which this furnishing of this data was handled, I do not think that this cross-examination is proper at all.

Mr. Caskey: It is not the data. It is trying to compare them that causes the difficulty.

Mr. Proskauer: May I suggest, your Honors, that all this exhibit is trying to do is to show the film rentals that were paid by these various companies, and it has no legal significance unless it spells out a pattern of conspiracy. That is what it is offered for. I don't want in all this discussion about whether a thing is comparable and all that sort of thing, to lose sight of those exhibits we put in that set these figures up in correct form and showed, as far as Warners are concerned, that beyond the possibility of argument,

there was no relationship between what we bought from and what we sold to these co-defendants.

Judge Bright: Judge, if they are offered to show an alleged conspiracy, it doesn't make any difference whether there is two million more or two million less,

(3114)

does it?

Mr. Proskauer: Speaking for myself, and not as an admission, and giving you an opinion of counsel, I agree with you. That is why I interrupted because I did not want that discussion about whether that was important to obscure what I think is the real point about these figures.

Mr. Caskey: Judge Bright, you recall, though, that the charge is more than conspiracy, and that charge has been largely abandoned.

Judge Bright: I am not arguing that question. I am arguing the theory that two dollars more or two dollars less does not make any difference on what they offer to prove, but this witness has only offered this chart on the figures which were sent to the Government by the defendants themselves.

Mr. Caskey: That is right, and the figures are not on a comparable basis because they have alternates as to how to furnish them.

Judge Bright: I do not understand he is comparing them on a comparable basis. He is only offering it as a tabulation of what you submitted to the Government.

Judge Hand: Go on, Mr. Wright.

Mr. Wright: Mark this as Exhibit 425.

Mr. Raftery: Mr. Wright, for the record, we did

(3115)

not furnish any of these figures. They were furnished by either Columbia, Universal or United Artists.

Mr. Wright: That is right. These are figures as reported by the five companies whose names appear at the head of the five columns.

Mr. Raftery: The theatre owners.

Mr. Wright: Yes. I take it 424 is received in evidence.

(Marked Government's Exhibit 424.)

Mr. Proskauer: Might I suggest that when your Honors come to look at this also, that you note the very large percentages that the companies pay to themselves.

Judge Hand: Which?

Mr. Proskauer: This one that has just been marked, your Honor, 424 I think it is.

Judge Bright: What was your statement?

Mr. Proskauer: I wanted to suggest, and we will argue this out more, that you note the very large percentages, gross percentages, that the companies pay themselves. Take Loew's, for example. If you look at the Loew column, at the end, at the bottom, you will see that became 46.4 per cent. If you take Paramount and look at the Paramount column, both horizontally and vertically, you will find that is 28 per cent. And so I am merely calling attention to the fact that this includes large sums that were just intercompany transactions.

Mr. Wright: No question about that.

(Marked Government's Exhibit 425 for identification.)

(3116)

Mr. Wright: (Addressing Mr. Seymour) This Exhibit 425 for identification correspondends to the photostats that you have marked as 417.

Mr. Proskauer: Mr. Wright, may I call your attention to a slight addition that I am sure you will

accede to. That footnote No. 4 should have added to it "exclusive of This Is The Army," just as you had it in the other exhibit. Factually that is correct.

Mr. Wright: You are referring now to a footnote on which exhibit?

Mr. Proskauer: The one you are offering. On 424 you did have a footnote "excluded about $1,465,000 paid for This Is The Army."

Mr. Wright: Yes.

Mr. Proskauer: Just in the interest of accuracy that should be stated on this exhibit also, and it would come properly as an addendum to footnote No. 4.

Mr. Wright: That is agreeable.

Mr. Davis: May I suggest, Mr. Wright, that in the column of Loew's here you show received by Loew from Loew's Theatres $8,878,852.

Mr. Wright: Yes.

Mr. Davis: Will you agree that that figure is incorrect because it omits the receipts from the Astor Theatre and from the Buffalo theatres, and that the

(3117)

proper figure should be $9,138,905?

Mr. Wright: That data, I believe, was not supplied to us when the tabulation was made up.

Mr. Davis: That may well be.

Mr. Wright: But we are perfectly willing to have the supplemental statement read into the record with the exhibit.

Mr. Davis: And that, of course, will modify the percentage calculation, which I have not had time to compute.

Judge Bright: What was that corrected amount?

Mr. Davis: The corrected amount is $9,138,905. And I may say to avoid confusion, in Exhibit 424, a similar figure stated is $9,282,490. That is due to

the fact that the figures which entered into 424 are the amounts billed; and the figure which I have just given the Court for Exhibit 425 is the cash received. There is a lag there between the billing and the receipt which accounts for that discrepancy.

By Mr. Wright:

Q. These figures on Exhibit 425 for identification, those are, are they not, the rentals received from the various affiliated theatres and others as reported on statements made by each of the eight distributor defendants in response to interrogatory No. 3, is that correct? A. Yes, sir.
(3118)

Q. And there are, I notice, a number of discrepancies in the table between the amounts reported by these various distributor defendants as having been received from the various theatres listed there that were affiliated with other defendants and the amounts reported as having been paid by them to the same distributors as reported in Exhibit 424. Can you tell us generally what accounts for those differences? A. Well, in Exhibit 425 we did as we did in Exhibit 424, copy the figures as given to us with proper annotations to make it clear just what those figures cover.

Now, it appears from an analysis of these footnotes and answers to these interrogatories that the differences in part, in addition to the one that Mr. Davis explained, is due to the fact that the coverage, the time coverage, varies, and in some instances—now, here in the case of Paramount Exhibit 425 covers a period of March 10, 1945, and Exhibit 424, the footnote says "For accounting purposes as of December 30, 1944." But they reflect the license fees for the pictures released during the 1943-1944 motion picture season.

Q. Well, in any event, the data you have recorded in the footnotes shows the periods covered, and that, in turn, is taken from the answers themselves, is that right? A. That (3119) is correct, sir.

Mr. Wright: Now we offer 425.

Preliminary Cross Examination by Mr. Caskey:

Q. Lieutenant, the total that the eight producers show as received from Fox was $22,485,000, is it not?

Mr. Wright: That is correct.

A. I beg your pardon? I am sorry.

Mr. Caskey: Will you read the question.

Q. (Read.) A. Yes.

Q. And the total shown on Exhibit 424 by National as paid to all eight distributors was $24,200,000? A. No. You say 22 million?

Q. No. I said the total paid to the eight distributors is $24,200,000. A. You mean paid by Fox National Theatres?

Q. Paid by National to the eight. A. The figure I have got is $25,000,000.

Q. Wait a minute. You have got to take out all others, don't you? A. Oh yes, I beg your pardon, that is right.

Q. So the discrepancy or the difference, however accounted for, is about $1,800,000? A. Approximately I should say. I could not tell you unless I calculated it.

Q. That is about 7 per cent? A. I said I would not venture a guess as to the actual percentage unless I calculated it. (3120)

Q. You have set forth a calculation. Look at your Universal calculation of a million seven. You give it 6.6. A. Universal 6.6?

Q. I say that a million eight would be about 7 per cent. A. (No answer.)

Q. All right. Well, you don't know where that 7 per cent is distributed? A. No. As I said before, Mr. Caskey, we made no attempt at reconciling the figures, any difference that existed between those figures. We merely copied them as you gave them to us or as other defendants gave them to us.

Q. That is right. But the sum total of it is that Fox's receipt from the four affiliated groups, taking it together, is slightly less than 25 per cent of its total national gross? A. You mean of the other affiliated groups?

Q. Yes, sir. A. Well, it is right there.

Q. Well, I want to bring it out. A. It is right there in the record.

Mr. Wright: If the Court please, all of these things are apparent on the face of the tabulation. There is nothing accomplished by cross-examination.

Judge Hand: I think you are right. It is not getting anywhere.

(3121)

Mr. Caskey: Very well, sir, if it is clear that commencing with the column on the left and reading across, Fox, the amount there under each one of those five columns is the amount said to be received from the theatre groups.

Q. That is correct, isn't it? A. That is right. Yes.

Q. And by adding the four figures you get the total percentage received from the four groups? A. That is right, or any other groups.

Mr. Caskey: Yes.

Mr. Raftery: May I ask Mr. Wright a question? I just want to be clear on this.

Mr. Wright: Surely.

Mr. Raftery: This column, third from the end, the five circuits paying the next highest film rentals, are they affiliated circuits?

Mr. Wright: I do not believe that they are. The footnote notes where they include a circuit such as Skouras or Randforce about which there might be a dispute. I think that, however, is noted in the footnote.

Mr. Raftery: But, generally, those are independent exhibitors included in that thing?

Mr. Wright: Yes.

Mr. Raftery: And when you get over here to United Artists, 50.3, does that mean from indepen-

(3122)

dents only or does the 50.3 add the 2.8——

Mr. Wright: 50.3 is the rental which United Artists showed that it got from the five affiliated circuits.

Mr. Raftery: And the five independents?

Mr. Wright: No, no. What was gotten from the five next highest independents was the figure, for United Artists—I beg your pardon, I read the wrong figures. Your figure for the total rentals received from affiliated theatres is 46.9. Your figure for the next five highest, which are independents, is 2.8.

Mr. Raftery: So it is really 53.1 from independents and 46.9?

Mr. Wright: Yes.

(Government's Exhibit 425 for identification received in evidence.)

Mr. Wright: Will you mark this 426 for identification?

(Marked Government's Exhibit 426 for identification.)

Mr. Caskey: What is the next one?

Mr. Wright: 426 for identification is the one you have numbered 418 without the percentages, because the percentages were objected to by one of the defendants.

Mr. Frohlich: Do I understand you are taking out these percentages, Mr. Wright?

(3123)

Mr. Wright: Yes, those were objected to by one of the counsel. This——

Mr. Proskauer: Why don't you just offer it, Mr. Wright? I do not believe anybody is goin to object to it.

Mr. Wright: I offer it.

Mr. Caskey: May we see it as it now exists?

(Exhibit handed to Mr. Caskey.)

Mr. Proskauer: Is this for the 1943-44 season?

Mr. Wright: Yes.

(Government's Exhibit 426 for identification received in evidence.)

Mr. Wright: And would you mark this next one as 427?

(Marked Government's Exhibit 427 for identification.)

Mr. Wright: That is a similar one to 426 but for the 1936-37 season, and it has the average film rentals for the reason computed at the bottom there. I do not believe the computation of the average rental appears on the photostat which you have.

Mr. Proskauer: Irrespective of that, would you let me inquire, with the Court's permission, is the point of these two exhibits—I ask this so we won't be

lost in briefing—that there has been a very large increase in the number of films of the more expensive type? Is that the point?

(3124)

Mr. Wright: That is one point.

Mr. Proskauer: Is there any other point? There is no question about that factually.

Mr. Wright: The other shows the relative box-office quality, which is some indication——

Mr. Proskauer: I don't hear you, Mr. Wright. The relative what?

Mr. Wright: The relative box-office quality of the features released by the eight defendants is also suggested or indicated by the exhibit.

Mr. Caskey: Well, if it is offered for that purpose I certainly object to it.

Mr. Proskauer: I can't object because he shows we are doing so well, in the highest brackets, that we must be producing very good pictures.

Judge Hand: Have you offered this in evidence, 427?

Mr. Wright: Yes, I have offered it.

Mr. Davis: Mr. Wright, as to these percentages here, shall we strike them out?

Mr. Wright: The percentages were stricken, because counsel for one defendant thought they might be misleading. They made no difference to us.

Mr. Davis: I understand they went out of 426. Are

(3125)

they also on the way out of 427?

Mr. Wright: Yes.

Mr. Davis: I just want to know so that I can make my exhibit conform.

Judge Bright: They do not appear in our exhibits.

Mr. Wright: I said they were stricken because of an objection by one counsel.

Judge Hand: Admitted.

(Government's Exhibit 427 for identification received in evidence.)

Mr. Wright: The next one I will ask to have marked as 428 for identification. I think that is your 420.

Mr. Seymour: May I suggest, Mr. Wright, that you have those four which are a part of one group marked together at one time, because I would like to examine them. I mean, mark it at this time, and then I will examine them all.

Mr. Wright: Well, I will go ahead with the examination of these, and then we will get to the other as soon as we can.

Direct Examination Continued by Mr. Wright:

Q. Now, this 428 for identification that you have was prepared, was it not, from the admissions of fact respectively (3126)
furnished by the eight distributor defendants? A. That is right.

Mr. Davis: A little louder, Mr. Witness, please, sir.

Q. The exhibit number opposite the name of the distributor is the number of the admission of fact of the particular distributor that was used? A. Yes, sir.

Mr. Caskey: What was that?

Mr. Wright: I said the exhibit number opposite the name of the distributor is the number of the admission of fact of the particular distributor that was used.

Mr. Caskey: It was not on our copy.

Judge Bright: Is this a substitute for one of your schedules that is in your trial brief?

Mr. Wright: Similar schedules were in the trial brief. This, however, has been expanded to include the 92 cities. The schedule in our trial brief included only 73, and this also has some corrections as to those.

Q. Can you tell us just what you did in preparing the figures that appear in that first column there under Warner? A. We took Warner's admission of facts and determined what exhibitors got the first-run contracts in the City of New York and indicated the theatre affiliated with Warner as indicated beside New York, New York.

Q. That is, the abbreviations you have under there, (8127) Warner, Paramount, and so on, in each case indicate the defendant with which the first-run account in question was affiliated, is that right? A. That is correct, sir.

Q. And that information was obtained from the theatre lists in evidence supplied by the defendants? A. Yes, sir.

Q. As to affiliation? A. Yes, sir, that is correct, sir.

Q. Now, that admission of fact, I believe, that Warner gave you showed, did it not, all of the theatres in which any features distributed by Warner had a first run in the town in question during that season; is that right? A. That is correct.

Q. And then you show in some cases the names of two or more exhibitors with the figure "&" between them. Can you tell us what that means with reference to the admission? A. Well, that merely means that the product was split between two or more exhibitors.

Q. And the affiliation of the exhibitors between whom it it was split is indicated there? A. That is correct.

Q. You did not attempt to show on this table the extent of the split? That is, whether it was 50-50 or ⅓-⅔? A. That is correct.

Q. And how about the cases where a number of the pictures had their exhibition, or where a few pictures were
(3128)
exhibited by one theatre, and the majority, the great majority of the pictures were exhibited by another? What was done there? A. Well, we excluded all pictures—that is, we excluded from the computation any exhibitor or group of exhibitors who exhibited during this season a total of six pictures or less.

Q. That is, if the exhibitor shown on the admission had a first run of only six or less of the season's product of the distributor for that year, that exhibitor was disregarded in building the table, is that right? A. That is correct, sir.

Q. Then your total at the bottom, where you say all independent 15, that is the number of the towns in which the first-run outlets were all independent for that particular distributor? A. That is correct.

Q. And the number 7—there was a split between affiliated and independent theatres? A. That is so indicated.

Q. And the number 70 is the number of towns where the first-run outlets were all affiliated for that particular distributor? A. Figure 7? Do you mean——

Q. The final figure 70. A. Oh, I beg your pardon. I thought you said 7.

Q. In these situations where you have a dash connecting two or more exhibitors' names, those indicate so-called
(3129)
pool situations? A. That is right.

Q. Now, the information as to the pooling in the town, that was not obtained from the admission of fact, is that right? A. That is right.

Q. The pooling data was obtained from other exhibits in evidence which are noted in footnotes at the bottom opposite each pool? A. That is right, sir.

Q. Now, will you tell us that procedure you follow with reference to the Fox column? Was the same treatment followed there? A. Yes, the same procedure was followed in the Fox situation as was carried out in the Warner situation.

Q. And was the same true as to the Paramount admission, the Paramount Company? A. Yes, except with a few exceptions.

Q. What are the exceptions there? A. Well, we eliminate from the computation all so-called Hopalong Cassidys which are considered westerns, and in four situations we made an exception to the rule of six or less.

Q. Which were those four situations? A. One I think was Camden, New Jersey, where during the 1943-44 season Paramount sold eight features to a fellow by the name of Varbalow for exhibition in the Towers and Victoria theatres.

Q. Why did you— A. Oh, I beg your pardon. Those are the only two theatres. I say these were the only two theatres to which these eight features were sold.

(3130)

Q. Do you have the split noted there in Camden? A. No, we do not.

Q. Well, what was the reason for excluding the Camden situation there? A. Wait a minute, I beg your pardon. I show a split. I beg your pardon.

Q. Then Camden is no exception, is it? A. Camden is no exception, that is correct.

Q. What, if any, exceptions are there? A. We showed an exception in the case of Loew's——

Q. I am confining your testimony to Paramount. Were there any exceptions as to the treatment used? A. I beg

your pardon. The exception was made in the case of Cleveland, Ohio.

Q. What was the situation at Cleveland? A. Well, in Cleveland the regular first-run account of Paramount was Loew.

Q. Yes. A. And in addition Paramount sold four pictures to the Circle Theatre, one picture to the New Broadway Theatre; one picture to the Windemeer Theatre; one picture to Windemeer and Commodore theatres; one to the Lorein-Fulton Theatre, I think it is, and one to the New Broadway and Commodore, and one to the Hilliard Square Theatre, for a total of ten features.

Q. Now, why did you exclude these outlets from your tabulation? A. Well, one reason was that we did not believe that these theatres constituted regular first-run accounts.

(3131)

Q. Why not? A. In view of the fact that RKO, Warner and Loew theatres in that town had clearance over these theatres I just mentioned.

Q. Did you compare those with that list of first-run theatres that were submitted by Mr. Rodgers on behalf of Loew? A. That is right.

Q. Were any of them on that list? A. No, they were not.

Q. Now, were there any other exceptions? A. In the case of Paramount?

Q. Yes. A. Norfolk, Virginia.

Q. What was the situation there? A. Well, Paramount licensed one feature to the Roxy Theatre; six to the Rosna or Rosne, I am not sure which; five to the Center Theatre.

Q. Why did you exclude those theatres? You say Norfolk? You show the Paramount product is divided there between the Loew independent pool and the independents,

do you not? A. I beg your pardon, I am sorry. This computation is not applicable.

Q. There was no exception made as to Norfolk, is that right? A. That is correct, sir.

Q. Well, were there any other exceptions as to Paramount? A. Pittsburgh, Pennsylvania.

(3131a)

Q. What was the situation there? A. Paramount licensed two to the Harris Senator Theatre; one to the Art Cinema Theatre; one to the Hilltop Theatre; two to the Colonial, and one to the Arcade, for a total of seven.

(3132)

Q. And why were those independent outlets excluded from your Paramount column? A. Well, one reason was that the theatres in the Loew-Warner pool had clearance over these theatres.

Q. Now, that was not true of the Harris, was it? A. Well, I would not be absolutely sure unless I check it. (Checking) Well, it would appear from Paramount's answer 6 to 11 that the Loew's Penn, Stanley, Warner, Ritz theatres got clearance over all other theatres in Pittsburgh.

Q. Well, did you check those theatres against Mr. Rodgers' list? A. Yes, sir, I did.

Q. Which, if any, of those appear on his list as a first-run theatre? A. Pardon me just a moment.

Two of those theatres Loew in its Exhibit 13 includes as regular first-run theatres.

Q. Which ones? A. One is the Harris Senator, and the other is the Art Cinema.

Mr. Davis: Say that again, please.

The Witness: I beg your pardon. I said that Loew in Exhibit No. L-13 includes the Art Cinema and the Harris Senator Theatres as regular first-run theatres.

Mr. Davis: Where?

The Witness: In Pittsburgh, Pennsylvania.

Q. And how many of the Paramount pictures released during that season did those two theatres get? A. The Harris
(3133)
Senator got two and the Art Cinema got one.

Q. Well, were there any other exceptions in computing the Paramount column? A. No, there were not.

Q. How about as to Loew? Did you follow the same method there? A. Yes, we followed the same procedure.

Q. Were there any exceptions? A. Yes.

Q. Where were they? A. In the case of New York City, Loew's sold three features to Radio City Music Hall and we considered that as a split and included the independent along with Loew's Theatres.

Q. Why was that? A. Well, in New York it appears that the practice of these defendants is to sell pictures to the Radio City Music Hall in small blocks or even in individual pictures; and I think it has been testified to that all these defendants seek to get Radio City Music Hall as a first-run account.

Q. Well, in any event, the playing time represented by three pictures in a first-run in New York is much greater than that represented by six in any of these other communities, is that right? A. I should think so.

Q. Now, any other exceptions? A. In the case of Loew's?

Q. Yes. A. No, there was not.

Q. Now, as the RKO, what if any exceptions to that procedure did you make? A. Let me check just a moment, sir. In the case of Pittsburgh, Pennsylvania——
(3134)

Q. What was the situation there? A. In Pittsburgh, RKO licensed 12 pictures to the Barry Theatre in that town.

Q. That theatre, that was on Mr. Rodgers' list, was it? A. Yes, it was.

Q. Why was that excluded. A. For several reasons. One, we did not believe it was a first-run account, because it appears from an examination of the answers to the interrogatories of all defendants that the only other defendant that sold pictures during that season to Skirball—that is, he owns this Barry Theatre, he owns or operates it—was Warner, who sold him three features. Furthermore, the Loew-Warner pool theatres in this city have clearance over all other theatres.

Q. Now, were there any other exceptions? A. To the best of my knowledge I do not believe there was.

Q. As to RKO? A. RKO or any of the other defendants.

Q. Now, as to Universal and United Artists, the admissions of fact were in a somewhat different form, were they not? A. That is correct, sir.

Q. In those cases they simply gave a general statement as to what the first-run account was during the entire period from 1936-1937 through 1943-1944, is that right? A. That is correct.

Q. They did not show the distribution of individual

(3135)

pictures in the towns in question in any of the seasons in question, is that right? A. That is right.

Q. So your data there is just taken as it was reported? A. Yes.

Q. Now how about Columbia? A. Columbia provided admissions of fact which merely gave the regular first-run account, according to my best recollection.

Q. And you simply took their statement as to which was the regular first-run account? A. That is right.

Mr. Wright: We offer 428 in evidence.

Mr. Proskauer: May we ask a few questions preliminarily?

Judge Hand: Yes.

Preliminary Cross-Examination by Mr. Proskauer:

Q. Lieutenant, Warner is in the first column, so I will talk to you first: As to all of these defendants and all the people shown on this chart, you arbitrarily omitted all accounts to which they sold fewer than six pictures, is that right? A. Six or less.

Q. Six or less? A. That is right.

Q. Now, why did you do that? A. Well, I think, as I understand it, the original request made to the defendants consisted of a list of theatres which constituted the regular first-run accounts.

Q. And you arbitrarily decided that if Warner was selling an independent theatre first-run anywhere in America (3136)
six pictures, which is somewhere around a third or a fourth of its entire production, that you were going to exclude that in your computation; is that what you did? A. Well now—

Q. Now, just answer that yes or no. Didn't you do that?

The Witness: Will you repeat the question?

Mr. Proskauer: With the Court's permission, may the reporter read it?

(Question read.)

A. Well, if you mean by the question that we arbitrarily excluded theatres because it is Warner's—that is, independent theatres sold by Warner because it is Warner, I would say no. I am not sure that I understand your question.

Q. Have you got the material there showing the number of independent theatres that Warner sold first-run in amounts of six or less? A. Yes, we do.

Mr. Wright: Exhibit 129,

Mr. Proskauer: All right, we will get that later.

Q. Now, take Buffalo, for example: You knew, didn't you, and your records showed that we sold six first-run pictures in 1943-1944 to the Buffalo 20th Century, which was an independent company, operating the Century Theatre? A. I will tell you in just a moment, Mr. Proskauer. Would (3137)
you kindly tell me what page it is on?

Q. What page? A. Yes, this admission of fact. I take it you have got that in your hand.

Q. Page 9. A. Yes, we omitted that because it was six or less.

Q. Do you know that Warner produced 19 pictures that year? A. That is correct.

Q. And you thought it was fair to try to give the Court the impression that we did not sell first-run to independents to make up a schedule arbitrarily omitting a sale of approximately a third of our product to an independent theatre in a great city like Buffalo?

Mr. Wright: If the Court please, that question is objected to. There has been no attempt to show that they did not sell independents in these towns. What the table purports to show is who the regular first-run account was that showed pictures of these distributors.

The Court: The question is all right. Overruled.

Judge Goddard: Is there anywhere on these schedules anything to show that less than six pictures are not included?

Mr. Wright: Why, his testimony, I think——

Judge Goddard: Is there anything on here?

Judge Bright: He does not show the cities on this schedule in which such exclusions were made.

(3138)

Mr. Wright: I think he testified generally that as to all these cities, in dealing with the first five columns there, he excluded the situations where six or less were sold, with such exceptions as he noted.

Q. You cannot answer that question? I am leaving it to you. You are a lawyer, are you? A. No, sir.

Q. An accountant? A. No, sir.

Q. Formerly attached to the Attorney General's office? A. No, sir.

Q. Are you an accountant?

Judge Bright: He said he was a first lieutenant.

A. No, I said I was not an accountant. If you ask me what my occupation was, I can answer your question.

Q. I do ask. A. Economist and statistician.

Q. Economist and statistician? I am putting it to you as an economist and statistician whether you think that it was a fair use of statistics to create this document and just arbitrarily leave out what you have told us you left out? You can answer that yes or no, and I will take your answer either way you give it. A. I cannot answer it yes or no, but I can explain the basis for this elimination.

Q. You have explained all that I think you care to say—have you got anything to say, in explanation of it, other than what you have already told us? A. Yes. It appears that any split, whether it is between two defendants, two affiliated

(3139)

theatres, or between an affiliated theatre and an independent theatre, takes the form of a split of fifty-fifty or two-thirds and one-third. Now, in the case of Warner, one-third of 19 would be 6⅓, I would take it. Is that correct.

Q. Well, I think so. A. All right. However, in the case of seasons——

Q. I think the Court will take judicial notice of that A. (Continued) —in the case of seasons you note on charts 429, 430, or subsequent exhibits, or subsequent documents which will be marked in evidence, we used the same basis of elimination, that is, six. If you go back to the 1936-1937 season, Warner Bros.—I think it was about 50 features—60 features—a one-third split of that would have been 20.

Q. 60 features? A. That is right, 1936-37, Warner produced 36—60 features. I beg your pardon. A one-third split would have been 20. Yet, on the theory that a split of anything other than, or less than, one-third does not constitute a regular first-run account, I think that you certainly got to——

Q. All right. Have you given all the explanation that you care to make to the Court as to your conduct in making this arbitrary omission? A. That is all I can think of at the

(3140)

moment.

Q. I will take that and let the record stand at that and just ask you one more question. If I count correctly, in the figure 70 at the very end of column 1, where you say "Total affiliated first-runs" you have included 27 instances in which Warner played its pictures in its own theatres? A. I imagine if its own pictures were played in its own theatres, they would be included in here. I do not know what the exact number is offhand.

Q. The exhibit will substantiate my mathematical accuracy, as long as you tell us that you have included in total affiliated first-runs all cases where Warner played its own pictures in its own theatres, and you do so tell me. A. Yes.

Mr. Proskauer: That is all.

Direct Examination Resumed by Mr. Wright:

Q. Just one question on Warner, before you go to the next one. As a matter of fact, Lieutenant, if you had taken for Warner a three-picture division for that 1943-44 season, you would have exactly the same figures as you have there except for Buffalo, would you? A. Yes, that is correct.

Mr. Wright: That's all.

Preliminary Cross-Examination by Mr. Davis:

Q. Lieutenant, turn to the Loew column here and look (3141)
at the line for Los Angeles, where you have marked "Fox and Loew." That indicates a product split, does it not? A. That is correct.

Q. Where did you get the idea that there was a product split in Los Angeles? A. Let me have Exhibit 58.

Mr. Wright: I think I can save time. I think that Mr. Davis is right, that there should be a dash between Fox and Loew, rather than an "and", because——

Mr. Davis: That is not what I am talking about.

Mr. Wright: (Continuing) ——because that was a Fox and Loew pool.

Mr. Davis: The facts are that in Los Angeles, while we own a theatre, we do not operate it. It is leased to Fox, and our only relation is as landlord of the theatre, and we are charged in this as splitting the product.

Mr. Wright: I think I can clear this up by saying that so far as we are concerned, I do not believe there is any such charge. We do treat as pool situations, or have treated for our purposes, those where one defendant owns the theatre and leases it to another for operation. There is no dispute as to the

basic facts. I think it is only a matter of language that we are talking about, as far as I can see.

(3142)

Mr. Davis: I would like to know by what authority that is treated as a pool. Certainly a landlord of real estate has a right to lease it to anybody he chooses without entering into the business of his tenant.

Mr. Wright: There cannot be any question about that.

Mr. Davis: Then, all right, if it is agreed this is incorrect as to Los Angeles, we will pass to San Francisco.

Mr. Wright: On our tabulation I would say it should be with a dash instead of an "and"——

Mr. Davis: I say it should be neither.

Mr. Wright: (Continuing) ——and a footnote to the theatre list shows the precise relationship between Loew and Fox in the theatres in question.

Q. Let us pass to San Francisco. You have a charge here, or, rather, you have a line which indicates Loew-Fox-Paramount. Are you suggesting that there is a pool of those theatres in San Francisco?

Mr. Wright: Certainly there cannot be any question but that the answer is Yes to that, and I think there is a footnote reference to the exhibits on which we rely to establish the joint relationship of the defendants in question in those theatres.

Mr. Davis: The point I am making, Mr. Wright, is your witness comes on the stand and says this is

(3143)

a correct report of what the exhibits contain. I say it is not a correct report of what the exhibits contain. I say there is no pool in San Francisco. I say that in San Francisco the only theatre we own has been

leased and we have no participation whatever in its operation or receipts.

Mr. Wright: Again, the facts as to the relationship are set forth in Exhibits 231, 232, 233 and 222, which are cited in the footnote.

Mr. Davis: Are you asserting that those exhibits support the statement which your witness has made in his schedule?

Mr. Wright: Yes, we are.

Mr. Davis: Well, I deny it.

Q. Will you point out, Mr. Witness, what the exhibits show as to San Francisco,

Mr. Wright: If the Court please, I think we can shorten this again. Those exhibits make it appear that the theatres owned respectively by Loew and Paramount and Fox in San Francisco are all operated by Fox. Now, there is no dispute between us as to those facts. Again, it is simply one of characterization. For our purposes we have collected those joint interests and for convenience referred to them as pool situations. By any other name the relationship of

(3144)

course remains exactly the same.

Mr. Davis: I appreciate Mr. Wright's chivalry in coming to take the place of his witness on the stand. I am merely testing the witness, who has presented this as an accurate picture of the theatre situation.

Judge Hand: Go on and answer.

Mr. Davis: It is either right or it is wrong, and there is no reason why it should be represented here by symbols which are supposed to indicate a certain relationship between these defendants when the relationship does not exist at all, and a misrepresenta-

tion by symbols is just as much a falsity as a misrepresentation by words. That is my position about it.

Judge Hand: Can you answer this question?

The Witness: I am afraid I cannot.

Q. All right, I will ask you one more and then we will—I have some others, but I will stop with one more. Take Paterson, New Jersey: What does your schedule indicate about the Loew films in Paterson, New Jersey? A. It indicates a Paramount-Warner pool.

Q. And that Loew's films are licensed to a Paramount-Warner pool? A. That is correct.

Q. Does it take any account of the fact shown by previous testimony in this case, that Loew's films in Paterson are divided between Warner and Adams and the independent (3145)
exhibitor? A. I am not sure about that.

Q. Well, I ask you whether your schedule indicates that, this schedule, this Exhibit No. 428? A. No, this schedule does not indicate the name of the theatre.

Q. Does that indicate licensing of films to any other exhibitor than an apparent, speaking by the schedule, Paramount-Warner pool? The answer is it does not? A. I am sorry. Will you read the question?

(Question read.)

A. I don't know.

Q. Let me give you one more. I will break my promise, and just mention one more here. Houston, Texas: What does your schedule, Exhibit 428, show as to the Loew films in Houston, Texas? A. Shows that they are exhibited in Loew and Paramount theatres or theatres affiliated with Loew and Paramount.

Q. Isn't it a fact that all Loew's first-run theatres in Houston are exhibited—licensed to Loew's own first-run

house? You have been over the papers. Isn't that right. A. I know, but you—I am sorry, I did not get qour question. You said "first-run theatres."

Q. Isn't it a fact, ash shown by the evidence and by the documents you have been over that Loew's films in Houston are licensed to Loew's own first-run house alone and that there is no split with Paramount? A. No, this shows there (3146)
is a split with Paramount.

Mr. Wright: That can be resolved by—haave you got exhibit 58?

Mr. Davis: Just a moment, Mr. Wright. I am speaking now, not of what Exhibit 428 shows, but of what the documents on which it is built will exhibit.

Mr. Wright: That is what I am trying to refer to. Exhibit 58, I believe, is the Loew's admission which will show what Loew said about where its pictures played.

Mr. Davis: That is all I want to ask him.

Judge Hand: We will adjourn until 2:15.

(Recess to 2:15 p. m.)

(3147)

AFTERNOON SESSION.

The Court: Now let us move along. We have spent a very long morning, without any intermission, making corrections, and stuff like that, which I think ought to be agreed on between the parties in advance.

Mr. Caskey: Wr. Wright was told about these objections Friday afternoon and refused to make the changes.

Mr. Wright: Now that is an utter misstatement of fact.

Mr. Seymour: If your Honor please, the difficulty has been that we saw these for the first time late Fri-

day. We checked them to some extent. They are not strict rebuttal material. It is really material that should have come in on the direct case.

Judge Hand: I think that is true.

Mr. Seymour: So we are doing the best we can.

Mr. Wright: The material itself, if the Court please, was all outlined in the appendix which was served on them September 20th. Now of course the additional material that was added here was not available then because the data on the additional cities necessary to complete the 92 did not come in until after our case was closed. We made every effort to give them the material in advance.

PETER M. BORWICK, resumed the stand.

Mr. Seymour: I just have a couple of questions on (3148) this.

By Mr. Seymour:

Q. Referring to the Paramount column, there are in that column some 48 theatres in which Paramount has an interest which shows Paramount product first-run, isn't that so? A. Well, I can't say offhand. I did not count——

Q. Subject to correction, it is approximately 48, isn't it? A. I would say somewhere in the neighborhood of that figure.

Q. Now, referring to the first entry in the column under the heading, "Paramount," what is that intended to mean, the word "Par." opposite "New York, N.Y."? A. It merely means that Paramount licensed its feature pictures to theatres affiliated with Paramount Pictures, Inc.

Q. In the City of New York? A. In the City of New York.

Q. And does New York, N.Y., include the five Boroughs? A. No. That includes Manhattan, first-run New York.

Q. That is not made clear, is it? A. Well, first-run New York is first-run New York—,

Judge Goddard: Will you speak a little louder, please.

The Witness: I beg your pardon.

A. (Continuing) I say first-run New York is first-run New York City.

Q. Isn't it a fact that the admissions of fact show that in (3149)
Manhattan, which is only one of the five Boroughs of New York, N.Y., Paramount Pictures were shown first-run not only in the Paramount theatre but also in Loew's theatres and in independent theatres in the Borough of Manhattan? A. The only way I can answer that is by checking the original exhibit. Would you kindly get that, please? (Exhibit handed to witness.) Yes, there is one feature picture licensed to the Macon Amusement Corporation for exhibition first-run in the Criterion theatre. I think that is a Loew theatre.

Judge Hand: Why did you limit this to Manhattan? Just because you were told to?

The Witness: No, sir, because Manhattan has clearance over Bronx, Brooklyn, Richmond, Queens and surrounding area.

Q. Wouldn't it have been correct, then, to indicate, when you say New York, N.Y., that it is only the Borough of Manhattan? A. To be absolutely precise, I imagine so. We can make that correction.

Q. Yes, you can easily make corrections——

Mr. Wright: If the Court please, there is no need for any correction. First-run in Manhattan is first-run in the entire City of New York. That is where the first-run occurs, and it has clearance over all the rest of the area.

(3150)

The Court: All right. Let him go on with his cross-examination.

By Mr. Seymour:

Q. Now, would you go on, please? Aren't there features licensed to others first-run in Manhattan in addition to the Paramount theatre, in addition to the one you have already mentioned? A. There are four features licensed to Bobby-Dick, Inc., for first-run in the Globe theatre. I don't know who operates or runs the Globe theatre offhand.

Q. You just excluded those because you thought it would be a good idea? A. No, sir.

Q. Why was that, because there were less than six? A. I would say that that was an inadvertent omission.

(3151)

Q. Were there some other features licensed by Paramount in theatres other than the Paramount Theatre in Manhattan? A. There were two features licensed to City Enterprises Corporation for exhibition in the Victoria Theatre. Offhand I don't know whether that is a Loew theatre or not.

Q. Is that another inadvertent omission? A. Well, I said that the entire total of—now, wait a minute.

Q. I am told it is not a Loew theatre. I do not know the fact. A. That is a Loew theatre, according to Exhibit 163.

Q. Loew's counsel shake their heads. I don't know. A. There is 163.

Q. Anyhow, you considered it a Loew theatre but you did not show licenses to Loew in your entry under Manhattan, isn't that so? A. The way this thing should have read is "Paramount and Loew."

Q. Why shouldn't it also have read "and independent"? A. No, because the total number of independents licensed here is less than six.

Q. Will you look at your reference to Bobby-Dick again? How many does your copy of the admission show to Bobby-Dick? A. That is four.

Q. Doesn't it show five? A. It does not.

Q. So what you say is that there were only six to inde-
(3152)
pendents and therefore you left them out; is that it? A. Now, wait a minute, wait a minute. You have two feature motion pictures licensed to United Artists Theatre Circuit and Paramount Pictures, Inc. for exhibition in first-run Rivoli. Well, that is two plus eleven, thirteen. That leaves only two licensed to—I mean, four licensed to independents.

Q. You gave us four as to Bobby-Dick and two— A. You see, there is one licensed to the Rivoli.

Q. What you say is you have left out reference to the independents on the ground that there weren't six? A. That is correct.

Q. According to your figures? A. That is right.

Q. And you inadvertently omitted the other one? A. That is correct.

By Mr. Caskey:

Q. Will you look at Richmond, Virginia, under the Fox column, about one-third down. A. Yes, I have it.

Q. You show there independent and Loew-Independent. A. That is right.

Q. Meaning that some pictures were licensed to an independent and more than six pictures were licensed to a theatre in which Loew and an independent had an interest? A. That is right.

Q. I show you Exhibit 44 for Richmond. Have you got it
(3153)
there? A. That is correct.

Q. How many pictures were licensed to the group that you designate as Loew-Independent? A. It doesn't say the number.

Q. Sir? Got the answer? A. Oh, wait a minute, wait a minute. Yes, I have it.

Q. How many were licensed? A. It does not say the number that was licensed to an independent.

Q. Well, I didn't ask you that. I said, how many were licensed to this group that you described as being Loew-Independent? A. Four.

Q. But you put that on your list, didn't you? A. That was included inadvertently.

Q. The exhibitor, as shown here, just follow me, Twentieth Century licensed to W. & V. Company, Inc., J. D. Eagan, four features for exhibition at the National and Park theatres first run. That is Wilmer & Vincent, isn't it? A. I understand that to be a Loew-Wilmer & Vincent pool.

Q. Just answer my question. That is Wilmer & Vincent? A. No, I don't know whether it is Wilmer & Vincent.

Judge Hand: Where is this?

Mr. Caskey: Under Richmond, Virginia.

Judge Hand: Oh, still Virginia?

Q. Well now, Mr. Borwick, at the heading you have (3154) this title, "Exhibitors holding first-run contracts with defendant distributors," is that correct? Did I read that right? A. That is what it says, yes.

Q. Now, this chart does not purport to show any such thing, does it? A. I beg your pardon. That should read "Exhibitors"——

Q. "Exhibitors holding first-run contracts with defendant distributors." That is the way it reads, isn't that right? A. I beg your pardon. That is right.

Q. Now, it does not show any such thing, does it? A. A. How do you mean that?

Q. Stick to Richmond. There is no contract that you have seen in evidence with Loew's for the exhibition of any

pictures in Richmond, is there? A. No, I haven't seen the actual contract.

Q. And the admission of fact is that we licensed four pictures to Wilmer & Vincent. Now, from some other source you say that Loew's have an interest in that theatre and so you show a chart indicating that Loew's has a contract for first-run pictures in Richmond, is that right? A. This Exhibit 163 shows the National Theatre as one in which Loew has an interest.

Q. Yes, that is right, but there isn't any contract with Loew's for any pictures? A. As far as I know, there is. (3155)

Q. You know to the contrary, don't you? The admission of fact is the only evidence that you have, isn't that so? A. Well, this W. & V. Company is an affiliated of Loew's.

Q. You know that to be a fact? Are you testifying to that either of your own knowledge or what you know to be in this record? A. I believe so. Get Exhibit 15, please.

Q. Let me illustrate it. Take San Francisco. There you show Loew-Fox-Paramount. You do not contend that there is any contract with Loew for the exhibition of Fox pictures in San Francisco, do you? A. Either with one or more of these defendants in the form of an operating company or some company affiliated with one or more of these defendants.

Q. Just sticking to San Francisco and Loew, do you content that there is in evidence any contract between Loew's and Twentieth Century-Fox licensing Fox pictures in San Francisco? Just that question. A. I can't answer that. I haven't seen the contract.

Q. Do you contend that there is any contract with any corporation in which Loew's has an interest? A. I believe so.

Q. What is the name of the corporation? A. (No answer.)

Q. Don't you know, Mr. Borwick, that Fox licenses its pictures to its own subsidiary in San Francisco?

(3156)

Mr. Wright: If the Court please, I don't think there is any question about the fact that only——.

Mr. Caskey: I am cross-examining, Mr. Wright.

Mr. Wright: Just a moment. There is no contention on our part at all with respect to any situation where a pool is shown as the exhibitor that the license contract for the first-run films in question was made with more than one. The license contract in any event would be with the one who operates the theatre. The only thing that the pool indication there shows is that theatres affiliated with the exhibitors mentioned there were jointly operated as first-run outlets for the product in question.

Mr. Caskey: Well, but the heading——

Mr. Davis: I may ask Mr. Wright by what authority he says that Loew's is a member of the pool in San Francisco.

Mr. Wright: The authority for that statement is the evidence referred to in the footnote there which shows that Loew's leases its theatre to Fox for operation there along with the Paramount theatres in San Francisco and the Fox theatres. All three theatres are operated by Fox as first-run outlets in the town. The contracts are admittedly made with Fox, the film contracts.

(3157)

Judge Hand: Well, it is the same old question raised before, as I understand it——

Mr. Caskey: Well, your Honor, in the first place ——

Judge Hand: ——as to whether a landlord and tenant relationship under these circumstances is the equivalent of a pool; isn't that it?

Mr. Wright: Precisely.

Mr. Davis: Do I understand Mr. Wright to contend now that that is the equivalent of a pool; to lease a theatre, as we have in San Francisco, having no contract other than landlord and tenant, that that constitutes a pool? I would like Mr. Wright to answer that and say that that is his position, because then we will know what we are shooting at.

Mr. Wright: As far as we are concerned, we used the term "pool" as one short word to describe a variety of relationships. One of those relationships is a situation where one of the defendants owns a theatre and leases it to another; another such situation is where they both own the theatres and have an operating agreement under which the profits and losses are shared; another is where they each own stock in a corporation.

Judge Hand: I know. Any kind of association you claim is a conspiracy under all the circumstances, no matter what form it took?

(3158)

Mr. Wright: Yes. We use the word "pool" to cover all of those situations.

Mr. Davis: If the Court please, I submit the word "pool", legally speaking, as used by Mr. Wright, has no significance whatever.

Mr. Caskey: I just want to challenge the statement Mr. Wright made. I said there was a provision for leasing the Loew theatre in San Francisco, and then he used these words, according to the best of my memory, along with the Paramount and Fox theatres. Now there is no such agreement in evidence.

Mr. Wright: By "along with" I meant only that both Loew and Paramount executed leases with Fox for their respective theatres, and all of the theatres of all three are operated by Fox as first-run outlets in the town.

Mr. Caskey: Now, Mr. Wright, can it be conceded —maybe this will shorten it—that in these so-called pool situations which you have listed, where you have a hyphen here, that the contract, the license agreement, was made with the operator of the theatre as specifically shown in Exhibit 44?

Mr. Wright: Obviously.

Mr. Caskey: All right; and is not made, in the case of San Francisco, with either Loew's or Paramount?

Mr. Wright: The exhibit is not intended to contradict in any way any fact that may appear in under-
(3159)
lying evidence.

Mr. Caskey: All right.

By Mr. Caskey:

Q. Now, Lieutenant, when we come to Jersey City, you show Warner, RKO, Skouras. Now why is RKO included? A. Well, I think footnote 12 would indicate the exhibit which would explain that.

Q. Did you put those footnotes on? A. Those footnotes were put on by Mr. Wright.

Q. And you had nothing to do with it? A. That is right.

Q. And you don't know whether they are right or wrong? A. I assume they are right.

Mr. Wright: Thank you.

Q. Now, do you know that the pictures were licensed in Jersey City to Skouras under a franchise in 1931, four years before RKO acquired any interest in the Skouras theatre? A. I did not know that.

Q. And you did not read Exhibit 12 in preparation for your testimony? A. As I said, I did not mark the footnotes.

Q. Now, when you get down to Elizabeth, New Jersey, what basis is there for saying RKO and Warner? A. Elizabeth, New Jersey?

Q. Fourth from the bottom. A. May I have Exhibit 44? (3160)

(Exhibit handed to witness.)

Q. 44 shows it was licensed to Skouras Theatres Corporation, doesn't it? A. Yes, I believe that Stanley theatre is a Warner theatre.

Q. What is the Stanley theatre? And assuming that, what is the RKO theatre? A. Well, I imagine the State theatre is the RKO theatre.

Q. Don't you know that is a Skouras theatre? A. Well, it is a Skouras theatre, yes.

Q. Well, up here, in Newark, you put Skouras, didn't you? A. Yes, we did.

Q. And in Jersey City you put Skouras, didn't you? A. Yes, sir.

Q. Now, what is the justification for leaving it out when you come to Elizabeth then? A. I do not know. Perhaps again it was due to inadvertence.

Mr. Caskey: I hope your Honors will not receive this exhibit in evidence.

Mr. Leisure: May I ask the witness just a couple of questions?

Judge Hand: Yes.

By Mr. Leisure:

Q. Lieutenant Borwick, the record here, RKO's answer to the Government's request to admit facts, the record shows for this 1943-44 season RKO licensed Warner and Loew's in (3161)

Pittsburgh. That is shown on your chart here under RKO in line 8, is it not? A. That is correct.

Q. Now I think you testified this morning that your first-run—you say the first-run contracts as used in this chart do not include the contracts for six or less pictures? A. That is correct, sir.

Q. It is a fact that RKO's answers do include in many instances licenses to independent theatres for less than six pictures? A. I could not give you a definite answer unless I checked the record.

Q. Well, without spending time on it, just let me refer you to this same one that we are talking about here in the Pittsburgh situation. You have shown Pittsburgh on your chart, haven't you, as to being Warner and Loew's? A. That is correct.

Mr. Wright: If the Court please, he also covered it in his direct testimony and explained exactly what he did in that situation.

Mr. Leisure: If you will just be patient with me, Mr. Wright, I will only take a min[illegible]

Q. It is shown by RKO's answers that as to the Skirball theatres, 11 pictures were licensed during that same season, first-run to the Barry theatre, which was an independent. You have shown that fact on your chart, Exhibit 428, have you? A. That is right.

(3162)

Q. And as I understood your testimony, your reason for excluding those is because you did not consider the theatre a regular first-run theatre? A. That is correct.

Q. And by regular, you meant that it did not take clearance over other theatres? A. Not only that, but it did not play—in other words, it did not get the regular splits of either, as I said, one to three, or fifty-fifty, but played what it could get.

Q. Now on this very theatre that we are talking about in Pittsburgh, your records show that that very theatre, the

Barry, took clearance over all other theatres in the city of 21 days on RKO pictures? A. You say the Barry theatre?

Q. Yes. A. Well, I do not have a record of it.

Q. Well, if you will just look at our interrogatories you will see that, sir. But without taking time to do that at this time, if that is true that in that case there was one theatre that was sold regularly that is classified as a first-run, your chart here does not reflect that, isn't that so? A. That is right,

Q. The record will speak for itself as to what I am saying as to whether it is true or not. Your chart does not reflect that as to the Barry theatre. A. This chart does not reflect the pictures sold to the Barry theatre.

Q. Now as I understood you in discussing the question (3163)
with Judge Proskauer this morning as to Buffalo, you said that you excluded the Twentieth Century theatre, is that right? A. Yes, I think I did.

Q. And you gave the same reasons I believe then—so we won't bring Mr. Wright to his feet—you gave the same reasons on cross-examination then that you gave on direct as to why you excluded it? A. I don't remember at the moment what the reason was.

Q. Well, you did exclude those? A. Yes, I did exclude those.

Q. And you did not consider it a regular first-run, and that is why you excluded it? A. That is right.

Q. Now the record in this case shows that RKO sells all of its first-run to that theatre. Would you feel that a theatre could be first-run for RKO and not first-run for Warner Bros? A. Would you repeat that, please?

Mr. Leisure: Will you please read it?

Q. (Question read.) A. Well, the only way I can answer that is simply this, that if it played discarded pictures or

small numbers of pictures of both of them, of course it would not be considered a first-run. Or if it played discarded pictures of RKO and did not play any pictures at all of Warner, why it still would not be a first-run.

Q. You say "if" now, Lieutenant. But the record shows (3164) that during the 1943-44 season, RKO Radio Pictures licensed 38 of its first-run pictures to the Twentieth Century, so there is no room for an "if" there, is there. It also played Princess O'Rourke. A. (No answer.)

Q. I don't want to spend any further time on it; I just want the record to be straight. A. Just a moment. I want to make sure that there is not an error here.

Q. Go right ahead. A. We show, of course, you played all your product independent in Buffalo.

Q. Does it show on the chart? A. It sure does. Are you talking about Buffalo, New York? Is that right?

Q. That is right. The point of my question was, and I was curious to know, how a theatre could be first-run for RKO and not be first-run for Warner Bros. That was the point of my examination about Buffalo. A. Yes. Well, let me say this, that the independent is already included in the distribution of product under RKO, so that the independent is already given credit for any product that it plays.

Q. That is true, but it is not shown as to Warner? A. That is right, it was not shown as to Warner,

Q. Yet it was the same theatre, and yet you excluded it as to Warner and did not exclude it as to us? A. As I say, it is already accounted for.

(3165)

Q. Did you have any other reason for excluding these theatres under 6 and the 11, such as the very theatre, other than the reasons you have given us for making up this total, Lieutenant Borwick? A. I don't recall of any.

Q. Now, you notice on your summaries, you have on your summaries—take RKO for instance—that we sold only 23 independents, and that we sold to 63 affiliated theatres. If those factors that I have been bringing out here show that we sold to 28 independents first-run, that would change your total so that the relationship instead of being 63 to 23 would be 35 to 20-some-odd; that would have changed your chart considerably, wouldn't it? A. On that assumption, yes.

Q. On the record? A. Well, not considerably. I beg your pardon. You said five changes would be involved. I would not say that is considerable.

Q. I said if there were 28, as I am suggesting to you, the record shows. A. That would be an increase of five which on the basis of a total of 92 cities would not be a considerable increase.

Mr. Leisure: If your Honors please, I object to this chart. I ordinarily certainly would not object to the chart, but this is not based on the record. The witness has taken the figures that are in the record

(3166)

and then arbitrarily outside of the record he has determined what he chooses to call regular first-run; so that there is something in the record here put in by this chart which is not borne out by the record. Now, if Mr. Wright had wanted to make this point it seems to me it was the burden upon him in his direct case to prove and show what he considered to be a regular first-run theatre as being a regular first-run theatre. Then this kind of a chart might be valuable. But as it is now, it seems to me it is grossly misleading to the Court, and I object to it not only because it is misleading but because it goes out of the record to prove what it tries to prove. Namely, as to RKO here, anyone reading this would think that we had sold to 63 affiliated theatres and to only 23 independents, whereas the record already shows that it

should be a relationship of 35 affiliated and 20-some-odd independents, which is very close, and which we know to be a fact, and that is what it should be, and this chart does not show that, and it can only arrive at that conclusion by going outside the record, assuming for his own purposes that something is not a regular first-run theatre. And I have already shown that with respect to Buffalo he regarded it as a first-run theatre, because we sold all our first-run product there, but it was not a first-run theatre for Warner.

(3167)

So I think the chart is very much misleading, and I object to it.

Judge Hand: I think it is certainly confusing. At most this sort of thing is argumentative. It is not testimony at all. But we will admit it.

Mr. Wright: If the Court please, I can re-examine him on some of these situations which Mr. Davis covered, for example, and which Mr. Davis was in error about and the witness was right. I can call attention to other corrections of that nature, and it seems to me that it is futile to go through the process on the stand of covering the arguments of the parties with respect to the exhibit. We have made clear I think exactly what was done in this connection, and the exhibit does not purport to be anything more than a statement of our contentions as to what this underlying data that is referred to in the exhibit shows; and as such I think that it should be clearly received.

Now, if your Honor wishes me to spend more time with the witness on these discrepancies that have been developed, I will do it.

Judge Hand: I said we will admit it.

Mr. Wright: I am sorry, I did not get the Court's ruling.

(Government's Exhibit 428 for identification received in evidence.)

(3168)

Mr. Wright: Would you mark these exhibits 429, 430 and 431 respectively.

(Marked Government's Exhibits 429, 430 and 431 for identification.)

Judge Hand: What are these, more towns?

Mr. Wright: This is the same data for the same towns for three prior seasons which are covered by these same admissions of fact.

Mr. Proskauer: Mr. Wright, would you save time and concede that these that you are now offering are subject to the same infirmities developed in cross-examination as the ones received in evidence?

Mr. Wright: Precisely.

There is just one question I want to ask him. I think there was a different method used as to one or two seasons and I want to have him explain that to the Court.

Mr. Seymour: I would like to ask a question about the next chart before it is received.

Mr. Proskauer: Could I have an answer to my question? It might silence me if I got an affirmative answer.

Mr. Wright: What is your question?

Mr. Proskauer: Will you concede that these that you are now offering are subject to the same infirmi-

(3169)

ties developed on the cross-examination of the witness as to the last one?

Mr. Wright: I answered you with a firm yes once, and I will do it again.

Mr. Proskauer: It was not firm enough for me to hear it.

Mr. Wright: These are similar tabulations to 428 based upon the admissions of fact filed by the eight respective defendants. 429 covers the 1941-42 season; 430, the 1939-40 season; and 431, the 1936-37 season.

Mr. Seymour: I should like to ask a few additional questions about these. I will just be a moment.

Mr. Wright: Well, may I ask him some direct questions first?

Mr. Seymour: Surely.

Direct Examination resumed by Mr. Wright:

Q. Calling your attention to the Paramount column in the exhibits marked for identification as 430 and 431, those were seasons, were they not, prior to the consent decree method of selling in small blocks, is that right? I am calling your attention to 430 and 431, the 1939-40 and 1936-37 seasons. A. Yes, sir.

Q. Those were seasons which were prior to the consent decree method of selling in small blocks, is that correct? (3170)

A. That is correct.

Q. During those seasons did you notice that in the answers furnished by Paramount they sometimes showed more features as receiving a first-run exhibition in a town than they actually released during that season? A. That is correct, sir.

Q. In those cases did you ascertain what the explanation of that was? A. Yes.

Q. And the explanation was, was it not, that they had—after the one exhibitor had bought the entire group for the season, certain features were rejected by him for first-run and then sold to another exhibitor, is that right? A. That is correct, sir.

Q. In those situations, regardless of whether an exhibitor played six or more, you did not include in your tabulation the exhibitor playing the rejected features, is that right? A. That's right.

Q. Otherwise the method you have pursued was the same as that that you have already described with reference to Exhibit 428? A. Exactly the same, sir.

Preliminary Cross Examination by Mr. Seymour:

Q. As I understand it, on these other charts that have just been received, you continued the process of excluding from the column any independent exhibitors who played six or less pictures, is that right? A. That is correct.

(3171)

Q. And that runs through all the columns in all these other charts? A. That is right.

Q. Did you also, referring to the chart for the 1941-42 period, exclude from the Paramount column some independent exhibitors who played more than six Paramount feature pictures during that season? A. Well, if I did, it was done inadvertently.

Q. Weren't there more than six Paramount feature pictures licensed to independent exhibitors in Camden during that season? A. Talking about the 1941-42 season?

Q. That's right. A. I notice here that you have got a note, "Information in regard to five features which are unaccounted for will be forthcoming shortly." I don't remember offhand whether we got that information or not. If we did not get the information, of course, it would be excluded. If we did, we will make the proper corrections.

Q. I ask you the same questions about Pittsburgh, Spokane, Fort Worth and Norfolk, were there any independent exhibitors who licensed more than six pictures in that season from Paramount which are not included? A. To save time, I will say the same thing, that it would not—if it was

omitted, it was omitted inadvertently and will be corrected
(3172)
accordingly.

Q. Referring to, let me ask you about, Kansas City, Missouri, there you have included RKO although the admissions of fact indicate that, I think, seven features were licensed, but you made no reference to an independent which licensed eight features. Is your answer the same as to that? A. Yes, very definitely.

Q. Referring to the 1939-40 season, would you look at Denver? A. 1939-40?

Q. Yes. That shows that Paramount pictures were licensed to Fox, does it not? A. 1939-40?

Q. Yes. A. Yes, it does.

Q. Isn't it the fact that the admissions show approximately six licensed to Fox and approximately 55 licensed to an independent? A. If it does, as I say, if it does, that can also be corrected.

Q. And that would be an inadvertent omission? A. Yes, sir.

Q. And I ask you the same questions as to the 1939-40 seasons as to Atlanta, Camden, Chicago, Fort Worth, Oakland, Paterson, Rochester, San Francisco, Scranton, Utica, Wilmington, Wichita and Norfolk, I aks you whether in the admissions of fact it does not appear that more than six features were licensed to independents in those cities in that year? A. As I say, I cannot tell you, again, without consult-
(3173)
ing the——

Mr. Wright: If the Court please, he has already testified that as to those prior years, 1936-37 and 1939-40, where they appeared to be rejected, that is, the features, he excluded the exhibitor playing them no matter how many there were.

Q. How could you tell from the admissions of fact that they were rejected features? A. Well, if you license 60 pictures during the season, that is, if you produced or distributed 60 pictures during the season and you distributed 70, of course, 10 must be rejected, so that the total number of exclusions would have to be 16, isn't that correct?

Q. So that, of course, applies to Denver where Fox licensed approximately six and an independent licensed 55, that is the reason you included Fox and not the independent? A. As I say, if there is—if in that total is included more pictures than you distributed during the season, therefore the basis for a rejection would have to be 16 and not 6.

Q. What you did was, where you found more than 60 you always excluded a reference to the independent, is that right? A. No, I can't say that.

Q. But generally where there was any question of doubt as to whether you ought to mention the independent, you ex-

(3174)

cluded the independent? A. No, that is not so.

Q. I can give you some more cities in that 1939-40 season. I have already mentioned a long list. Didn't you also exclude Birmingham, Kansas City, Missouri, Long Beach, Pittsburgh, Portland and Spokane, where more than six features were licensed to independents and you make no reference to it? A. I said the same statement I made before applied to these cities.

Q. Your observations as to New York, N. Y., would be the same as they were on the 1943-44 chart as to all of these, is that so, that the reference is actually to Manhattan? A. Well, it would be true if that was the policy at that time.

(3175)

Q. Dealing with the 1936-37 season, isn't it the fact that the admissions of fact show license of more than six features to independents in the following cities which you have not referred to on the chart for that year? A. Well, again—

Q. (Continuing) Atlanta, Birmingham, Cleveland, Fort Worth, Kansas City, Missouri—— A. Let me——

Q. (Continuing) Long Beach, Oakland, Omaha, San Francisco, Spokane and Wilmington, Delaware? A. Let me say this, that the original information that Paramount submitted to us was not complete and any errors that may crop up can be partly—can partly be accounted for by the lack of complete information, and as such information is completed, corrections will be properly made.

Q. But where you got information in the admissions showing the licensing of more than six features to independents, that was not incomplete information, was it? A. No, it was not.

Q. And your reason for excluding it, if the information contained that information, was simply that you decided not to include it, is that it? A. No.

Q. It was an inadvertent omission? A. It was an inadvertent omission in the calculation.

Q. And that might have happened in all those cities I mentioned? A. It might have happened. I cannot say that

(3176)

it has.

By Mr. Wright:

Q. Lieutenant Borwick, in connection with those——

Mr. Caskey: Just a minute. Are you finished?

Mr. Wright: I want to ask him just one.

Q. (Continuing) ——in connection with those two seasons on Paramount, 1936-37, 1939-40, it is a fact, is it not, that as to those seasons you excluded exhibitors playing those pictures which appeared to have been rejected regardless of whether or not they were affiliated or independent, or regardless of how many features they played, is that right? A. That is correct.

By Mr. Caskey:

Q. Look at 1936-37 under Denver. You show Fox pictures licensed to Fox. Where did you get that information?

The Witness: Would you kindly repeat your question, Mr. Caskey?

(Question read.)

A. The list we have here shows Fox have an interest in those theatres.

Q. As of what date is that theatre list? A. I don't know offhand.

Q. Look at the front of it. A. August 1, 1945.

Q. What other basis have you got for saying that it was (3177)
Fox theatres? A. Well, we used answers given to interrogatory 50—1939—as the basis of determining the theatre affiliation of any particular defendant.

Q. Doesn't it appear right on the face of the answer to the interrogatory, which I am showing to the Court, that that was an independently operated theatre in 1936, and doesn't the changeover to Fox stand out perfectly plain? Just look at the whole answer for the four years. They are all on one sheet of paper, aren't they? Look at Exhibit 44. That is the answer to the interogatory. A. Well, I cannot say who had a financial interest but what you have got here, General Theatres. I would have to search back——.

Q. What evidence is there in the record that you or Mr. Wright or anybody else can produce that Fox had any interest in any theatre in Denver in 1936? A. Well, this Exhibit No. 12 shows—supplied by defendant Fox—shows this Aladdin Theatre, Broadway Theatre, Denver Theatre. Now, I do not know who the other theatre is, but I do not find it here, but you show, on this answer here, you show the Aladdin, you show the Broadway; you show the Denver.

Q. As of what date is that? A. Well, this was submitted sometime in 1939 or 1940.

Q. Yes, sir. It does not purport to be as of 1936, does it? A. No, this does not, I imagine.

(3178)

Q. What other evidence have you got to justify your statement in this chart? A. Whether——

Q. What evidence. A. (Continuing) ——there is evidence we may have had in the files that may not have been introduced in evidence, I don't know.

Q. Your counsel has stated this is a compilation of what is in evidence. What did you yourself personally look at that led you to classify those theatres as Fox? A. On theatre lists supplied to us by defendants plus answers to interrogatories of that character, particularly this 50, plus any other information that we had in the Department of Justice files pertaining to that.

Q. Will you produce it, anything that you have got, that is not in evidence? A. If it is available, I shall produce it.

Mr. Caskey: Mr. Wright, have you any evidence that you want to produce to justify this statement?

Mr. Wright: If the Court please, I do not know at this moment when the Fox Company acquired the first-run theatres in Denver from Hoffman, who I believe was the former operator there, and is now a Fox partner. As far as we are concerned it is of no importance; if Mr. Caskey will give us a date on it, we will accept that date as the fact.

Mr. Caskey: My point is that we answered the

(3179)

interrogatories, and on the face, there was no justification for this. This purports to be a summary of evidence, and I submit there is no evidence in the record that justifies that statement.

Mr. Wright: If there isn't, the statement goes out, there is no question about that. I said, just name the date when Fox acquired the Denver first-runs and we will accept it.

Mr. Caskey: I will find the date, but I submit the exhibit ought not to be received because there is no justification for this one.

Judge Hand: I do not think myself it is a very good answer to say, whenever they find mistakes here, name the date and we will concede it. I realize that this is a complicated thing with lots of facts and you cannot be a perfectionist. Probably it is subject to scrutiny.

Mr. Seymour: If your Honor please, what I am troubled by is this, when a thing like this, which is full of mistakes, is received, it becomes a jumping off place, it appears in the Government's brief as gospel because it was received, although it is proved to be heresay in the cross-examination, and then to remind your Honors, and to make the corrections, we have to go through this whole process again. Having shown that it is inaccurate and that it is not in accordance with the evidence, it burdens your Honors and us to

(3180)

have it received and then be the springboard for other contentions. It is wrong, all these four charts have been proved to be wrong in many respects, but they will crop up again, uncorrected, if they are received in evidence, and I do not think these three should be received, and I think the other one ought to be stricken.

Mr. Caskey: The whole purpose, at this late date, just at the close of the case, of putting these in, as I was given to understand, as told by Mr. Wright, was so that we would have something which could be used

for the convenience of Court and counsel, which would be a fair summary of the evidence. These are not a fair summary of the evidence. They are, at most, a statement of contentions. In some instances we have shown them completely wrong, and they will simply, if received, as Mr. Seymour says, force upon us the burden, which is distasteful and distasteful to the Court of criticising and explaining and of attempting to set up another chart. We shouldn't have that burden. The person who prepared it should have that burden.

Mr. Wright: If the Court please, I submit that these charts are prima facie correct. There isn't any question that where you are dealing with 92 cities and exhibitors' contracts with first-run exhibitors with eight in each one, you have about 700-odd situations on each chart, and in no way I know of is it possible to avoid any errors creeping into the chart.

(3181)

Judge Hand: In many cases this witness has not only said he did not know, but in some cases you have conceded they were wrong, a mistake to be corrected, and it is a pretty sloppy kind of exhibit to put in as a tabulation.

Mr. Wright: If the court please, the data was checked as carefully as we were able to check it. The reason for these arbitrary adjustments that we had to make in the first instance was simply because the defendants declined to give us what the other three defendants gave us, that was a straightforward statement of who their first-run accounts were in these cities. Instead of giving us that, they listed all the pictures that played their pictures—the theatres playing them, regardless of whether they were neigh-

borhood, subsequent-runs, rejected pictures or anything else. I admit that has made a complex situation. We have dealt with it——

Judge Hand: Didn't they ever give you their first-runs?

Mr. Wright They gave us, as to these seasons, these statements, which simply said, in such and such and town the following number of pictures were exhibited first-run in such and such an exhibitor's theatre.

Judge Hand: What did they hold back from you, if they did hold anything back from you? Why haven't you got it long before this?

(3182)

Mr. Wright: This was a matter where we proceeded in this way: We originally served admissions with respect to some—notices to admit—with respect to some of these cities set forth, asking them to admit what the first-run theatres were in the town and what theatres were their regular first-run outlets, that is, during the seasons in question. Then they said, "Well, you don't need to serve any more notices. We will give you that data and for all the cities in the form of these statements," and when we got the statements they weren't the form of the statement as to what the first-run theatres were in the town. They refused to make any statement or concession as to what was or was not a first-run theatre in any town. They would not make any statement or concession as to who the first-run account, the regular first-run account, was in the town, but insisted on giving us only the statement as to who played the various number of pictures first-run in these towns. We took that data and we made this analysis of it, took it as they gave it to us, and I repeat, there is nothing in any of these

charts that is intended to contradict any of that underlying evidence on which it is based. We did feel bound to tabulate in this manner rather than putting the Court to the burden of examining all of the exhibits that are reflected here for the purpose of determining the respective merits of the parties' con-

(3183)

tions.

Judge Hand: You know what has been done in these various theatres, and how would you classify them if you did know them?

Mr. Wright: The record should, I say, that the record——

Judge Hand: Don't tell me what "should."

Mr. Wright: I say that the record——

Judge Hand: You have had an opportunity here to examine these people very fully, according to my notion, and I am not going to admit a lot of stuff that was merely a vague classification based on nothing you found.

Mr. Wright: I submit, if the Court please, that the record as it now exists, the underlying evidence itself, does permit accurate determination or sufficiently——

Judge Hand: Then don't interlard your remarks with statements that you could not get what you wanted and all that sort of thing. I really don't understand your argument, so I am not—and your defense of this exhibit, so I am not in a very good position.

Mr. Proskauer: I think I can clear this issue. He asked us, "What are your first-run theatres?" And we say, "We give you a list of every theatre in every city where we exhibit first-run." He has got in his mind some kind of an a priori subjective classification of what is called by him a regular first-run theatre.

(3184)

As I understand it, under that classification, the Music Hall in New York would not be a first-run theatre, because nobody uses it customarily, and he approximates everything, and he has throughout this trial, to the ridiculous norm that if we exhibit first-run, as we did in Buffalo, even with our guinea pig picture, not the refuse of our pictures, but the best picture we had, in a first-run theatre, where we sell six pictures, in his mind you exclude that because that is not what he calls a regular first-run, and all this difficulty comes from that obsession, subjective in the mind of the distinguished Assistant Attorney General. We have given him the facts and his criticism is that we do not adjust the facts to this a priori preconstruction of his about what he calls regular first-run accounts. I want to suggest to your Honor—

Judge Hand: He suggested that you have not given him the facts so that he could not get up any better exhibit than he has got.

Mr. Proskauer: They cannot get them——

Judge Hand: Wait just a minute. And he has followed that by a statement that his exhibit, with the exception of a few mistakes, which I should expect in a complicated situation like this is all right, that it is a proper classification. Those remarks seem to me

(3185)

wholly inconsistent.

Mr. Proskauer: They are not only inconsistent but they demonstrate why Mr. Seymour's objection and motion to strike the last exhibit should be granted. It does no harm to Mr. Wright to make that ruling, because he is still free to argue on his brief anything that is in this record. The vice that we see in this is that, instead of arguing what is in the record, we are going to

have to argue that an exhibit you have put in, or admitted, is not in the record and we are going to have to start from there and work backwards. It is no harm to Mr. Wright to exclude these exhibits, if this evidence is in the record.

Mr. Davis: May I say something?

Judge Hand: Of course, it is quite indifferent to us what tabulations in the way of exhibits we receive as long as there aren't too many, but it is vital that we should know what they mean and that they should show on their face what they mean as a reflection of the evidence without too much outside correction and examination.

Mr. Davis: I am a little bit sensitive, your Honor, about my client. When Mr. Wright says that "They haven't given" him evidence, I suppose he means that "they" to be an all-inclusive pronoun and that we are within it. We have answered every interrogatory that was put to us. And on this question of what our first-run theatres are, your Honors remember that some-

(3186)

thing like four weeks ago, the first witness who began the defendant's case, was introduced by my clients and gave a list of the theatres which he considered first-run, which was tendered and accepted subject to check, and on the 5th day of November last, two weeks ago, that list was formally and finally received in evidence. We have nothing more we can contribute on that subject.

Mr. Caskey: If your Honors please, my objection is just that this is plain unsupported by the record. We have shown to your Honors what we have answered. There was no holding back. We said Twentieth Century licensed to General Theatres, Inc., R. E. Hoffman, its pictures for exhibition by Aladdin, Broadway,

Rialto, Tabor and Denver Theatres first-run. There can't be any clearer statement than that, and the plaintiff, without any record, anything in the record, has said that that was a Fox theatre.

(3187)

Mr. Raftery: Your Honors, aren't we back now to the point where we were this morning before we started? Judge Hand just commented about the charts, provided there are not too many. I think there are thirty more that are contemplated. Now gradually we are getting around to an argument between the witness who prepared his idea of what evidence is in and what counsel said——

Judge Hand: That is all right, we are perfectly satisfied to have that kind of thing go on; it goes on in every lawsuit where there are tabulating experts, and it is more aggravated and aggravating in a complex suit like this. What I do want to have in here is something we want to be satisfied is not merely confusing to us. I do not care what tabulations he puts in.

Mr. Raftery: If your Honors please, the only suggestion I wanted to make—I do not know whether this would be agreeable to the rest—let the witness, instead of offering this bundle of charts, put them together, give them to us, just as he would an index or an appendix to a trial brief, and we will answer him as best we can from what is in, instead of burdening the Court with what he says is in and which everybody else says is not in, and stop the eternal argument. That is the only point I make. It is not evidence, it is argument.

Judge Hand: It certainly is not evidence, that

(3188)

is true; but wouldn't some of your own testimony be subject to the same objection?

Colloquy

Mr. Raftery: I did not offer a chart, not one.

Mr. Proskauer: The answer, your Honor, is no, because we put in evidence no chart which was even questioned as to its accuracy in correspondence with the record. Of course it is proper to put in tabulations and charts of evidence. What is improper is to put in tabulations and charts of things which are not evidence.

Mr. Wright: May I say this, if the Court please. The primary purpose in offering this is to aid the Court. Now admittedly this is argumentative in form. I am simply trying by this method to narrow the area of argument.

Now, without offering these charts, and simply starting with the basic material, we would set this up in a trial brief and argue it, or in a final brief, and they would make an argument in their brief disputing it. Now the range of that would be enormous, if in the first instance we just argued about the admissions of fact, the theat[illegible] lists, the pooling agreements, and the other data that is reflected here.

Now in order to narrow the scope of that argument we offer these tabulations as prima facie evidence of these facts, with a description of how they were derived, and what we did; and then it seems to me they direct their fire at this chart, and you come

(3189)

out with an accurate appraisal, a more accurate appraisal ultimately of what is in this record than the Court ever would if it simply tried to reconcile the different points of view without the tabulations.

Judge Hand: I have no doubt of that if those charts were not too vulnerable. In other words, if they really show what you are doing.

Mr. Proskauer: Your Honor, there would not be any objection to what Mr. Wright says if it were not for the fact that we have not only challenged him sucessfully to show that these charts are in accordance with the evidence, but we have affirmatively shown that they misstate the evidence. Now, how is it of illumination to the Court to admit complicated charts like these as——

Judge Hand: It certainly is not if what you say is accurate, and goes in deep enough to his charts. That is where I have difficulty. I do not think they are very satisfactory as presented because when we look at certain things and certain situations we certainly do not know without reading 25 or 30 or a hundred pages of testimony what the thing covers.

Mr. Proskauer: He can make these charts accurate and use them in a brief and not give us this sort of stuff.

Mr. Raftery: Mr. Wright just said in effect he is

(3190)

putting a jurat on the trial brief and having the witness swear to the truth of a trial brief. Now I submit that in the interest of economy of time, we will take his trial brief unsworn to and reply on what is in evidence.

Judge Hand: If we could not make out a basis for what he is saying in his trial brief, a similar chart in his trial brief would not do any good.

Mr. Proskauer: That is why it does not have the dignity of an exhibit.

Judge Hand: The thing may be in doubt, but we want to get some kind of a head-on issue here and understand when certain statements are made what the contentions are.

Colloquy

Mr. Davis: Here is what it comes down to, your Honor: when this case comes on to be briefed, presumably Mr. Wright in his brief will make certain statements of fact, and he will refer to something to support them. If these exhibits are accepted he will in brackets in his brief say "See Exhibit 440" or whatever it is. If they are not accepted, he will have to refer your Honors to the original sources of evidence that the record contains.

Now there is no reason why a fallacious exhibit should go in to short-cut the burden of counsel in searching for the testimony on which the exhibit rests. If the exhibit's accuracy as a summary is admitted, it is a very great convenience to the Court, to the plain-

(3191)

tiff, to the defendants, to be able to refer to that summary; but if the integrity of the summary is under serious—and in this case, as we think, entirely successful—attack, it ought not to be the subject of citation in any future brief or argument.

Mr. Wright: If the Court please, the attack that has been made has been limited to certain specific situations appearing in the chart, and I submit that from the Court's standpoint it is of value to the Court to have this chart so that the attack, if well founded, may then be channeled to those specific situations, and you will have before you a comprehensive statement of what is shown or claimed to be shown by a great mass of underlying data,

Now, in the absence of any tabulation of this kind, we simply started at the point where, in order to make any statement, we have to say "See Exhibit So-and-so, so-and-so, and so-and-so," reeling off perhaps forty or fifty of them, and the Court has to do——

Judge Hand: Shouldn't you make a better summary of this?

Colloquy

Mr. Proskauer: It is perfectly simple to cut this Gordian knot. Let him make a decent and fair summary and we will agree to them.

Judge Hand: You can't expect him to make a summary according to your contentions, of course.

(3192)

Mr. Proskauer: I don't want that. Just what is in evidence.

Judge Hand: All we want is a summary based on his own contentions which points in that direction clearly so that we will know how he reaches these. I do not think we have that.

Mr. Wright: Let me see if I can make it clear: as to United Artists, Universal and Columbia, there is, of course, no question as to the method of tabulation used there. They furnished us with a list purporting to show their first-run accounts in the towns in question during those seasons. We just made a direct transcription of those cases.

Now as to the other defendants, the problem arose this way: they did not just name the first-run account in the city for the season. They gave us a list of theatres which played any of their films on a first-run in the town, with the number of films played.

Now the reasons why we had to make an arbitrary analysis of that material are these. It is an established fact from the testimony of witnesses here, that all of the features that these defendants released during any particular season are not sufficiently attractive at the box office to justify a first-run in what is known as a regular first-run theatre. Some of those in consequence, every year are rejected, and find their way

(3193)

for initial exhibition in some later run theatres that are not generally regarded as first-run theatres in the trade.

Judge Hand: And you would call such a theatre second-run where though it is playing a picture first-run, it is a run in a theatre which you do not consider a first-run theatre?

Mr. Wright: Yes. In almost all instances we agree with Mr. Rodgers' tabulation as to what is a first-run theatre. There are, in the entire list I would say two or three differences.

Judge Hand: How much would it affect you if you took their form of tabulation?

Mr. Wright: If we took what form, if the Court please?

Judge Hand: Their form of classification.

Mr. Caskey: If the Court please——

Judge Hand: Wait a minute, one at a time.

Mr. Wright: We did, as I understand, check—I asked to have it done; I assume it was done—check these 1943-44 lists against Mr. Rodgers' list of first-run theatres. Of course as to the prior season, Mr. Rodgers' list, covering a substantially later date, would not be of much assistance, and I think as to 1943-44 on either basis the differences between a tabulation using the methods we pursued, and a tabulation

(3194)

simply checking against his list would reveal very few differences, that the amount would not be significant? Now——

Judge Hand: Where is it significant? (No response.) Can't you hear me?

Mr. Wright: What?

Judge Hand: Where is it significant? In what years is it significant?

Mr. Wright: I say that his tabulation has no value for the other years because he put in a list of first-run theatres, a current list, which is close to the 1943-

44 season. But when you got back into 1941-42, 1939-40, and 1936-37, there would be different theatres operating as first-run theatres in the town than those shown on his list. Now we did use his list as to 1943-44, where it had value.

Judge Hand: I do not see why you could not use it in other years. I make nothing out of your statement.

Mr. Wright: If we did that, the defendants would claim, I suppose, that Mr. Rodgers' list had no relevancy in the prior years. Now in order to guard ourselves against that claim, we simply used the figures which they supplied for those years and made an arbitrary adjustment which we think gives a correct picture of the actual distribution of these films in the so-called first-run outlets in these cities which are accustomed to show the first class pictures of one or more defendants on a first-run.

(3195)

Mr. Proskauer: Your Honor, Mr. Wright has suggested that these theatres that we listed playing first-run were playing the refuse, the rejects. That just is shown by the record to be a false alibi. Here, in our own case, this theatre up in Buffalo that he threw out of his tabulation because we sold him only six pictures was shown to have played Princess O'Rourke, which he took as our picture having the biggest return of any picture of the year, and we played that picture in that Buffalo theatre, which he says is not a first-run theatre, but it is a theatre which plays the entire output of RKO.

Judge Hand: You played it first-run, I suppose?

Mr. Proskauer: I beg your pardon, sir?

Judge Hand: I suppose you played it first-run up there?

Mr. Proskauer: Certainly, in that independent theatre.

Mr. Caskey: Your Honor, I should like to call your attention to one thing that is even more fundamental. When you take the 1941-42 chart, the town of Elizabeth is the fourth down at the bottom. Now, in Elizabeth, as this record clearly shows, there is the Liberty Theatre, operated by Skouras Theatres Corporation, in which, as you know, RKO has an indirect 15 per cent interest; and the Ritz and the Regent, operated by Warner Bros.; and to use Mr. Wright's words, those

(3196)

three theatres are pooled. Now, those are the only three first-run theatres in Elizabeth, and they exhibit the pictures of these eight defendants.

Now, let me read how the plaintiff describes those theatres: He says that Warner's licenses Warner. He says Fox licenses RKO and Warner; Paramount licenses Warner; Loew's licenses Warner; RKO licenses Warner and RKO; United Artists licenses Skouras; Universal licenses Warner.

Now, I submit that this Court, picking that chart up, would not know that the same three theatres were involved in each producer's product.

Mr. Wright: If the Court please, I think perhaps I can make this clear if I explained the ultimate use we would propose to make of these charts: For example, we would expect to show and argue in the brief from these the number of cities in which all the first-run outlets were affiliated. That is, according to my tabulation of the 92, 39. Now, for the purposes of that tabulation what Mr. Caskey is talking about would not make the slightest bit of difference. All of the outlets under his view, or our view, are affiliated. Again, we would make tabulations showing, on this

question of where all the first-run outlets are affiliated,
(3197)
according to our figures, 39 of those, and 4 were all of the first-run outlets unaffiliated. On another tabulation we show that in 12 of the towns the independents got only one major distributor's product, and in none were there any towns where the affiliated exhibitor got only one major product.

Now, those are the ultimate facts which we would argue in the brief, and we are laying a foundation for that here. Much of this quibbling over individual distributions and individual situations simply would not damage or affect those ultimate conclusions we would ask the Court to draw from the material in any event. That is why I think the Court has been misled here by some of this examination of situations that have been made into supposing——

Judge Hand: You could certainly improve these exhibits and make them conform more to the evidence if you went at it, I should think. I do not see but what they are all vulnerable, except 1943-44. Apparently they are not.

Mr. Wright: We had an additional check on 1943-44 in the light of that first-run theatre list. But as to the others, I submit, if the Court please, the extent to which they are vulnerable is easily ascertainable by a comparison of what is on the tabulation offered
(3198)
here and the underlying exhibits, and it is simple enough for them to actually point out the extent and degree of any errors that may appear.

Judge Hand: It is really your job to get them right when you put them in. It is not an exercise for us at all to be comparing any more things than we have to compare.

Mr. Wright: I am merely suggesting that this is a more agreeable exercise for the Court than would be the exercise required to simply start from scratch without those, let us say, intervening work sheets and then attempt to determine——

Judge Hand: That may be, but that is no answer to your failure to put in correct exhibits.

Judge Bright: Wouldn't we have to start from scratch wherever there is a challenge?

Mr. Wright: This simply narrows the area of challenge, as I see it. I submit, if the Court please, that the number of instances in which there are errors here, when considered in the light of the number of situations covered, and the ultimate use to which we propose to put them, will appear to be insignificant.

Now, that——

Judge Hand: Maybe so. We do not know whether they are or they are not.

(3199)

Mr. Proskauer: Don't forget, if your Honors please, that our cross-examination was impromptu. I do not know how many other things I could have developed.

Mr. Leisure: If your Honors please, the problem I have, as far as RKO is concerned on this 1943-44 one which we have referred to, is that there are 28 separate cities which are not correct, according to the record. Now, that changes the total down here at the bottom which, as I pointed out in the cross-examination of the witness, instead of our having sold to 63 affiliated theatres and only 23 independents, when corrected—and we will have to call a witness on rebuttal; and we should not be put to that burden merely because an improper exhibit is put in—when corrected the exhibit would show that we sold 35

affiliates and some 20 independents, which is what the record should be. Now, I submit we should not be put to that burden of calling rebuttal witnesses merely to correct Mr. Wright's exhibits.

Mr. Wright: Mr. Leisure does not need to call any rebuttal witness. All he has to do is to point out what the underlying exhibit says that is in conflict with what the testimony about the exhibit was; and I do not think he can do it in those situations.

Judge Hand: Wait a minute. He has not got the burden of correcting these.

(3200)

Mr. Wright: Let me say this: As to 429, 430 and 413, those are offered by us for the assistance of the Court. If the Court does not want to take them and does not feel it will be beneficial in narrowing down and disposing of the ultimate issues, I shall withdraw them. The effort here has been to assist the Court.

The Court: I think you had better.

Mr. Raftery: What are the numbers?

Mr. Wright: The one I intended to have remain was 428, the one in evidence. The ones I am withdrawing are 429, 430 and 431.

Mr. Davis: 428 was the one where the firing started, and it was fired at just as heartily as any of the others. Then it was agreed by stipulation that the others, later offered, were subject to the same infirmities.

Judge Hand: Mr. Leisure particularly is weeping freely over this Exhibit 428 and says that it is very misleading with respect to his client. Now, I should think you could correct it.

Mr. Wright: I would say it is there for examination; he can cross-examine on any one of those errors that he says exists. I say that it is substantially cor-

rect in its present form, as testified to by the witness——

Judge Goddard: I think it is confusing.

(3201)

Mr. Proskauer: Why doesn't the tail go with the hide? That is a legal principle as old as any of us. You conceded that the others have the same infirmity. This is just as bad as the ones——

Mr. Wright: I have conceded no infirmity. As a matter of fact, Mr. Davis cross-examined him and brought out two statements in two situations which are wholly incorrect. If we want to have a redirect examination on them I can show that fact. I just do not see the point in taking up the time of the Court.

Judge Hand: How about Mr. Leisure's objection?

Mr. Wright: Mr. Leisure's objection is in vague general terms. As to the one situation in Pittsburgh which was specific, I covered that on his direct testimony. It is particularly clear as to what the difference between us was. Now, when he says there are ten other situations that are wrong, I simply say there are not, and if there are——

Mr. Caskey: What about Richmond where you would not concede it was wrong?

Mr. Proskauer: What about Buffalo, a first-run theatre, where our guinea pig picture was shown?

Mr. Seymour: What about——

Judge Hand: I think you had better get this right.

(3202)

Judge Goddard: I could not rely on that.

Mr. Wright: If your Honors simply accept the statement of counsel that they are incorrect as against mine that I think it is substantially correct, there is nothing more that I can do.

Judge Hand: What about Mr. Leisure's objection?

Mr. Wright: As I say, I think Mr. Leisure is in error.

Judge Bright: What about the witness's statement? That is evidence. He has admitted certain errors.

Mr. Wright: He has admitted certain errors. There are on this chart the distribution of the films of eight companies in 92 cities. That means a consideration of 700-odd situations. Now, I submit that the fact that he may have made errors in 5, 10 or 15 of those does not at all disturb the prima facie validity of the chart as such when it is considered particularly that this is only a stepping stone to ultimate statements which would be totally unaffected by some of these alleged discrepancies that have been brought out.

Mr. Leisure: If your Honor please, the state of the record seems to be now, Mr. Wright says, if it is left in evidence that I can go ahead and cross-examine the witness as to those 28 cities. I do not propose to burden the Court with anything of that kind. I picked

(3203)

out three situations out of 28—I have them all here; I can read them to you—which I thought shows clearly to the Court that the total is wrong that it should be enought to exclude it.

I have one of two courses open, either to take the Court's time and cross-examine him on 28 cities showing that they are each one wrong, or calling a rebuttal witness and showing that Mr. Wright's exhibit is wrong.

Mr. Wright: I suggest you cross examine him.

Mr. Leisure: Now, I think he should submit the exhibit to us out of court and we should agree on it. There is not any question about the rightness or

wrongness of it. He has simply excluded from 28 cities RKO first-run, that is all there is to it. There can't be any dispute about that.

Judge Hand: I think you had better remodel this exhibit out of court. In my opinion I think it will only mix us up.

Mr. Proskauer: For the present I understand the record is that it is stricken?

Mr. Wright: I will examine the witness further.

By Mr. Wright:

Q. Now, Lieutenant Borwick, in connection with your examination of this data, can you tell us the number of towns in which all of the first-run outlets, as the term is (3204)
defined in the complaint in this case, were affiliated?

Judge Bright: Read that question.

(Question read.)

Mr. Proskauer: I object to that as an incompetent question by the inclusion of the words "as defined in the complaint in this case."

Judge Hand: Objection sustained. You just cannot have broad conclusions like this put to an expert witness as a foundation for a tabulation. That is just the vice of the table. We do not know exactly what is covers.

Mr. Wright: If the Court please——

Judge Hand: No, we have ruled on that. Put another question. Go on with your witness.

Mr. Wright: Will you mark that with the next exhibit number.

Mr. Proskauer: See if my understanding of the record is correct: I understand that 428 for the present is stricken?

what the actual clearance in question was? A. That is right, we wrote a number of letters.

Q. And then when you got responses to those requests, (3295)
giving you what the real clearance was, you also included, did you not, that clearance information in your tabulation? A. That is correct, sir.

Q. So that what you have here is a tabulation, then, is it not, of all of the first-run over second-run in the same town clearance data that was furnished by the defendants in response to our interrogatories? A. Yes, sir.

Judge Goddard: Mr. Raftery said that he submitted to you several hundred but you only account for 77.

The Witness: Well, Mr. Raftery——

Judge Goddard: Why didn't you analyze those others?

The Witness: Because the contracts—there was a space in those contracts for clearance. In most instances that was left blank with no remarks of any kind, so it was impossible to tell whether the clearance—whether there was no clearance at all, or whether there was what is called the usual clearance, clearance that has been prevailing, or whether they merely forgot to insert it in the contract.

Judge Goddard: To get the proper percentages, wouldn't it be proper to include in your figures those contracts where you were satisfied there was no clearance?

The Witness: Well, there was no other—no way of satisfying myself of that fact. I had to work only (3296)
within the framework of the interrogatory material that was available to us.

Preliminary Cross Examination by Mr. Caskey:

Q. Lieutenant, I want to clear up one thing. You say with relation to Portland, Maine, that to determine the classification, you looked to see whether or not the picture also played second-run? A. That is right.

Q. We did not furnish you, or were not requested to furnish you, any second-run data as to the cities between 25 thousand 50 thousand, is that correct? A. You weren't required to furnish that?

Q. Yes, and did not. A. Yes, you were.

Q. Wait a minute. We only furnished on the specimen picture, we furnished first-run on the 412 cities, is that correct? We furnished first and second-run on cities of 50,000 and more? A. That is right.

Q. And we furnished first, second and third on 200,000 and more, is that right? A. That's right.

Q. So we did not furnish second-runs on the group of cities between 25 and 50,000? A. That is right.

Q. How did you operate there? A. Why, in many instances it merely says the clearance provision, opposite the name of the theatre—in answer to interrogatories—merely says 20 days over second run, regardless of whether you gave us information as to the theatre that played second-run. (3297)
Obviously that is the answer.

Q. If it listed various theatres with different dates, different specifications, what did you do? A. Well, for instance?

Q. Well, I have here Montclair, New Jersey, which reads, "14 days after first-run Newark, 14 days ahead of Bloomfield, Watsessing, Caldwell and Little Falls, 30 days ahead of Verona. A. We don't do a thing, we just discarded it, because it said nothing with reference to second-run—what was that town in question?

Q. Montclair. A. It said nothing with reference to second-run in Montclair, so we did not use any of that information.

Q. So that is not charted? A. That's right.

Mr. Proskauer: A very selective chart.

Mr. Caskey: I submit this exhibit is not a fair representation of the data that is in evidence.

Mr. Wright: Just a moment.

Direct Examination resumed by Mr. Wright:

Q. Lieutenant Borwick, I think when you answered Mr. Caskey's question as to what he furnished you you said that he did furnish you with all clearances in towns over 50,000 as to first and second runs. Now, the fact is that that is what his company and all of these companies were requested to furnish, isn't that right? A. That is right.

(3298)

Q. And no instance were you actually furnished with all of the clearance data that was requested, isn't that right? A. No, I did not mean to give that impression.

Q. What you were furnished with was whatever they supplied in response to the original interrogatory and subsequent letter requests and you took and tabulated everything that was furnished that was susceptible to tabulation in this form, isn't that right? A. That is correct, sir.

By Mr. Caskey:

Q. In the contract that I just read to you in Montclair, the clearance of first-run over any subsequent run in Montclair is zero, is it not? A. Not necessarily.

Q. Well, you had before you the data which on its face does not grant clearance of first-run Montclair over any other run. That is what you had in front of you, wasn't it? A. There is nothing here which says——

Q. Will you answer my question? This is the very pink sheet you had in front of you? A. That is right.

Q. It does not grant the first-run exhibitor any clearance over any other run in Montclair on its face, does it? A. On its face, it does not.

Q. So it should have been classified as zero, should it not? A. Now, just a moment, Mr. Caskey. This information is (3299)

not complete—we believe it is not complete, because in many instances we came across situations where no clearance was mentioned or, for instance, we will say, "14 days." Well, "14 days" over what? We did not know whether it was 14 days over an adjoining town, I mean an adjacent town, over a second run, so if it wasn't specified, we did not include it.

Q. You are doing a tabulating job? A. That is right.

Q. Making an exhibit for the convenience of the Court, which is supposed to reflect what is in these two pink volumes? A. That is right.

Q. And you used nothing except the two pink volumes? A. That is right.

Q. Only what is in evidence in this case? A. That is right.

Q. What you had to work with showed that there was no clearance between first-run and second-run in Montclair, is that not correct? A. I don't know that from the record.

Q. You can't say that he granted no clearance there? You cannot say that those words grant no clearance? A. I can't say that. It says nothing about first-run having clearance over second-run in Montclair, and I don't know what the first-run clearance——

Q. If you were doing a tabulating job, wasn't it your duty to put down zero, whether you thought it was right or (3300)

wrong? A. Not necessarily. All depends on your methods of tabulating.

Judge Bright: In your tabulating did you put down what you thought was right and leave out what you thought was wrong?

The Witness: Not at all. We left out those situations in which the facts were not clear.

Judge Hand: I can tell you one thing right now, Mr. Wright, we are not going to receive this exhibit, as far as I am concerned, unless it is accompanied by correcting statements which will change the tabulation as made. It has got to be.

There is no doubt that it has got to. Maybe you are right in your contention that where they say nothing about it, there is still a clearance, but that has got to appear before we take a tabulation in here such as this.

Mr. Wright: If the Court please, the tabulation is not meant to suggest to the Court in any way that situations where clearance information was not furnished, where the data supplied to us merely said None or indicated no clearance over the succeeding town, we make no contention that this tabulation shows anything with reference to the existence or non-existence of clearance.

Judge Hand: It has got to show how many of those

(3301)

cases there are.

Mr. Wright: That is, in those situations.

Judge Hand: It has got to show how many of those cases there are. We are not going to take a thing like this, which merely gives one side of the argument and says nothing about the facts which have to be excluded, the data which has to be excluded in order to support that side of the argument. There is no use arguing this any more. This will be excluded unless it is corrected by some tabulation of some sort.

Mr. Wright: Do you wish to have added to this the number of situations in which we were furnished with data where the defendants' contracts or the summary of the contracts that they gave us said either none or where it was silent as to whether or not——

Judge Hand: That is right.

Mr. Wright: (Continuing) —there was clearance?

Judge Hand: That is right.

Mr. Wright: You wish a breakdown between the situations where the contract said none and where the provision was silent?

Judge Hand: That is all right. I should think that would be good too.

Mr. Wright: All right.

Mr. Proskauer: It would be very much fairer if in
(3302)
your categories you followed the conventional phrases in these contracts which have been indicated to you, namely, 7 days, 14 days, 30 days, 60 days, not using these arbitrary figures which correspond to nothing that is known in the industry.

Mr. Wright: When it comes to categories, if the Court please, the figures are susceptible of tabulation, and in grouping one day——

Judge Hand: I suppose so. I don't think much of this category, in view of the cross-examination, but we wont exclude it on that ground. It will go in with such infirmities as inhere in such a prospective exhibit.

Mr. Wright: That is inevitable, and we shall supply that supplemental list.

One thing more, if the Court please, does the Court understand that there is only one clearance involved there for each town; that actually these numbers here, which refer to contracts, actually are substantially

coextensive with the number of towns covered, that is, that Loew figure of 275 means that approximately——

Mr. Davis: 340.

Mr. Wright: (Continuing) —or 340 of the clearances in approximately 340 of those town situations were tabulated.

Judge Goddard: You mean 340 referred to cities,
(3303)
not to contracts?

Mr. Wright: It refers to the single contract clearance, but those were furnished one for each city.

Judge Goddard: Would you answer my question so I at least get it clear? Does that 340 in the first column refer to cities or does it refer to contracts?

Mr. Wright: It refers to both, if the Court please. It refers to one contract for one picture in one city. That was the way the data was supplied. That I think should be understood in appraising the extent——

Judge Goddard: I think you could make your heading a little bit clearer. When we take this up, we won't remember what you told us now.

Mr. Wright: We can change the heading in any way that you think would——

Judge Bright: It says Number of Situations, I understand it. It apparently refers to number of contracts.

Mr. Wright: No; there was submitted to us in the interrogatory answer—we asked for the data as to each of these towns with respect to one picture, that is, one contract, which would presumably be typical of the contracts made for all pictures during the season, inasmuch as clearance does not vary from picture to picture. That infirmity, if it is an infirmity, is inherent in the data and the method that we pur-

sued in attempting to assemble the information.

(3304)

The purpose of that, of course, was to relieve the defendants of the burden of examining 40 or 50 contracts made during a season to determine the clearance in a town, inasmuch as we are both satisfied that there isn't any substantial variation during the season. Therefore, the contract clearance with respect to only one picture was examined in each instance, but that represents, on this tabulation, a different town in each instance, and the extent of the coverage is represented by a comparison of the total numbers at the bottom here with the total towns to which the interrogatories were directed, that is, in the case of Loew, 340 against 420. I think the examination——

Judge Hand: Please go on. We cannot have so much talk.

(Marked Government's Exhibit 442 for identification.)

By Mr. Wright:

Q. I will show you this Exhibit 442 for identification, entitled "Distribution of feature film exhibition contracts between distributor defendants and exhibitors by the distances covered in clearance terms, 1943-1944 season," and can you tell the Court exactly how you prepared that tabulation?

(3305)

Judge Goddard: Mr. Wright, isn't it possible that you and other counsel could stipulate some of these things instead of going through them?

Mr. Raftery: This simply is the second obscure one. Those are the only two obscure ones I have found.

Mr. Wright: There could not be any dispute between us as to how these were prepared or what data was used. There is no question about that.

Mr. Frohlich: There is a very serious question about that, Mr. Wright.

Judge Hand: We cannot enlarge this. Go on with your case, and if they object to something, why, we will admit it or exclude it.

Q. (Continuing) Will you just tell the Court what you did in preparing this tabulation? A. This tabulation was prepared in a manner similar to the previous one. This merely represents the situations where one—where the exhibitor in one town gets clearance over an exhibitor in another town. The same information was used as on the previous exhibit. The number of miles merely represents the distance between the town which takes clearance over—the surrounding towns over which clearance is taken.

Q. And again you have, I notice, a smaller number of actual contract clearances that are tabulated here than you had in the other chart? A. That's right.

(3306)

Q. Why it that? A. Because the contracts themselves were silent as to such provisions or no information was made available to us.

Q. That is, where the contract clearance did not specify any clearance over another town, you did not include that in this tabulation? A. That's right.

Q. This was limited only to those situations where it appeared from the data furnished that there was some clearance in favor of one town over another, is that right? A. That is correct.

Q. And you included in this tabulation all of those situations for which they supplied you with data where such clearances appeared, isn't that right? A. That's right.

Q. And then in computing those distances, you simply took the mileage as shown between the town taking the clearance and the farthest town over which the clearance was taken, in accordance with road maps, is that right? A. That is right, Automobile Association road maps.

Judge Bright: You made the computation? You computed the mileage; it was not on the contract?

The Witness: No, sir, that is right.

Judge Hand: Did this cover all towns of a certain size and certain population in the United States?

Mr. Wright: The data requested was for the same

(3306A)

towns as is covered by the other, that is, we asked for first-run clearance in all towns over 25,000, which was 400-odd.

(3307)

Judge Hand: With respect to clearances, the situation between a country district and a suburb is often widely different, so that you do not get any standard at all. You take a place like——

Mr. Proskauer: Prescott, Arizona.

Judge Hand: —50 miles, perhaps, out of New York, or 25, or whatever your figure would be, it would be right here, with commuters coming in all the time, shoppers coming in all the time. You take it up in the Adirondacks and it is a different world, only a few people that can afford it, and a few joyriders in the summer will go to these things that far away, so that I do not think a tabulation based on mileage, universally applied, is very inclusive.

Mr. Wright: I agree with your Honor that it is not inclusive. However, there was an attempt to secure here, by the interrogatory data, uniform samples for each of the distributors. Had we gotten from them

reasonably complete data, we would have had a better table. We did the best we could with what we got.

Judge Hand: Don't begin to complain again. As they view it, it is very tiresome. The data that you could have got, why didn't you get more, if you didn't like the data you got, or think it is insufficient?

Mr. Wright: I have pointed out that where there
(3308)
was deficiency—that these were checked for deficiencies—that we requested additional data in those instances. In some instances we got it, in others we did not, but in any event we had no choice but to take whatever we ultimately got and to tabulate it, and that is what was done.

Judge Bright: But your exhibit is based on stuff that is not in the information furnished by the company.

Mr. Caskey: That is right.

Mr. Wright: As to the mileage computations, as to the exhibit, that is dependent upon a consideration of what was done with reference to material not in evidence, there is no question about that, except that in some instances, I might say, of course, the first-run clearance itself is stated in terms of so many days over a town within 25 miles, or 20 miles, or 15, as the case may be.

By Mr. Caskey:

Q. Lieutenant Borwick, I show you from the volume of answers to interrogatories on Fox the one pertaining to Stamford, Connecticut, which reads, "60 days clearance in Stamford, 30 days over Darien and Springdale, 14 days over Greenwich and New Canaan. Now, where did you put that

in this chart? A. Well, what we did was to list the distances
(3309)
from Stamford to Darien and Springdale and New Canaan.

Q. Yes. A. And took the distances, maximum distances of any of these three cities and put that down as one indicating one situation.

Q. Well now, as I understand it, the town of Stamford and the town of New Canaan are contiguous. How did you treat that? A. We just took the points as indicated on the road maps. If, of course, if the two dots were on top of each other, why, it was the distance of those two dots to Stamford.

Q. The town of Greenwich, Connecticut, and the town of Stamford are contiguous. How did you treat that? A. Well, as I just said, you could not tell from a road map whether it was contiguous or not, so we took the distance from Stamford to whatever town was the maximum distance from Stamford.

Q. I suggest there is no distance. A. Well, we just, as I said, we took the AAA map.

Q. You did not attempt to measure from theatre to theatre? A. No, of course.

Judge Bright: What did you do, scale it off on the map?

The Witness: Yes, that is correct, sir.

Judge Bright: With a ruler?

The Witness: Yes. You know, the automobile
(3310)
maps measure off short distances and we took those and summed up the total.

Q. What did you do for New York City? How did you treat New York City? A. You show me what clearance was on New York City.

Q. Never mind that. What did you do with Boise, Idaho, pictures playing the Pinney Theatre to have seven days clear-

ance over Meridan, Nampa and Caldwell? A. Well, we followed the same procedure, we measured the distance from Boise, Idaho, to each one of these towns, as shown on the map, point to point, and then took the maximum distance from Boise to the town which is—that is, the town which is the maximum distance from Boise indicates the figure as included in here.

Q. What comparison is it to show that the clearance of Stamford, Connecticut, extends seven miles to the theatre in New Canaan, Connecticut, and two miles to the theatre in Greenwich, Connectieut and five miles to the theatre in Darien, Connecticut, and that the clearance of the Pinney Theatre in Boise, Idaho, extends 40 miles to Caldwell? A. I am sorry, I did not understand your question.

Q. I say, the purpose of this chart is to compare various things, is it not? A. Well, it is to summarize the areas—summarize in simplest and convenient forms the data as (3311)
indicated in these answers to interrogatories in terms of area covered by clearances.

Q. If your figures are right, you put Stamford here in "10 or less"? A. That is correct, is the distance from Stamford to any one of these points mentioned in the clearance was that distance.

Q. And you put Boise, Idaho, probably in "51 and over"? A. I can't tell you where I put Boise, Idaho.

Q. I think that is correct, if I follow you. A. Wait a minute.

Q. What does that comparison established? A. What does that comparison establish?

Q. Yes, sir. A. I am not interested in what it establishes. I was merely interested in summarizing the facts

Q. Your general observation, of course, is that in the western part of the country the area of clearance is greater than in the eastern part of the country? A. Well, it could be. I wouldn't be sure unless I had these tabulations.

Q. After having worked on these 15, 16-hundred contracts, you are not able to say that that is so? A. Well, I don't want to make a general statement unless I have something to back it up.

(3312)

By Mr. Seymour:

Q. Do I understand correctly that where there were three places over which a first-run theatre had clearance, one of them one mile, one of them two miles and one of them fifteen miles, you only used the 15 miles on this chart? A. Yes because this chart attempts to show the maximum distance covered by these clearances.

Q. Where is there anything on the chart indicating that only the maximum was used? A. Right here, the footnote 1, bottom of the table.

Q. The farthest city, is that it? A. Yes, that is right.

Q. So that this does not purport to be a summary of the mileage in the clearance contracts, but only a summary of the farthest city? A. That is right.

Q. Let me ask you this, if you put your mileage categories differently, if you had used five miles instead of ten miles as the breaking point, you would have gotten quite a different picture, wouldn't you? A. I wouldn't say that at all.

Q. Any more than you would have got a different picture on the last exhibit by using different categories, is that right? A. That's right.

Mr. Davis: Why would it be different if he took five miles instead of ten?

(3313)

Mr. Proskauer: Well, he defends any choice he makes, and I am not going to examine him about it.

Mr. Davis: I am going to examine.

By Mr. Davis:

Q. Who suggested to you these 10-mile steps? A. This is my own idea, Mr. Davis.

Q. Why did you adopt 10 miles as the category? A. I could have adopted intervals of five miles.

Q. Yes. A. It would have meant we would have had ten 5-miles intervals instead of five 10-miles intervals.

Q. If you had adopted that, you would have gotten a different-looking picture? A. As I told Mr. Seymour, I am not sure that we would have. I don't know.

Q. What do you think of the probabilities? Don't you think it is probable you would have got a different picture? A. Well, no, because examining this kind of data, with hundreds of towns involved, in clearance, I would have to have a very prodigious memory to give you offhand an answer to a question like that.

Q. I am asking you if it is true as a matter of simple mathematical probability that if you had taken 5 miles instead of 10 you would have a different figure in your list of contracts and different figures in your percentages of the total? A. Well, sure, any different type of frequency dis-

(3314)

tribution, Mr. Davis, you would use, you would get different percentages.

Q. I would suppose so, and I am surprised that you should hesitate to admit it. A. Well, no, I did not understand your question. Your question wasn't that at all.

Q. Where did you get the 275— A. I did not understand that question at all.

Q. Where did you get the 275 contracts of Loew that you say you examined? A. That is, again, answers to interrogatories.

Q. Did you find in any of those contracts a mileage figure stated for clearance? A. Any Loew's contract?

Q. Yes. A. I can't say offhand. I know in some contracts there were—for instance, they would say, covering an area of 25 miles, or includes a number of counties.

Q. Where they said covered an area of 25 miles, you took that to be 25 miles measured by automobile road or 25 miles measured by radius from the center? A. By automobile road, of course.

Q. And you think if a contract said clearance over all theatres within 25 miles that meant road miles and not surveyor's miles? A. I don't know what they meant. I imagine people travel on road miles, Mr. Davis, rather than as the (3315)
crow flies.

Q. How did you interpret that phrase, if it was used? A. Well, I interpreted it as—well, it is subject to any interpretation, for that matter.

Judge Bright: How did you interpret it, is the question?

The Witness: I interpreted it as road miles, of course.

Q. Measured by ruler on an automobile map? A. Measured by a ruler or, if the automobile map gave the distances, I used the distances and added them up.

Q. Can you tell me again whether or not you found in any Loew contracts a clearance measured by mileage other than by the name of the town over which clearance was granted? A. I could not tell you unless I examined all your exhibits.

Q. You do not recollect any at this moment? A. No, I do not. I can't answer either way.

Judge Bright: I wonder, Mr. Wright, what you claim is the value of this exhibit?

Mr. Wright: All that this exhibit does, if your Honor please, is merely show that extensive clearances

are regularly granted by these defendants in favor of one town over another, that is, that first-run control in a particular town actually may mean, and frequently
(3316)
does mean, control over first-run exhibitions in fairly wide areas.

Judge Bright: Granted as against other defendants and independents?

Mr. Wright: Yes.

Judge Bright: Then what is the value of this particular exhibit?

Mr. Wright: The exhibit is not offered to show any differences in treatment between a clearance granted to independent theatres and affiliated theatres in this regard. It simply is intended to show the general characteristics of clearance as such, clearance as an institution in this particular industry.

Judge Hand: It is the old argument you have been making, apparently, that there is inherent vice in clearance and yet clearance is inevitable.

We will adjourn for lunch.

(Recess to 2:15 p.m.)

(3317)

AFTERNOON SESSION.

PETER M. BORWICK, resumed the stand.

Mr. Caskey: We have no further cross examination. We object to the exhibit on the ground of relevancy and materiality.

Mr. Wright: We offer the exhibit.

Judge Hand: We will receive it for what it is worth. I do not think it is worth much.

(Government's Exhibit 442 for identification received in evidence.)

Mr. Wright: Now, if the Court please, I have here a series of charts but I propose to finish the presentation of our case today, come what may. Now I have these charts here. I have given copies to the defendants. I can tell the Court what they are. If any defendant objects to them and the Court does not want them, I shall not offer that chart. If there is any one which is of interest to the Court and the defendant objects, I will offer that, but I hope I can shorten this up by telling you what they are, and we will find out whether there are objections.

Judge Hand: Yes, all right.

Mr. Wright: Now we took as to that one picture that you have the chart in evidence there for each company as showing the distribution of rentals in the towns over 25,000 on that picture first-run as compared to total revenue and total exhibitions in the

(3318)

various exchange areas. Now we took the same pictures and tabulated the data in the interrogatories showing the revenue in the cities over a million from the first four runs, which was the data we got; the revenue in the cities between 200,000 and a million received from the first three runs; and the cities between 50,000 and 200,000 where we got the first two runs, the revenue received from the first two runs.

In each of these cases these charts are subject to similar infirmities as those already discussed, in that there is not complete data as to all situations in all of the charts. The data, however, is complete as to certain cities in each one, and the extent to which it is incomplete and the reasons for incompleteness are reflected in footnotes on each chart.

Now that data is simply a refinement of the study of first-run control that we have already attempted to make. I think it is useful data, but as I say, I have no desire to inflict it upon the Court if the Court is not interested in any of it, regardless of what the defendants' position may be. If the Court wants any of it, and if there is objection from the defendants, I still won't insist on it, but I do have it here and I have copies and I offer it to this extent.

Judge Hand: Have you gentlemen been over these

(3319)

graphs?

Mr. Davis: I have been over them, your Honor, as to Loew's. The only objection I make to them is the same objection I made this morning, that they are misleading in this: They state the percentage of first-run rentals from affiliated theatres, one hundred per cent for instance in Manhattan. Now as a matter of fact that one hundred per cent was from Loew's own theatre. They have it on one picture, one picture in Loew's own theatre, is rated as one hundred per cent of the first-run rental from affiliated theatres, which is a distorted picture entirely. There is an implication that the revenue derived is from a consolidated source consisting of the five defendants.

Now the same thing as to Exhibit 447, cities from 200,000 to one million population. There are 38 cities on that list, and it shows—it is a very pretty chart—it shows that one hundred per cent of all film rentals received by Loew's, first-run rentals, was received from affiliated theatres, one hundred per cent the whole way down the line with the exception of Portland, Oregon. As a matter of fact, 24 of those theatres were Loew's; one was an independent; five were Fox; one RKO, and seven Paramount. And to say

that that is one hundred per cent affiliated is, I think, a distortion of the facts. I do not challenge the ex-
(3320)
hibits in any other particular.

Mr. Seymour: As far as Paramount is concerned, we have spot checked the charts; we have not had time to do more than that; we found a few errors; and the same observation applies that Mr. Davis made, that this business of taking a hundred per cent where the company has some interest in a theatre does distort the thing. Now, rather than take time to point out the errors, I am perfectly willing to do this: if your Honors want to receive these charts and if they are received against others, to have them received and then send the Government a list of the errors which we found, with the understanding that they will physically correct the charts at sometime.

Judge Hand: Yes; and particularly point out in your briefs the situation with regard to your own theatres, which of course you all will, I am perfectly sure. I think we will receive these.

Mr. Raftery: May I make a correction in 499? I am not objecting to the charts. In 499, footnote 4 reads, "Blanket contract." That is the contract we have with Loew's for second, third and fourth run in metropolitan New York. For the record, the contract is a single picture contract for a picture called Stage Door Canteen, made between Loew's Inc. and United Artists. The terms are 25 per cent of the gross re-
(3321)
ceipts until the combined gross receipts of all suburban runs, as we call them—that is, everything after the first-run in Loew's in Metropolitan New York—until those combined receipts equal fifty per cent profit of our film rental. Then the overplus of receipts are

divided, two-thirds to United Artists and one-third to Loew's. So instead of a blank here for second, third and fourth run, the film rental paid by Loew's for those pictures on those runs was $163,673. Now that is what the facts show and I will produce a witness if Mr. Wright wants it.

Mr. Wright: There is no question about the facts. The reason the footnote says blanket rental here is that the chart only purported to deal with three runs, and this rental payment, of course, that he is referring to, covers many more runs, and there is no breakdown as between Loew's. That is why for the purpose of the treatment here it is impossible to allocate or show any particular rental for any of those runs, and the notes simply refer to it as the runs as covered by a blanket deal which did not show individual run rental.

Mr. Raftery: The only objection we have is calling it a blanket contract. That is not a blanket contract. It is an individual contract for one picture.

Mr. Wright: There is no question about that.

Mr. Proskauer: Speaking for Warners, in the

(3322)

chart which was furnished us for Princess O'Rourke, Bronx, Brooklyn and Richmond are shown as first runs——

Judge Hand: The one you propose to offer?

Mr. Proskauer: I am not offering anything. I am speaking of the suggestion——

Judge Hand: The one that Mr. Wright has in his list which he has not yet offered?

Mr. Proskauer: Yes, I am speaking of his suggestion that we let these in——

Judge Hand: All right.

Mr. Proskauer: We heard Mr. Wright and the witness disavow this morning that either Brooklyn,

Bronx or Queens were first-runs; that they were second runs after Manhattan; and yet to get a showing on this chart he lists those Boroughs as showing first-runs. Now I am perfectly willing, having called attention to that, to let that point go, and I will comment on it in my brief, but I would like Mr. Wright to concede that in Manhattan, in Los Angeles and in Philadelphia, all the first-run income was from our own theatres and not from theatres of any other defendant.

Mr. Wright: I think that is perfectly true. Now as to the reason for treating Manhattan, Bronx, Brooklyn, Richmond and Queens first-run separately here, that is the way they were reported in the interrogatory answers to requests, and that is the way they

(3323)

have been set up in the tabulation.

Judge Hand: All right.

Mr. Frohlich: If your Honors please, the only exhibit that I thought I would object to this afternoon is 456, where Mr. Wright has taken a small group of cities on Cover Girl, from 200,000 to one million population, and he puts in the first and second run rentals.

Now we have been taking a lot of testimony in this case on 92 cities, and I do not want the Court to draw any inference from a small group of ten or fifteen cities. So I have prepared a chart of all of the 92 cities where Cover Girl was shown for the first and second runs, and I would like to put that in together with Mr. Wright's exhibit, and then I have no further objection at all.

Mr. Wright: We have no objection.

Judge Hand: All right. Now Mr. Leisure wishes to be heard.

Mr. Leisure: RKO Exhibit 453, we have gone over that with Mr. Wright, and under the heading, Buffalo, one hundred per cent first-run rentals for affiliated theatres, Mr. Wright concedes that that is an independent theatre and not an affiliated theatre. I wish the record to so show.

Mr. Wright: Correct.

(3324)

Mr. Proskauer: So your Honors may realize that I was not at all captious in my objection, that total of the first column is $160,000. Those that I mentioned in our own theatres only aggregate only $101,000.

Judge Hand: Well, that is very important in your brief. We will receive these exhibits and receive Mr. Frohlich's exhibit too.

Mr. Caskey: What are the numbers, Mr. Wright.

Mr. Wright: Those that have just been received, on the ones you have the numbers are 435 to 458 inclusive, but the numbering in the record here will be eight more in each case.

Mr. Davis: Let us get them right.

Mr. Wright: The first one will be 443.

Mr. Caskey: What is the first one?

Mr. Wright: 443, Princess O'Rourke, in cities over one million, first four runs broken down as to New York and five Boroughs.

444, Sweet Rosie O'Grady, same areas, same runs.

445, Let's Face It, same areas, same runs.

446, Lady Takes a Chance, same area, same runs.

447, As Thousands Cheer, same area, same runs.

448, Cover Girl, same area, same runs.

449, Stage Door Canteen, same area, same runs.

Mr. Proskauer: I haven't got a copy of that, Mr.

(3325)

Wright.

Mr. Wright: That is right. That was typed and you will be supplied with those as soon as we can run off an extra set.

450, Christmas Holiday, same area, same runs.

451, Princess O'Rourke, first three runs in the cities with population between 200,000 and a million.

Mr. Proskauer: Let me see that one, will you please.

Mr. Wright: That is 451. Your number on it is 443.

Mr. Proskauer: On 454, I can't do such lightning calculation, but I am reserving the right, if it is not already in the record, to show the information.

Mr. Wright: 451, your picture, Princess O'Rourke, in the first three runs in cities between 200,000 and a million.

Mr. Proskauer: I understand that it is in the record.

Mr. Wright: 452, Sweet Rosie O'Grady, same cities, same runs.

453, Let's Face It, same cities, same runs.

454, Lady Takes a Chance, same cities, same runs.

455, As Thousands Cheer, same cities, same runs.

Mr. Davis: Now may we have a stipulation that

(3325-a)

of the 38 cities that are listed, 24 are Loew's, one is an independent, five Fox, one RKO and seven Paramount?

(3326)

Mr. Wright: That sounds right to me. I accept your figure.

456, Cover Girl, same cities, same runs.

457, Stage Door Canteen, same cities, same runs.

Mr. Proskauer: I haven't that.

Mr. Wright: That will have to be retyped.

458, Christmas Holiday, same cities, same runs.

Mr. Proskauer: I haven't that.

Mr. Wright: That also will have to be another run on the typewriter.

459, the picture Princess O'Rourke, in cities between 50,000 and 200,000, first two runs.

Mr. Proskauer: The difficulty with this is it lumps all together and it looks as though we were all playing this thing when, as a matter of fact, the bulk of it is exhibition in our own theatres.

Mr. Wright: 460, Sweet Rosie O'Grady——

Judge Hand: Wait a minute, Mr. Wright. Are exhibits already in indicative of that fact?

Mr. Wright: That is correct.

Mr. Proskauer: I think we can correct the inference, which I think is wrong there, evidence which is already in the record.

Judge Hand: That is the only thing that we are really interested in, in regard to any of these tabulations, of course.

(3327)

Mr. Wright: That is correct.

Mr. Caskey: Mr. Wright, could you state for the record now for the convenience of counsel the exhibit numbers of the eight cities on interrogatories and the exhibit numbers of the theatre list, which, as I understand it, is the basic data from which all these charts are prepared?

Mr. Wright: May I finish this first?

Mr. Caskey: Yes, certainly.

Mr. Wright: Then I will go back and take that up.

461 is Let's Face It, same cities, same runs.

462 is Cover Girl, same cities, same runs.

463 is As Thousands Cheer, same cities, same runs.

Mr. Davis: Where is that, I haven't got that.

Mr. Wright: Your number on it would be 455.

Mr. Davis: You have put in two As Thousands Cheer. Is this a third one?

Mr. Wright: This is the one that covers the first two runs in cities from fifty to two hundred thousand.

Mr. Davis: I have it. What is the number?

Mr. Wright: 463.

(3328)

Mr. Davis: All right.

Mr. Wright: 464, Lady Takes A Chance, same cities, same runs.

465, Stage Door Canteen, same cities, same runs.

Mr. Proskauer: We haven't got that.

Mr. Wright: You will get a typed copy of that.

466, Christmas Holiday, same cities, same runs. You fill also receive a typed copy of that.

The data reflected in these tabulations, your Honors, are taken from the following exhibits, first, the theatre list, which shows the affiliation of the various theatres involved, are, for Fox, Exhibits 160 and 359; for Loew, Exhibits 163, 163-A and B; for Paramount, Exhibits 161, 162 and 360; for RKO, Exhibits 158 and 159; for Warner, Exhibits 156 and 157.

The interrogatory answers in question which are tabulated here are contained, for Fox, in Exhibits 41 and 42; for Loew, in Exhibits 57-1 through 57-49 and 57-A and B; for Paramount, Exhibit 82; for RKO, Exhibit 94; for Warner the exhibits are 126, 127 and 128; for Columbia 139; for United Artists 369, 369-1 through 369-6; Universal, 365, in two parts.

The tabulations I want to offer are those which were submitted at the conclusion of our case to all of the defendants with respect to the tabulations of data

(3329)

that was furnished in 1939 with reference to three cities, Altanta, Kansas City——

Mr. Proskauer: Mr. Wright, we do not hear you.

Mr. Wright: —Atlanta, Kansas City and Philadelphia.

Mr. Raftery: That is, submitted to all the defendants?

Mr. Wright: That is my understanding. I will explain to the Court what this data is first. The data I am referring to are tabulations made from interrogatory answers filed by each of the defendants in 1939, showing the rentals received and the play dates of all of their pictures in these three selected cities.

Mr. Proskauer: Which are they?

Mr. Wright: Atlanta, Georgia, Kansas City, Missouri, and Philadelphia, Pennsylvania.

There is for each city a basic tabulation for each distributor. Those are the ones which were submitted respectively to the distributors whose pictures were tabulated on that. There is also a composite tabulation for each of the cities, showing the percentage of affiliated and unaffiliated rental derived from all runs in the cities for all distributors.

Mr. Davis: May we see that summary?

Mr. Caskey: What changes have been made since

(3330)

these were offered and excluded?

Mr. Wright: These, I do not think, were offered and excluded. They were submitted to you, instead of being offered at that time, with the thought that any changes could be made by stipulation.

Mr. Raftery: May I see one?

Mr. Wright: Yes. I will just ask to have this Atlanta summary marked with the next plaintiff's exhibit number, and I will distribute copies to you gentlemen. There are three for the Court.

(Marked Government's Exhibit 467 for identification.)

Mr. Wright: I think, if the Court pleases, that the chart is self-explanatory and it shows on its face the data from which it was derived.

Mr. Proskauer: Mr. Wright, you are not offering New York, to which I made objection?

Mr. Wright: No, I am not.

Mr. Davis: Let us make sure that we are talking about the same thing.

Mr. Caskey: Mr. Wright, I have understood——

Mr. Wright: I will ask to have marked 468 for identification a similar summary for Kansas City.

(Marked Government's Exhibit 468 for identification.)

Mr. Caskey: With regard to 468, the attempt is

(3331)

to show that the first-run revenue, 99.5 per cent, came from affiliated theatres, and the vice of the exhibit is that it neglects to state what is in evidence, namely, that the RKO revenue, in the amount of $29,000, came from its own theatre; the Fox revenue came from two theatres, two other theatres which it operates; that the Loew revenues came from Loew's Midland Theatre; and that the Paramount revenue came from the Newman Theatre. So that by the process of lumping four separate groups of theatres, operated by four separate defendants, you arrive at the fact that among the four they played all the product. The only vice of these charts, Atlanta, Kansas City and Philadelphia, is in the selection of the cities. If you start out with a city where you know that the first-runs are operated by these defendants and the second-runs are

operated by these defendants, then, as Judge Hand observed this morning, you get an exhibit that shows those theatres played all the pictures.

In addition to that, we told Mr. Wright that we objected to the phraseology "preferred runs", and I understand that that was to be corrected.

Mr. Wright: I think the footnote shows that preferred runs means first, second and third. If you want to strike out the "preferred" and just substitute
(3332)
first, second and third runs, that is agreeable to us.

Mr. Caskey: There again, your Honors, I think it appears from one of the decisions of the Appeal Board, which your Honors admitted, in Kansas City there is a second-run theatre, the Boswell theatre, which is one of the finest theatres, not only in Kansas City, but anywhere, and it runs second-run in Kansas City and is operated by National Theatres. It has what the Appeal Board calls—the industry calls—a clear second-run, that is, it is the only theatre in Kansas City which plays 28 days after first-run. So, by selection, you get the result that all the second-run revenue in Kansas City comes from one theatre which National Theatres operates. The whole problem is purely one of selection.

Judge Hand: I assume that you will show the infirmities of selection in your brief and argue them.

Mr. Davis: May I make one more suggestion, because there is something there which I do not think Mr. Wright wants to commit himself to. It is a fly speck in the Atlanta chart. On the column of the Atlanta gross, he has it, as to each distributor, Atlanta gross is 3/10ths of 1 per cent of the national gross. It cannot be uniform for all of them, and it is not uniform on the figures in the column out of which

(3333)

the computation grows. There is a manifest mathematical error in that column.

Mr. Wright: If there is a mathematical error in the column, it clearly ought to be corrected. I must say I am not enough of a mathematician——

Mr. Davis: I think if you will look at it you won't want to say it is the same in every case.

Mr. Wright: I would say clearly, as to Universal, the figure—no, the figures are too large for me to handle at a glance, I confess.

Mr. Davis: They are to me, but I just know there is something wrong with that column.

Judge Bright: He refers to the column marked Atlanta Gross. You give each one of them 3 per cent of the gross total and your total is 3 per cent of the national gross. There must be some discrepancy.

Mr. Wright: Whatever the discrepancy is, it is apparent from the face of the chart. If there is an error there, it will be, I can assure you, corrected. I cannot stand here and correct it because my mathematical ability is not that good.

Mr. Davis: I think if I were you, I would just strike that column out entirely.

(Marked Government's Exhibit 469 for identification.)

Mr. Caskey: I wonder if I may, Judge Hand——

(3334)

Judge Hand: I should think there was trouble with your percentages, perhaps right through, but I don't understand it.

Mr. Wright: I beg your pardon?

Judge Hand: I should think there was trouble with your percentages right through. I don't understand it.

Mr. Wright: You mean because of the apparent uniformity?

Judge Hand: Well, I was looking at 468 now. No, they are not uniform.

Mr. Wright: That is the percentage——

Judge Hand: What is the 5 per cent, 5 per cent of what?

Mr. Wright: The 5 per cent figure there opposite the word "Loew's"? That is the percentage which $176,331, the Kansas City gross, is supposed to bear to the figure $37,658,719, the gross, national gross, for those pictures.

Judge Hand: Say that again.

Mr. Wright: The figure $176,331 represents the total gross for the 49 Loew features, and from all runs in Kansas City. The proportion that that gross bears to the total gross received from those features from all runs all over the country, that is, $37,658,719, is .5, that is 5/10ths of 1 per cent.

(3335)

Mr. Davis: My mental arithmetic was always poor, but I do not believe that is so.

Judge Hand: We cannot do this here on the bench anyway. I should think, if it was very important, that you should have it corrected——

Mr. Wright: I agree.

Judge Hand: —if it goes in. Maybe it is.

Mr. Wright: I agree with that, I think it is.

Judge Bright: If you take half of one per cent of 37 million dollars, it isn't $176,000. It is nearer $180,000.

Mr. Wright: $37,000,000, I suppose, 3 per cent would be about something less than one million. Half of one per cent would be something about a sixth of that.

Judge Bright: If you multiply the first two figures of 37,000,000 by 5 you get 185.

Mr. Caskey: They are obviously adjusted to the next highest——

Judge Bright: They have taken the fraction and made a round figure.

Mr. Caskey: Yes; you can see that the national gross in Kansas City, to be 5 per cent, would have to be $741,000.

Mr. Wright: If the Court desires to have us carry out those percentages, we will do them to just as

(3336)

many decimal places your Honors think is appropriate.

Judge Bright: Don't we have to admit 5 per cent is exactly half of it?

Mr. Wright: They are, on their face, to the nearest 1/10th of 1 per cent. That, I think, is plain on the face of the chart.

Mr. Caskey: With regard to the Philadelphia one, Mr. Wright, we would like to have the heading "All Preferred Runs" go out and specification as to what it is.

By Mr. Wright:

Q. That, I believe, Lieutenant, refers to the first three runs? A. If you will give me the chart.

Q. You have the chart there in front of you with reference to Philadelphia.

Mr. Proskauer: While the Lieutenant is looking at that, may I, with the Court's permission, ask you: You selected these three cities. Are you making any contention that those three cities are typical of a national situation? And if so, have you got any evidence of that?

Mr. Wright: We selected the three cities simply to show that in a situation where, concededly, all or substantially all of the first-run theatres are affiliated theatres, that the total film rentals derived from those cities, about 70 per cent comes through the affiliated outlets.

(3337)

Mr. Proskauer: I am perfectly aware of that and you heard the historical explanation as to how we came to own these theatres, this large number of first-run theatres in Philadelphia, and for that reason you chose to choose Philadelphia. Now, with the Court's permission I should like to have you answer my question: Do you claim that these three cities are fairly typical of a national situation?

Mr. Wright: They are only typical to the extent that they reflect the proportions of film rental derived from affiliated and unaffiliated theatres and other situations where the first-run theatre setup is substantially the same. There are many other situations in this country besides these where all or substantially all of the first-run theatres are affiliated.

Mr. Proskauer: In other words, all you are claiming is that where you have a situation like this one, that happens to exist in Philadelphia, this is typical of such situations?

Mr. Wright: Precisely.

Mr. Proskauer: But not of others. That is the way I understand it.

Mr. Wright: Yes.

Judge Hand: He tenders evidence of sore spots

(3338)

and then he is at liberty to argue either that you should abolish the sore spots or——

Mr. Proskauer: I am trying to segregate the sore spot problem from the general problem.

Mr. Caskey: Lieutenant, we want to know what those preferred runs are on the Philadelphia chart, and the number of theatres.

The Witness: Well, if Mr. Wright will kindly give me the basic tables from which was copied the information, I can tell you just exactly what it included.

By Mr. Wright:

Q. (Handing paper to witness.) A. This table itself, Mr. Wright, that you gave me, does not specify what those preferred runs are, but I know there are some basic tables which specify, which have a footnote. This one was omitted for some reason or other, but there is another basic table from one of the other towns or one of the other distributors, which indicates what those preferred runs are; whether they are first, second and third or first, second, third and fourth, I am not sure offhand.

Q. Your Kansas City footnote indicates that you took first, second and third in that town. I do not find a similar footnote for— A. There is one.

Q. —Philadelphia.

Mr. Caskey: Mr. Wright, you will concede that (3339)

in Kansas City that the so-called preferred runs constitute first-runs operated by the four defendants separately, the Plaza Theatre, which is second-run, and the Isis Theatre, third-run, and nothing else.

Mr. Wright: As far as the separate operation is concerned, I believe the record shows that there was a pool there during part of the season, which was dissolved during the season.

Mr. Caskey: So the rest of it is correct, that the second-run theatre is the Plaza and the third-run theatre is the Isis, and they are the only two theatres that are included in the data under the right portion of the chart, in addition to the first-runs.

Mr. Wright: That, I think, is undubitably correct.

Mr. Caskey: Can we get the number of theatres involved in the other two charts—the other one?

Q. These basic tables that we have here do not show any footnote as to what those preferred runs are. Do you have a work sheet here that shows what they were? A. I think we sent work sheets for the basic tables, for these three cities, to all the defendants for any proper corrections they would care to make and those indicate—they are classified by runs, first, second, third and fourth, and the theatres are specified (3340)
as to what particular defendant has a financial interest. I believe, however, Mr. Wright, that this tabulation on Philadelphia covers, that is, the phrase, "All Preferred Runs," covers first, second and third only.

Q. First, second and third? A. First, second and third, that is right.

Q. Only? A. Only.

Mr. Caskey: Why not leave it that way, unless there is a correction to be made in the record?

Mr. Wright: Yes. You apparently have the sheets which show the fact.

We will offer these last exhibits, 467, 468 and 469 for identification, these three summary sheets on those towns.

Judge Hand: All right, we will admit them.

Mr. Wright: We had submitted——

Judge Hand: We have admitted 443 to 466 and marked them in evidence.

Mr. Wright: And we are now offering 467, 468 and 469. I understand those are admitted?

Judge Hand: We have admitted those.

(Government's Exhibits 467, 468 and 469 for identification received in evidence.)

Mr. Proskauer: Are we going to see those before they are marked?

(3341)

Mr. Wright: You have copies.

Mr. Caskey: 467 is Atlanta?

Mr. Wright: Yes.

Mr. Caskey: 468 is Kansas City?

Mr. Wright: Yes.

Mr. Caskey: 469 is Philadelphia?

Mr. Wright: Yes.

I have, if the Court please, these additional basic tabulations that were referred to here, which were submitted to the defendants, and which contain the picture by picture breakdown of each distributor in each city of these rentals. I have no desire to put those into the record unless the Court has some interest in having them in, or the defendants. If anybody wants them in, they are here.

Judge Hand: What do the defendants say to that?

(3342)

Mr. Proskauer: I don't know what he is talking about.

Mr. Raftery: We have never seen that and do not want to see it.

Mr. Proskauer: I suggest that Mr. Wright put his case in. I have not asked him to put in anything else. I do not know what he is talking about. I have not any desires about it at all.

Mr. Wright: That concludes, then, our offer of tabular material subject to our supplying the attached

list of division of product, which is to supplement Exhibit 428, and the list of clearance situations where the data provided shows no clearance or was not supplied, which is to be attached, as I understand it, to Exhibit 441 for identification, which was not received in evidence, but which the Court indicated it would receive if we attached the list showing the extent to which the other data was not supplied.

Judge Hand: Yes.

Mr. Caskey: I assume we will have an opportunity to see it and cross-examine before it is received?

Judge Hand: You mean the one he has in his hand?

Mr. Caskey: That has been excluded. Now, if he gets something else up we want to see it.

(3343)

Mr. Wright: I do not propose to get anything else up. I propose merely to supplement this in accordance with the Court's suggestion with a list of the number of situations supplied which either showed that the contract set no clearance or where the data was silent as to whether there was clearance or not.

Judge Hand: That is not much of a job, is it?

Mr. Wright: I think we can get that in probably by tomorrow morning.

Judge Hand: All right. They are entitled to see it, of course.

Mr. Wright: Of course, before we submit it.

Judge Hand: I do not believe they will want to do much talking about that.

Judge Bright: Does the Government rest?

Mr. Proskauer: The trouble with these charts is, they have been put in in categories which are not conventional in the trade. I have never seen a more misleading chart than that, by reason of the arbitrary

selection of categories of days of clearance which bear no relation to anything that is conventional in the trade.

Judge Hand: Well, I cannot recommend any medicine to be applied in such a situation.

Mr. Proskauer: Well, we will have to supply our own medicine.

(3344)

Judge Hand: All right, and I have no doubt you will.

Mr. Proskauer: I just wanted the Court to know what the sickness was.

Judge Hand: Yes.

Mr. Wright: I think that is all.

(Witness excused.)

The Clerk: Some of the exhibits have not been marked.

Judge Hand: Yes. You see there is a sad gap here between 453 and 467. I do not know what will cure that.

Mr. Wright: I think if we had a brief recess, we could pick these off the title and supply them. I hesitate to take the Court's time——

Judge Hand: All right, we will take a short recess.

(Short recess.)

Mr. Shears: Will you mark these 419-A and 419-B for identification.

(Marked Government's Exhibits 419-A and 419-B for identification.)

Mr. Shears: They are subject to another exhibit which I am now offering. Yesterday your Honors will recall that I had marked for identification a num-

ber of price discrimination and clearance discrimination——

(3345)

Mr. Proskauer: A number of what?

Mr. Shears: Schedules of price discrimination and clearance discrimination; and I offered at that time to make any corrections which defendants saw fit to suggest. Only two defendants have done so, and they have stipulated as to those documents.

I shall now offer Exhibit 419 for identification and 419-A and B.

Mr. Davis: Tell us what it is, will you?

Mr. Shears: 419 consists of three sheets of Radio Keith-Orpheum Corporation, and 419-A is a national gross percentage contract with Theatre Service Corporation, dated June 1, 1944. 419-B for identification——

Judge Bright: What is 419-A, did you say?

Mr. Shears: It is a contract between the Radio Keith-Orpheum Pictures Corporation and the Theatre Service Corporation, dated June 1, 1944, relating to a percentage of national gross on 114 theatres.

Mr. Proskauer: Is that the one in Louisiana?

Mr. Shears: Yes.

Mr. Proskauer: That is an independent circuit.

Mr. Shears: We contend it is not an independent circuit: E. B. Richards purchases for both that and Paramount theatres——

Mr. Proskauer: Your Honor, that is where we go overboard. Mr. Richards——

(3346)

Mr. Shears: Just a moment. May I furnish this, and then you may speak?

Mr. Proskauer: Surely.

Judge Bright: We have a copy here of so-called 419-A.

Mr. Shears: Yes.

Judge Bright: Now, what is this 419-A?

Mr. Shears: A and B are contracts which are referred to on pages 2 and 3 of the exhibit which you have a copy of there. I do not have copies of 419-A and B, but they are explanatory of the exhibits which you have on pages 2 and 3. These are offered——

Judge Hand: Here we have 418, 420——

Mr. Shears: Those are subsequent offers.

Judge Hand: (Continuing) —423 and 419.

Mr. Shears: 419 is all I am offering at this time. 419 are the first three pages that you have in your hand.

Judge Hand: Yes.

Mr. Shears: And A and B are supporting contracts.

Judge Hand: I see.

Mr. Shears: This is offered, and I understand it is without objection on the part of Radio-Keith-Orpheum Corporation. And I also offer a stipulation at the same time.

(3347)

Mr. Proskauer: May I see it, please?

(Handed to Mr. Proskauer.)

Mr. Proskauer: In so far as this concerns Warner Bros. this schedule shows that a picture was leased to us for two days at 35 per cent; it was leased to Apex, independent theatre, for 40 per cent to 12,000 gross, and that is what is shown on the main exhibit. The stipulation shows the final adjusted contract terms to the Apex Theatre in Washington and the Bailey Theatre in New York; that the Washington contract was reduced to 35 per cent of the gross; so that Apex for two days, including a Sunday, paid 35 per cent, and the two Warner theatres paid 35 per cent.

Mr. Shears: And the Apex played after the Warner theatres.

Mr. Raftery: What picture is that?

Mr. Shears: Lady Takes a Chance.

Will you mark this 419-C for identification?

Mr. Proskauer: In order that this may all be in the record, the evidence already in will show that for their two days the Warner theatres paid very much more in dollars.

Mr. Shears: They should, getting first-run over the other theatre.

(3348)

Mr. Proskauer: You got the Sunday.

Mr. Shears: By requirement, while the others were optional.

Judge Hand: Now we have admitted all these intervening exhibits here by numbers, 453 to 466 inclusive.

(Government's Exhibits 453 to 466 for identification, inclusive, received in evidence.)

Mr. Shears: Now, do I understand that 419 is now admitted in evidence?

Judge Hand: Yes.

(Government's Exhibits 419, 419-A, 419-B and 419-C for identification received in evidence.)

Mr. Shears: And I now offer Exhibit 423 for identification in evidence, which is a similar schedule on the part of Warner Bros. Pictures Inc., and attached thereto are data with regard to their theatres indicated on this schedule supplied by the defendant.

Mr. Proskauer: May I see which one you are offering?

(Exhibit handed to Mr. Proskauer.)

(Mr. Shears confers with Mr. Proskauer.)

Mr. Proskauer: You better correct your statement on the record.

Mr. Shears: The data supplied by the defendant as to certain theatres in New Orleans and vicinity to
(3349)
which they sold pictures——

Mr. Proskauer: Your Honors, would it help if I called attention to this? We have corrected a schedule which they tendered us, and agreed on this, and I think it would be helpful if you would let me very briefly point out what the correction involves.

Mr. Shears: Just a moment, sir.

Mr. Proskauer: Pardon me?

Mr. Shears: Is this subject to stipulation, or are you going to argue?

Mr. Proskauer: I have stated to the Court that I am consenting to the admission pursuant to stipulation. I am not accustomed to withdrawing from my stipulations.

Mr. Shears: Then I submit to the Court there is no need for an explanation of what the corrections were; it only wastes the time of the Court.

Judge Hand: I do not know whether it is a waste of time or not. He said it would be brief.

Mr. Proskauer: By brief, I mean three minutes.

We leased, as this stipulation shows, pictures to a concern called the United Theatres which operated down in Louisiana. They owned about 20 theatres, and we had a general contract with them that they were to pay us 15 per cent of the box office on our pictures in all their theatres. We made that deal with them generally. United Theatres is an independent, un-

(3350)

affiliated corporation, and the discrepancy here which is shown, de minimis, as will surely appear to your Honors when you look at this, is due to the fact that we had this general agreement with this independent exhibitor for an overall 15 per cent in all their theatres.

Mr. Shears: May I answer that just by one brief statement? In Exhibit 419-A the Theatre Service Corporation buys for 114 theatres, and in the record on page 754 Mr. Rodgers said that E. V. Richards did the purchasing for Theatre Service and United Theatres.

Mr. Proskauer: What?

Judge Hand: Mr. Rodgers said that E. V. Richards did the purchasing for United Theatres.

Mr. Shears: And Theatre Service. Page 754.

Mr. Proskauer: Mr. Richards owned an independent circuit. He also had in some city a Paramount theatre—he was a Paramount partner. That does not make the circuit in which Paramount had no interest whatever an affiliated circuit.

Mr. Shears: We do not claim it is affiliated. We claim Mr. Richards buys not only for his own chain but for the Theatre Service chain, which is indicated on this.

Mr. Proskauer: But he did not buy from us for the other chain. He bought for his independent circuit.

(3351)

Mr. Shears: I pass up to the Court the list of theatres for which Mr. Richards purchased, which is shown in Exhibit 419-A and Exhibit 419-B, purchased on the same dates from RKO and now in evidence.

Judge Bright: Mr. Shears, while you are on these exhibits, what do you say that Exhibit 419 shows?

Mr. Shears: 419 shows that on the same date Paramount Richards, which is E. V. Richards, and Theatre Service purchased from RKO on the same national gross deal for all the theatres shown on those sheets—and those include all the theatres on the present exhibit——

Judge Bright: I thought you said you were offering Exhibits showing discriminatory practices.

Mr. Shears: Those are in support of the exhibits.

Judge Bright: Now, are you talking about the same exhibit I am?

Mr. Shears: 419.

Judge Bright: Tell me again what you are offering this to show.

Mr. Shears: 419, and subsequent exhibits which I am about to offer——

Judge Bright: No. 419 I am talking about.

Mr. Shears: (Continuing) ——show a discrimination in price and in some cases in clearance between theatres which are neither affiliated or where they are in a big circuit, or as in this present case, pur-

(3352)

chased by E. V. Richards, who is a Paramount official, between those groups of theatres and the independents, has nothing to do with the company to which we sold, shown on that exhibit.

Mr. Proskauer: May I say there is not a scintilla of evidence that Richards is a Paramount official. There is evidence that in a separate company, which has nothing to do with the company to which we sold, he has some interest with Paramount; and if what my friend is saying, that it shows we sold for a lower percentage to a circuit, wholly unaffiliated, which had a large number of theatres,—we did sell for 15 per

cent overall to such a circuit, which was wholly unaffiliated. That is the fact. Now, you can argue anything you want from it.

Mr. Shears: We can submit that in our briefs; but the evidence is clear in the record at the present time that E. V. Richards purchased for United Theatres and for Theatre Service, which are the two in issue at this point.

Mr. Proskauer: I do not see that that differs from what I said. All I said was that he purchased from us, at least this one circuit purchased from us and not the others.

Mr. Shears: The record is also clear that E. V. Richards is an official of the Paramount Company by virtue of the fact that they submitted an affidavit of

(3353)

his as the New Orleans representatitve for Paramount Company.

Mr. Proskauer: What do you mean by New Orleans representative?

Mr. Seymour: Now, I have sat quietly here——

Mr. Shears: He is a director. I will amend my statement.

Mr. Seymour: Mr. Richards is an officer of a company in which Paramount is interested in New Orleans. The Theatre Service Corporation which has been referred to is a company in which Paramount has no interest. Mr. Richards has an interest in that company.

Mr. Proskauer: The same is true of United Theatres. Paramount has no interest in that?

Mr. Seymour: Yes.

Judge Hand: What has this large independent circuit to do with this? Is your allegation of preferential treatment based on the fact that that was large

and got better treatment than some small people? What is it based on?

Mr. Shears: Our argument is based on the fact that Mr. Richards, who is the head of this organization, being affiliated with Paramount, obviously got a better deal than the independents did in that area, as shown by the figures on these charts.

Judge Bright: What figures? That is what I want you to show. Point out what you are driving at

(3354)

so we will understand it. Take 419, which is what I am talking about.

Mr. Shears: Yes. We were on the subject of the admission of the Warner documents. 419 is a blind deal, because in that case Theatre Service, Paramount-Richards purchased on a 00 301 percent of the national gross of all theatres using that picture, not only their own, but all theatres in the United States.

Mr. Proskauer: I don't like to interrupt, but you are mixing up RKO with Warner. There is no such thing on the Warner sheet at all.

Mr. Shears: I was asked about RKO by his Honor.

Judge Bright: I am only talking about 419. That is the RKO sheet.

Mr. Proskauer: Oh.

Mr. Shears: Counsel has been talking about one case and I have been talking about the other.

Judge Hand: This independent circuit, or this circuit that has been characterized, at least, as independent by Judge Proskauer—is that a circuit of Richards?

Mr. Shears: Theatre Service is composed of Richards' children, and Richards himself does the buying for Theatre Service, Paramount Richards and United Theatres. Now, that is all in the record.

(3355) Judge Hand: That is the independent circuit you referred to?

Mr. Shears: We do not characterize it as independent.

Judge Hand: All right. That is the circuit you referred to?

Mr. Shears: Yes.

Judge Bright: The only reason you say Theatre Service is not independent is because Richards buys for it? Have any of the defendants any interest in Theatre Service circuit as such?

Mr. Shears: They have not.

Judge Bright: But Richards buys for that and what other?

Mr. Shears: And for his own, Paramount Richards, in which they do have an interest; and you will see from these Exhibits 419-A and B, which I just passed up, the deal was made on identically the same day and identically the same terms.

Judge Hand: What interest had defendants in having Richards make favorable terms for some theatre circuit in which he and his children, or he or his children were interested and they were not interested, or do you claim there is an inference that they were interested? I do not know what your claim is about this independent circuit.

(3355A) Mr. Shears: We make no claim as far as United Theatres and Theatre Service are concerned, that any defendant has any interest whatsoever in those companies.

Mr. Proskauer: Those are two different companies, if your Honor please.

Judge Hand: Then what has it got to do with the case?

(3356)

Mr. Shears: Except that Paramount-Richards, in which Paramount does have a 50 per cent interest, as well as those companies do their booking through Mr. E. B. Richards who is a director of the Paramount Company.

Judge Goddard: Do you claim that he and his family got better clearance because of that; is that it?

Mr. Shears: The evidence shows that on these exhibits, yes, sir.

Judge Goddard: That is the purpose of it, isn't it?

Mr. Shears: That is the purpose of the exhibit.

Judge Bright: Now, does the evidence show that the Dreamland Theatre, for instance, which is given this 00301 rate pay more or less than the New Orleans Peacock which is listed at 35 per cent gross?

Mr. Shears: As I say, the national gross is a blind deal. There is no way for us to obtain that information. However, on the next exhibit——

Judge Bright: What we are interested in is this: You say it is discrimination.

Mr. Shears: Yes.

Judge Bright: Was he given a better deal than the other theatre was? And that would depend upon what he had to pay, wouldn't it?

(3357)

Mr. Shears: We would say yes.

Judge Bright: Does the evidence show that 35 per cent of the gross is more or less than 00301 of the national gross?

Mr. Shears: We will have to reduce that in our briefs. I could not reduce such a tremendous problem at this time, but we will do so.

Judge Bright: What do you say about it? You must have something to say about it. Is it more or less?

Mr. Shears: We say it is less.

Now, in the Warner Bros. exhibit, which is No. 423, it is evident from the face of the document that the same theatres about which we have been talking, the rate was 15 per cent as opposed to 35 and 40 per cent for the independents. Now, there is no question in this document about the discrimination; and, obviously, if E. V. Richards purchased for both United Theatres and Theatres Service and Paramount-Richards, on identically the same terms, it must be that the percentage national gross deal is a better deal, inas much as it is with Warner Bros. That is page 4 of the document that you have in front of you, the Warner Bros. Exhibit.

Mr. Proskauer: May I make perfectly clear to your Honors that what this exhibit shows was that we were selling a specific two films to Peacock, New

(3358)

Orleans, and also we were selling these two independent circuits, United Theatres and Theatres Service Company on a large over-all deal of 15 per cent of their gross in all theatres. Now, you can argue until you are blue in the face as to which was the better or which was the worse deal. We were not discriminating against Peacock because it was an independent. We had a general deal with two other independent circuits owning some 20 or 30 or 40 theatres—I do not know how many exactly—selling them——

Mr. Shears: I will give you that number if you wish. 114 for Theatres Service and 57 for Paramount-Richards.

Mr. Proskauer: All right, that is all the better. We made a deal with two theatres—I understand

that is not strictly correct, but it is sufficient for my purpose to say that we had a general contract with these two independent circuits to license pictures to them on a straight 15 per cent basis for this large number of theatres. How that is discriminating against an independent, I don't know. They were themselves an independent circuit, both of them.

Mr. Shears: I will not labor the point. The 15 per cent is, of course, the theatre gross. The 35 and 40 per cent are of the theatre gross in each case.

(3359)

Mr. Proskauer: I made one inadvertent statement. The 15 per cent was for United Theatres. To Theatres Service we sold on a flat basis.

Judge Hand: Now, what is the situation, Mr. Wright?

Mr. Wright: I would like to get through, if I possibly can, with the offer of the remaining exhibits here tonight.

Judge Hand: Now, these have been marked for identification.

Mr. Shears: 419 and 420 are in by stipulation. As to the balance——

Judge Hand: All right, they are admitted.

Now, go ahead, Mr. Wright.

Mr. Shears: As to 418, 417, 416, 422, 420 and 421, I have received no stipulation——

Mr. Seymour: I understood from counsel yesterday that he was giving us those schedules, and that he was going to offer them today, and at that time we would comment on them. When he is ready to offer the schedules which concern Paramount, I am ready to comment on them; and subject to some stipulations I want to make, and we will make progress. So why don't you go ahead?

Mr. Shears: I asked counsel yesterday to correct these documents and I received no correction.

(3360)

Mr. Raftery: He gave me two of them, and I am ready to stipulate on what terms I will consent to their going in. You offer them.

Mr. Seymour: Why don't you offer your schedule?

Mr. Shears: I withdraw the offer as to those which we have been unable to agree about, in order to save the Court's time.

Judge Hand: All right.

Mr. Shears: As a matter of fact, in each one we did not receive the data required to build up the document. The only two we have received complete are RKO and Warner Bros.

Mr. Seymour: In other words, you are not going to offer any against Paramount, is that right?

Mr. Raftery: I regret he is not offering the one on Universal.

Mr. Seymour: I regret he is not offering the one against Paramount.

Now, do you withdraw the Paramount schedule, Mr. Shears? Is that the point?

Mr. Wright: We withdraw the offers. If they want to offer them they can offer them. We want to get to material about which there cannot be any question.

Judge Hand: All right.

Mr. Wright: Now I will ask to have marked for

(3361)

identification the supplemental schedule that the Court asked us to prepare to go with Exhibit 428, and I will ask to have it marked as 428-A, showing the exact splits of pictures in each of the situations——

Mr. Proskauer: Is this our old friend——

Colloquy

Mr. Wright: This is what Mr. Raftery refers to as the bouncing exhibit.

Mr. Proskauer: Now, what have you done to make it stop bouncing?

Mr. Caskey: Have you a copy?

Mr. Wright: No.

Mr. Proskauer: Mr. Wright, it is utterly unintelligible when you you look at it. I do not know what it means.

Mr. Wright: Maybe I can make it clear to you.

Mr. Proskauer: I hope you can.

(3362)

The 428-A that you have there shows in each situation covered by 428 the number of features listed on the respective admissions of fact in evidence in the case which played affiliated and independent theatres wherever there was a division. Where there was no division, the notation simply gives the number or the word "or" as it was reported in the admission. Where there is a split reported, the precise split is indicated on this exhibit.

Judge Bright: May I ask you, Mr. Wright, to take the first line "New York, N. Y."

Mr. Wright: Yes.

Judge Bright: Warner 16. That means 16 pictures?

Mr. Wright: The numbers in each case refer to feature pictures, yes.

Judge Bright: Then in the next one, in the Fox column, that would be 15 of Fox pictures?

Mr. Wright: 15 Fox pictures.

Judge Bright: Three of the Loew Pictures?

Mr. Wright: No, I beg your pardon. The features in the Fox column are all features released by Fox; 15 of them had their first-run in New York City in

Fox theatres, three in Loew theatres; nine in independent theatres first-run New York City.

Mr. Proskauer: As I understand it, if you will let

(3363)

me ask, Mr. Wright, the first column, Warner Bros. showed all fifteen of their features in their theatres.

Mr. Wright: First-run New York City, that is correct; and in Chicago, Warner showed 16 in Paramount theatres there, one in an independent theatre, that is, one Warner feature was shown by an independent first-run in Chicago, 16 by the Paramount affiliate, Balaban & Katz.

Judge Bright: You offer the exhibit with the amendments?

Mr. Wright: Yes, 428 and 428-A.

Mr. Caskey: If your Honors please, I think as far as Fox is concerned, the vices which we pointed out have been corrected, but certainly there is no need, I think, for 428 to go in with all of the various mistakes that we pointed out.

Judge Hand: We will overrule you on that. We have been arguing about this thing for——

Mr. Caskey: Many hours.

Judge Hand: —nearly two days, and it will have to go in subject to such comments as you may make in your briefs and argument.

Mr. Proskauer: They will be very unpleasant comments, your Honor.

Judge Hand: I have no doubt of it.

Mr. Seymour: One problem about it, if your Honors please, is this, we have had no time to check this at all.

Judge Hand: It is subject to correction. I imagine you will get together and do that, if there is anything to correct.

Mr. Seymour: If there are any corrections, we will notify the Government, and if those corrections are not made, we would like an opportunity to clip to this exhibit, so that they will be readily available, the corrections which we maintain the evidence requires.

Mr. Wright: Entirely agreeable.

Mr Davis: Have you another copy of that?

Mr. Wright: No, we have just had one run on the typewriter.

Judge Bright: Mr. Wright, he may have my copy, if he wants it. Give it to Mr. Davis.

Mr. Wright: We will supply copies.

(Marked Government's Exhibits 428 and 428-A in evidence.)

Mr. Wright: We will ask to substitute a photostat of Exhibit 384 for the one which is in evidence, and return the original to whoever supplied it. The original was an exhibit in another case and so we have had to return the originals.

And I will ask to have marked as Exhibit 470 for
(3365)
identification a franchise, a two-year deal, for the 1943-44, 1944-45 seasons, for Universal Pictures in the Kincey circuit, a Paramount affiliate. I offer this for purposes of comparison with the form of two-year deal that was offered by Universal in its case as being made with independents.

Judge Bright: Marking it for identification, you said?

Mr. Wright: Yes—well, I am now offering it.

Mr. Seymour: May I see it?

(Marked Government's Exhibit 470 for identification.)

Colloquy

Mr. Wright: Mark this as 471 for identification.

(Marked Government's Exhibit 471 for identification.)

Mr. Wright: Is there any objection to 470?

(No response.)

(Government's Exhibit 470 for identification received in evidence.)

Mr. Wright: And I will offer an agreement, a current franchise, for the 1944-45 and 1945-46 seasons for the exhibition of Columbia pictures in the Loew metropolitan circuit, which has been marked for identification as Exhibit 471.

(Marked Government's Exhibit 472 for identification.)

Mr. Davis: No objection.

Mr. Frohlich: No objection.

(3366)

(Government's Exhibit 471 for identification received in evidence.)

Mr. Wright: And I will offer Exhibit 472 for identification, which is a two-year deal covering the 1943-44 and 1944-45 seasons for exhibition of Columbia pictures in the Fox Intermountain Circuit.

Mr. Caskey: Where did you get it.

Mr. Wright: I think we got that from Columbia. Mark that 473.

(Marked Government's Exhibit 473 for identification.)

Mr. Caskey: Do you know this, Mr. Frohlich?

Mr. Frohlich: That is accurate. No objection.

(Gov. Ex. 472 for identification received in evidence.)

Mr. Wright: And I will offer in evidence a two-year franchise deal for Universal pictures to be exhibited in the RKO metropolitan New York circuit, which has been marked for identification as 473.

Mr. Raftery: Does this come from uptown, Mr. Wright?

Mr. Wright: I believe it did.

Mr. Raftery: I mean, who supplied it? Mr. Leisure says RKO supplied it. If they say it is O.K., it is O.K. with me.

(Government's Exhibit 473 for identification received in evidence.)

(Government's Exhibit 474 marked for identification.)

Mr. Wright: I offer 474 for identification, at this time.

(3366a)

Mr. Proskauer: May I see it, please?

(Handed to Mr. Proskauer.)

Mr. Proskauer: In so far as this concerns Warner Bros., this schedule shows that a picture was leased to us for two days at 35 per cent; it was leased to Apex, independent theatre, for 40 per cent to $12,000 gross, and that is what was shown on the

(3367)

agreement between Paramount Pictures, Inc., and Partmar Corporation, relating to the exhibition of Paramount pictures in the Paramount theatre in Los Angeles, covering a ten-year period from 1939 through 1949. That I take it, is received.

(Government's Exhibit 474 for identification received in evidence.)

Colloquy

Mr. Wright: I have here, if the Court please, a three-year agreement covering the 1939-40, 1940-41 and 1941-42 seasons for the exhibition of Universal pictures in the so-called Sparks Circuit in Florida. I will offer the entire agreement if any one else wants the entire agreement in. All I am interested in is this one provision which I will read into the record, if that procedure is agreeable to the other parties.

Mr. Proskauer: I can't tell you whether it is agreeable because I never saw it and I don't know what it is.

Mr. Wright: This agreement, as I say, covers a three-year period for the exhibition of Universal films in the towns in the Sparks Circuit. The number of towns covered are those which comprise the circuit and are, I believe, about forty or fifty in number. I don't think the exact number is material for our purposes.

The provision I want to call attention to is this:

"If desired, one additional run will be granted

(3368)

in the following towns without additional charge:

"De Land, Orlando, Fort Lauderdale, Sarasota, Gainesville and St. Augustine."

Mr. Proskauer: Is it a percentage contract?

Mr. Wright: The terms of the contract are simply rental of $81,909 per year. "Such film to be exhibited in the town and according to the runs designated upon the attached sheet, Exhibit B, made a part of the contract."

And then there is a further provision that Sparks Circuit, Inc., "may have the right to exhibit any picture included in this contract in any theatre operated by it in the town of Palm Beach, Florida, and that the rental of such film shall be $100." And then "it is

further agreed that any runs set forth in this agreement shall carry a rental price of $25 per run."

Mr. Raftery: You only want incorporated that Sparks got a free run in those towns, if he wanted it?

Mr. Wright: He was given an optional free run in the towns of De Land, Orlando, Fort Lauderdale, Sarasota, Gainesville and St. Augustine.

Mr. Raftery: How many towns are there altogether?

Mr. Wright: There are——

Mr. Raftery: I mean, the free run?

Mr. Wright: There are six towns.

(3369)

Mr. Raftery: I don't care whether he puts the contract in or puts the provision in, as far as Universal is concerned.

Judge Bright: Is the Sparks Circuit an independent circuit?

Mr. Wright: No, that is one in which Paramount, I believe, owns approximately 90 per cent interest.

Mr. Frohlich: That is the one, your Honors will recall, where Columbia gave the franchise agreement to Sparks and it was proven that out of the 43 cities Mr. Sparks owns all the theatres in 32 cities. There isn't another theatre in any of those 32 cities but the Sparks theatres.

Mr. Raftery: That is the one Scully testified that Rogers was a tough buyer.

Mr. Wright: There isn't any dispute about that.

Judge Bright: About the testimony about the fact that he is a tough buyer?

Mr. Raftery: Either way.

Mr. Wright: That he is a tough buyer. I don't remember the other part of it. Then I have here a franchise agreement from RKO Radio—I have another exhibit that I simply want to call attention to the facts about, without making an offer unless some-

one wants it in the record. It is a franchise from RKO Radio Pictures, Inc. to Junior Orpheum Corpo-
(3370)

ration, San Francisco, Limited, dated September 1, 1941, but actually executed November 19, 1941, between those parties covering the exhibition of RKO films in the town of San Francisco for a ten-year period, commencing September 1, 1941, and ending August 31, 1951. I merely offer the statement of that fact to show that RKO has made franchises for RKO pictures since the consent decree was entered.

Mr. Leisure: We have no objection to it as long as the record shows that the theatres are our own subsidiaries.

Mr. Wright: I have here also a contract between Universal and Skouras Theatres Corporation covering the seasons 1944-45, 1945-46, and 1946-47, which relates to a number of theatres operated by Skouras in metropolitan New York. The provision I want to call attention to is simply one which appears in the clearance schedule for each of the, I believe, thirty or forty odd theatres, altogether. This appears at the bottom of each page on which the theatres are scheduled. "Skouras theatres to have seven-day clearance on any new or newly operating theatres within the area of the furthest point over which any Skouras theatre is accorded clearance.

Mr. Raftery: The only objection we have to that is that Skouras is not a part to this action in any
(3371)

respect. It is a dealing with an exhibitor not a party to it and you are not going to offer the whole thing?

Mr. Wright: If you want the whole thing in, I will put it in.

Mr. Raftery: I don't want anything in.

Mr. Wright: Otherwise I will offer the provision. If the Court please, I believe we actually have somewhere here a provision as to the existence of a fact. Have you got a copy of our stipulation, Mr. Frohlich?

Mr. Frohlich: I haven't, but I have no objection to your reading it or putting it in the record.

Mr. Wright: If I can find it, I will put it in.

The stipulation executed between Mr. Frohlich and myself is as follows:

> "It is hereby stipulated between counsel for the defendant Columbia Pictures Corporation and the plaintiff that Columbia now serves its feature films to two neighborhood houses in New Orleans, Louisiana, to-wit, the Beacon and Lakeview theatres which are located within two blocks of each other, with sixty days' clearance in favor of the Beacon over the Lakeview, and has maintained that clearance from the opening of the Beacon in 1941 to the present time."

That, the Court will recall, is one of the situations

(3372)

where the appeal board cut a similar clearance in favor, or, used by other defendants, to one day in 1943.

Mr. Frohlich: And Columbia was never a party to any clearance controversy.

Mr. Wright: That is quite correct. As far as the decree is concerned, Columbia did not sign it.

I had a similar stipulation, or a stipulation in somewhat different form regarding the same theatres with United Artists, I believe, which I also appear to have——

Mr. Raftery: I am ready to stipulate on this not in that form.

Mr. Wright: Yes, I understand that. You have a copy then?

Mr. Raftery: No, I haven't a copy. I will read into the record what I am willing to stipulate. You may take it or leave it.

Mr. Wright: All right, why don't you do that?

Mr. Raftery: With the exception of two pictures, Stage Door Canteen and Johnny Come Lately, both of which played Mrs. Smith's theatre—what is the name of her——

Mr. Wright: The Lakeview.

Mr. Raftery: (Continuing) The Lakeview first-run in that zone, all of our pictures have been made available to Mrs. Smith for booking, I mean all the pictures she has licensed have been made available

(3373)

to her for booking sixty days after their play date at the other theatre.

Mr. Wright: The Beacon.

Mr. Raftery: The play-off shows on the 1943-44 product that she has played these pictures: the earliest one of 13 she played three months after availability, the last one, the outside date, is eight months after availability. All the other pictures vary from three months to eight months.

On the 1944-45 season, there were 13 pictures involved, the earliest one she played 43 days after availability, the longest eight months after availability, and the same sixty-day availability prevailed.

Mr. Caskey: Availability means the time when she had a right——

Mr. Raftery: When she had a right to play it. And the other eleven pictures vary from two months to eight months after availability.

Mr. Wright: It is a fact, is it not, Mr. Raftery, that in her contracts all that is said as to clearance is simply "after Beacon"?

Mr. Raftery: That is right.

Mr. Wright: Sixty days after Beacon.

Mr. Raftery: No, there is nothing in the contract. He asked me to find the fact.

Mr. Wright: The fact is the contract simply says (3374)

"after Beacon" but the practice is to make her wait at least sixty days.

Mr. Raftery: And also, the top price she paid for any one of these features with the exception of the two she played clear, was $15.

Judge Bright: Would she be given notice of availability of those pictures after the expiration of sixty days?

Mr. Raftery: That is right.

Judge Bright: Right immediately after?

Mr. Caskey: Before.

Mr. Raftery: In sixty days they are available to her.

Judge Bright: When is she given notice of availability?

Mr. Raftery: As soon as we set a booking in the other theatre. You set the booking in the theatre. That is a question that Judge Goddard was asking about during the examination of one of the witnesses. In your contract you have a provision that requires the distributor to give a written notice of availability as soon as the picture is available. Then it is her option to date the picture. She is the one that dates it and she has a period within which to date. Notwithstanding the fact that these pictures were made available on the sixtieth day after the finish of the (3375)

run at the other theatre, her booking sheets on the play-off shows we waited as long as three months to

get the big sum of $15 in this situation. The other two pictures she played clear of the Beacon because we had a fight with Mershon and did not sell him the picture in any part of his United Theatres.

Mr. Caskey: I don't think you have answered Judge Bright's question as to when notice of availability was sent to her.

Mr. Raftery: It was sent to her as soon as you set your booking date in the first theatre.

Judge Bright: That does not mean a thing to me. When do you set the booking date in the first theatre?

Mr. Raftery: In the first theatre, that depends on the first run in your theatre. You have a first-run in New Orleans. That picture plays downtown—most of our pictures up until this year played downtown in the Loew theatre. As soon as you set your first-run, then you set your availability for the second run. Now we will assume this Peacock theatre was the second run. As soon as you set your date on that one, you immediately set your date on your third run. That is the date of availability. Then the exhibitor comes into the exchange, goes to the booker and sits down and works out her dates on the pictures she wants to book. She had all these availabilities sixty

(3376)

days after the other one, and she set them as far back as eight months after they could have been played. That is the way they book them.

Mr. Caskey: She got the notice sixty days before she could have played the picture.

Mr. Raftery: Right.

Judge Bright: When you say they play clear you mean that is without any clearance?

Mr. Raftery: No, the other theatre did not play the picture at all. Stage Door Canteen——

Judge Bright: She could play it first-run?

Mr. Raftery: She played it first run in both instances—exclusive run in that competitive area.

Mr. Wright: Now I am informed that Mr. Raftery is also willing to stipulate this schedule that was marked for identification as 417, as to the Stage Door Canteen in certain theatres in Kansas City, is that right?

Mr. Raftery: I was willing to stipulate that but I am awfully sorry about that Universal one. I don't want to stipulate the two of them. You had better ask Mr. Caskey about that. That is his stuff. I don't want to be stipulating for him, too.

Mr. Caskey: The Government cannot justify the statement on the front of this, that the Dickinson theatre played after the Waldo.

(3377)

Mr. Marcus: The Appeal Board decision indicates that.

Mr. Caskey: I am thoroughly familiar with that, sir, and the Appeal Board does not indicate any such thing. Of course if you want to put the contract in evidence, that is all right, but I certainly object to this prejudicial schedule, which is not like anything that is in evidence.

Mr. Wright: What do you want taken out of the schedule to satisfy you?

Mr. Caskey: Put in the contract and then make up your own schedule and we will make up one for our brief.

Mr. Wright: We will offer the folder identified as 417 with the contracts in evidence and without the schedule.

Mr. Caskey: There are some others than Kansas City in that folder.

Mr. Wright: Then they should be removed.

Mr. Raftery: What are the towns involved there?

Mr. Wright: The only town involved is Kansas City, Missouri. The theatres involved are the Fox, Waldo, the Rock Hill and the independent Dickinson and Bijou.

Mr. Raftery: Where is the Dickinson, in what town?

Mr. Wright: It is in, I believe, a suburb of Kansas City, called Mission, Kansas City.

(3377-A)

Judge Goddard: What is the date of the contract?

Mr. Wright: The date of the contract between United Artists and the Bijou is October 8, 1943; that between United Artists and Dickinson is July 19, 1943; the Fox contract with United Artists is Dated May 8th, 1945.

(Marked Government's Exhibit 417 in evidence.)

(3378)

Mr. Wright: We should also like to offer these two United Artists—well, they are actually two contracts dated September 20, 1944. This contract, dated September 20, 1944, relates to one picture but consists of three pages, all between United Arists and a group of exhibitor corporations affiliated with Paramount and Minnesota Amusement Company. I will ask to have that marked with the next exhibit number.

(Marked Government's Exhibit 475 for identification.)

Mr. Wright: And as 476 for identification two dated June 26, 1944, attached together, for exhibition of one picture in the Kincey Circuit, also affiliated with Paramount.

Mr. Raftery: Before I consent, could you tell us the purpose for offering anything like that?

Mr. Wright: These are recent agreements in which a profit-sharing deal was made between United Artists and these Paramount affiliates.

Mr. Raftery: Do you mean we have an interest in the operation of those theatres?

Mr. Wright: You do.

Mr. Raftery: Or was our film rental measured by house expenses? Is that what it means?

Mr. Wright: Yes.

Mr. Raftery: I object to the characterization of
(3379)
profit-sharing. I have no objection to it going in.

Judge Hand: There is a great tendency on the part of everybody except yourself to put in anything of which he has possession.

(Marked Government's Exhibits 475 and 476 in evidence.)

Mr. Wright: That tendency, if the Court please, we have now checked. We rest—I have one qualification, subject to the supplying of the schedule which was to be added to Exhibit 421 for identification in order that it might be received, and that, I think, they are working on upstairs.

Mr. Caskey: I withdraw my desire to see it.

Mr. Seymour: I have those remaining affidavits and things, if I may proceed for a couple of minutes and clean up that matter.

Judge Hand: All right. These exhibits that are marked here only for identification, I take it, have been offered in evidence, isn't that right?

Mr. Wright: Which exhibits are those?

Judge Bright: 474, 475 and 476.

Judge Hand: There were a number.

Mr. Wright: They were all offered and received, I understood it.

Judge Hand: We intended to receive them. I (3380) wanted to be sure they had been.

Judge Goddard: 417 too.

Mr. Seymour: First, Mr. Keough, who was a witness here is in the hospital, and there were certain corrections in his testimony that he wanted to have made, and that we have agreed with the Government should be made by stipulation, and I would like to have the stenographer copy those corrections into the record, so that reference can be made to that.

(The stipulation referred to is as follows:)

"IT IS HEREBY STIPULATED AND AGREED that if Austin C. Keough were recalled to the witness stand, he would testify as follows, in correction of the testimony heretofore given by him at the following pages of the typewritten record:

"1. At page 1263. In lieu of his answer reading 'Starting in about the year 1913, Paramount,* * *' he would testify 'Starting in about the year 1918, Paramount,* * *'.

"2. Also at page 1263. In lieu of the answer commencing 'There was a Big Four, which then consisted of a company called Vitagraph, and Selig, and Spoor, and Essanay', he would testify 'There was a Big Four, which then consisted of a company called Vitagraph, and Selig, and Lubin, and Essanay'.

"3. At page 1289. In lieu of the sentence in the answer commencing 'That is the form that

Judge Thacher and the Supreme Court said was illegal to use by agreement', he would testify: 'This form, as later revised in 1926 and again revised after the Federal Trade Commission conference in 1927, is the form that Judge Thacher and the Supreme Court said was illegal to use by agreement'.

"4. At page 1295. In lieu of the answer commencing 'Now that contract, having been worked out by this Committee,' * * * and ending the Federal Trade Commission conference—', he would testify: 'This 1928 contract, evolved from the Federal Trade Commission conference, was in use until a decision by Judge Thacher in October, 1929, and thereafter Paramount used its own form of contract until about 1934'.

"'In April of 1930, representatives of distributors and exhibitors met at Atlantic City to evolve another uniform contract. They did evolve a contract, and by the end of the year 1930 submitted it and recommended its adoption. It was used by some distributors and not by others. There was no

(3382)

agreement among any of the distributors as to its use. It is not the same agreement which Paramount used and which is marked "Exhibit P-10." It was referred to in the industry as the 5-5-5 contract and its use was optional, as were also the provisions therein for the arbitration of disputes'.

"5. At page 1296. In view of the foregoing clarification, Mr. Seymour's answer to Judge Bright's question at page 1296 should be changed to read as follows:

'Judge Bright: The 5-5-5- contract is Exhibit P-10?

'Mr. Seymour: No, Exhibit P-10 is Paramount's own form of contract. The 5-5-5 contract was similar to the one marked P-11'.

"6. At page 1297. In lieu of the answer commencing 'It was a shorthand description of the Committee that was made up * * *', Mr. Keough would testify: 'It was a shorthand description of the Committee that was made up. There were 5 men representing Allied States Exhibitors' Asso-

(3383)

ciation, 5 representing motion picture theatre owners of America, who were both independent exhibitors' organizations, and 5 who represented distributors of the affiliated exhibitors.'

"7. At page 1317. In lieu of the sentence in the answer which commences 'In other words, Paramount agrees that this first run account of its choice * * *', Mr. Keough would testify as follows: 'In other words, Paramount thereby agrees that this first run account of its choice, to whom it has granted the license, that Paramount, in licensing that same picture to be exhibited on a subsequent run in competing theatres whose admission prices are equal to or lower than the minimum stated in the clearance provision of the license agreement, will not so license that picture as to permit its exhibition until after the expiration of the stated period of clearance.'

"8. Also at page 1317. In lieu of his answer to the question by Mr. Proskauer, Mr. Keough would testify: 'Won't license it for exhibition within 30 days, within the 30 days stipulated clear-

ance, in a theatre which charges less than whatever the stated price is in that particular contract'."

(3384)

Mr. Seymour: Second, Mr. Beatty, who was a witness for Paramount, called by Paramount, has made an affidavit as to testimony which he would have given if recalled, and I understand that the Government stipulates that the testimony would be given in accordance with this affidavit, if recalled, with the same force and effect as if he were here, and I ask that that be copied into the record.

Mr. Wright: There is one qualification I wish to make as to this last stipulation. He is now offering an affidavit from the witness Beatty as to what the witness Beatty would say if now recalled to explain certain terms in a contract which was offered in evidence. Mr. Beatty has signed this affidavit and I accordingly agree that if called to the stand at this time he would say what he said in his affidavit. However, I would object at this stage to that testimony being received, even if he were here on the witness stand because he should have made the explanation that he now seeks to make at the time he was here.

Mr. Seymour: The only reason——

Judge Hand: We will overrule that. Go on.

Mr. Seymour: Very good. I would like to have that copied into the record.

(3385)

(The affidavit of E. C. BEATTY is as follows:)

"E. C. BEATTY, President of W. S. Butterfield Theatres, Inc. and Butterfield Michigan Theatres Company, being duly sworn, deposes and says;

"I am informed by counsel for Paramount Pictures, Inc., that after I was called as a witness on behalf of that defendant and testified in connection with the proceedings in the United States District Court for the Southern District of New York in United States vs. Paramount, et al., counsel for the Government introduced in evidence a certain agreement between Walter S. Butterfield, Famous Players Lasky Corporation, Balaban & Katz Corporation, Publix Theatres Corporation, and B. F. Keith Corporation, dated September 24th, 1926, as Government's Exhibit number 387.

"I am further informed that Government counsel referred to paragraph 20 of said agreement. This paragraph speaks for itself.

"If I had been interrogated by the Government counsel in regard to this Agreement, and particularly paragraph 20 thereof, when I was on the witness stand, I would have testified, and the fact is, that this paragraph of the Agreement was never carried out or performed by any party to the Agreement and that it has never been operative.

(3386)

The fact is W. S. Butterfield Theatres, Inc. was incorporated on the 24th day of December, 1926; that prior to that time there was no one in existence who could execute a contract for said W. S. Butterfield Theatres, Inc.; and I further state that after the 24th day of December, 1926, and up to the present time, no contract as set forth in the said paragraph 20 was ever entered into by W. S. Butterfield Theatres, Inc.; that neither Publix, Keith or any other organizaton or individual ever requested execution of such a contract; and I, together with all my associates with W. S. Butter-

field Theatres, Inc., and so far as I know all interested in Keith or Publix took it for granted and acted on the theory that no such contract was or would be executed. And the fact is, further, that W. S. Butterfield Theatres, Inc. did not, after its incorporation, agree with Keith that Publix would act as agent in negotiations with Producers Releasing Corporation, nor did Publix Theatres Corporation negotiate film licenses for W. S. Butterfield Theatres, Inc., Butterfield Michigan Theatres Company, or any subsidiary of either of the said corporations.

"From the organization of the Butterfield corporations, and including the period during the lifetime of W. S. Butterfield, all negotiations for pic-

(3387)

tures purchased for exhibition purposes have been conducted and consummated by myself or those specially designated employees who referred for final action all such purchases to me. To the best of my recollection, I do not recall that W. S. Butterfield made any purchases or participated in any other way for pictures for exhibition purposes.

"To the best of my personal knowledge, neither Keith nor any successor of Keith ever demanded that the new company, W. S. Butterfield Theatres, Inc., contract for any pictures of Producers Distributing Corporation, never named a substitute therefor, and never demanded that it contract for the exhibition of any pictures whatsoever. However, I further state to my personal knowledge that practically all of the pictures of Producers Distributing Corporation, while it existed, and all leading Companies in the country, sold to and the Butterfield Corporations purchased substantially all their pictures.

"I further state that Mr. W. S. Butterfield died in the month of April, 1936, and immediately thereafter I became President and Treasurer, and performed all the duties of General Manager of the two aforementioned corporations.

"I further state that no officer, employee or representative of Publix Theatres Corporation or

(3388)

of Paramount Pictures, Inc. or any of its predecessors has ever participated in or been consulted in regard to any negotiations with any distributors in the licensing of films to the theatres operated by said corporations except that naturally officers, employees or representatives or Paramount Pictures, Inc. have participated with myself, or specially designated subordinates of mine, in the negotiations of licenses for the exhibition of Paramount pictures in theatres operated by those two corporations or any subsidiaries thereof.

(Sgd.) E. C. BEATTY."

Mr. Seymour: Now, to complete two groups of affidavits which I had offered, the first group being P-24, I offer as part of P-24 the affidavits of M. A. Lightman, William K. Jenkins and E. H. Rowley and ask to have those treated as part of P-24.

(Marked Defendant Paramount's Exhibit P-24-A.)

Mr. Seymour: Then I ask to have treated as part of P-25 the remaining affidavits in that category which I propose to have marked, an affidavit David R. Wallerstein, an affidavit of Clifford J. Shaw—several affidavits of Clifford J. Shaw—and an affidavit of Joseph Phillipson.

That completes the reserved right to put in additional affidavits, which your Honors were kind enough
(3389) to grant me.

(Marked Defendant Paramount's Exhibit P-25-A.)

Mr. Wright: It raises, of course, the question of our motion to strike. We had the motion virtually completed but we haven't yet seen this last material. I haven't had a chance to include it. I suppose that our motion, if forwarded and included in the record after the close of the proceedings, would be taken to have the same force and effect as if filed now?

Judge Hand: Oh, yes.

Mr. Proskauer: Shall I proceed? I have a very short number of exhibits.

The first ones I offer, I state by way of explanation, relate to Government's Exhibit 403, which you will remember was the statement of our profit and loss for certain years.

I offer in evidence a condensed statement of the profit and loss of Warner Bros. for the fiscal years ending 1929 to 1944 inclusive, which are taken from our published reports.

Mr. Wright: Did you say condensed or consolidated?

Mr. Proskauer: I said condensed.

Mr. Wright: Is it a condensed consolidated statement?

(3390)

Mr. Proskauer: It is a statement of the profits of the corporation as shown in its annual reports, and it is by the books of account of the company.

I don't want to comment on this other than to call your Honors' attention to the fact that in 1929 our

profit was 14 million dollars, in 1932 our loss was 14 million dollars. There have been variables like that all through. The average, for the last three years, was a profit of just under eight million dollars and for the 13 years prior to that it was $948,000.

(Marked Defendant Warner's Exhibit W-17.)

Mr. Proskauer: I offer in evidence a schedule showing the net profit in relation to our total income percentagewise during each of those years.

While it is being marked, I will call your Honors' attention to the fact that in 1929 we earned almost 20 per cent on our income.

Mr. Wright: May we have a copy of that?

Mr. Proskauer: The 16-year average was 2.19 per cent. The 13-year average from 1929 to 1941 was just under one per cent and the three-year percentage for the years 1942 to 1944 inclusive was 6.02 per cent.

(Marked Defendant Warner's Exhibits W-18 and W-19.)

(3391)

Mr. Proskauer: The next schedule I offer shows net profit in relation to net worth. That shows that in 1929 we made nearly 20 per cent on our net worth. In 1932 we lost 20 per cent on our net worth. For the 13 prewar years, 1929 to 1941, we earned 1.22 per cent on our net worth and for the three war years we earned 7.84 per cent.

(Marked Defendant Warner's Exhibit W-20.)

Mr. Proskauer: The next schedule shows the same computation with respect to our total assets.

Mr. Wright: We are going to get copies of these eventually, I take it?

Mr. Proskauer: Right now, I hope.

That shows for the three war years we averaged 4.33 per cent on our assets; that for the 13 years preceding that we averaged .53 per cent, and that for the 16 years prior to that, we averaged 1¼ per cent earning on our total assets.

(Marked Defendant Warner's Exhibit W-21.)

Mr. Proskauer: Your Honors will recall I cross-examined the Government witness on the box-office receipts as showing why the profits for the last three years had been so good. I offer in evidence a schedule showing the fluctuation in attendance and box-office receipts of motion picture theatres operated in the

(3392)

United States. By that, of course, I mean the Warner Bros. theatres. The heading is somewhat ambiguous.

It shows that in 1932 the attendance was 163,000,000 and the box-office receipts $51,600,000; in 1944 the attendance increased to 218,000,000 and the box-office receipts increased to $77,200,000. The 13-year average is 183,900,000 attendance and $54,300,000 receipts. The 10-year average for the prewar years 1932 to 1941, inclusive, are 174,800,000 attendance and only $49,300,000 box-office receipts, but for the three war years, the attendance went up to an average of 214,100,000, and the box-office receipts to an average of $71,100,000.

(3393)

I offer in evidence a schedule taken from the Film Daily Year Book of 1945 page 47, showing the national average of United States theatre admission prices for motion picture theatres.

Mr. Wright: Now, just a minute: As far as we are concerned, these admission price fluctuation data I think are not relevant or material, but if we are

going to use such sources as Motion Picture Daily tabulation, we have an OPA study showing the rise in admission prices when they considered the question of applying ceilings. I submit if we get into that kind of a field there is better data than this——

Mr. Proskauer: If there is any question about it I will withdraw it. We will rest on our own admission prices. Counsel suggested at one stage here that we had not, as he said, passed on to the public economies, or that the huge increase in the cost of our film production had been passed on to the public. I will rest on my own figures on that if counsel objects to showing the national figures.

Mr. Wright: We do not object to showing the national figures.

Mr. Proskauer: Well, if you do not want to show them one way or the other, do not make arguments like that.

(3394)

Mr. Frohlich: If the Court please, I would like to have Mr. Wright——

Judge Hand: Wait a minute. You have got something more?

Mr. Proskauer: Yes. I have got an affidavit.

Mr. Frohlich: I am sorry.

Mr. Proskauer: This affidavit shows the actual minimum evening adult admission prices actually charged in the various theatres that played Princess O'Rourke. I understand that Mr. Wright is willing to stipulate that this affidavit may be used in lieu of calling Mr. Jones personally.

Mr. Wright: Yes, indeed, and that he would testify——

Mr. Proskauer: And it may be admitted and marked with the same force and effect as though it were his testimony if he were called as a witness.

Colloquy

(Marked Defendant Warner's Exhibit W-22.)

Mr. Proskauer: I now offer a schedule—and the source of it is this last affidavit which went in evidence—of the contract minimum admission prices and the actual minimum admission prices of exhibitions listed—these are exhibitions of Princess O'Rourke—listed in Government's interrogatories 6 to 11 in evidence and while it is being marked I will briefly call attention to this——

(3395)

Judge Hand: Wait a minute.

(Marked Defendant Warner Exhibit W-23.)

Mr. Proskauer: What the schedule shows is, when you get down to A and B, that in 395 cases the actual minimum admission prices were greater than contract minimum admission prices, and it lists how much more there were. Then it shows that in 57 cases the minimum admission price was less than the contract minimum price, and it shows how much—I mean the actual admission price was lower than the contract minimum. And we shall argue certain inferences from that in our brief.

I think that is all we have. We rest.

Mr. Davis: If the Court please, my contribution will be a very trifling one. In view of what has transpired this afternoon, I am not even sure that it is a necessary one. The Court will remember that the Government produced tabulations showing the distribution of license fees paid to all defendants in the cities of Atlanta, Philadelphia and Kansas City, showing the distribution of license fees between affiliated and non-affiliated theatres, first-runs and subsequent-runs. I rather anticipated that on those three exhibits we should hear an argument from the Govern-

ment that they were typical in the situations throughout the country. Mr. Wright has now stipulated that that is not his purpose, and that that will not

(3396)

be the argument as to Atlanta, Kansas City, and Philadelphia.

To meet that argument, however, I have had prepared a schedule of 15 cities, including such cities as Baltimore, Cleveland, St. Louis, Washington, New York, Columbus, Ohio, and others, in which I have had shown the distribution of license fees paid to Loew's on the first-run, subsequent-runs and all the film rentals distributed between Loew's own theatres, theatres of co-defendants here, and the independents. And although, as I say, the concession of the Government has somewhat minimized my belief in the necessity of this, I nevertheless offer it; and having offered it, I gracefully retire.

(Marked Defendant Loew's Exhibit L-18.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Fox Exhibit F-28 for identification.)

Mr. Caskey: I offer in evidence a chart showing the playoff of the picture Sweet Rosie O'Grady in St. Louis, Missouri.

(Marked in evidence Fox Exhibit F-28.)

Mr. Caskey: It was made on the same basis as some charts that were offered by the Government for other cities.

I offer in evidence a similar chart for Indianapolis, Indiana.

(3397)

(Marked Defendant Fox's Exhibit F-29.)

Mr. Caskey: In the course of Mr. Kupper's testimony I stated that I was not examining him in detail as to the 92 cities, but would offer in evidence as an exhibit the detailed statement that was submitted to Mr. Wright prior to Mr. Kupper's leaving the stand; and we now have submitted to him the revised copy which contains wholly immaterial corrections.

Mr. Wright: I haven't the faintest idea as to whether these corrections made since he left the stand are material or not.

Mr. Caskey: I assure you they are not.

Mr. Wright: I submit this is an objectionable procedure.

Judge Hand: I hope we won't get into the old business of spending more time for days correcting minutes.

Mr. Caskey: You can see they are purely grammatical.

Mr. Wright: If you will just offer it with the changes made since he was on the stand indicated, I think the Court can then see and we can see what has been done.

Mr. Caskey: All right; stitch that right on the back, Mr. Clerk.

Mr. Proskauer: With the understanding if you

(3398)

do not agree on it, you can go back and talk to the reporter.

(Marked Defendant Fox's Exhibit F-30.)

Mr. Caskey: We rest.

Mr. Leisure: We have three exhibits, if your Honor please: We have three exhibits which we have

already cleared with Mr. Wright. I think they can just be marked without comment. This is a schedule of income, of net profits of RKO. May we have that marked, please?

(Marked Defendant's RKO-Exhibit 26.)

Mr. Leisure: The second is a schedule of RKO film rentals received for typical pictures from affiliated and unaffiliated exhibitors in comparable size theatres.

(Marked Defendant RKO Exhibit 27.)

Mr. Leisure: And the third is a table supplementing material shown by the Government on its chart, Exhibit 432.

(Marked Defendant RKO Exhibit 28.)

Mr. Frohlich: I will be very brief. I have a simple request to make, with the permission of the Court, of Mr. Wright. There came into evidence this afternoon a contract between Columbia and Loew's, a franchise agreement. That had a provision in it under which Columbia made some allowance of house expenses. In view of Mr. Wright's statement that he would consider that a sharing of profits—and I did not bring any other contracts down with me—but I would like him to stipulate that I have such contracts

(3399)

of a similar nature with independents with identical clauses. I assure you that is a fact, and I want to do this in the interest of time.

Mr. Wright: I would like to see those contracts that are identical. I would concede that you may have contracts with independents in which your film rental is determined giving consideration to house expense, if that is what you have in mind.

Mr. Frohlich: Yes, I have those.

Mr. Wright: That stipulation we will give you, but that they are identical, we will not.

Mr. Frohlich: That will satisfy me. That is all.

Mr. Raftery: The Universal defendants rest. United Artists rests.

For the record I wish to make the same motions to dismiss I made at the close of the Government's case.

Mr. Frohlich: Columbia makes the same motions.

Mr. Seymour: I suppose there may be some virtue in renewing the motions to strike which the defendants made, and I should like to renew them and include within them, without taking the time to supply details, the various exhibits that have been offered since the defendants closed their case, the point being, of course, that we have taken the position throughout as to all these exhibits that exhibits affecting one de-

(3400)

fendant were not admissible against others, and they have never been connected until this time.

Judge Hand: Well, that will be denied.

Mr. Caskey: Denied as to all of them?

Judge Hand: Yes.

Mr. Proskauer: And may they all have the benefit of an exception?

Judge Hand: Yes. But the time is coming when you do not have to take it. I think it has come under the new rule. I do not know too much about the new rule. Hasn't it?

Judge Bright: Yes.

Judge Hand: Now, Mr. Wright, you want to put on the record motions to do all kinds of things, too?

Mr. Wright: That is correct, Judge.

Judge Hand: So as to show that you too have not been idle?

Mr. Wright: I cannot claim any activity in that connection myself, but one of my assistants has been laboring with that problem for a week.

Mr. Proskauer: Why not insert in the record any motion you want and let the Court deny it now?

Mr. Wright: That is agreeable.

Judge Hand: Is there anything more anybody wants to do except put in briefs and argue the case?

(3401)

Mr. Proskauer: That is all I want.

Judge Hand: Now when will you be ready with your brief, Mr. Wright?

Mr. Wright: Well, we are wholly in sympathy with the Court's program of disposing of the case at the earliest possible moment. As I recall, your Honor has definitely set a date for argument as either the 3rd or 4th of January, or at least some time in the first week. Now, we, of course, would like to get a brief from the defendants as far in advance of that argument as we can. That is our problem, and we will do anything possible in the way of serving our brief so that we may have a brief from them at the earliest possible date. I had originally suggested an exchange with that in view, but even if we must file ours first, we would certainly do it at such time as would compel them to file a brief at least a week or more in advance of argument.

Mr. Proskauer: Your Honors, may I suggest this: This case has been a great physical strain due to the shorthand way it was put in. Now, all of my associates here who are going to have the burden of effectual briefing here are unanimous that we cannot do a job under three weeks after we get the Government's

brief. I assure your Honors that we older men feel that is a wholly reasonable position. There is such a mass of detail here. So whatever Mr. Wright says as

(3402)

to his necessities, I would suggest you grant them and give us three weeks, and then set the argument down for a week after the expiration of that three weeks, and we can have our reply briefs either on the argument or shortly after that, as your Honors may direct.

Judge Hand: How about that, Mr. Wright?

Mr. Wright: I think a week prior to argument is fairly short. We would rather have ten days, but that is——

Judge Hand: Well, all right, we will give you ten days. You have been very cooperative, and we are certainly very grateful. It has been a very pleasant trial, with very pleasant, accomplished people. I do not want to leave a bad taste in anybody's mouth, except the man who is discontented with the ultimate decision, who, I suppose, is never satisfied.

(Discussion off the record.)

Judge Hand: Now, Mr. Wright, what have you got to say in view of all these things? What do you want? Your main brief you will be ready to serve, I take it, about the 10th of December?

Mr. Wright: That is a very tight squeeze, I think, for us. We will endeavor to get, if the defendants are to have three weeks after for theirs, I suppose we would have to file on the 10th. If we were still going to have a week before argument, theirs would be the

(3403)

31st, then I assume the argument would go into the second week in January.

Judge Hand: Yes, I rather think that will have to be so. I think probably both of you need a little

more time to get ready after these main briefs are in. Of course, reply briefs ordinarily, unless they bring up some new point——

Mr. Proskauer: They never amount to anything, your Honor.

Judge Hand: Well, they sometimes do, but they generally do not, I will admit. But sometimes they do a great deal. In the Circuit of Appeals they have sometimes been responsible for deciding a case.

Mr. Wright: Now, in Washington there is just one qualification. We have a very serious typing problem, with the multiple defendants and the Court. If there was some way we could arrange to have service on, let us say, a common agent for these five, and one for the other three, so that we could serve a brief which has been run once on the typewriter on the due date, which, of course, we will have printed up later, I think we could meet that December 10th date, providing we could make service in that manner.

Mr. Proskauer: How many copies would you give us?

(3404)

Mr. Wright: Well, we would have one run, which would be an original and six. I suppose that would mean three for the Court, and we would have to have at least one for our file——

Mr. Proskauer: It is all right, we will print it overnight.

Judge Hand: Do you want the 15th, Mr. Wright?

Mr. Wright: Well, if that is going to extend their time I don't want the 15th. I want to keep——

Judge Hand: Of course it has got to extend their time. I do not believe they can get their stuff in in less than three weeks. What I am awfully anxious about is the length of these briefs. I am death on long briefs. I know you have a lot of things to dis-

cuss, but I am death on long briefs. They confuse and they multiply confusions.

(Discussion off the record.)

Mr. Wright: As far as I am concerned I am willing to abide by any page limitation or other limitation you wish to set on our brief now. I believe too in short briefs. I did serve you with voluminous appendices on that trial brief, but I did supply a 25-page brief.

(3405)

Mr. Proskauer: Your Honors, in this case I think we are going to find ourselves in the position of serving briefs with certain supplemental schedules that you would not read unless you were in doubt as to some fact. Now for example, let me illustrate what I mean. Mr. Caskey has prepared a very elaborate analysis of all these appeal board decisions. I think we ought to hand that to your Honors. But in the brief proper we would reason certain deductions from that long analysis, and the analysis would be just handed to you separately. So I am going to suggest to your Honors, do not give us an artificial form here. Just admonish us that we are going to get much more favorable consideration from the Court if we do not burden them with extensive briefs, and I think we shall obey.

Judge Hand: And you can probably plan that out with one another so as to avoid duplication.

Mr. Proskauer: We are going to do our best to avoid repetition in the briefs.

Judge Hand: All right. Now when do you want to serve your brief, Mr. Wright?

Mr. Wright: We will accept the extra five days that your Honors generously offered and take the 15th.

Judge Hand: All right, the 15th of December.

Mr. Wright: That is with the understanding that we make only two copies available to all the defendants——

(3406)

Mr. Seymour: That is not very practical. I understood Mr. Wright to say he could not do that on December 10th. Unfortunately, their habit of charting makes it very difficult for us to reproduce it properly here.

Judge Hand: Yes, I think so. You had better get it here in suitable form, and stir up the Government Printing Office——

Mr. Wright: I am sure we cannot get a printed brief by the 15th. That is something I have had up with them many times. I cannot get a brief printed in that office within two weeks of the time I submit the original copy. That is the fact as it now is. It is impossible to serve printed briefs.

Judge Hand: Well, they will have great difficulty in their references then.

Mr. Wright: They say they have the facilities here for printing a copy on receipt for their own use, and I propose to give them as many copies as we get from one run of the typewriter.

Mr. Proskauer: Don't worry about that, your Honors. We will print their brief overnight.

Judge Bright: You did not plan to give the Court a typewritten copy, did you?

Mr. Wright: Well, if the Court——

Judge Bright: Why not give counsel our type-

(3407)

written copies and furnish us with the printed copies?

Mr. Wright: That would be agreeable. If your Honors are willing to wait we could then serve——

Judge Bright: You could use those typewritten copies, give them to counsel, and serve us only with a printed one.

Mr. Wright: Yes. We can then serve six copies, and that should be enough for the defendants.

Judge Hand: What is the other proposition?

Mr. Proskauer: My proposition is, your Honor, we will get their brief on Saturday, the 15th, and I suggest that we serve our brief then on Monday, January 7th. That gives us the weekend and three weeks.

Judge Hand: Yes, I think you will have to do that.

Mr. Proskauer: And then you can set the argument, as far as we are concerned, on any day that is agreeable to your Honors and the Government.

Judge Hand: Well, we will probably set it—what day would be the 15th of January?

Mr. Caskey: Tuesday, sir.

Judge Hand: Tuesday. Would that be all right for you?

Mr. Wright: Well, we were to get their briefs when?

(3408)

Mr. Proskauer: Monday, the 7th.

Mr. Wright: Yes, we could go ahead then.

Judge Hand: And then you can get up any reply you want meanwhile. And I should think that ought to be one brief with such charges as you wish to make against the various defendants under a single cover anyway.

I want to remind the defendants now that this does not provide for their having anything really before their argument in the way of a reply brief. What do you care about that?

Mr. Proskauer: Personally I don't. I don't know what anybody else does.

Mr. Davis: I don't, for one.

Judge Hand: All right. They have an indifference to your reply brief, Mr. Wright, which may tend to abbreviate it, I don't know.

Mr. Wright: I did not understand that there was any limitation on our reply. I thought we wanted the time so that we could get ready for the argument. We might wish, and I assume we would have an opportunity to file a reply brief within a few days after the argument. I do not believe we could actually get a brief on file within seven days of the receipt of their brief.

Mr. Proskauer: Your Honor, that is perfectly agreeable to us. Let us just exchange the main briefs, but I think that must mean, of course, Mr. Wright, that you are not going to serve us a pro forma main brief, reserving your fire for your reply brief?

Mr. Wright: We will do the best job we can to make it a complete and full presentation.

Judge Hand: All right. We thank you very much, and we will now adjourn to January 15th for the argument. The various briefs to be dealt with as we have indicated.

(Adjourned until January 15th, 1946, at 10:30 a.m.)

(3410)

PLAINTIFF'S MOTION TO STRIKE OUT CERTAIN TESTIMONY OFFERED BY THE DEFENDANTS

The defendants having rested their case, plaintiff hereby moves to strike out the following testimony offered on their behalf on the grounds hereinafter stated:

Plaintiff moves to strike out the following testimony as incompetent, irrelevant and immaterial because it was either:

a) a conclusion of ultimate fact which was for the Court to draw from facts in evidence, or

b) a conclusion of ultimate fact based upon unoffered primary evidence within the control of the offering defendants, or

c) represented mere speculation based upon facts not in evidence, or

d) was an argument unsupported by facts in evidence, or

e) seeks to establish a reasonable use of a power to exclude competitors and fix prices which is illegal per se:

(1) *The statements of William F. Rodgers,* General Sales Manager and Vice-President of Loew's, Inc.:

(a) that the system of runs used in the industry is necessary, the reasons therefor, and that it is the only basis on

(3411)

which you can afford to invest large amounts of money in pictures; and stating what would happen if pictures were shown simultaneously without priority of run (fols. 602-4).

(b) that in negotiating runs he applies the same criteria for theatres affiliated with the co-defendants as he does to theatres owned by independents (fol. 606).

(c) that he has no agreement, contract, understanding or concert of action with the co-defendants or any of their

officers or agents regarding the run that should be given to any theatre (fol. 607).

(d) that if clearance were not given the first-run exhibitor, the subsequent run exhibitors would advertise the picture while the first or other prior run exhibitor is playing it; and stating that only in this way can their collective business be handled (fols. 608-9).

(e) that in fixing clearance he disregards the fact that the theatre involved is affiliated with a co-defendant or with a circuit (fol. 611).

(f) that there is not and never has been any agreement beween himself or Loew's with any defendant as to the time or place of clearance, or the granting of clearance to any particular theatre (fol. 611).

(g) that the exhibitor prefers to buy a season's product (3412)
at one time, and that he believes this method is better for the exhibitor (fols. 614-15).

(h) as to advantages to exhibitor of fixing compensation on a percentage rather than a flat rental (fol. 619).

(i) that he does not make the licensing of Loew's pictures to a theatre of a co-defendant dependent as to price, terms or duration, on what that co-defendant may be licensing him (fols. 626-7).

(j) that the theatre owner in specifying the admission price expects to get his availability in many cases based upon the price of admission that he charges (fol. 630).

(k) denying that he procured information relating to the business of the co-dependants, or of competitors from the audit reports (fol. 633).

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(l) that there is no agreed division of territory between Loew's and any co-defendant, as far as exhibition or sales is concerned (fol. 634).

(m) that there is no relationship between negotiations or arrangements for the showing of Paramount pictures in Loew's theatres and the licensing of Loew's pictures in Paramount's theatres (fol. 757).

(n) that he has never conditioned the licensing of Loew's
(3413)
pictures to Fox West Coast theatres, upon Fox licensing its pictures to Loew's theatres; and that the subject has never been discussed; also that the same is true as to National Theatre groups operating out of Seattle, Denver, Milwaukee and Kansas City (fol. 763).

(o) that the licensing of Loew's pictures to the California group is never conditioned upon the licensing of the pictures in any or all of the theatre groups in Seattle, Denver, Milwaukee or Kansas City (fol. 763).

(p) that none of the groups described in (o) above have conditioned the licensing of Loew's pictures upon Loew's licensing the other groups (fol. 764).

(q) that in licensing R.K.O. theatres there was no conditioning of the showing of R.K.O. pictures in Loew's theatres (fol. 767).

(r) that Republic, Monogram and P.R.C. carry on certain distribution activities and general statements as to what they do (fols. 768-71).

(2) *The statements of Adolph Zukor,* Chairman of the Board of Paramount Pictures, Inc.:

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(a) purporting to set forth the reasons why Paramount Pictures, Inc. acquired theatres (fols. 853 to 858).

(b) that the acquisition of theatres by Paramount Pic-
(3414)
tures, Inc. was not for the purpose of monopolizing the exhibition of motion pictures in the United States (fol. 859).

(c) that Paramount has not at any time monopolized the exhibition of pictures in the United States (fol. 860).

(d) that distribution and exhibition of motion pictures has always been highly competitive (fol. 861).

(e) that Paramount is in competition with the co-defendants and independents in production, distribution and exhibition, at all levels and in all branches (fol. 861).

(f) that the cost of a first class picture has increased from between 40 and 60 thousand dollars, when he went in business, to $1,500,000 to $2,000,000 today; and some cost $3,000,000 (fol. 862).

(g) that there is not and has not been any agreement or understanding among the defendants, or any of them, to restrain competition in the production, distribution and exhibition of motion pictures in the United States (fol. 864).

(h) that there is not and has not been any agreement or understanding among the defendants, or any of them, to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms (fol. 864).
(3415)

(i) that there has not been any agreement or understanding to withhold any production personnel and equipment from any producer of motion pictures (fol. 865).

(j) that there is not and has not been, any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel or to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants (fol. 865).

(k) that there is not and has not been any agreement or understanding among the defendants or any of them to fix the terms upon which pictures would be licensed to any exhibitor in the United States (fol. 865).

(l) that there is not and has not been any agreement among the defendants or any of them to license pictures in any theatres before they have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the film and before it has been trade-shown (fol. 866).

(m) that there is not and has not been, any agreement or understanding among any of the defendants to condition the licensing of films or group of films upon the licensing of another film or group of films (fol. 866).
(3416)

(n) that there is not and has not been any agreement or understanding among any defendants to condition the licensing of films in a theatre or theatres upon the licensing of film in another theatre or theatres (fol. 866).

(o) that there is not and has not been any agreement or understanding among any defendants to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the term of such long term franchises or to preclude independent distributors from licensing their pictures to such circuit theatres (fol. 866).

(p) that there is not and has not been any agreement or understanding among any defendants with respect to the license terms granted to circuit theatres because such theatres are part of the circuit (fol. 866).

(q) that there is not and has not been any agreement or understanding among any defendants in licensing their pictures to favor the theatres in which any defendant had an interest against theatres not affiliated, with respect to run, clearance, license fee or any other terms of licensing (fol. 867).

(r) that there is not and has not been any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in (3417) which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other (fol. 867).

(s) that there is not and has not been any agreement or understanding among any of the defendants to exclude independently produced pictures from theatres in which any defendant has an interest (fol. 868).

(t) that there is not and has not been any agreement or understanding among any defendants to exclude unaffiliated exhibitors from the operation of competing first-run theatres in places where theatres affiliated with defendants are located (fol. 868).

(u) that there is not and has not been any agreement or understanding among any defendants to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent run affiliated theatres in places where affiliated theatres are located (fol. 868).

(v) that there is not and has not been any agreement or understanding among any defendants to use the first and

early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in places where affiliated theatres are located and elsewhere. (fol. 869).
(3418)

(w) that there is not and has not been any agreement or understanding among any defendants as to the terms upon which each or any of them would license their film to unaffiliatde exhibitors (fol. 869).

(x) that there is not and has not been any agreement or understanding among any defendants to deprive any theatre operator of film supply or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor (fol. 869).

(y) that there is not and has not been any agreement or understanding among any defendants to divide available films among affiliated theatres owned or controlled by two or more producer—exhibitor defendants located in the same competitive area without competitive negotiations (fol. 869).

(z) that there is not and has not been any agreement or understanding among any defendants not to compete with each other in licensing pictures to be exhibited in places where two or more of them had interests in theatres (fol. 869).

(aa) that there is not and has not been any understanding or agreement among any defendants to enter into joint agreements with respect to a theatre whereby film buying control or operation proceeds is divided between two or more
(3419)
exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre (fol. 870).

(bb) that there is not and has not been any understanding or agreement among any defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres (fol. 870).

(cc) that there is not or has not been any agreement or understanding among any defendants to acquire a monopoly or to monopolize the business of exhibiting pictures in the United States or any city or town thereof (fol. 870).

(dd) that as far as his company is concerned there was never any agreement with Warner's or anybody else as to where his company or Warner's should operate or what the two respective companies should do (fols. 873-4).

(ee) that he never made any agreement with Warner's or anybody regarding subject covered in (dd), (fol. 874).

(ff) that there was no agreement not to go into any territory where Warner's had theatres or for Warner's not to go into territory where Paramount had theatres or an interest therein (fol. 874).

(3420)

(3) *The statements of Y. Frank Freeman,* Vice-President of Paramount, and until October 1944 in charge of their studio operations in Hollywood:

(a) that since 1938 the cost of the production of a top bracket picture has increased 100 to 150% (fols. 822-3).

(b) that competitive bidding results in prices as high as $450 for a stage play for production of a picture (fol. 884).

(c) that there is no agreement or understanding to limit the practice of exchanging stars, production material, etc. to the defendants in this case (fol. 902).

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(4) *The statements of Charles M. Reagan,* Vice-President of Paramount Pictures, Inc. in charge of sales for the United States and Canada:

(a) that the cost of production of Paramount pictures has been going up; that the cost of production is much greater than it was even a few years ago (fol. 947).

(b) that there is no joint advertising by the distributors about all their pictures (fol. 956).

(c) that there is no discrimination between affiliated and independent theatres in cooperative advertising (fol. 957). (3421)

(d) that there is no relationship between his negotiations, or that of his colleagues, with Loew's Inc. for the licensing of Paramount pictures in Loew's theatres and the negotiations for the licensing of Metro pictures in theatres in which Paramount has an interest (fol. 965).

(e) that as to negotiations or arrangements made or under way for exhibition of Warner pictures in Paramount theatres, there is no relationship between them; and vice versa (fol. 969).

(f) that the deals are indiscriminately negotiated (fol. 981).

(g) that in selecting the theatre to which Paramount pictures will be licensed first run, he doesn't apply any different criterion to the theatres in which the defendants have an interest than he does where they have no interest (fol. 991).

(h) that there is keen competition in the distribution of films (fol. 986).

(i) that where one distributor grants clearance that is identical or nearly identical to the clearance granted by an-

other distributor to the same theatre, this is not the result of any agreement or understanding between the distributors (fol. 999).

(j) that exhibitors generally charge the same admission price over a long period of time and the reasons therefor (fol. 1015). (3422)

(k) that the public would object if admission prices were changed from picture to picture, or repeatedly (fols. 1015-16).

(l) that with reference to admission charges there is no difference whether an exhibitor is independent or affiliated (fol. 1016).

(m) that the frequent uniformity of minimum admission prices in contracts with a particular exhibitor from several distributors, does not result from any agreement or understanding between the distributors (fol. 1016).

(n) that the fact that various subsequent runs have about the same admission prices in the same area does not result from any agreement or understanding between the distributors (fol. 1018).

(o) that one exhibitor will decide to charge a certain admission price and if the theatre is successful the others quickly copy him (fol. 1018).

(p) that there is no difference in the consideration given to cancellations depending on the source of the request (fol. 1024).

(q) that the fact of whether a defendant has an interest in a theatre or not does not affect whether his product is split (fol. 1025). (3423)

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(r) that he could not effectively offer to license his pictures on the basis of competitive bidding (fol. 1035).

(s) that the licensing of Paramount pictures to Loew's Inc. on a particular run in New York City, and the licensing of pictures of other distributors either to Loew's, Inc. or R.K.O. is not the result of any understanding or agreement between the distributors (fol. 1138).

(t) that the fact that Paramount licenses to Loew's, Inc. on certain runs is not to the result of any agreement between distributors other than Paramount and Loew's (fol. 1139).

5. *The statements of Martin J. Mullin,* Vice-President and General Manager of M. & P. Theatres; Vice-President of New England Theatres; an officer of Publix Notoco and President of its subsidiaries;

(a) that there is no relationship between the terms of film deals for theatres he operates and negotiations or arrangements made for licensing or exhibiting Paramount films in theatres of any other defendant (fols. 1343-44).

(b) giving his theory as to what would happen if his (3424)
admission prices were changed regularly (fols. 1348-49).

(6) *The statements of John J. Friedl,* President and General Manager of Minnesota Amusement Company:

(a) giving his theory as to the economic condition of the industry at the time an operating agreement between R.K.O. and Minnesota Amusement was in effect (fols. 1376 to 1378).

(b) that there is no relationship between his negotiations with distributors and negotiations or arrangements which may be made by Paramount or the distributors with respect to other theatres (fol. 1385).

(c) that the length of clearance has nothing to do with whether the theatre is one of his or that of an independent (fols. 1396-97).

(d) that there is no difference in clearance based upon the fact of affiliation (fol. 1399a).

(e) that to the best of his knowledge the similarity of clearance does not result from any agreement or understanding aomng the distributors (fol. 1424).

(7) *The statements of Edward C. Beatty,* President and Treasurer of W. S. Butterfield Theatres, Inc. and Butterfield Theatres Corporation:

(a) that the status of operation of R.K.O. theatres in (3425)
Grand Rapdis, Michigan, was very poor in 1933 (fol. 1440).

(b) that one theatre referred to above in Grand Rapids, Michigan, was closed because of the lack of business and that the other one was not very successful (fol. 1440).

(c) that due to changes in theatres after an operating agreement was effected, the public got better facilities for seeing pictures in Grand Rapids, Michigan (fol. 1442).

(d) contained in his affidavit supplementing the testimony he gave on the witness stand (fols. 3385-88).

(8) *The statements of Spyros P. Skouras,* President of Fox:

(a) giving negative answers to the so-called "Zukor" questions concerning conspiracy, unreasonable restraint of trade and monopoly (fols. 1453 to 1458-a).

(9) *Statements of William J. Kupper,* General Sales Manager of Fox:

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(a) that the first run exhibitor would not object if subsequent runs charged higher admission prices than specified in the contract (fol. 1504).

(b) that the length of time a picture will play in a first run theatre of Loew's Inc. in Worcester is not conditioned (3426)
upon the length of time Fox will play a Loew's picture (fol. 1538).

(c) that there is no exchange of screen time between the defendants (fol. 1538).

(d) that his company and the other defendants have not "ganged up" on the independent exhibitors (fol. 1628).

(e) giving negative answers to the so-called "Zukor" questions concerning conspiracy, unreasonable restraint of trade and monopoly (fol. 1628).

(f) that there is no relationship between licenses Fox negotiates with Paramount operating companies for exhibition of Fox pictures in Paramount theatres and licenses for Paramount pictures in Fox theatres; and also the same statements (by stipulation) as to the other defendants (fol. 1629).

(g) that no exhibitor who has followed an affiliated exhibitor has been prejudiced or injured by omission of admission prices from the contract (fol. 1695).

(h) and all of his statements contained in a pamphlet entitled "Extension of Wm. J. Kupper Testimony"—pages 1 thru 94, (Exhibit F-30, fol. 3397).
(3427)

(10) *The statements of A. W. Smith, Jr.*, Eastern Sales Manager of Fox and having jurisdiction over exchanges in the Eastern part of the country:

(a) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, unreasonable restraint of trade and monopoly; and giving negative answers to the so-called "Skouras" questions relating to conspiracy, unreasonable restraint of trade and monopoly (fol. 1697).

(11) *The statements of Joseph M. Schenck,* an executive in the production department of Fox:

(a) giving the reasons why Charlie Chaplan did not subscribe to a franchise which gave United Artists' Circuit theatres exclusive right to first run exhibition of United Artists' pictures in towns where they were located (fol. 1706).

(b) that he had no knowledge of an agreement among any of the defendants to aid or assist one another in loaning and exchanging production personnel and deal with each other on non-competitive basis (fol. 1711).

(c) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly as to production personnel and equipment (fols. 1711-12).

(d) giving negative answers to the so-called "Zukor" (3428)
questions relating to conspiracy; restraint of trade and monopoly as to general activities of the defendants (fols. 1712 to 1715).

(12) *The statements of Felix A. Jenkins,* Secretary and Director of Fox:

(a) that Fox has not conspired with any other defendant or defendants to monopolize or restrain trade and commerce (affidavit—stipulated) (fol. 1730).

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(13) *The statements of Abraham Montague,* General Sales Manager of Columbia:

(a) that the exhibitor knew what he was buying when he bought a year's product (fol. 1736).

(b) that "blind selling" or "block booking" is the most satisfactory method of distribution from the exhibitor's standpoint (fol. 1737).

(c) that the "block booking" method of selling is vital to Columbia and his theory as to why (fols. 1737-38).

(d) that his company has no understanding, arrangement or agreement with any defendant except the contracts for exhibition of pictures in their theatres (fol. 1739).

(e) that Columbia spent $1,632,300 for production in 1928 and that amount has increased each year (fol. 1740). (3429)

(f) that Columbia faces competition from all defendants (fol. 1743).

(g) that his company treats affiliated and independents the same as to selectivity (fol. 1750).

(h) that the action of NRA affected standard contracts, admission prices, etc. and that this was for the protection of the exhibitor (fols. 1751-52).

(i) that exhibitors have been very successful in the last ten years (fol. 1754).

(j) giving his reasons why "block booking" is necessary for Columbia and his theory as to what would happen without it (fols. 1754-55).

(k) that the situations applicable as to Columbia also apply to Republic, P.R.C., Universal, and Monogram (fol. 1789).

(l) as to the general activities of other companies and associations (fols. 1790 to 1794).

(m) that the subsequent run theatres have been very prosperous in the past ten years (fol. 1799).

(n) that the cost of top pictures has increased in the last ten years, giving the figures (fol. 1801).

(o) that there is no relationship between licenses granted one Paramount affiliate (Minnesota Amusement) and those granted another (New England) (fol. 1802).
(3430)

(p) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (by stipulation) (fol. 1808).

(14) *The statements of Paul N. Lazarus,* Manager of the Contract Department of United Artists:

(a) giving negative answers to the so-called "Zukor" questions relating to cosnpiracy, restraint of trade, and monopoly (fol. 1948).

(15) *The statements of Harry J. Muller,* Treasurer of United Artists:

(a) that there has been a progressive increase in the cost of domestic distribution during the last ten years, (with exceptions) (fol. 1995).

(b) that advertising cost from 1945 to date is 35% higher than corresponding period of last year (fol. 1995).

(16) *The statements of Edward C. Raftery,* President of United Artists:

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(a) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 1998).
(3431)

(17) *The statements of William A. Scully,* Vice-President and General Sales Manager of Universal:

(a) that independents and affiliates are treated alike regarding selectivity (p. 2017).

(b) indicating the desires of exhibitors regarding product (fols. 2017-18).

(c) that exhibitors like "block booking" and why (fol. 2018).

(d) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2036).

(e) that his company does not discriminate between independents and affiliates (fol. 2036).

(18) *The statements of Benjamin Kalmenson,* Sales Manager of Warner:

(a) That no contracts since 1938 contain covenant on part of Warner to require subsequent run exhibitor to charge any particular price (fol. 2069).

(b) that most Warner contracts do not refer at all to subsequent admission prices as criterion of clearance (fol. 2071).

(c) that showing in their own theatres benefit first and subsequent run exhibitors (fol. 2076).

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(d) giving negative answers to the so-called "Zukor" (3432)
questions relating to conspiracy, restraint of trade and monopoly (fol. 2077).

(e) that his company uses no devices to discriminate against independent exhibitors (fol. 2077).

(19) *Statements of Jason J. Joy,* Executive of Fox, having charge of all personnel at studio except actors;

(a) that no distinction is made as to whether producer is affiliated or independent in deciding whether they will lend a star or feature player (fol. 2100).

(b) that the cost of producing pictures increased during the last ten years (fol. 2125).

(c) that competition for books, plays and similar material applies to all companies (fol. 2128).

(20) *The statements of Harry M. Warner,* President of Warner:

(a) that his company has not monopolized, etc. (by stipulation) (fol. 2129).

(b) that the only way to solve their difficulties was to acquire theatres (fol. 2132).

(c) that theatres were not acquired to avoid competition (fol. 2134).

(d) that First National was not acquired to stifle competition in production and distribution (fol. 2135).
(3433)

(e) denying that Warner conditions licensing to other defendants on reciprocal basis (fol. 2137).

(f) that divorcement of theatres will jeopardize the industry (fol. 2140).

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(g) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade, and monopoly (fols. 2141 to 2146a).

(21) *The statements of Barney Balaban,* President of Paramount:

(a) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade, and monopoly (fol. 2147).

(22) *The statements of Nathaniel P. Rathvon,* President of R.K.O.:

(a) giving his theory as to the advantages of integration of production, distribution and exhibition; and the effect of their separation (fol. 2217).

(23) *The statements of Robert Mochrie,* General Sales Manager of R.K.O.:

(a) that the annual cost of operating the R.K.O. distribution system is in excess of $7,000,000 (fol. 2308).

(b) that his company and the other distributor-defend-
(3434)
ants have never combined and conspired to monopolize the distribution of motion pictures and to exclude from that business independently produced pictures, and that his company has no such understandings or agreements (fols. 2311-12).

(c) that in selling pictures his company is competing and did compete during the 1943-44 season with some companies (fol. 2312).

(d) that in selling to independents or affiliates he does not make any distinction between them as to whether he will insist on a block of five or not (fol. 2318).

(e) that the fact that a theatre is or is not affiliated with one of the integrated companies does not constitute a factor in his choice of customers (fol. 2328).

(f) that there is no difference in applying his company's policy between towns where the first run theatres are both affiliated and independent and towns where all the first run theatres are independent (fol. 2331).

(g) that there is no agreement between R.K.O. and any other defendant whereby R.K.O. agrees that it will continue to serve its present customers and will not entertain bids from others (fols. 2336-37).
(3435)

(h) that the fact that the theatre is affiliated or independent has nothing to do with the length of time that R.K.O. will run a picture; and that he fights with all of them to run pictures as long as he can get them to (fol. 2339).

(i) that the fact that a theatre is operated or controlled by an integrated company does not constitute any factor at all in deciding the clearance to be granted it (fol. 2339).

(j) that he has no agreements or understandings that he will adopt the same clearance (fol. 2349).

(k) that in making certain contracts he did not differentiate between theatres operated or controlled by integrated companies or other theatres (fol. 2351).

(l) that in licensing his pictures for exhibition in theatres affiliated with another defendant, he does not agree

in the contract or agree orally upon the admission price to be charged by subsequent run theatres (fol. 2361).

(m) that he has never licensed R.K.O. pictures to theatres affiliated with an integrated company on the condition or understanding that that company extend particular terms to any R.K.O. theatres (fol. 2362).

(n) that the fact that an integrated company licensed (3436)
pictures to any of R.K.O.'s theatres does not in any way effect his readiness to license his pictures to theatres affiliated with such an integrated company; or have any bearing on the terms which he will extend to theatres affiliated with such integrated company (fol. 2362).

(o) that he is in absolute, keen, continuous competition all of the time to sell pictures (fols. 2368-69).

(p) that the subsequent run exhibitor prefers the pictures which have a longer first run over the one that has a shorter first run; and that he (the subsequent run exhibitor) has found from experience that it will gross more business for him and certainly he wants it (fol. 2403).

(q) that he (the subsequent run exhibitor) does not suffer the inconvenience of not knowing the exact date on which he is going to get that picture; he (the witness) thinks the subsequent run exhibitor is glad to have a picture like that available to him (fols. 2403-04).

(24) *Part of R.K.O.'s Exhibit 25* as follows:

(a) that part of Exhibit R.K.O.-25 which gives the acquisition cost of the various theatres shown in the table (fol. 2473).

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(25) *Warner's Exhibit W-5* which is a table giving total film rentals received by Warner and its subsidiaries from domestic and foreign sources (fol. 2479).

(26) *Warner's Exhibit W-10* which is a table for the years 1931 to 1945 purporting to show the cost of American-made Warner Feature Pictures and the average theatre admission prices at Warner theatres (fol. 2483).

(27) *Warner's Exhibit W-11* which is a table for the years 1937 to 1944 purporting to show percentage of Warner Film Cost paid to Warner as film rental by Warner theatres and theatres affiliated with other four Distributor Defendants (fol. 2485).

(28) *Warner's Exhibit W-12* which is a schedule showing a comparison of the cost of the positive print of "Princess O'Rourke" and the average film rental per booking (fol. 2486).

(29) *The statements of Joseph Bernhard,* head of Warner's Theatre Department until November 7, 1945:

(a) that Warner's did not acquire an interest in any theatre during his tenure of office with the purpose of having theatres where they would not be in competition with the theatres of any other person or company; and that there was no agreement or understanding, express or implied, to such
(3438)
effect (fol. 2496).

(b) that all of their theatres were acquired in the open market and in most cases in open and keen competition; and some of such theatres were acquired in competition with competing companies engaged in producing pictures (fol. 2487).

(c) that as head of the Theatre Department he has had no policy for the expansion of theatre holdings (fol. 2497).

(d) that any theatres acquired during the time he was employed by Warner were to protect their business and meet varying economic conditions, shift of populations or needs caused by obsolescence which had arisen with the changes over the years (fol. 2497).

(e) that he always operated the Theatre Department separate and apart from the Distribution Department and has never allowed the operations of the Distribution Department to influence his judgment in the licensing of pictures for the Theatre Department (fol. 2497).

(f) Warner's Exhibit W-15 purporting to give a collation from the Theatre Department and Distribution Department of instances bearing out the witness's testimony (fols. 2497-8).

(g) giving negative answers to questions relating to con- (3439)
spiracy, restraint of trade and monopoly similar to the Skouras' answers pertaining to the same subject (fols. 2499 to 2504).

(30) *The statements of Nicholas N. Schenck,* President of Loew's:

(a) that there is not now and has not been any contract, agreement, understanding or concert of action between Loew's Incorporated and any one or more of the defendants with respect to matters described as (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), and (17) in his testimony (fols. 2514 to 2517).

(b) that with the exception of individual license contracts entered into between Loew's and other distributors

or vice-versa, there has been no combination of the defendants to do the acts mentioned in (a) above, after the ending of the National Recovery Act (fol. 2517).

(c) that Loew's has not prevented any defendant or any independent producer from competing with Loew's in the production of films (fols. 2517).

(d) that Loew's has not prevented any defendant or independent distributor from competing with Loew's in the distribution of films (fol. 2518).
(3440)

(e) that Loew's has not prevented any defendant or any unaffiliated exhibitor from competing with Loew's in the operation of theatres (fol. 2518).

(f) that Loew's has never discriminated in favor of "affiliated" or "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a cricuit or because of such affiliation (fol. 2518).

(g) that Loew's has never conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's (fol. 2518).

(h) that no other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant (fol. 2518).

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(i) that Loew's has never had and does not now have, any agreement or understanding with any distributor with respect to the minimum admission prices which such dis- (3441)
tributor should insert in its licenses for any theatre or theatres not operated or controlled by Loew's (fols. 2518-19).

(j) that Loew's has never had and does not now have, any agreement or understanding with any distributor with respect to the run which such distributor should grant for any theatre or theatres not operated or controlled by Loew's or the order of sequence of runs between such theatres (fol. 2519).

(k) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, unreasonable restraint of trade and monopoly (fol. 2519).

(31) *The statements of Rudolph Berger, J. E. Flynn, E. K. O'Shea, J. J. Maloney and G. A. Hickey,* Division Sales Managers of Loew's:

(a) that in the respective exchange areas over which they have supervision, there is not now and has not been any contract, agreement, understanding or concert of action between Loew's and any one or more of the defendants with respect to any of the matters set forth in paragraphs (1) through (13) under item "2" of their testimony (fols. 2523 to 2525).

(b) that except for the individual contracts licensing the exhibition of films which Loew's as a distributor or ex- (3442)
hibitor has made with any of the defendants, there has not been any combination of the defendants to do the acts specified in paragraph (a) above at any time after the ending of the National Recovery Act (fol. 2525).

(c) that Loew's has not prevented any defendant or any independent distributor from competing with Loew's in the distribution of films (fol. 2525).

(d) that Loew's has never discriminated in favor of "affiliated" or "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of affiliation (fols. 2525-26).

(e) that Loew's has never conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's (fol. 2526).

(f) that Loew's has no agreement or understanding with any prior run exhibitor either "affiliated" or "independent" fixed the minimum admission price which Loew's must insert in its license agreement with a subsequent run exhibitor (fol. 2526).

(3443)

(32) *The statements of Joseph R. Vogel and Charles C. Moskowitz,* Vice-Presidents of Loew's and in charge of the theatres operated by that company:

(a) that there is not now and has not been any contract, agreement, understanding or concert of action between Loew's and any one or more of the defendants with respect to any of the matters described in paragraphs (1) through (11) under item "1" of their testimony (fols. 2527-28).

(b) that except for individual contracts licensing the exhibition of Loew's films, as a distributor or exhibitor, made

with another defendant, there has been no combination of the defendants to do the acts outlined in (a) above at any time after the ending of the National Recovery Act (fol. 2529).

(c) that Loew's has not prevented any defendant or "unaffiliated" exhibitor from competing with Loew's in the operation of theatres (fol. 2529).

(d) that no other producer-exhibitor defendant has ever conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant (fol. 2529).

(e) that Loew's has no agreement or understanding with
(3444)
any distributor, either "affiliated" or "independent," fixing the minimum admission price which a subsequent run exhibitor of said distributor's feature pictures must charge (fol. 2529).

(33) *The statements of George A. Smith,* Western Division Sales Manager for Paramount:

(a) that in licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, neither he nor his associates are concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed (fol. 2560).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above (fol. 2560).

(c) that in negotiating with the heads of the various exhibition companies associated with National Theatres Corporation such negotiations with these individuals are separately conducted and wholly independent of each other (fol. 2561).

(d) that the licensing of pictures with any of the National Theatres Corporation companies is not dependent in any way upon the success or failure of negotiations with any of the other companies (fol. 2561).
(3445)

(e) that in negotiating with representatives of various companies associated with National Theatres Corporation he has no knowledge or information as to whether or not Fox is negotiating to license or has licensed Fox films for exhibition in any of the Paramount theatres (fol. 2561).

(f) that there is no relation whatever between his negotiations for the licensing of Paramount pictures and the licensing of Fox pictures for exhibition in any of the Paramount theatres (fol. 2561).

(g) that he never refuses to license Paramount pictures to the various theatre companies associated with National Theatres Corporation unless and until any of the theatres in which Paramount is interested has offered or concluded licenses for Fox pictures (fol. 2561).

(h) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he does not have any agreement or understanding with any distributor as to whether Paramount will or will not license its pictures to any exhibitor, or as to terms, including run and clearance upon which Paramount pictures will be licensed to any exhibitor (fol. 2562).
(3446)

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(i) that subject to the exceptions noted in (h) above, he does not have any agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliated" or "unaffiliated" theatre (fol. 2562).

(j) that subject to the exceptions noted in (h) above, he does not communicate to any distributor the terms upon which Paramount has licensed or will license the exhibition of Paramount pictures to any "affiliated" or "unaffiliated" exhibitor (fols. 2562-3).

(k) that he does not receive any information as to the terms upon which other distributors have licensed or will license their pictures to any "affiliated" or "unaffiliated" exhibitor (fol. 2563).

(l) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2579).

(34) *The statements of William H. Erbb,* Eastern Division Manager for Paramount:

(a) that in licensing Paramount's pictures for exhibition in theatres of other defendants, he and his associates are not concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any Paramount theatre, or with the terms upon which
(3447)
they are licensed (fol. 2565).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above and that such matters are beyond the functions of the Distribution Department (fols. 2565-6).

(c) that there is no relationship between his negotiations for the licensing of Paramount pictures to companies asso-

ciated with Warner's and the licensing of the pictures of that defendant for exhibition in any Paramount theatres (fol. 2566).

(d) that he does not ever refuse to license Paramount pictures to companies associated with Warner's unless and until any of the Paramount theatres have offered or concluded licenses for the theatres of that defendant as a distributor (fols. 2566-67).

(e) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in theatres of that defendant, he has no agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of their pictures to any exhibitor, as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor (fol. 2567).

(f) that with the exceptions noted in (e) above, he does not have any agreement with any distributor as to the admis-
(3448)
sion prices which are charged or to be charged by any "affiliated" or "unaffiliated" exhibitor (fol. 2567).

(35) *The statements of James J. Donohue,* Central Division Manager of Paramount:

(a) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he does not have any agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor (fols. 2571-72).

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(b) that subject to execptions stated in (a) above, he does not have any agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliate" or "unaffiliated" exhibitor (fol. 2572).

(c) that subject to exceptions stated in (a) above, he does not communicate to any distributor the terms upon which Paramount has licensed or will license the exhibition of its pictures to any "affiliated" or "unaffiliated" exhibitor (fol. 2572).

(3449)

(d) giving negative answers to the so-called "Zukor" questions relating to consiracy, restraint of trade and monopoly (fol. 2579).

(e) contained in an affidavit (folg. 2580 to 2618).

(36) *The statements of Hugh Owen,* Southern Division Manager of Paramount:

(a) that in licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, he and his assistants are not concerned as to whether or not that defendant, as a distributor, licenses or refuses to license its picture for exhibition in any Paramount theatre, or with the terms upon which they are licensed (fol. 2575).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above; and that such matters are entirely beyond the function of the Distribution Department (fol. 2575).

(c) that his negotiations with Mr. Vogel and Mr. Moskowitz are separately conducted and independent of each other (fol. 2576).

(d) that the licensing of pictures in the field where Mr. Moskowitz represents Loew's are not dependent in any way

upon the success or failure of negotiations with respect to the field in which Mr. Vogel represents Loew's (fol. 2576). (3450)

(e) that there is no relationship between his negotiations for the licensing of Paramount pictures for exhibition in Loew's theatres or in R.K.O. theatres, and the licensing of the theatres of either of those defendants for exhibition in any of Paramount's theatres (fols. 2576-77).

(f) that he does not ever refuse to license Paramount pictures for exhibition in Loew's theatres or R.K.O.'s theatres unless and until any of Paramount theatres have offered or concluded licenses for the pictures of either of those distributors (fol. 2577),

(g) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he has no agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which the Paramount pictures will be licensed to any exhibitor (fols. 2577-78).

(h) that subject to the exceptions noted in (g) above, he has no agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliated" or "unaffiliated" exhibitor (fol. 2578).

(3451)

(i) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2578).

(37) *All of the statements of Sam Dembow,* President of Golden Pictures, Inc. (fols. 2624 to 2632).

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(38) *The statements of Harry David,* General Manager, Northio Theatres Corp.; John Balaban, General Manager, Balaban & Katz Corp.; Harry M. Warren, General Manager, Central States Theatre Corp.; J. J. O'Leary, President, Comerford Publix Theatres Corp.; Hunter Perry, President, Dominion Theatres, Inc.; Frank Rogers, President, Florida State Theatres, Inc.; Tracy Barham, Vice-President and General Manager, Inter-Mountain Theatres, Inc.; R. J. O'Donnell, General Manager, Interstate Circuit, Inc.; S. L. Oakley, Vice-President, Jefferson Amusement Co.; John J. Ford, Treasurer and General Manager, Maine & New Hampshire Theatre Co.; Frank Rogers, President and General Manager, Paramount Enterprises, Inc.; Harry Royster, General Manager, Paramount Pictures Theatre Corp.; E. V. Richards, Jr., President, Paramount-Richards Theatres, Inc.; Anast N. Notopolulos, President, Pennware Theatre Corp.; Alpenn Theatre Corp. and Penler Theatre Corp.; Carl R. Bamford, President, Publix-Bamford Theatres, Inc.; Jules J. Rubens, General Manager and Vice-President, Publix-

(3452)

Great States Theatres, Inc.; Harry L. Nace, Vice-President, and General Manager, Publix-Rickards-Nace, Inc.; George Zeppos, Vice-President and General Manager, Publix Wheeling Corp.; R. J. O'Donnell, General Manager, Texas Consolidated Theatres, Inc.; G. Ralph Branton, General Manager, Tri-States Theatre Corp.; Earl J. Hudson, President, United Detroit Theatres, Corp.; Nathan E. Goldstein, President, Western Massachusetts Theatres, Inc.; H. F. Kincey, Secretary, Wilby-Kincey Service Corp.; R. B. Wilby, President, Wilbey-Kincey Service Corp.; Wm. K. Jenkins, President, Georgia Theatre Co.; M. A. Lightman, President, Malco Theatres, Inc. and Malco-Memphia and Vice-President, Richards Lightman Theatres, Inc.; E. H. Rowley, President, Arkansas Amusement Co.:

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(a) that there is no relationship whatever between the terms of film deals negotiated for the theatres which the respective witnesses operate and any negotiations or arrangements for the licensing or exhibition of Paramount films in theatres of any other defendant (respective affidavits attached to Exhibit P-24).

(b) that there is no relationship whatever between film deals of their respective companies and film deals of any other companies in which Paramount is interested (respective affidavits attached to Exhibit P-24).
(3453)

(c) that no representative of Paramount participates or interferes in any way in their respective negotiations with distributors for the licensing of films to be used in theatres operated by their respective companies or dictate or advise them as to the terms of any film license contracts that they respectively make or are to make with any other distributor (respective affidavits attached to Exhibit P-24).

(d) that there are theatres operated by the respective witnesses in which they would like to license the pictures of Loew, Fox, Warner, R.K.O., Columbia, Universal and United Artists where they are unable to do so (respective affidavits attached to Exhibit P-24).

(e) that in the cases referred to in (a) above, the distributors mentioned, license some or all of their pictures to theatres which are in competition with the theatres operated by the respective witnesses (respective affidavits attached to Exhibit P-24).

(f) that their respective companies follow a policy of keeping all theatres operated by them up to date in accordance with the needs of the community (respective affidavits attached to Exhibit P-24).

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(39) *All of the statements* contained in the 104 affidavits which comprise Exhibit P-25.
(3454)

(40) *All of the statements of Jules Lapidus,* Warner, Eastern Sales Manager; and *Roy Haines,* Western and Southern Sales Manager for Warner (fols. 2634 to 2639).

(41) *All of the statements* contained in the affidavit of Harold J. Fitzgerald, President and operating head of Fox Wisconsin Theatres, Inc. (fols. 2671 to 2713).

(42) *All of the statements* contained in the affidavit of Frank L. Newman, Sr., President of Evergreen State Amusement Corp. (fols. 2713 to 2758).

(43) *All of the statements* contained in the affidavit of Elmer C. Rhoden, President and operating head of Fox Mid West Theatres, Inc. (fols. 2728 to 2810A).

(44) *All of the statements* contained in the affidavit of F. H. Ricketson, Jr., President and Director of Fox-Inter-Mountain Theatres, Inc. (fols. 2811 to 2840).

(45) *All of the statements* contained in the affidavit of Charles P. Skouras, President, National Theatres Corp., (fols. 2841 to 2909).

(46) *All of the statements* contained in the affidavit of Dan Michalove, Vice-President and Director of the National Theatres Corp. (fols. 2921 to 2924).
(3455)

(47) *All of the statements* contained in the affidavit of Harry G. Ballance, Southern District Sales Manager of Fox (fols. 2925 to 2929).

Plaintiff's Motion to Strike Out Certain Testimony Offered by the Defendants

(48) *All of the statements* contained in the affidavit of William C. Gehring, Central Division Sales Manager of Fox (fols. 2929 to 2933).

(49) *All of the statements* contained in the affidavit of Herman Webber, Divisional Sales Manager of Fox (fols. 2933 to 2937).

(50) *All of the statements* contained in the affidavit of Harold J. Mirisch, Head of the Licensing Department of R. K. O. (fols. 2939 to 2941).

(51) *All of the statements* contained in the affidavit of Ned E. Depinet, President of R. K. O. (fols. 2941 to 2946).

(52) *All of the statements* contained in the affidavit of Malcolm Kingsberg, Vice-President and Treasurer of R. K. O. (fols. 2946 to 2948).

Respectfully submitted,

ROBERT L. WRIGHT,
Special Assistant
to the Attorney General

CLERK'S COPY.

Vol. VI

TRANSCRIPT OF RECORD

(Pages 2545 to 2810)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

SUPREME COURT OF THE UNITED STATES

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vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE]

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

—2798

[CONTINUED FROM FIRST PAGE]

No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,
Defendants.

Equity
No. 87-273.

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D.J.,

New York, January 15, 1946;
10:30 o'clock a. m.

(Met pursuant to adjournment.)

Judge Hand: Now, have you arranged among yourselves for any order of argument or any scheme at all?

Mr. Wright: I discussed the matter over the telephone with Mr. Caskey yesterday, if the Court please. I told him that our main argument would consume, I thought, less than two hours, and we would then, of course, finish up this morning; and I understood from him the defendants would probably want this afternoon and tomorrow morning, and then we could finish up tomorrow afternoon.

Judge Hand: That is all right. We shall adjourn today at a quarter past four. I have an engagement at half-past four that I should get to

ARGUMENT ON BEHALF OF GOVERNMENT.

Mr. Wright: If the Court please, in making this argument we shall assume that the Court has read our brief, the two joint briefs filed by the producer-exhibitor defendants, and the briefs separately filed on behalf of Columbia and on behalf of United Artists and Universal. These briefs, we believe, define the basic issues with which the Court is confronted, and we shall address ourselves to those issues. The five supplemental briefs filed by each of the producer-exhibitors merely elaborate the arguments contained in joint briefs, and while they point up certain invidious distinctions between the various producer-exhibitors, we do not read any of them as claiming that any differences in their business conduct or power are so great that the dissolution relief sought by the plaintiff might properly be denied as to one while granted as to another.

Judge Hand: Assuming that there were no defendants but one, do you claim that any of them monopolize or restrain commerce as between themselves and their own subsidiaries?

Mr. Wright: Oh yes, we do.

Judge Hand: So you could leave out, according to your contention, all of the great, universal alleged conspiracy and still have a case you think?

Mr. Wright: That is right, your Honor.

Judge Hand: Based on their system and not on just incidents, particular incidents?

Mr. Wright: That is right. Of course, they have to be viewed against the context of the industry in which they are engaged and the industry practices.

Our main argument will be divided between Mr. Marcus and myself, with Mr. Marcus devoting his attention principally to the aspects of the case which affect all eight defendants as distributors. My argument will be confined, insofar as practicable, to the relief sought against the five producer-exhibitor combinations, as such.

Mr. Wright on behalf of Government

I think it is reasonbly clear from their briefs that the producer-exhibitors' defense to this suit rests principally on a claim that their trade practices must be viewed as isolated transactions wholly unrelated to the kind of business organizations that employ them. A further assumption on which their defense rests is that if a particular business practice or method of organization has been habitually and generally employed in a particular trade, it cannot violate the Sherman Act, even though this normal structure and practice are such as to restrict arbit arily the competitive opportunities in the trade in question.

Now, the plaintiff's case, admittedly, rests on the rejection by the Court of both of these fundamental assumptions on which the defendants argument is based. We make no claim that we can prevail in this case unless the Court makes an objective examination of the economic structure of this industry and the competitive practices which prevail in it, and the basic assumptions on which it operates, free from any——

Judge Hand: Now there perhaps I misunderstand you. I thought that you did. I thought you just have in answer to my question.

Mr. Wright: No, I think not.

Judge Hand: I thought you said if there was—well, we will take the Fox films in the California situation and other situations, that they and their subsidiaries violated the Sherman Act if there was not another defendant on the scene.

Mr. Wright: That is right, but our contentions as to dissolution do attack the basic assumptions on which Fox considered alone operates its business. That is if you adopt a preconception that merely because the Fox organization alone has assumed a status as a respected institution the Government may not challenge its validity under the Act, then of course we can't prevail.

I merely point out in viewing any segment of this industry this suit raises basic questions which require a fresh

objective examination of what is being done in the business free from any notion that merely because it is established it is legal.

Now this proceeding was deliberately designed to bring into question these basic assumptions on which the industry operates in its economic structure and trade practices. It was not brought to ascertain the extent of such economic hardships as the system may from time to time inflict upon any particular members of the industry, nor was it primarily directed to competitive effects prohibited by the Act in any particular local area. The Government has deliberately confined its evidence to the more general aspects of the structure and practice of the defendants in order to demonstrate the fundamental incompatibility of that structure and practice with free competition as such. We freely concede that if the defendants are right in their theory that the Sherman Act protects only complaining witnesses and not the interest of the general public in the maintenance of a free enterprise system as such then this proceeding has no merit.

We also concede that in evaluating the structure of these defendant combinations and their established trade practice, the Court is not bound to accept any notions of the prosecuting officers as to what kind of an industry structure seems to them to be desirable. In fact, the Court is bound to reject all such notions advanced by anyone except in so far as they are found compatible with maintenance of the kind of competitive opportunities which the Supreme Court has said the Sherman Act protects. We do not ask this Court to replace the existing consent decree with an effective decree on any other basis than a finding that the consent decree is inadequate to enforce the Sherman Act against the defendants. Such a finding must, of course, be based upon an application of what the Supreme Court has held in interpreting the Act to the proven industry facts rather than the past or present opinions of the parties as expressed by their counsel.

Now as a corollary of this proposition, the fact that a particular monopolistic or competition-suppressing practice

represents an exercise of sound business judgment on the part of persons enjoying its benefits, must equally be without weight in determining whether or not the Act has been violated.

If absence of sound business judgment were a condition of law violation there could be no effective enforcement of this Act, which, by its nature, places restraints upon the pursuit of business self-interest to its logical limits.

We make these concessions, not from any altruistic motive, but in the firm knowledge that the decisions of the Supreme Court make it impossible for this Court to accept these postulates on which the defendants rely.

The courts have repeatedly emphasized the necessity for viewing the activity of the dominant elements of an industry as a whole in any antitrust case brought against them by the Government. The courts have also repeatedly held that even when a restraint of trade has become sufficiently established and generally profitable to become acceptable to most or all of the members of an industry immediately involved in the restraint, that fact cannot save it from the condemnation of the law. The Pullman Company enjoyed an unchallenged monopoly of the business of furnishing sleeping car service for fifty years, but that did not prevent the divorcement of this business from Pullman's car manufacturing business when it was found that such integration unreasonably restrained trade in the purchase of sleeping car equipment. The Aluminum Company of America enjoyed a virtually complete monopoly of the production of alumina and partial monopolization of the aluminum fabricating business for almost as long a period and was only saved from a decree ordering its dissolution as a means of establishing competition by the existence of a statute more specific than the Sherman Act, designed to accomplish the same purpose. In that case, as here, there had been a prior consent decree which the defendants attempted to use as an immunity cloak for continuing monopolization, but the effort met with no success.

In their reliance upon the consent decree in this case to defeat relief here, the defendants have succinctly stated their basic opposition to the enforcement of the antitrust laws, as such. At pages 2 and 3 of their joint brief regarding the consent decree, the defendants state:

> "In the negotiation of the decree it early became apparent to all parties that, in addition to the subjects referred to above"—those subjects were blind selling and block booking—"there were certain recognized trade practices within the industry which in practical application had given rise to a number of complaints and criticisms on the part of some so-called independent exhibitors. It was also recognized that the considerations and factors involved in these trade practices (such as clearance and run, for example) were of a business nature and that decisions with respect thereto primarily involved the exercise of business judgment. It was concluded by both the Government and the defendants that an adequate and fair solution of many of these problems could not be achieved by resort to proceedings under the antitrust law. Many elements quite different from violations of law, were involved. It was considered essential that some procedure, expeditious in nature and designed to provide something of a layman's review of business judgment was the most desirable procedure for resolving these controversies."

The suggestion that the Government, in entering into the consent decree agreed with the defendants that the solution of unfair trade practice problems within the industry "could not be achieved by resort to proceedings under the antitrust law," is simply a claim that the Government and the Court, by entering that decree, were setting up a plan of industry regulation which neither had the slightest authority to sanction. The only jurisdiction this Court has now or ever had in this case was to enforce the antitrust

laws against the defendants or to dismiss them from the suit. The filing of the complaint in this suit had no other purpose than such enforcement; the members of the Attorney General's staff who represented the Government in negotiating that decree were employed for no other purpose; and the Court, in entering that decree, was engaged in no other purpose than the enforcement of the antitrust law.

Judge Hand: That is all very true, in one sense, but it is not very profitable, you know, to lead the Court and the industry like infants crying in the night, and nothing but a cry; or, as Sill said in his poem, "A lot of people dancing in infuriosio, nothing but cares around."

You ought to have some kind of a system, I should think, that you advocate and could point to, if you object to this.

Mr. Wright: I think we do. We advocate a free competitive system instead of this rigidly controlled one.

Judge Hand: You mean a system where they rent a picture to one theatre just that one time, with nothing else?

Mr. Wright: We advocate, fundamentally, a system where a distributor is free to function as a distributor without any agreement or affiliation binding him to some exhibitor for the purpose of eliminating competition between exhibitors.

The defendants' claim that restraint of trade in this industry may not be corrected by resort to proceedings under the antitrust law is simply another way of phrasing its basic claim that the industry practices in which the defendants engage are outside the reach of the antitrust laws because they have been widely accepted and continuously employed for many years. This Court is not organized to perform and this proceeding was not brought to provide "a layman's review" of the business judgment of the defendants. Their business judgment, insofar as it is reflected in the profitability of their business, may be unimpeachable. The question that this Court has to resolve is whether or not what was done by them unreasonably restrained trade in motion pictures.

While a concept of unreasonableness, related to the public interest in the preservation of competition, rather than the pursuit of successful business policy is one which is apparently foreign to these defendants, this concept has become firmly imbedded in the most recent decisions of the Supreme Court. These decisions show that Court's profound concern for the protection of this interest, regardless of whether anyone gets on the witness stand and complains that suppression of competition hurt him and regardless of whether the suppression has become thoroughly institutionalized.

In the Interstate Circuit case the business judgment of the defendants in imposing the restrictions which the Court found illegal was clearly vindicated by the fact that their overall revenue from the exhibition areas in question was increased as the result of the imposition of the illegal restrictions. That is to say, the increase in rentals received from Interstate more than offset the decrease in rentals from independents, yet the soundness of the business judgment which led to the imposition of these restrains could not save them from the Court's condemnation. In the Ethyl Gasoline case no witness took the stand to complain about any practice. The case was heard on stipulated facts. There was no attempt to show that the prices which the Ethyl Gasoline Corporation sought to maintain for its product by the licensing system there brought in question were reasonable or unreasonable, nor was there any attempt to show that any particular member of the public or the gasoline industry had been directly injured by the system. In fact, the defendants offered proof that the whole purpose of the system was to protect the public from injury by providing for safe handling of a potentially dangerous product. Yet the Court was unimpressed by those claims and insisted that that system was illegal per se because it arbitrarily stabilized prices, and the public was conclusively presumed to have an interest in a free market for any product which moves in interstate commerce, and which the Sherman Act protects.

In the Masonite case no one complained that he was hurt by the practices there brought into question. The defend-

ants offered affirmative proof to the effect that the prices charged for hardboard were reasonable and that the public benefited from this system of distribution that they had devised whereby one manufacturer made all the board and the others distributed it on an agency basis at prices fixed by Masonite. Again the complete rationality of this system was assumed from the standpoint of the exercise of sound business judgment by the defendants, but the scheme was held to be illegal because it suppressed price competition as such.

Now, in Mercoid v. Midcontinent Corporation, a long established patent licensing practice was overthrown. A combination patent was held not infringed by the knowing manufacture and sale of competing products for use as part of the patented combination. Now, although such activity had long been established as contributory infringement, the Court simply held that an extension of monopoly rights granted by the patent laws in any manner whatsoever violated the public purposes of the patent laws and the Sherman Act.

Now, in United States v. Crescent Amusement Co., the District Court, in refusing the Government's request to incorporate in its decree a provision compelling the defendants to secure Court approval before acquiring theatres, held that it was sufficient merely to prohibit future acquisitions which were preceded by predatory practices.

Now, when the Government argued that there might be a complete destruction of competition by a voluntary sale without any predatory practices when the only competing theatre in a particular town was acquired, the District Court replied that such a limitation would tend to deprive independent theatre operators of a market for their theatres. The plaintiff argued successfully in the Supreme Court that the effect of an acquisition on competition must be the test, regardless of whether or not the application of that rule tended to restrict the sales opportunities of particular independent exhibitors. The Supreme Court accepted the plaintiff's argument and directed the District Court to incorporate a provision in its decree which would prevent the de-

fendants from acquiring theatres in any town unless they first satisfied the court that it would not restrain unreasonably competition in theatre operations, and those defendants operated in towns with less than 2500 people.

Now, in going to the unusual length it did in reversing the District Court on a matter which would ordinarily have been within its discretion, the Supreme Court demonstrated a concern for the preservation of motion picture theatre operating competition, per se, which completely refutes the defendants' assertion that the sole basis for the Court's decision in that case was the history of predatory practices in which the defendants had engaged. We submit that anyone who will read together the opinions in these five consecutive cases just mentioned, commencing with Interstate Circuit and concluding with Crescent Amusement, cannot escape the conclusion that the Supreme Court has steadily moved in a direction which these defendants have simply ignored in their argument. While the Crescent case alone commits the Court to the specific proposition that full opportunity for theatre operating competition in licensing films is required by the Sherman Act, the general trend of the Court's thinking, exhibited by these five cases, shows that regardless of how firmly established are the practices indulged in by any business organization, or how desirable they may seem from the standpoint of business efficiency, if they endanger the existence of a competitive market, as such, they must be terminated.

Now, the only court besides this one which has had occasion to consider the competitive effects of the defendants' integrated structure, as a structure, found that this structure had in fact unreasonably restrained competition in and of itself. This decision, rendered by a three-judge court in Paramount v. Langer (23 F. Supp. 890), upheld the North Dakota theatre divorcement law, and although appealed by the defendants, was not reviewed on the merits by the Supreme Court because the statute was repealed before the case could be heard.

Now, let us examine the precise nature of the competition that the defendants claim exists in the motion picture theatre market. It is expressly conceded that there is no competition among them as theatre operators for the films of the distributors which own theatres, in the locations where those distributors have affiliated theatre interests. The extent of their claims as to competition among affiliated theatres is simply the claim that they are in competition with each other for the public's dollar in the small number of situations where two or more serve the same competitive area.

Now, there is no testimony in this entire record to the effect that there have been at any time any competitive negotiations between two or more affiliated theatres for the film product of any distributor defendant. The plaintiff's evidence shows that for the last ten years, in the principal cities of the country, there has been no shift in the first run outlets for the defendants' films as between affiliated theatres, except as a result of termination of product or theatre pooling agreements. There is evidence that on occasion some of the distributor defendants have broken with affiliated circuit outlets at various times, but there is no evidence that any distributor defendant did so because it received a better offer from one defendant's theatres than from the theatres of another defendant. No affiliated theatre operator testified, by affidavit or otherwise, that he has ever even made an offer to license films being exhibited by another affiliated theatre, and in view of the elaborate testimony of the defendants' executives received by the Court without restrictions of any kind, the fact that no such testimony was tendered is clear evidence that no such offers have been made.

Now, there is no express concession as to lack of competition in licensing films by the affiliated theatres generally, by their counsel, but the record is perfectly clear that there was no more competition among them in licensing films generally than there was with respect to the situations where their affiliated theatres used their own films. Now, this

absence of film licensing competition among the producer-exhibitors is not fortuitous. It is amply illustrated by documents in evidence which demonstrate a specific intent on the part of all of them not to compete with each other.

Now, let us look first at the theatre operating agreements in evidence relating to San Francisco, California——

Judge Goddard: Mr. Wright, what would you do, auction off pictures? What is your solution?

Mr. Wright: You mean as to how pictures should be sold?

Judge Goddard: Yes.

Mr. Wright: I see no reason why they should not be sold competitively.

Judge Bright: What do you mean by that?

Mr. Wright: Well, putting pictures on the auction block does not appeal to me as anything which is inconsistent with the purposes of the Sherman Act. I do not see why they should not go on the auction block.

Judge Goddard: What is your solution? What do you say? What is your solution?

Mr. Wright: Well, our solution primarily is the dissolution of these combinations which we say, as such, prevent competitive distribution and exhibition of films.

Judge Goddard: Assuming that that is done, then how does a distributor go about to sell his picture?

Mr. Wright: We think a distributor should go about selling his picture by deciding where he wants it shown and how many runs, what the sequence shall be, and so forth, without making any agreement with one group of exhibitors against another giving certain theatres a fixed quasi permanent preferred status in a system of exhibition or distribution. Let him use his own judgment in making his film contracts free from these restrictions.

Judge Goddard: Isn't that what the distributor is doing now? Getting as much as he can?

Mr. Wright: He is getting as much as he can, but he is doing it by a process which involves the making of agreements which plainly restrict competition between theatre operators. That is a privilege that we don't think he has. Mr. Marcus in his argument will undertake to develop more fully the case against the distributors as such.

However, if I may, I would like to proceed with my discussion of this question of theatre operating competition if I may.

Now, as I say, calling attention to San Francisco, California, that is a case where Fox alone with five producer-exhibitors is engaged in operating theatres, although Paramount and Loew also own theatres in that town.

Now the first agreement——

Mr. Caskey: Mr. Wright, RKO operates a theatre in San Francisco.

Mr. Wright: Mr. Caskey calls my attention to the fact that RKO has one theatre there, and I believe that is correct. But at any event Fox operates first-run theatres there. Paramount and Loew also own theatres there which are operated by Fox and I propose to discuss the agreements which have brought that situation about.

Now the first agreement in point of time is Exhibit 232-A, dated December 10, 1930, which was when Paramount first leased its first-run theatres in San Francisco, Portland, and Seattle to Fox for periods varying from three to twenty years.

Now that contract was made between Paramount-Publix Corporation, the principal Paramount theatre-operating corporation, and Fox Film Corporation, distributor of Fox films, which controlled Fox West Coast Theatres, Inc., exhibiting corporation which was to operate the theatres in question. The agreement expressly assumed that the latter all of the first-run theatres in these towns in which Fox had any financial interest whatsoever whether in the form of a minority stock ownership or just a participating agreement. It provided that Paramount should receive as additional rent a share of Fox's earnings from first-run exhibition of all distributors' films in all such first-run theatres if those

earnings exceeded a stipulated amount. Fox is also given the exclusive right to show Paramount films first-run in these towns and an option to license them for second run. The agreement further expressly provided that if control of Fox West Coast Theatres, Inc. passed out of the hands of Fox Film Corporation, Paramount could terminate the agreement on six months' notice. The present disclaimer of a vital interest in the affiliation of those theatres with which they do business had apparently not occurred to these defendants in 1930.

The next agreements involving the San Francisco situation are both dated January, 1934, and were made between the Paramount trustees in bankruptcy and Fox West Coast and Fox Film and are in evidence as Exhibits 232 and 233. The latter consists of three leases for the same three Paramount theatres in San Francisco covered by the 1930 agreement, for ten-year terms, all expiring in 1943, and they are expressly conditioned on the continuance of a Paramount ten-year film franchise for the same theatres dated August 1, 1933.

These leases were executed pursuant to Exhibit 232, under which the trustees made an agreement with Fox covering the San Francisco, Seattle and Portland theatres included in the 1930 agreement and adding to the Fox San Francisco first-run pool Loew's Warfield Theatre.

Now this over all agreement did not result merely from problems arising in bankruptcy, but expressly states that it is a composition of disputes arising under the 1930 agreement and its terms are in effect an extension of that agreement through 1943. It gives Paramount 37½ per cent of the operating profits of all of the first-run theatres in San Francisco operated by Fox, including the one owned by Loew and leased to Fox, and provides for parallel franchises for the use of Paramount films in Fox theatres in Oakland and Portland, as well as in San Francisco.

Now by Exhibit 222, dated November 5, 1943, an agreement made between Paramount Pictures, Inc., and Fox West

Coast Theatres, this pooling arrangement as to San Francisco has been extended for another ten years, through 1953.

Now then, Exhibit 231 is a lease of the Loew's Warfield Theatre to Fox executed by Metro Goldwyn Mayer Distributing Corporation, which is also in evidence, and that is dated August 1, 1936, and covers a ten-year period, and is also expressly conditioned upon continuation of a film franchise simultaneously executed for the exhibition of the Loew films in the Fox first-run houses in San Francisco.

Now there are also in evidence franchise and lease agreements executed by Loew and Fox with reference to Los Angeles at the same time whereby a theatre there was leased to Fox and the Loew pictures were committed to the Fox Theatres.

Now in the face of those written agreements, how can anyone argue that Fox, Loew and Paramount have exhibited no intention of restricting competition among themselves, and that their film licenses with each other have not been conditioned upon theatre affiliation?

Now the written agreements by which RKO and Warner have prevented and still prevent theatre operating competition between the theatres owned by them in Albany, New York, are in evidence as Exhibits 204 and 229. 204 is an agreement between RKO Proctor Corporation and Fast Theatres, Inc., by S. H. Fabian, president, which provides for lease to and operation by Fast of two RKO theatres in Albany, two located at Schenectady, and one at Troy. The agreement is dated January 1, 1935, and extends for 21 years, expiring in 1956. In addition to a guaranteed rental, Fast is to pay a percentage of its net profits from theatre operations to RKO, after deducting certain management fees paid to Fast. The agreement originally provided that the film buying for these theatres be done by RKO for a fee of 1% of the gross. In 1937, according to a supplemental letter attached to the agreement, the film buying was taken over by Fast, but the 1% fee continued to be paid to RKO.

Perhaps the most striking provision of this agreement is that under it Fast agreed that it would not extend its busi-

ness outside the cities of Albany, Schenectady and Troy, New York, and that it would not become financially interested in any theatre in any manner outside of those cities. Fast also agreed not to operate the five theatres covered by the agreement in conjunction with theatres located outside these three cities and RKO agreed not to acquire any other theatre interests in those cities.

Now Fast's agreement to confine its operation to these three cities went far beyond the mere restriction of competition between Fast and RKO. It was plainly a provision calculated to preserve from encroachment the theatre operating territory of the other defendants as it excluded Fast from areas in which they and not RKO operated theatres. For example, Paramount, which operates in nearby towns, such as Newburgh and Poughkeepsie, received direct protection by this agreement against any encroachment by Fast on its territory.

Judge Hand: Why do you have to sell theatres in order to cure that, if there is a wrong there?

Mr. Wright: Well, the agreement is, I would say, per se illegal, and of course——

Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely unlikely for this court to give. But that is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course.

But this sort of think that you are arguing now is the kind of thing that has always been argued, and remedies have constantly been granted that were thought sufficient. Maybe they have not been against the kind of thing you are calling our attention to here.

Mr. Wright: If the Court please, my only purpose in calling attention to these specific agreements is on this question of intent. Obviously, the particular situation in Albany

might to some extent be remedied by voiding particular competition-restraining agreements. But I am arguing these and calling them to your attention merely as evidence of the fact that there is an express intention on the part of these defendants not to compete as theatre operators.

Now I have not finished the analysis of this situation which shows where Warner came in there at the same time, and it is through Fast that the link between Warner and RKO in that situation occurred.

Judge Bright: May I ask you one question, Mr. Wright?

Mr. Wright: Yes.

Judge Bright: In that restriction to Fast, restricting theatre operation, is there any territorial limit to which that restriction should be confined?

Mr. Wright: He is confined to those three towns.

Judge Bright: I mean outside those three towns is there any limit where he shall not acquire other theatres?

Mr. Wright: No, he cannot acquire theatres anywhere.

Judge Bright: In the United States?

Mr. Wright: That is right. It limits his operation expressly to those three cities—Albany, Schenectady and Troy. He agrees not to become interested in theatres outside those three cities,—that is, not Fabian individually. This is Fast Theatres Corporation.

Judge Bright: That is one reason why I asked the question. Fabian has other theatres.

Mr. Wright: Oh, Fabian operates in partnership with these defendants in many other situations through many other corporations.

Judge Bright: Isn't Fabian Fast, and Fast Fabian?

Mr. Wright: Well, the only thing that appears in the record is that Fabian is president of the Fast Theatres, Inc. a corporation, which executed the agreement, and which operates the Albany theatres and the theatres in Schenectady and Troy.

Now Exhibit 229 is a profit-sharing agreement dated July 2, 1941, between Fast Theatres, Inc., and Stanley Mark-

Strand Corporation, a wholly-owned theatre operating subsidiary of Warner, pooling the operation of three theatres owned by Warner in Albany with the Palace and Leland theatres operated by Fast. The Palace is one of those owned by RKO, and leased to Fast under the exhibit that I just referred to.

Now this Exhibit 229, the pooling agreement between Fast and Warner, provides for the formation of an operating committee composed of representatives of Fast and Warner, to determine the policies of the five theatres and contains the following provision at paragraph 3, page 4, with respect to clearance:

> "Fast, as the operator of the Palace Theatre, Albany, New York,"—that is an RKO theatre—"agrees that in the licensing of photoplays for exhibition in the said Palace Theatre, it shall not obtain clearance over the theatres covered by this agreement in excess of the clearance which the said Palace Theatre now has, and Stanley, as the operator of the Strand Theatre, Albany, New York,"—that is the Warner theatre—"agrees that in the licensing of photoplays for the said Strand Theatre, it will not obtain clearance over the theatres covered by this agreement in excess of the clearance now in effect for said Strand Theatre."

While RKO was not a direct party to this agreement it was a necessary party to any clearance arrangement involving its films, which were committed to the Palace Theatre by the franchise made a part of its lease of the Palace Theatre to Fast in its operating agreement with Fast. (Exhibit 204.)

Now the occasion for this Warner pooling agreement was apparently the construction of a new theatre in Albany by Warner, called the Delaware. Warner had previously owned theatres there for a number of years and had previously pooled its theatres in Troy, New York, with those operated

by Fast, including the Proctor, owned by RKO, by an agreement dated August 30th, 1935, as appears from Warner's 1939 answer to Interrogatory 52a (Ex. 118).

Paragraph 13 of page 15a, of the Albany pooling agreement between Fast and Warner contains the following covenant by Fast:

> "Fast is the owner in fee, in the City of Albany, New York, of a theatre site upon which was formerly erected the Hall Theatre and which was recently detroyed by fire. In consideration of the granting by Stanley to Fast of an interest in the operating results of the Delaware Theatre, as hereinbefore set forth,"—that refers to the provision sharing profits of the Albany operation—"Fast agrees during the term of the lease on the said Delaware Theatre, namely, twenty (20) years from the date of the completion thereof, that it will not erect or permit to be erected on the said Hall Theatre site a theatre building, or permit the said Hall Theatre site to be used for the exhibition of motion pictures, television or vaudeville."

Now paragraph 14, which appears on page 16 of the same agreement, further provides that neither of the parties will own theatre interests in Albany in the future during the term of the Delaware Theatre lease, unless they are operated jointly or unless either party refuses to share in such joint operation.

By an agreement dated July 21, 1943, attached to this Exhibit, this profit-sharing arrangement was extended for a five-year period, expiring in August 1951. Now neither of these Warner agreements purported to restrict Fast's operations to Albany, Schenectady and Troy, but this had already been accomplished by its agreement with RKO. The net effect of all these agreements, read together, was, of course, simply the complete elimination of any theatre operating competition between Fast, RKO, and Warner, in Albany.

Now these agreements I have just referred to are admittedly of a somewhat more complex character than those generally employed by the defendants to accomplish a similar purpose. We did not offer in evidence all of their pooling agreements but we did offer a sufficient number to illustrate the various kinds of express arrangements under which the defendants have limited theatre operating and film licensing competition among themselves and their theatre operating affiliates.

We have digested these agreements in evidence and have submitted copies of the digests to counsel for the defendants, together with an appropriate index, and we are today delivering copies of these to the Court.

Sufficient it is to note here that similar results to these I have just described have been obtained in other cities by straight leases of theatres from one defendant to another, leases conditioned upon the simultaneous maintenance of film franchises, leases coupled with operating agreements relating to general film licensing procedure, operating agreements which share profits, and agreements confining future theatre operations to specific territory. The areas covered by these agreements in evidence include more than 30 towns of widely varying sizes in approximately 25 states and involve all of the defendants in one agreement or another. Agreements of this character do not exhaust the kind of arrangements by which the defendants jointly engage in theatre operations. The instances such as Buffalo, New York, where Paramount and Loew each own approximately 40 per cent of the stock in a theatre operating corporation, Buffalo Theatres, Inc.; or Oklahoma City, where Warner owns a half and Paramount one-quarter of the stock of another theatre operating corporation; or Denver, Colorado, where Loew has a half interest in a corporation in which RKO has the other half—those stock holdings were listed and described together with others at page 6 of our Trial Brief. In those situations, contractual arrangements are, of course, superfluous as a means of eliminating competition between the defendants involved.

All possible combinations of the five theatre-owning defendants are represented by these joint stockholding arrangements or operating agreements. There are only ten mathematically possible two-party combinations of five different parties and these defendants have managed to exhaust all of those possibilities by combinations with one another which expressly eliminate theatre operating competition.

These written agreements and corporate arrangements, the defendants argue, are not enough to establish an intent not to compete with each other, but if they are not, what evidence possibly could establish that fact? We have shown that in the 32 cities of more than 100,000 population, where they operate theatres in nominal opposition to each other, they do not in fact compete for films. We have shown that in a substantial number of cities of all sizes where they might normally be expected to compete with each other if they desired to do so, that they have not done so by express agreement. In the 800-odd towns of less than 100,000 population in which the defendants operate theatres, there are only 19 in which more than one has any theatre affiliations. The details of this national division of theatre operating territory appear in the appendix to our brief. Apparently the only proof that would satisfy the defendants' concept of proof of an intent not to compete with each other as theatre operators would be one gigantic written pooling agreement executed by all of the defendants and their affiliates which provided in express terms for the situation that actually exists, to wit, a stable, arbitrary division of all film product and all theatre operating territory among their theatres. Of course, the so-called Paramount formula deal comes close to being that kind of agreement, as it is in essence an arbitrary division of the theatre market which simply assigns an arbitrary percentage of the national market to each of the circuits licensed under it. The theory on which these circuits are expected to furnish fixed percentages of Paramount's national film rental regardless of the films' performance in their theatres is apparently that each of them has been assigned a fixed percentage of the national theatre market.

All of these agreements are far more direct and decisive evidence of an intent to restrict competition than the Government ordinarily possesses. Normally, we rely on letters or memoranda in which a careless or poorly advised corporate official has expressed an interest in making the kind of an agreement with a competitor which these defendants have actually executed. This industry is one of the few in which restraint of trade remains so firmly imbedded in the practice of its managers that they habitually execute written agreements suppressing competition in the ordinary conduct of their business.

If the Court prefers evidence of restraint of more subtle character, we recommend examination of the Mainstreet Theatre situation at Kansas City, Missouri. This is a 3000-seat, downtown, million-dollar theatre formerly leased to RKO which was once operated with the best pictures available as part of a first run pool covering the Fox, RKO and Paramount theatres in that town. Mr. Rhoden, the Fox theatre head in the area, assures us that it was not suitable for such operation because it was in the wrong part of the downtown area, and it was closed in 1938, after the pool terminated. He does not say why this was not discovered before 1938. In 1941, he states, an independent tried to operate it for two months with vaudeville and feature films of "lesser box-office attraction," but was unsuccessful. Now, in November, 1942, Fox bought a half interest in the fee to that theatre and in January, 1943, RKO bought the other half interest in it.

Now, there is no written agreement regarding it between the joint owners, but it remains closed and the joint ownership of these defendants will obviously prevent any independent who might suppose that he could get suitable film for it from attempting to operate it and thus disrupt the first run situation in Kansas City.

We are told by Mr. Rhoden that a partition suit is pending, and I suppose if the theatre is cut in half it would be permanently removed as a threat to the Kansas City first run situation. According to the defendants' argument, all

theatres are competitive, regardless of affiliation, and no doubt the only way in which the kind of theatre competition they talk about may be suppressed is by physical destruction of a theatre building.

All of this conduct simply reflects a non-competitive condition that is inherent in the corporate structure of the defendant organizations. This structure may not be viewed as existing in a vacuum. The fact that a distributor might conceivably own a theatre circuit which exhibited only the films that it distributes does not make the integrated structure of these defendants, which habitually use each other's theatres as outlets for each other's films, a legal one. The defendants' claim that a distributor's exhibition of his own pictures in his own theatres is legal, as an abstract proposition of law, simply begs the fundamental question posed by this lawsuit. That question is not the abstract one of whether or not one who distributes pictures may lawfully own theatres. The question presented by this suit is whether or not elimination of competition resulting from the continued and habitual use of theatres controlled by each of these defendants as outlets for the films of the others, with the consequent elimination of theatre operating and film licensing competition among them, may be permitted to continue.

Now, the defendants' argument that this established cross use of each other's theatres as distribution outlets is legal because it makes more commercial transactions than would occur if their theatres confined themselves to their own pictures and thereby stimulates what they are pleased to call competition, is predicated on the assumption that they must and should own theatres. Their right to an integrated structure of this kind, if presented in the absence of any showing as to its competitive effects, might well be sanctioned by any court. But these defendants must be judged, not on the basis of how they might theoretically behave, but on what their actual competitive record has been, and this record is one of habitual suppression of theatre operating and film licensing competition among them and with others.

Now, this Court, by their argument, is faced with the alternative of simply assuming the legality of the defendants' theatre ownership because they say it is legal, or subjecting it to the tests of legality announced by the Supreme Court. Now, as long ago as the Reading cases, that Court expressly rejected the argument advanced here that if you don't exceed the powers granted in your corporate charters, your corporate structure is immune from attack under the Sherman Act. The second Reading case clearly rejected the further argument advanced here that if the structure was legal when created, it could not be dissolved by virtue of adverse effects on competition which later developed.

Now, the Supreme Court has never countenanced a non-competitive relationship such as that necessarily resulting from the established cross use of the five largest theatre circuits in this country as market outlets for the films of the five largest distributors. In approving the pooling of certain oil cracking patents among four oil companies which did not and could not dominate the production or marketing of the finished product, gasoline, the Court said in Standard Oil v. United States, 283 U.S. 163, at page 174:

> "Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product, is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act"

And the same language, of course, applies with all the more force to an exchange of licenses which fixes prices.

Now, these defendants might conceivably argue that there are alternative remedies for dealing with this situation, but they cannot justify its continuance under the Sherman Act. Dissolution is not an end in itself, but only an established judicial means of terminating an unlawful combination. They could, for example, with some plausibility, argue that if a theatre-owning distributor were prohibited from licens-

ing its films to theatres owned by another distributor and if theatres affiliated with a distributor were similarly prohibited from licensing the films released by other theatre-owning distributors, for exhibition in their theatres, the relationship between them might conceivably be made competitive without divorcement. But since they themselves obviously prefer to give up their theatres rather than the right to such cross use of films, there is no alternative but to terminate——

Judge Hand: Who says that?

Mr. Wright: Well, their argument certainly by implication says it.

Judge Hand: I did not think so. They are arguing for every point they can make, as lawyers generally do, and just as you are doing. I do not see any implication at all from their argument in their briefs that they would prefer divorcement of their theatres and dismembering everything to restriction to the kind you are talking about now.

Mr. Wright: Well, quite apart from that, and assuming there is no implication in their brief of any such argument, I merely point out that if the defendants or the Court can devise or knows of some relief which would accomplish the same result, we would welcome it ourselves as an alternative to dissolution, because we recognize that that is a last resort proposition which should only be used when other means have failed. But I am merely pointing out that on the basis of experience nothing else that has been done over the long period of time in which we have been trying to solve this problem has or gives any promise of restoring or making competition among these integrated companies possible except dissolution.

Judge Bright: I have just been wondering: Assuming we go a hundred per cent with your demand for dissolution, where does it leave this industry? And where do you start from there, and in which direction do you go?

Mr. Wright: Well, in the first place, the first thing it does for this industry is to free the exhibition business as

such from distributor domination. You then have an industry where your distributors are behaving as distributors with a sole eye to film rental and your exhibitors are operating their theatres on an independent basis with a view to satisfying the requirements of theatre operation.

Now, I do not say that that alone solves the problems of the industry. In my view, when you are dealing with a situation such as you have here, where restraint of competition has become so firmly imbedded in an industry structure, there is not any one step that you can take that will make competition where competition did not exist before. The most that can be done in any event is to work out provisions which will make competition possible and which will prevent the continuance of the restraints which have been found to occur in it in the past.

Now, on this problem of competition among these defendants, it seems to me there is no way of eliminating the habitual restraint of competition among them without preventing this cross use of each other's theatres as exclusive outlets for them as distributors.

Judge Hand: Now you are arguing for this different remedy and really not arguing for the situation where it might well be said, as they said about Agricola, he made a desert and called it peace.

Mr. Wright: I am merely suggesting that as an alternative remedy. I do not think myself that it is as adequate a remedy of dissolution. But I point it out as simply another means of attempting to accomplish the same result; and I say there is nothing in the defendants' attitude to indicate that they would not regard restrictions of that character as any more desirable than the more traditional method of an actual dissolution of these combinations through stock divestiture.

Judge Bright: Doesn't your argument impliedly admit that there is keen competition in distribution?

Mr. Wright: I think not. I do not see how there can be any more competition in distribution as among the five integrated distributors with this system of cross use of each other's theatres as outlets than there can be competition among them as theatre operators. They are constantly making agreements with each other which directly restrict their conduct as distributors. Now, you can't——

Judge Bright: It does not restrict their conduct as distributors. It finds a sure market for distribution.

Mr. Wright: Well, I call your Honors' attention to the provision that I just read from the operating agreement in Albany where the agreements were made as to what clearance restrictions should be imposed. Now, that is an express agreement but impliedly, whenever one distributor is licensing the theatres of another distributor, he is, in effect, agreeing to impose similar terms and similar restrictions with respect to his theatres, because the affiliated theatre with whom he is dealing——

Judge Bright: Doesn't it more definitely fix the clearance provisions that have already existed in the business?

Mr. Wright: If the Court please, assuming that it does, that does not make it legal. Now, this clearance structure—there is no proof in this record, despite the defendants' allegation that the clearance structure that you have in this industry existed prior to the organization of these integrated groups. That structure is itself a product of this system. You did not have these elaborate clearance and run structures back in the days when there was no affiliation. I think if you will look at those early license agreements in evidence you will see that there is no printed provision for admission prices such as you now have and that the whole character of the business did undergo a change when your distributors became interested in theatre operation, and vice versa.

Now, the mere fact that many of those clearance structures are long established cannot possibly save them. Now, if their effect——

Judge Hand: That is true, of course, but what I would like to get at is whether really you think there should not be any clearance provisions at all by anybody; anything?

Mr. Wright: Precisely.

Judge Hand: You do?

Mr. Wright: That is right.

Judge Hand: You didn't once.

Mr. Wright: That is right.

Judge Bright: You do not want to scrap the consent decree completely, then?

Mr. Wright: In so far as it purports to arbitrate the clearance, quite definitely.

Judge Bright: In other respects, too?

Mr. Wright: Yes.

Judge Hand: Isn't it simply a question of arbitrating, as Judge Bright says? You don't want any clearance provision under any circumstance?

Mr. Wright: That is quite right. We feel that the distributor should be free to determine his run and clearance structure without making any express agreement with any exhibitor in the area.

Judge Bright: That carries you right back to the copyright owner's right to sell his product.

Mr. Wright: That is quite right. It depends on the interpretation of copyright.

Judge Goddard: If I understand, the cost of a print, of an ordinary picture, is $150 to $300 and for technicolor, $600 to $850. I also understand that a great many, perhaps thousands of the smaller theatres pay less than the cost of a print.

Mr. Wright: That is right.

Judge Goddard: How would you work that out?

Mr. Wright: The distributor needs to make no clearance agreement with anybody to distribute whatever number of prints he has got in the manner in which he thinks is most advantageous. He would, I presume——

Judge Goddard: I want to understand that, because it seems to me that is what he is doing now. My question seems to me clear. Where the price of the print is more than the theatre pays, if you don't have clearance, what would you do? How would that theatre get pictures?

Mr. Wright: The absence of a clearance agreement does not in any way prevent the distributor from making such multiple use of the prints he has got as he can by licensing as many exhibitors as he can deliver a print to. There is nothing to prevent him from doing that. He does not have to make an agreement with any exhibitor in order to efficiently use his print supply.

Judge Goddard: How would he determine to whom he would give his print? I mean, there would be no clearance? You would say if he did not give it to A that A was discriminated against.

Mr. Wright: Well, I suppose that he would use his best judgment as to where he thought the pictures ought to play and when. He would, of course, include in his license provision, I suppose, the dates and places where the picture was to play in the particular theatres that he licensed, but he does not have to make a further agreement with that exhibitor as to where they shall play subsequently in order to license them to some subsequent run.

Judge Goddard: Don't you come down, finally, to the proposition that one theatre must have it in advance of another? Isn't that essentially clearance?

Mr. Wright: This record very clearly shows that one theatre does not have to have the print in advance of another. In many situations that obtains. 15 or 20 theatres in Baltimore play virtually simultaneously, and in some first-run situations you will find two and occasionally three theatres playing day and date.

The matter of how many runs you have in a particular sequence and where they occur is something that we think can be safely left to the distributor's own judgment without encumbering that judgment with agreements to operate in a

certain way in the future, which give these theatre operators, as such, protection from competition.

I think if you examine this structure objectively you cannot help concluding that the main purpose of clearance is to control and regulate theatre operating competition, and, as such, it is, of course, principally in the hands of theatre owners rather than distributors.

Judge Goddard: Now, Mr. Wright, supposing we were to decide that clearance should be done away with, how would you handle this question that I have just raised?

Mr. Wright: I do not think it is up to the Court to handle it. I think it is up to the distributor to handle it. The decree would simply prohibit him from making an agreement with any exhibitor as to the terms on which he would serve his pictures to other exhibitors. He would be left free, of course, to license his film to such exhibitors on such runs as he thought would give him the most revenue in the particular area where he was serving his prints.

Judge Goddard: Isn't that what he is doing now?

Mr. Wright: No.

Judge Goddard: Exercising his judgment?

Mr. Wright: Not at all, if the Court please. I think the agreements in evidence very clearly show that he in many cases makes an express agreement to abrogate any exercise of judgment. He says that for a certain period of time you shall have, that is theatre A, shall have a priority over theatre B on all my pictures. That kind of agreement is not necessary to permit him to efficiently distribute his prints, and that is what the clearance system today is, is one which fixes a theatre's status. That is the way it performs; that is the way it functions. There is no justification, in our view, for the use of these restrictions to fix theatre operating status.

Judge Hand: Would you ask for a decree that the picture owner or distributor would only play his pictures in his own theatre or in that of the independents?

Mr. Wright: That kind of decree might be a substitute for divorcement if it were coupled with, of course, a freeze

on theatre acquisitions, because if you had unrestricted interchange of theatres, you would have a situation such as Kansas City, where five of these people each has a first-run theatre.

I would expect that kind of provision to lead really to the divorcement of theatres, because it would take the monopoly value away from them that they now have, and if you took that away, I don't think these defendants would want them. That is the main purpose of their structure, is to use these outlets as a means of preferential treatment for each other.

Judge Hand: You think they would prefer total to partial divorcement?

Mr. Wright: That is a matter for them, I think, to express themselves on. I do not pretend to know.

Quite apart from the obvious elimination of competition between the five integrated groups which has occurred by virtue of their corporate structure, that same structure has a very substantial effect in eliminating theatre-operating competition among the various units affiliated with each defendant combination. The Paramount combination, for example, consists not only of a parent producing and distributing corporation and a parent theatre-operating company, but numerous subsidiary theatre-operating corporations, many of which are only half owned by Paramount and are claimed to operate on a highly independent basis, although subject to negative control by Paramount's New York office, which nominates half of the directorate. There is no dispute about the fact that all of these corporations, whether 50 per cent owned or 100 per cent owned, cannot acquire a theatre without approval of the parent organization. The fact that they all confine their operations to separate territories is, therefore, not a matter of mere chance. Paramount is able to enforce the kind of geographical pattern of theatre ownership among these affiliates that is most compatible with the general division of theatre operating territory among all defendants. If local management autonomy has the stimu-

lating effect on efficiency claimed for it by the Paramount witnesses, why should their theatre acquisition activities be directed and controlled by Paramount's New York office any more than their film licensing activities? We think the answer lies in the fact that Paramount could not, in the absence of such control, prevent theatre acquisitions. But the allocation of films among them may be and is accomplished simply by concerted action among the major distributors, the control of all of which is centralized in New York City. Thus, in the case of Paramount, dissolution of the combination is essential not only to permit competition between the Paramount affiliates and other defendants' theatres in licensing films, but is also needed to eliminate the restraint of theatre operating competition now imposed through Paramount's control of the number and location of the theatres they operate.

As for the Fox group, the defendant National Theatres Corporation admittedly has no business function except to operate as a holding company for the various Fox theatre circuits, and link them to the Twentieth Century Fox-Fox Film Corporation, the producing and distributing member of the combination, which owns all of National's stock. The circuits which National owns are also claimed to operate——

Judge Hand: What do you want to do with them, providing all others should be held pure and untainted?

Mr. Wright: I don't think you can hold all others pure and untainted.

Judge Hand: I know you think that. Of course you think that. I am trying to see what your, what I might call, territorial or local grievances are. That is the reason I asked you this question at the beginning.

Mr. Wright: In this case you cannot effectively give the relief against grievances of a primarily local character. The purpose of the case is to attack the general monopolization——

Judge Hand: Of course.

Mr. Wright: (Continuing)—of domestic business.

Judge Hand: I know that. It is evident from your complaint and your brief and everything else, but I had asked you whether you claimed that these regional practices were in themselves bad as between——

Mr. Wright: We do.

Judge Hand: Now, wait a minute. (Continuing)—as between—well, you were just talking about Fox Film; I spoke of that because of the California situation—between Fox Film and their own affiliates?

Mr. Wright: Yes, we say that relationship is illegal per se and should be dissolved.

Judge Hand: What would you do there?

Mr. Wright: Well, the first thing that it seems to me you would obviously have to do would be to dissolve National.

Judge Hand: Forget for a minute this over all contention about divorcing theatres everywhere in the United States. What would you do about Fox if Fox were here alone?

Mr. Wright: That is what I said, the first step, as I see it, would be to dissolve National Theatres Corporation, which is the link between Twentieth Century-Fox Film and these five large circuits in which National owns all of the stock—all of National stock being owned by Twentieth Century-Fox Film. I simply wanted to point out what restraints that theatre operating——

Judge Hand: In other words, you would say, if Fox owned the whole thing, which it does not in a technical, legal sense, and there were no other defendants in the case, that they would violate the Sherman Act and should be dissolved?

Mr. Wright: As to whether or not, if there were a single corporation involved, you would reach the same result, I think there might be some doubt. That is, we do rely——

Judge Hand: You are claiming here that they are essentially one, that they act together, and yet you do not

want to say, if they were one, that they would violate the law that the aggregate violates?

Mr. Wright: That is right, if the Court please. There are certain disabilities that you encounter by a multiple corporate form of business organization under the Sherman Act that you might not encounter otherwise. There may not be a rational basis for that distinction but I think it is found in the decisions of the courts.

In the General Motors case, for example, the two corporations were found to have conspired with each other to restrain trade. One was wholly-owned by the other and operated as a virtual department of the parent, and yet, for Sherman Act purposes, they were held capable of conspiring and combining with each other, and I think we do have to look at these structures as they actually exist in determining liability rather than as they might be under some other scheme of control.

The restraints on theatre operating competition placed on these Fox circuits as a result of their common ownership by National is perfectly clear from evidence that these Fox circuits, in addition to this common acquisition control, have from time to time simultaneously executed similar film licensing agreements with other defendant distributors which amount to concerted film buying, and that the effect of such combination has been to permit these circuits to virtually take over the distribution of the films of other defendants in the areas where they operate. An example of that is Exhibit 383, which consists of five simultaneous agreements between United Artists and the five principal Fox theatre circuits, being executed for the exhibitors by Spyros Skouras, president of National.

In the case of Warner, the defendant Warner Bros. Circuit Management Corporation concededly does the buying for the entire circuit, as is the case with Marcus Loew Booking Agency for the Loew Circuit, and RKO Film Booking Corporation for the RKO circuit.

All of these film-buying corporations are wholly owned by the respective parent corporation and are effective means by which a whole series of corporations with various degrees of affiliation with each other and with the parent companies are combined together for film-buying purposes. They operate to restrain film licensing competition on a scale far greater than the buying combinations condemned by the Crescent and Schine cases. Their continuing existence clearly cannot be justified if the law of those cases is to be applied to these defendants. In short, we submit that the law requires that each of the theatre-operating affiliates of each of these defendants must be made to stand on its own competitive feet by positive dissolution measures of the kind that have already been applied to much smaller units in the industry.

Mr. Marcus: If the Court please, Mr. Wright has pointed out the absence of competition among the theatre-operating defendants. This absence of competition is a large part of a still larger picture of a competitive rigor mortis in this industry.

The eight defendants have adopted and maintained for many years a system of distribution designed and effective to restrain competition among exhibitors and to promote regional circuit monopolies. There has been little variance between any of these defendants in the tenacity with which they have clung to this system or in their conscious use of it to promote the interests of the affiliated and independent circuits to the detriment of the smaller independent. At the time of the consent decree the theatre-operating defendants, faced with the possibility of divorcement of their theatre interests, consented to a slight, but as we shall show, quite inadequate modification of this system. Columbia, Universal and United Artists, not having theatres, have not consented to any modification of it.

This system has for its core the use of restrictive licensing provisions and the well-established business policy of these defendants to fix the status of the smaller independent

and to deny him the opportunity of getting out of that status, save as shown in the Crescent, the Schine and in this case when, in response to the wishes of a circuit, they reduced that status.

We will limit our discussion of licensing restrictions to admission prices, clearance and block booking, blind selling. We have collated in our brief at pages 78 to 88 other license provisions which have been used to effect a situation in this industry well within Section 1 and Section 2 of the Sherman Act. As to those provisions, we should hope to be heard with respect to the form any injunctive relief which may be decreed in this case takes.

We note that in variety these restrictions compare with those in the Hartford-Empire and the Sugar Institute cases and, as in those cases, their variety has been a measurable factor in keeping the industry in a largely non-competitive condition.

While we shall argue the illegality of each of these three practices as such, we also take the position that each restriction is illegal as part of the general plan used by these defendants to control the industry unreasonably, and we take the further position that these eight defendants have combined to restrain trade with respect to these and other practices.

All of these defendants have knowingly used these restraints over a long period of time and much of their restrictive force has been derived from the community of their use by all of the eight distributor defendants.

As was said by the Court in the Bigelow case, recently decided:

> "Knowing participation by competitors without previous agreement in a plan, the necessary consequences of which, if carried out, is unreasonable restraint of interstate commerce, is sufficient to establish an unlawful conspiracy."

The same thought, in slightly different words, was expressed by the Court in the Goldman case:

> "Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us."

The scope and effect of this restrictive pattern of distribution may be pointed out by a brief reference to some of the cases decided within the past ten years.

Judge Hand: Of course, you are really claiming they are contributory infringers, aren't you?

Mr. Marcus: No, your Honor.

Judge Hand: It is the same kind of thing.

Mr. Marcus: No, your Honor. Our claim here is that they have combined to put this industry under a system of restriction so broad that the system can operate only under those restrictions.

Judge Hand: Oh, no. I don't mean your general claim. I am talking about this Bigelow quotation and that sort of thing.

Mr. Marcus: Well, the Bigelow——

Judge Hand: Universal and Columbia and United Artists.

Mr. Marcus: No, your Honor, that quotation from the Bigelow case is on the question of combination by these defendants to do two things, one, to set up a system of restrictive licensing, and, two, to combine with respect to each of the three particular restrictive provisions that I shall deal with.

In the Interstate Circuit case, all of these defendants aided an affiliated circuit in Texas and New Mexico to restrict competition of independent exhibitors and support a local monopoly by restrictive license agreements. In the Perelman case the so-called Big Five and United Artists used restrictive licensing provisions to restrict competition of

other producers and competition of independent theatres in Philadelphia with affiliated theatres. In the Schine case restriction of independent competition with the Schine Circuit and support of its monopoly position in large areas in New York, Ohio, Kentucky, Delaware and Maryland were given by all these defendants through the use of restrictive licensing agreements and denying independent exhibitors an opportunity to negotiate for product which Schine desired to use or desired should not be used by his competitors.

Similarly in the Crescent case which involved a large area in the south central part of the United States, these defendants with the exception of Columbia and Universal, helped the Crescent circuit restrict competition of independent exhibitors and secure the circuit's dominance.

In the Goldman case, all of the defendants gave united support to Warner's monopoly of first run exhibition in Philadelphia by denying independent exhibitors the opportunity to negotiate for a first run status. In the Bigelow case, the theatre operating defendants aided a Paramount circuit and a Warner circuit in Chicago to restrict independent competition by keeping the independent exhibitor in a subordinate status through the use of an illegal run and clearance system.

I shall turn now to the question of fixing minimum admission prices. Admittedly all of the defendants use license forms providing for the fixing of minimum admission prices. Admittedly the minimum admission price is inserted as a term of the contract in a great many of the contracts of all of the defendants. It is immaterial whether the exhibitor or the distributor initially determines the specific minimum admission price inserted. Once inserted, it becomes a price-fixing agreement.

The defendants rely on their copyright to justify this kind of price fixing. But it is well established that neither a patent nor a copyright can justify a combination or conspiracy fixing prices whether the subject matter is or is not patented or unpatented, copyrighted or uncopyrighted. It

is also well established that neither a patentee nor a copyright holder may use his patent or copyright to restrict competition in what is unpatented.

Judge Goddard: Mr. Marcus, would you say that if there were no conspiracy that the distributor might fix the minimum admission price?

Mr. Marcus: No, your Honor, and that will be another point in my argument.

Judge Bright: Well, was there any fixing of admission price?

Mr. Marcus: Yes, there is.

Judge Bright: They go to an exhibitor and they say, "We will permit you to exhibit this picture for so much providing the theatre charges so much." That is the amount that the man has been charging. Or the reverse of that. The exhibitor goes to the distributor and says, "We will purchase the right to exhibit the picture and we are willing to agree that we will charge so much." Is that price fixing?

Mr. Marcus: Well, your Honors, according to the testimony of the defendants and their argument what happens is that the distributor merely inserts the going admission price of the exhibitor or a price suggested by the exhibitor and each distributor knows that the minimum admission price rarely, if ever, varies from picture to picture.

Judge Goddard: That price fixes terms upon which he may license the feature, doesn't it?

Mr. Marcus: Yes, but there is one other element, your Honor.

Then we have a situation where each defendant, knowing that the other distributor is going to enter into a similar price-fixing agreement, enters into such an agreement, and this sort of concerted action is illegal under the Interstate Circuit case. That in that case it was charged that this sort of concerted action was carried on on the basis of regional price fixing and this one is carried on on the basis of national price fixing certainly cannot help the defendants, and under the Ethyl, Univis, and Hartford Empire cases that is an added factor of illegality.

Judge Bright: Isn't that the case where the distributor said we will not sell your film unless you make the exhibitor raise his admission price? How do you take the position that that is anywhere similar to the situation generally?

Mr. Marcus: We have the parallel situation here, your Honor, where the exhibitor invites each distributor to fix by agreement a certain minimum admission price and of course he knows the admission price of subsequent runs are also going to be fixed, and each distributor getting that invitation enters into similar agreements. It is our position that thus we have a decision similar to the Interstate Circuit case and in that case the court held——

Judge Bright: You say the exhibitor invites the distributor to fix the admission price?

Mr. Marcus: That is the position——

Judge Bright: Is there any evidence of that in this case? Isn't there evidence just to the contrary?

Mr. Marcus: Well, I should have said, your Honor, that the exhibitor invites the defendants to take the admission price that he suggests and in each case each distributor knows that he is going to get a similar invitation, and knowing that, enters into similar price fixing agreements. And we take the position that that brings the situation under the Interstate Circuit case. It was recognized in the Bigelow case where the Court said that the Interstate case "also holds that a conspiracy fixing the minimum admission prices for the exhibition of copyrighted motion picture film is illegal," and in the Schine case Judge Knight cited the Interstate Circuit case as clearly pointing to the reasons for condemning minimum admission price and clearance provisions in a film license contract, and there is no such situation in the Schine case as there was in the Interstate Circuit case.

Judge Goddard: Mr. Marcus, hasn't the copyright owner the absolute right to say on what terms his picture may be shown, such as for instance the charges to be made, in the absence of concerted action?

Mr. Marcus on behalf of Government

Mr. Marcus: We would take the position that he has no right to enter into a price fixing agreement for that purpose.

Judge Goddard: You mean he may not say how much may be charged for seeing his picture? This is in the absence of any concerted action.

Mr. Marcus: That is right. Any restrictions must be judged on the basis of the context in which it is to be found, and we say that in the context of this industry a single agreement by a single distributor would be illegal, especially of course in this industry where each distributor makes a wide series of such agreements all over the country.

On this question of combination we also assert that even if the same minimum admission price were not fixed by each defendant distributor a combination to fix minimum admission prices is illegal whether or not it is a combination to fix the same admission price or not. And this was pointed out by the Court in the Socony-Vacuum Oil Company case, 310 U.S. at page 222.

Judge Bright: Conceding your statement that a combination to fix the price is illegal, what evidence is here that there is a combination to fix prices?

Mr. Marcus: The uniform practice of the defendants. Our argument on this matter of combination is that each defendant distributor knows that the other defendant distributor is getting an invitation from the exhibitor to enter into a price fixing agreement and enters into a similar price fixing agreement.

Judge Bright: You keep calling it a price fixing agreement. Isn't it an agreement to license film upon certain terms and those terms are based upon what admission price the exhibitor says he will charge in his theatre?

Mr. Marcus: Well, your Honor, the minimum admission price is the term of the contract.

Judge Bright: I understand that. But is it a price fixing proposition?

Mr. Marcus: We say yes, once the defendants inserted it as a term of the contract. We might call the contract as a

whole a license merely because it covers a great many restrictions, but if one of the restrictions covers price fixing we might also properly call it a price fixing agreement, just as we might call a license agreement a clearance fixing contract.

We call the Court's attention to the fact that if as stated by the defendants——

Judge Hand: Have you got any decisions holding such a thing as that?

Mr. Marcus: Well, your Honor, we feel that the Interstate Circuit case, the Bigelow case, the Goldman case, and also the recently decided American Tobacco case in 147 Fed. (2d) 93—that is a case we did not cite in our brief.

Judge Hand: Well, those cases had very different features, didn't they? Repression and exclusion? Were they based on the price fixing theories that you are urging now?

Mr. Marcus: Yes. They were based upon a finding of conspiracy and combination in a substantially uniform concert of action which is what we charge here.

Judge Hand: To do what? To do what?

Mr. Marcus: In the Bigelow case one of the elements of the case was to fix minimum admission price and in the Tobacco case the price fixing element was the crux of the case.

We call the Court's attention also to the fact that if as stated by the defendants they let the exhibitor fix the minimum admission price then the use of a common agent for this purpose brings them within the Masonite case.

Now we have argued in our brief and we now take the position that a single distributor may not fix minimum admission prices, and that agreements to that effect are outside the copyright privilege and within the Sherman Act. It has been suggested by counsel for Columbia in a book written by them in 1917 entitled "The Law of Motion Pictures and The Theatre", at page 481, that the rights of restrictive licensing by a copyright holder are less than those of a patentee since the copyright law gives no right of exclusive use. This dis-

tinction was again pointed out in a Symposium on Copyright Law in 1940 in a book entitled "Third Copyright Symposium" at page 285.

Our case on this point need not rest on such distinction, however. The minimum admission price is not a price fixed for the copyrighted article. It is a price fixed for an entertainment program of which the copyrighted picture is merely one part.

In the Interstate Circuit case the court said:

> "Because the patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment which included features other than the particular picture licensed."

Judge Goddard: The reason for that is that that agreement attempted to regulate something beyond one copyright.

Mr. Marcus: Well, this price fixing of minimum admission prices does exactly that too, your Honor, because the program of entertainment for which you and I pay at the ticket office always covers more than the single feature licensed. It is well known that the theatre entertainment program includes such things as shorts, newsreels, and various other things.

The lack of relevance of the minimum admission price to the copyright is seen by the fact that whether the licensing contract covers one or 50 pictures, the price does not vary, except in the case of road shows.

In the case of United States v. Univis Lens Co., 316 U. S. 241—I don't believe that we cited that case in our brief—where patents on a particular lens blank were used through a license system to control the price of the finished lens, the court assumed that the patent was not fully practiced until the finishing licensee had ground and polished the blanks.

The Court said:

> "But merely because the licensee takes the final step in the manufacture of the patented product, by doing work on the blank which he has purchased from the patentee's licensee, it does not follow that the patentee can control the price at which the finished lens is sold."

So in the instant case the fact that the theatre operator in order to practice the copyright has to provide other facilities and entertainment cannot justify control by the distributors of the finished entertainment.

In the Ethyl case at page 456 the Court pointed out that a patentee could not condition his license so as to control conduct by the licensee not embraced in the patent monopoly.

This sort of price fixing present in this case is merely another form of an arrangement to control matters not within the scope of a patent or copyright condemned in Motion Picture Patents, Carbice, Mercoid and many other Supreme Court cases.

As is clear from the record this system of minimum admission price fixing is applied to all runs in order to protect the earlier account. Price fixing for this purpose is clearly illegal under the Interstate Circuit case.

As in the case of other restrictions, minimum admission price restrictions have been deliberately used to discriminate against and even to eliminate a smaller independent exhibitor, to favor his affiliated or other circuit opposition. This is noted in Judge Knight's opinion in the Schine case, in some of the Appeal Board decisions in evidence and illustrated at pages 53 to 56 of the Government's brief.

Those page references, your Honors, are page references to the brief first given to your Honors and not our printed copy, which we are offering to the Court today. The pagination differs somewhat because ours is in larger type.

Judge Bright: Are you going to substitute another brief for the one we already have?

Mr. Marcus on behalf of Government

Mr. Marcus: Yes. That brief was printed up by the defendants. We now have had ours printed by the Government Printing Office. The print is considerably larger.

Mr. Davis: It would be very embarrassing to us, your Honors, if that original brief was discarded because all of our briefs follow the pagination of the brief you have in your hands.

Judge Bright: I don't see why that should have been done. We have to get some kind of a brace to support them now.

Mr. Marcus: My page references will refer to that first brief. There were such things as the pagination of the index which the printer for the defendants took no particular care to make correct, which we have done in our brief.

Judge Hand: Well, you are going to introduce a little more confusion into the case, that is all.

Mr. Proskauer: Your Honors understand that all our references to the plaintiff's alleged brief refer to the brief that you have in your hand, Judge Bright. That will save some confusion.

Judge Bright: The first brief is the alleged brief, is that it?

Mr. Proskauer: Yes.

Mr. Davis: It almost makes us regret our helpful disposition in which we assumed the printing of that brief in order to expedite the Government's labors.

Mr. Marcus: We appreciate that, Mr. Davis, and we will refer as far as pages are concerned, to those briefs.

Judge Goddard: What will we gain by taking a different paged brief?

Mr. Wright: If the Court please, at the time the brief was finished, we could not get a quick brief out of the Government Printing Office. We therefore turned over our typewritten brief to the defendants on the due date. They printed it, served themselves, gave a copy to your Honors. We gave a copy to the Government Printer to print on December 17th.

We did not get a page proof—could not get a page proof back until January 10th, and we got the finished brief yesterday. Now we offer it to you because it is in larger type; it is easier to read; the index has been corrected so it is more usable. If your Honors do not want to use it we certainly do not want to insist that you do, but we have had it printed up for your convenience

Judge Hand: Well, we had better not do that. You see, we have got this all worked over and marked up and everything else, and it is plain enough to read, and it has been printed and submitted, and I assume there are no glaring errors that you wish to call our attention to.

Mr. Wright: There are number of typographical errors which we have also undertaken to correct on this brief. We do not have any extra copies of the other.

Judge Bright: The trouble is that the defendants have referred to the paging of the original brief in theirs.

Mr. Wright: That presents no difficulty. You have a copy of the brief to which the pages refer.

Judge Bright: Isn't that some more work for us to find out what the new pages are?

Mr. Wright: It is offered only as a convenience. If the Court does not want it, that settles it.

Judge Bright: It is not a convenience.

Judge Hand: We do not want it.

Judge Goddard: What I might suggest, if there are any typographical errors in the first brief, I would like to know that.

Mr. Wright: There are, yes.

Judge Hand: Well, I would not like to know them unless they are important. I mean, one of the vices of any long case is correcting minutes and correcting things all the time having no importance. Now if you have got anything important here, of course we ought to know it.

Judge Goddard: I only mean important ones, of course.

Mr. Marcus: I shall now take up the question of clearance.

Mr. Marcus on behalf of Government

Judge Hand: Take up the question of what?

Mr. Marcus: Clearance. Mr. Wright has already stated that the Government's position is that clearance agreements are illegal under the Sherman Act. Generally speaking there are two types——

Judge Hand: Have you been converted too from the state of original sin only a little while ago?

Mr. Marcus: No, your Honor.

Judge Hand: You mean you are pure from the beginning?

Mr. Marcus: From the very beginning. Generally speaking, there are two types of clearance agreements used in this industry. One type consists of an agreement between an exhibitor and a distributor whereby it is agreed that another exhibitor shall be prohibited from showing pictures until the lapse of a specified time interval. The other type consists of an agreement between an exhibitor and a distributor that the former will not show a picture until a specified time after it has been exhibited by another exhibitor. On the one hand we have an agreement between A and B that C shall restrict his competition with A. On the other hand, we have an agreement between A and B that A will restrict his competition with C.

We submit that these types of agreements and combinations are clearly illegal under the Sherman Act.

Judge Bright: How are you going to take care of the problem then that C, the last man to use the picture, is not willing to pay the price for the first exhibition.

Mr. Marcus: I think there are two answers to that, your Honor. That again seems to assume that a system within the Sherman Act would not work in this industry, and we take the position that that is contrary to the premises——

Judge Bright: No. I assume that it is not a violation of the Sherman Act. Now why is it that C cannot pay the price for the first exhibition of the picture?

Mr. Marcus: We do not say he cannot.

Judge Bright: I am assuming he cannot. Would there be a violation of the Sherman Act because he sees fit to buy the pictures upon the understanding that he won't show it for 30 or 50 or 60 days later than the fellow who is willing to pay the price?

Mr. Marcus: Well, one of the principles of the Sherman Act, your Honor, is that what might be done without agreement may be illegal when done by agreement; and in my argument I refer to a case which makes that distinction.

Judge Bright: What would be the benefit of beating the devil around the bush?

Mr. Marcus: Your Honor, in the Interstate Circuit case——

Judge Bright: The Interstate Circuit case? How is that parallel to this situation? There was an exhibitor who just held up a distributor, saying, "If you don't make them charge so much we won't buy your film." How is that parallel here?

Mr. Marcus: That is quite right here. But the defendants in their joint brief, in their arguments on clearance restrictions, almost exactly parallel the argument made by the dissenting opinion in the Interstate Circuit case, and that part of the dissenting opinion dealt with clearance agreements.

Judge Bright: If they lay down with the dissenting opinion, do they get up with fleas?

Mr. Marcus: The thing is, your Honor, that that sort of argument was rejected by the majority of the court. Mr. Justice Roberts took the position that under the majority opinion in the Interstate Circuit case, the clearance agreement would be illegal.

Mr. Raftery: I could not hear you. Who took that?

Mr. Marcus: I believe it was Mr. Justice Roberts who wrote the dissenting opinion.

We may call the Court's attention to the fact that unlike the——

Judge Hand: You will have to repeat that again. It does not make sense to me. What are you claiming about the Interstate Circuit case?

Mr. Marcus: That the argument used by the defendants in their joint brief to justify the validity of clearance agreements as such parallel the arguments made by the dissenting opinion which used what was done in the industry with respect to clearance agreements as a justification for reaching the result contrary to that which was reached by the majority opinion.

Judge Hand: That may be, but the decision did not turn on any such point, did it?

Mr. Marcus: Well, I would have to say that in my opinion, no, your Honor, but the dissenting—well, just a minute, your Honor. The dissenting opinion thought that unless the majority opinion were willing to take the position that clearance agreements as such were illegal, they could not have reached the decision they did reach.

Judge Hand: This present argument you are making from the Interstate case seems to me utterly unpersuasive.

Mr. Marcus: Well, it was unpersuasive to the majority in the Interstate Circuit case, that is, the argument that was made by the three dissenting judges.

Now even if there were a copyright privilege permitting restrictive licensing, we submit the defendants are no better off. According to the defendants' testimony, the exhibitor tells each distributor what his clearance is with another distributor and asks for the same clearance from each. This invitation is accepted and thus we find substantially uniform clearances in many situations. This sort of combination in response to an exhibitor's invitation is clearly illegal under the Interstate Circuit, Bigelow and Goldman cases.

The use of a copyright by any of these defendants to set up, as in this case, a national system of clearance restrictions, goes far outside any possible copyright privilege. The national scope of licensing restrictions was, in our opinion, one of the elements in the court's decision in the Masonite,

the Ethyl and the Hartford-Empire cases. In all of those cases a restrictive licensing system was used. And, of course, a copyright does not give one a license to use it to protect others from competition.

Turning to defendants' claim of long use and essentiality of clearance, we will refer the Court to the B. B. Chemical case, in 314 U.S., 495. In that case, in discussing the restrictive use of a method patent, the court said:

> "It is without significance that, as petitioner contends, it is not practicable to exploit the patent rights by granting licenses because of the preference of manufacturers and of the methods by which petitioner has found it convenient to conduct its business. The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant."

The argument of long use to support the use of basing points restrictive of competition was rejected by the Supreme Court in the recent cases of Corn Products Co. v. Commission, 324 U.S. 726; the Trade Commission v. Staley, 324 U.S. 746.

Clearance and minimum admission price fixing have, of course, a long history of mutual support to fix not only minimum admission prices but also the film rentals of the films licensed. There is nothing in the copyright law or in any other law which permits such price fixing arrangements. Judge Knight, in the Schine case, rightly points to the Interstate Circuit case as inconsistent with the existence of these two types of restrictive agreements in a license.

It is true that in private suits, where a particular exhibitor was simply trying to better his position in the system, a number of lower courts have assumed that the certain local clearance systems were valid in denying relief to these plaintiffs. Thus in the Westway Theatre case cited by the defendants, we find the Court upholding agreements

between distributors and an exhibitor in Baltimore, giving the latter clearance over a theatre about to be built, largely on the ground that this was commonly done in the industry. A similar result occurred in Gary, Indiana, when an exhibitor——

Judge Hand: That was Judge Chesnut's case?

Mr. Marcus: That is right, the Westway case.

A similar result occurred in Gary, Indiana, when an exhibitor there complained of his subordination to the Chicago clearances of the affiliated theatre. In the consent decree there is the statement that "it is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

That statement admittedly permitted the arbitrators who heard individual clearance complaints to accept the same basic assumptions as to clearances in making their awards that the District Courts had made in hearing treble damage complaints but it did not adjudicate the validity of clearance as such.

And it is a commentary upon the ineffectiveness of the criteria of the consent decree to bring this system outside of the Sherman Act, that the arbitrators and the Appeal Board deem it necessary to apply clearances in proportion to the degree of competition in a particular situation.

As Mr. Keough testified, clearance is a euphemism for the term protection which was used prior to NRA. Protection, of course, is a more apt description of this system since it is admittedly used primarily to protect some exhibitor—according to the defendants, the one with the bigger and better theatre, against the competition of another exhibitor. This sort of protection we submit is illegal under the Interstate Circuit and Ethyl cases.

Grave doubt is cast upon a claim of essentiality of clearance by the use of day and date booking, extended runs, move-overs, and basing runs upon admission prices. We may note that Mr. Montague's recognition of clearance as a weed in the garden of distribution is hardly compatible

with a recognition of its essentiality. An argument of necessity of time intervals—and I believe this was the point you were raising, Judge Bright—an argument of necessity of time intervals between runs is not an argument for clearance restrictions. As the Supreme Court said in the Sugar Institute case, 297 U.S. 553,585, with respect to the contention of the defendants that it was necessary in that industry to announce price changes before sales,—and I quote——

> "Defendants' argument on this point is a forcible one, but we need not follow it through in detail. For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirements of adherence to such announcements without the deviations which open and fair competition might require or justify."

In the Ethyl, Univis Lens and Hartford-Empire cases the Supreme Court struck down an entire system of restrictive licensing despite the fact that there were aspects of that restrictive licensing system which might have stood up alone.

Under the doctrine of those cases another ground for doing away with the clearance system is its very extensive misuse to restrain competition. As is noted by the trial courts in the Crescent and Schine cases, clearances were given to circuit operators where none had existed before, exhibitors in one town who had clearance over theatres in another town found this situation reversed when a circuit acquired the latter theatre.

Judge Goddard: How many instances of that are there in the record?

Mr. Marcus: There are many instances in the findings of fact in the Crescent case, your Honor, and in the Schine case.

Judge Goddard: How about here in this record, this case?

Mr. Marcus on behalf of Government

Mr. Marcus: Well, we take it, your Honor, that your Honor is entitled and should, with respect to the national scope of these various practices, to look at the decisions of other courts involving these practices.

Judge Goddard: Yes, I agree with you, but you made a statement, and I was interested to know how it was supported by the facts. How many instances are there of clearances changed when it was taken over by an affiliate?

Mr. Marcus: If your Honor would like, I should be glad to collate the number and the specific instances as found in the findings of fact in the Crescent case——

Judge Goddard: No, I am talking about this case.

Mr. Marcus: In this case, your Honor, we did not attempt to introduce evidence with respect to individual situations.

Judge Goddard: I think there was some point made of that in the Government's brief, and I think the various defendants have supplied that information and there are very few.

Mr. Marcus: Your Honor, the arbitration decisions themselves point to that.

Mr. Proskauer: How many?

Judge Goddard: That is a little different situation. The arbitrators passed upon, as I understand it the length of clearance.

Mr. Marcus: Well, there is at least one decision which we offered in evidence which I recall, in which the arbitrators noted that—I think it was in Chicago—there had been a certain clearance, and then it had been increased.

Judge Goddard: That may have been, but I think there are very few. If there are more, I should be interested to know it. I think there are very few.

Mr. Marcus: Well, we could attempt to look through the arbitration decisions to ascertain that, but I say that on that question your Honors are clearly entitled to and should look at the Crescent and Schine cases.

Clearances inordinate in time and area were abundantly bestowed on favored circuits. We have set out at pages 78 to 85 of our brief instances——

Judge Bright: Which pages did you say?

Mr. Marcus: 78 to 85.

Judge Bright: Are these pages in your new brief or the old brief?

Mr. Marcus: The old brief. We have set out at these pages instances of clearances so long in time and area as on their face to be grossly restrictive of competition. The defendants have responded in their briefs by citing still other similar instances from the record in this case. Clearance has been a major device to promote and maintain affiliated theatre operation dominant in local areas. The arbitration decisions illustrate other instances of the misuse of clearance.

We say flatly that the primary basis of the clearance system is to protect favored exhibitors from competition without regard to respective revenue possibilities of one theatre as compared with another. The common form of clearance is one given to a theatre or theatres over a town, over specific towns, or over a geographical area and not over other specified theatres. Universal currently insures the Skouras circuit from competition by expressly giving it clearance over new theatres, and Loew has similarly protected its theatres in Metropolitan New York.

The defendants have long abandoned any attempt to determine under any public interest criteria the reasonableness of any particular clearance. For the most part, they take a clearance as they find it, as stated by Mr. Montague, except when persuaded by a circuit to grant a clearance detrimental to a smaller competitor or when forced by court or arbitration action to reduce a particular clearance. To illustrate, I should like to read a clearance Fox was giving an exhibitor in Chester, Pennsylvania, in the 1943-44 season. This is the clearance:

"The only run for features and shorts, excepting News, the Exhibitor is entitled to pursuant to this contract is first run Chester, Pennsylvania, with the usual protection and clearance granted to first run exhibitors in said City. Such clearance or protection, however, shall be subject to any change or modification made by any Local Clearance and Zoning Board having jurisdiction thereof in accordance with the 'Code of Fair Competition for the Motion Picture Industry' as approved on November 27, 1933 by President Roosevelt."

Mr. Caskey: What is that?

Mr. Raftery: What exhibit is that?

Mr. Marcus: 42.

We submit that clearance restrictions should be held invalid both because of their basic illegality and their extensive misuse.

Judge Bright: Do I understand you that any clearance provision in any contract is a violation of the Sherman Act?

Mr. Marcus: We take that position in the context of this industry, yes.

Judge Bright: By an individual or a group?

Mr. Marcus: That is right, and your Honor must not forget that when we talk about clearance agreements, we are not talking about a clearance agreement between Loew's and some specific exhibitor in New York; we are talking about clearances by Loew with exhibitors all over the country, setting up a restrictive time interval system.

I shall turn now to the question of block booking and blind selling. Of the defendants, only Columbia and Universal are presently selling or licensing pictures in large blocks without previous trade showings. The other defendants have been able, according to the testimony in this case, to get along well under a contrary system and we hardly think these two defendants can in good faith assert inability to do likewise.

Since there has been no adjudication against any of these defendants of the illegality of this system of distribution, the problem is significant with respect to all of them. The effect of this system, of course, is to compel many exhibitors to take most or none of the pictures licensed. We submit that this is the sort of tying agreement condemned in a long line of cases. Its use as a means of mutual enforcement of the value of different copyrights is clearly improper under the Ethyl case, where the Court held that the monopoly power or one patent could not be used to expand the monopoly power of another patent. By itself, the monopoly power of a particular copyrighted picture may be slight, depending upon its drawing power. If its value is slight, it has scant chance of monopolizing the playing time or the more profitable part of the playing time of any exhibitor. But when it and others like it become the tail to the kite of the more desirable pictures, we have the kind of situation the Court in the Ethyl case condemned.

It is a device, as shown in the Schine and Crescent cases, readily susceptible to use as a means of promoting a favored circuit monopoly of exhibitions. Its use compels an exhibitor to take the bad with the good, to the detriment of the movie-going public. When coupled with, as it is, minimum admission price restrictions, it becomes a device to control admission prices through the group strength of many copyrights.

For all of these reasons, it is submitted that block booking and blind selling should be held invalid. We believe that the——

Judge Hand: What about the provision in the consent decree about the limited number?

Mr. Marcus: Five? Well.——

Judge Hand: Is that too many? Is everything too many above one?

Mr. Marcus: That provision, your Honor, has expired.

The Court: No, no, no. I am not talking about whether it has expired or has not expired. I am talking about your doctrine.

Mr. Marcus on behalf of Government

Mr. Marcus: I think, your Honor, whether or not selling five pictures together might be a violation of the Sherman Act does not reflect upon whether selling an entire season's product is invalid under the Sherman Act. There are——

Judge Hand: Very likely it does not. I merely asked you another question. If you cannot answer it, all right. I don't blame you. This is a very confused subject. You ought not to be as much confused as I generally am.

Mr. Marcus: Your Honor, I do not think that question can be answered without seeing how selling in blocks of five is used in this industry to control competition. I should say that as far as selling a season's product, on this basis it clearly does control and restrict competition unreasonably.

We believe that the Famous-Lasky case——

Judge Hand: Apparently they conceded that a great many of them did, or, at least, Judge Goddard held that and signed the consent decree to that effect.

Mr. Marcus: The consent decree expressly states nothing in it shall be construed as a finding.

Judge Hand: Oh, yes, that's right. It is interlocutory.

Mr. Proskauer: None of us is selling a season's product anymore—none of the five.

Mr. Marcus: Well, some of the defendant distributors are selling in blocks larger than five. Loew has sold, on several occasions, blocks larger than five.

We believe that the Famous-Lasky case in 57 Fed. (2d) 152 went off on the ground that, under the circumstances of that case, block booking was not conducive of a monopoly by the defendant. We think, moreover, that its language with respect to tying agreements is not supported by later Supreme Court cases.

In closing, we may point out to the Court that the scope and persistence of restrictive licensing has brought about a condition where both distributors and exhibitors bargain more over the value of a restriction than over the value of a copyrighted film.

We submit to the Court that judgment in this case, to be effective must include provisions enjoining all of these de-

fendant distributors from employing restrictive trade practices, in addition to the divestiture of the producer exhibitor combinations.

Judge Hand: We will adjourn now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

ARGUMENT ON BEHALF OF DEFENDANT LOEW'S

Mr. Davis: If the Court please, I open on behalf of the defendant Loew's, Inc.

No doubt some of the things which I have to say will be of common interest to all of the defendants in the case just as in our briefs. Your Honors have observed that we have undertaken to file two briefs on behalf of all the defendants, one of them dealing with the Consent Decree and the arbitrations under it, the other dealing with certain general principles which we think are applicable throughout; and in addition each one of us have filed a brief in which we undertake to expound our position as we see it vis-a-vis the proof in the case.

The arguments to which we have listened this morning from my brothers Wright and Marcus have left me in some doubt as to the exact scope and course of the argument which I thought necessary to be made. I am disposed to discard no little amount of detail which I expected to invite the Court's attention to and devote myself rather to the general principles of law which seem to us to be decisive.

It must be clear to your Honors that this is quite a unique case in the history of cases under the Sherman law. It is the most ambitions antitrust case so far as I know that has ever been presented to any court—ambitious because it has as its confessed purpose the complete readjustment and

change of the economic structure of an entire industry. In so far as I know no case has ever come forward with any such ambitious scope as that. It is unique because I think it may fairly be said that it is the most amorphous antitrust case ever presented. It is a case in which the lines of definition of the complaint are more indistinct that in any other case that I can recall and in which the logical connection between the facts in evidence and the ultimate conclusion the Government seeks to draw is more vague and imperfect. It is unique I think among antitrust cases because it is the most profoundly critical antitrust case that I can remember.

The complaint as it emerges from the briefs and arguments of Government's counsel is with utter frankness addressed to the industry as a whole represented in the person of these eight defendants and addressed to the entire body of practice which that industry has built up. I did not realize until I listened to my learned friends how many things could be wrong with a single industry.

Some of these companies, perhaps not all, choose to conduct their activities in a corporate form, having a parent corporation, and instead of mere departmental divisions, subsidiary corporations wholly owned through which they conduct their consolidated corporate enterprise. That is a very familiar phenomenon resorted to for many reasons, convenience, and of bookkeeping, and where the corporation is indulging in the ownership of real estate is extremely common, so that the legal title may be vested in an owner of residence in the same state in which the reality is situated for reasons of local legislation and of local taxation.

Now, that we are told is all wrong. That we are solemnly told by counsel for the Government is a combination, a conspiracy between the parent corporation and its subsidiaries which is obnoxious to the Sherman law. They may abandon these hundred per cent subsidiaries; they may draw back all the titles into the body of the parent, that is all right. We are solemnly told that now to conduct a corporate enter-

prise through a parent corporation with corporate subsidiaries is obnoxious to the Sherman law as a combination between them.

We are told again that integration is an offense per se; that it is no longer legal for the manufacturer to pursue his product all the way from the raw material to the manufacture, to the distribution, to the sale at wholesale or retail through facilities of his own creation into the hands of the ultimate consumer. Therefore any such integration as appears with each one of these defendants, except the pretermitted three, that integration is in itself an offense against the Sherman law.

We are told that it is an offense for independent manufacturers to sell or license their product to others who are engaged in the same business, and that whenever these corporations license their films one to another, that thereby there is a combination in restraint of trade, and that that practice ought to be abandoned.

Now, I observed that when the question was bluntly put to Government counsel, "Do you maintain that these defendants should exhibit their films in their own theatres but should not license them for exhibition in the theatre of any other?"—I observed that counsel approached the answer to that question with great temerity, and well he might. For how it can be made an offense under the Sherman law for the owner of property to sell it to somebody else simply because that other person is in the same business, staggers one's legal imagination. But that is wrong.

They say that the fixation of admission prices in a license contract is a fixation of prices such as denounced by the Trenton Potteries and other cases, and that is wrong.

They say that the system of runs is wrong because, instead of negotiating with the licensee for the exhibition at a fixed time and place, these companies ought to put their films on the auction block and on such a day have an Irish come-all-ye and invite all prospective users to submit competitive bids and, therefore, that the system of runs is wrong.

They say the system of clearance is wrong, and I was both interested and relieved to have counsel for the Government make a direct answer as to the Government's position on that question because up to this time there has been some hesitation about that—there is some hesitation about that in the Government's brief. In the Government's brief they intimate that they thought at one time it was right, when the consent decree was entered, but that perhaps in the light of further knowledge they may then have been wrong. Not an admission that they were wrong but a concession of that possibility. This morning my brother Wright has answered affirmatively that all clearance in any contract by a single distributor is per se restraint of trade in a violation of the Sherman law.

We are told that cross-licensing is wrong and, by cross-licensing, and I am repeating myself for a moment, the licensing of films by one to another. When that criticism first appeared it was a criticism of cross-licensing. Then counsel for the Government invented a newer, and in their opinion no doubt a better phrase, diagonal license, whatever that may mean. And now this morning the same topic has appeared under the title of cross use of each other's theatres.

I remember in Alice in Wonderland Humpty-Dumpty says, "When I use a word, it means just what I want it to mean." And Alice says, "Well, how can you make one word mean so many different things?" And Humpty-Dumpty says; "Well, it means what I want it to mean. The only question is, who is to be master?"

I don't know what mastery the Government gets out of cross-licensing, diagonal licensing, cross use. Simply means that they are selling one to the other the commodity that they respectively own. But that is wrong.

Then we thought that the system of arbitration affirmatively commended in the Government's brief, for in its brief the Government speaks of it in terms that narrowly approach eulogy; it commends the impartiality of the arbitra-

tors; commends the diligence with which they have discharged their task, yet admits that some beneficial results have been achieved; and one might think that on the whole the system of arbitration was to go unscathed of criticism here, especially so when your Honors recall that that system of arbitration was not invented by the defendants in this case to avoid divorcement of their theatres, as my brother Wright intimated this morning, as a means of escaping on our part from a worser fate. It was prayed for by the Government in its amended and supplemental complaint. It prayed that the Court might set up just such a system of arbitration as it did. There was finally issued the court decree on the prayer of the Government and the assent of the defendants. And it is a little disappointing to have the Government say this morning that the arbitration system is bad and probably exceeded the power of the court at the time it was created and decreed.

Now, that is a rather sweeping indictment, not only of these defendants, but of an entire industry, and I repeat that I do not recall in any previous antitrust proceeding so general, so sweeping, so ambitious an effort to recreate—the language of my learned friend—to recreate the entire economic structure of one of the principal industries in this country.

I can conceive of that sort of an argument being addressed to a congressional committee by some hot reformer. I suppose within the limits of the Constitution there are things that the Congress can decree. I am not as certain about the limits of its power as I once was and I would be slow to say that Congress might not do some things which are along the line that my brother Wright suggests. But this is a court of justice where we are proceeding upon a charge made, a defense interposed, and proof taken, and we may have what theories we please about what is economically sound and unsound and what commercially is wise and unwise, but the whole question is what is the charge and what is the proof?

Mr. Davis on behalf of Defendant Loew's

Now my brother Wright was kind enough to state on our behalf certain positions which he conceived that we had taken. I made a note of them at the time.

He suggests that our position is that what we have done, if done under sound business judgment, is thereby vindicated face to face with the Sherman law. He suggests that we hold that the consent decree is an immunity cloak to us against any violations of the Sherman law. I was particularly interested in the Government's brief to read on page 5—and I read it for the purpose of comment only—after stating certain principles of law about which there can be no great dispute he endeavors to put us in the wrong from the beginning by saying, "The legal propositions relied upon by the defendants may be roughly stated as converse of the foregoing propositions"—which would mean the converse of everything that has been decided under the Sherman Act with perhaps the following addition—"a use of competitive restraint by any business organization or combination of business organizations which enhances their ability to serve the public by increasing their financial strength and stability may justify a court in approving such restraints as reasonable even though they would otherwise be regarded as unreasonable and therefore violative of the Act."

In other words, proof that a certain practice or a contract or a combination or a conspiracy improves the financial strength and stability of the participants is according to what my brother Wright ascribes to us a defense against a violation of the Sherman law.

Now I shan't claim for myself or my colleagues here at the table any profound legal learning. We are all in our modest way trying to do what we can to help our clients, simple country boys, if you choose, trying to make a living. But there isn't any man at this table so foolish as to assert any of the propositions which my brother Wright has ascribed to us, and I must put that away as beyond contemplation.

He ascribes to us the proposition that habitual use of an illegal practice may come to sanction it,—sort of a statute of limitations or estoppel by time against the Government.

Let me state our conception of the law of this case. There is no dispute about it, there can be no dispute about it for so far as I know there isn't a legal principle necessary for the decision of this case that has the slightest novelty or which is not so axiomatic that it needs no citation for its support.

Eight corporations, wholly diverse and separate, as shown by the record, without any organizational contact, without any common ownership, without any common management, are called into court under what charge? Read the amended complaint. First that they are parties to a combination and conspiracy in restraint of trade, violation of Section 1 of the Sherman law; and second, that they are parties to a monopoly, to an attempt to monopolize, and to a conspiracy to monopolize in violation of Section 2 of the Sherman law.

Now those are the things we are charged with.

The gravamen of the offense under Section 1 of the Sherman law is a partnership in crime, some form of deliberately concerted action, some contract, combination or conspiracy, some agreement shown between the persons accused to effect the restraint complained of. Lacking proof of such an agreement the charge absolutely fails.

Throughout my brother Wright's brief there runs the word "collectively", a recognition on the part of the Government that collective and concerted action was necessary to support their complaint.

And if you take away that one word "collectively" from the Government's brief, there is nothing left of any substance whatever.

Now of course the existence or non-existence of such a conspiracy can be shown either by direct evidence, by such a written contract as my friend alludes to, or by some of the inter-office correspondence on which prosecutors under the Sherman Law have advantaged for so long—to such an extent, indeed, that some people have said that what American

business needed is more illiterate business men. But it may be so proven. It may be proven as well by circumstances like any other fact. But if the proof is circumstantial, it must be something more than raise a mere suspicion. It must be inconsistent with innocence and consistent only with guilt; for this is a highly penal statute; and whether the Government is proceeding on the criminal or the civil side of the court, presumption of innocence attends the defendants throughout, and the burden of rebutting that presumption is and must remain upon the Government. And where the effort is to prove a combination or conspiracy by circumstances, mere uniformity or similarity in matters lawful in themselves, and least of all the type of well established and recognized trade practices common to the industry as a whole, does not raise an inference of a combination or conspiracy in violation of the Act. And, of course, where the combination or conspiracy is shown, there must be some unreasonable restraint.

Now we do not press that doctrine as far as my friend thinks we do. We do not say that reasonableness or unreasonableness is to be determined by the profitable or unprofitable character of the restraint resorted to, but there must be some showing of public injury which renders the restraint unreasonable. For concerted action may as well be innocent as wicked, and what the Act is primarily aimed at is destruction of competition in trade to the injury of the public.

Of course there are many cases, some of which my friends have alluded to, where certain practices manifestly injurious have been denounced. Price fixing; we agree that is bad. Concerted curtailment of production; we agree that is bad. Division of markets; we agree that is bad. The destruction or exclusion of competitors deliberately resorted to are already recognized as ways to the forbidden end. And I challenge my friends for the Government in all this mass of documents to point to one single document that utilizes any of those forbidden means.

Section 2 of the Sherman law under which we are also called to answer, forbids any monopolizing, attempts to monopolize or conspiracy or combination to monopolize.

Now it has been recognized by all the decisions that there is some overlap betwen the field of the first and second sections of the Sherman law. The most apparent perhaps is that monopoly is ordinarily the end of which the restraint of trade is the mere means. But when the Government charged a combination or conspiracy to monopolize, it must prove it in the same fashion as they proceed to prove a combination or conspiracy under Section 1. And I call attention to a distinction, a distinction which in some aspects of this case has not been observed or commented on, between the use of the word "monopoly" as a term in law, and the use of the term "monopoly" in its vulgar and common employment. Commonly employed, it is frequently used as a synonym for solitude; but monopoly in law is not solitude alone. It is the intent and the power and the purpose to exclude others.

A man who has the only theatre in a city or a town or a village is no monopolist. The only manufacturer producing certain commodities is not, *per se*, a monopolist, even though they both stand alone in their respective fields. But have they the power and the desire and the purpose to exclude others from entering that field? Or have they achieved that solitude by the destruction of others who stood in their path? That is monopoly in the legal sense.

Now of course it is highly competent, when you are investigating a monopoly, to consider the share of the total trade which the monopolist has absorbed to himself; but it is his share of the total that is important; it is his proportion of the field that he has grossed that is critical. What others may have, his rivals, cannot be added to his in order to build up a wholly fictitious picture of engrossment, which is exactly what our friends have attempted here. Monopoly cannot be built up by mere mathematical addition. One and one make two, and two and two make four, and under certain circumstances that is a highly interesting mathematical phenomenon. But you cant' take my business and add it it to the business of a half dozen rivals and say that as a

group we have 70, 80, 90 per cent of all the business done, and call us a monopoly.

So that when in the Government's brief and in argument they allude to the fact that these five culprits collectively or as a group produce 70 per cent of the pictures produced, or more perhaps; 70 per cent of the revenue derived, and, ergo, they have achieved a monopoly, that is not enough unless then can prove that we have shared a common purpose, pursued a common end, and reached it by concerted action.

I challenge my friend to point to anything in this record that will support that proposition. I challenge any showing of a financial interest; any proof of a combination or conspiracy; and in its absence, all this multiplicity of what I might call adding machine testimony, has no significance in this case whatever. You might as well have filed the Dow Jones report of averages so far as illuminating this controversy.

Now, so much for the Sherman law. I hope I have made the position of the defendants here too plain to be susceptible of misrepresentation or of misunderstanding; and if that is not the law of the Sherman Act, if that is not what can be distilled from all of the decisions, then I confess my inability. And I do not find in the Interstate case and the Crescent case and the Schine case and the Bigelow case, and the Goldman case, and these other cases on which my friends so constantly rely—I do not find any doctrine different from that at all.

Let us talk about copyrights. Of course the monopoly of a copyright is one created by law. It is a designed and purposeful legal monopoly, and like patents, believed to be created under the Constitution in the public interest. It gives to the owner of a copyrighted book, picture, drama, or musical composition, the right to exclude all others from using, selling, reproducing, exhibiting or imitating without his consent. Except for that right to exclude it does not, as I understand the copyright law, enlarge the rights which are already inherent in the owner of a copyrighted article.

Mr. Davis on behalf of Defendant Loew's

I have not, like some of my learned friends here, written any books on the subject that can be quoted either for or against me, but that is my conception of the Copyright Law, and any author is at liberty to criticise me. All the Copyright Law does, is not to enlarge those rights which are inherent in an owner by virtue of his act of creation, but to protect those rights from invasion by others. He may exact for his consent to such an invasion a price fixed between himself and the licensee by any measurement he chooses. I lay that down as fundamental. It is part of the right of an owner. Of course, he cannot lay down as a measurement the number of murders committed, but any measurement not contrary to public policy is within his absolute right to adopt. It may be a flat price in dollars. That is within his rights. If it is a per diem picture he may charge so much per diem for each day of its exhibition, utterly regardless of the box office receipts. If it is shown at a theatre, if he chooses to, he can charge so much per capita for every person who passes the ticket window regardless of the price of the tickets. He can even count the traditional and familiar red-headed persons who pass in or out and charge so much per auburn-haired person. I don't like to leave the red-headed person out because we never do in stating a summary of this kind. It may be a percentage of either the gross or the net receipts on that particular exhibition, or his measure may be a percentage of the over-all income of the licensee. And if it is either of the latter, the copyright owner, when he names his percentage, and in order to protect his anticipated revenue and return, may inquire of the theatre owner what are his minimum admission prices out of which receipts are to grow, and may agree with the theatre owner as a part of this contract of license that during the life of the exhibition, such prices shall be maintained.

Now, that is what these people have done. They have repeatedly said in their license contracts, during the exhibition of the licensed article we shall receive such a percentage, and that we may know in advance what we can expect to receive and may be protected in having that ex-

pectation realized, you shall charge not less, during this exhibition, than the prices you are charging at your theatre.

Judge Hand: The Government, as I understand it, says that irrespective of combination, irrespective of anything, if that was done by a single man, it would violate the Sherman Act. You understand that, don't you?

Mr. Davis: I understood the Government to say that, and I don't mind saying, your Honor, that I gasped as I heard it.

The Court: Well, they did not get that far before, and they have evidently had a conversion, and the thing has been progressive. As Herr Klein said, "Nothing ever is. Everything becomes."

Mr. Davis: I am not sure that I would call the Government's attitude conversion. *Facilis descensus averni.* Since having started down this slope, they do not know just where to put their feet and stop.

Judge Hand: I was having a bit of a controversy with my brother-in-law as to whether it shouldn't be Averni, and he has gone back to the 14th Century and found statements in which it was Averno then.

Mr. Davis: All I have to say to your Honor, in your defense and mine, is that there was some terribly bad Latin put out in the medieval years.

On the copyright factor of this thing, the copyright aspect, enters in just here: I repeat that the owner has a perfect right to measure his compensation by any measurement he chooses to adopt, that is not in violation of public policy. We all know there are certain contracts that per se violate public policy and cannot be entered into, restraint of marriage, contracts of felony and whatever, but as long as he stays out of those recognized limits, he is the master of his own measurement.

These contracts have this peculiarity. Under these contracts the motion picture producer remains at all times the owner of the copyrighted article and of the rolls of film by which it is to be reproduced. That he never parts with. The relations between him and the exhibitor are those of licensor and licensee, so far as the copyright article is concerned, and bailor and bailee, for use so far as the films are concerned.

The naming of the admission price to the theatre is not fixing a price for resale of the article. This occurs where a copyrighted book, for instance, is sold outright for a named price to the book seller and freed to the channels of trade. There the original copyright owner has parted with all interest in the article, he has received his reward, it has entered the channels of trade, and his dominion over it and the price to be received for it is entirely gone. That is the Bobbs-Merrill case. In this case the copyrighted article never enters the channels of trade and the owner never parts with its dominion.

It may be admitted that where the copyrighted article is sold outright a resale price fixed by the original vendor who has parted with it cannot be imposed. But where the vendor or the licensor retains the full license and control and merely permits a showing for a return upon compensatory terms it is entirely different. It is quite like the case where the owner of real estate leases his building for a specified time and specified use and takes by way of rental certain percentage of the rents which his tenant collects for the use of the building, with a covenant that no leases shall be made at less than so much per square foot. There is no price fixing about that except that he gets his revenue out of the profits earned on the use of the leased or licensed article.

Well, let's come to integration. The Government tells us that the integrated structure of this industry—and this really is its principal complaint; indeed the Government's brief opens with the—shall I say somewhat confident statement that the only thing the Court need be concerned with here is relief—and when I saw all these exhibits going in I thought that was probably true—but it must be assumed from the Government's brief that the offense has been proven, guilt has been established and that the defendants here are on their hands and knees awaiting the final sentence, and that all that is important here is relief and all the relief that is important is to divorce these people from their theatres.

Mr. Davis on behalf of Defendant Loew's

May I say in passing before I go down to a little further disquisition on the law that I wonder if the magnitude of that operation has ever occurred to the learned counsel for the Government. My client has theatres of a book value of—I am not sure about the figures—$60,000,000—of that order. My friends have clients who are equally fortunate in the possession of considerable amount of real estate. There are some—what is it?—4000 or 4500 affiliated theatres. Well, whatever it is—several thousand theatres owned by these corporations, of superior character most of them, so much so that I think nobody who listens to this testimony here would dispute, the largest, the best theatres in the country; and the Court is to order them to be sold, they are to be divorced. I supposed sold. Certainly the Court is not going to order them to be burned even in the pursuit of so righteous a purpose as the vindication of the Sherman law. Sold to whom? Are they to be sold theatre by theatre and town by town? Are they to be closed until some local speculator comes and is willing to take it over?

I have assumed that the Government would recoil from the idea of having them sold in large blocks to any syndicated operation for fear that they might be building up a worse monopoly than the one they have successfully destroyed. Who is to buy them? When are they to be sold? How long must they be closed before a prospective purchaser appeared? What is to happen to the industry in the meantime? Who is to rent them? Who is to exhibit in them? I wonder as a practical matter—and I assume we all claim to be practical men whether we are or not—I wonder whether the learned counsel for the Government have appreciated the magnitude of the surgical operation for which they are so loudly clamoring.

Now I take it that the common law right—I go back to the law—of any manufacturer, I care not in what line it may be—to follow his article all the way from the assembling of the raw material through the intervening stages of manufacture, distribution and sale, whether wholesale or retail, whether under the roofs of another or under his own, to the

hand of the ultimate consumer has not been denied at any time. And for myself, again with my reservations as to the present limitations of the Constitution, I do not think it to be constitutionally deniable. I can imagine no statute that would cut off that right without interfering with the Fifth Amendment if it still survives.

Now the fact that a successful integration may give the integrated enterprise an economic advantage over rivals who have not chosen to follow a similar course—and that is the gravamen of the Government's complaint—is nothing to its discredit in law or in morals. The free competition which the Sherman law was enacted to preserve contemplates exactly that result. Competition means the struggle of one to obtain what another equally desires. It is intended by the underlying logic of the Sherman law that the battle shall be to the strong and the race shall be to the swift, and success is not penalized by it. Nor are men robbed by it by the methods and means to obtain that success, and it does not seek to bring about a dead level of economic or financial equality. If these defendants find it to their profit to produce, to distribute and to exhibit in their own theatres—a phrase which popped up earlier in this case—at exorbitant profits, that is a matter of the most entire inconsequence so far as the Sherman law is concerned. I think we have shown that our profits are not exorbitant. I think all of us will admit that we wish they were more. But whether more or less is a matter of entire inconsequence here.

Now so much for integration. That is our position about it, and we challenge the Government to put in its surgical knife at the point it wants and dismember the living body of this industry.

I want to say something about uniform trade practices. It was ascribed to us by my brother Wright this morning the conception that practices long continued acquired a certain measure of sanction and that we rely upon the habits of the industry for our defense. I repudiate that suggestion. A practice which of itself is a violation of law does not get any

better by repetition. In fact, the burden of guilt may only pile a little higher. But uniform trade practices without more—without more, I repeat, are no proof whatever of conspiracy or combination. Every line of business of which I have any knowledge evolves certain methods peculiar to itself by which it may be most profitably carried on. I know of no exception; not even the law. They evolve, as has been the case here, a glossary of terms peculiar to themselves. And where a certain practice initiated by one proves useful it is sure to find imitators, and these may appear in such numbers as to make the practice universal. That is a very, very common phenomenon. In this industry such are the practices of runs, clearances, percentage contracts; minimum admission prices, and such too is the general over-all similarity—not identity, but similarity of licensing contracts, similarity which in certain businesses like insurance is compelled by law.

One other point which I emphasized in opening the case and desire to emphasize at its close in view of some remark by my brother Marcus in which he asserted that the Court would take cognizance of violations instanced by the Interstate Circuit, Crescent, the Schine, the Goldman and other cases, and of the arbiter awards. I wish to emphasize again that absent proof of conspiracy, isolated cases, especially where they have been adjudicated and remedy has been applied, contracts, instances are inadmissible absent conspiracy against third persons not parties to the particular transaction. I insist upon that now, I insisted upon it in opening, and I wish my client be judged only by so much of the proof as is addressed to its alleged misconduct.

I am trying, your Honors, to ration myself.

(To Mr. Proskauer): Are you getting impatient?

Mr. Proskauer: Never when I listen to you.

Mr. Davis: Thank you. That is very handsome.

Well, I shall hurry.

Now, tested by these legal principles—and I offer them for criticism or dispute—tested by what I claim to be these

thoroughly tested legal principles, axiomatic in character, how does my particular client stand here?

We began the case with a charge of a monopoly of production. In the light of the proof of the manner in which production was carried on, and the freedom to whomsoever willed to enter into that particular activity, the Government withdrew that charge and admitted that it no longer charged any effort to monopolize the production of motion picture features.

We were left with distribution and exhibition. How does my defendant Loew stand on the question of distribution? Have we monopolized it? Have we restrained it? We produced 33 features last year and six specials. We distributed them freely over the country. We showed them in roughly all of the theatres of the country. We sold them under license contracts which contained the features which are now complained of; and if those features were illegal, we as to each individual contract restrained trade.

The testimony of Mr. Rodgers was that in one season we made about 180,000 such contracts—or maybe it was in less than a season, I am not sure—and if guilty, let it be said we were guilty that year 180,000 times, which would seem to be a burden of guilt enough to sink any defense.

Now, what did we do that was wrong? That is what we want to know.

Said my friend he would favor selling these films competitively. That is to say, at public auction. Is it conceivable that this industry could do that? Here are 18,076 theatres in the United States. They make an average of 300 to 350 films of each feature which rotate in sequence the country over. Could they produce if they wanted to 18,076 films, rolls, reels, at one time, and send them the country over to every theatre? In the first place, it would be folly, and in the second place it would be an economic impossibility. There is not a company, no matter how prosperous, in the business that could possibly do it. If that be true, they have got to be shown somewhere, some place before they are

shown somewhere else. You can't perform on these films the miracle of the loaves and fishes and have 300 films simultaneously serve 18,076 theatres. And if you have got to show them some place before you show them elsewhere, obviously you have got to select those places, and you have got to negotiate with the proprietor of those theatres the terms on which he shall have this privilege of exhibition.

Now, we put on the stand the witness Rodgers, and Loew's Exhibit L-13, a list of all the first-run theatres in the critical 92 cities. He gave the reasons why he showed his films first run in this theatre and that and every one of them. 36 of them were cities in which Loew itself had the first run. The others were divided between affiliated and independent theatres. The evidence shows that in some cases where there were affiliated theatres he showed first runs in independents, and vice versa. He gave clearance.

Now, it amazes me that anybody should misunderstand the legal foundation of clearance. I do not think it draws wholly from the Copyright Law. I think it is a sample—not just the word I want—an incident of the oldest form of commercial restraint that the books contain, which neither the Sherman Law nor any other law has ever denounced. It is elementary; it is Hornbook law that the vendor selling a piece of property in order to protect the thing his vendee has bought may disable himself for a reasonable time and in a reasonable area from competing himself or putting anybody else in competition with him. I sell a grocery store and I contract with my vendee that I won't go into the grocery business in that town for a certain period of time. The oldest form of restraint that I can remember in the commercial law, bad only—bad only when it is unlimited in space and unlimited in time.

Now, what do they do? They license a theatre for compensation from the exhibitor at a certain place, at a certain time for a certain duration, and they say to the person who has purchased that privilege, "We will protect you"—I like the word "protection" better than I do "clearance" myself; I do not shrink from it at all—they say to their licensee,

"We will protect you the enjoyment of this privilege by not putting any person in competition with you for a specified time in a specified area." I do not care whether it is a copyright or what it is; it is a familiar example of a familiar process sanctioned by every court that ever sat in the Anglo-Saxon world, and, so far as I know, it may be wider than that. Under every system of law of which I have any knowledge, it has always been held dishonorable to sell property with one hand and destroy its value with the other. That is what clearance is, and that is all it is.

Now, because clearance created a great deal of ill feeling among exhibitors, jealousy and malice being human passions which, unfortunately, have not yet been exercised, and because some were envious of another, a great deal of controversy arose about it. We said to the Court, "Relieve us of the burden of this controversy; give these people a cheap and inexpensive form in which they may give vent to whatever injury they think they may have;" and the Court set up the arbitration machinery accordingly, not to relieve us from the danger of divorce, not to exempt us from the command of the Sherman law, but to bring about, as far as the Court on its side and we on ours could do, a condition of peace and prompt remedy in the industry.

Now, we have used clearance; we still use clearance, and if that be treason or guilt under the Sherman Law, then counsel for the Government must make the most of it.

We have used minimum admission prices. I have already referred to that and won't repeat it.

We have resorted to percentage contracts as a basis for measuring the return due us for our consent to exhibition. And if that be treason, make the most of it.

What else have we done in distribution? Have we adopted any fixed pattern—that is a favorite word with the Government—have we adopted any fixed pattern of patronage with our co-defendants or they with us? Have we conditioned the licensing of our films in any one theatre upon a contravening promise on their part to license us? Have we favored one over the other? The record is utterly barren of any-

thing of that sort. Indeed—and I am not going to take the time for statistics—it will appear that so far as the alleged conspirators are concerned, we have gotten more money year by year out of the independent exhibitor than we have out of any one of them. And the only way in which our takings from them can be made formidable is by the process of addition, on which the Government relies to establish its monoply.

Let me hurry on. Have we monopolized or restrained exhibition? That is the third branch of the industry. What has Loew's done in that respect? How have we monopolized and how have we restrained? We operate 131 theatres, 64 of them in the City of New York, the others scattered widely over the country, and all those outside of New York I believe are first-run theatres where we exhibit our own films first. We had in 1935 128 theatres; in 1940, I think it was, we had 132. We are now operating in this year of grace 131. So that in that period of time, if monopolizing theatres means reaching out and buying them, we have certainly neglected our opportunities; for in the same period theatres in the United States have multiplied from 13,000 to over 18,000. If we were monopolizing theatres, why, weren't we a part of that Oklahoma rush?

We show our own films first run in our own theatres. 33 films and 6 specials are not enough to keep a first-run theatre going. You can keep grinding them out day after day, but the public, unfortunately, has other notions about it. And after a film has run so long they ask a change of diet, and the wise theatre owner must provide it. We have not enough of our own films to keep our theatres going. I rather gather from an answer my friend made to the Court this morning that his position was that if we showed only our own films in our own theatres, there was not anything wrong about it. I suppose the necessary and logical consequence of that is that when our own films run dry we shall close our theatre until we get another film from the same source.

Judge Hand: Well, he would let you use the independents until you got an unlawful combination of them.

Mr. Davis: I suppose we would go down the same slippery slope if we tried to sell our films with them, but that is pretty nearly what we have done.

If your Honors will turn to Appendix 1 of this brief, talking about monopolies in exhibition——

Judge Bright: Which brief?

Mr. Davis: Loew's individual brief.

Judge Bright: What page?

Mr. Davis: The first appendix. It is on page—well, it is page 51, really. This is the place where we edged up. After we finished our brief, we edged up on the court a little bit in some appendices, not an unfamiliar process.

I just want to indicate the character of that, and I shan't take the Court the whole journey through. That is intended to show, so far from monopolizing exhibition by engrossing the film supply, we show it in these cities where we have first-run theatres, 36 in all, our own film in our own theatre; we show it also in Akron, for instance, 19 films of the United Artists, 16 or half of 16 are Paramount; at the same time, in the same place, independent theatres competing with us were showing Fox, RKO, Warner, Universal, Paramount and Columbia. Curious conduct on the part of members of a conspiracy! A great lack of that consideration for one another which you might expect.

If you will go down every one of these cities, you will find that in no one of them did we absorb the film supply. You will find that in every one of them we had active first-run competitors who were showing the films of our brethren in this fraternal organization.

All I ask the Court to do, in the light of that statement, is to give to the appendices of our brief a moment's consideration.

I have taken, if your Honors please, more time, and under some adverse circumstances, more time than I promised my brethren. It is a fascinating subject and the temptation to verbosity is, indeed, extreme, but I know I am supported by those——

Mr. Proskauer: Of really equal verbosity.

Mr. Davis: Yes, I will admit, who are equally verbose, and therefore I subside.

ARGUMENT ON BEHALF OF DEFENDANT PARAMOUNT

Mr. Seymour: May it please the Court, on behalf of the Paramount defendants, the charges against them are first, that they have followed the general industry practices which Mr. Davis has referred to; second, apparently that they constitute some kind of illegal combination themselves; third, that they are a party to some kind of illegal combination with the other defendants. And then, because they have interests in some theatres in small towns, many of them in the South, it is said that they have local theatre monopolies. And finally, there is a blanket attack in the brief about so-called discriminations, and Paramount is said to practice some of them.

I want first to say just a little more about these industry practices. Mr. Davis has covered them pretty generally but I would just like to add a few words about them and then pass to the particular charge against Paramount.

We have shown in this case that the practice of licensing motion pictures on run and with clearance is old in the industry, not for the purpose of showing that it has been done so long it would be a shame to change it, but for the purpose of showing it dates back before anybody had any interest in theatres—before any producer-distributor had any interest in theatres, and that has been proved beyond any dispute. It is perfectly apparent that from the very beginning of the industry, prior to the time when Paramount, which was the first to acquire an interest in theatres, had any theatres or interest in theatres, pictures were licensed on run and with clearance, and I cannot quite understand how Mr. Wright passes that off by saying that the contracts in evidence which refer to protection or clearance have that provision typewritten in.

Mr. Wright: Have you got them there?

Mr. Seymour on behalf of Defendant Paramount

Mr. Seymour: They are in evidence. They show that they were used in 1917 and 1918, and there is evidence that the other practices, percentage licenses, and specifying a minimum admission price, are very old. Now their antiquity does not give any protection if they are illegal, but they do show that they do not have any relationship to the question of affiliation and therefore they must be judged on their merits.

Furthermore, there isn't any possible dispute on this record that those practices are followed by every distributor in the industry; that all motion pictures are licensed on run and with clearance, most of them or many of them on a percentage, and in almost every case a minimum admission price is fixed, and that applies not only to distributors who are defendants in this case, but to distributors who are not defendants in this case, and that such terms are included in licenses with all exhibitors, whether they are affiliated or independent. Therefore, that whole question of trade practice is utterly unrelated to the question of affiliation or interest in theatres or to the relief which the Government asks.

I will just say a word about each of those practices if I may. As to run, your Honors know from what has been said here today and from the evidence that all distributors make a relatively limited number of prints, due to serve from five to fifteen thousand theatres, which are the customers of those pictures. Prints are expensive. The majority of exhibitors pay rentals on any particular picture which are less than the cost of a single print. Now, not only is it essential to distribute on run from the distributor's point of view in order to get the largest revenue and to make some profit on the increasingly expensive pictures which are being produced, but it also enables the pictures to be exhibited at different times, at different admission prices, so that the most expensive picture produced is eventually available to the public at a nominal admission price, a thing which could not be done without the practice of licensing on successive runs.

Clearance is nothing more than an agreement corollary to an agreement for an exclusive run, assuring the exhibitor

against competition in the immediate area for a limited period of time. It is perfectly plain from the evidence that clearance is stated in all kinds of different ways, depending on local conditions, local past practice and so on. There is no pattern of clearance over the country. And while it is true, as has been suggested, that where distributor A and distributor B deal with exhibitor X, at different times on different pictures, X tends to have the same run and the same clearance, it is perfectly evident in this case that that is the result of individual negotiation and competitive conditions and not a result of agreement between the distributors and, indeed, there is no claim to the contrary.

It is suggested, although it was not emphasized in argument, that somehow this clearance practice is used favorably to affiliated theatres and unfavorably to independent theatres. There is nothing in that at all. Clearance arose before there was any affiliation. The evidence of the clearance terms in this record showing the terms on which the distributors have licensed pictures to both affiliated and independent theatres, shows no pattern of granting longer clearance or more favorable clearance to affiliated theatres than independents. The one thing that is shown is this: it is a universal practice indiscriminately used in dealing with the various exhibitors in various areas, so that any claim of discrimination in clearance is perfectly empty on this record.

What is the purpose both of run and clearance from the exhibitor's point of view? It assures him an exclusive right for a limited time to exhibit the picture on a particular run. It enables him safely to agree to pay the distributor the rental which is the subject matter of the negotiations, and from the exhibitor's point of view, that is the reason he is able to agree to do it because he knows that for a limited time he will be the only exhibitor in the particular area free to exhibit the picture and he won't have to worry about his customers waiting for another theatre, which is going to play right after him, without a period of clearance, and

from the distributor's point of view it is the way he is able to get the largest reward for the license which he makes.

It is suggested, although it was not emphasized on argument, that somehow clearance terms prejudice subsequent runs. I think that was cleared up entirely during the trial. It is perfectly apparent that each theatre knows what the clearance terms are in favor of the prior run theatre. Notices of availability come to the later run, and the later run is able to book its pictures. No possible claim can be made that there is any prejudice; that any theatre has been without pictures.

The Government argues in its brief that there is some kind of control in favor of the earlier run. It is perfectly apparent—that is another way of saying the same thing—it is perfectly apparent that control rests not in the exhibitor but in the distributor who, in order to get the largest possible reward, agrees to these terms with the prior run exhibitor in order to assure payment of the film rental.

It seems a distortion of the relationship to say that there is some kind of control, but whether you choose to view it that way or not, the subsequent run exhibitor is not prejudiced by the system which he has agreed to, and which he gets the benefit of over the later run.

Judge Hand: What is the real claim of prejudice? So far as the subsequent people go, what is the real claim of prejudice in this clearance? It is urged to be one of delay, isn't it?

Mr. Seymour: Everybody——

Judge Hand: Of course, they get it.

Mr. Seymour: Every subsequent run theatre wants less clearance, more over his competitor and less over himself, and that is what the arbitrations have been about.

Mr. Wright: Since it is our claim, may I state it briefly, your Honor.

Judge Hand: Yes.

Mr. Wright: With respect to admission price fixing, it is simply this, that the subsequent run exhibitor has no protection whatsoever of his position by virtue of his contract

that the admission price be fixed, and this record shows that the Paramount partners say they fix their own admission prices, and when one of them who has a prior run over a competing subsequent independent chooses to cut his price down to the same price as the independent and maintain his priority, there is nothing in the subsequent run contract with the distributor that protects him from that kind of unfair competition.

Mr. Seymour: That is a canard which has been completely destroyed in our brief, and it is a distortion. I feel certain that Mr. Wright could not have read the record himself or he would not have said such a thing. He had two witnesses here who testified under my examination, Messrs. Mullin and Friedl, that they determined the admission prices in the theatres that they were operating, and in which Paramount had an interest, and that those were the prices that went into the contracts with distributors, and we had other testimony which clearly esablished that it was a universal practice in this industry for the exhibitor to determine the price. What Mr. Wright is referring to, when referring to Paramount partners, is that they said that they fixed the price that went into the contract, and therefore that they are in a different position than other exhibitors, and that is not so at all.

What does Mr. Wright say in his argument to your Honors ought to be the system as to first run and clearance? If I followed him, what he said is this: run and clearance are illegal if a matter of agreement, even between a single distributor and a single exhibitor, leaving aside any claim of combination; that what ought to happen is this: your Honors ought to throw the consent decree out the window and enjoin any agreement by which exclusive runs are granted or by which clearance is granted and let the industry run on this wholesome basis, that distributor A goes to a theatre which cost three million dollars, a first-run theatre, and says to the exhibitor, "We would like to license our picture to you for a rental of one hundred thousand dollars." And the exhibitor says, "Well, what about my run? Do I get first-run,

exclusive first-run? And do I get clearance over houses charging a lower admission price, or over houses in the neighborhood?" And the distributor says, "We can't talk about that." And the exhibitor says, "Well, we always used to talk about it. For twenty years it was part of my agreement, and in 1940 the Government said that was all right, and consented to a consent decree signed by Judge Goddard, and now you say you can't talk about it," to which the distributor would have to reply, "Mr. Wright doesn't like it any more," and the exhibitor would say, "Well, how can I agree to pay you a hundred thousand dollars without knowing, and without your commitment that you won't go across the street right away and license the same picture for $50,000 to my competitor and have him start exhibiting it at ten cents on the day I start?" And the distributor says, has to say to him, according to Mr. Wright, "Don't worry about that. Don't worry about that, you know me pal!" That is the way Mr. Wright suggests this business should be done, that the distributor alone must do it; that it cannot be done as a matter of agreement; that although it is an essential part of the negotiations of the rental terms that the exhibitor should have some assurance that what he is licensing will not be immediately destroyed or cut down in value, still the Sherman Act forbids that kind of essential requirement.

And quite aside from the fact that we contend, and I think the Court will find, that Mr. Wright now takes a different view than the Attorney General and the Court did in 1940, that can hardly justify disregard of the recognition of these practices in the consent decree. They are plainly lawful. There is nothing in the Sherman Act which interferes with the ancient, as Mr. Davis said, the ancient practice of granting a negative covenant, reasonable in time and area, to protect against destruction. There is no more reason why there cannot be a negative covenant in connection with the licensing of a copyrighted motion picture than there is with other personal property or real property, in connection with which it has been recognized.

Judge Bright: You say we cannot change the consent decree in any of its particulars?

Mr. Seymour: Oh, no. If I said that, I went too far. What I meant to say, as we argue in our joint brief, on the consent decree, is that, of course, the Court has reserved power under the consent decree to make changes to effectuate its purpose, but the consent decree stands as recognition of an appropriate way to deal with many of these matters, approved by the court and by the Government, and it would take an extraordinary showing to induce the court to disregard the effect of that. That is but an application to this consent decree of the principles indicated in the Chrysler case and the Radio case, which we presented on our joint brief, and I did not mean the court was without power to change it, because, of course, the court has power, but there is an extraordinary showing required, more than that Mr. Wright has changed his mind.

I shall leave run and clearance and pass to two other matters which have been the subject of comment in the field of trade practice. The first is percentage contracts. It is perfectly plain that many pictures are licensed by all distributors on percentage contracts with all exhibitors. In other words, whether an exhibitor is affiliated or independent has no effect on whether a particular distributor will try to license on percentage. Distributors consider that percentage contracts give them a reward, directly keyed to box office receipts, giving them a higher reward on good pictures and giving the exhibitor some little protection on pictures which are disappointing at the box office.

Now what does the Government say about that? As I understand it, the Government does not challenge the fact that a picture may be licensed on a percentage basis. What it says is that the licensor and the licensee then become partners and accordingly that where one of these distributors licenses a picture to a theatre in which another distributor is interested, they become partners and therefore they are

partners in suppressing competition or somehow in dealing with competition at the licensee's place of business.

Now that seems to us to be most extraordinary new law.

It is quite clear that where property is licensed or rented on the basis of compensation not in a flat cash amount but for compensation based upon his share in the profits as a fair method of measuring it, the licensor or lessor and the lessee do not become partners. It has been settled for years in this State and in the Supreme Court, if the license or the rental or the share in profits is paid in reward for use of property rather than as a part of a relationship between the parties not related to the use of property there is no partnership relation created.

So that that attack or that claim that these people are all partners with each other, including all the independent exhibitors who are in the business, would strike most of the exhibitors as being a very odd new form of law. And I daresay that when Columbia licensed a picture to the Music Hall if it went out as a partner of the Music Hall and ordered a new pipe organ for the Music Hall, as it would be entitled to do as a partner, some question might be raised by the seller as to its capacity to commit the Music Hall on that basis. Not that the present organ is not entirely adequate.

Now on minimum admission prices, that has been adverted to, and I want to make only a couple of comments about it.

It is perfectly clear in this case that the amount gets into the contract because it is the exhibitor's admission price. He determines the admission price. It goes into the contract, and the effect of the contract is merely that on the limited number of pictures involved he will not lower his admission price during the period of the license, being quite free to do it afterward or to raise it during the period. It is also perfectly clear that where a particular exhibitor licenses from five or six distributors, he does not have a different admission price for each distributor; so the price tends to be the same. Now that is how the exhibitor's price is brought about, not because of any arrangement between the distributors.

Now what interest does the distributor have in admission prices? Obviously he has a direct interest in seeing that the total intake is not reduced by a reduction in the admission price after it has been agreed upon, and where there is a flat rental the distributor has an interest in not having him defeat his ability to pay the flat rental.

Furthermore, as the evidence shows, if the prior run exhibitor should reduce his price it would affect the distributor's ability to get high rentals from subsequent-run exhibitors. So that there is a direct interest by the distributor in that admission price.

Now it is a far cry, so far a cry that the gap can't be leaped by the Government, between a provision of that kind, having a direct relationship to the interest of the property owner and copyright proprietor, in getting the full reward for his license, and the typical price-fixing cases we are all familiar with.

Judge Bright: As I understand him, he says that the price fixing situation is present under those circumstances because you as a distributor charge, say, 40 per cent of the gross and the gross is earned by more entertainment than your feature. Therefore, you are fixing the price that he shall charge on other products than your own.

Mr. Seymour: I want to pass to that argument. I understood the Government to contend that aside from that argument the minimum admission price arrangement was illegal because it fell within the ban of the standard price fixing cases.

I want first to say that obviously it does not involve price fixing in the sense that was involved in the typical price fixing cases that the Supreme Court has had. Obviously it does not have any relationship to the Interstate case or the Masonite case as we point out in our brief, and I shall not go into that now.

Now their final argument is the one your Honor mentions. It is in effect, that where the distributor licenses a feature picture to a particular motion picture theatre, with

a provision in the agreement that during the existence of that license the theatre shall not charge less than 40 cents admission price, that arrangement is illegal because the distributor knows that the exhibitor may show shorts with the picture, or may play a pipe organ in the theatre, certainly will heat the theatre, and perhaps may have a double feature or may have a comic, an animated cartoon, with the picture.

Now first you notice that there is absolutely no tying-in in any of these licenses that have been referred to, that is, there isn't any requirement in any of these licenses that there shall be exhibited with the feature licensed something else. There is no relationship to what else the exhibitor shall do. The exhibitor is free to show the feature licensed, to exhibit cartoons, to spray his theatre with perfume, to play a pipe organ, to have newsreels or what he wants. So there is none of that typical tying-in which involves an attempt to use the price restriction to control something that is not a subject of the copyright.

Now if the Government is right about it—in other words, if the copyright proprietor having a percentage interest cannot assure that his percentage will be as high as he thought it would be when he dealt with the thing, that means this: that a copyright proprietor could fix a minimum admission price where he knew that the exhibitor was going to show in an open air theatre on a lawn during a time when it would be impossible for him to provide other entertainment, that is, if he was not going to heat the theatre, if he was not going to provide any music, if he was not going to provide any shorts, if he was not going to provide any cartoons, if he was not going to provide any stage show, it would be all right. Once the exhibitor in the exercise of his own untrammelled choice chose to put something else in to get the public to come in and pay money into his box office the copyright proprietor's right would be gone.

Now that seems to us nonsense in the absence of any attempt to tie-in the two, and we don't think that tying-in cases can possibly have the effect of denying the copyright

owner a legitimate right where renting does not have anything to do with something else that is added.

Judge Hand: Is this an old contention in this line of litigation?

Mr. Seymour: In the Interstate case the Government made this argument with respect to minimum admission price and the Supreme Court said that it found it unnecessary to pass on the argument, and assumed for the purpose of its discussion that a single distributor could do certain things, which I think indicates that the Court did not pass on it and certainly had no conviction on it, and your Honors are familiar with the Westway case and the Gary case.

Judge Hand: Yes. They really affirmed Judge Chesnut's opinion.

Mr. Seymour: In the Fourth Circuit in the Westway case.

Judge Hand: It was just a little per curiam.

Mr. Seymour: Yes, it was affirmed on Judge Chesnut's opinion in the Westway case.

Now, I should like to pass to the separate phase of the case in so far as it concerns Paramount. Paramount does follow in distributing its pictures these trade practices as every other distributor does. We believe they are lawful; we believe they have nothing to do with affiliation. Now, laying aside that aspect of the case, I want to deal with the phases of the case which concern Paramount particularly. First the Government argues that there is some kind of an illegal combination of Paramount alone. Your Honor asked about Fox this morning, and the Government said, "Well, we say Fox is an illegal combination even though nobody else is involved"; and I assume they would say the same thing about Paramount. The corporate structures are quite different, but I say they would say the same thing.

Now, why would they? If I understand the Government's point about these companies individually which is made in

their brief, it is that—and I think the argument is put this way—first, the ownership of theatres or an interest in theatres tends to subsidize poor pictures; and, second, the ownership of an interest in theatres provides an opportunity for violating the law—that there is a kind of a tentacle out there which might twist you with somebody else into violating law, and that it somehow subsidizes bad pictures.

Now, we have covered that matter in the joint brief. I do not believe there is any separate charge against each defendant except in those general terms. There is no evidence in this case whatever that the ownership of theatres is used to subsidize bad pictures. What is perfectly evident in this case is that every producer, every distributor, whether having a theatre interest or not, tries to make the best pictures he can. He is interested in getting the biggest box-office returns he can. He is trying to make money. Now, in the field of public taste, which is uncertain, where tastes change, where you can't tell when you make a picture precisely what conditions will be six months later,—obviously some pictures will be greater box office attractions than others. Some pictures, although considered to be greater artistic successes than others, will be poorer box office attractions.

Now, there is just no basis, I think, for the suggestion that these things tend to subsidize bad pictures. But what if they do? Why isn't a producer, having a lawful right to own theatres, at liberty to make mistakes as well as to be right consistently? Indeed, I do not know that the Sherman Act requires that people be more right in this field than in others.

And on this theory that it provides a kind of an opportunity for yielding to temptation and that your Honors ought to take that away, I would suppose that there were doctrines about temptation that antedated the Sherman Act, and that we have not yet found any way, by injunction or otherwise, to make people avoid temptation. And all the Sherman Act does is to provide relief where temptation has

been yielded to in the area in which it deals. So I do not think that we need to spend any time on this charge of separate illegality which, if I understand it, is the way I have stated it to be.

Now, what is the charge——

Judge Hand: I thought in their argument he claimed, in answer to my question, that they had an unlawful combination with their own subsidiaries——

Mr. Seymour: I think he does claim it, and I——

Judge Hand: —and that that might result in monopolization or restraint in a given town and at least create a local situation. Then I said to him, "How are they any worse with subsidiaries as regards the Sherman Act than if they stood as one big corporation alone?" And his answer was, "Well, I suppose the answer that the Supreme Court has given in some of these tax cases, if they did set up a corporate structure like that, they were bound by it in all the presumptive inequities that might be perpetrated if it was more real."

In addition to that, of course, there are cases where their interest is not very large in these subsidiaries, these so-called affiliates where they doubtless could have an unlawful combination.

Mr. Seymour: Well, let us see just where that comes out. I think I understand what your Honor says, but I am not sure that I understand quite what the basis of the Government's answers to your Honor's questions was.

Judge Hand: Well, I don't either.

Mr. Seymour: First I was dealing with a charge in the brief as to why each of these groups is an unlawful combination itself, and that charge is based, as I understand it, on the claim that there is some kind of subsidy of poor pictures and some kind of a temptation to deal——

Judge Hand: That is one of them. But that does not touch this thing we have been talking about.

Mr. Seymour: Now, I understood your Honor this morning when you asked Mr. Wright——

Mr. Wright: May I make a one-sentence statement?

Judge Hand: Yes.

Mr. Wright: That combination as such that Mr. Seymour is representing has both the power to exclude theatre operating competitors and the power to exclude distributors from playing time in its theatres, which is the result of combination and is illegal in itself.

Mr. Seymour: If I understand that—I don't believe I do understand it. I think what it means is that if I owned a theatre, I can say to a particular distributor, I will not license your pictures, and that is illegal. Now, that is the ordinary consequence of the ownership of property.

Judge Bright: I did not quite understand your statement now.

Mr. Seymour: Mr. Wright said, if I understood him, that this individual illegal combination that he is talking about, to which we are now addressing ourselves, has a capacity to exclude exhibitors and to exclude distributors. In other words——

Judge Bright: From your theatres?

Mr. Seymour: From the theatres in which Paramount has an interest.

Judge Bright: How would that be a violation of the Sherman Act? They have a right to show what they wish in their own theatres, don't they?

Mr. Wright: If the Court please, it is not just a question of their own theatres; it is a question of a multi-corporate organization—most of these corporations, each is a large circuit of theatres. The interest that the parent company holds in those corporations varies from 12 to 100 per cent. Most of them are 50 per cent or more. Now, the assembling and collecting of those corporations under common control does have competitive consequences which we say are sufficiently severe to make the combination an illegal one as such; and among those consequences are the power to exclude arbitrarily theatre operators from the areas in which they operate and to exclude arbitrarily the films distributed by

other distributors from these affiliated theatres; that is, theatres which are merely affiliated as distinguished from those which may be actually owned by the parent corporation.

Judge Bright: Do I understand you to charge them with the mere existence of the power to exclude and not the exercise of it still constitutes a violation?

Mr. Wright: We would argue that, but we do not have to on this record because we say that the record amply demonstrates the exercise and abuse of the power.

Judge Hand: Well, you see, I think this bears out what I said about his contention.

Mr. Seymour: I am glad your Honor asked it because it is getting more extreme all the time, and the more extreme it gets, the more absurd it seems.

Judge Hand: Well, he is going from strength to strength. Go ahead.

Mr. Seymour: Well, he is going from one place to another. Whether those are both strength, I don't know.

Judge Bright: Well, there would be some merit in his contention if he has proof of actual exclusions.

Mr. Seymour: There is no such proof, as your Honor knows.

Judge Bright: He says he has.

Mr. Seymour: As I understand it, what he says is he has proved a national combination. Now, that we are not talking about——

Judge Bright: We are talking about individuals.

Mr. Seymour: Well, what he says in addition to that, "I do not have to argue but I would be willing to"—having courage on all fronts, as we would expect—"I would be willing to argue that Paramount"—if I understand him—"Paramount is an illegal combination with the various theatre operating companies in which it has an interest because those theatre operating companies could refuse to buy pictures if they wanted to, and because they could, if they wanted to, exclude some other exhibitor coming into their area."

Mr. Seymour on behalf of Defendant Paramount

Now, I do not believe it will be contended——

Judge Bright: Some other distributor I think he said.

Mr. Seymour: He said both distributor and exhibitor. I will take it either way because there is no proof of either. In other words, what he says, as I understand it, is that the ownership of these theatre interests, because the operators of those theatres, all local operators, could refuse to buy, the whole combination is illegal.

Now, I think he is confusing, although I am not an expert in what he is confusing—I am prepared to say it is a good many things—but I think in this record he is confusing the kind of a corporate structure which might give rise under proper circumstances to a claim of illegality and one which might not. It is plain that where a company has a subsidiary and there is an unlawful agreement, you can have an unlawful agreement under the Sherman Act because they are two different entities; whereas if you had only one you could not have an unlawful agreement among itself.

Now, if that is what he is talking about we are in accord. It is perfectly plain that you have to have two entities to have an agreement between two entities; but it is also plain that if you have got one entity with a monopoly acquired under circumstances and with the intent to monopolize, that you can have a Sherman Act violation. That was the distinction I think he was talking about this morning.

Now, let me address myself to the charge he now says he makes, and that is that Paramount along with those theatre operating companies in which it has an interest, varying from 12½ to 100 per cent, is in itself an illegal combination. The evidence shows that those theatre interests were acquired beginning in 1919 to block the destruction of Paramount as a competitive element in this industry. At that time there was a combination of the most powerful exhibitors and many of the smaller exhibitors in this country to destroy Paramount, to steal away its stars, to steal away its market and boycott its product, and that is the way Paramount began to acquire its interest in theatres. It has ac-

quired subsequent interests for the purpose of protecting the outlet for its product. Many of those subsequent interests were acquired in competition with other distributors. There is not a word of proof in this case that the purpose of acquiring any of these theatre interests was unlawful in any aspect. There is not a word of testimony in this case that in fact any one of these theatre companies or any one of its theatres has been operated in such a way as to unlawfully exclude anybody. The fact is, as the record shows, that in these theatres Paramount pictures are shown; that the pictures of other distributors are shown. Sometimes they cannot get the pictures they want because other distributors license them elsewhere; just as any one of these theatres could refuse to put in salt water taffy if they did not want to, we can, of course, say, "We do not need your pictures," to a particular distributor. But I am entirely at a loss on this record to know on what possible basis it can be suggested that there is any unlawful combination involved in the Paramount structure. There is no proof of unlawful exclusion; there is hardly a claim of unlawful exclusion, of distributor or exhibitor.

Now, there is one phase of that which still is quite consistent with what I have said. That I will have to develop tomorrow, and that is the claim that there are a few small towns in which Paramount owns an interest in the one or two theatres of the town. If that is what Mr. Wright is talking about we can dispose of it very promptly.

Now, your Honor wants to leave, I think. Shall we stop now?

Judge Hand: All right.

Mr. Wright: If the Court please, we have these digests prepared. I do not know whether you want them overnight or not. If you do I will hand them up; if not, I will let them go until tomorrow.

Judge Hand: Very well.

(Adjourned to January 16, 1946, at 10:30 a.m.)

Mr. Seymour on behalf of Defendant Paramount

New York, January 16, 1946;
10.30 o'clock a. m.

Trial resumed.

Mr. Seymour: May it please the Court, yesterday when I referred to the fact that run and clearance had been used in the industry before any defendant had any interest in theatres, I should have mentioned the fact that the Government alleges in the amended complaint, in paragraph 114, that run and clearance came into the industry in 1915 and 1916, which is before any defendant had an interest in theatres.

At the close yesterday we were discussing the claim that Paramount, for example, individually was an illegal combination or that there was an illegal agreement among the Paramount defendants, and it was not quite clear what the Government's claim was. I think that consideration of the complaint in this regard, in the light of the Government's answers to further interrogatories clarifies the situation. The complaint, paragraphs 170 to 177, alleged the individually illegal combination of the several defendants with theatre interests, and, for example, alleged that they restricted production. Now, of course, that claim is out of the case. We addressed, last spring, an interrogatory to the Government, No. 43, asking what they expected to prove with respect to this claim of illegal combination individually, and their answer was, "Plaintiff states that it does not expect to show that specific independent producers or distributors were prevented from competing with any specific defendant or alleged combination of defendants. Plaintiff will argue that such prevention is a necessary consequence of the mere existence of the combinations referred to in paragraph 170 of the petition."

I take that to mean that in so far as distribution is concerned the contention is that, where Paramount owns an interest in theatres, since those theatres exhibit Paramount

pictures, and, to some extent, the pictures of other distributors, to that extent they disable themselves from exhibiting pictures of other distributors, and to that extent exclude. In other words, that the ownership of theatres in itself is illegal, a contention with which Mr. Davis dealt yesterday and which I do not think needs to detain us today.

The remaining part of that complaint, I think, relates to the so-called claim of individual theatre monopolies where a defendant owns all the theatres in a particular town. That I shall deal with in a few moments.

Now, it is perfectly clear that the Paramount defendants have and can acquire no monopoly of production, distribution or exhibition.

Judge Hand: Is this a quotation from the answer to the interrogatories in your brief?

Mr. Seymour: It is not in our brief because the question did not arise as to what the claim was until yesterday; but it is on file and it will be in the stenographic transcript.

Judge Hand: I see. Well, it will be in these minutes of this argument.

Mr. Seymour: Yes.

Now, the Government rather reluctantly but definitely withdrew its claim of any monopoly in production, and we do not need to spend any time on that; but the testimony which eventually forced the Government to that concession is still important because it shows that really there is no restriction on distribution in this country; that any picture produced gets distributed, and profitably distributed; so not only is there no monopoly of production but obviously there is no monopoly of distribution.

Now, it is perfectly apparent that anybody who wants to embark his capital on creating a distributing organization with the exchanges and the salesmen, and so on that has to be provided, can do so. There is no restriction on doing so. The evidence shows that distributors who have not any interest in theatres including distributors who are not defendants in this case, have prospered during the very period of alleged combination and conspiracy.

Mr. Seymour on behalf of Defendant Paramount

Paramount has no monopoly of exhibition. Paramount has an interest in 1550 theatres, which is somewhat under 9 per cent of the total theatres in the United States. Of that number it has an interest amounting to over 51 per cent in companies which own or operate 500 theatres; so that its total interest in companies which it can be said to control involves approximately 3 per cent of the total theatres in the United States. And again I shall lay aside the claim of local monopoly, which I shall come to in a moment. So that really the case here comes to the vague claim of combination between the defendants, and I should like to analyze that a little more. Mr. Davis dealt with it effectively yesterday.

The Government's claim in that respect has been variously stated to arise out of cross licensing, diagonal licensing, and now I think Mr. Wright expresses it in terms of cross use. Now, the cross licensing theory which the Government had originally, apparently, was that where Paramount licensed pictures to a theatre in which Warner had an interest, and, in a different licensing transaction at a different time, Warner licensed pictures to a theatre in which Paramount had an interest, those transactions were so related that they amounted to cross licensing.

Now, the evidence in this case generally completely destroys any such claim and shows that there is no relationship between the transactions; and I am going to deal with the specific Paramount evidence on that score in a moment. The diagonal licensing claim which is now used in the Government's brief as sort of a substitute for cross licensing seems to be this: that where Paramount licenses a Warner theatre, say, in Camden, New Jersey, Paramount acting as a distributor licensing to the Warner theatre which is an exhibitor, that that, in effect, creates two horizontal agreements, one between Paramount as a distributor and Warner as a distributor and the other between Paramount as an exhibitor and Warner as an exhibitor, having in mind the fact that in Camden, New Jersey, there is no theatre in which Paramount has an interest.

Now we think that is a wholly fanciful theory. Such a transaction is simply between Paramount as distributor and Warner as exhibitor. It does not relate to any other transaction. There is no agreement between the two parties at the distribution level as the evidence shows, and to say that it is an agreement between the Warner Theatre in Camden and a theatre separately and autonomously operated in which Paramount has an interest, say, in Minneapolis, is simply it seems to us perposterous. Certainly that is not the consequence of that transaction.

To think of an analogy, although books are sold and not licensed, it would be as sensible to argue that where Scribner's books are sold in the Putnam book store that there is an agreement between Putnam and Scribner as publishers and also an agreement between the Scribner and Putnam book stores. It seems to us that that is not so. The parties are simply dealing at different levels and unless there is an illegality in that restraint nothing can be made of it. And what the Government attempts to do is to take all these agreements, describing them as cross-licenses or diagonal licenses, and add them together and say that out of that you get some kind of combination. We say you can't do that.

As far as Paramount is concerned you can't consider it even diagonally as an illegal agreement because as the evidence shows incontrovertibly——

Judge Hand: Now I never understood really what that word "diagonal" meant. It seems to me that it is a great vice that is very common now in all kinds of arguments—I guess it always has been—of using all kinds of figures of speech which people love. Half the time they don't understand them themselves and nobody else can. They are picturesque.

Mr. Seymour: It is hard to understand, but as I get it from the Government's presentation in its brief it says that where Paramount at this level as a distributor licenses to Warner at this level as an exhibitor, that that is diagonal

licensing. It is in that sense that they add them all together and say that we have a combination. Even if the theory had any substance it couldn't possibly be applied to transactions involving theatres in which Paramount has an interest.

Your Honors will recall that the evidence shows that in 1932 Paramount gave up centralized operation of its theatre interests; that from 1932 on, all the theatres in which Paramount has an interest except for the Paramount Theatre in New York and the Newman Theatre in Kansas City, as to which no special point is made, are operated locally by separate companies in which Paramount has varying interests from 12½ to 100 per cent. Those companies have had headquarters in the areas where the theatres are operating. They are in charge of local operators. The local operator in the case of a 100-per-cent-owned company has a contract giving him the right to decide such questions as film licenses and all questions of operating policy, and his reward is in part based on the profit of the theatre operations. Where Paramount does not have a 100 per cent interest, where it has 50 per cent or some lesser amount, the theatres are operated by the stockholders on the ground who also have a right to operate autonomously and who look to their stockholding for their profit.

Now the importance of that is, when you take into account the further testimony that there is no relationship whatever between the separate licensing transactions of those companies and the licensing transactions of Paramount through its distribution department, the importance of that is that you could not even consider any transaction in which one of those theatres is involved as anyhow related to any transaction in which Paramount acts as a distributor. It is perfectly apparent that those companies are operated in a genuine sense independently of any control by Paramount, so far as film licensing is concerned and therefore in none of those theatres can Paramount be regarded as an exhibitor. So that when Warner, for example, licenses a picture to one

of those theatre-operating companies for exhibition in one of those theatres, it is not a license to Paramount, and in that sense there is no diagonal quality in it even if it makes any sense in any context. It is perfectly apparent that since those local operators depend for their compensation upon the profitable operation of those particular theatres that there could not be any relationship between what Paramount gets as a distributor from a Warner theatre or a Loew theatre and what they pay. In other words, they are in a position where it would be impossible to have any relationship between those things without hurting the interests of the local operators, which they wouldn't stand for, and would not have to under their contracts.

Now that, I think, so far as Paramount is concerned, completely destroys any of these fancy theories of cross-licensing or diagonal licensing, aside from the general testimony that there isn't any such thing and there isn't any conditioning of licensing. Indeed that is pretty explicitly admitted in the Government's brief. And the statistics referred to in the briefs show there is no relationship between the film rentals paid to the various defendants as distributors by the various theatres in which they are interested.

So that I think the theory which the Government operates upon is completely destroyed by the evidence in this record as far as any such claim is concerned.

Now the Government's claim, as Mr. Davis pointed out yesterday—and I won't dwell on it—is really made up on just a mathematical basis aside from this empty theory of cross licensing. The Government simply adds up the total amounts paid by all theatres in which all defendants have an interest and arrives at some percentage which it says shows combination. And that is done by saying that they collectively received certain amounts and that they have a monopoly position. You can't by mathematics create collective action and you can't by mathematics create a monopoly position. And we have analyzed those figures in our brief.

It is apparent that the Government takes a figure of 70 per cent and calls it 70 per cent of different things every time it describes it, and whatever the errors are in that calculation, and however illusory the calculation is, the basic fallacy is that it attempts to add together the wholly separate operations of five active competitors and attempts to get your Honors to say from that, that there is an illegal combination. And in the absence of agreement or concert of action, it is perfectly evident that those statistics and those mathematical aggregations are simply irrelevant to the charge.

Perhaps there is a claim, although certainly it is not explicated or made clear, that you should conclude that there was some kind of combination because of some pattern of conduct among these defendants. It is suggested as to that pattern that the defendants favor each other's theatres over independents. If that were so, if you had a pattern where in every case the defendants always favored each other's theatres, and if the favoritism was illegal, you might have some pattern which would be significant, but the evidence in this case completely refutes any such thing, and I will deal with it as far as Paramount is concerned.

I may say that this pattern that the Government refers to is set forth with respect to the 92 larger cities in the country, selected simply because they have populations of over a hundred thousand and not because they are really any separate market, as they are not, so the question is, does that pattern appear there? What the record shows, as far as Paramount is concerned, is this: Paramount has interests in 47 large theatres in those 92 cities. In those theatres Paramount pictures are exhibited. In many of them pictures of other distributors are also exhibited, since normally a theatre needs more than the product of any one distributor in order to operate the year around. The evidence shows that in each case the quality of those theatres is such that they are the natural choice as a matter of sensible customer selection for those who license them. Surely the fact that Paramount licenses its own pictures to theatres in

which it has an interest does not show any favoritism to other distributors. It shows that the theatres have been operated precisely as one would expect, primarily for the purpose of giving an opportunity to show Paramount pictures.

Let us look beyond those theatres to the remaining 45 cities out of the 92. What we find there is that in the remaining 45 cities Paramount sometimes licenses its pictures on first run to theatres affiliated with other defendants and sometimes to independent theatres. In many of those cities there are competitive theatres on first run, in all there are other runs, but the evidence clearly shows why each one of those theatres was chosen, and it clearly shows that Paramount was merely exercising its judgment to get the theatre which would provide the highest revenue. But the significant thing is that in fifteen of those cities Paramount licenses independent theatres first run. And the evidence shows why it chooses those, that in those cities Paramount considers that those theatres are the best outlets for its product. And in eleven of those cities there are affiliated theatres.

In addition, Paramount splits its product in five cities between independent and affiliated theatres. I think it plain that if there were anything in this theory of pattern, that consistently defendants favor each other's theatres, choose each other's theatres, solely because they are affiliated, you would not find any case of selection of an independent theatre over an affiliated theatre, and yet in Paramount's case you do find it in a significant number of cases.

I won't burden the Court with the detail of that evidence but I think it is perfectly plain from the evidence that we produced, and indeed, from the evidence that each defendant produced, that the selection of theatre outlets for first-run, other than theatres in which the particular distributor is interested, bore no relationship to affiliation, that is, it was not based on affiliation; that it was based upon the individual exercise of business judgment by the particular distributor as to the best outlet, and the fact that in many cases the best outlet in a particular place was an affiliated

theatre was due not to the fact that it was affiliated but to the fact that the particular defendant had chosen to have interests in the best theatre or the theatre comparable to the best theatre in the town, which is no violation of the Sherman Act.

It is suggested that there is something odd about the fact that there is relative stability of accounts in this business. The evidence explains why that is. The evidence explains, in Paramount's case and in the case of other defendants, that where they have a satisfactory account, the tendency is to stay with that account; that it is preferable to continue a satisfactory business relationship than to change it. In the Paramount case there is testimony that if they were to change it for temporary advantage and then the new account were found to be unsatisfactory and the old account had filled its time with another distributor's product, the net result would be very unsatisfactory from Paramount's point of view.

It is apparent from the evidence that there is active competition between distributors for an opportunity to show their pictures. The figures on individual pictures show that some pictures are shown in five thousand theatres, some in ten, some in fifteen, reflecting the fact that sometimes a distributor does better and sometimes poorly in the attempt to get licenses for his pictures in a large number of theatres. But it is true, undoubtedly, that there is a tendency in this business, both with an independent account and with an affiliated account, not to go running around trying to see if you can do a little better on this picture or that. And the Government theory that these pictures could be licensed effectively by mere auction block technique, so that the largest theatres would get the product anyhow by bidding the highest prices, is simply a suggestion of introducing chaos into a business that has served the public pretty well as it is.

Now, the Government has referred to so-called pools, and I want to say a word about them. The evidence shows that now, or at least until recently, in eight localities in the

United States, Paramount had operating agreements; that is, theatres in which Paramount had an interest had entered into local operating agreements with theatres of some other defendant. Now, the evidence is clear and undisputed that those operating agreements were originally made during the depression; that they were made to effect operating economies; that they did not result in advanced admission prices. Indeed, the evidence in at least one case is that it resulted in a decrease in admission prices; and there is evidence further that the arrangement did not reduce the total number of films used by the theatres. So that all you have is a local situation with several particular theatres based upon local conditions which were deemed to effect local economies.

Now, the Government, if I understand it correctly, does not make any particular request for relief with respect to such local situations. What it says is that they show a general intent to conspire and agree and combine among these defendants.

Now, plainly it could not make any request for relief, it seems to me, on this record as to any particular local situation of that kind, because there has been absolutely no showing that the local arrangement had any effect on interstate commerce. The number of films was not reduced, and there is no showing that public or other disadvantage arose. But from the point of view of intent generally, it seems to me perfectly apparent that those local situations show nothing about intent generally. What they show is that there was a decision during the depression in that locality with respect to the particular theatres involved to make an operating agreement. The very contrast between the number of localities where there are such operating agreements and the large number where theatres affiliated with different defendants are in active competition and not subject to an operating agreement shows that there was no intent generally to eliminate competition between them.

Judge Bright: Do you make a distinction between operating agreement and pooling agreement?

Mr. Seymour: I call what the Government calls pool an operating agreement because that is what the evidence calls it, and the Government calls it a pool because it suits its purposes to call it a pool. Now, I do not think there is any real difference between them. In both cases there is an agreement for the operation of theatres locally, and the Government calls it a pool. I can't see that it makes any difference in its legal effect, whatever you call it.

Judge Goddard: Mr. Seymour, that refers to a situation where two or more defendants have an interest in the same theatre?

Mr. Seymour: I did not hear the first part of that question.

Judge Goddard: That refers to a situation where two or more of the defendants have an interest in the same theatre?

Mr. Seymour: Generally not. It refers to the situation, such as there was in Grand Rapids—although that does not involve two or more defendants—such as there is in Minneapolis or was in Minneapolis where a theatre in which, say, Paramount had an interest, and a theatre in which, say, RKO had an interest agreed that they should be operated through a common operator in order to effect economies. They do not generally involve only one theatre; they involve several.

Now, those are the things that the Government calls pools, and they are the things we call operating agreements.

Now, in addition to those there are several situations where there is a lease, or something like that, where a theatre has been leased to one of the other defendants, or to a corporation in which another defendant has an interest. Now, sometimes the Government calls those pools. They certainly are not pools, and there is nothing on this record to indicate any impropriety in any of them. I would suppose that one who owned a theatre was entitled to lease it to the best possible lessee, the person who is most likely to pay the rental

and to operate it effectively. And there is nothing on this record to challenge any of those.

Now, I should like to refer specifically to the one situation involving Paramount, as I recall it, which Mr. Wright mentioned yesterday, and that is the situation in San Francisco, because I think it throws a good deal of light on this claim of the Government's.

Judge Hand: Now, before you do that, I am not entirely clear why the Government does not or that it should not, if there is violation of the Sherman Act in this West Coast situation, ask for relief against it in this case. You say that interstate commerce is not involved. I should think it probably was.

Mr. Seymour: Well, what I was talking about, if your Honor pleases, were the eight so-called pools to which Paramount theatres are parties. Now, the San Francisco agreement which I am about to come to is not included in that group because it is not a pool or operating agreement in the same sense, and I just want to mention that San Francisco situation.

There in 1930 Paramount leased theatres to the predecessor of Fox in accordance with an arrangement, which I think is in evidence, which provided for payment of rent in terms of an interest in the profits of the operation of the theatres, and gave a franchise on Paramount pictures. Now, the original reason for that was obviously to have the theatres properly operated and to assure an outlet for Paramount product. But in 1932 or 1933 Fox terminated that arrangement. Paramount then had a claim of 12 million dollars against Fox. Paramount was in bankruptcy and Fox was in bankruptcy, and the claim stood in the way of reorganization. And in order to forward reorganization, the agreement made by the trustees in bankruptcy, I think in 1934, which is in evidence, which provided for a lease to Fox of those theatres and a franchise by Paramount, so that Paramount could exhibit its pictures, was submitted to Judge Coxe in the Paramount reorganization for his consideration and approval; and it was approved.

Now, we do not say, of course, that his approval involved any consideration of the Government's present claims, but we do say that the fact that that agreement was submitted to a reorganization court shows not as the Government claims that the agreement evinced an intent to monopolize or to restrain trade, but that it evinced an intent to facilitate reorganization of a bankrupt company; and there is none of that quality about the thing which could possibly show, I think, any such intent as the Government tries to attribute to it.

Now, I want to say a word about the Paramount formula deal which the Government has adverted to in brief and argument: Your Honors will recall that we brought out on our direct case that with many of the theatre operating companies in which Paramount has an interest but not with all, Paramount pictures are licensed on a so-called formula deal basis, and the typical formula deal contract is in evidence; and that provides that Paramount is to receive a percentage based upon the national performance on the pictures licensed to the particular companies in which Paramount has an interest. Our witness showed that in his opinion that gave Paramount what it regarded as a fair rental and a higher rental than it might have obtained in other ways; and the Government does not contend, even if it would be relevant, which I doubt, that that gave the Paramount affiliated companies more favorable terms than their independent competitors, as far as rental is concerned.

Now, it also appears that when the Paramount distribution department was in a controversy with Evergreen, which is one of the National Theatre companies, and they could not get together on terms, Paramount suggested that a formula deal be worked out with Evergreen, Paramount thinking that that would give it a larger reward for its pictures; and it worked out that way.

Now, again, I do not understand it to be claimed that the terms of that deal gave any rental advantage to Evergreen. Certainly, if Paramount got more than it would have gotten

in some other way, it did not give Evergreen any advantage over Paramount.

Judge Bright: How extensive are your formula deals throughout the country?

Mr. Seymour: They are made, so far as I am aware, if your Honor pleases—they are made with many of the companies in which Paramount has an interest; and in addition there is a formula deal with Evergreen. So far as I know there are no others.

Judge Bright: Are there any formula deals with exhibitors other than those of the defendants, associated or affiliated with the defendants?

Mr. Seymour: So far as I know there are not, your Honor.

Now, of course, the thing originated in an effort to work out a method of compensation to Paramount for its own pictures in theatres in which it had an interest. Similar terms were worked out with Evergreen for some of the theatres in which National Theatre has an interest; and as the evidence shows, the formula deal is of relatively recent development.

Now, the Government's claim about it seems to be twofold, first that it shows a non-competitive atmosphere in the industry. Well, I would not suppose that the fact that the formula deal was used with the theatres in which Paramount had an interest in connection with Paramount pictures shows anything about the competitive quality of the industry. We claim we would be entitled to make reasonable deals with the theatres in which Paramount has an interest, and it does not affect competition generally. And so far as the formula deal with Evergreen is concerned, it is evident that Paramount got higher rental than it otherwise could have gotten.

Now, what the Government also says about it is that somehow, although it did not prejudice other exhibitors in rental terms, it gave those who had the formula deal an opportunity to play the pictures for longer than the other exhibitors had the right to do, and that might prejudice them.

Now, the trouble with that claim is that there is no evidence of anything of the kind. There is no evidence by any exhibitor or by any document that the privileges under the formula deal have been abused by any of the theatres in which Paramount has an interest; and in the absence of such evidence, this claim of possible prejudice is just sheer speculation, and I think cannot show anything as to the impropriety of the formula deal between Paramount and the theatres in which it is interested.

Judge Bright: The theatres under the formula deal are licensed under the same form of agreements with other theatres

Mr. Seymour: The formula deal agreement which fixes the formula percentage and the other terms related to it has attached to it the standard form of agreement.

Judge Bright: Well, is there any evidence in the case that in any instance with exhibitors having the benefit of the formula deal, that there had been any different or preferential clearance or run provisions?

Mr. Seymour: None so far as I know, if your Honor pleases. I think, in other words, that the claim that there is any disadvantage through operation of the formula deal is simply speculation, and I cannot see any possible basis for that claim except just as a matter of theorizing, and if there was any basis for it they should have come forward with some proof.

Now, I want to pass to this question of local monopoly——

Judge Bright: Before you go to that, Mr. Seymour: You have been speaking about pooling arrangements, and you dealt solely with pooling arrangements in so far as Paramount alone is concerned. I may be mistaken, but as I understand the Government's contention, it is that the existence of pooling arrangements throughout the United States, and so many of them, show a pattern of interlocking or interdealing between the defendants, which is capable of the inference that there is some understanding to restrain competition.

Mr. Proskauer: There is not any such evidence.

Mr. Seymour: Well, let me make a comment on that. I think perhaps that is the Government's claim, because Mr. Wright said yesterday that there were ten possible combinations out of five defendants, and that they all appeared in pools.

Well, the fact of the matter is that there are eight so-called pools between Paramount theatres and theatres in which another defendant is interested, but in some of those situations there is an affiliated theatre in competition with the pooled theatres. Now there are so-called pools in which Paramount has no interest whatever and is not involved in any way. Theatres in which Paramount is interested, as the evidence shows, have operating or "pooling" agreements with independent theatres in various local situations. But since they have not been brought into question here, no details of these are in evidence.

Now, it seems to me perfectly evident that you can't take isolated local pool situations involving the theatres of two defendants, say in Minneapolis and St. Paul, add them to the so-called pool that Mr. Wright referred to yesterday between two other defendants in Albany, and say that you get some national pattern because there is no evidence at all that they involved anything but the local interests and advantages of the particular theatres involved. And when you add to that the fact that at least as far as Paramount is concerned, and I think as far as others, similar agreements have been made with theatres of the independents, all you get is a series of pools. And you certainly don't get any aggregate of national significance. And it certainly is apparent from all the evidence that they didn't pool in lots of places.

Now, I want to talk about this claim of local monopoly as far as Paramount is concerned. Mr. Phillips reminds me that Mr. Wright said yesterday that there were thirty so-called pools in the United States, which is an insignificant number considering the number of theatres.

Mr. Wright: What I said was that there were thirty in evidence.

Mr. Seymour: Well, I think with Mr. Wright's enthusiasm for getting everything in evidence, we can assume that that is a pretty fair percentage of those that he has discovered.

Now, on the local monopoly claim, as far as Paramount is concerned, that arises in two aspects apparently. First the Government says that there are forty localities in which affiliated theatres are the only first-run theatres. In a few of those Paramount has the only first-run theatres. In others two defendants or three defendants may have the only first-run theatres. The Government chooses to call those closed first-run situations. Now that it seems to me adds nothing to this case and shows nothing of significance in the case. In each of those cities it appears that there are other theatres operated on other than first-runs in competition with these first-run theatres. The use of the word "closed" means nothing so far as this record is concerned except the fact that those are the first-run theatres in the town accepted as such by distributors in licensing their pictures. There is nothing to indicate that there is any other theatre in any of those towns which is of a size and location which would normally make it a natural choice for a distributor to license first-run, and using the word "closed" is a convenient way of saying that in those places the particular theatres have all the first-run product. In the absence of some evidence of exclusion of some qualified theatres—and there is no evidence; in fact the evidence is to the contrary—those so-called closed first-run situations where there is obviously competition with other theatres in the town I think need not detain us at all.

Now I want to talk about the other aspect of this so-called local monopoly situation and that is this: the Government lists in its brief 157 towns taken from the record in which it says Paramount has an interest in all the theatres. Now there is a little error in that calculation. There are only 151 in the record because some of them are duplications. It does not make any difference which figure we take, 151 or 157. Those towns are in various locations,

many of them in the South, where a particular operating company in which Paramount has an interest, has an interest in all the theatres in the town.

Now we think that is of no significance in this case because no attempt has been made, utterly no attempt has been made, and there is no evidence that those theatres were acquired by predatory practices, that those theatres excluded, or the operators of those theatres have excluded anybody else, or indeed that there was any need for any other theatre in the town, or that anybody would have thought of providing one.

Let me give you some idea of the size of the towns. Out of 151 towns which we think the record correctly indicates, there are 47 towns with one theatre.

There are 61 towns with two theatres, 28 with three, 12 with four, and two with five. The towns involved run all the way from such well known localities as Needville, Texas, which has a population of 500; Exmore, Virginia, with a population of 932; Smakover, Arkansas, with a population of 2,235; Yoakum, Texas, with a population of 4,733, up the scale of populations until you get to populations of—well, there is one town of a little over 20,000, one town of a little over twenty-one, and several with around twenty-four, but, in general, the towns are very small towns with one or two theatres. There is not the least indication that anyone would want more theatres in any of these towns or that anybody has been kept from having them. There are three towns of more significant size, which are in that list, West Palm Beach, Florida, where it appears that Paramount has an interest in five theatres. That is adjacent to Palm Beach. And in Norwalk, Connecticut, a town of 39,849, Paramount has an interest in one theatre and that is adjacent to South Norwalk. And Newton, Massachusetts, which has a population of 69,000, where Paramount has an interest in one theatre, is adjacent to Boston. In all those larger localities to which these towns are adjacent, there are many theatres

operated in competition, and it is perfectly apparent that these places are simply suburbs from which people go to see pictures in the larger place, as they do in so many localities.

What does it show? What it shows is that over a period of time the theatre-operating companies in which Paramount has an interest have owned and operated one, two or three theatres in these small towns. It is perfectly plain that it is no offense under the Sherman Act to be a lone trader, as has been said in the Pullman case recently, which your Honors will get a little tired of, because I think it is quoted in almost every brief, although it is good doctrine.

And there is no evidence of exclusion, no evidence of predatory practice, no evidence that anybody has been kept out.

Suppose a theatre operating company in which Paramount is interested should have to get rid of its interest in one of these theatres in one of these towns where it has the only theatre, wouldn't the next fellow be a monopolist? Wouldn't he have the same power of exclusion? That is, that he would be able to use only a certain number of pictures and he could not use more. And therefore it seems to me that this local monopoly phase of the case is quite empty of any content.

We have shown that there are some 11 or 12 hundred localities in the United States in which independents own all the theatres, and in which no defendant has any interest. There is no more reason to suppose that there is a violation in the little towns that have been referred to than there is in those other towns, and your Honors will remember that there are some 16,000 incorporated places in the United States, and Paramount is charged with having an illegal monopoly in 151, which, as I figure it, is somewhat under 1 per cent, and when you consider the size of these places, down to 500 in population, I doubt if your Honors will think that you can draw the line in any place and say that on the evidence in this case there is any possible illegality.

I want to pass to one other charge and I will be through. The Government's brief refers to discrimination but it is not

quite clear what is meant. Sometimes it looks as though what is meant is that a particular defendant in some situations has discriminated against some exhibitors, sometimes independent exhibitors. Plainly, most of these claims of discrimination are not made out, if that is what they mean. In other words, if they mean that generally there is a policy to favor affiliated exhibitors over independent exhibitors, we proved for Paramount, for example, that all the deals that are made with any kind of exhibitor are made indiscriminately between affiliated and independents, and if that charge is some general, vague, charge of discrimination, it does not have anything to do with this case. This case charges a national combination, and unless the Government can show a studied, concerted program of discriminating for the purpose of restraining trade or obtaining a monopoly, these episodes of discrimination would be irrelevant.

Finally, we are dealing here with licensing. We are dealing here with licensing of copyrighted products, and not dealing with sales, and there is no statutory inhibition of discrimination in connection with licensing, such as there is with sales. I say that, not defensively, because I will show your Honors in a moment that this claim of discrimination, as far as Paramount is concerned, is empty, but it is a kind of irrelevant comment in this case because it hasn't anything to do with the merits of the case.

The Government talks about franchises and refers to the fact that Paramount granted franchises at one time. The evidence shows that eight or ten years ago Paramount, as a matter of policy, discontinued granting franchises. It is clear that under the consent decree the consenting defendandts were forbidden to grant long-term licenses, because of the trade showing requirement and the block of five requirement, and it is clear from the evidence that Paramount, like the other consenting defendants, has adhered to the provisions of the decree despite the fact that that particular provision has lapsed.

Mr. Seymour on behalf of Defendant Paramount

There is no evidence in this case of the granting of any franchises in the last eight or ten years by Paramount and the whole thing is utterly irrelevant. Even while Paramount was granting them, it appears from the evidence in this case that, more were granted to independent exhibitors than to affiliated exhibitors.

Finally, although this has no particular application to Paramount, the Government now seems to have some bitter criticism of ten-year franchises, and yet it is just ten years ago that in this Court, in 1936, in a suit by the Anti-trust Division against Warner Bros. and certain other defendants, the Government insisted that two of the defendants, Warner and RKO, grant a ten-year franchise to an exhibitor in St. Louis as a condition for discontinuing the suit. So that its enthusiasm for franchises, like so many other things, that it once was for, has waned, since it took official action to the contrary.

The Government talks about master agreements, and says there is something wrong about master agreements. We have had that all out here in the testimony. It appears, as far as Paramount is concerned, and, indeed, as far as other defendants are concerned, that the so-called master agreements are sometimes used as a matter of convenience in dealing with a large number of theatres, and the only purpose of those agreements is to avoid writing a separate and detailed contract with each theatre. There is a general contract with the standard form attached, at least in Paramount's case, and then a separate deal sheet for each theatre. Even in a time when there wasn't a paper shortage, I should suppose that that practice, which the evidence shows Paramount followed quite indiscriminately in dealing with any large group of theatres, was perfectly lawful.

Judge Hand: Just what is that? What did they do? I have forgotten it.

Mr. Seymour: Well, where Paramount, for example, licenses a company with, say, ten theatres, instead of writing a separate license agreement for each theatre, it may, and

the other defendants sometimes do the same thing, make one master agreement with the operating company and a separate deal sheet for each theatre, and it is simply a paper and time-saving device. There is no evidence of any abuse of the thing or any discrimination. Paramount does it with any customer who has enough theatres to make it a time-saving device.

The Government talked at one time——

Judge Hand: Dealing with one customer, or a customer with subsidiaries, I suppose, that is, a lot of theatres.

Mr. Seymour: It is the multiplicity of the theatres and the number of theatres that causes this method of dealing.

Now, during the trial it was suggested that Paramount had discriminated in rental terms against independent exhibitors and yet, although the Government had access during its preparation of this case to hundreds of thousands of licenses, its brief does not mention a single example of the alleged rental discrimination by Paramount. So that is out of the case as far as Paramount is concerned.

Then the Government says that Paramount has somehow discriminated in clearance terms, that it has somehow been more favorable to affiliated theatres than independents. I dealt with that yesterday. There is nothing in it. Paramount has applied, in dealing with independents and affiliated theatres, the same kinds of considerations affecting the length and the scope of the clearance that it applies in any other case. The clearance terms vary from area to area. There is no pattern about them, but, for every long clearance that you can find in this record in favor of an affiliated theatre, there is an equally long clearance somewhere in favor of an independent theatre. And for every broad clearance that you can find for an affiliated theatre, there is an equally broad clearance somewhere for an independent theatre. And it shows merely that in the particular area where the particular customer was affiliated or independent, the clearance was granted which seemed appropriate. The remedy, if the clearance is too long, is provided by the decree.

On this whole question of discrimination I have only this final word to say. The Government, not having advanced any real proof of discrimination, says that the defendants had it in their power, since they had all the license contracts, to come forward with documentary evidence that there was no discrimination, and that the fact that they did not do so should lead the Court to conclude that there must have been a multitude of discriminations. Your Honors had that before you on the discussion of the Government's motion to strike. It seems to us nonsense. I rather think it appeared, when it was suggested before, that the Government has the burden of proof. The Government had access to everything. They cannot shift the burden to us or obscure the fact that they have not come forward with any real proof, by saying we had the contracts and we should have snowed your Honors under—a thing which you would not have let us do—snowed your Honors under with thousands of contracts.

We feel that on this record the Government is entitled to no further relief, and that there has been utter failure to show the combination or conspiracy which it set out to show, or any individual restraint as far as Paramount is concerned, and that appropriate judgment to that effect ought to be entered.

I don't know whether your Honor was serious yesterday in a discussion with Mr. Wright about this, but I would like to make a comment on it. Mr. Wright, I think, suggested that it might be a good idea to restrain the affiliated theatres from using the product of other defendants. That would simply mean, of course, that the affiliated theatres, where they needed the product of other distributors, would be required to turn out their lights and get our of competition, or buy Westerns or similar pictures from other distributors who were not bound by the decree. How that would forward the competition which the Government is interested in eludes me.

Judge Bright: You just mentioned the fact that you did not think the Government was entitled to "any more

relief." You mean more than has already been given in the consent decree?

Mr. Seymour: Yes.

Judge Bright: How far can this Court go on that proposition? In other words, have we got to find a violation of the Sherman Act in order to grant any relief to the Government or, if we cannot find a violation, must we dismiss and set aside the consent decree?

Mr. Seymour: I suppose there are maybe as many views about that as there are lawyers, but I will give your Honor my view. The consent decree reserves certain issues for trial and certain prayers for relief. It disposed of certain issues subject to the Court's reserved power to modify the decree upon a showing that it was not working properly. We are here and have been here on the reserved issues and the reserved prayers for relief, the consent decree having, as I have said, disposed of the issues which were embraced within it, to-wit, the issue of clearance, the issue of run, and things of that kind.

It is our view that what the Government has failed to do here has been to prove any violation of law on the reserved issues, and, therefore, any right to further relief by way of divorcement, which is what was reserved for trial. That being so, whether the form should be dismissal or simply a denial of the request for further relief on the reserved issues, I am not quite clear, but it would not, of course, affect the existence, I think, of the consent decree, that having dealt with issues carved out and which are not now on trial.

Judge Bright: I understood Mr. Wright to say yesterday that he thinks we should scrap the consent decree.

Mr. Seymour: That is what he thinks.

Judge Bright: That would mean starting de novo.

Mr. Seymour: That is right. That is what he thinks. We do not think so. We think that those issues are dealt with in the consent decree subject to your Honor's ability to modify upon a proper showing, which has not been made.

Judge Hand: What about the three years?

Judge Bright: About block selling?

Judge Hand: Yes.

Mr. Seymour: You are talking about——

Judge Goddard: That is one of the settled issues.

Mr. Seymour: For example, on block booking, if that is one of the issues your Honor is thinking about——

Judge Bright: Wasn't there a three-year limit to that?

Mr. Caskey: No, sir. Permanent.

Judge Bright: What was it the three-year limit was set for?

Mr. Seymour: My colleagues remind me that the three-year provision was a provision by which the Government agreed not to press the issues for divorcement for three years, and that three years have elapsed and the Government is now pressing both issues. There are certain other provisions which elapsed by reason of the Government's failure to get similar injunctions against other defendants not parties to the decree, and they concern such things as block booking, and as to those the decree has lapsed and yet the defendants who consented have been abiding by those lapsed provisions. And I suppose, your Honor, speaking for myself, I suppose your Honor could reinstate those lapsed provisions. Certainly the defendants who have abided by them propose to continue to abide by them, as far as I know, but the provisions on clearance and for arbitration of runs have not lapsed and are still in full effect, in order to be so continued.

ARGUMENTS ON BEHALF OF DEFENDANTS TWENTIETH CENTURY FOX FILM CORPORATION AND NATIONAL THEATRES CORPORATION

Mr. Caskey: If your Honors please, the discussion between Judge Bright and Mr. Seymour perhaps anticipated a portion of the case that I had planned to discuss because the effect of the consent decree, its history, its operation, play a very vital part in the ultimate decision to be made here.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

The history is important because it shows that the bargain of the Government was no improvident one. For many months prior to June 1940 there had been extensive negotiations between the representatives, not only of the Department of Justice, but the Department of Commerce and the representatives of these defendants. Those issues were not resolved and the case came on for trial in June. Opening statements were made and then successive adjournments were taken for a period of five months, during which the parties literally lived together and fashioned this decree.

The Government was represented by four negotiators, including the present trial counsel. The then Assistant Attorney General, who was a self-professed opponent of monopoly, intervened, held hearings, discussions, and issued public statements. And finally, on November 14, and 15, extensive hearings were had before this Court and, after consideration, the decree was entered.

The first portion of the decree deals with certain marketing problems that had risen out of the controversy of block booking and blind buying. Those procedures had been held lawful in this circuit, but, without disputation, five of the defendants agreed to a radical change in their method of doing business. First of all, they agreed that no picture should be licensed for exhibition to any exhibitor until it had been completely manufactured, a positive print actually made. They agreed, second, that it should not be offered to any exhibitor until it had been publicly exhibited for the benefit of all the exhibitors who would come, and an elaborate system of invitations for these trade showings was set up.

They agreed, third, that they would not offer at any one time more than five of these completely manufactured trade shown pictures.

Fourth: They agreed that they would not condition the licensing of one group of pictures on another; that the exhibitor might take one and be free to reject the other.

Fifth: They agreed that in the merchandising of their short subjects, their newsreels, their western or action pic-

tures, and the foreign made pictures which they distributed, that they would not force the exhibitor to take those by conditioning the licensing of their desirable features on the licensing of shorts and news, westerns and foreigns.

And sixth, they agreed that no license agreement with any circuit should embrace the theatres of more than one exchange area.

Now, these provisions were insisted upon by the Department of Justice, and on their face, as any reading of the decree will disclose, they are permanent. They were, however, subject to an escape clause. If the Department, contrary to its protestations and publicity, did not secure a like decree against the non-consenting defendants within a stipulated period, then these five were to be free of those requirements.

Now, the Department did not make——

Judge Hand: That means of all requirements under the decree?

Mr. Caskey: No, sir, of these marketing requirements that I have just listed; that is, these six marketing requirements and only those six.

Judge Hand: All right.

Mr. Caskey: Now, the Department did nothing to bring about any trial of the action against the non-consenting defendants. Mr. Wright, did not even say "boo" to Ed Raftery.

Mr. Wright: Boo.

Mr. Caskey: But the consenting defendants did not attempt to escape from those provisions of the decree, and they have continued during these years to market their product in accordance with the provisions of Sections 3, 4 and 5. They license no picture to any exhibitor until it has been completely manufactured, until it has been trade-shown; they license their pictures only in small groups, usually considerably less than five. There is no conditioning of the licensing of one group upon another, and there is no conditioning of the licensing of features upon taking shorts, newsreels, foreign, action, or western pictures.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

In good faith these five consenting defendants, despite the tremendous cost of doing business and the necessity of a greatly increased inventory have continued to observe the letter as well as the spirit of the decree.

Now, the next group of problems with which the decree dealt were problems which were trade practices which everyone recognized were essential in the conduct of the business, but which was alleged had been the subject of misuse or abuse and which could not readily be determined by the ordinary judicial procedure.

Now, talking about run, clearance and the practice of licensing on percentage and of entering into a contract specifying a minimum admission price, when Sections 6, 7, 8 and 10, dealing with these practices, were finally agreed to, they were agreed to in the light of the amended petition which framed the issues and which clearly show that in 1940 as well as yesterday, the Department of Justice was fully informed of all the vices that it says flows from a system of run and clearance; that the illegality was fully pleaded, was denied; and that the decree represents an adjudication on the issues made.

Let me call your attention to the specific allegations of the amended complaint: First it alleged that each theatre ordinarily plays all of the features it exhibits on the same run with the same clearance. That charge they made then they have repeated now.

They alleged, paragraph 113, that the incorporation of the provisions with respect to run, clearance and admission price had tended to stabilize the playing position and operating policies of the particular theatres from year to year.

They allege in paragraph 119 that uniform schedules of zoning and clearance are actually in effect in every exhibition territory in the United States.

They allege that the defendants have conspired and combined with each other concertedly to fix the run, clearance and minimum admission price on which any exhibitor in the United States may play.

And in paragraph 128 the whole nub of the Government's position was stated. I read it:

"The first-run exhibitor is also usually required to charge the highest admission price as a condition of securing a given clearance over subsequent-run theatres. Subsequent-run theatres could not normally play a picture so profitably at the same admission price as the first-run in view of the fact that they must play it at a substantially later date after the capacity of the picture to attract an audience from the particular clearance zone has been partially exhausted by the first run. The result is that the entire admission price, run and clearance structure of the theatres in a given town or city is subject to run and clearance terms fixed in license agreements betwen the major distributors and first-run exhibitors, and the availability to subsequent-run exhibitors of the most profitable features is determined by the manner in which the first-run exhibitor exercises his selective privilege. In recognition of this fact the producer-exhibitor defendants have uniformly refrained from operating subsequent-run theatres in towns or cities where they do not operate first-run theatres."

Now that reads just like good orthodox Wright.

And finally they say in paragraph 149c, the defendants have conspired and combined with each other concertedly to grant circuit theatres arbitrary and unreasonable clearance over competing independent theatres. As a result, independent theatres, in many instances, are unable to exhibit feature pictures until their novelty and freshness have worn off and their box office value has been seriously diminished, solely because earlier exhibition in the independent theatres would decrease the profits of a circuit exhibitor.

And there are like allegations as to the effect of the granting of clearance by an individual distributor.

Now I have adverted to these to show that in 1940 when this decree was entered there was no unexplored area. The Department was fully familiar with the effect of run and

clearance on this industry, it made these allegations and they were denied. And then what did the parties do? They entered into this agreement, approved by this Court, that run and clearance were essential, and they set up standards whereby the reasonableness or unreasonableness of the particular run and the particular clearance could be judged. They set up this arbitration system.

Now this arbitration system was prayed for, as Mr. Davis stated, by the plaintiff. I read the fourth prayer of the amended petition:

> "That a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the Court may deem proper be established pursuant to the final decree of this Court, in order to secure adequate enforcement of whatever general and nation-wide prohibition of illegal practices may be contained therein."

Now it is our position that these provisions are permanent. Let me read what the Assistant Attorney General said to this Court when he presented this section of the decree. Mr. Hayes said:

> "And I may say in that connection that it has long been felt, both by exhibitors and by distributors, that their eyes, as was their duty, the complaints of explaints concerning clearance than to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII. * * * Those of us who have worked on this decree after reviewing, as I said at the very beginning, the numerous industry problems in all their ramifications with the government representatives keeping constantly before there is no fairer way to handle and dispose of combibitors and the complaints of public groups, are of the opinion that the decree is a desirable forward step. We believe it will work. We believe it will produce good. We recommend the decree to your Honor."

In Exhibit 390, prepared by the American Arbitration Association, the details of the operation of the arbitral system are shown. First of all there is the complaint. A man who says that the clearance against his theatre is too long in time or too extensive in area, that he can't get the pictures as soon as he would like to have them. Then there are the intervenors, the people who currently have clearance over the complainant, and who certainly are loath to give it up. Then there are the representatives of the distributors with their books and records available for the arbitration. Then the arbitration—there are careful, patient, over-patient hearings, usually before trained lawyers, usually accompanied by an inspection of the competitive area and the theatres. There then follows the opinion of the arbitrators, many of them models of judicial writing. And if the parties are not satisfied there is the appeal, the briefs, the right to oral argument, and a complete review *de novo*.

How does the system work? Well, we have Mr. Braden's testimony to that effect. From February 1, 1941, through October 8, 1945, 416 cases had been filed, of which 343 dealt with clearance or with clearance in combination with some other portion of the decree.

112 cases were withdrawn and 21 resulted in a consent decree before the arbitrator, leaving 283 awards. In 177 cases, the decision of the Arbitrator granted the complainant some relief. In 106, denied it.

Of the 241 awards that deal with clearance, 161 granted the complainant some relief and 80 denied it.

Now this has not only been successful in its operation but it has been economical. As Mr. Davis so clearly pointed out and as the amended complaint and the consent decree show upon their face, the arbitration system was not set up as any bargain to protect us against divorcement or divestiture. It was set up with an honest purpose to solve these trade practice difficulties, and it has been supported by the distributors to the extent of expenditures of $1,347,000. And yet the average cost to the complainant who has pursued his matter

all the way through an appeal has been $48.62. We see no reason why there should be stricken down, and we think on the face of the decree that it is permanent, subject only to the power of the Court, under Section 23d, which enables any party to this decree to apply after a period of three years for any modification.

Mr. Seymour said it is impossible to state with absolute precision the legal requirements of modification. I think the law is pretty well crystallized in the two Swift decisions and in the decision in the Chrysler case. The modification must be bottomed upon a finding of illegality other than that which is said to arise from a following of the decree. In other words, it cannot be said that we are to be damned for having granted clearance since the entry of the decree, when the decree itself specifically permitted it. The Chrysler and Swift cases, as we see them, make it clear that any modification must be for the purpose of furthering the purpose and intent of the decree, and the modification must be one that does not do substantial injury to the defendants.

Now it is not a modification to change "Yes" to "No." It is not a modification to say that something which on this record, after these allegations, was lawful and legal in 1940, is no longer lawful and legal.

The remaining sections of the decree dealing with acquisition of theatres, which is Section 11, and the prohibition against the Government bringing this or any other action for divorcement within the three-year period, have expired. But there again, as the evidence clearly shows, there has been no program of expansion by these defendants. During the five-year period the amount of new theatres acquired has been inconsiderable, and when it was challenged by the Department of Justice a hearing was had and an adjudication in favor of the defendants resulted.

In connection with the operation of the arbitration system a great deal has been written. As I say, there have been 283 awards and many of them are quite lengthy. There have been 109 decisions of the Appeal Board and they range from eight to twenty pages.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

When the plaintiff made an application for a temporary injunction to modify the clearance sections, counsel offered all the decisions of the Appeal Board to the District Court for its consideration. During this trial, with the spell of advocacy upon him, he has selected only 21 and they are before your Honors. You will recall that we protested their admission, suggested that they were hearsay, that they were not binding upon us, we had had no chance to cross-examine, and the Court received them tentatively and provisionally. We think they should not be used as any evidence of the facts stated therein. We think they are, of course, useful to the Court as showing how the decree has worked, how the Appeal Board has patiently and painstakingly dealt with each of the problems that has come before it, but we do not think that they are any competent evidence of the facts that are stated in them; and I emphasize that because of what, it seems to us, is a peculiar unfairness in the plaintiff's brief.

The principal decision of the Appeal Board which is recited in the plaintiff's brief as proof of something that has to do with the situation down in New Orleans, or in that vicinity, in which there was a race of diligence between two exhibitors in erecting theatres, and the complainant filed a complaint that he did not get the product which he thought he should have, and that is quoted against us by the plaintiff's counsel. We think it a little unfair that the plaintiff's counsel did not state that as to two of us, we gave the complainant exactly what he wanted, and we think the attempt to use these Appeal Board decisions against those of us who were not even parties to the decision is an inadmissible substitute for testimony.

Judge Hand: Aren't the true facts, whatever they are, to be shown by the record so far as they relate to this case? That is, through answers to interrogatories and things like that? Does this make any difference? Are you just trying to get a ruling on an exception on evidence?

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres :

Mr. Caskey: Not at all. We don't want any exception at all. We are not complaining from the evidence point.

Judge Hand: You are merely confirming the correctness of the new rules in that respect.

Mr. Caskey: What I mean is this: Let me put it this way. The plaintiff has avowed that it was trying a paper case; that it was not putting in any proof of specific misconduct or any proof of specific discrimination which, if it had embarked upon, it would have had to call living witnesses and subject them to the hazards of cross-examination.

Now, we say, having elected to proceed on that broad course and having announced that purpose, it is not appropriate to have just a teeny little bit of evidence of discriminatory practices through these Appeal Board decisions when what is stated is stated in an opinion that does not deal with an antitrust problem at all but with simply the the review of a business judgment.

Now, I can give you one example that I think will solve the whole matter: There is a very beautiful suburb of Boston called Winchester, and the fathers for many years kept all theatres out; but eventually they yielded, and a new theatre was built, and it was within a few miles of some eight or nine other theatres. The operator was dissatisfied with his playing time, and he brought an antitrust suit in which he alleged combination and conspiracy to restrain trade, and so forth. Under the Massachusetts practice it was referred to an Auditor, and we had the good fortune to have as Auditor the Honorable Hugh McClellan, sometime District Judge. He recommended that the bill be dismissed.

The plaintiff was still not satisfied; and as it had the right to do, went before a jury. The verdict was for the defendants.

Then and only then they filed a complaint to the Arbitration System, and the Arbitrator, freed of the legal requirements of the Sherman Act, and simply sitting in review of what the distributors had done, made quite considerable changes in the clearance that affect the Winchester theatre. And when it got to the Appeal Board, they tried their hand

at it and they set up another and somewhat more complicated system.

Now, we say that certainly, having won an antitrust suit on the very issue of whether we had conspired or combined to grant an illegal clearance, that the decision of the Appeal Board modifying the clearance at some later time is certainly no evidence that there had been any violation of the Sherman Act.

Now, in the few remaining moments which I have, I desire——

Judge Hand: I think you take this item of argument rather too seriously.

Mr. Caskey: Well, then, that disposes of it.

Judge Hand: In other words, we are entitled, it seems to me, to have a picture of what this Board that has worked very well did.

Mr. Caskey: Certainly.

Judge Hand: And not fuss too much over the details, which we should not.

Mr. Caskey: That is quite correct, sir.

Judge Hand: I do not believe the Government would expect us to. They called attention to some features in the picture, and you could call attention to others.

Mr. Caskey: But what I am saying is, sir——

Judge Hand: We are not accustomed to reading any more, in suits of this kind, than we have to, or in ruling out a lot of stuff in evidence. It does not do any good. If it does not take too much time, in it goes.

Go ahead.

Mr. Caskey: Now, in the second part of my argument I want to discuss very briefly the position of Twentieth Century-Fox and its theatre-operating affiliates in the industry.

It is no longer necessary to discuss the problem of individual monopolization. Twentieth Century-Fox produces something like 9 per cent of the feature pictures produced in

this country and distributes a somewhat lesser percentage of those which are distributed. Revenue from all the theatres in the United States including its own is less than 15 per cent of the total revenue. While, naturally, we urge that it produce the good pictures, obviously it does not produce all of the good pictures. It has no monopoly position.

So the plaintiff is compelled to resort to a claim of combination which, as has been stated yesterday, means agreement. Now, it does not mean agreement in the sense of a signed document, but it means agreement in the sense that a plan or arrangement has been assented to, and it means agreement in the sense that there is some defined program. Certainly, an agreement among these defendants to sell to each other whenever they wanted to is no such agreement. It seems to us that the only agreement which could possibly be spelled out of the claims of the plaintiff is an agreement that we will deal with the other four companies wherever they are located, and that we will refrain from dealing with others in those situations.

Now, of that agreement there simply is no evidence and there are no facts from which the inference of any such agreement could be made. The market which we have been asked to test is this rather artificial market conceived by drawing a line under a hundred thousand and taking the 92 cities which were above it. Obviously, some of those cities are not key cities in any commercial sense. Obviously there are other cities of smaller population of greater importance. But taking what was tendered, we find first of all that Twentieth Century-Fox has an interest in theatres in only 17 of those cities, and that includes Philadelphia where its theatre during the 1943-44 season, for which you have statistics, was operated by Warner Bros. Of course, in those cities, to the extent that the screen time will absorb the product, National exhibits the pictures of Fox, and Fox does not license them first run elsewhere. But here in New York where the Roxy Theatre is unable to show them all, then Twentieth Century pictures are licensed to independent first-run the-

atres, and often in direct opposition—that is, often an independent on Broadway will be exhibiting a Fox picture at the same time that another Fox picture is being exhibited in the Roxy Theatre.

In four of the cities there are no affiliated theatres at all, and we deal as we must with those who have the independent first-run theatres in those communities.

So that is 21 cities, leaving 71. If the plaintiff's fundamental basis has any validity; if this cross-licensing or diagonal-licensing or sharing screen time, or whatever it is, is to be sustained, we should find that in those 71 cities in which there are affiliated theatres, Fox deals with them and refrains from dealing with others.

Now, the fact is to the contrary. In 17 cities in which there is an affiliated theatre of one of the defendants, Fox deals with an independent; and in 6 cities in which there are affiliated theatres of two or more defendants, Fox deals with an independent. So that there are 23 out of the 71 cities in which there are affiliated theatres but where Fox has chosen to deal with some other exhibitor, an independent exhibitor, and for the reasons set forth in Mr. Kupper's testimony.

Now when we turn to the National situation we find exactly the same lack of pattern. As I have said, during the year for which the statistics are available, the Fox Theatre in Philadelphia was leased to Warner's. But taking the other 16 cities, what do we find? The first thing we find is that in 11 of them National Theatres does not license Warner first run product at all. In 11 out of 16 we license no Warner product. In 5 out of 16 we license no Loew product. In 6 we license no Paramount product. In 8 we have no RKO product. In 11 we do not have Columbia. In 9 we do not have Universal. And in 7 we do not have United Artists.

Now, we appreciate that in some of these cities the reason that we do not have the product of the particular distributor is because it has a theatre in competition with ours. But our point is that there simply is no pattern, there is no relationship between what Twentieth Century-Fox licenses the

other four companies and what National Theatres licenses from the other four companies. There is no way in the world in which you can sit down and write out what this combination and conspiracy is, because the conduct of the parties is so at variance with any preconception as to show that there are no factual bases for any inference or conspiracy.

We put on, by stipulation, the testimony of the managers of the five principal divisions of National Theatres. They testified, uncontradicted and in detail, not mere generalizations, that in the licensing of motion pictures they are motivated solely by the purpose to secure the best pictures they can; that the fact that the particular distributor with whom they are dealing has or has not theatres is of no concern; that in licensing pictures for their theatres, they are not the least concerned, or informed, indeed, as to the distribution problems of Twentieth Century-Fox; that their theatres, which they license pictures for first-run, are either the best or comparable to the best in the community; that they are in direct and vigorous competition in every one of the 17 cities in which they operate except one, which is Wichita, Kansas, with other first-run exhibitors, and in Wichita they are in direct competition with a considerable number of other theatres.

I want to speak only a moment about the so-called pools or arrangements between two defendants. National has an almost irreducible minimum.

As the testimony shows, many years ago Loew's leased a theatre in Los Angeles and a theatre in San Francisco to Fox West Coast Theatres. That was before Twentieth Century-Fox had any interest whatever in that company. It had continued to lease and still operates those theatres under a flat rental. Certainly there can be no intent to eliminate competition in Los Angeles or San Francisco by purchasing stock in 1928 in a company which in 1924 had leased a theatre from Loew's.

The San Francisco situation has been fully explained by Mr. Seymour. There was a deal which was not negotiated by

theatre men. It was negotiated by two sets or two groups of trustees in bankruptcy and approved by two different bankruptcy courts. Of course, that does not give immunity under the antitrust laws, but I do think the two distinguished District Judges would be somewhat surprised to have it charged that they were attempting to restrain competition.

Then in Kansas City what is the situation? Years ago the so-called Junior Orpheum Circuit built the Main Street Theatre in Kansas City. They spent a lot of money, but they built the theatre off location. And when vaudeville ceased to be profitable, RKO was unable to successfully operate it. For a very few months in 1936 there was a playing arrangement in Kansas City in which a number of theatres were operated together. As a result, there became available for the Main Street Theatre a choice of the product of many distributors, but the result was unsuccessful. RKO gave up the theatre, that is, the lease on it, and it reverted to its owners, and that was the end of it, and the theatre was closed. But in 1942 there was a war on, and there were boom times in Kansas City, and a real estate agent came to Fox and said, "I can get you the Main Street Theatre—the fee of it—very cheaply." So National said, "Well, if you can do that, of course we will take it." And the agent had spoken without authority and we ended up owning one-half of the theatre, an undivided one-half interest and somebody else owning the other half. We immediately commenced a suit for partition and when the answers in the suit for partition came in, we learned that the people who had bought the other half—and I will not characterize their action—was RKO.

I do want to say a few words about Mr. Wright's conception of the real estate law in Missouri, which is about the same as that of his antitrust law. In Missouri, when you have a partition suit of a building, you do not cut it in half. A master in chancery is appointed and he takes sealed bids

from each party, and then they have a court hearing as to whether he shall sell it to the higher of the sealed bids from the two parties, or shall sell it at public auction and divide the proceeds among the parties. So I assure Mr. Wright that there will be no surgical demolition of the Main Street Theatre because of the partition suit.

I do not propose to argue the interstate commerce point, because it is wholly immaterial. I do point out that the theatre was closed and had not been operated for several years prior to the time when Fox acquired an interest in it, and that there is no kind of arrangement, agreement or understanding at all with RKO.

Finally, I want to come to these so-called closed towns. I do not want to repeat what Mr. Seymour said. Our situation is this: National has the only theatre in 16 towns. They have an average population of less than 5,000. We haven't got any quite as small as Smakover, but I will tender Delta, Colorado, as a fair example. We have two in California, five in Colorado, one in Illinois, one in Montana, one in Nebraska, two in Wisconsin, and four in the Michigan Peninsula. That is 16 local monopolies. We paid, during the 1943-1944 season an aggregate film rental to all distributors, including Fox, of $25,000,000. I estimate that the film rental paid by these 16 theatres did not exceed $25,000. It is an infinitesimal fraction of one per cent. The ownership of these closed towns certainly gives National Theatres no economic power which enables it to discriminate or to compel anybody to do anything they should not do.

Finally I come to this issue of discrimination. We say that however broadly the record may be construed, whatever may be to this Court's conception of discrimination, whether it is discrimination to sell to one man for five dollars and to another for six, which we think is not, but however the word "discrimination" be construed, there is not one sentence in this record that National Theatres Corporation has been guilty of any act of discrimination against anyone. There

is no evidence that National Theatres in the operation of its motion picture theatres has ever licensed a single picture which it did not need. There is no evidence that the admission prices which it charges the public are high or too high and have kept anyone from seeing any picture. There is no evidence that any motion picture produced anywhere has been excluded from the screen. There has been no act of engrossing. So we say that failing proof of combination, there have certainly been no acts of monopolization.

Argument on Behalf of Defendant RKO

Mr. Leisure: May it please the Court, the general proposition of law and many questions of fact common to the five individual defendants have been so ably covered by my distinguished associates, that I will confine my remarks to the evidence particularly affecting RKO.

The Government charges that each of the integrated defendants is in and of itself a combination in restraint of trade. There is also the charge that certain trade practices are illegal per se, but I believe there can be no doubt that the main charge against the defendant I represent is that RKO has knowingly and wilfully agreed to enter into a combination and conspiracy with the other integrated defendants to unreasonably restrain interstate commerce in the distribution and exhibition of motion pictures.

I come, therefore, directly to that point. The Court will find no evidence of any such combination and conspiracy in this voluminous record. The Government tendered no testimony or presented no injured parties for cross-examination in support of any such charge.

In respect of this charge, the Government has pitched its entire case upon the single contention that the course of dealing between the five integrated defendants presents evidence from which this Court could and should find evidence of discrimination.

As Mr. Davis pointed out in his admirable statement of yesterday, so sure of his position in this respect is counsel for the Government, that he passed over all such details as proof of the charges made, and he has advised this Court on the very face of his brief that the only matter with which it need concern itself is the nature of the penalty which he seeks to guide the Court in meting out to these defendants.

If I can but make clear what RKO's dealings have been with these other integrated defendants and the reasons for those dealings, I have every confidence that this Court will be fully able to apply the law governing relief without any help from either side in this litigation.

Specifically, the course of dealing that the Government complains about is that which the Government terms "cross licensing". Because of this course of dealing between the integrated defendants, Mr. Wright charges that they have agreed to favor each other in the selection of their first-run outlets to the exclusion of the so-called independents.

Now, does RKO favor affiliated theatres and discriminate against independents in the distribution of its priduct? Well, if it did, one would expect to find in this record evidence that RKO in some way sought to exclude the independents, or, at least, made some appreciable difference between the independents and the affiliates in the licensing of its film to them.

The record discloses no such discrimination. It shows something very different. It shows the fact to be that out of this test group of pictures for the 1943-44 season, in the very cities selected by the Government, both the 92 cities and those having a population of 25,000 and over, approximately 50 per cent of RKO's product was to be found in the affiliated theatres and approximately 50 per cent was to be found in the independent houses. The exact figures are: 47% in the independent houses and 53% in the affiliated houses; in other words, a variation of only 3 per cent on either side of the line from an absolutely equal division between the affiliates and the independents. And

this figure becomes even more striking when we consider that the Government claims that 71 per cent of the first-run theatres in these 92 cities are owned or operated by the integrated defendants.

Now, quite aside from this showing as to RKO's product in these 92 cities selected by the Government, let us look at the cities. Did RKO discriminate against the independents in those 92 cities? The record does not show any discrimination. It shows that in 27 out of the 92 cities, RKO owned or operated its own theatres. There is no discrimination in cities where RKO operates and shows its own pictures in its own theatres.

In 24 out of the remaining 65 cities, RKO licensed all of its product to the independents. I suppose even Mr. Wright would not contend that there has been any discrimination where RKO licenses all of its products to the independents.

In six of the remaining 41 cities, RKO divided its product one-half to the independents and one-half to the affiliates; so there is no discrimination in those cities.

In the remaining 35 out of the 92 cities RKO licensed its product to the affiliated theatres, but the record shows that there was no discrimination against the independents in the selection of these affiliated theatres. In fact, the evidence is not even disputed that these were the best available theatres in this vicinity. Specifically, the record shows that in more than 75 per cent of those 35 cities the affiliated theatres were at least 22 per cent larger than the independent theatres, and in many instances from 70 per cent to 190 per cent larger than the independent theatres. The record further discloses that the first run of affiliated outlets selected by RKO averaged 16½ per cent more revenue than the independent outlets averaged.

Now our general sales manager, Mr. Robert Mochrie, testified that in many instances RKO had actually taken its product away from affiliated theatres and licensed it to independent houses. Buffalo, New York, Salt Lake City, and

Oklahoma City were cited as specific examples. The Government did not seek to dispute this testimony either on cross-examination or by calling witnesses of its own to contradict it. Neither did the Government seek to show that RKO had ever taken product away from independent houses and licensed to competing affiliated theatres.

As was said by Mr. Whitney Seymour this morning, with the industry that counsel for the Government have shown in this case, I submit that such testimony would have appeared in this record if an army of United States Government accountants had been able to find a single instance of any such discrimination on the part of RKO, agreed to, or as an isolated transaction, tacit, or in writing.

Now there is also the charge in this case that the integrated defendants have agreed to favor each other in respect of the length of playing time and as to the quality of pictures licensed to the independents. Mr. Seymour I thought covered that beautifully this morning from the general standpoint. Let me be specific one second, and I can leave that part of my argument completely out, because it has been covered.

Here also the Government used as its test the first block of pictures for the 1943-1944 season. As to whether RKO did discriminate against the independents in playing time, let me point out to the Court what happened to that first block of pictures. The best picture in the block averaged six days in the affiliated theatres and it averaged six days in the independent houses. The next best picture averaged five days in the affiliated theatres and it averaged five days in the independent houses as well. The next picture averaged four days in the affiliated theatres and it averaged four days in the independent houses as well.

Now what happened to the two least successful pictures, which accounts for the entire block of five pictures? Were they palmed off on the independents for longer playing time, as Mr. Wright suggests? Not at all. The record shows that they averaged four days in the affiliated theatres, but they

only averaged three days in the independent houses. In other words, they were actually given longer playing time in the affiliated theatres than they were in the independent houses.

The record shows that the affiliated theatres licensed only 55 per cent of RKO's best product.

I have already pointed out that they licensed 53 per cent of all the product. I think a variation of two per cent is *de minimus*. Frankly, I have no fear that this Court will find that that a variation of two per cent in a nationwide distribution is the character of evidence which will support an inference of collusion.

Now if the Court please, those are the important charges of discrimination made against RKO as a distributor. I come now to the charge that RKO as an exhibitor has discriminated against the independents.

There is no evidence of any such discrimination in this record. The Government seeks to explain the absence of any proof of this charge by the suggestion in its brief that the integrated defendants naturally favor each other's product. What does the record show? Let's see whether RKO just naturally discriminated against the independents.

A nationwide survey of all RKO theatres during this 1943-1944 season shows some very interesting things on that:

It shows that RKO exhibited nationwide more Republic features than it did Loew's features.

It shows that it exhibited more Monogram features than it did Paramount features.

And it shows that it exhibited more Universal features than it did Fox and Warner features put together.

In other words, less than one picture out of every three pictures came from the other integrated defendants.

Now that is the record if your Honors please. I submit that such a record not only fails to support any charge of discrimination but it demonstrates that RKO could not have been a party to any understanding or agreement to injure the independents either in the distribution or in the exhibition of its pictures.

Mr. Leisure on behalf of Defendant RKO

I now come to the second general charge in this case and that is the charge that RKO is in and of itself a combination in restraint of trade. As this Court well knows, the Supreme Court has consistently held that the legality of any consolidation turns upon two important and main question,—first, its purpose, and second, the effect of its operations. I have reference to the Appalachian Coal case, the American Tobacco Company case, and the Standard Oil case.

Now, RKO's purpose was clearly shown in the record. Coming into a very highly competitive field was its purpose, and that is shown in the record, and I can save thirty minutes of the Court's time by not reviewing that because it is very clear that it's purpose was to come into the competitive field of producing, distributing and exhibiting motion pictures.

So coming down to the effect, what has been the effect of RKO's integration?

Well, as a producer, it has expanded from an almost nonexistent competitive factor to one of vigorous competition to the other four integrated defendants. It has neither the power nor the will to exclude other producers of motion pictures. The Government has not even suggested that it has such power or has even attempted to exercise it.

Now, what about the effect of its operations as a distributor? I submit that the record is clear. RKO has never attempted to exclude the independent producers. On the contrary, as the youngest and the smallest of the integrated companies, it relies upon the independent producers for more than 30 per cent of its film revenue.

The testimony of its president, Mr. N. Peter Rathvon, and its general sales manager, Mr. Robert Mochrie, remains unchallenged and uncontradicted in the record that RKO has always afforded a substantial outlet to the independents for the distribution of their product.

For a period of nine years down to the close of 1944, RKO has depended upon the pictures of independent producers for approximately one-third of its gross revenue.

Now, finally, what has been the effect of the operations of RKO as an exhibitor? Well, has it shown any tendency in this field in the direction of monopoly, as Mr. Wright suggests? It owns 106 theatres today. It has 50 less theatres today than it had when it entered the motion picture field in 1928. Does that look like any desire to monopolze motion picture theatres? Either RKO has no such desire as has been ascribed to it, or it has been missing some wonderful opportunities during the years that these theatres were being built.

Neither the size nor the competitive strength of RKO indicates any tendency in the direction of monopoly. As a producer it produces less than 8 per cent of all the feature motion pictures released in the United States. As a distributor, it distributes approximately 8 per cent of all the feature pictures distributed in the United States. As an exhibitor, out of every 1000 motion picture theatres operated in the United States in 1944, RKO operated less than six theatres. If there is such a thing as evidence, we think that this record clearly shows that the formation and present operation of RKO promotes, rather than restrains, competition.

I respectfully submit that every charge that RKO has entered into a combination and conspiracy with the other integrated defendants collapses under the impact of the facts in this record. The record stands unchallenged that RKO without its theatre holdings could not have emerged from receivership in 1940, or have expanded its production in 1942 and 1943. Therefore, it cannot be disputed that the mere fact of integration has enabled RKO to appear today as a substantial competitor in the motion picture industry.

The operating efficiency of the showcase theatre as a means of exploiting and advertising our product stands unchallenged in this record. The Supreme Court has persistently held that an efficient method of marketing a product should be encouraged and not condemned.

There is no evidence of predatory practices on the part of RKO such as led the Supreme Court to strike down the

combinations condemned in the Interstate, the Crescent, and other cases relied on by the Government in this case.

There is no evidence that RKO anywhere or at any time either coerced exhibitors to sell their theatres to it, or in any other manner impaired their fullability to go out and erect or buy or get all the theatres they wanted to get.

There is not even any attempt to bring out any such facts of predatory practices against RKO which runs through all these other cases.

And lastly, I submit that this record is unique it its total absence of any evidence to show that any person has ever been injured in any respect by RKO, under any of the charges contained in this complaint.

Judge Hand: We will take a recess now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION.

ARGUMENT ON BEHALF OF THE WARNER DEFENDANTS.

Mr. Proskauer: May it please your Honors, for the better part of a day I have heard my colleagues on this side of the counsel table indulge in a process of what I personally regard as murder as a fine art on the Government's case, and it might occur to your Honors that in view of that demolition, I might fairly temper the wind to the shorn in court and say the rest is silence. But I have a definitive objective in speaking. I am going to indulge in the task of trying to find the pattern in the Government's argument and follow through the labyrinth the maze of obscurities and contradictions which have characterized the presentation, in the endeavor to demonstrate finally to your Honors that there is no cause of action proved here.

First, I direct your attention to the question asked by Judge Bright this morning which related to the power of this Court with respect to the consent decree. First let me

say that it is obvious to your Honors that none of these defendants seek to avail themselves of the three-year escape clause. We have abided by the provisions of the consent decree from which we had a right to escape in view of the Government's inaction which reached its climax this morning when Mr. Wright finally got himself to say "Boo" to the three non-integrated defendants. So that if your Honors see fit to continue those provisions it is my submission that you have a perfect right to do that without any finding of law violation against us.

Second, with respect to the arbitration provisions I take it that a court always has a reserved power to perfect a plan formulated in a consent decree, and if the Government, as I shall point out later in another connection when I come to speak of remedy, had seriously undertaken to try to meet any criticisms suggested either by the Appeals Board or by the Court in the details of the arbitration provision, and if this Court should believe that there was anything that could be done to make that machinery even more effective than it concededly has been in the administration of this industry, you will find us ready and willing to consider, when the opportunity is given us, any suggestions that may be made in that regard.

Beyond those two things, which I think are within the reserved power of the Court—and I am speaking for myself alone—the effect of this consent decree is to my mind, and I read a few words from the Swift case (286 U. S. at 119):

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions, should lead us to change what was decreed after years of litigation with the consent of all concerned."

Before you can do what Mr. Wright has suggested, throw this consent decree in the waste basket, I suggest that in respects other than the two to which I have referred, you must find a clear showing of grievous wrong evoked by new and unforeseen conditions. So much for the consent decree.

Has there been a grievous showing of wrong? And from this point on, I shall argue as though there had been no consent decree. I grasp the nettle and take the challenge which the Government has offered.

There has been a curious inconsistency in the presentation of the Government's case. One aspect of it sticks out like a sore thumb when you read their brief. "Collectively" is the word they use, and there they base all their claim for relief on the assumption rather than the proof that "collectively" means conspiracy, an agreement to restrain or monopolize.

And at various times during the trial the Government has offered the issue on that phase of the litigation. At other times, and particularly in his summation yesterday, Mr. Wright discards that and he says, "We are not relying on proof of detail or specific agreement or on inference," but in somewhat high sounding phrase he says, "We rely on the principle of law that the integrated industry is illegal per se." I wont burden your Honor with reading from his oration of yesterday.

At one time during this trial, when he evidenced such a theory, there was a spectator in this courtroom who uttered what I think is the most significant bon mot I have heard about this case. There has been great competition among defense counsel to use that on argument. My colleagues finally generously conceded that I had the right to use it because the spectator was my son-in-law, a young Naval officer. When he heard Mr. Wright, and I asked him how the argument appealed to him, his answer was, "It seems to me that the Government's charge is that the moving picture industry is monopolizing the motion picture business," and that is exactly what it comes down to.

And I desire to examine it objectively, and I hope fairly, to demonstrate that in that presentation of his case Mr. Wright is treading on quicksand. What is this talk about illegality per se? Well, the first thing he objects to is integration. There is no harm in integration as such. I read two statements on integration, one from Mr. Justice Holmes,

"The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels." (227 U. S. at 217-218). And then in another case, which approximates very closely to this case, the Eastman case, where the Eastman Company, making almost all of the film that is used by motion picture producers, sought to go into the business of producing motion pictures, Judge Hough, than whom there was never a greater mind to sit upon this Court, used these words (7 F. 2d at 996):

> "Since corporate power exists, it was not and is not unlawful for Eastman Kodak Company to equip itself for, or enter upon, the business of making pictures, but it was and is unlawful for the Commission to order that company to divest itself of the factories and laboratories so lawfully acquired. * * * it is fundamental just now in this country that competition is holy * * *"

It does not follow from what I have thus far said that there are not forms of integration which are illegal, and therefore I think my next step should be to consider with your Honors what is it that makes integration legal or illegal? I find the complete answer to that in one case. That is the second Standard Oil case, the one which had to do with the attempt of the Government to prevent consolidation between the Vacuum Oil Company and the Standard Oil Company after the decree of dissolution against the Standard Oil Company had been made (47 F. 2d 288). And I believe I can help your Honors if I will run through that opinion and approximate what it says to the facts which are here before you.

First: "The industry, as a whole, is thoroughly into the stage of integrated companies," says the Court, which means that such a company owns or controls production, pipelines, and so forth.

That is true here. This industry is in a thoroughly integrated stage where for many years companies, for reasons which have been described to you in the testimony, have produced, distributed and exhibited motion pictures.

What is the criterion by which that should be judged? The Court says that "the superior business position of such an integrated company is evident." Mr. Wright seemed to argue yesterday that if we made an appeal to you to take into account the valid business considerations which prompted integration, that we were asking you to say that a course of conduct was legal merely because it enabled us to make money. I repudiate that argument which he puts into our mouths, but I do say that as Judge Hough pointed out further in that Eastman case, competition is not impaired; it is increased by integrations which make for business efficiency; and unless you can show that by reason of that integration there has been either by predatory practice, by invidious and planned and systematic discrimination, an exclusion from the market of people vi et armis, this Court says that the fact that integration gives a superior business position is a factor that you have a right and a duty to take into account.

What is the next thing that the Court said in that case? I read these words: "It is not of their making and is beyond their control. It is a business current which they cannot successfully oppose. It cannot be ignored in judging their actions and the results therefrom."

That is this case. How did these companies come to be integrated? You have heard the story from my brother Seymour. The independent exhibitors ganged up on the old Paramount, and Paramount met the ganging up by buying theatres and running them itself.

You have heard the story of how Warner got its theatres. We got our theatres because as a struggling infant, young company, we were being throttled in the production of talking pictures and sound films by the great companies which some of my brothers here represent. And we wanted—and I ask you to read the story both in the testimony of Mr.

Keough and in the testimony of Mr. Harry Warner—we wanted and bought theatres for the purpose of enabling us to produce sound pictures which, except for our ownership of those theatres we would have been wholly unable to produce. So I give you, therefore, the second parallel. It is a business current that cannot be ignored in judging our actions.

What is the third consideration? The Court says: "From the above it is clear that there are sound business reasons for this merger which are entirely sufficient and are wholly unconnected with any design to create a monopoly."

That is this case. Certainly it would be piling Ossa on Pelion for me to repeat at this stage of the argument the business reasons which have been developed here, valid business reasons, harming no one, for the integration of this industry, and which have not anything in the world to do with monopoly or restraint of trade; and I shall come to that phase of this by and by.

Then there is another and somewhat more incidental phase. It was developed in that Vacuum-Standard Oil case that those companies were engaged in a foreign business, and the Court used these words, strangely and prophetically applicable to this case: "The plaintiff objected"—that was the Government—"to all evidence as to foreign business" and it said that "the act does not govern foreign trade. We cannot agree. While, of course, the act is not designed to have extra-territorial effect, yet that does not render this evidence immaterial. We do not judge violation of the decree by the effect of the merger upon foreign trade, but the business of each of these companies is a unit, and each has an important foreign trade as an integral part of that business. This is so because the industry is not a local nor even a national matter, but it is world-wide, because there are various companies engaged in it, the trade of which is world wide, and "because the tendency in the industry is to aspire to and to acquire worldwide trade."

And the importance of that I think has not been sufficiently emphasized in this case. The evidence is that for the most part these companies would not break even if it were

not for their foreign business. And how do we hold that foreign business? We hold it because we make the best pictures and at this moment we are fighting with our backs to the wall to hold it against discriminatory laws which are being enacted in Europe. And strike down that profit which comes to us from the ownership of theatres that enables us to pay a million, a million and a half, and two million dollars in the production of the great pictures and you deprive not only us of that foreign market; you deprive this country of that foreign market. And at every stage of what I am saying to your Honors I am going to ask you to observe that I take Mr. Wright's criterion of the public interest. The public interest is an essential criterion in the determination of this case, and it is the uncontradicted evidence that to strike down the integration of this industry is to deprive this country of a return of millions of dollars, many millions of dollars, that come in here every year in return for nothing more substantial physically than a few sheets of celluloid.

Mr. Wright: Where does that appear in the record, Judge?

Mr. Proskauer: Well, Mr. Wright, I am not here under cross-examination. You will find the testimony in Mr. Harry Warner's testimony, and I cannot give you the page at this moment, and you will also find it in Exhibit W-5. And it would give me great pleasure if you asked me that after I finished.

Mr. Wright: I am sorry, but you have my record.

Mr. Proskauer: If you want your record, you can have it. I am using this record for the most useful purpose it has ever been put to. Do you want it back?

Mr. Wright: I would like to look at it.

Mr. Proskauer: You have said your "boo" to me. Now let's go on. Take it all.

Mr. Wright: I hate to interrupt you, Judge.

Mr. Proskauer: Nothing you can say will make me cease to love you even though I despise your argument.

Mr. Proskauer on behalf of Defendant Warner

I am sorry for the interruption, your Honors.

I want to go ahead with that case, showing always the parallel between the integration there specifically sanctioned by the Court and the integration which we have here under attack. Competition? What the Sherman Law does is to forbid unreasonable restraints on competition, and this is what that Court said:

> "The round situation is that while Socony was formerly the thoroughly dominating concern in this territory, and while it still has more business and outlets than any other company therein, yet competition of all kinds and in all localities has entered and thriven and is participated in by rivals ample able to take care of themselves."

Whether you think of Warner Bros. alone or Warner Bros. as a link in this imaginary chain of five integrated defendants, that is true in this case. It is true in every phase of this case. There are, as I remember the figures, and I state them subject to immaterial correction, approximately five thousand more independent theatres in this country than there were in 1935.

Warners have not increased their theatres. Loew's and RKO have not increased their theatres. Paramount has increased only by that device that you know of, the so-called partnership with people all over the country. Has anybody come here to say that there isn't ample competition in the growth of theatres—independent theatres—in the exhibition field? In the production field?

We have Mr. Wright's concession that there is no monopoly in production, but I am not content to rest on that concession. I am inviting your attention to the evidence which shows the growth of these three little fellows over there and of P.R.C. and of Monogram, and I quote Mr. Wright substantially when I say that he conceded that no

man who had the ability to produce a decent picture had the slightest difficulty in having it exhibited.

If you challenge me on that, Mr. Wright, I will find it.

Mr. Wright: Yes, I do. Where is that?

Mr. Frohlich: Montague's testimony.

Mr. Proskauer (Reading): "I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in its intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed." (R., p. 1949).

That is what I am referring to, Mr. Wright, and I think I fairly paraphrased it, and I don't wonder that you express surprise here at the fact that for once you did make an absolutely clear concession of an indisputable fact.

And I should like to be free from that kind of interruption. I am not accustomed to misquoting concessions or testimony.

There too, as here, the integration related to a business that controlled the ultimate retail outlets—some of the retail outlets, just as here, where we own some of the theatres that are the ultimate retail outlet to the public for the exhibition of these pictures.

Intent? Let's see what intent has got to do in determining whether integration is illegal *per se*.

"There is no direct evidence in this record of such an intent to restrain commerce." I repeat, there is no direct evidence in our record of any intent to restrain commerce. "The only direct evidence is to the effect that the intent and purpose of this merger is to meet the normal and natural business interests of the two companies brought about by the development of, and the changed competitive and business conditions in, the industry." That, I submit, is a fair statement of the evidence of all the defendants' witnesses in this case, uncontradicted and unchallenged; and while I am not unmindful of the observation made by Judge Hand during this trial that a court was not going to be too much influ-

enced by general denials in abstract terms by officers, I advance for your consideration the suggestion that you cannot ignore those denials, and that positively instead of negatively they are entitled to the very greatest weight when they are fortified by the mass of detailed and specific evidence adduced here to which it will be my privilege in a moment to advert.

Lastly, what is it in its effect on restraining commerce that makes an integration legal or illegal?

Says the Court, "The Supreme Court has construed the purpose of the Act to be to prevent monopoly by preserving that character and degree of competition which will prevent monopoly. This has been variously expressed as 'undue' restraint or 'unreasonable' restraint of trade or of commerce." And then it quotes from a dissenting opinion of Mr. Justice Holmes with approval, this phrase:

"This idea has been succinctly expressed by Justice Holmes as 'a combination in unreasonable restraint of trade imports an attempt to override normal market conditions.'"

We have attempted to override no normal market conditions, as I shall prove when I come to consider the second phase of this case.

Why does Mr. Wright resort, in the last stages of this case, to a return to a somewhat ecstatic amorphous dissertation on trade practices of integrated industry? Judge Hand during this trial referred to a book, "The Age of Jackson" where everybody thought everything was a monopoly, and it is that kind of ecstacy which seems to pervade the thinking of those who stay a long time in the Antitrust Bureau. From that same book I culled a statement and put in my brief a phrase, "A doctrinaire preference for deductive logic over facts."

When you consider that first horn of the dilemma on which I am seeking to impale the Government, namely, this general idea that there is something illegal *per se* in integration, I believe you will come to see that that aptly describes

the approach made here yesterday in Mr. Wright's summation.

Why does he do that? He does it because he has realized the breakdown of the Government's case on the other theory he advanced and which he bases on the uses of the word "collectively." And at the risk of some repetition, which I will reduce, I assure your Honors, to the minimum, I desire to examine what the evidence here is to sustain the use of that word "collectively" in its legalistic sense, its legal sense; namely, of a conspiracy. And I am going to try to put the case to your Honors, not repeating, but referring to the factual statements that have been adduced by my colleagues, in an integrated hole. I am arguing to the fact finders now. You are my jury.

What is the evidence of collectivity? Let us just see. The suggestion is made that we are engaged in a conspiracy. There is no direct evidence of it, as everybody has conceded. What are the facts from which he endeavors to infer it? First, it is conceded that there is no monopoly with respect to production. Second, the concession that I just made from Mr. Wright has been made. Third, and I refer again to the public interest, it is conceded that every member of the public can see every picture, no matter how great or expensive, for a trifling admission cost, if he is willing to wait. If he wants to see it right away quick, he will go to one of the big, expensive theatres and pay 75 cents or a dollar or more to see it. It is conceded, and I measure my words when I say "conceded", that there is profound competition among the defendants for film revenue and the box office dollar. And Judge Bright asked a question yesterday which sticks in my mind with reference to the proof on that subject. Could you have any better proof of it than the admitted fact that each one of these eight defendants maintains a distribution system at the expense of millions and millions of dollars for each one of them? Going out, fighting one another, to sell their pictures—and we sell ours singly—to sell their pictures

to the 18,000 theatres in this country, of whom over 15,000 are absolutely independently owned? Why do we engage in that competition? We engage in it because we could not live without it.

In normal times, when there is not so much money going around that enables the economically lower strata to go to the more expensive theatres, which are largely owned in some of these cities by the defendants, 61.6 per cent, if I remember the figure correctly, of our revenue comes from theatres wholly unaffiliated with any one of these defendants; and it is in the area that we are spending a sum which I estimate as about 30 per cent—cost of distribution—30 to 40 per cent of our film revenue. How? In conspiring with these other people? Not at all. In fighting the life out of them to get the last dollar of revenue from these independent theatres throughout the country.

Now, let us take up, after registering those indisputable facts with you, what the Government thinks it has adduced. They say we own a large percentage of the theatres. Well, I might reply to that, your Honor,—so what? But the fact is that we operate Warner theatres first run in only 28 of these cities. In 16 of them we are in competition with independent first-run theatres and in 10 more with the first-run theatres of other defendants. That fact standing alone has no legal significance. It would have significance only if it could be brought into alignment with a combination or conspiracy which could link us up with the other defendants as being guilty of exclusion.

Now, they say, "But you license a large percentage of your first-run pictures to affiliated theatres." Again I suggest—so what? These defendants own the show theatres. You have heard the showplace argument for the ownership of those theatres. Public interest? Public interest is served by it. The publicity that they get from those first-run exhibitions work advantageously right down the line to every subesquent-run exhibitor.

Mr. Proskauer on behalf of Defendant Warner

But let us take Warner's situation—and I am going to give you very few figures; I know they are hard to carry away, and they are on this brief. But take Plaintiff's Exhibit 428. It shows that independents were Warner's regular first run accounts in 24 cities and that there was independent first-run competition in 31 different cities, 16 where Warner's licensed its own theatres and in 15 cities where it licensed a theatre affiliated with another defendant. In 55 of these 92 cities there was independent first-run competition, and with negligible exception, in every one of the others there was bitter first-run competition between the defendants themselves.

I am not going to give you, with your permission, an exhaustive discussion of this evidence. What I am really doing is to try to give you the will to decide based upon this demonstration on our brief, which I think is unanswerable, factually, on the question of drawing any inference of conspiracy or agreement either to monopolize or to restrain.

Now, I proceed rapidly from that point of view, skipping a number of the considerations to which I direct your attention on my brief; but I will give you one figure. It is estimated that the total box-office receipts in this country are $1,350,000,000 a year. It is shown by the interrogatories that the box-office receipts of all these defendants collectively —I will use—"collectively" for once—is $460,000,000 a year. The excess of revenue of independently-owned theatres over affiliated theatres is approximately $900,000,000 out of a total of $1,350,000,000. That does not look very much like a very effective conspiracy to restrain; and while we may be guilty of some minor offenses, of which I am not aware, I think nobody will claim that we are lacking in business acumen; and if we wanted to suppress we have done an awfully bad job.

Now, here is an amazing contention of the Government's: Each defendant has discriminated against a small independent exhibitor in favor of affiliated and unaffiliated circuits. So what? I do not admit the fact. I am not going to repeat

the argument made here by Whitney Seymour this morning, which showed the enormous advantages sometimes given to the small exhibitor; and you will find in my brief a calculation with shows that percentagewise the small independent exhibitor is paying less for his film than these big circuits. But let me pass that and assume that we were discriminating against small independent exhibitors in favor of affiliated and unaffiliated circuits. I have never known that it was a violation of the Sherman law to give a large customer an advantage in trading over a small customer. I have never known that it was regarded as a restraint on competition. If a man who owns a dozen theatres comes in to me and says, "I will take a picture for the whole dozen theatres if you will give it to me at a price," and I give him a better price than I could possibly give him if he was just giving me one theatre, I do not see how it can be regarded as a restraint on competition. But the essential part of this is the give-away of the necessitated use by Mr. Wright of the word "unaffiliated." What a queer kind of conspiracy where it is suggested that we discriminate not in favor of affiliated circuits but we also discriminate in favor of unaffiliated circuits. I put that to you as a juror in the box, your Honors. Would that make any sense in supporting a contention that we were engaged in a conspiracy to monopolize?

"Oh," but says Mr. Wright, "you show a discrimination because I have shown that in a few trifling instances larger percentages were paid for subsequent-runs than for prior-runs."

Now, Judge Bright may remember that he asked some questions about that during the course of the trial, and I brought out clearly what is demonstrated beyond possibility of cavil at page 19 in my brief that the run is only one of the factors that determines price; and I gave as the cardinal example of it the evidence which I adduced from one of the witnesses about th Music Hall here. The Music Hall pays a lower initial percentage than almost any other theatre for its first-runs. Why? Because it has a big stage show, an

enormous seating capacity, and because a producer can afford profitably to give them a lower rate; and that is not the only example of it. For that evidence to have probative effect on the issue of a conspiracy to monopolize, you would have to show, one, that it was widespread, and the evidence here shows only I think three or four instances of it, countrywide, not very many more—I won't guarantee that exact number. You would also have to show that it was a systematic practice directed against non-affiliates, where on my brief I show that in many instances, in several instances at least, non-affiliates had the advantage in that kind of price discrimination, if you please—and I am not afraid to use the word "discrimination," because, as I have said on my brief, discrimination becomes legally important in this case only if it rises to the dignity of proof of conspiracy to restrain. Of course we discriminate, and so does everybody else who sells anything. And I am saying that this discrimination to which I am presently referring is legally insignificant because it lacks that quality, and because the Government gave no proof from which any inference of invidious organized exclusion of unaffiliated theatres could be drawn.

Now, uniformity of conduct: The Government says, "You license the same people every year." You can go through this country, your Honors, and you will see clothing stores—Hart, Schaffner & Marx stores, or Kirschbaum stores, or College—I do not know some of these other trade names—or, let us say Adam Hats, as my friend suggests—you can't deduce from mere uniformity any significance; and I am not going to turn to the brief to get those cases which you heard where the courts say that mere uniformity is no evidence of conspiracy.

Uniformity also of admission price, they say: There is that beautiful quotation in one of the cases. This is also from the second Standard Oil case:

"Grocers, butchers, and all other lines in the same markets generally sell the same things at the same prices for the sound reasons that they wish to get all they can; that they

cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

To all of those considerations we plead guilty. Go out on Broadway here and the adjacent streets and tell me what difference there is in the prices charged for admission by the legitimate theatres?

Now, your Honors, I want to be realistic about this. Isn't it just a little nonsensical to talk about an inference of conspiracy from the fact that a motion picture house is known as a 50-cent house or a 75-cent house, and that it does not change? I am not going to labor that point. I give it to you confident that I am preferring facts over a doctrinaire preference for deductive logic.

Now, clearance and run: I think you have been fed up on clearance and run, but there is one thing I want to say about it: First, we have in this consent decree a provision that clearance reasonable in time and area is essential to the conduct of this business. I do not have to estop the Government by that judicial pronouncement. You read Judge Chesnut's opinion in the Westway case, and you can't escape from it. He reviews that evidence of the kind that you have heard here. And when Mr. Wright talks about abolishing clearance, I find myself the defender of a public interest, not he. I would like to see what would happen to Mr. Wright if he went before a group of independent, second-run exhibitors and told them that he had got a decree abolishing clearance. I told you I like him, and I would be deeply concerned for his physical safety.

Now I put it humorously, your Honor,—quasi-humorously—but it is true you can't run this business without clearance.

Judge Hand: But he has had a spiritual conversion here in the nature of a revival.

Mr. Proskauer: The trouble with Mr. Wright's spiritual conversions is that they are so frequent, so contradictory, and so impalpable that at times I think if I may put it humorously, they are spiritous rather than spiritual.

Mr. Proskauer on behalf of Defendant Warner

I am not going to spend any more time on defending clearance per se, but it does not follow from what I have said that clearance is not capable of abuse as an instrument for the suppression of legitimate competition. It is because of that fact that we put in these provisions in the consent decree.

My good friend Caskey this morning broke my heart by reading one statement of Mr. Hays's that I had here that I wanted to read. Maybe he won't mind and your Honors won't if I just read a word or two of it to emphasize this point I am making.

Here you have this system of clearance which I say without fear of successful contradiction is essential to the business of this industry, and you have 18,000 theatres scrapping about it, and we come in and we say, "We don't want to use clearance as an instrument of oppression." We say, "We consent to the granting of your prayer, Mr. Hayes," —Mr. Wright's distinguished predecessor—"for the appointment of a great arbitral system out of which we can't make anything, we can only lose, and we are so anxious to be sure that clearance and run are being properly handled that we will pay the hundreds of thousands of dollars of expense for the maintenance of that system so that any little fellow anywhere in the United States if he thinks he has got a raw deal can come in and for practically nothing get an immediate decision."

Now what does Mr. Hayes say about that:

"There is no fairer way to handle and dispose of complaints concerning clearance than to have the clearance fixed by some impartial arbitrator."

I say that, the Government said it, and the Government's brief even today in one of those moments of reconversion to which Judge Hand referred, uses these words, "We ascribe as fully now as we did in 1940 to the notion that any clearance must be reasonable as to time and area, but now we regard the essentiality of clearance as such as extremely doubtful."

And in another place he concedes, Mr. Wright concedes that this arbitration system to the extent that it operated well and successfully. These are his words:

"It has no complaint"——

Mr. Wright: No question about that one.

Mr. Proskauer: There is no question about anything I say, Mr. Wright.

> "It has no complaint as to the administration of this arbitration system and the arbitrators and the appeal board have admirably performed their intended task of relieving this Court of complaints."

Now I don't like to criticise any brother lawyer, but I have been reading some of these briefs lately and some of these arguments, and I have had awful feelings, truly, for the profession.

Judge Bright: How about the Court?

Mr. Proskauer: Well, I have an awful feeling with the Court.

Judge Hand: I think you have been infinite in your moderation. About 750 pages as against—well, I don't know how many. We had 1500 in the Aluminum case, you know.

Mr. Proskauer: Your Honor, don't tempt me to talk too long. I am going to give you an example of what I mean. You will find three or four of them at the beginning of my brief. But I saw a statement of unreasonable clearances where it said there was a clearance of 365 days, and I said to myself, "In God's name, how can anybody justify that?" And I went and looked it up and this is what I found: that the clearance of 365 days was an ultimate clearance over a theatre that charged 5 cents admission and that intermediate was a whole series of perfectly normal and reasonable clearances.

Now I am giving you that as a caveat. There are a dozen things like that in the plaintiff's brief, and there have been a dozen things like that in the plaintiff's argument.

To sum up—and I call attention to it in my brief—I don't think it is quite according to Hoyle to suggest a clearance like that as something typical of the industry.

Now, has there been any suggestion that clearance was used as a means of unreasonable discrimination against independents? I know of none. Has there been any evidence that there was a serious abuse of clearance other than in the deductive logic of brother Wright? Out of all these fifteen thousand independent theatres in the United States and in the five years that have elapsed since this consent decree, there have been four hundred complaints. Just four hundred! I am not going to burden you with the number that were decided in our favor and the number that were inconsequential, and the number that were settled. Let us suppose, arguendo, that they were all justified complaints. Seriously, when you have given them, by this consent decree, a method of speedy alleviation of their sorrows, when there are only four hundred people who have complained during the whole five years, out of 18,000 theatres, isn't it a little strain on one's credulity to suggest that there has been an abuse of the system of clearance in order to effect a monopolistic restraint on interstate commerce?

I must be getting along. I have been going an hour. Price fixing. I am not going to gild refined gold by going over Whitney Seymour's argument, but I want to make one addition to it, and it is elicited by a question of Judge Bright's. He asked about this theory of the Government's, that the theatre was not charging just for the exhibition of the picture but for the short, or whatever else went with the picture, and that leads me to try to clarify, as it lies in my mind, what these tie-in cases mean. What they hold is that if I have a patent or a copyright, my legal monopoly does not entitle me to say to a man, "I will license you this picture, but you have got to buy from me some candy or something else." That hasn't anything in the world to do with the essential purpose and effect of the copyright or the patent. You cannot use a patent or a copyright right to impose on a

buyer or a licensee something that you demand from him in connection with a subject matter foreign to your legitimate monopoly. What in the world has that got to do with the situations where I license a theatre owner to show my film? I don't tell him he has got to show it with a news reel? I don't tell him anything. And I impose no condition upon him excepting that for any shows he gives which show my picture, he is to give me 25, 30, 15 per cent of it. There is no tie-in in that such as there is in the cases which have been decided, And that is the sole addition, and I think it is an essential one, I shall make to the brilliant argument of my friend Whitney Seymour. I trust that your Honors will bear that in mind.

Price discrimination. I want to add a word about that, and I am a little out of my logical order. I wrote this in here and I did not get it in in the right place. You will forgive me for going back on my tracks for just a minute.

They say, Warners, you are guilty of price discrimination because you have made a deal with Richards down in New Orleans to show pictures at all of his chain of theatres for 15 per cent. I wish your Honors would read the colloquy that occurred during the trial when that evidence was adduced. Richards is an independent theatre operator. He has an independent chain of theatres but—don't interrupt me, Mr. Wright; everything I say is right—but he happens also to have some connection with a specific Paramount theatre or theatres—I have forgotten—and he buys for all of them. We say to Mr. Richards, "not because you happen to have a small interest with Paramount, but because you, entirely independent of Paramount, are the operator of a big chain of local theatres, we will make an overall deal with you for 15 per cent." Are we giving away ourselves to Paramount? Why, it is absurd. The fact that Richards had this little interest with Paramount in a theatre gives to this case nothing of discrimination by us in favor of Paramount.

Judge Bright: How about a discrimination against independents?

Mr. Proskauer: He is an independent. Most of his theatres are independent.

Judge Bright: Other independents outside of that chain?

Mr. Proskauer: I have got a right to discriminate when I sell my pictures. I have said, sir, and I have maintained that right unquestionably, I have a right to reduce my price to a large customer. That is not discrimination in any legal sense. There is a lot of talk about discrimination here which has no legal significance, and I am glad you put that question to me, Judge Bright, because I would like to answer it head-on. I discriminate every time I make a sale or a license. I take my customer, I make my deal with him. If he is a good customer, and I think I can make a lot of money by reducing the price, I discriminate in his favor. There is no law against discrimination. The kind of discrimination that is outlawed is a discrimination practiced in connection with an attempt to restrain trade unlawfully, unreasonably, or to create a monopoly. And I rest on that proposition, sir.

Now we come to the next ——

Judge Hand: How did this deal leave the New Orleans situation?

Mr. Proskauer: So far as I know, I know of no complaints about it. Was there ever any? No evidence of any complaint or trouble at all. Mr. Wright just digs this situation out of the papers we furnished him. I never heard of any trouble about it. I have never heard anybody complain about it. That is one of those deductive things.

In every case there is a residuum of atmospheric argument and the Government constantly insinuates here, oh, the Goldman case was decided against you, and the Schine case, and the Interstate case. Therefore, you must be bad people. Well, I might retort in kind, the Gary case and the Shad case, and I have another case written down here and I have lost it—the Westaway case—they were all decided in our favor, so we must be good people. But what it comes down to, your Honors, is this, and I am going to have a word to say about sore spots later, because I know Judge Hand's

mind has been running on that a little during this trial, I said, when I opened this case to your Honors, that it would be incredible if, in the conduct of a great industry like this, with all its complications, you could not find something to cavil about.

We have been blackjacked by that circuit down there in the Interstate case, and wrongly, wrongly! We yielded to a species of blackmail and made a perfectly illegal agreement to fix the price of other people's theatres as a condition of licensing to that circuit's theatre. I have no quarrel with that case. It was righted as a local situation by a court of justice.

We got the Goldman case, where the court drew an inference of fact that we had entered into an agreement not to sell to a particular theatre. That decision has righted what the court held, and which I believe incorrectly, to be a wrong. And so with every one of these four or five or six cases that are constantly thrown in our teeth here.

That Chicago case, a jury found—a jury found—as a fact that there had been an agreement not to sell to a theatre.

Judge Hand: What became of the Goldman case, is it through?

Mr. Proskauer: No, sir.

Judge Hand: There is an application for a writ or something, or is there a writ?

Mr. Proskauer: I don't want to take the time to tell you all the things about it at the moment.

Judge Hand: No.

Mr. Proskauer: Suffice to say that there are some interlocutory proceedings going on. They asked for a jury trial on damages. Judge Kirkpatrick refused to give it to them. They brought a mandamus in the Circuit Court against Judge Kirkpatrick and it has been argued. I don't think it has been decided. Has it? It hasn't been decided yet. Meanwhile, we are all marking time until we can get somewhere in the case and go up on appeal.

Mr. Proskauer on behalf of Defendant Warner

On this phase of the case, your Honors, I am just submitting to you, you cannot prove this case by showing that in three or four instances there were specific local situations where the courts redressed a wrong, particularly in view of Mr. Wright's emphasis yesterday that he was not driving at specific things; he was directing his claim against the whole nationwide pattern of this industry.

What is the next thing they say? Cross licensing. Again I am not going to paint the lily by going over what Mr. Seymour said. As far as Warner Bros. are concerned, I say that it is not only the oath of our officers which demonstrates beyond the possibility of contradiction, I mean beyond the possibility of it, that we never conditioned what we licensed for our theatres by what we license to the theatres of our co-defendants. I have elaborated that on my brief. I am not going to detain you here with it on oral argument.

Judge Bright: Is there any contention to the contrary?

Mr. Proskauer: I don't know. I never can tell what Mr. Wright is contending. If your Honor cares to ask it of him, I should be delighted to have his answer.

Mr. Wright: I think you are right, Judge Bright, there is no contention that each contract they make with each other is conditioned upon the execution of a similar agreement.

Mr. Proskauer: You see, the trouble with Mr. Wright's concessions is that they always have a little modification. Now, the answer to that question was yes or no. I do not know what he meant by the addition. I am saying that the evidence demonstrates beyond the possibility of contradiction that there is no back scratching. That is a word perhaps that he can understand.

Mr. Wright: That we do not concede.

Judge Bright: I do not think he concedes that.

Mr. Wright: That is right.

Mr. Proskauer: Then I make my point.

Judge Hand: It shows the great danger of figures of speech.

Mr. Proskauer on behalf of Defendant Warner

Mr. Proskauer: Let me put it literally so that even an Assistant Attorney General can understand it. I say that the evidence shows beyond the possibility of contradiction that there is no such cross-licensing as will support any inference that we condition what we license to and by what we license from the co-defendants, so that there is no inference therefrom of a conspiracy to exclude anybody else.

Mr. Wright: That we deny.

Mr. Proskauer: All right, then I will just give you one example of it out of a half dozen places which I treated in my brief. I say there is no pattern whatever. If you had a pattern you would suppose that when we licensed more from Loew's, they would license more from us, and vice versa, with all of them. I shall just read a few of them. They are all in this brief: In 1931 and 1932 we paid Loew's 40 per cent less than we did the prior year. Loew paid us 43 per cent more. In the next year we paid them 22 per cent more than in the prior year. They paid us 62 per cent less. Now, I am not taking that as an isolated example. I am telling your Honors that this brief will demonstrate that that is typical and there is nothing in this case as to cross-licensing, as Mr. Seymour developed this morning, which gives rise to any inference of conspiracy to restrain trade.

Now, public interest: I have referred to that briefly, and I make only a passing reference to it now. The growth of the theatres, the millions we spend in competitive distribution; the enormous increase in the cost of pictures absorbed entirely by us, as is indisputable, shown by an exhibit we put in evidence, the cost never passed on to the public; admission prices remaining about the same—I do not know what the humorous phase of it is. Mr. Wright seems to be enjoying it, outwardly. I am stating that to be what the evidence in this case shows.

Now, it is developed in this case that there are certain places that we call sore spots, possible sore spots; and there was a great to-do made about Albany. And particularly yesterday Mr. Wright made a great pother about a contract

we made with the Fast Company, I think it was, in which it was provided that that company should operate only in Albany and Troy, as I remember.

Mr. Wright: You did not make it.

Mr. Proskauer: I beg your pardon?

Mr. Wright: I was going to say that appeared in the RKO agreement with Fast. Maybe it appears in yours too; I do not know it, if it did.

Mr. Proskauer: Well, I don't know whether it was with us or with RKO. It does not make any difference with respect to what I am going to say.

And he left your Honors under the impression that that was some kind of a covenant not to compete anywhere else, and, therefore, there was something illegal in it; and when you analyze it, what do you find? Here is this man Fabian, a well known independent theatre operator, unaffiliated with us, operating theatres in a number of cities, and he comes up to Albany—and the detail of this deal is in the brief, and I am not going to go into a mass of it—he comes up to Albany and he wants to make a deal by which if he does not build a new theatre he can get an interest in our theatre. And we say to him, "All right, there is not enough business here for two theatres. We do not want cutthroat competition. We will make a deal with you, and we will give you an interest in this theatre, so you won't build the other theatre right across the street from us." We have a right to do that on the local scene if we are not using oppressive tactics to force Fabian—and I may say you may almost take judicial notice that nobody uses any oppressive tactics to force Fabian. He is one of the biggest and most successful operators in the country.

Now, we say, "We are going to form a separate corporation with you, but we do not want that corporation doing business outside. We want to restrict this business to the particular area in which we are negotiating with you." And that provision is made. And Mr. Wright used that yesterday as though that was some kind of an agreement to pre-

vent competiton in other cities, whereas, in truth and in fact and objectively it left Fabian perfectly free, Fabian the man, independently of this corporation, to go and open theatres anywhere in the world he pleased. Now, that just does not make sense.

Philadelphia—and I am taking my sore spots—we happened to own all the first-run theatres in Philadelphia. You heard the story of how we came to get them. Why, your Honors, if there is anything wrong in those—and I do not concede there is—they are being corrected on the local scene.

One of the Judges asked this morning, "Could you correct them here?" If you thought that they had force you could correct them here. It is certainly within your power.

I urge that it is not within the mandate that this evidence gives you, where it is perfectly clear that it is being treated locally, but, certainly there is nothing in those situations to support the picture of this nationwide conspiracy to which my friend referred; and the same thing goes for pools. That is an awfully ugly word. There are no pools here in the technical sense of pools that have been condemned under some of the authorities. Mr. Seymour told you how they originated. Nobody gave any evidence, as far as I remember, as to the extent to which those pools were with independents or affiliates. And why? Because they are de minimis.

Warner Bros.—and how many pools have we got all over the country? 24 I think it is, or something like that. They are utterly inconsequential. Nobody would be hurt if they were maintained, or if they were enjoined. There is not the slightest proof, however, that the pools are limited to co-defendants to make them evidence of a nationwide conspiracy. There is no evidence of that; and if there is any such contention made—here, I have got it written down here.

We had pools in 25 towns, 19 with independents, four with defendants, and two jointly with affiliates and independents.

Now all that evidence is not in the record. It is not in the record because no contrary evidence was given, but I am

asserting to you the real picture to show why Mr. Wright never made any proof that these so-called pools were being used as an instrument of conspiracy among the co-defendants, and I repeat, your Honor, so far as we are concerned they are absolutely negligible. We don't care a rap about them.

Judge Hand: Do you have anything to do with that California situation?

Mr. Proskauer: Not a thing in the world.

Judge Hand: I thought you had.

Mr. Proskauer: Oh, no.

Now I am coming to the end. What is this talk about dissolving us as a monopoly, dissolving Warner Bros., and divorcing Warner Bros. from the Warner Bros. Theatres Corporation?

I have spent a good deal of time in the last week reading the cases on that. This is what they hold, your Honors: In every single case where dissolution was decreed, except in two or three to which I shall refer, the dissolution was based—and I am going to shorten this; I am telling your Honors that that is what you will find when you read the cases—the organization dissolved was itself the monopoly. That was the Tobacco case, that was the Standard Oil case. In two or three cases of which the Reading case is the outstanding case, the organization which was ultimately ordered dissolved was directly the device by which the nefarious practice was being imposed upon the community, that is, a holding company existed in the Reading case by means of which there was an absolute agreement to control wholesale coal prices, and the Court held on one branch of the case that that violated a provision in the Interstate Commerce Law forbidding coal mines from owning coal companies, and it put the provision on that ground and it referred also to the other phase of it, and I am not going to argue that they put it solely on the ground of the Interstate Commerce Act. They said that the whole thing was a device to create

a monopoly, standing alone, not in combination with anybody else. In other words, it was as though you were to find that Warner Bros. and the Warner Bros. Theatres Company together were a monopoly imposing their will and their unjust conduct on a long suffering public.

Now there is nothing like that here. Absolutely nothing. Warners are not a monopoly. There is no monopoly created by any conspiracy between Warner Brothers Pictures Company and Warner Brothers Theatres Company. There is no such charge really. The charge is that those two companies in conspiracy with all these other companies are doing something, and I assert, your Honors, and I want to make this distinction clear because it is an honest, reasonable distinction, there is not a case in the books that ever ordered a dissolution between a parent and a subsidiary company excepting where the combination between parent and subsidiary was itself the vital part either of the monopoly or of the conspiracy to restrain.

And what are the practical consequences of this claim for divorcement? Mr. Wright was questioned yesterday as to what he wanted to do with this industry. So far as anything he has ever said is concerned I think he wants to put it in a vacuum and wrap it up in cotton padding and there let it die and stagnate. You can't run this business divorced. There has not been a human being who lifted his voice here to give any contrary evidence, and every witness testified to the impossibility of running it divorced. I have used in my brief the phrase that Mr. Wright wants to give us an atomic bomb that will take us back into the nickelodeon days, and that is exactly what it is.

But I am not alone in this. I will quote Mr. Hayes again, and this is what he said before Judge Goddard:

> "Both the defendants and the Government honestly believe that it is infinitely to be preferred"—that is, the consent decree—"to years of litigation

with the possibility at the end of the chaos"—that is his word, not mine—"of the chaos that might result from divorcement."

And no matter what else your Honors may think about this case I submit with full confidence that with every consideration for the public interest you are not going to remit this industry into the chaos that would result from disintegration. You are not going to strike down these companies which for a quarter of a century have been doing business as integrated companies. Maybe my period is wrong, but I think it is about right, isn't it? About 20 or 25 years—with harm to nobody, with not a living witness brought here to testify to a single predatory act or practice, with what has been properly called a paper case. I am pleading in the public interest when I ask your Honors to throw this suggestion of divorcement out of consideration as one that would lead to ruin and chaos.

Argument on Behalf of Defendant Columbia Pictures Corporation

Mr. Frohlich: May it please your Honors, we have reached the point in this case where we can say the case has been divided into two parts. I speak for one of the three non-theatre-owning defendants. Our problems are different from those of the five integrated defendants. I am going to confine myself to the problem that I think is the chief problem confronting these three defendants. I am going to speak on block booking, and I am going to speak on the charge of discrimination and nothing else.

We have tried this case here for two months. The Government has submitted voluminous briefs. I sat here patiently yesterday and listened with the greatest attentiveness to Mr. Wright and Mr. Marcus and I have not heard yet why these three defendants are in this case, what they have done that merits condemnation by this Court and what relief is

asked against them. I was startled when the brief was served on me and I found that the Government's counsel said in plain English, "We don't know what relief we want now. Let's find out what this Court will do with the other five defendants and then perhaps we can ask the Court to grant some relief so far as you are concerned."

It is rather a fantastic situation, but it is symptomatic. It indicates, your Honors, that even Mr. Wright is not convinced that this defendant Columbia, or the other two defendants, Universal and United Artists, have broken any law and that they should be condemned by this Court or any relief at all granted against them.

I have no interest in this consent decree. If these other five defendants want that consent decree continued and they wish to operate under it, that is their privilege. I do not. I am fighting here for the very life and existence of this defendant, because we cannot run our business and sell our pictures in the manner that the Government seeks to impose on the industry in small blocks of five or less.

In order to have this Court hold that block booking is an illegal practice the Government must ask this Court to make a finding that block booking is in restraint of trade. I have tried to make that sentence as short as I can, and that I think is the very heart of block booking.

And what is block booking? To my mind it is very much like what Darwin speaks of when he speaks of Natural Selection. It is an evolution that grew up in this young industry in the past 30 or 35 years out of the business, out of what I would say the harmony that is necessary between the exhibitors and the producers and distributors.

Your Honors will recall the testimony of Mr. Montague, who was himself one of the pioneers of the business, originally an exhibitor, and then a state-righter, and now connected as general sales manager of this corporation Columbia. He knew the problems of this business and has grown up with it. And he knew and testified that in the early days of this industry these companies had great difficulty in market-

ing the pictures which they produced. They tried it with franchise holders and it didn't work. They tried it with state rights, and it didn't work. All sorts of devices were used whereby these people could recoup their investment and make a reasonable profit, and they finally came to block booking. They came to this practice under which a company would license its product for a full season to the exhibitor, and that has worked out to this very day. Not only has it worked out with one company but with every company in the business.

Judge Bright: Mr. Frohlich, does the block booking system give the exhibitor any choice or does he have to take your whole product for the whole season?

Mr. Frohlich: No; the testimony is, Judge Bright, that when this exhibitor makes his contract for 44 pictures he has a certain amount of selectivity, and the average selectivity, as Montague testified, is about 32 out of the 44, so that he may reject 12 pictures during the course of the year. And in addition he comes in from time to time with adjustments and we give it to him, and we have been very glad to do it. We want these people to make money with our product.

Judge Hand: Why would it ruin you not to have this system? I don't understand that.

Mr. Frohlich: Well, I am coming to that, Judge Hand. I am trying to explain why it would completely ruin Columbia. To begin with Columbia owns no theatres.

Judge Hand: Let me ask you—I suppose it is not in the record; maybe I have no right to ask you, but I assume it is common property—how about these other independents? Do they have a block booking system?

Mr. Frohlich: Certainly.

Judge Hand: You mean everybody does except these five?

Mr. Frohlich: Monogram and Republic and P. R. C. block book just like Columbia and Universal. And I am going to show your Honors why that would ruin them.

I say to begin with we own no theatres. We have absolutely no method of recouping from any ready market the monies that we put into the production of motion pictures. The other five defendants are fortunate. They own theatres. When they make a picture for a million dollars they can send it into their theatres and they can at least recoup part of their million dollars and try to sell and recoup further moneys from the other theatres. We can't do that. We haven't the slightest outlet for our pictures.

Now the only way in which we can insure some sort of recoupment and reduce the hazard and the gamble, which is inherent in this business like in no other business in the world, is by making these contracts at the beginning of each season with groups of exhibitors under which we know, rain or shine, at the end of that season we will have at least X dollars in our treasury, and will have recouped a part of our investment.

Now that is the only way we can operate. If we couldn't do that, how do you suppose we could spend two million dollars on a picture? Go out and try to sell it piecemeal? That just isn't possible. We have to look to block booking in order to reduce the hazards and enable us to risk that investment.

Now, just think of what has happened in the last 15 years with the rising costs. Columbia originally spent in 1928, 1929, when we were just a young company in the industry, $1,600,000 in one year for all of its pictures. That was the extent of its investment. Times have changed. The cost of producing pictures has advanced. Public taste has changed. You have got to give them more important pictures; and last year we spent $16,600,000.

Now, where do you suppose we could look for $16,600,000 if we had to go down in this country and sell each picture by itself to every exhibitor? We can't do it. The only reason we can spend $16,600,000 is that we know that we can make contracts in advance for the seasons which will net us maybe ten or twelve or thirteen million dollars, and we

can gamble with the rest. And that is why Columbia must have block booking; and when I say "Columbia," I am speaking for every independent distributor in the United States, the companies that own no theatres, that that have no method of recouping their investment.

As Mr. Montague testified, another consideration, which is a very great and important consideration to Columbia, is that inventories are frozen by this method of selling in small blocks or groups. Here, when we make our contract at the beginning of the season, as we release the picture it is shot out, sent out through the country, and it is released for distribution, and we get our money back, and we get our money back in time to use it and turn it over again during the year. When you take these pictures and split them into small groups and have to wait until they are all manufactured and produced, you have to have trade showings, and then go around and sell them, you just lose that time. You lose four or five months. That was the objection I made originally when this decree came up before Judge Goddard. I said we can't afford to take our money and tie up for four or five months in inventory on the shelf, because we haven't got that kind of money. We certainly can't make 44 pictures a year if we have to do that. That is another one of our problems, and Montague so testified, and that is in the record.

So that again, block booking is essential to these small companies with limited capital; and we are a little company with limited capital, your Honors.

Judge Goddard: What opportunity does the theatre owner have to know what would be in the pictures?

Mr. Frolich: I was just coming to that. Because the Government in condemning block booking—and that condemnation of block booking was not Judge Goddard's idea; it was submitted to him by the Government. The Government insisted it had discovered a way to the promised land. Block booking was going to be destroyed and was going to cure all the evils in the industry; and the Government insisted on it, and that is why I never consented to that decree.

Judge Hand: Of course, there must have been a lot of complaint about it, a big complaint, or they would not have thought they discovered a way to the promised land and done any of these things.

Mr. Frohlich: Well, if there were any complaints about it the time to produce the complaint was right here in this court room, and there was not a witness put on the stand who testified that block booking hurt him. And I know why Mr. Wright did not put an exhibitor on the stand, because he could not get a single exhibitor in the United States—I say that advisedly—who would say that he did not want block booking. You heard Mr. Montague's testimony. Mr. Montague said, "I went to the exhibitors' conventions after 1940 and they were clamoring to go back to block booking."

I would like to have a few of these exhibitors on this stand. I would show you why they do not want this present system. They are not happy with it. This case has been tried in a vacuum; and some of the most important elements which could have been brought out on the stand, and on which the Government had the burden, were not brought out.

The expense of selling pictures in small groups is very substantial. You have got to have a tremendous sales organization; and, again, this little company can't afford it. You have got to sell your pictures eight or nine times a year if you sell them in small groups. That means a sales campaign, publicity, traveling around the country, contacting the exhibitors. Where is the money going to come from? If you think it is not going to hurt Columbia, I will show you how it would hurt Columbia. The Government put in evidence in this case, an exhibit showing the profits that Columbia made in the past ten years.

In ten years, mind you, from 1934 to 1944, and what did it show? It showed that for the first three or four years of that period Columbia, with all its investment, cleared about two million dollars a year, and then there was a falling off and for three years it practically went broke. One year it made nothing; next year it had $500,000, next year $500,000.

And then the war came along and with the lush period of the war, Columbia again made almost two million dollars. It did not make as much during the war as it had made the first three years of that 1934 period.

Now, your Honors, Mr. Montague testified the expense of that selling campaign eight or nine times a year would be a terrific burden on this company. It would certainly entail terrific expenditures and it would eat into these profits. We hadn't any fourteen million dollars profit. This company is living from hand to mouth, after twenty years in business, and to saddle it with that kind of burden and tell it to spend another million or more for additional sales campaigns, is absolutely harsh and unnecessary.

And last but not least, the exhibitors want block booking. I am making that statement advisedly. I have proof of it by Mr. Montague, uncontradicted and unimpeached. There has not been a witness to take that stand to testify to the contrary. And the exhibitors who clamor for block booking today, to give them an assurance of product, are entitled to some consideration too.

Why didn't the Government, with all its resources, knowing that this was a critical point in the case, terrifically critical, why didn't they produce witnesses here and make proof to show that block booking was bad and vicious and a violation of the Sherman Act? Because, don't forget, your Honors, if you are going to take away block booking you will have to make a finding that block booking violates the Sherman Act in restraint of trade, and you will have to reverse two courts, one the Second Circuit Court of Appeals, and one, the Third, which have held that block booking is a very lawful practice. And I will show you how the Government attempts to supply this want of proof by language in the brief. Here is the way the Government brushes aside all considerations of evidence and proof. I am an old-fashioned lawyer and, in my mind, you have got to produce proof in a courtroom and then you can argue from that. You don't make statements in a brief. You don't make statements on the floor of the courtroom. So the Government says on page 111 of its brief:

"Block booking is the tying of a series of copyright monopolies to each other and conditioning the availability of one of a block of dramatic works on the acceptance of others."

The Government has said it! Where is there proof in this record of tying in? What did Columbia ever tie in? When it goes to an exhibitor and says "I want you to buy 44 pictures," and he says "Very well, what is your price?" is that tying in? Is that a condition? If I understand the English language, no.

And that is what the Government bases its claim on, solely and simply, on its own statement, when the very case which supports block booking, the Federal Communications Commission case in the Second Circuit Court of Appeals—said there was no tying in.

So the Government is now asking this Court to reverse these two cases, to forget every consideration of fair dealing in the industry, and to take the five small companies and saddle them with a tremendous expense which may bankrupt them, and turn over the business to the other five large companies. That is Mr. Wright's idea of fairness and of a proper decision under the Sherman Act, destroy the little fellow and give the big fellow a real monopoly. And he would have a beautiful one, because these little companies cannot operate under that system, and if block booking is taken away from them, your Honors, they are gone.

To recapitulate, block booking, I say, is a convenient method of selling. It keeps selling expenses down; it does not freeze capital. It makes a ready market, so that a man may gamble those millions and try to appease that fickle public taste; and the exhibitors want it.

Those considerations, I submit to your Honors, should be very weighty and certainly you should not, on the simple statement of Government's counsel in a brief, condemn a practice which has grown up for twenty-five years in this industry, under which every company made money, every com-

pany operated, every exhibitor made money, and the public got the benefit of the skill and genius of these men in this business.

Why condemn this practice and destroy it on absolutely no proof in the record and on the mere statement of the Government, because the Government thinks it is a solution to some of the practices that hurt the industry?

I assure the Court it is no solution, just as much as divorcement is no solution. From the fertile brain of the Department of Justice, block booking was going to be the solution. Today it is divorcement. God alone knows next year what other panacea they are going to have, to solve the problems of this industry.

I am going to have a few words to say, your Honors, on the question of discrimination, and then I will be through.

Judge Goddard: May I ask, the average independent theatre uses how many films a year?

Mr. Frohlich: Well, the average is about two and three hundred pictures a year.

Judge Goddard: And you sell in blocks of 40 from which they must accept 32?

Mr. Frohlich: They usually accept the 32. Sometimes we have to give them an adjustment and they take a few less. And the evidence is that we give the independents all the breaks on it. We give them a better selectivity than we give the affiliates because he needs it, he is a small fellow.

Judge Goddard: They still have an opportunity to get a large supply from the other source?

Mr. Frohlich: Yes, they have an opportunity to do that, of course.

The Government being very sorely pressed and not knowing what to say about Columbia again used its fertile imagination and came out with this very serious charge, wholly unsupported by proof; it said in its brief at page 21, that Columbia, Universal and United Artists are in a different position from non-distributor defendants, in that they have generally reached a satisfactory accomodation with the pro-

ducer exhibitors, which has enabled them to take more film rental individually from these theatres than that of all the non-defendants put together. That is a startling charge! In other words, they say we very little fellows here are members of this conspiracy because we get more money from the affiliates than the other independent non-defendants like Monogram and Republic and Producers Releases Corporation.

In the first place, there isn't the slightest proof in this record of any conspiracy between these three defendants and the other side. There is no proof in this record that there has ever been any discrimination as against the non-defendants. The proof in this record is that Columbia, just like United Artists and Universal, make good pictures. The Government admitted that. It said again in its brief—that was a lapse, because I imagine they must have forgotten what they said in one part of the brief—when they came to the other part of the brief, towards the end, the man who wrote it forgot what he said, but he made a slip here and I am going to hold him to it, he says, "True, such a business is more hazardous", meaning a business without theatres, "is more hazardous but it does yield profits and results in the making and distribution of films comparable to those controlled by the producer-exhibitors." Well, thank him for that concession! At least we make——

Judge Hand: He thinks it makes men of you, not to have theatres.

Mr. Frohlich: At least we make comparable pictures.

The point I want to make is this, if our pictures are comparable to the pictures of the other five defendants, can this Court draw an inference of conspiracy because we sell our pictures to the theatres owned by the other five defendants? Why shouldn't they buy our pictures? Is that any proof in this record that Republic's, that Monogram's, that Producers Releases Corporation's are comparable pictures? And that they were excluded and that we three were favored? Oh, no. No such proof. How dare the Government make that charge without such proof in the record? It is another illustration

of the Government's helplessness in trying to fasten a case on Columbia without proof or evidence of any kind by mere statements in a brief. And it is not honest and it is not fair to these three defendants, who have been dragged through this trial for months and months, to have them come into court and meet that kind of charge.

Judge Hand: Your charge is very much abbreviated by everybody.

Mr. Frohlich: I have done my share at abbreviating it.

Judge Hand: I never could see much of a case against you, I said so in the beginning, but in considering it further, I may yet be convinced that you are in it.

Mr. Frohlich: I have ten minutes more, and I——

The Court: You cannot cleanse your sins by yelling, you know.

Now, we were charged with discrimination; and in order to build up a case of discrimination the Government arbitrarily selected, as your Honor knows, three groups of cities. It took 92 cities of 100,000 or more; it took 413 cities of 25,000 or more; and it took a group of 73 cities which it claimed were closed monopolistic cities, 73 out of 92. Now, there are three groups of cities, and I am just going to very briefly call your Honors' attention to the ultimate figures we submitted in these charts which were put in evidence. In the 92 cities, the proof is that Columbia sells to independents in one-third of those cities, and that is an excellent showing in these large important cities of 100,000 inhabitants or more, with the large theatres in the finest locations.

And then breaking down the 92 cities into the so-called competitive cities where there are independent and affiliates in those cities, Columbia sells to 32 independents of the 48 cities, or 65 per cent.

Now, I submit that is an extremely impressive showing; that we do sell to the independents wherever possible, beginning with the large cities where we could get the most revenue.

The same holds true in the 73 cities. We sell to one-third of the independents in those cities. And again in the com-

petitive situations of 413 cities, we sell 65 per cent to the independents. Now, certainly, Columbia is not discriminating against independents when it goes out in these cities and sells its product to that tremendous proportion of independent theatres.

The Government charges that the defendants did not sell away from each other. Well, in these 92 cities the evidence is that Columbia has sold away in 12 of the cities—"sell away" meaning it takes its product from the affiliated and turns it over to the independent. Certainly that is inconsistent with a conspiracy. It gave "move-overs" to independents in 9 of those cities, again inconsistent with any tie-up or any combination or any conspiracy.

So that the practice and custom of Columbia has been to sell wherever possible to the independents, and we do sell to so many independents that our revenue is derived chiefly from the independents. The evidence shows that about one-third of our revenue is derived from affiliates and about two-thirds from independents. Now, certainly that is not consistent with an adherence to any conspiracy. And in my brief I referred—and I am not going to burden your Honors with any reading from it—to Judge Davies' findings in the Crescent case where the case was tried for two months, and evidence taken, and Judge Davies held that the course of conduct of Columbia has been to sell wherever possible to the independent theatre. Now, that certainly is not consistent with a national conspiracy of any kind.

Judge Hand: Do you have a foreign business?

Mr. Frohlich: Oh yes. Columbia has a foreign business. All these companies have. And we had a foreign headache in the last few years with this foreign business, because we couldn't get any money over. It has been tied up, blocked in London for many years, and so on. But we have that foreign business.

So now I am not going to say any more to your Honors about discrimination. I think the evidence is clear and convincing that Columbia has certainly been selling to independent theatres, and that in no way has it discriminated

with respect to any practice against independents and in favor of these five larger companies.

Judge Goddard: They are apparently your best customers. Why should you want to eliminate them?

Mr. Frohlich: Well, we had to have some customers. We have got to have some customers. After all, Judge Goddard, we are in the market to sell our pictures.

Judge Goddard: Oh, yes. They are your best customers, according to your figures. They buy 65 per cent, did you say? What did you say?

Mr. Frohlich: I thought your Honor said——

Judge Goddard: I am not talking about the foreign business; I am talking about independents.

Mr. Frohlich: The independents are our best customers.

Judge Goddard: 65 per cent?

Mr. Frohlich: 65 per cent of our money comes from the independents throughout the country.

Judge Goddard: Then it would seem to be not to your interest to eliminate them.

Mr. Frohlich: That is quite right. And following self-interest, following self-interest and good common horsesense, we have continued to sell to these independents, all of which is inconsistent with any conspiracy. That is the point. What our motives may be—naturally, our motives are selfish. We are all in this business to make money out of it, to make a living; but we certainly are not party of any conspiracy.

So that in view of the evidence here, your Honors, the failure of the Government to give any proof with respect to block booking; the failure of the Government to show any discrimination; the failure of the Government to show any adherence to a conspiracy by this defendant—I earnestly urge the Court to dismiss this case against Columbia.

Judge Hand: Well, I presume you would rather go over until to tomorrow?

Mr. Raftery: I would, if you don't mind.

Judge Hand: All right. We will adjourn until 10.30 tomorrow.

(Adjourned to January 17, 1946, at 10.30 a. m.)

Mr. Raftery on behalf of Universal and United Artists

New York, January 17, 1946,
10.30 o'clock a.m.

Trial resumed.

ARGUMENT ON BEHALF OF DEFENDANTS UNIVERSAL AND UNITED ARTISTS

Mr. Raftery: If it please the Court, I am going to speak for two defendants, that is, the Universal group and the United Artists Group.

In view of the fact that Mr. Frohlich finished up Columbia last evening, I will start with Universal, because of the great parity between Universals' method of selling and Columbia's. United Artists, on the other hand, is as unlike either of these companies as it unlike any of the five, so I will save them for the last.

Universal is the oldest in point of time of all the companies that have been brought in here by Mr. Wright. It has had a continuous existence in practically the same corporate form with slight changes since 1911.

As shown by the testimony of Mr. Scully, the company underwent a reorganization in 1937 and new management went in. Starting in 1938 the company began to show some real progress, and I believe the Securities and Exchange Commission reports that Mr. Wright introduced showed it had paid a very substantial excess profits tax in the year 1944. At any rate, it increased the number of theatres that it served from an average of 7,400 to an average better than 11,000 in the seven-year period. It had been in red ink almost continuously from 1928 to 1938 and in 1938 they got rid of the red ink bottle and began writing in black.

Now it owns a studio. It is one of the oldest studios of any size in Los Angeles County. In fact, I believe at some point in some of the examinations before trial Mr. Wright brought out that its studio is known as Universal City, and it has a post office Universal City. It operates in a regular straight schedule. By that I mean it produces pictures with

regularity, using its own funds, delivers them to the distributing defendant with regularity, and has a regularity of release and is able to render to a theatre or theatres a steady service, a steady supply of product. It owns no theatres.

I am not going to repeat anything that Mr. Frohlich said about the absolute necessity of a company of that character with approximately 50 releases, with newsreels, with shorts —the absolute necessity of a company of that character, owning no theatres, of selling its product in advance. It must sell its product in advance and it must have a backlog of contracts at all times in order to keep up with production and the costs of production.

I am going to touch one phase that Judge Bright asked Mr. Frohlich that Mr. Frohlich did not go into, and that was blind selling.

Your Honor asked Mr. Frohlich if the exhibitors ever had an opportunity to look at the pictures before they bought them, or something to that effect. Mr. Kupper was called to the stand as the representative of Twentieth Century-Fox; and some counsel asked Mr. Kupper about trade showings. Now, since Judge Goddard's decree the so-called Big Five have been selling their pictures in blocks of five and trade-showing them before the exhibitor even negotiated for the product.

Mr. Kupper was asked, "Do the exhibitors go to trade shows?" And Mr. Kupper rather sadly said, "I regret to say they don't."

Every device known to get exhibitors to go to trade shows has been tried by the five and by United Artists. In fact, only last week, as an added attraction for a trade show that was held at the Normandy Theatre on 53rd Street, held at 10:50 in the morning—and we all know exhibitors do not get up so early in the morning, but 10:50 we thought would be a reasonable hour— and as an added attraction they put a little card in it which entitled every one of them to a free lunch at 21; and the exhibitors were conspicuous by their absence even with the free lunch.

Now, they do not look at pictures. They do not want to look at pictures. I have known exhibitors that—well, there is one in particular. We had a preview out in San Bernadino of the picture "Since You Went Away," and this fellow Richards whom Scully told us so much about, and we heard a lot about it from others—our general sales manager says, "My God! Richards is here tonight. I don't ever remember Richards seeing a picture before."

Now, when they buy pictures and when they bought them over the 20-odd years that they have talked about here, they were buying a trade name. I remember seeing theatres in New England and New York State. They would have a sign in front "Home of Paramount Pictures" or "Home of Metro-Goldwyn-Mayer Pictures." They bought that trade name. I remember when Universal sold a service, and they would sell a man a complete service, and as part of the service would be "The Home of Universal Pictures."

Now, Mr. Scully told us how they set up these groups of pictures. He goes out to the studio either in May or June of each year and he sits down with the studio executives, and he comes back to New York with a complete list of the proposed releases for the theatrical year, which starts sometime, we will say, August 1st or—I think every sales manager has a different starting date—we will say August 1st and ends the following July. He will set that up with his advertising department; they prepare elaborate brochures; they prepare in their contract that they are going to have this special, giving the name of the book or the play; the name of the people who are to be in it; the name of the director who is to direct it; and they go down the line; and then they have in addition—I forget—I think Scully called them his marquee pictures; and he told us marquee pictures were those where you put a name band, or that sort of thing, and you set that up in your contract. You go to your exhibitor.

Now, I do not subscribe a hundred per cent to Mr. Montague's rule that you can average what the exhibitor buys. That is, he said if he had forty-four pictures, his average

showed that thirty-one were bought. That is, thirty-one were committed. The elimination took care of the rest. You can't subscribe to that a hundred per cent. I am more inclined to go along with Scully. Scully says you go in to the exhibitor; you have this brochure; you have this contract; you show him the goods, wares and merchandise you are going to have for that season, and you say, "Here, I am going to have 44 features, 5 specials; I have got a newsreel; I have got some shorts; let us make a deal." And he said you walk out of there with the best deal you can make. He said very rarely are you able to get an exhibitor who will buy your entire block. He may buy 30 of them; he may buy 20. And I think it was Judge Hand who asked Mr. Scully, in effect, "What he really gets is an option on your pictures?"

Now, that is about the way the thing really works out.

Montague told us about the crying towel, where the exhibitor comes in after the contract is made, after he is committed, after he is supposed to play the pictures, and he starts weeping, "I can't play these; they are bad," and so forth, and you adjust them.

So, in reality, blind selling is just another one of these high sounding phrases that have come into this business. We had some more yesterday, such as back scratching, and there are more slogans in the trade, many of which the Government has introduced and many of which the trade itself has introduced. You have got a very peculiar trade. You have more associations than any other; I think when Judge Goddard had his bearing on the consent decree you will recall how many there were; you had briefs from the Southern California Exhibitors Association, the Allied States, the man from Ohio, the man from Texas. You had them from all over. You have all these associations. And they have all these conventions, and they have all these meetings.

Montague summed up his experience since 1940, when the decree was signed, by telling his experience with these associations. Montague testified he was on the committee of distributors that was forever dealing with these folks, trying

to get better trade practices. Montague testified none of them wanted blocks of five; that they preferred to buy in bulk. They wanted to know that their theatre had so many pictures committed for the coming season.

Judge Bright: Did your prospectus carry a synopsis of the picture, the general trend of the plot or theme?

Mr. Raftery: Since 1927 every contract that I know of, that Universal has used, and these brochures I am telling about, has an over-glowing synopsis of what the picture is to be. In fact, your question, Judge Bright, reminds me that I was reading the record of the Federal Trade Commission hearings the other night. Those hearings were conducted by a man named Meyers, who at that time was Federal Trade Commissioner and who now is the head of one of the exhibitor associations. Well, in those hearings that very question came up and they adopted some glowing resolutions. It seems that one company started out to sell a picture called "White Flannels." That was to be a great love story of a college town. Well, somewhere the script got mixed up with something else and when it was finished, it was a dire tragedy of a Pennsylvania mining town. So out of that came this resolution about synopses and what not.

There is another interesting thing in connection with the question of block booking. It was United Artists. At that time United Artists had a general sales manager named Lichtman, who now is one of the top executives of Mr. Davis's client, and a lot of church folks were there at this hearing and they were protesting about block booking because that is where the protests about block booking came from, not from exhibitors; it was from the civic groups—a minister, I forgot his name, I think it was Mr. Holmes, he was the leader of it. And they had a report that some theatre manager gave as an alibi for playing a Mae West picture that, in order to get the other more cultural pictures, he had to take the Mae West picture. Well, everyone there knew there was no honesty in that statement of the theatre manager because the chances are that he would not talk about the other pictures until he got the Mae West.

Now, during it, Mr. Lichtman, in order to give United Artists a particularly good place with the church people, stood up and he says "United Artists is the only company here that does not block book." And there was an exhibitor from Pittsburgh, a man named Denny Harris, and he was an important exhibitor out there. He followed Mr. Lichtman. He said, "If United Artists is the only company that does not block book, then for God's sake give us block booking."

Now that is in the record in the Federal Trade Commission hearings.

Block booking has been—well, it is, I don't know, it is like the five-cent fare, everybody likes to talk about it and nobody does anything about it, because it is an essential thing one way or another.

Now you say blocks of five or trade showing. The trade showing idea came from England. The trade showing has been in existence over there for many, many years. In fact, they are supposed to sell pictures in blocks of one, one picture at a time after trade showing, and only after trade showing. The results of trade showing in England are very apparent. In England you have practically a complete monopoly of production and exhibition. There is no monopoly in distribution because all the American companies are operating over there. In exhibition, you have laws which require the exhibitor to exhibit so many feet, or, numerically, so many British pictures for every foreign picture he shows—the quota laws. The other thing the Government threw in against the importation of films was this trade showing.

What has been the result of it? You have two circuits, in reality, dominating the whole British Empire—that is, the British Isles. You have three circuits, two of whom are controlled by one man. Mr. Rank, whose name is in the papers here. Let me say, by the way, since we left here on the 21st of November they have formed two new national distributing companies in this country, with this Mr. Rank dominating them. That is in line with what Judge Proskauer was talking about, new competition from abroad.

You have complete monopoly of production and you have trade showing and only selling after.

Trade showing in blocks of five is not going to relieve anything in our opinion. Now as regards Universal——

Judge Hand: Well, somebody got very excited about block booking. What is the matter with it? What is the dispute all about? Is it just a question of whether you should have this unlimited choice and unlimited obligation, a sort of free will business as against predestination? What is it?

Mr. Raftery: Well, I look on block booking as a red herring that everybody throws across the trail trying to mask and hide the real economic differences between exhibition and distribution.

Judge Hand: But they all forbade it except your people in this consent decree. What did they do it for?

Mr. Raftery: They have their theatres. They can show their pictures in their own theatres and if they are unlucky enough to have a bad one they can slough it off. Universal has no theatres. If Universal has to get into this trade showing thing they are going to be helpless. At least now they have a contract with an exhibitor and he will have a place for the picture somewhere. You recall Montague's testimony. He said this is an exhibitors' market. It is still an exhibitors' market and it has been for years. The exhibitor buys as much stuff as he needs and no more. He can go out of business by over-buying. If he does he will pay for it. He will try to buy just what he needs and pay as little as he can for it. The difference was explained by Montague and Scully. What the exhibitors want—I will wager today if Metro or Paramount were to offer the rank and file exhibitor in this country a five-year franchise for all their product for the next five years every one of them would jump at it. The same goes for Twentieth Century or any of the other defendants. Here is where the economic difference is: How many pictures can we eliminate from what we buy? It is a right of elimination. Selective contract.

Mr. Raftery on behalf of Universal and United Artists

Any contract that has gone into evidence of any importance with Universal or Columbia are essentially elimination contracts. The exhibitor will buy 44 with the right to eliminate as high as 30 of them. Or he will buy 40 with the right to eliminate 20. I think I saw one contract where he obligated himself to play only 8 out of 40. That is the way the exhibitor buys. He wants the right of elimination.

Now block booking in blocks of five, I can't see any difference between a block of five and a block of 40. It is just a question of degree. No one ever questioned the legality of block booking except in that Federal Trade Commission case which your Honor sat on—Federal Trade v. Paramount. I subscribe that is good law and either of these companies have a perfect right legally to sell their pictures in advance just the same as anybody else in any line of business.

For instance, Judge Proskauer touched lightly on other name products. Johnston & Murphy shoes, you can't buy Johnston & Murphy shoes except in these Whitehouse & Hardy stores. And Hickey-Freeman clothes, you go, I think to Tripler's for those. In all these name products, they will buy them from year to year, from year to year, and year to year. And they will be the only ones who handle them in that competitive area.

Now I submit in this case on the evidence not a single witness has been called to complain either about block booking, blind selling, or any of these practices that Universal is alleged to have indulged in.

Universal only mentioned once in the closing.

Judge Hand: You say that the only difference between block booking and, well, the five-picture arrangement is—well, in either case you would say that the purchaser, the exhibitor, would want to eliminate something if some of the pictures weren't good, and it is therefore just a question of degree in the assortment?

Mr. Raftery: And he generally by contract protects himself when he makes the deal.

Judge Hand: Does he in these five?

Mr. Raftery: Yes—no, not in the five. He has no elimination in the fives. There may be some exhibitor strong enough to do so, but there are no contracts that I have seen in evidence where there are any eliminations.

Judge Goddard: The right of elimination extends to how many pictures? I understand eight. It is blocks of 40 with the right——

Mr. Raftery: No, you don't sell blocks of 40. You sell as many pictures as the exhibitor will buy, and in that there is generally, in all the contracts that have gone into evidence, a typewritten provision that of the 40 pictures licensed the exhibitor is obligated to play a minimum of 10. Well, if he has that provision he throws out 30, if he wants to.

Judge Goddard: You mean he has a right out of 40 to eliminate 30?

Mr. Raftery: There are contracts like that in evidence.

Judge Hand: Well, that is not really block booking.

Mr. Raftery: Yes. It is just another slogan. It is just a question of degree. As Mr. Scully put it we have a seasonal product and we try to sell it all, and if we don't succeed we sell as much as we can.

Judge Hand: In block booking contracts what is the average number that an exhibitor can eliminate?

Mr. Raftery: That I can't answer, because it depends upon each individual contract.

Judge Bright: It is part of the dicker.

Mr. Raftery: It is part of the dicker. There is no obligation on his part to buy any.

Judge Bright: Where does the public come out on that type of buying? The public has to see mediocre pictures or scrubs.

Mr. Raftery: It can see mediocre pictures on any arrangement. For instance, we sell pictures one at a time. We had a picture called "A Voice in the Wind," which we thought was a good picture. No one else thought so. No one else bothered to see it. We sold that on an individual contract, one picture. The public—I don't know, they seem to know

the pictures they want to see. I have gone in and sat through pictures in theatres that I thought were terrible.

Judge Goddard: Do you mean, Mr. Raftery, the exhibitor may take 40 or he may take only one?

Mr. Raftery: There are contracts to that effect in here.

Judge Goddard: I got the impression that the Government charged here that you compel an exhibitor to take so many pictures.

Mr. Raftery: No. The Government hasn't produced a single witness to show that he was ever required to take more Universal pictures than he wanted to take—not one.

On the contrary, if you look at the Universal franchises that are in, those three-year deals, those are broken down into a one-year deal and a two-year deal superimposed on it if the exhibitor wants it. Seven hundred odd independent exhibitors bought those three-year deals.

Judge Hand: Well, it is very hard to see why there has been all this outcry about block booking if it makes no difference, and particularly if nobody was requiring it. That is certainly inconsistent with ordinary probabilities.

Mr. Raftery: If there was any hue and cry against block booking it would come from the exhibitors. And not one exhibitor has come forward on this trial to complain in one degree against selling pictures in advance. Not one.

Judge Bright: As I understand your argument, you are in favor of block booking because it is an economic necessity, but it is not to the other five?

Mr. Raftery: I would say to the other five block booking would be just as good for them as the way they sell in blocks of five. When I say block booking, I mean to sell it all in advance. Of course, they have the economic advantage of having their own theatres to exhibit their pictures in. You heard Mr. Rathvon say on the stand that he will take a picture and put it in the Palace Theatre and gladly come out of there without any film rental just to put the picture across for the future exhibitions. Well, Universal has not any theatres to do that. Neither has Columbia.

I say this, to your Honors: I say that any restriction on the right of the trader to sell either in ones or blocks of two or blocks of forty, that there is no place in the law where the Government has reached a point where they can regulate industry to that extent. Block booking is just an outgrowth of show business. When the key theatres here in town were the vaudeville houses, you would make a deal with Keith for 40 weeks of vaudeville. You did not know what you were going to get every week, except that you knew you would get a Keith bill, and you knew the trade name you were dealing with.

I do not say that every Universal picture made is a good picture. In fact, I think it was Judge Proskauer on the first or second or third day of the trial proved that worst picture ever played in Philadelphia was the Universal picture, at the Earl Theatre—oh, it did not play the Earl; it played a theatre which normally is a second-run house; it never had a first-run. But I do say as a trader they have the absolute legal right to sell their product in advance either in blocks of ten or forty or twenty; because no one has been hurt; no exhibitor has come forward to say it is not the way he wants to buy. No exhibitor has come here and said, "They blackjacked me or coerced me or forced me into taking his product that I did not need." On the contrary, the record is absolutely silent as far as evidence is concerned.

Judge Hand: Well, then you have a sort of a confession and avoidance argument which is, at least in this case now, that there is no block booking in the old sense?

Mr. Raftery: That is right.

Mr. Scully testified fully on that as to the manner and method of selling Universal pictures. Mr. Montague testified fully as to Columbia, and contracts were put in evidence. Now, we do not think the issue is of any importance. We never have thought it was an important issue. We think the hue and cry has been a bugaboo that was raised originally as an alibi, and it was completely disposed of in the Federal Trade Commission case here in this circuit.

Now, in that Federal Trade Commission case they took thousands of pages of testimony all over the country, the Federal Trade Commission did, and they issued a cease and desist order, and that order was upset in this court; and we submit that is the law as far as block booking and blind selling are concerned.

Judge Hand: Did they seek a review of that in the Supreme Court?

Mr. Raftery: I do not know. I could not say.

Now, in the Crescent case and in the Interstate case, every one of these cases that Mr. Wright relies upon, practically all the contracts involved, with the exception of United Artists in those cases—that means Paramount, Fox, Universal, everyone, were this type of contract. And somewhere along the line in the judicial decision someone would have said contrary to the Federal Trade Commission if there was any thought on the part of the Court that there was any illegality in he practice. In fact, in the Crescent case voluminous Universal contracts were introduced by the Government; and we put in a few they left out; and Judge Davies' findings of fact and conclusions of law—I think it is Government's Exhibit 299 in this case—gives Universal a complete clean bill of health. As far as Columbia, they were dismissed at the close of the Government's case; and every contract that was put in—and there were hundreds of Columbia's contracts—were on this same form or substantially the same form we have got here.

Judge Goddard: Mr. Raftery, do you say that an exhibitor may either contract for a single or for a block of pictures? Is that at his option?

Mr. Raftery: I would not go that far, Judge. Universal might say this. Here you have got two competing exhibitors, one with a theatre across the street from the other; and your salesman goes in to Exhibitor A, and he says, "I will only buy one picture; I will buy that big special you have got." And we will say, "What about the rest of our product? You

are not going to talk about that? And he says, "I am not interested." Well, we will go across the street to the competitor. He goes across the street and makes a deal. He may be able to sell 20 over there. He is not going to sit back and let the exhibitor punish him, because the exhibitor is not the kindest fellow in the world, as Scully's testimony indicated during the trial.

For instance, you take Fall River, Massachusetts. You remember we had a lot of talk about our friend Yamins. He has not bought a Universal picture for about five years. Richards, down in New Orleans, he has not bought a Universal picture in six years. And the result of that is that Scully went out and created competition against him. That is, he went to little theatres and got them to remodel their theatres, fix their theatres up, and gave them three-year franchises.

Now, just one word on those franchises: The Government did not mention them in the final argument, but they referred to them just a little bit in the brief. Every one of these franchises in evidence—and when I handed those to the clerk the other day was not to add to that stack you got; but I remembered a promise I had made to put the exhibits together and have a set for the Court. You have got here, I think, about 700-odd franchises, all Universal franchises, all made during the last three years. The longest is about three years in duration. I think that is right, isn't it, Mr. Wright, three years?

Mr. Wright: You have the exhibit there.

Mr. Raftery: Well, they are either two or three years. Now, we submit that this is not the forum or not the lawsuit to litigate any one of these franchises. We submit that if there is any illegality in any one of these documents, a necessary party to any litigation is the exhibitor. It is like Judge Hand said about Albany, it is a local situation. Now, not one competing exhibitor has come forward to offer any evidence that any one of these franchises in any way prejudiced him directly, indirectly, or in any way at all.

Now, we submit that any judicial consideration of each of these documents must be in a litigation where the exhibitor is a party, Universal is a party, and whoever has been injured; and that each franchise would have to be litigated separately; the Court would have to inquire into the nature, the extent and the area affected by each one; and that is nothing that can be even talked about here.

Now, what is the situation with regard to Universal? Universal, according to the testimony of the five exhibitor defendants, has improved in stature steadily since 1938. The quality of its pictures has improved; what they have paid them in film rental has improved; their grosses have generally improved, according to the Securities and Exchange Commission report put in by Mr. Wright; and they are rendering a better service to the exhibitors today than they ever rendered in their history. Now, that is the sum and substance of Universal. They are hardly mentioned in the brief, except on this block booking, which is the red herring that somebody somewhere along the line has been throwing across since 1922 and which generally ends up as a lot of nothing.

Now, United Artists is an entirely different type of company than Universal. It is entirely different from any of the five. United Artists is perhaps the least dependable of all the distributors. We own no studio; we produce no pictures; and many times we live entirely on promises from our producers that do not materialize. We have gone as much as five months without a picture. In fact, one year we had to go out and buy some Paramount pictures, because they had too much inventory and could not handle them, and we had nothing—oh, I withdraw that nothing—we had one picture, a picture called "Moon and Six Pence" which was in production but not delivered. So we went out and bought some Paramount pictures, including some Hopalong Cassidys. We had never been in the Western business before, but we got in, and we found out it was a pretty good business. We bought about eight other features. Well, we had enough to

have a convention, and we had just hired a short time before a man who had been the general sales manager for Warner's. So some wit at the convention got up and described our product that year that we had a Warner sales manager selling Paramount pictures for United Artists. And that has been the lack of continuity of delivery which has been our problem since 1919. So, naturally, we have to have a different method of selling than anybody else.

First, under our contracts, which are in evidence, we are required to sell our pictures separately one at a time, and that is the way we sell them. We used to sell them before screening and before they were delivered; and we found that a very bad method for us, because all we were doing was creating a lot of bad will.

I remember one picture we sold three times. I think the name is Life of Rudolph Valentino. To this day that producer has not delivered that picture. We were authorized to sell it and he didn't make it. So, for the most part, over the years, we have sold our pictures one at a time, sometimes after they are finished, sometimes before they are made, and sometimes while they are in production and being made and after we know what we have got.

The Government has referred to United Artists twice in their argument here in closing but they have referred to us about thirty times in the brief. One of the references they have in the brief is an alleged discrimination in Los Angeles County, California. They claim we sold a picture to Skouras or National Theatres on a sliding scale—a picture called Stage Door Canteen—on a sliding scale that started at 20 and went to 50 per cent. We had a great deal of evidence about that. And he says at the same time we sold the same picture to an exhibitor in Burbank for 50 per cent of the gross. That is true, we did. Lazarus testified that in the early stages of selling Stage Door Canteen we tried to get 50 per cent from everybody. In my brief I stated, with a little bit of tongue in cheek, as I did not have the copy of the exhibit, that it was my recollection that we had a con-

tract printed especially for Stage Door Canteen, and in it, so that our salesmen would not be misled; we had printed in there "50 per cent of the gross receipts." I said in all probability that was an early stage of Stage Door Canteen to the man in Burbank, and he went for the 50 per cent. Yesterday my friend here got me out part of what we referred to on the trial as the $800 worth of photostats, and that is the Stage Door Canteen contract for Burbank. It is Exhibit No. 369-1, subdivision 751. And that is a contract for Stage Door Canteen for Burbank, California, and I see printed right across the face of it, "50 per cent of the gross receipts." I said it was an early sale, "15th of July, 1943."

But yesterday I was wondering what was attached to it. We have heard a lot about the preferences given to affiliated circuits. Now, somehow, there got annexed to this exhibit, and I presume it is in evidence because it is out of the bundle, four other contracts, and I see that Woman of the Town was sold to the same exhibitor and he had the right to play Woman of the Town in the Major and/or the Loma, and/or the Magnolia. In other words, he could play it in any one of the three theatres. You remember that is one of the big preferences we gave the big five, let them move it from one theatre to another, or select any one of the three. The terms, he plays it for seven days. He pays 35 per cent of the gross receipts for the first four days, and the last three were reduced to 30 per cent of the gross receipts. "The exhibitor on percentage has the privilege of deducting the cost of the second feature not to exceed $75, from the gross receipts, before computing the film rental." That is another great preference that we gave these affiliates, the right to deduct the second feature. I think there is something in the brief about it, that is, the Government's brief.

Here is another contract attached to this exhibit for Victory Through Air Power. The only difference is, instead of starting at 40 and going down to 35 and going to 30, in this one he starts at 30 and goes to 25. On Hi Diddle Diddle—

Mr. Proskauer: Is that an independent exhibitor?

Mr. Raftery: Yes, this is the big discrimination that is in the brief.

Mr. Proskauer: You did not tell the Court they were independent theatres.

Mr. Raftery: Thanks for doing it. 35 per cent of the gross and 30 on Hi Diddle Diddle. And here is a James Cagney picture, an important picture, 40 per cent of the gross for the first four, 35 for the next four, and the privilege of deducting the cost of the second feature.

I also told your Honors, as the selling got a little tougher, they were forced to strike out that 50 and write in the best deal they could get. Here is the 50 inked out on a contract for the Lamb Amusement Company, and it is dated 12 November, 1943. As the selling got later and the exhibitor got tougher, you had to go down. So, instead of 50 now you get 40, and the split figure. And all through this here—Yamins in Fall River, Newport, Rhode Island, Lafayette theatre in Central Falls, Rhode Island, all independents, the 50 is stricken out, 40 is in. University, Cambridge. Here is one here, Wyandotte, Michigan, where the 50 is out and they are down to 30.

So instead of there being any discrimination of any kind, all that this exhibit shows is that all exhibitors, both the affiliated and the independent, try to get every edge they can from the distributor, irrespective of whether it is United Artists or Universal or Paramount.

Mr. Wright criticizes United Artists on two franchises in his brief, that is all, because we have no other franchises. And the reason, frankly, why we don't make them, we do not think they are good for us. Not that we do not think that they are good for the exhibitor. And in this statement here he says in the case of United Artists, there are closer ties with Loew and Paramount theatres due to two ten-year franchises, with the pattern of distribution set by these franchises continuing since their lapse.

First of all, if you remember, when he offered the Paramount franchise, I stipulated he could put it in on condition he would recognize the fact that in this court, in the Paramount bankruptcy, the franchise terminated in 1933. It wasn't taken over by the Irving Trust Company as Receivers of Publix.

In that franchise, instead of being a ten-year deal that set a pattern for future distribution, it was a five-year deal by operation of law. It was out the window.

I am only going to make one statement in regard to that, that it set a pattern. In 1939-1940 Mr. Wright examined personally our sales force. He examined fully on this Paramount situation. Instead of reading into the record the evidence he got regarding our dealings with Paramount since 1933, he makes this statement with no support of the manner that we have dealt with Paramount since. As a matter of fact, the testimony shows that in New England—we will just take that one sector,—since 1933 United Artists sells against the Paramount theatres in every situation where Paramount has any opposition in the whole of New England except one, and that is New Bedford, Massachusetts, and in New Bedford we did sell against Paramount when we had a fight with the local fellow and we went back selling M. & P.

In this batch of contracts, Paramount has two big fine contracts. In Holyoke, Massachusetts, I just ran across Rifkin, who has a little more or less inferior theatre there. We sold Stage Door Canteen to Rifkin twice. We sold it the first time for a run and then he bought a repeat run, played it twice in the same theatre.

As regards the Loew's franchise, he says we have set the pattern on the Loew franchise. I did not know the Loew franchise was in evidence until I found, instead of going in through us, it went in through the Loew exhibits. The Loew franchise was made in 1927 although dated 1928. When that franchise was made, all the Loew theatres played vaudeville—that we were selling—or stage shows, and the film rental recited in that franchise for practically all our the-

atres was 17½ per cent of the gross. That does not mean for all our pictures but all the pictures covered by that franchise. Some of our producers were not in on it. The 17½ per cent was predicated on the advance in admission prices charged by those theatres plus the vaudeville show. Instead of allowing them to deduct the cost of the vaudeville show, we took 17½ per cent of the show. Sound came in, vaudeville went out, and we considered that a very bad contract from our standpoint and in 1936 we did not renew it, and the contracts that he has put in now, that we are making with Loew, are paying 35 per cent of the gross and higher percentages. There is no pattern since 1936. It is entirely different. And this statement is absolutely without foundation in fact or on any evidence in the record. The evidence is directly to the contrary.

Judge Goddard: What page is that?

Mr. Raftery: That is page 22 of his brief.

Of course the statement that Mr. Frohlich read yesterday just before that, where he says that we have reached a satisfactory accommodation with the producer-exhibitors. We do not subscribe to that. We never reached a satisfactory accommodation with any exhibitor. They won't satisfy us. They cannot satisfy us.

He then goes on and says that Universal's distribution pattern exhibits a similar tie with RKO.

Judge Hand: Where are you reading from?

Mr. Raftery: Page 22, the top of the page.

This is, in fact, the most insidious charge against United Artists and Universal. It is the bottom of page 21, and 22 right at the top.

Judge Hand: Yes.

Mr. Raftery: In other words, he says that we are able to get the crumbs from the table of Paramount and Loew, and Universal gets them from Paramount. I think Scully testified here that he sold half of his Universal product to Loew in New York. He got mad at RKO in Chicago, took his

product away, and he is selling it to B. & K. out there, which is a Paramount affiliate. He took the product away from RKO in San Francisco and he is selling it to Blumenfeld. And only recently, he testified, that down there in Los Angeles he said he made other accommodations because he could not get what he wanted out of RKO. In other words, it is a gratuitous statement. There is no pattern. The evidence is entirely different.

I have talked enough about this, because I think in our brief we have covered everything.

As I understand the Government's argument they have extended what they have asked for in their brief. In their brief they ask for divorcement and then they ask for no relief against United or Universal or Columbia as distributors. But on the argument yesterday or the day before Mr. Wright and Mr. Marcus stated—and I am going to try to paraphrase their contentions, and I am going to try to close very quickly after that—they want divorcement first. They have not signified the nature of the divorce, how it is going to operate, whether it is just going to be the creation of a lot of local circuits, and I don't know whether our state will be worse then than it is now. At any rate I don't know what they want on that and I am not going to talk about it.

But they want to force the selling of pictures on the auction block, if I correctly understood Mr. Wright. They want the elimination of clearance completely. They say that the distributor shall go out and select his run and sell his run. I think it was Judge Bright, or it may have been Judge Hand, who asked Mr. Wright what would happen if you were just having the distributor selling the runs, no clearances, and the exhibitor using the same 300 or 350 prints.

One of Mr. Wright's predecessors—I don't know which one it was—he set up some kind of a complaint department down in the Department of Justice, and every time an exhibitor had a squawk he would write a letter to the Department of Justice. Then the Department in turn would write

a letter to all the distributors. Then everybody would write letters back and forth.

Now what would happen would be simply this: we would select the 81st Street Theatre, if there is one at 81st Street, and we would give it the run there. The man at 83rd Street would say, "I can't get it; 81st Street is getting it." He would write a letter to the Department of Justice. In other words, we would be back in that letter-writing stage we were in for several years before this lawsuit was filed.

Judge Hand has talked considerably about the Westerway case. I was one of the associate counsel in that case, and I recall the plaintiff telling how he operated in that case. He would go to Washington to the exchanges to try to buy pictures ahead of Durkee, the independent exhibitor he was talking about.

"What did you do?"

"I would go down to Warner Brothers."

"Whom would you see?"

"The branch manager."

"What would you do then?"

"I would go up to the Department of Justice."

"Whom did you see there?"

"Mr. So and So."

"What did he say?"

"Go back to RKO. See if you can get some pictures from RKO."

The whole sum and substance of the testimony before Judge Chesnut was that he in partnership with the representative of the Department of Justice was trying to break down Durkee's clearance and get clearance for himself.

If you are going to go back—not go back, create a new method of creating runs with no clearance, then I can see nothing but organized chaos as far as distributing pictures is concerned. It is just an economic impossibility.

Now as regards the auction block method, one of the big complaints that we have had from the Department of Justice is that, "You have taken the pictures away from your

old customer and given them to somebody else, either an independent or an affiliate."

Mr. Wright: If the Court please, I think the complaint here states the complaint of the Department of Justice. It seems to me it is going a little bit far outside this question.

Mr. Raftery: I still repeat that in this case there has been the inference created that pictures were taken away from one exhibitor and given to another. That is a false statement because nothing has been taken away from anybody. What is meant: You have a contract for this year and you service your pictures to this theatre here (indicating). For some reason or no reason you decide not to sell this exhibitor the following year. We say there is no obligation to continue with that exhibitor at any time. So we go over here (indicating) and sell over here to the competing account. That is still called a sell-away or a take-away. Now that has been a complaint. Yet, if you are going to auction-block, that will cease to be a complaint, because no one will have any security in the operation of any theatre. Take a theatre like the evidence shows here in the 92 cities, a theatre in Erie, Pennsylvania, caller the Shea's. That plays all the Fox, Metro and United Artists pictures. I think it is a percentage of Fox or Metro, but it is all United Artists and the other two. We know that that theatre is in no way comparable to the big theatre that Warner Bros. have up there. If you are going to auction-block, Warner's can outbid on the individual picture.

You have got to get a customer. You have got to establish the customer. You have got to establish a steady release of your pictures. You have got to establish your revenue. All you are going to get this way is an auction block. Are you going to support your account or are you going to desert your account?

We stated in the beginning that we sell the market as we find it. We didn't create it. And I respectfully submit as far as Universal and United Artists are concerned that we should not be in this court. We have no position in this

court. We have done nothing but sell pictures. If that is a crime we are guilty.

REPLY ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Wright: If the Court please, I had not wanted to go back into the events that led up to bringing us where we are today, but in view of the argument that was made yesterday, I think that it is necessary to do it in order to understand the scope of the issues and precisely what this Court is now being called upon to do or not do. I therefore would like to sketch briefly some of the events leading up to the entry of the consent decree, which were omitted from the statement made yesterday.

Now that decree at the time it was presented to Judge Goddard was uniformly opposed by everybody who appeared in court at those hearings except the government and the defendants. All of the other persons who were permitted to be heard, were opposed to it. Those were primarily the circumstances which made it necessary for us to present it, if it were to be made effective at all upon a wholly tentative experimental basis.

We had negotiated with these people for months. We felt that what they had to offer deserved a fair trial, that it should be put into effect on that basis as far as we were concerned. The problem we recognized as a complex one. The Justice Department had been struggling with it for twenty years. We had this mass of complaints which seemed to take up an inordinate amount of our time as well as the courts'. We wanted to get rid of it and solve it if we could, without resort to prolonged litigation.

We hoped that that decree would do the job. But there is not any question but what in the remarks of Mr. Hays and in the decree itself, it was expressly put forward and accepted not as any final solution or adjudication of anything but merely as a decree which would give an opportunity to the parties to find out whether or not there could

be a satisfactory solution of these problems without prolonged litigation.

Now, as to the hearing, Judge Goddard, of course, had no facts before him. The arguments that were made were not addressed to legal propositions. It was simply an airing of complaints; so that the recital in the decree to the effect, of course, that it was not a finding or an adjudication as to anything was simply a necessary consequence of the manner of its presentation; and the responsibility for it was ours. It was our representation to Judge Goddard that the decree should be entered, which he accepted and one which, I suppose, that any judge would accept under similar circumstances. We were willing to take the responsibility for giving the Court the necessary assurance that this relatively radical experiment should be undertaken. And I for one would think the Court was thoroughly justified in undertaking it. I do not want to be understood as asserting here that the Court acted in any way outside its authority in entering that decree. My only point was that if it did what these defendants say it did, and gave them permanent immunity as to any of these matters, then we did not have the right to do it and neither did the Court. But that is not what we did.

Now, as to those limitations on that three-year period, they were not quite accurately stated by Mr. Caskey. As far as the provisions as to method of sale, there was in effect only a one-year trial period as to those. Those were felt at the time to be very drastic things, and some of the industry made the same statements that you hear today, that they were going to be economically ruined by those methods of sale; and very elaborate escape provisions were put into the decree. But the only season during which those five defendants were bound to employ those methods of sale was the season 1941-42. And after that they were free to do anything they chose in those respects.

Now, as to the three-year limitations: They were for a period of three years enjoined from engaging in a general program of expanding their theatre holdings. That limita-

Mr. Wright: You can license, as I see it, under the law five or fifty at a time.

Judge Hand: Yes.

Mr. Wright: In one agreement.

Judge Hand: I used five simply as symbolic.

Mr. Wright: Providing you do not condition the license terms for any one of the five, or fifty, upon the terms which are to be paid for another of the group.

Judge Goddard: What do you mean by "conditioning"? You mean make a price on a certain percentage of the box office receipts of 25 pictures, say?

Mr. Wright: There is no reason why you should not stipulate such percentages for the pictures as you think that they are worth, but what I mean is, you cannot say, "You can have copyright A for 25 per cent of the receipts, if you buy 50, but if you want copyright A alone, it is going to cost you 50 per cent of the receipts." To me, that is plainly conditioning the terms of that copyright on the terms on which the exhibitor buys the other.

Mr. Proskauer: You may sell cheese that way, but you don't have a copyright on the cheese.

Mr. Wright: You may sell cheese that way, but we are not concerned here with how you can sell cheese.

Judge Goddard: As I understand you, Mr. Wright, you say there is no objection to a distributor saying to an exhibitor, "We make a deal on 25 pictures"?

Mr. Wright: Yes, make 25 ——

Judge Goddard: Is that right?

Mr. Wright: Yes, 25 — sell 50, if he has them ready to sell. Of course, blind buying is another aspect of the——

Judge Goddard: Yes, we won't take up blind selling now.

Mr. Wright: Yes.

Judge Goddard: But there is no objection on the part of the Government to a distributor making a contract with a theatre owner to take 25 pictures, or take 40 pictures, with the right to eliminate 8 or 10, if he wishes to?

Mr. Wright: That is right.

Judge Goddard: Your answer is, there is no objection?

Mr. Wright: Yes.

Judge Goddard: I cannot understand what the argument is about.

Mr. Wright: I am sorry that I cannot——

Judge Hand: I understand what he says, but I do not get the classification. I do not understand what it is all about. Why?

Mr. Wright: Well, I think it is a very clear consequence of the position the Supreme Court has taken in interpreting the patent laws.

Judge Hand: They have never taken it about this sort of thing, have they, at all?

Mr. Wright: Well, it seems to me——

Judge Hand: Now, wait a minute. Answer my question. It won't necessarily be a concession that will involve your position. It may or may not. But just answer my question, whether there is any decision directly in point in regard to coypright or patents?

Mr. Wright: Yes.

Judge Hand: Of course, you can talk about the Dry Ice case, and all those things, and the Motion Picture Patents case, and the Socony-Vacuum case and say they are in point. I don't know whether they are or not. I would like to have something like this rather than these analogies. I don't think these are the ordinary tie-in contracts. Maybe they are within the same principle.

Mr. Wright: That is what we contend. I concede we can't come any closer on the facts than, let us say, the Mercoid[1] case and the Motion Picture Patents case. We can't bring you closer to the factual situation that is presented than in those cases. We do rely for our argument on the principles that are to be deduced from what the Supreme

[1]See also United Shoe Machinery Corp. v. U.S., 258 U.S. 451; Hartford Empire Co. v. U.S., 323 U.S. 886; Motion Picture Patents Co. v. Universal Film Co., 235 Fed. 398 (CCA2), aff'd on other grounds 243 U.S. 502; Oxford Varnish Co. v. Ault & W. Corp., 83 F (2d) 764 (CCA6).

Court has done in that whole line of cases reviewed in the Mercoid case the trend of—which has not terminated but which is still going on.

Judge Bright: I wonder if I get you. I understand you to say that any one of these distributors can sell one or more or can license one or more of their copyrights to any distributor providing they do not condition the license of one for the benefit of any of the others.

Mr. Wright: I am not quite clear what you mean by "benefit."

Judge Bright: Well, condition the price or the right to take, the right to buy, for the benefit of any of the others.

Mr. Wright: You mean by benefit, as a means of persuading him to purchase any of the others?

Judge Bright: Well, that is for the benefit——

Mr. Wright: I would say yes. Yes.

Judge Hand: Perhaps I don't get your classification really yet. I should think your answer ought to be no.

Mr. Proskauer: Your Honors, I don't want to transgress the proprieties by too much interruption, and if your Honors think I do, please shut me up, but I would like to pose one question just to clarify this if you will let me.

Judge Hand: All right.

Mr. Proskauer: It comes from one of my associates, and it is so poignant. Sandburg's Lincoln—there are four volumes of them. Each one is separately copyrighted. If you buy them all together you pay $12 for them. If you buy them separately you pay $16. Now is that illegal? Is it illegal to say, "I have got some books and I want to break the set. I will sell them all conditioned on the other, each one separately copyrighted, for a certain price. If you want to break up the set and buy them separately you have got to pay more."

Judge Bright: That is hardly parallel. Your copyrights run to different pictures. They are not really in one book. They are separate stories, every one of them.

Mr. Proskauer: It is parallel, I would say, your Honor, because he says we have a detriment from the copyright law.

His argument is that having a copyright I can't do with my property what I would be entitled to do if I didn't have a copyright.

Mr. Wright: That is right.

Mr. Proskauer: That is what his argument comes down to.

Mr. Wright: No question about that.

Judge Bright: That is the way I understand it. I understand him to say that you can license your copyright on any feature, but you can't sell it upon condition that he buy some other feature or that he pay a price for some other feature or that he do something for the benefit of the other feature.

Mr. Wright: Mr. Marcus calls my attention to the fact that in the Hartford-Empire case differences in royalty payments on the uses of the patents there involved were used to tie the patents together in that case. That was one of the practices employed there, and the technique used was to make the single use at a higher royalty than if used as part of the combination.

If I may go back a moment to the consent decree, it did some other things that were not mentioned here, that I think should also be understood.

There are, as you know, in effect between the Government and the defendants two other consent decrees, one in Chicago, the other in Los Angeles, both of which I think were entered in 1932 and both of which restrained the defendants from engaging in trade practices of various sorts.

Some of the provisions of both of those decrees were suspended and are suspended pending the continuance of the arbitration procedure in this case.[2]

I mention that because it shows the scope of this proceeding which affects not only the decree immediately before you put these other decrees as well.

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[2]There was also a 1930 consent decree in the same litigation as that in which the Los Angeles decree was entered, which was similarly suspended in part. See trial brief App. C, pages 147-149 for details of these proceedings.

At the time the consent decree was entered here, there were two contempt proceedings pending, one in Chicago and one in Los Angeles, under those decrees. The one in Los Angeles had not been set for hearing and was dismissed. The one in Chicago was pending on exceptions to a master's report which had recommended that Paramount and Balaban & Katz should be found guilty of violating the decree and recommended dismissal as to the other distributor defendants. That was disposed of by dismissal of the latter defendants and the entering of nolo pleas by the former defendants, with a payment of $10,000 by them.

At the same time these defendants who are defendants here were also defendants in the three so-called independent circuit suits which were brought in various parts of the country primarily against these combinations of independent exhibitors, but also with these defendants here as co-defendants, and which originally charged not only that the defendant distributors had conspired and combined with the exhibitor groups to impose the restrictions there involved on their competitors, but also charged a conspiracy among the distributors themselves to impose the same restrictions.

Now as a part of the settlement of this suit, we agreed to dismiss from those suits as defendants the consenting defendants to this decree and we also amended those to eliminate the charge of co-conspiracy among the distributors to impose the restraints in question. And that was done so that those suits were left in the position where they would try out a question which we had debated at some length with these defendants as to whether or not any conspiracy among distributors was necessary to constitute a violation of the Act. As the suits were left, they charged no conspiracy between distributors. They charged a conspiracy only between the exhibitor defendants and each of these distributors who were still charged as co-conspirators with the exhibitors but were dismissed as defendants.

Now I would like to outline what from our standpoint we hoped to accomplish during this three-year trial period.

In the first place, one thing we hoped to do which we did do was to get one of these circuit cases litigated through the Supreme Court to get the answer to some of these undecided legal questions. We did that in the Crescent case and we think that if you want to see what the Supreme Court thinks the Interstate Circuit doctrine was, you will find it stated in the Crescent case by the Supreme Court itself[3] rather than in the Westway case or any District Court decision on this question of whether or not you have to have two distributors conspiring together in order to have an unlawful conspiracy under the Sherman Act.

In the Crescent case the Supreme Court held that they did not even have to find for the purpose of establishing liability that Crescent conspired with one distributor; that it was enough that these exhibitor groups combined among themselves to restrain the trade in pictures distributed by these defendants, although the District Court had found expressly that each of the consenting defendants here had separately combined with the exhibitor defendants there for the purpose of restraining the trade of their competitors.

Judge Bright: The Crescent case, is that the Texas case?

Mr. Wright: No, that was the Interstate Circuit case. The Interstate Circuit case directly led to the filing of the Crescent case and these other independent circuit suits which were filed shortly after the decision in the Interstate case came down from the Supreme Court in 1939. At the time of the entry of the consent decree none of those independent circuit cases had been reached for trial.

Now we hoped by the small block limitation as against these defendants not only to make a freer selection of pictures which would make it possible to more sharply differentiate the reward of the good from the bad, and thus stimulate, as we saw it, production and distribution of better pictures, but we hoped with the licensing in small blocks

[3] 323 U.S. 173, 181, Ftn. p. 183. See also references to Interstate Circuit case in Ethyl Gasoline case, 309 U.S. 436, 456-457, and Masonite case, 316 U.S. 265, 275.

tion ceased at the end of the three-year period as did the limitation on the Government against its litigating the——

Judge Hand: I do not understand this.

Mr. Wright: I beg your pardon.

Judge Hand: I do not understand this thing about 1941-42 that you just mentioned. Where is that?

Mr. Wright: The escape provisions I believe are in Section 23, is it, of the decree? Have you Appendix C of our trial brief? That has the decree printed in full.

Judge Hand: We have got the consent decree here.

Mr. Wright: Well, if you will look at Section 12 you will see the escape provisions which made those sections of the decree which dealt with selling dependent for any extension beyond the 1941-42 season upon the securing of like relief against the non-consenting defendants over here. So that actually there was only a firm commitment as to the one season.

Now, with reference to that provision, or the lapse of those provisions, I would like to say too that it is not true that we did nothing——

Judge Hand: Just a minute. That is a very limited matter, isn't it?

Mr. Wright: I just want to clear the thing up as to what happened.

Judge Hand: I do not know just what you mean, but all right.

Judge Goddard: Section 21 provides for three years.

Mr. Wright: Yes, but the three-year period applied generally to the other provisions of the decree. I simply wanted to point out first that there was this one-year trial period for the method of selling provisions, with a proviso that if we got similar relief against the other defendants, that could be extended. The statement was made we did nothing to get such similar relief; and I want to call Judge Goddard's attention to the fact that we did this: We came in before your Honor and attempted to secure a severance of issues as to those three defendants so that we could present

for decision the question of block booking and blind selling independently of the other issues raised in th suit, because we did not see how we could possibly try those other issues separately as to those three defendants. Your Honor will recall that the little three objected to any such severance; and, of course, I think your Honor quite properly ruled that in the absence of consent those issues could not be severed; and there was, therefore, no trial against the little three separately to determine that.

Judge Goddard: The situation is quite simple. That section generally provided for three years, in general terms, and then in Section 12 said in effect that the consenting defendants conformed to the rule of five pictures in a block, but if you did not get the other defendants to agree to it they were only bound to that for a year; isn't that it in substance?

Mr. Wright: That is correct. And we did not get it. I merely wanted to point out that an effort was made to separately adjudicate that block booking, blind selling issue at that time or within the time, which was unsuccessful.

Judge Hand: So far as this decree is concerned they can go on with block booking now?

Mr. Wright: There is nothing to prevent them from using any method of selling they desire, and has not been since the 1941-42 season.

Judge Goddard: They have been at liberty for upwards of two years—it is more than two years—to sell in block booking, but they have not done it; isn't that right?

Mr. Wright: That is quite correct.

Mr. Proskauer: We have said here that we do not want to take any advantage from the escape clause.

Mr. Wright: The evidence I think is clear that the block booking—the difference has been one of degree. It has been confined to small blocks. That is, they have chosen to sell their pictures in groups of five, or an occasional group, I believe, of eight or ten rather than in season groups which were previously used by them and which are still used by Columbia and United Artists.

Mr. Raftery: You mean Universal.

Mr. Wright: Columbia and Universal, quite right.

Judge Hand: You object to those blocks of five arrangement?

Mr. Wright: Yes, we do.

Judge Hand: You just want them to sell picture by picture?

Mr. Wright: We do not think you have to make a separate contract for every picture, but we do feel that the law has quite definitely now reached the stage where it is illegal to condition the sale of one copyright upon another, and that is essentially what happens in this business when the method of sale is such as to tie these groups of copyrights together in the one highly restrictive licensing agreement. That we think clearly under present decisions is absolutely contrary to the purposes of the Copyright Law as well as the Sherman Act, because on its face it tends to prevent the Copyright Law from serving its purpose of differentiating the rewards of the various copyrights in accordance with such merit as they may have.

Now, I concede that as far as exhibitors are concerned, many of them, or perhaps most of them, want the security that comes from having as many pictures as they can tied up with a maximum privilege of elimination. That is the ideal position as far as the exhibitor is concerned. On the other hand, they do want freedom of selection. Now, there is nothing particularly new about this doctrine or its application. As counsel for Columbia pointed out in its brief, there is in effect a consent decree today with respect to Ascap, the organization which deals in music copyrights, which provides that if the user wishes to buy any music copyright singly, he may do so. On the other hand, if he wishes to make a group purchase, he may do that. But the license of one may not be conditioned upon the license of another by the copyright owner.

Now, I am not going to take——

Judge Hand: You say you have got that in a consent decree as to Ascap?

Mr. Wright: Yes. Of course, that does not adjudicate anything either; but I say that the state of the court decisions is such that that same conclusion, I think, is impelled as to the illegality of this copyright tie-in in this business.

Now, there were further——

Mr. Caskey: Mr. Wright, to put it clearly, the exhibitor to have an option to take whatever trade-shown pictures he wants.

Mr. Wright: That is right. If he wants to buy one, he should be able to buy one without having the terms of the one conditioned upon the terms of another.

Mr. Proskauer: And if another exhibitor wants to buy two or three, we have no right to say to him we prefer you over the man who wants to buy one?

Mr. Wright: That is right.

Mr. Proskauer: That speaks for itself.

Judge Bright: Did you mean your last answer, Mr. Wright? Did you mean your last answer as broad as you made it?

Mr. Wright: Perhaps I did not listen carefully enough.

Judge Bright: In other words, if one of these distributors goes to an exhibitor and asks how much he would like to buy, and he says he only wants one, do you mean to say he cannot go across the street and pick out an exhibitor who is willing to take three or more?

Mr. Wright: If the other exhibitor has complete freedom of choice.

Judge Bright: Well, he has the right of selection.

Mr. Wright: He has a right of selection among exhibitors, of course, if both exhibitors have equal rights of selection as to his pictures.

Judge Bright: The distributor can sell to whichever one he chooses.

Mr. Wright: It is not just a question of——

Judge Bright: Can a distributor sell to whichever one it chooses under those circumstances?

Mr. Wright: Yes. I had understood him to mean, can he go across the street and find somebody that he can force more

pictures on, and by using a forcing technique sell that exhibitor as against the first one.

Judge Goddard: Suppose you give us a clear answer on it, Mr. Wright. It seems to me you answered two ways to Judge Proskauer. Is it your position that if a distributor can get a customer to take five or three or four pictures instead of one, that he is not at liberty to deal with that person but he must sell to a man who would only take one?

Mr. Wright: He is at liberty to deal with anyone he pleases. The question is, what method he uses to get any particular customer to take three, four, five or fifty. That is, if he conditions the terms for the one upon terms for the others in dealing with the man who buys five, we say that he is violating the Sherman Act and the purposes of the copyright statute.

Judge Hand: Do you call it conditioning to say, "If you want to buy you must take five"? Do you?

Mr. Wright: Yes, clearly. Clearly.

Judge Bright: It is not a violation to say to him "You can buy as many as you wish"?

Mr. Wright: That is right. He can say, "You can have one, and the terms for that one are going to be the same, whether you buy one or five." The way the conditioning is handled in the trade is that he is told. "Yes, you can have one, but if you want just one it will cost you considerably more than if you bought that as a part of a group of five."

Judge Bright: Is that a violation?

Mr. Wright: I think it is, yes. That is in substance what happens.

Judge Bright: That, it would seem to me, would prohibit any merchant from selling to a big buyer on better terms than he does to a small buyer.

Mr. Wright: Well, as to what other merchants may do, I think that is another matter. I think the law is also clear that a copyright owner in dealing with copyrights does not have the same freedom of contract that somebody who deals in uncopyrighted material would have. I think the Court has clearly taken the position——

Judge Bright: Well, can a copyright owner sell for any price that he sees fit?

Mr. Wright: I beg your pardon?

Judge Bright: Can a copyright owner sell or license for any compensation that he sees fit?

Mr. Wright: That is right.

Judge Bright: Then why can't he sell to a small buyer on sharper terms than he would to a larger?

Mr. Wright: Well, it is not a question of sharpness of terms, as I see it.

Judge Bright: Well, for greater compensation, I will put it that way. Why can't he sell to one who buys or licenses one film for a greater compensation than he could sell a license to one who buys 20 films?

Mr. Wright: Well, I think that is a little different proposition than the one I asserted. I am not saying that—of course, he does not have to have uniform terms for a single picture as among all exhibitors. I simply say that in dealing with a particular exhibitor he cannot condition the terms on which he makes one copyright available to that exhibitor upon the terms on which other copyrights are to be made available to that exhibitor.

Judge Bright: Well, in the absence of any conditioning he can sell on any terms he sees fit, or license on any terms he sees fit; or am I stating it a little too strong?

Mr. Wright: I think you are. Then we run into the extent to which he can impose restrictions. If you are talking merely about ——

Judge Bright: Price.

Mr. Wright: — rental terms, price, that is correct.

Now, I wanted to point out in so far as this arbitration system is concerned, that was set up on a three-year basis and has been continued since that time by an annual extension of the terms of the Appeal Board at least by stipulation between the Government and the defendants. And as far as we are concerned, we have no desire to scrap the system as your Honor suggested the other day until such time as it can

be replaced with one which is effective; and for that purpose, even after the expiration of the three-year period we have consented to its continuance in its existing form. But in so far as the decree is concerned, at the expiration of the three-year period it is expressly stated that the whole matter is wide open for modification of any kind on petition of any party; and, of course, that is what we are here for now, to determine what kind of a decree is necessary to enforce the act with reference to all of these trade practice matters as well as to determine the fundamental legality or illegality of these defendants' structures.

Judge Goddard: Mr. Wright, I understand the term of the Appeals Board expires shortly. Are you fearful about it being extended another year or pending the result of this litigation?

Mr. Wright: My feeling is that we should extend it for six months with the understanding that the extension is without prejudice to any action that the Court may take in this proceeding. I assume there will be some sort of decision here within that time and that is why I think an extension of more than six months would not be desirable.

Judge Goddard: Is that agreeable to all counsel?

Mr. Caskey: We do not think the Government's consent is necessary. We think it is quite shortsighted to make it only six months, but we are not going to press the point. If that is the desirable interim relief, why, we are willing to have it six months. That brings us to the 1st of August.

Judge Bright: Without prejudice to either side.

Mr. Wright: That is right.

Mr. Caskey: Obviously, without prejudice.

Judge Bright: And subject to whatever decree is entered in this litigation.

Mr. Caskey: I personally think that it would be much better to make it a one-year term, subject to the further order of the Court.

Mr. Frohlich: Of course, your Honors, the three non-consenting defendants take no position whatever.

Mr. Caskey: We invite you in.

Judge Bright: We did not look in your direction at all.

Mr. Proskauer: Why not make an order continuing it subject to the further order of the Court, just that? I don't think you have to have any term in it.

Judge Goddard: Is that satisfactory, Mr. Wright?

Mr. Wright: Provided it is without prejudice, I think that is all right.

Judge Bright: I think that is fair enough.

Mr. Proskauer: You cannot prejudice us and we do not want to prejudice you.

Mr. Wright: Not much.

Judge Goddard: Mr. Caskey, will you see that an order is presented to that effect?

Mr. Caskey: An indefinite extension subject to the further order of the Court?

Judge Goddard: As stated.

Judge Hand: All right, Mr. Wright.

Mr. Wright: This decree, as I say, imposed this three-year limitation on the defendants with respect to engaging in a general program of theatre expansion, and that, of course, also expired, and there has been no renewal there.

There was an interlocutory proceeding under that when Fox and Paramount bought additional theatres during the period of the decree in what we thought were fairly substantial numbers. We brought a proceeding asserting a violation of this Section 11, which was heard upon stipulated facts there. Of course, there was no dispute as to the number of theatres they had acquired and where they had been acquired and the fact, that in the course of those acquisitions certain independent competition had been eliminated by the acquisitions.

Judge Hand: I do not exactly get your position about these five and one pictures. You say that, as I understand it, you say that it is all right to license five provided you do not insist upon it? You give the licensee an option to do something else?

that it would actually result in some loosening of what seemed to us to be a fairly rigid pattern of distribution which we attributed in part to season block selling and to the use of long term franchises.

We observed the operation of the system and were disappointed in that expectation as appears from the evidence here as to what happened with respect to distribution of these defendants' pictures in the principal cities from the period beginning with 1936-1937, the last season before the suit was filed, then 1938-1939, the last before the entry of the decree, 1941-1942, the season when the blocks of five had to be used, and 1943-1944, the last season prior to the commencement of this proceeding when they were still being used voluntarily.

Those exhibits which are in the form of admissions of fact by each of the defendants involved, I think speak for themselves.[4] They show that with the exception of RKO, which during that season 1941-1942 did license a substantial number of new first-run accounts there that it had not licensed before, there were very few changes of any kind and virtually none as between affiliated first-run operators and the RKO distribution pattern shifted back in 1943-1944 much to what it had been before.

Now another thing that we hoped this system would accomplish was a general loosening of the clearance structure by means of these arbitration proceedings, that the established rigidity which it had could be in part broken down by having these exhibitors come in and file proceedings which would result in either a reduction in the period of clearance or total elimination of it.

Very early in the operation of the system we found that while we had been careful to couch those awards in negative terms, that is, we did not provide that anybody could come in and arbitrate for the right to have clearance over somebody else, the effect of an award fixing a maximum clearance which a consenting distributor could impose against a com-

[4] Fox (Ex. 44), Loew's (Ex. 58), Paramount (Ex. 84), RKO (Ex. 95), Warner (Ex. 129).

plainant's theatre, was to encourage the imposition of a similar clearance by other distributors. We found that in certain cases, such as that involving the Bailey Theatre, which we offered in evidence here, referred to in our brief at page 109, an exhibitor might show that, if treated fairly, he would have been given a prior run over another theatre, but by virtue of circuit or distributor affiliation, the affiliated theatre was being given a prior run over his theatr with substantial clearance against him.

Now the Board found that the distributor's practice of licensing the Kensington, the affiliated theatre, on a run—I believe it was seven days ahead of Bailey—was unreasonable, and entered an award which cut this clearance to oneday. But in view of the fact that what the arbitrator and the board in substance found was really not that he had merely been discriminated against as to clearance but that actually he should, if the distributors were licensing on a fair basis, be playing ahead of the Kensington or with it, instead of behind it in response to any clearance, that award had in itself a very unfavorable aspect. Although the limitations which the board said prevented it from granting the full relief to which the exhibitor might be equitably entitled were provisions in the decree for which the Government was responsible, this did not change the fact that the result was an inequitable one.

Now that alone would not have been so disturbing had it not been for the fact that we could see the tendency of these awards to fix a pattern or status which other distributors would follow—that is, you saw what happened here with respect to Columbia, which was not then even licensing this other affiliated theatre. Bailey was being licensed clear of the Kensington theatre by Columbia. But when that award came down, then Columbia immediately introduced a discrimination in its license agreement that had not even been there before, a provision to the effect that if the affiliated circuit bought Columbia pictures for the Kensington, the Bailey would have to play one day behind it just as it did on the other distributors pictures.

Now I am not going to go into the Appeal Board decisions or awards in detail. We offered you those which we thought were sufficient to show the inadequacy of the system to give the relief that the Sherman Act requires.[5]

Another adverse aspect of the situation, I think you can see from a mere reading of the award in the Overton, Texas, case.[6] That is where a theatre affiliated with Jefferson Amusement Co. which is 50 per cent owned by Paramount operated the only theatre in the town. There were two of them. One burned down. They took their time about rebuilding. The citizens of the town decided they wanted to have their own theatre there and they built, as the arbitrator found, a very nice theatre for the town. Then the Jefferson Amusement Company proceeded to remodel a store, opened what is called a store show, and the new theatre found that it could not buy pictures from these consenting defendants except on a second run because the Jefferson Company absorbed all their first-run product between the two theatres it had, and these people were then permitted to buy a second run of the pictures, playing them 30 days behind Jefferson, and Jefferson further made the situation a little more acute for the local owners of the new theatre by cutting the first-run admission price of one of these theatres to exactly the same price as the independent was charging, so that they had the characteristic situation where the independent takes his most severe beating with the affiliated theatre playing the pictures at exactly the same admission price with substantial protection in the form of clearance over him.

Now, he arbitrated and got an award to the effect that the clearance was unreasonable, and it was cut from 60 days to 14 days. But in our view that kind of a secondary position really does not satisfy the requirements of the Sherman

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[5]See Appeal Board Decision Nos. 27 (Ex. 2); 52, 58, 63, 65, 67, 70, 72 (Ex. 3); 87 (Ex. 4), 109 (Ex. 291) and 111 (Ex. 292); Arbitration Award Nos. 14-1fh-42 (Ex. 293), 1-18D-41 (Ex. 294); 20-1H-42 (Ex. 297); and 7-4f-41 (Ex. 298).

[6]Arbitration Award No. 7-4f-41 (Ex. 298). Shows that clearance originally imposed was 60 instead of 30 days.

Act as to what relief the independent would be entitled to have on the basis of the facts that appeared there.

Judge Bright: Why doesn't it?

Mr. Wright: Well, if the Court please, the mere fact that somebody else in the town happens to be there first does not in our view mean that when a new theatre comes in it should not have an opportunity to bargain for pictures free from restrictions imposed in favor of the existing theatre. That is exactly the difference between the position of these defendants as theatre operators in a small town of that character and the position that you or I might occupy if we were operating the only theatres in the town. I agree that the mere fact of sole possession of physical facilities in any location does not mean a monopoly. It is only when you couple it with the power to exclude others from the business or the right to restrict their activities.

Judge Hand: What is the restriction here you are talking about?

Mr. Wright: The film licensing control which Jefferson Amusement had in that case by virtue of its affiliation with Paramount.

Judge Hand: You mean that it had some provisions as to second showings? That it should not have any? That it should have just its trade run provision? Is this going back to your argument now, or your main position, I mean?

Mr. Wright: The facts that occurred there merely illustrate to us the inadequacy of any scheme of relief which simply results in changes of status within an established clearance system, and does not actually give an opportunity for a full and free competition between theatres in licensing films.

Judge Hand: Well, you really do not want them to have any freedom of contract.

Mr. Wright: We want them to have complete freedom of contract.

Judge Hand: Well, I know. You say so. Here was another contract that somebody had with a customer first, and you do not like that.

Mr. Wright: Well, the contracts are, of course, repeated. This was under selling in small groups. The clearance, of course, while nominally renegotiated with each group actually continues in effect, but there was no existing contractual arrangement which would have prevented these defendants from dealing with this new exhibitor on a competitive basis had they chosen to do so; but they chose to protect the affiliated account against that competition.

Judge Hand: Well, that it is. That is what I say. You object to any tendency to stick to their customer. That is really it, isn't it?

Mr. Wright: Sticking to customers is one thing.

Judge Hand: Well, what more?

Mr. Wright: Licensing customers restrictively is something else.

Judge Hand: What was the restriction there? Too long clearance?

Mr. Wright: The fact that if the theatre had gotten the kind of a deal that it would normally be entitled to, it probably would have licensed ahead of this little store show that Jefferson opened in order to use up the product; and yet the limitations of the decree were such that the Arbitrator could do no more than mitigate the existing clearance situation and cut down the time interval, leaving the independent in the position of playing the following run at the same admission price as the affiliated first-run, which is ordinary competitive murder.

Now, I want to say something about one provision of the decree which did what we hoped it would do, and that was Section 6, which provided the so-called some run provision. What gave rise to that was this: Of course, the most extreme form of clearance restriction is where the distributor says to a competitor, "I am not going to license you pictures at all. I already have a first-run account in this town. I think the town is so small, or the situation is such that if you exhibit my pictures at all you are going to injure the first-run situation. So I won't sell you."

Well, in order to take care of that situation, Section 6 was inserted in the decree which provided that anybody was entitled to some run of pictures from these defendants at terms to be fixed by the distributor, with the only proviso that the terms should not be calculated to defeat the purpose of the section; and if the distributor could show that the effect of licensing the additional run would diminish his over-all revenue from the area, he could refuse to license. In all of the cases that were brought, I know of no instance where that showing was made.

That provision did open up areas where runs had been refused before and did create, we felt, a new competition that had not been there before.

The difficulty that arose there was the limitation of the award. The award was that if the arbitrator or board found that distributor had been refused a run contrary to the section, then the distributor was simply ordered to make him another offer, and then if the offer was unreasonable in any of its terms, the exhibitor could then go back and arbitrate again. Well, after you have two awards and a couple of Appeal Board decisions, the thing is liable to become endless, and, in particular situations, you reach the point where you might have to have somebody actually arbitrate rental terms before you could get a fair solution. But for the most part we feel that that section worked and was effective in prohibiting that extreme form of discrimination, where the distributor does not impose merely unreasonable clearance terms, but simply says, "You cannot buy on any terms."

I have pointed out the manner in which the consenting defendants were dismissed from these proceedings. We tried the Crescent case with all the other three defendants in, and two were dismissed by the Court, one was held.

In trying the latter cases it was apparent to us that the more appropriate forum for relief against these defendants as to their distribution practices as such was really here where it could operate on a general basis rather than in those proceedings, and they were accordingly also dismissed

out of those suits, that is, the Griffith and the Schine cases. That was on our motion.

I want to state further that at the conclusion of the three-year period we, of course, again made an effort to see what could be done by way of modifications which would relieve ourselves and the Court of the burden of this litigation, and we filed formally in August 1944, a proposal to modify the consent decree, which set forth the provisions we thought it would have to have in order to make it effective. That was done when we had exhausted all possibilities of agreement. After we filed the petition here, we offered the defendants the opportunity to litigate the relief question, if they so desired, without any adjudication of law violations, if they were willing to assume law violations for the purpose of hearing the relief questions, because, as we viewed the matter, there could not be further substantial relief without either admission of violations or adjudication of them. That offer was declined by them and it then became necessary to set the matter down for hearing.

We again went in on a preliminary motion as to clearance relief before Judge Goddard, and that resulted in further efforts, which were unsuccessful, to compose differences and work out some kind of decree which would make what we were doing here unnecessary.

Now, the reasons——

Judge Hand: Of course, we don't know—I don't know whether we possibly should know—what these negotiations were about. I really don't understand them. I suppose they were about some kind of modification of the decree.

Mr. Wright: Well, the fundamental stumbling block in our negotiations was that the defendants insisted on further postponement of litigation of the fundamental question of legality of their structure as a condition of modification, and we had reached the point where we felt that question had to be decided.

I simply want to point out that one of the reasons we are here, of course, is the fact that the only supporters of this decree or this method of regulation, as it now is, at this time,

in the light of the five years experience, is the defendants themselves. There is no one who has been satisfied by, its operation in other elements of the industry, and the Government itself is satisfied, on the basis of experience, that it simply does not perform its job of enforcing the Sherman Act. Under those conditions, we, of course, have no choice but to proceed to get these matters adjudicated which are the subject of a widespread and, we think, legitimate complaint.

In that connection I might say that the general character of these complaints, in so far as small exhibitors are concerned, is largely that in this kind of restrictive system, their bargaining power is such, by virtue of their size, that in any event, under any scheme of regulation, so long as its fundamental administration is in the hands of the theatre-owning defendants, they come out on the short end, either in film rental terms, or in one manner or another. They have no protection, of course, against inroads in such territories as they may be operating. The theatre-owning distributors are, in effect, looking down their throats as competitors because of their right to audit the receipts of their businesses as a result of licensing them films on percentage terms. None of these exhibitors regards these arbitration rights as compensation for the absence of a right to do business in a free market, and we are not in a position to tell them that they do provide such compensation.

As far as your independent producer is concerned, it is perfectly true that there are many more independent producers now than there were before. We think the decree has resulted in improving the opportunities for independent producers to have their product exhibited, but the fact remains that they find themselves selling in a market which is controlled by their competitors, and they complain about that control.

Judge Bright: Aren't all markets controlled by competitors?

Mr. Wright: Not by the kind of concerted action that is involved in this case. That, of course, is fundamentally what this case presents.

Judge Bright: What do you mean by "concerted action involved in this case"?

Mr. Wright: Well, the market here that you are dealing with is admittedly a protected market. That is what every one of these defendants says is the fundamental purpose they had in gathering together these aggregations of theatre circuits which they have brought under common control, and they make no bones about the fact that as far as theatres affiliated with them, regardless of degree of affiliation, those theatres constitute a market as to which they have priority for their films.

That kind of market protection is the product of concerted action. It isn't, in our view, the kind of market protection which is possible under the Sherman Act. These people who complain about it, assuming that they may be wholly wrong in thinking that they might be able to do better in a market in which there is free competition than one which is protected by the existence of these various combinations, still have the right under the Sherman Law, as we understand it, to do business in a market which is free from protection of this character, achieved by the means that have been shown here.

Judge Bright: I still wonder if you mean by "concerted action" the effort on the part of each of these distributors to buy theatres for the exhibition of their product? Is that what you mean by "concerted action" and "protected market"?

Mr. Wright: That is the primary means of protection, the collection of these theatre circuits under their control.[7]

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[7] A brief history of the acquisition of stock interests in theatre circuits by each producer-exhibitor is found in their answers to 1939 Interrogatory No. 58. These are contained in Ex. 45 for Fox, Ex. 48 for Loew's, Ex. 85 for Paramount, Ex. 91, 98, 101 and 107 for RKO and Ex. 116 for Warners. Stock affiliation is only one method of assuring such protection as shown by Ex. 474, a 10 year franchise expressly restricting playing time available to other distributors in Paramount Theatre at Los Angeles, which is operated by Partmar Corp., a corporation in which neither Paramount nor any other defendant owns stock.

A secondary means of protection is the establishment of a pattern of theatre ownership, which amounts to a virtual territorial distribution among them, so that each of them does exercise in many areas a 100 per cent control, in others a very high degree of control, as exhibitors, over the fate of any film. Now, the combination, the concerted action, of course, does not stop with the aggregation of these theatre circuits into a market for the films of the particular distributor affiliated with them or with the mere territorial division.

Judge Hand: Your theory is that if they find a place where there isn't so much competition by powerful interests, they ought to go there, or, rather, that they ought not to go there, they ought to go to the place where there is the most active competition? They cannot go to this other place either because they have a monopoly or because they would be in a position where the competition would not be as powerful.

Mr. Wright: Well, the affiliation and general pattern of theatre control is such that in many areas, or most areas, there is no competition among theatres for their films.

Judge Hand: I know, I understand those particular towns referred to.

Judge Bright: When you say there is no competition, Mr. Wright, do you mean because they own, say, all the first-run theatres in a given city, there is no competition?

Mr. Wright: That is right, as theatre outlets for films. I did not invent the term "closed situations." Mr. Frohlich, counsel for Columbia, referred to those situations as closed first-run situations. In those he said he had no choice of outlet.

Judge Bright: That would be so, say, if there were three first-run theatres in some particular community and each one was owned by a different distributor.

Mr. Wright: Yes—well——

Judge Bright: There would be concerted action or a protected market, as you call it.

Mr. Wright: The market is, because of the manner in which these various combinations behave vis-a-vis each other,

actually protected even in the situations where there may be two of them in nominal opposition, that is, in the larger cities there are a large number of situations where two or more actually have theatres, but we say that on this record it is perfectly clear that in those situations there is no competition between them as theatre operators when it comes to licensing films. They are, of course, both selling entertainment to the public and are standing there competing with each other in that sense, but in the sense of representing alternative markets, or customers, for a distributor's films, that situation doesn't even prevail there.

And the reason for that lies in the very character of the practice, the licensing practice, which they carry on with each other—the constant and habitual use of theatres affiliated with one distributor as prior-run outlets for the films of another. That is, you do not have simply a showcase operation in any sense of the word. All of these distributors use outlets of other distributors for showcase purposes in some situations and their own in others; and it is not just a matter of using each other's outlets as a means of making sales to the public. The express agreements that they make with each other do much more than that. They provide express restrictions as to what can be done with their pictures by way of the terms on which they may be made available to others in the same area. They agree to impose substantial clearances; they fix admission prices that each is to charge, and the same distributors, of course, go further and in the contracts of such independents who may be attempting to compete on later runs, include price-fixing provisions which are calculated admittedly, to prevent a diversion of patronage from these prior-run theatres and which serve the express purpose of protecting them from theatre operating competition as such.

Judge Bright: Well, you have stated that there are express agreements among the distributors in a situation of that kind——

Mr. Wright: Yes.

Judge Bright: Do you have any particular reference to some such express agreement?

Mr. Wright: The ordinary license agreement.

Judge Bright: By "express agreement" you mean, then, the license agreements that they submit to other owners?

Mr. Wright: The restrictions are accomplished both ways, both by the license agreement, that the affiliated units——

Judge Bright: What I am trying to do is to make a distinction, if there is any, between an express agreement between two distributors to do certain things with reference to other exhibitors in that area, or to refer to the express agreement as relating to the license agreements which are issued by these several distributors to other exhibitors in that area.

Mr. Wright: I am referring to both the license agreements which the defendants make with the affiliates of each other and with independents—let us take a concrete example. In selling first-run Philadelphia, these defendants make a license agreement, as distributors, with the Warner Bros. Circuit Management Corporation, or whatever Warner subsidiary buys the films for that area, in which there is an express agreement as to the terms on which those films licensed will be made available to other exhibitors in a very wide area. For example, that Warner first-run clearance that is incorporated in those agreements gives first runs in Philadelphia priority over the entire State of Delaware and many counties in Eastern Pennsylvania, a large number in New Jersey. Now, that kind of agreement where you have the use of a common first-run outlet both by Warner for its own pictures and by another distributor for his pictures in which they apply the same clearance and establish the same restrictions, is, in our view, very clearly an effective agreement between those two producer-exhibitor defendants both as distributors and as exhibitors to restrict competitive opportunities of other exhibitors in the area involved in licensing and exhibiting the films of both.

Judge Hand: Of course, you want to upset the whole arrangement, what you call the general pattern; but you do

not seem to pay any attention to local situations except as evidence of something larger. I do not know whether you do or not. I do not know whether you make any real complaint about Albany and other places, or whether you merely think they are sort of malignant symptoms.

Mr. Wright: I think that the latter is a more correct description. As to the first-run Philadelphia situation, for example, now, it is perfectly true that for a long period of time Warner had a hundred per cent first-run monopoly position in the town, because Fox leased its first-run theatre there to Warner for operation with a film franchise, and Fox was the only other producer-exhibitor who owned a first run theatre there. Now, even when that situation expired and Fox took its theatre back, in our view that situation actually is no more competitive today than it was then from the standpoint of the opportunity of an outsider to enter into that market either as a distributor or as exhibitor; and it is for that reason that we have not tried to center your Honors' attention on these particular pooling agreements which expressly accomplish an elimination of competition which we say is inherent in the nature of the structure of these defendants and their film licensing practice in any event.

Now, those agreements are clearly illegal, per se, and should be enjoined.[8] As Judge Proskauer indicated, he would be delighted to have you do that. That would not upset——

Mr. Proskauer: I would not say delighted.

Mr. Wright: Well, it would not upset the defendants' control of the market in any way, and that is really what is in issue here, market control; not just individually exercised market control but market control where each group supports the other's control by express agreement.

Judge Bright: Each time you refer to express agreements, you do not mean agreement between the defendants themselves but agreements by which they license affiliated theatres on a certain basis?

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[8] Shawnee Compressed Co. v. Anderson, 209 U.S. 423; U.S. v. Union Pacific RR Co., 226 U.S. 61.

Mr. Wright Reply on behalf of Government

Mr. Wright: Well, in some cases those are agreements between defendants and in some cases a defendant and a defendant's affiliate are involved. That is, Warner Bros. as a distributor may make an agreement with Loew as an exhibitor, both of whom are defendants in the case. In another case, the agreement might be made with a Loew subsidiary. I do not make any particular distinction between agreements actually executed by a defendant or somebody that a defendant controls or is affiliated with by virtue of operating agreements or stock interest.

Mr. Proskauer: You mean license agreements.

Judge Hand: Well, we will adjourn now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

Mr. Wright: If the Court please, we were discussing before lunch the nature and character of the agreements that these defendants make with each other, and as far as I am concerned, I am going to devote the rest of the time here principally to attempting to make clear to the Court, if I can, the fundamental nature of this business and how it works. As far as the legal analysis goes there isn't anything I can contribute other than to cite the cases to you as they explain themselves. But the understanding of this industry's structure and how it got that way and how it works is really vital to doing anything in this case.

One important fact that I think has escaped the Court's attention—and it is vital to the whole case—is the fact that the whole structure of clearance and admission prices is one that consists of a licensing practice where one is geared to the other—that is, your time intervals are functions of admission price differentials and vice versa; and that that is not accidental and it is not the result of the exercise of individual judgment by distributors, but it is a product of express

agreement and uniform adherence to that pattern—knowing adherence—over a substantial period of time.

Judge Hand: Supposing you had no clearance at all, took it out, forbade it, where would that leave you? Everything else the same.

Mr. Wright: If you left the theatre structure as it is, in so far as the ability of the producer-exhibitors to control this market the great danger is that it would do nothing at all. They would continue without the benefit of any express licensing restrictions to give each other exactly the same preferential treatment that they do today.

I merely want to point out that the significance of the licensing agreements and the licensing practice lies largely in the fact that it shows how this got where it is, that clearances and admission prices are not something handed down from above, they are not fixed independently by anybody. They are the product, have been the product, of systematic agreements between the parties involved.

Now these agreements which accomplish this dual purpose of fixing the prices at which these various runs occur and the intervals between them are all ostensibly based upon copyright privileges. You can't possibly justify the kind of price fixing for the purpose of diverting business from one unit to another that goes on in this case without resort to the copyright statute; and the fundamental issue of law that is presented here is a proper interpretation of that Act.

Now just let me give you an example of what would happen if you accepted the defendants' claim that they have got a perfect right as property owners to fix these admission prices for exhibition of their products independently of copyright privileges. They would say, that as the owner of a theatre, as the owner of the property can always license it for a percentage of the gross receipts that it yields; it is done every day in leases. All right, let us assume that up to that point you can do it. Now, does that give the owner of a theatre the right to fix the admission prices that the operator of the theatre, his lessee, may charge because he fixes his rental

in terms of a percentage of the gross receipts? And go a little bit further and take two theatre owners who are also engaged in theatre operation. Can one of them lease his theatre to the other as an operator for a percentage of the gross receipts and then fix the minimum admission price at that theatre, while the other theatre owner leases his to the first one as operator for a percentage of the receipts and fixes the admission prices of that theatre? And then, can they go further and in leasing other theatre property to so-called independent theatre operators fix the price which they shall charge for their entertainment, so that the patronage will not be unduly diverted from the other theatres in which they have an interest both as theatre operators and theatre owners?

It does not require any citation of authority to show that that kind of price fixing is illegal per se when you are dealing with prices which are charged or affect any commodity which moves in interstate commerce, as films do. The only way that you can possibly justify this whole restrictive licensing scheme is to get it in under the Copyright Act.[9] And the reason you cannot get it in under the Copyright Act, in any circumstance is because, in any view of the case, these defendants as copyright owners when they are fixing a theatre's minimum admission price, are not fixing the price of the property that they happen to own; they are fixing the price that a theatre operator charges for an entertainment to which they contribute one element in the form of a positive print that he can run through his projection machine for the purpose of throwing on the screen a feature which is a part of the entertainment for which the price is paid.

It is perfectly clear, it seems to us, from any examination of the cases we have cited in our brief that you cannot possibly sustain restrictive licensing of that kind either when done individually—unilaterally, that is, by a distributor; of

[9]See RCA Manufacturing Co. v. Whiteman 114 F (2d) 86, 89 (CCA2) cert. denied 311 U.S. 712 to the effect that common law rights in copyright material are completely surrendered when owner avails himself of privileges granted by copyright statute.

course it is not done individually when he makes an agreement—or whether it is done as it is here as a part of a general scheme to control a market.

We gave you the statistics which showed the extent of the dominance and the position in the industry of the various units that are involved here, not for the purpose of proving any conspiracy or concerted action in themselves, because they obviously do not do anything of the kind. For that we rely on the actual facts in the record as to what these combinations consist of and the express licensing arrangements they make with each other. That furnishes the concerted action.

Judge Bright: You said on the evidence in the record and the licensing agreements.

Mr. Wright: That is also in; I did not mean to imply that those were not in the record. I was referring to two kinds of evidence of concerted action, one kind—

Judge Bright: You rely on licenses as one evidence of concerted action. What is the other?

Mr. Wright: The other is the actual control through stock ownership and operating agreements. Under the Sherman Act the form that the combination to restrain trade takes is utterly immaterial. You can group your corporations together for a common purpose either by express agreements, a stock pooling arrangement, or simply by pursuing knowingly a common course of action to a common end.

Judge Hand: I do not know what you mean by stock ownership arrangement. Are you referring to the subsidiaries, the companies in which the main defendants have an interest? Because there is no stock ownership arrangement as between one another.

Mr. Wright: Well, that last statement needs to be qualified. There is a stock ownership by these defendants, two or more of them, in certain exhibitor corporations. That is, the Buffalo Theatres, Inc. which operate theatres in Buffalo is 40 per cent owned by Loew and 40 per cent by Paramount.

In addition to those stock ownership arrangements, there are situations such as Atlanta where Loew's move-over house

there, the Rhodes, is operated by Lucas & Jenkins, which also operates the Paramount house there; and in the Rhodes Loew's has 50 per cent of the profits.

Judge Hand: Maybe if that is an abuse it should be broken up, I don't know. You are not interested in that apparently at all.

Mr. Wright: We are vitally interested in it, but we are interested in it principally as evidence of the manner in which these people work with each other. We say—

Judge Hand: I know, but nobody is vitally interested in evidence alone. I mean, at least I am interested in some result that it may point to. Now, you say that the only significance of the thing—we won't use the word "interest"—the only significance of the thing, as I understand it, is evidential.

Mr. Wright: That those agreements are in themselves illegal. We assert that. We say further, however, that if you confine your relief in this case to merely prohibiting express agreements of that particular character, or implied agreements of that particular character, you do not change the fundamental restraint of competition in this market which results from the structure of each of these defendants as such and their constant dealing with each other as preferred outlets for each other's film.

Now, as I was pointing out with respect to this element of dominance, that is an important element in Sherman Act cases in considering what should be done or what the economic effects of a particular practice are. We pointed out to you by those statistics the fact that these five producer-exhibitor defendants, if you consider them individually, are the five largest theatre circuits in the country by far. The figures as to the next largest independent circuit show the total rentals that they paid to be, I think, 10 or 15 per cent only of those paid by the RKO circuit, which is the smallest of the so-called Big Five.

Now, as distributors, they are also the five largest units in the industry in terms of the film rental dollars that they take in.

Now, the significance of that dominant position here is not merely that you have these five large units. In any industry you will find four or five leaders, or maybe two or three; but that dominance here is arrived at and maintained by mutual support, by the constant making of agreements with each other which restrict the trade of their competitors. For example, Paramount and Loew, as theatre operators in Atlanta, where they have only, I think, six or seven theatres between them—they are the first-run theatres—take out of that town in excess of 70 per cent of all the film rental that is paid by it, and that film rental is a fair reflection of the total receipts that are paid for the privilege of seeing pictures in Atlanta. Now, they are not able to achieve that degree of success in Atlanta simply by being the owners of fine theatres there. They are not content to rely on such superiority over other theatres in Atlanta, the 40 or 50 others, that the physical quality of their theatres or the ability of their management might give them. They go further, and in licensing their films to those theatres make express agreements which have the admitted effect and purpose of seeing that receipts from the area are channeled into their theatres and not diverted into the other 50 or 60-odd in which they do not have financial interests.

And they do that by agreements which expressly restrict the terms on which these films are to be made available to other exhibitors in Atlanta, and they go further and in their agreements licensing those films to those exhibitors actually fix the minimum admission prices which they can charge.

Judge Hand: Are their theatres better?

Mr. Wright: I don't think there is any evidence that they are. The Rhodes is a very small theatre. As to the move-over houses, we had testimony it only became a move-over house when they got a half interest in the operation, and that is characteristic anywhere. I think I took the witness Rodgers over the Columbia Theatre situation in Washington, D. C. a move-over house, and the witness described it as a small unprepossessing theatre.

The physical quality of the theatre does not determine in any way where its playing position is going to be in any particular area. That is determined by agreement.

Judge Goddard: Isn't that a pretty big statement? The defendants say that the distributor picks out the best theatres. You say it makes no difference.

Mr. Wright: I say the best theatre in any particular situation from the standpoint of revenue capacity is not just a function of size or location. Revenue-producing capacity is a function of the kind of restrictions that you impose to protect the patronage of that theatre just as much as it is of its size or physical capacity.

Loew's for example uses very effectively a small unprepossessing theatre, the Columbia, as what is called a continued first-run, a move-over house. When it gets through playing in their big house they put the picture over in this house and play it at the same admission price. They have got a low operating cost and they can give it additional playing time and they find it profitable to use it that way, and of course it has the first-run protection that the other first run houses have there in Washington in the films they show not being made available for whatever the first-run clearance period in Washington is. I think it is 21 days.

Judge Proskauer: May I ask if Mr. Wright did not concede at page 2451 that Atlanta was not typical of a general situation?

Mr. Wright: The only concession I made was that as to Atlanta the theatre pattern was different from other situations. You don't find the same theatre pattern in Atlanta that you find necessarily in other towns. You may find a different pattern of theatre ownership in every town in the country, but for our purposes that is completely immaterial. What you do find is that where these defendants have theatres—I don't care what kind of a theatre it is, whether it is a big one or a small one—you find them not only using each other's theatres as outlets for their films but you find them pursuing a deliberate conscious licensing practice which

gives those theatres a prior playing position in the area where they operate and protects them from diversion of patronage by the price and clearance restrictions that are applied generally in the area both to defendants theatres and to other theatres.

Now the mere fact that the same kind of price fixing goes on in areas where only independent theatres operate or that in many cases they also license independent theatres in the areas where they operate does not for a moment rebut the inescapable fact that their position in the industry in terms of the film rentals they are able to pay as theatre operators and the receipts they are able to take in as theatre operators is a consequence of more than the mere physical ownership of property. It is a consequence of this systematic restrictive licensing practice which is calculated to produce exactly the results it does produce and keep these people on top of the business.

This question of how these agreements are made, that is, who first suggests what an admission price shall be, or whether or not the price is one customarily charged by the theatre, in my opinion are wholly immaterial in determining whether or not you have got a price fixing conspiracy that is illegal. The fact remains that you have a price structure controlled by agreement among competitors. These license agreements of the defendants expressly fix admission price and clearance by the very language of the printed form, which is that one method of penalizing price reductions is a corresponding reduction in clearance.

What was done in the Interstate case is simply a clear example of using your clearance and price restrictions to intensify the discriminatory quality of that control by eliminating price differential based on a difference in playing position. In that case the subsequent-run competitors of Interstate normally charge 15 or 20 cents and they play 7 to 14 days behind the Interstate subsequent-run theatres which charge 25 cents admission. Obviously, one way to be sure that they were less competitive, was to persuade the distribu-

tors to move up their minimum price to 25 cents in the independent contracts and keep the existing differential in time—the clearance interval in favor of the affiliated theatres, and that is exactly what was done with the effects that were noted by the Supreme Court.

That is only one way to use these restrictions to get at a competitor.

Another thing that you as an exhibitor can do to your competitor, is to provide in your license contract with a distributor that if your competitor plays at the same admission price you shall have protection over him. In either event you come out the same way.

Now there are express agreements in this record made between defendants in this case which say exactly that, and I pointed to one series of them in our brief (pp. 53-54) made with Warner theatres in certain towns in Wisconsin, where these distributors made an express agreement with Warner which says 30 days clearance over all theatres charging the same admission price as the Warner house, and an additional clearance if there is a differential, and so on down the line.

Now although that agreement I think is clearly illegal in itself on the basis of Judge Proskauer's concession yesterday, we don't make any special point of agreements of that character as a basis alone for relief, because even if you enjoined each of these distributors from making an agreement of that character with Warner in those towns or anywhere else, as long as you permit them to use those Warner outlets there as the first run outlets for their films they can and would without any express agreement give Warner the same kind of a preference by the manner in which they made their prints available.

Now, your Honors have been led to believe, it seems to me, by the discussion of these defendants, that you cannot have such a thing as run, or intervals between runs, or multiple runs unless you have clearance and admission price fixing agreements. That is utter nonsense.

You can go into any area as a distributor and decide to sell just as many runs as you please. In Kansas City, for example, the Fox theatres play simultaneous first-runs in three theatres on some occasions, one small one downtown, a big one in another location, and another smaller one out in a suburban area. Then they go into an exclusive second run and an exclusive third run at Fox theatres. Then they go out to independents. Your pattern varies from town to town. In a place like Baltimore, where there are only affiliated theatres which are first runs, when it gets through with the first runs, it may go into twelve or fifteen houses.

Mr. Caskey: What was that statement?

Mr. Wright: I say, in a city like Baltimore, where you have only—where the only affiliated theatres are first run theatres, I believe, with the exception of one Loew theatre, which plays an exclusive second run on some Loew pictures, 21 days, after first runs the films can go into a large group of independent theatres in Baltimore, all of which may play at approximately the same time or simultaneously. That is what is known as an open booking, or day and date, basis. On some pictures some of these exhibitors may play first, and on other pictures others may play first, but the general playing position of all of them is about the same.

Judge Hand: What does that day and date mean?

Mr. Wright: Generally simultaneous exhibition. That is, of course, you have to have more prints at that stage of release than you do at the earlier stage. You serve, generally speaking, you serve more and more theatres simultaneously as you go down the run sequence. The print limitation, of course, is one that is wholly within the distributor's control. He may make up just as many prints as he thinks he can profitably use. He serves, of course, forty or fifty theatres with each print.

The fact that one theatre pays less than the cost of the print is of no significance whatsoever in determining print use. And in using his prints in a way that he thinks is most profitable, he does not have to make an express agreement

with any exhibitor in the area as to when he is going to make prints available to somebody else. All he has to do is to make an agreement with the exhibitors he licenses as to when he is going to make prints available to them. That does not require the use of the kind of restrictions that are employed in this business at the present time, and I think if you will look at the nature of those restrictions, and at their history, you can see that their purpose is not primarily one of an efficient distribution of the distributor's product but it is a matter of restricting and controlling theatre competition in an area.

When it comes to admission price fixing, he can license his films certainly for a percentage of the gross receipts and still do business without insisting that the licensee charge a specific admission price at his theatre. Neither of those gentlemen is presumed to be an idiot. He makes the contract with the exhibitor who normally would be expected to charge a price which will result in the maximum gross return, to his theatre while the film is playing there.

Judge Hand: But I should suppose the thing could be done perfectly well in another way, if they wanted to do it. They could provide that, instead of fixing a minimum price, they could provide some kind of rental, some kind of minimum rental, some kind of a guaranteed thing, which would require them to charge that price without saying so, and it would be perfectly proper, doubtless, to do that.

Mr. Wright: I see no reason why they cannot agree on a flat rental, if they want to, and, of course——

Judge Hand: It could be a flat rental with a sliding scale.

Mr. Wright: Yes, and in making such an agreement they would always, naturally, take into consideration what kind of a theatre they were licensing, and one of the qualities of the theatre you license is the admission price it charges.

Judge Hand: Is this anything more than a form?

Mr. Wright: Well, if the Court please——

Judge Hand: Formality, as to which way you do it?

Mr. Wright: I think it clearly is. The vice of these agreements is that they do place the exhibitor in a position where he has to maintain the price, come what may, and they do not do it with reference to just one picture, and it isn't in relation to the quality of the picture at all.

Judge Hand: He would have to, under my assumption, or else go broke, or else not make the contract, one of the two.

Mr. Wright: No, under your assumption, if your Honor please, you would have a much freer distribution of films than you have today. If a bad picture came along, it might not be played at a standard price. Presumably it might be reduced to a price which would yield greater returns.

Judge Hand: You are coming to something else, I think, and that is the combination of these different pictures. You do not like that. That is another story.

Mr. Wright: They cannot; it is not another story, if your Honor please, because it is all done together. You have got to view the transaction as a whole. You cannot view it as a restrictive licensing practice that might theoretically exist. I think you have to look at what they have done and the way they do it is to tie a group of copyrights together into a single agreement and make these stipulations for the entire group, and even when they use small groups, instead of season groups, they continue the same restrictions from group to group. So that what you have got is a use of the restrictions to fix theatre status and restrain theatre operating competition instead of the primary service of the distributor's interest in film rental as such, which he can serve perfectly well by controlling the use and disposition of his prints and his license terms and terms of percentage or flat rental without regard to agreements of that character.

The significance of the agreement element is that it shows the purpose of this system that has been built up.

Now, the letter that O'Donnell wrote to all the distributors in the Interstate Circuit case, when he said, "I am not going to buy your films and play them at 40 cents in my

first-run theatres unless you agree that you won't show them at these other houses at less than 25 cents" is obviously an element of negotiation; a threat not to buy the film except on the terms offered is implicit in any kind of bargaining, whether you have a letter from the exhibitor or whether you do not.

The testimony that was given in this case in which the defendants attempt to explain uniformity of clearance is simply based on the proposition that they say, the exhibitor says this is the kind of clearance he gets from distributor A and he wants it from you, distributor B. Well, what is your alternative? The alternative is, of course, if you do not give it to him he does not buy your film.

Now, I think it is apparent on this record that if you look at the picture as a whole you can see what could not be made apparent in any of these cases where you had nothing but a local system involved, that the very purpose and effect of the system, as such, is a means of restraining theatre-operating competition and wholly outside any purpose of the Copyright Act or any privilege which the Copyright Act grants to anyone.

Now, I do not propose to attempt to analyze for you these copyright and patent decisions. All I want to do is simply call your attention to an additional one which came down the other day, which you can of course read for yourselves; and that is one referred to in Mr. Frohlich's brief called Scott Paper Co. v. Marcalus Mfg., decided November 13. Now, that case is to me a perfect illustration——

Judge Hand: Where is that referred to?

Mr. Wright: I believe it is in Mr. Frohlich's brief. There is no citation for it yet, because it was just decided November 13th.

Mr. Frohlich: It is 90 Lawyers Edition, page 88, on page 25 of the Columbia brief.

Judge Hand: Yes, I see it.

Judge Bright: What was that case? I have read it but I have forgotten. Just what was it?

Mr. Wright: It involved an infringement suit brought by an assignee of a patent. Marcalus had invented or said he had invented a paper-cutting machine which he assigned to his then employer. He then went into business for himself in opposition to the employer and he built a machine which was substantially the same as the one he had gotten the patent on, but which was an exact copy of one on which a patent had expired. When his former employer, the assignee of the patent, sued him for infringement, although he was estopped to attack the validity of the patent, because in assigning it he had represented that he had patented something, he was able to defeat the infringement action by showing that all he did when he made this infringing machine was to copy the prior art.

Now, the application of the ordinary doctrine of equitable estoppel that prevails in any other transaction or dealing with any other property would clearly have prevented him from prevailing with that defense; and yet the Third Circuit Court of Appeals and the Supreme Court let him prevail on the ground that the interest of the public in having free access to an expired patent was so much greater than any considerations of private contract, that he should not be held to have infringed when he merely copied this expired patent.

Now, that provoked a very sharp dissent by Mr. Justice Frankfurter, which merely points up the extreme lengths to which the Court has gone in insisting on interpreting the patent and copyright statutes with emphasis on their public purposes, just as interpreting the Sherman Act it subordinates claims of private injury to the public interest in maintaining business competition. The theory on which it seems to me it is proceeding in copyright and patent cases is that when you secure the benefits of a public grant of that kind, the possibilities for abuse are such that you are held to a higher standard or different standard of performance in dealing with it than somebody who might just be selling cheese.

Judge Bright: How far can they go under this Copyright Act, do you think? They can sell their product, surely.

Mr. Wright: Well, the outright sale presents no problem——

Judge Bright: They can license their product.

Mr. Wright: The problem here arises in connection with licensing restrictions. I think it is perfectly clear that in so far as you are licensing not a mere performing right but are renting a print, that you certainly cannot go beyond simply specifying how much money or the kind of flat rental or percentage terms that the fellow who uses it is going to pay you for the use. I do not think you can attach to his use restrictions of any kind which tend to prevent the use by others of the copyrighted product, prevent the user of a copyrighted product from using such other material of any kind, copyrighted or uncopyrighted, patented or unpatented in conjunction with it, or from operating his theatre business in any way that he pleases. That is, the mere fact that it makes it more profitable to you as a copyright owner to control an exhibitors activities as a theatre operator does not at all give you the right to incorporate in the provisions of a license under which you grant him the privilege of using the print provisions such as those you have here, which fix the price he charges for his whole entertainment and fix the terms on which you can make a print available to his competitor.

Judge Bright: Well, suppose A licenses the use of that feature to, we will say, a first-run house for 30 per cent of the gross——

Mr. Wright: Yes?

Judge Bright: —now, he can go to another chap who wants the feature also but says, "I can't pay 30 per cent of the gross," can you license that same feature to the second man for $250——

Mr. Wright: Why not?

Judge Bright: —on condition that he play it 30 days after the first fellow?

Mr. Wright: If you phrase the condition that way I think it would be invalid; but, clearly, I think when you license it

to him you can specify the period when he is to have it in his theatre and control his use in that way. That is, you tell him, "I am renting this to you for a certain specific date."

Judge Hand: That is just another instance of things you say can be done; but things which equal the same thing equal each other generally.

Mr. Wright: If the Court please, I insist that they do not equal the same thing. You do have here an agreement restricting and exhibitor's conduct as an exhibitor and restricting the distributor's behavior as a distributor. The copyright owner, if he is to operate within his grant, may not make an agreement as to what he is going to do with A in terms of what he is going to do with B.

Judge Bright: Under your statement, to take a broad aspect of it, this copyright owner could not license his feature to the man who pays the high dollar and protect him against some kind of competition?

Mr. Wright: He certainly could not protect him from competition by making an agreement with him to do that. The only protection that he could ever get—well, he might get incidental protection from competition if the distributor decided independently that for his purposes he was going to license to A, and he was going to wait 10 days or 30 days before he licensed B, so he does not grant B a license to play until a specific period of time.

Now, conceivably you could justify the fact that A might be thereby protected from competition with B by saying that such an incidental restraint would be none of the copyright owner's business, but he is not in a position to say that when he makes an express agreement with A that he is going to give him this protection in dealing with B; and particularly in a system where he does not do this would be far more defensible if he were dealing with an individual copyrighted picture. But where it is done in groups of pictures from month to month, year to year, and you get a resulting structure of price and clearance restrictions which are geared to theatre status rather than to copyright ownership, it seems

to me you are just way beyond any kind of price fixing that the copyright could conceivably be thought to sanction; and when you are in that price fixing field of an interstate commodity, you are clearly involved in a per se violation of the Sherman Act.

Judge Bright: Haven't you under the guise of the Sherman Act repealed the Copyright Law?

Mr. Wright: The Supreme Court—we have not done anything.

Judge Bright: I should have said, are you trying to repeal the Copyright Law by the Sherman Act?

Mr. Wright: We are not trying to do anything, if the Court please. This descent that Mr. Davis described down this path that leads to the place with a Latin name whose spelling is doubtful, is not being led by us.

The Court, it seems to us, is clearly leading the way down that slope and is only half way there now. The district and circuit courts are following along behind, and tied to them by opinions are defendants such as these with their feet firmly set against the descent. All we are doing is to render such assistance as we can.

Judge Bright: By pushing them.

Mr. Wright: Well, we are primarily here, it seems to me, simply to aid the courts, although occasionally of course we may nudge them with the fork.

Mr. Proskauer: The ferryman over the River Styx.

Judge Bright: It seemed to me, Mr. Wright, that one statement does not seem to jibe with the other. You say in selling to A for a percentage of the take you could not impose any restriction or impose any condition that you would not sell to B for use in less than 30 days after completion of performance of A, but you could in selling to B sell at a lower price and provide that he shall not use until 30 days after your former purchaser had finished with it.

Mr. Wright: I think you would be a little safer if you expressed your period of time in terms of the actual days

on which he would play rather than to try to tie it to his competitor's play date.[10]

Judge Bright: I see.

Mr. Wright: Now, let's take a look at what this system is alleged to do for the public.

Now the clearance and run structure that you have got here does not assure anybody of seeing a picture at a particularly low admission price at any time. The general purpose and effect of the structure, as you have seen, is to try to keep the price level up all the way. The only departures that the distributors encourage is where they have something that they think is really good and where they market if individually they try to move up the price structure for that single picture. And I think I took the witness Thalhimer over the admission price in Richmond and there wasn't a single house below the price of 25 cents. And there isn't anything about the system that encourages anybody to get in at the bottom and render a low-priced service. The tendency is the other way. The low-price subsequent-run theatre gets no protection whatever. That was shown very clearly by the correspondence between Mochrie and this fellow in Macon who was following the first-run theatre on the RKO pictures and having to do it at the same admission prices.

Now the system as such is not only illegal right on its face as a system, but the kind of abuses in it that are shown in this record are in my view in themselves enough to con-

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[10]The copyright owner would still not be saved from a Sherman Act violation if it appeared from other evidence that his purpose in fixing B's play date was to restrict competition between A and B as theatre operators. If the license to B said on its face that B could not play until 30 days after A, fixed B's minimum admission price, conditioned B's run upon its maintenance, and applied those restrictions uniformly to a group of copyrights of widely varying quality, these terms would appear to be conclusive evidence that this was his purpose. See the pre-suit (1936-37) and post-decree (1943-44) printed forms of license collected in trial brief App. B. (Ex. 275-290) and compare with pre-integration (1917-1918) printed form (Ex. P-5 and P-6).

demn it. It has been used persistently for the purpose of excluding your smaller independent operators from the more profitable phases of the business.

Judge Hand: You talk about excluding. They do an enormous amount of the business and get an enormous amount of the pictures. You think there is some unfair preferential treatment and that all these people are excluded. I don't understand.

Mr. Wright: There is no exclusion in any absolute sense, in any sense of keeping people out of the business, but there doesn't have to be. Under the Sherman Act if you use illegal means to accomplish a partial exclusion that is enough. And that is all you have here. You can go into the theatre business. There is no way of keeping these people from building theatres or buying theatres and operating them. The exclusion comes in the position that you get——

Judge Hand: They are increasing all the time and they are getting pictures all the time, and they are operating them all the time.

Mr. Wright: That is right. There have been 5,000 more theatres in the last ten years, and of course there are many more independent pictures, and you can open a theatre and you can show something on the screen. But that has not affected the control and dominance of this market that these defendants have enjoyed. I think the figures in evidence clearly show that it has not.

Now why is it with an increase of that kind in the number of theatre operations, Columbia finds itself today with fewer independents to sell in those first-run situations in towns over 25,000 than it sold ten years ago? Why it is that with this increased independent distribution and production in terms of numbers they have not penetrated this market at all in terms of making any inroads on the proportion of the dollar volume that your producer-exhibitors are able to get out of it?

Judge Hand: Undoubtedly they can't combine to keep these people out. The fact that they get most of the busi-

ness—and there are piles of the business that they do not get—is conclusive of nothing.

Mr. Wright: I don't suggest that it is. I merely say that——

Judge Hand: You might just as well say about the chain stores and the country stores. Up where I was born they didn't have any chain stores at one time and now they have just about one country store left in the place. Why was it in that case? Because the chain stores came in and gave a great deal better service.

Now all these things are capable of that interpretation and you have got to prove the wrong and not that these are big fellows and they do a tremendous business and somebody else does not do as large a business, though he would like to do it.

Mr. Wright: If all we had, if the Court please, were those statistics as to size, there wouldn't be any case. Nobody says there would be, but I am pointing out that the dominance they share is a consequence of the mutual support that these people give each other by express agreement and by adherence to these established patterns of non-competitive theatre operation throughout the country, and your patterns of division of films among the affiliated operators, where they do operate in the same territory. Take the example here in New York; your RKO Circuit and your Loew Circuit. They operate in the same areas. They have all the prior runs after the first run here. Nobody gets pictures until after Loew and until after RKO. Well, there still isn't any competition for pictures between them because the Loew Circuit plays what is known as the Loew split of the major product, that is, pictures of Loew, Paramount, Columbia, and half of Universal; and the RKO Circuit plays the remainder of the eight defendant companies. And then they go to the independents. That is not just the result of size of those circuits. It is the result of express agreements made by these distributors with those circuits which gives them a blanket pric y for their theatres over the competing independent theatres.

You take the Paramount-Loew situation here in New York City. Of course, the reason that we again emphasize this theatre structure as well as the license agreements is that even without any written agreement whatsoever as to film licensing, as far as the record shows, Loew theatres played those Paramount pictures for three seasons while they were arguing over the proper division of the profits from their exhibition, and then they made a written agreement in 1945 which finally formalized the terms under which Paramount had been serving those pictures and Loew had been exhibiting them.

Now it is simply an illustration that you cannot possibly make Loew and Paramount competitors by any kind of mere licensing practice restraints that you want to impose on them as long as you permit them each to operate both as distributors and theatre operators and deal with each other as exclusive prior run outlets for the films of each other.

The question has been asked here, well, what kind of system are you going to substitute for this very tightly arranged one that now exists? I do not think that there is any obligation either on the part of the Government or this Court to devise for these defendants some other system than the one they have now got which would still leave them in control of the industry and give it a kind of competitive facade through appropriate regulatory provisions.

Judge Hand: That is technically so but it is not very helpful, and I do not think it is a good approach to the problem. You have a great big business here that is very complicated, very hard even to understand, and to say that it is nobody's obligation, who is proposing to break up the entire system, to suggest a good alternative, seems to me absurd.

Mr. Wright: If the Court please, nobody is trying to break up an entire system. All that I am suggesting to you is that the function of this Department and of the Court is not to devise systems of operation for any business. I do not know enough about it to devise a system which would meet

all or any substantial part of the objections to the present system those that have been made to me from various elements involved in it. I do not think, with all due respect, that the Court in the time that it has to study the industry, is in a position to evolve for the defendants any new system, as such, to replace an existing system. We find that we get into trouble and we lead the courts into trouble when we try to do that.

In the Hartford-Empire case, there was a clear case for dissolution of the Hartford-Empire Company. Many independents intervened and ask to have worked out some kind of decree where the Hartford-Empire Company could be maintained intact and limit the relief to licensing restrictions. So there was worked out a complex plan of royalty free licensing and it went to the Supreme Court as a substitute for dissolution. Then when it got up there, a minority of the court rewrote the decree and came out with an equally, if not more complex, plan of licensing—compulsory licensing on reasonable royalties—which is now in effect, but, interestingly enough, as to the trade association involved, ordered dissolution virtually on its own motion. And had the Government and the court confined themselves in the first instance in that case to the traditional procedure of dealing with the problem, breaking up the combination found to be illegal, instead of attempting to impose an elaborate series of restraints that let it continue to function and still do equity in the industry, we would never have gotten into the snarl that we did.

I say, of course, that we are bound to exercise the utmost diligence and effort to work out all of these problems with the minimum of fundamental readjustment in any basic economic structures that we can, but we do have the job of law enforcement. That is all we do. We are a law enforcing agency. The only instrument we have to work with is the Sherman Act as the courts interpret it, and when we come into court in a case of this kind, the relief that we most necessarily advocate has to be confined to traditional judicial methods of dealing with these problems.

When we are dealing with consent arrangements we can, to some extent, go further, but I simply want to call the Court's attention to one phase of this whole arbitration system which I think that it ought to know about. A suit was brought in St. Louis, to which we were not made a party, charging us with conspiracy with these defendants to restrain trade by consenting to the institution of this system. The same plaintiff sought to intervene in this suit. His intervention was denied. We opposed, the defendants opposed it, and he attempted to appeal.

Judge Hand: Were you a party, and the Attorney General?

Mr. Wright: We were not made parties to his St. Louis suit. He attempted to litigate the matter here. We opposed. He tried to appeal the decision.

Judge Hand: There was a defect of parties, I should think. There is no end to what the fancy of litigants may go.

Judge Bright: Didn't we get a brief here within the last two or three weeks from that party?

Mr. Wright: I would not be surprised.

Judge Bright: It was entitled in some case out in the Midwest.

Mr. Wright: St. Louis is where it is pending. The only thing I wanted to point out about that suit is this: I am naturally satisfied that there is nothing in his complaint. He is in no position to raise, in my view, the questions he seeks to review, the constitutional——

Judge Hand: He will claim you are arguing against him without a hearing.

Mr. Wright: I simply want to point out that if he had the right to raise them, the constitutional questions he is talking about are serious, that is, I have extreme doubt myself as to whether on any permanent or quasi-permanent basis this Court, quite apart from consent, even on the basis of findings of fact and conclusions of law, could establish or maintain any kind of an arbitration system which arbitrated competitive status in an industry, you are then going,

it seems to me, beyond the purposes of law enforcement and getting into a scheme of regulation which has to have legislative support, if it is going to be valid at all. And that was one reason why we proposed in our modification to use the system as a means of arbitrating complaints of discrimination, complaints that runs had been refused, or restrictive terms imposed for the purpose of protecting some exhibitor from competition rather than for some purpose permitted by the Copyright Law and the Sherman Act and penalizing such conduct with an award of money damages, which would serve as a substitute for contempt punishment.

Within that kind of system I think arbitration or some such mechanics as that provided by arbitration may be used, but I have the gravest doubt as to whether in a proceeding of this character you can give any permanent status whatsoever to proceedings which have the effect of fixing business status in an industry.

Your Honors have heard both sides of the industry here in a sense. One of them says that they have got to have a right to practice a certain kind of restrictive licensing procedure in order to balance the advantage that these other defendants have per se from the ownership of theatres without restrictive licensing or any other forms of business practice. Now I do not think that it is the function of the Court or the Department to attempt to work out, in the first instance, some kind of scheme which is going to sanction illegal restraints over in this part of the industry so that the illegal restraints in this half won't let them get out of line. I don't understand that that is the function of any of us that are involved in this in this proceeding, and I call that to the Court's attention for what it may be worth.

Before I closed, I wanted to make clear to your Honor that I too had read the book you recommended, the Age of Jackson. I had my wife buy it for me for Christmas. And as far as I could make out, the only monopoly generally thought to be illegal there in Jackson's time was the Bank of the United States, and, as the book pointed out, in attempt-

ing to secure a recharter of that monopoly from Congress, Nicholas Biddle testified before a Congressional committee that although his bank could have destroyed any of the State banks, he had not seen fit to injure any of them.

That argument did not impress the people of Jackson's day as the basis for permitting that much concentration of economic power in private hands, and I do not think that it has any more validity today than it had then—in fact, considerably less since the passage of the Sherman Act.

Judge Bright: The statute of limitations has run against that anyway.

Mr. Wright: But the moral that I gathered Mr. Schlesinger—was trying to make by his book—was that the Jacksonians had won the battle for discussion of the political future of this country in democratic terms. That is, from then on, of course people did not advocate antidemocratic systems as against a democratic one, but now, of course, and ever since, both sides, if they have any question, always use the same terminology. We always talk in terms of democracy. Whether that helps any, I don't know.

Mr. Proskauer: No, it does not.

Mr. Wright: But it is pretty clear, I think, from the arguments made in this case that you can use Sherman Act terminology and come out with any kind of result that you want to come out with as long as you do not look at the particular consequences of the situation you are dealing with too closely.

What this Court and any other court actually does, when confronted with a question of this kind, as distinguished from what it says about it, really depends, it seems to me, on how the Court feels about that much-abused term "free enterprise", and that isn't anything I can influence by any argument I make or that they can influence by what they say, but I just want to quote what Harry Warner had to say with reference to this foreign market thing, which was referred to in Judge Proskauer's argument. What he says is this, at page 1560,

"In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened to (and did for a time) block our funds derived from exhibition in England and was only dissuaded from so doing by being convinced that the American companies could not continue to supply England with quality productions if their English revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing. The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production."

I hesitate to single out Mr. Warner because, from my own view, I think his company has probably made more pictures worth making than all the rest of the industry put together, but he has, very obviously——

Mr. Caskey: That is the crowning proof.

Mr. Wright: (Continuing) —a blind spot in the way he feels about this business of free enterprise. He wants to sell American pictures in a foreign market free from restrictions, where they may be sold on their merits. He does not want that kind of market, though, at home. It is absolutely necessary for him, he says, to protect his market here by the kind of elaborate organization and the practices which you have before you.

Now, I just want to point out in behalf of the English, although I am no Anglophile, that they too, of course, have

considered this problem at length. As Mr. Raftery stated, in 1926 they passed the Films Act which prohibits blind selling and block booking in England; and very recently in 1944 during the coalition government the Board of Trade appointed a committee to make a study of the film monopoly problem in England. That is one of the characteristics of this motion picture monopoly problem, that it is not confined to this country; it is universal. We correspond with people in Australia and New Zealand about it. But after discussing the similar tendencies to monopoly in England, the growth of integration there, and all the arguments that had been advanced by the proponents of integration in England, and that it was a necessary trade weapon in the foreign markets as a wedge in getting more English pictures shown over here, I think it is interesting to note what this English committee had to say about those arguments.

Mr. Caskey: What exhibit is that?

Mr. Wright: This is not an exhibit. It is a report dated 1944 entitled "Tendencies to monopoly in the cinematograph film industry".[11]

At page 31, in paragraph 111, after discussing these tendencies, the committee said:

> "Apart, however, from these general considerations of our national trade policy, there are a number of other objections to this country endeavoring to force its way into the overseas market for films by the exercise of monopoly power, which to our minds are conclusive. The first is that the primary needs of the British screen would be thereby sacrificed. Granted our assumption that a healthy, independent British industry is indispensable, then our view given without hesitation is that if monopoly is the price of securing an export trade in films, that price is too high."

[11]Report is dated July 3, 1944 and is by a three man investigating committee appointed by the Cinematograph Film Council, a division of the Board of Trade, pursuant to a request from the President of the Board dated December 6, 1943.

Now, that is from a country that has no Sherman Anti-trust Law, and has not, presumably, the anti-monopoly tradition that we have over here.

Now, of course, the whole problem of the relation of this industry to our foreign relations is one which our State Department rather than Mr. Harry Warner or the Court or the Justice Department are primarily concerned with. But I might also call your attention to the fact that the recent report of Dr. McMahon on the Postwar International Information Program of the United States which deals with motion pictures, at page 79[12] does show at least a sympathetic understanding of what we are trying to do in this case, and contrary to the view the defendants would have you take, I do not think this proceeding is regarded as any subversive threat to our foreign policy or foreign trade as it affects the motion picture industry.

Now, of course, this whole question of what is to be done in a situation like this is an extremely difficult one. The burden of the Court, which has to do something, is much greater than the burden of those of us who simply assemble and present the problem. And, of course, as to doing something, it was suggested by some cynics when the Hartford Empire case and the Crescent case came down at the same time —"Well, if you are dealing with a medium size organization, you can take it apart and give effective relief, but the minute you get up to something big, the courts shy away from it."

Now, I do not think the fact, as Mr. Davis points out, that Loew has got 60 million dollars worth of theatres means that any standard of law can possibly be applied here other than that which was applied to, let us say, Meyer Schine who has 6 million dollars worth of theatres. I do not think for an instant that it is possible to make any differentiation of that kind. If we were wrong in the Schine and Crescent cases, we are wrong here, but it seems to me the Supreme Court has said that we were right in those cases.

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[12] As published by the Department of State.

Now, the natural tendency, of course, of any court in dealing with a problem of this kind is to shy away from the complexities that result in dealing in any drastic or effective way with large business organizations; but the fact remains that where the law requires it, it has to be done.

Now, I for my part think the Court has been extremely patient in listening to me and receiving this whole mass of evidence here. I am only sorry that I personally and our staff have not been able to do a better and a more effective job than we have of lightening that tremendous burden of actually comprehending the material and making it possible to assimilate it. If we can do anything more by way of a reply brief; I would be glad to file one. I know, however, that if we file 10 pages more and say anything or say nothing, that would immediately result in 50 or 100 pages of saying the same thing, let us say, ten times as eloquently.

Now, I do not want to impose that kind of a burden on the Court unless it be helpful, but I am completely at the Court's disposal in making any kind of an analysis or survey of the evidence or reply that the Court thinks would help.

Judge Hand: No. I have an idea that these arguments that you have been giving us will be very helpful, and I should think they ought to take the place of reply briefs and further briefs by them, and so on. I propose to go over these oral arguments which will be submitted to us very carefully.

Mr. Wright: It is entirely agreeable to us.

Judge Hand: We have been going through the main briefs, and, of course, they have the details more. But these oral arguments have been very interesting and very good, and they present the large outlines, the theories that have to be dealt with and met. Don't you think that is so?

Mr. Wright: Yes, I agree, your Honor. I have no desire to file except as it might help on some particular point. Now, we have prepared these digests of the license contracts and pooling agreements we put in evidence with indices, not as a substitute for the agreements themselves but merely as a convenient means of collecting them and giving you a quick

idea of what is in them so you can determine which ones you want to examine and which ones you want to ignore.

If there is anything we can do beyond that we want to do it.

Judge Hand: Some people who attended the Nurenburg trial told me—one of the American staff—that Justice Lawrence would not receive any exhibits unless they pointed out exactly what they were relying on. He thought it shortened the process very much. But this case has been very well kept down, I think by everybody.

Mr. Proskauer: Before we adjourn, your Honor, may I as a recipient of the Croix de Guerre from the Government make a very brief observation which will not be in the nature of a reply or sur-rebuttal. I would like to close in the atmosphere of the era of good feeling rather than in the age of Jackson which was somewhat controversial; but I am not able to forget that in our progress we started with Biddle the president of the Bank of the United States and ended with Biddle who instituted this litigation. That seems to me to be not without significance.

While I don't want to make a reply, I do want to make an observation of not more than half a minute on something that really was new here and that was the observation about the power of this Court in regard to the——

Judge Hand: Will you begin that again?

Mr. Proskauer: I was going to say about the arbitration system, that is imposed on nobody. Nobody is compelled to arbitrate excepting ourselves. We are compelled by our consent. It is a privilege to the exhibitor and not an obligation on him. And therefore I think Mr. Wright's self-reproach that having been a party to instituting an un-constitutional court is wholly beside the point, and I think he should absolve himself from all doubts or fears on that point. Other than that I would like to ask the Court to oppose this new argument by the arguments made in anticipation yesterday and I ask the privilege of joining with Mr. Wright in an expression of deep appreciation to the Court for the

patience and attention which has characterized this trial. You have made our burden very much lighter and I hope we have assisted in making yours lighter, too.

Judge Hand: We think everybody has. I won't say anything about the era of good feeling and about the age of Jackson, but I think that Mr. Wright will probably argue that there was necessarily a splendid period in between in which all the banks of the United States failed.

Mr. Proskauer: I hope it is not mal apropos to call your Honor's attention to the fact that there has been an intermediate period in which most of these moving picture companies failed.

Judge Hand: Of course your client will probably be so much pleased by being put at the head of the list by the Government and being so fully advertised that they will be willing to abide any sort of suffering.

Mr. Proskauer: No, sir. We fear the Greeks bearing gifts.

Mr. Seymour: May I just add that I am sure that all counsel have never been so graciously expedited as they have been by this Court. We felt the lash but it never left a sting or a bruise.

Judge Hand: I don't know whether you have been expedited or pushed. It is all right with us—isn't that so?

Well, thank you very much.

CLERK'S COPY.

Vol. VII

TRANSCRIPT OF RECORD

(Pages 2811 to 3136)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *Petitioner,* *vs.* PARAMOUNT PICTURES, INC., *et al.* *Defendants.*	Equity No. 87-273.

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D. J.,
Constituting a Statutory Court.

New York, October 21, 1946; 10.30 o'clock a. m.

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ROBERT E. SHER, ESQ.,
Attorney for Louis Bernheim Theatre Company.

Judge Hand: Now, we have here various motions listed, and I shall call the calendar that has been made up of these motions:

Application of Lust Theatres.

Mr. Schils: Ready for the plaintiffs, your Honor.

Mr. Caskey: Ready to oppose.

Judge Hand: Application of W. C. Allred.

Mr. Jackson: Ready for the motion to intervene if your Honor please.

(3884)

Judge Hand: American Theatres Association.

Mr. Arnold: Ready for the application to be presented, your Honor.

Judge Hand: Society of Independent Motion Picture Producers.

Mr. Ernst: Ready for the application.

Judge Hand: Application of Vanguard Films.

Mr. Isseks: Ready for the application, your Honor.

Judge Hand: Radio Center, Inc.

Mr. David Sher: Ready for the application.

Judge Hand: Independent Theatre Owner and Operator Members, by Peter F. Blasi.

Mr. Levy: Ready for the application, your Honor.

Judge Hand: Application of Joseph P. Day.

Mr. Kenney: Ready for the application, if your Honor please.

Judge Hand: Application of Conference of Independent Exhibitors' Association for leave to be heard and file briefs.

Mr. Myers: Present and ready, your Honor.

(3885)

Judge Hand: We will hear this Lust Theatre application.

Mr. Lust: May it please your Honors, we are an illustration in miniature of what this great litigation is about. We, you might say, are the dog at whom the stone has been thrown in this industry. We filed our motion on July 22nd requesting this Court to vacate and set aside and review an arbitration decision of the Appeal Board of the Motion Picture Arbitration tribunals that had been set up by this Court under its decree of November, 1940. We filed that motion for the reason that we had a situation in which a clearance was restrictively relegating us to a very inferior position causing us a loss of around $100,000 a year.

Now if the Court please, I thought you might appreciate an illustration of a visual presentation of what the facts in this situation are.

Judge Hand: We can't see that we have any jurisdiction over any such application.

Mr. Lust: Well, I believe your Honors do for the reason that it is the decree of the Court which was entered under the Court, by the Court, and the Court set up this agency, and I believe if your Honors will examine the authorities that are set out in our brief you will find that it would be contrary to equity for the Court to establish an agency and relinquish control over that agency.

Our position is— I am glad your Honor came to that point because I wanted to discuss it—our position is that under (3886)
the holding of the Supreme Court by Mr. Justice Cardozo in 286 U. S., the Supreme Court said that where an equity court retained continuing supervision under the Sherman antitrust act, which is an act that applies on a nationwide basis, that the inherent power lies in the Court to control that supervision, to modify, vacate, or change the decree in any effect, and it certainly stands to reason that it retains the power to control the agency set up by the Court.

Judge Hand: Well, you stipulated here that these should be non-appealable and to decide by the decision. We would have to review everything the court has done. If anybody was aggrieved or claimed to be aggrieved we would have to review everything that we have done for the last five years.

Mr. Lust: I would like to call your Honor's attention to Farragut v. United States, which is cited in 89 U. S., or 22 Wallace. That was a case where Admiral Farragut had been directed by the United States Government to take the City of New Orleans and to force an entrance into the Mississippi River. He succeeded in doing so but he had the assistance of the Army.

Congress passed a law which allowed Admiral Farragut and his officers to claim prize money as a result of that seizure of ships and stores.

A claim of about a million dollars was lodged with the Government subsequently by Admiral Farragut and his (3887)
officers, whereupon the Treasury Department intervened in the case and claimed that they were not lawfully entitled to it because they had had the assistance of the Army.

What I am coming to is this, that they entered into a submission to arbitration, which was more final and binding in its wording than the submission here which comes under a forced, coerced procedure that is laid on us by the Court. We say that this is a judicial process of the Court; that

this arbitration association was set up as an arm of the court, similar to a master who, under the Federal Rules, must report back his findings to the Court, similar to a grand jury, where the Court retains control over the grand jury. And we cite in that connection the National Window Glass case, which we set up in our brief, which is a Sherman Act case.

In the Farragut case, the submission read that the arbitration should be final and binding as to all matters of law as well as fact, and that they shall become a decree of the Court. The arbitrators awarded $966,000 and another item of $46,000, whereupon the Government filed exceptions.

Admiral Farragut and his proponents then claimed that the award was final and binding, and the matter went to the Supreme Court of the United States.

Mr. Justice Miller of that Court said that it was final

(3888)

as to matters of fact, but where there were mixed facts and conclusions of law, or where there was a mistake of law, it was not final and could have been reviewed by the lower court as well as by the Supreme Court of the United States.

We point, in our brief that we will submit this morning to any member of arbitration cases where it is said it is the universal and general rule that where there is miscalculation of statistics, as we have by the Appeal Board in our decision; where there is a misquotation of the record, as we have by the Appeal Board in our decision; where there is an assumption solely by the Appeal Board against facts definitely stated by the arbitrator, as we had in the arbitrators' decision; that those are mistakes of error which the Court will review in any arbitration situation.

Generally, your Honors will find, and we point out some of these cases in the brief that we desire to submit, that arbitration is set up by statutory enactment, by legislative enactment. I do not know of any other situation, I haven't been able to find any, any that have gone to the court, where arbitration was established by a court, as an instrumentality

or means or enabling function of the court, but in the statu-
(3889)
tory situations it has been held that the arbitration is compulsory and unconstitutional unless there is a right of review in the court for mistakes of errors committed by the arbitrator. We cite the case of In re Compulsory Arbitration, 9 Colorado, which is not cited in our brief, and the case of St. Louis v. Williams, which is in 49 Arkansas, not cited in our brief.

In this industry itself, if the Court please, arbitration was established by joint action of the parties and was held illegal by the Supreme Court of the United States in 1932 in the Paramount case and the First National case.

There was the same joint action that is admitted of record by the defendants on this motion. The only difference between that situation and our situation here is that they did not have the benefit of a court decree.

Our position is that the Supreme Court has said in Swift & Company v. United States that this is not a contract situation; that a consent decree is not a contract; that a consent decree is a decree of the Court with all the force and binding power of the Court.

Therefore, when we submitted to arbitration, we submitted with the conviction that should there be a clear, arbitrary, capricious action by the Appeal Board, by this body functioning at long distance over and apart from the arbi-
(3890)
trator, that we could then come to the Court and have the matter corrected, and I am prepared to point out to your Honors nine or more glaring errors in the opinion of the Appeal Board. All the Court has to do is to take the Appeal Board decision and contrast it with the arbitrator's decision and find that the Appeal Board acted without the benefit of the record.

I would like to call the Court's attention to this, that we have only had one opposition filed here, and that is by the intervenor Bernheimer. By the intervenor I mean the

intervenor in the arbitration proceeding, the party who is contesting us. The eminent counsel here has not seen fit to file any opposition here to our motion, although it has been on the docket for three months.

As I understand the rules 8(d) and 12(h), of the Rules of Procedure, all our affirmative averments, including the averment of concerted action between the distributors and Bernheimer, have been admitted technically, and they have waived all the defenses except the defense of jurisdiction which your Honor directed my attention to.

The Bernheimer defendant has filed an opposition in which, first, he challenges the jurisdiction of the Court, but in the third part of that opposition he submits new matters for the inspection of the Court and submits an affidavit in support of it, and we would call the Court's attention to the (3891)
fact that by submitting the new matter, he has submitted this matter to the jurisdiction of the Court.

Of course, we country lawyers like to observe our rules, and I want to call the Court's attention to, again, Rules 8(d) and 12(h), and the fact that no opposition has been filed to our motion.

Judge Hand: Now we will hear the opposition.

Mr. Lust: May I submit this brief?

Mr. Caskey: On behalf of the distributors who were respondents in the arbitration proceedings, we submit that the District Court has no supervisory powers over the Appeal Board as to any particular decision. Whether or not on an application of a party the District Court could exercise, by modification of the decree or construction of the decree, some jurisdiction over the appeal board or its practices is a question that need not be debated—certainly no jurisdiction of the District Court to review a specific determination of the Appeal Board. If any review is to be entered into, we think the Court will become convinced that the Appeal Board correctly decided the principals involved and applied the facts to those principles.

The Court: Application of Allred.

Mr. Jackson: If your Honors please, this is a motion by a number of independent exhibitors to intervene. There is a (3892)
similar motion made in behalf of the American Theatres Association, in which Mr. Paul Williams and Judge Arnold appear as counsel. Their motion was made before the Allred motion, and I feel that in good faith, and in accordance with our talks with Mr. Williams and Judge Arnold, that they are entitled to proceed, if that is agreeable to the Court. I am not trying to avoid; I am quite prepared to go ahead.

Judge Hand: That is all right.

Mr. Jackson: We did have that understanding.

Judge Hand: That is quite all right.

American Theatres.

Mr. Williams: If the Court please, we have divided our time equally. Judge Arnold will present the over-all legal problems that are involved in the application to intervene, while I will attempt to give you a picture of the practical operation of the exhibition branch of the business, which we think is very material here. I have had the opportunity to observe it at first hand during the past two years, and we think it is very important that certain observations be made.

Being a member of this Bar for many years, I introduce Judge Arnold to you.

Mr. Arnold: May it please the Court, these intervenors, who are represented by myself and Mr. Williams, are two (3893)
associations, the American Theatres Association, consisting of about 6,000 theatres of all kinds, and they are represented here excepting those theatres which are affiliated with the major defendants, and the Southern California Theatres Association, which is a large association in California, representing every type of theatre; and in addition to these associations because of, what we think, is the unlikely chance that it might be held that the Associations were not bound by the decree, we have a list of individual intervenors, representing

chains, small independent theatres, theatres of every type and every situation, who intervened as individuals, and we claim intervention as of right under Section 24(a) for the sole purpose of objecting to the Court's suggested plan of distribution of pictures by competitive bidding.

I will argue that briefly. We think that we meet all the requirements of Section 24(a). In the first place, there is no question but that our intervention is timely. It was filed almost immediately after we had notice of the proposed decree. In the second place, there is no question but that the interest of these independent theatres is directly and immediately affected by the proposal of mandatory competitive bid-
(3894)
ding. It will control precisely and in detail the business of these intervenors. It will not only destroy existing arrangements which are perfectly legal and on which those exhibitors now depend, but it also will set up a new affirmative regulation of the industry operating for the indefinite future.

So there is no question about our interest. Nor do I think there is any question but that we will be bound by this affirmative provision of the decree.

And, finally, I think there is no doubt—and indeed the Government admits—that we do not have adequate representation in this situation. The Government itself has proposed, our at least gone along, with the court's proposal on competitive bidding to the extent that it compels independent exhibitors, the Government's proposal, would compel independent exhibitors to bid against each other in situations where the major defendants have no interest whatever.

Now, we take no position on the proposal of the Government that the defendants shall not exhibit each others pictures in their own theatres. Our organization has not been consulted on that point, and so we can take no position on that. But whether or not that be an appropriate provision in the decree to compel us to competitively bid in the situations in which the defendants are not interested, has no relevance to the purposes of this suit.

(3895)

The Government objects to our intervention on the sole ground, that I can see in their letter to your Honor, on the ground that in an antitrust suit everybody is more or less bound by the decree, and we are not bound by this decree any more than in any other antitrust suit where people are incidentally affected by the dissolution of a combination or by the changing of the contractual relationships between parties which the court has declared to be illegal. But we insist that this is not a situation of a party being incidentally affected by the dissolution of an illegal arrangement between two other parties.

This is a situation where the court has gone outside the condemnation of illegal arrangements and has attempted to introduce competition in this industry by telling these innocent parties that they must compete, and as a practical effect, since the distribution outlets, since the channels of distribution are controlled by the defendants, we will be completely and entirely bound by a decree which directs how the pictures shall be sold. We do not think that Rule 23 means that we be bound in the sense of res adjudicata. Of course that would not make any sense because if we were bound as res adjudicata we would have to be parties. This rule, and I think the cases in our brief which I won't bother the court

(3896)

to recite—this rule means bound in a practical and substantial way, so that legal rights which we have in the absence of a decree are prejudiced, damaged, or taken away. And there is no question but what those legal rights are taken away by this decree.

Assume that some other court would in a future proceeding brought by one of these independents, declare that the suggested plan of the court was erroneous. Nevertheless, the defendants in this suit would, we think, as to past action, have the defense that they were compelled to sell pictures by competitive bidding by the order of this court.

And furthermore, if this case goes to the Supreme Court, the effect of stare decisis would be even more conclusive on us than res adjudicata.

The Government suggests that our rights can be taken care of adequately by a brief amicus curiae, and perhaps since the court is kind enough to hear us, that might be true in this court but it is not true in the Supreme Court. We need intervention as of right because one of the most important privileges or rights which we want in this litigation is the right to appeal, and the right to appear in the Supreme Court. It is very doubtful if we could appear in the Supreme Court if the case were appealed amicus curiae without the
(3897)
consent of all the parties, and there is the equal possibility that the Government and the major defendants might get together and might not appeal. So that we are not protected by the suggestion of appearance amicus curiae.

Now if the court please, I want to respectfully suggest what I consider are the errors which this court unwittingly made in suggesting competitive bidding.

I think there are three fundamental considerations which this court overlooked. The first is that the regulation which the court proposes is for the benefit of the wrongdoers, and its principal impact is on the innocent parties who now seek to intervene. Why did the court suggest competitive bidding in this case?

It held that these great integrated producer combinations were lawful or at least could operate without dissolution; that they were lawful organizations, that they did not sufficiently dominate the market so that they should be dissolved. And yet it is clear that the court was concerned about the nature operation of those organizations. It was concerned about getting competition in the industry, and so it adopted the plausible device of reaching out and saying "These innocent independents shall furnish that competition and they shall do it for the benefit of two classes of people—first the majors, so that the court would not be compelled to make

(3898)

a more drastic remedy against them, and second for the benefit of the public perhaps because the court suggests that the defendants may be able for some time to operate the theatres better than newcomers.

Well, the burden, we submit, cannot legally be put on us to furnish that competition. We are not guilty parties. We are not subject to the order of this court. And while the order in form directs only the defendants, in substance it imposes a system of distribution of pictures on us for the benefit of the wrongdoers.

Now the second error or misconception which is behind this suggestion of competitive bidding is the notion that competitive bidding can create competition. I think that is a fundamental error in the economics of this decree, and you cannot, of course, in an antitrust decree, overlook the economics of the industry.

I would assert that competitive bidding may be the result of a competitive market, that is, as in wheat or corn, or cotton, or where there are parties of approximately equal bargaining power and where the supply can increase to meet the demand, and where no group dominates that supply. Then, of course, competitive bidding is the normal and natural competitive result. But where groups are not of equal bargaining power, where the supply is restricted or tightly con-

(3898-A)

trolled, competitive bidding does not create a competitive market. Instead it intensifies the monopoly domination of that market.

(3899)

And the third error, it seems to me, is in the court's conception that there is a product here for which competitive bids can be made. We suggest, and we think our brief conclusively establishes, that there is no standard commodity here; that pictures are not being sold. It is only rights which are of various characters and there is no possible standard except the business judgment of the defendants.

And if the Court attempts to classify all these various rights so that there will emerge a set of standards or units, we think that the Court will have entered into an unworkable administrative code which will not and cannot work.

And we finally suggest that the result of these errors is to impose the system which will destroy the independents for whose protection this suit was originally brought.

The exhibitors do not want this system. They do not want to go in on a scarce market and cut each other's throats for these pictures which are not enough to go around. There were 437 of these pictures in 1937, 300 in 1945, about ten years later, and there will be less in 1946. Indeed, I think one of the best illustrations of what is going to happen is found in the Film Daily of September 11th where Darryl Zanuck, vice-president and production chief of Twentieth-
(3900)
Fox, predicted that 40 per cent of the scheduled pictures would be shelved if the proposal of the Court were entered into.

Now, he apparently likes that. He seems to think that there will be fewer medium grade pictures, but I do not think that this Court is in the position to deprive this vast number of theatres of their product on some fanciful theory that the public will get better entertainment. In my view, of course, the more pictures that are produced the better chance of getting a good one. And, furthermore, the commercial success of a picture does not necessarily determine its artistic quality.

Now, what does this mean? It means that the exhibitors will have to pay more and more for a scarer and scarer product. Now, why should that handicap be put upon them? Suppose, for instance, that the great tin can manufacturers bought up Del Monte and Van Camps and discriminated against and drove out of business the smaller canners; and suppose the Government brings a suit charging that illegal discrimination because of the domination of the can manufacturers and their combination with the major brands; and

suppose the Court finds the discrimination to exist, and then goes further and says, "We will cure that discrimination. We will put in a provision that the little canner and Del
(3901)
Monte and Van Camp competitively bid for these scarce tin cans."

Well, of course, it might stop the discrimination, but it would do so by driving the little people out of business. Where a product is scarce and tightly controlled, competitive bidding will create monopoly instead of competition. In those situations if codes are to be introduced, or legislation, the only way to preserve competitive bidding is by rationing.

And I further suggest, if the Court please, that this competitive bidding, if it were to apply at all, is on the wrong end. I suggest that it cannot be applied by court decree, but let us take a regulatory situation: You may recall that some time ago great finance houses like Kuhn-Loeb and Morgan-Stanley were charged with dominating the market for railroad bonds and fixing commissions which were unjustified. The Securities and Exchange Commission under jurisdiction of an Act inquired into that situation and decreed that these bonds should be sold by competitive bidding. But that did not mean that the railroads went to Kuhn-Loeb and Morgan-Stanley and made their competitive bids as to which would pay the highest price for that financial service. No, it was the finance houses which submitted the bids to the railroads. If competitive bidding were possible in this situa-
(3902)
tion,—and I do not think it did, because, as I have said before, we have no standard commodity—but if it were possible in this situation, the only appropriate exercise of it would be to have the major defendants bid for the playing time of the independent exhibitors. The Court has used this device of competitive bidding in a way that I have never seen it used before. That is, they are supposed to be protecting the independents, but, actually, competitive bidding protects only the recipient of the bid.

Now, I am aware that probably in the Court's mind was the thought that competitive bidding could be used, would be a normal channel to get somebody into the market who was excluded from the market by favoritism; that through that device you had a yardstick which would prevent the exercise of favoritism by these defendants in the future.

Well, in the first place, you do not have any such yardstick, as I will show a little later, but instead of benefiting these independents, it compels them to go into this cutthroat race and pay more and more and more for their pictures.

They must have a constant supply. It turns the independent exhibition into a complete gamble. And not only is the bargaining power of the majors greater because of their financial resources; it is also greater because they do not

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have to pay for their own pictures.

So they go in with some 20 to 30 per cent of the supply already; and the answer and the only answer to competitive bidding of a weak group for a scarce product is more and more consolidations, chains, and the elimination of the weaker persons. And it was that kind of concentration which was the original evil out of which this final suit resulted.

Now, as I say, in the first place I do not think the Court has the power to put on an innocent party the burden of changing their practices in order that a large combination shall have the temptation to discriminate; and, second, if the Court had that regulatory power, it would be an uneconomic regulation, because competitive bidding is not in itself a competitive market; it does not create a competitive market. It may be the result of a competitive market where the bargaining power is equal and the supply is large. It will create monopoly when introduced in a situation of scarcity.

Now, the third misconception which underlies this suggestion is the idea that there is a possible standard other than the business judgment of the recipient of the bids which will be the major producer in this case—that there was a possible standard to determine this commodity, and what is the best

(3904)
bid for this commodity. The Court in its opinion suggests a number of the factors in the sale of motion pictures which makes such a standard impossible. There is clearance; there is the type of theatre; there is the general plans for distribution; there is the question of whether a long run and a low percentage is better than a short run and a higher percentage. There is the question of whether a percentage price is better than a flat price. The Court has its choice of letting this thing drift without formulating an attempted code for these standards, or to formulate a code. And in either event, I suggest that the decree will be a failure, because, in essence, I do not think that anything more than the business judgment of these defendants can determine the best bid.

And, furthermore, experience, I believe, shows that competitive bidding put in operation for the benefit of people who dominated the market results in collusion just as fast as any other form of market exercise of power.

In the Tobacco case I think the tobacco companies thought for a while that they had a perfect protection against the antitrust laws because all the tobacco was bought on competitive bidding.

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It was a much easier commodity to standardize than motion pictures. Nevertheless, there were about 120 grades. And it was elaborately regulated. Every basket of tobacco had a ticket on it with the price and the purchaser; and the millions of tickets went to the Department of Agriculture. Yet it was that very system which created the monopoly which the Court found the tobacco companies guilty of in the Tobacco Case.

And what the competitive bidding did in this case was to furnish a smoke screen behind which these coercive practices could continue.

I suggest in this case, since business judgment will inevitably determine the bid, the Court has, by this proposal, in effect said that the defendants may use their judgment as

to how to distribute these pictures, and as long as that judgment seems to be based upon their financial returns, all the remedies of the antitrust laws are taken away. These independents today are operating, protected by the threats of prosecution, triple damage suits.

Assume that this industry has not learned enough today so that it will continue the practices condemned by the Court. Make that assumption, and the competitive bidding will protect it, I mean, the competitive bidding scheme, will protect it in the continuation of those practices by taking

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away all the other rights.

Assume that the industry has learned enough so that it is not going to drive independents out of business in the ways which it did in the past, then we have put in a system where the independents are compelled to drive themselves out by cutting each other's throats.

Well, if the Court please, I think I will turn the rest of the argument over to Mr. Williams. I have given you the general conditions. I expect him to give you specific illustrations which will amplify the point.

Mr. Williams: May it please the Court, I feel under a somewhat acute and searching obligation to bring to this Court the plight into which this litigation has placed the exhibitors of this country, and when I say "exhibitors" I mean the independent exhibitors.

I happen to be the man who was directed by the Attorney General in 1936 to make a thorough investigation of the motion picture industry with recommendations. This litigation was the outgrowth of that investigation.

The original complaint in this action was my work, and I was in charge of this case into the consent decree negotiations up until the point where I thought that by that consent decree a provision relating to the sale of pictures was being imposed upon these exhibitors which had no relationship to the action which we were bringing, did not restrain or im-

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pede or stop the illegal practices with which the defendants were charged; but, on the other hand, would place them under a burden which would make their plight even worse than it was before. That was the provision whereby the producers were prevented from selling pictures in blocks of more than five.

Judge Arnold, who was then in charge of the Antitrust Division, was caught in the unfortunate position of having two sets of advisers with different viewpoints. I, having charge of the trial, believed that that position was injuring the very people whom we were seeking to aid. The consent decree section, on the other hand, it seems, had been having conversations looking toward a consent decree and genuinely believed that that was in aid of the litigation. So there was the split. I remember going to Washington on one or two occasions and trying to convince Judge Arnold that nobody in this industry, nobody, no exhibitor——

Judge Hand: I think this is rather absurd to tell us all about your——

Mr. Williams: All right.

Judge Hand: —housekeeping there. It is very complicated and apparently involved deep divisions among yourselves.

Mr. Williams: Anyway, I had one view and they had
(3908)
the other, and I could not go along, and that was what I thought was the end of my relationship to the case, but here I am, back again, trying to tell your Honors the difficulties, not only that that provision brought to the exhibitors, but what competitive bidding will do to them.

A great deal of law has been written in this case and in all of the cases about what the defendants, the distributors, may not do. May not I invite the attention of the Court to what exhibitors may legally do in the purchase of pictures?

I agree that the provisions against the tie-in clauses and all of that are right. The rationale of those laws, as I under-

stand them, is to prevent a seller of goods, who has a patent, or a copyright, or an exclusive right to sell something from forcing a buyer to buy something in addition to that which is beyond the copyright or patent.

But, look at it from the other angle: If an exhibitor wants to buy more than one picture, if he desires to buy a season's purchase of pictures, is there anything in the law whereby he should be prevented from doing so?

(3909)

Now then, under the old system an exhibitor was permitted to buy a season's run of pictures. Under that practice the various distributors in the spring would have a program for the ensuing year. They would present that program at a convention and develop it, and then the exhibitor could buy those pictures in a year's block. The practice in some of them had grown up so that they forced the whole block. But I call your attention to this provision in the consent decree commanding block booking in sales of not more than five. The exhibitors then were up against the practical difficulties of having to buy blocks of five without the possibility of eliminating any pictures, which is an altered form of block booking.

Now out in my association there day after day after day exhibitors have to buy pictures which they cannot use as a result of that provision. Now then, what the exhibitors of the country want is the right to buy an annual sale of pictures with reasonable rights of elimination, and I want to ask this court if there is anything unlawful in such a procedure and if there is nothing unlawful about it should they not, if they are able to persuade the distributors to sell on such a basis, to buy in that way?

But I venture to think that the distributors, having tasted of this new method of selling pictures in groups of five, would decline to do so for the simple reason that it

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has given them a means of knowing the specific value of each of their pictures, of getting more revenue out of the

exhibitors on account of that, and eliminating the chance of mistake in assessing the true value of every picture.

As the court knows, the making of pictures is a fickle thing. No matter how much money or how much effort you put into the making of pictures, nobody can tell what public acceptance any one of them will have. Under the old system, where they bought annually, the kind and character and quality of each picture was designated so that an exhibitor might have a chance of getting in and making money on pictures that were misjudged. Under this decision, the consent decree, and particularly on what this court proposes to place on exhibitors, all of that will be removed.

Now then, as to competitive bidding where the right to buy pictures is alone limited to the highest bidder, I think if that regulation is put into effect it will remove from this industry every element of stability that has yet reached it. There is more than price that goes into the business judgment of who in the long run will make most money for any distributor—the kind and character of the theatre, the honesty and integrity of the exhibitor, past experience and all of that.

(3911)

Now I don't mind that these customer relations shall be binding forever, because I think you can safely leave it to the business judgment and the desire of the distributors to make money in the long run to go to the theatre that would be entitled to it. But I think to remove all of these other considerations from the buying of pictures is to introduce a chaos into this industry that is greater than any that ever existed before.

Already out there in my country, in California, independent exhibitors have been so concerned with the opinion of this court that those who have been in business for many years are putting their theatres on the market and getting out. They don't think that the future of the industry under such a regulation that this court is proposing to impose on them would warrant them in continuing in the business

when there is an inflated value for the sale of theatres out there.

Now then just a few more words and I will have ended. They feel that the placing of this method of sale upon them, that is, a regulation that is beyond the power of the court, that it tends to encroach upon the legislative field, that if any such regulation is to be made of the industry it should be the Congress and not the courts that should do it, and that the true function of the court as stated in the old Standard Oil case is to enjoin that which is illegal. If there is a
(3912)
monopoly they have the power to dissolve it and then let free enterprise and free bargaining run its course.

I believe that within this industry they have the power and the desire and the willingness to correct most of these things if the free sway of enterprise and competition is permitted to them. But for the court to regulate or for the government to regulate it with all of its complexities and all of its difficulties would be to add chaos to what already has become chaos.

Now then I just urge the court to think of that. I know men on both sides—the distributors and all of them. They are men of ability, good will, and I believe that they have it within their power outside of these things that are unlawful, which ought to be stopped, to sit down together and work out something which will be for the good and benefit of all.

The Court (Hand, C. J.): Now Mr. Jackson.

Mr. Jackson: If your Honors please, a great deal of ground has already been covered and I shall try not to duplicate what has been said.

Our motion is in behalf of a number of Southern independent exhibitors to intervene. It is exactly like the preceding motion which has been presented. We too take no
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position in regard to any of the issues in the case other than this question of auction sales of pictures, picture by picture,

theatre by theatre. We are interested in coming into the case for the reasons which have been given and which will be given, to ask your Honor's reconsideration of that feature of the proposed decree and also because your Honors have reserved jurisdiction of the case and questions may come up in the future which would affect independent exhibitors, and then there is of course the question as to whether if there is an appeal we would want to be heard in the Supreme Court on this question.

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Our immediate petitioners here, some 20-odd in number, are mostly smaller exhibitors, and, in turn, they are acting in behalf of some 2200 independent exhibitors whose theatres are located in the Southern States. They are unanimous in their opposition to the introduction of auction selling. They feel it will do them irreparable damage; that they will lose their good will, and many of them are likely to be put out of business.

There are one or two technicalities in respect to motions of this kind which I think should be spoken of briefly: in the first place, Rule 24 requires that an application should be timely. On that point, of course, this question of auction selling was never an issue in the case——

Judge Hand: I do not think you need to argue that.

Mr. Jackson: All right, sir.

The next point along that line, as to whether the petitioners are represented—on that, very briefly, the Government is presently opposing intervention, saying our interests would be cared for as just a part of the public; and prior to the trial of the case this question was never litigated, so that the issues are not factually before your Honor on the basis of evidence, and the defendants in the case are entirely

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indifferent, apparently, so far as I am aware, to whether we intervene or whether we do not intervene, or whether there is auction selling or whether there is no auction selling. So I think it is quite clear that we are not represented.

Now, on the question of being bound by the judgment, I should like to refer just very briefly to one additional fact which has already been discussed, and I won't go into it, but I think that is fully recognized by your Honors in your opinion where you said:

> "As to these non-party interested exhibitors, while our decision will not be res adjudicata as to these not parties to the litigation, the parties are necessarily and properly bound and indeed the decision is a judicial precedent against the others on the question of law involved in those situations we have referred to where they have unreasonably restrained trade or commerce."

So it seems to me that the binding effect of this decree if it incorporates auction selling on those independent exhibitors has been already recognized by the Court and accepted.

On the question of delay, in view of what your Honor (3916)
said a moment ago, there is no need to discuss that. We acted promptly after the decision came down, and when as soon as these exhibitors realized the full impact of this holding, this requirement that they buy at auction sale, they gathered together in meetings of their associations, and that took some time. They then retained counsel; counsel had to study an extended record and read a great many briefs, and then when retained properly made the motions which are before your Honors.

There is apparently, so far as I can see, no occasion for delay in connection with taking further testimony. I know of no contradiction to the petition which has been filed, and even if testimony had to be taken on the petition, it could be taken with great expedition and very promptly.

On the question——

Judge Goddard: Have you any testimony you would like to offer?

Mr. Jackson: I beg your pardon?

Judge Goddard: Is there any testimony you would like to offer?

Mr. Jackson: Not unless our petition is controverted. If our petition is controverted factually we would like to offer testimony. Otherwise we rest on our petition and the allegations which it contains.

Now, as to the only other point I shall ask your Honors
(3917)
to hear Mr. Barton, who is far more familiar with the actual operating of this business than I am, and who can be of greater value than I can be to the Court. I think he will supplement the remarks which have already been made by Mr. Arnold and Mr. Williams to some advantage; and the only other point which I have in mind to make at the moment is that it seems to me that the relief other than auction selling which the Court has directed and will direct, is adequate, and it would seem reasonable to suggest that the relief in these other respects should be tried out before this new practice, this intervention, should be put into effect, at least.

I introduce Mr. Barton.

Mr. Barton: May it please the Court, inasmuch as auction selling is not an issue in the case and was only briefly and casually referred to in the arguments, I want to present to the Court three points which I ask the Court to consider as though I were making a motion for a new trial on after discovered evidence; and since the petition does not controvert, it will not be necessary in our opinion to take any additional evidence. There is certain corroborating testimony already in the record.

The points are these, that auction selling is impracticable; that if auction selling is decreed, it will work harm,
(3918)
and we say irreparable harm to our clients and to other exhibitors similarly situated, and, last, it will be of no benefit to the public.

Now, the first point, the impracticability of auction selling: As the Court knows, the exhibitors have to form their program in advance. They have to determine whether they are going to have——

Judge Hand: Let me ask you whether you can think of any other system that would give a wider opportunity for pricing these films.

Mr. Barton: Our reply to that, sir, is that if the Court will permit its mandates in respect to the other points to operate, that they will satisfy the demands of the Government; and I should be very glad to take those up one by one and show you how we think they would be effective to satisfy the same matters of which the Government complains. We cannot suggest any other system, except let those take effect, and then let the barter and trade and free competition and such things also take effect, and we believe that will satisfy the situation.

The exhibitors are unanimous in feeling that that is the case. That is the first time I have ever seen them unanimous. The south and the north and the east and the west have gotten together in opposition to auction selling, believing, as

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I say, that these facts that I want to present to you had been before the Court at the time it considered auction selling, the impracticability of it, and the damage it will do to the exhibitors, and the failure to help the public—had they been before the Court, the Court would not have made this direction; and we have no other plan to offer except the one I suggest. What the Court otherwise decreed will be adequate for the purpose.

Now, shall I proceed?

Judge Hand: Yes.

Mr. Barton: Now, if you are going to have competitive bidding—we have called it auction selling because there are a few references in the record to auction selling—the first question is how many auctions ought there to be, in each city, at the same time, or at different times? How many times a

year?. Are the auctions to be held in the spring or fall, or every month, or when? Will all the producers be asked for bids at the same time or at different times? These are practical suggestions that the exhibitors have brought to us. Will bids be made by mail, or will you have a room in which the bidders will get up and say we offer so much for this picture, and he offers so much, and probably knock it down just like you do real estate or personal property?

(3920)

How are you going to arrive at the minimum price when one man says he wants his picture for varying runs, as they say, we want it for five days, ten days, twelve days; we want it for what we call preferred playing time, that is, holidays; or we want it at this time or that time? Another man says, We want to bid for the picture on varying runs. Things of that sort. In other words, if we understand the decree, the exhibitors say to the producer, "We would like to bid for this picture, submit a bid, and we want to submit the bid to run for certain days, or for so many days"; another man says other times and for so many days. All these varying requests have come to the producers.

How is the producer to determine how many offerings he is going to make at a minimum? Is he going to make one or a dozen? Is he going to try out the first suggestion of an exhibitor, and then a second, and then a third? It just ties itself up until we see no out for it.

Under those circumstances, if there are no bids at the minimum price what is this producer going to do? Is he going to make another offer, after his minimum price is so high and nobody wants it at this price? Is he going to come and say, "I offer it again"?

Then, if the Court please, let us consider the number of bids. Exhibitors now offer 50 to 300 features a year, de-

(3921)

pending on the number of times they change their programs. They need from 150 to 900 shorts. That means that each exhibitor, depending upon the number of changes in his

program, has got to make from 200 to 1200 successful bids, and I say successful. He will have to put in innumerably more bids in order to be assured of from 200 to 1200 successful bids.

By what standard is the producer to determine when bids shall be accepted? Here are a few of the varying things that may enter into a bid. One exhibitor may bid a flat amount, another, a greater or lesser flat amount. There may be all sorts of flat amounts. They may be for varying percentages of gross receipts, 20, 25 up to 40. There may be varying sliding scales in the bid. There may be varying practice and varying guarantees.

What is to be the measuring rod by which a producer can determine which bid he should accept?

By what standards of the sellers, the distributors and the producers, to determine the adequacy of the theatre as to location, size and equipment? Among a few of the other things that will have to enter into his judgment, those would be some of the consideration. All those things are going to delay in awarding bids. A seat not sold is gone forever; a picture not sold, when it is popular and when people know about it, and expect to see it, loses a great deal of its value.

(3922)

By reason of all these complications that I have suggested to the Court, inevitably there will be delays in awarding pictures, and that means that these pictures are going to lose a great deal of value.

In addition to that, an exhibitor will not be able to arrange his program because he does not know until his bid is awarded what picture he is going to get. He will never know whether he is a successful bidder for a dozen pictures, or whether he hasn't got enough pictures.

Here are five or eight or ten distributors asking for bids. He puts in all of these bids. He won't know whether he gets a dozen awards or one award. He will be in a complete state of confusion as long as this system lasts.

And then out of all this, inevitably, there are going to arise innumerable controversies. The unsuccessful bidder is going to say to the distributor, "You treated me wrong and we want to see your books. I would like to know how you gave Mr. Jones over there a picture when I thought mine was the best bid." There you have a controversy. And even if it goes to arbitration, it is a controversy, and, inevitably, out of the impracticability of this situation, innumerable controversies are going to develop.

(3923)

In the meantime, what is going to happen to the picture? You may hold up an award of the picture by some court action, or arbitration, or any number of things may happen, not only to the detriment of the exhibitor but to the detriment of the distributor, who wants the picture displayed while the picture is ripe and ready for public introduction.

So much for a number of the things which make, in our opinion, auction selling or competitive bidding impractical. We just don't feel it can be worked out practically.

We have worked with it, we have tried to figure out some way, and we all came to the unanimous conclusion that it cannot be made to work practically. But suppose someone can work out a way to make it work practically, or we think it works practically? Or we think it could be made to work? What is going to be the effect on the exhibitors?

You may say, or somebody may say, that then these points I am going to bring up are somewhat speculative, but they are unanimous judgment of people who have been in the business for years; they have risked their fortunes and they have spent their lives in the business, many of the kind who started off with six runs for a nickel in the little stores which

(3924)

were gradually converted into motion picture houses, and then have gradually developed from that stage into a comfortable and modern theatre. They know what the effect of certain actions will be upon their business from experience. They are men of experience who know that if this is done, this

result will follow, and they say, with unanimity, that if auction selling is imposed upon them, these results, among others, will follow.

My friends have already alluded to the fact that it will foster monopolies. It is perfectly obvious that the theatre operator who has the most resources and the best theatre, and usually the two come together, is going to make the highest bid, most successful bid. He is going to get all the good pictures, and, as the Court knows, all pictures are not good. A producer may spend a good deal of money on a picture and think he has a swell production which will have vast popular appeal, and then when he shows it in the theatres he finds it is a flop; or he may spend little money on some picture and it grew to be a great success. If the Court wishes, I could give you names of pictures. But, to get along, ordinary business practice will inevitably result in the best financed operator getting the best pictures, leaving to the less financially strong house the poorer pictures.

Under the present system, by the course of barter and
(3925)
trade and negotiation, the smaller houses do get first run pictures. They may have, over a period of years, a course of dealing with some producer which has been beneficial to the producer and beneficial to the exhibitor. The public is accustomed to going to see certain types of pictures, and he will have had a good first-run picture one week and next week he may have a poor first-run picture. Under this system it is inevitable that the big man is going to get all the pictures and the little fellow is going to be reduced to a second, or sub-run house, or what is known in the trade as a slough house.

Under this decree, may it please the Court, the defendants enjoy an immediate advantage. They may display in their houses the pictures they produce.

On the present production we roughly estimate that they may have as much as six month's production. They can show pictures without auction bidding, without going into the market and subjecting themselves to the hazard of the auction

block; they can show six months of pictures, and by stretching it in the bigger cities, we estimate they will probably have enough production to show a whole year; in the smaller cities and towns, of course, that isn't true.

They already have one strike against the independents
(3926)
because they know that the independent has got to bid and bid well to get that picture which they have put on the auction block in order to have something to show against his picture. It is human nature that they are going to charge more for it. It is human nature that those film rentals are going up.

All the factors that I have narrated are going to enter into distribution.

You have to have, I don't know how many people, auctioning these pictures off; you have to have a lot of exhibitors getting ready to submit bids, and all those things are going to increase the cost of the films.

And then, under the decree of the Court, a distributor cannot take into account those things which apply in any business enterprise, in any course of dealings, that is, to name a few, the reputation of the man with who you are dealing for honesty, integrity, fair dealing, efficiency, cooperation, and a record of his past transactions.

Now, to cover the risk that you are bound to take. You may say he is a responsible bidder, but he may have a lot of money and be a very difficult exhibitor to deal with. To cover that risk, inevitably you are going to add something to the price, your minimum price, and that is another reason why your film rentals are going up.
(3927)

And then I come to a most important item, it is not a matter of contract, but as a matter of verbal understanding and of trade practice indulged in and, necessarily so, by all the producers and all the exhibitors. A producer comes along, a salesman, and says, "I have a fine picture, one of the best pictures. It is going to do a whopping business, and

I want this price for it." Under the present system the exhibitor says, "I don't think all those things are true. I will pay you this." And they trade, and finally arrive at a price, but the distributor also says to him, "If this picture does not turn out to be what I say it is going to be, what I prophesy, then I will give you an adjustment." Those adjustments arise from the fact that the picture is not what the producer thinks it is going to be. It may be because of the territory in which it is shown. For instance, "Young Mr. Lincoln" was popular in the North; in the South it was not a particularly popular picture. They thought Woodrow Wilson was going to be a great hit, but I understand it was not the box office hit they expected. Those pictures were sold on some high basis to exhibitors, and when they proved not as productive and not as popular as was stated, the producer comes along and says, "I will adjust what you have agreed to pay me." They found that good business. That is uniform throughout the industry. It is an accepted trade practice. I mean the
(3928)
return of thousands and millions of dollars to the exhibitor, because these exhibitors are people they want to keep in business. They have found in experience that they are good exhibitors, they know how to do business, and it is profitable from both ends that these adjustments should be made. But there may be other reasons for adjustments in addition to the poor drawing power; there may be bad weather, a circus may come to town, or there may be a fire; there may be a power failure, a strike, and various other attractions which take away from the drawing power of that picture at that particular time.
(3929)

You can't always book a picture, may it please the court, for the precise time you want it because prints are limited. In those events there are post-exhibition adjustments. Now those would not be possible under this system.

Now there are a number of additional injurious factors. I have already alluded to the fantastic number of bids that

each exhibitor would make, I have spoken of over-buying and under-buying. I have not mentioned double features. There is considerable difference of opinion in the trade as to the advantage or disadvantage of double features, but if he has got to buy pictures by auction bidding, he will not be able to show two pictures because both pictures will cost him a higher price. He is able to do it this way because he buys one picture at one price and the other at a higher price, and averages the two. But under this auction selling he will be unable to arrange his program. He may buy all Westerns. It would be ruinous for an exhibitor to buy all Westerns, buy one Western after another, except certain exhibitors in small towns where they have action pictures on Saturday nights. He may buy all historical pictures or he may have multigraphs. He will not be able to arrange his program. An exhibitor has to schedule his program so that it will be attractive. If he is a second-run house he will perhaps want

(3930)

to follow within a reasonable time after the first-run house. He would want to do something to make his program more attractive. It is a showmanship business, and you have got to properly prepare your program. And these exhibitors do not know how they will be able to arrange their program because they don't know what pictures they will have and what pictures they can expect to have.

So much for the damages it will do to the exhibitor.

Now coming to the public, I have already pointed out to the court that inevitably the small first-run houses will be converted into second-run houses and sub-run houses. At the present time you can go to a neighborhood house and see a good first-run picture because it is not in a competitive area and does not interfere in any way with the downtown house.

I think in this particular situation there are two theatres. You might call them faith and hope, because they have been built up by the exhibitor from faith and hope over a period of years. One has a seating capacity of 700, another say of 800, making a total of 1500. At the present time they are

able by negotiation to exhibit first-run pictures day and date, that is, simultaneously. There is in that same town a picture theatre of 1200 seats.

(3931)

Now under auction bidding, if they each ask for first-run only and there is only one first-run awarded to that town, as is usually the case in a town of 150 to 200 thousand, that big theatre is going to get that picture. That is just an illustration of a point I made before. But it seems that the neighborhood houses are going to sink down. They can't vary their prices according to their pictures. The public is accustomed to paying a uniform price at a theatre and seeing one week a good picture and the next week a picture that is not so good. Should they be fortunate enough to get a good picture they will pay a higher price but in the meantime they will have slumped down to a second or third or sub-run house, and the public has got to journey down-town to the larger and bigger houses.

I have already said that inevitably the cost of films is going to increase. Well, there is only one thing to do about that, that is to pass it on to the public. So admission prices will inevitably increase.

I have spoken of the inevitable deterioration of picture houses because with the uncertainty of what picture they will have they will not be able to arrange their pictures attractively, and that is the assence of showmanship business.

And finally, as far as the public is concerned, no one as

(3932)

far as I know has asserted that the auction selling program would give the public better programs or lower admission prices.

Now may it please the court, some six years ago I appeared here at the behest of certain exhibitors some of whom I now represent, and on their behalf I pointed out what we considered harmful provisions of the proposed consent decree. It was generally stated then among the exhibitors that they did not believe the consent decree would be sufficient to accomplish the purposes desired by the Government. As

you know, the consent decree was entered. Our prophesies came too true. Mr. Williams has pointed out the results of the block booking provision which we violently opposed. As a result this trial was had last fall, and your opinion was handed down. The exhibitors were pretty unanimous, and in their forecast they were pretty correct. As I said before, I have never seen such unanimity among the exhibitors. They were unanimous with few exceptions and those exceptions can be explained away by economic facts. You can't put a theatre in a field and expect the public to go there. You can put a theatre in an open field where you can drive out with a girl, that sort of thing, but you can't build a million or a million-and-a-half-dollar theatre in an uneconomic location and expect it to do business.

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If the court had time, we would go into these rare cases, but the rest of the exhibitors, independents, affiliates, and the like—and under the court's decree I anticipate there will be very few affiliates—they are all pretty unanimous. There are now about three thousand theatres that are wholly owned or might be affiliates. Under the decree the affiliates have got to divest themselves. Either they have got to sell or not sell or buy. What you are actually doing under this decree when the time comes if the owners of the affiliates should have to buy out the owner's interests, they too would be affiliates. And under this decree to reach these defendants you are imposing the stricture of auction selling, this uneconomic thing on some fifteen or sixteen thousand other theatres to reach probably what will be only fifteen hundred theatres. And I say there is abundant law in the land to take care of these situations if unjust conduct should result.

The Crescent case, the Interstate case—those cases—plus the injunctive provisions that the court otherwise proposes in this decree will, we think and believe, be adequate under the circumstances.

And I say in conclusion, why require these independents to buy their pictures by auction selling when we believe it

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is not needed to secure the desired results, when we believe it will not accomplish the desired purposes, and as far as we know, no one wants it.

The Court said of its consent decree in this recent hearing, the only people the court knew that wanted it was the Government and the defendants. No one wants the auction selling that I know of. It will work irreparable damage to the exhibitors whom the purpose of this proceeding is to benefit. And finally, it will not help the public.

We ask that you strike this provision out of any decree you may enter.

Judge Hand: Now, Mr. Barton, you made a very interesting argument here I think. What I would like to ask you if you are willing to answer is whether your clients were satisfied with things as they were. I believe they didn't like the consent decree—the five picture business—but they were satisfied before that, or are they people that have been complaining?

Mr. Barton: As far as I know, no, sir, none of my clients have complained of the present system of doing business, and they feel that they can by barter and trade and the sense they may put in their transactions properly and efficiently conduct their negotiations with the distributors.

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Judge Hand: Then fortunately or unfortunately you do not represent the class that objects to the status quo. They are well satisfied. But there seems to be a very large class that does.

Mr. Barton: As to those—and there may be among my clients—these 20 representatives of two or three thousand theatres, there may be a number of whom I do not know who do object. You asked me if I personally knew. But they have said in meetings that they believe that the other strictures which the Court proposes to impose will be adequate to take care of the situation. They think more harm will

result to them from auction selling than will be gained by that.

Does that answer your question?

Judge Hand: Yes.

I think we had better hear the opposition now to these motions to intervene.

Mr. Wright: Do I understand that the defendants have no objection to these interventions?

Mr. Davis: No, you do not understand. Our position in a nutshell, if your Honors please, is this: We cannot consent to these interventions by virtue of which the intervenors would become parties to the suit. We do not think they follow either the mandatory or the permissive clauses of Rule 24. We are, however, perfectly willing that the Court

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shall hear them as amici and shall receive any information or light that they can give the Court with reference to the formulation of the decree. We have not seen fit to traverse the petitions. Indeed, a pleading to a petition to intervene, by way of a denial, traverse or whatever, is procedure entirely unknown, I think. We neither admit nor deny, therefore, what their petitions contain. We stand upon the proposition that our entire good will may be heard by the Court, but we see no reason for making them parties to a litigation which already has a considerable number of parties, and quite a large volume of legal talent, agreement among whom is not always easy to obtain. I do not see why these intervenors should look forward so hopefully to the right to appear and be heard on argument in the Supreme Court. They can be heard in the Supreme Court as amici. They probably would not be heard orally. My impression is that if the case ever reaches that posture it will be possible to produce from the ranks of the Government and the defendants all the oratory to which the Supreme Court would be willing to submit.

Mr. Wright: If the Court please, I think Mr. Davis has stated what is substantially our position, that the letter that

we wrote the Court as to Mr. Arnold's petition, of course, also applies to the Allred petition.

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There is just one further thing I want to add here, and that was the point raised by your Honor that these people and any of them represent no one but themselves. There are a very substantial group of exhibitors who have interests quite different from theirs, who have views quite different from theirs as to what ought to be done here. Now, we submit that all of these views should be entertained by the Court in the form of such amicus briefs that they would care to file, but the effect of making them parties would simply be to hopelessly confuse the litigation without in any way aiding the solution that the Court has to arrive at.

Mr. Frohlich: Your Honor, on behalf of Columbia I should like to be heard for a moment with respect to the intervenors. Columbia has no objection to the A. T. A. or Mr. Jackson's clients, or Mr. Williams' clients intervening. I think they should be in this case in view of the radical nature of this decree and the effect of it upon thousands and thousands of smaller exhibitors. I think they ought to be here; they should be heard; they should be permitted to have such standing as will let them argue in the Supreme Court, and I am sure that no harm can be done to any of these defendants by this intervention. I think the Supreme Court will listen patiently to 15,000 exhibitors in this case.

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Mr. Arnold: May I only say in reply that I did not argue the cases. Our cases are found in the memorandum to our motion to intervene, and I take it the Court would rather read those cases than hear me talk about them.

Mr. Davis: May I in connection with that remark of Mr. Arnold say we have an eight-page memorandum in which these cases to which he alludes are somewhat discussed on the question of law. The question of whether or not these interventions follow the scope of Rule 24; and with your Honors' permission we will hand up this memorandum.

Mr. Proskauer: May I ask what your Honors' desires are with respect to the substance of these suggestions that have been made? It has been our intention not to discuss them on these preliminary motions to intervene, but to refer to them when we come to discussing the decree itself; and if that is agreeable to your Honors, we will follow that course.

Judge Hand: Well, I should think that is the thing to do. I think that we should either allow them to intervene or allow them to file briefs. As I look at the thing now, it would be the latter, just amicus briefs, and not intervention. As I understand the law, I do not think it is necessary, but

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we still look at these briefs that will be submitted, and then there will be presentation of these objections, in either event, of course, on the settlement of the decree.

Now, of course, the decree itself is objected to, this auction selling business, by the defendants other than the major defendants in the case. The major defendants either no longer particularly object to that, or are in despair over their condition or the condition of the Court, or something.

Mr. Proskauer: No, your Honor. We say nil desperandum. We are not in despair. I think we will make that clear when we come to discuss the decree.

Judge Hand: The application of Society of Independent Motion Pictures. That is just a motion.

Mr. Ernst: Yes, to file a brief amicus, and I want to be heard just for a few minutes.

We represent the independent producers who have been scarcely mentioned in the proceeding here today. This is a group of about 20 producers none of whom has the power to dominate the market either by the control of theatres or by horizontal agreements with others. They are not parties to the case; there is no accusation against them. The testimony shows that they in effect are the ingenious outside free enterprise operators who have been able to survive in a market

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place dominated either by brick and mortar or horizontal agreements.

In answer to your inquiry, in effect, what other horses there are in the race other than the horse of competitive bidding, it seems to me there are two horses in the race, as to one of which we make no comment. That was the horse put in by the Government with respect to the divorce of brick and mortar from production. And on that we make no comment. But it does seem to me that now no matter what the decree shall be, this Court should make certain that those independent operators who together amount to a product equal to one major, should not have their hands tied, because they have been guiltless, and it may well be that your choice now is a kind of public service commission, arbitration board, running an important industry forever and a day, or the injection of free enterprise and competition into the industry by the independent exhibitors and the independent producers being allowed, as all people in business are allowed to do in the United States, dealing with copyrights, dealing singly, and without the domination of brick and mortar theatres, to make arrangements either auction bidding or no auction bidding, auction bidding with a concealed multiplicand or a disclosed multiplicand, fixing all prices by agreement. And
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it seems to me that the only hope of this industry, once having passed your major premise on brick and mortar, is the hope that free enterprise can be injected by this prominent, ingenious group of independent producers who make the pictures peculiarly of merit, as testified to by one of the attorneys for the defendants.

I may say a word about the public in relation to this concept: You have a clear analogy to this kind of an industry in the book field. In the book field there are special editions gotten out, $10, $12, limited editions, which are in effect clearance and run, because without clearance and run to protect the $10 special limited edition, there could be no such editions, as against the 25-cent reprint if it came out at

the same time. There is no trouble within the book industry to establish and perpetuate a free competitive market for consumers, because by and large there has neither been any group of producers who have been able to dominate an area by retail outlets, and there has never been permitted horizontal agreements of the courts to thus control the marketplace.

What we have in mind is just one simple thing, that whatever decree is written, there must be taken into consideration the fact that the opinion is more than an opinion in regard
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to eight defendants. It lays down, perforce, a pattern for an entire industry. This is the one corrective impulse in the industry, that if it is allowed freedom of play in the marketplace, freedom vis-a-vis exhibitors who are also free and operating individually and not in cahoots with the conspirators, that impulse may be your greatest corrective toward freedom.

For example, there is no reason why if the position of the independent producers and independent exhibitors is not fully protected, no matter what the decree may be, why the independent producer won't be able to shop around for an exhibitor or the exhibitors shop around for independent producers, either on an auction basis, a disclosed price basis, an agreement admission basis, a clearance basis, as long as no one exhibitor and no one of these producers has the power to dominate the marketplace.

Now, what will that mean to the consumer? It means that some exhibitors will be able to stand up and put a sign on their doors, a dollar admission. What does that mean to the public? That means that the exhibitor is doing what he has a right to do, to say to the public you are going to average up. When you come to my theatre you are going on an averaging basis. You are not buying pictures by picture;
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you are buying for a dollar, whether the picture cost a fortune or nothing, whether it is good or bad. That certainly

is within the realm of free enterprise if the exhibitor wants to take that hazard.

On the other hand, exhibitors say, "No, I want to compete picture by picture, and I will find an independent producer who will let me have his picture at a 90-cent or a dollar admission." Now, what is the hazard of that competition? That merely means that if that independent exhibitor has dealt with a Disney or Goldwyn, or a Selznick, or a Cagney, or any one of these great independents, both the producer and the exhibitor have taken this hazard. They have pegged the price at a dollar by agreement which is lawful, but they run the risk that across the street there will be a picture at 90 cents which will find more public favor.

That is exactly what happens in other fields, and it seems to me clear under the cases that there is no illegality in such an agreement if there is no horizontal accord and if there is no domination of the marketplace by the ownership of brick and mortar. And even if it be short of domination of the marketplace by brick and mortar, the brick and mortar cannot but have an effect on the horizontal dealings in the neighborhood of the theatres owned by the majors.

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I should imagine that all we are asking for is just one simple consideration. Not being guilty, being competitive, being the ingenious branch that has been able to stand up against such a monopoly of conspirators, no general pattern of the industry should be laid down without leaving clearly open that none of these restrictions have any impact on independent exhibitors who want to buy from these independent producers, and independent producers who want to sell to the independent exhibitors. And that, if you please, having passed your major premise which has driven you to auction selling, the major premise as to the brick and mortar, as to which we say nothing, it seems to me that is the sole corrective left to encourage the expansion of that market so that the public will buy picture by picture, and exhibitors will be free to buy by auction or not, by price, by run, by clear-

ance, any terms they see fit, as long as the seller and the buyer have no position in the marketplace capable of domi ating any competitive area.

Judge Hand: Vanguard Films.

Mr. Isseks: May it please the Court, I appear on behalf of Vanguard Films, an independent producer of motion pictures. Vanguard has made a motion for leave to file a brief amicus curiae. This brief is directed to one single problem, namely, the need of a road show exception to the (3945)
provisions of this judgment. And I submit to your Honors, from my understanding of the briefs filed by the parties, and the record in this case, I believe that insufficient consideration has been given to that problem. The facts appearing in the petition filed by Vanguard show clearly that if there is no such exception for road shows, there will be an undue burden on all producers of outstanding, exceptional and costly feature motion pictures, and there would be, particularly, a tremendous hardship on my client, Vanguard Films.

Now, your Honors, it is most significant that the consent decree which had provisions restraining the five major defendants from certain practices in connection with the distribution of motion pictures, excepted specifically road shows from any phase of the consent decree.

Now, your Honors would like to know why my client, Vanguard Films, has a real and vital interest in the question of exempting road shows. Vanguard Films has as its executive producer David O. Selznick, who has been known for many years to the public and to the industry as a pioneer of high quality and exceptional motion pictures. It was he who produced "Gone With The Wind" which as of 1939 cost more than any picture made up until that time. Van-
(3946)
guard is a very small producer of motion pictures. It makes either one or two pictures a year. It is not controlled directly or indirectly by any of the eight defendants. For more than a year prior to June 11, 1946, the date of this

Court's opinion, Vanguard had in production a picture called "Duel in the Sun." The picture today cost five and a half million dollars. Practically all of that expense was incurred on June 11, 1946. It was contemplated that that picture would be road shown, and if there is an injunction here against price fixing as to any picture, including a road show picture, Vanguard will be seriously harmed because it planned to road show that picture beginning December 15th, after first having a premiere in Dallas, Texas. In addition to the cost of making the film, which was about five and a half million dollars, Vanguard has already spent a million dollars in advertising. Vanguard planned to do something that was traditional in the industry.

Now, your Honors, as I understand it, and as I understand the record may even show in this case, for many years when you have an exceptional picture, and particularly when you have a costly picture, you road show it in selected theatres, in selected cities at increased admission prices, and

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the producer through his distributor fixes the increased admission price. I should have pointed out, your Honors, that we release under contract through the defendant United Artists. I also understand that the record shows that since about 1938 only four pictures have been road shown.

Judge Goddard: Altogether?

Mr. Isseks: Four.

Judge Goddard: Altogether? Does that include all road shows or only those of your client?

Mr. Isseks: No, of all the defendants, I understand. I understand in finding of fact 31 submitted by the five defendants, it shows that only four pictures were road shown. If I am wrong I will be corrected. I will tell you what they are: Gone With The Wind, For Whom the Bell Tolls, Wilson, and the Song of Bernadette. One of those was produced by my client—I think maybe two—but the producer, as a rule, your Honor, has not road shown pictures unless they are very expensive or very unusual.

Now, as I pointed out to your Honors, the consent decree excepted road shows completely, although there were restrictions in the decree. The Government in its original petition made no criticism of road shows, although they defined it. The Government in the amended petition made no
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criticism of road shows although they defined it, and I understand during the trial of the case, your Honors, the Government did not attack road shows as such.

Judge Hand: Is Vanguard entirely independent?

Mr. Isseks: Yes.

Judge Hand: Affiliated with no one?

Mr. Isseks: It distributes through United Artists. It is not controlled directly or indirectly by any of the eight defendants. We do release under United Artists under a contract made in 1941.

Now, during the trial of the case I understand the Government made no attack upon road shows. They did, of course, offer evidence that special privileges were given to certain large groups of theatres, either affiliated or non-affiliated, where there were special road show privileges; and it is significant that the Government's brief on page 10, in pointing out that while commercial exploitation of the ordinar feature film involved other forms of entertainment, they specifically state that road shows do not involve any other form of commercial exploitation.

Now, your Honors, I come now to the legal questions involved——

Judge Hand: Why do you have to fix the price?

Mr. Isseks: We want to get our money back, your Honor;
(3949)
that is what it comes down to. I will explain it to your Honor very simply. When you have——

Judge Hand: Why is your client in such a pitiful state as compared to the other people——

Mr. Isseks: Your Honor, my situation——

Judge Hand: ——they do not say that this will ruin them.

Mr. Isseks: I think they have submitted a road show exemption, your Honor. The five major defendants have submitted one which would benefit them only, and I think that does not go far enough because it will really increase any economic advantage it now has. Our exemption, we suggest, is not only for ourselves; we suggest it should be applied to the industry, or, in the alternative, to the three minor defendants; or in the third alternative, to those pictures which were in production on June 11 and which were costly.

I come now, your Honors, to what I think are the legal questions involved: The only possible objection to road show exemption would be that the defendants—and I include all the eight defendants—would be able to fix the admission prices of the picture in a theatre. Now, we submit, your Honors, that there is no case holding, including your Honors' decision, that the fixing of admission prices by a single producer, including the defendants, or a single distributor, including the defendants, constitutes a violation of the Sher-
(3950)
man Act.

Now, certainly, your Honors, the General Electric case which your Honors cited in your opinion has held that a patentee may fix the price which his licensee may sell the article to the public; and the Supreme Court, your Honors, in the Interstate Circuit case, which your Honors cited in your opinion, at least inferentially indicated that a distributor might fix the admission price at which his exhibitor would show the feature film, provided that the admission price did not include the admission price for that of another feature film.

Now this Court in its opinion said:

> "Nor need we now decided whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film if other licensors and exhibitors are not in

competition. As other licensors and exhibitors are always in competition"——

the word here is "contemplation", but I think it is a misprint and should be "competition"——

"as far as we can see the question would appear academic."

Now, your Honors, I submit it is not academic as far as exceptional, costly pictures are concerned.

(3951)

Judge Goddard: What is the difference in principle between a less expensive picture and one that cost a great deal of money? What is the difference in principle?

Mr. Isseks: I think your Honor has to meet the economic conditions in the industry. Your Honors have gone on in the sentence preceding the one I read and said that any copyright owner may fix the admission prices and fix any other condition in his own theatre, which means that the five major defendants have an economic advantage over us. They can now take—take Paramount. Paramount can take its costly picture and put it in its own theatre and charge any admission price it pleases because it is a copyright owner. We can't do that. First of all we have to distribute through one of the eight defendants; secondly, we do not own any theatres, and it seems to me that where there is economic advantage which they now have and which the decree is going to continue, we ought to be put at least on a parity with them, and we say when you come to an expensive picture—and there is a public interest in expensive pictures—and your Honors are aware that this industry has had advantages in the art only by reason of the fact that somebody has come along and taken either a work of art or a play, or a well known book, or something of public interest, and he has made

(3952)

an unusual picture out of it. In doing that, he has to first make it long, as a rule, and secondly he has to spend a lot of money——

Judge Hand: Well, you say you are entitled as an independent producer who has not been a bad boy—there is nothing against you up to date—to fix these things——

Mr. Isseks: Your Honor, I go further. That is one of our——

Judge Hand: ——and that these other bad people can't perhaps, can't under our decree.

Mr. Isseks: I say they can as to their own theatres, and I say if they can as to their own theatres, they have an economic advantage.

Judge Hand: Yes, they can as to their own theatres, that is right.

Mr. Isseks: And they can raise prices as they please.

Now, under your Honors' decree, United Artists, which has no theatres—I think they may have a half interest in one or two theatres on the West Coast—but under this decree, their economic advantage as to their theatres is going to be continued, as to road show pictures, expensive road show pictures.

I ought to point out the tradition of road shows. A picture is road shown because only in that way can the man who
(3953)
makes the expensive picture recoup his unusual cost; and there is only a limited number of patrons in the country, a limited number of seating capacity, and if he has got this high cost, he has in the past, and as the consent decree recognized, been able to go out and do something different.

Now, your Honors might say well, if you permit this exemption broadly applying to all the defendants, everybody, they might use this exception as a means of evading the prohibition against fixing admission prices. We suggest four ways, four conditions that could be added to your definition of road show which appears on footnote 1 of your opinion. One condition goes to requiring a picture to be costly, a certain cost over the average cost. Another condition would be to fixing increased admission prices. A third would be with regard to tying in other pictures. You would have to

road show only one picture; and the fourth condition would be only that one producer could road show two pictures a year, although, as a matter of fact, you never get that high. History has shown that only four have been released by these eight defendants in the last five or six years.

Now, your Honors, I just have two other things I want to say: I think I have touched on them already, but it will only take me two minutes. There are three ways of handling
(3954)
this. I think it is a very vital and important thing to the independent producer, particularly to my client. One way of handling it is to have an exception for all the defendants and those who must distribute through defendants, have a flat exemption that this decree shall not apply to road shows as hereinafter defined, and define it, and I urge that.

The second way of doing it would be at least to make the independent producers on an equal level with the five majors, and that is to have the exception apply to the three minor defendants and those who released through those three minor defendants. As your Honors know——

Judge Hand: Is this in your memorandum?

Mr. Isseks: Yes.

(Continuing)—the third thing, your Honors, is that your Honors limit the exception to pictures on June 11, 1946, or at least in production, so that people like ourselves and maybe others like us won't be hurt by your Honors' decree.

One other comment I think is important. I think the Government and the defendants ought to state their position on this. It does not appear in the briefs. You can look at your Honors' opinion, and look at the briefs filed, and look
(3955)
at the record, and there is nothing to show what the Government's view is on this road show problem, and there is nothing to show what the defendants' views are.

Now, they have submitted something which I do not think would help the independent producer or the three minor de-

fendants; it would help them only; and as to that if I have any position here at all, I object.

Thank you very much.

Judge Hand: Do you want to say anything about this, Mr. Wright, or do you want to take it up on the settlement of the decree?

Mr. Wright: I think since we have the next two days to say what we have to say, I rather hesitate to encroach on the time of the other non-parties. I suppose they all ought to be heard first.

Judge Goddard: Can you say whether you are opposed to the position just heard?

Mr. Wright: Well, there are a number of qualifications. As to a road show exemption per se, we are opposed.

Judge Hand: Radio Center.

Mr. David Sher: May it please the Court, this is an application for leave to file a brief amicus submitted in behalf of
(3956)
an independent theatre known as the Mosque Theatre, located in Newark. It is directed to a single proposition, and that is if auction bidding is to be instituted, it is suggested that such bidding will not be effective unless coupled with the proposal suggested by the Government in its decree to the effect that the five major defendants shall not be enabled to show each other's pictures. The brief points that out if that proposal is not included, these defendants will be able through their own production to have a competitive advantage in the auction bidding which will neutralize the entire value of that bidding. It is a short brief, your Honors, and we ask to leave it.

Judge Hand: Very well.
(3957)

Judge Hand: Independent Theatre Owner and Operator Members.

Mr. Blasi: Your Honors, with your permission I would like to present Mr. Herman Levy of the Federal Bar of Connecticut, who is counsel for the Independent Theatre

Owner and Operator Members of the Motion Picture Theatre Owners of America, and I ask your Honors to hear him.

Judge Hand: All right.

Mr. Levy: Thank you. My name is Herman M. Levy, of New Haven, Connecticut.

If the Court please, I think my task this morning has been made quite brief because so much has been said that I had planned on saying against auction bidding.

I would like to state that my organization represents 2700 or 3000 independent theatre owners who are represented by my firm, some of them interlocked with other organizations holding memberships in the A.T.A. and the Southern group in our organization.

We have been wondering whether the words used by the Court:

> "The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered"——

whether those words used by the Court meant auction bidding. The term "auction bidding" was coined, or auction sell-
(3958)
ing or auction bidding as a term was coined after the decision was announced. Who started it, we don't know. Certainly the words were not used in the decision.

Now did the Court intend by those words—and we ask this as amicus curiae—to start a restricted system of competition in the industry where a salesman would go from theatre to theatre comparable and adequate to get a bid of one theatre and refer that bid to the next theatre and to the next, and in that way get the highest competitive bid? It is hard to believe that that is what the Court intended. That is what existed in this industry some twenty-five years ago when a salesman would take a picture and go from house to house. If that is what is intended, that is what

we are afraid of this morning. And if the Court meant that plan as the only plan for doing business, then we state that that plan will bring about two disastrous results both of which the Sherman Act was intended to avoid. First it will mean increased film rentals. That is self-evident. Two houses buying pictures under the old system, house A was a favored house, it had been there a long time and got the pictures first-run. House B got the second-run in town. Now with auction bidding, with both houses able to bid at the same time, it is obvious that house A will pay more money to hold on to its run, and house B will bid to the point of

(3959)

over-bidding to get a run it never had. That means reckless bidding. If film rentals go up, that increase will have to be passed on to the consumer. Certainly that was never the intention of the Sherman Act. And yet the conclusion that the consumer will pay more for admissions is inescapable because film prices will positively go up. The degree of increase nobody can today anticipate. And secondly, in our opinion, competition will become restrictive if the courts say—and that seems self-evident—that you may sell your product only on this basis and no other.

Now the Court asked an attorney in this room who spoke earlier, what alternative he had, and I subscribe to his alternative. The Government complained not that the distributors own and operate theatres but that in the operation of those theatres certain unlawful practices had been developed. Now we say to the Court, this Court has found those practices unlawful. Why may they not be enjoined from indulging in those practices and open the door to any kind of legitimate competition? Once the Court has found unlawful acts, then the Sherman Acts says the court must open the door to competition, not in any restricted sense, that this is the way and the only way you can do business, but any way, whether these exhibitors are independent or affiliates, might find, and if the means that they find are unlawful means, then it is for the Department of Justice

(3960)

to step in again. But until that time the court should open the door wide to competition in any legitimate way that they may find.

In the event the Court is not satisfied, and apparently from the decision I must conclude that the Court is not satisfied, with the alternative of merely enjoining unlawful practrices and leaving the door open to any competition that these theatres may evolve with their customers, then I see the Court sees fit to set forth in its decision what shall be the tests in determining clearance, and it lists seven of those. It says the defendants may use these tests in determining what is clearance. Then I say to the Court with the exception of the elimination of one or two, why not amend the decision of the Court to read that in the sale of those pictures, the exhibitors use those tests. I am merely adding on a certain proposal that the exhibitors have added in their proposed decree that in addition to those tsets there should be the test of financial stability, comparable customers, the customer's position and integrity in the community, and their past history with this distributor. But we submit that those suggestions of the distributors plus the one selected by the Court under the decree to be used for clearance, make an alternative plan and leave the door wide open for the

(3961)

bartering and negotiation that we are asking for this morning.

Now if these suggestions are good enough and legal enough for clearance, then they must be good enough and legal enough for competition in the buying of pictures, and we submit that those same things plus the few that I mentioned, could be incorporated in this decree and then open the door wide open to any legitimate competition that these defendants and theatre owners can evolve.

(3962)

Judge Goddard: May I ask, Mr. Levy, what about the stipulation of admission fees?

Mr. Levy: We are opposed to that, on the other hand. We are opposed and the Court has found that illegal.

Judge Goddard: That is your third relief, as I recall it, in consideration for clearance.

Mr. Levy: Yes. Those, of course, elements of the seven which have been found by the Court to be illegal we would not expect to be included. However, under the consent decree, the distributor granted a run and clearance based upon a very important element that your Honors have left completely out of this decision, and that is the amount of revenue that the distributor could get from a picture.

If I represent a house, or own a house, or operate one which can give to a distributor more revenue for his picture, on whatever the terms, I feel that I am entitled to that picture. Under the decision as it now stands, if I read it correctly, and if not I suppose someone will subsequently correct me, the amount of revenue derived by the producer is no factor in helping me to get a picture, even though mine is the biggest house.

I know it cannot be by admission prices in the contract, but it certainly could be, as it was in the consent decree, by the amount of revenue to be obtained, and that, if the Court

(3963)

please, a distributor knows pretty well from his past history, what one house will do and what another house will do.

Contained in this brief, and I shall not go into it in detail as I would like your Honors to read it, are certain practices that we feel the door has been opened to, in the decision as it now stands, and we took those up with Mr. Wright and submitted to him our analysis of what evils could develop under the system which is proposed by the Court. He found some of those with merit and has included them in his proposed decree. And as a friend of the Court, if your Honors please, we ask your Honors to give your serious consideration to those proposals of Mr. Wright and ours for inclusion in the decree.

Under any system of competitive bidding, if your Honors please, a man could very easily overbuy, if money is the only factor, overbuy and backlog, and overbid and operate at a loss. That overbidding and operating at a loss is remote, I question. The federal court in Illinois, only recently, in the A. & P. case, found that that organization operated at a loss to get rid of competition, and without going into detail of overbidding, backlogging and overbuying and so forth, operating at a loss, we do submit and ask the Court to consider those points and to include them, if it meets with the Court's philosophy in the final decree.

(3964)

That brings us next to the subject of arbitration. My clients are keenly disappointed that the Government has asked for the liquidation of arbitration. It has been our position for years, for 15 years that I know, as an association to stand for and foster arbitration and conciliation rather than litigation. As your Honors pointed out in the decision, litigation is a very serious and expensive procedure. We ask that the Court give serious consideration to arbitration, despite the Government's objection, at least, as the Court stated, for those people who wish to arbitrate their matters; and I understand the Government's concern is that the distributors may or are planning to use arbitration as an escape for the penalties of violation of the decree. We say that that is not what this Court intended, and if it did open the door to that, then certainly the right of exhibitor A to arbitrate with Fox or Paramount should not be correlated with the Department of Justice's duty of enforcing the decree that is entered. The two are not mutually necessary, in my opinion.

We feel, finally, if the Court please, that the plan offered, whether it be the plan that has been accepted as the auction bidding, house to house bidding, picture by picture bidding, or any other form of restricted competition, if that is what this Court intended, I would just like briefly to show how

(3965)

such a plan opens the door to litigation in an industry that has been sorely tried by litigation since I can remember.

Judge Hand: Hasn't that been pretty well developed by these other speakers?

Mr. Levy: If your Honor feels it has, I am perfectly willing to withdraw that remark.

The Court: If you have any new thought, all right.

Mr. Levy: I am not sure that it is new. I thought it was more forceful, but I will withdraw my comment. I will then withdraw those comments and rest upon my predecessor's remarks, but I would like to say this: If this plan is a workable plan, if this is what the Court intended and it is a workable plan, why are both the proposed decree of the distributors and the proposed decree of the Government silent on the rules and regulations of auction bidding? Not a word, as I can see it, is in either proposed decree. Your Honors stated in your decision that the parties to this suit shall submit their findings to the Court for its assistance. The Court will have no assistance on auction bidding. And the reason I feel is because it corroborates the unworkableness of this plan. As soon as you start saying, "This is fine" on paper, "house B can now get first run by bidding $25 more

(3966)

than house A." It holds only with house A and house B, and you cannot get it to work with another town.

It is unworkable, in my opinion, and impossible to draw up a set of rules and regulations that can govern the system of auction bidding.

One final point, and that is that this organization last July started a poll of the independent theatre owners in the United States. It was not limited to our membership; anybody at all, whether he was for auction bidding or against auction bidding, belonged to an organization or not, was asked to answer four questions on controversial matters raised by the Court, auction bidding, arbitration and so forth, and we offer those without comment except to say that of almost over 250 answers received, the vast majority of them

were from small independent theatre owners, owning not more than five theatres, and most of them one and two, and of the 280 votes on auction bidding, 261 are opposed and 19 for. I won't go into the other answers. They are all tabulated and they are offered only for the purpose of argument.

And then I would like to say something which is not in the brief, and which has been brought up by the discussion here and which has been discussed thoroughly, the provision of road showing. As far as our independent exhibitors are concerned, we have no objection to road shows when, as and

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if their pictures be road shown on a national policy, and not one city picked out, or one there and another there; but if the national policy is launched by the distributor, wherein the picture will be road shown all over the country, we feel they are entitled to that and have no objection to that.

I thank you very much for permission to argue this matter.

Judge Hand: Joseph P. Day. I do not see that you should be heard on an application merely to enlighten as to how you can auction. There is no reason you shouldn't file something, if you want to.

Mr. Kenney: If your Honors please, our only request is on the basis of having studied the thing and with the feeling that we may be able to be of some assistance, that we be permitted to file a brief. It was not our intention to ask for permission to argue.

Judge Hand: Conference of Independent Exhibitors. That seems to be another application.

Mr. Myers: It is an application, your Honor, for leave to file a brief as amicus curiae and to make a brief oral statement.

If your Honors please, I speak for the Conference of Independent Exhibitors Asspciations. With our humanitarian

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instincts we have brought together 22 independent theatre associations covering 28 states, and the Territory of Alaska, so that they could all join in one brief and in one brief state-

ment to the Court, and, to that extent, expedite these hearings.

Strange voices and strange champions for the independent exhibitors seem to arise on these occasions, and to the extent that they advance arguments that coincide with our position, we welcome them, but we must, in order to keep the record straight, we must point out that included in this very short brief of ours and this very short statement are all, with possibly one exception, of the independent exhibitor associations of the United States in the sense that they are comprised wholly of independent exhibitors and are not a mixture of independents, affiliates, producer-owned theatres and the like.

I have regretted that there seemed to have been put forth to the Court here this morning an utterly negative attitude toward the Government's position and what it is seeking to do in this case. True, our independent exhibitor organizations are opposed to the competitive bidding system as outlined in the Court's decision. They do not think it is workable, they think it will work injustice, but that ground has been so thoroughly covered that I do not intend to impose on the Court by rehashing any part of it.

(3969)

We have gone a little beyond that and we look forward to the contingency, however remote, that such a system might come into operation in this industry, and, therefore, have ventured to suggest methods for making it as workable and as little burdensome upon the industry, and particularly upon our exhibitors, as possible.

In the first place, we do not think that it is possible for this system to promote competition in this business so long as the producer-distributors-exhibitors have this great backlog of their own product to exhibit in their own theatres. We do not think independent theatres, under those circumstances, could possibly compete successfully for the product against the affiliated theatres. So, we align ourselves with the Government in the suggestion that any competitive bidding system, in order to be effective, must be accompanied by an injunction against the cross-licensing by these defendants

—the Big Five I am talking about—of the playing of each other's pictures in their theatres.

It might very well be asked, "Haven't they a right to do that?", and I am not prepared to say that they haven't a right to play each other pictures in their theatres, abstractedly considered, but in Sherman Act cases many things are
(3970)
enjoined in order to make effective the relief which the statute calls for, which may be entirely legal in and of themselves. The Sherman Law, as it has been well said, is a limitation of rights, rights which may be put to evil consequences. Therefore, I think it is an entirely appropriate thing, in order to make this bidding system effective and just, that it should be accompanied by an injunction against cross-licensing. And if the defendants say that is a harsh remedy, we must bear in mind that the opinion of this Court says that the bidding system is, in substance, an alternative to the very harsh remedy of complete divestiture; and if, as seems likely, the defendants prefer the competitive bidding system of divestiture, then I should think they should yield whatever is necessary to make that system workable.

It has been well said here this morning, and very eloquently said, that there cannot be a comparison of bids on a percentage basis. Frankly, I have been with the independent exhibitors for some 17 years and I have studied this from every angle, and I have conferred with them almost constantly since the Court's opinion, and I want you to know that we are sympathetic with this proceeding here and not taking a position of opposition to it; but we cannot see how bids, based on a percentage arrangement, can be compared
(3971)
justly or fairly, or how any such attempt can avoid these very discriminations which were practiced before and which are the underlying basis of this proceeding.

So, instead of using that merely as an objection, we venture to suggest that if the defendants want competitive bidding, as an alternative to divestiture, there again they

should yield to the extent that all competitive bidding be on a flat rental basis and not a percentage basis.

Flat rental contracts, as your Honors know from the printed forms in the Government's brief, are payable on the barrelhead. So that not only allows of a complete comparison, but also it eliminates incidentally, some of the most evil incidents of percentage playing and some of the most irritating and irksome things in this business, and that is the checking of theatres, the espionage over the operations of the independent theatres, auditing their books and finding out all about their business, designating the days of the week on which pictures may be played; and, incidentally, it would also eliminate all the controversy, so far as those engagements are concerned, concerning the admission price to be charged, and as to the responsibility of the exhibitors and the size and suitability of his theatre for the pictures on the particular run.

Again, on the assumption that the competitive bidding
(3972)
system might come into effect in this industry, we offer concrete suggestions for making it as workable as possible.

We do not think this business is going to be conducted to the chant of the tobacco auctioneer. We think, if there is going to be competitive bidding it will have to be done as we have known it all our lives, the system of sealed bids, the requirement that they be submitted within a definite time after the picture is offered, for the offering of those bids at a particular time and for inspection of bids by the disappointed bidders, and other concrete suggestions, all contained in the brief, your Honors, which I hope will be helpful in the consideration of the matter.

In conclusion, I would say that we do join in the other statements made here, the reasons advanced why the competitive bidding system as outlined by the Court would be unworkable and would work a hardship on the independent exhibitors. We don't like it, we don't want it, but if it is to come, we want it to be as workable and as little burdensome as possible.

Mr. Proskauer: Before we adjourn, would you permit me to inquire of Mr. Myers: Have you even taken a poll of your members as to whether they want to abolish percentage?

Mr. Myers: Yes, Judge Proskauer, I think that has been done in every territory affiliated with our association; and (3973)

if you are a student of the trade papers, as I know you must be, you probably read that there was an open forum of the independent exhibitors of the United States in Boston last month, and it was not at all confined to our members. With 600 independent exhibitors in the room that afternoon, they took a poll on the subject, and I rather imagine the press and Warner Bros. by this time has received a copy of the resolution they adopted on that very subject of percentage selling.

Mr. Proskauer: The recommendation is that that would be disastrous.

Judge Hand: Everybody has been heard who wants to on these motions? And has everybody filed briefs who wants to? On the motions of moving parties, I mean.

Mr. Kenney: If your Honor please, as I stated before, we had no desire to be heard on argument, but that we wanted to file a brief. May I ask a time limit on filing a brief as amicus curiae?

Judge Bright: Didn't your client submit a long letter on the subject, outlining his mechanics?

Mr. Kenney: The entire mechanics of the plan were not outlined in that letter. They have now been further elaborated together with certain forms which are to be devised, which are the heart of the plan itself.

Judge Hand: You may submit it by tomorrow.

(3973a)

Mr. Kenney: I gather your Honor does not want it in printed form.

Judge Hand: I don't care whether you print it or not. We will adjourn until tomorrow morning at 10.30.

(Adjourned to Tuesday, October 22, 1946, at 10.30 o'clock a.m.).

(3974)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Petitioner,
vs.
PARAMOUNT PICTURES, INC., *et al.*
Defendants.

Equity
No. 87-273.

New York, October 22, 1946,
10.30 o'clock a.m.

HEARING RESUMED.

Mr. Wright: May it please the Court, the principal arguments that the plaintiff desires to make in connection with the judgment proposals and proposed findings that are now before the Court have already been submitted in written form.

Mr. Proskauer: We don't hear a word you are saying.

Mr. Wright: I say the principal arguments that we desire to make in connection with the proposed judgments and findings that the Court now has before it have already been made and submitted by us to the Court and to you and to the friends of the Court in written form.

We have no desire to enlarge upon those arguments or to reiterate them orally at this time as we assume we will be given an opportunity tomorrow to reply to such argument as the defendants may make today.

Therefore, our time today will be devoted to a discussion of the points raised by the non-parties who were heard
(3975)
yesterday.

In evaluating those points we think the Court should give some consideration to the position of those groups in the industry as disclosed in their various petitions and briefs.

You will note from their petition that Mr. Jackson's and Colonel Barton's group and their activities in this connection are being actively supported, financially and otherwise, by certain unnamed Paramount partners. Their position is perhaps closer than any of the others to that already assumed by the defendants in this suit. The associations respectively represented by Mr. Arnold and Mr. Williams have members who are defendants in this suit or affiliated with these defendants. But those members are not participating in this particular proceeding. The same is true of the Motion Picture Theatre Owners of America, represented by Mr. Levy, on whose behalf a brief has also been submitted, but the representation there is also confined to the independent members of that organization.

Now, as stated by Mr. Levy his memberships overlap that of the others just mentioned to some extent.

Thus these groups who are silent on or opposed to the basic relief, affirmative relief sought by us, are composed (3976)
of independent exhibitors who by their membership and cooperation with these organizations affiliated with the defendants are already—are now and always have been committed to the proposition that collaboration with the defendants is more profitable for them than maintenance of an adversary position of basic opposition to monopoly as proposed by this suit.

The Government's proposed judgment, in so far as it grants affirmative basic relief directed to that monopoly position, is fully supported by the only completely independent groups who have appeared here, that is, the briefs submitted by Radio Center, Inc. and the Conference of Independent Exhibitor Associations.

The two briefs submitted on behalf of independent producers are confined to independent producers who market their films through the distributor-defendants. They are independent in the sense that they finance their own productions, but it seems clear from the allegations of their peti-

tions and briefs that they have no independence whatsoever when it comes to securing an outlet for their films.

All of them insist that it is economically impossible for them to release their pictures through any other distributor than a defendant. All of the exhibitor briefs insist that independent exhibitors cannot operate without the films dis-
(3977)
tributed by these defendants.

In fact, most of what is said in the briefs of all those groups is based upon the proposition that the defendants today collectively enjoy an effective monopoly over the distribution of films in this country.

As to this point, there is no possible ground for disagreement between them and the Government. However, there is a sharp divergence between some of their views and ours as to what the Court should do in such a situation. As we understand the Sherman Act, the Court has no choice, when confronted with a monopoly of this character, but to adopt effective measures to destroy that monopoly.

Neither the Justice Department nor the courts are authorized to establish a policy of monopoly for the industry with which they deal. Congress alone may decide that a given monopoly should be subjected to some form of regulation or given an exemption rather than dissolution. Congress alone has the power to create the necessary administrative machinery for such regulation.
(3978)

The briefs of the independent producers advocate affirmative relief which is only consistent with the continued retention of the existing monopoly of distribution that the defendants now have, and for that reason alone ought to be rejected. If certain advantages which the holders of that monopoly now enjoy prevent the independents from competing with them, the proper remedy is to remove those advantages rather than to compensate the independent elements with a special immunity from antitrust law requirements.

Now, while it may be true that the price-fixing prohibitions of the decree strike harder at independent producers, than they do at the major defendants, by virtue of the latter's complete power to fix prices in their own theatres, it is hardly an admissible solution to permit illegal price-fixing on behalf of the independent producers who release through these defendants.

Of course, in so far as these independents may release their film through non-defendant-distributors, they are not subject to any of this decree's restrictions. The kind of exemption they seek, while granted to benefit independent producers, would in effect take United Artists completely out from under the decree, as they release only independently produced film. They are a distribution agency only. The (3979)
same is true not only of price-fixing privileges, but all of the exemptions from the decree which these independents ask this Court to grant them, as well.

The road showing of pictures, for examples, presents the problem of admission price-fixing and clearance restriction in acute form. A road show is, by definition, an exhibition at extraordinarily high admission prices supported by an extraordinarily long clearance, to wit, as much as twelve months before the picture becomes available for general release. That kind of film exploitation hardly seems consistent with the objectives of the Sherman Act. However advantageous it may be to a producer in recovering his investment, such a benefit cannot possibly remove such price-fixing from the condemnation of the Act.

With reference to the road show exemptions suggested in the Vanguard petition, as I have already pointed out, we are opposed to any road show exemption. However, if there is to be any exemption of that kind, it should, in our view, be limited to films released through non-theatre-owning defendants, as suggested in the second alternative of the Vanguard petition.

Now, as far as the particular picture "Duel in the Sun," which apparently gave rise to that petition, is concerned, we

believe that the provisions of the decree probably ought not
(3980)
to be made to apply to that picture, but the kind of exemption for this purpose proposed in the third alternative stated in the Vanguard petition is one which would exempt not only that picture, but a substantial number of unreleased pictures now in the hands of the major defendants, by virtue of a very substantial back-log that all of them had built up at the time this decision was rendered. That alternative is therefore objectionable in that form.

Now, we have been informed by counsel for United Artists, which is to release the picture, that it proposes to appeal from the price-fixing provisions of the judgment in any event, and we assume that a stay of such provisions during such appeal would probably take care of whatever special hardship might be presented by that picture.

Now, the various briefs filed on behalf of the exhibitor non-parties simply reveal what might have been supposed, even in the absence of such briefs, that some exhibitors support the Government more wholeheartedly than others in this proceeding, and the degree of support in general reflecting the degree of absence of affiliation or association with the defendants. We recognize, of course, that all of them are unanimous in opposing so-called auction selling, except the independent theatre operator in Newark, who owns the largest theatre there and who favors auction selling
(3981)
plus a ban on cross-licensing as the best solution, short of divorcement, for his particular situation.

The phrase "auction selling", which has been rather freely used by all of the parties who appeared here yesterday to describe the method of licensing proposed in the decree suggested by the Court, is not one which appears in the opinion. Nor does it appear in the decree we proposed. We have not understood the Court's opinion as advocating the institution of an administered system of actual auction sales of motion pictures. We read it merely as advocating a com-

petitive disposition of runs by which two or more competing exhibitors might seek to exclude each other in providing that in order to prevent discrimination in awarding such runs, that the high bid, or high offer, in financial terms, should prevail.

Now, in order that our position as to the competitive disposition of exclusive runs and auction selling provisions, if you prefer, be made perfectly clear, we again point out that in our view without the prohibition against cross-licensing included in paragraph 8 of Section 3 of our decree, a so-called auction selling provision would be more harmful than beneficial to the enforcement of the Sherman Act against these defendants.

Therefore it seems to us that the choice now before the

(3982)

Court, assuming that divorcement is unacceptable, is between the restricted system of competitive disposition of exclusive runs, including the ban on cross-licensing offered by the Government, or no so-called auction selling or competitive bidding system at all, unless the Court is prepared to adopt a system of selling films which only the major defendants desire.

Judge Hand: I did not understand what you were talking about in that last statement. In fact, I could not hear it clearly.

Mr. Wright: I am sorry, I will repeat it:

I say, it seems to us that the choice that is now before the Court, assuming that divorcement is unacceptable to the Court, lies between the system of competitive disposition of runs plus a ban on cross-licensing among the major defendant theatres, which we offered in our decree, or no auction selling or competitive licensing of runs system unless the Court is prepared to adopt a system of selling films in this suit which only the major defendants in the suit desire to have put into operation.

Now, we believe that——

Judge Goddard: That is not clear to me.

Judge Bright: You mean that the defendants would like to have it according to their proposed findings?

(3983)

Mr. Wright: I say what the Court has before it are two proposals which would give effect to the so-called auction selling or competitive bidding principle: 1, advanced by the defendants, which is objectionable not only to the Government but to the minor defendants, and to all of the exhibitor parties who have appeared here.

Judge Bright: Can you tell us briefly what that includes?

Mr. Wright: The defendants' proposal?

Judge Bright: Yes.

Mr. Wright: They have a rather elaborate system outlined for auctioning pictures with a statement of considerations which, as we view it, would be to permit them to continue to select virtually any customer that they wish to select in any particular situation.

(3984)

Mr. Wright: Now, what we proposed was a system of resolving the contest between independents——

Judge Hand: Do you really think that what they are proposing goes entirely outside of our decision, do you, in regard to this——

Mr. Wright: Yes, I do.

Judge Hand: They won't be permitted to do that if it is no.

Mr. Wright: I submit further that it not only goes outside the decision but it is not a system which any of the people who are supposed to be benefited by it have said will benefit them.

Now we believe that our paragraph 10, Section 2, taken as a whole, that is, the section in which 10(a) provides for some run at reasonable terms, 10(b) provides for competitive distribution of exclusive runs, Section (c) and (d) are in the language of the opinion providing that the licensing be without discrimination, theatre by theatre, picture by picture, and (e) is a provision providing that pictures must be

in our view that kind of general prohibition as to methods of licensing cannot break up affirmatively and effectively a combination such as has been found here. We think the Supreme Court has plainly indicated that mere injunctive relief of that character is not sufficient to deal with situations of this kind.

Mr. Proskauer: May it please your Honors, we had anticipated that the course of procedure here today would be to have some general comment expressing the view of the defendants, and that then we would take up the respective decrees that had been submitted, if your Honors desired it, section by section, and endeavor to arrive at the decree which your Honors feel you should enter in this case. We did not conceive that we came here to retry the case. I shall have a word or two more to say about that as I proceed.

At the outset I wish to indicate a wide divergence in viewpoint between the Government and ourselves as we approach this problem.

(4001)

The Government's memorandum in favor of its proposed decree begins in submitting a formal judgment which differs from that outlined in the opinion. That is of the essence of what we are talking about. The Government's proposal has no resemblance to the decree outlined in the opinion, and they frankly admit it. It is true that they say that they expect the Court will consider proposals which are supported by the findings, even though they do not accede with the relief outlined, and to that extent we would concede frankly that they are entitled to be heard.

But let us just, in order that I may fix the starting point for this consideration, take up one or two things that the Government has inserted in its decree:

"Clearance in favor of theatres owned by the defendants completely enjoined."

That is in their Section 11, Paragraph 5. Now let me say I am not going to elaborate on these things now. If it meets with your Honors' view, we will take those up in detail when

we come to consider the decree itself as submitted by us and by them.

In your opinion you suggested certain standards by which the reasonableness of clearance was to be determined. Those are discarded by the Government. All reference to arbitra-
(4002)
tion is omitted; and, finally, out of the air, the Government pulls an injunction as to which, of course, I shall have more to say, absolutely restraining any one of us from showing anybody else his picture in his own theatre. Nothing of that sort was decided by this Court, and I shall call your attention to phrases in your opinion which utterly negative any such suggestion of finding or the reasonableness of any such relief.

Now, when the Government comes to criticizing our form of judgment, they say that we "have submitted a rather complex device conferring upon these defendants privileges and immunities which they do not now possess. If forced to choose between the decree proposed by the major defendants and a decree of dismissal, we should cast our vote for dismissal." I suggest that this particular form of in terrorem argument is hardly appropriate in this case.
(4003)
There is nothing we have suggested in this decree that is not grounded in the Court's opinion, and there is nothing that he can specify under that charge which gives it the slightest vitality.

For example, he says here today to your Honors that we had outlined details of a system of competitive bidding where the opinion did not make any such suggestions. But I call your Honor's attention to the words of the opinion:

> "The administrative details in such changes will require further consideration."

And we in pursuance of that deemed it to be our duty to formulate and suggest to the Court and to our adversary the details which the Court called for for further considera-

tion that would make this competitive bidding system that was evidently firmly grounded in the Court's mind workable and efficient—at least as workable and as efficient as we knew how to make it.

We are a little resentful, if I may say frankly, your Honors, of the suggestion not perhaps we were lacking in good faith enough to attempt to mislead this Court, but that we were stupid enough to believe that we could do it; and we could do nothing better to give evidence of the intense earnestness with which we seek to implement what your Honors have decided than the preparation of this document
(4004)
which brings into the sharpest relief the agreements and the differences between the Government and ourselves.

Now I have said that we are not here to appeal from your Honors' decision. Surely this competitive bidding system your Honors must know is not palatable to us defendants. It calls on us to do a difficult and very arduous and very perilous, from the business standpoint, task. Your Honors wrote that that is what there should be and we are not here to ask you to reverse your opinion. If you should decide that you want to modify that we are perfectly willing to consider with your Honors and give you the benefit of such aid as counsel should give the Court of even further alternative suggestions. But that leads me directly to the issue which Mr. Wright tenders us in absolute repudiation of what your Honors have written.

The suggestion is made here that Colonel Barton's client includes some Paramount partners.

Well, your Honors, all these associations are made up of all kinds of people. Two things are evident from what occurred here yesterday—that you cannot put these people into watertight compartments, and that there is also a great area of good will which the Government ignores between the 15,000 absolutely independent theatres in America, which
(4005)
have grown up and are coining money today, between those

15,000 people and these five major defendants from whom they draw most of their pictures. And the time has come, I agree with Mr. Wright, to cut the heart of this thing and see whether Mr. Wright by his blind intransigence can persuade your Honors to destroy this industry.

He constantly talks about monopoly. Let's see what your Honors decided.

In the vast area of production the complaint is dismissed. There is no suggestion of monopoly or restraint.

Now when we come to exhibition and distribution this is what your Honors wrote:

> "The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition."

I emphasize the next words; we have relied on them:

> "They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block booking and the other things we have criticized."

I relate those words to Judge Bright's question as to the validity of the suggestion that Colonel Barton and Mr. Levy made here yesterday that the injunctive provisions de hora the competitive selling plan gives the relief which cures the

(4006)

evils which have been found here.

It is still an object all sublime to make the punishment fit the crime.

What have we been found guilty of? And if I omit anything I hope somebody will correct me.

Price fixing.

Mr. Davis: Admission price fixing.

Mr. Proskauer: Admission price fixing, I mean; not the prices of pictures. You have enjoined us from that. That cures that.

played within thirty days of availability, that the license shall so specify.

Judge Bright: Section 10 of what?

Mr. Wright: Paragraph 10 of our Section 2.

Judge Goddard: Of the decree?

Mr. Wright: Our proposed judgment.

Mr. Davis: Page 6 of the folder.

(3985)

Judge Goddard: Mr. Wright, will you restate the two alternatives you suggested. I didn't get them clearly.

Mr. Wright: The alternatives with respect to auction selling that are now before the Court, as I say, are these: Our paragraph 10 of section 2 that you have before you plus the ban on cross-licensing embodied in paragraph 8 of section 3, or the major defendants' proposals as to cross-licensing which are embodied in their proposed judgment.

Now as I said, we believe that our Paragraph 10 in Section 2, taken as awhole, does constitute a workable set of standards for licensing films on a non-discriminatory basis, but that such a set of standards is obviously inadequate by itself to meet the problems posed by this suit.

Now any attempt to grant relief simply by superimposing a licensing system upon an industrial structure which remains essentially monopolistic by virtue of the control of distribution and exhibition facilities in a relatively few hands, cannot satisfy the Sherman Act.

Judge Hand: Now you call a thing monopolistic essentially because you can add together a number of people's interests and by treating it as one make it monopolistic. If their conduct is the conduct of united action, that is one

(3986)

thing. That we have attempted to interfere with and break up. You are just going back to the old proposition which would really mean that there was a monopoly of production, that the Sherman Act was violated by everything they did. It would mean the revival of issues, I should think, that you have apparently abandoned.

Mr. Wright: Not at all, your Honor. What I have said concerning a monopoly of distribution is in no way inconsistent with our disclaimer that there was an actual monopoly of production facilities.

Now we of course disagree strenuously with the Court's view, as we pointed out in our comments on their proposed findings, that the conduct of the defendants in this case was such that you could not aggregate them for purposes of estimating their control over this industry.

(3987)

We think, in view of the Court's findings of a conspiracy among them, not only to fix prices but clearances and runs as well, you are compelled to aggregate them in any estimate that you attempt to make of their power in determining whether or not that power rises to monopoly proportions or proportions which require you to enter a decree which strikes at the power itself rather than merely to deal with certain aspects of its exercise.

Judge Hand: I do not see why you haven't the same proposition as to production exactly.

Mr. Wright: You do not have the same concentration of facilities in the hands of the defendants. You have independent people producing it.

Judge Hand: I do not see why not. I should think you would have great concentration, perhaps not proper percentage, but you can say that as to distribution, you can say that as to anything, any of the things they do. If you consider the fact that most of their pictures, of the best pictures, are theirs, which you are always saying, and if you add them together and treat them as a unit, there is a monopoly in production, I do not see any reason why you should not go after them along all lines and stop everything they do, sell out all their pictures, sell out all their theatres, sell out everything.

(3988)

Mr. Wright: As I understand the Court's ruling, the thing which would prevent us from aggregating their pro-

duction facilities for purposes of finding a monopoly is that the Court did not find that they conspired with one another in conducting their production activities. What the Court found was a concert of action among them with respect to their distribution activities.

The Court: Of course, you said they did not conspire with regard to production, that they had competition, and that you did not make any such contention.

Mr. Wright: I am assuming that for the purpose of this argument.

Judge Hand: As a result of your investigation into the matter.

Mr. Wright: I say that assumption is implicit in the argument I am making today. I am insisting that the critical point at which the supply is controlled is at the distribution level. At that point, it seems to me, perfectly clear not only from the evidence in the record but the positions taken by everyone else who has been heard here, that these defendants have actually complete control of the product.

The Court rejected our proposed solution of that problem by way of divorcement relief. We do not propose to argue that matter here. We do insist, however, that this Court

(3989)

must, in any event, make a basic attack on this problem by any injunctive relief which may be decreed. Such a basic attack is, we believe, embodied in our proposed ban on the use of the major defendants' theatres as outlets for each other's pictures.

This provision is, in our view, the only provision short of divorcement which gives any hope of supplying the industry with the additional independent distribution and exhibition outlets that are essential to break the existing distribution and exhibition monopoly.

Judge Bright: If that relief were granted, wouldn't that exclude the major operators from exhibition during large portions of the season?

Mr. Wright: I don't understand what you mean by that, no.

Judge Bright: If they were only permitted to exhibit their own product in their own theatres.

Mr. Wright: That is not what the proposal calls for.

Judge Bright: I thought you said you would prevent them from exhibiting the other defendants' product in their own theatres.

Mr. Wright: The production of the other major defendants. They would always be free to exhibit their own
(3990)
product plus the product of the minor defendants plus the product of non-defendant distributors.

Judge Bright: Could they get enough product to continue operation?

Mr. Wright: I think the record shows quite clearly that they could. After all, you have testimony in here as to these independent exhibitors who were existing with only one, two and three of the defendants' product in this suit and, in many cases, with none of the product that is controlled by the five major defendants.

There certainly is nothing in this record which would support any claim that a theatre could not be operated with only the product of one major defendant plus the three minor defendants plus independent distributors. In normal distribution of the product, in a competitive situation, where you have these eight major companies, one would play four of the defendants' product and another one would play the other four. That is a characteristic, normal pattern.

Judge Bright: I was just wondering whether you were not seeking indirectly to divest them of their theatres.

Mr. Wright: Well, it might be that in certain situations they might prefer to give up a theatre rather than to accept that restriction. If so, I see no reason why that makes the relief any less acceptable. The choice is theirs.
(3991)

Judge Goddard: What is the fact, how many pictures does a defendant, average defendant make?

Mr. Wright: I think the figures in the record for the 1943-44 season show that the major defendants were making about 30 apiece.

Judge Goddard: That would not provide, would it, for the year's play?

Mr. Wright: No, except in a limited number of first run situations, where it would, yes. It all depends on the character of the operation, as chosen. Of course, there is no freeze on the number of pictures that any defendant chooses to make in any event. That is not a fixed matter. That may vary very widely, as in the past, from 20 to 60 pictures or more.

Judge Hand: To what extent do you attack first run discrimination only? I do not exactly know; I suppose you would say you never were attacking it, although the statistics were based on it.

Mr. Wright: It is the focal point of the attack because the first run distribution is again in exhibition, the critical area where control over the entire exhibition and distribution pattern in particular areas is exercised. It is through

(3992)

the first run theatres, through the first run theatre operation and, of course, ownership of these defendants is largely concentrated in first run theatres in metropolitan areas.

Judge Hand: You have not asked anywhere only to prohibit them from exhibiting on first runs?

Mr. Wright: We do not so limit our ban on cross-licensing.

Judge Hand: You mean in your proposed decree?

Mr. Wright: In our proposed decree. Its effect would largely be confined to that except in metropolitan situations, the larger cities, where the defendants, as well as controlling first run, have a substantial number of second, third and fourth run theatres, but its principal impact would be upon the first run situations.

All of the independents who have been heard here have assumed in their arguments that this monopoly of distribu-

tion would continue under the decree proposed by the major defendants, and we think they are right in that assumption. We think it is plain that the monopoly wil continue unless those major defendants are prohibited from mutual use of each other's theatres for exhibition of each other's pictures, and thus compelled to seek new exhibition outlets.

(3993)

Judge Hand: You mean, on any run?

Mr. Wright: That is our proposal, yes.

Judge Hand: On any run? I thought you just said it was not your proposal.

Mr. Wright: I said our proposal is not, in terms, restricted to first run exhibition. I said its practical effect would be largely for that in first run situations because those were the situations in which the defendant theatre ownership is concentrated.

As I say, we think it is plain that the prohibition of their mutual use of each other's theatres for outlets of each other's pictures is the only way, short of divorcement, that you can compel them to seek new exhibition outlets and to open their theatres to new distributors.

There is no assurance, of course, that any relief short of divorcement will terminate that monopoly, and we think that fact is implicit in all the argument that your Honors heard yesterday. We are not pressing the divorcement argument at this time only because we assume that we are all here to seek the best solution available within the terms of the Court's expressed desire to enter a decree which does not grant a divestiture on the scale necessary to effectuate divorcement.

(3994)

Judge Hand: As things are, not perhaps as they would be under a changed decree, what would there be left for, well, we will say for Paramount, the first one named here, if it was confined to its own theatres? Of course, you have stated, in general, what would be left. I mean, in particular, what would you statistics show would be left that would

please the public, let alone minister to their advantage, in the various localities? Of course, if they got some perfect star picture, they might run it in one big place the whole year. You must be prepared, I think, to make some kind of estimate and not just rely on the fact that these people are doing wrong, they must be destroyed.

Mr. Wright: The record clearly shows, your Honor, that that kind of prohibition would not destroy them. It would not compel them to dispose of any theatre except in perhaps a very few situations, in which they might require the product of more than four of these defendants. There is a great deal of flexibility involved there because they may step up, they may well step up their own production and distribution in order to take care of those needs. This proposal of ours gives them complete flexibility in that regard. (3995)

Mr. Wright: I can say this, your Honor, that as to first-run situations, the record is perfectly clear that there is no first-run situation that I know of that can't, or that it appears in this record you could not survive with the product of four major defendants. You can just consider what is the situation where there are two first-run exhibitors. Obviously they can't both play all of the products first-run.

Judge Hand: Of course if Paramount had the only theatre in a place and that was all that was necessary to supply the demand, it would really prevent that place from having any of the shows, the good shows, of Warner, Loew's—any of these people.

Mr. Wright: It would not prevent that place from having those pictures very long. There would be another theatre there in very short order. In the places which are now closed towns in the hands of these affiliated defendants, theatres would be opened very promptly.

Judge Hand: I shouldn't wonder if that was true in some of them. On my hypothesis, though, it would not do anything. I said one theatre was enough for the town. If one theatre was enough to furnish all the accommodation

except good shows—I mean by "good", variety of shows chosen from these defendants—why, I am by no means clear that the mere inability to see some shows would build up
(3996)
another business if there wasn't the material for it in the population to make it pay.

Mr. Wright: What your Honor is talking about is a situation that simply is not found in this record. These defendants do not operate theatres in one-theatre towns. In almost——

Judge Hand: Oh, I admit that.

Mr. Wright: In almost all of the tows where they are, they are sufficiently large to support multiple theatres. That situation that your Honor poses is wholly academic insofar as this record is concerned.

Now in any event, a situation consistent with the Sherman Act cannot, we believe, be secured in this industry merely by imposing on the independent buyers competition among themselves for a monopoly control of product. Prohibition of course licensing among the major defendants would tend to create a free supply of film product.

Now we note that counsel for some of the defendants expressed disappointment over the abandonment of arbitration in our proposal. That was Mr. Levy, I believe. But at the same time he seemed to agree with us that arbitration should not be a decree-enforcing device. Of course if these defendants and any exhibitors with whom they deal may in-
(3997)
dividually decide to arbitrate their grievances, they are free to do so.

In the absence of coercion attributes resulting from a collective application of such a system, there is nothing in arbitration, per se, which is necessarily inconsistent with the Sherman Act. However, all of this being so, there is clearly no occasion to incorporate in this decree any provisions of that character. The purpose of the decree that is entered

here must be to enforce the public policy of the Sherman Act, as such, rather than to implement mere private rights of persons affected by it.

If, as these independents say, and as the distributors now urge, arbitration is not intended to substitute in any way for the normal devices which would customarily be employed to enforce a decree of this character, then certainly there is no reason for this Court to deal with this matter in any way in its present decree other than to terminate the existing arbitration system.

One word of caution should perhaps be noted with respect to any attempt to create a workable judgment by selecting some provisions offered by the Government and others offered by the defendants. The decree offered by us has interdependent provisions which are necessary to make it work. For example, dissolution of joint theatre holdings among the defendants themselves, if uncontrolled judicially, might

seriously weaken the efficacy of the relief granted against cross-licensing. The unqualified ban on theatre expansion and the insistence that the defendants completely eliminate themselves from the present situation where their interests are jointly held with independents, is also a necessary complement of the ban on cross-licensing. It is apparent from the defendants' proposed judgment, which offers no plan for actually disposing of any theatre interests, but provides that they may either buy out or sell to the independent interest, or retain the status quo, that they contemplate a stalemate in most of the situations where they are now in partnership with independents. This Court, of course has no power to compel any independent to sell his interest or buy a defendant's interest, and all the defendants would have to do in those situations where the independent declined to sell or buy at a price agreeable to them, under their proposal, would be to sit back and inform the Court that no dissolution was possible at the end of whatever period is set for their completion.

Now, we are here primarily to expedite the entry of this judgment, whatever it may be, and unless the Court wishes to question me further now, I think the best thing to do now is to sit down.

(3999)

Judge Bright: I have one question to ask you, Mr. Wright. It was proposed here yesterday that this competitive bidding system be eliminated entirely, and that the other injunctive provisions of the decree would take care of whatever evil may now exist in the industry. What do you think of that?

Mr. Wright: We think the other injunctive provisions are plainly inadequate to take care of evils found by the Court, and we think the Court's opinion quite clearly reflected that point of view when it suggested competitive bidding as an alternative to divorcement, at least to be tried until found wanting.

Judge Bright: Well, do you care to specify in which respects it is inadequate, the other injunctive provisions?

Mr. Wright: Well, in general all that those provisions do—now I am referring to the other injunctive provisions advocated by the defendants——

Judge Bright: Indicated by the opinion.

Mr. Wright: Well, the opinion did not, as I understand it, set limits on the injunctive relief which might be granted. As I understood the opinion, the only relief which was flatly rejected at this time was divorcement, and I suppose we are really here to decide what form of injunctive provisions should go into effect.

(4000)

Now we have proposed this affirmative injunctive provision prohibiting joint use of defendants' theatre outlets by each other. So that we say is a provision which does attack this unlawful power at its base, and would be, in our view, an effective provision.

Now all of the other provisions merely relate to the form of licensing procedure that is to be used in the future, and

Unlawful clearances. You have not only enjoined us from that; you have prescribed the methods by which reasonable clearance are to be determined.

Those and master agreements. You have enjoined us from that.

Block booking. You have enjoined us from that.

You said nothing about runs, but if the time comes when your Honors want to consider any alternative to this competitive bidding plan I think my colleague, Mr. Whitney Seymour, has a suggestion to make that would cure any possible suggestion of evil as to the creation of runs.

But the point of what I am saying is: We challenge the right of the Government to come in here and talk about destroying this monopoly, which to them means just the destruction of a great business, as though we had been

(4007)

found guilty, really, of an octopus-like monopoly which was strangling business and trade and called for such radical uprooting as a court would feel it could give despite the misery caused because of the seriousness of the offenses and their widespread nature. We have been found guilty of doing just those four things. You have enjoined us from doing that.

He suggests that those arbitration provisions—and he actually charges us with that in his brief—that we put in these arbitration provisions to escape the consequences of violation of your Honor's decree.

I don't believe that counsel for the Government of the United States should say a thing like that when there isn't a word in our proposed decree that makes arbitration a substitute for either contempt or treble damage suits, or anything else.

Mr. Wright: Why is it in the decree, Judge?

Mr. Proskauer: I will tell you why it is in the decree, but first I would like you to be man enough to say that what I have said is true.

I hear no answer.

That question that counsel puts to me——

Judge Hand: I don't see from what I know about the case and from the argument of either of you that this arrangement of arbitration affects the Government at all. Of course
(4008)
they can accept it or reject it. They have said, and we really put it in because all sides said, that it had worked so splendidly and that it had been a great advantage to have that tribunal. It does not get rid of the proponents of the decree. It does not get rid of treble damage suits; it was never intended to.

Mr. Proskauer: Your Honors, we accept everything you said. My heat was occasioned because of the charge of working subterfuge on this Court.

Judge Hand: I know, but there is no answer in the world to what I have said. Of course they don't have to stipulate anything if they don't want to, and nobody does. We made that plain in our opinion. We thought you all regarded it as an advantage to dispose of things without multiple litigation.

Judge Proskauer: That is the spirit in which we considered it, your Honor, exactly that.

Judge Goddard: Judge Proskauer, you don't take the position that if the parties to a controversy resort to arbitration that that grants immunity, do you?

Mr. Proskauer: Certainly not. We repudiate that completely.

Judge Goddard: I thought that from what you said.

Mr. Proskauer: What we resent is that we are charged with having taken that position.
(4009)
Now that leads me to the end of what I want to say.

Your Honors have said in this opinion "That it does not follow that we should break up the exhibition business, root and branch. Such total divestiture would be injurious," and I don't read on. But the Government seeks divestiture despite all the showing that was made on this trial and the

showing that has been made to your Honors and the decision that has been made by your Honors, and they come in with a provision founded in nothing in the opinion which enjoins us from licensing pictures to one another for ten years, and if there was ever one thing that everybody connected with this industry who would be candid and honest would agree on, it would be that such a provision amounts to complete divestiture.

I am answering the question that Judge Bright put to Mr. Wright.

My people estimate that if we in our theatres, Warner Bros. in their theatres, could not buy any pictures of any one of the other majors that we would be closed 65—is that the figure?

A Voice: Yes.

Mr. Proskauer: —approximately 65 per cent of the time.

This record is replete with testimony, in the inter- (4010)
rogatories and from these various documents, of the number of pictures produced, the number that are required to run a firstclass theatre in the city, and this proposal which Mr. Wright and Judge Thurman Arnold take out of thin air amounts to this: You can keep your theatres, but you can starve with them. We won't let you have the same right which anybody else has to go and buy pictures from Paramount or Fox or RKO.

Why not? We have not been found to be guilty of any monopolization with them. And if the considerations which move your Honors to deny Mr. Wright's claim of divorcement are sound, as we believe they are, those same considerations must move you to strike down or where it has been asked for for the first time in this case this particular injunctive relief, which is a slow death—even worse than the immediate decapitation with which he threatened us. It is impossible, your Honors, for any one of these defendants to continue theatre ownership successfully under any such decree and there isn't the slightest occasion for it.

(4011)

Judge Hand: These people yesterday said that this system, this competitive bidding system, would leave them worse off than they are now because the major defendants would always be able to outbid—I infer that is their argument—and always get the pictures. Have you any comment to make on that argument?

The other objections they made may be more or less serious. They are just as serious to you as they are to them, and just as serious to everybody else as they are to them, that is, the technical administrative objections that they urged. I considered that they might be troublesome. I do not imagine that they are insuperable.

What does the trade, so far as your knowledge goes, outside of these protests that we heard in argument yesterday by a limited number of associations, think of some system of competitive bidding? We never said it should be put on an auction block anyway.

Mr. Proskauer: No, of course not. I have never referred to it as auction block.

Judge Hand: Yes.

Mr. Proskauer: I have to answer your question less directly than I am accustomed to answering questions from the bench. We do not like this system that your Honors proposed. We think it is going to impose very great burdens on us. I am not here to defend or to attack it but——

(4012)

Judge Hand: Let me interrupt you at this point: It is hard to have any other system without what amounts to conditional licensing.

Mr. Proskauer: I was going to come directly to your Honor's question. I do not think there is any force, personally, in the objections to it that you mentioned in your question, because, for a defendant in this case to overbid for the purpose of crushing out a competitor, being the kind of thing that A. & P. was found guilty of in that suit, is clearly a violation of the law, and I suppose a clause could be formu-

lated which would enjoin us from doing the thing that we would never dream of doing. I think that that particular criticism on it is one that can be readily met. The other difficulties, as I told you, are very great and that is why, when we left court here yesterday, we all sat in a huddle, almost all afternoon, trying to formulate some suggestion that might be made to your Honors, if you asked us for it, to tighten this thing up if you drop this competitive bidding system.

We are not asking you to drop it but if you do drop it, we believe, as I have suggested, that if you read your own opinion and find out just what it is you are trying to stop, you will find you have stopped it dehors if perhaps you (4013)
would add complete protection on the subject of runs as well as of clearance, and this whole job is done, you have an industry then that is functioning.

But answering your question directly, I think you can enjoin us from unreasonable overbidding.

Judge Goddard: Judge Proskauer, you said that if the Court asked for it you had some suggestions to make with respect to auction bidding?

Mr. Proskauer: No.

Judge Goddard: You did not?

Mr. Proskauer; Not, not with respect——

Judge Goddard: Or some alternative.

Mr. Proskauer: No, it was simply a tightening up, a tightening up of the provisions which enabled me answer Judge Bright's question in the affirmative, that the injunctive provisions of this decree gave all the relief which the Court's opinion called for, and when we come to that, I am going to ask Mr. Seymour to take it over because he has been the father of it.

Mr. Arnold: I simply rise to correct the record. I think it is important that it be clear what my client's position is. Judge Proskauer inadvertently, and no doubt because he

connects me with schemes which he considers uneconomic, says that we supported, Judge Thurman Arnold and Mr.
(4014)
Wright supported the Government's section on the limited cross-licensing. I want to make it clear that I said yesterday, and I say again today, that the Association which I represent is split on every subject except one and that is competitive bidding will never work under the proposal made by the Court, nor should we be compelled to come in and competitively bid against each other under the proposal made by the Government. That is our position, and I want it perfectly clear.
(4015)

Mr. Proskauer: I am very glad to have the correction and to proclaim that for once on this occasion Judge Arnold has put himself into a good economic situation.

Mr. Arnold: I put myself into an economic situation where my clients differ.

Mr. Davis: I want to say that having gone through this trial and sat on this side of the table, my sympathy goes out to Mr. Arnold in the fact that his clients are split. It is a phenomena which throughout this case has not been at all unusual.

I only want to say one or two things in concurrence with what Judge Proskauer has said. I think practically all of us on this side of the table regard competitive bidding as an experiment, doubtful in outcome and difficult in administration, but we are all quite willing to accept the judgment of the Court in that particular and do our best to implement it. I think I would be somewhat lacking in candor if I did not say that the attack made upon it yesterday had somewhat shaken my own confidence in the final outcome. But we are not here—and I repeat this—we are not here to retry this case. We are not here appealing for a modification of the Court's opinion, and I beg the Court to believe that in the draft decree which we have submitted we have made an earnest and as intelligent an effort as we are

(4016)

capable of to implement the Court's opinion and put it down in writing.

My brother Wright does not accept that either as to motive or as to result; and as I sat here this morning studying his aspect from the rear, it occurred to me that the only trouble with my brother Wright is that he is out of his century. He belongs back in the time of Cato the Censor, when every speech which he delivered in the Roman Senate closed with the words "Carthago delenda est"; and every remark my brother Wright makes in this case closes with the remark there must be divorcement. He begins with a major premise which finds no support in the record—there is a monopoly—and not varying at all from that major premise, he reaches the inevitable conclusion there must be divorcement. And I respectfully submit, however that may exhibit the great virtue of consistency, it is at this particular point in this case very little assistance either to the Court or to counsel.

Now we shall discuss, if your Honors so please, in due rotation, clauses of the decree that deal with divorcement, but I say now that the striking dissimilarity between the Government's draft and ours—I said "divorcement", I meant competitive bidding—the striking dissimilarity is that the Government says in effect there shall be competitive bidding,

(4017)

period; make what you will of it; do the best you can with it. That I respectfully submit is not a decree appropriate to this case, and we have undertaken to foreshadow and outline as best we can the machinery by which this system is to be put in operation. Our machinery may not be the best; it may not be perfect. Suggestions may be made by which it can be improved, but the decree must be vocal on that question if it is to amount to a decree at all by which the conduct of these parties can be guided.

But mounting of the general declaration that there must be competitive bidding, the Government proceeds further and

says there must not be competitive bidding, however, between the major defendants at the bar. I respectfully submit, having in mind the fact that the purpose of the Sherman Law is to promote and not limit competition, I respectfully submit that that is the most bizarre proposal that has ever been made in an antitrust case. It is not a proposal to enlarge the market or free it; it is a proposal to restrict it. It is not a proposal to multiply the purchaser of any commodity, it is a proposal to limit them.

Here, for instance, is Loew's, Incorporated, with 131 theatres out of 18,000. It is proposed to remove from the market of Loew's Incorporated, 3000 theatres, and those the (4018)
best. Here is Loew's producing eight and a fraction per cent, and distributing, of all the films produced. It is proposed to deny to Loew's the right to market those films in 3000 theatres, and those the best out of the entire 18,000. And that is supposed to be the protection, the enlargement, the increase of competition under the Sherman Act.

Now I submit that such a non sequitur as that has never been seriously proposed in any litigation of this character, and it falls by its own weight.

I think whatever else I have to say I will reserve in the course of the discussion of the decree.

Judge Hand: Do the other defendants wish to be heard?

Mr. Proskauer: We would like to know your Honor's pleasure as to how to take up this decree.

Judge Hand: How about the findings?

Mr. Caskey: We have those too, your Honor. They are submitted in the blue volume, and we would prefer to take them up after the discussion of the decree, because some of these findings will be dependent upon the indication of the Court's opinion in the decree.

Judge Hand: It is your desire to take up the decree first?

Mr. Caskey: Yes. We would like to take it up section by section.

(4019)

Judge Hand: Well, I do not know that we have any objection to that.

Mr. Cooke: If the Court please, I would like to be heard on behalf of Universal. I do not know that this is the appropriate time. I do not like to step into the middle of this fight.

Judge Hand: Go ahead if you would like to be heard.

Mr. Cooke: We take this position, your Honor: first in respect of competitive bidding, we agree that much has been said here about the ineffectiveness of competitive bidding and its unworkability. We go further than that and we say that the imposition of such a regulatory system is not within the judicial power, that these provisions are legislative and not within the powers of an equity court.

Now, in that connection——

Mr. Davis: Mr. Cooke, would it be possible for you to either raise your voice or turn around?

Mr. Cooke: Yes, surely, I will step back and speak from here.

In the Bausch & Lomb case, the Supreme Court was presented with this problem: the Government on appeal asked that the Softlite Company file with the District Court a

(4020)

written instrument providing that it will sell its product without discrimination to any person offering to pay cash therefor, and in refusing to include such provision the Supreme Court said:

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes but in no instance has it indicated an intention to interefere with ordinary commercial practices. In a business such as Softlite, which deals in a specialty of a luxury or near luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service."

Now certainly that is a fortiori true of this business, and therefore I approach this problem with the idea that there is very serious doubt of the legality of any competitive bidding system, as to whether the District Courts are authorized to impose such a system.

Now, Section 4 of the Sherman Act confers jurisdiction upon the District Courts to prevent and restrain violations of the Act. That is to suppress any unlawful practices and to take such measures as may be appropriate to prevent their occurrence. We do not conceive that that means that a straightjacket can be put upon a business as to the manner in which it does business; that it may be required to sell to the highest bidder and not to old customers; that it may be

(4021)

required to sell theatre by theatre and picture by picture—and the latter is very important to us on account of the manner in which we offer our pictures.

Much has been said in this case about block booking, but there is nothing in the record, no evidence that we condition the sale of one picture upon the sale of another. We do offer our pictures as a whole, the entire season's product. Some of those who spoke to exhibitors yesterday said that that was what they wanted with reasonable rejection rights. Now the Government has conceded in one of its findings that it has proposed, that we do give considerable freedom in permitting rejection.

Now I speak of a competitive bidding system first because it seems to me that the Court's entire opinion depends upon the validity of it and its effectiveness depends entirely on whether that is in or out. Now if it is out, all you have is an injunction against certain trade practices, and we are enjoined with the others against participating in those trade practices.

Of course, if we are going to adhere to the letter of the opinion and not going to consider any changes therein, why I have not very much to say, but it seems to me that there are very serious differences of opinion here.

(4022)

Now take the matter of clearance: the major defendants are satisfied with the consent decree standards that the Court has outlined in its opinion. The Government says that the public interest is what should control. I take a very different position, and I think the Supreme Court takes a very different position. In the General Electric case, and in the more recent General Talking Pictures case in 1938, it seems to me that the Supreme Court very clearly laid down the rule that should be applied. It may not be so easy to apply it to particular facts, but the rule is perfectly clear; and it is not a rule that has relation to the public interest, because the public interest has been satisfied in the issuance of copyright or patent, as the case may be. That is this—and I quote from the General Electric case—and this relates to an admission price specification:

> "If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."

Now that to my mind is the test of whether any of these restrictions are valid. The Supreme Court has said it very deliberately in 1938 again in the General Talking Pictures case, has reiterated. Are the conditions reasonably related

(4023)

to the reward we are entitled to secure under our copyright. And it seems to me, if that be true, that the very foundations of this whole scheme are undermined.

Now the reason I mention that is that our basic position is this: our basic position is that the root of the evils in this industry are not the trade practices; that if there are any evils in this industry, the root is entirely elsewhere. We take the position that any one of these trade practices are

perfectly legal in and of themselves. Of course, if they are used in the course of a conspiracy to dominate the exhibition business, or to restrain trade, they can greatly aggravate the effects of such a conspiracy, there is no question about that, and they should be enjoined. But we take the position that we should not be enjoined. We take the position that the relief to be accorded should be along the lines of that in the Crescent case.

In the Crescent case the Supreme Court said franchises were perfectly legal in and of themselves, but it enjoined the franchises in that particular case, the continuance of them. That is, it enjoined the monopolistic aggregation that had secured those franchises. It did not enjoin the distributors. In fact, it put that question completely to one side. (4024)

Now I find myself very much in agreement with the Government on a number of very basic things here. For instance, this question of a collective monopoly: of course there can be a collective monopoly. Peculiarly enough, it happened that a day before your Honors' decision came down on June 10th, that the Supreme Court in the American Tobacco case held precisely that, as the Government says, and I was in that case, and therefore I have a strong consciousness of it.

Then there is this matter of discrimination. I confess I am attacking the roots of your Honors' opinion because I feel that I have to, and I have submitted a memorandum to your Honors which displays my views in that connection. On discrimination, so far as I know, there is no law, no antitrust law against discrimination. Your Honors have said in the opinion on the basis of the Interstate Circuit case, that any discriminating contract is unlawful. Now I do not understand the Interstate Circuit case to have held that at all. What I understand the Interstate Circuit case to have held is this, that if a distributor uses his copyrights for the benefit of an exhibitor, in the interests of an exhibitor, an exhibition chain, and for its purposes, that that goes outside

of what he is permitted to do under his copyright; but he is not using it for the benefit of himself to secure the reward
(4025)
to which he is entitled under his monopoly, but he is using it for the benefit of the exhibition chain, and therefore such agreements are unlawful. In that case the distributors had a certain given course of business, and Mr. O'Donnell on behalf of these exhibition chains down there, occupying a very dominating position, came along and demanded that they change their practices with respect to the subsequent run exhibitors; that they require them to increase their prices to 25 cents and not double feature. And therefore when the distributors acquiesced they did so not for their own purposes but for the purposes of exhibitors.

Now the only antitrust law I know against discrimination is the Robinson-Patman Act, and that concerns only commodities of like kind and quality.

Your Honors have said that we are in this case for one reason, one outstanding reason, that we treated in our license contracts the major defendants in respect of certain, what I consider, subordinate matters, better than we did independents.
(4026)

Now I don't think there is any way in this record of testing whether we did or not, because the most important element is the film rentals we get from a contract, and there is no evidence in this record that I know of that permits you to in any comprehensive way determine whether or contracts with the major defendants were more favorable over all than with the independents. But aside from that I take the position that we have the right to discriminate between customers. Much more important the Supreme Court has taken that position in the Colgate and the Raymond Brothers cases which were cited with approval in the Bausch & Lomb case a few years ago. And that is aside from copyright.

Now under copyright the Supreme Court said in the Interstate Circuit case that an exclusive license was perfectly

legal. Now how can anything be more discriminatory than that, more discriminatory than an exclusive license, where anybody who does not get the license is barred from getting the picture? And if that is true, and if that is perfectly legal—and that is flatly what the Supreme Court said—I cannot see how discrimination in the minor matters on our part and on the part of a non-monopolistic distributor can possibly be illegal in and of itself.

Judge Bright: Mr. Cooke, aren't you reargiuing the case instead of helping us to settle these findings?

(4027)

Mr. Cooke: That is why I suggested this might not be an appropriate time for me to speak. But I believe that with competitive bidding out, if it is to go out,—there seems to be some question about it,—the entire balance of your Honor's opinion is upset.

Judge Bright: You don't think it ought to go out, is that the idea?

Mr. Cooke: That competitive bidding ought to go out?

Judge Bright: You don't think it ought to go out?

Mr. Cooke: I do, Judge Bright, yes.

Judge Bright: With the rest of the opinion.

Mr. Cooke: If by that your Honor means that I categorically disagree with the fact as found in the opinion that the root in the evil in this industry is the trade practices, yes.

Judge Bright: You said it was somewhere else. Where else was it?

Mr. Cooke: I am not taking a position on that. I think that is a matter for the Court.

Judge Hand: You think there are no evils or don't you want to take a position on that?

Mr. Proskauer: They are such little ones.

Mr. Cooke: I think the Government is amply able to take care of itself on that. My basic position is this: that in

(4028)

respect of each of these practices—clearance, admission prices, and run, and these subordinate discriminations—that

in respect of each one of them they are legal in and of themselves.

Now I think, Mr. Wright, if I understood him correctly, said that road shows—fixing of prices for road shows would be all right with distributors who did not own theatres. He conceded that. He conceded a difference between the two.

Now one of your Honors asked yesterday what was the difference in principle between fixing a price for a road show and fixing a price for any other picture. I don't see any difference in principle, and I think the position that we have a right to specify that there be no change in price during a run, that we have to negotiate our film rentals on the basis of admission prices as they are. We have nothing to do with admission prices. We have no theatres. We negotiate our licenses on the basis of things as they are.

Judge Bright: You specify admission prices in your licenses, don't you?

Mr. Cooke: Surely.

Judge Bright: Then why do you say you have nothing to do with them?

Mr. Cooke: Nothing to do with fixing them in the first
(4029)
instance.

Judge Hand: You say in your licenses they must be maintained.

Mr. Cooke: That is right, sir, and we claim under the General Electric case that we have a continuing interest in that situation and therefore we have a right to require that those admission prices be maintained.

Judge Hand: All those are serious arguments, but you seem to have one position—that we were wrong about everything whatever rights other parties such as the Government and the major defendants may have had.
(4030)

Mr. Cooke: No, I do not take that position, your Honor. I take the position in respect of certain things, yes: in respect of clearance, I take that position; in respect of dis-

crimination, I take that position; in respect of there cannot be a collective monopoly, I take that position—most emphatically!

In view of the Supreme Court decision in the Tobacco case, I do not see how your Honors can say there cannot be a collective monopoly. I am not saying this is; I am saying there certainly can be. And, goodness, the Supreme Court in the American Tobacco case held that American Tobacco, Reynolds and Liggett-Myers were a collective monopoly in so many words.

Mr. Davis: In connection with the purchasing of tobacco.

Mr. Cooke: In the purchase and sale of tobacco.

Mr. Davis: Of concerted action in the sale of tobacco.

Mr. Cooke: Certainly, fixing prices in buying and selling of tobacco.

Judge Hand: Of course, if you have concerted action, there is no question but what you can have it among a number of people and then you can say that is a collective monopoly. Nobody ever yet has denied that in this case, that I know of. They have merely denied the fact in certain aspects
(4031)
of the evidence.

Mr. Cooke: That is a different matter.

Universal, as your Honors know, is unwilling to enter into any arbitration system. The reasons for that are not arbitrary or capricious in the lease. They are very sound and substantial. We do not regard the matters that the major defendants have suggested for arbitration are at all appropriate for arbitration by reason of the way we look at clearance, for example. We do not think it is appropriate for arbitration to determine whether a specific clearance granted has a reasonable relation to our award of licensing our pictures. We do not think that block booking is a proper subject for arbitration here, as the major defendants have said, particularly as there is no evidence in this case of any conditioning of the sale of one picture upon another.

Judge Hand: We have said in our opinion that if you do not consent to it, it could not be done in any way that would affect you no matter who else consented, so you are over that bridge. You need not argue about it, if you don't propose to have anything to do with it.

Mr. Cooke: I just wanted to advise your Honors we had some reasons for it other than being perfectly arbitrary about it.

(4032)

Judge Goddard: What are your reasons, Mr. Cooke?

Mr. Cooke: In respect of clearance?

Judge Goddard: No, in respect of arbitration.

Mr. Cooke: As I say, I think clearance is totally inappropriate to arbitration because——

Judge Goddard: Now would you determine the controversy, go into court each time?

Mr. Cooke: Well, the consent decree standards for the arbitration of clearance I regard as completely inappropriate because I do not think they have any bearing on what the problem is. The problem is whether we have imposed a restriction which is reasonably related to our award. It is a perfectly selfish test. We have been granted a copyright here.

Judge Goddard: You mean that there will be no controversies?

Mr. Cooke: Well, I suppose there will be controversies, yes.

Judge Goddard: How would you dispose of them?

Mr. Cooke: They ought to be disposed of by the Court.

Judge Goddard: In other words, you suggest they go to court each time instead of arbitration, which here has worked out pretty well?

(4033)

Mr. Cooke: We disagree completely with the basis for arbitration in respect of clearance.

Judge Goddard: I think I understand.

Judge Hand: He disagrees with the standards.

Mr. Cooke: I disagree with the standards. They are objective standards that have no relation to the test that the Supreme Court has laid down, reasonable relation to our award under the copyright monopoly.

Then, I haven't heard much said about it, I understand the Government to take the position that this competitive bidding system will not be workable without arbitration. How could the Court supervise an elaborate bidding system? And it seems to me that that knocks out the props from under the whole thing. If you are not going to have arbitration, because the Government won't consent to it or we won't consent to it, how can you operate your competitive bidding system?

There seems to be a lot of sentiment to the effect that it won't work, aside from its legality.

I think the Associated Press case—I think what Mr. Justice Douglas said in the concurring opinion in that case as to what was decided—shows very clearly it is a very serious question here as to whether a court can require non-discrimination as to all applicants. In that case they re-
(4034)
quired the by-laws to be amended so that papers in the position of the Chicago Sun would not be prejudiced in their application for admision by taking into consideration the fact that they were competing with the Chicago Tribune, but they expressly stopped short of ordering the Associated Press to supply its news to all non-members without discrimination. Surely the Associated Press is more of a quasi public institution than the motion picture business is or Universal is.

The Government has here, and this is perhaps more appropriate when we consider the decrees, the Government has a provision here that we offer non-exclusive runs at reasonable rates. At reasonable rates! Well, in the Hartford Empire case that is precisely what the Supreme Court said that they would not do, require future patents to be licensed

at reasonable rates. Precisely! Although they did require patents that had been used in the conspiracy to restrain trade to be licensed at reasonable rates.

Judge Bright: Is there anything in our opinion that said that a copyright owner was not entitled to a reasonable reward for his copyright?

Mr. Cooke: No, I don't think so, your Honor.

Judge Bright: Wasn't your client involved in the toils
(4035)
of this case because you acted in concert with the others, in agreeing upon certain clearances and fixing certain admission prices and things of that character?

Mr. Cooke: I want to come to that.

Judge Bright: Isn't that the fact?

Mr. Cooke: That is the last subject which I shall deal with.

There have been two recent cases in the Supreme Court, the Falcone case and the Direct Sales case that point out very clearly the test to be applied in a situation like this.

Our basic position is that we dealt with the market as we found it. Of course we sold our pictures to the major defendants. They were our market or our best customers, unquestionably. What were we to do, were we to treat them as outcasts? Were we not entitled to deal with them? Certainly not. And the mere fact——

Judge Bright: We tried to tell you what you should not do and what you should do.

Mr. Cooke: In the Falcone case the Supreme Court held very clearly that merely dealing with somebody who was engaged in an unlawful enterprise, and I am assuming for the purpose of argument that, as your Honors have found, the major defendants were so engaged, for the purpose of argument only, that one had the right to deal with persons
(4036)
engaged in an unlawful enterprise.

In that case certain dealers in cans, sugar and yeast had sold the same to bootleggers, and they knew they were boot-

leggers, as Mr. Justice Stone pointed out. The convictions were reversed, nevertheless, above. And in the case, two or three years later, the Direct Sales case, the Supreme Court pointed out the differentiation, that when one joins mind and hand with co-conspirators or actively cooperated in promoting their conspiracy, he was guilty of participation therein; but if he simply dealt with the members of a conspiracy, sold goods to them, even though he knew about it, that he was not guilty.

I can see, your Honors having heard this evidence in the case and applying those tests, that you might determine the thing one way or the other, but it is our position that that is all we did, that in making a master agreement with one of the major defendants, that we were guilty of no violation of the law; that there is nothing inherently unlawful about a master agreement; there is nothing inherently unlawful about a franchise; that it all depends on the way it is used.

In the Crescent case, when they dissolved the exhibition chain, the Supreme Court ordered it dissolved and it ordered

(4037)

an injunction against franchises but it did not enjoin those who had granted the franchises. It enjoined those who had received the franchises, that is, the monopolistic chain.

Mr. Wright: If the Court please, may I make a suggestion? I understood the defendants had proposed to discuss the decree first, but, in the light of what your Honor said, Judge Hand, in response to Mr. Cooke on this question of a collective monopoly, it seems to me that there is a basic finding offered by the defendants on which they rely, arising out of an apparent contradiction in the opinion, which has to be resolved, really, before there can be any intelligent discussion of what kind of decree is going to be entered.

I understood you to say just now that you had no doubt that there was collective action, the parties to such action could be aggregated for the purpose of estimating their monopoly position. And the argument of the defendants, which, as I recall, was their argument at the trial, was simply that

they could not be aggregated because they had not engaged in concerted action.

As I understand the Court's opinion, there is an express finding that these five major defendants have engaged in concerted action, a conspiracy, if you please, to fix prices, to control clearances and runs, in which the three minor de-
(4038)
fendants were also participants.

The defendants have submitted as a finding a statement which appears later in the opinion that you could not aggregate the businesses of these major defendants for the purpose of determining whether or not they had an exhibition monopoly, and they have also submitted, I believe, a finding to the effect——

Judge Bright: Do you know what finding that was, Mr. Wright?

Mr. Wright: Further along, near the end.

Judge Bright: Of course, that, if it is anything, is some kind of conclusion of law.

Mr. Wright: Yes, obviously a conclusion of law but nevertheless probably a significant one in determining what ought to be done here.

Mr. Davis: Finding No. 90 on page 31, Judge Bright.

Judge Hand: Of course, we did hear the argument and disposed a great many of them as to the findings in the Aluminum case, as I remember, right in open court, and then we went in and very quickly disposed of the rest. This is vastly more complicated and I am just wondering. I would really like the serious views of all the lawyers here in this case whether we are going to get anywhere by going through
(4039)
this thing in open court with a lot of talk, finding by finding; whether we haven't got to do it in our own chambers by ourselves? It was really my idea that the most fruitful discussion that could be had here was, really, along some general, pivotal lines, as to which we doubtless would make no decision on, and then go at it when we could get to it. Of

course, I cannot get to it in a minute because I just had a week in the Circuit Court of Appeals with 19 cases, and I am trying to get my memoranda ready to report for a conference, but I am perfectly willing to give now a couple of days if it is necessary for this purpose, if it does any good to anybody.

(4040)

Mr. Wright: If the Court please, for my part I agree with your Honor that you have the materials here for a paragraph by paragraph analysis which can obviously be much better made in your chambers than taken by a two-day discussion here. I wanted only to discuss, and my intention was only to discuss such aspects of the case as I thought were basic.

Judge Hand: I think that is very important to do—anything like that—and we don't pretend to overrule anybody that wants to discuss anything here within reasonable limits. But do you think it will do any good to proceed here in detail about these findings?

Mr. Seymour: May it please the Court, I think our suggestion would be, if it is agreeable to your Honors, that we proceed to take up the proposed decree, paragraph by paragraph. When we conclude that I think some general observations on our side about the findings will be our best contribution to your Honors, because the form in which the findings are set up indicate why the Government's findings are inappropriate and the findings which are not included at all in the Government's findings are appropriate to support your Honors' conclusions. But I think if we go to the findings first you would avoid an unnecessary amount of detail. And there are some findings that have not been proposed

(4041)

yet by us and will not be proposed until we have had a chance to see your Honors' views about details of the decree. I think what we would feel was important was to be able to take up with your Honors section by section the contrast in the decrees so that you would have the reasons for the various provisions we propose. Then I think it would be

unnecessary to discuss in any detail the findings. I believe if we spend the balance of the day and such additional time as your Honors want taking up the decree section by section that you will find that this form in which we have submitted the findings takes care of the subject.

While that is a little reverse of your Honor's suggested procedure, I think it will save your Honors' time.

Judge Hand: Of course, we should say, without committing ourselves in the least—and we are not committed in our own interior consciousness in the least—we were moved, all of us, by this large attack by so-called independents, many of whom were independents, on the competitive bidding system.

Mr. Seymour: I think a discussion of that will come up in a detailed discussion of the decree because we have made a proposal about that and the Government has made a proposal about it. We can thrash that out when we come to that section. But there are many differences between the decrees (4042)
between Mr. Wright's and ours. He has set up his decree to catch us everywhere he can and thinks that the aggregate of those traps or those provisions that he has made for tearing off our clothes will pretty well take the theatres away. We have beyond all set up our decree to meet the specific conclusions of relief that your Honors have suggested. I think if we could turn to that section by section it will be helpful to your Honors.

Judge Hand: I guess we better do that.

Mr. Proskauer: Supplementing what Mr. Seymour has said, if you take this decree up section by section I don't think we will bother you with too much detail. It is the simplest way of getting at the fundamentals that you want discussed.

Mr. Caskey: If the Court is familiar with the structure——

Judge Bright: Mr. Caskey, I think you wrote a letter to us in which you attached a sheet—just one single sheet, in

which you mentioned the fundamental differences between the Government's and the proposed decree of the defendants.

Mr. Caskey: No, that was between the two different drafts that were submitted. There is no such——

Judge Bright: Oh, between the drafts.

Mr. Caskey: There is no such succinct memorandum.

(4043)

Judge Goddard: The drafts of October 7th and October 15th.

Mr. Caskey: That is right.

Judge Goddard: This yellow one is the final——

Mr. Caskey: This yellow one is the final document and the blue is the final findings. The differences in the preamble primarily relate to the Government's insertion of the specification of violation of Sections 1 and 2 in a very general manner. The opinion refers to Section 2 of the decree only in one place—Section 2 of the Act, rather, only in one place—and we respectfully submit that this generality should not be adopted; that the language which we have proposed should be used.

Remember that the only place that the opinion referred to Section 2 of the Act is in connection with the fixing of first-run minimum admission prices as tending to make as many of the 10,000 potential customers go to the first-run theatre rather than to the subsequent-run theatres.

That is the only reference in the opinion to Section 2.

Judge Hand: You want that out?

Mr. Caskey: Yes, we want the language that we violated the Sherman Act without the specification of sections and without the generality of their language which states that every violation is a violation both of Section 1 and Section 2,

(4044)

which of course is not the case and is not the opinion.

Judge Hand: In what did we hold that they violated Section 2?

Mr. Caskey: The only reference was with respect to minimum admission prices where you gave the example

where you said if there were 10,000 potential customers in a community that the fixing of the first-run minimum admission price tended to divert or attract more of those customers to the first-run theatre and thereby to enhance its monopoly.

Page 26 of the opinion is the only reference to Section 2.

Judge Hand: We will underscore that. All right. We have underscored it.

Mr. Caskey: Thank you, Judge.

Paragraph I of both decrees relate to production. The basic difference is that we ask that there be added to the decree the words which would show that this Court finds that the complaint is dismissed as against the defendants as to all claims based upon their acts as producers, whether as individuals or in conjunction with others, and then these additional words "are based upon any alleged violation of the Sherman Act with respect to production including all claims based upon alleged acts of discrimination against producers." (4045)

That is to make the decree as substantially in harmony with the amended petition and to grant us a decree as to production which is in harmony with the amended petition which is dismissed.

Judge Hand: I don't know that Mr. Wright would have any objection to that.

Mr. Wright: We have a very strenuous objection to that.

Mr. Caskey: I wasn't so hopeful.

Judge Hand: Well, what is your objection to that?

Mr. Wright: Well, if the Court please, our proposed judgment states exactly what the Court found.

Judge Hand: Never mind that. What is your objection to this?

Mr. Wright: Well, that it goes beyond what the truth is as disclosed by the record. The fact that the control of distribution which these defendants possess and jointly exercised, and their control over exhibition is in itself a discrimination against independent production. There was never any surrender by us of any claim that their restrictive

practices did have the effect of restricting the opportunities of producers to market their product in a free market. Now those restraints exist by virtue of distribution practices that were found here.

(4046)

Mr. Caskey: I disavow that—I disavow any such intention.

Judge Bright: You do what?

Mr. Caskey: I say we disavow any such intention to cover the matters——

Judge Bright: It was discussed on the trial when we were talking about whether there was a claim against a producer. I think Mr. Wright made the statement then——

Mr. Caskey: Yes, sir.

Judge Bright: Mr. Wright then made a rather blanket admission that the producers——

Mr. Wright: I think if your Honor will read the minutes you will find that I pointed out at that time that we did hold that the distribution practices of these defendants and their exhibition monopolies in and of themselves did restrict unreasonably the opportunity of independent producers to find a market notwithstanding that the activities of these defendants as producers had not been such as to constitute a monopoly or a restraint of trade.

Judge Bright: I was wondering if you didn't later make a broader admission than that.

Mr. Wright: I think that we did not. If somebody could point to it I think we can discuss that. But clearly

(4047)

our position is as we stated in the memorandum that this is not a correct—this admission is not justified by anything that we conceded or that the Court found or that it could find from the record before it.

Mr. Caskey: I think it is clearly covered by the concession which was made and is also covered by the failure of proof. The supplemental complaint here and the petition have many pages of charges with respect to production, and

this is a summary or shorthand condensation of them and is intended, as it says, to relate to the activities of the defendants with respect to production.

II in both decrees relates to distribution activities.

In the preamble we have suggested that there be added after the enumeration of the parties the words which are found in the last and next to the last lines, "one acting as a distributor of features", and we make the corresponding suggestion when we come to Section III which relates to exhibition.

These defendants act as both distributors—it is on page 13——

Judge Hand: Yes.

Mr. Caskey: We want to make it perfectly clear, if your Honors please. The purpose is obvious, to separate the distribution activities of the defendants from their activities as (4048)
exhibitors, and to prevent any claim of a contention that a license agreement between, let us say, Twentieth Century-Fox and Loew's, Inc. was an agreement between two distributors.

Judge Bright: Any objection, Mr. Wright? Is there any objection to the insertion of the words "when acting as a distributor or when acting as a distributor"?

Mr. Wright: If that is the purpose we certainly do object to it. Our contention has been all along that when that happens they are making agreements between two distributors and between two exhibitors, that that is the effect of such an agreement.

Mr. Proskauer: Another way of arguing for divorcement.

Mr. Caskey: 1 deals with fixing the minimum admission price. We took the liberty of departing from the Court's language which read "either in writing or through a committee or through arbitration or upon the happening of any event or otherwise," to insert the more general and comprehensive language "in any manner or by any means" in our proposal, which is on the fifth line of our proposal.

We are enjoined from fixing the minimum admission price in any manner or by any means.

Judge Bright: Any objection to that, Mr. Wright?

Mr. Wright: If you prefer that language to the language (4049)

in your opinion, we see no reason why you should not, up to that point. That is not all of his provision.

Mr. Caskey: We next provide in recognition of the factual situation that every exhibitor has an admission price, that clearance is involved, and that——

Judge Hand: Wait a minute.

Judge Bright: Which subdivision are you talking about?

Mr. Caskey: The next proviso in 1, that we may require an exhibitor to state the admission prices fixed by him which he intends to charge during the exhibition of the particular picture licensed.

Now, that has two bases: First, it has the basis of clearance. The Court recognized in its opinion that the amount of clearance which might be granted was in part determined by the admission prices of the theatre having the prior-run and the subsequent-run, provided those admission prices were set, fixed, or determined by the exhibitor.

Mr. Proskauer: Page 62 of the opinion.

Mr. Caskey: Page 62 of the decree part of the opinion.

The Court also recognized that in licensing pictures we were entitled to measure our film rental by a percentage of the gross receipts, and in its opinion at page 32 indicated (4050)

that the distributor would be inclined to seek out the higher-priced theatres for the earlier runs.

Now, for those reasons we think that the decree should frankly provide that the offer to license by the exhibitor should state the admission price which he proposes to charge.

Mr. Proskauer: That we may ask him to state that.

Mr. Caskey: That we may ask him to state that. The price in the case of competitive bidding is obviously a

necessary factor, as 40 per cent of 30 cents probably will be greater than 40 per cent of 25 cents. At any rate, it is a factor which the distributor must know and evaluate.

Now, I realize that it can be said that we are getting close to an agreement, but the Court recognized that difference, recognized that there is a difference between an agreement which carries with it the very definite penalties which were carried in the forms of license agreement used until the trial of this case, and the statement by the exhibitor of what he intends to charge as a basis both for fixing picture clearance and as a basis for evaluating competing bids from competing exhibitors. We think it absolutely necessary and we think it should be, frankly, included in the opinion.

Judge Goddard: The decree.

(4051)

Mr. Caskey: The decree, yes.

I assume there will be objection.

Judge Bright: You have already objected to that earlier this morning, haven't you?

Mr. Wright: I think so. I will elaborate. We object to it, and I think we would prefer no anti-price-fixing provision whatsoever rather than the one with the qualification that these people have included in it.

Mr. Proskauer: Your Honors, I am intrigued by the suggestion he would prefer no price-fixing agreement. That form of argument is, I think, not conducive to the creation of a good decree. Let us see what we are talking about. We are enjoined from price-fixing. The Court has recognized in its opinion that the price which a theatre normally charges —and where we all know every theatre has its regular price —is a factor in two aspects. I am not saying this; the Court said it. The Court said it was a factor in fixing clearance and it was a factor in determining who was the high bidder. All we are asking to put in is a proviso—that the injunction against price-fixing does not deter us from getting that information from an exhibitor as to what his normal rate is that he is going to charge, and that is all.

Judge Bright: Suppose an exhibitor on one of these bids submitted a price and said, "I will give you 40 per cent of
(4051a)
my gross, and I will guarantee that my gross will not be less than $40,000," and not specifying his admission prices, why wouldn't that answer your problem?
(4052)

Mr. Proskauer: It would, but suppose he said, "I don't want to give you a minimum. I am telling you I am going to charge 30 cents," and I say, "All right, I will charge you"——

Judge Bright: No, he does not specify, he does not agree to any admission price; the exhibitor does not agree to any admission price, but he says, "I will pay you 40 per cent of my gross which will not be less than $40,000."

Mr. Proskauer: We would take it in a minute if the figures are right.

Judge Goddard: That does not take care of the clearance.

Mr. Proskauer: It does not take care of the normal situation.

Let us take a man who won't be quite as outspoken as our new exhibitor, Judge Bright, is, and he comes along and says, "I am willing to give you 40 per cent but I am not going to give you any maximum or any minimum." And another man says, "I will give you 40 per cent." All we ask is that in determining which is the highest bidder we are not deemed guilty of contempt of court when we ask a man who offers us 40 per cent, "What are you going to charge?" That is all there is to it.

Judge Bright: Aren't you right back in the same position
(4053)
that you were in the beginning of this litigation? That is an implied suggestion to him that if he wants what he wants he will have to charge a certain admission price.

Mr. Proskauer: No. At the beginning of this litigation we actually made a contract with him that he had to charge

so much. Now all we are asking is that we ascertain from this man how much he intends to charge.

Judge Bright: What is the fundamental difference? What is the fundamental difference between the two methods?

Mr. Proskauer: The fundamental difference is that we are not in the first instance doing the thing that your Honor said was improper.

Judge Hand: That is true but you are suggesting to the man that if he does not charge enough he won't get the picture.

Mr. Proskauer: Let me put it another way: Of course we are suggesting that, but suppose you had a picture, and you were working under this form of decree that is suggested here, that you are going to give it to the highest bidder, and two men offered you 40 per cent each, and they had exactly the same number of seats in their theatres, and you wanted to determine which was the biggest bid—don't you think that you would like to know how much each man proposed to charge?

(4054)

Judge Bright: Well, I have been wondering whether your inquiry as to what his admission price would be would not have implied on the end of your question the words "or else."

Mr. Proskauer: Everything can be viewed from that point of view to some extent, but I would like to ask you, if I may, how you would answer my question. You are charged with the obligation of giving a picture to the highest bidder, acting reasonably, and two men come in and offer you 40 per cent, what is the harm in saying to that man, "What else?" He has not got any right to the picture. We are going to give it to the highest bidder.

Judge Bright: The only way I could answer it, Judge Proskauer, is to say that it seems to me you are right back where you started from on this question of admission prices.

Mr. Proskauer: Well, I do not know quite what the significance of that is. We are not asking that man to charge a given price. We are not asking him to agree to anything.

Judge Bright: You said you did not before, that you did not ask them, but that the exhibitor always fixed the price.

Mr. Proskauer: But our agreement—in most instances the exhibitor agrees to it. I am going to make a personal admission. I do not think this is so important for this rea-
(4055)
son, that everybody knows what every theatre charges. This is a uniformity here which comes not from any price-fixing but from just the fact that Broadway theatres charge $3.50 or $4.00, or whatever it is, and certain types of theatres charges 50 cents, and certain ones charge 75, so we know that. But we do not want to go to jail for asking a question when we are trying to determine which is the highest bidder.

Judge Bright: You could easily keep out of jail by not asking the question.

Mr. Proskauer: I am not so sure. Suppose that we did not ask the question, and the fellow comes in and says, "I was the highest bidder because I was going to charge a dollar and the other fellow as only going to charge 50 cents, and therefore you violated the decree."

Judge Hand: You can get rid of some of these complexities by having no percentage arrangements, having a flat rental.

Mr. Proskauer: Yes, we could also get rid of it by our jumping in the river and putting a torch to all our theatres.

Judge Goddard: And the question of admission price comes up in the question of clearance.

Mr. Proskauer: Yes. Your Honor has said here in words that the admission price should be taken into account in
(4056)
determining clearance. Why can't we ask, "What is your admission price?"

Mr. Caskey: It seems to me that we have got to stick to the position that the vice is the agreement. Now, it is perfectly true that the testimony in this case was that in

making the agreement, that the initiative came from the exhibitor and that usually the agreement was simply the incorporation of the exhibitor's practice which had been the case with respect to pictures which had been sold to be exhibited at a higher admission price than currently enjoyed. But as Judge Bright has said, once we get past the point of who originated the figure, there was an agreement coupled with elaborate provisions for its enforcement.

Judge Bright: Well, there is some comment on that subject in our opinion.

Mr. Caskey: Yes, exactly.

Now, in any competitive situation it is impossible, it seems to me, looking at it realistically, to ignore the fact th admission prices are going to be discussed, and that is why we put this thing right out in the open rather than deal with it in any covert manner. If you have two exhibitors who really want the picture, and who are urging upon the distributors their desirability as the potential buyer, it is inevitable on a suggestion by one that "My price will be (4057)

higher, your film rental will be higher, because my gross receipts at the box office will be higher because of what I charge multiplied by the number of people that come in."

Mr. Proskauer: Might I suggest that we leave this with the thought that your Honors will read those portions of your opinion that are quoted in our first column here on page 2, and give us what you think is right under that opinion. That is what we want. We want to conform with that opinion.

Judge Hand: We will adjourn until 2.15.

(Recess to 2.15 p.m.)

(4058)

AFTERNOON SESSION

Mr. Caskey: Section 2 deals with clearances granted by concert. We have eliminated from the plaintiff's proposal the words "or any exhibitor," so that the prohibition reads "From concertedly agreeing with each other to maintain a system of clearance."

The reason for the suggested elimination is that any clearance involves an agreement between a distributor and an exhibitor and we do not feel that this Court meant to condemn a situation such as we might have, for example, in Boston where Fox licensed its pictures first run to a theatre operated by Paramount and granted it a clearance of, say, 28 days over other theatres in Boston. That we understood this Court to say was perfectly lawful.

If another distributor, let us say, Warner Bros., licensed some of their pictures to the same theatre operated by Paramount and grant, as they may well, the same clearance in number of days with respect to that picture, we do not think it falls within any condemnation of this Court.

Therefore, we suggest respectfully that the words by the plaintiff "or with any exhibitor" should be eliminated and that the prohibition be against a concerted action among the defendants, as distributors.

Likewise, in the footnote, we have inserted in our pro-

(4059)

posals the words "which are essentially agreed upon between the distributor and its licensee." We think that the essence of clearance is agreement, and that for there to be a clearance arrangement or agreement there must be a contract. To be sure, that contract can be implied from the circumstances, it can be spelled out from conduct. We are not arguing that the only type of clearance in a contract is that that is embodied in a license agreement. We have accepted the Court's suggestion that the word usually stipulated in the contract be taken, but we do say that it is of the essence that

this decree recognize that there is no clearance unless there is an agreement.

Let me illustrate: in New York we license the Music Hall to play a picture and we grant it 14 days' clearance over all theatres in the five counties comprising New York City. That, clearly, is clearance, and if we were to violate it, we would be subject to action by the exhibitor. It is also perfectly true that when we have a picture which we intend to exhibit in the Music Hall we will not exhibit that picture, let us say, in Poughkeepsie or in Princton, New Jersey, until it has commenced or completed its exhibition in the Music Hall, because, acting as a distributor, in a desire to attract as many people to the theatres in Princeton and in

(4059a)

Poughkeepsie as possible, we want the benefit of the advertising and the exploitation from the Music Hall, but that has nothing to do with clearance; there is no clearance between the Music Hall in New York and the theatre in Poughkeepsie. There may be an interval of time, but that interval of time is not dictated by any agreement with the first-run exhibitor in New York but is dependent solely upon the business judgment of the distributor.

Those are the two important points in this section.

(4060)

Judge Bright: What do you say about those, Mr. Wright?

Mr. Wright: The question that he raises here in the defendants' proposed form of judgment is how many agreements it takes before you have one that is illegal. Now, when he says here "from concertedly agreeing with each other," I take it the word "concertedly", while taken from the opinion in that connection is an obvious redundancy——

Mr. Proskauer: Is what?

Mr. Wright: An obvious redundancy. If these defendants agree with each other to maintain—if two or more agree with each other to maintain a system of clearance, I take it that that agreement is clearly illegal.

Now, he further has a qualification that he insists that that system also be maintained by clearances which are expressed in terms of other agreements in addition to the agreement among the defendants themselves to maintain the system. Now, that clearly imposes another requirement there that is wholly unnecessary, to reach an illegal result. When you have two or more of these people agreeing with each other to maintain a system of clearance, you have exactly the kind of concerted action with respect to clearance that this Court condemned in this opinion, and that has always been condemned.

(4061)

Now, as to our inclusion of a condemnation of an agreement between one of these defendants and an exhibitor not a party to the suit to maintain a system of clearance, it seems to us that that was clearly contemplated in the quoted section of your opinion which is set forth here.

It says, "The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors."

Now, clearly, we think that is what should be done, and that is what we have done.

Mr. Bright: Would that prohibit an agreement between any one of these distributors and any single exhibitor?

Mr. Wright: I should not suppose so. The qualification there is supplied by the phrase "maintain a system of clearances."

Now, I take it a system of clearances involves something more than simply an agreement between a single distributor and a single exhibitor as to what the clearance shall be for a particular theatre.

Judge Bright: Well, might it be said that such agreements between a single distributor and a single exhibitor

(4062)

over a period of years would be a system as to that theatre?

Mr. Wright: Well, what you would have to have to amount to the maintenance of a system—my answer to that

would be no. I would think that the word "system" to me implies something more than mere continuity in time; it implies clearance as a device to maintain a particular competitive situation or a competitive position with respect to a group of other theatres in the area over a substantial period of time, but clearly a mere agreement between a distributor and an exhibitor as to what the clearance should be at any particular time for a particular theatre would not, in my view, be the maintenance of a system.

(4063)

Mr. Davis: If the Court please, I just want to seize one of the rare opportunities for agreeing with brother Wright. I agree with him that the adverb in "from concertedly agreeing" is redundant, and I would suggest that it should be "from agreeing with each other to maintain a concerted system of clearances."

Mr. Proskauer: Did I understand Mr. Wright—I couldn't hear him—to agree that in any event Warner as a distributor could agree with Metro-Goldwyn-Mayer as a distributor for a particular clearance? Am I right?

Mr. Wright: When you are talking about Warner and Metro-Goldwyn-Mayer, we disagree with that. We say that any agreement of that kind between them is unlawful.

Mr. Proskauer: Let's see what you said. That we should be enjoined: "from concertedly agreeing to maintain a system of clearances as among ourselves or with other exhibitors," and you also said that "the foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful."

And then you go on, "It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the ex-

(4064)

hibitor-defendants have assisted in creating and have acqui-

esced in this system. This we find to be the case and hold in violation of the Sherman Act."

That we want enjoined—at least we ask in this decree to be enjoined. But we don't want to be enjoined from doing what your Honors expressly say is reasonable and lawful and reasonable and lawful for any distributor whether he is a defendant or not, to agree on a particular clearance with any exhibitor, whether he is a defendant or not.

Now the difficulty with Mr. Wright's words as he now interprets them is this: "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances," and he says that if we do the particular thing that you said we could do with each other, one of us with another, that that violates this injunction about maintaining a system of clearances. That means that Mr. Wright's provision as he interprets it now——

Mr. Wright: Excuse me, Judge; we didn't say that at all. I said we regard such an agreement as illegal. We don't regard it as reached by this particular provision. This provision I take it was intended to reach the kind of agreements you might make generally, not the agreements you make with each other.

(4065)

Mr. Proskauer: Now I ask you the question, would you regard it as a violation of your language if Warner as a distributor made a clearance agreement with Metro-Goldwyn-Mayer as an exhibitor?

Mr. Wright: No, I do not think that would fall within this particular provision.

Judge Bright: In a particular theatre.

Mr. Proskauer: In a particular theatre as to a particular picture. What is the answer?

Mr. Wright: The answer is no, that it would not fall within this provision although we would regard it as illegal because in essence under our contention—which I will develop later—these people do not have the capacity to act

separately as distributors and exhibitors for the purpose of avoiding liability. I think in Sherman Act cases you have got to consider them as units and view them in that respect.

Judge Proskauer: We are threatened with an injunction here which is very serious for us.

Judge Bright: Could the language be clarified so as to make an exception of these things? Mr. Wright says in his opinion it would not violate this particular provision. I have in mind, say, for instance, that Warner wanted to license a picture to the Paramount Theatre in this city, and they give them a 14-day clearance, would that be a violation of the injunction?

(4066)

Mr. Wright: That would only violate the provision that we have in our form of judgment, the prohibition against cross-licensing. I don't see that it is involved here.

The Court (Judge Bright): He says that would violate a later provision in the proposed plaintiff's judgment in regard to cross-licensing.

Mr. Proskauer: We have discussed that already. I have said all I want to say on cross-licensing. I am talking about clearance as such.

Judge Bright: I have been wondering, to avoid any possible dispute about it, whether there could be a proviso put in this clause to provide for the possibility of a motion to punish for contempt.

Mr. Caskey: We would like to have it. The thing that we are trying to get at, Judge Bright, is that there are eight of us who are defendants in this case and there are three other companies engaged in licensing motion pictures with us. Inevitably a similarity develops. We license to the Metropolitan Theatre in Boston clearance of 28 days. It is very difficult to think up any reason why another distributor should do it on 27 days or 29 days or 30 days or 14 days. And this tendency toward similarity or the comparison of contracts with a single exhibitor made by different distributors ought not to come within the condemnation unless the

(4067)
Court also finds, as it has found in this case, that there was a concert of action or agreement among distributors. That of course has been condemned by the Court and should be enjoined. But what we are fearful of, and it may be that your proviso will cure it, is to be charged with having acted in concert when all we have done is to make an agreement with an exhibitor which in and of itself is fair and reasonable but which is similar, even identical, with other agreements made with other distributors dealing in the same market.

Judge Hand: Well, what Mr. Davis said was "from agreeing with each other to maintain a concerted system of clearances."

Mr. Caskey: I think that would do it.

Judge Hand: I don't see why that doesn't do it. I don't see why the defendants should object.

Mr. Wright: I don't see why they would either.

Judge Hand: Do you object to it?

Mr. Wright: Yes.

(4068)
You introduce a double element of concerted action there. I take it, if there is agreement between the defendants to maintain a system of clearances, that takes it outside the law. What you mean by an agreement to maintain a concerted system, I frankly don't know, but I assume you mean something more or different from merely the agreement to maintain a system; and if that is what you ask, then I think that the provision is much less restrictive than what your opinion said you would grant.

Mr. Raftery: Of course, your Honors, speaking only for United Artists, I am more worried about this provision because of a remark Judge Bright made. The finding of concerted action in this case was based primarily on similarities that arose from everybody selling the same way, that is, with the same clearance. If we start off and make an isolated deal, as Mr. Caskey suggests, and those isolated deals keep

piling up and up and up, we run up against the same concerted action again, based entirely on similarity, unless there is something else added to the finding that will protect the distributor, who is purely a distributor and has no theatre affiliations. That same similarity of action is no proof of concerted action.

I do not see how we, sitting over here, can at all be protected by any decree of this character. We lead right back again to the proposition that, after three or four years of
(4069)
operation, you will have a series of similarities, you will have a series of individuals making complaints that the same clearance is given to the same theatre, and so forth and so forth, and we are right back where we started at the commencement of this litigation.

We are very fearful of any decree of this character, that is, we are inclined almost to say you might as well outlaw clearance entirely, which we feel is an absolute essential in the operation of our business as to put in anything as limited as that just suggested by Mr. Davis.

Unless there is a protection on similarity, I think all of us are going to be open to contempt proceedings perpetually during the operation of this decree.

Mr. Davis: I am disappointed, I thought at least Mr. Wright and I had got together, particularly getting together not only in defense of the English language, but in defense of the Court's opinion.

The thing which is forbidden is, shall agree with each other to maintain not merely a system, but a system of clearances which has been agreed upon in concept between. That is the sort of thing which I think the Court was striking at and that is the sort of thing which I think, by the mere substitution of an adjective for an adverb, putting the adjective where it belongs, accomplishes the result.
(4070)

Judge Bright: Do you object to their changing the definition of clearance in the footnote?

Mr. Wright: Yes, we do. We think that adds an additional element of agreement that is not necessarily present.

As I understand the purpose of this provision, it is not to give protection to the defendants. The purpose is to break up an existing system of clearances. You cannot break that up, it seems to me, by using a provision which simply would permit these people to go right on maintaining the clearances they have maintained before in slightly different form. That, in our view, accomplishes nothing.

Mr. Caskey: Section 3, subdivision 3 of our proposal, and 3, 4 and 5 of the plaintiff's deal with clearance when granted by an individual distributor to a single exhibitor. Our 3 is to be contrasted, in the first instance, with the plaintiff's 4.

The principal difference is that we have added to our 3 the suggestion that the clearance shall not be in excess of what is reasonably necessary to protect the licensee in the run granted or the licensor's revenue from the exhibition of the feature licensed. We think there is a duality of interest. Both the licensee and the licensor have an interest which may

(4071)

be protected and that the decree should so recite. We have set forth, by exact quotation, the factors which are listed in the Court's opinion. The last one——

Judge Hand: I think there can be no doubt about the propriety of putting in that (a).

Judge Goddard: Don't you think admission prices there merely do what we have set out to prevent? Doesn't this allow a control of admission prices?

Mr. Caskey: Sir, I do not think it allows control. I think it merely sets the standard. For example, it seems to me that there is no control in granting a license of 28 days between a first-run theatre that charges 75 cents——

Judge Goddard: My point, Mr. Caskey, is this: the defendants are stipulating as to admission prices, but if you bring in control of admission prices under the guise of considering clearance and runs, you bring it in and make it one of the conditions that they shall maintain a certain admission

price. Isn't that indirectly doing what we said you should not do?

Mr. Caskey: What I am trying to say, sir, is this: Let me analogize it by a ladder, and I put the highest rung in the same position as a first-run theatre. Now, I take it that there will be nothing illegal in saying that if the first run in
(4071a)
a city charges 75 cents, and if this exhibitor with whom you are proposing to make a license only wants to charge 10 cents, that his playing position, that is, the length of the clearance, should be down towards the bottom of the ladder, but that if he wants to charge 50 cents, we are not to be allowed to play much closer to the first run. I cannot see how that violates the prohibition of your opinion as to fixing prices. The determination would be on the exhibitor.
(4072)

Judge Goddard: Doesn't the exhibitor stipulate to maintain an admission price in connection with clearance? He does not get the clearance, he does not get the run, as I understand it, unless he sticks to a certain admission price.

Mr. Caskey: No, I should think not. I should think that clearly under your opinion the control, the enforcement would be gone. If you make a contract in contemplation that the first run shall change 75 cents, and that there shall be 28 days between it and second run, and that the second run is charging and will charge 40 cents, and then, for reasons best known to the exhibitor, instead of charging 40 cents, he charges 15 cents, that there would be no remedy. I gather that that that would be prohibited, that there would be to that extent freedom.

Now, whether there would be a misrepresentation, a breach of warranty——

Judge Hand: That is true, there is that technical difference.

Mr. Caskey: Well, it is substantial.

Judge Hand: What was bothering us was whether a man faced with this kind of a situation would not in effect do

about the same thing, get or lose his license based on what he was going to charge.

(4073)

Mr. Caskey: Judge, this apparently is not the first time that you have "rassled" with this problem because——

Judge Hand: Oh no.

Mr. Caskey: —because at page 32 you said:

> "The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real."

Judge Hand: That is true. We thrashed it all out once. It always bothered me more or less.

Mr. Caskey: It is inherent, your Honor, because of the fact that none of us can change, that each theatre does have an admission price. That is the basic cause of the problem, the fact that there is an admission price for the admission of the public to the theatre.

Mr. Proskauer: Let us see if we can't clarify this a little, your Honors, in this way: We are being enjoined—I

(4074)

will use the short expression—unreasonable clearance, being enjoined from going into clearance in excess of what is reasonably necessary to do certain things. Now, clearance is necessary for the protection of the licensee; it is necessary for our protection of our revenue, and your Honors wrote, and we all agreed, that in determining what is the reasonable clearance as between two theatres, the admission price of the theatre as set by the exhibitor, not as set by us, is

involved. All we have done is to recite that fact as one of the elements that are taken into consideration.

Now, Judge Goddard's question was whether in that way we would not possibly indirectly affect a man's admission price. My answer to that is that factually it is not so, because these theatres we all know set their own prices, and those prices remain continuously the same year in and year out. But——

Judge Hand: Well, that is not the whole story, because you had a system of licenses, and you insisted that they maintain them, in some cases insisted on the price itself, and you had a lot to do with it.

Mr. Proskauer: We are being enjoined from that, your Honor.

Judge Hand: I know you are, but the result of that is that you have got a standard of price—which may be (4075).
changed, to be sure—that had been created by yourselves in part.

Mr. Proskauer: And we are being enjoined from doing it.

Now, when two theatres come to us and discuss clearance, the most natural thing in the world for a theatre charging a dollar is to say, "We are a dollar theatre; we ought to have a clearance over a 50-cent theatre." And all we are doing is to use your Honor's own language, that that is one factor to be taken into account, and I think the answer to Judge Goddard's inquiry is taken from your own language, Judge Hand.

Judge Hand: I think that is absolutely true, but we are talking about the settlement of the decree, which is capable of certain modifications, my own language and other things.

Mr. Proskauer: Well, I can defend your language, your Honor.

Judge Hand: Well, that is all right, that is all I want you to do, not to say that it is my language.

Mr. Proskauer: I defend it because it is absolutely correct, factually. After we have been enjoined from fixing

prices over and above all else, it remains true that an admission price which is fixed by an exhibitor without compulsion from us, free of compulsion from us, is a factor which he (4076)
wants us to take into account in fixing his clearance and which we want to take into account in fixing his clearance. It is not determinative. It is one element that is factually relevant to be taken into account.

Judge Goddard: Judge Proskauer, don't we end up with a contract under which the exhibitor is committed to maintain that price?

Mr. Proskauer: No, not at all, because that exhibitor after we fix his clearance on the basis of his normal admission price is free to change it or do anything he pleases with it.

Judge Goddard: Is that right? After you have granted clearance at a certain admission price, he would have a right to change it?

Mr. Proskauer: Certainly, there is no contract about it; he has got a right to do it.

Judge Goddard: That does not appear in the contract?

Mr. Proskauer: Not at all.

Judge Hand: No, no, that is perfectly true. That is technically sound, as Judge Proskauer says. It may be more than technically sound. But on the other hand it may be true that he cannot get another license if he misbehaves. (4077)

Mr. Proskauer: But this follows, if he reduces his admission price when he comes to get another clearance we do not say, "You should not have reduced your admission price," but we do say that in fixing his new clearance we should take into account what your Honors have said is a reasonable factor,—"What is the admission price that you are normally charging?"

You can't isolate these things into water-tight compartments. Here is a factor that if you ask any exhibitor around whether he did not think that his admission price

was a relevant factor in determining his clearance, he would say, why, of course, everybody would agree to that. I do not think you would get an exhibitor in America to say that that was not a fair element to take into account. That is all we are asking you to do. We are not asking you to sanction any contract to fix the price; we are asking you to sanction our right to prescribe the price; we are merely saying that when we are hailed up for contempt, for fixing an unreasonable clearance, or when we go before an arbitration board——

Judge Goddard: That they may take that into account?

Mr. Proskauer: That they may take that into account.

Judge Goddard: There is no contract to maintain that (4078)
price?

Mr. Proskauer: Absolutely none, your Honor.

Mr. Caskey: Section (g) of our proposed III is identical with plaintiff's proposed III. Both of them are statements of what the Appeal Board held some five years ago.

The provision that the plaintiff has inserted as No. V is that we cannot enforce any existing agreement which grants clearance to any theatre not its own in which a defendant owns a direct or indirect financial interest of more than 5 per cent.

Now, if this is read in the light of the further prohibition that we cannot license the theatre at all, this becomes immaterial. That is, as I understand it, the Government is also proposing later on that in the future we may not license Loew's or Warner's or Paramount or RKO theatres, and this would strike down any existing clearance in an existing license agreement. There is nothing in this Court's opinion that justifies any such thing. This Court made no differentiation between license agreement between a distributor which owned theatres when it dealt with the other affiliated theatres.

Now, if it has reference to something other than existing license agreements, if it has reference to some vague under- (4079)
lying arrangement or understanding, we say that no such

agreement or understanding was proved, and, of course, it should not be enjoined.

We respectfully submit that this section should not be incorporated in any proposed decree.

Mr. Wright: If the Court please, what we are concerned with here is much more than any matter of verbiage. This is a controversy over these clearance provisions, and this controversy is basic to what was actually found here. Now, as we understand the Court's finding as expressed in its opinion, what you found was a conspiracy among all of these defendants to fix theatre admission prices, minimum theatre admission prices which was implemented by a system to fix uniform runs and clearances as well; that is, a conspiracy to fix not only the theatre admission prices by provisions in the license but to control the price differentials in the various competitive areas by uniform systems of run and clearance. So what you came out with was a system in which admission prices were geared to particular theatres rather than to the particular picture that was played at the theatre.

Now, that system having been found to be illegal, we take it that the purpose of any injunctive provisions that are

(4080)

directed at clearance is to terminate that system.

Now, normally in cases where a licensing system of that character has been fund to be illegal, such as, for example, the Interstate Circuit case, the Ethyl Gasoline case, the court simply voids those licenses, strikes down the whole licensing system; but what is apparently sought to be done here is to preserve the substance of the system, even some of the actual agreements themselves, subject to some adjustment, presumably, by sparating legal from illegal parts of the agreement.

Now, in no Sherman Act case that I know anything about have illegal agreements been dealt with in that way. There are situations where an agreement otherwise legal has been stricken down becar-e associated with illegal conspiracy, but in no case may agreements which have been a part, used as a

part of such conspiracy, be saved as legal even in part; and for that reason I think the relief outlined in the opinion is inadequate to actually do what the findings suggested ought to be done.

Now, as I understand the theory behind the Court's adoption of the test of legality, that it should be such clearance as was reasonably necessary to protect the licensee in the run granted, was that that was the means of transferring control of clearance from the distributor defendants

(4081)

who had so wilfully abused it, used it illegally, to the exhibitors, so that the exhibitors would be the ones who would fix whatever clearance terms should prevail for their individual benefit rather than fixing by the distributors of such terms for their benefit.

Now, these people have added a qualification which I do not believe was even mentioned in the analysis, in which they have simply added as an alternative to protection of the licensee in the run granted, protection of the licensor.

Now, it seems to me——

Judge Goddard: Where is that, Mr. Wright?

Mr. Wright: That appears in the third line of their paragraph 3.

Judge Hand: Page 4?

Mr. Wright: Page 4, their paragraph 3, third line.

Mr. Caskey: I mentioned that specifically.

Mr. Wright: Now, that was picked right out of the air. There was nothing in your Honors' opinion that suggested any such test whatsoever. The test advocated there was the licensees' protection, and it had to be that test if you were going to accomplish the objective of transferring the control of the protection out of the hands of the defendants who

(4082)

had abused it into that of a non-party. Now, the result of that qualification——

Judge Hand: You say we should have out "or" down to——

Mr. Wright: What we say you should have, if the Court please—we object to using the defendants' proposed form of judgment as the basic one on which you operate. Now, we have given you a form of judgment which is set forth here which we say takes care of the matter properly, and that represents what we think should be done rather than any surgical operation you may perform on their proposals. But
(4083)
I am simply pointing out the things in their proposal which we think tend to frustrate the purpose of the decree. And number one——

Judge Hand: You say that anyway that clause is bad, I suppose.

Mr. Wright: Number one, that qualification "or the licensors' revenue" clearly defeats the purpose of the relief and is a qualification which is not derivable from your opinion.

If there should be no clearance between theatres in substantial competition, as the Court said, clearly such clearance ought to be enjoined flatly as we have done it in our paragraph 3. There is no point in listing there as one of a series of factors which somebody might want to consider in determining whether there was a violation. If they have done that, that is a violation right there.

Judge Goddard: Mr. Wright, can I ask you this: You provide "from granting any clearance between theatres not in substantial competition." Well, I suppose that a theatre, we will say, down in Louisiana, would not be in substantial competition with Radio Music Hall here. Would you say that there could be no clearance between those theatres?

Mr. Wright: Why, quite obviously.

Judge Goddard: Well, the consequences of that—have you thought them through?
(4084)

Mr. Wright: I don't suppose that anybody has suggested that there ought to be clearance in favor of the Radio City Music Hall over some theatre in another part of the country.

Judge Goddard: Well, I think it has been suggested. It is a very great benefit to a play to make a big success in New York so that they build up a reputation before putting it in some third-rate theatre in the South.

Mr. Wright: Well, I don't understand that that is the kind of benefit we are dealing with here. I suppose that if your theory of clearance is that it is only such clearance as is reasonably necessary to protect the licensee in the run granted, it must be that what you have in mind is his particular competition in exhibiting the picture. Now as far as I know, there is no conceivable competition between a theatre in New York and one in New Orleans in exhibiting the same picture, and I would assume, of course, that the words "substantial competition" would mean theatres which were drawing from substantially the same areas—the same potential patrons.

Judge Bright: This 5 of your proposed judgment, did you have any particular target that you were shooting at in that or is that just a——

(4085)

Mr. Wright: The target that we were shooting at is the clearance agreements now in effect in favor of affiliated theatres. We say clearly that those ought to be knocked out in toto without further inquiry. They are part of this illegal system that was erected to protect the revenues of those theatres. We see no occasion in any circumstances to continue any such clearance in effect.

Now as to this list of factors, the Court has put its finger immediately on the vice in the admission price factor; I won't discuss that any further. But the other factors are essential factors which seem to us to simply leave the question of who gets the clearance, what clearance, and how much, up to the distributor's unrestricted business judgment.

Now it has been proven in the past that the exercise of that judgment was not—never has been sufficient to make the system operate in a reasonable manner, and we don't think that it is advisable to attempt to freeze by any list of factors

that you might recite, the determination of under what circumstances the clearance has exceeded that necessary to give the reasonable protection that your Honors said you thought the licensees ought to have. We think the only satisfactory test that can be adopted there is simply your straight test of such standards as you can get out of decided Sherman
(4086)
Act cases dealing with that kind of restriction. That doctrine is in a state of flux right now. It may and probably will continue to change. This standard that is set up here should not be phrased in such a way as to immunize this practice from such changes.

Mr. Caskey: If your Honors please, the language at the top of 3, "or the licensor's revenue from the exhibition of the feature licenses" I previously called your attention to. It is directly deductible from your opinion at page 32, which is printed on page 3. Having printed it on page 3, we did not print it on page 4. And we think that it is directly in harmony with the decision of the Supreme Court in the Interstate case, and in line with the argument this morning that a clearance may be granted which is necessary to protect the licensor from the reasonable enjoyment of his copyright monopoly.

Now the reason for setting these factors out is to have some kind of objective and reviewable and understandable standard. There isn't any freeze because we have inserted the words "among others" and the whole decree of course is subject to modification in the event that this flux that Mr. Wright talks about, comes into existence.

Nothing could be clearer than the unfairness of taking this G: "There should be no clearance between theatres not
(4087)
in substantial competition"—and isolating it. This Lust Arbitration we had yesterday illustrates that. The arbitrator says there is no substantial competition. The Appeal Board says there is. But a great many things, including location, including population, including policies of operation go into

that ultimate determination. And that is why we assume that the Court correctly listed it among the factors and why we have done it. If it were a question of black and white possibly it would be all right to isolate it. But it isn't. It is a question of very dark gray—an almost imperceptible difference of shade.

It is a question of ultimate judgment of the person who has to review it.

Now it may be correct theoretically that there should be no objective standards, and that the whole determination should be the bargain between the distributor and the exhibitor as to what is reasonably necessary to protect the licensee in the run granted and to protect the copyrighted monopoly. But as Judge Goddard so clearly pointed out this morning, we do have controversies about these things and if we are to have controversies and to have any effective method of determining them, we must have reasonable objective standards. These standards more or less are from the consent decree. They worked well. They furnished a

(4088)

basis for a determination by independent men that have been generally accepted and we urge the Court to include that in this decree.

Judge Goddard: You agree that there should be no clearance between these theatres not in substantial competition but you ask that these factors should be taken into consideration in determining whether there is competition.

Mr. Caskey: That is what the Supreme Court said in the matter of Colgate, which was decided in 1941 and which we have decided to live up to if your Honors please.

Mr. Cooke: May I say a word about 3 and 5? I don't agree with the Government or with the major defendants. I agree with the Government to this extent, that in the memorandum submitted to your Honors it said that there was a substantial body of law which should govern the restrictions in this situation, that is, matters like clearance. I very definitely agree on that. The Government didn't name any of the cases and I would like to inquire whether or not

among those cases is not the General Electric case and the General Talking Pictures case, and whether or not the test in those cases as laid down by the Supreme Court was not the reasonable relationship of the restriction imposed to the licensor's reward. I think it is inescapable that those cases (4089)
must be intended in the substantial body of law referred to by the Government.

Now this which is proposed by the major defendants, frankly, I think it is absurd. They propose that no clearance shall be granted in excess of what is reasonably necessary to protect both the licensee's interest and the licensor's interest. In other words, at the same time you protect the interests of both parties to the bargain, and I just don't see how it can possibly be done. One is antagonistic to the other. The only test is that of reasonable relationship to the reward under the copyright monopoly.

Now secondly, as to 5, the doing away with existing clearances, I think the Government is clearly right that clearances in existing agreements should be done away with as granted by any parties to this conspiracy. I think that was exactly what was held in the Hartford Empire case. The patents which were used in connection with the unlawful restraint of trade.

Mr. Proskauer: Will your Honors hear me in an endeavor to clarify this thing? There are three questions involved here. The first is the inclusion of the phrase "or the licensor's revenue from the exhibition of the feature license." That finds its root in these words in your opinion: (4090)

> "A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher price theatres first where the revenue is likely to be greater and consequently in case of li-

censes on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatre must be prepared to meet, or else be content with subsequent runs and grants of clearance over them."

That is what your Honors wrote. That is indubitably true. It has its basis in the record, and my friend on my right is clearly in error when he says that there is an inconsistency in any of these two factors.

(4091)

The clause that we put in is a recognition to which we are entitled in fact and under your Honor's opinion, that in determining whether a license is in excess of what is reasonable, one of the factors to be taken into account is not only the protection of the licensee's run, but also whether reasonable and not for the purpose of discrimination or monopoly. We gave a due regard to those factors which are set forth in your Honor's opinion. That is our defense of the insertion of that phrase.

The next question which arises is whether we should list factors for the purpose of guidance of ourselves, of a court on a contempt proceeding, or of arbitrators in the determination of what is the Government's injunction as they proposed from granting clearance in excess of what is reasonably necessary to protect the licensee in the run granted. I do not have to quote cases. I have quoted enough on my right. However, when you are subjecting people to an injunction, the violation of which is a contempt, it is certainly reasonable for them to say, not that we want to inject arbitrary standards that we have taken out of the air, but that you include the very objective standards to which you referred in your opinion, and we have quoted those objective

standards verbatim. In the decreedal part we have quoted them verbatim.

All that means is that we are enjoined, as the plaintiff (4092)
would have us enjoined, from granting any clearance in excess of what is reasonably necessary to protect the licensee in the run granted or the licensor's revenue, if you decide to include that phrase, and we merely add that, in determining what is a reasonable clearance, the following factors, among others, should be taken into consideration.

Mr. Wright says, by doing that, we seek in some devious way to avoid the effect of your Honor's opinion. We have quoted your Honor's opinion and we believe we are entitled to just that protection which your Honor's opinion gave us.

I raise my voice again against Mr. Wright's attitude in coming in here and regarding us as criminals who have done everything in the world. We have done certain wrong things and you are enjoining us from them, but that does not mean that we are to close our eyes to the practical necessities of this enormous business and to put ourselves in the position where we do not know what to rely on in determining whether we comply with an injunction restraining us from granting clearance over what is reasonably necessary to protect the licensee.

The third thing is this clause which enjoins Warner Bros. from enforcing any agreement made to give clearance to a Paramount affiliate down in Charleston or some other place. (4093)
What is the assigned reason for that? That the Court found that we had an illegal system of licensing. There is no point in throwing the whole industry into chaos and confusion by saying that we cannot enforce these few existing license agreements that are now in being—you are going to suspend the effect of this judgment for some time anyway—— and there isn't the slightest practical good to anybody in arbitrarily inserting this clause.

Those are the three points involved, and we submit them to the Court.

Mr. Caskey: Defendants' proposed section 14 and the plaintiff's 6, relating to franchises, are identical.

Mr. Cooke: I would like to say a word on that. On the matter of franchises, your Honors, the provisions, of course, are identical and are in accordance with your opinion. We have submitted two findings on franchises. One is No. 23, page 8. Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors. No. 22 deals with the purposes of these franchises, in order to create competition in the areas where the exhibitors had failed and refused to license the Universal product or exhibit the same. Universal induced persons, firms and corporations, to invest substantial sums of money in opening new theatres or in improving existing theatres and granted to these (4094)
accounts deals varying from one year to five years wherein and whereby these theatres were granted an exclusive right to exhibit Universal pictures for the period of said deals in the specific theatres mentioned in the agreements and for runs listed therein, whether the deal was for one year or longer.

That illustrates, it seems to me, the vice of considering these practices illegal in and of themselves. We made 727 franchise agreements with independents, only 43 with affiliated theatres, and yet every franchise we have is to be struck down here.

Mr. Caskey: Defendants' proposed subdivision 5 enjoins the further performance of existing formula deals or master agreements and from making formula deals and master agreements in the future.

The difference between our proposal and the plaintiff's primarily is in the definition. Ours are more inclusive than the plaintiff's.

As to formula deals, we propose in footnote 6 to enjoin any agreement in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. That is

more inclusive than the plaintiff's, which relates only to the type of formula deal where the formula relates to a whole circuit.

(4095)

The same, in effect, as to master agreements. We have defined a master agreement as any agreement where there are not separate provisions covering the licensing of the feature for the exhibition of each picture in each theatre and not simply confined it to the so-called blanket or basket deals.

Mr. Wright: I do not think there is any difference between us with reference to formula deals.

When it comes to master agreements, there the prohibition is directed purely at an agreement which has a certain form, and as the definition says, if you have separate licenses for separate theatres—separate provisions for licensing the feature for each particular theatre, then it is all right; but the test we derived from the opinion, and which we included in our prohibition, was the question of whether or not, except for those agreements, the defendant had actually offered the film for license to competing theatres, so the effect of the agreement was not to shut off competition by individual opponents of the circuit. In that form we think the provision has some substantial meaning, and the form proposed by the defendant is a mere device which determines how you arrive at the agreement but doesn't do much more.

Mr. Caskey: That is not the intention, and, as far as we are concerned——

(4096)

Judge Hand: Are you talking about 7 now?

Mr. Caskey: I am talking about our 5 and 6 and the plaintiff's 7—in the footnotes 6 and 7.

Judge Bright: You mean your 6 and 7 and the plaintiff's 4 and 5?

Mr. Caskey: No, the plaintiff's 7 and the footnotes 4 and 5.

As far as some of us are concerned, if you take the ambiguity out of the plaintiff's 7, that is, the text 7, and there

is an ambiguity, as you will see by reading it, which could be corrected by making it read "from making or further performing the existing formula deals," and going on down to the next to the last line and putting a period after "films," I think it would meet our purposes and the Government's.

Judge Hand: I don't quite get that.

Mr. Caskey: As your Honor reads the Government's 7, you will see that there is an injunction against performing certain types of agreements, except such as have been offered on a competitive basis, and then it goes on, "from making any similar agreements", and the word "similar", I think, is ambiguous. We thought you could correct that ambiguity by striking out that last clause and covering it by the two words to be inserted at the very beginning of the paragraph, so it (4097)
reads, "from making or further performing any existing formula deals" and so forth.

Mr. Wright: I take it you would then have to strike out the word "existing".

Mr. Caskey: Well, you could.

Mr. Wright: "enjoined from making or further performing any existing"——

Mr. Caskey: Perfectly willing to strike it out.

Judge Hand: How would that read?

Mr. Caskey: It would read, "from making or further performing any formula deal or master agreement to which it is a party except such agreement," and then it goes on down to the very bottom, and you put a period after the word "film" and strike out the words "from making any similar agreements in the future."

Judge Bright: Would that be all right, Mr. Wright?

Mr. Raftery: The definition is going to remain the same on the master agreement?

Have you agreed on the definition of 5 and 7 remaining the same? Which is going to be the definition?

Mr. Caskey: Well, we haven't got to that.

Mr. Wright: To save argument there, we will take your definition on both.

Mr. Caskey: That is agreeable to us.

Judge Goddard: You agreed on the definition of "formula"?

(4098)

Mr. Caskey: Take our footnote 6 and our footnote 7.

Mr. Wright: I take that back. If the Court please, the master agreement definition, as I pointed out before, I think we will insist on ours, because ours, I think, defines it in terms of substance instead of form.

Mr. Raftery: We won't take his. He left out—for instance, we might sit down, where a man has five theatres, and write them all up on one sheet and attach our standard form, and we would have a separate license fee and separate clearance. In other words, you would have a separate deal on each theatre and incorporate them in one rider in order to save writing all those contracts. As I understand Mr. Wright's definition, you cannot do that; you have to write a separate contract for each situation.

Mr. Caskey: We did not understand it that way.

Mr. Raftery: That is the way I read it.

Judge Hand: I did not understand so, and I thought that is just what we said in our opinion.

Mr. Wright: I agree with your Honor. I say the thing that is controlling is the substance of the negotiation, not the form of the agreement.

Judge Hand: We have already said, and I don't think you ever disagreed with that, that they could have them in

(4099)

one instrument.

Mr. Raftery: It is the words "blanket deal" that I object to, because in the blanket deal you blanket five theatres in one contract. Have it on the record it doesn't mean that. I don't care what it means.

Mr. Caskey: Some of my associates have called my attention to the fact that in all of our proposal we have

used the word "feature" or "features" instead of the word "films." If the Court adopts the compromise now suggested with this proposed paragraph 7, the word "films" which is carried in there twice, should be made to read "features".

As far as the two definitions are concerned, I understand we are in agreement that as to formula deals, we should use the one proposed by us and that we are indifferent as to whether our definition of master agreement or the plaintiff's is adopted, but that we all understand that if a master agreement has been negotiated in a competitive manner, that the results then may be incorporated in a single sheet of paper.

Judge Bright: Is there any dispute about the definition of "formula deal"?

Mr. Wright: No, one whatever.

Judge Bright: Are you taking No. 6?

(4100)

Judge Goddard: No. 6 footnote.

Judge Hand: Are you taking footnote No. 6 as his definition instead of yours?

Mr. Wright: That is agreeable to us, if you prefer it.

Judge Bright: It isn't our preference. I am wondering what objection you have.

Mr. Wright: None whatsoever.

Mr. Froelich: If your Honor please, subdivisions 8 and 9 of the Government's decree are the very crux of the case so far as Columbia is concerned, and Universal, because while we do not find the words "block booking" used in either of these two decrees, block booking was an issue and block booking was struck down by this Court.

For some reason that I do not understand, all of the parties who have submitted decrees have refrained from using it and they insert some provisions which in effect do away with block booking as practiced, such as we knew it.

In this document which the Court has, page 5, subdivision 8, is not fully printed. You will only find four lines of it. The balance of the paragraph, as it appears in the

Government decree, it is injunction against block booking, and it recites two things, one, it provides that features may
(4101)
be included in a group in one contract provided the licensee shall have an opportunity to bid for each picture and shall have made the same bid and so on. Then it says, where there has been no trade showing of the pictures, why, the exhibitor may reject as much as 25 per cent. The 25 per cent, of course, is a secondary proposition, but nevertheless of importance to Columbia, because I think it is high. I think 20 per cent should be the limit. I would even prefer to see it less, because the Government professedly wants to encourage production of pictures. It says, "We want open competition. We want the greatest amount of pictures. We want a completely free market." Yet, if they want that complete market, the last thing that they can do is to discourage producers from producing pictures.

There is no reason in this case why producers, who spend their moneys and gamble on pictures, should be compelled to take back an unreasonable amount of pictures if the exhibitors don't like them. Every one has to take his risk. This Court heard testimony here from Montague and from others——

Judge Goddard: Mr. Frohlich, didn't we hear a considerable amount of testimony from independent exhibitors to the effect that they would be perfectly satisfied with 20 per cent?

Mr. Frohlich: I don't recall such testimony, but I
(4102)
would be very happy if the Court would adopt that suggestion.

Judge Goddard: It was an affidavit, I think.

Mr. Frohlich: There may have been some such testimony in the case, but I thought 25 per cent is too high, because here we are with millions of dollars invested and we go down and market these pictures and then we have 25 per cent thrown back on us. It simply means we lose that money,

and where are we going to end? It simply means we are going to make less pictures, we are going to take less of a gamble, and the industry will suffer. I think that 25 per cent is too high.

Judge Hand: 25 per cent is in the opinion.

Mr. Wright: There is no percentage specified in the opinion, your Honor. We merely suggested 25. We hold no brief for any particular figure. If you want to make it 20, we are not going to waste time arguing about that.

Mr. Frohlich: The opinion was blank, your Honor, on that; there was no percentage.

(4103)

Judge Goddard: Mr. Wright, do you remember, is it not true that there were a number of affidavits submitted by independents in which they suggested they would be satisfied with 20 per cent?

Mr. Wright: I remember Mr. Levy saying here yesterday, arguing for the Motion Picture Theatre Owners of America, that he would have been happy with 20 per cent cancellation but was glad to see that the Government had suggested 25. In our view, this is a minor issue——

Judge Hand: This is section what we are talking about? 8?

Mr. Wright: Paragraph 8 of section 2 of our decree. The number that he is talking about of that paragraph appears at page 11 of the yellow document that you have there.

Judge Bright: What do you say to 20 per cent? Did you say 20 per cent is all right?

Mr. Wright: Yes, we were agreeable to any percentage the Court cared to designate, but we felt bound to make some suggestion, and we made that one.

Mr. Frohlich: In addition to that section the following subdivision 9 I think has some significance in respect to the right given to sell more than one picture, or the right to sell a group.

As I take it from the Government's decree, and from the

(4104)

opinion of the Court, Columbia could sell a group or all of

its product at the beginning of the year provided each picture was sold separately and each picture was sold to the highest competitive bidder. I did not gather from the opinion that Columbia was prohibited from selling its product at the beginning of the season. My impression in reading that opinion is that it is given the right providing competitors in a given area are given the right to compete for each picture, and each picture separately negotiated, and so on.

Now, Columbia would be happy with that, but that is taken away by subdivision 9, which says you can't license your films more than six months in advance of its release. Now, that clause is a new clause. It did not appear in the Government's first decree. I do not know who suggested it Mr. Wright, but it came into this new form——

Judge Hand: Is it in the opinion anywhere ?

Mr. Proskauer: No.

Mr. Frohlich: No.

Mr. Proskauer: Mr. Wright's memorandum admits that it is completely new.

Judge Hand: I don't remember it anywhere.

Mr. Frohlich: It is completely new.

Judge Hand: Now, Mr. Frohlich, I am quite interested

(4105)

as well as surprised that you come in now and say that this thing which has been done, which has been represented as greater than what William Jennings Bryan used to call the time of '72 is all right.

Mr. Frohlich: You mean block booking? If I can sell my pictures at the beginning of the season, negotiate that picture separately, fix a price, give the competitor the right, that is all right with Columbia, and I would not have any kick about it.

Judge Hand: I never understood we were saying anything like that.

Mr. Frohlich: I did. Originally I understood——

Judge Hand: Well, you had very little capacity as a shock absorber I thought on that first hearing.

Mr. Frohlich: Well, I certainly was shocked when this decision came down and I first read it, because I got the distinct impression that I could not sell my pictures at the beginning of the season, but I have changed my mind since, and if your Honors say that this decision permits me to sell all of my pictures, providing I sell them separately and negotiate them separately, and conform to the other requirements, why, I can do that.

Judge Hand: I do not see why you can't.

Judge Goddard: We thought you could.

Judge Hand: I do not see why Mr. Wright should object to that feature.

(4106)

Mr. Frohlich: But he is taking this away from me, Judge Hand.

Judge Hand: Wait a minute. I know he is with this six months, and I do not know what that is; that is something new to me.

Mr. Proskauer: It is new to all of us.

Mr. Frohlich: I know why he put it in. He wants to nullify that right just the same way he wants——

Judge Hand: Well, it is probably a safer position for him for the record to nullify all rights. Here you have this right of 20 per cent of rejection that you have to give, and the other right—well, I don't know. You could not reject anything else under this proposed decree that you wish to consent to or that you say you do not object to. You would give no other right. In other words, their cancellation would be absolutely limited to 20 per cent unless they had seen the picture.

Mr. Frohlich: Yes, we have been doing that.

Judge Hand: Then supposing they had seen the picture, then they would have to reject within so many days; you would let them do that?

Mr. Frohlich: Oh no. If they have not seen the picture, then they had the right to reject 20 per cent.

Judge Hand: I meant "not."

(4107)

Mr. Frohlich: If they had seen the picture, that is something else again. If they have not seen it, they have the right of rejection.

Judge Hand: Well, I have not all the clauses of the opinion definitely in mind, but as far as I know you would be satisfied if you could bid picture by picture and were only obliged to give them a 20 per cent rejection?

Mr. Frohlich: Yes.

Judge Hand: That is an arbitrary rejection.

Judge Goddard: That is on blind selling.

Mr. Frohlich: On blind selling. We have been giving them that anyway for years, about 20 per cent, so I have no objection to 20 per cent.

Judge Goddard: But what you now want is not to be restricted to selling six months in advance?

Mr. Frohlich: That is right, because that takes away with one hand what I have been getting with the other hand. It is impossible to tell when you are going to show a picture. It may take six months or seven or eight or nine or ten months. You start off with a picture, and there are a million delays, and you don't know just where you are at. Now, if we are given the right to sell our season's product in that way, why should that be taken away?

(4108)

Now, there is another clause which is a joker, and that is the 30-day clause, and that is another one of the clauses that Mr. Wright took out of the air that is not in the opinion, subdivision (e).

Judge Hand: Where is that?

Mr. Frohlich: Subdivision (e) of paragraph 8. It is not in the printed form that your Honor has.

Mr. Caskey: At the top of page 9.

Mr. Proskauer: Why not wait until we get to it in the regular course?

Judge Bright: Where did you say it was?

Mr. Frohlich: It is on page 4 of the mimeographed decree of the Government.

Mr. Wright: It is page 2 of the yellow document.

Mr. Frohlich: And I couple that with the six months, because that is another harsh provision which absolutely protects nobody and hurts the distributor. It says each license shall specify a date of availability of a print for the run licensed, provided that such run shall commence within 30 days after such availability.

Now, how in God's name can you do that especially when you have got clearance? It is inconsistent with clearance; it is inconsistent with the right to sell your product in the way we have described it, and it helps nobody, and I think that Mr. Wright, being dissatisfied with the so-called block
(4109)
booking, has evolved out of his own ingenuity the six months provision and the 30 days provision to cripple me and take away that——

Judge Bright: Mr. Wright, will you tell me why you are doing such terrible things?

Mr. Wright: Yes, I will be glad to. There certainly is no secret about it.

Mr. Levy, I think as he points out in his memorandum, came to me in discussing this decree and this proposed method of auction selling, and he was somewhat concerned with what the motion picture trade calls over-buying. That is, he pointed out to me that the auction selling provisions as such would not prevent the accumulation by a particular exhibitor of more pictures than he could use just to keep them away from a competitor. Now, the cancellation privilege may be adequate to protect——
(4110)

Judge Hand: You are more terrified and beseiged by these putative intervenors than even the Court.

Mr. Wright: Well, we have had to deal with them somewhat more extensively than the Court has. But in any event, as I was saying, on this question of over-buying, that is, the

accumulation of more pictures than an exhibitor can use, the competitive method of bidding of course does not solve that or touch that problem at all, and the cancellation privilege does not either. That is, the cancellation privilege may be sufficient to protect an exhibitor from having forced upon him blind pictures that he doesn't want, but it does not prevent him from accumulating by making a deal for a year's product a large number of pictures and then holding them off the market until he exercises the cancellation privilege as a means of keeping them from a competitor.

Now that 30-day provision arose out of the same problem. That is, if exhibitors under this auction method of selling were permitted to license films wherever they were, the high bidder, without regard to the particular playing time that they had in their theatres, they could again accumulate a supply of pictures which would go far beyond their immediate needs and have the effect of holding those pictures off the market. The provision requiring playing within thirty days of availability was designed to keep that market (4111)
in a fluid condition. So that if you did not have playing time available you would not license the picture.

Now those provisions, as I say, came about in that manner, and we have offered them to the Court because we think they are essentially sound and that they would help the administration of any system of competitive bidding that the Court might devise.

Mr. Proskauer: Your Honors, these two provisions which are seemingly innocuous are quite serious. Take the 30-day provision first. Mr. Wright seems to envisage us as sitting up nights trying to find some way of over-buying or concentrating. There is no proof of over-buying in this case. It has never been suggested. We have got to sell pictures to 15,000 theatres that we don't have anything to do with, that we don't own or control in any way. You have got to service them. The proof in this case shows that our profit comes from our dealings not with one another but from our dealings

with these 15,000 independent theatres, and to cure a purely fantastic, fanciful motion—to cure a perfectly fantastic and fanciful notion that we are going to go into a conspiracy to harm our best customers by accumulating a lot of pictures which cost us a lot of money and then storing them up on the shelf, something for which there is no basis whatever, (4112)

what does he suggest? That a contract must provide an availability date and that a picture must actually be released within thirty days after that.

Now if you will read, as I know you will, your Honors, the paragraph on page 9 under the heading "Defendants' Comment," you will realize what that means in practice. We have got the problem of prints. It would be perfectly cruel for me to repeat all the evidence that your Honors well remember about this print situation. A print, as you know, costs much more than we get per license from hundreds of thousands of theatres. You can't any more practically in running this business do what Mr. Wright suggests, than I can jump off the top of this building unhurt. We don't know just when the pictures are going to be finished. We don't know just when we are going to get our prints. We don't know what the exigencies are on the return of these prints. And there has never been the slightest trouble about this availability business. When we get in shape, when we know we are going to have the print we give the exhibitor a notice of availability and he can then program his theatre.

Under Mr. Wright's suggestion, the biggest yowl you ever heard will come from the exhibitors because they don't want to be bound to an availability date where they have to produce within thirty days after that. They want a flexibility (4113)

about the availability date for the reasons that you will find set forth fully on page 9, and the thing is worked without friction, there is no trouble whatever about it. When the print situation clarifies and when we know when we are going to get a print for a man in Morristown, New Jersey,

or in Tulsa, Oklahoma, we give him notice and then our booking people get in touch with him and we arrange with him when he wants the print to complete his program. What in the world is the Government interested in in that? What business is it of any——

Judge Hand: I am not sure that they are sure that they are. I thought Mr. Wright showed some doubt about that, at any rate, in advocating it. Apparently he is not guilty of the modern crime of over-simplification.

Judge Goddard: Mr. Wright, the right to exhibit under these provisions is within ten days, so it could not be tied up for very long.

Mr. Wright: That would depend upon when that extension opportunity were made available. Of the two provisions, I myself regard the 30-day provision of more importance than the six months' limitation. If one were to go and the other be retained, I would sacrifice the six months limitation first. (4114)

I think there is a very interesting comment by the defendants on page 9 of this yellow document with reference to that 30-day provision.

Mr. Proskauer: The document is yellow only in the binding.

Mr. Wright: They say "neither the allocation of prints by a distributor nor the booking of pictures by an exhibitor should be straightjacketed."

Well, of course, that is exactly what a system of clearance does, that is, to impose restrictions in making prints available. The difference between clearances in this kind of provision as far as they are concerned is that they can control and manipulate the clearances so that they can favor the theatres that they want to favor. But in a 30-day provision of this kind you would have a completely non-discriminatory application of this print distribution, and that is unfavorably regarded by the defendants.

Mr. Proskauer: We want to favor every theatre.

Mr. Raftery: A 30-day provision, 60-day provision, 90-day provision, Mr. Wright is talking about codes in the six-month provision. He wants protection for those exhibitors who buy a block of Mr. Frohlich's pictures, and twenty per cent come in and they don't want any codes. He is not protecting the market for anybody else because nobody else
(4115)
wants the rejects of anybody else.

Then you come to the 30-day provision and this applies to companies like United Artists. If we have a good picture they book them right fast. If there is a picture they don't want, they won't book, and you are not going to give a license to anybody else because they don't want it. And you have to fight with them. If you are going to put this provision in that they must buy your pictures and they must book them, then I think we are just gilding the lily about a whole lot of nothing and both provisions ought to come out.

Judge Hand: Mr. Raftery, are you as much pained about these provisions as Mr. Gerlach was in the beginning?

Mr. Raftery: I am only pained about another provision. I still think there is no price fixing in this litigation and I hope that you gentlemen might reconsider it.

As regards block booking I think we offered ample evidence that United Artists is not involved in this block booking.

As regards price fixing, we have submitted findings on that.

Judge Hand: Well, this gives you the method of distribution that you want.
(4116)

Mr. Raftery: United Artists has been distributing that way for about twenty-seven years, selling them separately and individually and to our sorrow sometimes and to our happiness at other times, depending on the quality of the picture.

Mr. Cooke: On over-buying, our position simply is that those who over-buy should be enjoined; not distributors.

On this matter of conditioning the sale of one picture upon the sale of another, we take the position that there is no evidence that we ever conditioned the sale of one picture upon the sale of another and that therefore no injunction should run against that.

Judge Hand: We are not going to review our decision on all of these details, you can be sure of that. You are wasting your time.

Mr. Davis: Now, if the Court please, we are back again on the thorny subject of competitive bidding.

We are now dealing with plaintiffs' section 10 on page 6, and defendants' number 7 on page 9.

Judge Hand: Now where are you, which page?

Mr. Davis: I am now about to make a few observations which I shall condense and make as brief as possible on plaintiff's paragraph 10 on page 6, and our paragraph 7 on page 9, which deal with the thorny subject on competitive bidding.

(4117)

Judge Bright: What paragraph is that?

Mr. Davis: Paragraph 10(b), which is all the plaintiff has to say in aid of our effort to construct competitive bidding:

> "Where a run is desired upon terms which exclude simultaneous exhibition in competing theatres, it shall be offered to the competing exhibitors involved having a theatre adequate to show the picture upon such a run and granted to the highest responsible bidder," —and then comes the vessel clause: "provided that such exclusive run does not unreasonably restrict competition in the area covered."

Which seems to leave us about where we were when the process began.

Moreover, it is not the run which the distributor is prepared to offer, but it is the run which the exhibitor out

of his own inner consciousness desires, and when he expresses his desire for any run then it shall be offered, by what method or machinery the Government does not point out, to the competing exhibitors and granted to the highest responsible bidder, thus leaving it to the exhibitor to specify the run which shall be offered and with a limitation that he shan't get it if his getting the run would unreasonably restrict competition.

We submit that that is a wholly inadequate treatment
(4118)
of the subject.

Now in our Section 7, we have endeavored to carry into it——

Judge Hand: Page 9?

Mr. Davis: Section 7 on page 9. I shall only point out what are the cardinal features or principles which we have had in mind in drafting that section. I shall not take your Honors' time with the verbiage.

The first principle, which of course is axiomatic, is that the competitive bidding system shall apply only in those areas where there is competition; that if there be an area where there is but one theatre we shall not go through the machinery of competitive bidding at that theatre but we will deal with it as an independent and an isolated contractor in the customary method and manner within the other restrictions that the decree has imposed upon us.

In order to have competitive bidding you must have a competitive situation.

The second proposition which we undertake to exemplify in our draft is that the tender must necessarily come from the producer-distributor and not from the exhibitor. The person who has the article to sell must describe the article which he is ready to offer and to tender to those who care to accept his tender. It would be utterly impossible to leave
(4119)
it to the multiple exhibitors to frame in advance the description of the thing for which they wanted to bid. That would

be chaos and confusion worse confounded. You never would have any starting point on which your competitive bidding might proceed. It seems to us inevitable and necessary and axiomatic that the tender of the thing which is offered must come from the producer distributor. And when he tenders it, he must also have the right to say what are the limits of his tender. He has the right to say, "I offer this on such a run, on such terms, in such area, and at such minimum figures, and such clearance." He must have the right to say, "I am ready to sell this to any and everybody but I am not carrying on a distress sale here, I am not offering it to an Irish Come-all-ye, if you please. I am saying if you won't bid this for it you can't get it at all or I will start over again," just as any public vendor of any sort. There is set up in advance an upset price below which the offeror cannot be bound in his offering.

The third proposition we set up is that there must be some sort of machinery or standard by which you can determine what is the best bid that you receive. To say simply that the best bid is to be left entirely to the discretion of the offerer, to the producer-distributor, really doesn't get us (4120)
very much farther. If it is intended that this should be regulatory machinery, the producer-distributor must have some criterion by which it can be judged whether it is or is not the best bid, and the primary criterion we present and the obvious criterion, indeed the only criterion by which the distributor should be bound are his prospects of revenue. He is not in business for his health. He is selling this license because he hopes to derive a profit, and in determining which is the best and which the inferior bidder, he must and is entitled to consider selfishly which one offers the higher reward.

Now in determining his film revenue, certain factors are involved, and among them necessarily is the admission price of each theatre as set by each exhibitor for the period of the exhibition of the features.

We come back again to the question of prices. No distributor can estimate his revenue without ascertaining what are the admission prices from which the revenue is to flow—not by contract, not by agreement, but as a fact on which his revenue ultimately must depend.

And so in Section (b)(1) on page 10 we list the criteria which the distributor may justly consider in determining his prospective revenue as between Theatre A and Theatre B.
(4121)

Judge Hand: I see.

Mr. Davis: (b)(1).

Judge Hand: Yes.

Mr. Davis: (b)(1), (2) and (3).

And we submit that without some such catalog the whole subject is left at large. Some such catalog we believe to indispensable for the execution of the Court's purpose.

Now, the fourth thing we have under consideration is that this decree necessarily cannot go into too great minutiae; that there must be rules and regulations by which these bids shall be received and dealt with and disposed of. Those rules and regulations obviously must flow from a common source. They must be described and set forth by those who make the general public offer, to wit, the producer-distributor, but provided that each producer-distributor shall draw up his regulations, rules and regulations describing the area within which the tender is made; describing the time within which the tender must be accepted, describing the form, if you please, in which the bids must be set forth. There must be some sort of mechanical uniformity about the procedure. But to avoid the suggestion that by means of those rules and regulations we seek to evade the general purpose of the Court, we provided that those rules and regulations when drawn up by the separate producers shall
(4122)
be filed with the clerk of the court and kept under judicial supervision.

The fifth thing we have to consider is when this system, if adopted, shall go into effect. Manifestly it cannot be done overnight. Manifestly the machinery of this industry cannot be suddenly adapted to this frame, and some reasonable time must be allowed for the mere mechanics of the operation, let alone the time necessary to educate the sales staffs and the executives in its adoption. We do not think that it could be done with diligence in less than six months, and that is a time drawn out of the air. I should think, with my limited knowledge of the industry, that that is a minimum rather than a maximum, and that that much time must be given if this system is to be installed in order to educate your personnel and perfect the mechanics.

And then finally we provide that if there is any violation of the competitive bidding system, those who are offended by that violation may resort to arbitration, as they would do in case of clearance or in case of other arbitrable subjects. We throw this whole competitive bidding into the arbitral machinery on those who choose—and there can be no compulsion, on that we are all agreed—on those who choose to employ it.

Now, if your Honors please, I am not going to take the

time to go over this—my friend Judge Proskauer thinks that I have been too cursory, and that I should call your attention to the fact that each such license should be granted solely upon the merits—this is the license which is tendered after bidding—without discrimination as between the exhibitors bidding for the run, whether in favor of theatres in which any other defendant has an interest, old customers, or any person whatsoever; and finally each license shall be offered and taken theatre by theatre, and feature by feature, and the distributor defendant for his protection—here is where we get a little something on the side—the distributor defendant may reject any and all offers which are the product of collusion among the exhibitors. And I think that is a possibility which cannot be overlooked in this particular

industry. I think it is quite possible the exhibitors would get together and gang up on the distributor under this machinery.

Now, we do not submit that to the Court as a system of perfection. We are not prepared to say that that is all that could be said in drawing up such a plan. We do insist, if your Honors retain this system, the decree will be utterly abortive unless it is fitted into some such frame as we have drawn. Will it be abortive or not? That is the question which none of us are willing to prophesy about.

(4124)

Mr. Arnold: May it please the Court, I think that we covered the subject of competitive bidding yesterday. I am not going to take the time of the Court to do any more than to say that these provisions prove our contention. I do not see how it is possible for anybody to read them and say that by such provisions—and we say by any provisions; I do not think provisions can be drawn; they might be drawn more complicated—that by such provisions you have given to the unreviewable business judgment of the distributors the control of distribution and have taken away all of the protection which we now have under the antitrust decision, and in return to give the exhibitor nothing more than the necessity of paying higher prices.

And I want to only comment further on the collusive bidding section. I would suggest that if you are going to set up a system of competitive bidding it would not be unreasonable to have a provision preventing collusion. So the exhibitors in this situation not being able to get together and make some kind of joint bids must form themselves into chains. It seems to me the greatest indication to concentration, and I think that the reasons, which I am not going into, I brought out as fully as I could yesterday. The reason

(4125)

is that this competitive bidding is at the wrong end. It is bidding by the weaker party for a scarce product; and the second reason is that competitive bidding does not create a

free market excepting where parties are of equal bargaining position and the product increases with the demand.

Thank you.

Mr. Stites: Your Honor, would it be out of line for an amicus curiae remark at this moment? I come from Kentucky and I represent a Kentucky association of theatre owners, and we are completely independent with one or two minor exceptions.

Judge Hand: Yes?

Mr. Stites: In Louisville we have the Loew's Theatre, which has approximately 3200 seats, and in the past has had Metro and United Artists and Columbia. We have a smaller theatre, the Mary Anderson, using Warner's, and then we have got the Fourth Avenue Amusement Theatres which have had Paramount, Twentieth Century-Fox, RKO and Republic. Now, they have a theatre that is approximately the same size as Loew's Theatre, which is 3200 seats. Now, the occasion could well arise where Warner's would have a picture which in the past has gone to the Mary Anderson, which has been a first run theatre, though it is one of the smaller theatres.

(4126)

Now, when a picture is open for bids, in all probability the Mary Anderson will be eliminated unless some provision is made so that the picture can be run for more than one week or more than two weeks. Now, the Mary Anderson has run sometimes for six or seven weeks with one of Warner's star pictures. On the other hand, it is very seldom that either Loew's or Rialto has shown a film for more than one week. Now, there is a situation where except for Loew's the State of Kentucky is completely independent, and I would say that probably the only solution to that, except Mr. Arnold's solution, would be that if the Rialto has an opportunity to bid, I say the Rialto should be able to kind of cut its own clothes in its bid.

Mr. Seymour: May it please the Court, I would like to add a word on this competitive bidding situation: As Mr. Davis and Judge Proskauer have said, we tendered in this

defendants' draft of decree a proposal which is designed to meet the suggestion in the Court's opinion that a competitive bidding system should be established. And the suggestion which Mr. Davis has outlined seems to us a fair attempt to meet that proposal.

After yesterday's argument on behalf of the independent exhibitors who so unanimously opposed competitive bidding, especially after the argument made by Mr. Jackson and Mr.
(4127)
Barton, that perhaps your Honors ought to stop short of dealing with that area at all, in view of the other injunctions. Counsel for the defendants, for the five defendants represented here, discussed somewhat the question of whether under your opinion that seemed a matter that would appeal to you, and we rather concluded that the opinion shows that the Court in suggesting a competitive bidding system was really concerned about making some provision in the decree which would guard against discrimination against theatres which were really qualified by physical and other conditions to get a better run than they have, based upon favoritism to affiliates, or favoritism to circuits, or favoritism to old customers, and that basically that is what the Court was trying to get at in its suggestion for competitive bidding.

Now, I do not know that that is so, but reading the opinion that seemed to me at least to be what the Court had in mind. I personally was struck by the argument made yesterday on behalf of various of the independent exhibitors as to the complications in their operation of their theatres for them to pass from a system of negotiation to a system of bidding with all its elaborate mechanism, because however simple tries to keep it, it is bound to elaborate; and that among the various objections which were voiced here, seemed
(4128)
to me to be one which perhaps your Honors would be particularly struck by. And so we tried to see whether there was some other form in which your Honors' basic notion might be cast which would carry out what you had in mind and not involve the elaborate mechanism which is inherent

in a competitive bidding system. I jotted down here a few things which may or may not be what you have in mind. I have not attempted to cast them into any definitive form. I have discussed them with counsel for the other major defendants, and if your Honors should be interested in seeing them cast in a definitive form, I think we could cast them very promptly and submit them.

Now, basically this proposal—and I want to make it clear that this is not an attempt on our part to get away from that situation of competitive bidding but merely attempt to see whether we can suggest something else that may be helpful to the Court in dealing with the problem that it had in mind. In broad outline this suggestion would be an injunction against arbitrarily refusing to license any feature on a run designated by the distributor which is requested by an exhibitor who operates a theatre in competition with a theatre which is not that distributor's theatre. In other words, where there are two competing theatres other than the distributor's theatre.

(4129)

In such cases, the license must be negotiated theatre by theatre and picture by picture. The license must be granted solely upon the merits without discrimination between bidders in favor of theatres affiliated with another defendant, or circuits or old customers, or anything else.

Then these injunctive provisions should, I should think, be implemented by reference of disputes to the arbitration system elsewhere provided for disputes as to clearance and other things in the decree, and, of course, the arbitrators would be given authority to provide proper relief in connection with such disputes.

Judge Hand: They say they won't have anything to do with the arbitration system, the minor defendants and the Government. I don't know why exactly. I have never understood why.

Mr. Seymour: Let me comment on that, your Honor. This arbitration system, as I understand it, is believed by

many people who have no axe to grind to have worked very well. It has surely been administered superbly by the arbitration system and Appeals Board.

The Court: You had set it up and the Government had set it up. His position has changed.

Mr. Seymour: Well, Mr. Wright may have strategic reasons for that position, and I do not think that that is critical to the Court decision as to what to do here. We (4130)
are not suggesting that any recourse to arbitration should be in lieu of other remedy. We are not suggesting that the Government should be barred from the usual remedies provided for the violation of a decree nor, indeed, that private parties should be barred. What we are offering is a consent rather along the lines suggested in the opinion to try to help to bring about peaceful settlement of disputes through a continuation and an expansion of the arbitration system, and I have grave doubts whether the Government's consent would be necessary.

If I may just complete this outline of this possible approach to the problem, I would suggest that these disputes as to violations of the injunctive provisions, that is, as to whether there was discrimination or whether there was an arbitrary refusal, should be arbitral under the arbitration system, and that adequate relief, of course, be provided by that system; probably that there should also be included in the decree a so-called "some-run" provision. There was, as your Honors will recall, in the consent decree a provision which assured any exhibitor of at least getting some runs. That would be supplemental, I should think, to the injunctions against arbitrary refusal and discrimination.

And then, it is perfectly plain that the use of arbitration as I have indicated and as everybody agrees, is not in (4131)
substitution for anything else, if those suggestions should appeal to your Honors as meeting the objections voiced to the elaborate character of a competitive bidding system—

and they do seem to us to strike at the thing which your Honors had in mind—we would be very glad to try to cast them in the next few days and submit them, but I haven't done that because time has been short and I did not know whether they were really along the lines your Honors were thinking along.

Mr. Frohlich: May I be heard for a moment on this question of competitive bidding? Competitive bidding sounds very good, but it is the old auction block, no matter what you call it. We had Joseph F. Day in here yesterday, who stands here ready to pick the bones, he is an auctioneer, and I think it is a strange situation where one industry in the United States, in which billions of dollars are invested, would be compelled to market its product on the auction block.

However, I think I have a further and a deeper objection to it than that. I prefer to stand on the monopoly of copyright which is involved here. I object both to the Government's and to the major defendants' outline of the method of procedure for the highest bidder for pictures.

It seems to me that when we own a copyright and we are not acting in concert with other owners of copyright, we do

(4132)

not pool our products, we are not in conspiracy, we are acting alone, and we must be presumed to be acting alone under this decree, because whatever conspiracy has existed here has been struck down, we now stand, each of the defendants, on our own two feet—each is marketing his product to his own exhibitor, and in that case the sky is the limit—no one can restrain me on my monopoly. I have the strongest monopoly known in the law, the monopoly of copyright. I have a perfect right to impose any reasonable condition, where it doesn't affect other users; I have a perfect right to ask any price I please; I can sell it when and how I please; I can sell to whom I please. That right to license, to market and to publish under the copyright act is utterly unrestricted. It is completely free and I cannot be limited. I

do not see why this Court should attempt to impose a limitation on the licensing of my product, because that is what it does when it says you must sell to the highest bidder. Suppose the highest bidder is a scoundrel who doesn't pay his debts, and I don't like him? Suppose the highest bidder has a theatre down in a cheap neighborhood and destroys the value of my picture? Suppose the highest bidder is a completely unsatisfactory man, with whom I would not want to deal under any circumstances? Under this decree I am forced to deal with him.

(4133)

That, I think, is a very radical departure from all business relationships and interferes primarily with that monopoly which I urge cannot be interfered with. The courts cannot limit it; the Government cannot limit it; the Government cannot come in an take away any part of that monopoly. The only one who can regulate that to any extent is Congress and it must be done within the limitations of the Constitution.

That monopoly is so strong that I think this Court, in making a decree of this kind, may be making a decree which would be upset, and I think it is my duty to the Court to call it to its attention.

Frankly, if I were Columbia selling to the highest bidder, I could make more money; I could hold these exhibitors up and make more money. No question about it. But that is not what is involved in this lawsuit. This Court is trying to do a job, it wants to do something for the industry that will do away with evils. I am not here to oppose that. I am here to help the Court, but I think the Court is stepping on dangerous grounds when it begins to consider taking this monopoly, which is completely untrammeled, completely free, no one can impinge on it, and then regulating the operation of these copyright owners with respect to their monopoly, and it will simply invite reversal in the higher court. I would not like to see it. I would like to see the decree here

(4134)

such that nobody will appeal from it. I am honest with the Court. We don't want litigation. We feel that we haven't done anything wrong, but the decree as written up to this point would not hurt us and we are willing to be bound by all the injunctive provisions, but beyond that I earnestly appeal to the Court not to consider that proposition.

Judge Hand: Of course, these things that you are arguing I would certainly have said a few years ago were all absolutely sound and true; and, in fact, I always thought the dissenting opinion—I don't remember whether it was a dissenting or concurring opinion—in the Vick case of Justice Holmes was the only sound view. I don't believe all these theories of hooking on patents without further legislation to the Sherman Act, but the Supreme Court has done it again and again.

Mr. Frohlich: But in the Hartford Empire case they expressly refused to do it, and that is only a recent case, 1944.

Judge Hand: It isn't because I think there is necessarily virtue in letting a copyright owner do all sorts of things, but I think there is great confusion in trying to build up all sorts of theories of law against the traditional meaning of copyrights and patents under the guise of the Sherman Act.

(4135)

Mr. Frohlich: That is right.

Judge Hand: It fills the whole subject with confusion, to my mind, but we are entirely cognizant of that thing and there are many features of it that, as far as the practical, immediate public interest goes, are in favor of doing what has been done by the courts.

Mr. Proskauer: Before we adjourn, and I imagine we will shortly, may I just say a word in supplement to what Mr. Seymour has said?

When Judge Bright asked this morning views as to whether the other injunctive provisions—yesterday it was—

took care of the evils, that is a question we reviewed at our luncheon table yesterday. As I said this morning, we believe that the injunctive provisions took care of every transgression you have found with one possible exception, and that was the question of runs, and without elaborating on the thing, I would like to impress on your Honors in summary that what Mr. Seymour has said is that, for the first time, we defendants have come in with a suggestion, that there be the same judicial and arbitral control of runs that there heretofore has been over clearance.

If that appeals to you, I think it enables us to say that if you take that in substantially as Mr. Seymour outlined it to you, you would have enjoined wrongful conduct on our part in every area in which you have found it, and you would

(4136)

have completed a coordinated injunctive system that would get the ultimate result that you had in your minds to get by the competitive system.

Judge Hand: I do not know what Judge Arnold would say to that.

Mr. Raftery: Before adjourning, your Honor, perhaps I might leave a thought with you: you will recall our contracts in evidence with our producers. We cannot license final exhibition of a single picture to an exhibitor without going back to the separate producer and getting his approval. We cannot get into any competitive business. We also have to follow his direction of the method and marketing of each individual picture. We have at the present time, I think, 23 producers telling us how to handle each individual picture. I just cannot conceive of any way that we can get into any system of competitive bidding, because we are prevented completely by contract with each independent producer.

Judge Hand: Judge Bright has to get away tomorrow at about 11 or half past 11, and I do not think there would be any use in us trying to have a session until the next day. So I think we will have to adjourn until Thursday at 10.30.

In regard to this suggestion of Mr. Seymour's, have you any remarks to make, Judge Arnold?
(4137)

Mr. Arnold: Your Honor, the suggestion comes as a surprise. I had my own opinion on it, but I will have to consult my clients, because I do not believe you want my own opinion; you want the opinion of the people I represent.

Judge Hand: All right.

Mr. Wright: If the Court is interested in the Government's opinion, I could give it to you very quickly.

Judge Hand: Go ahead.

Mr. Wright: What he is suggesting, if I heard him aright, and it is hard for me to believe that I did, was a method of insulating them by one step more from applying the principles that the Court has now said should apply to their offer of runs; if I heard him aright, he said that there should be an injunction against an arbitrary refusal to license a run designated by the distributor and then, in the event that you found a violation of that provision, then they would have to offer the picture or offer films to the person who suffered the violation picture by picture, without discrimination, in the terms that your Honor has already said they should offer them. If that is so, it is preposterous.

Mr. Arnold: May I state what I was going to suggest to my clients I understood? All of the injunctive provisions of the decree remain unchanged with respect to this, but that they would, as a matter of consent, make this offer to any-
(4138)
one who was still unsatisfied as to the injunction provisions of the decree.

Mr. Proskauer: It is a little more than that. It is what you say, but it is more. It adds to the injunctive provisions, not as Mr. Wright said in some conditional way, it adds a square injunction against unreasonable refusal of runs just as in the present decrees there are injunctive provisions against clearance. We add run to clearance, and when you

talk to your clients, you will find that has been one of their chief desires. We are enjoined from unreasonable refusal to give runs and without in any way abating the right to punish us for contempt or sue us for refusal to abide by that provision, we voluntarily offer arbitration as an additional remedy to those who want it.

Mr. Arnold: In the decree?

Mr. Proskauer: In the decree.

Mr. Wright: May I ask on what possible theory can arbitration be included in this decree when the Government, whose decree it is, does not desire to have it there? If they want to arbitrate, they are perfectly free to arbitrate outside this proceeding. I would assume that the only purpose any arbitration provision could possibly have in this decree would be for the purpose of decree enforcement. If it is

(4139)

not a means of decree enforcement, why are we concerning ourselves with arbitration proposals from these people at all?

Mr. Proskauer: I would like to answer that question, if the Court would permit me. We are concerning ourselves here because this is not the Government decree. It is the Court's decree. We come in and we say to your Honors, we ask you to implement your opinion by certain definitive injunctive provisions, and if Mr. Wright is still yelling about divorce, we say voluntarily that, in order to facilitate those exhibitors who do not want to resort to expensive litigation, as Judge Goddard suggested this morning, that we voluntarily will consent that there be inserted in this decree an arbitral system under the general supervision of the courts, that we pay for, and to which anybody, who wants to resort, may resort.

We have a legal argument which I do not propose to go into at this late hour, unless your Honors want it, that your Honors have a perfect power to decree that by reason of the Government's consent in the consent decree, but that is another matter.

(4140)

What I am trying to get away from now is the divergence of this discussion on to the arbitration system, which is an incident of it. I am trying to hold it to the line that Judge Arnold was very helpfully and properly talking about.

What this thing really does, if your Honors should decide that you do not want to go through with the competition system, that is suggested, what it does is, it enlarges the area of injunctive relief from clearance and price-fixing to include run as well. And it compels us, by injunction, to refrain from arbitrary refusal to give a run. I am sure that all those who are versed in the practical details of this industry would agree that that is a great step forward.

Mr. Arnold: I hate to disappoint you, Judge Proskauer.

Mr. Proskauer: You usually do, so I am not surprised about it.

Mr. Arnold: I am not prepared at the present time to agree, but I am glad we had this discussion because I thought this was a voluntary offer which was made to the industry to assist in the decree and not to be a part of the decree. Do you insist, in formulating these provisions, that they be part of the decree?

Mr. Proskauer: Insist? We insist about nothing. We

(4141)

are making the suggestion to the Court, and the only ones of your clients that will object to it are those who have good runs now and are afraid they may lose them.

Mr. Arnold: I do not know about that, but I want to make this clear. It is of no consequence to you whether or not this is put into the decree. It might be of considerable consequence, I don't know, to some of my clients because, once you put arbitration into the decre and someone chooses not to use it, anyone with the ability of Judge Proskauer or Mr. Wright, will talk about what an unreasonable man he

is to bother the Court when the decree itself provides for arbitration. I do not know what my clients are going to say.

Mr. Proskauer: I am not talking about arbitration. I am talking about the substantive provisions for the moment, and when I paid you a compliment it was because for a moment you were talking about substance and not the remedy, and now you are going to remedy again.

Mr. Arnold: Yes, that is what I am doing. All I want to find out this evening is, in making the suggestion is it of consequence to the parties making it that it be embodied in the decree or are they perfectly willing to make it a general letter to the industry?

Mr. Proskauer: Are you talking about arbitration?

Mr. Arnold: Yes.

(4142)

Mr. Seymour: I will say for myself that I visualized it as a matter to be submitted to the Court for consideration as a possible matter to be included in the decree.

Mr. Proskauer: Subject to the Court ruling, we would like it in the decree.

Judge Bright: Mr. Wright, would you object to inserting in the decree in this case a provision for arbitration providing there is also inserted a clause that it would not immunize the defendants from any proceeding that you might take on a claim that they are violating the decree?

Mr. Wright: I think we would because there just is no occasion for that kind of arbitration, an arbitration which is not intended is a decree enforcement device, arbitration which is not intended in any way to supersede the normal enforcement procedures that we would employ, to be in this decree at all. If they want that kind of system, they have got to set it up, it seems to me, outside this lawsuit.

Mr. Barton: May it please the Court, I think we should like to comment on that suggestion but I frankly don't understand it and would like to reserve the right to comment until

I have a clear conception of what the suggestion is that the
(4143)
gentleman is offering. I don't want my silence to show assent.

Judge Hand: I should think you had better, perhaps, confer with Judge Arnold and Mr. Barton as to whether there was any hope of satisfaction for them in this suggestion. If what you are suggesting does not satisfy them any better than what our opinion has proposed as a remedy, why should we fuss a great deal with it?

Mr. Arnold: I want to explain our difficult position. The only thing on which all these theatres are agreeing has been that they don't want auction bidding; so it is very difficult for us to get agreement on other parts——

Judge Hand: The only thing that they all agree on is what?

Mr. Arnold: That they didn't want auction or competitive bidding, and that is what limits us in not being able to answer your question.

Mr. Proskauer: Does your Honor express any view on whether we should try to formulate this into——.

Judge Hand: I think you better talk to the high contracting parties who represent your adversaries here to see whether there is any use in talking about it at all.

Mr. Proskauer: We have only one high contracting adversary and that is the Government.
(4144)

Judge Hand: I don't know that we would care to go into it if it is something that everybody is going to fight about as a proposed new remedy suggested by Mr. Seymour. Don't you think you can tell among yourselves whether it is worthwhile, to see whether you want to do it?

Mr. Proskauer: I could if it were not for Mr. Wright. I think I could sell this to Judge Arnold.

Mr. Wright: Anything you can sell to him you are perfectly at liberty to agree with him on.

Judge Hand: We will adjourn until Thursday.

(Adjourned to Thursday, October 24, 1946, at 10.30 a.m.)

(4145)

New York, October 24, 1946,
10.30 o'clock a.m.

HEARING RESUMED.

Mr. Seymour: May it please the Court, since I indicated on Tuesday that I had a suggestion that might meet what your Honors had in mind in lieu of the formality of competitive bidding, we have tried to cast the suggestion. We have it cast in rough form. Subject to consideration of details, I think we are prepared to hand up a copy of it to the Court, if the Court would be interested in seeing it.

Mr. Davis has an addendum, which is represented by a superimposed sheet, and it may be that there will be some other minor changes later on we will want to suggest.

I would like to tell your Honors what the substance of it is. It is along the lines of what I said——

Judge Hand: Has Mr. Wright seen it?

Mr. Seymour: We have just got the proof. We have not, so far as I know, furnished one to Mr. Wright yet. He must, of course, have one and we will make one available to him at once.

(4146)

Without arguing it, I would just like to tell your Honors the substance of the proposal. It does not differ much from what I said the other day. It inhibits the arbitrary refusal of a run to an exhibitor requesting a run designated by the distributor. It inhibits discrimination in the granting of runs and requires that they shall be granted on the merits. It sets forth the factors which a distributor is to consider in determining which of two theatres on the merits should have the run. It provides for the grant of some run, that is, it takes into this provision the so-called some-run provision of the consent decree, in addition to what I have already mentioned, so that an exhibitor is, in any event, assured of getting some run, quite aside from the question of discrimi-

nation and arbitrary refusal I mentioned before. And then, the controversies arising under this section are subject to arbitration with what we think to be adequate remedies by the arbitrators.

And I may say, in anticipation, if your Honors please, that we think we can satisfy your Honors that there is no doubt about your power in this case to include an arbitration system in your decree.

Judge Proskauer will present the legal argument on the subject a little later on.

Finally, this proposal makes it perfectly plain that the arbitration system does not in any way affect the Government's right to proceed for violation of the decree by con-
(4147)
tempt. And it also makes it clear that as to an exhibitor he has an election of remedies. He may choose to proceed by arbitration or he may choose to pursue his remedies afforded him by law. Obviously he ought not to have it both ways. And therefore it indicates that as to an exhibitor there is an election of remedies. But the critical point seems to us to be that it in no way effects the Government's right to proceed for violations of the injunctive provisions of the decree, and thus it provides the useful remedy of arbitration to those who choose to invoke it and provides a skilled way for disposing of controversies which involve all kinds of elaborate questions not ideally designed for consideration in the light of the usual rules of evidence and so on. In other words, it has the advantages which everybody has found in the arbitration system and which we have enlarged upon, and which your Honors have indicated in your opinion. That is the substance of this proposal. We have outlined it in substance to some of the exhibitor groups. They are in a position to give you their views about it insofar as they are able to do so today, and I won't attempt to do so for them of course.

Mr. Davis, do you want to add anything to what I have said?

Mr. Davis: The addendum of which Mr. Seymour spoke (4148)
presented by us is that we are opening up here a fresh field of adjudication and controversy between the distributors and the exhibitors, whether or not there has been a refusal of a run as requested. Obviously, no man is injured if the run is granted and he has not requested to the contrary. Now, we want to narrow the field of controversy about that request just as much as we can. That is the predicate for this procedure, that there must have been a refused request, and we do not want the question of request left at large on oral testimony between the demanding exhibitor on the one hand and our field agent on the other, because when gentlemen's rights depend upon whether or not there has been such a request, their memories cannot always be relied upon.

So we ask that the request when made shall be formalized, to be the predicate for any further proceeding, and must be made in writing and addressed to the home office of the company so that there may be some undisputable evidence that the exhibitor really made the request that is the basis of his complaint. That is a mere matter of procedure, that is true, but we think in view of the far-flung variations of this industry, it is a very important procedure and will tend to narrow at least one angle of possible controversy. That we (4149)
submit as a substitute for the first paragraph in the printed proof.

Mr. Arnold: If it please the Court, at the close of the last session the Court inquired the position of the American Theatre Association with respect to the proposal suggested by Mr. Whitney Seymour on behalf of the defendants. The proposal was not in concrete form. The idea, however, was that some plan of voluntary arbitration conducted jointly by the major companies be embodied in the decree as a possible substitute for the system of competitive bidding in opposition to which the American Theatres Association have sought to intervene in this action.

In response to the Court's request, I have conferred with counsel for the defendants as to the scope and character of their tentative proposal. I have also conferred with the representatives of the American Theatres Association who, in turn, have conferred with others over the long distance telephone. As a result we have reduced to writing a system which represents as closely as we can, without actually taking a poll, the attitude of our Association.

Our Association is a large aggregation of theatres in every part of the country. It was formed for the purpose of
(4150)
acting in the interest of the American theatre industry on all questions in which every theatre had a common interest to protect. Since our membership contains theatres of every type, there are many conflicting interests between them which the Association cannot properly represent. It was for that purpose that prior to the introduction of the issue of competitive bidding in this suit, the Association took no position whatever in the litigation. When, however, the proposal of competitive bidding was suggested by the Court, the members and directors of the A. T. A. felt that the Association could and should intervene because they believed the system would operate to the injury of all the member theatres, large and small, and in every type of situation.

The poll taken by the theatres confirmed this position. The vote was almost unanimous to oppose competitive bidding. For that reason we intervened in this court simply for that purpose.

Now, we have taken no poll on the suggested arbitration. Time has not permitted it. However, we believe that we can safely say on the basis of a sampling of our membership that if the Association were compelled to make a choice between a system of arbitration and a system of competitive bidding, they would undoubtedly choose arbitration.
(4151)

Many members of our Association called us yesterday and asked us to endorse arbitration because they feared that

If we did not approve that proposal the Court might adhere to its former position in favor of competitive bidding.

Of course, we realize that the Court in asking our position did not ask us to choose between these alternatives. We are only informing the Court as to what our position would be if we had to choose between competitive bidding and arbitration of theatre runs. Considering the question of arbitration not as an alternative to competitive bidding but, as we think the Court intended, as an independent proposition, the Association can take no position whatever. Certainly, many of our members, the number of which cannot be ascertained now, would approve of arbitration as a practical solution in a confused situation.

On the other hand, a number of our members would oppose the incorporation of any such provision in the decree. Their position is that no concerted plan of arbitration jointly conducted by the defendants and approved by the Court can possibly be voluntary in any real sense, since the arbitration of the run of any one theatre would affect all others in a competitive position. If the defendants desire to try out

(4152)

a scheme of arbitration we think they should do so by making arrangements within the industry and without seeking the sanction of this Court. This we realize will be difficult. My clients, however, would, I am confident be unanimous in their willingness to participate in an industry conference and negotiations to bring it about.

That is the statement.

Judge Hand: I do not understand what the sanction of the Court has to do with it. I mean, on its practical side, that I suppose is all your clients are talking about.

Mr. Arnold: Well, I will represent what has been told me without taking a position as to whether my clients who have told me that are reasonable or not. Suppose there is theatre A and theatre B, each of which think they are entitled to a run, and each of which think that if they do not get run it is an arbitrary refusal. Suppose theatre B has the run; sup-

pose theatre A seeks arbitration. Now, of course, it would be utterly futile to arbitrate between theatre A and theatre B with respect to that run on one or any number of theatres, and then have the other theatre come in court not being bound by the arbitration and sue under the antitrust laws.

So as a practical proposition we can't conceive—and I (4153)
think the major defendants will concede this, I don't know—these people who I represent cannot conceive of how arbitration can be voluntary. Now, I do not want to argue here whether that position is a reasonable one or not, but it is a position taken by a very large number of our industry.

Judge Hand: What I was asking was how is it any more or less voluntary because it is or is not set up by a court?

Mr. Arnold: Well, if the Court please, we suggest that if all the Court is saying in the decree is "You can get together and arbitrate," it is just a perfectly futile provision. And we must be—and I must be very careful and say that the "we" I am now talking about is this group—this group does not think it is possible to incorporate anything in the decree which is not a complete futility which to a certain extent has not compulsory features. Now, that is the opinion of a group in our industry. Another group says, "Well, all right, we like arbitration."

Judge Hand: We may or may not have power; we may or may not think it desirable under the circumstances; it may or may not be true that we should do it without consent of the groups. But the difference you fail to point out in (4154)
any way that is convincing to me between something that is set up in the way you have suggested and something that is set up by the Court—that is, it just does not mean anything to me. I do not understand that.

Mr. Arnold: Well, let me see if I can make it clear: If the Court—and I assume the Court would only want to set up a workable system of arbitration—if the Court sets up a workable system of arbitration, it allows the defendants

to combine, says this particular group; it allows these defendants to combine in that system and gives a certain psychological sanction to the arbitration.

(4155)

This group thinks that there is no possible way that these defendants can effectively combine to put in anything that will work unless the arbitration of the run between Theatre A and the distributor binds Theatre B; and they simply say it would be a complete futility to put it in the decree of the Court unless it did contain a compulsory feature. That is the argument I wished to make.

Judge Hand: You mean they want more parties to the arbitration?

Mr. Arnold: No; they say that it is impossible to arbitrate the run of Theatre A without affecting the interests of Theatre B.

Judge Hand: May the Theatre B be heard?

Mr. Arnold: If Theatre B wanted voluntarily to be heard and wanted voluntarily to arbitrate then we need nothing in the decree; but if Theatre B did not want to arbitrate, the arbitration on behalf of Theatre A would be a complete futility because, theoretically, Theatre B would, the minute the arbitration was through would sue, because he was the man who was arbitrarily deprived of the run. Don't make myself clear? That is the fear of this group, that if the Court puts anything in there that is effective at all, it will involve a certain——

(4156)

Judge Goddard: So far as you know, has that been found to be a real objection in past arbitration? I am afraid not.

Mr. Arnold: Well, I am in the unfortunate position here of representing two groups and not being able to argue whether this group is reasonable in their position, but that is their position, as the Court knows. There is one suit now pending under the old decree, not to review the arbitration but to say that it was binding people who were not parties to the decree.

Judge Goddard: We have had three or four hundred of these arbitrations. As far as I know, that point has never been raised. No objection has been raised on that point.

Mr. Arnold: There is a suit now pending.

Judge Goddard: That is the exception, one.

Mr. Arnold: And we have not polled our membership to tell you how many people take that exception. I am only now trying to represent that a certain number do, and, in order to explain what our position is, I am simply explaining why they do. Have I made that position clear? And I am not authorized to argue the power of the Court, or anything of the sort. I am simply giving an actual picture.

Mr. Seymour: May I just say that Mr. Arnold's remarks have been directed really at the arbitration part of this

(4157)

proposal. Now the arbitration part of it is simply an implementation of the injunction, an additional remedy of injunction. It is the injunction which with the arbitration seems to us perhaps to be aiming in the direction which your Honors' suggestion of competitive bidding aims, because it provides for an opportunity to negotiate for a better run rather than going through a lot of formalities about bidding and enjoins us from discriminating.

I would like also to say that this suit that Mr. Arnold refers to is a suit in which Mr. Russell Hardie represents the plaintiff and in which the charge is in essence that the consent decree was an illegal conspiracy between the defendants, the Attorney General, and the court.

Mr. Arnold: That suit, incidentally, is brought by one of the members of this association. So if I made the opposing positions clear I think I have done about all I can, and we end with the suggestion that from the point of view of the consent of all the members of this association, we would be, as I said, much happier if this thing were tried out without the sanction of the court, and I think I can say that all of

them would be willing to work it out in a conference if it could be worked out.

(4158)

Mr. Proskauer: May I ask your Honors to keep as a separate matter this question of arbitration? I want to be heard on that with your Honors' permission a little later, and I shall have a good deal to say about it. Therefore I am rising to emphasize what Mr. Seymour has said. We didn't suppose that this proposal was going to precipitate the discussion on arbitration as such. The gravamen of this suggestion is that it is a further injunctive prohibition against us to refrain from discriminating in runs as well as in clearance.

Mr. Wright: If the Court please, in view of your Honors' *statement the other day that you, Judge Hand, did not understand* why our position had become what it is on this arbitration question and in view of Judge Bright's last question before the recess there on Tuesday, I would like to tell you fully exactly how we came to be where we are now.

When the Court suggested that the use or arbitration in connection with its proposed decree, and conditioned that use upon the consent of the parties, we assumed that since we were a party to the litigation that such relief was conditioned upon our consent as well as that of the defendants who might be subjected to it. We regarded the opinion as an invitation to sit down with the defendants and if we

(4159)

could, work out a method of arbitration which would be an effective means of enforcing a new decree. When we attempted to do so we were promptly met by a refusal on the part of three of the defendants to even discuss the matter at all—the three minor defendants. The five major defendants were delighted to discuss the matter but it became immediately apparent to us that they were not prepared to agree to any substantive provisions which would mean surrender by them of any of the power that they now have to control run and clearances.

We took to be the essence of the Court's opinion that that control must in any event be transferred from them to exhibitors who were not parties to the lawsuit.

Now in short we assumed that we were the prevailing party in the litigation. The defendants were not convinced by the opinion that they had not prevailed.

Now they regard our position in that respect as intransigent but that is what it is.

On such circumstances there simply is no basis for agreement between them and us.

In view of the fact that we have taken the position we have that arbitration on their terms would not grant satisfactory relief and therefore could not be embodied in the decree, we were somewhat surprised when they continued to press upon this court the adoption of their arbitration system. We make no secret of the fact that we view this
(4160)
move with considerable skepticism and that skepticism has not been abated or changed by their present insistence that they don't intend to have the system operate as a substitute for such contempt proceedings as we might be able to bring to enforce such provisions as we thought would be effective to apply the Sherman Act to the defendants in this case.

Now it seems to me that it is quite apparent from that insistence that what these major defendants are after is a judicial sanction for an arbitration system the rules of which are collectively negotiated by them, a system which is financed by them under rules which in our view contradict rather than implement the standards of conduct that are required by the Act that this Court is here to enforce.

Now apart from that question of lack of our consent, this dilemma that Mr. Arnold referred to and which is directly raised in this suit that is now pending in the Eighth Circuit Court of Appeals, is one which I think can be passed over lightly. It is true that we think that particular attack should fail. What has happened there is that this exhibitor

in St. Louis who did not agree or intervene in an arbitration proceeding is complaining about the fact that the award which was entered without his consent in that proceeding,
(4161)
or the suit in which the decree was entered, had the effect of reducing the clearance which he had previously enjoyed.

Now I don't think there is much difficulty presented by that suit in view of the fact that the awards under the consent decree are pretty carefully framed in negative terms and were consented to by the Government and were adopted only as a temporary measure subject to ultimate judicial review here to decide what the final solution should be.

But even if that is so, I think you are presented with quite a different question. If you try to incorporate in a decree an arbitration system which is not consented to by the Government, which simply represents what these defendants are willing to agree to, and which would, if it were to do anything effective at all, probably result in the grant of affirmative rights which would be more difficult to defend against the claims of non-parties to the arbitration and the suit than the kind of arbitration we have heretofore had under the decree.

Now Mr. Seymour suggested Tuesday that our refusal to go along with an arbitration proposal of the kind I have just discussed is also a strategic position on our part, and we don't deny that. We think the strategy of both the plaintiff and the defendants in this case is fairly obvious.
(4162)
Our strategy is to insist that this Court direct its attention to the means short of divorcement by which the unlawful combination that has been found to exist among the five major defendants may be dissolved.

In now proposing a system of settling industrial disputes ...ough an arbitration system jointly established by them, the major defendants' strategy is clearly directed toward the entry of a decree which will continue to let them use joint action to control the run and clearance structures we now have.

Now for the purposes of dissolving the basic unlawful combination among the major defendants, such joint agreement as evolves from luncheon talks among their counsel have little more virtue, as far as we are concerned, than the arrangements found illegal by this Court which evolve from concerted action among their clients. The fact that counsel for these five major defendants may agree on any proposal for relief against all of them is simply a guarantee that such a proposal itself will represent the lowest common denominator of whatever privilege each defendant individually might be willing to surrender.

(4163)

We insist that a primary objective of any decree that this Court enters in this litigation must be to compel completely individual and independent action by all of these defendants, and particularly the major defendants in this litigation, in their future business dealings.

There is no question about the fact that an unlawful combination has been found to exist among them, and the primary question that we are here to discuss is, I take it, how shall that combination be dissolved by provisions short of divorcement.

We have proposed here a decree which, we think, is effective for that purpose, and we are here to be heard on that decree, those proposals that we have offered, and I do not think that this time, that was set long ago, last June, to consider proposals in final form that we and the defendants have offered to the Court, should now be taken up to consider some alternative that has just been handed to us this morning, and with your Honors——

Judge Hand: That may be so, but you are making just as fundamental objections to what we decided as they are, just exactly.

Mr. Wright: I do not understand that we are, your Honor.

Judge Hand: Of course you are.

Mr. Wright: May I ask in what respect?

(4164)

Judge Hand: Your amendment here about their being unable to license to each other goes to the root of the thing, and you are re-arguing the whole thing again. I do not criticize you for it, but do not criticize them for re-arguing it.

Mr. Wright: I was not criticizing them for re-arguing it.

Judge Hand: I think you are.

Mr. Wright: I was suggesting that three or four months was sufficient time in which to have prepared and put before this Court such final proposals as they wanted to offer for inclusion in a decree; that I did not suppose that this was a point at which we would take off on new proposals which had not been submitted by one to the other.

I do not understand your Honor's statement, frankly, that our proposal is in any way inconsistent with what the Court found. As I see it, the Court found an unlawful combination.

Judge Hand: Inconsistent with what they decided. Whether they made philisophical or factual findings to the contrary is capable of argument, of course, and you are making it.

Mr. Wright: I take it the only decision that is foreclosed from reconsideration here is the decision that the combination should not be dissolved by divorcing these defendants

(4165)

from their theatres. I take it that the Court did not mean to intend simply by outlining the terms of a decree to prevent the discussion here of such other injunctive relief as might be effective to dissolve the combination, particularly——

Judge Hand: I do not say that we did. I am criticizing you for criticizing other people for arguing for their setup.

Mr. Wright: I withdraw the criticism.

Judge Hand: I do not think that is important anyway. Let us not discuss it.

Judge Goddard: Mr. Wright, in the prayer of relief, in the supplemental complaint, the Government asks for arbitration, as I recall it.

Mr. Wright: That was necessary, of course, to give jurisdiction for the entry of the decree which embodied that arbitration. There is no question about that.

Judge Goddard: It is a relief asked for.

Mr. Wright: That complaint was filed simultaneously with the consent decree which included that relief, but I am telling you what our present position is, which is different from that when the complaint was filed, admittedly, in that respect.

(4166)

Now, I do not know whether your Honors want me to spend any time discussing these proposals that we have seen or not. If they are still regarded by the Court as possibilities, I will discuss them, but if this withdrawal or this substitution of the defendants is regarded as making them unacceptable to the Court, since they are unacceptable to us, I do not want to waste time on it.

Mr. Caskey: Now, Mr. Wright, let us understand it: The opinion of this Court directed that a decree be submitted embodying provisions for competitive licensing of pictures, and in accordance with that request of the Court we submitted the provisions which are set forth in section 2(7), which is a detail plan for meeting the Court's opinion. We were not privil ged to submit alternatives. It was our duty to comply with the Court's request following the arguments of the friends of the Court and the interveners, and we have outlined the provisions which Mr. Seymour and Mr. Davis have submitted. Now, so far the argument has primarily gone off on arbitration, which is not the essence of the problem at all, because what we are submitting is two injunctive provisions of substance, one against discrimination in licensing runs, and the other against refusing to license any run; and

(4167)

these two injunctions are suggested as an alternative for the means which the Court formulated to deal with the problem of run, namely, competitive bidding.

Now, the argument on arbitration is a wholly different problem. We have made it perfectly clear that the arbitra-

tion proposals are a supplemental relief to be given to exhibitors and are not in any way to impair the right of the Government to proceed in the future in such manner as it may be advised.

Mr. Wright: May I address myself to the substance of these proposals?

Judge Hand: Yes.

Mr. Wright: Now, as we see both, their competitive bidding proposal and this one that has just been handed us this morning, there is nothing in either of these which would compel any one of these major defendants as theatre operators to bid against each other as a theatre operator in licensing the films of anybody. Now, the evidence in this case is clear that they have not engaged in competitive bidding among themselves for anybody's film product in the past, and there is nothing in the decree proposed by the defendants which would offer them or offer any inducement to them to engage in such competition in the future. Now,

if they are to be left in a situation where they retain the same economic interest in cooperation with each other, derived from theatre ownership that they have had in the past, it seems plain to us that strong affirmative measures must be adopted to see that such collaboration does not occur in the future. Certainly, the smaller towns and larger first run situations, where there is now no independent first run competition, or no first run opposition to them, are themselves a partial product of this past collaboration between them. Now, just so long as they are permitted to continue to do business with each other, both as theatre operators and as film distributors, it is difficult for us to see how such future collaboration may be avoided.

Now, certainly——

Judge Hand: I do not entirely get your thought, but I supposed your thought was that they had so much economic power among them that they would outbid some of these larger independents, and the stronger independents would

outbid any other independent. Now, you say they won't bid against each other, and therefore the bidding in any particular situation would be left to a single independent, and that would seem to be an advantage by a lack of competition to the independent, wouldn't it?

(4169)

Mr. Wright: I am addressing myself, if the Court please, now to the situations where there are no independents, where the situation is completely dominated by them, and as I say, in those situations what is proposed here simply does not give any promise of introducing competition that did not exist in the past.

Judge Hand: I should think that might be true in places like Cincinnati.

Mr. Wright: Well, there are a substantial number of those.

Now, if the decree that is entered here does not succeed or change the presently established pattern of distribution, which is itself the product of the concerted action that was condemned by the Court, then we think the decree would be a failure by Sherman Act standards.

Now, our key proposal for compelling the major defendants to cease agreeing with each other as to how their product should be marketed, and to induce them actively to compete with each other both as distributors and exhibitors, is embodied in paragraph 8 of section 3 of our proposed decree. That is the section which contains the prohibitions primarily directed at the major defendants in the suit.

Judge Goddard: Mr. Wright, didn't you suggest yesterday that one defendant might not use the pictures of another

(4170)

major defendant?

Mr. Wright: That is the provision I am talking about. This paragraph that I have just referred to enjoins the major defendants from exhibiting films which they produce and distribute in each other's theatres for a period of ten years. Now, at the conclusion of the period it provides that

any part may come in and modify the provisions in any manner which the facts then appearing to the Court may warrant. It does not prohibit any defendant from exhibiting its own films in its own theatres or from exhibiting there the films distributed by the three minor defendants, Columbia, Universal and United Artists, or the films distributed by non-parties to this suit.

Now, the films that major defendants distribute may be exhibited either in their own theatres or in theatres not owned or controlled by one or the other major defendants.

Now, a similar proposal was briefly considered at the argument of this case. Discussion of it arose in the following manner, and I am quoting from pages 2574 and 2575 of the printed record:

"Judge Hand: Would you ask for a decree that the picture owner or distributor would only play his pictures in his own theatre or in that of the inde-
(4171)
pendents?

"Mr. Wright: What kind of decree might be a substitute for divorcement if it were coupled with, of course, a freeze on theatre acquisitions, because if you had unrestricted interchange of theatres, you would have a situation such as Kansas City, where five of these people each has a first-run theatre."

That statement was incorrect. It should be four instead of five.

"I would expect that kind of provision to lead really to the divorcement of theatres, because it would take the monopoly value away from them that they now have, and if you took that away, I don't think these defendants would want them. That is, the main purpose of their structure is to use these outlets as means of preferential treatments for each other.

"Judge Hand: You think they would prefer total to partial divorcement?

"Mr. Wright: That is a matter for them, I think, to express themselves on. I do not pretend to know."

We now have express confirmation from Mr. Proskauer of my suggestion that the major defendants would rather (4172)
not have a theatre unless they are free to use it as a means of providing preferential treatment for each other's film product.

Now, at page 4009 of the transcript of Tuesday, he said:

"My people estimate that if we in our theatres, Warner Bros. in their theatres, could not buy any pictures of any one of the other majors that we would be closed 65—is that the figure?

"A Voice: Yes.

"Mr. Proskauer: —approximately 65 per cent of the time."

Now, let us consider exactly what he told the Court when he made that statement. What he is saying in effect is simply that Warner Bros. is unwilling to keep its theatres open unless approximately 65 per cent of the playing time in those theatres is reserved for the film product of their four major co-conspirators in this case.

Now, as to who gets the remaining 35 per cent of the playing time in Warner Bros. theatres, no anonymous voice is needed to supply the necessary statistics. Quite obviously that will go to Warner's own pictures. Now, any decree of this Court which permits that situation to prevail would simply be a device for legalizing the exclusion of other people's films from their theatres by the major defendants. (4173)

As to the specific effects of our proposal to ban cross-licensing in particular situations, it is wholly unnecessary to rely on any anonymous statistics. The record in this case shows exactly what the actual first run distribution of the defendants' film product was in their theatres and the theatres

of the independents for the entire 1943-44 season in cities of more than 100,000 population. The record also shows the first run distribution of the first blocks of the major defendants' pictures released during that season as between the defendants' and independent theatres in all of the cities of over 25,000 population. We submit that this data, tabulated in our exhibits 428, 428a, and 432, furnish the best basis available to this Court for estimating what the actual effect of our proposed relief would be in the principal cities where the defendants now operate theatres. I also call your attention to a similar tabulation supplied by Loew as an appendix to its brief,—I am referring to the brief filed at the close of the evidence—and the tabulation set forth in our brief filed at the same time at pages 40 through 45. Now it should be borne in mind that in every situation any defendant's theatre would be left with the privilege to exhibit its own product free from any restrictions, plus product of the other three defendant-distributors and the three existing independent distributors, and such new distributors as might be
(4174)
created in the future through the normal process of competition.

What do these tables show in terms of the number of theatres that the defendants would be required to dispose of if this proposal were put into effect. If you will take the trouble to examine them, I think it will be apparent to you that in no town in which they now operate theatres would the application of our provision result in complete divestiture of theatres by any major defendant, unless, as Mr. Proskauer suggests, they cannot keep open any theatre unless it operates primarily for the benefit of themselves and their principal co-conspirators. It is apparent from the evidence in this case that our provision in actual operation in specific situations would only deprive the defendants of a monopoly position wherever they had one. It would take none of them out of any town where any one of them is now operating, providing only that they are willing to operate there on a

competitive basis. Mr. Davis' tabulation, Appendix I of the brief for Lowe, shows that its theatre operations would have been completely unaffected during the 1943-44 season in 11 of the 36 cities tabulated. In 11 more of those cities they (4175)
would have been compelled to give up only one or two pictures. The only cities in which they would have had to surrender the entire product of one of the major defendants are Bridgeport, Canton, Cleveland, Columbus, Hartford, Memphis, New Haven, Springfield, Washington, D. C., Worcester, and Yonkers. There were no independent first run theatres in any of the 11 towns I have just named except Springfield, where the independent had only Columbia and half of Universal, Hartford, where two independents have Warner, Columbia, and half of Universal, and, Canton, where the independent had Fox, RKO, and Columbia. Loss of any privileges they have enjoyed in the past is a result regarded by the defendants as disastrous, but if their situation is compared with that of independent exhibitors, it is by no means apparent that a monopolization of film product is essential to the operation of a first run theatre. Mr. Proskauer's statement that his client cannot operate theatres without access to the product of the other four major defendants in addition to Warner's own films, presents a rather curious contrast to the independent first run theatres which existed during the 1943-44 season with the product of no other major defendant but Warner Bros. This happened in Jacksonville, Tampa, and St. Petersburg, Florida and Waterloo, Iowa, from which you will note that (4176)
situations of this character are not confined to the large cities. If you will examine these tabulations, you can see at a glance that the normal pattern for the independent first run operator is to show the picture of one or two or three of the defendants in this suit. Thus, in towns such as New Britain, Conn., and Hammond, Indiana, the independent first run theatres have only RKO, in Bangor, Maine, and Chelsea,

Massachusetts, they have only Columbia, in Clinton, Iowa, only United Artists, in York, Pennsylvania, only Fox.

In some cases, if the independent is fortunate enough to have most of the first run theatres in the town, he may have as many as four or five of the defendants' product. If he has the same number of first run theatres as the defendants, he may sometimes get a split of the defendant's pictures.

You heard testimony from one well-satisfied independent in this case who was called on behalf of the defendant Fox as to the first run situation in Richmond. Mr. Thalheimer, you will recall, operates three first run theatres there using the films of Fox, RKO, Columbia, and Universal, and from his testimony, which appears at page 1381 of the record, it also appears that Loew's first run theatre plays the product (4177)

of Loew and United Artists, and the two Wilmer & Vincent first run theatres, pooled with Loew, play the product of Paramount and Warner. Thus, Loew's theatre got along very nicely with only its own product and that of one of the minor defendants and the two other first run theatres pooled with it, got along with only two other defendants' pictures. The effect of the defendant's competitive bidding proposal would, of course, be to place in jeopardy all of the product which Thalheimer now exhibits and he would in return have an opportunity to compete with Loew only for the product of United Artists. The effect of our proposal would be to permit Loew to continue to exhibit what it now exhibits plus whatever firms of Columbia, Universal, and independent product it might bid away from its competitors. Certainly as between the two proposals, ours offers a greater protection to the independent exhibitor than the defendants' proposal and it does not, by the widest stretch of the imagination, require Loew to dispose of its theatre in Richmond or any theatre in any town where it does not insist on monopolizing the film supply, whether individually or in combination with other major defendants.

A situation similar to Richmond is Louisville, which you heard described by Mr. Stites on Tuesday, Tr. 4125.

(4178)

There we find that Mary Anderson, an independent theatre, subsisting on Warner product alone. The Mary Anderson's very existence would be put in jeopardy by the defendants' propasal, while our proposal would do no more than to prevent Loew from taking the Warner product away from the Mary Anderson while at the same time permitting Loew to continue to show exactly what it shows now, that is, Loew, United Artists, and Columbia, plus whatever product of independent distributors or other minor defendants which it can secure in an open market.

(4179)

Now of course it is apparent that in situations such as Cincinnati, for example, where RKO has all of the first-run theatres, that first run monopoly would be broken because RKO could not continue to exhibit all of the defendants' product first run but would have to content itself with approximately half. This would mean that in Cincinnati RKO would either give up some of its eight first-run theatres to independents or keep all of its theatres and supply them with a greater proportion of pictures distributed by the minor defendants and independents than it has heretofore. We cannot see how either alternative could be regarded as disastrous from the standpoint of effective Sherman Act enforcement, or from the standpoint of RKO's survival as a theatre operator, unless such operation is dependent upon monopolization of film product for its success.

Of course, in any closed town or closed first-run situation, that is, where one or more of the major defendants own all of the theatres or all of the first-run theatres, the effect of our proposal would mean either the disposal by these defendants of some of those theatres or the opening of new theatres in independent hands which would play the product of the other majors. It might well result in the sale of a number of so-called move-over first-run theatres by which these defendants have been accustomed to expand their first-

(4180)

run revenue at the expense of the following runs. But in no

case would any of these major defendants be eliminated as first-run theatre operators in those towns. They would only be deprived of a dominant position there. And again we see no basis for suggesting that that kind of divestiture is either economically ruinous or inconsistent with this Court's opinion.

Judge Hand has asked me to point to the public benefits from such a result and those benefits are the advantages which are presumed to flow from operation of theatres by genuine competitors instead of by members of former members of an illegal combination. If this Court believe that such benefits are illusory, I can only say that Congress and the Supreme Court, as exemplified by its Crescent opinion, believes they are not.

Judge Hand: Of course, one of the apparent difficulties with your argument is not necessarily that they could not get along if they could not license their films to other people, but that in a great many of these towns the towns could not get along. They would not get a good variety of pictures. In other words, you are again using this argument, which is perfectly proper that you should use—I am not criticizing that—but you are using it for divorcement. Isn't that true? (4181)

Mr. Wright: I insist that I am not using it for divorcement. I say that it only amounts to divorcement if the defendants are unwilling to operate without a monopoly position. If they are willing to compete it amounts to only a divestiture of a few theatres where they are the dominant operators.

Judge Hand: In other words, you think it would only affect a few cities, that the people in most cities could get all of this variety.

Mr. Wright: It will affect a substantial number of cities but I submit, if the Court please, that what the people get in those cities is in no way harmed by this kind of proposal. The same number of theatres that are there now will be there. Perhaps a few more. The same number of pictures

that have been available for exhibition will be available too. What we have is a resettling of the patterns of distribution so that where you now have only major first-run exhibitors or where the independent exhibitors exist but are in a minority position, you have a situation where the product is so distributed that there is active competition among them.

Judge Hand: Yes, but these defendants have very good pictures, all of them. You all know that.

Mr. Wright: Yes.

Judge Hand: And in these towns you are talking about,
(4182)
without this cross-licensing system, as you call it, they couldn't get those pictures.

Mr. Wright: I don't understand your Honor's question. You say without cross-licensing they couldn't get those pictures?

Mr. Proskauer: Of course they couldn't.

Mr. Caskey: Take New Haven, Mr. Wright. What would you do there?

Judge Hand: How could they? They may get pictures according to your idea that are just as good or even better from the minor defendants or from some others, but they couldn't get those pictures.

Mr. Wright: There is nothing in this record if the Court please that shows that the citizens of New Haven are in a worse position if some independent exhibitor should exhibit them than if one of those defendants should exhibit.

Mr. Caskey: There is no independent.

Mr. Wright: I merely point out under this provision there would be an independent first-run exhibitor in that town.

Mr. Proskauer: In other words, we have to divorce.

Judge Hand: Well, that comes to divorcement again.

Mr. Wright: It doesn't come to divorcement if the Court please, because it doesn't take them out of the theatre busi-
(4183)
ness as theatre operators. It would require them in New

Haven to sell some of all of the theatres which they now own. They would not have complete control of the New Haven first-run situation. They would have independent competition.

Mr. Caskey: Created by divestiture.

Mr. Wright: I think the point at which our proposal is vulnerable is not the one suggested by the defendants, that it would bring economic ruin on them, or foreclose the kind of competition that the industry ought to have, but that it leaves each of these major defendants with a tremendous competitive advantage in any competitive situation by virtue of its own supply of film. Whether this advantage is in itself in the long run enough to prevent or frustrate any efforts to introduce competition into this industry is a serious question which this Court's decision has resolved in the negative. However, it seems to us not only consistent with that decision, but essential in the light of the decision to see that the decree that is entered here does give affirmative relief which will at least break up the pattern of non-competitive distribution that presently exists.

Judge Hand: What about this suggestion of yours which you are now urging very strongly against this kind of licensing? If the competitive bidding was eliminated which

(4184)

everybody—I don't know quite what your own position is—but about everybody more or less mildly or strongly objects to——

Mr. Wright: Well, we believe in it as a method of solving controversies between people of relatively equal bargaining strength such as the independent elements of the industry. If two independents want to exhibit the same pictures on the same run which excludes the other one, I don't know any better way to settle that problem than by saying that the one who bids the most money for the run gets the picture, gets the run.

Now that, it seems to me, is implicit in any kind of system of competitive distribution that I envisage.

It is perfectly true that you run into serious administrative difficulties if you are going to have some kind of auction system and you run into serious administrative difficulties if, as is the custom, your bids or offers or rental terms are phrased in percentage terms. The difficulty there is that you never know—I assume of course that the losing bidders will be permitted to see the high bid, although the defendants' proposal does not cover that point—but suppose they look at the winning bid and they see that somebody has accepted 30 per cent when they bid 40 per cent. Now you never know whether that 30 per cent bid was the high bid until you audit (4185)
the receipt of the winner on the actual run of the picture.

Now if you are going to expose to virtually public audit the winner's receipts in this manner, I don't think these people are very long going to engage in active competition on that basis. I think then perhaps you are almost driven into some sort of a collusive scheme. And for that reason we have not attempted to do anything more with competitive bidding in our proposal than to simply state what we deem to be general principles for resolving these controversies where two or more want the same privilege which excludes the other.

I would like to address myself for a moment to our paragraph 10 of our section 2. That is the section that refers to the licensing practice, and that contains our proposal——

Judge Bright: Before you do that, I would like to ask you one question about this paragraph 8, about which you have been talking.

Mr. Wright: Yes.

Judge Bright: Now would that be fair in a situation where only one of the majors is an exhibitor?

Mr. Wright: In a situation where only one of the majors is an exhibitor? He would be unaffected if he were showing less than half of the eight majors' product. He is only af- (4186)
fected where he has a dominant position. Where he is exhibiting all or a majority of the available product—

that is, where he is relying on product of the other major defendants in addition to his own rather than his own product plus product of the minor defendants and independents.

Judge Bright: You don't so limit that in your Section 8.

Mr. Wright: Yes, we do so limit it. The limitation is perhaps obscure there.

Judge Bright: I can't even see it. It is more than obscure.

Mr. Wright: It is there by reason of the limitation of Section 2 of the decree, or Section 3. You will note in the first paragraph of Section 3 of the decree that that applies only to the corporations which are part of the structure of the five major defendants in the suit. That is the way the limitation is in there.

Judge Bright: Which provision is that?

Mr. Wright: At the beginning, the first paragraph of Section 3 of our proposal.

The Court: Yes.

Mr. Wright: You see the enjoining phrase——

Judge Bright: Yes.

Mr. Wright: —refers only to the corporations which are (4187)
part of the five-theatre-owning defendants. It does not refer in terms at all to the minor defendants.

Judge Bright: I guess perhaps you didn't understand what I was driving at.

Mr. Wright: Perhaps not.

Judge Bright: In your Paragraph 8 of Section 3——

Mr. Wright: Yes.

Judge Bright: —you prohibit the majors from licensing other majors' films.

Mr. Wright: Right.

Judge Bright: How would that be fair in a situation where a major alone has a theatre? Why shouldn't he be permitted to use the product of the other defendants?

Mr. Wright: Well, I submit that the reason for prohibiting him from such a use is not necessarily that such use

would be in itself illegal, but that you have a past pattern of which he and the other defendants have been a part of illegal conspiracy and because of that you are justified in adapting means to permanently break up that conspiracy.

Now there is nothing startling about that kind of relief in Sherman Act cases. Almost every decree that we have that is effective does go further than merely enjoining the members of an established conspiracy from doing acts which would be legal in themselves.

And while I am on the point, I would like to clear up a couple of misstatements that were made about the Hartford-
(4188)
Empire case. That case did decree licensing on reasonable royalties for future as well as present patents Similar relief was decreed in the National Lead case in this district. That case is on appeal. We appealed in the ground that the provision should have been royalty free——

Mr. Caskey: Mr. Wright, that was only improvements on existing patents; that was not new patents——

Mr. Wright: One of the defendants has now come in and insisted that the relief should be royalty-free licensing because there is no possible way of agreeing on a reasonable royalty.

Those cases I think have some relevance here to our provision 10(a) of our section 2. That is, our so-called sum run provision. We provide simply that each exhibitor who wants it is entitled to sum run of the pictures that these defendants release upon reasonable terms.

Mr. Caskey: Mr. Wright, may I interrupt. Have you finished with your argument on cross-licensing?

Mr. Wright: Our argument is in one piece. We offer the cross-licensing prohibition as an integral part of our decree to be considered with the provisions that I am now discussing, the sum run and our treatment of competitive bidding.
(4189)

Now, as I say, we have in our section 10(a) provided a sum run provision of that character which would require

the licensing of a run upon reasonable terms to anybody who wanted it. Now, that provision while it has an effective sound, does also present serious administrative difficulties, because the determination of what reasonable terms are in any of these situations is a rather difficult thing to get at, but in principle we think that is a sound form of relief to prevent the extreme form of discrimination; that is, where a defendant distributor may say in order to protect some favored customer, "I am not going to license you at all because I want to protect the revenue from this competitive theatre."

That is the only way I know how to answer that form of discrimination.

Now, our sub-section (b) is the only provision there which really discusses competitive distribution of runs as such, and we provide there simply that where two or more exhibitors are both seeking a run which excludes the other, that it shall go to the highest bidder.

Now, the last phrase that we added there——

Judge Bright: I was going to ask you about that. That proviso is as general as I have ever seen.

(4190)

Mr. Wright: That proviso on mature reflection I hold no brief for. I think that it is probably unnecessary in view of the provision for sum run in (a). That is, if you read (a) and (b) together I think that takes care of the rare situation where some high bidder might try to exclude by his bid a competitor from getting any later run of the picture at all. I think (a) with (b) with the proviso stricken would be workable.

Judge Bright: Well, he would do that on his own if he attempted anything like that and somebody agreed to it.

Mr. Wright: Yes. I think you may assume that the proviso in (b) is stricken, but that, of course, is with the qualification that (a) goes with (b). I think they have to be read and used together.

Now, all we did in (c), of course, was simply take the language of the Court verbatim in terms of preventing dis-

crimination, and we also simply took the Court's language verbatim in our (d) which requires the offer to theatre by theatre, and picture by picture, which seems to us is obviously the only way in which you can have a genuine competitive disposition of films.

Now, we are not at all prepared to abandon the principles of competitive distribution of runs in those situations
(4191)
laid down in the Court's opinion. We think they are sound providing that they are coupled with the prohibition against cross-licensing which does not compel, or, rather, which eliminates the possibility of your independent having to compete on an auction basis, let us say, with one of these defendant's theatres, where he is faced by a situation where his competitor has an assured source of supply on whatever discriminatory terms he desires to employ, and everything that he has is open to competition. Well, we just don't think that kind of competition would be of any benefit to the non-parties to the suit. But if limited to situations where the non-parties face each other, then we think the Court's proposal, as embodied in what we have offered you, is the best statement of general principles that can be incorporated in the decree.
(4192)

Unless there are some questions, I think that is the essence of our proposal as to what the Court ought to do in lieu of the competitive bidding scheme outlined in the opinion.

Judge Bright: I still do not think you have fully answered the question which I asked you about the situations where one of the major defendants was the only exhibitor in any particular community. If you exclude them from using the product of the other four majors, not only they will suffer but the public will suffer from not being permitted to see those pictures.

Mr. Wright: I take it you are not now talking about a so-called closed run situation; you are talking about an actual closed town, that is, where the town has presently no

other theatres than those operated by a major defendant, is that right?

Judge Bright: That is right.

Mr. Wright: In that situation, I would say this, that there the proposal does compel that exhibitor to either dispose of one or more of his theatres, that he now has there, to some independent, or, certainly, an independent will be induced to come in, knowing that he can get the product of four of these companies, which that single major defendant cannot do.

I think I have pointed out that we suggested, of course,
(4193)
a period of adjustment before the provision went into effect. During that period we think there would be adjustments of two kinds, one, the divestiture of some theatres by these defendants; two, the formation of new distributing groups to enter the distribution field; and, three, the production of substantially more features by each of these defendants themselves. So that the precise effect of the provision when it went into effect, could not be accurately anticipated in advance of those adjustments.

Judge Goddard: How would a producer feel about going ahead and producing more pictures when his market is limited, greatly limited? He would be running into a losing business?

Mr. Wright: If you are talking about a distributor which is a part of or affiliated with one of the major defendants, he is now in the fortunate position of having an assured market and would still have an assured market for his pictures in his own theatres.

It is perfectly true that he would have to go out and seek new outlets in many situations where he now licenses another major defendant, but I am pointing out that the outlets are there. They are in independent hands.
(4194)

Judge Proskauer said yesterday——

Judge Goddard: What facts have you to support that? Don't you suppose that they are placing their pictures with every theatre they possibly can now?

Mr. Wright: Obviously, in first run situations there is an exclusionary element in the placement. You make a selection for first-run situations and, to a lesser extent on subsequent runs, between a number of possible outlets. I am simply saying you would have to select other outlets than those that they now have in a number of situations.

Mr. Proskauer said yesterday, as far as Warner was concerned, the money they made from distribution was made by selling to 15,000 independent exhibitors anyway; that is where the profit in the distribution end of the business came from.

The defendants throughout the trial——

Mr. Proskauer: Why don't you be careful in your statements?

Mr. Wright: (Continuing)—offered statistics to show that, apparently, they licensed each other's theatres simply as some form of public service. All we are telling them is to leave the public service to each other and go out and make some more money by selling some more independent accounts. I don't think that is a particularly harsh treatment as far as they are concerned.

(4195)

Judge Bright: It seems to me that the net result of the situation that I mentioned, in which you say you exclude the use of the product of the other defendants——

Mr. Wright: Other major defendants.

Judge Bright: (Continuing)—the other major defendants, would be to say to the defendant who was operating, "You have a monopoly in that town. You had better get somebody else to enjoy that monopoly."

Mr. Wright: It does not give anyone else a monopoly. All it does, it is saying, "You have a monopoly in the town. We are going to take the monopoly away from you. Someone goes in against you," but it leaves him in the town so that neither he nor the newcomer has the town.

I submitted in some of the memoranda that we sent to the Court before these hearings the opinion of Judge Knight in the Schine case. In the small towns, he handled that problem in that suit, those are mostly towns from five to 25 thousand, by ordering Schine to sell a theatre or theatres of his selection in those towns to an independent competitor in order to create actual competition in those towns and destroy a monopoly position.

The monopoly positions that are involved here are, of course, infinitely more significant in terms of industry control than any of those little situations that were involved in
(4196)
the Schine case, and I submit that the kind of relief that is being proposed here is less drastic, if you compare the scale of the violations and the scale of defendant's operations, than the kind of relief to which both Schine and Crescent have been subjected.

Judge Bright: I suppose a fair answer to that is that in the Schine case you had proof of overt acts by Schine, by which he was driving out competition, where there is no such proof available in this case.

Mr. Wright: Oh, now, if the Court please, how can you better dispose of your competitors than by the maintenance of a system by which you jointly control preferential runs and by which you maintain your ultimate price of the product? And that there is exclusion, partial exclusion, is implicit in any system of runs and clearances that you could operate and in the system that was operated here. The obvious effect of it, as the Court pointed out in the opinion in the first-run situations, is to concentrate the available revenue in the hands of the prior run operator by taking it away from those on the lower levels. I do not see how there is any basis for assuming that power so exercised by these defendants in this case is any less harmful than the kind of power that was exercised in the Schine and Crescent cases.
(4197)
It seems to me, essentially, that is the real difference between ourselves and the defendants, that is, we presented the

case and argued the case in terms of market control, actual power to dominate the market, and I think that if the recent decisions of the Supreme Court mean anything, they mean that power is the crux of Sherman Act cases, and that your relief and the effectiveness of your relief has to be tested by what it does to the defendant's power to continue a control of the market when they have been found to have maintained by illegal means in the past.

Judge Hand: I have an idea: Of course, you are entitled to answer these things Mr. Wright has said, but we can go on here while we, according to the old Philadelphia song, are sitting by the winding creeks holding our breath for weeks and weeks listening to this eternal argument. I do not feel inclined to do it very, very much longer. I think we will have to get down to these main issues. The one Mr. Wright has been discussing is a very main issue, and it certainly calls for discussion as to whether we should or should not adopt it. After we have got rid of that point and some of these other main issues, we will have to sit down, when we can get any time to do it, and I get over my conference with the Circuit Court of Appeals, and make our decision in final form. I do not think we can talk here forever, that is all.

(4198)

Mr. Proskauer: I have tried to accommodate myself to that admonition.

Judge Hand: You always do. You are always brief. We really cannot, however, go on in this horrible, horrible pastime of settling decrees, which has always been the most obnoxious thing on earth that I have ever had to do since I have been on the bench. We cannot go on forever with that.

Mr. Proskauer: I will begin then, your Honor——

Judge Hand: It is very important, of course, to the parties and to the situation, and we have got to define our terms and define our situations. We cannot prolong this forever.

Mr. Proskauer: I will begin by saying that my embarrassment is that, no matter what we begin to discuss, and I am not saying this in criticism of Mr. Wright, the answer to it is

not a discussion of the thing that is sub judice at the moment, it is a recurral to those things which have already been threshed out.

Yesterday I supposed that between Mr. Davis and myself and Mr. Wright we had thoroughly discussed this curious situation of enjoining what he called cross-licensing, which is not cross-licensing at all in the technical sense, and I had occasion then to take your Honor's opinion and to point out exactly what we had been found guilty of and what we had been acquitted of. Now today I get an argument that com-
(4198a)
pletely ignores that, that continues to talk about monopolization, that your Honors expressly acquitted us of; that treats the major defendants' buying power as a consolidated thing and that harks back always to what Mr. Wright, really, when you analyze what he said, frankly admits is a coercive divorcement.
(4199)

This notion that if there are three theatres in a town—I am going a little further than Judge Bright's question—let us take a situation where there are three theatres in the town, all owned by major defendants here, but three competing theatres; and he says that those three theatres have got to close because they can't get each other's pictures.

Mr. Wright: I said nothing of the sort. That is what you said.

Mr. Proskauer: Well, I did say it. I say that practically that means they have got to close or be sold, or something, and I am not going to bandy words about it, but what I am trying to say is that it is perfectly apparent and clear over the somantics that Mr. Wright is trying to inject in this discussion, and that is that these people could not see the pictures in those cities.

Now, I advanced the argument yesterday, and I believe that it found some favor with the Court, that the injunctive provisions of this decree were, as I put it, punishment sufficiently deterrent to fit the particular crimes of which we

have been found guilty. I do not want to go over that argument all again. I sympathize very deeply with what Judge Hand has said. May I now incorporate it by reference here
(4200)
and ask your Honors in considering what Mr. Wright has said today, just read what Mr. Davis and I said yesterday in answer to him when he was saying exactly the same thing that he said today, and now revised in a different form with the same assumptions.

Essentially this talk about our not showing one another's pictures is an enforced divorcement which your Honors have held was totally unavailing and totally unnecessary, and if you wish to go into the details of those figures that he has been raising, my friend Mr. Caskey here is ready to take it up and give your Honors a very good talk on it. If you do not want to go into it, we are perfectly willing to let it go.

Now, I am not going to defend myself against certain misquotations here. The 65 per cent figure that I used simply meant that our theatres in certain large areas would be dark that part of the time that we could not get other major product. It did not mean at all that we were taking 65 per cent of the product, because it related only to small areas and special situations. And so I could go through all he said, straightening out these misquotations.

But now I want to follow your Honor's suggestion of coming to what I think is the heart of this thing. The cross-
(4201)
licensing feature we think we disposed of yesterday to your Honor's satisfaction. I agree with Mr. Wright that the purpose of a decree is to cure the evil complained of. Now, in what postures are we here? You wrote, your Honors, that you wanted this competitive bidding. We have not asked you to exclude it from this decree. I wish to make clear our exact position. When severe criticism of it was made by independents or by exhibitors, we undertook to expand the injunctive part of your decree over and beyond something that was not in your opinion, and, namely, to subject ourselves to

injunction with respect to run as well as clearance. I emphasize that. That is the essence of Mr. Seymour's proposal. We are not asking you to enjoin us in this respect. We are suggesting to you that if in your wisdom you believe that the competitive system has too many difficulties, that if you add to the injunctive provisions that are already in this decree the injunctive provisions that Mr. Seymour has suggested, you have effectively created a machinery to destroy the four evils that we have been found guilty of and which I enumerated yesterday. You will kill them if you do that, in our judgment. And I do not want the significance of what has
(4202)
been done here to take either of two aspects, either that we are here trying to get away from your Honors' opinion with respect to competitive bidding—because we are not. If that is what you want, we have suggested clauses to implement it. If you decide to change your minds on it, we give you this suggestion as an additional harness and rein on us that will, we believe, effectuate the purposes of your opinion.

Now, a great deal has been said here about arbitration. I start out my discussion about arbitration by a reference to your Honors' opinion, "Even though we may regard it as desirable that such a system in view of its demonstrated usefulness should be continued in aid of the decree which we propose to direct."

That is what your Honors have said about it. There are two opinions about arbitration among certain groups of exhibitors. All those who have lost arbitration think it is a terrible system, and all those who have won them think it is great, and that is the foundation, I believe, of Judge Arnold's embarrassment in getting conflicting views from various members of his organization; but this system which was set up under Judge Goddard's guidance has justified the encomium that you put on it, which I think no fairminded student of this problem can gainsay.
(4203)

Now, Mr. Wright refers to it as our arbitration system financed by us. That is one of the most—I won't say "in-

decent"; I am looking for a less harsh word than that—I will just say unfair insinuations I have ever heard from counsel in a courtroom. How is it our arbitration system, excepting that we pay for it under the direction of the Court and our consent? Did we appoint a single arbitrator? Every member of the Appeals Board was appointed by Judge Goddard, who was so meticulous about it that he would not even take suggestions from anybody. The panels are chosen by the American Arbitration Association. What does counsel mean by coming in here with the dirty innuendo that that arbitration system is our arbitration system? It is a system set up, to use your language, in aid of the decree, and I propose now to demonstrate to a mathematical certainty that you have got a right to put it in this decree despite the turnabout of the Government.

When it comes to the implementation of it, let me say that the rules of arbitration of course have to meet the approval of this Court just as they had to meet Judge Goddard's approval under the consent decree. It is impossible to make any man arbitrate. You can't force him into this system either by making it a part of a decree or otherwise. (4204)

And in the rare and almost unheard of case where all parties did not gladly come in and consent to arbitration, arbitration would be abortive, and the system would not help with respect to a situation where A and B claim clearance or run, and A wanted to arbitrate and B did not, you would have to rely on the injunctive provisions of this decree, and we would have to decide at our peril, and we could not invoke arbitration whether it was in the decree or out of the decree. But we are not going to cast this system into the ashcan because of that exceptional case. We are going to think of the 400-odd cases to which Judge Goddard referred where everybody was ready to come in and arbitrate it, and we are going to think of the posture that this Court would be in if it does not create such a machinery in aid of this decree where anybody who feels himself aggrieved under this, he has got to go down to the Attorney General and make a motion

to punish somebody for contempt because he did not think somebody restrained from discriminating in giving someone a run; and I am saying to your Honors with all the earnestness I possess as an officer of this court that for your own protection in the administration of this decree; it is vital that you preserve an arbitration system properly and de-
(4205)
cently set up under your own supervision, we consent to pay for it.

Now, I propose, as I said, to demonstrate to a mathematical certainty that you have got the power to do it, and that argument divides itself as a legal argument into two heads. First you have got the power to do it, irrespective of the consent decree; you have got a right to impose upon us our consent to do anything that you think is helpful in carrying out your decree. You have got an absolute right to say to us, "This Court insists that you set up an arbitration system or else we will divorce or give cross-licensing injunctions, or any other thing."
(4206)

If you have got a right to impose it on us, certainly the fact that we are not only ready but glad to have it imposed on us in our desire to bring peace into this industry, does not affect your power to bring peace into this industry, does not affect your power to impose it on us. And when Mr. Wright talks about the bill in this case, to which Judge Goddard referred, in anticipating that reference I had run off here copies of the decretal prayer of the plaintiff that a "nation-wide system of impartial arbitration tribunals or such other means of enforcement as the Court may deem proper be established pursuant to the final decree of this Court in order to secure adequate enforcement of whatever general and nation-wide prohibition of illegal practices may be contained therein."

Judge Hand: Is that the amended complaint?

Mr. Proskauer: That is the complaint upon which this case is now before your Honors, the supplemental and amended complaint.

And while Mr. Wright has got a right just as a mere matter of power to change his mind, though he signed this together with the then distinguished Attorney General, Judge Arnold, he has got a right to change his mind, but that is the pleading we are here under.

Mr. Wright: May I make one point clear right now? If this Court had intimated in its opinion that it could or (4207)

would impose a system of that kind on these defendants, not make it subject to their consent, we certainly would have presented you one, and if that is the position of the Court now, that is something that certainly was not revealed by the opinion. The opinion said that it must be conditioned upon the consent of the defendants.

Now I don't see much point in arguing the matter now as though you had said "it doesn't have to be conditioned upon the consent of the parties. We will impose such an arbitration system."

Mr. Proskauer: As usual, I find myself in a complete haze as to what the distinguished Assistant Attorney General is trying to say.

We proposed and served on him a draft decree calling for certain arbitral provisions. We got back from him a proposal that the whole arbitration system be scrapped. Now I don't know what he is talking about, and I don't want to waste any more time bandying words with him. I am here to ask your Honors to preserve this arbitration system and I am arguing the point that you have the power to do it. You have the power to do it because the Government itself has alleged that it is an appropriate method of carrying out a decree and because the Government itself has prayed for it, and even if the Government had not, you have got a right (4208)

to impose it on us, as I said, as an efficient means of carrying out the purposes of the decree.

Now I don't know what he wants changed in the present system. He has not honored us with his confidence in that

respect. All we got from him, as I say, was a curt statement that the arbitration system would be liquidated.

But there is another point——

Mr. Wright: That statement is untrue.

Mr. Proskauer: Well, I don't propose to argue that with you, Mr. Wright. I propose to finish my argument to your Honors.

This consent decree is not a piece of waste paper. I have read opinions in two cases—the Swift case and the Glass case I think it was—the Chrysler case—where the Supreme Court considered the power of the court to amend the consent decree. I have never heard of any litigation which questioned the power of a court to preserve so much of a consent decree as they thought was proper. There isn't a case like that in the books. That consent decree was a judgment of this court. I am not now talking about it as a contract or any of those controversial things which are discussed in those two opinions. I am taking it at its face. It is a judgment of this court. And if you discard every-

(4209)

thing else I have said up to this point, I would say that your Honors had the power to reserve what that judgment adjudicated, namely, the establishment of an arbitration system. It is in your wisdom to decide whether or not to do it, whether it is an appropriate instrument; but you have the power to do it. After the Government consented to that judgment there isn't the slightest doubt.

Now I want to say one more thing and then I shall have finished. Judge Hand asked, as I understand it, a question that raised the general subject of whether you could not do this arbitration thing outside of a decree of the court. We can't. It raises a question that is too serious legally to be thought of, namely, whether, if we go out and try to agree with one another and with exhibitors to a general system of arbitration, we are not bringing ourselves within the condemnation of those sections similar to what your Honors have condemned as a general system of clearance, and I for

one would not dream of permitting a client to enter into such a system, however beneficial it was, unless this Court ordered it.

Now I see Mr. Wright chuckling, and I know his argument, I have heard it before. It is the absurd claim of the plaintiff in the St. Louis case that the court has authorized a violation of the Sherman Law. And despite his glee I
(4210)
will meet it head on.

What may be a violation of the Sherman Law if it is a voluntary agreement among individuals—and I don't say that this is or is not; I am just saying I am not going to take the chance in the present temper of the Attorney General's office—"Carthage delenda est," if I may quote.

Mr. Davis: It was not original with me.

Mr. Proskauer: It was most original to you. We can't do that. But your Honors can compel us to consent to a system. If we were thwarting the Court and thwarting the Attorney General's office voluntarily, it might be the subject of denunciation from such purists as now seek to enforce the Sherman Law. It does not follow at all from that that your Honors have not the perfect right when the Government prayed for it, when the Government prayed for it, to set up exactly what the Government prayed for.

And I again say to your Honors in all deep earnestness that whatever else you may do with this decree, if you want to keep this Court free from continuity of applications, from embarrassment in the decision of all kinds of controversial questions, and give the independent, if they choose to seek it, a quick, cheap and efficient method of settling these controversies, keep in those provisions for arbitration.
(4211)

Judge Hand: Now, Mr. Caskey, it was said that you have some observations about this matter which the Government calls cross-licensing, which you wish to have put in the decree.

Mr. Caskey: The observations that I have to make are simply to call your Honors' attention to the state of the record upon which any judgment would have to be entered. There is in evidence one exhibit which shows the distribution of the first-run of the product among all of the first-run theatres in the 92 cities in the United States that have a population of 100,000 or more.

Judge Hand: You had better refer to that by exhibit number.

Mr. Caskey: 428 is my recollection.

Mr. Wright: Right.

Judge Hand: And whose exhibit was it?

Mr. Caskey: That is Government's Exhibit 428. That shows with respect to each theatre which operated on a first-run basis the product that it played during the 1943-1944 season.

There is also in evidence—and I will supply the stenographer with the exhibit numbers—answers to interrogatories by each of the eight defendants which show the theatres which operated on a first-run basis in cities of a population of 25,000 or more.

(4212)

Mr. Wright: I think that is 432.

Mr. Caskey: That is right—well, that is your summary.

Mr. Wright: Yes, that is the tabulation from these interrogatory answers.

Mr. Caskey: That is right. That shows the distribution of the first block of pictures released by each of the companies; that is to say, taking Twentieth Century-Fox, which shows where the first block, which was three pictures, played first-run in the cities of 25,000 or more.

There is no evidence as to the product used by any affiliated theatres which operated on other than first-run. There is no evidence——

Mr. Wright: I think that is in error. There are interrogatory answers as to the larger cities, you will recall, which cover the first five runs in the largest, the first four in the next largest, and so on.

Mr. Caskey: That is for 1936-1937 in the old case.

Mr. Wright: No, the 1943-1944 answers. They cover the first five runs in the largest, the first four in the next largest, the first three in the next largest, and so on down, so they do show the extent of the defendants' control.

(4213)

Mr. Caskey: We can't agree on anything. That is, as far as I recall it, with respect to one picture.

Mr. Wright: That is right, with respect to one picture.

Mr. Caskey: With respect to one sample picture and for that purpose that proved nothing.

Mr. Wright: That selection of a sample picture was made on the theory that it would be representative of the defendant's products.

Mr. Caskey: I have to dispute that, I am sorry. It was the picture which grossed the most. It was the picture which had the widest distribution.

Now I repeat, that except for this there is no evidence as to what product any affiliated theatre played when it operated other than first-run, or when it played in a city, or any other run if the city was smaller than 25,000. Now that is from the exhibition end.

Now from the distribution end there are in evidence exhibits and tabulations which are referred to in the Government's brief showing the percentage of revenue which each of the defendants received from each of the affiliated theatres, that is to say, speaking very generally, the proof showed the percentage of Columbia's revenue which it re-

(4213-A)

ceived—not Columbia's, because that would be inapposite—but Twentieth Century, the revenue which it receives from Paramount, Warners, R.K.O., Loew's theatres, its own theatres, and the independents. That would show the per-

(4214)

centage of revenue which it would lose under this ban against so-called cross-licensing, unless, of course, the theatres were sold to someone else and the revenue recouped in that manner.

Judge Hand: This was first-run revenue?

Mr. Caskey: No, the latter referred to the total national revenue that the distributors received.

Mr. Seymour: Could I just add a word upon the subject of cross-licensing, as the Government calls it? It seems to me a most fantastic proposal in favor of restoring competition to take out of competition by court decree those most able, or among those most able to compete. The proposal is a proposal that the distributors should be denied the opportunity to have their product sought by most of the 3,000 best theatres in the United States. And the proposal is, to the defendants as exhibitors, that most of those theatres shall be denied an opportunity to seek or compete for product, and that is all based upon the premise which your Honors expressly rejected, that there was monopolization between these companies in their mutual dealings; and I submit that the proposal is almost too fantastic to merit all the consideration that your Honors have so patiently given to it.

Mr. David: Will your Honors permit me just a word, not by way of argument, but to set the record straight?

(4215)

I dislike this phrase "cross-licensing" in this connection. Cross-licensing involves, by its very use, the suggestion of mutuality. If there is anything in this case which has been proven up to the hilt by every witness it is that there is no reciprocal obligation on the part of any licensee of one of the major's films to reciprocate by a similar exchange of business or, if you choose, a favor.

There is nothing in the record which can possibly support the assertion, much less indicate, that there is a system of reciprocal favoritism.

I much prefer, if we can, to get the phrase out of our minds and that we should drop the phrase cross-licensing and speak, if you please, of inter-defendant licensing. That is what it is. It is not cross-licensing in any sense.

I remember, when the Government started with its charts and exhibits, it spoke of diagonal-licensing, and that, of

course, depended entirely upon the method by which the chart was constructed, and those diagonals did appear. I would rather have diagonal-licensing than cross-licensing.

We were told, when this suggestion came forward from the Government, that it would not hurt us; that, after all, (4216)
we could keep our theatres alight with our own films and with the films of the minors; and we are now told quite frankly this morning, the mask is thrown off, we are told that the real effect of it will be that some of our theatres will be left dark, and the economic consequence of that will be the Government will attain its primary objective and we will sell the theatres rather than keep a caretaker there with no audience to attend it.

In other words, what the Government is proposing is that, instead of using the guillotine on it, it prefers to use slow poison, and whatever satisfaction that evinced I suppose we should be grateful for.

But there is just one aspect of this thing which I do not think anybody has alluded to on this Governmental program. Suppose they were all driven out of the use of each other's films, and when I say all I am speaking, of course, of the majors at the table, and we are all going to be supplied by the minors' films. Has it occurred to the Government that by throwing all that new weight upon the films of the minors, there won't be enough of the minors' films to go around?

If the minors are to fill up the deficiencies in our theatres, we are not going to be helped if we have all got to resort to that common pool and that common pool alone, which, of itself, mathematically, I think, demonstrates that the (4217)
Government cannot have it both ways. It cannot invite us to keep our theatres open from that source and then say, of course, with the demand upon that source, that we can possibly keep our theatres open by using it.

From every angle, if your Honors please, at which you view it, it is a perfectly absurd suggestion. It seems to bear

no resemblance whatever to anything of fact or to anything of law.

And may I say just this about the Sherman Law and about the apparent attitude of the Government? It is very evident that this motion picture scene is not a plateau or a tabletop. It is a landscape with hills and with valleys in it, and some on the hilltops get more sunlight than those who are located down in the lower valleys. It seems to be the theory of the government that on that landscape you can take an iron sheet, called the Sherman Law, and press it down so that when you lift it the landscape will be a level plateau. The Sherman Law does not contemplate that, no law has ever contemplated it, and there is not now, there never has been, and the wit of man will never devise a statute under which one dollar will do the work of ten. Those inequalities will persist as long as the activities of men differ, as long as their capacities differ, and as long as their earnings differ. And the Sherman Law is not directed to the creation of a statute

(4218)

of absolute equality at all. In essence the Sherman Law, and it is often spoken of as the law of the jungle—I do not think it is the law of the jungle, I think it is the law of nature—in essence the Sherman Law is that the race shall be to the swift and the battle to the strong, and no artificial impediments shall be put in their way.

Mr. Jackson: May I ask your Honor whether you would care to hear the attitude of the independent exhibitors represented by Colonel Barton and myself with respect to the proposal made this morning?

Judge Hand: Yes.

Mr. Jackson: I will be very brief. In the first place, in order that there be no misunderstanding either with the Court or with the two thousand odd exhibitors we represent, I should like to say that our instructions were to come here, to appear, to seek intervention, if the Court would permit it, and, finally, to oppose in every possible way the imposition of competitive bidding, or, as it has been called, auction sales.

We are not authorized and cannot part from those instructions. We still seek intervention and we still ask the Court to throw out competitive bidding for the reasons which we have given and which I will not repeat except to say that we regard it as creating a situation where two or more ex-
(4219)
hibitors will compete among themselves as to which shall pay the most money to the distributors. And we believe that the other relief which your Honors have in your decree is sufficient to cure the evils which you have found to exist.

Yesterday we were asked to consider your proposal which Mr. Seymour has presented and we proceeded to consider it and get in touch with as many of these exhibitors as we could reach in person or by telephone. Among those whom we reached, only two have opposed it. They have said that they want neither competitive bidding nor arbitration. They want a free, open and unrestricted market. The remainder of those, and they are not too many, but all we could reach, have taken the postion that this proposal is far less objectionable than competitive bidding, and they would, I think, much prefer to see it go into effect if the sale of features, of pictures, is to be the subject of your Honors' decree.

I think that constitutes our position. Perhaps your Honors would hear Colonel Barton a moment, if he has something to add or anything to correct.

Mr. Barton: May it please the Court, I do not think there is much I can add to Mr. Jackson's statement, except perhaps I might briefly restate our position and enlarge upon our reasons, because I have been in closer touch with our
(4220)
clients, who are scattered from Virginia to Texas, and to Arkansas, than has Mr. Jackson.

They fell, from their experience with the practices of the defendants, which the Court disapproves, that the dozen or so remedial actions directed by the Court will effect the desired results without competitive bidding as outlined by the Court, which is a repetition of the argument I have already made. My clients feel the losses which will flow from the

competitive bidding direction are far greater than any possible benefits which may accrue for the reasons previously stated. We have listened with a great interest to Mr. Davis's plausible sounding presentation of the major producers' version of competitive bidding. In our opinion it does not overcome any of the administrative difficulties which I pointed out and will inflict even greater harm on the exhibitors than we had previously anticipated because it makes the defendants the legislature, the judge, the jury, and, finally, the sheriff, to transfer more money from the exhibitors' pocketbooks to the treasuries of the defendants.

(4221)

Our reiterated plea is that competitive bidding be eliminated from the decree, and, within the limitations of, or the orbit established by the other provisions of the opinion, that the exhibitors be permitted freely to barter and trade with the defendants. We still have some of the faith of our fathers in free enterprise.

In respect to the proposal advanced by the defendants as a substitute for the competitive bidding proposal, we are most desirous of assisting the Court by a definite expression of our views. As Mr. Jackson has said, we have had difficulty ascertaining our clients' views because of the large territory in which they live. Many we have not reached. Two, as he said, are very strongly opposed to the proposal, especially the arbitration provisions. To the extent we have been able to ascertain our clients' opinions, it may be summarized as follows: They are unalterably opposed to competitive bidding as outlined by the Court. They believe that the other remedies which the Court has directed are adequate to cure the ills of which complaint is made without implementing them, these remedies, by competitive bidding.

But if the Court is finally of the opinion that these remedies must be implemented, then our clients feel that the principles of the substitute proposal are much to be pre-

(4222)

ferred to competitive bidding as directed by the Court. I

used the word "principles" because we have not had time or opportunity to go over the details of the proposal with our clients as fully as we should like to do.

Mr. Arnold: In that connection, if the Court please, may I make a request which I have been asked to make on behalf of my client: In the event that the Court should decide on an arbitration system, we would be greatly indebted to the Court if before formulating those findings, our clients should have an opportunity to see them.

Mr. Williams: If the Court please, in so far as my client, the Southern California Theatre Owners Association is concerned, I previously have not had an apportunity to take up and discuss with them the substitute proposal, but I think in essence I can adopt for them what Judge Arnold has said about the American Theatres Association, and I think that fairly represents our position at this time.

Mr. Raftery: May it please the Court, after all the reference to the minors, may I state that all this discussion today brings us back to the proposition that we would like on behalf of United Artists the privilege of submitting a separate decree. We do not like the Government's decree.
(4223)
We appreciate the great kindness in suggesting this diagonal licensing, if I may not be offensive to Mr. Davis, because we realize the great competitive advantage we will have in dealing with the theatres of the big five in the future. We do not like what has been submitted by the majors, and I think I outlined we do not like some of the conclusions of the learned Court. We felt and we argued strenuously, I believe, during the trial that we should, instead of being over here in the bleachers, we should have been outside the fence at all times. We feel there are certain specific findings of fact that as regards each of us separately that make us perhaps no better but at least different from our brethern at this table. We feel to throw us into a decree where we have so many separate problems, that only some of these folks have, —and we did not submit a decree because we wanted to ask

your permission first; we only submitted findings and a brief to support the findings. For example, the definition of a feature picture which Mr. Wright says is anything that is 4000 feet or longer, we think has got to be supplemented because you have in this industry things known as Westerns, which some of us handle, and I do not mean "The Outlaw"; we have Westerns which were sold in series, the only way
(4224)
you could sell them, and that is the only way the exhibitors want to buy it, and we think there should be a specific exemption in this decree that would cover Westerns as well as shorts.

You heard Mr. Isseks yesterday or the day before talk about road shows. My company has roadshown perhaps as many pictures as any other company in this industry, perhaps more. In the old days of the company, Mr. Fairbanks and Miss Pickford and Griffith generally road-showed every important picture they had. Vanguard, one of our producers, has its Duel In the Sun, and wants us to road show that. We think that the Government could aptly sit down with us and work out an exemption on road shows and an exemption on Westerns, because they are not the ordinary supply, the ordinary commodity of commerce that is involved in this litigation. We would like to sit down with the Government, if possible, and with your Honors at some time and consider the findings, our proposals.

When I wrote that United Artists did not fix prices, as your Honors found in your general opinion—I knew I did not brief it before because it escaped my attention, because I believed, perhaps foolishly, that your Honors would find that in view of the fact that there was no sale of tangible
(4225)
property involved in this business, that price-fixing did not apply. I think your Honors made the first finding of this character in all the litigation on price-fixing, that there is something illegal in this type of transaction where you fix an admission price in a theatre. There has never been a

finding in the books, so far as I can find, and I think I have exhausted every authority, where price-fixing in the manner set out in this trial has been held illegal per se by any court. In fact, the basis of every decision where price-fixing has been found illegal is where the seller either parted with the title, or as they did in the Victor case, pretended to make a lease or license when in reality they made a sale.

In that United Artists license agreement of October 1941, I examined every record that was put in, and United Artists did not put in a provision that the exhibitor must charge X dollars or X cents admission to its theatre. The simple provision was that the exhibitor warranted that the admission price at his theatre was blank cents. There was no penalty provision; there was no agreement that he must charge it for the exhibition of that picture; it was a mere warrant. And we ask therefore for the privilege of having our findings

(4226)

passed on individually as they are submitted, and that we be permitted to submit a separate decree, because I look on the price-fixing thing as perhaps the most serious thing so far as the independent distributor is concerned. We depend on our revenue on percentage engagements for all important pictures. We can't accept the suggestion of flat rentals. If we want to go back to the flat rental days in this business, then we might as well give up as far as quality is concerned.

Judge Hand: Had you no provisions in any of your licenses as to price maintenance?

Mr. Raftery: Prior to October 1941 there were provisions in some of the license agreements that are in that the exhibitor agreed to charge for that particular picture. There was no penalty if he did not. From October 1941 every printed contract that Mr. Wright has put in evidence has the mere warranty provision, just as I put it in the proposal, with no penalty——

Mr. Wright: Is it your position that there are no penalties for breach of the warranty or breach of the contract?

Mr. Raftery: Yes.

Mr. Wright: In that I think Mr. Raftery is in error.
(4227)

Judge Hand: What?

Mr. Wright: In that I think Mr. Raftery is in error.

Mr. Raftery: Did you produce a witness to show that we ever exacted a penalty or ever tried to stop an exhibition?

Mr. Wright: I believe if your Honors will examine the agreements he refers to you will find that there are penalties prescribed not for failure to maintain admission prices as such but for breach of the agreement.

Mr. Raftery: There is nothing in the record that we have ever at any time tried to enforce any of those old ones; but from October 1941—and we are looking at the present, not at the past—there is no provision fixing admissions in any one of those contracts.

Now we come to the question of run and clearance. We have asked for specific penalties on those. I am not going to argue that now. We respectfully ask that the Court give consideration to Road Show, to a definition of Features.

I know the independent exhibitors. I know the whole industry will agree that Westerns deserve a special category. I feel that road shows are very important because they do not come frequently, but when they do come they are an
(4228)
emergency type of picture.

I understand Mr. Wright stated in answer to Mr. Isseks that everything was cured as regards Duel In The Sun because he said he heard from someone that Raftery was going to appeal on the price-fixing. That does not cure it. Let us assume that we do decide to appeal on the price-fixing, I feel we will have to, if your Honors adopt this new rule that price-fixing per se is illegal in the manner in which we do it in the motion picture business; I think for the preservation of independent production that we have got to appeal on that.

As regards our other problems—and I have had specific findings submitted—we distribute for about 23 independent

producers. Each of them separately by contract control our general sales policy on each picture. They are the ultimate to say whether we take an agreement or do not take an agreement. I think competitive bidding is one of the loveliest-sounding things that I have ever heard in my 27 years in the industry. I have not the great sympathy for Judge Arnold's clients or Colonel Barton's; I have never known an exhibitor yet who could not take care of himself when he bought pictures.

(4229)

I told your Honors at the opening of the trial we tried to get everything we could get, and they tried to pay us as little as possible, and the injection of competitive bidding is not going to change that. I do not believe that any two clients, whether they are independent or affiliated, are going to break down and start bidding furiously to get any picture we have got. They are going to find a way to control competitive bidding if it is put in, and they will control it by not bidding. I believe that is the only practical thing it will come to.

However, I have no opinion on whether it should be in the decree or out of the decree. I do not want it in any decree against us, and that is the reason I am asking for a separate decree. I want to enter a decree or a proposed decree where there are as few injunctive provisions against us as possible, and no mandatory provisions about what we have to do in the future.

Judge Hand: Why, you just want a decree in your favor.

Mr. Raftery: I asked for that in the beginning.

Judge Hand: I know that, but that is not a settlement of the decree——

Mr. Raftery: I know——

(4230)

Judge Hand: Now, wait a minute. That is the trouble with most of these attempts to settle a decision of the Court. They come back and really put in there what they would have put in if there had been no decision——

Mr. Proskauer: I am not guilty.

Judge Hand: Then I do not see that that serves any purpose; but if you want to put in some kind of a proposed decree with regard to yourself or your clients that meets in general with our decision, why, go ahead. I do not see the difference between what you propose as far as preservation of your rights is concerned and your situation now.

Mr. Raftery: Well, it is a little more than that, your Honor. I think that I am fair in asking your Honors, if I have pointed out to you in these proposed findings what I believe are errors that you have made in regard to United Artists' position—I feel I am fair in asking you to reconsider, for example, on the price-fixing proposition; and if the undisputed evidence is that there has not been a single price-fixing provision in a United Artists contract since October 1941, why is there any necessity of any injunctive provision on that point against a defendant like United Artists? Why should we be put in the same position as the other seven defendants?

(4231)

Judge Goddard: You are only speaking of United Artists——

Mr. Raftery: I am only speaking of United Artists on that.

Now, as regards the Road Show provisions and Westerns, there has been no evidence of any kind or character put into this record except what was advanced by the amicus curiae the other day on what road shows really are. All we have is a definition. We strongly urge that road shows be omitted by specific direction, because we do not think it is going to increase the flow of interstate commerce one way or another. As regards any other definition of features I am willing to accept Mr. Wright's conclusion that 4000 feet—I think he is a little low on it; I think 5000 would be a little fairer—as a definition of what constitutes a feature film.

I do think that we could accomplish a lot if we eliminate road shows and eliminate that and straighten out our facts on United Artists in connection with the price-fixing, and I

intend to sumbit a decree which is not, as you put it, a victory—I intend to submit a decree with the proper injunc-
(4232)
tive provisions in based upon your decision, not on my wishful thinking.

Judge Hand: Well, you can do that.

Now we will adjourn until a quarter past two.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

Mr. Seymour: May it please the Court, I have been asked to carry along now with the discussion of the yellow-covered document, if that is agreeable to your Honors.

I am going to pick it up with section III on page 13 because I think the other intermediate sections, which we haven't discussed, are clear enough on the document without any separate discussion. Involves arbitration and other things which we talked about generally.

Mr. Cooke: If it please the Court, before we proceed to section III, as Mr. Seymour talks about, which concerns the major defendants only, on which I will have nothing to say, might I just say one brief word on the clearance provision in arbitration in connection therewith? It is this, that we feel that the clearance provision on page 4, proposed by the Government, that is, that we cannot grant any clearance
(4233)
against theatres in substantial competition with a theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted, is in direct conflict with the Interstate Circuit case as construed by the Supreme Court itself in one sentence in the Ethyl Gasoline case, in which it said that the restrictions in the Interstate Circuit case were imposed "for the exploitation or promotion of a business not embraced within the patent."

It seems to me that in granting clearance to protect a run, we are doing precisely that. Protect a run can mean nothing else but protect the revenue of the licensee, and we feel that that is something that we cannot do. The major suggestion adds to that, to protect the licensee in the run, the idea of protecting the licensor, and it is my position that under the General Electric and General Talking Pictures cases, the latter decided in 1938, that that is the only proper provision that we have a right to impose any restriction which is reasonably related to the reward of the licensor.

One other thing and I am through, again in connection with clearance: I spoke yesterday of the mutual incompata-
(4234)
bility between protecting the licensor's interest and also the licensee's run, as suggested by the majors, and took one example of a flat rental contract. We sell a picture for a thousand dollars. Your Honors have held that we are completely out on a flat rental contract, that we have no continuing interest there and we have no right to fix the admission prices. Our interest, if we are getting a thousand dollars for that run, is to fix as short a clearance as possible in order that we may be able to get as much as possible from the subsequent runs. That is as plain as could possibly be. What is the licensee's interest? The licensee's interest is to have as long a clearance as possible, so as to be protected as much as possible from the subsequent runs. Therefore, I cannot understand how we can protect the licensor's interest and the licensee's interest at the same time. How can we grant any clearance in excess of what is reasonably necessary to protect both the licensor's interest and the licensee's interest? I cannot understand how any such thing is workable at all. Now, that is to be arbitrated. I cannot understand how the arbitration of such a thing can possibly be the fact.

I thank you.

(4235)

Mr. Seymour: Turning to section III, the heading of that section on page 13 merely follows the form which we followed

in section II; that is, the injunction is against the defendants as exhibitors, whereas in section II it was against them as distributors. That structure seems to us convenient and desirable for clarity.

In subdivision 1 of III we have brought into the injunction against the defendants as exhibitors the inhibitions of section II on franchises, formulate deals and master agreements made with distributor defendants, and we think that is the convenient way to incorporate the appropriate provision there. The Government's section I is inappropriate first because the incorporation of paragraph 5 of their draft brings over their injunction against all clearance contracts between defendants, which we discussed on Tuesday, and as to which we take the position that, of course, the Court should only enjoin the agreements to the extent that they are unreasonable, as the opinion indicates.

In addition, their paragraphs 6 and 7 which they seek to incorporate by reference by section I, enjoin master agreements, formula deals and franchises with non-defendants. We do not think the Court intended to reach out beyond the parties to the suit in that regard.

(4236)

Mr. Caskey: May I just point out to the Court that Tuesday we agreed that in lieu of our proposed subdivision (5) of section II, we would take subdivision (7) of section II as proposed by the Government, as we amended it orally in court.

Mr. Seymour: That would still require or still indicate the adoption of our form of section I.

Mr. Caskey: That is correct.

Mr. Seymour: The reference to the Government's subdivision (7).

Now as to Arabic 2 on page 14, that is a section in three subdivisions in which we deal with your Honors' disposition of theatre pooling agreements; and we specify in the three subdivisions the types of pooling agreements which are enjoined. Subdivision (a) deals with a pooling agree-

ment involving a given theatre of a defendant and a given theatre of an exhibitor, normally in competition with the defendant's theatre where they are operated as a unit or whereby the business policies are collectively determined by a joint committee or one of the exhibitors, and whereby the profits of such pooled theatres are divided among such defendant and such exhibitor.

(4237)

Now the difference between our language and the Government's is primarily in the use of the word "and," "and whereby the profits of such pooled theatres are divided."

In your opinion in discussing the pools which you find illegal you use the word "and." In the portion of your opinion suggesting a decree you use the word "or". We rather assumed in view of the traditional definition of a pool that the word "and" was the one that you had intended because it is perfectly obvious that normally in a pool operation of this kind an essential characteristic is that the profits of the pooled theatres are to be divided, and we think that ought to be adopted and the other changes are purely in the interest of clarification.

The reason I think the word "and" is important is this: there may be situations where a defendant owns a theatre and has leased perhaps from some real estate operator or anybody else another theatre on a straight rental or on some other basis but where there is no division of profits between the theatres, but since the defendant is the owner of one theatre and the lessee of another, he naturally operates them together. I don't think your Honors were talking about that kind of pool.

Mr. Wright: May I say something on that? I think coun-

(4238)

sel overlooks Paragraph 4 of our judgment, and subdivision 2(c) of theirs which deals with the lease situation. It is perfectly clear there is no attempt to enjoin the making of leases except where there is a profit-sharing arrangement. That is explicitly covered in their provision and in our provision.

But where they say they think they would like to be able to make or to continue to perform pooling, "a given theatre of a defendant and a given theatre of an exhibitor, normally in competition with the defendant's theatre, are operated as a unit, or whereby the business policies for such theatres are collectively determined by a joint committee."

Now they say both those situations apparently should be permitted if there is no division of profits. That seems absurd to us. Regardless of whether there was a division of profits or not, if the policies are jointly made and if they are operated as a unit, clearly that is the kind of operation that the Court intended to condemn and prohibit.

Mr. Seymour: We took it from your Honors' opinion that you were concerned with the traditional pooling situation where there is a division of profits. We were also concerned with what Mr. Wright thinks the language was not intended to reach and I think the only way to be sure on that is to have the decree clear enough on that point.

(4239)

Now in subdivision 2(b) we deal with the pooling agreements where the parties agree that they may not acquire other theatres in the competitive area where the pool operates "without first offering such other theatres for inclusion in the pool."

That represents no real difference in substance from the Government's language. We think it is a little clearer and therefore suggest that since it is important that the decree be clear, that we use clear language.

Turning over to page 15, 2(e), the language of our 2(c) makes it plain that the type of pooling agreement there dealt with is one where there is released by a defendant to another defendant or to another exhibitor operating in the same competitive area and where the profits of the allied theatres are divided. And we think it plain from your Honors' opinion, which is commented upon in the right hand column, that the reference to profits are profits of allied theatres, but that you did not intend to bar a lease where there was no—a lease at

least not involving another defendant, where there was no division of profits.

Now we provide, as the Government also provides in its draft that such agreements mentioned in Section 2 are terminated within two years after the date of the decree. That is the idea suggested by the Government and the only difference between us is that we have another provision in this decree (4240)
that the time provisions do not begin to run until the decree becomes final—final by failure to appeal or upon the mandate of the Supreme Court. Obviously a change in the status quo as to many of these matters today would be difficult until the decree has finality.

Our Section 3 deals with ownership in conjunction between defendants of a proprietary interest in a theatre or a corporation and so on, and then also deals with the situation where one defendant leases to another on a profit-sharing basis. Both those are enjoined.

We think it important that the word "proprietary" be used to make it plain that in a mere lease between defendants on a flat rental basis, where defendant A leases to defendant B on a flat rental basis, that this is not intended to bar such lease because in your opinion you indicated that such normal business transactions were not to be enjoined. If you use language other than "proprietary interest in conjunction," there might be a doubt about that situation, and the Government suggests language which I think is doubtful in that regard. We again provide that such relationship shall be terminated within two years and the remaining differences between our draft and the Government's are these:

First, there is no provision in our draft for approval of (4241)
the Court where a joint interest between defendants is liquidated by one defendant buying out another. Your Honors, you recall, dealt with two situations involving common interest. One was this joint ownership between defendants. The other was a joint interest with independent exhibitors.

That whole matter is dealt with in our Section 4. You did not indicate that you thought it necessary to have court approval for transactions between defendants where one bought out the other, and I should think it was unnecessary because obviously in such a transaction there is no real interference with the competition in the area where one defendant buys out the other. That simply liquidates the illegal relationship which your Honors have found, and I don't see why your Honors should be bothered with applications. At least you didn't direct it, but the Government's draft does.

Judge Hand: What does the Government say to that?

Mr. Wright: There is no question about the fact that it goes beyond what the Court ordered in the opinion. We felt it was necessary to go beyond that as a corollary in our proposal in order to prevent the defendants from using each other as outlets for their films. Naturally any such purpose might be frustrated by so handling that the distribution of joint interests went to two or three of the defendants in a (4242)
town where there was only one in the town before.

It was where the effect of that kind of competition would not permit real competition but would restrain, that we made this provision, and for that reason we provide for the exercise of judicial control.

Judge Hand: Is this 3?

Mr. Seymour: Yes, your Honor, I am on Section 3 on page 15. The transaction that Mr. Wright says he is worried about obviously couldn't occur under this section.

Mr. Wright: Our provision is in our 5. Obviously the provisions in our decree are necessarily related to the other provisions of our proposed decree. You don't get a cohesive, coherent document out of taking some of ours and applying them to some of theirs, or vice versa.

Mr. Seymour: I think what Mr. Wright means to say probably is that this is another inhibition like his cross-licensing inhibition which we have dealt with, which is not

in the opinion and is designed to have the effects which we have already discussed.

One other thing which the Government does not include. In Section 3 it is provided in our draft that any lease or agreement which violates the section may be eliminated by inhibition. That seems a practical provision and that is simply a matter of convenience in carrying out the Court's decree.

(4243)

Now I pass to section IV—I am going to page 16, subdivision 4, and take up first 4(a); and let me preface my discussion on this section by saying this: This is the section which deals with the partial divestiture ordered in your Honor's opinion by which you required the defendants to divest themselves of interests which they held in companies or theatres with independent exhibitors where the interest was more than 5 per cent or less than 95 per cent; and this whole section deals with that subject.

That was a matter which, as your Honors know, was not litigated, really. The Government asked complete divestiture. We argued that there should be none, and there was never an occasion when the question of whether particular interests ought to be divested or involved any illegality, was the subject matter of proof. Your Honors concluded that the pools were illegal, and quite naturally assimilated these joint interests with independent exhibitors to pools, and included, on that assimilation, I assume, that these joint interests had to be divested.

Now, we provide in this section for divestiture, as your Honors have directed; but in view of the fact that the record in this case really contains no details as to particular situations, we have included a provision for applications to the Court after the decree is entered for exemptions of some

(4244)

situations from the decree, and have laid down the standards which your Honors will want to consider in that connection.

From the Paramount's point of view—other defendants are concerned in this connection, but Paramount, I think it is fair to say, is particularly concerned—your Honor's opinion directing divestiture of the 5 to 95 per cent situations struck at relations involving somewhat over a thousand theatres. Those theatre investments are considered by the management of Paramount to be worth somewhere in the neighborhood of 100 to 125 million dollars. They have a book value of somewhere in the neighborhood of 40 million dollars. I mention those figures only to show that there are very substantial problems involved in that aspect of your Honor's decision, and I ask no change in the decision, and I am not quarreling with it. I merely suggest, as this decree does, that opportunity be afforded to come in and present special situations from time to time where your Honors might find that it was undesirable or unreasonable to apply your decision its full rigor to a particular situation which you have never examined before.

Now, with that background, section 4(a) requires or states that the defendants are enjoined from continuing to

(4245)

own in conjunction with any independent exhibitor proprietary interest of more than 5 and less than 95 per cent. That we think is precisely in accordance with your Honor's direction.

Now, the definition of an independent exhibitor contained in footnote 11 on page 16 is a significant part of that provision. We understand your Honor's opinion to conclude with respect to such relationships that if the relationship was with one who was really qualified to be an independent exhibitor and who but for the relationship would have been operating one of these theatres, that that is what your Honor was striking at, and that is what the definition provides. The independent exhibitor is one not a defendant or associated with a defendant who but for such joint proprietary interest would be operating one or more of such jointly-owned theatres for its own account in competition with the defendant.

Now, what that takes care of is a situation where, for example, the co-owner is a widow or an investor or a bank, and where it is perfectly evident that but for the relationship the co-owner would not be operating the theatre as an exhibitor. I do not think your Honors had in mind that there
(4246)
was any restraint in that relationship. That is the reason for the language in that footnote. It differs from the Government's fundamentally. Your Honors used the words "restraint of punitive competition" when you dealt with this situation. The Government uses the word "potential." We have tried to carry out what we understood to be the spirit of your view in our definition. Obviously the widow in one view might be a potential competitor, because anybody, I suppose, theoretically could be a potential competitor, but she would not but for the relationship be operating one of the theatres. Therefore we think the word "potential" is far too broad and carries quite a different connotation than your word "punitive."

Judge Hand: Maybe I do not get it too well, but how could anybody on earth tell what she would do? In the case you mentioned she probably would not do it herself but she might do it through somebody else, and she would then be equally an independent.
(4246a)

Mr. Seymour: I think what your Honors had in mind, at least, from having read your opinion, was that there was a restraint in the ownership of somebody who, but for their relationships, would in fact have been an exhibitor.

Plainly, the investor, without any experience in the motion picture business, without any operation of a motion picture theatre, is one who would not be. Now, concededly there are widows who might be, who might be a widow who is an active motion picture operator, and we do not suggest that widow alone disposes of the point. My point is that there are a few situations where we have this distinction excludes situations which your Honors' ruling did not have in mind.

Finally, in Section 4(a) we have a provision in the last three lines for applications to the Court for permission to retain interests which are required to be divested by the first part of Section 4(f), and that is the provision, there are several others, which I was referring to when I said we wanted an opportunity, if so advised, to be able to come in at a later date and show your Honors the particular facts.

Judge Bright: Where is that?

Mr. Seymour: That is the last three lines in Section 4 on page 16.

(4247)

What we want to do is to have the right to come in at a future date and show your Honors, as required by Section 4(c), that the retainer of a particular interest would not unreasonably restrain competition in the area. Section 4(c) requires such a finding in connection with any such application. I think it is proper, in the present state of this record, since the matter was never litigated, item by item, that that opportunity should be reserved to us, and it is of the greatest importance to Paramount, and we think of equal importance to other defendants, and we would feel that your Honors would want to keep that way open to consider particular facts.

Of course, there is another aspect which is raised by section 4(b). 4(b) is our attempt to comply precisely with your Honors' decision as to how to dispose of these interests. You direct that the interests be disposed of by a sale or a purchase or by a division of assets. Precisely in accordance with your Honors' opinion our section (b) provides that purchases or divisions of assets shall be subject to court approval.

The Government inhibits any purchase now under the form of decree. They just bar any purchase or division of assets by which the defendant could acquire any part of it, even with the approval of the Court. That is plainly directly contrary to your opinion.

(4248)

I want to state an additional reason for that reservation in 4(f). It is possible that as an attempt is made to work out the various dispositions which will have to be made under the decree some impasses may be reached. For example, the Paramount theatres that are affected are owned by in the vicinity of 300 corporations which are located in many states. The laws of the various states differ as to the rights of forcing a dissolution, which might be possible in some situations, one cannot tell yet, and since there is no control, really, over what the other party to the transaction does, there may be impasses, and, in that event, Section 4(a) would give us a right to come to the Court and ask to be relieved of a direction because of that particular situation, and, of course, we would have to come and make a showing as required by 4(c). So that 4(c) really states the standards which we would have to satisfy the Court of under the other sections.

You will note in 4(b) that the time within which that direction that is to be complied with, that is on page 17, has been left blank in this draft. Your Honors can appreciate what a colossal task it is to attempt to carry out this direction, where so many theatres, so many interests are involved. We hope that your Honors will give us a substantial period of time. I think the Government has

(4249)

suggested two years. We think that is inadequate. We think that with the most diligent effort it will take a considerable period of time to clean these situations all up, as, in accordance with your directions, such must be cleaned up. We would suggest, as a tentative period, I think, something like three years, with the expectation that under your reserved jurisdiction, if we need more time on a particular situation we may come in and ask for it; but if your Honors were disposed to give us more time, that would be welcome.

Judge Bright: You have the same privilege on two years to come back and ask for relief.

Mr. Seymour: That is true, but your Honor can appreciate what the problem is in trying to deal with the vast number involved here, and we think if we had a somewhat longer period, the chances to make substantial progress within the initial limitation would be somewhat greater.

Judge Hand: Have you been trying to do any of these things now?

Mr. Seymour: You cannot do anything, if your Honor please. You cannot really do anything in the way of trying to make a deal with a co-owner while the uncertainty as to whether this is the final disposition of the case remains. The Government has indicated that they are going to appeal, that has been widely published in the trade press and elsewhere,

(4250)

and until the decree becomes final it would be very difficult indeed to make any progress in the direction of working out negotiations.

And, of course, as my learned brother has pointed out, if we did make any changes in the situation, non constat, it might not be at all affected by the results of an appeal.

So, really, until the decree becomes final, it is difficult to make progress in this direction with the best faith in the world.

Finally, we have gotten to 4(d). Here I want to tell your Honors about it, because that is almost entirely a Paramount problem. 4(d) on page 18 provides that when it is shown that a joint relationship between an exhibitor defendant or a subsidiary or an independent exhibitor resulted from the sale by the exhibitor defendant or a subsidiary or a trustee in bankruptcy of the partial interest, the exhibitor defendant may apply to the Court for relief to retain it.

I believe there are four situations affecting Paramount, there may be one or two more, but I think four is correct, where the trustees in bankruptcy, either of Paramount or of Paramount Publix, or some other subsidiary then owning 100 per cent of a theatre, were, by reason of the bankruptcy, put in a position where they had to dispose of a portion of

(4251)

the interest in order to preserve the rest, and those dispositions were approved by the trustees, and, in some instances, at least, by the Court. We do not say that that disposes of the issue for this Court. We do say that that ought to present a situation where, if the transfer back of the 50 per cent interest, or its retainment does not involve any substantial restraint or any unreasonable restraint, we ought to have a right to apply to the Court to keep it. Only special situations result in that condition.

Judge Hand: There are a great many theatres, though, aren't there?

Mr. Seymour: There are a number of theatres involved.

Judge Hand: Where are those theatres, on the West Coast mostly?

Mr. Seymour: No, the theatres are, some of them, in Virginia, some are in Pennsylvania, some are in New England, and some of them are now in Nebraska.

There are four different situations where the backgrounds indicate that the transfer could not possibly have been made for the purposes of restraint; and we have been hopeful, if we could satisfy your Honors on a hearing of those facts, if we decide to apply, that your Honors might perhaps take those out of your decree in the event that we ask for the opportunity to present that situation.

(4252)

Judge Hand: That rather leaves me cold.

Mr. Seymour: Well, I hope your Honor won't prejudge it.

Judge Hand: No.

Mr. Seymour: I hope, because again——

Judge Hand: We have pretty well prejudged it already.

Mr. Seymour: But, you see, the difficulty is on this situation, as on some of the others, we did not have an opportunity, really, to present the detailed facts which would enable you to examine the details of a particular situation because this issue was really not litigated. There was some brief reference——

Judge Hand: I thought there was a great deal of talk about it.

Mr. Seymour: There was a lot of talk about divestiture, but I do not believe that anyone, until your Honor had reached that conclusion, had supposed that a 95 per cent and 5 per cent line would be drawn, or it was argued that that should be drawn. I think that is your Honor's line. All I ask is, you having drawn the line after the testimony closed, that we be permitted to reserve the right to come in. If your Honor, upon such application, decides against us, that is the chance we must take, but I hope you will preserve the right

(4253)

to come in. That disposes of Section 4.

Section 5——

Mr. Wright: Would you rather hear me now or later?

The Court: (Judge Hand) On this, yes.

Mr. Wright: I do not know, if the Court please, how much time you want me to spend in discussing their proposal or whether you want me to confine my discussion to ours.

I think it is quite apparent to the Court what has been attempted here by them in the modifications that they proposed in the opinion. What they seek is essentially an opportunity to relitigate all of these questions that we think the Court decided.

In so far as evidence is concerned, ample opportunity was given them to put in the whole story of every acquisition, every pool they had. We facilitated the presentation of that evidence by letting them put it in through stipulated testimony without the necessity of calling witnesses. There cannot possibly be any occasion here for further hearings, such as they contemplate, except to relitigate these questions that have already been decided.

On this deadlock question that was raised by Mr. Seymour, the possibilities of deadlock, on this question of sale

(4253a)

or purchase by two parties, that is what led us to propose

in our proposal, which also departs from the Court's opinion, that instead of trying to permit a purchase by these defendants, or a sale by them to the independents, that the thing ought to be settled here and now, and settled, in our view, in favor of a sale to other parties, not necessarily the partner, but a sale, in any event, a divestiture of the defendant's interest.

(4254)

Now, the reasons for that, the practical reasons for that, are these, that this Court simply does not have any control over what the independent partner does with his interest. If he does not want to buy or sell at a particular price, there is nothing you can do to make him buy or sell; but you do have jurisdiction over the defendants, and it seems to me rather than postpone indefinitely the resolution of those controversies—it is perfectly obvious that they want to maintain every one of these joint relationships that they can—that you should and you properly may order that these pools be dissolved by a sale of the defendants' interests, and that is what we have provided, not necessarily to the partner but simply by sale to someone.

Now, of course, I do not think the time limitation there as it is put in the first instance is so important, whether it is two years or three years. In any event, we know in situations of this kind they always get extensions if it appears they have a good reason for not having been able to carry out the kind of divestiture that has been ordered; but I do not think we ought to be in a position where we do not know until the end of some two or three-year period whether anything has been or is going to be sold at all, and what if any difficulties are preventing it from being sold; and I think

(4255)

the provisions we incorporated for periodic reports to the Court as to what is being done are essential to any efficient administration of this plan to dissolve these pool situations.

Now, our definition of "independent" of course does differ greatly from theirs. They say the term independent exhibi-

tor as used in this decree means an exhibitor. Now, that takes care of the widow or the mere investor. They say it has to be an exhibitor. That is more rigorous than our definition right there; but then they go on and put this proviso on the end so that even when he is an exhibitor they can come in and litigate the rather vague question as to whether or not that particular exhibitor but for this interest would be operating these theatres, a wholly speculative inquiry that I think would——

Mr. Seymour: Is that an "or", Mr. Wright?

Mr. Wright: You are right, I beg your pardon—"or a person, firm of corporation." But, in any event, this last proviso it does seem to me to introduce a completely vague standard there that would permit them to retain any one of those interests.

Judge Bright: What do you say about the criticism being made of your use of the word "potential"?

Mr. Wright: I would say as to our "potential," if your (4256)

Honors' word "punitive" is preferred, I think that might be a reasonable substitution. But it is essential, I think, that you do not get into an inquiry at this late date as to what might have happened five, ten, fifteen years ago if the pool had not been made.

Now, as far as their test of exemption in (c) there, they want to hang on to these relationships if on a retrial here we do not show that they unreasonably restrained competition, and that just seems to me is an express provision for relitigating what you have already decided. That gives us nothing. If we can show that any relationship unreasonably restrains competition between two people, we can dissolve it and enjoin it under the Sherman Act by an independent suit. That, it seems to me, has no place in this decree at this stage of the game.

Now, as to this last one, (d), obviously all of that data that he wants to again submit to the Court was in the record, and I assume it was considered by the Court when the deci-

sion was made that these relationship were, per se, violations and should be dissolved, and I can see no occasion other than to frustrate the dissolution of the pools to permit them to relitigate the matter in that fashion.

Mr. Seymour: Your Honors, Mr. Wright keeps talking
(4257)
about these things as pools. It was for precisely that reason that I thought you had assimilated these two pools and had not had occasion to examine the particular facts which we never litigated. When Mr. Wright says that we litigated them and therefore we are trying to relitigate them—all we are asking is for a chance to avoid the potential, terrible destruction of values which may occur by having the matters submitted to your Honors' discretion if a decision is reached, to apply at some future time; and I think that is the kind of reservation that ought to always be made by a court of equity which has not heard proof on the particular subject.

Now, the suggestion that Mr. Wright should now have a provision in the teeth of your Honors' opinion that these interests must be sold rather than that we may be able to satisfy your Honors that it would be proper to buy, seems to me a most shocking suggestion. Mr. Wright shows very little concern with the public interest in preserving the values that are involved, an interest which is shared by the stockholders of the companies and I think by the public.

Judge Hand: Well, I do not think we are going to do any such thing as that.

Mr. Seymour: I should think that matter ought to be
(4258)
left flexible as your Honors directed it should in the opinion.

Judge Hand: That is what we intended to do.

Mr. Seymour: Now I will pass on, if I may, to section 5 at the top of page 5. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says "from

expanding its present theatre holdings in any manner whatsoever." Now, that is directly in the teeth of your Honor's opinion.

Judge Hand: We are not going to have any such drastic provision as that. We considered that.

Mr. Seymour: Section 6 is a provision for notice to the Department of Justice, of course, in connection with any application to the Court on the reserved matters; and IIII on page 19——

Mr. Wright: May I discuss for a moment their 5 and our β on the question of expansion?

Judge Hand: Yes.

Mr. Wright: What we proposed, if the Court please, was not a provision against any acquisition. We proposed a planned injunction against expansion, and we did that for two reasons: one to resolve the question as to what kind of expansion the Court intended here in their proposal. We

(4259)

do not see that their proposal there would prohibit expansion of any kind, and certainly during the pendency of the final disposition of the divorcement issue we would suppose that it would be proper, in the face of the findings that have already been made, to at least maintain the status quo during that period by preventing the defendants from taking advantage of the period to expand their theatre holdings.

Now, if you will read the provision as they write it, it may be in the terms of your decree, but under it I do not know what if any form of expansion is prohibited; and if none is prohibited, the provision in that form offers nothing to the plaintiff—that is, if it is a question of the 5 that they have there——

Judge Hand: Get down to some specific situation and not just talk in general terms.

Mr. Wright: Let us read it. It says, "from expanding its theatre holdings except for the purpose of acquiring the interests of co-owners of jointly owned theatres pursuant to the provisions of subdivision 3 and 4."

That is plain enough. That means they can expand when they buy out independent partners.

Now they say, "provided, however, that nothing herein contained shall prevent an exhibitor defendant from acquir-
(4260)
ing theatres or interests therein in order to protect its investments or in order to enter a competitive field."

Now, if you enter a new, competitive field I suppose that is one thing; but I would imagine that any theatre you acquired in an area where you were already competing might be regarded as a protection of the investments you already had there.

Judge Hand: I should think you are right about that.

Mr. Wright: So the result of this would be that no form of expansion that I can conceive of would be prohibited at all. They can buy out the partners; they can pick up theatres in the fields where they already are, and they can go into new fields where they do not operate now. Well, that, I submit, is a plain grant of immunity. It does not offer any protection whatsoever to any of the objectives that we are trying to achieve.

Judge Hand: They have said, as I understand it, if in the latter case this Court or the district court of the district shall approve, in the latter case.

Mr. Wright: The new competitive field is subject to court approval. Well, may I ask what the Court regards as circumstances which would lead to your approval of their entry
(4261)
into a new competitive field?

Judge Hand: Wasn't that very largely in the consent decree?

Mr. Wright: The consent decree—

Judge Hand: Never mind. Answer my question, please.

Mr. Wright: Yes, quite right, and as far as we are concerned the consent decree provision proved in practice to be wholly inadequate to prevent an expansion during that period.

Judge Hand: Why was it inadequate? Was Judge Goddard inclined to let any theatres that wanted to come in? What do you mean by inadequate?

Mr. Wright: There was a proceeding brought under the decree—there were substantial acquisitions by Fox; there were substantial acquisitions by Paramount——

Judge Hand: Did you object to those?

Mr. Wright: Yes, we went in and objected and we litigated the issues——

Mr. Caskey: And you lost.

Mr. Wright: We lost the case. Judge Goddard found that those acquisitions were not a part of a general program of expansion. That was what was prohibited by the consent (4262)

decree, a general program of expansion, and they had these same exemptions to protect investments——

Judge Hand: How many cases were there?

Mr. Wright: Oh, I would say there were perhaps 60 or 80 theatres involved, but there were some of those which were actually closed towns, these acquisitions which converted competitive situations into closed situations.

Now, I repeat if the purpose of this provision is to give protection to the Government, we would think we would be better off with no provision dealing with the subject of expansion at all than this proposed V; that is the rights that we have under the Sherman Act as such we think are superior to the rights that we would get with such a provision as is proposed here; and we think in effect it would be a grant of immunity from the Act.

Judge Goddard: Mr. Wright, is it your recollection that the Court permitted them to acquire 60 or 70 theatres?

Mr. Wright: That I think was about the net result of the Court's decision. Of course, there was no provision if your Honor will recall, for submitting the proposition prior to acquisition. These acquisitions had gone on for some time, and then they were set forth in petitions which we filed.

Judge Hand: You mean after the consent decree?

(4263)

Mr. Wright: Yes, the consent decree itself provided that that provision was enforcible.

Judge Hand: That may have been acquired after the consent decree.

Mr. Wright: Yes, after the consent decree but prior to the institution of the petitions on which we sought to prevent the expansion.

Judge Goddard: Each of those presented a particular situation, and I thought it quite evident that there was not a general plan of expansion. I was convinced of that.

Mr. Seymour: I think the failure of those theatres—as Judge Goddard will no doubt recall—arose due to the fact that one Sparks who had a fifty per cent interest in a number of theatres in Florida, wanted to go out of business and came to Paramount and asked to have Paramount buy his remaining fifty per cent interest, which he did, and that is the way a number of theatres were involved.

Mr. Wright: Don't misunderstand me, Judge Goddard; I am not arguing that your decision in that case was wrong. If we thought it had been we would have appealed from it. We didn't appeal. We thought from the terms of that decree your decision was right, but I am merely pointing out that that kind of decree provision we are not satisfied does us more harm than it does good.

Judge Hand: I don't see why you don't think his de-

(4264)

cision was wrong. Maybe you didn't think his decision was wrong. Of course you changed many times in your position in this whole litigation. How could you have failed to appeal if your views about the subject matter had been the way they are now?

Mr. Wright: Because, if the Court please, we were bound by the decree. We had a decree which did nothing to prohibit expansion in those terms which were adequate to do it.

Now the failure of the decree to live up to proper Sherman Act standards was essentially our fault in negotiating rather

than Judge Goddard's, and that is why we did not appeal and could not appeal, as I saw it, from his decision.

Judge Goddard: Mr. Wright, do you think the defendants should be prevented from acquiring an interest of a partner?

Mr. Wright: From what?

Judge Goddard: A situation like that, where a defendant owns fifty per cent of a theatre together with another.

Mr. Wright: Yes, we do. We think the proper disposition of those situations is to dissolve that pool by a sale of the defendant's interest.

Judge Hand: You mean a sale in which the defendant
(4265)
was prohibited from buying? A sale under which the defendant was prohibited from buying?

Mr. Wright: That is right, a sale to independent interests. That is the way we think those relationships should be dissolved.

Mr. Seymour: Of course, your Honor, what we have done here, I think, is to follow your Honors' language precisely. There is no intention on the part of my client to start a campaign of expansion; but as your Honors properly recommend in your opinion, to shackle these defendants so that they cannot go into a new competitive area, and that they can only do as your Honors permit, or to shackle them so that they could not fix up or build to take care of an obsolescence or a fire situation, would be a very burdensome provision.

Mr. Wright: I don't understand how the District Courts other than this Court are to have jurisdiction to approve these applications. Has any thought been given to that? That is not in the opinion. That apparently is something that has come up here.

Mr. Seymour: That is right. Your Honors wrote that it shall be subject to the approval of this Court or other competent authority. We assumed that by that that your Honors meant the District Court in the district, and we put it in.

(4266)

If your Honors have something else in mind, we will put it in.

Judge Hand: Well, what about that? Is this court supposed to live and endure forever?

Mr. Proskauer: We hope so.

Mr. Wright: Insofar as it reads the Southern District of New York, I suppose that it will endure as long as any district.

Judge Hand: Then you want instead of "District Court," you want to say "or the District Court for the Southern District of New York."

Mr. Wright: If the Court please, we don't want that in at all.

Judge Hand: Now assume that it is going to be put in there. We put it in.

Mr. Wright: I would assume that would be necessary to fix the limits of your own jurisdiction in that connection.

Judge Goddard: Will all those proceedings come to the Southern District of New York, no matter where they arise throughout the country?

Mr. Wright: This Court is sitting in this litigation as a specially constituted district court for this district.

Judge Hand: I know, but I think you ough to get rid

(4267)

of this specially constituted district. Are you going to create in every case ex necessitas? If these judges are out a new set of judges so as to have a three-judge court, and call it an emergency court, fifty years from now?

Mr. Wright: No. If the Court please, I assume that for the purposes of administration of whatever final decision comes out of this litigation we don't need three judges.

Judge Hand: All right, then you mean the District Court for the Southern District of New York.

Mr. Wright: Yes.

Judge Hand: I should think that might be reasonable; maybe necessary. Now go on.

Mr. Caskey: Section IV, which is printed on page 19, follows the language of the opinion and enjoins a defendant from operating, booking or buying features for any theatre through any agent known by it to be acting in such capacity for any other exhibitor whether it be independent or affiliated. The only difference between us and the Government is that we have inserted the words, "known by it," which is obviously a necessary precaution.

Roman numeral V——

Mr. Proskauer: Not to argue but to help your Honors to keep track of what is going on, you will note that Para-
(4268)
graph 8 under plaintiff's proposed judgment column on page 18 is the Government's provision about diagonal licensing that we have all been talking about.

Judge Hand: Yes.

Mr. Proskauer: That is the one that we have the best sentence passed on.

Judge Bright: Just a minute. Is there any objection to the insertion of "known by it" in your provision?

Mr. Wright: It seems to me too trivial to argue about. I would assume with them the responsibility in any of these provisions in knowing what their agents are doing.

Mr. Caskey: Well, do you say yes or no?

Mr. Wright: I say that I can't believe that it is a matter of substance. It seems to me a silly thing to put in.

Mr. Proskauer: That means yes.

Mr. Leisure: If the Court please, Section 5 under the defendants' proposed decree reads:

> "Nothing contained in this decree shall be deemed to apply to the leasing or otherwise contracting for the temporary use of a theatre for the road showing of a particular feature."

Now that only applies to a picture, as you will observe by the footnote 12:

"Because of its character or unusual cost, cannot, in the judgment of the distributor defendant, exer-
(4269)
cised in good faith, be distributed as advantageously by the distributor's normal method of distribution, and which is exhibited by such defendant at advanced admission prices."

Now the reason for that provision is that from time to time the industry has produced these extremely costly pictures which have advanced the art, and we believe thereby benefited the public, and over a period of years those pictures have never been large. In the past ten years there were four.

Judge Hand: Wouldn't they become large if they were exempted from this decree?

Mr. Leisure: I don't think so.

Judge Hand: I mean, wouldn't there be a great inducement to claim road showing over them?

Mr. Leisure: No, because of the risks involved and the losses I don't think it would ever be large. In fact the past history shows that they have never been large. In the last ten years there has only been four of these pictures.

Judge Hand: You mean by any of these defendants? You mean by all of them?

Mr. Leisure: By all of us, yes. Only four in the last ten years. If your Honor feels that there is any chance of there
(4270)
being a large number, and I don't feel there is, you could limit it by placing a number on them.

Judge Hand: I think it is a kind of unimportant thing to provide if there are only four that have been produced in the last ten years.

Mr. Leisure: Let me say why it is important to us, why Universal pointed out why it is important to them.

It is important to RKO, as I have said, because of the unusual cost for the pictures. They must be distributed at an advanced admission price if the cost is to be recouped.

Judge Hand: Have they cost any more—these road shows —than any other expensive pictures?

Judge Goddard: The Vanguard cost five and a half million.

Mr. Leisure: If I may advert for a moment from what I was about to say, just to give an example on that, Judge Hand, long prior to the decision in this case, on April 18, 1943, to be exact, RKO contracted with an independent contractor to produce a best seller book known as The Robe, dealing with a deeply religious subject. The picture is to cost about five million dollars. By the time we finish with dis-
(4271)
tributing and advertising it will cost well above nine million dollars. Although we entered into that with an independent contractor the risk is entirely RKO's. With the experience of every producer—not just ours alone—the experience has shown that it would be extremely hazardous if not impossible to recoup anything like nine million dollars in the regular course of business. The road showing for those great shows such as Birth of a Nation——

Judge Hand: Now RKO could show that in a dozen theatres at any price at any place it chose ahead of anybody.

Mr. Leisure: We only have one hundred theatres your Honor, and we simply would never have attempted to make a nine-million dollar picture and have only the right to show it in our own theatres. It would be just impossible.

Mr. Proskauer: Why don't your Honors limit it by putting in something about the upset cost of the picture. Nobody wants to apply that to ordinary pictures.

Judge Hand: How about that, Mr. Wright?

Mr. Wright: Our position, as I explained before in connection with the Vanguard petition, is that we don't see any merit in any road show exemption as such, and particularly not in this kind of exemption that is proposed here. What they want to do here is pick up a theatre and lease it temporarily for a particular exhibition anywhere, any time that

(4272)

they have a picture that they think is special and that that is the best way to exploit it.

Judge Hand: Now assuming that this could be limited to a very few, to very expensive pictures, what harm would it do? It might induce them to make them when they wouldn't make them otherwise.

Mr. Wright: That I doubt, if your Honor please, but on the assumption that it would be so limited to the mostly costly pictures, I would still say that the provision by itself, by its terms, provides an obvious means of avoiding the price-fixing provisions of the decree.

Now what would you do here? In the ordinary exhibition you lease a film to a theatre for a percentage of the gross receipts, or, as these defendants have done in some cases, a percentage of the profits. Now suppose that you just change your agreement into a form of a theatre lease for the duration of the engagement and the theatre operator simply leases the theatre to the film owner with the license term stated so that he receives the reverse percentage of the receipts of the engagement?

Now obviously, if you are going to permit, open the door to what this provision says you can do there, I think gradually you just eat away all of the prohibitions that are now in the decree.

(4273)

Mr. Raftery: May it please the Court, we are vitally interested in this proposal. We are road-showing now one picture here in New York, Henry V, by a man named Shakespeare. The only way you could get the public, really, to come to see that picture was by a special presentation. That is the first road show that we have had now in nearly ten years, and we think we have had more road shows than any other company. We have one ahead of us, "Duel in the Sun". I don't like the provision here as written, because it does not read—well, it reads to me more the way brother Wright construes it. If you limit this to one picture a year

per defendant, and under condition that the negative cost—we will forget advertising and exploitation—is three million dollars or more, that is putting it way up in the high brackets, and then, say, instead of talking about leasing a theatre, so we won't be guilty of subterfuge, as brother Wright has said, and say, "Nothing contained in this decree shall be deemed to apply to licensing the exhibition of one road show picture per defendant in a theatre or theatres, use whatever language he wants, really you are making a licensing of an exhibition right, whether you do it by leasing the theatre or whether you do it by percentage of the gross, or whether you do it by flat rental, it is not going to affect (4274)
anybody; then define your road show and in your definition of road show put your limitation of one picture a year for a defendant, negative cost $3,000,000, and I do not believe that there will be any harm to anybody; there will be no restraint of commerce.

This particular "Duel in the Sun", the negative cost that our producer, Vanguard, has acquired to date, and I got these figures from his banker, is five and a half million dollars actual negative cost to date, without advertising, without printing. The picture has been nearly three years in the making, in preparation. It was conceived long before we got into this trial. I do not anticipate we will have another road show for a good long time unless somebody else decides to make a Shakesperian thing again, and we will be, perhaps, in again.

The Shakesperian picture I speak about, I think we would be barred of because of the definition of negative cost. As I understand, the negative cost of that did not quite reach three million dollars, but I say three million dollars because that is way above the average cost of any of the important pictures.

Mr. Wright: I would say this, if the Court please, if there were to be any exemption at all it should, I think,

(4275)

be in terms of numbers that could be released during a year rather than negative cost. I do not think negative cost is something that is readily ascertainable, as far as we are concerned, and I can't think it offers a very satisfactory standard for determining what ought to go in——

Judge Hand: He has both:

Mr. Wright: One year.

Mr. Raftery: One year and three million dollars.

Judge Hand: He proposed one year and three million dollars.

Mr. Isseks: May I say just a few words? I started this?

The Court: Yes.

Mr. Isseks: We object as an independent producer to the defendants' proposal just as the Government does, and just as counsel for United Artists does. We think it will help the major defendants only. We think, if there is going to be an exception, it will be flat, just as Mr. Raftery has suggested, nothing in this decree shall apply to any picture road shown, and then define road shown as to cost, one year or some other way, but I think if you take the defendants' pro-

(4276)

vision somebody like ourselves is going to be hurt, because we release through United Artists, and they do not have any theatres, and they do not have facilities for leasing theatres, or getting theatres, and I submit there should be some road show exemption to apply to everybody equally.

Judge Bright: It is only to the road show; after it is road shown the picture will take its regular course.

Mr. Isseks: Yes, and then it should be subject to the injunctions against price-fixing and everything else, and it should be that that is so, after the road showing, that it is subject to the injunctive provisions applied in connection with general release. I think we made that clear in our brief and in our petition.

Mr. Wright: I think it would be proper, if you were going to grant a road show exemption, to limit it to non-thea-

tre-owning defendants. It seems to me their owning theatres gives them substantial facilities for that kind of exploitation that others don't have; and if you are going to have an exemption, we would urge that kind of limitation as well as a numbered limitation.

Judge Goddard: What is the history? Haven't they had many more? Apparently you haven't had as many.

(4277)

Mr. Raftery: We have had more road shows, I think, because generally the road show comes from that type of producer that Mr. Keough described on the stand, who takes all his own money and goes out and makes some one of these important pictures, one a year.

Judge Hand: I think you had better propose some of these clauses in your proposed decree. I think Mr. Isseks would like to propose them.

Mr. Isseks: I would like to work on that with Mr. Raftery. We distribute through him.

Judge Hand: Get together with him and agree with him.

Mr. Isseks: We will get together.

Mr. Proskauer: May we revise our proposal along the lines of this discussion——

Judge Hand: Yes.

Mr. Proskauer: (Continuing) —so we will be restricted to one a year a company, to a cost of at least three million dollars?

Judge Hand: Yes.

Judge Bright: Do you road show in more than one place that particular picture?

Mr. Proskauer: Oh, yes.

Mr. Isseks: Oh, yes, we do.

(4278)

Mr. Proskauer: For instance, we have a contract with Mrs. Clarence Day to road show "Life With Father." The picture is costing about four million dollars, and we are required to road show it in New York, Chicago and Los Angeles. It has nothing to do with the general contract.

Judge Bright: What is to prevent, under this general talk we have had here, having all exhibitions of any particular picture called a road show?

Mr. Proskauer: I did not get your Honor's question.

Judge Bright: Under the talk we just have had here now, what is to prevent you from calling all exhibitions of some particular picture a road show?

Mr. Proskauer: What I suggested, that we can only do it with one picture a year.

Judge Bright: That is right.

Mr. Proskauer: And that it has got to cost at least three million dollars.

Judge Bright: That is right, but how many times can you road show that picture all through its existence?

Mr. Raftery: That happened once in 27 years——

Mr. Proskauer: We can road show it through the country.

Mr. Raftery: (Continuing) In 27 years it happened once, and it happened with the same producer who is making (4279)

"Duel in the Sun" who made "Gone With the Wind." It was road shown from coast to coast first time around. It later came back and played all the theatres at popular prices.

Judge Bright: That was so of one of Griffith's pictures.

Mr. Raftery: Birth of a Nation, that was before 27 years ago. That was in Judge Proskauer's time.

Judge Proskauer: Your Honor, we have to show it through the country, and of course, we would like to get the road show through and get into general distribution after that, and then it is subject to all the provisions of the decree.

If you don't do that, you are just going to eliminate pictures like "The Robe" and these pictures of Mr. Isseks' clients, and we won't make them.

Judge Bright: What I had in mind was not to exempt a picture on every show, not to exempt from this decree the showing of a picture all the time as a road show.

Mr. Isseks: Your Honors' definition says clearly your Honors' definition of road show says it is prior to general

release, and that assumes there is going to be a general release, and I think we can work up a definition pursuant to
(4280)
Judge Hand's suggestion. Mr. Raftery and I will work together on it and we will distribute it to counsel, and I think it ought to satisfy the Court.

Judge Bright: We enter into the study of semantics again and——

Mr. Isseks: No, I am not going to get into that.

Judge Bright: (Continuing)—I think it is in vain.

Mr. Isseks: I think if we can limit it by making it prior to general release, limit the cost of the picture, and other limitations as such, I think it will prevent any evasion.

Judge Hand: What about these wild wests they talk about?

Mr. Raftery: Westerns?

Judge Hand: I mean westerns

Mr. Raftery: We have a contract to distribute what are known as Hopalong Cassidys. They are made at a very inexpensive cost and you sell them six at a time. An exhibitor won't buy them unless he can get the whole six, and they are generally popular down in the South and Southwest —very, very popular down there, and Mr. Frohlich here goes to every one of them.

I would like to ask Mr. Wright if he has any exemption those from the provisions of this decree, westerns as they are understood?
(4281)

Mr. Wright: I see no reason for exempting a picture just because it is popular.

Judge Hand: The Government never consents to anything, no matter what. It is a waste of time to ask, and it prolongs our argument. Now proceed.

Mr. Proskauer: We are to redraft something and to submit it to your Honors?

The Court: Yes.

Mr. Leisure: There is only one thing I would like to add, your Honor, and that is on this question of limiting it to one.

We are a little like United Artists, we represent some independents, Walt Disney, for instance, and Sam Goldwyn. If they do present one of these unusual pictures and come in to have it distributed, I do not see what there is in equity or in the Sherman Act that cause this Court to prevent unusual pictures from being shown. And that situation may arise. It won't happen often. People don't reach in to spend nine million dollars; they just don't do it.

Judge Hand: You would either get ahead of the other fellow or he would get ahead of you for that particular year. I know time is regarded as of the essence in these things, but it would only result in not having it as a road show or delaying it as a road show. Would that be one of the calamities of the 20th century?

(4282)

Mr. Leisure: It would never be made, if you did not have some opportunity of recouping the expenditures. You just wouldn't make it. Why should you? And that would mean a decree——

Judge Hand: If it was so good, you might make it a few minutes later.

Mr. Leisure: I cannot conceive of making it as a business enterprise unless you could see your way clear to recoup what money you have put into it.

Judge Hand: Yes, it would be your only road show for the next year or for that year.

Mr. Leisure: Let us suppose Mr. Goldwyn came in, or Walt Disney, and wants to show one the same year? What reason is there in law or equity to say you have had your one this year, we are going to portion this out?

Judge Hand: I do not know. What you say is more or less persuasive, but the exemption is doubtful and maybe we won't grant it, and you had better be contented with what has been suggested, I should say. Now go on, please.

Mr. Leisure: I thought it would be better, instead of having it limited, say, to a number, if you had it limited so you know it was an outstanding picture, it would advance the

art and be to the benefit of the public. In other words, use as your criterion not some arbitrary number, but some figure
(4282a)
that would convince the Court that it was one of these outstanding pictures.

The Court: Do you want to use five million?

Mr. Leisure: I think three million would be a better figure.
(4283)

Mr. Caskey: If the Court please, VI at page 20 confines the scope of this decree to the Continental United States. That is a provision which is copied from the provision of the consent decree, and is particularly acute with respect to the distribution of pictures in Hawaii and Alaska in which places none of the defendants operate exchanges.

In the Hawaiian Islands, on the four principal islands, which as your Honors know are somewhat widely separated, there are 107 theatres, many of them extremely small. The method of distribution is to grant to a single company the right to exhibit and in turn sublicense other exhibitors. We furnish only one, very rarely two prints. The picture print is shipped to Hawaii to that company; they exhibit it, and in turn circulate it among the islands. This whole scheme would be utterly inapplicable and probably would result or might well result in a withdrawal from the Hawaiian Islands. There was no evidence whatsoever concerning the situation in either Hawaii or Alaska or Puerto Rico, which are the only three places which would be affected by our proposal—there has been no suggestion of any violation of law in those places, and we respectfully submit that the ambit of the decree should be limited to the proof, and that this should not apply to those territories. I am sure that
(4284)
there will be no purpose served, and it might very well deprive the people of those communities of an opportunity to see motion pictures. I do not want to offer proof on the subject unless it is necessary, but we are informed that it is

utterly impossible to build in the Hawaiian Islands at the present time; so if some other system of distribution were required and we were compelled to erect our own facilities, it might be years before the physical facilities themselves could be supplied.

Judge Bright: Any objection, Mr. Wright?

Mr. Wright: I do not understand why the statement in the terms "nothing contained in this decree shall apply to operations or activities or any defendant outside of the Continental United States period" would not suffice. Now, I may be unduly skeptical, but that last proviso strikes me as a little odd. I do not quite see what they are getting at there.

Judge Bright: Activities in the United States relating to distribution of pictures outside of the United States.

Mr. Wright: Well, what possible activities within the United States that come within the scope of this decree would relate to distribution or exhibition of motion pictures outside? I just don't understand.

(4285)

Judge Bright: Mr. Caskey said they distributed them from here.

Mr. Wright: Yes. I suppose to the extent that their distribution activities are here and done here, they ought to be controlled here. Now, it just seemed to us that that is a little too vague to make a satisfactory exemption, as far as we are concerned.

Mr. Caskey: At the time the consent decree was drawn, from which this is copied, we had innumerable decrees under the antitrust laws from the published decrees, and this is standard practice, and the only thing we want to be sure of, the thing that is most important, which I understand you now to agree to, is that it need not apply to the licensing of pictures outside of the Continental United States, which excludes Hawaii, Alaska and Porto Rico.

Mr. Wright: I think that is right.

Judge Bright: I think you made a statement at the beginning of the trial, Mr. Wright, that you were only interested in operations within the Continental United States.

Mr. Wright: That is quite right.

Judge Bright: That you were seeking to suppress a national conspiracy.

Mr. Wright: Quite right.

Judge Bright: Then what is the matter with this?
(4286)

Mr. Wright: I merely repeat that as far as I can see the first three lines take care of any exemption that is needed adequately.

Mr. Caskey: Section VII on page 20 is designed to express that portion of the Court's opinion at page 63 which relates to the right of a defendant to exhibit its own pictures in its own theatres upon such terms as to admission prices and clearance and on such runs as it sees fit. We think it should be included in the decree and not left, because this Court saw fit to include it in the decree part of its opinion. For the purpose of this section we have defined a theatre as one's own in accordance with the footnote 14. That is, it applies to any theatre which we are permitted to retain an interest of 50 per cent or more.

Paragraph 8 I think is without controversy, and relates to the right of the Attorney General to inspect the documents and interview witnesses of the defendants.

Paragraph 9 on page 22 relates to the retention of jurisdiction, and in our judgment that is vital to any decree dealing with an antitrust case in this industry.

The first section (a) is standard language which permits
(4287)
their the plaintiff or any defendant to apply for such orders and directions as are necessary or appropriate for the interpretation, construction, application, enforcement and punishment of the decree. I take it that that language is substantially the same as suggested by the plaintiff, and from page 66 of your opinion.

Judge Bright: Doesn't the form proposed by the plaintiff comprehend all the subdivisions that you seek to incorporate?

Mr. Caskey: No, sir, I think not, sir, and if I may respectfully say, the form contemplated by the plaintiff only is coordinate with our sub-paragraph (a). For example, our sub-paragraph (b) enables us or the plaintiff to apply at any time to modify our set aside the decree, or to take further proceedings in the event that it should appear that the operation of the decree has failed to bring about a correction of the violations of the Sherman Act. We think that this is appropriate in this type of case to show that the Court has retained a supervisory power to modify this decree or to take further proceedings in the event that they are necessary to bring about a compliance with the Sherman Act.

Subdivision (c) is a provision which makes it possible for a defendant to apply to this Court to enlarge any period of time which is required to do an act under the decree. I (4288)
think it is a necessary and reasonable provision in view of the drastic reorganizations which the decree envisages. We hope we will not abuse it.

Sub-paragraph (d) enables any defendant to apply to the Court to modify or set aside the decree as to that defendant in the event that economic conditions or other conditions so change as to make the decree or a provision thereof inappropriate. That we think is necessary in view of the decision of the Supreme Court in the Swiss case; it is a precautionary provision which we think the Court should adopt in order to keep this decree flexible and capable of dealing with the problem as it may exist in future years.

Paragraph X on page 23 relates to a condition which might exist if either by legislation or by a decree which should grant divorcement of other relief similar to that prayed for in the amended and supplemental complaint that would give the defendants who desire a right to withdraw from any arbitration system which might be set up.

Paragraph XI is the paragraph to which Mr. Seymour has already adverted. It fixes the final effective date of the decree and the period for the commencement of the time within which a defendant is required to take action as the
(4289)
time when the decree becomes finally effective either by a failure to appeal or by the entry of the final decree upon mandate of the Supreme Court.

Mr. Frohlich: May I be heard for a moment on that section, your Honor?

Judge Hand: Yes.

Mr. Frohlich: The Government, I see, has a corresponding provision that paragraphs 8, 9 and 10 of section II will not become effective until January 1, 1947. I respectfully ask that the time there be extended to July 1, 1947. That is a very radical change of the whole system of selling pictures, especially for these smaller companies like Columbia and Universal and others, and January 1st is just six or seven weeks off from that, and we feel we could use five or six months to build up an inventory to give us an efficient inventory on hand so we can operate with some hope of recoupment. I am not asking for too much. I do not think the Government will seriously oppose it.

Mr. Caskey: Paragraph 13 on page 24 deals with the existing consent decree. We provide that this decree shall be a modification of and in substitution for the existing decree entered on November 20, 1940, and that the existing consent decree shall remain in full force and effect with
(4290)
respect to any act or conduct occurring prior to the effective date of this decree. We think the suggestion by the plaintiff that the provisions of the consent decree are to be of no further force or effect except in so far as necessary to liquidate the financial obligations of the defendants in the arbitration association are utterly inadequate; conduct has been taken under the decree, and as to that conduct the decree should be effective.

Plaintiff has suggested in its last sentence that even the existing awards made under that decree and decided by the Appeals Boards should be enforcible only to the extent that they are consistent with the provisions of the decree; or, in other words, that the validity of each one of the existing awards must be reviewed and determined by someone in the light of this proposed judgment.

Finally we respectfully suggest, although the sum of money involved is comparatively small, that it is inappropriate in an equity antitrust case such as this that costs should be taxed against the defendants.

Judge Hand: Do you want to say anything?

Mr. Wright: That last comment, if the Court pleases, really poses very aptly the question that has got to be decided, whether or not we won the case. In every equity case (4291)
that we have brought and won that I know anything about, costs have been imposed as a matter of course.

Now, there are a number of these other last provisions that have been gone over here that I do not think merit serious discussion except on the theory that what you were going to enter here would be some kind of a charter of immunity for these defendants rather than a decree which is intended to prohibit unlawful conduct. If you want that discussion I will be glad to embark upon it. It seems to me to be a waste of time. This retention of jurisdiction, all the elaborate escapes that have been set forth there, if it had ever been submitted to us in the form of a consent decree would never have received the slightest serious consideration.

Now, if the Court is going to give that kind of consideration to it we would like to be heard on it, but it seems to me on its face that it is——

Judge Bright: I think you had better discuss it. Take No. 8. Is there any objection to that insertion that counsel may be present when you are making the examination?

Mr. Wright: As far as whether they have one lawyer or two lawyers looking over the shoulder of our people when
(4292)
they examine books, it is not worth discussing as far as we are concerned.

Judge Bright: The answer is no objection?

Mr. Wright: No objection.

Judge Bright: All right.

Mr. Wright: That is right.

Judge Bright: How about 9?

Mr. Wright: 9 is the one I had reference to which I did not think was worth serious discussion. Now let us just take a look at this (b). All that is a restriction on the powers that the Court might otherwise enjoy. He says, enabling the plaintiff or any defendant to apply to this Court at any time to modify or set aside the decree or to take further proceedings in the event that it should appear that the operation of this decree had failed to bring about a correction of the violations of the Sherman Act hereby found to exist and which are the basis of this decree. "Sherman Act violations hereby found to exist." In other words, he wants to limit any further action solely to those violations, notwithstanding that other violations might appear.

For example, what would be the effect of this provision if on a mandate of reversal it appears that there were other violations here by subsequent conduct? I mean, it just is
(4293)
nothing but a device to cause doubt on what the Court might be able to do.

Now, this (c), enabling any defendant——

Mr. Caskey: Mr. Wright, just a minute. The authorship of (b) is the Supreme Court of the United States, and that provision was directed by the Court to be inserted. You will find it discussed in the Appalachian Coals, Inc. v. United States of America. We did not invent the language. That is what the Supreme Court held was an appropriate pro-

vision to bring about supervisory control over the soft coal industry.

Mr. Wright: In so far as I know, I know of no decree which we have entered in my time, which is relatively short in the Antitrust Division, which contains elaborations of that sort. The provision that we put in there is the standard provision that has been in use.

Now, let us take a look at that (c), enabling any defendant to make any application to the Court provided for in this decree including any application to enlarge the time, etc., etc., which would make enforcement of such requirement—be relieved of any requirement at all when it is inappropriate, oppressive, unduly burdensome, or otherwise.

Now, what does that open up? I do not know, but I should suppose it would invite a petition any time that some-

(4294)

body decided he did not like to abide by the provisions of the Court's injunction.

And the same thing is true with your (d), and that concludes what we have to say about 9.

Now, your 10 is simply another escape, this time from arbitration provisions, and in this connection I must say that I think it was rather an odd position to take that in view of the Court's opinion which said that arbitration could only be imposed by the consent of the defendants, to come in here now and say that of course whenever he saw fit to impose it it could do so over the objection of the defendants, and at the same time they come here with a provision which says that even arbitration that they consent to only stays in effect as long as more effective relief which they succeeded in avoiding here is not imposed upon them.

Now, as far as the provision as to appeal, I would see no occasion merely because there is an appeal, that that automatically stays the operation of the decree. I would suppose that any stay pending appeal would normally be limited to such provisions as are appealed from, where someone asks for a stay. If a provision is not appealed from, I should see no reason why it should not go into effect unless

it were so intimately related to some provision that was
(4295)
appealed from that you could not have that provision in the decree in the event of a reversal or modification of the other provision.

That again I think applies to both 11 and 12.

As far as the time element is concerned, I do not think it makes any difference whether you say January 1 or some other date, so long as there is a date that is fixed and you know when there will be some relief.

Now, as to the treatment of the consent decree, it seems to us that the provision that we proposed is the only kind of provision by which you can accomplish an orderly liquidation of the system as such. In cutting it off you have got to remember there are still pending and undisposed of cases; there are awards that were made during the period the decree was in operation.

Now, I should suppose that those awards as we have provided should be enforcible to the extent that there is no conflict between them and any new provisions that are entered here.

Now, their provision of course contemplates a continuation of virtually what would be a consent decree between them and the Court over our objection; and as to that, that is something which is primarily a matter for the Court to de-
(4296)
termine. We have said all we have to say about the propriety of that suggested procedure.

Now I should like, if I might, to address myself to a question that Judge Bright asked which my colleagues tell me that I did not understand at the time. I gather from what they say that the situation you asked me about and which I answered you about was a one-theatre town rather than a town in which there were a number of theatres owned by all of the defendants; and in that connection I would like to say that in so far as I can see, there is no town which would not benefit by two theatres as against one. That is,

two theatres are always in a position to show more pictures, give the public service, make more pictures available to them than one. But if your Honors should feel that you have evidence in the record from which you can independently conclude that any one-theatre town that these defendants are now in would not under any circumstances support another theatre, then you would be completely justified in simply eliminating that one-theatre town situation and all one-theatre town situations from the proposal that we made, and the effect of such elimination would be very insubstantial because of the limited number and small size of those situations.

(4297)

There is just one other comment I should like to make on Mr. Davis's fear that the demands imposed upon the three minor defendants to supply product which our proposal would involve might not be met by them. Well, his argument and the entire argument of the defendants assumes that from now on the pattern of the distribution in the motion picture industry is fixed to the extent that there are not going to be new distributors of quality pictures outside of the eight defendants in this suit. Now, I say that that is just the kind of situation that cannot be accepted by the Court if it is going to actually effectuate a dissolution of this combination of these eight defendants to control distribution of pictures in this country.

Mr. Proskauer: Your Honors, I have studiously obeyed the admonition of Judge Hand not to strive for the last word here. I shall make no reference to the last remarks of Mr. Wright. I think we have argued that back and forth here to an extent which has tried the patience of the Court.

I want to make an observation about this retention of jurisdiction clause, however, because I think that is vital.

Mr. Wright always finds in our conduct a searching for immunity. Now just look at his section 7 on page 22. He

(4298)

retains jurisdiction of the cause only for the purpose sub-

stantially of enforcing the decree or punishing violations thereof.

On Tuesday Judge Hand observed that this was a tremendously more complicated industry than any that had ever come before a court. These discussions here for the last three days indicate that nobody should have the hardihood to say that what is done here now necessarily has finality in the sense that experience won't show that there should be a change.

Now, how in God's name have we sought to get immunity when we ask this Court to retain jurisdiction to enable the plaintiff or any defendant to take further proceedings in the event it should appear that the operation of this decree has failed to bring about a correction of the found violations of the Sherman Law?

(4299)

Mr. Proskauer: We haven't asked your Honors to say that we are the only ones who can come in. We have subjected ourselves in what we propose here——

Mr. Wright: You want an answer to that question, your Honor?

Judge Hand: Yes.

Mr. Wright: The difference between our proposal and theirs is this: anyone can come in under this proposal, "Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same," that is, this decree.

Now we haven't attempted to limit in advance what the Court can consider on the petition of any party as an appropriate ground for modification. But the purpose of the modification is always the construction or carrying out or enforcement of the decree.

Now they are suggesting that they might wish to come in and they want to have it stated in advance simply as a means for getting out from under the decree if it appears that it becomes more burdensome than they think it would

be. I don't think that is a reason, a sound reason for including——

Judge Hand: We think your clause "or for other or further relief" doesn't cover it.

(4300)

Mr. Wright: Their standards in my view represent a considerably more favorable position than they could possibly derive by applying adjudicated cases to the construction of our words "or for other or further relief."

I think the safe way to handle it is—you have here the language, "or for other or further relief," and if anybody makes an application he is entitled to get whatever relief he can show he is entitled to under whatever authorities he can then muster, rather than by some prestated set of standards that he thinks are going to help.

Mr. Proskauer: May I say, Mr. Wright's interruption has not tended to clarify this situation. His language of the retention section relates solely to construction and enforcement. There is not a word in his section that relates to modification in the language which has been told you by Mr. Caskey was taken from the Appalachian case. If there is an issue between us here, let's face it. We ask this Court to retain jurisdiction practically for all purposes. We do it because nobody is omniscient. We do it because as these complicated provisions of this decree get into action it may well be that the Government can come in and say, "This has

(4301)

not done the job." We are willing to subject ourselves to that under this form, or it may well be that we can come in and say there is something here which obviously creates an inequity and we ask your Honors to do exactly what the Court said in the Appalachian case, a District Court ought to reserve jurisdiction to do.

Now the only thing I have heard which gives any pause at all—and I don't think it is really pause—is the suggestion that possibly the words "or for other or further relief" may cover these things. I don't think they do, your Honors, and I believe we should have with the Government the clear right to come into this court in a situation as complicated as this

and show—not relief from things occasioned—shall I proceed, Judge, or wait?

Judge Hand: Well, I had in my mind—I didn't hammer it out—I really had in my mind if this thing became impracticable as a means of controlling your monopolizing tendencies, that the Government could come in and make another application and say that there must be divestiture or something else. I had that in mind.

Mr. Proskauer: That is what this says.

Judge Hand: I am rather surprised that Mr. Wright should raise this question. You might have raised it.

Mr. Wright: We ourselves, if the Court please, suggested,

(4302)

of course, specific reconsideration after specific periods of certain provisions by the Court. But if the decree is going to have finality at all, I think it must not open up every provision of the decree the way in which this Section 11 seeks to open.

Judge Hand: Are you afraid you could not appeal from it because it is not final?

Mr. Wright: Whether or not it would have finality for those purposes I don't think there is a serious question. I think it probably would.

Judge Hand: We shan't lightly disturb any such decree. You would have to show something on either side that was very controlling.

Mr. Wright: Yes.

Judge Hand: In other words, we don't any of us, I suppose,—and certainly I don't above almost all other men—pay very much attention to rearguments after I once crystallize. I used to, but I found it did a great deal more harm than good. I find that it was a terrible practice, a weakness. And we have always here tried to differ very fundamentally from the various courts in the west in which a decision is only a step in talk and other decisions that go on for years. And in the reports you generally see both opinions printed as to what they thought of their first decision and what they

(4303)
thought after the second and so on: I don't believe in that and I don't think it is sensible or practical. It is not because I don't very often doubt my own conclusions and decisions, but having decided how to jump after more dubitation than is in the heads of most men, I don't intend to recant until somebody has told me I must who is superior.

Mr. Wright: I take it what we were concerned with in Section 7 is not any recantation at all, but the circumstances under which at some later time reconsideration might be had. For our part we would much prefer to take our chances under that provision than we would under the provision that they have proceeded under in their Section 9.

Mr. Proskauer: May I proceed very briefly along the lines you indicated?

Judge Hand: Yes.

Mr. Proskauer: This is a judgment against us and you are going to orient in this decree a procedure for curing these evils of which we have been found guilty. I don't want any reargument. I don't want anything but for you to keep jurisdiction over this case so that if by reason of what transpires after the decree it becomes apparent to you either that the Government should have greater relief than you gave
(4304)
it or that we should have some modification of the relief you gave it—not that they are going to get it or we are going to get it—but that you have the jurisdiction to entertain an application. Now that is all we are asking and unless we all claim omniscience here, I should think Mr. Wright would agree with us that that was a sensible thing in the public interest to do in a great and complicated industry like this.

Now I sense what is in Mr. Wright's strategy. He wants to go to the Supreme Court and argue that he should have divestiture and that this does not give it to him and he doesn't want to have it said that this Court acted reasonably in retaining jurisdiction, and he believes his chances of reversing this Court on appeal are less if you do what the Supreme Court said in the Appalachian case should be done

—that when you are dealing with a continuous and complicated situation you should retain jurisdiction.

I don't want to prolong the argument at this hour. I commend that to your Honors as something fundamental and serious and the language of it I ask that your Honors take and consider what is the right and the decent thing to do here.

Now Mr. Wright, may I proceed just a few minutes with-
(4305)
out interruptions? I don't mind them when they are relevant, but I don't hear many relevant ones. And when I say this my lips are going to be closed on this decree because it would be just repetition.

I am going now to the last provision about the effect of what is to be done with this consent decree.

There again I argued that this morning in connection with my argument on arbitration. Mr. Wright replied to it. Now we have got the whole thing thrown into the hopper again. I restate my position, your Honors. The consent decree is the judgment of this Court. It remains in full force and effect except as you choose to modify it. Nobody has ever questioned it. The cases have questioned the right of a court to modify a consent decree, but nobody has ever questioned the fact that the consent decree was a judgment of the court, and we ask that language because it gives vitality and basic root for our contention with respect to these arbitration provisions.

(4306)

And when Mr. Wright said to me this morning that I was misrepresenting him when I said that they wanted to throw the arbitration in the ashcan, I call your Honor's attention in support of that statement to the very provisions he has been arguing here for about the liquidation of the whole arbitration system.

Judge Hand: You don't any of you care for any more discussion of this case before it is finally submitted for a decree?

Mr. Proskauer: I think not, your Honor, as far as I am concerned. I can't speak for all my colleagues.

Mr. Raftery: I only would like to have a few days to submit that proposed decree.

Judge Hand: Yes.

Mr. Raftery: I will get it in.

Judge Hand: And Mr. Isseks.

Mr. Cooke: I would also like to submit a decree on behalf of Universal.

Judge Hand: All right.

Mr. Leisure: How long a time will we have to submit something on road shows? What period of time?

Judge Hand: Oh, ten days.

Mr. Leisure: Ten days. Thank you. On the findings?

Judge Hand: Yes. That is for Mr. Raftery, too.

(4307)

Mr. Raftery: That will be fine.

Judge Hand: And Mr. Isseks—any of you. You have ten days.

Mr. Leisure: On the findings of fact and conclusions of law I asume you want no discussion on that?

Judge Hand: On the findings of fact and conclusions of law and the proposed decree. I should think this discussion of the proposed decree covered all this minutia as to findings.

Mr. Proskauer: With just one exception.

Judge Hand: It seems to me if you are going into all these findings it will just take forever and we will probably forget.

Mr. Proskauer: Being in entire agreement with your Honor's suggestion, as far as we on this side of the table are concerned, I don't see any advantage of going over the findings. I just want to call attention to one fundamental thing, and that is that the Government has omitted from its proposed findings everything that was said or found in our favor. That is why we have a great deal more findings than the Government.

Mr. Frohlich: I don't think it necessary for Columbia to submit a decree. Whatever changes are to be made can either be made by changes in the Government's decree or in the
(4308)
Court's own decree. I dont want to burden the Court with too many documents.

Mr. Seymour: We have certain changes for Paramount. May we arrange with your secretary?

Judge Hand: Yes. There is such a multitude of paper we may never be able to determine which should be first and which should be last.

Mr. Seymour: I just want to add one word with regard to the findings. As Judge Proskauer has said they contain many which were left out in the Government's findings because they were favorable to the defendants. Second, our findings are consistent with the opinion, follow the Court's opinion, and the Government's are directly inconsistent in many respects with the opinion.

And finally we didn't propose in that blue book any findings with respect to the limited divestiture phase in the decree, and that was because until we knew how your Honors wanted the decree, to deal with that subject it was pretty difficult,

Judge Hand: Wait a minute. What is that?

Mr. Seymour: In our proposed findings in the blue book there are no findings which relate to the portion of the decree which is subsection (4) of subdivision (3), that is the limited divestiture section. Now would this proper pro-
(4308a)
cedure: When your Honors get to that point of the decree to decide what you are going to do with Section 4, if we could get advice from the Court informally, both sides, as to what those provisions are to be, and then we will submit the appropriate findings rather than burden you otherwise.

Judge Hand: Yes, I think you better do it now. Submit anything you want.

Mr. Seymour: May we have a few days on that?

Judge Hand: Oh, yes. Ten days for everybody.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Equity 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al., Defendants

I, William V. Connell, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. (Vols. 1 to 7 inc. of printed testimony.)

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 6th day of May in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States the one hundred and seventy-first.

William V. Connell, Clerk. (Seal.)

United States District Court

Southern District of New York

United States of America, *Petitioner*, vs. Paramount Pictures, Inc., *et al.*, *Defendants*.	Equity No. 87-273.

Before:

Hon. Augustus N. Hand, *C. J.*,
Hon. Henry W. Goddard, *D. J.*, and
Hon. John Bright, *D. J.*,
Constituting a Statutory Court.

New York, January 22, 1947;
10.30 o'clock a. m.

Appearances:

For the Government:

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John R. Neisley, Esq.,
Curtin Shears, Esq.,
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HERMAN LEVY, Esq.,
Attorney for Independent Theatre Owner Members of Motion Picture Theatre Owners of America;
Sherman Rosenberg, Esq., of Counsel.

SULZBERGER & SULZBERGER, Esqrs.,
Attorneys for certain stockholders owning 50 percent interest in a single theatre operated by Loews;
Myron Sulzberger, Jr., Esq., of Counsel.

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(4)

The Clerk: In the matter of the motion of the five majors in United States of America against Paramount Pictures, Inc., et al.

Mr. Donovan: If the Court please, the motion before your Honors was to amend the decree filed by this Court on Christmas Eve.

To amend that decree for RKO I respectfully ask the Court to conform the decree to the opinion of the Court in this case by adding language which will make paragraph 6 of section III read as follows:

> "From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court and the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court."

Your Honors will observe that the language follows very (5)
closely the language of your Honors in outlining the terms of the decree on page 65 of your opinion, because there it was said that the decree to be entered—and now I quote your language—"shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments or in order to enter a competitive field; if in the latter case, this Court or other competent authority shall approve the acquisition after due application is made therefor."

In fact, our proposed language is more restrictive because it applies to any expansion.

Now, that position, your Honors, that you took in that paragraph had already been foreshadowed by what your Honors said on page 60—and I quote:

"The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in Interstate Circuit, nor more severe than the one it imposed in United States v. Crescent Amusement Co."

It is true, your Honors, that if this language should be added it would make the remedy in this case conform very closely or almost exactly as in the Crescent case. And as I read the Crescent case, your Honors, it would appear that the essence of that case was theatre expansion by unlawful means, and the Court there found that there had been an unlawful monopoly established in the operation of theatres (6)
in various States of the South, and in addition it found that there had been coercion or attempted coercion upon independents for the turning over of their theatres. But even in those circumstances and with those findings the Government requested and the Court approved a provision prohibiting expansion—and now I quote from the opinion of Justice Douglas—"except after an affirmative showing that such acquisitions will not unreasonably restrain competition."

In pointing out the considerations which governed the Court in the formulation of such a decree, the Supreme Court used this language:

"The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. . ."

Now, within the principle laid down by your Honors, it seemed to us only fair that the same opportunity should be

given to RKO and to the defendants here as was given the
(7)
defendants in the Crescent case, particularly since there is no finding here of any unlawful monopoly such as was established in the Crescent case, and there is no finding of coercion such as was established there. The contrary has been found by the Court in this case: First, that the organization of RKO increased competition in every branch of industry; second, that RKO achieved no monopoly of theatres individually or collectively, considering it with the theatres of the other defendants; and the basic finding of this Court was that the irregularities and restraints arose not from the ownership of theatres by the producer-distributors, but in the trade practices and in the joint ownership and joint operations referred to and enumerated in Finding 154.

Now, if it please the Court, as I read your Honor's opinion, it seemed to me that the underlying philosophy in the approach to a remedy was in the necessity, as your Honors expressed it, on page 60, of restoring competition to the moving picture industry that would be fair both to the competitors and to the public; and that the best way of dealing with it was by the abatement of these trade practices rather than by total divestiture.

Now, your Honors, if this decree can be construed to mean absolute prohibition of expansion regardless of circumstances, then I am advised by my client that RKO would
(8)
be in an impossible competitive position. And there are a few specific facts that need to be considered. There are certain findings based upon the testimony of Mr. Rathvon, president of RKO, which tend to show that RKO had always endeavored to operate its theatres as showcases for the initial exploitation of its features, of the features it distributes, with the result that the advertising by reason of that exploitation meant the increase of revenue to all who exhibited those pictures.

Of course RKO is not in a position to take advantage of that situation because she has no theatres in the South

except in New Orleans, none in the Southwest, none in the Northwest, and only two in California. And more than that, your Honors, out of the 19 years of its existence, seven of those years were spent in receivership in which she lost many theatres.

I think your paragraph 118 of the Findings shows that while RKO had 109 theatres, Paramount had 1,395, Fox 636, Warner 501, and Loew 135. At the trial RKO had 106 theatres. Today she has 102. And without applying further to the Court for relief, she will have somewhere between 80 and 85 left of which she owns only 32 in fee.

Now, if it please the Court, in view of that situation, if RKO is to be locked into a position where she cannot get (9)

that healthy growth that was spoken of in the Crescent case, and which was the basic purpose of your Honors in the opinion, then she will be subjected to a kind of a progressive divestiture which will mean slow strangulation for her; and I respectfully submit that the public interest would be fully safeguarded by giving to RKO and to these other defendants the same relief which was given in the Crescent case, so that expansion could be prohibited except where there is an affirmative showing that such acquisition would not unreasonably restrain competition; and I suggest, your Honors, that if there is to be such a fixed determination in the prohibition of expansion, that then not only will the purpose of the Sherman Act be defeated but also the purpose of your Honors' decision.

Mr. Seymour: May it please the Court, I want to add a few words on behalf of Paramount with respect to this same portion of the motion.

The decree as promulgated by your Honors may be ambiguous as to what you intended with respect to theatre expansion. As one reads paragraph 5 with paragraph 6, it seems probable that your Honors were following your opinion in that decree and were providing not absolutely against expansion but only against expansion where more than 5

percent but less than 95 percent interests were acquired. So
(9a)
one may read the first sentence of paragraph 5. But in view of the very strict language of paragraph 6 of subdivision 3, we felt it desirable to come back to your Honors for clarification at this time so that there could be no misunderstanding about what the decree meant.
(10)

Now General Donovan has referred to the opinion which indicates that you did not intend to ban expansion absolutely but recognized the propriety of acquisitions to protect investments and theatre expansion, or the acquisition of theatres to enter a new competitive field; and in your opinion you indicated that the latter should involve court approval.

The language of the opinion, when we came to the argument on the decree seemed to be quite clearly what your Honors had definitely determined because in examining the colloquy I am reminded as we set forth in our little memorandum that we filed yesterday that when I was arguing against the Government's absolute ban on expansion and began to attack that as contrary to the opinion, Judge Hand said, "We are not going to have any such drastic opinion as that. We considered that." And naturally I passed on because that seemed to be precisely in accordance with the opinion, and I took it that your Honors had rejected the Government's suggestion.

Now the findings and conclusions, like the findings and like the colloquy, point not to a complete ban on expansion but point only to the divestiture of those joint interests which your Honors held to be unlawful and there is nothing in the
(11)
findings or in the conclusions to support an absolute ban on any theatre acquisition.

In our proposed clarification we have gone even farther than your Honors went in your opinion. In the opinion the Court indicated it would be content with a decree which re-

quired court approval only when the acquisition was for the purpose of acquiring a theatre in a competitive field. It did not require court approval where a theatre was acquired in order to protect investments. In our proposed clarification we have provided for court approval for both. Not only did we think that was consistent with everything that happened in this case to have this clarification in substantially the form suggested, but to read the decree as intending to ban absolutely any theatre acquisitions in the way of an expansion to protect investments or to enter a competitive field would go beyond, we think, relief which has been authorized even in more extreme cases.

General Donovan has pointed out that in the Crescent case, with all the Sherman Act violations which the court found there, the Supreme Court directed a decree which permitte acquisition upon court approval and recognized that (12)
that did not impose an undue burden on the court. In the Schine decree, where, as Judge Bright recognized, the facts went far beyond any facts in this case, the same right of acquisition with court approval was allowed in the decree.

If these defendant-exhibitors should be denied the right upon a proper showing and court approval to expand, then your Honors' holding that they had a lawful right to own theatres would be substantially negated because it is surely a part of the right to own theatres to protect your investments, and it is surely a part of the recognition which your Honors gave to the public interest in the ownership of theatres, the public advantage in these fine large theatres, that these defendants should be allowed to enter a new competitive field,

Now they might have been allowed to do that without any application to the Court, merely being restrained by the requirements of law. But surely with approval of the Court, so that any acquisition in either of those fields may clearly involve no undue or unreasonable restraint of trade, they should be entitled to do it, and indeed to deny them that right

would be to relegate them to a class in the community where everybody else can do this and they can't, though they have not been found guilty of violation in theatre expansion or
(13)
acquisition except in regard to joint interests, which of course are forbidden.

Now I shan't labor the importance of the right to protect investments or to enter a competitive field, because your Honors have recognized that without any guidance from us in your opinion, and reiterated it in the colloquy, and seem to have recognized it in the findings. But plainly, there are many situations in which a theatre-owning defendant must be free with court approval to take action to protect its theatre investment.

Let me give—and I don't attempt to exhaust them—a couple of examples which show the kind of thing which they surely must be free to do with court approval under the opinion.

U. N. is about to build a magnificent part of the City on the East River. It seems probable that a part of that will be a theatre section. No one can say now whether it will draw substantial patronage from the Times Square area and as congestion and transportation in New York City gets worse it probably will.

Now Paramount owns a fine theatre in the Times Square area. Surely if there should be a substantial migration of
(14)
theatre patronage to that new section of New York, Paramount ought to be free to come to your Honors and ask leave to acquire a theatre there to protect its investment.

There are situations where the business section of the City moves from an old area to a new area. Surely the owner of a theatre in the old area ought to be able to come to the Court and get the right to erect a new theatre to protect its investment in the old theatre from diversion of patronage.

Another example which is perhaps not of great general interest but of some interest is this: Open air theatres have

become more and more common. These so-called drive-in theatres. Surely if that movement shall spread, Paramount, owning a theatre in the community and finding that during the summer months a substantial portion of the patronage was taken away, ought to be free to come to court and get leave to acquire a drive-in theatre or an outdoor theatre.

Now those are just examples of the kind of thing that might be necessary to protect investments.

Now on the entry into the competitive field, as I say, it was a public advantage and the Sherman Act recognizes that it is a public advantage to have competition in exhibition, and that it was a public advantage to have competition in
(15)
exhibition from these defendants. Now there are areas where these defendants have no theatres where it is not a public advantage to have that competition. The Sherman Act does not take that view and your Honors didn't seem to. Your Honors knew that there are areas where, for example, Paramount has no interests or theatre interests, and the exhibitors have boycotted pictures and denied the exhibitor an opportunity to exhibit pictures. That is a public disadvantage and of course it is a serious disadvantage to the distributors, and surely Paramount and the other defendants ought to be free to go into such an area and compete and assure an outlet for their pictures and an opportunity to the public to see their pictures.

That boycott situation is not the only one where such an opportunity ought to be afforded.

Now I submit to your Honors that the decree should be clarified so as to conform to everything your Honors have said in this case which indicates that your Honors have recognized the propriety of leaving some flexibility in the future development of this business and not denying these defendants the lawful rights which they were held by your Honors to have, to-wit, the right of owning theatres and
(16)
exhibiting pictures; and we submit to grant this clarification

will simply put the decree in clear harmony with everything your Honors have done in this case, and not to grant this clarification will put the decree out of harmony with everything your Honors have done in this case and out of harmony with the current course of recent Supreme Court decisions on relief.

Judge Hand: Now Mr. Seymour, we in drawing up this decree—and it was in the opinion—reserved jurisdiction. That is at once a benefit and a danger to anybody connected with the business, of course. In other words, if it doesn't work you are at liberty to divest on further hearings and if this arrangement bears too hard on any theatres in any given situation you can still come to court and ask to modify where the specific right to modify in this respect was not preserved.

Mr. Seymour: Your Honor is aware of the difficulties with applications to modify under the general reservations. Now we submit that there should be a specific reservation in this regard as your opinion foreshadowed, and also the discussion foreshadowed, so that it may be plain to whomever might be hearing the case at the time that your Honors specifically reserved the right to come in with such applications.

(17)

Judge Hand: Does anyone else want to be heard on this clause that General Donovan and Mr. Seymour have been talking about?

Mr. Caskey: Not on this reservation.

Judge Hand: All right, that being so——

Mr. Arnold: I would like, if the Court please, to address a few remarks to the effect of this acquisition on expansion, or the effect of expansion upon our clients, the purpose of which is to suggest a possible reconsideration of our right to intervene.

Our clients represent every sort of situation. For example, many of them would be affected—are affected by subsection 4 on page 6 of the decree, the section which restrains the defendants from making or continuing leases of theatres

in the same competitive area to an independent for a share of the profits.

Now they haven't seen this motion. I don't know what position they would take under the motion, but I suspect that many of them would take this sort of position: as the decree now stands, a lessee from a major under a profit-sharing arrangement can change that lease I assume to a fixed rental but the major cannot expand by taking over the operation of that theatre itself. Now here is a section of the
(18)
decree which goes further than our original grounds for intervention in that it takes away a specific property right and here is a motion for expansion which takes away all bargaining power when that property right is affected, when that lease is cancelled.

Now I assert that the Court cannot consider this motion until it has given notice to those in our situation whose property rights will be affected. They have, I think, a clear position as necessary parties with respect to this motion. I haven't contacted them. It is difficult to explain this thing over the long distance phone but I do want here in protection of the various members I represent to suggest that as the decree now reads they have the right in the situations covered by section 4 to change a profit-sharing rental into a fixed rental, the expansion will permit the major to take that over in order to protect his own investments, and their property rights, specific lease property rights, would be adversely affected, and therefore, while I can't take a position on the motion I suggest the Court has no jurisdiction to grant that motion without notice and without a hearing, and I wish to point out again the effect which this motion might have with respect to competitive bidding.
(19)

Judge Bright: That was the only ground you asked to intervene on?

Mr. Arnold: That was the only ground on which I asked to intervene, but now a new motion is made which our clients

have never seen, which affects specific property rights. Of course we claim no right to intervene until such time as our specific property rights are affected. I am not here doing anything more than in the interests of my clients suggesting until we have an opportunity to intervene on this new motion the Court should not pass on it, and I further suggest that we are necessary parties with respect to any motion which affects our leases. I can't tell the Court who these people would be; I am simply making a record to protect their interests if any.

I wish to say further with respect to the effect of expansion on competitive bidding, the situation we can imagine might be this: a group of independents are in any given city buying their pictures on competitive bidding from one of the majors. The major puts a minimum bid of $5000 a picture on. No one is able to bid for the picture. The suggestion is always there that that is a boycott and that they can now come in and build a theatre in order to protect their pictures and in order to expand their own competitive situa-
(20)
tion. That, if the Court please, is exactly what will happen, the threat of the building of a new theatre, the pressure—you see, we start out with a seller's market, and on top of that seller's market there is the pressure of a possible new theatre coming in. I suggest that that is one of the things which should be taken into consideration with respect to the operation of the beginnings of competitive bidding and expansion. I quite agree that my only right here is to talk in this connection about competitive bidding. I have no right to talk about expansion except insofar as it affects competitive bidding, and I think I have the right to point that out. And then one final thing and I am through; and that is, I would like to call the Court's attention to the fact that since this decree has been handed down there are a number of events and actual evidence which could be produced to show that the Court should give reconsideration to its competitive bidding proposal. I think it would be presumptuous for me

to repeat that which the Court heard very courteously and at great length on competitive bidding, but I think it is proper for me to outline a few situations which have developed since the Court entered its decree, and suggest the proof would be available of that character.

(21)

Since the decree old customers' relationships and franchises are being cancelled and repudiated from Massachusetts to New Mexico. And I think we could show that this competitive bidding scheme is becoming the greatest bonanza to the majors that they ever have had in the history because of the bargaining position in which it would put them. We argued that before. The only thing I add now is that we offer to show the thing in actual operation.

Now I will give a typical situation to show how that is working. In one city an old customer relationship which has lasted for fifteen years has been broken, and the picture, a major and most important picture has been sold to another major defendant.

(22)

Now, I think that instances like that would build up the picture of the piecemeal destruction of a competitive system by legalized operations one by one under a decree which prevents the Court or any other court from looking at the entire situation and seeing where the practice of competitive bidding is leading.

I will use one analogy and then I am through. It is an analogy in reverse. The A. & P. Stores have been recently convicted of violation of the Antitrust Laws. Their policy was to go into town after town and accumulate retail outlets. Their money was made behind the retail outlets. Their methods of getting retail outlets would be to indulge in fierce competition in a given town until their outlets were established and competition was destroyed. I think that in no single town could it have been shown that the A. & P. had violated the Antitrust Laws. The Court, however, was able to look at the entire acquisitions of A. & P. and they were convicted of violation of the Antitrust Laws.

Now, I think that the practices since the decree would show a pattern of that character taking place in the operation of competitive bidding, and it is that new matter only which I wish to call to the attention of the Court.

Judge Goddard: Judge Arnold, are you opposed to giving the exhibitor the option of competitive bidding?

(23)

Mr. Arnold: The option, if the Court please, is purely illusory. He does not have any option. He is compelled in a competitive situation, if one man makes a bid, to come in. In other words, the Court, it seems to me, has effectively allowed a combination of major defendants to impose this on the market. I do not want to go into that too much; I do not want to repeat all the arguments I made before. That, of course, has been our position. I do not think that the decree has substantially changed it at all.

Mr. Proskauer: May it please your Honors, I just have a word to say. I do not want to go far afield with Judge Arnold. We are not here on our motion on this competitive system, and I would not have got up if it had not been for his suggestion that in some sinister way we were using this decree for the purpose of coercing his clients.

I suggest the impropriety of such a representation to this Court, and I ask your Honors to consider the improbability of such a thing in the light of the fact that we are coming here with a motion, a part of which is to be submitted to you bye and bye asking for a stay of these provisions for the very reason that we do not want to go through with this change of system which does bring hardship in its wake—I

(24)

admit—to us and to everybody else until we get reoriented. This talk about competitive bidding giving us an option to coerce independents by our own collective action has no substance whatever, and I am suggesting that the determination of this motion we have made should not be influenced by the somewhat atmospheric observations of my friend Judge Arnold.

I should like to say a word about Judge Hand's suggestion made to Mr. Whitney Seymour, and that was that perhaps we could get this relief as to the theatre situation by coming in under the general power of amendment section of the decree. I should like to point out the great differences between coming into court and saying we are here by virtue of a provision of the decree, asking permission to do a thing where we have got the burden and must sustain the burden of showing that we are not violating the law by doing it—that on the one hand—and on the other hand coming into a court and saying we want the decree itself modified. That burden is too great to impose on us in a practical situation like this where you will probably have from time to time perhaps six, seven, perhaps a dozen applications a year from one company or another to acquire a theatre under circumstances which it undertakes to show to the Court are perfectly proper, and the Court might very well and probably

(25)

would say in many of those cases we think you have sustained that burden and we will permit you to acquire theatre A, where a court would be wholly unwilling to say that on this showing we are going to modify the decree. The troubling part of this wholly surprising provision in your Honor's decree was that it was completely unforeshadowed. You had in your opinion, as was pointed out, very carefully envisaged the validity of these situations in which we want to expand theatre ownership. You had in colloquy expressly said that you would not put such a drastic provision in the decree. Therefore why is not the thing to do to make this decree conform with the necessities of the case, as your Honors yourselves noted them, and merely put in a provision that we are entitled to come here and take the burden of showing you that we should be entitled to acquire a theatre under specific circumstances?

Judge Hand: Mr. Wright.

Mr. Wright: If the Court please, I do not propose to make an argument here. I assumed that the time for

argument over the provisions of the decree were covered last October, in view of the extraordinary length of time that was given everyone to have his say about the decree prior to that date. I merely want to say with respect to this prohibition (26)
against expansion that in so far as the Government is concerned, its meaning is perfectly clear that there shall be no expansion except such expansion as might occur pursuant to an order entered by this Court approving an acquisition in the course of dissolving an existing joint relationship.

Now, that, it seems to me, is what the provision clearly said, but if it does not mean what it said, I think the Court ought to say so now.

There has been some inadvertent misrepresentation here, I think, of what the colloquy was and what these other similar provisions in the Crescent and Schine decrees provided that I think should also be cleared up. The provision you entered was a compromise between the position that we advocated and what the defendants advocated. We asked for an unqualified prohibition against expansion, and that was the request to which your Honors' remarks that were quoted by Mr. Seymour were directed. We did not get that. The defendants have an express authorization to expand in the course of acquiring these partnership interests. They also have, as I understand the decree, a much more flexible position than that which was actually accorded to either the Schine or the Crescent defendants. Those decrees, in terms, prohibit any acquisition except with the Court approval. Schine at this moment has a petition pending for leave to (27)
build a theatre to replace one which was burned down.

Now, the prohibition here is not in terms a prohibition against acquisition but one against expansion; so I should suppose without any court proceeding whatsoever these defendants are free to replace such existing facilities as they lose or abandon.

Now, I had assumed that one purpose——

Judge Hand: Repeat that last thing.
Mr. Wright: Will you please read that.

(Last remarks of Mr. Wright read.)

Mr. Wright: In prohibiting expansion except in the course of this dissolution proceeding pursuant to Court approval, I should suppose that one of the things the Court had in mind was preventing any substance being given to exactly the sort of claim that Mr. Arnold said some exhibitors were now making with respect to the probable effect of the competitive bidding system. I should suppose that the prohibition in its present form is, of course, intended to see that the operation of that system or other practices of the defendants would not be used as a means of promoting the over-all theatre position of the defendants.

Now, I think it is perfectly clear that where the Court has found, as it did here, that there has been an attempt to

(28)

monopolize, even though the monopoly has not been made effective, it is clearly entitled to adopt adequate measures to see what monopolization does not in fact result; and I think in accordance with the existing findings of the Court it was clearly authorized to go further than it did, and that is unqualifiedly prohibit expansion of the theatre holdings of these groups that have been found guilty of the violations which are recited in the findings. It did not do that, and it seems to me that the exception that was provided—that is, permitting these people to actually expand at the expense of independent partners—was an extremely liberal exception which, under no circumstances, ought to be broadened. If the Court, however, has any intention of broadening it, I do not think the matter should be deferred to some future application. I think we ought to know now what the actual intention of the Court is in that respect. I assume that its intentions are actually reflected in the provision as written; but if I am incorrect in that, I think we ought to know now.

Mr. Sulzberger: Your Honors, I represent certain stockholders who own a 50 percent interest in a single theatre presently operated by Loew's. We are vitally affected by
(29)
the provisions of this decree, especially those provisions which involve the sale to or the purchase of that stock interest to Loew's. There are probably hundreds of similar individuals in a similar situation. We feel that it is impossible for this Court to envisage every situation where an independent or an investor is going to be vitally affected by a provision of this particular decree, and it seems fair to us that before this decree is put in final form wherein a modification of the decree will have to be applied for on notice to all the defendants, which would be an expensive procedure for a single theatre owner or a stockholder who owns an interest in a single theatre,—that your Honors provide by publication or other adequate means that all persons who will be vitally affected by this particular decree, and who may lose substantial sums as a result of the provisions of this particular decree, be given an opportunity to come in and to be heard so that they may present to this Court ways in which their financial interest is being adversely affected by the decree so that the same may be clarified now.

Now, in our particular case—and I do not want to burden the Court at this particular time with that individual situa-
(30)
tion—my clients own a 50 percent stock interest in a single theatre. I do not think that they would be classed by this Court as either independents or theatre operators, though it might very well be that the Court could or would come to such a conclusion. This particular person may be required under the provisions of that decree to sell its stock interest, though it may not prefer to do so, or to buy when perhaps it it is not in a position to buy the stock interest of Loew's in that particular theatre. This particular stockholder, if it should buy, or, rather, if it should sell, is going to be vitally affected by that particular provision of the

decree which provides that a theatre is not a defendant's own theatre unless it owns 95 percent or more of the stock interest in that particular theatre. And there are many provisions in this particular decree which affect independents and investors in a way not envisaged either by the Court or by the Government. And in concluding I would like to say for my own clients and for independents generally that we would like an opportunity to present to this Court suggestions with reference to the decree before it becomes finally operative.

Mr. Davis: If your Honors please, I do not know what the situation is to which Mr. Sulzberger refers. I do not want to be understood as opposing to his attitude as a

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co-stockholder with Loew's. It is not clear to me how the Court can sit here day-in day-out and pass on the equities of everyone of this multiplied number of instances.

Judge Hand: Of course we cannot, and we are not going to either. We are going to allow them to ventilate their ideas, but the idea that we cannot make a decree against some defendants in an equity suit under the Sherman Act without bringing in stockholders and everybody else, has been exploded by a number of authorities, and we dealt with it in the decree, and we do not propose to follow that trail much further even by listening to vocal exercises.

Mr. Davis: Well, I do not find myself in dissent with the Court. I want to make it clear, however, that I am not speaking in opposition to Mr. Sulzberger or Mr. Sulzberger's clients.

Now, I have not said anything on this question of expansion because I am content with what my colleagues have said on that subject. It does seem to me that a hard and fast rule, no expansion whatever, which freezes the present holdings of the parties, is apt to work more hardship than it is public benefit, and the question which we present there is whether the Court follows the language of its opinion, or

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whether it follows the more restricted language of the decree. The opinion seemed to use to leave a proper degree of latitude, and we think the decree should preserve it.

Now, on the question of competitive bidding, still a very contentious subject, as one may perceive from the remarks of my brother Arnold, what we suggest in that connection is this, that the operation of that system, experimental as we all know it to be, should be suspended until reasonable time, 90 days or whatever, after the entry of final decree in this case if and when an appeal should be taken. If no appeal is to be taken by any of the parties and the case ends here, then we know what to do. If an appeal is to be taken, we submit that this rather expensive and experimental process should await the final determination of the case so that we would not be put in the attitude of beginning it today and dropping it again tomorrow. We should like the case to reach a stage of finality before we are compelled to enter upon that experiment and we so suggest.

When it comes to the dissolution of pools, your Honors have provided that joint ownership should be disposed of in two years. You set no time whatever for the dissolution of pools. We submit that the same sort of latitude in time should be extended to the dissolution of pools as to the dis-

(33)

solution of joint ownerships; because in essence the problems are very much the same and require the same sort of negotiation and readjustment to the interests of the parties; and we should like a time limit set on the dissolution of pools.

I am not disposed to argue this matter to any great extent. We have tried by our memorandum and our brief to give your Honors the exceptions we have to make for the moment to the decree, and I make it clear that this is not a proceeding on our part for a rehearing or a retrial of the case. It is to the interest of the public that there should be an end to litigation, I suppose, and we accept your Honors' opinion for present purposes. Our object is only

to bring the decree into conformity with that opinion and with the necessities of the parties.

Mr. Caskey: I might make a slight technical suggestion: We are not asking for any addition of time to dissolve the relationship between co-defendants to the extent that that has not already been accomplished. We propose to accomplish it by March 1st.

The requested provision for two years with regard to pools and leases are arrangements with independents and not as among ourselves.

With regard to the so-called competitive bidding, as far (34)
as the five theatre owning defendants are concerned, we are not asking for any stay with respect to provision 8(b) which requires that each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or otherwise; nor are we asking for any stay as to 8(d), which provides that each license shall be offered and taken theatre by theatre and picture by picture. That too it is contemplated will go into effect immediately. In fact, it is, generally speaking, in effect now. Nor are we asking for any stay from section 9 which provides that we are enjoined from arbitrarily refusing the demand of an exhibitor for the run that he desires and licensing it to another. Thus, your Honors will see that the essence of the reform is in effect, and what we are asking is that the precise procedure or ritual specified in section 8(a) and 8(c) shall not become effective until final disposition.

We are not asking for a postponement of the general plan which this Court has suggested, that licenses shall not be refused arbitrarily, that they shall be granted solely on the merits without discrimination theatre by theatre, picture by picture.

Judge Goddard: What about the admissions?

Mr. Caskey: We are not asking for any stay with regard (35)
to that. I think it is a fair statement to say that that pro-

vision has been taken out of most of the contracts of the five theatre-owning companies. I do not know what the others have done. I do know that in the case of Twentieth Century-Fox the provision was taken out as soon after June 11 as we could do it, and I think that generally speaking it has been taken out.

Judge Goddard: June 11?

Mr. Caskey: That was the date of the opinion. We took it out as soon as the opinion came down. And you may recall that we addressed a letter to the Court on this subject in the early summer of 1946, so I think as far as the five companies are concerned, the practice of fixing admission prices has been stopped.

Judge Hand: Of course, when it comes to the extra time you have asked for a stay, if there is an appeal you can go right down to Washington and try to get it.

Mr. Caskey: Yes, but it must be clear to your Honors that this is the appropriate forum for the stay, and I think on consideration you will see that the two-year period should have applied. I think it is merely a matter of mechanics; if the paragraph had been renumbered it would have applied to all three. I do not think there is any essential difference between a pool with an independent or a lease to an inde-
(36)
pendent, or a joint stock ownership such as has been described by Mr. Sulzberger. They all fall into the prohibited category.

Mr. Seymour: May I just make a comment in answer to your Honor's suggestion that we could go to the Supreme Court for this stay on the competitive bidding thing. I think it is plain that the thing is so complex, the whole problem of distribution is so complex, and the question of whether this represents a real change which ought not to go into effect until it has been considered, is one which your Honors can appraise far better than the Supreme Court can on an actual motion. Now, it is plain that it is a revolutionary reform; that is what you intended it to be. Whether it can be made

plain to the Court on a motion for a stay, I do not know; and it seems to us that your Honors are in a far better position to pass on that than the Supreme Court would be on that application. This case will be complicated enough for the Supreme Court when it gets there on the merits, and this question of distribution and the change in distribution, it seems to me ought to go to them on the merits rather than on an application for a stay.

Mr. Proskauer: Your Honors, we are asking one other clarification in your decree, and it relates to a conclusion of law. As the decree is now drawn, that conclusion reads (37)
(9(d))—and if you look at page 11 of the little memorandum we handed you you can follow I think very clearly the rather simple argument I propose to make to you.

The conclusion reads:

"Conspiring with the distributor defendants"—

Mr. Wright: Excuse me, Judge. If you would rather hear me now on this question of the stay, or put the whole thing over—the order that you have been following I thought was to discuss one subject at a time.

Mr. Proskauer: Oh yes, I will gladly give way.

Mr. Wright: If you would rather do it this way, all right.

Mr. Proskauer: I waited to see if you were going to get up. I will give way.

Mr. Wright: With reference to the stay of the competitive bidding provisions of the decree, it seems to me quite clearly that is an integrated section. You can't, it seems to me, stay part of those provisions and have others operate effectively.

Now, for our purposes there are many situations of people who have been in communication with us which are contrary to the representations which have been made by many (38)
of these organizations here; they thought their particular situations would be helped when and if competitive bidding

went into effect. They, of course, have been advised that the effective date of the provisions will be July 1. In view of that fact, our inclination, I think, is to see that the provision is at least given an actual trial in operation; that you cannot determine whether all of these dire consequences will ensue, or what its actual effects will be without actual experience under it. The only way to get experience under it is to put it into effect.

Now, I have this qualification in that. I had assumed that serious consideration would not be given to motions to amend the substance of the judgment at this time; and if there were not this protection against affiliated theatre expansion along with it, I would have some qualms myself about seeing that it goes into effect without that protection; but as I assumed the matter will be now, I assumed that the judgment will stay in its present form, and under those circumstances it is very doubtful whether we will appeal from the competitive bidding provisions as such at all.

Now, nobody else has filed an appeal, and I do not see how the Court can possibly say at this time that the provision is going to be under attack on the appeal. The only
(39)
point at which that can be determined, I think, is at the expiration of the 60-day period when all appeals will be on file and the Supreme Court will then obviously be the proper forum in which to consider what if any stay should be granted to whom with respect to what provisions, and what if any conditions might be appropriately imposed; and I suppose one of the main considerations in connection with any stay based upon a until final disposition of the Supreme Court, would be when the case was going to be so disposed of, and I submit that only the Supreme Court itself would be in a position to speak on that point or to give consideration to that question. It might very well insist as a condition of a stay on an expedition of the appellate process, or that the case could be more quickly disposed of than it might otherwise be. Of course, the position that the defend-

ants are asking for here is one in which they could sit back and without any appeal of their own simply have complete protection with no incentive whatsoever to cooperate with the Government in getting a speedy determination. That I think would be a very unfortunate place in which to put the case.

Judge Hand: Now, Mr. Wright, regarding the time they ask for on divestiture of these pooling contracts as compared with joint ownership—what have you got to say to that?

(40)

Mr. Wright: With respect to that, your Honor, I see no essential difference between a pooling agreement or a profit-sharing lease or those other agreements which the Court found to be unlawful in themselves, and, let us say, a franchise. I assume that all of these agreements of that character which are found to be unlawful are terminated and become unenforcible on the date that the judgment becomes effective. Now, I see no special reason for any extension of the period at which those agreements become unenforcible. It is true that the declaration of unenforcibility will lead to the making of new arrangements between the present parties. They have already had six or seven months in which to explore the possibilities, and are given additional time in which to complete them; and it seems to me that if any special hardship case should develop and the facts were brought to the attention of the Department, I would assume that there would be no difficulty in granting such particular time as might be necessary to avoid a particular hardship. But I see no reason whatsoever for just a blanket postponement of the effective date of that relief. These agreements are illegal in themselves, and I see no reason why their continuance should be countenanced after the date of the judgment.

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Judge Hand: What about the joint ownership?

Mr. Wright: Well, the joint ownership is appropriately taken care of now by a two-year provision. They are given a two-year—

Judge Hand: They say they would like them coterminous.

Mr. Wright: Well, it seems to me they are essentially different things.

Judge Hand: Well, that is just what I wanted to hear.

Mr. Wright: The reason for the two-year period in dissolving the joint ownerships, I take it, is that these involve transfers of stock and property which by their nature require a more elaborate treatment. Now, these pools which are the product of simply an agreement, it seems to me, are effectively terminated simply upon a voiding of the agreement. That settles the pool. Now, I see no reason why any time is required for the termination of one of that character other than what has already been given. The judgment, as I say, declares franchises invalid as of the date it becomes effective. I see no distinction between such agreements and the pooling agreements in so far as illegality is concerned or the time at which they should be terminated. It seems to me they should all be terminated when the judgment becomes effective.

(42)

Mr. Caskey: If your Honors please, it seems to me that the distinction which Mr. Wright seeks to make between the pools and the joint ownership is utterly unrealistic. Many of these so-called pools involving two or more theatres which are operated by one of these defendants for the joint account of themselves and a third party are in corporate form; many of them are set up by joint ventures; others exist by virtue of leases or subleases or assignments of leases. In many cases, or, at least, in a number of cases, the pool itself has acquired for the joint account a third or a fourth theatre; there is no operator; it is not possible just to say that on March 1st the third party will come and take his theatre.

Judge Hand: Well, you have got some time, and a lot of those pools are very obnoxious things. They ought not to have been had; the parties ought to have known enough not to have them even in the vague state of the law about the Sherman Act.

Mr. Caskey: Whatever that fault may be, the fact is that it is not feasible to get third parties to come in to operate

by March 1st. Many of these pools represent theatres owned by third persons, who may technically come within your definition of an operator but who, in fact, are not operators, (43)
who will have to make arrangements for the operation of their theatres, for the purchase of films and for the detail of conducting business again.

We are not seeking delay just for delay's sake but seeking it in order that the rights of both parties will not be prejudiced by any precipitous action, and I think that an orderly dissolution of these pools over a two-year period will be more beneficial to the non-defendants who are involved. We quite agree with your Honors' statement of the law as to its effect upon third parties, but, nevertheless, the orderly return of their property is of importance to us and to the Court.

Mr. Seymour: May I just comment a moment on Mr. Wright's answer to our argument about this stay of the competitive bidding provisions. He suggested that we ought to have waited until we saw whether there was an appeal, and who appealed, and so on. Well, we could not wait because that decree fixed an effective date, and the only way that this application could be made was under the 10-day rule, and we had to come to your Honors to ask you to postpone that effective date.

Now, it is just idle to suggest that no attack upon this competitive bidding provision is going to be made in the Supreme Court. All the friends of the Court practically that (44)
have been here have indicated that they do not like it and they have now, I think, entered orders on your Honors' denial of their interventions; and Judge Arnold, if I could understand it this morning, had not embraced competitive bidding with enthusiasm nor indicated that he was not going to attack it above.

Now, our real point is that if we put this system into effect, and then if the Supreme Court should modify it or

strike it out or do something else in response to the attack which will certainly be made upon it, the whole industry would be just convulsed, and your Honors know that better than the Supreme Court does, and that is the reason we ask your Honors for relief.

Mr. Arnold: If the Court please, I can clarify that. I am authorized to tell the Court that the ATO is going to appeal, and I appreciate Mr. Wright's suggestion that we learn by experience. Pending appeal. We just prefer not to learn by experience during that period, so our position is quite clear on that. I am sorry I did not mention it in my first discourse.

Judge Hand: What?

Mr. Arnold: That there is going to be an appeal, and on (45)
the stay of competitive bidding.

Judge Hand: And what else?

Mr. Arnold: On our desire to have competitive bidding stayed. I am speaking only to competitive bidding.

Mr. Rosenberg: If the Court please, I am an associate of Mr. Levy's, counsel for M. P. T. O. A.—that is, for the independent members thereof. Mr. Levy's train has been delayed from Missouri, and I have been authorized to say that he and the independent members of M. P. T. O. A. are in favor of the distributors' suggestion that the provisions relating to competitive bidding be stayed until such appeals as may be taken are taken.

Mr. Proskauer: Your Honors, the correction we wish made, as I was saying, is on a conclusion of law, No. 9(d). Perhaps the simplest way to get it before your Honors is to give you the present reading and then give you in contrast the way we ask to have it changed.

It now reads, as you find it on page 11:

> "Conspiring with the distributor defendants to discriminate against independent competitors in fixing minimum admission prices, run, clearance and other license terms."

The change we wish made is to make that read as it is printed on page 12, namely:

(46)

"Conspiring with the distributor defendants to receive discriminatory license provisions, as found in Finding 110 above."

Our difficulty with this is that it runs directly counter in its general form to the facts as you found them, and subjects us, we think, to very great hazard in treble damage suits.

Now, let me make that clear. If you read the conclusion as it is printed in the decree, and on page 11, it is a general finding of illegality in conspiring against independent competitors in fixing minimum admission prices, run, clearance, and other license terms.

Now, this is what you said in your opinion which directly negatives that in its present form, and I am reading from page 52 of the opinion:

"The foregoing is not to be construed, however, as indicating that the distributor defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

Then follows a discussion which I omit.

"In the absence of such facts, we are unable to infer that the distributor defendants have violated the Sherman Act in this particular regard, but any dis-

(47)

criminations in other ways noted above in favor of affiliated licensees connected with the independent circuits must be enjoined."

And you found specifically in Finding of Fact 110 what those things that were to be enjoined were. If you will look at Finding 110 as it is printed at the bottom of page 11, you will find that you found it as a fact that various con-

tract provisions have resulted in discrimination against small independent exhibitors, and you listed what those were. There is no finding of fact to justify the present conclusion of law in its general form. That Finding of Fact 110 amply justifies it in the form that we suggested, and, indeed, your opinion, that portion of it which I have read, negatives the validity of the general form in which Conclusion of Law 9(d) now reads. And as I said, your Honors, while at first blush this may sound as if it had a semantic phase, it becomes a matter of intense moment to us in defending those treble damage suits which we contemplate as a probability in the light of the decree which you are here making. We fear that if that 9(d) remains in its present form, a man will come in and offer in evidence a contract between us and a theatre, one of our co-distributors, and say he rests, and that the court found that we were conspiring with the distributor defendants to discriminate against (48)
independent competitors in fixing minimum admission prices, run, clearance and other license terms, when, in fact, all that your Honors found in your finding of fact was certain specific violations which we are not asking you to change. Indeed, when it is all said, we are asking you to conform Conclusion of Law 9(d) with Finding of Fact 110 and with your opinion.

Judge Hand: Do you want to say anything, Mr. Wright?

Mr. Wright: Not unless the Court wants to hear me on this. It seems to me quite obvious that Conclusion of Law 9(d) in its present form is a necessary consequence of the factual findings that were made. The Court found that these distributors jointly maintained by conspiracy a system of uniform admission prices, runs and clearances, which, as a matter of law was itself a discrimination against all those not embraced in that combination; and to make the change that is suggested now it seems to me is utterly inconsistent with the findings of fact.

The Clerk: The Court will now proceed with the next motion, which is that of Columbia Pictures.

Mr. Frohlich: If your Honors please, I have but one suggestion to make on the decree. I have proposed that section 7, the very last paragraph in your decree, shall be amended to read as follows:

(48a) "Paragraphs 7, 8 and 9 of section 2 of this judgment shall not become effective until July 1, 1947, and in the event of an appeal to the Supreme Court by any party from those paragraphs, such paragraphs shall not become effective until 90 days after the entry of final judgment upon the mandate of the Supreme Court."

(49) Now I am speaking, your Honors, on behalf of a company that owns no theatres, and we feel that with the exhaustive provision and the very precise mechanism for competitive bidding, Columbia, owning no theatres, has been placed at a very terrific competitive disadvantage with regard to the Big Five. We can't take our investment and put it in theatres and at least recoup part of our investment. We have got to go out on the highways and byways and sell to strangers. We are going to take an appeal. We feel we have been placed in a position where we can't compete against these five defendants and we are going to appeal against competitive bidding and against the jurisdiction of this Court to make that sort of a decree on competitive bidding, and we are going to do it in view of that fact, that it would be a hardship to compel us to go into this competitive bidding. And until we get a decision from the Supreme Court—and it is going to take a long time to print these voluminous exhibits—I think the Supreme Court adjourns in May—I don't think we can get this appeal on before the summer and I don't think anybody in the country is going to be hurt or injured if there is a restraining provision in the decree giving us additional time until the Supreme

(50)

Court decision comes down. The exhibitors don't want it. There is not an exhibitor in the United States who wants competitive bidding. The Little Three don't want it. The Big Five say, "Well, it is all right with us; we are not asking for any time." They ought to be very happy. But we are in a different spot. I want a square deal. I want this Court to give me something to protect ourselves and give me a chance to go up to the Supreme Court to test out whether I have got to compete with five gigantic companies in this matter of competitive bidding and selling because I am afraid we are not going to be able to do it and I am not speaking only for Columbia but I am speaking for every small distributor in the United States.

The Clerk: The Court will now hear counsel in the motion of Universal Pictures.

Mr. Cook: My argument will be directed to one point only: the propriety of franchises of reasonable length with small exhibitors which the decree read literally presently prohibits. I say "read literally," because I believe the matter should be litigated before your Honors or some other court and that it would not be construed to mean that because of the fact that there was no issue in this case as to the invalidity of franchises with small exhibitors, as I shall

(51)

presently attempt to show.

But that would not help us in a business deal. If we want to make a deal, a franchise deal with a small exhibitor, they won't be satisfied with any such construction of the decree.

Now on the theatre-by-theatre aspect of competitive bidding we think it is a good thing as tending to produce a free market. We do not think it will have the effects that ought to be expected, that might perhaps be expected.

We also assume that picture-by-picture bidding must be followed before we can license a picture to a circuit thea-

tre. We do not believe that either or both of these requirements will succeed in restoring competitive conditions without considerable change in the present theatre setup.

In this connection concerning the stay on competitive bidding which we have also asked for, I think it will make considerable difference in our attitude what the Supreme Court does with other aspects of this, on the theatre setup for instance. Under a different theatre setup we might favor competitive bidding.

Now we take the position, however, that where we desire to license our pictures to a small exhibitor, insistence upon (52)

picture-by-picture bidding will go far to defeat the purposes of this proceeding. These purposes are very plainly stated in the section of the Government's complaint dealing with franchises. They are to protect the independent theatre from the dominance in the buying of pictures of the circuit theatre which is defined as a member of a circuit or buying combine of more than five theatres. There is no complaint whatsoever about franchises as an institution. All of the complaint is about franchises with circuit theatres because they are highly discriminatory against small distributors.

Now here is what the complaint says on the subject of long-term franchises and this is all it says:

"Generally, distributors enter into license agreements with exhibitors every season, and most license agreements cover only a single season's output of pictures. In their dealings with circuits, however, both affiliated and unaffiliated, the distributors engage in the practice of entering into long-term franchises. These franchises are for periods varying from two years to twenty years, and they cover the exhibition of pictures released by a distributor during their term in the theatres of the circuits with which they are made. The amount of film rentals involved in a single franchise has (53)

sometimes exceeded two million dollars and a single franchise has sometimes covered the terms of exhibition in more than five hundred theatres in widely separated localities."

Your Honors will note that all that refers to franchises with circuit theatres.

"Long term franchises are generally advantageous to the circuits with which they are made. By virtue of the fact that the circuits have large buying power and pay to the distributors large sums of money, these franchises often discriminate against independent theatres whose buying power is small."

That is the whole burden of this whole thing, that they discriminate against independent theatres, that they discriminate against the independent theatres, and maintain this discrimination during the period of the franchises. They establish the runs and protections with respect to all the theatres in the circuit, and "These franchises deny to other theatres during their term, the opportunity to bid for or to license the runs of pictures covered by such a franchise in competition with the circuit theatres. Another effect of these long term franchises is that they restrict the market for films independently produced and released. Many of these franchises do not contain all the terms and conditions pursuant (54)
to which pictures are licensed, but are simply agreements to enter into binding licenses at some future time.

"Franchises generally provide for the exhibition of pictures in all of the theatres operated by the circuit involved, and some of them have even provided that additional theatres acquired by the circuit during the term of the franchise are to be included within its terms."

And then without reading, it goes on to talk about the discriminatory terms of these franchises, the practice known as underage and overage with double features, vaudeville performances, and so on and so forth. The whole complaint is against franchises with circuit theatres. There is no complaint whatsoever about franchises as an institution. The entire complaint is about franchises with circuit theatres because they are highly discriminatory against small exhibitors.

Then why prohibit franchises of reasonable length with small exhibitors—and I may say that practically all our franchises are two and three-year franchises. Less than one per cent are over that.

Why prohibit franchises of reasonable length with small exhibitors when the best interests of such exhibitors requires a precisely opposite course?

Judge Bright: Aren't you rearguing the merits of the
(55)
decision instead of whether this decree should be amended? Why should we go back and reargue the merits of the decree on this motion? The findings of fact have stated what we found on this subject. We are not going to go back to the complaint. We are not interested in going back to the complaint now.

Mr. Cook: I am trying to get a construction of the decree which the complaint really intended.

Judge Bright: Why don't you go back——

Judge Hand: I can't imagine the decree intending any such thing as you are saying. We thought these things were bad because they tied up the thing for a very long time and kept it out of the market. It tended to be discriminatory.

Mr. Cook: Against small exhibitors. Franchises made with circuits were discriminatory against small exhibitors, but franchises with small exhibitors are nevertheless under the prohibitive language of this decree prohibited.

The argument I am making thus is a plea for a more effective decree, not a less effective one, with respect to this particular aspect, franchises.

Now if franchises with small exhibitors are prohibited in this decree, as the literal language would indicate that they are, it must have been for one of two reasons. Either they
(56)
were considered to be inherently illegal or they were part of the remedy.

Now that is one reason, Judge Bright, why I speak of the issue, because the prohibition of franchises with small exhibitors could not be part of the remedy if the issue in the

proceeding was the legality or illegality of franchises with circuit theatres and not with independent exhibitors. I think it is quite obvious that it is not part of the remedy.

Are they inherently illegal? That is, franchises of reasonable length.

Well, a franchise is nothing more than an exclusive dealing contract. As a matter of fact the way "franchise" is defined in this decree, it not only prohibits what I regard as a franchise but it prohibits any commitment of your pictures because it does not contain the reservation that I am asking for here, it does not contain the clause that a franchise confers exclusive exhibition rights, for a certain time at least. In other words, any commitment of your pictures for any length of time is legal.

Judge Bright: Under the definition it confines it to one season. You said any length of time.

Mr. Cook: I accept your correction, of course.

Judge Hand: Accept the correction? That was the whole (57)
meat of the cocoanut. What is the use of talk about it as a correction? We don't intend to have these long franchises whether you have been accustomed to make them or haven't been accustomed to make them. We decided that. Is there to be no end to our decision, no termination of this situation so that people can take their appeal if dissatisfied and go on?

Mr. Cook: I am confining myself to one very close point here, your Honors. If I said "any length of time," of course I misspoke myself, but the requirement of picture by picture selling would prohibit us from selling our pictures for any length of time in conjunction with the other provision concerning franchises.

My argument is going to be very brief here.

Judge Goddard: Is your point, Mr. Cook, that you ought to have the right to license pictures for more than one year, or one season?

Mr. Cook: Yes, to small exhibitors.

Judge Goddard: That is your point?

Mr. Cook: To small exhibitors as defined by the Government in the complaint, and that is independent theatres. Independent theatres are defined as theatres which are not members of a circuit of five or more theatres. I can't see for (58)
the life of me how under the Sherman Act an exclusive dealing arrangement which obtains throughout all business and has time and time again been held to be legal, can be prohibited. As appears from a restatement of the law of contracts, that is stated as one of half a dozen legal restraints of trade. Likewise in Williston on Contracts, there are multitudinous cases holding them as legal. I am not talking about circuits. I am not talking about the suppression of exhibition franchises of that kind or our right to make franchises in the future of that kind. I am only talking about franchises with independent exhibitors for a reasonable period of years.

Now what do we have? Universal makes a franchise with a small exhibitor. We make only a relatively small part of the available features. Certainly a franchise with a small exhibitor can't have any appreciable effect in suppressing competition or restraining trade if it is made for a reasonable term of years and without any unduly restrictive features.

Of course franchises can be applied further in restraint of trade or monopoly. As far as your Honor's statement stands here of restraint, franchises with affiliated theatres and circuits undoubtedly aggravate that. There is no question about that. I am talking about an entirely different thing.
(59)

Now take the situation of a small exhibitor who wants to open a theatre and he goes to a bank and wants to borrow money. Is it conceivable that a bank would lend him any money without his being able to obtain a commitment for one or more distributors' pictures? Is it conceivable that he would entertain going into an operation with these power-

ful interests bidding against him picture by picture? What I am saying is this: your Honors have in non-competitive situations very expressly in your decree excluded the necessity of competitive bidding. Now what I am saying is this: that where a distributor wants to license a small exhibitor, commit his pictures to a small exhibitor for a reasonable term of years, that he should be permitted to do so and it can't—

Judge Bright: Where he makes an agreement of that kind in a particular neighborhood he excludes the other exhibitors from getting their pictures, doesn't he?

Mr. Cook: Yes.

Judge Bright: Then he restrains the other exhibitor—

Judge Hand: But this is too long, it is too much.

Mr. Cook: Of course a franchise might be made for too long a period.

Judge Hand: You say you have them for two or three years. Why should you have them any such length of time as that?

(60)

Mr. Cook: Let me explain, your Honor. Under this decree each one of these great theatre chains has an assurance of product from its parent. That is expressly confirmed in this decree. Therefore your chain theatre, your affiliated theatre, immediately has a tremendous advantage over the independent theatre, which cannot have any assurance of product, which must buy picture by picture, every picture it buys. Therefore the franchises of greater importance to the independent exhibitor. I don't mean that I am arguing the case of the independent exhibitor. Of course not. It is of great importance to us because it is very important to us to have show windows for our pictures just as this decree provides for the major defendants to have.

Now what difference does it make in respect to violations of the Sherman Act whether we obtain our show windows through contract or whether we obtain them through the purchase of a theatre or a great chain of theatres. We may

not have the resources to buy a great chain of theatres. We may have the resources to obtain them through contract, and I can't see that as long as that contract is between a small factor of the exhibition side and a relatively small factor on the distribution side, that if it is for a reasonable term of years, not excessive, and if it has no other objection-
(61)
able features why it should not be considered to be legal.

Now it may be that your Honors will want to pass on each individual application with small exhibitors and there might be a lot of them. The Supreme Court has time and time again said, in the Nash case, and in the Appalachian Coal case, in the Chicago Board of Trade case, that whether there is an unreasonable restraint depends upon all the surrounding facts and circumstances, and I am not saying that every franchise would be legal.

Judge Goddard: Mr. Cook, supposing the pictures are licensed for a period of years, several years. What chance has the independent theatre to get these pictures during those years? He is out of them, isn't he?

Mr. Cook: You mean a competing independent theatre?

Judge Goddard: Yes.

Mr. Cook: That is true of all competing theatres. That is true in all businesses. That is true in the oil industry.

Judge Goddard: It ties it up too long.

Mr. Cook: Too long a period ought not to be permitted.
(62)

Judge Goddard: I suppose the difference is we think beyond one season as too long.

Mr. Cook: I just wondered if your Honors considered a franchise with one exhibitor for a reasonable term discriminatory. This is not the case of these highly discriminatory franchises made with circuit theatres.

Judge Goddard: One of the very purposes of the decree is to protect the rights of the independent theatres.

Mr. Cook: Yes, and I say if this provision of the decree is read in that way it greatly injures the independent theatre.

Judge Hand: I don't understand it at all. You say that, but I don't understand it. I don't think it is necessary. If the particular arrangement benefits one independent theatre, which of course it may, it keeps the other out of the market in regard to that matter, and you simply say that that is customary in all trades, and that is inevitable in all dealings. That is true. It is a question of degree. We guard this thing beyond one season. You haven't said a thing to show me, either in the record or outside of the record, that it was necessary for anybody to tie these things up for more than a season.

Mr. Cook: I, of course, agree with your Honor that the
(63)
unreasonableness of any restraint in anything of this kind is a matter of degree, and that you approach a borderline and you go over unto unreasonableness. But whether this is reasonable or unreasonable, you have got to look primarily at the economic power of the persons involved. Mr. Justice Brandeis in some of his decisions has been particularly clear on this subject in the Katz case which I cite in my memorandum. That is the very basis of the decision in the case. The very basis of the decision in the case was that the business unit indulging in it was not in a monopolistic position.

Judge Hand: I think we have got your point anyway.

Mr. Cook: It doesn't interfere in the slightest with the working of the decree. It is only a clarification of it.

The Clerk: The Court will hear counsel in the United Artists motion.

Mr. Raftery: You know when your Honors got through whittling down what we thought was the copyright——

Judge Hand: That copyright burns in your mind.

Mr. Raftery: —and when you expressly overruled the Supreme Court in the Interstate case, why naturally we must appeal because we may have some friends up there.

However, I am going to confine myself to one section,
(64)
Article 2, Section 4, of the decree, and one sentence in it.

It is the one sentence that you can see the jail doors in front of you. That is where your Honors have added that "Wherever any clearance provision is attacked as not legal under the provisions of this decree the burden shall be upon the distributor to sustain the legality thereof."

Now in the remaining sentence of that paragraph you took away from the distributors any right to protect or insert in any contract a clearance that the distributor deemed necessary to protect his revenue in the licensing of the particular copyright. In that first sentence you in effect said only such clearance as the exhibitor—which means our licensee but it meant the exhibitor—reasonably needs shall be granted to protect his revenue. In other words, you put into the hands of an exhibitor the right to tell us what clearance we are going to give. I think it amounts to that in the end. You always had to give the exhibitor the clearance that the exhibitor wanted or you didn't sell him.

We submit as a distributor that it is unfair to shift the burden of sustaining the legality of any clearance if it is ever questioned, and we know it is going to be questioned because under Judge Goddard's consent decree the arbitration boards were almost daily in the beginning hearing

(65)

clearance complaints. We submit if there is any burden—I mean if it is necessary to put a provision in here fixing the burden of proof, that burden should be on the exhibitor and not on the distributor, because the clearance is not the clearance the distributor believes he should reasonably have, but it is the clearance that the exhibitor claims he needs for his theatre, and it licenses to the exhibitor in his theatre. That is the only point I am going to argue. Of course, my pets of price fixing and admission prices and so forth, we say in our brief we have got to go to another forum. And likewise on franchises and the right to make franchises we feel there has been an arbitrary fixing of one year. It could have been three, five, or none. But we submit all those things are subjects for the appeal. Likewise, I am not going to press

the point in regard to competitive bidding. I haven't any faith in competitive bidding, because I don't believe the exhibitors are going to knock themselves out for our product. We still have to sell them, as I said on the trial. If we have got good pictures they will buy them. If they are bad, they won't want them.

The Clerk: The Court now stands adjourned.

[fol. 3136] UNITED STATES OF AMERICA,
Southern District of New York, ss:

Equity 87-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al., Defendants

I, William V. Connell, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. (Printed pp. 1 to 44; stenographers Minutes pp. 1 to 65.)

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 6th day of May in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States the one hundred and seventy-first.

William V. Connell, Clerk. (Seal.)

CLERK'S COPY.

Vol. VIII

TRANSCRIPT OF RECORD

(Pages 3137 to 3841)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

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THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE]

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 3137] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

v.

PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION; Loews, Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.; Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.; United Artists Corporation, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT—Filed November 14, 1940.

Leave of Court having been first obtained, the United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, hereby amends and supplements the petition filed herein on July 20, 1938, and the bills of particulars filed pursuant thereto, by substituting therefor this amended and supplemental complaint against the following defendants:

Paramount Pictures, Inc., Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation; Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, National Theatres Corporation; Columbia Pictures Corporation, Screen [fol. 3138] Gems, Inc., Columbia Pictures of Louisiana, Inc.; Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange,

Inc.; United Artists Corporation, defendant corporations, and for its complaint plaintiff alleges upon information and belief, as follows:

I. Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said Act being commonly known and hereafter referred to as the Sherman Act, against the above-named defendants in order to prevent violations by them, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to monopolize, and contracts, combinations and conspiracies to restrain trade and commerce among the several states and territories of the United States have been and are conceived, carried out and made effective, in part, within the Southern District of New York, and many of the unlawful acts done in pursuance thereof have been performed by the defendants, or some of them, and their respective representatives, within said District. The interstate trade and commerce involved in the motion picture industry, as hereinafter described, is carried on, in part, within the said District.

II. Description of Defendants

3. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of produc- [fol. 3139] ing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

5. (a) Radio-Keith-Orpheun. Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

[fol. 3140] (d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

6. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Dela-

ware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

7. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in [fol. 3141] the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or association companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation, approximately 42% of the capital stock of which is owned and controlled by Twentieth Century-Fox Film Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

8. The defendants described above in Paragraphs 1 to 7, inclusive, will be referred to sometimes hereinafter as "producer-exhibitor defendants."

9. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh

Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

[fol. 3142] 10. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New

York, and is engaged in the business of distributing motion pictures.

11. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

12. All of the defendants hereinbefore described as engaged in the distribution either directly or through subsidiaries, will be referred to sometimes hereinafter as the "distributor defendants."

[fol. 3143] 13. All of the defendants hereinbefore described as engaged in production, either directly or through subsidiaries, will be referred to sometimes hereinafter as "producer defendants."

III. Definition of Terms.

14. The following terms when used in this complaint have the meaning indicated:[1]

Production

15. (a) *Producer.*—Any person, partnership, association or corporation engaged in the production of motion pictures.

(b) *Major Producer.*—One which produces motion pictures for release by a major distributor[2] pursuant to a prior understanding or agreement with such major distributor.

(c) *Independent Producer.*—One which is not a major producer.

(d) *Feature.*—Any motion picture, the length of the film of which is approximately five thousand feet (usually five reels) or more.

(e) *First Class Features.*—A feature which grosses in excess of $400,000 in film rentals from exhibition within the United States.

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[1] For convenience, they have been grouped under headings describing the three principal branches of the industry; production, distribution and exhibition.

[2] For definition of major distributor see Paragraph 16(b) below.

(f) *Short Subject.*—A motion picture, the length of the film of which is less than five thousand feet (five reels), and is usually two or three thousand feet.

(g) *News Reel.*—A motion picture, the length of the film of which is less than five thousand feet and which portrays events of general current interest.

[fol. 3144] Distribution

16. (a) *Distributor.*—Any person, partnership, association or corporation engaged in the business of licensing motion pictures for exhibition and distributing the positive prints of such motion pictures to exhibitors.

(b) *Major Distributor.*—A distributor which is a defendant herein or is controlled by a defendant herein.

(c) *Independent Distributor.*—One which is not a major distributor.

(d) *State Rights Distributor.*—An independent distributor which does not operate a system of national exchanges but buys from an independent producer the exclusive right to distribute its pictures in a particular state or territory.

(e) *Exchange.*—An office maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange, and for the physical distribution of such films throughout this territory. An exchange usually has facilities for the receipt, storage and subsequent shipment to exhibitors of films and advertising matter concerning them.

(f) *Franchise.*—A licensing agreement, or series of licensing agreements entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement.

(g) *Block Booking.*—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license all or a majority of all of the features released by a distributor during a period of one year or more.

[fol. 3145] Exhibition

17. (a) *Exhibitor.* Any person, partnership, association or corporation engaged in the operation of a theatre for the exhibition of motion pictures.

(b) *Affiliated Theatre.* A theatre owned, controlled or managed by a major producer or distributor, or in the ownership, control or management of which a major producer or distributor has a financial interest.

(c) *Unaffiliated Theatre.* One which is not an affiliated theatre.

(d) *Metropolitan Theatre.* A theatre located in one of the following key cities: Albany, New York; Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York, Buffalo, New York; Charlotte, North Carolina; Chicago, Illinois; Cincinnati, Ohio; Cleveland, Ohio; Dallas, Texas; Denver, Colorado; Des Moines, Iowa; Detroit, Michigan; Houston, Texas; Indianapolis, Indiana; Kansas City, Missouri; Los Angeles, California; Memphis, Tennessee; Milwaukee, Wisconsin, Minneapolis, Minnesota; New Haven, Connecticut, New Orleans, Louisiana; New York, New York; Newark, New Jersey; Oklahoma City, Oklahoma; Omaha, Nebraska; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Portland, Oregon; San Francisco, California; St. Louis, Missouri; St. Paul, Minnesota; Salt Lake City, Utah; Seattle, Washington; Washington, District of Columbia [1]

(e) *First Run Theatre.* One which customarily exhibits the first-class feature pictures released by one or more major distributors on a first run showing in the city or town in which it is located.

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[1] The cities listed above are a group in which certain statistical analyses of first-run exhibition have been made by the petitioner and the term metropolitan has been adopted as a convenient means of referring to theatres in these cities. They include the ten largest cities in the United States and all of the cities in which any of the defendants maintains an exchange. They are all key cities, as defined in Paragraph 17 (c) hereof. Brooklyn was treated as a separate city in the petitioner's analyses and is, therefore, referred to as such herein.

(f) *Theatre Circuit.* A group of more than five theatres owned, controlled, or managed by the same person, partner-
[fol. 3146] ship, or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film.

(g) *Circuit Theatre.* Any theatre in a theatre circuit.

(h) *Independent Theatre.* One which is not a circuit or affiliated theatre.

(i) *Motion Picture Season.* The period from September 1 of one year to August 31 of the next.

(j) *Release.* The act of making prints of a motion picture available for public exhibition in theatres.

(k) *National Release Date.* The date upon which a motion picture is first released generally throughout the United States.

(l) *Trade Showing.* A private exhibition of a film for the trade prior to national release.

(m) *Pre-release.* A public exhibition of a motion picture prior to national release.

(n) *Road Show.* A public exhibition of a motion picture in advance of national release in a limited number of theatres at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

(o) *Key City.* One of such size and strategic location that the first-run exhibition of a motion picture therein effectively advertises such motion picture among exhibitors and the public in a wide area surrounding such city.

(p) *First Run.* The first exhibition of a motion picture in a given zone after national release.

(q) *Second Run.* The exhibition of a motion picture in any zone next subsequent to its first run.

(r) *Repeat or Subsequent Run.* Any exhibition of a motion picture in a zone subsequent to its first run.

(s) *Clearance.* The period of time which must elapse between runs of the same picture within a particular area or in specified theatres.

[fol. 3147] (t) *Zone.* A specified geographical area within which a particular clearance operates.

IV. Growth of the Defendants

A. Paramount [1]

18. Famous Players-Lasky Corporation (now known as Paramount Pictures Inc.) was organized by Mr. Adolph Zukor (Chairman of the Board of Paramount Pictures Inc.) and Mr. Jesse L. Lasky and incorporated on July 19, 1916. The corporate name was changed to Paramount Famous Lasky Corporation on April 1, 1927 and on April 24, 1930 the name was changed to Paramount Publix Corporation.

19. In 1933 Paramount Publix Corporation was adjudicated a bankrupt in the United States District Court for the Southern District of New York. In June, 1935, it was reorganized under Section 77B of the Bankruptcy Act under the name of Paramount Pictures Inc.

20. Twelve producing companies were merged with Famous Players-Lasky Corporation in 1917. At the same time the company integrated production and distribution by acquiring a national distribution system through merger with Artcraft Pictures Corporation and Paramount Pictures Corporation. Thereafter the company from time to time acquired interests in other producing and distributing companies.

21. At the present time pictures are produced by the parent company, Paramount Pictures Inc., which is one of the principal producing companies in the industry. It maintains production facilities in Hollywood, California, and in New York and Long Island, New York. The following chart indicates Paramount's relative position in the

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[1] The term "Paramount," as hereinafter used, includes all subsidiaries of the parent corporation, Paramount Pictures Inc. The term "subsidiaries" as used throughout this complaint includes all corporations in which the parent owns directly or indirectly, a percentage of the voting stock sufficiently large to permit the exercise of substantial voting control, even though such percentage is less than 51% of the total voting stock.

[fol. 3148] industry with respect to pictures produced for the seasons mentioned.

Season	Features Produced in Industry	Features Produced by Paramount
1930-31	510	58
1931-32	490	56
1932-33	510	51
1933-34	480	55
1934-35	520	44
1935-36	517	50
1936-37	535	41
1937-38	450	40
1938-39	526	58

22. Paramount Pictures Inc. also produces approximately 45 shorts and 104 news reels each season.

23. Paramount pictures are distributed directly by it and also by its wholly owned subsidiary Paramount Film Distributing Corporation, through exchanges in 33 key cities. During 1936-37 season Paramount distributed 59 features, 18 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

24. In 1919 Paramount entered upon a program of theatre acquisition. In that year it acquired a stock interest in Southern Enterprises, Inc., which operated approximately 135 theatres in the South. In 1920 a stock interest was acquired in New England Theatres, Inc., which operated approximately 50 theatres in the New England states. About 1926, Paramount acquired a stock interest in the Butterfield Theatre Circuit, which operated approximately 70 theatres in Michigan. During the same year a stock interest was acquired in Balaban and Katz Corporation, which operated approximately 50 theatres in Illinois. Theatres were also subsequently acquired in the West and Middle West through the acquisition of various theatres and of stock interests in various corporations operating theatre circuits.

25. The number and location of theatres now operated by Paramount are approximately as follows:

[fol. 3149] (a) First-run Metropolitan Theatres:

City	No. of Theatres
Atlanta, Ga.	4
Boston, Mass	4
Brooklyn, N. Y.	1

City	No. of Theatres
Charlotte, N. C.	3
Chicago, Ill.	6
Dallas, Tex.	6
Des Moines, Ia.	4
Detroit, Mich.	5
Houston, Texas	3
Memphis, Tenn.	2
Minneapolis, Minn.	6
Newark, N. J.	1
New Haven, Conn.	1
New Orleans, La.	3
New York, N. Y.	1
Omaha, Neb.	3
Salt Lake City, Utah	6
St. Paul, Minn.	4
Total	63

(b) Other theatres operated by Paramount are approximately as follows:

State	No. of Theatres
Alabama	33
Arizona	8
Arkansas	47
California	4
Colorado	9
Connecticut	5
Florida	109
Georgia	34
Idaho	9
Illinois	116
Indiana	8
Iowa	60
Kentucky	11
Louisiana	17
Maine	39
Maryland	1
Massachusetts	78
Michigan	11
Minnesota	32

State	No. of Theatres
Mississippi	35
Missouri	1
Nebraska	11
New Hampshire	10
New Jersey	2
New Mexico	7
New York	24
North Carolina	66
North Dakota	10
Ohio	16
Oklahoma	6
Pennsylvania	72
Rhode Island	3
South Carolina	23
South Dakota	20
Tennessee	26
Texas	199
Utah	15
Vermont	8
Virginia	17
West Virginia	3
Wisconsin	5
Total	1,210

26. The parent corporation, Paramount Pictures, Inc., has gross assets of approximately $90,000,000. Its consolidated gross income was in excess of $100,000,000 for the fiscal year ended in 1939.

B. Loew's [1]

27. In about the year 1905, the late Marcus Loew (who before his death in 1927, was president of Loew's Incorpo- [fol. 3150] rated), in association with others, began to operate some so-called "penny arcades" in New York City and one in Cincinnati. Shortly thereafter, certain of these penny arcades were remodeled so as to permit, in part of the premises, the exhibition of single reel motion pictures, for which

[1] The term "Loew's," as hereinafter used, includes all subsidiaries of the parent corporation, Loew's, Incorporated.

an admission price of 5¢ was charged. In 1907 the enterprise acquired its first theatre. It was located in Brooklyn, New York, and was operated with vaudeville and single reel pictures.

28. The motion picture subjects were bought by Mr. Loew from various picture producers and exhibited in the Loew theatres; the custom was to buy one print of each subject. By the year 1910, Mr. Loew and his associates owned stock interests in a number of corporations operating store shows and theatres in New York and elsewhere, all of them showing vaudeville and short-subject pictures.

29. In 1910, Mr. Loew and his associates organized Loew's Consolidated Enterprises, which, in 1911, was succeeded by Loew's Theatrical Enterprises.

30. Between 1911 and 1919, Loew's Theatrical Enterprises, through subsidiary corporations, extended its activities in the operation of theatres devoted to motion pictures or a combination of vaudeville and motion pictures. Additional theatres were acquired in New York City and in certain cities other than New York. By 1919, Loew's Theatrical Enterprises had financial interests in approximately 56 theatres.

31. In October 1919, Loew's, Incorporated, was organized, and acquired all of the outstanding stock of Loew's Theatrical Enterprises. The extent of the theatre business of Loew's, Incorporated, has increased gradually since 1919.

32. The number and location of the theatres now operated by Loew's is approximately as follows:

[Fol. 3151] (a) Metropolitan First-run Theatres:

City	No. of Theatres
Atlanta, Ga.	1
Baltimore, Md.	1
Boston, Mass.	2
Brooklyn, N. Y.	1
Cleveland, Ohio	2
Denver, Colo.	1
Houston, Texas	1
Indianapolis, Ind.	1
Kansas City, Mo.	1

City	No. of Theatres
Memphis, Tenn.	1
Newark, N. J.	1
New Haven, Conn.	2
New Orleans, La.	1
New York, N. Y.	2
Pittsburgh, Pa.	1
St. Louis, Mo.	1
San Francisco, Calif.	1
Washington, D. C.	3
Total	24

(b) Other theatres are located as follows:

State	No. of Theatres
Connecticut	8
Delaware	1
District of Columbia	1
Indiana	2
Kentucky	1
Maryland	2
Massachuchetts	3
New York	64
New Jersey	2
Ohio	8
Pennsylvania	2
Rhode Island	1
Tennessee	1
Virginia	2
Total	98

33. In 1920, Loew's, Incorporated, entered the field of production and distribution of motion pictures by acquiring the outstanding stock of Metro Pictures Corporation. In 1924, Metro Pictures Corporation merged with Goldwyn Pictures Corporation under the name of Metro-Goldwyn-Pictures Corporation. The result of this merger was that Loew's, Incorporated, became the owner of all of the common stock of Metro-Goldwyn Pictures Corporation. At about the time of this merger, Louis B. Mayer Pictures,

Inc., contracted to supervise the production of all pictures produced by the merged company, and turned over to Metro-Goldwyn Pictures Corporation certain of the assets of Louis B. Mayer Pictures, Inc. The business of Metro-Goldwyn Pictures Corporation was subsequently assumed by Metro-Goldwyn-Mayer Corporation. On December 31, 1937, Metro-Goldwyn-Mayer Corporation ceased to do business and the production activities were taken over by Loew's, Incorporated.

[fol. 3152] 34. The following tabulation indicates the feature pictures produced by Loew's as compared with the total number of features produced, for the nine year period ending with the 1938-39 season:

Season	Features Produced in Industry	Features Produced by Loew's
1930-31	510	43
1931-32	490	40
1932-33	510	37
1933-34	480	44
1934-35	520	42
1935-36	517	43
1936-37	535	40
1937-38	450	41
1938-39	526	51

35. For the eight year period ending with the 1937-38 season, Loew's produced an average of 36 short subjects per year.

36. Loew's product is distributed through exchanges maintained by it in 31 key cities. During the 1936-37 season Loew's distributed 50 features, 10 more than it produced, and ordinarily distributes each season a substantial number of features produced by others for release by it.

37. The parent corporation, Loew's Incorporated, has gross assets of approximately $150,000,000. During the fiscal year ending in 1939, its gross income was in excess of $100,000,000.

C. Fox[1]

38. Twentieth Century-Fox Film Corporation was incorporated under the name of Fox Film Corporation on Feb-

[1] The term "Fox", as hereinafter used, includes all subsidiaries of Twentieth Century- Fox Film Corporation and of National Theatres Corporation.

ruary 1, 1915. Fox Film Corporation was voluntarily reorganized with the consent of its creditors, and security-holders in the summer of 1933. In August 1935, Fox Film Corporation acquired all the assets of Twentieth Century Pictures, Inc., a producing and distributing company, and the name of the company was changed to Twentieth Century-Fox Film Corporation.

[fol. 3153] 39. The following chart indicates the feature pictures produced by Fox as compared with the total number of features produced for the nine year period ending with the 1938-39 season:

Season	Features Produced in Industry	Features Produced by Fox
1930-31	510	48
1931-32	490	46
1932-33	510	41
1933-34	480	46
1934-35	520	40
1935-36	517	52
1936-37	535	52
1937-38	450	49
1938-39	526	56

40. Movietonews, Inc., a wholly owned Fox subsidiary, for the eight year period ending 1937-38, produced an average of 20 shorts and 104 news reels per year.

41. Fox product is distributed directly by Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Distributing Corporation and Twentieth Century-Fox Corporation of Texas, wholly owned subsidiaries, through exchanges in 31 key cities. During the 1936-37 season Fox distributed 65 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

42. In August 1925, Fox Film Corporation acquired approximately one-third of the common stock of West Coast Theatres, Inc., a company operating theatres in California and other western states; and, in March 1928, Fox Film Corporation purchased all the common stock of Wesco Corporation (now National Theatres Corporation), a holding company for theatre operating corporations.

43. In 1934, Wesco Corporation readjusted its capital structure by voluntary agreement among its creditors and stockholders, pursuant to which The Chase National Bank

of the City of New York acquired 58% of the stock of Wesco Corporation and Fox Film Corporation retained 42%. At about the same time the Chase Bank acquired a substantial stock interest in Fox Film Corporation and still owns a substantial interest in Twentieth Century-Fox Film Cor- [fol. 3154] poration. The name of Wesco Corporation was thereafter changed to National Theatres Corporation and the Chase Bank still retains 58% of the stock of National Theatres Corporation. National Theatres Corporation operates theatres in the middle and far western parts of the United States through numerous subsidiary operating corporations.

44. In 1937, Twentieth Century-Fox Film Corporation acquired all the common stock of Roxy Theatre, Inc., which owns the Roxy Theatre, a large first-run theatre in New York City.

45. The location and number of theatres now operated by Fox is approximately as follows:

(a) Metropolitan first-run theatres:

City	No. of Theatres
Denver, Colo.	4
Detroit, Mich.	1
Kansas City, Mo.	3
Los Angeles, Calif.	5
Milwaukee, Wis.	3
New York City	1
Portland, Ore.	4
San Francisco, Calif.	4
Seattle, Wash.	5
Total	30

(b) Other theatres are located as follows:

State	No. of Theatres
Arizona	7
California	196
Colorado	32
Idaho	9

State	No. of Theatres
Illinois	21
Iowa	6
Kansas	56
Michigan	5
Missouri	45
Montana	17
Nebraska	10
New Mexico	6
Oregon	9
Utah	2
Washington	23
Wisconsin	50
Wyoming	14
Total	308

46. Twentieth Century-Fox Film Corporation has gross assets of approximately $60,000,000. During the fiscal year ended in 1939, its consolidated gross income was approximately $50,000,000.

[fol. 3155] D. Warner [1]

47. Warner Bros. Pictures, Inc., was incorporated in 1923 for the purpose of producing, distributing, and exhibiting motion pictures. At that time, it owned and operated a motion picture studio in Hollywood, but had no theatres.

48. The Warner Company became interested in experimental work in the development of talking pictures, and, in August 1926, the first public performance of talking pictures was presented in the Warner Theatre in New York City.

49. Warner is one of the principal producing companies in the industry and maintains production facilities at Burbank and Hollywood, California, and Brooklyn, New York. The number of features produced by it as compared with the total number of features produced for the nine year

period ending with the 1938-39 season is indicated by the following tabulation:

Season	Features Produced in Industry	Features Produced by Warner
1930-31	510	69
1931-32	490	56
1932-33	510	53
1933-34	480	63
1934-35	520	51
1935-36	517	58
1936-37	535	58
1937-38	450	52
1938-39	526	54

50. During the eight year period ending 1937-38 Warner produced an average of 102 short subjects per year.

51. In 1925 Warner Pictures, Inc. acquired Vitagraph, Inc., which operated 34 exchanges in the principal cities of the United States and Canada, and two other affiliated companies which operated exchanges in foreign countries. Warner products distributed through Vitagraph, Inc. During the 1936-37 season Vitagraph distributed 60 features, 2 more than it produced, and ordinarily distributes some features each season produced by others for release by it.

[fol. 3156] 52. Warner Bros. Pictures, Inc., entered the exhibition field in December 1924, when it acquired a theatre in Youngstown, Ohio. In 1925, it acquired 13 additional theatres in various parts of the United States. In December 1928, the corporation acquired a majority of the stock of Stanley Company of America, which operated, directly or through subsidiaries, 182 theatres and had partial stock interests in theatre companies that owned or leased 51 theatres. The theatres of the Stanley Company of America were located in the Middle Atlantic States and the District of Columbia.

53. Subsequently, the company acquired interests in theatres in Missouri, Pennsylvania, Maryland, New Jersey, Ohio, Connecticut, New York, Illinois, Wisconsin, Virginia, and Kentucky.

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[1] The term "Warner", as hereinafter used, includes all subsidiaries of the parent corporation, Warner Bros. Pictures, Inc.

54. The approximate number and locations of theatres now operated by Warner are as follows:

(a) Metropolitan first-run theatres:

City	No. of Theatres
Albany, N. Y.	2
Baltimore, Md.	1
Brooklyn, N. Y.	1
Charlotte, N. C.	1
Cleveland, Ohio	2
Los Angeles, Calif.	2
Memphis, Tenn.	1
Milwaukee, Wis.	1
Newark, N. J.	2
New Haven, Conn.	1
New York, N. Y.	2
Oklahoma City, Okla.	7
Philadelphia, Pa.	8
Pittsburgh, Pa.	2
Washington, D. C.	2
Total	35

(b) Other theatres are located as follows:

State	No. of Theatres
California	10
Connecticut	34
Delaware	6
District of Columbia	14
Illinois	19
Indiana	3
Kentucky	8
Maryland	7
Massachusetts	16
New Jersey	90
New York	44
Ohio	36
Oklahoma	7
Oregon	2
Pennsylvania	185

State	No. of Theatres
Virginia	9
Washington	3
West Virginia	11
Wisconsin	18
Total	522

55. Warner Bros. Pictures, Inc. has gross assets of approximately $150,000,000. During the fiscal ended 1939 its gross income exceeded $100,000,000.

[fol. 3157] E. RKO [1]

56. Radio-Keith-Orpheum Corporation was incorporated under the laws of the State of Maryland on October 25, 1928. Since its incorporation it has been primarily a holding company for subsidiaries engaged in the production, distribution, and exhibition of motion pictures. Shortly after after its organization, Radio-Keith-Orpheum Corporation secured control of its principal exhibition and production companies, Keith-Albee-Orpheum Corporation and FBO Production, Inc., respectively.

57. Organized on January 28, 1928, as a Delaware corporation, Keith-Albee-Orpheum Corporation acquired, in February of the same year, all of the outstanding stock of B. F. Keith Corporation and approximately 90% of the outstanding stock of Orpheum Circuit, Inc. Subsidiaries of B. F. Keith Corporation owned and operated in various cities in the eastern part of the United States a large number of theatres which, although originally devoted to the performance of vaudeville, were converted and used for the exhibition of motion pictures. Orpheum Circuit, Inc., directly or through subsidiaries, operated theatres throughout the Midwest and Western parts of the United States.

58. In addition to Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., Radio-Keith-Orpheum Corporation obtained the controlling interest in numerous other companies engaged in the motion picture exhibition business, the most important being RKO Proctor Corporation and RKO Midwest Corporation. RKO Proctor Corporation

[1] The term "RKO", as hereinafter used, included all subsidiaries of Radio-Keith-Orpheum Corporation and Keith-Albee-Orpheum Corporation.

operated the Proctor circuit of theatres located in the New York metropolitan district and in up-state New York. RKO Midwest Corporation controlled a group of theatres in Ohio and Michigan.

59. The number and location of theatres now operated by RKO is approximately as follows:

[fol. 3158] (a) Metropolitan first-run theatres:

City	No. of Theatres
Albany, N. Y.	2
Boston, Mass.	2
Brooklyn, N. Y.	2
Chicago, Ill.	1
Cincinnati, Ohio	6
Cleveland, Ohio	2
Denver, Colo.	1
Des Moines, Iowa	1
Los Angeles, Calif.	2
Minneapolis, Minn.	1
Newark, N. J.	2
New Orleans, La.	1
New York, N. Y.	1
Omaha, Neb.	1
San Francisco, Calif.	1
St. Paul, Minn.	2
Washington, D. C.	1
Total	29

(b) Other theatres are located as follows:

State	No. of Theatres
California	1
Illinois	2
Iowa	5
Massachusetts	3
Michigan	7
New York	53
New Jersey	14
Ohio	13
Rhode Island	2
West Virginia	3
Total	103

60. The name of FBO Production Productions, Inc., the principal producing company absorbed by Radio-Keith-Orpheum Corporation, was ultimately changed to RKO Radio Pictures, Inc., RKO maintains production facilities in Hollywood and Culver City, California.

61. The number of features produced by RKO during the nine year period ending 1938-39 as compared with the total number of feature pictures produced during that period is indicated by the following chart:

Season	Features Produced in Industry	Features Produced by RKO
1930-31	510	32
1931-32	490	48
1932-33	510	45
1933-34	480	40
1934-35	520	40
1935-36	517	43
1936-37	535	39
1937-38	450	41
1938-39	526	49

62. In January 1931, Radio-Keith-Orpheum Corporation took over, through subsidiaries, the news reel and other production business and facilities of Pathe Exchange, Inc.

63. For the eight-year period ending 1937-38 RKO Radio Pictures, Inc. produced an average of 33 short subjects per [fol. 3159] year and the Van Beuren Corporation, a wholly owned subsidiary, produced an average of 48 short subjects per year. During the same period Pathe News, Inc., a wholly owned subsidiary, produced an average of 10 short subjects and 104 news reels per year.

64. RKO product is distributed by RKO Radio Pictures, Inc. through its exchanges located in 32 cities. During the 1936-37 season RKO distributed 47 features, 8 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

65. On January 27, 1933, Radio-Keith-Orpheum Corporation went into an equity receivership and Irving Trust Company was appointed Receiver. On June 8, 1934, Radio-Keith-Orpheum Corporation filed a petition for reorganization under Section 77B of the Bankruptcy Act in the United States District Court for the Southern District of New York. Irving Trust Company was appointed Trustee in reorganization. A plan of reorganization was approved January 17, 1939, confirmed April 11, 1939, and

such approval and confirmation were affirmed by the Circuit Court of Appeals for the Second Circuit on September 8, 1939.

66. The parent corporation has gross assets of approximately $70,000,000. During the fiscal year ended in 1939 its consolidated gross income was about $40,000,000.

F. Columbia [1]

67. Columbia Pictures Corporation was incorporated in the State of New York on January 10, 1924. Its organizers and, at that time, sole stockholders were Joe Brandt, Harry Cohn, and Jack Cohn. Commencing on February 4, 1925, with the acquisition of the assets of C.B.C. Film Sales Corporation, Columbia Pictures Corporation bought up exchanges throughout the country for the marketing of its product. By 1929, its distribution system was organized upon a national scale. In 1930, it secured exchanges for the foreign distribution of its film.

[fol. 3160] 68. During 1928, Columbia acquired, through merger, Screen Shapshots, Inc., Hall Room Boys Photoplays, Inc., Starland Revue, Inc., all producers of short subjects, and in 1931 secured 50% and, in 1937, the remaining 50% of the capital stock of Screen Gems, Inc., also a producer of short subjects.

69. The following chart shows the number of features produced by Columbia, as compared with the total number of features produced during the nine-year period ending with the 1938-39 season:

Season	Features Produced in Industry	Features Produced by Columbia
1930-31	510	27
1931-32	490	31
1932-33	510	36
1933-34	480	44
1934-35	520	39
1935-36	517	36
1936-37	535	38
1937-38	450	39
1938-39	526	54

[1] The term "Columbia", as hereinafter used, includes all subsidiaries of the parent corporation, Columbia Pictures Corporation.

70. During the eight year period ending 1937-38, Columbia Pictures Corporation, produced an average of 39 short subjects and Screen Gems, Inc., produced an average of 22 short subjects per year.

71. Columbia product is distributed through its 32 exchanges located in key cities. During the 1936-37 season Columbia distributed 51 features, 13 more than it produced, and ordinarily distributes a substantial number of features produced by others for release by it.

72. The parent corporation has gross assets of approximately $15,000,000. During the fiscal year ended in 1939 its gross income was about $20,000,000.

G. Universal[1]

73. Universal Pictures Corporation, formerly Universal Film Manufacturing Company, was incorporated in New York, in 1912, and with its subsidiaries, engaged in the production and distribution of motion pictures in the United States and throughout the world.

[fol. 3161] 74. Universal Pictures Company, Inc., was formed on January 10, 1925, and at approximately the same time purchased the entire outstanding capital stock of Universal Pictures Corporation. From 1925 to 1936, Universal Pictures Corporation was the production branch of its parent company, Universal Pictures Company, Inc. During such period, motion pictures produced by Universal Pictures Corporation were distributed by Universal Film Exchanges, Inc. and the Big U Film Exchange, Inc.

75. In April 1936, Universal Corporation was organized for the chief purpose of acquiring the controlling stock interest of Carl Laemmle and his associates in Universal Pictures Company, Inc., a producer, and Big U Film Ex-Exchange, a distributor of motion pictures.

76. The number of features produced by Universal, as compared with the total number of features produced dur-

[1] The term "Universal", as hereinafter used, includes all subsidiaries of the parent corporation, Universal Corporation.

ing the nine-year period ending 1938-39, is indicated by the following tabulation:

Season	Features Produced by Industry	Features Produced by Universal
1930-31	510	22
1931-32	490	32
1932-33	510	28
1933-34	480	38
1934-35	520	39
1935-36	517	27
1936-37	535	40
1937-38	450	45
1938-39	526	45

77. For the eight year period ending with the 1937-38 season, Universal produced an average of 111 short subjects and 104 news reels per year. During the 1936-37 season, Universal distributed 40 features; no more than it produced, but it ordinarily distributes each season some features produced by others for release by it.

78. In January 1926 Universal Pictures Corporation and its president, Carl Laemmle, secured a substantial stock interest in Universal Chain Theatres Corporation, which, through subsidiaries and affiliated companies, operated a [fol. 3162] large number of theatres. In 1928, Universal Chain Theatres Corporation and its affiliates operated about 315 theatres in Canada, the District of Columbia, and 20 States of the United States, including the Griffith Amusement Company circuit of 40 theatres in Oklahoma and Texas, and the Schine chain of 90 theatres in New York and Ohio. A substantial number of its theatres were disposed of between 1929 and 1931. It went into receivership in 1933, and its remaining theatres were sold by the receiver.

79. The dissolution of Universal Pictures Corporation in December 1936, was accompanied by a transfer of its assets to Universal Pictures Company, Inc. Since January 1, 1937, Universal Pictures Company, Inc., has been engaged in the production of motion pictures which are distributed in the United States by Big U Film Exchange, Inc., and Universal Film Exchanges, Inc.

80. Universal Pictures Company, Inc., has gross assets of approximately $12,000,000. During the fiscal year ended in 1939, its gross income was about $20,000,000.

H. United Artists [1]

81. United Artists Corporation was organized in 1919, by a group of individuals who had achieved prominence in the production branch of the motion picture industry. The purpose of the corporation was to distribute the features produced by its organizers.

82. Most of the features distributed by United Artists Corporation have been first-class features, although as a general rule it does not release as many pictures per year as the other major companies.

83. The following tabulation indicates the number of United Artists releases as compared with the total number of features produced during the nine year period ending 1938-39:

[fol. 3163]

Season	Features Produced in Industry	Features Released by United Artists
1930-31	510	13
1931-32	490	14
1932-33	510	16
1933-34	480	20
1934-35	520	19
1935-36	517	17
1936-37	535	19
1937-38	450	16
1938-39	526	18

84. United Artists now distributes pictures for the following producers among others: Samuel Goldwyn, Charles Chaplin, Mary Pickford, Alexander Korda, and London Film Productions, Ltd., Selznick International, Edward Small, Sol Lesser, Hal Roach, David Loew, Ernest Lubitsch, Walter Wanger, and Richard Rowland.

85. United Artists maintains exchanges in 26 cities.

86. The corporation is owned by five stockholders, Charles Chaplin, Samuel Goldwyn, Mary Pickford, the Estate of Douglas Fairbanks and Alexander Korda. It issues no public statement of gross assets or business done but for the fiscal year ended in 1939 its gross income exceeded $10,000,000.

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[1] The term "United Artists", as hereinafter used, refers to the defendant, United Artists Corporation.

I. Joint Theatre Interests

87. Each of the producer-exhibitor defendants is jointly interested financially in one or more theatres with one or more of the other producer-exhibitor defendants, through profit sharing arrangements with respect to particular theatres; through so-called pools where several theatres owned or controlled by two or more are operated as a unit; through direct or indirect ownership of stock in a single theatre operating corporation by two or more of such defendants; or through arrangements where one owns or leases a theatre and the other manages it. Such joint interests include all of the following combinations with respect to one or more theatres: Fox with Loew's, Fox with Paramount, Fox with RKO, Fox with Warner, Loew's with Paramount, Loew's with RKO, Loew's with Warner, Paramount with RKO, Paramount with Warner and RKO with Warner. [fol. 3164]. 88. There are about 200 theatres in the United States in which such joint interests are held, including a substantial number of metropolitan first-run theatres.

89. In addition to the foregoing joint theatre interests of the producer-exhibitor defendants with each other there are numerous other joint theatre interests where executive employees, or managing agents of one producer-exhibitor defendant have direct or indirect stock interests in a theatre operating corporation in which another producer-exhibitor defendant also owns a direct or indirect stock interest.

V. Competitive Conditions in the Motion Picture Industry

A. Limited Source of Supply of Features and Particularly First Class Features

90. In the early stages of motion picture production films possessed entertainment value for the public merely because of the novelty of watching figures and objects in motion projected on a screen. They were priced by the foot or by the reel without regard to their quality as dramatic productions. As the novelty wore off, it became increasingly necessary to produce films which had stories of dramatic interest, employed well-known acting talent and eliminated technical faults in photography and projection.

91. By 1908 there were ten well established companies in the United States which were either producing or im-

porting motion picture films and selling them to independent exchanges scattered throughout the country, but operated on a local basis. From these exchanges films were distributed weekly to exhibitors for a rental based on footage, although some attempts had been made to produce and market individually features of distinctive quality. At that time there were between 125 and 150 exchanges and 6,000 exhibitors in the United States.

[fol. 3165] 92. In 1908, largely to escape the effects of a patent war conducted chiefly by the Edison companies, which held basic camera and projection equipment patents, the ten leading manufacturers decided to pool their interests and patents in the Motion Picture Patents Company. These companies were: Biograph, Kalem, and Pathe, in New York; Vitagraph in Brooklyn, Edison in New Jersey; Lubin in Philadelphia; and Essanay, Kleine, Meli and Selig in Chicago.

93. Each manufacturer took a license from the Patents Company entitling it to produce and lease motion pictures. By a system of licenses extending to distribution and exhibition, control of the entire industry was attempted. The licenses generally covered all branches of the industry, including cameras, film, and projectors.

94. The General Film Company was then organized to distribute the films of the ten producers on a national scale. Exchanges were either established by it or existing exchanges bought out. Other distributors had to secure the films of other producers in order to continue their business.

95. The Patents Company and the General Film Company were met by a militant group of producers, distributors, and exhibitors who operated without their licenses. And a number of law suits followed. Private suits for damages under the antitrust laws were instituted by them, and finally the Government instituted a suit in equity in 1912 which brought about the dissolution of the Motion Picture Patents Company by a decree dated January 24, 1916.

96. Meanwhile, the art of producing motion pictures had been going forward. The standardized film of one reel of 1,000 feet was rapidly displaced after 1912 by the feature picture of five reels or more. While the Motion Picture Patents Company adhered to the idea of short, standardized

films of one reel and a daily change of program to be sold on a footage basis, others who had made a careful study [fol. 3166] of audience reaction were convinced that the time had arrived for further advances in production. Complete stories, plays, and books were translated into motion pictures. Among the early advocates of this change was Adolph Zukor, who formed the Famous Players Company in 1912, and produced "Queen Elizabeth," in which Sarah Bernhardt appeared, and soon "The Prisoner of Zenda," with James K. Hackett, a well-known actor, was produced.

97. From a position of comparative obscurity in 1912, Adolph Zukor and his Famous Players Company by 1916 had become the dominating influence in the industry. The feature pictures of this company were in demand the country over and were recognized generally as the best pictures on the market. A national distribution system had been secured through the acquisition of the control in that year of Paramount Pictures Corporation, which had been organized two years before by William W. Hodkinson, a San Francisco distributor.

98. The cost of making pictures had mounted abruptly, due principally to the rise in salaries of stars, directors, and technicians of all kinds. Then these costs were passed on to the distributors and exhibitors, who had largely remained independent of producers, great alarm was felt by the persons engaged in these two branches of the industry, and resulted, in 1917, in the organization of First National Exhibitors Circuit, an association of exhibitors, which, through production and distribution units financed by its membership under a system of franchises, sought to assure its membership of a constant, satisfactory supply of pictures.

99. Many of the theatres in the new association were and had been customers of Famous Players. Thus the market for the pictures of that company was being threatened, and soon stars, feature players, directors and other personnel, were leaving the employ of Famous Players-Lasky for that of First National Exhibitors Circuit.

[fol. 3167] 100. In 1919 Famous Players-Lasky Company began its acquisition of theatres as hereinbefore recited. By 1930, as hereinbefore recited, five of the major companies, Paramount, Loew's, Warner, Fox and RKO, had all devel-

oped nationwide businesses, in which production, distribution and exhibition were integrated. During the interim feature production costs had mounted steadily and the returns from their exhibition kept pace. This trend was accelerated in 1927 by the introduction of commercially profitable sound films which required costly equipment to produce, with the result that by 1930 the best features produced by each of these companies were costing as much as $500,000 or more each to produce.

101. By 1930 the eight defendant distributors were releasing substantially all of the features produced in the United States at a cost of more than $250,000 as they were the only ones which had the national distribution systems and established first-run outlets necessary to make the production of such features profitable. Since that date, they have continued to maintain complete control of the distribution of such features, although many of them have been produced by producers not employed by a major company but pursuant to arrangements made preceding the production of such films for release by a major distributor. Such arrangements generally included the use of equipment owned by, or production talent under contract to, one or more of the defendants. These arrangements have often included financing of the production directly by the major distributor involved or the borrowing of capital by the producer upon its showing that it has been assured of release through a major distributor. Ordinarily, no funds have been or are available for this type of production in the absence of such an assurance.

[fol. 3168] 102. As the equipment and technical and artistic talent necessary to produce profitable features became more costly, competition for the use of such talent became even more costly to producers; and since 1930 the major producers have preferred to loan and exchange the highest priced technical and artistic talent which they may have under exclusive contract to and with each other on standardized terms rather than drive the price of such talent higher by competing for the privilege of placing it under contract in the first instance.

103. The producer-exhibitor defendants have an additional inc tive to pool their production resources arising out of th act that each owns theatres which share the profits of s cessful features released by any of the others.

Ordinarily, the major producers make available to each other their stars, feature players, directors and other personnel and their sets, scenery, and other technical equipment necessary for the production of motion pictures while they do not readily make them available to independent producers. Even where such talent has been made available to independent producers, the terms have frequently been discriminatory as compared to the terms upon which it has been made available to major producers.

104. Since 1933 the number of instances in which stars, feature players, directors, writers, cameramen or other production talent under contract to a defendant has been loaned to another major producer as compared with loans to independent producers during the same period are approximately as follows:

	Number of Loans by Defendants	
Defendant	To Major Producers	To Independent Producers
Loew's	610	56
Paramount	439	46
Warner	223	12
RKO	109	12
Fox	251	7
Columbia	175	36
Universal	198	11

[fol. 3169] 105. Fox, Loew's, Paramount, RKO and Warner have collectively received during the past five years approximately 70 per cent of the total film rentals received by all distributors of motion pictures from exhibition in the United States, and Columbia, United Artists and Universal received about 25 per cent of such total film rentals. Fox, Loew's, Paramount, RKO and Warner have during each of said years collectively released about 80 per cent of all first class features, and Columbia, United Artists and Universal have during each of said years released about 15 per cent of all first-class features. The first-class features represent those which have generally cost the most money to produce, have received the most intensive exploitation by distributors, have been successful in attracting patrons to theatres, and have yielded the largest gross box-office returns to exhibitors. No other distributor has released more than 1 per cent of such features during any of said years and in no year have all other distributors combined released more than 5 per cent of such features.

B. Block Booking and Blind Selling in Long Term Contracts

106. In the early stages of motion picture distribution, the uniform quality of films and dependence by exhibitors on their novelty, rather than quality, to attract audiences, was well adapted to the method of licensing still employed in the industry. Then as now films were licensed sight unseen in large groups for delivery at weekly intervals over a period of a year or more.

107. License contracts today ordinarily contain the terms on which a group of features are to be exhibited over a period of at least one year. With the exception of United Artists, which usually makes a separate contract for the films released by each of its producers, the distributors cover in one license contract all of the features released during the one-year period or a lesser number to be selected from all released, as and when released. The licenses are [fol. 3170] generally negotiated prior to the commencement of each motion picture season before any of the features covered have been released. The exhibitor has no knowledge of the quality or character of the features he licenses other than data concerning the stories, directors, stars, and featured players, supplied as to some pictures by some of the distributors in prospectuses of the coming season's production program and the exhibitor's past experiences with similar productions. Such production programs are always subject to change without notice to any exhibitor and his license contract offers no protection against loss which may result from the failure of the pictures produced to live up to the claims made for them as box-office attractions at the time they are sold.

108. The quality of feature pictures, as box-office attractions, varies widely even with respect to those released by the same company and they are accordingly priced in various brackets in the license agreement in accordance with anticipated quality. The feature released by any of the defendant distributors during any one season which is the most successful in attracting theatre audiences will ordinarily gross more than $1,000,000 in film rental and play in more than 10,000 theatres, in the United States, while the least successful feature will ordinarily gross less than $200,000 in film rental and play in less than 5,000 theatres, in

the United States. The features assigned to the top price bracket in license agreements ordinarily have rental terms based upon a percentage of the box-office receipts, sometimes against a guaranteed figure, and those in the lowest price brackets are ordinarily licensed for a flat rental. The pictures in each bracket are usually untitled and unidentified.[1] The result is that most features are not definitely allocated to a price bracket until after their release and [fol. 3171] the question of proper allocation is a continuous source of dispute between exhibitors and distributors.

109. Each distributor defendant releases each year a certain number of features (generally those in the lowest price bracket) which most exhibitors do not wish to exhibit at all. Therefore, in negotiating licenses, the distributor attempts to secure a commitment by the exhibitor to play all of the features released by it during the one-year period with as small a cancellation or rejection privilege as possible and the exhibitor attempts to limit his commitment by either obtaining as wide a rejection or cancellation privilege as possible or sometimes by licensing a specific number of features, less than all released during such period. The extent to which the exhibitor is able to limit his commitments to those features which he thinks he can profitably exhibit depends upon the relative bargaining strength of the parties. In view of the limited supply of profitable features, a defendant distributor, in dealing with small independent exhibitors with limited buying power, is ordinarily able to compel the exhibitor to commit himself to play many features which he does not want and cannot profitably exhibit as a condition of licensing other features which he does want and can profitably exhibit. To the extent that such commitments are made, the market for films of other distributors which the exhibitor wants to play is correspondingly limited, and one result of the tying of unprofitable features to profitable features in the license contracts of the major distributors has been to prevent or discourage the entry into the market of independent producers and distributors. Another result of such block booking has been to encourage the production of features by the major com-

[1] An example of such bracketing is as follows; Four features at 35%; six at 30%; ten at 25%; ten at $200.00 flat rental; and ten at $100.00 flat rental.

panies which are not sufficiently attractive to be sold on their own merits but which may be successfully marketed by block booking them with other features of superior quality.

[fol. 3172] 110. While the restrictive effect of such block booking is substantially lessened in the case of United Artists by the employment of separate license agreements for each of its producers, most of which produce no more than four pictures a year, this defendant generally negotiates the licenses for all of its producers' pictures with the same exhibitor at the same time and sometimes conditions the sale of one producer's pictures upon the purchase by the exhibitor of the pictures of another producer which he does not desire to use.

111. In addition to the rental to be paid, the license contracts also ordinarily specify the run on which the features are available to the exhibitor, the clearance, if any, which his theatre shall have over competing theatres, and usually specify the minimum (adult and children, matinee and evening) admission prices to be charged by his theatre when exhibiting such features.

C. Run, Clearance, and Minimum Admission Prices

112. Although the entertainment value of the feature pictures released in the United States from week to week varies widely, theatre admission prices are generally uniform at a particular theatre regardless of the quality of the particular feature exhibited. Under the prevailing system of licensing features for a particular run for periods of a year or more with clearance at a specified minimum admission price, each theatre ordinarily plays all of the feature pictures it exhibits on the same run with the same clearance. All theatres which play features on the same run in the same competitive area ordinarily play them at the same admission price regardless of changing competitive conditions which might otherwise affect admission prices during the period of the license.

113. The incorporation of the foregoing provisions with respect to run, clearance and admission prices in annual licensing agreements and franchises, has tended to stabilize the playing positions and operating policies of particular theatres from year to year and the negotiation of license [fol. 3173] contracts with subsequent-run exhibitors is

always subject to whatever rights have been established by license agreements with the prior-run exhibitors. Even where there are two or more theatres in a position to compete for the privilege of exhibiting the same features upon the same run, negotiations are seldom conducted simultaneously with the competing exhibitors for the licensing of pictures on such run. The distributor ordinarily negotiates the rental terms to be paid without any competitive bidding and only if an agreement is not reached with the exhibitor with whom negotiations for a certain run are started are negotiations undertaken with a competing exhibitor for that run.

114. In the very early years of the motion picture industry the age of films was not a significant factor. As films acquired plot content and as certain players became known to the motion picture public, however, it became important to exhibitors to show them as early as possible after release. Prior to the advent of the feature picture, films were licensed generally on the basis of age, with the license fee becoming smaller as the reel grew older. There was evolved during this period the concept of "run" which eventually displaced the earlier method of licensing pictures and instead of licensing pictures one week old, two weeks old, etc., exhibitors licensed product on first run in a given territory, on second run in said territory a specified period of time after first run, on third run in said territory a specified period of time after second run, etc. As the form of the motion picture developed from single reel to the feature picture and as certain players attained great popularity, motion picture theatres were able to command higher admission prices, and the operation of deluxe first-run theatres in large cities charging a high admission price became feasible and profitable. From about 1915 or 1916, when the first of these deluxe theatres, designed primarily [fol. 3174] for motion picture exhibition at advanced admission prices, were constructed, exhibitors operating such theatres sought to obtain and frequently did obtain long periods of protection over all other theatres in the city and surrounding territory where they were located.

115. From about 1915 to about 1931 it was frankly conceded by distributors and exhibitors generally that uniform runs and clearances were desirable, even though arrived at as the result of agreement between distributors, and many

efforts were made to eliminate differences in the run and protection terms on which distributors dealt with theatres. During this period a number of contracts and franchise agreements provided in effect that the run and protection terms therein granted by a given distributor were to be the same as those granted to the theatre or theatres involved by other distributors.

116. In about 1930, after the producer-exhibitor defendants had substantially completed their theatre acquisition programs, they made a concerted effort to establish uniform zoning and protection plans throughout the United States through the Film Boards of Trade.[1] It was the purpose of those plans to establish in each exhibition territory a uniform plan of zoning and protection which would give a definite status to each theatre in the territory and which would prevent any distributor from dealing with such theatre with respect to run, zoning, or protection, on any terms other than those provided for in the plan. Such uniform zoning and protection plans, through agreements of the exhibitors and the distributors, were adopted for the 1930-31 season for the following cities: Charlotte, North Carolina; Detroit, Michigan; Los Angeles, California; [fol. 3175] Omaha, Nebraska; Salt Lake City, Utah; Denver, Colorado; Kansas City, Missouri; Milwaukee, Wisconsin; St. Louis, Missouri; San Francisco, California. There were also proposed and recommended by the local committees of the exhibitors and distributors and were awaiting acceptance by the home offices of the distributors in New York City, uniform zoning and protection plans for the 1930-31 season for the following cities: Albany, New York; Cincinnati, Ohio; New Orleans, Louisiana; Philadelphia, Pennsylvania; Buffalo, New York; Memphis, Tennessee; Oklahoma City, Oklahoma; and Washington, D. C. There were also under consideration for the 1930-31 season, by local committees, uniform zoning and protection plans for the following cities: Atlanta, Georgia; Chicago, Illinois; Des Moines, Iowa; Minneapolis, and St. Paul, Minnesota; New York, New York; Portland, Oregon; Boston, Massachusetts; Cleveland, Ohio; Indianapolis, Indiana; New Haven, Con-

[1] Trade practice enforcement bodies located in each city where the defendants maintained exchanges.

necticut; Pittsburgh, Pennsylvania; and Seattle, Washington.

117. In 1932 the United States District Court for the District of Nebraska [1] held that the Uniform Zoning and Protection Plan for the Omaha Distribution Territory was an agreement between distributors which restrained trade in violation of the Sherman Act. After the illegality of these uniform zoning and protection plans became apparent in 1932, the distributors, refrained from employing any express agreements with each other with respect to uniform protection and zoning.

118. Another concerted effort was made to establish uniform zoning and protection plans under the code of the motion picture industry adopted pursuant to the National Industrial Recovery Act in December 1933. From that time until May 1935, when that Act was invalidated by the Supreme Court, efforts were made by local clearance and zoning committees throughout the country to establish uni- [fol. 3176] form clearance and zoning plans. (It was at about this time that the term "clearance" was substituted in the industry for the term "protection" which had been used prior thereto.) Such a plan was actually arrived at in Los Angeles, California, and a modification of that plan is still in effect in that territory. Although such plans were under consideration in numerous other territories, the invalidation of the National Industrial Recovery Act prevented those plans from going into effect. Since May 1935, the industry has made no open effort to establish uniform clearance and zoning by express agreements between distributors.

119. Notwithstanding the disavowal by distributors of agreements between themselves with respect to uniform clearance and zoning schedules, such schedules are actually in effect in every exhibition territory in the United States. Many of these schedules were arrived at by agreement before 1932 and have been carried forward since that time as a matter of tacit understanding and custom. Other uniform clearance and zoning schedules have developed as a result of pressure uniformly exerted by the dominant exhibitor in

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[1] *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. (2d) 538.

a zone upon all of the distributors. The dominant circuits in every exhibition area, whether they be affiliated or unaffiliated, in purchasing product generally request and secure the same runs and the same protections from all distributors with whom they deal and such terms are incorporated in express agreements with each such distributor. The result is a uniform system or plan of clearance which is embodied in a series of similar clearance schedules agreed to by the dominant exhibitors with each distributor rather than a single schedule.

120. Each distributor knows the run and clearance [fol. 3177] granted by every other distributor licensing the same theatres and knows that the effect of such uniformity is to freeze the playing positions and admission prices of all theatres in an area where such uniform schedules prevail.

D. Long Term Franchises

121. Generally, distributors enter into license agreements with exhibitors every season and most license agreements cover only a single season's output of pictures. In their dealings with circuits, however, both affiliated and unaffiliated, the distributors engage in the practice of entering into long-term franchises. These franchises are for periods varying from two years to twenty years, and they cover the exhibition of pictures released by a distributor during their term in the theatres of the circuits with which they are made. The amount of film rentals involved in a single franchise has sometimes exceeded two million dollars and a single franchise has sometimes covered the terms of exhibition in more than five hundred theatres in widely separated localities.

122. Long-term franchises are generally advantageous to the circuits with which they are made. By virtue of the fact that the circuits have large buying power and pay to the distributors large sums of money, these franchises often discriminate against independent theatres whose buying power is small. These franchises generally give to the circuit theatres a selective choice of pictures and, regardless of changes in circumstances that may take place during the term of such a franchise, the circuit is permitted to tie up all the pictures or a substantial portion of the pictures released by the distributor while it is obligated to take only

a selection of said pictures. By establishing the runs and protections with respect to all the theatres in the circuit, these franchises deny to other theatres, during their term, the opportunity to bid for or to license the runs of pictures covered by such a franchise in competition with the circuit [fol. 3178] theatres. Another effect of these long-term franchises is that they restrict the market for films independently produced and released. Many of these franchises do not contain all the terms and conditions pursuant to which pictures are licensed, but are simply agreements to enter into binding licenses at some future time.

123. Franchises generally provide for the exhibition of pictures in all of the theatres operated by the circuit involved, and some of them have even provided that additional theatres acquired by the circuit during the term of the franchise are to be included within its terms. Some of these franchises also provide that where a circuit has not exhibited all the pictures licensed in certain theatres, it may make up for this deficiency by exhibiting in other theatres more pictures than have been licensed for exhibition in such theatres. This practice is known as overage and underage. These franchises also confer advantages upon certain theatres by providing for reductions in film rentals where vaudeville performances are given and where double feature programs are used and also by providing that in certain situations advertising costs are to be paid by the distributor or shared between the distributor and the exhibitor. Rental terms in such franchises are frequently calculated in accordance with formulae which are based upon the net profits to the exhibitor, rather than gross receipts, from the exhibition of the feature picture involved and are in effect profit sharing agreements.

E. Circuit Discrimination

124. In licensing films to an exhibitor who owns or controls a number of theatres, such as a large circuit, the terms with respect to all of the circuit theatres are generally negotiated at the same time regardless of how many theatres there are in the circuit or where they are located. The exhibitor in negotiating such terms attempts to secure the [fol. 3179] most favorable terms for all of his theatres and in so doing frequently conditions the granting of certain terms in one theatre situation which he controls upon the

granting of certain terms in another unrelated theatre situation which he also controls. In negotiating terms for such a circuit, the distributor sometimes conditions the use of its films in certain competitive situations where the circuit needs the distributor's films upon the acceptance by the circuit of films which the circuit does not need in other competitive situations. The result is that an independent exhibitor, operating a single theatre in competition with a circuit is unable to compete for the privilege of licensing the distributor's films on the basis of what his theatre can offer as against the circuit theatre in immediate competition with him, but is frequently excluded from any consideration as a prior-run outlet for the distributor's films because of competitive conditions existing in an entirely different exhibition situation, over which the independent exhibitor has no control.

125. In licensing films to an affiliated circuit, the same procedure is followed as with respect to any other circuit except that the factor of affiliation introduces into the negotiations an inducement to discriminate in favor of affiliated theatres at the expense of unaffiliated theatres. A producer-exhibitor defendant, in negotiating for the licensing of films released by it for exhibition in theatres owned and controlled by another producer-exhibitor defendant, must take into consideration the terms demanded by the other producer-exhibitor in licensing its films for exhibition in theatres owned or controlled by such first producer-exhibitor. The granting of certain terms and privileges with respect to the exhibition of one producer-exhibitor defendant's films in another producer-exhibitor defendant's circuit is necessarily conditioned upon the granting of similar terms and [fol. 3180] privileges by the latter with respect to the exhibition of its films in the circuit of the former.

F. Control Over Exhibition Exercised by First-Run Exhibitors

126. A number of prints of each feature, depending on the number of theatres to be served, are delivered to each exchange prior to national release date and delivered by the exchange to the various theatres which have licensed the film in accordance with the priority established by their contracts and returned to the exchange after each use. The picture is privately screened on or shortly after arrival for

the benefit of the trade and particularly the exhibitors which hold first-run contracts. The contracts held by such exhibitors generally give them wide selective privileges which enable them to reject a substantial number of the features covered by their contracts after the picture has been screened for them. If the theatre is accepted for first-run exhibition, it is exhibited in a first-run theatre and subsequently in the remaining theatres in accordance with their respective playing positions, established by the run designated in their respective license contracts. If it is rejected it is offered for license to other exhibitors operating first-run theatres or successively offered for license to exhibitors operating subsequent-run theatres in the order of the runs on which they play. As the first-run exhibitor not only has the opportunity to screen the picture but also frequently obtains reports on the box-office performances of the picture in key cities before making his selection, the pictures rejected are almost invariably inferior as box-office attractions to those selected.

127. Exhibitors holding first-run license contracts for the pictures released by one or more of the defendant distributors ordinarily charge the highest admission prices in the towns or cities where such first-run theatres are located as [fol. 3181] their programs consist of selected features comprising the highest quality of available motion picture entertainment.

128. The first-run exhibitor is also usually required to charge the highest admission price as a condition of securing a given clearance over subsequent-run theatres. Subsequent-run theatres could not normally play a picture so profitably at the same admission price as the first-run in view of the fact that they must play it at a substantially later date after the capacity of the picture to attract an audience from the particular clearance zone has been partially exhausted by the first run. The same considerations generally compel a difference in admission prices corresponding to a difference in run and clearance for the same picture in all subsequent-run theatres. The result is that the entire admission price, run and clearance structure of the theatres in a given town or city is subject to run and clearance terms fixed in license agreements between the major distributors and first-run exhibitors, and the availability to subsequent-run exhibitors of the most

profitable features is determined by the manner in which the first-run exhibitor exercises his selective privilege. In recognition of this fact the producer-exhibitor defendants have uniformly refrained from operating subsequent-run theatres in towns or cities where they do not operate first-run theatres.

G. Local Exhibition Monopolies

129. In the course of integrating the production and exhibition branches of the industry as heretofore recited, the producer-exhibitor defendants have acquired control of a substantial number of local exhibition monopolies. In many instances they acquired circuits of theatres which had already established such a monopoly prior to affiliation and have maintained such monopolies. In either case these monopolies consist of receiving a substantial majority of [fol. 3282] the total theatre admission revenue in large communities, generally cities of more than one hundred thousand population, and paying a substantial majority of the total film rentals received by distributors from all theatres located in such a community. In such communities competing unaffiliated exhibitors operate only at the sufferance of the producer-exhibitor defendants and they can offer no substantial competition to affiliated exhibitors either with respect to the terms on which films are licensed or the terms on which they are exhibited to the public.

130. Such monopolies have been established and maintained by acquiring control of the first-run theatres or the theatres operating on the first and other early runs. By control of first-run theatres alone, affiliated exhibitors have been able to secure as much as two-thirds of the total theatre admissions paid in cities as large as 250,000. This result is accomplished in part, by maintaining a long clearance and substantial admission price differential between the first and subsequent runs. In larger cities, affiliated exhibitors have found it necessary to control the theatres operating in the first two or three runs in order to secure a similar proportion of the total available film revenue, but, in either case, clearance and runs have been so adjusted that few unaffiliated theatres, if any, have an opportunity to play a first-class picture until all or nearly all of the affiliated theatres have exhibited it. A similar pattern occurs with respect to affiliated exhibitor control over first and subse-

quent-run theatres and the distribution of total film revenue in a substantial majority of the cities of the United States with a population of 100,000 or more. In acquiring such film revenue monopolies the defendants have not generally found it necessary to acquire control of all the theatres most suitable for first and early run exhibition in such cities. By this control of the licensing of all first class features they have been able to exclude such theatres from first or early run operation while in unaffiliated hands.

[fol. 3183] 131. More than 80% of all the metropolitan first-run theatres [1] are affiliated theatres. More than 95% of the features exhibited in metropolitan first-run theatres are released by the distributor defendants. In the following metropolitan cities all of the first-run theatres are affiliated theatres:

Boston, Mass.; New Haven, Conn.; Albany, N. Y.; Brooklyn, N. Y.; Newark, N. J.; Philadelphia, Pa.; Washington, D. C.; Charlotte, N. C.; Memphis, Tenn.; New Orleans, La.; Houston, Texas; Dallas, Texas; Oklahoma City, Okla.; Kansas City, Mo.; Cincinnati, Ohio; Cleveland, Ohio; Chicago, Ill.; Milwaukee, Wis.; Des Moines, Iowa; Minneapolis, Minn.; St. Paul, Minn.; Omaha, Nebr.; Salt Lake City, Utah.

132. In only 4 [2] of the 92 cities of the United States with populations of 100,000 and over are there no affiliated theatres. In 73 of the remaining 88, the producer-exhibitors operate enough first-run theatres in each to receive a substantial majority of the total theatre admissions paid in each of these cities. The five producer-exhibitors also own or operate one or more theatres in 200 of the 283 cities of population between 25,000 and 100,000.

VI. Interstate Commerce

133. The business of producing motion pictures embraces the photographing of scenes on reels of celluloid film, said scenes having been prepared in advance by the assemblage,

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[1] For definition of a metropolitan theatre see Paragraph 17(d).

[2] Tulsa, Oklahoma; Fall River, Massachusetts; Tacoma, Washington; and Fort Wayne, Indiana.

[fol. 3184] at the studios, or upon location, of the necessary directors, actors, actresses, extra players, and other persons and facilities necesary to complete the scenes to be photographed. The personnel necessary to the production of a motion picture is usually assembled at the studios in California, where most of the pictures are made, and costumes and raw materials entering into the making of pictures, in many instances, are manufactured outside the State of California and shipped across state lines to the studios for use in production.

134. Approximately two billion feet of negative stock celluloid film are used in the production of motion pictures annually, practically all of which is manufactured at plants located in the states of New York and New Jersey. Approximately 90% of the raw negative stock is shipped across state lines to the studios in California to be utilized in the production of motion pictures.

135. After the scenes going to make up a motion picture have been photographed, the film is developed, cut, fixed, edited and arranged at the studios in California. Then the negatives are shipped to laboratories located principally in California, New York and New Jersey, where the required number of positive prints are made (usually between 50 and 250) to fulfill the contractual requirements for the picture in question. The positive prints so prepared are the motion picture films which are protected in motion picture theatres, in most instances, after having been shipped across state lines to the film exchanges maintained in the various exchange cities throughout the country.

136. In the spring of each year, producers of motion pictures announce their prospective programs for the coming exhibition season. These programs describe the pictures to be produced, so far as known, giving their titles, the names of the stars and other featured players, the directors, and such other pertinent material as may be avail- [fol. 3185] able. Plans are then made for the production and release of the photoplays upon the program, at approximately regular intervals throughout the exhibition season, which begins on September 1 of each year.

137. When programs have been arranged and fixed, the distributors, through their salesmen, who work out of the

exchanges, solicit exhibitors to enter into license agreements covering exhibition of photoplays for the coming season. Each photoplay is copyrighted under the Copyright Laws of the United States, and the solicited license agreements as signed by exhibitors are, by the terms thereof, usually transmitted to the principal office of the distributor, usually in New York, where such agreements are either approved or rejected.

138. The positive prints, when prepared at the laboratories, are packed in tin boxes which, in turn, are placed in wooden cases, and said positive films as completed, are from time to time shipped and transported from the laboratories where completed, across state lines to the various film exchanges throughout the country where they are utilized.

139. Upon receipt of the motion picture films by an exchange, they are delivered to the various exhibitors in the exchange territory, who, under their license agreements with distributors, have the first or prior right to exhibit the respective films, and are then returned to the exchange and transported to the exhibitors having the next succeeding right to exhibit, and so on until all exhibitors who are to exhibit the photoplays have been served, or transported directly from the prior-run theatre to a subsequent-run theatre. Many shipments of films from exchange to exhibitor, and from exhibitor to exchange, cross state lines. When the films are worn out, they are shipped or returned to laboratories for scrapping; which shipments, as a rule, cross state lines, the final destination usually being New York City.

140. Thus, in the course of producing, distributing and exhibiting motion pictures there is a constant, continuous stream of trade and commerce between the states, in and between the territories and the states of the United States, [fol. 3186] consisting of the solicitation and the making of contracts for the future delivery over periods of time of films to be produced and delivered as hereinbefore described; the assemblage of personnel, property and material at the studios or upon location for the production of pictures; the transportation of negative films from the studios to the laboratories where positive prints of motion picture films are prepared, and from there shipped to film exchanges throughout the United States; the continuous dis-

tribution of said films from the exchanges to and from motion picture theatres located in the areas served by the respective exchanges; the interchange of said films between each exchange and other exchanges of the same distributor located in other states of the United States or in the territories thereof and, finally, the shipment of said films from said exchanges throughout the United States to points within the State of New York or elsewhere for scrapping.

141. The activities of each branch of the motion picture industry are either in or directly affect trade and commerce among the several states.

[fol. 3187] VII. Offenses Charged

A

Conspiracies To Unreasonably Restrain and Monopolize the Production, Distribution and Exhibition of Motion Pictures Participated in By All of the Distributor Defendants

142. All of the distributor defendants, each well knowing all the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain, and pursuant to said combinations and conspiracies have in fact unreasonably restrained, trade and commerce in the production, distribution and exhibition of motion pictures in the United States, and have attempted to and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known and hereinafter referred to as the "Sherman Act," in the following manner:

143. By concertedly aiding and assisting in the loaning and exchanging of production personnel under contract to each major producer, and costly production equipment owned by each major producer, to and with other major producers on uniform, non-competitive terms.

144. By concertedly aiding and assisting the major producers to exclude independent producers from access to production personnel under contract to each major pro-

ducer, and costly production equipment owned by each major producer, on the same terms on which they are made available to major producers.

145. By concertedly fixing license terms in contracts made before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown.

[fol. 3188] 146. By concertedly fixing the run, clearance and minimum admission price terms on which an exhibitor may play features in license agreements covering periods of a year or more.

147. By concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films.

148. By concertedly conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in another theatre or group of theatres, which has no relationship to the first theatre or group of theatres other than common ownership or control or a common film buying agent.

149. By concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are a part of a circuit. The means of such discrimination most frequently employed with respect to such theatres are the following:

(a) Run

In areas where such theatres compete with independent theatres, the defendant distributors have offered to license feature pictures distributed by them to said theatres on a run ahead of said independent theatres, and only if said circuit theatres decline to license said product on said prior run is that run offered to competing independent exhibitors. Said priority of run has ordinarily been continued from season to season, that is to say, the said defendants reserve a prior run for circuit theatres, and refuse to license feature pictures distributed by them on said prior run to independent exhibitors, even though said independent exhibitors request the prior run from one or more of

the defendants before said defendants have agreed in writing to license their feature pictures for an approaching motion picture season on said prior run to competing circuit theatres. Feature pictures distributed by the defendants have been licensed to circuit theatres on prior runs, although competing independent theatres, by virtue of their location, seating capacity, equipment, appearance, and the amount of other [fol. 3189] product they already have under contract, are as suitable or more suifable than competing circuit theatres to exhibit the feature pictures requested on a prior run, and although they may offer and be in a position to pay a higher film rental for a feature pictures than the competing circuit theatres. As a result, independent exhibitors operating in competition with circuit theatres have been and are systematically excluded from the opportunity to procure preferred runs of feature pictures distributed by the defendants in the localities in which circuit theatres operate. In many instances the defendant distributors have refused to license an independent exhibitor on any run at all in order to protect a circuit theatre from competition, regardless of how much clearance in favor of the circuit theatre the independent exhibitor is willing to submit to and regardless of what admission price he will charge or what rental he will pay.

(b) Delivering prints

In delivering prints for exhibition by independent exhibitors competing on the same run in the same exchange territory with such circuit theatre, the distributor defendants ordinarily serve the circuit theatre first if there is an insufficient number of prints available in the exchange to serve all theatres operating on the same run simultaneously, and thus give circuit theatres prior playing dates not provided for in their exhibition contracts.

(c) Clearance

The defendant distributors have granted such circuit theatres arbitrary and unreasonable clearance over competing independent theatres. In ...ny instance such defendants have granted clearance to circuit the-

atres which serves no legitimate interest of the distributor. Such clearance is granted by the defendants solely at the insistence of said circuit theatres and for the purpose of aiding said circuit theatres to sup- [fol. 3190] press the competition offered by independent theatres rather than to secure the most revenue for the distributor. As a result, independent theatres, in many instances, are unable to exhibit feature pictures until their novelty and freshness have worn off and their box office value has been seriously diminished, solely because earlier exhibition in the independent theatres would decrease the profits of a circuit exhibitor.

(d) Minimum admission prices

In many instances each distributor defendant has agreed with such circuit theatres to require independent theatres exhibiting their feature pictures on a run subsequent to that of the circuit theatre, to charge a minimum admission price for such exhibition so high that such subsequent run independent theatres cannot operate successfully.

(e) Prohibition of double features on subsequent runs

In many instances each defendant distributor has agreed with such circuit theatres to prevent independent theatres exhibiting their feature pictures on a run subsequent to that at a circuit theatre from exhibiting, as part of a double feature program, feature pictures which have been exhibited at the circuit theatre.

(f) Selectivity of deals

In contracting with such a circuit of theatres, each defendant distributor ordinarily gives it the right to select a certain number of the feature pictures released by it each season for exhibition at the circuit's theatres. In contracting with independent theatres, however, each such defendant has ordinarily refused to license any of its product unless the independent exhibitor contract for all of the feature pictures released by it. Or, in the event that independent exhibitors are granted selective privileges in licensing pictures, the selection granted to them has ordinarily not been as great as that granted to competing circuit theatres.

[fol. 3191] (g) Designation of play dates

In many instances each distributor defendant, in licensing feature pictures to independent exhibitors, requires that certain pictures be exhibited upon designated days or reserves the privilege of designating the days on which a certain number of the feature pictures licensed should be exhibited. Ordinarily, each such defendant designates that such feature pictures be played on the most desirable days in the week from the standpoint of attracting patronage, that is, Saturdays, Sundays or holidays, and ordinarily the feature pictures which are designated to be played on such preferred days are ones which the exhibitor has licensed on percentage terms. The independent exhibitor is forced to accept such designation of play dates in order to obtain the product necessary for the operation of his theatre. Although each distributor may require such circuit theatres to play certain pictures on designated days, the number of pictures designated by each distributor to be so played by circuit theatres is usually not as great as the number designated to be so played by independent exhibitors.

(h) Forcing of short subjects, news reels, trailers, serials, reissues, westerns and foreigns

In many instances each defendant distributor has refused to license its feature pictures to independent exhibitors unless they also agree to license and pay for the short subjects, news reels, trailers, serials, reissues, westerns and foreigns released by that defendant, even though the independent exhibitor does not wish to license such additional films and has no need for them. This practice is usually not enforced against such circuit theatres.

(i) Film rentals

In many instances, each distributor defendant has required independent theatres to pay higher film rentals for the exhibition of feature pictures on a given run than it requires of such circuit theatres, and in many [fol. 3192] instances independent exhibitors are required to pay as much or more for the exhibition of feature pictures on a subsequent run as circuit theatres

pay for the exhibition of the same feature pictures on a prior run. Moreover, independent exhibitors are required to play a greater number of pictures on percentage terms than are such circuit theatres and the latter theatres are permitted to pay flat rentals for many pictures played by independent exhibitors on a percentage basis. Independent exhibitors are also required to play more percentage pictures with a minimum guaranteed film rental than are such circuit theatres.

(j) Advertising allowances

In many instances each distributor defendant, in licensing feature pictures to such a circuit of theatres, agrees to pay the cost of advertising such pictures or share it with the circuit. The defendants seldom, if ever, agree with independent exhibitors to pay for or share advertising costs.

(k) Score charges

Independent exhibitors are required by each defendant distributor to pay score charges * on practically every picture which they exhibit, while such circuit theatres seldom, if ever, are required to pay score charges on more than half of the pictures which they play.

(l) Optional contracts

In many instances each defendant distributor gives such circuit theatres the privilege or option of playing certain specified features without assuming any binding obligation to do so. This is in reality a selective [fol. 3193] contract which gives such circuit theatres wide choice in regard to the pictures which they ex-

* Originally, sound came from a disc or record, the playing of which was synchronized with the picture. A charge was made for the use of the disc, which came to be called a "score charge." As sound developed, the sound track was superimposed on the film and the disc was discarded. Nevertheless, distributors continued to require the payment of score charges which in reality amount to additional film rental.

hibit. Such benefits are seldom, if ever, extended to independent exhibitors.

(m) Contract modifications

In many instances each defendant distributor permits material changes and alterations in its contracts with such circuit theatres. Seldom, if ever, are such modifications made by the defendant distributors in their contracts with independent exhibitors, and in the cases where they are made, the modifications are much more limited than when the contract is with such a circuit of theatres. Among the types of modifications made in contracts with such circuit theatres are the following:

1. Reduction of film rentals where box-office receipts upon the exhibition of pictures covered by the contract have been disappointing.

2. Reduction in film rentals where pictures covered by the contract are double-featured.

3. Reduction in film rentals where pictures covered by the contract are shown with vaudeville.

4. Reduction in film rentals where pictures covered by the contract are shown in connection with a premium give-away, by which attendance at the theatre is encouraged.

5. Changing pictures covered by a contract specifying percentage of box-office revenue as rental, to a flat rental, so-called, which means a fixed rental designated in terms of dollars and cents.

6. Elimination of pictures covered by contracts by repeating or extending the playing time of other pictures covered by the same contracts.

[fol. 3194] 7. Transfer of pictures under contract for exhibition at one circuit theatre to another theatre operated by the same circuit.

8. Cancellation of some of the pictures covered by a contract when other pictures are more successful at the box office than the distributor and circuit theatre have anticipated.

(n) Overage and underage

In many instances each defendant distributor permits such a circuit of theatres to play fewer pictures in one of its theatres than the contract requires, and to charge the deficit thus created against pictures played in another one of its theatres in excess of the commitment of such theatre. This privilege is seldom, if ever, extended to independent exhibitors.

(o) Move-overs

In many instances such a circuit of theatres is permitted by each of the defendant distributors to move a picture from one of its theatres where its exhibition has been completed to another theatre operated by the same circuit for a continued run or exhibition. This practice, which is generally confined to metropolitan areas, reduces the box-office value of a picture when it reaches subsequent-run exhibitors. This privilege is seldom, if ever, extended to independent exhibitors.

(p) Overbuying

In many instances such a circuit of theatres is knowingly permitted by the defendants to contract for the exhibition in certain theatres operated by it of more films than such theatres can profitably exhibit for the purpose of withholding such films from competing [fol. 3195] independent exhibitors who need them in order to operate their theatres. Many pictures so licensed by such circuit theatres are never exhibited by them because of their lack of screentime to play them, and yet they are released to competing independent exhibitors, if at all, only after the elapse of such a length of time after their release that their exhibition value has been substantially diminished. In other cases, the circuit theatres actually exhibit all of the pictures licensed by them by following a policy of making a greater number of weekly program changes than are necessary to meet the entertainment requirements of their patrons.

[fol. 3196] B

Conspiracies To Unreasonably Restrain and Monopolize the Exhibition of Motion Pictures Participated In By the Producer-Exhibitor Defendants

150. All of the producer-exhibitor defendants, each well knowing all of the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain and monopolize and pursuant to said combinations and conspiracies have in fact unreasonably restrained and monopolized, trade and commerce in the exhibition of motion pictures in the United States, in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

151. By concertedly conditioning the licensing of films distributed by one producer-exhibitor defendant in theatres operated by another such defendant upon the licensing of film distributed by the latter defendant in the theatres operated by the former defendant.

152. By concertedly excluding independently produced films from affiliated theatres.

153. By concertedly excluding unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where affiliated theatres are located.

154. By concertedly excluding unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where such affiliated theatres are located.

155. By concertedly using the first and early-run affiiated theatres to control the film supply, run, clearance and admission prices of operators of competing unaffiliated theatres in the cities and towns in which affiliated theatres are located.

156. By concertedly coercing and intimidating unaffiliated exhibitors located in towns where there are no affiliated theatres to license their films upon arbitrary terms by expressed or implied threats to build or acquire a competing [fol. 3197] theatre and use it to destroy the business of the unaffiliated exhibitor.

157. By concertedly coercing and intimidating exhibitors located in towns where affiliated theatres are located or

where an affiliated exhibitor desires to locate into relinquishing control of his theatre or a share of the profits thereof to the affiliated exhibitor by expressed or implied threats to deprive him of access to films necessary to the successful operation of his theatre or to so limit the terms and conditions on which he licenses such films that they may no longer be profitably exhibited by him.

158. By pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more producer-exhibitor defendants, located in the same competitive area and frequently operating on the same run, which would operate in competition with each other except for such pooling or profit sharing agreements.

159. By agreeing to divide the available films among affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area, without competitive negotiations, in situations where such theatres would otherwise compete with each other for such films.

160. By entering into joint arrangements with respect to a single theatre, whereby the film buying control or proceeds from operation thereof is divided between two or more producer-exhibitor defendants.

161. By concertedly refraining from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres, except under agreements preventing competition such as those noted in paragraphs 158, 159, and 160 above.

162. By concertedly effecting a division of the territory of the entire United States between them for theatre operating purposes.

163. By concertedly acquiring and maintaining a monop- [fol. 3198] oly of the business of exhibiting motion pictures in approximately 80% of the cities of the United States with populations of more than 100,000.*

164. By concertedly acquiring and maintaining a monopoly of the business of exhibiting motion pictures in all of the cities of the United States with populations of more than 1,000,000.*

* All population figures are taken from 1940 census.

165. By concertedly acquiring and maintaining a monopoly of the business of exhibiting motion pictures in each of the following cities of the United States with populations of more than 100,000* for theatres affiliated with the producer-exhibitor defendants respectively named thereafter.

City	Population Rank	Defendants
New York, New York	1	Loew's, Paramount, RKO, Warner
Chicago, Ill.	2	Paramount, RKO, Warner
Philadelphia, Pa.	3	Fox, Paramount, Warner
Detroit, Mich.	4	Fox, Paramount
Los Angeles, Calif.	5	Fox, Loew's, Paramount, RKO, Warner
Cleveland, Ohio	6	Loew's, RKO, Warner
Boston, Mass.	9	Loew's, Paramount, RKO
Pittsburgh, Pa.	10	Loew's, Warner
Washington, D. C.	11	Loew's, RKO, Warner
San Francisco, Calif.	12	Fox, Loew's, Paramount, RKO
Milwaukee, Wisconsin	13	Fox, Warner
Buffalo, N. Y.	14	Loew's, Paramount
New Orleans, La.	15	Loew's Paramount, RKO
Minneapolis, Minn.	16	Paramount, RKO
Cincinnati, Ohio	17	RKO
Newark, N. J.	18	Loew's, Paramount, RKO, Warner
Kansas City, Mo.	19	Fox, Loew's, Paramount
Houston, Texas	21	Loew's, Paramount
Seattle, Wash.	22	Fox
Rochester, N. Y.	23	Loew's, Paramount, RKO
Denver, Colo.	25	Fox, Loew's, RKO
Portland, Ore.	26	Fox
Columbus, Ohio	27	Loew's, RKO
Oakland, Calif.	28	Fox
Atlanta, Ga.	29	Loew's, Paramount
Jersey City, N. J.	30	Loew's, RKO, Warner
Dallas, Tex.	31	Paramount
Memphis, Tenn.	32	Loew's, Paramount, Warner
St. Paul, Minn.	33	Paramount, RKO
Birmingham, Ala.	35	Paramount
San Antonio, Texas	37	Paramount, Warner
Omaha, Nebr.	39	Paramount, RKO
Dayton, Ohio	40	Loew's, RKO
Syracuse, N. Y.	41	Loew's, RKO, Warner
Oklahoma City, Okla.	42	Paramount, Warner
San Diego, Calif.	43	Fox
Worcester, Mass.	44	Loew's, Paramount, Warner
Richmond, Va.	45	Loew's
Fort Worth, Tex.	46	Paramount
Jacksonville, Fla.	47	Paramount
Miami, Fla.	48	Paramount
Youngstown, Ohio	49	Warner
Hartford, Conn.	51	Loew's, Paramount, Warner
Grand Rapids, Mich.	52	Paramount, RKO
Long Beach, Calif.	53	Fox
New Haven, Conn.	54	Loew's, Paramount, Warner

* All population figures are taken from 1940 census.

[fol. 3199]

City	Population Rank	Defendants
Des Moines, Iowa	55	Paramount, RKO
Flint, Mich.	56	Paramount, RKO
Salt Lake City, Utah	57	Paramount
Springfield, Mass.	58	Loew's, Paramount, Warner
Bridgeport, Conn.	59	Loew's, Warner
Norfolk, Va.	60	Loew's
Yonkers, N. Y.	61	Loew's, Paramount, RKO
Scranton, Pa.	63	Paramount
Paterson, N. J.	64	Paramount, Warner
Albany, N. Y.	65	RKO, Warner
Chattanooga, Tenn.	66	Paramount
Trenton, N. J.	67	RKO
Spokane, Wash.	68	Fox
Camden, N. J.	71	Warner
Erie, Pa.	72	Warner
Wichita, Kans.	74	Fox
Knoxville, Tenn.	75	Paramount
Wilmington, Del.	76	Loew's, Warner
Reading, Pa.	79	Loew's, Warner
Tampa, Fla.	83	Paramount
Sacramento, Calif.	85	Fox
Peoria, Ill.	86	Paramount
South Bend, Ind.	88	Paramount
Lowell, Mass	89	Paramount, RKO
Utica, N. Y.	90	Warner
Charlotte, N. C.	91	Paramount
Duluth, Minn.	92	Paramount

[fol. 3200]

C

Conspiracies to Unreasonably Restrain and Monopolize the Production of Motion Pictures Participated in by the Producer Defendants

166. All of the producer defendants, each well knowing all of the matters and things hereinbefore alleged, for many years last past, have combined and conspired with each other to unreasonably restrain and monopolize and pursuant to said combinations and conspiracies have in fact unreasonably restrained, trade and commeree in the production of motion pictures in the United States, and have attempted to and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Sherman Act, in the following manner:

167. By concertedly placing under contract most of the valuable stars, featured players, directors, technicians and others who have gained fame, prestige, renown, artistic, technical or other great value in the production branch of the industry.

168. By concertedly loaning and exchanging production personnel under contract to each major producer, and costly production equipment owned by each major producer, to and with other major producers on uniform, non-competitive terms.

169. By concertedly excluding independent producers from access to production personnel under contract to each major producer, and costly production equipment owned by each major producer, on the same terms on which they are made available to major producers.

D

Combinations of Which Each Producer-Exhibitor Defendant is a Member Which are Illegal Per Se

170. Each of the combinations of parent and subsidiary corporations which respectively form Fox, Loew's, Paramount, RKO and Warner constitutes a separate combination and monopoly in restraint of trade, which in and of [fol. 3201] itself has violated Sections 1 and 2 of the Sherman Act in the following manner:

171. By preventing independent producers from competing with such a combination in the production of films.

172. By preventing independent distributors from competing with such a combination in the distribution of films.

173. By preventing unaffiliated exhibitors from competing with such a combination in the operation of theatres in cities and towns where theatres operated by it are located.

174. By acquiring and maintaining a monopoly of the business of exhibiting motion pictures in areas serving a substantial percentage of the total population of the United States.

175. By coercing and intimidating unaffiliated exhibitors located in towns where such a combination operates no theatres to license its films upon arbitrary terms by expressed or implied threats to build or acquire a competing theatre and use it to destroy the business of such unaffiliated exhibitors.

176. By coercing and intimidating unaffiliated exhibitors located in towns where such a combination operates theatres

or where it desires to operate theatres, into relinquishing control of their theatres or a share of the profits thereof, to it, by expressed or implied threats to deprive them of access to its films or to so limit the terms and conditions on which they license such films that they may no longer be profitably exhibited by them.

177. By conditioning the licensing of films distributed by such a combination in theatres operated by another such combination, upon the licensing of films distributed by the latter combination in theatres operated by the former combination.

[fol. 3202]

E

Illegal Contracts Between Each Distributor Defendant and Circuit Theatres

178. Each defendant distributor, well knowing all the matters and things hereinbefore alleged, for many years last past, has contracted with various theatre circuits throughout the United States, including the affiliated circuits hereinbefore mentioned, to restrain and, pursuant to such contracts, has in fact unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures among the several States of the United States, in violation of Section 1 of the Sherman Act, by entering into licensing agreements with said circuits of theatres which contain provisions calculated to impose on independent exhibitors in competition with such circuit theatres, one or more of the discriminatory restrictions referred to in the lettered subparagraphs of paragraph 149, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants.

F

Illegal Coercion By Each Producer-Exhibitor Defendant

179. Each producer-exhibitor defendant, well knowing all the matters and things hereinbefore alleged, for many years last past, has violated Section 2 of the Sherman Act by using the monopolistic buying power of its circuit of theatres to compel each of the defendant distributors and other distributors of films to enter into licensing agreements with its circuit on terms which prevent unaffiliated theatres

from in fact competing with its circuit theatres, either with respect to the terms on which said unaffiliated theatres license films or the terms on which they exhibit films to the public, regardless of whether such license contracts were made pursuant to any prior concerted action, combination or conspiracy between two or more defendants.

[fol. 3203] G

Illegal Contracts Made by Each Defendant Distributor with Exhibitors Generally

180. Each distributor defendant, well knowing all the matters and things hereinbefore alleged, for many years last past has made divers contracts with exhibitors generally throughout the United States to unreasonably restrain and, pursuant to such license contracts, has in fact unreasonably restrained trade and commerce in the distribution, production and exhibition of motion pictures in the United States in violation of Section 1 of the Sherman Act, in the following manner, regardless of whether such license contracts were made pursuant to any concerted action, combination or conspiracy between two or more defendants.

181. By fixing license terms in contracts made before the exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown.

182. By fixing the run, clearance and minimum admission price terms in license agreements covering large groups of pictures of widely varying quality released over periods of a year or more.

183. By conditioning the licensing of one film or group of films upon the licensing of another film or group of films.

184. By conditioning the licensing of films in one theatre, or group of theatres, upon the licensing of films in another theatre, or group of theatres, which has no relationship to the first theatre, or group of theatres, other than common ownership or control or a common film buying agent.

185. By making clearance agreements which are calculated to suppress competition between exhibitors rather than to protect the distributor's revenue.

[fol. 3204] 186. By refusing to license a run on any terms, for the purpose of protecting an exhibitor from competition rather than to protect the distributor's revenue.

187. By arbitrarily withholding prints available in an exchange from one exhibitor in order to give another exhibitor a prior playing date not provided for in his licensing agreements.

VIII. Prayer

Wherefore, plaintiff prays:

(1) That the court issue its preliminary injunction restraining the defendants herein, and each of them, from building, buying, leasing, or otherwise acquiring any additional theatres or any further interest, or interests, in any additional theatres either directly or indirectly through the acquisition thereof by subsidiary or associated corporations or otherwise until the final decree herein or until the further order of this court.

(2) That each of the contracts, combinations, and conspiracies in restraint of interstate trade and commerce, together with the attempts to monopolize and the monopolization of the same, hereinbefore described, be declared illegal and violative of the Sherman Act.

(3) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of the respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the attempts at monopolization, the monopolies and all restraints of said interstate trade and commerce in the production, distribution, and exhibition of motion pic-
[fol. 3205] tures described herein, and from entering into and carrying out, directly or indirectly, expressly or impliedly, any monopolies or restraints of interstate trade and commerce similar to those alleged herein to be illegal.

(4) That a nationwide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of

whatever general and nation-wide prohibitions of illegal practices may be contained therein.

(5) That the integration of the production and exhibition branches of the industry by the producer exhibitor defendants herein, and each of them, be declared to be unlawful as an instrumentality of monopoly and restraint upon interstate trade and commerce, and violative of the Sherman Anti-Trust Act.

(6) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures Inc., Loew's, Incorporated, and Radio-Keith-Orpheum Corporation, and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, either in theatres and theatre holdings or in production and distribution facilities and that they, and each of them, and their respective successors be permanently enjoined from acquiring, directly or indirectly, any other interests in the branch of the industry divested or in any persons, firms, or corporations which are engaged or may engage in that branch of the industry; said divestiture to be accomplished and carried out upon such terms and conditions as the court may deem proper.

(7) That the defendants Paramount Pictures, Inc., Twentieth Century-Fox Film Corporation, National Theatre Corporation, Warner Bros. Pictures, Inc., Warner [fol. 3206] Bros. Circuit Management Corporation, Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, R. K. O. Proctor Corporation and R. K. O. Midwest Corporation and each of them, under the direction and supervision of the court be ordered and directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find have been used by one or more of them to unreasonably restrain trade and commerce in motion pictures in violation of Section 1 of the Sherman Act or to monopolize trade and commerce in motion pictures in violation of Section 2 of the Sherman Act.

(8) That the plaintiff have such other and further relief as the court may deem proper.

(9) That the plaintiff recover its costs herein.

United States of America, John T. Cahill, United States Attorney for the Southern District of New York.

Robert H. Jackson, Attorney General. Thurman Arnold, Assistant Attorney General. James V. Hayes. Robert L. Wright, Robert E. Sher, J. Stephen Doyle, Jr., John F. Clagett, James M. Malloy, Special Assistants to the Attorney General. J. Frank Cunningham, Seymour Simon, Special Attorneys.

[fol. 3207] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF NATIONAL THEATRES CORPORATION TO THE AMENDED AND SUPPLEMENTAL COMPLAINT

[fol. 3208] To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

National Theatres Corporation (sometimes hereinafter referred to as "National"), by its solicitors, Dwight, Harris, Koegel & Caskey, for its Answer to the Amended and Supplemental Complaint (hereinafter referred to as the "Amended Complaint") herein:

1. Answering Paragraph 1 of the Amended Complaint, denies that it has violated, is violating, or is about to violate any section or sections of the Act of July 2, 1890, commonly known as the Sherman Act.

2. Denies the allegations and each of them in Paragraph 2 of the Amended Complaint, and avers that neither it nor any of its representatives has acted unlawfully or in violation of the Act of July 2, 1890, either within the Southern District of New York or elsewhere.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any [fol. 3209] of them in Paragraphs 3, 4, 5, 6, 9, 10, 11, 14, 16(d), 16(f), 17(d), 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,

29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 102, 104, 105, 106, 114, 117, 126, 132, 133, 134, 135, 137, 138, 139, 142, 143, 144, 145, 146, 147, 148, 166, 167, 168, and 169 of the Amended Complaint.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 7(a) of the Amended Complaint, except it admits that Twentieth Century-Fox Film Corporation (hereinafter sometimes referred to as "Fox"), is a corporation organized and existing under the laws of the State of New York, with a place of business at 444 West 56th Street, New York, N. Y., and is engaged in the business of producing and of distributing motion pictures in various parts of the United States.

Answering the allegations of Paragraph 7(b) of the Amended Complaint, denies that National is a holding company for the theatre interests of Fox.

5. Answering the allegations of Paragraph 8 of the Amended Complaint, denies that Fox is an exhibitor of motion pictures and that National is a producer of motion pictures and protests the use of the appellation "producer-exhibitor defendant" to describe either of them.

6. Answering the allegations of Paragraph 15(b) of the Amended Complaint, denies that the term "major producer" is accurately defined in said paragraph and avers that said term is relative and could be applied to any of a number of producers who at the particular time might generally be regarded as the principal or more important producers.

7. Denies the allegations and each of them in Paragraphs 15(c), 15(e), 16(c), 17(h), 17(o), 17(s), 17(t), 101, [fol. 3210] 103, 109, 110, 112, 113, 115, 116, 119, 120, 122, 124, 125, 127, 128, 129, 130, 140, 141, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, and 187 of the Amended Complaint.

8. Answering the allegations of Paragraph 16(b) of the Amended Complaint, denies the term "major distributor"

is accurately defined in said paragraph and avers that said term is relative and could be applied to any of a number of distributors who at the particular time might generally be regarded as the principal or more important distributors.

9. Denies the allegations and each of them in Paragraph 16(g) of the Amended Complaint, except it admits that the term "block booking" is sometimes applied to the simultaneous licensing of a number of motion pictures, most of which are to be produced in the future.

10. Denies the allegations and each of them in Paragraph 17(b) and 17(c) of the Amended Complaint, except it admits that the term "affiliated theatre" may be used where the policy under which a theatre is operated and the licensing of pictures for exhibition in such theatre are both subject to control actually exercised by a defendant.

11. Denies the allegations and each of them in Paragraph 17(e) of the Amended Complaint, except it admits that the theatres operated by it which customarily contract for and exhibit first runs of pictures in the communities where they are located are sometimes called "first run theatres."

12. Denies the allegations and each of them in Paragraphs 17(f) and 17(g) of the Amended Complaint, except it admits that a group of two or more theatres owned, controlled or managed by the same interests are sometimes referred to as a "circuit" and that a theatre in such group is sometimes referred to as a "circuit theatre."

[fol. 3211] 13. Answering the allegations in Paragraphs 17(i), 17(j), 17(k), 17(l), 17(m), 17(n), 17(p), 17(q) and 17(r), admits that the terms referred to in these paragraphs are sometimes used in the motion picture industry as therein defined.

14. Denies the allegations and each of them in Paragraph 38 of the Amended Complaint, except it admits that Fox was incorporated under the name of Fox Film Corporation on February 1, 1915, that the debt structure of Fox was voluntarily adjusted with the consent of its creditors, security holders and stockholders in the summer of 1933 and that in 1935 Fox acquired the property, business and assets

of Twentieth Century Pictures, Inc., and that in 1935 the name Fox Film Corporation was changed to Twentieth Century-Fox Film Corporation.

15. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 41 of the Amended Complaint, except it admits and avers that Fox pictures are distributed by Twentieth Century-Fox Film Corporation and that exchanges for the distribution of Fox pictures are maintained in Denver, Colorado; St. Louis and Kansas City, Missouri; Los Angeles and San Francisco, California; Salt Lake City, Utah; Seattle, Washington; Portland, Oregon; Milwaukee, Wisconsin; and Omaha, Nebraska.

16. Denies the allegations and each of them in Paragraph 42 of the Amended Complaint, except it admits that Fox acquired approximately one-third of the common stock of West Coast Theatres, Inc., in August, 1925, and that in March, 1928, Fox acquired all the stock of Wesco Corporation.

17. Denies the allegations and each of them in Paragraph 43 of the Amended Complaint, except it admits that Wesco Corporation adjusted its capital structure in 1934 by volun-
[fol. 3212] tary agreement among its creditors and stockholders, pursuant to which The Chase National Bank of the City of New York acquired 58% of the stock in Wesco and Fox Film Corporation retained 42%; that the name of Wesco Corporation was thereafter changed to National Theatres Corporation; that The Chase National Bank of the City of New York still retains 58% of the stock of National Theatres Corporation; and that direct and indirect subsidiaries of National Theatres Corporation operate theatres in the middle and far western parts of the United States; and except it admits that The Chase National Bank of the City of New York is and for some years has been a stockholder in Fox.

18. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 45 of the Amended Complaint, except it admits that, as of November 2, 1940, direct or indi-

rect subsidiaries of National operated theatres as indicated by the following tabulation:

City	No. of theatres
Denver, Colo.	5
Detroit, Mich.	1
Kansas City, Mo.	3
Los Angeles Calif.	6
Milwaukee, Wis.	3
Portland, Ore.	3
San Francisco, Calif.	4
Seattle, Wash.	6

State	No. of theatres
Arizona	6
California	212
Colorado	34
Idaho	11
Illinois	20
Iowa	6
Kansas	56
Michigan	5
Missouri	37
Montana	19
Nebraska	8
New Mexico	6
Oregon	9
Utah	2
Washington	25
Wisconsin	48
Wyoming	12

[fol. 3213] 19. Denies the allegations and each of them in paragraph 87 of the Amended Complaint, except it admits that direct or indirect subsidiaries of National operate some theatres jointly with other exhibiting companies, and avers that such method of operation is not confined to theatres affiliated with one or more of the defendants to this action.

20. Denies the allegations and each of them in Paragraph 100 of the Amended Complaint, except it admits that during the period between 1919-1930, the cost of production of

motion pictures had mounted steadily, the cost of production was accelerated by the introduction of sound in motion pictures, many of the best features cost as much as $500,000 or more each to produce, and avers that with the increased cost of production licenses to exhibit feature pictures increased accordingly.

21. Denies the allegations and each of them in Paragraph 107 of the Amended Complaint, except it admits that some contracts to license motion pictures contain the terms under which the features licensed are to be exhibited over a period of one year or more, that one license agreement with a distributor may cover all the pictures to be released during the motion picture season or seasons covered by the license agreement or a lesser number to be selected from the whole, and that some license agreements have been negotiated prior to the commencement of the motion picture season to be covered by the license and before any of the features covered by the license had been released.

22. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 108 of the Amended Complaint, except it admits that the quality of feature pictures varies, that feature pictures are placed in various price groups in some license agreements, that many of the features placed in the top price brackets in license agreements contain terms based upon a percentage of the box office receipts, that many of the pictures in the lower price brackets are licensed for a flat rental, that the pictures in each price bracket are sometimes untitled when the license agreement is made, and that many features are not definitely allocated to a price bracket until released; and denies that the question of proper allocation of pictures in price [fol. 3214] brackets is a continuous source of dispute between exhibitors and distributors.

23. Denies the allegations and each of them in Paragraph 111 of the Amended Complaint, except it admits that its license agreements specify the rental to be paid for each picture, the run on which the feature pictures are to be made available, the clearance, if any, which the licensed theatre shall have over competing theatres, the clearance, if any, which competing theatres shall have over the licensed

theatre, and sometimes state the minimum admission prices which the exhibitor agrees to charge.

24. Denies the allegations and each of them in Paragraph 118 of the Amended Complaint, except it admits that a code for the motion picture industry was adopted pursuant to the National Industrial Recovery Act.

25. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 121 of the Amended Complaint, except it admits that direct or indirect subsidiaries of National enter into license agreements with distributors each season, that most of such license agreements cover only a single season, and that some of such license agreements may cover a period of two or more years.

26. Denies the allegations and each of them in Paragraph 123 of the Amended Complaint, except it avers that license agreements entered into by direct or indirect subsidiaries of National with distributors, covering one year or two or more years, vary with each particular distributor and for the precise terms thereof respectfully refers to the originals.

27. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 131 of the Amended Complaint, except it admits that direct or indirect subsidiaries of National operate first run theatres in the following towns:

Kansas City, Missouri,
Milwaukee, Wisconsin.

[fol. 3215] 28. Further answering, the defendant National Theatres Corporation denies that it or any corporation in which it owns any stock has a monopoly of or has attempted to monopolize the exhibition of motion pictures; denies that National has connived or conspired with any one to monopolize the production, distribution or exhibition of motion pictures, or to restrain trade and commerce in the production, distribution or exhibition of motion pictures, or has in any way violated the provisions of the Act of July 2, 1890.

29. Further answering, the defendant National Theatres Corporation denies each and every allegation, inference or implication in said Amended Complaint of any unlawful act,

conduct, combination, conspiracy or monopoly and denies that plaintiff is entitled to the relief prayed for in said Amended Complaint or to any of such relief, or to any relief whatsoever in the premises.

Wherefore, National Theatres Corporation, having fully answered the Amended Complaint herein, demands judgment dismissing the complaint, as amended and supplemented by the Amended Complaint, together with the costs and disbursements of this action, herein most wrongfully incurred.

Dwight, Harris, Koegel & Caskey, Solicitors for the Defendant, National Theatres Corporation, Office and P. O. Address: 100 Broadway, Borough of Manhattan, New York, N. Y.

(S.) John Fletcher Caskey, A Member of Said Firm.

New York, N. Y., November 14, 1940.

[fol. 3216] IN THE DISTRICT COURT OF THE UNITED STATES

[Title Omitted]

ANSWER OF TWENTIETH CENTURY-FOX FILM CORPORATION TO AMENDED AND SUPPLEMENTAL COMPLAINT

[fol. 3217] *To the Honorable the Judges of the District Court of the United States for the Southern District of New York:*

Twentieth Century-Fox Film Corporation (sometimes hereinafter referred to as "Fox"), by its solicitors, Dwight, Harris, Koegel & Caskey, for its Answer to the Amended and Supplemental Complaint (hereinafter referred to as the "Amended Complaint") herein:

1. Answering Paragraph 1 of the Amended Complaint, denies that it has violated, is violating, or is about to violate any section or sections of the Act of July 2, 1890, commonly known as the Sherman Act.

2. Denies the allegations and each of them in Paragraph 2 of the Amended Complaint, and avers that neither it nor any of its representatives has acted unlawfully or in viola-

tion of the Act of July 2, 1890, within the Southern District of New York or elsewhere.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 3218] or any of them in Paragraphs 3, 4, 5, 6, 9, 10, 11, 14, 16(d), 16(f), 17(d), 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 105, 106, 131, 132, and 134 of the Amended Complaint.

4. Answering Paragraph 7(a) of the Amended Complaint, denies that Fox is engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, in foreign countries or elsewhere, except it admits that it owns all of the common stock of Roxy Theatres, Inc., which owns and operates the Roxy Theatre in New York, N. Y., and that it owns 42% of the capital stock of National Theatres Corporation, direct and indirect subsidiaries of which are engaged in the business of exhibiting motion pictures.

Answering Paragraph 7(b) of the Amended Complaint, denies that National Theatres Corporation is a holding company for the theatre interests of Fox.

5. Answering the allegations in Paragraph 8 of the Amended Complaint, denies that Fox is an exhibitor of motion pictures and that National Theatres Corporation is a producer of motion pictures and protests the use of the appellation "producer-exhibitor defendant" to describe either of them.

6. Answering the allegations in Paragraph 15(b) of the Amended Complaint, denies that the term "major producer" is accurately defined in said paragraph and avers that said term is relative and could be applied to any of a number of producers who at the particular time might generally be regarded as the principal or more important producers.

7. Denies the allegations and each of them in Paragraphs 15(c), 15(e), 16(c), 17(h), 17(o), 17(s), 17(t), 87, 101, 102, [fol. 3219] 103, 109, 110, 112, 113, 115, 116, 119, 120, 125, 127,

128, 129, 130, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, and 187 of the Amended Complaint.

8. Answering the allegations of Paragraph 16(b) of the Amended Complaint, denies the term "major distributor" is accurately defined in said paragraph and avers that said term is relative and could be applied to any of a number of distributors who at the particular time might generally be regarded as the principal or more important distributors.

9. Denies the allegations and each of them in Paragraph 16(g) of the Amended Complaint, except it admits that the term "block booking" is sometimes applied to the simultaneous licensing of a number of motion pictures, most of which are to be produced in the future.

10. Denies the allegations and each of them in Paragraphs 17(b) and 17(c) of the Amended Complaint, except it admits that the term "affiliated theatre" may be used where the policy under which a theatre is operated and the licensing of pictures for exhibition in such theatre are both subject to control actually exercised by a defendant.

11. Denies the allegations and each of them in Paragraph 17(e) of the Amended Complaint, except it admits that the theatres which by contract with Fox have the right to the first run of pictures distributed by it in the communities where such theatres are located are sometimes called "first run theatres."

12. Denies the allegations and each of them in Paragraphs 17(f) and 17(g) of the Amended Complaint, except it admits that a group of two or more theatres owned, controlled or managed by the same interests are sometimes referred to as a "circuit" and that a theatre in such group is sometimes referred to as a "circuit theatre."

[fol. 3220] 13. Answering the allegations in Paragraph 17(i) of the Amended Complaint, avers that the motion picture season of Fox begins on August 1 of one year and ends on July 31 of the following year.

14. Answering the allegations in Paragraphs 17(j), 17(k), 17(l), 17(m), 17(n), 17(p), 17(q) and 17(r), admits that

the terms referred to in these paragraphs are sometimes used in the motion picture industry as therein defined.

15. Denies the allegations and each of them in Paragraph 38 of the Amended Complaint, except it admits that Fox was incorporated under the name of Fox Film Corporation on February 1, 1915, that the debt structure of Fox was voluntarily adjusted with the consent of its creditors, security holders and stockholders in the summer of 1933, that in 1935 Fox acquired the property, business and assets of Twentieth Century Pictures, Inc., and that in 1935 the name Fox Film Corporation was changed to Twentieth Century-Fox Film Corporation.

16. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 39 of the Amended Complaint, except it avers that the feature pictures produced by Fox during the following seasons were as stated below:

1930-1931—48
1931-1932—46
1932-1933—41
1933-1934—46
1934-1935—40
1935-1936—52
1936-1937—52
1937-1938—49
1938-1939—55

17. Denies the allegations and each of them in Paragraph 40 of the Amended Complaint, except it admits that Movie-
[fol. 3221] tonews, Inc., is a subsidiary of Fox, and avers that for the season 1930-1931 Movietonews, Inc., released no short subjects and that, for the seven-year period ending 1937-1938, the average number of short subjects produced by Movietonews, Inc., was 23, and that, for the eight year period ending 1937-1938, the average number of newsreels produced by it for release in the United States was 158.

18. Denies the allegations and each of them in Paragraph 41 of the Amended Complaint, and avers that its pictures are distributed in the State of Louisiana by Twentieth Century-Fox Distributing Corporation, which maintains an office in New Orleans, Louisiana, in the State of Texas by Twentieth Century-Fox Corporation of Texas, which main-

tains an office in Dallas, Texas, and throughout the rest of the United States by Twentieth Century-Fox Film Corporation which maintains branch offices in 29 cities throughout the United States, and that during the 1936-1937 season it distributed 64 feature pictures, including 4 reissues.

19. Denies the allegations and each of them in Paragraph 42 of the Amended Complaint, except it admits that it acquired approximately one-third of the common stock of West Coast Theatres, Inc. in August, 1925, and that in March, 1928, it acquired all the stock of Wesco Corporation.

20. Denies the allegations and each of them in Paragraph 43 of the Amended Complaint, except it admits that Wesco Corporation adjusted its capital structure in 1934 by voluntary agreement among its creditors and stockholders, pursuant to which The Chase National Bank of the City of New York acquired 58% of the stock of Wesco and Fox retained 42%; that the name of Wesco Corporation was thereafter changed to National Theatres Corporation; that The Chase National Bank of the City of New York still retains 58% of the stock of National Theatres Corporation; that direct and indirect subsidiaries of National Theatres Corporation operate theatres in the middle and far western parts of the United States; and except it admits [fol. 3222] that The Chase National Bank of the City of New York is and for some years has been a stockholder in Fox.

21. Answering the allegations in Paragraph 44 of the Amended Complaint admits that Fox owns all the common stock of Roxy Theatres, Inc., which operates the Roxy Theatre in New York, N. Y.

22. Denies the allegations and each of them in Paragraph 45 of the Amended Complaint, except it admits that the Roxy Theatre is operated as stated in paragraph 21 above of this Answer and that, as of November 2, 1940, direct or indirect subsidiaries of National Theatres Corporation operated theatres as indicated by the following tabulation:

City	*No. of Theatres*
Denver, Colorado,	5
Detroit, Michigan	1
Kansas City, Missouri	3
Los Angeles, California	6
Milwaukee, Wisconsin	3

City	*No. of Theatres*
Portland, Oregon	3
San Francisco, California	4
Seattle, Washington	6

State	*No. of Theatres*
Arizona	6
California	212
Colorado	34
Idaho	11
Illinois	20
Iowa	6
Kansas	56
Michigan	5
Missouri	37
Montana	19
Nebraska	8
New Mexico	6
Oregon	9
Utah	2
Washington	25
Wisconsin	48
Wyoming	12

23. Denies the allegations and each of them in Paragraph 100 of the Amended Complaint, except it admits that during the period between 1919 and 1930 the cost of production had [fol. 3223] mounted steadily, that the cost of production was accelerated by the introduction of sound in motion pictures, and that some of the best feature pictures produced by Fox cost as much as $500,000 or more each to produce.

24. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations or any of them in Paragraph 104 of the Amended Complaint, except it admits that during the period from January 1, 1933, to June 30, 1939, it made 258 loans of stars, feature players, directors, writers, camera men and other production talent to producers.

25. Denies the allegations and each of them in Paragraph 107 of the Amended Complaint, except it admits that many of its license contracts contain the terms under which the features licensed under that contract are to be exhibited

over a period of one year or more, that one license agreement with an exhibitor may cover all feature pictures to be released during the motion picture season covered by the license agreement or a lesser number to be selected from the whole, that production programs are subject to change, and that some of its licenses have been negotiated prior to the commencement of the motion picture season to be covered by the license and before any of the features covered by the license had been released.

26. Denies the allegations and each of them in Paragraph 108 of the Amended Complaint, except it admits that the quality of feature pictures varies, that feature pictures are placed in different price groups in the license agreements, that some of its pictures gross more than $1,000,000 and may play in more than 10,000 theatres in the United States, that some of its pictures may gross $200,000 or less and may play in no more than 5,000 theatres in the United States, that many of the features placed in the top price brackets in the license agreements contain terms based upon a percentage of the box office receipts, that many of the pictures in the lower price brackets are licensed for a flat rental, that the pictures in each price bracket are sometimes untitled when the license agreement is made, and [fol. 3224] that many features are not definitely allocated to a price bracket until released.

27. Denies the allegations and each of them in Paragraph 111 in the Amended Complaint, except it admits that its license agreements usually specify the rental to be paid for each picture, the run on which feature pictures are to be made available to the exhibitor, the clearance, if any, which the licensed theatre shall have over competing theatres, the clearance, if any, which competing theatres shall have over the licensed theatre, and sometimes state the minimum admission prices which the exhibitor agrees to charge when exhibiting Fox pictures.

28. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 114 of the Amended Complaint, except it avers that as long as Fox has been a producer and distributor of motion pictures it has licensed its pictures on a so-called "run" basis.

29. Denies the allegations and each of them in Paragraph 117 of the Amended Complaint, except it admits that it

was a defendant in the case entitled *Youngclaus v. Omaha Film Board of Trade*, reported in 60 F. (2d) 538, and for the text of the decision and judgment therein respectfully refers to the original.

30. Denies the allegations and each of them in Paragraph 118 of the Amended Complaint, except it admits that a code for the motion picture industry was adopted pursuant to the National Industrial Recovery Act.

31. Denies the allegations and each of them in Paragraph 121 of the Amended Complaint, except it admits that most of its license agreements with exhibitors cover only the pictures to be released during a single season, and that it has entered into license agreements with exhibitors covering more than one season.

[fol. 3225] 32. Denies the allegations and each of them in Paragraph 122 of the Amended Complaint, except it avers that all license agreeemnts are advantageous to any theatre, whether for one or more reasons, since thereby the exhibitor is assured of product for that season or seasons.

33. Denies the allegations and each of them in Paragraph 123 of the Amended Complaint, except it avers that its license agreements with exhibitors covering one or two or more years vary with each exhibitor and for the precise terms thereof respectfully refers to the originals.

34. Denies the allegations and each of them in Paragraph 124 of the Amended Complaint, except it admits that, in licensing its films to exhibitors who own more than one theatre, the terms with respect to those theatres may be negotiated at the same time and except it admits and avers that every exhibitor in negotiating for pictures attempts to secure the terms most favorable to him.

35. Denies the allegations and each of them in Paragraph 126 of the Amended Complaint, except it admits that a number of prints of each feature picture is delivered to each exchange, the number varying with the needs of each particular exchange, that the prints are shipped to various theatres served by each individual exchange in accordance with contracts, that prints are returned to the exchange after use, that pictures are sometimes privately screened on or shortly after arrival for the benefit of employees

and exhibitors, and that if a picture is rejected by an exhibitor under his contract such picture may offered or licensed to another exhibitor.

36. Answering Paragraph 133 of the Amended Complaint, it denies that the personnel necessary to the production of a motion picture is usually drawn across state lines.

37. Answering Paragraph 135 of the Amended Complaint, it denies that all shipments of positive films to film exchanges are made across state lines.

[fol. 3226] 38. Answering Paragraph 136 of the Amended Complaint, states that it is without knowledge or information sufficient to form a belief as to the other defendants herein and it avers that the exhibition season of Fox begins on August 1 of each year.

39. Answering Paragraph 138 of the Amended Complaint, denies that all shipments of positive films are made across state lines.

40. Answering Paragraph 139 of the Amended Complaint, denies that when films distributed by it are worn out they are shipped or returned to its laboratories for scrapping or that such shipments necessarily cross state lines, or that the final destination is New York City.

41. Further answering the defendant Twentieth Century-Fox Film Corporation denies that it has a monopoly of or has attempted to monopolize the production of motion pictures; denies that Fox has a monopoly of or has attempted to monopolize the distribution of motion pictures; denies that Fox or any corporation in which it owns any stock has a monopoly of or has attempted to monopolize the exhibition of motion pictures; denies that Fox has connived or conspired with anyone to monopolize the production, distribution or exhibition of motion pictures, or to restrain trade and commerce in the production, distribution or exhibition of motion pictures, or has in any way violated the provisions of the Act of July 2, 1890. Fox further avers that it has produced and distributed motion pictures in free and open competition with the other defendants herein and with numerous other producers and distributors and that Roxy Theatres, Inc. and the subsidiaries and affiliates of National Theatres Corporation have exhibited motion pictures in free and open competition with other exhibitors.

42. Further answering the defendant Twentieth Century-Fox Film Corporation denies each and every allegation, inference or implication in said Amended Complaint of any unlawful act, conduct, combination, conspiracy or monopoly and denies that plaintiff is entitled to the relief prayed [fol. 3227] for in said Amended Complaint or to any of such relief, or to any relief whatsoever in the premises.

Wherefore, Twentieth Century-Fox Film Corporation, having fully answered the Amended Complaint herein, demands judgment dismissing the complaint, as amended and supplemented by the Amended Complaint, together with the costs and disbursements of this action, herein most wrongfully incurred.

Dwight, Harris, Koegel & Caskey, Solicitors for the Defendant Twentieth Century-Fox Film Corporation, Office and P. O. Address: 100 Broadway, Borough of Manhattan, New York, N. Y.

S.) John Fletcher Caskey, A member of said firm.
New York, N. Y., November 14, 1940.

[fol. 3228] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF LOEW'S INCORPORATED TO PETITIONER'S AMENDED AND SUPPLEMENTAL COMPLAINT—Filed November 14, 1940

Defendant, Loew's, Incorporated, by J. Robert Rubin and Davis, Polk, Wardwell, Gardiner & Reed, its solicitors, answers the amended and supplemental complaint herein, sometimes hereinafter referred to as the complaint, as follows:

1. Admits that the complaint was filed and these proceedings were instituted under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, against the defendants named in the complaint, but this defendant denies that it, either individually, or jointly with any other defendant or defendants, has violated, now is violating or intends to vio-

late any provision of said Act, either as alleged in the complaint, or in any other manner.

[fol. 3229] 2. Denies each allegation of Paragraph 2 of the complaint insofar as the same relates to this defendant, and states that it is without knowledge or information sufficient to form a belief as to the truth of said allegations insofar as the same relate to any other defendant.

3. Answers the respective subdivisions of Paragraph 3 of the complaint as follows:

(a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Paramount Pictures, Inc., or subsidiaries thereof, are engaged in the business of producing, distributing and exhibiting motion pictures; and

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (b).

4. Denies each allegation of Paragraph 4 of the complaint, except that it admits that Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at No. 1540 Broadway, New York, New York; that it is engaged in the business of producing motion pictures and of distributing motion pictures in various parts of the United States, and that subsidiaries of Loew's, Incorporated, are engaged in the business of exhibiting motion pictures in various parts of the United States.

[fol. 3230] 5. Answers the respective subdivisions of Paragraph 5 of the complaint as follows:

(a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Radio-Keith-Orpheum Corporation, or subsidiaries thereof, are engaged in the business of producing, distributing and exhibiting motion pictures;

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivisions (b) to (e), inclusive.

6. Answers the respective subdivisions of Paragraph 6 of the complaint as follows:

(a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Warner Bros. Pictures, Inc., or subsidiaries thereof, are engaged in the business of producing, distributing and exhibiting motion pictures;

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (b), except that it admits that Vitagraph, Inc., is engaged in the business of distributing motion pictures; and

(c) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (c).

[fol. 3231] 7. Answers the respective subdivisions of Paragraph 7 of the complaint as follows:

(a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Twentieth Century-Fox Film Corporation, or subsidiaries thereof, are engaged in the business of producing, distributing and exhibiting motion pictures; and

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (b).

8. Admits the allegations of Paragraph 8 of the complaint.

9. Answers the respective subdivisions of Paragraph 9 of the complaint as follows:

(a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Columbia Pictures Corporation, or subsidiaries thereof, are engaged in the business of producing and distributing motion pictures; and

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivisions (b) and (c).

10. Answers the respective subdivisions of Paragraph 10 of the complaint as follows:

[fol. 3232] (a) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (a), except that it admits that Universal Corporation, or subsidiaries thereof, are engaged in the business of producing and distributing motion pictures; and

(b) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivisions (b) to (d), inclusive.

11. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 11 of the complaint, except that it admits that United Artists Corporation is engaged in the business of distributing motion pictures.

12. Admits the allegations of Paragraphs 12, 13 and 14 of the complaint.

13. Answers the respective subdivisions of Paragraph 15 of the complaint as follows:

(a) Denies each allegation of subdivision (a) and alleges that a producer is any individual, partnership, unincorporated association or corporation which produces motion pictures;

(b) Denies each allegation of subdivisions (b) and (c);

(c) Admits the allegations of subdivision (d);

(d) Denies each allegation of subdivision (e); and

[fol. 3233] (e) Admits the allegations of subdivisions (f) and (g).

14. Answers the respective subdivisions of Paragraph 16 of the complaint as follows:

(a) Denies each allegation of subdivision (a) and alleges that a distributor is any individual, partnership, unincor-

porated association or corporation which licenses motion pictures for exhibition and distributes the positive prints of such motion pictures to exhibitors;

(b) Denies each allegation of subdivisions (b) and (c);

(c) Denies each allegation of subdivision (d), except that it admits that the term "State Rights Distributor" is sometimes used in the industry generally to designate a distributor which does not operate a system of national exchanges but licenses the exhibition of motion pictures in a state or territory;

(d) Admits the allegations of subdivision (e) except that it denies that an exchange is maintained for the purpose of soliciting license agreements and alleges that it is maintained for the purpose of soliciting applications for licenses; and

(e) Denies each allegation of subdivisions (f) to (g), inclusive.

15. Answers the respective subdivisions of Paragraph 17 of the complaint as follows:

(a) Denies each allegation of subdivision (a) and alleges that an exhibitor is any individual, partnership, unincor- [fol. 3234] porated association or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit;

(b) Denies each allegation of subdivisions (b) and (c);

(c) States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of subdivision (d);

(d) Denies each allegation of subdivision (e), and alleges that a first run theatre is a theatre which, by virtue of a contract between the exhibitor and a distributor, exhibits motion pictures licensed by such distributor to such exhibitor on their first run or showing in the particular area in which the theatre is located;

(e) Denies the allegations of subdivision (f), and alleges that a theatre circuit is a group of theatres affiliated together either by stock ownership, common ownership or common buying or whose licenses are negotiated by a buying combine or common buying agent;

(f) Admits the allegations of subdivisions (g) to (i), inclusive;

(g) Denies the allegations of subdivision (j), except that it admits that the term "release" is used in the motion picture industry to designate either a motion picture or the making of prints of a motion picture available for public exhibition in a theatre or theatres;

(h) Admits the allegations of subdivision (k);

(i) Denies each allegation of subdivision (l) and alleges [fol. 3235] that a trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally;

(j) Admits the allegations of subdivision (m);

(k) Denies each allegation of subdivision (n) and alleges that a road show is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar;

(l) Admits the allegations of subdivision (o), and alleges that the term is also used to mean a city in which the best motion pictures are regularly given their first run exhibition, and gross their largest returns, in the district in which such city is located, or a city in which a number of companies distributing motion pictures maintain exchanges;

(m) Admits the allegations of subdivisions (p) to (r), inclusive;

(n) Denies each allegation of subdivision (s), and alleges that clearance is the period of time fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres; and

(o) Denies each allegation of subdivision (t), and alleges that a zone is a specified geographical area.

16. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 18 to 26, inclusive, and any subdivisions thereof.

[fol. 3236] 17. Admits the allegations of Paragraphs 27 to 31, inclusive, of the complaint.

18. Admits that it operates the number of theatres located in the cities and states referred to in subdivisions (a) and (b) of Paragraph 32 of the complaint, except that it denies that it operates any theatre in Denver, Colorado or in San Francisco, California, that it operates more than three theatres in the City of Washington, which is co-extensive with the District of Columbia, and that it operates in the State of Maryland more than two theatres, both located in the City of Baltimore, Maryland.

19. Admits the allegations of Paragraph 33 of the complaint, except that it denies that the name of the merged company was Metro-Goldwyn Pictures Corporation, and alleges that the name of the merged company was Metro-Goldwyn-Mayer Corporation, and that Metro-Goldwyn-Pictures Corporation was a subsidiary of this defendant which held the capital stock of said Metro-Goldwyn-Mayer Corporation, and that it denies the allegation of the fifth sentence of said Paragraph and alleges that from 1924 to December 31, 1937, Metro-Goldwyn-Mayer Corporation produced pictures for this defendant.

20. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 34 of the complaint as to the total number of features produced in the industry; denies each allegation [fol. 3237] thereof insofar as it relates to it, and alleges that during the nine-year period ending with the 1938-39 season it produced feature pictures as follows:

Season	Features Produced by Loew's
1930-31	45
1931-32	39
1932-33	36
1933-34	46
1934-35	41
1935-36	42
1936-37	43
1937-38	38
1938-39	47

21. Admits the allegations of Paragraph 35 of the complaint.

22. Admits the allegations of Paragraph 36 of the complaint, except that it denies that during the 1936-37 season

it distributed ten more features than it produced, and, alleges that during the 1936-37 season it produced forty-three features and distributed fifty-two features, including four reissues.

23. Admits the allegations of Paragraph 37 of the complaint.

24. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 38 to 86, inclusive, of the complaint.

[fol. 3238] 25. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 87 of the complaint, except that it admits that it is a party to certain agreements with respect to certain theatres, and that other exhibitors, including subsidiaries of certain other defendants herein, are also parties to such agreements.

26. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 88 and 89 of the complaint.

27. Admits the allegations of Paragraph 90 of the complaint, except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that in the early stages of motion picture production films possessed entertainment value for the public merely because of the novelty of watching figures and objects in motion projected on a screen.

28. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 91 to 95, inclusive, of the complaint.

29. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 96 of the complaint, except that it admits that [fol. 3239] after 1912 the film of 1000 feet was displaced by the feature picture of five reels or more and that during such period the motion picture art had been going forward.

30. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 97 of the complaint.

31. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation

of Paragraph 98 of the complaint, except that it admits that First National Exhibitors Circuit, an association of exhibitors, was organized in or about the year 1917.

32. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 99 of the complaint.

33. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 100 of the complaint, except that it admits that by 1930 this defendant was engaged in the production, distribution and exhibition of motion pictures; that the motion pictures which it produced were distributed by it throughout the United States; that Paramount, Warner, Fox and RKO, either directly or through subsidiaries, each also was engaged severally in the production, distribution [fol. 3240] and exhibition of motion pictures and that each severally distributed throughout the United States the motion pictures so produceed by it; that during the period from 1919 to 1930 feature picture production costs had mounted steadily and that in or about 1927 the introduction of sound films accelerated this increase in the costs of production to such an extent that an outstanding feature sound film in some cases was costing as much as $500,000.00 or more to produce.

34. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 101 of the complaint, except that it admits that since 1930 it has distributed features produced by producers other than the defendant herein pursuant to arrangements made preceding the production of such features; that such arrangements sometimes have included the use of equipment owned by, or production talent under contract to this defendant, and that such arrangements sometimes have included partial financing of the production by this defendant.

35. Admits the allegations of the first clause of Paragraph 102 of the complaint; denies the allegations of the second clause of said Paragraph insofar as the same relate to this defendant, and states that it is without knowledge or information sufficient to form a belief as to the truth of said allegations insofar as the same relate to any other defendant.

36. States that it is without knowledge or information [fol. 3241] sufficient to form a belief as to the truth of any allegation of Paragraph 103 of the complaint insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant, except that it admits that this defendant has from time to time made available to other producers, including independent producers as well as other defendants herein, its stars, feature players, directors and other personnel, and its sets, scenery, and other technical equipment necessary for the production of motion pictures.

37. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 104 of the complaint insofar as the same relates to any other defendant in this action; denies each allegation thereof insofar as it relates to this defendant, and alleges that, from about 1933 to about August 30, 1939, it has loaned stars, feature players, directors, writers, cameramen and other production talent, under contract to it, to other producers of motion pictures, some of which are defendants in this action.

38. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 105 of the complaint.

39. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation [fol. 3242] of Paragraph 106 of the complaint, except that it admits that its motion picture films in the early stages of motion picture distribution were well adapted to the method of licensing then employed in the industry; that its motion picture films today are well adapted to the method of licensing now employed by it, and that then as now certain motion picture films were licensed without prior trade showings and in groups for delivery at fairly regular intervals over a period of time.

40. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 107 of the complaint insofar as the same relates to any other defendant, and denies the same insofar as it relates to this defendant, except that it admits that some of its licenses today contain the terms on which all or several of its features are to be exhibited under copy-

right over a period of time, as and when released; that some of its licenses provide for the exhibition under copyright of a minimum number of features out of the maximum number of features specified in the license, and that some of its licenses are negotiated prior to the commencement of the exhibition season.

41. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 108 of the complaint insofar as the same relates to any other defendant; admits the allegations of the [fol. 3243] first three sentences and denies the allegations of the last two sentences of said Paragraph insofar as the same relate to it, and alleges that its pictures in each bracket are usually untitled and unidentified when licensed but are allocated to a price bracket when they are about to be released.

42. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 109 of the complaint insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant, except that it admits that by free, voluntary and separate negotiations with its prospective customers it endeavors to license to each of them as many features as possible, consistent with its best business judgment.

43. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 110 of the complaint.

44. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 111 of the complaint insofar as the same relates to any other defendant and admits the allegations of said Paragraph insofar as the same relate to this defendant.

45. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 112 of the complaint.

[fol. 3244] 46. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 113 of the complaint insofar as the same relates to any other defendant, and denies each allega-

tion thereof insofar as it relates to this defendant, except that it admits that in licensing the exhibition of its pictures to a subsequent run exhibitor it does not violate the terms of its license contract with any exhibitor who has licensed a run of its pictures prior to that of said subsequent run exhibitor, and that in the licensing of its pictures it does not employ auction block methods.

47. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegations of Paragraph 114 of the complaint.

48. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 115 of the complaint, except that it admits that from time to time since about 1915 to about 1931 many exhibitor and distributor interests conceded that uniform clearances were in many respects desirable and that efforts were made from time to time, at the request of exhibitor interests, to eliminate differences in clearance.

49. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 116 of the complaint insofar as the same relates to any other defendant; denies each allegation thereof [fol. 3245] insofar as it relates to this defendant, except that it admits that with the knowledge and acquiescence of the plaintiff, this defendant participated in conferences to establish the basis for clearance schedules by voluntary agreement of all parties affected.

50. Admits that the United States District Court for the District of Nebraska rendered a decision on July 2nd, 1932, in a case entitled Youngclaus v. Omaha Film Board of Trade et al. (reported in 60 F. (2d) 538) in which Metro-Goldwyn-Mayer Distributing Corporation was a party defendant, to the effect that the agreement among distributors which is therein set forth restrained trade in violation of the Sherman Anti-Trust Act; states that it is without knowledge or information sufficient to form a belief as to the truth of any other allegation of Paragraph 117 of the complaint insofar as the same relates to any other defendant; denies each other allegation thereof insofar as it relates to this defendant, except that it admits and alleges that since 1932 it has refrained from participating in any negotiations with respect to uniform clearance and zoning

except as admitted in its answer to Paragraph 118 of the complaint.

51. Denies the allegations of Paragraph 118 of the complaint except that it admits that in 1933 the National Industrial Recovery Act was passed and that pursuant thereto a Code of Fair Competition for the Motion Picture Industry was duly promulgated; that pursuant to the express provisions of that Act this defendant, with others [fol. 3246] engaged in the motion picture industry, was bound by the decisions of local Clearance and Zoning Boards established pursuant to said Code; that a Clearance and Zoning Schedule was prepared and adopted for the Los Angeles Exchange Territory; that other such schedules were in preparation by local Clearance and Zoning Boards in other sections of the United States but that these, as well as the schedule for the Los Angeles Exchange territory, were terminated with the declaration by the Supreme Court of the illegality of the National Industrial Recovery Act, and denies that since May, 1935, this defendant has made any further effort to establish any uniform clearance and zoning, either by express agreement with other distributors, or otherwise.

52. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 119 and 120 of the complaint insofar as the same relates to any other defendant or any theatre circuit, and denies each allegation thereof insofar as it relates to this defendant, except that it admits that it attempts by individual and separate negotiations to obtain the same clearance from each distributor from which it licenses motion pictures for exhibition in theatres operated by its subsidiaries.

53. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 121 of the complaint insofar as the same relates to any other defendant and denies each allegation [fol. 3247] thereof insofar as it relates to this defendant, except that it admits that it has granted licenses for more than one year and that the film rental from a single such license has exceeded $2,000,000.00, and it alleges that in recent years it has entered into no long term license for the exhibition of its pictures.

54. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 122 insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant, except that it admits that its licenses for a period of more than one season, as well as its licenses for a year or less, are advantageous to its licensees, and admits that some of the licenses entered into by this defendant, either as licensee or as licensor, contain provisions that some of the terms are to be reviewed and renegotiated annually before the beginning of the motion picture seasons covered by said license.

55. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 123 of the complaint insofar as the same relates to any other defendant; denies each allegation thereof insofar as it relates to it, except that it admits and alleges that certain contracts for more than one year, like contracts for one year or less, provide for the deduction of the cost of vaudeville performances before the calculation [fol. 3248] of film rental or for the deduction of the cost of a second feature where double features are used before calculating film rental, that in one or two instances contracts entered into by it have provided for after acquired theatres; that said contracts have expired and that none such are now in existence.

56. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 124 of the complaint insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant, except that it admits that an exhibitor, in negotiating for a license agreement, seeks to secure the most favorable terms for the theatre or theatres for which he is negotiating.

57. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 125 of the complaint insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant.

58. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 126 of the complaint insofar as the same

relates to any other defendant, denies each allegation thereof insofar as it relates to this defendant, except that it admits the allegation of the first, fourth and fifth sentences of said Paragraph 126 insofar as the same relate to [fol. 3249] it, and admits that its pictures are frequently screened on or shortly after their arrival at the exchange for the benefit of the trade.

59. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 127 of the complaint insofar as the same relates to any other defendant; admits the allegations thereof insofar as they relate to this defendant and alleges that the quality of motion picture entertainment available is not the only factor affecting admission prices.

60. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 128 of the complaint insofar as it relates to any other defendant; denies each allegation thereof insofar as it relates to this defendant, except that it admits that admission prices tend to vary with the run on which an exhibitor licenses the motion pictures distributed by this defendant.

61. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraphs 129 and 130 of the complaint insofar as the same relates to any other defendant and denies each allegation thereof insofar as it relates to this defendant.

62. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 131 of the complaint insofar as the same re- [fol. 3250] lates to any other defendant and denies each allegation thereof insofar as it relates to this defendant except that it admits that with respect to the 1st run theatres operated by its subsidiaries located in the cities referred to in Paragraph 17 (d) of the complaint, approximately 95% or more of the feature pictures exhibited by such theatres were released by the distributor defendants, a large percentage of the pictures so exhibited being released by this defendant itself.

63. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 132 of the complaint.

64. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 133 of the complaint, except that it admits the allegations contained in the first sentence of said Paragraph 133, and admits that the personnel necessary to the production of a motion picture is usually assembled at studios in California, where most of the pictures are made.

65. Denies each allegation of Paragraph 134 of the complaint insofar as the same relates to this defendant except that it states that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of said Paragraph insofar as the same relates to any other defendant, except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that approximately two billion feet of negative stock celluloid film are used in the production of motion [fol. 3251] pictures annually, practically all of which is manufactured at plants located in the States of New York and New Jersey.

66. Denies each allegation of Paragraph 135 of the complaint insofar as the same relates to this defendant and states that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of said Paragraph insofar as the same relates to any other defendant, except it admits the allegations contained in the first and third sentences of said Paragraph 135 and admits and alleges that in the case of Loew's Incorporated positive prints are made from negatives at its laboratories located in California and that usually between 200 and 400 positive prints are made for each feature picture.

67. Denies each allegation of Paragraph 136 of the complaint insofar as the same relates to this defendant and states that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of said Paragraph insofar as the same relates to any other defendant, except that it admits that in the spring or early summer of each year, this defendant announces its anticipated program for the coming exhibition season, such announcement describing the literary properties, actors, actresses, producers and directors available to it for production of motion pictures and such other pertinent material as may be available, and admits that plans are made for the pro-

[fol. 3252] duction and release of the pictures at as nearly regular intervals throughout the exhibition season as may be, such year generally commencing on September 1st of each year.

68. Denies each allegation of Paragraph 137 of the complaint insofar as the same relates to this defendant and states that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of said Paragraph insofar as the same relates to any other defendant, except that it admits and alleges that Loew's Incorporated, through its sales representatives who work out of its home office and film exchanges, solicits exhibitors to execute applications for license agreements covering exhibition of pictures of the coming season and in some cases of prior seasons and admits that each feature and short subject is copyrighted under the copyright laws of the United States by Loew's Incorporated, and the solicited applications as signed by the exhibitors are by the terms thereof and in fact, transmitted to the principal office of Loew's Incorporated, in New York City, where such applications are approved or rejected by it.

69. Admits the allegations of Paragraphs 138 and 139 of the complaint.

70. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 140 of the complaint, except that it admits that as to this defendant, the business of producing motion [fol. 3253] pictures involves the assemblage of personnel, property and material at the studios for the production of pictures and the making of negative film and positive prints at the studios; that the business of distributing motion pictures involves the solicitation of applications for licenses under copyright and the making of contracts for the future delivery over a period of time of films produced and to be produced; the transportation of the positive prints from the studios to its film exchanges throughout the United States; the continuous distribution of said films from the exchanges to and from motion picture theatres located in the areas served by the respective exchanges, the interchange of said films between an exchange and other exchanges of the same distributor located in other states of

the United States; and the shipment of said films from said exchanges throughout the United States to points within the State of New York or California for scrapping.

71. States that it is without knowledge or information sufficient to form a belief as to the truth of any allegation of Paragraph 141 of the complaint.

72. Denies each allegation of Paragraphs 142 to 187 of the complaint, both inclusive.

Wherefore, answering defendant above named demands judgment dismissing the petition, together with costs and [fol. 3254] disbursements of this action.

(sgd) J. Robert Rubin 1540 Broadway Borough of Manhattan City of New York

(sgd) Davis, Polk, Wardwell, Gardiner & Reed 15 Broad Street Borough of Manhattan City of New York Solicitors for above named defendant.

[fol. 3255]. In United States District Court

[Title omitted]

Answer of Paramount Pictures Inc. and Paramount Film Distributing Corporation to the Amended and Supplemental Complaint

Paramount Pictures Inc. (sometimes hereinafter referred to as "Paramount") and Paramount Film Distributing Corporation, by their solicitors, Simpson Thacher & Bartlett, for their answer to the amended and supplemental complaint herein (hereinafter referred to as the "amended complaint"):

1. Deny that they have violated, are violating or intend to violate, jointly or severally or otherwise, any section or sections of the act of July 2, 1890 commonly referred to as the "Sherman Anti-Trust Act", as alleged in paragraph "1" of the amended complaint, or in any other manner.

2. Deny each and every allegation contained in paragraph "2" of the amended complaint and allege that neither of them, nor any representative or representatives of either

of them, has or have acted unlawfully or is or are acting [fol. 3256] unlawfully or in violation of the Sherman Anti-Trust Act, either within the Southern District of New York or elsewhere.

3. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "4", "5", "6", "7", "8", "9", "10", "11", "12", "13" and "14" of the amended complaint.

4. Deny each and every allegation contained in paragraphs "15(b)", "15(c)", "15(e)", "15(f)", "15(g)", "16(b)", "16(c)", "16(d)", "16(e)", "16(f)" and "16(g)" of the amended complaint, and allege that the terms "major producer" and "major distributor" admit the inclusion of producers or distributors of motion pictures in addition to the defendants herein and in addition to those who produce pictures for release by the defendants herein or are controlled by a defendant herein.

5. Deny each and every allegation contained in paragraphs "17(b)", "17(c)", "17(d)", "17(e)", "17(f)", "17(g)", "17(h)", "17(i)", "17(j)", "17(l)", "17(n)", "17(o)", "17(p)", "17(q)", "17(r)", "17(s)" and "17(t)" of the amended complaint.

6. Admit that the allegations contained in paragraphs "18" and "19" of the amended complaint are substantially accurate, except that they deny that the definition of "Paramount" and the term "subsidiaries" when referring to Paramount, contained in the footnote on page 11 of the amended complaint, is an accurate definition thereof.

7. Deny each and every allegation contained in paragraph [fol. 3257] "20" of the amended complaint, except that they admit that Paramount and its predecessors from time to time acquired interests in producing and distributing companies.

8. State that they are without knowledge or information sufficient to form a belief as to the accuracy of the allegations contained in paragraph "21" of the amended complaint with respect to the number of features produced by the motion picture industry in the years therein named and admit that the number of features produced by Paramount for the years named is substantially accurate.

9. Admit the allegations contained in paragraphs "23" and "24" of the amended complaint, except that they allege that Paramount pictures are distributed through exchanges located in 31 cities and except that they deny that the acquisitions of theatres by Paramount in 1919 or in any other year were pursuant to any "program of theatre acquisition", as alleged in said paragraph "24".

10. Deny that the term "First-run Metropolitan Theatres" has any fixed or static meaning and hence state that they are without any knowledge or information sufficient to form a belief as to the accuracy of the figures with respect to "First-run Metropolitan Theatres" contained in paragraph "25" of the amended complaint, deny that more than a very few of the theatres referred to in said paragraph are operated, or that their operating policies are controlled by Paramount.

11. State that they are without knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "27", "28", "29", "30", "31", [fol. 3258] "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43", "44", "45", "46", "47", "48", "49", "50", "51", "52", "53", "54", "55", "56", "57", "58", "59", "60", "61", "62", "63", "64", "65", "66", "67", "68", "69", "70", "71", "72", "73", "74", "75", "76", "77", "78", "79", "80", "81", "82", "83", "84", "85" and "86" of the amended complaint.

12. Deny each and every allegation contained in paragraphs "87", "88" and "89" of the amended complaint, except that these defendants admit that there are situations in which Paramount is jointly interested financially in one or more theatres with one or more of the other defendants or with others who are not defendants in this action, and these defendants state that they are without knowledge or information sufficient to form a belief as to the existence of such situations or the number of such situations in which the other defendants, or one or more of them, may be interested financially but in which Paramount is not so interested.

13. Admit that the allegations contained in paragraphs "90" to "99", inclusive, of the amended complaint are substantially accurate, except that they deny that Adolph Zukor or Famous Players Company by 1916, or any other year,

exercised a dominating influence over the industry, as alleged in paragraph "97", and except that these defendants deny any inference which may be drawn or intended to be drawn from the allegations contained in said paragraphs "90" to "99", inclusive, that competition in the moving picture industry is not and has not always been free and open, and that there is a limited source of supply of feature pictures, or of first class feature pictures, and they deny [fol. 3259] that any limited source that may exist is the result of any agreement, combination or conspiracy among the defendants or any of them, or of any wrongful or illegal act on the part of these defendants, or either of them, or anyone acting on their behalf.

14. Deny each and every allegation contained in paragraph "100" of the amended complaint and deny any inference which may be drawn or intended to be drawn therefrom that in 1919, or at any other time, Famous Players-Lasky Company entered upon a "program of theatre expansion" or that its theatre acquisitions or the theatre acquisitions of Paramount were or are illegal in any respect or were intended to violate or did violate the provisions of any law.

15. State that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "101" of the amended complaint, except that they deny upon information and belief that they or the other defendants individually or collectively have control of the distribution of feature pictures produced in the United States at a cost of more than $250,000.

16. Deny each and every allegation contained in paragraphs "102" and "103" of the amended complaint, except that they admit that equipment and technical and artistic talent necessary to produce profitable feature pictures have steadily grown more costly to producers and except that they admit that Paramount has on occasions hired equipment and technical and artistic talent from other producers [fol. 3260] and has rented such equipment and technical and artistic talent to other producers including producers who are not defendants herein, and allege that such transactions have been upon the basis of individual bargains made at the time of each such hiring or each such renting.

17. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "104" of the amended complaint and as to the accuracy of the figures set forth in said paragraph.

18. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations and the computations and percentages contained in paragraph "105" of the amended complaint.

19. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "106" of the amended complaint.

20. Deny each and every allegation contained in paragraph "107" of the amended complaint, except that they admit that many of their license agreements ordinarily contain the terms on which the feature pictures licensed are to be exhibited over a period of one year or more; that their license agreements sometimes cover all of the features released or to be released during a one-year period, or a lesser number selected or to be selected from all released as and when released; that license agreements are sometimes negotiated prior to the commencement of the motion picture season before any of the feature pictures covered thereby [fol. 3261] have been released, and frequently their license agreements are negotiated after the motion picture season has commenced and many of the feature pictures covered thereby have been produced, and that production programs announced in advance of the production season are necessarily subject to change during the period of production.

21. Deny each and every allegation contained in paragraph "108" of the amended complaint, except that they admit that the quality of feature pictures as box-office attractions necessarily varies widely, even with respect to those released by the same company; that they are sometimes priced in various brackets in the license agreements of these defendants in accordance with their anticipated quality; that features in one price bracket may have license terms based upon a percentage of box-office receipts, sometimes against a guaranteed figure, and that pictures in another bracket may be licensed for a "flat rental;" that feature pictures in various price brackets are sometimes untitled when the license agreement is made and that some

features are not definitely allocated to a price bracket until released.

22. Deny each and every allegation contained in paragraph "109" of the amended complaint.

23. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "110" of the amended complaint, except that they deny any inference which may be intended to be drawn from said allegations that "block booking" has [fol. 3262] any restrictive effect.

24. Deny each and every allegation contained in paragraph "111" of the amended complaint, except that these defendants admit that in addition to the license fees to be paid, their license agreements usually specify the run on which the feature pictures are to be exhibited by the exhibitor, that they usually specify the clearance, if any, which the exhibitor shall have over competing theatres and that they sometimes specify the minimum (adult and children, matinee and evening) admission prices which the exhibitor agrees to charge in his theatre or theatres when exhibiting the feature pictures covered by the license agreement.

25. Deny each and every allegation contained in paragraphs "112" and "113" of the amended complaint, except that they admit that the entertainment value of feature pictures released in the United States varies widely and that motion picture theatres generally do not change their admission prices from week to week but that each attempts to maintain a uniform admission price over a period of time.

26. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "114" of the amended complaint, except that they allege that as long as Paramount has been a producer and distributor of feature motion pictures it has licensed them upon a so-called "run" basis, and frequently their license agreements provide for periods of clearance over competing theatres.

27. Deny each and every allegation contained in paragraph "115" of the amended complaint, except that they [fol. 3263] admit that it is and for many years has been conceded by them and by exhibitors generally that uniform

runs and clearances are desirable, and except that they state that they are without knowledge or information sufficient to form a belief as to the provisions contained in license agreements of other distributors.

28. Deny each and every allegation contained in paragraph "116" of the amended complaint.

29. Deny each and every allegation contained in paragraph "117" of the amended complaint, except that they admit that in 1932 the Federal District Court in Nebraska rendered a decision in a case known as *Youngclaus v. Omaha Film Board of Trade, et al.*, 60 F. (2d) 538, to which decision this Court is respectfully referred, and except that they deny that after said decision in 1932, or at any time, they employed any agreements, express or otherwise, with other producers or distributors with respect to "protection" or "zoning."

30. Deny each and every allegation contained in paragraph "118" of the amended complaint, except that they admit that a code for the motion picture industry was duly adopted pursuant to the National Industrial Recovery Act which, among other things, dealt with "zoning" and "protection" and that the said code remained in force and effect in the industry until the invalidation of the said National Industrial Recovery Act by the Supreme Court of the United States.

31. Deny each and every allegation contained in paragraphs "119" and "120" of the amended complaint.

[fol. 3264] 32. Deny each and every allegation contained in paragraph "121" of the amended complaint, except that they admit that they enter into license agreements with exhibitors from time to time; that most of their license agreements cover only a single season's production of feature pictures, and that many of their license agreements cover periods of more than one season, and that their license agreements frequently cover more than one theatre.

33. Deny each and every allegation contained in paragraphs "122," "123," "124" and "125" of the amended complaint, except that they admit that every exhibitor in negotiating any license agreement attempts to secure the most favorable terms possible from the distributor.

34. Deny each and every allegation contained in paragraph "126" of the amended complaint, except that they admit that a number of prints of each feature picture, the number varying, among other things, in accordance with the needs of each particualr exchange, are delivered to each exchange prior to the national release date and delivered by the exchange to the various theatres which have licensed the film in accordance with the run established by the license agreements and that the prints are usually returned to the exchange after each use, and that feature pictures are frequently screened for all exhibitors who desire such screening.

35. Deny each and every allegation contained in paragraphs "127" and "128" of the amended complaint, except that they admit that exhibitors holding license agreements for the first run of Paramount pictures ordinarily charge higher admission prices in the towns or cities where their [fol. 3265] theatres are located than do exhibitors holding license agreements for subsequent runs of Paramount pictures and admit that the admission prices for subsequent runs of a feature pictures usually are lower than the admission prices for the preceding runs.

36. Deny each and every allegation contained in paragraphs "129" and "130" of the amended complaint.

37. State that they are without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations or computations contained in paragraphs "131" and "132" of the amended complaint.

38. State that they are without knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraphs "133" to "141," inclusive, of the amended complaint, except that they deny the allegations contained in the said paragraph "141" in so far as it is therein alleged, or intended to be alleged, that all phases of the business of producing or distributing and of exhibiting motion pictures are in or directly affect trade and commerce among the several states and allege that many of the activities of each of the said branches of the industry are wholly intrastate.

39. Deny each and every allegation contained in paragraphs "142" to "187," inclusive, of the amended complaint.

Wherefore defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation pray that the [fols. 3266-3267] amended and supplemental complaint herein be dismissed as against them and each of them, with costs.

Simpson Thacher & Bartlett, 120 Broadway, New York, N. Y., Solicitors for defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation, by Albert C. Bickford, a member of said firm.

[fol. 3268] In the District Court of the United States

[Title omitted]

Consolidated Answer of RKO Defendants to Amended and Supplemental Complaint

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The defendants, Radio-Keith-Orpheum Corporation,[1] RKO Radio Pictures, Inc., RKO Proctor Corporation and RKO Midwest Corporation (hereinafter sometimes referred to as the answering defendants), by their solicitors, William J. Donovan and William Mallard, answering the Amended and Supplemental Complaint herein, allege as follows:

1. Deny so much of (1)[2] as alleges that the answering defendants have violated or are violating, or intend to violate Sections 1 or 2 of the Sherman Anti-Trust Act in the

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[1] Radio-Keith-Orpheum Corporation is hereinafter sometimes referred to as "the parent company"; RKO Radio Pictures, Inc., as "the RKO Company engaged in production and distribution"; RKO Proctor Corporation, RKO Midwest Corporation and Keith-Albee-Orpheum Corporation as "the RKO Companies engaged in exhibition"; and Keith-Albee-Orpheum Corporation as "KAO".

[2] Numbers in parentheses refer to corresponding numbered paragraphs of Amended and Supplemental Complaint.

manner alleged in the petition, or in any other manner, severally, or either jointly among themselves or with any other person or persons and, except as so denied state that they are without knowledge or information sufficient to form a belief as to each and every allegation therein.

[fol. 3269] 2. Deny each and every allegation of (2).

3. As to (3) and (4), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

4. As to (5a) admit that Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, N. Y., and allege that it owns stock and other securities in corporations which are engaged in the business of producing, distributing or exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries, and, except as so admitted and alleged, deny each and every allegation therein.

Admit the allegations contained in (5b).

As to (5c) admit that Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware and has a place of business at 1270 Sixth Avenue, New York, N. Y., and that Radio-Keith-Orpheum Corporation owns approximately 99% of its common stock and 33% of its preferred stock, and except as so admitted deny the allegations therein, but allege that "KAO" owns stock and other securities in corporations which are engaged in the business of exhibiting motion pictures, either directly, or through subsidiary or associated corporations.

As to (5d) and (5e) admit the allegations therein.

5. As to (6), (7), (9), (10) and (11), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 3270] 6. As to (15a),[1] deny the accuracy of the defini-

[1] Paragraph 6 through 8 of this answer are qualified in the same manner as the paragraphs of the Amended and Supplemental Complaint to which they are in answer are qualified by paragraph 14 thereof.

tion therein and allege that the term "producer" as therein defined includes persons, partnerships, associations and corporations which are seldom, if ever, referred to in the industry as producers;

As to (15b) and (15c), deny the accuracy of the definitions thereon;

As to (15d), admit the accuracy of the definition therein;

As to (15e), state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (15f) and (15g), admit the accuracy of the definitions therein;

7. As to (16a), admit the accuracy of the definition therein;

As to (16b) and (16c), allege that some companies that are engaged in the distribution of motion pictures are sometimes referred to in the industry as "major distributors," and that other companies so engaged are sometimes referred to as "independent distributors" and, except as so alleged, state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (16d), admit that the term "state rights distribution" is sometimes used in the industry, but, except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (16e), admit the accuracy of the description therein, except they deny that branch exchanges operated by RKO [fol. 3271] Radio Pictures, Inc., solicit license agreements, but allege that they solicit applications for license agreements.

As to (16f), admit that the term "franchise" is sometimes used in the industry to describe a license agreement, or series of license agreements entered into as part of the same transaction, for the exhibition by the Licensee of the motion pictures released by the licensor during more than one exhibition season, and, except as so admitted, deny the remaining allegations therein.

As to (16g), deny the accuracy of the definition therein.

8. As to (17a), admit the accuracy of the definition therein;

As to (17b) and (17c), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

As to (17d), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

As to (17e), deny the accuracy of the definition therein.

As to (17f), admit that a group of theatres which is owned, controlled or managed by the same person, partnership or corporation is sometimes referred to as "a theatre circuit," and except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein;

As to (17g) and (17i), admit the accuracy of the definitions therein;

As to (17h), deny the accuracy of the definition therein. [fol. 3272] As to (17j), admit that the term "release" when used as a verbal noun, is used in the industry as therein defined;

As to (17k) and (17m), admit that terms national release date and pre-release are used in the industry as therein defined;

As to (17-L), deny the accuracy of the definition therein, but allege that a trade showing is the exhibition of a feature at a theatre or projection room for the benefit of the trade generally;

As to (17n), deny the accuracy of the definition therein.

As to (17-o), RKO Radio Pictures, Inc., admits the accuracy of the definition therein; the other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof;

As to (17p), (17q) and (17r), allege that "first-run" in the first exhibition of a motion picture after national release in a community or area; second-run is the exhibition of a motion picture in such community or area next subsequent to its first-run exhibition, and that subsequent-run is an exhibition of a motion picture in such area or community subsequent to its first-run, but usually after second-run; and, except as so alleged, deny each and every allegation therein;

As to (17s), allege that clearance means the period of time fixed by agreement between an exhibitor and a distributor prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres, and, except as so alleged, deny the accuracy of the definition therein;

[fol. 3273] As to (17t), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

9. As to (18) through (55), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

10. As to (56), admitt hat Radio-Keith-Orpheum Corporation, the corporation therein referred to, was incorporated under the laws of the State of Maryland on October 25, 1928, and that since its incorporation it has been primarily a holding company, i. e., owning stock in subsidiaries that either directly, or through other companies, are engaged in the production, distribution or exhibition of motion pictures. Shortly after its organization it acquired substantially all of the common stock of Keith-Albee-Orpheum Corporation and FBO Productions, Inc. Keith-Albee-Orpheum Corporation owned stock in other corporations that were engaged in operating theatres for the exhibition of vaudeville and motion pictures. Subsidiaries of FBO Productions, Inc., were engaged in producing and distributing motion pictures. Except as so alleged, they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

11. As to (57), admit that Keith-Albee-Orpheum Corporation was incorporated on January 28, 1928, under the laws of the State of Delaware, and on to wit, February 16, 1928, acquired as of January 1, 1928, all the issued and outstanding stock of B. F. Keith Corporation and approximately 90% of the issued and outstanding common stock of Orpheum Circuit, Inc. B. F. Keith Corporation and Orpheum Circuit, Inc. owned or operated directly, or owned stock in corporations which owned or operated a number of theatres in various cities in the eastern part, and in the mid-[fol. 3274] western and western parts, respectively, of the United States, which prior thereto were engaged primarily in the exhibition of vaudeville, either alone or in conjunction with the exhibition of motion pictures. Except as so alleged, they deny the allegations therein.

12. As to (58), allege that subsequent to its incorporation and in addition to the acquisition of stock in Keith-Albee-Orpheum Corporation and Orpheum Circuit, Inc., as hereinabove alleged, Radio-Keith-Orpheum Corporation acquired

the ownership of stock in other companies which were either directly engaged in the business of showing vaudeville and/or exhibiting motion pictures, or owned stock in corporations engaged therein. Two of such companies were the RKO Proctor Corporation and the RKO Midwest Corporation. The RKO Midwest Corporation or companies subsidiary thereto, owned the fee, held the leasehold or operated theatres in Ohio and Michigan. The RKO Proctor Corporation, or companies subsidiary thereto, owned the fee, held the leasehold or operated theatres in the New York metropolitan district and upstate New York. Except as so alleged, they deny the allegations therein.

13. As to (59), Radio-Keith-Orpheum Corporation and the answering defendants engaged in exhibition admit that they and KAO, or subsidiaries thereof, operate the following number of theatres in the following cities:

City	No. of Theatres
Boston	2
Champaign, Ill.	2
Chicago	1
Cincinnati, Ohio	9
Cleveland, Ohio	3
Columbus, Ohio	2
Dayton, Ohio	3
Denver, Colorado	1
Des Moines, Iowa	1
[fol. 3275] Highland Park, Mich.	1
Kansas City, Mo.	1
Los Angeles, Cal.	1
Lowell, Mass.	1
Mt. Vernon, N. Y.	2
Newark, N. J.	1
New Brunswick, N. J.	3
New Rochelle, N. Y.	1
New York City, N. Y.	43
Providence, R. I.	1
Richmond Hill, N. Y.	1
Rochester, N. Y.	2
Rockaway Park, N. Y.	1
St. Paul, Minn.	1
San Francisco, Cal.	1
Syracuse, N. Y.	6

City	No. of Theatres
Trenton, N. J.	6
Union City, N. J.	1
Washington, D. C.	1
White Plains, N. Y.	1
Yonkers, N. Y.	3

and allege that they and KAO, or subsidiaries thereof, own the fee or the leasehold in or have an interest in the management or operation of, or in the proceeds or profits from the operation of, or have other types of interest, by the ownership of stock and otherwise, in other theatres not referred to above which none of them operate, or control the operation thereof; and state that they are without knowledge or information sufficient to form a belief as to the classification between "metropolitan first-run theatres" and "other theatres." Except as admitted and alleged, they deny the allegations therein.

RKO Radio Pictures, Inc., states that it is without knowledge or information sufficient to form a belief as to the truth thereof.

14. As to (60), admit that the name of FBO Productions, Inc., was ultimately changed to RKO Radio Pictures, Inc., and that RKO Radio Pictures, Inc., maintains studios for [fol. 3276] the production of motion pictures at Hollywood and Culver City, California, and, except as so admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

15. As to (61), admit that the corporations that are subsidiaries of Radio-Keith-Orpheum Corporation that are or were engaged in production produced feature motion pictures in the numbers therein alleged which were released during the motion picture exhibition seasons therein set forth except that they produced 41 during the 1938-39 season, and not 49 as alleged, and, except as admitted, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

16. As to (62), admit that Radio-Keith-Orpheum Corporation purchased in January 1931 specified assets of Pathe Exchange, Inc., or subsidiaries thereof, including its newsreel business and certain facilities for the production

of motion pictures, and that the assets so purchased were held by various subsidiaries of Radio-Keith-Orpheum Corporation. Except as so admitted, they deny the allegations therein.

17. As to (63), allege that RKO Radio Pictures, Inc., produced an average of 36 short subjects per year. The Van Beuren Corporation, which is now a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation but is in process of dissolution, produced, or had an interest in the production of, an average of 48 short subjects per year [fol. 3277] for the eight-year period ending 1937-38. During the same period Pathe News, Inc., which is a wholly-owned subsidiary of Radio-Keith-Orpheum Corporation, produced an average of 10 short subjects and 104 newsreels per year. Except as so alleged or admitted, they deny the allegations therein.

18. As to (64), allege that RKO Radio Pictures, Inc., presently maintains exchanges located in 32 cities for the distribution of motion pictures commonly known as "RKO product". During the 1936-37 season, it distributed 47 feature pictures. Usually, in each motion picture season, it distributes a number of pictures which are made by other producers. Except as so alleged, it denies each and every allegation therein.

19. As to (65), admit the allegations therein.

20. As to (66), Radio-Keith-Orpheum Corporation admits that it has gross assets of approximately $70,000,000, and, except as so admitted, denies each and every allegation therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

21. As to (67) through (86), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

22. As to (87), the RKO defendants engaged in exhibition allege that in several cities where they or their subsidiaries own, operate or control theatres, the operation [fol. 3278] of some of these theatres is carried on in conjunction with the operation of theatres in which other defendants herein and other exhibitors have an interest, pur-

suant to various operating arrangements between them. Such other defendants are subsidiaries of Loew's, Inc., Warner Bros. Pictures, Inc., and Paramount Pictures, Inc. The nature of such operating relationships varies with the terms of the agreement under which the operation is carried on, and they vary so that they cannot be generically summarized as alleged in the complaint. Except as so alleged, they deny each and every allegation thereof.

The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

23. As to (88) and (89), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

24. As to (90) through (99), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

25. As to (100) they admit that Radio-Keith-Orpheum Corporation had acquired between its incorporation in 1928 and 1930, the ownership of stock in companies that were engaged or subsidiaries of which were engaged in production, distribution and exhibition of motion pictures, and that the distribution system of RKO Distributing Corporation was nation-wide and that some of the pictures produced by RKO Radio Pictures, Inc., in 1930, cost as much as $500,000 or more to produce. Except as so admitted, they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 3279] 26. As to (101) Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., deny that they or any predecessor, either alone or in conjunction with any other person, now or ever had any control over the distribution of features costing in excess of $25,000, except in so far as they control their own distribution facilities. They admit that RKO Radio Pictures, Inc., and RKO Distributing Corporation, its predecessor in distribution, has at times distributed feature pictures produced by companies or individuals other than RKO Radio Pictures, Inc. Some of the contracts under which some of such pictures were produced contained provisions for the use by the producer of equipment owned by and production talent under contract to RKO Radio Pictures, Inc., and for the

financing of the cost of production in part by RKO Radio Pictures, Inc., or the borrowing of capital by the producer from other sources. Except as so admitted and denied, deny each and every allegation thereof.

The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations stated therein.

27. As to (102), RKO Radio Pictures, Inc., admits that equipment and technical and artistic talent necessary to produce profitable pictures has become more costly and that competition for the use of such talent has increased the cost thereof, and except as so admitted deny each and every allegation therein.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

28. As to (103), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., deny each and every allegation thereof. The other answering defendants state that they [fol. 3280] are without knowledge or information sufficient to form a belief as to the truth thereof.

29. As to (104), RKO Radio Pictures, Inc., admits that between January 1, 1933, and August 31, 1939, it loaned to other producers 91 stars, featured players, directors, writers, cameramen and other production talent who were under contract to it and received $250 per week or more in salary. Except as so admitted, it denies the allegations in so far as they state to them and state that they are without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to other defendants.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

30. As to (105), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

31. As to (106), state that they are without knowledge or information sufficient to form a belief as to the truth thereof, except that RKO Radio Pictures, Inc., denies the last sentence thereof in so far as it purports to describe the manner in which it licenses its pictures.

32. As to (107), RKO Radio Pictures, Inc., admits that many of the license contracts it negotiates with exhibitors contain the terms relative to a group of features to be released during a releasing season, and admits that its production program is subject to change without notice.

Except as so admitted, denies each and every allegation in so far as they relate to it, and it states it is without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to other defendants.

[fol. 3281] The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

33. As to (108), RKO Radio Pictures, Inc., admits that the quality of the various feature pictures it distributes, varies widely in box-office attraction, and that in many of its license agreements, prices for pictures are grouped in various brackets in accordance with anticipated quality and in consequence of the bargaining between buyer and seller. It admits that the features in the top price bracket sometimes have rental terms based upon a percentage of the box-office receipts, and sometimes against a guaranteed figure, and those in the lowest price bracket are ordinarily licensed for a flat rental. It admits that the pictures in each bracket are sometimes untitled and unidentified and that, as a result, in such cases a picture is not allocated to a price bracket until it is about to be or after it is released. It admits that the amount of gross revenue and number of bookings received by the features it distributes in the same season vary widely.

Except as so admitted, denies each and every allegation in so far as they relate to it and states it is without knowledge or information sufficient to form a belief as to the truth thereof in so far as they relate to the other defendants.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth thereof.

34. As to (109), RKO Radio Pictures, Inc., denies that RKO Radio Pictures, Inc., releases each year a certain number of feature motion pictures which most of the exhibitors do not wish to exhibit at all. It alleges that each license agreement for its pictures is the result of free

negotiation with the licensed exhibitor, and that in such negotiations RKO Radio Pictures, Inc. attempts to induce the exhibitor to purchase or license as many features as [fol. 3282] it has or will probably have available for that exhibitor, consistent with its sound business judgment.

It denies that RKO Radio Pictures, Inc., attempts to or does or has compelled any exhibitor to commit himself to buy or play any features which he does not want or cannot profitably exhibit, either as a condition of licensing other features which he does want, and can profitably exhibit, or any other condition. Except as so admitted, alleged and denied, deny each and every allegation therein.

The other answering defendants state they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

35. As to (110), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

36. As to (111), admit the allegations therein.

37. As to (112), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

38. As to (113), deny each and every allegation therein, except that RKO Radio Pictures, Inc., admits it does not make license agreements with one exhibitor that are inconsistent with rights granted by contract to another exhibitor.

39. As to (114) and (115), state that they were without knowledge or information sufficient to form a belief as to the truth of the allegations therein, except that they deny the allegations in (115) in so far as they relate to the period between 1927 and 1931.

40. As to (116), deny each and every allegation therein [fol. 3283] in so far as they relate to them, and state that they are without knowledge or information in so far as they relate to other defendants, except that Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit that, with the knowledge and acquiescence of the plaintiff, RKO Distributing Corporation participated in conferences to establish the basis for clearance schedules by voluntary agreement of all parties affected.

41. As to (117), they admit that the United States District Court for the District of Nebraska rendered a decision on July 2nd, 1932, in a case entitled *Youngclaus* v. *Omaha Film Board of Trade, et. al.*, in which RKO Distributing Corporation was a party defendant, (which decision is reported in 60 F. (2d) 538), that an agreement among distributors which is therein set forth restrained trade in violation of the Sherman Act, and except as so admitted, deny each and every allegation therein, and allege that they have at all times refrained from entering into any agreement, express or otherwise, as therein alleged.

42. As to (118), RKO Radio Pictures, Inc., admits that a Code for the motion picture industry was duly adopted pursuant to the National Industrial Recovery Act, and except as so admitted, denies each and every allegation therein, in so far as they relate to it, and alleges that it has made no effort, by express agreement with other distributors, or otherwise, to establish uniform clearance schedules or zones.

The other answering defendants state that they were without knowledge or information sufficient to form a belief as to the truth thereof.

43. As to (119) and (120), deny each and every allegation therein in so far as they relate to them respectively.

44. As to (121), deny each and every allegation therein, except they admit that most of the license agreements [fol. 3284] entered into by them, either as licensor or licensee, cover only a single season's output of pictures of the licensor, but that at times they have entered into license agreements for a period of more than a single season, commonly known as franchises. RKO Radio Pictures, Inc., have entered into such license agreements not only with "affiliated" and "unaffiliated" circuit exhibitors, but also "independent" exhibitors. They state that they are without knowledge or information as to the allegations relative to the periods of franchises, or the maximum amount of film rental, or number of theatres or localities involved in "a single franchise."

45. As to (122), admit that a franchise, or a license of the exhibition of motion pictures for more than a single season, like any license agreement for motion pictures, is advantageous to the licensee in that it assures the licensee

a supply of motion pictures therein licensed, provided the licensor is able to perform; and allege that they, as licensor or licensee, grant or are granted rights under a franchise, the franchisor is unable to grant to other exhibitors during the term thereof rights inconsistent therewith. Except as so admitted, deny each and every allegation therein in so far as they relate to them and state that they are without knowledge or information sufficient to form a belief in so far as they relate to other defendants.

46. As to (123), deny each and every allegation in so far as they relate to them, and state they are without knowledge or information sufficient to form a belief as to the truth thereof, in so far as they relate to the other defendants.

47. As to (124), admit that an exhibitor, in negotiating a license agreement, attempts to secure the most favorable terms for all the theatres for which he is negotiating, and admit that they either, as licensor or licensee as the case [fol. 3285] may be, at times negotiate at the same time in respect to all the theatres that compose a circuit. They deny that as a result of the matters therein alleged, an independent exhibitor, operating a single theatre or a large number of theatres in competition with a circuit, is unable to compete for the privilege of licensing the films distributed by RKO Radio Pictures, Inc., (or pictures distributed by other distributors for which an answering defendant engaged in exhibition is negotiating), and deny that such independent exhibitor is frequently or ever excluded from consideration as a prior-run outlet in the manner or as a result of the matters therein alleged; and, except as so admitted and denied, deny the allegations therein.

48. As to (125), deny each and every allegation therein.

49. As to (126), admit that prior to national release date a number of prints of a feature are delivered to each branch exchange of RKO Radio Pictures, Inc., in accordance with the number of accounts in that exchange and the prospective popularity of the picture. Upon or shortly after the arrival of the prints at the exchange, the feature is sometimes privately screened, or exhibited for the benefit of the salesmen and the trade. Thereafter, if the exhibitor who has, by license agreement, the right to exhibit the feature pictures distributed by RKO Radio Pictures, Inc., in that area on first-run, books said feature, it is exhibited

first in that exhibitor's theatre. Upon its return to the exchange office, after completion of first-run exhibition, it is exhibited by other exhibitors in that area in accordance with their respective playing positions as provided for by their license agreements with the distributor. If the first-run exhibitor elects not to book or play said feature, RKO Radio Pictures, Inc. either attempts to liecense it to another [fol. 3286] exhibitor to be exhibited on first-run or makes it available to be booked by the subsequent-run exhibitors who have contracted for its use, in the order established by their respective license agreements. They admit that at times the pictures they reject as first-run licensees, or, as to RKO Radio Pictures, Inc., the pictures which its first-run licensees reject, are inferior as box-office attractions to those selected. Except as so admitted, they deny each and every allegation therein.

50. As to (127), deny each and every allegation therein except that RKO Raoid Pictures admits that licensees having the right to exhibit its pictures first-run usually charge higher admission prices than its subsequent run exhibitors in that area. They state that they are without knowledge or information sufficient to form a belief in so far as the allegations relate to other defendants.

51. As to (128), RKO Radio Pictures, Inc., admits that the admission prices charged by exhibitors on both first and subsequent run are a factor it considers in determining the run and clearance on which it will license an exhibitor and that its first-run exhibitors usually charge the highest admission prices in their area and that the run of subsequent-run exhibitors tends to vary with the relative admission price charged, and except as so admitted, deny each and every allegation therein.

RKO Proctor Corporation and RKO Midwest Corporation admit that, in respect to first-run license agreements they negotiate with distributors who are defendants herein, the admission prices they propose to charge are a factor in securing first-run exhibition, and that, in the areas where they operate theatres, the run of subsequent-run exhibitors tends to vary with the relative admission prices charged, and, except as so admitted, deny each and every allegation therein.

Radio-Keith-Orpheum Corporation states it is without [fol. 3287] knowledge or information sufficient to form a belief as to the truth thereof.

52. As to (129) and (130), deny each and every allegation therein.

53. As to (131) and (132), state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

54. As to (133), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein in so far as they purport to describe the production of feature length pictures by RKO Radio Pictures, Inc., except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that personnel employed in such production is in many instances drawn across state lines from all parts of the nation, and that costumes and raw materials entering into the making of pictures in many instances are manufactured outside the State of California and shipped across state lines to the studios. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

55. As to (134), state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein.

56. As to (135), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit and allege that, as to pictures produced by RKO Radio Pictures, Inc., after the scenes going to make up a motion picture have been photographed, the negatives of such pictures are developed by an independent contractor in California. The negative is then cut, fixed, edited, and then usually shipped by it to [fol. 3288] New York or New Jersey, where positive prints are made by another independent contractor. They admit that the number of positive prints so made varies between fifty (50) and upwards of two hundred and fifty (250), and are made to fulfill the contractual requirements of RKO Radio Pictures, Inc., for the picture in question. Said positive prints are the motion picture films which are pro-

jected through the motion picture projectors onto the screens of motion picture theatres, and admit that in most cases said positive prints are shipped across state lines to the branch exchanges maintained by RKO Radio Pictures, Inc. Except as so admitted, they deny the allegations therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

57. As to (136), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein in so far as they relate to RKO Radio Pictures, Inc., the other answering defendants state that they lack knowledge or information sufficient to form a belief as to the truth thereof.

58. As to (137), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein, in so far as they relate to them, except that they allege that their salesmen solicit exhibits to enter into license agreements both before and after the production program for the ensuing season is arranged and fixed. The other answering defendants state that they lack knowledge or information sufficient to form a belief as to the truth thereof.

59. As to (138), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

[fol. 3289] 60. As to (139), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., admit the allegations therein in so far as they relate to RKO Radio Pictures, Inc., except they allege that positive prints are seldom delivered from one exhibitor to another without being returned to the branch exchange for examination and repair and temporary storage. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to their truth.

61. As to (140), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. deny each and every allegation therein, except they admit that the production of motion pictures by RKO Radio Pictures, Inc. involves, in part, the assemblage of personnel, property and material at its studios

and on location; that the distribution of motion pictures by RKO Radio Pictures, Inc., involves, in part, the solicitation and making of contracts for the delivery of motion pictures produced and to be produced, the transportation of negative film from California to laboratories in New York and New Jersey where positive prints of said motion pictures are prepared and thence shipped to the film exchanges of RKO Radio Pictures, Inc. throughout the United States, the delivery of said prints from said exchanges to and from the motion picture theatres located in the areas served by the respective exchanges, the occasional interchange of said prints between various exchanges of RKO Radio Pictures, Inc., some of which may be located in other states of the United States, and finally the shipment of said prints from said exchanges to New York for scrapping.

The answering defendants that are engaged in exhibition state that they are without knowledge or information sufficient to form a belief as to the truth thereof, except that they deny that the operation of a theatre, the exhibition of motion pictures, and the making of arrangements incident [fol. 3290] thereto is interstate commerce or is a part of interstate commerce, or a part of a constant, continuous stream of trade and commerce between the states.

62. As to (141), deny each and every allegation therein.

63. As to (142) through (150), Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc. deny each and every allegation therein.

The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

64. As to (150) through (165), deny each and every allegation therein.

65. As to (166) through (169), Radio-Keith-Orpheum Corporation, and RKO Radio Pictures, Inc. deny each and every allegation therein. The other answering defendants state that they are without knowledge or information sufficient to form a belief as to the truth thereof.

66. As to (170) through (177), deny each and every allegation therein.

67. As to (178), deny each and every allegation therein.

68. As to (170), deny each and every allegation therein.

69. As to (180) through (187), deny each and every allegation therein.

70. Deny each and every allegation in the amended and supplemental complaint that relates to them, which has not been hereinabove admitted, denied, or otherwise answered; and state that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation in said complaint, in so far as they or any of them [fols. 3291-3293] relate to other defendants and have not been hereinabove admitted, denied, or otherwise answered.

Wherefore, having made complete answer to the Amended and Supplemental Complaint herein, the answering defendants respectfully pray that an order be entered dismissing said complaint, with prejudice, and that the answering defendants be awarded costs and disbursements and such other relief as the Court may deem just and proper.

November 14, 1940.

(Signed) William J. Donovan, William Mallard; Solicitors for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., RKO Proctor Corporation and RKO Midwest Corporation.

[fol. 3294] In the District Court of the United States

[Title omitted]

Answer of Keith-Albee-Orpheum Corporation to Amended and Supplemental Complaint

The defendant Keith-Albee-Orpheum Corporation by its solicitors, Goldwater & Flynn, Esqs., answering the amended and supplemental complaint herein, alleges as follows:

1. Denies each and every allegation of the following paragraphs of the complaint insofar as they relate, or purport to relate, to the answering defendant, and denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations insofar as they

relate to the other defendants: 2, 116, 119, 129, 130, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186 and 187.

2. Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation in the following paragraphs of the complaint: 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 60, 61, 62, 63, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, [fol. 3295] 97, 98, 99, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 139, 142, 143, 144, 145, 146, 147, 148, 149, 166, 167, 168, and 169.

3. Denies so much of paragraph 1 of the complaint as alleges, or purports to allege, that the answering defendant has violated, is violating, or intends to violate, Section 1 or Section 2 of the Sherman Anti-Trust Act in the manner alleged in said complaint, or in any other manner, either individually or with any other person, or persons, and denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of each and every other allegation therein.

4. Denies so much of paragraph 5 (c) of the complaint as alleges that Keith-Albee-Orpheum Corporation is engaged in the business of exhibiting motion pictures and alleges that Keith-Albee-Orpheum Corporation owns stock and other securities in corporations which are engaged in the business of exhibiting motion pictures, either directly or through subsidiary or associated corporations.

5. Admits that the terms defined in paragraphs 15, 16 and 17 of the complaint may possibly have the meanings therein set forth but denies that said definitions are in all respects accurate or that they are commonly accepted by the motion picture industry.

6. Admits so much of paragraph 56 of the complaint as alleges that Radio-Keith-Orpheum Corporation was incorporated under the Laws of the State of Maryland on October 25, 1928, and that since its incorporation, it has been

primarily a holding company, and that shortly after its organization it acquired substantially all of the common [fol. 3296] stock of Keith-Albee-Orpheum Corporation and FBO Productions, Inc., and alleges that at the time of the acquisition by Radio-Keith-Orpheum Corporation of the common stock of Keith-Albee-Orpheum Corporation, Keith-Albee-Orpheum Corporation was engaged in the business of holding stock and other securities in corporations engaged in operating theatres for the exhibition of vaudeville and motion pictures, either directly or through subsidiary or associated corporations and further alleges that Radio-Keith-Orpheum Corporation now holds approximately 99.85% of the common stock of Keith-Albee-Orpheum Corporation, and approximately 33.8% of the preferred stock of said corporation, and that the Certificate of Incorporation of Keith-Albee-Orpheum Corporation provides that whenever six quarterly dividends on the preferred stock shall be unpaid, in whole or in part, the entire voting power for the election of a majority of the Board of Directors shall be exclusively vested in the preferred stock until all such arrears have been paid; that six quarterly dividends on the preferred stock of Keith-Albee-Orpheum Corporation have been in arrears since on or about April 1, 1933; that whether or not Radio-Keith-Orpheum Corporation has the right to elect a majority of the Board of Directors of Keith-Albee-Orpheum Corporation depends upon whether it is entitled to cumula- the question has never been submitted to the Courts; that certain large holders of preferred stock of Keith-Albee-Orpheum Corporation have challenged such right and that the question has never ben submitted to the Courts; that the Board of Directors of Keith-Albee-Orpheum Corporation, since June 19, 1933, has been selected by mutual agreement between the principal stockholding groups; that since 1933 Radio-Keith-Orpheum Corporation has not controlled the Board of Directors of Keith-Albee-Orpheum Corporation or the activities of that Corporation. Except [fol. 3297] as hereinabove admitted and alleged, the answering defendant denies that it has knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in said paragraph 56 of the complaint.

7. Admits so much of paragraph 57 of the complaint as alleges that Keith-Albee-Orpheum Corporation was incorpo-

rated on January 28, 1938 under the Laws of the State of Delaware and on, to-wit, February 16, 1928, acquired as of January 1, 1928 all of the issued and outstanding stock of B. F. Keith Corporation, and approximately 90% of the issued and outstanding common stock of Orpheum Circuit, Inc. and that B. F. Keith Corporation owned or operated, directly, or owned stock in corporations which owned or operated, a number of theatres in various cities in the eastern part of the United States which, prior thereto, were engaged primarily in the exhibition of vaudeville, either alone or in conjunction with the exhibition of motion pictures, and that Orpheum Circuit, Inc. owned or operated directly, or owned stock in corporations which either owned or operated theatres located in the midwestern and western parts of the United States, and except as so admitted and alleged, denies the allegation of paragraph 57 of the complaint.

8. Denies so much of paragraph 59 of the complaint as alleges, or purports to allege, that those theatres owned, operated or controlled by subsidiaries of Keith-Albee-Orpheum Corporation which are included in tables (a) and (b) of said paragraph, are now operated by RKO, and denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the other allegations of said paragraph 59.

9. Admits so much of paragraph 64 of the complaint as alleges that RKO product is distributed by RKO Radio Pictures, Inc. and denies that it has any knowledge or infor- [fol. 3298] mation thereof sufficient to form a belief as to the truth of the other allegations thereof.

10. Admits so much of paragraph 87 of the complaint as alleges that in the cities where the subsidiaries of Keith-Albee-Orpheum Corporation own, operate or control theatres, the operation of some of these theatres is carried on in conjunction with the operation of theatres in which the other defendants herein, and other exhibitors, have an interest, pursuant to various operating arrangements between them and, except as so admitted, denies each and every allegation thereof.

11. Admits so much of paragraph 100 of the complaint as alleges that Radio-Keith-Orpheum Corporation had acquired, between its incorporation in 1928 and 1930, the own-

ership of stock in companies that were engaged in production, distribution and exhibition of motion pictures, and except as so admitted, denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations thereof.

12. Denies so much of paragraphs 140 and 141 of the complaint as allege, or purport to allege, that the exhibition branch of the motion picture industry is either in, or directly affects trade or commerce among the several states.

Further Answering the Complaint, and As a First, Separate Defense Thereto, Defendant Alleges:

13. That this Court has no jurisdiction over the matters and things alleged in the complaint.

[fols. 3299-3300] Further Answering the Complaint, and As a Second, Separate Defense Thereto, Defendant Alleges:

14. That the petition fails to state a claim as to the answering defendant on which any relief can be granted.

Wherefore, having made complete answer to the complaint, the answering defendant prays that this complaint be dismissed as to it, and that it be awarded its costs and disbursements and such other and further relief as to the Court may seem just and proper in the premises.

Dated, New York, N. Y., November 14th, 1940.

Monroe Goldwater, Goldwater & Flynn, Solicitors for Keith-Albee-Orpheum Corporation, 60 East 42 Street, New York, N. Y.

[fol. 3301] In District Court of the United States

[Title omitted]

Answer of Defendants Warner Bros. Pictures, Inc., et al. to Amend and Supplemental Complaint

Defendants Warner Bros. Pictures, Inc., Vitagraph, Inc., and Warner Bros. Circuit Management Corporation, by R. W. Berkins, their solicitor, for their answer to the

amended and supplemental complaint, hereinafter referred to as "complaint," respectfully allege:

1. Answering paragraph 1 of the complaint, defendants deny that they or any of them have jointly or severally violated section 1 or 2 or any of the sections of the Act of Congress commonly known as the Sherman Anti-Trust Act.

2. Deny each and every allegation in paragraph "2." of the complaint.

3. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph 3 (a) and (b), 4 and 5 (a), (b), (c), (d) and (e) of the complaint.

4. Deny each and every allegation in paragraphs 6 (a) and 6 (b) of the complaint except admit that defendant Warner Bros. Pictures, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New [fol. 3302] York, New York; that said defendant is engaged in the business of producing motion pictures, and it and some of its subsidiary and associated corporations are engaged in the business of exhibiting motion pictures in various parts of the United States; that Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures in the United States.

5. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 7 (a) and (b), 9 (a), (b) and (c), 10 (a), (b), (c) and (d), and 11 of the complaint.

6. Admit that the terms "major producer" as defined in paragraph "15 (b)" of the complaint and "major distributor" as defined in paragraph "16 (b)" of the complaint are sometimes loosely used by some persons, but deny that said definitions are applicable exclusively to the defendants herein.

7. Deny each and every allegation in paragraphs 15 (c) and (e) of the complaint.

8. Deny each and every allegation in paragraph "16 (c)" of the complaint.

9. Deny each and every allegation in paragraph "16 (d)" of the complaint, except admit that some state rights distributors do not operate a system of national exchanges but acquire the right to distribute motion pictures in a particular state or territory.

10. Admit the allegations in paragraph "16 (e)" of the complaint, except deny that license agreements are solicited at any Vitagraph exchange, but admit that applications for [fol. 3303] license agreements are solicited at Vitagraph exchanges.

11. Admit that the term "franchise" as defined in paragraph "16 (f)" of the complaint is sometimes loosely used by some persons.

12. Deny each and every allegation in paragraph "16 (g)" of the complaint.

13. Deny each and every allegation in paragraph 17 (b) and (c) of the complaint.

14. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "17 (d)" of the complaint.

15. Deny each and every allegation in paragraph "17 (e)" of the complaint.

16. Deny each and every allegation in paragraphs 17 (f), (g) and (h) of the complaint.

17. Admit that the term "motion picture season" as defined in paragraph "17 (i)" of the complaint is sometimes loosely used by some persons.

18. Deny each and every allegation in paragraph "17 (l)" of the complaint, except admit that a "trade showing" is the exhibition of a motion picture at a theatre or projection room for the benefit of exhibitors generally.

19. Deny each and every allegation in paragraph "17 (n)" of the complaint.

20. Admit the allegations of paragraph "17 (p)" of the complaint except deny that such first run exhibition is necessarily after national release.

21. Deny each and every allegation in paragraph "17 (s)" of the complaint.

22. Deny each and every allegation in paragraph "17 (t)" of the complaint, except admit that a "zone" is a specified geographical area.

[fol. 3304] 23. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 18, 19, 20, 21, 22, 23, 24, 25 (a) and (b), 26, 27, 28, 29, 30, 31, 32 (a) and (b) and 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 (a) and (b) and 46 of the complaint.

24. Deny each and every allegation in paragraph "47" of the complaint, except admit that Warner Bros. Pictures, Inc., was incorporated in 1923, for the purposes enumerated in its certificate of incorporation, which include among others, producing, distributing and exhibiting motion pictures, and admit the second sentence of said paragraph.

25. Deny each and every allegation in paragraph "49" of the complaint, except admit that Warner Bros. Pictures, Inc., is one of the principal producing companies in the motion picture industry and maintains production facilities at Burbank, Calif., and it or its subsidiary or associated corporations maintain production facilities at Brooklyn, N. Y.; that the number of feature motion pictures produced by it or any subsidiary or associated corporations for the nine year period ending with the 1938-39 season, is indicated by the following tabulation:

Season	Feature Motion Pictures
1930-31	70
1931-32	56
1932-33	53
1933-34	54
1934-35	51
1935-36	58
1936-37	58
1937-38	52
1938-39	53

[fol. 3305] 26. Deny each and every allegation in paragraph 54 (a) and (b) of the complaint except admit that Warner Bros. Pictures, Inc. or its subsidiary and asso-

ciated corporations operate the following number of theatres in the following states:

California	12
Connecticut	31
Delaware	6
Washington, D. C.	19
Illinois	16
Indiana	2
Maryland	9
Massachusetts	16
New Jersey	63
New York	27
Ohio	30
Oklahoma	3
Oregon	2
Pennsylvania	162
Tennessee	1
Virginia	8
Washington	3
West Virginia	11
Wisconsin	12

27. Deny each and every allegation in paragraph "55" of the complaint.

28. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 56, 57, 58, 59 (a) and (b), 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85 and 86 of the complaint.

29. Deny that they have any knowledge or information [fol. 3306] sufficient to form a belief as to the truth of any of the allegations in paragraphs 87, 88, 89 of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants, except admit that in addition to the theatres listed in paragraph "26" of this answer, certain subsidiary and associated corporations of Warner Bros. Pictures, Inc. have interests in the operation of certain theatres owned or operated by others including some of the producer-exhibitor defendants, pursuant to the terms of certain agreements.

30. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99 of the complaint.

31. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 100 and 101 of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants, except admit that in 1930, Warner Bros. Pictures, Inc. was engaged in the business of producing motion pictures; that Vitagraph, Inc., a wholly owned subsidiary of said Warner Bros. Pictures, Inc. was engaged in the business of distributing pictures, and Warner Bros. Pictures, Inc. and some of its subsidiary and associated corporation- were engaged in the business of exhibiting motion pictures; that in 1930, some of the motion pictures produced by Warner Bros. Pictures, Inc. or by its associated and affiliated corporations cost as much as $500,000.00 or more; that Vitagraph, Inc. has distributed motion pictures not produced by Warner Bros. Pictures, Inc. or its [fol. 3307] subsidiary or affiliated corporation, pursuant to arrangements which at times might include the use of equipment owned by, or talent under contract to such companies, and which might at times include the financing of those productions directly or indirectly by such companies.

32. Deny each and every allegation in paragraphs 102, and 103 of the complaint, except admit that equipment and technical and artistic talent and the use thereof, necessary to these defendants to produce profitable motion pictures have become more costly, because of the competition therefor.

33. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations paragraph "104" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that during the period January 1, 1934 to September 2, 1939 Warner Bros. Pictures, Inc. loaned to other producers, in 235 instances, stars, feature players, directors, writers, cameramen and other production personnel.

34. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "105" of the complaint.

35. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "106" of the complaint, in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants.

36. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "107" of the complaint in so far as they relate to the other defendants; deny each and every [fol. 3308] allegation in said paragraph in so far as it relates to these defendants except admit that some of the license contracts of Vitagraph, Inc. contain the terms on which a group of motion pictures are to be exhibited over a period of at least one year; that some of the contracts of Vitagraph, Inc. cover all or a lesser number of motion pictures released during the one year period or a lesser number to be selected from all released as and when released; that some licenses are negotiated prior to the commencement of each motion picture season before any of the motion pictures covered have been released; that the production programs announced by Vitagraph, Inc. at the beginning of each motion picture season are subject to change without notice to any exhibitor.

37. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "108" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants except admit that the quality of the motion pictures produced by Warner Bros. Pictures, Inc. varies as box office attractions; and that such motion pictures are priced in various brackets in the license agreement in accordance sometimes with anticipated and sometimes with known quality; that some of its motion pictures may gross more than One Million ($1,000,000.) Dollars in film rental and play in more than ten thousand (10,000) theatres, while other of its motion pictures may gross less than Two Hundred Thousand ($200,000.) Dollars in film rental and

play in less than Five Thousand (5,000) theatres; that the motion pictures priced in the highest brackets in license [fol. 3309] agreements sometimes have rental terms based upon a percentage of the box office receipts and sometimes rental terms based upon a percentage of the box office receipts against a guaranteed figure and the motion pictures priced in the lowest priced brackets are sometimes licensed for a flat amount; that the motion pictures included in each price bracket are sometimes untitled and unidentified; that sometimes such motion pictures are allocated to a price bracket after their release; that sometimes differences of opinion arise between exhibitors and Vitagraph with respect to such allocation.

38. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "109" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants.

39. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "110" of the complaint.

40. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "111" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that some of the license contracts between Vitagraph, Inc. and exhibitors contain provisions with respect to the run on which the motion pictures are available to the exhibitor, the clearance over competing theatres, and the minimum admission prices to be charged when exhibiting such motion pictures.

41. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations [fol. 3310] in paragraph "112" of the complaint in so far as they relate to the other defendants; deny each and every allegation in so far as it relates to these defendants, except admit that the entertainment value of the motion pictures released in the United States from week to week varies widely; and that many of the theatres operated by Warner Bros. Pictures, Inc. or its subsidiary or associated

corporations play all of the motion pictures it exhibits on the same run with the same clearance and at the same admission price.

42. Deny that they have any knowledge of information sufficient to form a belief as to the truth of any allegations in paragraph "113" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that the provisions in any license agreement of Vitagraph, Inc. with regard to run and clearance prevent Vitagraph, Inc. from thereafter granting to other exhibitors rights in conflict therewith.

43. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs "114" and "115" of the complaint.

44. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "116" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that, with the knowledge and acquiescence of the plaintiff, Warner Bros. Pictures, Inc. participated in some conferences to establish the basis for clearance schedules by voluntary agreement of all parties affected.

[fol. 3311] 45. Answering paragraph "117" of the complaint, deny that they have entered into any agreements, express or otherwise, with respect to uniform protection and zoning.

46. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "118" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that a code for the motion picture industry was adopted pursuant to the National Industrial Recovery Act, and deny that these defendants have made any effort to establish uniform clearance and zoning by any agreements.

47. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allega-

tions in paragraphs "119" and "120" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants.

48. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs "121" and "122" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants, except admit that some long term franchises are advantageous to the exhibitors with whom they are made in that they grant such exhibitors an assurance of product for the term of such franchise, and that wherever a distributor grants rights under a long term franchise it is thereafter and during said term unable to grant to other exhibitors rights in conflict therewith.

[fol. 3312] 49. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "123" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that some franchises do contain some of the provisions described in said paragraph of the complaint.

50. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs "124" and "125" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants, except admit that an exhibitor in negotiating for a license agreement seeks to obtain the most favorable terms for the theatre or theatres for which he is negotiating.

51. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "126" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that a number of prints of each motion picture are delivered to each exchange of Vitagraph, Inc. prior to its national release date and are made available by that exchange to the various theatres for which such

motion picture has been licensed in accordance with the terms of the license, and are usually returned to that exchange after exhibitions, and that the number of prints of each motion picture delivered to each Vitagraph, Inc. exchange depends upon various factors including the number of theatres served by such exchange.

[fol. 3313] 52. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "127" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that many theatres, operated by Warner Bros. Pictures, Inc. or its subsidiary or associated corporations, which exhibit motion pictures first run on the area in which such theatres are located charge the highest admission prices in such areas, and the programs of such theatres generally consist of motion pictures of the highest quality which those corporations are able to obtain for said theatres.

53. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "128" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that the admission price charged by an exhibitor is one of the factors considered by Vitagraph, Inc. in negotiating run and clearance.

54. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs "129" and "130" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants.

55. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "131" of the complaint in so far as they relate to the other defendants; deny each and every allega-[fol. 3314] tion in said paragraph in so far as it relates to these defendants, except admit that of the feature motion pictures played in certain first run theatres operated by Warner Bros. Pictures, Inc. or its subsidiary or associated corporations in certain of the larger cities approximately

95% were released by distributors who are defendants herein and that said percentage varies with each such theatre.

56. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "132" of the complaint.

57. Answering paragraph "133" of the complaint, these defendants admit that the acts alleged in the first sentence of the paragraph constitute some of the factors entering into the production of motion pictures; deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in the remainder of said paragraph in so far as they relate to the other defendants; and deny said allegations in so far as they relate to these defendants, except admit that most of the personnel involved in the production of motion pictures is usually assembled at the studios in California, and some of the costumes and raw materials entering into the making of motion pictures may be manufactured outside of the State of California and shipped to California.

58. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "134" of the complaint.

59. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "135" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these [fol. 3315] defendants, except admit that after the scenes going to make up a motion picture have been photographed, they are developed, cut, fixed, edited and arranged at the studios in California; that the positive prints of motion pictures produced by Warner Bros. Pictures, Inc. are made in the States of California and New York; that usually 165 to 330 positive prints of each feature length motion picture are made for distribution in the United States; that the said positive prints are those which are projected through motion picture projectors to the screens of motion picture theatres, and that some positive prints are shipped across state lines to film exchanges maintained by Vitagraph, Inc. in certain cities in the United States.

60. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "136" of the complaint in so far as they relate to the other defendants, and deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that several months before the commencement of the motion picture season Vitagraph, Inc. announces its program of motion pictures for the coming season; that said program generally describes the motion pictures to be distributed, so far as known, giving, in many instances, their titles, the names of the stars and other featured players, the directors, the story material and such other pertinent material as may be available, subject to exigencies of production; that plans are made for the production of such motion pictures as may not have already been [fol. 3316] completed, and the release of the motion pictures at approximately regular intervals throughout the motion picture season, which begins approximately September 1st of each year.

61. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "137" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that generally, Vitagraph, Inc. proceeds, through its salesmen, who work out of its film exchanges, to solicit applications from exhibitors for a license to exhibit the motion pictures announced in its program; that each such motion picture is copyrighted under the copyright laws of the United States by the producer thereof, and that the solicited applications, when signed by exhibitors, are, by the term thereof, transmitted to the principal office of Vitagraph, Inc. in New York where such applications are either approved or rejected by Vitagraph, Inc.

62. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "138" of the complaint in so far as they relate to the other defendants, and deny that all positive prints, when completed at the laboratories, are shipped across state lines to the various film exchanges of Vitagraph, Inc.

63. Admit the allegations in paragraph "139" of the complaint except allege that the transportation of film from a prior run theatre to a subsequent run theatre is not a usual occurrence at a Vitagraph, Inc. exchange.

[fol. 3317] 64. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph "140" of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraph in so far as it relates to these defendants, except admit that the production of motion pictures involves, in part, the assemblage of personnel, property and material at the studios of Warner Bros. Pictures, Inc.; that the distribution of motion pictures by Vitagraph, Inc. involves, in part, the solicitation and making of contracts for the delivery of motion pictures produced and to be produced, the transportation or positive prints of said motion pictures to the film exchanges of Vitagraph, Inc. in the United States, the distribution of said films from said exchanges to and from the motion picture theatres located in the areas served by the respective exchanges, the occasional interchange of said films between various exchanges of Vitagraph, Inc. some of which may be located in other states of the United States, and finally, the shipment of said films from said exchanges to a point within the state of New York for scrapping.

65. Deny each and every allegation in paragraphs 141, 142, 143, 144, 145, 146, 147, 148, 149 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), and (p), 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, and 169 of the complaint.

66. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 170, 171, 172, 173, 174, 175, 176 and 177 of the complaint in so far as they relate to the other de-
[fols. 3318-3319] fendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants.

67. Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraphs 178, 179, 180, 181, 182, 183, 184, 185, 186 and 187 of the complaint in so far as they relate to the other defendants; deny each and every allegation in said paragraphs in so far as it relates to these defendants.

Wherefore, these defendants pray that the complaint herein be dismissed as against them and each of them, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: November 14, 1940

R. W. Perkins, Solicitor for Defendants, Warner Bros. Pictures, Inc., Vitagraph, Inc. and Warner Bros. Circuit Management Corporation.

[fol. 3320] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COLUMBIA'S ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

The defendants, Columbia Pictures Corporation, Screen Gems, Inc., and Columbia Pictures of Louisiana Incorporated, all hereinafter referred to collectively as "Columbia," answering the amended and supplemental complaint by Schwartz & Frohlich, their attorneys, deny that they have created a monopoly or attempted to create a monopoly, or have restrained or attempted to restrain trade or commerce, or have in any way violated the Sherman Anti-Trust Act.

1. Deny each and every allegation contained in paragraphs "1," "2," "14," "15(a)" to "(g)" inclusive, "124," "125," "126," "127," "128," "150," "151," "152," "153," "154," "155," "156," "157," "158," "159," "160," "161," "162," "163," "164," "165," "166," "167," "168," "169," "170," "171," "172," "173," "174," "175," "176," "177," "178," "179," "180," "181," "182," "183," "184," "185," "186," and "187."

[fol. 3321] 2. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "3," "4," "5," (a) (b) (c) (d) (e), "6," (a) (b) (c) "7" (a) (b) "10," (a) (b) (c) (d) "11," "18," "19," "20," "21," "22," "23," "24," "25," "26," "27," "28," "29," "30," "31," "32,"

"33," "34," "35," "36," "37," "38," "39," "40," "41," "42," "43," "44," "45," "46," "47," "48," "49," "50," "51," "52," "53," "54," "55," "56," "57," "58," "59," "60," "61," "62," "63," "64," "65," "66," "73," "74," "75," "76," "77," "78," "79," "80," "81," "82," "83," "84," "85," "86," "87," "88," "89," "90," "91," "92," "93," "94," "95," "96," "97," "98," "99," "100," "105," "106," "129," "130," "131" and "132."

3. Deny each and every allegation contained in paragraphs "101," "102," "103," "104," "116," "117," "118," "119," "120," "121," "122," "123," "133," "134," "135," "136," "137," "138," "139," "140," "141," in so far as it may be deemed to relate to the answering defendants, and as to the remaining allegations in said paragraphs deny knowledge or information sufficient to form a belief as to the truth thereof.

4. Defendants deny each and every allegation contained in paragraph "15" and allege that the proper and correct definition of "major producer" is a producer who is engaged in the business of exhibiting motion pictures, in addition to the production thereof; that the true and correct definition of "independent producer" is a producer who is not engaged in the exhibition of motion pictures in addition to the production thereof; that "features" are motion [fol. 3322] picture photoplays of 5,000 feet (usually five reels) or more in length, other than westerns, serials and special subjects as hereinafter defined; feature pictures are divided however, into those which are known as Class "A" features and those features which do not approach the dignity of Class "A" features; a Class "A" feature is one which is suitable for feature billing in the so-called metropolitan de luxe motion picture theatres of the United States; these Class "A" features usually involve a much more substantial investment than do other features by reason of the use of stories commanding a high purchase price and of directors and artists commanding very large salaries; there are rare exceptions where pictures not involving a substantial investment approach the dignity of Class "A" features because of their unexpected and unusual appeal to the public.

A "Special" picture is a motion picture, other than a photoplay, of an educational, descriptive or geographical nature.

There are other pictures in excess of 5,000 feet which are known as "serial" pictures; such pictures are exhibited in instalments, being continued from week to week in a particular theatre in which such serial is being exhibited.

A short subject is a motion picture, which is usually less than 5,000 feet or five reels.

A "star" is a motion picture actor or actress who is outstanding and whose name alone is the main attraction to any picture in which he or she appears. On the other hand, there are a great many "feature" players who are popular but who are not heavily advertised and whose names are ordinarily subordinate to the title of the picture, the director or the star thereof.

[fol. 3323] A western picture is a feature motion picture, and is so designated whether it is more or less than 5,000 feet in length.

A "Western" picture is one which lays great stress upon cowboys, riding of horses, marksmanship and furious fights between heroes and villians, woven into a romantic story, and depicted in a melodramatic manner.

5. Admit the allegations contained in paragraph "67" and further allege that Columbia is one of the independent producers operating in California and maintaining studio facilities in Hollywood.

6. Deny each and every allegation contained in paragraphs "69," "70," and "71," in so far as the same relates to the answering defendants, and deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraphs; and further answering such paragraphs allege that Columbia produced and distributed the following number of pictures in the following seasons:

Season	*Class A Features*	*Other Features*	*Westerns*	*Special Subjects*	*Serials*
1928-29	4	27	0	0	0
1929-30	4	19	0	0	0
1930-31	6	13	8	0	0
1931-32	6	17	8	0	0
1932-33	6	22	8	0	0
1933-34	6	26	12	0	0
1934-35	6	25	8	0	0
1935-36	5	29	2	0	0

1936-37	6	25	7	0	0
1937-38	10	21	8	0	1
1938-39	7	23	9	0	4
1939-40	5	26	10	0	0

[fol. 3324] In addition to the above, Columbia distributed the following number of pictures in the following seasons, which were produced by other independent producers:

OUTSIDE PRODUCERS

Season	*Class A Features*	*Other Features*	*Westerns*	*Special Subjects*	*Serials*
1928-29	0	0	0	0	0
1929-30	1	0	0	0	0
1930-31	1	7	0	1	0
1931-32	1	3	8	0	0
1932-33	0	4	8	2	0
1933-34	0	3	0	0	0
1934-35	0	4	0	0	0
1935-36	0	4	10	0	0
1936-37	1	6	6	0	0
1937-38	2	7	11	0	3
1938-39	1	5	4	0	0
1939-40	1	11	0	0	4

The number of feature motion pictures produced by all motion-picture companies has increased in recent years. The fact is that all of the producers in the United States from 1927 down to the date of this suit have increased their production of feature pictures, indicating an increase of independent production rather than a decrease thereof.

Upon information and belief the following number of Class "A" features, other features, western, and special subject films were released by all companies including independent and major producers during the following years:

[fol. 3325]

	Independents	*Majors*	*Total*
1927	323	355	678
1928	484	297	781
1929	329	313	642
1930	252	281	533
1931	321	257	578
1932	456	245	701

	Independents	*Majors*	*Total*
1933	406	253	659
1934	506	254	760
1935	537	251	788
1936	452	265	717
1937	508	294	802
1938	522	247	769
1939	492	269	761
Total	5588	3581	9169

These figures have a greater significance when it is considered that there was a revolutionary change in the technique of producing and exhibiting motion pictures in 1928. Prior to that year pictures were made without sound effect. They cost less to produce because no money was required for sound reproducing machinery, technicians, and music royalties; and an entirely new type of actor and actress was required. With the introduction of talking pictures many stars of the silent screen were unable to adapt themselves to the new methods.

After 1928 it became necessary to invade the field of legitimate drama, not only for stories but for artists who were skilled in the art of diction and expression. As a result of this situation all of the picture companies were compelled to bid for such artists, and the salaries of the latter were greatly enhanced in comparison to preceding years.

Another burden added to the cost of producing pictures after 1928 was sound and dialogue effect. The companies [fol. 3326] possessing patents upon the machinery and equipment for recording and reproducing sound and dialogue compelled the payment of substantial royalties for the use of their patented machinery and equipment. In the aggregate these royalties have run into many millions of dollars a year. Moreover, it became necessary after 1928 to employ men skilled in the method of recording and reproducing sound and dialogue. This added another burden to production.

There was still another burden, namely, new machinery and equipment, which made it mandatory to completely overhaul and change all motion picture studios. It was also necessary to employ a great many musicians. Substantial expense was incurred in making recordings and retakes of

sound effects, music and dialogue, all of which had been unnecessary prior to 1928.

In the field of foreign distribution of motion pictures, it was necessary to have dialogue in foreign languages and superimposed titles. In addition, the laws of many countries require that the sound effects and dialogue be recorded or "dubbed" in the respective foreign countries in which the pictures are being distributed. In addition to that practice, many of the foreign countries required American companies distributing their films therein to purchase films made abroad by subjects or citizens of such foreign countries, referred to as "quotas" and "kontingents." Originally it was possible to comply with these quota or kontingent requirements by purchasing a cheap film made in a foreign country, but more recently there have been enacted in such foreign countries so-called "quality quotas" which require an American distributor of motion pictures to purchase a motion picture produced abroad at a cost of a very substantial sum. In most cases it is impossible to distrib- [fol. 3327] ute motion pictures at a profit unless an adequate foreign market is assured. That market has been seriously curtailed because of war in Europe. The major part of the investment in a motion picture is in the production thereof. Once this production cost is incurred, it is necessary to secure as wide a distribution as possible. All this requires a very substantial investment at the outset and an organization familiar with conditions existing throughout the world, and able to distribute pictures effectively in such countries with an eye to these various problems and conditions.

Columbia has substantially increased its production schedule on "A" features, other features and westerns since 1928 as compared with prior years. For the four years of its existence prior to 1928, Columbia produced an average of 22 Class "A" features, other features and westerns at an average annual cost of $729,370. Since 1928, and through the 1939-40 season it has produced an average of 44 * pictures annually at an average annual cost of $5,981,100. The

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* This includes "A" features, other features, westerns, special subjects and serials.

following figures for the last twelve years show the increased expenditure for production by Columbia:

	Amount Spent in Production
1928-29	$ 1,632,300
1929-30	2,523,400
1930-31	4,182,800
1931-32	3,614,100
1932-33	4,304,400
1933-34	5,198,200
1934-35	6,163,300
1935-36	7,053,800
1936-37	6,728,000
1937-38	11,499,200
1938-39	9,505,300
1939-40	9,368,600

[fol. 3328] In order to carry out this increase, Columbia was compelled to invest a larger amount of capital. It spends a great deal more money in producing pictures at the present time than it spent years ago. Notwithstanding the tremendous amounts of capital necessary to finance the production and distribution of motion pictures, there has been an increase in independent production not only by Columbia, but by other independent producers.

Many pictures of independent producers have had wide distribution throughout the United States, including metropolitan areas.

Moreover, the number of pictures produced each year is no index of the increased activities of producers in recent years. As a rule the feature pictures within recent years are anywhere from five to ten reels in length, whereas prior to 1928 features were, as a rule, five reels in length, with a few exceptions. In the production of a feature picture a great many scenes are taken and a great deal of footage is consumed which never sees the light of day. This added cost is brought about by the desire of producers to perfect a more artistic result. It is not uncommon for a producer to make 100,000 feet of film, which is subsequently edited and cut down to ten reels and oftentimes less.

7. Deny each and every allegation contained in paragraph "16" and allege that the true definition of a "major distributor" is a distributor who is engaged in the business of

producing and exhibiting motion pictures, in addition to the distribution thereof.

The true definition of an "independent distributor" is one who is not engaged in the exhibition of motion pictures. [fol 3329] The true definition of "block booking" is the licensing under a single contract of all or a percentage or part of the pictures to be released by the producer or distributor during a given season.

A. Answering the allegations contained in paragraph "17", defendants deny the allegations therein contained, and allege that the definitions contained in that paragraph are of no practical value and are not currently used in the motion picture industry; that the true distinction between theatres depends not upon their affiliation or lack of affiliation with a producer of motion pictures, but rather upon whether the management of or booking for such theatre is done on the basis of one single theatre or on the basis of managing or booking for several theatres. In the former case, the theatre and the owner thereof is referred to as an "independent"; in the latter case the theatre or the owner threof is referred to as a "circuit".

9. Deny any knowledge or information sufficient to form a belief as to paragraph "107," so far as it relates to the other defendants, and denies same in so far as it may be deemed to relate to the answering defendants except that the answering defendants admit that from time to time separate contracts are made with exhibitors for the exhibition of a varying number of photoplays released by Columbia and that such license agreements are negotiated at varying times during a so-called "motion picture season."

10. Deny each and every allegation of paragraph "108," except that defendants admit that the quality of feature pictures, as box-office attractions, varies widely.

[fol. 3330] 11. Deny each and every allegation contained in paragraphs "109," "110," "111," "112," "113," "114," "115," except that defendant admits that Columbia makes exhibition license agreements with various exhibitors for the exhibition of feature pictures distributed by Columbia.

12. Deny each and every allegation contained in paragraphs "140," "141" insofar as same allege that production and exhibition of motion pictures is in or is a part of interstate trade or commerce.

13. Deny each and every allegation contained in paragraphs "142," "143," "144," "145," "146," "147," "148," and "149," and allege that these defendants do not dominate and control, directly or indirectly, any branch of the motion picture business, and have not and do not combine, conspire or participate with any other persons, firms or corporations in any attempt to secure the control thereof, directly or indirectly. Columbia is an independent producer and distributor of motion pictures, and has been such since its organization in 1924. At its inception its capital stock consisted of 2,500 shares of common stock of the par value of $100 each.

From the outset, Columbia found it very difficult to secure proper distribution for its pictures. Much as it desired to limit its operations solely to the field of production, it was compelled by reason of the chaotic state of the distribution field, to establish its own exchanges in many cities throughout the United States. It was producing pictures on a modest scale but was finding it difficult to market its product. It was completely at the mercy of local film exchanges who either refused contracts for the distribution of its pictures [fol. 3331] or who offered Columbia such harsh and inequitable terms, that the corporation could not make a fair profit upon its invested capital. These contracts between the corporation and film exchanges throughout the United States were, as a rule, made on a percentage basis, the distributor charging a certain percentage of the gross receipts from exhibitors as a distribution charge. In a great many cases these local film exchanges furnished improper and inadequate statements of the gross receipts from exhibitors. The task of checking up on these receipts was burdensome and in many cases, impossible; in some cases, the distributors went out of business or became insolvent before any adequate check-up could be made. This method of distribution was haphazard, inefficient and costly. Among the factors which brought about the acquisition of Columbia's own distributing agencies were:

(a) dissatisfaction with the method of distribution;

(b) the uncertainty entertained by Columbia that it was getting its proper shares of the monies resulting from the distribution of the picture;

(c) the inability to market all pictures produced;

(d) situations developed where one year's product would be turned over to certain state-right distributors while the next year's product would be turned over to another, and so on, which made it very difficult to ascertain or anticipate what results could be secured from the distribution in order to secure adequate financing for future pictures; and

[fol. 3332] (e) the establishment by Columbia of its own distributing agencies throughout the country would not only secure to Columbia a nation-wide distribution of the pictures but also, no part of the proceeds would have to be paid to state-right distributors.

Although Columbia was not in a position at the time to finance its own exchanges, the need for distributing its own pictures was so great that the corporation was compelled to arrange for finances in order to enable it to establish and operate its own exchanges for distribution.

In March of 1929, Columbia entered into an agreement with bankers in the City of New York, for a financing plan. Said bankers undertook to underwrite for the company, 25,000 shares of no par value preferred stock. The charter of the company was amended to provide for an authorized capital stock of 300,000 shares of common and 25,000 shares of preferred. The corporation sold to the bankers the 25,000 shares of preferred stock for $750,000, and the bankers agreed to sell said stock at public offering, which they did.

With the moneys so received from the bankers, Columbia organized and established its own film exchanges for distribution in various cities throughout the United States. For the first time it was enabled to secure adequate and fair returns from the distribution of its pictures. The distribution of motion pictures is wholly unlike the sale of other merchandise to independent jobbers. In the first place, motion pictures are never sold outright. They are merely licensed for limited periods and for certain purposes. Secondly, where distribution is made to an independent agency, such distribution is on a percentage basis and not on the [fol. 3333] basis of an outright sale. The necessities of the motion picture business, as it is and must be conducted at the present time, require that a producer of motion pictures to be successful, must invest in facilities for the distribution of its own pictures.

Columbia having found that distribution of its pictures by itself was the only practical means of marketing its pictures, decided to extend the field of distribution to European countries. For that purpose it required further capital. Accordingly, in April, 1930, Columbia sold additional shares of stock to bankers for $1,600,000, and such bankers, in turn, sold such stock to the public. There are now over 1,000 investors of Columbia scattered throughout the country. The proceeds of this sale were utilized by Columbia in opening up foreign exchanges for distribution and for other corporate purposes. At no time, since 1929, has Columbia distributed its pictures through any of the other defendants herein, nor has Columbia distributed pictures produced by any of the other defendants through Columbia exchanges. It has, however, distributed, since 1929, a substantial number of pictures produced by other independent producing companies. Such pictures have consisted from time to time, of Class "A" features, other features, shorts, comedies, westerns, serials and special subjects.

In negotiating for and entering into contracts for the distribution of the pictures of independent producers, Columbia has encountered vigorous competition from other distributors of motion pictures. Independent producers are constantly changing from one company to another in contracting for the distribution of their pictures.

Examples of such changes from one distributor to another are exceedingly numerous. A few will suffice to show the practice.

[fol. 3334] Walt Disney, the creator of famous cartoon characters, such as "Mickey Mouse," "Minnie Mouse," "Donald Duck," and more recently "Snow White and the Seven Dwarfs," "Pinnochio" and "Fantasia," originally distributed his pictures through one Pat Powers. Thereafter he made a contract for distribution through Columbia, and subsequently with United Artists Corporation and presently with R.K.O. Radio Pictures, Inc. Many distributing companies are now competing for the distribution of Walt Disney's future pictures.

David Loew, a famous independent producer, originally distributed his pictures through R.K.O. Radio Pictures, Inc.; then distributed through Columbia; he is now distributing through United Artists.

Walter Wanger, a producer of note, produced pictures for Paramount Pictures, Inc., for a period of approximately

ten years; then for Columbia; later for Metro-Goldwyn-Mayer Corporation; then back to Paramount Pictures, Inc. His pictures are presently being distributed by United Artists Corporation.

Emanuel Cohn, whose producing unit is known as the Major Producing Corporation, originally produced pictures for Paramount Pictures, Inc.; then for Columbia; then returned to Paramount Pictures, Inc., and is now negotiating with several companies for the future distribution of his pictures.

B. P. Schulberg, who for many years was in charge of production at Paramount Pictures, Inc., had his pictures distributed by Columbia after he severed his connection with Paramount Pictures, Inc.; more recently his pictures have been distributed by Metro-Goldwyn-Mayer Corporation.

Hal Roach, producer of a unique type of picture, originally had his pictures distributed by Pathe Exchange, Inc.; at present he distributes some of his pictures through Metro-[fol. 3335] Goldwyn-Mayer Corporation, and some of his pictures through United Artists Corporation.

Sol Lesser, whose producing unit is known as Principal Productions, Inc., originally distributed through First National Pictures, Inc., and through various states rights organizations; he now divides the distribution of his pictures between 20th-Century-Fox Film Corporation and R.K.O. Radio Pictures, Inc., and has also distributed several pictures through Columbia.

David Selznick, originally produced pictures for R.K.O. Radio Pictures, Inc.; then switched to Metro-Goldwyn-Mayer Corporation, and finally distributed through United Artists Corporation. He distributed his picture "Gone With The Wind," through Metro-Goldwyn-Mayer Corporation.

Many independent producers contract with Columbia and other producers on a one-picture basis, and such producers decide solely for themselves the company for which they will produce their pictures or through which they will have their pictures distributed. All the companies are in competition for the pictures of such independent producers.

At no time has Columbia extended to any of the other defendants the facilities of its distribution exchanges in any shape, manner or form, directly or indirectly. The business of production and distribution engaged in by Co-

lumbia has been separate and distinct from the business of the other defendants herein; and at no time, has Columbia permitted or suffered any other defendant to have any part in its production or distribution business, nor has it at any time or in any way directly or indirectly, had any part in the production or distribution business of the other defendants herein or any of them.

[fol. 3336] National distribution of motion pictures and distribution of motion pictures throughout the world, in order to bring a fair and adequate return to a producer of pictures, requires a substantial investment of capital and an efficient organization. While historically, the motion picture business was split up into three groups, production, distribution and exhibition, as a practical and feasible matter, production and distribution today go hand in hand, each a corollary to the other. There are a substantial number of independent distributors in the United States, but none of these distributors, with the exception of defendant United Artists Corporation, has an efficient organization or a sufficient number of local exchanges throughout the United States and European countries, to afford a world-wide distribution of a motion picture. The invested capital required in the production of motion pictures, especially since the advent of talking pictures in 1928, runs into very substantial amounts, ranging from $100,000 to $2,000,000 for each picture.

The average cost of Class "A" features released by Columbia each season from 1932-33 to 1938-39 is as follows:

1932-3	1933-4	1934-5	1935-6	1936-7
$202,900	$347,200	$456,800	$587,000	$517,200
	1937-8	1938-9	1939-40	
	$733,400	$737,300	$883,500	

The average cost of other features released by Columbia during the same period is as follows:

1932-3	1933-4	1934-5	1935-6	1936-7
$101,100	$ 94,700	$113,700	$126,000	$100,800
	1937-8	1938-9	1939-40	
	$112,000	$102,100	$129,800	

[fol. 3337] If Columbia were compelled to desist from distributing its own pictures, it would find that pictures in which it had invested millions of dollars annually, would be

incompetently and inefficiently handled, improperly exploited and the financial returns wholly inadequate. It is impossible to secure the necessary financial backing for any producer of motion pictures which does not have an efficient distributing organization. The thousand and more investors in Columbia have made their respective investments in Columbia's securities in reliance upon its ability to distribute its own pictures. All of the motion pictures of Columbia are copyrighted.

The field of production and distribution of motion pictures has gradually merged as a matter of necessity. This has been due to the great advance in business and to the great amount of money invested in the production of pictures which make it requisite that producers have their own facilities for protecting their respective investments. Distribution today is actually a part of production and cannot be divorced from production. It is only when the producer has a very small investment in his motion picture and has little to lose, or when the distributor contributes to the cost of his production, that the producer is willing to entrust its distribution to others.

[fol. 3338]

(a) During the exhibition years 1934–35, down through 1940 and part of 1940–1941, the following features released by Columbia were exhibited in the metropolitan houses of defendant Warner Bros. Pictures, Inc., as hereinafter indicated:

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Albany	Strand	0	0	0	0	0	0	0
Baltimore	Stanley	0	0	0	0	1	0	0
Brooklyn	Strand	16	6	14	16	11	21	7
Charlotte	Broadway	9	9	7	15	8	12	5
Cleveland	Hippodrome	4	3	2	2	5	4	2
Los Angeles	Downtown	12	0	3	1	0	3	0
	Hollywood	0	0	3	1	1	0	0
Memphis	Warner	1	0	0	2	0	0	0
Milwaukee	Warner	0	0	0	0	0	0	0
Newark	Branford	12	3	3	4	8	12	5
	Capitol	12	2	5	5	18	0	5
New Haven	Sherman	0	0	0	3	0	0	0
New York City	Strand	0	0	0	0	0	0	0
Oklahoma City	Midwest	4	1	0	0	0	0	0
	Warner	0	0	0	0	0	0	0
Philadelphia	Aldine	0	2	0	0	0	1	0
	Boyd	1	1	3	5	0	1	0
	Earle	4	4	3	6	2	1	1
	Fox	0	0	3	1	3	0	1
	Stanley	4	2	1	0	2	5	1
	Karlton	5	2	4	2	3	6	0
	Keith's	2	3	2	2	2	1	1
	Staunton	5	4	7	3	5	6	0
Pittsburgh	Stanley	3	0	0	0	0	0	0
Washington	Earle	7	5	8	7	6	7	3
	Metropolitan	9	6	8	10	10	13	3

* 1940–41 is incomplete.

[fol. 3339]

(b) During the exhibition years 1934–35 down through 1940 and part of 1940–41 the following features released by Columbia were exhibited in the metropolitan houses of defendant Loew's Inc.; as hereinafter indicated:

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Atlanta	Grand	0	0	0	0	0	0	0
Baltimore	Century	0	0	0	0	0	0	0
Boston	Orpheum	7	18	19	22	17	22	5
	State	24	18	19	22	17	23	5
Brooklyn	Metropolitan	0	1	0	0	0	0	0
Cleveland	State	0	0	0	0	0	0	0
	Stillman	0	0	0	0	0	0	0
Houston	State	0	0	0	0	0	0	0
Indianapolis	Palace	10	23	22	21	24	28	7
Kansas City	Midland	0	0	22	25	29	29	12
Memphis	State	0	0	0	0	0	0	0
Newark	State	0	26	23	26	23	20	3
New Haven	Poli's	20	16	16	14	15	18	6
	College	11	20	13	15	9	15	7
New Orleans	State	0	0	0	0	0	0	0
New York City	Capitol	0	1	0	1	0	0	0
	State	5	3	3	6	3	6	1
Pittsburgh	Penn	1	0	0	0	0	0	0
St. Louis	State	0	0	0	7	15	11	3
	Capitol	0	0	0	0	0	0	0
Washington	Palace	0	0	0	0	0	0	0

* 1940–41 is incomplete.

(c) During the exhibition years 1934–35, down through 1940 and part of 1940–41 the following features released by Columbia were exhibited in the metropolitan houses of defendant Radio-Keith-Orpheum Corporation, as hereinafter indicated:

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Boston	Keith's Memorial	4	2	1	0	3	1	0
	Boston	1	6	0	11	0	30	3
Brooklyn	Albee	0	2	0	0	0	0	0
Chicago	Palace	0	0	0	0	0	0	0
Cleveland	Allen	5	6	5	7	4	8	2
	Palace	1	5	5	6	4	5	1
Cincinnati	Palace	3	1	3	1	2	3	1
	Albee	2	3	0	1	1	3	1
	Capitol	1	0	1	0	0	4	1
	Shubert	4	6	1	7	3	4	0
	Grand	3	1	3	2	0	0	1
	Lyric	0	0	4	1	3	4	3
Denver	Orpheum	2	0	0	0	0	0	0
Kansas City, Mo.	Main Street	0	0	0	0	0	0	0
Des Moines	Orpheum	34	36	17	20	17	31	9
Los Angeles	Hillstreet	0	0	0	25	23	28	8
	Pantages	4	0	0	25	23	28	8
Minneapolis	Orpheum	5	6	4	2	4	6	1
Newark	Proctor's	3	0	0	1	1	0	0
N. O.	Orpheum	6	7	6	7	6	9	3
New York City	Palace	1	0	0	0	0	0	0
Omaha	Brandeis	17	22	22	21	19	24	7
San Francisco	Golden Gate	0	3	0	1	1	0	0
St. Paul	Orpheum	13	10	5	1	4	4	1
Washington	Keith's	0	0	0	0	1	0	0

* 1940–41 is incomplete.

[fol. 3341]

(d) During the exhibition years 1934–35, down through 1940 and part of 1940–41 the following features released by Columbia were exhibited in the metropolitan houses of defendant National Theatre Corporation, as hereinafter indicated:

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Denver	Denver	3	3	4	5	4	12	6
	Broadway	10	6	12	4	2	2	0
	Paramount	9	25	26	20	16	11	5
	Tabor	6	7	11	2	32	32	9
Kansas City, Mo.	Uptown	0	0	0	0	0	0	0
	Tower	20	17	0	0	1	1	0
Los Angeles	Lowe's State	0	0	0	2	0	0	0
	Chinese	0	0	0	2	0	0	0
	United Artists	0	0	0	2	1	0	0
	Four Star	0	0	0	1	0	0	0
Milwaukee	Wisconsin	1	1	2	2	3	0	0
	Palace	10	13	10	18	13	19	4
Portland, Ore.	Paramount	5	3	9	9	11	14	6
	Mayfair	19	10	6	6	3	2	3
	Orpheum	1	5	7	11	8	1	1
San Francisco	Fox	10	0	0	0	0	0	0
	Lowe's Warfield	0	0	0	0	0	0	0
	Paramount	0	0	0	0	0	0	0
	St. Francis	0	0	0	0	0	0	0
Seattle	Fifth Avenue	0	0	0	0	0	0	0
	Paramount	0	0	0	0	0	0	0
	Orpheum	0	0	0	0	0	0	0
	Music Hall	0	0	0	0	0	0	0
	Music Box	0	0	0	0	0	0	0
	Blue Mouse	0	0	0	0	0	0	0

* 1940–41 is incomplete.

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[fol. 3342]

(e) During the exhibition years 1934–35, down through 1940 and part of 1940–41 the following features released by Columbia were exhibited in the metropolitan houses of defendant Paramount Pictures, Inc., as hereinafter indicated:

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Atlanta	Capitol	0	0	0	0	0	0	0
	Fox	0	0	0	0	0	0	0
	Paramount	0	0	0	0	0	0	0
	Georgia	0	0	0	0	0	0	0
Boston	Metropolitan	0	0	0	0	0	0	0
	Fenway	2	0	0	0	0	0	0
	Paramount	0	0	0	0	0	0	0
Brooklyn	Paramount	0	0	2	4	10	10	2
Buffalo	Buffalo	0	0	0	0	0	0	0
	Century	0	0	0	0	0	0	0
	Great Lakes	0	0	0	0	0	0	0
	Hippodrome	0	0	0	0	0	0	0
Charlotte	Carolina	2	2	3	2	5	6	2
	Imperial	2	5	5	2	3	1	0
	State	16	16	13	7	13	15	2
Chicago	Apollo	1	3	1	4	0	1	1
	Chicago	4	2	3	4	4	4	1
	Garrick	5	4	3	1	2	5	1
	Oriental	0	7	8	2	11	5	3
	Roosevelt	2	0	0	1	3	0	0
	United Artists	0	1	0	0	0	0	0
Dallas	Capitol	19	19	18	21	20	16	9
	Majestic	2	0	0	3	4	4	1
	Melba	3	12	8	8	4	0	0
	Palace	3	2	3	2	0	3	1
	Rialto	0	1	1	0	3	8	2

* 1940–41 is incomplete.

[fol. 3343]

City	Theatre	1934–5 Pictures	1935–6 Pictures	1936–7 Pictures	1937–8 Pictures	1938–9 Pictures	1939–40 Pictures	1940–41* Pictures
Des Moines	Des Moines	0	0	4	4	2	0	0
	Paramount	0	0	11	9	9	0	0
	Roosevelt	0	0	2	2	4	0	0
Detroit	Madison	8	7	0	0	0	0	0
	Michigan	0	0	0	0	1	0	0
	State	0	1	0	0	0	0	0
Houston	Kirby	5	10	13	20	15	15	6
	Majestic	3	1	1	2	4	5	2
	Metropolitan	2	4	4	5	2	4	1
Kansas City, Mo.	Newman	0	0	0	0	0	0	0
Memphis	Malco	3	5	8	7	6	9	5
	Strand	9	22	16	22	17	30	13
Minneapolis	State	0	0	4	3	0	1	0
Newark	Paramount	0	0	0	0	0	6	0
New Haven	Paramount	1	0	0	0	0	6	0
New Orleans	Saenger	0	0	1	0	0	0	0
	Tudor	2	0	0	0	0	0	0
New York City	Paramount	0	0	1	0	0	0	0
Oklahoma City	Capitol	0	2	0	0	0	0	0
	Criterion	1	0	0	0	0	0	0
Omaha	Omaha	0	0	0	0	0	0	0
	Orpheum	0	0	0	0	0	0	0
Salt Lake City	Capitol	1	1	5	9	7	22	10
	Paramount	0	0	1	5	2	0	0
	Victory	4	2	12	19	12	0	3
St. Paul	Paramount	0	1	2	2	0	2	1
	Riviera	0	1	4	9	4	1	0
	Tower	9	6	11	13	18	20	11

*1940–41 is incomplete.

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[fol. 3344] 14. Further answering said paragraphs "142" to "149" inclusive defendant Columbia alleges that the following are the only occasions since 1933 on which Columbia has loaned its actors, writers, cameramen, directors, and other technicians to or borrowed artists or technicians from other producers:

In the following instances, players were loaned by Columbia to *defendant* major producers since 1933 for the pictures indicated:

1933

Company	Player	Picture
Fox Film Corp.	Walter Connolly	Paddy, the Next Best Thing
"	Richard Cromwell	Hoopla
"	"	House of Connolly
Metro, Goldwyn-Mayer Corp.	Donald Cook	Viva Villa
Paramount Productions	Richard Cromwell	Pay Day
"	Donald Cook	Jenny Gerhardt
"	Peter Adams	Pay Day
RKO Studios	Walter Connolly	Success Story
"	Donald Cook	Long Lost Father
Warner Bros. Pictures	"	The Word Changes
"	Genevieve Tobin	Goodbye Again

1934

Fox Film Corp.	Walter Connolly	Charlie Chan's Challenge
"	"	Servant's Entrance
"	Richard Cromwell	Life Begins at Forty
"	Florence Rice	East River
Metro-Goldwyn-Mayer Corp.	Raymond Walburn	Ambulance Call
"	Donald Cook	The Night Is Young
"	John Buckler	David Copperfield
Paramount Productions	Robert Allen	Menace
"	Walter Connolly	Father Brown
"	Richard Cromwell	Bengal Lancers
"	Joseph Schildkraut	Cleopatra
RKO Studios	Arthur Hohl	Romance in Manhattan
Warner Bros. Pictures	Victor Jory	Midsummer Night's Dream

[fol. 3345]

1935

Fox Film Corp.	Tala Birell	Hold That Tiger
"	Victor Kilian	Bad Boy
"	Raymond Walburn	Gentle Grafter
"	"	Red Heads on Parade
"	"	Road to Romance
"	Donald Cook	Secret Lives
Metro-Goldwyn-Mayer Corp.	Victor Kilian	Riff Raff
"	Raymond Walburn	The Great Ziegfeld
"	Peter Lorre	Mad Love
"	Donald Cook	Casino Murder Case
"	Douglas Dumbrille	Naughty Marietta
Paramount Productions	Walter Connolly	So Red The Rose
"	George Murphy	Woman Trap
"	Douglas Dumbrille	Peter Ibetson

Company	Player	Picture
"	James Blakeley	Two In A Tower
"	Richard Cromwell	Annapolis Farewell
"	"	MacFadden's Flats
Radio Pictures Corp.	Ann Sothern	Hurry For Love
"	Thurston Hall	"
"	Arthur Hohl	Village Tale
"	"	Husk
"	Wyrley Birch	Last Days of Pompeii
"	Robert Middlemass	The Green Shadow
	1936	
Metro-Goldwyn-Mayer Corp.	Herman Bing	Maytime
"	Walter Connolly	The Good Earth
"	"	Libeled Lady
"	Thurston Hall	Three Wise Guys
"	Thomas Mitchell	Man of the People
"	Raymond Walburn	Absolute Quiet
"	"	Born to Dance
"	"	Three Wise Guys
Paramount Productions	Ralph Bellamy	Johnny Get Your Gun
"	Herman Bing	Champagne Waltz
"	Lloyd Nolan	Texas Rangers
"	Victor Kilian	Invitation to Happiness
"	Lionel Stander	I Loved a Soldier
"	Douglas Dumbrille	The Princess Comes Across
RKO Studios, Inc.	Herman Bing	Street Girl
"	Thurston Hall	Once Over Lightly
"	Douglas Dumbrille	Witness Chair
"	"	M'Liss

[fol. 3346]

	1936	
20th Century-Fox Film Corp.	Jean Dixon	To Mary With Love
"	Walter Connolly	Nancy Steele is Missing
"	Victor Kilian	Banjo on My Knee
"	"	Death in Paradise Canyon
"	"	Romona
"	"	Seventh Heaven
"	"	Wooden Crosses
	1937	
Metro-Goldwyn-Mayer Corp.	Lionel Stander	Last Gangster
"	Raymond Walburn	Broadway Melody of 1937
Paramount Pictures	Richard Arlen	Artists & Models
"	Melvyn Douglas	The Angel
"	"	I Met Him in Paris
"	John Gallaudet	Double or Nothing
"	Thomas Mitchell	The Years Are So Long
"	Gene Morgan	"
"	Raymond Walburn	High, Wide & Handsome
RKO Radio Pictures	Chester Morris	Flight From Glory
20th Century-Fox Film Corp.	Marc Lawsence	Charlie Chan on Broadway
"	Raymond Walburn	Thin Ice
Warner Bros. Pictures	Ralph Bellamy	Food For Scandal
"	Walter Connolly	First Lady
"	Thurston Hall	Return from Limbo
"	Victor Kilian	Tovarich

1938

Company	Player	Picture
Loew's Inc.	Walter Connolly	Too Hot to Handle
RKO Radio Pictures Inc.	Ralph Bellamy	Carefree
"	Rita Hayworth	Geo. O'Brien #4
20th Century Fox Film Corp.	Marc Lawrence	While New York Sleeps
"	Raymond Walburn	The Legion Marches On
Warner Brothers Pictures, Inc.	Ralph Bellamy	Boy Meets Girl
"	Walter Connolly	All Rights Reserved

1939

Loew's Inc.	Walter Connolly	Maiden Voyage
"	Marc Lawrence	Sergeant Madden
Warner Bros.	Edith Fellowes	Gantry the Great

[fol. 3347]

1940

Loew's Inc.	Rita Hayworth	Susan and God
20th Century-Fox	Don Beddoe	Charley Chan's Oriental Cruise
"		Bad Girl
Warner Bros.	Rita Hayworth	Strawberry Blonde

1941

Warner Bros.	Rita Hayworth	Affectionately Yours

The following artists, other than players, were loaned by Columbia to *defendant* major producers since 1933 for the pictures indicated:

1933

Company	Artist	Picture
Metro-Goldwyn-Mayer Corp.	Norman Krasna (Writer)	Viva Villa

1935

Radio Pictures Corp.	Joseph August (Cameraman)	Mr. Grant
"		The Informer

1936

Metro-Goldwyn-Mayer Corp.	Zoe Atkins (Writer)	Camille

1937

Paramount Pictures	Stephen Avery (Writer)	Artists & Models

1938

RKO Radio Pictures, Inc.	Paul Jarrico (Writer)	Story: Beauty for the Asking

1940

Paramount	Lewis Meltzer (Writer)	New York Town
Paramount	Charles Vidor (Director)	New York Town

[fol. 3348]

In the following instances, players were loaned by Columbia to *independent* producers since 1933 for the pictures indicated:

Company	Player	Picture
	1933	
Maxwell Cohn	Diane Sinclair	Dark Waters
Liberty Pictures	Richard Cromwell	When Strangers Meet
Meteor Pictures	Barbara Weeks	Rusty Rides Alone
Chas. R. Rogers Talking Pictures	Walter Connolly	Eight Girls in a Boat
	1934	
Foy Productions	Charles Gabin	That's Gratitude
"	"	Call To Arms
"	Sheila Mannors	"
Liberty Productions	Ines Courtney	Sweepstakes Annie
Chas. R. Rogers Talking Pictures	Raymond Walburn	I Married An Actress
Samuel Goldwyn	Ann Sothern	Treasure Hunt
Select Productions	Donald Cook	Gigolette
20th Century Pictures	Ann Sothern	Folies Bergere
Universal Pictures	Geneva Mitchell	Night Life of the Gods
	1935	
Central Films, Ltd.	Edith Fellows	Tugboat Princess
Conn Pictures Corp.	Gloria Shea	Black Gold
Larry Darmour	Joan Perry	Heir to Trouble
"	Geneva Mitchell	The Twain Shall Meet
Foy Productions	Jack Holt	Gimpy
Gaumont-British Pictures Corp.	Peter Lorre	Secret Agent
H. M. Pictures Corp.	Walter Connolly	Soak The Rich
Liberty Pictures	Ines Courtney	Dizzy Dames
Majestic Pictures Corp. of Calif.	Donald Cook	Thunder in the Streets
Mascot Pictures	Victor Jory	Stream Line Express
"	Arthur Hohl	One Frightened Night
Principal Pictures	Douglas Dumbrille	Calling of Dan Matthews
20th Century Pictures	Robert Allen	Buccaneer
"	Thurston Hall	Metropolitan
"	Raymond Walburn	Thanks A Million
"	Arthur Hohl	It Had To Happen
"	Douglas Dumbrille	Richelieu
Universal Pictures	Jean Arthur	Diamond Jim Brady

[fol. 3349]

	1936	
Central Films	Henry Mollison	Secret Patrol
"	Charles Starrett	Gun Smoke & Secret Patrol
Larry Darmour	Martha Tibbetts	Ranger Courage
"	"	Phantom Fighter
"	Robert Allen	Law of the Ranger
"	"	Phantom Fighter
"	"	Ranger Courage
"	"	Rio Grande Ranger
Principal Productions	Ralph Bellamy	The Recreation of Brian Kent
Richard A. Rowland Prods.	Charles Starrett	Love & Laughter
Hal Roach Studios, Inc.	Raymond Walburn	Mr. Cinderella
Selznick International	Lionel Stander	A Star is Born
Universal Pictures Co.	Thurston Hall	We've Had Our Moments
"	Raymond Walburn	I Hate Horses
"	Jean Dixon	My Man Godfrey

1936

Company	Player	Picture
Walter Wanger Productions	Lloyd Nolan	Big Brown Eyes

1937

Samuel Goldwyn, Inc., Ltd.	Mary Astor	Stella Dallas
"	Leona Maricle	Woman's Touch
"	Thomas Mitchell	Hurricane
Harold Lloyd	Raymond Walburn	Professor Beware
Republic Pictures	Patricia Farr	The Lady Misbehaves
Selznick International Pictures	Nana Bryant	Tom Sawyer
"	Walter Connolly	Is Nothing Sacred
"	Victor Kilian	Tom Sawyer
"	Lionel Stander	Let Me Live
Harry Sherman Productions	Jean Parker	The Barrier
Universal Pictures Co.	Thurston Hall	Oh, Doctor
Samuel Goldwyn Productions	Jane Hamilton	Goldwyn Follies
Central Films, Ltd.	John Gallaudet	Murder is News
"	"	Manhattan Whirlwind
"	Rita Hayworth	Devil in Ermine
"	"	Face Work
"	Bill Irving	"
"	"	Devil in Ermine

[fol. 3350]

Central Films, Ltd.	Rosalind Keith	Manhattan Whirlwind
"	Eddie Laughton	Face Work
"	"	Devil in Ermine
"	Marc Lawrence	Face Work
"	George McKay	Devil in Ermine
"	"	Face Work
"	"	Murder Is News
"	"	Manhattan Whirlwind
"	Iris Meredith	Murder Is News
"	Charles Quigley	Face Work
"	"	Devil in Ermine
"	Frank C. Wilson	Murder Is News
Larry Darmour	Robert Allen	Ranger Feud
"	"	Ghost Ranger
"	Rosalind Keith	Murderers Welcome

1938

Adventure Serials	Don Terry	Secrets of Treasure Island
Larry Darmour	Jacqueline Wells	Flight to Nowhere
Harold Lloyd	Thurston Hall	Professor Beware
Principal Prods., Inc.	Dick Curtis	Rawhide
"	Arthur Loft	Rawhide
Universal Pictures Co., Inc.	Ralph Belamy	The Crime of Dr. Hallick

1939

Larry Darmour	Godron Elliott	The First Ranger
Irving Starr Productions	Edith Fellowes	Passport to Happiness
"	Rita Hayworth	"

1940

David L. Loew-Albert Lewin, Inc.	Glenn Ford	So Ends Our Night
Frank Lloyd Pictures, Inc.	Cary Grant	Howards of Virginia

[fol. 3351]

In the following instances, artists other than players were loaned by Columbia to *independent* producers since 1933 for the pictures indicated:

Company	Artist	Picture
	1933	
Meteor Pictures	Ross Lederman (Dir.)	Whirlwind
"	"	Rusty Rides Alone
Chas. R. Rogers Talking Pictures	Albert Rogel (Dir.)	
	1934	
Universal Pictures	Edward Buzzell (Dir.)	Transient Lady
	1936	
Central Films	Del Lord (Dir.)	Why Let 'Em Live
"	David Selman (Dir.)	Secret Patrol
	1937	
Central Films, Ltd.	Leon Barsha (Dir.)	Face Work
"	"	Devil in Ermine
"	"	Murder Is News
"	"	Manhattan Whirlwind
	1938	
Bobby Breen Productions	Fred Niblo, Jr. (Writer)	Story: Fisherman's Wharf
Samuel Goldwyn, Inc., Ltd.	Paul Jarrico (Writer)	Story: Duchess of Broadway
	1939	
Edward Small Productions	Charles Vidor (Director)	My Son My Son
Universal Pictures	John Brahm (Director)	Rio
Frank Lloyd Productions, Inc.	Sidney Buchman (Writer)	Howards of Virginia
Edward Small Productions	Lewis Meltzer (Writer)	The Legend of Sleepy Hollow

[fol. 3352]

In the following instances, players were borrowed by Columbia from *defendant* major producers since 1933 for the pictures indicated:

Company	Player	Picture
	1933	
Fox Film Corp.	Victor Jory	My Woman
"	Spencer Tracy	Man's Castle
"	Miriam Jordan	Let's Fall in Love
Metro-Goldwyn-Mayer Corp.	Mary Carlisle	East of Fifth Avenue
"	May Robson	Lady for a Day
"	Jean Parker	"
"	Mary Carlisle	Once to Every Woman
"	Clark Gable	It Happened One Night
Paramount Productions	Randolph Scott	Cocktail Hour
"	Carole Lombard	Brief Moment
"	Helen Twelvetrees	Goin' to Town
"	Roscoe Karns	It Happened One Night
RKO Studios	Bruce Cabot	Criminal Within (Shadows of Sing Sing)
"	Betty Furness	Let's Fall in Love
"	William Gargan	Line-Up

Company	Player	Picture
Warners Bros. Pictures	Claire Dodd	Rules for Wives (Ann Carver's Profession)
"	"	My Woman
"	Guy Kibbee	Apple Annie (Lady for a Day)
"	Warren William	"
"	Glenda Farrell	"
"	Arthur Kohl	Man's Castle
"	Glenda Farrell	"
	1934	
Fox Film Corp.	Norman Foster	Evidence (Behind the Evidence)
"	Mona Barrie	One Night of Love
"	"	I'll Fix It
Metro-Goldwyn-Mayer Corp.	Irene Hervey	White Lies
"	May Robson	Mills of the Gods
"	James Durante	Carnival
"	Nat Pendleton	Defense Rests
"	May Robson	Orchids & Onions (Lady by Choice)
"	Myrna Loy	Broadway Bill
"	Douglas Dumbrille	"

[fol. 3353]

	1934	
Paramount Pictures	Roscoe Karns	Twentieth Century
"	Allison Skipworth	The Captain Hates the Sea
"	Gail Patrick	Murder in the Studio (Crime of Helen Stanley)
RKO Studios	Wynne Gibson	The Captain Hates the Sea
Metro-Goldwyn-Mayer Corp.	Robert Young	Whom the Gods Destroy
"	Stuart Erwin	The Party's Over
Warner Bros. Pictures	Allen Jenkins	Whirlpool
"	Lyle Talbot	One Night of Love
	1935	
Metro-Goldwyn-Mayer Corp.	Louis Hayward	Feather in Her Hat
"	Shirley Ross	Devil's Squadron
"	Bruce Cabot	Mad Money (Don't Gamble with Love)
"	William Tannen	Rich Man's Daughter (She Couldn't Take It)
"	Leo Carrillo	Wings of Song (Love Me Forever)
"	Mary Carlisle	Super Speed
Paramount Productions	Wendy Barrie	Feather in Her Hat
"	Gail Patrick	The Lone Wolf (The Lone Wolf Returns)
"	Herbert Marshall	If You Could Only Cook
"	Kathleen Burke	Jim Burke's Boy (Awakening of Jim Burke)
"	Katherine DeMille	The Black Room Mystery
RKO Studios	John Arledge	Panic on the Air
20th Century-Fox Film Corp.	William Stelling	Devil's Squadron
"	Rochelle Hudson	Rolling Along (The Music Goes Round)
"	Jack Haley	Girl Friend
Warner Bros. Pictures	Helen Lowell	Party Wire

[fol. 3354]

1936

Company	Player	Picture
Metro-Goldwyn-Mayer Film Corp.	Virginia Bruce	Lady of Glamour (Women of Glamour)
"	Rosalind Russell	Craig's Wife
"	Billie Burke	"
"	Louise Henry	Road to Nowhere (End of the Trail)
"	Nat Pendleton	Trapped by Television
"	Chester Morris	Queer Money (Counterfeit)
"	Bruce Cabot	Hooded Legion (Legion of Terror)
"	Reginald Owen	Adventure in Manhattan
"	Franchot Tone	Cissy (The King Steps Out)
"	May Robson	Grand Old Woman (Woman in Distress)
Paramount Pictures	Cary Grant	Interlude (When You're in Love)
"	Ida Lupino	Weather or No (Let's Get Married)
Paramount Productions	John Howard	Lost Horizon
"	Benny Baker	Five Spot (Panic on the Air)
RKO Radio Pictures	Margot Grahame	Queer Money (Counterfeit)
20th Century-Fox Film Corp.	Jane Darwell	Craig's Wife
Warner Bros. Pictures	George Brent	More Than a Secretary

1937

Metro-Goldwyn-Mayer Corp.	Betty Furness	With Kind Regards (It Can't Last Forever)
Paramount Pictures, Inc.	Cecil Cunningham	The Awful Truth
"	John Howard	Criminal Code (Penitentiary)
20th Century-Fox Film Corp.	Helen Westley	I Married an Artist
"	"	I'll Take Romance
Warner Bros. Pictures	Joan Blondell	There's Always a Woman
"	Patricia Ellis	Venus Makes Trouble

[fol. 3355]

1938

Loew's, Inc.	Lionel Barrymore	You Can't Take It With You
"	John Beal	Edw. G. Robinson pict. (I Am the Law)
"	James Stewart	You Can't Take It With You
RKO Radio Pictures Inc.	Ann Miller	You Can't Take It With You
"	Anne Shirley	Romantic Age (Girl's School)
"	Katherine Hepburn	Holiday
20th Century-Fox Film Corp.	Gloria Stuart	Lady Lawyer (The Lady Objects)
Loew's Inc.	Virginia Bruce	There's That Woman Again
"	Virginia Weidler	Lone Wolf Spy Hunt
Warner Bros.	Margaret Lindsay	There's That Woman Again

1939

Loew's Inc.	Maureen O'Sullivan	Let Us Live
"	Virginia Weidler	Outside These Walls
"	Guy Kibbee	Mr. Smith Goes to Washington
"	James Stewart	"
"	Allan Curtis	Good Girls Go to Paris

1939

Company	Player	Picture
20th-Century-Fox	John Russell	Mr. Smith Goes to Washington
Loew's Inc.	Rosalind Russell	His Girl Friday
Paramount	Fred MacMurray	Too Many Husbands

1940

Paramount	Ray Milland	Doctor Takes a Wife
Warner Bros.	John Litel	Men Without Souls
Loew's Inc.	Florence Rice	The Secret Seven
"	Rosalind Russell	This Thing Called Love

1941

Paramount	Martha O' Driscoll	Her First Beau
"	Jackie Cooper	"
Warner Bros.	George Brent	They Dare Not Love
20th Century-Fox	Jane Withers	Her First Beau

[fol. 3356]

In the following instances, artists other than players were borrowed by Columbia from *defendant* major producers since 1933 for the pictures indicated:

1933

Company	Artist	Picture
Paramount Productions	Seton I. Miller (Writer)	Man of Steel
RKO Studios	Sidney Buchman (Writer)	

1934

RKO Studios	Sidney Buchman (Writer)	

1935

Paramount Productions	Alfred Santel (Director)	Feather in Her Hat
"	Ted Tetzlaff (Cameraman)	Ruth Chatterton (Lady of Secrets)
Warner Bros. Pictures	Elmer Dyer (Cameraman)	Lost Horizon

1936

Metro-Goldwyn-Mayer Corp.	Richard Boleslawski (Director)	Theodora Goes Wild
RKO Radio Pictures	Peverell Marley (Cameraman)	Women of Glamour
20th Century-Fox Film Corp.	Harry Sauber (Writer)	
Warner Bros. Pictures	Mary McCall (Writer)	Craig's Wife

1937

Metro-Goldwyn-Mayer Corp.	George Oppenheimer (Writer)	I'll Take Romance
"	Wilhelm Von Wymetal, Jr. (Stage Dir.)	"
RKO Radio Pictures	Joel Sayre (Writer)	
20th Century-Fox Film Corp.	Luciene Andriot (Cameraman)	I'll Take Romance

[fol. 3357]

1938

Company	Artist	Picture
RKO Radio Pictures, Inc.	Phil Epstein (Writer)	Detective Story
"	Anthony Veiller (Writer)	Murder in Massachusetts
Paramount	Ken Englund (Writer)	There's That Woman Again
20th Century-Fox	Sheridan Gibney (Writer)	Our Wife

1939

Loew's Inc.	Richard Rooson (Director)	Only Angels Have Wings
"	Jules Furthman (Writer)	" "
Paramount	Ken Englund (Writer)	His Girl Friday
"	Claude Binyon (Writer)	
"	Victor Young (Musical Director)	Golden Boy
RKO Pictures, Inc.	Nick Musuraca (Cameraman)	Golden Boy
20th Century-Fox	Karl Freund (Cameraman)	Golden Boy
Warner Bros.	Arthur Todd (Cameraman)	Incredible Mr. Williams
Paramount	Robert Carson (Writer)	Singapore

1940

Paramount	Frederick Hollander (Musical Composer)	Too Many Husbands
Warner Bros.	Sid Hickox (Cameraman)	The Doctor Takes a Wife
Warner Bros.	Arthur Todd (Cameraman)	Incredible Mr. Williams
Warner Bros.	Earl Badlwin (Writer)	He's My Uncle

1941

Paramount	LeRoy Prins (Dance Director)	Time Out for Rhythm
Paramount	Theodore Reed (Director)	Her First Beau
20th Century-Fox	Ethel Hill (Writer)	Angel Cake

[fol. 3358]

In the following instances, players were borrowed by Columbia from *independent* producers since 1933 for the pictures indicated:

1933

Company	Player	Picture
Reliance Pictures	Marjorie Rambeau	Man's Castle

1934

Hal Roach Studios	Scott Becket	Whom the Gods Destroy
"	Patsy Kelly	The Party's Over
20th Century Pictures	Arline Judge	The Party's Over
"	Paul Kelly	Blind Date
Universal Pictures	Roger Pryor	Orchids & Onions (Lady by Choice)

	1935	
Samuel Goldwyn	Billie Burke	Rich Man's Daughter (She Couldn't Take It)
"	"	Feather in Her Hat
"	David Niven	"
Reliance Productions	Gordon Jones	Devil's Squadron
Universal Pictures	Billy Burrud	Devil's Squadron
"	Henry Mollison	The Lone Wolf (Lone Wolf Returns)
"	Henry Armetta	Unknown Woman
Walter Wanger Productions	Peggy Conklin	One Way Ticket
	1936	
Larry Darmour	Jack Holt	Outlaws of Paloose (End of the Trail)
B. P. Schulberg Productions	Edward Arnold	Fer-de-Lance (Meet Nero Wolfe)
Samuel Goldwyn	Joel McCrea	Purple & Fine Linen (Adventure in Manhattan)
Universal Productions	Gerald Smith	When You're in Love
"	Dorothea Kent	Safari in Paradise (More Than a Secretary)
"	Billy Burrud	U. S. Smith (Pride of the Marines)

[fol. 3359]

	1937	
Company	Player	Picture
Universal Pictures Co.	Mischa Auer	It's All Yours
Walter Wanger Prods.	Madeleine Carroll	Thanks for Nothing (It's All Yours)
	1938	
Samuel Goldwyn, Inc., Ltd.	Jerome Cowan	There's Always a Woman
B. P. Schulberg Prod., Inc.	Edward Arnold	You Can't Take It With You
Selznick International Pict.	Margaret Tallichet	Romantic Age (Girls' School)
Universal Pictures Co.	Mischa Auer	You Can't Take It With You
Universal Pictures Co.	Nan Grey	Romantic Age (Girls' School)
Universal Pictures Co.	Samuel S. Hinds	You Can't Take It With You
	1939	
Samuel Goldwyn Inc. Ltd.	Thomas Mitchell	Only Angels Have Wings
B. P. Schulberg Prod. Inc.	Edward Arnold	Mr. Smith Goes to Washington
Pacific Prod. Inc.	Cliff Edwards	His Girl Friday
	1940	
Howard Hughes Prod.	Ruth Terry	Blondie Goes Latin
Selznick International Pictures Inc.	Allan Marshall	He Stayed for Breakfast
	1941	
Hal Roach Studios Inc.	John Hubbard	She Knew All The Answers
Universal Pictures Co. Inc.	Samuel S. Hinds	Senate Page Boys

[fol. 3360]

In the following instances, artists other than players were borrowed by Columbia from *independent* producers since 1933 for the pictures indicated:

Company	Artist	Picture
	1935	
B. P. Schulberg Productions	Leon Shamroy (Cameraman)	She Married Her Boss
	1936	
Pioneer Pictures, Inc.	James Van Trees (Cameraman)	They Met in a Taxi
Selznick International	Max Steiner (Music Dir.)	The Man Who Lived Twice Lost Horison
United Artists Studio Corp.	Alfred Newman (Music Conductor)	When You're in Love
	1937	
Samuel Goldwyn Inc., Ltd.	Joe Bigelow (Writer)	Easy Sailing
United Artists Studio Corp.	Alfred Newman (Music Conductor)	Interlude (When You're in Love)
Universal Pictures Co.	Merritt Gerstad (Cameraman) Warrier Cruse (2nd Cameraman) Michael Walsh (Ass't Cameraman)	I Married An Artist
	1938	
Selznick International Pict.	George Cukor (Director)	Holiday
	1939	
Walter Wanger Prod. Inc.	Ken Englund (Writer)	Doctor Takes a Wife and This Thing Called Love
	1940	
Selznick International Pictures Inc.	Albert Simpson (Special Effects Cameraman)	Arizona

[fol. 3361] This borrowing and loaning is necessary to enable an independent producer, such as Columbia, to survive. It is necessary to have a certain collaboration between the star, the director, the story and the cameraman. The production of motion pictures is not an ordinary commercial business. Fundamentally the stringent requirements of an art must be met by producers in order to create works that please and entertain the public of the world. Producers must blend the component elements—the story, the artist, the director, the technician—and produce a work to which each element has made its important contribution, and which in the final result carries a universal appeal.

There always has been and still is the greatest competition between motion picture producers for stories, stars, directors and technicians.

In recent years, the motion picture companies have had to compete not only among themselves, but also with radio broadcasting stations, in securing talent. The salaries paid by the radio broadcasting industry have been so attractive to the artists, that the motion picture companies have had to increase the salaries paid by them. During 1937, the radio industry spent approximately $45,000,000 for artists. In fact, the motion picture companies, including Columbia, have been compelled to make their pictures more attractive because of the competition of radio. In many cases, the motion picture companies, including Columbia, have been compelled to negotiate with artists bureaus operated by owners of radio broadcasting stations in securing the services of artists in the production of motion pictures. In such negotiations, Columbia has always acted independently of any other motion picture producers. Columbia has always tried to obtain the best talent for its pictures within [fol. 3362] the limits of its means. The cost of story material has greatly increased over the years, and within recent years it is not uncommon for a producer to pay from $50,000 to $200,000 for a successful Broadway play for picture purposes. Columbia paid $200,000 for the picture rights to "You Can't Take It With You," which was recently released. Other companies have paid similar sums for literary properties.

In acquiring these properties each company is in keen competition with all the other companies, and the motion picture rights to such stories are acquired by the highest bidder. The market is open to anyone who chooses to pay

the price demanded, and the motion picture producers bid against each other for successful plays.

Successful novels command high prices for motion picture reproduction. Having acquired a successful work, such as a play or novel, the producers' problem does not end there. He is required to cast his picture with artists who can suitably portray the characters of the work. That is one of the most difficult problems in production. Columbia has but a limited number of artists on its payroll under contract to it. All other producing companies, including the defendant producers, likewise have a limited number of artists on their payroll. No producing company that ever existed could afford to carry on its payroll the vast number of artists from whose ranks could be drawn the particular stars to appear in the works which these producing companies acquire from time to time.

Columbia on the occasions that it has borrowed artists from other producing companies has been compelled to do so because it did not have in its employ the artists who were suitable for the particular production in mind.

[fol. 3363] In 1933, Columbia produced "It Happened One Night." The story was definitely suited to the talents of Clark Gable and Claudette Colbert, neither of whom was under contract with Columbia, which, however, had no artists in its employ suitable for the parts. It was compelled to go to Metro-Goldwyn-Mayer Company, the employer of Clark Gable, and arrange with that company for his services. Claudette Colbert was then under contract with Paramount, but that contract was about to expire. Columbia finally succeeded in obtaining her services by direct contract with her for a single picture. These two artists made a brilliant success in roles for which they were naturally suited.

For "Mr. Deeds Goes To Town," which was produced in 1936 by Columbia, this defendant borrowed from Paramount Pictures Corporation Gary Cooper, because it had no artist in its own employ who could even remotely fit the leading role of the picture.

The cases above cited are merely illustrative of the many situations that constantly exist.

The same applies with respect to directors. Certain story material can be handled by one director and not by another. Some directors are expert in comedies, some in romances, others in more serious pictures. Columbia cannot afford to

have in its employ a sufficient number of outstanding directors with enough versatility to direct every kind of story required by the corporation. Consequently, from time to time Columbia has been compelled to borrow capable directors from other companies in order to insure success.

Another element that very frequently motivates Columbia's engagement of a particular director is the fact that such director is best fitted to direct a particular star. A great many stars prefer to work for their own director who [fol. 3364] is capable of bringing out to the best advantage their talents and abilities, and when such stars are borrowed by Columbia Pictures Corporation it has frequently had to borrow the director to go with the star in order to have harmonious and economical production.

The same holds true with cameramen. These highly trained technicians occupy an important position in the industry, and many directors and stars will only work with a particular cameraman, because the latter has the requisite skill to produce the best lighting effects and to accentuate the best features of the star.

In no case has Columbia ever borrowed a star, director or technician from another producer unless it actually needed the services of such star, director or technician and had none in its own employ who could at the moment substitute for him. Columbia has always found it very difficult to borrow a star, director or technician; on occasions Columbia's requests were refused outright and on occasions it was compelled to pay a very substantial bonus to acquire the services of the individual. When it borrowed Katharine Hepburn from RKO Corporation for the picture "Holiday" it was compelled to pay a consideration of $50,000 over and above the amount that it was required to pay the artist under the contract between them. Columbia is not and never has been a party to any pool for the purpose of exchanging its directors, artists or technicians in the industry.

Columbia has never loaned any of its artists, directors or technicians to any other producer, except where there was an urgent demand on the part of such producer for the particular artist, director or technician.

[fol. 3365] In borrowing or loaning such artist, director or technician it is immaterial to Columbia whether the borrower or lender is a major producer or not. Columbia has never made any distinction between producers in this respect.

The number of artists borrowed by Columbia from the major producers is insignificant compared with the number of such artists which such producers have under contract. Upon information and belief, the major producers had under contract at the date of the commencement of this suit, the following number of actors and actresses (this does not include directors, producers, cameramen or other technicians):

Metro-Goldwyn-Mayer Corporation	95
Warner Bros.	60
Paramount	59
Twentieth-Century Fox	93
R.K.O. Radio	39
Total	346

During previous years, the major producers had under contract a similar number of actors.

At the commencement of this suit Columbia had under contract only six stars and eight feature players.

During 1937, Columbia borrowed from these companies in the aggregate only six players, and borrowed ten during 1938, eight in 1939, and four in 1940. In previous years, Columbia borrowed a larger number of actors from the major producers, but the number of instances in which Columbia has been able to borrow such actors from the major producers has declined in recent years.

There are many occasions when Columbia has attempted to borrow players from other producers but has been un- [fol. 3366] able to do so for the following reasons: In some instances, the player or the producer did not like the role for which the player was desired. In other instances, the player or the producer did not like other features of the proposed production, for example, the director, the script, the leading man or woman. In some cases, the proposed assignment conflicted with a similar part which the producer having the player under contract planned for such player in one of its own productions, in many cases, the player was not available at the time or for the period desired. Oftentimes the player was of such importance that a loan-out would not be considered except if in exchange it could borrow a player of equal importance or box-office value.

For the Grace Moore picture "I'll take Romance," Columbia tried to borrow James Stewart, Robert Taylor or Franchot Tone from Metro-Goldwyn-Mayer, but none of them was available. An effort was made to borrow Fred MacMurray from Paramount, but he was likewise unavailable.

For the Grace Moore picture, "When You're In Love," Columbia tried to borrow Fred MacMurray, James Stewart or Franchot Tone for the leading male part, but again was unable to do so. It finally succeeded in borrowing Cary Grant from Paramount but only upon committing itself to lend to Paramount one of its stars, Jean Arthur.

For its picture "More Than A Secretary," Columbia tried to borrow a leading man from virtually every one of the producers, and with great difficulty finally succeeded in getting George Brent from Warner Bros., upon giving them a commitment to loan Jean Arthur to them.

For its picture, "Holiday," Columbia unsuccessfully tried to borrow Barbara Stanwyck from the R.K.O. Radio and 20th Century-Fox.

[fol. 3367] In order to borrow Joel McCrea from Samuel Goldwyn, Inc., Columbia was compelled to agree to lend to Goldwyn three of its contract players.

For its pictures "It's All Yours" and "There's Always A Woman," Columbia attempted to borrow Loretta Young of 20th Century-Fox. In one case, she was not available; in the other, she refused the assignment because she did not like the leading man or director.

Columbia tried to borrow Alice Faye from 20th Century-Fox for a proposed picture entitled "Grand Gesture." She was not available, and Columbia has been unable to engage or borrow a suitable star for this picture, and it has been obliged to defer the production of this picture.

For its picture "It's All Yours," Columbia endeavored to borrow Don Ameche or Tyrone Power from 20th Century-Fox without success. For the same picture it attempted to borrow Franchot Tone or Robert Young from Metro-Mayer and also Ray Milland from Paramount, all without success.

On a number of occasions Columbia has tried to borrow Frances Dee from Paramount, but she has never been available.

Columbia has tried unsuccessfully to borrow the following artists for the following pictures:

For "Frankie":

George Raft—from Paramount
Robert Young—from Metro-Goldwyn-Mayer
Franchot Tone—from Metro-Goldwyn-Mayer

For "There's That Woman Again":

Maureen O'Sullivan—from Metro-Goldwyn-Mayer
Margaret Sullavan—from Metro-Goldwyn-Mayer
Joan Blondell—from Warner Bros.

[fol. 3368] For "Start Cheering":

Allan Jones or Robert Young—from Metro-Goldwyn-Mayer
Dick Powell—from Warner Bros.
Jack Haley or Tony Martin—from 20th Century-Fox

For "Golden Boy":

Tyrone Power—from 20th Century-Fox
John Garfield—from Warner Bros.

For "Blondie":

Nan Grey—from Universal

For "Mr. Smith Goes to Washington":

Lionel Barrymore—from Metro-Goldwyn-Mayer
Frank Morgan—from Metro-Goldwyn-Mayer
Lewis Stone—from Metro-Goldwyn-Mayer
Gary Cooper—from Samuel Goldwyn, Inc.

On many occasions, Columbia attempted to borrow Robert Montgomery from Metro-Goldwyn-Mayer, but without success.

The attempted borrowing of directors and writers by Columbia has been attended with the same difficulties.

In the following additional instances Columbia attempted to borrow artists from other producers, and was for one reason or another unsuccessful:

For "The Lady Objects":

Maureen O'Sullivan—from Metro-Goldwyn-Mayer
Margaret Lindsay—from Warner Brothers

Gail Patrick—from Paramount
Frances Farmer—from Paramount

[fol. 3369] For "Girls' School":

Helen Parrish—from Universal
Marjorie Weaver—from 20th Century-Fox
Arleen Whelan—from 20th Century-Fox
Gail Patrick—from Paramount
Andrea Leeds—from Samuel Goldwyn

For "You Can't Take It With You":

Gregory Ratoff—from 20th Century-Fox
Akim Tamiroff—from Paramount
Olivia de Haviland—from Warner Brothers
Frances Dee—from Paramount

For "I Am The Law":

John Barrymore—from Paramount

For "There's Always A Woman":

Lloyd Nolan—from Paramount

For "Holiday":

Robert Benchley—from Metro-Goldwyn-Mayer
Virginia Bruce—from Metro-Goldwyn-Mayer

For "It's All Yours":

Robert Montgomery—from Metro-Goldyn-Mayer

For "Broadway Bill":

Guy Kibbee—from Warner Brothers

For "Her First Beau":

Judy Garland—from Metro-Goldwyn-Mayer—refused
Betty Field—from Paramount—unavailable

[fol. 3370] For "They Dare Not Love":

Robert Young—from Metro-Goldwyn-Mayer—unavailable

For "The Lady In Question":

Hedy LaMarr—from Metro-Goldwyn-Mayer—refused
Frank Morgan—from Metro-Goldwyn-Mayer—unavailable
Wallace Beery—from Metro-Goldwyn-Mayer—refused
Paulette Goddard, from Paramount—unavailable

For "Bedtime Story":

Rosalind Russell—from Metro-Goldwyn-Mayer—artist refused to play part
Fred MacMurray—from Paramount—refused

For "Singapore":

Dorothy Lamour—from Paramount—unavailable

For "First Woman Doctor":

Betty Davis—from Warner Brothers—refused

For "A Doctor's Husband":

Madeleine Carrol—from Paramount—refused

For "Under Age":

Brenda Joyce—from 20th Century-Fox—unavailable for this picture.
Ronald Regan—from 20th Century-Fox—unavailable for this picture

[fol. 3371] For "The Big Boss":

Dean Jagger—from 20th Century-Fox—unavailable for this picture.

For "Betty Co-Ed":

Regis Toomey—from Warner Brothers—unavailable

While Columbia has been willing to cooperate with other producers in loaning to them its players, directors and writers, it has on several occasions been unable to grant the request of such other producers.

Universal desired to borrow Jean Arthur from Columbia for "Letter of Introduction." She was unavailable at the time, as there was some legal difficulty with her which pre-

vented Columbia from using her services or lending her to any one else.

20th Century-Fox desired to borrow Ralph Bellamy for a picture from Columbia, but upon reading the script Bellamy declined to play the part.

Metro-Goldwyn wanted to borrow Ralph Bellamy for "They Gave Him A Gun." Columbia did not like the part and declined to make the loan-out.

Selznick-International desired to borrow Dolly Haas for "The Last Gangster," but since they insisted upon obtaining options for additional pictures with Miss Haas, Columbia refused to loan the artist, and the parties were unable to consummate a deal.

Paramount desired to borrow Rita Hayworth for "Hold Back The Dawn" and R.K.O. desired to borrow Glenn Ford. Columbia declined to make these loan-outs.

[fol. 3372] Columbia has only a limited number of stars, featured players, stock players, directors, technicians and others who have gained fame, prestige, renown, artistic, technical or other great value in the industry and particularly in the production branch thereof.

The following is a complete list of the stars, feature players, stock players, and other employees under contract with Columbia for the production of its pictures at the time of the commencement of this action.

Stars [6]

Jean Arthur	Irene Dunne
Charley Chase	Cary Grant
Marlene Dietrich	Edw. G. Robinson

Featured Players [8]

Ralph Bellamy	Edith Fellows
Andy Clyde	Charles Starrett
Walter Connolly	Three Stooges
Melvyn Douglas	Sons of the Pioneers

Stock Players [19]

Beatrice Blinn	Dick Curtis
Gloria Blondell	Ann Doran
Stanley Brown	Gordon Elliott
Beatrice Curtis	Richard Fiske

Rita Hayworth
Lola Jensen
Eddie Laughton
Marc Lawrence
Iris Meredith
Robert Paige
Joan Perry
John Tyrrell
Francis Walker
Jacqueline Wells
Jay Wilsey

[fol. 3373]

Directors [9]

John Brahm
Frank Capra
Charles C. Coleman, Jr.
Alexander Hall
D. Ross Lederman
Del Lord
Rouben Mamoulian
Sam Nelson
Frank Strayer

Producers [11]

Irving Briskin
Charles Chase
Fred Kohlmar
Wallace MacDonald
Hugh McCollum
William Perlberg
Everett Riskin
E. Lloyd Sheldon
Joseph Sistrom
Robert Sparks
Jules White

Writers [17]

Sidney Buchman
Al Duffy
Paul Jarrico
Gladys Lehman
Fred Niblo, Jr.
Michael L. Simmons
Jonathan Latimer
Robert E. Kent
Arthur Horman
James Edw. Grant
Richard Flournoy
Charles Condon
Bennett Cohen
Harold Buchman &
Maurice Rapf
Walter Wise
Charles Francis Royal

Technicians [23]

Cameraman
"
"
"
"
"
"
"
Lucien Ballard
Henry Freulich
Irving Lippman
Franz Planer
Adolph Schafer
Allen Siegler
Robert Tobey
Joseph Walker

[fol. 3374]

Art Director	Lionel Banks
Asst. Director	Arthur Black
" "	Clifford Broughton
Construction Superintendent	Samuel Harwick
Hairdresser	Helen Hunt
Medical Director	Dr. Immerman
Set Dresser	Mrs. Babs Johnstone
Fashion Designer	Robert Kalloch
Sound Engineer	John Livadary
Casting Director	W. D. Mayo
Music Composer	Ben Oakland
Gaffer	Homer Plannette
"	James Punter
Musical Director	Morris Stoloff
Title Artist	Edward Withers

All these individuals had been placed under contract by Columbia independently of any other motion picture companies and in actual competition with such other companies for their services.

Many of the employees of Columbia have been under contract to it for many years, and there has been no radical increase in the number of contract employes within recent years. Such increases as have been made, have been entirely commensurate with the growth of the business of Columbia. In engaging its personnel, Columbia has acted independently of and not in concert with any of the other defendants, directly or indirectly.

The stars, featured players and other artists and employees of Columbia were not all employed under exclusive contracts. Many of them insisted upon and retained the right to make pictures for other producers of their own choosing during the same period of time that they were under contract to make pictures for Columbia. Among [fol. 3375] such artists and employees have been Irene Dunne, Cary Grant and Edward G. Robinson.

The tendency on the part of artists, technicians and other employees to refuse to agree to devote their time exclusively to Columbia during the periods of their respective contracts, has made it necessary for Columbia to engage a greater number of such employees than it had in the past.

The following artists had the privilege of making pictures for other companies while under contract to Columbia. These artists were employed by the independent producers listed during the term of their contract with Columbia.

Artist	*Year*	*Producer*
Mary Astor	1936-37	Selznick International
Andy Clyde	1937	Harry Sherman Productions, Universal
George Bancroft	1936	B. P. Schulberg Productions
Fay Wray	1933-34	Twentieth Century, Universal
Brian Aherne	1940	General Film Co.
Jean Arthur	1940	Frank Ross-Norman Krasna, Inc.
Joan Bennett	1940	Edward Small
Virginia Bruce	1940	Universal Pictures, Inc.
Andy Clyde	1940	Roland Reed Productions Este Productions
Rochelle Hudson	1939	Republic Pictures
Boris Karloff	1940	Universal Pictures, Inc. Monogram Pictures
Pete Lorre	1940	Republic Pictures
Dub Taylor	1940	Republic Pictures
Loretta Young	1941	Frank Lloyd Productions

[fol. 3376] Columbia has always acted as an independent producer in engaging its personnel and in so doing has acted in competition with the producers, including the other defendants herein, as well as other independent producers who are not defendants herein. For example, since 1933 the following players, directors, writers and technicians have been employed both by Columbia and independent producers, not parties to this suit:

Players

Ralph Bellamy	Joan Bennett
Leo Carrillo	Gregory Ratoff
Melvyn Douglas	Gail Patrick
Mary Astor	Lionel Atwill
Victor MacLaglen	Binnie Barnes
Tullio Carminati	Chester Morris

Players (Continued)

Constance Cummings
Margo
Irene Hervey
Wendy Barrie
Henry Stephenson
Edith Fellows
Berton Churchill
Nana Bryant
Sheila Bromley
Charles Starrett
Arline Judge
Conrad Nagel
Robert Barrat
Henry C. Gordon
Herman Bing
Robert Strange
Warren William
John Galludet
Jessie Ralph
Lillian Bond

Nancy Carroll
Lorna Gray
Joseph Schildkraut
Victor Kilian
Katherine Doucet
Tala Birell
Penny Singleton
Herbert Marshall
Douglas Montgomery
Cary Grant
Alma Kruger
Mary Brian
Basil Rathbone
Lloyd Nolan
Geneva Mitchell
Louise Stanley
Dolores Del Rio
June Collyer
Dorothy Burgess
Judith Allen

[fol. 3377]

Inez Courtney
Sally O'Neil
Ann Doran
Marc Lawrence
Jimmy Durante
Aline MacMahon
Stuart Erwin
Henry Kolker
Peter Lorre
Lew Ayres
Jackie Moran
Donald Meek
Robert Middlemass
Harry Langdon
Arthur Hohl
Claude Gillingwater
Joyce Compton
Irving Pichel
Jacqueline Wells
Charles Buddy Rogers

Ruth Donnelly
Evelyn Knapp
Paul Kelly
George Bancroft
Charles Farrell
Victor Jory
Otto Kruger
Marian Shilling
James Blakeley
Dick Curtis
Donald Cook
Robert Armstrong
Arthur Loft
Jimmy Butler
Evelyn Venable
Marjorie Gateson
Andy Clyde
John Buckler
Polly Moran
Roger Pryor

Players (Continued)

Dorothy Tree	Peggy Stratford
Edward Everett Horton	Michael Bartlett
Eddie Nugent	Patsy O'Conner
Rochelle Hudson	Martha Tibbetts
Barbara Weeks	Robert Fiske
Eddie Fetherstone	Henry Mollison
Raymond Walburn	Rosalind Keith
David Carlyle	Arthur Lake
(Robert Paige)	James Dunn
Marion Weldon	Neil Hamilton
Ian Keith	Lyle Talbot
Ralph Remley	Walter Connolly
Mary Russell	Fay Wray
Wallace Ford	Boris Karloff
William Gargan	Helen Vinson
H. B. Warner	Robert Allen
Alexander D'Arcy	Marian Marsh
Shirley Grey	Jean Dixon
Reginald Denny	Richard Cromwell

[fol. 3378] Players (Continued)

Bud Jamison	Joseph Calleia
Gloria Shea	Mary Carlisle
Joan Perry	Melville Cooper
Charles Sabin	Frances Dee
Dorothy Wilson	Ruth Donnelly
Fred Keating	Johnny Downs
Sally Eilers	Nan Grey
Paul Hurst	Rochelle Hudson
Rita Hayworth	Warren Hull
Lionel Stander	Frieda Inescort
Patricia Farr	Isabel Jewell
Henrietta Crosman	Boris Karloff
Sally Blane	Otto Kruger
Karen Morley	Doris Weston
Walter Abel	Loretta Young
Jean Arthur	Constance Bennett
Joan Bennett	Bruce Cabot
Alan Baxter	Thurston Hall
Charles Bickford	Ann Sothern
Eric Blore	Norman Foster
Bruce Cabot	Randolph Scott

Players (Continued)

Elissa Landi	Joan Blondell
Helen Mack	Beulah Bondi
Thomas Mitchell	Edward Brophy
Marguerite Churchill	Harry Carey
Richard Arlen	Lee J. Cobb
Dolly Haas	Dolores Costello
Jean Parker	Harry Davenport
Charles Bickford	Brian Donlevy
Edward Arnold	Ann Dvorak
Clarence Kolb	Penny Singleton
Lola Lane	Randolph Scott
Gene Lockhart	Onslow Stevens
Paul Lukas	Luana Walters
Helen Mack	Michael Whalen
Ralph Morgan	Ann Dvorak
Richard Arlen	Preston Foster
Edward Arnold	Douglas Fairbanks, Jr.

[fol. 3379]

Frances Robinson	Barbara Stanwyck
Chester Morris	June Storey
Una O'Connor	Jackie Searle
Pat O'Brien	Virginia Weidler
Jean Parker	Henry Wilcoxson
Eugene Pallette	Fay Wray
Roger Pryor	Warren William
Beverly Roberts	Brian Aherne
Evelyn Keyes	Montague Love
Linda Winters	Ida Lupino
Brian Donlevy	Marian Marsh
John Halliday	Thomas Mitchell
Josephine Hutchinson	Barton McLane
Porter Hall	Adolphe Menjou
Victor Jory	Martha O'Driscoll
Bobby Jordan	Maureen O'Sullivan
Tommy Kelly	Gail Patrick
Paul Kelly	Claude Rains
June Lang	Irene Rich
Anita Louise	

Directors

Leon Barsha
Ford Beebe
David Burton
Eddie Buzzell
Irving Cummings
Tay Garnett
Marion Gering
Alfred E. Green
Lambert Hillyer
James W. Horne
Alan James
Erle C. Kenton
Gregory La Cava
Harry Lachman
D. Ross Lederman
Edward Ludwig
Rouben Mamoulian
Hamilton MacFadden
Roy William Neill
Arthur Ripley
Aubrey Scotto
William A. Seiter
David Selman
Victor Schertzinger
Frank Strayer
Ray Taylor
Charles Vidor
Gordon Wiles
Mack V. Wright

[fol. 3380]

C. C. Coleman, Jr.
Nick Grinde
Lewis D. Collins
Edward Sedgewick
Jos. H. Lewis
George Stevens
Sam White
Richard Wallace
Ben Stoloff
Frank McDonald
Ray Taylor
Howard Hawkes
Sidney Salkow
James Whale
Erle C. Kenton
Lambert Hillyer
Christy Cabanne
Edward Ludwig

Writers

Frank R. Adams
Doris Anderson
Robert D. Andrews
Joseph Anthony
Stephen Morehouse Avery
John Balderston
Barry Barringer
Ford Beebe
Charles Belden
Arnold Belgard
Thomas Bell
Charles Bennett
Michael Blankfort
David Boehm
Houston Branch
Laurie Brazee
Gilson Brown
Adele Buffington
James M. Cain
J. Benton Cheney
Jerome Chodorov
Bennett Cohen
Earl Felton
Ron Ferguson
Joseph Fields
Richard Flournoy

Writers (Continued)

Garrett Fort
Owen Francis
Paul Franklin
Lea Freeman
Samuel Fuller
Harvey Gates
Maurice Geraghty
Alex Gottlieb
James Gow
Joe Graham
Bert Granet
James Gruen
Maurice Hanline
Ann Harolde
Ray Harris
Ethel Hill
Arthur T. Horman
Lionel Houser

[fol. 3381]

Anthony Coldeway
Lester Cole
Adele Commandini
Charles R. Condon
Delmar Daves
Albert De Mond
Jacques Deval
Basil Dickey
Edgar Edwards
Saul Elkins
Guy Endore
Richard English
Francis E. Faragoh
Joseph Krumgold
John Francis Larkin
John Howard Lawson
Gladys Lehman
William Lipman
Sherman Lowe
Mary C. McCall, Jr.
Mary E. McCarthy
Bernard McConville
Horace McCoy
John McDermott
Dorrel & Stuart McGowan
Joseph Moncure March
Al Martin
Seton I. Miller
Jefferson Moffitt
Jane Murfin
Jack Natteford
Grace Neville
Jack Neville
Norman Houston
Harry O. Hoyt
Harrison Jacobs
Paul Jarrico
J. Griffin Jay
Henry Johnson
Robert L. Johnson
Edmund Joseph
Aben Kandel
Jack Kirkland
Arthur Kober
Fred Kohner
H. S. Kraft
Charles Francis Royal
Harry Sauber
George Sayre
Dore Schary
Ray Schrock
Doris Schroeder
Ewing Scott
Mannie Seff
Maxwell Shane
Richard Sherman
Harold Shumate
David Silverstein
Vernon Smith
Earl Snell
Lynn Starling

Writers (Continued)

Donald Ogden Stewart
Arthur Strawn
Wallace Sullivan
Leslie Swabacker
Jo Swerling
Henry Taylor

[fol. 3382]

George Oppenheimer
B. Harrison Orkow
E. E. Paramore
Edwin C. Parsons
Paul Perez
George Plympton
Joseph Poland
Gertrude Purcell
Milton Raison
John B. Rathmell
Wells Root
Charles Bennett
Houston Branch
Sy Bartlett
Miles Connolly
Arthur Caesar
Carlton Sand
Basil Dickey
Wellyn Totman
Barry Trivers
Wanda Tuchok
Wm. Ullman, Jr.
Dale Van Every
George Waggner
M. Coates Webster
Nathaniel West
Aileen Wetstein
F. McGrew Willis
Robert D. Andrews
Charles Condon
Oliver Drake
Peter Dixon
Paul Franklin
Guy Endore
Frank Fenton
Fred Schlick
Edward Eliscu
Earl Felton
Jane Hinton Smith
Everett Freeman
Sheridan Gibney
Bert Granet
Alex Gottlieb
Fred Guiol
Lambert Hillyer
Edmund L. Hartmann
Gordon Kahn
Jack Lait, Jr.
Edmund Kelso
Fred Myton
Peter Milne
Francis Martin
Karl Brown
Arnold Belgard
Bernard Feins
Harry Fraser
Harvey Gates
Wyndham Gittens
Milton Gropper
Michael Hogan
Joseph Hoffman
Frances Hyland
Joseph Krumgold
Aben Kandel
Robert Lively
John Larkin
Sarah Mason
Martin Mooney
N. Brewster Morse
Robert Neville
Stuart Palmer
Marion Orth

[fol. 3383] Writers (Continued)

Charles Arthur Powell	Charles M. Brown
Harry Segall	Gene Edward Tuttle
Gladys Lehman	Irngard Von Cube
Walter Wise	A. Dorian Otvos
Milton Lazarus	Rex Taylor
Bogart Rogers	Michael Blankfort
Gilson Brown	Bennett Cohen
Morgan B. Cox	Tom Gibson
Colin Clements	Rowland Leigh
David Lamson	Lowell Brodaux
Scott Littleton	Jay Dratler
James Creelman	John Rathmell
Irwin Shaw	Stanley Roberts
Ted Reeves	Gordon Rigby
Allen Rivkin	Lynn Root
Sidney Salkow	Don Ryan
Harold Schumate	David Silverstein
Jerry Sacheim	Arthur Strawn
Kurt Siodmak	Michael Simmons
Daniel Taradash	Dwight Taylor
Horace McCoy	Robertson White
John Neville	William Watson
Joseph O'Donnell	Luci Ward
Roy Chanslor	Leslie T. White

Cameramen

Lucien Andriot	Bert Longendecker
James S. Brown, Jr.	Peverell Marley
William Beckway	Virgil Miller
John W. Boyle	Leon Shamroy
Harry Forbes	William Thompson
Merritt Gerstad	Joseph A. Valentine
Herbert Kirkpatrick	Gilbert Warrenton
John Stumar	George Meehan
Karl Freund	Lee Garms

[fol. 3384] No two directors or players have the same value. There is a distinction between stars, featured players, and stock players. Moreover, during the years since 1933, 245 players were each engaged by Columbia for only one picture. The answering defendants are without knowl-

edge as to the arrangements between the other defendant producers and their respective contract players.

The following is a list of players engaged by Columbia for only one picture:

Player	*Year*	*Picture*
Evelyn Knapp	1933	Speed Wings
Sue Carol	1933	Twentieth Century
John Barrymore	1933	Straightaway
Claudette Colbert	1933	It Happened One Night
Helen Vinson	1934	Captain Hates the Sea
Leon Errol	1934	Captain Hates the Sea
Victor McLaglen	1934	Captain Hates the Sea
John Gilbert	1934	Captain Hates the Sea
Boris Karloff	1934	Black Room, The
Lilian Harvey	1934	Let's Live Tonight
Tullio Carminati	1934	Let's Live Tonight
Sally Eilers	1934	Carnival
Lee Tracy	1934	Carnival
Edward G. Robinson	1934	Whole Town's Talking
Warner Baxton	1934	Broadway Bill
Gary Cooper	1935	Mr. Deeds Goes to Town
Edward Arnold	1935	Crime and Punishment
Joan Bennett	1935	She Couldn't Take It
George Raft	1935	She Couldn't Take It
Ronald Colman	1935	Lost Horizon
James Dunn	1936	Come Closer, Folks
John Boles	1936	Craig's Wife
John Boles	1937	She Married an Artist
Ralph Bellamy	1933	One Is Guilty
Shirley Gray	1933	One Is Guilty

[fol. 3385]

Ralph Bellamy	1933	Before Midnight
Claude Gillingwater	1933	Before Midnight
June Collyer	1933	Before Midnight
Evelyn Knapp	1933	Police Car 17
Ralp Bellamy	1933	Once to Every Woman
Gregory Ratoff	1933	Let's Fall in Love
Mary Brian	1933	Shadows of Sing Sing
Mary Brian	1933	Fog
Reginald Denny	1933	Fog
Robert Armstrong	1933	Above the Clouds

Player	*Year*	*Picture*
Dorothy Wilson	1933	Above the Clouds
Loretta Young	1933	A Man's Castle
Ralph Bellamy	1934	By Persons Unknown
Shirley Gray	1934	By Persons Unknown
Gail Patrick	1934	Crime of Helen Stanley
Shirley Gray	1934	Crime of Helen Stanley
Ralph Bellamy	1934	Crime of Helen Stanley
Shirley Gray	1934	Beyond the Law
Lillian Bond	1934	Hell Bent for Love
Evelyn Knapp	1934	Man's Game
Henrietta Crosman	1934	Among the Missing
Winnie Lightner	1934	I'll Fix It
Neil Hamilton	1934	Fugitive Lady
Arline Judge	1934	Name the Woman
Rita La Roy	1934	Name the Woman
Jean Arthur	1934	Defense Rests
Neil Hamilton	1934	Blind Date
Dorothy Burgess	1934	Black Moon
Robert Armstrong	1934	Hell-Cat, The
Doris Kenyon	1934	Whom the Gods Destroy
Jean Arthur	1934	Whirlpool
Jacqueline Wells	1934	Square Shooter
Marion Shilling	1934	Westerner, The
Wallace Ford	1934	In Spite of Danger
Bruce Cabot	1934	Men of the Night
Judith Allen	1934	Men of the Night

[fol. 3386]

Sally Blane	1934	Against the Law
Conrad Nagel	1934	Death Flies East
Tullio Carminati	1935	One Night of Love
Wallace Ford	1935	Men of the Hour
Norman Foster	1935	Superspeed
Harry Langdon	1935	Atlantic Adventure
George Bancroft	1935	Mr. Deeds Goes to Town
Melvyn Douglas	1935	She Married Her Boss
Pauline Lord	1935	Feather in Her Hat
Basil Rathbone	1935	Feather in Her Hat
Jimmy Butler	1935	Awakening of Jim Burke
Ralph Remley	1935	Awakening of Jim Burke
Ralph Bellamy	1935	Air Hawks
Michael Bartlett	1935	Love Me Forever

Player	*Year*	*Picture*
Ralph Bellamy	1935	Eight Bells
Roger Pryor	1935	Girl Friend
Ralph Bellamy	1935	Dangerous Intrigue
Sally O'Neil	1935	Too Tough to Kill
Roger Pryor	1935	Case of the Missing Man
Charles Bickford	1935	Pride of the Marines
Ian Keith	1935	Don't Gamble With Love
Irvin Pichel	1935	Don't Gamble With Love
Karen Morley	1935	Devil's Squadron
Lionel Atwill	1935	Lady of Secrets
Otto Kruger	1935	Lady of Secrets
Berton Churchill	1935	You May Be Next
Norman Foster	1935	Escape From Devil's Island
Mary Brian	1936	Killer at Large
Russell Hardie	1936	Killer at Large
William Gargan	1936	Alibi for Murder
Lina Basquette	1936	Final Hour
Marc Lawrence	1936	Final Hour
Marguerite Churchill	1936	Final Hour
June Clayworth	1936	Two Fisted Gentleman
James Dunn	1936	Two Fisted Gentleman
[fol. 3387]		
Drue Leyton	1936	Blackmailer
Paul Hurst	1936	Blackmailer
H. B. Warner	1936	Blackmailer
William Gargan	1936	Blackmailer
Robert Strange	1936	Trapped by Television
Joyce Compton	1936	Trapped by Television
Lyle Talbot	1936	Trapped by Television
Jackie Moran	1936	And So They Were Married
Mary Astor	1936	And So They Were Married
Melvyn Douglas	1936	And So They Were Married
Marion Weldon	1936	Dodge City Trail
Iris Shunn	1936	Cowboy Star
Paul Kelly	1936	Parole Racket
Aline McMahon	1936	When You're in Love
Henry Stephenson	1936	When You're in Love
Catherine Doucet	1936	When You're in Love
Margo	1936	Lost Horizon
Edw. Everett Horton	1936	Lost Horizon
Jane Wyatt	1936	Lost Horizon

Player	*Year*	*Picture*
Wynne Gibson	1936	Racketeers in Exile
Evelyn Venable	1936	Racketeers in Exile
Helen Mack	1936	I Promise to Pay
Reginald Denny	1936	More Than a Secretary
Ruth Donnelly	1936	More Than a Secretary
Wynne Gibson	1936	Come Closer, Folks
Dorothy Wilson	1936	Craig's Wife
Alma Kruger	1936	Craig's Wife
Paul Kelly	1937	Frameup, The
Dorothy Wilson	1937	Speed to Spare
Eddie Nugent	1937	Speed to Spare
Robert Armstrong	1937	It Can't Last Forever
Eduardo Ciannelli	1937	League of Frighfened Men
Irene Hervey	1937	League of Frightened Men

[fol. 3388]

James Dunn	1937	Venus Makes Trouble
Alexander D'Arcy	1937	Awful Truth
Stuart Erwin	1937	I'll Take Romance
Robert Barrat	1937	Penitentiary
Marjorie Gateson	1937	No Time to Marry
Leo Carrillo	1937	Little Miss Roughneck
Johnny Green	1937	Start Cheering
Hal Le Roy	1937	Start Cheering
Jimmy Durante	1937	Start Cheering
Gertrude Niesen	1937	Start Cheering
Broderick Crawford	1937	Start Cheering
Douglas Montgomery	1937	Life Begins With Love
Otto Kruger	1937	Counsel for Crime
Douglas Montgomery	1937	Counsel for Crime
Lorna Gray	1938	Adventure in Sahara
C. Henry Gordon	1938	Adventure in Sahara
Paul Kelly	1938	Adventure in Sahara
Paul Kelly	1938	Juvenile Court
Bruce Cabot	1938	Homicide Bureau
Charles Farrell	1938	Flight to Fame
Wendy Barrie	1938	I am the Law
Otto Kruger	1938	I am the Law
Barbara O'Neil	1938	I am the Law
Leo Carrillo	1938	City Streets
Henry Daniell	1938	Holiday
Jean Dixon	1938	Holiday

Player	*Year*	*Picture*
Binnie Barnes	1938	Holiday
Henry Kolker	1938	Holiday
Edw. Everett Horton	1938	Holiday
Lew Ayres	1938	Holiday
H. B. Warner	1938	You Can't Take It With You
Donald Meek	1938	You Can't Take It With You
Spring Byington	1938	You Can't Take It With You

[fol. 3389]

Fay Wray	1938	Smashing The Spy Ring
Ida Lupino	1938	Lone Wolf Spy Hunt, The
Ralph Morgan	1938	Lone Wolf Spy Hunt, The
Tom Dugan	1938	Lone Wolf Spy Hunt, The
Maureen O'Sullivan	1938	Let Us Live
Betty Furness	1938	North Shanghai
Alan Baxter	1938	My Son Is a Criminal
Walter Abel	1938	First Offenders
Beverly Roberts	1938	First Offenders
Robert Paige	1938	Flying G-Men
Richard Barthelmess	1938	Only Angels Have Wings
Thomas Mitchell	1938	Only Angels Have Wings
Allyn Joslyn	1938	Only Angels Have Wings
Charles Bickford	1938	Romance of the Redwoods
Jean Parker	1938	Romance of the Redwoods
Dorothy Moore	1938	Blondie Meets The Boss
Jonathan Hale	1938	Blondie Meets The Boss
Joel Dean	1938	Blondie Meets The Boss
Inez Courtney	1938	Blondie Meets The Boss
Fay Bainter	1939	Lady and the Mob, The
Ida Lupino	1939	Lady and the Mob, The
Lee Bowman	1939	Lady and the Mob, The
Henry Armetta	1939	Lady and the Mob, The
Frances Dee	1939	Coast Guard
Barbara Stanwyck	1939	Golden Boy
Adolphe Menjou	1939	Golden Boy
Lee J. Cobb	1939	Golden Boy
Joseph Calleia	1939	Golden Boy
Chester Morris	1939	Blind Alley
Ann Dvorak	1939	Blind Alley

Player	*Year*	*Picture*
Melville Cooper	1939	Blind Alley
Alan Curtis	1939	Good Girls Go to Paris

[fol. 3390]

Michael Whalen	1939	Outside These Walls
Dolores Costello	1939	Outside These Walls
Richard Arlen	1939	Missing Daughters
Marian Marsh	1939	Missing Daughters
Isabel Jewell	1939	Missing Daughters
Jean Parker	1939	Parents On Trial
Johnny Downs	1939	Parents On Trial
Frieda Inescourt	1939	Woman is the Judge, A
Otto Kruger	1939	Woman is the Judge, A
Brian Donlevy	1939	Behind Prison Gates
Fred Stone	1939	Konga, The Wild Stallion
Warren Hull	1939	Mandrake, The Magician
Doris Weston	1939	Mandrake, The Magician
Claude Rains	1939	Mr. Smith Goes to Washington
Edward Arnold	1939	Mr. Smith Goes to Washington
Thomas Mitchell	1939	Mr. Smith Goes to Washington
Eugene Pallette	1939	Mr. Smith Goes to Washington
Beulah Bondi	1939	Mr. Smith Goes to Washington
H. B. Warner	1939	Mr. Smith Goes to Washington
Harry Carey	1939	Mr. Smith Goes to Washington
Astrid Allwyn	1939	Mr. Smith Goes to Washington
Onslow Stevens	1939	Those High Grey Walls
Gene Lockhart	1939	His Girl Friday
Porter Hall	1939	His Girl Friday
Helen Mack	1939	His Girl Friday
Mary Carlisle	1939	Beware of Spooks!

[fol. 3391]

Player	*Year*	*Picture*
Jonathan Hale	1939	Blondie Brings Up Baby
Otto Kruger	1939	Scandal Sheet
Clarence Kolb	1939	Amazing Mr. Williams, The
Ruth Donnelly	1939	Amazing Mr. Williams, The
Edward S. Brophy	1939	Amazing Mr. Williams, The
Preston Foster	1939	Cafe Hostess
Ann Dvorak	1939	Cafe Hostess
Bruce Cabot	1939	My Son Is Guilty
Harry Carey	1939	My Son Is Guilty
Eric Blore	1939	Lone Wolf Strikes, The
Montague Love	1939	Lone Wolf Strikes, The
Alan Baxter	1939	Lone Wolf Strikes, The
Robert Wilcox	1939	Lone Wolf Strikes, The
Astrid Allwyn	1939	Lone Wolf Strikes, The
Frieda Inescourt	1939	Convicted Woman
June Lang	1939	Convicted Woman
Lola Lane	1939	Convicted Woman
Harry Davenport	1939	Too Many Husbands
Dorothy Peterson	1939	Too Many Husbands
Melville Cooper	1939	Too Many Husbands
John Qualen	1939	Too Many Husbands
Tom Kelly	1940	Military Academy
David Holt	1940	Military Academy
Bobby Jordan	1940	Military Academy
Jackie Searl	1940	Military Academy
Barton MacLane	1940	Men Without Souls
Reginald Gardner	1940	Doctor Takes A Wife, The
Gail Patrick	1940	Doctor Takes A Wife, The
Edmund Gwenn	1940	Doctor Takes A Wife, The

[fol. 3392]

Robert Wilcox	1940	Island of Doomed Men
Jean Muir	1940	Lone Wolf Meets a Lady, The
Eric Blore	1940	Lone Wolf Meets a Lady, The

Player	*Year*	*Picture*
Victor Jory	1940	Lone Wolf Meets a Lady, The
Roger Pryor	1940	Lone Wolf Meets a Lady, The
Miles Mander	1940	Babies For Sale
Jonathan Hale	1940	Blondie Has Servant Trouble
Ann Dvorak	1940	Girls of the Road
Helen Mack	1940	Girls of the Road
Lola Lane	1940	Girls of the Road
Brian Aherne	1940	Lady in Question, The
Irene Rich	1940	Lady in Question, The
Eugene Pallette	1940	He Stayed For Breakfast
Una O'Connor	1940	He Stayed For Breakfast
Douglas Fairbanks, Jr.	1940	Angels Over Broadway
Thomas Mitchell	1940	Angels Over Broadway
Barton MacLane	1940	Secret Seven, The
Anita Louise	1940	Glamour For Sale
Roger Pryor	1940	Glamour For Sale
June MacCloy	1940	Glamour For Sale
Warren William	1940	Arizona
Porter Hall	1940	Arizona
Vivienne Osborne	1940	So You Won't Talk?
Bernard Nedell	1940	So You Won't Talk?
Tom Dugan	1940	So You Won't Talk?
Binnie Barnes	1940	This Thing Called Love
Allyn Joslyn	1940	This Thing Called Love
Gloria Dickson	1940	This Thing Called Love

[fol. 3393]

Lee J. Cobb	1940	This Thing Called Love
Gloria Holden	1940	This Thing Called Love
Jonathan Hale	1940	Blondie Plays Cupid
Bruce Cabot	1940	Girls Under 21
Paul Kelly	1940	Girls Under 21
Pat O'Brien	1940	Escape to Glory
John Halliday	1940	Escape to Glory
Melville Cooper	1940	Escape to Glory
Alan Baxter	1940	Escape to Glory
Eric Blore	1940	Lone Wolf Keeps a Date, The
Jonathan Hale	1940	Blondie Goes Latin

Player	*Year*	*Picture*
Tito Guizar	1940	Blondie Goes Latin
Beulah Bondi	1940	Penny Serenade
Anita Louise	1940	Phantom Submarine, The
Chester Morris	1940	Meet Boston Blackie
Amanda Duff	1940	Devil Commands, The
June Storey	1940	Lone Wolf Takes a Chance, The
Henry Wilcoxen	1940	Lone Wolf Takes a Chance, The
Eric Blore	1940	Lone Wolf Takes a Chance, The
Thurston Hall	1940	Lone Wolf Takes a Chance, The
Louise Currie	1940	Pinto Kid, The
Marjorie Cooley	1940	West of Abilene
Luana Walters	1940	Durango Kid, The
Luana Walters	1940	Cross the Sierras
Edith Fellows	1941	Her First Beau
Josephine Hutchinson	1941	Her First Beau
William Tracy	1941	Her First Beau
Una O'Connor	1941	Her First Beau

[fol. 3394]

Jonathan Hale	1941	Her First Beau
Martha Scott	1941	They Dare Not Love
Paul Lukas	1941	They Dare Not Love
Nan Grey	1941	Under Age
Tom Neal	1941	Under Age
Mary Anderson	1941	Under Age
Alan Baxter	1941	Under Age
Dorothy Faye	1941	North from the Lone Star
Eve Arden	1941	She Knew All The Answers
William Tracy	1941	She Knew All The Answers

The practice of loaning an occasional star, director or technician to another producer, has encouraged producers to place such employees under contract thereby giving employment to many hundreds of talented people, and encouraging the growth of the industry. If producers would be unable to farm out or loan their employees to other producers when they were unable to find appropriate vehicles

for their particular talents, such producers would be reluctant to, and in many cases, would not place the artists, directors and technicians under long term contracts. As a result of refusal of producers to engage artists under contracts, it would be necessary for the artists to spend a considerable amount of time in going from one casting office to another, rather than concentrating upon the performance of their services. Such a practice would discourage talent, would create tremendous economic waste and unemployment and would seriously hamper the development of the motion picture industry in America.

[fol. 3395] Columbia has never participated, directly or indirectly in the profits of any other defendant producer by reason of the exhibition of the latter's pictures, or the exhibition of the pictures of Columbia, or through any other method or means.

In a number of instances where Columbia has borrowed a star from a defendant producer and has made a picture with the participation of such star, many of the theatres affiliated with said defendant producer have not booked or rented the picture made with such star.

In cases where Columbia loaned one of its stars to any other producer, it has been impossible, and it has never been the practice for Columbia Pictures Corporation to share, directly or indirectly, in the receipts from exhibition, and it never shared in such receipts. Obviously, Columbia could not share in such receipts by reason of the ownership in said theatres because it owns no such theatres, and it has never made a contract with a producer to whom it loaned such stars, the terms of which provided that Columbia was to get any part of the receipts for the exhibition of pictures made with the participation of such stars.

In borrowing and loaning artists and other talent, Columbia has never discriminated between the producer defendants herein and other producers, and has borrowed from and loaned to producers solely on the basis of its needs and available talent.

Columbia has licensed and distributed its pictures in competition with the product of other independent producers. In other cases, it has distributed the product of other independent producers together with its own product, without any discrimination. Many independent producers have in the past five years produced some of the best pictures in

the industry. For example, the following pictures have received tremendous public acclaim:

[fol. 3396] COLUMBIA
American Madness
Bitter Tea of General Yen
Washington Merry-Go-Round
So This Is Africa
No More Orchids
Lady for a Day
Man's Castle
Captain Hates the Sea
It Happened One Night
No Greater Glory
Twentieth Century
Broadway Bill
One Night of Love
Love Me Forever
The Whole Town's Talking
She Married Her Boss
Mr. Deeds Goes to Town
The King Steps Out
If You Could Only Cook
She Couldn't Take It
The Music Goes Round
When You're in Love
Theodora Goes Wild
Craig's Wife
Adventure in Manhattan
More Than a Secretary
The Awful Truth
I'll Take Romance
There's Always a Woman
Lost Horizon
Holiday
You Can't Take It With You
Only Angels Have Wings
Blind Alley
Golden Boy
[fol. 3397] Good Girls Go To Paris
There's That Woman Again
Mr. Smith Goes to Washington
His Girl Friday
Too Many Husbands

COLUMBIA—(Continued)

Doctor Takes a Wife
He Stayed For Breakfast
Arizona
This Thing Called Love

UNIVERSAL

100 Men and a Girl
All Quiet on the Western Front
Showboat
Back Street
Imitation of Life
Diamond Jim
The Doomed Battalion
Three Smart Girls
Mad About Music
Frankenstein
Magnificent Obsession
My Man Godfrey
Invisible Man
That Certain Age
Three Smart Girls Grow Up
Letter of Introduction
The Rage of Paris
First Love
Destry Rides Again
Nice Girl
Back Street
Boys From Syracuse
Argentine Nights
Hired Wife
Spring Parade
Seven Sinners

[fol. 3398] WALTER WANGER

Gabriel Over the White House
Algiers
Vogues of 1938
Blockade
History is Made at Night
Stand In
I Met My Love Again
Stage Coach

Trade Winds
Eternally Yours
Slightly Honorable
Foreign Correspondent
Long Voyage Home
House Across the Bay

CHARLIE CHAPLIN

Modern Times
Great Dictator

MAJOR PICTURES CORP.

Pennies from Heaven

HOWARD HUGHES

Hell's Angels
Scar Face

EDWARD SMALL

The Duke of West Point
King of the Turf
Man in the Iron Mask
My Son, My Son
Son of Monte Cristo

PICKFORD-LASKY CORPORATION.

The Gay Desperado

[fol. 3399] SELZNICK.

Little Lord Fauntleroy
Prisoner of Zenda
A Star Is Born
The Adventures of Tom Sawyer
The Garden of Allah
Nothing Sacred
The Young in Heart
Made for Each Other
Intermezzo
Gone With the Wind
Rebecca

HAROLD LLOYD CORPORATION.

The Freshman
Professor, Beware

DAVID L. LOEW PRODUCTIONS.

Wide Open Faces
The Gladiator
So Ends Our Night

WALT DISNEY.

Snow White and the Seven Dwarfs
Pinocchio
Fantasia

SAMUEL GOLDWYN, INC.

Nana
We Live Again
Kid Millions
Wedding Night
Dark Angel
Barbary Coast
[fol. 3400] Splendor
Strike Me Pink
These Three
Wuthering Heights
They Shall Have Music
Dodsworth
Come and Get It
Beloved Enemy
Woman Chases Man
Stellas Dallas
Dead End
Hurricane
Goldwyn Follies
Marco Polo
The Cowboy and the Lady
Real Glory
Raffles
Westerner

PRINCIPAL PRODUCTIONS, INC.

Let's Sing Again
Rainbow on the River

MONOGRAM PICTURES CORPORATION.

Oliver Twist
Hoosier Schoolboy
Legion of Missing Men
Birth of a Baby
Boy of the Streets

GRAND NATIONAL PICTURES CORPORATION.

Damaged Goods

MARCH OF TIME CO.

March of Time (Series of Shorts)

[fol. 3401] HAL ROACH.

Merrily We Live
Topper
Captain Fury
There Goes My Heart
Topper Takes a Trip
Housekeeper's Daughter
Of Mice and Men

REPUBLIC PICTURES CORPORATION.

Man of Conquest
Dick Tracy (Serial)
Lone Ranger (Serial)
Gene Autry (Westerns)

ALEXANDER KORDA

Drums
Prison Without Bars
Four Feathers
Thief of Bagdad
That Hamilton Woman

SOL LESSER

Our Town

HAREFIELD PRODUCTIONS LTD.

Clouds Over Europe

FRANK LLOYD PRODUCTIONS, INC.

Howards of Virginia

ROBERT SHERWOOD PRODUCTIONS INC.

Adam Had Four Sons

[fol. 3402] The exchange of stars is largely due to the changing demand of the stars themselves as well as to the keen competition which now exists for their services. Since the stars are able, in large part, to dictate the terms upon which they are willing to be employed, and desire to be free to make pictures for producers other than those who have them under contract, it is frequently impossible to place a star under contract except on the basis of permitting such star to make pictures for other producers. The stars assert that the continued exploitation of pictures in which they appear, by a single producer with the limited story material that such producer possesses, results in the stars being miscast, thereby losing their appeal with the public. In order to protect themselves against the possibility of such poor casting and to keep their appeal perennial, the stars demand great freedom with respect to the parts which they shall portray, asserting that farming out gives them an opportunity to be cast in good parts. The miscasting of a star results in the star's dissatisfaction and disability to perform at his best, and likewise destroys the investment of the producer in the picture. This often runs into hundreds of thousands of dollars, and neither the producer nor the artist can afford to suffer the loss of prestige, standing and investment in such a case.

Thus, the changing position of the star and the increased emphasis on artistic attainment, together with a scarcity of artists, literary material and the limited financial means of each of the producers, are responsible for the development of the practice of loaning out stars. That practice has nothing whatsoever to do, so far as the answering defendants are concerned, with any alleged control of the production and exhibition by the five producer-exhibitor defendants.

[fol. 3403] Columbia at no time has imposed any harsh onerous or unfair trade practices upon exhibitors in the United States or any part thereof, and it has distributed its pictures to exhibitors in the United States in open competi-

tion with the pictures of other producers including the other defendant producers.

In many cities where there are two first-run theatres, both of which are willing to secure licenses for Columbia's product, Columbia splits its product between them regardless of whether or not such theatres are affiliated with the producer-exhibitor defendants. The following instances during the season 1937-38 are illustrative of such practice:

Town	Theatre	Owner	Affiliated
No. Adams, Mass.	Paramount	Publix	Yes
"	Richmond	R. M. Loew	No
Attleboro, Mass.	Union	Fiber & Shea	No
"	Bates Opera House	Levenson Circuit	No
Providence, R. I.	Strand	National Realty (E. Reed Mgr.)	No
"	Loew's State	Loew's	Yes
Westfield, Mass.	Park	Fiber & Shea	No
"	Strand	Wester Mass Circuit	No
Endicott (Union), N. Y.	Elvin	Comerford	Yes
"	Dittrich	B. W. Dittrich	No
Chicago, Ill.	Sheridan	Essaness	No
"	Vogue	Essaness	No
"	Mont-Clare	B. Cherukas	No
"	Elm	B. Cherukas	No
"	Marshall Sq.	Julius Goodman	No
"	Douglas or West	Julius Goodman	No
Kewanee, Ill.	Rialto	F. W. Shaver	No
"	Peerless	Publix	Yes
Maysville, Ky.	Russell	J. B. Russell	No
"	Washington	Jack Frisch	No

[fol. 3404]

Cleveland, O.	5 Pts. or Plaza	Horwits & Associated	No
"	LaSalle	Gusdonovic	No
"	LaSalle	Gusdonovic	No
"	Commodore	Lefkowich & Greenberger	No
"	Euclid	Lefkowich & Greenberger	No
"	Windemere	Windemere Th. Co.	No
"	Cedar-Lee	Lefkowich & Greenberger	No
"	Heights	Horwits	No
Steubenville, O.	Paramount	Chatkin & Feld	No
"	Grand	Biggio & Son	No
Dallas, Tex.	Rialto or Tower	Interstate	No
"	Mirror	Robb & Rowley	No
Iowa City, Ia.	Strand	T. Brown	No
"	Iowa	L. Kaplan	No
"	Pastime	A. Dunkel	No
"	Iowa	L. Kaplan	No
Muscatine, Ia.	Amusu	C. J. Jamison	No
"	Palace-Uptown	Skouras	Yes
Brookfield, Mo.	Degraw	Skouras	Yes
"	Civic	O. W. Williams	No
Carrollton, Mo.	Uptown	Commonwealth Circuit	No
"	Missouri	Athens Amuse. Co.	No
Carthage, Mo.	Delphus	E. W. Williams	No
"	Crane	Skouras	Yes

Town	Theatre	Owner	Affiliated
Clinton, Mo.	Lee	Commonwealth Circuit	No
"	Uptown	Dickinson	No
Eldorado, Kan.	Eldorado	Skouras	Yes
"	Eris	Fite Circuit	No
Excelsior Spgs., Mo.	Beyer	Skouras	Yes
"	Lyric	E. O. Briles	No
Ft. Scott, Kan.	Yale	Sproule Bros.	No
"	Liberty-Empress	Skouras	Yes
Hays, Kan.	Star	F. L. Lowe	No
"	Strand	Skouras	Yes
[fol. 3405]			
Hoisington, Kan.	Royal	Commonwealth Circuit	No
"	Star	F. L. Lowe	No
Independence, Kan.	Booth	Dickinson	No
"	Main Street	R. H. Montgomery	No
Iola, Kan.	Uptown-Iola-Kelley	Skouras	Yes
"	New	W. A. Weaver	No
Kirksville, Mo.	Family	Frank Anderson	No
"	Kennedy	Skouras	Yes
Lawrence, Kan.	Dickinson-Varsity	Dickinson	No
"	Patee	Commonwealth Circuit	No
Lexington, Mo.	Main Street	Skouras	Yes
"	Eagle	John C. Young	No
Lyons, Kan.	Lyons	Skouras	Yes
"	Star	F. L. Lowe	No
Marysville, Kan.	Rialto	L. Sproule	No
"	Liberty	Skouras	Yes
Monett, Mo.	Gillios	Commonwealth Circuit	No
"	Strand	C. M. Swabb	No
Ottawa, Kan.	Plaza-Webster	L. Sproule	No
"	Cozy	Skouras	Yes
Trenton, Mo.	Plaza-Royal	Commonwealth Circuit	No
"	Rita	G. J. Spencer	No
Hawthorne, Col.	Plaza	E. S. Calvi	No
"	Rex	E. S. Calvi	No
Hot Spgs., Ark.	Paramount-Central	Malco Theas.	No
"	Strand	H. E. Wheatley	No
"	Strand	H. E. Wheatley	No
"	Central	Malco Theas.	No
Milwaukee, Wis.	Palace-Wisconsin	Skouras	Yes
"	Riverside	Riverside Oper.	No
"	Allis	Skouras	Yes
"	Capitol	George Fischer Circuit	No
"	Climax	Chas. Trempe	No
"	Roosevelt	J. A. Ludwig	No
Lidgerwood, N. D.	Roxy	E. Schneider	No
"	Wiley	E. G. Garrison	No
[fol. 3406]			
Thompsonville, Conn.	Franklin	Robt. Ellisno	No
"	Strand	P. Perokas	No
Houma, La.	Grand or New	Affiliated	Yes
"	Fox	Helper & Chauvin	No
Morgan City, La.	Dixie	Affiliated	Yes
"	Opera House	Claude Darcy	No
Natchez, Miss.	Rits or Grand	Saenger	Yes
"	Star	Chas. Moral	No
Reserve, La.	Maurin	Affiliated	Yes
"	Community Club	Comm. Club Thea.	No
Sulpher, La.	Strand	J. M. Heard	No
"	Roosevelt	R. N. Carnahan	No

Town	Theatre	Owner	Affiliated
New York, N. Y.	Orpheum	Bello	No
"	St. Marks	Brandt	No
"	Boemian Annex	Fanchi	No
"	Granada	Interboro	No
Brooklyn, N. Y.	Alhambra	Hattem	No
"	Grand Art	G. Stamatus	No
"	Hollywood	Hattem	No
"	Senate	Randforce	Yes
Hempstead, L. I.	Rivoli-Hempstead	Skouras	Yes
Rockville Center, L. I.	Fantasy	Century	No
Hempstead, L. I.	Hempstead	Skouras	Yes
Rockville Center, L. I.	Strand	Century	No
Mt. Vernon, N. Y.	Embassy	Brandt	No
"	Biltmore	T. & C. Thea. Corp.	No
Suffern, N. Y.	Lafayette	Skouras	Yes
"	Strand	H. Friedman	No
Yonkers, N. Y.	Strand	RKO	Yes
"	Warburton	Sterling Amu. Corp.	No
Freehold, N. J.	Strand	Walter Reade	Yes
"	Liberty	Liberty Th. Inc.	No
Clinton, N. J.	Clinton Point	C. E. Smith	No
Highbridge, N. J.	Highbridge	J. Eller	No
Kearney, N. J.	Hudson	Warner	Yes
"	Regent	A. Siegel	No
[fol. 3407]			
Princeton, N. J.	Arcade	J. Strure	No
"	Garden-Playhouse	Casey & Wheeler	No
Elk City, Okl.	Elk	Griffith	No
"	Rex	Mrs. Mary Hunt	No
Enid, Okl.	Mecca-Arcadia	Griffith	No
"	Royal	Roy T. Shield	No
Lawton, Okl.	Palace-Murray	Lawton Thea. Corp.	No
"	Ritz	L. L. Jones	No
Bridgeton, N. J.	Stanley	Atlantic Thea.	No
"	Criteron-Majes.	L. Linker	No
Milton, Pa.	Legionair	Pete Pappas	No
"	Capitol	Publix	Yes
Old Forge, Pa.	Home	A. M. Scaro	No
"	Holland	Publix	Yes
Reading, Pa.	Embassy-State	Wilmer & Vincent	No
"	Astor	Warner	Yes
Shenandoah, Pa.	Capitol	Oppenheimer & Sweet	No
"	Strand	Publix	Yes
Lewiston, Pa.	Pastime	Ike Berney	No
"	Rialto	Paul Klingler	No
Morgantown, W. Va.	Metropolitan	Geo. Sollows	No
"	Warner	Warner Circ.	Yes
Salt Lake, Utah	Star or Roxy	Star Thea. Inc. Roxy Thea. Inc.	No
"	Empire	W. E. Shipley	No
Alameda, Cal.	Alameda	Nasser Bros.	No
"	Strand		
Bluefield, W. Va.	State	Publix	Yes
"	Rialto or Colonial	L. Salsberg	No
Norfolk, Va.	Byrd	J. D. Hofheimer	No
"	Colonial or Wells	S. W. Craver	No

15. Further answering said paragraphs and also paragraphs 180, 181, 182, 183, 184, 185, 186 and 187, Columbia alleges that in marketing its films it licenses its pictures to those exhibitors who will give the best exploitation to its

pictures under the most favorable circumstances, netting [fol. 3408] Columbia the greatest possible return. It is immaterial whether the exhibitor is affiliated with any producer or not. As a matter of fact, Columbia often finds itself virtually at the mercy of some groups of exhibitors wholly unaffiliated with the producer-defendants herein, and Columbia deals with such exhibitors on an unequal bargaining basis which is wholly in their favor.

Many so-called independent exhibitors throughout the country combine for the purpose of dictating terms to producers, including Columbia.

These exhibitor combinations have grown in number and strength in the past ten years. For example, in New York City, there are a number of such exhibitor combinations, each controlling more than a score of theatres. Upon information and belief the practice of some of these exhibitor combinations is to approach an owner of a theatre in their territory and assure him that by their huge buying power, they can compel Columbia and other producers to license pictures to them at a very low rental, and such exhibitor combinations frequently contract with the owner to accept as compensation a percentage of the reduction of his yearly film rental. In dealing with such exhibitor combinations Columbia finds itself unable to bargain effectively so as to obtain a reasonable rental on its pictures. If Columbia refuses to deal with such exhibitor combinations upon their terms, it is threatened by them with a boycott. As a consequence of this practice, Columbia has been compelled to license its pictures to these exhibitor combinations upon terms very harsh and inequitable to it, and such exhibitor combinations have obtained Columbia's product for far less than a fair rental value.

In many cities of the United States today, the important exhibitors are banded together in exhibitor combinations [fol. 3409] which bargain for their pictures with the advantage of collective bargaining and collective purchasing power, and with the other advantage of threat of boycott to any producer who refuses to meet their terms. The market for the exhibition of pictures is limited, and if Columbia is unwilling to meet the terms proposed by the exhibitor combinations in that particular locality, it finds itself unable to arrange for any distribution of its pictures in said territory to other exhibitors upon a fair rental value.

In many instances in the past few years, Columbia has actually been boycotted in certain territories by these local exhibitor combinations.

These operators of circuits of theatres, who are not made defendants in this action, wield tremendous power in the field of exhibition in their respective territories; upon information and belief, some of the affiliated circuits are powerful enough to dictate to their own affiliate producers the terms upon which such chains will book their pictures.

It is impossible for Columbia to investigate the local competitive situation of each of its exhibitor licensees.

In determining whether a particular theatre shall be given a franchise for a first-run or a subsequent run, it is necessary to take into consideration the consistent policy of the theatre, bearing in mind its size, its location, its admission charge, the size of its audience, the amount which the exhibitor is willing to pay for the licensing of the pictures, the auspices under which the picture will be first received in a particular community and many other factors, none of which has any possible relation to the question of whether or not the particular exhibitor is affiliated with any of the producer-exhibitor defendants, or whether the theatre is part of a circuit.

Columbia denies that the so-called small independent exhibitor operating a little theatre in an unpretentious [fol. 3410] neighborhood and charging a very low admission price, suffers any injury by reason of failure to obtain a first or second run, because the patronage of such theatre is perfectly satisfied to view its pictures on a third or subsequent run.

In more than 5400 cities and towns in the United States, in each of which there are less than eight theatres, all theatres in each of such towns are owned by one individual or corporation. This defendant is not able to sell in a competitive market in any of such localities. The exhibitor in such cases is virtually able to dictate his own terms to this defendant.

The fact is that the exhibition end of the motion picture industry has been most profitable and successful in the past fifteen years. Motion picture exhibitors throughout the country, large and small members of the exhibitor combinations and non-members of combinations, have made tremendous sums of money on their investment. During the past ten years of depression, very few exhibitors were forced

out of business but on the contrary their business has increased and their properties have enhanced in value. While the producers of pictures take all the risk and hazard (in recent years, several producers have been forced into bankruptcy), the exhibitors take little or no risk.

Columbia has at no time knowingly permitted any exhibitor to overbuy. It sells its products to exhibitors without regard to the number of pictures that the exhibitor may have bought from others, and it has no actual knowledge of what pictures are being purchased by exhibitors from other companies, nor has it the ability nor the legal power to compel exhibitors to divulge such information to it. As a matter of fact, if Columbia should demand such information from exhibitors, they would refuse to exhibit the pic- [fol. 3411] tures distributed by Columbia rather than give it the necessary information as to their dealings with others. A demand for such information would be regarded by any exhibitor as an unwarranted interference with his business, and this would be true, whether the exhibitor were affiliated or unaffiliated. It is impossible to obtain such information.

Exhibitors license their firms from distributors of motion pictures produced by more than two hundred companies throughout the world. The motion pictures produced in foreign countries enter into competition with pictures produced in the United States. Many foreign pictures have been very successful, and have had extensive runs in the motion picture theatres of the United States in competition with the pictures of Columbia and other American producers. Such pictures include:

"Henry the Eighth"
"Maedchen in Uniform"
"Ghost Goes West"
"Mayerling"
"Rembrandt"
"Carnival in Flanders"
"Moonlight Sonata"
"Elephant Boy"
"We're Going to be Rich"
"Thirty Nine Steps"
"Nine Days a Queen"
"Cardinal Richelieu"
"Escape Me Never"
"Knight Without Armor"
"M"

"Grand Illusion"
"Drums"
"Pygmalion"
"The Lady Vanishes"
"Harvest"
[fol. 3412] *"The Beachcomber"*
"Generals Without Buttons"
"Good-bye, Mr. Chips"
"Carnet de Bal"
"Professor Mamlok"
"Champs Elysees"
"Heart of Paris"
"Ballerina"
"Orage"
"The Count of Monte Cristo"
"Dark Rapture"
"Scarlet Pimpernell"
"Baker's Wife"
"Pep Le Moko"
"Night Train"
"Drums"
"Prison Without Bars"

The motion pictures produced by independent producers here and abroad and exhibited throughout the United States aggregate a vastly greater number than those produced by the major producers.

The competition in the United States from pictures produced abroad is steadily increasing in spite of the war. For the first six months of 1938, French studios produced fifty-five motion picture films with sixty-four additional pictures in production, or about to be produced. The influx into France of capable talent from Germany and Austria due to political upheavals in those countries improved the quality of French production. Whereas the sales resistance to pictures of Germany manufacture is so powerful as to make those pictures almost a negligible factor, there is no similar resistance to pictures made in France.

Recently, leading figures in the motion picture field have formed companies for the distribution of pictures pro- [fol. 3413] duced abroad. The recent announcements of one of such companies indicates that it will distribute no less than twenty-five feature foreign films to a very substantial number of theatres, particularly in the east. A third

company has recently taken over the exclusive distribution of Mexican pictures in the United States. This shows the trend of competition incurred from foreign pictures.

Columbia distributes not only all the pictures produced by itself, but a great number of pictures produced by other producers. Such pictures distributed by Columbia in recent years, the product of other producers, are the following:

1929-1930

Sweethearts on Parade

1930-1931

Charley's Aunt
Meet the Wife
Atlantic
Murder
Africa Speaks
Young Woodley
Man From Chicago
Middle Watch
Night Birds

1931-1932

Pagan Lady
No Greater Love
One Way Trail
Shotgun Pass
Fighting Marshall
Fighting Fool
The Secret Witness
The Dreyfus Case
Texas Cyclone
Daring Danger
Riding Tornado
Two-Fisted Law

[fol. 3414]

1932-1933

Deception
What Price Innocence
The Blonde Captive
Cornered
Western Code
Fighting For Justice
End of the Trail
Obey the Law
Night of Terror
Mussolini Speaks
Man of Action
Silent Men
Whirlwind
Rusty Rides Alone

1933-1934

Rex, King of Wild Horses
Social Register
Song You gave Me

1934-1935

That's Gratitude
Swell Head
Champagne For Breakfast
Together We Live

1935-1936

Calling of Dan Matthews
Mine With the Iron Door
Western Frontier
Heir to Trouble
Western Courage
Lawless Riders
Cattle Thief
Tugboat Princess
Heroes of the Range
Avenging Waters
Fugitive Sheriff
The Secret Patrol
Mysterious Avenger

1936-1937

Pennies From Heaven
Thunder in the City
Beloved Vagabond
Roaring Timber
Unknown Ranger
Rio Grande Ranger
Reckless Ranger
Trouble In Morocco
North of Nome
Outlaws of the Orient
Abdul the Damned
Ranger Courage
Law of the Ranger
Rangers Step In

[fol. 3415]

1937-1938

Woman Against the World
Flight Into Nowhere
Making the Headlines
Trapped by G-Men
Hollywood Round-up
Headin' East
Overland Express
Stagecoach Days
Pioneer Trail
Jungle Menace
Law of the Texan
Convicted
Mysterious Pilot
Under Suspicion
Reformatory
Wide Open Faces
The Gladiator
Stranger From Arizona
Heroes of the Alamo
Rolling Caravans
Phantom Gold
Secrets of Treasure Island
California Frontier

1938-1939

Clouds over Europe
Crime Takes a Holiday
Strange Case of Dr. Meade
Trapped in the Sky
In Early Arizona
Frontiers of '49
Lone Star Pioneers
Law Comes to Texas

1939-1940

Howards of Virginia
U Boat 29
Music in My Heart
Hidden Power
Fugitive at Large
21 Days Together
Green Archer
Terry and the Pirates
Outside the 3-Mile Limit
Passport to Alcatraz

Miracle of Main Street	Fight for Life
Mad Men of Europe	Shadow
I Married Adventure	Deadwood Dick

The exhibitor is not the ultimate consumer. It is not his demands which the producer bears in mind in producing a motion picture but rather the demands of the public, [fol. 3416] which pays admissions to the theatre, which the producer aims to satisfy. The public is the ultimate consumer. The producers aim to meet the taste and fancy of the public at large, and they are not interested in the desires of the exhibitors, except to the extent that such desires reflect the taste and fancy of the public itself. The producers' public is infinitely greater than the handful of exhibitors. The public whose demands the producer must supply extends throughout the world. No picture has ever been successful that did not have a universal appeal. The exhibitor is not familiar with the taste and fancy of the public, except in his small community. An illustration of that fact may be given. A few years ago a leading exhibitor issued an advertisement in the trade press violently attacking a number of prominent motion picture stars and asserting that they had outlived their usefulness and were "poison at the boxoffice." The fact is that after this blast was issued, a number of these stars appeared in motion pictures which attained tremendous success and popularity. The best examples of such pictures and stars are the Columbia picture, "Holiday," with Katherine Hepburn, and the Walter Wanger production "Algiers," with Charles Boyer. These pictures, incidentally, were all produced by independent producers, and their success was instantaneous. The attack upon these stars was abortive, and did not represent the taste of the ultimate consumer, who, in the last analysis, pays his admission money at the box-office and pays only when he likes the picture. This public includes 85,000,000 people who attend motion picture performances in the United States weekly. They are the ultimate market in the United States.

[fol. 3417] Further answering the allegations intending to refer to so-called "Block Booking" contained in paragraph "147" the answering defendants allege that Columbia has never entered into any practice of conditioning the licensing of one film or group of films upon the licensing of another

film or group of films, and that with respect to each and every contract under which Columbia has licensed its pictures on a basis of block booking, such contracts have been wholly voluntary on the part of both Columbia and the exhibitor, whether such exhibitor was a so-called independent exhibitor or an affiliated exhibitor. Where franchises have been issued on a basis of block booking, the affiliated theatres have not been permitted to license the picture of Columbia on a selective basis any more than have the independent exhibitors and exhibitor combinations. It has been the practice to license pictures by block booking for a great many years, long prior to the entry of Columbia in the motion picture field; and the practice has continued to this day. From the time that motion picture companies announced their production schedule at the beginning of the season, it was necessary, in order to insure a proper carrying out of that schedule, that the companies have an outlet for their pictures. Such an outlet could not be depended upon, unless the exhibitors were willing to contract for the entire product. It was likewise important to the exhibitor that he be in a position to insist upon receiving all of the pictures of the producer.

The practice was not foisted upon the exhibitors by the producers, but was rather the result of mutual agreement for the benefit of both. Columbia prepares a schedule each Spring of the number of pictures which it proposes to make for the following season. While this schedule is subject to change in some respects, Columbia adheres to it [fol. 3418] substantially. The production of the pictures called for by this advance schedule requires the investment of many millions of dollars in the employment of stars, purchase of story material, employment of directors and technicians, creation of studio facilities and equipment, costumes, scenery, and a great many other factors. Commitments for these expenditures must be made far in advance of the production of the pictures, and Columbia is compelled to enter into a great many contracts to satisfy these commitments. It must know at the commencement of the season the extent of the outlet which it will have for its pictures during that season. Unless it is permitted to book pictures in block, it will be unable to carry out this program of production.

As a matter of fact, no exhibitor is compelled to take every picture produced by Columbia. In licensing its pic-

tures for exhibition, Columbia does so independently of any other producer of motion pictures, and at no time compels an exhibitor to take so many pictures that he is prevented from securing other pictures through other distributors. The fact is that no exhibitor contracts for the pictures of Columbia exclusively, nor is he compelled to do so. In many cases, where there are two first-run theatres in a particular community, and both theatres are willing to enter into license agreements with Columbia, it permits them to divide the season's product between them on an equal basis or "split". This practice exists whether the exhibitors be affiliated or independent or independent circuits.

Further answering the allegations, designated as "Forcing of Short Subjects and News Reels, etc.," the answering defendants allege, that Columbia has never forced any exhibitor, whether independent, independent circuit or affiliated, to take short subjects and news reels, etc. Columbia does [fol. 3419] not produce or distribute news reels. To the extent that it licenses its short subjects and the other product referred to together with the balance of its season's product, that practice is indulged in with respect to affiliated theatres to the same extent as in the case of so-called independents or exhibitor combinations. If Columbia were unable to license its short subjects, etc. at the commencement of the season at the same time that it licenses its features, it would have to give up the business of producing the remainder of its program. This would drastically curtail its business, and would restrict rather than encourage competition in the field of production of motion pictures.

Further answering the allegations, designated as "designation of play dates", the answering defendants allege, that there is keen competion among the producers of motion pictures for the exhibition of their feature pictures on those days when the greater part of the public attends a motion picture theatre. Where an exhibitor shows the picture for only half a week, and where the picture is licensed on a basis of a percentage of the receipts of the exhibitor, it is naturally to the advantage of the producer to have its pictures exhibited at the times when the public attends the theatre. When a producer invests a very substantial sum in the production of a motion picture, it would be impossible

to recoup its investment if the exhibitor were able to exhibit that picture on the basis of giving the producer a percentage of the receipts on those days when the attendance at the theatre was very low. Much as defendant Columbia would like to have its pictures exhibited on a percentage basis on Saturdays, Sundays and holidays it has had little success in inducing exhibitors to accept such arrangements. [fol. 3420] In the great majority of cases, exhibitors, both independent, independent combinations and affiliated, have refused to exhibit the pictures of Columbia on a percentage basis on Saturdays, Sundays and holidays and Columbia has been deprived of the revenue to which it believes itself entitled from exhibition on those days on a percentage basis. No exhibitor in the United States operates his theatre for the benefit of or in the interest of Columbia nor does Columbia make any unreasonable charge or secure unreasonable compensation for the exhibition of its pictures.

Further answering the allegations, designated as "Clearance", the answering defendants allege that Columbia does not give its licensees for prior-run exhibitions unreasonable protection or clearance over subsequent-runs in the same territory. Prior-run exhibitors are entitled to have a certain amount of protection and clearance. Competition is so keen in the distribution of motion pictures, that if Columbia should refuse to give the necessary clearance to prior-run exhibitors, whether they be independent, independent combinations or affiliated exhibitors, they would refuse to take the product of Columbia, and Columbia could no longer carry on its business successfully.

The practice of granting protection to prior-run exhibitors is not one that Columbia insists upon, but rather is one that the exhibitor insists upon, and which Columbia believes he is entitled to. In fact, there can be no dispute about the right of a prior-run exhibitor against a subsequent-run, if he is to obtain enough revenue from the exhibition of his pictures to warrant the increased amount that he pays for the privilege of his prior run. Prior-run pictures are exhibited in houses where the exhibitor pays a greater rental than does the exhibitor in a subsequent-run house. They are usually in more desirable locations. The [fol. 3421] furnishings and acoustics are of a superior quality, and the auspices under which the picture in a prior-run house is presented are such as to require the exhibitor to make a large investment, and to charge a higher admis-

sion prices and he can accomplish this only by having a sufficient period of protection against a subsequent-run house. Otherwise, the patrons would go only to the subsequent-run house where the price of admission is lower.

Further answering the allegations, designated as "Overbuying", the answering defendants allege, that there is no way that Columbia can put a stop to this practice, if the practice exists. If this practice be unlawful, the culprits are the exhibitors, and not the answering defendants.

Further answering the allegations, designated as "Film Rentals", the answering defendants allege, that there is no discrimination by Columbia in the film rentals charged to exhibitors, whether said exhibitors are or are not part of circuit combinations. In some instances exhibitors, whether they be circuit, affiliated with distributors or otherwise, or individually operated theatres, compel Columbia to license its pictures to them for less than their value.

The method of paying film rental by a percentage of the gross box-office receipts of the exhibitor is not unfair to the exhibitor. It would be the ideal method of determining an adequate and fair rental of pictures. This method has been in use in the field of the legitimate theatre since its earliest advent. The percentage of the gross which Columbia secures from the exhibitor has never been unfair, arbitrary, unreasonable or unconscionable. To the knowledge of these answering defendants, no exhibitor was ever forced to shut down his theatre because of rental fees, [fol. 3422] percentage or otherwise, that he paid to Columbia. Columbia has never acted in combination with other producers or distributors of motion pictures in the licensing of motion picture films to exhibitors.

Further answering the allegations, designated as "Advertising Allowances", the answering defendants allege, that wherever arrangements are made with exhibitors for the sharing of advertising costs, there is no discrimination between affiliated, independent and independent combinations of exhibitors. All are treated alike. The practice of sharing advertising costs is beneficial to both the exhibitor and the producer. With regard to some pictures there have been advertising campaigns. These campaigns have been limited to the following pictures during the seasons beginning with 1935-36:

"Mr. Deeds Goes to Town"
"Music Goes Round"

"King Steps Out"
"When You're in Love"
"Theodora Goes Wild"
"Pennies From Heaven"
"It's All Yours"
"Lost Horizon"
"Awful Truth"
"I'll Take Romance"
"There's Always a Woman"
"Holiday"
"Girls' School"
"You Can't Take It with You"
"Let Us Live"
"Only Angels Have Wings"
"Golden Boy"
"He Stayed for Breakfast"
"His Girl Friday"
"Too Many Husbands"
[fol. 3423] "Doctor Takes a Wife"
"21 Days Together"
"Howards of Virginia"
"Mr. Smith Goes to Washington"
"This Thing Called Love"
"Arizona"
"Adam Had Four Sons"

In practically all instances theatres, whether affiliated or not, paid exactly 50%—no more and no less over and above the regular newspaper advertising budget of such theatre.

Advertising campaigns of this nature were conducted only with respect to percentage bookings in practically every instance.

Further answering the allegations, designated as "Optional contracts", the answering defendants allege, that Columbia does not make any such contracts as are described therein, and in all cases, there is no discrimination between affiliated, independent and independent combinations of exhibitors.

Further answering the allegations, designated as "Contract modifications", the answering defendants allege, that where insistence upon the letter of the contract would work hardship on exhibitors, Columbia has given such exhibitors some of the benefits described in said subdivision notwithstanding the terms of the contract. These modifications are made in favor of affiliated, independent and independ-

ent combinations of exhibitors. There is no discrimination between them, except that on occasion, the independent exhibitor who is financially unable to meet his contractual obligations is given certain indulgence, and in some cases, independent combinations are given such benefits by reason of threats, coercive practice and intimidation of Columbia [fol. 3424] by them. If Columbia should refuse to grant such modifications to the independent combinations, they are threatened with boycotts of their product in the particular territory controlled by such independent combination.

Further answering the allegations, designated as "Overage and Underage", the answering defendants allege, that in those instances where Columbia has permitted overage and underage, it has done so as the only means of selling a license to exhibit its pictures. Without that clause, those licensees, who control the theatres involved, would refuse to accept the license from Columbia and Columbia would thereby be deprived of all revenue from the exhibition of its pictures in the particular territory involved.

Further answering the allegations, designated as "Move-overs", the answering defendants allege, that they do not indulge in this practice in favor of affiliated exhibitors, and do not in any wise discriminate against independent exhibitors in this respect.

For a First Separate and Distinct Defense, the Answering Defendants Allege:

16. That Columbia has a number of contracts with affiliated, independent and independent combinations of exhibitors, which the petitioner seeks to nullify, cancel or modify. All these contracts between Columbia and such exhibitors were made in the City of New York prior to the commencement of this action, and the parties to such contracts are all subject to the jurisdiction of this court. The exhibitors domiciled in this district having contracts with Columbia, which the petitioner seeks to nullify and cancel, are the following:

[fol. 3425] Catskill Theatres Corp.
M. F. Tubbs
Mitchell Conery
A. McNamara
Philip Eisenberg
Robert C. Kay

Coney Island Motion Picture Corp.
Chester Didsbury
Kimball Amuse. Corp.
Highland Theatrical Corp.
Manor Theatre Corp.
Loren Theatre, Inc.
Bennie Berman, Joseph Rosen, co-partners
Arthur Enterprises, Inc.
Gemma Amusement Corp.
Tryon Amusement Corp.
Bell Amusement Corp.
The Marcus Loew Booking Agency, a corporation
Radio City Music Hall Corporation.

17. Columbia has a number of contracts with artists which the petitioner seeks to nullify, cancel or modify. All these contracts between Columbia and such artists were made in the United States prior to the commencement of this action, and the parties to such contracts are all subject to the jurisdiction of this Court and are domiciled within the United States. Such artists with whom Columbia has contracts include Irene Dunne and Cary Grant.

18. The aforesaid individuals, firms and corporations, whose contracts are sought to be affected by the petition herein, were and are necessary and indispensable parties to this suit, and no proper determination of this suit can be had without the presence of said parties herein.

[fol. 3426] For a second separate and distinct defense, the answering defendants allege:

19. That heretofore and on or about May 7, 1937, this petitioner instituted an action against the defendant, Columbia Pictures Corporation and others, in the United States District Court, Northern District of Texas, in which petitioner alleged that defendant, Columbia Pictures Corporation, had conspired with others to restrain trade and commerce in motion picture films and to monopolize or attempt to monopolize the exhibition of motion picture films in the States of Texas and New Mexico, in violation of an Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" and of the acts amendatory thereof and supplemental thereto; Columbia Pictures Corporation filed an

answer in that action in said court; thereafter such proceedings were had in said action that a final decree was entered in said court on October 13, 1937, in which it was adjudged and decreed that defendant, Columbia Pictures Corporation among others, had engaged in a combination, conspiracy and agreement with some of the defendants in said action to restrain trade and commerce in motion pictures in violation of the aforementioned statute; on appeal from said decree to the United States Supreme Court, said final decree was affirmed. (Interstate v. United States, 304 U. S. 55.)

20. Upon information and belief, the issues embraced in said action and therein litigated, included and embraced the acts alleged in the petition herein to be in violation of law; in said action the court therein had jurisdiction to hear and determine, and there could have been there litigated, heard and determined therein all of the acts complained of in the [fol. 3427] petition herein alleged to have been committed by defendant, Columbia Pictures Corporation and the other Columbia defendants.

21. The defendant Columbia Pictures Corporation was enjoined and restrained from doing the acts mentioned and described in said Decree, a copy of which is hereto annexed and made a part of this answer as Exhibit 1.

22. By reason of the premises, the acts and matters complained of in the petition herein are res adjudicata as against all of the Columbia defendants.

For a third separate and distinct defense, the answering defendants allege:

23. That heretofore and on or about the 28th day of April, 1939, this petitioner instituted an action against the defendant Columbia Pictures Corporation and others in the United States District Court for the Western District of Oklahoma, entitled *United States of Am[illegible] v. Griffith Amusement Company et al.*, in which petitioner alleged that defendant Columbia Pictures Corporation had conspired with others to restrain trade and commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures in violation of an Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies"; Columbia

Pictures Corporation has filed an answer in that action in said Court and said action is still pending and undisposed of.

24. That heretofore and on or about the 7th day of August, 1939, this petitioner instituted an action against the defendant Columbia Pictures Corporation and others in the [fol. 3428] United States District Court for the Western District of New York, entitled, *United States of America* v. *Schine Chain Theatres, Inc., et al.*, in which petitioner alleged that defendant Columbia Pictures Corporation had conspired with others to restrain trade and commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures in violation of an Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies"; Columbia Pictures Corporation has filed an answer in that action in said Court and said action is still pending and undisposed of.

25. That heretofore and on or about the 11th day of August, 1939, this petitioner instituted an action against the defendant Columbia Pictures Corporation and others in the United States District Court for the Middle District of Tennessee, Nashville Division, entitled, *United States of America* v. *The Crescent Amusement Company, et al.*, in which petitioner alleged that defendant Columbia Pictures Corporation had conspired with others to restrain trade and commerce in motion picture films and to monopolize and to attempt to monopolize the exhibition of motion pictures in violation of an Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies"; Columbia Pictures Corporation has filed an answer in that action in said Court and said action is still pending and undisposed of.

26. Upon information and belief, the issues embraced in each of the actions referred to and described in paragraphs 23, 24 and 25, respectively, and in each of said actions being litigated, include and embrace the acts alleged in the peti-[fol. 3429] tion herein to be in violation of law; in each of said actions the Court therein has jurisdiction to hear and determine and there can be there litigated, heard and determined all of the acts complained of in the petition herein

alleged to have been committed by defendant Columbia Pictures Corporation and the other Columbia defendants.

27. The defendants herein plead each of said actions referred to and described hereinabove in bar of this action.

Wherefore, these answering defendants pray that the petition be dismissed, together with the costs and disbursements of the action.

Schwartz & Frohlich, Attorneys for Defendants, Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Incorporated, 1450 Broadway, New York City, New York; (Sgd.) Herman Finkelstein.

March, 1941.

Charles Schwartz, Louis D. Frohlich, Herman Finkelstein, Arthur H. Schwartz, Counsel and Members of Said Firm.

[fol. 3430] EXHIBIT 1 TO ANSWER

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

No. 3736-992. Equity

UNITED STATES OF AMERICA, Complainant,

vs.

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., Karl Hoblitzelle, R. J. O'Donnell, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, Defendants

FINAL DECREE—Filed October 13, 1937

This cause having come on to be heard at a special term of the district court of the United States for the Dallas Division of the Northern District of Texas, upon the plead-

ings, the agreed statement of facts and the evidence, both [fol. 3431] oral and documentary, introduced by the respective parties in open court, and having been argued by counsel, and the Court having filed its opinion herein on the 25th day of September, 1937,

It is hereby ordered, adjudged and decreed as follows:

(1) That the defendants, Paramount Picture Distributing Company, Inc., R. K. O.-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, by including at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in license agreements for motion picture films released and distributed by them beginning with the exhibition season of 1934-35 and for each season subsequent thereto, with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, provisions requiring that such motion picture films so released and distributed by them that had been shown in the same city first run for a night adult lower floor admission price of 40¢ or more should not be exhibited by said subsequent run exhibitors for less than a night adult lower floor admission price of 25¢ and should not be exhibited as a part of a double feature program, have engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, to restrain trade and commerce in said motion picture films, in violation of an Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

[fol. 3432] (2) That the defendant, Vitagraph, Inc., by including at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell in its license agreements with the subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films, in violation of an

Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

(3) That the defendant, Metro-Goldwyn-Mayer Distributing Corporation, by including at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth and San Antonio, beginning with the exhibition season 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of an Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies."

(4) That the aforesaid provisions as to minimum night adult lower floor admission price and double featuring so [fol. 3433] included by the defendants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., R. K. O.-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Twentieth Century-Fox Film Corporation of Texas, at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell upon subsequent run-exhibitors of motion picture films released and distributed by the distributor defendants in the cities above named are illegal and void.

(5) That each and every one of the corporate defendants and their respective officers, agents, representatives and employees, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in said combination, conspiracy and agreement.

(6) That the defendants, Paramount Pictures Distributing Company, Inc., R. K. O.-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchange, Inc., and Twentieth Century-Fox Film Corporation of Texas, and their respective officers, agents, representatives and employees be, and they are

hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more, and pro- [fol. 3434] hibiting said subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

(7) That the defendants, Vitagraph, Inc., and Metro-Goldwyn-Mayer Distributing Corporation, their officers, agents, representatives and employees be and they are hereby perpetually enjoined and restrained from enforcing or attempting to enforce said provisions in their said license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

(8) That the defendants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., R. K. O.-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Film Corporation of Texas be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., this latter company not having made any such agreement since 1934-35, Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double-featuring as a result of any combination, conspiracy or agreement among [fol. 3435] the said distributor defendants, and any of them,

or between the said distributor defendants, and any of them, and the said exhibitor defendants, and any of them.

(9) That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employees, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films released and distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

(10) This decree does not affect the legal right of any distributor, without understanding, or, agreement with any other distributor or exhibitor, to contract with an exhibitor for the exclusive exhibition of his copyrighted motion pictures, or, for time of exhibition.

(11) That the petitioner recover of the defendants its costs herein.

Dallas, Texas, this 13th day of October, 1937.

Wm. H. Atwell, U. S. District Judge.

[fol. 3436] In the District Court of the United States

[Title omitted]

Answer of United Artists Corporation to Amended and Supplemental Complaint

Defendant United Artists Corporation answering the amended and supplemental complaint of the plaintiff by its attorneys, O'Brien, Driscoll & Raftery, respectfully alleges:

1. Defendant denies each and every allegation of paragraphs 1 and 2 of plaintiff's amended and supplemental complaint.

2. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 (a) (b); 4; 5 (a) (b) (c) (d) (e); 6 (a) (b) (c); 7 (a) (b); 9 (a) (b) (c); 10 (a) (b) (c) (d) of plaintiff's amended and supplemental complaint.

3. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, [fol. 3437] 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 and 80 of plaintiff's amended and supplemental complaint.

4. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraph 63 of plaintiff's amended and supplemental complaint, except that defendant admits that it released the number of feature pictures mentioned and described in said paragraph as features released by United Artists.

5. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105 and 106 of plaintiff's amended and supplemental complaint.

6. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraph 107 of plaintiff's amended and supplemental complaint, except that the defendant admits that it from time to time makes a separate contract with exhibitors for the exhibition of photoplays produced by each of the respective producers using the facilities of the defendant for distribution.

7. Defendant denies each and every allegation of paragraph 108 of plaintiff's amended and supplemental complaint, except that defendant admits that the quality of feature pictures, as box-office attractions, varies widely.

8. Defendant denies each and every allegation of paragraphs 109, 110, 111, 112, 113, 114 and 115 of plaintiff's amended and supplemental complaint, except that defendant admits that it makes exhibition license agreements with various exhibitors for the exhibition of feature pictures distributed by the defendant, and for the contents of said agreements respectfully asks leave to refer to the origi- [fols. 3438-3440] nals thereof.

9. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 116, 117, 118, 119, 120, 121, 122 and 123 of plaintiff's amended and supplemental complaint.

10. Defendant denies each and every allegation of paragraphs 124, 125, 126, 127 and 128 of plaintiff's amended and supplemental complaint.

11. Defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraphs 129, 130, 131 and 132 of plaintiff's amended and supplemental complaint.

12. Defendant denies each and every allegation of paragraphs 140 and 141 of plaintiff's amended and supplemental complaint in so far as it alleges that the production of motion pictures is in or a part of interstate trade or commerce.

13. Defendant denies each and every allegation of paragraphs 142, 143, 144, 145, 146, 147, 148, 149 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p), 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186 and 187 of plaintiff's amended and supplemental complaint.

Wherefore, defendant demands judgment dismissing the plaintiff's amended and supplemental complaint together with the costs and disbursements of this action.

O'Brien, Driscoll & Raftery, by Edward C. Raftery,
Attorneys for Defendant, United Artists Corporation. Office & P. O. Address, 152 West 42nd Street, Borough of Manhattan, City of New York.

[fol. 3441] In the District Court of the United States

[Title omitted]

Answer of Universal Corporation et al. to Amended and Supplemental Complaint

Defendants, Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc. and Big U Film Exchange, Inc., by their attorney, Charles D. Prutzman, answering plaintiff's Amended and Supplemental Complaint, respectfully allege:

1. Defendants deny each and every allegation of paragraphs 1 and 2 of plaintiff's Amended and Supplemental Complaint.

2. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 (a) (b), 4, 5 (a) (b) (c) (d) (e), 6 (a) (b) (c), 7 (a) (b), 9 (a) (b) (c), 11, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72 of plaintiff's Amended and Supplemental Complaint.

[fol. 3442] And further deny that Universal Film Exchanges, Inc. is a wholly owned subsidiary of Universal Corporation and that Big U Film Exchange, Inc. is a wholly owned subsidiary of Universal Corporation, as alleged in Subdivisions (c) and (d) of Paragraph 10, but admit that Universal Film Exchanges, Inc. is a wholly owned subsidiary of Universal Pictures Company, Inc. and that Big U Film Exchange, Inc. is a subsidiary of Universal Pictures Company, Inc. and Universal Corporation, which together own all of its capital stock.

3. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of Paragraphs 76 and 78 of plaintiff's Amended and Supplemental Complaint, except defendants admit that there were produced and released the number of photoplays listed in said paragraphs as features produced by Universal during the respective seasons referred to in said paragraphs, and except that it denies that Universal Chain Theatres Corporation operated theatres in Canada or the District of Columbia, but it admits that it had an interest in the Griffith Amusement Company which operates theatres in Oklahoma and Texas and in the Schine Chain which operated theatres in New York and Ohio.

4. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of Paragraphs 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 and 107 of plaintiff's Amended and Supplemental Complaint.

5. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of Paragraph 108 of plaintiff's Amended and Supplemental Complaint, [fol. 3443] except that defendants admit that the quality of feature pictures varies widely as Box Office attractions.

6. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of Paragraphs

109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, and 132 of plaintiff's Amended and Supplemental Complaint, except that defendants aver that exhibition license agreements are made with various exhibitors for the exhibition of Universal pictures in theatres in the United States of America, and the defendants respectfully ask leave to refer to the originals of said agreements for the contents thereof.

7. Defendants deny each and every allegation of Paragraphs 133 to 141, inclusive, of plaintiff's Amended and Supplemental Complaint in so far as said paragraphs attempt to allege that the business of producing motion pictures is in or a part of Interstate Trade and Commerce.

8. Defendants deny each and every allegation of Paragraphs 142, 143, 144, 145, 146, 147, 148, 149 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p), 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186 and 187 of plaintiff's Amended and Supplemental Complaint.

Wherefore defendants demand judgment dismissing plaintiff's Amended and Supplemental Complaint, together with the costs and disbursements of this action.

Charles D. Prutzman, Attorney for Universal Defendants. Office & Post Office Address, 1250 Sixth Avenue, Borough of Manhattan, New York City.

[fol. 3444] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

UNITED STATES OF AMERICA, Plaintiff

v.

PARAMOUNT PICTURES, INC., ET AL., Defendants

Consent Decree—Rules of Arbitration and Appeals

[fol. 3445] DECREE—Filed November 20, 1940

The United States of America having filed its Petition herein on July 20, 1938, and its Amended and Supplemental Complaint on November 14, 1940; the defendants: Paramount, Pictures Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Cor-[fol. 3446] poration; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation [1] having appeared and severally filed their answers to such Petition and to such Amended and Supplemental Complaint and having asserted the truth of their answers and their innocence of any violation of law; and no testimony having been taken, but each of the consenting defendants having consented to the entry of this decree without any findings of fact, upon condition that neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being (1) an admission or adjudication that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated or are or is violating any statute or law, or (2) evidence that such allegations, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated any statute or law, or (3) an admission or

[1] The above-named defendants are referred to hereinafter as the consenting defendants.

adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of any statute or law, and upon the further conditions hereinafter set forth; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof upon such conditions, and having moved the Court for the entry of this decree;

[fol. 3447]

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

I

The Court has jurisdiction of the parties hereto; and for the purposes of this decree and of proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

The Petitioner not having offered any proof of its allegations that defendants have violated the antitrust laws, and defendants having denied each and every such allegation, this Court has not determined or adjudicated and by this decree does not determine or adjudicate, and this is not a decree to the effect that any of said defendants has violated or is now violating any of such laws, or any other statute; and this decree relates solely to future conduct herein below specified and is not based upon any finding, determination, or adjudication that any right or statute has yet been or is now being violated.

II

Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations [fol. 3448] acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required.

III

No consenting defendant engaged in the distribution of motion pictures (hereinafter referred to as a distributor

defendant) shall license or offer for license [1] a feature motion picture [2] (hereinafter sometimes referred to as a feature) for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown [3] within the exchange district [4] in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a [fol. 3449] trade publication [5] having general circulation among exhibitors [6] in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

IV

(a) No distributor defendant shall offer for license or shall license more than five features in a single group. In offering its features for license to an exhibitor a distributor may change the combinations of features in groups as it may from time to time determine, and may license or offer for license as many groups of features as it may from time

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[1] License means (as a verb) to make an agreement, or (as a noun) an agreement, by which a distributor grants the right to exhibit a motion picture in any theatre engaged in the exhibition of motion pictures for profit.

[2] A feature motion picture is a motion picture approximately 5,000 feet, or more, in length.

[3] A trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally.

[4] Each distributor defendant shall file with the Department of Justice a map of each of its exchange districts, showing the territorial limits thereof. Changes in the territorial limits of an exchange district shall be made only after two weeks' notice to the Department of Justice. References in this Section and in Sections V, IX and XVIII hereof to exchange districts are to exchange districts of each distributor defendant, as constituted from time to time.

[5] Trade publication means a daily or weekly newspaper or magazine which is devoted primarily to news concerning the motion pictpre industry.

[6] Exhibitor means any individual, partnership, unincorporated association or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit.

to time determine, provided that the license or offer for license of one group of features shall not be conditioned upon the licensing of another feature or group of features.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[1] or foreigns[2] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

[fol. 3450] Where a license has been entered into, controversies arising upon a complaint by an exhibitor that the licensing to him of one group of features was conditioned by the distributor upon the licensing of another feature or group of features or the licensing of shorts or foreigns shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds thereof, not later than two days after receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application or applications for such features, shorts or foreigns. The power[3] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of such features was so conditioned; and, if the finding be in the affirmative, (2) an award cancelling the license for (or to the extent that it may relate to) such other feature or group of features, or such shorts or foreigns.

Where no license has been entered into, controversies arising upon a complaint by an exhibitor that a distributor defendant has offered for license to him more than five

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[1] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[2] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

[3] When, in any arbitration under this decree, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

features in a single group or that the offer of a license to him of one group of features was conditioned upon the licensing of another feature or group of features, or the licensing of shorts or foreigns, shall be subject to arbitration. An exhibitor shall have no right to assert any claim that an offer so to license such features was so made or [fol. 3451] conditioned unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds therefor not later than five days after the exhibitor claims the alleged offer was made. The power [4] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such features was so made or conditioned; and, if the finding be in the affirmative, (2) an award imposing upon the distributor making such offer a penalty in an amount not to exceed five hundred dollars ($500.00). Such penalty shall be payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

V

No license for features to be exhibited in theatres located in one exchange district [1] shall include theatres located in another exchange district, nor shall the licensing of features for exhibition in theatres located in one exchange district be conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district.

Controversies arising upon a complaint by an exhibitor thereby affected that the licensing by a distributor defendant of features for exhibition in theatres located in one exchange district was conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district shall be subject to arbi- [fol. 3452] tration. The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of features for exhibition in theatres located in one exchange district was so conditioned upon the licensing of a feature or group of

[4] See footnote 3 to this Section.

[1] See footnote 4 to Section III.

[2] See footnote 3 to Section IV.

features for exhibition in theatres located in another exchange district; and, if the finding be in the affirmative, (2) an award imposing upon the distributor defendant so licensing features a penalty in an amount not to exceed five hundred dollars ($500.00), payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

VI

No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising upon a complaint by an exhibitor that, contrary to the provisions of this Section, a distributor defendant has refused so to license its pictures shall be subject to arbitration. The power[1] of the arbi-

[1] See footnote 3 to Section IV.

trator in deciding any such controversy shall be limited to [fol. 3453] making (1) a finding as to whether or not, contrary to the provisions of this Section, the distributor has refused to license its pictures to the complainant for exhibition in said theatre; and, if the finding be in the affirmative, (2) an award directing the distributor to offer its pictures for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor's total film revenue in the

competitive area in which the complainant's theatre is located, and, in the event that the arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor's total film revenue in said area, he shall vacate the award.[1]

VII

Controversies arising upon the complaint of an exhibitor that a feature licensed to him by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality served by such theatre on moral, religious [fol. 3454] or racial grounds shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless written notice of his election to cancel such feature, together with a statement of his reasons therefor, shall have been mailed to the distributor defendant at its Home Office not later than ten days after the receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application for such feature. In such event the license in so far as it relates to the exhibition of such feature in the theatre specified in the notice shall be deemed cancelled unless within five days after receipt of such notice, the distributor shall have mailed to the exhibitor a notice in writing of its denial of such claim and of its intention to arbitrate the controversy. The power[1] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the feature is generally offensive in the locality served by the exhibitor's theatre on moral, religious or racial grounds; and, if the finding be in the affirmative, (2) an award cancelling the license in so far as it relates to the exhibition of such feature in said theatre.

VIII

Controversies arising upon the complaint of an exhibitor that the clearance[1] applicable to his theatre is unreasonable

[1] See footnote 3 to Section IV.

[1] (Section VII) See footnote 3 to Section IV.

[1] (Section VIII) Clearance means the period of time, fixed by agerement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

[fol. 3455] shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area where the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power [2] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to [fol. 3456] whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered

[2] See footnote 3 to Section IV.

into pursuant to such franchise between such distributor defendant and any other party bound by this decree.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change,[2] he shall make a redetermination of the maximum clearance.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special [fol. 3457] feature,[3] provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

IX

In booking prints for exhibition by exhibitors competing on the same run in the same exchange district,[1] a distributor defendant shall not withhold delivery of prints available in its exchange from one exhibitor in order to give a competing exhibitor a prior playing date not provided for in his license. It is recognized that distributors must be permitted discretion in the ordinary course of booking and distributing films in an exchange district when too few prints are available in the exchange for the playing dates

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[2] See footnote 3 to Section IV.

[3] For the purposes of this Section, a special feature means a feature which for a period of time is exhibited at generally advanced first-run admission prices.

[1] See footnote 4 to Section III.

desired by two or more theatres. In such cases this Section shall have no application.

Violations of this Section shall be subject to arbitration and, if the arbitrator finds [2] that the distributor complained against has pursued a policy of withholding available prints from the complaining exhibitor in violation of this Section, [fol. 3458] he shall enter an award directing the distributor to discontinue such policy.

X

A. Controversies arising upon a complaint by an independent exhibitor [1] that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by said exhibitor in one of said exhibitor's theatres which was in existence or which replaced [2] a theatre in existence at the date of this decree shall be subject to arbitration.

B. In any such arbitration no award shall be made against a distributor defendant unless the arbitrator shall first find the following facts:

(1) The complainant is an independent exhibitor and the theatre operated by him and specified in his complaint was in existence at the date of the decree or replaced such a theatre; and

(2) Such refusal of the distributor to license its features for exhibition in the complainant's theatre on the run re-

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[2] See footnote 3 to Section IV.

[1] An independent exhibitor, as used in this Section, is one wholly independent of any circuit of more than five theatres and not affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of more than five theatres and whose licenses are not negotiated by a buying combine or common buying agent negotiating for more than five theatres.

[2] A theatre shall not be deemed to have replaced such an existing theatre unless erected in the same neighborhood as one which was destroyed or permanently abandoned as a theatre, for the purpose of succeeding to its patronage, and with a seating capacity not more than 25 percent greater than that of the theatre replaced.

quested by the complainant continued during a period of not less than three successive months; and

[fol. 3459] (3) The distributor during such period has licensed the features requested by the complainant on the run requested by him to a theatre (sometimes hereinafter referred to as a circuit theatre) which was in competition with the theatre specified in the complaint and which was a component of a circuit of not less than 15 theatres or which was affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of not less than 15 theatres or the licenses for which were negotiated by a buying combine or common buying agent negotiating for not less than 15 theatres; and

(4) The complainant's theatre has not available to it features sufficient in nature and quantity to enable it to operate on the run requested by the complainant; and

(5) (a) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or

(b) Subsequent to July 20, 1940 and during the two consecutive motion picture seasons[3] immediately preceding the filing of the complaint, the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint and during such period exhibited on such run substantially all the features released during such period by the distributor complained against; or

[fol. 3460] (c) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant demanded in writing[4] features for the theatre specified in his complaint from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under

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[3] A motion picture season means the period from September 1 of one year to August 31 of the next year.

[4] Demands in writing shall be deemed to include complaints in writing to the Department of Justice.

the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; or

(d) The complainant operated the theatre specified in his complaint for at least one year prior to the entry of this decree, and subsequent to July 20, 1935 and prior to July 20, 1940 a prior operator of said theatre had demanded in writing [5] features from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; and

(6) Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on [fol. 3461] the run requested by the complainant was a circuit theatre.

C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres, the capacity of each for producing revenue for the distributors; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their com-

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[5] See footnote 4 to this Section.

parative suitability[6] for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the dis-[fol. 3462] tributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom.

D. If in any such arbitration the arbitrator finds[7] for the complainant, he may enter an award against the distributor which shall not affect the license to exhibit any feature then under license to the circuit theatre but which shall prohibit such distributor from thereafter licensing its features for exhibition either in the circuit theatre specified in the complaint on the run requested by the complainant, or in the complainant's theatre specified in the complaint, on such run, otherwise then by a separate contract or agreement which shall not be a part of any contract or agreement for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.

E. After a final award in favor of a complaining exhibitor has been made under this section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who entered the original award if available) upon the ground that such award has not been complied with in good faith by the distributor against which it was entered. If in any such proceeding the arbitrator shall find[7] that the distributor has not complied in good faith with the original award, the arbitrator may award damages to the exhibitor for loss resulting from the distributor's

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[6] "- considering this factor in situations where the exhibitor customarily exhibits features in two or more theatres on the same run in the same situation as a unit by contracting for groups of features on an "or" basis (i. e., for exhibition at one of two or more specified theatres) all of such theatres may be considered collectively as a unit.

[7] See footnote 3 to Section IV.

failure to comply with the original award but any such award of damages shall be purely compensatory.

[fol. 3463] Any further arbitration proceeding for an award of damages for violation of the original award must be commenced within sixty days after such violation has occurred, by filing a statement specifying the facts constituting each alleged violation for which damages are sought and the exhibitor's alleged damages resulting from each such alleged violation. No award of damages shall be made in any such proceeding for any violation of the original award not occurring within said sixty day period, but prior violations may, in any such proceeding, be considered by the arbitrator as evidence bearing upon the question of the distributor's good faith.

XI

(1) For a period of three years after the entry of the decree herein each of the consenting defendants will notify [1] the Department of Justice immediately of any legally binding commitment for the acquisition by it of any additional theatre or theatres.

(2) During such period each such defendant will also report [1] to the Department of Justice on or before the tenth day of each month the changes in its theatre position, if any, that have occurred during the preceding month, as [fol. 3464] follows, together with a statement of the reasons for such changes:

(a) Theatres contracted to be built, or under construction;

(b) Theatres lost or disposed of;

(c) Theatres acquired;

(d) Interests in theatres acquired, with a statement of the nature and extent of such interests.

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[1] The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

(3) If upon receipt of such information the Department of Justice requests any such defendant to furnish further information with respect to any of the above transactions in which it is involved, such defendant will make a reasonable effort to supply such information promptly.

(4) No information furnished under subdivision (1), (2) or (3) hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purpose of its business. Proceedings based on a violation of this subdivision (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which [fol. 3465] shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section.

XII

(a) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, requiring each of them to trade show its features before licensing the same for exhibition, Section III of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(b) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, limiting the number of features which may be licensed in a single group, subdivision (a) of Section IV of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants,

or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(c) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions requiring each of them to trade show [fol. 3466] its features before licensing the same for exhibition, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with Section III of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject said defendant or defendants to such provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of Section III of this decree.

(d) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions limiting the number of features which may be licensed in a single group, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with subdivision (a) of Section IV of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject such defendant or defendants to said provisions of such other decree and entitle it or them to the [fol. 3467] benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of subdivision (a) of Section IV of this decree.

(e) If, prior to June 1, 1942, (1) a decree containing the provisions referred to in subdivision (c) hereof, or (2) a decree containing the provisions referred to in subdivision (d) hereof, or (3) a decree containing the provisions referred to in both of said subdivisions, shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, but an appeal therefrom has been taken or any of said provisions have not become operative and of full force and effect, then the operation of the provisions dealing with the same subject matter contained in Section III or subdivision (a) of Section IV of this decree shall be suspended and shall be of no binding force and effect upon any consenting defendant except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to said date and subsequent to August 31, 1941, unless and until such decree shall become final and such provisions shall be in full force and effect against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation. After such decree shall have become final, any consenting defendant may at any time exercise its right of election provided for in subdivisions (c) and (d) of this Section.

(f) If, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall require the trade showing of features before licensing the same [fol. 3468] for exhibition, each of the consenting defendants shall be relieved from further compliance with Section III of this decree, and if, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall limit the number of features that may be licensed in a single group, each of the consenting defendants shall be relieved from further compliance with subdivision (a) of Section IV of this decree. In either of such events any consenting defendant may at any time make application to this Court, of which notice shall be served upon Petitioner and all other consenting defendants, for an order relieving the consenting defendants, and each of them, from further compliance with Section III or subdivision (a) of Section IV of this decree, or both, as the case may be, and vacating the same, and thereupon this Court shall make and enter such an order.

(g) At any time after September 1, 1943, any consenting defendant may move to vacate the then effective provisions of Section III and subdivision (a) of Section IV of this decree by filing an application under oath stating that during any consecutive twelve months period preceding the filing of such application either (1) distributors of motion picture films have licensed 25 percent or more of the features released for exhibition in the United States otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree [1] or (2) 12½ percent or more of the total gross income from [fol. 3469] licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, has been derived from pictures licensed otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree.[1]

Petitioner and all other consenting defendants shall be served with notice of the filing of such application.

Upon such application the Court shall enter an order relieving the defendants from further compliance with the provisions of Section III and subdivision (a) of Section IV of this decree, unless within sixty (60) days after service of such application Petitioner shall establish to the satisfaction of the Court that during said twelve months period less than 12½ percent of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, had been derived from pictures licensed otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree.[2]

(h) At any time after September 1, 1942, any consenting defendant may apply to the Court to vacate the provisions of Section III and subdivision (a) of Section IV of this decree, or the provisions of either of such Sections, and upon such application, the Court shall enter an order relieving the consenting defendants from further compliance with

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[1] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

[fol. 3470] such provisions, upon such defendant showing to the satisfaction of the Court that, subsequent to said date and by reason of the competition of persons not selling exclusively in accordance with said provisions of said Sections, or of either of them,[2] compliance by the applicant defendant with such provisions of said Sections, or of either of them, has substantially and adversely affected the applicant defendant's business.

XIII

Nothing contained in this decree shall apply to operations or activities of any consenting defendant outside of the continental United States[1] or to operations or activities of any consenting defendant within the continental United States in so far as they relate to the disrtibution or exhibition of motion pictures outside of the continental United States.

XIV

Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing[1] of such picture upon such terms and conditions as may be fixed by the distributor.

[fol. 3471]

XV

The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof.

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[2] See footnote 1 to this Section.

[1] (Section XIII) The continental United States as used herein means the territory within the boundaries of the forty-eight states and the District of Columbia.

[1] (Section XIV) Road showing is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar.

XVI

No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such defendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award [1] made and entered in such an arbitration proceeding.

XVII

Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right [fol. 3472] of each distributor defendant [1] to license the exhibition, or in any way to arrange or provide for the exhibition in such manner, upon such terms and subjected to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which it directly or indirectly, by stock ownership or otherwise, owns a financial interest at

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[1] (Section XVI) For the purposes of this Section the final award in any arbitration proceeding under Section X of this decree shall be only a final award for damages as therein provided.

[1] (Section XVII) For the purpose of this Section (1) defendant RKO Radio Pictures, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Radio-Keith-Orpheum Corporation, or its successors, directly or indirectly, has; and (2) defendant Vitagraph, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Warner Brothers Pictures, Inc., or its successors, directly or indirectly, has.

the time of the entry of this decree and also at the time of such license, and (2) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which such distributor defendant accquires after the date of the decree and owns at the time of such license directly or indirectly by stock ownership or otherwise, a financial interest of not less than 50 per cent and (3) in any theatre in the ownership, lease, management, or operation, or in the proceeds or profits from the management or operation, of which a company in which such defendant owned not less than 42 per cent of the common stock at the date of the decree and at the [fol. 3473] time of such license,[2] acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 per cent.

XVIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney or the Assistant Attorney General in charge of antitrust matters, and on notice to any consenting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters

[2] In the case of the distributor defendant Twentieth Century-Fox Film Corporation, or its sucessors, the defendant National Theatres Corporation, or its successors, shall be deemed to be such a company if said distributor defendant owned not less than 42 per cent of its common stock at the date of the decree and not less than 35 per cent of its common stock at the time of such license, provided not less than 42 per cent of its common stock is owned by Twentieth Century-Fox Film Corporation, or its successors, and by present or future officers or directors of National Theatres Corporation, or its successors.

contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which inter- [fol. 3474] view counsel for the officer or employee interviewed and counsel for the company may be present. Without in any way limiting the rights granted in the foregoing provisions of this Section each of the distributor defendants shall keep at its principal office current records, which shall be accessible for the purpose aforesaid, showing——

(1) The dates when and the places where each of its features is trade shown, the names of the trade publications wherein notice of each trade showing was published, and the dates of publication; the name and location (by town and exchange district [1]) of each theatre in which each feature is licensed for exhibition, and the date of license thereof;

(2) As to each license entered into by it, the date thereof and the names and location (by town and exchange district [1]) of the theatres involved, the names of the parties thereto and of the distributor's sales representative who negotiated the license, and the names of the features licensed for exhibition;

(3) All arbitration awards rendered against the distributor with a statement showing what the distributor has done to comply therewith.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

[fol. 3475] XIX

Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the right of any distributor defendant to select its own customers, to bargain with them in accordance with law, or to negotiate with or to license to or to accept any offer from

[1] See footnote 4 of Section III.

any exhibitor to license its motion pictures or any number thereof upon such terms and conditions as it deems advisable or to its best interests.

XX

The provisions of Section III, of subdivision (a) of Section IV, of Section V and of Section X of this decree shall have application only with respect to features released in the United States after August 31, 1941.

XXI

Petitioner, by its counsel, has represented to the Court that the public interest requires that the provisions of this decree shall operate for a trial period of three years from the date of entry hereof. Petitioner has further represented to the Court, and each of the consenting defendants has consented to the entry of this decree upon the condition, that Petitioner will not for a period of three years, after the entry of this decree, either in this action of any other action or proceeding against any such defendant seek either the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the Petition filed herein July 20, 1939, or in paragraphs (5), (6) and (7) of Section VIII of the [fol. 3476] Amended and Supplemental Complaint filed herein November 14, 1940, or otherwise seek to divorce the production or distribution of motion pictures from their exhibition; or to dissolve any such defendant or any corporation in which any such defendant has, directly or indirectly, a substantial stock interest and which is engaged in the exhibition of motion pictures or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof, direct or indirect, in motion picture theatres in which it had an interest at the date of the entry of this decree.

XXII

1. The method and conditions of and the procedure for the arbitration of claims and controversies hereinbefore provided for in this decree, as well as the arbitration of claims and controversies provided for in any decree refer-

ring to this decree which may be entered by the ...rict Court of the United States for the Northern Dis...t of Illinois, Eastern Division, in an action entitled "United States of America, Petitioner, against Balaban & Katz Corporation, et al., Defendants", modifying a consent decree entered in said action on April 6, 1932 and the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Southern District of California, Central Division, in an action entitled "United [fol. 3477] States of America; Plaintiff, vs. West Coast Theatres, Incorporated, et al., Defendants", modifying a consent decree entered in said action on August 21, 1930, shall be as specified in this Section and in the Rules of Arbitration and Appeals which are provided for hereinafter.

2. An arbitration system for the arbitration of claims and controversies referred to in this decree shall be administered by an impartial Administrator.

The Administrator shall establish and maintain an Arbitration Tribunal in each city in the United States in which three or more of the distributor defendants shall maintain exchanges.

The Administrator shall establish and maintain a panel of not less than ten arbitrators for each Arbitration Tribunal and shall establish and maintain suitable offices and personnel, including a clerk, for each Arbitration Tribunal and for the Appeal Board provided for hereinafter. The Administrator shall have the power to appoint and remove members of the panels and personnel.

3. No person shall be appointed a member of any panel of arbitrators who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre as landlord, lessor, or otherwise.

4. The American Arbitration Association is appointed Administrator of the arbitration system under this decree, and is authorized and directed to perform the duties and functions of such Administrator until further order of the Court.

[fol. 3478] Any successor to the American Arbitration Association as Administrator shall be appointed by the

Court on the joint application and recommendation of the Petitioner and of a majority of the distributor defendants, except that if the Petitioner and a majority of the distributor defendants fail to join in making such application and recommendation the successor Administrator shall be appointed by the Court.

5. There shall be a Budget Committee consisting of three members, one of whom shall be appointed by the Administrator, one of whom shall be appointed by the distributor defendants, and one of whom shall be the Chairman of the Appeal Board. The Budget Committee shall budget the cost of the maintenance and operation of the arbitration system. Such budget for the first twelve months of the operation of the arbitration system shall not exceed four hundred ninety thousand dollars ($490,000.00), except with the consent of a majority of the distributor defendants. The budget for each succeeding twelve months period shall not exceed four hundred sixty-five thousand dollars ($465,000.00), except with the consent of a majority of the distributor defendants, provided, however, that the Court may, on the application of the Petitioner, and for good cause shown, order an increase in the budget for any year in such amount, not exceeding fifty thousand dollars ($50,000.00), as it may find necessary for the effective operation of the arbitration system.

6. Each arbitrator shall be selected and each arbitration proceeding shall be conducted in the manner prescribed by the Rules of Arbitration and Appeals which [fol. 3479] are filed herewith and are hereby approved. Such Rules may be amended or added to from time to time by the Administrator with the approval of a majority of the Appeal Board upon notice to the Petitioner and to the distributor defendants of such proposed amendments or additions and an opportunity for a hearing thereon. No amendment of or addition to such Rules shall change the qualifications of arbitrators as set forth in Rule II of such Rules or deny to any exhibitor or distributor defendant the right to intervene as a party in any proceeding by which it may be affected or deny to any party to an arbitration proceeding the right: to receive notice of all proceedings therein; to participate in the selection of arbitrators; to challenge the qualifica-

tions of arbitrators; to be represented by counsel or otherwise; to secure the production of witnesses and of evidence; to examine and cross-examine all witnesses; and to appeal to the Appeal Board from any adverse award. The Rules may provide for the arbitration of claims and controversies between distributor defendants and exhibitors other than claims or controversies referred to in subdivision 1 of this Section which by agreement between the parties thereto shall be submitted to the tribunals.

7. There shall be an Appeal Board which shall have jurisdiction to determine appeals from awards made by the Arbitration Tribunals. It shall consist of three members appointed by the Court, each of whom shall be a person of known impartiality and distinction. Each such member shall be appointed for a term of three years and shall serve during such term unless he shall be removed [fol. 3480] by order of the Court or shall resign. Each member of the Appeal Board shall be eligible for reappointment.

If any member of the Appeal Board is disqualified from passing upon any appeal, or is temporarily unable because of illness, absence or other cause to act as a member of the Appeal Board, the Court may on application of one or more members of the Appeal Board appoint another person of known impartiality and distinction to act as a temporary member of the Appeal Board in place of the member so disqualified or unable to act. The compensation of such temporary member shall be fixed by the Court.

One member of the Appeal Board shall be designated by the Court as the Chairman of the Board.

The members of the Appeal Board shall be compensated on an annual basis. The Chairman of the Board shall be paid twenty-thousand dollars ($20,000.00) per annum, and each of the other members of the Board shall be paid seventeen thousand five hundred dollars ($17,500.00) per annum.

The Appeal Board shall have its offices in New York, New York.

8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals;

by penalties imposed in accordance with the provisions of Sections IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time [fol. 3481] to be necessary. Such amounts shall be assessed by the Administrator to and shall be paid by the several distributor defendants in amounts proportionate to their respective gross receipts from licenses for the exhibition of motion pictures in the United States. The proportionate gross receipts of such defendants during the 1939-40 motion picture season shall be used in determing the amount to be paid by each such defendant for the expenses of establishing the arbitration system and of maintaining it during the first twelve months of its operation. Thereafter the gross receipts for the motion picture season ending on the August 31st immediately preceding the start of the particular twelve months period shall be used in determining such amounts.

Each distributor defendant shall inform the Administrator promptly after the end of each motion picture season of its total gross receipts during such motion picture season from licenses for the exhibition of motion pictures in the United States. Such information shall be treated by the Administrator as confidential and shall not be divulged except as required by law.

9. Any person who has the right to institute an arbitration proceeding under any provision of this decree or of any other decree referred to in subdivision 1 of this Section may institute and prosecute such proceeding in the manner and subject to the conditions specified in the Rules of Arbitration and Appeals, upon the condition that such person file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide in [fol. 3482] substance that such complainant submits the controversy to arbitration and undertakes to abide by and to comply fully with whatever final award may be entered therein.

Any exhibitor or distributor who intervenes as a party in any arbitration proceeding as provided in the Rules of Arbitration and Appeals, shall file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator,

which shall provide, in substance, that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein.

Representatives of the Department of Justice, duly authorized in writing, shall be permitted reasonable access during regular office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Appeal Board, of the Arbitration Tribunal, and of the Administrator, which relate to the arbitration system and to the arbitration of claims and controversies under this decree.

XXIII

Jurisdiction of this cause is retained for the purpose of:

(a) Enabling any of the parties to this decree to apply to the Court at any time for such orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of violations thereof;

[fol. 3483] (b) Enabling any of the parties to this decree to apply to the Court at any time for a modification of this decree in order to conform it to any Act of Congress enacted after the entry of this decree;

(c) Enabling any consenting defendant to make any application to the Court referred to in any provision of this decree;

(d) Enabling any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof;

(e) Enabling any consenting defendant to apply to the Court at any time more than three years after the date of the entry of this decree, to vacate this decree, or any modification thereof, or to vacate or modify any provision thereof, on the ground that under the economic or competitive conditions existing at the time of such application, this decree or any modification thereof, or any provision thereof, is inappropriate or unnecessary, or oppressive or unduly burdensome, regardless of whether or not such economic or competitive conditions are new or unforeseen. The right of each consenting defendant to make any such

application and to obtain such relief is expressly reserved by them and is hereby expressly granted.

Whenever obligations or prohibitions are imposed upon the defendants by the laws of any State or by rules or regulations made pursuant thereto, with which the defendants by law must comply, the Court, upon application of the defendants, or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws, [fol. 3484] rules or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party to this decree under the provisions of this Section shall be made in open court upon notice to all of the other parties to this decree, and each such party, upon such application, shall have the right and privilege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

Dated November 20th, 1940.

Henry W. Goddard, United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the plaintiff:

(S.) John T. Cahill, United States Attorney; Thurman Arnold, Assistant Attorney General; James V. Hayes, Robert E. Sher, Robert L. Wright, A. H. Feller, Special Assistants to the Attorney General.

[fol. 3485] For the Defendants:

Paramount Pictures, Inc., Paramount Film Distributing Corporation, by (S.) Thomas D. Thacher, Simpson, Thacher & Bartlett, 120 Broadway, New York, N. Y., Their Attorneys.

Loew's, Incorporated, by (S.) John W. Davis, Esq., 15 Broad Street, New York, N. Y.; J. Robert Rubin, Esq., 1540 Broadway, New York, N. Y., Its Attorneys.

Radio-Keith-Orpheum Corporation, RKO Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, by (S.) Wm. J. Donovan, Esq., Dono-

van, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.; William Mallard, Esq., 1270 Sixth Avenue, New York, N. Y.; Ralstone R. Irvine, Esq., 2 Wall Street, New York, N. Y; Otto C. [fol. 3486] Doering, Jr., Esq., 2 Wall Street, New York, N. Y., Their Attorneys.

Keith-Albee-Orpheum Corporation, by (S.) Monroe Goldwater, Esq., Goldwater & Flynn, 60 East 42nd Street, New York, N. Y., Its Attorneys.

Warner Bros. Pictures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, by (S.) Hon. Joseph M. Proskauer, 11 Broadway, New York, N. Y., Robert W. Perkins, Esq., 321 West 44th Street, New York, N. Y., Their Attorneys.

Twentieth Century-Fox Film Corporation, National Theatres Corporation, by (S.) Richard E. Dwight, Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y., Their Attorneys.

[fol. 3487] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

RULES OF ARBITRATION AND APPEALS PURSUANT TO SUB-DIVISION 6 OF SECTION XXII OF THE DECREE IN THE ABOVE ENTITLED ACTION

I. Initiation of arbitration

An arbitration proceeding shall be initiated by filing with the Clerk of the Tribunal having jurisdiction of the controversy a Demand for Arbitration and a submission as provided in subdivision 9 of Section XXII of the [fol. 3488] Decree, and by paying a filing fee of $10.00 to the Clerk of the Tribunal.

Filed herewith and made a part of these Rules is a map[1] showing the territory throughout which each Arbitration Tribunal shall have jurisdiction (each of which territories is hereinafter called an Arbitration District), and the city in each such Arbitration District in which the Arbitration Tribunal shall be located. The Tribu-

[1] Not printed herein.

nal having jurisdiction in a particular proceeding shall be the Tribunal maintained pursuant to Section XXII of the Decree in the Arbitration District in which the complainant's theatre is located, excepted that when a distributor institutes an arbitration proceeding the Tribunal having jurisdiction shall be the Tribunal in the Arbitration District in which the theatre involved is located.

The Demand for Arbitration shall be signed by the complainant and shall set forth:

The name and address of the complaining party; the name and address of each theatre involved in the controversy; the name and address of each exhibitor or distributor against whom complaint is made (hereafter sometimes referred to as a defending party); the name and address of each other exhibitor and distributor whose business or property it is believed by the complainant may be affected by an award in the proceeding; and a brief statement in simple language of the claim and the relief sought.

At the time of filing the Demand the complainant shall deliver to the Clerk of the Tribunal sufficient copies of the Demand to enable the Clerk to deliver one copy to each [fol. 3489] defending party and to each other exhibitor and distributor named in the Demand, and the Clerk shall forthwith make such delivery.

Within seven days after the date on which the Clerk of the Tribunal delivers a copy of the Demand to a defending party, such party may sign and file with the Clerk of the Tribunal a list giving the name and address of each exhibitor or distributor not named in the Demand whose business or property it is believed by such party may be affected by an award in the proceeding.

The Clerk of the Tribunal shall forthwith deliver a copy of the Demand to each exhibitor and distributor named in any list filed by a defending party.

Any exhibitor or distributor named either in the Demand or in any list filed by any defending party and any other exhibitor or distributor whose business or property may be affected by an award in the proceeding may, at any time prior to the commencement of the first hearing, intervene and thereby become a party to the proceeding by filing with the Clerk of the Tribunal a statement which shall set forth his interest as an intervenor in the proceeding and a sub-

mission as provided in subdivision 9 of Section XXII of the Decree and by paying a filing fee of $10.00 to the Clerk of the Tribunal. The Clerk of the Tribunal shall forthwith deliver notice of each intervention to each other party to the proceeding.

Any party who intervenes more than fifteen days after the filing of the Demand shall not be entitled to participate in the selection of the arbitrator.

[fol. 3490] If, at any time after the fifteenth day following the filing of the Demand and prior to the appointment of an arbitrator, all parties to a proceeding who became parties, by intervention or otherwise, on or before said fifteenth day shall by written agreement select another Tribunal as the Tribunal having jurisdiction and file such agreement with the Clerk of the Tribunal originally having jurisdiction, jurisdiction of the proceeding shall thereby be transferred to the Tribunal so selected. Thereafter no further proceedings shall be had in the Tribunal originally having jurisdiction except that the Clerk thereof shall forthwith deliver notice of such transfer to the American Arbitration Association and shall forthwith deliver the entire file in such proceeding to the Clerk of the Tribunal so selected, who shall forthwith take the action prescribed in Rule III for the appointment of an Arbitrator from the Panel of Arbitrators for his Tribunal.

II. Qualifications of arbitrators

No person shall be appointed a member of a Panel of Arbitrators established in accordance with the Decree who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre, as landlord, lessor or otherwise.

No member of a Panel shall serve as an arbitrator in any proceeding if he has or has had any financial or other relations with any party to the proceeding, or has any interest in the result of the proceeding, or has any personal [fol. 3491] bias, which might prejudice the right of any party to a fair and impartial award.

III. Appointment of arbitrators

Not less than fifteen nor more than seventeen days after the filing of the Demand in accordance with Rule

I, the Clerk of the Tribunal shall deliver to each party an identical list of arbitrators selected from the Panel of Arbitrators, for the purpose of enabling the parties to indicate thereon their preference of arbitrators. If the Clerk of the Tribunal does not receive the list from any party within seven days after the delivery of the list to such party, all the names on such list shall be deemed acceptable to such party.

The Clerk of the Tribunal shall forthwith appoint an arbitrator from the names indicated as acceptable to all parties. In the event no name appears from the lists to be acceptable to all parties, or that none of those shown to be acceptable is available, the American Arbitration Association shall appoint an arbitrator from the remaining members of the Panel.

Not less than sixteen days after the filing of the Demand and prior to the appointment of an arbitrator, (or in the case of an arbitration of a controversy under either Section IV or Section VII of the Decree, at any time prior to the appointment of an arbitrator) the parties to any controversy may by written agreement unanimously appoint one or more arbitrators from the Panel of Arbitrators to arbitrate such controversy, by filing such agreement with the Clerk of the Tribunal.

No irregularity in the appointment of an arbitrator [fol. 3492] shall affect the validity of the proceeding or of the award.

Notice of appointment shall forthwith be given to the arbitrator by the Clerk of the Tribunal, and a signed acceptance obtained.

IV. Removal of arbitrator and filling of vacancy

Upon written application of any party prior to the date the arbitrator's award becomes final, the American Arbitration Association shall, upon proof satisfactory to it that an arbitrator is disqualified under Rule II, revoke the appointment of such arbitrator and declare the office vacant and the award, if any, vacated. No such action shall be taken by the American Arbitration Association in any case where an award has been made unless the applicant party shall have given five days notice of its application to all other parties. Unless application for disqualification is made immediately following a party's discovery of the

reason therefor, such party shall be deemed to have waived such disqualification.

The American Arbitration Association also may revoke the appointment of an arbitrator at any time by reason of his neglect, refusal or failure to perform the duties of his office.

If the appointment of an arbitrator is revoked, or if by reason of resignation, death or illness an arbitrator is unable to perform the duties of his office, a new arbitrator shall forthwith be appointed by the Clerk of the Tribunal from among the names acceptable to the parties or by the American Arbitration Association, in accordance with the second paragraph of Rule III.

[fol. 3493] V. Hearings

Hearings shall be held at the office of the Arbitration Tribunal having jurisdiction of the controversy involved or at such other place in the same Arbitration District as may be agreed upon by the parties with the consent of the arbitrator.

Hearings shall commence as promptly as possible after the appointment of the arbitrator.

The arbitrator shall fix the time of the beginning of the hearing and may adjourn the hearing from time to time.

The Clerk of the Tribunal shall deliver to the parties written notice of the name of the arbitrator and of the time and place of the beginning of the hearing at least five days prior thereto, unless such notice is waived by the parties.

VI. Procedure at hearings

The arbitrator shall take the oath of office in the form prescribed by the Administrator before commencing the hearing.

Parties may be represented by counsel or by others.

Each party shall have the right to examine or cross-examine all witnesses.

Witnesses shall testify under oath or its legal equivalent.

Evidence shall be received only at hearings of which all parties shall have had due notice and the arbitrator in making his award shall consider only evidence so received and such inspections as he may make hereunder.

[fol. 3494] The arbitrator shall have power to require any party to produce such records or documents as the arbitra-

tor may deem necessary to a proper determination of the controversy. In lieu of producing or offering original records or documents, any party may, with the approval of the arbitrator, produce or offer sworn copies thereof or sworn excerpts of the relevant or material portions thereof. If any party challenges the authenticity, correctness or adequacy of such documents or excerpts, the arbitrator shall determine such authenticity, correctness or adequacy. All exhibits offered in evidence shall be numbered and so marked as to indicate whether or not they were received.

The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

Whenever the arbitrator deems it necessary he may make an inspection in connection with the subject matter of the controversy upon notice to the parties.

The arbitrator may hear argument and receive briefs.

VII. Closing and reopening the proceeding

After all parties have indicated that they have no further evidence to offer, the arbitrator shall declare the proceeding closed.

Prior to the expiration of the time for making an award the arbitrator may reopen the proceeding upon his own initiative, or for good cause upon the written application of any party on five days' notice to all other parties.

At any time within twenty days after the award has been filed the arbitrator may also reopen the proceeding [fol. 3495] for the purpose of correcting inadvertent errors in the award.

VIII. Defaults and withdrawals

If any party to a proceeding defaults by failure to comply with the fourth paragraph of Rule XI or withdraws from the proceeding after an arbitrator is appointed, the proceeding shall nevertheless continue to an award unless all other parties to the proceeding consent to a dismissal. A party who defaults or withdraws shall not be entitled to participate further in the proceeding but shall be bound by the award.

IX. Powers of arbitrators

The arbitrator shall have the powers and shall perform the duties granted to and imposed upon him by the Decree and these Rules, and in making his award he shall comply with the Decree and these Rules.

X. Awards

The award shall be filed with the Clerk of the Tribunal within thirty days from the date of closing the proceeding, or from the date fixed by the arbitrator for the filing of briefs, whichever is later.

The award shall be specific, shall contain such findings as are required by the Decree and shall be signed by the arbitrator and acknowledged before a notary public or other officer duly authorized to administer oaths.

In his award the arbitrator shall assess costs against the losing party or parties or apportion them among the parties as he may deem proper. Costs shall be limited to the arbitrator's fee and the filing fees.

[fol. 3496] The Clerk of the Tribunal shall forthwith deliver a copy of the award and any corrected award to each party, with the date of filing endorsed thereon.

The award, or, if corrected, the corrected award, shall become final and binding upon the parties upon the expiration of the time for filing a notice of appeal therefrom, unless an appeal is taken in accordance with these Rules.

XI. Arbitrator's fees

The American Arbitration Association shall fix for each Arbitration District the per diem rate of the arbitrator's fee, which in no event shall exceed $50.00 per diem. The arbitrator shall be entitled to the per diem fee for each day or part thereof that he shall attend a hearing or make an inspection.

Any expenses incurred by an arbitrator in making inspections as provided in Rule VI, and in conducting hearings at other places than the Tribunal office as provided in Rule V, shall be borne equally by the parties.

No other compensation or expenses and no gratuities or benefits of any kind shall be paid to or conferred upon an arbitrator by any party.

Prior to the commencement of each day's hearing or inspection, each party to the proceeding shall deposit with the

Clerk of the Tribunal a sum equal to the arbitrator's per diem fee. Failure to make such deposit shall constitute a default.

After the award is filed, the arbitrator shall be paid his fee out of the sums deposited by the parties to the proceeding. The Clerk of the Tribunal shall return any undis- [fol. 3497] bursed sums to the parties entitled thereto upon the final disposition of the controversy.

XII. Stenographic Cost [1]

The Clerk of the Tribunal shall make the necessary arrangements for the taking of a stenographic record of the testimony when such a record is requested by one or more of the parties, who shall deposit the cost thereof with the Clerk of the Tribunal.

Any party desiring a transcript of the stenographic record of the hearing shall pay the cost thereof and in the event that such party did not pay the cost of taking the stenographic record it shall reimburse the other party or parties for the cost thereof.

XIII. Extensions of Time

The parties may in writing unanimously agree to extend the time specified in any of the foregoing Rules and, except as to Rule X, the arbitrator may extend such time upon the written application of any party upon five days notice to all other parties.

XIV. Notice of Appeal

Any party to a proceeding may apeal from an award by filing a notice of appeal with, and paying a filing fee of $25.00 to, the Clerk of the Tribunal in which the award was made, not later than twenty days after the date of filing of the award or the corrected award. The Clerk of the Tribunal shall forthwith deliver a copy of the notice of appeal with [fol. 3498] the date of filing endorsed thereon to each party to the proceeding and to the Clerk of the Appeal Board.

The appellant shall have made at his own expense, and, within ten days after filing the notice of appeal, shall file with the Clerk of the Tribunal in which the award was

[1] Under Rule XIV no appeal can be taken unless three copies of the transcript of the record or an abbreviation thereof are filed with the Clerk of the Tribunal.

made, three copies of the transcript of the stenographic record of the hearing or such abbreviation thereof as may be agreed upon by the parties.

XV. Record on Appeal

Upon receipt of the three copies of the transcript or an agreed abbreviation thereof filed by the appellant, the Clerk of the Tribunal shall forthwith prepare the record on appeal which shall consist of the following:

1. The Demand for Arbitration and the submission.

2. Statements and submissions of intervening parties.

3. Notice of appointment and signed acceptance of the arbitrator.

4. Clerk's record of hearing.

5. Three copies of the transcript of the stenographic record of hearing or such abbreviation thereof as may have been agreed upon by the parties.

6. Exhibits received in evidence and exhibits offered but not received in evidence, except such as may be omitted by stipulation of the parties.

7. The award.

Unless otherwise directed by the Appeal Board, the record on appeal shall remain on file in the Tribunal until the expiration of the time for filing of all briefs as provided in Rule XVI.

[fol. 3499] Immediately upon the expiration of such time the Clerk of the Tribunal shall transmit the record on appeal to the Clerk of the Appeal Board.

XVI. Proceedings on Appeal

Within thirty days after the filing of the notice of appeal, each party shall deliver a copy of his brief on appeal to every other party and file with the Clerk of the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Within forty days after the filing of the notice of appeal, each party shall deliver a copy of any answering brief to each other party and file with the Clerk of the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Upon the written agreement of all parties the Appeal Board shall, and upon its own initiative may, order oral argument. At any time not later than five days after the expiration of the time for filing answering briefs any party may apply to the Appeal Board for permission to present oral argument. Such application shall be in writing, shall state the reasons therefor and shall be filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party. Any objection to such application shall be made in writing and filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party, within five days after the filing of the application. The ruling on such application shall be made by the Appeal Board forthwith after the expiration of the five day period allowed for the filing of objec- [fol. 3500] tions and a copy of the ruling shall forthwith be delivered by the Clerk of the Appeal Board to all parties.

When the Appeal Board has ordered oral argument it shall fix the date thereof. The Clerk of the Appeal Board shall deliver to the parties notice in writing of the time and place of such argument, at least ten days prior thereto.

Oral arguments shall be heard by the Appeal Board only in New York, New York.

XVII. Decision and Opinion of the Appeal Board

All members of the Appeal Board shall pass on all appeals and, except as provided in Rule XIX, on all other matters, and the concurrence of two shall be necessary to a decision.

The decision of the Appeal Board together with an opinion stating the reasons therefor shall be in writing and signed by the members of the Appeal Board or a majority thereof. The decision shall be acknowledged before a notary public or other officer duly authorized to administer oaths. The decision and opinion shall be filed with the Clerk of the Appeal Board, who shall forthwith file a copy thereof with the Clerk of the Tribunal and shall forthwith deliver a copy thereof to each of the parties. The Clerk of the Tribunal shall forthwith notify each of the parties of the date of filing with him.

The Appeal Board in its decision may affirm, modify, correct or reverse the award of the arbitrator, including provision for costs therein, or may remand the proceed-

[fol. 3501] ing to the Tribunal for a rehearing or for further action in accordance with the decision of the Appeal Board.

The Appeal Board in its decision may assess the cost of the stenographic record and of the transcript thereof against the losing party or parties, or apportion it among the parties as it deems proper.

XVIII. Proceedings Subsequent to Decision of Appeal Board

Unless the Appeal Board remands the proceeding to the Tribunal or reopens the proceeding as hereinafter provided, the decision of the Appeal Board shall become the final award and shall become binding on all parties ten days after it is filed with the Clerk of the Tribunal.

When the Appeal Board remands a proceeding the arbitration shall thereupon proceed in accordance with the decision of the Appeal Board.

Within ten days after the decision of the Appeal Board has been filed with the Clerk of the Tribunal the Appeal Board may reopen the proceeding for the purpose of correcting inadvertent errors. In such case the corrected decision shall be signed and acknowledged and copies thereof shall be delivered and filed as provided in Rule XVII. Such corrected decision, unless it remands the proceeding to the Tribunal, shall become the final award and shall become binding on all parties when it is filed with the Clerk of the Tribunal, or ten days after the decision corrected thereby was filed with the Clerk of the Tribunal, whichever is later.

XIX. Extension of Time

The parties may by written agreement extend the time specified in any of the Rules relating to appeals, and any [fol. 3502] member of the Appeal Board may do so upon the written application of any party made upon five days notice to all other parties.

XX. Submission of Other Controversies

Controversies between exhibitors and distributors other than those referred to in subdivision 1 of Section XXII of the Decree may be submitted to the arbitration system by the parties thereto, provided:

a) At least one of the parties thereto is a distributor defendant as defined in the Decree; and

b) A submission in writing setting forth the controversy to be arbitrated is signed by all the parties thereto and filed with the Clerk of the Tribunal having jurisdiction.

These Rules in so far as they are applicable shall apply to the arbitration of such controversies except as the submission may otherwise provide and except that no exhibitor or distributor may intervene therein.

XXI. Access to Records

At no time shall access to the record of any proceeding or appeal be permitted to any person not a party, except that awards, decisions and opinions may be made public.

XXII. Definitions

"Decree" means the Consent Decree dated November 20, 1940 entered in the District Court of the United States for the Southern District of New York in an action entitled "United States of America v. Paramount Pictures, Inc., et al."

[fol. 3503] "Arbitration Tribunal" and "Tribunal" mean the Tribunal established by the American Arbitration Association in any city as provided in the Decree.

"Clerk of the Tribunal" means the Clerk of the Arbitration Tribunal having jurisdiction.

"File with the Clerk" means actual receipt by the Clerk.

"Deliver" or "Delivery" means either personal delivery or the placing of the document in the mails properly stamped and addressed to the person intended to receive such document.

"Proof of Delivery" means an admission of delivery or an affidavit of personal delivery or of mailing.

"Award" means award and findings.

"Person" means any individual, partnership, unincorporated association or corporation.

The above Rules of Arbitration and Appeals are hereby approved.

November 20th, 1940.

(S.) Henry W. Goddard, United States District Judge.

Filed Nov. 20, 1940.

[fol. 3504] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

APPLICATION FOR MODIFICATION OF DECREE—Filed August 7, 1944

The United States of America, plaintiff herein, hereby applies to the court for modification of the consent decree heretofore entered herein on November 20, 1940, pursuant to section XXIII thereof, in the manner hereinafter set forth for the reasons set forth in paragraph 1 hereof.

1. Sections III and IV (a) of said decree have been inoperative since September 1, 1942, and the restraining provisions of Section XI of said decree have been inoperative since November 20, 1943. Said decree is now inadequate to perform its intended function of restraining the violations of law alleged in the complaint and conforming the operation of the decree defendants [1] to the requirements of the Sherman Act. Plaintiff respectfully submits that in order to perform said function said decree should be modified in the respects set forth in the following paragraphs. Where no mention is made of an existing section, no change is requested. As to section III, no change in the form thereof is requested but plaintiff prays that said section may again be made operative.

2. Plaintiff prays that subsection (a) of section IV of the decree be stricken therefrom and that the following subsection (a) be substituted therefor:

> [fol. 3505] No distributor defendant shall condition the licensing of one feature or group of features upon the licensing of another feature or group of features.

Plaintiff further prays that the last two paragraphs of subsection (b) of section IV, which appears on pages 6 and 7 of the decree, be sticken therefrom. Said section IV, if modified as prayed herein, would read as follows:

> (a) No distributor defendant shall condition the licensing of one feature or group of features upon the licensing of another feature or group of features.

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[1] The term "decree defendants" as used herein refers to all of the parties which consented to the decree entered herein on November 20, 1943.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[1] or foreigns[2] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

3. Plaintiff prays that section V of the decree be stricken therefrom and that the following section V be substituted therefor:

(a) No decree defendant shall condition the licensing of films in one theatre or group of theatres upon the licensing of films in another theatre or group of theatres.

4. Plaintiff prays that section VIII of the decree be modified by striking therefrom the sentence, "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures" and substitute therefor the following sentence: "Clearance shall be deemed to be unreasonable whenever its effect is to restrain competition between two or more theatres unreasonably."; by adding the following clause to the provisions [fol. 3506] defining the power of the arbitrator: "An award providing that a theatre holding clearance found to be unreasonable should take no clearance over the complainant's theatre may be made regardless of whether or not there is substantial competition between said theatres."; and by striking the following two provisions:

Subject to the provisions of Section XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pur-

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[1] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[2] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

suant to such franchise between such distributor defendant and any other party bound by this decree.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Said section VIII, if modified as prayed herein, would read as follows:

Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:

Clearance shall be deemed to be unreasonable whenever its effect is to restrain competition between two or more theatres unreasonably.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

[fol. 3507] (7) All other business considerations, except that the arbitrator shall disregard the fact that a

theatre involved is affiliated with a distributor or with a circuit of theatres.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. An award providing that a theatre holding clearance found to be unreasonable should take no clearance over the complainant's theatre may be made regardless of whether or not there is substantial competition between said theatres.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change, he shall make a redetermination of the maximum clearance.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature, provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

5. Plaintiff prays that sections IX and X of the decree be stricken therefrom and that the following section be substituted therefor.

No distributor defendant shall license or make available for exhibition in theatres any films released by it upon terms which have the effect of unreasonably restraining competition between two or more theatres

in exhibiting said files. Controversies arising on a complaint by an exhibitor thereby affected that a distributor has so licensed or made available such films for exhibition in the complainant's theatre or in a theatre competing with his theatre shall be subject to arbitration in accordance with the terms of this decree. If the arbitrator finds that this section has been so violated, [fol. 3508] he shall make an award which will describe the specific course of conduct found by him to violate this section and will require the payment of an amount by such defendant or defendants as he finds have engaged in such conduct which in his judgment will compensate the complainant for any pecuniary loss sustained as the result of such a violation or violations and discourage the recurrence of such violations.

6. Plaintiff prays that section XI of said decree be stricken therefrom and that the following section be substituted therefor:

(a) No decree defendant shall hereafter acquire, directly or indirectly, any financial interest in any theatre.

(b) Each decree defendant which is directly or indirectly engaged in the production, distribution and exhibition of films shall within three years from the date of this modification completely divorce its exhibition business from its production and distribution business to the end that no defendant directly or indirectly engaged in producing or distributing films shall then own any financial interest in theatres and no defendant directly or indirectly engaged in operating theatres shall then own any interest in the production or distribution of films.

(c) Each decree defendant directly or indirectly engaged in operating theatres shall within such time and upon such terms as the court may deem reasonable divest itself of such theatre interests as the court may in the course of supplemental proceedings hereunder, find should be divested in order to insure theatre operating competition in the communities where they are now monopolizing theatre operation.

(d) All of the theatre-operating agreements, implied or expressed, by which any two or more of the

[fol. 3509] decree defendants share in the financial benefits from the operation of theatres jointly owned or controlled by any two or more of them are hereby declared void, and each decree defendant is enjoined from entering into or enforcing any similar agreements.

7. Plaintiff prays that section XII of the decree may be stricken therefrom.

8. Plaintiff prays that section XV of the decree may be stricken therefrom and that the following section be substituted therefor:

> All franchise and any licenses entered into pursuant thereto by any of the decree defendants are hereby declared illegal and void and the said defendants are hereby enjoined from making or enforcing any similar agreements.

9. Plaintiff prays that section XVII of the decree may be stricken therefrom and that the following section be substituted therefor:

> No distributor defendant shall license its films to any affiliated theatre upon terms which unreasonably restrain the ability of an unaffiliated theatre to compete with such affiliated theatre.[1]

10. Plaintiff prays that section XX of the decree may be stricken therefrom.

11. Plaintiff prays that section XXI of the decree may be stricken therefrom.

Attached hereto is a copy of the proposed modified decree with the sections thereof renumbered to conform to the omissions proposed herein.

United States of America, by Robert L. Wright, Special Assistant to the Attorney General. Francis [fol. 3510] Biddle, Attorney General. Wendell Berge, Assistant Attorney General. James B. M. McNally, United States Attorney.

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[1] For the purposes of this section an affiliated theatre is one in which a distributor defendant owns, directly or indirectly, a financial interest. All other theatres are unaffiliated.

[fol. 3511] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Notice of and Memorandum in Support of Plaintiff's Motion for Temporary Relief With Respect to Unreasonable Clearance—Filed February 5, 1945

[fol. 3512] NOTICE OF MOTION

To:

Simpson, Thacher & Bartlett, Esqrs., 120 Broadway, New York City, Attorneys for Paramount Pictures, Inc. and Paramount Film Distributing Corporation.

John W. Davis, Esq., 15 Broad Street, New York City, Attorney for Loew's, Incorporated.

Donovan, Leisure, Newton & Lumbard, Esqrs., 2 Wall Street, New York City, Attorneys for Radio-Keith-Orpheum Corporation, RKO Pictures, Inc., RKO Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation.

Joseph M. Proskauer, Esq., 11 Broadway, New York City, Attorney for Warner Bros. Pictures, Inc., Vitograph, Inc., and Warner Bros. Circuit Management Corporation.

Dwight, Harris, Koegel & Caskey, Esqrs., 100 Broadway, New York City, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation.

Schwartz & Frohlich, 1450 Broadway, New York City, Attorneys for Columbia Pictures Corporation, Screen Gems, Inc., and Columbia Pictures of Louisiana, Inc.

O'Brien, Driscoll & Raftery, 152 W. 42d Street, New York City, Attorneys for United Artists Corporation.

[fol. 3513] Charles D. Prutzman, Adolph Schimmel, 1250 6th Avenue, New York City, Attorneys for Universal Corporation, Universal Pictures Company, Universal Film Exchange, Inc., and Big U. Film Exchange, Inc.

GENTLEMEN:

Please Take Notice that upon the pleadings in the above-entitled case, the defendants' answers to plaintiffs' written interrogatories heretofore filed herein, the decisions numbered 1 to 104, inclusive, rendered by the Appeal Board appointed by the Court, in the course of arbitration proceedings under the consent decree heretofore entered herein, and

the memorandum attached hereto and made a part hereof, counsel for plaintiff will appear before the Honorable Henry W. Goddard, in the courtroom usually occupied by him in the Federal courthouse for the Southern District at Foley Square, in the City of New York, on the fifth day of March 1945, at 10 o'clock in the forenoon, and move the Court for the entry of an order enjoining the defendants Loew's, Incorporated, Paramount Pictures, Inc., R.K.O. Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, and Warner Bros. Pictures, Inc., the corporations respectively controlled by them and their officers, agents, and employees from granting unreasonable clearance in licensing for exhibition in theaters feature films distributed by them, pending the entry of a final decree herein, and for such other and further relief as to the Court may seem just in the premises.

Wendell Berge, Assistant Attorney General.

Dated February 5, 1945. Washington, D. C.

[fol. 3514] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RELIEF WITH RESPECT TO UNREASONABLE CLEARANCE

I. Prior Proceedings

On August 7, 1944, plaintiff filed its application for modification of the consent decree of November 20, 1940, setting forth in detail modifications which it deemed essential to make that decree adequate to perform its function of restraining violations of law by the consenting defendants. The arbitration provisions of that decree have continued to remain in effect by agreement of the parties since the expiration of the three-year trial period on November 20, 1943, but since the defendants have declined to concede expressly the existence of law violations, even for the purpose of determining the proper scope of temporary relief, the plaintiff is remitted to a trial of the suit on the merits for any permanent relief and to such additional temporary relief as the Court may grant on a motion therefor. As no trial on the merits was imminent and the violations which

led to the entry of the decree continued, the plaintiff moved orally on December 20, 1944, for temporary relief pending the entry of a final judgment. On that date, March 5, 1945, was set as the date on which plaintiff's motion for temporary relief against the consenting defendants with respect [fol. 3515] to unreasonable clearance would be heard and written notice of motion for such relief is attached hereto and served herewith.

As stated by plaintiff's counsel on December 20, the Government will not offer oral testimony in support of this motion but will rely principally upon a consideration by the Court of facts which have been established in the course of the arbitration proceedings under Section VIII of the decree, the section which deals with unreasonable clearance. The purpose of this memorandum is to advise the defendants of the particular arbitration decisions on which the plaintiff will rely at the hearing, as directed by the Court, and to apprise them of the particular relief which will then be sought. It is our understanding that we shall be advised by February 20 of their position with respect to the relief sought, and particularly as to what, if any, testimony they will seek to introduce at the hearing.

II. Plaintiff's Theory of the Motion

In the absence of express agreement between the plaintiff and the defendants as to either the necessity for injunctive relief or its form, plaintiff is now proceeding upon the assumption that its case for additional temporary relief requires a showing to the effect that (1) the consenting defendants have, since the suit was filed, imposed unreasonable clearances which, *prima facie*, violate the Sherman Act, and (2) the decree in its present form fails to give adequate temporary relief against such violations. Upon such a showing, we think it is clear that relief additional to that provided by the present Section VIII should be granted, pending the entry of a final decree. As the use of the arbitration system as a mechanism for enforcement of any provision of the decree is dependent upon an agreement of the parties, the provisions that we propose for the purpose of this hearing would normally be enforced by contempt proceedings. Although the issue to be decided here is thus what the substantive provisions of the temporary decree shall be which deal with unreasonable clearance, the

[fol. 3516] parties will be free, in any event, to agree to implement whatever substantive provision the Court adjudge the plaintiff to be entitled to by the existing arbitration system, or such other enforcement mechanism as the Court may approve.

III. What Unreasonable Clearance Is Under the Decree and Under the Sherman Act

Clearance, as defined in the consent decree, is "the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres." Such an agreement obviously restricts the ability of one theatre to compete with another in licensing, booking and exhibiting a particular distributor's films. As the agreement is one which restrains interstate commerce in films it is a violation of Section 1 of the Sherman Act unless the restraint is a *reasonable one. Interstate Circuit* v. *United States*, 306 U. S. 209.

Clearance restrictions have traditionally been imposed by distributors in this industry on the theory that their ownership of copyrights on the films distributed entitled them to impose such restrictions on the exhibition of the films in theatres as are necessary and appropriate to realize maximum revenue from the exploitation of the copyright. Upon this theory distributors have customarily undertaken to fix the minimum admission prices at which their films should be exhibited to the public in all of the theatres they license and maintenance of these minimum prices is made a condition of the enjoyment of such run (priority of exhibition in a particular competitive area) and clearance privileges as the license grants.[1] Such a use of run, clearance and admission price restrictions is keyed to the existing [fol. 3517] system of distribution, which involves the playing of the same film on successive runs in various theatres in the same competitive area at successively reduced admission prices. Obviously the first-run exhibitors would not ordinarily be expected to pay film rentals based upon

[1] The form in which these provisions are cast in the printed license agreements respectively employed by the five consenting defendants is set forth in the Appendix to this memorandum.

the receipt of the highest admission price in a competitive area unless there were some assurance that the films they exhibited would not be exhibited elsewhere in the area at substantially lower prices until after the lapse of some reasonable period of time. Nevertheless, even such price-fixing has been held to be illegal when used to protect a theatre operating monopoly from independent competition by destroying an existing price differential between subsequent runs in the same city. *Interstate Circuit* v. *United States*, 306. U. S. 209.

As the minimum admission price fixed in the film license is not a price paid for the privilege of vending, performing or reproducing the copyrighted film, such a price restriction does not appear to be a *bona fide* exercise of any of the exclusive privileges granted by the copyright laws under any circumstances. The price paid for such a privilege is the sum paid by the exhibitor to the distributor for the use of the film in his theatre, designated in the license as film rental. Whether this sum is stated as a flat figure or a percentage of the gross receipts, it will vary with the ability of the film to attract patrons to the theatre and the distributor thus had a financial stake in the exhibitor's admission prices, which determine the extent and value of that patronage. However, this kind of stake in the price at which a product is ultimately merchandised does not permit an interstate distributor of the product to fix the price at which others will vend it to the public. Such price-fixing violates the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U. S. 373.

Such price-fixing is also outside the protection of the copyright laws where the product is copyrighted *(Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339) and outside the protection of the patent laws where it is patented *(Straus* v. *Victor* [fol. 3518] *Talking Machine Co.*, 243 U. S. 490) although a patentee has been held to possess the right to fix the price at which its own product is to be sold by its agents and it imposes a similar requirement on a manufacturing license. *General Electric Co.* v. *United States*, 272 U. S. 446.

A film distributor does not sell its film to exhibitors but merely grants the exhibitor a license to use a positive print of its film for commercial exhibition in his theatre for a specified period of time. The exhibitor does not sublicense the film but sells to his patrons the right to witness a performance in his theatre of which the exhibition of a single

feature film may be only a part. The exhibitor, who possesses the theatre, determines the program of entertainment to be offered and collects the admission fees which make the exhibition of the film profitable; would normally determine independently the price at which that entertainment should be made available to the public. There appears to be no sound legal reason for permitting any of the persons who do not make the ultimate sale to the public, but merely contribute to the production of entertainment created by the combined use of a theatre investment, copyrighted film, patented equipment and various special skills, to fix the price to the public in contracts made with the exhibitor covering the use of their respective contributions.[2]

[fol. 3519] The monopolistic consequences of permitting these defendants to use their copyrights to fix admission prices and impose other restrictions on theatre operating competition are apparent when the prior use of patent rights to dominate the industry is considered. In 1915 a decree was entered in *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800 dissolving a combination of film distributors and projection equipment manufacturers which had effectively monopolized the motion picture business in this country as it then existed by the use of patent licensing restrictions. One form of these restrictions was the tying of the use of essential patented projection equipment controlled by the combination to the use of films distributed by

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[2] The film rental terms, of course, determine how much of the admission price stays with the owner of the theatre and how much goes to the distributor for his share in producing the entertainment sold. How much of these respective shares are further distributed by the theatre owner to those who supply him with the patented equipment that he employs in the course of the performance and by the distributor to those who created the copyrighted film, of course, depends upon such contractual arrangements as the exhibitor and distributor respectively make with others. But it seems clear that neither the ownership of a patent nor a copyright on any feature of the entertainment gives such owner any legal right to restrict the terms on which that entertainment is sold by others no matter how desirable such restrictions may be from the standpoint of the patent or copyright owner.

them, which was declared to be outside the scope of the patent laws in *Motion Picture Patents Co.* v. *Universal Film Co.*, 273 U. S. 502. The problem with which we are immediately concerned on this motion is the extent to which five theatre-owning distributors may restrict the terms on which their films are made available to competitive theatres by license agreements made with their theatres and theatres unaffiliated with them. If no limitation is placed on the use of such restrictions it is self-evident that they will be used to promote the business of these distributors, their theatre affiliates and other theatre circuits with large film buying power at the expense of the small independent theatre operators.[3]

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[3] Monograph 43 of the TNEC states, at pp. 40-45:

"Powerful exhibition interests competing with weaker rivals have demanded extended clearance periods from distributors, and have insisted that they be granted protection over geographical areas larger than could be warranted in any economic sense. In view of the larger aggregate rentals paid by these dominating exhibition units as compared with their smaller competitors, and the fear that these rentals might be reduced or withdrawn, distributors in many cases have acquiesced to these demands.

The primary reason for the negotiation of extended protection has been, of course, the simple desire to hear the cheery ring of the bell in the cash register. A theatre able to negotiate extended clearance without being required to pay correspondingly higher rentals tends to draw patronage away from competing subsequent-run exhibitors. That this practice may render the competitor's business wholly unprofitable may not be an undesirable aspect of the situation. If the large exhibitor is able to acquire cheaply the properties of his competitors, he may achieve a local monopoly of the exhibition field. In this case the admission prices and clearance periods which are established will be designed solely to enhance his profits at the expense of all motion picture patrons in the locality, so far as this may be permitted by the distributors.

The consumer interest in unfair clearance is quite clear. The consumer desires to see each picture as promptly as possible and at the lowest admission price compatible with continued desirable service. It is quite evident that unfair clearance, whether present as such or carried through to

[fol. 3520] In partial recognition of the foregoing facts, the system of clearance arbitration provided by Section VIII of the decree was established in the hope that it would afford substantial relief for exhibitors suffering from unreasonable clearances imposed by the five theatre-owning distributors and that such relief would benefit the public. The decree was set up on a temporary basis for a three-year trial period in order that it might be modified in the light of experience gained during that period and its arbitration provisions have been continued in effect since November 20, 1943, by agreement of the parties, pending a judicial determination of such additional relief as the law may warrant.

Section VIII provides that upon the complaint of an exhibitor subject to the clearance complained of an arbitration may be had in which the reasonableness of the clearance is determined and an award may be made which limits the clearance that may be imposed upon him in future licenses. The award is made subject to modification upon rearbitration in the light of such changes in conditions occurring subsequent to the award as may warrant such relief. An appeal [fol. 3521] as of right from all such awards to a three-man board appointed by this Court is provided by the Rules of Arbitration. The Appeal Board, on such appeals, reviews the entire record made before the arbitrator, *de novo*.

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the ultimate objective of a local monopoly, directly contravenes the interests of the consumer.

Unfair clearance is not primarily a question of producer-distributor control of exhibition. It has been employed repeatedly by large independent theatre organizations. Nevertheless, the practice has been closely identified with the theatre operations of the major companies. As has been already indicated, the five major companies control and operate a great number of large prior-run theatres throughout the United States. Since unfair clearance is most usually instituted by such theatres over subsequent-run competitors, this control is most significant. Moreover, since these major companies in general do not compete with each other in their theatre operation activities, the mutual advantages to be derived from reciprocal permission to enforce unfair protection terms on subsequent-run exhibitors must not be disregarded.

IV. The Defendants Have Repeatedly Granted Unreasonable Clearance Since This Suit Was Filed

In demonstrating that the consenting defendants have granted unreasonable clearance, in violation of the Act, during the pendency of the suit, we shall rely only upon those arbitration proceedings in which clearance imposed by one or more of these defendants was found by the Appeal Board to be unreasonable. As each of the defendants respectively involved in each case was a party to these proceedings in which the facts were carefully reviewed by an able board appointed by the Court for that purpose, we think that the facts found by them bind the defendants for the purpose of this proceeding, although the legal conclusions to be drawn from these facts are, of course, for this Court to determine.

The only standard set up by the decree for determining the reasonableness of clearance was a declaration that "clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures" and an enumeration of seven factors to be considered by the arbitrator which may be summarized as follows: (1) historical development, (2) admission prices, (3) general character of the theatres, (4) their policies of operation, (5) film rentals, (6) extent of competition for patronage, and (7) general business considerations, excepting circuit and distributor affiliations. The relief granted was limited to a finding that the clearance complained of was unreasonable, and the only award that may be made is one fixing the *maximum* clearance which may be granted in future licenses. Clearance granted by one of these defendants in favor of its own theatres was expressly exempted from any relief as were existing license agreements made by them except those made with each other pursuant to franchises with each other. Licenses for the exhibition of special features to be shown at advanced admission prices are also exempt from the [fol. 3522] operation of the provision. The decree also provided that this relief should in no way restrict the rights of exhibitors and distributors to negotiate for or license any run that the distributors desired to grant. The relief available consists solely of a finding that the clearance complained of is in fact unreasonable plus a declaration of the maximum amount of clearance that may thereafter be imposed in favor of the theatres enjoying the unreasonable clearance. Violation of an award is punishable by contempt proceedings.

That such relief only ameliorates rather than prohibits violations of law resulting from the imposition of unreasonable clearance by the defendants is implicit in the mere statement of these provisions. However, they have served the purpose of recording the facts concerning such unreasonable clearance abuses as were brought to arbitration, for the guidance of the Court in dealing with this problem. These decisions do not, of course, constitute a record of all of the unreasonable clearances which exhibitors have been subjected to by these defendants as the proceedings were instituted only by such exhibitors as believed that the prospect of securing the extremely limited relief held forth by the decree warranted the substantial expenditure of money and effort required to carry an arbitration through to final decision.

In a number of these cases one or more of the defendants was found to have imposed substantial clearance between theatres in entirely separate communities which were in only slight competition with each other. Under the decree, as interpreted by the Appeal Board, relief was limited to a more reduction of such clearance rather than its elimination. These holdings are tabulated as follows:

Case No.	Complainant's Theatre	Distributor Defendant Imposing Unreasonable Clearance	Maximum Clearance Finally Awarded
4A	American, Canton, N. Y.	R.K.O., Warner	3 days favor Strand, Ogdensburg, N. Y.
9	York, Capitol Athol, Mass.	Loew	1 day favor Fitchburg, Fitchburg, Mass.
[fol. 3523]			
10	Apex, Washington, D. C.	Loew	5 days favor Calvert Uptown, Washington, D. C.
22	Liberty, Freehold, N. J.	R.K.O., Fox, Loew, Paramount and Warner	(1) 3 days favor Lyric, Asbury Park, N. J. (2) 7 days favor St. James, Mayfair and Paramount, Asbury Park, N. J.
23	Bayne, Virginia Beach, Va.	Warner	5 days favor Newport, Norfolk, Va.
30	Tioga, N. Philadelphia, Pa.	Warner	21 days favor Strand, N. Philadelphia, Pa. with exceptions.
32	Playhouse, Clyde, N. Y.	R.K.O., Fox, Loew, Paramount and Warner	7 days favor Capitol, Newark, N. Y.
38	Colonial, Manchester, Vt.	Loew, R.K.O.	1 day favor Paramount, Grand, Rutland, Vt.
39	San Val, Burbank, Calif.	R.K.O., Loew, Paramount and Warner	28 days favor Major, Magnolia, and Loma, Burbank, California

Case No.	Complainant's Theatre	Distributor Defendant Imposing Unreasonable Clearance	Maximum Clearance Finally Awarded
45	Smalley, Sidney, N. Y.	R.K.O., Fox, Loew, Paramount and Warner	3 days favor Colonia, Norwich, N. Y.
50	Beverly and Glenn, St. Louis, Mo.	Paramount, R.K.O., Fox, and Warner	(1) 1 day favor Wellston, St. Louis, Mo. (2) 1 day favor Victory, St. Louis, Mo. on picture not shown at Wellston.
52	Bountiful, Bountiful, Utah	R.K.O., Fox, Loew Warner	(1) 28 days favor Centre, Utah, Studio, Paramount, Rialto, Salt Lake City, Utah. (2) 14 days favor Capitol, Victory, Salt Lake City, Utah (with exceptions).
53	Smalley, Delhi, N. Y.	R.K.O., Fox, Warner, Loew and Paramount	3 days favor Oneonta, Palace, Oneonta, N. Y.
64	Beacon, Beacon, N. Y.	R.K.O., Fox, Loew and Warner	1 day favor Broadway, Rits, Newburg, N. Y.
68	Savoy, Bloomfield, N. J.	R.K.O., Fox, Loew and Paramount	(1) 14 days favor Royal; 7 days favor Broadmoor, Bloomfield, N. J.
81	Ellicott, Elicott City, Md.	R.K.O.	7 days favor Alpha, Catonsville, Md.; *less* 1 day for each day delay in booking films by prior run theatre.
[fol. 3524]			
86	Liberty, Herkimer, N. Y.	R.K.O., Fox, Loew and Paramount	7 days favor Stanley, Avon, Olympic, Utica, N. Y.
93	La Salle, Niagara Falls, N. Y.	R.K.O., Fox, Loew, Paramount and Warner	30 days favor Strand, Cataract, Bellvue, Niagara Falls, N. Y.
97	Apollo, Buffalo, N. Y.	R.K.O., Fox, Loew, Paramount and Warner	10 days favor Elmwood, Buffalo, N. Y.
100	Ampere, E. Orange, N. J.	R.K.O., Fox, Loew Paramount and Warner	1 day favor Beacon, E. Orange, N. J.
104	Playhouse, Ayer, Mass.	Fox, Loew, Warner and Paramount(*)	(1) 1 day favor Plymouth, Metropolitan, Leominster, Mass. (where playhouse not subject Lowell clearance); (2) 7 days favor Strand, Merrimac, Lowell, Mass.

(*) On all except Paramount.

In holding that there should be some clearance between theatres which were not in substantial competition but merely drew some patronage from the same general area, the Board apparently assumed that entering an award prohibiting a distributor from granting clearance in favor of one theatre over another in the same competitive area

was an unwarranted interference with the distributor's right to license the competing exhibitors on such runs as he may deem necessary to exploit his films properly. Whether this conclusion was compelled by the language of the decree or not,[2] the result has been that the defendants have been expressly allowed to impose clearance between theatres only slightly competitive even though, in such circumstances, there is no public justification whatsoever for contractual arrangements of this character.

In this connection, it should be understood that a prohibition against the imposition of clearance in favor of one theatre against another does not compel the distributor to do business with either theatre or both except upon such terms as he finds profitable. While Section VI of the decree, and the Sherman Act, itself, does prohibit him from refusing to deal with one theatre for the purpose of protecting another from competition, if his refusal to deal is based solely on the protection of his total revenue from a [fol. 3525] particular competitive area he does not run afoul of Section VI.

The distributor may, as he frequently does, deal with the two theatres upon an open booking basis; that is to say, permit each to book the films licensed for exhibition to his theatre without regard to the time at which they are exhibited in the other. The mere mechanics of booking films for exhibition from eight or ten different distributors, all of whom serve numerous customers with each positive print, may seldom permit the playing of the same film simultaneously in the two theatres, but they may be served without discrimination by supplying prints as the prints and playing time in the theatres involved become available. Thus, the pictures released by a particular distributor may alternately be made available first to one theatre and then the other so that at the end of the season, although they have never played the same pictures simultaneously, neither theatre has been relegated to a fixed inferior position by the distributor in question. Thus all that the elimination of clearance in a particular situation does is to permit service of prints to the theatres involved upon a non-discriminatory basis, if the distributor licenses them both. It does not

[2] In other cases the Board has abolished all clearance between certain theatres which were only slightly competitive. See Nos. 22, 36 and 100.

compel him to license either or restrict him in any way from charging such rentals and imposing such admission price, and other restrictions as may be appropriate to the protection of his combined revenue from both.

The primary evil inherent in the imposition of any clearance between theatres which are not substantially competitive is not that it suppresses competition for patronage but that it establishes a discriminatory sequence of exhibition which has no relation to the legitimate needs of the distributor or the public. What it does is simply give the theatre enjoying the clearance booking control over the theatre against which it is held. The latter thus becomes entirely dependent upon the manner in which the former books pictures as they may not be made available in the second theatre until after they have been played in the first and this is true whether the clearance is one day or thirty days. Such control is indubitably desired by the [fol. 3526] theatres enjoying such clearance and to the extent that they may insist upon it as a condition of doing business with the distributor, the granting of it might be regarded as beneficial to him in the sense that, without it, he might not obtain the exhibitor's business. But the *Interstate Circuit* case, *supra*, clearly establishes that neither the Sherman Act nor the copyright statute permits the use of agreements restricting the use of a copyrighted film merely to satisfy the demands of a dominant theatre owner, who owns no copyright, at the expense of the public interest. The public supplying the bulk of the patronage for the controlled theatre suffers with the exhibitor discriminated against from his inability to respond to their demands in booking films for exhibition in the controlled theatre while the public patronizing the theatre exercising the control enjoys no corresponding benefit whatsoever.

We respectfully submit that a provision prohibiting the imposition of any clearance between theatres not in substantial competition with each other should be added to the existing decree.

As previously noted, the ostensible public justification for clearance is that its use is essential to support a structure of varied entertainment at varied admission prices. A theatre playing films on first run at a high admission price might ordinarily be expected to require clearance over a second run charging a lower price, and so on down the scale of runs and admission prices. However, there is clearly

no legitimate purpose in granting clearance between theatres which charge the same admission price, whether they draw from precisely the same area, or whether they are twenty miles apart. The only effect of imposing clearance between such theatres when they are highly competitive is arbitrarily to divert patronage from one to the other. Prices being the same, there is only one way in which they can compete at all and that is by offering a better entertainment value for the money and the public clearly suffers from the imposition of any restriction upon that [fol. 3527] competition.

As for the distributor, he has no interest, putting aside the question of circuit-buying power and theatre affiliation, in such arbitrary diversion of patronage from one theatre to another. His only legitimate aim is obtaining the maximum revenue from the exhibition of his films in both theatres. To the extent that one pays a greater rental by virtue of superior physical facilities, superior management, better rental terms or any other reason, he may regard one theatre as a superior customer to the other. Even so there is clearly no occasion for him to restrict arbitrarily the ability of the inferior operator to compete with the other in exhibiting his films by compelling the latter to play behind the former at the same or a greater admission price, unless he decides to promote the business of the favored customer as against the inferior one instead of promoting his overall film revenue from both.

[fol. 3528] Cases in which the Board found that unreasonable clearance had been imposed between competing theatres charging substantially the same admission prices but left some clearance between them in effect are tabulated as follows:

Case No.	Complainant's Theatre	Distributor Defendants Imposing Unreasonable Clearance	Maximum Clearance Finally Awarded
4A	American Canton, N. Y.	RKO, Warner	3 days favor Strand Ogdensburg, N. Y.
9	York, Capitol Athol, Mass.	RKO, Fox, Loew, Paramount, Warner	1 day favor Fitchburg Fitchburg, Mass.
10	Apex Washington, D. C.	Loew	5 days favor Calvert Washington, D. C.
17	Colony Sayreville, N. Y.	RKO, Fox, Paramount, Warner	7 days favor Capitol South River, N. J.
18	State, Texas Atlanta, Tex.	RKO, Fox, Warner	1 day favor Paramount Strand, Texarkana, Tex
20	Palm St. Louis, Mo.	Paramount, Fox	3 days favor Aubert, St. Louis, Mo.
22	Liberty	RKO, Fox, Loew,	3 days favor Lyric

Case No.	Complainant's Theatre	Distributor Defendants Imposing Unreasonable Clearance	Maximum Clearance Finally Awarded
22	Freehold, N. J.	Paramount, Warner	Asbury Park, N. J.
23	Bayne Va. Beach, Va.	Warner	5 days favor Newport, Norfolk, Va.
24A	Bailey Buffalo, N. Y.	Fox, RKO, Warner	1 day favor Kensington Buffalo, N. Y.
27	Dickinson Mission, Kansas	RKO, Fox, Loew, Warner, Paramount	1 day favor Aztec Shawnee, Kansas 14 days favor Plaza Kansas City, Mo.
30	Tioga N. Phila., Pa.	RKO, Fox, Loew, Warner, Paramount	21 days favor Strand N. Phila., Pa.
37	Regent Buffalo, N. Y.	RKO, Fox, Loew	3 days favor Apollo Buffalo, N. Y.
39	San Val Burbank, Calif.	RKO, Loew, Warner, Paramount	28 days favor Major, Magnolia, Loma Burbank, Calif.
47	Texas Bastrop, Tex.	Warner	23 days favor Strand Bastrop, Tex.
49	Orpheum Saugerties, N. Y.	RKO, Fox, Loew, Warner	7 days favor Broadway Saugerties, N. Y.
[fol. 3529]			
50	Beverly, Gem St. Louis, Mo.	RKO, Fox, Warner, Paramount	1 day favor Wellston St. Louis, Mo.
52	Bountiful Bountiful, Utah	RKO, Fox, Loew, Warner	14 days favor Victory Salt Lake City, Utah
53	Smalley Delhi, N. Y.	RKO, Fox, Loew, Warner, Paramount	3 days favor Palace Oneonta, N. Y.
60	Rivoli St. Louis, Mo.	RKO, Fox, Warner, Paramount	7 days favor Senate, Lyric St. Louis, Mo.
64	Beacon Beacon, N. Y.	RKO, Fox, Loew, Warner	1 day favor Broadway Newburg, N. Y.
67	Smalley Johnstown, N. Y.	RKO, Fox, Loew, Warner, Paramount	14 days favor Hippodrome, Gloversville, N. Y.
73	Dueber Canton, Ohio	RKO, Loew, Warner, Paramount	7 days favor Mozart, State, Valentine, Strand Canton, Ohio
74	Riant Conshohocken, Pa.	RKO, Fox, Loew, Warner, Paramount	7 days favor Garrick Norristown, Pa.
79	Colonial Skaneateles, N. Y.	RKO, Fox, Loew, Warner, Paramount	1 day favor Palace
88	Apollo St. Louis, Mo.	RKO, Fox, Warner, Paramount	7 days favor Pageant St. Louis, Mo.
90	Trylon Forrest Hills, N. Y.	RKO, Fox, Warner, Paramount	1 day favor Drake Middle Village, N. Y.
96	Winchester Winchester, Mass.	RKO, Fox, Loew, Paramount	7 days favor Strand Woburn, Mass.
97	Apollo Buffalo, N. Y.	RKO, Fox, Loew, Warner, Paramount	10 days favor Elmwood Buffalo, N. Y.
100	Ampere E. Orange, N. J.	RKO, Fox, Loew, Paramount, Warner	1 day favor Beacon E. Orange, N. J.
102	Liberty, Madison Covington, Ky.	RKO, Fox, Loew	10 days favor Family, Shirley Covington, Ky.
103	State Saugus, Mass.	RKO, Fox, Loew, Warner, Paramount	14 days favor Mystic Malden, Mass.
104	Playhouse Ayer, Mass.	Fox, Loew, Warner, Paramount	1 day favor Plymouth, Metropolitan Leominster, N. Y.

We respectfully submit that the foregoing experience demonstrates that the general problem of unreasonable clearance is inadequately dealt with in the existing section [fol. 3530] VIII of the decree and that an adequate temporary provision must also flatly prohibit the granting of any clearance between theatres charging substantially the same admission price.

If this be deemed an interference with the distributor's right to discriminate among its customers in granting runs that objection has no support in law. Any relief granted in this case necessarily circumscribes the right of these defendants to discriminate among their customers in imposing one or more of the restrictions that they customarily incorporate in their license agreements. That such relief is necessary and appropriate when such restrictions have been used to violate the Sherman Act is established by *Interstate Circuit* v. *United States*, 306 U. S. 209, and *United States* v. *Crescent Amusement Co.*, 323 U. S. —, December 11, 1944.

The determination of the maximum length of clearance permissible in competitive situations where admission price differentials exist should be so adjusted that the period of clearance between any two theatres is proportionate to the admission price differential between them if there is to be any public justification of such clearance. This may be accomplished by a prohibition of all clearance in excess of that reasonably related to the maintenance of competition between two or more competing theatres charging different admission prices.

Apart from these general provisions, specific temporary relief expressly directed against unreasonable clearance arising from distributor affiliation is urgently required. There is no dispute that (1) each of the distributor defendants Fox, Loew, Paramount, RKO and Warner controls a large circuit of theatres, (2) each licenses films to its own circuit, the circuits owned by the others and theatres competing with them by license agreements which fix the minimum admission prices to be charged by all of the theatres licensed, (3) maintenance of those admission prices is tied to run and clearance provisions determining

the relative time at which the films licensed become avail-[fol. 3531] able for exhibition in competing theatres.[4]

We submit that such a system of admission price fixing by cross licensing is *prima facie* illegal because it is in effect a means by which affiliated theatre operators, through their distribution affiliates, agree with each other as to the admission prices that should be charged by their various theatres in the competitive areas in which each operates and as to those to be charged by independent theatre operators who compete with these affiliated theatres. Such a price-fixing system is unreasonable *per se* and may not be justified under the Sherman Act by any proof that these defendants might offer. See *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 219-224; *United States* v. *Masonite Co.*, 316 U. S. 265, 274. Pending the elimination of that system by divorcement of the distributor defendants from their theatre operating affiliates or such other permanent relief as may be granted at a trial on the merits, we believe that the use by them of clearance restrictions which adversely affect unaffiliated theatres attempting to compete with their theatres must be prohibited, at least where such a distributor cannot demonstrate that a particular clearance in favor of an affiliated theatre is essential to secure for the distributor the maximum film rental available from the competitive area involved. Such relief would be comparable in form to that granted by the Supreme Court in *United States* v. *Crescent Amusement Co.*, *supra*, although the substantive test is less exacting than that of showing no unreasonable restraint of competition imposed by the Crescent decision.

Such a provision is one which is far short of the ultimate clearance relief to which the plaintiff is entitled as a matter of law as it would permit a temporary justification of individual licensing agreements which the plaintiff expects ultimately to have declared void as unreasonable *per se*. Cf. *Interstate Circuit* v. *United States*, 306 U. S. 209. All

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[4] See the Appendix hereof and standard forms of license attached. Precise extent of theatre ownership is disclosed by defendants' answers to plaintiff's interrogatories 50 and 52.

[fol. 3532] that this temporary provision would do is to deprive affiliated theatres of such unfair clearance advantages as they now derive *by virtue of affiliation with these large distributor owner circuits in a limited class of cases.* It is, in effect, merely an extension of the doctrine now in force in section VI of the decree which prohibits a refusal to license a run on any terms except where the distributor can show that such a refusal will have the effect of reducing its total film rental in the competitive area in which the theatre refused the run is located. Such refusals to license a run on any terms are merely an exaggerated form of the protection against competition afforded by clearance and are based upon essentially the same considerations which lead a distributor to impose clearance which unreasonably restrains the ability of an independent theatre to compete with affiliated theatres and large independent circuits.

Insofar as the clearance abuses inherent in the suppression of the business of smaller independent operators by large independent circuits are concerned, the plaintiff believes that the ultimate relief required to obviate such violations lies in dissolution of such circuits. *Cf. United States* v. *Crescent Amusement Co., supra.* To the extent that such violations involve licenses made by the distributor defendants here they may be dealt with in this proceeding and for that reason unreasonable clearances which result from the use of independent circuit-buying power should also be outlawed in this suit. The general provisions previously suggested should be adequate temporary relief for this purpose but they do not deal specifically with the problem of clearance discrimination arising from the affiliation of theatres with distributors, which is at the heart of this case, and for which a special provision directed at unreasonable clearance in favor of affiliated theatres is necessary.

In the following cases the Board, under the limitations imposed by the decree, was prevented from eliminating entirely clearance found to be unreasonable which had been granted in favor of affiliated theatres, although the theatres [fol. 3533] involved were so located as to compete only

slightly with each other or charged substantially the same admission prices:

Case No.	Distributor Defendant Affiliated With Theatre Holding Unreasonable Clearance	Affiliated Theatres
9	Paramount	Fitchburg and Shea Fitchburg, Mass.
10	Warner	Calvert and Uptown Washington, D. C.
18	Paramount	Paramount and Strand Texarkana, Texas
24A	Loew and Paramount	Kensington Buffalo, N. Y.
27	Fox	Plaza Kansas City, Mo.
30	Warner	Strand and Keystone N. Phila., Pa.
36	Paramount	Paramount and Grand Rutland, Vt.
52	Paramount	Centre, Utah, Studio, Capitol and Victory Salt Lake City, Utah
64	Paramount	Ritz and Broadway Newburg, N. Y.
68	Warner	Royal and Broadmoor Bloomfield, N. J.
73	Warner	Ohio Canton, Ohio
86	Warner	Stanley and Avon Utica, N. Y.
96	Paramount	Capitol Arlington, Mass.
	Warner	Strand Woburn, Mass.
97	Loew and Paramount	Elmwood Buffalo, N. Y.
103	Paramount	Paramount Lynn, Mass.
	Warner	Warner Lynn, Mass.
[fol. 3534]		
104	Paramount	Fitchburg and Shea Fitchburg, Mass. Strand and Merimac Lowell, Mass.

In the following cases clearance granted to affiliated theatres was found to be unreasonably long but the theatres involved substantially competed and charged different admission prices:

Case No.	Distributor Defendant Affiliated With Theatre Holding Unreasonable Clearance	Affiliated Theatres
33	Warner	Stanley, Grand and Lyric Camden, N. J.
66	Paramount	Metropolitan Paramount Fenway Scollay Modern

	RKO	Keith Boston Keith Memorial
	Loew	Loew's State Loew's Orpheum
75	Warner	Castle and Sanford Irvington, N. J.
84	Fox	Apollo Los Angeles, Calif.
91	Paramount	Peerless Kewanee, N. Y.

Case No.	Distributor Defendant Affiliated With Theatre Holding Unreasonable Clearance	Affiliated Theatres

In the following cases complaints against clearance granted by one or more of the distributor defendants in favor of its own theatres had to be dismissed, because exempted from arbitration by section XVII of the decree, although similar clearance granted by others was found to be unreasonable.

Case No.	Distributor Dismissed
27	Fox
28	Loew
64	Paramount

[fol. 3535]

Case No.	Distributor Dismissed
69	Fox
73	Loew, Warner
82	Paramount
85	RKO
91	Paramount
96	Paramount, Warner
103	Paramount, Warner
104	Paramount

V. The Consent Decree Is Inadequate To Prevent the Defendants from Violating the Sherman Act by Granting Unreasonable Clearance.

A serious defect in the existing section VIII of the consent decree is that the burden of showing a particular clearance imposed by these defendants to be improper is placed upon the complaining exhibitor instead of upon the defendant imposing it. Any system which relieves them of the burden of sustaining the reasonableness of restraints of trade of this character gives them a considerable immunity merely because of the procedural obstacles placed in the way of bringing such restraints into the open. In

some cases the complaining exhibitor has not been aware of certain clearances with which he was confronted in the course of the arbitration proceedings until the defendants offered proof of it.[5] In all cases the complainant goes into the proceeding without any information whatsoever as to what the distributors experience with film rentals received from other theatres in the area would indicate as to [fol. 3536] the necessity of any particular clearance to protect overall film revenue.

In addition to this fundamental procedural difficulty, the many qualifying limitations of the present clearance provision cut down the scope of the complaints which may be arbitrated and the relief which may be granted. How the provisions preserving the distributor's right to discriminate in licensing runs has prevented the elimination of clearance in situations where it would otherwise be eliminated has already been pointed out in the decision cited under section IV of this brief. We have also referred there to the cases in which the exemption of affiliated theatres as contained in section XVII of the decree has prevented the arbitrator from granting relief against some of the defendants even though the clearance they imposed in favor of their own theatres was found to be unreasonable. Adjustment of unreasonable clearances has also been prevented in many cases by the existence of franchise agreements exempted by section XV of the decree, which defect has been noted by the Appeal Board in Case No. 54.

In Cases Nos. 25 and 50 the Board has also noted the inability of complainants who do not currently license the films of a defendant to arbitrate the unreasonableness of the clearance imposed against it in contracts made with the defendant by another competitor. Cases Nos. 17, 54,

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[5] In case No. 104 the Board said:

"In prior cases, as in this, the Board has had to consider a situation where the complainant did not know of some of the clearances granted by the defendants against his theatre, since they were contained not in contracts with him but in contracts with other exhibitors giving them clearances against his theatre. While the Board finds itself in no position to grant the relief which complainant asks, our comment is that this method of granting clearances seems unfair to us."

96, 103 and 104 have noted that clearances by which a theatre in one community is subjected to clearance of theatres in two or more other communities is unreasonable on its face but the awards merely give relief to the particular exhibitors involved in these cases with the result that the distributors are still free to impose unreasonable clearance of this character until and unless other exhibitors learn of them and attack them.

The manner in which the distributors successfully rely upon arbitrary limitations in the decree to frustrate the granting of equitable relief is illustrated by the following comment in Case No. 71, a Section VI proceeding:

> Counsel for Paramount makes no attempt in his brief either to answer or to mitigate the severe criticisms made by the Arbitrator of his client's conduct. He [fol. 3537] confines his argument wholly to the lack of power of the Arbitrator under the Decree to redress an injustice clearly shown by the record to have been done to the Welden. We share the Arbitrator's conviction that the Welden deserves a first run ahead of the Empire, and were it not for the limitations imposed by the Decree we should either direct the restoration of first run to the Welden, which is what the complainant really desires and deserves, or else we should affirm the award without question on the ground that it does equity and justice between the parties concerned. Section VI of the Decree, however, grants no authority to an Arbitrator or to the Board to make an award directing the offer to an exhibitor of any specified run. The Decree unquestionably reserves to each distributor, where two theatres are in the same competitive area, the right, subject only to the provisions of Section X which are not applicable here, to decide which theatre shall have the prior run.

The persistent use by the consenting defendants, during the pendency of this suit, of clearance provisions as a means of unreasonably restricting the terms on which theatres may compete in licensing their films and the inadequacy of the present decree to afford adequate relief against such violations of the Sherman Act are beyond dispute. We respectfully submit that the provisions suggested are the

minimum which the Court may properly grant if the persons now subjected to the illegal restrictions in question are to be given adequate protection pending the entry of a final decree in this case.

Respectfully submitted, Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Special Assistants to the Attorney General; Kenneth R. Lindsay, Horace Morrison, Special Attorneys.

[fol. 3538] Appendix

Attached hereto and marked Exhibits A, B, C, D, and E, respectively are photostatic copies of sample license agreements voluntarily supplied by Loew, Paramount, RKO, Fox, and Warner, respectively, in response to a letter dated July 28, 1944, from the plaintiff requesting the printed forms of feature license agreements currently in use.

Each form contains on its face appropriate blank spaces for the insertion of the evening and matinee, children and adult admission prices of the theatre licensed, the run licensed and the applicable clearance. The printed provisions containing the exhibitor's agreement to observe these prices, the penalties for noncompliance, and the general run and clearance provisions are found in the following excerpts from these forms.

Loew

IV. Clearance and Run. Unless otherwise provided, clearance is to be computed from the last licensed date of exhibition of each picture. During the life of this contract Loew's agrees not to exhibit or license the exhibition of any of said pictures in conflict with the "run" or prior to the expiration of the clearance period, if any, in the Schedule specified, but any violation hereof shall not affect this contract except as to the particular picture involved, and the damage which may be claimed by Exhibitor and which may be awarded in any arbitration or litigation shall not exceed the amount of the license fee herein provided for such picture, or, if it is a participating picture, the amount of damage claimed or awarded shall be limited as stated in the last sentence of the "Default" clause. Such claim for damage (as limited above) shall be Exhibitor's sole and exclusive remedy on account of such violation. If

other than a first run is granted hereunder Loew's shall have the right to license and/or exhibit any or all of said pictures as a "continued first run" (i. e., a run either at the initial first run or a moveover theatre immediately after [fol. 3539] the initial first run and prior to any run except first, with admission prices not less than those of the initial first run), whereupon Exhibitor's availability shall be postponed accordingly and any clearance herein provided over the theatre where such continued first run occurs automatically modified. If a second or subsequent run is herein granted, Exhibitor shall exhibit any of the pictures on an earlier run if Loew's so requires.

. . . . . .

IX. Admission Prices. Exhibitor agrees: (1) During the entire engagement of each picture to charge for each admission not less than the respective prices shown in the Schedule, and that if without Loew's prior written consent any of them are reduced Loew's may proceed as stated in 2(a) below; and (2) as to each participating picture to account to Loew's on the basis of the respective admission prices in the Schedule for each person admitted (a customary and reasonable number of free admissions is permitted), except that if any admission price charged is greater than herein scheduled Exhibitor shall account on the basis of the larger amount; and that if any scheduled admission price is reduced without such consent, or Exhibitor does not account as above provided with respect to any one or more such pictures, Loew's may either (a) forthwith change or modify the run, availability and/or clearance herein provided for or (b) may exercise the remedies provided under "Default."

. . . . . .

XV. Default. If Exhibitor violates any of the provisions of this agreement or becomes insolvent or is adjudicated bankrupt or executes an assignment for creditors or a receiver is appointed for any of Exhibitor's property, or if Exhibitor violates any of the provisions of any other exhibition contract(s) heretofore or hereafter made with Loew's, then in any of said events Loew's may either (1) terminate this contract or (2) terminate this and such other contract(s) or (3) suspend delivery of further pic-

tures hereunder (and, if Loew's elects, also under any or [fol. 3540] all such other contracts) pending compliance by Exhibitor.

Paramount

If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) to immediately terminate the license of the motion picture then being exhibited and of all the remaining motion pictures not theretofore exhibited hereunder, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion pictures shall forthwith terminate and revert to the Distributor and the Distributor may, at its option, declare such failure or refusal a breach of the entire contract entitling the Distributor to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder; or (b) forthwith to revoke the run, availability and clearance, if any, herein provided for and to fix the run, availability and clearance applicable to each motion picture thereafter deliverable hereunder, and the Exhibitor agrees to exhibit each such motion picture in accordance with the run, availability and clearance so fixed; and (c) if the license fee of any such motion picture is to be computed either in whole or in part upon a percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to the Distributor for all admissions to said theatre during the exhibition of such motion picture upon the basis of the said admission prices specified above. The Exhibitor shall not be entitled hereunder to any change in the run, availability or clearance, if any, herein provided for, by reason of any increase in admission prices at said theatre after the signing of this application by the Exhibitor.

It is expressly understood and agreed that the above minimum admission prices are exclusive of any State, Federal or local taxes which now are or may be imposed upon admission to the theatre or theatres licensed hereunder.

. . . . . .

[fol. 3541] Clearance and Run—Seventh: (a) Subject to the provisions of paragraph (b) of this Article, the Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the

run or prior to the expiration of the clearance period if any in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder, disregarding any "roadshow," "try-out" or "preview," or special "midnight" exhibition. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

(b) The Distributor shall have the right to exhibit or grant a license to exhibit any of said motion pictures as a "road-show," "try-out" or "preview" or special "midnight" exhibition at any time prior to the exhibition thereof hereunder. Any such 'road-show," "try-out" or "preview" or special "midnight" exhibition shall not be deemed a run of said motion picture, nor shall the run, availability or clearance provided herein with respect to said motion picture to be governed thereby.

. . . . . .

Remedies—Fourteenth: If the Exhibitor shall otherwise fail or refuse to perform any of the terms and conditions on the part of the Exhibitor to be performed hereunder or if the Exhibitor shall fail or refuse to perform any other license agreement with the Distributor, then upon the happening of any one or more of said events, the Distributor may at its option (1) suspend the delivery of additional motion pictures hereunder until such default or defaults should cease and be remedied, or (2) declare this license agreement breached by the Exhibitor entitling the Dis-
[fol. 3542] tributor to recover from the Exhibitor as liquidated damages for such breach the license fees payable in respect of all motion pictures not theretofore exhibited under this agreement and the Distributor shall be under no obligation thereafter to deliver or offer to deliver any motion picture or motion pictures hereunder.

R. K. O.

If during the exhibition of any picture hereunder, the Exhibitor should charge lower admission prices than those hereinbefore specified, the Distributor, in addition to all other rights hereunder shall have the right (a) to immediately terminate the license for the picture then being exhibited by giving written notice to that effect to the Exhibitor, and upon giving such notice the license for such picture shall thereupon terminate forthwith and revert to the Distributor; or (b) to reduce by not more than one-half any clearance period granted herein to the Exhibitor in respect of each picture thereafter deliverable hereunder; or (c) if no clearance is granted herein, then to withhold for not more than sixty (60) days the availability notice to the Exhibitor in respect of all pictures thereafter deliverable hereunder, and as to each such picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the availability thereof upon the date or dates determined as provided in Article Ninth hereof.

. . . . . .

Clearance and Run

Fourth: If the Exhibitor is granted a specific run or clearance of the pictures hereunder and is not in default hereunder, the Distributor will not license the exhibition of any such picture in conflict with the run or prior to the expiration of any clearance period so granted the Exhibitor.

. . . . . .

[fol. 3543] Exhibitor is granted herein a period of "clearance" to reduce such period by not to exceed one-half in respect to each of the licensed pictures thereafter deliverable hereunder; or (c) provided no period of clearance is specified in the Schedule to withhold, for a period not to exceed sixty (60) days notice of the date when each picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the available date thereof upon the date or dates determined as provided in paragraph 7 hereof;

if Distributor does not elect to terminate the license of the picture then being exhibited, as provided in subdivision (a) of this paragraph, the Exhibitor shall account for all admissions to said theatre during the exhibition of such picture on the basis of the admission prices hereinabove stipulated.

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8. Clearance and Run—The Distributor agrees not to exhibit or license the exhibition of any of said licensed pictures in conflict with the run or prior to the expiration of the clearance period, if any, specified in the Schedule at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said licensed pictures shall be computed from the last date of the exhibition thereof herein licensed.

• • • • • • • •

16. Remedies—If the Exhibitor shall fail or refuse to perform the terms and provisions of this agreement, or any of them, or if the Exhibitor becomes insolvent or is adjudicated a bankrupt, or executes an assignment for the benefit of creditors, or if a receiver is appointed for any of the property of the Exhibitor, or if the Exhibitor voluntarily or by operation of law should lose control of the said theatre or of his said interests therein, then, upon the happening of any one or more of said events, the Distributor may at [fol. 3544] its option: (1) terminate this license agreement, or (2) suspend the delivery of pictures hereunder until such default or defaults shall cease and be remedied.

• • • • • • •

Warner

Clearance—Eighth: Distributor agrees not to exhibit or grant a license to exhibit any picture in conflict with the "run" or prior to the expiration of the "clearance period," if any, in the Schedule specified for any theatre therein named or within the territorial limits therein defined. The period of clearance as to each picture shall be computed from its last date of exhibition and unless otherwise provided in the Schedule shall cover any theatre thereafter erected or opened in the immediate vicinity of Exhibitor's theatre.

• • • • • • •

Admission Prices—Eighteenth: Throughout the exhibition period of each picture Exhibitor shall charge for admission to said theatre as a minimum, the prices specified in the Schedule and unless a greater minimum is therein specified the minimum shall not be less than fifteen cents (15¢) for each adult person for each matinee and evening performance. If during any such period less than such minimum admission is charged, Distributor, in addition to all other rights of Distributor hereunder in the event of a breach, may at its option by written notice to Exhibitor, either terminate this license in its entirety or with respect to the picture then being exhibited.

* * * * * * *

Remedies for Breach—Seventeenth: If Exhibitor violates any of the provisions of this agreement * * * Distributor, in addition to all other rights may at its option (1) terminate this license agreement or (2) suspend the further delivery of pictures until such default or defaults cease and be remedied.

[fol. 3545] In United States District Court, Southern District of New York

Equity No. 87-273

United States of America, Petitioner,

vs.

Paramount Pictures, Inc., et al, Defendants

Before Hon. Henry W. Goddard, District Judge

Stenographer's Minutes of Hearing

[fol. 3546] Before Hon. Henry W. Goddard, District Judge

New York, March 5, 1945,
10:30 o'clock a. m.

Appearances:

Robert L. Wright, Esq., Harold Lasser, Esq., Philip Marcus, Esq., and Horace Morrison, Esq., Special Assistants to the Attorney General, for the Government.

Simpson, Thacher & Bartlett, Esqrs., Attorneys for Paramount Pictures, Inc. and Paramount Film Distributing Corporation; Whitney North Seymour, Esq., and Albert C. C. Bickford, Esq., of Counsel.

John W. Davis, Esq., Attorney for Loew's Incorporated; John W. Davis, Esq., and Theodore Kiendl, Esq., of Counsel.

[fol. 3547] Donovan, Leisure, Newton & Lumbard, Esqrs., Attorneys for Radio-Keith-Orpheum Corporation, RKO Pictures, Inc., RKO-Proctor Corporation, RKO Midwest Corporation, and Keith-Albee-Orpheum Corporation; George S. Leisure, Esq., R. R. Irvine, Esq., and Granville Whittlesey, Jr., Esq., of Counsel.

Joseph M. Proskauer, Esq., Attorney for Warner Bros. Pictures Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation.

Dwight, Harris, Koegel & Caskey, Esqrs., Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation; John F. Caskey, Esq., of Counsel.

O'Brien, Driscoll & Raftery, Esqrs., Attorneys for United Artists; Edward C. Raftery, Esq., of Counsel.

Charles D. Prutzman, Esq., Attorney for Universal defendants; Edward C. Raftery, Esq., and Adolph Schimmel, Esq., of Counsel.

Morris L. Ernst, Esq., Attorney for Society of Independent Motion Picture Producers, appearing only on the question of amicus brief.

Abraham L. Myers, Esq., and Jesse L. Stern, Esq., Attorneys for the Conference of Independent Exhibitors.

L. D. Frohlich, Esq., Attorney for Columbia Pictures.

[fol. 3548] The Court: Mr. Wright, I suppose we will hear you first.

Mr. Wright: If the Court please, I believe we have two motions here today. One of them is the hearing on our motion for interim relief with respect to unreasonable clearance and the other is the motion to set the entire case down for hearing on the merits on a day certain. Insofar as we are concerned the latter is the more important motion of the two. The motion for preliminary relief deals with only a small aspect of the case and I think we should first proceed to dispose of the trial date if we could.

Your Honor will recall last December that we asked to have the matter set down for trial on the merits and

that we again served a formal notice of motion for this hearing, as the representatives, I think of three of the defendants, were not present at that December hearing. But we now have served a formal notice of motion on them and I think the date should now be set.

Mr. Proskauer: Will you Honor ask Mr. Wright to speak up so we can hear him? I don't know what he is saying.

Mr. Wright: I am sorry, Judge.

The Court: Well, what do you suggest? What do you [fol. 3549] ask for, Mr. Wright?

Mr. Wright: We should like to have as early a date as possible with this qualification: That we have the Griffith case to try in Oklahoma City which is now set for May 7th. So I would assume the earliest date would be some time in September. I assume your Honor won't sit during the Summer.

The Court: I beg your pardon?

Mr. Wright: I assume your Honor will not be sitting in the Summer.

The Court: Nor in September I hope.

Mr. Proskauer: Not too early I hope, your Honor.

The Court: Mr. Wright, I usually get my vacation that time. October I think would probably be better. That is probably what you yourself prefer although you asked for an early date.

Mr. Wright: Whatever is agreeable with the court schedule here and——

The Court: I should think early in October. Of course I have to make that subject to conferring with Judge Knox because I am afraid it is going to be a very long trial and we will have to rearrange our assignments. It will be long, will it not?

Mr. Wright: I think how long it is depends on what [fol. 3550] we can accomplish in pretrial proceedings, but I should think we should have a definite date fixed now in order to make the pretrial procedure effective.

The Court: Yes. How about, say, the second Monday in October?

Mr. Wright: That would be agreeable to the Government.

Mr. Seymour: I think that will be agreeable to the defendants, your Honor.

The Court: Just see. That would be the 8th of October.

Mr. Davis: October 8th?

The Court: Yes, sir, Mr. Davis.

Mr. Wright: It is important that we get a general idea of how long this case is going to take. We make up our schedules of assignments—they have been made—and will have to be changed if I am engaged in this case for a substantial period.

Mr. Wright: I should think, if the Court please, it would be very difficult to give an accurate estimate of the time until we have a pretrial conference at which the question of how much of these issues are going to be seriously disputed will be discussed. I would hope that if it is agreeable to your Honor we could have such a conference at a very early date, let's say next month.

[fol. 3551] The Court: I will cooperate in every way. We will set it down now for October 8th. Now that is subject, however, to a possible change if it is going to interfere too much with the schedule.

Mr. Wright: Could we have a date for a pretrial conference now too?

The Court: Yes. Most any time would suit me.

Mr. Proskauer: That is perfectly agreeable to us, your Honor. We would like very much to have it.

The Court: Supposing we leave that until we finish with this matter. But you would like to know before you return to Washington?

Mr. Wright: Yes, we would.

The Court: We will talk it over later during the day. If I forget it you remind me, will you?

Mr. Wright: I shall.

I assume that your Honor has read the memorandum that we filed on February 5 in support of our motion for preliminary clearance relief.

The Court: I have read it, Mr. Wright. I have read it and I thought I read it carefully, but I have read it only once and I can't say that I am entirely familiar with it.

Mr. Wright: I simply wanted to point out at the outset that we did file that memorandum and served copies on the [fol. 3552] defendants so that there would be a fairly clear statement of the issues here before we arrived in the hearing room. Now in addition to our memorandum a response was filed by the defendants, I believe on February 20th, which I assume your Honor has also read, consisting of two or three pages.

The Court: That was a letter.

Mr. Wright: It was in the form of a letter of a couple of pages.

The Court: Yes, on February 19th I received a letter from Simpson, Thacher & Bartlett enclosing a copy of a letter written by various counsel for the defendants to Mr. Berge. That is the letter you refer to?

Mr. Wright: Yes.

Your Honor will recall that in our memorandum we pointed out that we would not seek to offer any oral testimony at this hearing, that our case would be made by offering and relying upon the decisions of the Appeal Board which was established by the order of this Court to review the decisions of arbitrators made in the course of the arbitrators' disposition of disputes under the provisions of Section 8 of the consent decree, and that in addition to that we should also rely on the answers to interrogatories filed [fol. 3553] by these defendants which show the extent of the theatre ownership of each of these distributor defendants which own theatres,—that is, the defendants who have consented to the decree—and we would of course also rely upon the license agreements which were attached to the memorandum—that is, the photostatic copies are attached —and the provisions which we thought pertinent are also attached as an appendix to the memorandum.

Now as we understand the defendants' position on this clearance question from their formal response they contend that all that the Court can do at this hearing is to look at the decisions of the Appeal Board.

The Court: Is to what?

Mr. Wright: As I understand the defendants they concede that your Honor may examine the decisions of the Appeal Board which we shall offer, but apparently only for the limited purpose of determining whether or not the arbitration provisions of the decree have been operating satisfactorily within the limits of the existing decree. Apparently if the Court decides that they have so operated then the defendants assert that we can have no more clearance relief no matter how inadequate those provisions of the decree may be in terms of Sherman Act enforcement.

Then if the Court finds that the system has not been oper- [fol. 3554] ating satisfactorily apparently the defendants insist that the decree still has to be left alone as they do not concede that a determination that the present provisions

of the decree are inadequate in dealing with clearance is in itself any basis for granting further temporary relief.

Now the Government's position is that the decree and the arbitration provisions can only justify themselves as an effective law enforcement method—that is, that your Honor is not sitting here in this proceeding to determine whether or not a satisfactory method of adjusting trade disputes has been set up and operated by the American Arbitration Association. Our contention here is that notwithstanding the undisputed merits of the functioning of the system as such that the decree within which it functions simply does not do the job that it was intended to do under the Sherman Act, and that is, prohibit and restrain the granting of unreasonable clearance.

The Court: I wish one of the first things you would do is to define affirmatively what unreasonable clearance is.

Mr. Wright: That is something that most of us I think have been struggling with for years without getting very satisfactory results.

[fol. 3555] The Court: You tell me what it is not, but what is unreasonable clearance?

Mr. Wright: That is it. But I should say that the answer that we propose and the petition for modification we filed on August 7, 1944, is that unreasonable clearance is clearance which unreasonably restrains competition. I don't think you can come any closer in a broad general definition than the terms of the Sherman Act itself.

The Court: That means that each instance has to be determined on its own particular facts, doesn't it?

Mr. Wright: I think that is quite correct but I think the fundamental mistake in approach that the present decree makes to the problem is starting out with the assumption that the burden is on some exhibitor complainant or someone who challenges the clearance arrangement to say that the restraint is an unreasonable one. I think that normally these restrictive provisions which embody clearance are prima facie illegal restrictions which can only be justified if those who impose them can show that there is some public benefit or that the arrangement is somehow necessary to the promotion of fair competition—that is, that on their face [fol. 3556] every clearance arrangement that these defendants make does restrain competition between two or more theatres in licensing their films.

We have pointed out as conspicuous examples of clearance which is unreasonable the situations where the defendants by these clearance provisions divert patronage from one theatre to another on a completely arbitrary basis which does not have any reasonable relationship either to the needs of the theatre-going public or to the needs of these distributors in protecting their film rental.

The Court: May I ask you, if you don't mind my interrupting, do you take the stand that all clearances are unreasonable?

Mr. Wright: We don't take the stand that all clearances are unreasonable but I think it is perfectly clear that all clearances are direct restraints of trade which fall within the prohibition of the Sherman Act unless they may be affirmatively shown to be reasonable in their nature and the real issue here is, who has the burden of justifying those restraints. Whether the Court in evaluating them may assume that the restraint is reasonable simply because it is used and is in existence, or whether the defendants have got to show that imposing a restraint of that kind is a proper and reasonable thing to do.

[fol. 3557] Now we say that clearly insofar as these defendants impose clearance in favor of each other's theatres by a system of cross licensing that is currently in effect, that those agreements, highly restrictive in their nature, are invalid on their face. Ultimately we would expect to obtain a decree in this suit which would outlaw completely the making of any such restrictive licensing agreements between these defendants, that is, through licensing each other's theatres.

As for the temporary relief, at this stage, we say that we will have shown when we introduce this material a prima facie case of illegality which would warrant the Court in prohibiting all of such arrangements except insofar as these defendants may come in and justify them as reasonably necessary for the conduct of the business.

Now the argument as to how and why we think these restraints are unreasonable I, of course, would prefer to leave until after we have offered this material that we expect to rely on. All I wanted to do first was to simply review how we got to this particular point in the litigation where we are now and to comment on one particular statement in the response that to us was rather startling.

[fol. 3558] As your Honor may recall that particular statement was that they were surprised at our suggestion that this arbitration system by which the present decree is enforced was in effect by agreement of the parties. Now we think that it is perfectly clear that the only way in which such system as this may be set up as a public law enforcement device is with the express consent of the Government and in no event are the defendants entitled to the particular means of enforcement that we adapted here on an experimental basis for a three-year trial period as a matter of judicial right.

Now in order to illustrate the fundamental difference between the defendants' view of the proper function and purpose of this arbitration system and ours I think it is necessary to review the previous action in this connection in the suit. Your Honor will recall that when this consent decree was established in November 1940 it was expressly established for a three-year trial period. The provisions with respect to the methods of selling pictures were limited to a one-year period, that 1941-1942 season. Those restrictions in blocks of five trade showing all expired at the end of that season although the defendants have continued to use that method of distributing films because it apparently [fol. 3559] has been more profitable to do so. Again at the end of three years the right was expressly reserved on our part to proceed to litigate the main issues of the suit, that is, the trade divorcement of the distributors from their theatre ownership and dissolution of their circuits and at the end of that period the restriction on the defendants' acquisition policies which had been incorporated in Section 11 of the decree also lapsed. There is also a provision in the decree which said at the end of three years any party was free to move for any modification of the decree whatsoever.

Now the arbitration provisions did not lapse automatically but in our view have been continued only because of the failure of either the Government or the defendants to move to set them aside, and that is what we mean when we say that they continue by agreement plus the fact that the continuance of the Appeal Board, as your Honor knows, has been twice extended by express stipulation of the parties.

Now after the expiration of the three-year period there were extensive negotiations between the parties looking toward a new decree and a proposal for a new decree was submitted by the defendants to the Department which suggested

certain minor improvements in the arbitration system and [fol. 3560] in the restrictions which the decree had contained, but still left untouched the main issues of the suit, that is, the theatre divestiture which is sought by the plaintiff. But these improvements in the functioning of the arbitration system and in extending the scope of the decree were expressly conditioned upon a further immunity of not less than five years against the prosecution or from the prosecution of the main issues of the suit.

Now that proposal received very careful consideration by the Department, by the Attorney General himself, and was rejected by him and that led to our filing last August a petition for modification in which we set forth the kind of provisions that the Department thought would be necessary to convert the existing decree into one adequate to enforce the Act. Then your Honor will recall that the opportunity which we offered by the proposal for modification to permit these defendants to continue under a decree which was made by consent and which avoided an adjudication of the issue of violation of the Act by simply submitting to your Honor for adjudication the question of what proper relief is—assuming violations of the Act—that opportunity was rejected by these defendants. So at that stage modification [fol. 3561] of the consent decree as such became impossible, as without consent, at least in some aspects, no such procedure was possible, and we were then driven to the point where in order to obtain any adequate relief at all we must, as we see it, actually try the case, establish violations, and secure the relief that those violations warrant.

As to this particular proceeding the clearance violations in themselves are only one minor aspect of the main problem, that is, clearance discrimination is only one of a dozen forms of discrimination in licensing films which arises out of the control of theatres by these defendants and the aggregation of other theatres in large circuits by independents who do business with them. So that in no event is this relief that we are seeking here anything more than, as we see it, a mere stop gap as to one particular aspect of the case in which the violations have been fairly continuous and frequent.

Now I don't think that I need say anything more at this time with respect to the theory of the motion other than that we expect to show by the material we offer for your Honor's consideration prima facie violations of the

Act with respect to unreasonable clearance since the decree was filed and the failure of the existing decree to [fol. 3562] deal adequately with those violations.

The first thing we want to offer, your Honor, are these 104 decisions of the Appeal Board. I have asked Mr. Braden to bring over a set and I don't think there will be any dispute as to the authenticity.

Mr. Proskauer: You may assume we won't have any question about that.

Mr. Wright: I think for the purposes of the record we ought to have the volumes offered.

Mr. Proskauer: You are offering them. We have an objection to their going into evidence.

Mr. Seymour: If your Honor please, the defendants have a fundamental objection to receiving these in evidence. We have indicated in our letter to Mr. Berge, which your Honor has a copy of, that we do not make any question as to the authenticity of the decisions, nor would we object to their consideration merely on the question of the way the decree has worked. But as evidence, evidence of violations of law, we have a fundamental objection. It would seem to me that for your Honor's convenience perhaps the way to proceed at this stage would be to have Mr. Wright mention these decisions, your Honor look at them, but not receive them in evidence at this time, and hear the argument on the defendants' side [fol. 3563] in which the objection will be discussed. If your Honor would prefer to have the objection stated more fully at this time I am prepared to do so.

The Court: No, I should think that would be all right. Wouldn't that be satisfactory to you? Have them marked for identification and then consider a little later whether we receive them in evidence?

Mr. Wright: It is immaterial to us at what point your Honor rules except we want it understood that our position is that those Appeal Board decisions are admissible for all purposes to prove violations of law and for whatever other conclusions your Honor may legitimately draw from the examination. And we are offering them not for any limited purposes but for all purposes in the suit.

Mr. Raftery: Are they being offered against the non-consenting defendants or against just the consenting defendants?

Mr. Wright: I think it is perfectly clear by the fact that the non-consenting defendants are not parties to the proceeding they would be in a somewhat different position to challenge the facts that are stated there than the parties that were. But I repeat they are being offered for whatever they may be worth against every defendant in the suit for all purposes.

[fol. 3564] The Court: On just what theory would they be admissible against the defendants who had no part in those proceedings?

Mr. Wright: I don't suppose they would be admissible to show any particular act of any of those defendants. However they are, I think, quite admissible in the suit for the purpose of acquainting the Court with a general course of business in the industry of which these other defendants are a part, and I suppose to that extent they might be said to be admissible against them, although that issue it seems to me is wholly academic at this point where we are seeking no temporary relief against these defendants.

Mr. Raftery: We would like to be heard on that later.

Mr. Caskey: Will it be understood that we all have the benefit of the objection?

The Court: What was that?

Mr. Caskey: I say may we all have the benefit of Mr. Seymour's objection?

Mr. Proskauer: May we not have an understanding that any objection made by defendants' counsel redounds to the benefit of all defendants' counsel?

The Court: Yes, but I think you ought to make a dis-

[fol. 3565] tinction between the consenting defendants and the others.

Mr. Proskauer: I am speaking only for the consenting defendants, the good ones.

(Government's Exhibits 1 to 5 marked for identification.)

Mr. Wright: (To Clerk) You might state what each of those is in terms of numbers of decisions covered by each volume so we have in the record a statement of what each one has in it.

The next material that we wish to offer in evidence, if the Court please, is the consenting defendants' answers to plaintiff's interrogatories numbered 50-A and 52. 50-A is an interrogatory which called for a statement of

the defendants' financial interests either direct or indirect in theatres in the United States.

The Court: Mr. Wright, did you say answers to interrogatory 50-A and——

Mr. Wright: 50-A is one number and 52 is the other.

The Court: That is Exhibit 6.

Mr. Seymour: May that be handled in the same way, your Honor?

The Court: Yes, but why would they not be admissible—interrogatories taken in this proceeding?

Mr. Seymour: Well, a technical objection perhaps [fol. 3566] would not lie, but the question of their relevancy to an injunction application, which is the kind that is before your Honor; is one which I think ought to be argued out in connection with the general argument.

The Court: Mark it for identification then.

Mr. Wright: As to marking I was informed that we were unable to locate the original interrogatories in the clerk's office which are on file and I have with me only our own copies which we of course don't want to surrender. So that I would suggest that if we could assign numbers to the documents now to be applied to the originals on file when they are located that would be sufficient in making the record.

Mr. Proskauer: Well, your Honor, just as a matter of convenience for your Honor and counsel in the brief that we are going to file we have referred to these by the number that the Appeal Board uses. Wouldn't that be a convenient way to refer to them?

Mr. Wright: I not having seen your brief have no idea——

Mr. Proskauer: Naturally you haven't seen it because it is still in proof. But I am suggesting, whether you have seen it or not, that it might be a convenience to both counsel and the Court if we refer to the numbers [fol. 3567] used by the Appeal Board. If it is not agreeable all you have to say is it is not agreeable.

Mr. Wright: I beg your pardon. I thought you were referring to the interrogatories. We of course have referred to them by their numbers and I assume that is the most convenient way for anyone to refer to them.

Mr. Caskey: Now how are you going to mark this?

Mr. Wright: Only the volumes containing them will be marked with a number and after that we will have a

designation in the record which will tell you the numbers of the Appeal Board decisions that are contained in that volume.

As to the interrogatory answers I think we should assign an exhibit number at this time to each one of them even though we haven't the originals present.

Mr. Caskey: There are ten numbers then?

Mr. Wright: There would be ten numbers, yes—no, there would be more than that. Well, I will take them in order here.

You mark the Loew answer to interrogatory 50-A as Exhibit 6 for identification and the Loew answer to interrogatory 52 as Exhibit 7 for identification.

I don't believe I mentioned the difference between the [fol. 3568] two. 50-A is the statement of all of the interests which the defendants have in theatres. 52 is a statement of the interests which are jointly held in theatres in which other defendants are also interested.

Then the Paramount answer to 50-A will be Exhibit 8 for identification and the Paramount answer to 52 will be Exhibit 9.

The Court: What is that, Mr. Wright?

Mr. Wright: That is Paramount.

The Court: The first, Exhibit 7 for identification, is the answer to interrogatory 52 by——

Mr. Wright: Loew. Exhibit 6 is the answer to interrogatory 50-A by Loew and Exhibit 7 the answer to 52 by Loew. Exhibit 8 is Paramount's answer to 50-A and Exhibit 9 is Paramount's answer to 52, all for identification.

(Answers to interrogatories above mentioned to be marked Government's Exhibits 6, 7, 8 and 9 for identification.)

Mr. Wright: Now the Warner Bros. answer to 50-A and 52 I believe is contained in the same document. However I think that all that need be marked for identification in that case is a list which appears in the Warner document marked "Answers to interrogatories" which is [fol. 3569] headed "Theatres owned or leased by Warner Bros. Pictures, Inc. and subsidiaries," which consists of twelve typewritten pages. That list I think may be marked Exhibit 10. That would be marked in lieu of Warner's full answer to Exhibit 2, interrogatory 50-A.

(To be marked Government's Exhibit 10 for identification.)

Mr. Wright: Then Warner's answer to 52 will be marked as Exhibit 11 for identification.

(To be marked Government's Exhibit 11 for identification.)

Mr. Wright: And the Fox answer to 50-A will be marked Exhibit 12 for identification and the Fox answer to 52 as Exhibit 13 for identification.

(To be marked Government's Exhibits 12 and 13 for identification.)

Mr. Wright: Then there are three answers for the RKO theatre operating companies. The answer of RKO Midwest Corporation to interrogatory 50-A may be marked as Exhibit 14.

The Court: Mr. Wright, I didn't get that last one. This relates to what?

Mr. Wright: This relates to RKO. RKO has three operating subsidiaries each of which made a separate answer. This one is RKO Midwest Corporation. Ex-
[fol. 3570] hibit 14 for identification is the answer to 50-A and Exhibit 15 for identification would be the RKO Midwest Corporation answer to 52.

(To be marked Government's Exhibits 14 and 15 for identification.)

Mr. Wright: Then the answer to 50-A of Keith-Albee-Orpheum Corporation will be marked Exhibit 16 for identification and the answer of the same corporation to 52 will be 17 for identification.

(To be marked Government's Exhibits 16 and 17 for identification.)

Mr. Wright: The answer of Radio-Keith-Orpheum Corporation to 50-A will be 18 and the answer of the same corporation to 52 will be 19.

(To be marked Government's Exhibits 18 and 19 for identification.)

Mr. Wright: Now we have attached to the memorandum that we submitted photostatic copies of the forms of

license agreement that are currently in use by these defendants and I don't think there is any occasion to have those separately marked as exhibits unless there is some dispute as to authenticity that I am not aware of or unless the defendants desire to have another set of these contracts marked and placed in evidence.

[fol. 3571] Mr. Caskey: Mr. Wright, I understand that a full photostatic copy is annexed to the original moving papers.

Mr. Wright: Yes, front and back. The whole thing.

And that completes our offers of proof in connection with this motion.

Mr. Proskauer: If your Honor please, I have been asked by my associates to make a general statement to your Honor of our position on this argument. My friend comes in here having asked for quick trial of this case and secured it and asks for the most drastic relief known to the law—a temporary injunction—without a pretense of showing those fundamental things, which I need not argue to a Judge of your Honor's experience are conditions precedent to the granting of this drastic temporary relief. And while in the course of what I shall have to say I may refer to a technical argument or two, and they are destructive of the Government's position, essentially I am making an appeal to your Honor's sense of fairness and justice and common sense.

Now at the very outset then where does the Government get a right to ask for temporary injunction? The statute says that when the parties complained of shall have been [fol. 3572] duly brought into court and pending any such petition and before final decree the Court may issue a temporary injunction. Here we have a final decree.

I might rest there, but as I told your Honor I want to show you the unreasonableness and unfairness of the Government's position, not merely its technical inadequacy.

What is this decree? And what do they say is your Honor's function here? I wrote it down. That you are not to sit here to determine whether this decree has worked well, and the Government makes the concession that it has worked well. And in the face of that they still come here and say, "We are asking for a temporary injunction. We must show immediate need. We must show danger to the public. We have got a quick trial. But the Judge who created or was so valuable to all the parties in creating this magnificent arbitral system, he has nothing to say as to whether this

decree is really working. He must not consider the question of whether it is good."

That is an amazing position to be taken by a man who asks for a temporary injunction against a final consent decree.

Now let us go to the next step. What about this decree? [fol. 3573] This is what the Government agreed to: "It is recognized that clearance reasonable as to time and area is essential in the distribution and exhibition of moving pictures." And there was a recital agreed to by the Government, "Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to the arbitral provisions."

Now why did the Government agree to that? We are not used to regarding the Antitrust Division as Santa Claus. They develop curious ideologies at times in their pursuit of alleged monopolies. They agreed to that because under the law they had to.

What my friend loses sight of completely in his argument about clearance is that we are not selling merchandise. We are licensing the right to exhibit a copyrighted picture. And all this stuff that we have heard here about price fixing and about the evil implications of price control might have some relevance if we were selling bricks or stone or clothes. But we have based our brief on the law, the copyright law.

Your Honor will find under the Morosco case that the Supreme Court has decided squarely that we got a perfect right to make a restrictive license with respect to the exhi- [fol. 3574] bition of our copyrighted motion pictures, and I just want to find that part of our brief.

(To Mr. Caskey): Find me that in our brief.

I will take it from another memorandum here. In Manners v. Morosco the Court held squarely that the owner of a copyright who licenses it can impose restrictive conditions and at the same time restrain the licensor from granting other licenses which interfere with that.

In the very case that my friend relies on, Manners v. Morosco—I mean Interstate Circuit v. The United States, one of the great cases where predatory practices were involved, which do not exist on this motion because there has been no showing of anything but the ownership of the theatres—and these decisions I shall advert to in a moment—in this Interstate case the Court said, "Under Section 1

of the Copyright Act the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant exclusive or restrictive license to others to exhibit it."

I could pile Pelion on Ossa on that point. Your Honor will find it in our brief. I am not arguing for what I am afraid my friend in his enthusiasm will try to put in my [fol. 3575] mouth, that the right to license gives the owner of a copyright any right to enter into other collateral conspiracies which might meet condemnation of the law. But we have no such case here. I am referring to this point merely to illustrate and eliminate the question of why the Government had to consent that clearance reasonable was required in the conduct of this business and why they recognize what was in us a fundamental right so long as we did not do the predatory things which have been condemned in cases like the Interstate case.

Now from there I go on.

What does my friend say is his reason for urging your Honor that he has shown per se a violation of the Sherman law? Now his own brief, your Honor, concedes these two points: He says that he must show that we imposed unreasonable clearances which prima facie violate the Sherman Act and, two, that the decree in its present form fails to give adequate relief against such violations.

I say to your Honor that he has lamentably failed in both those undertakings.

Your Honor asked a question of my good friend here which went to the heart of this thing—what is an unreasonable clearance? And as I go through very generally these cases your Honor will get the import of his inability to answer that question except in a rigmarole that unreasonable [fol. 3576] clearance is unreasonable clearance. That is what his answer came down to, and to suggest that because an Appeal Board in X cases decided that clearance was unreasonable by one day or in X cases by two days or in X cases by ten days—and I am going to give you some of the figures on the brief—that that proves a violation of the Sherman law is just, I submit to your Honor, the reductio ad absurdum of argument. And that contention of mine is not only implicit in the situation; it is explicit: Because here is what the Appeal Board says on that subject:

In No. 76 the matter of Gary the argument was made that because the complainant independent theatre owner had

brought a suit in the District Court for violation of the Sherman law for treble damages and had lost his case that therefore the reasonableness of clearance was res adjudicata and that he could not therefore succeed in a subsequent appeal he made for arbitration as to the reasonableness of his clearance.

I am going to read a few lines, with your Honor's permission, from this opinion of the Appeal Board because it is so scholarly, and I may say, so in line with the general scholarly and decent and fair approach of those three members of that Appeal Board that I say to your Honor that [fol. 3577] you never I believe in your experience will find a body of decisions that show a clearer understanding of facts, of law, and a desire to do justice in a complicated situation, so complex that there is practically no other way of handling it than under some such machinery as we devised with your Honor's aid. I am going to show your Honor that they themselves have demolished this argument that the Attorney General here makes.

> "The principle of res adjudicata could not possibly apply"—says the Appeal Board, "The issues in the Federal Court and in this proceeding are entirely different. In the Federal Court the issue is whether a conspiracy could be established in violation of the Sherman Antitrust Law. No such issues are involved in this proceeding. The question here is whether this clearance is reasonable or unreasonable. This issue is not involved in the Federal Court suit and the denial of the Arbitrator of this motion under Section 786 is correct and is affirmed."

And isn't that common sense? How could anybody seriously claim that a court of justice in an activity as complex and as difficult to administer as this would issue the temporary injunction that my friend Wright asks for, to [fol. 3578] restrain us under penalty of punishment for contempt from what he calls unreasonable clearance on a showing of nothing other than that from time to time the Appeal Board decided that certain clearances ought to be modified. What was the purpose of this consent decree? It was to accomplish just that, your Honor. When we sat around the table and when we came before your Honor we all knew that one of the most difficult things in the world to determine was clearance. We all knew that Judge Chest-

nut had held in the Westway case, and we know that it is the law of this land today, that clearance was right and just and necessary. We all knew that there were certain grievances that certain of the independent theatre owners had and we in good faith sat around the table with the Government and agreed on this machinery, and now the Government comes in and says, "Because you agreed to it and because it is working effectively and because the Appeal Board has done justice and adjusted the clearance provisions to the necessities of each particular situation"—and your Honor intimated in your question that they must be so adjusted, and indeed they must—he comes in and says, "You must not pay any attention to the fact that that decree is working perfectly, you must not pay any attention to the fact that the Appeal Board is redressing slight injus- [fol. 3579] tices time to time,"—and they are slight—"you must just assume as a matter of law that because they found injustices to adjust that therefore the defendants are violating the Sherman Law per se and you must pin them to the earth with an injunction restraining them from unreasonable clearance."

Your Honor, the statement of that claim is its answer.

Now let me go ahead. There is talk in his brief and in his motion papers—a lot of it—about substantial and unsubstantial competition. These Appeal Board members never decided that they were without power to meet that situation. Of course it has always been a fundamental tenet of the motion picture industry that it could not license a picture for simultaneous exhibition in a given area to two conflicting interests. Our copyrighted picture would not be worth very much to us if we did that. And nobody says that we have to. But what the Appeal Board has done is this: —and again I am going to ask your Honor's permission to read one opinion to illustrate the effective approach—and I am accentuating the word "effective"—I mean by effective an approach which does the job decently and honestly and justly. This is what they say on that subject that has agitated Mr. Wright so: "If the area served by the theatres [fol. 3580] are such there is no competition between them no clearance is justified." And when they find such a situation that was so or they have reduced the clearance to one day and they claim repeatedly, continuously in their opinion—and you will find them on our brief—the right to abolish clearance entirely where there is no competition.

"But," they say, "on the other hand if it appears that there is real competition, though perhaps small, the only award the arbitrator is authorized to make under the decree is one fixing the maximum clearance between the theatres involved which may be granted in licenses thereinafter entered into."

This language means that where theatres are in the same competitive area the arbitrator may not eliminate all clearance. In other words, they have reduced the whole proceeding to a common sense treatment. If there is no competition between the theatres the arbitrators can say there shall be no clearance. If there is substantial competition they may say there will be a substantial clearance. If there is slight competition in case after case they have reduced the clearance to one day saying that that was fair and that was the right thing to do. And my friend says that that proves that the defendants are quasi criminals violating the Sher- [fol. 3581] man Law and they have got to take the risk of an injunction restraining them in the general words "unreasonable clearances."

Here is what they say also, and this so much substantiates the implication of your Honor's question: "In the arbitration or clearance controversies under the decree the form of the consideration must always be the determination of what is reasonable in the particular case rather than the formulation of inflexible rules and their application with unyielding rigidity. General principles are to serve as standards but can never be stated so precisely as to exclude the possibility of exceptions demanded by fairness and equity."

Just imagine your Honor sitting where you sit and hearing a motion to punish us for contempt for violating the injunction which he seeks. What are you going to do? Here one man says that reasonable clearance is one day and another says it is twenty days and you take all these things into account and send a man to jail or punish him on a hearsay, vague consideration like that.

Now let's see what the Appeal Board did in these cases. Where the competition was slight—you will find these collated on our brief—in X cases they reduced it to one day, where it was a bit more to three days, in one group [fol. 3582] of cases to five days, in another to seven days depending on the intensity of the competition. And where the competition was greater they reduced it in some cases to ten days, to fourteen days, to twenty-one days, twenty-

eight days, or thirty days, deciding each case on its own merits. In over 75 per cent of the cases listed the Board wrote that some clearance was proper. It was only in 25 per cent of the cases that there was any question at all raised as to whether there should be no clearance. There are only six cases in which clearance was reduced to one day.

That is the gravamen of his grievance, that if the Court had had power—if the arbitrators had had power they would not have reduced it to one day but abolished it. In these cases there is no basis for the claim that the Board would have abolished clearance entirely if it had had the power. All they say in those cases, and we have collated them on our brief, is that there being slight competition the clearance should be reduced to one day, and in not a single case does the Appeal Board suggest that clearance should be eliminated even where there is competition though slight.

Now I am a little puzzled about my friend's strategy. [fol. 3583] I think he is, in the vernacular, laying back for me. He wants me to argue first so that he can then come along. But twice armed is he who has a cause as just as ours, and I don't mind that little strategy. I have met it from the Attorney General before. I might just as well anticipate him. He says that there should never be clearance between two theatres which have the same admission price. Well, why not? There are cases where clearance was granted in favor of a theatre charging a lesser admission price. What the Appeal Board says is that the amount of the admission price is a factor and a very important factor in determining clearance. But here are the things they say they must take into account in addition, and again I am giving you a catalog of the ships. The cases that he cites are cases where the Board said they had to take into account larger seating capacities, whether theatres were superior physically, whether they paid higher film rentals, whether they represented a much more substantial investment and engaged in a superior type of operation. Where does the Government, powerful though it be, get the license to come in here and say to this industry, "This Appeal Board does not know what it is talking about. We demand that you change this decree so that equality of [fol. 3584] admission price is ipso facto determinative of the whole question of clearance no matter how important the other factors may be in it."

I have anticipated him on that and if he gets any advantage out of that he can make the most of it.

Now then he makes a point that there should be something done about the fact that the decree excludes from arbitration our clearances to our own theatres. Your Honor will find that in practice we have never insisted on that. And if that was the only thing he had to say I would personally say to your Honor—and I bind no defendant now—de minimis non curat lex. It is such an inconsequential thing in the actual working out and we have never insisted on it and that little change certainly would not hurt anybody. And if he was nice and reasonable in court as he sometimes is out of court and came and talked to us about that I am sure that on that one point there would not be very much trouble.

But my colleagues always say to me that no argument by me on this subject of this arbitration system is complete unless I say that you must not burn down the house to roast the pig, and certainly to get that little result we are not compelled, I think, to destroy this arbitral system by [fol. 3585] a sweeping and vague injunction such as my friend here asks for.

Now then I want to come to the very last thing to which I shall advert; that is, this question of burden of proof. Well, there is very little to that, your Honor. In fact there is nothing to it. I want to begin by reading again what the Appeal Board says on that question of burden of proof. I will put my hand on it quickly. They say it is desirable to avoid legalistic refinements in arbitration proceedings.

Mr. Wright: Excuse me, Judge; what is the number of it?

Mr. Proskauer: That is Samuel Hookberg, No. 68. And in every case the Board and the arbitrators clearly required these defendants to produce evidence and information which was in their control. The importance of that is this: My friend says, "Think of the poor little distributor."

Mr. Wright: Exhibitor.

Mr. Proskauer: Yes, exhibitor. You see, the truth will out. The distributor is the poor little man. It is the exhibitor who is on top under this decree. That just showed a subconsciousness of the truth in me.

Here is the picture friend Wright paints: This little exhibitor comes in and he says, "My clearance is unreason-

able, I have to prove it, and I haven't got any evidence [fol. 3586] and I am just miserable."

Well now, your Honor, anybody can require these defendants to produce all the evidence in the world. Nobody is going to object to that, and burden of proof doesn't make any difference to us at all except in one aspect—that if you do put the burden of proof on us, thus entirely reversing the ordinary course of events, we are going to have 15,000 cases. There are 15,000 independent theatres struggling along under the domination of this terrible monopoly and making an awful lot of money and making a good deal of money out of asserting claims under the aegis of the Attorney General's office. We don't want that. That is not fair. If your Honor wants to provide that whenever a claim is made of unreasonable clearance that all the consenting defendants have to produce all their records and information relating to that particular claim you would be directing us to do no more than the arbitrators already direct us to do and that we have been doing and that meets that completely.

You see, when you begin to monkey with a complex structure like this you don't know where you are going to get. Take, for example, going back a moment to this claim of my friend's that clearance ought ipso factor to be denied [fol. 3587] where the admission price is the same. What would we have? A little theatre over there charges 35 cents and the theatre here charges 50 cents and the little fellow who is charging 35 cents sees a chance to make a ten-strike. He just raises his admission price to 50 cents and then he will come along and say, "Now you can't get any clearance over me." Where does the public get off? The dear public which is my friend's concern is going to be robbed by a continuous increase in the exhibition price of the showing of these films.

And so it is wherever you try to change anything by an ipso dixit and what the Appeal Board referred to as rigidity you are doing something that I would say with all the earnestness that is in me, your Honor, works not only to the disadvantage of these consenting defendants, it works to the disadvantage of the American public that today sees every one of these pictures, pictures costing three, four or five million dollars, to be produced ultimately for as little as ten or fifteen cents. That is the job these defendants are doing.

Your Honor, as I listened to my friend I couldn't, much as I love him, escape the feeling that the mountain labored and brought forth a mouse. What is all this about? What [fol. 3588] is the terrible danger to the public between now and the first Monday in October that requires the granting of this temporary relief—this drastic and threatening temporary relief? This vague relief? What is there that actuates us all to get into all this stew when we are going to try this case now and we will find out whether we have to divorce these theatres or not, that being the Government's pet contention?

And there again I wish to convince your Honor that nothing could be more harmful to the general public than the granting of that relief. But that is for the future. For the present what in the world has been shown here to actuate an equity judge, a chancellor, into granting temporary relief when there is question as to his power to do it, when there is no showing whatever of any illegality, when the inference drawn from these opinions is strained and untenable, and where in the final analysis there is not a single thing shown by way of pressing necessity to call on your Honor to exercise or grant this drastic relief?

What I have said will indicate to your Honor what our position is about these opinions. They are no evidence whatever of violation of the Sherman Law and we ask your Honor not to take them as that evidence. But however you [fol. 3589] take them and however you decide the technical points which I have raised I rest my appeal to you to deny this motion fundamentally on the decencies, the equity and the justice of this situation.

Mr. Seymour: May it please the Court, I would like to say just a word about the nature of this decree at this stage before I start dealing with the motion.

There isn't any possible doubt on the face of the decree that the arbitration provisions with respect to clearance are still in effect. The whole decree shows that except for those provisions which fell at a certain date the balance of the decree is still in effect. It is also clear that the decree is fine even though it is a consent decree. That has been authoritatively decided.

Now the only way to deal with anything which is included in this decree is by a modification of the decree under its terms, and this is not a motion for modification. This is

a motion for a temporary injunction and is governed by the ordinary rules of temporary injunction except for the serious problem which Judge Proskauer mentioned at the outset that an injunction under an antitrust case under Section 4 is to be considered before final decree.

[fol. 3590] But I pass on from that point.

The matter I want to deal with particularly is the problem of whether these Appeals Board decisions should be received on the basis on which they are offered by the Government. The Government says that on this motion they have two burdens: First, to prove that there have been violations of law; and second, to show that the decree does not appropriately deal with those violations or adequately deal with them.

Now we think that there are further burdens as there always are on an injunction motion, but just to consider those, these Appeals Board decision are offered of course on the first branch of that burden, to attempt to show prima facie violations of law.

Now what have they actually covered? Well, they are selecting out of 106, I think, some 51 in which the Appeals Board has reduced clearance or approved arbitrators' decisions reducing clearance all the way from one day up. They represent decisions on particular facts in particular cases under the standards laid down in Section 8 of the decree. They do not deal, were not intended to deal, and could not deal with questions of violations of the Sherman Act. Section 8 elaborates the considerations which were to be taken into account by the arbitrators and which were [fol. 3591] to be considered on appeal by the Appeals Board. They constitute the various elements which enter into the original business decision as to the length of clearance. The clearance arrangements which were reviewed by arbitration were business decisions, negotiated by distributors and exhibitors, and the arbitration provision, Section 8, the standards which the arbitrators were to apply, were those business standards, and this provided an independent review of the business judgment.

Now it is perfectly apparent that the standards set forth in Section 8 for the review of that business decision, a business decision which as your Honor knows involves intricate problems in the particular area and the particular situation—it is ridiculous to suppose that that review embraced a consideration of Sherman Act violations. If it

should be deemed to that would mean that this decree really set up the arbitrators in the place of the Court to pass on questions of violations of law and that the defendants by consenting, knowing that some of the decisions would be bound to go against them, set back after creating a noose which would be used at such time as the Government wanted to use it after a sufficient number of decisions adverse to distributors had developed.

[fol. 3592] Now it is perfectly evident, as Judge Proskauer has pointed out, the Appeals Board has held squarely the other side of this in the Gary case that a court decision that clearance was reasonable does not bind the Appeals Board, and the Appeals Board could nonetheless hold, applying the standards of Section 8, that in the particular situation it was unreasonable.

Now this is an a fortiori case. If a court case which might have all the elements of res adjudicata and stare decisis cannot be used to control the decision of the arbitrators, obviously a decision of the arbitrators under the limited standards of Section 8 cannot be regarded as res adjudicata and stare decisis for the purposes of considering violations of the Sherman Act. It seems to me it is apparent on the face of the decree, it is apparent by the fact that this is an arbitration decision that they were not considering violations of law and that they could not be vested with that power, were never vested with that power by the Court or the Government or by the defendants. Their decisions had none of that aspect. They are not a court. They proceed informally, not under regular rules of evidence. They are not bound to take into account the purpose, the [fol. 3593] nature, the effect of the things that they do consider. They are not bound to take into account the general things that would have to be taken into account in a Sherman Act case.

So it seems to me perfectly apparent that fine as the Appeals Board work is within the sphere in which it operates it cannot be stretched to amount to proof of violations of law to sustain the burden of the Government on this motion. It doesn't on its face, it doesn't as a matter of intent or fair intention of the decree or the purpose of the parties. The Appeals Board has so held the other way, and this is plainly an a fortiori case.

Now in the absence of any proof of violations of law—and these decisions are not proof of violations of law—there is no need to go to the second question at this stage of the case, as to whether the decree needs modification or not, because this is not a motion to modify. This is the typical motion for injunction on the questions raised under Section 4 and there is no other proof adequate to sustain a claim of violation of law. These interrogatories which are mentioned do not deal with anything but a few questions of fact which have nothing to do with violations of law, and the license agreements to which counsel have re- [fol. 3594] ferred are just the ordinary license agreement. There is no dispute that they are in effect, but they do not prove any violations of law and therefore at the very threshold there is a complete failure to show any violations of law. We think that your Honor therefore ought to sustain the objection to receiving these Appeals Board decisions and also to receiving the interrogatories on the grounds suggested.

The problem has one serious aspect, from the point of view of the defendants of course, in addition to that I have mentioned. Section 5 of the Clayton Act, which deals with consent decrees, would create some question perhaps—at least the matter has not been decided—if there were ever a subsequent modification of this decree and evidence was received at this stage of the case. So that our friends on the other side are apparently entirely aware of that. But if evidence should now be received, it might create serious difficulties in the way of any subsequent modification by consent from the defendants' point of view.

That is not a reason why your Honor should exclude the evidence but it is a serious problem for the defendants and a reason for your Honor's giving the greatest serious consideration.

[fol. 3595] The Court: I missed part of your argument on that, Mr. Seymour.

Mr. Seymour: Your Honor is familiar with Section 5 which provides in effect that a consent decree shall not be prima facie evidence of anything in a treble damage case. It also provides in effect that it must be a consent decree before testimony taken. Now it has never been adjudicated, but if evidence should be received at this stage of the case and at some subsequent stage it should be deemed desirable

to make some modification in this decree by consent it would raise a serious question as to whether after that testimony was taken, after the evidence was received, a decree by consent would be within the precaution of the statute.

Now that is not a reason for your Honor to exclude the evidence but from the defendants' point of view it is a reason why the objection, if otherwise valid, is of particular importance.

Now we think that there is no adequate compliance with the minimum standards of temporary injunction proof. If your Honor should even be in doubt about that question, we would ask your Honor to permit us to provide affidavits which would show the broad issues of fact that would have to be determined before your Honor could even consider [fol. 3596] granting a temporary injunction involving this clearance practice so general in the industry and which counsel for the Government says he wants to start destroying now and destroying completely by the time of the final trial.

We feel that this is one of those cases that your Honor has so often considered on the question of whether relief of a temporary character ought to be granted whether a full consideration of the disputed questions of fact would have to be given, and to that end I think your Honor will find it unnecessary to come to that. If your Honor came to a conclusion as to what kind of proof had to be taken we would like to know that. We are hopeful that these objections are sound and if they are sound there is no occasion to give further consideration to the motion at this stage.

Mr. Caskey: If your Honor please, I want very shortly to review the origin of Section 8 and the provision in it that clearance——

The Court: Excuse me just a minute.

Mr. Caskey: When the complaint was filed in 1938 it contained numerous allegations respecting the activities of the defendants in granting clearance, both clearance by concert of action or conspiracy and the individual clearance granted by a single distributor. Likewise the clearance [fol. 3597] granted by a distributor to its own theatres and to theatres said to be affiliated with other distributors was attacked. Those allegations were reframed but substantially re-alleged in the supplemental and amended peti-

tion that was filed in November of 1940. And one of those allegations was that the defendants had violated the law by making clearance agreements which are calculated to suppress competition between exhibitors rather than to protect the distributors' revenue, which is essentially the same statement that was made here this morning.

Now we filed answers denying those allegations and thus an issue was created. That issue was resolved by entering into a decree, a final decree, true by consent, true subject to modification in the manner provided within the decree, but nevertheless a final determination of the issues between the parties as made by the pleadings. Now the agreement, the consent decree says clearance, reasonable as to time, and reasonable as to area, is necessary in the distribution of motion pictures. And clearance is defined as a contract between the distributor and the exhibitor restraining the right of the distributor to itself exhibit or license the exhibition of its picture within the time and the area specified in the contract.

[fol. 3598] Now when that agreement was made the Interstate case had been decided and whatever it held was known to the Attorney General and his associates. At that time Judge Chesnut's opinion in the Westway case had been affirmed by the Circuit Court of Appeals for the Fourth Circuit. So there wasn't any question in the minds of everyone but that this provision in Section 8 correctly stated the then known law.

Now nothing has happened in the five years which have intervened except this remedial machinery has been operating to solve the particular problem that arises between two or more competing theatres, operating now since February of 1940, over four years. There have been over 400 arbitrations. The distributors have placed in funds over a million and a quarter dollars to maintain it, and I may say that they are bearing substantially all of the expense, the cost to the complainant through appeal, which on an average has been less than $45 a case. There has been no proof of any change in economic conditions, any change in law, any change in practice since the agreement was made and embodied in this decree in 1940. Therefore we think that the usual rule that the plaintiff seeking to get a temporary injunction must show cogent proof of emergency applies.

Now one word about these opinions. If they were in [fol. 3599] evidence what would they prove? Well, the first thing they would prove is that in a 106 cases three distinguished lawyers have given of their energy and ability toward the solution of a particular problem and have done it in a manner which is the admiration of everyone who studies it. That they will prove.

Second, they will prove that with respect to clearance there is not the slightest criticism of Section 8 in these 106 reports. They according to my calculation embrace about 111 pages and about 250 words on each page which gets up into the millions of words, but there is not a suggestion that there is anything wrong with Section 8 in the whole bunch. And that is all we are talking about today. It is true they establish that it is the practice in the industry to grant clearance between theatres which are located in the same competitive area even though the amount of the competition is small or slight. That is a fact. That is the universal practice in the industry. It was true in 1940; it is true today. But even there the Government does a little fudging, as they say. For example, one of the illustrations given is a case involving theatres up in Massachusetts—Fitchburg and Gardner and Athol.

Well, it came out in the course of the testimony that four [fol. 3600] of the defendants granted one day clearance to Fitchburg over Gardner and that was the practice. And they gave Athol the same availability. And all that the Appeals Board did was to say to the fifth company which granted seven days instead of one day, "You better go along with the rest and reduce yours to one day."

Now that doesn't establish any violation of law at all.

Now the first thing that these opinions would establish is that the distributors licensed their films sometimes to a subsequent run which charges about the same or occasionally even more than the prior run. Well, there is no significance to that. Take the very first case cited, Canton, New York, and Ogdensburg. Canton of course is the county seat, much the larger town. The other, 15 miles away, was in a university town. It played 14 days later and it charged the same admission price as Canton. I don't know what that establishes as a violation of law. It is just a fact that the exhibitor in operating his theatre in Ogdensburg thought that he could charge the same admission price as the exhibitor operating his theatres in Canton.

And the last thing that is established that would be [fol. 3601] material here is that the distributors grant clearance to theatres affiliated with each other and to independents alike. But there is not the slightest word in all these reports that the clearance which a distributor grants first to its own theatres or second to the theatres affiliated with some other producer is either any longer or greater in area than the clearance which its grants to other first run theatres in other parts of the country. The fact of distinction between the amount or type of clearance granted affiliated theatres and independent theatres is not adverted to once in all these opinions.

We think therefore that your Honor should exclude these reports from evidence and deny the application for the injunction.

The Court: Mr. Wright, how is the injunction that you are asking for—what would it provide?

Mr. Wright: We suggested three possible forms of injunction. Now of course I suppose we have not attempted any detailed discussion of the precise form until we have gotten the decision on the question of the need for additional relief. But with respect to this problem of the affiliated theatre clearance we had proposed a prohibition which would flatly restrain and enjoin the consenting defendants [fol. 3602] from imposing clearance restrictions in favor of each other's theatres until and unless they were first able to make a satisfactory showing that the purpose of that clearance or that that clearance was necessary to protect their revenue as distributors. In other words, that the decision to grant a clearance had not resulted from a desire to protect the theatres owned by each other from independent competition in the form of any exchange of reciprocal privileges, but actually the clearance was imposed in the course of performing a function as distributors.

The Court: Mr. Wright, an injunction is to prevent threatened violations of law as I understand it. Now under our procedure unreasonable clearances are prohibited. There is a good deal of difficulty in determining——

Mr. Wright: If your Honor is referring to the present decree I don't think that is a correct statement.

The Court: I am speaking quite generally, and don't hold me too closely to it because I am not as familiar with the law in this case as you are. But an injunction seeks to prevent a threatened violation of law.

Mr. Wright: Yes.

The Court: Now just what violation of the law is threat-
[fol. 3603] ened here? Under the machinery which we have set up we have a Board which determines whether or not there has been an unreasonable clearance and if there has been one they hand down a decision and as far as I know and believe then reasonable clearance is remedied.

Mr. Wright: The difficulty with that assumption is, your Honor, that these gentlemen are not free to deal with the problem of unreasonable clearance under the law as such. They operate within a very restricted framework which determines the nature of the relief they can grant and which sets up limited standards for determining whether or not unreasonable clearance exists. That is precisely what we are here arguing about—the inadequacy of that framework to permit that Board and those arbitrators to function in a manner which would effectively restrain and prohibit unreasonable clearance which violates the law as distinguished from clearance which——

The Court: That would seem so and I gather from your brief that you want to include such other situations.

Mr. Wright: We want to broaden——

The Court: I mean broaden. That is a better word. You want to broaden the power of the arbitrators.

Mr. Wright: We want to broaden two things—we would [fol. 3604] first broaden the scope of liability itself, and second broaden the means of dealing with the violations once established.

The system that is presently set up of course provides no penalties whatsoever no matter how——

The Court: Would you say this: So far as our present machinery is concerned, in the cases which the arbitrators and the Board have jurisdiction over, that there is no threat of law violation? Is that so?

Mr. Wright: If the Court please, we say there has been a continuous series of law violations.

The Court: Isn't it true that just as soon as it is found that there is an unreasonable clearance that it is remedied? Isn't that true?

Mr. Wright: I think your Honor has to make a distinction between the concept of unreasonable clearance as it is reachable under the existing decree and the term unreasonable clearance as it exists as a matter of law. Our whole argument is based upon the proposition that unreasonable clear-

ance, clearance which is unreasonable as a matter of law, which violates the Sherman Act, is not prohibited by the existing decree and may not be adequately dealt with under the provisions that are in the existing decree.

The Court: That would seem to be an indication that you [fol. 3605] thought that facts which might be unreasonable so far as the arbitrators were concerned or the Appeal Board, that those same facts might not be a violation of the Sherman Act, doesn't it?

Mr. Wright: There isn't any question about that. I think our position with respect to the Appeal Board's decision has been misinterpreted by counsel. We don't suggest that anything the Appeal Board decides is res adjudicata so far as your Honor is concerned on any issue of law whatsoever. They don't sit there, they were not appointed for the purpose of determining what the law is or what it is not. Their sole function, as I understand it,—and I think it clearly appears from the decree—is to sit and review these findings of fact, determine what the facts are in any particular situation, and in their view make an ultimate decision as to whether or not a particular clearance was reasonable or unreasonable as a matter of fact.

Now whether or not the facts as revealed by their decisions constitute violations of law, those are matters which of course are committed exclusively to your Honor for decision, and that is why we offer these simply as evidence and then propose to show that upon a consideration of the facts that have been reported and developed in the course of those [fol. 3606] proceedings there have been a continuing series of law violations which have not been effectively prohibited or restrained by the awards that the arbitrators and the Board have been empowered to make under the limitations of the existing decree. That in no sense is the fault of the arbitration system or the Board. We accept entire responsibility for that because of the limitations in the decree which we assented to at that time but which we assented to for a three-year fixed trial period only.

Mr. Proskauer: With your Honor's permission, I didn't quite understand from what Mr. Wright said whether he is abandoning his claim for an injunction restraining us for unreasonable clearance.

Mr. Wright: No, I am not abandoning it at all.

Mr. Proskauer: You are still asking for that?

Mr. Wright: Yes. One thing more. I want to say this before I sit down.

We had furnished these defendants 30 days in advance of the hearing with a fairly comprehensive statement of our position and evidence. Now I assume the purpose of that was to facilitate the hearing here and so that we would also be notified in advance as to what their evidence would be and they said in their statement they might wish to submit an affidavit or some testimony. I would suppose that before [fol. 3607] we get into full argument on this thing we ought to know what the defendants' proof as distinguished from their argument is going to be, and I think we ought to get to that if there is going to be any.

Mr. Proskauer: I thought we had had full argument.

Mr. Wright: All that I am doing is what I concede to be making an opening statement simply outlining what proof we were going to offer.

The Court: Now Mr. Davis.

Mr. Davis: If the Court please, may I say with great respect to the learned counsel for the Government his opening statement confused me and his supplemental statement has completely obfuscated me. I think I know less of what the Government's position on this motion is than I did before I came into the courtroom.

First as to these exhibits here. I now understand from my friend that they are offered to your Honor not simply to prove that the Appeal Board has found unreasonable clearances to the number of 51 but they are now offered that your Honor may take the recital of facts contained in these opinions as facts proven on this motion and by a consideration of those facts may determine whether there has or has not been a series of violations of the Sherman Law. [fol. 3608] Now that seems to me to broaden the purpose for which counsel desired to offer these opinions beyond anything that I had conceived to be possible, and certainly for the defendants we object to having the recital of facts in these opinions treated as though they were proven in this court—originally proven as facts on which your Honor should adjudicate violation or non-violation of the law.

I take it for granted there is not a defendant here who has not participated in these particular proceedings who would not insist that he had the right to cross-examine the witnesses who appeared if their testimony was to be received against them. And the manifest impropriety of pre-

senting against all of the defendants in solido these investigations as to each particular defendant is enough without more saying to condemn the whole tender so far as the purposes of this whole motion are concerned.

Now when we get to the motion itself and the attitude of the Government, again with the deepest respect, it seems to me a pure play on words. This decree says in terms that clearance, reasonable in time and reasonable in area, is necessary and good. By necessary implication it says that clearance unreasonable in time and area is bad. And to [fol. 3609] correct such infirmity it erects a whole arbitral system.

Now I don't understand my friend attacks the arbitral system at all. I haven't heard from him at all any word that he wants to abolish these arbitrations and this Board of Appeal. On the contrary I think I had understood him to say that it had worked well. If he didn't say that, if he has a contrary view, he stands solitary and alone on that question, because so far as I know there isn't a defendant or counsel or arbitrator or litigant who does not admit that this has been an excellent, operative, just system. What my friend wants is to reverse a formula and that is all there is to it. He wants the decree to be amended to read, "Clearance being a restraint of trade is per se bad, but if reasonable it may become good." Those are the two sides of the shield. The decree says good unless unreasonable. My friend wants by this elaborate motion to make it read clearance is bad unless reasonable. What is the difference? It is merely the reversal of the formula and nothing more, but leading, says the Government, to a shift in the burden of proof.

I have a great deal of respect for the burden of proof just as I used to have a great deal of respect in an earlier and better day for stare decisis. There are certain legal ideolo- [fol. 3610] gies which we part with with great regret, and I don't deny that there is still some vitality left in the burden of proof. There is vitality in the burden of proof on the criminal side of the court because of the presumption of innocence that attends the accused who may sit silent until the Government or the prosecuting officer has made out a complete and perfect case against him. And that burden never shifts. There is the burden of proof in the old-fashioned common law ejectment where the defendant in possession may sit in perfect silence until the plaintiff has proved

a chain of title absolutely perfect in every respect and his inability to meet that burden of proof defeats his recovery. But in the modern equity problem with our new rules for discovery and interrogatories it must be confessed that the burden of proof, which simply means who goes forward first, has lost most of its vitality. It may perhaps influence a wavering mind on the bench, of the jury, or the referee to furnish a makeweight by which ultimate decision may be arrived at and uncertainty dissolved. But between the parties involved it makes precious little difference, and in arbitral systems where the arbitrators sit on it and put their probe into both of the individuals it makes no difference at all except that the complainant must inaugurate the proceeding and set the machinery in motion.

[fol. 3611] Now to accomplish that stupendous reform of having the distributor set the machinery in motion instead of the exhibitor setting the machinery in motion my friend brings forward this portentous motion to amend this decree. And that seems to me the last bit of juice that there is in this orange and it is inconceivable to me that the Court should overleap all the tremendous obstacles to accomplish that reform.

The Court: Anyone else wish to be heard?

Mr. Wright: If the Court pleases, it doesn't seem to me that we are any clearer on this evidentiary point as far as the defendants' evidence is concerned than when I sat down before. Am I to understand that the defendants are resting their case simply on our presentation and relying on obtaining a ruling from your Honor to exclude our evidence? Or do they suppose at some future date when your Honor rules there will be given an opportunity to offer evidence? If the latter is the case I think we ought to have the ruling on the evidence here and now. I had supposed that if the ruling was deferred that they were going to offer what they had to offer. Otherwise I don't see how we can defer——

Mr. Seymour: If your Honor please, I think the matter [fol. 3612] will probably be disposed of by a ruling on this tender to which we have objected on the serious grounds that we have stated to you. I would suggest if your Honor would consider that any part of the weight necessary to be carried had been carried the defendants would want an opportunity to tender evidence on the disputed issues of fact. We would then want to submit these affidavits. If this

evidence is not received and your Honor decides to sustain the objections, because they are so plainly reasonable, there won't be any occasion to burden your Honor with these affidavits. Rather than elaborate the hearing by suggesting that the affidavits be considered along with this ruling I should suppose that that matter ought to await your Honor's ruling.

Mr. Wright: If the Court please there was no occasion whatsoever for us to furnish this elaborate statement of what our position was if we were going to be met here at the hearing with the suggestion that the defendants still can't make up their minds as to what if anything they want to offer until they know what this ruling is going to be. Now it seems to me that it is a useless waste of time to split this proceeding into a possible two hearings by deferring this question of whether or not they shall be permitted to go forward. It seems to me they have to decide now that [fol. 3613] they are willing to take their chances on the record as made or add to it whatever they have.

Mr. Proskauer: Your Honor, I want to add one word to that go forward or take their chances. We are not playing a game here. It is perfectly evident why we are very chary about putting in evidence. We are concerned with the possibility that if evidence is offered here and this consent decree were ever amended so that some theatre owner claiming to be injured will come in and say, "You offered evidence, therefore this consent decree is prima facie against you under Section 5 of the Clayton Law."

We have nothing to conceal. That is why we are walking on eggs a little bit about putting in evidence. I don't think the claim is serious, but somebody might make it and our clients are very sensitive about it and we have a great many treble damage suits to defend and the attorneys are right here in this courtroom looking for bits of help that they might pick up here. Now that being so we are pressing this objection to the offer of the evidence of these reports even though we have discussed them and said to your Honor, "Look them over instead of deciding. See what they really show or don't show. If they don't show any- [fol. 3614] thing exclude them from evidence. That is why we are putting it in that form. All we have got to say about an affidavit is that we have got an affidavit prepared here so that if your Honor admitted these in evidence and indicated that you thought there was any question here

we would like to put before you just the plain evidentiary facts that you are already familiar with as to the way clearance works and what it is, as to the number of prints we make and how they are distributed, and how the composite of prints requires—just those formal things. We don't want to offer it unless we have to do. That is why we are throwing ourselves a little bit on your Honor's consideration to give us an opportunity to mark it hereafter if it becomes necessary. If it is not necessary we don't want to.

Mr. Frohlich: May I say a word?

The Court: Yes.

Mr. Frohlich: I want to make a formal objection at this time to the offer of proof for the Government for the reason that Columbia was never a party.

The Court: May I have it on the record that you represent a non-consenting defendant?

Mr. Frohlich: I represent a non-consenting defendant and on behalf of that non-consenting defendant I want to make a formal objection to the proof offered for the reason that [fol. 3615] Columbia whether rightly or wrongly never wanted to be a party to this decree and never was a party to any of these arbitrations, has never had a chance, as Mr. Davis said, to cross-examine any witnesses or defend itself in any of these proceedings. And for the Government to offer this proof at this time would be tantamount to placing upon Columbia the stigma of having been in some way guilty of wrongful clearance. Now I think that under very elementary rules Columbia should not be bound by that kind of proof and I want to press my objection.

The Court: Isn't there something in that, Mr. Wright?

Mr. Wright: Yes, I think there is, your Honor, except that it is wholly academic at the moment. I don't think we come to any question as to admissibility as to Columbia when we are not seeking any relief against Columbia on this motion. It seems to me that would only arise at a later date in the course of the trial of the suit on the merits.

Mr. Raftery: I didn't think I would say anything until Mr. Wright said he wasn't seeking any relief against Columbia.

Mr. Wright: On this motion.

Mr. Raftery: Every bit of relief he gets against the big [fol. 3616] five he indirectly gets against the little three, because even though we do not participate or have anything to do with the arbitration proceedings when Mr. Caskey

mentioned a few towns such as Fitchburg and said it was cut down one day over Athol, United Artists and Universal have to give the same consideration by indirection. It is for that reason we are opposed to trying one of the important issues of this lawsuit on the merits on a motion. Clearance is an important part of this litigation. Just as some of the legal rules have passed out, as Mr. Davis has so well put it, Mr. Wright wants to pass clearance out of the picture. Forget it. Clearance is an essential part of the business. We had over 2000 contracts last year with clearance on one way or the other. Every one of those is a matter of negotiation just as profits and the other things that go into it. Now for your Honor to try ex parte—I just couldn't draw an affidavit to answer the contentions that he made in this particular situation. We submit he has shown no necessity for an injunction. You have set the case for trial for October. From what Mr. Proskauer has said all the exhibitors are having a field day. There is no necessity now for any injunction. This summary disposition of an issue [fol. 3617] as important as clearance on a motion the only factual support of which being some decisions by an Appeal Board at which not even all the five companies were parties in many and in some there would only be one of them—that is the sole evidence before your Honor to support a summary application to right a decree, and you ask Mr. Wright what type of injunction order would he suggest. It would clearly have to be a don't-beat-your-wife order because there is nothing that could be drawn except that the defendants are restrained from granting unreasonable clearance. He has not cited any cases that need temporary relief now. So we submit on behalf of Universal and United Artists that the motion now should be denied and the case, as your Honor has done, set for trial and we try this issue on the merits. And we actually filed the same objection Mr. Frohlich has to the introduction of these affidavits.

Mr. Casey: In amplification of what has just been said I find that of the 106 decisions in 31 Twentieth Century-Fox was not a defendant, not a party at all. And undoubtedly the same statistics would apply to all the other companies.

The Court: Mr. Wright, I don't think I should decide the question of the admissibility of these exhibits which have [fol. 3618] marked for identification. My impression is that the decisions of the Appeal Board are not proof there has been a violation of the Sherman Antitrust Law.

Mr. Wright: There is no contention on our part that it is.

The Court: Substantially so, isn't it?

Mr. Wright: We merely say that it is at least, certainly, prima facie proof of the facts therein contained as to these defendants who were parties to that proceeding, and for the purpose of this suit, when these men were especially designated to hear and determine these cases and to make these awards and if that arbitration system does not at least serve the function of legitimately bringing to your Honor's attention what is going on in this industry for the purpose of determining what kind — relief we ought to have in this suit, then it has no legitimate function whatsoever. As it is we were willing to consent to its institution and its continuance with that consideration in mind. You must remember that what this system does is to effectively insulate these defendants from these proceedings. To that extent it is very valuable to them and it is well worth the million and a half dollars they have put into it. Actually the arbitrators have no power to punish. All they can do is to [fol. 3619] make an award as to what should be done, as to future conduct. There is no violation of a contempt except a violation of the award occurs. That is a very nice thing for a defendant to have but it does carry at least some corresponding responsibilities. You can't have that system set up to determine those facts on that basis and still it seems to me come in here and say, "Yes, it is all right to have this system and have these awards to protect us from proceedings designed to punish us for violation of the Act but they can't be considered by this Court for the purpose of determining what we have done in order to see whether or not we have violated the Act." If that contention were accepted by your Honor we should move to set that entire system aside very promptly.

Mr. Proskauer: Your Honor, I don't understand my friend. He undertook the burden of showing that we were violating the Sherman Law. As I understood him, first he came in and said he was offering these opinions as proof of that. Now he says he is not offering them as proof of that, and if I follow him what he means is he is not offering them as adjudications but he is offering them to show what the facts they found were so that you can make an independent determination from those facts as to whether we have vio- [fol. 3620] lated the Sherman Law.

I am trying to translate it into language which even the defendants' lawyers can understand. I think at last I have done so.

Our point about that is this: You can't determine a motion on these 51 isolated opinions, whether the unreasonable clearance is to the extent of one day or two days, constitute violations of the Sherman Law. That is involved with countless other questions just as the arbitrators point out.

And further than that, as has been so effectively stated here particularly by Mr. Davis, who is always effective, you just can't assume that where some of those defendants go into an informal arbitration and say, "Well, to get through with this thing we will agree that those are the facts," that if we were trying the serious issue with all of us there as to whether we were committing a quasi criminal offense, as to whether we were violating the Sherman Law—you can't assume that we would let those facts go in in that way. Why that is really an absurdity.

And, if your Honor please, it is a comfortable thing for us not to be threatened with an injunction on vague a thing as unreasonable clearance and it is worth a million and a half dollars to us to do that, but we didn't buy the court [fol. 3621] with that million and a half dollars or buy the Attorney General's office. We put it up because they subject to the Court's approval agreed that by putting it up we were effectively creating a machinery under your Honor's guidance for really handling in a practically common sense way these things which come up from day to day. And the amazing thing to me is that in all my friend's argument he pays no attention to the practical side of this at all. He just ignores the day to day turning of this great machinery. He says, "You can't punish us." What is the use of punishing us? If we make a mistake of four days in a clearance contract and the Appeal Board reduces that clearance by four days what is the point in punishment? Is he so hungry for blood or thirsty for blood that somebody has got to go go to jail if he makes a mistake of four days in a clearance which is immediately corrected by the summary process of this appeal? And I still don't know what he is asking for here. If he is still pressing his claim for the injunction I am sure that that must be out under the considerations that we have brought forth for your Honor's consideration.

That is all I can see he is moving for. He talks about [fol. 3622] modifying the conditions. Just think of the absurdity of the one he claims. Before I can grant a clearance to the biggest theatre in New York which I own—let us assume I own the Rockefeller Center Theatre; I don't—my clients don't; I wish they did—let us assume they own it and they give a first run with clearance of 20 days to that great theatre. My friend is actually so impractical with the cob webs of the Antitrust Division—somebody used the word obfuscate—that before I could give that theatre clearance I have got to come into court and I have got to apply to you and you have got to sit there and give me your permission to give clearance to the Rockefeller Center Theatre. Now I don't like to use the word "nonsense" but really, your Honor, that is it.

Mr. Wright: If the Court please, I repeat that if these decisions of this Board are not to be admissible in this court for the purpose of showing to your Honor what the facts are as to what these defendants have done in those proceedings in which they were involved then that system has no further justification insofar as the Government is concerned.

The Court: Isn't that a pretty big statement? The very purpose of this arbitration plan was this: It is known clearance is something that must stay in this business. I think you can concede that. That is pretty general. [fol. 3623] The great difficulty is that you can't lay down any yardstick; it depends upon which particular case. Now in order to decide where there was unreasonable clearance it was thought as a fair, reasonable and practical matter to submit it to an impartial Board to decide. That is what the purpose of this arbitration and the Appeal Board is—to decide whether or not the clearance is unreasonable. If it is found that it is unreasonable then the defendants ought to change the clearance. Now I don't understand what you would substitute for that.

Mr. Wright: The difficulty of this scheme as it is set up is simply this, your Honor: Had these arbitrators been given the power to consider each claim of unreasonable clearance on its merits and it——

The Court: It seems to me you confuse two things. Perhaps I am confused, I am not sure. But you come here asking for an injunction. This is not a motion to revise

the decree. I think there are some things in this plan of arbitration that might be improved, but that is not before us just now. We are here now on a motion for granting an injunction.

Mr. Wright: That is right, and I take it if the defendants could point to the decree that is now in effect as an [fol. 3624] effective and adequate means of dealing with this problem then we would not be entitled to any further objection.

Mr. Proskauer: That is exactly what we do.

The Court: I would be very much interested—it is perhaps not a legal question—but I have been interested in this industry, had to be for some years now. I would like to know what you would substitute for the present plan of deciding whether there is unreasonable clearance. That is such an important question. I think it is very difficult to get a better answer than we have. If you have a better answer I would be very much interested in hearing it.

Mr. Wright: If the Court please, we have made a very specific concrete suggestion within the limits of the present plan in the petition we filed for modification of Section 8 in August of last year. We there spelled out what we thought ought to be done. In the existing section we said the first thing to be done would be to remove any presumption that clearance in any particular situation is necessary, that might be spelled out in the present phrase of the decree that clearance reasonable as to time and area is essential to the industry. We advocated arguing that clause. We also advocated an express statement to the [fol. 3625] effect that the arbitrator should have the power to abolish all clearance in any situation where he found it to be inequitable regardless of whether or not the theatres were in direct competition with each other or not. As the system now is if you are in the same competitive area it doesn't matter how unreasonable the fact may be that A in that area takes clearance over theatre B, the maximum area that theatre B can get under this section is to be told, "Well, you will still play one day behind theatre A," even if the equities are such that he ought to be playing well ahead of theatre A instead of behind him.

Mr. Proskaue : There is no ground for this statement.

Mr. Wright: From that inequity arises a third limitation in the existing Section 8 which we propose to strike. That is, the present limiting section says that nothing the arbi-

trator did should affect the distributor's right to license any run it shows. As far as we are concerned, and I am sure your Honor will see, if you consider these decisions closely and see what has happened in the industry during this three-year period, that run and clearance are actually inseparable. Clearance merely determines the interval between runs.

The Court: I know that.

[fol. 3626] Mr. Wright: And it is ridiculous to exempt priority of run from any arbitration system which purports to deal with unreasonable clearance. It can't be done and still give effective relief to anybody.

The Court: Those suggestions of yours, Mr. Wright, seem to have more to do with broadening and limiting matters which are referred for arbitration rather than having any bearing on the question of injunction.

Mr. Wright: If the Court please, I repeat, suppose that as a condition to further injunctive relief we show that the existing relief is inadequate doesn't do the job of restraining law violations that it is intended to do—and the comments I just made are directed at that end of demonstrating to you that there are violations of law—there are unreasonable clearances which do violate the law which are being imposed by these defendants every day which cannot be effectively reached and remedied under the setup that we have now got. Now we concede that improvement in the arbitration system as such could probably be had only by consent. The consent is not forthcoming from these defendants for any improvement unless it is conditioned upon further immunity from trial of the main issues of this suit for a substantial period [fol. 3627] of time. That is a condition that the Attorney General has rejected and will not accept. Therefore there is no possibility of improving the existing arbitration provisions by consent, and I might say that in connection with the defendants' concern about the offer of evidence here foreclosing full protection to them from any such future consent decree as might be entered that that is a hazard that really is primarily one for us to determine, and we would not be here asking for this relief or offering this evidence at this time if we hadn't satisfied ourselves completely through these prolonged negotiations that having gone on since November 20, 1943, there isn't any possibility of obtaining adequate relief through consent.

Now that is not a reason—this Section 5 as far as I can see is no reason at all for excluding or failing to rule at this time on the offer of this material that we are offering for your Honor's consideration.

The Court: If I had to do it now I should exclude it. I would like to look into it a little further before I rule against you. That is the only reason I am not ruling now. If you force me to rule now—you can't force me because I am not ready to.

Mr. Wright: If we had the ruling now, as I say, we [fol. 3628] would promptly move to set aside these arbitration proceedings under the decree because in our view the only way we could have justified—the only way we could have ever justified the setting up of a system of settling and arbitrating disputes as a matter of consent decree enforcement, something that has never been heard of before in any Government agency, was on the assumption that we were doing it only on an experimental basis and that further action in the suit could be taken on a consideration of the whole facts which that experiment revealed to the Court. At least whatever might be said about its inadequacy, which we recognized from the start, to deal as fully with violations as contempt proceedings might, that is, in the way of imposing penalties, that it at least brought to the light of day and made a record of the practices that were going on in the industry and the officers of this court appointed to consider and review those practices we assume certainly had the function of supplying your Honor with the data that you would need at the end of the trial period to determine to what extent the activities of these defendants had violated the law and to what extent additional relief might be needed to handle those violations.

[fol. 3629] The Court: Mr. Wright, it seems to me that the proper and fair disposition of this motion at the present time would be this: It would be, if I do receive this in evidence, allow the defendants to file an affidavit and also allow you to file a replying affidavit. I think that would be fair.

Mr. Proskauer: That is right. We will give you a copy of the proposed affidavit immediately.

Mr. Wright: The only objection to that plan is that it defers consideration of our proof. I think it would be appropriate to mark this material now and they could

make their objections and you could consider their objections to our material at the same time you consider our——

Mr. Proskauer: We are not going to offer anything in evidence. We are going to offer an affidavit conditioned on your Honor's receiving this evidence. If you don't receive the evidence we do not ask that you receive the affidavit. We will give a copy to Mr. Wright and we don't want it considered if you exclude the evidence. If you receive the evidence we would like our affidavit considered. And we have a brief from which I was cribbing as I argued which we will put in final shape and give to your Honor tomorrow.

[fol. 3630] (To Mr. Wright): We will give you a proof of it today.

The Court: Does that seem all right?

Mr. Wright: That procedure I think resolves the procedural problem. We would of course like time to reply to this brief which we haven't yet seen.

The Court: Certainly. Now the defendants will file a brief. Now when did you say?

Mr. Proskauer: We will give Mr. Wright a proof of it today. We will give it to him in final form tomorrow. We will file it with your Honor tomorrow.

The Court: You will have your brief tomorrow?

Mr. Proskauer: Yes.

The Court: That is the sixth. Now Mr. Wright, this is your brief, isn't it?

Mr. Wright: That is our main memorandum. It was submitted on February 5. You have had it at hand. The photostatic copy is attached.

The Court: This is it?

Mr. Wright: Correct.

The Court: You have another copy of it, have you?

Mr. Wright: Yes. I would be glad to supply one.

The Court: Now the defendant is submitting briefs [fol. 3631] tomorrow?

Mr. Caskey: Yes, sir.

The Court: And you want to reply to it?

Mr. Wright: Yes, your Honor.

The Court: Now when would you like to reply to it, Mr. Wright?

Mr. Wright: I should suppose 15 or 20 days would be sufficient.

Mr. Proskauer: I thought you were in a hurry.

Mr. Wright: That is about as fast as we can get anything typed.

The Court: Well, Mr. Wright, don't pay any attention to him.

Mr. Proskauer: Well, it is an illustration, your Honor, of the terrible danger that threatens the public that requires a temporary injunction. We would be delighted to give him 20 days or 20 weeks.

The Court: When do you want to file it? That would be the 26th?

Mr. Wright: That will be March 26.

The Court: March 26, is that all right?

Mr. Wright: Yes.

There is one other thing that is still undisposed of and that is this question of pretrial conference.

The Court: I thought that we would dispose of that [fol. 3632] after lunch. It is five minutes after one. Shall we come back here at half-past two?

Mr. Wright: I don't know that there is anything to come back for.

The Court: I don't know what you want.

Mr. Wright: I wanted to get a date set when we could have a pretrial conference and see if we could get an idea of how much time is going to be taken in the trial of this case.

The Court: Tell me what you want and I will try to meet you.

Mr. Wright: May we have some date in April? The early part of April?

The Court: Would you rather do it before these briefs are in?

Mr. Wright: I think it would be better to do it afterward.

The Court: Afterward. Now I think in April I am holding court in the motion term.

Mr. Wright: I suppose that could be done in chambers.

Mr. Proskauer: Oh yes, couldn't we have some date in April in chambers? I may be away in May.

The Court: I have the motion term, and as you all know when a judge is in the motion part he has a good many [fol. 3633] troubles and he doesn't want to add to them.

Mr. Proskauer: Well, we will protect you against the Attorney General as far as we can.

The Court: For the first two weeks in April I am in the motion part and I prefer to have that some other time. How about the latter part of this month?

Mr. Proskauer: (To Mr. Wright) Will you be ready by then?

Mr. Wright: Well, we will be working on this reply brief until the 20th.

The Court: Why not set it down for the same day, March 26th? How about that?

Mr. Wright: March 26th? All right.

The Court: How about that?

Mr. Proskauer: All right, excepting I don't suppose either of us is going to be very ready. I don't think we are going to have this thing analyzed to make it worth the trouble, but I am willing——

Mr. Wright: I would suppose that more than one such conference will be necessary in any event and I would suppose we might as well get started on March 26th. Whatever needs to be done I don't suppose will be done then anyway.

The Court: Monday, March 26th. Put it down at 2:15. So that, Mr. Wright, if that is convenient for you and [fol. 3634] everyone else I have set Monday, March 26th, for this pretrial conference at 2:15 in this room just to have some room designated. This is 1506. But it is quite likely we won't have anything formal to do and we will adjourn to my chambers.

Mr. Wright: Mr. Marcus reminds me there is also pending and undisposed of some objections that we made to some interrogatories directed to us by three of the defendants—I believe Columbia, Universal, and United Artists—which were generally continued for disposition at the time we continued the trial date shortly after we entered the consent decree, and I suppose those should be disposed of at some reasonably early date too.

The Court: Are they before me?

Mr. Wright: They were before you as I recall, your Honor, the last time they were up.

The Court: I don't recall anything about them. I don't know what you want me to do.

Mr. Raftery: Neither does counsel. We have forgotten about them.

Mr. Wright: If you say that we all forget about them that is fine.

Mr. Raftery: You just answer them.

Mr. Wright: We filed objections to these interrogatories and unless counsel is willing to withdraw the interroga-
[fol. 3635] tories why we want the objections disposed of.

The Court: Well, I don't know what they are.

Mr. Raftery: We will look them up and report back on the 26th.

Mr. Wright: All right.

The Court: Is that satisfactory, Mr. Wright?

Mr. Wright: Yes.

Mr. Ernst: If your Honor please, I represent the Society of Independent Motion Picture Producers. They are not as poor as Judge Proskauer's clients; they are doing well. The Society includes Selznick, Goldwyn, Disney, Orson Welles, Walter Wanger, and I represent others. We ask leave to file a brief amicus with respect to the motion that was made today. It is apparent I think to everybody that the independent producer of motion pictures has a direct interest in any restrictions in the market-place which impede the free flow of his commodity to that market-place in violation of the Sherman Law.

Mr. Caskey: If your Honor please, we ask you not to accept the brief. It is not yet in being and so we cannot comment on it. But we have had tender-- to us a brief from another group,——

Mr. Stern: I am appearing——

[fol. 3636] Mr. Caskey: —which contains a great many purported statements of fact, inflammatory and demagogic arguments which are not supported by testimony and should not be received. We think there is no need for briefs amicus when the plaintiff is the Government of the United States.

The Court: I don't think we need any help when we have got five live defendants with eminent counsel.

Mr. Ernst: May I ask if Mr. Caskey is speaking for all five companies?

Mr. Caskey: No.

Mr. Ernst: Or just for his own?

Mr. Caskey: Just for my own.

Mr. Stern: If your Honor please, I represent the Conference of Independent Exhibitors. It is the brief which Mr. Caskey refers to. I think your Honor has a copy.

The Court: It was left in my office——

Mr. Stern: It was left in your office Friday afternoon.

The Court: It was left in chambers when I came up from court. I haven't looked at it at all.

Mr. Stern: With that brief is an application for leave to file it would your Honor and copies of the brief have [fol. 3637] already been served on all the attorneys representing the defendant including a copy for the Government. We think we have a direct interest in this litigation, perhaps a more direct interest than anyone else outside of the defendants themselves. The purpose of this brief, if your Honor please, is to set forth to your Honor the views of the independent exhibitors throughout the United States and to conserve the time of the Court in obviating the submission of a great many briefs and a great many arguments. We represent 21 regional——

The Court: You realize that if you were to be allowed to file a brief there might be a hundred others wishing to do the same thing. How could I grant you the right and not grant everybody the right? Of course as you know the Attorney General is supposed to represent and I think Mr. Wright does ably represent the public and everyone else.

Mr. Stern: We are pretty nearly the everyone else.

Mr. Proskauer: That immediately raises a question of fact. You are not pretty nearly the everyone else. There are thousands and thousands of independent exhibitors who are not you at all and who do not believe in you.

[fol. 3638] Mr. Stern: Those are your own exhibitors. Those are the ones controlled by your——

The Court: Mr. Wright, don't you represent everyone including these defendants?

Mr. Wright: If the Court please, we do in theory but in this particular case I would prefer not to accept the responsibility. We of course try to give effect to all of the views of all of these other people who are vitally interested in the industry. However there are many conflicts between them. It is impossible to give adequate expression to all these various viewpoints that are involved. At the time this consent decree was entered we recognized that fact and your Honor will recall we had a hearing before your Honor to which everyone was invited to express his views with regard to this consent decree. In connection with any proposed modification or additional relief I think it would be quite proper and we think desirable for your

Honor to again receive the views of those who are interested. As I understand it, these people do not seek to intervene. That we might oppose. All they wish to do is to present briefs, and insofar as that is concerned we think it would be a desirable thing for your Honor to have their views before you.

Mr. Proskauer: Your Honor, I could understand counsel [fol. 3639] in good faith asking for leave to file amicus briefs if we were trying this case—if we were deciding the particular issue. But we are just here on a motion for a temporary injunction. That is all there is before you. What is the good of amicus briefs on that? We are going to get into a situation where we have a lot of stuff in these briefs that we are going to have — say things about. Your Honor is not going to know what the facts are. And we are going to say that some things he says are facts and some are not facts. That always happens in amicus briefs. We have a simple motion here.

Mr. Davis: May I make a remark based on what Judge Proskauer has just said?

I have long held the view that after the amoeba the lowest form of animal life is the amicus curiae. Now I have discovered after these long years that the amoeba should be elevated from that low gradation and that the amicus curiae is the lowest of the genus.

Mr. Ernst: Your Honor, if I could reckon the calendar as Judge Proskauer does I would have to agree with them. It seemed to me that when he said that this is just a little temporary thing, all will be disposed of on the second Tuesday of October he was just forgetting the basis of our [fol. 3640] judicial machinery in this country. The pattern of determination of this motion may well determine the pattern of economics in this industry for years to come before there is a final determination pending appeal, and the glib suggestion that it is just temporary is flying in the face of the realities of the market place, a market-place dominated as we contend by five major companies owning brick and mortar——

The Court: You are now being heard. If you wish to argue this I will be glad to hear you.

Mr. Ernst: I am arguing against the position that the amicus curiae is the lower form of amoeba. I am willing to say this:——

The Court: I think I might do this. After recess if you wish to argue this I will be glad to hear you. Recess until 2:15. I wanted to avoid receiving any further briefs.

(Recess to 2:15 p. m.)

[fol. 3641] Afternoon Session

Mr. Ernst: If your Honor please, I hesitate to take the time of the Court because this seems to me such a small matter. There are two applications before you for leave to file amicus briefs. I am talking for only one. If there were 50 or 100 then Judge Proskauer's bewildered plea a thousand that might have to be listened to would carry weight. But there are just the two of us. The brief we will file is for substantial people in the industry. The Government has said that it will be helpful to the Government and to the Court to have such brief.

The Court: Whom do you represent?

Mr. Ernst: I represent the Society of Independent Motion Picture Producers. These are a lower grade in the industry even than the companies called satellites. These people are Selznick, Goldwyn, Orson Welles, Cagney and Disney, who produce pictures and have no theatres and have no distribution system of their own. They are nevertheless of necessity vitally affected by the decree that is now in existence and would be extremely affected in my opinion if the Court should determine that the evidence proffered by the Government is inadmissible and if as a result of that the Government pursued its present intention of then [fol. 3642] asking for a vacation of the consent decree. I am in no position to argue fully on this question because I do not know what evidence will be before the Court. Our brief will take on one nature if you accept the analysis of the arbitrations. We have had in behalf of our clients at considerable expense our own independent analysis of the arbitrations made by competent researchers. I may say parenthetically that within the limitations imposed on the arbitrators there can be no objection, as I see it.

On the other hand when Judge Davis indicated that he knew of no objection to the present situation all I can say is that he is not aware of the very profound objections raised by a score or more of independent producers of substance, of quality and of importance in the market-place.

If the Court should accept the Government's proffer of

evidence and thereupon the affidavit which Judge Proskauer said he has drafted is also before the Court's mind for consideration we would like in our brief in behalf of these independent producers of pictures to address the Court. That we have a position in the situation goes beyond question. We are the lowest of the producers insofar as we are also using the monopoly of copyright referred to by [fol. 3643] Judge Proskauer, but we are in no position to have an accord in regard to price maintenance to which clearance is merely a corollary, and a necessary corollary no doubt in many instances. We are in no position to address ourselves to the operation of the decree and the operation of the restricted market-place today as are these five giants. What we would like the opportunity to do as one, and we understand there is only one other before you, is to submit within ten or twelve days a page proof of our brief to everybody and the final brief on the day when the Government's reply brief is due.

The Court: Well, if there are only two I think I will receive them—give you a chance to be heard. Mr. Myers? Is he here?

(No response.)

Mr. Bickford: Mr. Stern.

The Court: Mr. Abraham L. Myers, the gentleman this morning.

Mr. Wright: I think, if the Court please, that was Mr. Stern who appeared this morning. I believe the gentleman who appeared this morning is Mr. Stern whose name is on the brief submitted by Mr. Myers.

The Court: Is he or his representative present now?

(No response.)

[fol. 3644] The Court: In any event I will allow those two to submit briefs, so that there may be no feeling that they have not been given an opportunity to be heard.

Mr. Seymour: What is your Honor's pleasure about these affidavits? Shall we hand them up now and your Honor hold them until you have decided whether you want to consider them?

The Court: I suppose that is about the best.

Mr. Seymour: We will hand them up to the clerk and furnish the Government with copies.

Mr. Wright: I think they should be marked for identification.

Mr. Seymour: I don't see any occasion that they be marked. These are affidavits that we are submitting on the basis your Honor has indicated this morning. We are not going to offer them in evidence. One never offers affidavits in evidence.

Mr. Wright: Just so they are properly identified.

Mr. Seymour: I will be glad to state what they are. One is an affidavit by James L. Donohue, verified March 2, 1945. The other is an affidavit of J. Noble Braden verified March 5, 1945. And we will furnish you with copies later. [fol. 3645] The Court: There is no objection to them I take it?

Mr. Wright: Well, it is very difficult to say until we have seen them. I have read the affidavit of Mr. Braden and I don't think there is any question about the facts that are set forth. I haven't seen the other affidavit at all. There may be objection on their part.

The Court: Anything further now, gentlemen?

(No response.)

The Court: That is all.

Mr. Wright: I still haven't had the copy of the other affidavit.

Mr. Proskauer: You are going to have an opportunity.

Mr. Wright: And I assume anything we have to say by way of objections to these affidavits may be said in our brief inasmuch as we haven't yet been furnished with the copy of this one.

The Court: They have not been received in evidence yet.

Mr. Wright: That is right.

Mr. Proskauer: May it be understood if we desire to comment on these amicus briefs that we may do so on the same day that the Government files its final brief?

[fol. 3646] The Court: That is on the 26th, isn't it?

Mr. Proskauer: Yes.

(To Mr. Ernst): When are we going to get the page proof?

Mr. Ernst: Ten days I thought.

Mr. Proskauer: Ten days is the 15th. That allows us about ten days.

Mr. Ernst: I will split it in half.

The Court: Anyway as far as advising the Court you may do that on the 26th when we have your briefs.

(Conference at the bench.)

The Court: Mr. Seymour wants to know if you want those affidavits filed in the clerk's office. You don't, do you?

Mr. Seymour: I just think they should be filed with your Honor. If your Honor does not admit the Government's offer you won't have any occasion to consider them and therefore they need not be filed.

Mr. Wright: There is one thing more that we prepared for our own use that you may find helpful, and that is the summary of the 104 decisions which we have prepared and which you may wish to use in connection with our memorandum. (Handing to Court.)

I will furnish copies to counsel (handing to counsel).

[fol. 3647] The Court: Mark these what, Mr. Wright? Summary of Appeal Board decisions?

Mr. Wright: 1 to 104 inclusive.

(Adjourned to March 26, 1945, at 2:15 p. m., for pretrial conference, in Room 1506.)

(Adjourned to October 8, 1945, for trial.)

[fol. 3648] In the District Court of the United States

[Title omitted]

Expediting Certificate of the Attorney General of the United States—Filed June 13, 1945

To the Clerk of the District Court of the United States for the Southern District of New York:

I, Francis Biddle, Attorney General of the United States, hereby certify that the above entitled case now pending in said court is a civil action brought by the United States of America against Paramount Pictures, Inc. and other defendants named in the complaint herein, under the Act of Congress approved July 2, 1890 (26 Stat. 209), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, and that, in my opinion, said case is of general public importance.

I, therefore, request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen [fols. 3649-3651] hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies'; "An Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven; or any other Acts having a like purpose that may hereafter be enacted," approved February 11, 1903 (32 Stat. 823), as amended by the Act of Congress approved April 6, 1942 (56 Stat. 291); you file this certificate among the records of the above entitled case and immediately furnish a copy thereof to the senior Circuit judge (or in his absence, the Presiding Circuit Judge) of the Second Circuit, to the end that three judges in such circuit, of whom at least one shall be a circuit judge, be designated to hear and determine said case, and that said case be assigned for hearing at the earliest practicable date and in every way expedited, as provided in said act of February 11, 1903, as amended.

(S.) Francis Biddle, Attorney General.

Washington, D. C., June 12th, 1945.

[fol. 3652] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Screen Gems, Inc.; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Pictures Company, Inc.; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, Defendants.

OPINION—June 11, 1946

Before:

AUGUSTUS N. HAND, *Circuit Judge,*

HENRY W. GODDARD and JOHN BRIGHT, *District Judges.*

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Elliott H. Meyer, and John R. Nies-[fol. 3653] ley, Special Assistants to the Attorney General; Frank W. Gaines, Jr., Gerald A. Herrick, Robert B. Hummel, Harold Lasser and Horace T. Morrison, Special Attorneys for United States of America.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants; Whitney North Seymour, Louis Phillips, Albert C. Bickford and Armand F. MacManus, Counsel.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W.

Davis, J. Robert Rubin, C. Stanley Thompson, Benjamin Mcniker and S. Hazard Gillespie, Jr., Counsel.

George S. Leisure, Ralstone R. Irvine, Granville Whittlesey, Jr., and Gordon E. Youngman, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation; Roy W. McDonald, and Donovan Leisure Newton & Lumbard, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh and Howard Levinson, Counsel.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants;

[fol. 3654] O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, *Circuit Judge:*

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing and exhibiting motion pictures, either di-

rectly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of [fol. 3655] Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th [fol. 3656] Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh [fol. 3657] Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

[fol. 3658] (d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures

Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defendants —Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff. The issues therefore are whether there have been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

[fol. 3659] The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group

of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically excluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film [fol. 3660] supply, runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attempts to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to

carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit, executed a written consent to the entry of a decree by the District Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants [fol. 3661] had violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another features or group of features, nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which [fol. 3662] an award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses

thereafter entered into by a distributor that is party to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing agreement, or a series of licensing agreements, covering more than one motion picture season and covering the exhibition of pictures released by the distributor during the [fol. 3663] entire period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor to license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position, together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time

of such license, and (c) in any theatre of which a company [fol. 3664] in which the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

Tho three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably be- [fol. 3665] cause of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff did not secure the entry of a decree against the three minor

defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1] The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of *of* the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal," covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

[fol. 3666] Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits "* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that they are placed in the licenses in order to assure the distributor of a mini-[fol. 3667] mum revenue when it licenses upon a percent-

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Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

age basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2] Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.*, v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C. C. A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors. Such combinations we hold to be forbidden by the Sherman Act. [fol. 3668] The exhibits submitted in this case contain

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[2] That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's exhs. 275-290.

[3] The defendants in the *Goldman* case were substantially the same as those here, except the Universal Corporation was there eliminated by agreement.

numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3). It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely [fol. 3669] acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But it is plain that the distributor did

more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] Moreover, the distribu- [fol. 3670] tors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping

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[4] Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes sir."

* * * * * *

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare

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"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the

[fol. 3671] the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
Sneicer	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	30¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
LaSalle	Niagara Falls,	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	20¢ tax excl.	22¢	25¢	none	20¢	x	25¢	x
Capitol	x 30¢	x	x	x	Cleveland, Ohio	30¢	27¢	35¢	30¢
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Ritz	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x

[fol. 3672]

Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	30¢	30¢	33¢	30¢	x	x	33¢	x
Whalley	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	35¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appleton, Wisc.	40¢	46¢	none	none	45¢ tax incl.	none	x	46¢ plu 9¢ taxs
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	xx
Gloria orRiviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket, R. I.	40¢	40¢	x	none	x	x	x	x
Bijoux		x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in [fol. 3673] our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202

(RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and inde-
[fol. 3674] pendent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and

other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less [fol. 3675] than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's Metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. [fol. 3676] In turn, RKO, being itself a distributor, has

granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum [fol. 3677] of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v.

Masonite Corp., 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C.C.A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyright Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Cir-*
[fol. 3678] *cuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented

articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding, that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of deter-[fol. 3679] mining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his

theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. — (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified [fol. 3680] areas or towns. Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather

than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman [fol. 3681] Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each block and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger, high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their

apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one [fol. 3682] providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. — (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clear-

ances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonabl-ness of the specific clearances which may come before these tribunals, they should [fol. 3683] consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and [illegible]unts of clearance over them. The temptation to the [illegible]outor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and [illegible]ore clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.:

[fol. 3684] (4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

[fol. 3685] Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or

distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run [fol. 3686] against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by

affidavit that the situation with respect to the licensing of films, and the runs and clearance involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox-Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of a system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres [fol. 3687] into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the

same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally [fol. 3688] understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plain-

tiff's Exhibits 265, 472, (Columbia and Fox); 190 (RKO and Fox); 199, 272A 383, (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres [fol. 3689] in the immediate vicinity of the Exhibitor's theatre, then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearances is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's, testified that a run usually remains static for a given theatre. Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor

usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are sold by him only to Loew's and RKO. Record pp. 815-16.

[fol. 3690] The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures; Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U.S. (February 25, 1946); *Goldman*

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record, p. 693.

Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes.

v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D. C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, [fol. 3691] and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as

it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under [fol. 3692] a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties

are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions [fol. 3693] of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling

For many years the distributor-defendants licensed their films in "blocks," or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints [fol. 3694] of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the

five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against [fol. 3695] a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent*

Amusement Co., 323 U. S. 173; *Straus* v. *Am. Publishers' Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of [fol. 3696] another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents com-

petitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C. C. A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C. J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another.

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. [fol. 3697] The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. *v.* United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. *v.* United States, supra; Carbice Corporation *v.* American Patents Corp., supra; Leitch Manufacturing Co. *v.* Barber Co., supra; American Lecithin Co. *v.* Warfield Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit *v.* United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minne-*

apolis Honeywell Regulator Co., 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when produced, might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to [fol. 3698] market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals,

master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, [fol. 3699] normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between

major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under [fol. 3700] the Sherman Act. This result is certain when some of the parties are of major statute in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of the interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest

therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, [fol. 3701] Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening, Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films, Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting roadshow privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allow-

[fol. 3702] ing overage and underage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc. v. United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable [fol. 3703] restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no

longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibilities of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step, while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to [fol. 3704] the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defend-

ants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 133, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the [fol. 3705] drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities, and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibitions, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations

of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized[8]. In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves [fol. 3706] except so far as it may be restricted by the above trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

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[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have [fol. 3707] found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112, (E. D. Pa., 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate control-ing the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling

agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where [fol. 3708] powerful independent circuits were involved. *United States v. Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc. v. United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with inde- [fol. 3709] pendents which, in our opinion, calls for a divesti-

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

Feature Films Released During the 1943-44 Season By All Distributors

	No. of Films	Percentages of Total With "Westerns" included:	Percentages of Total With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Republic	29 features 30 "Westerns"	14.86%	8.66%
Monogram	26 features 16 "Westerns"	10.58%	7.76%
PRC	20 features 16 "Westerns"	9.07%	5.97%
Totals	397 335 without "Westerns"	100 %	100 %

ture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that they

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[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150

[fol. 3710] must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition [fol. 3711] of moving pictures. A system of fixed admission prices, clearances and block booking is so restrictive of competition in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are de-

Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres

Total affected by the decree according to RKO's Exhibit 11 1,292 Theatres

fended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and [fol. 3712] similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction

which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and, if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

[fol. 3713] The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

[fol. 3714] (7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is condi-

tioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license [fol. 3715] for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of

motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may [fol. 3716] be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

[fol. 3717] Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of

enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Augustus N. Hand, U. S. Circuit Judge, Henry W. Goddard, U. S. District Judge, John Bright, U. S. District Judge.

Dated June 11, 1946.

[fol. 3718] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Notice of Motion, Motion for Leave to Intervene and Intervening Petition of American Theatres Association, Inc., and Southern California Theatre Owners Association, et al.—Filed October 21, 1946

NOTICE OF MOTION

To Hon. Wendell Berge, Assistant Attorney General, Department of Justice, Washington, D. C.; Simpson Thacher & Bartlett, 120 Broadway, New York, New York, Attorneys for Paramount Defendants; Davis Polk Wardwell Sunderland & Kiendl, 15 Broad Street, New York, New York, Attorneys for Defendant Loew's, Inc.; George S. Leisure, Esq., 2 Wall Street, New York, New York, Attorney for Radio-Keith-Orpheum Corporation and affiliated Defendants; Joseph M. Proskauer, Esq., 11 Broadway, New York, New York, Attorney for Warner Defendants; Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; Schwartz & Frohlich, 1450 Broadway, New York, N. Y., Attorneys for Defendant Columbia; Charels D. Prutzman, Esq., 1250 6th Ave., New York, New York, Attorney for Universal Defendants; and O'Brien, Driscoll & Raftery, 152 W. 42nd Street, New York, N. Y., Attorneys for Defendant United Artists Corporation

[fol. 3719] Please take notice that on October 1, 1946, or as soon thereafter as counsel may be heard, the undersigned intervening petitioners will move this Honorable Court for an order permitting them to intervene as parties in the above-entitled action, on and in accordance with the attached Motion for Leave to Intervene and the accompanying pleading designated as "Intervening Petition."

American Theatres Association, Inc., Southern California Theatre Owners Association (and various individual theatre owners named in the attached motion and pleading) by Thurman Arnold, Arnold & Fortas, 821- 15th Street, N. W., Washington 5, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for Intervening Petitioners.

[fol. 3720] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation move this Honorable Court for leave to intervene as parties in this action on behalf of themselves and others similarly situated. Intervention is sought as of right under Rule 24(a) of the Federal Rules of Civil Procedure. Their purpose in intervening is limited to asserting their defenses as set forth in their proposed pleading, a copy of which is attached, to the order proposed in the recent opinion of this Court, the effect of which will be to compel them as exhibitors to purchase their supplies of defendants' motion pictures by competitive bidding.

For ground of this motion your petitioners state that they are independent exhibitors and associations of exhibitors engaged in showing motion pictures at theatres throughout the country. They will be bound by the decree as more particularly set forth below and in the annexed pleading. Their interests are at present unrepresented in this action, particularly in relation to the proposed inclusion in the decree of a requirement that the defendants' motion pictures be sold to the "highest responsible bidder."

American Theatres Association, Inc., is a mutual improvement corporation, incorporated under the laws of the District of Columbia, having as its objective the fostering [fol. 3721] of the common interest of those engaged in the motion picture exhibition industry in the United States, and similar purposes and objects. It has an extensive membership throughout the country (over 6000 theatres) consisting of exhibitors of all types; independent exhibitors in large cities; independent exhibitors in small towns; independent exhibitors in competition with the majors; and exhibitors having no competition. Its membership, scat-

tered throughout the country comprehends chains of various sizes and, exhibitors of every type and class, having the most various arrangements with the majors.

The policy of the above named petitioner has been to impose no restrictive limitations on membership. Every kind of theatre is eligible to join. For that reason a small minority of its members are corporations wholly owned by the defendants in this suit. The interests of such members are already represented by counsel for the defendants. It is obvious that the interests of these members are not the same as the interests of independent exhibitors. Consequently said petitioner does not intend to and will not represent the interests of such members in this matter, and it is understood that no position which the Association takes in the course of this proceeding is in any way representative of the views which members owned by the defendant may entertain. Likewise the Association does not represent in this matter one other of its members which is not a defendant in this action, namely, the Skouras Theatres Corporation, which operates theatres in the metropolitan area of New York City. No part of the expense of prosecuting this petition will be borne by members of the Association owned by defendants in this suit or by Skouras Theatres Corporation, nor will their support, advice, or counsel be sought. The members which the Association represents in the prosecution of this motion comprise the great bulk of its membership.

The Association's membership also includes other associations of exhibitors. Its membership is in every respect representative. The membership has urged intervention in this proceeding and the Association has widely publicized its intention to bring the plight with which exhibitors are threatened by the proposed decree to the Court's attention. The act of intervention has been approved by the directors of the Association at a special meeting and the overwhelming body of the members of the Association of all types have expressed approval of this action.[1]

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[1] There have been some individual dissents, e. g. a vice president of the Association operating a large chain has expressed confidence that he has sufficient economic power to be able to survive under a competitive bidding system and that he is in favor of it. The *Film Daily*, September —, 1946.

The Southern California Theatre Owners Association is a non-profit corporation incorporated under the laws of California and has in its membership exhibitors of all types, including owners of single theatres and of large chains and independent theatre owners and owners having various [fol. 3722] degrees of affiliation with the majors. A decision to seek intervention has been made by the Board of Directors of the Association. This action has been widely publicized, and no dissent has been voiced by any of its members. The Association has directed coordination of its activities in this endeavor with the American Theatres Association, with which it is affiliated.

Joseph Moritz is the owner and operator of the Victor Theatre located at 1718 South Main Street, Los Angeles, California. He operates an independent, subsequent-run theatre in competition with all the theatres located in downtown Los Angeles. In the same competitive area are theatres owned by the majors, i.e., Fox West Coast, operating both first run and subsequent run and various other independent theatres operating first run and subsequent run.

The Southern California Amusement Company, Inc., is a California corporation with offices at 1824 South Vermont Avenue, Los Angeles 6, California. It owns or operates approximately 40 theatres in Southern California, about half of which are located in the city of Los Angeles. The theatres it operates in Los Angeles are all subsequent run theatres. The other theatres which it operates are located in various rural communities in Southern California and it has no first runs except in small towns which are subject to clearance of larger cities.

Exhibitors Service, Inc., is a California corporation which operates a complete theatre service including buying, booking and administration. It acts as the buying agent for a number of small independent theatres in the smaller towns in Southern California, Arizona and Nevada. Some of the theatres it represents have opposition from theatres affiliated with defendants and from independent circuits, whereas others have independent opposition or no opposition.

Lawrence Capitol, Inc. is a corporation organized and existing under the laws of the State of Massachusetts. Its capital stock is owned by Jeremiah Campopiano and Jean C. Campopiano. It operates an independent first run

theatre, the Capitol Theatre, at 139 Common Street, Lawrence, Massachusetts, in competition with four theatres affiliated with one of the defendants herein, two of which are first run houses, one a move-over first run house, and one a second run house, and all of which are larger than your petitioner's Capitol Theatre.

Bijou Amusement Company and Paul Realty Company are corporations organized and existing under the laws of the state of Rhode Island. Their capital stock is owned by Mr. Fred J. Greene and Mr. Raymond F. Murphy of Woonsocket, R. I. They operate two independent theatres: the Bijou Theatre, located at 273 Main Street, in Woonsocket, R. I. and the New Park Theatre, located at 37 N. [fol. 3723] Main Street, Woonsocket, R. I. Both of these theatres are first run houses. They compete with a first run theatre affiliated with one of the defendants in this action, which has a larger seating capacity than either of your petitioner's theatres.

Andy Anderson is the owner and operator of the following independent theatres: the Kentucky Theatre, with a seating capacity of 425, located in Hartford, Ky., the population of which is approximately 1,800 people; the Majestic Theatre, with a seating capacity of 265, located in Beaver Dam, Ky., the population of which is approximately 1,600 people; the Lincoln Theatre, with a seating capacity of 375, located in Hodgenville, Ky., the population of which is approximately 2,000 people. The aforementioned theatres are the only theatres in their respective towns, and all of them play first run and repeat run pictures.

Arch and Miles L. Hurley are individuals doing business under the name and style of Princess-Odeon Theatres who operate two independent theatres in the city of Tucumcari, New Mexico. These are the only theatres in Tucumcari, the population of which is less than 7,500 people.

Raymond Gervers and Willard Gervers are co-partners who own and operate the Uptown theatre at 18 E. McMicken Street and the Fairview Theatre at 333 Warner Street in the city of Cincinnati, Ohio. These are independent subsequent run theatres which are not in competition with any theatres affiliated with the defendants in this action, their competition consisting of five other independent theatres.

Gamble Enterprises, Inc. is a corporation organized and existing under the laws of the State of Oregon, operated

by Ted R. Gamble, who, with his wife, owns its capital stock. It operates two independent subsequent run theatres, the Capitol and the Bagdad, in Portland, Oregon, both of which compete with theatres affiliated with one of the defendants in this action.

St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation are interrelated corporations organized and existing under the laws of the State of Missouri. They own and operate a group of independent first and subsequent run theatres in the city of St. Louis, Missouri. Their first run theatres are in competition with theatres affiliated with one of the defendants. Their subsequent run theatres compete with other independent subsequent run theatres.

Your petitioners seek to intervene for the sole purpose of being heard in this Court and on appeal in respect of the direction in the Court's opinion that the relief to be prescribed in the decree should include a provision to the following effect:

> [fol. 3724] "No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least 95 percent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. *The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered.*" (Emphasis supplied.)

Your petitioners desire to intervene because if it is signed and entered the decree of this Court requiring the granting of licenses to the "highest responsible bidder" will drastically affect their access to the films necessary to operate their theatres and the values of their property. It will likewise impair the competitive positions which many of these theatres hold in the industry.

Your petitioners are entitled to intervene in these proceedings as of right, because otherwise they will be bound by a decree in the framing of which they will not have been represented and the effect of which upon their interests, as

vital as those of the major producers, will not have been adequately presented to the Court.

All the requirements of Rule 24(a) have been complied with.

A. Your petitioners' application for leave to intervene is timely.

The application was filed promptly after your petitioners had notice of the proposed prescription of competitive bidding. It is presented before the entry of the decree and in advance of the institution of appellate proceedings.

So far as your petitioners are able to ascertain, no such relief as "auction bidding" was ever prayed for by the Government either in its numerous pleadings or its various briefs. Rather, its final brief urged only divestiture and injunctive relief. Neither did the defendants at any time suggest or propose such a system. Not until the final oral arguments on the merits was there any reference to such a mechanism for the distribution of motion pictures. Even then discussion was limited to the most casual colloquy; there was no attempt to define competitive bidding, to elaborate arrangements for its operation, to discover how well or poorly it served the interests of exhibitors variously situated or of the public, or to explore its incidence upon other parties to the industry. And your petitioners' first knowledge that "auction bidding" was under serious consideration as a mode of relief came only with this Court's opinion of June 11, 1946. Your petitioners have moved for permission to intervene as parties as promptly after that date as it was possible to act. It took time to discover what was involved in that section of the decree and to assess the consequences of so novel an arrangement upon the [fol. 3725] fortunes of types of exhibitors who are very differently situated. And, after the somewhat protracted process of finding a common mind among exhibitors whose unlike arrangements with the majors fall only into a quite intricate pattern, it has taken time to translate the conclusions which have been reached into the necessary legal papers.

B. Your petitioners have a direct, specific and vital interest in the provision of the proposed decree for the exclusive sale of motion pictures (except to a "95 per cent

subsidiary" of the distributor) to the "highest responsible bidder."

A motion picture theatre requires continuous availability of film in order to operate. The defendants in this case produce and distribute the great bulk of all motion picture product and almost all quality product. Regulation of the terms on which almost all films may be licensed is, of course, regulation of the terms on which the exhibitors can buy. Consequently the decree requiring the defendants to license their pictures by competitive bidding is a direct regulation of the entire business of the exhibitors.

The proposal for competitive bidding will create a revolution in the business of all exhibitors. The proposal has been the central topic of discussion in the industry in recent months. Almost every exhibitor has expressed himself forcefully on the subject. The overwhelming majority of exhibitors are convinced that the system of competitive bidding will reinforce and strengthen the monopoly power of the major distributors and will so injure the independent exhibitors as to force many of them out of business, lead to their classification as lower run houses, or force them to become satellites of the majors. Even the strongest independent circuits will have difficulty facing the buying power of the majors under a competitive bidding system, and only the most optimistic face the prospect with anything but despair.

The exhibitors are the intended beneficiaries of the suit. It is to protect them against oppression by the majors that the present action is being prosecuted, and this is recognized by the Court's decree. Yet it is the almost unanimous judgment of the exhibitors that the proposed remedy will effect no constructive change in the situation. It will in fact aggravate the very troubles it was designed to cure. Your petitioners desire to present to this Court, and to the Supreme Court if necessary, the reasons why they believe competitive bidding will have these effects under the pattern of the motion picture industry. It is for that purpose that the present intervention is sought.

Whatever may be said of the right of the exhibitors as intended beneficiaries to control the course of the litigation at earlier stages, it is clear that at the present time the opinion of the court proposes an immediate imposition upon them of a system of business operation which their experi-

[fol. 3726] ence indicates will be disastrous. Under the circumstances the immediate interest of the exhibitors is clear, and their right to be heard through representative organizations and individuals is essential to prevent the imposition of a system of regulation upon them without the opportunity to urge their case.

C. The interests of the applicants are now or may be inadequately represented.

It cannot be said now that independent exhibitors are adequately represented by the Attorney General, as was said earlier while the concern of the case was to establish monopolistic and restrictive practices on the part of the majors. That matter is now finished business. At this stage the concern of the case is to contrive a remedy for the wrongs which have been found. That remedy, set down in the decree, vitally affects the interests of various classes of exhibitors. These varied interests, and the incidence of the proposed "competitive bidding" have never been presented to the Court. In the absence of such concrete presentation, the Court can only frame its decree in the light of the way in which competitive bidding might generally be expected to work. But the motion picture industry is a distinctive industry. The pictures are leased, not sold; there is neither a standardized product nor a standard by which product can be measured. An auction market, without a standard unit, is hard to visualize. It is an argument on this subject, with concrete illustrations which it is the very purpose of this intervention to elaborate. Thus, even if at one stage, the Attorney General can be said to have represented the exhibitors, it is clear at this point, because his views on competitive bidding are diverse from theirs, that he no longer does so.

As has been indicated above exhibitors of all classes are almost unanimously opposed to the requirement of competitive bidding. The Government, on the other hand, has indicated no disposition to oppose it. Indeed during the final oral arguments on the merits Mr. Wright, government counsel, himself advanced the suggestion that competitive bidding might be proper. He stated specifically, "I see no reason why they [motion pictures] should not be sold competitively . . . I do not see why they should not go on the auction block." In the light of this statement, there

can be no question that if the Government is proposing to represent the applicants' interests, its representation is not only inadequate but will also prove misleading.

Certainly no other party, whether in industry or within the Government, can even claim to represent the interest of exhibitors. Consequently, the petitioning exhibitors and others similarly situated face the very real prospect that the Government will ignore the incidence of competitive bidding upon the posture of various classes of exhibitors [fol. 3727] and will direct its attention to other matters of much less concern to exhibitors. Furthermore exhibitors have no assurance that the Government will not drop the matter without exhausting appellate proceedings to reverse any decree which may be instituted to compel competitive bidding. Representation must be either by representatives of one's own choosing or else by persons whose own situation impels them to serve the interests in question. While the suit was in trial the exhibitor might be regarded as only incidentally involved—at that time representation by the Attorney General might be adequate. However, when relief of the type here contemplated is considered, the exhibitor's interest becomes not only direct but dominant. He can be protected only by representatives of his own choosing.

D. Applicants and those they represent will be bound by a judgment in this action to an extent necessary to require their admission to the proceedings as intervening parties.

It is an undisputable fact that a court decree dictating the sale by auction of defendant's motion pictures directly governs your applicants' method of doing business. Almost the entire business of your applicants depends upon obtaining the defendants' product, and such product can be obtained only on the terms upon which this court requires the defendants to sell their product. If, as petitioners believe, competitive bidding will increase the power of the defendants and will accentuate the power of the strong and the weaknesses of the small independent operator, no practical remedy exists except through the admission of your petitioners as parties to this action. For if, as applicants believe, the bidding system will inevitably destroy almost all independents faced with the power of the majors, the proposed decree will in practical effect deprive an independent of relief. For what can be the chances of success in an

antitrust suit of an independent driven out of business by the majors as a result of the competitive bidding system when he is faced with a defense that what the majors did was required by the decree of this Court? The exhibitors are convinced that the decree would legalize and extend the exercise of the gigantic power of the majors which otherwise would be illegal. The obstacle the decree would create to full relief is an imposition binding on exhibitors and one which they are entitled to attempt to remove.

E. Intervention at this stage will not hamper or unduly delay the proceedings.

The interests of your petitioners require no more than their representation as parties to the proceedings for the limited purposes of entitling them to be heard on the form of the decree insofar as it relates to competitive bidding and of protecting their right to appeal from an adverse decision solely on that subject. The allowance of this petition will [fol. 3728] not and cannot be used as an occasion to encumber the record with additional evidence or to delay these proceedings. All of the facts on which petitioners' argument will be based are already in the record or else can be found from authoritative statistical compilations or common knowledge within the industry of which the court can take judicial notice. The argument of petitioners will consist of an economic analysis of these facts. It will be presented prior to the convening of this Court on October 21, 1946.

F. Intervention by exhibitors will not be unwieldy.

The fears expressed that intervention would result in great numbers of exhibitors desiring to appear will not materialize in this case. Exhibitors have a right to intervene. However, it is true that they are "so numerous as to make it impracticable to bring them all before the court." See Rule 23, Federal Rules of Civil Procedure. Under the circumstances the court should permit intervention by such of them "as will fairly insure the adequate representation of all." See id. This task has been performed for the court by the exhibitors themselves. They are organized into associations. The associations have to a large extent cooperated in presenting to the court typical groups and individual exhibitors. American Theatres Association is

an organization of the most widely representative character representing exhibitors of all types throughout the country and including in its petition a typical regional association, the Southern California Theatre Owners Association, and individual members of various types. And the individual petitioners who are parties to this motion include independent exhibitors of practically every type and situation.

Wherefore, your petitioners pray this Court to enter an order admitting them as parties to this action for the limited purpose of appearing and of being heard in opposition to the entry of such part of the decree as may require the sale of defendants' motion pictures to "the highest responsible bidder" and to grant your petitioners such other and further relief as to the Court may seem appropriate.

Respectfully submitted, Thurman Arnold, Arnold & Fortas, 821 15th St., N. W., Washington, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for Intervening Petitioners.

September 20, 1946.

[fol. 3729] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING PETITION

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation respectfully represent for a defense or answer to the proposed plan of competitive bidding set out in the court's opinion, that

(1) The above named petitioners are exhibitors of motion pictures not owned by the defendants in this proceeding and associations which appear only on behalf of the majority of their members who are not owned by said defendants.

(2) The plan of competitive bidding will not carry out the purpose of the decree to create competition in the motion picture industry; nor will it provide a mechanism to prevent the domination of that industry by the defendants in this suit, which domination the court found in its opinion.

(3) The defendant-producers and their affiliates have resources available for bidding upon pictures and for the purchase of pictures which far exceed the available resources of independent exhibitors, including your petitioner-exhibitors and the exhibitors represented by your petitioners. Any plan of competitive bidding for pictures approved by the court will enable and authorize defendants and their affiliates to use their superior bargaining power to strengthen their monopolistic position. Accordingly, the basic purpose of the court will be defeated by this provision.

(4) At the same time, your petitioner-exhibitors, exhibitors represented by your petitioners and independent exhibitors generally will be deprived of existing protection [fols. 3730-3735] and benefits under the anti-trust laws without receiving proportionate protection from monopolistic practices from this court's decree. This will result as follows:

(a) The determination of the best competitive bid must necessarily depend not only upon price, but also upon a variety of other factors of uncertain weight, such as the location of the theatre, the reputation and good will of the exhibitor, type of patronage of the exhibitor, clearance, length of run, and the infinite variations of time, place and type of exhibition.

(b) These factors are of such variety, complexity and diverse weight that the judgment as to which is the "highest responsible" bid must necessarily be entrusted to the producer or distributor, within broad and practically meaningless limits.

(c) For such reasons and because of the thousands of individual transactions involved, effective supervision by this court of the performance of its decree with respect to competitive bidding cannot be expected.

(d) Accordingly, competitive bidding, if decreed by this court, will be competitive in name only. In result it will be merely a mechanism of distribution which can and will (1)

deprive independent exhibitors of the protection which the antitrust laws now provide against the use by defendants and their affiliates of their superior economic and strategic power to monopolize the market; and (2) legitimatize the domination of the market already condemned by this court.

(5) Your petitioner-exhibitors, exhibitors represented by your petitioners, and all other exhibitors who are not affiliates of defendants will accordingly be irreparably injured if the competitive plan for bidding for motion pictures is made part of the decree.

Wherefore, your petitioners pray that the plan for competitive bidding proposed by the opinion of this court be not promulgated as part of any decree which the court may make.

Respectfully submitted, Thurman Arnold, Arnold & Fortas, 821 15th St., N. W., Washington, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for Intervening Petitioners.

September 20, 1946.

[fol. 3736] [File Endorsement Omitted]

Motion for leave to file brief as amicus granted. They may also be heard on the settlement of the decree and findings. Motion to intervene denied.

A. N. H. *U. S. C. J.* H. W. N. *U. S. D. J.* J B *U S D J*

10/21/46,

Settle order on the above on notice

A. N. H. *U. S. C. J.* H W N *U. S. D. J.* J B *U S D J*

12/16/46

[fol. 3737] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*, Defendants.

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as Beach and Beach; Biscayne Beach Theatre, Inc.; T. N. Carnahan; Central Amusement Company, Incorporated; Emma Cox; W. F. Crockett, David Pender, Jr., Thelma H. Crockett and Mrs. E. P. Thompson, partners trading as Bayne-Roland Theatres; H. A. Everett; William R. Griffin, Sallie M. Wise and Frank V. Merritt, partners trading as Cullman Amusement Company; Nat Hancock; J. O. Harris and E. L. Harris, trading as J. O. and E. L. Harris; J. B. Harvey; Lexington Amusement Company, Inc.; M. C. Moore; W. W. Mowbray; Neighborhood Theatre, Inc.; Palace Amusements, Inc.; Benjamin T. Pitts; Henry Reeve; Ritz, Inc., Theatre; Strand Amusement Company, Incorporated; The Southern Amusement Company, Incorporated and Sidney Wharton; Petitioners for Intervention.

NOTICE OF MOTION

Sirs:

PLEASE TAKE NOTICE that the attached motion by petitioners for intervention will be made at a Stated Term for the hearing of motions of this Court to be held in and for the Southern District of New York, in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 1st day of October, 1946, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, N. Y. September 25, 1946. Yours, etc., John G. Jackson, Attorney for W. C. Allred, et al., Petitioners for Intervention. Jackson, Nash, Brophy, Barringer & Brooks, 15 Broad Street, New York, N. Y. Christian, Barton, Parker & Boyd, 909 East Main Street, Richmond, Virginia.

[fol. 3738] To:

Robert L. Wright and Harold Lasser, Attorneys for Plaintiff, 30 Broad Street, New York, N. Y.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.

Davis Polk Wardwell Sunderland & Kiendl, Attorneys for Defendant Loew's, Inc., 15 Broad Street, New York, N. Y.

Donovan Leisure Newton & Lumbard, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation, Two Wall Street, New York, N. Y.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants, 11 Broadway, New York, N. Y.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants, 100 Broadway, New York, N. Y.

Schwartz & Frohlich, Attorneys for Defendant Columbia, 1450 Broadway, New York, N. Y.

Charles D. Prutzman, Attorney for the Universal Defendants, 1250 Sixth Avenue, New York, N. Y.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation, 152 West 42nd Street, New York, N. Y.

[fol. 3739] In the United States District Court

[Title Omitted]

Motion to Intervene as Parties Defendant under Rule 24 of the Rules of Civil Procedure

W. C. Allred; Charles E. Beach and Elizabeth L. Beach, partners trading as Beach and Beach; Biscayne Beach Theatre, Inc.; T. N. Carnahan; Central Amusement Company, Incorporated; Emma Cox; W. F. Crockett, David Pender, Jr., Thelma H. Crockett and Mrs. E. P. Thompson, partners trading as Bayne-Roland Theatres; H. A. Everett; William R. Griffin, Sallie M. Wise and Frank V. Merritt, partners trading as Cullman Amusement Company; Nat Hancock; J. O. Harris and E. L. Harris, trading as J. O. and E. L. Harris; J. B. Harvey; Lexington Amusement Company,

Inc.; M. C. Moore; W. W. Mowbray; Neighborhood Theatre, Inc.; Palace Amusements, Inc.; Benjamin T. Pitts, Henry Reeve; Ritz, Inc., Theatre; Strand Amusement Company, Incorporated; The Southern Amusement Company, Incorporated and Sidney Wharton, move for leave to intervene as defendants in this action in order to assert the matters set forth in their petition, of which a copy is hereto attached, on the grounds that the applicants are severally exhibitors of motion pictures who are unable to conduct their several businesses as exhibitors without licensing pictures for exhibition from the defendants, due to the fact that pic-
[fol. 3740] tures which may be licensed from others than defendants do not provide an adequate supply of pictures, and the applicants will be irreparably damaged by being required to license such pictures only by successful bids at auction sales as directed in the opinion filed in this action on June 11, 1946; the said directions are not authorized by law; and the representation of the applicants' interests by existing parties is inadequate and the applicants will be bound by a judgment in the action.

John G. Jackson, Attorney for W. C. Allred, et al., Petitioners for Intervention. Jackson, Nash, Brophy, Barrington & Brooks, 15 Broad Street, New York, N. Y. Christian, Barton, Parker & Boyd, 909 East Main Street, Richmond, Virginia.

[fol. 3741] IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

PETITION TO INTERVENE AS PARTIES DEFENDANT UNDER RULE 24 OF THE RULES OF CIVIL PROCEDURE

The petition to intervene as parties defendant under Rule 24 of the Rules of Civil Procedure, of

Names of Petitioners	*Principal Offices of Petitioners*
W. C. Allred	Greensboro, North Carolina
Charles E. Beach and Elizabeth L. Beach, partners trading as Beach and Beach	Fernandino, Florida

Names of Petitioners	*Principal Offices of Petitioners*
Biscayne Beach Theatre, Inc.	Miami Beach, Florida
T. N. Carnahan	Sulphur, Louisiana
Central Amusement Company, Incorporated	New Orleans, Louisiana
Emma Cox	Osceola, Arkansas
W. F. Crockett, David Pender, Jr., Thelma H. Crockett and Mrs. E. P .Thompson, partners trading as Bayne-Roland Theatres	Virginia Beach, Virginia
H. A. Everett	Magee, Mississippi
[fol. 3742]	
William R. Griffin, Sallie M. Wise and Frank Merritt, partners trading as Cullman Amusement Company	Cullman, Alabama
Nat Hancock	Jefferson, Georgia
J. O. Harris and E. L. Harris, trading as J. O. and E. L. Harris	Dallas, Texas
J. B. Harvey	Clover, South Carolina
Lexington Amusement Company, Inc.	Lexington, Tennessee
M. C. Moore	Jacksonville, Florida
W. W. Mowbray	Blue Ridge, Georgia
Neighborhood Theatre, Inc.	Richmond, Virginia
Palace Amusements, Inc.	Newport News, Virginia
Benjamin T. Pitts	Fredericksburg, Virginia
Henry Reeve	Menard, Texas
Ritz, Inc., Theatre	Columbia, Mississippi
Strand Amusement Company, Incorporated	Laurel, Mississippi
The Southern Amusement Company, Incorporated	Lake Charles, Louisiana
Sidney Wharton	Warren, Arkansas

respectfully shows as follows:

Directions of the Court Sought To Be Eliminated.

1. Under date of June 11, 1946, this Court rendered its opinion in the above entitled action and in said opinion

without authority of law, directed that the decree to be entered thereon provide among other things the following:

> "No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had [fol. 3743] the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it" (66 F. Supp. 323, 358).

Associations Supporting Petition

2. The following associations of exhibitors have the purpose, among others of promoting the interests of exhibitors in the States indicated by their names. Each Association has approved and is supporting this application for leave to intervene.

Name of Associations	Addresses	No. of Theatres	No. of Seats	Percentages of Theatres in Area
M. P. T. O. of Virginia	Richmond	160	110,000	65%
Theatre Owners of North and South Carolina, Incorporated	Charlotte	384	220,000	61½%
Texas Theatre Owners, Incorporated	Menard	800	600,000	75%
* Southeastern Theatre Owners Association	Atlanta	900	569,500	100%

* Its area is northern Alabama, eastern Tennessee, Georgia and Florida.

The members of the associations include theatres owned by defendants, but no contributions have been made by any of them to the expense of the intervention or will be accepted by petitioners or said associations; the members also include "Paramount partners" or their theatres, who have made or will make contributions to that expense.

Varied Characteristics of Petitioners

3. Every petitioner is an independent exhibitor, as that term is defined in the opinion. No petitioner is a partner of, or otherwise financially interested in the business of another petitioner. Petitioners include some exhibitors which are not circuits † and some which are circuits. The theatres of petitioners include downtown and neighborhood theatres; some exhibit features first run, some second run, some subsequent run, and some vary their practices as to run. Some exhibit single feature programs, some double feature programs, and some exhibit double feature programs on certain days of the week and single feature programs on other days of the week. Some of the theatres of petitioners are in a city or town where there is no theatre except the theatre or theatres of one petitioner; some are in [fol. 3744] a city or town where there are theatres of competing exhibitors. In one or more cities or towns competing exhibitors include only independent exhibitors; in one or more they include defendants. In one or more cities or

† The word "circuit" as used herein means an exhibitor who operates six or more theatres.

towns where there is competition a petitioner is a circuit, and has circuit competition; in one or more no competitor is a circuit; in one or more one exhibitor is a circuit and one is not. Some of the first-run theatres of petitioners are in the same or a nearby city block with second or subsequent run theatres of their competitors. In these situations the lower admission charges to the second or subsequent run theatres render them unusually competitive with the first-run theatres of petitioners, notwithstanding difference of run.

The seating capacities of the first-run theatres of petitioners vary from 1396 to 270. The seating capacities of their second and subsequent run theatres vary from 1440 to 194. The seating capacities of some of the first-run theatres of defendants which compete with some of petitioners are largely in excess of the seating capacities of the first-run theatres of said petitioners in the same cities or towns. The same is true as to the seating capacities of some of the first-run theatres of independent competitors with one or more of petitioners. But in one or more of those cities and towns a petitioner has more than one first-run theatre and the combined seating capacity of those theatres substantially equals or exceeds the seating capacity of the competitor's theatre.

Conditions Necessary for Profitable Operation by Petitioners

4. In the conduct of their business petitioners have invested substantial amounts of money in theatre buildings and in the equipment, furnishing and decorating of the buildings, and in the building up of goodwill for their theatres by advertisement thereof and by service to the public; they employ numerous theatre managers, film buyers and bookers, general office workers, electricians, projector operators, ticket sellers and takers, ushers, cleaners, and workers in other categories. They buy substantial quantities of supplies; and they pay substantial amounts of property and license taxes to the states and their subdivisions. In order for the business of a petitioner to be operated at a reasonable profit, it is necessary that its theatre or theatres be accessible to its patrons, adequately equipped, furnished and decorated; that the prices of admission be reasonable; that the pictures exhibited shall be of a character to attract the public; that the performers in the features be individuals with large popular followings; that an adequate and continuous

flow of suitable pictures be assured; and that the exhibitions be well publicized in advance. The amount paid to the licensors of motion pictures is the largest item of expense of a first-run theatre, and is a substantial item of the expense of every theatre. In order for the business of a petitioner to be operated at a reasonable profit, it is necessary that the amount paid to licensors be reasonable. At least seventy (70%) per centum of all pictures are distributed by one or another of the defendants in this action and become available for exhibition only under license from a defendant. No petitioner can conduct its business profitably without exhibiting pictures licensed by one or more of the defendants.

[fol. 3745] Considerations Other Than Amounts of Film Rental Which Are Material in the Procurement of Licenses

5. In the conduct of the business of petitioners, they have found numerous factors to be materially helpful to an exhibitor in the effort to license features of a distributor for exhibition. The factors include the following: that the exhibitor be willing to agree to pay for the licenses a percentage of its gross receipts from admissions during the periods of the exhibitions; that the exhibitor shall be believed to be wholly honest in his accounting to the distributor. and to maintain complete and accurate box-office records; that the exhibitor be efficient; that the exhibitor shall furnish efficient service to the public in respect of selling and taking of tickets, ushering, projector operation, comfortable seats, cleanliness, rest rooms, and the like; that the exhibitor cooperate with the distributor in the advance exploitation of features, by substantial advertising paid for by the exhibitor, and in particular in exploiting features by appropriate use of publicity material and devices made available by the distributor; that the exhibitor shall not be unreasonable in his requests for adjustments of prices or for cancellations of licenses, or unreliable, unpleasant or unreasonable in the booking and in the other numerous contacts and transactions which are incidental to the execution of the license agreements from the time they are made until they are fully performed.

Certain Advantages of the Present System of Licensing

6. Up to the present time petitioners have had the opportunity to discuss the values of pictures for exhibition by them and to bargain as to the amounts of rental to be charged. Petitioners have been able to procure an adequate and steady flow of features and shorts for exhibition in their theatres under this system, without being required to pay such minimum fixed or percentage rentals therefor as may originally be demanded by the distributors, and without being required to be the highest bidders therefor. Petitioners have not been required to license the pictures theatre by theatre or picture by picture, but have been able to license a picture for exhibition in more than one theatre under one agreement, and to license more than one picture under one agreement. A petitioner which operates more than one theatre on the same run in a particular city or town has been able to license a feature for exhibition in such one of the theatres as he may thereafter select. Some of petitioners have exercised all of these privileges and have found them materially valuable. Each petitioner has also been enabled, subject to his conformity with the conditions mentioned in the preceding paragraph hereof, to have available for exhibition in his theatres, all of the pictures distributed by one or more of the defendants, over a period of years, either under agreements made annually, or under agreements made with respect to individual pictures or with respect to small blocks of pictures.

[fol. 3746] Rental Value of a Feature Varies in Different Localities, and Post-Exhibition Adjustments of Rental Are Often Necessary and Are Made Under Present System

7. Features are very much more favorably regarded by the public, and are very much more popular, in some localities than in other localities. Sometimes the subject of a feature will cause it to be clearly discernible both to the distributor and to potential exhibitors of the feature that it will not be attractive to the public in a particular locality; but as to other features popular in certain localities, there are sharp differences of opinion between the distributors and the potential exhibitors as to whether they will be equally popular, or more or less popular in a particular locality. The result of such differences of opinion is that a

distributor of a feature will frequently consider that it is much more valuable to an exhibitor in a particular locality, than the exhibitor considers it to be. Petitioners find themselves frequently in that situation. It is recognized by both exhibitors and distributors that a motion picture, unlike the ordinary marketable commodity, is of uncertain value and that the principal hazard of the business of both is the unpredictability of the public taste. For this reason, and also because it is to the economic interest of the distributors that their outlets operate at a profit, it has been a general practice that when such differences of opinion arise the petitioner will agree to pay the rental demanded by the distributor for the feature, and if the petitioner proves to be correct in his prophecy that the feature will not be attractive to the public in his locality, as evidenced by the gross receipts from its actual exhibition there, the distributor will lower the amount of the rental agreed to be paid, by an equitable amount. In many instances a potential exhibitor among petitioners will agree with a distributor that a feature which has proven attractive to the public elsewhere will prove equally attractive to the public in the locality of that exhibitor. The event will prove that for one reason or another, sometimes made known to the exhibitor by the expression of criticism and opinion by his patrons, and sometimes never known, the public in that locality does not find the feature attractive, and the gross receipts from its exhibition are unexpectedly small. In these situations it has been the general practice of the defendants in their dealings with petitioners to make equitable reductions of rental and they have frequently been made.

The expenses of the operation of a theatre, other than the amount of its expense for film rental are very stable from week to week and month to month. They are not substantially increased when the gross receipts from admission charges are unusually large, nor are they substantially decreased when the gross receipts from admission charges are unusually small. An exhibitor may reasonably pay a larger percentage of his gross receipts, as rental for the pictures exhibited, during a period when the gross receipts are unusually large, than he may reasonably pay during a period when his gross receipts are unusually small, because the larger the gross receipts the smaller is the percentage of them which is represented by the expenses other than film

rental, and the larger is the percentage of the gross receipts remaining available for the payment of film rental and for the provision of profit to the exhibitor. While [fol. 3747] adjustments in rentals of pictures which are rented at fixed amounts of rental are made for the reasons above set out, it is especially material to petitioners to have been able to procure such adjustments when the rentals of pictures are a stated percentage of gross receipts. It frequently happens that the licensing agreement between a defendant distributor and a petitioner will provide for the payment by the petitioner to the distributor of a certain stated percentage of the gross receipts of the exhibitor during the period of the exhibition of the picture, provided that such gross receipts shall not exceed a stated amount, but will require the payment of higher percentages of said gross receipts, if the said gross receipts shall exceed said amount to stated extents.

Petitioners operating on a double feature policy ordinarily exhibit one very attractive and one less attractive feature, and naturally pay a larger amount of film rental for the former than for the latter. When a theatre operates on a mixed policy, sometimes exhibiting single feature programs, sometimes double, it is not always known when a picture is licensed that it will be exhibited as a part of a double feature program, and in those situations, if it shall be so exhibited, its rental is frequently reduced in consideration of the gross receipts and the exhibitors' expenses being increased by the exhibition of the other feature.

If petitioners should be precluded from receiving the benefits of the adjustments mentioned in this paragraph, or if they should be precluded from making the "sliding scale" agreements referred to in this paragraph, the business of petitioners would be rendered materially more hazardous, the attractiveness of their programs to the public and their opportunity to make reasonable profits, would be materially lessened.

Booking of Pictures

8. When one of the petitioners shall have licensed a feature for exhibition, only the first one of two agreements essential to its exercise of the exhibition privilege has been accomplished, for the booking of the picture still remains to be done. As elsewhere alleged, in order to operate each of his theatres efficiently, an exhibitor must have a steady flow of features attractive to the public, one of which must

be in his hands to be exhibited in each theatre when the exhibition period of another feature has terminated. Feature programs of the theatres of petitioners are changed from once a week to four times a week. Occasionally, a popular feature will be exhibited for a longer period than usual. It may be substantially damaging to an exhibitor to exhibit in a particular theatre (except for a specialized type, as an "action" theatre, in the main exhibiting "westerns" and melodramatic features) successively or at close intervals of time, two or more pictures of the same type; *i.e.*, western, crime, comedy, historical, musical, etc.; or to book for his theatre a feature of a particular type at the same time that a feature of the same type is being exhibited by a competing theatre. Only a portion of the total features licensed for exhibition in a particular theatre are outstanding attractions. It is more profitable to space them among the programs than to have a substantial period of exceptional [fol. 3748] ly attractive programs, followed by a substantial period of mediocre ones. If a theatre is in a city or town other than a key town, a feature should be booked as closely as possible after its run in the nearest key town. When the feature of a program is mediocre, the shorts should be exceptionally entertaining. If a feature is unusally brief, the shorts should be more substantial, in order to have a well balanced program acceptable to the public; and the reverse is true. Features expected to be outstandingly popular with the public should primarily be booked for preferred playing times (as Saturdays, Sundays, or holidays); in many situations it is advisable to book for Sunday a different picture from the one booked for Saturday.

The booking for a theatre consists of arranging for pictures to be exhibited according to the foregoing principles, and efficient booking is essential to the efficient operation of a theatre. As a rule, features are not even theoretically "available" for exhibition at the dates they are licensed, but become theoretically "available" at later dates of which notices are given to licensees. When notice of availability is received, licensees are informed that a limited number of prints is available for use in rotation by the whole number of theatres in the geographical area of the distributors' exchanges in which the theatres are located. This number is invariably far less than the number desired by the exhibitors for immediate exhibition in the theatres of

the exchange area. The bookers for the several licensees must then book a print of the feature for each of their various theatres in which it is to be exhibited, *i. e.*, agree with the exchange on the precise date the print is to be received at the theatre and the date of the commencement of its exhibition.

The booker for a theatre maintains a tentative schedule for the exhibition of features therein, at dates when he hopes prints will be available, for a month or two in advance of exhibition dates. The booker is greatly aided in this schedule planning by being able to anticipate that there will become available for exhibition in the theatre, all of the features distributed by those distributors who usually make all their features available for such exhibition. When he finds he is unable to secure a print of a particular feature at the date tentatively scheduled by him, as frequently occurs, he must arrange through the exchange of its distributor, to procure a substitute from among the other features currently under license, or in emergency when none such is available must arrange for the theatre to license another feature suitable and available which can be booked for the desired date. His schedule will be altered from time to time as new features are licensed, or the licenses for the exhibition of features are cancelled because the feature for one reason or another comes to be considered unsuitable for exhibition.

The degree of the booker's efficiency and the consequent degree of success of the operation of his theatre inevitably depends materially upon the ability and personality of the booker and the personal relations existing between him and the personnel at the distributors' exchanges, and the extent to which the booker is thought reasonable, fair, considerate, reliable, courteous, forehanded in his negotia- [fol. 3749] tions and transactions with them. The booking of shorts presents lesser problems than the booking of features, and suitable shorts are less difficult to book than are features, but the efficient booking of shorts is also material to the efficient operation of a theatre. When a booker is responsible to book for more than one theatre, not only does the volume of his duties increase, but the complexity of his duties increases greatly, since a change in his schedule for one theatre often renders necessary or advisable changes in the schedules for others.

Some Disastrous Results of the Auction Selling System

9. The directions by the court with reference to auction selling as set forth in Paragraph 1 above will:

(a) Inflict irreparable damage upon each petitioner by causing him to suffer material losses. Such losses will inevitably accrue to all petitioners from the denial to them of the bargaining processes, and the freedom to contract according to the varied methods as alleged in Paragraph 6 above and the benefits of equitable post-exhibition adjustments of film rentals as alleged in Paragraph 7 above. Material losses to each petitioner will result from the fact that an exhibitor cannot determine at the time of making a bid for the privilege of exhibiting a feature in his theatre, the probable value to him of the license to exhibit the feature without knowing the date at which it will be received by him for exhibition and also knowing what other features will be in his hands for exhibition at that date, and the extent of his obligations to exhibit the latter at that date. Material losses to each petitioner will result from the fact that of the bids made by him, an unpectedly large proportion during particular periods of time will sometimes be unsuccessful. This will cause him to be from time to time, at least for short periods, without any features for exhibition, or else without a sufficient number of attractive ones. The bulk of his expenses must continue undiminished during these periods. Material losses will accrue to each petitioner because an unexpectedly large number of his bids will sometimes be successful during particular periods and he will be over-bought, from time to time, at least for short periods, and will not be able to exhibit all of the purchased pictures in such a manner as to secure an increase of gross receipts sufficient to offset his increase of film rentals. In some instances he will not have enough playing time to enable him to comply with the playing obligations of his license agreements. Material losses will accrue to each petitioner because of his uncertainty at all times as to which of his contemplated or open bids will be successful and which will be unsuccessful. This uncertainty will require him to make bids for an undesired number of pictures of the same type, with the hope that his bids for a

desired number, and no more, will be successful, and at the risk that too many or too few bids for pictures of a particular type will be successful, with consequent damage to the attractiveness of his programs. Material damage to each petitioner will accrue from the delay to which he must submit, under the auction selling system, in planning his schedule of programs and in booking and publicizing the programs, due to the uncer- [fol. 3750] tainty as to what pictures will be licensed to him under the auction selling plan and since the offering of a picture by a distributor, the making of bids, the scrutiny of the same, and the giving of notices of the result of each auction, must consume a substantial period of time;

(b) Inflict irreparable damage upon those petitioners which are in competition with exhibitors who operate larger theatres or exhibitors who have larger resources. An exhibitor with a larger theatre than the theatre of his competitor can afford to bid more for each of the outstandingly attractive features which may become available to the successful bidder for exhibition. Even without a larger theatre, a competitor with substantially greater resources can afford to make the highest bids for all the outstanding features and drive out of business the competitor with the smaller resources. Under the present system of licensing as alleged in Paragraphs 6 and 7 hereof, the smaller exhibitor has been able reasonably to compete with the larger one;

(c) Increase the prices of admission paid by the public. The auction selling system will materially increase the cost of operation of theatres because it will materially increase the amount of film rentals.

The auction selling system will materially increase the cost of the operation of theatres because of the material increases in buying expenses which will be imposed upon exhibitors by the adoption of the auction selling system. Since the film rent of an exhibitor is ordinarily his largest item of expense, it is essential that the amounts of his bids for pictures under the proposed decree should be limited to their approximate probable values. He must inform himself as

to the probable values to him of all the individual pictures among the entire body of approximately five hundred features, and several times as large a number of shorts, annually distributed, by all distributors. The information must be much more accurate than under the present system with its equitable adjustment practices; must cover all pictures rather than the smaller number which the exhibitor will have playing time to exhibit and which are distributed by the individual distributors from whom under the present system the exhibitor usually licenses pictures; and when an exhibitor operates more than one theatre, the proposed auction selling system will require the forming by him of a separate conclusion as to the probable value of each picture in each separate theatre. In order to secure for one theatre only, the fifty to three hundred features, and the one hundred and fifty to nine hundred shorts, annually required, the exhibitor must make many more bids since only a portion will be successful. The prohibition against bidding at one time for the privilege of exhibiting more than one picture or of exhibiting a picture in more than one theatre or of exhibiting in one theatre to be thereafter designated from a number operated upon the same run in one city or town, will greatly increase the number of required bids to be made by the exhibitor with more than one theatre. The auction system will greatly increase the time and labor required for buying and the necessary qualifications of buyers. The preparation and making of bids by exhibitors; the verifications by un- [fol. 3751] successful bidders of the correctness of the determinations by distributors of successful bidders; correspondence seeking clarifications of offerings and making requested clarifications of bids; the making, filing, indexing and maintenance of records of bidding: all of these will cause large increases in the present buying expenses of exhibitors. All of the increases of the costs of the exhibitors will inevitably be reflected in the long run by equivalent increases in the prices of admission paid by the public;

(d) Render the programs less attractive and amusing to the public by substantially interfering with their planning because, for the reasons set forth in Para-

graphs 6, 7 and 8 hereof, under the auction selling system, the exhibitors will not be able effectively to license and book appropriate pictures;

(e) Give rise to a large and an endless stream of controversy and litigation arising out of the questions of due notice of auctions, interpretation of provisions as to run and clearance, whether a particular theatre is of a size, location, and equipment to present a picture to advantage or "upon the terms agreed," "responsibility" of a bidder, interpretation of bids, discrimination among bidders, and the like.

Binding Effect of Judgment.

10. Substantial rights of petitioners are determined by the findings of fact and conclusions of law of the Court as set forth in the said opinion. No petitioner can conduct his business profitably without exhibiting pictures licensed by one or more defendants. The entry and enforcement of a decree, containing provisions based upon the directions of the Court set forth in Paragraph 1 hereof, would cause irreparable damage to them and all others similarly situated by the destruction of their goodwill and other property rights, and the disorganization of their business, all as herein set forth.

Adequacy of Representation.

11. Petitioners have caused to be examined the original and the amended and supplemental complaint filed herein, the briefs filed herein, and the oral arguments of counsel. The directions hereinabove set forth in Paragraph 1 hereof were not prayed for in the original or the amended and supplemental complaint, and neither in the said briefs nor in the oral argument of counsel were said directions sought on behalf of any party. The question of whether or not such directions should be made was not in issue at any time between the parties. On the contrary the defendants or some of them opposed such directions, and plaintiff's position as stated by its counsel was that such directions were unnecessary and inadvisable. The Court has not been adequately informed either by evidence or argument as to the effect of said directions upon petitioners or the public or as to the practicability of the same or their efficacy to achieve the desired results.

Petitioners have never been represented adequately or otherwise or permitted to be heard in respect to said directions as set forth in the opinion.

[fol. 3752] Timeliness of Petition.

12. The aforesaid opinion containing the directions set forth in Paragraph 1 hereof was rendered without notice to petitioners, or any of them, and without any opportunity being afforded them to be heard in opposition thereto. The directions relating to auction selling came as a complete surprise to petitioners. Following the rendering of the opinion, time was required for its dissemination by the trade papers and by other means among the exhibitors. The exhibitors not being parties to the suit, were not fully conversant therewith, and required further time to study, digest and analyze the effects on their business of the many provisions of the opinion. As they gradually became or were made aware of the harmful effects of the proposed auction selling plan, additional time was required for the crystallization of that opinion, and, because the exhibitors and the associations are widely spread, in organizing to present their objections to auction selling. Upon the completion of the necessary organization, counsel was expeditiously sought, and under the advice of counsel the relevant facts were assembled, all to the end of presenting to this Court at as early a date as possible (so as not unduly to delay the final determination of this matter or to prejudice the rights of the parties or the public) the facts as set forth herein and the legal conclusions arising therefrom, and seeking the relief herein prayed. As a result of this petition being approved and supported by the associations designated in Paragraph 2 and the extreme variation in the characteristics of individual petitioners, as alleged in Paragraph 3, it is believed that there will be presented to the Court by exhibitors only one or two petitions for intervention other than this one.

It is further believed that as the statements in this petition cannot be successfully contraverted, the relief herein sought may be granted without taking further evidence.

Prayers for Relief.

Wherefore, petitioners respectfully pray as follows:

1. That an order be made permitting petitioners to intervene as parties defendant herein for the purposes set forth in this petition;

2. That the opinion of the Court, dated June 11, 1946, be modified so as to exclude therefrom the directions set forth in Paragraph 1 of this petition;

3. That petitioners have such other and further relief in the premises as the Court may deem just and proper.

John G. Jackson, Attorney for Petitioners. Jackson, Nash, Brophy, Barringer & Brooks, 15 Broad Street, New York, N. Y.; Christian, Barton, Parker & Boyd, 909 East Main Street, Richmond, Virginia.

[fol. 3753] In the District Court of the United States

[Title omitted]

Plaintiff's Proposed Judgment—October 8, 1946

The Court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of [fol. 3754] the parties as to its findings and judgment and having filed its findings of fact and conclusions of law in accordance with said opinion wherein certain of the defendants herein were found to have violated Sections 1 and 2 of the act of Congress, approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It is hereby ordered, adjudged and decreed as follows:

I

1. The complaint is dismissed as to the defendant Screen Gems, Inc. and the corporation named in the complaint as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to the claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

Each of the defendants,[1] Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Pictures Company, Inc. (formerly known as Universal Corporation); Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation are hereby enjoined:

[fol. 3755] II

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances.[2]

3. From granting any clearance between theatres not in substantial competition.

4. From granting any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted.

5. From enforcing any existing agreement which grants clearance to any theatre not its own in which a defendant owns a direct or indirect financial interest of more than 5%.

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[1] Wherever a defendant is enjoined herein, the injunction shall also apply to its successors such individuals as act on its behalf with respect to the matters enjoined, and to corporations in which it owns a direct or indirect stock interest of 50% or more.

[2] The term "clearance" as used herein means the period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

6. From further performing any existing franchise [3] to which it is a party and from making any franchises in the future.

[fol. 3756] 7. From further performing any existing formula deal [4] or master agreement [5] to which it is a party, except such agreements as may have been made after the defendant had offered the films licensed to theatres operated in competition with those covered by the agreement in a manner which permitted such theatres to compete on a theatre by theatre basis with the theatres covered by these agreements for the privilege of exhibiting such films, and from making any similar agreements in the future.

8. From performing or entering into any license in which the license to exhibit one feature [6] is conditioned upon the licensee's taking one or more other features. Licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade shown prior to the granting of the license for more than a single picture, the licensee shall be given,

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[3] The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

[4] The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

[5] The term "master agreement" as used herein means a licensing agreement, also known as a "blanket deal," covering the exhibition of films in a number of theatres, usually comprising a circuit.

[6] The term "feature" as used herein means any motion picture, regardless of topic, the length of the film of which is in excess of 4000 feet.

by the licensor, the right to reject 25% of such pictures not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release [fol. 3757] within 10 days after there has been an opportunity afforded to the licensee to inspect it.

9. From licensing any film more than six months in advance of its release.

10. From offering films for license in the future for exhibition in any theatre not its own [7] in any manner except the following:

(a) A license to exhibit each film released for public exhibition shall be offered upon reasonable terms for some run [8] to the operator of each theatre which desires to exhibit it;

(b) Where a run is desired upon terms which exclude simultaneous exhibition in competing theatres, it shall be offered to the competing exhibitors involved having a theater adequate to show the picture upon such a run and granted to the highest responsible bidder, provided that such exclusive run does not unreasonably restrict competition in the area covered.

(c) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any ~~person whatsoever~~;

[fol. 3758] (d) Each license shall be offered and taken theatre by theatre and picture by picture; and

(e) Each license shall specify a date of availability of a print for the run licensed and provide that such run shall commence within 30 days after such availability.

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[7] A theatre is not a defendant's own theatre for the purpose of this decree unless it owns therein a legal or equitable interest of 95% or more, either directly or through subsidiaries.

[8] The term "run" as used herein means one of a succession of exhibitions of a motion picture in a given area, first run being the first exhibition in the area, second run being the next subsequent, etc. Where successive exhibitions occur in different theatres, they shall be regarded as separate runs for the purpose of this decree, even though such theatres may be under a common ownership or management.

11. From combining, conspiring, or agreeing with each other or with any exhibitors or distributors to eliminate competition among themselves or with others in any manner whatsoever.

III

The defendants Paramount Pictures, Inc.; Loew's Incorporated; Radio-Keith-Orpheum Corporation; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres, Inc. are hereby enjoined and restrained:

1. From performing or enforcing agreements referred to in paragraphs 5, 6, and 7 of the foregoing Section II hereof to which it may be a party.

2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

[fol. 3759] 3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant and from continuing to own or acquiring such an interest in conjunction with an independent [9] where such interest shall be

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[9] As here used the term "independent" means any former, present, or potential motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question.

greater than 5%, unless such interest shall be 95% or more. The existing relationships which violate this provision shall be terminated within two years The relationships between the defendants and independents which violate this provision shall be dissolved by a sale of the defendants' interest to operators not owned or controlled by any of the defendants herein. In dissolving relationships among defendants which violate this provision, one defendant may acquire the interest of another, if the Court shall first find that such acquisition will promote competition in the exhibition of motion pictures. Each of the defendants shall submit to this Court within 90 days a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court.

6. From expanding its present theatre holdings in any manner whatsoever.

7. From operating, booking, or buying films for any of its theatres through any agent who is also acting in such manner for any other exhibitor, independent or affiliated.

8. From licensing for exhibition in any theatre owned or controlled by it films distributed or produced by another defendant named in this section which is not affiliated with it, for a period commencing one year after the entry of this decree and continuing for a period of not less than ten years. At the conclusion of said period, any party may move to modify this provision in any manner which the facts then appearing to the Court may warrant.

IV

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings [fol. 3761] now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable to the extent that they may be consistent with the provisions of this decree.

V

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, or correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, [fol. 3762] except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VI

Paragraphs 8, 9, and 10 of Section II of this decree shall not become effective until January 1, 1947.

VII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such orders or direction as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

VIII

Plaintiff shall recover, jointly and severally, from the defendants enjoined herein, its costs.

Entered this — day of ——, 1946.

—— ——, Circuit Judge; —— ——, District Judge; —— ——, District Judge.

[fol. 3763] In the District Court of the United States

[Title Omitted]

Plaintiff's Proposed Judgment—June 19, 1946

The Court having rendered its opinion herein on June 11, 1946, and having filed its findings of fact and conclusions of law in accordance with said opinion wherein certain of the defendants herein were found to have violated Sections 1 and 2 of the Sherman Act,

It is hereby Ordered, Adjudged and Decreed as follows:

[fol. 3764] I

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and Universal Pictures Company, Inc. The complaint is also dismissed as to the claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II

Each of the defendants,[1] Paramount Pictures, Inc.; Para-

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[1] Wherever a defendant is enjoined herein the injunction shall also apply to its corporate successors, such individuals as undertake to act on its behalf with respect to the matters enjoined, and to corporations in which it owns a stock interest of 50% or more.

mount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation are hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

2. From concertedly agreeing to maintain a system of clearances [2] among these defendants, their exhibition affiliates, or with other exhibitors.

3. From granting any clearance between theatres not in substantial competition.

[fol. 3765] 4. From granting any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted or enforcing any existing clearance to the extent of such excess. In determining what is a reasonable clearance the following factors should be taken into consideration:

(a) The admission prices of the theatres involved, as set by the exhibitor;

(b) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(c) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cutrate tickets, lotteries, etc.;

(d) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

[2] The term "clearance" as used herein means the period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

(e) The extent to which the theatres involved compete with each other for patronage; and

(f) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent [3] circuit of theatres should be disregarded.

5. From further performing any existing franchise [4] to which it is a party and from making any franchises in the future.

[fol. 3766] 6. From further performing any existing formula deal [5] or master agreement [6] to which it is a party, except such agreements as may have been made after the defendant had offered the films licensed to theatres operated in competition with those covered by the agreement in a manner which permitted such theatres to compete on a theatre by theatre basis with the theatres covered by these agreements for the privilege of exhibiting such films and from making any similar agreements in the future.

7. From performing or entering into any license in which the license to exhibit one feature [7] is conditioned upon the

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[3] The term "independent" as used in this provision means a producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

[4] The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

[5] The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

[6] The term "master agreement" as used herein means a licensing agreement, also known as a "blanket deal," covering the exhibition of films in a number of theatres, usually comprising a circuit.

[7] The term "feature" as used herein means any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

licensee's taking one or more other features. Licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade shown prior to the granting of the license for more than a single picture, the licensee shall be given, by the licensor, the right to reject % of such pictures not trade shown prior to the granting of the license, such right of rejection to be exercised within 10 days after there has been an opportunity afforded to the licensee to inspect it.

[fol. 3767] 8. From offering films for license in the future for exhibition in any theatre not its own,[8] in any manner except the following:

(a) A license to exhibit each film released for public exhibition shall be first offered at a minimum price for any run[9] desired by the operators of each theatre within the competitive area where the offer is made;

(b) The license desired shall in such case be granted to the highest responsible bidder having a theatre [of size and equipment] adequate to show the picture upon the terms offered;

(c) The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever; and

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

III.

The defendants Paramount Pictures, Inc.; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; Keith-

[8] A theatre is not a defendant's own theatre for the purposes of this decree unless it owns therein a legal or equitable interest of 95% or more, either directly or through subsidiaries.

[9] The term "run" as used herein means one of a succession of exhibitions of a motion picture in a given area, first run being the first exhibition in the area, second run being the next subsequent, etc.

Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres, Inc. are hereby enjoined and restrained:

1. From continuing to perform any agreements referred to in paragraphs 5 or 6 of the foregoing Section II hereof to which it may be a party.

[fol. 3768] 2. From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

3. From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

4. From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

5. From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or in shares of stock or otherwise, in conjunction with another defendant exhibitor and from continuing to own or acquiring such an interest in conjunction with an independent [10] where such interest shall be greater than 5%, unless such interest shall be 95% or more. The existing relationships which violate this provision shall be terminated within . The relationships between the defendants and independents which violate this provision shall be dissolved by a sale to or a purchase from the co-owner or co-owners. No such interest of a co-owner may be purchased by a defendant unless this Court shall first find that such purchase will promote competition in the exhibition of motion pictures. Each of the defendants shall submit to this Court within days a

[10] As here used the term "independent" means any person not a party to this suit.

statement outlining the extent to which it has complied and the manner in which it proposes to comply with this pro- [fol. 3769] vision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such purchases as it proposes to make, with a statement of facts regarding each competitive situation involved in such proposed purchases sufficient to show the probable effect of such purchase on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such purchase plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such purchases shall be approved by the Court.

6. From expanding its theatre holdings, except in the course of acquiring a co-owner's interest in jointly owned theatres pursuant to the provisions of Section III(5) above. Other theatre interests necessary to protect a defendant's investment or in order to enter a competitive field may be acquired providing that no expansion of its theatre holdings shall result therefrom. In the latter case such acquisitions shall not occur until after approval of this Court is obtained therefor. Reasonable notice of such an application shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect to such approval before it shall be granted.

7. From operating, booking, or buying films for any of its theatres through any agent who is also acting in such manner for any other exhibitor, independent, or affiliated.

IV

Provision shall be made for the arbitration of claimed violations of Section II of this decree, as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals as may be hereunder created for adjustment [fol. 3770] of such disputes. The awards thereof shall be reviewable by an appeal board generally similar to the one created by the existing consent decree as to any parties consenting thereto. Within days the defendants shall submit to the Court their proposals as to the creation and operation of such arbitration and appeal board machinery as

they are willing to consent to for the purpose of implementing this section of the decree. Copies thereof shall be served on the Attorney General and the plaintiff shall have a reasonable time after receipt thereof to advise the Court as to any objections it may have to such systems as the defendants may propose. The provisions of the existing consent decree are hereby declared to be of no further force or effect, except as to arbitration proceedings now pending. They shall remain in effect as to such proceedings until final disposition shall have been made thereof. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable to the extent that they are consistent with the provisions of this decree.

V

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any consenting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview [fol. 3771] counsel for the officer or employee interviewed and counsel for the company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VI

Paragraphs of this decree shall not become effective until

VII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

VIII

Plaintiff shall recover, jointly and severally, from the defendants enjoined herein, its costs.

Entered this — day of ——, 1946.

——, Circuit Judge; ——, District Judge;
——, District Judge.

[fol. 3772] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PROPOSED DECREE OF DEFENDANTS PARAMOUNT, LOEW, FOX, WARNER AND RKO—Filed October 7, 1946

The Court having rendered its opinion herein on June 11, 1946, and having filed its findings of fact and conclusions of law in accordance with said opinion wherein certain of the defendants herein were found to have violated, in the respects therein specified, the act of Congress, approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It is hereby ordered, adjudged and decreed as follows:

[fol. 3773]

I

The petition and the amended and supplemental complaint are dismissed as to the defendants Screen Gems, Inc. and Universal Pictures Company, Inc. They are also dismissed as against the remaining defendants herein as to all claims based upon their acts as producers, whether as individuals or in conjunction with others, or based upon any alleged violations of the Sherman Act with respect to production, including all claims based upon alleged acts of discrimination against producers.

II

Each of the defendants,[1] Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation, (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, when acting as a distributor of features,[2] is hereby enjoined:

1. From granting any license in which a minimum admission price or prices to be charged at any theatre during [fol. 3774] the exhibition of the feature licensed is or are agreed upon between the licensor and the licensee in any manner or by any means, provided that nothing in this Decree shall limit or affect the right of a distributor defendant to require that any offer by an exhibitor[3] to license any of its features shall include a statement by the exhibitor of the admission price or prices, fixed by the exhibitor, which the exhibitor intends to charge for admission to the exhibitor's theatre during the exhibition of the feature.

2. From concertedly agreeing with each other to maintain a system of clearances.[4]

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[1] Whenever a defendant is enjoined herein the injunction shall be binding upon its officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

[2] The term "feature" as used in this Decree means any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

[3] The term "exhibitor" as used in this Decree means a person, firm or corporation which is engaged in the business of operating a theatre or theatres exhibiting feature motion pictures for profit for its own account.

[4] The term "clearance" as used in this Decree means the period of time, agreed upon between the distributor and its licensee and usually stipulated in a license agreement, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

3. From granting any clearance in excess of what is reasonably necessary to protect the licensee in the run granted, or the licensor's revenue from the exhibition of the feature licensed, and from enforcing any existing clearance to the extent of such excess. In determining what is a reasonable clearance, the following factors, among others, should be taken into consideration:

(a) The admission prices of the theatres involved, as set by the exhibitors;

(b) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(c) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cutrate tickets, lotteries, etc.

(d) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

[fol. 3775] (e) The extent to which the theatres involved compete with each other for patronage;

(f) The fact that a defendant or an independent circuit of theatres has an interest in one or more of the theatres involved should be disregarded; and

(g) There should be no clearance between theatres not in substantial competition.

4. From further performing any existing franchise [5] to which it is a party and from making any franchise in the future.

5. From further performing any existing formula deal [6]

[5] The term "franchise" as used in this Decree means a licensing agreement or a series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by a distributor during the entire period of the agreement.

[6] The term "formula deal" as used in this Decree means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross.

or master agreement[7] to which it is a party, and from making any formula deal or master agreement in the future.

6. From performing and from entering into any license in which the right to exhibit one feature is conditioned upon the licensing by the exhibitor of one or more other features.

7. From licensing a feature in any case where two or more exhibitors operating competing theatres have notified a distributor that they desire to license such feature on a [fol. 3776] run designated by the distributor defendant in any manner except the following:

(a) The distributor defendant shall offer such feature to each such exhibitor who has a theatre of the size, location and equipment suitable and adequate to show the feature to advantage upon such run. The offer may include minimum terms[8] upon which the distributor defendant will grant a license for such run. The license shall be granted to the exhibitor whose offer for the feature satisfies the minimum terms, if any, and in the judgment of the distributor defendant exercised in good faith affords the best terms. Each such license shall be granted solely upon the merits and without discrimination as between exhibitors competing for the run, whether in favor of theatres in which any other defendant has an interest, old customers, or any person whatsoever.

(b) In determining which exhibitor's offer affords the best terms the following factors, among others, should be taken into consideration and accorded the importance and weight to which each is entitled regardless of the order in which they are listed:

(1) The film revenue which the distributor defendant will derive from each theatre for the exhibition of such fea-

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[7] The term "master agreement" as used in this Decree means an agreement licensing the exhibition of a feature in two or more theatres in a particular circuit in which there are not separate provisions covering the licensing of the feature for exhibition in each particular theatre.

[8] The minimum terms may include, among other things, the minimum license fee; the exhibition period; the time when the exhibition is to commence; and the availability and clearance, if any, which will be granted for each such run.

ture on the run in question and upon the terms offered by the exhibitor. In estimating such film revenue, the distributor defendant should take into consideration, among other things:

The number of days for which and the particular days of the week or year or other playing arrangements upon which each exhibitor plans to play the feature; the character, location and size of each theatre; the type of entertainment which each exhibitor intends to present with the feature involved and which the exhibitor in the past has customarily offered the public; the appointments and equipment of each theatre; transit facilities; the admission prices of each theatre as set by each exhibitor for the period of the exhibition of the feature; the distributor defendant's actual experience with each of the exhibitors in fulfilling its obligations in past contracts; each exhibitor's reputation generally in the industry and in the community for honesty, fair dealing and showmanship; and the financial responsibility of the exhibitor operating each of the theatres involved.

[fol. 3777] (2) The comparative suitability of the theatres for the advantageous exhibition of the distributor defendant's feature on the run in question; and

(3) The effect which the exhibition of the feature in each of the theatres would have upon other exhibitions of the feature.

(c) Each license shall be offered and taken theatre by theatre and feature by feature.

(d) The distributor defendant may reject any and all offers which are the product of collusion among exhibitors.

(e) Each distributor defendant shall adopt and publicly announce reasonable rules and regulations applicable to the licensing of features pursuant to this subdivision 7 which may, from time to time, be amended by such distributor defendant. These may include a designation of areas within which it intends to offer each feature for license and the type, number and sequence of run to be offered therein, and the number, if any, of simultaneous exhibitions it will offer on any such run. Each distributor defendant shall file a copy of such rules, regulations and amendments, if any,

with the Clerk of the Court and with the Department of Justice.

(f) The provisions of this subdivision 7 of this Section II shall become effective not later than — months after the date of this Decree.

8. A license to exhibit one or more features in one or more theatres may be included in a single instrument provided that the license has been negotiated and entered into in a manner not inconsistent with the provisions of this Section II. To the extent that any of the features have not been trade shown[9] prior to the granting of the license for more than a single feature, the licensee shall be given, by the licensor, the right to reject —% of such features not trade shown prior to the granting of the license, but, such right to reject any such feature must be exercised by the exhibitor by notice in writing within ten days after there has been an opportunity afforded to the exhibitor to inspect it within the distributor's exchange district in which the exhibition is to be held.

[fol. 3778] 9. The provisions of subdivisions (3), (6) and (7) of Section II hereof may be enforced in arbitration against any consenting defendant,[10] as follows:

(A) Clearance

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 3 of this Section II shall be subject to arbitration in the manner provided in the Rules of Arbitra-

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[9] A distributor's feature shall be deemed to have been trade shown where it is exhibited at a theatre or projection room for the benefit of exhibitors generally within such distributor's exchange district in which the public exhibition is to be held.

[10] The term "consenting defendant" as used herein means each of the following named defendants: Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; RKO Radio Pictures, Inc.; Warner Bros. Pictures Distributing Corporation; Twentieth Century-Fox Film Corporation and each other defendant which hereafter files with the Court its written consent to be bound by the provisions hereof relating to arbitration.

tion which are annexed hereto and made a part hereof, and the power of the arbitrator in each of such controversies shall be limited to the making of an award fixing the maximum clearance between the theatre involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration or, where the arbitrator finds that the theatres involved are not in substantial competition, prohibiting the granting of clearance between the theatres in licenses thereafter entered into.

Any distributor defendant or any exhibitor affected by any such award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification, and, in the event that the arbitrator finds that there has been such change, he shall make a redetermination of the clearance and may make an award fixing the maximum clearance, if any, which may thereafter be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration.

[fol. 3779] When, in any arbitration under this subdivision, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

(B) Conditioning

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 6 of this Section II in licensing or offering to license a feature to such exhibitor shall be subject to arbitration in the manner provided in the Rules of Arbitration.

Where a license has been entered into, an exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor defendant at its home office a notice in writing of such claim and of the grounds therefor not later than two days after receipt by the exhibitor of the distributor defendant's written approval of the exhibitor's signed application or applications.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of a feature was in compliance

with such provisions, and if the finding be in the negative, (2) an award cancelling the license for (or to the extent that it may relate to) such other feature or features and (3) in the discretion of the arbitrator, an award of an amount not exceeding $500 to be paid to the complainant.

Where no license has been entered into an exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor defendant at its home office a [fol. 3780] notice in writing of such claim and of the grounds therefor not later than five (5) days after the exhibitor claims the alleged offer was made.

The power of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such feature was made in compliance with such provisions, and, if the finding be in the negative, (2) in the discretion of the arbitrator, an award of an amount not exceeding $250 to be paid to the complainant.

In any arbitration under this heading (B) if the Arbitrator finds in favor of the distributor defendant, he shall enter an award dismissing the complaint.

(C) Licensing

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 7 of this Section II shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the Arbitrator finds in favor of the distributor defendant, he shall enter an award dismissing the complaint. If the Arbitrator finds in favor of the complainant, he shall make an award specifying the respects in which the distributor defendant has failed to comply with the provisions of said subdivision 7 of Section II, and may also award to the complainant its actual compensatory damages in an amount of not less than $100. nor more than $5,000. No such award, however, shall affect any license agreement theretofore entered into or the exhibition of any feature thereunder.

An exhibitor shall have no right to assert such claim unless the arbitration shall be commenced within 30 days after the exhibitor shall have had notice of the facts constituting the claimed non compliance with subdivision 7 of Section II hereof.

[fol. 3781] III

Each of the defendants Paramount Pictures, Inc.; Loew's Incorporated; Radio-Keith-Orpheum Corporation; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation when acting as an exhibitor is hereby enjoined and restrained:

1. From entering into and from continuing to perform any agreements with a distributor defendant, of the type prohibited in subdivisions 4 and 5 of the foregoing Section II hereof.

2. From entering into and from continuing to perform any agreement for the pooling of theatres whereby

(a) a given theatre of a defendant and a given theatre of an exhibitor, normally in competition with the defendant's theatre, are operated as a unit, or whereby the business policies for such theatres are collectively determined by a joint committee or by one of the exhibitors, and whereby the profits of such pooled theatres are divided among such defendant and such exhibitor according to pre-agreed percentages or otherwise; or

(b) the parties thereto may not acquire other theatres in the competitive area where the pool operates without first offering such other theatres for inclusion in the pool; or

(c) such defendant leases any of its theatres to another defendant or to another exhibitor operating one or more theatres in the same competitive area in return for a share of the profits of any two or more of the allied theatres.

Existing agreements which violate the provisions of this section shall be terminated within 2 years after the date of this Decree.

[fol. 3782] 3. From continuing to own, in conjunction with another exhibitor-defendant, any proprietary interest in any theatre or in a firm or corporation owning, leasing or operating any theatre and from leasing a theatre to another exhibitor defendant upon a rental based upon a percentage of the profits of the leased theatre. Existing relationships which are inconsistent with this provision shall be termi-

nated within two years from the date of this Decree by a sale to or purchase from the co-owner or co-owners or by a division of the assets so jointly held or by a sale of the joint interest of one of such exhibitor-defendants to a party not a defendant herein or by the termination or revision of any lease inconsistent with the provisions of this Sub-division 3 of this Section III.

4. (a) From continuing to own in conjunction with any independent exhibitor[11] a proprietary interest in any theatre or in any firm or corporation owning, leasing or operating any theatre unless such interest is 5% or less or 95% or more, and provided, further, that any defendant owning an interest of more than 5% but less than 95% in any theatre may apply to this Court for permission to retain the same in accordance with the provisions of subdivision 4(d) hereof.

(b) The existing relationships between an exhibitor defendant and an independent exhibitor which are inconsistent with the provisions of 4 (a) above shall in each case be dissolved or otherwise dealt with within —— years after the date of this Decree, by ——.

[fol. 3783] (1) A sale or other disposition of the exhibitor defendant's interest; or

(2) A purchase by such exhibitor defendant of the outstanding interest; or

(3) A division of some or all of the assets between the parties to such relationship.

Purchases or divisions of assets pursuant to (2) and (3) above shall be subject to the approval of the Court upon application by the exhibitor defendant.

(c) The provisions of subdivision 4(a) shall not apply, nor shall the dissolution of any joint relationship between

[11] The term "independent exhibitor" as used in this decree means an exhibitor (which is not a defendant in this action, or a subsidiary of a defendant, or is not controlled by a defendant) or a person, firm or corporation which, but for such joint proprietary interest, would be operating one or more of such jointly owned theatres for its own account in competition with the defendant.

an exhibitor-defendant and an independent exhibitor be required, in any case where such joint relationship resulted from the sale, transfer or other disposition by the exhibitor-defendant of the partial interest to such independent exhibitor, except to the extent, if any, to which and in the places in which the parties were in competition at the time of such sale, transfer or other disposition by the exhibitor-defendant to the independent exhibitor.

(d) In any application by any defendant pursuant to subdivisions 4 (a) and 4 (b) of this section III, if the Court, after hearing, shall find that the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area in which the theatres are situated, it shall approve the application.

5. From expanding its theater holdings except in the course of acquiring the interests of co-owners in jointly owned theaters pursuant to the provisions of subdivisions 3 and 4 above; provided, however, that nothing herein con- [fol. 3784] tained shall prevent an exhibitor-defendant from acquiring theaters or interests therein in order to protect its investments or in order to enter a competitive field; if, in the latter case, this Court or the District Court of the United States for the district in which the theater or theaters are located, shall approve the acquisition after due application is made therefor.

6. Reasonable notice of any application pursuant to the provisions of sub-divisions 4 and 5 of this Section III shall be served upon the Department of Justice and the plaintiff shall be given an opportunity to be heard with respect thereto.

IV

Each exhibitor defendant is hereby enjoined from booking or buying films for any of the theatres which it operates, or from operating any theatre, through any agent known by it to be acting in such capacity with respect to any theatre in which it is not permitted to retain or acquire a proprietary interest, or from acting as a booking or buying agent with respect to any such theatre or any theatre which is not operated by it or by a corporation in which it is permitted to retain or acquire a proprietary interest.

V

Nothing contained in this Decree shall be deemed to limit the right of any defendant to lease or otherwise contract for the temporary use of a theatre for the road showing[12] by it of a particular feature distributed by it or a corporation controlled by it upon such terms and conditions as may be negotiated by such defendant.

[fol. 3785]

VI

Nothing contained in this Decree shall apply to operations or activities of any defendant outside of the Continental United States[13] or to operations or activities of any defendant within the Continental United States in so far as they relate to the distribution or exhibition of motion pictures outside of the Continental United States.

VII

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any of its own theatres.[14]

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[12] A road show shall be deemed to be the exhibition prior to its general release of a feature which, because of its character or unusual cost, cannot, in the judgment of the distributor defendant, exercised in good faith, be distributed as advantageously by the distributor's normal method of distribution and which is exhibited by such defendant at advanced admission prices.

[13] The term "Continental United States," as used herein, means the territory within the boundaries of the forty-eight (48) States and the District of Columbia.

[14] A theatre is a defendant's own theatre for the purpose of this Decree if such defendant has therein a proprietary interest of 95% or more, either directly or through subsidiaries, or if it has therein such an interest of 50% or more which it is permitted to retain or acquire under the provisions of this Decree or order of this court, and which theatre is operated by it or a subsidiary, or by a corporation in which it is permitted to retain or acquire such an interest.

VIII

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other [fol. 3786] records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

IX

Jurisdiction of this cause is retained for the purpose of

(a) enabling the plaintiff or any defendant to apply to this Court at any time for such orders and directions as may be necessary or appropriate for the interpretation, construction, application or carrying out of the Decree, for the enforcement of compliance therewith and for the punishment of willful violations thereof;

(b) enabling the plaintiff or any defendant to apply to this Court at any time to modify or to set aside the Decree or to take further proceedings in the event that it should appear that the operation of this Decree has failed to bring about a correction of the violations of the Sherman

Act hereby found to exist and which are the basis of this Decree;

[fol. 3787] (c) enabling any defendant to make any application to this Court provided for in this Decree including any application to enlarge its time to do or refrain from doing any act required by this Decree or to be relieved from any requirement of this Decree upon the ground that special circumstances exist which would make enforcement of such requirement inappropriate, oppressive, unduly burdensome or otherwise inequitable;

(d) enabling any defendant to apply to this Court at any time to modify or set aside, as to such defendant, this Decree or any modification thereof or to vacate or modify, as to such defendant, any provision thereof upon the ground that, under the economic, competitive or other conditions existing at the time of such application (regardless of whether or not such economic, competitive or other conditions are new or unforeseen), the Decree or any modification thereof or any provision thereof, as applied to such defendant is inappropriate or unnecessary or oppressive or unduly burdensome.

X.

Whenever any provision of this Decree is altered or modified or any further Decree is entered in this or any other cause awarding relief substantially similar to the relief prayed for by the amended and supplemental complaint herein and not granted by this Decree, or legislation is enacted by The Congress of the United States which has similar effect, each consenting defendant affected thereby and not agreeing thereto shall have the right at any time within one hundred twenty (120) days after such alteration, modification or further Decree, as the case may be, becomes effective, to withdraw its consent to arbitration by filing with this Court a written notification of such withdrawal. Upon any such withdrawal the withdrawing defendant shall cease to be a consenting defendant except as to licenses previously entered into and the provisions of subdivision 9 [fol. 3788] of Section II of this Decree shall, except as to such licenses, thereupon cease to be applicable to such defendant.

XI

Whenever in this Decree a defendant is required to do an act within any period of time after the date hereof such period of time shall commence upon the date when this Decree becomes final either by the expiration of the time within which to appeal therefrom without any appeal being taken or, in the event of an appeal, from the date when a final Decree is entered herein upon the mandate of the Supreme Court.

XII

The effective date of this Decree shall be stayed pending appeal.

XIII

The existing Consent Decree entered herein on November 20, 1940 shall remain in full force and effect with respect to any acts or conduct occurring prior to the effective date of this Decree.

Entered this — day of ——, 1946.

—— ——, Circuit Judge; —— —— District Judge; —— ——, District Judge.

[fol. 3789] SUGGESTED SUBSTITUTE FOR DEFENDANTS. PROPOSED DECREE II (7)

7 (a) From arbitrarily refusing the request * of an exhibitor that the distributor defendant license a feature to him for exhibition in his theatre on any run licensed by the distributor instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. A distributor defendant shall not be deemed to have arbitrarily refused any such request if it has granted the

* For the purposes of this subdivision a request by an exhibitor must be made in writing to the distributor defendant at its home office, by registered mail, and such demand shall be deemed to have been refused by the distributor defendant either upon the receipt by the exhibitor of the distributor defendant's refusal in writing, or upon the expiration of days after such mailing of the exhibitor's request.

license for the feature for such run theatre by theatre; feature by feature; solely upon the merits, and without discrimination as between the competing theatres, whether in favor of a theatre in which any other defendant has an interest; of a circuit theatre, of an old customer, or of any person whatsoever. In determining which of two competing exhibitors is entitled on the merits to the license for a particular feature for his theatre, the distributor defendant shall take into consideration the following factors, among others, and accord to them the importance and weight to which each is entitled regardless of the order in which they are listed.

[fol. 3790] (1) The film revenue which the distributor defendant will derive from each theatre for the exhibition of such feature on the run in question, and upon the terms offered by the exhibitor. In estimating such film revenue, the distributor defendant should take into consideration, among other things:

The number of days for which and the particular days of the week or year or other playing arrangements upon which each exhibitor plans to play the feature; the character, location and size of each theatre; the type of entertainment which each exhibitor intends to present with the feature involved and which the exhibitor in the past has customarily offered the public; the appointments and equipment of each theatre; transit facilities; the admission prices of each theatre as set by each exhibitor for the period of the exhibition of the feature; the distributor defendant's actual experience with each of the exhibitors in fulfilling its obligations in past contracts; each exhibitor's reputation generally in the industry and in the community for honesty, fair dealing and showmanship; and the financial responsibility of the exhibitor operating each of the theatres involved.

[fol. 3791] (2) The comparative suitability of the theatres for the advantageous exhibition of the distributor defendant's feature on the run in question; and

(3) The effect which the exhibition of the feature in each of the theatres would have upon other exhibitions of the feature.

7 (b) From refusing to license its features for exhibition in an exhibitor's theatre on some run (to be desig-

nated by the distributor) upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of this subdivision 7 (b), if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the defendant distributor's total film revenue in the competitive area in which such exhibitor's theatre is located.

C. Arbitration Under Section II 7. (a)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has failed to comply with the provisions of Subdivision 7 (a) of Section II of this Decree shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the arbitrator finds in favor of the distributor defendant, he shall dismiss the complaint.

[fol. 3792] If the arbitrator finds that the distributor defendant has arbitrarily refused to license the feature or features to the complainant on the run requested, and has instead licensed it or them to a competitor of the complainant on such run, he shall make an award against the distributor defendant, which award shall not affect any license to exhibit any features then under license to the complainant's competitor, but shall direct the distributor defendant thereafter in good faith to afford the complainant as well as such competitor the opportunity to negotiate for such run of any features thereafter released by the distributor defendant, for exhibition on such run, for which they desire to negotiate, and the arbitrator may in addition, in his discretion, direct the distributor defendant to pay to the complainant his actual pecuniary loss resulting from the distributor defendant's failure to comply with sub-division 7 (a) of this Section II, which damages shall be in the sum of not less than $100 nor more than $5,000.

After a final award in favor of a complaining exhibitor has been made under this section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who made the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor defendant

against which it was entered, and in any such proceeding, if the arbitrator shall find that the distributor defendant has not complied in good faith with the original award, [fol. 3793] he may award further damages to the complaining exhibitor for his actual pecuniary loss resulting from the defendant distributor's failure to comply with the original award, which damages shall not be less than $100 nor more than $5,000.

An exhibitor shall have no right to assert such claim unless the arbitration shall be commenced within thirty (30) days after the refusal constituting the claimed non-compliance with Subdivision 7 (a) of this Section II.

D. Arbitration Under Section II 7 (b)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 7 (b) of this Section II, shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the Arbitrator finds in favor of the distributor defendant, he shall enter an award dismissing the complaint.

If the Arbitrator finds in favor of the complainant, he shall make an award directing the distributor defendant thereafter in good faith to offer its features for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of said subdivision 7 (b) of this Section II. The burden of showing that granting a run on any terms to the complainant will have [fol. 3794] the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor defendant's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the Arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor defendant's total film revenue in said area, he shall vacate the award.

E. Election of Remedies

Any exhibitor shall be free to avail himself of the right (1) to file a complaint under the arbitration provisions of this subdivision 9 of this Section II of this Decree or (2) to pursue remedies at law or in equity, but his election of one remedy or the other as a particular controversy shall be final.

10. Nothing contained in this Decree, affording to exhibitors the right to proceed by Arbitration, as in this Decree provided, shall impair or affect the right of the plaintiff to take any proceedings which it otherwise could to enforce the provisions of this Decree or to punish wilful violation.

[fol. 3795] In the District Court of the United States

[Title omitted]

Defendant United Artists Corporation's Proposed Decree

The Court having rendered its opinion on June 11, 1946, and having duly considered the proposals of the parties as to its findings of fact and conclusions of law in accordance with said opinion wherein certain of the defendants herein were found to have violated Sections 1 and 2 of the Act of Congress, approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It is hereby ordered, adjudged and decreed as follows, as to the defendant, United Artists Corporation:

I

1. The defendant, United Artists Corporation, is hereby enjoined from granting any license for the exhibition of any picture distributed by it wherein the minimum admission prices for the public performance of said motion picture in any theatre, are fixed by United Artists Corporation and the exhibitor party to said agreement;

2. From agreeing with other distributors or with any group of exhibitors to fix or maintain uniform systems of clearances;

3. From granting any clearance in excess of what is reasonably necessary to protect United Artists Corporation's revenue from the exhibition of the picture licensed;

[fol. 3796] 4. From licensing the exhibition of any of its motion pictures in any theatres through any agent who is also acting as licensing agent for any other exhibitor, independent or affiliated.

5. From combining, conspiring or agreeing with any exhibitors or distributors to eliminate competition;

II

Provided, however, that nothing contained in this decree shall limit, impair or affect the right of United Artists Corporation to do the following:

1. To enter into distribution agreements with independent producers, wherein and whereby each independent producer retains control over the sales policy and marketing of each picture licensed to United Artists Corporation for distribution;

2. To enter into distribution agreements with independent producers, wherein and whereby United Artists Corporation grants to such independent producer the right to approve each and every exhibition license agreement solicited by United Artists Corporation from each and every exhibitor desiring to exhibit said motion picture;

3. To have the right to insert in any exhibition license agreement it may make for the exhibition of any of its pictures a stipulation by the exhibitor that the exhibitor warrants that at the time of the making of the exhibition license agreement the exhibitor charged the minimum admission prices for admission to his theatre set out in said agreement, provided there was nothing stipulated in said agreement that the exhibitor agrees to charge said price for the exhibition of the picture licensed to him or that he would continue to maintain said minimum admission prices, and, provided, further, that said agreements contained no provisions of a penalty nature in the event the exhibitor failed to charge said minimum admission prices;

4. From offering to license the exhibition rights in and to motion pictures distributed by it separately and individu-

ally in a free and open market so that the returns therefrom shall be as large as possible;

5. To have the right, separately and independently, to license the exhibition of its pictures for separate runs and with separate clearances between runs provided said runs and said clearances are negotiated with each separate exhibitor separately and independently;

6. To roadshow * upon such terms and conditions as may be fixed by United Artists Corporation or the producer of motion pictures which have a negative cost of not less than Three Million Dollars ($3,000,000), provided that United Artists Corporation may commence only one such motion picture roadshow during any consecutive twelve months' period from and after the date of this Decree (the commencement shall be deemed to be the first roadshow exhibi- [fols. 3797-3798] tion of the picture in the United States), and, provided, further, that the licensing of such motion picture when it is subsequently placed in general release shall be subject to the terms of this Decree.

7. Further, that United Artists Corporation shall have the right to license in groups of not more than six, so-called "Western" motion pictures which are released in a series, where the principal character remains the same throughout the series and where the negative cost does not exceed the sum of Two Hundred Thousand Dollars ($200,000) per Western, such as the so-called "Hopalong Cassidy" series, provided the exhibitor shall have the right to reject not more than 20% of any series whether the same be trade shown or not trade shown, as the term is understood in the business.

III

Jurisdiction of this cause is retained for the purpose of enabling either Plaintiff or Defendant United Artists Corporation or any of the parties to the Decree to apply to the Court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying

* Roadshow: A public exhibition of a motion picture in advance of its general release at admission prices higher than those customarily charged but not less than $1.00 (One Dollar) plus taxes, if any, for at least a majority of the seats.

out of the same, for the enforcement of compliance therewith and for the punishment of violations thereof, or for such other or further relief as to the Court may seem just and proper.

Entered this — day of ——, 1946.

——, Circuit Judge; ——, District Judge; ——, District Judge.

[fol. 3799] IN UNITED STATES DISTRICT COURT

[Title Omitted]

DECREE PROPOSED BY THE UNIVERSAL DEFENDANTS

The Court having rendered its opinion herein on June 11, 1946, and having filed its findings of fact and conclusions of law in accordance with said opinion wherein certain of the defendants herein were found to have violated, in the respects therein specified, Sections 1 and 2 of the Act of Congress, approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It is hereby ordered, adjudged and decreed as follows:

The petition and the amended and supplemental complaint are hereby dismissed as to Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., and Big U Film Exchange, Inc.

In the event the foregoing decree is refused, the Universal defendants propose the following decree in the alternative, without prejudice, however, to their contention that the petition and the amended and supplemental complaint should have been dismissed as against them, without acquiescing in any of the Court's findings or conclusions holding them guilty of violations of the Sherman Act, and without prejudice to their right to appeal therefrom.

[fol. 3800] I.

1. The complaint is dismissed as to the corporation named in the complaint as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to the claims made against the remaining Uni-

versal defendants which are based upon their acts as producers, either alone or in conjunction with others, including all claims based upon alleged acts of discrimination against producers.

II.

Each of the defendants, Universal Pictures Company, Inc. (formerly known as Universal Corporation), Universal Film Exchanges, Inc., and Big U Film Exchange, Inc., are hereby enjoined:

1. From performing any existing license agreement, in which minimum prices for admission to such theatre have been fixed by the licensor, and from hereafter making any such agreement with any affiliated exhibitor. In future licenses with affiliated exhibitors Universal may require the exhibitor to state the admission price it is currently charging and to warrant the truth of such statement, but the exhibitor may not be required to agree to maintain said price.

2. From carrying out any existing agreement to grant clearances, from agreeing hereafter with any distributor to fix clearances, and from participating hereafter in any system of clearances unreasonably restraining interstate commerce.

3. From granting hereafter any clearance in excess of what is reasonably necessary to enable Universal to reap the reward to which it is entitled under the legal monopolies granted to it in its copyrights.

4. From further performing any existing franchise to which an affiliated exhibitor is a party, and from hereafter [fol. 3801] entering into any franchise to which an affiliated exhibitor is a party. Universal may retain the franchises it now has with independent exhibitors and may enter hereafter into such franchises with independent exhibitors or with any exhibitor which it may hereafter own or control, as may be necessary or desirable to enable it to exploit its own motion pictures to the fullest extent, consistent with not unreasonably restraining interstate commerce.

5. From further performing any existing formula deal or master agreement with any affiliated exhibitor, and from making hereafter any formula deal or master agreement with any affiliated exhibitor.

6. From carrying out any existing license agreement with an affiliated exhibitor, and from entering hereafter into any license agreement with an affiliated exhibitor, in which the right to exhibit one feature is conditioned upon the licensing by the exhibitor of one or more other features.

7. From refusing to grant reasonable rejection rights to exhibitors in respect of pictures not trade shown. In no event shall Universal be required to grant rejection rights in excess of 10% of the features not trade shown. The right to reject any feature must be exercised within ten days after the licensee has had an opportunity to inspect it within the distributor's exchange district in which the exhibition is to be held.

The aforesaid injunctions with respect to performing existing agreements shall be permanent; those injunctions relating to future agreements shall continue in effect pending a finding of this Court that the effects of the combination and conspiracy, found herein to have been participated in by said defendants, have been dissipated.

III.

Nothing contained in this decree shall be deemed to apply to the leasing or otherwise contracting for the temporary use of a theatre for the road showing of a particular feature.

[fol. 3802]

IV.

Nothing contained in this decree shall apply to operations or activities of any defendant outside of the Continental United States or to operations or activities of any defendant within the Continental United States in so far as they relate to the distribution or exhibition of motion pictures outside of the Continental United States.

(Footnotes 2 through 7, 9, 12 and 13 of the decree proposed by the major defendants, which define the terms, "feature", "exhibitor", "clearance", "franchise", "formula deal", "master agreement", "trade-shown", "road-show" and "continental United States", are hereby incorporated by reference. The term "independent exhibitor" means an exhibitor which is neither a defendant exhibitor in this action nor a subsidiary of a defendant (other than a Universal defendant) nor is controlled by a

defendant (other than a Universal defendant) through stock ownership. The term "affiliated exhibitor" means an exhibitor which is a defendant exhibitor in this action, or a subsidiary of a defendant (other than a Universal defendant), or an exhibitor which is controlled by a defendant (other than a Universal defendant) through stock ownership.)

V.

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained [fol. 3803] in this decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VI.

Jurisdiction of this cause is retained for the purpose of

(a) enabling the plaintiff or any Universal defendant to apply to this Court at any time for such orders and directions as may be necessary or appropriate for the interpretation, construction, application or carrying out of the decree, for the enforcement or compliance therewith and for the punishment of willful violations thereof;

(b) enabling the plaintiff or any Universal defendant to apply to this Court at any time to modify or to set aside the decree or to take further proceedings in the event that it should appear that the operation of this decree has failed to bring about a correction of the violations of the Sherman Act hereby found to exist and which are the basis of this decree;

(c) enabling any Universal defendant to make any application to this Court provided for in this decree including any application to enlarge its time to do or refrain from doing any act required by this decree or to be relieved from any requirement of this decree upon the ground that special circumstances exist which would make enforcement of such [fols. 3804-3805] requirement inappropriate, oppressive, unduly burdensome or otherwise inequitable;

(d) enabling any Universal defendant to apply to this Court at any time to modify or set aside, as to such defendant, the decree or any modification thereof or to vacate or modify, as to such defendant, any provision thereof upon the ground that under the economic, competitive or other conditions existing at the time of such application (regardless of whether or not such economic, competitive or other conditions are new or unforeseen), the decree or any modification thereof or any provision thereof, as applied to such defendant is inappropriate or unnecessary or oppressive or unduly burdensome.

VII.

Whenever in this decree a defendant is required to do an act within any period of time after the date hereof such period of time shall commence upon the date when the decree becomes final either by the expiration of the time within which to appeal therefrom without any appeal being taken or, in the event of an appeal, from the date when a final decree is entered herein upon the mandate of the Supreme Court.

VIII.

The effective date of this decree shall be stayed pending appeal.

Entered this — day of ——, 1946.

—— ——, Circuit Judge; —— ——, District Judge; —— ——, District Judge.

[fol. 3806] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF COLUMBIA PICTURES CORPORATION ON FINDINGS AND DECREE—September 10, 1946

Jurisdiction of this Court is Limited

This is not a consent decree. At the outset, Columbia wishes to make perfectly clear that it consents to nothing in this decree.

We believe that it is the sole function of a Federal Court of Equity in a suit of this kind to enjoin the defendants only from continuing to do those acts which are in violation of the Sherman Anti-Trust Act. It is not the function of such Court to regulate an industry, to police it, and to force the defendants and others in the industry to adopt a given system of regulation and restrictions, particularly where the industry rests basically upon copyrights.

[fol. 3807] Since this Court has condemned block booking, we believe (without conceding the correctness of its position) that it should limit its Decree to an injunction against block booking. For this Court under the proposed Decree to define the methods by which pictures shall be sold—putting them on the auction block with an upset price, the giving of trade shows, limiting the defendants to their choice of customers and either directly or indirectly forcing them into an arbitration—is, we believe, beyond the jurisdiction of this Court.

The proposed provisions that have been coming down this Summer, both from the five producer-defendants and from the Government with respect to the method of sale of pictures, have clearly been beyond this Court's jurisdiction. In addition to the fact that they call for a species of regulation and policing, those provisions in the five major companies Decree resolves themselves into an attempt to force the three minor defendants into an arbitration system, although the Court itself has said in its opinion that it has no power to compel arbitration. This defendant unequivocally opposes any attempt to submit to arbitration.

The Decree proposed by the Government provides not only for injunctive relief, but the Court is asked by definition and exception to define the things which defendants may actually do, so that in effect and for all practical pur-

poses the Court is asked to make a mandatory decree of regulation and policing. This defect is inherent throughout the entire Government Decree. It applies particularly to Section II, Clause 8.

The same defect in our opinion applies to Clause II, Subdivisions 7, 8 and 9 of the Decree proposed by the five producer-exhibitor defendants. We believe that each distributor should be permitted to sell its pictures in any way it sees fit, providing it does not violate the injunction against block booking. To provide for a system, as proposed by the Government and the five producer-exhibitor [fol. 3808] defendants, of a uniform method of selling, of publicity with respect to prices, of compelling a sale by auction, etc., is an attempt to *regulate* an industry which is not on an equal footing with respect to the theatre market, each of the five producer-exhibitor defendants controlling a partial market of its own.

Moreover, the proposed method of putting pictures on the auction block, trade—showing them, and compelling sale to the highest bidder, is an unwarranted interference with the *monopoly* inherent in Columbia's copyrights.

Judge Stephens of the District Court, District of Columbia, held in no uncertain terms that the Sherman Act could not impinge upon the monopoly granted to the owner of a patent (*U. S.* v. *U. S. Gypsum Co.*, 70 U. S. Pat. Q. 49). After discussing various cases, particularly the General Electric case and the Bement case, the Court said, p. 75:

> "The patent law and the Sherman Act exist side by side, each being entitled to full recognition and application by the courts."

And in discussing the rights of the patent owner, Judge Stephens cited *Hartford-Empire Co.* v. *United States*, 323 U. S. 386. He pointed out particularly (p. 76) that Judge Dickinson in the Motion Picture Patents case had stated that the monopoly recognized by the patent law was not the monopoly condemned by the Sherman Act.

The monopoly of copyright stands on the same footing with the monopoly of patent; both monopolies are granted pursuant to Article I, Section 8 of the United States Constitution.

If we turn to the Copyright Act we find that the copyright proprietor's exclusive right to vend the work is unrestricted. We are not now talking of combinations, we

[fol. 3809] are talking of the individual copyright proprietor. This record was without a scintilla of proof that Columbia in granting a license to an exhibitor for a group of its pictures acted in concert with any other distributor. Moreover the proposed Decree has broken down whatever conspiracy was claimed to exist, and it assumes that Columbia will license its pictures to exhibitors alone and not in conspiracy with others. Consequently, Columbia is licensing a copyright alone and *not in conspiracy with others*, and under the proposed Decree the restrictions placed upon the licensing of that work are inconsistent with and destroy the exclusive rights granted under the Copyright Act.

The Decree creates a *compulsory license*. In the Copyright Act the only compulsory license provided for is that with respect to mechanical reproduction of musical compositions, for which the manufacturer is required to pay a royalty of two cents per record to the proprietor. There is no other compulsory provision in the Copyright Act. So far as we have been able to ascertain, that was the first compulsory licensing provision in any Act in the United States.

The proposed Decree, however, imposes *new* compulsory provisions. Although under the Copyright Act the proprietor (Columbia) may license whomever he pleases, he is required under the Decree to license only the highest responsible bidder. Although under the Copyright Act the proprietor (Columbia) may license his work for any kind of a showing or run, he is limited under the proposed Decree in licensing upon a first run to a theatre deemed adequate for that purpose.

Whereas under the Copyright Act the proprietor (Columbia) may license his work to an old customer, just because he is an old customer, he is prevented by this Decree from doing so. Although under the Copyright Act there is no restriction upon the proprietor (Columbia) in the [fol. 3810] *number* of copyrighted works which it may license at one time, the Decree restricts the licensing of pictures to theatre by theatre and picture by picture. It is clear that the proposed Decree impinges upon Columbia's copyrights and its monopoly in those copyrights.

The Supreme Court has quite recently (1944) held that a decree under the Sherman Anti-Trust Act cannot do this. (See *Hartford-Empire Co.* v. *United States*, 323 U. S. 386). In that case the decree contained provisions in paragraphs

21, 22, 23 and 24(a) which forbade any disposition or transfer of patented machinery other than by an outright sale; and it required Hartford to offer in writing to sell each of the present licensees of the machinery then under lease at a reasonable price to be fixed, any dispute to be settled by the Court. When the defendants attacked those provisions the Government replied that they were intended only to prevent defendants from setting up patent pools and monopolizing the patented inventions. The Court held that the District Court should have limited itself to enjoining the defendants from setting up such pools, but that it went far beyond that. It said (p. 413):

> "But the decree as entered requires that each of the defendants must hereafter forever abstain from leasing a patented machine, no matter what the date of the invention, and compels each of them if he desires to distribute patented machinery to sell the machine which embodies the patent *to everyone who applies, at a price to be fixed by the court.* The injunction as drawn is not directed at any combination, agreement or conspiracy. *It binds every defendant forever irrespective of his connection with any other or of the independence of his action.*" (Emphasis ours.)

It held that these provisions were confiscatory (p. 415). "If," it said, "as we must assume on this record, a de- [fol. 3811] fendant owns valid patents, it is difficult to say that, however much in the past such defendant has abused the rights thereby conferred, it must now dedicate them to the public." It held that a patent was property protected against appropriation both by individuals and by the Government, and that this was well settled law. At (p. 415):

> "In recognition of this quality of a patent the courts in enjoining violations of the Sherman Act arising from the use of patent licenses, agreements and leases, have abstained from action which amounted to a forfeiture of the patents."

In another paragraph of the decree, 24(b), the Court pointed out that a defendant hereafter acquiring a patent was not permitted to set the price for its use by others, or elect to use it himself, or refuse to license it or to retain it and neither use nor license it: "These," it said, "are options patent owners have always enjoyed" (p. 417). And

it pointed out that since 1877 Congress had been asked frequently to adopt a system of compulsory licensing of patents, but that it had consistently failed to enact these proposals into law. It said (p. 417):

> "It (Congress) has also rejected the proposal that a patentee found guilty of violation of the anti-trust laws should be compelled as a penalty to license all his future inventions at reasonable royalties."

The result of the decision was that paragraphs 21, 22 and 23 were eliminated from the decree, and paragraphs 24(a) and 24(b) modified. It is quite clear that the Court respected the patent monopoly enough to strike from the decree those portions of it which it felt impinged upon that monopoly, and that it regarded those provisions inserted by the Government as purely a scheme for compulsory licensing.

[fol. 3812] Since such is the holding of the Supreme Court, we believe that in this Sherman Anti-trust suit the relief should be limited to injunction. It cannot extend so far as to constitute a system of regulation for the future. The recent opinion of Judge Goodrich in *U. S.* v. *Pullman Company*, 50 Fed. Supp. 123, p. 136, is appropriate:

> "The Court's conclusion being that there has been a violation of the Sherman Act the final question is the equitable relief to be had in this suit. Counsel for the plaintiff have repeatedly suggested that in case of a finding of violation, the questions concerning relief might be referred to a master or one of the regulatory commissions to hold hearings at which exports, governmental or private, could state their views regarding proper organization of the business of passenger transportation in the United States. The Court is not inclined to view favorably so ambitious a program. *It does not regard itself as a legislative committee nor a regulatory commission.* A law suit has been brought, factual and legal conclusions reached and the relief to be afforded should be that which the Court can both understand and apply."

Block Booking

Columbia believes that the proposed findings submitted by the Government with respect to block booking are

totally inadequate and do not even begin to summarize the facts which were developed on the trial. We respectfully ask the Court to make some additional Findings of Fact which we believe were based upon the uncontraverted evidence. In addition to Findings on Block Booking, Columbia presents various other Findings which it believes are borne out by the Record. In these proposed Findings we refer the Court in many instances to the printed pages of the stenographic minutes, where the uncontradicted and unimpeached evidence supports such findings.

[fol. 3813] Additional Findings

1. In the early stages of the industry producers sold their pictures by the State Right method, both in the United States and throughout the world (1732-3). This was an uncertain operation and failed to give satisfactory revenue to the producers, and in the early 1920s the producers of pictures began to sell their pictures in blocks of a season's product in advance (1733-4). Columbia embarked on that system of distribution in 1929 and was compelled thereby to finance itself to the extent of a million dollars (1734-5). It has sold its pictures continuously since then in blocks of all or part of the season's product in advance (1735). All of the other distributing companies have sold their pictures in the same manner, except that the defendants, RKO, MGM, Twentieth Century-Fox, Warner and Paramount began to sell their pictures in blocks of five on the entry of the consent decree herein.

2. The exhibitors know fairly accurately what they purchase from Columbia when they buy its pictures in block at the beginning of each season. They know it from the history of the company, the type of releases it has, and because Columbia describes as adequately as possible its prospective pictures by title, by story and by stars (1736-7).

3. There is no such thing as blind selling (1812), and there is no proof in this record that any exhibitor in entering into a block booking contract with Columbia was misled with respect to the product or that he did not know what kind of pictures he was getting or that he was at any disadvantage by reason of such block booking contract (1736, 1759, 1812-3), and pictures are sold today as they always have been, on the star, the story, the director and similar elements (1630-3).

[fol. 3814] 4. During the period in question every agreement or contract by Columbia granting an exhibition right was in the nature of a limited exclusive right granted to a theatre owner—first the physical possession of a positive print, a tangible piece of property and second, the intangible right of license to publicly perform in his theatre the copyrighted subject contained in the positive print with no right to assign that performing right to anybody else; that the right was limited to exhibit or publicly perform said copyrighted work only in the particular theatre or theatres listed in the contract for the specific number of days included in the contract, with no right to lease or sell or in any way dispose of any part of the tangible property or print to anybody else, and with a further condition that when the public performance was completed under the contract, the print was to be returned to Columbia's exchange.

5. During the period in question Columbia did not sell or part with the title to any of the positive prints of any of the motion pictures distributed by it to any of the exhibitors exhibiting its motion pictures in the United States of America.

6. During the period in question Columbia, through its selling or licensing organization, solicited the various exhibitors of motion picture photoplays, in the United States of America, and tried to secure from said exhibitors exhibition license agreements under the terms of which said exhibitors would agree to exhibit all of the Columbia photoplays or a part of the Columbia photoplays, or any part of the Columbia photoplays that were available for exhibition for some run in said exhibitors' theatres.

7. During the period in question Columbia did not condition the licensing of any photoplay in any exhibitors' theatre upon that exhibitor's agreement to license other Columbia photoplays for exhibition in said theatre.

[fol. 3815] 8. During the period in question Columbia licensed the exhibition of its pictures both to the so-called affiliated theatres and independent theatres on flat rental terms, percentage terms and guarantee against percentage terms.

9. During the period in question Columbia licensed its pictures for exhibition to both affiliated and independent

theatres on so-called "selective" contracts and did not discriminate in favor of affiliated against independent theatres, and granted not only the same rights of selection to both affiliated and independent theatres but granted greater selectivity to the independents.

10. During each of the years in question in excess of 600 feature photoplays were generally released in the United States of America, exclusive of so-called foreign made films. That Columbia releases during the same period equalled a comparatively small number of feature photoplays generally released in the United States each year including top features, features of lesser merit, Westerns and shorts; that at no time during said period did Columbia monopolize or attempt to monopolize or had it the power to monopolize the distribution market in the United States of America, or any section thereof.

11. In order to secure as much revenue as possible from each picture Columbia licensed its pictures on these runs with variant time intervals between each run which time intervals are generally referred to in the business as "clearance periods."

12. In many of the contracts in evidence the clearance provisions are set out in the contract; in many others there are no provisions for clearance.

13. The nature, extent and area of clearance in every Columbia contract was a matter of separate negotiation [fol. 3816] between Columbia and the other contracting party, or may have been arrived at as the result of a decision of the Board of Arbitration, or the Appeal Board operating under the Consent Decree to which Columbia was not a party, or may have been a clearance period that had been recognized in the trade as reasonable and had been in existence a long period of time, or may have been the result of a Board of Arbitration operating under the N.R.A., or may have been a clearance that had been originally negotiated between Columbia and the operator of the theatre some years back and was not expressed in the contract in writing but was generally understood between the contracting parties as the clearance that was to be given under the particular negotiation.

14. Columbia granted clearance not only to protect the revenue of the exhibitor but also to protect the revenue of the distributor and the producer of each and every motion picture released by Columbia during the period in question and whenever and wherever it granted clearance.

15. That by licensing separate runs and making separate runs available to all types and classes of theatres, charging all types of admissions, Columbia made it possible, during the period in question, for the largest number of theatres to exhibit its pictures on all types and variants of film rental so that the largest portion of the public was able to see the pictures distributed by Columbia during said period.

16. That by so doing Columbia secured the widest flow in Interstate Commerce of the positive prints distributed by it during the period in question.

17. There is no proof in this record that Columbia granted to any large theatre circuit any unreasonable [fol. 3817] clearance or unjustified prior runs for any of their theatres.

18. In some of the contracts in evidence Columbia included a provision which fixed the admission price that the exhibitor would charge any member of the public paying an admission fee to view the exhibition of Columbia's pictures in some of the theatres to which Columbia licensed its pictures. The admission prices inserted in said agreement were the prices then charged by the exhibitor at the time the exhibition license agreements were negotiated between the respective exhibitor and Columbia for the showing of Columbia pictures in the theatre in question.

19. The insertion of this admission price provision was for a two-fold purpose, one, to guarantee to Columbia that if it sold on a percentage basis that its percentage would be based upon a fixed admission price, or if it sold on a flat rental that the intake from the engagement would be sufficient to guarantee payment of the flat rental stipulated; two, to protect each and every exhibitor playing these Columbia pictures subsequently to the first exhibitor against the practise of the first exhibitor reducing ad-

missions either to the level or below the level of the subsequent run theatres.

20. That whenever any admission price provision was inserted, as aforesaid, in any contract, the insertion was the result of independent and separate negotiation between each exhibitor and Columbia without consultation of any kind or character with any other distributor or exhibitor.

21. That if any similarity in admission prices in any of the Columbia exhibition license agreements to any of the admission prices in any other distributor's exhibition [fol. 3818] license agreement occurred, it was due wholly and solely to the fact that the admission prices stipulated by the exhibitor in the contract were the admission prices which prevailed at the time, and which the exhibitor charged regularly at his theatre to any person desiring to see pictures in that particular theatre. At no time during the period in question did Columbia make any license agreements with any exhibitor fixing the resale price of any of the tangible property licensed to any of the exhibitors.

22. The course of conduct of the defendant, Columbia, during the period in question, was to license its product for first run or any run open to independent exhibitors either operating in competition with the defendant exhibitors or not in competition, including the key cities in the United States having a population of 100,000 or over, wherever independent exhibitors operated theatres.

23. In conducting its business of distributing motion pictures and making exhibition license agreements during the period in question, Columbia conducted all its negotiations and made all its contracts, whether with independents or affiliated exhibitors, or unaffiliated circuits, without any intent, purpose or effect to bring about a monopoly in the distribution or exhibition business, or to unduly restrain Interstate Commerce, but merely licensed its product in the market the way it found it, and with the sole purpose and intent of receiving the maximum amount of revenue legitimately possible for all pictures distributed by it.

24. The trade shows which have been introduced by the defendants, RKO, MGM, Twentieth Century-Fox, War-

ner and Paramount under the Consent Decree have been very poorly attended by exhibitors (1632-3), who apparently do not require them for the purpose of familiarizing themselves with the product of the respective distributors.

[fol. 3819] 25. Columbia owns no theatres and may not look to such sources for its market. Other companies which sell their pictures by block booking and which own no theatres are Universal, Republic, Monogram and Producer's Releasing Corporation.

26. The method of selling pictures by block booking eliminates to some extent the hazard and gamble involved in producing pictures. In 1928-9 Columbia spent $1,632,300 in production; in 1944-5 it spent (estimated), $16,689,700 (Exhibit C-2). It could not have increased its budget and spent these moneys unless it had the assurance of a ready market which only block booking has given it, and block booking is vital and necessary to Columbia for its continued existence as a producer (1737). To sell pictures singly Columbia would have to change its whole financial base, it would have to obtain moneys by way of refinancing or stock issue to sink into an inventory and keep the same on the shelf for a period of time; whereas block booking enables Columbia to turn over its pictures rapidly and to put its money back into the production of pictures quickly (1737). To sell pictures singly means to freeze Columbia's capital so that it would require more capital with which to operate, and that Columbia could not very well do (1754).

27. If Columbia has to sell pictures singly it will have to go through many more sales campaigns each year and increase its personnel, all at a substantial increase in overhead (1749-50). The exhibitors throughout the country generally have accepted block booking as an advantageous form of purchasing pictures and they desire to continue to purchase their pictures by block booking, as it gives them an assurance of product (1737, 1760, 2018); and exhibitors ever since the Consent Decree have demanded the restoration of block booking with respect to the defendants, MGM, RKO, Twentieth Century-Fox, [fol. 3820] Warner and Paramount and have voiced great dissatisfaction in their conventions and meetings with the sale of pictures in small blocks of five or less (1761-3,

1789-91). There is no proof in this record that block booking violates the Sherman Act or that it is in restraint of trade or commerce.

28. Columbia and Universal under their respective contracts (2019) give a substantial degree of selectivity to their exhibitors when they sell their pictures in block (2017-8) and they give a greater degree of selectivity to the independents than to the affiliated exhibitors (1750). In this manner the exhibitor is protected against having bad pictures foisted upon him.

29. Columbia gives film rental adjustments to all of its exhibitor customers, and in fact, gives greater adjustments to independents than it does to affiliates (1757).

30. A great deal of Columbia's product is sold to the great mass of theatres in small towns on double features (1758).

31. Block booking has been a common method of selling pictures; it reduces selling expenses, but does not freeze pictures and inventories, and keeps them moving off the shelves as rapidly as they are produced; it creates a ready market for the producers and enables them to invest their capital with some reasonable hope of recoupment; and is a form of selling which the exhibitors desire to continue, as it assures them a ready market (2018) and relieves them of the burden, time and expense of making individual deals for each picture which they exhibit. There is no proof in this record that any exhibitor was ever hurt or injured in his business or property by reason of block booking.

[fol. 3821] 32. No exhibitor took the stand and testified with respect to block booking.

33. The abolition of block booking in this industry places Columbia at an economic disadvantage as against all other producers of motion pictures who own theatres, because the defendants who own theatres have a ready market for their pictures and may to some extent reduce the gamble and hazard of production, whereas defendant, Columbia, and other producers similarly situated have no ready market, so that in effect the abolition of block booking sought by the Government is a plain case of discrimination in favor of the defendants herein who

own their own theatres, and far from freeing the market for competition, the net result will be just the opposite.

34. Block booking has been found to be a perfectly legal practice by the courts in *Westway Theatres, Inc.* v. *Twentieth Century-Fox Company, Federal Trade Commission* v. *Paramount*, and *United States* v. *Crescent* and there is no decision by the Supreme Court which has ever condemned it.

Conclusions of Law

35. The combination or conspiracy alleged in the Complaint as to Columbia has not been established. The Columbia did not at any time during the period involved in this case, combine with the other defendants or any of their affiliates unreasonably to restrain Interstate trade or commerce in motion picture films or to monopolize or attempt to monopolize the distribution of motion picture films in the United States of America.

36. A Decree should be entered herein dismissing the complaint against Columbia.

[fol. 3822] Arbitration

Defendant, Columbia, cannot enter into any arbitration plan or scheme as suggested by the opinion and by the Decree proposed by the five major defendants.

Readjustment Period

With respect to master agreements or franchise agreements, Columbia respectfully asks that this Court grant it until at least January 1st, 1947 in order to abrogate these agreements. It will need that time as a minimum.

With respect to readjusting itself to selling pictures singly, Columbia will require at least a year from July 1st, that is to say, until July 1st, 1947, in order to give itself an adequate supply of pictures and create an inventory, and particularly in order to finance itself for that purpose. While the Government has consented to January 1st, 1947, we feel that that is insufficient, and the Government is somewhat arbitrary in seeking to compel Columbia to go into this new method on such short notice. The few months additional that Columbia seeks can in no wise impose any hardship upon the industry, because block booking, after all, has been a uniform business prac-

tice in the industry for over twenty years, and no reason exists why Columbia should be penalized under these circumstances. We ask that somewhere in this Decree there should be an automatic provision for this extension period for readjustment with respect to the matters outlined hereinabove.

Blind Selling

Cancellation privileges or selectivity in such cases should be limited to not more than twenty per cent., instead of twenty-five per cent., as proposed in the opinion of the Court. We think that the percentage should be reduced so as to give defendant, Columbia, and other producers similarly situated some protection against having a great deal of their pictures thrown back at them.

[fol. 3823] Booking Combines

We should like to have the Court insert somewhere in its Decree a provision enjoining *all* the defendants:

> "From offering films for license in the future to any agent who is acting for any group of exhibitors, independent or affiliated, in which he has no proprietary interest."

While the Decree as presently proposed by the Government may be open to the construction that booking combines throughout the country cannot impose their restraints upon these defendants under the proposed method of selling picture by picture and theatre by theatre, we think that there is too much ambiguity in the Decree at present with respect to the above situation. The evidence clearly shows that in addition to the affiliates there are unaffiliated circuits and even booking combinations throughout the country. No reason exists why they should have any special immunity. It is therefore requested that the above provision in the Decree be inserted so that it will catch them.

Respectfully submitted, Schwartz & Frohlich, Solicitors for Defendant Columbia. Louis D. Frohlich, Arthur Schwartz, Irving Moross, Max H. Rose, of Counsel.

Dated, New York, September 10th, 1946.

[fol. 3824] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL MEMORANDUM OF COLUMBIA PICTURES CORPORATION ON FINDINGS AND DECREE—October 16, 1946

The Government served its proposed decree on October 7, 1946, in which it has further sought to restrict the selling of motion pictures by the defendant distributors. Columbia takes exception particularly to paragraphs 8, 9 and 10 of Section II. These paragraphs read as follows:

"8. From performing or entering into any license in which the license to exhibit one feature is conditioned upon the licensee's taking one or more other features. Licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade shown prior to the granting of the licenses for more than a single picture, the licensee shall be given, by [fol. 3825] the licensor, the right to reject 25% of such pictures not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within 10 days after there has been an opportunity afforded to the licensee to inspect it.

"9. From licensing any film more than *six months* in advance of its release.

"10. From offering films for license in the future for exhibition in any theatre not its own in any manner except the following:

(a) A license to exhibit each film released for public exhibition shall be offered upon *reasonable terms* for some run to the operator of each theatre which desires to exhibit it;

(b) Where a run is desired upon terms which exclude simultaneous exhibition in competing theatres, it shall be offered to the competing exhibitors involved having a theatre adequate to show the

picture upon such a run and granted to the highest responsible bidder, provided that such exclusive run does not unreasonably restrict competition in the area covered.

(c) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatsoever;

(d) Each license shall be offered and taken theatre by theatre and *picture by picture;* and

(e) Each license shall specify a *date of availability* of a print for the run licensed and provide that such run shall commence *within 30 days* after such availability.

Attention is called to paragraph 8, where the exhibitor is given the right to reject 25% of pictures not previously [fol. 3826] trade shown. In our earlier memorandum we called the Court's attention to the fact that this percentage was too high, and should in no event exceed 20%. We believe that the distributor is entitled to as much protection as the exhibitor, and giving the exhibitor that substantial rejection right practically places the distributor at his mercy and can result in nothing less than reduced production, which neither Columbia nor the Government wants. Apparently the Government seeks to encourage production so as to make the greatest number of pictures available to exhibitors, particularly independent exhibitors. In the interests of increased production and availability of pictures to the greatest number of exhibitors, we believe that this percentage should be reduced to at least 20% at most, and if possible, to a smaller percentage.

In any event, it is the smaller companies like Columbia which will be adversely affected by so substantial a percentage as 25%. It is these companies which produce a great proportion of the second feature pictures; this percentage penalizes them in favor of the five major defendants, who, since the Consent Decree, have been selling upon the basis of trade showing, and will in all probability continue to do so.

Paragraph 9, which seeks to prohibit the licensing of a film more than six months in advance of its release, is an unfair and burdensome provision injected at the last moment by the Government, (it did not appear in the former

draft of the decree) and is thoroughly inconsistent with the provisions of the proposed decree and of the opinion, which permits distributors like Columbia to sell their pictures in blocks, providing each picture is sold on a separate basis. Clearly, under the opinion and the proposed decree, Columbia is permitted to sell its season's product providing each picture is sold separately, bargained for separately, priced separately and competitive bidding has been had separately. [fol. 3827] Of what earthly use is that provision to Columbia if it must come within the restraint of this six months' provision? Pictures take a considerable time in the making, there are delays in production; it is impossible sometimes to secure the proper artists; stories have to be rewritten; all sorts of elements arise that delay production, and as a result it is impossible to foretell with any degree of accuracy when a given picture will be released. That is the experience of the entire industry, and the Government is well aware of it. It pretends that it needs the six months' provision in order to prevent pictures being kept off the market, and potential competitors given an opportunity to bid for the product. That is a complete sham, because each competitor has already had an opportunity to compete for each of these pictures. Consequently, this is nothing but an indirect attempt on the part of the Government to take away from Columbia its right to sell all of its product at the beginning of the season, and to make it impossible to carry out what the Court is willing to grant and what the Government itself has not complained of.

Moreover, this clause places Columbia in a very disadvantageous economic position as against the Big Five. Those companies have large inventories of pictures; they have had many artists and directors under contract, and they made a great many pictures which are on the shelves ready to be released. As previously pointed out, Columbia is not in that favorable position. It has not had the capital to build up a large inventory, so that it cannot compete with the Big Five regardless of the additional advantage which the Big Five have with their own theatres.

In addition to these elements, this clause would require Columbia to embark upon a system of exploitation which is burdensome and expensive; it would have to double its selling campaign and its costs of exploitation; and the same holds true of every little producing company. Consequently, it becomes apparent that the Government by the insertion

[fol. 3828] of this provision, is either knowingly or unknowingly placing a terrific burden upon the smaller companies, and advantaging the Big Five with their huge inventories and capital investment.

Paragraph 10, Subdivision (b), is bad for the reason that it is unclear, vague and indefinite and is susceptible of many conflicting constructions. Particularly bad is the provision that an exclusive run must not unreasonably restrict competition in the area covered. In other words, Columbia on the one hand is given the right to grant an exclusive run to the highest bidder in a given territory. On the other hand, Columbia is required now to ascertain whether by giving the exhibitor such exclusive run it is unreasonably restraining competition in that area. How may Columbia determine that, particularly in a large city where there are four or five hundred theatres, like New York City? What is the area which is covered, and how is Columbia to determine whether the giving of that run for that picture in that area will restrain competition? This clause simply places a distributor like Columbia at the complete mercy of the Government, which may come in every day in the week and claim that Columbia has violated the decree. We think that that is an extremely loose clause and would result in making it impossible to license anyone for an exclusive run in an area except at the extreme hazard of being charged with violating the decree. In other words, the Government is indirectly seeking to prevent the granting of licenses for an exclusive run, which has been one of its avowed aims. It hopes to accomplish this by placing Columbia, for one, at the Government's mercy in every area where there are substantial competing theatres for an exclusive run.

Furthermore, as a practical matter, all exclusive contracts restrain competition to some extent and the line between reasonable and unreasonable restraint is so nebulous that it is unfair to make a distributor judge, at his peril, [fol. 3829] where the line is drawn, particularly in cases like this where Columbia has many thousands of contracts in competitive areas each year.

Moreover, the practical result of operating under this section might be that Columbia would be compelled to accept less money for its pictures, because it might have to turn down the highest bidder.

The Government pretends that it wants auction block selling, but it ties a long string to it which practically pre-

vents Columbia from selling to the highest bidder, except at its own peril. That situation is one that should not be tolerated. If there is to be auction block selling, let's have auction block selling and not a pretended selling; at least let us have such selling without any unfair restrictions placed upon it.

Moreover, every exhibitor in the territory is at least entitled to *some* run, as provided in paragraph 10, Subdivision (a). If Columbia gives one exhibitor the first run, the competing exhibitor, who has not bid high enough, is still entitled to get a subsequent run and can bid for that. Therefore, it is unnecessary to put in the restriction which is contained in the provisio at the end of Subdivision (b).

Paragraph 10, Subdivision (c)—Under this paragraph apparently all that Columbia could consider would be the price as bid between the competing theatres. We believe that price should not be the only criterion upon which to base a license. There are other criteria of even greater importance. Some theatres by their prestige, location, clientele and showmanship enhance the value of a picture, and give it prestige and standing which result ultimately in greater income throughout the particular territory, as well as in the country. Some theatres would hurt the prestige of the picture. Why shall not Columbia, at least, have the privilege of protecting its revenue on an overall basis by giving consideration as well to those elements in addition to the actual price bid?

[fol. 3830] Paragraph 10, Subdivision (e) is an impracticable provi on. It is utterly impossible to make a contract with an exhibitor for a second run or a subsequent run under this clause because there is no way of telling in advance when the first run will be sold, or having been sold, when it will be over. The actual opening date of a first run can never be fixed with any certainty, because the theatre may be holding over a prior picture on an extended run, and cannot be in a position to take the first run until that prior picture has exhausted its run. That may take weeks and weeks, and frequently does take such period of time. Consequently, this clause would limit Columbia to making only first run contracts for obviously it may not make contracts for second or subsequent runs until the first run picture has been played and the run completed. That seriously cripples Columbia's operations, and would cause endless confusion. It would make it impossible to have an orderly exploitation

of the picture with first and subsequent runs in any given territory, because no one can ascertain what the date of availability would be for subsequent runs.

Moreover, this clause would as a practical matter destroy all clearances, because regardless of the amount of clearance given, whether reasonable or unreasonable, any subsequent run theatre would be entitled to play the picture within thirty days after the date of availability for the run licensed. Inasmuch as the Court in its opinion has declared that reasonable clearance is legal and may still be given by distributors, and the Government has also concurred and acquiesced in that position, we believe that this subdivision (e) is of no purpose and can help nobody, except to completely confuse all proper clearance arrangements which will be entered into.

Section VI—Paragraphs 8, 9 and 10 of Section II are under this clause made operative January 1st, 1947. We again urge that Columbia should be given at least until [fol. 3831] July 1st, 1947 within which to bring itself within the new and radical change in its selling operations.

It had been contemplated, as we understood it, that there would be some agreement between the Government and the defendants with respect to the form of decree. That apparently is a forlorn hope. We are now down towards the end of October. The decree may not be signed for a few weeks. That would give Columbia only four or five weeks within which to change its method of operation, and to attempt to obtain some backlog or inventory with which to operate. It is impossible to do that within this short period of time. The period down to July 1st is an absolute necessity to prevent this company from being hurt by this change of condition, and we think the Government has been rather arbitrary and unfair in insisting on an immediate change of so radical a nature on such short notice.

We believe that the above clauses are bad, and that they are a further restriction upon the plaintiff's copyrights, and are a complete destruction of the exclusive rights which are granted to plaintiff under the Copyright Act.

We believe that this Court, sitting as a Court of Equity to enjoin violations of the Sherman Anti-Trust Act, may not as part of its relief destroy the exclusive monopoly inherent in the ownership of these copyrights.

The Copyright Act does not restrict the time within which a proprietor may license his work, nor the manner in which

it may be licensed, nor the person to whom it may be licensed, nor the terms upon which it may be licensed. Nor is the copyright proprietor required to license the work at all. Licensing the work is not a condition for registration. Publication with notice is all that is required. That unrestricted right may only be regulated where there is a combination with respect to a group of copyright owners; but where that combination has been enjoined, as is done by this [fol. 3832] decree, and each distributor licenses his work alone and separately and not in combination or conspiracy, he should be permitted to enjoy to the fullest extent the monopoly conferred upon him by the Copyright Act.

The Government by its first decree of August 15th, 1946, inserted provisions which were deemed objectionable because they conflicted with the monopoly of the Copyright Act. We so pointed out to this Court, and the Government received a copy of our brief. Thereafter the Government by this Proposed Decree (October 7, 1946) has attempted to go even further in imposing more rigorous and restrictive provisions.

Indeed, the Government frankly admits that it seeks a compulsory license provision which this Court by judicial fiat is to engraft upon the Copyright Law. On page 9 of its memorandum in support of its findings, the Government says:

> "We have also modified the auction selling method proposed by the Court to provide for the *compulsory licensing* of some run upon reasonable terms * * *. The 'some run' provision may, we think, be analogized to compulsory patent licensing on reasonable royalties—relief which has in the past been granted against defendants which had used illegal restrictive licensing practices similar to those involved here."

The Government cites no case in support of its startling statement although it speaks of such relief having been granted in the past. In a footnote, however, it refers to Section VI of the Consent Decree in this case.

But consent of the parties is not a precedent nor a substitute for judicial mandate. The Government can cite no case, *because, there is no case which supports this fantastic claim.*

The whole theory of reasonable royalties in patents was recently expounded in *Widenski* v. *Shapiro, Bernstein Com-*

pany, 147 Fed. (2nd) 909. In that case a copyright pro-[fol. 3833] prietor of a musical composition had obtained a decree for injunction and $250 minimum damage against a tavern keeper who had unlawfully performed the composition (54 Fed. Supp. 780). He raised the point that inasmuch as the defendant had been previously offered a license for $90.00 per year, such license fee was analogous to the "established license" or to the "reasonable royalty" which is given to patent owners in infringement suits when they are unable to prove actual damage or to find any profits. The plaintiff there claimed that the rule of established or reasonable royalty which prevailed in patent cases was a substitute or a makeshift device, because the patent statutes contain no provision for statutory damage; and that inasmuch as the Copyright Law provides for statutory damages (17 U. S. C. A. Sec. 25), there was no occasion for applying such rule in copyright cases, since in the absence of actual damage or profits, the prevailing copyright proprietor could nevertheless secure statutory damage. The Circuit Court of Appeals sustained that claim. Judge Woodbury, in his opinion, said:

> "It is indicated in the case last cited and established in *Enterprise Mfg. Co.* v. *Shakespeare Co.*, 141 F. (2d) 916, 919, and the cases cited therein, that proof of either established or reasonable royalties may be resorted to in patent cases only when the patentee is unable to make satisfactory proof of his actual damage and the actual profits of the infringer. That is to say, a plaintiff in a patent case, if he prevails on the issue of infringement, may recover upon the basis of an established or reasonable royalty only after he has failed to prove satisfactorily his own loss and the infringer's profits. Thus the royalty rule provides successful plaintiffs in patent suits who have been harmed but cannot prove either their actual damages or the defendant's actual profits with a means to es-[fol. 3834]. cape the hollow victory of an award of purely nominal damages. But the Copyright Act itself makes provision for similarly situated plaintiffs in copyright cases in the 'inlieu' clause of §25(b), a provision not found in the corresponding section of the Patent Law, (35 U. S. C. §70), and from this we conclude that it is a substitute for the established or reasonable royalty rule applied in patent cases."

It is manifest, therefore, that so far as *copyrights* are concerned, the Courts may not impose any established or reasonable license fee as a measure of damage, but are compelled to award either actual damage or statutory damage, or profits.

Consequently, the Government's argument falls flat.

Moreover, the *Empire-Hartford* case pointed out that even so far as *patents* are concerned, there is no such thing as a compulsory license. The rule of established or reasonable royalty is purely a rule of damage in an infringement suit. Congress alone would have the right to legislate a compulsory license provision; and, as pointed out in the *Empire-Hartford* case, Congress since 1879 has repeatedly refused to do so.

On what theory, therefore, does the Government justify these provisions in paragraphs 8, 9 and 10 of Section II of its decree with respect to copyrighted works.

It is apparently the Government's aim to destroy the monopoly of copyright by the ingenious device of these restrictive paragraphs above quoted. We believe that the Supreme Court would never sustain a decree which contained such provisions, and we believe that these restrictions fall within the condemnation of the *Hartford-Empire* case and should be deleted from any decree signed by this Court.

[fol. 3835] Findings

The Government's Findings are not Findings in any sense of the word, but are nothing more than a paraphrase of the opinion in part. We believe that a Finding of Fact should not be a legal argument but should be a plain description of facts which were proven on the trial, particularly as in this case a great deal of the proof came in without contradiction or impeachment.

The Government's Findings on block booking and blind selling (Findings Nos. 32, 33 and 34) illustrate the defect in its Findings. The Government completely overlooks the proof on the trial, closes its eyes to the testimony of witnesses who took the stand, and then calmly proceeds to speak about non-existent facts. It says, "Because of complaints of block booking and blind selling, etc., etc." Where is there any proof in this record of such complaints? Indeed, the proof is to the contrary, and to the effect that exhibitors have demanded and still demand block booking.

What kind of a Finding of Fact is it which *reverses* the testimony?

The Government paraphrases the opinion in Finding 34 to the extent that trade shows which are designed to prevent blind selling are poorly attended by exhibitors. The only inference to be drawn from that fact (which is proven in the record without contradiction) is that exhibitors do not want and do not require trade showings. They evidently prefer to buy their pictures without seeing them in advance. Who, then, has been hurt by the practice of Block Booking, and why should it be stricken down and why should not Columbia's Findings be adopted?

We have not been furnished with a copy of the proposed Decree and Findings by the five major defendants, which we understand have been filed and served on October 7th, 1946, so we are unable to comment thereon.

[fol. 3836] We respectfully submit that paragraphs 8, 9 and 10 of Section II of the Proposed Decree should be eliminated and Columbia's Findings of Fact should be adopted by this Court.

Respectfully submitted, Schwartz & Frohlich, Solicitors for Defendant Columbia.

Louis D. Frohlich, Arthur Schwartz, Irving Moross, Max H. Rose, of Counsel.

Dated, New York, October 16th, 1946.

[fol. 3837] In United States District Court

[Title omitted]

Findings of Fact and Conclusions of Law—December 31, 1946

This action having been duly tried and the proofs and arguments of the respective parties having been duly heard and considered, this court, having filed its opinion herein dated June 11, 1946, does hereby find and decide as follows:

Findings of Fact

1. The following are definitions of terms used in these findings and in the judgment to be entered hereon:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition

[fol. 3838] that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4,000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

[fol. 3839] *Road-show*—A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second

run being the next subsequent, and so on, and shall include also successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

Trade-Showing—A private exhibition of a feature prior to its release for public exhibition.

Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

4. In 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. Although this corporation was initially organized to function as a film buying combine, it evolved into a film producing company first by financing the production of pictures by others for exhibition in the theatres of its members and finally by producing its own motion pictures.

[fol. 3840] 5. The members of this First National group, consisting of many of the most important exhibitors in the United States controlling many of the best theatres, became franchise holders of the distributing company which they formed. They acquired not only the right to exhibit in their own theatres the pictures produced and distributed by First National, but also they each obtained the right to sub-franchise other exhibitors in their respective territories. In a short time there were some 3500 franchise holders, representing as many or more theatres.

6. First National soon began to negotiate for the services of well-known stars and directors in the employ of other producers, including Paramount, and the members of First National began to refuse to exhibit Paramount Films.

Such well known stars as Mary Pickford and Norma Talmadge went over to the First National Group.

7. Many of the theatres owned by members of First National had, for a long time prior to 1918, exhibited Paramount pictures. The formation and growth of First National gradually cut down the number of Paramount pictures exhibited in the theatres of the First National group. By 1919 Paramount faced a situation where a group of owners of many of the best theatres in the large cities, many of whom had been its customers in the past, had combined together for co-operative buying and had expanded into a strong organization which distributed its own pictures and threatened to supply its members with enough pictures to permit them to operate without using any pictures of other producers, including Paramount.

8. In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions. Prior to the fall of 1917 Paramount had no theatre interests. Between 1917 and 1919 it acquired an interest in two theatres in New York City as show windows, to replace the [fol. 3841] Strand Theatre which had gone over to the First National Group. During that year in conjunction with its representative in the South, it formed Southern Enterprises, Inc., which acquired various theatres in the South. At about the same time Paramount acquired a 50% interest in the Black chain of theatres in New England.

9. In January, 1932, Paramount went into equity receivership in the United States District Court for the Southern District of New York. It stayed in equity receivership until March, 1933, when it went into voluntary bankruptcy. It remained in bankruptcy until June, 1934, when upon passage of Section 77B of the Bankruptcy Law, it petitioned for reorganization. It was finally reorganized under its present name in June, 1935. During these years various companies operating theatres in which Paramount was interested were themselves the subject of bankruptcy or receivership proceedings.

10. Some of the theatre interests which Paramount held at the time of the trial of this action had been acquired and were wholly owned by it either directly or indirectly through subsidiary companies prior to its bankruptcy and reorgan-

ization. In the course of its reorganization, some of its partly owned theatre interests were created, i. e., in some instances the plan of reorganization approved by this court provided for the sale or other disposition by Paramount of a partial interest (sometimes amounting to 50%, sometimes more and sometimes less) in theretofore wholly owned theatre operating companies, or companies holding legal or equitable interests in theatres or theatre operating companies. The result was the creation of many of Paramount's present partly owned theatre interests.

11. In the course of the reorganization proceedings Paramount lost its interests in some theatres and also changed its relationship with respect to interests in some of its [fol. 3842] theatre operating companies. The effect of these proceedings and the policy of decentralization inaugurated in the course thereof, was that in some instances Paramount disposed of a partial interest in companies theretofore wholly owned.

12. Loew's Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

13. Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

14. RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

15. Keith-Albee-Orpheum Corporation was a corporation organized and existing under the laws of the State of Dela-

ware, with a place of business at 1270 Sixth Avenue, New York, New York, and was engaged in the business of exhibiting motion pictures prior to its dissolution on September 29, 1944. Approximately 99% of its common stock and 33% of its preferred stock were held by by Radio-Keith-Orpheum Corporation.

[fol. 3843] 16. RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

17. RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

18. RKO was organized in 1928 by Radio Corporation of America largely for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices in the motion picture production and exhibition fields.

19. At the time of its organization, RKO secured production and distribution facilities by merger with a small company, FBO Productions, Inc., which had limited production facilities and a national distributing organization. RKO invested substantial sums to modernize these facilities.

20. The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures.

21. During its initial organizational period, RKO acquired interests in a number of companies operating circuits of vaudeville theatres.

22. RKO went into receivership in 1933 and continued in receivership and reorganization until 1940. At the time of its receivership RKO operated considerably more theatres [fol. 3844] than its present total of 106. During the receivership it lost 57 theatres.

23. The organization of RKO did increase competition in each of the three branches of the industry.

24. Warner Bros. Pictures, Inc. is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

25. On April 4, 1923, the four Warner brothers, Harry M., Jack L., Albert, and Sam, transferred their business of production and distribution of motion pictures to a corporation known as Warner Bros. Pictures, Inc. (hereinafter referred to as Warner).

26. Beginning in 1925, Warner began the work of developing sound pictures under license and agreements from Western Electric, culminating in the production of such sound pictures as "The Jazz Singer", starring Al Jolson, in October, 1927, and the first 100% talking picture "The Lights of New York" in the summer of 1928.

27. The Stanley Company of America had in 1928 and for a year prior thereto about 250 theatres situated principally in and around Pennsylvania and New Jersey.

28. Negotiations were begun with the view of exchanging stock of Warner for the stock of Stanley Company of America. This transaction was consummated late in 1928.

29. With the acquisition of the stock of Stanley Company of America, Warner acquired 250 theatres which could be immediately equipped with sound installation.

[fol. 3845] 30. In the year and nine months immediately following the acquisition of the stock of Stanley Company of America Warner secured in a similar fashion several other circuits of theatres owning theatres in the same general locality and a smaller number of theatres scattered in various other parts of the country.

31. In 1931 Warner had an interest in 591 theatres, the largest number of theatres in which Warner has ever had an interest.

32. Today, the Warner companies have an interest in 547 theatres—a net reduction of 44 from its peak holdings of 591 in 1931.

33. First National Pictures, Inc., a corporation engaged in the production and distribution of silent motion pictures had been organized as far back as 1917 by approximately 24 exhibitors on a cooperative basis for the basis of acquiring film of first quality for exhibition in their own theatres, as well as for distribution by them for other theatres in the respective territories in which they operated.

34. In 1928 Stanley Company of America owned ⅓ of the stock of First National Pictures, Inc., all the stock of First National Pictures, Inc. being subject to a voting trust.

35. Warner acquired as part of the Stanley Company of America transaction in 1928, ⅓ of the stock of First National Pictures, Inc.

36. At or about the time of the acquisition of the Stanley Company of America stock, or shortly thereafter, Warner purchased another ⅓ of the stock of First National Pictures, Inc. from other First National Pictures, Inc. stockholders.

[fol. 3846] 37. Subsequently, in 1929, Warner acquired the remaining ⅓ of the stock of First National Pictures, Inc. from defendant, Twentieth Century-Fox.

38. Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures. On July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation.

39. Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

40. Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting mo-

tion pictures, either directly or through subsidiary or Associated companies, in various parts of the United States and in foreign countries.

41. Twentieth Century-Fox produces its features in its own studio in Los Angeles, California, distributes them in this country through thirty-one branches or exchanges which it operates in the principal centers of population, and licenses its features for exhibition in its own and other theatres.

42. Twentieth Century-Fox, acquired its initial interest in theatres through the purchase of stock in corporations then engaged in operating theatres. Since such original [fol. 3847] acquisition, it has acquired additional interests in theatres, some of which were acquired in competition with other defendants and with independent circuits and some of which are new theatres constructed by it.

43. National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

44. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

45. Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

46. Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty

Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

47. Universal Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1250 Sixth Avenue, New [fol. 3848] York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries On May 25, 1943, its name was changed to Universal Pictures Company, Inc., when a subsidiary of the same name was merged into it, but Universal Corporation was the surviving corporation.

48. The corporation named in the complaint as Universal Pictures Company, Inc., was a subsidiary corporation controlled by Universal Corporation, which was engaged in the business of producing motion pictures, prior to its merger into Universal Corporation on May 25, 1943.

49. Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

50. The Universal group of defendants at the time of the trial consisted of the following corporations: (1) Universal Pictures Company, Inc. (hereinafter sometimes called Universal Pictures), a Delaware Corporation with its principal office in New York, N. Y., engaged in the business of producing motion pictures and distributing the same through wholly-owned subsidiaries; (2) Universal Film Exchanges, Inc. (hereinafter sometimes called Universal Film Exchanges), a Delaware corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the United States (except for the Metropolitan District of New York City), a wholly-owned subsidiary of Universal Pictures; (3) Big U Film Exchange, Inc. (hereinafter sometimes called Big U), a New York corporation, with its principal office in New York, N. Y., engaged in the business of distributing motion pictures throughout the Metropolitan District of New York [fol. 3849] City, a wholly-owned subsidiary of Universal

Pictures. The term "Universal" as used herein means any or all of the Universal defendants.

51. Prior to May 25, 1943, the name of Universal Pictures Company, Inc. was Universal Corporation, incorporated in Delaware in 1936. It owned approximately 92% of the outstanding common stock of a Delaware corporation which was incorporated in the year 1925 and was also known as Universal Pictures Company, Inc. Said corporation last-named had its principal office in New York, N. Y., and was engaged in the business of producing motion pictures and distributing the same through its subsidiaries. It owned all of the outstanding stock of Universal Film Exchange Inc. and 20% of the outstanding common stock of Big U Film Exchange Inc. The other 80% of said stock was owned by Universay Corporation. On May 25, 1943, Universal Pictures Company, Inc. (Delaware, 1925) was merged into Universal Corporation (the surviving corporation), and the name of the surviving corporation was changed to Universal Pictures Company, Inc.

52. Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

53. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

54. During the entire period in question United Artists Corporation distributed photoplays in the United States of [fol. 3850] America that were produced by David O. Selznick, Mary Pickford, Charles Chaplin, Hunt Stromberg, William Cagney, Bing Crosby, Edward Small, Sol Lesser, Lester Cowan, Jack Skirball, Benedict Bogeaus, Seymour Nebenzal, Jules Levey, David Loew, Arnold Pressburger, Charles R. Rogers, Andrew Stone, Constance Bennet, Howard Hughes, Preston Sturgis, J. Arthur Rank, Edward Golden, or corporations with which the aforesaid individuals were associated and other independent producers.

55. United Artists Corporation maintains 26 branches or exchanges located throughout the United States, and through these facilities it distributes and has distributed all of the product handled by it during the period in question.

56. Paramount Pictures, Inc., Loew's Incorporated; Radio-Keith-Orpheum Corporation; Warner Bros. Pictures, Inc.; and Twentieth Century-Fox Film Corporation and their respective distribution and exhibition subsidiaries are the five major defendants.

57. As between the eight defendants, Paramount, Loew's, Fox, RKO, Warner, Columbia, United Artists and Universal, there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants.

58. Neither of the defendants Columbia, Universal and United Artists owns any theatres.

59. There exists active competition among the defendants and others in the production of motion pictures.

60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures.

[fol. 3851] 61. In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed.

62. In licensing features, each of the distributor defendants has agreed with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed.

63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor.

64. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission

price schedules to be maintained under severe penalties for infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised.

65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States.

66. All of the five major defendants have a definite interest in keeping up prices in any given territory in which [fol. 3852] they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas. Even if the licenses were at flat rate, a failure to require their licensees to maintain fixed prices would leave them free for lowering the current charge to decrease through competition the income to the licensor on theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas. There exists great similarity, and in many cases identity, in the minimum prices fixed for the same theatres in the licenses of all of the defendants.

67. The major defendants made operating agreements as exhibitors with each other and with independent exhibitors in which joint operation of certain theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein or are to be jointly determined by other means. These agreements show the express intent of the major defendants to maintain prices at artificial levels.

68. Certain master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors stipulate minimum admission prices often for dozens

of theatres owned by an exhibitor-defendant in a particular area in the United States.

69. Licenses granted by one defendant to another disclose the same inter-relationship among the defendants. Each of the five major defendants as an exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum admission prices. RKO; Loew's, Warner, Paramount, and Fox, in granting and accepting licenses with minimum admission prices specified, have among themselves engaged in a national system to fix prices, and Columbia, Universal, [fol. 3853] and United Artists, in requiring the maintenance of minimum admission prices in their licenses granted to these exhibitor-defendants, have participated in that system.

70. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices.

71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected.

72. The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatre where they will pay higher

prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the feature—no matter on what run—the gross revenue to be realized from their patronage is increased rela-[fol. 3854] tively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible.

73. Among the provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain feature motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways; in terms of a given period between designated runs-in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; in terms of clearances as fixed by other distributors; or in terms of combinations of these formulae.

74. The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

75. Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures.

76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest [fol. 3855] of the licensor in the rental to be derived from the exhibition of the feature licensed, without unreasonably interfering with the interest of the public.

78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.

79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents.

80. Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement.

81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system.

82. The defendants have acted in concert in their grant of run and clearance.

83. Clearances are given to protect a particular run against a subsequent run and the practice of clearance is so [fol. 3856] closely allied with that of run as to make findings on the one applicable to the other.

84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures.

85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features

to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license. Thus, price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated.

86. Formula deals have been entered into by Paramount and by RKO with independent and affilicated circuits. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the feature in their several areas, seriously and unreasonably restrain competition.

87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any "formula deal" license agreements.

[fol. 3857] 88. Master agreements which cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion, have been entered into by the distributor defendants and unreasonably restrain trade.

89. Franchises have been entered into by the distributor defendants, and unreasonably restrain trade, because they cover too long a period (more than one season), and also because they embrace all the features released by a given distributor.

90. Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest, and Loew's is not currently granting franchises. During its entire history Loew's, as a distributor, granted a total of 213 franchises, of which 154 were to independent theatres and only 59 to those in which any other producer-exhibitor had an interest.

91. Twentieth Century-Fox has not granted any franchises since June 6, 1940. In 1938-39, the motion picture season in

which Twentieth Century-Fox had the greatest number of franchises outstanding, there were 400. Of these, 361 were with independent exhibitors.

92. During the period in question Universal entered into franchise agreements with 727 independent exhibitors and 43 affiliated exhibitors.

93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits.

94. For many years the distributor defendants, except United Artists Corporation, licensed their films in "blocks", [fol. 3858] or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block booking and blind-selling based upon the supposed unfairness of contracts which often includes pictures the inferior quality of which could not be known, Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five, however, could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observed the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre.

97. Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it.

98. Since the consent decree of November 20, 1940, the five major defendants have given each exhibitor, whether a defendant or independent, an opportunity at trade shows [fol. 3859] to view each feature before licensing it. In general, trade shows, which are designed to prevent blind-selling, are poorly attended by exhibitors.

99. During the 1943-44 season, the number of features distributed by eight distributor-defendants and the three other national distributors were as follows:

Distributor-defendants	No. of Films	Percentages of Total With "Westerns" Included	Percentages of Total With "Westerns" Excluded
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Sub-total	260		
Other National Distributors			
Republic (29 features (30 "Westerns"		14.86%	8.66%
Monogram (26 features (16 "Westerns"		10.58%	7.76%
PRC (20 features (16 "Westerns"		9.07%	5.97%
		100%	100%
Sub-Total 137	397		
Total without Westerns	335		

100. The percentage of features on the market which any of the five major defendants could play in its own theatre would be relatively small and in no-wise approximates a monopoly of film exhibition.

[fol. 3860] 101. Continuously since its organization RKO has distributed features for independent producers. The particular independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of features was derived from such independently produced features.

102. It would be financially impossible for RKO to operate its theatres on features distributed by RKO alone.

103. Twentieth Century Fox produced less than 9 per cent of the total number of features nationally distributed in the United States during each year between 1936-37 and 1944-45.

104. Universal has customarily produced at its studios at Universal City, California, during each theatrical year (commencing on or about September 1st) between 45 and 50 feature-length motion picture photoplays, seven so-called Westerns, four Serials, 15 two-reel subjects, 30 single-reel subjects and 104 newsreels.

105. Said motion pictures were distributed by Universal and licensed for exhibition by motion picture theatres throughout the United States by means of a system of 31 exchanges located in various States in the United States, from the East Coast to the West Coast and from Canada to the Southern boundary. Universal also maintained a Home Office in the City of New York.

106. In marketing its motion pictures, Universal's usual and customary practice was to offer to license to exhibitors, by title and description as aforesaid, its entire line of pictures, consisting of feature-length motion picture photoplays, Westerns, short-subjects (consisting of serials and two-reel and one-reel pictures) and newsreels. In this way approximately 50 feature-length motion picture photoplays, a group of Westerns, short-subjects, two so-called "Special" [fol. 3861] photoplays, three features produced by inde-

pendent producers, and newsreels, were offered to exhibitors by Universal each year.

106A. During recent years, in excess of 600 feature-length motion-picture photoplays were released each year in the United States, exclusive of foreign-made films. Universal releases of feature-length photoplays, including Westerns and so-called Marquee pictures, during said period, equalled approximately 8% of the total number of feature-length photoplays released in the United States each year.

107. During the period in question, United Artists Corporation distributed between 20 to 26 pictures a year when the corporation had a good year and has handled as low as 4 in distribution in a releasing season.

108. At no time during the period in question did United Artists distribute more than 5% of the feature photoplays American made and distributed in the United States of America and generally distributed less than 5% of such releases.

109. That in each distribution agreement with each producer using the facilities of United Artists for distribution among other things there appears substantially the following language:

"United agrees to devote its best efforts to the proper marketing and disposition of the motion pictures delivered hereunder in all the territories licensed hereunder wherein it customarily markets motion pictures, and to make such marketing as complete and efficient as practicable, so that the gross returns from the marketing of the product hereunder shall be as large as possible and at the same time consistent with the sound business policy of United.

"United will use its best efforts to procure prices, license fees and rentals in a fair and open market reasonably satisfactory to the Producer.

[fol. 3862] "Exhibition Contracts: The exhibition contracts for each of such motion pictures delivered hereunder shall be made separate and apart from the exhibition contract of any other motion picture marketed by United, with the exception that in territories other than the United States where it is customary to

include more than one motion picture on a contract, the Producer authorizes United to market its product in accordance with that custom. In no event, however, shall any motion picture of the Producer be used to enforce the licensing, leasing or other disposition of any other motion picture marketed by United, and in such territory where it is the custom to include on one contract more than one motion picture United shall set out the respective license fees for each motion picture after the name of such motion picture.

"United agrees upon the written direction of Producer that United shall market wherever permissible the motion pictures designed by the Producer or its agent as a unit, and in such case such unit shall be licensed separate and apart from any other motion picture marketed by United, with the exception that in those countries where it is the custom to market all of the motion pictures on one contract, United shall adhere to the prevailing custom.

"The Producer shall have the right to designate a representative for the territories hereinafter specified. The Producer shall bear all the expenses of such representative. Such representative must have an office in the central location of such territory, and if so United shall submit to such representative for his approval or rejection all proposed written contracts with exhibitors for that territory. The territories and their central location are as follows:

Territory	Central Location
United States and Canada	New York
British Isles	London
Australia	Sydney

"Producer agrees that such submission shall not be necessary if made impractical by conditions beyond the control of United, such as conditions arising out of war.

[fol. 3863] "If the Producer has designated such a representative for any such territory, United shall submit for his approval or rejection each proposed written contract for the distributing, exhibiting or marketing of such Producer's motion pictures or any of

them in the territory in which such representative is acting. No such contract shall be accepted by United if within three (3) succeeding business days following the date on which said proposed written contract has been received by the Producer or its representative the Producer or its representative shall return such proposed contract to United with its rejection noted thereon or appended thereto.

"Should the Producer or its representative reject any such proposed contract the Producer or its representative shall have fourteen (14) days from the date of rejection in which to obtain a more favorable contract. Should the Producer or its representative fail so to do the original contract shall ipso facto be deemed approved unless the Producer or its representative shall have designated its original rejection as final. No proposed contract on which the rejection has been designated as final shall be entered into by United.

"Should the Producer or its representative at any time agree in advance with United upon the rental terms or license fees for the distribution, exhibition or marketing of any motion picture in any specified theatre or situation, United shall not be obligated to submit the contract containing the terms so agreed upon to the Producer or its representative for approval."

110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers and extended runs; granting road-[fol. 3864] show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of features for rental purposes. These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Small

independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors.

111. The discriminations referred to in Finding 110 would appear to be impossible under a system where the exhibitors competing for a license to exhibit a given feature on a given run do so on a parity since the same offer must be made to all pro-pective exhibitors in each competitive area.

112. Agreements were made by the exhibitor-defendants with each other and their affiliates by which given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the 'pooled'' theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages or otherwise. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". The result is to eliminate competition *pro tanto* both in exhibition and in distribution of features which flow almost automatically to the theatres in the earnings of which they have a joint interest.

113. Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants. The effect is to ally two or more theatres of different ownership into a coalition for the nulli-[fol. 3865] fication of competition between them and for their more effective competition against theatres not members of the "pool".

114. In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres. This is but another means of carrying out the restraints found above.

115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants,

together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as inconsequential investment in exhibition.

116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently.

117. Such joint interest as those described above in findings 112 through 116 exist in a great number of theatres, a summary of which is set forth in the following tabulation taken from RKO's Exhibit 11:

Theatres jointly owned with independents:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

[fol. 3866] *Theatres jointly owned by two defendants:*

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's RKO	3
Loew's Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following number will not be affected by the decree,

since the defendant or co-owning independent owns less than a 5% interest.

Paramount	177
RKO	32
Total	209 Theatres
Total affected by the decree according to RKO's Exhibit 11	1,292 Theatres

118. In the year 1945 there were about 18,076 motion pictures theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35 percent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1,395—a little less than half, or about 7.72 percent; Warner 501, or about 2.77 percent; Loew's 135, or about .74 percent; Fox 636, or about 3.52 percent; and RKO 109, or about .60 percent. There were 361 theatres, or about 2.00 percent, in which two or more of these defendants had joint interests, whether held [fol. 3867] directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owned an indirect minority stock interest. It includes all theatres in which each defendant otherwise owned a direct or indirect interest of any amount.

119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or individually, have a monopoly of exhibition.

120. On January 1, 1935, Loew's operated in the United States, 126 theatres. The first-run theatres, which are engaged to a large extent in exhibiting Loew's own product, Metro pictures, serve as "show-cases" for those pictures in the areas where the theatres are located.

121. The formation of RKO resulted in the conversion of vaudeville theatres acquired by it into motion picture

theatres and thereby introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located.

122. Ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres.

123. The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in ex- [fol. 3868] ploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors.

124. Each of the five major defendants is able to coordinate the initial exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign.

125. Twentieth Century-Fox is interested in theatres in only 16 of the 92 cities having a population of over 100,000. In 12 of these 16 cities features of one or more defendants is licensed to independent first run exhibitors competing with Twentieth Century-Fox (New York, Seattle, Denver, Portland, Oakland, San Diego, Long Beach, Los Angeles, San Francisco, Spokane, Sacramento, and Kansas City, Kansas) as well as to other defendants having theatres in some of these cities. In three of the remaining four cities there is also first run competition from others of the defendants.

126. The 17.35% of theatres which comprise the five circuits of the major defendants pay from 35 to 54% of the total domestic film rental respectively received by the eight distributor defendants and 45% of the total domestic film rental received by all of said distributor-defendants. The five largest unaffiliated circuits together pay less than 5% of such rental.

127. The major defendants, as distributors, during the 1943-44 season, received from 71 to 81% of the film rental that was paid to all distributors by exhibitors affiliated with the five major defendants. The minor defendants received

from 26 to 15% of such rental and the independent distributors from 2½ to 4½% of such rental.

128. During the 1943-44 season the eight distributor defendants received 45.2% of the total feature film rental, re-
[fol. 3869] ceived by them, from theatres affiliated with the five major defendants; and 54.8% of such rental from other exhibitors.

129. In some situations where Paramount had theatre interests, other defendant distributors licensed their features to competing theatres and not to the Paramount theatres, and in some cases the operating companies in which Paramount was interested were not able to obtain the right to exhibit the features of some of the other defendant distributors.

130. Paramount features are licensed for exhibition in from 8,000 to 14,500 theatres in the United States annually. The number of licenses each year varies from feature to feature and from year to year.

131. In 21 of the 36 out of the 92 cities where Loew's operates theatres none of the other four producer-exhibitors licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers.

132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Loew's first-run houses, decreased from 1382 to 998 and the features of non theatre-owning distributors, increased from 1201 to 1879.

133. In 1935, the other four theatre-owning distributors earned $2,611,986 from Loew's theatres and the non theatre-owning distributors earned $2,205,330 ($406,656 less). In 1944, the non theatre-owning distributors earned $5,261,116 in Loew's theatres, which was $419,477 more than the $4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors.

[fol. 3870] 134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non theatre-owning distributors, Columbia (8.8%), United Artists

(8.3%) and Universal (7.4%), was higher than that paid to each of three producer-exhibitors, RKO (2.1%), Warner Bros. (2.1%) and Twentieth Century-Fox (6.1%).

135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was to Loew's itself for the exhibition of Loew's pictures, and 27.1% was to non theatre-owning distributors. Thus a total of 75% of all film rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors.

136. During the 1943-44 season RKO received 56.9% of its total license fees from independent theatres, 14.1% from its own theatres, and (in the aggregate) 29% from theatres affiliated with other defendants.

137. In the 1943-44 season, of the total number of exhibitions of features in first-run and metropolitan circuit run-theatres operated by RKO, 23.1% were exhibitions of features distributed by RKO, 29.6% were exhibitions of features distributed by other theatre-owning distributors, and 47.3% were exhibitions of features distributed by non-theatre-owning distributors.

138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61 6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants, about 14% from theatres in which it had an interest, about 4% from theatres in which Twentieth Century-Fox had an interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest.

139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about [fol. 3871] 10% from Warner's own American theatres, and the balance, about 16% from American theatres in which one or more of the defendants had an interest.

140. Not a single one of the Loew first run theatres in the 39 of the 92 largest cities where Loew operates or has an interest in first run theatres licensed a Warner feature for exhibition in the 1943-44 season. In the same season the Warner theatres regularly exhibited the Loew features in many of the 28 of the 92 largest cities where Warner operated or had an interest in first run theatres.

141. The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year.

142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants.

143. Between 1937 and 1944 the theatres in which Warner had an interest substantially decreased the amount of film rental paid to the 5 theatre owning defendants, and substantially increased film rental paid to the non-theatre owning defendants.

144. Of the total film revenue received by Twentieth Century-Fox in 1944 from all theatres in the United States, 60.8 per cent was paid by exhibitors not defendants in this action; 14.1 per cent was paid by its own theatres; 1.26 per cent by Loew theatres; 5.52 per cent by RKO theatres; 13.46 per cent by theatres in which Paramount had an interest; and 4.82 per cent by Warner theatres.

145. On January 1, 1935, there were 13,386 theatres operating in the United States. In 1945, there were 18,076 theatres operating in the United States.

[fol. 3872] 146. In about 60 per cent of the 92 cities having populations of over 100,000, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices found to have unreasonably restrained competition.

147. In about 91 per cent of the 92 cities with over 100,000 population, there is competition on first runs between independent theatres and theatres of one or more of the defendants, or among the defendants themselves, except so far as it may be restricted by the trade practices found to have unreasonably restrained competition. In the remainder of the 92 cities there is always competition in some run.

148. In the aforementioned 92 cities, at least 70% of all of the first run theatres are affiliated with one or more of the major defendants. In 4 of said cities there are no affiliated theatres. In 38 of said cities there are no inde-

pendent first run theatres. In the remaining 50 cities the degree of first run competition varies from the most predominantly affiliated first run situations, such as Boston, Chicago, Los Angeles, Philadelphia, St. Paul, and Washington, D. C., in each of which the independent first run theatres played less than eleven of the defendants' features on first run during the 1943-1944 season, to the most predominantly independent first run situations, such as Nashville, Louisville, Indianapolis, and St. Louis, where the affiliated first run theatres played at least 31 of the defendants' pictures on first run during that season. In none of the said 50 cities did less than three of the distributor-defendants license their product on first run to the affiliated theatres. In 19 of said 50 cities less than three defendant-distributors licensed their product on first run to independent theatres. In a majority of said 50 cities the major share of all of the defendants' features were licensed for first run exhibition in theatres affiliated with the major defendants.

[fol. 3873] 149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other "first-run" theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents.

150. Of the 92 cities in the United States having a population in excess of 100,000, Twentieth Century-Fox is interested in first run theatres in 16 and licenses its features to them. In 4 of the remaining cities, none of the defendants has theatre interests. This leaves 72 cities in which there are first run theatres operated by defendants other than Twentieth Century-Fox. In 23 of the 72 cities, Twentieth Century-Fox licenses its features to independent exhibitors.

151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor.

152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in

production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below:

153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants.

154. The illegalities and restrain-s herein found, are not in the ownership of many or most of the best-theatres by [fol. 3874] the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.

155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public.

156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition.

157. During the 9 pre-war years of 1933-1941, the average cost of American made Warner features rose from $241,000 in 1933 to $448,000 in 1940. By 1945 the average cost had risen to $1,371,000.

158. In the past the foreign business of Warner has been exceedingly profitable.

159. With the cessation of the war the foreign markets for Warner pictures are being severely restricted.

160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness

in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money.

[fol. 3875] CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause under the provisions of the Act of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," hereinafter referred to as the Sherman Act.

2. Universal Pictures Company, Inc. and Screen Gems, Inc. have not violated the Sherman Act and should be dismissed as defendants herein.

3. None of the defendants herein has violated the Sherman Act by monopolizing or attempting to monopolize or conspiring to monopolize the production of motion picture films.

4. The consent decree entered herein on November 20, 1940, does not foreclose enforcement in this suit at this time of any rights or remedies, which the plaintiff may have against any of the defendants by virtue of violations of the Sherman Act by them, except such acts as were in accord with such decree during the period it was in force.

5. None of the defendants herein has violated the Sherman Act by combining, conspiring or contracting to restrain trade in any part of the business of producing motion pictures or by monopolizing, attempting to monopolize, or conspiring to monopolize such business.

6. The defendants, and each of them are entitled to judgment dismissing all claims of the plaintiff based upon their acts as producers, whether as individuals or in conjunction with others.

7. The defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor [fol. 3876] Corporation; RKO Midwest Corporation; Warner Bros. Pictures Inc.; Vitagraph, Inc.; Warner Bros. Cir-

cuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Acquiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices;

(b) Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area.

8. The distributor defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Conspiring with each other to maintain a nation-wide system of fixed minimum motion picture theatre admission prices;

[fol. 3877] (b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices;

(c) Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affili-

ated with other defendants and with large circuits as found in finding No. 110 above;

(e) Agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

(h) The defendants Paramount and RKO making formula deals.

9. The exhibitor-defendants, Paramount Pictures, Inc.; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; and National Theatres Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Jointly operating motion picture theatres with each other and with independents through operating agreements or profit-sharing leases;

[fol. 3878] (b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings;

(c) Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion pictures theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms.

10. The Formula deals, master agreements and franchises referred to in Findings 86, 88 and 89 have tended to restrain trade and violate Section 1 of the Sherman Act.

11. Block-booking as hereinabove defined, violates the Sherman Act.

12. Further conclusions of law are made and embodied in the decree filed herewith.

Dated: December 31, 1946.

Augustus N. Hand, United States Circuit Judge;
Henry W. Stoddard, United States District Judge;
John Bright, United States District Judge.

[fol. 3879] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, Plaintiff

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. P tures, Inc., Vitagraph, Inc., Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation, National Theatres Corporation, Columbia Pictures Corporation, Screen Gems, Inc., Columbia Pictures of Louisiana, Inc., Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc., and United Artists Corporation, Defendants.

DECREE—December 31, 1946

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of *amici curiae* as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

[fol. 3880] IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AS follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time [fol. 3881] stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiv-

ing the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent [fol. 3882] that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon

which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid [fol. 3883] shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and

reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him [fol. 3884] for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, and National Theatres, Inc. is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competi-

tive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or [fol. 3885] otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with re-

spect thereto before any such acquisition shall be approved by the court.

[fol. 3886] (6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

[fol. 3887]

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally

recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

[fol. 3888]

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946. Augustus N. Hand, United States Circuit Judge; Henry W. Goddard, United States District Judge; John Bright, United States District Judge.

[fol. 3889] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM IN RE FINDINGS AND DECREE—December 31, 1946

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the [fol. 3890] United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946. Augustus N. Hand, United States Circuit Judge; Henry W. Goddard, United States District Judge; John Bright, United States District Judge.

[fol. 3891] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION.

SIRS:

Please take notice that the undersigned will bring the within motion on for a hearing before this Court at such place in the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York and on such day and at such hour as the Court may hereafter direct, of which direction you will receive further notice.

Dated, New York, N. Y., January 10, 1947.

Yours, etc., Simpson Thacher & Bartlett, Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.; Davis Polk Wardwell Sunderland & Kiendl, Attorneys for Loew's Defendants, 15 Broad Street, New York, N. Y.; Donovan Leisure Newton Lumbard & Irvine, Attorneys for RKO Defendants, 2 Wall Street, New York, N. Y.; Joseph M. Proskauer, Attorney for Warner Defendants, 11 Broadway, New York, N. Y.; Dwight Harris Koegel & Caskey, Attorneys for 20th Century Fox Defendants, 100 Broadway, New York, N. Y., by Albert C. Bickford.

To Hon. Tom C. Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; Hon. F. X. McGohey, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y.

[fol. 3892] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION

The Paramount, Loew, RKO, Warner and Twentieth Century-Fox defendants move the Court to amend and modify its Conclusions of Law and Judgment heretofore filed, in the following particulars:

1

To amend Paragraph (6) of Section III to read as follows:

"From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court."

The foregoing amendment is sought for the reason that the language of Paragraph (6) of Section III in the Judgment might be susceptible to interpretation at variance with the Court's opinion.

The moving defendants assume, in the light of the colloquy between the Court and counsel appearing at pages 3057 to 3063 of the record, and from the statements contained in the opinion and the Findings of Fact upon which this injunctive provision must be based, that it was not intended in this paragraph to enjoin the defendants from acquiring interests in theatres where necessary and proper to protect their investments or enter a competitive field, provided that they should first show to the Court that such acquisition would not unreasonably restrain competition.

It is thought that this was the clear intention of the Court because of the following language in the opinion:

> "But it (the divestiture provision applying to partial interests) shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field . . ."

The colloquy at the hearing on the decree (1057-63) indicated that the Court had rejected the Government's request [fol. 3893] for an absolute prohibition. Furthermore, the Court found unlawful only those holdings which it directed should be rearranged under Paragraph 5 of Section III,—the joint and partial interests.

Accordingly, the request for clarification is clearly justified. In *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 186, the Court said:

> "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis."

2

(a) To add to Paragraph III (2) a sentence at the end thereof reading as follows:

> "The pooling agreements by one or more defendants with others not parties to this action, referred to herein, which violate this provision shall be dissolved within two years."

The ground upon which this amendment is sought is that no time was specified in this paragraph within which to comply with its provisions. While defendants will act diligently to comply, the task of dissolving pools with independents, involving, as they do, individuals and interests not parties to this action, is an involved and complicated one in some instances, and time must necessarily be consumed in dissolving them. Moreover, many of the pooled theatres have been operated for a long time by a defendant and the termination of the pools will require the owners to make other arrangements for the operation of their theatres

which cannot be done in the time now allowed by the decree. So far as pools between defendants are concerned, no time is asked beyond that already given by the Judgment.

(b) To amend Paragraph III (4) by adding the following sentence thereto:

"The leases referred to herein between a defendant and independents which violate this provision shall be terminated within two years."

The grounds for this amendment are the same as the grounds stated in the next preceding subparagraph hereof.

3

To amend Section VII to read as follows:

"Paragraph 7 of Sect. II of this Judgment shall not become effective until July 1, 1947.

Paragraphs 8 (a) and 8 (c) of Sect. II of this Judgment shall not become effective until July 1, 1947, and in the event of an Appeal to the Supreme Court by any party from these Paragraphs, such Paragraphs shall not become effective until ninety (90) days after the entry of final Judgment upon the mandate of the Supreme Court."

This Amendment to Section VII is necessary in order to postpone the effective date of Paragraphs 8(a) and 8(c) of [fol. 3894] Section II until the Supreme Court shall have decided any appeal which may be taken from the Judgment herein.

The method of licensing features required by paragraphs 8 (a) and 8 (c) of Section II is very different from that now in operation. That proposed new method of licensing is strongly opposed by organizations of independent exhibitors which sought to intervene in this action. To put this controversial new method of licensing into operation prior to a reasonable time after the final effective date of the Judgment herein is unnecessary and inappropriate because the Supreme Court may not approve the provisions in question, or may change or modify them. In that event, of course, further changes in the method of licensing features would be necessary with further disruption to the normal course of business.

This Court is most familiar with the complexities of the industry and the innovations that would be brought about by adoption of the method of licensing prescribed by this Court, and it should defer the effective date rather than pass this question to the Supreme Court for consideration before that Court can have an opportunity to understand the problems involved.

All parties concerned, including independent exhibitors, will be amply protected in the interim period pending a determination by the Supreme Court, because Paragraph 9 of Section II and Paragraphs 8 (b) and 8 (d) will become effective in accordance with the terms of the Judgment. The moving defendants will not apply to this Court or to the Supreme Court for a stay of the provisions of Paragraph 9 of Section II or Paragraphs 8 (b) and 8 (d) in the event that the requested postponement of the effective date of Paragraphs 8 (a) and 8 (c) is granted.

4

To amend Conclusion 9(d) to read as follows:

"Conspiring with the distributor defendants to receive discriminatory license privileges as found in Finding No. 110 above."

This amendment is requested in order to conform the conclusion to Finding of Fact 110, Conclusion of Law 8 (d), and the Opinion of this Court. The Opinion stated that nothing therein contained should be construed as indicating that the distributor defendants discriminated among their licensees with respect to film rentals, clearances or minimum admission prices, and the Court said:

"In the absence of such facts we are unable to infer that the distributor defendants have violated the Sherman Act in this particular regard. • • •"

There is no Finding of Fact that the exhibitor defendants discriminated or received discrimination with respect to film rentals, clearances, or minimum admission prices.

Finding 110 is the only finding with regard to discriminations, and it refers solely to the distributor defendants and does not include film rentals, clearances or minimum admission prices. Conclusion 8(d) is to the effect that the distributor defendants granted discriminatory license privi-

[fols. 3895-3896] leges as found in Finding 110 and the amendment which is sought would conform to this conclusion.

Wherefore, the moving defendants pray that the Court make and enter an order clarifying and amending the judgment and conclusions of law in accordance with the foregoing or, in the alternative, that the Court grant a rehearing, reargument or new trial as to the subject matter of this motion.

Dated, New York, N. Y., January 9, 1947.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.; Davis Polk Wardwell Sunderland & Kiendl, Attorneys for Loew's Defendants, 15 Broad Street, New York, N. Y.; Donovan Leisure Newton Lumbard & Irvine, Attorneys for RKO Defendants, 2 Wall Street, New York, N. Y.; Joseph M. Proskauer, Attorney for Warner Defendants, 11 Broadway, New York, N. Y.; Dwight Harris Koegel & Caskey, Attorneys for 20th Century Fox Defendants, 100 Broadway, New York, N. Y., by Albert C. Bickford.

[fol. 3897] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION

To the Attorney General, Department of Justice, Washington, D. C.; John F. X. McGohey, Esq., United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.; Donovan, Leisure, Newton & Lumbard, Esqs., Attorneys for Defendants Irving Trust Company as Trustee in Bankruptcy of Radio-Keith-Orpheum Corporation and other RKO defendants, 2 Wall Street, New York, N. Y.; J. Robert Rubin, Esq., 1540 Broadway, New York, N. Y., and Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Defendants Loew's Inc., et al., 15 Broad Street, New York, N. Y.; Robert W. Perkins, Esq., Attorney for Defendants Warner Brothers Pictures, Inc., et al., 321 West 44th Street, New York, N. Y.; Dwight, Harris, Koegel & Caskey, Esqs., Attorneys for Defendants, Twentieth Century-Fox Film Corporation, National Theatres Corporation, et al., 100 Broadway, New York, N. Y.; Simpson, Thatcher & Bartlett, Esqs., Attorneys for Paramount Pictures, Inc., et al., 120 Broadway, New [fol. 3898] York, N. Y.; Schwartz & Frohlich, Esqs., Attorneys for Defendant Columbia Pictures Corporation, et al., 1450 Broadway, New York, N. Y.; Charles D. Prutzman, Esq., Attorney for Defendants Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges Inc., Big U Film Exchange Inc., 1250 Sixth Avenue, New York, N. Y.

SIRS:

Please Take Notice that the undersigned will bring the within motion on for a hearing before this Court at such place in the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York and on such day and at such hour as the Court may hereafter direct, of which direction you will receive further notice.

Dated: New York, N. Y., January 10, 1947.

Yours, etc., O'Brien, Driscoll & Raftery, Attorneys for Defendant United Artists Corporation, 152 West 42nd Street, New York 18, N. Y.

[fol. 3899] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION

The defendant United Artists Corporation moves the Court to amend and modify its Conclusions of Law and Judgment heretofore filed, in the following particulars:

1

To strike out the last sentence of Paragraph 4 of Section II, and that said paragraph shall read as follows:

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted."

2

To amend Section VII to read as follows:

"Paragraph 7 of Sect. II of this Judgment shall not become effective until July 1, 1947.

Paragraphs 8(a) and 8(c) of Sect. II of this Judgment shall not become effective until July 1, 1947, but in the event of an Appeal to the Supreme Court by any party from these Paragraphs, such Paragraphs shall not become effective until ninety (90) days after the entry of final Judgment upon the mandate of the Supreme Court."

Wherefore, the moving defendant prays that the Court [fols. 3900-3902] make and enter an order clarifying the Judgment in accordance with the foregoing, or such other and further relief as the Court may deem fit and proper in the premises.

Dated: New York, January 10, 1947.

O'Brien, Driscoll & Raftery, Attorneys for Defendant United Artists Corporation, Office and P. O. Address, 152 West 42nd Street, New York 18, New York.

[fol. 3903] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION

To the Attorney General, Department of Justice, Washington, D. C.; John F. X. McGohey, Esq., United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.; Simpson, Thatcher & Bartlett, Esqs., Attorneys for Paramount Pictures, Inc., et al., 120 Broadway, New York, N. Y. Donovan, Leisure, Newton & Lumbard, Esqs., Attorneys for Defendants Irving Trust Company as Trustee in Bankruptcy of Radio-Keith-Orpheum Corporation and other RKO defendants, 2 Wall Street, New York, N. Y.; J. Robert Rubin, Esq., 1540 Broadway, New York, N. Y., and Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Defendants Loew's Inc., et al., 15 Broad [fol. 3904] Street, New York, N. Y.; Robert W. Perkins, Esq., Attorneys for Defendants Warner Brothers Pictures Inc., et al., 321 W. 44th Street, New York, N. Y.; Dwight, Harris, Koegel & Caskey Esqs., Attorneys for Defendants, Twentieth Century-Fox Film Corporation, National Theatres Corporation, et al., 100 Broadway, New York, N. Y.; Schwartz & Frohlich, Esqs., Attorneys for Defendant Columbia Pictures Corporation, et al., 1450 Broadway, New York, N. Y.; O'Brien, Driscoll & Raftery, Esqs., Attorneys for United Artists Corporation, 152 W. 42nd Street, New York, N. Y.

SIRS:

Please Take Notice that the undersigned attorney for the defendants Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges Inc., and Big U Film Exchange Inc., will move this Court on the 22nd day of January, 1947, at the United States Courthouse, Room 1705 in the City of New York, New York, at 10:30 o'clock in the forenoon of that day for an order, pursuant to Rule 52-B of the Federal Court Rules, amending the findings of the Court, making additional findings and amending the

judgment accordingly, in accordance with the motion annexed hereto.

Dated: January 10, 1947.

Charles D. Prutzman, Attorney for Defendants Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges Inc., Big U. Film Exchange Inc., 1250 Sixth Avenue, New York, N. Y.

[fol. 3905] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION

Come now the defendants Universal Corporation, Universal Pictures Company, Inc., Universal Film Exchanges Inc., and Big U Film Exchange, Inc., and each of them, and by their attorney below named move this Court under Rule 52-B of the Federal Court Rules to amend the findings of fact and decree as follows:

(1) To amend the definition of franchise, set forth in Finding of Fact No. 1 and item 5 of Article II of the decree, to accord with the evidence, to read as follows:

A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, granting preferential exhibition rights, in effect for more than one motion picture season, and covering the exhibition of features released by one distributor during the entire period of the agreement.

(2) To amend Finding of Fact No. 89 to accord with the evidence, to read as follows:

Franchises have been entered into by the distributor-defendants with affiliated and independent circuits, and such franchises unreasonably restrain the trade of competing independent theatres, because they cover too long a period (more than one season), and also because they grant perferential rights to powerful theatre circuits for all of the features released by a given distributor.

[fol. 3906] (3) To amend Conclusion of Law No. 8, subdivision (f) to accord with the evidence, to read as follows:

Making master agreements, and making franchises with circuits of theatres which unreasonably restrained the trade of competing independent theatres.

(4) To amend the first sentence of Article II, item 5 of the decree, to accord with the evidence, to read as follows:

From further performing any existing franchise with any circuit of theatres to which it is a party and from making any such franchises in the future, except such as do not unreasonably restrain the trade of competing theatres.

(5) To amend sub-division (d) of item 8 of Article II of the decree to read as follows:

Each license shall be offered and taken theatre by theatre and picture by picture, except as otherwise authorized hereby.

(6) To amend Finding of Fact No. 64 to accord with the evidence, by adding the following sentence:

None of such exceptional features were distributed by Universal.

(7) To amend item 2 of Article II of the decree, to accord with the law and to render this provision of the decree consistent with other provisions, to read as follows:

From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres. The making by a distributor, acting independently of other distributors, of a series of license contracts with one exhibitor, or of a series of license contracts with more than one exhibitor, which contain clearance provisions, shall not be considered to be the maintenance of a "system of clearances."

[fol. 3907] (8) To amend Article VII of the decree to postpone the effectiveness of items 8(a) and 8(c) of Article II, in the event of an appeal, until ninety (90) days after entry of judgment on the mandate of the Supreme Court.

The amendments suggested in Items (1), (2), (3), (4) and (5) are requested for the following reasons:

The findings of fact, conclusions of law and decree in their present form condemn all long-term contracts made

by Universal with any exhibitor, whether a member of a circuit affiliated with a major defendant, or a member of an independent circuit or a single independent theatre. Universal believes that the findings, conclusions and decree ought to be corrected in the respects heretofore stated for two reasons:

1. In the first place a mere long-term commitment assuring an exhibitor that he may have Universal pictures is not properly to be considered a franchise, because it lacks a very essential element of a franchise, to wit, the element of exclusiveness, for a limited time at least. All of the franchises in evidence, it believed, involve this element. Yet franchise has been defined in the findings, conclusions and decree in such a way as to not require the presence of this element, and to condemn mere long-term commitments always considered perfectly legal.

2. In the second place Universal defendants have been permanently restrained from making such long-term commitments, much less true franchises, even with single independent theatres. Universal submits that it ought to be permitted to make true franchises (involving the element of exclusiveness) with all single independent theatres. The issue in this case certainly had to do with the relationships between the defendant-distributors and the major exhibition chains. Conceding for the purpose of argument only that this issue might be expanded to include the relationships between the defendant-distributors and the large independent circuits or even beyond this to include all independent circuits, it certainly cannot be expanded to include the rela- [fol. 3908] tionships between non-integrated distributors such as Universal and single independent theatres. Indeed, it is plain that the object of the proceedings must have been to foster and protect these very relationships.

What the Sherman Act condemns is undue or unreasonable restraints of interstate commerce, *Standard Oil* v. *U. S.*, 221 U. S. 1; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106. The meaning of this was dealt with in *Appalachian Coals* v. *U. S.*, 288 U. S. 344, pp. 359-361, where it was said:

> "The decisions established, said this Court in *Nash* v. *United States*, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly

restricting competition or unduly obstructing the course of trade' ".

The considerations necessary to be dealt with in this connection were also outlined in the *Appalachian Coals* case, wherein it was said:

> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade every regulation of trade, restrains.' *Chicago Board of Trade* v. *United States, supra.* The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions."

Chicago Board of Trade v. *United States,* 246 U. S. 231, at p. 238; *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, at p. 438 are to the same effect.

[fol. 3909] Thus in considering the legality under the Sherman Act of a long-term arrangement for the sale of pictures, it is essential to consider, *inter alia,* the following:

(1) the size and economic power of the distributor, in this case Universal, which is a moderately sized distributor, *i.e.* to what degree it approaches monopolistic power.

(2) The size and economic power of the exhibitor.

(3) The duration in years of the arrangement.

(4) Whether or not the arrangement contains the element of exclusiveness, and the period of time during which this exclusiveness operates.

(5) The effect upon competition.

Exclusive dealing contracts for a term of years are inherently legal even under Sec. 3 of the Clayton Act (Title 15 USC, Sec. 14, 38 Stat. 731, Act of October 15, 1914, c.

323, Sec. 3) where there is no undertaking by the purchaser to abstain from using or dealing in the goods of others. This is thoroughly settled law. Restatement Law of Contracts, c. 18, Sec. 516; Williston on Contracts, Sec. 1645; *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *U. S.* v. *Bausch & Lomb*, 45 Fed. Sup. 387, at p. 398, where Judge Rifkind said that the "restraining covenant is for the protection of the purchaser who is spending large sums to develop his good will and to enlarge the public patronage of a relatively new article of commerce", and held the exclusive dealing arrangement before him to be legal. The Supreme Court affirmed in 321 U. S. 707.

If exclusive-dealing contracts for a term of years are inherently lawful, it is obvious that mere long-term commitments without the exclusive feature, such as the present definition of franchise condemn, are *a fortiori* legal.

Finding of Fact No. 22 proposed by Universal read in part as follows:

> [fol. 3910] "In order to create competition in the areas where the exhibitors had failed and refused to license Universal product or exhibit same, Universal induced persons, firms and corporations to invest substantial sums of money in opening new theatres or improving existing theatres and granted to these accounts deals varying from one year to five years wherein and whereby these theatres were granted the exclusive right to exhibit Universal pictures for the period of said deals, in the specific theatres mentioned in the agreements and for the runs listed therein, whether the deal was for one year or longer.

This properly represents the usual situation which led Universal to enter into a franchise arrangement with a single independent theatre or small independent chain. It was the reverse of unduly restraining interstate commerce.

The decree unconditionally preserved to the major defendants the right to maintain "show-windows" for their own pictures. Universal should not have to buy theatres in order to acquire "show-windows", but ought to be permitted to acquire them through contractual arrangements, i.e. through franchises not unreasonably restraining the trade of competing theatres. In situations in which there are presently no theatres it is obvious that potential exhi-

bitors will not put money into theatre projects unless long-term prior-run commitments can be obtained for the pictures of one or more distributors. In such situations, therefore, the granting of franchises is plainly a public benefit.

The proposed amendments to the findings, conclusions and decree to take care of this situation seem obviously called for, are simple, and do not interfere in any way with the objectives of the decree.

The amendments suggested in Items (6) and (7) speak for themselves. If the suggested amendment (7) is not made, it is feared that the same thing which the Court now regards as an illegal system of fixing minimum admission prices will be regarded as an illegal system of fixing clearances (despite the admitted legality of a single clearance [fol. 3911] which is reasonable) by reason of the expression "or exhibitors" being used, and entirely aside from any conspiracy or agreement among distributors.

Wherefore, said defendants pray that the findings of this Court be amended and added to in the foregoing respects, and that the judgment of the Court be amended as above indicated, or, in the alternative, that the Court grant a rehearing, re-argument or new trial as to the subject-matter of this motion.

Dated: January 10, 1947.

Charles D. Prutzman, Attorney for the Universal Defendants, 1250 Sixth Avenue, New York, N. Y.

[fol. 3912] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation having filed in this Court a Motion for Leave to Intervene and Intervening Petition which came on before this Court for argument on October 21, 1946, and this Court having heard argument thereon,

It is hereby ordered, adjudged and decreed, that the said Motion for Leave to Intervene is hereby denied but said moving parties are hereby authorized to be heard in oral argument before this Court and to file briefs as amicus curiae.

Augustus N. Hand, Circuit Judge, Henry W. Goddard, District Judge, John Bright, District Judge.

January 21st, 1947.

[fols. 3913-3914] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO INTERVENE

This cause was heard on application of W. C. Allred, et al., for leave to intervene as parties defendant herein, and the Court having considered the arguments of counsel and being advised in the premises, it is

Ordered, that W. C. Allred, et al. be and they hereby are denied leave to intervene herein as parties defendant but are allowed to file a brief and be heard on the settlement of the decree.

Dated: January 21st, 1947.

Augustus N. Hand, Circuit Judge, Henry W. Goddard, District Judge, John Bright, District Judge.

[fol. 3915] IN UNITED STATES DISTRICT COURT

OPINION OF EXPEDITING COURT, (ENDORSED ON MOTION PAPERS)—Dated February 3, 1947

Motion of Columbia Defendants: "Motion denied. Feb. 3, 1947. Augustus N. Hand, U.S.C.J. Henry W. Goddard, D.J. John Bright, D.J."

Motion of United Artists: "Motion denied. Feb. 3, 1947. Augustus N. Hand, U.S.C.J. Henry W. Goddard, D.J. John Bright, D.J."

Motion of Universal Defendants: "The within motion is denied. Feb. 3, 1947. Augustus N. Hand, U.S.C.J. Henry W. Goddard, D.J. John Bright, D. J."

Motion of Paramount, Twentieth Century-Fox, Loew, RK.O. and Warner Defendants: "Motion denied as to 1, 3 and 4; granted as to 2(a) and (b) by extending the time of dissolution and termination to July 1, 1947. To this end, Paragraph III(2) of this decree is modified by adding at the end the following:

> "The Pooling agreements by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III(4) of the decree is modified by adding at the end of the following:

> "The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Settle order on Notice.

Feb. 3, 1947

[fol. 3916] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER RE MOTIONS TO AMEND AND CLARIFY FINDINGS AND DECREE

The Court having entered its findings and judgment herein on December 31, 1946, and having heard and considered the motions to amend and clarify the findings and judgment filed by all defendants and having decided said motions on February 3, 1947, with a direction to settle the

order therein upon due notice to the parties, which has now been given,

It is Hereby Ordered, Adjudged and Decreed as follows:

Paragraph III (2) of said judgment is hereby modified by adding at the end thereof the following: "The Pooling agreement by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of said judgment is hereby modified by adding at the end thereof the following: "The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Said motions are in all other respects hereby denied.

(S.) Augustus N. Hand, United States Circuit Judge.
(S.) Henry W. Goddard, United States District Judge. (S.) John Bright, United States District Judge.

Dated this 10th day of February, 1947.

(Filed Feb. 11, 1947, U. S. District Court, S. D. of New York.)

[fol. 3917] In the District Court of the United States

[Title omitted]

Petition for Appeal

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final order and decree of this Court entered on the 31st day of December, 1946, does hereby pray an appeal from said final order and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript

of the record, proceedings, and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

(S.) Wendell Berge, Assistant Attorney General;
(S.) Robert L. Wright, Special Assistant to the Attorney General:

Dated this 18 day of February, 1947.

Copy of Decree and memorandum in re Findings & Decree included in original as filed.

[fol. 3918] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the final order and decree of said District Court entered on December 31, 1946, as amended, in the above-entitled cause, and says that in the entry of the final order and decree the District Court committed error to the prejudice of the said plaintiff in the following particulars:

1. The Court erred in concluding that the relief granted was adequate to prevent the guilty defendants from unreasonably restraining competition in the motion picture business in the future.

2. The Court erred in concluding that the major defendants had not actually achieved a monopoly in exhibition, either singly or collectively.

3. The Court erred in not concluding that the defendants had actually achieved a collective monopoly of distribution.

4. The Court erred in failing to prohibit the guilty defendants from making clearance agreements in the future.

[fol. 3919] 5. The Court erred in failing to prohibit the continued use by the major defendants of each other's theatres as exhibition outlets for each other's films.

6. The Court erred in failing to order ultimate divorcement of the distribution and production businesses of the major defendants from their theatre operations.

7. The Court erred in failing to require the major defendants to divest themselves of all their theatre holdings.

8. The Court erred in failing to prohibit absolutely any further acquisition of theatre interests by the major defendants.

9. The Court erred in failing to prohibit the major defendants from continuing to exhibit their own films in their own theatres upon terms which discriminate against their competitors.

10. The Court erred in decreeing competitive bidding as appropriate relief in situations where the defendants' theatres were in competition with independent theatres.

11. The Court erred in failing to require that all competitive bids be stated in terms of flat rental.

12. The Court erred in concluding that none of the defendants had attempted to monopolize or conspired to monopolize or restrain trade in the business of producing motion pictures.

13. The Court erred in concluding that the factor of print cost would confine exhibition to high-priced theatres unless a system of successive runs protected by clearance is employed.

[fol. 3920] 14. The Court erred in concluding that a grant of clearance when not accompanied by a fixing of admission prices or by an undue extension as to area or duration affords a fair protection to the licensee without unreasonably interfering with the public interest.

15. The Court erred in concluding that the fixing of clearance in license contracts or by other agreements is essential to the reasonable conduct of the motion picture business.

16. The Court erred in concluding that competition can be introduced into the present system of fixing admission prices, clearances, and runs by requiring a defendant-distributor, when licensing its features, to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder.

17. The Court erred in concluding that the percentage of features on the market which any of the five major defend-

ants might play in its own theatres would be so small as in no wise to approximate a monopoly of film exhibition.

18. The Court erred in concluding that the competitive bidding decreed by it would make it impossible for the defendants to discriminate unreasonably in favor of circuit theatres and against independents.

19. The Court erred in concluding that a defendants' interest of five per cent or less of a theatre investment in which others were also interested was *de minimis* and only to be [fol. 3921] treated as an inconsequential investment in exhibition.

20. The Court erred in concluding that the defendants' theatre holdings are not large enough to permit them, individually or collectively, to have a monopoly of exhibition.

21. The Court erred in concluding that there was or would be under its decree adequate competition between theatres operated by the major defendants in any city.

22. The Court erred in concluding that certain theatres which had used the product of more than one distributor in the past could not operate on the product of one distributor in the future.

23. The Court erred in concluding that the illegalities and restraints found to exist in the industry did not lie in or result from the ownership of theatres by the major defendants.

24. The Court erred in concluding that total theatre divestiture would be injurious to the corporations concerned and would be damaging to the public.

25. The Court erred in concluding that such divestiture would not remedy the illegal practices found by it which had unreasonably restricted competition in the industry.

Wherefore, plaintiff prays that the final decree of the District Court be appropriately amended and corrected to include the relief referred to above as having been erroneously denied.

(S.) Wendell Berge, Assistant Attorney General;
(S.) Robert L. Wright, Special Assistant to the Attorney General.

Dated this 18 day of February, 1947.

[fol. 3922] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz:

1. Amended and supplemental complaint filed November 14, 1940.

2. Answers to amended and supplemental complaint filed by all defendants.

3. Consent decree filed November 20, 1940, including Rules of Arbitration.

4. Official record of the stenographic minutes of the hearing before Judge Goddard with respect to entry of consent decree held on November 14, 1940.

5. Expediting certificate filed June 13, 1945.

6. Opinion of the expediting court rendered June 11, 1946.

7. The proposed judgments submitted by all parties.

8. Memorandum in re findings and decree dated December 31, 1946.

[fol. 3923] 9. Findings of fact and conclusions of law filed December 31, 1946.

10. Judgment of the court entered on December 31, 1946.

11. Motions to amend and clarify the findings and judgment filed by all defendants.

12. Order entered on February 11, 1947 with respect to motions to amend and clarify findings and judgment.

13. Official record of the stenographic minutes of the proceedings before the expediting court from October 8, 1945 through January 22, 1947.

14. All of the exhibits received in evidence on behalf of the plaintiff and the defendants.

15. Plaintiff's index of its exhibits.

16. Petition for appeal.

17. Assignment of errors and prayer for reversal.

18. Order allowing appeal.

19. Proof of service.

20. Statement required by Rule 12.

21. Citation.

22. Statement of jurisdiction.

23. This praecipe.

(S.) Wendell Berge, Assistant Atorney General;
(S.) Robert L. Wright, Special Assistant to the Attorney General.

Dated this 18 day of February, 1947.

[fols. 3924-3926] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final order and decree of this Court in this cause entered on the 31st day of December, 1946, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged,

That the appeal be and the same is hereby allowed as prayed for.

(S.) Augustus N. Hand, USCJ, Henry W. Goddard, USDJ, John Bright, USDJ.

Dated this 21st day of February, 1947.

[fol. 3927] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITIONS FOR APPEALS—Filed Februray 26, 1947

Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Twentieth Century-Fox Film Corporation, National Theatres Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), and Warner Bros. Circuit Management Corporation, defendants in the above-entitled cause, each considering itself aggrieved by certain of the Findings of Fact and Conclusions of Law, made and filed by this Court on December 31, 1946, and by the Judgment, Decree and [fol. 3928] Final Order of this Court likewise made and entered on December 31, 1946, and by the Order of this Court entered on February 11, 1947, denying a motion of these defendants to amend said Decree and said Conclusions of Law, do hereby severally pray an appeal therefrom to the Supreme Court of the United States.

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, these defendants severally present to this Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain each of their appeals herein, and file herewith their several Assignments of Errors and their Prayers for Reversal.

Wherefore, these defendants severally pray that each of their appeals may be allowed, that the amount of their respective bonds be fixed by order, that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said Judgment, Decree and Final Order were based, be duly authenticated and sent to the Supreme Court of the United States under the Rules of said Court.

Dated, February 26, 1947.

Donovan Leisure Newton Lumbard & Irvine, Attorneys for Defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation, By Thomas J. McFadden, a member of the firm, 2 Wall Street, New York, N. Y.

[fol. 3929] Joseph M. Proskauer, Robert W. Perkins, Attorneys for Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, By Joseph M. Proskauer, 11 Broadway, New York, N. Y.

Davis Polk Wardwell Sunderland & Kiendl, J. Robert Rubin, Attorneys for Defendant Loew's Incorporated, By Theodore Kiendl, A Member of the Firm, 15 Broad Street, New York, N. Y.

Dwight, Harris, Koegel & Caskey, Attorneys for Defendants Twentieth Century-Fox Film Corporation and National Theatres Corporation, By John F. Caskey, A Member of the Firm, 100 Broadway, New York, N. Y.

[fol. 3930] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERRORS AND PRAYERS FOR REVERSAL—Filed February 26, 1947

Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corpora-
[fol. 3931] tion, Twentieth Century-Fox Film Corporation, National Theatres Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), and Warner Bros. Circuit Management Corporation, defendants in the above entitled cause, in connection with their several petitions for appeals to the Supreme Court of the United States, hereby severally assign error to the Findings of Fact, Conclusions of Law, Judgment, Final Order and Decree of the United States District Court for the Southern District of New York entered on December 31, 1946, and to the Order of said District Court entered on February 11, 1947, and say that there is manifest error in the entry of such Judgment, Final Order and Decree, and in the proceedings in this cause prior to, concurrent with, and subsequent

to the entry thereof, committed by the said District Court to the prejudice of each of the said defendants severally, in the following several particulars, to wit:

1

The Court erred in Section II, Paragraph 1 of the Decree, in enjoining the distributor-defendants, and each of them, as follows:

> "1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means."

2

The Court erred in failing to conclude that a distributor-defendant has a lawful right under the Copyright Law and [fol. 3932] under the common law to agree with its licensee that the latter shall charge a price not less than that specified in the license agreement during the exhibition of the feature licensed, and erred in failing to permit a distributor-defendant to make such provisions in its license agreements with each licensee with whom it does business.

3

The Court erred in making its Finding No. 64 reading as follows:

> "64. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised."

4

The Court erred in making its Finding of Fact No. 65 reading as follows:

"65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged [fol. 3933] for most of the feature motion pictures exhibited either by the defendants or by independents within the United States."

5

The Court erred in its Finding of Fact No. 66 in finding that these defendants or any of them have a definite interest in keeping up prices in any given territory in which they own theatres, and in finding that they or any of them safeguarded this interest by fixing minimum admission prices in their respective licenses when distributing films to exhibitors in those areas.

6

The Court erred in its Finding of Fact No. 66 in finding that there was a system which presupposed a fixing of prices by all parties concerned in all competitive areas.

7

The Court erred in its Finding of Fact No. 67 in finding that the agreements therein mentioned showed the intent of the defendants, who were parties thereto, to maintain admission prices at artificial levels.

8

The Court erred in its Finding of Fact No. 69 in finding that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum admission prices specified therein, have among themselves engaged in a national system to fix prices, and in finding that Columbia, Universal, and United Artists have participated in that system.

[fol. 3934] 9.

The Court erred in making its Finding of Fact No. 70 reading as follows:

"70. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices."

10.

The Court erred in making its Finding of Fact No. 71 reading as follows:

"71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected."

11

The Court erred in its Finding of Fact No. 72 in finding that the differentials in admission prices appearing in [fol. 3935] licenses of a particular feature in theatres exhibiting on different runs in the same competitive area were calculated or intended by the distributor-defendants, or any of them, to give prior run exhibitors as near a monopoly of the patronage as possible.

12

The Court erred in its Conclusion of Law No. 7(a) in concluding that the defendants therein named, or any of them, have violated the Act of Congress approved July 2, 1890 (26 Stat. 209; 15 U. S. C.), as amended, herein referred to as the Sherman Act, as stated in said conclusion of law, by:

"Acquiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices."

13

The Court erred in its Conclusions of Law No. 8(a) and No. 8(b) in concluding that the defendants therein named, or any of them, have violated the Sherman Act, as stated in said conclusions of law, by:

"(a) Conspiring with each other to maintain a nationwide system of fixed minimum motion picture theatre admission prices;

(b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices."

14

The Court erred in failing to conclude that a distributor-defendant had a lawful right under the Copyright Law [fol. 3936] and under the common law to agree with its licensee that the latter shall charge an admission price not less than that specified in the license agreement during the exhibition of the feature as a roadshow.

15

The Court erred in making its Finding of Fact No. 79 reading as follows:

"79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents."

16

The Court erred in making its Finding of Fact No. 81 reading as follows:

> "81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system."

17

The Court erred in its Finding of Fact No. 82 in finding defendants or any of them "acted in concert in their grant of run and clearance."

18

The Court erred in Section II, Paragraph 2 of the Decree in enjoining each of the distributor-defendants "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances."

[fol. 3937] 19.

The Court erred in Section II, Paragraph 4 of the Decree in decreeing that

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

20.

The Court erred in making its Finding of Fact No. 84 reading as follows:

> "84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendant's theatre or theatres to which the latter had licensed their pictures."

21.

The Court erred in its Conclusions of Law No. 7 (b) and No. 8(c) in concluding that the defendants, or any of them,

have violated the Sherman Act, as stated in said conclusions of law, by conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in or as to each local competitive area.

22.

The Court erred in its Conclusions of Law No. 9(c) and No. 9(d) in concluding that the exhibitor-defendants, or [fol. 3938] any of them, have violated the Sherman Act, as stated in said conclusions of law, by:

"(c) Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion picture theatre admission prices, runs and clearances;

(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixng minimum admission prices, run, clearance and other license terms".

23.

The Court erred in its Finding of Fact No. 110 to the extent that it found that these defendants or any of them have discriminated against small independent exhibitors in favor of large affiliated and unaffiliated circuits.

24.

The Court erred in its Conclusion of Law No. 8(d) in concluding that the distributor-defendants, or any of them, have violated the Sherman Act, as stated in said conclusion of law, by:

"Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110."

25.

The Court erred in its Finding of Fact No. 115 in finding that the joint interests therein referred to between an exhibitor-defendant in conjunction with independent, ex- [fol. 3939] hibitors enabled the parties to operate theatres collectively rather than competitively.

26.

The Court erred in its Finding of Fact No. 116 in finding that when theatres are jointly owned by a major defendant and an independent exhibitor it is evident that both joint owners wish to participate and are directly or indirectly participating in the business of exhibiting motion pictures and that the defendant thereby eliminates putative competition between itself and the other joint owner who otherwise would be in a position to operate theatres independently.

27.

The Court erred in its Conclusions of Law No. 9(a) and No. 9(b) in concluding that the exhibitor-defendants therein named, or any of them, have violated the Sherman Act, as stated in said conclusions of law, by:

"(a) Jointly operating motion picture theatres with each other and with independents through operating agreements or profit-sharing leases;

(b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings."

28.

The Court erred in Section III, Paragraph (2) of the Decree in enjoining the exhibitor-defendants, or any of them, from continuing to perform existing agreements, therein referred to, with exhibitors not defendants herein.

[fol. 3940]

29.

The Court erred in Section III, Paragraph (5) of the Decree in enjoining the defendants or any of them

"From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, * * * in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more."

30.

The Court erred in Section III, Paragraph (6) of the Decree in enjoining the defendants therein named, or any of them, from expanding their present theatre holdings in any manner whatsoever except as permitted in Section III, Paragraph 5 of the decree.

31.

The Court erred in denying Paragraph I of these defendants' motions to amend and modify the decree so as to make Paragraph (6) of Section III thereof read as follows:

> "'From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendants shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the [fol. 3941] exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court.'"

32.

The Court erred in denying Paragraph 4 of the motion of these defendants to amend and modify Conclusion of Law 9(d) to read as follows:

> "Conspiring with the distributor defendants to receive discriminatory license privileges as found in Finding No. 110 above."

33.

The Court erred in not decreeing that any defendant might apply to the Court for permission to retain a given partial interest in a theatre or group of theatres upon a showing to and finding by the Court that the particular relationship did not or would not unreasonably restrain competition.

34.

The Court erred in decreeing in Section V of the Decree that the Consent Decree entered November 20, 1940, should be of no further force or effect, except insofar as it might be necessary to conclude arbitration proceedings now pending, and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, and in failing to permit the said Consent Decree to remain in effect as a final determination between the [fol. 3942] plaintiff and the defendants as to the matters therein set forth.

35.

The Court erred in failing to decree that disputes between one or more of these defendants and exhibitors arising under the Decree should be determined by arbitration under the Rules of Arbitration provided for in the Consent Decree, as the same might be modified by the order of the Court from time to time.

36.

The Court erred in denying and in failing to grant the motions made by the defendants and each of them to dismiss the petition and amended and supplemental complaint and to strike exhibits and evidence upon the grounds set forth in their respective motions appearing at pages 383-4, 503-526 and 2501 of the Record.

37.

The Court erred in so much of Finding of Fact No. 154 as states that there were illegalities and restraints.

38.

The Court erred in finding and concluding that these defendants or any of them violated the Sherman Act in the respects herein assigned as error.

39.

The Court erred in making and entering so much of the Decree as is herein appealed from.

[fol. 3943] Wherefore, each of these defendants severally prays that said Decree, Judgment and Orders be reversed,

modified or corrected and that an appropriate judgment be rendered herein.

Dated, February 26, 1947. Respectfully submitted: Donovan Leisure Newton Lumbard & Irvine, Attorneys for Defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation, By Thomas J. McFadden A Member of the Firm 2 Wall Street, New York, N. Y.

Joseph M. Proskauer, Robert W. Perkins, Attorneys for Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, By Joseph. M. Proskauer, 11 Broadway, New York, N. Y.

[fol. 3944] Davis Polk Wardwell Sunderland & Kiendl, J. Robert Rubin, Attorneys for Defendant Loew's Incorporated, By Theodore Kiendl A Member of the Firm 15 Broad Street, New York, N. Y.

Dwight, Harris, Koegel & Caskey, Attorneys for Defendants Twentieth Century-Fox Film Corporation and National Theatres Corporation, By John F. Caskey A Member of the Firm 100 Broadway, New York, N. Y.

[fol. 3945] In United States District Court

[Title omitted]

Order Allowing Appeals—Filed February 26, 1947

The defendants Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Twentieth Century-Fox Film Corporation, National Theatres Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), and Warner Bros. Circuit Management Corporation, having made and filed their petition severally praying for appeals to the Supreme

[fols. 3946-3949] Court of the United States from certain of the Findings of Fact and Conclusions of Law made and filed by the Court herein on December 31, 1946, and the Judgment, Decree and Final Order of this Court entered herein on December 31, 1946, and the Order of this Court entered on February 11, 1947, and having also filed their several Assignments of Errors and Prayers for Reversal, and their statement showing the jurisdiction of the Supreme Court of the United States to entertain such appeals, and having in all respects conformed to the statutes and rules in such cases made and provided, it is

Ordered and adjudged that the said appeals be and the same are hereby allowed as prayed for, and that each of said defendants severally give a bond with good and sufficient security in the sum of $2,000 that it, as appellant, will prosecute its appeal to effect and answer all costs if it fails to make its appeal good.

Dated February 26, 1947.

Augustus N. Hand, Circuit Judge, Henry W. Stoddard, District Judge, John Bright, District Judge.

[fol. 3950] In United States District Court

[Title omitted]

Petitions for Appeal—Filed February 26, 1947

Paramount Pictures, Inc., and Paramount Film Distributing Corporation, defendants in the above-entitled cause, each considering itself aggrieved by certain of the Findings of Fact and Conclusions of Law, made and filed by this Court on December 31, 1946, and by the judgment, decree and final order of this Court likewise made and entered on December 31, 1946, and by the order of this Court entered February 11, 1947 denying a motion of these defendants to amend said decree and said Conclusions of Law, [fol. 3951] do hereby severally pray an appeal therefrom to the Supreme Court of the United States.

Purusant to Rule 12 of the Rules of the Supreme Court of the United States, these defendants severally present to this Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain each of their appeals herein, and file herewith their several Assignments of Errors and their Prayers for Reversal.

Wherefore these defendants severally pray that their appeals may be allowed, that the amount of their respective bonds be fixed by order, that a citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment, decree and final order was based, be duly authenticated and sent to the Supreme Court of the United States under the rules of said Court.

Dated, February 26, 1947.

Simpson Thacher & Bartlett, Attorneys for Defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation, By Albert C. Bickfor a member of the firm, 120 Broadway, New York 5, N. Y.

[fol. 3952] IN UNITED STATES DISTRICT COURT

[Title omitted]

SEPARATE ASSIGNMENTS OF ERRORS AND PRAYERS FOR REVERSAL ON BEHALF OF THE "PARAMOUNT DEFENDANTS" (PARAMOUNT PICTURES, INC. AND PARAMOUNT FILM DISTRIBUTING CORPORATION)—Filed February 26, 1947

Paramount Pictures, Inc. and Paramount Film Distributing Corporation, defendants in the above entitled case in [fol. 3953] connection with their petitions for appeal to the Supreme Court of the United States, hereby assign error to the Findings of Fact, Conclusions of Law, Judgment, final order and decree of the United States District Court for the Southern District of New York entered on December 31, 1946, and to the order entered on February 11, 1947, and say that there is manifest error in the entry of such judgment, final order and decree, and in the proceedings in this cause prior to, concurrent with, and subsequent to the entry thereof, committed by the District Court to the prejudice of each of the said defendants in the following several particulars:

1.

The Court erred in Section II, Paragraph 1 of the decree in enjoining these defendants, and each of them, as follows:

"1. From granting any license in which minimum prices for admission to a theatre are fixed by the

parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means".

2.

The Court erred in failing to find and conclude that these defendants have a lawful right under the Copyright Law and under the common law to agree with their licensees that the latter shall charge an admission price not less than that specified in the license agreement during the exhibition of the feature licensed, and erred in failing to permit them to make such provisions in their license agreements with each licensee.

[fol. 3954]

3.

The Court erred as to these defendants in making its Finding of Fact No. 64 reading in part as follows:

"64. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised".

4.

The Court erred as to these defendants in making its Finding of Fact No. 65 reading as follows:

"65. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States."

5.

The Court erred in its Finding of Fact No. 66 in finding that these defendants or either of them have a definite [fol. 3955] interest in keeping up prices in any given territory in which Paramount Pictures, Inc. own theatres, which interest was safeguarded by fixing minimum admission prices in its respective licenses when distributing films to exhibitors in those areas.

6.

The Court erred in its Finding of Fact No. 66 in finding that either of these defendants was a party to any system which presupposed a fixing of prices by all parties concerned in all competitive areas.

7.

The Court erred in finding that there was any admission price fixing system.

8.

The Court erred in its Finding of Fact No. 67 in finding that operating agreements made by Paramount Pictures, Inc. as exhibitor with one or more other defendants as exhibitors, or with independent exhibitors, for the joint operation of certain theatres, which agreements provided for minimum admission prices to be charged at such theatres, showed the intent of these defendants or either of them to maintain admission prices at artificial levels.

9.

The Court erred in finding that the Paramount defendants, or either of them, in granting and accepting licenses with minimum admission prices specified therein, have engaged in a system to fix prices.

[fol. 3956]

10.

The Court erred, as to these defendants, in finding, in its Finding of Fact No. 70 that they, or either of them have acquiesced in the establishment of a price-fixing system and have conspired with any other defendant to maintain prices.

11.

The Court erred, as to these defendants, in making its Finding of Fact No. 71 reading as follows:

> "71. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected."

12.

The Court erred, as to these defendants, in its Finding of Fact No. 72 in finding that the differentials in admission [fol. 3957] prices appearing in licenses of a particular feature in theatres exhibiting on different runs in the same competitive area were calculated or intended by these defendants or either of them as distributor, to give prior run exhibitors as near a monopoly of the patronage as possible.

13

The Court erred in its Conclusion of Law 7(a) in concluding that these defendants or either of them have violated the Sherman Act, as stated in said conclusion of law, by:

> Acquiescing in the establishment of a price fixing system by conspiring with any other defendant to maintain theatre admission prices.

14

The Court erred in its Conclusions of Law 8(a) and 8(b) in concluding that these defendants, or either of them, have violated the Sherman Act, as stated in said conclusion of law, by:

(a) Conspiring with any other defendant to maintain a nationwide system of fixed minimum motion picture theatre admission prices;

(b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices.

15

The Court erred in failing to conclude that each of these defendants had a lawful right under the Copyright Law and under the common law to agree with each of its licensees [fol. 3958] that the latter shall charge an admission price not less than that specified in the license agreement during the exhibition of a feature as a roadshow.

16

The Court erred as to these defendants in making its Finding of Fact No. 79 reading as follows:

"79. The major defendants have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents."

17

The Court erred as to these defendants in making its Finding of Fact No. 81 reading as follows:

"81. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the theatres to which they license their films and the exhibitor-defendants have assisted in creating and have acquiesced in this system."

18

The Court erred in its Finding of Fact No. 82 in finding that these defendants or either of them acted in concert

with any other defendant in their respective grants of run and clearance.

19

The Court erred in Section II, Paragraph 2 of the Decree in enjoining these defendants, or either of them, from agreeing with any exhibitors or distributors to maintain a system of clearances.

[fol. 3959]

20

The Court erred in Section II, Paragraph 4 of the decree in enjoining these defendants, or either of them, as follows:

> "4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

21

The Court erred as to these defendants in making its Finding of Fact No. 84 reading as follows:

> "84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter had licensed their pictures."

22

The Court erred in its Conclusion of Law No. 7(b) in concluding that these defendants, or either of them, have violated the Sherman Act, as stated in said conclusion of law, by;

> [fol. 3960] Conspiring with any other defendant to maintain a nationwide system of runs and clearances which is substantially uniform in each local competitive area.

23

The Court erred in its Conclusion of Law No. 8(c) in concluding that these defendants, or either of them, have violated the Sherman Act, as stated in said conclusion of law, by:

> Conspiring with any other defendant to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area.

24

The Court erred in its Conclusions of Law No. 9(c) and 9(d) in concluding that Paramount Pictures, Inc., violated the Sherman Act, as stated in said conclusion of law, by

> Conspiring with any other defendant to fix substantially uniform minimum motion picture theatre admission prices, runs and clearances;
>
> Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission prices, run, clearance and other license terms.

25

The Court erred in Section II, Paragraph 7 of the decree in enjoining these defendants, or either of them, from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.

[fol. 3961]

26

The Court erred in Section II, Paragraph 7 of the decree, in decreeing that these defendants, or either of them, to the extent that any of their features have not been trade shown prior to the granting of the license for more than a single feature, should give the licensee the right to reject twenty per cent of such features not trade shown prior to the granting of the license.

27

The Court erred in Section II, Paragraph 8 of the decree in enjoining these defendants from licensing in the future any feature for exhibition in any theatre not its own, in any

manner except by the method and in the manner therein prescribed.

28.

The Court erred in its Conclusion of Law 8(g) in concluding that these defendants, or either of them, had violated the Sherman Act, as stated in said conclusion of law, by individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films.

29

The Court erred in its Finding of Fact No. 110 to the extent that it found that these defendants, or either of them, have discriminated against small independent exhibitors in favor of large affiliated and unaffiliated circuits.

[fol. 3962] 30

The Court erred in its Conclusion of Law 8(d) in concluding that these defendants, or either of them, have violated the Sherman Act, as stated in said conclusion of law, by:

> "Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits, as found in Finding of Fact No. 110."

31

The Court erred in its Finding of Fact No. 115 in finding that the theatre interests therein referred to between defendant Paramount Pictures, Inc. and an independent exhibitor enabled the parties to operate theatres collectively rather than competitively.

32

The Court erred in its Finding of Fact No. 116 in finding that when theatres are jointly owned by defendant Paramount Pictures, Inc. and an independent exhibitor it is evident that both joint owners wish to participate and are directly or indirectly participating in the business of exhibiting motion pictures and that defendant Paramount Pictures, Inc. thereby eliminates putative competition between

itself and the other joint owner who otherwise would be in a position to operate theatres independently.

33

The Court erred in so much of its Conclusions of Law No. 9(a) and 9(b) as conclude that defendant Paramount [fol. 3963] Pictures, Inc. violated the Sherman Act, as stated in said conclusion of law, by:

> Jointly operating motion picture theatres with any other defendant and with independents through operating agreements or profit-sharing leases;
>
> Jointly owning motion picture theatres with any other defendant and independents through stock interests in theatre buildings.

34

The Court erred in Section III, Paragraph (5) of the decree in enjoining defendant Paramount Pictures, Inc. "From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, * * * in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships * * * between defendants and independents which violate this provision, one defendant may acquire the interest of * * * [an] independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures."

[fol. 3964]

35

The Court erred in Section III, Paragraph (6) of the decree in enjoining defendant Paramount Pictures, Inc.

from expanding its present theatre holdings in any manner whatsoever except as permitted in Section III, Paragraph 5 of the decree.

36

The Court erred in failing to decree that defendant Paramount Pictures, Inc. might expand its present theatre holdings for the purpose of acquiring interests in theatres in order to protect its investments or in order to enter a competitive field, upon a showing as to each new theatre that such acquisition would not unduly restrain competition in the exhibition of feature motion pictures in the competitive area where such theatre was to be acquired.

37

The Court erred in denying Paragraph I of these defendants' motion to amend and modify the decree so as to make Paragraph (6) of Section III thereof read as follows:

> "'From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or for the purpose of acquiring theatres of interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be [fol. 3965] served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court.'"

38

The Court erred in denying Paragraph 4 of the motion of these defendants to amend and modify Conclusion of Law 9(d) to read as follows:

> "'Conspiring with the distributor defendants to receive discriminatory license privileges as found in Finding No. 110 above.'"

39

The Court erred in not specifically decreeing that defendant Paramount Pictures, Inc. might apply to the Court for permission to retain any presently owned partial interest in a theatre or group of theatres upon a showing to and finding by the Court that the retention of such partial interest did not or would not unreasonably restrain competition.

40

The Court erred in failing and refusing to decree as follows:

> "In any case where it is shown that a joint relationship between an exhibitor-defendant or a subsidiary thereof and an independent exhibitor resulted from the sale, transfer or other disposition by the exhibitor-defendant or a subsidiary thereof (or by a Trustee in Bankruptcy or other legal representative of either of them) of the partial interest to such independent exhibitor, the exhibitor-defendant may [fol. 3966] apply to this Court for permission to continue such relationship to the extent to which and in the places in which the parties to the joint relationship were not in competition at the time of such sale, transfer or other disposition of such partial interest."

41

The Court erred in decreeing in Section V of the decree that the consent decree entered November 20, 1940, should be of no further force or effect, except insofar as it might be necessary to conclude arbitration proceedings now pending, and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, and in failing to permit the said consent decree to remain in effect as a final determination between the plaintiff and the defendants as to the matters therein set forth.

42

The Court erred in failing to decree that disputes between one or more of the defendants and exhibitors arising under the decree should be determined by arbitration under the Rules of Arbitration provided for in the consent

decree, as the same might be modified by the order of the Court from time to time.

43

The Court erred in denying the motions made by these defendants and each of them to dismiss the petition and amended and supplemental complaint and to strike exhibits and evidence upon the grounds set forth in their respective motions appearing at pages 383-4, 503-526 and 2501 of the Record.

44

The Court erred in so much of Finding of Fact No. 154 as states that there were illegalities and restraints in [fol. 3967] admission price fixing, non-competitive granting of runs and clearances and certain discriminations among licensees between defendants and independents.

45

The Court erred in finding that these defendants or any of them violated the Act of Congress approved July 2, 1890 (26 Stat. 209; 15 U. S. C.), as amended, commonly known as the Sherman Act.

46

The Court erred in making and entering the decree appealed from.

47

The Court erred in Section III paragraph (2) of the decree in enjoining Paramount Pictures Inc. from continuing to perform existing agreements therein referred to with exhibitors not parties to this action.

Wherefore each of these defendants, severally prays that said decree, judgment and final order be reversed and a judgment rendered in favor of each of them.

Respectfully submitted, Simpson Thacher & Bartlett, Attorneys for Defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation, by Albert C. Bickford, a member of the firm, 120 Broadway, New York 5, N. Y.

Dated: New York, N. Y., February 26, 1947.

[fol. 3968] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEALS OF THE PARAMOUNT DEFENDANTS—Filed February 26, 1947

The defendants Paramount Pictures, Inc., and Paramount Film Distributing Corporation, having made and filed their petition severally praying for an appeal to the Supreme Court of the United States from certain of the Findings of Fact and Conclusions of Law made and filed by the Court herein on December 31, 1946, and the judgment, decree and final order of this Court entered herein on December 31, 1946, and the order of this Court entered on February 16, 1947, and having also filed their several Assignments of Errors and Prayers for Reversal, and [fols. 3969-3975] their statement (in conjunction with other defendants) showing the jurisdiction of the Supreme Court of the United States to entertain such appeals, and having in all respects conformed to the statutes and rules in such cases made and provided, it is

Ordered and adjudged that the said appeals be and the same are hereby allowed as prayed for, and that each of said defendants severally give a bond with good and sufficient security in the sum of $2,000 that it, as appellant, will prosecute its appeal to effect and answer all costs if it fails to make its appeal good.

Dated, February 26, 1947.

Augustus N. Hand, Circuit Judge; Henry W. Stoddard, District Judge; John Bright, District Judge.

[fol. 3976] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 6, 1947

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., defendants in the above entitled cause, considering themselves aggrieved by (1) the findings and conclusions filed by the Court on December 31, 1946, and (2) the final order and decree of this Court entered on December 31, 1946, do hereby pray an appeal to the Supreme

Court of the United States. Pursuant to Rule 12 of the Rules [fol. 3977] of the Supreme Court, the defendants present to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the defendants consider the action of the Court erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Defendants pray that their appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Schwartz & Frohlich, By Louis D. Frohlich, Member of the firm, 1450 Broadway, New York City, 18, N. Y., Counsel for Defendants, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc.

Dated this 4th day of February, 1947.

[fol. 3978] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed February 6, 1947

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., defendants in the above entitled cause, in connection with their petition for appeal to the Supreme Court of the United States, hereby assign error to the final Order and Decree of said District Court entered on Decem-
[fol. 3979] ber 31, 1946, in the above entitled cause, and to the Findings of Fact and Conclusions of Law filed on December 31, 1946, and say that in the entry of the final order and decree and in the filing of said findings and conclusions the District Court committed error to the prejudice of the said defendants in the following particulars:

I

As to the Findings and Conclusions

1. The Court erred in including in Finding No. 1 the following paragraph:

"Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period."

2. The Court erred in making Finding No. 93, which reads as follows:

"93. Block-booking, when the license of any feature is conditional upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits."

3. The Court erred in including in Finding No. 94 the following portion:

"94. * * * In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block booking and blind-selling based upon the supposed unfairness of contracts which often includes pictures the inferior qual-[fol. 3980] ity of which could not be known, Section III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five."

4. The Court erred in making Finding No. 97, which reads as follows:

"97. Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it."

And in failing to add as requested by defendants the following:

"1. In the early stages of the industry producers sold their pictures by the State Right method, both

in the United States and throughout the world (1732-3). This was an uncertain operation and failed to give satisfactory revenue to the producers, and in the early 1920s the producers of pictures began to sell their pictures in blocks of a season's product in advance (1733-4). Columbia embarked on that system of distribution in 1929 and was compelled thereby to finance itself to the extent of a million dollars (1734-5). It has sold its pictures continuously since then in blocks of all or part of the season's product in advance (1735). All of the other distributing companies have sold their pictures in the same manner, except that the defendants, RKO, MGM, Twentieth Century-Fox, Warner and Paramount began to sell their pictures in blocks of five on the entry of the consent decree herein.

2. The exhibitors know fairly accurately what they purchase from Columbia when they buy its pictures in block at the beginning of each season. They know it [fol. 3981] from the history of the company, the type of releases it has, and because Columbia describes as adequately as possible its prospective pictures by title, by story and by stars (1736-7).

3. There is no such thing as blind selling (1812), and there is no proof in this record that any exhibitor in entering into a block booking contract with Columbia was misled with respect to the product or that he did not know what kind of pictures he was getting or that he was at any disadvantage by reason of such blockbooking contract (1736, 1759, 1812-3), and pictures are sold today as they always have been, on the star, the story, the director and similar elements (1630-3).

4. During the period in question every agreement or contract by Columbia granting an exhibition right was in the nature of a limited exclusive right granted to a theatre owner—first the physical possession of a positive print, a tangible piece of property and second, the intangible right of license to publicly perform in his theatre the copyrighted subject contained in the positive print with no right to assign that performing

right to anybody else; that the right was limited to exhibit or publicly perform said copyrighted work only in the particular theatre or theatres listed in the contract for the specific number of days included in the contract, with no right to lease or sell or in any way dispose of any part of the tangible property or print to anybody else, and with a further condition that when the public performance was completed under the contract, the print was to be returned to Columbia's exchange.

5. During the period in question Columbia did not sell or part with the title to any of the positive prints of any of the motion pictures distributed by it to any [fol. 3982] of the exhibitors exhibiting its motion pictures in the United States of America.

6. During the period in question Columbia, through its selling or licensing organization, solicited the various exhibitors of motion picture photoplays, in the United States of America, and tried to secure from said exhibitors exhibition license agreements under the terms of which said exhibitors would agree to exhibit all of the Columbia photoplays or a part of the Columbia photoplays, or any part of the Columbia photoplays that were available for exhibition for some run in said exhibitors' theatres.

7. During the period in question Columbia did not condition the licensing of any photoplay in any exhibitors' theatre upon that exhibitor's agreement to license other Columbia photoplays for exhibition in said theatre.

8. During the period in question Columbia licensed the exhibition of its pictures both to the so-called affiliated theatres and independent theatres on flat rental terms, percentage terms and guarantee against percentage terms.

9. During the period in question Columbia licensed its pictures for exhibition to both affiliated and independent theatres on so-called 'selective' contracts and did not discriminate in favor of affiliated against independent theatres, and granted not only the same

rights of selection to both affiliated and independent theatres but granted greater selectivity to the independents.

10. During each of the years in question in excess of 600 feature photoplays were generally released in the United States of America, exclusive of so-called foreign made films. That Columbia releases during [fol. 3983] the same period equalled a comparatively small number of feature photoplays generally released in the United States each year including top features, features of lesser merit, Westerns and shorts; that at no time during said period did Columbia monopolize or attempt to monopolize or had it the power to monopolize the distribution market in the United States of America, or any section thereof."

5. The Court erred in including in Finding No. 154 that portion thereof which reads as follows:

"The illegalities and restraints herein found are * * * in block-booking."

6. The Court erred in including in Finding No. 156 the words "block-booking" as one of the practices which have been found unreasonable to restrict competition, and in failing to add as requested by defendants the following:

"22. The course of conduct of the defendant, Columbia, during the period in question, was to license its product for first run or any run open to independent exhibitors either operating in competition with the defendant exhibitors or not in competition, including the key cities in the United States having a population of 100,000 or over, wherever independent exhibitors operated theatres.

23. In conducting its business of distributing motion pictures and making exhibition license agreements during the period in question, Columbia conducted all its negotiations and made all its contracts, whether with independents or affiliated exhibitors, or unaffiliated circuits, without any intent, purpose or effect to bring about a monopoly in the distribution or exhibition business, or to unduly restrain Inter- [fol. 3984] state Commerce, but merely licensed its

product in the market the way it found it, and with the sole purpose and intent of receiving the maximum amount of revenue legitimately possible for all pictures distributed by it. • • •

25. Columbia owns no theatres and may not look to such sources for its market. Other companies which sell their pictures by block booking and which own no theatres are Universal, Republic, Monogram and Producer's Releasing Corporation.

26. The method of selling pictures by block booking eliminates to some extent the hazard and gamble involved in producing pictures. In 1928-9 Columbia spent $1,632,300 in production; in 1944-5 it spent (estimated), $16,689,700 (Exhibit C-2). It could not have increased its budget and spent these moneys unless it had the assurance of a ready market which only block booking has given it, and block booking is vital and necessary to Columbia for its continued existence as a producer (1737). To sell pictures singly Columbia would have to change its whole financial base, it would have to obtain moneys by way of refinancing or stock issue to sink into an inventory and keep the same on the shelf for a period of time; whereas block booking enables Columbia to turn over its pictures rapidly and to put its money back into the production of pictures quickly (1737). To sell pictures singly means to freeze Columbia's capital so that it would require more capital with which to operate, and that Columbia could not very well do (1754).

27. If Columbia has to sell pictures singly it will have to go through many more sales campaigns each year and increase its personnel, all at a substantial increase in overhead (1749-50). The exhibitors [fol. 3985] throughout the country generally have accepted block booking as an advantageous form of purchasing pictures and they desire to continue to purchase their pictures by block booking, as it gives them an assurance of product (1737, 1760, 2018); and exhibitors ever since the Consent Decree have demanded the restoration of block booking with respect to the defendants, MGM, RKO, Twentieth Century-Fox, Warner and Paramount and have voiced

great dissatisfaction in their conventions and meetings with the sale of pictures in small blocks or five or less (1761-3, 1789-91). There is no proof in this record that block booking violates the Sherman Act or that it is in restraints of trade or commerce.

28. Columbia and Universal under their respective contracts (2019) give a substantial degree of selectivity to their exhibitors when they sell their pictures in block (2017-8) and they give a greater degree of selectivity to the independents than to the affiliated exhibitors (1750). In this manner the exhibitor is protected against having bad pictures foisted upon him.

29. Columbia gives film rental adjustments to all of its exhibitor customers, and in fact, gives greater adjustments to independents than it does to affiliates (1757).

30. A great deal of Columbia's product is sold to the great mass of theatres in small towns on double features (1758).

31. Block booking has been a common method of selling pictures; it reduces selling expenses, but does not freeze pictures and inventories, and keeps them moving off the shelves as rapidly as they are produced; [fol. 3986] it creates a ready market for the producers and enables them to invest their capital with some reasonable hope of recoupment; and is a form of selling which the exhibitors desire to continue, as it assures them a ready market (2018) and relieves them of the burden, time and expense of making individual deals for each picture which they exhibit. There is no proof in this record that any exhibitor was ever hurt or injured in his business or property by reason of block booking.

32. No exhibitor took the stand and testified with respect to block booking.

33. The abolition of block booking in this industry places Columbia at an economic disadvantage as against all other producers of motion pictures who own theatres, because the defendants who own theatres have a ready market for their pictures and may to some extent reduce the gamble and hazard of production,

whereas defendant, Columbia, and other producers similarly situated have no ready market, so that in effect the abolition of block booking sought by the Government is a plain case of discrimination in favor of the defendants herein who own their own theatres, and far from freeing the market for competition, the net result will be just the opposite.

34. Block booking has been found to be a perfectly legal practice by the courts in *Westway Theatres, Inc.* v. *Twentieth Century-Fox Company, Federal Trade Commission* v. *Paramount*, and *United States* v. *Crescent* and there is no decision by the Supreme Court which has ever condemned it."

7. The Court erred in including in its Conclusion of Law No. 8 the following portion:

[fol. 3987] "(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;"

8. The Court erred in making its Conclusion of Law No. 11, which reads as follows:

"11. Block-booking as hereinabove defined, violates the Sherman Act."

II

As to Final Order and Decree

9. The Court erred in including in the final order and decree entered December 31, 1948, and more particularly in Section II thereof, paragraphs 7, 8 and 9, reading as follows:

"7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in

the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

[fol. 3988] (a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distribu-

tor shall grant such license upon the run bid for [fol. 3989] to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words 'exclude simultaneous exhibition' shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words 'competitive area' shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand."

[fol. 3990] Wherefore, defendants pray that the action of the District Court in making the findings and conclusions heretofore set forth and in failing to add the matter heretofore set forth submitted by defendant, and the action of

the District Court in including in the final order and decree of December 31, 1946, the paragraphs hereinbefore set forth, may be held erroneous and said decree accordingly reversed and the cause remanded for the elimination of the aforesaid findings and conclusions and the elimination of said paragraphs in the decree, and for such other and fit relief as the Court may deem just and proper.

Schwartz & Frohlich, by Louis D. Frohlich, 1450 Broadway, New York City 18, N. Y.; Counsel for Defendants, Columbia.

Dated this 4th day of February, 1947.

[fol. 3991] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 6, 1947

In the above entitled cause defendants, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., having made and filed their petition praying an appeal to the Supreme Court of the United States from the findings and conclusions filed by the Court on December 31, 1946, and the final order and decree entered on December 31, 1946, [fol. 3992] and having also filed their assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided, it is therefore

Ordered and adjudged that the appeal be and the same is hereby allowed as prayed for, and that said defendants give a bond with good and sufficient security in the sum of $2,000, that they as appellants shall prosecute their appeal to effect and answer all costs if they fail to make their appeal good.

Dated this 6th day of February, 1947.

Augustus N. Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fol. 3993] Citation in usual form. Filed Feb. 6, 1947. Omitted in printing.

[fols. 3994-3995] Bond on appeal for $2,000 approved and filed Feb. 6, 1947, omitted in printing.

[fol. 3996] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR RECORD

To the Clerk of the United States District Court:

In connection with the appeal allowed Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc. on February 6, 1947, in the above entitled case, please prepare a transcript of the record in the above entitled cause in the matter of the appeal herein, and include in said transcript in the order given below the following papers, viz:

1. Amended and Supplemental Complaint.

2. Answers to the amended and supplemental complaint of the following defendants:

Columbia Pictures Corporation and Columbia Pictures of [fol. 3997] Louisiana, Inc.; Paramount Pictures, Inc.; Loew's Incorporated; R.K.O. Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Twentieth Century-Fox Film Corporation; Universal Pictures Company, Inc. and United Artists Corporation.

3. The following portions of defendants' evidence, including the testimony of appellants and defendants' witnesses hereinafter mentioned and exhibits filed and read to the Court in connection with said evidence and objections of counsel to admissability of such evidence and exhibits, to-wit: Pp. 1731-1896, Abraham Montague; Pp. 1998-2059, William A. Scully; Pp. 1932-1992a, Paul N. Lazarus.

4. Argument and concession of Government's counsel contained in the minutes of the arguments before the Court on January 17, 1946, at pp. 215-219 inclusive.

5. The following defendants' exhibits not read into evidence: C-1, C-2, C-4, C-5, C-6, C-7, C-9, C-10.

6. Memorandum of Columbia Pictures Corporation on Findings and Decree, containing appellants' proposed Findings and Conclusions, dated September 10, 1946, and submitted to the Court in September, 1946.

7. Opinion of the court dated June 11, 1946.

8. Memorandum of Columbia Pictures Corporation on [fol. 3998] Findings and Decree dated October 16, 1946, and submitted to the Court in October, 1946.

9. Findings and Conclusions filed December 31, 1946.
10. Final decree entered December 31, 1946.
11. Opinion of the Court dated December 31, 1946.
12. Opinion of the Court dated February 3, 1947.
13. Proposed Findings and Conclusions submitted by plaintiff on June 19, 1946.
14. Proposed decree submitted by plaintiff on June 19, 1946.
15. Proposed Findings and Conclusions submitted by plaintiff on October 8, 1946.
16. Proposed Decree submitted by plaintiff on October 8, 1946.
17. Petition for appeal.
18. Assignment of Errors and Prayer for Reversal.
19. Order Allowing Appeal of Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc.
20. Appeal bond of Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc. issued by Maryland Casualty Company.
21. Statement required by Rule 12.
22. Citation.
23. Statement of Jurisdiction.
24. Proof of service of appeal papers and of Statement required by Rule 12.
25. This praecipe.

Schwartz & Frohlich, by Louis D. Frohlich, Counsel for Appellants, 1450 Broadway, New York 18, N. Y.

Dated, February 10th, 1947.

[fol. 3999] Service of the foregoing Praecipe and receipt of copy thereof is hereby acknowledged this 10th day of February, 1947.

John F. X. McGohey, United States District Attorney; Tom C. Clark, Attorney General of the United States; Attorneys for Appellee.

To Simpson, Thacher & Bartlett, Esqs., Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.

Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs.; Attorneys for Loew's Defendants, 15 Broad Street, New York, N. Y.

Donovan, Leisure, Newton, Lumbard & Irvine, Esqs., Attorneys for RKO Defendants, 2 Wall Street, New York, N. Y.

Joseph M. Proskauer, Esq., Attorney for Warner Defendants, 11 Broadway, New York, N. Y.

Dwight, Harris, Koegel & Caskey, Esqs., Attorneys for 20th Century-Fox Defendants, 100 Broadway, New York, N. Y.

O'Brien, Driscoll & Raftery, Esqs., Attorneys for Defendant, United Artists Corporation, 152 West 42nd Street, New York 18, N. Y.

Charles Prutzman, Esq., Attorney for Universal Defendants, 1250 Sixth Avenue, New York, N. Y.

[fol. 4000] AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
County of New York, ss:

Max Rose, being duly sworn, deposes and says, that he served the within Praecipe for Record of Columbia Appellants on

Tom C. Clark, Esq., Attorney General of the United States, Department of Justice, Washington, D. C.

Simpson, Thacher & Bartlett, Esqs., Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.

Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Loew's Defendants, 15 Broad Street, New York, New York.

Donovan, Leisure, Newton, Lumbard & Irvine, Esqs., Attorneys for RKO Defendants, 2 Wall Street, New York, New York.

Joseph M. Proskauer, Esq., Attorney for Warner Defendants, 11 Broadway, New York, New York.

Dwight, Harris, Koegel & Caskey, Esqs., Attorneys for Defendants 20th Century-Fox, 100 Broadway, New York, New York.

O'Brien, Driscoll & Raftery, Esqs., Attorneys for Defendant United Artists Corporation, 152 West 42nd Street, New York 18, New York.

Charles Prutzman, Esq., Attorney for Universal Defendants, 1250 Sixth Avenue, New York, New York.

on the 10th day of February, 1947, through the Post Office by depositing a true and correct copy of the same properly

enclosed in a post-paid wrapper, in a Post Office Box, regularly maintained by the Government of the United States at 1450 Broadway, Borough of Manhattan, City of New York and under the care of the General Post Office, in the Borough of Manhattan, City of New York.

[fols. 4001-4004] That a copy of said Praecipe was so mailed to each of the above named attorneys at their respective addresses as stated above. Such address in each instance is the address designated by such attorney or such firm of attorneys for the service of papers.

Max Rose.

Sworn to before me this 10th day of February, 1947. Belle B. Balaton, Notary Public, State of New York.

[fol. 4005] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 20, 1947

United Artists Corporation, one of the defendants in the above entitled cause, considering itself aggrieved by (1) the findings and conclusions filed by the Court on December 31, 1946, and (2) the final order and decree of this Court entered on December 31, 1946, does hereby pray an appeal to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the defendant presents to this Court herewith a statement [fol. 4006] showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the defendant considers the action of the Court erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Defendant prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said final order and decree was based, duly authenticated, be sent to the Supreme Court of the United States

under the rules of said Court in such cases made and provided.

Dated: New York, this 20th day of February, 1947.
O'Brien, Driscoll & Raftery, by Edward C. Raftery, A Member of the Firm, 152 West 42nd Street, New York 18, New York, Counsel for Defendant, United Artists Corporation.

[fol. 4007] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed February 20, 1947

In the above entitled cause defendant United Artists Corporation having made and filed its petition praying an appeal to the Supreme Court of the United States from the findings and conclusions filed by the Court on December 31, 1946, and the final order and decree entered on December 31, 1946, and having also filed its assignment of errors and prayer for reversal and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided, it is therefore
[fols. 4008-4009] Ordered and Adjudged that the appeal be and the same is hereby allowed as prayed for, and that said defendant give a bond with good and sufficient security in the sum of $2000, and that it, as appellant, shall prosecute its appeal to effect and answer all costs if it fails to make its appeal good.

Dated this 20th day of February, 1947.
Augustus N. Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fol. 4010] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed February 20, 1947

United Artists Corporation, one of the defendants in the above entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby

assigns error to the final Order and Decree of said District Court entered on December 31, 1946, in the above entitled cause, and to the Findings of Fact and Conclusions of Law filed on December 31, 1946, and says that in the entry of the final order and decree and in the filing of said findings [fol. 4011] and conclusions the District Court committed error to the prejudice of the said defendant in the following particulars:

The Court erred in not including in its Findings the following:

1. That during the entire period in question each Producer of each picture released by United Artists has had and has exercised the full right of exhibition contract approval on all pictures distributed by United Artists in the United States of America.

2. As a general rule each engagement for each exhibition in each theatre is licensed under a separate written contract on the usual printed form used by United Artists Corporation.

3. That the general and usual practice in the licensing of United Artists pictures to exhibitors is as follows: A salesman negotiates a contract or an application for the exhibition of each of the pictures released by United Artists Corporation separately and apart from any other pictures released by United Artists Corporation; that application is forwarded to the home office at New York City and if it bears the approval of the local branch manager or the district manager, it then, and only then, is forwarded to the New York home office; after it is passed upon by the home office of United Artists Corporation it is then submitted to the individual producer's representative in New York for approval or rejection by said producer's representative; if approved, it then is returned to the exhibitor, and if rejected, there is no deal.

4. In isolated cases negotiations are conducted separately for each picture and for convenience more than one picture may be included in a submission or proposed deal. If more than one is included the home office of United [fol. 4012] Artists breaks the deal down by each respective producer and submits the deal to each separate producer's representative for approval or rejection, just as in the case of a separate individual submission.

5. During the period in question every agreement or contract granting an exhibition right was in the nature of a limited exclusive right granted to a theatre owner—first, the physical possession of a positive print, a tangible piece of property, and, second, the intangible right of license to publicly perform in his theatre the copyrighted subject contained in the positive print with no right to assign that performing right to anybody else; that the limited right to exhibit or publicly perform said copyrighted work only in the particular theatre or theatres listed in the contract for the specific number of days included in the contract with no right to lease or sell or in any way dispose of any part of the tangible property or print to anybody else; with a further condition that when the public performance was completed under the contract, the print was to be returned to United's exchange.

6. During the period in question United did not sell or part with the title to any of the positive prints of any of the motion pictures distributed by it to any of the exhibitors exhibiting its motion pictures in the United States of America.

7. During the period in question United Artists through its selling or licensing organization solicited as many exhibitors as possible in the United States of America and tried to secure from said exhibitors separate exhibition license agreements for each of the photoplays distributed by United Artists that were available for exhibition for some run in said exhibitor's theatres.

8. During the period in question United licensed the exhibition of its pictures both to the so-called affiliated theatres [fol. 4013] and independent theatres on flat rental terms, percentage terms and guarantee against percentage terms.

9. During the period in question United Artists licensed the exhibition of each of its pictures generally for approximately 10,000 to 12,000 runs. In order to serve the 12,000 runs United bought from 150 to 350 positive prints for each of the pictures released by it depending upon the quality of the pictures and the number of runs. In each of the communities with theatres, depending upon the number of theatres and the population, United was required to service 12,000 runs with the aforesaid number of prints. The runs therefore varied in the smallest communities where the

usual rule was one run for the community to the large key cities like New York where the picture might have in excess of 100 runs. United therefore licensed its pictures first run, second run, third run and in many other variants of runs in said cities which had more than one run of each picture, it being the desired purpose of United Artists to secure as many runs as possible on the best terms obtainable for each of its pictures in every community.

10. In order to secure as much revenue as possible from each picture United Artists licensed its pictures on these runs with variant time intervals between each run which time intervals are generally referred to in the business as "clearance periods".

In many of the contracts in evidence these clearance provisions are set out in the contract; in many others there are no provisions for clearance.

11. There is no evidence that the extent, duration or area of clearance stipulated in any United Artists contract was arrived at in any other manner other than independent negotiation between United Artists and the other contracting party.

12. In attempting to license the exhibition rights of its photoplays during the period in question United Artists [fol. 4014] licensed its photoplays in intensive competition with the other distributors of motion pictures, to-wit: Loew's, 20th Century-Fox, Paramount, Warners, Universal, RKO, Columbia, all of whom are defendants in this action, and with Republic, Monogram, PRC and other distributors of motion pictures.

13. That if United Artists wished to license its photoplays to exhibitors desiring to acquire said licenses, United Artists, if it was to license its pictures, had to meet the competition both in run and in clearance of United Artists' competitors.

14. As a result of said competition certain uniformities in clearance both in duration and area appear in the various competitive areas in which multiple runs are licensed in the United States of America.

15. In the orderly operation of a theatre in a competitive area where multiple runs are shown, each exhibitor endeavors to secure from each distributor the same clearance

both as to duration and area from whom he licensed the same run in such competitive area.

16. United Artists, in an effort to sell as many runs as possible in every competitive area where multiple runs are shown because of the competitive conditions aforesaid, and notwithstanding the separate negotiations with each exhibitor for the licensing of its runs, licensed the exhibition rights of its pictures to the exhibitors involved in the competitive areas with stipulated clearances which did not differ from the clearances which the exhibitor licensed from other distributor competitors of United Artists.

17. By licensing successive runs and making them available to all types and classes of theatres, charging all kinds and types of admission prices, United Artists made it possible during the period in question for the maximum num-
[fol. 4015] ber of theatres to obtain its pictures on all types of rental contracts and for varying amounts of film rental, so that the maximum number of people were able to see the pictures distributed by United Artists. By so doing United Artists obtained the maximum flow in Interstate Commerce of the positive prints distributed by it during the period in question.

18. A picture, when produced by any so-called "United Artists Producer", is in negative form. In order to be projected onto the screen, so that it may be viewed by the public, the picture must be in positive form. Therefore, from the negative of each picture, positive prints must be made. United Artists licenses some of its features for exhibition in more than twelve thousand theatres throughout the United States. In many cases, the aggregate of the admission prices paid by the public to see a United Artists feature in one of these theatres will not equal the cost to United Artists in making a positive print of the feature, and, in the great majority of cases, the license fee paid to United Artists by a theatre for the license to exhibit a United Artists feature is considerably less than the cost of making a positive print. The average number of prints of a feature which United Artists has found practical and economic to make is far less than the number of theatres in any one of the twenty-six exchange districts, and the cost of making a positive print varies from $100 to $1,000.00.

19. Because of the foregoing facts, it is a practical impossibility for prints of a feature to be made available by

United Artists for simultaneous exhibition in all theatres desiring to show the feature. There are also reasons of showmanship which make simultaneous availability wholly impractical. Under such a setup, the public interest in any given area in a feature picture, which must be built up by repeated exhibitions in various theatres, accompanied by intensive advertising and promotion by each, would be lacking. Furthermore, any member of the public would have but [fol. 4016] one opportunity to see a feature, so that those who were not able to see it on the dates when all theatres in the area exhibited it would never be able to see it.

20. There is no evidence in the record that any exhibitor ever sought a run licensed by United Artists to a competing exhibitor or was ever refused a license by United Artists to exhibit any United Artists picture for that run or any other run that such exhibitor may have sought from United Artists.

21. There is no evidence that any of the clearances licensed by United Artists in any of the exhibition contracts in evidence in this case adversely affected the interest of any exhibitor of motion pictures operating in competition with any of the theatres to which said clearance was licensed.

22. There is no evidence that any exhibitor operating in competition with any of the theatres to which United Artists licensed clearance in any of the contracts in evidence sought from United Artists the same licenses or similar licenses with similar clearances or were refused licenses by United Artists of similar character.

23. None of the clearances shown to have been granted by United Artists was proved to have been unreasonable in duration, area or otherwise.

24. There is no evidence in the record that United Artists discriminated between affiliated and independent theatres in specifying their clearance over other theatres.

25. There is no evidence in the record that United Artists acted concertedly with any other defendant or with any exhibitor to unreasonably restrain the trade of subsequent run theatres through the fixing of clearance for prior run theatres.

[fol. 4017] 26. There is no evidence in the record that the theatres licensed by United Artists for first and prior runs were not those theatres which would be normally selected by an unaffiliated distributor for such purpose, without giving any consideration to the existence or non-existence of producer-distributor affiliation.

27. That since October 1941 the only provision in the printed form of the United Artists exhibition contracts regarding admission prices was as follows:

"EXHIBITOR warrants he Charges Minimum Admission

(After 5 P. M.—Adults ..... Children .....)
(Matinee —Adults ..... Children .....)"

28. There were no provisions in said contract which required any exhibitor to charge the particular admission which he warranted he charged for the exhibition of the picture licensed to him or that he continue to maintain the minimum admission price, nor did said contracts contain any other provision either of a penalty nature or otherwise concerning minimum admission prices.

29. If there was any similarity in admission prices in any of United Artists' license agreements to any of the admission prices in any other Distributor's exhibition license agreements, it was due to the following fact and circumstances:

Admission prices stipulated in the contracts where similarity existed were the admission prices that the exhibitor charged regularly at his theatre;

If United Artists wished to license a run of any picture to said exhibitor, it would have to meet the competition of the other Distributors of motion pictures in connection with admission price provisions and said similarity was the result of said competition rather than agreement between any of the Distributors. At no time [fol. 4018] during the period in question did United Artists make any license agreement with any exhibitor fixing the resale price of any of the tangible property licensed to any of the exhibitors.

30. The course of conduct of the defendant, United Artists, during the period in question, was to license its product for first run or any run open to independent exhibitors

either operating in competition with the defendant exhibitors or not in competition, including the key cities in the United States having a population of 100,000 or over, wherever independent exhibitors operated theatres.

31. In conducting its business of distribution of motion pictures and making exhibition license agreements during the period in question, United Artists conducted all its negotiations and made all of its contracts, whether with independent or affiliated exhibitors, or unaffiliated circuits, without any intent, purpose or effect to bring about a monopoly in the distribution or exhibition business, or to unduly restrain Interstate Commerce, but merely to license its product in the market the way it found it and with the sole purpose and intent of receiving the maximum amount of revenue legitimately possible for all pictures distributed by it.

32. That at all times during the period in question the defendant United Artists licensed the exhibition of each of its pictures separately for each of its Producers and could not, because of its contractual commitments to its Producers, make any license agreements with any exhibitor without the written approval of each separate Producer and because of the aforesaid it could not bring about a monopoly in the distribution or exhibition business and did not or could not unduly restrain Interstate Commerce in the licensing of its motion pictures in the United States of America.

[fol. 4019] 33. That during the period in question and particularly since October, 1941, the defendant, United Artists, did not include in its exhibition license agreements any provisions requiring any exhibitor to charge a minimum admission price for the exhibition of any of its pictures in any of the theatres to which it licensed exhibition rights.

34. In distributing motion pictures and making exhibition license agreements, United Artists conducted all of its negotiations and made all of its contracts, whether with independent or affiliated exhibitors, or unaffiliated circuits, without any intent or purpose to bring about a monopoly in the distribution or exhibition business, or to unduly restrain Interstate Commerce, and merely licensed its product to the market as it found it, with the sole purpose and intent

of receiving the maximum amount of revenue legitimately possible for all pictures distributed by it.

35. In licensing its motion pictures, which were articles of free commerce, to the various defendants which operated chains of theatres, United Artists had no knowledge or intent that the exhibition of its said motion pictures by said defendants would further or promote violations of the Sherman Act.

36. In licensing its motion pictures to theatres, United Artists did not cooperate with them or any of them in any violation of the Sherman Act.

The Court erred in not including the following proposed Conclusions of Law submitted by the defendant United Artists Corporation:

37. The combination of conspiracy alleged in the complaint as to the United Artists defendants has not been established. These defendants did not at any time during the period involved in this case combine with the defendant distributors, defendant exhibitors or any of their affiliates [fol. 4020] unreasonably to restrain interstate trade or commerce in motion picture films to monopolies or attempt to monopolize the distribution or exhibition of motion picture films in the United States of America.

38. A decree should be entered herein dismissing the complaint against United Artists Corporation, defendant.

The Court erred in including in its Findings of Fact, as to the defendant United Artists Corporation, the following:

39. In licensing features, each of the distributor defendants has agreed with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed.

40. The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors. Thus there was a general arrangement of fixing prices in which both the distributors and exhibitors were involved. The licenses required existing admission price schedules to be maintained under severe penalties for

infraction. In the case of such exceptional features as "Gone With The Wind", "For Whom The Bell Tolls", "Wilson", and "Song of Bernadette", licensed for exhibition prior to general release and as to which the distributors were not satisfied with current prices, they would refuse to grant licenses unless the prices were raised.

41. The defendants granting film licenses have agreed with their licensees to a system which determines minimum admission prices in all theatres where feature motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the feature motion pictures exhibited either by the defendants or by independents within the United States.

[fol. 4021] 42. All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas. Even if the licenses were at flat rate, a failure to require their licensees to maintain fixed prices would leave them free for lowering the current charge to decrease through competition the income to the licensor on theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas. There exists great similarity, and in many cases identity, in the minimum prices fixed for the same theatres in the licenses of all of the defendants.

43. Licenses granted by one defendant to another disclose the same inter-relationship among the defendants. Each of the five major defendants as an exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum admission prices. RKO, Loew's, Warner, Paramount, and Fox, in granting and accepting licenses with minimum admission prices specified, have among themselves engaged in a national system to fix prices, and Columbia, Universal, and United Artists, in requiring the maintenance of minimum admission prices in their licenses granted to these exhibitor-defendants, have participated in that system.

44. The distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices.

45. In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price [fol. 4022] structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's feature in the particular competitive area will also be restricted as to maintenance of minimum admission prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby erected.

46. The differentials in admission price set by a distributor in licensing a particular feature in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the feature—no matter on what run—the gross revenue to be realized from their patronage is increased relatively.

47. Some licenses granted clearance to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement.

48. The distributor-defendants have acted in concert in the formation of a uniform system of clearance for the

[fol. 4023] theatres to which they license their films and the exhibitors-defendants have assisted in creating and have acquiesced in this system.

49. The defendants have acted in concert in their grant of run and clearance.

50. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures.

51. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license. Thus, price fixing among the licensors or between a licensor and its licensees as well a the non-competitive clearance system may be terminated.

52. Master agreements which cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion, have been entered into by the distributor defendants, and unreasonably restrain trade.

53. Franchises have been entered into by the distributor defendants, and unreasonably restrain trade, because they [fol. 4024] cover too long a period (more than one season), and also because they embrace all the features released by a given distributor.

54. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: suspending the terms of a given contract, if a

circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers and extended runs; granting road-show privileges; allowing overage and underage; granting unlimited playing time; excluding foreign pictures and those of independent producers; granting rights to question the classification of features for rental purposes. These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors.

55. The discriminations referred to in Finding 110 would appear to be impossible under a system where the exhibitors competing for a license to exhibit a given feature on a given run do so on a parity since the same offer must be made to all prospective exhibitors in each competitive area.

56. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unrea- [fol. 4025] sonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.

The Court erred in including in its Conclusions of Law, as to the defendant United Artists Corporation, the following:

57. The defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated;

Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation; National Theatres Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchanges, Inc.; and United Artists Corporation have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Acquiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices;

(b) Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform in each local competitive area.

[fol. 4026] 58. The distributor defendants Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Twentieth Century-Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation, have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce, both before and after the entry of said consent decree, in violation of the Sherman Act by:

(a) Conspiring with each other to maintain a nationwide system of fixed minimum motion picture theatre admission prices;

(b) Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices;

(c) Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in Finding No. 110 above;

(e) Agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation;

[fol. 4027] (h) The defendants Paramount and RKO making formula deals.

59. The Formula deals, master agreements and franchises referred to in Findings 86, 88 and 89 have tended to restrain trade and violate Section 1 of the Sherman Act.

60. Block-booking as hereinabove defined, violates the Sherman Act.

The Court erred in including in its Decree, as to the defendant United Artists Corporation, the following provisions:

61. Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the par-

ties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning [fol. 4028] the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned

[fol. 4029] upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for such run. Within fifteen days after receiving such notice, any exhibitor in such competi- [fol. 4030] tive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental,

and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing to demand of an exhibitor, who operates a theatre in competition with [fol. 4031] another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

62. Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

63. For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint [fol. 4032] or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

64. Paragraphs 7 and 8 of Section II of this judgment shall not become effective until July 1, 1947.

Wherefore, defendant United Artists Corporation prays that the action of the District Court in making the Findings and Conclusions heretofore set forth and in failing to add

the matter heretofore set forth submitted by said defendant, and the action of the District Court in including in the final order and decree of December 31, 1946, the paragraphs hereinbefore set forth, may be held erroneous and said Decree accordingly reversed and the cause remanded for the elimination of said paragraphs in the Decree, and for such other and fit relief as the Court may deem just and proper.

O'Brien, Driscoll & Raftery, By Edward C. Raftery, 152 West 42nd Street, New York 18, New York, Counsel for Defendant, United Artists Corporation.

Dated this 20th day of February, 1947.

[fol. 4033] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR RECORD

To the Clerk of United States District Court, Southern District of New York:

In connection with the appeal allowed United Artists Corporation on February 20, 1947, please prepare a transcript of the record in the above entitled cause in the matter of the appeal taken herein and include in said transcript the following papers in the order given below:

1. The Amended and Supplemental Complaint filed November 14, 1940.

2. Answers to the Amended and Supplemental Complaint of the following defendants:

United Artists Corporation
Paramount Pictures, Inc.
Loew's Incorporated
R.K.O. Radio Pictures, Inc.
Warner Bros. Pictures, Inc.
Twentieth Century-Fox Film Corporation
[fol. 4034] Universal Pictures Company, Inc., and Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc.

3. The following portions of the official record of the stenographic minutes of the proceedings before the Expediting Court, to wit:

Abraham Montague	pp. 1731-1896
Stephen W. McGrath	pp. 1930-1932
Paul N. Lazarus	pp. 1932-1992a
Harry J. Muller	pp. 1993-1998
William A. Scully	pp. 1998-2059

4. The exhibits placed in evidence and read to the Court on behalf of the defendant United Artists Corporation.

5. Argument on behalf of defendant United Artists Corporation on January 17, 1946, and contained in pages 3771 to 3785 of the official record of the stenographic minutes of the proceedings before the Expediting Court.

6. Proposed Findings of Fact and Conclusions of Law submitted by defendant United Artists Corporation, and Memorandum in Support of defendant United Artists Corporation's said Proposed Findings of Fact and Conclusions of Law.

7. Opinion of the Court dated June 11, 1946.

8. Proposed Final Decree submitted by United Artists Corporation together with the Memorandum in Support of said Decree.

9. Findings and Conclusions filed December 31, 1946.

10. Final Decree entered December 31, 1946.

11. Opinion of the Court dated December 31, 1946.

12. Opinion of the Court dated February 3, 1947.

13. Petition for Appeal by United Artists Corporation dated February 20, 1947.

[fol. 4035] 14. Order Allowing Appeal dated February 20, 1947.

15. Citation dated February 20, 1947.

16. Assignment of Errors and Prayer for Reversal dated February 20, 1947.

17. Statement as to Jurisdiction submitted with petition for appeal.

18. Appeal Bond of United Artists Corporation issued by Fidelity & Deposit Company of Maryland.

19. Statement required by Rule 12.

20. Proof of service of appeal papers and of Statement required by Rule 12.

21. This praecipe.

Dated: February 25, 1947.

O'Brien, Driscoll & Raftery, by Paul D. O'Brien, Counsel for Appellant, United Artists Corporation, 152 West 42nd Street, New York 18, N. Y.

To: Hon. Tom C. Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; Hon. F. X. McGohey, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y., Attorneys for Appellees; Simp-
[fols. 4036-4037] son, Thacher & Bartlett, Esqs., Attorneys for Paramount Defendants, 120 Broadway, New York, N. Y.; Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Loew's Defendants, 15 Broad Street, New York, N. Y.; Donovan, Leisure, Newton, Lumbard & Irvine, Esqs., Attorneys for RKO Defendants, 2 Wall Street, New York, N. Y.; Joseph M. Proskauer, Esq., Attorney for Warner Defendants, 11 Broadway, New York, N. Y.; Dwight, Harris, Koegel & Caskey, Esqs., Attorneys for 20th Century-Fox Defendants, 100 Broadway, New York, N. Y.; Charles Prutzman, Esq., Attorney for Universal Defendants, 1250 Sixth Avenue, New York, N. Y.; Schwartz & Frohlich, Esqs., Attorneys for Columbia Defendants, 1450 Broadway, New York, N. Y.

[fol. 4038] In United States District Court

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal—Filed February 20, 1947

Petition for Appeal

Universal Pictures Company, Inc., (sued herein as Universal Corporation and Universal Pictures Company
[fol. 4039] Inc.), Universal Film Exchanges Inc., and Big U Film Exchange, Inc., defendants herein, feeling themselves aggrieved by the decree rendered and entered in the above entitled cause on the 31st day of December, 1946, hereby

appeal from the said decree to the Supreme Court of the United States, for the reasons set forth in the Assignments of Error filed herewith, and pray that their respective appeals be allowed, and that citations be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the rules of such Court in such cases made and provided. Pursuant to Rule 12 of the Rules of the Supreme Court, the above named defendants present to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

ASSIGNMENTS OF ERROR

And the said Universal Pictures Company, Inc., (sued herein as Universal Corporation and Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange, Inc.,* file the following Assignments of Error upon which they shall rely in the prosecution of their respective appeals to the Supreme Court of the United States, herewith petitioned for in said cause from the decree of the District Court of the United States for the Southern District of New York, entered on the 31st day of December, 1946.

[fol. 4040] The District Court erred:

1. In finding that Universal combined, or conspired and agreed with the other distributor defendants, or any of them, to fix and maintain minimum admission prices in motion-picture theatres.

2. In finding that Universal participated, in violation of the Sherman Act, in a national minimum admission price-fixing system in motion picture theatres, found to have resulted from the practices of the producer-distributor-exhibitor defendants in granting and accepting licenses for feature pictures to and from each other, with minimum admission prices specified.

3. In finding Universal guilty of the violations of the Sherman Act set forth in Assignments of Error Nos. 1 and 2 on the sole basis of the minimum admission prices.

* The term Universal as used herein refers to one or more of these corporations.

which it specified in its licenses for particular motion-picture theatres being similar to those specified by other defendant-distributors, when such similarity as existed was fully accounted for by the practice of exhibitors in maintaining the same admission price from day to day in a particular theatre irrespective of what distributor's pictures were being shown.

4. In finding that the minimum admission prices specified by Universal in its license agreements with particular theatres were in general uniform with the minimum admission prices specified by the seven other distributor-defendants in their license agreements with said theatres.

5. In finding that each of Universal's license contracts of copyrighted pictures constituted illegal price-fixing [fol. 4041] under the Sherman Act in that the maintenance as a minimum of the admission price currently being charged by the theatre licensed was required under specified penalties.

6. In finding that Universal's license contracts with its various licensees constituted an illegal price-fixing system by reason of the fact that they required the maintenance as a minimum of the admission price currently being charged by the theatre licensed.

7. In finding (if it was intended to so find) that Universal, in the case of exceptional features, refused to grant licenses unless the exhibitors licensed would raise their current admission prices.

8. In finding that Universal by requiring the maintenance as a minimum of currently charged admission prices, during the showing of its licensed pictures, and by fixing differentials in price between the various runs in a competitive area, attempted to give prior-run exhibitors as near a monopoly of the patronage as possible, if thereby the Court intended to find that Universal participated in an illegal monopolizing.

9. In finding that Universal in its license agreements commonly specified clearances in terms of the clearances fixed by other distributors.

10. In finding that Universal illegally granted unreasonable clearances to the prejudice of independents.

11. In finding that Universal acquiesced in and forwarded a uniform system of clearances, in violation of the [fol. 4042] Sherman Act, and acted in concert with the other defendant-distributors in the formation of such a system.

12. In finding, if it was intended to so find, that Universal's granting of clearances to all of the theatres in the immediate vicinity of a licensee's theatre, which might thereafter be erected or opened, was not upon a competitive basis, i.e. did not have a reasonable relation to the reward to which Universal was entitled under its copyrights, but that such clearances were illegal because granted upon the sole basis of whether the theatres to be thereafter erected or opened were operated by the exhibitor party to the agreement.

13. In finding that Universal acted in concert with the other defendants in its granting of runs.

14. In finding that Universal participated with the other defendant-distributors and exhibitors in a fixed system of clearances, runs and admission prices, to which independent distributors and exhibitors, when attempting to bargain with it, have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition, either with defendants' theatres or with those theatres to which the latter had licensed their pictures.

15. In finding, if it was intended to so find, that Universal's purpose in granting clearances was to protect particular runs against subsequent runs, and not to augment its own revenue from its copyrights in a legal manner.

16. In finding and concluding that licenses of a feature to circuits of theatres in return for a film rental measured [fol. 4043] by a percentage of the national gross receipts (formula deals) unreasonably restrained interstate commerce in and of themselves, irrespective of the economic power of the distributor entering in them, irrespective of their misuse by the exhibitor, and irrespective of whether or not they were made with affiliated exhibitors, large independent circuits or small independent circuits.

17. In finding and concluding that licensing arrangements with theatre circuits wherein all the theatres of the

circuit were included in a single agreement (master agreements), without affording other theatre owners an opportunity to bid for the picture in their several areas, seriously and unreasonably restrained interstate competition in and of themselves, irrespective of the factors set forth in the preceding Assignment of Error.

18. In finding that Universal cooperated in an unreasonable restraint of interstate commerce with exhibitors by entering into master agreements with theatre chains, because such agreements might be misused in that the licensed exhibitors could allocate the film rentals paid among their theatres as they saw fit and could exhibit the features upon such playing time as they deemed best, and could otherwise act within their discretion.

19. In finding and concluding that the practice of Universal in committing its pictures for more than a year to particular exhibitors for particular runs (franchises) unreasonably restrained interstate commerce in and of itself because said franchises covered too long periods and embraced all the pictures released by Universal, without respect to the effect upon competition under the particular circumstances.

[fol. 4044] 20. In finding and concluding that the franchises granted by Universal to small independent theatre chains were illegal in and of themselves for the foregoing reasons, and without respect to their competitive effect.

21. In finding and concluding that the franchises granted by Universal to individual independent exhibitors were illegal in and of themselves for the foregoing reasons, and without respect to their competitive effect.

22. In defining a franchise without specifying the necessity of its including the grant of preferential exhibition rights, i.e., as a mere long-term commitment.

23. In passing upon the legality of Universal's franchises with independent exhibitors, as defined in the amended and supplemental complaint, which was not an issue in the case.

24. In finding that Universal for many years licensed its films in "blocks" or indivisible groups before they had been actually produced, if by such finding it was intended to find that Universal ever conditioned the selling of one

or more of its pictures upon the purchaser's taking some or all of the remainder thereof.

25. In finding, if it was intended to so find, that Universal required licensees to accept all of its films in order to obtain any.

26. In finding, if it was intended to so find, that Universal through selling its pictures before they were produced, promised pictures of good quality or of a certain type, which when produced proved to be of poor quality or of another [fol. 4045] type, and in further finding, if it was intended to so find, that Universal hindered competing distributors in this way from marketing their products and caused them to lose their outlets for future pictures.

27. In finding, if it was intended to to so find, that Universal, through any of the various license provisions recited in finding of fact No. 110, individually discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits, and in holding this, in and of itself, to be a violation of the Sherman Act.

28. In the making of findings Nos. 152, 153, 154, 155 and 156, insofar as such findings by exculpating the theatre-owning defendants in respect of their activities in acquiring licenses for motion pictures and in the exhibition thereof, find, infer or conclude that any of the restraints or illegalities found by the Court are attributable to the activities of the Universal defendants.

29. In concluding that the Universal defendants have combined and conspired with the other defendants to unreasonably restrain interstate commerce in the distribution and exhibition of motion pictures, and have attempted to monopolize such trade and commerce in violation of Sections 1 and 2 of the Sherman Act, through participating in a nation-wide system of fixed motion-picture theatre minimum admission prices, and in a nation-wide system of runs and clearances which are substantially uniform in each local competitive area.

30. In concluding that the Universal defendants have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and have attempted [fol. 4046] to monopolize such trade and commerce in violation of Sections 1 and 2 of the Sherman Act by:

(a) Conspiring with the other defendant-distributors to maintain a nation-wide system of fixed minimum motion-picture theatre admission prices;

(b) Agreeing with their licensees to fix minimum motion picture theatre admission prices;

(c) Conspiring with the other defendant-distributors to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area;

(d) Agreeing with their licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110;

(e) Agreeing with their licensees to grant unreasonable clearance against theatres operated by their competitors;

(f) Making master agreements and franchises with such licensees;

(g) Conditioning the offer of a license for one or more copyrighted film upon the acceptance by the licensee of one or more other copyrighted films.

31. In concluding that Universal has combined and conspired to unreasonably restrain interstate trade and commerce in the distribution and exhibition of motion pictures, and has attempted to monopolize the same in violation of Sections 1 and 2 of the Sherman Act by conditioning the [fol. 4047] offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films.

32. In concluding that the master agreements made by Universal violated Section 1 of the Sherman Act.

33. In concluding that the franchises made by Universal, including the franchises with small independent exhibitors, violated Section 1 of the Sherman Act.

34. In decreeing that the Universal defendants shall be permanently enjoined from granting any license under copyright in which the minimum price for admission to an affiliated theatre is fixed by the parties.

35. In decreeing that the Universal defendants shall be permanently enjoined from granting any license under copyright to an independent chain of theatres or a single independent theatre, in which minimum prices for admission are fixed by the parties.

36. In enjoining the Universal defendants from agreeing with the other defendant-distributors to maintain a system of clearances, in view of the fact that the evidence does not justify the conclusion that Universal so acted.

37. In enjoining the Universal defendants from agreeing with exhibitors to maintain a system of clearances, in view of the fact that the evidence does not justify the conclusion that Universal so acted.

38. In failing to define a system of clearances as excluding the granting of licenses with clearance, whether reason-[fol. 4048] able or unreasonable, by a distributor to numerous exhibitors.

39. In decreeing that the Universal defendants may not grant any clearance between theatres not in substantial competition with the theatre receiving the license.

40. In decreeing that the Universal defendants shall not grant or enforce any clearance against theatres in substantial competition with the theatre receiving the license for exhibition, in excess of what is reasonably necessary to protect the licensee in the run granted.

41. In decreeing that the burden of proof in sustaining the legality of any clearance attacked as illegal shall be on the distributor.

42. In decreeing that the Universal defendants may not further perform existing franchises with affiliated theatres.

43. In decreeing that the Universal defendants may not further perform existing franchises with independent theatre circuits.

44. In decreeing that the Universal defendants may not further perform existing franchises with independent theatres.

45. In decreeing that the Universal defendants may not make any franchises in the future with affiliated theatres, irrespective of whether or not the effects of the combination

and conspiracy found by the Court have in the meantime been dissipated.

[fol. 4049] 46. In decreeing that the Universal defendants may not make any franchises in the future with independent theatre chains, irrespective of their effect upon competition.

47. In decreeing that the Universal defendants may not make any franchises in the future with independent theatres, irrespective of their effect upon competition.

48. In decreeing that the Unversal defendants may not further perform any existing formula deal or master agreement with affiliated theatres.

49. In decreeing that the Universal defendants may not further perform any existing formula deal or master agreement with independent theatre chains, irrespective of the effect upon competition.

50. In decreeing that the Universal defendants may not make any formula deals or master agreements with affiliated theatres in the future, whether or not the effects of the combination and conspiracy found by the Court have in the meantime been dissipated.

51. In decreeing that the Universal defendants may not make any formula deal or master agreement in the future with an independent theatre chain, irrespctive of the effect upon competition.

52. In decreeing that the Universal defendants may not perform any license agreement with any affiliated theatre, in which the license to exhibit one feature has been conditioned upon the licensee taking one or more other features.

[fol. 4050] 53. In decreeing that the Universal defendants may not perform any license agreement with any independent theatre chain or independent theatre in which the license to exhibit one feature is conditioned upon the licensee's taking one or more other features.

54. In decreeing that the Universal defendants may not in the future enter into a license agreement with any affiliated theatre in which the license of one feature is conditioned upon the taking of one or more other features, irrespective of whether or not the effects of the combination and conspiracy found by the Court have in the meantime been dissipated, and irrespective of the effect upon competition.

55. In decreeing that the Universal defendants may not in the future enter into any license agreement with any independent theatre chain or independent theatre, in which a license to exhibit one feature is conditioned upon the licensee's taking one or more other features, irrespective of the effect upon competition.

56. In decreeing that the Universal defendants, in offering to license their pictures in the future for exhibition in any theatre, may not do so, except in the manner and under the conditions prescribed by the Court in the provision of its decree numbered II (8).

57. In decreeing that each license shall be offered and taken theatre by theatre and picture by picture.

58. In decreeing that the method of competitive bidding set forth in II(8)(c) shall be followed where any exhibitor in a competitive area desires it.

[fol. 4051] 59. In decreeing that to the extent that any of Universal's pictures have not been trade shown, prior to the granting of a license for more than a single picture, the licensee shall be given the right to reject 20% of such pictures not trade shown.

60. In decreeing that the Universal defendants may not arbitrarily refuse to license their feature pictures to a particular exhibitor.

61. In decreeing, that while the producer-exhibitor defendants may license, or in any way arrange or provide for the exhibition of their motion pictures in their own theatres, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to them, the Universal defendants may not acquire show-windows for their motion pictures through long-term contractual arrangements with independent theatres.

62. In failing to find that Universal, as a producer and distributor without theatres, would have no reliable market for the great majority of its pictures, if offered singly, and that under such a procedure its ability to compete with the integrated defendants would be greatly lessened, and its speculative risk greatly increased.

63. In failing to find that Universal has a reliable market in the otherwise under-supplied exhibitor for a large group

of pictures of the less expensive type, and that such exhibitors, constituting most of the exhibitors in the country, desire to purchase their pictures in large groups, as it gives them assurance of the product.

[fol. 4052] 64. In failing to find that by offering its pictures in groups in the first instance, Universal's ability to compete with the integrated companies is greatly increased.

65. In failing to find that there is no evidence that Universal ever conditioned the licensing of one motion picture upon an exhibitor's agreement to license other motion pictures.

66. In failing to find that there is no evidence that Universal ever required exhibitors, who did not care to buy all of its feature pictures, to pay an excessive or disproportionate price for what they bought.

67. In failing to find that there is no evidence that Universal pictures were at all indispensable to the successful operation of any motion picture theatre.

68. In failing to find that the same privileges of selectivity and cancellation were granted by Universal to independent and affiliated theatres alike.

69. In failing to find that each Universal license of motion pictures to an exhibitor provided for: (a) an exclusive limited license under copyright to publicly perform or exhibit, in his theatre only and limited to a stated number of days, the copyrighted motion pictures licensed; and (b) the temporary physical possession by the exhibitor during the exhibition period of a positive print of the motion picture, making it possible for him to exercise the intangible exhibition right under the copyright.

70. In failing to find that the franchises granted by Universal to independent exhibitors promoted competition in [fol. 4053] interstate commerce instead of unreasonably restraining it.

71. In failing to find that in licensing its photoplays to exhibitors Universal had to meet the competition, both in run and in clearance, of its competitors, and that it could not, therefore, give less clearance, and was unwilling to give more clearance.

72. In failing to find that in the orderly operation of a theatre in a competitive area where multiple runs are shown, such exhibitor will insist on obtaining from Universal as much clearance, both as to duration and area, as he has obtained from the other distributors from whom he has licensed the same run in such competitive area.

73. In failing to find that there is no evidence that any exhibitor was ever refused a license by Universal to exhibit any Universal picture on any particular run.

74. In failing to find that there is no evidence that any of the clearances specified by Universal in any of the exhibition contracts in evidence in this case adversely affected the interest of any exhibitor of motion pictures operating in competition with any of the theatres so licensed.

75. In failing to find that there is no substantial evidence that any exhibitor, operating in competition with the theatres to which Universal licensed its pictures with clearance, sought from Universal the same licenses or similar licenses with similar clearances, or was refused licenses by Universal of similar character.

[fol. 4054] 76. In failing to find that there is no substantial evidence in the record that Universal acted concertedly with any other defendant, or with any exhibitor, to unreasonably restrain the trade of any subsequent-run theatre through the fixing of clearance for prior run theatres.

77. In failing to find that there is no substantial evidence in the record that the theatres licensed by Universal for first and prior runs were not those theatres which would be normally selected by an unaffiliated distributor for such purpose, without giving any consideration to the existence or non-existence of producer-distributor affiliation.

78. In failing to find that there is no evidence of any kind of an express agreement, written or oral, between Universal and any other defendant, or of any communication, written or oral, between any agent of Universal and any agent of any other defendant, for the purpose of, or having the effect of, fixing, affecting or in any way determining the persons to whom Universal should license its pictures, or the terms or conditions under which such pictures should be licensed, except that Universal engaged in negotiations

with the theatre-owning defendants of the same character as engaged in by Universal with theatre operators who were not defendants, for the licensing of pictures released by Universal to be exhibited in such theatres.

79. In failing to find that there is no evidence in the record that Universal ever communicated, orally or in writing, with any other defendant-distributor on the subject of film rentals, admission prices, clearances, runs to be granted, [fol. 4055] or any other matters connected with the distribution or the licensing of motion pictures.

80. In failing to find that there is no evidence that the deals made by Universal with affiliated exhibitors were substantially more favorable to them than the deals made by Universal with independent exhibitors were to them, when such deals are looked at over-all.

81. In failing to find that Universal conducted its negotiations with exhibitors for licenses upon the basis of the admission price policy of such exhibitors, which varied in each competitive area, and provided in its license agreements against the reduction of such admission price for the sole purpose of protecting the aggregate amount of film rental to be received by it from all runs in each competitive area.

82. In failing to find that to the extent that there was similarity in the admission prices specified in Universal exhibition license agreements to the admission prices specified in other distributors' exhibition license agreements, it was entirely due to the fact that the admission prices so stipulated in the various contracts were the admission prices that the exhibitor had fixed and was currently charging at his theatre, and upon the basis of which the licenses were granted.

83. In failing to find that there is no evidence in the record that Universal ever exercised its reserved right under its license agreements to penalize an exhibitor for lowering his admission price for exhibitions of Universal pictures.

[fol. 4056] 84. In failing to find that aside from the license agreements themselves, there is no evidence in the record that Universal ever attempted to prevent any exhibitor from freely changing the admission price he desired to

charge, either by lowering it or raising it, or ever attempted to specify the admission price to be charged by an exhibitor.

85. In failing to make the following finding proposed by Universal:

In 41 out of the 92 cities in the United States having a population of 100,000 or over, there were no independent first-run theatres operating during the 1943-44 motion picture season to which Universal could have licensed its pictures in preference to the affiliated first-run theatres operating in such cities. In approximately one-half of the remainder of said 92 cities, Universal licensed its product to the independent first-run theatres in competition with the affiliated theatres in such cities. There is no substantial evidence that in any of the cities, composing the other one-half of the remainder of said 92 cities, the independent first-run theatres were willing to buy Universal product on terms equivalent or substantially equivalent to those upon which it was purchased by the affiliated theatres to which it was sold. Prior to the 1943-44 motion picture season, and back to and including the 1936-37 motion picture season, the situation at no time was materially different from the foregoing.

86. In failing to make the following finding proposed by Universal:

In distributing motion pictures and making exhibition license agreements, Universal conducted all of its negotia- [fol. 4057] tions and made all of its contracts, whether with independent or affiliated exhibitors, or unaffiliated circuits, without any intent or purpose to bring about a monopoly in the distribution or exhibition business, or to unduly restrain interstate commerce, and merely licensed its product to the market as it found it, with the sole purpose and intent of receiving the maximum amout of revenue legitimately possible for all pictures distributed by it.

87. In failing to make the following finding proposed by Universal:

In licensing its motion pictures, which were articles of free commerce, to the various defendants which operated chains of theatres, Universal had no knowledge or intent that the exhibition of its said motion pictures by said defendants would further or promote violations of the Sherman Act, if in fact it did so.

88. In failing to make the following finding proposed by Universal:

In licensing its motion pictures to the various defendants which operated chains of theatres, Universal did not co-operate with them or any of them in any violation of the Sherman Act, even assuming that it had knowledge of the fact, if it be a fact, that said defendants or some of them were violating the Sherman Act.

89. In failing to find that there is no substantial evidence in the record that Universal discriminated between independent and affiliated licensees in respect of film rentals, clearances or minimum admission prices.

[fol. 4058] 90. In failing to confine the operation of the decree to the Continental United States.

91. In failing to exclude road-shows from the prohibition against specifying minimum admission prices.

92. In concluding that the similarity, and in many cases identity, in minimum admission prices contained in licenses for the same theatre, spelled uniformity of action among Universal and the other defendant distributors, and that such uniformity of action spelled an unlawful system in which Universal participated.

93. In decreeing that Universal must offer a license upon uniform terms to exhibit each feature released for public exhibition in any competitive area to the operator of each theatre in such area who desires to exhibit it on some run selected by such operator.

94. In decreeing that Universal may not take into consideration, in determining to which exhibitor to license its films, the past business dealings between it and an old customer.

95. In decreeing that Universal shall follow a method of competitive bidding which forbids it as a licensor of copyrighted motion-pictures to take in consideration, in awarding licenses which exclude simultaneous exhibition, any factors other than the responsibility of the bidder, the amount of film rental offered, and the adequacy of the theatre, in respect of size, location and equipment, to yield a reasonable return to the licensor.

96. In decreeing that Universal shall follow a method of competitive bidding which forbids it to offer a license in [fol. 4059] consideration of the payment of a percentage of the gross receipts of a theatre.

97. In decreeing that Universal shall follow a method of competitive bidding which compels the licensor to determine the highest bidder under penalty of contempt, and yet prescribes a method for offers and counter-offers which makes such determination impracticable.

98. In decreeing that each license granted by Universal shall be upon the merits without discrimination in favor of affiliates, old customers or others, while at the same time prescribing a method of bidding to be followed which excludes the consideration of many factors going to the merits.

99. In decreeing that Universal shall follow a method of competitive bidding which will greatly increase its expense of operation and is impracticable to comply with in many respects.

100. In failing to grant the motions made by the Universal defendants, and each of them, to dismiss the petition and amended and supplemental complaint, upon the grounds set forth in the motion appearing at pages 383-4, 503-526 and 2501 of the Record as printed for the District Court.

101. In failing to grant the motions made by the Universal defendants, and each of them, to strike exhibits and evidence upon the grounds set forth in the motion appearing at pages 383-4, 503-526 and 2501 of the Record as printed for the District Court.

102. In infringing upon Universal's right to grant exclusive licenses under copyright.

[fol. 4060.] 103. In finding that the Universal defendants or any of them violated the Act of Congress approved July 2, 1890 (26 Stat. 209; 15 U. S. C.), commonly known as the Sherman Act.

104. In failing to conclude that the Universal defendants did not at any time combine, conspire or contract with any of the defendant-distributors, with any of the defendant-exhibitors or with any of their affiliates or with any other person or corporation to unreasonably restrain trade or to

monopolize the same, nor did they monopolize or attempt to monopolize the same.

105. In failing to conclude that a decree should be entered as to each and all of the Universal defendants dismissing the petition and amended and supplemental complaint.

PRAYER FOR REVERSAL

Wherefore, defendants pray that the said decree may be reversed, and that a judgment or decree be rendered in favor of said defendants dismissing the petition and amended and supplemental complaint as to them, and for such other and further relief as to the Court may seem just and proper.

Charles D. Prutzman, Attorney for Universal Pictures Company Inc. and other Universal defendants, 1250 Sixth Avenue, New York, N. Y.

Thomas Turner Cooke, Of Counsel.
Dated: February 19, 1947.

[fols. 4061-4063] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 20, 1947

The defendants, Universal Pictures Company, Inc., (sued herein as Universal Corporation and Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange Inc., having filed their respective petitions for appeals to the Supreme Court of the United States from the final judgment and decree of this Court entered herein on the 31st day of December, 1946, and having filed their Assignments of Error and Prayer for Reversal, and Statement of Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided, it is hereby

Ordered, that the appeals herein to the Supreme Court of the United States be and they are hereby allowed as prayed for.

February 19th, 1947.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
John Bright, United States District Judge.

[fol. 4064] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal to the Supreme Court of the United States of defendants Universal Pictures Company Inc. (sued herein as Universal Corporation and Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange, Inc., and include in said transcript, in the order given below, the following papers, viz.:

1. Amended and supplemental complaint filed November 14, 1940.

2. Answer of defendants Universal Pictures Company Inc., Universal Corporation, Universal Film Exchanges Inc., and Big U Film Exchange, Inc. thereto, filed March 3, 1941.

3. Expediting Certificate, filed June 13, 1945.

4. Transcript of the proceedings and hearings before the Expediting Court, including therein the testimony of all of the witnesses called either by the plaintiff or by any of the defendants, from October 8, 1945, through January 22, 1947.

5. All of the exhibits which were admitted in evidence as against the above-named appellants or which were received [fol. 4065] on their behalf, during the foregoing hearings and proceedings.

6. Opinion of the Court, dated June 11, 1946.

7. Findings of fact and conclusions of law of the Court, filed December 31, 1946.

8. Judgment and decree filed December 31, 1946.

9. Memorandum in re Findings and Decree filed December 31, 1946.

10. Petition for Appeal.

11. Assignments of Error and Prayer for Reversal.

12. Order Allowing Appeal.

13. Citation.

14. Statement as to Jurisdiction of the Supreme Court of the United States.

15. Statement required by Rule 12.

16. Proof of Service of the foregoing Appeal papers.

17. Cost Bond.

18. This Praecipe.

Charles D. Prutzman, Attorney for Defendants-Appellants.

This 21st day of February, 1947.

Service of the foregoing praecipe for transcript of record, and the receipt of a copy thereof are hereby acknowledged this 21st day of February, 1947.

——, Attorney for the United States of America, Plaintiff.

[fol. 4066] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

Please prepare a transcript of the record in the above entitled cause in the matter of the appeals therein by the Paramount, Loew, RKO, Warner and Twentieth Century-Fox defendants to the Supreme Court of the United States, and include in said transcript, in the order given below, the following:

1. Petition, filed July 30, 1938.

2. Answers to the Petition filed by all defendants.

3. Amended and supplemental complaint filed November 14, 1940.

4. Answers to amended and supplemental complaint filed by all defendants.

5. Consent decree filed November 20, 1940, including Rules of Arbitration.

[fol. 4067] 6. Official record of the stenographic minutes of the hearing before Judge Goddard with respect to the entry of the Consent Decree, held on November 14, 1940.

7. Application for Modification of Consent Decree, filed by Plaintiff August 7, 1944.

8. Motion by Plaintiff for a temporary injunction filed on or about February 5, 1945 and the stenographic minutes of the hearing thereon, held March 5, 1945.

9. Expediting certificate filed June 13, 1945.

10. Opinion of the Expediting Court rendered June 11, 1946.

11. Proposed findings of fact and conclusions of law, filed by these defendants.

12. Proposed judgments or decrees, filed by these defendants.

13. Memorandum opinion of the Court in re findings and decree, dated December 31, 1946.

14. The Court's findings of fact and conclusions of law, filed December 31, 1946.

15. Judgment or decree of the Court entered on December 31, 1946.

16. Motions to amend and clarify the findings and judgment, filed by these defendants.

17. Memorandum Opinion of the Court re these defendants' motions to amend and clarify, filed February 3, 1947.

[fol. 4068] 18. Order entered on February 11, 1947 with respect to these defendants' motions to amend and clarify findings and judgment.

19. Official record of the stenographic minutes of the proceedings before the Expediting Court from October 8, 1945 through January 22, 1947.

20. All of the exhibits received in evidence on behalf of the plaintiff and each of the defendants.

21. Petitions for appeal filed by these defendants.

22. Assignments of errors and prayers for reversal filed by these defendants.

23. Statements of jurisdiction filed by these defendants.

24. Orders allowing appeals of these defendants.

25. These defendants' cost bonds and endorsements of approval thereof.

26. These defendants' statements required by Rule 12.

27. These defendants' citations.

28. Proofs of service of 21-24 and 26-7 above.

29. This praecipe.

Respectfully submitted, Simpson Thacher & Bartlett, Attorneys for Defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation, by Albert C. Bickford, a Member of the Firm, 120 Broadway, New York, N. Y.; Donovan [fol. 4069] Leisure Newton Lumbard & Irvine, Gordon E. Youngman, Attorneys for Defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation, by Thomas J. McFadden, a Member of the Firm, 2 Wall Street, New York, N. Y.; Joseph M. Proskauer, Robert W. Perkins, Attorneys for Defendants Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, by Joseph M. Proskauer, 11 Broadway, New York, N. Y.; Davis Polk Wardwell Sunderland & Kiendl, J. Robert Rubin, Attorneys for Defendant Loew's Incorporated, by Theodore Kiendl, a Member of the Firm, 15 Broad Street, New York, N. Y.; [fol. 4070] Dwight Harris Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation, and National Theatres Corporation, by John F. Caskey, a member of the Firm, 100 Broadway, New York, N. Y.

Dated, March 3, 1947.

To Hon. Tom C. Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; Hon. F. X. McGohey, U. S. Attorney for the Southern District of New York, U. S. Court House, Foley Square, New York,

N. Y.; Schwartz & Frohlich, Attorneys for Columbia Pictures Corp., et al., 1450 Broadway, New York, N. Y.; O'Brien, Driscoll & Raftery, Attorneys for United Artists Corporation, 152 West 42nd Street, New York, N. Y.; Charles Prutzman, Attorney for Universal Defendants, 1250 6th Avenue, New York, N. Y.

[fol. 4071] Proof of Service

Service of the foregoing praecipe in the above-entitled cause is accepted, and copies received this 5th day of March, 1947.

(3 copies rec'd) Tom C. Clark, (1 copy rec'd) John F. X. McGohey, Copy rec'd Schwartz & Frohlich, O'Brien Driscoll Raftery & Lawler, Copy rec'd Charles Prutzman.

[fol. 4072] In District Court of the United States

[Title omitted]

Counter-Praecipe

To the Clerk of the United States District Court for the Southern District of New York:

In connection with the appeal by the plaintiff, United States of America, from the judgment or decree entered herein December 31, 1946, you are hereby requested, pursuant to the provisions of Rule 10 of the Rules of the Supreme Court of the United States, to incorporate into the transcript of record on such appeal, in addition to the portions of the record indicated by the United States of America in its praecipe dated February 18, 1947, the following papers:

1. Petition filed July 30, 1938.

2. Answers to the petition filed by all defendants.

3. Application for modification of the consent decree filed by the plaintiff August 7, 1944.

4. Motion by plaintiff for a temporary injunction filed on or about February 5, 1945, and the stenographic minutes of the hearing thereon held March 5, 1945.

[fol. 4073] 5. Proposed findings of fact and conclusions of law filed by the undersigned defendants.

6. Memorandum opinion of the court re the motions of these defendants to amend and clarify the decree, filed February 19, 1947.

7. Petitions for appeal filed by each of the undersigned defendants.

8. Assignments of errors and prayers for reversal filed by each of the undersigned defendants.

9. Statements of jurisdiction filed by each of the undersigned defendants.

10. Orders allowing appeals of each of the undersigned defendants.

11. The undersigned defendants' cost bonds and endorsements of approval thereof.

12. The undersigned defendants' statements required by Rule 12.

13. The undersigned defendants' citations.

14. Proofs of service of the undersigned defendants' petitions for appeal, assignment of errors, statements of jurisdiction, orders allowing appeals, statements required by Rule 12 and citations.

15. This counter-praecipe.

Dated, March 5, 1947.

Respectfully submitted, Simpson Thacher & Bartlett, Attorneys for Defendants Paramount Pictures, Inc. and Paramount Film Distributing Corporation, by Albert C. Bickford, a Member of the Firm, 120 Broadway, New York, N. Y. Donovan Leisure [fol. 4074] Newton Lumbard & Irvine, Gordon E. Youngman, Attorneys for Defendants Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, and RKO Midwest Corporation, by Thomas J. McFadden, a Member of the Firm, 2 Wall Street, New York, N. Y.; Joseph M. Proskauer, Robert W. Perkins, Attorneys for Defendants Warner Bros. Pictures, Inc., Warner

Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, by Joseph M. Proskauer, 11 Broadway, New York, N. Y.; Davis Polk Wardwell Sunderland & Kiendl, J. Robert Rubin, Attorneys for Defendant Loew's Incorporated, by Theodore Kiendl, a Member of the Firm, 15 Broad Street, New York, N. Y.; Dwight [fol. 4075] Harris Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation, and National Theatres Corporation, by John F. Caskey, a Member of the Firm, 100 Broadway, New York, N. Y.

Dated, March 5, 1947.

To Hon. Tom C. Clark, Attorney General of the United States, Department of Justice, Washington, D. C.; Hon. F. X. McGohey, U. S. Attorney for the Southern District of New York, U. S. Court House, Foley Square, New York, N. Y.; Schwartz & Frohlich, Attorneys for Columbia Pictures Corp., et al., 1450 Broadway, New York, N. Y.; O'Brien, Driscoll & Raftery, Attorneys for United Artists Corporation, 152 West 42nd Street, New York, N. Y.; Charles Prutzman, Attorney for Universal Defendants, 1250 6th Avenue, New York, N. Y.

[fol. 4076] Proof of Service

Service of the foregoing counter-praecipe in the above-entitled cause is accepted, and copies received this 5th day of March, 1947.

(3 Copies Rec'd) Tom C. Clark, (1 Copy Rec'd) John F. X. McGohey, U. S. Atty.; (Copy Rec'd) Schwartz & Frohlich, O'Brien, Driscoll, Raftery & Lawler, (Copy Rec'd) Charles Prutzman.

[fol. 4077] In the United States District Court

[Title omitted]

Order Allowing Appeal

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors'

Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation having filed a petition for appeal to the Supreme Court of the United States from the Orders entered herein on December 31, 1946, and January 21, 1947, and having filed their assignments of errors, it is hereby

[fols. 4078-4084] Ordered, that an apeal by the above named parties in the above entitled cause to the Supreme Court of the United States from the Orders heretofore filed and entered herein on December 31, 1946, and January 21, 1947, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof; and it is hereby

Ordered further that the bond on appeal to be approved by this Court is fixed at the sum of $2,000.00.

Dated February 26th, 1947.

Augustus N. Hand, U. S. Judge for Second Circuit; Henry W. Goddard, District Judge for the Southern District of New York; John Bright, District Judge for the Southern District of New York.

[fol. 4085] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF AMERICAN THEATRES ASSOCIATION INC., ET AL., FOR ALLOWANCE OF APPEAL

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc.,

and Fanchon & Marco Service Corporation filed in this court a Motion for Leave to Intervene and Intervening Petition which came on before this court for argument on October 21, 1946. The Motion requested leave to intervene to oppose [fol. 4086] the adoption of a decree requiring competitive bidding for the licensing of film to exhibitors. On December 31, 1946, the court adopted a decree containing modified provisions with respect to competitive bidding in paragraph 8(c) of Part II thereof. On January 21, 1947, this court denied the said Motion for Leave to Intervene, but granted permission to be heard and to file a brief as amicus curiae. On February 3, 1947, this court amended its decree of December 31, 1946, in respects not relevant to appellant's petition. The above named parties do hereby petition for leave to appeal from this court's orders of December 31, 1946, and January 21, 1947, to the Supreme Court of the United States because of errors prejudicial to them which are set forth in the assignment of errors presented and filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court. And your petitioners further pray that an order be made fixing the amount of security which your petitioners shall give and furnish upon such appeal.

Thurman Arnold, Arnold & Fortas, 821 15th Street, N. W., Washington 5, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for Appellants.

Dated February 25, 1947.

[fol. 4087] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

American Theatres Association, Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and

Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation in connection with their Petition for an Appeal to the Supreme Court of the United States, hereby assign error to the entry of the judgments entered on December 31, 1946, and January 21, 1947, in the above entitled cause. The December 31, 1946, [fols. 4087a-4089] order imposed a system of competitive bidding on exhibitors and the order of January 21, 1947, denied moving parties the right to intervene and permitted them only to be heard and to file a brief as amicus curiae. The above parties say that in the entry of the said judgments the said District Court committed error to their prejudice in the following particulars:

(1) The Court erred in denying their Motion for Leave to Intervene;

(2) The Court erred in denying their right to file their Intervening Petition;

(3) The Court erred in limiting your appellants to the right to be heard and to file briefs amicus curiae;

(4) The Court erred in failing to grant the relief requested by their Intervening Petition;

(5) The Court erred in adopting Paragraph 8(c) of Part II of its decree requiring the licensing of pictures by competitive bidding under certain circumstances.

Wherefore, appellants pray that the judgment of the District Court denying the Motion for Leave to Intervene may be reversed, and that the provisions of Paragraph 8(c) of the judgment of the District Court of December 31, 1946, may also be reversed.

Thurman Arnold, Arnold & Fortas, 821 15th Street, N. W., Washington 5, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for Appellants.

Dated February 25, 1947.

[fol. 4092] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 7, 1947

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers, viz.:

1. The papers designated for inclusion in the transcript by the praecipe filed herein by the plaintiff, United States of America, with the exception of the Rules of Arbitration called for by paragraph 3 hereof and the papers called for by paragraphs 15 through 23 thereof.

2. Notice of Motion, Motion for Leave to Intervene and Intervening Petition of American Theatres Association, Inc., and Southern California Theatre Owners Association, et al., dated September 20, 1946.

3. Order denying intervention of American Theatres Association, Inc., et al., dated January 21, 1947 (also contained in Exhibit 3 to Statement as to Jurisdiction set forth in Paragraph 10 below).

[fol. 4091-4093] 4. Petition of American Theatres Association, Inc., et al., for Allowance of Appeal, dated February 25, 1947.

5. Assignment of Errors and Prayer for Reversal by American Theatres Association, Inc., et al., dated 25, 1947.

6. Order Allowing Appeal of American Theatres Association, Inc., et al., dated February 26, 1947.

7. Appeal bond.

8. Citation accompanying Order Allowing Appeal, dated February 26, 1947.

9. Statement Required by Rule 12 of the Rules of the Supreme Court of the United States.

10. Statement as to Jurisdiction Submitted with Petition for Appeal by American Theatres Association, Inc., et al., and Exhibits thereto.

11. This Praecipe.

12. Proof of Service of the documents designated in paragraphs 4, 5, 6, 8, 9, 10 and 11, above.

Said transcript is to be prepared as required by law and the Rules of this Court and Rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court of the United States.

Thurman Arnold, Arnold & Fortas, 821 15th Street, N. W., Washington 5, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Association, Attorneys for American Theatres Association, Inc., et al, Appellants.

Dated March 6, 1947.

[fol. 4094] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 28, 1947

W. C. Allred, et al., Petitioners herein, feeling themselves aggrieved (1) by the final order of the District Court for the Southern District of New York entered the 23rd day of January, 1947, denying said petitioners leave to intervene in the above-entitled action, and (2) by the final decree made and entered in the above-entitled action the 31st day of December, 1946, do hereby petition for an appeal from said order and said final decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herein.

Wherefore, petitioners pray that an appeal be allowed to the Supreme Court of the United States, that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which the said order and decree were based, duly authenticated, be sent to the [fol. 4095] Supreme Court of the United States under the rules of said Court in such cases made and provided.

Dated: February 27, 1947.

Jackson, Nash, Brophy, Barringer & Brooks, Christian, Barton, Parker & Boyd by John G. Jackson, 15 Broad Street, New York 5, N. Y., Counsel for Petitioners.

[fol. 4096] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 28, 1947

W. C. Allred, et al., Petitioners in the above-entitled action, file the following Assignment of Errors on which they will rely in their appeal to the Supreme Court of the United States:

1. The United States District Court for the Southern District of New York erred in refusing to grant Petitioners' application to intervene as of right in the above-entitled action.

2. The said Court erred in making the order, entered January 23, 1947, denying Petitioners' application to intervene.

3. The said Court erred in holding (if so held) that its judgment of December 31, 1946 is not binding on these Petitioners.

4. Said Court erred in holding (if so held) that representation of Petitioners' interests was adequate.

5. Said Court erred in holding (if so held) that Petitioners' application was not timely.

[fol. 4097] 6. Said Court erred in refusing to exercise its discretion to permit the Petitioners to so intervene.

7. The said Court erred in including in its final decree entered December 31, 1946 and more particularly in Section II thereof, the portions of paragraph 8 reading as follows:

"8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

"(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run, (other than that upon which such feature is to be exhibited in the theatre of the licensor) selected by such operator, and upon uniform terms;

"(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

"(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross re- [fol. 4098] ceipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words 'exclude simultaneous exhibition' shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words 'competitive area' shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

"(d) Each license shall be offered and taken theatre by theatre and picture by picture."

8. The said Court erred in holding that it was empowered and authorized under the provisions of the Sherman Anti-Trust Act to include in its decree the above quoted paragraphs.

Wherefore, Petitioners pray:

(1) That the action of the District Court in denying Petitioners' application to intervene may be held erroneous and that said order accordingly be reversed; and

[fol. 4099] (2) That the action of the District Court in including in the final decree of December 31, 1946 the paragraphs hereinbefore set forth may be held erroneous and said decree accordingly reversed and the cause remanded for the elimination of the aforesaid paragraphs in the decree; and

(3) For such other relief as the Court may deem just and proper.

Dated: February 27, 1947.

Jackson, Nash, Brophy, Barringer & Brooks; Christian, Barton, Parker & Boyd, by John G. Jackson, 15 Broad Street, New York 5, N. Y., Counsel for Petitioners.

[fol. 4100] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 28, 1947

A petition for appeal filed by the above named Petitioners from the order of this Court entered January 23, 1947, denying said petitioners leave to intervene in the above-entitled action and from the final decree in the above-entitled action made and entered by this Court on the 31st day of December, 1946, together with the prayer for reversal, assignment of errors and statement as to jurisdiction, having been presented to and considered by this Court, it is

Ordered that an appeal as prayed for in said petition for appeal be and the same hereby is allowed to the Supreme Court of the United States; and it is

Further ordered that security for costs on appeal be and the same hereby is fixed in the sum of $2,000;
[fol. 4101] Further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and decree and transmit the same to the Supreme Court of the United States within forty days from this date.

Dated: February 27th, 1947.

Augustus N. Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fols. 4102-4105] Citation in usual form, Filed February 28, 1947, omitted in printing.

[fols. 4106-4109] In United States District Court

[Title omitted]

Order Extending Time

Upon the annexed affidavit of Albert C. Bickford, duly sworn to on the 3rd day of April, 1947, making application pursuant to Rule 11 of the Rules of the Supreme Court of the United States for the time of the appellants Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph Inc.), Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation and National Theatres Corporation to docket their cases on appeal and to file the records thereof with the Clerk of the Supreme Court of the United States be extended to May 10, 1947, it is

Ordered that the time of the said appellants hereinbefore named to docket their cases on appeal and to file the records thereof with the Clerk of the Supreme Court be and the same hereby is extended to May 10, 1947.

Dated, New York, N. Y., April 3, 1947.

Augustus N. Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fols. 4110-4115] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon the annexed affidavit of George A. Raftery duly sworn to the 31st day of March, 1947, making application pursuant to Rule 11 of the Rules of the Supreme Court of the United States for the time of the appellants, United Artists Corporation, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., to docket their cases on appeal and to file the records thereof with the Clerk of the Supreme Court of the United States, be extended to May 10, 1947, it is

Ordered, that the time of the said appellants United Artists Corporation, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., to docket their cases on appeal and to file the records thereof with the Clerk of the Supreme Court, be and the same is hereby extended to May 10, 1947.

Dated: New York, March 31, 1947.

Augustus N. Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fols. 4116-4121] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon the annexed affidavit of Irving Moross, duly verified the 14th day of March, 1947, making application pursuant to Rule 11 of the rules of the Supreme Court of the United States, that the time of the appellants Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., to docket their case on appeal and to file the record thereof with the Clerk of the Supreme Court of the United States, be extended for a period of forty days, it is

Ordered that the time of said appellants to docket their case on appeal and to file the record thereof with the Clerk of the Supreme Court be and the same is hereby extended for a period of forty days from and after the date hereof.

Dated: New York, March 14, 1947.

Augustus N. Hand, Circuit Judge, Henry W. Goddard, District Judge, John Bright, District Judge.

[fols. 4122-4125] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition by Harold Lasser, Special Attorney, is praying for an extension of time within which to file and docket the certified copy of the record on file herein.

It is therefore ordered and adjudged that the return date of the citation heretofore issued in the within cause be and the same is extended for an additional period to and including May 10, 1947; and that the said plaintiff be and hereby is granted to and including the 10th day of May, 1947 within which to file and docket the certified copy of the record on appeal herein in the Office of the Clerk of the Supreme Court of the United States.

Dated this 31st day of March, 1947.

Augustus N. Hand, U. S. Circuit Judge, Henry W. Goddard, U. S. District Judge, John Bright, U. S. District Judge.

[fols. 4126-4130] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Good cause appearing therefor, and upon motion of Thomas Turner Cooke, Esq., counsel for Universal Pictures Company Inc. (sued herein as Universal Corporation and Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange Inc., appellants herein, it is

Ordered, by the undersigned, the judges who signed the order allowing the appeal and issued the citation herein, that the return day of said citation be extended for a period of forty (40) days, and that the said appellants be, and they hereby are, granted to and including the 10th day of May, 1947, within which to file and docket the certified copy of

the record on appeal herein in the Office of the Clerk of the Supreme Court of the United States.

Dated: New York City, March 25, 1947.

Augustus N. Hand, United States Circuit Judge,
Henry W. Goddard, United States District Judge,
John Bright, United States District Judge.

[fols. 4131-4134] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME

In the above entitled cause, the petitioners, W. C. Allred, et al., and the petitioners American Theatre Association, Inc., et al., having made and filed their petition by John G. Jackson, praying for an extension of time within which to file and docket the certified copy of the Record on Appeal herein, it is therefore

Ordered and adjudged that the return date of the Citations heretofore issued in this cause be and the same is extended to and including May 10, 1947, and that said W. C. Allred, et al., petitioners, and American Theatre Association, Inc., et al., petitioners, be and hereby are granted to and including the 10th day of May, 1947, within which to file and docket the certified copy of the Record on Appeal herein in the office of the Clerk of the Supreme Court of the United States.

Dated: 4/4/47.

Augustus N. Hand, Circuit Judge, Henry W. Goddard, District Judge, John Bright, District Judge.

[fol. 4135] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION PROVIDING FOR CONSOLIDATION OF RECORDS, ETC.—Filed April 28, 1947

It is hereby stipulated and agreed between all of the parties to this suit, by their respective counsel, that the clerk of this court may prepare and transmit to the Supreme Court of the United States one consolidated record upon

which all of the appeals heretofore filed by said parties may be heard, and that said record shall consist of the following:

1. Copies in chronological order of all of the documents specified by the appellants in their respective praecipes, except the exhibits and typewritten transcript of the testimony and arguments.

2. In lieu of the typewritten transcript of the testimony and arguments a printed copy thereof shall be included in the form in which it was printed for the use of the expediting court.

3. All of the exhibits received in evidence shall be included in the record in their original form.

4. The time within which the record herein may be filed in the Supreme Court may be extended to May 10, 1947.

Dated: April 21, 1947.

United States of America, by Robert L. Wright, by Harold Lasser, Special Assistant to the Attorney [fol. 4136] General; Simpson, Thacher & Bartlett, Attorneys for Defendants Paramount Pictures, Inc., et al.; John W. Davis, Attorney for Defendant Loew's Incorporated; Donovan, Leisure, Newton, Lumbard & Irvine, Attorneys for Defendants Radio-Keith-Orpheum Corporation, et al.; Joseph M. Proskauer and Robert W. Perkins, Attorneys for Defendants Warner; Dwight, Harris, Koegel & Caskey, Attorneys for Defendants Twentieth Century-Fox Film Corporation and National Theatres Corporation; Schwartz & Frohlich, Attorneys for Defendants Columbia Pictures Corporation, et al.; Thomas Turner Cooke, Attorney for Defendants Universal Pictures Corporation, et al.; O'Brien, Driscoll & Raftery, Attorneys for Defendant United Artists Corporation.

[fols. 4137-4138] [File endorsement omitted.]

[fols. 4139-4140] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 79

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed May 23, 1947

1. Now comes the appellant in the above entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. Appellant designates for printing the portions of the record listed in the schedule attached to the stipulation attached hereto and expressly made a part hereof which has been executed by all of the parties herein.

Dated this 23d day of May, 1947.

George T. Washington, Acting Solicitor General.

[fol. 4141] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

Nos. 79-84

[Titles omitted]

[fol. 4142] STIPULATION

It is Hereby Stipulated and Agreed by the undersigned as follows:

1. The Clerk shall print only so much of the record as is designated in the attached schedule. Any of the parties may refer to and quote in its brief or argument any part of the record (including exhibits), and may supply printed copies thereof as an appendix or supplement to its brief.

2. In lieu of reprinting the transcript of the proceedings before the District Court, forty additional copies thereof, as printed for use in the District Court, shall be

furnished to the Clerk of the Supreme Court for inclusion in the printed Supreme Court record.

Dated May 23, 1947.

Robert L. Wright, Special Assistant to the Attorney General, Attorney for the United States of America. Whitney North Seymour, Attorney for Paramount [fol. 4143] Pictures, Inc., et al. John W. Davis, Attorney for Loew's Incorporated. Ralstone R. Irvine, Attorney for Radio-Keith Orpheum Corporation, et al.: Joseph M. Proskauer, Robert W. Perkins, Attorney for Warner Bros. Pictures, Inc., et al. John F. Caskey, Attorney for Twentieth Century-Fox Film Corporation and National Theatres Corporation. Schwartz & Frohlich, Attorney for Columbia Pictures Corporation, et al. Thomas Turner Cooke, Attorney for Universal Pictures Corporation, et al. Edward C. Raftery, George A. Raftery, O'Brien, Driscoll & Raftery, Attorney for United Artists Corporation.

[fol. 4144] Schedule

Amended and Supplemental Complaint filed November 14, 1940.

Answer of National Theatres Corporation to Amended and Supplemental Complaint.

Answer of Twentieth Century-Fox Film Corporation to Amended and Supplemental Complaint.

Answer of Loew's Incorporated et al. to Amended and Supplemental Complaint.

Answer of Paramount Pictures Inc. et al. to Amended and Supplemental Complaint.

Answer of Radio-Keith-Orpheum Corporation et al. to Amended and Supplemental Complaint.

Answer of Keith-Albee-Orpheum Corporation to Amended and Supplemental Complaint.

Answer of Warner Bros. Pictures, Inc. et al. to Amended and Supplemental Complaint.

Answer of Columbia Pictures Corporation to Amended and Supplemental Complaint.

Answer of United Artists Corporation to Amended and Supplemental Complaint.

Answer of Universal Corporation et al. to Amended and Supplemental Complaint.

Consent Decree, Rules of Arbitration and Appeals entered November 20, 1940.

Application for Modification of Consent Decree Filed by Plaintiff August 7, 1944.

Motion by Plaintiff for Temporary Injunction filed February 5, 1945.

Stenographic Minutes of Hearing on March 5, 1945.

[fol. 4145] Expediting Certificate of the Attorney General.

Opinion of District Court dated June 11, 1946.

Plaintiff's Proposed Decree dated October 8, 1946.

Plaintiff's Proposed Decree dated June 19, 1946.

Proposed Decree of Defendants Paramount et al.

Proposed Decree of Defendant United Artists.

Proposed Decree of Universal Defendants.

Memorandum of Columbia re Proposed Findings and Decree dated September 10, 1946.

Supplemental Memorandum of Columbia re Proposed Findings and Decree dated October 16, 1946.

Findings of Fact and Conclusions of Law of Expediting Court, dated December 31, 1946.

Decree of Expediting Court entered December 31, 1946.

Memorandum of Expediting Court re Findings and Decree dated December 31, 1946.

Motion of Paramount et al. to Amend and Modify Conclusions of Law and Judgment.

Motion of United Artists to Amend and Modify Conclusions of Law and Judgment.

Motion of Universal Corporation et al. to Amend Findings of Fact and Decree.

Memorandum Opinion of Expediting Court re Motions to Amend and Clarify Findings and Judgment.

Ordered entered February 11, 1947 re Motions to Amend and Clarify Findings and Decree.

Plaintiff's Petition for Appeal.

Plaintiff's Assignment of Errors and Prayer for Reversal.

Plaintiff's Statement as to Jurisdiction.

[fol. 4146] Plaintiff's Praecipe.

Order Allowing Plaintiff's Appeal.

Loew's RKO, Warner and Fox Petitions for Appeals.

Assignments of Errors.
Order Allowing Appeals.
Statements as to Jurisdiction of Paramount, Loew's, Fox, RKO and Warner.

Paramount defendants':

Separate Petitions for Appeal.
Assignments of Errors.
Order Allowing Appeals.

Columbia defendants':

Appeal Bond.
Statement Required by Rule 12.
Citation.
Proof of Service of Appeal Papers and of Statement Required by Rule 12.
Petition for Appeal.
Assignment of Errors.
Statement as to Jurisdiction.
Order Allowing Appeal.
Praecipe.

United Artists':

Petition for Appeal.
Order Allowing Appeal.
Assignment of Errors and Prayer for Reversal.
Statement as to Jurisdiction.
Praecipe.

Universal defendants':

Petition for Appeal.
Assignments of Error and Prayer.
[fols. 4147-4148] Praecipe.
Order Allowing Appeal.

Praecipe of Paramount, Loew's, RKO, Warner and Fox.
Counter-Praecipe of Paramount, Loew's, RKO, Warner and Fox.
Order extending time of Paramount, RKO, Warner, Fox and Loew's to Docket Cases on Appeal and File Records to May 10, 1947.
Order extending time of United Artists and Columbia to Docket Cases on Appeal and File Records to May 10, 1947.

Order dated March 14, 1947, extending time of Columbia to Docket Case on Appeal and File Records for a period of 40 days.

Order extending Plaintiff's time to Docket Case on Appeal and File Records to May 10, 1947.

Order extending time of Universal to Docket Case on Appeal and File Records to May 10, 1947.

Stipulation providing for consolidation of records, etc.

[fols. 4149-4152] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

Nos. 80-81

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed May 23, 1947

The appellants in Nos. 1349 and 1350 for their statement of the points on which they intend to rely in their respective Appeals to this Court adopt the points contained in their assignments of errors heretofore filed herein.

Said appellants for their respective Appeals refer to the entire record filed in this Court on May 8, 1947, as necessary for the consideration of the foregoing points. Said appellants designate as parts of the record to be printed by the Clerk of the Supreme Court of the United States only so much of the record as is designated in the Stipulation filed in this Court on May —, 1947.

John W. Davis, Attorney for Loew's Incorporated. Joseph M. Proskauer & Robert W. Perkins, Attorney for Warner Brothers, Inc., et al. Ralstone R. Irvine, Attorney for Radio-Keith-Orpheum Corporation, et al. Dwight, Harris, Koegel & Caskey, Attorney for Twentieth-Century Film Corporation and National Theatres Corporation. Whitney North Seymour, Attorney for Paramount Pictures, Inc., et al.

Service of the Foregoing Statement of Points to be Relied upon and Designation of Parts of Record Necessary for Consideration thereof is acknowledged this 23 day of May, 1947.

Robert L. Wright, Special Assistant to the Attorney General, Attorney for the United States of America.

[fol. 4153] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 82

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND DESIGNATION OF PARTS OF RECORD WHICH APPELLANTS THINK ARE NECESSARY FOR THE CONSIDERATION THEREOF—Filed May 13, 1947

Appellants, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., intend to rely upon each of their formal assignments of error, and adopt same as their statement of the points to be relied upon, but for convenience and brevity propose to group the discussion of said points as follows:

1. Plaintiff contended in the District Court that block [fol. 4154] booking was a violation of the Sherman Act. It based its contention upon the arbitrary and wholly unsupported argument that block booking involved the licensing of one or more pictures conditioned upon the sale of one or more other pictures—in other words, that appellants, as well as other distributors, made it a practice of compelling exhibitors to license pictures which the exhibitors did not want in order that the exhibitors could license pictures which they did want. The plaintiff apparently took the position, which the District Court adopted, that the mere licensing of pictures in groups or blocks was in and of itself a licensing upon condition. Appellants claim that they have an inherent right to license their pictures in groups at the beginning of the season, just as every manufacturer has a right to sell his entire output before he produces it, and that there is not a scintilla of evidence in this case that any exhibitor was forced to buy one picture in order to obtain another. In fact, not a single exhibitor was called to the stand by the plaintiff, and the definition of block booking in the findings (Finding No. 1) is wholly unsupported by any proof in this record. On the contrary, appellants' general sales manager, Abe Montague, testified that the exhibitors throughout the country have always wanted and presently clamor for block booking, particularly when it comes to smaller companies like appellants, because exhibitors use a great deal of appellants' product to fill out their double feature programs, and that block booking

gives them an assurance of product; that it is an economical way of transacting business both for appellants and for exhibitors, and that there is nothing inherently wrong or [fol. 4155] improper in licensing pictures in groups any more than it is wrong and improper for a book shop to sell fifty books to one customer, or for a group of copyright owners to license a thousand musical compositions to a radio broadcaster. Moreover, how is competition suppressed, even if applicants did condition licenses in the manner charged? Appellants own all of these copyrights. They compete with no one with respect to their own copyrights; and since they have a complete monopoly on their own copyrights, the courts have no power to weaken that monopoly.

2. Block booking as an industry practice has existed for over a quarter of a century. It has been litigated and passed upon and approved by two Circuit Courts of Appeals in *Federal Trade Commission* v. *Paramount*, 57 Fed. (2d) 152, and *West Ways Theatre, Inc.* v. *Twentieth Century Fox Film*, 30 Fed. Supp. 830, aff'd. 113 Fed. (2) 932. Moreover, in *U. S.* v. *Crescent*, 323 U. S. 173, which affirmed a judgment in favor of the Government against a large independent circuit in Tennessee, block booking was shown to be the customary method of selling, but no findings were made attacking it or holding it to be a violation of the Sherman Act. The Courts thus having sanctioned block booking as a lawful practice, appellants were justified in believing that they had a right to continue to sell their pictures in that manner; and they should not be exposed at this time to the danger of facing treble damage suits for having acted in good faith for this long period of time with the sanction of the courts. It was no more unlawful for the appellants to sell their pictures in groups or blocks on December 31, 1946 (the date of the Decree herein) than it was in the years (1932, 1940 and 1944) when the above named cases were decided.

[fol. 4156] 3. The District Court has created a system of restrictions upon the licensing of pictures which amounts to a compulsory license upon these copyrighted works and in essence means that appellants have to put their pictures up on the auction block, sell to the highest bidder, forego the good will of their tried and true customers, and become for all purposes a public utility. Appellants contend that

the Court below had no jurisdiction to make such provisions in its decree; that sitting as an anti-trust Court it was limited merely to the injunctive process, and that even if it wished to go beyond that and to embark upon a system of regulation of an entire industry (which is in effect what it does), the method of the regulation violates the constitutional property rights of appellants and completely destroys their monopolies in their respective copyrights. Appellants claim that they have the inherent right to license their pictures to their old customers and to preserve their good will in the industry, built up for over twenty years; that they have a right to bargain with each exhibitor with respect to the terms of his license, and that right cannot be taken away from them; that they are not affected with a public interest; that they are not a public utility and certainly not a public utility for 18,000 theatres; and that the monopoly granted to them under their copyrights is very wide and there is no compulsory provision in the Copyright Law with respect to motion pictures.

4. Appellants contend that since under this decree they are acting lawfully and singly, and not in conspiracy or combination with any of the other defendants, they have a perfect right to sell their pictures in any manner they [fol. 4157] see fit, to whomever they please, and upon such terms as they think proper and reasonable. While the District Court may enjoin a conspiracy, it cannot go beyond that, and it cannot regulate lawful conduct under the guise of preventing restraint of trade. The philosophy of the Sherman Act is to keep competition open, not to impose restrictions on trade and commerce. The District Court has no power of regulation such as a Court of Bankruptcy would have.

5. Appellants contend that this decree is in and of itself an instrument of restraint and actually stifles competition, and therefore it itself violates the Sherman Act. They urge that the District Court has discriminated against appellants as well as United Artists and Universal and other small distributors who do not own theatres, and that this decree operates to favor the five major defendants who do own and operate theatres. By the provisions for competitive bidding (which is a polite way of saying, "Put your pictures on the auction block"), the five major defendants have a right to take the pictures produced by them re-

spectively and turn them over to their own theatres upon any terms they see fit. Then those theatres come into active competition with independent theatres. The practical result is that when one of these affiliated theatres bids against an independent theatre for the better pictures the affiliated theatre, paying very little for the pictures licensed from its affiliated producer, has unlimited funds with which to compete against the independent, and it is easy to see who will be the highest bidder. This system of bidding would result in giving the affiliated theatres a tremendous economic advantage over independent theatres [fol. 4158] and deprive the latter of the better pictures. That certainly was not the intention of the Sherman Act. The effect of such system is to compel appellants to deprive their old customers of product and to hand over their pictures to affiliated theatres and thus actively help to destroy their old and independent customers.

6. Appellants contend that as proprietors of the respective copyrights of their motion pictures, past and future, they possess a monopoly which is not abhorrent to the Sherman Anti-Trust Act and which that Act was not designed to interfere with; that the decree seriously interferes with the appellants' monopoly in these copyrights, and that the provisions of the decree expressly take from appellants the most important exclusive rights vested in them by the Copyright Act of 1909. (17 U. S. C. A.)

7. Appellants contend that they are being deprived of their property without due process of law in that their right to freely market their product is impinged upon and restricted, and they contend that this decree violates their rights under the Fifth Amendment to the Constitution.

8. While this was a long trial and many exhibits were received in evidence, appellants believe that the portions of the record designated by them in their praecipe are sufficient for the consideration of this Court in determining the issues presented by appellants' appeal. Appellants have limited themselves to the pleadings and other necessary filed papers and to the testimony of only three witnesses, Abraham Montague, William A. Scully and Paul N. Lazarus, and a few pages of argument and concessions. Appellants' exhibits, to wit: C-1, C-2, C-4, C-5, C-6, C-7, C-9, [fols. 4159-4163] C-10, are mainly charts showing the

method of appellants' selling over the years. No useful purpose will be served by designating specifically each portion of this tremendous record which is unnecessary for the Court's consideration on appellants' appeal. We prefer to state that aside from the documents and testimony set forth in appellants' praecipe, all other portions of this record are unnecessary in considering the question of block booking and competitive bidding which will be all that is being submitted by appellants for this Court's consideration and determination.

Schwartz & Frohlich, By Louis D. Frohlich, Member of Firm, Counsel for Appellants, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., 1450 Broadway, Borough of Manhattan, New York 18, N. Y.

[fols. 4164-4168] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 83

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed July 8, 1947

The appellant United Artists Corporation for its Statement of Points on which it intends to rely in its appeal to this Court, adopts the points contained in its Assignment of Errors heretofore filed herein,

Said appellant, for its respective appeals, refers to the entire Record filed in this Court on May 8, 1947, as necessary for the consideration of the foregoing points. Said appellant designates as parts of the Record to be printed by the Clerk of the Supreme Court of the United States only so much of the record as is designated in the stipulation filed in this Court on May —, 1947.

May 21, 1947.

(S.) Edward R. Raftery, Attorney for Appellant United Artists Corporation.

[fol. 4169] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 84

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed May 22, 1947

The appellants state that the points on which they intend to rely are those presented by their Assignments of Error and each of them.

The appellants state that the following parts of the record (in addition to the exhibits which have been filed in original form and the transcript of the proceedings before the District Court, forty copies of which, as printed for use in the District Court, have been furnished to the Clerk of this Court for inclusion in the printed record) are necessary for the consideration of the foregoing points, and, therefore, designate them as the parts of the record to be printed by the Clerk of the Supreme Court of the United States:

1. Amended and Supplemental Complaint filed November 14, 1940.

2. Answer of Universal Corporation et al. to Amended and Supplemental Complaint.

3. Opinion of District Court dated June 11, 1946.

[fols. 4170-4171] 4. Decree proposed by Defendant Universal Pictures Corporation.

5. Findings of Fact and Conclusions of Law of Expediting Court, dated December 31, 1946.

6. Decree of Expediting Court entered December 31, 1946.

7. Memorandum of Expediting Court re Findings and Decree dated December 31, 1946.

8. Motion of Universal Corporation et al. to Amend Findings of Fact and Decree.

9. Memorandum Opinion of Expediting Court re Motions to Amend and Clarify Findings and Judgment.

10. Order entered February 11, 1947 re Motions to Amend and Clarify Findings and Decree.

11. Petition for Appeal.

12. Assignments of Error and Prayer for Reversal.

13. Praecipe.

14. Order Allowing Appeal.

15. Order extending time of Universal to Docket Case on Appeal and File Record to May 10, 1947.

16. Stipulation providing for consolidation of records, etc.

Thomas Turner Cooke, Charles D. Prutzman, Counsel for Appellants.

May 20, 1947.

Service of the foregoing points to be relied on and designation of parts of record to be printed is hereby acknowledged this 20th day of May, 1947.

Harold Losser, Counsel for Appellee.

[fol. 4172] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 85

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed May 21, 1947

Comes now American Theatres Association, Inc., et al., petitioners-appellants herein, by their attorneys, and for their Statement of Points on which they intend to rely hereby adopt their Assignments of Error.

And for their designation of the parts of the record which they deem necessary for the consideration of the foregoing points, these petitioners-appellants concur in the designation thereof (incorporated herein by reference thereto) filed by the appellant in *United States of America, appellant*, v. *Paramount Pictures, Inc., et al., appellees*, in cause No. 1348, October Term 1946, pending in this Court

and also involving an appeal from the decree of December 31, 1946, as amended, partially appealed from herein, and also including:

1. Notice of Motion, Motion for Leave to Intervene and Intervening Petition of American Theatres Association, [fol. 4173] Inc., et al., dated September 20, 1946.

2. Order denying intervention of American Theatre Association, Inc., et al., dated January 21, 1947 (also contained in Exhibit 3 to Statement as to Jurisdiction designated in paragraph 6 below.)

3. Petition of American Theatres Association, Inc., et al., for Allowance of Appeal, dated February 25, 1947.

4. Assignments of error and prayer for reversal of American Theatres Association, Inc., et al., dated February 25, 1947.

5. Order allowing appeal of American Theatres Association, Inc., et al., dated February 26, 1947.

6. Statement of American Theatres Association, Inc., et al., required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States, dated February 26, 1947.

7. Praecipe of American Theatres Association, Inc., et al., dated March 6, 1947.

8. Order of April 4, 1947, extending time to docket appeal of American Theatres Association, Inc., et al., to May 10, 1947, and attached affidavit-petition.

9. Proof service of the documents designated in paragraphs 3, 4, 5, 6, and 7 above.

10. This document and proof of service thereof.

Thurman Arnold, Arnold & Fortas, 821—15th Street, N. W., Washington, D. C.; Paul Williams, General Counsel to Southern California Theatre Owners Assn., Attorneys for Petitioners-Appellants.

[fol. 4174] IN THE SUPREME COURT OF THE UNITED STATES

No. —

AMERICAN THEATRES ASSOCIATION, INC., et al., Petitioners-Appellants

v.

UNITED STATES OF AMERICA, Plaintiff-Respondent,

and

PARAMOUNT PICTURES, INC., et al., Defendants-Respondents

AFFIDAVIT OF SERVICE

Thurman Arnold, being first duly sworn, on oath deposes and says that he is the attorney for American Theatres Association, Inc., et al., petitioners-appellants herein; that on the 21st day of May, 1947, he placed a copy of the attached Statement of Points and Designation of Record, filed herein by said petitioners-appellants, in the United States Post Office, with proper postage thereon, full prepaid, addressed to the following at the addresses indicated:

Hon. John F. Sonnett, Assistant Attorney General, Department of Justice, Washington, D. C.

Simpson Thacher & Bartlett, 120 Broadway, New York, New York, Attorneys for Paramount.

Davis Polk Wardwell Sunderland & Kiendl, 15 Broad Street, N. Y. C., Attorneys for Loew's, Inc.

George S. Leisure, Esq., 2 Wall Street, New York, New York, Attorney for Radio-Keith-Orpheum Corporation and affiliated Defendants.

[fols. 4175-4176] Joseph M. Proskauer, Esq., 11 Broadway, New York, New York, Attorney for Warner.

Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation.

Schwartz & Frohlich, 1450 Broadway, New York, N. Y., Attorneys for Columbia.

Charles D. Prutzman, Esq., 1250 6th Avenue, New York, N. Y., Attorney for Universal.

O'Brien, Driscoll & Raftery, 152 W. 42nd Street, New York, N. Y., Attorneys for United Artists Corporation.

Thurman Arnold, Arnold & Fortas, 821 Fifteenth St., N. W., Washington 5, D. C., Attorney for American Theatres Association, Inc., et al., Appellants.

Subscribed and sworn to before me this 21st day of May, 1947. Marguerite E. O'Brien, Notary Public, D. C. My Commission Expires April 14, 1951.

[fol. 4177] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 86

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed May 23, 1947

Come Now, W. C. Allred, et al., appellants herein, by their attorney, and for their Statement of Points on which they intend to rely hereby adopt their Assignments of Error.

And for their designation of the parts of the record which they deem necessary for the consideration of the foregoing points, these appellants concur in the designation thereof (incorporated herein by reference thereto) filed by the appellant in *United States of America, appellant* v. *Paramount Pictures, Inc., et al., appellees*, in cause No. 1348, October Term 1946, pending in this Court and also involving an appeal from the decree of December 31, 1946, as amended, partially appealed from herein, and also including the transcript of the record as certified by the Clerk of the United States District Court for the Southern District of New York, on behalf of these appellants, except that it will be unnecessary to include the cost bond on appeal.

John G. Jackson, 15 Broad Street, New York 5, N.Y., Attorneys for Petitioners-Appellants, W. C. Allred, et al.

[fol. 4178] Service of a copy of this document is acknowledged May 19, 1947.

John F. Sonnett, Assistant Attorney General, by Harold Lasser, Department of Justice, Washington, D. C. May 20th—Simpson, Thacher & Bartlett, 120 Broadway, New York, New York, Attorneys for Paramount. May 20, 1947—Davis, Polk, Wardwell, Sunderland & Kiendl, 15 Broad Street, New York, New York, Attorneys for Loew's, Inc. William J. Donovan, by George Vinion, Jr., 2 Wall Street, New York, New York, Attorney for Radio-Keith-Orpheum Corporation and affiliated Defendants. Joseph M. Proskauer, Esquire & Robert W. Perkins, 11 Broadway, New York, New York, Attorneys for Warner. Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, New York, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation. Schwartz & Frohlich, 1450 Broadway, New York, New York, Attorneys for Columbia. Charles D. Prutzman, Esquire, 1250 Sixth Avenue, New York, New York, [fols. 4179-4180] Attorney for Universal. O'Brien, Driscoll & Raftery, 152 West 42nd Street, New York, New York, Attorneys for United Artists Corporation.

[fols. 4181-4182] SUPREME COURT OF THE UNITED STATES

Nos. 79-84, October Term, 1947

ORDER NOTING PROBABLE JURISDICTION—June 23, 1947.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. Further consideration of the motion of American Theatres Association and others for leave to intervene is postponed to the hearing of the cases on the merits.

Mr. Justice Jackson took no part in the consideration or decision of this order.

[fol. 4183] SUPREME COURT OF THE UNITED STATES

Nos. 85 & 86, October Term, 1947

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—June 23, 1947.

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the cases on the merits.

Mr. Justice Jackson took no part in the consideration or decision of this order.

[fol. 4184] Endorsed: Files Nos. 52,212, 52,213, 52,214, 52,215, 52,216, 52,217, 52,218, 52,219, Southern New York, D. C. U. S., Term No. 79, The United States of America, Appellant, vs. Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, et al. Term No. 80, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants, vs. The United States of America. Term No. 81, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants, vs. The United States of America. Term No. 82, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants, vs. The United States of America. Term No. 83, United Artists Corporation, Appellant, vs. The United States of America. Term No. 84, Universal Pictures Company, Inc., (sued herein as Universal Corporation and Universal Pictures Company, Inc.) Universal Film Exchanges Inc., and Big U. Film Exchange, Inc., Appellants, vs. The United States of America. Term No. 85, American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz, et al., Appellants, vs. The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation, et al. Term No. 86, W. C. Allred; Charles E. Beach and Elizabeth L. Beach, Partners trading as Beach and Beach, et al., Appellants, vs. The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation, et al. Filed, May 8, 1947. Term Nos. 79 October Term 1947. 80 October Term 1947. October Term 1947. 82 October Term 1947. 83 October Term 1947. 84 October Term 1947. 85 October Term 1947. 86 October Term 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

PARAMOUNT PICTURES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

EQUITY No. 87–273

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on December 31, 1946. A petition for appeal was filed on February 21, 1947, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and

Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173.

STATUTES INVOLVED

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

On July 20, 1938, the appellant filed its complaint, charging the defendants with violating sections 1 and 2 of the Sherman Act by monopolizing and unreasonably restraining competition in the exhibition, distribution, and production of motion picture films throughout the United States. The major defendants were five integrated groups of corporations, commonly known as Fox, Loew, Paramount, RKO, and Warner, respectively, each of which is engaged in producing, distributing, and exhibiting such films. The remaining defendants were Columbia Pictures Corporation and certain of its subsidiaries, collectively referred to as Columbia, Universal Corporation and certain of its subsidiaries, collectively referred to as Universal, engaged in both producing and distributing motion picture films, and United Artists Corporation, a company engaged exclusively in distribution.

All eight defendants were claimed to be members of a general conspiracy to monopolize and unreasonably restrain competition in the domestic motion picture business. The five major defendants were further charged with collectively and individually monopolizing, through their theatre

operations, motion picture exhibition in about 80 percent of the cities of over 100,000 in the United States. Each of the major defendants was also charged with being, in itself, a combination in unreasonable restraint of trade. The relief prayed was that the conspiracy among all the defendants be terminated, that they be enjoined from continuing a wide variety of trade practices claimed to be illegal in themselves, and that the major defendants be compelled to divorce the exhibition business from their distribution and production activities.

Negotiations for a settlement which were undertaken before any evidence was heard resulted in the entry of a consent decree against the five major defendants on November 20, 1940. An amended and supplemental complaint brought up to date the allegations of the prior complaint, but made no substantial change in the character of the charges or the relief prayed, except to request specifically a nationwide system of enforcement through arbitration tribunals to implement such relief as might be had against unlawful trade practices of a nationwide character.

The decree adjudicated no law violations, but established a system of arbitration by which independent exhibitors could secure a hearing before an arbitrator supplied by the American Arbitration Association with respect to complaints that unreasonable licensing restrictions of

a specific character had been placed upon them by the major defendants when acting as film distributors. The decree further provided for the entry of an award against such defendants, after such hearing, intended to limit appropriately the future conduct of these defendants in dealing with the complainant and his competitors. These awards were made subject to review on appeal by any party by a specially constituted appeals board of three members appointed by the District Court. Upon affirmance by the board or expiration of time in which to appeal, the awards become final and disobedience was punishable by contempt. Operations of the system were financed by the defendants, but supervised by the Appeal Board and the America Arbitration Association. The Department of Justice intervened in some of the proceedings and was kept fully advised as to all complaints, awards, and appeals.

The decree also provided that the major defendants' feature films could not be licensed before being trade-shown and could not be offered or licensed in groups of more than five at a time. It also prohibited the forcing of so-called short subjects and newsreels by conditioning sales of feature pictures upon sales of these less important films. The only provision of the decree restricting the activities of the major defendants as theatre operators was a prohibition against their engaging in a general program of theatre

expansion. There were no prohibitions restricting their conduct as producers.

The decree expressly reserved the right of the United States to request the divorcement relief originally sought, and still prayed for in the amended and supplemental complaint, at the end of a three-year trial period. During the same period the Government was prohibited from seeking such relief either in the instant proceeding or in any other. The provisions with respect to trade showing and licensing features in blocks of five were binding upon the defendants after the 1941–42 motion picture season only if the Government had by that time subjected the minor defendants to the same relief, and while the Government did not procure such relief prior to the specified date, the major defendants continued to observe these provisions voluntarily. The decree also provided that any party might move for any modification whatsoever after the expiration of the three-year period.

The court, prior to entry of the decree, heard objections to it made by a number of independent exhibitors, through their counsel, as friends of the court. The court overruled these objections.

At the conclusion of the trial period the plaintiff found, upon a review of the consent decree's actual operation, that it was inadequate to correct the violations of law alleged in the complaint and that adequate relief could not be obtained without

a judicial finding of such violations. It therefore moved to set the issues made by the complaint and answers for trial against all eight defendants. On June 13, 1945, an expediting certificate was filed. The taking of evidence commenced before an expediting court composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright on October 8, 1945, and was concluded on November 20, 1945.

At the trial the plaintiff assumed the burden of establishing its allegations and of showing that the relief granted by the consent decree was inadequate to correct the violations of law alleged in the complaint. The plaintiff's case consisted mainly of (1) an exposition of the corporate structure of each defendant; (2) the general manner in which the major defendants' theatre holdings had been acquired, with an accurate description of their individual theatre holdings by name, location, and size; (3) the precise manner in which the major defendants jointly controlled, with each other and with other exhibitors, specific theatre operations; (4) the general forms of agreement used by all the defendants in licensing films and representative executed agreements by which they had licensed each other and their affiliates upon terms which discriminated against others; (5) tabulations of film rentals paid by their theatres to all distributors and received by the defendants as distributors from all theatres,

showing the manner in which film receipts had been arbitrarily concentrated in the hands of the major defendants as theatre operators in the areas where they operated theatres and in the hands of all eight defendants as film distributors throughout the country; (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the principal theatres in the principal cities of the United States and the restrictive provisions by which a uniform run, clearance, and admission price structure in all areas was maintained; and (7) arbitration and appeal board decisions disclosing a wide variety of discriminatory effects of the defendants' licensing practice upon specific independent exhibitors.

The Government abandoned its allegations that the defendants monopolized motion picture film production by their activities as producers, but insisted that their distribution and exhibition monopolies, as such, unreasonably restricted the economic opportunities of all independent producers. The evidence offered at the trial showed that the major defendants' control over distribution and exhibition was, in general, as great at the time of the trial as it had been before the entry of the consent decree although there had been a substantial increase in the number of independently produced films.

The defense consisted mainly of (1) historical data to show that each defendant's theatres were

acquired to meet competitive threats from others; (2) rationalization of the trade practices attacked in terms of business necessity and long usage; (3) statistical data intended to minimize the importance of the defendants' position in the industry and to show that the film rental payments they made to each other were not reciprocal or uniform in amount; (4) general denials of any intent to produce the discriminatory effects shown by the plaintiff's evidence; (5) general denials of the existence of any unlawful combination or conspiracy; and (6) affirmative testimony that there was intense competition among all the defendants in their production activities and testimony by the major defendants that they received substantial economic benefits from their theatre ownership, withdrawal of which would impair their service to the public.

The case was argued on January 15, 16, and 17, 1946, and an opinion by Circuit Judge Hand was rendered for the court on June 11, 1946, and reported at 66 F. Supp. 323. It found all the defendants guilty of violating the Act by their activities in distribution and exhibition, both individually and collectively. They were found not guilty insofar as their acts as producers were concerned. Although the court found that the major defendants had jointly maintained a collectively dominant position in the distribution and exhibition fields by an illegal uniform run, clear-

ance, and minimum admission price structure which permitted others to enter the business only upon terms determined by these defendants, it held that their businesses could not be aggregated for the purpose of determining whether or not they enjoyed a control over either of those fields amounting to monopoly proportions. It concluded with respect to the towns in which the major defendants had complete control over exhibition in a particular community by operating all of the theaters there, or complete first run control in a large city by operating all of the first run theaters, that there was no sufficient proof that such a position was the result of the foregoing illegal practices, rather than a lack of enterprise or competence among potential independent competitors. The court, therefore, failed to find that any of the defendants, either individually or collectively, had actually achieved a monopoly in any branch of the industry in violation of section 2, although they were found to have violated that section by attempts to monopolize.

The court also rejected the plaintiff's claim that the major defendants' vested interests in protecting their own theatre-operating profits was itself a cause of the film licensing practices by which price-fixing and clearance privileges claimed by them to be lawful under their film copyrights were illegally extended to protect theatre operators from competition with one

another. The court concluded that such practices would exist even in the absence of such ownership and that the divorcement relief sought by the plaintiff would be injurious both to the defendants and to the public. It therefore decided that such relief should not be granted, at least until a substitute remedy decreed by it should be tried and found inadequate. In lieu of divorcement relief it said that the defendants' features should be licensed picture by picture and theatre by theatre upon a basis where the films would be exhibited by the high bidder, regardless of affiliation, old customer relationships, or other criteria formerly relied on to favor arbitrarily one customer over another, provided, however, that each defendant might discriminate in any manner it chose with respect to the exhibition of its own films in its own theatres. Such relief had not been suggested by the parties or discussed in their briefs.

Certain established trade practices, such as minimum admission price fixing in film licenses and conditioning the licensing of one feature upon the taking of one or more others were outlawed unconditionally, in accordance with plaintiff's prayer. Clearance, that is, an agreement between a distributor and an exhibitor licensed on a prior run which protects the receipts of that run by providing that a given number of days must elapse before a print of the same film is made available for a subsequent run in another

theatre or theatres, was unequivocally prohibited as to theatres not in substantial competition, but the court rejected plaintiff's contention that the defendants' clearance agreements, as such, were illegal. Clearance "in excess of that reasonably necessary to protect the licensee in the run granted" was therefore declared invalid only to the extent deemed excessive.

All so-called pooling arrangements, by which one or more theatres of one or more defendants or theatres of a defendant and an independent exhibitor were operated under a profit-sharing, common management, or joint stock ownership plan, were declared unlawful and their dissolution was ordered. Where the arrangements took the form of joint stock interests in corporations,[1] these interests were to be dissolved by a sale of the defendant's stock or a purchase by the defendant of the other party's stock. All purchases by a defendant of an independent's interest were to be subject to court approval, granted only after a showing that the purchase would not unduly restrain competition. Expansion of the defendants' theatre holdings in certain other situations was also sanctioned, subject to court approval. The court also recommended in its opinion that the existing arbitration system or one similar in form should be continued as

[1] Interests of 5 percent or less were excluded from this provision as *de minimis*.

a procedural device for enforcing the prohibitions of the decree, but conditioned such use upon the consent of the parties.

Proposed judgments and findings were then submitted by all parties and hearings were had thereon on October 21, 22, and 24, 1946. Counsel representing various groups of independent exhibitors were heard as friends of the court, all of whom objected to the competitive bidding provisions of the judgments submitted by the parties in accordance with the court's opinion, which asserted that such a provision would make divorcement relief unnecessary to achieve the aims of the suit. Two of these groups sought to intervene as parties and were denied intervention, but they and all others who sought leave to argue were heard orally and permitted to file briefs. An objection common to all was that the major defendants, as theatre operators had such a tremendous advantage over all other exhibitors in financial resources and in their privilege of exhibiting their own pictures in their own theatres upon any terms they pleased, that other exhibitors could not successfully compete with them in operating theatres. Counsel for the principal independent producers in the industry were also heard as friends of the court. They argued that since they were dependent upon the distributor-defendants for profitable distribution of their films the decree's restrictions on dis-

tribution practices would hurt them more than it would the major defendants, since the latter had their own theatre outlets which were unaffected by the restrictions.

The Government's proposed judgment modified the decree outlined in the opinion in the following principal respects: (1) a provision prohibiting the major defendants from licensing films produced or distributed by them to each other for use in their theatres for a ten-year period commencing one year after the entry of judgment was proposed as a supplement to the competitive bidding relief;[2] (2) the relationships involving theatre interests held by the defendants in conjunction with independents, and found by the opinion to violate the Act, were to be dissolved only by a

[2] The primary purpose of this proposal was (a) to limit competitive bidding relief to disputes among nondefendant exhibitors insofar as the distribution of the major defendants' films were concerned; (b) to give the major defendants' theatres an incentive to bid against one another for the films of distributors not affiliated with them; (c) to compel a major defendant, as a distributor, to seek independent theatre outlets instead of another major's theatres; and (d) to prohibit the making of competitive-restricting agreements among themselves which had customarily taken the form of restrictive provisions in the film license agreements which one as a distributor made with the other as an exhibitor. A secondary effect was to compel a major defendant either to sell one or more theatres to an independent in areas so completely dominated by the defendant that there were not sufficient independent theatres to absorb the product of four of the major defendants and to increase the number of films which would be required for the major defendants' theatres from nontheatre-owning and nondefendant distributors.

sale of the defendants' interest to nondefendants; (3). the defendants were to be unconditionally prohibited from expanding their theatre holdings, either by acquiring the interests of independent partners or otherwise; and (4) all existing clearance agreements which protected the defendants' theatres were to be declared invalid. These modifications were all submitted as consistent with the opinion since they did not disturb the integrated structure of the major defendants, which the court found to be valid, but were intended to break up the illegal combination among them found by the court to exist. The existing arbitration system was to be liquidated since three of the defendants declined to agree to arbitration for any purpose and no agreement was reached between the major defendants and the plaintiff as to the substantive provisions under which such a system might operate.

The defendants offered decrees which ranged from decrees of dismissal to decrees which merely relaxed some of the provisions outlined in the opinion. The major defendants submitted a decree which included an arbitration system, apparently intended to operate simultaneously with contempt proceedings as a means of enforcement. At the hearing the major defendants suggested as a possible substitute for the so-called competitive bidding provisions a prohibition against "arbitrary refusal" to license one exhibitor a particular run sought by a competing exhibitor.

On December 31, 1946, the court entered a judgment, a copy of which is attached, rejecting the prohibition against cross-licensing sought by the Government and the prohibition against acquisition of independent partnership interests by the defendants. The court did modify the decree outlined in the opinion by providing for the liquidation of the existing arbitration system, as requested by the Government, and did prohibit all expansion of the defendants' theatre interests except that resulting from such acquisitions as the court might approve in dissolving joint relationships. It made all clearance agreements prima facie invalid when attacked and cast the burden of justifying the reasonableness of such agreements upon the distributor.

The judgment also narrowed the application of the competitive bidding provisions and added as a separate provision a modification of the provision submitted by the defendants relating to arbitrary refusals to license a run. The general means by which the competitive bidding restrictions are to be made operative are outlined in the judgment, but it neither creates nor authorizes any mechanism other than contempt by which they may be made effective. The court adopted findings of fact and conclusions of law which were substantially the same as those indicated in the opinion, with a memorandum, a copy of which is attached, which again recom-

mended voluntary arbitration as a means of resolving disputes arising under the decree.

On January 10, 1947, all defendants filed motions to amend and clarify the findings and judgment, which were denied on February 3, except for an extension of the time allowed to dissolve certain pooling arrangements.[3]

THE QUESTIONS ARE SUBSTANTIAL

The Government's appeal presents four main questions. First, accepting the expediting court's findings as to the extent and nature of the violations involved in their entirety, it erred as a matter of law in failing to enter a judgment which dealt adequately with these violations. Second, the court erred as a matter of law in concluding that the major defendants had not actually achieved a monopoly in exhibition, either singly or collectively, and that all of the defendants had not actually collectively achieved a monopoly of distribution, in violation of section 2 of the Sherman Act. Third, the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition. Fourth, the court, upon proper findings as to the legal consequences of the defendants' violations, should have ordered the

[3] The changes made in the judgment by this decision have been indicated upon the face of the copy attached hereto by enclosing the provisions added in brackets.

ultimate divorcement of the major defendants' theater holdings from their distribution and production activities and should have restrained them from licensing films for exhibition in each other's theaters while such relief is being effectuated. It should also have enjoined all of the defendants from continuing to make clearance agreements.

In rejecting the relief sought by the Government in favor of a system of competitive bidding, which merely regulates the exercise of the major defendants' power to dominate the domestic motion picture film industry, the expediting court exceeded the limits of its discretion in determining appropriate Sherman Act relief. Accepting as true every fact found by the court, the major defendants are found to have collectively maintained for a substantial period of time a collectively dominant position in both the distribution and exhibition of motion picture films in this country by a conspiracy which imposed unreasonable restrictions upon the opportunity of theatres operated by others to compete with their own theatres in licensing and exhibiting motion picture films and upon the competitive opportunities of independent distributors, as well. The defendants' collective domination of distribution was admittedly nationwide.

The major defendants' domination of exhibition as theatre operators was, of course, confined to the areas in which they operated theatres, but

these areas included all but four of the 92 cities in the United States with populations of more than 100,000 and the great majority of those over 25,000. In 38 of the 92 cities of more than 100,000, one or more of the defendants operated all of the first run theatres and this was true of more than 100 cities of between 25,000 and 100,000. The decree concededly does nothing to disturb the continuance of this dominance because the opinion did not find it to be unlawful, despite the fact that it has been acquired and maintained by unlawful means.

The major defendants have not competed with each other either in buying or selling films in the past and there is nothing in the decree to induce such competition in the future. On the contrary, they are now expressly permitted to make agreements with each other for clearance "reasonably necessary to protect the licensee in the run granted." They are also now expressly authorized to retain the same vested interest in favoring each other's theatres as against outsiders that they had when the suit was begun and are further expressly authorized to use their own theatres as vehicles for discriminatory exploitation of their own films. The proposed injunction against mutual use by the defendants of each other's theatres for exploiting their films would not have prevented the latter form of discrimination, but it would have eliminated the unlawful combination among

the major defendants, insofar as that could be accomplished by injunctive provisions. It probably would indirectly compel divestiture of some of the defendants' theatres in situations where they are dominant as theatre operators, but would not eliminate them as theatre operators in any situation where they are willing to compete, as the ordinary independent exhibitor is compelled to compete, by showing the product of four or less of the defendant-distributors plus that of independent distributors. The prohibition against cross-licensing among the major defendants was therefore consistent with the court's finding that the law violations in question were the product of a horizontal combination rather than integration and was clearly required to dissolve the unlawful combination among the major defendants. In the light of recent decisions, the court's failure to find any actual monopolization of exhibition seems inexplicable. The areas of commerce embraced by the defendants' theatre operations were sufficiently large to be the subject of monopolization, even though the defendants might not be regarded as having ever intended to secure "a nationwide monopoly of exhibition." Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Paramount Pictures, Inc.*, 63 F. Supp. 229. The decision in *American Tobacco Co.* v. *United States*, 328 U. S. 781, clearly establishes that finding of possession of monopoly power

in violation of section 2 of the Sherman Act is not dependent upon proof of "overt acts" by which it is exercised against a particular competitor, as the trial court assumed in seeking to distinguish the *Crescent* and *Schine* cases, *supra*. The *Tobacco* decision also shows that the percentage of the market controlled by two or more parties to a conspiracy to monopolize may be aggregated, as the court below thought they could not.

The principles of law announced in *Interstate Circuit* v. *United States*, 306 U. S. 208, are entirely inconsistent with the lower court's assumption that a film distributor may adopt licensing restrictions by agreement with an exhibitor which are calculated to protect the licensee from competition. If such agreements are to be sanctioned at all, their legality must apparently be made to rest upon protection of the licensor, which owns the copyright in the film licensed. But it is hardly possible to justify the making of any such agreements in the future by defendants found to have made in the past the persistent and widespread illegal use of them found in this case.

The inability of a court to regulate effectively in the public interest the illegal power found in the possession of the defendants in this case by the conventional mechanisms at its disposal was virtually conceded by the expediting court when

it recommended the adoption of an arbitration system to secure enforcement of the decree. But it apparently recognized an inherent lack of power to establish and maintain a mechanism not approved by the defendants when it conditioned the incorporation of such a system in its decree upon the consent of the parties. The fact that the Government and the defendants were unable to agree upon arbitration machinery which would make effective the trade practice provisions of the judgment should have compelled the court to revise its relief in terms of prohibitions enforceable by contempt. The court's adherence to a system of decree-administered competition in the face of obvious limitations on enforcement approaching inability to enforce at all may hardly be justified upon the basis of the court's expressed conclusion that the defendants and the public would be hurt by divorcement relief and its impliedly similar conclusion as to the Government's proposed ban on cross-licensing of films among the major defendants. There is no evidence whatsoever that the theatre-going public would suffer hardship of any kind from a change of ownership or management of theatres now owned or managed by the major defendants. Any conclusion as to the public desirability of avoiding such private injury as may result from relief necessary to achieve the objectives of the Sherman Act appears to be for Congress rather than

the courts. A specific legislative authorization would seem essential to substitute for dissolution of a monopoly which violates the Act mere regulation of its business practices.

The basic issue posed by this appeal is thus one of judicial power rather than the mere exercise of judicial discretion. If the district court is right in its assumption that the untried and unenforceable competitive bidding relief is an adequate substitute for the traditional divestiture relief and complete prohibition of future agreement among the guilty defendants, traditionally applied in situations of this character, then a proceeding under section 4 of the Sherman Act has become an instrument for protecting an established monopoly from either effective judicial or legislative correction. We submit that the district court's assumption is untenable and that reversal of its decision by this Court is required not only to secure adequate relief in this case but to maintain the validity of the equity suit as a mechanism of Sherman Act enforcement.

Respectfully submitted.

(S) GEORGE T. WASHINGTON,
Acting Solicitor General.

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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

PARAMOUNT PICTURES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT

v.

PARAMOUNT PICTURES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 3504–3563) is reported in 66 F. Supp. 323, and its findings of fact, conclusions of law and decree are reported in 70 F. Supp. 53.

JURISDICTION

The judgment of the district court was entered on December 31, 1946 (R. 3694). Timely motions of all defendants to amend the findings of fact, conclusions of law and judgment were ruled upon on February 10, 1947 (R. 3719–3720). The

petition for appeal was filed on February 18, 1947. (R. 3720–3721) and allowed on February 21, 1947 (R. 3725).

The jurisdiction of this Court rests on Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345). Probable jurisdiction was noted on June 23, 1947[1] (R. 3840).

QUESTIONS PRESENTED

1. Whether, in view of the widespread and habitual abuse of the defendants' enormous economic power over the distribution and exhibition of motion-picture films, and in view of the conspiracy and attempt to monopolize, all of which the court below found, the relief granted by the trial court is so inadequate as to constitute an abuse of discretion.

2. Whether each major defendant's ownership of production, distribution and exhibition facilities, which operates to control access to the domestic market at strategic points, constitutes a vertical combination in violation of Sections 1 and 2 of the Sherman Act, in view of the separate power of each to exclude competitors and the sep-

[1] On the same date, this Court noted probable jurisdiction in the appeals filed by the defendants herein in Nos. 80, 81, 82, 83, and 84 (R. 3840). Consideration of jurisdiction to hear the appeals in Nos. 85 and 86 of persons who sought unsuccessfully to intervene below was postponed to the hearing of this case on the merits (R. 3841).

arate and collective continuing abuse of that power.

3. Whether the divorcement of the major defendants' exhibition interests from their distribution and production interests is required to prevent the resumption of the unreasonable restraints found below, to dissipate the effects of these restraints and to pry open the film market to independent exhibitors and distributors.

4. Whether the court below erred in directing that the illegality inherent in the joint ownership by defendants and independents of theatre interests be terminated through a purchase by one or the other, instead of requiring that the defendants' interest be sold to nondefendants.

5. Whether the common use of each other's affiliated theatre outlets by all of the major defendants should be prohibited as an independent means of terminating their conspiracy, as interim relief until divorcement can be accomplished, and as an incentive to expeditious divorcement by theatre divestiture.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. (15 U. S. C. 1.)

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor * * * (15 U. S. C. 2.)

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. 4.)

The Act of March 4, 1909, 35 Stat. 1075, 17 U. S. C. 1, provides in part as follows:

[SECTION 1.] That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

* * * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any

manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

* * * * *

Article 1, Sec. 8 of the Federal Constitution provides in part as follows:

> The Congress shall have Power * * *
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; * * *

The First Amendment to the Constitution provides in part as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

STATEMENT

I

PRIOR PROCEEDINGS IN THE CASE

The United States filed its original complaint in this case on July 20, 1938, and its amended and supplemental complaint on November 14, 1940 (R. 3137). The defendants named were five separate integrated groups of corporations (the major defendants),[2] each engaged in producing,

[2] The term "major defendants" is used in this brief as it was by the court below (Fdg. 56, R. 3670).

distributing, and exhibiting motion-picture films throughout the United States; two separate integrated groups of corporations, each engaged in producing and distributing motion-picture films; and one corporation engaged exclusively in distribution.

The complaint charged, among other things (R. 3137–3201): (a) that all eight defendants, as distributors, had engaged in a conspiracy to restrain and had restrained, had attempted to monopolize and had monopolized interstate trade in the production, distribution, and exhibition of motion pictures, by concertedly fixing minimum admission prices, clearances[3] and runs[4] for theatres, and also by concertedly engaging in numerous other unlawful practices, many of which discriminated against small independent[5] theatres and in favor of large circuits of theatres, including the circuits of the five major defendants; (b) that the five major defendants (all engaged in producing, distributing, and exhibiting) had engaged

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[3] "The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres" (Fdg. 1; R. 3660).

[4] "The successive exhibitions of a feature in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on" (Fdg. 1; R. 3660–3661).

[5] The term "independent" is used throughout this brief, as it was by the trial court (R. 3660), to refer to "A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant."

in a conspiracy to restrain and monopolize and had actually restrained and monopolized interstate trade in the exhibition of motion pictures in most of the larger cities of the United States; (c) that each of the five major defendants constituted a vertical combination of the business of producing and distributing on the one hand and exhibiting on the other, which in itself violated Sections 1 and 2 of the Sherman Act; and (d) that each distributor-defendant had entered into various contracts with theatre circuits, including the affiliated circuits of the five major defendants, and with exhibitors generally, which unreasonably restrained trade. The complaint prayed that the conspiracy among all the defendants be terminated, that defendants be enjoined from the numerous trade practices alleged to be illegal, and that each major defendant be compelled to divorce its exhibition business from its production and distribution business.

Before any evidence was heard, negotiations for settlement were undertaken. As a result, the amended and supplemental complaint of November 14, 1940, was filed, and a consent decree against the five major defendants only was entered on November 20, 1940 (R. 3373). The amended complaint brought up to date the allegations of the original complaint, but made no substantial changes in the character of the charges or of the relief prayed, except to request a nation-wide

system of arbitration tribunals to assist in securing adequate enforcement of prohibitions against illegal trade practices of nation-wide scope. Answers denying the charges of the amended complaint were filed by all defendants (R. 3201–3370), and the consent decree contained no admission of law violation and adjudicated no issue of fact or law except that the complaint stated a cause of action.

Pursuant to the amended prayer, the consent decree established an arbitration system (R. 3402–3413)* under which independent exhibitors could secure a hearing, before an arbitrator supplied by the American Arbitration Association, of complaints that unreasonable licensing restrictions of a specified character had been placed upon them by a consenting defendant as a film distributor. The decree provided for awards intended to limit the future conduct of the defendants in dealing with the complainant and his competitors, the awards being subject to review by an appeals board of three members appointed by the district court. Upon affirmance by the board or expiration of time for appeal, the awards became final and disobedience was punishable by contempt. Operations of the system were financed by the defendants, but supervised by the appeals board and the American Arbitration Association. The Department of Justice intervened in some of the

* The consent decree and rules of arbitration are printed in full and indexed in the Appendix to this brief, separately bound, at pp. 362–403.

proceedings and was kept fully advised as to all complaints, awards, and appeals.

The decree also provided that the consenting defendants' feature films could not be licensed before being trade-shown and could not be offered or licensed in groups of more than five at a time. It also prohibited the forcing of so-called short subjects, newsreels, reissues, westerns or foreigns by conditioning their sales upon sales of feature pictures. The only provision of the decree restricting the activities of the consenting defendants as theatre operators was a prohibition against their engaging in a general program of theatre expansion for a three-year period. There were no prohibitions restricting their conduct as producers.

The decree expressly reserved to the United States the right at the end of a three-year trial period to request the divorcement relief originally sought and still prayed for in the amended complaint. During that period, the Government was prohibited from seeking such relief in the instant or any other proceeding. The provisions concerning trade-showing and licensing features in blocks of five were binding upon the consenting defendants after the 1941-42 motion picture season only if the Government had by that time subjected the other defendants to the same relief.[1]

[1] Although the Government did not procure such relief by the specified date, the major defendants continued to observe these provisions voluntarily.

The decree also provided that any party might move for any modification whatsoever after the expiration of the three-year period.

At the end of the three-year period the Government concluded, upon review of the consent decree's actual operation, that it was inadequate to correct the violations of law alleged in the complaint and that appropriate relief could not be obtained without a judicial finding of those violations. Accordingly, it moved for trial against all eight defendants on the issues made by the amended complaint and answers, and sought a preliminary injunction pending final judgment.* (R. 3420). On June 13, 1945, an expediting certificate was filed (R. 3502). Beginning October 8, 1945, and concluding November 20, 1945, evidence was taken before an expediting court composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright.

At the trial, the Government abandoned its allegations that the defendants had monopolized film production by their activities as producers, but maintained that their distribution and exhibition monopolies had unreasonably restricted the economic opportunities of all independent producers,

* The motion for preliminary injunction was limited to a prohibition against the granting of unreasonable clearance (R. 3420–3421). It was argued and taken under advisement but was still undecided when the trial on the merits commenced.

and of course continued to assert the other allegations of unlawful conduct.

On June 11, 1946, an opinion by Circuit Judge Hand was rendered for the court (R. 3504). It held that the defendants individually and collectively had engaged in conspiracies and agreements in restraint of trade in the distribution and exhibition of motion pictures in violation of Section 1, and had attempted to monopolize such trade in violation of Section 2, but held that the defendants had not, either individually or collectively, [redacted] actually monopolized any part of trade in either the exhibition or distribution of pictures. On December 31, 1946, the court entered its findings of fact and conclusions of law (R. 3659–3694), and its decree (R. 3694–3702).

II

THE FACTS

Our attack on the action below is confined largely to the adequacy of the relief granted. We do not dispute any of what we consider to be the evidentiary findings, but we do challenge the court's failure to conclude that the defendants, both individually and collectively, had monopolized important segments of the motion picture industry. In this discussion of the facts, therefore, we shall rely largely on those found by the district court. In those instances in which we go beyond the findings in order to give a complete

picture, we shall refer only to facts about which we believe there is no dispute.

A. *The defendants.*—The five major defendants in this case are Paramount Pictures, Inc., (Paramount); Loew's Incorporated (Loew); Radio-Keith-Orpheum Corporation (RKO); Warner Bros. Pictures, Inc. (Warner); and Twentieth Century-Fox Film Corporation (Fox); and certain of their respective distribution and exhibition subsidiaries[9] (Fdg. 56, R. 3670). Each of these defendants is engaged either directly or through subsidiary or associated companies in the production, distribution, and exhibition of motion pictures throughout the United States.

The other three defendants are Columbia Pictures Corporation (Columbia) and Universal Corporation (Universal), and their respective

[9] The Paramount group of defendants includes: Paramount Pictures, Inc., engaged in producing, distributing and exhibiting motion pictures, either directly or through subsidiaries; Paramount Film Distributing Corporaton, a wholly owned subsidiary, engaged in distributing (Fdgs. 2, 3; R. 3661).

Loew is engaged in producing, distributing and exhibiting, either directly or through subsidiaries (Fdg. 12, R. 3663). No Loew subsidiary is named a defendant.

The RKO group of defendants includes: Radio-Keith-Orpheum Corporation, engaged in producing, distributing and exhibiting, either directly or through subsidiaries; RKO Radio Pictures, Inc., a wholly owned subsidiary, engaged in production and distribution; Keith-Albee-Orpheum Corporation, engaged in exhibition prior to its dissolution on September 29, 1944, and 99% of whose common stock and 33% of whose preferred stock was held by Radio-Keith-

subsidiaries;[10] and United Artists Corporation (United). Columbia and Universal are engaged directly or through subsidiary or associated companies in the production and distribution of motion pictures. United is engaged only in the distribution of motion pictures. None of these

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Orpheum Corporation; RKO Proctor Corporation, a wholly owned subsidiary, engaged in exhibiting; and RKO Midwest Corporation, a wholly owned subsidiary engaged in exhibiting (Fdgs. 13–17; R. 3663–3664).

The Warner group of defendants includes: Warner Bros. Pictures, Inc., engaged in producing, distributing and exhibiting, either directly or through subsidiaries; Vitagraph, Inc., a wholly owned subsidiary, engaged in distributing (on July 20, 1944, its name was changed to Warner Bros. Pictures Distributing Corporation); Warner Bros. Circuit Management Corporation, a wholly owned subsidiary, which acts as booking agent for the exhibition interests of Warner Bros. Pictures, Inc. (Fdgs. 24, 38, 39; R. 3665–3666).

The Fox group of defendants includes: Twentieth Century-Fox Film Corporation, engaged in producing, distributing and exhibiting, either directly or through subsidiaries; National Theatres Corporation, owned and controlled by, and a holding company for the theatre interests of, Twentieth Century-Fox Film Corporation (Fdgs. 40, 43; R. 3666–3667).

[10] The Columbia group of defendants includes: Columbia Pictures Corporation, engaged in producing and distributing motion pictures, either directly or through subsidiaries; Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary, engaged in distributing (Fdgs. 44, 46, R. 3667–68).

The Universal group of defendants includes: Universal Corporation, engaged in producing and distributing motion pictures, either directly or through subsidiaries; Universal Film Exchanges, Inc., a wholly owned subsidiary, engaged in distributing; Big U Film Exchange, Inc., a wholly owned subsidiary, engaged in distributing (Fdgs. 47, 49, 52, R. 3668–3669).

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three defendants owns any theatres (Fdg. 58; R. 3670).

B. *The theatre acquisitions of the five major defendants.*—Prior to 1919, none of the defendants had combined the business of distributing with that of exhibiting pictures. In that year, Paramount decided to acquire "theatres of its own so that it might assure itself of outlets for Paramount productions" (Fdg. 8, R. 3662), and formed Southern Enterprises, Inc., which acquired various theatres in the south. At about the same time, Paramount also obtained a 50 percent interest in the Black chain of theatres in New England (Fdg. 8, R. 3662; Ex. 85, R. 197).

In 1920, Loew was a substantial theatre operator. At that time it acquired Metro Pictures Co., a producer and distributor. In 1924, Metro was merged with Goldwyn Pictures Co. and Mayer Pictures Co., both producers and distributors, to form Metro-Goldwyn-Mayer (Ex. 48, R. 181).

RKO was organized in 1928 by Radio Corporation of America. At the time of its organization it acquired production and distribution facilities through merger with another company, and also acquired interests in a number of companies operating circuits of vaudeville theatres (Fdgs. 18, 19, 21, R. 3664; Ex. 94, R. 203).

In 1925, Warner acquired its first theatre circuit (Ex. 116, R. 209). In 1928, Warner acquired the stock of the Stanley Company of America

which owned about 250 theatres situated principally in the Pennsylvania and New Jersey area (Fdgs. 27–29, R. 3665; Ex. 116, R. 209). In the next year and nine months, Warner acquired the stock of several other corporations owning circuits of theatres in the same general area and a smaller number of theatres scattered in various other parts of the country (Fdg. 30, R. 3665; Ex. 116, R. 209).

In 1925, Fox acquired its intial interest in theatres through the purchase of stock in corporations engaged in operating theatres (Ex. 45, R. 175). Since then, it has acquired additional theatre interests, some by acquisition from others and some by its own construction (Fdg. 42, R. 3667; Ex. 45, R. 175).

In 1929 and 1930, all of the major defendants except Loew acquired additional theatre circuits and emerged in 1930 in substantially their present form (Exs. 45, 85, 94, 116, R. 175, 197, 203, 209).

C. *The geographical pattern of the major defendants' theatre holdings.*—The exact location of all of the major defendants' theatres is shown at pp. 208–255 of the Appendix. These defendants operate theatres in 922 towns located in all 48 states and the District of Columbia. In Alabama, Arkansas, Florida, Maine, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, and Vermont, the only affiliated theatres are Paramount's. In Kansas, Montana, Nevada, and Wyoming, the only affiliated theatres are

those of Fox. In Idaho, Indiana, Kentucky, Michigan, New Mexico, Oklahoma, Virginia, and West Virginia, there are no towns in which two or more major defendants separately operate theatres.[11]

Thus of the total of 922 towns in which these defendants own theatre interests, there are 775 (84%) in which only one defendant has such interests. See App. pp. 208–255. In addition, there are 100 towns in which two or more defendants pool (*infra*, pp. 29–31) all or some of their theatre interests. There remain, therefore, only 47 towns in which the theatre interests of two or more majors are operated even in nominal competition with each other. A great part of these are cities of more than 100,000.[12] Even after the pooling arrangements are terminated, as directed by the district court (*infra*, p. 44), there will be only 60 towns, or 6 percent of the total of

[11] This geographical allocation is spelled out in more detail in Monograph 43, *The Motion Picture Industry—A Pattern of Control*, TNEC, pp. 15–16. See also Ex. RKO–11, R. 1764.

[12] The only towns of less than 100,000 in which this situation prevails are Phoenix and Tucson, Ariz. (Paramount and Fox), Santa Barbara, Calif. (Fox and Warner), New London, Conn. (Paramount and Warner), Sioux City, Ia., and Waterloo, Ia. (Paramount and RKO), Lynn, Mass (Paramount and Warner), Union City, N. J. (RKO and Warner), White Plains, N. Y. (Loew and RKO), Ambridge and Butler, Pa. (Paramount and Warner), Aberdeen and Hoquiam, Wash. (Fox and Warner) (App. pp. 208, 212, 214, 222, 226, 236, 238, 242, 252).

922 in which the major defendants own theatre interests, where they will be competing even nominally as exhibitors.[120]

This situation prevails notwithstanding an expansion in the theatre interests of Paramount and Fox since 1935.[121] Their expansion, even when achieved through theatre corporations only 50% owned by them, has been subject to control at all times by the home offices of these companies (R. 886, 2102).

The lack of competition among the defendants in licensing films in towns where two or more of them have theatres operating in nominal opposition was demonstrated in concrete terms by evidence introduced by the Government describ-

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[120] Dissolution of pooling agreements between defendants in Cleveland, Ohio, Hammond, Indiana, Idaho Falls, Idaho, Lynchburg, Virginia, Minneapolis, Minnesota, Oak Park, Illinois, Philadelphia, Pa., Pittsburgh, Pa., St. Paul, Minn., San Antonio, Texas, San Francisco, California, Waterbury, Conn., and Yonkers, New York, would leave each party to the pool with one or more theatres in the town, in each of which towns there was no prior theatre competition between any defendants.

[121] See the following:

Year:	Paramount	Fox
1935	[1] 1,034	
1937	[1] 1,212	
Nov. 1938	[1] 1,440	[2] 561
1945 (approximate)	[3] 1,550	[4] 634

[1] Taken from Ex. 151, which "includes theatres that are owned but leased to other interests."

[2] Taken from Exs. 12 and 13, which include pooled interests.

[3] Taken from Goldenson's testimony (R. 824) which covered interests held through stock ownership of from 12½% to 100%.

[4] Taken from Ex. 160, which also includes pooled interests.

ing the precise manner in which the defendants licensed their product for first run. This evidence shows that, in the 92 cities of more than 100,000 population, during the period 1936–37 to 1943–44, the product of the defendant distributors continued to flow to the defendant exhibitors with virtually no shifts from one defendant exhibitor to another. On the other hand there were substantial changes as between the defendants' theatres and independents' theatres (Exs. 44, 58, 84, 95, 147, 195, 349, U–1; R. 175, 185, 196, 203, 235, 255, 239, 1406, 1834).[14]

The witness Rogers, sales manager of Loew's, conceded that there was no competition among

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[14] These admissions of fact which cover the seasons 1936–37, 1939–40, 1941–42, and 1943–44, respectively, show that during these seasons there were no shifts in the first run distribution of any defendants films from one affiliated outlet to another, except in the following instances:

Newark, N. J.—Beginning with the 1941–42 season, RKO, which had been selling its own (Skouras operated) theatre split its product between this theatre and Paramount and Warner.

Kansas City, Mo.—The Fox-Paramount-RKO pool, which played Fox, Paramount, RKO, Warner and Universal product first run, was dissolved at the end of the 1936–37 season. The distribution of the pool's first-run product thereafter was as follows: Warner to Paramount and RKO; Fox to Fox; Paramount to Paramount and RKO; RKO to RKO; Universal to Fox.

Des Moines, Iowa.—The RKO-Paramount pool which held all defendants' first-run contracts was dissolved during the 1939–40 season. The first run distribution of defendants' films thereafter was still confined to the RKO and Paramount theatres.

Providence, R. I.—In the season 1941–42, RKO split its

the major defendants' theatres in licensing the films he sold (R. 410, 572), and it is equally apparent that there was none among the major defendants' theatres in licensing the films distributed by any of them since such competition would have been utterly inconsistent with the general conspiracy to which these defendants were parties. (See *infra*, pp. 22–29.) No evidence was offered by any defendant to prove that any such competition among them occurred.

D. *The defendants' position in the industry.*—In the year 1945, the five major defendants had interests in 3,137 of the 18,076 motion-picture theatres in the United States, or about 17.35 percent.[15] (Fdg. 118, R. 3684). These 3,137 theatres, however, paid 45 percent of the total domestic film rental received by all eight distributor-defendants, as compared with the less than 5

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product between Loew's and RKO theatres but in 1943–44 season sold its own theatres exclusively.

Lowell, Mass.—Fox split its product for the 1936–37 season between Paramount and RKO but in 1939–40 and thereafter sold to Paramount only.

[15] The figure 3,137 includes both theatres owned by the five major defendants and theatres in which any one of those defendants held a joint interest with an independent exhibitor (see *infra*, p. 31), except where the interest of the defendant was an indirect minority stock interest. The total theatre interests of this nature held by each defendant are: Paramount, 1,395; Warner, 501; Loew, 135; Fox, 636; and RKO, 109. There are 361 more in which two or more of the defendants held joint interests with each other either through joint stock ownership or through lease or operating agreements (Fdg. 118, R. 3684).

percent of such rental paid by the five largest unaffiliated theatre circuits" (Fdg. 126, R. 3685).

Most of these theatres are concentrated in the larger cities of the United States. The five major defendants together own interests in at least 70 percent of all the first-run theatres in the 92 cities of the United States having populations of over 100,000. They own interests in all of the first-run theatres in 38 of those cities.[16] (Fdg. 148, R. 3688). In 15 more, their affiliates have a virtual monopoly of first-run theatres.[17] In

[16] The defendant Loew offered a list of first-run theatres in cities of over 100,000 which showed on its face that in the following 33 cities all such theatres were affiliated with one or more of the defendants: Albany, Rochester, Syracuse and Yonkers, N. Y.; Bridgeport and New Haven, Connecticut; Cleveland, Cincinnati, and Columbus, Ohio; Des Moines, Iowa; Dallas, Ft. Worth, Houston, and San Antonio, Tex.; Flint and Grand Rapids, Mich.; Minneapolis, Minn.; Milwaukee, Wis.; Elizabeth, Newark, and Paterson, N. J.; Chattanooga, Knoxville, and Memphis, Tenn.; Peoria, Ill.; Omaha, Nebr.; South Bend, Ind.; Charlotte, N. C.; and Lowell and Worcester, Mass. (App., pp. 327–338). The list contained theatres listed as independent first-runs in Boston, Chicago, Philadelphia, St. Paul, and Washington, D. C., which Exs. 428 and 428A (App., pp. 299–307) show have played only one or two of the pictures of any defendant during an entire year.

[17] In New Orleans and Los Angeles, the independents played a total of 27 and 10 films, respectively, of those released by the defendants. In Atlanta, Ga., Birmingham, Ala., Dayton, Ohio, Detroit, Mich., Denver, Colo., Jacksonville and Tampa, Fla., Salt Lake City, Utah, Seattle and Spokane, Wash., Somerville, Mass., Trenton, N. J., and Wilmington, Del., the independent theatres played the regular product of only one defendant distributor on first run (Exs. 428, 428A; App., pp. 299–307).

others, the major defendants' affiliated theatres secured for first-run showing a major part of the product of the eight distributor-defendants.[18] (Exs. 428, 428A; App. pp. 299–307).

In cities of between 25,000 and 100,000 population, the major defendants own interests in 577 of a total of 978 first-run theatres, or almost 60 percent (Ex. 432; App. pp. 308–317). In 135 such cities, their affiliated theatres played all of the product of the eight distributor-defendants on first run.[19] And in at least 300 additional towns, most of them with populations under 25,000, an operator affiliated with one of the major defendants has all of the theatres in the town (Exs. 371, 397; R. 359–370, 2166).

The eight distributor-defendants comprise by far the most important distributors of motion pictures in the United States. In the 1943–44 season these defendants together distributed approximately 78 percent of the features ("Westerns" excluded) distributed by all national distributors in the United States (Fdg. 99, R. 3677).

These eight distributor-defendants received approximately 97 percent of the total film rental

[18] Of the remaining cities of over 100,000, the product of the eight distributor-defendants was about equally divided on first-run between affiliated and unaffiliated theatres in cities, unaffiliated theatres had the larger number of first-run theatres and secured more than half of the first-run product in more, and all of the first-run theatres are unaffiliated in the remaining four (Exs. 428, 428A; App., pp. 299–307).

[19] These cities are listed at R. 2355–2357.

paid by all the affiliated theatres during the 1943–44 season. From 71 to 81 percent of that rental went to the five major defendants as distributors, from 26 to 15 percent went to the other three distributor-defendants, and only from 2½ to 4½ percent went to independent distributors (Fdg. 127, R. 3685–86).

E. *The conspiracy to fix prices, clearances, and runs.*—In the distribution of copyrighted motion pictures, the right to exhibit is licensed rather than sold by the distributor to the exhibitor (Fdg. 61, R. 3670). In licensing features, each of the eight distributor-defendants has agreed with its respective licensees on the minimum admission prices to be charged in exhibiting its features (Fdg. 62, R. 3670). Each distributor-defendant also has followed the practice of including in its license contracts agreements that the distributor will neither exhibit nor grant to another a license to exhibit the pictures licensed for a specified number of days after the run licensed. "This so-called period of 'clearance' or 'protection' is stated in the various licenses in differing ways; in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; in terms of clearances as fixed by other distributors; or in terms of combinations of these formulae" (Fdg. 73, R. 2673). Clear-

ance is of course given to protect a particular run in a theatre over a subsequent run (Fdg. 83, R. 3674).

The price, clearance, and run provisions are all mutually interdependent. The run and clearance provisions together fix the relative playing positions of all theatres in a given area, and the minimum price provisions are based on playing position, the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on (Exs. 276, 278, 280, 282, 284, 286, 288, 290; App. pp. 1–18).

The pattern of exploitation of a first-class film in metropolitan centers is one in which the greatest film rental is derived from the first-run theatres and progressively lesser rentals are received from subsequent exhibitions (Exs. 467, 468, 469; App. pp. 280–285). The larger first-run film rental is of course a direct reflection of the proportionately greater box-office receipts of the first-run theatre resulting from the protection against competition of other theatres in the area which the run, clearance and minimum admission price provisions afford. In smaller towns, where fewer runs are sold, the first-run yields an even greater proportion of the total revenue from the town (Exs. F–21, F–21A; App. pp. 294–296).

All of the defendants, both distributor and exhibitor, have engaged in a conspiracy to fix the prices, runs, and clearances for substantially all

theatres throughout the United States, including the large number of important affiliated theatres (Fdgs. 64, 65, 81, 82, R. 3670–3671, 3674). This conspiracy has been effectuated mainly by means of film-licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors (Fdg. 64, R. 3670).

Each of the five major defendants as an exhibitor has been licensed by all of the other defendants as distributors at the fixed admission prices. The five major defendants have engaged in this nationwide system of price-fixing both by granting the price-fixing licenses as distributors and by accepting them as exhibitors; and the other three distributor-defendants have participated in the system by licensing the exhibitor-defendants at the fixed prices (Fdg. 69–71, R. 3672). The defendants' licenses are in effect price-fixing arrangements among all of the distributor-defendants, as well as between such defendants individually and their various exhibitors (Fdg. 64; R. 3670). In this way are controlled the prices to be charged for most of the feature motion pictures exhibited in the United States (Fdg. 65, R. 3671). The major defendants also have made operating agreements as exhibitors with each other and with independent exhibitors providing for joint operation of theatres at fixed minimum admission prices, demonstrating the express intent of these defendants to maintain artificial prices (Fdg. 67, R. 3671). And certain master

agreements and franchises between various defendants as distributors and other defendants as exhibitors stipulating minimum admission prices for large numbers of the defendants' theatres further indicate participation in the price-fixing scheme (Fdg. 68, R. 3671).

By agreeing to maintain the prices stipulated in the licenses, each exhibitor of any distributor's pictures consents to the price level at which he will compete with all other exhibitors of those pictures in his competitive area, whether they exhibit on the same or another run. The net effect of all the licenses of a distributor is to establish a price structure which regulates the competition between the various licensees of that distributor in each competitive area. Each exhibitor knows from the uniformity of price practices existing in the industry that the prices of all other exhibitors in his area are similarly controlled. Consequently, all licensees of each distributor are knowingly participating in the price-fixing system, and there is thus a conspiracy between each distributor-defendant individually and its licensees to fix minimum admission prices (Fdg. 71, R. 3672).

By means of the same types of agreements between the eight defendants as distributors and the five major defendants as exhibitors, all of the defendants have acted in concert in the formation of a uniform system of clearances and runs for the various theatres throughout the country

(Fdgs. 73, 81, 82, R. 3673, 3674). Some of their license agreements have granted clearance to all theatres then or thereafter owned or operated by a particular exhibitor as against all theatres in the competitive area then in operation or thereafter opened. The obvious purpose of such licenses was to give an advantage to the particular exhibitor over all competitors, without relation to the size, location or appointments of the competitive theatres (Fdg. 80, R. 3674). The major defendants "in numerous instances have maintained unreasonable clearances to the prejudice of independents" (Fdg. 79, R. 3674).

The net effect of this system of fixed prices, clearances and runs is that "a price structure is erected which regulates the licensees' ability to compete against one another in admission prices" (Fdg. 71, R. 3672).

An obvious purpose and result of this system was to increase the profits of the major defendants both as distributors and as exhibitors, and to produce greater profits for the nonexhibitor defendants in their capacity as distributors. "All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres and this interest they were safeguarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas" (Fdg. 66, R. 3671). The differentials in admission prices between first-run and later-run theatres in any competitive area are

calculated to encourage as many patrons as possible to see the picture at the first-run theatres where they will pay the higher prices. The greater the percentage of potential customers who can be persuaded to see the picture at higher-priced first-run theatres, the greater will be the gross revenue received from exhibition of the picture, which will of course be reflected in increased rentals to the distributors. "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible" (Fdg. 72; R. 3672–3673).

As a result of the control over both distribution and exhibition exercised by the defendants, the conspiracy has been so successful that "Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures" (Fdg. 84; R. 3674).

While the precise point at which this conspiracy originated cannot be accurately determined from the record, it is clear that it began some time after the entry of the major defendants into the exhibition field. An attempt was made by the defendants to show that licensing

restrictions of the same character as those on which the conspiracy rests had been used prior to the integration of the defendants. The defendant Paramount offered in evidence a series of license forms intended to show the evolution of the standard form from 1917 through 1945 (Exs. P–1, P–5–P–8, P–11, P–12, P–14–P–16; App. pp. 18–45). The development of the form of license, run and clearance provisions, admission-price-fixing provisions and provisions for auditing the exhibitor's receipts, as they appear in the exhibits, is shown in the Appendix, pp. 18–45. This evolution shows on its face a steadily widening control by the distributor over the exhibitor's business during the period 1923 to 1942.

The first of these licenses which granted rights in a film copyright (Ex. P–7) was the 1923 form (R. 926), which contained provisions for both a minimum admission price restriction and a protection or "run" clause. In 1926, a so-called "standard form" of license (Ex. P–8) was adopted by agreement among the defendant distributors (R. 925), which contained more detailed admission price and "protection" provisions, comparable to those in use for the past ten years. The witness Keough placed the initial use of clearance provisions which referred to the prices to be charged by theatres other than those which signed the license in question as around 1924, 1925 or 1926 (R. 943–944). There was also positive evidence that in at least one

area the system of fixing varying admission prices for competing theatres in accordance with their playing positions did not evolve until the principal theatre circuit there was acquired by one of the defendants.[20] The use of copyright restrictions in film licenses as a device for suppressing competition in this industry thus did not occur until after integration commenced, and it evolved into a more complete form of regulation of theatre operating competition as distributor-ownership of theatres increased.[21]

F. *Theatre "pooling" arrangements.*—The exhibitor-defendants have entered into many arrangements, both with each other and with independent exhibitors, for the pooling of theatres

[20] The witness Rhoden, President of Fox Midwest Circuit, operating theatres in Kansas and Missouri, which were bought by Fox in 1929 (R. 2041), said, with respect to his company's operations in Kansas City, Mo.: "Prior to the 1935–36 motion picture season, the availabilities of subsequent run theatres in Kansas City, Missouri, and the surrounding territory were based upon admission prices. This general system of clearance based upon admission prices had existed in the area since approximately 1929" (R. 2061). The change made in 1935 gave Fox theatres exclusive rights to the first three runs in the town (R. 1215).

[21] The prior use by the original motion picture patent trust of patent license restrictions for the same purpose is disclosed in *United States* v. *Motion Pictures Patents Co.*, 225 Fed. 800 (E. D. Pa.), appeal dismissed, 247 U. S. 524, in which the United States secured an antitrust decree effectively dissolving that combination. It pooled patents essential to the operation of projection equipment and attempted to control

which otherwise would be competitive. These arrangements have been of three types. One form has been that of "operating agreements" under which "given theatres of two or more exhibitors, normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors, and by which profits of the 'pooled' theatres were divided among the exhibitors in or owners of such theatres according to pre-agreed percentages or otherwise" (Fdg. 112, R. 3682). Some of these agreements provide that the parties may not obtain additional theatres in the competitive area without first offering them to the pool (Ibid).

Another form of pooling arrangement has been "accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the 'pooled' theatres" (Fdg. 114, R. 3682). And a third form has been through joint ownership of theatres, or theatre-owning corporations (Fdg. 115, R. 3682).

The number of theatres thus held jointly by each defendant is as follows (Fdg. 117, R. 3683, 3684):

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the market for films by requiring licensees of the projection equipment to use it exclusively for films licensed from them. Such a restriction was held illegal per se, in *Motion Picture Patents Co.* v. *Universal Film Company*, 243 U. S. 502, and the two decisions disposed of the patent licensing restriction techniques as a means of monopolizing the film business.

Theatres jointly owned or operated with independents: [1]	
Paramount	816
Warner	20
Fox	66
RKO	155
Loew	21
Total	1,078
Theatres jointly owned or operated by two defendants:	
Paramount-Fox	6
Paramount-Loew	14
Paramount-Warner	25
Paramount-RKO	150
Loew-RKO	3
Loew-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214
Grand total	1,292

[1] These figures exclude theatres in which either the defendant or the independent held an interest of 5% or less, the district court having treated such an interest as *de minimis* (Fdg. 115, R. 3683).

The necessary effect of all of these pooling arrangements is to eliminate competition. In the case of pooling by two defendants, "The result is to eliminate competition *pro tanto* both in exhibition and in distribution of features which flow almost automatically to the theatres in the earnings of which they have a joint interest" (Fdg. 112, R. 3682). In the case of pooling between a defendant and an independent, the effect is to eliminate competition in exhibition between the theatres involved and to combine their power in competition against theatres not in the pool (Fdg. 114, R. 3682).

G. *Block-booking and blind-selling.*—For many years, the distributor-defendants, except United

Artists, licensed their copyrighted films in blocks of a year's releases before they had actually been produced. In such cases, the exhibitor knew nothing of the films he was buying, except the picture's title, plot, and players. In many cases, the exhibitor was forced to take licenses for all of the films in order to get any, although sometimes he was given a right to subsequent cancellation of a certain number of the pictures. The consent decree entered into by the five major defendants required them to trade-show their films before offering them for license, and limited to five the number which might be offered and licensed in any contract. These consent decree provisions on trade-showing and block-booking have lapsed, but the five consenting defendants have continued to observe them. Columbia and Universal have continued to license in annual blocks but have allowed the exhibitors considerable freedom in rejecting a percentage of the pictures (Fdg. 94, R. 3676). Both block-booking and blind-selling prevent exhibitors from bidding for individual pictures on their particular merits (Fdgs. 93, 97, R. 3676–3677).

H. *Master agreements.*—All of the distributor defendants have entered into master agreements with exhibitors covering the exhibition of features in a number of theatres, usually either an affiliated or an unaffiliated circuit. Under such license agreements, the circuits are allowed to allocate the film rental paid among the theatres as they

see fit, to exhibit the pictures on such runs and clearance as they deem best, and to decide upon other terms for exhibition (Fdg. 88, R. 3675).

I. *Formula deals.*—Paramount and RKO have entered into formula deals with circuits affiliated with Paramount.[22] In these deals, the license fee for a given feature to be paid by the theatres covered is determined by a specified percentage of the feature's national gross. The circuit may allocate film rentals, runs, and clearances among its various theatres as it sees fit (Fdg. 86, R. 3675).

J. *Franchises.*—Franchises are licensing agreements which cover the exhibition of all features released by a distributor during more than one motion picture season (Fdg. 1, R. 3660). All of the distributor-defendants have entered into some franchises with various exhibitors (Fdg. 89, R. 3675).

In the case of master agreements, formula deals and franchises, all of the theatres of a circuit are included in one agreement, and other theatre owners in the area are given no opportunity to bid for the features covered by the agreements.

K. *Other practices which discriminate against independents.*—The distributor-defendants have included in their contracts with the large affili-

[22] In one case (Ex. 419B, App. pp. 126–127) the circuit was one in which Paramount owned no stock but the films for which were bought by E. V. Richards (R. 2458), a Paramount officer (R. 2464).

ated and unaffiliated circuits numerous privileges which are not granted to the small independent exhibitors. These provisions are found most frequently in franchises and master agreements, which are made with the large affiliated and unaffiliated circuits. Small independents are usually licensed, however, upon the standard forms of contract, which do not include such privileges. "The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors" (Fdg. 110, R. 3681–3682).

III

THE TRIAL COURT'S CONCLUSIONS OF LAW

The district court's construction of Sections 1 and 2 of the Sherman Act and its application of those provisions to its evidentiary findings of fact is set forth both in its conclusions of law (R. 3691–3694) and in its opinion (R. 3504–3563). These legal conclusions of the court may be summarized as follows:

(1) *Price fixing:* All of the defendants, both distributor and exhibitor, have (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring with each other to fix uniform minimum theatre admission prices (R. 3516–3530, 3692–3693).

Each of the distributor-defendants also has (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring individually with its respective licensees to fix uniform minimum theatre admission prices (R. 3527–3530, 3692–3693).

The Copyright Act does not legalize defendants' price fixing because of the horizontal and vertical conspiracies (R. 3528–3529).

(2) *Clearance and run:* All of the defendants, both distributor and exhibitor, have (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area (R. 3530–3540, 3692–3693).

The court concluded, however, that an individual grant of clearance, when unaccompanied by price fixing and reasonable as to time and area, was essential in the distribution and exhibition of pictures and was lawful on the same principle that a vendor of property may covenant not to compete within a properly limited time and area (R. 3530–3534).

(3) *Theatre pooling arrangements:* Each exhibitor-defendant has unreasonably restrained trade in the distribution and exhibition of motion

pictures by joint operation (through operating agreements and profit-sharing leases) and joint ownership, both with each other and with independents, of normally competitive theatres (R. 3547–3549, 3693).

(4) *Other unlawful practices:* Each distributor-defendant has (a) unreasonably restrained and (b) attempted to monopolize trade in the distribution and exhibition of motion pictures by: (1) agreeing individually with large affiliated and unaffiliated circuits to grant unreasonable clearance over theatres operated by their competitors (R. 3532–3533, 3693); (2) agreeing individually with such affiliated and unaffiliated circuits to grant numerous license privileges which discriminated against their exhibitor competitors (R. 3549–3551, 3692–3693); (3) entering into master agreements and franchises with such affiliated and unaffiliated circuits (R. 3540–3542, 3693); (4) blind-selling; and (5) block-booking [22] (R. 3542–3547, 3693). The court concluded that block-booking is unlawful because it conditions the licensing of one copyrighted film upon the acceptance of another, thereby preventing bidding for individual films on their merits and adding to the monopoly of one copyrighted picture that of another. The court also concluded that Paramount and RKO had similarly violated the Sher-

[22] United Artists is exempted from this conclusion, since the court found that it had never engaged in block-booking (Fdg. 95, R. 3676).

man Act by entering into formula deals (R. 3540–3541, 3693).

Each exhibitor-defendant has also unreasonably restrained trade in the distribution and exhibition of motion pictures by conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission prices, clearances, runs and other license terms (R. 3693).

(5) *Monopoly:* Despite the trial court's findings and conclusions that the defendants had conspired to restrain trade in the distribution and exhibition of motion pictures and had attempted by their conspiracy to monopolize such trade, it held that "The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553); and the court further held that even in the many cities where two or more of the major defendants control all or substantially all of the first-run theatres their interests could not be aggregated in considering whether a monopoly existed (R. 3552). With respect to those cities in which a single defendant owns all the first-run theatres, the court held that there was no unlawful monopoly because there was not sufficient proof that the monopoly position had been intentionally acquired rather than resulting from the inertness or inability of independent competitors (R. 3554). The court said nothing concerning the Government's claim of a collective distribution monopoly,

or its contention that each vertically integrated combination between a major distributor and its theatres violated both Sections 1 and 2. Consequently, the court failed to find that any of the defendants, individually or collectively, had monopolized any part of the industry in violation of Section 2 of the Sherman Act.

IV

THE DECREE

At the close of the case, the Government reiterated its request for complete divorcement of the major defendants' theatre interests from their distribution and production interests, and took the position that the form and extent of the relief against unlawful trade practices could not be determined until the basic divorcement issue had been decided. The court in its opinion, however, not only decided the issues of law violation but outlined in considerable detail the form of the decree to be entered (R. 3559–3563). The court stated that the decree should provide injunctions against all the unlawful conspiracies and agreements, such as horizontal and vertical price fixing; agreements on systems of run and clearance, and unreasonable clearance even when individually imposed; master agreements, franchises and formula deals; all other practices which discriminated against independents; block-booking and blind-selling; and pooling arrangements in the

form of operating agreements and profit-sharing leases. The opinion also stated that all joint ownership of theatres by two defendants, or by one defendant with an independent where the defendant's interest in any theatre was more than 5 percent and less than 95 percent, was to be terminated.

No divestiture of the major defendants' vast theatre holdings was to be ordered. The court recognized that mere injunctions against all the unlawful practices would not restore competition in the industry, and that some affirmative relief was necessary. But it concluded that the restraints existing in the industry did not lie in the "ownership of many or most of the best theatres by the producer-distributors," but in the unlawful practices, because if these practices were employed in favor of powerful independents, rather than the defendants, substantially the same undesirable results would follow (R. 3554–3555). Moreover, the court concluded that divestiture would "be injurious to the corporations concerned," and "damaging to the public" because "a new set of theatre owners * * * would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted * * *" (R. 3559, 3551). In lieu of divestiture and as "The only way competition may be introduced into the present system of fixed prices, clearances, and runs" (R. 3540), the court directed establishment of a competitive bid-

ding system under which each picture (except those which a distributor exhibited in its own theatres) was to be sold to the highest desirable bidder on a picture-by-picture and theatre-by-theatre basis. The court concluded (R. 3551): "We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting." The competitive bidding system had not been suggested or discussed by any of the parties.

The court, in its opinion, also directed that the joint theatre ownerships between a defendant and an independent could be dissolved either by purchase from or sale to the co-owner, or by sale to a nondefendant. Purchases of such interests by defendants were to be subject to court approval. Thus the defendants were permitted to acquire outright theatres in which their joint ownership with others had been held unlawful (R. 3561–3562). Except for acquisitions made in the process of dissolving the unlawful joint ownerships, each defendant was to be enjoined from expanding its theatre holdings (R. 3700).

Finally, the court rejected the Government's contention that clearance was unlawful *per se*, and concluded that clearance individually imposed and not "in excess of what is reasonably necessary to protect the licensees in the runs

awarded to them" was lawful, and should not be enjoined (R. 3559–3560, 3530–3534).

Proposed findings and judgments (R. 3596–3603, 3610–3635) were submitted by all parties and hearings thereon had on October 21, 22, and 24, 1946 (R. 2917–3090). Counsel representing various groups of independent exhibitors, heard as friends of the court, all objected to the competitive bidding provisions outlined in the court's opinion (R. 2811–2872). A ground common to all these objections was that the major defendants as theatre operators had such a tremendous advantage in financial resources and in their privilege of exhibiting their own pictures in their own theatres upon any terms they pleased that other exhibitors could not successfully compete with them.

Counsel for the principal independent producers in the industry were also heard as friends of the court. They contended that since they were dependent upon the distributor-defendants for profitable distribution of their films, the decree's restrictions on distribution practices would hurt them more than it would the major defendants, whose own theatre outlets remained unaffected by the restrictions (R. 2850–2861).

The court having ruled in its opinion against divorcement and the Government's contention that all clearance was unlawful *per se*, the Government proposed a judgment modifying that outlined in the opinion in the following principal respects:

(1) a provision prohibiting each major defendant from licensing films produced or distributed by it to another major defendant for use in its theatres for a ten-year period commencing one year after the entry of judgment was proposed (R. 3601); and (2) joint interests in theatres held by a defendant with an independent exhibitor were to be dissolved only by a sale of the defendant's interest to a nondefendant (R. 3600–3601).

On December 31, 1946, the court, rejecting both of the Government's proposals mentioned above, entered its judgment (R. 3694–3701) providing that:

All the distributor-defendants were enjoined from:

(1) Granting any licenses in any way fixing minimum theatre admission prices (R. 3695);

(2) Agreeing with each other or with any exhibitor or distributor to maintain a system of clearances (R. 3695);

(3) Granting any clearance between theatres not in substantial competition, or between theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted." When any clearance provision is attacked as not legal under the decree, however, the distributor shall have the burden of sustaining its legality (R. 3695–3696);

(4) Making or performing any master agreements, franchises or formula deals (R. 3696);

(5) Entering into any license in which the right to exhibit one feature is conditioned on the licensee's taking one or more other features (block-booking) (R. 3696);

(6) Refusing to extend to a licensee the right to reject 20 percent of features licensed prior to trade-showing, where any feature has not been trade-shown before the granting of a license for more than a single feature (R. 3696);

(7) Licensing a feature for exhibition in any theatre (other than its own) except by offering it at a minimum flat rental to the operator of each theatre in a competitive area who desires to exhibit it on any run. Within fifteen days, any such operator may submit a bid for the run he desires on a flat rental, percentage of gross receipts, or any other rental basis. The distributor may reject all offers, but any license granted must be to the highest "responsible" bidder on each run "having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." This method of licensing is not required in areas where there is no competition among theatres or in which no exhibitor makes an offer within the fifteen-day period. Each distributor's own theatres are exempt from this provision, and to those the distributor may license on any terms as to price, clearance, run, or otherwise that it chooses (R. 3696–3698).

All the defendant exhibitors were enjoined from:

(1) Making or performing any operating agreement with another defendant or with an independent exhibitor whereby two or more normally competitive theatres are operated collectively (R. 3698). All existing agreements of this kind are to be dissolved by July 1, 1947 (R. 3719). All agreements that newly acquired theatres in the area must be first offered to the pool are likewise enjoined (R. 3698–99).

(2) Making or performing any profit-sharing lease under which a defendant leases any theatre to another defendant or to an independent exhibitor in the same competitive area in return for a share of the profits (R. 3699). All existing profit-sharing leases are to be terminated by July 1, 1947 (R. 3719).

(3) Owning any interest in any theatre jointly with an independent (where the defendant's interest is greater than 5 percent and less than 95 percent) or with another defendant. Existing relationships of this kind between defendants and independents are to be terminated within two years either by the defendant's purchase of the other party's interest, by defendant's sale of his interest to the other party, or by sale to a non-defendant third party. Purchases by a defendant of an independent's or another defendent's interest are subject to approval of the court upon finding "that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." (R. 3699.)

(4) Expanding their theatre holdings in any manner except by acquisitions of joint interests as described above (R. 3700).

The decree expressly states that none of its provisions is to be construed to limit in any way the right of any distributor-defendant to license or otherwise provide for the exhibition of motion pictures distributed by it "in such manner, and upon such terms, and subject to such conditions" as it may choose in any theatre in which it has or may under the decree acquire an interest of 95 percent or more either directly or through subsidiaries (R. 3700).

The court in its opinion (R. 3562) had directed that the decree provide for arbitration of disputes as to bids, clearances, runs and similar controversies that would arise under its competitive bidding system and other provisions of the decree. The arbitration system was to apply only "to all parties who may consent to the creation of such tribunals for adjustment of such disputes" (R. 3562). The three nonexhibitor defendants, however, refused to agree to arbitration for any purpose and no agreement could be reached between the major defendants and the Government on the substantive provisions for the operation of such a system. Consequently, in its decree, the court provided for the liquidation of the arbitration system which had existed under the consent decree (R. 3700), but, in an accompanying memorandum stated (R. 3702):

"We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

All parties have appealed, and on April 7, 1947, this Court entered an order staying substantially all provisions of the judgment relating to motion picture licensing practices and the provision terminating the consent decree and liquidating the arbitration system, pending final disposition of these appeals.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

(1) In decreeing competitive bidding as appropriate relief (A. of E. 1, 10, 16, 18, 21, R 3721–3723);

(2) In failing to prohibit the continued use by the major defendants of each other's theatres as exhibition outlets for each other's films (A. of E. 5, R. 3721);

(3) In failing to prohibit absolutely any further acquisitions of theatre interests by the major defendants (A. of E. 8, R. 3722);

(4) In failing to order ultimate divorcement of the distribution and production businesses of the major defendants from their theatre operations by divestiture of their theatre holdings (A. of E 2, 3, 6, 7, 17, 20, 23, 24, 25, R. 3721–3723).

SUMMARY OF ARGUMENT

I

Each of the five major defendants is a film producer and distributor which has a large theatre circuit composed of wholly and partially owned theatre corporations. These vertical combinations were formed in order to acquire an assured outlet for films. The eight distributor-defendants are the principal sources of feature films and the five major defendants the principal market outlets for films in the United States. No exhibitor can operate successfully without access to a substantial number of the films of the eight distributor defendants, and no producer or distributor can succeed without access to a substantial number of the affiliated theatres of the five majors. The distributor-defendants have habitually made unlawful copyright license agreements with exhibitors containing provisions designed to restrict theatre operating competition. Identical restrictions on any particular theatre have been imposed by all the distributor defendants, and this practice has been followed with respect to all theatres with which the defendants deal. They have thus conspired with one another to restrict competition among themselves and with other distributors. They have thereby erected and maintained a fixed run,

clearance and admission price system to which other distributors and exhibitors must conform to gain access to the market.

Thus, the five theatre owning defendants have a continuing power and established proclivity to discriminate in favor of each other as distributors and exhibitors. The major defendants' theatre circuits are so located geographically that there is little competition among them. In the limited areas in which theatres affiliated with one defendant are in nominal competition with theatres affiliated with another, actual competition among them in licensing films and fixing admission prices has been completely eliminated by the conspiracy. The same distributor's product habitually goes to the same affiliated outlet, and there has been little change in that pattern of distribution over the years. The defendants have also made express agreements with each other to pool specific theatres. They have made similar pooling agreements with independent theatre operators in other areas. They have also pooled theatre interests with each other and with independents over wide areas by pooling stockholdings in theatre corporations. These pooling arrangements were held illegal *per se* by the trial court. But the vertical integration and cross licensing are permitted to continue substantially unchanged.

The judgment below is inadequate to give the relief that the expediting court intended to grant.

That court recognized that affirmative relief was necessary. It recognized that it could have divorced the theatre business of these defendants from their distribution and production business so that economic incentives would induce future competition. It would have given such relief if it had followed existing judicial precedents dealing with similar abuses of such power. However, because of business hardship and a public inconvenience which the court mistakenly assumed such relief involved, the court instead decided first to try to compel future competition by regulating the film buying of 18,000 theatres. Such regulation was not sought by the Government and is opposed by those members of the industry whom it was intended to benefit.

The system of competitive bidding adopted for this purpose is wholly inadequate because competitive bidding can be no more than an empty gesture in an industry which must be non-competitive while vertical combinations exist. It is unenforceable because the defendants have considerable room for arbitrary exercise of discretion in determining the highest bidder and because no adequate enforcement machinery is available. Even if effectively enforced, the system would not prohibit the restrictions by which the defendants have illegally controlled the distribution of films in the past, even though some formal changes in the manner of their imposition are required by

the decree. Independents are now in such a weakened bidding position due in large part to the defendants' long continued unlawful conduct that they cannot successfully compete with the major defendants for films.

For more than twenty years, attempts to regulate the motion picture industry in order to protect independents against unreasonable license restrictions have been made. Yet, in 1946, the court below found the defendants still in illegal control of the industry. The failure of such past regulations shows that the decisive competitive weapon has not been a particular restrictive practice but the power, inherent in the integration of the defendants, to suppress and control competition. So long as this power continues, any form of license regulation is futile.

II

The only way in which the domestic film market can now be opened to competition is by divorcing the major defendants from their affiliated theatres. Acquisition and continued use of similar market control for a similar purpose by vertical combinations has always resulted in their dissolution in Sherman Act cases decided by this Court. In *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, the railroad was divested of anthracite coal mines which it had acquired to assure itself of the business of transporting and marketing their coal without competition

from other carriers. The continuing power to discriminate against competitors which was inherent in that combination was coupled there, as here, with an intent to use such power for that purpose. Such an intent was established there, and here, by a past record of illegal discrimination. Upon such a record, this Court ordered dissolution of that combination, notwithstanding a continuing power in the Interstate Commerce Commission to regulate such discrimination.

In *United States* v. *Swift & Co.*, 286 U. S. 106, a 1920 consent decree which took the five major meat packers out of the grocery and retail meat trade was before this Court. The district court had, in 1930, rescinded prohibitions against their engaging in the grocery business and against any use of their distribution facilities for handling the groceries of others because it thought the rise of integrated grocery chains in the intervening ten years had ended any threat of monopoly by the packers in this field. That decision was reversed by this Court, despite the fact that there was then active competition among all five packers, because the packers had control of meat distribution facilities which gave them individually a continuing power to suppress competition in the distribution of groceries, and which they had shown a proclivity to use for that purpose. This was regarded as sufficient basis for refusing to rescind prohibitions designed to terminate their power.

The conspiracy found below may not effectively be terminated without divorcement of the affiliated theatres. So long as the five majors retain their theatres and all eight distributor-defendants are allowed to enter into license agreements with them, the defendants can continue to use these non-competitive theatre outlets of the major defendants to bring about uniformity of restrictive provisions in their film licenses. Wherever such license agreements between the distributor and exhibitor defendants are made, they will have much the same competitive effect as the horizontal agreements by which the conspiracy found below has been maintained. While a prohibition like that which we seek against cross-licensing among the major defendants (see point III) would eliminate the conspiracy among those five defendants, it would not prevent each of them from entering into similar restrictive agreements with the three non-exhibitor defendants.

The required divorcement can in part be accomplished by compulsory sale to independents of the major defendants' interests in those theatre enterprises now owned jointly with independents. These joint interests were specifically found below to be illegally held, but the court below erred in permitting their termination by purchase by the defendants. Sale by the defendants is, we think, the obvious remedy for the illegality, and such divestiture is, moreover, required by *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

III

The five major defendants should, in any event, be prevented from using each other's theatres as outlets for each other's films. Their joint use of theatres to suppress competition by pooling agreements among their theatre subsidiaries was found to be illegal below and enjoined. Their continued joint use of each other's theatres has the same competitive effect when a license agreement between the distributing subsidiary of one and an exhibiting subsidiary of another is permitted. By prohibiting these defendants from dealing with each other, the film market will be partially opened to competition from both independent distributors and exhibitors. This prohibition would not, however, end the continuing discrimination inherent in the major defendants' use of their affiliated theatres as noncompetitive outlets for their own films and as outlets for the films of the three non-exhibitor distributors. While it would supply an incentive for the major defendants to compete with each other, their power, incentive and means to suppress the competition of independent exhibitors and distributors by licensing discriminations would continue. This prohibition is therefore only an interim measure which must be supplemented by divorcement to secure effective, permanent relief.

ARGUMENT

I

The remedy decreed below is so inadequate as to constitute an abuse of discretion

The district court found that the distributor-defendants are the eight dominant distributors of motion pictures in the United States. Together they distributed approximately 78 percent of all features (Westerns excluded) nationally distributed during the 1943–44 season (Fdg. 99, R. 3677).

Five of these defendants have entered the exhibition field on a large scale, primarily by purchasing theatre circuits from former independent operators (Fdgs. 8, 18, 19, 21, 27–29, 30, 42, R. 3662, 3664–3665, 3667). The trial court specifically found that Paramount had acquired its theatre interests for the purpose of assuring an outlet for its films (Fdg. 8, R. 3662), and it is undisputed in the record that the other four defendants acquired some or all of their theatre circuits for a similar purpose. In addition, these defendants have entered into numerous agreements among themselves and with independent exhibitors providing for the joint ownership and operation of theatres (Fdg. 117, R. 3683–3684). As a result, these five defendants in 1945 had interests in a total of 3,137 theatres in the United States (Fdg. 118, R. 3684).

These theatres are concentrated in the larger cities of the United States. The five defendants

own interests in at least 70 per cent of all first-run theatres in the 92 cities of the United States having a population of over 100,000 (Fdg. 148, R. 3688–89). In eight of those cities, corporations affiliated with one defendant own all the first-run theatres, in 30 others affiliates of two or more defendants own all the first-run houses (Fdgs. 147, 148, R. 3688–3689), and, in ~~15~~ 16 more, the defendants' affiliates have a virtual monopoly of first-run theatres (Exs. 428, 428A, App. 299–307). The defendants also own interests in almost 60 per cent of all first-run theatres in the approximately 300 towns of the United States having populations of between 25,000 and 100,000 (Ex. 432; App. 308–317). In 135 of those cities, their affiliated theatres played all of the product of the eight distributor defendants on first-run (R. 2355–2357). In more than 300 additional towns, most of them with populations under 25,000, an operator affiliated with one major defendant has all of the theatres showing all runs in each town (Exs. 371, 397 (R. 370, 2166); R. 359–370).

These theatre circuits are so located that there is practically no competition among them. Of the 922 towns in which the defendants own theatre interests there are 775 in which only one defendant has such interests. There are 100 additional towns in which two or more defendants have pooled their theatre interests. Thus there are at present only 47 towns (5%) in which the

theatre interests of two or more majors are operating in nominal competition with each other, and even if the pooling arrangements are terminated pursuant to the direction of the trial court, there will be only 60 such towns (6%).

In the light of this position of the defendants in the distribution and exhibition fields, it is apparent that no exhibitor can operate successfully without access to at least some of the product of the defendant distributors (Fdg. 151, R. 3689), and that no producer or distributor can succeed without doing business with the theatres of the five major defendants.[1] Having this power over both the distribution and exhibition of motion pictures, the defendants have engaged in a conspiracy to fix the prices, runs, and clearances for substantially all the theatres in the United States, their own as well as their competitors'. (Fdgs. 64, 65, 81, 82, R. 3670–3671, 3674).

The conspiracy to fix runs was nothing more or less than an exclusionary conspiracy. It was an agreement among the eight distributor defendants as to which theatres they would license on first-run, which they would license on second-run, and so on. This agreement of course, accounts for the major defendants' great control over first-run exhibition in the larger cities. Each

[1] From 35 to 50 percent of a feature film's total domestic gross comes from only 3 or 4 percent of its total domestic exhibitions. From 60 to 72 percent of these decisive exhibitions occur in affiliated theatres. See App. p. 279 and Exs. 433–440, printed at App. pp. 262–278.

of the defendants selected not only its own theatres but also those of the other defendants for first-run showings, and, by means of the conspiracy and their control over distribution, guaranteed those theatres dominion over the first-run field.

The conspiracy on prices and clearance was designed not only to eliminate price competition in the sale to the public of defendants' products, but also to protect the first-run theatres, encourage the maximum number of persons to patronize those theatres, and thereby increase the profits of defendants both as distributors and as exhibitors. The clearance agreements fixed the interval between runs so as to protect the first-run exhibitors from the competition of later runs and to persuade patrons to attend the first-run showings rather than wait for subsequent showings (Fdg. 83, R. 3674). By means of the price agreements, "a price structure is erected which regulates the licensees' ability to compete against one another in admission prices" (Fdg. 71, R. 3672). The range in prices between competing theatres was so fixed as "to give the prior-run exhibitors as near a monopoly of the patronage as possible" (Fdg. 72, R. 3672–3673).

The conspiracy has been extremely successful. While defendants' theatres comprise only a little over 17 percent of the total number of theatres in the United States, they have paid 45 percent of

the total domestic film rental received by all eight distributor defendants.[16] This contrasts with the less than 5 percent of such rental paid by the five largest unaffiliated theatre circuits. (Fdg. 126, R. 3685).

The eight distributor defendants, on the other hand, received approximately 97 percent of the total film rental paid by the affiliated theatres in the 1943–44 season, from 71 to 81 percent going to the five majors and from 26 to 15 percent going to the other three defendants (Fdg. 127, R. 3685).[17] By reason of their power and their conspiracy, the defendants have so controlled the industry that "Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs

[16] See Ex. 425, App. 258–259. A tabulation offered by Warner (Ex. W–4, App. pp. 360–361) shows that its percentage of film rental received from all affiliated theatres increased from 37.2 to 45.4% during the period 1935–44. This increase was achieved notwithstanding a decrease in the proportion of affiliated theatres to independent theatres in the domestic market during the same period. Compare affiliated expansion noted in note 13, p. 17, *supra*, with Fdg. 145, R. 3688.

[17] See Ex. 424, App. pp. 256–257. This control of the film revenue from these theatres has remained substantially unchanged during the past ten years, notwithstanding a substantial increase during the same period in the proportion of independently distributed films used by these theatres (see App. pp. 344–346, 348, 350, 353).

or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures" (Fdg. 84, R. 3674).

The district court recognized that the defendants had such extensive power to exclude others from the film market that mere injunctions against future practices would not be enough, and that some affirmative relief was necessary to eliminate the effects of the unlawful conduct and restore competition to the industry. Consequently, it adopted the competitive bidding plan as "The only way competition may be introduced into the present system of fixed prices, clearances and runs * * *" (R. 3540). It thought that this plan would bring an end to the noncompetitive price-fixing, run and clearance system (R. 3540), and enable independents to compete with the large affiliated circuits on a fair basis, even where the defendants now operate all of the first-run theatres (R. 3552–3553).

In our view, the district court plainly erred in concluding that the competitive bidding system would accomplish even the objectives which it recognized were necessary. We think that competitive bidding will neither end the unlawful practices nor permit independents to compete with the majors on a fair basis, and, moreover, that even if it were otherwise adequate in substance to accomplish those purposes, it will not do so because the system is procedurally unwork-

able. Consequently, we submit that the judgment below is so inadequate as to amount to an abuse of discretion.

A. THE COMPETITIVE BIDDING SYSTEM IS INEFFECTIVE TO ELIMINATE THE RESTRAINTS AND RESTORE COMPETITION

In equity proceedings brought by the United States under Section 4 of the Sherman Act, it is the authority and duty of the district court "to prevent" as well as to "restrain" violations of the Act. Accordingly, it is well established that the court must enter a decree which not only will end the illegal practices found to exist, but which will provide "such reasonable measures as would preclude their revival" (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461; *Local 167* v. *United States*, 291 U. S. 293, 299), and will "effectively pry open to competition a market that has been closed by defendants' illegal restraints". *International Salt Co., Inc.* v. *United States*, No. 46, October Term, 1947.

The decree below will not accomplish any of these purposes. Under that decree, the distributor-defendants remain as the largest distributors of pictures in the United States with control of the supply necessary to operate a theatre successfully. The five major defendants continue not only as the most important distributors, but also as the operators of by far the largest theatre cir-

cuits in the United States—the very relationship that the trial court found had been so persistently abused in the past. These major theatre circuits are so powerful, so concentrated in the larger cities, and so distributed geographically that no distributor can succeed without access to the market which they represent. Each defendant can continue to do business with the other defendants just as it has in the past, except that if an independent bids for pictures the majors' theatres must outbid him, and the defendants are enjoined from agreeing on minimum admission prices or imposing unreasonable clearance. They are expressly permitted, however, to grant such clearance "as is reasonably necessary to protect the licensee in the run granted." Each major also is explicitly allowed to continue to license all of its own product to its own theatres on any terms it chooses, even to the extent of discriminating against independents by any of the very means the lower court found generally unlawful. In fact, the only relief given to the independent is that he is allowed to bid against the five major defendants for pictures.

We think that this, in reality, is no affirmative relief at all, for the reason that the independents are in no position to compete with the majors for pictures, an inability in large part due to the defendants' unlawful conduct over the past years. We submit, therefore, that the competitive bidding system is fundamentally ineffective because

it does nothing to pry open to independent competition the market that has been so long closed by defendants' unlawful conduct.

The independent will be attempting to break into a monopolized field against powerful corporations backed by great wealth and resources. If these corporations want to prevent his entry into the field by outbidding him on pictures, there is no doubt of their ability to do so. In fact, it is likely that paying higher prices for the films would result in no injury to the majors for they would at the same time receive more as distributors.

The independent newcomer is competing with a company that makes a profit in both distribution and exhibition. If the affiliated company wants to undercut an independent exhibitor, it can operate its theatre at a loss, and still survive on its profits from production and distribution. In addition, the affiliated exhibitor has the great advantage of the assured supply of its own distributor's pictures. The independent has no assured supply and must compete with the affiliated exhibitor for the product of the other distributors. The affiliated exhibitor can use the profits from its assured product to out-bid the independent for the desirable films of other distributors needed to fill out its program. The independent's chances of securing adequate films through competitive bidding become progressively worse as

the number of affiliated companies having theatres in a particular town increases. If three of the majors have theatres in any one town the independent can compete with those three for the product of only the other five distributors.

And with respect to the picture supply tied to each major's affiliated theatres, that defendant is permitted by the decree to discriminate against independent exhibitors in any way it chooses. It can grant exceptionally long clearance or engage in any of the various other discriminatory practices which have been followed in the past and which the district court found generally unlawful.

Finally, in many cities it will be difficult, if not impossible, for the independents to obtain theatres. The majors will not, of course, sell their theatres to independent competitors. And it is not easy to build theatres, as the lower court suggested. The first-run downtown areas in most cities are built up with no available sites for construction of new theatres.

The competitive bidding system is also basically ineffective because it does nothing to eliminate the very inducements which gave rise to the unlawful conduct in the first place. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189–190. Since the affiliated circuits of the five majors remain by far the largest customers of the distributor-defendants, those distributors have the same economic incentive to

favor the majors' theatres wherever possible. Since the distributor-defendants continue as the most important sources of supply, the major defendants as exhibitors have the same economic incentive to favor those distributors. And there will, of course, be the continued inducement among the major defendants as both suppliers and customers of each other to continue to use their dual functions to cooperate rather than to compete with each other.

The terms of the competitive bidding system will themselves do much to bring these incentives into play. The decree provides that the distributor-defendants must offer each picture to all exhibitors in a competitive area, stating the minimum flat rental acceptable for a specified number of days of exhibition, the time when the picture will be available and the clearance which will be granted. Within 15 days, any exhibitor in the area may submit a bid stating the run desired, the amount he will pay on the basis of a flat rental, a percentage of gross receipts or any other rental basis he desires, the clearance he will accept and the days on which he wants to exhibit the picture. The distributor-defendant may reject all offers, but if it accepts any, it must grant the license on the run bid to the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to a licensor" (R. 3697).

These provisions give the distributor-defendants every opportunity to favor the large affiliated theatres. They can so combine the length-of-run and rental terms that the offer would be attractive only to a major's theatre. Moreover, it is highly unlikely that any two exhibitors would submit bids specifying the same exhibition dates, clearance and rental basis. The distributors have the authority to compare the imponderables listed in the decree and decide which of the bids is most desirable. The mere comparison of a flat rental bid with one specifying a percentage of gross receipts would be a highly discretionary matter. Also the distributors decide who is a "responsible bidder" and whether the bidder has an adequate theatre (R. 3697). With all of these decisions left to the distributor-defendants and with their powerful incentive to favor the large affiliated theatres, the independent is hardly in any better position than formerly to obtain pictures.

It becomes apparent, therefore, that the competitive bidding system will not introduce new independent competition into either the exhibition or the distribution field, will not even bring about competition among the defendants themselves, and as a result will do nothing to disturb the restrictive pattern of distribution and price-fixing created by the unlawful conspiracy.

In the many towns in which one or more of the defendants own all of the theatres or all first-run theatres, the situation will go on precisely the same as before. In those towns, there is no independent in a position to invoke the competitive bidding system. The decree expressly provides that operation of the system is not required in areas where there is no competition among theatres or in which no offer is made within 15 days after a picture is offered for bidding. With no independent to bid, there is no reason to assume that any of the majors' theatres will bid. Evidence introduced at the trial concerning the distribution of the defendants' pictures in the 92 cities of over 100,000 demonstrated that the pattern of first-run distribution among the majors' theatres remained virtually the same during the period 1936–37 to 1943–44. The defendants' witness Rogers, sales manager of Loew's, conceded that there was no competition among the majors' theatres in licensing the pictures he sold (R. 410, 572). No evidence was introduced by defendants to prove that any such competition among the majors' theatres existed. And, of course, any such competition would have been incompatible with the defendants' general conspiracy. It is apparent, therefore, that in such cities the major defendants would continue to get the same pic-

tures and runs as they did under the conspiracy and market them at the same prices.

The defendants are permitted also to extend whatever clearance "is reasonably necessary to protect the licensee in the run granted." Since by the very terms of the decree the reasonableness of clearance is to be measured by the protection required by the exhibitor, it follows that the length of clearance must depend on the amount of rental paid. The higher the rental paid by the exhibitor the greater is his need for protection over a subsequent run. The net effect of the clearance restriction, therefore, is that the exhibitor gets the amount of clearance it pays for. Consequently, the defendants' theatres can continue with substantially, if not precisely, the same clearance they formerly had.

While the decree prohibits price-fixing in the license agreements, clearance largely controls the ability to charge higher prices. By virtue of the clearance provision, therefore, the defendants will be permitted to maintain their prices as before. They cannot by their license agreements control the prices of independent subsequent-run houses, but, again, the possibility of competition from this source can be regulated through clearance provisions. If the subsequent-run houses reduce prices, the distributors can justify an increase in prior-run clearance, which would of course

largely dissuade any independent from taking such action.

The competitive bidding system is almost equally ineffective in the event an independent attempts to enter a town in which the defendants now own all theatres or all first-run theatres, or in a town in which there already is some minor independent competition. In such cases, the independent can invoke the competitive bidding system and at least force the defendants to go through the formality of bidding. But, undoubtedly, the majors will continue to do business with the same distributors as before and simply out-bid the independent, thereby preventing him from getting any pictures, or at least any more than he formerly had. Having the pictures, the major defendants can continue with their clearance over subsequent runs and maintain the same pattern of protection and price control as was created by the conspiracy.

It is for these very reasons that those the decree was intended to benefit oppose the competitive bidding system. The independent exhibitors have consistently objected that it will give them no relief because of the affiliated theatres' tremendous advantage in financial resources and their privilege of exhibiting their own pictures in their own theatres on any terms they please (R. 2870–2872). The principal independent producers have objected that the decree will not help

them because their access to the important segment of the market represented by the affiliated theatres will continue to be controlled by their competitors (Brief for Society of Independent Motion Picture Producers, pp. 16–21), and further that the decree actually adds injury by subjecting them to the same prohibitions as the defendants (since they are compelled by economic necessity to distribute through the defendants), while at the same time leaving the defendants free of those prohibitions in the operation of their own theatres (*Id.* at pp. 31–33). Even the non-exhibitor defendants contend that the decree puts them at a competitive disadvantage with the majors because they must put up all of their pictures for competitive bidding, while the majors have an assured outlet in their own houses in many important cities (Columbia Brief, pp. 66–68).

B. THE COMPETITIVE BIDDING SYSTEM IS UNWORKABLE

We further submit that, even if the substantive provisions of the competitive bidding system were effective to eliminate the evils found by the lower court, it would not be an adequate remedy because no adequate method for enforcement of this regulatory system either exists or is in prospect. All the disputes arising anywhere in the United States over the reasonableness of clearance, the fairness of distributors' offers, and the distribu-

tors' decisions on the best bid, the responsibility of the bidder and the adequacy of theatres, can be settled only in the Southern District of New York by way of contempt proceedings instituted by the Department of Justice. Neither the Department nor the court could handle all of the controversies that might arise if even a fair number of independents chose to pursue this remedy. The delays in decisions on such disputes obviously would be interminable. And even then the decisions would cover only the narrow issues of the individual controversies before the court and would not govern future conduct, except possibly in the case of controversies over the adequacy of theatres. Consequently, the independent would be required to come to the Department of Justice each time he thought he was being unfairly treated. In many cases moreover, the independent would be reluctant to follow this procedure for fear of antagonizing the distributors on whom he is dependent for supply. As this court said in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 190, "There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available."

By this decree the district court has assumed the burden of regulating the day-by-day business activities of over 18,000 theatres located through-

out the United States. The court recognized that its decree would hardly be workable without the aid of an arbitration system which it was not within its power to order. In its opinion, the court stated that the decree should provide for arbitration for all parties who would consent to such a system (R. 3562). And in its memorandum accompanying its decree it said: "We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree" (R. 3702).

There is, however, no chance for such a system. The refusal of the three non-exhibitor defendants to agree to the 1940 consent decree had demonstrated beyond any doubt that they were not prepared to submit to regulation of their trade practices in order that the industry's antitrust problems might be solved without disturbing the dominating position of their theatre owning competitors. They reiterated this refusal at the hearings preceding the entry of the judgment here under review. The Government's experience under the consent decree had convinced it that a permanent solution of the problem posed by this suit was not possible by consent. That was, of course, the basic reason for this trial.

C. EXTENSIVE EXPERIENCE SHOWS THAT NO JUDGMENT WHICH MERELY REGULATES DEFENDANTS' TRADE PRACTICES CAN GIVE ADEQUATE RELIEF

In no other industry have the dominant members been so often involved in antitrust litigation, so frequently found to have violated the Sherman Act, and so often subjected to injunctive relief against their trade practices.[2] This extensive past experience, involving both judicial and administrative proceedings, demonstrates with the certainty of a laboratory experiment that mere regulation of trade practices will not eliminate unreasonable restraints in this industry. It establishes that such restraints are inherent in the control of the five principal theatre circuits by

[2] No specific reference will be made to pending antitrust proceedings against these defendants by private persons, of which there are many. A prospectus filed by Loew in July of 1947 with the Securities and Exchange Commission recites at p. 13:

"There are approximately 40 such private Anti-Trust suits now pending in which the Company and/or its subsidiaries are among the defendants. In such suits, with few exceptions, all the other so-called major distributors in the industry are also party defendants. In 2 of said actions only equitable relief by way of injunction or otherwise is sought. Most of these suits are for treble damages with or without injunctive relief. * * * *This type of litigation is common to the industry.*" [Italics supplied.]

A similar statement appears in a prospectus of May 1947, filed by Fox with the Commission. To the same effect are Universal Prospectus of March 1944, p. 24 (46 suits); Fox Prospectus of July 1943, p. 35 (49 suits); Columbia Prospectus of November 1935, pp. 6–7 (36 suits); RKO Prospectus of June 1944, p. 30–31 (46 suits).

the five principal film distributors and their use of each other's theatres as outlets for their films.

1. *Federal Trade Commission.*—The initial attempt of the Government to protect independent exhibitors was made in 1921. In that year, the Federal Trade Commission instituted an action against Famous Players-Lasky Corporation (predecessor of the defendant Paramount), Adolph Zukor and Jesse Lasky, its principal executives, and a number of theatre chains in which they had acquired substantial financial interests. After extended hearings, the Commission, on July 9, 1927, entered an order against Zukor, Lasky, and Famous Players-Lasky Corporation. The corporation and its two principal officers were ordered to cease and desist from (1) a general conspiracy to restrain trade in motion pictures as set forth in the findings, (2) employing block-booking in renting films to exhibitors, and (3) acquiring or threatening to acquire theatres with the purpose or effect of coercing exhibitors to play films produced or distributed by Famous Players-Lasky Corporation.[4] The conspiracy prohibited by paragraph 1 of the

[4] The following accurate prophesy of the ultimate result of such vertical integration appeared in an issue of the Annals of the American Academy of Political and Social Science, devoted to The Motion Picture, published in November 1926, Vol. CXXVIII, No. 217:

"The tendency toward consolidations and elimination of weaker concerns continues, and with it a tremendous growth

order was one in which the respondents had attempted to dominate the entire industry by first merging a group of film producers with the dominant film distributing corporation and then acquiring control of a series of theatre operating chains which were largely engaged in the operation of first run theatres."

The Circuit Court of Appeals for the Second Circuit declined to grant the Commission's petition to enforce the block-booking provision in the Commission's order in the absence of a

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of the chain theatre movement, which was given important impetus by the First National combine and the Famous Players-Lasky counter movement. Every important producer-distributor combination is seeking to extend theatre controls and the investment of the motion picture in the theatre plant is climbing to new high totals. The exhibitor, the retailer chains, are eventually to control the production-distribution machinery, but in the process the masters of production-distribution are taking control of exhibition" (pp. 18–19).

In the November 1947 issue of the Annals, again entirely devoted to the motion picture industry, Charles Skouras, president of Fox West Coast Theatres Corporation noted that "some 2,700 theatres account for 55 to 60 percent of the revenue received by the motion picture producers" (p. 28), and Donald Nelson, president of the Society of Independent Motion Picture Producers, noted that (p. 56);

"The independents were forced to the painful realization that, no matter how well their pictures were made, they were not getting a fair chance to place them before the public. By a system of cross-licensing, under which one major studio would agree to show the pictures of another in theatres under its ownership or control, and by other trade methods which the Federal court has since held illegal, the large Hollywood

"finding that the respondent combined with other large producers for the purpose of hindering those outside the large combination". *Federal Trade Commission* v. *Paramount Fdmous-Lasky Corporation,* 57 F. 2d 152, 157. But that finding has been supplied by the court below and its absence in the *Paramount Famous-Lasky* case hardly justified Paramount's disregard of the unlitigated provisions of the Commission's order which both preceded and followed this decision. The Commission found that Paramount had interests in only 368 theatres in 1926 (11 F. T. C. 187, 209), whereas 20 years later it was in possession of approximately 1,400 such interests (Fdg. 118, R. 3684). These theatres were admittedly acquired for the purpose of relieving Paramount of the necessity of competing with other distributors in licensing its films. Even if it be assumed that the means of acquisition were

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combines managed to acquire a monopolistic control over a vast part of the industry."

The vertically integrated combinations' monopoly of the industry is described in detail at pp. 125–136 of this issue of the Annals.

[5] The Commission found that first run theatres at that time yielded about 50 percent of the total film rental earned by any particular film. The record in this case shows that the restrictive practices used to channel revenue into first run theatres were being so successfully used 20 years later, that as much as 80 or 90 percent of the total film rental earned in large cities on a first-class picture comes from the first run theatres. See App. pp. 295–296.

different from those prohibited by the Commission's order, it seems clear that their trade restraining purpose was precisely the same.

In May 1925, the Federal Trade Commission instituted two proceedings charging West Coast Theatres, Inc. (which, with its subsidiaries, constituted a vertically integrated combination) and others with preventing independents from securing any films or securing films until they had lost their exhibition value (12 F. T. C. 383, 436). In August of that year, Fox acquired an interest in West Coast Theatres, Inc. (Ex. 45, R. 175). In May of 1929, the Commission made elaborate findings of restraints and monopolization, including the following (12 F. T. C., pp. 470, 480):

> Paragraph Thirteen. By purchase and construction of theatres, by contracts with competitors eliminating competition, by making partnerships with competitors, respondents West Coast Theatres, Inc., and West Coast Theatres, Inc., of Northern California, have steadily progressed from the time of the organization of the former to the time of the hearing in this proceeding toward domination of the motion picture theatre field in California. * * *
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> * * * * * *
>
> Paragraph Twenty-One. Because of extensive ownership and control of theatres in California by respondents, and because of common interests of respondents West

Coast Theatres, Inc., and West Coast Theatres, Inc., of Northern California, with some of the producers and/or distributors doing business in California, respondents exert and have exerted great influence and power over the business of leasing motion picture films in that territory. Such power places these respondents in position either to give a producer and/or distributor a satisfactory business in the State of California, or to make it extremely difficult for the producer to find a satisfactory market in that territory for his motion picture films. Such influence and power has been used by respondents West Coast Theatres, Inc., West Coast Theatres, Inc., of Northern California, and T. & D. Jr. Enterprises, Inc., to prevent their competitors from securing films for their theatres which were desired by respondents, and to force producers and/or distributors by threats of boycott of their films, to refuse to lease films to their competitors, who had been customers of said producers and/or distributors for a long time, in certain cities and towns, and give said films to respondents for their theatres in said cities and towns.

The Commission ordered the respondents to cease and desist from interfering by the means theretofore used with the sale or lease of films to independent exhibitors (12 F. T. C. at pp. 433, 488). Subsequent litigation concerning similar

practices by these respondents is described in the ensuing paragraphs of this brief.[6]

2. *Government Sherman Act suits.*—Local actions against theatre circuits on the West Coast and in Chicago, in which the defendants here or their predecessors were joined, were instituted by the Government in 1928. *United States* v. *West Coast Theatres, Inc.*, S. D. Calif.;[7] *United States* v. *Balaban & Katz Corporation*, N. D. Ill.[8] The West Coast actions concerned the same circuit as was involved in the 1925 Federal Trade Commission proceedings mentioned above. Criminal informations, indictments, and petitions in equity were filed; the essence of the charges in all was that the defendants had conspired to exclude independent exhibitors from contracting for films on early runs. The ensuing proceedings were protracted and, in California, for example, during the pendency of the proceedings, a uniform zoning and clearance schedule was adopted by the defendants and others, giving rise to a new suit

[6] As shown by the findings here, maximum interference with the independents' right to secure films was ultimately achieved through copyright license restrictions rather than by a sale or lease of any film. *Supra*, pp. 27–29 and App. pp. 18–45.

[7] Criminal information (No. 4902–M) filed September 28, 1928; indictment (No. 9663) filed April 19, 1929; petition in equity (S–10–C) filed August 21, 1930; petition in equity (Y–38–H) filed November 16, 1932; contempt information (No. 14048–C) filed August 31, 1939.

[8] Petition in equity (Eq. No. 8854) filed December 15, 1928; contempt information (Cr. No. 31230) filed November 9, 1938.

in equity charging the illegality of such a schedule. The years passed, consent decrees were entered, and contempt proceedings were brought, but little more can be said to have been accomplished than an ultimate supersedure of those decrees by the 1940 consent decree entered in the instant case.[9] For the California and Chicago courts had sought mainly to control the form of agreement used to accomplish an unlawful result, only to be met by new and different forms which enabled the defendants to attain the same ends.

Suits against the defendants or their predecessors involving their nation-wide distribution activities bore little more fruit. Two such suits were instituted by the Government in April 1928. In one of these, it was charged that the de-

[9] In a report filed May 1, 1940, a Special Master hearing the contempt case found that the contracts made between Balaban & Katz and the defendant distributors Fox, Loew, Paramount, and Warner gave Balaban & Katz the selective first choice of the best pictures released by each one of them and that by reason of these contracts, the independent exhibitors in the loop district of Chicago were unable to exhibit pictures suitable for first-run exhibition. The Master recommended that Barney Balaban, Balaban & Katz Corporation, B & K Management Corporation, and Paramount be found guilty of violation of paragraph 10 of the consent decree, a general provision against monopolization in the terms of section 2 of the Sherman Act, and that none of the defendants be found guilty of violating the more specific provisions of the decree that they had also been charged with violating. Subsequently the Master reversed his recommendation as to Barney Balaban. On December 10, 1940, fines were imposed against Balaban & Katz Corporation, B & K Management Corporation, and Paramount upon pleas of nolo contendere, and the information was dismissed as to the other defendants.

fendants had agreed upon a uniform licensing contract and had concertedly refused to license pictures to independent exhibitors who refused to execute the agreement. This standard form contract provided for the submission of any dispute which might arise under the contract to a board of arbitration, in the selection of which the distributors had a dominant voice. In the other suit, the defendants were charged with concertedly refusing to license pictures to independent purchasers of motion-picture theatres who refused to assume contracts for films entered into by the previous owners of the theatres. Each of these restrictive provisions was administered through local Film Boards of Trade. The Government prevailed in both of these suits. *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44.

The local Film Boards of Trade which administered the arbitration and assumption of contract provisions found unlawful in those cases also established uniform clearance schedules. This latter phase of their activity was subsequently disclosed in *Youngclaus* v. *Omaha Film Board of Trade,* 60 F. 2d 538 (D. Neb.), which found the uniform clearance schedule there involved to be a violation of the Sherman Act. That schedule was the product of express agreement among the distributors and only that mode of establishing such schedules was enjoined. The

terms of that schedule were somewhat more favorable to the independent theatres in Omaha than the schedules in force there at the time this suit was tried, which were established by separate express agreements between the first run exhibitor, a Paramount affiliate, and the distributor defendants.[10]

On December 15, 1936, the Government filed a suit at Dallas, Texas, against Paramount, a large theatre circuit affiliated with it, and against the other seven distributor-defendants here. It

[10] Uniform clearance for the first run theatres in Omaha, Nebraska, as of July 22, 1930, established by the Omaha Film Board of Trade, as reported at page 539 of the above case, was as follows:

"RUNS AND PROTECTION

"Paramount, World and Orpheum, Omaha, maximum protection in the City of Omaha after the last day of exhibition over all subsequent run as follows:

38 days over theatres charging admission of 35¢.
42 days over theatres charging admission of 30¢.
56 days over theatres charging admission of 25¢.
77 days over theatres charging admission of 20¢.
98 days over theatres charging admission of 15¢.
120 days over theatres charging admission of 10¢.

* * * * *

"Paramount, World and Orpheum, Omaha, maximum protection after the last day of exhibition, thirty (30) days over Strand, Broadway and Liberty, Council Bluffs. Seven (7) days additional for each five cents (5¢) less charged in admission.

* * * * *

"Paramount, World and Orpheum, Omaha maximum protection after the last day of exhibition as follows:

"28 days over theatres located within the radius of from 1 to 25 miles of Omaha.

charged that all of these defendants had violated the Sherman Act by agreements which prevented independent exhibitors in competition with the

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"7 days over theatres located within a radius of from 25 to 35 miles of Omaha."

Clearance of first run theatres in Omaha, during the 1943–44 motion picture season as set forth in a letter of June 7, 1944 from Tri-States Theatres Corporation, 50% owned by Paramount, to Paramount Film Distributing Corp., is as follows:

"Set forth herein below is a schedule for the town of Omaha, Nebraska showing the first run clearance which has finally been agreed upon after negotiations and discussion between us.

"The clearance set forth herein will go into effect and apply in respect of all of your 1943–44 photoplays which we or our affiliates have contracted or which we or our affiliates may hereinafter contract to exhibit.

"Orpheum, Paramount, and Omaha Theatres—1st Run

60 days over second run, Omaha, Nebr.
28 days over Council Bluffs, Iowa
28 days over Arlington, Nebr.
28 days over Blair, Nebr.
28 days over Elkhorn, Nebr.
28 days over Gretna, Nebr.
28 days over Louisville, Nebr.
28 days over Plattsmouth, Nebr.
28 days over Springfield, Nebr.
28 days over Valley, Nebr.
28 days over Waterloo, Nebr.
28 days over Glenwood, Iowa
28 days over Neola, Iowa
28 days over Treynor, Iowa
7 days over Murray, Iowa
7 days over Fremont, Nebr.
7 days over Nehawka, Nebr.
7 days over Weeping Water, Nebr.
7 days over Ashland, Nebr.
7 days over Elmwood, Nebr.
7 days over Herman, Nebr.
7 days over Union, Nebr.
7 days over Logan, Iowa
7 days over Carson, Iowa
7 days over Malvern, Iowa
7 days over Minden, Iowa
7 days over Medale, Iowa
7 days over Missouri Valley, Iowa
7 days over Mondamin, Iowa
7 days over Oakland, Iowa
7 days over Persia, Iowa
7 days over Shelby, Iowa
7 days over Thurman, Iowa

circuit in subsequent-run situations from exhibiting at an admission price of less than 25 cents pictures which had been shown in the circuit's first-run theatres at a 40-cent admission price. The Government also charged that they had made agreements which provided that any feature shown first-run in the circuit's theatres with an admission price of 40 cents or more could not be shown on a double feature bill in a subsequent run theatre. The district court found that these restrictions had injured the business of the independent subsequent run houses and adversely affected the public in these areas by increasing admission prices at their theatres, most of which had been accustomed to charging 15 cents instead of 25 cents (*United States* v. *Interstate Circuit,* 20 F. Supp. 868 (N. D. Tex.)). It entered a decree enjoining each of the distributor defendants from making any agreements with the exhibitor defendants which granted the restrictions referred to above. This Court, on appeal, held the restraints involved illegal and affirmed the district

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"Please signify your understanding and agreement hereto by signing in the space indicated below and kindly return one copy to the writer" (Ex. 82, Omaha; R. 196).

The clearance granted by Fox (Ex. 42, Omaha; R. 173) and Loew (Ex. 57–28; R. 185) in first-run Omaha contracts with Tri-States for the same season was identical with that stated above except that the clearance over Plattsmouth, Nebr., was 14 days instead of 28 for each of these distributors and neither of them included the towns of Glenwood and Logan, Iowa, in their schedules.

court's decree. *Interstate Circuit* v. *United States*, 306 U. S. 208.

In the instant case, the Government introduced in evidence the contract between Universal and Interstate Circuit found illegal in the *Interstate* case (Ex. 198, App. 86), together with the 1941–1944 franchise contract between Universal and Interstate Circuit (Ex. 261, App. 50–57). The latter agreement omitted the prohibited clearance restrictions, but gave the circuit just as many prior runs and a greater control over availability of Universal films to its competitors than it had before. That contract established a blanket weekly rental of $5,000 for all features, shorts, serials and news used on all runs. The amount of the rental was subject to "review and revision" in accordance with actual performance, and the net effect of the deal was simply to make Interstate Circuit the "chosen instrument" of the distributor for exploiting this territory on a virtual partnership basis.

Despite the interdiction of the *Interstate* and *Perelman*[11] cases against restrictions upon double featuring, Columbia (Ex. 139, R. 228), Paramount (Ex. 82, R. 196), Fox (Ex. 42, R. 173),

[11] In 1938, the Third Circuit Court of Appeals found the five major defendants guilty of combining to prevent independent theatre operators in Philadelphia from playing double features. *Vitagraph, Inc.* v. *Perelman*, 95 F. 2d 142, certiorari denied, 305 U. S. 610. This opinion, as well as that of the trial court, 9 F. Supp. 729 (E. D. Pa.), contains a valuable analysis of the defendants' tendency to present a united front against independent competition.

RKO (Ex. 94, R. 203), Universal (Ex. 365, R. 346), and Warner (Exs. 126–128, R. 221–222) have been giving the distributor-exhibitor theatres in Cleveland, Ohio, a clearance over subsequent runs graduated in length according to the admission price and double feature policy of the latter. For instance, Paramount's clearance in 1943–44 in Cleveland was 35 days over subsequent run single bill theatres and 63 days over subsequent run double bill theatres. Other examples of this sort of restriction taken from answers to interrogatories are: Universal (Ex. 365, R. 346); RKO in Sioux City, Iowa (Ex. 94, R. 203); Fox in Lakewood, Ohio (Ex. 42, R. 173); Paramount in Fort Worth, Texas (Ex. 82, R .196).

3. *NRA Code and 1940 consent decree.*—The regulation of trade practices as a method of eliminating restraints from the industry and affording independents and the public alike the protection of the Sherman Act does not become more effective when implemented by a nation-wide administrative enforcement system. That we believe is amply demonstrated by the experience under the NRA and the 1940 consent decree. The Code of Fair Competition for the Motion Picture Industry (NRA Code No. 124) became effective on December 7, 1933, and expired in May 1935. This Code attempted to regulate only unfair trade practices. To administer the Code, two sets of local boards were set up throughout the country: Local Clearance and Zoning

Boards, which had authority to establish uniform schedules fixing the playing positions of all theatres in local competitive areas, and Local Grievance Boards, which heard unfair practice complaints of individual exhibitors. While these boards heard a substantial number of complaints, the most that can be said of their decisions is that they tended to palliate the effects of discriminations implicit in continued control of large theatre circuits by film distributors.[12] The Boards' membership generally consisted of representatives of distributors, first run exhibitors, and later run exhibitors, and, since the first run exhibitors were more often than not affiliates of the distributors, it is not surprising that patterns of discrimination are found in the uniform clearance and zoning schedules established pursuant to NRA authority. That these discriminatory patterns still persist is pointed out in a consent decree Appeal Board decision of 1944 (App. 428, 430).

While the consent decree entered in this case in 1940 established an efficient and impartial arbitration system, even its effect has been merely to mitigate the discriminations inherent in the major defendants' ownership of theatres. See App. pp. xi, xii, 403–446. The trial court's finding that the Government was entitled to new affirmative relief is itself a finding that the consent decree was inadequate to end the violations

[12] See Bertrand, *The Motion Picture Industry*, NRA Work Materials No 34, Industry Studies Section, 1936, p. 79; *Darrow Board Report of May 1934.*

found. And private antitrust litigation against the defendants during the period of operation of the consent decree confirms this conclusion.

4. *Private Sherman Act suits.*—During the foregoing period of regulation under the consent decree, all of the distributor defendants have been found guilty in private antitrust suits of combining in a united front against independent exhibitors who sought to compete with them. In Chicago, all of the major defendants were found guilty of jointly maintaining a discriminatory admission price, run and clearance structure in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; 162 F. 2d 520, certiorari denied November 10, 1947, No. 394, this Term. The injunction granted by the district court prohibits Paramount from playing its own films in the Balaban & Katz (98% owned by Paramount) first-run theatres in downtown Chicago for more than two successive weeks. These were the same theatres that were involved in the Master's findings, *supra*, p. 79, note 9. In 1945, all of the defendants here were found guilty of illegally protecting Warner's first-run monopoly in Philadelphia in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. C. A. 3). Pursuant to this decision, the district court entered an injunction compelling Warner to extend to the complainant the right to bid for first-run exhibition of Warner films in Philadelphia, although Warner operates first-run theatres there. The most recent

finding of Sherman Act violation by these defendants is that of *Theatre Investment Co.* v. *RKO Radio Pictures, Inc.*, 72 F. Supp. 650 (W. D. Wash.), decided in 1947, where the court found all of the distributor defendants here and a circuit affiliated with Fox guilty of restricting independent theatre competition in Seattle, Washington. While these private Sherman Act suits have given some relief to the particular complainants there involved, they cannot, of course, solve the problem posed here of restoring and protecting competition for the benefit of the public. All independents, including these complainants, are still faced with the ever-recurring discriminations not anticipated by their injunctions which are inherent in the integrated structure of the major defendants.

5. *Conclusion.*—The history above set out teaches that the ultimate solution to the problems raised by the defendants' pervasive economic power over the distribution and exhibition of motion pictures is not to be found in a new regulatory scheme. The only appropriate relief in this case at this time is relief which will terminate this conspiracy for all time and will open to future competition a film market long closed to such competition by the defendants' unlawful conduct.

In now offering its competitive bidding system as a substitute for divorcement, the court's opin-

ion suggests that, if this system fails to work after a trial period, divorcement may still be decreed (R. 3551). But the district court was not writing on a clean slate. If its judgment offered real hope of solving any of the basic problems that its opinion raises, this would be a welcome experiment. But the impossibility of effective administration, the opposition of those it is intended to benefit, and its resemblance in impact and method to past systems of regulation which have already been tried and found wanting, deprives the lower Court's system of any value, even as a tentative approach to solving these problems. Its system of regulation would therefore have to be rejected even if there were no judicial precedents for dealing with these problems by the remedies sought by the Government. The following argument will show that both prohibition of cross licensing among the major defendants and ultimate divestiture of their theatres are now required to open the domestic film market to competition at both the exhibition and distribution levels. We shall also show that such relief is the kind held appropriate by decisions of this Court. This Court has never sanctioned mere regulation of a vertical combination which has persistently abused its continuing power to discriminate against independents.

II

The district court should have ordered ultimate divorcement of the distribution and production businesses of the major defendants from their theatre operations by divestiture of their theatre holdings

A. EACH INTEGRATED VERTICAL COMBINATION BETWEEN A MAJOR DEFENDANT'S PRODUCING AND DISTRIBUTING BUSINESS AND ITS AFFILIATED THEATRES CONSTITUTES A RESTRAINT AND A MONOPOLIZATION OF AN APPRECIABLE SEGMENT OF TRADE WHICH CAN BE REMEDIED ONLY BY DIVORCEMENT

The Government has consistently maintained that each integrated combination between a major distributor and its affiliated theatres constitutes a restraint and a monopolization of an appreciable segment of trade in violation of both Sections 1 and 2 of the Sherman Act, and that this amounts to a continuing unlawful condition which can be corrected only by theatre divestiture. The opinion of the trial court is silent with respect to this point, except for the statement that (R. 3555): "The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition." The findings of fact and conclusions of law add nothing explicit in this connection.

It is not our contention that each major defendant has a national monopoly of distribution, or that its film product alone would give its theatres a national monopoly of exhibition. We contend that each vertical affiliation between a major dis-

tributor and its theatres necessarily results in a continuing restraint and monopolization with respect to that important segment of trade represented by the pictures it distributes to its own theatres.

Most of the major defendants' vast theatre holdings were acquired through purchase of assets or stock in, or merger with, independent theatre enterprises (Fdgs. 8, 21, 28–30, 42; R. 3662, 3664, 3665, 3667). The trial court specifically found that Paramount's theatre interests were acquired "so that it might assure itself of outlets for Paramount productions" (Fdg. 8, R. 3662). It is undisputed in the record that the other four major defendants also integrated theatre operations with film distribution in order to have non-competitive market outlets for their films. It is clear, therefore, that such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution. They were in each case a deliberate creation of a market control which would assure them of retail outlets regardless of the merits of their product.

The necessary consequence of these several affiliations is arbitrarily to tie the pictures of each major defendant to its own theatres, and conversely to tie those theatres arbitrarily to the pictures of the major defendant. Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion

picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor, all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres. As the defendants' witness Rathvon, president of RKO, frankly stated with reference to his company's ownership of key first-run theatres:

> * * * if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution * * * it gives you a chance to get some revenue back because you forced it into the flow of distribution (R. 1622).

This Court has consistently held that combinations vertically integrated to secure arbitrary market control violate the Sherman Act. *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Reading Co.*, 253 U. S. 26;[1] Cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218. They constitute an unreasonable restraint, an attempt to monopolize, and an actual monopoliza-

[1] The first *Reading* decision (226 U. S. 324) merely voided certain price maintenance contracts, leaving intact certain integrated rail and mine combinations, but in the second *Reading* decision, cited above, the Court found that elimination of the price maintenance agreements had not been adequate relief and dissolved the principal integrated combinations.

tion of a part of trade because "the mere existence of such a combination and the power acquired" thereby "constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." *United States* v. *Reading Co., supra,* at p. 58.

The *Lehigh Valley* case is almost precisely like the instant one. There, several railroads competed for the business of transporting coal from certain Pennsylvania anthracite mines to the eastern markets. The Lehigh Valley Railroad Company entered upon a policy of acquiring coal lands tributary to its lines by purchasing and leasing such lands, and by acquiring stock in corporations owning such lands. It organized a coal company to hold title to the acquired coal lands and stock. Later it organized a sales company to act as selling agent for the coal company. At the time the suit was brought, the railroad company had gained control of the transportation and sale of most of the coal derived from lands tributary to its lines. This amounted to about 20 percent of all anthracite coal produced, and the coal mined by the railroad company and its subsidiaries was something less than that. The largest single purchase, that of Cox Brothers, resulted in discontinuing the latter's connections with the other carriers and exclusive carriage of its coal by the Lehigh. This Court held that the railroad's de-

liberate purchase of the coal lands for the purpose of arbitrarily controlling the transportation and sale of coal derived from those lands amounted to a restraint of trade, an attempt to monopolize and an actual monopolization of a part of the transportation and sale of anthracite coal in violation of the Sherman Act. It directed divorcement of the railroad company, the coal company and the sales company so that each would be entirely independent of the others. The railroad company and its coal producing and selling subsidiaries had no monopoly of the transportation or sale of all anthracite coal, and this Court did not mention the effect upon the national coal market of the railroad company's control of 20 percent of all anthracite coal produced. The vertical combination was held unlawful because the railroad's acquisitions of coal lands were for the purpose of eliminating competition for the transportation of coal mined from those lands, and this amounted to a restraint and a monopolization of an appreciable segment of commerce. The continuing inducement to rate discrimination provided by such a combination was thought to have serious enough consequences to warrant divestiture relief, even though the Interstate Commerce Commission had continuing power to control such discrimination by appropriate regulatory action.

The illegality of the integrated vertical combinations in the case at bar is further confirmed by the numerous decisions of this Court condemning

similar restraints when accomplished by a conspiracy between two or more parties. *Associated Press* v. *United States,* 326 U. S. 1, 18–19, and cases cited; *Binderup* v. *Pathe Exchange,* 263 U. S. 291. Since the Sherman Act looks to substance rather than form (*United States* v. *Yellow Cab Co.,* 332 U. S. 218, 227), restraints which are unlawful when accomplished by a horizontal conspiracy must be equally unlawful when they follow as a natural consequence of a vertically integrated combination. *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 376–377. To hold otherwise would be to emasculate the Act and make of it an inducement to integrated combinations with their serious tendencies to monopoly.

It would be no defense even if the trade restrained and monopolized by each of the vertical combinations were small in relation to the entire amount of commerce in the distribution and exhibition of motion pictures. "The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226; Cf. *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255.

But here the trade restrained by each is substantial. A large and important part of the pictures exhibited by any group of affiliated theatres comes from its affiliated distributor, and substan-

tially all of the distributor's pictures are taken by its affiliated theatres wherever it has such theatres. During the 1943–44 season, RKO distributed 38 features; Fox and Loew, 33 each; Paramount, 31; and Warner, 19. The features distributed by these five majors aggregated 154 of a total of 260 (excluding "Westerns") distributed by the eight distributor-defendants, and a total of 335 distributed by all national distributors (Fdg. 99, R. 3677). In 1945, Paramount had interests in 1,395 theatres; Fox, 836; Warner, 501; Loew, 135; and RKO, 109 (Fdg. 118, R. 3684). During the 1943–1944 season, theatres affiliated with Fox paid to it, in round numbers, $5,000,000 out of total film rental payments of $25,000,000. Comparable figures for the other major defendants are: Loew, $9,000,000 out of $20,000,000; Paramount, $14,000,000 out of $50,000,000; RKO, $4,000,000 out of $13,000,000; Warner, $6,000,000 out of $23,000,000 (Ex. 424, App. pp. 256–257).[10] Clearly each vertical relationship results in a restraint and a monopolization of an "appreciable segment" of the market. The market thus

[10] The number of corporations through which the theatres affiliated with each major defendant are held is: Fox, 235; Loew, 81; Paramount, 378; RKO, 73; and Warner, 33. The number in which each has a direct or indirect stock interest of 51% or more is Fox, 200; Loew, 50; Paramount, 179; RKO, 43; and Warner, 23. The number in which each has an interest of 50% is: Fox, 10; Loew, 21; Paramount, 128; RKO, 10; and Warner, 10. A detailed statement of these holdings appears at App. pp. 446–462.

closed to competition is much greater than that involved in the *Yellow Cab* case (replacements of 5,000 taxicabs in four cities) and in *International Salt Company, Inc.* v. *United States,* No. 46, this Term (119,000 tons of salt worth $500,000).

The fact that defendants' pictures are copyrighted provides no defense. It is true that under the Copyright Act the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others, but the Act gives no one any special privilege in the general operation of motion-picture theatres. The judgment here expressly sanctions the making of license agreements by the major defendants which contain every form of discrimination condemned in the opinion and findings, provided only that the license is for the exhibition of films distributed by it in a theatre or theatres in which it owns a direct or indirect interest of 95% or more (R. 3700). As noted above the unreasonable restraint of trade sanctioned by this provision of the judgment alone is substantial in extent. The court rested its sanction of clearance agreements between the defendants and others, which are intended to give "reasonable" protection to the licensee against competition from another theatre operator (R. 3530–3531), upon an analogy between them and a valid common law agreement of the seller to protect the good-will of a going business by an agreement not to compete with

the buyer for a reasonably limited length of time in a reasonably limited area. But no such analogy can sustain the unlimited restrictions which the judgment allows these distributors to incorporate in their licenses with their 95% owned theatres. The trial court therefore apparently assumed that such a privilege was granted by the Copyright Act.

Its error becomes apparent upon a consideration of *Interstate Circuit* v. *United States*, 306 U. S. 208, the most recent case discussing the extent to which the Copyright Act provides a defense against a charge of Sherman Act violation. If Paramount now adds a forty-five per cent stock interest in Interstate Circuit to the fifty percent it presently has and had when that decision was made, it could in its license agreements with this affiliated circuit incorporate much the same clearance restrictions that were there found to violate the Sherman Act, without liability for contempt of the judgment entered here.[2] Paramount would then, the court below apparently assumed, merely be engaged in the exhibition of its own copyrighted films, a privilege

[2] Paramount could not now include a minimum admission price restriction in its licenses with Interstate's competitors. It could still agree with Interstate that if an independent competitor charged less than 25¢ admission, Paramount would not serve the independent with films until long after the films had played at an Interstate theatre. Paramount could also accomplish the same result without any agreement simply by not making prints available promptly to such competitors.

which the Copyright Act expressly grants to it. This assumption not only contradicts the existence of the separate corporate entities respectively employed by all of the major defendants in carrying on their distribution and exhibition businesses (see App. pp. 446–462), but also ignores the diverse functions of these entities and the function of the theatres themselves.

As the court below found, none of these theatres except for a limited number in the very largest cities could operate with the films of only one distributor (Fdg. 151, R. 3689). Neither the theatres of the defendants nor the theatres competing with them are an outlet for but a single distributor's films. These theatres compete in making available for the public all the films that each can profitably license from any distributor, and it was that competition in selling films to the public that was unlawfully suppressed in the *Interstate Circuit* case and here. Such suppression in *Interstate Circuit* impaired the ability of the independent to compete as a theatre owner and unlawfully protected Paramount as a 50% theatre owner. The restriction also gave Paramount additional revenue as a film distributor, but this Court flatly rejected the increase in film rental as a justification for the suppression of theatre operating competition which also resulted. The case was therefore a clear holding that the Copyright Act affords no sanction for

restrictions which suppress theatre operating competition simply because they are the most effective means of exploiting a copyright.

The Copyright Act gives a film distributor no more right to suppress competition among theatre owners by clearance agreements than it sanctions such a suppression by agreements to maintain a stated price. The distributors' assumption that they had a legal right to control price competition between theatres rested upon the false premise that they had a specially protected interest in the gross receipts of all theatres which exhibited their films, although they furnished only one part of the entertainment sold.

A motion-picture patron pays an admission fee for the privilege of sitting in a theatre for a period of time during which he may see one feature film, a newsreel, and a short subject, or two features, or any combination of feature films and other forms of entertainment which the theatre management sees fit to offer. Depending on his taste and opportunities, the patron may choose a comfortable seat in an air-conditioned theatre with a poor picture to look at, or a less attractive theatre from a physical standpoint with superior entertainment on the screen. In any event, the admission price he pays does not necessarily reflect the quality of the entertainment offered him by any particular film which appears on the program.

Everyone who contributes to this entertainment must, of course, look to the payment from the patron as the ultimate source of his reward for his patricular contribution. The maker of the projection equipment, the owner of the theatre building, the operator of the theatre, the producers of the films exhibited, the makers of the technical devices, and the possessors of the dramatic and other talent employed in their production, all have a similar stake in seeing that the patron pays the highest price consistent with maximum attendance, for the privilege of witnessing the ultimate entertainment to which they all contribute. Suppression of price competition among theatres may well be the most effective method of securing a maximum financial return for all of them, but a distributor's film copyright no more justifies the making of restrictive agreements which accomplish that result than patents possessed by other contributors to the entertainment world. The limits of the copyright or patent grant clearly are exceeded by license restrictions which control the terms on which not merely the licensors' product but related entertainment is sold to the public. *Mercoid Corp* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 666.

There is thus no sanction in the Copyright Act for the use of theatres to suppress competition, regardless of whether they are wholly or par-

tially owned by a film distributor. The question presented by the lower court's sanction of restrictive agreements made by a defendant with a theatre operating corporation in which it has or may acquire control of 95% or more must therefore be determined by the application of Sherman Act principles. Control of another corporation by a Sherman Act defendant has never been thought to justify the making of agreements between them which unreasonably restrict the competition of others. *General Motors* v. *United States*, 121 F. 2d 376 (C. C. A. 7), certiorari denied, 314 U. S. 618. While such control may in practical effect make the use of such an agreement wholly unnecessary to accomplish the restraint desired, such control *per se* could never give a lawful sanction to such agreements where the parties deemed their use desirable or necessary.[a]

Since such agreements are in fact wholly unnecessary to accomplish the trade restraining purposes of the major defendants, any judgment which leaves them in control of their theatres sanctions the continued restraint of trade implicit in such ownership. But in view of the corporate structure of these combinations, whereby theatre owning and operating functions are performed by

[a] As noted at p. 87, *supra*, federal courts in private antitrust litigation involving similar violations by these defendants have enjoined distributors owning interests of 95% or more in certain theatres from discriminating in favor of those theatres in licensing films to them.

corporate entities separate from those engaged in production and distribution, the failure to divorce the theatre corporations from the others sanctions a continuing conspiracy among each group of affiliated corporations which is itself a continuing violation of Section 1 of the Act.

Even if each major defendant is regarded as a single trader, it is in no different position from a manufacturer of any article, copyrighted or not. Any manufacturer has the right to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize. But no manufacturer, whether of a copyrighted or an uncopyrighted article, has the right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of the market. The restraint on competition resulting from such integrations is particularly serious where, as here, there are only a few distributors, there are and can be only a limited number of theatres in any one competitive area, a large investment is required for new entrants into the exhibition field, and the downtown areas of large cities are built up so that it is difficult to secure adequate sites for new theatres. The continuing power thus acquired to exclude competition in the sale and purchase of pictures is unlawful because it "was not

obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227–228.

Nor does it make any difference that one of the reasons for the theatre acquisitions was that the actions of others were making it difficult for defendants to market their films. If others were violating the antitrust laws, that is no justification for defendants doing likewise. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 467–468; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188. And if others were securing an advantage over defendants by means of honest competition, defendants can not combat that advantage with unlawful conduct. The law requires that success in the market be attained by competition, not combination.

It can not be said that the Government is entitled to no relief against these vertical combinations because they are stale, most of them having been effected between 1919 and 1930. Cf. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417. In the case at bar the restraining effects of the combinations have continued to date, and are more serious now than when the integrations took place. Moreover, the market control provided by these vertical combinations has constantly been abused to the

prejudice of independent exhibitors, independent producers, independent distributors and the public. This persistent use of their theatres as a means of arbitrary suppression of the competition of others is itself conclusive evidence of the unlawful purpose of the major defendants' vertical integrations. *United States* v. *Reading Co., supra,* pp. 59–60; *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255, 259.

There is no economic justification whatever for the integration here involved. The distributor does not need its own theatres to "sell" its pictures to the patrons. Theatre-goers are attracted by the stars, the directors, the story, the national advertising done by the producers and distributors, and the quality of the picture. The quality of the theatre is an important factor, but there is no reason why independents cannot operate as good theatres as the distributors. Assuming two theatres of equal quality and location, a picture will attract as many patrons in one as in the other. Nor is there any saving to the patron through this integration. The number of steps in distribution is the same. There would seem to be a single reason for such affiliation, amply reflected in this record: a desire for market control with the resulting opportunity to control prices, exclude competition and extract monopoly profits both as a distributor and as an exhibitor.

The lower court's decree permits these vertical relationships to stand and expressly provides that

each major defendant may exhibit its pictures in its affiliated theatres on any terms it chooses. The effect of the decree is to put the judicial imprimatur on these integrated combinations and forever remove them and their serious trade-restraining consequences from the prohibitions of the anti-trust laws. We submit that the creation of these combinations was itself a violation of law and that their mere existence constitutes a continuing illegal restraint of trade. Under these circumstances dissolution of these combinations should be ordered. *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Reading Co.*, 253 U. S. 26, 63; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 354–360; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 78–82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 186–188; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 97; *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

There are further compelling reasons for divorcement here. In addition to the serious trade restraints which necessarily flow from the vertical integration of the five major defendants, all of the defendants have for years used these integrated positions to carry out the unlawful conspiracy found by the court below to restrain competition among themselves and with independents in both the distribution and exhibition of motion pictures throughout the United States. These

vertical relations have provided the incentive, the power and the very means for accomplishment of that unlawful conspiracy. In view of the demonstrated proclivity of defendants to use that power for such unlawful purposes, divorcement is a necessary measure to eliminate the conspiracy and restore competition to the industry.

The five major defendants have participated in the conspiracy for the dual purpose of eliminating competition in both distribution and exhibition. The three non-exhibitor defendants have participated for the purpose of restricting competition in the distribution field. The conspiracy had been effectuated through license agreements made by all eight defendants as distributors with the five major defendants as exhibitors specifying uniform terms as to runs, prices and clearances. By means of these uniform agreements, all of the defendants have eliminated competition among themselves as distributors. At the same time, they have protected the theatres of the five major defendants from the competition of independents.

So long as the five major defendants are permitted to retain their theatres and the eight distributor-defendants are allowed to enter into license agreements with them, all will have the same incentive and the same power to eliminate competition among themselves and with others. In fact it is inevitable that the exclusionary and price-fixing conspiracy will continue, albeit in a somewhat different form.

When a distributor defendant licenses a major's theatre and agrees on any terms which restrict the competition of others in exhibiting the same films, such agreement constitutes an understanding between those two defendants as distributors, since each major defendant is a distributor as well as an exhibitor. When two or more defendants as distributors license the theatres of a major with the same restrictive provisions, the net result is identical agreements between them restricting the terms on which their films will be made available to other theatres. Thus, precisely the same unreasonable competitive effects as resulted from the general horizontal conspiracy found below may be continued. Since such restrictions control admission prices, the defendants may even continue their price-fixing conspiracy.

Relief short of divorcement also will permit the defendants to retain the fruits of their unlawful conduct. The exclusionary conspiracy on runs was designed to give defendants' theatres a superior position, and the price-fixing and clearance conspiracy had the purpose and effect of protecting that position and the profits of those theatres. As the court below found, the conspiracy was successful. Consequently, the present superior position of the defendants' theatres throughout the important cities of the United States has been built up and maintained by defendants' conspiracy.

The decision of this Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, supports divorcement in this case. There this Court approved divestiture of affiliates whose acquisition represented part of the fruits of the conspiracy, saying (p. 189): "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." Further, the Court approved divestiture of affiliations which induced joint action and agreement, saying (pp. 189–90): "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future."

We also think that *United States* v. *Swift & Co.*, 286 U. S. 106, while it involves a consent decree, provides strong support for dissolution of these combinations. There, this Court reversed a modification in 1930 of a consent decree entered in 1920. The complaint charged that the five major meat packers had achieved a joint monopoly of the distribution of meat by concerted action with each other, and that they had begun

to control the supply of groceries through ownership of refrigerator cars and branch houses. Possession of the latter facilities was alleged to give them such substantial advantages in distribution costs that they could undercut the prices of competitors not possessing the economic advantages of such integration. (286 U. S., at p. 110.)

All five packers, without expressly admitting any law violation, consented to an injunction against (1) owning any interest in a stockyards company, (2) making, selling or transporting 114 enumerated grocery products, (3) using or permitting others to use their distribution facilities for the handling of those grocery products, (4) selling meat at retail, (5) holding any interest in any public cold storage plant and (6) selling fresh milk or cream (286 U. S., at p. 111).

Ten years after this decree was entered, Swift and Armour prayed for a modification permitting them, *inter alia*, to own and operate retail meat markets, to make, sell and deal in the 114 grocery items, and to use and permit others to use their distribution facilities in handling those items. As grounds for the modification sought, the defendants were able to show that great changes in the methods of food distribution had occurred since the entry of the decree. Other vertically integrated combinations such as A. & P. had begun to dominate the grocery business. (See Record in *Swift* case, pp. 1045–1048.) It was stipulated that each of the defendants then had no monopoly

of meat distribution and was in active competition with the others in each geographical market where they bought and sold (*Id.* at pp. 1043–44). The district court granted the modification as to the grocery business because it thought that use of the packers' storage, transportation and marketing facilities for groceries as well as meat was "sound as an economic and business proposition" and that the presence of the new chains in the grocery field would prevent any grocery monopoly by the packers (*Id.* at p. 1058). In denying the meat retailing modification, however, the district court said (*Id.* at p. 1059):

> Whether such complete integration in merchandising from the producer to the consumer would produce better conditions as a whole is an economic question which is not for the Court to decide. The policy of Congress as shown by the statutes enacted by it and as interpreted by the Supreme Court is to preserve and stimulate competition, and to permit the defendants to engage in the retailing of their own products would, in my opinion, have the opposite result.

The United States appealed, but the defendants did not. In determining the propriety of the district court's grocery modification, this Court did not consider separately the prohibition against defendants' making, selling or transporting groceries from the prohibition of the use by anyone of their distribution facilities for that

purpose since it regarded one as necessary to supplement the other. After reciting the allegations in the complaint concerning the economic advantages inherent in the packers' vertical integration which enabled them to undercut independent competition in the grocery trade, this Court said (286 U. S. at p. 116):

> Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals.

The Court then pointed out that the decree was framed upon the theory that even after the meat monopoly was dissolved, each defendant packer would be "so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether" (286 U. S. at p. 116). The Court reasoned that the prohibition against engaging in the retail meat business and the grocery prohibition which the district court modified were both "directed against abuse of power by the individual units after the monopoly was over; and the death of the monopoly, the breaking up of the combination, if an adequate reason for terminating one of them, is an adequate reason for terminating both" (286 U. S. at p. 117). Then, after

reviewing the advantages inherent in the major packers' vertical integration which parallel those of the major defendants here, the Court said (286 U. S. at p. 119):

> The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints.

The consent decree there was also sustained because the defendants "chose to renounce what they might otherwise have claimed" (286 U. S., at p. 119). Nevertheless, the elaborate discussion of the economic power inherent in the vertical integrations and the asserted abuse of such power which led to the entry of the decree was evidently intended to show that the prohibition which the court below had modified on the ground of changed conditions continued to be appropriate relief so long as the power and economic incentive to repeat such an abuse was unchanged.

Here, as in the *Swift* case, there have been serious trade restraints resulting from horizontal agreements among the vertically integrated defendants. The defendants have demonstrated a proclivity to persist in such abuses of their power, despite the extensive use of injunctive provisions and administrative regulations intended to prevent them (*supra*, pp. 72–89). Consequently, removal by divorcement of the power to continue

such restraints through agreements among all the defendants as distributors with the five major defendants as exhibitors is necessary, if the decree is to end the unlawful practices, provide "such reasonable measures as would preclude their revival," and "effectively pry open to competition a market that has been closed by defendants' illegal restaints" [4] (see p. 60, *supra*).

We contend in Point III (*infra*, pp. 127–135) that the five major defendants should be prohibited from cross-licensing among themselves for a ten year period, while the long-range remedy of divorcement is being carried out. Such a cross-licensing prohibition would effectively eliminate the power of these five defendants to conspire among themselves as they have in the past. It would have no effect, however, upon the continuing incentive, power and proclivity of the three non-exhibitor defendants and each major defendant to eliminate competition among themselves and with others by the simple expedient of continuing to enter into the license agreements which gave rise to this conspiracy in the first place. And, as we also point out in Point III, a prohibition against cross-licensing without divorcement would not in any event provide the full relief necessary to restore competition to this industry.

[4] See, Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. of Ch. L. Rev. 567, 589, et seq.

B. THE TRIAL COURT SHOULD, IN ANY EVENT, HAVE COMPELLED THE MAJOR DEFENDANTS TO SELL THEIR STOCK INTERESTS IN THEATRE CORPORATIONS OWNED JOINTLY WITH INDEPENDENT EXHIBITORS

The district court found that according to Exhibit RKO-11 there were a total of 1,078 theatres jointly owned or operated by the major defendants with independent exhibitors which would be affected by the dissolution provision of its judgment (Fdg. 117, R. 3683–3684). The agreements for joint operation were ordered terminated by July 1, 1947. There were some jointly owned theatres in which either the defendant or the independent owned less than a 5 percent interest, which the court treated as *de minimis* (Fdg. 115, R. 3682–3683). The court held that the remaining joint ownerships were unlawful and should be terminated within two years "by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants" (R. 3699). In the case of purchase by a defendant, however, there must be a showing to the satisfaction of the court that such acquisition will not unduly restrain competition in the exhibition of motion pictures. The Government contends that all such illegal joint ownerships with independent exhibitors should be dissolved by sale of defendants' interests to non-defendants.

Each major defendant, in creating each of these joint ownerships, eliminated competition between it and an independent "for their more effective

competition against theatres not members of the 'pool'" (R. 3548). Such a resriction of competition was particularly unreasonable because each acquiring major was "a powerful factor in the industry capable of exerting vast influence to its ends" (R. 3556) and had habitually restrained and controlled normal competition.

The court made no inquiry into the precise circumstances under which any particular interest had been acquired and treated all such relationships alike insofar as their dissolution is concerned. It recognized the enormous extent of the joint interests acquired by the major defendants in independent theatre enterprises as an obvious consequence of the majors' extraordinary control over the film supply on which those independents were dependent for survival. For example, Loew did not license its films for a first run moveover to independent theatres in Atlanta, Georgia, and Providence, Rhode Island, until it had acquired a 50 percent interest in them (R. 578–579). The theatre pooling agreements in evidence (App., pp. 137–206) show that partial control of the film supply was the basic bargaining weapon with which every defendant entered a pooling negotiation with an independent, and that an important purpose of any such pooling arrangement was to make films available to the independent's theatre on terms that were not available to an independent operator. By allowing the defendants to buy these independents out entirely, the

decree will simply permit the defendants to complete the process of eliminating these independents which was begun in the first place by defendants' unlawful conduct and market control.

We agree with the finding that these relationships are unlawful, but they should have been dissolved by a sale of the defendants' interests under the doctrine applied in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. Only by such a sale may the defendants be deprived of the fruits of their unlawful conduct. Permitting a major defendant to take over an independent's interest entirely will lead to more serious results than those found to be illegal. While joint ownership eliminated putative competition between a major and an independant, at least there was an independent in business. The district court's decree, however, will permit complete removal of the independent from the exhibition field and allow the major defendant, already a powerful factor and guilty of serious restraints on normal competition, to increase its power. Instead of eliminating an existing restraint in a way calculated to increase competition, the decree will extend the scope of the restraint by imposing an even more serious one.

This provision is particularly unsound when considered in the light of the district court's conclusion that the defendants had both restrained and attempted to monopolize trade in the distribution and exhibition fields. It seems clear

that where defendants have attempted to monopolize an industry they should at the very least be prohibited from gaining any further power by any means whatsoever. The district court apparently applied this theory in enjoining the major defendants from expanding their present theatre holdings in any manner other than that under discussion (R. 3700). But it failed to follow that principle in its relief with respect to joint ownerships. There appears to be no valid reason for this difference in treatment.

While such acquisitions are subject to court approval, that condition does not, in the view of the Government, cure the deficiencies in the court's decree. It is our view that if joint operation or ownership is illegal *per se*, as the trial court found, that illegality can, under no circumstances, be terminated by a defendant's acquisition of its partner's interests to make the enterprise wholly owned and controlled by a defendant. The seriousness of leaving it open to a defendant to acquire exclusive rights is underlined by the expectation that, in most instances, the independent will be inclined to sell rather than buy, for separation from the major will deprive the independent of the protection which induced the affiliation.* The theatres in question also have a monopoly

* While defendants have so far reported to the district court no substantial dissolution of joint stock interests with independents, Paramount has reported that most of its partners are interested in selling to it rather than buying out Paramount.

value in the defendants' hands which they have for no one else. Therefore, any proposal to buy or sell at a fixed price would result in a purchase by the defendant instead of by the non-defendant.

The optional nature of the provision also produces a deadlock in those situations where neither the defendant nor the independent desires to sell. In such cases the effectiveness of the provision is left entirely to future litigation, the outcome of which cannot now be predicted. The Government proposes compulsory sale of defendants' interests to non-defendants as the only certain way of dissolving these pooling relationships, and as the only means of preventing the major defendants from extending an already illegally acquired control of theatres.

These compulsory sales to independents of the major defendants' stock interests in theatre-owning corporations will accomplish substantial divorcement relief as to some of the major defendants. It will not, however, divest them of local theatre-operating monopolies maintained through other corporations in which independents have no interest whatever.

C. THE LOWER COURT'S CONCERN THAT DIVESTITURE WOULD BE INJURIOUS TO DEFENDANTS AND THE PUBLIC PROVIDES NO BASIS FOR DENYING SUCH RELIEF

One of the reasons given by the lower court for denying divestiture was that it "would be injurious to the corporations concerned," and

"would be damaging to the public" because new theatre owners "would be quite unlikely for some years to give the public as good service" as the defendants (R. 3551, 3559, 3690).

We do not deny that divestiture of the theatre interests would injure the defendants. We do deny that the injury would be undue, or any more than is necessary to protect the public interest in free competition. This Court has said on several occasions that, while the primary duty in an antitrust case is to eliminate restraints and restore competition, consideration should be given to the interests of the general public and investors. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, 187; *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 453, 457. We know of no case, however, where divestiture has been refused because it would injure the corporate defendants that have violated the law. The true rule is that "those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

There are two answers to the trial court's concern over damage to the public. The first is that there is nothing in the record to suggest that independent interests cannot give the public as good service as the defendants. The trial court

was certainly not justified in taking judicial notice to this effect. The basic requisite for successful theatre operation is access to good pictures. Independent exhibitors have been deprived of this essential in the past by defendants' unlawful conspiracy. Given adequate films, it seems apparent that any competent businessman can give the public good service. There are four towns of over 100,000 which the defendants have not invaded (Fdg. 150, R. 3689). No one has suggested that the theatre-goers in these towns have suffered. The record here shows that the renowned Radio City Music Hall in New York City is operated by unaffiliated interests. And the Third Circuit Court of Appeals found in *William Goldman Theatres* v. *Loew, Inc.*, 150 F. 2d 738, 742, that the independent theatre there involved "as to management, reputation and in all other respects * * * was suitable for profitable exhibition of first-class feature motion pictures on first-run competition with the" Warner theatres in Philadelphia.

The second answer to the lower court's concern over public injury is that its conclusion is a paradox. The control over the industry exercised by the defendants, their system of fixed prices, clearances, and runs, and their various discriminatory practices for years have injured the public and deprived it of the advantages of competition. If these practices can be eliminated

and competition restored only through divestiture of the distributor-exhibitor relationship, it is contradictory to deny such relief on the ground that the public might be injured because the service of independent competitors might temporarily be inferior to that provided by the monopolists. Monopolists often may provide good service, but in the Sherman Act Congress has made the judgment that competition is, in the end, to the greater public advantage.[58]

What has already been said serves, we think, to put at rest the objections made to divestiture by the court below on the grounds of injury to the defendants and to the public. An additional factor to be noted in this connection, however, is that the interest of the public in divestiture is not solely negative—avoiding injury to it; the interest of the public is a positive one—an interest in ensuring the distribution of more motion-picture products to more exhibitor outlets. If divesture is, as we think it is, the only way in which that end can be attained, then the public has a direct and affirmative interest in that remedy.

Motion pictures have become an important medium of expression and education. Their importance in controlling the thought and action of the American people has recently been the subject of a study dealing with the adverse public effects

[58] A legislative determination that divorcement of exhibition from production is in the public interest was upheld in *Paramount Pictures, Inc.* v. *Langer*, 23 F. Supp. 890, 899 (N. D.), reversed for mootness, 306 U. S. 619.

of monopolistic practices in these fields.* Divestiture will make for greater independent production of motion pictures and more exhibition outlets willing and able to exhibit to the public not only those pictures produced and distributed by the defendants but also other products, with different outlooks and of different types, which now are made available to the public, if at all, only in small out of the way theatres access to which is unavailable to the public at large.

The evidence introduced at the trial was quite properly concerned with the commercial rather than cultural aspects of the film business. In our view the relief requested here which the trial court rejected is required by antitrust precedents in purely commercial fields and was so argued there. Nevertheless, the expediting court's remedy has implications affecting constitutional

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*See general report of The Commission on Freedom of the Press, *A Free and Responsible Press*, c. 6, pp. 82–83, 1947. The conclusions of the full commission, with respect to the problems here considered, may be summarized as follows:

1. The constitutional guarantee of freedom of the press should be recognized as including motion pictures. The growing importance of the documentary film gives fresh emphasis to the need.

2. The Government should use its antitrust powers to destroy monopolistic control of production, distribution, and theatrical outlets. A healthy competition within the industry conduces to that variety and quality of service which the public interest requires.

See also, subsidiary report, *Freedom of the Movies*, University of Chicago Press, 1947.

freedom of expression which may scarcely be ignored here.

The content of films, regardless of who produces them, or exhibits them, must necessarily be conditioned to some extent by the prejudices and moral attitudes of those who control the channels of distribution. Only by assurance that the distribution field is equally open to all may the fullest diversity of film content be had. The existing decree makes no attempt to give such assurance. In fact it gives assurance that the major distributors will continue to control the distribution of the most commercially valuable films in the future as they have in the past because it assures them of continued possession of a controlled market for their product which they are free to exploit in any discriminatory manner that they choose. The past performance of the defendants has been one of creating and maintaining a control of the film market expressly designed to prevent a diversity of financial rewards comparable to the diverse merits of the films they distributed. Certainly such a past gives little hope that they will in the future encourage production of the wide variety of films needed to satisfy the wide variety of tastes possessed by the potential American film audience, rather than a standardized mass product adapted to profitable exhibition in a controlled market.

The lower court's findings leave no doubt that

the freedom to exploit commercially films of the widest diversity by divers marketing methods has been illegally suppressed by the defendants in this case. The precise effects of that suppression are now incalculable. We know only from this record that they have been long continued and wide-spread. The decree under review established a system of affirmative regulation of the defendant's distribution practices as a substitute for measures required to restore that freedom, because such measures involve a high degree of dislocation of business ownership. We respectfully submit that this Court's past decisions require the rejection by this Court of that approach and the adoption of the relief here sought.

Our point can be succinctly stated by paraphrasing a sentence from Judge Learned Hand's opinion for the district court in *United States* v. *Associated Press*, 52 F. Supp. 362, 372: It is impossible to treat two theatres or two films as interchangeable, and to deprive a theatre or a distributor of the benefit of any service of the first rating is to deprive, *pro tanto*, the theatre-going public of means of information which it should have; "it is only by cross-lights from varying directions that full illumination can be secured."

When the *Associated Press* case came to this Court, the Court noted that the First Amendment, far from providing an argument against the applica-

tion of the Sherman Act, provided "powerful reasons to the contrary". 326 U. S. 1, 20. And Mr. Justice Frankfurter, concurring, rested his affirmance of the judgment upon the ground that the restrictions it prohibited "offend the basic functions which a constitutionally guaranteed press serves in our nation". 326 U. S. at 29. When here, as in the *Associated Press* case, the distribution of information is involved, "We do not agree that the corporation's property interests settle the question". *Marsh* v. *Alabama*, 326 U. S. 501, 505.

III

The district court should have prohibited cross-licensing among the major defendants

The Government proposed below to prohibit each major defendant from licensing films produced or distributed by it to another major defendant for use in its theatres for a 10-year period beginning one year after entry of the judgment. The one-year waiting period is designed to permit the defendants to make necessary adjustments through increased film production, or through selling theatres in areas where they could not operate all of their theatres with their own product plus that of the three non-exhibitor defendants and that of non-defendant distributors. The 10-year period is considered

sufficiently long to assure discontinuance of the major defendants' unlawful conduct. This relief is also required independently of divorcement as a means of inducing a prompt divesture of theatres in those towns where the defendants have a monopoly position. See *infra*, pages ~~194–195~~. 122

A prohibition against cross-licensing is particularly appropriate relief in this case because it is directed at the very agreements by which the defendants effectuated their conspiracy. Each of the major defendants as a distributor has licensed theatres of the other majors as exhibitors on preferential terms including the conspiratorial prices, clearances and runs. Since these defendants are by far the largest exhibitors and among the most important distributors, the licensing agreements among them have set the pattern for the operation of the conspiracy in most of the large cities in the United States. So long as the right to make such agreements continues the pattern of restraints fixed by the conspiracy will persist. Under such circumstances use of these agreements should be prohibited at least until the effects of the conspiracy can be dissipated, even though the defendants are deprived of rights they otherwise might have. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 187–188; *Interstate Circuit* v. *United States*, 306 U. S. 208; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v.

Masonite Corporation, 316 U. S. 265; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

Even if defendants were prohibited absolutely from making restrictive agreements of any kind, each of them normally would tend to make its films available to the others upon the same runs they had enjoyed in the past and would continue to maintain the now customary periods of protection against later runs which were originally established by the illegal conspiracy. This can and has been done without a written agreement of any kind. For example, the record shows that Paramount did not conclude a license agreement with Loew's theatres in New York City for the 1944–45 season and did not serve them with any films until May 1945 (R. 811). Notwithstanding that there was no contract in effect during these negotiations which gave Loew a prior position in the playing of Paramount films in New York City, the showing of these films in independent subsequent-run theatres was delayed until after their exhibition by Loew (R. 782-893). Similarly, in many instances the defendants have done business with each other under contracts which contained no express clearance provisions, but simply permitted the licensee to play as many runs as it desired before the film was available to others (See Exs. 241, 273, 399, 471; App. pp. 45, 89, 116, 125, 127).

Of particular significance in this connection are net-profit-sharing license agreements between the major defendants, which the court below did not enjoin. Examples of such agreements are found in Exhibits 243 and 250 (See App. pp. 59, 97). These agreements show that Loew's pictures were licensed to Paramount's theatres in Chicago during the 1943–44 season for a share of the net profits derived from their exhibition, while, during the same season, Paramount's pictures were licensed to Loew's New York theatres for a share of the net profits derived from their exhibition. In the latter contract, no clearance or admission price terms appear, but the priority of Loew's theatres over subsequent runs on these films was maintained throughout the period covered pursuant to clearance established by prior agreement (R. 782–783).

The effect of such film licensing in unifying the financial interests of two or more defendants in exploiting a particular market is substantially the same as that of the theatre pooling arrangements which the court held unlawful.[1] It would seem that the major defendants' film licensing agreements with each other must be equally unlawful if consciously produced suppression of

[1] See pooling agreements establishing a division of films among the parties to apply after termination of the agreements (Exs. 205, 218, 230, 386; App. pp. 137–147, 180–181, 193–194, 119).

competition by agreement is the test. The court, however, permitted such licensing to continue and such arrangements would not be ended by the competitive bidding system prescribed by the trial court.

While a prohibition against cross-licenses between the major defendants would not itself prevent their theatres from exhibiting the films of Universal, Columbia, and United Artists upon the prior runs now established, it would tend to break up the existing pattern of prior runs in the major defendants' theatres, which has required these and all other distributors to favor such theatres in the past, even in the absence of an ownership interest in any theatre. The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply, which enables them to set a pattern of run priority to which other distributors conform in selling in any market in which the defendants' theatres are located.

As we have pointed out earlier (*supra*, p. 108), if permitted to cross-license, the defendants can accomplish horizontal restrictive agreements among themselves, the very practice found unlawful by the court below. Since the major defendants are both distributors and exhibitors, the net effect of such cross-licenses is to use the non-competitive outlets of each other to bring about

uniformity of licensing restrictions, and thereby eliminate competition among these five defendants and with others in both distribution and exhibition. We submit that the resulting uniform agreements are unlawful *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *International Salt Co., Inc.*, v. *United States*, No. 46, this Term. In any event, these cross-licenses must be prohibited if effective relief is to be granted against defendants' conspiracy to fix prices and playing positions by means of such licenses.

A prohibition of cross-licensing, in addition to preventing continuation of the very practices by the major defendants which the court below found unlawful, would tend to bring at least some independent competition into both distribution and exhibition fields. It would compel the major defendants, as distributors, to seek other prior-run outlets in the areas where they now employ each other's theatres for that purpose. It follows of course that a defendant would sell such theatres as it did not choose to operate with its own pictures plus those of the three nonexhibitor defendants and independent distributors. This record, however, shows that such operation in cities of over 25,000 is feasible, since independents operating first-run theatres in such cities have in the past generally existed with the product

of only one, two or three of the distributor-defendants (see Exs. 428, 428A, 432, App. pp. 299, 304, 308). In no case would any defendant be compelled to withdraw from any town as a theatre operator.

In towns where one defendant owns all of the theatres,[8] the primary effect of the prohibition would be to establish an independent theatre. This might occur by a sale of a defendant's theatre to an independent, or through new construction by an independent. In either event, the defendant's theatre operating monopoly in that area would be broken. Thus the relief provides a substantial degree of flexibility for the defendants in meeting its requirements.

There are no exact litigated precedents for such relief, since no other integrated manufacturers of products for mass consumption have enjoyed a similar mutual use of each other's retail outlets.[9] Relief restricting the number and character of

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[8] Theatre affiliates of Paramount have at least 220 of these closed towns, those of Warner at least 61, and those of Fox at least 63 (R. 359–369; Exs. 371, 397, R. 370, 2166). These are mainly towns of less than 25,000 population.

[9] Perhaps the closest approach to such a situation in Sherman Act litigation before this Court is represented by *United States* v. *Masonite Corp.*, 316 U. S. 265. But in that case the use of competing manufacturers as sales outlets for the products of one as a means of controlling resale prices was alleged to be permitted by patent license agreements. As shown (*supra*, p. 97), there is no basis here even for a claim of any comparable copyright license sanction.

retail outlets available to a national distributor is found in the consent decree before this Court in *United States* v. *International Harvester Co.*, 274 U. S. 693. That decree required the defendant to divest itself of some 5,000 retail outlets which it was alleged had been used to deprive other manufacturers of adequate retail outlets. This Court, in refusing additional relief sought by the Government, relied heavily on that provision as an adequate stimulus to competition. 274 U. S. at pp. 705–706. In *United States* v. *Swift & Co.*, 286 U. S. 106, this Court reversed a district court decision which had modified the 1920 consent decree against the major meat packers. This modification would have revoked a prohibition of the use of their distribution facilities for the marketing of certain grocery products made by them or by others which was included in the decree as assurance against their engaging in any part of the business of making or marketing such products. (See full discussion of *Swift* decision, *supra*, pp. 110–115).

A prohibition against cross-licensing among the major defendants should stimulate competition in both distribution and exhibition, but it will not deprive defendants of the fruits of their conspiracy, will not effectively reduce the power of defendants to the point necessary to permit independents to compete on a fair basis, and will not remove the restraints which automatically flow

from the vertical integration between each major distributor-defendant and its theatres. We propose a ban on cross-licensing as a necessary short-range remedy which will provide some relief during the long period required to bring about complete divorcement, and which supplies an economic incentive for divestiture of theatres in the cities where one or two of the major defendants occupy a monopoly position as theatre operators. Where three or four operate first-run theatres, the effects of such a prohibition in providing independent first-run outlets are unimportant, since there are then non-competitive preferred outlets for the films of most of the major defendants.[10] But a prohibition against the use of major defendants' theatres as an exhibition outlet for the features of another does in any event provide an incentive, now lacking, for such defendants to compete with one another, both as theatre operators and as film distributors. This is essential to any effective relief which may be decreed.

CONCLUSION

We respectfully submit that this Court should reverse the judgment below and remand the case for the entry of a decree divorcing the major defendants from their affiliated theatres and pro-

[10] It should also be borne in mind that a flat prohibition of theatre acquisitions through dissolution of pools is a necessary complement of this relief. (See, *supra*, pp. 115–120.)

hibiting those defendants from dealing with each other until such divorcement is completed.

Respectfully submitted.

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APPENDIX TO BRIEF FOR UNITED STATES

I—Film Licenses

A. Excerpts From Printed Forms of License of Each Distributor-Defendant for the 1943–44 Season

1. Columbia (Ex. 286, R. 274):

(a) Admission Price Provisions

Minimum admission price: Matinee—Adult ..... Children .....; evening—Adult ..... Children .....

* * *

Admission prices

Twentieth: The Exhibitor warrants, represents and agrees that the admission prices listed in the Schedule are the usual prices charged by Exhibitor and that during the whole of the licensed exhibition period of the motion pictures exhibited hereunder, Exhibitor shall charge not less than the prices listed in said Schedule. Exhibitor acknowledges that said prices specified in the Schedule are the prices normally and usually charged under Exhibitor's regular operating policy for admission to said theatre and that, induced thereby, Distributor has agreed to the license fees set forth in the Schedule. If during any such period less than said admission prices listed in the Schedule is charged, the Distributor, in addition to all other rights and remedies hereunder, and at law and in equity shall have the right (a) to immediately terminate the license of the motion picture then being exhibited, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion picture shall forthwith terminate and revert to the Distributor; or (b) if any of the pictures exhibited at such lesser admission price are licensed hereunder upon a percentage of the gross receipts, to require the payment by Exhibitor out of such gross receipts of the equivalent amount payable to Distributor had the aforesaid admission price set forth in the Schedule been charged; and/or provided the Exhibitor is granted herein a period

of "Clearance" to reduce such period by not to exceed one-half (½) in respect to each of the motion pictures thereafter deliverable hereunder; or (c) provided no period of "Clearance" is specified in the Schedule, to withhold for a period not to exceed sixty (60) days, notice of the date when each motion picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each motion picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such motion picture after notice of the available date thereof upon the date or dates determined as provided in Clause Sixth hereof.

(b) Run and Clearance Provisions

Run: If the Exhibitor is granted hereunder a second or subsequent "run," the Distributor shall have the right in its sole discretion to grant the Exhibitor in respect to any of the motion pictures herein embraced, a "run" prior to such second or subsequent "run" by giving notice in writing to such effect to the Exhibitor and the Exhibitor agrees to exhibit any such motion picture in accordance therewith.

* * *

Clearance and run

Seventh: The Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the "run" or prior to the expiration of the "clearance period" if any in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

* * *

Advertising prior to first run

Ninth: (a) If the Exhibitor is granted a subsequent run of the said motion pictures, the Exhibitor shall not

advertise any thereof by any means of advertising prior to or during the exhibition of any one of said motion pictures by any other exhibitor having the right to a prior run thereof. Nothing in this Clause shall be deemed to prohibit the Exhibitor from advertising generally all of said motion pictures as a group, but such general advertising shall not refer to any one of said motion pictures during its exhibition by any other exhibitor having the first or immediately prior run thereof, excepting as herein provided.

(b) The Exhibitor shall not advertise by any means of advertising any of said motion pictures which may be roadshown by the Distributor and not excepted and excluded from this license, until after the completion of such roadshowing in the United States, and then only as permitted in paragraph (a) of this Clause.

(c) For a breach of the provisions of this Clause the Distributor shall have in addition to all other rights the right to exclude from this license any motion picture advertised in violation of the provisions hereof by written notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor, but without prejudice to any and all rights Distributor may have against Exhibitor on account of such breach.

* * *

First run exhibitions

FIFTEENTH: (a) If the Exhibitor is granted a first run of the said motion pictures, the Exhibitor shall exhibit each of the feature motion pictures excepting those described in Paragraph (d) of this Clause within the period beginning with the date scheduled and announced by the Distributor for the general release of each feature motion picture in the territory wherein is located the exchange of the Distributor out of which the Exhibitor is served and ending one hundred and twenty (120) days thereafter, notwithstanding any provision of Clause Sixth hereof to the contrary. If the first exhibition date of any of the said motion pictures shall occur on a date later than ninety (90) days after its scheduled and announced general release date, then the period of clearance of such motion picture shall be reduced so as to expire one hundred and

twenty (120) days after said scheduled date of its general release. If the Exhibitor is granted a first run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said period of one hundred and twenty (120) days, the grant of the said first run and the clearance period in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor, with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in Paragraph (e) of this Clause provided.

Second run exhibitions

(b) If the Exhibitor is granted a second run of the said motion pictures and any other exhibitor having been granted the first run thereof immediately prior to such second run fails to exhibit any of the feature motion pictures, excepting those described in Paragraph (d) of this Clause within the said period of one hundred and twenty (120) days specified in Paragraph (a) of this Clause, the Exhibitor shall exhibit each such feature motion picture within the period beginning with the date of the expiration of the said one hundred and twenty (120) days period and ending fourteen (14) days thereafter, notwithstanding any provision of Clause Sixth hereof to the contrary. If the Exhibitor is granted a second run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said fourteen (14) days period the grant of such second run and the clearance period if any in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in Paragraph (e) of this Clause provided.

Subsequent runs exhibitions

(c) If the Exhibitor is granted a run subsequent to a second run of the said motion pictures and any other Exhibitor having been granted the second run thereof immediately prior to such subsequent run fails to exhibit any of the feature motion pictures, excepting those described in Paragraph (d) of this Clause within the said

period of fourteen (14) days specified in Paragraph (b) of this Clause the Exhibitor shall exhibit each feature motion picture within the period beginning with the date of the expiration of the said fourteen-day period and ending seven (7) days thereafter, notwithstanding any provision of Clause Sixth hereof to the contrary. If the Exhibitor is granted a run subsequent to a second run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said seven (7) day period, the grant of such subsequent run and the clearance period if any in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in Paragraph (e) of this Clause provided.

Extended runs

(d) Any of the motion pictures which shall have been exhibited at any theatre in the said territory for more than one show week prior to the run granted the Exhibitor shall be excepted from the provisions of this Clause and of Paragraph (b) of Clause Fourth.

Exhibition after revocation of run and clearance

(e) Upon the waiver of the grant of the run and/or the clearance period of any feature motion picture as provided in Paragraphs (a), (b), or (c) of this Clause, the Exhibitor upon payment of the sum or sums payable hereunder as provided in this Clause for the license to exhibit such feature motion picture, shall have the right to exhibit the same hereunder upon a date or dates not in conflict with any run and/or clearance period granted or hereafter granted to other exhibitors, upon written request mailed or delivered to the Distributor within sixty (60) days after the last date upon which such feature motion picture should have been exhibited by the Exhibitor as provided in this Clause. Failing to make such request within said period of sixty (60) days the license to exhibit such feature motion picture granted hereunder shall terminate and revert to the Distributor.

2. Fox (Ex. 276, R. 273):

(a) Admission Price Provisions

Admission prices

The Exhibitor during the whole of the licensed exhibition period of each of the licensed pictures exhibited hereunder shall charge for admission per person to said theatre the following prices: Evenings—Adults, Orchestra ..... Balcony .....; Children, Orchestra ..... Balcony .....; Matinees—Adults, Orchestra ..... Balcony .....; Children, Orchestra .....Balcony .....

If during any such period less than said admission price is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) to terminate the license of the picture then being exhibited, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such picture shall forthwith terminate and revert to the distributor; or (b) provided the Exhibitor is granted herein a period of "clearance" to reduce such period by not to exceed one-half in respect to each of the licensed pictures thereafter deliverable hereunder; or (c) provided no period of clearance is specified in the Schedule to withhold, for a period not to exceed sixty (60) days notice of the date when each picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the available date thereof upon the date or dates determined as provided in paragraph 7 hereof; if Distributor does not elect to terminate the license of the picture then being exhibited, as provided in subdivision (a) of this paragraph, the Exhibitor shall account for all admissions to said theatre during the exhibition of such picture on the basis of the admission prices hereinabove stipulated.

(b) Run and Clearance Provisions

Exhibition arrangement

Clearance—Run .....

The license herein granted for the number of days specified in the Schedule shall not include the right of exhibition at any time previous to dawn of the first

licensed and booked date of exhibition without securing express written permission hereunder.

Notwithstanding the maximum number of days of exhibition herein specified, or of any right hereunder to exhibit at any one or more of two or more theatres named herein, the license herein granted is expressly limited to the right to exhibit each licensed picture at only the theatre and on the respective date or dates of exhibition which shall be designated, selected, or otherwise agreed upon, and confirmed by Distributor in writing for such theatre; and said license shall not include any right of exhibition (a) at any other time or place of exhibition, (b) by means of any print other than that furnished to Exhibitor by Distributor for the express purpose of exhibition upon the play dates so licensed and confirmed in writing for the designated theatre, nor (c) at any time prior to 8:00 A. M. of the first play date so licensed and confirmed unless exhibition prior to such hours is expressly permitted in advance thereof by Distributor in writing.

* * *

8. Clearance and run: The Distributor agrees not to exhibit or license the exhibition of any of said licensed pictures in conflict with the run or prior to the expiration of the clearance period, if any, specified in the Schedule at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said licensed pictures shall be computed from the last date of the exhibition thereof therein licensed.

* * *

10. Advertising prior to first run: (a) If the Exhibitor is granted a subsequent run of the said licensed pictures the Exhibitor shall not advertise any thereof prior to or during the exhibition of such picture by any other exhibitor having the right to a prior run thereof.

(b) The Exhibitor shall not advertise any of said licensed pictures which may be road-shown by the Distributor, until after the completion of such road-showing in the United States.

(c) For a breach of the provisions of this paragraph the Distributor shall have, in addition to all other rights, the right to exclude from this license any licensed picture advertised in violation of the provisions hereof by written

notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor.

3. LOEW'S (Ex. 278, R. 273):

(a) Admission Price Provisions

Net admission prices per person (excluding admission taxes): Children under 12, Matinee, Orchestra.....Balcony.....Evening (Commencing — P. M.) Orchestra .....Balcony.....Adults and Children of 12 and over, Matinee, Orchestra.....Balcony.....Evening (Commencing — P. M.) Orchestra.....Balcony.....

* * *

13th: Admission Prices. A main consideration for the grant of this license is that Exhibitor warrants and agrees as follows: that during the entire engagement of each said pictures not less than the respective prices shown in the Schedule shall be charged for admission, and if without Distributor's prior written consent any of such respective prices are reduced during the engagement of any of said pictures Distributor may forthwith change or modify the run, availability and/or clearance herein provided for; that with respect to each participating picture Exhibitor shall account to Distributor on the basis of the respective admission prices shown in the Schedule for each person admitted to the theatre at each performance, except for a customary and reasonable number of free admissions to bona fide representatives of the press and/or in consideration of theatre advertising (provided that if at any performance any of the prices of admission are greater than as shown in the Schedule Exhibitor shall account on the basis of such larger amounts); and that during the engagement of any participating picture any of the admission prices shown in the Schedule are reduced without Distributor's prior written consent or upon failure or refusal of Exhibitor to account on the basis herein provided with respect to any one or more of the participating pictures, Distributor may forthwith either (1) change or modify the availability and/or clearance herein provided for, or (2) terminate the license herein granted as to all pictures not theretofore exhibited hereunder, or (3) terminate the license herein granted and any other exhibition

contract(s) between the parties hereto, as to all feature pictures not theretofore exhibited thereunder. In the event of such termination Distributor may thereupon declare such violation a breach of the entire contract, or contracts, so terminated as to all feature pictures not theretofore exhibited and/or paid for, entitling Distributor to recover as damages therefor the amount payable as license fees in respect of all feature pictures not theretofore exhibited and/or paid for pursuant to the provisions of the contract so terminated. Such rights shall be in addition and without prejudice to any and all other rights and remedies granted Distributor in this agreement and to any and all other rights and remedies of Distributor at law or equity.

Employment or use of cut-rate tickets or coupons or any other method of a substantially similar nature—including as example but without limitation two-for-one tickets or scrip tickets—which lowers the price of admission during the exhibition of any of the pictures licensed hereunder to said theatre to any patron or patrons below any of the respective minimum admission prices provided for hereunder shall constitute a reduction in admission price violative of this Article, entitling Distributor to exercise any or all of the rights herein granted.

(b) Run and Clearance Provisions

10th: Clearance and Run. During the life of this contract Distributor agrees not to exhibit or license the exhibition of any of said pictures in conflict with the "run" or to the expiration of the clearance period, if any, in the Schedule specified, but it is agreed that any violation hereof shall not affect this contract except as to the particular picture to which such violation has occurred, and that the damage which may be claimed by Exhibitor shall not exceed the amount of the license fee herein provided for such picture or if such picture has been contracted for, or is designated by Distributor, to be exhibited on guarantee against percentage, shall not exceed the amount of such guarantee, or if straight percentage, shall not exceed an amount to be determined as provided in "Liquidated Damages", and that such claim for damage shall be the sole and exclusive remedy of Exhibitor on account of such violation. In any arbitration involving a claim by Exhibitor under this Article any award in favor of Exhibitor shall be

limited as above provided. Unless otherwise provided herein the clearance period as to each picture shall be computed from the last date of exhibition thereof licensed hereunder. If clearance is granted hereunder against a specified theatre or theatres indicating it was Distributor's intention to grant such clearance against all theatres in the immediate vicinity of Exhibitor's theatre, then unless otherwise provided in the Schedule such clearance shall be deemed to apply to and include any theatre hereafter opened in such vicinity.

4. PARAMOUNT (Ex. 280, R. 273):

(a) Admission Price Provisions

Admission prices

The Exhibitor agrees to charge minimum admission prices per person to said theatre on the respective exhibition dates thereat of the motion pictures licensed hereunder as follows: Evenings (After 6 P. M.): Adults, Orchestra ....., Balcony ..... Children, Orchestra ..... Balcony .....; Matinees (Before 6 P. M.): Adults, Orchestra ..... Balcony ..... Children, Orchestra ..... Balcony .....

If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) To immediately terminate the license of the motion picture then being exhibited and/or of all the remaining motion pictures not theretofore exhibited hereunder, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion pictures shall forthwith terminate and revert to the Distributor and the Distributor may, at its option, declare such failure or refusal a breach of the entire contract entitling the Distributor to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder; or (b) Forthwith to revoke the run, availability and clearance, if any, herein provided for and to fix the run, availability and clearance applicable to each motion picture thereafter deliverable hereunder, and the Exhibitor agrees to exhibit each such motion picture in accordance with the run, availability and clearance so fixed; and (c) If the license fee of any such motion picture is to be computed either in whole or in part upon a

percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to the Distributor for all admissions to said theatre during the exhibition of such motion picture upon the basis of the said admission prices specified above. The Exhibitor shall not be entitled hereunder to any change in the run, availability or clearance, if any, herein provided for, by reason of any increase in admission prices at said theatre after the signing of this application by the Exhibitor.

It is expressly understood and agreed that the above minimum admission prices are exclusive of any State, Federal, or local taxes which now are or may be imposed upon admission to the theatre or theatres licensed hereunder.

(b) Run and Clearance Provisions

If the Exhibitor is granted hereunder a second or subsequent run, the same shall not be exclusive unless otherwise specified in this Schedule, and the Distributor shall have the right to license as many of the same runs and as many prior and subsequent runs as it may desire. If so required by the Distributor, the Exhibitor shall exhibit any motion picture licensed hereunder for an earlier run than herein provided.

* * *

Clearance and run—~~Seventh. (a) Subject to the~~ provisions of paragraph (b) of this Article, the Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the run or prior to the expiration of the clearance period, if any, in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder, disregarding any "road show," "try-out" or "preview," or special "midnight" exhibition. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

(b) The Distributor shall have the right to exhibit or grant a license to exhibit any of said motion pictures as a

"road show," "try-out" or "preview" or special "midnight" exhibition at any time prior to the exhibition thereof hereunder. Any such "road show," "try-out" or "preview" or special "midnight" exhibition shall not be deemed a run of said motion picture, nor shall the run, availability or clearance provided herein with respect to said motion picture to be governed thereby.

Advertising prior to run—Eighth. (a) The Exhibitor shall not advertise by any means of advertising any of said motion pictures if road shown by the Distributor until after the completion of such road showing in the United States.

(b) If the Exhibitor is granted a second or subsequent run of said motion pictures the Exhibitor shall not advertise any thereof by any means of advertising prior to or during the exhibition of any one of said motion pictures by any other exhibitor having the right to a prior run thereof in the same city, town, or zone.

(c) For a breach of the provisions of this Article the Distributor shall have in addition to all other rights the right to exclude from this license any motion picture advertised in violation of the provisions hereof by written notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of said motion picture shall terminate and revert to the Distributor.

5. RKO (Ex. 282, R. 274):

(a) Admission Price Provisions

Admission prices

During the entire period while any picture licensed hereunder is being exhibited at the theatre, the Exhibitor shall charge the following prices per person for admission to said theatre, which prices shall be exclusive of any tax upon such admission.

Matinee: Adults, orchestra.....balcony.....; children, orchestra.....balcony..... Evening: Adults, orchestra.....balcony.....; children, orchestra..... balcony.....

Unless a greater admission price is specified above, the Exhibitor will charge an admission of not less than 15¢ exclusive of any tax for adults at evening performances and not less than 10¢ exclusive of any tax at all other performances.

If during the exhibition of any picture hereunder, the Exhibitor should charge lower admission prices than those hereinbefore specified, the Distributor, in addition to all other rights hereunder shall have the right (a) to immediately terminate the license for the picture then being exhibited by giving written notice to that effect to the Exhibitor, and upon giving such notice the license for such picture shall thereupon terminate forthwith and revert to the Distributor; or (b) to reduce by not more than one-half any clearance period granted herein to the Exhibitor in respect of each picture thereafter deliverable hereunder; or (c) if no clearance is granted herein, then to withhold for not more than sixty (60) days the availability notice to the Exhibitor in respect of all pictures thereafter deliverable hereunder, and as to each such picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such picture after notice of the availability thereof upon the date or dates determined as provided in Article Ninth hereof.

(b) Run and Clearance Provisions

Clearance and run

Fourth. If the Exhibitor is granted a specific run or clearance of the pictures hereunder and is not in default hereunder, the Distributor will not license the exhibition of any such picture in conflict with the run or prior to the expiration of any clearance period so granted the Exhibitor.

* * *

Continued runs

Sixth. If any run herein granted is other than a first run, the Distributor shall have the right without incurring any liability to the Exhibitor to license any of the pictures hereunder for a "continued first run exhibition." A "continued first run exhibition" is defined to mean a run commencing immediately after the end of the initial first run and before any other run, and with admission prices not lower than those charged at the initial first run. The availability to the Exhibitor of any picture so exhibited for a continued first run shall be deferred for a period equal to the number of days that such picture shall have been so exhibited.

Prior runs

Seventh. If the run herein granted is other than a first run, the Distributor may request that any of the pictures be exhibited by the Exhibitor as a prior run and the Exhibitor agrees to comply with such request.

6. WARNER (Ex. 284, R. 274):

(a) Admission Price Provisions

Schedule of minimum admission prices

Admission prices. The Exhibitor during the whole of the licensed exhibition period of the pictures exhibited hereunder agrees to and shall charge for admission to said theatre as a minimum the following prices: (See Article Eighteenth, Page One.)

Adults: Evening, Adm. Price ..... Tax ..... Total Adm. ..... Matinee, ... Adm. Price ..... Tax ..... Total Adm. ..... Adults (U. S. Service Uniform): Evening, Adm. Price ..... Tax ..... Total Adm. ..... Matinee, Adm. Price ..... Tax ..... Total Adm. .....: Children: Evening, Adm. Price ..... Tax ..... Total Adm. ..... Matinee, Adm. Price ..... Tax ..... Total Adm. .....

* * *

Admission prices

Eighteenth. Throughout the exhibition period of each picture Exhibitor shall charge for admission to said theatre as a minimum, the prices specified in the Schedule and unless a greater minimum is therein specified the minimum shall not be less than fifteen cents (15¢) for each adult person for each matinee and evening performance. If during any such period less than such minimum admission is charged, Distributor, in addition to all other rights of Distributor hereunder in the event of a breach, may at its option by written notice to Exhibitor, either terminate this license in its entirety or with respect to the picture then being exhibited.

(b) RUN and Clearance Provisions

Clearance and run

Eighth. Distributor agrees not to exhibit or grant a license to exhibit any picture in conflict with the "run" or

prior to the expiration of the "clearance period," if any, in the schedule specified for any theatre therein named or within the territorial limits therein defined. The period of clearance as to each picture shall be computed from its last date of exhibition and unless otherwise provided in the Schedule shall cover any theatre thereafter erected or opened in the immediate vicinity of Exhibitor's theatre.

Advertising prior to first run

Ninth. If Exhibitor is licensed a subsequent run of said pictures Exhibitor shall not advertise any of them in any way before the completion of all prior run exhibitions other than by the general advertising of them as a group without referring to any one of them. Distributor may, in addition to all other rights of Distributor in the event of a breach, exclude from this license any picture advertised in violation of this paragraph by written notice to such effect mailed to Exhibitor.

7. United Artists (Ex. 288, R. 274):

(a) Admission Price Provisions

Exhibitor warrants he Charges Minimum Admission: (After 5 P. M.—Adults ..... Children .....) Matinee, Adults ..... Children .....

(b) Run and Clearance Provisions

Clearance and run

Eleventh. (a) Provided the Exhibitor is not in default hereunder the Distributor agrees to observe the Clearance specified in the schedule hereof.

(b) If the Exhibitor is granted hereunder a second or subsequent run, the Distributor shall have the right in its sole discretion to advance the Exhibitor's run, and the Exhibitor agrees to exhibit any motion picture the run of which is thus advanced in accordance therewith, even though the Exhibitor's run thus becomes a first run and there are no runs prior thereto.

Advertising prior to first run

Twelfth. If the Exhibitor is granted hereunder a second or subsequent run, the Exhibitor agrees not to advertise any picture to be delivered hereunder except by means of advertisements inside the said theatre not in-

tended for removal therefrom by the public, prior to the exhibition of any such picture by any other exhibitor having the right to the first or prior run thereof. In the event of any violation of this clause the Exhibitor agrees to pay to the Distributor a sum equal to the damage, if any, so caused such other Exhibitor, and the Distributor may, at its option, terminate the license granted hereunder for that picture to be delivered by the Distributor. The Distributor, however, shall not be liable for any breach of the provisions of this article by any other exhibitor.

8. UNIVERSAL (Ex. 290, R. 274):

(a) Admission Price Provisions

Admission prices

The Exhibitor during the whole of the licensed exhibition period of each of the motion pictures exhibited hereunder agrees to and shall charge for admission to said theatre not less than the following prices:

Matinees: Adults, orchestra.....loges.....balcony .....Children, orchestra.....loges.....balcony....

Evening: Adults, orchestra.....loges.....balcony .....Children, orchestra.....loges.....balcony.....

If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) immediately to terminate the license of the motion picture then being exhibited, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion picture shall forthwith terminate and revert to the Distributor; or (b) provided the Exhibitor is granted herein a period of "clearance" to reduce such period by not to exceed one-half in respect to each of the motion pictures thereafter deliverable hereunder; or (c) provided no period of clearance is specified in the Schedule to withhold for a period not to exceed sixty (60) days notice of the date when each motion picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such motion picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such motion picture after notice of the available date thereof upon the date or dates determined as provided in Clause Sixth hereof. If the Distributor does not elect to

terminate the license of the motion picture then being exhibited, as provided in subdivision (a) of this paragraph, the Exhibitor shall account for all admissions to the said theatre during the exhibit of such motion picture on the basis of the respective admission prices above stipulated for each person admitted to the said theatre, at each performance of said motion picture, provided that if at any such performance any of the prices of admission are greater than the respective amounts above set forth, the Exhibitor shall account to the Distributor on the basis of such larger amounts. The Distributor shall also have the right to suspend all further deliveries of motion pictures to the Exhibitor until such scale of admission prices at the said theatre shall have been restored to at least the amounts above specified. The use of "two for ones", service passes or similar devices shall be construed as a reduction in admission.

(b) Run and Clearance Provisions

Clearance and run

Seventh: The Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the "run" or prior to the expiration of the "clearance period" if any in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such a clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

* * * *

Advertising prior to first run

Ninth: (a) If the Exhibitor is granted a subsequent run of any of the said motion pictures, the Exhibitor shall not advertise any thereof by any means of advertising, prior to or during the exhibition thereof by any exhibitor having the right to prior run thereof.

(b) Nothing herein contained shall be deemed to prohibit the Exhibitor from advertising generally all of the feature motion pictures licensed for exhibition by the Exhibitor as a group, but such general advertising shall not refer to any one of said motion pictures at any time prior to its exhibition by any other exhibitor having first or immediately prior run thereof, excepting as hereinabove provided.

(c) The Exhibitor shall not advertise by any means of advertising any of said motion pictures which may be roadshown by the Distributor and not excepted and excluded from this license, until after the completion of such roadshowing in the United States, and then only as permitted in paragraph (a) of this Clause.

(d) For a breach of the provisions of this Clause the Distributor shall have in addition to all other rights the right to exclude from this license any motion picture advertised in violation of the provisions hereof by written notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor.

B. Evolution of the Printed License Form

In the following pages the evolution of the printed form of license, as evidenced by the agreements introduced by the defendant Paramount, is shown with respect to (1) the initial licensing clause, (2) the run and clearance provisions, (3) the minimum admission price provisions, and (4) the provisions relating to auditing the exhibitor's receipts. The applicable provisions relating to each of these headings appearing in each of these forms is hereinafter set forth with the form's exhibit number and year in which it was used.

1. *Initial Sentence Describing Form of License*

(a)

Ex. P–5, 1917 (R. 916).

First. The Distributor agrees that it will, during the year commencing on or about the 5th day of August 1917, release.....motion pictures, in which.....shall enact the leading role; and it hereby gives and grants to the Exhibitor the license to exhibit one copy of each of said

films, at the above named theatres only, for.....successive days, and the Exhibitor agrees to pay for such license the sum of.....Dollars, per picture, such payments to be made as follows:

(b)

Ex. P–7, 1923 (R. 926)

First. The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under copyright, subject to the terms and conditions hereinafter stated, to exhibit, during the year commencing.....1920 only at the above named theatre, for the number of successive days hereinafter specified, each of the copyrighted photoplays identified under the production numbers and titles specified in the schedule below, the titles being subject to change by the Distributor at any time.

(c)

Ex. P–8, 1926 (R. 927)

The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein, subject to the terms and conditions hereinafter stated to exhibit (during the year commencing with the date fixed or determined as hereinafter provided for the exhibition in the above named theatre of the first photoplay deliverable hereunder) each of such photoplays at the said theatre only, for the number of successive days in the said schedule specified.

(d)

Ex. P–12, 1928–9 (R. 943)

License—First. (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule pro-

vided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided.

(e)

Ex. P–11, 1935 (R. 931)

License—First. The Distributor grants the Exhibitor and the Exhibitor accepts, a limited license under respective copyrights of the motion pictures designated and described in the Schedule hereof and under the copyright of any matter included in any sound recorded therewith, to exhibit publicly said motion pictures and to reproduce for public performances such recorded sound in synchronism therewith, but only at the said theatre for the number of consecutive days specified in the Schedule and for no other use or purpose; provided that the reproducing equipment in the said theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have at the date or dates of the exhibition of each of such motion pictures a license from the copyright proprietor thereof or from any licensee of such copyright proprietor to perform publicly the said copyrighted musical compositions.

(f)

Ex. P–14, 1941 (R. 1867)

License—First. The Distributor grants the Exhibitor and the Exhibitor accepts, a limited license under respective copyrights of the motion pictures (heretofore trade-shown in accordance with Section III of the Consent Decree dated November 20, 1940, entered in the District Court of the United States for the Southern District of New York in an action entitled "*United States of America* v. *Paramount Pictures Inc., et al.*") specified in the Schedule hereof and under the copyright of any matter included in any sound recorded therewith, to exhibit publicly said motion pictures and to reproduce for public performances such recorded sound in synchronism therewith, but only at the said theatre, for the number of consecutive days specified in the Schedule and for no other use or purpose; provided that the reproducing equipment in the

said theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have at the date or dates of the exhibition of such motion pictures a license from the copyright proprietor thereof or from any licensee of such copyright proprietor to perform publicly the said copyrighted musical compositions.

(g)

Ex. P–15, 1942 (R. 1868)

License—First. The Distributor grants the Exhibitor and the Exhibitor accepts, a limited license under respective copyrights of the motion pictures specified in the Schedule hereof and under the copyright of any matter included in any sound recorded therewith, to exhibit publicly said motion pictures and to reproduce for public performance such recorded sound in synchronism therewith, but only at the said theatre for the number of consecutive days specified in the Schedule and for no other use or purpose; provided that the reproducing equipment in the said theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have at the date or dates of the exhibition of such motion pictures a license from the copyright proprietor thereof or from any licensee of such copyright proprietor to perform publicly the said copyrighted musical compositions.

(h)

Ex. P–16, 1944 (R. 1868)

Same as Ex. P–15 (1942).

(i)

Ex. P–1, 1945 (R. 683)

License—First. Distributor grants Exhibitor, and Exhibitor accepts, a limited license under copyright of the motion pictures specified in the Schedule hereof and of any matter recorded therewith, to exhibit publicly said

motion pictures and to reproduce the recorded sound in synchronism therewith at the said theatre for the number of days specified in the Schedule; on condition that, if copyrighted musical compositions are included in such recorded sound, Exhibitor will have at the date or dates of exhibition of such motion pictures a license from the copyright proprietor or the licensee thereof, to perform publicly the said musical compositions.

2. *Run and Clearance Provisions*

(a)

Ex. P–5, 1917 (R. 916)

There were no printed run and clearance provisions in the 1917 form. The 1917 license in evidence, Ex. P–5, contains the following typewritten provision:

For the protection of the applicant no productions supplied under this contract shall be shown in any other theatre in the Back Bay Section for a period of two weeks after the Exeter St. Theatre, with the exception of the St. James Theatre, which can play these productions on the same day and date with the Exeter St. Theatre.

(b)

Ex. P–6, 1918 (R. 917)

In the 1918 application, Ex. P–6, the following statement appears:

It is understood that for the protection of the applicant, you will not supply any production included in said service for exhibition (within the period of.....days immediately succeeding the last day of exhibition of the same production by the applicant) in any other theatre within the following described territory:

(c)

Ex. P–7, 1923 (R. 926)

Tenth. During the life of this agreement the Distributor agrees not to authorize or license the exhibition of any of the photoplays above specified in violation of any protection or "run" clause contained in this contract.

The only other reference to run or clearance is the column heading in the schedule, "Consecutive Days Run".

(d)

Ex. R-8, 1926 (R. 927)

Run:

Protection Period. The Distributor agrees that during the period of .....days immediately succeeding the expiration of the period for which the said photoplay is licensed hereunder, the Distributor will not exhibit or permit the exhibition of said photoplay within the following described territory:.....

.....

In addition to the provisions of Article "Fourteenth" hereof, the Exhibitor agrees not to advertise or announce in front of the theatre above named or in the lobby thereof or on the screen or by newspaper or by any other medium of advertising whatsoever, the exhibition of said photoplay until the theatre, or theatres named below shall have completed its or their exhibitions thereof:.....

* * *

Seventh. During the life of this contract the Distributor agrees not to authorize or license the exhibition of any such photoplays in violation of the "run" or "protection," period, if any, in the schedule specified. Unless otherwise provided herein such "protection" shall be computed from the first date of exhibition of each photoplay as fixed herein.

(e)

Ex. P-12, 1928 (R. 943)

Run: Protection Period:

Protection and Run—Fourth. During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise provided in the Schedule, such "protection" shall be deemed to ap-

ply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

(f)

Ex. P-11, 1935 (R. 931)

Run: Clearance:

* * *

Clearance and Run—Seventh. The Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the "run" or prior to the expiration of the "clearance period" if any in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

Advertising Prior to First Run—Eighth. (a) If the Exhibitor is granted a subsequent run of the said motion pictures, the Exhibitor shall not advertise any thereof by any means of advertising prior to or during the exhibition of any one of said motion pictures by any other Exhibitor having the right to a prior run thereof. Nothing in this Clause shall be deemed to prohibit the Exhibitor from advertising generally all of said motion pictures as a group but such general advertising shall not refer to any one of said motion pictures during its exhibition by any other exhibitor having the first or immediately prior run thereof, excepting as herein provided.

(b) The Exhibitor shall not advertise by any means of advertising any of said motion pictures which may be roadshown by the Distributor and not excepted and excluded from this license, until after the completion of such roadshowing in the United States, and then only as permitted in paragraph (a) of this Clause.

(c) For a breach of the provisions of this Clause the Distributor shall have in addition to all other rights, the right to exclude from this license any motion picture ad-

vertised in violation of the provisions hereof by written notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor, unless arbitration is herein provided for and immediately upon the receipt of any such notice of exclusion the Exhibitor by written notice given to the Distributor shall deny breaching any of the provisions of this Clause, in which case the question of fact raised by such denial shall be determined by arbitration.

First Run Exhibitions—Fifteenth. (a) If the Exhibitor is granted a first run of the said motion pictures, the Exhibitor shall exhibit each of the feature motion pictures excepting those described in Paragraph (d) of this Clause within the period beginning with the date scheduled and announced by the Distributor for the general release of each feature motion picture in the territory wherein is located the exchange of the Distributor out of which the Exhibitor is served and ending one hundred and twenty (120) days thereafter, notwithstanding any provision of Clause Sixth hereof to the contrary. If the first exhibition date of any of the said motion pictures shall occur on a date later than ninety (90) days after its scheduled and announced general release date, then the period of clearance of such motion picture shall be reduced so as to expire one hundred and twenty (120) days after said scheduled date of its general release. If the Exhibitor is granted a first run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said period of one hundred and twenty (120) days, the grant of the said first run and the clearance period in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor, with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in Paragraph (e) of this Clause provided.

Second Run Exhibitions. (b) If the Exhibitor is granted a second run of the said motion pictures and any other exhibitor having been granted the first run thereof immediately prior to such second run fails to exhibit any of the feature motion pictures, excepting those described in Paragraph (d) of this Clause within the said period of one

hundred and twenty (120) days specified in Paragraph (a) of this Clause, the Exhibitor shall exhibit each such feature motion picture within the period beginning with the date of the expiration of the said one hundred and twenty (120) days period and ending fourteen (14) days thereafter, notwithshtanding any provision of Clause Sixth hereof to the contrary. If the Exhibitor is granted a second run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said fourteen (14) days period the grant of such second run and the clearance period if any in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in Paragraph (e) of this Clause provided.

Subsequent Runs Exhibitions. (c) If the Exhibitor is granted a run subsequent to a second run of the said motion pictures and any other Exhibitor having been granted the second run thereof immediately prior to such subsequent run fails to exhibit any of the feature motion pictures, excepting those described in Paragraph (d) of this Clause within the said period of fourteen (14) days specified in Paragraph (b) of this Clause the Exhibitor shall exhibit each feature motion picture within the period beginning with the date of the expiration of the said fourteen day period and ending seven (7) days thereafter, notwithstanding any provision of Clause Sixth hereof to the contrary. If the Exhibitor is granted a run subsequent to a second run of the said motion pictures and the Exhibitor fails to exhibit any feature motion picture within said seven (7) day period, the grant of such subsequent run and the clearance period if any in respect thereof shall be deemed waived by the Exhibitor and the license fee as to such feature motion picture shall thereupon forthwith become due and payable to the Distributor with the right to the Exhibitor to exhibit such feature motion picture as hereinafter in this Clause provided.

Extended Runs. (d) Any of the motion pictures which shall have been exhibited at any theatre in the said territory for more than one show week prior to the run granted the Exhibitor shall be excepted from the provisions of this Clause and of Paragraph (b) of Clause Fourth.

Exhibition After Revocation of Run and Clearance. (e) Upon the waiver of the grant of the run and/or the clearance period of any feature motion picture as provided in Paragraphs (a), (b) or (c) of this Clause, the Exhibitor upon payment of the sum or sums payable hereunder as provided in this Clause for the license to exhibit such feature motion picture, shall have the right to exhibit the same hereunder upon a date or dates not in conflict with any run and/or clearance period granted or hereafter granted to other exhibitors, upon written request mailed or delivered to the Distributor within sixty (60) days after the last date upon which such feature motion picture should have been exhibited by the Exhibitor as provided in this Clause. Failing to make such request within said period of sixty (60) days the license to exhibit such feature motion picture granted hereunder shall terminate and revert to the Distributor.

If the provisions of this Clause shall in anywise be in conflict with the provisions of any other license agreement made and entered into by the Distributor with any other exhibitor prior to September 1, 1935, the provisions of this Clause shall be deemed to be subordinate and subject to the provisions of such other license agreement.

(g)

Ex. P–14, 1941 (R. 1867)

Run: Clearance:

If the Exhibitor is granted hereunder a second or subsequent run, the same shall not be exclusive unless otherwise specified in this Schedule, and the Distributor shall have the right to license as many of the same runs and as many prior and subsequent runs as it may desire. If so required by the Distributor, the Exhibitor shall exhibit any motion picture licensed hereunder for an earlier run than herein provided.

* * *

Clearance and Run—Seventh. (a) Subject to the provisions of paragraph (b) of this Article, the Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the run or prior to the expiration of the clearance period if any

in the Schedule specified at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said motion pictures shall be computed from the last date of the exhibition thereof licensed hereunder, disregarding any "road-show," "try-outs" or "preview," or special "midnight" exhibition. If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the Schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened.

(b) The Distributor shall have the right to exhibit or grant a license to exhibit any of said motion pictures as a "road-show," "try-out" or "preview" or special "midnight" exhibition at any time prior to the exhibition thereof hereunder. Any such "road-show," "try-out" or "preview" or special "midnight" exhibition shall not be deemed a run of such motion picture, nor shall the run, availability or clearance provided herein with respect to such motion picture be governed thereby.

Advertising Prior to Run—Eighth. (a) The Exhibitor shall not advertise by any means of advertising any of said motion pictures which may be roadshown by the Distributor until after the completion of such roadshowing in the United States.

(b) If the Exhibitor is granted a second or subsequent run of the said motion pictures, the Exhibitor shall not advertise any thereof by any means of advertising prior to or during the exhibition of any one of said motion pictures by any other exhibitor having the right to a prior run thereof in the same city, town or zone.

(c) For a breach of the provisions of this Article the Distributor shall have in addition to all other rights the right to exclude from this license any motion picture advertised in violation of the provisions hereof by written notice to such effect mailed to the Exhibitor and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor.

(h)

Ex. P-15, 1942 (R. 1868)—Same as Ex. P-14 (1941)

(i)

Ex. P–16, 1944 (R. 1868)—Same as Ex. P–14 (1941) and P–15 (1942)

(j)

Ex. P–1, 1945 (R. 683)

Run: Clearance:

* * *

Clearance and Run—EIGHTH. (a) Subject to the provisions of paragraph (b) of this Article, Distributor agrees not to exhibit or grant a license to exhibit any of said motion pictures for exhibition in conflict with the run or clearance, if any, specified in the Schedule. Clearance as to each of said motion pictures shall be computed from the last date of exhibition thereof licensed hereunder. If clearance is granted against all theatres in the immediate vicinity of Exhibitor's theatre, then unless otherwise provided in the Schedule, such clearance shall include theatres in such vicinity thereafter erected or opened.

(b) Distributor shall have the right to exhibit or grant a license to exhibit any of said motion pictures as a "roadshow," "try-out" or "preview" or special "midnight" exhibition at any time prior to the exhibition thereof hereunder. Any such exhibition shall not be deemed a run of said motion picture, nor shall the run, availability or clearance provided herein with respect to said motion picture be governed thereby or computed therefrom.

(c) If Exhibitor is granted a second or subsequent run, the same shall not be exclusive unless so expressly specified in the Schedule and Distributor may license as many of the same runs and as many prior and subsequent runs as it may desire. If Distributor so requires, Exhibitor shall exhibit any motion picture licensed hereunder for an earlier run than herein provided.

Advertising prior to run—Ninth. (a) Exhibitor shall not advertise by any means any of said motion pictures if roadshown by Distributor, until after completion of such roadshowing in the United States.

(b) If Exhibitor is granted a second or subsequent run of said motion pictures Exhibitor shall not advertise any thereof by any means, prior to or during the exhibition of

any of said motion pictures by any other exhibitor having the right to a prior run thereof in the same city, town or zone.

(c) Distributor shall have in addition to all other rights and remedies the right to exclude from this license any motion picture advertised in violation of the provisions hereof, by mailing written notice to Exhibitor and upon such mailing the license of said motion picture shall terminate and revert to Distributor.

3. *Admission Price Provisions*

(a)

Ex. P–5, 1917 (R. 916)

Contains no provision respecting admission prices.

(b)

Ex. P–6, 1918 (R. 917)

Application contains a representation which reads as follows:

Applicant agrees to charge following admission prices for "Paramount Pictures":

Minimum.....¢

Maximum.....¢

(c)

Ex. P–7, 1923 (R. 926)

Second: The Exhibitor shall charge an actual minimum admission fee of .....cents..... at said theatre on the dates when said photoplays shall be exhibited thereat.

(d)

Ex. P–8, 1926 (R. 927)

The Exhibitor agrees to charge the following minimum prices for admission to said theatre during entire period of exhibition of said photoplay:

Matinee: Adults, Boxes..... Orch..... Balcony ..... Children, Boxes....., Orch..... Balcony.....

Evening: Adults, Boxes..... Orch..... Balcony ..... Children, Boxes..... Orch....., Balcony.....

Any free list of the theatre shall be suspended during the exhibition of the said photoplay hereunder, and no passes or reduced or gratuitous admission shall be allowed unless expressly and specifically provided for in this contract.

If the Exhibitor charges less than the admission prices herein stipulated, the Exhibitor shall account for all admission to the said theatre during the exhibition of such photoplay on the basis of the prices hereinabove stipulated.

Seventeenth. The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

(c)

Ex. P-12, 1928 (R. 943)

The Exhibitor agrees to charge minimum admission prices to said theatre on the respective exhibition dates thereat of the photoplays licensed hereunder as follows:

Evenings: Adults, Orchestra ..... Balcony .....
Children, Orchestra ..... Balcony .....
Matinees: Adults, Orchestra ..... Balcony .....
Children, Orchestra ..... Balcony .....

Minimum Admission Charge—Twelfth. The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

(f)

Ex. P–11, 1935 (R. 931)

The Exhibitor agrees to charge minimum admission prices per person to said theatre on the respective exhibition dates thereat of the motion pictures licensed hereunder as follows:

Evenings (after 6 P. M.): Adults, Orchestra ..... Balcony ..... Children, Orchestra ..... Balcony .....

Matinees (before 6 P. M.): Adults, Orchestra ..... Balcony ..... Children, Orchestra ..... Balcony .....

If during any such period less than said admission prices is charged, the Distributor in addition to all other rights hereunder shall have the right: (a) to immediately terminate the license of the motion picture then being exhibited and/or of all the remaining motion pictures not theretofore exhibited hereunder, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion picture and/or motion pictures shall forthwith terminate and revert to the Distributor and the Distributor may, at its option, declare such failure or refusal a breach of the entire contract entitling the Distributor to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder; or (b) provided the exhibitor is granted herein a period of "clearance" to reduce such period by not to exceed one-half in respect to each of the motion pictures thereafter deliverable hereunder; or (c) provided no period of "clearance" is specified in the Schedule to withhold for a period not to exceed sixty (60) days notice of the date when each motion picture thereafter deliverable hereunder will be available for exhibition by the Exhibitor; and as to each such motion picture the "run" thereof, if any, granted the Exhibitor, shall be deemed revoked and the Exhibitor agrees to exhibit each such motion picture after notice of the available date thereof upon the date or dates determined as provided in Clause Sixth hereof; and (d) if the license fee of any such motion picture is to be computed either in whole or in part upon a percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to the Distributor for all admissions to said

theatre during the exhibition of such motion picture upon the basis of the said admission prices specified above.

* * *

Roadshows—Seventeenth. (a) The Distributor shall have the right to exhibit and/or cause to be exhibited as a "roadshow," at any time prior to the exhibition thereof hereunder, such of the motion pictures licensed hereunder as the Distributor may from time to time select and determine, provided, however, that such roadshow exhibitions shall be at theatres at which admission prices for evening performances, during such exhibitions thereof, of not less than one ($1) dollar shall be charged for the majority of the orchestra seats, and further provided that, except in the cities of New York and Los Angeles, not more than two of such motion pictures shall be so roadshown.

(b) If and when any such roadshow exhibition shall be in the City of New York and/or the City of Los Angeles, and if the Exhibitor's theatre is situated in the territory then served by the Distributor's exchange or exchanges located in New York or in Los Angeles, as the case may be, the Distributor shall have the right to except and exclude from this license not to exceed two of such motion pictures so roadshown in each or both of said territories, upon sending to the Exhibitor written notice to such effect not later than four (4) weeks after the commencement of such roadshow exhibition and provided that the Distributor shall by like notice except and exclude such motion picture from all other license agreements containing this Clause and licensing the exhibition of such motion picture in such territory. The exception and exclusion of any such motion picture in the territory then served by the Distributor's exchange or exchanges located in the City of Los Angeles, or in the City of New York, as the case may be, shall not be deemed to require the Distributor to except and exclude the same motion picture in both of said territories.

(g)

Ex. P–14, 1941 (R. 1867).

The Exhibitor agrees to charge minimum admission prices per person to said theatre on the respective exhi-

bition dates thereat of the motion pictures licensed hereunder as follows:

Evenings (After 6 P. M.): Adults, Orchestra..... Balcony ..... Children, Orchestra ..... Balcony .....

Matinees (Before 6 P. M.): Adults, Orchestra..... Balcony..... Children, Orchestra..... Balcony.....

If during any such period less than said admission prices is charged; the Distributor in addition to all other rights hereunder shall have the right: (a) to immediately terminate the license of the motion picture then being exhibited and of all the remaining motion pictures not theretofore exhibited hereunder, by written notice to such effect to the Exhibitor and upon the giving of such notice, the license of such motion pictures shall forthwith terminate and revert to the Distributor and the Distributor may, at its option, declare such failure or refusal a breach of the entire contract entitling the Distributor to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder; or (b) forthwith to revoke the run, availability and clearance, if any, herein provided for and to fix the run, availability and clearance applicable to each motion picture thereafter deliverable hereunder, and the Exhibitor agrees to exhibit each such motion picture in accordance with the run, availability and clearance so fixed; and (c) if the license fee of any such motion picture is to be computed either in whole or in part upon a percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to the Distributor for all admissions to said theatre during the exhibition of such motion picture upon the basis of the said admission prices specified above. The Exhibitor shall not be entitled hereunder to any change in the run, availability or clearance, if any, herein provided for by reason of any increase in admission prices at said theatre after the signing of this application by the Exhibitor.

It is expressly understood and agreed that the above minimum admission prices are exclusive of any State, Federal or local taxes which now are or may be imposed upon admission to the theatre or theatres licensed hereunder.

(h)

Ex. P–15, 1942 (R. 1868)

Same as Ex. P–14 (1935).

(i)

Ex. P–16, 1944 (R. 1868)

Same as Ex. P–14 (1935) and Ex. P–15 (1942).

(j)

Ex. P–1, 1945 (R. 683)

The minimum admission prices per person (excluding federal, state or local taxes) to said theatre on the respective exhibition dates of the motion pictures licensed hereunder shall be as follows:

Evenings (After 6 P. M.): Adults, Orchestra..... Balcony..... Children, Orchestra..... Balcony.....

Matinees (Before 6 P. M.): Adults, Orchestra..... Balcony..... Children, Orchestra..... Balcony.....

If the license fee of any such motion picture is to be computed in whole or in part upon a percentage of the gross receipts of said theatre and if Exhibitor charges less than said minimum admission prices, Exhibitor shall nevertheless account to Distributor for admissions to said theatre during the exhibition of such motion picture upon the basis of the minimum admission prices above provided.

If Exhibitor charges less than said minimum admission prices, Distributor may forthwith revoke the run, availability and clearance, if any, herein provided for and fix the run, availability and clearance applicable to each motion picture hereunder, and Exhibitor agrees to exhibit each such motion picture in accordance with the run, availability and clearance so fixed. Exhibitor shall not be entitled to any change in the run, availability or clearance, if any, herein provided for because of any increase in admission prices at said theatre after the signing of this application by Exhibitor.

4. *Provisions For Auditing Exhibitor's Receipts*

(a)

Ex. P–5, 1917 (R. 916)

Contained no such provision.

(b)

Ex. P–7, 1923 (R. 926)

Sixteenth. If this contract calls for payments computed upon the Exhibitor's gross receipts, the Exhibitor shall furnish to the Distributor daily a correct itemized statement of the gross receipts of said theatre for admission thereto upon the play dates of said photoplays, upon forms supplied by the Distributor should the latter so demand; and the Distributor shall have access at all reasonable times for the purpose of inspection to the box office and to all books and records relating to the Exhibitor's box office receipts during the period of exhibition of said photoplays.

(c)

Ex. P–8, 1926 (R. 927)

Fifth. If this contract calls for payment or any part thereof computed upon the Exhibitor's gross receipts the Exhibitor shall furnish to the Distributor daily a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor.

The Distributor shall have access during the period of exhibition of each such photoplay and for a period of sixty (60) days after the receipt by the Distributor of the final box office statement, for the purpose of inspection, to the box office and to all books and records relating to the Exhibitor's box office receipts during the period of exhibition of each such photoplay.

Payment or any part thereof computed upon the Exhibitor's box office receipts shall be made daily during the

exhibition of the print of each photoplay for which payment is so required to be made.

(d)

Ex. P-12, 1928 (R. 943)

Percentage Bookings. If this contract calls for payment or any part thereof computed upon the Exhibitor's gross receipts, such payment or any part thereof shall be made daily, together with a correct itemized statement of the gross receipts of said theatre for admission thereto upon the exhibition date or dates of each photoplay for which payment is so required to be made. Should the Distributor so require, such itemized statement shall be made upon forms furnished by the Distributor. Upon such date or dates an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine the Exhibitor's books and records insofar as they relate to such gross receipts. The Distributor, or its authorized representative, shall also have access for a period of sixty (60) days after the receipt by the Distributor of the final box office statement, to all of the Exhibitor's books and records for the purpose of verifying such box office statement. The Distributor agrees that any information obtained by it pursuant to the provisions of this Clause will be treated as confidential, except in any arbitration proceeding or litigation in respect of this contract. The Distributor agrees, unless such representative be a regular employee of the Distributor, not to employ, as such representative any person a resident of, or regularly employed in the place where the Exhibitor's theatre is located, excepting with the consent of the Exhibitor.

(e)

Ex. P-11, 1935 (R. 931)

(b) Percentage Bookings. If the rental of any of such motion pictures is to be determined either in whole or in part upon the admission receipts of said theatre or any part thereof, the Exhibitor agrees to pay such rental immediately after the last exhibition upon the last date of

the exhibition of each such motion picture or if requested by the Distributor at the end of each day's exhibition. In each such case the Exhibitor shall deliver to the Distributor immediately after the last exhibition upon each date of exhibition of each such motion picture a correct itemized statement of the gross receipts of said theatre for admission thereto upon each such date. Such statement shall be signed by the Exhibitor or the Manager or Treasurer of said theatre and the Cashier thereof and shall include a statement of such facts and figures as may be provided in the Schedule to be furnished by the Exhibitor, and if requested by the Distributor, shall be made upon forms furnished by the Distributor. Upon the exhibition date or dates of each motion picture an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine all relevant entries relating to such gross receipts in all the Exhibitor's books and records, and if hereunder it is provided that the Exhibitor make certain expenditures and/or deductions, to examine all entries relating to such expenditures and/or deductions. Such right of access and examination of the Exhibitor's books and records limited as aforesaid, shall continue for a period of four (4) months after the receipt by the Distributor of each such statement. The Distributor agrees, unless such representative is in the continuous employ of the Distributor or employed as a checker, not to employ as a representative for such purpose any person a resident of or employed in the place where the said theatre is located, other than a person engaged in business as an accountant. The Distributor agrees that any information obtained pursuant to the provisions of this clause will be treated as confidential, excepting in any arbitration proceeding or litigation in respect to this license.

(c) Liquidated Damages—Percentage Bookings. If the Exhibitor fails or refuses to exhibit any of said motion pictures as herein provided and the rental or any part thereof is to be computed in whole or in part upon a percentage of the admission receipts of said theatre, the Exhibitor shall pay the Distributor as liquidated damages for each day the Exhibitor fails or refuses to exhibit such motion pictures, in addition to any fixed sums payable

hereunder in respect of such motion picture, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by the Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said motion picture should have been so exhibited hereunder, or if no feature motion picture distributed by the Distributor was exhibited at such theatre during said ninety day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty operating days immediately prior to the date or dates when such motion pictures should have been exhibited, or prior to the date of such failure or refusal to exhibit any of said motion pictures; provided that if the Exhibitor shall exhibit such motion pictures for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to sixty-five (65%) of the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

(f)

Ex. P-14, 1941 (R. 1867)

(b) Percentage Bookings. If the license fee for any of such motion pictures is to be determined either in whole or in part upon the admission receipts of said theatre, or any part thereof, the Exhibitor agrees to pay such license fee immediately after the last exhibition upon the last date of the exhibition of each such motion picture, or if requested by the Distributor, at the end of each day's exhibition. In each such case the Exhibitor shall deliver to the Distributor immediately after the last exhibition upon each date of exhibition of each such motion picture a correct itemized statement of the gross receipts of said theatre for admission thereto upon each such date. Such statement shall be signed by the Exhibitor or the Manager or Treasurer of said theatre and the Cashier thereof and shall include a statement of such facts and figures as may be provided in the Schedule to be furnished by the Exhibitor, and if requested by the Distributor, shall be made

upon forms furnished by the Distributor. Upon the exhibition date or dates of each motion picture an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and for such purpose shall have access to the theatre, including the box office, and also the right to examine all relevant entries relating to such gross receipts in all the Exhibitor's books and records, and if hereunder it is provided that the Exhibitor make certain expenditures or deductions, to examine all entries relating to such expenditures or deductions. It is further agreed that if the Exhibitor's operating expense is an element in the computation of the license fees payable to the Distributor hereunder, the right herein granted to the Distributor to audit the Exhibitor's books and records shall include the right to examine all of such books and records relating to the Exhibitor's operating expenses. Such right of access and examination of the Exhibitor's books and records limited as aforesaid, shall continue for a period of one (1) year after the receipt by the Distributor of each such statement. The Distributor agrees that any information obtained pursuant to the provisions of this paragraph will be treated as confidential, excepting in any arbitration proceedings or litigation in respect to this license. It is agreed that the acceptance by the Distributor of any sum tendered by the Exhibitor in full payment of any license fee payable hereunder, based upon a percentage of the admission receipts of said theatre, shall not estop or prevent the Distributor from thereafter disputing the correctness of such payment. It is further agreed that any and all sums of money accruing to the Distributor hereunder as its share of the gross receipts during the exhibition of any motion picture hereunder, shall be held by the Exhibitor in trust for the Distributor until payment thereof to the Distributor as hereinbefore provided.

(c) Liquidated Damages—Failure to Exhibit. If the Exhibitor shall fail or refuse to exhibit any of said motion pictures as provided herein, then and in such event, the Exhibitor shall pay as liquidated damages a sum equal to the fixed sum or sums herein specified as the license fee for each such motion picture, and if the license fee or any part thereof is to be computed in whole or in part upon a percentage of the admission receipts of said theatre,

the Exhibitor shall pay the Distributor as liquidated damages for each day the Exhibitor fails or refuses to exhibit such motion pictures, in addition to any fixed sums payable hereunder in respect of such motion pictures, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by the Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said motion picture should have been so exhibited hereunder, or if no feature motion picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such motion pictures should have been exhibited, or prior to the date of such failure or refusal to exhibit any of said motion pictures; provided that if the Exhibitor shall exhibit such motion pictures for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to seventy-five (75%) percent, of the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

(g)

Ex. P–15, 1942 (R. 1868)

(b) Percentage Bookings. If the license fee for any of such motion pictures is to be determined either in whole or in part upon the admission receipts of said theatre, or any part thereof, the Exhibitor agrees to pay such license fee immediately after the last exhibition upon the last date of the exhibition of each such motion picture, or if requested by the Distributor, at the end of each day's exhibition. In each such case the Exhibitor shall deliver to the Distributor immediately after the last exhibition upon each date of exhibition of each such motion picture a correct itemized statement of the gross receipts of said theatre for admission thereto upon each such date. Such statement shall be signed by the Exhibitor or the Manager

or Treasurer of said theatre and the Cashier thereof and shall include a statement of such facts and figures as may be provided in the Schedule to be furnished by the Exhibitor, and if requested by the Distributor, shall be made upon forms furnished by the Distributor. Upon the exhibition date or dates of each motion picture an authorized representative of the Distributor is hereby given the right to verify the sale of all tickets of admission to said theatre, and the receipts therefrom; and at any time after the conclusion of the engagement of each such motion picture, the Distributor's authorized representative shall have the right to audit all of the Exhibitor's books and records pertaining to the exhibition of such motion picture, the admissions to said theatre and the receipts therefrom; and for such purpose the Distributor's authorized representative shall have access to the theatre, including the box office, and also the right to examine all relevant entries relating to such gross receipts in all the Exhibitor's books and records, and if hereunder it is provided that the Exhibitor make certain expenditures or deductions, to examine all entries relating to such expenditures or deductions. It is further agreed that if the Exhibitor's operating expense is an element in the computation of the license fees payable to the Distributor hereunder, the right herein granted to the Distributor to audit the Exhibitor's books and records shall include the right to examine all of such books and records relating to the Exhibitor's operating expenses. In computing the Exhibitor's operating expenses, all income payable to the Exhibitor, such as amounts from renting or sub-renting space in the theatre building or for screen advertising in the theatre, etc., during the engagement of any motion picture licensed hereunder, the license fee for which is based in whole or in part upon a percentage of the admission receipts of said theatre, shall be deducted from the Exhibitor's operating expenses. The Distributor agrees that any information obtained pursuant to the provisions of this paragraph will be treated as confidential, excepting in any arbitration proceeding or litigation in respect to this license. It is agreed that the acceptance by the Distributor of any sum tendered by the Exhibitor in full payment of any license fee payable hereunder, based upon a percentage of the admission receipts of said theatre, shall

not estop or prevent the Distributor from thereafter disputing the correctness of such payment. It is further agreed that any and all sums of money accruing to the Distributor hereunder as its share of the gross receipts during the exhibition of any motion picture hereunder, shall be held by the Exhibitor in trust for the Distributor until payment thereof to the Distributor as hereinbefore provided.

(c) Liquidated Damages—Failure to Exhibit. If the Exhibitor shall fail or refuse to exhibit any of said motion pictures as provided herein, then and in such event, the Exhibitor shall pay as liquidated damages a sum equal to the fixed sum or sums herein specified as the license fee for each such motion picture, and if the license fee or any part thereof is to be computed in whole or in part upon a percentage of the admission receipts of said theatre, the Exhibitor shall pay the Distributor as liquidated damages for each day the Exhibitor fails or refuses to exhibit such motion picture, in addition to any fixed sums payable hereunder in respect of such motion picture, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by the Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said motion picture should have been so exhibited hereunder, or if no feature motion picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such motion picture should have been exhibited, or prior to the date of such failure or refusal to exhibit said motion picture; provided that if the Exhibitor shall exhibit said motion picture for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to seventy-five (75%) percent of the gross receipts of said theatre during the last day of the exhibition thereat of said motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

(h)

Ex. P–16, 1944 (R. 1868)

Same as Ex. P–15 (1942).

(i)

Ex. P–1, 1945 (R. 683)

(b). Percentage Bookings. If the license fee for any of said motion pictures is to be determined in whole or in part upon all or any part of the gross admission receipts (herein referred to as gross receipts) of said theatre, Exhibitor shall pay the percentage part of such license fee immediately after the last exhibition date of each such motion picture respectively, or if requested by Distributor, at the end of each day's exhibition. Exhibitor shall deliver to Distributor immediately after the last exhibition of each respective motion picture a correct itemized statement of the gross receipts of said theatre for each date of exhibition, upon forms furnished by the Distributor, signed by Exhibitor or the Manager or Treasurer and the Cashier of said theatre. The statement shall include such facts and figures as may be provided in the Schedule to be furnished by Exhibitor. Distributor is hereby given the right to verify, upon the exhibition date or dates of each motion picture, all admissions to said theatre, and the receipts therefrom; and at any time or times after the conclusion of the engagement of each motion picture Distributor shall have the right to audit all of Exhibitor's books, records and vouchers pertaining to the exhibition of such motion picture, the admissions to said theatre and the receipts therefrom, and pertaining to any expenditures or deductions provided hereunder to be made by Exhibitor, and if Exhibitor's operating expense is an element in computing the license fees payable hereunder, pertaining to such operating expenses. The right of verification and the right to audit may be exercised by Distributor through its authorized representatives. For said purposes Distributor and its authorized representatives shall have free access, on and after said exhibition dates, to the theatre, box office, ticket machines, tickets, stubs, books, records and vouchers. Distributor agrees that any information obtained pursuant to the provisions of this paragraph shall be treated as confidential excepting in any arbitration proceedings or litigation. Acceptance by Distributor of

any sum tendered by Exhibitor in full or part payment of any license fee based upon a percentage of the admission receipts of said theatre shall not estop or prevent Distributor from thereafter disputing the correctness of such payment.

(c) Liquidated Damages—Failure to Exhibit. If Exhibitor fails or refuses to exhibit any of said motion pictures as provided herein, Exhibitor shall pay as liquidated damages a sum equal to the fixed sum herein specified as the license fee for each such motion picture, and if the license fee is to be computed in whole or in part upon a percentage of the gross receipts of said theatre, Exhibitor shall pay Distributor as liquidated damages for each day Exhibitor fails or refuses to exhibit such motion picture, in addition to any fixed sums payable hereunder in respect of such motion picture, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said motion picture should have been so exhibited hereunder, or if no feature motion picture distributed by Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days prior to the date or dates when such motion picture should have been exhibited. Upon demand therefor, Exhibitor shall deliver to Distributor a statement of said daily gross receipts, sworn by Exhibitor to be correct. If Exhibitor shall exhibit said motion picture for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to seventy-five (75) percent of the gross receipts of said theatre during the last day of the exhibition thereat of said motion picture.

C. Examples of Licenses Used by Defendants in Dealing with Each Other

1. Paramount formula deal with Fox subsidiary, Evergreen Theatres Corporation (Ex. 241, R. 269).

Agreement made this 5th day of June 1944, by and between Paramount Film Distributing Corporation, herein-

after called the "Distributor," party of the first part, and Evergreen Theatres Corporation, as agent for the various motion picture exhibition companies affiliated or associated with said Evergreen Theatres Corporation and operating the various theatres listed in Schedule "A" annexed hereto, hereinafter called the "Exhibitor," party of the second part, witnesseth:

First. (a) Distributor, subject to the terms and conditions hereinafter specified, grants to the Exhibitor a license under the respective copyrights of the motion pictures (hereinafter called "photoplays") licensed hereunder, to exhibit in the theatres listed in the annexed Schedule "A," hereby made a part hereof, for the respective runs designated therein, the following photoplays.

Going My Way

The Exhibitor hereby accepts such license and agrees to fully and faithfully comply with all the terms and conditions hereof.

(b) It is the intention and agreement of the parties hereto that the license granted herein is for the exhibition of said photoplays in the theatres and on the runs specified in Schedule "A" for such playing time in each theatre as may be determined by the Exhibitor. Such license to the Exhibitor shall include, without limiting the generality of the foregoing the right to exhibit the said photplays at Midnight Shows, preview (not "Studio" previews) and on repeat engagements. In further reference to said Midnight Shows, previews and repeat engagements, it is understood and agreed that such privilege shall be granted only in such cases where the exhibition of the photoplay will not interfere with the clearance or run granted to any other Exhibitor on such photoplay. In further reference to repeat engagements, such exhibition shall be permitted only as the last run in the zone or territory in which the particular theatre is situated, provided that such Photoplay has not been withdrawn from release nationally, and provided further that a serviceable print is available at the Exchange serving the theatres under this Agreement.

(c) The Distributor agrees to deliver to the Exhibitor prints of each of the photoplays licensed hereunder sufficient in number to enable the Exhibitor to exhibit each

such photoplay in each of the theatres listed in Schedule "A" on the fun set forth in such Schedule, on the date or dates of exhibition selected by the Exhibitor; except in those situations which have the right to exhibit the photoplays upon national release date, the Distributor agrees to assign to the Exchange the number of prints presently being served to that exchange, and the Distributor agrees to make available at least the same number of prints that were served to the Exhibitor for such situations for the motion picture season 1940–1941.

(d) For the purpose of this agreement, a photoplay shall be deemed to have been "generally released" after it has been publicly exhibited in ten (10) or more situations throughout the United States at admission prices usually charged for admission to the theatres where so exhibited, excluding roadshows and preview exhibitions, if any.

Second. For the license herein granted, the Exhibitor agrees to pay license fees for each of such motion pictures, as follows:

If the total license fees (including all amounts payable hereunder by the Exhibitor after final computation hereinafter explained) paid to the Distributor for license for the exhibition of each such photoplay in the United States (including Honolulu) during the first eighteen (18) months following the "general release" of each such photoplay shall be:

1. in excess of $1,250,000.00, the Exhibitor shall pay as a license fee for such photoplay 0.74778 percent of such total license fees;

2. equal to or in excess of $500,000.00, but not in excess of $1,250,000.00 the Exhibitor shall pay as a license fee for such photoplay 0.70115 percent of such total license fees;

3. less than $500,000.00, the Exhibitor shall pay as a license fee for such photoplay 0.65431 percent of such total license fees.

Such license fee shall be computed and paid in the following manner:

(a) Within seven (7) days after the date of general release as fixed by the Distributor in the United States of each such photoplay licensed hereunder, the Distributor shall estimate the total license fee (including amounts

payable hereunder by the Exhibitor) expected to be paid to it for license for the exhibition of each such photoplay in the United States (including Honolulu) (hereinafter sometimes referred to as "first estimate"). The Exhibitor shall pay to the Distributor an amount equal to the proper percentage, as provided herein, of such estimated total license fees in equal weekly installments of One-Seventeenth (1/17) of such amount on the first business day of each consecutive week following the date of general release of each such photoplay, the first of which payments shall be made on the first business day of the second week of general release.

(b) During the sixteenth (16th) week following the date of general release of each such photoplay, the Distributor shall again estimate the total license fees (including amounts payable hereunder by the Exhibitor) expected to be paid to it for licenses for the exhibition of such photoplay in the United States (including Honolulu) (hereinafter sometimes referred to as "second estimate"). If the second estimate shall be greater than the first estimate, the Exhibitor shall pay simultaneously with the seventeenth (17th) installment payable hereunder, an amount representing the difference between the amount payable in accordance with the first estimate and the amount payable in accordance with the second estimate. If the second estimate shall be less than the first estimate, the Distributor shall forthwith refund to the Exhibitor such amount as shall represent the difference between the first and second estimate, or reduce the amount of the last installment, as the case may be.

(c) During the twentieth (20th) month following the date of general release of each such photoplay, the Distributor agrees to furnish the Exhibitor with a statement prepared by Price, Waterhouse and Company, its present auditor, or such public accounting firm as shall then be engaged by the Distributor for the preparation of its financial statements, which statement shall indicate the total license fees paid to the Distributor for licenses for the exhibition of each such photoplay in the United States (including Honolulu), and shall be certified by said Price, Waterhouse and Company, or its successor, to be correct (hereinafter sometimes referred to as "final computa-

tion"). Not later than thirty (30) days after such final computation the Exhibitor shall pay any additional sum required to be paid, or the Distributor shall refund to the Exhibitor any excess payment made by it, as the case may be in accordance with the aforesaid statement so rendered, so that the adjusted total payment made hereunder by the Exhibitor shall equal the proper percentage as provided herein of the said total license fees (including amount payable hereunder by the Exhibitor) as set forth in such final computation.

Third. The clearance and availability with respect to the theatres licensed hereunder shall be the same as are in effect at the date hereof unless otherwise noted on Schedule "A" attached hereto.

Fourth. Other terms and provisions of the license herein granted are set forth on Schedule "B" annexed hereto and made a part hereof, provided, however, that wherever the terms and provisions of said Schedule "B" are in conflict or inconsistent or at variance with the terms and provisions contained herein, then, and in such event, the provisions of this agreement shall govern and apply.

In witness whereof, the parties hereto have signed and sealed this agreement the day and year first above written.

(As Agent)
EVERGREEN THEATRES CORPORATION.
By ROY A. BROWN. (Sgd.)

PARAMOUNT FILM DISTRIBUTING CORPORATION.
By D. GOODMAN. (Sgd.)

SEATTLE EXCHANGE

Schedule "A".—List of situations, theatres, and runs included in this agreement

Situation	Theatre	Run
Aberdeen, Wash	D & R or Weir	1st.
	Weir	2nd.
Bellingham, Wash	Mt. Baker or American or Avalon.	1st & M. O.
	American or Avalon.	2nd.
Bremerton, Wash	Admiral or Rialto or Rex.	1st & M. O.
	Rex	2nd.
Everett, Wash	Granada or Everett or Balboa.	1st.
	Granada or Everett or Balboa.	2nd.
Hoquiam, Wash	7th Street	1st.
Olympia, Wash	Liberty	1st.
Seattle, Wash	5th Avenue and/or Paramount. and/or Orpheum. and/or Palomar. and/or Roosevelt. and/or Music Box. and/or Blue Mouse. and/or Music Hall.	1st & M. O.
	Coliseum or Roosevelt.	2nd.
Seattle, Wash	Egyptian or Neptune.	1st sub., 3rd city.
Spokane, Wash	State or Fox or Orpheum.	1st & M. O.
	Liberty	2nd.
Wenatchee, Wash	Liberty or Rialto	1st.
	Rialto	2nd.

[*Exhibit 241 includes eight additional contracts in the same form which merely cover additional films and are therefore not printed herein. The standard form attached to Ex. 241 is also omitted from printing.*]

2. Franchise for Universal films in theatres of Paramount subsidiary, Interstate Circuit, Inc. (Ex. 261, R. 271).

Agreement Covering Universal Product Season 1941/42—1942/43—1943/44 Between Interstate Circuit, Inc.—Texas Consolidated Theatres, Inc., Dallas, Texas and Universal Film Exchanges, Inc., of New York, New York.

1. The following agreement is entered into between Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., herewith called the Exhibitor and Universal Film Exchanges, Inc., of Dallas, Texas, herein called the Distributor, for Universal features, shorts, serials and News product for the seasons 1941/42, 1942/43, and 1943/44.

2. The Exhibitor as above set forth operating theatres in the towns listed on the attached sheet marked Exhibit "A" agrees to pay the Distributor the sum of $260,000.00 payable at the rate of $5,000.00 a week for 52 consecutive weeks commencing week ending September 4th, 1941. It is understood that these payments are for the following units of service which are to be distributed by Universal Pictures, Inc.

44 regularly released Universal Feature Pictures.
3 Frank Lloyd Productions.
7 action pictures (Foran-Devine).
7 Jack Mack Brown westerns.
1 2-reel special short.
69 reels short subjects.
2 serials in each situation (excluding 1st run Houston, substituting privilege four 1st run San Antonio) to be selected from Universal's total serial releases each year.
Universal News service as listed in Paragraph #4.

3: It is understood and agreed that the distributor shall deliver prior to October 30, 1942 the minimum of feature, serial, short and newsreel product listed above. Should the distributor deliver less than the total number of (44) regular features as designated above, the exhibitor is to be entitled to a credit of three thousand seven hundred fifty dollars ($3,750.00) for each regular feature not so delivered. In the event the three Frank Lloyd productions are not delivered, exhibitor is to be entitled to a credit of eight thousand dollars ($8,000.00) for each Lloyd production not so delivered. In the event a lesser number of Foran-Devine productions, western features, short subjects, newsreels or serials are not available for delivery, exhibitor is to be credited against commitment in an amount to be mutually agreed upon between exhibitor and distributor.

4. The distributor agrees to furnish Universal News in the following situations for fifty-two consecutive weeks starting week ending October 12th:

Theatre	Town	Number of issues
State	Austin	2
Kimo	Albuquerque	2
White	Dallas	2
Parkway	Fort Worth	2
Queen	Galveston	1
Gem	Brownwood	1
Arcadia	Ranger	1
Palace	San Marcos	2
Strand	Waco	1
Empire	San Antonio	1

5. With reference to the short product, it is understood that the Distributor will deliver a selection of sixty-nine reels of one and two reel short subjects plus the two-reel Special in each first run situation listed on the schedule attached and marked "Exhibit A."

The Distributor agrees to furnish second run features and short subjects as follows: (See Exhibit B attached)

Town	Theatre	Number of features	Number of two-reel subjects	Number of one-reel subjects	One special
Austin	Capitol	26	13	43	1
Dallas	Tower-Melba	30	13	43	1
Fort Worth	Majestic	30	13	43	1
Galveston	Tremont-Kay	30	13	43	1
San Antonio	Palace-State	26	13	43	1
Albuquerque	Chief-Lobo	36	13	43	1
Abilene	Palace-Majestic	30	13	43	1
Breckenridge	National	30	13		1
Brownsville	Queen	26			
Brownwood	Gem-Queen	30	13	43	1
Corsicana	Ideal-Grand	30	13	43	1
Harlingen	Rialto-Strand	30	13	43	1
McAllen	Queen-Azteca	20			
Mercedes	Rio	16			
Paris	Plaza-Lamar	30	13	43	1
San Benito	Palace	20			1
Temple	Bell-Gem	30	13	43	1
Wichita Falls	State-Gem	30			
Denton	Palace-Dreamland	30	13	43	1

6. The Distributor agrees also to furnish third and subsequent run features, two-reel subjects and one-reel subjects as follows (see Exhibit C attached):

Town	Theatre	Number of features	Number of two-reel subjects	Number of one-reel subjects	One special
Albuquerque	Mission-Lobo-Mesa	30	13	43	1
Austin	Varsity	26	13	43	1
Austin	Austin	26	6	15	1
Brownwood	Ritz	26	13	43	1
Corsicana	Grand	26	13	43	1
El Paso	Palace	30	13	43	1
Do	Pershing	26	13	43	1
Dallas	Lakewood	26	13	43	1
Do	Dalsee	26	13	43	1
Do	Fair	26	13	43	1
Do	Forest	26	13	43	1
Do	Knox	26	13	43	1
Do	Lawn	26	13	43	1
Do	Melrose	26	13	43	1
Do	Varsity	26	13	43	1
Do	Village	26	13	43	1
Do	White	26	13	43	1
Do	Mirror	26	13	43	1
Do	Lovers Lane	26	13	43	1
Do	Mockingbird Lane	26	13	43	1
Fort Worth	Parkway	26	13	13	1
Do	Tivoli	26	13	13	1
Do	Varsity	26		43	1
Do	Bowie	26	13	43	1
Do	Riverside	26	13	43	1
Galveston	Key	26	13	43	1
Denison	Rio	26	13	43	1
Houston	Bluebonnet	26	13	43	1
Do	Eastwood	26	13	43	1
Do	Northmain	26	13	43	1
Do	Tower	26	13	43	1
Do	Delman	26	13	13	1
Do	Yale	26	13	43	1
Do	Alabama	26	13	43	1
Do	River Oaks	26	13	43	1
Do	University	26	13	43	1
Do	Almeda	26	13	43	1
Do	Village	26	13	43	1
Do	Wayside	26	13	43	1
San Antonio	State	26	13	43	1
Do	Uptown	30	13	43	1
Do	Highland	30	13	43	1
Do	Harlandale	30	13	43	1
Do	Broadway	30	13	43	1
Do	Prince	30	13	43	1
Do	Sam Houston	30	13	43	1
Paris	Lamar	26	13	43	1
Do	Dixie (col)	26	13	43	1
Temple	Little	26	6	20	1

7. The distributor agrees to furnish fourth run features as follows:

Town	Theatre	Number of features
Austin	Texas	18
Do	Cactus	30
Albuquerque	Mission-Mesa	18

8. Exhibitor has the right to exhibit any feature picture hereunder in each first run theatre at one so-called midnight preview or just before the opening of the regular engagement or not over ten days prior thereto.

9. It is expressly understood that the exhibitor is not obligated to actually play any pictures hereunder, but only to make the payments as above stipulated.

10. The current exhibition contracts now in use attached hereto and marked Exhibit "E" so far as not inconsistent with the terms hereof, shall be a part of this agreement.

11. The distributor agrees to hold available for exhibitor six prints of each major picture for thirty days after available date and four prints on ordinary releases, provided exhibitor completes the first run showing in such period for Dallas, Houston, San Antonio, Ft. Worth, and Austin.

12. Playing arrangement: All first run product is to be dated and played within availability period, otherwise product will be considered automatically available for subsequent run bookings.

13. Second, Third, Fourth, and Subsequent run product is to be played "as available", otherwise product will be considered automatically available for subsequent run bookings. See clearance agreement marked Exhibit D herewith attached and made part of this agreement.

14. It is further understood that all Newsreels, Short Subjects, Serials, Westerns, and Action pictures, plus present flat buy second run and subsequent runs, are to be charged the same flat basis as last year, 1940-41.

15. It is understood that for the 1942/43 season, there will be a review and revision of the weekly payment by November 1, 1942. The purpose of this review and revision is to determine as to whether the $5,000.00 weekly payment plan shall be revised upward or downward.

16. It is also understood that for the 1943-44 season, there will be a review and revision of the weekly payment by November 1, 1943.

[Note: Initials R. J. M and E. R. O. written in pencil or ink opposite par. 15]

17. The Exhibitor agrees to play the product on substantially the nationally designated percentage terms set up by the Distributor, these designations to be mutually agreed upon, based on performance.

18. In the event that as a result of these designations on feature product, there is an excess sum of money accumulated beyond the $260,000.00 payment, then the Distributor shall participate to the extent of 50% of this excess.

Executed this 8th day of May 1941.

INTERSTATE CIRCUIT, INC.
TEXAS CONSOLIDATED THEATRES, INC.
By R. J. McDONNELL (Sgd.)
UNIVERSAL FILM EXCHANGES, INC.,
EDW. R. O. SMITH (sgd.)
Countersigned and approved:
[Initials illegible] SCULLY (sgd.)
Sales Manager. 7/8/41.

EXHIBIT A

Town	Theatre	Number days	First run availability
Austin	Paramount-State-Queen	3-4-7	60 days after release date.
Galveston	Martini-State-Queen	3-4-7	Do.
Arlington	Aggie-Texas	1-3	45 days after Fort Worth.
Abilene	Paramount-Maj-Pal-Queen	2-5	60 days after release date.
Albuquerque	Sunshine-Kimo-Rio	3-4-7	Do.
Amarillo	Paramount-State-Rialto	3-4-7	Do.
Breckenridge	Palace-National	2-4	Do.
Brownsville	Capitol-Queen	2-4	Do.
Brownwood	Bowie-Lyric-Queen-Gem-Ritz	2-4	Do.
Corsicana	Palace-Ideal-Grand-Rio	2-4	Do.
Denison	Rialto-Rio-Star	2-4	Do.
Denton	Texas-Palace-Dreamland	2-4	Do.
Eastland	Lyric-Connellee	2-4	Do.
Harlingen	Arcadia-Rialto	2-4	Do.
McAllen	Palace	2-4	Do.
Mercedes	State	1-3	Do.
Paris	Grand-Plaza-Lamar-Rex	2-4	Do.
Ranger	Arcadia-Columbia	2-4	Do.
San Benito	Rivoli-Palace	2-4	Do.
Temple	Arcadia-Gem-Bell	2-5	Do.
Tyler	Tyler-Liberty-Arcadia-Majestic	2-7	Do.
Vernon	Vernon-Pictorium	2-4	Do.
Waco	Waco-Orpheum-Strand-Rivoli	3-4-7	Do.
Weslaco	Ritz-Gem	1-3	Do.
Wichita Falls	Witchita-Maj-Strand-State	2-3-4-7	Do.
El Paso	Plaza-Elleney-Wigwam	3-4-7	Do.
San Marcos	Palace-Plaza	3-4	Do.
Dallas	Pal-Maj-Tower-Rial-Cap	3-7-14	Do.
Ft. Worth	Worth-Hollywood-Palace	3-7-14	Do.
Houston	Metropolitan-Majesty-Kirby	3-7-14	Do.
San Antonio	Maj-Aztec-Tex-Empire	3-7-14	Do.

[Initialed] RJM
ERO

EXHIBIT "B"

SECOND RUN

Town	Theatre	Number days	Availability following first run
Austin	Capitol	2-3	60
Dallas	Tower-Melba	4-7	60
Fort Worth	Majestic	2-5	60
Galveston	Tremont-Key	2-5	60
Albuquerque	Chief-Lobo	2-4	60
Abilene	Maj-Pal-Queen	2-3	90
Breckenridge	National	2	90
Brownsville	Queen	2	90
Brownwood	Gem-Queen-Ritz	2-3	90
Corsicana	Ideal-Grand-Rio	2-3	90
Harlingen	Rialto-Strand	2-3	90
McAllen	Queen-Aztec	2	90
Mercedes	Rex	2	90
Paris	Plaza-Lamar-Rex	2	90
San Benito	Palace	2	90
Temple	Bell-Gem-Little	3	90
Wichita Falls	State-Gem-Strand	3-4	90
San Antonio	Palace-State	3-5	60
Denton	Palace-Dreamland	2	90

Where second run has been sold to theatres other than Interstate-Texas Consolidated if first runs are not played during availability period they are to be made available to subsequent runs accordingly and may be dated by Interstate-Texas Consolidated Theatres after the subsequent run without additional charge.

[Initialed]
RJM
ERO

EXHIBIT C

THIRD, FOURTH, AND SUBSEQUENT RUNS

Town	Theater	Number days	Availability following first run
Albuquerque	Mission-Lobo-Mesa	2-3	75-105
Austin	Varsity	2-3	75
El Paso	Palace	2-3	105
San Antonio	State	2-3	75-90
Austin	Austin	2-3	75-90
Do	Texas	2-3	105-135
Do	Cactus	2-3	150
Dallas	Lakewood	2-4	45
Do	Dalset	2-3	90
Do	Fair	2-3	90
Do	Forest	2-3	90
Do	Knox	2-3	105
Do	Lawn	2-3	150
Do	Melrose	2-3	75
Do	Varsity	2-3	75
Do	Village	2-4	45
Do	White	2-4	75
Do	Mirror	1-3	105-135
Do	Mockingbird Lane		75-90
Do	Lovers Lane		75-90
Fort Worth	Parkway	2-4	75
Do	Tivoli	2-4	75
Do	Varsity	2-3	75
Do	Bowie	2-3	75
Do	Riverside		75-90
El Paso	Pershing	2-4	90
Houston	Bluebonnet	2-3	90
Do	Eastwood	2-3	90
Do	North Main	2-3	90
Do	Tower	2-4	90
Do	Delman	2-4	90
Do	Yale	2-3	90
Do	Alabama	2-4	90-105
Do	University	2-3	120
Do	Almeda	2-3	90-105
Do	River Oaks	2-3	90-105
Do	Wayside		90-105
Do	Village		90-105
Galveston	Key	2-3	90
San Antonio	Uptown	2-3	105-120
Do	Highland	2-3	105-120
Do	Harlandale	2-3	105-120
Do	Broadway	2-3	75-105
Do	Prince		145-160
Do	Sam Houston		145-160
Paris	Lamar	2-3	90
Do	Dixie (col.)	2-3	90
Temple	Little	2-3	90
Brownwood	Ritz-Gem	2-3	90
Corsicana	Grand	2-3	90
Denison	Rio		90-120

4. Master agreement for Paramount films in Loew theatres (Ex. 243, R. 269).

LOEW'S INCORPORATED

METRO-GOLDWYN-MAYER PICTURES

Office of
C. C. Moskowitz
Vice-President

LOEW BUILDING,
BROADWAY AT 45TH STREET,
New York 19, N. Y., May 17, 1945.

Mr. CHARLES REAGAN
Paramount Pictures Inc.,
1501 Broadway, New York, N. Y.

DEAR CHARLIE: The following confirms the settlement agreed upon between us.

FOR THE CIRCUIT

Season 1940–1941, as per contracts in existence with the three (3) lowest grossing pictures on the long-half as the reversion pictures.

Seasons 1941–1942, 1942–1943 and 1943–1944, the long-half film rentals are settled on the following formula:

Combination of two (2) pictures starting at 30% for the two (2) pictures and graduating up allowing the Exhibitor 25% of the film rental as profit at all times until the Distributor has 40% of the gross as film rental, the balance of the gross divided 50% to the Distributor and 50% to the Exhibitor.

Where the second feature is that of another Distributor, the same method was used and then the actual cost of the second feature deducted from the total film rental, except for TWO YANKS IN TRINIDAD, SINTOWN, BEAUTIFUL BUT BROKE, where the costs used are amounts agreed upon between us, the balance being Paramount film rental.

Where Screeno and Vaudeville were involved, the costs of these items were deducted from the gross before computing the film rental.

In the instances of Equal Billing Shows, these were computed as agreed upon and are shown on various schedules rendered.

In the instance of any "B" picture played with some other company's "A" picture, agreed film rental is $20,000, less $100.00 for the Century Theatre and $300.00 for the Ziegfeld Theatre, if played after these theatres were closed.

"C" Pictures—$8,000.00 except those played after the Century Theatre closed in which $50.00 was deducted for each picture.

STATE THEATRE

Season 1940-1941, as per contract in existence.

Seasons 1941–1942, 1942–1943 and 1943–1944 figured on the following basis:

Twenty-five (25%) Percent of the receipts after deducting the actual cost of the stage show, stage hands and musicians until such time as the Exhibitor has 50% of the film rental as profit, the balance of the gross divided 50% to the Distributor and 50% to the Exhibitor. If, however, at 25% the Exhibitor does not get 50% of the film rental as profit, in that case it reverts down to a point where the Exhibitor has 50% of the film rental as profit, but in no event does the Distributor receive less than 20% as film rental.

EMBASSY THEATRE

Season 1942–1943, at the agreed figure—$5,783.42.

ADVERTISING

Reimbursement of $19,397.22 for extra advertising.

By the foregoing, settlement is made for all prior years to and including 1943–1944, it being understood, however, that as to the years 1942–1943 and 1943–1944, the settlement is subject to your approval of the figure submitted for those two (2) years.

The summary sheet covering the four (4) years is attached hereto.

Upon receipt of your confirmation of this letter, we will promptly forward check for the amount due you.

Yours very truly,

MARCUS LOEW BOOKING AGENCY,

(Sgd.) By C. C. MOSKOWITZ,

Vice-President.

JUNE 5th, 1945.

Mr. C. C. MOSKOWITZ,
Loew's Incorporated,
1540 Broadway, New York, 19, New York.

DEAR CHARLIE: Except to note the fact that the recent settlement agreed upon between us was limited and confined to our 1940–41, 1941–42, 1942–43, 1943–44 feature product which played your Intown Circuit, I concur with all other details set forth in your letter of May 17th.

The summary sheet covering this 4-year period, attached to our letter, indicates that Loew owes Paramount $135,877.41. Won't you, therefore, please instruct your Accounting Department to forward check in that amount in order that we can bring our books into balance pending completion of the audit. Thanks.

Cordially yours,

[Signature illegible]

[*Work sheets showing computation of film rental attached to Ex. 243 have been omitted in printing.*]

D. Government's Digests of Film Licensing Agreements in Evidence

EXHIBIT 172 (R. 244, 247)—PARAMOUNT PICTURES IN LOEW THEATRES

1. Parties: Contract between Paramount Famous Lasky Corporation (Paramount) and Marcus Loew Booking Agency (Loew).

2. Date of Agreement: June 25, 1927.

3. Duration: August 1, 1927, to July 31, 1937.

4. Coverage: For all purposes of this agreement, the following cities, towns, and/or other places are hereinafter collectively referred to as the "territory" and such cities, towns, and/or other places are hereinafter severally referred to as "localities." Each such locality shall include all territory included within the political or corporate limits of such locality and in addition thereto, such contiguous territory, if any, considered by distributors of feature photoplays as part of or embraced within each respective locality. Such territory is as follows: Akron, Ohio, Baltimore, Md., Cleveland, Ohio, Canton, Ohio, Evansville, Ind., Harrisburg, Pa., Norfolk, Va., Pittsburgh, Pa., Providence, R. I., Reading, Pa., Richmond, Va., Syracuse, N. Y., Washington, D. C., Roanoke, Va., Kansas City,

Mo., Memphis, Tenn.; ordinary Westerns and certain other specified pictures excluded from the agreement.

5. Rental Terms: Paramount was to have the right to designate in each year six (6) "specials." As to such "specials," Loew was to pay to Paramount such fixed sums or percentages as should be agreed upon from time to time by the parties or through arbitration in case of failure to reach an agreement. As to other pictures, Loew was to pay such fixed sums or percentages as should be agreed upon between the parties, and the license fees so determined in any year should govern as to pictures released by Paramount in any subsequent year. Provisions were made for refusing license fees so determined and providing for arbitration. Where license fees were not agreed upon prior to availability of the pictures, Loew was to exhibit them and to pay the license fees as thereafter determined.

6. Other Terms: The agreement stated that the parties had agreed upon what pictures were to be played in each locality for the 1927–28 season.

It was agreed that before May 1st of each of the other years Paramount was to notify Loew of the approximate number of pictures it expected to release for the year, and before June 1st Loew was to notify Paramount of the proportion of such releases that Loew desired to exhibit in each locality.

Before July 1st of each year Paramount was to deliver to Loew a list of features it expected to release, and as to each locality where Loew should exhibit less than 70% of the pictures released by Paramount in such year, Paramount was to divide the pictures in the list into groups so that, as to each locality, each group should contain approximately the proportion of pictures Loew desired to exhibit in each locality. Within three weeks after receiving any such list, Loew was to select one of such groups for exhibition in each locality. As to any locality where Loew should desire to exhibit more than 50% of Paramount releases, Loew should exhibit at least 70% and have a right to select from all the pictures available. Loew was to exhibit at least 70% in Evansville, Indiana, and Cleveland, Ohio. In any locality where Loew exhibits at least 70% of Paramount releases in any year, Loew was to exhibit in such locality at least 50 of the pictures released by Paramount in such year.

"Loew shall exhibit the photoplays as aforesaid for exhibition hereunder at such of the theatres then operated by Loew, situated in each respective locality in the aforesaid territory, as Loew shall from time to time determine; provided, however, that in each locality where Loew shall then operate more than one theatre, Loew agrees to accord to the photoplays to be exhibited hereunder, the same relative preference as to desirability of theatres at which exhibited that Loew at the time being accords to photoplays released by any corporation with which Loew shall be affiliated, during the corresponding year, taking into consideration the quality of such photoplays."

Loew agreed not to reduce the admission prices of each theatre below the admission prices then customarily charged.

Paramount was to have access to Loew's records with respect to exhibition of Paramount pictures in Loew theatres.

Except as might be otherwise agreed upon from time to time, Paramount was not to exhibit or license any of the pictures licensed hereunder at any other theatres located in such respective localities until expiration of the respective protection periods existing at the date of the agreement in favor of the respective theatres in each locality.

It was provided that references in the agreement to theatres operated by Loew should include all theatres located in the territory which Loew might at the time own, lease, control, manage, or operate, or in respect to which it might have any management, participation, or similar contract.

EXHIBIT 173 (R. 247)—LOEW PICTURES IN PARAMOUNT THEATRES

1. Parties: Metro-Goldwyn-Mayer Distributing Corporation (Loew) and Balaban & Katz Corporation (Paramount).

2. Date of Agreement: September 21, 1934.

3. Duration: Three (3) years from August 1, 1934.

4. Coverage: Covers all theatres of Balaban & Katz' Chicago circuit. The Chicago United Artists, Roosevelt, Apollo and Garrick theatres are referred to as the "Loop

Theatres." Balaban & Katz' other houses in Chicago, except the Oriental, were referred to as "Houses outside the Loop."

5. Rental Terms: Twelve pictures to be known as "run" pictures were to be designated by Metro and to be played at a run house. The run houses at the present time being the Roosevelt and United Artists theatres. Terms to be the same as the terms for run pictures of the 1933–34 season.

Eighteen pictures to be designated by Metro to play at the Chicago Theatre seven days at Five Thousand dollars ($5,000) per picture, plus score charge. Six pictures to play at Apollo at twenty percent (20%) of gross receipts. Six pictures to play at the Garrick at twenty percent (20%). At any time Balaban & Katz could substitute a house of equal kind and quality for any of the run houses.

Terms for features to be played in the Apollo and Garrick theatres during each subsequent 52-week period after the first 52-week period were to be thereafter negotiated.

The commitment of forty-two pictures for the Loop Houses was based upon the release of forty-eight pictures. If less than forty-eight were released, Balaban & Katz to use not less than seven-eighths. There is an involved formula as to commitments for the Chicago Theatre and Loop Houses depending upon the number of pictures released and the number of Class A pictures released. For each picture playing first run in either the United Artists, Roosevelt, or Chicago and repeating in the Apollo or Garrick, Metro to receive twenty percent (20%) of the repeat run. For each picture playing first run at the Apollo or Garrick and repeating in the Oriental, Metro to get One Thousand dollars ($1,000) for the repeat run for seven days, plus a score charge.

Commitment on features for each individual theatre outside the Loop to be the same as the commitment of 1933–34 features, and for the first 52-week period the same rental to be paid as for the 1933–34 features. Terms for features to be exhibited in each subsequent 52-week period to be thereafter negotiated.

As to theatres outside the Loop after receiving from Balaban & Katz as film rental for features shown during the first 52-week period an amount equal to the film rental contracted to be paid for all of the theatres for 1933–34 feature product, Metro was to supply for exhibition at said

houses, without charge, not exceeding Twenty-five Thousand dollars ($25,000) worth of features to be selected from pictures released by Metro during the first 52-week period for exhibition in the Loop.

Foreign pictures and ordinary Westerns not to be included in this agreement.

6. Other terms: "No pictures playing first run in the Chicago, Roosevelt, or United Artists Theatre is to be played in the Oriental Theatre; it being understood and agreed that if we elect to sell for a second run in the Loop any pictures that play first run in the Chicago, Roosevelt or United Artists theatre such pictures shall be offered by us to you for exhibition at the Oriental Theatre second run before we offer them to any other exhibitor; and you are to have such pictures for the Oriental if terms are agreed upon, otherwise we are to be free to license same to others."

Clearance in effect at the time of execution of this agreement to apply. It was agreed that as long as Balaban & Katz maintained the minimum admission prices under the clearance now in effect or which might be adopted from time to time, Metro would not license any pictures exhibited first run at any of the theatres covered by this agreement for exhibition in any subsequent run theatre in Cook County charging less for night adult admission on a lower floor than 15¢. If Balaban & Katz reduced their adult evening admission price below 25¢ in such zone, Metro should be free to license pictures to theatres charging less than 15¢.

EXHIBIT 174 (R. 247)—PARAMOUNT PICTURES IN WARNER THEATRES

1. Parties: Paramount Pictures, Inc., Paramount Pictures Distributing, Inc., by Neal Agnew, Vice President and *Warner Bros. Pictures, Inc., ***Warner Bros. Pictures, Inc., (Cal.), ***Warner Bros. Pictures, Inc., (Del.), ***Warner Bros. Pictures, Inc. (Pa.), ***Warner Bros. Pictures, Inc. (W. Va.), ***Warner Bros. Pictures, Inc. (Ky.), ***Warner Bros. Pictures, Inc. (Va.), ***The Connecticut Theatre Corp., **Stanley Theatre Company of America, ***Massachusetts Amusement Corp., ***Intra-State Theatre Corp., **Stanley-Mark Strand Corp., ***General Theatre Co., ***Warner's Midwest Theatres,

Inc., **Regent State Corp., **Stanley-Davis-Clark Corp., **Mansfield Operating Corp., **Stanley-Shapiro Theatre Co., **Spiers Theatre Realty Co., **Lindy Amusement Co., Inc., **Metropolitan Theatre Co., ***Seashore Theatres, Inc., ***Warner Circuit Management Corp., each by Joseph Bernhart as "*General Manager, **Vice President and ***President."

2. Date of Agreement: October 28, 1936.

3. Duration: 2 years—August 1, 1936 to July 31, 1938.

4. Coverage: Covers all theatres owned or controlled by Warner Bros. Pictures, specific coverage being shown by Schedule A which is not attached to exhibit.

5. Rental Terms: Rental is based upon a percentage of the total gross box office receipts with no splits shown. Two releases are to play at 35%, 6 at 30%, 17 at 25% and 40 at 20% of total box office receipts. For the six releases to be played at 30% it is provided that if any two in theatres licensed gross substantially less than the gross receipts of all six, the terms of said two revert to 25%.

Concession is granted on the rental for photoplays played as part of a double bill. If in the first year any of the top 13 features is exhibited as part of double features, the cost of the second picture may be deducted from the gross; or if it is likewise a percentage picture, the Paramount percentage may be reduced by 5%.

6. Other Terms: Provision is also made for deduction where pictures are played with vaudeville.

Foreign pictures were excluded, as well as features not produced, financed or supervised by Paramount or its affiliates or subsidiaries nor made nor supervised by Paramount, its affiliates or subsidiaries.

EXHIBIT 175 (R. 247)—WARNER PICTURES IN PARAMOUNT THEATRES

1. Parties: Vitagraph Inc. (Warner) and United Detroit Theatre Corporation.

2. Date of Agreement: June 8, 1936.

3. Duration: One year—1936–1937 season.

4. Coverage: The following theatres in Detroit, Michigan: Michigan, United Artists, and State.

5. Rental Terms: At the Michigan Theatre seventeen pictures (to be designated by the distributors) seven days each at fifteen percent (15%) of the box office receipts to $26,000 and fifty percent (50%) thereafter for each

picture. If stage attraction costs more than $4,000 the additional cost of stage attraction to be added to the above split figure of $26,000.

In the United Artists Theatre (eight pictures to be designated by distributors) seven days each at twenty-five percent (25%) of box office receipts to $15,000 and fifty percent (50%) thereafter for each picture. Terms for any picture playing a second or additional week to be twenty-five percent (25%) of the box office receipts to $13,000 and fifty percent (50%) thereafter. If gross receipts are less than $10,000, terms to be twenty percent (20%) of box office receipts.

On such pictures as are nationally designated as "specials" and percentage pictures, terms are to be: on thirty-five percent (35%) pictures, thirty-five (35%) of box office receipts to $15,000 and fifty percent (50%) thereafter. On thirty percent (30%) pictures, thirty percent (30%) of box office receipts to $15,750 and fifty percent (50%) thereafter.

In the State Theatre rental is at a fixed percentage of box office receipts with no provision for a split.

6. Other Terms: Run and Clearance: First run. For the Michigan Theatre admission price to be not less than 35¢ matinee and 55¢ evenings. The admission prices are also fixed for United Artists theatre at 35¢ matinee and 50¢ evenings.

EXHIBIT 177 (R. 248)—RKO PICTURES IN PARAMOUNT THEATRES

1. Parties: RKO Distributing Corp., United Detroit Theatres Corp. (Paramount).

2. Date of Agreement: September 9, 1936.

3. Duration: 1935–1936, 1936–1937.

4. Coverage: Subsequent run at Varsity Theatre.

5. Rental Terms: 19 pictures to be selected by Exhibitor out of 62: 2 pictures, 4 days (Sun.), 35 %; 2 pictures, 3–4 days, $200; 4 pictures, 3–4 days, $175; 6 pictures, 3–4 days, $125; 5 pictures, 3–4 days, $100.

6. Other Terms: Minimum adult admisison prices, 25¢. No clearance specified in contract.

EXHIBIT 178 (R. 249)—PARAMOUNT PICTURES IN FOX THEATRES

1. Parties: Paramount Pictures Distributing Company, Inc., and Fox West Coast Theatres Corporation.

2. Date of Agreement: August 1, 1933, executed November 30, 1934.

3. Duration: 10 years, August 1, 1933 to July 31, 1943.

4. Coverage: 1st run in Liberty and Paramount Theatres in Portland, Oregon.

5. Rental Terms: Rental for the first year of this agreement as follows: At the Liberty Theatre the contract calls for a total of 25 weeks playing time as follows: 6 weeks at 30% to a split, 50% over the split; 14 weeks at 25% to a split, 50% over the split; 5 weeks at 20% to a split, 50% over the split. At the Paramount Theatre 16 pictures shall play at 20% to a split with 50% to the distributor over the split, 9 pictures at $500 for 7 days each, and the balance at $350 for 7 days each.

The exhibitor has the privilege of excluding 10% of the $350 pictures.

The "split figure" shall be deemed to mean that where the gross receipts of the theatre of each photoplay shall reach a figure which will allow the exhibitor to reimburse itself out of such gross receipts for its operating expenses and for the minimum license fee so paid and will allow the exhibitor as profit a further sum out of such gross receipts equal to the minimum license fee so paid and the exhibitor agrees to pay Paramount in addition to the minimum license fees specified above a sum equal to 50% of such gross receipts in excess of such split figure.

Article 6 (b) Page 6: With respect to the photoplays to be released during each of the remaining nine years the Exhibitor and Paramount shall agree as to the terms and conditions on or before July 1st of each year.

6. Other Terms: Clearances shall be "those which prevail in said zone."

Admission prices shall be comparable to those charged by theatres of similar character in cities of corresponding size.

Provision for including additional theatres which exhibitor might operate.

EXHIBIT 179 (R. 249)—PARAMOUNT PICTURES IN FOX THEATRES

1. Parties: Paramount Pictures Distributing Company, Inc., by Austin C. Keough, vice president, and Evergreen State Amusement Corporation (Del.), by W. C. Michel, vice president, and Fox West Coast Corporation by W. C. Michel, vice president.

2. Date of agreement: March 5, 1937.

3. Duration: 10 years and 5 months—March 7, 1937 to July 31, 1947.

4. Coverage: 1st run in the following theatres in Seattle, Washington: Fifth Avenue, Paramount, Coliseum and Orpheum.

5. Rental terms: The same terms as under old franchise. This relates to agreement between Paramount and Evergreen dated August 1, 1933 executed November 30, 1934, for 10 years, from August 1, 1933 to July 31, 1943.

The agreement dated March 5, 1937 also provides that the exhibitor and Paramount shall agree on or before July 1 of each year of the 10-year period after the 1936–1937 season as to the terms and conditions on which features, shorts, and news reels licensed for each year commencing August 1st next ensuing shall be exhibited.

The exhibitor and Paramount shall from time to time agree as to what constitutes "fair and reasonable" license fees and recording charges and a "fair and reasonable" number of one and two reel short features.

6. Other terms: Fox West Coast Corporation was made a party to this agreement because of the simultaneous execution and delivery of a sublease covering the Paramount Theatre in Seattle, Washington, between West Coast as sublessor and the exhibitor as sublessee. The sublease was for 10 years, from March 5, 1937 to July 31, 1947. The agreement reserves a right of assignment to Fox West Coast under certain contingencies.

The length of run is to be 7 days for features, shorts, and Paramount news reels.

Clearances are to be those which prevail in said zone both as to time and area.

Admission prices shall be comparable to those charged by theatres of similar character in cities of corresponding size, but obligation depends on Paramount giving the prevailing clearance.

Provision for inclusion of additional theatres of exhibitors.

EXHIBIT 180 (R. 254)—FOX PICTURES IN PARAMOUNT THEATRES

1. Parties: Fox Film Corporation, by John C. Clark, and United Theatre Enterprises, Inc. (Paramount), by Wm. K. Jenkins.

2. Date of Agreement: August 16, 1935.

3. Duration: Two years: 1935–36, 1936–37 seasons.

4. Coverage: 1st run in following theatres in Macon, Georgia: Rialto, Capitol and Ritz.

5. Rental Terms: The Exhibitor shall play during each season 6 features pictures, selected by Distributor, at 30% of gross, and, as additional rental 50% of gross receipts in excess of the accumulative split figure of $539 per day. These pictures shall be played at the Capitol Theatre for 3 days.

The Exhibitor will also play 12 pictures at 25% of gross receipts for two to three days at the Capitol, in which the remaining pictures will be played at 20% of gross for 2 to 3 days.

It is also provided that if the Exhibitor obtains control of any other first run theatres in Macon in lieu of, or in addition to those theatres mentioned, then this agreement shall extend to such theatres.

6. Other terms: Clearance as "usual" as set up by the Zoning and Clearance Committee. Such clearance is subject to any change made by the local Zoning and Clearance Board.

The Exhibitor agrees to charge the following admission prices: Rialto.—Evening: Adults, orchestra, 35¢; balcony, 15¢; children, orchestra, 10¢; balcony, 10¢.

Admission prices are also fixed for the Capitol and Ritz Theatres. It is further provided that if a first run competitor reduces his prices, the Exhibit may apply for reduction to meet competition. Such consent will not be given if it is against business policy. If comparable first run houses increase admission prices, distributor will give Exhibitor written notice of the increase and one month thereafter, unless Exhibitor disputes within 30 days, such new prices shall prevail. If parties fail to agree, the matter will be submitted to arbitration.

The Capitol Theatre is classified as the "A" theatre, the Rialto as the "B" theatre and the Ritz Theatre as the "C" theatre.

The Agreement is labeled a "Franchise."

EXHIBIT 181 (R. 375)—LOEW PICTURES IN WARNER THEATRES

1. Parties: Loew's Inc., by Rodgers, and Warner Bros. Pictures, Inc.; Warner Bros. Pictures, Inc. (Cal.); Warner Bros. Pictures, Inc. (Del.); Warner Bros. Pictures, Inc. (Pa.); Warner Bros. Pictures, Inc. (W. Va.); Warner

Bros. Pictures, Inc. (Ky.); Warner Bros. Pictures, Inc. (Va.); The Connecticut Theatrical Corp.; Stanley Company of America; Massachusetts Amusement Corp.; Intrastate Theatre Corp.; Stanley-Mark Strand Corp.; General Theatre Co.; Warner's Midwest Theatres, Inc.; Regent State Corp.; Stanley, Davis, Clark Corp.; Mansfield Operating Corp.; Stanley-Shapiro Theatre Co.; Spiers Theatre Realty Co.; Lindy Amusement Co., Inc.

2. Date of Agreement: October 1, 1936.

3. Duration: 3 seasons—1936–1937, 1937–1938, 1938–1939. Each season beginning September 1 and ending August 31.

4. Coverage: 1st run unless otherwise specified in theatres in Warner circuit.

5. Rental Terms: National percentage terms: 30 Class "A" pictures to be designated as 40%, 35% or 30% and 50 to be designated as 25%. Balance Class "B" pictures at terms shown in deal sheets. Fixed rental terms: 4 at 35% to a split and 65% over the split to be determined from average gross receipt of "Mutiny on the Bounty," "China Seas" and "Rose Marie." The terms for the rest of the pictures in flat deal situation as indicated on deal sheets.

Terms for pictures played with vaudeville—the cost of vaudeville may be deducted from the gross before computing rental on 30 highest term pictures. Vaudeville may be played for only two days with said pictures. If vaudeville is to be played with the remaining cheaper pictures the terms may be revised by mutual agreement. The cost of added attractions, i. e. bank night, gift night, Screeno, etc. not to exceed $200 may be deducted from gross before computing percentage film rentals. Deduction allowed for feature playing on double bill.

6. Other Terms: Expressly excluded from the agreement were foreign and Western pictures distributed by Loew. Also, if more than 20% of the features of any season should be produced elsewhere than at a studio of Loew or Hal Roach, Inc. which was not a subsidiary or affiliate of Metro, Warner was not required to accept any such other features in excess of the 20%.

Evening adult admission prices not to be reduced without Loew's consent below 25% of present price and in no case less than 15¢.

Where Exhibitor has closed theatres, product is to play in open theatre. Where all Warner theatres closed in a situation, Warner to be bound to rental fees less what Loew may receive from another Exhibitor in the situation upon relicense. Upon 60 days notice before next season Warner may reclaim product for reopened theatre.

Clearance as indicated in deal sheets. Right of selection as indicated in deal sheets.

Special terms set up for Warner's first-run theatres in Philadelphia and the clearance set out. In general the rental terms varied from 20% to 50% depending upon the size of the gross receipts.

It is agreed that each feature is to be played not later than fourteen (14) days after national release; and conditioned upon the foregoing, clearance shall be as follows as to each of said Boyd, Stanton, Stanley, and Fox Theatres, same to be computed from the last date of exhibition, except in the case of continued first runs: Twenty-eight (28) days over all theatres in Greater Philadelphia and in Chester, Montgomery, Bucks, and Delaware Counties in Pennsylvania, and all theatres in Gloucester, Burlington, Camden, Cumberland, and Atlantic Counties (except Atlantic City) in New Jersey.

Except as follows:

Twenty-one (21) days over Arcadia Theatre, Philadelphia;

Fourteen–twenty-one (14–21) days over Chester, Pa.;

Fourteen–twenty-one (14–21) days over Camden, N. J.

EXHIBITS 182, 182A (R. 250, 2269)—LOEW PICTURES IN RKO THEATRES

1. Parties: Metro-Goldwyn-Mayer Distributing Corporation, by T. T. Connors, Vice President and Sales Manager, and R. K. O. West Corporation, by J. Libson, Vice President and General Manager.

2. Date of Agreement: August 7, 1936.

3. Duration: 1936–37 season.

4. Coverage: The following theatres in Cincinnati, Ohio: Albee, Capitol, Palace, Lyric, Grand, Family, and Shubert.

5. Rental: A rider attached provides that the rental shall be on a percentage basis to a split. The exhibitor agrees to play the 1936–37 season product consisting of

from 44 to 52 pictures on the following basis: 4 pictures at 40%, 6 pictures at 35%, 6 pictures at 30%, 14 pictures at 25%, the balance not to exceed 22 pictures at a flat rental of $1,000 to play at the Albee, Palace, Capitol, Lyric, or Family or Shubert or Grand or Keith with playing time allocated among the theatres. On a moveover, exhibitor has privilege of excluding from contract a $1,000 flat run. The split figures are designated for each theatre except Family, according to the percentage indicated. For example: Palace: 40% pictures split over $18,000, 35% pictures split over $16,000, 30% pictures split over $14,000, 25% pictures split over $12,000. Some adjustment is provided for as illustrated by the provision that any 25% picture playing at the Capitol Theatre grossing less than $6,000 shall be adjusted to 20%.

6. Other terms: First run. Clearance: 45 days over all suburban towns, and 45 days from end of first run over Carthage, Cheviot, Norwood, St. Bernard, Reading, Lockland, Elmwood, Sharonville, Cleves, Mt. Healty, Addyston, Loveland, New Richmond, Milford, Harrison, Macon, Amelia, and Batavia, Ohio; 45 days over Covington, Newport, Bellevue, Dayton, Latonia, Ft. Thomas, Ky.; 14 days over Hamilton, Williamsburg, Ohio, and Lawrenceburg and Aurora, Indiana.

Admission prices not specified.

EXHIBIT 183 (R. 250)—RKO PICTURES IN LOEW THEATRES

1. Parties: RKO Distributing Corporation, by Jules Levy, and Poli New England Theatres, Inc., by J. Vogel.

2. Date of Agreement: November 13, 1936.

3. Duration: One year—1936–37 season.

4. Coverage: Exclusive 1st run in Poli or Palace Theatre at Hartford, 23 features at an equal split. It is understood that Distributor can designate and allocate all features in this contract.

5. Rental Terms: 1 at 40%, 1 at 35%, 3 at 30%, 6 at 25%, 6 at $350, 6 at $250. If any of the 30% or 35% pictures play double features the Distributor will give a picture to play with it. If no picture is available at the time, $250 will be deducted from the film rental for the cost of the second picture. If any of the 25% group plays double bill Exhibitor can deduct not more than $250 from the gross receipts.

6. Other Terms: 30 days clearance in West Hartford and East Hartford, 10 days before Windsor Locks and Rocky Hill. Ahead of Middletown, New Britain, and Rockville. Admission prices not specified.

EXHIBIT 184 (R. 250)—RKO PICTURES IN LOEW THEATRES

1. Parties: RKO Distributing Corp. and Poli New England Theatres, Inc. (Loew), by Joseph R. Vogel, V. P. of Loew's, Inc., Bridgeport, Conn.

2. Date of Agreement: Nov. 23, 1936.

3. Duration: 1936–37.

4. Coverage: Exclusive 1st run in Majestic or Poli, Bridgeport, Conn.

5. Film Rental: Astair #2, 7 days, 40% single bill; 1 feature, 7 days, 35%; 2 features, 7 days, 30%. If any of above, with the exception of Astair play double feature, RKO will give picture to play with it. If no picture is available at time $200.00 will be deducted from film rental for cost of other feature. 5 features, 7 days, 20%; Remainder, if any, 7 days, 25%. If any 20% or 25% double featured, exhibitor can deduct no more than $200.00 from the gross receipts. 6 features, 7 days, $300.00 flat rental; 6 features, 7 days, $200.00 flat rental. No more than 12 features to be designated to play on a percentage basis from all the available product. Re *Split*—The Distributor has the right of designation and allocation of all features. Same to be made prior to play date.

6. Other Terms: No admission prices. Designated clearance: 30 days in Bridgeport, 14 days before Fairfield, Stratford, Westport, and Walnut Beach.

EXHIBIT 185 (R. 250)—RKO PICTURES IN LOEW THEATRES

1. Parties: RKO Distributing Corp. and Poli New England Theatres, Inc. (Loew's), by Joseph R. Vogel, vice pres. of Loew's, Inc., Meriden, Conn.

2. Date of Agreement: Nov. 23, 1936.

3. Duration: 1936–1937.

4. Coverage: Exclusive 1st run in Palace or Poli, Meriden, Conn.

5. Film Rental: 2 Astaires, 3–4 days, 40% (single feature); 1 picture, 3–4 days, 35%; 1 picture, 3–4 days, 30%. Above pictures to play on maximum preferred playing

time. 6 pictures, 2–3–4 days, 25%; 8 pictures, 2–3–4 days, 20%; 5 pictures, 2–3–4 days, 15%; 12 pictures, 2–3–4 days, $75.00 flat rental, score $2.50 day; 11 pictures, 2–3–4 days, $50.00 flat rental, score $2.50 day. If any pictures exclusive of the Astaire's plays double bill no more than $50.00 can be deducted from the gross.

6. Other Terms: No admission prices specified. Clearance 30 days in Meriden, 7 days before Wallingford, after Hartford.

EXHIBIT 186 (R. 250)—RKO PICTURES IN LOEW THEATRES

1. Parties: RKO Distributing Corp. and Poli New England Theatres, Inc., by Joseph R. Vogel, vice pres., Loew's Inc., Waterbury, Conn.

2. Date of agreement: Nov. 23, 1936.

3. Duration: 1936–1937.

4. Coverage: Exclusive 1st run for 23 pictures in Poli Theatre, Waterbury, Conn.

5. Film rental: 1 Astaire, 4 days, 40% (single bill); 1 feature, 4 days, 35%; 3 features, 4 days, 30%. If any of above pictures excepting the Astaire play double feature RKO will give picture to play with it. If no picture is available at time $200 will be deducted from gross film rental for cost of it. 6 features, 3–4 days, 25%; 40% of 25% pictures to play 4 days. No more than 12 pictures to be designated to play on a percentage basis including Joe E. Brown's. 12 features 3–4 days, $200.00 flat rental. If and 25% group double featured, Exhibitor can deduct no more than $200 from the gross.

6. Other terms: Admission prices not fixed. Clearance: 30 days in Waterbury. 10 days ahead of Thomaston, Oakville, and Watertown. 14 days over Naugatuck.

EXHIBIT 187 (R. 250)—LOEW PICTURES IN FOX THEATRES

1. Parties: Metro-Goldwyn-Mayer Distributing Corp., by Al Lichtman, Vice President, and Fox West Coast Theatres Corp., by Spiro P. Skouras, Vice President, assigned by Metro-Goldwyn-Mayer to Loews, Inc.

2. Date of Agreement: August 31, 1936.

3. Duration: 9 years from September 1, 1936, to August 3, 1945.

4. Coverage: Exclusive 1st run. All of Los Angeles County except Pamona, California. and relates specifically

to the following theatres in Los Angeles—Loew's State, United Artists, Four Star, and Grauman's Chinese.

5. Rental Terms: After first three years rental terms, playing time and clearance to be negotiated in advance of each release season. Special rental terms set up for first season's product. The rental for 22 features for the 1936–1937 season at the State and Chinese theatres is based on a sliding scale of the percentage of the gross running from 20% to 50%. For the 22 features to be played at Loew's State and Chinese Theatres on a percentage basis, the distributor is entitled to a maximum rental of 50% on 8 pictures to be designated. The maximum of the remaining percentage pictures should not be more than 40% of the gross receipts. There are special provisions for extended time and moveovers and double bills.

6. Other terms: Maximum number of features which may be road-shown by distributor after first year to be agreed upon. Westerns and foreigns excluded from obligation of exhibitor but must first be offered to exhibitor and if agreement on terms not effected, such pictures not to be licensed to other exhibitors in County of Los Angeles upon terms more favorable than Fox was willing to agree to. Exhibitor to charge not less than average admission prices charged by similar theatres in County. Reference is made to simultaneous execution of lease from Metro to Fox of Loew's State Theater at Los Angeles, with right of Metro to terminate this agreement upon termination of the lease by virtue of lessee's default. This exhibit contains the terms for pictures of the 1943–44 season, but which are made subject to further negotiations between W. E. Rodgers, of Loew, and Charles P. Skouras, of Fox West Coast Agency. This agreement permits a reduction in evening adult admission prices below those of 1940, within certain limits.

EXHIBIT 188 (R. 275)—LOEW PICTURES IN FOX THEATRES

1. Parties: Fox Film Corp., by W. C. Michel, and Anchor Theatrical Corp. (Loew), by Leopold Friedman, Washington, D. C.

2. Date of Agreement: July 1, 1932.

3. Duration: 10 years.

4. Coverage: 1st run in Fox, Palace, Columbia theatres, Washington, D. C.

5. Film Rental: Fourth Provision of contract is partially quoted: "The terms of film rental to be paid by the Exhibitor to the Distributor shall be the same as the terms of film rental paid by the Exhibitor to M. G. M. Distributing Corp. for the photoplays furnished by said M. G. M. Distributing Corp. at the respective theatres." "Score charges to continue only so long as M. G. M. Distributing Corp. continues to impose score charges for films licensed by it and controlled by Distributor or its subsidiaries." "Prior to Sept. 1 of each season Exhibitor shall deliver to Distributor a certificate verified by its President or Vice President or Treasurer setting forth the terms of film rental for the ensuing year."

6. Other Terms: 40 features out of entire season's product to be selected by exhibitor, with reduced commitment if any of the theatres were closed. Road shows to be carried on in exhibitor's theatres; not more than 4 features to be road-shown. Same average clearance against all other theatres in Washington as is generally granted by all other distributors to theatres covered by this agreement. No provision as to admission prices.

EXHIBIT 189 (R. 252)—FOX PICTURES IN RKO THEATRES

1. Parties: 20th Century Fox and RKO by J. J. O'Connor.

2. Date of Agreement: October 16, 1936.

3. Duration: 1936-1937 season.

4. Coverage: 1st run in Keith Theatre in Boston, Mass.; 17 of 17 pictures.

5. Rental Terms: Two "A" pictures at $2,500 guarantee against 20% with a split of 50% over $22,000; 6 "B" pictures at $25,000 guarantee against 17½% with a split of 50% over $22,000.

If any picture does not earn the $25,000 guarantee at 20% or 17½%, the income received by the distributor on any second or subsequent weeks' engagement will be credited against such deficit until such time as the $2,500 guarantee has been earned. However, on the 8 above pictures the exhibitor guarantees the distributor a minimum of $20,000. On the second and subsequent weeks' en-

gagement of any picture, the percentage is to be the same as the first week without guarantee.

Five "C" pictures are to be played at a guarantee of $1,000 against 20% if Boston without vaudeville or at $1,000 flat if Boston with vaudeville, at a guarantee of $1,000 against 17½% if at Keith and 50% over $22,000. Four "D" pictures at $750 flat at Boston. If any pictures in Group "C" are played on percentage as a double bill without vaudeville, the exhibitor can deduct the cost of the second feature. The above is based on a ⅓ even split of distributor's product. From time to time, distributor will make 3 equal splits of available pictures not previously split. These spilts will be submitted to M. & P. Theatres which have first run of ⅔ of distributor's production in Boston and they will select one of the equal splits. RKO will have second choice and the remaining split will go to M. & P. Theatres.

6. Other Terms: Admission prices not specified. There is a long clearance schedule, the last paragraph of which provides as follows:

"In the city of Boston proper six weeks' clearance after completion of run on the Globe and Bijou Theatres. 60 days' clearance after completion of run of picture over Park, Stuart, Washington, Strand, Olympia, Palace and Rialto Theatres, as long as such theatres charge admission price of not less than 40¢ for the entire orchestra at night performance. With reference to such subsequent run theatres that may charge less than 40¢ and more than or less than 25¢, clearance shall be the minimum clearance maintained by all other companies servicing these theatres."

EXHIBIT 190 (R. 252)—RKO PICTURES IN FOX THEATRES

1. Parties: RKO Distributing Corporation, Del., by Fred E. Depinet and Evergreen State Amusement Corporation, Del. (Fox), by S. P. Skouras.

2. Date of Agreement: August 20, 1936.

3. Duration: One year—1936–1937 season.

4. Coverage: 1st run unless otherwise specified in deal sheets in exhibitor's theatres in Washington and Oregon. If any theatre fails to exhibit all features in its commitment the shortage may be offset against any overage of any theatre in the same exchange territory. Spot book-

ing or optional deal where no different commitment is specified shall not be considered as overage.

5. Rental Terms: Straight percentage and flat rental without split. Three features at 35% of gross with reversion to 30% as hereafter provided; 3 at 35% of gross with reversion to 30% as hereafter provided; 3 at 30% of gross with reversion to 25% as hereafter provided; 8 at 25%. Balance at flat rental.

With 35 and 30% feature, if after deducting the percentage from gross box office receipts the balance remaining does not equal the house expense designated for such theatre in schedule "B" plus an amount equal to ½ of the film rental, then the license fee shall be 30 and 25% respectively. The house expenses shall be secured by multiplying the tenths or twelfths by the number of days of exhibition allowing 1/10 for each week, 2/10 for Saturday and 3/10 for Sunday, while weeks having a holiday shall be computed in twelfths allowing 1/12 for each weekday, 2/12 for Saturday, 3/12 for Sunday and 3/12 for the holiday.

Except on the 6 highest percentage features where there is a stage show or vaudeville the percentage shall be 15%. Where the 6 highest percentage features are shown with a stage show or vaudeville, the cost of same shall be deducted from the gross box office receipts before computing the distributor's percentage. If 35% or 30% features are shown as part of a double feature program, the percentage paid the distributor shall be reduced 5%. If 25% features are shown as part of a double feature program the percentage paid the distributor shall be reduced to 15%. In no event shall the percentage paid the distributor on any percentage feature be less than 15%. Exhibitor may make a reduction of film rental of 5% from gross receipts for bank night before computing percentage terms payable to distributor.

Deductions are made for extended and moveover playing time and for bank nights.

The exhibitor's maximum commitment is for 48 features, each theatre commitment to be fixed on deal sheets. Commitment to be reduced if 2 features not released starring Fred Astaire, in one of which Ginger Rogers also to be starred.

"If any theatre operating for a full week, changes its policy to operate only part of the week with a less number of program changes per week, the number remaining photo-

plays becoming available that such theatre is obligated to play shall be reduced in proportion to the lesser number of changes corresponding to the changes in policy upon which the theatre operates."

Eliminations from lowest classification varies according to amount of commitment from 6 to 2.

Overage and underage provided for.

Provision is made for exonerating the exhibitor from its commitment as to theatres which are kept closed and reinstating the agreement as to such of the closed theatres which reopen.

6. Other terms: If distributor "road shows" any feature covered in this agreement, exhibitor shall have the prior right to exhibit this picture as a road show. Clearance shall be mutually agreed upon and should not be less favorable than preceding season. If distributor fails to accord the clearance granted, then the exhibitor may eliminate its obligation to play or pay for any feature on which the clearance is not given.

No admission prices specified.

Contract excludes outside producers except in two specified instances, foreign productions and program Westerns, but exhibitor is given a right to elect to take foreign feature after produced.

EXHIBIT 191 (R. 252)—WARNER PICTURES IN FOX THEATRES

1. Parties: Vitagraph, Inc. (Warner Bros.), by G. L. Sears, and Fox West Coast Agency Corp., Fox West Coast Theatres Corp., by Spyros Skouras.

2. Date of Agreement: June 8, 1936.

3. Duration: 1936–1937.

4. Coverage: 1st run in theatres in California, Arizona and Montana.

5. Film Rental: Unless otherwise specified in deal sheets: 2—35% of gross with reversion to 30% as provided; 5—30%; 18—25%; Bal. flat rental.

Reversion schedule on 35% features. If after deducting 35%, the balance remaining shall not equal the house expense as provided in schedule "A" plus an amount equal to ½ of the house expense, then the percentage will be reduced to 30%. House expense is computed taking a figure opposite the name of a theatre and mul-

tiplying it by the total number of "tenths." "Tenths" are represented by the number of days each such photoplay is actually exhibited—1/10 for a weekday, 2/10 for Saturday, 3/10 for Sunday.

Additional playing time—Flat rentals.

Article Fourth. If in any situation flat rental photoplays shall be exhibited for a longer consecutive period than the number of days indicated on deal sheets, then the Exhibitor shall pay as license fee for each day of additional playing time 50% of the pro rata daily film rental.

Score charges for additional days on the 50% basis.

Deductions for stage shows and vaudeville.

Double Bills.

Percentage pictures on double bill for 5% less of the box office receipts.

Additional playing time on percentage pictures.

Article Twenty-fourth.

This article permits a reduction in the percentage of the 35% pictures after they have reverted to 30% on the following basis:

If any of these pictures have reverted to 30% and are then carried for additional playing time, the percentage for the additional time shall be reduced to 25% if the designated house expense as it is provided in Schedule A plus an equal amount is less than 30% of the gross.

6. Other Terms: Number of features as set forth in deal sheets for each theatre.

Agreement excludes foreign pictures and program Westerns.

Elimination privilege of 4 pictures out of 52 altogether or as to particular runs.

Overage and underage provided for.

Exoneration of commitment with respect to closed theatres provided for, with right of reinstatement prospectively of agreement as to reopened theatres.

EXHIBIT 192 (R. 253)—FOX PICTURES IN WARNER THEATRES

1. Parties: 20th Century Fox Film Corporation, By W. C. Michael, Executive Vice President and Warner Bros. Circuit Management Corporation, by Joseph Bernhard, President.

2. Date of Agreement: July 28, 1936.

3. Duration: 3 years—1936–1937; 1937–1938; 1938–1939 seasons.

4. Coverage: 1st run unless otherwise indicated in deal sheets in theatres in the circuit. Commitments to be specified on the deal sheets.

5. Rental Terms: Two pictures at 35%. 4 pictures at 30%. 16 pictures in the 1936–1937 season at 25%; 18 in 1937–1938 and 1938–1939 seasons at 25%; 30 at 20% or at flat rentals for the 1937–1938 and 1938–1939 seasons. 25% and 20% pictures to be reduced to 20% and 15% respectively if shown as part of double billings. 35% and 30% pictures are reduced to 22½%, and 25% and 20% pictures are reduced to 15% if shown with regular vaudeville. When an occasional act is shown, the cost not to exceed $100, may be deducted from the gross before the percentage is computed.

Flat rentals as specified in deal sheets for 1936–1937. For subsequent years flat rentals to depend upon a comparison of gross receipts for a group of percentage pictures for the two preceding seasons. Considerable flexibility is allowed as to the number of pictures allocable to any classification in a particular season even though the total number in each classification for the three years remained fixed.

The contract covers only such features of outside producers as (a) cost to produce not less than One hundred fifty ($150,000) Thousand Dollars, and (b) that the distribution agreement between Producer and such other producer shall have been made prior to the commencement of production of such picture and Producer shall have notified Exhibitor of such distribution agreement within seven (7) days after the execution thereof, and (c) that such picture shall be based upon a well-known story, book or play or feature a well-known motion picture star or be directed by a well-known director, and (d) that the Producer is not bound by contract with such other producer to obtain such other producer's consent or approval to the terms and conditions of licensing the exhibition thereof.

6. Other Terms: Deal sheets and schedule A to specify terms, playing time and commitment for particular theatres.

It is agreed that the Clearance to be granted to the Exhibitor as to the various theatres, cities, towns, or zones

covered by this agreement, shall be in accordance with the Clearance Schedule hereto annexed and hereby made a part hereof and designated as Schedule "B." The clearance of photoplays in the Exhibitor's theatres over other theatres in a particular zone, city, or situation shall be applicable to any new theatres which may be opened or erected during the term of this agreement.

Where commitment for a theatre is less than 75% of features, distributor may sell excess to exhibitor's opposition subject to exhibitor's right to make selection from entire product. Where minimum commitment is for more than 75% no right is reserved to distributor to sell exhibitor's opposition.

Exoneration of commitment is allowed with respect to closed theatres, with right of contract reinstatement as to reopened theatres.

When commitment is for all features and average license fee is not more than $250, 10% exclusion privilege given.

Admission prices not specified.

EXHIBIT 194 (R. 253)—RKO PICTURES IN WARNER THEATRES

1. Parties: RKO Distributing Corp., by Jules Levy, General Sales Manager, and Warner Brothers Circuit Management Corp., by Joseph Bernhard, President.

2. Date of Agreement: August 31, 1935.

3. Duration: 2 years—1935-36 and 1936-37 seasons.

4. Coverage: 1st run in theatres in Circuit.

5. Rental Terms: With some specified exceptions a percentage of the total gross box office receipts and split. 3 pictures at 30% with reversion to 35% if the theatre profit equals or exceeds ½ of the film rental at 35%. 3 pictures at 25% with reversion to 30% if the theatre profit equals or exceeds ½ of the film rental at 30%. 7 pictures at 25%. Balance at terms indicated on the deal sheets. Any percentage pictures shown with regular vaudeville has its film rental reduced to 15% except the 3 top pictures which shall be 20% to a 50% split giving the theatre a profit equal to ½ of the film rental. Occasional acts, the cost thereof not to exceed $100, may be deducted from the gross receipts before film rental percentages are computed.

Specified terms and playing for each theatre to be set forth on deal sheets.

6. Other Terms: Clearance to be in accordance with clearance schedule designated Schedule "B".

Foreign made pictures and program, Westerns excluded.

Overage and underage provided for.

Distributor to limit road-shows in cities where exhibitor's theatres are located to 2 pictures, and exhibitor to have right to exhibit road-show in its theatres upon its election to do so after a prior screening of the picture at several designated local offices.

Exoneration of commitment with respect to closed theatres provided with right of contract reinstatement as to reopened theatres.

Selection provided for on deal sheets.

Admission prices not specified.

EXHIBIT 195 (R. 255)—UNITED ARTISTS' PICTURES IN PARAMOUNT THEATRES

1. Parties: United Artists Corp. by Joseph M. Schenck and Publix Theatre Corp. (Paramount) by Sam Katz.

2. Date of Agreement: Feb. 3, 1928.

3. Duration: Oct. 1, 1927–July 31, 1937.

4. Coverage: Not to exceed 14 features a year after the first year when Exhibitor is obligated to show 15 features in theatres listed in attached schedules, located in following States: Illinois, Wisconsin, Florida, Georgia, California, Arkansas, Texas, Oklahoma, South Carolina, New York, Rhode Island, North Carolina, Alabama, Tennessee, Iowa, Maine, New Hampshire, Missouri, Nebraska, Colorado, Connecticut, Massachusetts, and Vermont.

5. Rental Terms: (1) Flat rentals as set forth in Schedule "A"; (2) As a minimum guaranty a sum equal to the number of points on the basis of thousands of one percent, multiplied by the cost of each photoplay to be delivered. The points for each theatre set out in Schedule "A".

Cost of a photoplay consists of cost of production and cost of positive prints, this figure, plus the cost of distribution should equal $1,000,000 for purposes of this method of determining film rental. In addition, exhibitor to pay 50% of net profits from exhibiting picture.

"For the purpose of simplifying procedure, it is understood and agreed that authorized representatives of the Distributor and the Exhibitor shall quarterly agree upon the amount of the expenses for each theatre respectively relating to the investment depreciation, amortization, re-

turn on investment and other similar items which are to be constant during the next fiscal quarter and the amounts so agreed upon shall be used in the calculation of film rental hereunder during the succeeding quarterly period ....."

6. Other Terms: Exhibitor entitled to usual protection prevailing which it receives with respect to other motion pictures.

Admission prices not designated.

"The Exhibitor and Distributor agree that this agreement is subject to such prior rights as the United Artists Theatre Circuit, Inc., a Maryland corporation, has to the exhibition of the motion pictures distributed by United Artists Corporation pursuant to its agreement dated June 22, 1926, with United Artists Corporation, a copy of said agreement having been provided the Exhibitor by the Distributor, and the Distributor agrees that it will not extend the rights of the United Artists Theatre Circuit, Inc., to more than the 'first twenty theatres' constructed or acquired by the United Artists Theatre Circuit, Inc., and after the twenty theatres have been so constructed or acquired, to any theatre or theatres constructed or acquired by United Artists Theatre Circuit, Inc., in replacement or substitution for one or more of the first twenty theatres (or in replacement or substitution for one or more substituted theatres) which shall have gone out of the United Artists Theatre Circuit, Inc.'s, circuit prior thereto, providing such extension shall interfere with the right of the Exhibitor to exhibit for 'first run' the so-termed United Artists' pictures or photoplays in any of the theatres of the Exhibitor set forth in Schedule 'A'; and the Distributor does hereby set forth in Schedule 'C' the list of the so-termed United Artists Theatre Circuit's theatres as of this date which are included in the aforesaid contract between United Artists Corporation and United Artists Theatre Circuit, Inc."

EXHIBIT 196 (R. 321)—COLUMBIA PICTURES IN PARAMOUNT THEATRES

1. Parties: Columbia Pictures Corp. and Sparks Circuit, Inc. (Paramount), by Frank Rogers.
2. Date of Agreement: Sept. 8, 1936.
3. Duration: 1936–1937.

4. Coverage: 28 features out of 38—Exhibitor's selection and 12 Westerns at $500 each in theatres in 41 towns in Florida.

5. Rental Terms: 4 at $2,187.50, 6 at $1,250.00, 28 at $750.00.

6. Other Terms: This license also included commitment for Columbia shorts.

The right to eliminate features was restricted to the pictures from the $750 group.

This contract is for 1st and subsequent runs. Exhibitor has right to play pictures 75 times each. Exhibitor agrees to consume all runs on each feature listed hereon with a period of ten months from date of first run.

No admission prices specified.

Frank Capra productions were also contracted for by separate contract of same date for flat sum of $5,000 for the same 41 towns for 75 times.

EXHIBIT 198 (R. 324)—UNIVERSAL PICTURES IN PARAMOUNT THEATRES

1. Parties: Universal Film Exchanges, Inc., and Interstate Circuit, Inc. (Paramount), by R. J. O'Donnell.

2. Date of Agreement: Nov. 6, 1936.

3. Duration: 1936–1937, 1937–1938.

4. Coverage: Austin, 1st run, 2nd run; Dallas, 1st run: Village, Arcadia, Melrose, White; Ft. Worth, 1st run, 2nd run: Tivoli or Parkway; Houston, 1st run: Tower or Delman, North Main, Eastwood, Blue Bonnet; San Antonio, 1st and 2nd run.

5. Rental Terms: Rentals in Austin, Dallas, Fort Worth, San Antonio and Houston are largely on percentage terms, for first run, other showings are on flat rentals. Percentage is on a reversion basis, 30% if circuit gross over $45,000–25% if less.

Deductions permitted for bank night.

6. Other Terms: This agreement was signed with provision that all "undated" 1935–36 product as of 10/2/36 be cancelled.

Previews seven days ahead of opening allowed on special terms.

Product shown in 5 specified situations at 40¢ night prices, not to be shown in subsequent runs on double bill or at less than 25¢ night prices.

At Fort Worth may select any 4 pictures, 2nd run at 20%.

Exhibitor has privilege of holding top group pictures for extended run up to 14 days with reduction.

EXHIBIT 199 (R. 256)—UNITED ARTISTS' PICTURES IN FOX THEATRES

1. Parties: United Artists Corporation, L. J. Schlaifer, and Evergreen Theatres Corporation, S. P. Skouras (Fox).

2. Date of agreement: November 7, 1938.

3. Duration: 1938–1939.

4. Coverage: Special provisions and general remarks: Identical contracts were made by United Artists with the Fox West Coast Agency Corporation, the Fox Mid West Amusement Corporation, the Fox Inter-Mountain Amusement Corporation the Fox Wisconsin Amusement Corporation, and as part of this series of contracts the Fox theatres within the Los Angeles Exchange District, San Francisco Exchange District, Seattle Exchange District, Denver Exchange District, Salt Lake City Exchange District, Kansas City Exchange District, Milwaukee Exchange District, St. Louis Exchange District, and Omaha Exchange District are listed along with the particular run and rental terms allocated for each theatre.

Samuel Goldwyn Productions, David O. Selznick Productions, Walter Wanger Productions, Hal Roach Productions, Edward Small Productions.

Additional features excluding foreign features released by United Artists are to be offered the exhibitor.

5. Rental Terms: Pictures are divided into three classifications. Under the first classification in the theatres licensed on a percentage basis, 30% to equal the split figure as indicated for a particular theatre on a deal sheet, and in addition 25% of such part of the gross receipts as equals the split figure for the additional exhibition period as indicated on the deal sheets, and in addition 50% of that part of the gross receipts for each theatre as shall be in excess of such split figures for the cumulative period of exhibition.

On the second class of pictures, 25% of the gross as equals the split figures as indicated for the particular theatre on a deal sheet and in addition, 50% of such part of the gross receipts for each theatre as shall be in excess of the split figure.

On the third class, 25% of the gross box office receipts if a single bill basis, 20% of the gross box receipts on a double bill basis. With respect to moveovers on a percentage basis, there is to be reduction of five percent of the gross box receipts and in flat rental situations additional playing time is to be paid for on the basis of 50% of the pro rata daily rental required.

6. Other Terms: Where pictures are licensed on a percentage rental basis, the scale of admission prices is to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists.

Clearance is to be mutually agreed upon but not to be less favorable to exhibitor than previous season's clearance, and unless otherwise specified all runs are to be deemed first run in each town, situation, or zone.

On the deal sheets where a subsequent run is indicated, exhibitor has right to eliminate such subsequent run if the theatre has played a prior run.

There is a special provision with respect to double-bill programs, reducing the rental fees in such case, and there is a provision for revision of rental fee terms in the case where there is played a stage show or where there is a vaudeville policy. Fox is given the privilege of exhibiting pictures which have already been exhibited on a regular run in any theatre at a special matinee or morning performance for children without charge to the exhibitor. The exhibitor is permitted to hold previews or midnight shows.

If a theatre closes for a period of 8 weeks or longer, the obligations under this contract with respect to that theatre are to be canceled subject to renewal if the theatre reopens.

Deductions are to be allowed for bank nights.

Percentage features to be exploited and advertised by exhibitor to the same extent as comparable pictures of other distributors exhibited by exhibitor.

Extended playing time and moveover privileges given exhibitor at reduced film rentals.

If distributor road-shows picture in a situation where exhibitor has agreed to show all or part of distributor's product, exhibitor to have prior right to exhibit road-show.

EXHIBIT 240 (R. 268)—PARAMOUNT PICTURES IN RKO THEATRES

1. Parties: Paramount Pictures, Inc., and RKO Midwest Corp.
2. Date of Agreement: Varying dates in 1943–1944.
3. Duration: 1943–1944 product.
4. Coverage: 1st run in Albee, Palace, Grand, Family, Keiths, Lyric, Capitol, Shubert Theatres in Cincinnati, Ohio. A few pictures licensed for only one or two theatres.
5. Rental Terms: Some pictures sold on flat rental basis. Some on percentage terms varying from 15% to 65%.
6. Other Terms: Clearance as usual. In some contracts minimum admission prices fixed, in others not. Minimum admission prices raised from 55¢ in 1943 to 60¢ in 1944. One block of pictures provides for an optional moveover on some pictures at 25%.

EXHIBIT 241 (R. 269)—PARAMOUNT PICTURES IN FOX THEATRES

1. Parties: Paramount Film Distributing Corporation and Evergreen Theatre Corporation (Fox).
2. Date of Agreement: Various dates in 1943 and 1944.
3. Duration: 1943–44 season.
4. Coverage: 1943–44 Paramount features. Separate contracts for a group and for single pictures. Same terms in each contract. Specified theatres in Aberdeen, Bellingham, Bremerton, Everett, Hoquiam, Olympia, Seattle, Spokane, Wenatchee in the State of Washington. 1st and 2nd runs in each of the above towns.
5. Rental Terms: "If the total license fees (including all amounts payable hereunder by the Exhibitor after final computation hereinafter explained) paid to the Distributor for license for the exhibition of each such photoplay in the United States (including Honolulu) during the first eighteen (18) months following 'general release' of each such photoplay shall be:

1. In excess of $1,250,000 the exhibitor shall pay as license fees on such photoplays 0.74778% of such total license fees;

2. Equal to or in excess of $500,000 but not in excess of $1,250,000 the exhibitor shall pay as a license fee for such photoplay 0.70115% of such total license fees;

3. Less than $500,000 the exhibitor shall pay as a license fee for such photoplay 0.65431% of such total license fees."

6. Other Terms: For exhibition in the theatres and on the runs specified on attached schedules "for such playing time in each theatre as may be determined by the exhibitor. Such license to the exhibitor shall include, without limiting the generality of the foregoing, the right to exhibit the said photoplays at midnight shows, preview (not 'studio' previews) and on repeat engagements." As to last-named privileges not to interfere with run or clearance granted others, and repeats to be last run in zone.

Clearance and availability same as in effect as the date of contract.

Moveover privileges given in Bellingham, Bremerton, Seattle and Spokane.

No minimum admission prices fixed. (One foreign picture sold at a flat rental for all towns covered in contract.)

EXHIBIT 242 (R. 269)—PARAMOUNT PICTURES IN WARNER THEATRES

1. Parties: Paramount Pictures, Inc., and Warner Bros. Circuit Management Corporation.

2. Date of Agreement: Various dates in 1943 and 1944.

3. Duration: One year, 1943–1944 season.

4. Coverage: Warner theatres in Washington, D. C. First and subsequent runs.

5. Rental Terms: Some pictures on 25%, some on 30%, some on a 35%, some on a 40% sliding scale; some on a 35% to 40% sliding scale. Special terms for "Dr. Wassel." "Going My Way" sold to Apollo Theatre at 70% over expenses. Some pictures at flat rentals. On double features on 35% and 30% pictures deduct cost of second feature not exceeding highest flat rental paid Paramount in each situation. On 25% pictures to be 20%. The Earle which plays vaudeville was sold several top pictures at 20% to $22,500 and 50/50 over; and the "Miracle of Morgan's Creek" for the second week at 15%. The Metropolitan, following the Earle, was sold this picture at 25% to $8,000 and 50/50 over.

The fourth block of pictures was sold to Warner's on the following terms:

"The Hour Before Dawn" Percentage Situations—30%, the picture may go as high as 32½% or drop to 27½%, depending on your theatres in the percentage situations in the Washington Exchange territory making an over-all profit of 35% of the film rental paid us.

Flat Rental Situations—Same flat rental to be paid us as generally paid for 30% pictures such as Palm Beach Story or Happy Go Lucky.

"Navy Way"—22½% or same flat rental as paid for Aerial Gunner.

"You Can't Ration Love"—20% or low flat rental. Usual clearance to apply.

In those percentage situations where we customarily allow you percentage terms less than the regular deal, you are to receive the same consideration on the pictures above. The fifth and sixth blocks were sold on somewhat similar terms.

6. Other terms: First run in the City of Washington with 21 days clearance after last play date over all theatres in the City of Washington, including colored theatres, with the following clearance over towns adjacent to the City of Washington: Rockville, 21 days; Laurel, 14 days; Silver Spring, 21 days; Alexandria, 14 days; Clarendon, 21 days; Cherrydale, 21 days; Falls Church, 21 days; Gaithersburg, Mt. Rainier, Capitol Heights, Bethesda, Hyattsville.

Admission prices not specified.

EXHIBIT 243 (R. 269)—PARAMOUNT PICTURES IN LOEW THEATRES

1. Parties: Paramount Pictures, Inc., and Marcus Loew Booking Agency.

2. Date of Agreement: May 17, 1945.

3. Duration: 3 years—1941–1942, 1942–1943, 1943–1944 seasons.

4. Coverage: Greater New York City. Subsequent run.

5. Rental Terms: For the circuit, combination of 2 pictures starting at 30% for the 2 pictures and graduating up, allowing the exhibitor 25% of the film rental as profit at all times until the distributor has 40% of the gross as

film rental. The balance of the gross divided 50% to the distributor and 50% to the exhibitor. Deductions for second feature of another distributor, for Screeno and vaudeville. Special terms for State and Embassy Theatres. House expense figures set out in an attached schedule. "Standing Room Only" sold to Criterion Theatre 1st run for 70% after expenses are deducted.

6. Other Terms: Clearance not specified. Admission prices not specified.

EXHIBIT 244 (R. 269)—WARNER PICTURES IN PARAMOUNT THEATRES

1. Parties: Vitagraph, Inc., and United Detroit Theatres Corp. (Paramount).

2. Date of Agreement: Various dates in 1943 and 1944.

3. Duration: 1943–1944 season.

4. Coverage: 1st run and subsequent run in Exhibitor's theatres in Detroit, and first run in Exhibitor's theatres in Birmingham, Michigan.

5. Rental Terms: On percentage pictures. Some at 30% to a split figure and 1% increase for each $8,200 to another split figure, then 50–50. Reversion downward for second week if gross less than first split figure. Some at 35% to a split figure then 50–50 with reversion downward if gross less than splitting point. Lower terms on carry-overs. Some first runs and all subsequent runs at flat rentals. First runs in Birmingham on flat rental basis.

6. Other Terms: The number of days of playing time is specified for different pictures and different theatres. No minimum admission prices are specified for the first-run theatres, but are for the subsequent-run theatres. There is a clearance schedule covering the exhibitor's subsequent-run theatres. The first-run clearance schedule is as follows:

Regular Releases: Radius Not Less Than 22 Miles: Until four (4) weeks after our last playdate, including Detroit, and Wyandotte, Windsor, Walkerville, Sandwich, and not to be announced nor advertised for showing until three (3) weeks after our last playdate of this engagement.

Radius 22 Miles to 60 Miles: Until one (1) week after our last playdate including Detroit, Mt. Clemens, Ann

Arbor, Ypsilanti, Monroe, Trenton, Pontiac, and Port Huron, and not to be announced nor advertised for showing until after our last playdate of this engagement.

Special or "Run" Pictures: Radius Not Less Than 22 Miles: Until six (6) weeks after our last playdate, including Detroit, Wyandotte, Windsor, Walkerville, and Sandwich, and not to be announced nor advertised for showing until four (4) weeks after our last playdate of this engagement. Mt. Clemens is specifically eliminated from the above; clearance on Mt. Clemens shall be two (2) weeks after our last playdate and that such production or productions shall not be announced nor advertised for showing until one (1) week after our last playdate of the Detroit engagement.

Radius 22 Miles to 60 Miles: Until one (1) week after our last playdate, including Detroit, Ann Arbor, Ypsilanti, Monroe, Trenton, Pontiac, and Port Huron, and not to be announced nor advertised for showing until after our last playdate of this engagement.

EXHIBIT 245 (R. 270)—WARNER PICTURES IN FOX THEATRES

1. Parties: Warner Bros. Pictures Distributing Corporation and Fox West Coast Agency Corporation.

2. Date of Agreement: Various dates during 1943–44 season.

3. Coverage: 1943–44 Warner features. Separate contracts for various groups. Specified theatres in San Francisco and eighteen towns in San Francisco exchange area.

4. Rental Terms: Certain of the pictures are listed on flat rental terms and certain on a sliding scale percentage. Typical of the agreements for the various blocks is this provision: "With respect to the flat rental terms listed on the Schedule 'A' attached [illegible] and made a part of our License Agreement and Supplement, dated September 14th, 1943, it is understood and agreed that the flat rentals listed therein shall be paid by us to you. When this photoplay has completed its engagements in all of the situations or runs on Schedule 'A' wherein it is licensed to us for exhibition at flat rental, the box office receipts realized from the flat rental situations as described below shall be compared with the average box office receipts

realized from the exhibition of the following photoplays at flat rental in the same flat rental situations:

They Died With Their Boots On
Kings Row
Captain of the Clouds
The Gay Sisters

and if the sum total of the box office receipts realized from the engagement of Watch On the Rhine exceeds the average of the sum total of the box office receipts of the four pictures listed, the box office receipts percentage increase shall be determined and all of the flat rental prices on Schedule 'A' shall be increased in the same proportion."

With respect to percentage terms the various contracts provide as follows: "With respect to the situations listed herein, wherein a photoplay has been licensed at a percentage of the box office receipts terms, the photoplay, unless otherwise provided herein, based upon box office results shall receive from twenty percent (20%) to forty percent (40%) single bill, based upon the one percent (1%) sliding scale figures attached to, and made part of, this agreement, plus a sum equal to fifty percent (50%) of the amount by which the box office receipts exceed the forty percent (40%) sliding scale figure multiplied by the number of units of play time given to the photoplay."

5. Others Terms: "The exhibitor is hereby granted the same number of days of clearance and the same availability for each of its situations on runs as are in effect at the date hereof. All runs are to be deemed first run in each town, situation or zone unless otherwise indicated in writing." No minimum admission prices fixed.

EXHIBIT 246 (R. 270)—WARNER PICTURES IN RKO THEATRES, NEW YORK CITY CIRCUIT

1. Parties: Vitagraph, Inc. (Warner) With Keith-Albee-Orpheum Corporation (RKO).

2. Date: Various dates in 1943 and 1944.

3. Duration: 1943–44 seasons.

4. Coverage: Subsequent run in RKO's metropolitan New York theatres.

5. Rental Terms: For the most part pictures were sold on a sliding scale percentage basis starting at 20%, graduating up by ½ percent steps to 25%, each step except the

last being based upon an increase of 5,200 over the preceding split figure. After the 25% splitting figure was reached the distributor was to get a certain flat bonus sum plus 50% of the gross receipts in excess of the splitting figure. Generally pictures were sold on a 5- to 7-day playing-time basis and the above terms were for the 1st five days. A substantial discount was allowed for pictures played on the 6th and 7th days. Special terms for Midway Theatre in Forest Hills. Some pictures were sold on a total film rental basis for specified theatres; some pictures were sold at varying flat rentals to different theatres.

6. Other Terms: Most of the contracts which are part of this exhibit incorporate by reference paragraphs 5, 6, 7, 8, and 9 of an agreement of November 5, 1942. This latter agreement is part of this exhibit. The paragraphs referred to provide for first showing 7 days after downtown Manhattan and certain downtown Brooklyn theatres. Except as a few specified exceptions, 7 days' clearance, over all theatres in the counties where RKO's theatres are, and in Nassau county, is given RKO theatres listed on Schedule A. Minimum admission prices fixed.

EXHIBIT 247 (R. 270)—LOEW PICTURES IN WARNER THEATRES

1. Parties: Loew's, Incorporated, and Warner Brothers Circuit Management Corp.

2. Date of Agreement: Noyember 2, 1943.

3. Duration: 1943–44.

4. Coverage: Warner subsequent-run theatres in Washington, D. C.

5. Rental Terms: The distributor shall designate the classification for each picture at each theatre on one of the following classifications: Classification I: 40% sliding scale; Classification II: 35% sliding scale; Classification III: 30% sliding scale; Classification IV: 25% or flat; Classification V: 20% or flat. The sliding scale is set upon a basis of what the picture does in certain test situations—specified Warner theatres in designated towns—taking into consideration a number of listed factors such as units of playing time. Depending upon whether the picture grosses an amount equal to test figure the ultimate percentage may be above or below the sliding scale percentage. Provision made for flat rental and straight percentage

sales on some pictures. Deductions for double features and where occasional vaudeville.

6. Other Terms: Minimum admission prices not specified. Some clearances shown on deal sheets.

EXHIBIT 248 (R. 270)—LOEW PICTURES IN RKO THEATRES

1. Parties: Loew's, Inc., and RKO Midwest Corporation.

2. Date of Agreement: Various dates in 1943 and 1944.

3. Duration: 1943–1944 season.

4. Coverage: RKO's theatres in Cincinnati, Ohio. Some pictures designated for a specified theatre, some for a number of theatres.

5. Rental Terms: Generally on a sliding scale percentage basis starting at 25%, with certain theatres allowed higher splitting points than others.

6. Other Terms: Minimum admission prices fixed; not the same for each theatre. Clearance generally the same for all theatres, generally from 5 to 7 weeks over subsequent runs and numerous towns in Ohio and Kentucky. 14 days over several towns in Indiana. Certain move-over privileges given.

EXHIBIT 249 (R. 270)—LOEW PICTURES IN FOX THEATRES

1. Parties: Metro-Goldwyn-Mayer Distributing Corporation and Fox West Coast Theatres Corporation.

2. Date: August 31, 1936 (Franchise) and various dates in 1943 and 1944.

3. Duration: Franchise from Sept. 1, 1936, to August 31, 1945, and 1943–44 contracts.

4. Coverage: Loew's State Theatre, United Artists Downtown Theatre, Four Star Theatre, Grauman's Chinese Theatre, or comparable theatres of Exhibitor in Los Angeles. 1st run.

The franchise terms are set out in Exhibit 187.

5. Rental Terms: For 1943–44 season, some on sliding scale percentage, some on flat rental. Double bill allowance.

6. Other Terms: Minimum admission prices fixed.

EXHIBIT 250—PARTS 1 AND 2 (R. 270)—LOEW PICTURES IN PARAMOUNT THEATRES IN CHICAGO, ILL.

Part 1

1. Parties: Loew's Incorporated and Balaban & Katz Corporation.

2. Date: Various dates in 1943 and 1944.

3. Duration: 1943–1944.

4. Coverage: First run—Chicago. 1943–44 Loew features in Paramount theatres. Separate licenses for each picture or groups (29)—with some contracts superseded by later ones.

5. Rental Terms: (1) Flat rentals. (2) On sliding scales, i. e., percentage based on gross receipts with proviso "The sliding scale terms in this contract cover first week of run. Each subsequent week, or any part thereof, to be played on the following terms: Distributor to receive 70% of all gross receipts in excess of actual operating expense" or (3) Gross receipts in excess of weekly house expense to be divided as follows: 70% Distributor, 30% Exhibitor. The exhibitor may deduct cost of second feature from total gross receipts before computing Distributor's share, or (4) Sliding scale plus: (Contract 7076FT) in licensing "Swing Shift Masie" for exhibition at Apollo Theatre, licensee "may play the above picture at the Chicago Theatre, 7 days, $5,000" or (5) Sliding scale plus agreement that feature will not be exhibited on a double feature program ("Madame Curie" license—#7869).

6. Other Terms: Only 1 or 2 pictures contracted for from each block. Sliding scale percentage starts from 25%. Minimum admission prices specified in rider attached to each license.

7. Clearance: "21 days on all theatres in Chicago Loop district, except moveover engagements on any picture that plays in the first run out-lying Chicago district, 14 days after completion of the first Loop showing. 28 days on all theatres in the Chicago Loop district, except moveover engagements, on any picture that plays in the Chicago out-lying district, 21 days after completion of the first Loop showing. 21 days on all theatres in the city of Chicago outside of the Loop district and in Cook, Du Page and Lake Counties in Illinois (except Waukegan, Ill., which may play immediately following), and in Lake

County, Ind. No theatres in the following counties to play until after close of the engagement on any picture played for one week and not until 14 days after the opening day on any picture played more than one week: McHenry, Kane, De Kalb, Kendall, Will, Grundy, and Kankakee Counties in Illinois. Porter and La Porte Counties in Indiana."

Part 2

1. Parties: Same.
2. Date: Various dates in 1943 and 1944.
3. Duration: 1943–1944.
4. Coverage: Balaban & Katz subsequent run Chicago, and outlying theatres.
5. Rental Terms: Either on a total flat rental for a number of specified theatres or 25% of gross until Exhibitor has a profit equal to ⅓ of Distributor's 25%. Receipts thereafter to be divided 75% to Distributor and 25% to Exhibitor, on a cumulative basis.
6. Other Terms: Minimum admission prices fixed, and clearance set out for each theatre.

EXHIBIT 251 (R. 270)—FOX PICTURES IN PARAMOUNT THEATRES

1. Parties: Twentieth Century-Fox Film Corporation and Lucas and Jenkins (Paramount).
2. Date: Various dates in 1943 and 1944.
3. Duration: 1943–44 seasons.
4. Coverage: 1st, 2nd, and 3rd runs in a number of theatres in a number of towns in Georgia.
5. Rental Terms: Some first runs in some theatres as high as 35%; others as low as 20% and at flat rentals. Some pictures sold for a total sum covering a number of runs over the circuit, including four consecutive runs in Macon and Savannah, Georgia; on some pictures the exhibitor had the option to pay on a percentage or flat rental basis. On 1 picture after reaching a control figure 40% was to be paid from 1st dollar.

The 2nd and 3rd runs with rare exception are sold at flat rentals. The average flat rental price for the top picture in the blocks sold on 2nd run for a 2 or 2/3 day play time was less than $60; the average of the rest was below $35. The average 3rd run rental for 2 days was less than $30.

6. Other Terms: On some pictures in some towns holdover privileges at 5% discount. No minimum admission prices fixed; no clearance terms.

EXHIBIT 252 (R. 270)—FOX PICTURES IN WARNER THEATRES

1. Parties: Twentieth Century-Fox Film Corporation and Warner Brothers Circuit Mgt. Corp.
2. Date: Various dates in 1943 and 1944.
3. Duration: 1943–44 season.
4. Coverage: 1st and subsequent runs in Warner theatres in Philadelphia, Pa.
5. Rental terms: Varied with picture and theatre. Some on straight percentage, some on percentage plus 50% after a certain splitting point. Some on flat rentals. Reductions for holdover runs.
6. Other Terms: No minimum admission prices specified. Clearance: As per clearance sheets dated 10/7/43. The clearance sheets were not received by the Government.

EXHIBIT 253 (R. 271)—FOX PICTURES IN LOEW THEATRES

1. Parties: Contract between Twentieth Century-Fox Film Corporation and District Amusement Corporation (Loew).
2. Date of Agreement: Various dates in 1944.
3. Duration: 1943–44 season.
4. Coverage: Showing of certain Fox pictures for the 1943–44 season in the Palace, Capitol or Columbia theatres in Washington, D. C.
5. Rental Terms: Fox was to receive percentage of gross receipts ranging from 15% to 40% depending upon, where and what picture played; and in the case of three designated pictures Fox was to receive 50% of the gross receipts over and above $5,000. A flat rental ranging from $1,000 to $4,000 was provided for certain pictures to be played in specified theatres.
6. Other Terms: The agreement provided for exclusive first run in Washington, D. C., and all surrounding towns with 21 days clearance after conclusion of showing. 14 days over Alexandria, Va., Arlington, Va., Delray, Va., Cherrydale, Va., Capitol Heights, Md., Falls Church, Va., Fort Myer, Va., Round Hill, Va., Mt. Rainier, Md., Hyattsville, Md., Laurel, Md., Marlboro, Md., Silver

Spring, Md., Rockville, Md., Bethesda, Md., Gaithersburg, Md., Poolesville, Md.

A provision regarding minimum admission prices was inserted but the spaces re such prices were left blank.

EXHIBIT 254 (R. 271)—FOX PICTURES IN RKO THEATRES

1. Parties: Twentieth Century-Fox Film Corporation and Keith Massachusetts Corp. (RKO), Keith Memorial Theatre Corp. (RKO).

2. Date: (1) Nov. 1, 1943, (2) Dec. 15, 1943, (3) April 12, 1944, (4) June 14, 1944, (5) Mar. 9, 1944, (6) Oct. 4, 1944.

3. Duration: 1943–1944 Season.

4. Coverage: The licenses cover the exhibition of features in RKO theatres in Boston. Runs are not specified except by reference to a preceding license; the clearance is similarly specified by reference to a prior license.

5. Rental Terms: (1) Contract dated Nov. 1, 1943. Flat rentals for two pictures named. (2) Contract dated Dec. 15, 1943. Sliding scale percentage based on total gross receipts—after deducting cost of second feature—not to exceed $1,000.00. (3) Contract dated April 12, 1943. Flat rentals for two pictures named. (4) Contract dated June 14, 1944. Flat rental for two pictures named. (5) Contract dated Mar. 9, 1944. Sliding scale percentage based on total gross receipts. After deducting actual cost of 2nd feature—not to exceed $1,000.00. (6) Contract dated Oct. 4, 1944. Sliding scale as above. Reduced terms for 2nd week.

6. Other Terms: No minimum admission prices specified. No clearance terms specified.

EXHIBIT 255 (R. 271)—RKO PICTURES IN PARAMOUNT THEATRES

1. Parties: Contract between RKO Radio Pictures Inc. and United Detroit Theatres Inc. (Paramount).

2. Date of Agreement: Various dates in 1944 and 1945.

3. Duration: 1943–44 season.

4. Coverage: Showing of RKO pictures in the Rivera, Fisher, Cinderella, Madison, Ramona, Birmingham, Bloomfield, Vogue, Varsity, Melvindale, Alger, Northwest and Rosedale theatres in Detroit, Michigan, and suburbs.

5. Rental Terms: RKO was to receive rental, depending upon the picture and where played, as follows:

(A) "Bride By Mistake"—30% of gross receipts up to $20,867; thereafter 50% of the gross. It was further provided that if the gross was less than $20,867 the percentage was to be reduced to 25%. The play date was to be not later than 1/12/45.

(B) "Government Girl"—flat rental ranging from $35 to $1,000 depending upon the theatre in which the picture was shown.

(C) "Tender Comrade"—25% of the gross receipts. It was further provided that the actual cost of second feature for each theatre was to be deducted from gross receipts of each theatre before computing RKO's share from each theatre.

(D) "Fallen Sparrow", "Lady Takes A Chance", "Iron Major", "Around the World", "Higher and Higher"—flat rental ranging from $35 to $1,500 depending upon the picture and where played.

6. Other Terms: (A) *Clearance*—(1) *First run—of Detroit:*

(a) Regular releases—radius not less than 22 miles—until 4 weeks after their last playdate, including Detroit and Wyandotte; radius 22 to 60 miles—until 1 week after their last playdate, including Detroit, Mt. Clemens, Ann Arbor, Ypsilanti, Monroe, Trenton, Pontiac, and Port Huron.

(b) Specials or Run Pictures—radius not less than 22 miles—until 6 weeks after their last playdate, including Detroit and Wyandotte. Mt. Clemens was specifically eliminated from above and in lieu thereof clear ce on Mt. Clemens to be 2 weeks after their last ydate—radius 22 to 60 miles—until 1 week after thei last playdate; including Detroit, Ann Arbor, Ypsilanti, Monroe, Trenton, Pontiac, and Port Huron.

(2) *Subsequent run—Detroit and Suburban:* Specified in detail.

EXHIBIT 256 (R. 271)—RKO PICTURES IN WARNER THEATRES

1. Parties: RKO Pictures Corporation and Warner Bros. Circuit Management Corp.

2. Date: Various dates beginning Nov. 16, 1943.

3. Duration: 1943–44 season.

4. Coverage: Separate deal sheets for each group of pictures to be exhibited in Warner Theatres in Pittsburgh area, 1st, 2nd, and 3rd run.

5. Rental Terms: Film rentals are sometimes flat figures, sometimes percentage rentals based on gross receipts: 114 deal sheets and supplements thereto constitute this exhibit. On extended run in Ritz "Lady Takes a Chance" sold at 26%.

6. Other Terms: No minimum admission prices nor clearance specified.

EXHIBIT 257 (R. 271)—RKO PICTURES IN LOEW THEATRES

1. Parties: Memorandum contract between RKO Radio Pictures, Inc., and Loew.

2. Date of Agreement: Various dates in 1944 and 1945.

3. Duration: 1943-44 season.

4. Coverage: Showing of certain RKO pictures in Poli or Palace theatres in Hartford, Connecticut.

5. Rental Terms: RKO was to receive flat rental on certain pictures ranging from $158.75 to $317.50, depending upon the picture and where shown; in other situations percentage of gross ranging from 20% to 35% (less DF) depending upon the picture and where shown.

6. Other Terms: A number of spot booking arrangements.

Memorandum contract dated December 22, 1943, states "as per schedule attached," but schedule is not attached.

EXHIBIT 258 (R. 271)—RKO PICTURES IN FOX THEATRES

1. Parties: RKO Radio Pictures, Inc., and Evergreen Theatres Corporation (Fox).

2. Date: Various dates in 1943–1944.

3. Duration: 1943–1944 season.

4. Coverage: Fox Theatres in Portland and Vancouver.

5. Rental Terms: Both sliding scale, based on percentage of gross receipts, and flat rentals for first and subsequent runs in theatres operated by Fox and specified in exhibit.

Pictures in the blocks designated as "A" and "B" are usually rented 1st run at a percentage of "20% to 40% plus 50% in excess of 40% . . ." and subsequent run at flat rental; pictures in blocks "C", "D" and "E" are

rented for a flat fee in all runs. Some film rentals are left open, with the notation (Sched. "A" October 19, 1944) "agree locally".

Provision is made for rentals on holdover pictures or for pictures having additional playing time. The agreement of November 1, 1943, reads: Terms are subject to attached RKO Radio Pictures Inc. Standard Form of Exhibition Contract and Supplemental Agreement.

6. Other Terms: Moveovers, holdovers and double bills have special terms.

No minimum admission prices specified. No clearance terms specified.

EXHIBIT 259 (R. 271)—UNIVERSAL PICTURES IN WARNER THEATRES

1. Parties: Warner Bros. Circuit Management Corp. and Universal Film Exchanges, Inc.

2. Date of Agreement: Various dates in 1941, 1942 and 1943.

3. Duration: 1941–42, 1942–43,1943–44 season.

4. Coverage: Warner's first-run Philadelphia theatres.

5. Rental Terms: For each of the three seasons Universal was to receive as the basic formula the following:

5 pictures at 35%, 2½% off for double bill.

5 pictures at 30%, 2½% off for double bill.

5 pictures at 25%, 5% off for double bill.

Balance of commitment, 20% (if d. b. 15%) or flat rental.

The deal sheet dated Dec. 1, 1941, contains the following provisions:

30 pictures; selection out of 43.

Boyd or Stanley or Fox

(5) pictures: If gross is $8,000 or less, 20%; If gross is $15,000 or less, 25%; If gross is in excess of $15,000, 30%; If gross is in excess of $20,000, 32½%; If gross is in excess of $25,000, 35%.

Aldine or Stanton or Capitol or Karlton or Keiths

If Aldine, terms to be agreed upon when booking is made.

(30): (10) pictures, 25% of gross; (15) pictures, 20% of gross.

For any picture playing a second week or any part thereof, terms to be five percent less than earned first week with a minimum of 20%. If gross same as first week, same terms as first week.

Any picture that Warner deems not suitable for showing first run Philadelphia may be eliminated without charge.

The deal sheet for the 1941–42, 1942–43, 1943–44 seasons covering carry-over first run at Karlton or provides that rental shall be 20% to $2,500, thereafter 50% split.

Deal sheet dated Oct. 26, 1943, for "Fired Wife" at the Earle which provides for a 6-day run at $1,750.

The agreement also contained the following provision:

"Revision of national allocations in the three top brackets may be obtained by Warner submitting to Universal sufficient evidence of failure of any picture to gross, in the percentage situations, a total amount comparable to grosses of previous pictures of the distributor which have warranted 35%, 30% and 25% allocations."

6. Other Terms: The following items were to be negotiated and agreed upon between Mr. William A. Scully and their zone managers:

A. Total commitments each situation.

B. Break-down of commitments against theatres in each situation.

C. Total number percentage pictures to be played in each situation.

D. Flat rental situations and prices for each bracket.

E. Clearance.

The following provision is included in the agreement:

"The total number of pictures in the three top brackets is to be cumulative over the three-year period; that is, neither party is obligated to allocate five pictures in each of the three brackets each year but may allocate more or less as the Universal production schedule may justify from year to year. If, by July 1st, 1943, Universal has allocated and Warner has accepted more than ten (10) pictures in any of the three top brackets, then the number of pictures in such brackets to be delivered for the season 1943–44 is to be subject to renegotiation."

Overage and underage to remain the same as in 1940–41 master agreement with following modification:

Film rentals payable for extended playing time on the

top 10 pictures beyond playing time contracted for in the deal sheets shall not count as overage.

Clearance provided for in connection with each specific situation.

EXHIBIT 260 (R. 271)—RKO PICTURES IN WARNER THEATRES

1. Parties: RKO Film Booking Corporation, Warner Bros.

2. Date: November 12, 1943.

3. Duration: 1943–44 season.

4. Coverage: Hippodrome and Palace Theatres, Cleveland, Ohio.

5. Rental Terms: Warners has selection of "20 out of 50 pictures" for exhibition at Hippodrome and Palace.

As to Hippodrome: Eight pictures at sliding scale starting at 30% of gross.

As to Hippodrome or Palace: Eight pictures: If at the Hippodrome, 25% up to $12,000 then 50/50. If at the Palace, terms to be agreed upon. Four pictures: If Hippodrome, 20%; if Palace, $1,000.

"5 outside pictures, same as top terms."

For each picture moved to Allen, terms to be 5% less than Hippodrome before split.

EXHIBIT 261 (R. 271)—UNIVERSAL PICTURES IN PARAMOUNT THEATRES

1. Parties: Agreement between Universal Film Exchanges, Inc., Interstate Circuit, Inc. (Paramount), and Texas Consolidated Theatres, Inc., of Dallas, Tex. (Paramount).

2. Date of agreement: May 8, 1941.

3. Duration: 1941–42, 1942–43, 1943–44 seasons.

4. Coverage: Showing of Universal features, 1st and number of subsequent runs, shorts, serials, and news product for the seasons referred to above in certain specified theatres located in New Mexico and Texas.

5. Rental terms: Universal was to receive the sum of $260,000, payable at the rate of $5,000 per week for 52 consecutive weeks, commencing September 4, 1941. The contract provided that these payments were for certain units of service as specified. It was also provided that certain credits would be allowed if Universal should deliver less product than specified.

6. Other terms: The exhibitor had the right to exhibit any feature picture governed by the agreement in each first-run theatre at one midnight preview. Universal further agreed to hold available for the exhibitor six prints of each major picture for 30 days after available date and four prints on ordinary releases, provided exhibitor completes the first-run showing in such period for Dallas, Houston, San Antonio, Fort Worth, and Austin.

The agreement also provided that for the 1942–43 season there would be a review and revision of the weekly payment by November 1, 1942. The contract stated that the purpose of this review and revision was to determine whether the $5,000 weekly payment plan shall be revised upward or downward. A similar arrangement was made for the 1943–44 season.

The exhibitor agreed to play product on substantially nationally designated percentage terms, set up by the distributor; these designations to be mutually agreed upon, based on performance; and if as a result of these designations on feature product there is an excess sum of money accumulated beyond the $260,000 payment, then Universal shall participate to the extent of 50% of this excess.

Exhibitor is not obligated to play any picture contracted for.

Subsequent run availabilities set out.

EXHIBIT 262 (R. 271)—UNIVERSAL PICTURES IN LOEW THEATRES

1. Parties: Universal Film Exchanges, Inc., Poli-New England Theatres, Inc. (Loew's).

2. Date: January 12, 1944.

3. Duration: Part of 1943–44 season.

4. Coverage: Poli, Majestic, Globe, Lyric Theatres, Bridgepo[illegible]

5. Re[illegible] Terms: "Exhibitor agrees to play (5) pictures at the following terms: Any pictures that play Poli theatre as top pictures are to be played at a percentage of the gross box office receipts from twenty-five percent (25%) graduating upward to forty percent (40%) depending upon the amount of such box-office receipts, by one percent (1%) graduation as indicated by the sliding scale hereto attached. If any of these pictures do not gross $6,300, terms revert to twenty percent (20%).

Any pictures that play the Majestic theatre as top pictures are to be twenty-five percent (25%) of the gross if any of these pictures do not equal or exceed $5,000, terms to revert to twenty percent (20%).

Deduct: Cost of 2nd feature from gross in each of the above in an amount not to exceed $275.00, before figuring percentages.

Any flat rental pictures that play Poli or Majestic as 2nd features are to be $275.00 each. The exhibitor may play (10) pictures at the Globe or Lyric Theatres at $100.00 for 3–4–7 days."

Licenses for "specials"—"*Flesh & Fantasy*" and "*Three Cheers for the Boys*" are part of this exhibit, they include:

Rental terms: "Any pictures that play Poli theatre as top pictures are to be played at a percentage of the gross box office receipts from 25% graduating upward to 40%, depending upon the amount of such box office receipts, by one percent (1%) graduation as indicated by the sliding scale hereto attached. If any of these pictures do not gross $6,300, terms revert to 20%. Any pictures that play Majestic theatre as top pictures are to be 25% of the gross. If any of these pictures do not equal or exceed $5,000, terms revert to 20%. *Deduct:* Cost of 2nd feature from gross in each of the above in an amount not to exceed $275.00 before figuring percentage."

Also two Walter Wanger Productions at Rental Terms: "Any pictures that play Poli theatre as top pictures are to be played at a percentage of the gross box office receipts from 25% graduating upward to 40%, depending upon the amount of such box office receipts, by one percent (1%) graduation as indicated by the sliding scale hereto attached. If any of these pictures do not gross $6300, terms revert to 20%. Any pictures that play Majestic theatre as top pictures are to be 25% of the gross. If any of these pictures do not equal or exceed $5,000, terms revert to 20%. *Deduct:* Cost of 2nd feature from gross in each of the above amount not to exceed $275.00 before figuring percentage." One Julian Duvivier Production at same terms.

6. Other Terms: No minimum admission prices specified. Clearance: 30 days in Bridgeport, 14 days before Fairfield, Stratford, Westport, Wildmere Beach, and Milford.

EXHIBIT 263 (R. 271)—UNIVERSAL PICTURES IN FOX THEATRES

1. Parties: Universal and Fox Midwest Amusement Corporation.
2. Date: February 23, 1944.
3. Duration: 1943–1944 season.
4. Coverage: 1st run Kansas City, Mo.
5. Rental Terms: Five at 20% to 40% plus 50% in excess of 40% sliding scale; 2½% reduction for double bills but minimum is 20%. Five at 20% to 40% in excess of 40% sliding scale, same double bill deductions. Six at 40% to 20%, if double bill, 5% reduction, but 20% minimum. Five outside producers releases at first or second group terms. Two at $550; the rest at $385. These flat-rental pictures could play day and date at 2 out of 3 of the following theatres: Tower, Uptown, and Esquire. Except as to 7 flat-rental pictures contracted for, if they played Esquire or Uptown, $220. If additional pictures used: $275 at the Tower; $220 at the Uptown or Esquire; $137.50 if at Plaza for 3/4 days.
6. Other Terms: Commitment: 31 if less than 50 released; 32 if 50 released; 33 if 51 or more released. Playing time is 7 days. Vaudeville terms on percent pictures to be agreed upon. This exhibit is a single deal sheet. It states that its terms are subject to a Master Agreement dated 9/30/41 and a Special Letter Agreement dated 2/23/44. Neither of these two last-mentioned agreements was furnished the Government. The deal sheet also states that percentage formula figures that apply to each theatre are set forth on Schedule B dated September 4, 1943. This schedule was not furnished the Government.

EXHIBIT 264 (R. 271)—COLUMBIA PICTURES IN THEATRES OF POLI-NEW ENGLAND THEATRES, INC. (LOEW'S), IN BRIDGEPORT, CONNECTICUT

1. Parties: Columbia Pictures Corporation and Poli-New England Theatres, Inc.
2. Date: June 1, 1942.
3. Duration: 1943–1944 season.
4. Coverage: Poli and Majestic Theatres, Bridgeport, Conn.
5. Rental Terms: Sliding scale with the Exhibitor having the selection of "34 pictures out of 44." 8 to play

Poli only on sliding scale. If on double bill, terms reduced to 2½%. 4 to play Poli only on sliding scale. If on double bill, 2½% reduction. 22 at $300 each. With respect to the 12 top percentage pictures the distribution is to receive a minimum of 20%. "Sliding Scale" annexed to exhibit. Run and Clearance: Exclusive first run, Bridgeport. 30 days in Bridgeport, [illegible] days before Fairfield, Stratford, Westport, and Walnut Beach.

EXHIBIT 265 (R. 271)—COLUMBIA PICTURES IN FOX THEATRES

1. Parties: Columbia Pictures Corp. and Affiliated Theatres Corp. (Fox).

2. Date of Agreement: November 23, 1942.

3. Duration: Three years—Sept. 1, 1942–Sept. 30, 1943; Sept. 1, 1943–Sept. 30, 1944; Sept. 1, 1944–Sept. 30, 1945.

4. Coverage: Washington and Oregon. Thirty to forty photoplays to be released by the distributor each season.

5. Rental Terms: Eight pictures on a percentage basis from 50% to 20% minimum of the net box office receipts computed in relation to the one percent sliding scale or reversion figures as specified on the deal sheets. Eight pictures on a percentage basis from 40% to 20% minimum computed on the same basis. The balance on a flat rental basis. The percentage is reduced 2½% on the first eight and 5% on the second eight when the feature is exhibited on a double feature program; computation is based upon 10ths and 12ths relating to the days of exhibition. When exhibited with a stage show or vaudeville a fair and reasonable percentage shall be agreed upon or arbitrated. For flat rental photoplays held over, the rental is 50% of the flat rental figure computed on a daily basis; and for percentage pictures the hold-over may revert to 15% computed on the same basis as for the original showing. A similar provision applies to move-overs.

6. Other Terms: Pictures exhibited in the one or two seasons immediately preceeding may be shown without cost in conjunction with another photoplay of the exhibitor.

The designations of the distributor of those plays to be agreed upon in the first 16 on a percentage basis may be arbitrated.

Photoplays released by the distributor in excess of 40 shall first be offered to the exhibitor.

Eliminations by the exhibitor shall be made only from the percentage and highest flat rental classifications in theatres where the exhibitor has agreed to exhibit part of the product only. In theatres where the exhibitor has to exhibit the entire product he may eliminate four photoplays from those included in the lowest flat rental classification only.

A shortage of commitment in any single theatre may be offset by an overage in another theatre in the same exchange territory.

In the event any theatre closes for a period of 8 days the contract is cancelled as of the first day the theatre closed and in the event of sale, if the distributor is not willing to transfer the contract to the purchaser the agreement is also cancelled.

Runs are specified on deal sheets which are not annexed to the exhibit.

The cost of give-aways may be deducted from the rental.

In a letter dated November 23, 1942, it is stated that the deal sheets do not contain the clearance but that the understanding is that the clearance to be specified in no event would be less favorable than that granted to each theatre for the motion picture season 1941–42.

EXHIBITS 266, 266a (R. 271, 2159)—COLUMBIA PICTURES IN WARNER THEATRES

1. Parties: Columbia Pictures Corporation, Warner Bros. Circuit Management Corporation.
2. Date: September 1, 1943; May 18, 1944.
3. Duration: 1943–44, 1944–45, 1945–46.
4. Coverage: First-run Warner circuit except as otherwise indicated by deal sheets[1] or this agreement.
5. Film Rentals: As specified on deal sheets.
6. Other Terms: Clearance in accordance with clearance schedule, Schedule B.[2] If clearance is granted against a named theatre or theatres indicating that it is the intention of the distributor to grant such clearance against all theatres in the immediate vicinity of the exhibitor's theatre, then unless otherwise provided in said "Schedule B" such clearance shall include any theatre in such vicinity thereafter erected or owned.

[1] Deal sheets not furnished government.
[2] Not furnished government.

Exhibitor not obligated to take foreign pictures, program western or pictures having an animal as principal character.

Reduction for double features, vaudeville shows, and bank nights.

Special terms for midnight shows, regular percentage terms for previews.

Selection rights except as to top 13 pictures; elimination provided for. Overage and underage provided for.

EXHIBIT 267 (R. 271)—COLUMBIA PICTURES IN PARAMOUNT THEATRES

1. Parties: Columbia Pictures Corporation and Florida Theatres, Inc.

2. Date of Agreement: December 1, 1943.

3. Duration: 1943–44 season.

4. Coverage: Florida towns, 1st and consecutive subsequent runs.

5. Rental Terms: 3 features at 35% of gross; 4 features at 30% of gross; 4 features at 25% of gross; and the remainder at flat sums.

6. Other Terms: The exhibitor agrees to play a minimum of $4,000 worth of Columbia short subjects.

Exhibitor may use each feature 85 times. No minimum admission prices of clearances specified.

EXHIBIT 268 (R. 271)—COLUMBIA PICTURES IN RKO THEATRES, DAYTON, OHIO

1. Parties: Columbia Pictures Corporation, RKO Midwest Corporation.

2. Date: July 29, 1942.

3. Duration: Two years, 1942–43, 43–44.

4. Coverage: Keiths, Colonial, Strand, State Theatres in Dayton, Ohio.

5. Rental terms: 36 features licensed—

5 at 35% of the gross to $11,000 and 50% over straight pictures to play Keiths.

5 at 30% of the gross to $9,000 and 50% over straight pictures to play Keiths.

6 at 25% of the gross to $8,000 and 50% over straight pictures to play Keiths, Colonial, Strand.

20 at 20% of the gross to play at Keiths, or Colonial, or Strand or State—if double billed at State 15% of gross.

Rental to be $250 flat for 7 days on a 20% picture which Colonial play with vaudeville.

6. Other Terms:

1st run in Dayton, 45 days over all suburban runs. 7 days from end of run to 30 days over named towns.

Amendments by rider on percentage split figures in Keiths.

No minimum admission prices fixed.

If distributor adopts policy of distributing television productions contract to be renegotiated.

EXHIBIT 269 (R. 272)—UNITED ARTISTS PICTURES IN LOEW THEATRES

1. Parties: United Artists Corporation and Loew.

2. Date of agreement: August 31, 1943 and November 17, 1943.

3. Duration: Part of 1943–44 season.

4. Coverage: Grand Theatre, Atlanta, Georgia; Vendome Theatre, Nashville, Tennessee; "Johnny Come Lately," "Hi Diddle Diddle," "Stage Door Canteen."

5. Rental Terms: 35% to 50% split with reversion to 20 and 25% under certain conditions.

6. Other Terms: Standard contract attached. No minimum admission prices specified; no clearance terms specified.

EXHIBITS 270, 270a (R. 272, 2161)—UNITED ARTISTS PICTURES IN LOEW THEATRES, NEW YORK CITY

1. Parties: United Artists Corporation, Loew's Inc.

2. Date: September 22, 1943.

3. Duration: Part of 1943–44 season.

4. Coverage: Theatres in New York City in Loew's Greater New York Theatre Circuit.—For "Johnny Come Lately."

5. Rental Terms: "Johnny Come Lately" is to play as the "A" picture for the so-called long half playing time in all of the theatres of the Loew Greater New York Theatre Circuit, on the following terms and conditions:

Twenty-five Percent (25%) of the gross receipts until such time as the combined gross for that production of all of the so-called Loew Metropolitan Theatres (excluding the State Theatre, New York City), shall equal the operating expenses of those theatres (such operating cost

to include cost of second feature), plus the twenty-five percent (25%) film rental, plus a profit to the Exhibitor equal to Fifty Percent (50%) of the said twenty-five percent (25%) film rental. Thereafter, the gross receipts shall be divided Fifty Percent (50%) to the Distributor and Fifty Percent (50%) to the Exhibitor.

As to the State Theatre, New York City, the film rental for that production shall be computed entirely separate and apart from the computations of the film rental for the balance of the so-called Loew Metropolitan Circuit of Theatres, in the following manner:

There shall first be deducted from the gross receipts the actual cost of the stage show, musicians and stagehands, the cost of the stage show is Seven Thousand Eight Hundred and Seventy-Five Dollars ($7,785). Then the Distributor is to receive Twenty-Five Percent (25%) of the remaining gross receipts until such time as the theatre receives an amount equal to one-half of the said Twenty-Five (25%) film rental as profit. Thereafter, the gross receipts shall be divided Fifty Percent (50%) to the Distributor and Fifty Percent (50%) to the Exhibitor.

6. Other Terms: Double bill allowance over circuit up to $14,000. No minimum admission prices specified; no clearance terms specified.

EXHIBIT 271 (R. 272)—UNITED ARTISTS PICTURES IN WARNER THEATRES

1. Parties: United Artists Corporation and Warner Bros. Circuit Management Corporation.

2. Date of Agreement: Various dates in 1943 and 1944.

3. Duration: 1943–44 season.

4. Coverage: Entire Warner Bros. circuit for several features separately specified.

5. Rental Terms: Some at 25% of the gross receipts with permission to deduct the cost of a second feature and the cost of added attractions not to exceed $100.

Flat rental situations shall pay the same flat rentals that have been paid in the past for United Artists 25% pictures. Some features carry a percentage of 20%, others 30%, some a flat amount of $1,500 in specified situations, and in Stanton Theatre, Philadelphia, for the feature "It Happened Tomorrow," the rental is based on a sliding scale from 25% to $14,000, with a 50% split thereafter.

Similar terms apply to other pictures and theatres listed.

6. Other Terms: It is generally provided as to each feature that after the completion of its engagements throughout the entire circuit the results are to be reviewed by the exhibitor and distributor and after all the factors had been weighed, consideration is to be given to an increase in the above terms.

Deductions for double features, midnight shows, extended playing time and added attractions. Clearance not specified but reference made to clearance sheets of 8/31/43.

EXHIBIT 272 (R. 272)—UNITED ARTISTS PICTURES IN FOX THEATRES

1. Parties: United Artists Corporation, Fox West Coast Agency.

2. Date: Various dates in 1943.

3. Duration: 1943–44 season.

4. Coverage: Loew's State, Chinese, Ritz, Carthay Circle, United Artists, Wilshire, Four Star and others for Los Angeles Area.

5. Rental Terms: "Stage Door Canteen." For Loew's State, Chinese and Ritz:

50% to 20% minimum single or double bill with allowance when feature played double.

"The film rental as to Loew's State Theatre is to be determined and paid as provided above.

"The film rentals on photoplays exhibited in the Chinese Theatre in Hollywood, are to be determined and paid also as provided above. When the feature has completed its engagement, if the undersigned as the Exhibitor, does not earn in the Chinese Theatre on the photoplay licensed and exhibited, the same ratio of theatre profit to film rental paid as is earned by the undersigned as Exhibitor in the Loew's State Theatre on the photoplay, then you agree to credit the undersigned or to pay the undersigned in cash, such sums of money as will give to the Chinese Theatre the same ratio of theatre profit to film rental as is earned in the Loew's State Theatre on the photoplay.

"Conversely, if the ratio of theatre profit to feature film paid on account of the exhibition of the photoplay in the Chinese Theatre shall be greater than the ratio of theatre profit to film rental paid on account of the exhibition of the photoplay in the Loew's State Theatre, then we shall

pay to you such sums of money as additional film rental so that the ratio of theatre profit to film rental shall be the same for both the Loew's State and Chinese Theatres."

For Carthay Circle:

50% to 15% minimum single or double bill.

Other terms for other theatres specified in "Schedule A" for "Victory Through Air Power" at flat rentals; "Hi Diddle Diddle."

"The Kansan" was sold in numerous situations for the most part on flat rentals.

"Jonnny Come Lately" was sold first run for several theatres in Los Angeles, day and date, for the first week at 20 to 40% plus 50% of the gross receipts in excess of 40% sliding scale figure; for additional weeks, 15% to 40% plus 50% of the gross in excess of 40% sliding scale figure. Double bill allowance.

6. Other Terms: No minimum admission prices specified. No clearance terms specified.

EXHIBIT 272a (R. 2160, 2170)—UNITED ARTISTS PICTURES IN FOX THEATRES

1. Parties: United Artists Corporation, Fox West Coast Agency Corporation, Evergreen Theatres Corporation.

2. Date of agreement: Supplementary contract dated December 7, 1942 and June 24, 1943.

3. Duration: 1942–43 season.

4. Coverage: Los Angeles, San Francisco, and Seattle Exchange Territories: "Stage Door Canteen," "Lady of Burlesque."

5. Rental terms: Provided in Schedule A, which is not attached to the exhibit. Letter of June 24, 1943 provides for a deduction of 2½% for exhibition on a double feature program and permits a reversion to 15% of the box-office receipts for holdover exhibition.

6. Other terms: The cost of bank night and other give-aways may be deducted from the gross receipts in computing the rental and special terms shall be agreed upon in the event the features are shown in connection with a stage show or vaudeville.

Clearance shall be mutually agreed upon and in no event shall it be less favorable than clearance in effect on the date of the agreement.

EXHIBIT 273 (R. 272)—UNITED ARTISTS PICTURES IN PARAMOUNT THEATRES

1. Parties: United Artists Corporation and Florida Theatres, Inc. (Paramount).
2. Date of agreement: September 17, 1943.
3. Duration: Part of 1943–44 season.
4. Coverage: Florida towns—"Stage Door Canteen," "Hi Diddle Diddle," "Johnny Come Lately," "The Kansan."
5. Rental terms: 35% of gross receipts to specified split films for the respective theatres, then 50% for "Stage Door Canteen", 30% of gross for specified cities for "Hi Diddle Diddle" and a flat rental basis of $2,500 for other specified towns in Florida for the same picture. 35% of the gross for "Johnny Come Lately" in specified cities. Flat rental of $3,000 for other cities listed. $1,500 for "The Kansan". Rental for specified cities.
6. Other terms: 1st and subsequent runs as high as 10 specified for particular towns 100 runs of last 3 pictures licensed.

No clearance terms specified; no minimum admission prices specified.

EXHIBIT 274 (R. 272)—UNITED ARTISTS PICTURES IN RKO THEATRES

1. Parties: United Artists Corporation and RKO Midwest Corporation.
2. Date of Agreement: September 1 and 16, 1943.
3. Duration: Part of 1943–44 season.
4. Coverage: Palace, Grand, Lyric, Albee, Schubert Theatres at Cincinnati, Ohio. For "Stage Door Canteen," "Victory Through Air Power," "Hi Diddle Diddle," William Cagney picture, and "The Kansan."
5. Rental Terms: "Stage Door Canteen"—40% to a 50–50 split at $16,000. "Victory Through Air Power"—25%. "Hi Diddle Diddle"—30% to a 50–50 split at $12,000. At the Grand and Capitol the moveover terms are 25% to $7,000, then 50–50. If the picture does less than $6,000, terms to revert to 20%. Cagney—35% to a 50–50 split at $16,000. "The Kansan"—$500.

6. Other Terms: Minimum admission prices fixed for "Hi Diddle Diddle" at the Palace and Lyric Theatres at 44–55 cents evenings for adults, 44 cents matinees for adults, and 17 cents for children.

Deduction for double bills. No minimum admission prices specified; no clearance terms specified.

EXHIBIT 383 (R. 1541)—UNITED ARTISTS PICTURES IN FOX THEATRES

1. Parties: United Artists Corporation; Fox Subsidiaries.

2. Date: Sept. 1, 1941.

3. Duration: 1941–42 season.

4. Coverage: Substantially identical contracts with the major Fox circuits covering productions of four producers. First run unless otherwise noted on deal sheets.

5. Rental Terms: Pictures on percentage are to be classified as Group I or II, according to certain defined control figures based on test situations to be compared with gross receipts. Provision for flat rentals. Flat rentals for specific theatres or group of theatres set out in attached schedules.

6. Other Terms: Additional productions of producers mentioned to be offered to exhibitor. Deduction for double bills but license fee not to go below certain percentage.

Right to eliminate subsequent runs if theatre which usually plays subsequent run has played the prior run.

On move-overs sliding scale may go to 17½ or 15%. On hold-overs scale may go to 17½%.

Special terms for additional playing time on flat rental pictures; where stage show and vaudeville policy terms to be negotiated.

Exhibitor has prior right to roadshows.

Special terms for previews and midnight shows.

As to theatres closed for 8 weeks or more, obligations cancelled, but reinstated if reopened except as to product licensed in meantime by distributor to another exhibitor.

Clearance to be agreed upon but not to be less favorable than that of prior season.

Special terms for bank night and give-aways.

EXHIBIT 384 (R. 1498)—UNIVERSAL PICTURES IN FOX THEATRES

1. Parties: Universal Film Exchanges, Inc., and Fox Midwest Amusement Corporation.

2. Date: January 16, 1939.

3. Duration: 1938–1939; 1939–1940 seasons.

4. Coverage: Fox's theatres in Kansas, Missouri, Nebraska, Illinois, and Iowa. Not less than 32 nor more than 40 features licensed.

5. Rental Terms: 1st run unless otherwise indicated on deal sheets.

The rental terms for each season are as follows: 4 photoplays each at 35% of the gross box office receipts, to be reduced to 30% if the gross does not reach a specified figure as on the Deal Sheets. 4 photoplays each at 30% of the gross box office receipts, to be reduced to 25% if the box office receipts do not reach a specified figure. 2 photoplays each at 25% of gross receipts. 2 photoplays each at 25% to be reduced to 20% if gross does not reach a specified figure. Balance: Flat.

Additional allowances are made in cases where photoplays are exhibited with vaudeville, on double bill, added attraction, give-aways, etc.

6. Other Terms: Foreign pictures, pictures of outside producers and "program westerns" are excluded from the deal.

Moveovers are permitted with additional reductions in percentage rentals; similarly with holdovers. The Exhibitor is given the first opportunity to exhibit "road show" attractions on terms to be mutually agreed upon.

In the event the Distributor releases more than 40 pictures, the excess shall be first offered to Fox in all situations where it has agreed to use all or more than half of Universal's product. In situations where there has been a split of product, the Exhibitor will receive a split of such excess over 40. The Exhibitor also has a right to eliminate 6 pictures if 40 are licensed to it, and 3 pictures if 20 licensed.

Clearance terms are to be mutually agreed upon and no less favorable to Exhibitor than clearances granted in preceding season. Existing delinquencies for film rentals due for 1937–38 season from Fox are cancelled.

If prior to July 1, 1939, either party thinks rental terms for second season are inequitable, William A. Scully, representing the Distributor, and Sypsos P. Skouros, representing the Exhibitor, to agree on equitable terms.

EXHIBIT 386 (R. 1673)—PARAMOUNT PICTURES IN RKO THEATRES

1. Parties: Consolidated Theatres, Inc., W. S. Butterfield, Inc., by W. S. Butterfield, President, by E. C. Beatty, Secretary and Treasurer.

2. Date of Agreement: Aug. 24, 1933.

3. Duration: Sept. 9, 1933–Sept. 8, 1953.

4. Terms: *Consolidated Theatres, Inc.*, is the lessee of the following theatres in Grand Rapids, Michigan: (Center) Isis Theatre—Kent Theatre and Majestic Theatre. *RKO Midwest Corp.* is the owner in fee of the following theatres in Grand Rapids Michigan: Regent Theatre, Keith Theatre.

The parties to this contract desire to employ the services of a manager to operate the theatres as one unit in Grand Rapids, Michigan, and to provide for the joint application and distribution of the receipts from the operation upon the following terms: Manager to contract for, select and book all motion pictures; (2) RKO Vaudeville Exchange shall have exclusive agency to book, procure, or furnish vaudeville; (3) The manager agrees to book and exhibit therein during the term of this agreement such number of motion pictures distributed by RKO Distributing Corp. and subject to such terms and conditions as are specified in Article 30 of an agreement made Sept. 24, 1926 (See Exhibit 387), between Walter S. Butterfield, Famous Players Lasky Corp., Balaban & Katz Corp., Publix Theatres Corp., and B. F. Keith Corp.; (4) After payment of expenses 50% of remaining sum to Consolidated and the remaining 50% to Midwest. Loss similarly to be shared.

At the expiration or prior termination of this agreement all motion pictures distributed by Paramount Distributing Corporation contracted for by the manager shall be assigned to Consolidated and all motion pictures distributed by RKO Distributing Corp. contracted for by the manager shall be assigned to Midwest.

EXHIBIT 387 (R. 1673)—PARAMOUNT PICTURES IN RKO THEATRES

1. Parties Signatory to This Memorandum of Agreement: Walter S. Butterfield, hereinafter called "Butterfield"; Famous Players Lasky Corp., hereinafter called "F. P. L.," by Adolph Zukor, President; Balaban & Katz Corp., hereinafter called "B & K," by Sam Katz Vice President; Publix Theatres Corp., hereinafter called "Publix," by Austin C. Keough, Secretary; B. F. Keith Corp., hereinafter called "Keith," by B. E. G. Lander, Jr., Vice President.

2. Date of Agreement: Sept. 24, 1926.

3. Duration: 25 years beginning Jan. 2, 1927.

4. Terms: F. P. L. and Butterfield agree to be incorporated as W. S. Butterfield Theatres, Inc., hereinafter referred to as the "new company."

There shall be three classes of stock—Class A to be owned by Butterfield, Class B to be owned by F. P. L., Class C to be owned by Keith.

Page 12 (fa): Refers to Butterfield's rights to sell its Class "A" stock to certain individuals, one of whom is E. C. Beatty.

Page 12 (fb): FPL is entitled to transfer its Class "B" stock to any corporation in which FPL or B & K or both together shall own not less than 50% of the stock.

Page 12: FPL-Butterfield and Keith agree each with the other to carry out provisions in the memorandum as to disposition of stock of the new company.

Page 15: Butterfield agrees to turn over his theatres and join with F. P. L. and Keith.

Schedule A, Page 57; Schedule C, Page 72

See page 15, Par. 6a. Butterfield agrees to cause to be executed and delivered to the new company, leases on a number of specified theatres in a number of designated towns for the term of 25 years.

Page 17: Butterfield agreed to turn over certain other theatres and theatre sites to new company.

Page 17: Butterfield owns a stock interest in the Garden Theatre, Battle Creek, Michigan, and the Regent Theatre at Battle Creek, Michigan, and agreed to lease this stock to the new company and to subsequently acquire balance of stock on behalf of new company.

Page 19: Butterfield and Kunsky and Trendle own 52% of the stock of Consolidated Theatres, Inc., operating theatres in Grand Rapids, Michigan. Butterfield agreed to buy out Kunsky and Trendle and arranged to have the new company take over the payment of the cost of the theatres as well as his original interest.

Page 20: The new company acquired control of 5 theatres (See Schedule H), Bay City, Michigan, through 100% ownership of Southern Enterprises, Inc., which owned 50% of the operating company Wenonah Theatre Co.

Schedule H, Page 95

F. P. L. owns 100% Southern Enterprises, Inc., which in turn owns 50% of Wenonah Theatre Co., which owns, leases or operates the following theatres in Bay City, Michigan: Regent, State, Columbus, Washington, Wenonah.

Page 22: B & K acts in capacity of guarantor for subsidiary, Saginaw Theatre Co., a subsidiary of B & K certain theatres in Saginaw, Michigan, as follows: (a) A theatre to be erected and leased from Elf Khurafeh Temple Association in Saginaw, Michigan; (b) The Mecca Theatre, Saginaw, Michigan. The new company is to assume the two above leases.

Page 23: F. P. L., Keith, and Butterfield agree to cause the new company to enter into an employment contract with W. S. Butterfield for five years beginning 1/2/27 for his service as president of the new company at $1,000 per week.

Page 24: Refers to Schedule "K" on page 144. An employment contract for five years beginning 1/2/27 between F. P. L., Keith, and Butterfield with Edward C. Beatty to be general manager of the new company.

Page 27 and 28: F. P. L., Butterfield, and Keith agree, 1/2/27, that Publix as agent shall for twenty-five years purchase *all* motion pictures to be exhibited in the theatres of new company and for any theatres subsequently acquired.

Page 31, Par. 19: A twenty-five year franchise, dated from 1/2/27, for F. P. L. pictures to be made by new company.

Page 34, Par. 19 (e): When the new company cannot exhibit all of F. P. L. products in a city—

"* * * FPL shall have the right to make a division of such available pictures of FPL between the theatres.

of the new company or its subsidiaries and any other theatres in such places * * *."

* * * Provided always, however, that in the event that: (1) at any time Famous Players shall find that it cannot obtain exhibition for all of its pictures distributed by it in such place, unless it licenses all of such pictures to a theatre or theatres other than those of the new company or of its subsidiaries in such place, or (2) if FPL finds that it is unable to obtain exhibition for such of the pictures distributed by it as the new company or its subsidiaries shall fail to take. * * * then FPL shall have the right, during the continuance of such conditions in such place, to dispose of any or all of its pictures to theatres other than those of the new company * * *; and provided further, that FP shall in no event make contracts with respect to other theatres in such places for more than one year's releases at a time, unless with the written consent of the new company."

Page 36: The provisions of Par. (e), page 34, apply in Grand Rapids, Michigan, even though the best theatre of the new company has 400 seats less than the best theatre of the opposition.

Page 37 (h): The new company shall not reduce or maintain prices below the level of admission prices charged for like classes of theatres in cities, towns, and villages having comparable operating conditions to the end that all things being relatively equal FPL shall receive as favorable film rentals for the exhibition of its pictures * * * by the new company * * * as it receives elsewhere in the U. S. under comparable conditions.

Page 38 (i): All FPL features shall receive first run in the new company houses which have a first-run policy. Pictures of FPL shall not be exhibited for a first run in any theatre of the new company having a second-run policy without the consent of FPL in each instance.

Page 40, Article 20: "F. P. L. and Butterfield severally agree to cause the new company promptly following its organization to agree with Keith that Publix will, as agent for the new company and its subsidiaries, contract from time to time and from year to year, wherever demanded by Keith for first-run exhibitors in each of the cities, towns, and villages in which the new company or its subsidaries have one or more theatres, from time to time during the term of this agreement, of a number of feature motion pic-

tures of P. D. (or any corporation producing or distributing feature motion pictures substituted by Keith for said P. D. C. * * *)."

(P. D. C.—Producers Distributing Corporation.)

The price of motion pictures of PDC shall be determined by mutual agreement between PDC and Publix. If an agreement cannot be reached, the matter will be arbitrated as in the case of arbitration for pictures of F. P. L.

Page 43, Par. 21: Pictures shall play even though the film rental terms are in dispute and shall thereafter be arbitrated.

Page 44, Par 24: The new company shall pay Publix $5 per week for each theatre of new company served by Publix under said contract from time to time. This fee may be adjusted. Such fee shall represent fair compensation to Publix for its services under said contract.

Page 44, Par. 25: Publix will be compensated for exploitation of any pictures by the new company, all or a substantial part of which shall be exhibited in theatres of the new company.

Page 45, Par. 26: This contract as provided for in Article 18 may be assigned by Publix to F. P. L. or to any corporation which may be owned or controlled by F. P. L.

Page 46, Par. 28: Butterfield, F. P. L., and Keith agree to incorporate promptly a corporation to be named Butterfield Michigan Company or such other available name hereafter referred to as "second company." This stock shall be subscribed and paid for in cash at $10.00 a share. Butterfield buying the A stock, FPL buying the B stock, Keith buying the C stock.

Page 47: The purpose of the "second company" is to acquire theatres during the term of the contract outside the areas of Detroit or Grand Rapids, Michigan, in a circle having a 10-mile radius. The agreement however, provides that either the "new company" or the "second company" may make the acquisition of any additional theatre.

Pages 47–48, Par. 30: Provision was made for addition of new theatres to the list covered by the contract.

Par. 31: The provisions of this contract to apply to the second companies, with certain exceptions.

Par. 32: Butterfield, FPL, and Keith shall cause the new company and the second company to enter into a contract with each other providing that during the term

of the agreement the new company shall devote and the second company shall engage, the services of the new company in the administration of the affairs of the second company.

EXHIBIT 395 (R. 2165)—FOX PICTURES IN RKO THEATRES

1. Parties: Fox Film Corporation, as Distributor; Keith-Albee-Orpheum Corporation, by its Agent; RKO Film Booking Corporation; RKO Proctor Corporation, by its Agent; RKO Film Booking Corporation, as Exhibitors.

2. Date of Agreement: January 2, 1935.

3. Duration: 3 years—August 1, 1934 to July 31, 1935; August 1, 1935, to July 31, 1936; August 1, 1936, to July 31, 1937.

4. Coverage: Greater New York and includes all feature motion pictures released by distributor during each of the specified motion picture seasons.

5. Rental Terms 25% of the gross for the second and fourth pictures featuring Shirley Temple, with a reduction to 17½% for double feature showing with vaudeville. $31,700 for the first and third pictures featuring Shirley Temple. $2,300 for each of four feature pictures designated by the distributor to be exhibited in not more than 14 of said theatres. The balance of said pictures shall pay an average of $12,400 per picture to be allocated to the respective pictures by mutual agreement.

For the second and third seasons the parties mutually agree upon the playing time to be afforded the pictures and the license fees to be paid by the exhibitor, and in the event of failure to agree, the matter to be arbitrated.

6. Other Terms: The distributor has the right during the first season to sell the Kingsway or Avalon Theatres to play Fox pictures day and date with the RKO major Brooklyn circuit. If during the second and third seasons the exhibitor shall provide a theatre of similar size and caliber in the general location of the Kingsway and Avalon, then the distributor shall sell its pictures to the theatre so provided by the exhibitor at prices to be mutually agreed upon or determined by arbitration.

In respect to the theatres covered and located in New York, Bronx, and Westchester Counties, the protection granted over any other runs in those counties shall be 7 days from the last day of exhibition. The same pro-

tection is granted to theatres located in Kings, Queens, and Nassau Counties.

The admission prices now being charged at said theatres shall not be reduced during the exhibition of any picture the film rental for which is based on a percentage of the gross receipts without the consent of the distributor.

By letter dated January 2, 1935, the Riverside and Nemo Theatres were included in the franchise agreement; and by letter dated January 2, 1935, confirmation is made of existing franchise agreements in effect betwen Fox Film Corporation and Skouras Theatre Corporation and the Randforce Amusement Corporation, dated respectively November 2, 1931, and December 16, 1931, which agreements granted to various theatres mentioned therein first subsequent run in Greater New York and other Metropolitan districts.

By letter dated May 1, 1936, the exhibitor was granted permission to substitute a theatre on the Grand Opera House site, 23d Street, New York City, in place of the present 23d Street theatre.

EXHIBIT 399 (R. 2185)—PARAMOUNT PICTURES IN PARAMOUNT THEATRES

1. Parties: Paramount Pictures, Inc., and Paramount Film Distributing Corporation, as Distributor and [Paramount Parties] as Exhibitors.

2. Date of Agreement: Undated.

3. Duration: September 25, 1942, to September 23, 1943.

4. Coverage: Specified theatres in certain cities in Arkansas, Illinois, Iowa, Nebraska, New Mexico, Indiana, Texas, Virginia, Idaho, Utah, West Virginia, South Carolina, North Carolina, Mississippi, Kentucky, Tennessee, Georgia, Florida, Massachusetts, Vermont, Maine, New Hampshire, Rhode Island, Connecticut, South Dakota, Minnesota, Wisconsin, North Dakota, Arizona, New York, Ohio, Louisiana, Alabama, Pennsylvania, Michigan, all feature plays released by the distributor for exhibition during the 1942–43 season.

5. Rental Terms: A percent is allocated to each theatre licensed based upon the total revenue derived from exhibition of the features in the United States after deduction of the amount of revenue derived from Paramount's affil-

iated theatres. An estimate is made within seven days after the date of general release of the feature photoplay and the exhibitor shall pay his proper percentage of such estimate in equal weekly installments of 1/17 of such total estimate. During the 16th week, a revised estimate of the national total should be made and adjustments made between the parties to compensate for any over or under payment.

6. Other Terms: Runs are specified for each theatre.

EXHIBIT 419a (R. 2460)—RKO PICTURES IN PARAMOUNT THEATRES

1. Parties: Letter agreement between RKO Radio Pictures Inc. and Theatres Service Corp. (Paramount).
2. Date of Agreement: June 1, 1944.
3. Duration: Not specified.
4. Coverage: Showing of 5 specified features in certain Paramount theatres in La. and Miss.
5. Rental Terms: RKO was to receive an amount equal to 0.00304 of the total license fees earned under the licenses for exhibition of each such feature in the U. S. during a two year period beginning with the first playdate of such feature in U. S. Such amount was to be estimated within 3 days from date of agreement and paid in weekly installments as specified; with subsequent payments and final adjustment on basis of actual fees earned.
6. Other Terms: Clearance and availability to be the same as were in effect on date of agreement.

EXHIBIT 419b (R. 2460)—RKO PICTURES IN PARAMOUNT THEATRES

1. Parties: Letter agreement between RKO Radio Pictures Inc. and Paramount Richards Theatres Inc. (Paramount).
2. Date of Agreement: June 1, 1944.
3. Duration: Not specified.
4. Coverage: Showing of 5 specified features in certain Paramount theatres in Ala., Fla., La., Miss., and Texas.
5. Rental Terms: RKO was to receive an amount equal to .00574 of total license fees earned under the licenses for exhibition of each such feature in U. S. during a 2-year period beginning with the first playdate of such feature in U. S. Such amount was to be estimated within 3 days

from date of agreement and paid in weekly installments as specified; with subsequent estimated payments and final adjustment on basis of actual fees earned.

6. Other Terms: Clearance and availability to be the same as were in effect on date of agreement.

EXHIBIT 471 (R. 2474)—COLUMBIA PICTURES IN LOEW THEATRES

1. Parties: Columbia Pictures Corporation and Marcus Loew Booking Agency.

2. Date: Feb. 7, 1945.

3. Duration: 1944–45, 1945–46 seasons.

4. Coverage: Loew's New York Metropolitan Circuit and State Theatre 44 pictures annually. Foreign pictures excluded.

5. Rental Terms: 14 pictures at a sliding scale percentage of total gross. 6 control figures are set up. 20% up to a certain control figure, with a maximum increase of 1% when succeeding control figure is reached until last control figure when terms to be 25% plus 66⅔% of additional gross receipts.

The control figures reflect the operating expenses of the circuit and the estimated Loew profit at each control figure. Weekly operating expense for each house is set out in a schedule. Control figures subject to variance in case of double featuring where cost of second feature is more or less than $18,000, which figure was included in the computation of the control figure.

Without Columbia's consent second feature cost of Columbia or Universal's second features not to exceed $18,000 and $19,500 for other distributors' second feature. If any of the 30 pictures play as a second feature in one or two specified theatres, Loew to pay $500 for each of the two theatres it plays.

The 14 percentage pictures are to play at 5 specified theatres at 15%.

30 pictures at $9,475 each.

The 14 top pictures licensed to Loew for its Broadway State Theatre at $2,500 each.

6. Other Terms: Loew has right to exhibit each of the 30 flat rental pictures for such playing time as it deems desirable and may show each picture in any or all of its theatres in the circuit.

Loew's circuit theatre to have 1st run circuit showing (7 days after Broadway run) in all boroughs, except

Brooklyn, where 7 days after downtown Brooklyn 1st run; in Westchester County (except in Peekskill) and Long Island.

13 specified theatres given a zone clearance respectively over a large number of theatres respectively. Schedule "D" provides: "In addition to the foregoing named theatres over which clearance is given to the aforesaid Loew Theatres, and any other theatre or theatres now or hereafter located within a radius measured by the distance from the exhibitor's theatre and the theatres mentioned in the above list, located farthest away from the exhibitor's theatre 7 days clearance after conclusion of showing."

EXHIBIT 472 (R. 2475)—COLUMBIA PICTURES IN FOX THEATRES

1. Parties: Columbia Pictures Corp. and Fox Inter-Mountain Amusement Corp.

2. Date of agreement: November 23, 1942.

3. Duration: Three years—Sept. 1, 1942–Sept. 30, 1943; Sept. 1, 1943–Sept. 30, 1944; Sept. 1, 1944–Sept. 30, 1945.

4. Coverage: Colorado, Wyoming, Nebraska, Utah, Idaho, Montana and New Mexico. 30 to 40 photoplays released by the distributor during each of the three seasons.

5. Rental terms: Eight pictures on a percentage basis from 50% to 20% minimum of the net box office receipts computed in relation to the one percent sliding scale or reversion figures as specified on the deal sheets.

Eight pictures on a percentage basis from 40% to 20% minimum computed on the same basis. The balance on a flat rental basis. The percentage is reduced 2½% on the first eight and 5% on the second eight when the feature is exhibited on a double feature program computation is based upon 10ths and 12ths relating to the days of exhibition. When exhibited with a stage show or vaudeville a fair and reasonable percentage shall be agreed upon or arbitrated. For flat rental photoplays held over, the rental is 50% of the flat rental figure computed on a daily basis, and for percentage pictures the hold-over may revert to 15% computed on the same basis as for the original showing. A similar provision applies to move-overs.

6. Other terms: Pictures exhibited in the one or two seasons immediately preceding may be shown without cost in conjunction with another photoplay of the exhibitor.

The designations of the distributor of these plays to be agreed upon in the first 16 on a percentage basis may be arbitrated.

Photoplays released by the distributor in excess of 40 shall first be offered to the exhibitor.

Eliminations by the exhibitor shall be made only from the percentage and highest flat rental classifications in theatres where the exhibitor has agreed to exhibit part of the product only. In theatres where the exhibitor has to exhibit the entire product he may eliminate four photoplays from these included in the lowest flat rental classification only.

A shortage of commitment in any single theatre may be offset by an overage in another theatre in the same exchange territory.

In the event any theatre closes for a period of 8 days the contract is cancelled as of the first day the theatre closed and in the event of sale, if the distributor is not willing to transfer the contract to the purchaser the agreement is also cancelled.

Runs are specified on deal sheets which are not annexed to the exhibit.

The cost of give-aways may be deducted from the rental.

In a letter dated November 23, 1942, it is stated that the deal sheets do not contain the clearance but that the understanding is that the clearance to be specified in no event would be less favorable than that granted to each theatre for the motion picture season 1941–42.

EXHIBIT 473 (R. 2475)—UNIVERSAL PICTURES IN RKO THEATRES

1. Parties: Universal Film Exchanges and B. F. Keith Corporation (RKO).

2. Date of Agreement: Sept. 1, 1941 but actually executed January 16, 1942.

3. Duration: 1941–42, 1942–43.

4. Coverage: Specified RKO Theatres in 15 cities. First run unless otherwise specified in deal sheets.* Expressly excluded are foreign made pictures, pictures produced by an outside producer, Westerns and action pictures of cheap variety.

* The agreement refers to attached deal sheets. The photostat of the agreement furnished by Universal to the Government did not contain deal sheets.

5. Rental Terms: For 1941–42 season where RKO licensed all pictures, 6 plus 3 Frank Lloyd productions at 35%; 6 at 30%, 8 at 25%, flat rental for 23. Same terms, but proportionate decrease in number of features in each classification, where RKO sold a split (Providence and in 1 out of 3 RKO theatres in New Brunswick). Prior to July 1942, parties to agree on rental terms for 1942–43 product.

As to pictures in first two brackets played on a double bill RKO could deduct actual cost of second feature before computing Universal's share in gross receipts. As to feaures in third bracket, double billed, 5% allowance. Deductions allowed on percentage pictures played with a stage show or added attractions. On holdovers and moveovers of percentage pictures in first and second bracket, 25% less cost of second feature if any, in third bracket, 20% if single, 15% if part of double bill. On holdovers of flat rental pictures, 50% of original rental pro rated to one day, except as to top bracket pictures where all were sold on flat rental basis.

6. Other Terms: Midnight shows and previews allowed exhibitor at reduced rentals; Universal may discontinue authorization for previews if it deems itself adversely affected.

Universal to designate the classification of its pictures, but if RKO disputes classification, matter to be subject to arbitration.

Clearance and availability to be same as provided for the 1940–41 season unless otherwise indicated on deal sheets.

If any theatre hereof is closed permanently, or its interest in the operation of any theatre hereof is discontinued by RKO, the contract insofar as it affects such theatre may be cancelled by RKO as of the date of such permanent closing or discontinuance.

If any theatre hereof is closed temporarily, that is, for a period of not less than eight (8) weeks, then RKO shall have the right as to such theatre to cancel pictures becoming available during the time the theatre is so closed.

If the policy of any theatre changes permanently, the terms and commitments for such theatre shall be subject to review and revision.

All road shows to be first offered RKO.

As part of the consideration for RKO's entering into this agreement Universal agreed to release RKO from unplayed commitments and monies due for periods prior to 1941–42 season on Universal product.

EXHIBIT 474 (R. 2475)—PARAMOUNT PICTURES IN PARAMOUNT THEATRE, LOS ANGELES

1. Parties: Paramount Pictures, Inc., and Partmar Corporation.

2. Date of Agreement: August 30, 1939.

3. Duration: September 1, 1939–August 31, 1949.

4. Coverage: Paramount features, shorts and newsreels in Paramount Theatre,* Los Angeles, California.

5. Rental Terms: If theatre has a stage show policy, rental terms for first year are as follows:

As to Class "A" feature: For 1st week 30% to $20,000 then 50/50; for 2nd and 3rd weeks 25% to $17,000 then 50/50. If 3rd week's gross receipts less than $18,000 terms to be 15%. Except as to the 15% terms, in computing the license fee, cost of stage show up to $4,500 to be deducted.

As to Class "B" pictures 25% of weekly gross to $17,000 then 50/50—cost of stage show up to $4,500 first deductible from weekly gross; as to 4 Class "B" pictures may revert to 15% if weekly gross less than $18,000.

For Class "C" features 15% of weekly gross up to $21,500 then 50/50.

For each Class "D" features, $1,050.

On a straight feature policy, terms for first year as follows:

Class "A" minimum fee, 35% until gross receipts reach a split figure which will allow exhibitor to recover operating expenses and minimum license fee paid plus 50% of such minimum fee; and in addition to such minimum fee 50% in excess of gross receipts.

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*In neither Paramount's subsidiary corporation list of 1939 (Exhibit 62, R. 187) nor of 1945 (Ex. 64, R. 187) is this corporation listed. The Paramount Theatre appears upon Paramount's theatre list of 1945 (Ex. 161, R. 242) as a theatre in which Paramount is interested. Exhibit 376 (R. 888) which is a list of Paramount franchises prepared by Paramount for this trial lists the operator as an independent and states the theatre is leased on a flat rental basis. The agreement, however, provides in some detail for the internal control of the exhibitor.

Class "B" features: Same terms as for Class "A."
Class "C" features: 30%.
Class "D" features: 25%.
Class "E" features: $1,050 each.

If any of the above features is shown on a double bill, license fee of second feature to be first deducted from gross receipts but not over $1,050.

6. Other Terms: Paramount, in each of the 10 years, and regardless of the number of features released by it in each of these years and regardless of the classification thereof made by it in licensing other theatres, is to classify from time to time the features licensed to this theatre. For the first year, if theatre operated on a stage show policy, the classification was to be 1 Class "A" feature, 20 Class "B" features, 16 Class "C" features, the rest Class "D" features. If on straight feature policy, for first year classification to be 1 in Class "A," 5 in Class "B," 12 in Class "C," 12 in Class "D," the rest in Class "E."

The Exhibitor agrees to exhibit at the Paramount Theatre during each year of the ten (10) year period of this agreement such number of feature photoplays licensed hereunder as shall be necessary to consume not less than forty-six (46) weeks of playing time at the Paramount Theatre during each such year and to pay the license fees for not less than such number of feature photoplays.

If during the remaining six (6) weeks of any yearly period of the term of this agreement the Exhibitor shall not exhibit any feature photoplays licensed hereunder, and shall exhibit feature photoplays not released by or through Paramount, then and in such event the Exhibitor agrees to pay to Paramount for each such week the sum of One Thousand Fifty Dollars ($1,050.00) on the first business day of each such week. The Exhibitor agrees that it will not exhibit such other feature photoplays not licensed hereunder for more than two (2) consecutive weeks during any month of any yearly period hereof.

Each feature, newsreel and short licensed to be exhibited at least 1 week and Class "A" features at least 3 weeks. The exhibitor is given an extended run privilege on features. Stage shows for the purpose of the agreement are such stage shows as should cost the exhibitor at

least $4,500 a week. Stage shows are to be first class De Lux shows. Stage show policy is one where stage shows as defined are part of the program. Straight feature policy is a policy of showing only motion pictures or motion pictures and stage shows of lesser cost than $4,500 a week or consuming less than 30 minutes.

Paramount and exhibitor to endeavor to agree each year after first year as to terms, including classifications of features, clearances, and minimum admission prices.

Subject to otherwise agreeing, clearances to commence from conclusion of exhibition and to be same as for 1939–1940 season.

Minimum admission prices for first year fixed.

If the lease covering the theatre, simultaneously entered into between Paramount Pictures Inc. and Partmar Corporation, is terminated or if Paramount is divested of its interest in the theatre, Paramount may cancel the agreement but not if exhibitor continues in lawful possession and operates the theatre. There is an agreement as to the ownership of the stock of the exhibitor, and Paramount is given right to cancel franchise if certain changes in stock or management of the exhibitor occurs.

EXHIBIT 475 (R. 2485)—UNITED ARTISTS PICTURES IN PARAMOUNT THEATRES

1. Parties: United Artists Corporation and Minnesota Amusement Company.

2. Date of Agreement: Sept. 20, 1944.

3 & 4. Duration and Coverage: United Artists Corporation made a contract with the Minnesota Amusement Company for the picture "Abroad With Two Yanks." Three contracts were made at the same time, one covering first runs in situations outside of Minneapolis and St. Paul, one covering first run in those two cities, and the third contract covering subsequent run.

It was provided that the picture was to play first run in the following situation in the "A" theatres on a preferred change playing time: Aberdeen, South Dakota, Austin, Minnesota, Eau Claire, Wisconsin, Duluth, Minnesota, Fargo, North Dakota, Glen Forks, North Dakota, Hibbing, Minnesota, Huron, South Dakota, La Crosse, Wisconsin, Madison, South Dakota, Minot, North Dakota, Mitchell,

South Dakota. Rochester, Minnesota, St. Cloud, Minnesota, Sioux Falls, South Dakota, Superior, Wisconsin, Virginia, Minnesota, Watertown, South Daktota, Winona, Minnesota.

The picture was to play second run in a number of specified towns and theatres.

5. Rental Terms: The first run contract, outside of Minneapolis and St. Paul, provided for 35% of the gross which could revert to 25% by 2½% steps based on a cumulative split figure. All reversion figures to be based upon house expense, film rentals, and one-half of the film rental as profit. La Crosse, Wisconsin, not to be included in a cumulative split figure.

Midnight shows were to be 5% less than the regular terms.

The subsequent run contract was made on a basis of 25% of gross playing time to be agreed upon.

The contract for Minneapolis and St. Paul provided for 30% of the gross but if that failed to equal house expense, film rental, and 50% of the film rental as profit, terms to revert to 27½%. If at 27½% the gross failed to equal house expense, film rental, and 50% of film rental as profit, terms to revert to 25%. Contract covered the Orpheum theatre for 7 day minimum and Orpheum theatre in St. Paul, 7 day minimum. It provided that holdovers and moveover terms were to be negotiated. Midnight shows at terms 5% less than regular terms.

6. Other terms: Minimum admission prices and clearance not specified.

EXHIBIT 476 (R. 2485)—UNITED ARTISTS PICTURES IN PARAMOUNT THEATRES

1. Parties: United Artists and H. F. Kincey Theatre Circuit (Paramount).

2. Date of agreement: June 20, 1944.

3 and 4: Duration and coverage: 1st run of "Abroad With Two Yanks." Theatres and playing time to be agreed upon. Theatres covered were:

State and Theatre

Abbeville, S. C., Opera House.
Anderson, S. C., State or Strand or Criterion.
Ashboro, N. C., Carolina.

Burlington, N. C., Paramount or Carolina or Alamance.
Chapel Hill, N. C., Carolina or Pick.
Charlotte, N. C., Carolina or Imperial or Broadway or State or Dilworth.
Columbia, S. C., Palmetto or Carolina or Ritz or Strand or Five Points.
Concord, N. C., Cabarrus or Paramount.
Darlington, S. C., Liberty.
Durham, N. C., Center or Carolina or Rialto.
Fayetteville, N. C., Colony or Carolina or Broadway or State.
Florence, S. C., Colonial or Carolina.
Gastonia, N. C., Temple or Lyric.
Goldsboro, N. C., Paramount or Carolina or Wayne.
Greensboro, N. C., Carolina or National or Imperial.
Greenville, N. C., Pitt or State or Colony.
Greenville, S. C., Carolina or Rivoli or Center.
Greenwood, S. C., State or Carolina or Ritz.
Hendersonville, N. C., Carolina or State.
Hickory, N. C., Center or Paramount.
High Point, N. C., Center or Broadhurst or Paramount or Carolina or Rialto.
Lexington, N. C., Carolina or Granada.
Raleigh, N. C., Ambassador or State or Palace or Capitol or Varsity.
Rockingham, N. C., Richmond or Little.
Rocky Mount, N. C., Center or Carolina.
Salisbury, N. C., Capitol or State or Victory.
Spartanburg, S. C., Carolina or State or Strand or Palmetto.
Sumter, S. C., Sumter or Carolina or Rex.
Wilmington, N. C., Bailey or Carolina or Royal or Bijou.
Wilson, N. C., Wilson or Carolina or Ritz.
Winston Salem, N. C., Carolina or State or Forsyth or Colonial.
Bluefield, W. Va., Granada or State.
Danville, Va., Capitol or Rialto or Dan.

The agreement sets out the maximum playing for each of the above cities.

The agreement also covers 2nd run for many of the above cities.

5. Rental terms: If picture grosses $40,000 or over—over the complete circuit the terms are to be 35% of the gross receipts.

If picture grosses $30,000 or over—but less than $40,000—terms to be 30% of the gross receipts.

If picture grosses less than $30,000—terms to be 25% of the gross receipts.

Theatres and playing time to be mutually agreed upon.

Gross receipts as set forth in this contract means receipts from admissions from any theatre herein involved after deducting all taxes on admissions.

If picture is exhibited at Midnight Shows or Kiddie Shows or Late Shows, the receipts of these shows are not to be included in the receipts of the regular run, and exhibitor agrees to pay for such shows, terms of 5% less than designated terms.

Holdovers in the same theatre are to be 5% less than designated terms. Pictures may be moved to another house for a special engagement not to be considered a run, at same rental terms as regular run. Moveovers to play at 25%.

When this subject plays a Give-Away Day, the amount of the addition to the Give-Away may be deducted from the gross before figuring the Distributor's share.

Second run is licensed for 1 to 3 days. In each situation alternative flat rentals are set up. The average top figure is less than $30; the average low figure is less than $25. The choice of alternatives depends upon whether the picture grosses enough on first run to place it in the 35% bracket. Exhibitor has privilege of late show at no additional charges.

6. Other Terms: Clearance 90 days A house, and 60 days B house, within a radius of 5 miles of city limits. High Point, N. C. 14 days over Thomasville, N. C. and Wilmington, N. C. 14 days over Carolina Beach, N. C. Bluefield, W. Va. 30 days ahead of Princeton, Bramwell, W. Va. and Bluefield, Va. 14 days ahead of Matoake, McComas, Pocahontas, and Tazewell, Va. Danville as determined by American Arbitration Board. Clearance for second run for each of the cities sold was 30 days over a third run within a radius of 5 miles of city limits.

II—Theatre Operating Agreements

A. Examples of Theatre Operating Agreements Between Defendants (printed in full):

1. Pooling Agreement Between Paramount subsidiary, Minnesota Amusement Company, and RKO subsidiary, St. Paul Theatres Company (Ex. 205, R. 257).

May 28, 1936.

Minnesota Amusement Company,
17 North 6th Street,
Minneapolis, Minn.

Dear Sirs: You have advised the undersigned that you are in possession of, and in control of the operations of, the Paramount, Riviera, and Tower theatres located in St. Paul, Minnesota, and have represented that you will continue in such possession and control for the term of the Agreement hereinafter referred to.

The undersigned is in possession of, and in control of the operations of, the Palace Orpheum Theatre, St. Paul, Minnesota, and represents that it will be in such possession and control for said term.

You and the undersigned desire to enter into an agreement providing for the cooperative operation of said theatres, all on the terms and conditions hereinafter set forth.

In consideration of the premises and of the mutual agreements hereinafter contained, it is hereby agreed, subject to your confirmation hereof and the approval of your Board of Directors and of the Board of Directors of the undersigned, that on or before June 26, 1936, or the nearest ending thereto of a theatrical week, you and the undersigned will enter into an agreement (hereinafter called the Agreement) containing substantially the following provisions with such additions and modifications as may be mutually agreed upon between you and the undersigned:

I. TERM

The term of the Agreement shall begin at 12:01 o'clock A. M., June 26, 1936, and shall end at 12:00 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee hereinafter referred to; provided, however,

(a) that the Agreement shall terminate as of 12:00 o'clock midnight August 31, 1938, or any subsequent August 31 in the event that the net earnings (as hereinafter defined) paid to you for the year e ding on the preceding June 26 have not equalled $82,000 and that you have given notice to the undersigned not later than the June 1 immediately preceding such August 31 that you desire to cancel the Agreement as of such August 31 if such earnings do not equal $82,000; and

(b) that the Agreement shall terminate as of 12:00 o'clock midnight August 31, 1938, or any subsequent August 31 in the event that the net earnings (as hereinafter defined) paid to the undersigned for the year ending on the preceding June 26 have not equalled $39,500 and that the undersigned has given you notice not later than the Ju[illegible] immediately preceding such August 31 that the undersigned desires to cancel the Agreement as of such August 31 if such earnings do not equal $39,500.

II. OPERATIONS

There will be created and maintained during the term of the Agreement a committee to be known as, and which is hereinafter called, "the Operating Committee" consisting of two (2) mem[illegible]rs, each of which members shall from time to time desi[illegible] an alternate to act as a member of the Operating Committee in his absence or inability to act. One member of the Operating Committee shall at all times be the representative of and shall be designated by the undersigned; and the other member of the Operating Committee shall at all times be the representative of and shall be designated by you. Either party to the Agreement may at any time, upon written notice to the other, substitute a new member of the Operating Committee for its representative on the Operating Committee. It is contemplated that the Operating Committee shall meet in New York City.

The Operating Committee shall have power and authority, from time to time, to direct the entertainment policy which shall be followed at the aforesaid theatres, the motion pictures which shall be obtained for exhibition in such theatres and the prices to be paid therefor, and may delegate such of its powers as it desires to a committee to be known as, and which is hereinafter called, "the Local Operating Committee," the membership of

which shall be designated in the same manner as the membership of the Operating Committee. It is contemplated that the Local Operating Committee shall meet in Minneapolis. Neither the Operating Committee nor the Local Operating Committee shall have power to take any action without the concurrence of both its members.

The product of RKO Radio Pictures, Inc., shall be acquired through the undersigned for use in the aforesaid theatres on the same terms as such product shall be acquired by other companies affiliated with RKO Radio Pictures, Inc.; subject, however, in the case of each specific commitment, to the approval of the Operating Committee.

The product of Paramount Pictures, Inc., shall be acquired through you for use in the aforesaid theatres on the same terms as such product shall be acquired by other companies affiliated with Paramount Pictures Inc.; subject, however, in the case of each specific commitment, to the approval of the Operating Committee.

The contracts in respect of the product of RKO Radio Pictures, Inc. shall be signed by the undersigned, and the contracts in respect of the product of Paramount Pictures Inc. shall be signed by you.

Upon the termination of the Agreement for any cause the undersigned shall have the right to assume and acquire any outstanding contracts for the exhibition in the aforesaid theatres of the product of any of the following companies: RKO Radio Pictures, Inc., Columbia Pictures Corporation, Universal Pictures Corporation and Vitagraph, Inc., or any successor corporation to any of said corporations, and you have a similar option in respect of contracts for the product of any other motion picture producing or distributing companies.

If either the Operating Committee or the Local Operating Committee shall at any time determine that it is advisable to exhibit vaudeville, stage shows or similar attractions in any of the aforesaid theatres, such vaudeville, stage shows or similar attractions shall be contracted for through Orpheum Circuit Booking Corporation or Radio-Keith-Orpheum Western Vaudeville Exchange or Artist Booking Offices, Inc., and Orpheum Circuit Booking Corporation or Radio-Keith-Orpheum Western Vaudeville Exchange or Artist Booking Office, Inc., as the case may be, shall be entitled to its customary booking fees in respect thereof; provided, however, that all fees so collected shall

be divided into two (2) equal parts one of which shall be paid to Artist Booking Office, Inc., and the other to Orpheum Circuit Booking Corporation and Radio-Keith-Orpheum Western Vaudeville Exchange jointly.

III. POOLING AND DIVISION OF GROSS RECEIPTS

The gross receipts derived from the operation of the aforesaid theatres shall be applied, under the direction of the Operating Committee, as follows:

(a) to the payment of the operating expenses of the aforesaid theatres (which term shall not be deemed to include rent, taxes, interest, property insurance and other fixed charges) including all sums paid on account of salaries of house staffs, service fees for sound equipment, fees payable to American Society of Composers, Authors, and Publishers, all costs of entertainment, governmental license fees, costs of electricity, fuel, water, gas, telegrams, telephone calls and postage, public liability, burglarly and similar insurance, and costs (which shall not be amortized) of ordinary incidental repairs and maintenance.

(b) in the event that the agreement referred to in Section IV hereof shall be entered into with Orpheum Theater and Realty Co., Ltd. in respect of the President Theatre, St. Paul, to the payment of all sums payable to Orpheum Theater and Realty Co., Ltd. in respect thereof.

(c) to the payment to you of $2,650 per annum in respect of the steam supplied to you under your lease of the Paramount Theatre,

and the balance, if any, remaining after such application (which balance is herein called "net earnings") shall be divided as follows:

At the end of each theatrical accounting month (which shall consist of such periods of four and five weeks as the parties may determine) 67½% thereof shall be paid to you and 32½% thereof shall be paid to the undersigned until such time as you shall have received in the calendar year beginning on the preceding June 26 $109,350 and thereafter for the balance of such calendar year in the ratio of 60% to you and 40% to the undersigned.

Appropriate provisions shall be made for prorating the earnings of any fractional portion of a year at the termination of the Agreement so as to provide for a division in a similar ratio as if the Agreement had terminated on a June 25.

You and the undersigned will each be supplied (a) with daily statements of box office receipts of each of the aforesaid theatres, and (b) with weekly statements of gross receipts and operating expenses within seven (7) days after the end of each theatre week.

Any of the aforesaid theatres may be closed at any time whether or not due to casualty without affecting the division of net earnings between you and the undersigned; provided, however, that the Palace Orpheum Theatre shall not be closed at such times or for such periods as will constitute a default by the undersigned under the existing lease thereof.

IV. PRESIDENT THEATRE, ST. PAUL

You and the undersigned will endeavor to enter into an agreement (either directly or through a nominee designated for the purpose) with Orpheum Theater and Realty Co., Ltd., the owner of the President Theatre, St. Paul, Minnesota, providing:

(a) that during the term of the Agreement the President Theatre shall be operated by a nominee of you and the undersigned, or by you and the undersigned, or by either you or the undersigned, as you and the undersigned may determine (which party is hereinafter in this article called the Tenant),

(b) that the Tenant will pay as rent for the President Theatre a fixed rent of $2,000 a year gross to the landlord, and a contingent rent equal to the amount by which 25% of the annual net earnings derived from the operation of the President Theatre exceeds $2,000, and

(c) that Orpheum Theater and Realty Co., Ltd., may cancel said agreement at any time on condition that it shall agree that the President Theatre shall not be used for theatrical purposes at any time during the remainder of the term of the Agreement.

Upon the making of such agreement with Orpheum Theatre and Realty Co., Ltd., appropriate instruments will be executed to provide that the operation of the President Theatre shall be controlled by the Operating Committee; that all expenses of the Tenant, including the rent payable by it to Orpheum Theater and Realty Co., Ltd., shall be paid out of the gross earnings under the Agreement and shall be treated as expenses in determining net earnings

under the Agreement and any profits obtained by the Tenant shall be treated as earnings under the Agreement.

V. TERMINATION

The Agreement shall terminate in the event of the insolvency of you or the undersigned or in the event that you shall lose possession and control of the Paramount, Riviera, and Tower theatres or any one of them or in the event the undersigned shall lose possession and control of the Palace Orpheum Theatre.

VI.

During the term of the Agreement neither you nor the undersigned nor any company affiliated with you or the undersigned shall at any time become interested in the operation of any theatre located in downtown St. Paul or of any theatre which may be considered to compete with the Paramount, Riviera, Tower, and Palace Orpheum Theatres, or any one of them.

You may continue the operation of the Cameo Theatre, St. Paul, provided such operation is conducted on a basis which shall be noncompetitive with any of the aforesaid theatres. At any time at your request the Cameo Theatre may be subjected to the cooperative control of the Operating Committee provided that in that event (a) the distribution of the net earnings under the Agreement shall not be changed; (b) there shall be paid to you as part of the operating expenses, annually, the sum of $2,000 or 25% of the net profits derived from the operation of the Cameo Theatre, whichever shall be the greater; and (c) you may withdraw the Cameo Theatre from such cooperative control at any time by covenanting with the undersigned that it will not be used for theatrical purposes during the remainder of the term of the Agreement.

VII. ASSIGNMENT

The Agreement shall not be assigned by either you or the undersigned without the written consent of the other party first had and obtained.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By N. J. BLUMBERG, *Vice President.*

Confirmed:

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

NEW YORK, *August 22, 1941.*

MINNESOTA AMUSEMENT COMPANY,
17 North 6th Street, Minneapolis, Minnesota.

DEAR SIRS: The Paramount, Riviera, Strand, and Tower Theatres, located in St. Paul, Minnesota, controlled by you, and the Orpheum Theatre, located in St. Paul, Minnesota, controlled by the undersigned, are at present being operated pursuant to the provisions of a letter agreement, dated May 28, 1936, between you and the undersigned, which letter agreement provides that such method of operation shall end at 12 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee provided for therein.

This will confirm our understanding that such method of operation and the division of the gross receipts and net earnings derived therefrom shall be continued for one additional theatrical accounting month after the termination of the term provided for in said letter agreement.

Kindly confirm the foregoing by signing and returning to the undersigned the duplicate original of this letter handed you herewith.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By C. W. KOERNER, *Vice President.*

Confirmed, —, 1941.

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

NEW YORK, *September 15, 1941.*

MINNESOTA AMUSEMENT COMPANY,
17 North 6th Street, Minneapolis, Minnesota.

DEAR SIR: The Paramount, Riviera, Strand, and Tower Theatres, located in St. Paul, Minnesota, controlled by you, and the Orpheum Theatre, located in St. Paul, Minnesota, controlled by the undersigned, are at present being operated pursuant to the provisions of a letter agreement, dated May 28, 1936, between you and the undersigned, which letter agreement provides that such method of operation shall end at 12 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee provided for therein, as modified and extended by a letter agreement, dated August 22, 1941, which provides that such method of oper-

ation shall be continued for one additional theatrical accounting month after the termination of the term provided for in said letter agreement dated May 28, 1936.

This will confirm our understanding that such method of operation and the division of the gross receipts and net earnings derived therefrom shall be continued for one additional theatrical accounting month after the termination of the term as extended by said letter agreement, dated August 22, 1941.

Kindly confirm the foregoing by signing and returning to the undersigned the duplicate original of this letter handed you herewith.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By C. W. KOERNER, *Vice President.*

Confirmed Sept. 25th, 1941.

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

NEW YORK, *October 7, 1941.*

MINNESOTA AMUSEMENT COMPANY,
17 North 6th Street, Minneapolis, Minnesota.

DEAR SIRS: The Paramount, Riviera, Strand, and Tower Theatres, located in St. Paul, Minnesota, controlled by you, and the Orpheum Theatre, located in St. Paul, Minnesota, controlled by the undersigned, are at present being operated pursuant to the provisions of a letter agreement dated May 28, 1936, between you and the undersigned, which letter agreement provides that such method of operation shall end at 12 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee provided for therein, as modified and extended by two letter agreements dated, respectively, August 22, 1941, and September 15, 1941, which provide that such method of operation shall be continued for two additional theatrical accounting months after the termination of the term provided for in said letter agreement dated May 28, 1936.

This will confirm our understanding that such method of operation and the division of the gross receipts and net earnings derived therefrom shall be continued for one additional theatrical accounting month after the termination of the term as extended by said letter agreements.

Kindly confirm the foregoing by signing and returning to the undersigned the duplicate original of this letter handed you herewith.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By C. W. KOERNER, *Vice President.*

OK. M. L. M.

Confirmed, October 29, 1941.

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

NEW YORK, *November 25, 1941.*

MINNESOTA AMUSEMENT COMPANY,
17 North 6th Street, Minneapolis, Minnesota.

DEAR SIRS: The Paramount, Riviera, Strand, and Tower Theatres, located in St. Paul, Minnesota, controlled by you, and the Orpheum Theatre, located in St. Paul, Minnesota, controlled by the undersigned, are at present being operated pursuant to the provisions of a letter agreement dated May 28, 1936, between you and the undersigned, which letter agreement provides that such method of operation shall end at 12 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee provided for therein, as modified and extended by three letter agreements dated, respectively, August 22, 1941, September 15, 1941, and October 7, 1941, which provide that such method of operation shall be continued for three additional theatrical accounting months after the termination of the term provided for in said letter agreement dated May 28, 1936.

This will confirm our understanding that such method of operation and the division of the gross receipts and net earnings derived therefrom shall be continued for one additional theatrical accounting month after the termination of the term as extended by said letter agreements.

It is understood that any modification of said agreement dated May 28, 1936, which will among other things provide for a change in percentage of distribution of receipts shall be effective as of the end of the last accounting week in the month of October 1941.

Kindly confirm the foregoing by signing and returning to the undersigned the duplicate original of this letter handed you herewith.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By ALEX E. REOCH, *Vice President.*

Confirmed, November 25, 1941.

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

NEW YORK, N. Y. *December 5, 1941.*

MINNESOTA AMUSEMENT COMPANY,
17 North 6th Street, Minneapolis, Minnesota.

DEAR SIRS: The Paramount, Riviera, Strand, and Tower Theatres, located in St. Paul, Minnesota, controlled by you, and the Orpheum Theatre, located in St. Paul, Minnesota, controlled by the undersigned, are at present being operated pursuant to the provisions of a letter agreement dated May 28, 1936, between you and the undersigned, which letter agreement provides that such method of operation shall end at 12 o'clock midnight August 31, 1941, or the nearest ending thereto of a theatrical week as determined by the Operating Committee provided for therein, as modified and extended by four letter agreements dated, respectively, August 22, 1941, September 15, 1941, October 7, 1941, and November 25, 1941, which provide that such method of operation shall be continued for four additional theatrical accounting months after the termination of the term provided for in said letter agreement dated May 28, 1936.

This will confirm our understanding as follows:

1. Such method of operation shall be continued to 12 o'clock midnight August 31, 1944, or the nearest ending thereto of a theatrical week, as determined by the Operating Committee provided for in said letter agreement of May 28, 1936; provided, however, that in the event the leasehold of the Orpheum Theatre now held by the undersigned (which leasehold expires, by its terms, December 29, 1943) shall not be renewed or extended, or in the event the undersigned shall fail to obtain a new leasehold of such theatre, then such method of operation shall terminate December 29, 1943;

2. From and after the ending of the theatrical accounting month of October 1941 the net earnings, as defined

in said agreement of May 28, 1936, derived from such operation will be divided between you and the undersigned in the ratio of seventy percent (70%) to you and thirty percent (30%) to the undersigned.

Kindly confirm the foregoing by signing and returning to the undersigned the duplicate original of this letter handed you herewith.

Very truly yours,

ST. PAUL THEATRES COMPANY,
By ALEX E. REOCH, *Vice President.*

Confirmed December 16th, 1941.

MINNESOTA AMUSEMENT COMPANY,
By JOHN J. FRIEDL, *President.*

2. Pooling Agreement Between Paramount subsidiary, Quaker Theatres Corporation, and Warner subsidiary, Stanley Company of America (Ex. 221, R. 264).

Agreement entered into this 27th day of August, 1936, by and between Stanley Company of America, a Delaware corporation, hereinafter referred to as "Stanley" and Quaker Theatres Corporation, a Delaware corporation, hereinafter referred to as "The Company",

Witnesseth:

Whereas Stanley represents that it leases and operates the Circle, State and 69th Street Theatres, in the City of Philadelphia, Pennsylvania, which leases are for a period extending beyond the term of this agreement and which leases are valid and in full force and effect, and

Whereas The Company represents that it leases and operates the Tower, Roosevelt, Nixon and Frankford Theatres, in the City of Philadelphia, State of Pennsylvania, which leases are for a period extending beyond the term of this agreement and which leases are valid and in full force and effect, and

Whereas Stanley is a skilled and experienced theatre operating organization, capable of rendering valuable services in the supervision and operation of all of the theatres above named and in the leasing and booking of motion pictures, entertainments and attractions therein and in the keeping of books of account in the operation thereof, and

Whereas economy of operation can best be achieved by vesting Stanley with the sole right of operating and managing all of the theatres covered hereby,

Now, therefore, in consideration of the premises and of the sum of One Dollar, lawful money of the United States, by each party to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, it is hereby mutually agreed and covenanted by and between the parties hereto as follows:

1. The Company, as to the Tower, Roosevelt, Nixon and Frankford Theatres, hereby vests in Stanley, except as herein otherwise reserved, the management thereof and Stanley agrees, subject to the terms and conditions hereinafter enumerated, to manage and operate the said theatres heretofore leased and operated by The Company and also agrees to manage and operate the State, Circle and 69th Street Theatres heretofore operated by it, for the joint benefit of Stanley and The Company.

2. Stanley accepts the management of the theatres leased by The Company and heretofore operated by it and agrees to devote the best efforts of its organization to the management of the said theatres and to the management of the Circle, State and 69th Street Theatres so that all of the theatres covered hereby shall during the term of this agreement be operated for the joint benefit of Stanley and The Company.

Stanley shall have the exclusive right and authority to book all motion pictures licensed for the theatres covered hereby and to procure all entertainments and attractions for said theatres.

The parties hereto agree during the term of this agreement to continue to use their best efforts to obtain licenses of such photoplays as each of the said parties have heretofore licensed from various distributors. Such license agreements shall provide that the photoplays covered by said agreements shall be available for exhibition in all of the said theatres covered by this agreement. All existing film license agreements held by either of the parties covering the exhibition of photoplays in any of the theatres covered hereby shall be modified so as to permit the exhibition of said photoplays in all of said theatres. All agreements licensing the exhibition of Paramount and Warner-First National pictures shall be on the average for substantially the same rental terms per picture and shall be for substantially the same proportion of pictures released by Paramount and Warner-First National respectively

and said agreements shall be subject to the approval of the members of the Operating Committee. It is also agreed that the same number of Paramount and Warner-First National pictures, or as near as may be, shall be exhibited in the "A" theatres hereunder and that Stanley will accord to the pictures of Paramount and Warner-First National the same length and preference of playing time as near as may be practicable. The Company agrees, during the term of this agreement, to contract for the exhibition of Paramount news in the Company's theatres covered by this agreement.

This provision shall be effective with the commencement date of this agreement.

3. Stanley, as to the premises in which the State, Circle and 69th Street Theatres are located, and the Company, as to the premises in which the Tower, Roosevelt, Nixon and Frankfort Theatres are located, agree to pay on the due date thereof all rent, real estate and personal property taxes, insurance (except as hereinafter otherwise provided) and interest applicable thereto, as well as to make and pay for all repairs (except as hereinafter otherwise provided) in and to each of the said premises.

Stanley agrees out of the gross receipts received from the operation of all of the theatres covered hereby, to pay all expenses necessary and expedient for the operation of said theatres, (sometimes hereinafter referred to as "Operating expenses") other than said rents, real and personal property taxes, insurance, interest and cost of repairs.

4. The gross and net income received from the operation of said theatres shall be collected and distributed as follows:

A. Stanley shall collect the gross income of all of the theatres covered by this agreement and shall deposit such gross income in a special and separate bank account containing only such funds, in its own name or in the name of its affiliated company, which may act as its disbursing agent.

B. From the funds so deposited, Stanley shall pay all operating expenses of the theatres promptly when due.

For the purpose of this agreement the term "week" shall mean the theatre week, whether or not the same shall conincide with the calendar week as shall be fixed by the Operating policy of the theatres adopted from time to time by the Operating Committee; the term "accounting

period" shall be deemed the period of time commencing with the last Saturday in one calendar month and ending on the last Saturday of the succeeding calendar month; the term "gross income" shall mean the aggregate of and shall include all moneys received by such theatres for admissions thereto, including moneys received from and during benefit and/or midnight performance given thereat, less the amount of admission taxes, if any, imposed upon admissions by any lawful governmental authority and shall also include such additional sums as may be received in the theatres from various concessions, such as weighing scales, candy vending machines, advertising curtains and with respect to any benefit performances at said theatres, only the net amount of moneys received by such theatres for admission during such benefit performances, shall be included in the gross receipts thereof, and there shall not be included therein the amount of any rebate, overcharge or other amount paid to or received by the society or association giving or sponsoring said benefit performances; the term "operating expenses" shall have the meaning ordinarily attributed thereto in proper accounting practice applicable to the motion picture business, but shall be exclusive of the items of, real estate and personal property taxes, rent, insurance, interest and repairs specified in paragraph "3" as being directly chargeable to "Stanley" and "The Company" with respect to their respective theatres.

"Operating expenses" shall include, without limitation of the generality of the foregoing, the following items:

(a) Film rentals.

(b) Salaries of performers, musicians and stage hands.

(c) Cost of acts and productions.

(d) Salaries of all persons actually employed in the theatres, such as managers, cashiers, doormen, engineers, ushers, cleaners, projection and sound men and any overtime and extra salaries paid to said employees.

(e) Newspaper and other advertising, including lobby displays, cost of promotions, contests, car cards, etc. scenery, cost of rental of stage props and equipment.

(f) Telegraph, telephone and postage expended in the actual conduct and operation of each theatre, cost of supplies consumed in the theatres, cost of uniforms and cleaning.

(g) License fees charged by any governmental authority for the privilege of doing business, and such fees as

may be charged for inspection of the theatres by any governmental bureau or department.

(h) Fees payable to the American Society of Composers, Authors and Publishers.

(i) Cost of electricity, heat, fuel, water, ventilation, refrigeration and gas consumed in the theatres, as well as the cost of burglar alarm and fire prevention and safety device service employed in the theatres.

(j) Workmen's compensation, fidelity, safe, burglary and hold-up insurance.

(k) Arbitration expenses, if any,

(l) The cost of repairs as provided in paragraph "6" hereof.

(m) Cost of audits as provided in paragraph "7" hereof.

No home office expenses of either party shall be charged as an expense or operation of the theatres, nor shall any item of Social Security Taxes be charged as an expense of operation but each party hereto shall bear and pay such item individually with respect to the employees in its respective theatres.

Any rebates, allowances, or refunds allowed or obtained on any item of expense shall be applied to and deducted from such item so as to reduce the same by the amount thereof.

Public liability insurance shall be maintained by Stanley and The Company covering their respective theatres in amounts of not less than $50,000 for injury to or death of any one person and not less than $800,000 for injury to or death of more than one person arising out of any one calamity, and each party shall bear and pay the premiums for the insurance so carried and such premiums shall not be charged as an operating expense against the theatres covered hereby. The insurance policies so carried by Stanley and The Company with respect to the theatres covered by this agreement shall indemnify Stanley, The Company and such other companies or individuals as Stanley and The Company may from time to time designate, as their respective interests may appear.

No charge shall be made by Stanley or The Company for the booking of talent in any of the theatres covered hereby. Any vaudeville, stage shows or similar attractions which may be used in any of the theatres covered by this agreement will be acquired through either Artists Booking Office, Inc. or Warner Bros., Artists Bureau, Inc.; any

booking fees so received by either of them shall be divided equally between the said companies.

C. The balance of the gross income for each accounting period as herein set forth remaining after the payment of operating expenses for said accounting period shall be termed "net receipts." The net receipts shall be allowed to accumulate in said special bank acount up to but not exceeding $10,000.00, which amount shall constitute a working fund for use in the operation of the theatres. In the event that said working fund shall at any time be used up or dissipated in whole or in part, it shall be replenished forthwith in the manner in which it was created from subsequent receipts

D. Net receipts, if any, in excess of the sum of $10,000 derived from the operation of the theatres covered hereby during the first year of the term of this agreement, shall be distributed within fifteen (15) days after the last Saturday of each calendar month during the term of this agreement (which day is hereby defined as meaning the "accounting day") in the proportion of 57% to Stanley and 43% to The Company until the sum of $431,000 of net receipts during such year of the term of this agreement, shall have been distributed; thereafter all net receipts in excess of $431,000 during such year of the term of this agreement shall be distributed in the proportion of 50% to Stanley and 50% to The Company. During the second year, the net receipts shall be divided in the proportion of 57% to Stanley and 43% to The Company until the sum of $441,000 of net receipts during such year shall have been distributed and thereafter all net receipts in excess of $441,000 during the second year of the term of this agreement shall be distributed in the proportion of 50% to Stanley and 50% to The Company. Any amount remaining in the working fund at the termination of this agreement shall be distributed in the proportion of 57% to Stanley and 43% to The Company.

If, for any reason, the Operating expenses shall for the period between one accounting day and the subsequent accounting day during the term of this agreement, exceed an amount equal to the sum of the gross income for said period and any amount remaining in the working fund, Stanley shall notify the Company of such fact and of the amount of such excess; within five (5) days of the giving of such notice Stanley agrees to deposit in the work-

ing fund 57% of the amount of such excess and The Company agrees to pay to Stanley for deposit in the working fund 43% of such excess, if such excess shall occur during any accounting period during any year of this agreement, prior to the distribution of $441,000 of net receipts. And such contribution shall be in the proportion of 50% by Stanley and 50% by The Company, if such excess shall occur during any accounting period during any year after the sum of $441,000 in net receipts shall have been distributed between Stanley and The Company.

In the event of the failure of either Stanley or The Company to make their respective payments to the working fund within said period, the party which shall not be in default, in addition to all other rights and remedies herein provided, shall have the right to terminate this agreement by notice to the defaulting party.

5. In the event of the failure of either Stanley or The Company to make good its share of the excess of the operating expenses over and above the gross receipts and the amount remaining in the working fund during any particular accounting period, the other party not in default, shall have the right to advance the sum which the defaulting party shall be obligated to pay, whereupon the party which shall not be in default shall be entitled to receive 100% of the net income until the said non-defaulting party shall be reimbursed for the entire amount which it shall have advanced for the defaulting party, together with interest at the rate of 6% thereon. But in addition to said remedies herein and in the foregoing paragraphs provided, the non-defaulting party shall have the right to proceed by any appropriate action to recover the amount which the said defaulting party shall have been obligated to contribute as hereinbefore provided.

6. Stanley shall not make any repairs in or to any of said theatres leased by The Company except with the written consent of The Company first had and obtained, which consent shall specify the manner in which payment for said repairs shall be made; Stanley may, in its unlimited discretion, make repairs and replacements of a temporary nature which shall not exceed the sum of $25.00 for each item to any of the theatres covered hereby and such items of temporary repairs and replacements shall be deemed and be included as an operating expense. Stanley agrees to keep said theatres in good condition

as to such ordinary and temporary repairs without discrimination.

7. Full, complete and accurate books, records, accounts, data and vouchers shall be kept and maintained by Stanley as respects the theatres, the supervision and/or management of same and shall not be destroyed until both Stanley and The Company agree thereto, and shall be audited annually by Price, Waterhouse & Co. or some other firm of accountants of like standing. All disputes with respect to accounting shall be determined by Price, Waterhouse & Co. or some other accountants of like standing and the decision of such accountancy firm shall be conclusive and binding upon the parties hereto, and the expense shall be charged against the operation of the theatres.

All of said books, records, accounts, data and vouchers shall at all reasonable times be available for inspection by The Company at the office of Stanley at No. 321 West 44th Street, New York City, New York, and The Company shall at all reasonable times have the right to make copies thereof or abstracts therefrom.

Stanley shall furnish or cause to be furnished to The Company daily statements of box office receipts in connection with the operation of said theatres, as well as statements of receipts and expenses in connection therewith for each show week, as well as for each accounting period as herein defined.

8. This agreement shall apply only to the theatres themselves; all rents receivable by Stanley or The Company from sub-tenants in the buildings in which their respective theatres are located, shall be collected by Stanley and The Company respectively and shall not in any way be a part of, or subject to, any of the terms of this agreement.

9. Each of the parties hereto shall appoint a representative who together upon the date of this agreement becomes effective, shall make an inventory of the property located in the theatres leased by The Company, which inventory shall be signed by the representatives of both of the parties hereto. At the termination of this agreement, Stanley shall account for and turn back to The Company the property located in the theatres leased by The Company in the same condition as received, ordinary wear and tear,

damage by fire, the elements, acts of God and any other casualty excepted.

10. Any existing theatre license fees, service charges, supplies and other operating charges and expenses which may have been paid by either party at a time prior to the execution of this agreement and which shall cover a period extending beyond the commencement date of this agreement, shall be adjusted and apportioned and such amount as represents that proportion chargeable for a period after the commencement of this agreement shall be repaid to that party hereto which shall have paid the same; and the amount representing such payment to either party shall be charged as an expense of operation. Likewise, upon the termination of this agreement that proportion of such items as shall have been paid for a period extending beyond the date of the term of this agreement, shall not be deemed an operating expense but shall be repaid by the party leasing and operating the theatre for which said expense shall have been incurred.

11. It is understood and agreed that the initial operating policy of the theatres covered by this agreement shall be as follows:

In the locality in which the Circle and Roosevelt Theatres are located, the Circle shall be the "A" house, operating either on a full week policy or on a split week policy of four (4) and three (3) days with Friday opening; and the Roosevelt Theatre shall be the "B" theatre operating on a full week policy or with a split week policy of three (3) and four (4) days and with Saturday opening.

In the locality in which the State and Nixon Theatres are located, the State Theatre shall be the "A" theatre, operating on a full week policy or on a split week policy of four (4) and three (3) days, with Friday opening and the Nixon Theatre shall be operated as the "B" theatre, operating on a full week policy or on a split week policy of three (3) and four (4) days, with a Saturday opening.

In the locality in which the Tower and 69th Street Theatres are located, the Tower Theatre shall be operated as the "A" theatre on a full week policy or on a split week policy of four (4) and three (3) days, with a Friday opening and the 69th Street Theatre shall be operated as the "B" theatre on a full week policy or on a split week policy of three (3) and four (4) days with a Saturday opening.

The present policy in admission prices prevailing at the Frankford Theatre shall continue, but if "tab" shows are added on Thursdays, Fridays and Saturdays, increased prices will be charged for said days as long as the said policy continues.

All theatres are to run continuously on Saturdays and Sundays and an increase in price shall be made for admission after 6 P. M. on Saturdays.

Stanley agrees that it will not close any theatre covered hereby except for repairs or renovations and except by reason of strikes, epidemics, orders of any duly constituted authority, fire, earthquake, acts of God or inevitable casualty or except with the consent of the Operating Committee.

12. Within ten (10) days after the execution hereof, the parties hereto agree to the appointment of an Operating Committee consisting of two members, one of whom shall be designated by Stanley and the other of whom shall be designated by the Company. Either party hereto may at any time upon written notice to the other, substitute a new member of the Operating Committee (either permanent or temporary) instead and in place of the one previously designated by it.

Subject to all of the provisions and limitations contained in this agreement and to the provisions of the respective leases covering the theatres herein named, the duties, powers and functions of said committees shall be as follows:

A. It shall have the sole power and authority from time to time to designate and change the entertainment policy and specify the admission prices to the theatres covered by this agreement.

B. It shall have the power to determine any dispute arising between Stanley and The Company under this agreement, except accountancy disputes as hereinbefore provided.

C. It shall prepare a budget for the operation of the theatres; it shall have full budgetary control over all operating expenses as herein enumerated. No person shall be employed in the operation of any of the theatres whose salary shall be in excess of $100.00 per week without the consent and approval of the Operating Committee. No contract extending beyond the expiration date of this

agreement shall be entered into without the written consent of the parties hereto.

D. It shall meet regularly in New York City during the term of this agreement and it shall keep a written record of all action had or taken at said meetings. The presence of both members of the Committee shall be necessary to constitute a quorum and a unanimous vote and in lieu thereof the unanimous consent in writing of both members of the Committee shall be required to transact any business hereunder. Any decision made by the Operating Committee with respect to any matter or thing within its jurisdiction, shall be final and binding but it shall have no authority to amend the provisions of this agreement or to transact any business not within the general scope and not in furtherance of the general purposes of this agreement.

E. In the event that there shall be a dispute between the members of the Operating Committee with respect to any matter or thing with reference to the supervision and operation and management of the theatres covered by this agreement, or in the event that the members of the Operating Committee are unable to agree upon any matter or thing involving the management and scope of this agreement, then said dispute or controversy shall be referred for determination by arbitration as hereinafter provided.

13. In controversy under this agreement shall arise between Stanley and The Company, which controversy or dispute cannot be decided by the Operating Committee to be appointed pursuant to the provisions of this agreement, it shall be settled by arbitration law of the State of New York, in the following manner:

Either party may by notice in writing served on the other, appoint one arbitrator and call upon the other to appoint a second arbitrator within five (5) days after the receipt of such notice; and each party agrees that upon receiving any such notice it will so appoint an arbitrator.

The two arbitrators thus appointed shall, within five (5) days after the appointment of the one last appointed, jointly appoint a third arbitrator. The controversy shall be submitted to the three arbitrators in such manner as they shall direct and their decision, or the decision of a majority of them, rendered in writing, shall be final, conclusive and binding upon the parties. In the event that a second arbitrator shall not be appointed as provided, or the two arbitrators first appointed shall fail to appoint

a third, application maybe made by either party to the Supreme Court of the State of New York, or to a Judge thereof, to designate and appoint an arbitrator or arbitrators as the case may require, as provided by the Arbitration Law of the State of New York. Each party shall pay its own expenses in connection with the arbitration, but the compensation and expenses of the arbitrators shall be borne in such manner as may be specified in their decision in writing.

Any board of arbitration created as herein provided shall be vested with absolute discretion as to the manner and method of making its determination and decision.

In the event of any arbitration as herein provided, each of the parties hereto shall cooperate with the other and with the Board of Arbitration and in particular each party shall furnish to any such board of arbitration any and all data and/or information in its possession that may be called for by said board of arbitration.

14. If any theatre covered hereby shall be damaged or destroyed by fire or other casualty so that the parties hereto shall be unable to operate the same, the remaining theatres shall continue in operation and the gross income and net receipts of the remaining theatres shall be applied and divided as herein set forth. If such damage or destruction however, shall result in the cancellation or termination of the lease covering said theatre, and the party hereto which shall lose said theatre shall be unable to enter into a new lease for the same within sixty (60) days after the occurrence of such damage or destruction, then this agreement shall ipso facto terminate and come to an end as of the date of such damage or destruction. If any theatre covered hereby shall be so damaged or destroyed so that it cannot be repaired or rebuilt within six (6) months after the date of such damage or destruction, then either party may cancel this agreement as of the date when it shall be determined that the said theatre cannot be repaired or rebuilt within the said period of six (6) months after such damage or destruction. Notwithstanding anything herein contained to the contrary, it is specifically understood and agreed that this agreement shall in no wise be affected if the lease on the Frankford Theatre covered hereby shall be lost or if the said theatre shall be damaged or destroyed.

15. This agreement may not be assigned or transferred by Stanley or by The Company without the written consent of the other, except to their respective parent companies or a 100% subsidiary thereof.

16. This agreement shall be for a period commencing September 4, 1936 at 8 A. M. and ending August 31st, 1939, at the close of business.

17. Wherever in this agreement it is provided that notice shall or may be given by one party to the other, such notice shall be in writing and shall be personally delivered or sent by registered mail, if to Stanley at No. 321 West 44th Street, New York City, New York, or if to The Company at No. 1501 Broadway, New York City, New York. Such notice shall be deemed to have been given upon its delivery, if delivered, or upon its receipt, if sent by registered mail. Either party may at any time alter its address by giving written notice to the other party.

18. Should Stanley or The Company default in any of the terms, covenants or conditions hereof, or should a permanent receiver or trustee in insolvency proceedings or re-organization proceedings be appointed of either of them, or should either of them petition for a re-organization of its business, or should Stanley lose possession of either the Circle, State or 69th Street Theatres, or should The Company lose possession of either the Tower, Nixon or Roosevelt Theatres, or should Stanley or The Company fail to contribute any sums herein provided to be paid by them at specified times, thereupon the party hereto which shall not be in default in the performance of the terms, covenants and conditions hereof, shall, in addition to the other rights and remedies herein provided in such event or events, have the right to cancel this agreement by sending notice of cancellation at least five (5) days prior to the date as of which this agreement shall be cancelled, whereupon on the date designated in said notice this agreement shall be deemed cancelled and terminated and of no further force and effect. In addition to said remedy, the party which shall not be in default shall have the right to proceed by appropriate action or actions to recover the amount which said defaulting party shall become obligated to pay pursuant to the terms hereof, and in addition thereto the said party which shall not be in

default shall have the right to proceed by appropriate action to collect such damages as it may have sustained by reason of the breach of this agreement by said defaulting party.

19. Stanley agrees that it will not engage anyone in connection with the operation of the theatres covered hereby whose salary shall be charged as an expense of operation of the theatres covered by this agreement unless said employee shall devote all of his time and attention to the theatres covered hereby.

In witness whereof, the parties hereto have hereunto caused these presents to be executed by their duly authorized officers and their respective corporate seals to be affixed the day and year first above written.

STANLEY COMPANY OF AMERICA,
By (Sgnd.) J. BERNHARD, *Vice President.*

Attest:
[SEAL] (Sgnd.) E. K. KESSBERG,
OK A. O. V. *Asst. Secretary.*

QUAKER THEATRES CORPORATION,
By (Sgnd.) PAUL RAIBOURN, *Vice President.*

Attest:
[SEAL] (Sgnd.) VAN ALEN HOLLOMON,
OK Y. F. F. *Secretary.*

B. Government's Digests of Theatre Operating Agreements in Evidence

EXHIBIT 200 (R. 257)

1. Parties: Agreement between B. F. Keith Corporation, and Skouras Theatres Corp., Broadway and Ninety-Sixth Street Realty Company.

2. Date of Agreement: April 29, 1938.

3. Duration: Period covering Sept. 1, 1939, and ending Aug. 31, 1952.

4. Coverage: Colonial Theatre, New York City; Riverside Theatre, New York City; 81st St. Theatre, New York City; unnamed theatres may be substituted.

5. Rental Terms: Parties agree that Skouras Theatre and Colonial Theatre (referred to as Keith Theatre) shall run day and date and have same entertainment policy sub-

ject to change only by the Advisory Committee, appointed pursuant to the terms of the agreement.

Keith to have exclusive agency for buying and booking for both theatres (except newsreels) and is to have authority to execute such licenses as may be necessary.

Keith agrees to use its best efforts to obtain agreements licensing the Skouras and Keith (Colonial) theatres for 1st run exhibition in the operating area, day and date with their first exhibition in any of the theatres in the RKO major circuit (as defined in Schedule A), the same features and shorts as are licensed under such agreements for 1st neighborhood run in ¾ of the Class A theatres in the RKO major circuit. Keith agrees that if it cannot obtain for exhibition in Skouras 1st run in the operating area and day and date with 1st exhibition in the RKO major circuit in Manhattan and the Bronx, such feature shall not be exhibited 1st run in any theatre controlled by Keith except the Nemo Theatre or Hamilton Theatre. The agreement defines "Class A theatres" and the amount of license fee to be paid by Skouras is to be determined "by the then current method of allocation employed by Keith." The agreement further provides that Keith "shall deliver to Skouras a statement showing the theatre admissions in the aggregate in the various quoted counties owned, operated or booked for by Keith, together with film rentals in the aggregate payable by such theatres, exclusive of road shows and theatres in Times Square and Albee Square areas, and in addition, Skouras to be given copies or digests of license agreements pertaining to the two theatres. Film rentals for Skouras and Keith theatres are to be in proportion on such aggregate film rentals with total theatre admission, and total film rental "ratio" to be considered.

6. Other Terms: The agreement provides for the establishment of an Advisory Committee of four with the power among others to determine entertainment and operating policy, to direct that both theatres be closed and to determine disputes.

The net receipts and/or net losses of both theatres are to be distributed as follows:

Up to $270,000 for any year: 65% to and by Keith; 35% to and by Skouras.

Over $270,000 for any year: 50% to or by Keith; 50% to or by Skouras.

Keith retains the right to substitute certain theatres in place of Colonial and both parties agree that they will not aid any other persons to obtain pictures for exhibition in the defined "operating area."

If any theatre operating under this agreement is closed by direction of Advisory Committee the agreement is to continue and division between the parties "shall continue . . . as though both theatres were open and operated" (page 31); if a theatre is closed for other reasons substitution of "a comparable theatre" may be made.

On expiration of agreement Keith to get the product it had secured for the theatres except Fox, which was to go to Skouras.

Supplementary letter dated Sept. 1, 1939, from B. F. Keith Corporation to Skouras Theatres Corporation, substitutes the 81st St. Theatre for the Colonial Theatre.

Amendatory Agreement: Between Eighty-First St. Theatre Corporation and B. F. Keith Corporation dated Sept. 1, 1939. Formal agreement substituting 81st St. Theatre for Colonial Theatre, with 81st St. Theatre Corp. assuming terms and conditions of agreement dated April 29, 1938.

Letter dated Aug. 22, 1941, between parties, excludes newsreels from computations in connection with "film adjustment formulae."

Exhibit "P": Letter from Fox-Film Corporation to Randforce Amusement Corporation dated June 26, 1935.

1. Fox extends franchise for additional four years.
2. Certain runs waived in favor of Kingsway and Avalon.
3. Recites agreement of same date between United Artists Circuit, Inc. and Keith Albee Orpheum Corporation.

Letter dated Sept. 21, 1939 from Twentieth Century Fox Film Corp. to B. F. Keith wherein former consents to playing of features at Riviera instead of Savoy.

Letter dated July 23, 1941 extending agreement to Aug. 15, 1941.

EXHIBIT 201 (R. 257)

1. Parties: Contract between RKO and Skouras.
2. Date of Agreement: January 2, 1935.
3. Duration: Various dates as hereinafter specified.

4. Coverage Rental Terms, etc.: This exhibit is in three parts and consists of a series of agreements dealing with the pooling of the operation of RKO and Skouras theatres in the greater New York and suburban area, the transfer of management of certain theatres, and the fixing of playing time and sequence of runs among various theatres owned by the parties.

Part I

Part 1 of the exhibit consists of a series of interrelated agreements all executed on January 2nd, 1935, to take effect as of July 31, 1934. The first agreement provides for the pooling of the operation of the Skouras' Academy of Music Theatre and RKO's Jefferson theatre both on 14th Street, New York City, for a period of 3 years ending July 31, 1937. The agreement provides that RKO is to do the booking for the theatres and the Academy is to have first choice of pictures available to the RKO Major Circuit and the Jefferson is to have second choice of pictures and each theatre, subject to modification by a jointly constituted advisory committee, agrees to maintain admission prices as set forth in an annexed schedule. It is agreed that neither party will acquire any interest in any theatre south of 33rd Street, New York, without giving the other party an option to acquire a 50% participation in such interest. The profits and losses of the combined operation of the Academy and Jefferson theatres are to be shared equally by the parties.

In addition to pooling the operations of the Academy and Jefferson, the series of agreements provides for the exclusive booking by RKO of pictures for Skouras theatres, the availability of pictures licensed by Skouras for exhibition in RKO theatres, priority of exhibition among theatres operated by the parties, the admission prices to be changed in certain theatres, and the transfer by RKO to Skouras of an interest in the operation of theatres of RKO. These agreements were extended to July 31, 1948.

Part II

This consists of an agreement pooling the operation of RKO's 81st Street Theatre and Skouras' Riverside theatre in New York City for a period from March 31, 1938, to August 31, 1939. The two theatres are to have the same

operating policies and RKO agrees to make available for exhibition in the Skouras theatres pictures licensed for the RKO Major Circuit simultaneously with their exhibition in the RKO theatres and Skouras agrees not to book pictures except through RKO and to pay the proportionate amount of the rental payable by RKO for the entire circuit. Skouras agrees to make pictures licensed from Fox available to the RKO theatre. The combined profits and losses are to be shared 65% by RKO and 35% by Skouras. RKO and Skouras agree that they will not, without the other's consent, obtain the same pictures for exhibition in any theatre day and date with the Skouras and RKO theatres in the "operating area" (a described portion of the upper west side of Manhattan) except the Nemo theatre, nor without the direction of a joint operating committee permit their exhibition in the operating area within seven days after their exhibition in the RKO and Skouras theatres.

Part III

This is an agreement between Skouras and RKO relating to the operation of Skouras' Nemo theatre on upper Broadway, New York City, for a period from March 31, 1938 to August 31, 1952. RKO is appointed sole booking agent for the theatre and RKO agrees to obtain for the Nemo theatre the same pictures as are licensed for the 81st Street and Riverside theatres (see Part II of this Exhibit). Skouras agrees to pay the proportionate rental on films licensed by the RKO Major Circuit. The theatre is to be managed by an operating committee representing each of the parties and the profits after a designated figure, are to be shared equally, any loss to be borne by Skouras. The agreement contains the same provisions as the agreement covering the Riverside and 81st Street theatres (Part II of this Exhibit) limiting the exhibition of pictures licensed for the Nemo in the operating area.

Exhibit 202 (R. 257)

1. Parties: Randforce Amusement Corporation and B. F. Keith Corporation.

2. Date of Agreement: May 26, 1937.

3. Duration: From period beginning Sept. 3, 1937 and expiring Aug. 31, 1944.

4. Coverage: Republic Theatre, Brooklyn, N. Y.

5. Terms: Randforce agrees to permit Keith to manage, operate and book for its Republic Theatre and to direct all its policies, including the fixing of admission prices. Keith paid $20,000 upon execution of the contract and agreed that the policy and admission prices at the Republic be the same as maintained at Keith's RKO Greenpoint and RKO Bushwick. Randforce agrees to cooperate with Keith and to exhibit features at its Republic, day and date with features exhibited in RKO Greenpoint and RKO Bushwick. Film rentals to be determined by formula then in use by Keith for determining film rentals in its own theatres. Full accounting by each party to the other, with Keith paying $7,988.52 to Randforce as rent, with Keith receiving 2% of the cash receipts as its compensation plus 50% of amount by which cash receipts exceed cash disbursements.

Letter dated May 26, 1937 from RKO Film Booking Corporation Agent for Keith-Albee-Orpheum Corporation and RKO Proctor Corporation to Twentieth Century Fox Film Corporation, (marked "accepted" by W. C. Michel) as follows:

"Referring to our Franchise Agreement made as of August 1, 1934, but actually executed January 2, 1935, as amended and extended, this will confirm our understanding as follows:

"(1) Effective September 3, 1937, you will recognize and accept the Republic Theatre, located at Grand and Keap Streets, Brooklyn, New York, as a first run RKO theatre under said Franchise Agreement, as amended and extended, for the balance of the term thereof with the same rights and privileges to which the theatres listed in Schedule A attached to said Franchise Agreement are entitled, provided, however, that in case you receive from the undersigned written notice of the termination of an agreement dated the 26th day of May 1937, between Randforce Amusement Corporation and B. F. Keith Corporation with respect to said Republic Theatre, you shall thereafter cease to so recognize and accept such Republic Theatre.

"(2) Except as herein expressly provided, said Franchise Agreement, as amended and extended, shall remain in full force and effect."

Letter dated Dec. 28, 1943 from Randforce Amusement Corporation to B. F. Keith Corporation extends term of required contract to Aug. 31, 1954.

1. Parties: Agreement between Savridge Realty Corporation (Randforce) and B. F. Keith Corporation.

2. Date of Agreement: July 31, 1934.

3. Duration: July 31, 1934, to July 31, 1937.

4. Coverage: Savoy Theatre, Brooklyn, N. Y.

5. Terms: Savridge, owner of Savoy, engages Keith to manage and operate said theatre and to supply it with feature pictures to be exhibited first run day and date with the exhibitions of such motion pictures in RKO Brooklyn major circuit of ten theatres therein designated. Savridge agrees not to reduce present admission prices but to adhere to a Schedule "A" as annexed thereto. The parties agree that any change in admission prices shall be by mutual consent. Film rentals to be determined by formula with allocation to each theatre in accordance with respective gross receipts of such theatres. Agreement may be cancelled if franchise agreement between Fox Film Corporation and RKO is cancelled.

Extended to Aug. 31, 1941, by agreement dated June 26, 1935.

* * * * *

1. Parties: Agreement between Randforce Amusement Corporation and B. F. Keith Corporation.

2. Date of Agreement: July 31, 1934.

3. Duration: July 31, 1934, to Aug. 31, 1941.

4. Coverage: Stone, Stadium & Embassy Theatres, Brooklyn.

5. Terms: Randforce enters into booking agreement with Keith whereby latter agrees to book for above named theatres in conjunction with its booking for RKO's Brooklyn major circuit—Stone, Stadium and Embassy are to exhibit day and date first run with theatres in RKO Brooklyn major circuit and Randforce agrees not to reduce present admission prices (set forth in annexed Schedule "A") without written consent of RKO.

In the event that the franchise agreement between Fox Film Corporation and RKO shall be cancelled, this contract may likewise be cancelled by either party on appropriate notice. Annexed are:

Schedule "A": lists admission prices for Embassy, Stone and Stadium.

Schedule "B": lists theatres in RKO New York major circuit.

Exhibit "C": Agreement between B. F. Keith Corp. and Randforce Amusement Corp. dated June 26, 1935, whereby "booking agreement" dated July 31, 1934, is extended to Aug. 31, 1941.

EXHIBIT 203 (R. 257)

1. Parties: Agreement between RKO Proctor Corporation and Skouras Theatres Corporation.

2. Date of Agreement: September 22, 1939.

3. Duration: Period commencing September 1, 1939, and ending August 31, 1952, with provision for extensive renewals.

4. Coverage: Proctor Theatre in Newark, N. J.

5. Terms: Provides for the organization of a corporation under the name of Proctor-Skouras Newark Theatre Corporation of which the shares are to be purchased by RKO and Skouras. The new company is to lease the building in which the Proctor Theatre is situated at a rental of $60,000 per annum for a term of thirteen years commencing September 1, 1939, and ending August 31, 1952, and in turn agrees to sublease the theatre property to RKO at an annual rental of $61,000. RKO and Skouras are to share equally in the capitalization of the new corporation. RKO is to manage and operate the theatre unless the operation of the theatre and commercial property shall have resulted in a net loss for two consecutive years when the management will be transferred to Skouras. If the operation of the combined property shows a loss under Skouras for a period of two years, the management and operation then revert to RKO. Neither RKO nor Skouras is to acquire, operate, or have any interest in any other theatre in Newark unless RKO or Skouras first offers the other party the right to participate equally in any such venture through the organization of a corporation in which RKO and Skouras shall have an equal stock interest. RKO is to buy for exhibition first run at the theatre upon the best available terms all feature pictures released by RKO, and if RKO is unable to procure such pictures, then Skouras is to have the right to suspend the agreements. Skouras agrees to procure 20th Century-Fox films for exhibition first run

in the theatre, and in case Skouras is unable to procure such pictures, RKO has the right to suspend the agreement.

The agreement provides for an advisory committee of four members, composed of two representatives of each party. The committee was given final power as to the operating policy of the theatre; as to the making of substantial repairs; and as to the approval of agreements for the purchase of pictures for exhibition at the theatre.

Part 2 of the exhibit consists of the lease from RKO Proctor Corporation to Proctor-Skouras Newark Theatre Corporation dated September 22, 1939. This lease is for a term of thirteen years commencing September 1, 1939, ending August 31, 1952, and refers to the agreement between RKO and Skouras executed contemporaneously with the lease and provides that if that agreement is terminated, the lease is to be terminated as of the date of the termination of the agreement.

EXHIBIT 204 (2 PARTS) (R. 257)

1. Parties: RKO Proctor Corporation and Fast Theatres, Inc.

2. Date of Agreement: January 1, 1935.

3. Coverage: Provides for lease or sublease to Fast Theatres, Inc. (S. H. Fabian, Pres.), of Proctor's Grand, and Palace Theatres, at Albany, New York; Proctor's and Plaza Theatres at Schenectedy, New York; and Proctor's Theatre at Troy, New York. (See Ex. 229 pooling Warner theatres in Albany with Fast Theatres, Inc.)

4. Terms: Agreement leases or subleases above-named theatres for a twenty-one year period expiring August 26, 1956, for a guaranteed annual rental, graduated from $205,000 to $216,000 per year plus a share of the net profits varying from 27½ to 50%, depending upon profits earned, after deduction of management and booking fees paid to lessee.

By Article XXXI, p. 61, the lessee agrees during the term of the lease that "it will not extend its business outside the cities of Albany, Schenectedy, and Troy, N. Y., nor will it become financially interested in any manner in any theatre outside of said cities." The lessee further agreed not to make any agreements for operating these theatres in conjunction with theatres located outside these three cities. The lessor agreed in the same article

(p. 62), not to acquire any other theatre interests in these cities.

At pp. 67–68 it appears that a twenty-one-year franchise for the exhibition of RKO pictures in the leased theatres was made simultaneously with the lease and termination of the lease is provided for if the franchise is terminated prior to its expiration date.

A separate document labeled "Film Buying Agreement", bearing the same date as the lease is attached, under which Fast appoints Proctor as its agent to buy films for the leased theatres for 1% of its gross receipts. According to a letter of December 9, 1937, film buying was taken over by Fast beginning with the 1936–37 season, but the obligation to pay the 1% fee was unaffected. A "Vaudeville Booking Agreement" of the same date is also attached.

Part two of this exhibit consists of a series of amendatory letters modifying the basic agreements in respects not material for purposes of this case.

EXHIBIT 205 (R. 257)

1. Parties: Agreement between Minnesota Amusement Company (Paramount) and St. Paul Theatres Company (RKO).

2. Date of Agreement: May 28, 1936.

3. Duration: Period covering June 26, 1937 to August 31, 1941.

4. Coverage: Paramount Theatre, St. Paul, Minn.; Riviera Theatre, St. Paul, Minn.; Tower Theatre, St. Paul, Minn.; Palace Orpheum Theatre, St. Paul, Minn.

5. Terms: Agreement effected cooperative operation. It set up an operating committee of two, composed of representatives of the two companies which was to meet in New York. It also provided for a local operating committee. It provided for about a two to one division of net earnings.

Provision was made in the agreement for bringing the President Theatre into the deal and it was provided that:

During the term of the Agreement neither you nor the undersigned nor any company affiliated with you or the undersigned shall at any time become interested in the operation of any theatre located in downtown St. Paul or of any theatre which may be considered to compete

with the Paramount, Riviera, Tower and Palace Orpheum Theatres, or any one of them.

You may continue the operation of the Cameo Theatre, St. Paul, provided such operation is conducted on a basis which shall be non-competitive with any of the aforesaid theatres. At any time at your request the Cameo Theatre may be subjected to the cooperative control of the Operating Committee provided that in that event (a) the distribution of the net earnings under the Agreement shall not be changed; (b) there shall be paid to you as part of the operating expenses, annually, the sum of $2,000 or 25% of the net profits derived from the operation of the Cameo Theatre, whichever shall be the greater; and (c) you may withdraw the Cameo Theatre from such cooperative control at any time by covenanting with the undersigned that it will not be used for theatrical purposes during the remainder of the term of the Agreement.

With respect to film product, the contract provided:

The product of RKO Radio Pictures, Inc. shall be acquired through the undersigned for use in the aforesaid theatres on the same terms as such product shall be acquired by other companies affiliated with RKO Radio Pictures, Inc.; subject, however, in the case of each specific commitment, to the approval of the Operating Committee.

The product of Paramount Pictures, Inc., shall be acquired through you for use in the aforesaid theatres on the same terms as such product shall be acquired by other companies affiliated with Paramount Pictures Inc.; subject, however, in the case of each specific commitment, to the approval of the Operating Committee.

Upon the termination of the Agreement for any cause the undersigned shall have the right to assume and acquire any outstanding contracts for the exhibition in the aforesaid theatres of the product of any of the following companies: RKO Radio Pictures, Inc., Columbia Pictures Corporation, Universal Pictures Corporation and Vitagraph, Inc. or any successor corporation to any of said corporations, and you have a similar option in respect of contracts for the product of any other motion picture producing or distributing companies.

EXHIBIT 206 (R. 258)

1. Parties: Agreement between Singer Minneapolis Corporation (RKO) and Minnesota Amusement Company (Paramount).

2. Date of Agreement: December 11, 1936.

3. Duration: Period covering September 25, 1936 to September 2, 1937.

4. Coverage: Minnesota Theatre, Minneapolis, Minn., State Theatre, Minneapolis, Minn.; Lyric Theatre, Minneapolis, Minn.; Astor Theatre, Minneapolis, Minn.; Orpheum Theatre, Minneapolis, Minn.

5. Terms: A partnership operation was created under the agreement and an operating committee of four persons was established. Each party was entitled to two members on the committee. Receipts were to be shared in approximately 3 to 1 ratio.

This agreement provided that while Minnesota Amusement Company should be in possession and control of the Grand Theatre and the Unique Theatre in Minnesota, which theatres were not being operated, they were not to be included in the agreement and it was agreed that Minnesota would not operate Grand or Unique unless they were first offered to be included in this agreement.

It was provided that neither party nor any company affiliated with either party should become interested in the operation of any first or subsequent run theatres in downtown Minneapolis unless they were first offered to be included under the agreement.

The contract provided that the parties should submit to each other at this time complete information as to all motion-picture product which has been contracted for exhibition in the aforesaid theatres during the 1936–37 playing season ending August 31, 1937, and the terms and conditions of all agreements with respect to same.

"The product of RKO Radio Pictures, Inc., shall be acquired through the undersigned for use in the aforesaid theatres on the same terms as such product shall be acquired by other companies affiliated with RKO Radio Pictures, Inc., subject, however, in the case of each specific commitment, to the approval of the Operating Committee. The product of Paramount Pictures, Inc., shall be acquired through you for use in the aforesaid theatres on the same terms as such product shall be acquired by

companies affiliated through so-called 'partnership deals' with Paramount Pictures . . . .

A series of agreements made a few changes with respect to the theatres covered and extended the basic agreement to August 31, 1944.

EXHIBIT 207 (R. 258)

1. Parties: Lease from Straham Theatres Corporation (Paramount) to RKO-Proctor Corporation.

2. Date of Agreement: July 23, 1937.

3. Duration: Period covering July 23, 1937, to August 30, 1947.

4. Coverage: Strand Theatre, Yonkers, N. Y.

5. Terms: The rent was to equal 40% of the combined net receipts of the Strand, RKO-Proctor and Central Theatres in Yonkers. The lessee agreed to make available for the three theatres first run RKO product for the 1937–1938 to 1946–1947 seasons and the lessor agreed to make available to these three theatres one-half of Paramount features and shorts for that period.

An agreement of July 31, 1939, between the parties refers to the cancellation of a lease on Central Theatre and eliminates provisions to the agreement with reference to the Central Theatre.

An agreement of May 1, 1942, between the parties refers to the lessee subleasing the Parkhill Theatre, and brings it within the agreement, but by agreement of November 20, 1942, this theatre was taken out of the agreement.

EXHIBIT 208 (R. 258)

1. Parties: Agreement between Publix Theatres Corporation (Paramount) and 45 West Randolph Theatre Corporation.

2. Date of Agreement: April 1, 1929.

3. Duration: Period covering 10 years.

4. Coverage: United Artists Theatre, Chicago, Ill.

5. Terms: Randolph engages Publix to manage, operate, etc., the United Artists Theatre for ten years beginning April 1, 1929, conforming to agreement between Famous Players Laskey Corporation and United Artists Theatre Circuit, Inc., dated March 23, 1929.

(a) Publix to manage and operate, subject to orders of Board of Directors of Randolph;

(b) Publix to select and exhibit features;

(1) As to United Artists features: pursuant to contract between United Artists Corporation and United Artists Theatre Company, dated June 22, 1926, or renewals thereof;

(2) As to Famous Players: pursuant to contract between Famous Players Laskey Corporation and United Artists Theatre Circuit, Inc., dated March 23, 1929;

(3) As to all other features: to be selected by alternate lot by representatives of Publix and Randolph; theatre to be operated as first-run theatre and in accordance with existing contracts between distributors and Publix Theatres Corp.

$500 per week to Publix for operation; with $15,000 to be retained as reserve. Publix reserves the right to appoint Balaban and Katz as its agent.

1. Parties: Contract between United Artists Theatre Company and United Detroit Theatre Corporation (Paramount).

2. Date of Agreement: January 3, 1937.

3. Duration: For period ending August 31, 1941.

4. Coverage: United Artists Theatre, Detroit, Mich.

5. Terms: Michigan Company engaged United Detroit to manage and operate United Artists Theatre, subject to right of cancellation if franchise agreement dated September 1, 1936, between MGM Distributing Corporation and Detroit Corporation is terminated. Detroit Corporation to have complete management of theatre subject to existing MGM franchise of September 1, 1936.

Detroit Corporation to receive 40% of aggregate of all admission receipts and other income resulting from operation of the theatre.

EXHIBIT 209 (R. 259)

1. Parties: Agreement between B. F. Keith Corporation (RKO) and Monroe Amusements, Inc. (Paramount).

2. Date of Agreement: May 1, 1934, but actually executed and delivered June 18, 1937.

3. Duration: Period covering seven years.

4. Coverage: Palace, Temple, Century, Regent, and Capitol Theatres, Rochester, N. Y.

5. Terms: Agreement covered the pooling of operation of theatres leased by Keith and Monroe. By letter agree-

ment dated July 31, 1940, the agreement was modified in certain respects and extended until 1946.

Agreement provides for the appointment of an operating committee consisting of one member to be appointed by Keith and two members to be appointed by Monroe with power to:

1. Determine and change entertainment policies and admission prices at any of the pooled theatres.

2. Supervise the buying and booking for the pooled theatres.

3. Direct the closing of any of the theatres for any periods of time the committee deems advisable.

4. Approve the allowance of operating expenses for any of the theatres.

The combined net receipts or operating losses are to be divided between the parties according to a formula.

Keith has the right to discontinue operation of the Temple Theatre and Monroe to discontinue operation of the Capitol Theatre without the consent of the other. If the theatre premises are thereafter operated as a place of public theatrical or motion-picture entertainment by anyone other than the party who formerly operated it, the other party shall have the right to terminate the agreement.

EXHIBIT 211 (R. 261)

1. Parties: Agreement between International Vaudeville Company (Loew); Skouras Theatres Corporation; Ardstodd Inc.; Olthea Inc.; Metropolitan Play House, Inc.; Ninety Seventh Street & Broadway Realty Company and William A. White.

2. Date of Agreement: March 14, 1939.

4. Coverage: Olympia, Stoddard, 83rd St., Riviera, and Lincoln Square Theatres, New York, N. Y.

5. Terms: Agreement recites that Ardstodd and Olthea are New York corporations; that by agreement dated September 2, 1937, Latona Holding Corporation assigned to Ardstodd all its interest in a lease between Unum Real Estate Corporation and Latona dated November 22, 1933, covering Stoddard Theatre, New York City. Said lease after modifications expires September 30, 1945.

On September 2, 1937, by assignment from 2770 Broadway Corporation, Olthea got rights under existing lease

between Breller Realty Corporation and 2770 Broadway Corporation dated May 15, 1930, for premises for the Olympia Theatre, New York City. Said lease as modified expires September 30, 1951. Olthea being in possession of Olympia and Ardstodd in possession of Stoddard "agree that Skouras, Metropolitan and White are to assume the debts, liabilities, etc., of Olthea and Ardstodd." The agreement further recites that the Olympia Theatre has been closed from December 7, 1938, to the date of subject contract. The International Vaudeville Company purchases one-half of the interests of Skouras, Metropolitan and White in Olthea and Ardstodd. International Vaudeville also buys certain promissory notes from Skouras, Metropolitan and White, Olthea to give Skouras a non-negotiable note in part payment of advances.

Paragraph 2 (f) provides that Ardstodd and the 97th Street & Broadway Realty Company will enter into an agreement (Exhibit "D") whereby the Realty Company agrees that in operating its Riviera Theatre it will not exhibit any picture previously shown at Stoddard until at least seven (7) days after completion of Stoddard's run, that the Stoddard be operated as second run theatre, playing day and date with the Lincoln Square Theatre and ahead of the Realty's Riviera Theatre. Under "D" the Realty Co. is to be paid $1,666.67 per month while the terms of the agreement are carried out. The original agreement contains guaranty provisions for reimbursement to Skouras for any amounts he may be required to pay to Unum Real Estate Corporation. Exhibit "C" of this exhibit contains list of "contracts covering the Olympia and Stoddard Theatres." Contract further provides 2 (g), a management agreement will be entered into between Olthea and Marcus Loew Booking Agency in the form designated as attached Exhibit "E" and Skouras and Ardstodd shall enter into a management agreement in a form designated as attached Exhibit "F".

Exhibit E

This is an agreement wherein Olthea hires Marcus Loew Booking Agency to manage and book for the Olympia. It is recited that the Agency manages the 83rd and Lincoln Square Theatres. Loew agrees that

it will provide pictures for the Olympia with the same availability as it secures for the 83rd Street Theatre, with no pictures playing the 83rd Street Theatre ahead of the Olympia.

Exhibit F—Agreement Between Ardstodd, Inc. and Skouras Theatres Corporation

Ardstodd employs Skouras Theatres Corporation to book, manage, and direct for the Stoddard Theatre; Skouras agreeing that it will provide pictures for the Stoddard with such availability that Stoddard will play at least seven (7) days ahead of any other theatre, which Skouras or any affiliated or subsidiary company owns, leases, books, or operates directly or indirectly, playing such pictures between 57th Street and 120th Street except Loew's 83rd Street Theatre, the Olympia Theatre and the Lincoln Square Theatre "it being understood that as long as the operators of the Lincoln Square permit, the Stoddard may have the same availability as the Lincoln Square." Skouras receives as compensation 3% of the gross receipts of the Stoddard.

EXHIBIT 212 (R. 262)

1. Parties: Agreements between Fox Metropolitan Playhouses Inc., Randforce Amusement Corporation, and Loew.

2. Coverage: Certain theatres in New York City.

3. Terms: (1) Lease of October 11, 1929, between The Radfield Corporation and Fox Metropolitan Playhouses Inc. for period from October 11, 1929 to October 11, 1954. Fox leased for $35,000 a year premises in Brooklyn.

(2) Agreement of May 21, 1936, between Palace Brooklyn Corporation, assignee of Radfield, Metropolitan Playhouses, Inc., and Randforce Amusement Corporation.

Recites sublease from Fox Metropolitan to Randforce to February 1945, that Metropolitan now assumes obligations of original lease and Randforce assumes obligation of lease of October 11, 1929. Covers Alba Theatre.

(3) Letter of August 8, 1945, from Metropolitan Playhouses, Inc., to Lowe's Inc. advising extension of Randforce's lease on Alba Theatre to August 31, 1945.

(4) Leases between Astoria Theatre Corporation (Loew), Maso Amusement Corporation, Randforce

Amusement Corporation and Number One Theatre Inc. June 12, 1944, resulting in sublease of Alhambra Theatre to Randforce.

EXHIBIT 213 (R. 262)

1. Parties: Agreement between Loew, Skouras, and Cinema, Inc.

2. Date of agreement: January 3, 1936.

3. Duration: Period covering January 3, 1936, to August 31, 1945.

4. Coverage: Triboro, Astoria, Grand, and Steinway Theatres, New York, N. Y.

5. Terms: The Triboro and Astoria are affiliated with Loew's, the Grand and Steinway operated by Skouras, and the Broadway operated by Cinema. The agreement provides for an operating committee of two members; one designated by the Loew theatres, and the other designated by Skouras and Cinema. The duties and powers of the committee are as follows:

1. To designate and change the policy and the number of program changes of the pooled theatres; it being agreed that the Triboro and Astoria are to be operated as first-run theatres for the term of the agreement.

2. To determine which of the pictures available to all of the parties are first class pictures which shall be exhibited first run at the Triboro and Astoria Theatres, and the booking of the remaining pictures.

3. The committee is to have no power to establish admission prices which are to be established by the individual parties to the agreement, and except as power is specifically given to the operating committee the operation and management of the various theatres remains with the parties.

4. Skouras agrees that it will not exhibit any motion pictures at the Crescent Theatre until at least seven days after the exhibition of such motion pictures at the other theatres.

5. The agreement provides for the payment out of the combined net receipts of fixed amounts to each of the parties and the excess is to be in the proportion of 50% to the Loew theatres and 50% jointly to Skouras and Cinema.

The second agreement is dated November 5, 1940, and modifies and extends the 1936 agreement until August 31, 1955. By the terms of this agreement the Astoria Theatre

is leased to Skouras from November 19, 1940, until August 31, 1955, at an annual rental of $69,402.53. It provides that the Triboro and Astoria Theatres shall be operated as first run theatres during the term of the agreement, and that pictures shall be exhibited at the Broadway and Grand Theatres not earlier than seven days after the conclusion of exhibition at the Triboro and Astoria Theatres, and if such pictures are not exhibited at the Triboro and Astoria Theatres they shall be exhibited not earlier than seven days after the conclusion of exhibition at Loew's Plaza Theatre, Corona. The 1936 agreement is further modified to provide that the operating committee is to fix the admission prices at the Astoria Theatre.

EXHIBIT 214 (2 AGREEMENTS) (R. 262)

1. Parties: Loew's Incorporated and United Artists Theatres Circuit, Inc.

2. Date of Agreements: February 15, 1927.

3. Coverage: Provides for joint ownership of Penn-Federal Corporation, owner of Penn Theatres at Pittsburgh, Penn., and first run exhibition of Loew and United Artists films there. See Ex. 220, which pools this theatre with 2 Warner theatres in Pittsburgh.

4. Terms: A holding corporation is to be organized with two classes of stock, A and B, each class to elect half of the directors, to which Loew will transfer common stock of Penn-Federal Corporation. A stock of holding company will then be issued to United Artists Theatre Circuit for $100,000. Agreement refers to 10 year franchise dated June 22, 1926, between United Artists Theatre Circuit and United Artists Corporation, giving theatres of former first run privilege where it operates theatres and provides that terms of franchise agreement shall apply to exhibition in the Penn-Federal Corporation theatre in Pittsburgh with a modification as to computation of operating costs to provide for dividends on preferred stock of Penn-Federal. If either party decides to sell interest in holding company, other shall have preemptive purchase right.

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1. Parties: Loew-United Artists Columbus Corporation and the Chapel-State Theatre Company.

2. Date of Agreement: September 1, 1939.

3. Coverage: Provides for joint operation of Ohio and Broad Theatres at Columbus, Ohio.

4. Terms: Marcus Loew Booking Agency to make film contract for $100 per week and net profits from both theatres to be divided 50–50.

(Although Exhibit 164 lists Penn-Federal Enterprises, Inc., as a corporation, 50% owned by United Artists Theatre Circuit, Inc., it is interested in the Century, Valencia, and Parkway Theatres at Baltimore, the Ohio and Broad Theatres at Columbus, the State Theatre at Louisville, and the Penn at Pittsburgh, all listed as managed by Marcus Loew Booking Agency, Loew's counsel have advised plaintiff that the foregoing two agreements are the only written agreements in effect with respect to these theatres. They state that the three Baltimore theatres and the State at Louisville are managed by Marcus Loew Booking Agency under an oral arrangement for a percentage of the receipts.)

EXHIBIT 216 (R. 268)

1. Parties: Agreement between Stanley Company of America (Warner) and Loew's Theatre & Realty Corporation.

2. Date of Agreement: September 8, 1941.

3. Duration: Period covering 10 years, commencing September 26, 1941.

4. Coverage: Aldine Theatre, Wilmington, Delaware.

5. Terms: This lease provides for a guaranteed minimum rental of $30,000 per year, plus 15% of the amount by which the annual gross box-office receipts exceed the sum of $200,000, but not to exceed $4,000. The lease recites that the parties are contemporaneously executing a lease for the Loew's Parkway Theatre at Wilmington, wherein the tenant in this lease is landlord and the landlord herein is tenant (Exhibit 217), and it is provided that any default by either party to that lease shall give the other party the right to terminate its lease of the Aldine Theatre.

EXHIBIT 217 (R. 263)

1. Parties: Loew's Theatre & Realty Corporation and The Stanley Company of America (Warner).

2. Date of Agreement: September 8, 1941.

3. Duration: Covering a period of ten years commencing September 26, 1941.

4. Coverage: Loew's Parkway Theatre, Wilmington, Delaware.

5. Terms: This lease was executed simultaneously with the lease from Stanley to Loew's of the Aldine Theatre (Exhibit 216) and it is provided that if either party to that lease defaults, the other party at its option may terminate the lease to the Parkway Theatre. Lease provides for a rental of $10,000 per annum.

EXHIBIT 218 (R. 264)

1. Parties: Warner Bros. Theatres, Inc., Parmond Theatre Corporation (Paramount) and Warner Bros. Circuit Management Corporation.

2. Date of Agreement: March 19, 1936.

3. Duration: March 1, 1936, to February 25, 1941.

4. Coverage: Parthenon, Hammond, Indiana; Orpheum, Hammond, Indiana; Paramount, Hammond, Indiana.

5. Terms: This is a management agreement under the terms of which Warner, operating the Parthenon and Orpheum theatres, Hammond, Ind., and Parmond operating the Paramount Theatre in Hammond, Ind., pooled their operation, management, and product under license in Warner Management Corporation. Latter is authorized to select and book all motion pictures for said theatres; all agreements licensing the exhibition of Paramount and Warner First-National pictures shall be on substantially the same rentals per picture and shall be for substantially the same proportion of pictures released by Paramount and Warner-First National, respectively; that the same number of Paramount and Warner First-National pictures shall be exhibited in the "A" theatre mentioned therein (Parthenon) with Management taking over any unplayed licenses. All existing film agreements of Warner and Parmond are assigned to Warner Management with Warner undertaking to obtain licenses for all Warner First-National pictures and Parmond undertaking to obtain licenses for the exhibition of all Paramount pictures, with such agreements to be entered into in the name of Warner Bros. Circuit Management Corporation. Warner Bros. Circuit Management is to receive $150.00 weekly for such operation and the net receipts (i. e., gross receipts less operating expenses), were to be distributed 65% to Warner and 35% to Parmond. The agreement further defined the operating policy of the theatres enumerated:

(a) Parthenon to exhibit "first choice" pictures available to the parties;

(b) Paramount under "combination policy," i. e., exhibition of pictures after Management Corporation has assigned first choice of pictures to Parthenon;

(c) Orpheum to be operated as a "sluff" or subsequent run house.

The present scale of admission prices for all theatres were to be maintained, nor can Management Corporation make any material change in the operating policy of the theatre except with the consent of Warner and Parmond.

On termination of the agreement Warner was to assume all unplayed first-run pictures under film agreements from MGM, Warner First-National, Columbia, United Artists, and RKO and all unplayed second-run pictures from MGM, Universal, Warner First-National, Columbia, RKO, 20th Century, and United Artists, in Hammond. Parmond on termination was to assume all contracts for unplayed first-run pictures from Paramount, Fox-20th Century and Universal.

Letter

From: Parmond Theatre Corporation (Paramount).

To: Warner Bros. Circuit Management Corporation and Warner Bros. Theatres, Inc.

Date: May 7, 1940.

Extending term of March 19, 1936, to February 28, 1946.

Assignment

1. Parties: Parmond Theatre Corporation (Paramount) Hohman-Clinton Realty Corporation (Paramount).

2. Date of Agreement: June 1, 1940.

3. Terms: Parmond assigns all its right, title and interest in and to the March 19, 1936 agreement to Hohman-Clinton and Warner Bros. Theatres, Inc. consents thereto in writing dated June 20, 1940.

Extension Agreement

1. Parties: Among Warner Bros. Theatres, Inc., Hohman-Clinton Realty Corporation (Paramount) and Warner Bros. Circuit Management Corporation.

2. Date of Agreement: October 5, 1943.

3. Duration: Term extended to August 31, 1953.

4. Coverage: Parthenon, Hammond, Ind.; Orpheum, Hammond, Ind.; Paramount, Hammond, Ind.

5. Terms: This extension agreement recites the March 19, 1936 agreement and the memorandum of May 7, 1940 and extends the term to August 31, 1953. The agreement is made conditional upon the leases which Warner holds on the Parthenon and Orpheum and which are to be extended. If said leases terminate, either party shall have the right to cancel this agreement.

EXHIBIT 219 (R. 264)

1. Parties: Agreement between Keith Ohio Corporation (RKO) and Warner Bros. Theatres, Inc.

2. Date of Agreement: August 27, 1937.

3. Duration: Covers period from August 27, 1937, to August 31, 1943.

4. Coverage: Palace, 105th Street, Hippodrome, Lake, Uptown, and Allen Theatres, Cleveland, Ohio.

5. Terms: Agreement provides for the pooling of the operation of the Palace, Hippodrome, Allen, and Lake Theatres under one management and control to be exercised by an operating committee consisting of four members, two appointed by each of the parties. The committee had the sole power and authority to designate and change the entertainment policy and specify the admission prices at the various theatres subject to the provisions of any of the leases covering the said theatres.

It is agreed that the Hippodrome Theatre, during the term of the agreement, shall have first choice of pictures available to either Warner or Keith for first run exhibition. The Palace shall have second choice of such pictures.

Warner agrees to procure all Warner Bros. pictures and Keith agrees to procure all RKO pictures for presentation at the Palace, Hippodrome, Allen, and Lake Theatres, and each party agrees to indemnify the other party to the extent of one-half of any obligation it incurs in licensing pictures of other producers. It is further agreed that during the time the Lake Theatre shall be closed Warner is to receive from the income derived from the operation of the Palace, Allen, and Hippodrome the sum of $12,000, and Warner agrees that it will not sublet the Lake Theatre or

permit it to be used for theatrical purposes as long as Warner is in possession thereof.

The agreement also provides that after Warner and Keith have exercised their choices of pictures for exhibition in the Hippodrome and Palace Theatres, the remaining pictures available for exhibition first run in the downtown section of Cleveland shall be delivered to the operating committee for exhibition in the Allen Theatre. It is also agreed that they will not engage in the operation of any theatre within a radius of one mile from either the Palace, Hippodrome, Allen, or Lake Theatres which may be competitive with said theatres.

By agreement dated February 24, 1943, the 1937 agreement is extended to August 31, 1950. By the terms of this agreement Warner and RKO agree to make any pictures, except those road-shown, licensed to either of them, available for exhibition in the pooled theatres before exhibiting or permitting them to be exhibited in any other theatre in the Cleveland area. Each party agrees not to waive any of the clearances of any of the pooled theatres in favor of any theatre in which that party is interested without the consent of the other party, and Warner consents that the 105th Street Theatre shall retain its preferred second run.

EXHIBIT 220 (R. 268)

1. Parties; Stanley Company of America (Warner) and Penn-Federal Corporation (Loew's-United Artists Theatre Circuit, Inc.).

2. Date of Agreement: July 5, 1938.

3. Coverage: Stanley Theatre, Pittsburgh; Warner Theatre, Pittsburgh; Penn Theatre, Pittsburgh.

4. Duration: From July 5, 1938, to August 31, 1940.

5. Terms: This agreement provides for the management and operation of the Stanley Theatre, Warner Theatre, and Penn Theatre, Pittsburgh, and recites the existing film license agreements entered into by Stanley with Vitagraph covering Warner and First National features (annexed as Exhibit A) and film license agreement entered into by Penn with Loew's covering exhibition at the Stanley, Penn, or Warner (annexed as Exhibit B) for the purpose of: * * * effecting a more economical policy of operation by adopting a mutually satisfactory arrangement with respect to the operating policies of the said theatres * * *.

The agreement provides for the appointment of an operating committee with the power to: (a) Designate and change the entertainment policy and specify admission prices, "but not with respect to the Warner Theatre which shall be operated as a first run theatre under the sole management and control of Stanley"; (b) to determine disputes; (c) to prepare an operating budget for the theatres and maintain full budgetary control.

The agreement provides also that the Penn Theatre be operated as a first-run theatre and shall have the first choice of all pictures available to both Penn and Stanley and that the Stanley Theatre be operated as a "first-run theatre on a combination policy," i. e., vaudeville, with one feature per week. If vaudeville is presented at the Penn, same must also be presented at the Stanley Theatre with the Stanley Theatre having second choice of all pictures available. The Warner is to be operated as "a first-run theatre on a straight motion-picture policy after a choice has been exercised of the pictures for exhibition in the Penn and Stanley theatres."

The agreement also provides that the clearance shall not be increased or reduced over subsequent runs during its term and fixes clearance as follows:

Exclusive first-run in the city of Pittsburgh with twenty-eight (28) days clearance over Pittsburgh; 28 days over all theatres within 15 miles from Pittsburgh city limits; 14 days over all theatres 15 to 25 miles from Pittsburgh city limits and 7 days over all theatres 25 to 35 miles from Pittsburgh city limits.

The availability of pictures for subsequent runs after the Penn, Stanley, and Warner theatres shall remain as at present.

The parties further agree that none of the pictures available to them for first-run exhibition in any of the theatres covered shall be made available for first-run exhibition in any other theatre in Pittsburgh unless approved by the Committee.

The Committee is to determine which pictures available in first-run Pittsburgh are first choice, and those not so selected for the Penn shall be available for the Stanley as second choice. All remaining pictures shall be available for the Warner.

The parties also agree to operate the theatres as first-run theatres without change except by consent of Stanley and Penn.

The net receipts of the Penn and Stanley theatres are to be divided equally between the parties and out of the net receipts of the Warner Theatres, Warner was to receive the first $40,000 with remaining net receipts to be divided equally between Penn and Stanley.

In the event that a loss is incurred in the operations of the Stanley and Penn, such losses shall be borne equally by the parties.

Each party agrees to abide by the terms of the film licenses, copies of which are annexed to the agreement.

Representations were made in the agreement (par. 22) that Penn had available under the license first-run features released by Loew's, United Artists, and one-half of the product of Paramount Pictures Corp.; that Stanley had under license for first-run exhibition all features produced or released by Warner Bros. Pictures, Inc., First National, RKO, and one-half of product of Paramount Pictures.

Agreement

1. Parties: Stanley Company of America (Warner), Penn-Federal Corporation (Loew's-United Artists Theatre Circuit, Inc.).
2. Date: June 19, 1942.
3. Duration: Extends term of agreement to August 31, 1947.
4. Coverage: Stanley, Warner, and Penn Theatres.

Letter

From: Warner Circuit Management Corporation.
To: Penn-Federal Corporation (Loew's-United Artists Theatre Circuit, Inc.).
Date: June 19, 1942.

Defines "operating expense" and other items.

1. Parties: Stanley Company of America (Warner) and Penn-Federal Corporation (Loew's-United Artists Theatre Circuit, Inc.).
2. Date of Agreement: June 19, 1942.
3. Duration: Extends term to August 31, 1947.
4. Coverage: Stanley, Warner, Penn, and Ritz, Pittsburgh.
5. Terms: Modifies July 5, 1938, agreement and extension thereof dated April 10, 1940, to include operation and management of Ritz Theatre in Pittsburgh. This

agreement designates the policy of operation of Ritz as a first-run theatre on "straight motion-picture policy," excepting pictures available to Stanley and Penn after the first choice has been exercised by the Penn, Stanley, and Warner theatres. (Copies of film licenses are annexed to the agreement.)

EXHIBIT 221 (R. 264)

1. Parties: Stanley Company of America (Warner) and Quaker Theatres Corporation (Paramount).

2. Date of Agreement: August 27, 1936.

3. Duration: For period commencing September 4, 1936, and ending August 31, 1938.[1]

4. Coverage: Circle, State, and 69th Street Theatres of Stanley; and Tower, Roosevelt, Nixon, and Frankford Theatres of Quaker; in Philadelphia, Pennsylvania.

5. Terms: Covers the pooling of operations of the theatres.

The management and operation of all of the theatres is vested in Stanley, and Stanley is given the exclusive right to book all motion pictures and to procure all entertainments and attractions for the said theatres. The parties agree to use their best efforts to obtain licenses of such photoplays as each of the parties have theretofore licensed from various distributors so as to permit the exhibition of the said photoplays in all of the pooled theatres, and it is agreed that Stanley will accord to the pictures of Paramount and Warner-First National the same length and preference for playing time as near as may be practical. Stanley is to collect the gross income of all of the theatres; and after paying all operating expenses the net receipts are to be distributed in a proportion of 57% to Stanley and 43% to Quaker to a splitting point, and thereafter the balance of the receipts is to be distributed equally.

The agreement provides for the appointment of an operating committee consisting of two members, one designated by Stanley and the other by Quaker, which shall meet regularly in New York City. The committee shall

[1] According to the 1945 theatre lists of Warner and Paramount (Exs. 156, 161, R. 242–3) this pool has been discontinued.

have the power to designate and change the entertainment policy and specify the admission prices to the theatres covered by the agreement.

EXHIBIT 222 (R. 264) (SEE EX. 232)

1. Parties: Paramount Pictures, Inc., Fox West Coast Theatres Corporation, California Theatre Realty Company and Strand Leasing Company.

2. Date of Agreement: November 5, 1943.

3. Coverage: Paramount and California (now State) Theatres, St. Francis, Warfield, Fox, and Alcazar Theatres in San Francisco, Calif.

4. Terms: This agreement is a modification of Ex. 232. It extends the leases on San Francisco theatres owned by Paramount and the Paramount first-run film franchise for that city for a ten-year period expiring June 30, 1953. During this period Fox agrees to continue to pay Paramount 37½% of the net profits of its San Francisco theatre operations (including the profits received from the theatres leased from Loew and others), even if Fox loses possession of some of the theatres involved by an earlier termination of the lease (p. 6).

EXHIBIT 223 (R. 268)

1. Parties: Agreements between Stanley Company of America (Warner) and Skouras Theatres Corporation.

2. Date of Agreement: September 3, 1935.

3. Duration: Period covering September 6, 1935, to January 31, 1945.

4. Coverage: Theatres owned at Hackensack, New Jersey; Jersey City, New Jersey; and Elizabeth, New Jersey.

5. Terms: The Stanley theatres involved are the Oritani at Hackensack, the Stanley at Jersey City, and the Ritz and Regent at Elizabeth. The Skouras theatres are the Fox at Hackensack, the State at Jersey City, and the Liberty at Elizabeth.

Original agreement provides for pooling of operation and places the control of the theatres under the control of an operating committee of four members: Messrs. Joseph Bernhard and Donald Jacocks, representing Stan-

ley; and Messrs. George and Spyros Skouras, representing Skouras. The operating committee has the sole power to designate and change the entertainment policy and specify the admission prices at the theatres covered by the agreement.

Skouras is authorized to buy and book all pictures for exhibition in the Fox and Oritani Theatres at Hackensack, and State Theatre at Jersey City subject to the approval of Stanley, and Stanley is authorized to buy and book all pictures for exhibition in the Ritz, Regent, and Liberty Theatres at Elizabeth, New Jersey, and the Stanley Theatre at Jersey City. Stanley agrees to obtain a license for the exhibition of Warner Bros. pictures and Skouras agrees to obtain a license for the exhibition of Fox pictures in all of the theatres covered by the agreement. The combined net receipts of the theatres in the towns covered by the agreement are to be divided between the parties according to a specified percentage.

By agreement dated March 25, 1943, the agreement of September 3, 1935, was extended for an additional period of ten years from February 1, 1945.

EXHIBIT 224 (R. 268)

1. Parties: Warner Bros. Theatres, Inc., and Lynchburg-Perry Theatre, Inc. (Paramount).

2. Date of Agreement: September 25, 1936.

3. Duration: Term beginning October 5, 1936, and ending October 4, 1938.

4. Coverage: Trenton Theatre, Lynchburg, Va.

5. Terms: Warners, in possession under a superior lease dated October 4, 1933 now subleases Trenton Theatre, Lynchburg, Va., to Lynchburg-Perry Theatre, Inc. (Paramount), for a term beginning October 5, 1936, and ending October 4, 1938 at a rental beginning at $910.00 per month. A copy of the original lease is annexed as follows: (1) Date of Agreement: October 4, 1933. (2) Coverage: Trenton Theatre, Lynchburg, Va. (3) Terms: Parties of the first part lease Trenton Theatre to Warners for a period beginning January 1, 1935, and ending December 31, 1939, at $541.66 per month.

Supplemental Agreement

1. Parties: Warner Bros. Theatres, Inc., and Lynchburg-Perry Theatres, Inc. (Paramount).
2. Date of Agreement: December 25, 1936.
3. Coverage: Trenton Theatre, Lynchburg, Va.

4. Terms: Under this agreement Warner assigns all film contracts relating to unplayed pictures to Lynchburg-Perry Theatre, Inc., as set forth in schedule A annexed to agreement.

Supplemental Agreement

1. Parties: Warner Bros. Theatres, Inc., and Dominion Theatres, Inc. (Paramount).
2. Date of Agreement: December 14, 1938.
3. Coverage: Trenton Theatre, Lynchburg, Va.
4. Terms: This agreement recites the original lease dated October 4, 1933, the sublease from Warner to Lynchburg-Perry and the assignment thereof to Dominion. Annexed thereto is an agreement extending the term of the underlying lease to December 30, 1944. It recites that Dominion Theatres, Inc., as exhibitor had entered into a license agreement with Vitagraph, Inc. as distributor, for the exhibition of feature pictures in the Paramount, Trenton, and Isis theatres, Lynchburg, beginning with the 1938–1939 season and ending with the 1943–1944 season. It was agreed between Warners and Dominion that if the franchise agreement be breached by Dominion, Warner reserved the right to terminate the sublease.

Supplemental Agreement

1. Parties: Warner Bros. Theatres, Inc., and Dominion Theatre, Inc. (Paramount).
2. Date of Agreement: November 14, 1944.
3. Duration: Term extended to December 30, 1949.
4. Coverage: Trenton Theatre.
5. Term: This agreement cancels paragraph 5 (tie in with franchise agreement) of the December 14, 1938, lease, and extends the term to December 30, 1949.

EXHIBIT 225 (R. 268)

1. Parties: Agreement between Empire Theatre of San Antonio, Inc. (Warner), and Interstate Theatre Operating Corporation (Paramount).

2. Date of Agreement: August 6, 1934.

3. Duration: Original lease for one year and extended from time to time to September 30, 1941.

4. Coverage: Empire Theatre, San Antonio, Texas.

5. Terms: Lease provides for a rental of $24,000 per year. Lease recites that the tenant has entered into a simultaneous agreement with Warners for the exhibition of Warner pictures in the Empire Theatre and it is agreed that a breach of that agreement shall constitute a breach of the lease. During this period Vitagraph, Inc., the Warner distributing subsidiary, was substituted as lessor and Interstate Circuit, Inc., substituted as lessee.

EXHIBITS 226, 226a (R. 268, 2269)

1. Parties: Paramount Pictures, Inc., Fabian-Brooklyn Theatres, Inc., and Stanley-Mark-Strand Corporation (Warner).

2. Date of Agreement: September 1, 1940.

3. Coverage: Provides for joint operation of Paramount, Fox, and Strand Theatres in Brooklyn, N. Y.

4. Terms: Agreement provides for pooling of film product controlled by the parties, Paramount by Paramount, Columbia by Fabian, and Warner by Stanley-Mark-Strand, among Paramount, Fox, and Strand Theatres for five-year period with operation supervised by a three-man committee, one member appointed by each of the three parties. The Paramount is to be operated with first choice of the available product, the Fox with second choice, and the Strand with third choice. Net profits and losses are to be divided ⅓ to each party. Admission prices are to be fixed by the committee for all three theatres, subject to minimum prices fixed in license agreements (par. 14, p. 17).

Film license agreements are attached which provide film rental terms for Paramount and Warner features based upon varying percentages of the gross depending upon profits earned from exhibition of these films. As for Columbia films, two pictures are to play the Paramount for

a percentage of the gross receipts and the rest are covered by a flat rental.

Ex. 226A is a franchise for Paramount films in the same theatres, dated September 1, 1938, for the 1938–39 and 1939–40 seasons, made pursuant to a prior operating agreement between the same parties, dated September 1, 1936, and renewed on September 1, 1938.

EXHIBIT 227 (R. 268)

1. Parties: Agreement between Stanley Company of America (Warner) and Kearuth Theatre Corporation.

2. Date of Agreement: August 22, 1940.

3. Duration: Covers a period of one year commencing September 1, 1940, and has been extended from time to time by agreement, the last extension being to August 31, 1948.

4. Coverage: Hudson and Regent Theatres, Kearny, New Jersey.

5. Terms: Agreement provides for pooling the operation of Stanley's Hudson Theatre and Kearuth's Regent Theatre. Agreement provides that the theatres shall be under the supervision of an operating committee of two members, one appointed by each of the parties which shall have the power to change the entertainment policies and specify the admission prices of the theatre. Stanley is to license all pictures to be exhibited in the theatres and the pictures shall be so licensed that they will be available for exhibition in either of the theatres. The combined net receipts of the two theatres are to be divided between the parties in the proportion of approximately 52% to Stanley, and approximately 48% to Kearuth, and the combined loss, if any, is to be borne in the same proportions.

EXHIBIT 228 (R. 268)

1. Parties: Poli-New England Theatres, Inc. (Loew), and Connecticut Theatrical Corporation (Warner).

2. Date of Agreement: May 31, 1939.

3. Coverage: Lease of the Strand Theatre at Waterbury, Conn. for 2 years, expiring March 31, 1942, for 20% of the gross receipts by Poli-New England to Connecticut.

EXHIBIT 229 (R. 268)

1. Parties: Fast Theatres, Inc., and Stanley-Mark-Strand Corporation (Warner).

2. Date of Agreement: July 2, 1941.

3. Duration: Covers a period of five years and three months commencing June 1, 1941, and ending August 31, 1946. By agreement dated July 21, 1943, the agreement was extended for a further period of five years ending August 31, 1951.

4. Coverage: Grand, Leland, Ritz, Madison, and Delaware Theatres, Albany, New York.

5. Terms: Agreement provides that the operation and management of the Grand and Leland Theatres of Fast and the Ritz, Madison, and Delaware Theatres of Warner are to be pooled. The operation and management of the pooled theatres shall be under the supervision of an operating committee of four members, two designated by Fast and two designated by Stanley, who shall have the sole power and authority from time to time to designate and change the entertainment policy and specify the admission prices at the pooled theatres. Fast agrees that in the licensing of pictures for exhibition in the Palace Theatre it will not obtain clearance over the theatres covered by the agreement in excess of the clearance which the Palace has, and Stanley agrees that as operator of the Strand Theatre it will not obtain clearance over the theatres covered by the agreement in excess of the clearance in effect. Each party agrees that it will negotiate for and license the photoplays which it has heretofor licensed for its theatres, and that all license agreements shall permit exhibition in all of the pooled theatres. The combined net receipts of the pooled theatres are to be divided in the proportions of 41% to Fast and 59% to Stanley, and the combined losses are to be borne in the same proportions.

Fast is given a 41% interest in Stanley's lease for the Delaware Theatre under construction, and agrees to reimburse Stanley for 41% of all expenditures made by Stanley in furnishing and equipping the Delaware Theatre.

EXHIBIT 230 (R. 268)

(a)

1. Parties: Fox Philadelphia Building, Inc. (Sub-Lessor) and Stanley Company of America (Sub-Lessee) (Warners).

2. Date of Agreement: July 28, 1936.

3. Duration: Beginning August 1, 1936, ending July 31, 1939.

4. Coverage: Fox Theatre, Philadelphia.

5. Terms: Recites "senior lease" for premises dated June 30, 1921 from William H. Morris to William Fox Entertainments Company for a term of 50 years, modifications and assignments thereof and last senior lease wherein Girard Trust Company was lessor and Fox Philadelphia Building, Inc. was lessee dated August 1, 1934, copy of said lease is annexed to exhibit marked Exhibit B.

Under the terms and provisions of this agreement Fox Philadelphia sub-leases the Fox Theatre to Stanley for a period of three years ending July 31, 1939 at a rental of $10,683.33 monthly plus taxes, with a covenant among others, that the junior lessee will not breach the terms and conditions of the senior lease.

The agreement refers to an existing franchise agreement between Warner Bros. Circuit Management Corp. and 20th Century Fox, dated July 28, 1936 (annexed as Exhibit C) which provides that if such franchise agreement be terminated the sub-lessor may, upon proper notice, terminate its sub-lease. In the event of such termination of sub-lease, Stanley agrees that it will assign all its right, title and interest and all the right, title and interest of Warner Bros. Circuit Management Corporation in and to the film franchise agreements relating to the exhibition of first run pictures in Philadelphia to Fox Philadelphia Building, Inc., the sub-licensor, and will use its best efforts to procure the consent of 20th Century Fox Film Corporation to such assignment.[1]

[1] The film franchise agreements mentioned in this agreement were not annexed to the photostatic copy of the lease furnished to the Government.

(b)

1. Parties: Fox Philadelphia Building, Inc. and Stanley Company of America (Warners).
2. Date of Agreement: July 31, 1939.
3. Duration: Extends term five years to July 31, 1944.
4. Coverage: Fox Theatre.
5. Terms: Recites sub-lease dated July 28, 1936 and extends its term five years to July 31, 1944 with modifications. A new rental at $11,166.66 monthly is provided for and a new Article XVII relating to existing film franchise is substituted providing, among other things, that if the existing film license agreement with 20th Century Fox providing for exhibition of motion pictures for 1939–1940 season is cancelled, or if Fox pictures are not licensed to the sub-lessee for exhibition in the Fox Theatre either party, upon proper notice, may terminate the sub-lease. The substituted Article provides further that if the sub-lease is terminated prior to the termination or cancellation of the license agreement or of any subsequent license agreement relating to the exhibition of motion pictures distributed by 20th Century Fox to the Fox theatre, Stanley agrees that if requested to do so by Fox Philadelphia it will assign through the latter all its right, title and interest in all the right, title and interest of Warner Bros. Circuit Management Corporation to that part of such license agreement relating to the exhibition of first run motion pictures in Philadelphia.

(c)

1. Parties: Fox Philadelphia Building, Inc., and Stanley Company of America (Warner).
2. Date of Agreement: June 12, 1944.
3. Coverage: Fox Theatre.
4. Duration: August 1, 1944 to July 31, 1949.
5. Terms: By this agreement Fox leases the Fox theatre to Stanley at a rental of $184,000 per year plus taxes and other charges. Provision is made that the name "Fox" be continued as the name of the theatre with the tenant agreeing (Article 23) to use the premises as a first run first class motion picture theatre. The agreement further provides (Article 11) that either party may at its discretion and without any reason therefore terminate this lease upon at least one year's prior written notice.

EXHIBIT 231 (R. 265)

1. Parties: Lease from Loew's to Fox West Coast Theatres.

2. Date of Agreement: August 31, 1936.

3. Duration: Covers period of nine years from September 1, 1936, to August 31, 1945.

4. Coverage: Warfield Theatre, San Francisco, California.

5. Terms: Provides for an aggregate rental of $1,125,000. Lease refers to a franchise agreement executed simultaneously with the lease for the exhibition of Loew pictures in the Warfield Theatre and other theatres in the city of San Francisco, and it is provided that if the franchise agreement is terminated pursuant to the provisions thereof, the landlord shall have the right at its option to terminate the lease.

EXHIBIT 232 (R. 265) (SEE EXS. 222 AND 231)

1. Parties: Trustees in Bankruptcy of Paramount Publix Corporation, Fox Film Corporation, and Fox West Coast Theatres Corporation.

2. Date of Agreement: January 25, 1934.

3. Duration: Approximately ten years.

4. Coverage: (1) Lease of the following theatres in San Francisco; Paramount, period May 1, 1933, to June 30, 1943; California, period May 1, 1933, to August 31, 1943; St. Francis, period January 1, 1934, to June 30, 1943.

(2) Paramount participation in the net earnings of the following theatres operated by Fox in downtown San Francisco: Paramount, California, St. Francis, Warfield.

(3) Lease of Paramount Theatre, Oakland, California, for a period of 15 years commencing May 1, 1933, with an option to renew.

(4) Lease of Paramount Theatre, Portland, Oregon, for the period November 10, 1933, to October 31, 1943.

(5) Ten-year film franchise agreements relating to exhibition of Paramount pictures first-run in Fox theatres in the cities of San Francisco, California, Oakland, California (15 years), Portland, Oregon, and Seattle, Washington.

5. Terms: This agreement which, together with exhibits attached thereto, comprises a total of 409 pages. The preliminary portion contains recitals as to a previous

agreement, dated December 10, 1930, between Paramount and Fox, under which Paramount agreed that it would cause its appropriate subsidiaries to sublet, and Fox agreed that it would cause Fox West Coast Theatres, Inc., or other designated subsidiaries, to hire from Paramount's subsidiaries certain theatres in the above-named cities. As an outgrowth of this December 10th agreement, and also as a result of certain other transactions entered into between Paramount and Fox, controversies had arisen between the Paramount Trustees and Fox which they desired to settle in accordance with the provisions of the instant agreement.

Article I (page 12) Rent Arrearages on the Paramount, California, and St. Francis Theatres in San Francisco

This article provided for settlement of rental arrearages of these theatres.

Article II (page 15) New Leasing Argeement, San Francisco Theatres

It was provided that West Coast would cause a new corporation to be named West Coast Leasing Corporation, or such other name as West Coast should designate (termed "Coast Leasing") to be organized under the laws of Delaware for the purpose of acquiring and operating theatres; that Paramount Trustees would cause the Granada Realty Company, as lessor, and West Coast as lessee, to enter into a lease of the Paramount Theatre in San Francisco substantially in the form annexed as "Exhibit B" (page 85) attached to the agreement, for a period of ten years and two months beginning May 1, 1933, and ending June 30, 1943, at an annual rental of $87,500 and upwards; that Paramount Trustees would cause the Market Street Realty Company, as lessor, to lease to West Coast, as lessee, the California Theatre in the form annexed marked "Exhibit C" (page 114) for a period of ten years and four months, beginning May 1, 1933, and ending August 31, 1943, at an annual rental of $35,000 until August 31, 1936, and $42,500 for each year thereafter until termination of the lease; that the Paramount Trustee would cause the Strand Leasing Company, as sublessor, and West Coast, as sublessee, to execute a sublease of the St.

Francis Theatre, San Francisco, substantially in the form annexed, marked "Exhibit D" (page 141), for a period of nine years and six months, beginning January 1, 1934, and ending June 30, 1943, at an annual rental of $75,000. West Coast agreed that it would immediately cause Coast Leasing to execute a sublease of each of these San Francisco theatres.

Section 14 of this Article (page 25) stipulates that the trustees in bankruptcy of Fox West Coast Theatres, in addition to the other San Francisco theatres mentioned, are operating Loew's Warfield Theatre owned by a subsidiary of Loew's, Inc., and leased to Fox West Coast Theatres, bankrupt, for a term ending September 27, 1941. It is also stipulated that negotiations are pending for, and West Coast agrees to use its best efforts to obtain, a lease, sublease, or operating arrangement, for the Embassy Theatre, San Francisco. This Article further provides that West Coast will cause to be transferred to Coast Leasing all rights, title, and interests which Fox or West Coast, or their subsidiaries, may have or become entitled to in the profits of operation of the aforesaid theatres.

Section 15 of this Article (page 27) provides that there shall be annexed as "Exhibit E" (page 177) a map of the downtown district of San Francisco showing the motion picture theatres in said district; that in the event there should be acquired any additional theatre or theatres in said district by Fox, West Coast, or the trustees in bankruptcy of Fox West Coast Theatres, or by Paramount Trustees, each theatre shall be offered to Coast Leasing, or a wholly owned subsidiary thereof, within thirty days after the acquisition.

Article III (page 28) Agreement for Payment of a Portion of Operating Profits, San Francisco Theatres

It provided that for the period from May 1, 1933, to date of commencement of operations of Coast Leasing, West Coast will pay to Paramount Trustees a sum equal to 37½% of the aggregate net earnings for such period arising from the operation of all theatres within the downtown district of San Francisco in which either Fox or West Coast, or the bankrupt estate of Fox West Coast, shall have any interest. For the period from the date of commencement of operations of Coast Leasing to June 30, 1943, West

Coast agrees to pay Paramount Trustees a sum equal to 37½% of the aggregate net earnings of Coast Leasing.

Article IV (page 45) Paramount Theatre, Oakland, California

Section 2 of this Article provides that West Coast will cause Solano Theatre Corporation, Ltd., to enter into an agreement of lease with Broadway and Twentieth Properties, Inc., substantially in the form annexed marked "Exhibit F" (page 178), as lessor for the Paramount Theatre in Oakland, this lease to be for a term of fifteen years, beginning May 1, 1943, with an option to the lessor to renew for five additional years at a rental of $70,000 per annum, or 15% of the annual gross receipts, whichever sum may be greater.

Article V (page 49) Seattle and Portland Theatres

Section 1 of this Article provides for a settlement whereby Fox agrees to pay to Paramount Trustees in complete satisfaction and full discharge of Fox's obligation to them and to Paramount, with respect to arrearages in rent claimed to be due under the agreement of December 10, 1930 up to December 31, 1932 for the Paramount Theatre in Seattle, the sum of $9,696.89. Fox, by payment of the sum of $4,500, makes a similar settlement of all claims arising under the December 10th agreement relating to the Rialto Theatre in Portland, Oregon. A similar settlement is made with respect to arrearages in rental claimed under the December 10th agreement for the Paramount Theatre in Portland, Oregon by the payment by Fox of the sum of $20,833.34.

Article VI (page 59) Film Franchise Agreements

Section 1 provides that Paramount Trustees will cause Paramount Pictures Distributing Company, Inc., to execute and deliver the following agreements covering features, news reels, and short subjects:

(1) Film Franchise Agreement annexed marked "Exhibit L" (page 250).

Parties: Paramount Pictures Distributing Company, Inc., and Fox West Coast Theatres Corporation.

Duration: Term beginning August 1, 1933, and ending July 31, 1943.

Coverage: The following theatres in San Francisco: Paramount, Warfield, St. Francis.

Run: First run (subject to Paramount's right to "road-show").

Admission Price: The exhibitor will charge admission prices comparable in amount to the average admission prices charged for admission by theatres of similar character in cities of corresponding size.

Rental: For Class "A" features at Paramount Theatre for each week of exhibition, 25% of gross to $14,000 and a sum equal to 50% of gross in excess of $14,000. Where weekly gross less than $10,000 license fee to be 20% of gross during such week; for Class "B" features at Warfield Theatre, 15% of weekly gross up to $20,000, 50% above that sum. Minimum guarantee $1,750; for Class "C" features at Warfield, 15% of weekly gross up to $20,000, 50% above that sum; for Class "D" features at St. Francis Theatre $800.

(2) Film Franchise Agreement annexed marked "Exhibit M" (page 287).

Parties: Paramount Pictures Distributing Company, Inc. and Fox West Coast Theatres Corporation.

Duration: Fifteen years—August 1, 1933 to July 31, 1948.

Coverage: Fox, Paramount, Orpheum, Grand Lake Theatres, Oakland, California.

Run: First run Oakland, California.

Admission Price: Exhibitor will charge admission prices comparable in amount to the average admission prices charged for admission by theatres of similar character in cities of corresponding size.

Rental: For Class "A" features at Fox in conjunction with stage presentation, 15% of gross up to $19,000, and 50% thereafter. For Class "A" features at Fox not in conjunction with stage presentation, 25% of the weekly gross up to $15,000, 50% thereafter. If weekly gross less than $10,000 then license fee to be 20% of such weekly gross.

For Class "A" feature photoplays at Paramount Theatre with stage presentation, 15% of weekly gross up to $18,000, 50% thereafter. For Class "A" features at Paramount without stage presentation, 25% of weekly gross up to

$13,000, 50% thereafter. If weekly gross without stage presentation less than $9,000, the license fee shall be 20%.

For Class "A" features at Orpheum Theatre with stage presentation, 15% up to $17,000, 50% thereafter. For Class "A" features at Orpheum Theatre without stage presentation, 25% up to $12,000, 50% thereafter. If weekly gross less than $8,000, license fee 20% of such weekly gross. For Class "B" features at Orpheum or Grand Lake Theatres $500 per photoplay.

(3) "Exhibit N" (page 328) is an agreement providing for the application of the terms and conditions of the film franchise agreements referred to in Exhibits "L" and "M" to pictures released for exhibition in San Francisco and Oakland during the period May 1, 1933, to August 1, 1933.

(4) "Exhibit O" (Page 330) Film Franchise Agreement.

Parties: Paramount Pictures Distributing Company, Inc., and Fox West Coast Theatres Corporation.

Duration: August 1, 1933, to July 31, 1943.

Coverage: Liberty and Paramount Theatres in Portland, Oregon.

Run: First.

Admission Price: Admission prices shall be comparable to those charged by theatres of similar character in cities of corresponding size.

Rental: Deal sheets attached to contract provide that at the Liberty Theatre there shall be a total of twenty-five weeks playing time as follows: Six weeks at 30% a split, 50% over the split. Fourteen weeks at 25% to a split, 50% over the split. Five weeks at 20% to a split, 50% over the split.

At the Paramount sixteen pictures shall play at 20% to a split, with 50% over the split. Nine pictures at $500 per picture, seven days each. Balance $350 for seven days each. Exhibitor has the privilege of excluding 10% of the $350 pictures of Group S–5. The "split figure" is deemed to mean that point where the gross receipts of the theatre during the exhibition of each such percentage photoplay shall reach a figure which allows the exhibitor to reimburse itself out of such gross receipts for its operating expenses and for the minimum license fee so paid, and will allow the exhibitor as profit a further sum out of such gross receipts equal to the minimum license fee so paid.

(5) "Exhibit P" (page 362) Franchise Agreement.

Parties: Paramount Pictures Distributing Company, Inc. and Evergreen State Amusement Corporation (Delaware).

Duration: Ten years, commencing August 1, 1933, and ending July 31, 1943.

Coverage: The following theatres in Seattle, Washington, the Fifth Avenue, Paramount, and Orpheum Theatres.

Run: First (subject to Paramount's right to "road-show" as provided).

Rental: Fifth Avenue, twenty weeks' playing time, six weeks, 30% to a split, 50% over the split. Fourteen weeks, 25% to a split, 50% over the split.

Paramount (total of 20 pictures). If stage show, 15% to a split, 50% over the split. If no stage show, 25% to a split, 50% over the split.

It is also agreed if the weekly gross receipts of the Fifth Avenue Theatre during the exhibition of any such 30% or 25% photoplays shall not reach the house expenses during such respective weekly exhibition, then such license fees shall be reduced with respect to such week to 25% of gross to the split and 50% over with respect to such 30% photoplays and 20% of the gross to a split with 50% over with respect to such 25% photoplays.

EXHIBIT 232a (R. 2269)

1. Parties: Contract between Paramount-Publix Corporation (Paramount) and Fox Film Corporation (Fox).
2. Date of Agreement: December 10, 1930.
3. Duration: Varying dates from 3 years to 20 years.
4. Coverage: (a) Sublease of the following Paramount first run theatres:

Theatre and City

California, San Francisco; Paramount, San Francisco; St. Francis, San Francisco; Paramount, Seattle; Paramount, Portland; Rialto, Portland.

(b) Licensing of Paramount pictures in said theatres.

5. Rental Terms: (a) Sublease.—Fox to pay Paramount

a stipulated annual rental ranging from $39,737.60 to $217,743.99, depending upon the theatre involved; with a provision that if the actual yearly earnings of Fox West Coast Theatres Inc.'s "first-run" exhibitions in San Francisco, Seattle and Portland (combined) exceed their average yearly earnings as specified, then Fox will pay Paramount, as additional rent, 35% of the difference between such average yearly earnings and the actual yearly earnings; but such additional payment shall not exceed, in the aggregate, the sum of $109,600—with proportionate reduction where a lease is terminated; and with a further provision that in determining the annual earnings and the average earnings of Fox West Coast Theatres Inc., it shall be assumed that it has under its operation and control, for such year, all "first-run" theatres in the cities mentioned * * * in the operation of which Fox shall have had any financial interest (whether thru majority or minority stock ownership, or thru participating agreements or otherwise).

(b) Licensing of Paramount pictures in the theatres subleased by it to Fox.—Fox was to have exclusive right to exhibit Paramount pictures in the theatres referred to above so long as Fox has under sublease to it any of the theatres in the respective cities described; the rental terms being specifically provided for in detail.

6. Other Terms: (a) The agreement contains a provision to the effect that if a majority of the voting and controlling stock of Fox Film Corporation shall pass into the hands of others than the present owners thereof, or if the ownership and control of Fox West Coast Theatres Inc. shall pass out of the hands of Fox Film Corporation, then in either event Paramount shall have the right to terminate this agreement upon giving 6 months' notice.

(b) There was also a provision that for the 1931-32 season, Paramount will refrain from disposing, for second-run exhibition in any of the cities covered by the first-run license granted by it to Fox, of any of the pictures covered by the first-run license aforementioned until Fox shall have an opportunity to agree with Paramount upon terms for such second-run exhibitions in Fox's theatres in said cities.

EXHIBIT 233 (R. 265)

1. Parties: Lease between Strand Leasing Company (Paramount) and Fox West Coast Theatres Corporation.
2. Date of Agreement: January 1, 1934.
3. Duration: January 1, 1934 to June 30, 1943.
4. Coverage: St. Francis Theatre, San Francisco, California.
5. Terms: Provides for a total rental of $712,500.

Refers to a franchise agreement dated August 1, 1933 between Paramount and the lessee for the exhibition of Paramount pictures in certain theatres in San Francisco, including the leased theatre, and lease provides that if Paramount becomes entitled to terminate the franchise agreement according to the provisions thereof, it shall have the right at its option to terminate the lease.

1. Parties: Lease between Market Street Realty Co. (Paramount) and Fox West Coast Theatres Corporation.
2. Date of Agreement: May 1, 1933.
3. Duration: May 1, 1933 to Aug. 31, 1943.
4. Coverage: California Theatre, San Francisco, California.
5. Terms: Provides for a specified annual rental.

Refers to a franchise agreement dated August 1, 1933, between Paramount and the lessee for the exhibition of Paramount pictures in certain theatres in San Francisco, including the leased theatre, and lease provides that if Paramount becomes entitled to terminate the franchise agreement according to the provisions thereof, it shall have the right at its option to terminate the lease.

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1. Parties: Lease between San Francisco Paramount Corporation and Fox West Coast Theatres Corporation.
2. Date of Agreement: May 1, 1933.
3. Duration: May 1, 1933 to June 30, 1943.
4. Coverage: Paramount Theatre, San Francisco, California.
5. Terms: Provides for a specified annual rental.

Refers to a franchise agreement dated August 1, 1933 between Paramount and the lessee for the exhibition of Paramount pictures in certain theatres in San Francisco,

including the leased theatre, and lease provides that if Paramount becomes entitled to terminate the franchise agreement according to the provisions thereof, it shall have the right at its option to terminate the lease.

EXHIBIT 235 (R. 266)

1. Parties: Lease by Loew's to Fox West Coast Theatres Corporation.

2. Date of Agreement: August 31, 1936.

3. Duration: Period covering September 1, 1936, to August 31, 1945.

4. Coverage: State Theatre, Los Angeles, California.

5. Terms: Provides for a total rental of $1,350,000, payable in monthly installments of $12,500 each.

Lease refers to a franchise agreement between Loew's and the tenant to be executed simultaneously with the lease for the exhibition of Loew pictures in the State Theatre, and it is provided that if the franchise agreement is terminated pursuant to the provisions thereof then the landlord at its option shall be entitled to terminate the lease.

EXHIBIT 236 (R. 266)

1. Parties: Publix-Salt Lake, Inc. (Lessor) (Paramount), and Fox Idaho Theatre Corporation (Lessee).

2. Date of Agreement: June 1, 1935.

3. Coverage: Paramount Theatre, Idaho Falls, Idaho.

4. Duration: June 1, 1935 to October 30, 1944.

5. Terms: Publix leases its Paramount Theatre, Idaho Falls, Idaho to Fox for a period of years ending October 30, 1944 at $833.33 per month. The lease recites that the present lease shall be subject to the superior lease between Colonial Investment Company, and Publix-Marcus Inc., dated October 16, 1929, which was thereafter assigned to Publix Salt Lake, Inc. the sub-lessor herein.

EXHIBITS 238, 239 (R. 267)

1. Parties: Fox West Coast Theatres Corporation, Grauman's Greater Hollywood Theatre, Inc., United West Coast Theatres Corporation, United Artists Theatre Circuit, Inc., United Artists Theatres of California, Ltd., Fox West Coast Agency Corporation, and United Artists Theatre Corporation of Los Angeles.

2. Date of Agreement: September 20, 1937.

3. Duration: Ending March 31, 1947.

4. Coverage: Loew's State Theatre, Los Angeles, California; Grauman's Chinese Theatre, Hollywood, California; Four Star Theatre, Los Angeles, California; United Artists Downtown Theatre, Los Angeles, California.

5. Terms: By this agreement Grauman's Greater Hollywood, United West Coast, Los Angeles United Artists and United Artists, and West Coast, vest the management of their Chinese, Four Star, United Artists Downtown, and Loew's State Theatres in Fox West Coast Agency Corporation, with the Agency receiving 5¼% of the gross income of all theatres as its fee. Fox West Coast Agency is to have the exclusive authority to lease and book all attractions for exhibition, and may, "from time to time close and thereafter reopen any of the theatres", provided written consents have been obtained. Various rentals (enumerated on page 5) are to be paid to the parties for their respective theatres with the net profits being divided equally between Fox West Coast Theatres Corporation and United Artists Theatres Circuit, Inc. The agreement further provides that in the event that the Four Star shall not be used as a first-run theatre it may at the election of Fox West Coast Theatres Corporation be excluded from the operation of the agreement and be reincluded if it again operates as a first-run theatre. The sublease for the Four Star Theatre is to be extended by agreement between United Artists Theatres of California, Ltd., and United Theatres West Coast Corporation so that it will expire on March 31, 1947.

Letter

1. Parties: United Artists Theatres of California, Ltd., and Fox West Coast Theatres Corporation, Grauman Greater Hollywood, Inc., United West Coast Theatres Corporation, United Artists Theatres Circuit, Inc., Fox West Coast Agency Corporation.

2. Date: January 1, 1939.

3. Coverage: Four Star, Chinese, Loew State, United Artist Downtown Theatres.

4. Terms: This agreement (in letter form) modifies the agreement of September 20, 1937, as to rental terms due to a reduction in rental under senior lease.

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Supplemental Agreement

1. Parties: Hollywood Egyptian, Inc., Egyptian Theatre Corporation and United West Coast Theatres Corporation (Fox United Artists Theatre Circuit).

2. Date: October 13, 1942.

3. Coverage: Hollywood Egyptian Theatre, Los Angeles, California.

4. Terms: Egyptian Theatre Corporation assigns all its right, title and interest in and to its lease with Hollywood Egyptian Theatre, Inc., and the latter assume all liability thereunder. Mutual releases are exchanged between Hollywood Egyptian, Inc., and Egyptian Theatre Corporation with the provision that the sublease shall continue with Hollywood Egyptian Theatre, Inc., as sublessor and United West Coast Theatres Corporation agreeing to be bound by all of the agreements of the sublessee.

Supplemental Agreement

1. Parties: Egyptian Theatre Corporation (lessor), United West Coast Theatre Corporation (lessee).

2. Date of Agreement: January 1, 1934.

3. Duration: Period of five years ending December 31, 1938.

4. Coverage: Egyptian Theatre.

5. Terms: Recites that the Egyptian Theatre Corporation is in possession of the premises under a lease dated June 29, 1927, from Boulevard Theatre Co. Egyptian Theatre Corporation leases all the premises therein described for a period of five years ending December 31, 1938, at a rental of $2,766.64 per month.

Supplemental Agreement

1. Parties: Egyptian Theatre Corporation (lessor), United West Coast Theatres Corporation (lessee).

2. Date of Agreement: November 1, 1938.

3. Coverage: Egyptian Theatre.

4. Duration: Term extended to March 31, 1947.

5. Terms: This agreement modifies the sublease dated January 1, 1934, and extends the term thereof to March 31, 1947. Recites the "senior lease" which expires June 29, 1952.

Joint interests are shown under the column headed "Pools." In this column we have also included the situations in which United Artists Theatre Circuit is interested with one of the defendants as it is jointly interested with each of them in various locations, although none of them own a direct or indirect stock interest in it. As used in this tabulation, the term "pools" include all such joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement.

In compiling this tabulation, the following sources were used:

(a) 1945 theatre lists furnished by the five distributor-exhibitor defendants, marked as Government Exhibits 156 (R. 242), 157 (R. 242), 158 (R. 242), 159 (R. 242), 160 (R. 242), 161 (R. 243), 162 (R. 243), 163 (R. 243), 163b (R. 2159), and 360 (R. 240);

(b) List of corporate structure and theatre holdings furnished by United Artists Theatre Circuit, Inc., marked as Government Exhibit 164 (R. 375);

(c) 1945 corporate structure lists (supplements to 1939 interrogatory 17) furnished by the five distributor-exhibitor defendants, marked as Government Exhibits 22 (R. 179), 47 (R. 180), 64 (R. 187), 87 (R. 202), 119 (R. 219), and 120 (R. 220);

(d) Answers to 1939 interrogatories 50 (a) and 52 furnished by the five distributor-exhibitor defendants, marked as Government Exhibits 8 (R. 161), 9 (R. 161), 12 (R. 162), 13 (R. 162), 48 (R. 181), 88 (R. 202), 97 (R. 203), 100 (R. 204), and 118 (R. 217).

A. LIST OF THEATRE HOLDINGS OF DEFENDANTS WHICH SHOWS THE NUMBER AND LOCATION, BY STATE AND CITY, OF ALL THEATRES IN WHICH EACH DEFENDANT SEPARATELY OWNS A DIRECT OR INDIRECT STOCK INTEREST OF 50% OR MORE; THOSE IN WHICH THEY OWN A STOCK INTEREST OF LESS THAN 50%; AND THOSE IN WHICH TWO OR MORE DEFENDANTS OR CORPORATIONS AFFILIATED WITH ONE OR MORE OF THEM ARE JOINTLY INTERESTED.

[Numbered footnotes refer to Pool situations]

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Alabama:											
Anniston					4						
Auburn					1						
Bessemer						2					
Birmingham					7						
Chickasaw					1						
Ensley					3						
Jasper					2						
Mobile					6						
Montgomery					6						
Selma					2						
Troy					2						
Tuscaloosa					4						
Totals—12 towns					38	2					
Arizona:											
Globe		2									
Phoenix	2				7						
Tucson											

Yuma	3										
Totals—4 towns	7	2			9						
Arkansas:											
Camden					4						
Clarksville					2						
Conway						2					
Dardanelle					1						
Fayetteville						4					
Fort Smith					6						
Helena						2					
Hope						2					
Hot Springs					4						
Jonesboro					3						
Little Rock					8						
McGehee					2						
Morrilton					1						
Newport					2						
Pine Bluff						4					
Russellville					2						
Smackover					2						
Springdale						2					
Stuttgart					2						
Van Buren					2						
Totals—20 towns					41	16					

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	
California:											
Alhambra		5									
Anaheim	2										
Bakersfield	5										
Banning	1										
Bell	3										
Bell Gardens	1										
Berkeley [1]											4
Beverly Hills	3								1		
Brawley	2										
Burlingame	3										
Calexico	1										
Claremont	1										
Compton	2										
Culver City	1										
El Centro [1a]	1										2
Fresno	4								1		
Fullerton	1										
Glendale [1a]	2										4
Hanford	2										
Hermosa Beach	1										

Huntington Park	1							1		
Inglewood [3]	1									4
Long Beach [3]	1									7
Los Angeles [3]	44	10			1	*2		4		13
West Los Angeles	2									
Hollywood [4]	5									4
North Hollywood	2									
Manhattan Beach	1									
Maywood	1									
Monrovia [3]										2
Oakland	10									
Ontario	3									
Palo Alto [3]										2
Pasadena [3]										9
Pomona	4									
Porterville	3									
Redlands	3									
Redondo Beach	2									
Redwood City	2									
Richmond [3]										5
Riverside	4									
Sacramento [3]										5
Salinas	3									
San Bernardino	5							1		

[1] Fox and United Artists Theatre Circuit, Inc.
[1a] Fox and United Artists Theatre Circuit, Inc.
[2] Fox and United Artists Theatre Circuit, Inc.
[3] 12 Fox and United Artists Theatre Circuit, Inc.; 1 Lowe's and Fox.
[4] Fox and United Artists Theatre Circuit, Inc.
*Owns 1; other 1 under operating agreement with an independent.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	
California—Continued											
San Carlos	1										
San Diego	14										
San Francisco [4a]	3				1		1				5
San Jose [2]											3
San Luis Obispo	3										
San Mateo	3										
San Pedro									1		
Santa Ana	2										
Santa Barbara	1								3		
Santa Maria		2									
Santa Monica	4										
Santa Paula	2										
South Pasadena [2]											2
Stockton	4										
Taft	1										
Tracy	3										
Tulare	2										
Vallejo [2]											6
Ventura		2									
Visalia	2										

Watsonville	3						
Totals—54 towns	181	19		2	3	12	77
Colorado:							
Boulder	3						
Canon City	2						
Climax	1						
Colorado Springs				3			
Delta	2						
Denver [1]	12						1
Durango	3						
Florence	2						
Fort Collins	3						
Grand Junction				2			
Greeley				2			
La Junta	2						
Leadville	2						
Longmont	2						
Montrose	2						
Pueblo				2			
Sterling	3						
Trinidad	2						
Walsenburg	2						
Totals—19 towns	43			8			1

[1] Fox and United Artists Theatre Circuit.
[1a] 4 Fox and Paramount; 1 Fox, Loew's and Paramount.
[1] Loew's and RKO through Colorado Orpheum Corp.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	
Connecticut:											
Ansonia									2		
Bridgeport			4						3		
Bristol									2		
Danbury									3		
Derby									1		
Hartford			2		1				6		
Manchester									2		
Meriden			2								
New Britain									2		
New Haven			3		1				1		
New London					1				1		
Norwalk					1						
Norwich			1						1		
South Norwalk					1				2		
Torrington									3		
Waterbury			1						1		1
West Hartford									1		
Willimantic									2		
Totals—18 towns			13		5				32		1

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Delaware:										
Wilmington *								5		2
District of Columbia:										
		3				1		10		
Florida:										
Arcadia				1						
Bartow				2						
Bradenton				2						
Clearwater						2				
Cocoa				1						
Coral Gables				2						
Dania				1						
Daytona Beach				5						
Deland				2						
Delray Beach				2						
Eau Gallie				1						
Eustis				1						
Fort Lauderdale				5						
Fort Myers				3						
Gainesville				3						
Hialeah				4						
Hollywood				2						
Jacksonville				10						
Lakeland				4						
Lake Wales				1		1				
Lake Worth				2						
Melbourne				1						

* Loew's and Warner.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	
Florida—Continued											
Miami					7						
Miami Beach					4						
Mount Dora					1						
New Smyrna					2						
Ocala					4						
Orlando					8						
Palatka					2						
Palm Beach					3						
Palmetto					1						
Pensacola					4						
Plant City					2						
St. Augustine					3						
St. Petersburg					10						
Sanford					2						
Sarasota					4						
South Jacksonville					1						
Sulphur Springs					1						
Tallahassee					3						
Tampa					8						

Umatilla					1						
West Palm Beach					5						
Winter Haven					2						
Winter Park					3						
Totals—45 towns					131	3					
Georgia:											
Athens					5						
Atlanta [1]			1		3						1
Augusta					5						
Barnesville					1						
Brunswick					3						
Buford					2						
Columbus					4						
Elberton					1						
Gainesville					3						
Lexington					1						
Macon					5						
Moultrie						3					
St. Simons Island					1						
Savannah					5						
Waycross					2						
Totals—15 towns			1		42	3					1

[1] Loew's and Paramount through Lucas and Jenkins.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Idaho:											
Boise					1						
Caldwell	3										
Idaho Falls											1
Pocatello	3										
Preston					2						
Nampa	2							1			
Twin Falls					2						
Totals—7 towns	8				5						1
Illinois:											
Alton					2						
Aurora					3						
Belleville	2										
Benton	2										
Berwyn					1						
Bloomington					4						1
Blue Island					2						
Centralia	2										
Champaign									2		

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Chicago[a]					13	3	3		17		1	
Chicago Hgts.					3							
Christopher	1											
Danville					3							
Decatur					2							
Du Quoin	1											
East St. Louis					3							
Edwardsville					1							
Elgin					3							
Evanston					3							
Freeport					1							
Galesburg					2	1						
Harvey					1							
Jacksonville	3											
Joliet					3							
Kankakee					3							
Kewanee					3							
La Grange					2							
La Salle						3						
Marion	2											
Moline					3							
Mt. Vernon	3											
Normal					1							
Oak Park [b]						1					1	
Pekin					3							
Peoria					6							
Peru						2						

[a] Fox and Paramount.
[b] Paramount and United Artists Theatre Circuit, Inc.
[c] Loew's and Paramount.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Illinois—Continued											
Quincy						2					
Rockford						5					
Rock Island					3						
Springfield	1				1						
Streator					2						
Waukegan					3						
West Frankfort	3										
Wood River					1						
Ziegler	1										
Totals—45 towns	21				108	16	4		17		2
Indiana:											
Evansville			2								
Gary						2					
Hammond											
Indianapolis			1					1			3
Marion					3						
South Bend			1		1						

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Totals—8 towns				3		7		2		1				3
Iowa:														
Algona								2						
Boone						3								
Burlington						4								
Cedar Falls								1						
Cedar Rapids						3				1				
Centerville								2						
Chariton						2								
Charles City						2								
Clarion						1								
Clear Lake						2								
Clinton								3						
Council Bluffs			1											
Cresco						1								
Davenport						3				1				
Des Moines						8		2		1				
Dubuque										4				
Eagle Grove						1								
Estherville						1								
Forest City						1								
Fort Dodge						3								
Fort Madison			2											
Grinnell						2								
Iowa City						3								
Mason City								3						
Marshalltown										3				

[1] Paramount and Warner.

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Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Iowa—Continued											
Muscatine	3										
New Hampton					1						
Newton						2					
Oelwein						2					
Oskaloosa						5					
Ottumwa						5					
Sioux City [11]					1		2				6
Waterloo					2		1				
Totals—33 towns	6				42	27	13				6
Kansas:											
Arkansas City	2										
Atchison	2										
Chanute	2										
Clay Center	1										
Coffeyville	3										
Concordia	1										
Dodge City	3										
Eldorado	1										

Emporia	2										
Fort Scott	2										
Hays	1										
Hutchinson	4										
Iola	3										
Johnson County	1										
Kansas City	1										
Liberal	2										
Lyons	1										
Marysville	1										
Newton	3										
Ottawa	2										
Pittsburg	3										
Salina	5										
Topeka	5										
Wellington	1										
Wichita	8										
Winfield	2										
Totals—26 towns	59										
Kentucky:											
Danville					2						
Fulton					3						
Henderson					2						
Louisville			2								
Owensboro					4						
Totals—5 towns			2		11						

[a] Paramount and RKO through Affiliated Theatres, Inc.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Louisiana:											
Alexandria											
Baton Rouge					3						
Monroe						5					
New Orleans [2]					3						
Shreveport					3		2				1
						9					
Total—5 towns					9	14	2				1
Maine:											
Auburn											
Augusta					1						
Bangor						2					
Bath						3					
Biddeford					2						
Brunswick					2						
Fort Fairfield					2						
Gardiner					2						
Hallowell						1					
Houlton						1					
Lewiston					2						
					4						

Livermore Falls						1						
Norway						1						
Orono						1						
Portland					2							
Rockland					3							
Rumford						1						
South Paris						1						
Waterville					1							
Westbrook					1							
Wilton						1						
Totals—21 towns					22	13						
Maryland:												
Baltimore [13]									2		3	
Frederick									2			
Hagerstown									3			
Silver Spring									3			
Totals—4 towns									10		3	
Massachusetts:												
Allston					2							
Amesbury									1			
Arlington					1							
Boston			3		6	1	2					
Brighton					1	1						
Brockton					2							

[13] Loew's and Paramount through Canal Realty & Improvement, Inc.
[14] Loew's and United Artists Theatres Circuit, Inc. See ex. 214

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Massachusetts—Continued											
Cambridge					1						
Chelsea					2						
Chicopee					1						
Clinton									2		
Dorchester					7						
East Milton						1					
Everett									1		
Falmouth					1	1					
Fitchburg					2						
Gloucester					2						
Greenfield					1						
Haverhill					2						
Holyoke					3						
Hull					1						
Hyde Park						2					
Jamaica Falls						1					
Lawrence									4		
Lowell					2		1				
Lynn					2				2		
Marlboro						2					

Mattapan					1						
Natick					1						
Needham					1						
New Bedford					2						
Newburyport									2		
Newton					1						
Norfolk Downs						1					
North Adams					2						
Northampton					2						
North Attleboro					1						
North Cambridge					1						
Palmer					1						
Pittsfield					4						
Roslindale						2					
Roxbury					4	3					
Somerville					4						
Springfield			1		3				2		
Taunton						2					
Waltham						4					
Ware					1						
Waverly									1		
Westfield					1						
West Newton						1					
Woburn									1		
Wollaston						1					
Worcester			2		1				1		
Totals—52 towns			6		70	23	3		17		

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	
Michigan:											
Adrian [18]											2
Alligan [18]											1
Ann Arbor [18]											5
Alpena [18]											2
Battle Creek [18]											5
Bay City [18]											4
Benton Harbor [18]											3
Big Rapids [18]											1
Birmingham											
Cadillac [18]					2						2
Detroit [18a]	2				16		1				1
E. Lansing [18]											1
Flint [18]											8
Grand Haven [18]						1					2
Grand Rapids [18b]											10
Greenville [18]											2
Hancock	2										
Hillsdale [18]											2
Holland [18]											

Houghton	1										
Ionia [16]											2
Iron Mountain	2										
Jackson [16]											5
Kalamazoo [16]						2					5
Lansing [16]											4
Laurium	1										
Ludington [16]											2
Manistee [16]											3
Melvindale					1						
Menominee	1				3						
Monroe [16]											3
Muskegon [16a]											3
Niles [16]											3
No. Lansing [16]											1
Owasso [16]											3
Pontiac [16]											6
Port Huron [16]											3
St. Joseph [16]											1
Saginaw [16]											7
South Haven [16]											2
So. Lansing [16]											1
Sturgis [16]											2
Three Rivers [16]											2
Traverse City [16]											3

[15] Paramount and RKO through Butterfield Michigan Theatres Co.
[16] Paramount and RKO through W. S. Butterfield Theaters, Inc.
[16a] Paramount and United Artists Theatre Circuit, Inc.
[16b] 5—Paramount and RKO through W. S. Butterfield Theatres, Inc.*; 5 Paramount and RKO.
*RKO also has a 25 percent additional interest in these 5.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Michigan—Continued											
Willow Run [16]											1
Ypsilanti [16]											2
Totals—11 towns	9				19	3	1				118
Minnesota:											
Austin					3						
Duluth					4						
Fairmont					2						
Hibbing					4						
Mankato					3						
Minneapolis [17]					9						8
Moorhead					1						
Rochester					4						
St. Cloud					4						
St. Paul [17]					6						4
Virginia					3						
Winona					4						
Totals—12 town					47						12

Mississippi:												
Biloxi					2							
Clarksdale					2							
Columbus						3						
Greenville					2							
Greenwood					3							
Gulfport					2							
Hattiesburg					4							
Jackson						5						
Meridian					3							
Natchez					2							
Tupelo						2						
Vicksburg					3							
West Point						2						
Winona						1						
Totals—14 towns					23	13						
Missouri:												
Boonville	1											
Brookfield	1											
Cape Girardeau	2											
Carthage	2											
Excelsior Spgs	3											
Joplin	4											
Kansas City [10]	18		1		1		1					1
Kirksville	2											
Lexington	2											

[10] Paramount and RKO through W. S. Butterfield Theatres, Inc.
[11] Paramount and RKO.
[12] Fox and RKO.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Missouri—Continued											
Marshall	1										
Moberly	2										
Nevada	2										
St. Louis			2								
Sedalia	2										
Springfield	5										
Totals—15 towns	47		3		1		1				1
Montana:											
Billings	2										
Butte	3										
Great Falls	4										
Helena	3										
Lewistown	2										
Missoula	4										
Totals—6 towns	18										

Nebraska:												
Alliance	2											
Beatrice	1											
Fairbury					2							
Falls City					2							
Grand Island					4							
Hastings					2							
Lincoln					3							
McCook	2											
North Platte	2											
Omaha					3	1						
Sidney	2											
Totals—11 towns	9				16	1						
Nevada:												
Reno	2	3										
New Hampshire:												
Berlin					3							
Concord						2						
Dover					2							
Portsmouth					2							
Totals—4 towns					7	2						

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than tp per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
New Jersey:											
Atlantic City [19]									9		
Bayonne									2		
Belleville									1		
Bergenfield [19a]											1
Beverly									1		
Bloomfield									2		
Bordentown									1		
Bound Brook [19a]											1
Bridgeton									3		
Burlington									2		
Camden									5		
Clementon									1		
Collingswood									1		
Cranford									1		
Dover									2		
Dumont [19a]											1
E. Rutherford [19a]											1
E. Orange									1		
Elizabeth [20]									1		2
Englewood [19a]											2

Hackensack [20]										1		2
Highland Park							1					
Hoboken										2		
Irvington										2		
Jersey City [20b]			1							3		11
Kearny [20c]										1		
Little Falls										1		
Mount Holly										1		
Margate										1		
Milburn										1		
Millville										2		
Montclair										4		
Moorestown										1		
Newark [20a]			1		2					12		3
New Brunswick							3					
North Bergen			1									
Nutley										1		
Orange										2		
Passaic										4		
Paterson					1					4		
Penns Grove										2		
Pleasantville										2		
Ridgewood										1		
Riverside										1		

[19] Includes 1 for Ventnor.

[19a] These theatres are owned and leased by Metropolitan Playhouses, Inc., which are leased and subleased by Skouras Theatres Corp. and Randforce Amusement Corp., respectively, in each of which Metropolitan Playhouses, Inc., owns 50 percent of the stock.

[20] Warner and United Artists Theatre Circuit, Inc.

[20a] 1 Warner and Skouras Theatres Corp.; 2 RKO and Warner.

[20b] 1 Warner and Skouras Theatres Corp.; 9 RKO and Skouras Theatres Corp.

[20c] 1 Warner and Skouras Theatres Corp.; 1 RKO and Warner.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
New Jersey—Continued											
Rutherford [19a]											1
South Orange									1		
Swedesboro									1		
Teaneck [19a]											1
Trenton							7				
Union									1		
Union City							1		2		
Vineland									3		
Westwood [19a]											2
Woodbury									2		
Totals—54 towns			3		3		12		92		30
New Mexico:											
Albuquerque					7						
Hot Springs	2										
Las Cruces	3										
Las Vegas	3										
Totals—4 towns	8				7						

New York:												
New York City [19b]	1		64		1		34		2		116	
Albany [19b]							2		1		5	
Arlington					1							
Batavia									2			
Bronxville [19a]											1	
Buffalo [22]											10	
Dunkirk									1			
Elmira									3			
Forest Hills [24]											1	
Fulton					2							
Glens Falls					1							
Hornell									2			
Jamestown									4			
Lackawanna [23]												
Medina									2			
Middletown					3							
Mount Vernon			1									
Newburgh					4							
New Rochelle			1				1					
Niagara Falls [23]											1	
Nyack [19a]											2	
Olean									2		2	

[19a] These theatres are owned and leased by Metropolitan Playhouses, Inc., which are leased and subleased by Skouras Theatre Corp. and Randforce Amusement Corp. respectively, in each of which Metropolitan Playhouses, Inc., owns 50 percent of the stock.

[19b] *112 of these theatres are owned and leased by Metropolitan Playhouses, Inc., which are leased and subleased by Skouras Theatres Corp. and Randforce Amusement Corp., respectively, in each of which Metropolitan Playhouses, Inc., owns 50 percent of the stock; 3 Paramount and Warner; 1 RKO, United Artists Theatre Circuit, Inc., and Paramount.

[22] Loew's and Paramount through Buffalo Theatres, Inc.

[24] RKO and Skouras through Eaton Theatre Corp.

[23b] RKO, Warner and Fabian.

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Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 percent or more	Less than 50 percent	50 percent or more	Less than tp percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	
New York—Continued											
Ossining [19a]											2
Owego					1						
Peekskill					2						
Poughkeepsie					3						
Portchester [19a]											
Rochester [24a]			1								5
Schenectady							2				
Stapleton					1						
Syracuse			2				5				
Troy [24b]									4		1
Utica									3		
Wellesville									2		2
Waverly					2						
Woodhaven			1								
Woodside			1								
White Plains			1				1				
Yonkers [25]											3
Totals—39 towns	1		72		21		45		28		149

| | | |

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
North Carolina—Continued											
Rockingham					2						
Rocky Mount					2						
Salisbury					3						
Wilmington						5					
Wilson					3						
Winston-Salem					2	2					
Total—28 towns					69	12					
North Dakota:											
Fargo					3						
Grand Forks					2						
Jamestown					3						
Minot					3						
Totals—4 towns					11						
Ohio:											
Akron			1						1		
Bellevue					2						

Canton			1						1		
Cincinnati							9	3			
Cleveland [26]			4				1		4		4
Clyde					1						
Chillicothe									1		
Columbus [27]							2	1			2
Coshocton									2		
Dayton			1				8				
Findlay									1		
Fremont					3						
Hamilton					3						
Lima									4		
Lorain									1		
Mansfield									3		
Marion					2						
Massillon									1		
Middletown					3						
Portsmouth									3		
Sandusky									1		
Sidney									2		
Springfield									5		
Steubenville									1		
Toledo			2		2						
Youngstown									3		
Totals—26 towns			9		16		15	4	34		6

[26] RKO and Warner.
[27] Loew's and United Artists Theatre Circuit, Inc.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Oklahoma:											
Oklahoma City [25]											10
Oregon:											
Eugene	2										
Portland	1	8									
Salem									5		
Totals—3 towns	3	8							5		
Pennsylvania:											
Aliquippa						4					
Ambler									2		
Ambridge					1				2		
Ardmore									1		
Bala Cynwyd									1		
Bloomsburg					2						
Brookville									1		
Butler					2				2		
Carlisle					2						
Chester									3		

Collingsdale									1			
Danville					1							
Darby									1			
Dickinson City					1							
Donora									3			
Dormont									2			
Drexel Hill									1			
Dunmore					1							
Duryea					1							
Elkins Park									1			
Erie									3			
Etna									1			
Forest City					1							
Forty Fort					2							
Gettysburg									2			
Greensburg									3			
Hanover									2			
Harrisburg			1									
Hawley					1							
Hazelton					3							
Honesdale					1							
Jenkintown									1			
Jersey Shore					1							
Johnstown									3			
Kingston					1							
Lansdowne									1			
Lancaster									3			
Lebanon						3						

[28] Paramount and Warner through Standard Theatres Corp.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	
Pennsylvania—Continued											
Luserne					1						
Mauch Chunk						1					
McKeesport									2		
Miners Mills					1						
Mount Oliver									1		
New Kensington									2		
Northumberland					1						
Oil City									1		
Old Forge					1						
Olyphant					1						
Palmyra									1		
Parsons					1						
Philadelphia [39]									72		6
Pittsburgh [39]									20		4
Pittston					2						
Plymouth					1						
Pottstown									2		
Pottsville					3						
Prospect Park									1		
Punxsutawney									2		

Reading			1						2			
Red Lion									2			
Ridgeway									1			
Sayre					1							
Scranton					13							
Sharon									2			
Shenandoah					2							
State College									3			
Sunbury					2							
Tarentum									3			
Titusville									2			
Towanda					1							
Tyrone									2			
Upper Darby [29a]												2
Warren									2			
Washington									2			
Waynesboro									2			
Westchester									2			
West Reading			1									
Wilkes-Barre					9							
Wilkinsburg									3			
Williamsport					2							
Willow Grove									1			
York									4			
Totals—82 towns			3		63	8			177			12

[29] 5 Paramount and Warner; 1 Fox and Warner.*
[29a] Paramount and Warner.
[30] Loew's and Warner.
*Reacquired by Fox recently (Tr. 1558–9).

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	50 percent or more	Less than 50 percent	
Rhode Island:											
Newport					1						
Pawtucket					1						
Providence			2				1				
Woonsocket					1						
Totals—4 towns			2		3		1				
South Carolina:											
Abbeville					1						
Anderson					3						
Columbia					6						
Darlington						1					
Florence						2					
Greenville					3						
Greenwood					3						
Spartanburg					4						
Sumter					3						
Totals—9 towns					23	3					

South Dakota:											
Aberdeen					3						
Huron					3						
Madison					2						
Mitchell					2						
Sioux Falls					5						
Watertown					4						
Totals—6 towns					19						
Tennessee:											
Bristol					2						
Chattanooga					3						
Elizabethton					2						
Jackson					3	1					
Johnson City					3						
Kingsport					4						
Knoxville					8						
Memphis			2		2				1		
Nashville			1		1						
Totals—9 towns			3		28	1			1		
Texas:											
Abilene					4						
Amarillo					2						
Anahuac					1						
Arlington					2						
Arp					1						
Austin					7						

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	50 per cent or more	Less than 50 per cent	
Texas—Continued											
Baytown						2					
Beaumont					9						
Breckenridge					2						
Brownsville					2						
Brownwood					5						
Channelview						1					
Conroe						2					
Corsicana					4						
Daingerfield						1					
Dallas					16						
Denison					3						
Denton					3						
Donna					1						
Eagle Lake						1					
Eastland					2						
El Paso					6						
Fort Worth					13						
Galveston					5						
Gladewater					3						
Goose Creek						2					

Greenville						3						
Groves					1							
Hallettsville						1						
Harlingen					4							
Henderson						2						
Houston			1		22							
Hughes Spring						1						
Jacksonville						3						
Kilgore						3						
La Porte						1						
Longview						4						
Lufkin						3						
Marshall						3						
McAllen						3						
Mercedes						3						
Nacogdoches						3						
Nederland						1						
Needville						1						
Orange					4							
Overton						2						
Paris					7							
Pelly						1						
Port Arthur					6							
Port Neches					2							
Ranger					2							
Richmond						1						
Rosenberg						2						
Rusk						2						
San Antonio					14							
San Benito					2							

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Texas—Continued											
San Juan					1						
San Marcos					3						
Silsbee					1						
Temple					5						
Texarkana					4						
Tyler					4						
Vernon					2						
Waco					5						
Willis						1					
Weslaco					2						
Wichita Falls					5						
Yoakum						2					
Totals—68 towns			1		190	56					
Utah:											
Brigham					1						
Logan					4						

Ogden	2				4						
Provo					4						
Salt Lake City					5						
Totals—5 towns	2				18						
Vermont:											
Barre					2						
Brattleboro					2						
Burlington						2					
Montpelier					1						
Rutland					3						
Totals—5 towns					8	2					
Virginia:											
Cape Charles					1						
Charlottesville					4						
Clifton Forge									2		
Danville						3					
Exmore					1						
Hampton					2						
Harrisonburg									3		
Hilton Village					1						
Lexington									2		
Lynchburg [31]					2					1	

[31] Paramount and Warner.

Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Virginia—Continued											
Newport News					2						
Norfolk			3								
Phoebus					1						
Richmond			4	1							
Staunton									2		
Winchester									1		
Totals—16 towns			7	1	14	3			10		1
Washington:											
Aberdeen	2								2		
Bellingham	3										
Bremerton	3										
Everett		4									
Hoquiam	1								1		
Manette	1										
Olympia	1										

Seattle	2										
Spokane	4										
Vancouver	4										
Wenatchee		2									
Totals—11 towns	21	15							3		
West Virginia											
Bluefield						2					
Charleston									2		
Clarksburg									1		
Fairmont									2		
Huntington								3			
Martinsburg									4		
Morgantown									1		
Parkersburg									2		
Wheeling					1						
Totals—9 towns					1	2		3	12		
Wisconsin:											
Appleton									2		
Beaver Dam	2										
Delavan									1		
Fond du Lac	3										
Eau Claire					3						

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Location	Fox		Loew's		Paramount		RKO		Warner		Pools
	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	50 per-cent or more	Less than 50 per-cent	
Wisconsin—Continued											
Janesville	4										
Kenosha	1										
La Crosse									4		
Lake Geneva					2						
Madison	4								1		
Marinette	3								2		
Menasha	1										
Milwaukee	31										
Oshkosh	2								10		
Port Washington	2										
Racine											
Sheboygan									3		
Stevens Point	2										
Superior											
Wausau	3				3						
Totals—20 towns	58				8				27		
Wyoming:											
Cheyenne	4										
Kemmerer	1										
Laramie	3										
Rawlings	3										
Rock Springs	2										
Sheridan	2										
Totals—6 towns	15										
Grand totals—~~915~~ 922 towns	518	47	131	1	1,168	225	101	8	501	0	437
Grand total											[1] 3,137

[1] Excludes a substantial number of theatres which are affiliated with 1 or more of the defendants through film buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

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5. Warner (Ex. 437, R. 2407)

Billings and rentals paid to Warner Bros. Pictures, Inc., in each exchange area for the exhibition rights to its feature film "Princess O'Rourke" released during the 1943–1944 season in all cities with populations of 25,000 and over

Exchange area	Total		First run only							
			Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
	Number of billings	Film rentals	Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany, N. Y.	228	$27,280	8	3.5	$13,199	48.5	5	62.5	$11,354	86.4
Atlanta, Ga.	928	97,340	26	2.8	39,806	40.5	21	80.8	33,369	81.8
Boston, Mass.	653	120,077	49	7.5	60,486	50.4	27	55.1	34,233	56.5
Buffalo, N. Y.	261	80,206	8	3.1	37,396	54.6	5	62.5	13,541	49.3
Charlotte, N/C	428	48,342	15	3.5	14,169	31.3	14	93.3	11,488	80.9
Chicago, Ill.	564	122,300	22	3.9	55,218	45.1	13	59.2	52,772	95.7
Cincinnati, Ohio	540	58,894	17	3.1	31,082	53.1	9	52.9	19,102	61.4
Cleveland, Ohio	333	60,158	21	5.9	29,409	49.0	13	61.	28,631	99.2
Dallas, Tex.	960	88,648	20	2.1	35,044	39.5	15	75.0	31,626	88.6
Denver, Colo.	333	31,930	4	1.2	14,497	45.5	2	50.0	13,104	83.4
Des Moines, Iowa	264	20,514	11	3.7	8,248	40.2	9	81.8	7,202	87.3
Detroit, Mich.	501	85,574	16	3.2	26,905	38.0	13	81.3	23,770	88.6
Indianapolis, Ind.	316	42,265	13	4.1	21,387	50.6	1	7.7	815	2.4
Kansas City, Mo.	489	50,958	8	1.6	19,915	39.0	6	75.0	18,447	92.5
Los Angeles, Calif.	567	165,443	23	4.1	98,640	59.3	16	69.5	77,492	78.6
Memphis, Tenn.	416	27,926	4	1.0	9,841	35.2	4	100.0	9,841	100.0
Milwaukee, Wis.	300	28,905	12	4.0	13,015	45.2	11	91.7	17,305	98.1
Minneapolis, Minn.	549	46,613	10	1.8	17,602	37.8	9	90.0	16,739	94.9
New Haven, Conn.	196	34,068	14	8.9	20,916	59.7	12	75.0	16,949	85.5
New Orleans, La.	515	40,415	(1)		(1)		(1)		(1)	
New York, N. Y.	845	236,113	(1)		(1)		(1)		(1)	
Oklahoma City, Okla.	333	26,566	6	1.8	7,186	28.4	2	40.0	3,909	54.4
Omaha, Nebr.	286	15,260	3	1.1	5,976	39.2	3	100.0	5,976	100.0
Philadelphia, Pa.	667	151,719	24	3.6	73,407	48.7	19	79.2	64,617	88.7
Pittsburgh, Pa.	449	71,221	12	2.7	20,134	28.2	9	75.0	16,497	82.1
Portland, Oreg.	196	32,625	2	1.0	17,051	52.5	2	100.0	17,051	100.0
St. Louis, Mo.	429	43,180	8	1.9	12,670	30.1	3	25.0	1,232	9.9
Salt Lake City, Utah	304	35,168	7	2.3	8,695	30.9	6	85.7	7,720	88.8
San Francisco, Calif.	478	112,658	10	2.1	45,656	40.5	9	90.0	45,056	98.7
Seattle, Wash.	271	49,409	7	2.6	26,258	53.2	4	57.1	21,400	81.5
Washington, D. C.	301	96,[illegible]	13	3.6	42,256	43.7	8	44.4	29,985	70.9
Total, minus New York and New Orleans	12,730	1,821,833	399	3.1	$19,991	45.0	271	67.9	646,108	78.9

[1] Defendant did not provide sufficient information for first run analysis.

Source: Defendant's Answers to Interrogatory Nos. 2, 6, 7, 8, 9, 10, and 11. Exhibits 125, 126, 127, and 128.

B. FEATURE FILM RENTALS PAID TO DISTRIBUTOR DEFENDANTS AND ALL OTHER DISTRIBUTORS BY THEATRES AFFILIATED WITH PRODUCERS-EXHIBITOR DEFENDANTS FOR FEATURES RELEASED DURING THE 1943–44 SEASON AS REPORTED BY THEM IN ANSWERS TO INTERROGATORY 12 (Ex. 424, R. 2276, 2284).

Distributor defendants and all others receiving rentals	RKO		Fox [1]		Warner Bros.[2]		Paramount [3]		Loew's	
	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total	Amount	Percent of total
RKO	$3,916,743	30.6	$2,411,915	9.5	$2,330,176	9.9	$3,556,080	7.1	$403,849	2.0
Fox	2,181,515	17.0	5,069,701	20.0	2,362,866	10.1	7,263,767	14.6	1,310,639	6.6
Warner Bros.	2,013,330	15.7	2,437,953	9.6	6,212,268	26.5	5,681,831	11.4	403,211	2.0
Paramount	747,537	5.8	3,956,642	15.6	3,030,692	12.9	14,231,293	28.6	2,887,939	14.4
Loew	650,229	5.2	5,958,640	23.5	4,045,440	17.3	10,041,241	20.1	9,282,490	46.4
Total paid to producer-exhibitors	9,509,354	74.3	19,834,851	78.2	17,982,440	76.7	40,774,212	81.8	14,288,128	71.4
Columbia	707,092	5.5	1,162,319	4.6	1,316,509	5.6	2,280,947	4.6	1,743,975	8.7
United Artists	192,587	1.5	1,157,149	4.6	725,507	3.1	1,378,551	2.8	1,718,040	8.6
Universal	1,990,609	15.5	2,056,032	8.1	2,518,722	10.7	3,395,247	6.8	1,745,797	8.8
All others	412,918	3.2	1,131,185	4.5	899,056	3.9	2,006,654	4.0	504,662	2.5
Total	12,812,560	100.0	25,341,536	100.0	23,442,234	100.0	49,835,611	100.0	20,001,602	100.0

[1] Covers the period Dec. 26, 1943 to Dec. 30, 1944, and includes shorts and newsreels.

[2] Includes shorts and newsreels.

[3] The above figures for accounting purposes are as of Dec. 20, 1944 but are believed to reflect the license fees for the pictures released during the 1943–44 season.

[4] Excludes about $1,465,000 paid for "This Is The Army."

Source: Defendants' answers to Interrogatory 12, 1945. Exhibits: 93—RKO; 43—Fox; 125—Warner, 125-a— Warner; 83—Paramount; 56—Loew's.

C. PERCENTAGES OF TOTAL FEATURE FILM RENTALS RECEIVED BY DISTRIBUTOR DEFENDANTS FROM THEATRES AFFILIATED WITH PRODUCER-EXHIBITOR DEFENDANTS AND FROM OTHER EXHIBITORS FOR FEATURES RELEASED DURING THE 1943–44 SEASON (Ex. 425, R. 2287, 2289).

Distributor defendants receiving rentals	RKO	Fox	Warner	Paramount	Loew's	Rentals paid by theatres affiliated with the five producer-exhibitor defendants	Rentals paid by five circuits paying the next highest rentals [1]	Rentals paid by other theatres	All rentals
RKO	14.1	7.6	5.3	11.9	1.2	43.1	[2] 4.4	52.5	[3] 100.0
Fox [4]	5.2	10.6	4.6	12.7	2.1	35.2	[5] 4.7	60.1	100.0
Warner [6]	6.0	7.8	19.[illegible]	[7] 17.9	.5	51.6	[8] 3.6	44.8	100.0
Paramount [9]	1.3	8.[illegible]	6.9	32.2	5.2	54.0	[2] 4.1	41.9	100.0
Loew	1.5	9.5	6.8	16.6	16.6	50.7	4.3	45.1	[3] 100.0
Columbia	3.7	5.9	6.4	10.2	8.8	35.0	[10] 2.7	62.3	100.0
United Artists	1.1	8.4	7.1	13.0	17.3	46.9	2.8	50.3	100.0
Universal	7.6	6.6	9.6	12.0	6.3	42.1	[11] 2.4	55.5	100.0
Total	4.8	8.5	8.2	16.8	7.1	45.3	3.7	51.0	100.0

[1] Includes 5 circuits, not necessarily the same in each case, paying the next highest rentals in order of magnitude to producer-exhibitor defendants indicated.

[2] Includes Skouras.

[3] Covers all rentals received up to Apr. 26, 1945, for feature films released during 1943–44 season.

[4] Percentages used are those given by defendant in answer to Interrogatory No. 3 for all rentals for the United States and Canada, including shorts and newsreels.

[5] Incudes Skouras and Randforce circuits.

[6] Covers all rentals billed up to Mar. 31, 1945, for feature films released during 1943–44 season, exclusive of "This is the Army."

[7] Buffalo Theatres, Inc., has been classified by Warner as a Paramount affiliate.

[8] Covers features released during the period Oct. 1, 1943 to Sept. 30, 1944, and includes all rentals to Mar. 10, 1945.

[9] Represents all net billings through Mar. 15, 1945.

[10] Columbia unable to supply 5 next highest circuits. Figure given covers following five circuits: Skouras, Century, Robb & Rowley, Wilmer & Vincent, and Randforce. (See Exh. C–12.)

[11] Includes only 1 circuit.

Source: Defendants' answers to Interrogatory No. 3, 1945. Exhibits: 95—RKO; 40—Fox; 125—Warner; 81—Paramount; 56—Loew's; 138—Columbia; 144—United Artists; 382—Universal.

D. DISTRIBUTION OF LICENSE FEES PAID TO EACH OF THE DEFENDANT DISTRIBUTORS FOR EXHIBITION RIGHTS TO ALL FEATURE FILMS RELEASED DURING THE 1943–44 SEASON, BY SIZE OF FILM RENTALS (Ex. 426, R. 2200).

Film license rentals	Fox (number of features)	Loew (number of features)	Paramount (number of features)	RKO (number of features)	Warner (number of features)	Columbia (number of features)	United Artists (number of features)	Universal (number of features)
$2,000,000 and over	9	11	5	1	9	1	1	
$1,000,000 to $2,000,000	8	12	9	12	4	5	3	0
$500,000 to $1,000,000	4	7	4	3	3	5	7	8
$250,000 to $500,000	4	2	12	9	0	10	4	8
Less than $250,000	8	1	1	13	3	20	1	24
Total	33	33	31	38	19	41	16	40
Average rental per feature	$1,132,990	$1,656,419	$1,324,352	$748,877	$1,548,377	$477,599	$897,730	$536,169

Source: Defendants' answers to interrogatory 2, 1945.
Exhibits: 40, Fox; 56, Loew; 80, Paramount; 93, RKO; 125, Warner; 137, Columbia; 143, United Artists; 362, Universal.

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E. DISTRIBUTION OF LICENSE FEES PAID TO EACH OF THE DEFENDANT DISTRIBUTORS FOR EXHIBITION RIGHTS TO ALL FEATURE FILMS RELEASED DURING THE 1936–37 SEASON, BY SIZE OF FILM RENTALS (Ex. 427, R. 2292).

Film license rentals	Fox (number of features)	Loew (number of features)	Paramount (number of features)	RKO (number of features)	Warner (number of features)	Columbia (number of features)	United Artists (number of features)	Universal (number of features)
$2,000,000 and over		3						
$1,000,000 to $2,000,000	7	11	7	1	2		1	
$500,000 to $1,000,000	14	11	9	8	12	2	9	4
$250,000 to $500,000	12	13	17	12	14	6	1	4
Less than $250,000	28	12	26	26	32	23	8	32
Total	61	50	59	47	60	31	19	40
Average rental per feature	$462,746	$753,925	$437,146	$329,084	$357,780	$207,659	$483,197	$202,594

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F. TABULATIONS SHOWING THE PROPORTION OF TOTAL DOMESTIC FILM RENTAL WHICH COMES FROM FIRST RUN EXHIBITION IN CITIES OF 25,000 AND OVER AND THE PROPORTION OF SUCH FIRST RUN REVENUE WHICH COMES FROM THEATRES AFFILIATED WITH THE DEFENDANTS

1. Fox (Ex. 433, R. 2403)

Billings and rentals paid to Fox in each exchange area for the exhibition rights to its feature film "Sweet Rosie O'Grady," released during the 1943–44 season in cities with populations of 25,000 and over

Exchange area	Total		First run only							
	Number of billings	Film rentals	Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
			Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany, N. Y.	226	$34,069	3	3.0	$15,472	45.4	1	14.3	$3,309	21.3
Atlanta, Ga.	969	135,229	19	2.0	48,495	33.0	18	94.7	44,992	92.9
Boston, Mass.	672	156,606	49	7.3	80,626	51.5	23	46.9	41,288	51.2
Buffalo, N. Y.	247	64,749	8	3.2	33,033	51.0	4	50.0	24,098	72.8
Charlotte, N. C.	504	65,443	13	2.6	22,929	35.0	12	92.3	20,116	87.7
Chicago, Ill.	554	172,209	125	4.5	68,196	39.6	18	72.0	62,582	92.2
Cincinnati, Ohio	330	78,294	16	3.0	38,849	49.6	7	43.8	21,753	81.7
Cleveland, Ohio	317	84,907	18	5.7	42,286	50.0	7	38.9	23,989	80.2
Dallas, Tex.	831	119,356	18	2.2	49,902	41.8	14	77.8	47,334	94.7
Denver, Colo.	350	41,642	4	1.1	16,002	38.4	4	100.0	16,002	100.0
Des Moines, Iowa	271	31,482	11	4.0	8,025	25.5	11	100.0	8,025	100.0
Detroit, Mich.	405	126,531	14	3.5	48,642	38.4	14	100.0	48,642	100.0
Indianapolis, Ind.	510	62,526	12	2.9	28,032	44.8	2	16.7	4,867	16.6
Kansas City, Mo.	522	65,973	9	1.7	23,187	35.2	8	88.9	21,083	93.5
Los Angeles, Calif.	591	164,409	20	3.4	86,739	52.8	18	90.0	85,541	98.6
Memphis, Tenn.	372	34,451	3	.8	9,721	28.2	3	100.0	9,721	100.0
Milwaukee, Wis.	373	80,226	12	4.4	20,892	37.1	8	66.7	17,185	82.1
Minneapolis, Minn.	667	69,753	6	1.1	19,140	41.8	6	100.0	19,140	100.0
New Haven, Conn.	348	44,138	14	6.1	20,699	64.9	8	40.0	6,697	18.9
New Orleans, La.	502	80,770	8	1.6	18,849	31.1	8	100.0	18,849	100.0
New York, N. Y.	804	288,288	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)
Oklahoma City, Okla.	299	33,846	4	1.3	11,257	33.3	1	25.0	5,945	52.8
Omaha, Nebr.	275	24,114	4	1.5	8,660	35.9	4	100.0	8,660	100.0
Philadelphia, Pa.	619	176,930	24	3.9	75,564	42.7	11	45.8	24,207	32.0
Pittsburgh, Pa.	393	82,121	[2] 10	2.5	[2] 17,108	20.8	3	30.0	1,807	10.6
Portland, Oreg.	171	33,410	3	1.8	12,680	38.0	3	100.0	12,680	100.0
St. Louis, Mo.	445	61,690	[2] 7	1.6	[2] 7,628	12.4	5	71.4	6,588	86.3
Salt Lake City, Utah	303	42,179	4	1.3	15,686	30.1	4	100.0	12,686	100.0
San Francisco, Calif.	551	126,366	8	1.5	53,985	42.1	7	87.5	52,416	98.9
Seattle, Wash.	306	54,350	6	2.0	25,276	46.5	4	66.7	19,359	76.7
Washington, D. C.	556	121,439	16	2.9	55,336	45.6	3	18.8	14,627	26.8
Total	13,900	2,805,372	373	2.7	984,705	35.1	237	63.8	725,470	73.7

[1] Does not include billings with blanket commissions.
[2] No first run data furnished at the time this tabulation was in preparation.
[3] No first run data furnished for St. Louis and Pittsburgh.

Source: Defendant's answers to interrogatories No. 2, 6 to 11, 1945. (Exhibits 40, 41, and 42.)

2. Loew (Ex. 435, R. 2406)

Billings and Rentals Paid to Loew's, Inc. in Each Exchange Area for the Exhibition Rights to its Feature Film "As Thousands Cheer" Released During the 1943–1944 Season in Cities With Populations of 25,000 and Over

Exchange area	Total		First run only							
			Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
	Number of billings	Film rentals	Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany, N. Y.	239	844,708	7	2.9	816,295	35.6	4	57.1	812,698	77.3
Atlanta, Ga.	1,108	102,780	27	2.4	35,844	34.1	25	92.6	83,995	97.3
Boston, Mass.	693	213,208	45	6.9	112,262	52.6	39	86.4	88,219	78.6
Buffalo, N. Y.	246	86,947	8	3.3	44,088	32.7	5	62.5	36,788	83.4
Charlotte, N. C.	614	95,057	13	2.1	38,987	33.7	12	92.3	33,210	85.9
Chicago, Ill.	888	194,676	22	2.8	83,707	42.2	14	63.6	78,840	94.0
Cincinnati, Ohio	320	115,852	17	5.3	38,696	33.0	10	58.8	40,494	98.8
Cleveland, Ohio	346	103,674	20	5.8	60,044	48.4	13	65.0	41,262	84.1
Dallas, Tex.	1,051	148,238	20	2.0	63,210	38.0	15	75.0	58,181	92.0
Denver, Colo.	291	84,[illegible]	5	1.7	19,473	36.0	5	100.0	19,473	100.0
Des Moines, Iowa	274	42,719	12	4.4	20,667	48.9	11	91.7	19,528	97.4
Detroit, Mich.	436	180,740	18	4.1	68,677	42.6	14	77.8	65,973	94.7
Indianapolis, Ind.	310	93,911	13	4.2	41,128	49.6	5	38.5	38,915	89.6
Kansas City, Mo.	341	91,494	6	1.8	31,561	34.5	7	87.5	29,823	94.3
Los Angeles, Calif.	648	203,890	21	3.3	82,334	40.6	19	90.5	81,361	98.8
Memphis, Tenn.	270	58,223	4	1.1	10,691	23.1	4	100.0	10,691	100.0
Milwaukee, Wis.	299	61,847	11	3.7	22,695	35.6	10	90.9	20,931	96.0
Minneapolis, Minn.	330	77,331	15	2.8	31,913	41.3	14	93.3	30,898	96.8
New Haven, Conn.	186	66,086	16	8.7	60,989	78.3	15	93.8	60,989	100.0
New Orleans, La.	476	60,332	11	2.3	24,624	40.8	2	18.2	14,929	60.1
New York[1]	826	439,165	35	4.2	101,025	23.5	25	71.4	87,937	86.7
Oklahoma City, Okla.	331	40,356	3	.9	12,403	30.7	1	33.3	6,829	55.1
Omaha, Nebr.	323	35,818	3	.9	10,801	30.2	3	100.0	10,801	100.0
Philadelphia, Pa.	649	236,354	22	3.4	100,991	42.7	15	68.2	83,204	82.6
Pittsburgh, Pa.	433	112,304	13	2.9	39,159	34.9	9	69.2	21,368	54.7
Portland, Oreg.	195	43,643	2	1.0	15,709	35.8	1	50.0	1,403	8.9
St. Louis, Mo.	444	72,460	6	1.8	21,233	29.2	6	75.0	19,213	90.6
Salt Lake City, Utah	330	47,480	7	2.1	12,218	25.7	7	100.0	12,218	100.0
San Francisco, Calif.	571	170,869	6	1.4	55,635	32.5	7	87.5	54,720	98.4
Seattle, Wash.	345	67,611	7	2.0	27,684	41.0	4	57.1	21,267	76.9
Washington, D. C.	730	167,312	16	2.2	61,913	37.0	8	50.0	46,566	75.2
Total	14,982	3,538,477	442	2.9	1,363,367	38.5	318	72.1	1,163,137	85.3

[1] Does not include First Run at Astor Theatre, New York City; data not furnished by defendant.

Source: Defendant's Answers to Interrogatory Nos. 2, 6, 7, 8, 9, 10 and 11. Exhibits 56 and 57.

3. Paramount (Ex. 438, R. 2407).

Rentals paid to Paramount Pictures, Inc., in each exchange area for the exhibition rights to its feature film "Let's Face It" released during the 1943–44 season in cities with population of 25,000 and over

Exchange area	Total film rentals	First run only. Rentals: Amount	Rentals: Percent of total	Rentals from affiliated theatres: Amount	Rentals from affiliated theatres: Percent of all first run
Albany, N. Y.	$20,762.41	$13,906.89	53.43	$11,203.11	71.45
Atlanta, Ga.	135,364.42	(1)	(1)	(1)	(1)
Boston, Mass.	142,936.13	(2)	(1)	(1)	(1)
Buffalo, N. Y.	55,693.80	27,959.01	50.12	26,994.28	96.55
Charlotte, N. C.	55,563.88	(3)	(3)	(3)	100.00
Chicago, Ill.	153,294.83	(1)	(1)	(1)	(1)
Cincinnati, Ohio	58,217.34	[4] 24,023.14	41.26	[5] 20,692.50	86.13
Cleveland, Ohio	80,908.02	[4] 35,560.47	43.95	[5] 23,277.63	76.17
Dallas, Tex.	126,178.60	(1)	(1)	(1)	(1)
Denver, Colo.	42,908.90	[4] 4,170.33	9.72	[5] 3,044.12	72.60
Des Moines, Iowa	34,635.19	(3)	(3)	(3)	100.00
Detroit, Mich.	119,844.65	[4] 31,594.76	26.36	[6] 25,266.60	80.43
Indianapolis, Ind.	53,363.66	[4] 23,535.21	44.10	[4] 4,532.45	19.26
Kansas City, Mo.	92,806.04	(1)	(1)	(1)	(1)
Los Angeles, Calif.	160,362.54	(1)	(1)	(1)	(1)
Memphis, Tenn.	35,165.65	(3)	(3)	(3)	100.00
Milwaukee, Wis.	50,771.61	[4] 10,944.77	20.96	[4] 9,786.94	91.03
Minneapolis, Minn.	53,437.80	(3)	(3)	(3)	100.00
New Haven, Conn.	39,788.13	[7] 13,132.73	33.02	[7] 10,563.89	80.46
New Orleans, La.	82,908.22	(3)	(3)	(3)	100.00
New York, N. Y.	494,898.35	(1)	(1)	(1)	(1)
Oklahoma City, Okla.	31,930.26	[4] 8,854.13	27.73	[4] 3,412.67	38.54
Omaha, Nebr.	22,646.75	(3)	(3)	(3)	100.00
Philadelphia, Pa.	139,193.75	[4] 57,905.83	36.09	[4] 41,788.75	72.13
Pittsburgh, Pa.	64,797.68	22,806.75	35.33	16,204.51	70.90
Portland, Oreg.	38,174.17	(3)	(3)	(3)	100.00
St. Louis, Mo.	80,295.66	[10]	[10]	[10]	[10]
Salt Lake City, Utah	36,811.15	(3)	(3)	(3)	100.00
San Francisco, Calif.	127,106.05	[10]	[10]	[10]	[10]
Seattle, Wash.	45,6[illegible]5.95	[10]	[10]	[10]	[10]
Washington, D. C.	111,786.85	[11] 51,956.40	45.87	[11] 43,378.25	84.96

[1] Data available insufficient.
[2] Data available insufficient. All first run theatres affiliated.
[3] Two cities with affiliated theatres lacking.
[4] One city with affiliated theatres lacking.
[5] Detroit, affiliated, is lacking.
[6] Milwaukee and three other cities, all with affiliated theatres, lacking.
[7] Hartford, New Haven, New London, and Norwalk, all with affiliated theatres lacking.
[8] One city with nonaffiliated theatres lacking.
[9] Scranton, Wilkes-Barre, Hazleton, and Williamsport, all with affiliated theatres, lacking.
[10] Data for affiliated theatres lacking.
[11] Danville, Lynchburg, and Newport News, all with affiliated theatres, lacking.

Source: Defendant's answer to Interrogatories Nos. 2, 6 to 11, inclusive. Exhibits 80 and 82.

4. RKO (Ex. 434, R. 2404)

Billings and Rentals Paid to RKO in Each Exchange Area for the Exhibition Rights to its Feature Film "The Lady Takes a Chance" Released During the 1943–1944 Season in Cities With Populations of 25,000 and Over

Exchange area	Total		First runs only							
	Number of billings	Rentals	Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
			Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany	199	$30,559	7	3.5	$9,558	46.5	4	57.1	$5,051	54.2
Atlanta	1,020	91,775	24	2.4	30,196	42.7	21	87.5	23,805	86.5
Boston	613	95,134	51	8.3	47,154	49.6	29	56.9	35,601	75.5
Buffalo	254	46,105	10	3.9	28,282	61.3	6	60.0	13,719	48.5
Charlotte	571	47,110	13	2.3	14,614	31.0	12	92.3	12,247	83.8
Chicago	898	97,824	21	3.5	33,307	34.0	14	66.7	30,142	90.5
Cincinnati	494	57,050	19	3.8	30,634	53.7	11	57.9	26,122	85.3
Cleveland	380	61,484	16	4.2	27,510	44.7	6	37.5	12,462	45.3
Dallas	993	101,721	22	2.2	46,558	46.1	17	77.3	42,686	91.1
Denver	328	37,469	4	1.2	16,074	42.9	2	50.0	12,843	79.9
Des Moines	231	20,775	9	3.9	10,019	48.2	9	100.0	10,019	100.0
Detroit	442	65,114	13	2.9	22,028	33.8	12	92.3	21,784	98.8
Indianapolis	326	42,900	13	4.0	19,969	46.5	2	15.4	1,018	5.1
Kansas City, Mo	457	40,797	9	2.0	15,457	37.9	8	88.9	14,746	95.4
Los Angeles	614	158,772	37	6.0	104,317	67.0	28	75.7	96,180	92.2
Memphis	299	35,234	3	1.0	8,102	22.0	[2] 2	66.7	5,953	73.5
Milwaukee	276	33,484	13	4.7	[1] 13,819	41.3	10	76.9	11,553	83.6
Minneapolis	449	39,849	12	2.7	18,712	47.0	9	75.0	15,774	84.3
New Haven	198	30,226	10	5.1	20,447	68.6	13	81.3	18,536	89.5
New Orleans	806	86,363	[3] 1	0.2	[4] 6,268	17.5	[3] 1	100.0	[3] 6,268	100.0
New York	809	266,283	[5] 41	5.1	[5] 123,744	47.9	[5] 34	82.9	[5] 118,733	96.9
Oklahoma City	238	27,186	3	0.9	7,969	28.4		0.0		0.0
Omaha	200	17,344	4	2.0	8,250	47.6	3	75.0	6,196	75.2
Philadelphia	600	119,729	25	4.2	46,681	39.0	17	68.0	30,940	66.2
Pittsburgh	412	58,265	13	2.9	17,944	31.7	10	83.3	15,838	88.7
Portland, Oreg	102	23,981	2	2.0	6,779	28.3	2	100.0	6,779	100.0
St. Louis	463	40,170	[6] 7	[6] 1.5	[6] 8,627	[6] 25.0	[6] 4	[6] 75.0	[6] 3,251	[6] 22.5
Salt Lake City	200	32,983	6	2.0	13,943	42.8	3	50.0	4,288	30.8
San Francisco	518	98,852	11	2.1	39,847	41.1	10	90.9	39,737	99.7
Seattle	311	39,257	6	1.9	[7] 14,536	[7] 15.9	6	100.0	14,536	100.0
Sioux Falls	114	8,638	1	.9	1,696	17.2		0.0		0.0
Washington, D. C	400	91,600	(8)	(8)	(8)	(8)	(8)	(8)	(8)	(8)
Total	13,967	1,916,253	431	3.1	822,799	42.1	305	70.1	656,998	81.1
			463		878,738		313	67.6	690,615	78.6

[1] West Allis, Wis., rental not available—included in a lump-sum schedule.
[2] Includes rental data for the city of New Orleans only. Data on other cities in exchange area not furnished by defendant in time for inclusion in this table.
[3] Data on Tacoma 1st run not available in time for inclusion in this table.
[4] No 1st run data available for Washington, D. C., in time for inclusion in this table.
[5] Data on Springfield, Ill., not available in time for inclusion in this table.
[6] Does not include the following which are under a lump sum schedule: DeWitt Theatre, Bayonne, N. J.; Capitol Theatre, Belleville, N. J.; Royal Theatre Bloomfield, N. J.; Clifton Theatre, Clifton, N. J.; Regent Theatre, Elizabeth, N. J.; Ritz Theatre, Garfield, N. J.; Fabian Theatre, Hoboken, N. J.; Sanford Theatre, Irvington, N. J.; Regent Theatre, Kearney, N. J.

Source: Defendant's Answers to Interrogatories, Nos. 2 and 6–11, 1945 (Exhibits 93 and 94).

6. Columbia (Ex. 436, R. 2407)

Billings and Rentals Paid to Columbia in Each Exchange Area for the Exhibition Rights to Its Feature "Cover Girl," Released During 1943–44 Season in Cities With Populations of 25,000 and Over

Exchange area	Total		First runs only							
			Billings		Rentals		Billings on affiliated theatres		Rentals from affiliated theatres	
	Number of billings	Rentals	Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany [1]	204	$32,343	7	3.4	$14,982	46.0	4	57.1	$10,807	71.3
Atlanta [2]	777	105,715	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
Boston	617	156,697	46	7.5	102,349	65.3	15	31.2	82,112	80.9
Buffalo	213	37,233	7	3.4	25,967	69.0	3	42.0	15,559	42.3
Charlotte [3]	546	56,411	12	2.2	13,039	23.1	11	91.7	10,195	78.3
Chicago [4]	821	112,573	[4] 4	(2)	[4] 4,604	(2)	[4] 1	(2)	[4] 1,121	(2)
Cincinnati [5]	452	67,322	14	3.1	27,736	41.2	9	64.2	24,465	88.1
Cleveland [6]	326	70,210	19	5.8	47,151	67.2	7	36.8	20,342	43.1
Dallas	904	91,904	20	2.2	40,474	44.1	14	70.0	36,208	89.4
Denver	362	38,737	8	2.2	17,903	46.4	6	75.0	14,602	81.5
Des Moines	274	34,918	12	4.4	18,498	53.0	9	75.0	17,648	95.4
Detroit	451	82,376	17	3.8	44,200	53.6	13	76.5	41,526	93.8
Indianapolis [2]	302	61,178	(2)	(2)	(2)	(2)	(2)	(2)	(2)	(2)
Kansas City	479	80,103	8	1.7	18,622	37.1	6	75.0	14,718	89.8
Los Angeles	620	175,378	20	3.2	109,694	62.5	15	75.0	85,620	78.1
Memphis	237	27,936	4	1.7	9,697	34.7	4	100.0	9,697	100.0
Milwaukee	253	43,951	14	5.5	20,043	46.6	13	92.9	19,118	95.4
Minneapolis	471	47,453	8	1.7	17,775	37.4	6	75.0	15,133	85.1
New Haven [7]	178	80,628	12	6.7	38,267	47.9	9	75.0	21,628	72.2
New Orleans [8]	460	37,649	7	1.5	15,194	40.3	7	100.0	15,194	100.0
New York [9]	781	458,318	27	3.9	233,290	50.9	16	59.3	55,440	23.8
Oklahoma City	280	26,095	3	1.0	6,833	26.3	0	0.0	0	0.0
Omaha	256	23,284	3	1.2	10,394	44.7	2	66.7	7,505	72.3
Philadelphia [10]	516	172,324	20	3.9	74,552	43.3	13	65.0	52,589	70.5
Pittsburgh	391	73,696	12	3.1	25,512	34.9	2	16.7	1,619	6.3
Portland, Oregon	157	27,511	4	2.5	13,506	48.6	4	100.0	13,506	100.0
St. Louis [11]	870	42,784	6	1.6	15,085	35.3	3	50.0	2,660	17.6
Salt Lake City	251	33,013	5	2.0	10,992	33.3	4	80.0	9,071	82.5
San Francisco [12]	497	118,268	10	2.0	34,428	29.1	3	30.0	6,267	18.3
Seattle	266	46,380	6	2.3	24,598	53.1	2	33.3	4,534	18.4
Washington, D.C.	694	120,733	17	2.7	67,394	30.2	5	29.4	13,536	33.5
Total minus Atlanta, Chicago, Indianapolis, and San Francisco	10,88	2,144,09[illegible]	940	8.3	1,044,[illegible]05	50.5	202	38.4	559,040	36.4

[1] No 1943–1944 Deal.
[2] No data furnished for any city of Exchange at time tabulation was prepared.
[3] No data furnished for Raleigh, Rocky Mount, and Wilmington, N. C., Greenville and Spartanburg, S. C., at time tabulation was prepared.
[4] Data furnished only for Quincy, Moline, Rock Island, and Bloomington, Ill. No data furnished at time this tabulation was prepared for approximately 20 cities in Illinois (including Chicago) and northwestern Indiana. Therefore, percentage was not calculated.
[5] No data was furnished for Covington, Ky., at time this table was prepared. No deal was made in Lexington, Ky.
[6] No first run in Cleveland Heights or E. Cleveland, Ohio. No data furnished for Zanesville and Lakewood, Ohio, at time this tabulation was prepared.
[7] West Hartford and WestHaven, Conn., had no first runs.
[8] No data furnished for Jackson and Meridian, Miss., at time this tabulation was prepared.
[9] Film rental for affiliated theatres in Bronx and Queens Boroughs was based on formula deal and was not available for individual theatres. No data furnished for Bloomfield and Belleville, N. J., at time this tabulation was prepared.
[10] No data furnished for Camden, N. J., at time this tabulation was prepared.
[11] No data furnished for Paducah, Ky. at time this tabulation was prepared. There are no first run theatres in University, Mo.
[12] No data furnished for San Francisco, Calif., at time this tabulation was prepared.

Source: Defendant's Answer to Interrogatories Nos. 2, 6 to 11, 1945 (Exhibits 137, 139).

7. Universal (Ex. 439, R. 2408)

Billings and rentals paid to Universal Pictures Co., Inc. in each exchange area for the exhibition rights to its feature film "Christmas Holiday" released during the 1943–1944 season in cities with populations of 25,000 and over

Exchange area	Total		First run only							
			Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
	Number of billings	Film rentals	Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Albany, N. Y.	151	$19,735	6	4.0	$9,661	48.9	4	66.6	$8,656	92.0
Atlanta, Ga.[1]	673	82,777	20	2.9	37,189	44.9	23	84.6	32,954	88.2
Boston, Mass.[1]	479	105,161	50	10.4	65,408	62.4	18	36.0	37,647	57.6
Buffalo, N. Y.	192	39,888	10	5.2	25,826	64.8	6	60.0	12,102	46.9
Charlotte, N. C.	303	43,089	20	6.2	15,709	36.6	13	65.0	12,304	84.3
Chicago, Ill.[1]	326	77,157	21	6.2	26,691	34.5	14	66.6	23,196	87.2
Cincinnati, Ohio	414	80,883	20	4.8	26,043	31.4	11	55.0	21,269	81.7
Cleveland, Ohio[1]	346	80,486	17	4.9	26,534	32.5	9	52.9	17,899	62.7
Dallas, Tex.	552	70,974	19	3.9	23,758	33.0	17	89.5	20,289	94.2
Denver, Colo.	215	25,735	7	3.2	11,371	44.2	7	100.0	11,371	100.0
Des Moines, Iowa	166	17,622	11	6.6	9,668	54.4	10	90.9	9,303	96.0
Detroit, Mich.[1]	321	82,813	14	4.4	31,138	38.9	13	92.8	30,185	96.9
Indianapolis, Ind.	221	40,234	15	6.8	22,497	56.3	3	20.0	4,271	18.2
Kansas City, Mo.	356	39,352	10	2.8	15,093	39.4	9	90.0	14,209	94.8
Los Angeles, Calif.	672	128,762	34	7.3	84,042	65.3	28	82.3	71,421	85.0
Memphis, Tenn.	267	19,801	5	1.9	5,315	27.1	5	100.0	5,315	100.0
Milwaukee, Wis.	197	32,312	13	6.6	14,551	45.1	11	84.6	13,815	94.3
Minneapolis, Minn.	261	25,982	10	3.8	[illegible]	49.2	7	70.0	11,027	86.4
New Haven, Conn.	251	22,100	17	11.2	21,883	68.3	13	76.5	19,450	89.7
New Orleans, La.	273	35,906	9	3.3	16,661	46.3	1	11.1	10,026	60.2
New York, N. Y.	734	297,082	37	5.0	[2] 140,812	47.3	28	75.7	[2] 124,696	96.6
Oklahoma City, Okla.	241	22,080	6	2.5	7,322	33.5	2	33.3	4,125	52.7
Omaha, Nebr.	186	13,815	4	2.6	6,305	45.3	4	100.0	6,305	100.0
Philadelphia, Pa.	466	120,086	34	4.8	39,761	46.3	15	62.5	28,936	69.4
Pittsburgh, Pa.[1]	379	61,098	11	2.9	22,444	36.7	9	36.4	3,081	13.6
Portland, Oreg.	149	18,874	2	1.3	7,328	39.0	1	50.0	781	10.4
St. Louis, Mo.	308	35,409	10	3.3	14,162	40.0	5	50.0	2,080	14.7
Salt Lake City, Utah	192	22,394	6	3.1	7,949	35.6	4	66.6	6,985	88.4
San Francisco, Calif.	380	79,920	10	2.6	35,618	44.6	2	20.0	4,550	12.8
Seattle, Wash.	189	31,815	7	3.7	15,136	47.5	3	42.8	10,273	67.9
Washington, D. C.	482	86,919	17	3.5	32,741	41.7	4	23.5	9,722	29.9
Totals	10,130	1,780,702	468	4.6	872,002	49.0	288	62.7	616,257	70.7

[1] No rental data available for Knoxville, Tenn.; Fall River, Mass; Belmont, Mass.; Warwick, R. I.; Rock Island, Ill.; East Cleveland, Ohio; Hamtramck, Mich.; Highland Park, Mich.; Royal Oak, Mich.; Wyandotte, Mich.; Sharon, Pa.

[2] Rentals for New Rochelle, Mt. Vernon, and Yonkers not included in total first-run amount or in affiliated theaters first-run amount due to lump-sum deal.

Source: Defendant's Answers to Interrogatory Nos. 6-11 inclusive, 1945.

8. United Artists (Ex. 440, R. 2408)

Billings and rentals paid to United Artists Corporation in each exchange area for the exhibition rights to its feature film "Stage Door Canteen" released during the 1943–1944 season in cities with populations of 25,000 and over

Exchange area	Total		First run only							
			Billings		Rentals		Billings in affiliated theatres		Rentals from affiliated theatres	
	Number of billings	Film rentals	Number	Percent of total	Amount	Percent of total	Number	Percent of all first runs	Amount	Percent of all first runs
Atlanta, Ga.	770	$134,868	20	2.6	903,347	47.1	27	93.1	$83,081	82.3
Boston, Mass.[1]	567	255,872	45	8.2	160,479	55.7	15	33.3	98,821	61.6
Buffalo, N. Y.	240	109,214	17	7.1	65,898	60.3	11	64.7	57,441	87.2
Charlotte, N. C.	286	84,561	17	5.9	27,476	32.6	15	88.2	21,886	79.7
Chicago, Ill.[2]	449	220,205	37	8.2	141,681	61.5	29	78.4	130,778	91.6
Cincinnati, Ohio	369	113,135	21	5.7	71,654	63.3	12	57.1	56,438	79.0
Cleveland, Ohio	287	130,775	18	6.7	78,627	56.3	16	88.8	75,251	95.7
Dallas, Tex.	1,106	175,839	37	4.1	82,806	47.1	19	70.4	68,243	82.4
Denver, Colo.[2]	201	61,490	2	0.6	1,728	2.8	2	100.0	1,728	100.0
Detroit, Mich.[1]	353	181,456	19	5.1	37,366	34.7	15	83.3	35,226	94.5
Indianapolis, Ind.	292	101,782	15	5.1	52,971	52.0	5	33.3	31,116	58.7
Kansas City, Mo.	470	96,692	15	3.1	45,220	47.3	10	66.6	33,983	75.2
Los Angeles, Calif.	460	186,838	37	8.1	120,836	64.7	33	89.2	114,120	94.4
Milwaukee, Wis.	200	72,830	14	4.8	38,926	36.7	12	85.7	35,838	98.4
Minneapolis, Minn.	411	73,646	15	3.6	30,238	41.1	15	100.0	30,238	100.0
New Haven, Conn.	186	71,873	15	9.6	60,401	84.6	10	66.6	55,230	76.2
New Orleans, La.	476	80,026	9	3.9	34,157	42.7	1	11.1	19,080	57.8
New York, N. Y.[3]	998	714,205	44	4.8	300,230	42.0	34	77.3	283,917	94.6
Omaha, Nebr.	466	82,774	13	2.8	22,548	27.2	10	76.9	15,886	69.0
Philadelphia, Pa.	838	278,497	20	5.7	135,249	48.5	16	84.2	92,726	68.6
Pittsburgh, Pa.	432	146,332	15	3.5	58,084	39.1	11	73.3	36,947	63.6
St. Louis, Mo.	486	114,331	14	2.8	45,757	40.0	12	85.7	43,226	96.2
Salt Lake City, Utah	286	47,963	6	2.1	13,831	28.2	6	100.0	13,831	100.0
San Francisco, Calif.	233	169,252	14	4.2	94,899	55.9	12	85.7	46,065	48.7
Seattle, Wash.	260	124,779	13	3.4	64,055	51.3	9	69.2	33,779	52.7
Washington, D. C.	545	196,295	13	2.8	76,089	38.7	5	38.3	24,143	30.9
Total	11,065	4,015,208	514	4.3	1,981,092	46.9	363	70.4	1,469,131	73.1

[1] No data available for Portland, Maine; Bangor, Maine; and Lewiston, Maine.
[2] No data available for Denver, Colorado; Pueblo, Colorado; and Colorado Springs, Colorado.
[3] Blanket deals covering the following cities excluded: Evanston, Ill., and Berwyn, Ill.
[4] Blanket deals covering the following cities excluded: Flint, Mich., Pontiac, Mich., Battle Creek, Mich., Bay City, Mich., Jackson, Mich., Muskegon, Mich., Port Huron, Mich.—Blanket contract with Butterfield covering these cities excluded.
[5] Blanket deals covering the following cities excluded: Bronx, New York City, Brooklyn, New York City, Richmond, New York City, Yonkers, New York, Hoboken, New Jersey, Irvington, New Jersey, Union City, New Jersey, Mt. Vernon, New York, New Rochelle, New York, Belleville, New Jersey, Bloomfield, New Jersey, Kearney, New Jersey, North Bergen, New Jersey, and White Plains, New York.

NOTE: For explanation of arrangement of exchange areas see attached list.

Source: Defendants' answers to Interrogatories 6 to 11, inclusive, 1946.

The following exchange areas used by Universal are not used by United Artists: Albany, N. Y., Des Moines, Iowa; Memphis, Tenn.; Oklahoma City, Okla.; Portland, Oreg.

Changes in cities in exchange areas due to the omission of the above exchange areas by United Artists:

Universal		United Artists
Albany Exc.	Albany	New York Exc.
	Troy	
	Amsterdam	
	Rome	Buffalo Exc.
	Watertown	
	Utica	
Des Moines Exc.	Moline	Chicago Exc.
	Davenport	
	Burlington	
	Clinton	
	Dubuque	
	Cedar Rapids	
	Des Moines	Omaha Exc.
	Mason City	
	Ottumwa	
	Waterloo	
Memphis Exc.	Memphis	St. Louis Exc.
	Owensboro	
	Little Rock	Kansas City Exc.
	Fort Smith	
Oklahoma City	Oklahoma City	Dallas Exc.
	Enid	
	Tulsa	Kansas City, Exc.
	Muskogee	
Portland Exc.	Portland	Seattle Exc.
	Salem	

9. Recapitulation of data from all eight defendants disclosed in Exs. 433–40 (R. 2403–2408), inclusive:

The percentages of all domestic billings which represent first runs in cities of 25,000 and over and the percentages of all domestic rentals from such runs received by each defendant distributor from the feature film released during the 1943–44 season with the largest total number of domestic billings, are as follows:

		Billings	Rentals
Fox (Ex. 433)	Sweet Rosie O'Grady	2.7	35.1
Loew (Ex. 435)	As Thousands Cheer	2.9	38.5
Paramount (Ex. 438)	Let's Face It	(1)	(2)
RKO (Ex. 434)	Lady Takes A Chance	3.1	42.1
Warner (Ex 437)	Princess O'Rourke	3.1	45.0
Columbia (Ex. 436)	Cover Girl	3.3	50.5
Universal (Ex. 439)	Christmas Holiday	4.6	49.0
United Artists (Ex. 440)	Stage Door Canteen	4.3	46.9

[1] Data not supplied.
[2] Data includes only 13 of 31 exchange areas

The percentages of all first run billings in affiliated first run theatres in cities of 25,000 and over and the percentages of all first run rentals derived from these theatres by each defendant distributor from the same features, are as follows:

		Billings	Rentals
Fox (Ex. 433)	Sweet Rosie O'Grady	68.5	73.7
Loew (Ex. 435)	As Thousands Cheer	72.1	85.3
Paramount (Ex. 438)	Let's Face It	(1)	(2)
RKO (Ex. 434)	Lady Takes A Chance	67.6	78.6
Warner (Ex. 437)	Princess O'Rourke	67.9	78.9
Columbia (Ex. 436)	Cover Girl	59.4	56.4
Universal (Ex. 439)	Christmas Holiday	68.7	70.1
United Artists (Ex. 440)	Stage Door Canteen	70.4	78.1

[1] Data not supplied.
[2] Data includes only 13 of 31 exchange areas

G. TABULATIONS SHOWING THE PROPORTION OF TOTAL FILM RENTAL RECEIVED FROM A LARGE CITY WHICH COMES FROM FIRST RUN EXHIBITION IN THAT CITY

1. Percentage of total film rentals received from first and subsequent runs during 1936–37 season by all defendants in:

(a) Atlanta, Ga. (Ex. 467, R. 2455)

Distribution of license fees paid to all defendants for exhibition to all feature pictures released in Atlanta during the 1936–37 season, by affiliation and by runs

Distributor	Number of features	Number of national exhibitions	National gross	Atlanta gross		First run					
						Total		Affiliated		Unaffiliated	
				Amount	Percent of national gross	Amount	Percent of Atlanta gross	Amount	Percent of total first run	Amount	Percent of total first run
R. K. O.	47	360,021	$15,466,998	$61,436	.4	$27,440	66.2	$27,156	98.0	$284	1.0
Fox	62	819,148	28,717,081	78,447	.3	43,982	84.5	43,362	98.2	620	.8
Loew's	49	622,604	27,698,719	116,997	.4	108,667	94.5	106,164	97.7	2,533	2.3
Paramount	53	412,820	24,681,450	66,283	.3	46,631	86.8	43,270	92.9	361	.8
Universal [1]	5	27,600	2,847,938	7,397	.3	5,067	68.2	5,027	99.4	39	.6
United Artists	19	122,736	9,180,745	30,478	.3	23,643	77.6	19,772	83.2	771	3.6
Warner	67	493,657	21,446,843	69,885	.3	42,827	60.4	41,189	96.0	638	1.0
Columbia	35	257,691	8,133,947	24,486	.3	15,765	64.8			15,765	100.0
Total	335	3,121,967	148,125,849	415,397	.3	311,468	74.8	320,938	93.4	20,930	6.6

Distributor	Number of features	Subsequent runs						Total affiliated		Total unaffiliated	
		Total		Affiliated		Unaffiliated					
		Amount	Percent of Atlanta gross	Amount	Percent of subsequent runs	Amount	Percent of subsequent runs	Amount	Percent of Atlanta gross	Amount	Percent of Atlanta gross
R. K. O.	47	$13,984	22.8	$40	0.3	$13,944	99.7	$27,196	65.7	$14,238	34.3
Fox	62	20,794	25.5	200	.7	20,594	99.3	43,482	54.2	20,964	25.8
Loew's	49	6,300	5.5	75	1.2	6,228	98.8	106,290	92.4	8,708	7.6
Paramount	53	21,484	32.2	47	.2	21,037	98.8	43,317	65.4	21,998	33.6
Universal [1]	5	2,340	30.7			2,340	100.0	5,027	68.9	2,370	31.1
United Artists	19	5,935	22.4			5,935	100.0	19,772	74.7	5,706	25.3
Warner	60	19,294	31.6			19,294	100.0	41,186	67.7	19,670	32.3
Columbia	28	8,656	35.5			8,656	100.0			24,421	100.0
Total	333	104,799	25.2	362	.3	104,437	98.7	291,190	70.0	125,017	30.0

[1] Defendant did not submit answers to Interrogatory No. 48 for the entire season's releases in Atlanta.

Source: Defendants' answers to Interrogatory No. 48.

Affiliated exhibitors (as per Ex. F-21)—Continued	Percent	Total first runs	Total runs
Duluth, Minn	76	1	6
Somerville, Mass	70	2	7
Cambridge, Mass	43	1	7
Elizabeth, N. J	76	1	5
Long Beach, Calif	90	2	11
Spokane, Wash	86	1	8
Wichita, Kans	83	2	12
Sacramento, Calif	88	2	8
Kansas City, Kans	81	1	12
Worcester, Mass	94	2	10
Hartford, Conn	87	2	8
New Haven, Conn	75	2	16
Springfield, Mass	77	1	8
Bridgeport, Conn	86	2	14
Youngstown, Ohio	84	1	7
Paterson, N. J	87	1	5
Albany, N. Y	88	1	8
Trenton, N. J	88	3	13
Yonkers, N. Y	72	1	8
Grand Rapids, Mich	56	1	20
Flint, Mich	66	1	13
Independent exhibitors (as per Ex. F-21):			
Richmond, Va	70	2	11
Miami, Fla	71	3	28
Norfolk, Va	86	1	9
Camden, N. J	87	1	11
Erie, Pa	91	1	9
Wilmington, Del	85	1	11
Reading, Pa	86	1	6
Utica, N. Y	79	1	11
New Bedford, Mass	88	2	7
Fall River, Mass	81	1	5
Nashville, Tenn	88	1	13
Canton, Ohio	75	1	5
Tulsa, Okla	78	2	15
Gary, Ind	78	1	6
Fort Wayne, Ind	67	1	9
Tacoma, Wash	78	2	13

(b) Kansas City, Mo. (Ex. 468, R. 2455)

Distribution of license fees paid to all defendants for exhibition rights to all feature pictures released in Kansas City, Mo., during the 1936–37 season, by affiliation and by runs

Distributor	Number of feature pictures	Number of national exhibitions	National gross	Kansas City gross		First run					
						Total		Affiliated		Unaffiliated	
				Amount	Percent of national gross	Amount	Percent of Kansas City gross	Amount	Percent of total first run	Amount	Percent of total first run
R. K. O.	47	340,081	$15,466,966	$63,317	0.4	$39,023	61.8	$38,879	99.6	$146	0.4
Fox	64	526,966	26,946,028	121,038	.4	53,377	43.8	53,253	99.2	124	.8
Loew's	49	406,004	37,688,719	176,331	.5	80,906	55.7	80,779	99.9	129	.1
Paramount	53	413,500	24,981,400	122,859	.5	56,714	46.2	56,541	99.7	173	.3
Universal [1]	5	37,050	2,547,903	15,278	.6	9,479	62.0	9,464	99.8	15	.2
United Artists	19	132,728	9,180,745	48,494	.5	28,416	58.6	28,340	99.7	76	.3
Warner	60	432,667	21,446,843	91,450	.4	41,316	45.2	41,037	99.3	279	.7
Columbia	38	217,491	8,139,967	42,936	.5	16,931	39.4	16,510	97.5	421	2.5
Total	335	2,509,479	148,382,571	682,291	.5	335,066	49.1	332,403	99.5	1,663	.5

Distributor	Number of feature pictures	Subsequent runs						Total affiliated		Total unaffiliated		All preferred [1] runs					
		Total		Affiliated		Unaffiliated						Affiliated		Unaffiliated			
		Amount	Percent of Kansas City gross	Amount	Percent of subsequent runs	Amount	Percent of subsequent runs	Amount	Percent of Kansas City runs	Amount	Percent of Kansas City runs	Amount	Percent	Amount	Percent	Total	Percent of Kansas City gross
R. K. O.	47	$34,292	54.2	$12,349	35.7	$22,043	64.3	$41,128	65.0	$22,189	35.0	$33,832	94.8	$1,841	5.2	$35,673	56.3
Fox	64	68,349	56.2	33,160	48.5	35,189	51.5	86,013	70.7	35,613	29.3	69,064	98.3	1,206	1.7	70,269	57.8
Loew's	49	76,423	43.3	34,047	44.6	42,376	55.4	133,826	75.9	42,505	24.1	115,434	98.5	502	.5	116,076	65.8
Paramount	53	66,145	53.8	29,929	45.2	36,216	54.8	86,470	70.4	36,389	29.6	71,226	98.2	1,302	1.8	72,528	59.0
Universal [1]	5	5,799	38.0	2,021	34.9	3,778	65.1	11,485	75.2	3,793	24.8	10,1[illegible]	.2	78	.8	10,205	66.8
United Artists	19	20,078	41.4	8,231	41.0	11,847	59.0	36,571	75.4	11,923	24.6	32,347	99.0	332	1.0	32,679	67.4
Warner	60	30,134	54.8	19,759	39.4	30,375	60.6	60,796	66.8	30,654	33.5	60,174	97.9	1,072	2.1	51,246	56.0
Columbia	38	26,005	60.6	5,050	19.4	20,955	80.6	21,860	50.2	21,376	49.8	18,345	91.2	1,775	8.8	20,120	46.9
Total	335	347,225	50.9	144,446	41.6	202,779	58.4	477,849	70.0	204,442	30.0	400,599	98.0	8,197	2.0	408,796	59.9

[1] Includes first, second, and third runs.

[2] Defendant did not submit answers to interrogatory No. 48 for the entire seasons releases in Kansas City, Mo.

Source: Defendants' answers to Interrogatory No. 48.

(c) Philadelphia, Pa. (Ex. 469, R. 2455)

Distribution of license fees paid to all defendants for exhibition rights to all feature pictures released in Philadelphia during the 1936–37 season, by affiliation and by runs

Distributor	Number of feature pictures	Number of national exhibitions	National gross	Philadelphia gross		First run					
						Total		Affiliated		Unaffiliated	
				Amount	Percent of national gross	Amount	Percent of Philadelphia gross	Amount	Percent of total first run	Amount	Percent of total first run
Radio-Keith Orpheum Corp.	47	340,061	$15,465,986	$230,765	2.1	$98,360	18.2	$97,833	99.1	$526	0.9
Twentieth Century-Fox Film	66	525,731	20,000,570	627,368	2.2	139,315	30.1	139,731	98.0	2,584	2.0
Loew's, Incorporated	80	488,265	27,696,207	1,000,287	3.7	261,304	26.1	260,795	99.8	509	.2
Paramount Pictures, Inc.	53	413,800	24,981,400	831,496	3.1	101,668	19.1	101,309	99.2	348	.8
Universal Corporation [1]	5	37,040	2,020,451	66,731	3.3	16,400	24.6	16,372	99.8	28	.2
United Artists Corp. [1]	5	41,007	3,915,097	137,308	3.5	43,473	31.7	43,473	100.0		
Warner Bros. Pictures, Inc.	60	432,667	21,446,843	329,133	2.5	113,337	21.9	113,337	100.0		
Columbia Pictures Corp.	39	217,491	6,122,957	210,311	2.6	60,465	19.2	57,962	99.6	2,493	6.1
Total	323	2,429,472	142,369,899	3,433,199	2.4	765,537	22.4	729,343	99.1	6,494	.9

Distributor	Number of feature pictures	Subsequent runs						Total affiliated		Total unaffiliated		All preferred runs					
		Total		Affiliated		Unaffiliated						Affiliated		Unaffiliated		Total	Percent of Philadelphia gross
		Amount	Percent of Philadelphia gross	Amount	Percent of subsequent runs	Amount	Percent of subsequent runs	Amount	Percent of Philadelphia gross	Amount	Percent of Philadelphia gross	Amount	Percent	Amount	Percent		
Radio-Keith Orpheum Corp.	47	$202,375	81.8	$154,361	80.8	$108,134	41.2	$212,093	65.1	$108,672	32.0	$111,693	97.2	$3,120	2.8	$114,832	35.8
Twentieth Century-Fox Film	66	300,947	78.9	220,902	44.1	279,956	55.9	344,744	55.0	282,518	45.0	180,709	87.3	26,287	12.7	207,006	32.0
Loew's, Incorporated	80	738,983	73.9	486,309	65.5	252,680	34.2	747,071	74.7	253,216	25.3	237,909	94.2	20,918	5.8	258,811	25.9
Paramount Pictures, Inc.	53	429,513	80.9	294,676	68.9	133,937	31.2	397,164	74.7	134,332	25.3	230,265	94.6	13,102	5.4	243,367	45.8
Universal Corporation [1]	5	80,361	78.4	31,847	63.2	18,504	36.8	48,219	72.2	18,532	27.8	22,534	98.3	357	1.7	22,891	68.7
United Artists Corp. [1]	5	68,855	84.7	67,713	76.2	21,122	23.8	116,180	84.6	21,122	15.4	87,168	100.0	18	(2)	87,186	63.5
Warner Bros. Pictures, Inc.	60	416,295	78.7	296,087	71.6	118,208	28.4	410,924	77.7	118,208	22.3	193,386	99.7	707	.3	194,072	36.7
Columbia Pictures Corp.	39	169,746	80.8	60,538	35.7	109,208	64.3	98,820	46.9	111,691	53.1	54,287	81.7	12,156	18.3	66,443	31.7
Total	323	2,657,345	77.6	1,615,566	60.8	1,041,747	39.2	2,374,941	69.4	1,048,241	30.6	1,228,073	94.1	77,035	5.9	1,305,108	38.1

[1] Defendants did not submit answers to Interrogatory No. 48 for the entire season's releases in Philadelphia.
[2] Less than 0.05 percent.
[3] Defendant's Answers to Interrogatory No. 48.

2. Percentage of total film rentals received by Fox from first and subsequent runs of one 1943–44 season feature in all cities over 100,000 (Exs. F–21, F–21A; R. 1583, 2271)

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population

RECAPITULATION

	Revenue	Percent first run revenue	Percent United States gross at October 13
Paramount Affiliates	3170,837.06	21.99	6.04
Skouras Theatres	16,732.86	2.16	.89
National Theatres (including Roxy, New York City)	298,008.62	38.47	10.88
Loew's	63,454.88	8.18	2.25
Warner Bros	46,180.70	5.96	1.64
Standard Theatres (Paramount-Warner)	5,945.35	.77	.21
Independents	130,864.91	16.88	4.64
R. K. O	37,161.47	4.80	1.32
Paramount Publix and R. K. O. (Butterfield)	6,498.21	.83	.23
Grand total	775,334.06	100	27.48

Total film rental to October 13, 1945—United States only, $2,821,772.00.

PARAMOUNT AFFILIATES

Town and State	Theatre	Length of run	Play date	Film rental	Total revenue
Chicago, Ill	State-Lake	4 weeks	10/28–11/24		943,230.01
Boston, Mass	Metropolitan	2 weeks	11/25–12/8	$14,872.37	
	Paramount and Fenway	1 week (M/O)	12/16–12/22	2,536.31	
					17,708.68
New Orleans, La	Saenger	10 days	11/24–12/3	7,930.43	
	Tudor	1 week (M/O)	12/4–12/10	630.00	
					8,560.43
Minneapolis, Minn	Lyric	Preview	11/5	103.43	
	State	1 week	11/18–11/24	5,506.45	
	Century	2 weeks (M/O)	11/25–12/8	3,445.39	
	World	1 week (M/O)	12/9–12/15	175.00	
					9,230.77
Houston, Tex	Majestic	2 weeks	12/9–12/22		7,201.08
Atlanta, Ga	Fox	1 week	10/21–10/27	4,362.92	
	Roxy	11 days (M/O)	10/31–11/10	2,448.20	
					6,711.21
Dallas, Tex	Majestic	1 week	12/2–12/8	5,987.30	
	Melba	2 weeks (M/O)	12/9–12/22	2,250.74	
					8,238.04
St. Paul, Minn	Paramount	1 week	11/18–11/24	3,068.73	
	Riviera	1 week (M/O)	11/25–12/1	1,485.08	
					4,553.81
Birmingham, Ala	Ritz	Preview	10/23	141.82	
	Alabama	8 days	10/27–11/3	3,750.19	
	Lyric	1 week (M/O)	11/4–11/10	630.39	
					4,522.40
San Antonio, Tex	Majestic	1 week	12/16–12/22	5,075.81	
	Texas	1 week (M/O)	12/23–12/29	2,140.29	
					7,216.10

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population—Continued

PARAMOUNT AFFILIATES—Continued

Town and State	Theatre	Length of run	Play date	Film rental	Total revenue
Omaha, Nebr.	Paramount	1 week	11/18–11/24	$2,655.21	
	Omaha	1 week (M/O)	11/25–12/1	800.00	
					$3,455.21
Ft. Worth, Tex.	Worth	1 week	12/3–12/9		3,894.46
Jacksonville, Fla.	Florida	1 week	12/23–12/29		4,086.26
Des Moines, Iowa	Des Moines	1 week [1]	11/25–12/1	2,660.80	
	Roosevelt	1 week [1]	11/25–12/1	780.00	
					3,440.80
Salt Lake City, Utah	Centre	8 days	11/25–12/2	5,775.69	
	Studio	1 week (M/O)	12/3–12/9	1,146.35	
					6,922.04
Scranton, Pa.	Strand	8 days	11/25–12/2		3,417.22
Chattanooga, Tenn.	State	Midnight Show.	10/30	116.31	
	Tivoli	4 days	10/31–11/3	1,669.61	
	State	2 days (M/O)	11/4–11/5	290.21	
					2,076.13
Knoxville, Tenn.	Tennessee	4 days	11/3–11/6	2,562.74	
	Riviera	3 days (M/O)	11/8–11/10	433.01	
					2,995.75
Tampa, Fla.	Tampa	1 week	1/13–1/19		3,431.39
Peoria, Ill.	Madison	5 days	12/2–12/9	2,775.82	
	Apollo	6 days (M/O)	12/10–12/15	378.21	
					3,154.03
South Bend, Ind.	Colfax	1 week	12/10–12/16	2,090.01	
	Granada	5 days (M/O)	12/17–12/21	681.39	
					2,771.40
Lowell, Mass.	Strand	1 week	12/9–12/15	0	1,354.40
Charlotte, N. C.	Carolina	1 week	11/7–11/13	2,394.75	
	Broadway	5 days (M/O)	11/14–11/18	315.36	
					2,710.12
Duluth, Minn.	Norshor	1 week	12/9–12/15		1,539.19
Somerville, Mass.	Capitol	4 days [1]	1/19–1/22	490.40	
	Ball Sq.	4 days [1]	1/19–1/22	833.92	
					1,004.32
Toledo, Ohio	Paramount	1 week	10/29–11/4	5,151.31	
	Princess	1 week (M/O)	11/5–11/11	1,038.46	
					6,189.77
Cambridge, Mass.	Central Sq.	4 days	12/31–1/3		1,201.64
Total					170,527.06

SKOURAS THEATRES

Newark, N. J.	Proctor's Palace.	13 days	11/24–12/6		$11,109.65
Jersey City, N. J.	State	13 days	11/25–12/7		3,775.00
Elizabeth, N. J.	Ritz	6 days	12/28–12/30		1,848.21
Total					16,732.86

[1] Day and date.

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population—Continued

NATIONAL THEATRES (Including ROXY THEATRE, NEW YORK CITY)

Town and State	Theatre	Length of run	Play date	Film rental	Total revenue
New York City, N. Y	Roxy	4 weeks	10/20–11/16		$150, 202. 50
Detroit, Mich	Fox	18 days	11/[illegible]–12/9	$10, 181. 83	
	Adams	1 week (M/O)	12/10–12/16	1, 210. 02	
Los Angeles, Calif	Loews State	1 week [1]	[illegible]–10/6	10, 770. 83	33, 370. 85
	Chinese	1 week [1]	[illegible]–10/6	5, 760. 00	
	Ritz	1 week [1]	[illegible]–10/6	4, 830. 75	
	Four Star	1 week (M/O)	10/7–10/13	1, 304. 07	
	Wilshire	2 weeks (M/O)	10/7–10/20	1, 702. 85	
San Francisco, Calif	Fox	3 weeks	10/21–11/3	14, 654. 39	24, 848. 17
	Alcazar	1 week (M/O)	11/4–11/10	380. 00	
Milwaukee, Wis	Wisconsin	2 weeks	10/7–10/20	8, 081. 18	14, 854. 80
	Strand	2 weeks (M/O)	10/21–11/3	3, 473. 36	
Kansas City, Mo	Esquire	2 weeks [1]	10/29–11/4	5, 688. 40	7, 588. 53
	Uptown	2 weeks [1]	10/22–11/4	3, 739. 28	
Seattle, Wash	Music Hall	6 days [1]	10/13–10/17	3, 037. 33	8, 332. 58
	Paramount	2 weeks [1]	10/13–10/25	5, 303. 74	
	Music Box	2 weeks (M/O)	10/26–11/8	4, 241. 74	
Denver, Colo	Denver	1 week [1]	10/26–11/1	7, 173. 90	13, 843. 23
	Esquire	1 week [1]	10/26–11/2	1, 442. 07	
	Aladdin	1 week (M/O)	11/3–11/8	1, 303. 33	
	Rialto	1 week (M/O)	11/6–11/15	1, 275. 42	
	Broadway	1 week (M/O)	11/17–11/22	727. 77	
Portland, Oreg	Orpheum	15 days [1]	11/23–12/7	9, 630. 83	12, 022. 72
	Playhouse	20 days [1]	11/23–12/15	1, 794. 89	
Oakland, Calif	Fox	2 weeks	10/21–11/3	13, 226. 99	11, 411. 06
	Grand Lake	20 days (M/O)	11/4–11/23	2, 184. 07	
San Diego, Calif	Fox	1 week [1]	10/19–10/25	7, 954. 89	12, 430. 70
	State	1 week [1]	10/19–10/25	2, 414. 26	
	Orpheum	6 days (M/O)	10/26–11/1	2, 514. 05	
Long Beach, Calif	West Coast	9 days	9/[illegible]–10/7	6, 116. 23	12, 802. 91
	Imperial	11 days (M/O)	10/8–10/18	2, 121. 55	
Spokane, Wash	Fox	9 days	11/14–11/22		9, 227. 78
Wichita, Kans	Miller	8 days	11/3–11/10	3, 230. 13	4, 068. 24
	Sandra	1 week (M/O)	11/11–11/17	1, 207. 01	
Sacramento, Calif	Senator	1 week [1]	11/17–11/23	3, 943. 26	6, 451. 13
	Alhambra	1 week [1]	11/17–11/23	1, 789. 29	
Kansas City, Kans	Grapado	1 week	12/4–12/10		5, 402. 65
					869. 13
Total					286, 005. 62

[1] Day and date.

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population—Continued

LOEW'S

Washington, D. C.	Palace	2 weeks	11/4-11/17	$11,[illegible]	
	Columbia	1 week (M/O)	11/25-12/1	1,[illegible]	
					$13,[illegible]
Buffalo, N. Y.	Great Lakes	2 weeks	11/11-11/24		11,871.41
Columbus, Ohio	Ohio	1 week	10/21-10/27	4,[illegible]	
	Broad	1 week (M/O)	10/30-11/3	1,[illegible]	
					6,[illegible]
Memphis, Tenn.	Loew's Palace	2 weeks	10/28-11/10		5,[illegible]
Worcester, Mass.	Palace	1 week	10/28-11/3	4,[illegible]	
	Elm St.	1 week (M/O)	11/4-11/10	1,[illegible]	
					6,[illegible]
Hartford, Conn.	Poli	1 week	10/28-11/3	4,[illegible]	
	Palace	1 week (M/O)	11/12-11/17	1,[illegible]	
					5,[illegible]
New Haven, Conn.	Poli	1 week	10/21-10/27	3,[illegible]	
	College	1 week (M/O)	10/30-11/3	1,[illegible]	
					4,[illegible]
Springfield, Mass.	Palace	1 week	10/28-11/3		4,[illegible]
Bridgeport, Conn.	Poli	1 week	10/21-10/27	4,[illegible]	
	Globe	1 week (M/O)	10/30-11/3	[illegible]	
					5,[illegible]
Total					[illegible]

WARNER BROS.

Philadelphia, Pa.	Stanley	32 days	10/19-11/3	[illegible]	
	Earle	1 day	11/17	1,[illegible]	
					[illegible]
Cleveland, Ohio	Hippodrome	1 week	11/18-11/24	5,[illegible]	
	Allen	1 week (M/O)	11/25-12/1	3,[illegible]	
	Lake	9 days (M/O)	12/2-12/9	[illegible]	
					12,[illegible]
Youngstown, Ohio	Warner	1 week	11/17-11/23		3,[illegible]
Paterson, N. J.	Fabian	1 week	11/18-11/24		3,[illegible]
Albany, N. Y.	Strand	1 week	10/7-10/13		3,[illegible]
Total					44,[illegible]

STANDARD THEATRES (PARAMOUNT-WARNER)

Oklahoma City, Okla.	Criterion	2 weeks	10/28-11/3	$4,[illegible]	
	Tower	9 days (M/O)	11/5-11/11	743.79	
					$5,[illegible]

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population—Continued

INDEPENDENTS

Town and State	Theatre	Length of run	Play date	Film rental	Total revenue
Pittsburgh, Pa	J. P. Harris	3 weeks	10/20–11/9	$10, 878.36	
	Harris Senator	1 week (M/O)	11/10–11/16	661.18	
					$11, 539.54
Richmond, Va	Byrd	1 week [1]	11/11–11/17	2, 161.67	
	State	1 week [1]	11/11–11/17	2, 580.25	
					4, 741.92
Miami, Fla	Capitol	1 week [1]	10/27–11/2	2, 367.40	
	Miami	1 week [1]	10/27–11/2	2, 003.66	
	Lincoln	1 week [1]	10/27–11/2	2, 119.72	
					6, 535.57
Norfolk, Va	Norva	2 weeks	10/25–11/10		11, 540.67
Camden, N. J	Savar	10 days	12/6–12/15		2, 228.92
Erie, Pa	Shea's	10 days	11/24–12/3		5, 331.50
Wilmington, Del	Rialto	23 days	10/27–11/18		4, 962.35
Reading, Pa	Embassy	2 weeks	11/3–11/16		4, 610.16
Utica, N. Y	Olympic	12 days	10/7–10/18		2, 966.19
New Bedford, Mass	State	1 week	12/1–12/7	3, 093.34	
	New Bedford	1 week (M/O)	12/8–12/14	349.94	
					3, 443.28
Fall River, Mass	Durfee	1 week	11/10–11/16		3, 105.07
St. Louis, Mo	Ambassador	2 weeks	10/21–11/3	9, 861.34	
	Schubert	3 weeks (M/O)	11/4–11/24	2, 914.14	
					12, 775.48
Nashville, Tenn	Paramount	2 weeks	5/11–5/24		3, 487.84
Akron, Ohio	Colonial	15 days	11/25–12/9		6, [illegible]
Canton, Ohio	Palace	1 week	11/8–11/14		2, 302.80
Tulsa, Okla	Ritz	8 days	11/25–12/2	3, 353.33	
	Majestic	3 days (M/O)	12/7–12/9	222.95	
					3, 576.28
Louisville, Ky	Rialto	1 week	11/20–12/1	4, 697.03	
	Brown	2 weeks (M/O)	12/2–12/15	988.54	
					5, 685.57
Indianapolis, Ind	Indiana	1 week	11/24–11/30	5, 545.35	
	Lyric	1 week (M/O)	12/1–12/7	1, 002.54	
					6, 547.89
Gary, Ind	Palace	6 days	1/5–1/11		1, 517.80
Fort Wayne, Ind	Paramount	1 week	12/9–12/15		2, 310.19
Baltimore, Md	New	4 weeks	10/21–11/17		12, 874.21
Providence, R. I	Majestic	15 days	11/25–12/9	4, 512.71	
	Carlton	6 days (M/O)	12/10–12/15	313.89	
					6, 826.60
Tacoma, Wash	Music Box	1 week	11/10–11/16	3, 537.12	
	Bluemouse	1 week (M/O)	11/17–11/23	1, 033.67	
					4, 570.79
Total					130, 864.97

[1] Day and date.

Film Rental "Sweet Rosie O'Grady," First Run and Extended Engagements, 92 Cities With More Than 100,000 Population—Continued

R. K. O.

Town and State	Theatre	Length of run	Play date	Film rental	Total revenue
Cincinnati, Ohio	Albee	1 week	11/5–1/11	$8,282.23	
	Capitol	6 days (M/O)	11/13–11/17	1,695.80	
	Keiths	1 week (M/O)	11/18–11/24	1,029.20	
					$11,007.43
Trenton, N. J.	Lincoln	1 week [illegible] Day &	1/14–1/20	3,889.94	
	Palace	1 week [illegible] Date	1/14–1/20	893.27	
	Trent	1 week (M/O)	1/21–1/27	932.81	
					5,496.92
Rochester, N. Y.	[illegible]	1 week	12/3–12/8	5,109.03	
	Regent	1 week (M/O)	12/9–12/15	980.68	
					6,089.26
Dayton, Ohio	Keith	1 week	11/4–11/10	6,700.57	
	Colonial	1 week (M/O)	11/11–11/17	1,309.57	
					8,010.14
Syracuse, N. Y.	Keith	1 week	12/2–12/8	4,822.57	
	Eckel	1 week (M/O)	12/9–12/15	484.72	
					5,307.29
Yonkers, N. Y.	Proctors	1 week	12/23–12/29		1,869.44
Total					37,151.47

PARAMOUNT PUBLIX AND R. K. O. (BUTTERFIELD)

Grand Rapids, Mich.	Regent	6 days	11/20–11/27		$3,119.77
Flint, Mich	Capitol	1 week	11/21–11/27		3,348.44
Total					6,468.21

Total revenue, all runs, "Sweet Rosie O'Grady" (Ex. 21a)

City	Number of exhibitions	Revenue
1. Birmingham, Ala	18	$5,302.48
2. Los Angeles, Calif	117	43,241.96
3. San Francisco, Calif	41	21,746.08
4. Oakland, Calif	20	12,082.97
5. San Diego, Calif	13	15,467.01
6. Long Beach, Calif	11	10,208.87
7. Sacramento, Calif	8	6,126.94
8. Denver, Colo	20	15,476.76
9. Hartford, Conn	8	6,688.38
10. New Haven, Conn	16	5,836.48
11. Bridgeport, Conn	14	6,331.36
12. Wilmington, Del	11	5,807.60
13. Washington, D. C	42	26,202.60
14. Jacksonville, Fla	15	5,108.34
15. Tampa, Fla	15	4,160.43

Total revenue, all runs, "Sweet Rosie O'Grady"—Continued

City	Number of exhibitions	Revenue
16. Atlanta, Ga.	31	[illegible]
17. Chicago, Ill.	239	[illegible]
18. Peoria, Ill.	6	[illegible]
19. Indianapolis, Ind.	30	[illegible]
20. Gary, Ind.	6	[illegible]
21. Fort Wayne, Ind.	9	[illegible]
22. Des Moines, Iowa	20	[illegible]
23. Wichita, Kans.	13	[illegible]
24. Kansas City, Kans.	13	[illegible]
25. Louisville, Ky.	23	[illegible]
26. New Orleans, La.	41	[illegible]
27. Baltimore, Md.	67	[illegible]
28. Boston, Mass.	48	[illegible]
29. Worcester, Mass.	10	[illegible]
30. Springfield, Mass.	8	[illegible]
31. Lowell, Mass.	6	[illegible]
32. New Bedford, Mass.	7	[illegible]
33. Fall River, Mass.	8	[illegible]
34. Somerville, Mass.	7	[illegible]
35. Cambridge, Mass.	7	[illegible]
36. Detroit, Mich.	114	[illegible]
37. Grand Rapids, Mich.	20	[illegible]
38. Flint, Mich.	13	[illegible]
39. Minneapolis, Minn.	48	[illegible]
40. St. Paul, Minn.	26	[illegible]
41. Duluth, Minn.	6	[illegible]
42. Kansas City, Mo.	33	[illegible]
43. St. Louis, Mo.	32	[illegible]
44. Omaha, Nebr.	18	[illegible]
45. Jersey City, N. J.	16	[illegible]
46. Paterson, N. J.	5	[illegible]
47. Trenton, N. J.	12	[illegible]
48. Camden, N. J.	11	[illegible]
49. Elizabeth, N. J.	6	[illegible]
50. Newark, N. J.	26	[illegible]
51. New York, N. Y.:		
Bronx	61	[illegible]
Brooklyn	120	[illegible]
Manhattan	96	[illegible]
Queens	89	[illegible]
Richmond	12	[illegible]
Total, New York	410	[illegible]
52. Buffalo, N. Y.	40	[illegible]
53. Rochester, N. Y.	23	[illegible]
54. Yonkers, N. Y.	8	[illegible]
55. Albany, N. Y.	8	[illegible]
56. Utica, N. Y.	11	[illegible]
57. Cleveland, Ohio	71	[illegible]
58. Cincinnati, Ohio	58	[illegible]
59. Columbus, Ohio	46	[illegible]
60. Dayton, Ohio	21	[illegible]

Total revenue, all runs, "Sweet Rosie O'Grady"—Continued

City	Number of exhibitions	Revenue
61. Youngstown, Ohio	7	$4,142.79
62. Akron, Ohio	20	8,099.75
63. Canton, Ohio	5	3,176.48
64. Toledo, Ohio	14	7,270.15
65. Oklahoma City, Okla	21	7,538.97
66. Tulsa, Okla	15	4,662.97
67. Portland, Oreg	41	13,457.48
68. Philadelphia, Pa	188	64,705.05
69. Pittsburgh, Pa	68	20,803.64
70. Scranton, Pa	10	4,493.90
71. Erie, Pa	9	3,945.95
72. Reading, Pa	6	1,982.37
73. Providence, R. I	10	3,982.97
74. Charlotte, N. C	8	2,810.90
75. Houston, Tex	34	11,353.13
76. Dallas, Tex	34	11,085.75
77. San Antonio, Tex	13	3,432.79
78. Fort Worth, Tex	15	3,205.10
79. Memphis, Tenn	34	8,124.90
80. Chattanooga, Tenn	11	2,889.60
81. Knoxville, Tenn	9	2,434.85
82. Nashville, Tenn	13	3,980.07
83. South Bend, Ind	9	2,900.43
84. Norfolk, Va	9	13,434.35
85. Richmond, Va	11	6,776.70
86. Seattle, Wash	31	10,519.35
87. Spokane, Wash	8	4,704.54
88. Tacoma, Wash	13	3,922.85
89. Milwaukee, Wis	37	10,995.95
90. Salt Lake City, Utah	7	2,640.94
91. Syracuse, N. Y	17	3,272.25
92. Miami, Fla	28	9,227.85
Total	2,883	1,201,993.49

3. Recapitulation of Fox data disclosed in Exs. 467, 468, 469 (R. 2455) and F–21, F–21A (R. 1583, 2271):

As shown in Plaintiff's Ex. 467, which recapitulates the rental performance of the defendants' films released during the 1936–37 season in the town of Atlanta, Georgia, although the only affiliated theatres in the town were seven first-run theatres, those theatres paid about 70% of the total film rental received by all of the distributor defendants from all of the theatres in Atlanta, despite the fact that Columbia received all of its rentals from unaffiliated theatres. In Kansas City (Ex. 468) and Philadelphia (Ex. 469), the affiliated theatres also paid about 70% of the total film rentals received by all defendants, although in those larger cities the affiliated theatres blanketed the first three runs in each city instead of just the first runs.

Comparable town-by-town figures are available for the feature film "Sweet Rosie O'Grady", the Fox feature with the largest number of domestic billings released by Fox during the 1943–44 season. Fox's Exs. 21 and 21–A, the latter being a supplement prepared by Fox at Plaintiff's request and offered by Plaintiff, show the following proportion of rentals derived from first runs in these three cities on this picture, as compared with the comparable figures for all Fox 1936–37 features in the same towns (Exs. 467, 468 and 469).

	Atlanta	Kansas City	Philadelphia
	Percent	*Percent*	*Percent*
Sweet Rosie O'Grady	70	73	34
All Fox 1936–37 features	64.5	43.8	30.1

While the percentage of first-run rental from a popular film will generally be greater than that for an unsuccessful one, these figures indicate the current trend toward an increase in the percentage of the total gross which the first runs contribute. That this increase is, in part, due to greater use of simultaneous first runs, and moveover first runs is shown by the following examples computed from Exs. F–21 and F–21–A. The figure in the first column is the percentage of the total revenue from the city which came from the first runs and the figure in the second column is the number of theatres which played them on first run. The third column is the total number of exhibitions in the town and represents the total number of theatres which played the film on all runs.

Affiliated exhibitors (as per Ex. F-21):	Per-cent	Total first runs	Total runs
Birmingham, Ala	84	2	18
Oakland, Calif	86	2	29
San Diego, Calif	90	3	13
Long Beach, Calif	90	2	11
Sacramento, Calif	88	2	8
Denver, Colo	78	5	29
Hartford, Conn	87	2	8
New Haven, Conn	75	2	16
Bridgeport, Conn	86	2	14
Atlanta, Ga	79	2	31
Peoria, Ill	91	2	6
Des Moines, Iowa	76	2	20
Wichita, Kans	88	2	12
New Orleans, La	77	2	41
Worcester, Mass	94	2	10
Trenton, N. J	83	3	13
Rochester, N. Y	75	2	23
Cincinnati, Ohio	70	3	56
Dayton, Ohio	87	2	21
Oklahoma City, Okla	79	2	21
Portland, Oreg	74	2	41
Charlotte, N. C	90	2	8
Dallas, Tex	75	2	34
San Antonio, Tex	86	2	13
Chattanooga, Tenn	79	2	11
Knoxville, Tenn	87	2	9
South Bend, Ind	82	2	9
Seattle, Wash	76	3	31
Salt Lake City, Utah	80	2	7
Syracuse, N. Y	79	2	17
Independent exhibitors (as per Ex. F-21):			
New Bedford, Mass	88	2	7
Toledo, Ohio	84	2	14
Tulsa, Okla	78	2	15
Providence, R. I	84	2	10
Tacoma, Wash	78	2	13

The following percentages calculated from the same exhibits show that in all but five of the 49 cities from 100,000 to 200,000 population, the first-run rentals alone now range as high as 70% to 94% of the total rental taken out of the town:

Affiliated exhibitors (as per Ex. F-21):	Per-cent	Total first runs	Total runs
Jacksonville, Fla	79	1	15
Des Moines, Iowa	76	2	20
Fort Worth, Tex	73	1	15
Salt Lake City, Utah	80	2	7
Scranton, Pa	77	1	10
Chattanooga, Tenn	79	3	11
Knoxville, Tenn	87	2	9
Tampa, Fla	82	1	15
Peoria, Ill	91	2	6
South Bend, Ind	82	2	9
Lowell, Mass	78	1	6
Charlotte, N. C	90	2	8

4. Percentage of total film rentals received by Loew from first and subsequent runs of all features released during 1943–44 season in 15 cities (Ex. L–18, R. 2498):

Distribution of license fees paid to defendant Loew's Incorporated for exhibition of all feature pictures released in 15 cities during 1943–44 season showing amounts paid by Loew's theatres and by Fox, Paramount, R. K. O., and Warner theatres and by independent theatres

City and State	Total film rental paid to Loew's for all runs, 1943–44	First-run film rentals paid to Loew's							
		Total		Paid by Loew's theatres		Paid by Fox, Paramount, R. K. O., Warner theatres		Paid by independent theatres	
		Amount first-run film rental	Percent of all film rental	Amount film rental	Percent of first-run film rental	Amount film rental	Percent of first-run film rental	Amount film rental	Percent of first-run film rental
Baltimore, Md.	$594,933	$241,934	42.67	$241,034	100.00				
Cleveland, Ohio	505,991	222,646	43.94	222,646	100.00				
St. Louis, Mo.	467,648	275,733	49.25	275,733	100.00				
Washington, D. C.	675,872	220,422	32.62	220,122	99.86			300	0.14
New York City	5,272,910	1,214,196	23.05	627,161	51.39	630,791	2.72	346,244	45.68
Akron, Ohio	193,889	133,245	76.62	133,245	100.00				
Columbus, Ohio	249,441	157,786	63.26	157,786	100.00				
Indianapolis, Ind.	284,922	139,192	48.84	139,192	100.00				
New Haven, Conn.	144,204	99,813	69.22	99,813	100.00				
Erie, Pa.	77,462	63,174	81.53			18,260	28.90	44,918	71.10
Fall River, Mass.	80,338	48,838	84.00					48,838	100.00
Fort Wayne, Ind.	77,914	64,880	83.01					64,880	100.00
Portland, Oreg.	300,739	205,136	68.22					205,136	100.00
Tacoma, Wash.	147,427	123,655	83.90					123,655	100.00
Tulsa, Okla.	93,942	74,428	79.99					74,428	100.00

City and State	Subsequent-run film rentals paid to Loew's								All film rentals paid to Loew's					
	Total		Paid by Loew's theatres		Paid by Fox, Paramount, R. K. O., Warner theatres		Paid by independent theatres		Paid by all Loew's theatres		Paid by all Fox, Paramount, R. K. O., Warner theatres		Paid by all independent theatres	
	Amount subsequent run film rental	Percent of all film rental	Amount film rental	Percent of subsequent run film rental	Amount film rental	Percent of subsequent run film rental	Amount film rental	Percent of subsequent run film rental	Total amount film rental	Percent of all film rental	Total amount film rental	Percent of all film rental	Total amount film rental	Percent of all film rental
Baltimore, Md	$323,778	57.33	$16,756	5.17			$307,022	94.83	$357,779	45.64			$307,022	54.36
Cleveland, Ohio	285,536	56.16	55,064	19.28	227,170	9.52	203,302	71.20	277,919	54.67	227,170	5.34	203,302	39.99
St. Louis, Mo	288,090	50.74					288,090	100.00	279,733	49.26			288,090	50.74
Washington, D. C	455,139	67.37	55,237	12.14	168,323	36.98	231,579	50.85	275,370	40.78	168,323	24.92	231,879	34.33
New York City	4,057,114	76.94	2,725,444	67.17	61,841	1.52	[1] 1,270,429	31.31	3,362,605	63.76	92,632	1.76	1,818,673	34.48
Akron, Ohio	37,643	23.40					37,643	100.00	123,246	76.70			37,643	23.40
Columbus, Ohio	90,685	36.80					90,685	100.00	157,756	63.50			90,685	36.50
Indianapolis, Ind	75,731	36.96					75,731	100.00	129,192	63.04			75,731	36.96
New Haven, Conn	44,391	30.78					44,391	100.00	99,813	69.22			44,391	30.78
Erie, Pa	14,309	18.47			7,507	52.46	6,802	47.54			25,793	33.25	51,720	66.75
Fall River, Mass	9,490	16.00					9,490	100.00					59,328	100.00
Fort Wayne, Ind	13,234	16.99					13,234	100.00					77,914	100.00
Portland, Oreg	95,584	31.78			29,516	30.88	66,068	69.12			29,516	9.82	271,304	90.18
Tacoma, Wash	23,742	16.10					23,742	100.00					147,427	100.00
Tulsa, Okla	18,614	20.01					18,614	100.00					93,042	100.00

[1] Revenue from Randforce and Skouras theatres included.

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H. TABULATIONS SHOWING FIRST RUN DISTRIBUTION OF FEATURES RELEASED BY THE DEFENDANTS AMONG THEATRES RESPECTIVELY AFFILIATED WITH THEM AND INDEPENDENT THEATERS

1. For all of the defendants' features released during the 1943–44 season in all cities over 100,000 (Exs. 428, 428A):

Exhibit 428 (R. 2324, 2473)

Exhibitors holding first-run contracts with defendant distributors in 82 cities with populations of 100,000 and over, during the 1943–44 season

Distributor licensor appears at head of each column. Abbreviations "War," "Par," "Fox," "Loew," and "RKO" indicate particular defendant with which first run licensee is affiliated. "Ind" indicates first run licensee is not affiliated with any distributor. Where symbol "&" is used the distributor's films were divided among first-run licensees shown. Where symbol "—" is used the first-run licensees shown had pooled their theatres.

	Warner (Ex. 129)	Fox (Ex. 44)	Paramount (Ex. 84)	Loew (Ex. 88)	RKO (Ex. 99)	United Artists (Ex. 145)	Universal (Ex. 147)	Columbia (Ex. 379)
New York, N. Y	War	Fox & Ind	Par [3]	Loew & Ind	RKO & Ind	Loew & Par. & Ind.	Loew & Par. & Ind.	Ind.
Chicago, Ill	Par	Par	Par	Par	RKO	Par	RKO	Par.
Philadelphia, Pa	War	War	War	War	War	War	War	War.
Detroit, Mich	Par	Fox	Par	Par	Par	Par	Ind	Fox.
Los Angeles, Calif	War	Fox	Par	Fox—Loew	Fox & RKO—Ind. [4]	Fox	RKO—Ind [5]	RKO—Ind. [5]
Cleveland, Ohio	RKO—War [4]	RKO—War [4]	Loew	Loew	RKO—War [4]	Loew	RKO—War [4]	RKO—War. [4]
Boston, Mass	Par	Par & RKO	Par	Loew	RKO	Loew	RKO	Loew.
Pittsburgh, Pa	Loew—War [5]	Ind	Loew—War [5]	Loew—War [5]	Loew—War [5]	Loew—War [5]	Ind	Ind.
Washington, D. C	War	Loew	Loew & War	Loew	RKO & War	Loew	RKO	War.
San Francisco, Calif	Loew—Fox—Par. [6]	Loew—Fox—Par. [6]	Loew—Fox—Par. [6]	Loew—Fox—Par. [6]	RKO	Ind	Ind	Ind.
Milwaukee, Wis	War	Fox	Fox	Fox	War	War	War	Fox.
Buffalo, N. Y	Loew—Par [7]	Loew—Par [7]	Loew—Par [7]	Loew—Par [7]	Ind	Loew—Par [7]	Ind	Ind.
New Orleans, La	Par & RKO	Par	Par	Loew	RKO & Ind	Loew	RKO	RKO.
Minneapolis, Minn	RKO—Par [8]	RKO—Par [8]	RKO—Par [8]	RKO—Par [8]	RKO—Par [8]	RKO—Par [8]	RKO—Par [8]	RKO—Par. [8]

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Exhibit 428—Continued

***Exhibitors holding first-run contracts with defendant distributors in 92 cities with populations of 100,000 and over, during the 1943–44 season*—Continued**

	Warner (Ex. 129)	Fox (Ex. 44)	Paramount (Ex. 84)	Loew (Ex. 88)	RKO (Ex. 95)	United Artists (Ex. 146)	Universal (Ex. 147)	Columbia (Ex. 379)
Cincinnati, Ohio	RKO	RKO	RKO	RKO	RKO	RKO	RKO	RKO.
Newark, N. J	War	Skouras—RKO.[9]	Par	Loew	Par & RKO & War.	Loew	War	Loew & War.
Kansas City, Mo	Par & RKO	Fox	Par & RKO	Loew	RKO	Loew	Fox	Loew.
Houston, Tex	Par	Par	Par	Loew & Par	Par	Loew	Par	Par.
Seattle, Wash	Fox	Fox	Fox	Fox	Fox	Fox & Ind	Fox	Ind.
Rochester, N. Y	RKO—Par[10]	RKO—Par[10]	RKO—Par[10]	Loew	RKO—Par[10]	Loew	RKO—Par[10]	Loew.
Denver, Colo	Fox	Fox	Ind	Loew—RKO[11]	Loew—RKO[11]	Fox	Fox	Fox.
Portland, Oreg	Fox & Ind	Fox	Fox	Ind	Fox	Fox	Ind	Fox.
Columbus, Ohio	RKO	Loew & RKO	Loew	Loew	RKO	Loew	RKO	Loew.
Oakland, Calif	Fox & Ind	Fox	Fox	Fox	Fox	Fox & Ind	Ind	Ind.
Atlanta, Ga	Par	Par	Par	Loew	Par	Loew	Par	Ind.
Jersey City, N. J	War—RKO—Skouras.[12]	War—RKO—Skouras.[12]	War—RKO—Skouras.[12]	Loew	War—RKO—Skouras.[12]	Loew	War—RKO—Skouras.[12]	Loew.
Dallas, Tex	Par	Par	Par	Par	Par	Par	Par	Par.
Memphis, Tenn	War	Loew	Par	Loew	Loew & Par	Loew & Par[13]	Par	Par.
St. Paul, Minn	RKO—Par[13]	RKO—Par[13]	RKO—Par[13]	RKO—Par[13]	RKO—Par[13]	RKO—Par	RKO—Par[13]	RKO—Par.[13]
Birmingham, Ala	Par	Par	Par	Par	Par & Ind	Par	Par	Ind.
San Antonio, Tex	Par	Par	Par	Par	Par	Par	Par	Par.
Omaha, Nebr	Par & RKO	Par	Par	Par	RKO	Par	Par	RKO.
Dayton, Ohio	Ind	RKO	RKO	Loew	RKO	Loew	RKO	RKO.
Syracuse, N. Y	RKO	RKO	RKO	Loew	RKO	Loew	RKO	Loew.
Oklahoma City, Okla	Par—War[14]	Par—War[14]	Par—War[14]	Par—War[14]	Ind	Par—War[14]	Ind	Ind.
San Diego, Calif	Fox & Ind	Fox	Fox	Fox	Fox	Fox	Ind	Ind.
Worcester, Mass	War	Loew	Par	Loew	Loew & Par & War.	Loew & War	Par & War	Loew.
Richmond, Va	Loew—Ind[15]	Ind & Loew—Ind.[15]	Loew—Ind[15]	Loew—Ind[15]	Ind	Loew & Loew—Ind.[15]	Ind	Ind.
Fort Worth, Tex	Par	Par	Par	Par	Par	Par	Par	Par.
Jacksonville, Fla	Ind	Par	Par	Par	Par	Par	Par	Par.
Miami, Fla	Par	Ind	Par	Par	Par	Ind	Ind	Ind.
Youngstown, Ohio	War	War	Ind	War	Ind	War	War	Ind.
Hartford, Conn	War	Loew	Par	Loew	Loew & War	Loew & War	War & Ind	Ind.
Grand Rapids, Mich	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par.[16]
Long Beach, Calif	Fox & Ind	Fox	Fox	Fox	Ind	Fox	Fox & Ind	Ind.
New Haven, Conn	War	Loew	Par	Loew	Loew & War	Loew & War	Par & War	Loew.
Des Moines, Iowa	Par & RKO	Par	Par	Par	RKO	Par	Par	RKO.
Flint, Mich	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par[16]	RKO—Par.[16]
Salt Lake City, Utah	Par	Par	Par	Par	Ind	Par	Par	Par.
Springfield, Mass	War	Loew	Par	Loew	Par & War	Loew & War	War & Ind	Ind.
Bridgeport, Conn	War	Loew	War	Loew	Loew & War	Loew & War	Loew	Loew.
Norfolk, Va	Loew—Ind & Ind.[15]	Loew—Ind[15]	Loew—Ind & Ind.[15]	Loew—Ind[15]	Ind	Loew—Ind[15]	Ind	Ind.
Yonkers, N. Y	RKO	RKO	RKO	Loew	RKO	Loew	RKO	Loew.
Scranton, Pa	Par	Par	Par	Par	Par	Par	Par	Par.
Paterson, N. J	War	War	Par	Par—War	War	War	War	Par.
Albany, N. Y	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]	RKO—War—Fabian.[17]
Chattanooga, Tenn	Par	Par	Par	Par	Par	Par	Par	Par.
Trenton, N. J	RKO & Ind	RKO & Ind	RKO	RKO	RKO	Ind	RKO	RKO.
Spokane, Wash	Fox	Fox	Fox	Fox	Fox	Fox	Ind	Fox.
Camden, N. J	War	Ind	War & Ind	War	Ind	War	Ind	War.
Erie, Pa	War	Ind	War	War & Ind	War	Ind	Ind	Ind.
Wichita, Kans	Fox	Fox	Fox	Fox	Fox	Fox	Fox	Fox.
Knoxville, Tenn	Par	Par	Par	Par	Par	Par	Par	Par.
Wilmington, Del	War	Ind	War	Loew	War	Loew	War	War.
Reading, Pa	War	Ind	Ind	Loew	Ind	Loew	Ind	Ind.

Exhibit 428—Continued

Exhibitors holding first-run contracts with defendant distributors in 92 cities with populations of 100,000 and over, during the 1943–44 season—Continued

	Warner (Ex. 129)	Fox (Ex. 44)	Paramount (Ex. 84)	Loew (Ex. 58)	RKO (Ex. 95)	United Artists (Ex. 145)	Universal (Ex. 147)	Columbia (Ex. 379)
Tampa, Fla.	Ind	Par	Par	Par	Par	Par	Par	Par.
Sacramento, Calif.	Fox & Ind	Fox	Fox	Fox	Fox	Fox & Ind	Ind	Ind.
Peoria, Ill.	Par	Par	Par	Par	Par	Par	Par	Par.
South Bend, Ind.	Par+I	Par	Par	Par	Par	Par	Par	Par.
Lowell, Mass.	Par	Par	Par	Par	RKO	RKO	RKO	RKO.
Utica, N. Y.	War	Ind	War	War	War	War	War	Ind.
Charlotte, N. C.	Par	Par	Par	Par	Par	Par	Par	Par.
Duluth, Minn.	Par	Par	Par	Par	Ind	Par	Par	Ind.
Baltimore, Md.	War	Ind	War & Ind	Loew	Ind	Loew	Ind	Ind.
St. Louis, Mo.	Ind	Ind	Ind	Loew	Ind	Loew	Ind	Ind. & Loew.
Indianapolis, Ind.	Ind	Ind	Ind	Loew	Ind	Loew	Ind	Loew.
Louisville, Ky.	Ind	Ind	Ind	Loew	Ind	Loew	Ind	Ind.
Toledo, Ohio	Par & Ind	Par	Par	Loew	Ind	Loew	RKO	Loew.
Providence, R. I.	Ind	Ind	Ind	Loew	RKO	Loew	Ind	Ind.
Akron, Ohio	War	Ind	Loew & Ind	Loew	War & Ind	Loew	Loew	Loew.
Nashville, Tenn.	Ind	Ind	Ind[1]	Loew	Ind	Loew	Ind	Ind.
Tulsa, Okla.	Ind	Ind	Ind	Ind	Ind	Ind	Ind	Ind.
Kansas City, Kans.	Ind	Fox	Ind	Fox	For & Ind	Fox	Fox	Ind.
Fort Wayne, Ind.	Ind	Ind	Ind	Ind	Ind	Ind	Ind	Ind.
Fall River, Mass.	Ind	Ind	Ind	Ind	Ind	Ind	Ind	Ind.
Cambridge, Mass.	Ind	Par	Par	Par	Ind & Par	Ind	Ind	Par & Ind.
Gary, Ind.	Par	Ind	Par	Par	Ind	Par	Ind	Ind.
New Bedford, Mass.	Ind	Ind	Par	Par & Ind	Ind	Par	Ind	Ind.
Elizabeth, N. J.	War	RKO & War	War	War	War & RKO	Skouras	War	War.
Canton, Ohio	War	Ind	Loew	Loew	Ind	Loew	War	Ind.
Tacoma, Wash.	Ind	Ind	Ind	Ind	Ind	Ind	Ind	Ind.
Somerville, Mass.	Par	Par	Par	Par	Par	Par	Par	Ind.
Total No. Independent First runs:								
All independent	15	21	13	8	23	9	29	34
Affiliated independent split	7	3	5	3	6	4	4	2
Total affiliated first runs	70	66	74	84	63	70	59	56

[1] Theatre leased from Paramount.
[2] "Par" wherever appearing refers to exhibitions affiliated with Paramount.
[3] See Ex. 158.
[4] See Exs. 156–219.
[5] See Ex. 220.
[6] See Exs. 231, 232, 233, and 222.
[7] See Exs. 161 and 163.
[8] See Ex. 206.
[9] See Ex. 203.
[10] See Ex. 209.
[11] See Ex. 100.
[12] See Ex. 106.
[13] See Ex. 205.
[14] See Exs. 156 and 161.
[15] See Ex. 163.
[16] See Exs. 156 and 161.
[17] See Exs. 204 and 229.

NOTE: "–" indicates pool; "&" indicates product split.
Source: Defendants' "Admission of Facts," 1945.

	Warner	Fox	Paramount	Loew	RKO
New York, N. Y.	War—16.	Fox—15; Loew—3; Ind—9.	Par—13; Loew—3; Ind—4.	Loew—22; Par—1; Ind—7.	RKO—15; Par—1 Loew—1; Ind—11.
Chicago, Ill.	Par—16; Ind—1.	Par—all.	Par—39.	Par—32; Ind—1.	RKO—34; Ind—4.
Philadelphia, Pa.	War—all.	Par—all but 1; Ind—1.	War—39; Ind—2.	War—32.	War—38.
Detroit, Mich.	Par—all.	Fox—all.	Par—32.	Par—33.	Par—37; Ind—1.
Los Angeles, Calif.	War—16; Fox—2; Ind—1.	Fox—all.	Par—32; RKO—1; Fox—4; Ind—1.	Fox West Coast Theatres—128.	Fox—14; Jr. Orpheum LA—16; Ind—8.
Cleveland, Ohio.	War—16.	War Bros. Cir. Mgt.—26; Ind—5.	Loew—32; Ind—12.	Loew—33.	RKO—26; War—12.
Boston, Mass.	Par—all.	Par—26; RKO—10.	Par—32.	Loew—37; Par—3.	RKO—35; Ind—3.
Pittsburgh, Pa.	War—6; Loew—9; Ind—3.	Ind—31.	War—24; Ind—7.	Penn Fed. & War—33.	War—24; Ind—13.
Washington, D. C.	War—all.	Loew—all.	War—20; Loew—9; Ind—2.	Loew—32; Ind—1.	RKO—11; War—25; Loew—1; Ind—1.
San Francisco, Calif.	Fox West Coast Agency Corp.—all.	Fox West Coast Agency Corp.—all.	Fox West Coast Theatres Inc.—32; Ind—1.	Fox West Coast Theatre Corp—33.	RKO—33; Fox—5.
Milwaukee, Wis.	War—18; Ind—1.	Fox—all.	Fox—31; Ind—1.	Fox—34.	War—36; Fox—1; Ind—1.
Buffalo, N. Y.	Buffalo Theatres Inc—13; Ind—6.	Buffalo Theatres all but 3; Ind—3.	Buffalo Theatres—36.	Buffalo Theatres Inc—32.	Ind—38.
New Orleans, La.	Par—8; RKO—8; Ind—2.	Par—28; Loew—1; Ind—1.	Par—32.	Loew—27; Ind—5.	RKO—19; Ind—19.
Minneapolis, Minn.	Minn. Amusement Co.—all.	Minn. Amusement Co.—all.	Minn. Amusement Co.—32.	Minn. Amusement Co.30; Ind—3.	Minn. Amusement Co.—38.
Cincinnati, Ohio.	RKO—all.	RKO—all.	RKO—32.	RKO—33.	RKO—34; RKO & L Lisbon—4.
Newark, N. J.	War—all.	Skouras—all.	Par—31; War—1.	Loew—32.	RKO—34; War—2; Par—2.

Kansas City, Mo.	RKO—10; Par—8.	Fox—all.	Par—12; RKO—12; Fox—6; Ind—2.	Loew—31.	RKO—31; Ind—7.
Houston, Tex.	Par—16.	Par—all.	Par—32; Ind—3.	Loew—26; Par—6.	Par—27; Ind—11.
Seattle, Wash.	Fox—all.	Fox—all but 1; Ind—1.	Fox—32.	Fox—40.	Fox—37; Ind—1.
Rochester, N. Y.	Monroe Amuse. Co.—BF Keith Corp—all.	Monroe Amuse. Co.—BF Keith—all.	Monroe Amuse. Co.—BF Keith—31; Ind—1.	Loew—32.	RKO—Comerford (Par)—28.
Denver, Colo.	Fox—all.	Fox—all.	Ind—32.	Colo. Orpheum Corp—33.	Colo. Orpheum Corp—28; Fox—3.
Portland, Oreg.	Fox—11; Ind—8.	Fox—all.	Fox—32.	Ind—27; Fox—6.	Fox—substantially all.
Columbus, Ohio.	RKO—13.	Loew—13; RKO—16.	Loew—32.	Loew—35.	RKO—36; Loew 2.
Oakland, Calif.	Fox—11; Ind—8.	Fox—all.	Fox—32; Ind—1.	Fox—33.	Fox—36; Ind—3.
Atlanta, Ga.	Par—16.	Par—all.	Par—32; Ind—3.	Loew—29; Ind—1.	Par—32; Ind—5.
Jersey City, N. J.	War—all.	Skouras—all.	Skouras—15; War—16.	Loew—32.	Skouras—38.
Dallas, Tex.	Par—all.	Par—all.	Par—32.	Par—32.	Par—35; Ind—3.
Memphis, Tenn.	War—16; Ind—3.	Loew—all.	Par—32.	Loew—30.	Loew—18; Par—12 War—4; Ind—4.
St. Paul, Minn.	Minn. Amusement Co.—all.	Minn. Amusement Co.—all.	Minn. Amusement Co.—32.	Minn. Amusement Co.—31; Ind—2.	Minn. Amusement Co.—38.
Birmingham, Ala.	Par—19.	Par—all.	Par—32; Ind—1.	Par—32.	Par—15; Ind—21.
San Antonio, Tex.	Par—18.	Par—all.	Par—32.	Par—32.	Par—37; Ind—1.
Omaha, Nebr.	Par—9; RKO—10.	Par—all.	Par—32.	Par—33.	RKO—34; Ind—3.
Dayton, Ohio.	Ind—16.	RKO—all.	RKO—32.	Loew—28; RKO—1.	RKO—28.
Syracuse, N. Y.	RKO—all.	RKO—all.	RKO—31.	Loew—32.	RKO—38.
Oklahoma City, Okla.	Standard Theatres—all.	Standard Theatres—all.	Standard Theatres—32.	Cooper Standard Theatres—32.	Ind—37.
San Diego, Calif.	Fox—10; Ind—9.	Fox—all.	Fox—33.	Fox—34.	Fox—37.
Worcester, Mass.	War—all.	Loew—all.	Par—32.	Loew—31; Ind—1.	War—16; Par—7 Loew—11.
Richmond, Va.	Fabian Theatres—all.	Ind—all but 4; Wilmer & Vincent—4.	Wilmer & Vincent—30; Ind—1.	Loew—32; Fabian—15.	Ind—36.
Ft. Worth, Tex.	Par—16.	Par—all.	Par 32; Ind—1.	Par—37.	Par—33; Ind—5.
Jacksonville, Fla.	Ind—17.	Par—all.	Par—32.	Par—32.	Par—35; Ind—3.
Miami, Fla.	Par—17.	Ind—all.	Par—32.	Par—22.	Par—37; Ind—1.
Youngstown, Ohio.	War—all.	War—all.	Ind—32.	War—32.	Ind—38.

Exhibit No. 188a—Continued

	Warner	Fox	Paramount	Loew	RKO
Hartford, Conn.	War—all.	Loew—all but 1; War—1.	Par—32.	Loew—32.	War—30; Loew—15.
Grand Rapids, Mich.	Butterfield—all.	Butterfield—all.	Butterfield—32.	Butterfield—32.	Butterfield—32.
Long Beach, Calif.	Fox—9; Ind—10.	Fox—all.	Fox—32; Ind—2.	Fox—32.	Ind—34.
New Haven, Conn.	War—all.	Loew—all but 1; Ind—1.	Par—32.	Loew—32.	Loew—30; War—17; Ind—1.
Des Moines, Iowa.	Par—11; RKO—7.	Par—all.	Par—32.	Par—32.	RKO—32; Ind—2.
Flint, Mich.	Butterfield—all.	Butterfield—all.	Butterfield—32.	Butterfield—32.	Butterfield—32.
Salt Lake City, Utah.	Par—all.	Par—all.	Par—32.	Par—32.	Ind—substantially all.
Springfield, Mass.	War—all.	Loew—all.	Par—32.	Loew—32.	Par—19; War—17; Loew—1.
Bridgeport, Conn.	War—all.	Loew—all.	War—32.	Loew—32.	Loew—30; War—17; Ind—1.
Norfolk, Va.	Fabian Theatres—3; Ind—7.	Fowler (Loew-Ind)—all.	Wilmer & Vincent—20; Ind—12.	Loew—32.	Fabian—3; Ind—30.
Yonkers, N. Y.	RKO—all.	RKO—all.	RKO—32.	Loew—32.	RKO—32.
Scranton, Pa.	Par—17.	Par—all.	Par—32.	Par—31.	Par—26; Ind—2.
Paterson, N. J.	War—all.	War—all.	Par—31.	War—16; Essex Amusement—5.	War—23; Ind—2.
Albany, N. Y.	War—all.	Fabian—24; War—9.	War—16; Fabian—16.	Fabian—32.	Fabian—27; War—1.
Chattanooga, Tenn.	Par—13.	Par—all.	Par—32.	Par—30.	Par—23; Ind—5.
Trenton, N. J.	RKO—11; Ind—6.	RKO—13; Ind—19.	RKO—31; Ind—1.	RKO—32.	RKO—5.
Spokane, Wash.	Fox—13; Ind—6.	Fox—all but 1; Ind—1.	Par—32.	Fox—30.	Fox—32.
Camden, N. J.	War—all.	Ind—32.	War—24; Ind—8.	War—31; Ind—1.	Ind—26; War—2.
Erie, Pa.	War—all.	Ind—all.	War—32.	War—31; Ind—32.	War—24.
Wichita, Kans.	Fox—all.	Fox—all.	Fox—31; Ind—1.	Fox—32.	Fox—27; Ind—1.
Knoxville, Tenn.	Par—all.	Par—all.	Par—32; Ind—1.	Par—32.	Par—24.
Wilmington, Del.	War—17.	Ind—all.	War—32.	Loew—32; War—1.	War—32.

Reading, Pa.	War—16; Ind—3.	Ind—all but 1; Loew—1.	Ind—32.	Loew—26; Ind—6.	Ind—32.
Tampa, Fla.	Ind—16.	Par—all.	Par—32.	Par—32.	Par—30; Ind—1.
Sacramento, Calif.	Fox—11; Ind—6.	Fox—all.	Fox—32; Ind—1.	Fox—32.	Fox—26; Ind—3.
Peoria, Ill.	Par—all.	Par—all.	Par—31.	Par—31.	Par—32.
South Bend, Ind.	Par—19.	Par—all.	Par—32.	Par—35.	Par—substantially all.
Lowell, Mass.	Par—all.	Par—all.	Par—32.	Par—32.	Lowell Theatre Corp—33.
Utica, N. Y.	War—all.	Ind—all.	War—31; Ind—1.	War—32.	War—32.
Charlotte, N. C.	Par—16; Ind—1.	Par—all.	Par—32.	Par—32.	Par—30.
Duluth, Minn.	Par—all.	Par—all.	Par—32.	Par—32.	Ind—32.
Baltimore, Md.	War—16; Ind—3.	Ind—26; Loew—1.	War—7; Ind—24.	Loew—32.	Ind—27.
St. Louis, Mo.	Ind—all.	Ind—all.	Ind—31.	Loew—32.	Ind—24.
Indianapolis, Ind.	Ind—16; RKO—8.	Ind—all.	Ind—32.	Loew—32.	Ind—32.
Louisville, Ky.	Ind—15.	Ind—all.	Ind—32.	Loew—32.	Ind—32.
Toledo, Ohio.	Par—7; Ind—11.	Par—all but 1; Loew—1.	Par—32.	Loew—32.	Ind—32.
Providence, R. I.	Ind—all.	Ind—all.	Ind—32.	Loew—32.	RKO—32; Ind—3.
Akron, Ohio.	War—17; Loew—2.	Ind—all but 2; War—1; Loew—1.	Loew—16; Ind—16.	Loew—32.	War—13; Ind—20.
Nashville, Tenn.	Ind—all.	Ind—all.	Ind—32.	Loew—27; Ind—2.	Loew—4; Ind—30.
Tulsa, Okla.	Ind—all.	Ind—all.	Ind—32.	Ind—32.	Ind—32.
Kansas City, Kans.	Ind—all.	Fox—all.	Ind—31.	Fox—32.	Fox—32; Ind—15.
Ft. Wayne, Ind.	Ind—all.	Ind—24.	Ind—32.	Ind—32.	Ind—32.
Fall River, Mass.	Ind—3.	Ind—all.	Ind—30.	Ind—32.	Ind—32.
Cambridge, Mass.	Ind—19.	Par—all.	Par—30; Ind—1.	Par—32.	Par—14; Ind—24.
Gary, Ind.	Par—all.	Ind—all.	Par—31.	Par—32.	Ind—32.
New Bedford, Mass.	Ind—all.	Ind—all.	Par—32.	Par—17; Ind—15.	Ind—27.
Elizabeth, N. J.	War—all.	Skouras—all.	War—31.	War—32.	War—25; Ind—3.
Canton, Ohio.	War—all.	War—1; Ind—24.	Loew—32.	Loew—32.	Ind—32.
Tacoma, Wash.	Ind—19.	Ind—all.	Ind—32.	Ind—32.	Ind—32.
Somerville, Mass.	Par—all.	Par—all.	Par—31.	Par—31.	Par—29; Ind—3.

State and city	Number of affiliated theatres playing first run	Product played by affiliated first-run theatres in cities where both affiliated and independent theatres operate	Number of independent theatres playing first run	Product played by independent first-run theatres in cities where both affiliated and independent theatres operate
Alabama:				
Anniston	1		0	
Gadsden	0		1	
Mobile	4	Col-Fox-Par-RKO-Warner.	2	UA-Loew-Univ.
Montgomery	3		0	
Tuscaloosa	1		0	
Arizona:				
Phoenix	4		0	
Tucson	2		0	
Arkansas:				
Fort Smith	3		0	
Little Rock	4		0	
California:				
Alameda	0		3	
Alhambra	4		0	
Bakersfield	4		0	
Belvedere Township.	2		0	
Berkeley	3	Col-Fox-Loew-Par-RKO-Warner-UA.	1	Columbia-Univ.
Beverly Hills	4		0	
Burbank	0		4	
Fresno	4		0	
Glendale	4	UA-Col-Fox-Loew-Par-RKO-Warner-Univ.	1	RKO.
Huntington Park.	2		0	
Inglewood	4		0	
Pasadena	0		0	
Riverside	4		0	
San Bernardino	5		0	
San Jose	2	UA-Col-Fox-Loew-Par-RKO-Warner-Univ.	2	Columbia-RKO.
Santa Ana	2	UA-Col-Fox-Loew-Par-RKO-Warner-Univ.	2	RKO.
Santa Barbara	4		0	
Santa Monica	1	Fox-Loew-Par-RKO-UA.	2	Col-RKO-Warner-Univ.
South Gate	0		3	
Stockton	3	Fox-Loew-Par-RKO-Warner-UA.	1	Columbia-Univ.
Colorado:				
Colorado Springs.	2	Fox-Loew-Univ-Par.	2	RKO-Col-War-UA.
Pueblo	2	Fox-Loew-Univ-Par.	2	RKO-Col-War-UA.
Connecticut:				
Bristol	2		0	
Meriden	3	Col-Fox-Loew-Par-RKO-UA.	1	RKO-Warner-Univ.
Middletown	0		3	
New Britain	4,2	UA-Col-Fox-Loew-Par-RKO-Warner-Univ.	1	RKO.
New London	2		0	
Norwalk	3		0	
Stamford	0		5	
Torrington	3		0	
Waterbury	3		0	
West Hartford Town.	1		0	
West Haven Town.	0		1	
Florida:				
Miami Beach	3	UA-Loew-RKO-Warner-Par.	1	Fox-Univ-Col.
Orlando	2		0	
Pensacola	3	Col-Fox-Par-RKO-Warner.	1	Loew-Univ-UA.
St. Petersburg	2	Loew-Fox-RKO-Univ-UA-Par.	1	Warner.
West Palm Beach.	3		0	
Georgia:				
Augusta	4		0	
Columbus	3		0	
Macon	5		0	
Rome	0		3	
Savannah	5		0	
Idaho:				
Boise City	2	UA-Fox-Loew-Par-Warner-Univ.	1	Col-RKO.
Illinois				
Alton	2		0	
Aurora	3		0	
Belleville	1	Fox-Loew-Par-RKO-UA.	2	Col-Warner-Univ.
Berwyn [1]	1	Col-UA-Fox-Loew-RKO-Warner-Univ-Par.	2	RKO.
Bloomington	2		0	
Cicero	0		3	
Danville	2		0	
Decatur	2		0	
East St. Louis	1		0	
Elgin	3		0	
Evanston [1]	2	UA-Par-Fox-RKO-Warner.	1	Loew-RKO.
Galesburg	2		0	
Joliet	3		0	

See footnotes at end of table.

State and city	Number of affiliated theatres playing first run	Product played by affiliated first-run theatres in cities where both affiliated and independent theatres operate	Number of independent theatres playing first run	Product played by independent first-run theatres in cities where both affiliated and independent theatres operate
Illinois—Con.				
Maywood	0		2	
Moline	2	Fox-Loew-Par-Warner-Univ-UA.	1	Col-RKO-Warner.
Oak Park	2		0	
Quincy	2		0	
Rockford [3]	3	Col-Par-RKO-Loew-Fox-Univ.	1	UA-War.
Rock Island	2	Fox-Loew-Par-Warner-UA.	1	Col-RKO-Warner.
Springfield	2	Fox-Loew-Par-UA-RKO.	3	Col-Warner-Univ.
Waukegan	3		0	
Indiana:				
Anderson	0		2	
East Chicago	0		2	
Elkhart	0		3	
Evansville	2	Col-Par-Fox-Loew-Univ-UA.	2	RKO-Warner.
Hammond [3]	2	Col-Par-Fox-Loew-RKO-Warner-Univ-UA.	1	RKO.
Kokomo	0		3	
La Fayette	0		4	
Marion	2		0	
Michigan City	0		2	
Mishawaka	0		2	
Muncie	0		3	
New Albany	0		2	
Richmond	0		3	
Terre Haute	0		4	
Iowa:				
Burlington	3		0	
Cedar Rapids	3		0	
Clinton	2	Warner-Par-Fox-Univ-RKO-Loew-Col.	1	UA.
Council Bluffs	1	Par-Fox-RKO-Warner-Univ.	2	Col-Loew-RKO-UA.
Davenport	3		0	
Dubuque	3		0	
Mason City	3		0	
Ottumwa	2		0	
Sioux City	3		0	
Waterloo	3	UA-Col-Fox-Loew-Par-RKO-Univ.	1	Warner.
Kansas:				
Hutchinson	3		0	
Topeka	3		0	
Kentucky:				
Ashland	0		2	
Covington	0		4	
Lexington	0		3	
Newport	0		1	
Owensboro	4		0	
Paducah	0		3	
Louisiana:				
Alexandria	2	Fox-War-Par-Col-RKO.	1	UA-Univ-Loew.
Baton Rouge	2	Col-Fox-Par-RKO-Warner.	1	Loew-Univ-UA.
Monroe	2	Col-Fox-Par-RKO-Warner.	1	Loew-Univ-UA.
Shreveport	4	Col-Fox-Par-RKO-Warner.	1	Loew-Univ-UA.
Maine:				
Bangor	3	UA-Fox-Loew-Par-RKO-Warner-Univ.	1	Col.
Lewiston	2		0	
Portland	1	Loew-Par-Warner-UA.	2	Col-Fox-Loew-RKO-Univ.
Maryland:				
Cumberland	0		4	
Hagerstown	2	Loew-Fox-Par-RKO-Warner-UA.	1	Col-Fox-Universal.
Massachusetts:				
Arlington town. [3]	1	Univ-Loew-Fox-Par-RKO-Warner.	1	Col-RKO.
Belmont town.	0		1	
Beverly	0		2	
Brockton	1	Fox-Loew-Par	2	UA-Col-RKO-War-Univ.
Brookline town.	0		2	
Chelsea [3]	1	Univ-Fox-Loew-Par-RKO-War.	1	Col.
Chicopee [3]	1	Fox-Loew-Par-RKO-Warner.	1	Col-Univ.
Everett	1	UA-Fox-Loew-RKO-Warner-Univ.	1	Col-Fox-Par.
Fitchburg	2		0	
Haverhill	2	Par-Loew-War-RKO-Fox.	1	Univ-UA-Col.
Holyoke	2	Par-Loew-War-RKO-Fox.	1	Univ-UA-Col.
Lawrence	3	War-Col-Loew-Par-RKO-Univ.	1	UA-Fox.
Lynn	3	RKO-Loew-UA-War-Fox-Par.	1	Univ-Col.
Malden	0		4	
Medford	0		2	
Melrose	0		1	
Newton	1		0	
Pittsfield	3	Par-Loew-War-RKO-Fox.	1	Univ-UA-Col.
Quincy	0		3	

See footnotes at end of table.

First-run theatres affiliated with producer-exhibitor defendants and independent first-run theatres in cities with populations of 25,000 to 100,000 and product played by such theatres in cities where both operate, 1943–1944—Continued

State and city	Number of affiliated theatres playing first run	Product played by affiliated first-run theatres in cities where both affiliated and independent theatres operate	Number of independent theatres playing first run	Product played by independent first-run theatres in cities where both affiliated and independent theatres operate
Massachusetts—Con.				
Revere	0		2	
Salem	0		3	
Taunton	2		0	
Waltham	2		0	
Watertown	0		1	
Michigan:				
Ann Arbor	3		0	
Battle Creek	5		0	
Bay City	2		0	
Dearborn	0		2	
Hamtramck	0		3	
Highland Park	0		2	
Jackson	3		0	
Kalamazoo	6		0	
Lansing	3		0	
Muskegon	5		0	
Pontiac	5		0	
Port Huron	2		0	
Royal Oak	0		2	
Saginaw	3		0	
Wyandotte	0		2	
Minnesota:				
Rochester	3		0	
Mississippi:				
Jackson	3	Fox-Par-RKO-Warner-Col.	2	Loew-Univ-UA.
Meridian	2	Fox-Par-RKO-Warner-Col.	2	Loew-Univ-UA.
Missouri:				
Joplin	2		0	
St. Joseph	0		2	
Springfield	2		0	
University City	0		3	
Montana:				
Butte	3	Col-Fox-Loew-Par-RKO-UA.	1	Warner-Univ.
Great Falls	2		0	
Nebraska:				
Lincoln	3	Par-Fox-Loew-Warner-Univ.	3	Col-RKO-Warner-UA.
New Hampshire:				
Concord	2		0	
Manchester	0		4	
Nashua	0		2	
New Jersey:				
Atlantic City	7	Par-Col-Fox-Loew-RKO-Warner-UA.	2	Fox-RKO-Univ.
Bayonne	4	Par-Fox-Loew-RKO-Warner-Univ.	1	Par-Col-Fox-Loew-UA.
Belleville	1		0	
Bloomfield	2		0	
Clifton	0		3	
East Orange	3	Col-Fox-Loew-RKO-Warner.	1	Fox-Loew-Par.
Garfield	0		1	
Hackensack	3		0	
Hoboken	1		0	
Irvington	2	Par-UA-Col-Fox-Loew-RKO-Warner-Univ.	1	RKO.
Kearny	2		0	
Montclair	3		0	
New Brunswick	2	Par-Fox-Loew-RKO-Warner-Univ.	1	Col-Warner-UA.
North Bergen Township	1		0	
Orange	3	Par-UA-Col-Fox-Loew-RKO-Univ-War.	1	RKO.
Passaic	5	Par-Fox-Loew-RKO-Warner-Univ-UA.	1	Col-RKO.
Perth Amboy	0		4	
Plainfield	0		3	
Teaneck Township	1		0	
Union City	3		0	
West New York	0		2	
West Orange	0		2	
Woodbridge Township	0		1	
New Mexico:				
Albuquerque	3		0	
New York:				
Amsterdam	0		2	
Auburn	0		3	
Binghamton	0		4	
Elmira	2	Par-Loew-RKO-Warner-Univ-UA.	1	Col-Fox-Loew.
Jamestown	2		0	
Kingston	0		3	
Mount Vernon	2		0	
Newburgh	2		0	
New Rochelle	2		0	
Niagara Falls	1	Warner-Par-UA	3	Univ-Col-Fox-Loew-RKO-War.
Poughkeepsie	2		0	
Rome	0		2	
Schenectady	2		0	
Troy	4		0	
Watertown	0		3	
White Plains	2		0	

First-run theatres affiliated with producer-exhibitor defendants and independent first-run theatres in cities with populations of 25,000 to 100,000 and product played by such theatres in cities where both operate, 1940–1944—Continued

State and city	Number of affiliated theatres playing first run	Product played by affiliated first-run theatres in cities where both affiliated and independent theatres operate	Number of independent theatres playing first run	Product played by independent first-run theatres in cities where both affiliated and independent theatres operate
North Carolina:				
Asheville	3	UA-Col-Fox-Loew-Par-RKO-War-ner-Univ.	1	RKO.
Durham	3		0	
Greensboro	3		0	
High Point	4		0	
Raleigh	4		0	
Rocky Mount	2		0	
Wilmington	3		0	
Winston-Salem	4		0	
North Dakota:				
Fargo	3		0	
Ohio:				
Cleveland Heights	0		2	
East Cleveland	0		2	
Elyria	0		2	
Hamilton	2		0	
Lakewood	0		2	
Lima	2	UA-Loew-RKO-Warner-Univ-Par.	0	Col-Fox.
Lorain	1	UA-RKO-Warner-Par.	3	Col-Fox-Loew-RKO-Univ.
Mansfield	3		0	
Marion	2	Par-Col-Loew-RKO-Univ-UA.	1	Fox-Warner.
Massillon	1	Loew-RKO-Warner-Par-UA.	2	Col-Fox-Loew-RKO-Univ.
Middletown	2		0	
Newark	0		2	
Norwood	0		2	
Portsmouth	3		0	
Springfield	3		0	
Steubenville	1	Loew-RKO-Warner-UA.	3	Col-Fox-Loew-Par-RKO-Univ.
Warren	0		4	
Zanesville	0		3	
Oklahoma:				
Enid	0		3	
Muskogee	0		1	
Oregon:				
Salem	2		0	
Pennsylvania:				
Aliquippa	2		0	
Allentown	0		6	
Altoona	0		4	
Bethlehem	0		6	
Chester	3	UA-Par-Col-Loew-RKO-Warner-Univ.	1	Fox-Loew-RKO.
Easton	0		5	
Harrisburg	3		5	
Haverford Township	0		3	
Hazleton	3		0	
Johnstown	3	UA-Loew-Par-RKO-Warner-Univ.	1	Col-Fox-Par.
Lancaster	3	UA-Par-Col-Loew-RKO-Warner-Univ.	1	Fox-Loew-Par.
Lebanon	3	Col-Fox-Loew-RKO-Warner-Univ.	1	Par-UA.
Lower Marion Township	1	Fox-Loew-RKO-Univ.	3	Col-Fox-Loew-Par.
McKeesport	2	Loew-Par-RKO-Warner-UA.	2	Col-Fox-Par-Univ.
New Castle	0		3	
Norristown	0		4	
Sharon	3		0	
Upper Darby Township	3		0	
Washington	2	Loew-RKO-Par-War-Fox-UA.	1	Univ-Col.
Wilkes-Barre	4		0	
Wilkinsburg	3		0	
Williamsport	2	Par-Col-Fox-RKO-Warner-Univ.	1	Loew-RKO-UA.
York	3	Par-Col-Loew-RKO-Warner-Univ-UA.	1	Fox.
Rhode Island:				
Central Falls	0		2	
Cranston	0		2	
East Providence	0		1	
Newport	1	Loew-Par	2	UA-Col-Fox-RKO-War-Univ.
Pawtucket	1	Loew-Par-RKO	2	UA-Col-Fox-RKO-War-Univ.
Warwick	0		3	
Woonsocket	1	Loew-Par-RKO-Warner.	1	UA-Col-Fox-RKO Univ.
South Carolina:				
Charleston	0		4	
Columbia	3		0	
Greenville	3		0	
Spartanburg	3		0	
South Dakota:				
Sioux Falls	2	Fox-Loew-Par-War-UA.	2	Col-RKO-Univ.

First-run theatres affiliated with producer-exhibitor defendants and independent first-run theatres in cities with populations of 25,000 to 100,000 and product played by such theatres in cities where both operate, 1948–1944—Continued

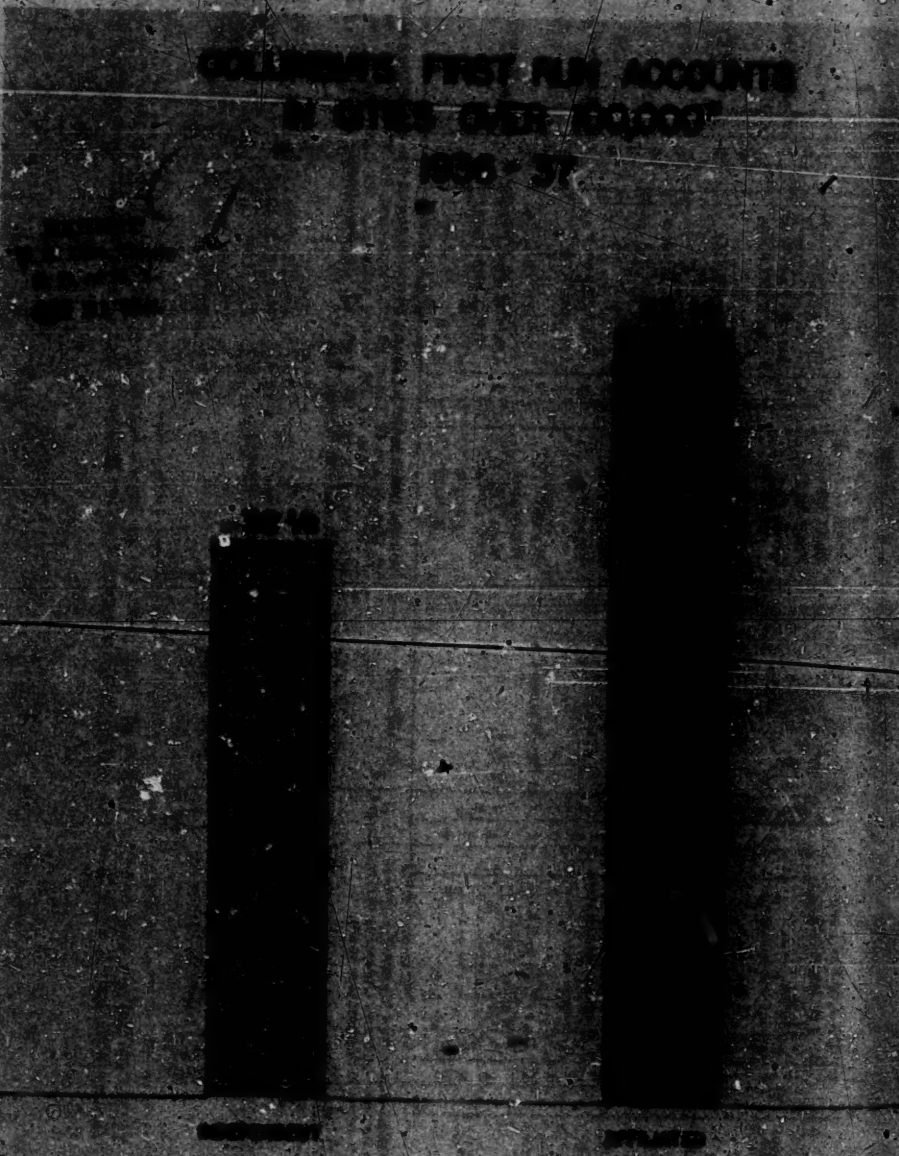
State and city	Number of affiliated theatres playing first run	Product played by affiliated first-run theatres in cities where both affiliated and independent theatres operate	Number of independent theatres playing first run	Product played by independent first-run theatres in cities where both affiliated and independent theatres operate
Tennessee:				
Johnson City[1]	3	Col-Par-Fox-Loew-RKO-War-Univ-UA.	1	Fox-Warner.
Texas:				
Abilene	3		0	
Amarillo	4	UA-Col-Fox-Loew-Par-RKO-War-Univ.	1	RKO.
Austin	3		0	
Beaumont	4		0	
Corpus Christi	0		3	
El Paso	4	UA-Col-Fox-Loew-Par-RKO-War-Univ.	1	RKO.
Galveston	3		0	
Laredo	0		3	
Lubbock	0		2	
Port Arthur	3		0	
San Angelo	0		3	
Tyler	3		0	
Waco	4	UA-Col-Fox-Loew-Par-RKO-Warn-Univ.	1	RKO.
Wichita Falls	3		0	
Utah:				
Ogden	4		0	
Vermont:				
Burlington	2	UA-Fox-Loew-Par-RKO-Warner.	1	Col-RKO-Univ.
Virginia:				
Alexandria	0		4	
Arlington	0		3	
Danville	3		0	
Lynchburg	3		0	
Newport News	2	Par-Loew-RKO-Warner-Univ.	2	Col-Fox-Warner-UA.
Petersburg	0		4	
Portsmouth	0		4	
Roanoke	0		6	
Washington:				
Bellingham	2	Fox-Loew-Par-RKO-Warner-UA.	1	Col-Warner-Univ.
Everett	3		0	
Yakima	0		5	
West Virginia:				
Charleston[2]	2	UA-Col-Par-RKO-Warner-Univ.	2	Fox-Loew-RKO.
Clarksburg	1	UA-Fox-Loew-RKO-Warner-Univ.	2	Col-Fox-Loew-Par-RKO.
Huntington	2	Par-Loew-War-RKO-Fox-Univ.	1	UA-Col.
Parkersburg	2		0	
Wheeling	1	Loew-Par	6	UA-Col-Fox-Loew-Par-RKO-Warner-Univ.
Wisconsin:				
Appleton	2	UA-Col-Fox-Loew Par-RKO-War-Univ.	1	RKO.
Beloit	0		2	
Eau Claire	3		0	
Fond du Lac	2		0	
Green Bay	1	Loew-Par-War-Col-RKO-Univ.	2	Col-RKO-Loew-Fox-UA.
Kenosha	2		0	
La Crosse	3	Col-Fox-Par-UA	2	Loew-RKO-Warner-Univ.
Madison	4		0	
Oshkosh	2		0	
Racine	3		0	
Sheboygan	3		0	
Superior[3]	2	Fox-Loew-Par-Warner-UA.	1	RKO-Univ.-Col.
Wausau	2		0	
Wauwatosa	1		0	
West Allis[3]	2	UA-Col-Fox-Par-RKO-War-Univ.	1	RKO.

[1] Columbia claims this is "not a town."
[2] Information for these cities on Columbia derived from C-6.
[3] Loew did not provide data on this town.
[4] Universal did not play.
[5] United Artists did not play.
[6] Warner had no record of playing.

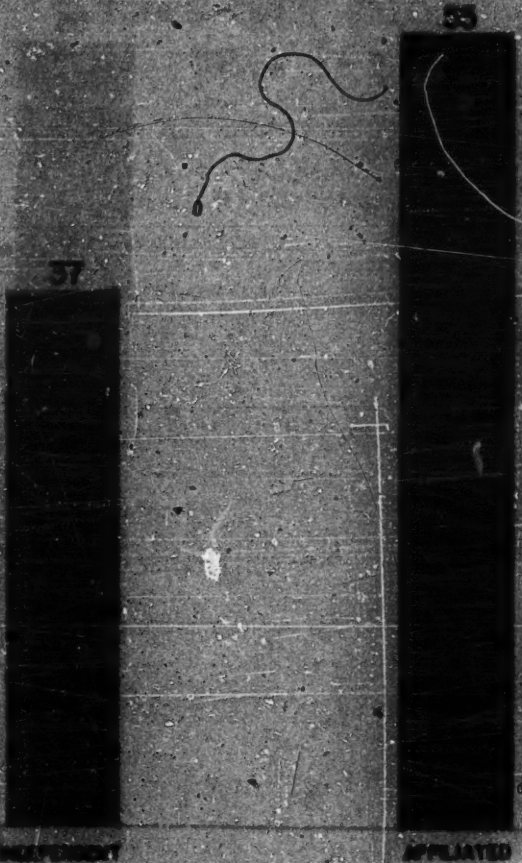
Source: Defendants' Answers to Interrogatories 6 to 11, 1945 and theatre lists Fox, Exs. 42 and 43; Loew, Ex. 87; Paramount, Ex. 82; RKO, Ex. 94; Warner, Ex. 126; Columbia, Ex. 130; United Artists, Ex. 300; Universal, Ex. 265. Theatre Lists: Fox, Exs. 160, 208; Loew, Ex. 165; Paramount, Exs. 161, 162, 209; RKO, Exs. 188 and 189; Warner, Exs. 185, 187.

78841 O—48—22

3. For all films released by Columbia in cities over [illegible] during seasons 1936-37 through 1942-44 (Ex. C-7, R. 1286.)



COLUMBIA'S FIRST RUN ACCOUNTS IN CITIES OVER 100,000*
1938-39



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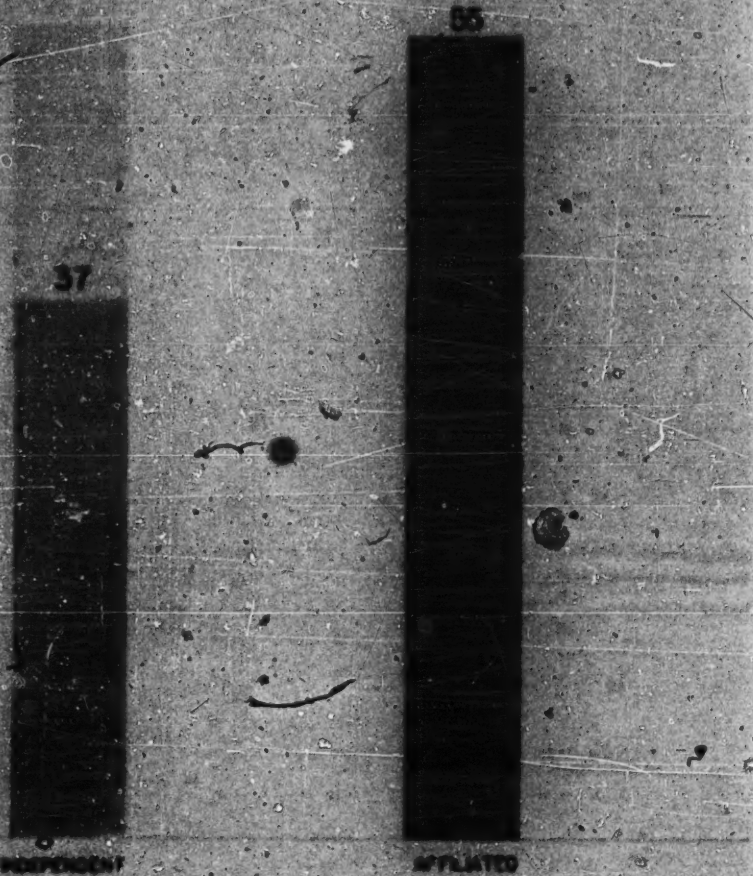
COLUMBIA'S FIRST RUN ACCOUNTS IN CITIES OVER 100,000* 1939-40



* CENSUS OF 1940

SCALE 1" = 8

COLUMBIA'S FIRST RUN ACCOUNTS IN CITES OVER 100,000* 1940-41

*'40 — CENSUS OF 1940

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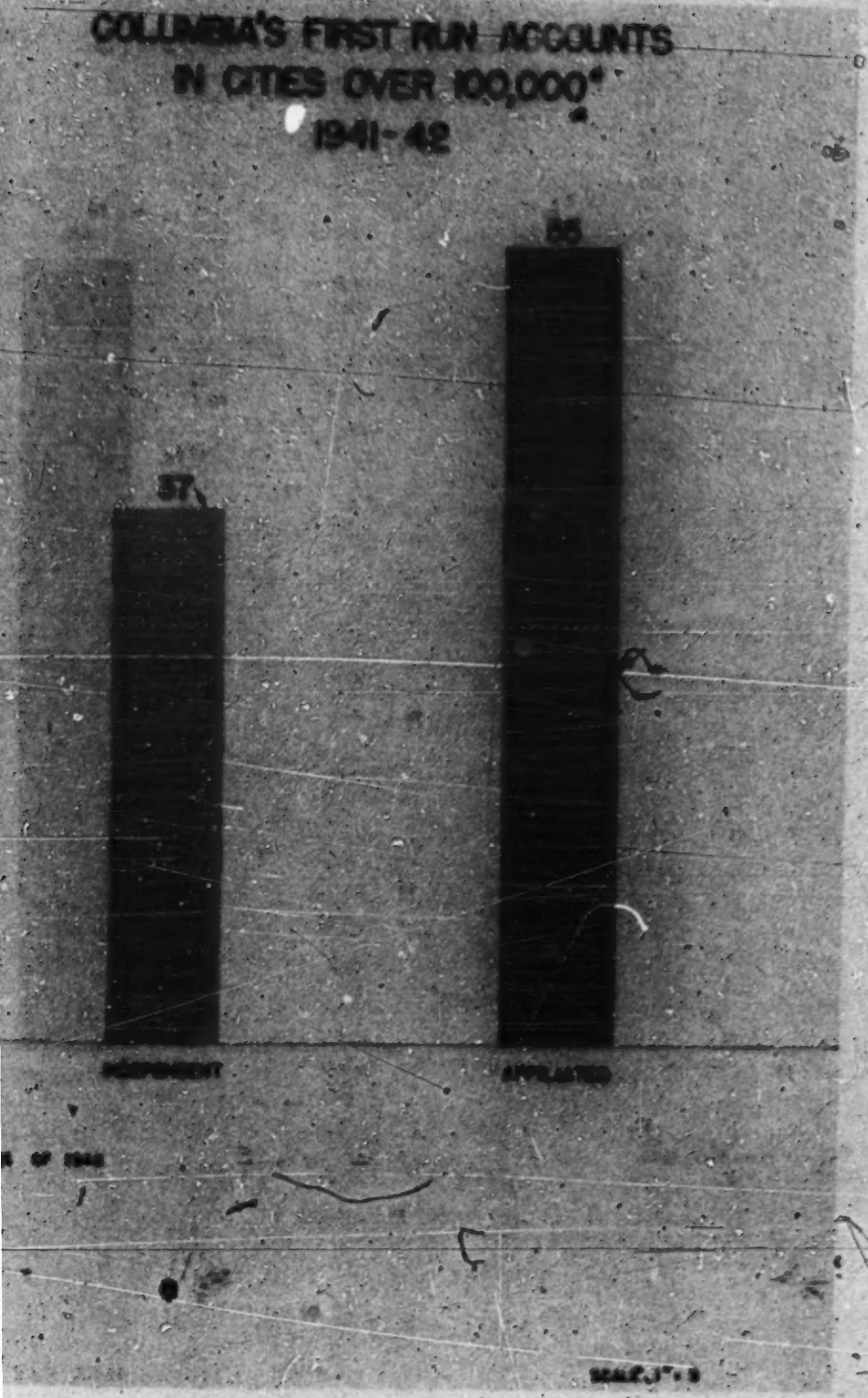
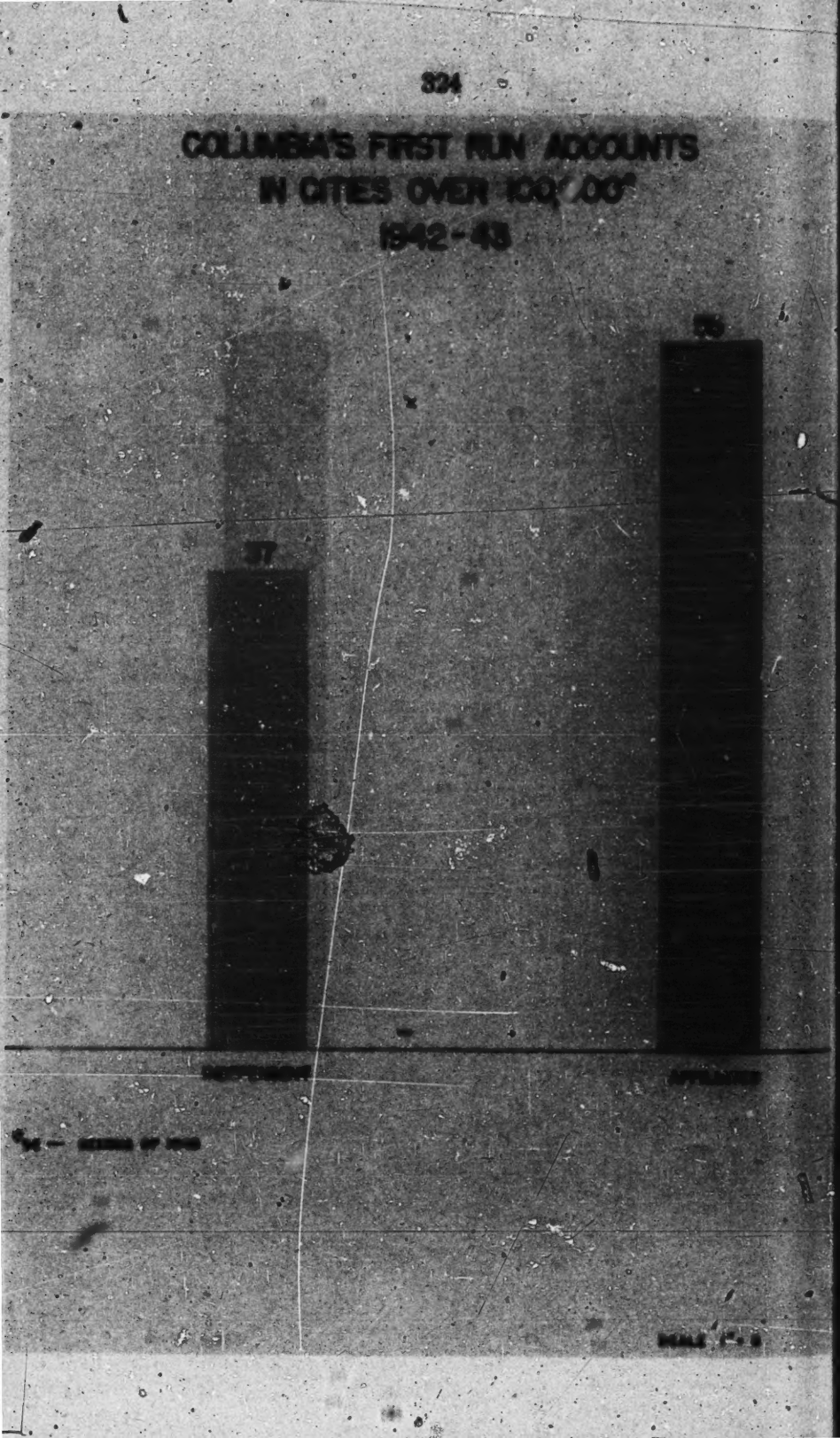
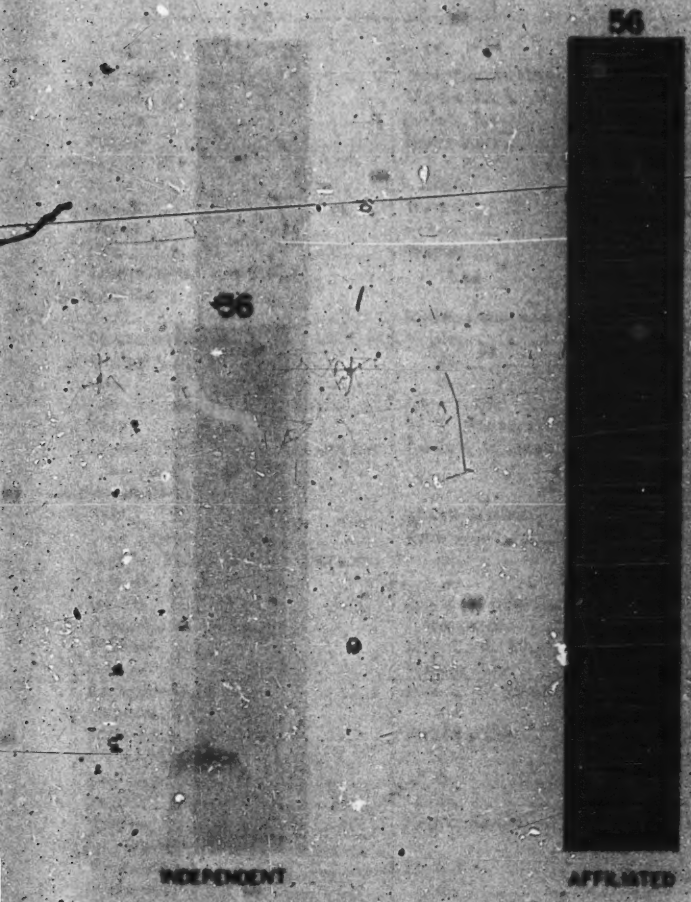

COLUMBIA'S FIRST RUN ACCOUNTS
IN CITIES OVER 100,000*
1941-42
85
57

COLUMBIA'S FIRST RUN ACCOUNTS IN CITIES OVER 100,000 1942-43



COLUMBIA'S FIRST RUN ACCOUNTS IN CITIES OVER 100,000* - 1943-44



* CENSUS OF 1940

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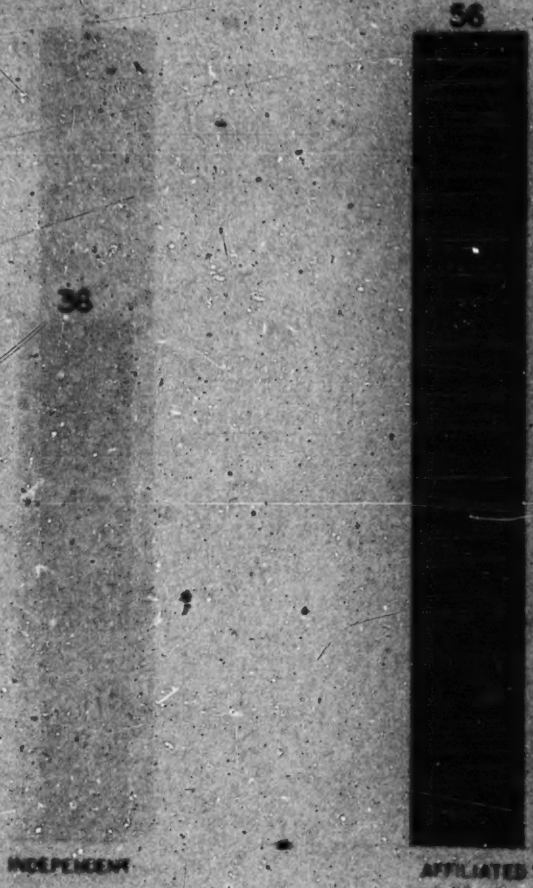
COLUMBIA'S FIRST RUN ACCOUNTS IN CITIES OVER 100,000* 1944-45



*92 — CENSUS OF 1940

SCALE 1"=4

I. List of All First Run Theatres in the 92 Cities in the United States Having a Population of 100,000 and Over; Offered by Defendant Loew (Ex. L-13, R. 1678).

Theatre	Operator	Number of Seats
Akron, Ohio:		
Colonial	Shea Theatre Corp.	1,750
Strand	Warner Bros.	1,158
Loew's	Loew's, Inc.	3,000
Palace	Harry Katz	2,650
Albany, N. Y.:		
Palace	Fabian	3,640
Strand	Warner	1,200
Grand	Fabian	1,500
Ritz	Warner	1,134
Leland, some first runs	do.	1,200
Atlanta, Ga.:		
Fox	Public-Lowe and Jenkins	4,000
Paramount	do.	3,000
Capitol	do.	2,500
Roxy	do.	2,000
Loew's Grand	Loew's, Inc.	2,900
Rialto	W. T. Murray	900
Rhodes, M. O. from Grand and two first run.	Lowe & Jenkins	725
Baltimore, Md.:		
New	Morris Mechanic	1,700
Loew's Century	Loew's, Inc.	2,600
Loew's Valencia, first run and M. O.	do.	1,600
Keith's	L. Schoenberger	2,400
Hippodrome	I. Rappaport	3,200
Mayfair	Mrs. C. W. Hicks	600
Stanley	Warner Bros.	3,200
Little (revivals)	Mrs. C. W. Hicks	300
Birmingham, Ala.:		
Alabama	Public-Wiley	2,500
Lyric—M. O. from Alabama	do.	1,372
Ritz	do.	1,400
Strand	do.	700
Empire	Frank Merritt	924
Boston, Mass.:		
Metropolitan	M. & P.	4,300
Paramount	do.	1,707
Fenway	do.	1,371
Loew's State	Loew's, Inc.	3,200
Loew's Orpheum	Loew's Inc.	2,900
RKO Boston	RKO	3,227
RKO Memorial	do.	2,907
Translux	Interstate	700
Majestic	Brandt	1,626
Bridgeport, Conn.:		
Loew's Poli	Loew's Inc.	3,041
Loew's Majestic	do.	2,240
Loew's Globe	do.	1,909
Loew's Lyric	do.	2,165
Warner	Warner Circuit	1,332
Merritt	do.	977

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Buffalo, N. Y.:		
Shea's Buffalo	Loew's Inc	3,488
Great Lakes	do	3,029
Hippodrome	do	2,089
20th Century	Buffalo 20th Century, Inc	3,042
Lafayette	Basil Brothers	2,988
Cambridge, Mass.:		
Central Sq	M & P	2,123
University	S. Sumner	1,889
Camden, N. J.:		
Savar	Sam Varbalow	1,800
Grand	Warner Bros	903
Stanley	do	2,258
Canton, Ohio:		
Palace	Interstate Thea., Inc. (A. G. Constant)	1,877
Ohio	Warner Bros	818
Loew's	Loew's Inc	2,126
Charlotte, N. C.:		
Carolina	Charlotte Amus. Co. (Wilby-Kincey)	1,456
Imperial	Strand Theatres, Inc. (Wilby-Kincey)	946
Broadway	Charlotte Amus. Co. (Wilby-Kincey)	1,103
Chattanooga, Tenn.:		
Tivoli	Publix-Wilby	1,709
State	do	859
Chicago, Ill.:		
McVicker's	J. Jones	2,372
Apollo	B & K	1,340
Chicago	do	4,000
Garrick	do	907
Wood's	Essaness	1,072
Oriental	Costello	3,188
Roosevelt	B & K	1,535
State-Lake	do	2,700
United Artists	do	1,694
Palace	RKO	2,400
Grand	do	1,200
World Playhouse	J. Vicedomini	480
Cincinnati, Ohio:		
Palace	RKO Midwest Corp	2,616
Albee	do	3,043
Capitol	do	2,000
Lyric	do	1,092
Shubert	do	2,100
Keith	do	1,600
Family	do	1,010
Grand	do	1,430
Cleveland, Ohio:		
State	Loew's, Inc	3,437
Stillman	do	1,848
Ohio	do	1,305
Hippodrome	Warner Bros	3,478
Lake	do	800
Palace	RKO Theatres	3,193
Allen	do	3,003

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L–13)—Continued

Theatre	Operator	Number of Seats
Columbus, Ohio:		
Palace	B. F. Keith Col. Corp.	3,000
Grand	do	1,200
Ohio	Loew's O. A. Col. Corp.	3,079
Broad	do	2,347
Dallas, Tex.:		
Majestic	Interstate Theatres	2,147
Palace	do	2,332
Capitol	do	1,052
Rialto—some 2d run	do	1,313
Melba—1st run & Holdover	do	1,841
Tower	do	1,295
Dayton, Ohio:		
Keith	RKO Midwest Corp.	2,000
Colonial	do	1,676
State	do	1,006
Victory	William Keyes	1,414
Loew's	Loew's Theatres, Inc.	2,304
Denver, Colo.:		
Denver	Fox Greater Theatres	2,512
Paramount	do	2,076
Esquire	do	742
Aladdin, 1st run M. O.	do	1,352
Rialto, 1st run M. O.	do	873
Denham	Denham Theatre, Inc.	1,735
Orpheum	Colo-Orpheum (RKO & Loew's)	2,500
Des Moines, Iowa:		
Des Moines	Tri-States	1,700
Paramount	do	2,000
Roosevelt	do	900
Orpheum	RKO	1,632
Detroit, Mich.:		
Fox	Fox Michigan Corp.	5,045
Adams	Adams Amusement Co.	1,770
Michigan	United Detroit Theas.	1,038
United Artists	do	2,070
Palms State	do	3,000
Broadway Capitol	do	3,448
Downtown	Downtown Amus. Co.	2,880
Duluth, Minn.:		
Norshor	Minnesota Amus. Co.	1,302
Garrick	do	989
Granada	S. A. Blackmore	980
Lyric	Minnesota Amus. Co.	1,023
Elizabeth, N. J.:		
Ritz	Warner Bros.	2,809
Regent	do	2,481
Liberty	Rbourse	1,948
Erie, Pa.:		
Shea	Erie Amusement Co.	1,434
Warner	Warner Bros.	2,600
Colonial	Colonial Amus. Co.	900

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L–13)—Continued

Theatre	Operator	Number of Seats
Fall River, Mass.:		
Durfee	N. Yamins	2,220
Centre	do	1,300
Empire	do	1,819
Flint, Mich.:		
Capitol	W. S. Butterfield Theatres	2,200
Regent	do	1,600
Palace	do	1,200
Garden	do	1,000
Fort Wayne, Ind.:		
Emboyd	Harrison Theatre & Realty Co.	2,812
Paramount	do	2,000
Jefferson	do	1,257
Palace	do	1,800
Wayne	Pete Mallers	875
Fort Worth, Tex.:		
Worth	Interstate Theatres	2,200
Hollywood	do	1,700
Palace	do	1,405
Gary, Ind.:		
Palace	Young & Boucher	2,432
Gary	do	900
State	Publix-Gt. States	1,200
Grand Rapids, Mich.:		
Majestic	W. S. Butterfield Theatres	1,200
Keith's	do	2,000
Regent	do	1,800
Center	do	1,170
Kent	do	1,000
Hartford, Conn.:		
Dow's	Dow	1,200
Loew's Poli	Loew's Inc.	3,091
Loew's Palace	do	1,710
Allyn	M & P	1,200
E. M. Loew	E. M. Loew	1,221
Regal	Warner Circuit	1,000
State	Harris Bros.	2,000
Strand	Warner Circuit	1,000
Houston, Tex.:		
Majestic	Interstate Theaters	2,200
Metropolitan	do	2,320
Kirby	do	1,400
Lowe's State	Lowe's Inc.	2,321
Indianapolis, Ind:		
Circle	4th Ave. Amusement Co.	2,600
Indiana	do	2,121
Lyric	do	1,330
Lowe's Palace	Lowe's Inc.	2,448
Keith's	Keith's Operating Co.	1,271
Jacksonville, Fla.:		
Florida	Florida Theatres, Inc.	2,185
Palace	do	1,021
Arcade	do	1,115
Temple	do	800
St. Johns	St. Johns Operating Co.	900

1. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Jersey City, N. J.:		
State	Stanley	3,100
Stanley	Warner Bros.	4,323
Loew's Journal Square	Loew's Inc.	3,157
Kansas City, Kans.:		
Granada	Fox Midwest Theas., Inc.	1,174
Electric	Electric Theatre Co.	1,800
Kansas City, Mo.:		
Uptown	Fox Midwest Theatres	2,043
Esquire	do	800
Fairway	do	700
Tower	do	2,000
Midland	Loew's Inc.	3,373
Newman	Paramount Kansas City Operating Corp.	1,800
Orpheum	Radio Keith Orpheum	1,800
Knoxville, Tenn.:		
Tennessee	Publix-Wilby	1,000
Riviera	do	600
Strand	do	800
Long Beach, Calif.:		
West Coast	Fox West Coast	2,110
United Artists	do	1,342
Imperial	do	801
Long Beach	do	1,196
State	Milt Arthur	1,345
Cabart	do	900
Rivoli	do	1,185
Los Angeles, Calif.:		
Loew's State	Fox West Coast	2,200
Grauman's Chinese	do	2,000
Uptown	do	1,700
Carthay Circle	do	1,518
United Artists	do	2,400
Four Star	do	941
Fox Wilshire (Beverly Hills)	do	2,296
Ritz	do	1,376
Los Angeles	Fox Principal	2,700
Orpheum—1st run occasionally	do	2,207
Egyptian	Fox West Coast	2,000
RKO Hill Street	RKO Theaters	2,000
Pantages	do	2,813
Paramount	Milt Arthur	3,397
Paramount (Hollywood)	do	2,813
Warner Bros.	Warner Bros.	1,787
Warner Bros. (Hollywood)	do	2,758
Wiltern	do	2,344
Hawaii	Galeson & Sutton	1,000
Million Dollar	Harry Popkins	2,100
Vogue	do	900
Pan-Pacific	do	600

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew's (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Louisville, Ky.:		
Rialto	4th Ave. Amusement Co	3,054
Strand	do	1,965
Brown	do	1,807
Loew's United Artists	Loew's, Inc	3,273
Mary Anderson	Peoples Theatre Co	1,406
National	Not known—not connected with any defendant	2,310
Lowell, Mass.:		
Strand	M & P	1,535
Merrimac Sq	do	1,807
RKO Keith	RKO	1,987
Memphis, Tenn.:		
Strand	Malco Theatres, Inc	1,200
Malco	do	2,000
Loew's Palace	Loew's Inc	2,154
Loew's State	do	2,560
Warner	Warner Bros., Inc	2,602
Miami, Fla.:		
Capitol	Wometco Theatres, Inc	1,224
Miami	do	476
Paramount	Paramount Publix	1,796
Olympia	do	2,125
Milwaukee, Wisc.:		
Wisconsin	Fox-Wisconsin Amusement Corp	2,880
Palace	do	2,362
Strand	do	1,281
Warner	Warner Bros	2,430
Alhambra (and M. O.)	do	2,800
Riverside	do	2,600
Minneapolis, Minn.:		
Radio City	Minnesota Amusement Co	4,024
State	do	2,289
Orpheum	do	2,812
Gopher	do	1,028
Aster	do	700
Century	do	1,604
Lyric	do	1,078
World	do	300
Nashville, Tenn.:		
Paramount	Crescent Amusement Co	1,863
Knickerbocker	do	1,100
Princess	do	1,230
Loew's Vendome	Lowe's Inc	1,880
Newark, N. J.:		
Paramount	A. Adams	1,008
Adams	do	[1] 1,800
Proctor's Palace	RKO	2,305
Branford	Warner's	2,666
Loew's State	Lowe's Inc	2,880

[1] Approximate.

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew's (Ex. L-15)—Continued

Theatre	Operator	Number of Seats
New Bedford, Mass.:		
State	H. Zeitz	1,760
Empire	do	1,736
New Bedford	do	1,339
Olympia	M & P	3,473
New Haven, Conn.:		
Loew's Poli	Loew's Inc	3,007
Loew's College	do	1,493
Loew's Bijou	do	1,493
Paramount	M-A P	2,848
Roger Sherman	Warner Circuit	2,660
New Orleans, La.:		
Saenger	Paramount-Richards	3,439
Tudor, first-run occasionally	do	709
Globe, first-run occasionally	do	882
Loew's State	Loew's Inc	2,300
Orpheum	Mort H. Singer	2,214
Liberty, first-run occasionally	do	1,200
Center, first-run occasionally	Mrs. H. Lazarus	882
New York, N. Y.:		
Roxy	Roxy Theatre, Inc	5,920
Globe	Brandt	1,270
Gotham	do	810
Rialto	Arthur Mayer	594
Music Hall	Radio City Music Hall Corp	5,945
Capitol	Moredall Realty Corp	4,820
Hollywood	Warner's	1,527
Strand	Stanley-Mark Strand Corp	2,900
Rivoli	The Biddle Realty Corp	2,092
Paramount	Paramount Picture Theatres, Inc	3,664
Loew's State	Loew's Inc	3,326
Criterion	Macon Amusement Corp	1,020
Victoria	City Entertainment Corp	700
Astor	City Investing Corp	1,135
Republic	Brandt	1,250
Ambassador	Skirball Bros	1,118
Winter Garden		1,230
Norfolk, Va.:		
Norva	Fabian Theatres	1,800
Granby	do	1,000
Loew's State	Loew's Inc	2,057
Newport	Wm. S. Wilder	700
Colley	do	770
Centre	do	1,000
Oakland, Calif.:		
Fox	Fox West Coast	3,251
Paramount	do	3,434
Orpheum	do	2,661
Grand Lake (M. O.)	do	2,272
Franklin (M. O.)	do	813
T & D	Blumenfeld	2,000
Esquire	do	1,370
Roxy	do	1,075

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew's (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Oklahoma City, Okla.:		
Criterion	Standard Theatres	1,320
Midwest	do	1,478
Liberty	do	1,000
Tower	do	919
Wafner	do	2,000
State	T. B. Noble	1,000
Omaha, Nebr.:		
Orpheum	Tri-States Theatre Corp	2,000
Paramount	do	2,776
Omaha	do	2,053
Brandeis	RKO	1,000
Paterson, N. J.:		
Fabian	Warner Bros	3,263
Garden	do	1,194
Rivoli	do	1,700
U. S.	Adam Adams	1,480
Peoria, Ill.:		
Madison	Great States	1,730
Palace	do	1,920
Rialto (M. O. from Madison)	do	1,905
Philadelphia, Pa.:		
Aldine	Warner Bros	1,297
Boyd	do	2,328
Capitol	do	502
Earle	do	2,704
Fox	do	2,433
Mastbaum	do	4,840
Stanton	do	1,430
Stanley	do	2,980
Erlanger	Wm. Goldman	1,850
Studio	W. Goldberg	386
Pittsburgh, Pa.:		
J. P. Harris	J. P. Harris Theatre Corp	2,145
Harris-Senator	do	1,840
Fulton	Fulton-Shea Theatre Corp	1,800
Stanley	Warner Bros	3,796
Warner	do	1,919
Ritz	do	773
Loew's Penn	Loew's Inc	3,488
Barry	Varsity Amusement Co	1,800
Art Cinema	Morris Rubin	374
Portland, Oreg.:		
Paramount	Hamrick-Evergreen	3,000
Orpheum	do	1,233
Oriental	do	2,100
Playhouse	do	1,242
Music Box	do	931
Mayfair	do	1,801
Broadway	J. J. Parker Theatres	1,632
United Artists	do	895

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Providence, R. I.:		
Majestic	E. Fay	2,362
Fay's	do	1,926
Carlton	do	1,430
Loew's State	Loew's, Inc.	3,232
Strand	Ed Reed	1,800
Keith-Albee	RKO	2,202
Reading, Pa.:		
Embassy	Wilmer & Vincent	2,480
Ritz	do	1,228
Astor	Jay Emanuel	2,485
Park	do	1,880
Warner	Warner Bros.	1,228
Colonial	Loew's Inc.	1,800
Richmond, Va.:		
Byrd	Morton Thalheimer	1,306
State	do	698
Capitol	do	676
Loew's	Loew's Inc.	2,196
National	Fabian Theatres	1,303
Colonial	do	1,500
Rochester, N. Y.:		
RKO Palace	B. F. Keith Corp.	2,961
	Monroe Amusements, Inc.	
Century	do	2,135
RKO Temple	do	1,495
Regent	do	1,502
Loew's Rochester	Loew's Inc.	3,661
St. Louis, Mo.:		
Ambassador	Fanchon & Marco	3,000
Fox	do	5,000
Missouri	do	3,000
St. Louis	do	3,878
Shubert	do	1,360
Loew's State	Dayton Theatre Co.	3,073
Loew's Orpheum	do	1,904
St. Paul, Minn.:		
Paramount	Minnesota Amus. Co.	2,362
Orpheum	do	2,183
Strand	do	739
Tower	do	1,048
Riviera	do	1,306
World	Berger Amus. Co.	800
Salt Lake City, Utah:		
Centre	Intermountain Theatre	1,039
Utah	do	1,931
Capitol	do	1,842
Studio (M. O.)	do	285
Uptown	J. L. Lawrence Theatres	1,320
San Antonio, Tex.:		
Majestic	Interstate Theatres	3,705
Aztec	do	2,438
Texas	do	2,705
Empire	do	1,483
Princess	do	844

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew (Ex. L–13)—Continued

Theatre	Operator	Number of Seats
Sacramento, Calif.:		
Senator	Fox West Coast	2,041
Alhambra	do	1,978
Capitol	do	1,084
Tower	Blumenfeld	1,200
Esquire	do	1,000
Times	do	800
San Diego, Calif.:		
Fox	Fox West Coast	3,000
State	do	1,612
California	do	2,091
Adams	do	835
Orpheum	do	2,400
Mission	do	909
Balboa	do	1,800
Spreckels	Law Metzger	2,000
Broadway	do	700
Tower	do	600
San Francisco, Calif.:		
Fox	Fox West Coast	4,651
Paramount	do	2,646
Warfield	do	2,672
St. Francis (1st run M. O.)	do	1,430
State (1st run M. O.)	do	2,063
Golden Gate	RKO	2,800
Orpheum	Blumenfeld	2,445
United Artists	do	1,209
Esquire	do	930
Tivoli	do	1,440
Scranton, Pa.:		
Strand	Comerford-Publix	1,480
Comerford	do	1,800
Capitol	do	1,700
State	do	993
Seattle, Wash.:		
Fifth Avenue	Evergreen Theatres Corp. (Fox West Coast).	2,308
Paramount	do	3,000
Music Hall	do	2,283
Orpheum	do	2,700
Blue Mouse	do	848
Music Box	do	846
Palomar	J. Danz Circuit	1,330
Liberty	Jensen-Von Herberg Theaters	1,680
Somerville, Mass.:		
Broadway	A. F. Viano	950
Teele Sq	do	980
Capitol	M & P	1,733
Ball Square	do	1,348
Somerville	A. F. Viano	700
South Bend, Ind.:		
Colfax	Great States	2,000
Palace	do	2,576
Granada	do	2,288

1. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew's (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Spokane, Wash.:		
Fox	Evergreen Theatres Corp. (Fox West Coast).	2,351
Orpheum	do	1,272
State	do	954
Granada	Howard Malbride	600
Syracuse, N. Y.:		
RKO Keith	S. K. E. Op. Corp., RKO Film Booking Corp.	2,548
Paramount	do	1,493
Eckel	do	1,408
Empire (Class B, 1st run)	do	1,171
Loew's State	Loew's Inc	2,906
Loew's Strand (M. O.)	do	1,620
Tacoma, Wash.:		
Roxy	John Hamrick Theatres	1,329
Music Box	do	1,500
Blue Mouse	do	647
Rialto	Mrs. H. T. Moore & J. Ousley	1,100
Riviera	Mike Barovic	600
Tampa, Fla.:		
Tampa	Florida Theatres, Inc	1,381
Strand	do	1,061
Park	do	1,281
State	B. E. Gore	615
Toledo, Ohio:		
Paramount	Silverman & Katz	3,406
Princess	do	940
Loew's Esquire	Loew's Inc	687
Granada	W. N. Skirball	1,274
Rivoli	do	2,474
Pantheon	do	922
Valentine	Loew's Inc	1,460
Trenton, N. J.:		
Mayfair	Hildinger	1,100
Stacy	do	700
Lincoln	RKO	2,342
Capitol	do	1,878
State	do	1,087
Trent (M. O. from Lincoln)	do	1,139
Palace	do	1,126
Tulsa, Okla.:		
Ritz	Ralph Talbot	1,234
Orpheum	do	1,400
Majestic	do	904
Rialto	do	1,250
Utica, N. Y.:		
Avon	Warner Bros	1,367
Olympic	C. C. Gordon	1,200
Stanley	Warner Bros	2,963

I. List of All First Run Theaters in the 92 cities in the United States Having a Population of 100,000 and Over Offered by Defendant Loew's (Ex. L-13)—Continued

Theatre	Operator	Number of Seats
Washington, D. C.:		
Loew's Palace	Loew's Inc.	3,352
Loew's Capitol	do	3,430
Loew's Columbia	do	1,210
Earle	Warner Bros.	2,240
Metropolitan	do	2,026
RKO Keith's	RKO	1,859
Little (Revivals)	Mrs. Louise Miller	300
Wichita, Kans.:		
Miller	Fox Midwest Theaters	1,935
Orpheum	do	1,657
Palace	do	1,234
Wichita	do	930
Sandra	do	640
Wilmington, Del.		
Rialto	A. J. Belair	732
Aldine	Loew's, Inc.	1,783
Queen	Warner Bros.	1,449
Warner	do	1,761
Grand Opera House	do	1,822
Worcester, Mass.:		
Palace	Loew's Poli	3,439
Elm	do	3,344
Warner	Warner Bros.	1,300
Capitol	M & P	1,879
Yonkers, N. Y.:		
Proctor's	RKO	2,060
Loew's Yonkers	Loew's Inc.	2,616
Youngstown, Ohio:		
Warner	Warner-Shea Pool	2,503
Paramount	do	1,526
Park	do	1,527
Palace	The Palace Co (Ed Printon)	2,300

J. TABULATIONS OFFERED BY DEFENDANTS SHOWING PROPORTIONS OF FILM RENTAL PAID BY THEIR THEATRES TO THEMSELVES, TO OTHER DEFENDANTS, AND TO INDEPENDENT DISTRIBUTORS, AND NUMBER AND SOURCE OF FILMS EXHIBITED IN SAID THEATRES

1. Loew:

(a) *Feature film license fees paid by Loew's metropolitan theatres for the fiscal years ending Aug. 31, 1931 to 1944 (Ex. L-8, R. 1674)*

	To Loew's		To Columbia		Paramount		R. K. O.		Republic	
	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total
1944	$3,730,535	60.2	$1,137,111	12.4	$1,661,260	18.9	$145,734	1.6	$160,173	1.8
1943	3,336,805	38.9	1,068,089	12.8	1,414,018	16.5	128,082	1.6	241,922	2.8
1942	2,706,439	39.6	913,780	13.3	1,366,236	20.0	130,653	1.9	98,268	1.4
1941	3,233,134	44.7	867,547	9.7	1,676,902	14.9	94,991	1.3	99,411	1.4
1940	3,807,076	48.4	789,157	9.6	1,233,960	16.1	114,820	1.5	87,309	1.2
1939	2,962,002	44.4	601,269	9.0	1,220,662	18.3	104,573	1.6	135,666	2.0
1938	2,627,082	38.1	704,319	10.2	1,408,012	20.3	134,548	2.1	124,608	1.9
1937	2,891,206	44.0	556,965	8.3	1,620,800	24.9	135,572	2.1	73,198	1.2
1936	[1] 377,871				[2] 2,519					
1935	1,270,411	30.3	312,538	7.5	827,340	19.8	104,942	2.5		
1934	1,666,230	35.9	72,666	1.5	962,919	20.8	104,364	2.2		
1933	1,511,831	[3] 36.1	111,943	2.8	897,518	22.6	84,189	2.0		
1932	1,962,194	41.9	218,114	4.6	1,169,652	25.8	32,754	.7		
1931	1,770,303	37.3	92,000	1.9	1,230,990	25.7	90,000	1.9		

See footnotes at end of table.

(Ex. L–8), continued

	20th Century Fox		United Artists		Universal		Warners		Miscellaneous		Total
	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	
1944	$115,095	1.2	$832,766	8.9	$1,233,536	13.2	$127,720	1.4	$253,519	2.7	$9,345,946
1943	136,175	1.6	1,267,792	14.8	795,907	9.3	122,334	1.5	11,443	.2	8,571,384
1942	140,938	2.1	744,257	10.8	610,315	8.9	127,735	2.0	7,703	.1	6,858,355
1941	114,652	1.6	1,304,512	18.0	408,804	5.7	167,441	2.3	28,642	.4	7,225,036
1940	156,800	2.0	1,065,947	13.5	393,560	5.0	137,358	1.7	85,514	1.2	7,871,991
1939	133,239	2.6	909,631	13.6	267,003	4.0	137,503	2.0	118,460	1.9	6,670,227
1938	173,490	2.6	1,261,616	18.3	199,088	2.9	163,462	2.5	100,545	1.6	6,900,918
1937	124,459	2.0	773,833	11.8	156,169	2.4	165,268	2.7	84,217	1.3	6,566,419
1936 [1]	[2] 12,750										392,840
1935	131,622	3.2	760,582	16.7	126,134	3.0	617,376	14.7	96,000	2.3	4,186,915
1934	20,474	.6	571,357	12.1	69,519	1.5	1,066,719	22.7	141,161	3.0	4,706,620
1933	88,516	2.1	313,073	7.6	39,849	1.0	790,909	19.1	230,314	5.5	4,183,082
1932	239,849	5.0	455,269	9.5	42,722	1.0	554,951	11.6	161,895	3.2	4,786,010
1931	250,278	5.0	794,318	15.6	45,000	1.0	321,285	6.6	244,000	5.1	4,756,201

[1] Year 1936: No feature film license fees paid by the Metropolitan theatres are included for this year.
[2] Capital Theatre only.

NOTE.—Each figure listed above represents film rental paid for features exhibited within the respective fiscal years.

(b) *Feature film license fees paid by all Loew theatres in United States (including Buffalo theatres) for the fiscal years ending Aug. 31, 1931, to 1944 (Ex. L–9, R. 1679)*

Year	To Loew's		To Columbia		Paramount		R. K. O.		Republic	
	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total
1944	$9,273,310	47.9	$1,714,566	8.8	$2,848,511	14.7	$403,845	2.1	$189,586	1.0
1943	7,771,784	44.9	1,561,131	9.0	2,142,361	12.4	382,695	2.2	292,097	1.7
1942	6,865,919	49.3	1,269,663	9.1	1,896,555	13.6	232,775	1.8	15,903	.1
1941	6,898,751	51.1	1,011,530	7.6	1,525,002	11.5	189,327	1.4	113,501	.9
1940	8,745,620	59.4	1,057,949	7.2	1,548,535	10.5	219,376	1.5	98,654	.7
1939	6,008,640	51.9	846,502	7.3	1,444,009	12.5	175,962	1.5	149,886	1.3
1938	5,335,169	45.0	1,000,914	8.4	1,658,780	14.0	207,414	1.8	136,111	1.1
1937	6,074,409	51.7	769,511	6.5	1,972,692	16.8	195,447	1.7	80,297	.7
1936 [1]	3,053,357	60.7	192,360	3.8	230,700	4.6	92,088	1.8		
1935	3,347,477	41.0	481,706	5.9	1,341,050	16.2	180,246	2.2		
1934	3,392,714	43.9	72,886	.9	1,351,357	17.5	104,364	1.4		
1933	3,186,856	45.1	111,943	1.6	1,441,525	20.4	84,189	1.2		
1932	4,057,511	48.5	218,114	2.6	1,669,089	20.2	32,754	.4		
1931	4,067,785	43.2	95,000	1.0	1,947,601	20.7	80,000	.9		

See footnote at end of table.

(Ex. L-9), continued

	20th Century-Fox		United Artists		Universal		Warner's		Miscellaneous		Total
	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	Rental	Percent of total	
1944	$1,186,069	6.1	$1,615,177	8.3	$1,428,709	7.4	$403,211	2.1	$315,074	1.6	$19,376,065
1943	1,067,137	6.2	2,732,551	15.8	938,178	5.4	371,225	2.1	38,050	.2	17,303,217
1942	919,963	6.6	1,561,306	11.4	731,977	5.2	377,193	2.7	28,434	.2	13,921,687
1941	846,172	4.1	2,283,970	17.2	468,033	3.5	298,870	2.2	68,606	.5	13,313,733
1940	484,747	3.3	1,871,575	12.6	421,011	2.9	169,397	1.1	122,185	.9	14,720,549
1939	521,309	4.5	1,698,523	14.7	292,683	2.5	273,498	2.4	161,740	1.4	11,573,692
1938	616,327	5.2	2,223,119	18.8	213,135	1.8	235,283	2.0	222,956	1.9	11,849,765
1937	553,724	4.7	1,568,131	13.3	171,894	1.5	227,894	1.9	138,821	1.2	11,753,730
1936	673,186	13.4	657,989	13.1	37,037	.7	57,014	1.2	34,222	.7	5,027,941
1935	309,670	6.2	1,426,266	17.5	178,894	2.2	681,030	8.3	118,442	1.5	8,164,793
1934	177,006	2.3	1,251,243	16.2	69,519	.9	1,186,180	15.0	181,122	1.9	7,728,302
1933	280,451	4.0	661,186	9.4	39,814	.6	947,314	13.4	288,726	4.1	7,060,001
1932	487,117	5.8	926,614	11.2	42,722	.5	662,614	7.9	240,940	2.9	8,358,758
1931	631,626	6.7	1,813,367	19.3	46,000	.5	454,746	4.8	275,639	2.9	9,425,708

[1] *Year 1936:* No feature film license fees paid by the metropolitan theatres are included for this year except the fees paid by the Capitol Theatre, New York City, which were paid to Loew's, Fox, and Paramount.

NOTE.—Each figure listed above represents film rental paid for features exhibited within the respective fiscal year.

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(c) Source of Feature Pictures Exhibited in all Loew's first-run theatres throughout the United States, 1934-45 (Ex. L-16, R.2252)

Season	Number of all features exhibited by Loew's first-run theatres	Number of Loew's features	Percent of Loew's features to all features	Number of "outside" features	Number of theatre-owned distributor's features (Fox, Par, RKO, and Warners)	Percent of theatre-owned distributor's features to all "outside" features	Number of non-theatre-owned distributors features	Percent of non-theatre-owned distributors features to "outside" features (percent)
1934-35	4,228	1,645	39	2,583	1,382	54	1,201	46
1935-36	4,347	1,[illegible]	38	2,695	1,[illegible]60	53	1,345	47
1936-37	4,168	1,698	41	2,470	1,333	54	1,137	46
1937-38	4,896	1,784	36	2,831	1,212	43	1,619	57
1938-39	4,561	1,929	42	2,632	1,111	42	1,521	58
1939-40	4,569	1,921	40	2,748	1,107	40	1,641	60
1940-41	4,986	2,006	40	2,980	1,345	45	1,735	58
1941-42	5,140	2,028	39	3,112	1,275	41	1,837	59
1942-43	4,977	1,717	34	3,260	1,205	40	1,955	60
1943-44	4,618	1,578	34	3,040	1,139	37	1,901	63
1944-45	4,294	1,417	33	2,877	998	35	1,879	65

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(d) Recapitulation of data in Exs. L–8, L–9, and L–16

Loew's Exhibit 8 confirms the fact that the preferred playing time in the affiliated theatres is reserved for affiliated features. It shows the film rentals which Loew's Metropolitan theatres paid to the distributor defendants, to the non-defendants, to Republic, and to all others (which are grouped under the heading "Miscellaneous"), for the years 1931 to 1944, inclusive. Thus, the Republic figure must be added to the Miscellaneous figure to secure the total for non-defendant distributors. This exhibit shows that there has been a decrease in the percentage of total rentals paid by these theatres to all non-defendant distributors from a high of 5.1% in 1931 to 4.2% in 1944, although this percentage has risen substantially from the lowest figure on the chart of 1.5% in 1942. The same percentages for *all Loew's theatres* is shown on Loew's Exhibit 9, which includes the Metropolitan theatres and the theatres outside that area, which are substantially all first run theatres. The percentage of total rental paid to non-defendants, as shown on this exhibit, are for the year 1931, 2.9%, for the year 1942, 0.3%, and for the year 1944, 2.6%, which, when compared with the higher percentage for the Metropolitan theatres, listed above, simply reflects the fact that Loew's Metropolitan circuit includes numerous subsequent runs in which non-defendant product gets some representation, while in the first runs outside the Metropolitan district non-defendant features get virtually no representation. The corresponding totals for the payments made to affiliated distributors and to other distributor defendants for the same years for the Metropolitan theatres and for all Loew theatres respectively are as follows:

	Loew's Metropolitan Theatres (ex L–9)		All Loew Theatres (ex L–9)	
	Major defendants	Other defendants	Major defendants	Other defendants
1931	76.5	18.4	76.3	20.8
1942	65.5	33.0	74.0	25.7
1944	61.3	34.5	72.9	24.5

Thus, while there has been a very great increase in the proportionate payments to unaffiliated defendants for the

use of their films in subsequent run theatres, there has been a counter-balancing decrease in proportionate first run rental payments to the unaffiliated defendants, which have resulted in only a small net decrease in the payments to affiliated distributors for all runs in all Loew theatres.

The fact that the most profitable playing time in first run theatres has been increasingly reserved for affiliated films is further confirmed by Loew's Exhibit 16, which shows the number of features exhibited by all of Loew's first run theatres for the seasons 1934–35 through 1944–45, inclusive, broken down among those released by Loew, by other affiliated distributors, and by all non-theatre owning distributors, which category, of course, includes the other defendant distributors as well as non-defendants. This exhibit shows that the percentage of Loew features used, in terms of numbers, decreased from 39% in 1934–35 to 33% in 1944–45, with an intervening peak of 42% in the 1938–39 season. It also shows that the proportion of all of the other features used by these theatres which were supplied by the affiliated distributors decreased from 54% in 1934–35 to 35% in 1944–45, with a correspondingly steady increase in the number of features supplied by non-theatre owning distributors from 46% to 65%. Yet, when these figures are compared with the proportionate rental payments for the roughly corresponding periods, tabulated in Loew's Exhibit 9, it appears that from the year 1935, which includes the last eight months of the 1934–35 season, to the year 1944, which includes only the first four months of the 1944–45 season, but is the last year shown on the exhibit, there was an increase in the payments made by all Loew theatres for Loew features from 41.0% to 47.9%, and a decrease in the payments of the same theatres for the features of the other affiliated distributors from 36.2% to 31.9% during this period. The total payments to all affiliated distributors by all Loew theatres thus actually increased from 77.2% to 79.8% during this period. Since the previous comparison of Loew's Exhibits 8 and 9 has already shown that Loew's first runs paid a higher percentage of their total film rental to affiliated distributors than their subsequent runs paid, it is apparent that despite the great increase in the proportion of films distributed by unaffiliated distributors used in the Loew first run theatres, there was a proportionate decrease in rental payments to them by those theatres.

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A comparison of the proportionate feature rentals paid by all Loew theatres to the same distributors during each of the calendar years 1931 to 1944, inclusive, was furnished in Ex. L–9. These figures show the following comparisons between the proportion of numbers of features used and the proportion of feature rentals paid to the various distributors which furnished them:

NUMBER OF FEATURES

	Major defendants	Other defendants	Nondefendants
1934–35 season	71.6	24.6	3.8
1944–45 season	56.2	31.7	12.1

FEATURE RENTALS

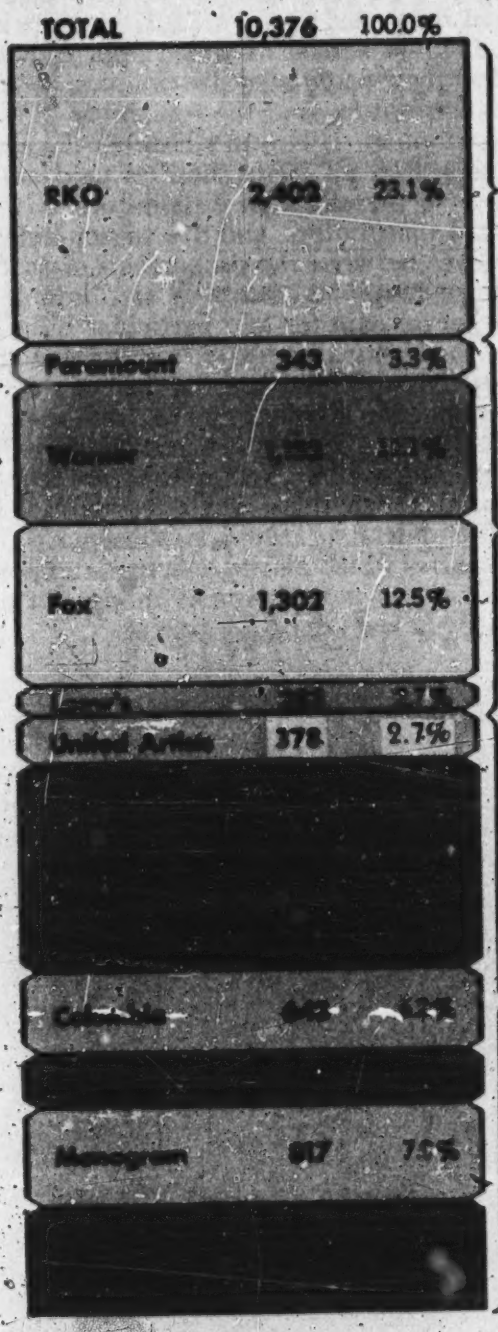
1935	72.9	25.6	1.5
1944	72.9	24.5	2.6

The foregoing table shows that the greatly increased use of features released by non-defendant distributors in recent years has resulted in no increase in the unaffiliated distributors' proportionate penetration of the domestic film market, in terms of dollars.

RKO:

(a) NUMBER OF FEATURE BILLINGS EXHIBITED (1943-44) IN RKO THEATRES: BY DISTRIBUTOR

FIRST RUN AND METROPOLITAN CIRCUIT RUN (Ex. RKO-8 (R-1659))



Source: RKO Film Booking Dept. Records

(b) *Recapitulation of data in Ex. RKO–8 (R. 1659) compared with RKO data in Ex. 424 (R. 2276, 2284)*

A comparison of Exhibit RKO–8 with plaintiff's Exhibit 424 (*supra*, p. 256) shows that R O's first run theatres and the theatres in its Metropolitan circuit, which are mainly subsequent runs, used a total of 10,376 feature billings during the 1943–44 season of which approximately 53% were supplied by the affiliated distributors, 26% by other defendant distributors, and the remaining 21% by nondefendant distributors. Plaintiff's Exhibit 424 shows that for the same season all RKO theatres paid out in rentals about 74% to the affiliated distributors, 23% to the other defendant distributors, and 3% to non-defendants. The difference between the proportions of feature billings and feature rental payments is attributable to the fact that the rental paid for any particular billing is dependent upon the particular run it represented in a particular competitive area and the number of days of the run. This comparison simply demonstrates that the non-defendant distributors did not get rentals per billing for their features comparable to those secured by the defendants' films, although there was a substantial use in numbers of non-defendant films in subsequent run theatres and in theatres which played on a first-run policy with inferior product and more frequent changes of program at comparatively low admission prices.

3. Fox:

(a) Film rentals respectively paid to eight defendants, Republic and other independents for calendar years 1935–44 (Ex. F–23, R. 2146):

National Theatres Amusement Co., Inc., Circuit Film Rentals Paid Distributors by Calendar Years, Relative Percentages

Distributor	1935	1936	1937	1938	1939	1940	1941	1942	1943	1944
	Percent	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*
20th Century Fox	27.47	23.17	22.51	21.90	22.37	16.72	18.90	23.60	21.26	20.01
Loew's	23.46	25.51	25.38	24.48	26.10	24.05	24.38	24.05	21.14	23.51
Loew's G. W. T. W						[1] 10.70	[1] 2.30			
Paramount	16.09	16.19	15.47	14.23	13.46	12.71	12.93	15.12	13.49	15.61
Vitagraph	11.25	11.90	11.82	12.10	11.18	8.87	12.74	11.86	12.56	9.62
R. K. O	7.25	7.60	7.77	10.24	7.78	8.00	7.04	7.90	10.26	9.82
	85.52	84.37	82.95	81.95	80.89	81.05	78.47	81.25	78.70	78.27
United Artists	5.46	4.29	6.83	6.82	7.23	6.83	6.58	4.39	6.39	4.87
Columbia	2.60	3.07	3.75	3.58	4.01	3.94	5.30	4.46	4.48	4.59
Universal	2.90	3.82	3.19	4.22	5.29	5.54	6.31	6.62	7.10	6.11
Republic	(2)	.98	1.05	1.40	1.53	1.78	1.97	2.13	1.76	2.27
Miscellaneous	3.33	1.98	2.80	1.33	1.06	.96	1.37	1.15	1.37	2.19
Total	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00

[1] Roadshow engagements.
[2] Popular price run.
[3] 1935 Republic in Miscellaneous—no break-down available.

(b) Recapitulation of Ex. F–23, (R. 2146) showing independents' high, low, and first and final percentage:

The respective percentages of total film rentals paid by theatres affiliated with Fox to affiliated distributors, to other defendants, and to non-defendants appear as follows on Exhibit F–23:

	Major defendants	Other defendants	Non-defendants
(First year) 1935	85.59	11.05	3.32
(Nondefendants low) 1939	80.89	16.33	2.78
(Last year—also nondefendants high) 1944	78.27	17.27	4.46

4. Warner:

(a) Film rentals respectively paid to eight defendants and independents during fiscal years ended August 1931–45 (Ex. W–3, R. 1811):

Warner Bros. Pictures, Inc., and subsidiaries and affiliated theatres, total film rentals paid by Warner theatres

Fiscal year ended August	Companies to whom paid									
	Warner	Paramount	Loew's	20th Century-Fox	R. K. O. and Pathe	United Artists	Columbia	Universal	All others	Grand total
1931	$5,937,665	$916,304	$2,350,576	$1,826,299	$1,715,815	$1,228,936	$323,822	$1,007,361	$949,600	$16,263,378
	36.51%	5.63%	14.51%	11.23%	10.54%	8.17%	2.22%	6.19%	4.60%	100%
1932	4,320,660	2,003,059	1,394,978	1,501,204	1,335,278	375,446	743,788	1,078,063	710,464	13,462,980
	32.09%	14.88%	10.36%	11.15%	9.92%	2.79%	5.52%	8.01%	5.28%	100%
1933	4,019,562	1,846,457	1,418,676	1,133,883	955,955	578,056	435,030	762,161	804,312	11,663,660
	34.49%	15.84%	12.17%	9.73%	8.20%	4.96%	3.73%	6.54%	4.34%	100%
1934	3,773,589	2,008,661	2,064,922	330,357	1,273,950	586,233	469,153	898,259	367,462	11,722,586
	32.18%	17.65%	17.61%	2.83%	10.87%	5.00%	4.00%	7.66%	3.20%	100%
1935	3,851,272	2,255,043	2,130,704	866,083	1,370,179	810,718	630,096	892,386	423,861	13,030,322
	29.55%	17.31%	16.35%	6.65%	10.51%	6.22%	4.84%	5.31%	3.26%	100%
1936	3,847,644	2,371,267	2,614,908	1,447,249	1,514,884	895,963	685,574	764,819	363,279	14,405,337
	26.71%	16.46%	18.16%	10.05%	10.52%	6.19%	4.09%	5.30%	2.54%	100%
1937	4,631,261	2,835,560	3,295,677	1,909,935	1,530,367	983,149	691,240	742,352	448,479	16,841,076
	28.00%	15.33%	19.56%	10.94%	9.19%	5.82%	3.68%	4.40%	2.72%	100%
1938	4,358,629	2,210,885	3,214,896	1,882,857	1,757,635	1,577,645	683,434	837,414	418,311	16,943,406
	25.72%	13.05%	18.97%	11.11%	10.37%	9.31%	4.03%	4.94%	2.46%	100%
1939	4,709,562	2,117,858	3,640,980	1,808,179	1,478,740	1,244,937	890,853	1,014,489	413,014	17,008,619
	27.69%	12.45%	21.41%	9.98%	8.69%	7.32%	4.69%	5.96%	2.44%	100%
1940	4,433,071	2,155,729	4,374,114	1,570,888	1,760,654	1,248,081	878,642	1,209,642	438,841	18,359,192
	24.14%	11.74%	24.91%	8.55%	9.59%	6.80%	4.79%	7.09%	2.39%	100%
1941	4,988,827	2,327,965	3,844,606	1,430,553	1,394,782	1,321,936	900,302	1,371,414	438,556	17,989,292
	27.56%	12.95%	21.37%	7.95%	7.75%	7.35%	5.01%	7.62%	2.44%	100%
1942	5,982,681	2,441,640	3,608,472	1,956,660	1,636,570	956,333	1,067,630	1,764,503	465,950	19,880,438
	30.09%	12.28%	18.15%	9.84%	8.23%	4.82%	5.37%	8.88%	2.34%	100%

Warner Bros. Pictures, Inc., and subsidiaries and affiliated theatres, total film rentals paid by Warner theatres—Continued

Fiscal year ended August	Companies to whom paid									
	Warner	Paramount	Loew's	20th Century-Fox	R. K. O. and Pathe	United Artists	Columbia	Universal	All others	Grand total
1943	6,559,908	2,574,685	3,574,757	2,242,909	2,414,645	938,976	1,217,243	2,153,143	625,541	22,821,947
	28.74%	11.72%	16.06%	8.83%	10.59%	4.20%	5.75%	9.43%	2.74%	100%
1944	6,212,206	3,030,692	4,045,440	1,383,886	2,230,178	725,807	1,216,509	2,518,722	886,056	23,443,234
	26.50%	12.92%	17.25%	10.09%	9.94%	3.09%	5.62%	10.75%	3.84%	100%
1945	7,762,557	3,477,731	4,415,996	2,270,580	2,820,488	1,476,806	1,331,281	2,006,328	927,971	26,508,686
	29.28%	13.13%	16.66%	8.80%	10.67%	5.58%	5.02%	7.56%	3.51%	100%

NOTE.—Represents film rental for features, shorts, and newsreels paid by Warner theatres for fiscal year indicated. The film rental paid "Warner" does not include the rental paid for the picture "This is The Army." This rental is also excluded from the grand total.

Film rentals for the following nonconsolidated companies are included above:
Atlantic Theatres, Inc., 50% owned by Warners.
Mansfield Operating Company, 50% owned by Warners.
Mt. Oliver Theatre Company, 50% owned by Warners.
Regent-State Corporation, 50% owned by Warners.
Standard Theatres Corporation, 50% owned by Warners.
W. F. Theatre Company, 50% owned by Warners.
Stanley Shapiro Theatre Co., 51% owned by Warners.

Film rentals for the following theatres owned or leased by others, included in operating agreements are included above.
Paramount Theatre, Hammond, Ind.
Frankfort and Nixon Theatres, Philadelphia, Pa.
Tower and Roosevelt Theatres, Philadelphia, Pa.
Oriental and Tower Theatres, Milwaukee, Wis.
State and Strand Theatres, Harrisonburg, Va.
Regent Theatre, Kearny.
Elwood Theatre, Newark.
Palace Theatre, Orange.
Royal and Broadmoor Theatres, Bloomfield.
Bellevue Theatre, Upper Montclair.
Rio Theatre, Appleton (became 100% owned by Warners 4/30/44).

(b) *Recapitulation of Ex. W–3 showing independents' high, low, and first and final percentage:*

The respective percentages of total film rentals paid by Warner theatres to affiliated distributors, to other defendants, and to non-defendants appear as follows on Exhibit W–3:

	Major defendants	Other defendants	Nondefendants
(First year) 1931	78.62	17.38	4.00
(Nondefendants high) 1932	78.40	16.22	5.38
(Nondefendants low) 1934	82.14	15.58	2.28
(Last year) 1945	78.32	18.16	3.51

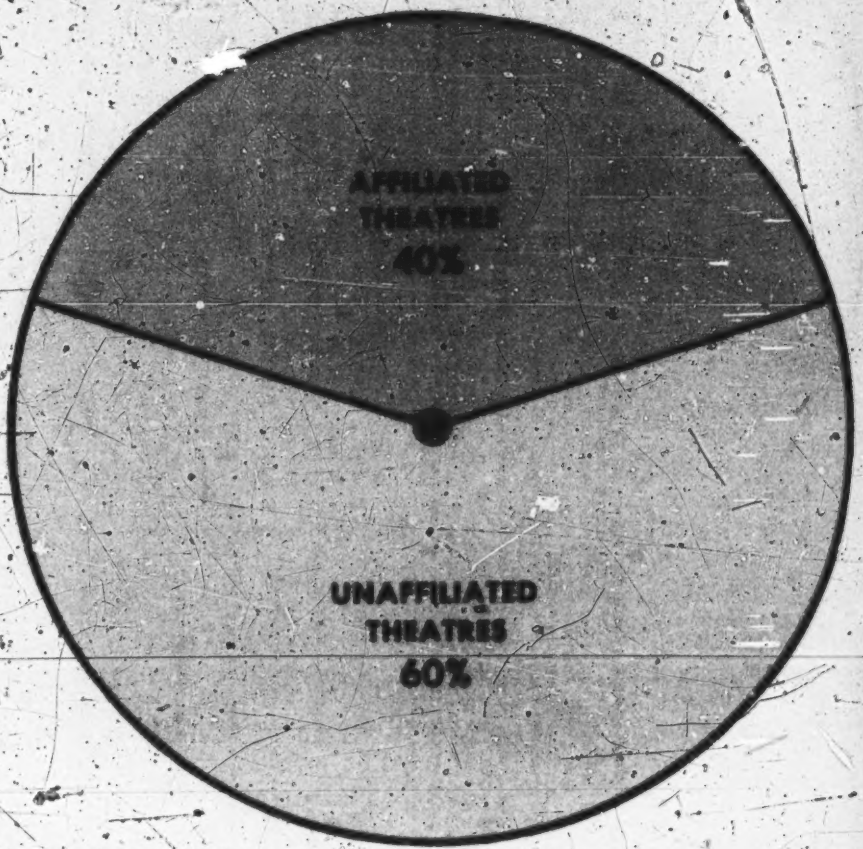
K. Tabulations offered by defendants showing proportion of film rental received from their own theatres, theatres of other defendants, and independent theatres.

1. Fox:

(a) U.S. film revenue for 1943–44 apportioned between (a) affiliated and unaffiliated theatres, (b) unaffiliated, Fox, and other affiliated theatres, and (c) unaffiliated, Fox, and other affiliated theatres in cities of less than 25,000, cities of 25,000 to 100,000, and cities of over 100,000, respectively (Ex. F–26, R. 2147.)

TWENTIETH CENTURY-FOX FILM CORPORATION

SOURCE OF 1943-'44 UNITED STATES FILM REVENUE

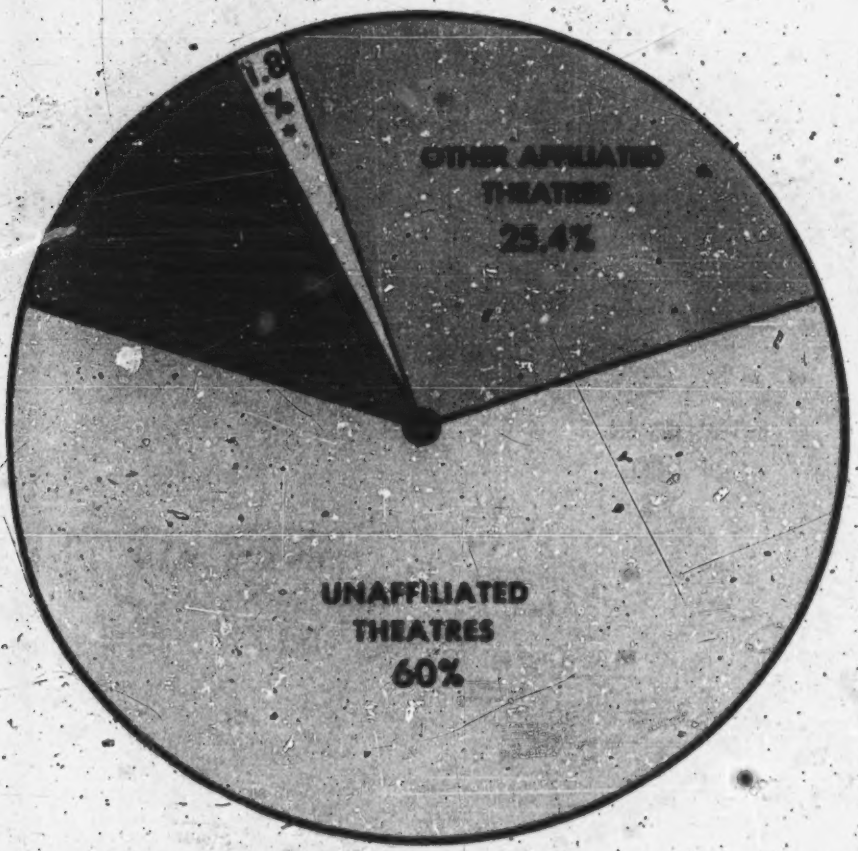


SOURCE: EXHIBIT F-

PREPARED BY:
DWIGHT, HARRIS, KOEGEL & CAREY

TWENTIETH CENTURY-FOX FILM CORPORATION

SOURCE OF 1943-'44 UNITED STATES FILM REVENUE



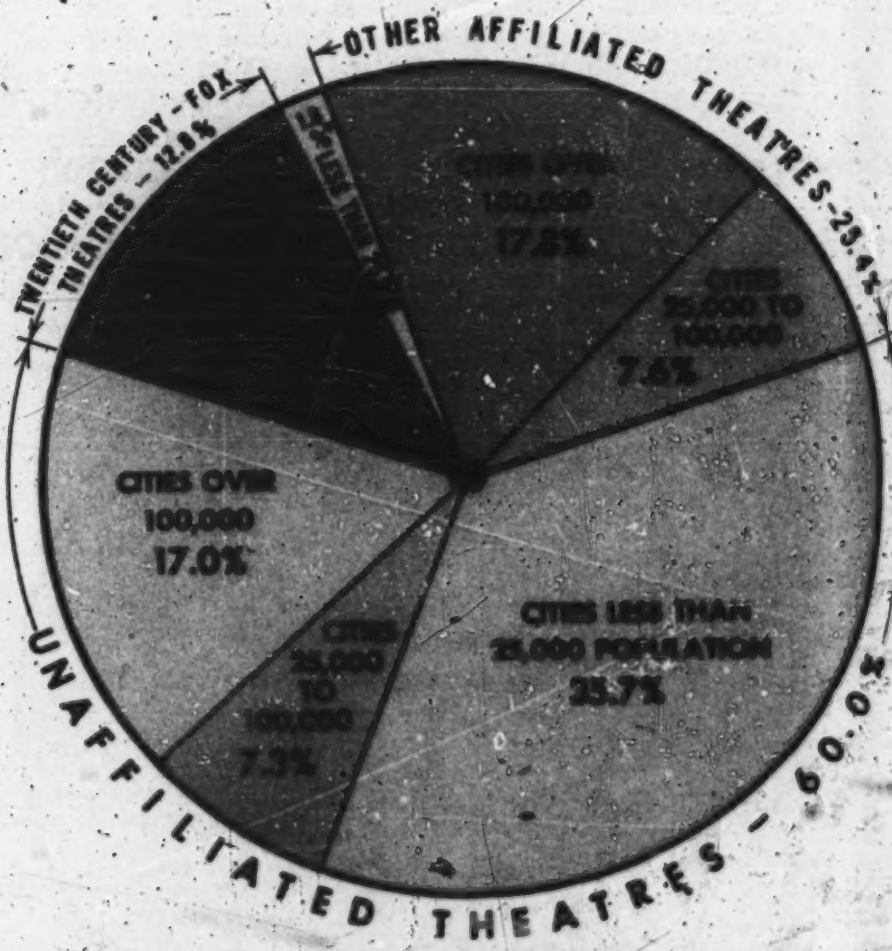
*This represents revenue paid by all affiliated theatres, including ieth Century-Fox theatres, in towns less than 25,000 population. mount attributable to each affiliated group is not readily ascertainable.

SOURCE - EXHIBIT F-19

Prepared By:
, Harris, Kiegel & Caskey

TWENTIETH CENTURY-FOX FILM CORPORATION

SOURCE OF 1943-'44 UNITED STATES FILM REVENUE

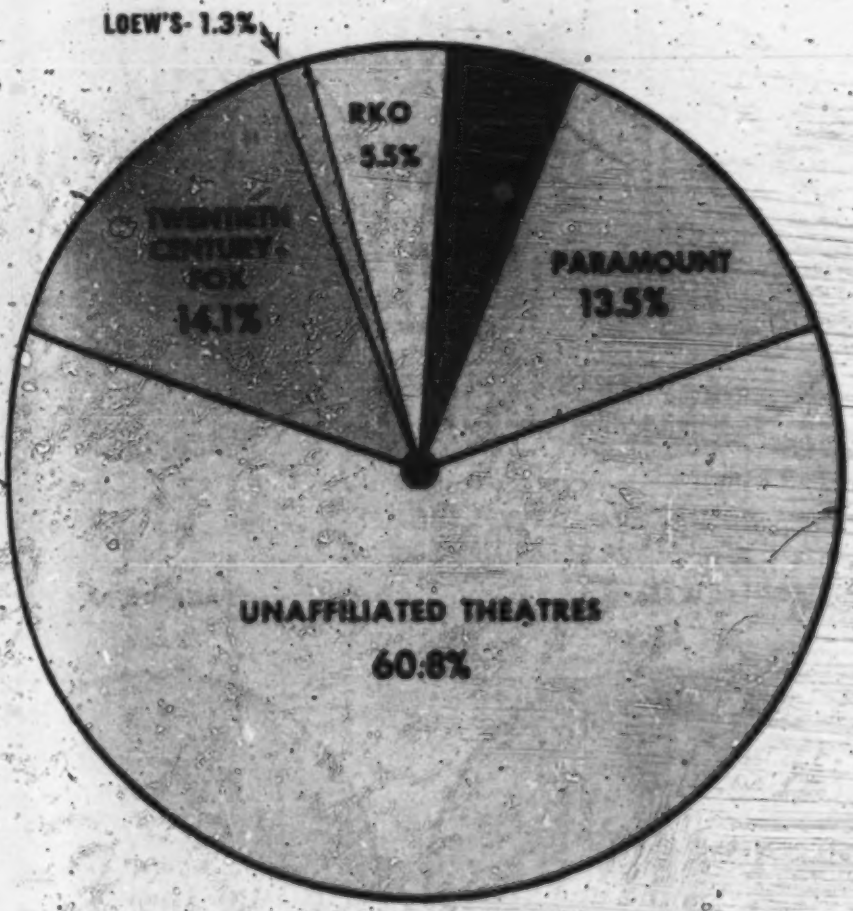


* This represents revenue paid by all affiliated theatres, including Twentieth Century-Fox theatres, in towns less than 25,000 population. The amount attributable to each affiliated group is not readily ascertainable.

SOURCE - EXHIBIT

Prepared By:
Dwight Harris, Koegel & Caskey

(b) PERCENTAGE OF PRODUCER-EXHIBITOR REVENUE TO TOTAL DOMESTIC REVENUES FOR YEARS 1933–1944 (Ex. F-27, R. 2147)

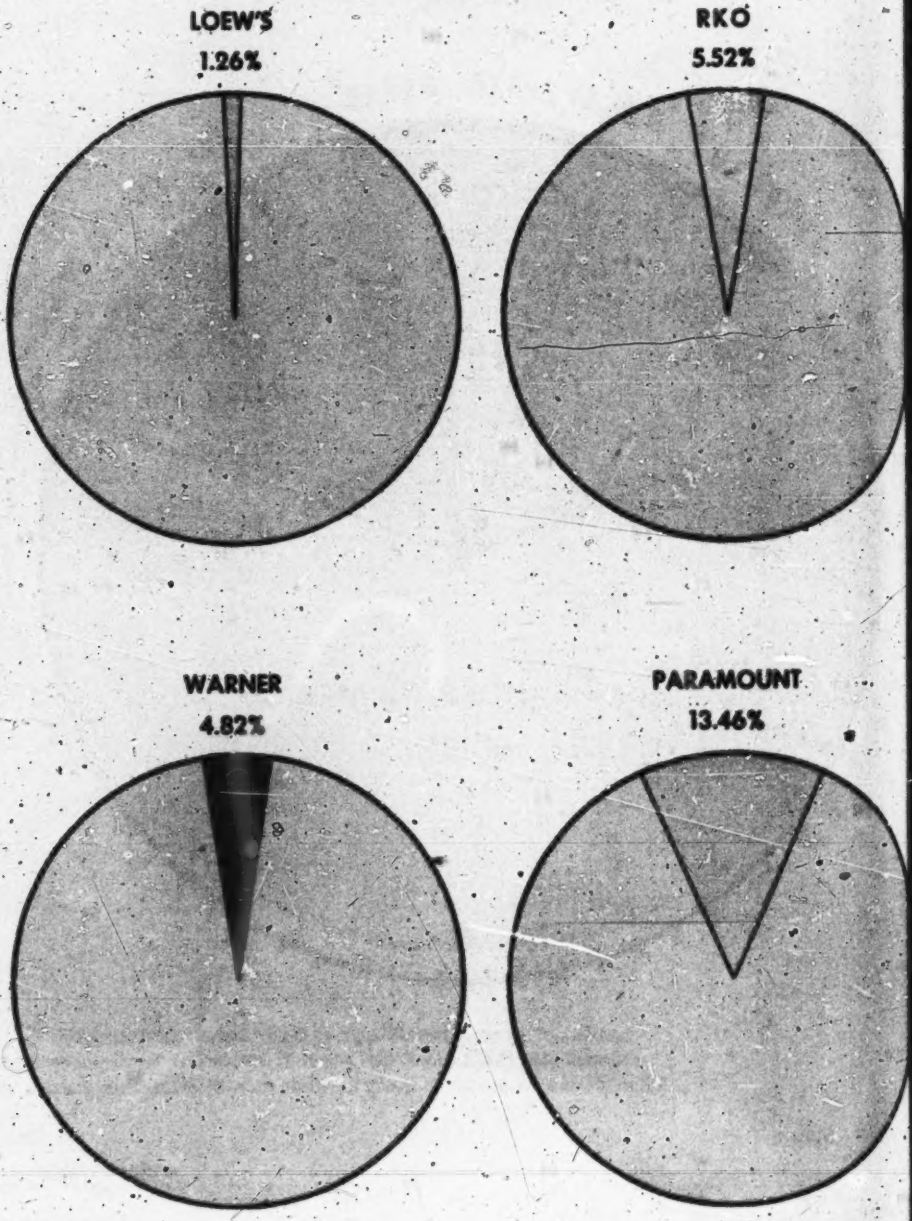


SOURCE: EXHIBIT F-18

Prepared By:
[illegible], Harris, Kohlmeier & Caskey

The Whalen Chart Co., N. Y.

TWENTIETH CENTURY-FOX FILM CORPORATION
PERCENTAGE OF PRODUCER-EXHIBITOR REVENUE TO TOTAL DOMESTIC REVENUE
1944



Prepared By
Dorsey, Harris, Kimball & Cooley

2. Loew:

(a) Total domestic feature rentals received from Fox, Paramount, RKO, Warner, and all others, excluding Loew, and total rentals paid by Loew to Fox, Paramount, RKO, Warner and all others, excluding Loew, for years 1937–44 (Ex. L–10, R. 1679):

Loew's outside payments 1937–1944, total feature film license fees received by Loew's as a distributor from all domestic exhibitors (excluding Loew's)

Year		Fox rental	Paramount rental	R. K. O. rental	Warner rental	Rental all others	Total
1937	Loew's received	$2,839,252	$5,873,712	3640,380	$2,925,832	$16,299,400	$28,578,576
	Loew's paid	553,724	1,972,692	198,447	227,804	2,726,654	5,679,321
1938	Loew's received	2,543,726	5,941,104	628,316	2,897,076	17,985,988	29,996,209
	Loew's paid	616,327	1,658,750	207,414	235,988	3,796,235	6,514,594
1939	Loew's received	2,674,040	6,650,904	744,588	3,273,192	19,413,628	32,956,352
	Loew's paid	521,309	1,444,009	175,982	273,488	3,150,284	5,565,082
1940	Loew's received	4,197,533	8,883,597	1,014,101	4,007,073	23,817,566	41,919,870
	Loew's paid	464,747	1,548,835	219,376	168,867	3,581,374	5,982,929
1941	Loew's received	3,384,907	7,405,[illegible]	731,153	3,538,937	22,855,443	37,896,436
	Loew's paid	546,172	1,525,002	189,327	298,870	3,945,610	6,504,981
1942	Loew's received	3,496,040	7,851,302	708,951	3,294,102	21,936,130	37,286,523
	Loew's paid	919,963	1,898,555	232,775	377,192	3,627,283	7,055,768
1943	Loew's received	4,292,256	8,415,628	753,480	3,431,220	22,365,200	39,257,764
	Loew's paid	1,067,127	2,142,381	382,695	371,225	5,562,006	9,525,433
1944	Loew's received	5,169,944	9,947,428	841,380	3,731,209	26,164,580	44,954,520
	Loew's paid	1,186,089	2,848,511	403,848	403,711	5,261,116	10,102,755

3. Warner:

(a) Total U. S. and Canadian film revenues received from theatres owned, operated, or affiliated with Warner, Paramount, Fox, Loew, RKO, and all others for fiscal years ending August 1931–1945 (Ex. W–4, R. 1812).

Fiscal year ending August	Film rentals received from theatres owned, operated, or affiliated with—						All other accounts	Grand total
	Warner	Paramount	Fox	Loew's	R. K. O.	Total		
1945	$7,762,557	$6,993,306	$2,594,643	$316,799	$2,089,704	$19,657,009	$21,830,233	$41,487,242
	18.7%	16.8%	6.4%	0.8%	5.0%	47.4%	52.6%	100%
1944	6,212,206	5,978,499	2,331,617	203,283	1,660,886	16,386,551	19,686,705	36,073,256
	17.3%	16.5%	6.4%	0.6%	4.6%	45.4%	54.6%	100%
1943	6,559,968	6,176,037	2,197,297	226,430	1,672,931	16,832,663	19,856,871	36,689,534
	17.8%	16.9%	6.0%	0.6%	4.6%	45.9%	54.1%	100%
1942	5,962,681	6,370,718	1,699,095	208,808	1,800,491	16,061,593	21,437,601	37,499,194
	15.9%	16.9%	4.6%	0.5%	4.9%	42.8%	57.2%	100%
1941	4,958,827	5,117,417	1,589,912	194,673	1,898,256	13,759,085	19,260,899	33,019,984
	15.0%	15.5%	4.8%	0.5%	5.8%	41.6%	58.4%	100%
1940	4,433,001	3,909,766	1,103,861	179,204	1,690,570	11,316,402	18,448,446	29,764,848
	14.9%	13.1%	3.8%	0.6%	5.7%	38.1%	61.9%	100%
1939	4,709,562	4,309,383	1,495,876	278,610	1,767,615	12,561,001	19,473,255	32,034,256
	14.8%	13.4%	4.8%	0.8%	5.5%	39.3%	60.7%	100%
1938	4,358,629	3,872,560	1,456,882	228,320	1,768,347	11,684,747	19,093,674	30,778,421
	14.0%	12.8%	4.7%	0.7%	5.7%	37.9%	62.1%	100%
1937	5,631,281	4,001,691	1,443,101	234,200	1,592,281	11,902,554	19,260,062	31,162,616
	14.8%	12.8%	4.7%	0.7%	5.2%	38.2%	61.8%	100%
1936	3,847,644	2,616,511	1,070,019	285,778	1,181,089	9,001,051	17,540,554	26,541,605
	14.5%	9.8%	4.1%	1.1%	4.4%	33.9%	66.1%	100%
1935	3,851,272	3,087,319	1,030,486	765,224	926,941	9,661,242	16,237,970	25,899,212
	14.9%	11.9%	3.9%	2.9%	3.6%	37.2%	62.8%	100%
1934	3,773,589	2,631,436	688,718	1,118,706	343,686	8,726,135	14,528,930	23,255,065
	16.2%	11.3%	3.7%	4.8%	1.5%	37.5%	62.5%	100%
1933	4,019,562	2,932,016	999,232	977,007	242,101	9,175,918	13,302,585	22,478,503
	17.9%	13.1%	4.4%	4.3%	1.1%	40.8%	59.2%	100%
1932	4,320,680	2,749,130	805,551	698,060	825,795	9,399,216	13,008,720	22,407,936
	19.3%	12.3%	3.6%	3.2%	3.6%	42.0%	58.0%	100%
1931	5,937,665	2,913,742	1,489,161	483,117	890,290	11,724,975	17,073,982	28,798,957
	20.7%	10.1%	5.2%	1.7%	3.1%	40.8%	59.2%	100%

NOTE.—Film Rentals received include receipts for Features, Short Subjects, Trailers and Advertising Accessories. Receipts from "This Is the Army" are excluded. All figures for years prior to 1940-41 are compiled on basis of collections. Figures shown for 1940-41 and subsequent years are compiled on basis of Net Billings with the exception of Warner Theatres which are on a collection basis for all years.

IV—The Consent Decree of 1940 and Rules of Arbitration Under It

A. Consent Decree

In the District Court of the United States for the Southern District of New York

Civil Action No. 87–273

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S, INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; AND UNITED ARTISTS CORPORATION, DEFENDANTS

DECREE

The United States of America having filed its Petition herein on July 20, 1938, and its Amended and Supplemental Complaint on November 14, 1940; the defendants: Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loew's Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Keith-Albee-Orpheum Corporation; RKO Proctor Corporation; RKO Midwest Corporation; Warner Bros. Pictures, Inc.; Vitagraph, Inc.; Warner Bros. Circuit Management Corporation; Twentieth Century-Fox Film Corporation, and National Theatres Corporation[1] having appeared and severally filed their answers to such Petition and to such Amended and Supplemental Complaint and having asserted the truth of their answers and their innocence of

[1] The above-named defendants are referred to hereinafter as the consenting defendants.

any violation of law; and no testimony having been taken, but each of the consenting defendants having consented to the entry of this decree without any findings of fact, upon condition that neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being (1) an admission or adjudications that the allegations of the Petition or of the Amended and Supplemental Complaint, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated or are or is violating any statute or law, or (2) evidence that such allegations, or any of them, are or is true, or that such defendants, or any one or more of them, have or has violated any statute or law, or (3) an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of any statute or law, and upon the further conditions hereinafter set forth; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof upon such conditions, and having moved the Court for the entry of this decree;

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

I

The Court has jurisdiction of the parties hereto; and for the purposes of this decree and of proceedings for the enforcement thereof, and for no other purpose, the Court has jurisdiction of the subject matter hereof and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies".

The Petitioner not having offered any proof of its allegations that defendants have violated the antitrust laws, and defendants having denied each and every such allegation, this Court has not determined or adjudicated and by this decree does not determine or adjudicate, and this is not a decree to the effect that any of said defendants has violated or is now violating any of such laws, or any other statute; and this decree relates solely to future conduct herein below specified and

is not based upon any finding, determination, or adjudication that any right or statute has yet been or is now being violated.

II

Each consenting defendant, its successors, officers, directors, agents and employees, and all persons and corporations acting under, through, or for it, hereby is and are enjoined from doing the acts prohibited by this decree, and is and are directed to do the acts thereby required.

III

No consenting defendant engaged in the distribution of motion pictures (hereinafter referred to as a distributor defendant) shall license or offer for license [2] a feature motion picture [3] (hereinafter sometimes referred to as a feature) for public exhibition within the United States of America at which an admission fee is to be charged, until the feature has been trade shown [4] within the exchange district [5] in which the public exhibition is to be held. Every trade showing shall be preceded by a notice, published in a trade publication [6] having general circulation among exhibitors [7] in such exchange district, which shall state the title of the picture and the date and the time when and the place or places where it will be trade shown.

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[2] License means (as a verb) to make an agreement, or (as a noun) an agreement, by which a distributor grants the right to exhibit a motion picture in any theatre engaged in the exhibition of motion pictures for profit.

[3] A feature motion picture is a motion picture approximately 5,000 feet, or more, in length.

[4] A trade showing is an exhibition of a feature at a theatre or projection room for the benefit of exhibitors generally.

[5] Each distributor defendant shall file with the Department of Justice a map of each of its exchange districts, showing the territorial limits thereof. Changes in the territorial limits of an exchange district shall be made only after two weeks' notice to the Department of Justice. References in this Section and in Sections V, IX and XVIII hereof to exchange districts are to exchange districts of each distributor defendant, as constituted from time to time.

[6] Trade publication means a daily or weekly newspaper or magazine which is devoted primarily to news concerning the motion picture industry.

[7] Exhibitor means any individual, partnership, unincorporated association, or corporation engaged in the public exhibition of motion pictures in a theatre or theatres for profit.

IV

(a) No distributor defendant shall offer for license or shall license more than five features in a single group. In offering its features for license to an exhibitor a distributor may change the combinations of features in groups as it may from time to time determine, and may license or offer for license as many groups of features as it may from time to time determine, provided that the license or offer for license of one group of features shall not be conditioned upon the licensing of another feature or group of features.

(b) No distributor defendant shall require an exhibitor to license short subjects, newsreels, trailers, or serials (hereinafter collectively referred to as shorts) as a condition of licensing features. No distributor defendant shall require an exhibitor to license reissues, westerns,[8] or foreign[9] (hereinafter collectively referred to as foreigns) as a condition of licensing other features.

Where a license has been entered into, controversies arising upon a complaint by an exhibitor that the licensing to him of one group of features was conditioned by the distributor upon the licensing of another feature or group of features or the licensing of shorts or foreigns shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds thereof, not later than two days after receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application or applications for such features, shorts or foreigns. The power[10] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the licensing of such features was so conditioned; and, if the finding be in the affirmative, (2) an award cancelling the license for (or to the extent that it may

[8] Westerns are those western pictures which are not of the usual character and type of, and are inexpensively produced as compared with, the distributor's general line of features.

[9] Foreigns are features produced outside of the United States except such as are produced in the English language by the distributor or a subsidiary or affiliate thereof.

[10] When, in any arbitration under this decree, the finding of the arbitrator shall be that the complainant has not sustained his complaint, the arbitrator shall enter an award dismissing the complaint.

relate to) such other feature or group of features, or such shorts or foreigns.

Where no license has been entered into, controversies arising upon a complaint by an exhibitor that a distributor defendant has offered for license to him more than five features in a single group or that the offer of a license to him of one group of features was conditioned upon the licensing of another feature or group of features, or the licensing of shorts or foreigns, shall be subject to arbitration. An exhibitor shall have no right to assert any claim that an offer so to license such features was so made or conditioned unless he shall have mailed to the distributor at its Home Office a notice in writing of such claim and of the grounds therefor not later than five days after the exhibitor claims the alleged offer was made. The power [11] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the offer to license such features was so made or conditioned; and, if the finding be in the affirmative, (2) an award imposing upon the distributor making such offer a penalty in an amount not to exceed five hundred dollars ($500.00). Such penalty shall be payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

V

No license for features to be exhibited in theatres located in one exchange district [12] shall include theatres located in another exchange district, nor shall the licensing of features for exhibition in theatres located in one exchange district be conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district.

Controversies arising upon a complaint by an exhibitor thereby affected that the licensing by a distributor defendant of features for exhibition in theatres located in one exchange district was conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district shall be subject to arbitration. The power [13] of the arbitrator in deciding

[11] See footnote 10 to this Section.
[12] See footnote 5 to Section III.
[13] See footnote 10 to Section IV.

any such controversy shall be limited to making (1) a finding as to whether or not the licensing of features for exhibition in theatres located in one exchange district was so conditioned upon the licensing of a feature or group of features for exhibition in theatres located in another exchange district; and, if the finding be in the affirmative, (2) an award imposing upon the distributor defendant so licensing features a penalty in an amount not to exceed five hundred dollars ($500.00), payable into the arbitration fund referred to in subdivision 8 of Section XXII hereof.

VI

No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising upon a complaint by an exhibitor that, contrary to the provisions of this Section, a distributor defendant has refused so to license its pictures shall be subject to arbitration. The power [14] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not, contrary to the provisions of this Section, the distributor has refused to license its pictures to the complainant for exhibition in said theatre; and, if the finding be in the affirmative, (2) an award directing the distributor to offer its pictures for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this Section. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

[14] See footnote 10 to Section IV.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor's total film revenue in said area, he shall vacate the award.[15]

VII

Controversies arising upon the complaint of an exhibitor that a feature licensed to him by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality served by such theatre on moral, religious, or racial grounds shall be subject to arbitration. An exhibitor shall have no right to assert any such claim unless written notice of his election to cancel such feature, together with a statement of his reasons therefor, shall have been mailed to the distributor defendant at its Home Office not later than ten days after the receipt by the exhibitor of the distributor's written approval of the exhibitor's signed application for such feature. In such event the license in so far as it relates to the exhibition of such feature in the theatre specified in the notice shall be deemed cancelled unless within five days after receipt of such notice, the distributor shall have mailed to the exhibitor a notice in writing of its denial of such claim and of its intention to arbitrate the controversy. The power [16] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the feature is generally offensive in the locality served by the exhibitor's theatre on moral, religious, or racial grounds; and, if the finding be in the affirmative, (2) an award cancelling the license in so far as it relates to the exhibition of such feature in said theatre.

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[15] See footnote 10 to Section IV.

[16] (Section VII) See footnote 10 to Section IV.

VIII

Controversies arising upon the complaint of an exhibitor that the clearance [17] applicable to his theatre is unreasonable shall be subject to arbitration under the following provisions:

It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures.

In determining whether any clearance complained of is unreasonable, the arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The historical development of clearance in the particular area wherein the theatres involved are located;

(2) The admission prices of the theatres involved;

(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut-rate tickets, lotteries, etc.;

(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

(6) The extent to which the theatres involved compete with each other for patronage; and

(7) All other business considerations, except that the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres.

The power [18] of the arbitrator in deciding any such controversy shall be limited to making (1) a finding as to whether or not the clearance complained of is unreasonable; and, if the finding be in the affirmative, (2) an award fixing the maximum clearance between the theatres involved which may be granted in licenses thereafter entered into by the distributor defendant which is a party to the arbitration. Subject to the provisions of Section

[17] (Section VIII) Clearance means the period of time, fixed by agreement between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres.

[18] See footnote 10 to Section IV.

XVII hereof, the award may fix such maximum clearance under any then existing franchise or any license entered into pursuant to such franchise between such distributor defendant and any other party bound by this decree.

Any distributor defendant or any exhibitor affected by such an award may institute a further arbitration proceeding for a modification thereof upon the ground that since the making of the award the conditions with respect to the theatres involved therein have so changed as to warrant modification; and, in the event that the arbitrator finds that there has been such change,[20] he shall make a redetermination of the maximum clearance.

Nothing contained in this Section shall be deemed to restrict, and no award made in any arbitration under this Section shall restrict, the exhibitor's right to license for any theatre any run which he is able to negotiate with any distributor, nor the distributor's right to license for any theatre any run which it desires to grant.

Nothing contained in this Section and no award hereafter entered in any arbitration in accordance with its provisions shall apply to licensing the exhibition of any special feature,[20] provided such special feature is licensed under an exhibition contract applicable only thereto, or to the right of a distributor defendant to include in such contract and to make a part thereof such special terms and conditions, including such special clearance provision or provisions, as such distributor shall fix, establish and enforce for and in connection with the exhibition of such special feature.

IX

In booking prints for exhibition by exhibitors competing on the same run in the same exchange district,[21] a distributor defendant shall not withhold delivery of prints available in its exchange from one exhibitor in order to give a competing exhibitor a prior playing date not provided for in his license. It is recognized that distributors must be permitted discretion in the ordinary course of

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[20] See footnote 10 to Section IV.

[20] For the purposes of this Section, a special feature means a feature which for a period of time is exhibited at generally advanced first-run admission prices.

[21] See footnote 5 to Section III.

booking and distributing films in an exchange district when too few prints are available in the exchange for the playing date desired by two or more theatres. In such cases this Section shall have no application.

Violations of this Section shall be subject to arbitration and, if the arbitrator finds [32] that the distributor complained against has pursued a policy of withholding available prints from the complaining exhibitor in violation of this Section, he shall enter an award directing the distributor to discontinue such policy.

X

A. Controversies arising upon a complaint by an independent exhibitor [33] that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by said exhibitor in one of said exhibitor's theatres which was in existence or which replaced [34] a theatre in existence at the date of this decree shall be subject to arbitration.

B. In any such arbitration no award shall be made against a distributor defendant unless the arbitrator shall first find the following facts:

(1) The complainant is an independent exhibitor and the theatre operated by him and specified in his complaint was in existence at the date of the decree or replaced such a theatre; and

(2) Such refusal of the distributor to license its features for exhibition in the complainant's theatre on the run requested by the complainant continued during a period of not less than three successive months; and

(3) The distributor during such period has licensed the features requested by the complainant on the run requested by him to a theatre (sometimes hereinafter re-

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[32] See footnote 10 to Section IV.

[33] An independent exhibitor, as used in this Section, is one wholly independent of any circuit of more than five theatres and not affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of more than five theatres and whose licenses are not negotiated by a buying combine or common buying agent negotiating for more than five theatres.

[34] A theatre shall not be deemed to have replaced such an existing theatre unless erected in the same neighborhood as one which was destroyed or permanently abandoned as a theatre, for the purpose of succeeding to its patronage, and with a seating capacity not more than 25 percent greater than that of the theatre replaced.

ferred to as a circuit theatre) which was in competition with the theatre specified in the complaint and which was a component of a circuit of not less than 15 theatres or which was affiliated either by stock ownership, common ownership, common buying or otherwise with a circuit of not less than 15 theatres or the licenses for which were negotiated by a buying combine or common buying agent negotiating for not less than 15 theatres; and

(4) The complainant's theatre has not available to it features sufficient in nature and quantity to enable it to operate on the run requested by the complainant; and

(5) (a) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or

(b) Subsequent to July 20, 1940, and during the two consecutive motion picture seasons [28] immediately preceding the filing of the complaint, the complainant operated the theatre specified in his complaint on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint and during such period exhibited on such run substantially all the features released during such period by the distributor complained against; or

(c) Subsequent to July 20, 1935 and prior to July 20, 1940 the complainant demanded in writing,[29] features for the theatre specified in his complaint from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code prior to May 27, 1935; or

(d) The complainant operated the theatre specified in his complaint for at least one year prior to the entry of this decree, and subsequent to July 20, 1935 and prior

[28] A motion picture season means the period from September 1 of one year to August 31 of the next year.

[29] Demands in writing shall be deemed to include complaints in writing to the Department of Justice.

to July 20, 1940 a prior operator of said theatre had demanded in writing [27] features from the distributor complained against on the same run as or on an earlier run than that enjoyed by the circuit theatre specified in the complaint; or the complainant had filed with a Local Clearance and Zoning Board or a Local Grievance Board under the Code of Fair Competition for the Motion Picture Industry approved pursuant to the National Industrial Recovery Act such a complaint which was not finally disposed of by administrative decision under said Code priod to May 27, 1935; and

(6) Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on the run requested by the complainant was a circuit theatre.

C. In determining whether the exhibitor's complaint is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributors; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability [28] for exhibition of the distibutor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the ex-

[27] See footnote 26 to this Section.

[28] In considering this factor in situations where the exhibitor customarily exhibits features in two or more theatres on the same run in the same situation as a unit by contracting for groups of features on an "or" basis (i. e., for exhibition at one of two or more specified theatres) all of such theatres may be considered collectively as a unit.

hibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom.

D. If in any such arbitration the arbitrator finds [9] for the complainant, he may enter an award against the distributor which shall not affect the license to exhibit any feature then under license to the circuit theatre but which shall prohibit such distributor from thereafter licensing its features for exhibition either in the circuit theatre specified in the complaint on the run requested by the complainant, or in the complainant's theatre specified in the complaint, on such run, otherwise than by a separate contract or agreement which shall not be a part of any contract or agreement for the licensing of features for exhibition in any other theatre or conditioned upon the licensing of features for exhibition in any other theatre.

E. After a final award in favor of a complaining exhibitor has been made under this section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who entered the original award, if available) upon the ground that such award has not been complied with in good faith by the distributer against which it was entered. If in any such proceeding the arbitrator shall find [9] that the distributor has not complied in good faith with the original award, the arbitrator may award damages to the exhibitor for loss resulting from the distributor's failure to comply with the original award but any such award of damages shall be purely compensatory.

Any further arbitration proceeding for an award of damages for violation of the original award must be commenced within sixty days after such violation has occurred, by filing a statement specifying the facts constituting each alleged violation for which damages are sought and the exhibitor's alleged damages resulting from each such alleged violation. No award of damages shall be made in any such proceeding for any violation of the original award not occurring within said sixty-day period, but prior violations may, in any such proceeding, be considered by the arbitrator as evidence bearing upon the question of the distributor's good faith.

[9] See footnote 10 to Section IV.

XI

(1) For a period of three years after the entry of the decree herein each of the consenting defendants will notify* the Department of Justice immediately of any legally binding commitment for the acquisition by it of any additional theatre or theatres.

(2) During such period each such defendant will also report* to the Department of Justice on or before the tenth day of each month the changes in its theatre position, if any, that have occurred during the preceding month, as follows, together with a statement of the reasons for such changes:

(a) Theatres contracted to be built, or under construction;

(b) Theatres lost or disposed of;

(c) Theatres acquired;

(d) Interests in theatres acquired, with a statement of the nature and extent of such interests.

(3) If upon receipt of such information the Department of Justice requests any such defendant to furnish further information with respect to any of the above transactions in which it is involved, such defendant will make a reasonable effort to supply such information promptly.

(4) No information furnished under subdivision (1), (2) or (3) hereof shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

(5) For a period of three years following the entry of this decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business. Proceedings based on a violation of this sub-

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*The notification and report shall include such commitments and changes as may have been made by corporations not parties to this decree which are controlled by such defendant. They shall also include such commitments or changes as may have been made by corporations in which such defendant owns a financial interest but which it does not control, if such defendant has received knowledge of such commitments or changes. Each defendant will request such corporations to notify it immediately of any such commitment or change.

division (5) shall be only by application to the Court for injunctive relief against the consenting defendant complained against, which shall be limited to restraining the acquisition, or ordering the divestiture, of the theatres or interests therein, if any, about to be acquired, or acquired, in violation of this Section.

XII

(a) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, requiring each of them to trade show its features before licensing the same for exhibition, Section III of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(b) If, prior to June 1, 1942, a decree shall not have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, limiting the number of features which may be licensed in a single group, subdivision (a) of Section IV of this decree, after said date, shall be inoperative and of no binding force and effect upon the consenting defendants, or any of them, except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to such date and subsequent to August 31, 1941.

(c) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions requiring each of them to trade show its features before licensing the same for exhibition, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with Section III of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or de-

fendants so electing which shall subject said defendant or defendants to such provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of Section III of this decree.

(d) If, prior to June 1, 1942, a decree shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation containing provisions limiting the number of features which may be licensed in a single group, any consenting defendant may at any time thereafter file herein a written notice of its election to be relieved from further compliance with subdivision (a) of Section IV of this decree and to comply with said provisions of such decree against said defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, and thereupon an order or supplemental decree shall be entered herein on the application of the defendant or defendants so electing which shall subject such defendant or defendants to said provisions of such other decree and entitle it or them to the benefits of any terms thereof providing for the suspension, modification or vacation of said provisions, and relieve it or them from further compliance with the provisions of subdivision (a) of Section IV of this decree.

(e) If, prior to June 1, 1942, (1) a decree containing the provisions referred to in subdivision (c) hereof, or (2) a decree containing the provisions referred to in subdivision (d) hereof, or (3) a decree containing the provisions referred to in both of said subdivisions, shall have been entered against the defendants United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, but an appeal therefrom has been taken or any of said provisions have not become operative and of full force and effect, then the operation of the provisions dealing with the same subject matter contained in Section III or subdivision (a) of Section IV of this decree shall be suspended and shall be of no binding force and effect upon any consenting defendant except with respect to licenses entered into prior to September 1, 1942, for the exhibition of features released prior to said date and subsequent to August 31, 1941, unless and until such decree shall become final and such provisions shall be in full force and effect against the defendants

United Artists Corporation, Universal Corporation and Columbia Pictures Corporation. After such decrees shall have become final, any consenting defendant may at any time exercise its right of election provided for in subdivisions (c) and (d) of this Section.

(f) If, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall require the trade showing of features before licensing the same for exhibition, each of the consenting defendants shall be relieved from further compliance with Section III of this decree, and if, at any time, an Act of Congress or a rule or regulation made pursuant to an Act of Congress shall limit the number of features that may be licensed in a single group, each of the consenting defendants shall be relieved from further compliance with subdivision (a) of Section IV of this decree. In either of such events any consenting defendant may at any time make application to this Court, of which notice shall be served upon Petitioner and all other consenting defendants, for an order relieving the consenting defendants, and each of them, from further compliance with Section III or subdivision (a) of Section IV of this decree, or both, as the case may be, and vacating the same, and thereupon this Court shall make and enter such an order.

(g) At any time after September 1, 1943, any consenting defendant may move to vacate the then effective provisions of Section III and subdivision (a) of Section IV of this decree by filing an application under oath stating that during any consecutive twelve months period preceding the filing of such application either (1) distributors of motion picture films have licensed 25 percent or more of the features released for exhibition in the United States otherwise than in accordance with the then effective provisions of Section III and subdivision (a) of Section IV of this decree [11] or (2) 12½ percent or more of the total gross income from licenses for the exhibition of motion pictures in the United States, excluding the gross income of states rights exchanges, has been derived from pictures licensed otherwise than in accordance with the then effec-

[11] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

tive provisions of Section III and subdivision (a) of Section IV of this decree.[32]

Petitioner and all other consenting defendants shall be served with notice of the filing of such application.

Upon such application the Court shall enter an order relieving the defendants from further compliance with the provisions of Section III and subdivision (a) of Section IV of this decree, unless within sixty (60) days after service of such application Petitioner shall establish to the satisfaction of the Court that during said twelve months period less than 12½ percent of the total gross income from licenses for the exhibition of motion pictures in the United States excluding the gross income of states rights exchanges, had been derived from pictures licensed otherwise than in accordance with the then effective provision of Section III and subdivision (a) of Section IV of this decree.[33]

(h) At any time after September 1, 1942, any consenting defendant may apply to the Court to vacate the provisions of Section III and subdivision (a) of Section IV of this decree, or the provisions of either of such Sections, and upon such application, the Court shall enter an order relieving the consenting defendants from further compliance with such provisions, upon such defendant showing to the satisfaction of the Court that subsequent to said date and by reason of the competition of persons not selling exclusively in accordance with said provisions of said Sections, or of either of them,[34] compliance by the applicant defendant with such provisions of said Sections, or of either of them, has substantially and adversely affected the applicant defendant's business.

XIII[35]

Nothing contained in this decree shall apply to operations or activities of any consenting defendant outside of the continental United States[36] or to operations or

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[32] Or with corresponding then effective provisions of a decree against the defendants, United Artists Corporation, Universal Corporation and Columbia Pictures Corporation, referred to in subdivisions (c) and (d) of this Section.

[33] See footnote 31 to this Section.

[34] See footnote 31 to this Section.

[35] (Section XIII) The continental United States as used herein means the territory within the boundaries of the forty-eight states and the District of Columbia.

activities of any consenting defendant within the continental United States insofar as they relate to the distribution or exhibition of motion pictures outside of the continental United States.

XIV

Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing [36] of such picture upon such terms and conditions as may be fixed by the distributor.

XV

The provisions of this decree shall not apply to any franchise which was signed prior to June 6, 1940, or to any license entered into pursuant to any such franchise, except that Section VIII hereof shall apply to all such franchises and such licenses between parties bound by this decree other than licenses referred to in Section XVII hereof.

XVI

No consenting defendant and no officer, director, agent or employee of any such defendant, shall be deemed to have violated any provision of this decree if the arbitration of disputes or controversies arising relative to the subject matter thereof is herein provided for, unless such defendant has refused to arbitrate such a dispute or controversy in the manner and under the conditions specified in this decree and in the Rules of Arbitration and Appeals which are filed herewith, as amended from time to time, or has failed or refused to abide by and perform the final award [37] made and entered in such an arbitration proceeding.

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[36] (Section XIV) Road showing is an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar.

[37] (Section XVI) for the purposes of this Section the final award in any arbitration proceeding under Section X of this decree shall be only a final award for damages as therein provided.

XVII

Nothing contained in this decree shall be construed to limit, impair or restrict in any way whatsoever the right of each distributor defendant[38] to license the exhibition, or in any way to arrange or provide for the exhibition in such manner, upon such terms and subject to such conditions as may be satisfactory to it, of any or of all of the motion pictures which it may at any time distribute (1) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which it directly or indirectly, by stock ownership or otherwise, owns a financial interest at the time of the entry of this decree and also at the time of such license, and (2) in any theatre in the ownership, lease, management or operation, or in the proceeds or profits from the management or operation, of which such distributor defendant acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 percent and (3) in any theatre in the ownership, lease, management, or operation, or in the proceeds or profits from the management or operation, of which a company in which such defendant owned not less than 42 percent of the common stock at the date of the decree and at the time of such license,[39] acquires after the date of the decree and owns at the time of such license, directly or indirectly, by stock ownership or otherwise, a financial interest of not less than 50 percent.

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[38] (Section XVII) For the purpose of this Section (1) defendant RKO Radio Pictures, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Radio-Keith-Orpheum Corporation, or its successors, directly or indirectly, has; and (2) defendant Vitagraph, Inc., or its successors, shall be deemed to have the same interest in the ownership, lease, management or operation or in the proceeds or profits from the management or operation of any theatre which Warner Brothers Pictures, Inc., or its successors, directly or indirectly, has.

[39] In the case of the distributor defendant Twentieth Century-Fox Film Corporation, or its successors, the defendant National Theatres Corporation, or its successors, shall be deemed to be such a company if said distributor defendant owned not less than 42 percent of its common stock at the date of the decree and not less than 35 percent of its common stock at the time of such license, provided not less than 42 percent of its common stock is owned by Twentieth Century-Fox Film Corporation, or its successors, and by present or future officers or directors of National Theatres Corporation, or its successors.

XVIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any consenting defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this decree, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for the company may be present. Without in any way limiting the rights granted in the foregoing provisions of this Section each of the distributor defendants shall keep at its principal office current records, which shall be accessible for the purpose aforesaid, showing—

(1) The dates when and the places where each of its features is trade shown, the names of the trade publications wherein notice of each trade showing was published, and the dates of publication, the name and location (by town and exchange district [40]) of each theatre in which each feature is licensed for exhibition, and the date of license thereof;

(2) As to each license entered into by it, the date thereof and the names and location (by town and exchange district [40]) of the theatres involved, the names of the parties thereto and of the distributor's sales representative who negotiated the license, and the names of the features licensed for exhibition;

[40] See footnote 5 of Section III.

(3) All arbitration awards rendered against the distributor with a statement showing what the distributor has done to comply therewith.

Information obtained pursuant to the provisions of this Section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

XIX

Except as otherwise expressly and specifically provided in this decree, nothing herein shall be construed to limit the right of any distributor defendant to select its own customers, to bargain with them in accordance with law, or to negotiate with or to license to or to accept any offer from any exhibitor to license its motion pictures or any number thereof upon such terms and conditions as it deems advisable or to its best interests.

XX

The provisions of Section III, of subdivision (a) of Section IV, of Section V and of Section X of this decree shall have application only with respect to features released in the United States after August 31, 1941.

XXI

Petitioner, by its counsel, has represented to the Court that the public interest requires that the provisions of this decree shall operate for a trial period of three years from the date of entry hereof. Petitioner has further represented to the Court, and each of the consenting defendants has consented to the entry of this decree upon the condition, that Petitioner will not, for a period of three years after the entry of this decree, either in this action or any other action or proceeding against any such defendant seek either the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the Petition filed herein July 20, 1938, or in paragraph (5), (6), and (7) of Section VIII of the Amended and Supplemental Complaint

filed herein November 14, 1940, or otherwise seek to divorce the production or distribution of motion pictures from their exhibition; or to dissolve any such defendant or any corporation in which any such defendant has, directly or indirectly, a substantial stock interest and which is engaged in the exhibition of motion pictures or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof, direct or indirect, in motion pictures theatres in which it had an interest at the date of the entry of this decree.

XXII

1. The method and conditions of and the procedure for the arbitration of claims and controversies hereinbefore provided for in this decree, as well as the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Northern District of Illinois, Eastern Division, in an action entitled "United States of America, Petitioner, against Balaban & Katz Corporation, et al., Defendants," modifying a consent decree entered in said action on April 6, 1932 and the arbitration of claims and controversies provided for in any decree referring to this decree which may be entered by the District Court of the United States for the Southern District of California, Central Division, in an action entitled "United States of America, Plaintiff, vs. West Coast Theatres, Incorporated, et al., Defendants," modifying a consent decree entered in said action on August 21, 1930, shall be as specified in this Section and in the Rules or Arbitration and Appeals which are provided for hereinafter.

2. An arbitration system for the arbitration of claims and controversies referred to in this decree shall be administered by an impartial Administrator.

The Administrator shall establish and maintain an Arbitration Tribunal in each city in the United States in which three or more of the distributor defendants shall maintain exchanges.

The Administrator shall establish and maintain a panel of not less than ten arbitrators for each Arbitration Tribunal and shall establish and maintain suitable offices and personnel, including a clerk, for each Arbitration Tribunal and for the Appeal Board provided for hereinafter. The Administrator shall have the power to appoint and remove members of the panels and personnel.

3. No person shall be appointed a member of any panel of arbitrators who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre as landlord, lessor, or otherwise.

4. The American Arbitration Association is appointed Administrator of the arbitration system under this decree, and is authorized and directed to perform the duties and functions of such Administrator until further order of the Court.

Any successor to the American Arbitration Association as Administrator shall be appointed by the Court on the joint application and recommendation of the Petitioner and of a majority of the distributor defendants, except that if the Petitioner and a majority of the distributor defendants fail to join in making such application and recommendation the successor Administrator shall be appointed by the Court.

5. There shall be a Budget Committee consisting of three members, one of whom shall be appointed by the Administrator, one of whom shall be appointed by the distributor defendants, and one of whom shall be the Chairman of the Appeal Board. The Budget Committee shall budget the cost of the maintenance and operation of the arbitration system. Such budget for the first twelve months of the operation of the arbitration system shall not exceed four hundred ninety thousand dollars ($490,000.00), except with the consent of a majority of the distributor defendants. The budget for each succeeding twelve months period shall not exceed four hundred sixty-five thousand dollars ($465,000.00), except with the consent of a majority of the distributor defendants, provided, however, that the Court may, on the application of the Petitioner, and for good cause shown, order an increase in the budget for any year in such amount,

not exceeding fifty thousand dollars ($50,000.00), as it may find necessary for the effective operation of the arbitration system.

6. Each arbitrator shall be selected and each arbitration proceeding shall be conducted in the manner prescribed by the Rules of Arbitration and Appeals which are filed herewith and are hereby approved. Such Rules may be amended or added to from time to time by the Administrator with the approval of a majority of the Appeal Board upon notice to the Petitioner and to the distributor defendants of such proposed amendments or additions and an opportunity for a hearing thereon. No amendment of or addition to such Rules shall change the qualifications of arbitrators as set forth in Rule II of such Rules or deny to any exhibitor or distributor defendant the right to intervene as a party in any proceeding by which it may be affected or deny to any party to an arbitration proceeding the right: to receive notice of all proceedings therein; to participate in the selection of arbitrators; to challenge the qualifications of arbitrators; to be represented by counsel or otherwise; to secure the production of witnesses and of evidence; to examine and cross-examine all witnesses; and to appeal to the Appeal Board from any adverse award. The Rules may provide for the arbitration of claims and controversies between distributor defendants and exhibitors other than claims or controversies referred to in subdivision 1 of this Section which by agreement between the parties thereto shall be submitted to the tribunals.

7. There shall be an Appeal Board which shall have jurisdiction to determine appeals from awards made by the Arbitration Tribunals. It shall consist of three members appointed by the Court, each of whom shall be a person of known impartiality and distinction. Each such member shall be appointed for a term of three years and shall serve during such term unless he shall be removed by order of the Court or shall resign. Each member of the Appeal Board shall be eligible for reappointment.

If any member of the Appeal Board is disqualified from passing upon any appeal, or is temporarily unable because of illness, absence or other cause to act as a member of the Appeal Board, the Court may on application of one or more members of the Appeal Board appoint another

person of known impartiality and distinction to act as a temporary member of the Appeal Board in place of the member so disqualified or unable to act. The compensation of such temporary member shall be fixed by the Court.

One member of the Appeal Board shall be designated by the Court as the Chairman of the Board.

The members of the Appeal Board shall be compensated on an annual basis. The Chairman of the Board shall be paid twenty thousand dollars ($20,000.00) per annum, and each of the other members of the Board shall be paid seventeen thousand five hundred dollars ($17,500.00) per annum.

The Appeal Board shall have its offices in New York, New York.

8. The expenses of the arbitration system shall be paid out of a fund administered by the Administrator. Such fund shall be established and maintained: by filing fees provided for by the Rules of Arbitration and Appeals; by penalties imposed in accordance with the provisions of Sections IV and V of this decree, and by such additional amounts, to be paid by the distributor defendants, as may be determined by the Budget Committee from time to time to be necessary. Such amounts shall be assessed by the Administrator to and shall be paid by the several distributor defendants in amounts proportionate to their respective gross receipts from licenses for the exhibition of motion pictures in the United States. The proportionate gross receipts of such defendants during the 1939–40 motion picture season shall be used in determining the amount to be paid by each such defendant for the expenses of establishing the arbitration system and of maintaining it during the first twelve months of its operation. Thereafter the gross receipts for the motion picture season ending on the August 31st immediately preceding the start of the particular twelve months' period shall be used in determining such amounts.

Each distributor defendant shall inform the Administrator promptly after the end of each motion picture season of its total gross receipts during such motion picture season from licenses for the exhibition of motion pictures in the United States. Such information shall be

treated by the Administrator as confidential and shall not be divulged except as required by l[illegible]

9. Any person who has the right to institute an arbitration proceeding under any provision of this decree or of any other decree referred to in subdivision 1 of this Section may institute and prosecute such proceeding in the manner and subject to the conditions specified in the Rules of Arbitration and Appeals, upon the condition that such person file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide in substance that such complaint submits the controversy to arbitration and undertakes to abide by and to comply fully with whatever final award may be entered therein.

Any exhibitor or distributor who intervenes as a party in any arbitration proceeding as provided in the Rules of Arbitration and Appeals, shall file with the Clerk of the Arbitration Tribunal a submission, in the form and executed in the manner prescribed by the Administrator, which shall provide, in substance, that such intervenor submits to the arbitration and undertakes to abide by and to accept whatever final award may be entered therein.

Representatives of the Department of Justice, duly authorized in writing, shall be permitted reasonable access during regular office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Appeal Board, of the Arbitration Tribunal, and of the Administrator, which relate to the arbitration system and to the arbitration of claims and controversies under this decree.

XXIII

Jurisdiction of this cause is retained for the purpose of:

(a) Enabling any of the parties to this decree to apply to the Court at any time for such orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of violations thereof;

(b) Enabling any of the parties to this decree to apply to the Court at any time for a modification of this decree in order to conform it to any Act of Congress enacted after the entry of this decree;

(c) Enabling any consenting defendant to make any application to the Court referred to in any provision of this decree;

(d) Enabling any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of this decree for any modification thereof;

(e) Enabling any consenting defendant to apply to the Court at any time more than three years after the date of the entry of this decree, to vacate this decree, or any modification thereof, or to vacate or modify any provision thereof, on the ground that under the economic or competitive conditions existing at the time of such application, this decree or any modification thereof, or any provision thereof, is inappropriate or unnecessary, or oppressive or unduly burdensome, regardless of whether or not such economic or competitive conditions are new or unforeseen. The right of each consenting defendant to make any such application and to obtain such relief is expressly reserved by them and is hereby expressly granted.

Whenever obligations or prohibitions are imposed upon the defendants by the laws of any State or by rules or regulations made pursuant thereto, with which the defendants by law must comply, the Court, upon application of the defendants, or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws, rules or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party to this decree under the provisions of this Section shall be made in open court upon notice to all of the other parties to this decree, and each such party, upon such application, shall have the right and privilege of requiring the production of witnesses upon whose testimony such application is sought or op-

posed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

Dated November 20th, 1940.

HENRY W. GODDARD,
United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the plaintiff:

(S) John T. Cahill,
JOHN T. CAHILL,
United States Attorney.

(S) Thurman Arnold,
THURMAN ARNOLD,
Assistant Attorney General.

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For the Defendants:

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, By (s) THOMAS D. THATCHER, Thomas D. Thatcher, *Simpson, Thatcher & Bartlett, 120 Broadway, New York, N. Y., Their Attorneys.*

LOEW'S, INCORPORATED, By (s) JOHN W. DAVIS, John W. Davis, Esq., *15 Broad Street, New York, N. Y.*, (s) J. ROBERT RUBIN, J. Robert Rubin, Esq., *1540 Broadway, New York, N. Y., Its Attorneys.*

RADIO-KEITH-ORPHEUM CORPORATION, RKO PICTURES, INC., RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, By (s) WM. J. DONOVAN, William J. Donovan, Esq., *Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.*; WILLIAM MALLARD, Esq. *1270 Sixth Avenue, New York, N. Y.*; RALSTONE R. IRVINE, Esq., *2 Wall Street, New York, N. Y.*; OTTO C. DOERING, JR., Esq. *2 Wall Street, New York, N. Y., Their Attorneys.*

KEITH-ALBEE-ORPHEUM CORPORATION, By (s) MONROE GOLDWATER, Monroe Goldwater, Esq., GOLDWATER & FLYNN, *60 East 42nd Street, New York, N. Y., Its Attorneys,*

WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, By (s) JOSEPH M. PROSKAUER, Hon. Joseph M. Proskauer, *11 Broadway, New York, N. Y.*; (s) ROBERT W. PERKINS, Robert W. Perkins, Esq., *521 West 44th Street, New York, N. Y., Their Attorneys.*

TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, By (s) RICHARD H. DWIGHT, Richard H. Dwight, *Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y.; Their Attorneys.*

Filed: Nov. 20, 1940.

B. Rules of Arbitration

In the District Court of the United States for the Southern District of New York

Civil Action No. 87-273

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S, INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; AND UNITED ARTISTS CORPORATION, DEFENDANTS

RULES OF ARBITRATION AND APPEALS PURSUANT TO SUBDIVISION 6 OF SECTION XXII OF THE DECREE IN THE ABOVE ENTITLED ACTION

I. Initiation of arbitration

An arbitration proceeding shall be initiated by filing with the Clerk of the Tribunal having jurisdiction of the

controversy a Demand for Arbitration and a submission as provided in subdivision 9 of Section XXII of the Decree, and by paying a filing fee of $10.00 to the Clerk of the Tribunal.

Filed herewith and made a part of these Rules is a map[1] showing the territory throughout which each Arbitration Tribunal shall have jurisdiction (each of which territories is hereinafter called an Arbitration District), and the city in each such Arbitration District in which the Arbitration Tribunal shall be located. The Tribunal having jurisdiction in a particular proceeding shall be the Tribunal maintained pursuant to Section XXII of the Decree in the Arbitration District in which the complainant's theatre is located, except that when a distributor institutes an arbitration proceeding the Tribunal having jurisdiction shall be the Tribunal in the Arbitration District in which the theatre involved is located.

The Demand for Arbitration shall be signed by the complainant and shall set forth:

The name and address of the complaining party; the name and address of each theatre involved in the controversy; the name and address of each exhibitor or distributor against whom complaint is made (hereafter sometimes referred to as a defending party); the name and address of each other exhibitor and distributor whose business or property it is believed by the complainant may be affected by an award in the proceeding; and a brief statement in simple language of the claim and the relief sought.

At the time of filing the Demand the complainant shall deliver to the Clerk of the Tribunal sufficient copies of the Demand to enable the Clerk to deliver one copy to each defending party and to each other exhibitor and distributor named in the Demand, and the Clerk shall forthwith make such delivery.

Within seven days after the date on which the Clerk of the Tribunal delivers a copy of the Demand to a defending party, such party may sign and file with the Clerk of the Tribunal a list giving the name and address of each exhibitor or distributor not named in the Demand whose business or property it is believed by such party may be affected by an award in the proceeding.

[1] Not printed herein.

The Clerk of the Tribunal shall forthwith deliver a copy of the Demand to each exhibitor and distributor named in any list filed by a defending party.

Any exhibitor or distributor named either in the Demand or in any list filed by any defending party and any other exhibitor or distributor whose business or property may be affected by an award in the proceeding may, at any time prior to the commencement of the first hearing, intervene and thereby become a party to the proceeding by filing with the Clerk of the Tribunal a statement which shall set forth his interest as an intervenor in the proceeding and a submission as provided in subdivision 9 of Section XXII of the Decree and by paying a filing fee of $10.00 to the Clerk of the Tribunal. The Clerk of the Tribunal shall forthwith deliver notice of each intervention to each other party to the proceeding.

Any party who intervenes more than fifteen days after the filing of the Demand shall not be entitled to participate in the selection of the arbitrator.

If, at any time after the fifteenth day following the filing of the Demand and prior to the appointment of an arbitrator, all parties to a proceeding who became parties, by intervention or otherwise, on or before said fifteenth day shall by written agreement select another Tribunal as the Tribunal having jurisdiction and file such agreement with the Clerk of the Tribunal originally having jurisdiction, jurisdiction of the proceeding shall thereby be transferred to the Tribunal so selected. Thereafter no further proceedings shall be had in the Tribunal originally having jurisdiction except that the Clerk thereof shall forthwith deliver notice of such transfer to the American Arbitration Association and shall forthwith deliver the entire file in such proceeding to the Clerk of the Tribunal so selected, who shall forthwith take the action prescribed in Rule III for the appointment of an Arbitrator from the Panel of Arbitrators for his Tribunal.

II. QUALIFICATIONS OF ARBITRATORS

No person shall be appointed a member of a Panel of Arbitrators established in accordance with the Decree who has any financial interest in, or has or has had any connection with, the production, distribution or exhibition of motion pictures, or has or has had any interest in any motion picture theatre, as landlord, lessor or otherwise.

No member of a Panel shall serve as an arbitrator in any proceeding if he has or has had any financial or other relations with any party to the proceeding, or has any interest in the result of the proceeding, or has any personal bias which might prejudice the right of any party to a fair and impartial award.

III. APPOINTMENT OF ARBITRATORS

Not less than fifteen nor more than seventeen days after the filing of the Demand in accordance with Rule I, the Clerk of the Tribunal shall deliver to each party an identical list of arbitrators selected from the Panel of Arbitrators, for the purpose of enabling the parties to indicate thereon their preference of arbitrators. If the Clerk of the Tribunal does not receive the list from any party within seven days after the delivery of the list to such party, all the names on such list shall be deemed acceptable to such party.

The Clerk of the Tribunal shall forthwith appoint an arbitrator from the names indicated as acceptable to all parties. In the event no name appears from the lists to be acceptable to all parties, or that none of those shown to be acceptable is available, the American Arbitration Association shall appoint an arbitrator from the remaining members of the Panel.

Not less than sixteen days after the filing of the Demand and prior to the appointment of an arbitrator (or in the case of an arbitration of a controversy under either Section IV or Section VII of the Decree, at any time prior to the appointment of an arbitrator), the parties to any controversy may by written agreement unanimously appoint one or more arbitrators from the Panel of Arbitrators to arbitrate such controversy, by filing such agreement with the Clerk of the Tribunal.

No irregularity in the appointment of an arbitrator shall affect the validity of the proceeding or of the award.

Notice of appointment shall forthwith be given to the arbitrator by the Clerk of the Tribunal, and a signed acceptance obtained.

IV. REMOVAL OF ARBITRATOR AND FILLING OF VACANCY

Upon written application of any party prior to the date the arbitrator's award becomes final, the American Arbitration Association shall, upon proof satisfactory to it that

an arbitrator is disqualified under Rule II, revoke the appointment of such arbitrator and declare the office vacant and the award, if any, vacated. No such action shall be taken by the American Arbitration Association in any case where an award has been made unless the applicant party shall have given five days' notice of its application to all other parties. Unless application for disqualification is made immediately following a party's discovery of the reason therefor, such party shall be deemed to have waived such disqualification.

The American Arbitration Association also may revoke the appointment of an arbitrator at any time by reason of his neglect, refusal or failure to perform the duties of his office.

If the appointment of an arbitrator is revoked, or if by reason of resignation, death or illness an arbitrator is unable to perform the duties of his office, a new arbitrator shall forthwith be appointed by the Clerk of the Tribunal from among the names acceptable to the parties or by the American Arbitration Association, in accordance with the second paragraph of Rule III.

V. HEARINGS

Hearings shall be held at the office of the Arbitration Tribunal having jurisdiction of the controversy involved or at such other place in the same Arbitration District as may be agreed upon by the parties with the consent of the arbitrator.

Hearings shall commence as promptly as possible after the appointment of the arbitrator.

The arbitrator shall fix the time of the beginning of the hearing and may adjourn the hearing from time to time.

The Clerk of the Tribunal shall deliver to the parties written notice of the name of the arbitrator and of the time and place of the beginning of the hearing at least five days prior thereto, unless such notice is waived by the parties.

VI. PROCEDURE AT HEARINGS

The arbitrator shall take the oath of office in the form prescribed by the Administrator before commencing the hearing.

Parties may be represented by counsel or by others.

Each party shall have the right to examine or cross-examine all witnesses.

Witnesses shall testify under oath or its legal equivalent.

Evidence shall be received only at hearings of which all parties shall have had due notice and the arbitrator in making his award shall consider only evidence so received and such inspections as he may make hereunder.

The arbitrator shall have power to require any party to produce such records or documents as the arbitrator may deem necessary to a proper determination of the controversy. In lieu of producing or offering original records or documents, any party may, with the approval of the arbitrator, produce or offer sworn copies thereof or sworn excerpts of the relevant or material portions thereof. If any party challenges the authenticity, correctness or adequacy of such documents or excerpts, the arbitrator shall determine such authenticity, correctness or adequacy. All exhibits offered in evidence shall be numbered and so marked as to indicate whether or not they were received.

The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

Whenever the arbitrator deems it necessary he may make an inspection in connection with the subject matter of the controversy upon notice to the parties.

The arbitrator may hear argument and receive briefs.

VII. CLOSING AND REOPENING THE PROCEEDING

After all parties have indicated that they have no further evidence to offer, the arbitrator shall declare the proceeding closed.

Prior to the expiration of the time for making an award the arbitrator may reopen the proceeding upon his own initiative, or for good cause upon the written application of any party on five days notice to all other parties.

At any time within twenty days after the award has been filed the arbitrator may also reopen the proceeding for the purpose of correcting inadvertent errors in the award.

VIII. DEFAULTS AND WITHDRAWALS

If any party to a proceeding defaults by failure to comply with the fourth paragraph of Rule XI or withdraws from the proceeding after an arbitrator is appointed, the

proceeding shall nevertheless continue to an award unless all other parties to the proceeding consent to a dismissal. A party who defaults or withdraws shall not be entitled to participate further in the proceeding but shall be bound by the award.

IX. POWERS OF ARBITRATORS

The arbitrator shall have the powers and shall perform the duties granted to and imposed upon him by the Decree and these Rules, and in making his award he shall comply with the Decree and these Rules.

X. AWARDS

The award shall be filed with the Clerk of the Tribunal within thirty days from the date of closing the proceeding, or from the date fixed by the arbitrator for the filing of briefs, whichever is later.

The award shall be specific, shall contain such findings as are required by the Decree and shall be signed by the arbitrator and acknowledged before a notary public or other officer duly authorized to administer oaths.

In his award the arbitrator shall assess costs against the losing party or parties or apportion them among the parties as he may deem proper. Costs shall be limited to the arbitrator's fee and the filing fees.

The Clerk of the Tribunal shall forthwith deliver a copy of the award and any corrected award to each party, with the date of filing endorsed thereon.

The award, or, if corrected, the corrected award, shall become final and binding upon the parties upon the expiration of the time for filing a notice of appeal therefrom, unless an appeal is taken in accordance with these Rules.

XI. ARBITRATOR'S FEES

The American Arbitration Association shall fix for each Arbitration District the per diem rate of the arbitrator's fee, which in no event shall exceed $50.00 per diem. The arbitrator shall be entitled to the per diem fee for each day or part thereof that he shall attend a hearing or make an inspection.

Any expenses incurred by an arbitrator in making inspections as provided in Rule VI, and in conducting hear-

ings at other places than the Tribunal office as provided in Rule V, shall be borne equally by the parties.

No other compensation or expenses and no gratuities or benefits of any kind shall be paid to or conferred upon an arbitrator by any party.

Prior to the commencement of each day's hearing or inspection, each party to the proceeding shall deposit with the Clerk of the Tribunal a sum equal to the arbitrator's per diem fee. Failure to make such deposit shall constitute a default.

After the award is filed, the arbitrator shall be paid his fee out of the sums deposited by the parties to the proceeding. The Clerk of the Tribunal shall return any undisbursed sums to the parties entitled thereto upon the final disposition of the controversy.

XII. STENOGRAPHIC COST[1]

The Clerk of the Tribunal shall make the necessary arrangements for the taking of a stenographic record of the testimony when such a record is requested by one or more of the parties, who shall deposit the cost thereof with the Clerk of the Tribunal.

Any party desiring a transcript of the stenographic record of the hearing shall pay the cost thereof and in the event that such party did not pay the cost of taking the stenographic record it shall reimburse the other party or parties for the cost thereof.

XIII. EXTENSIONS OF TIME

The parties may in writing unanimously agree to extend the time specified in any of the foregoing Rules and, except as to Rule X, the arbitrator may extend such time upon the written application of any party upon five days notice to all other parties.

XIV. NOTICE OF APPEAL

Any party to a proceeding may appeal from an award by filing a notice of appeal with, and paying a filing fee of $25.00 to the Clerk of the Tribunal in which the award

[1] Under Rule XIV no appeal can be taken unless three copies of the transcript of the record or an abbreviation thereof are filed with the Clerk of the Tribunal.

was made, not later than twenty days after the date of filing of the award or the corrected award. The clerk of the Tribunal shall forthwith deliver a copy of the notice of appeal with the date of filing endorsed thereon to each party to the proceeding and to the Clerk of the Appeal Board.

The appellant shall have made at his own expense, and, within ten days after filing the notice of appeal, shall file with the Clerk of the Tribunal in which the award was made, three copies of the transcript of the stenographic record of the hearing or such abbreviation thereof as may be agreed upon by the parties.

XV. RECORD ON APPEAL

Upon receipt of the three copies of the transcript or an agreed abbreviation thereof filed by the appellant the Clerk of the Tribunal shall forthwith prepare the record on appeal which shall consist of the following:

1. The Demand for Arbitration and the submission.
2. Statements and submissions of intervening parties.
3. Notice of appointment and signed acceptance of the arbitrator.
4. Clerk's record of hearing.
5. Three copies of the transcript of the stenographic record of hearing or such abbreviation thereof as may have been agreed upon by the parties.
6. Exhibits received in evidence and exhibits offered but not received in evidence, except such as may be omitted by stipulation of the parties.
7. The award.

Unless otherwise directed by the Appeal Board, the record on appeal shall remain on file in the Tribunal until the expiration of the time for filing of all briefs as provided in Rule XVI.

Immediately upon the expiration of such time the Clerk of the Tribunal shall transmit the record on appeal to the Clerk of the Appeal Board.

XVI. PROCEEDINGS ON APPEAL

Within thirty days after the filing of the notice of appeal, each party shall deliver a copy of his brief on appeal to every other party and file with the Clerk of

the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Within forty days after the filing of the notice of appeal, each party shall deliver a copy of any answering brief to each other party and file with the Clerk of the Appeal Board six copies of such brief with proof of delivery of a copy thereof to each other party.

Upon the written agreement of all parties the Appeal Board shall, and upon its own initiative may, order oral argument. At any time not later than five days after the expiration of the time for filing answering briefs any party may apply to the Appeal Board for permission to present oral argument. Such application shall be in writing, shall state the reasons therefor and shall be filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party. Any objection to such application shall be made in writing and filed with the Clerk of the Appeal Board, together with proof of delivery of a copy thereof to each other party, within five days after the filing of the application. The ruling on such application shall be made by the Appeal Board forthwith after the expiration of the five-day period allowed for the filing of objections, and a copy of the ruling shall forthwith be delivered by the Clerk of the Appeal Board to all parties.

When the Appeal Board has ordered oral argument it shall fix the date thereof. The Clerk of the Appeal Board shall deliver to the parties notice in writing of the time and place of such argument, at least ten days prior thereto.

Oral arguments shall be heard by the Appeal Board only in New York, New York.

XVII. DECISION AND OPINION OF THE APPEAL BOARD.

All members of the Appeal Board shall pass on all appeals and, except as provided in Rule XIX, on all other matters, and the concurrence of two shall be necessary to a decision.

The decision of the Appeal Board together with an opinion stating the reasons therefor shall be in writing and signed by the members of the Appeal Board or a majority thereof. The decision shall be acknowledged before a notary public or other officer duly authorized to

administer oaths. The decision and opinion shall be filed with the Clerk of the Appeal Board, who shall forthwith file a copy thereof with the Clerk of the Tribunal and shall forthwith deliver a copy thereof to each of the parties. The Clerk of the Tribunal shall forthwith notify each of the parties of the date of filing with him.

The Appeal Board in its decision may affirm, modify, correct or reverse the award of the arbitrator, including provision for costs therein, or may remand the proceeding to the Tribunal for a rehearing or for further action in accordance with the decision of the Appeal Board.

The Appeal Board in its decision may assess the cost of the stenographic record and of the transcript thereof against the losing party or parties or apportion it among the parties, as it deems proper.

XVIII. PROCEEDINGS SUBSEQUENT TO DECISION OF APPEAL BOARD

Unless the Appeal Board remands the proceeding to the Tribunal or reopens the proceeding as hereinafter provided, the decision of the Appeal Board shall become the final award and shall become binding on all parties ten days after it is filed with the Clerk of the Tribunal.

When the Appeal Board remands a proceeding the arbitration shall thereupon proceed in accordance with the decision of the Appeal Board.

Within ten days after the decision of the Appeal Board has been filed with the Clerk of the Tribunal, the Appeal Board may reopen the proceeding for the purpose of correcting inadvertent errors. In such case the corrected decision shall be signed and acknowledged, and copies thereof shall be delivered and filed as provided in Rule XVII. Such corrected decision, unless it remands the proceeding to the Tribunal, shall become the final award and shall become binding on all parties when it is filed with the Clerk of the Tribunal, or ten days after the decision corrected thereby was filed with the Clerk of the Tribunal, whichever is later.

XIX. EXTENSION OF TIME

The parties may, by written agreement, extend the time specified in any of the Rules relating to appeals, and any member of the Appeal Board may do so upon the written

application of any party made upon five days' notice to all other parties.

XX. SUBMISSION OF OTHER CONTROVERSIES

Controversies between exhibitors and distributors other than those referred to in subdivision 1 of Section XXII of the Decree may be submitted to the arbitration system by the parties thereto, provided:

a) At least one of the parties thereto is a distributor defendant as defined in the Decree; and

b) A submission in writing setting forth the controversy to be arbitrated is signed by all the parties thereto and filed with the Clerk of the Tribunal having jurisdiction.

These Rules in so far as they are applicable, shall apply to the arbitration of such controversies except as the submission may otherwise provide and except that no exhibitor or distributor may intervene therein.

XXI. ACCESS TO RECORDS

At no time shall access to the record of any proceeding or appeal be permitted to any person not a party, except that awards, decisions, and opinions may be made public.

XXII. DEFINITIONS

"Decree" means the Consent Decree dated November 20, 1940, entered in the District Court of the United States for the Southern District of New York in an action entitled "United States of America v. Paramount Pictures, Inc., et al."

"Arbitration Tribunal" and "Tribunal" mean the Tribunal established by the American Arbitration Association in any city as provided in the Decree.

"Clerk of the Tribunal" means the Clerk of the Arbitration Tribunal having jurisdiction.

"File with the Clerk" means actual receipt by the Clerk.

"Deliver" or "Delivery" means either personal delivery or the placing of the document in the mails properly stamped and addressed to the person intended to receive such document.

"Proof of Delivery" means an admission of delivery or an affidavit of personal delivery or of mailing.

"Award" means award and findings.

"Person" means any individual, partnership, unincorporated association, or corporation.

The above Rules of Arbitration and Appeals are hereby approved.

November 20th, 1940.

(S) HENRY W. GODDARD,
United States District Judge.

Filed Nov. 20, 1940.

V. GOVERNMENT'S DIGESTS OF DECISIONS AND AWARDS UNDER THE CONSENT DECREE

A. Appeal Board Decisions

Ex. 1 (R. 276, 305-8). Appeal Board Decision No. 10, decided November 14, 1941:

A. *Unfair practices.*—Situation where a defendant has more than one theatre in a community—control over the playing time of other theatres.

B. *Complainant.*—Kogod and Buka, independent operators of Apex theatre in Washington, D. C.

C. *Nature of complaint.*—Unreasonable clearance given Warner theatres Calvert and Uptown over Apex by Loew: Section VIII of consent decree involved.

D. *Decision.*—Clearance unreasonable.

E. *Situation as stated in Appeal Board's opinion.*—The Appeal Board said:

> "Uptown and Calvert are both owned and operated by the same exhibitor. There is no clearance between them. Both theatres, so far as the existing contracts are concerned, enjoy the same run. The exhibitor, however, in practice exhibits pictures in one of these theatres before the other. At one time the pictures were shown in the Uptown first and then in the Calvert. They are now shown in the Calvert before being shown in the Uptown. At the will of the exhibitor they may at any time be again played at the Uptown first. The record shows that the Calvert plays very few of its pictures on, or immediately after, its availability date. It delays playing many of its pictures from ten to sixteen

days after availability. Uptown plays many of its pictures on or ahead of its availability date. The actual playing dates, however, at Calvert and Uptown have been such as to prevent, under existing clearances, Apex from having pictures available for it to play until an unreasonably long time has elapsed after completion of the first run downtown. This is unfair to Apex and the existing clearances against it are unreasonable."

Ex. 1. Appeal Board Decision, No. 12, decided December 5, 1941:

A. *Unfair practices.*—Clearance given circuit operator to preserve its local monopoly—clearance imposed without written contract.

B. *Complainant.*—Esquire-Great Neck Corporation, operator of Squire Theatre at Great Neck, Long Island.

C. *Nature of Complaint.*—Unreasonable clearance imposed on Squire Theatre in favor of the Playhouse, a Skouras theatre, and the Little Neck Theatre, by Fox, Warner, Loew, Paramount, and RK.

D. *Decision.*—Unreasonable clearance reduced.

E. *Situation as stated in Appeal Board's opinion.*—The Appeal Board quotes from the arbitrator's decision as follows:

"So far as Great Neck is concerned, the Arbitrator is convinced, and, therefore, finds that the historical development of clearance has been based upon the desire of the Playhouse to exclude all competition from the town in which it enjoyed a monopoly for seventeen years.

Ex. 1. Appeal Board Decision No. 18, decided February 17, 1942:

A. *Unfair practices.*—One defendant's affiliate given 1st runs in all circuit towns—unreasonable clearance, even though not expressed in writing.

B. *Complainant.*—B. R. McLendon, operating the State and Texas Theatres in Atlanta, Texas.

C. *Nature of complaint.*—Unreasonable clearance given Paramount-Richards Theatres, Inc., Theatres in Texarkana by Fox, RKO, and Warner.

D. *Decision.*—Unreasonable clearance reduced from 28 days to 1 day.

E. *Situation as stated in Appeal Board's opinion.*—In this case RKO admitted that it gave the Texarkana theatres a 30-day clearance. The other defendants took the position that no clearance existed by agreement in favor of Texarkana over Atlanta and that there was nothing to arbitrate. Texarkana was found to be 28 miles from Atlanta. The Appeal Board found to the contrary and stated as follows:

"The only other contract in evidence is that between Paramount-Richards, Inc., and Fox, dated September 9, 1941. It covers only five features, but provides for their exhibition in fifty theatres in seventeen different cities and towns, including the Paramount and Strand Theatres in Texarkana. It provides that each theatre has first run, presumably in its respective community. There is no clearance against any of these theatres. On the face of the contract, therefore, all of these fifty theatres, including the two in Texarkana, are entitled to play on exchange release date.

"The contract situation affecting Texarkana and Atlanta is, then, that Texarkana is entitled to play pictures on exchange-release date, while Atlanta must wait at least forty-five days after exchange-release date before it can play. In practice the actual clearance of Texarkana over Atlanta is the number of days which elapse between the end of the run of a picture in Texarkana and forty-five days after the picture was released by the exchange. Inasmuch as the distributor is not required to give Atlanta the picture until the expiration of sixty days, the period of waiting time may be even longer. To hold upon such a state of facts that Texarkana has no clearance over Atlanta which can be arbitrated under Section VIII, would be highly technical and would in our opinion tend to nullify the purpose of Section VIII.

"Complainant opened his first theatre in Atlanta in 1935. For some two years he was not subjected to any clearance, nor was there any availability clause in his contracts. Later on Texarkana was granted a thirty-day clearance over Atlanta. Then, as a result of an antitrust suit commenced by complainant, the availability clause, heretofore quoted, was inserted in his contracts. Vitagraph claims that this clause has been eliminated from its contracts with complainant and that this proceeding should therefore be dismissed as to it. But its 1940–41 contract with complainant included this clause and that contract had not been completed when the demand for arbitration was filed. Furthermore, on the hearing Vitagraph's representative refused to stipulate that the clause would not be reinstated in future contracts. Vitagraph is a proper party."

Ex. 2 (R. 276, 305–8). Appeal Board Decision No. 24, decided May 4, 1942:

A. *Unfair practices.*—Changing availability after affiliated theatre comes into hands of independent—unreasonable clearance.

B. *Complainant.*—Dipson Theatres, Inc., operating the Bailey Theatre in Buffalo, New York.

C. *Nature of complaint.*—While the Kensington and Bailey theatres were operated by affiliated interests the two theatres had the same availability. After acquisition of the Bailey by the complainant, the Kensington, for the most part was given not only a prior run but also clearance over the Bailey. Complaint against Fox, R. K. O., Loew, Paramount, and Warner.

D. *Decision.*—Complaint dismissed as to Loew and Paramount because of their interest in the Kensington. Clearance reduced.

E. *Situation as stated in Appeal Board's Opinion.*—"Subdivision 7 of Section VIII requires an Arbitrator to disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres. This means, as counsel for producers have often stated in their briefs, that the theatres

involved in these clearance cases should be judged on their merits as theatres and not otherwise. This just and salutary rule should be equally applicable to the producers themselves. Applying that test, the Bailey theatre is fairly entitled to the same treatment accorded to it by these defendants prior to its acquisition by the complainant. By reason of this change of ownership only, the defendants, with the exception of Vitagraph, have attempted to deprive the Bailey theatre of the run and playing position which it had held for many years. This is an obvious injustice."

Ex. 2. Appeal Board Decision No. 27, decided June 22, 1942:

A. *Unfair practices.*—Domination of exhibition in metropolitan area by one defendant-system of distribution in area originated by a defendant producer-exhibitor acquiesced in by other defendants; unreasonable clearance over independent theatre; defendant producer-exhibitor favoring own theatre over theatre which is its customer.

B. *Complainant.*—Dickinson, Inc., operating Dickinson Theatre in Mission Township outside of Kansas City, Mo.

C. *Nature of complaint.*—Unreasonable clearance given affiliated theatres in Kansas City by Loew, Fox, RKO, Paramount, and Warner.

D. *Decision.*—Unreasonable clearance reduced as to Plaza Theatre and eliminated as to 4 other theatres. Clearance of 56 days after first run reduced to 14 days.

E. *Situation as stated in Appeal Board's opinion.*—The Appeal Board said:

"The intervenor, Fox Kansas City Corporation, operates some fifteen theatres in Kansas City, Missouri. It is an affiliate of Twentieth Century-Fox Film Corporation within the meaning of Section XVII of the Decree. The record shows that Fox and this affiliate have been the dominating factors in the distribution of pictures in Kansas City proper and to a lesser extent in the suburban area. The system of distribution,

originated in 1935 by Fox, was acquiesced in by the other distributors.

"There are five large, high class, first run theatres in Kansas City, Missouri, each owned and operated by an affiliate of one of the defendants. * * *

"The system under which pictures are exhibited in Kansas City, Missouri, and in neighboring areas comprising what is known as Greater Kansas City, is one fixed by 'availabilities' after the first run downtown theatres. Specific clearances are not granted to theatres having availabilities after first run nor are specific clearances fixed between subsequent run theatres. * * *

"The Kansas City system of distribution, based on availabilities after first run downtown, is similar to the systems prevailing in Columbus, Oakland and Chicago, where the Board has held that the actual clearance of a prior run theatre over a subsequent run theatre is the number of days elapsing between the last showing of a picture at a prior run theatre and the time when that picture becomes available to a subsequent run theatre. * * *"

The Appeal Board held that no clearance was justified in favor of the Isis, Waldo, Brookside, and Waldo over the Dickinson.

All the distributor defendants except Vitagraph challenged the authority of the arbitrator to make any award affecting the clearance granted by them to theatres with which they were affiliated and the Appeal Board reversed the arbitrator's denial of their motion.

Ex. 2. Appeal Board Decision No. 35, decided August 21, 1942:

A. *Unfair practices.*—Withholding pictures from an independent who was building a theatre in order to give them to a circuit which made plans to build in some vicinity after the independent's plans were projected.

B. *Complainant.*—Lakeview Theatres, Inc., operating the Lakeview Theatre in Lakeview, a suburb of New Orleans.

C. *Nature of complaint.*—Paramount and RKO and Warner's reserving first run for a theatre of a circuit built after complainant's theatre was opened. Section VI complaint.

D. *Situation as stated in Appeal Board's opinion.*—It appeared that Lakeview Theatres, Inc., was organized in July 1941, construction was begun on September 10, and was opened January 28, 1942. In July, first suburban run was requested from the defendants for the theatre and all except Warner replied indicating a willingness to negotiate.

By September 1941 the United Theatres, Inc., a circuit, was planning to build a theatre near the Lakeview. In the fall of 1941 the complainant was informed by RKO and Warner that it could not have suburban first run and RKO and Warner licensed their films to the United Theatres, Inc., for a theatre not yet in operation. The United Theatre did not open until after the Lakeview theatre was opened. Complainant negotiated with Paramount for first suburban run and while involved in a dispute as to terms Paramount home office negotiated a contract with United Theatres licensing certain films on first suburban run to any theatre which United Theatres might construct in Lakeview. This provision was included in an agreement which covered all the theatres owned by United Theatres, Inc.

"The apparent purpose of the defendants was to require complainant to await the opening of the theatre to be operated by United Theatres, Inc., before exhibiting defendant's films on any run. The terms and conditions of the offers were, as to each of the defendants, calculated to defeat the purpose of Section VI. Each offer imposed a limitation upon the license offered to the complainant which was essentially unjust and unreasonable. Standing alone in its area, as the Lakeview did at this time, it was entitled to a first run in that area. For a first run alone was possible under such circumstances.

"The offer of old films from the 1940–41 season was not a compliance with Section VI."

Ex. 2. Appeal Board Decision No. 40, decided October 5, 1942:

A. *Unfair practices.*—Inability of an independent exhibitor to secure pictures from defendants on reasonable terms because of defendants' dealings with his circuit opposition—fixing of admission prices to benefit circuit theatre.

B. *Complainant.*—Louis M. Sosna operating the Sosna Theatre in Mexico, Mo.

C. *Nature of complaint.*—Refusal of Fox, RKO, Warner, and Paramount to negotiate with Sosna for 1st or 2d run, or for any run on reasonable terms.

D. *Decision.*—Defendants directed to offer pictures on a run on terms consistent with Section VI of the decree.

E. *Situation as stated in Appeal Board's opinion.*—

"In July 1941, Sosna wrote to the defendants asking for an opportunity to negotiate for first run in Mexico on their pictures for the 1941–42 season. Receiving no favorable reply, he wrote again in August 1941, asking for an opportunity to negotiate for second run. Vitagraph did not reply. Paramount and Fox replied that they were negotiating with the Frisina circuit for second run. RKO offered to sell its pictures to the Sosna on third run.

"The Arbitrator found that prior to the filing of the complaint Vitagraph had refused to offer its pictures to Sosna on any run despite repeated requests by him for some run. After the complaint was filed Vitagraph offered Sosna a second run on every other block of five pictures, pictures to become available ninety days after the conclusion of first run. The Arbitrator found that this offer—assuming it could be considered—failed to satisfy the requirements of Section VI inasmuch as it was contrary to the purpose of that Section to reserve half of second run for the Frisina circuit which, having opportunity over six months to buy it, had failed to do so.

"In September 1941, Paramount offered the Sosna pictures of the 1939–40 and 1940–41 seasons on third run, thirty days after second run, at prices which Sosna admitted to be fair. The

offer was conditioned on Sosna's agreeing to charge a minimum adult admission price of fifteen cents. There is evidence that Paramount pictures are played first run in Mexico at an adult admission price of fifteen cents, and fifteen cents is the minimum required by Paramount's contracts with the Liberty and Rex. To require a third run theatre to charge the same admission price as the price at which Paramount's pictures are shown first run seems unreasonable. Even Fox and RKO, which have shown little disposition to deal with complainant, are willing to allow Sosna to charge a minimum admission of ten cents. Whether thirty days clearance between second and third run in Mexico is reasonable depends, as we have said, on facts which are not in evidence. Furthermore, the only uncontroverted offer which Paramount has made to Sosna is an offer of pictures of the 1939–40 and 1940–41 seasons. The requirement that distributors offer their pictures on some run on terms and conditions not calculated to defeat the purpose of Section VI refers, in the absence of particular specification, to current pictures. Although pictures released late in the 1940–41 season would in September 1941 be current pictures for a third run theatre, the evidence discloses only that a 'selection' of 1940–41 pictures was offered to complainant.

"In February 1942, RKO offered the Sosna a third run on pictures of the 1938 through 1941 seasons, some of which had not been shown on second run, and third run on three groups of five pictures of the 1941–42 season. At this time, and through the time of the hearing, RKO had not sold a second run in Mexico, and there was no evidence that anyone but Sosna wanted to buy it. RKO's branch manager testified, nevertheless, that he would not offer second run to the Sosna until an attempt to sell it to Frisina had failed. It appears that RKO requires second run in Mexico to play ninety days after first run and third run sixty days after second run. Whether considered as a refusal to offer the Sosna the earliest run for which there was no other inter-

ested customer, or as an offer of pictures to be played after 150 days clearance in favor of the first run theatre, the offer appears to be unreasonable.

"The defendants have shown little disposition to meet the complainant half way in negotiation; and they have apparently proceeded during the hearing upon the plan of disclosing as few facts as possible with respect to the various factors which we pointed out in complainant's first appeal should be put in evidence in a case under Section VI. Proof of many of these factors is in the possession or control of the defendants alone, yet little of it can be found in the record. It is necessary that it be produced. It is not clear whether the Liberty or the Rex is the first run theatre or whether they share first run. There is no proof of the availability of the Liberty and the Rex; or whether they habitually play on availability; or the rental fees charged them; or the revenue they bring to the defendants."

RKO, Fox, Paramount, and Warners were directed to offer their pictures for exhibition in the Sosna theatre on a run on the terms of conditions not calculated to defeat the purpose of Section VI.

Ex. 3 (R. 276, 305–8). Appeal Board Decision No. 52, decided February 1, 1943:

A. *Unfair practices.*—Unreasonable clearance given defendants' theatres—excuse of unavailability of prints.

B. *Complainant.*—J. N. Bills, operating the Bountiful Theatre at Bountiful, Utah.

C. *Nature of complaint.*—1st run theatres of a Paramount affiliate given a clearance of 60 to 67 days over complainant's theatre by RKO, Paramount, Warner, Loew, and Fox.

D. *Decision.*—Clearance unreasonable; reduction to 21 days maximum after the Centre, Utah, Studio, and Rialto theatres, and from 28 days to 14 days after the Capitol and Victory. Complaint dismissed as to Paramount under Section XVII of the Decree.

E. *Situation as stated in Appeal Board's opinion.*—

"The Salt Lake City downtown first run theatres are the Centre, Capitol, and Victory operated by Intermountain, the Utah and Studio operated by Saltmount, and the Paramount (also known as Uptown) operated by one Lawrence, who also operates the theatres of the complaining intervenors. The Rialto, also operated by Lawrence, has the privilege of first run on RKO pictures. The Victory is not exclusively first run, but shows some pictures on second or subsequent run. The Studio is not an initial first run theatre, but is used as a 'move-over' house to continue first runs commenced at the Utah or the Centre, the continued exhibition at the Studio after the move-over being properly considered as still first run. With the exception of the Paramount and Rialto these first run theatres have enjoyed a clearance over the complainant and over the complaining intervenors of sixty or in some instances sixty-seven days.

"Clearance as long as sixty days in favor of first run city theatres is abnormal. Forty-five days, and even thirty-eight days, is more than has usually been deemed reasonable in metropolitan areas for protection of first run theatres against either second run houses downtown or first run neighborhood or suburban theatres. The defendants emphasize the wide expanse of the Salt Lake City exchange district, and argue that the great distances which each print must travel between exhibitions make longer clearances appropriate and diminish the probability that shortening the clearance will hasten the showing of a picture at a particular theatre. But the competition on which clearance is based is competition for the patronage of customers, and is not governed by the availability of prints."

Ex. 3. Appeal Board Decision No. 58, decided March 11, 1943:

A. *Unfair practices.*—Independent exhibitor refused a reasonable run or reasonable clearance in order to favor a circuit theatre. Ineffectiveness of consent decree.

B. *Complainant.*—Lakeview Theatres, Inc., operating the Lakeview Theatre in Lakeview, a suburb of New Orleans.

C. *Nature of complaint.*—Paramount, RKO, and Warner refused to sell the Lakeview a run ahead of the Beacon, although the Beacon, a circuit theatre was not opened until after the Lakeview.

D. *Decision.*—Defendants should offer pictures to complainant on a run and on terms not inconsistent with Section VI of the decree, and a clearance of 60 or 30 days as proposed by Warner and RKO, respectively, would be unreasonable.

E. *Situation as stated in Appeal Board's decision.*—

"That the complainant has received less than fair dealing at the hands of these distributors, the Board does not question. This was sufficiently indicated in our prior opinion. The statement in that opinion last quoted we have reconsidered, to see whether, within the limits of the Decree, a basis can be found for affording complainant relief which the facts seem to warrant. We are compelled again to conclude that it is not within our power to do so. Section VI, by its terms, expressly reserves to the distributors the right to determine the run which shall be offered to an exhibitor.

"We are constrained to do likewise in the present case. The present distribution of pictures between the two theatres, which we have previously stated, sufficiently shows the apparent injustice which has been done to the complainant by the action of the defendant distributors. We are frank to say that a split of first run between these two theatres by these distributors seems entirely reasonable and appropriate under the circumstances, particularly as the Lakeview was the pioneer theatre in the neighborhood and is in every way equal, if not superior, to the Beacon."

Ex. 3. Appeal Board Decision No. 65, decided April 19, 1943:

A. *Unfair practices.*—In town where circuit has several theatres, independent theatre bound to follow all of circuit's theatres—clearance without written contract.

B. *Complainant.*—W. V. Adwell, operating the Roxy Theatre in San Angelo, Texas.

C. *Nature of complaint.*—Inability of independent operator to get a run from Warner, Fox, Paramount, and Metro until all theatres of a circuit played the pictures, including a circuit theatre opened later than complainant's theatre.

D. *Decision.*—Current pictures should be offered complainant on some run and an offer of availability of 150 days after 1st run would not comply with Section VI of the consent decree. Complaint dismissed as to Sections VIII and X of the Decree.

The Appeal Board found that all the other theatres in the city, seven in number, were operated by an affiliate of Robb and Rowley Circuit. The complainant sought a reasonable clearance and the right to prior runs over the Lyric theatre. The Appeal Board said:

"All of them, except the Lyric, have been operated by the Circuit for many years and there have been no theatres, other than the Circuit's theatres, in San Angelo for at least twenty-five years. On August 27, 1942, complainant, an independent operator, opened the Roxy theatre on Concho Street. On September 17, 1942, the Circuit opened the Lyric theatre also on Concho Street and almost directly opposite the Roxy and immediately adjoining the Ritz. The Lyric theatre building had originally been a theatre but for some sixteen years prior to 1942 had been used for other purposes."

The Appeal Board held that the complainant under section 10 must be dismissed because complainant theatre was not owned until August 27, 1942, and must be dismissed under section 8 because it did not appear from the record that any theatre in San Angelo had any specific contract clearance over the Roxy.

"The Ritz plays the better quality pictures third run. Prior to December 1942, it charged 28¢ when it played second run. In December 1942, the Circuit exchanged the policies of the Lyric and the Ritz. The Ritz's admission price was reduced to 22¢ and the Lyric's raised to 28¢. The Lyric became the second run theatre

and the Ritz the third run theatre with respect to the better pictures.

"During the many years when the Circuit had no competition for its theatres in San Angelo, it would appear, although the record is very meagre, that pictures were played at its six theatres about as it saw fit, with very little attention, if any, paid to runs and clearances. There is, however, evidence that, in Texas cities similar to San Angelo runs are played on the following availability: Second run 60 days after first run; third run 90 days after first run; fourth run 120 days after first run; fifth run 150 days after first run, and sixth run 180 days after first run.

"We are unable to agree with the Arbitrator, however, that complainant is entitled to no relief. The situation in San Angelo is an extraordinary one. The Circuit operates seven theatres, and apparently desires to obtain runs for all, or as many as possible, of them ahead of the Roxy, notwithstanding the fact that two at least of its theatres charge admission prices substantially less than the twenty-two cents charged by the Roxy. So far complainant has been unable to license from any defendant any of the current 1942–43 releases, although there is evidence that, in the case of at least one defendant first and second run on some current product had been licensed in San Angelo and the pictures had been exhibited in one or more of the Circuit's theatres prior to the date of the hearing. The excuse given by this defendant for not negotiating with complainant for a subsequent run on current pictures, although at the date of the hearing on January 11, 1943, some four months had elapsed since some current product had been trade shown, was that it had been unable up to that date to come to terms with the Circuit on third and fourth runs. Such a long delay is clearly unreasonable, and the excuse given for it is no justification for refusing to negotiate with complainant for some run."

Ex. 3. Appeal Board Decision No. 67, decided April 29, 1943.

A. *Unfair practices.*—Theatre subjected to an unreasonable clearance given 3 circuit theatres differing considerably in revenue returns to distributors.

B. *Complainant.*—Smalley Theatres, Inc., operating the Smalley Theatre in Johnstown, New York.

C. *Nature of complaint.*—Unreasonable clearance given to Schine Circuit theatres, the Glove and Hippodrome in Gloversville over Smalley Theatre in Johnstown, by Paramount, Fox, RKO, and Warner.

D. *Decision.*—The Appeal Board found that a clearance of 30 days was unreasonable with respect to the Glove theatre and with respect to the Hippodrome. It found that the Glove and Hippodrome although given the same clearance were distinctly different in revenue possibilities and held that the clearance of the Glove should be reduced to 21 days and the clearance of the Hippodrome to 14 days.

Ex. 3. Appeal Board Decision No. 68, decided May 10, 1943:

A. *Unfair practices.*—Independent theatre subject to same clearance in favor of two affiliated theatres, differing in revenue returns to distributors—ineffectiveness of decree.

B. *Complainant.*—Samuel Hochberg operating the Savoy Theatre in Bloomfield, New Jersey.

C. *Nature of complaint.*—Warner, Fox, Paramount, RKO, and Loew gave Warner affiliated theatres, the Royal and Broadmoor, an unreasonable clearance of 14 days over the Savoy.

D. *Decision.*—Clearance of Royal unaffected. Clearance of Broadmoor reduced to 7 days, as to Fox, Paramount, Loew, and RKO pictures.

E. *Situation as stated in Appeal Board's opinion.*—Appeal Board found that there was sufficient affiliation for Warner to be dismissed from the suit. The Appeal Board found that the Broadmoor was playing the poorer pictures and was not entitled to as much protection over the Savoy as the Royal. The Appeal Board found that there was some competition between the Broadmoor and the Savoy and in such situation the arbitrator could not abolish clearance entirely.

Ex. 3. Appeal Board Decision No. 70, decided May 20, 1943:

A. *Unfair practices.*—Use by defendants of restrictive admission prices, unreasonable clearances, and late runs to favor circuit theatres.

B. *Complainant.*—Louis M. Sosna, operating the Sosna Theatre in Mexico, Missouri.

C. *Nature of complaint.*—Warner, RKO, Fox, and Paramount refused to negotiate with Sosna except on unreasonable terms.

D. *Decision.*—RKO, Fox, and Paramount should offer pictures to Sosna on terms calculated not to defeat purposes of Section VI of consent decree.

E. *Situation as stated in Appeal Board's opinion.*—Warner licensed Sosna a second run and a stipulation was filed agreeing it had complied with Section VI.

"The RKO licenses to the Frisina circuit provided that second run should follow first run by sixty days, while the Fox and Paramount licenses provided for a clearance in favor of first run over second run of ninety days. The complainant's contention as to these clearances, so far as they affect the Sosna, is that a first run clearance of sixty days for the Liberty over either the Rex or the Sosna, second run, is reasonable, but ninety days is unreasonable; that the Rex should have no clearance over the Sosna; and that no theatre should have any protection whatever in the case of a picture shown first run at a ten-cent adult evening admission price.

"The offers of all three distributor defendants to Sosna contained conditions with respect to admission prices. RKO requires an admission price of not less than 10 cents at all times. Fox requires a minimum admission price of 10 cents except on pictures which were shown at 10 cents on first run. Paramount requires that the admission price be 5 cents less than charged on second run, except that there is a 10 cent minimum and children may be admitted for 10 cents at any time. Complainant asserts that these are unfair requirements for third run in Mexico, Missouri, and demands the privilege of showing pictures for an adult night admission price of

10 cents, with a 5-cent matinee charge and 5 cents for children at all times.

"While the Liberty and the Rex usually charge higher prices—the Liberty much higher—each of them has a weekly bargain night with an adult admission price of 10 cents. The defendants' contracts with the Frisina circuit stipulate a minimum admission price of 15 cents, and the defendants assert that none of their pictures are shown with their consent on bargain nights. The evidence proves that this sometimes happens, nevertheless, and the complainant charges that serious efforts are not made to prevent it. The complainant has two bargain days a week, at 10 cents, with a 5-cent matinee, and claims to take in more money at these prices than at higher ones. He desires the defendants' pictures to fill out his programs, and contends that he has no fair chance to compete with Frisina unless he can show some of them at his bargain day rates.

"The Arbitrator has expressed the view that, if the complainant is unable to make his theatre succeed, the result is not due to any action on the part of the distributors or any just grievance with respect to the terms on which he is allowed to buy pictures, but rather to the fact that there is no legitimate place in Mexico for a third run theatre. It is not the function of the Arbitrator or of this Board to pass upon the wisdom or folly of commercial ventures. It may be true that Mexico does not furnish sufficient patronage for a third run, and that the Sosna theatre, so long as it is obliged to play third run, will eventually fail no matter what terms are offered. It is undoubtedly true, as we took pains to make clear on the former appeal, that the terms are not required to be such as to ensure successful operation by the exhibitor where such success is impossible because of circumstances for which the distributor is not responsible. (Matter of Sosna, Dec. No. 40, Oct. 5, 1942.) On the other hand, the future may justify complainant's persistence. The complainant has a right to try the experiment unhampered by any unjust terms

imposed upon him, and while our authority under Section VI does not extend to interference with the distributor's choice of run, we have jurisdiction to disapprove terms and conditions which add unfairly to the complainant's burden.

"It will be noted that the reasonableness of a minimum admission price must be judged in relation to other terms and conditions, including clearance, as well as to the admission prices charged on prior run exhibitions. In this connection it is appropriate to enlarge what we said on the former appeal about admission prices and to declare that in our opinion it is unreasonable to require the same admission prices to be charged for third run as for second run when all other factors are equal. A relationship between admission prices and clearance is recognized in Section VIII of the Decree. As to clearance, appropriate criteria of reasonableness have been developed in the decisions of this Board in cases arising under Section VIII."

Ex. 3. Appeal Board Decision No. 71, decided June 1, 1943:

A. *Unfair practices.*—Compelling exhibitor to buy pictures for more than one of his theatres.

B. *Complainant.*—Welden Theatre, Inc., operating the Welden Theatre in St. Albans, Vermont.

C. *Nature of complaint.*—Paramount refused to sell its pictures first run to complainant unless its pictures were bought for other theatres in other towns.

D. *Decision.*—No relief available under decree.

E. *Situation as stated in Appeal Board's opinion.*—In St. Albans the theatres were the Welden, the Bellevue, the Empire. The Welden was the newest theatre and was a de luxe theatre. It had also been a first run theatre exclusively. From its opening to November 1942 it played Paramount pictures first run. The Empire is a much inferior theatre. On November 16, 1942, Paramount shifted its first run pictures from the Welden to the Empire, and since that day refused to license its pictures first run to the Welden. Around March 1942, the complainant had

joined up with a booking agency, the Affiliated Theatres, Inc., which bought and booked pictures for a number of theatres. The Appeal Board quoted as follows from the opinion of the Arbitrator:

"In the spring of 1942 Affiliated Theatres Corporation licensed a block of pictures from the respondent for first-run showings at the Welden Theatre. At the same time it also licensed pictures from the respondent to be shown at other theatres for which it acted as licensing agent. Although Affiliated represented and acted for several exhibitors as already stated and that fact was known to the respondent, negotiations for licenses in all cases were for particular theatres. Price arrangements were distinct and subject to individual agreement in respect of each theatre. In September of 1942 Albert M. Kane, the respondent's branch manager at its Boston office, offered Affiliated one or more blocks of its forthcoming releases. Included among the pictures offered was 'Holiday Inn' which Kane insisted be purchased on a percentage basis. At the same time Kane informed Mr. Howard, President and Manager of Affiliated Theatres Corp., that Paramount's policy for the new season would be to sell top pictures entirely on a percentage basis. Howard was unwilling to accept the proposed arrangements and refused the pictures on the terms offered. Shortly thereafter, however, Howard spoke with William Erbb, district manager of the Paramount Film Distributing Corp. in Boston, and advised him that he desired and was willing to buy Paramount pictures for exhibition at Welden Theatre upon the distributor's terms. Howard testified that Erbb then told him that Affiliated would have to buy for all of the theatres which it represented or for none at all. This testimony was not contradicted and is corroborated in a letter from Neil Agnew, General Sales Manager of Paramount Pictures, Inc., addressed to Mr. Howard under date of December 4, 1942, in which the writer said:

"'Your letter makes mention of the fact that we were able to agree as to terms for certain of

our pictures at the Welden Theatre, St. Albans, but says nothing with respect to the balance of your circuit. The difficulty seems to be that we could not agree as to terms in the other 10 situations, and, therefore, we were unable to make a deal.'

"It is further substantiated by the fact that Welden enjoyed first-run pictures from Paramount from the time of its opening until September of 1942, shortly after it had designated Affiliated as its buying agent. Prior to entering into this contract Mr. Mathieu, who was President and General Manager of Welden Theatre, Inc., informed one Duane, respondent's salesman in the St. Albans district, of his intention to join the Affiliated group. Mr. Duane thereupon cautioned him that if he did so Paramount would refuse to license pictures to him. I find that the respondent's refusal to license pictures to be shown at the Welden Theatre on first run was dictated solely by the decision taken by it that Affiliated would have to buy for all of its associated theatres or could buy for none at all."

The Arbitrator had found that Paramount had violated section 6.

The Appeal Board said:

"The undisputed facts fully sustain the Arbitrator's conclusion that Paramount's refusal to continue licensing its pictures first run to the Welden was due solely to the unwillingness of Affiliated Theatres to buy the pictures on Paramount's terms for the other theatres represented by it.

"The Decree contemplated that the distributors should deal with theatres on their individual merits. This is clearly indicated by the provisions of paragraph (7) of Section VIII which specifically direct an Arbitrator in a Section VIII proceeding to disregard the fact that a theatre involved is affiliated with a circuit. Paramount's refusal under the circumstances to deal with the Welden on its own merits, when it knew that the Welden was willing to meet its terms and had been a satisfactory customer for years, is a type of discrimination utterly at variance with the

spirit of the Decree. This is not the case of an exhibitor attempting to use the concentrated economic power of a group of theatres to obtain favorable terms from the distributor, but that of a distributor arbitrarily penalizing an independent exhibitor for employing a booking agent with which the distributor was in controversy as to other theatres. If its action were governed by the individual merits of the theatres it is hard to conceive that Paramount would not be far better off in continuing to license its pictures first run to the Welden, a newer, larger, better situated and better operated theatre than the Empire.

"Counsel for Paramount makes no attempt in his brief either to answer or to mitigate the severe criticisms made by the Arbitrator of his client's conduct. He confines his argument wholly to the lack of power of the Arbitrator under the Decree to redress an injustice clearly shown by the record to have been done to the Welden. We share the Arbitrator's conviction that the Welden deserves a first run ahead of the Empire, and were it not for the limitations imposed by the Decree we should either direct the restoration of first run to the Welden, which is what the complainant really desires and deserves, or else we should affirm the award without question on the ground that it does equity and justice between the parties concerned. Section VI of the Decree, however, grants no authority to an Arbitrator or to the Board to make an award directing the offer to an exhibitor of any specified run. The Decree unquestionably reserves to each distributor, where two theatres are in the same competitive area, the right, subject only to the provisions of Section X which are not applicable here, to decide which theatre shall have the prior run."

Ex. 3. Appeal Board Decision No. 72, decided June 8, 1943:

A. *Unfair practices.*—Independent theatre relegated by distributors to a playing time behind a circuit theatre and subjected to unreasonable clearance—ineffectiveness of decree.

B. *Complainant.*—Mrs. William L. Paternostro, operating the Delta Theatre about a mile outside the city limits of Lake Charles, La.

C. *Nature of complaint.*—Section VI and Section VIII. Independent theatre could not buy RKO or Paramount pictures except after they ran at circuit theatres.

D. *Decision.*—Complaint dismissed. Relief not afforded by decree.

E. *Situation stated in Appeal Board's opinion.*—There were five theatres in Lake Charles, all operated by the Southern Amusement Company.

"On September 2, 1941, complainant caused an announcement to be published in the Lake Charles newspaper that she planned to erect and operate a new theatre at the present site of the theatre here involved, the Delta. The next day the same paper carried an announcement that the Southern Amusement Company 'will build two suburban theatres in Lake Charles.'

"The construction of the complainant's Delta theatre began about September 20, 1941, on land which complainant had owned for about a year. Immediately thereafter construction was begun by the Southern Amusement Company of a theatre, later named the Victory, which it located eighty feet from the Delta. By forced construction work, the Victory theatre was opened some two weeks prior to December 13, 1941, when the Delta was opened."

In October 1941 Paternostro had negotiated with Paramount for some pictures and the contracts had no provisions with respect to the Victory theatre but later Paramount refused to play pictures ahead of the Victory and after June 1942 Paramount made no further effort to offer her pictures. While the theatre was being built she signed contracts with RKO for pictures but the contracts were never approved because the pictures were sold to the Victory.

"There is nothing in the record which indicates that the defendants investigated the respective merits of the Delta and Victory as theatres before deciding which should have the prior

run. It seems apparent that the conclusive factor was that the Victory was operated by a large and important circuit and the Delta by a small independent exhibitor. Southern Amusement Company is considered, as Paramount's representative testified, an important account and complainant a good but small customer.

"It is apparent that complainant's chief concern, both before and after the inception of the proceeding, is not clearance but run. She expressed herself satisfied with being permitted to play pictures at the Delta sixty days after first run, provided the Delta could play ahead of the Victory. What she sought was a run ahead of the Victory, not a reduction of clearance.

"The Board has repeatedly held that under Section VI it has no power to direct that one theatre be given a run ahead of another.

"The defendants, during the trial, made offers of a run which the Arbitrator found proper. He says 'Award is denied under Section VI of the Consent Decree because the defendant distributors have now offered to license their pictures to complainant on minimum terms with reasonable clearances in accordance with the spirit of that section. Both offers appear in the record.' We do not find in the record adequate proof to support this finding. So far as RKO is concerned it is to be noted that its offer did not even include any current releases. We have held that an offer under Section VI must include current releases.

"Nor is there in this record anything which would justify a finding that a fourteen or fifteen day clearance in favor of the Victory is reasonable. We know nothing whatever about the Victory except the circumstances and apparent purpose under which it was built, and that it is the property of the Southern Amusement Company which seeks to extend its dominance over the motion-picture business of Lake Charles by excluding complainant from the suburban field in which she was apparently the pioneer.

"Nor is it clear to us from the record that complainant should justly be required to wait sixty

days after first run downtown. This is an unusually long clearance for first run city theatres.

"The present record would seem to indicate, as we have previously stated, the purpose of defendants to license their films first to all of the Southern Amusement Company's theatres in Lake Charles, including the Victory, giving them an aggregate of sixty days playing time 'to clear' and then to require complainant's new theatre to wait fourteen days after the Victory before defendants' features are available to it.

"The terms and conditions which may be properly imposed on the Delta must consider the five theatres of the Southern Amusement Company as a unit and the terms and conditions attached to the Delta's run must recognize its merits as a theatre and establish a just relationship with these other theatres. Any other approach to this problem would be in effect to warn every independent theatre owner that in entering an area controlled by a single unit it does so at the peril of having its theatre, regardless of its merits, relegated to a position in which it cannot survive in case such dominating unit concludes to extend its operation."

Ex. 4 (R. 276, 305–8). Appeal Board Decision No. 85, decided August 17, 1943:

A. *Unfair practices.*—Independent theatre subject to unreasonable clearance in favor of a number of affiliated theatres—effect of monopoly power—manipulation of availabilities.

B. *Complainant.*—Edsol Corporation operating the Scotia Theatre in Scotia, New York.

C. *Nature of complaint.*—Unreasonable clearance given by Fox, Warner, RKO, Paramount, and Loew to a number of theatres affiliated with RKO.

D. *Decision.*—Unreasonable clearance reduced.

E. *Situation as stated in Appeal Board's opinion.*—The complaint was brought with respect to Fast Theatres, Inc., operating the Proctor, State, Plaza, Erie, and Strand theatres in Schenectady, New York. Because RKO had an interest in these theatres within the meaning of section 17 of the Decree it was dismissed as a party. The

clearance complained of was the clearance given the Plaza, State, and Proctor theatres.

"Until the 1936–37 season the clearance of the first run theatres in Schenectady was generally thirty days over a sixteen mile radius, excluding Amsterdam, Troy, and Albany. From the 1936–37 season until the 1941–42 season, inclusive, the Schenectady first run theatres had a forty-two day clearance over the same area. In the 1941–42 season this clearance was reduced to thirty-five days.

"The proof is convincing that there is active competition between the Scotia and the Plaza theatre. This competition, however, is clearly a one way competition. There is no evidence whatever that any residents of Schenectady cross the bridge to Scotia in order to go to the Scotia theatre. There can be no question but that sufficient competition exists to warrant clearance between the State, Proctor, and Plaza theatres on the one hand and the Scotia on the other. There is no evidence, however, of any substantial competition between the Scotia theatre and the subsequent run theatres in Schenectady of which the Strand is one.

"The situation briefly is this: The intervenor, through its operation of the Proctor, State, Erie, and Plaza theatres, has a complete monopoly in Schenectady of the exhibition of the defendant distributors' first and second run pictures and, by using the Erie as a move-over theatre for pictures previously played at the Proctor or State, is able materially to extend the so-called first run playing time of the best pictures. Although the move-over at the Erie does not in any way affect the availability of the Plaza or the Scotia the result is that a picture played at Erie will have played in two theatres before reaching the Plaza and in three theatres before reaching the Scotia. The practical effect of this, except as to availability, is substantially the same as if the Erie had a second run without intermediate clearance, the Plaza a third run and the Scotia a fourth run. Furthermore, the intervenor, by any delay

in playing pictures at the Plaza, is in a position to extend indefinitely the priority in playing time of the Proctor, State, and Erie theatres over subsequent run theatres. Whether any such delay is intentional or not is quite immaterial in its effect on subsequent run theatres.

"There is some dispute as to the actual playing dates of the Plaza and, based thereon, the actual availabilities of the Scotia.

"It is apparent from the foregoing that the thirty-five day clearance in favor of the first run theatres has not had any great significance. When the operator of this group of theatres and the distributors as well are willing to permit a second run theatre to play nearly 30% of its pictures ahead of availability even though it may be, as in this case, only a few days ahead, it is a pretty clear indication that the theatres having the prior run are not considered as needing thirty-five days' protection."

Ex. 4. Appeal Board Decision No. 87, decided January 19, 1944:

A. *Unfair practices.*—Taking a run away from independent to give it to a circuit. Unreasonable clearance established on basis of a circuit's demands.

B. *Complainant.*—Anthony Demharter, operating the Peacock theatre in New Orleans.

C. *Nature of complaint.*—Section 10 complaint against Paramount, RKO, Fox, and Warner. Demharter complained—

"That prior to 1935 the Peacock theatre enjoyed a run sixty days following this first run downtown Canal Street, New Orleans; that in or about the motion picture season of 1934–35 the defendants refused to license the Peacock on the said run and thereafter would only sell their features to complainant on a subsequent suburban run subject to sixty days' clearance in favor of the Rivoli theatre and, in the case of Vitagraph, subject to sixty days' clearance in favor of the Rivoli and Dreamland theatres, both of which theatres had a run sixty days after first run down-

town Canal Street; that the Rivoli and Dreamland were operated by United Theatres, Inc., a circuit operating more than fifteen theatres; and that the run previously enjoyed by the Peacock of sixty days after first run downtown Canal Street had been arbitrarily taken away from the Peacock and given to theatres operated by a circuit within the meaning of Section X. Complainant asked for relief under Section X."

D. *Decision.*—Distributors to negotiate on the basis of individual theatres as between the Peacock, Rivoli, and Dreamland.

E. *Situation as stated in Appeal Board's opinion.*—

"We cannot agree with the Arbitrator that complainant failed to prove his case under this paragraph.

"Complainant testified that the Peacock theatre plays a minimum of 208 pictures a year and that the only pictures that he was able to buy on a run sixty days after first run Canal Street were from Universal and Republic, together with a few miscellaneous pictures aggregating not more than about sixty per annum. This testimony was not contraverted by the defendants and there is no question in our minds but that complainant's theatre has not available to its features sufficient in nature and quantity to enable it to operate on the run requested by him.

"This brings us to a consideration of paragraph (6) of subsection B of Section X, which reads as follows:

'Such refusal to license the exhibition of said features in the complainant's theatre specified in his complaint was in fact because the theatre licensed to exhibit them on the run requested by the complainant was a circuit theatre.'

"To support complainant's claim under the foregoing paragraph the record shows the following facts. In the first place, according to complainant's uncontroverted testimony, the Peacock had enjoyed a run from one or more of the defendants sixty days after first run downtown, for about two and one-half to three years, from 1927 to about 1930, and this run was then taken

away from the Peacock and given to the Capitol, a circuit theatre, while the Peacock was made to play sixty days after the Capitol and the Dreamland. The Capitol was located about half-way between the Dreamland and the Rivoli. When the Capitol burned down a few years later the Peacock was subjected to a clearance of sixty days in favor of the Rivoli, which was operated by the same circuit."

Referring to award of the NRA Code Authority, the Appeal Board said:

"The award of the Code Authority previously quoted was in accord with the final zoning plan. It clearly recognizes that the Peacock and the Gentilly should be in one zone, that either or both might be given a first suburban run in that zone, and that first suburban run is sixty days after the first run downtown, the run requested by complainant. The award then provides that the second suburban run shall be thirty days after first suburban run. The defendants, however, paid no attention to the award notwithstanding the fact that it was made some months before the decision declaring the NRA unconstitutional, but they continued to grant the Rivoli sixty days' clearance over the Peacock and, in the case of Vitagraph, both the Rivoli and the Dreamland sixty days' clearance over the Peacock.

"In the absence of any evidence on the part of the defendants, we think the only legitimate inference that can be drawn from the evidence introduced by the complainant is that the reason for licensing the run in question to the Rivoli and Dreamland is that the latter are circuit theatres."

At the hearing, the complainant introduced in evidence a clearance schedule for United Theatres, Inc., for the 1936–37 season. The Appeal Board said:

"While the testimony does not make it clear who prepared this schedule or in what manner it was used, it bears the earmarks of having been prepared not by the distributors but by the circuit to show the runs and clearances demanded

for its own theatres, and of having been accepted by the distributors and put into effect by them. On its face it reveals a contemptuous disregard of the interests and probable rights not only of the Peacock but of practically every theatre not belonging to the circuit. It prescribes in every case the abnormally long clearance of sixty days between suburban runs. It attempts to subject the Peacock, Gentilly, and other theatres to a clearance in favor of the New Almonaster Avenue theatre, not yet even built, before there could be adequate opportunity to measure the factors on which clearance depends. The schedule even goes so far as to subject the Lafayette, for example, to a sixty-day clearance in favor of no less than twenty-one separate circuit theatres, and the Palace to twelve.

"With this schedule before us, it would be a wholly unjustified assumption for us to conclude that the transfer of the run previously enjoyed by complainant's theatre to the Rivoli and Dreamland theatres belonging to this circuit was not made because these theatres formed a part of that circuit. The record amply supports a quite contrary conclusion."

Ex. 291 (R. 276, 305–8). Appeal Board Decision No. 109, decided May 24, 1945:

A. *Unfair practices.*—Unreasonable clearance not disclosed to independent exhibitor.

B. *Complainant.*—National Theatre Company operating the National Theatre in Boston.

C. *Nature of complaint.*—Unreasonable clearance given by Fox, Paramount, RKO, Warners, and Loew to Dudley and Rivoli theatres.

D. *Decision.*—Complaint dismissed as to Loew and Warner as to Rivoli theatre because clearance not unreasonable. Dismissed as to Paramount because of latter's interest in the Dudley and Rivoli. Clearance over National Theatre reduced.

E. *Situation as set out in Appeal Board's opinion.*—

"In the Boston metropolitan area the first run suburban or neighborhood houses ordinarily follow downtown Boston by 28 days. The amount

things as they are, but that had Skouras rented the Strand, Skouras could have dictated the run of his Company's product which that theatre should enjoy. He said that nothing could induce him to sell the Strand ahead of the theatres of the Skouras Circuit in Astoria so long as the Skouras Circuit account was satisfactory.

"Mr. Randel for Paramount Pictures, Inc., while evasive, admitted that he would sell Skouras first although also admitting that the Strand was outstanding as compared with the other theatres in the district. He further admitted that a new theatre company into any district could not get a run until all those with whom the defendant distributors had previously dealt had been satisfied.

"Two pertinent and significant questions persist in the mind of the Arbitrator.

"1. Why did not Skouras Theatres, Inc., which either owns or operates five theatres in the Astoria District, after receiving notice, intervene in this proceeding? Legitimately the Arbitrator may infer that this Skouras aggregation has no interest in the outcome of the proceeding. More logically for a man of legal and practical experience, the Arbitrator concludes that Skouras Theatres, Inc., did not intervene because it had complete confidence that its interests would be amply protected by the defendant distributors. This inference the Arbitrator believes is freighted with unhealthy implications.

"2. Why do the defendant distributors, while offering no proof whatever that their revenues in the Astoria district will be impaired by granting to the Strand Theatre their product on a comparable basis with competing theatres of Skouras, nevertheless stand here in this proceeding as the champions not of their own interests, but rather as the guardians of the Skouras holdings in Astoria?

"The fact that Skouras Theatres, Inc. did not appear as an intervenor drives the Arbitrator to the unescapable conclusion that that Corporation has nothing to fear from any award of

the Arbitrator in this proceeding. If this absence of apprehension is due to the fact that any award made by the Arbitrator will not financially affect them, then some of the testimony of the defendant distributors must be disregarded. If the sense of security enjoyed by Skouras be due to their reliance on their associations with the defendant distributors and their belief that this association and their contractual relations would be amply protected by these defendants free from disturbance from the Arbitrator, then the Arbitrator is unable to escape the conclusion either that there is an agreement undisclosed between Skouras Circuit and these defendants, or that the Consent Decree in Section VI is disturbingly lacking in provisions adequate to deal with the situation such as presently exists in the Astoria district."

The Arbitrator reluctantly dismissed the complaint on the ground that it had been filed prior to the opening of the theatre.

"If, as is seriously contended by all the defendants, the Decree protects unreservedly the right of distributors to designate the run of their product, then the Decree is woefully defective in protecting the rights of new theatre owners in a district where circuit theatres are already entrenched. It was contended by a representative of Vitagraph that this action should have been brought under Section X. Of course, Section X is inapplicable because this theatre was not in existence at the time the Decree was made and yet Section X would permit an Arbitrator after certain findings of fact to remedy a situation such as is apparent in this case."

Ex. 297 (R. 276, 305-8). Arbitration Decision No. 28-1H-42, decided July 21, 1942:

A. *Unfair practices.*—Inability of independent theatre to get a run until all circuit theatres in opposition got pictures.

B. *Complainant.*—Gem Theatre Co. operating the Gem theatre in Tulsa, Oklahoma.

C. *Nature of complaint.*—Independent could not get a run from Warner, Loew, Paramount, Fox, and

RKO until Griffith Circuit Theatres given 10 runs. Section X complaint.

D. *Decision.* Distributors to license Griffith's theatres in Tulsa by separate contracts.

E. *Situation as stated in arbitrator's opinion.*—It was alleged that Loew, Paramount, and RKO did not offer the Gem pictures until they had been first offered to Griffith on 10 runs following first run in Tulsa. Certain pictures were offered to complainant only after being offered to Griffith and refused by Griffith. In Tulsa there were 12 theatres, Griffith owned 10. At the time of the hearing there were four first-run theatres in Tulsa and thirteen subsequent-run theatres, ten of which were owned by Griffith.

The Arbitrator said the evidence showed that for this season all of the distributors had first offered every group of pictures to Griffith for all the runs it wanted, usually 10, and what was left after Griffith made its choice was offered to the Gem and Cozy. Arbitrator concluded that the refusal to license features 5th and 6th run to the Gem and Cozy was because the theatres licensed to exhibit them on the run requested by the complainant was a circuit theatre. The Arbitrator said "the run position in the Griffith theatres is left as a matter of policy with Griffith, but the run position of the Gem and Cozy is determined by the respondent."

Ex. 298 (R. 276, 305–8), Arbitration Decision No. 7–4F–41, decided Nov. 1, 1941:

A. *Unfair practices.*—Inability of independent with better theatre to get pictures on early run or on reasonable clearance because of preference shown affiliated theatre.

B. *Complainant.*—Overton Amusement Co., Inc., operating the Overton Theatre in Overton, Texas.

C. *Nature of complaint.*—Loew, Fox, RKO, and Warner gave Paramount's affiliated theatre unreasonable clearance over complainant's theatre.

D. *Decision.*—Unreasonable clearance reduced.

E. *Situation as stated in arbitrator's opinion.*—

"(2) Evidence leads the Arbitrator to believe that the Jefferson Amusement Company and/or East Texas Theatres, Inc. (herinafter referred

to as the Jefferson Amusement Company), failed to properly serve the consumer public of Overton and its immediate trade territory after the burning of the original Gem Theatre. The Jefferson Amusement Company was given ample time in which to rebuild its theatre in Overton but did not see fit to do so.

"(3) As a result of popular demand and a natural desire to hold that part of the business of his trade territory which was being drawn elsewhere by lack of a motion picture house which would adequately serve the people of the trade territory as to capacity, appointments, etc., interested local citizens formed the Overton Amusement Company, Inc., and built a theatre in keeping with the population and purchasing power of the community, which theatre was named the Overton Theatre.

"(4) At about or shortly after the time the Overton Theatre was opened, the Jefferson Amusement Company leased a small store building and opened a theatre therein, giving it the same name as that of the burned theatre, namely, the Gem.

"The distributors saw fit to sell first run not only to the Strand (the other theatre operated by the Jefferson Amusement Company), but also to the inferior Gem theatre which pretty well absorbed the vast majority of the better pictures. Management of the Overton concluded to become a second run house.

"(5) Operation as a second run house with clearance such as has prevailed in the past was satisfactory for a few months until such time as the Jefferson Amusement Company reduced admission prices of its first run theatres to the same as that charged by the Overton Theatre for second run. The admission price of the theatres involved is one of the factors which shall be taken into consideration under the terms of the Consent Decree. The evidence presented indicates that it is an almost unheard of situation in this territory where the first run theatre does not make any higher charge than the second

of clearance enjoyed in turn by these houses over the subsequent runs appears from the evidence to depend chiefly on admission prices.

"A chart put in evidence by the intervenors and not challenged by the complainant shows that there is no subsequent run theatre, with an admission price as low as that of the National, which has an availability of less than 92 days after downtown Boston. So far as Fox at least is concerned, the complainant has a right at any time to shorten the clearance by increasing its admission price.

"It follows that the 21 days allowed in the Warner contracts is not unreasonable. Furthermore, we agree with the Arbitrator that any clearance provision specified merely 'as available' or as 'subsequent run' is unreasonable if it can be understood to mean more than thirty days. The sixty days included in the current Fox contracts is in our opinion clearly unreasonable even in view of the large admission price differential. This is an unusually long clearance between second and third run theatres in populous cities and we find no exceptional circumstances to warrant it in this case.

"The discrepancies which have appeared in this case between some of the clearance provisions in the contracts of the complainant as compared with the contracts of the intervenors, while having little effect upon our decision, make it appropriate to reemphasize and extend our previous comments on the unfairness of this method of granting clearance (Matter of Ayer Playhouse, Dec. No. 104, Dec. 21, 1944). The clearance provisions should be harmonious, and should be disclosed to both parties."

Ex. 292 (R. 276, 305–8). Appeal Board Decision No. 111, decided June 20, 1945:

A. *Unfair practices.*—Independent theatre in opposition to a circuit theatre not given opportunity to negotiate for 1st or 2nd run.

B. *Complainant.*—Benton Roy, operating the Roy Theatre in Mansura, Louisiana.

C. *Nature of complaint.*—Section VI complaint against Fox, Warner, and Paramount—inability to get first runs.

D. *Situation as stated in Appeal Board's opinion.*—First runs were being first offered to the Joy theatre, a circuit theatre. The Appeal Board said it had no jurisdiction to grant complainant a right to first runs. Until sometime after the Roy theatre was opened, Fox was unwilling to sell second run but in October 1944 decided to sell second run to the Joy theatre although the Roy theatre had asked for second run. Appeal Board said:

"Although the Joy theatre apparently purchased only a few Fox pictures second run, it was given the privilege of taking them all and the pictures it did purchase were some of the best pictures distributed by Fox. There can be no question but that the offer by Fox of a second run to the Joy theatre ahead of the Roy theatre was an act calculated to defeat the purposes of Section VI."

B. *Arbitration Awards*

Ex. 293 (R. 276, 305–8). Arbitration Decision No. 14–IFH–42, decided October 14, 1942 (no appeal):

A. *Unfair practices.*—Affiliate with several theatres allowed to juggle clearance and bookings among its theatres to detriment of independent—Ineffectiveness of decree.

B. *Complainant.*—Henry Hiser operating the Hiser Theatre, Bethesda, Md.

C. *Nature of complaint.*—Section 8—clearance, and Section 10—run complaint. Loew, Warners, RKO, and Paramount, relegated the Hiser to an inferior position to the Avalon, Uptown, and Calvert and Silver, Warner theatres, and to the Apex, an independent theatre. These were Washington, D. C., theatres. Bethesda is a suburb of Washington.

D. *Decision.*—Complaint under Section X dismissed. Complaint under Section VIII dismissed as to Warner and Paramount, Loew and RKO clearance reduced.

E. *Situation as stated in arbitrator's decision.*—

"The other theatres named have been built subsequently to the building of the Hiser, and though their runs, by reason of arrangements hereinafter noted, are prior to that of Hiser, no contractual provisions relate the Hiser's playing dates to those of any of the named theatres excepting the Avalon.

"In the Washington area there do not exist successive runs which can be definitely classified as first, second, third, fourth, etc. The larger downtown theatres have a first run, but after that the succession of playing dates is accomplished by the granting to particular theatres of clearance over other named theatres and, as to the Warner theatres between themselves, by decision of the Warner operating company.

"But to dispose of the controversy upon these considerations alone would be to oversimplify the problem.

"Complainant points out that changes have occurred since his theatre was pegged behind the Avalon which should be taken into account.

"Notable among those changes are the erection of the Uptown in 1936, the Calvert in 1937, the Silver in 1938, and the Apex in 1939, all of which he complains have been granted runs prior to those of the Avalon and the Hiser, thus postponing his playing position and resulting in his getting feature pictures after they have lost their pulling power by lapse of time and frequency of showing.

"As to clearance, or waiting time, between the showing at the Avalon and the showing at the Hiser, the justification for which must be competition to a degree requiring the prior run theatre to have this protection, the parties respondent by their own actions in the past year and a half appear to have adjudged that no clearance is necessary. The distributors have voluntarily reduced it to one day or zero, with the consent of the Warner interests who operate the Avalon. The Arbitrator therefore decides as to this clearance that what the parties have done is reason-

able, and that the former 14-day clearance accorded the Avalon over the Hiser has become unreasonable.

"There is another respect in which, in the opinion of the Arbitrator, the clearance granted the Avalon over the Hiser has become unreasonable.

"Granting, as one must, the right of the distributors to give to the Warner controlled Calvert, Uptown and Avalon runs prior to that of the Hiser, yet there are elements in the situation which offend a common sense of justice, and if a remedy can be found within the bounds set out in the Consent Decree, it should be applied.

"The Calvert, the Uptown, and so far as contractual provisions are concerned the Avalon, have runs 21 days after first run down town. The Warner theatres do not contract with distributors for clearance as between themselves. As counsel for the Warner interests puts it in his brief—'suitable clearance is accorded by a distributor to one Warner theatre over another competing Warner theatre by staggering availabilities and in practical booking and playing operation.' In practice, the Calvert and the Uptown run contemporaneously, the run in one usually starting a day after that in the other. The Avalon plays not earlier than 7 days after the first playing date at the Uptown. The playing sequence and the intervals between these three theatres are subject to practical booking and availability problems, wholly at the election of Warner. Warner's counsel computes the earliest availability to Hiser as 31 days after first run down town, as follows, 21 days before availability to the Uptown and the Calvert, 7 days thereafter before availability to the Avalon, 2 days run at the Avalon, and the availability to the Hiser.

"Complainant's booking agent testified that in practice the present availability to Hiser varied from twenty-eight (28) days after down town to fifty (50) to sixty (60) days after down town, dependent upon whether and when Warner played the picture at the Avalon.

"Whether or not the longer interval from down town playing occurs frequently, the fact remains that it can occur whenever Warner so solves its own booking problems, and the determination of a circuit having fifteen theatres in the Washington area is necessarily not always dictated by the separate interests of Avalon considered independently. If Avalon were an independent theatre having a run of clearance defined as twenty-eight (28) days after down town Washington, the situation of a theatre whose playing time follows that of the Avalon would be different from that here presented, as the motives of self interest leading to prompt booking stressed in the Warner brief, might then more safely be relied on to protest the Hiser, which is pegged behind the Avalon.

"It is true that the Consent Decree directs that in proceedings under Section VII the arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit. Nevertheless, the fact that there are no fixed clearances or runs as between the several theatres which include the Avalon, which alone of them is determinative of the Hiser's playing date, which in the present case results from their being parts of a circuit, is a fact which is being taken into account."

Warner and Paramount said that they were not currently supplying the Hiser and had no precontractual relations and therefore should be dismissed from the complaint. The complainant said he stopped buying from them because he could not get from them the playing position he sought.

"If the matter were one of first impression, one might well hold that an exhibitor need not make a contract containing an objectionable term, in order to put himself in a position to complain of the term to which he objects, but the cited holding of the Appeal Board appears unequivocal, no qualifying or countrary decisions have been cited, and the Arbitrator feels bound to dismiss the complaint as to these distributors on the ground stated."

Ex. 294 (R. 276, 305–8). Arbitration Decision No. 14–4FH–41, decided August 8, 1941. (No appeal):

A. *Unfair practices.*—Unreasonable clearance given affiliated theatres, independent unable to negotiate for first runs, holding back availabilities.

B. *Complaint.*—L. W. Lea, operating the Lea Theatre in Danville, Virginia.

C. *Nature of complaint.*—Section VIII—clearance and Section VI—run, complaint. 1st run given theatres operated by a Paramount affiliate and unreasonable clearance given them by Fox, Lowe, Paramount, RKO, and Warners.

D. *Decision.*—Complaint dismissed under Section X. Paramount dismissed from case because of its affiliation. Clearance reduced.

E. *Situation as stated in Arbitrator's opinion.*—

"Prior to 1933 the only clearance in Danville, Virginia, was thirty days between first run theatres and second run theatres. The second run theatres did not take clearance over any subsequent run.

"After intervenor began to do business in Danville, and beginning with the 1932–33 season, the clearance in Danville was increased as follows: The contracts with first run theatres provided they should have clearance over second run of from sixty to ninety days; the contracts with the second run theatres provided they should have clearance of thirty days over subsequent runs.

"In many of the contracts which the distributors have with the complainant in respect of the Lea Theatre, there is a provision, under the heading CLEARANCE-RUN, reading as follows: 'Third run in Danville, Virginia. Thirty days after the second run, Danville, Virginia. Not more than one hundred twenty days after first run or six months after national release.'

"Complainant maintains that the above quoted provision in his contracts results, in effect, in granting aggregate clearances of one hundred twenty days between the first run and the third run, to which complainant is entitled, and urges that such clearances are unreasonable. Respondents and intervenor maintain that the pro-

vision in the various contracts does not fix the clearance, as defined by the Consent Decree, but that reference must be made to the contracts with the first and second run theatres in order to determine what the applicable clearance is; that upon reference it will be found that for the most part such clearances consist of from sixty to ninety days in favor of the first run over the second run, and thirty days over subsequent runs."

"Moreover, there is uncontradicted testimony in this case that the shortest time after national release when any picture has been made available to complainant was one hundred nine days; that the longest time between release and the date made available has been one hundred sixty-five days. Uncontradicted testimony also was given that the shortest time between the first run in Danville and an exhibition, there being no intermediate runs, was seventy-one days, the longest time after first run in Danville being one hundred ninety days.

"It is recognized that clearance is necessary between first and second runs, and, in some instances, between subsequent runs. It is also recognized that minds may reasonably differ as to what a reasonable clearance is. But a clearance which at once tends to stifle competition and is not necessary to protect prior run theatres is unreasonable. It seems to me that so far as the Lea Theatre is concerned, sixty or ninety days after a first run in Danville is unreasonable, and that thirty between second and third runs is unreasonable, particularly so where the third run theatre has no assurance of an exhibition prior to four months after a first run in Danville, or six months after national release, and the charges of the third run theatre are practically the same as those of the prior run theatres."

Ex. 295 (R. 276, 305–8). Arbitration Decision No. 1–18D–41, decided December 12, 1941 (No appeal):

A. *Unfair practices.*—Independent not given an opportunity to negotiate for pictures—monopoly practices—ineffectiveness of consent decree.

B. *Complainant.*—Cedar Operating Co., Inc., operating the Strand Theatre in Astoria, Long Island.

C. *Nature of complaint.*—Section VI complaint against Paramount, Loew, RKO, Fox, and Warner.

D. *Decision.*—Complaint dismissed because brought before theatre opened. RKO was dismissed because of its interest in Skouras Theatres Corp.

E. *Situation as stated in Arbitrator's opinion.*—Skouras Theatres, Inc., had the Astoria, the Broadway, the Grant, the Crescent, and the Steinway theatres in that district. The Arbitrator found as a fact that negotiations between the owners of the Strand and Skouras for the leasing of the theatre were terminated because Skouras would pay about only one-half of the fair rental value. He found that had Skouras Theatres rented the Strand that that theatre could have dictated the run to be enjoyed by the Strand for the product of all five defendant distributors. He found:

"13. The income of the defendant distributors in the district will not be lessened by granting to the complaining party a run upon such terms and conditions as will give the complainant a fair opportunity to operate the Strand Theatre with profit.

"14. Some time prior to the completion of the Strand Theatre and within the year 1941, the Broadway Theatre, Strand's nearest competitor and one of the Skouras theatres, changed its long-time policy of two double feature programs per week to three such programs weekly.

"The theatre provides a fine, modern housing for displaying motion pictures with sound. It is air-conditioned, equipped with the lastest improved sound-production devices, and has sponge rubber cushioned seats. It is clean, has ample facilities, and is ably managed by an experienced motion picture theatre manager, Mr. Jacques Horn, who was an intelligent and frank witness for the complainant.

"The upshot of numerous conferences with all representatives of all the defendant distributors seems to have been that the complaining party was refused the run it wanted on the 1940–41

product of the 'Big Five,' but was offered the 'last run' in Astoria on its product because, according to the unfailing testimony of all the defendants, the 1940-41 product had already been fully contracted for by existing theatres in the district.

"The complaining party also repeatedly requested of the defendant distributors a run on the 1941-42 product. The answer of the distributor defendants as to this product was that they were forbidden by the Decree to contract for that product until the trade showings of it had been held; or if, as in a few cases the trade showings of the first block of the 1941-42 product had already been held prior to August 15th (the date of filing the submission) then the defendants answered that these feature pictures were still showing in metropolitan theatres and that no contracts could be made with any theatres in Astoria until these metropolitan showings and further 'road showings' had been concluded.

"Skouras Theatres, Inc., called throughout the proceedings Skouras Circuit, with wide holdings of motion-picture theatres, owns or operates five theatres in Astoria district, the Astoria, the Broadway, the Grant, the Crescent, and the Steinway. They, partly owned by RKO, have a preferential license for pictures from 20th Century-Fox terminating in 1948. While the witnesses of the other defendants were reluctant to admit the fact, the fact is nevertheless evident to the Arbitrator that Vitagraph, Loew's and Paramount did not and do not intend to deal with the complaining party until Skouras Bros. have been satisfied.

"The Broadway Theatre, one operated by Skouras and located within four blocks of the Strand, has, for an unexplained reason, this year changed its former policy from two double feature shows weekly to three such shows. It is a fair inference that, had not such a change been made, certain pictures of the 1940-41 product of the defendants would have been available for the Strand. Query: Did Skouras demand and

did the defendants grant to him these additional pictures in order that no pictures of the defendants should be available for the competing Strand Theatre?

"That Skouras at that time was negotiating with Jacob Levy for the lease of the Strand Theatre adds poignancy to this episode. The testimony of Jacob Levy that the negotiations with Skouras for the lease were terminated because Skouras would pay only half the fair rental value of the theatre was uncontradicted. It is apparent to the Arbitrator that Skouras, having control of the output of the defendants in the district, is perfectly capable of dictating his own terms for the rental of theatres, for it is obvious that a theatre unable to secure the output of the five defendants on a profitable run is a worthless piece of property. That such a deplorable threat to free enterprise remains possible under the Consent Decree, seems to the Arbitrator inimical to the public interest and unhealthy for the industry.

"The Arbitrator is satisfied that the five defendants do not intend to permit any new theatre to come into the Astoria district where five theatres are controlled by Skouras unless that new theatre is also controlled by Skouras and that irrespective of the fact that there has been in the district such an increase in population as might reasonably warrant a prudent businessman to invest his capital in a theatre providing more modern accommodations for the public.

"Mr. Hodes testifying for RKO Radio Pictures, Inc., stated that had Skouras obtained the Strand Theatre, he could have had any run for that house which he desired and further admitted that his Company would not disturb the status quo in Astoria so far as runs of their product are concerned.

"Mr. Rothenberg for Vitagraph, Inc., admitted that a new theatre coming into a district even though that district were 'underseated' could not get pictures from his Company except 'last run pictures'; that his policy was to leave

run. The evidence also tends to bear out the fact that it is unusual in this territory for first run to be sold to an inferior theatre. The Arbitrator, however, recognizes the right of a distributor to sell runs to whomever he pleases.

The Arbitrator found that a 60-day clearance was unreasonable and the clearance allowed the Strand and Gem theatres over the Overton Theatre should be a maximum of 14 days.

VI—Corporate Structure of Each Defendant

In the following pages we have tabulated the most recent data introduced in evidence showing the names of each corporation in which a defendant owns voting stock which is engaged in any branch of the film industry, the branch in which it is engaged and the percentage of stock control held. The branch of the industry in which each corporation is engaged is indicated by "E" for exhibition, "P" for production, and "D" for distribution. The principal subsidiary corporations of each defendant have been listed in alphabetical order. Except for Loew, corporations in which these subsidiary corporations own voting stock are listed alphabetically under each subsidiary holding the stock interest in question. The percentage listed is in each case the percentage held, directly or indirectly, by the parent company, except where otherwise noted, and is given to the nearest whole number.

A. Columbia

(Ex. 130) (R. 222, 224, 225, 228)

	Industry branch	Percent of ownership
Columbia Pictures Corporation	P & D	
Columbia Pictures of Louisiana, Inc.	D	100
Screen Gems, Inc.	P.	100

B. Fox

(Ex. 130) (R. 222, 224, 225, 228)

	Industry branch	Percent of ownership
Twentieth Century-Fox Film Corporation	P & D	
Movietonews, Inc.	P	100
National Theatres Corporation	E	100
Evergreen State Amusement Corporation	E	53
Bellingham American Theatre Company	E	53

	Industry branch	Percent of ownership
Twentieth Century-Fox Corporation—Continued		
National Theatres Corporation—Continued		
Evergreen State Amusement Corporation—Contd.		
Bellingham Amusement Company	E	53
Cascade Theatres Corporation	E	32
Multnomah Theatres Corporation	E	32
Rainier Theatres Corporation	E	32
Columbia House Theatre Corporation	E	53
Empire Amusement Company	E	53
Eugene Theatre Company	E	53
Evergreen Theatres Corporation	E	53
Hollywood Amusement Corporation	E	53
Hudson House Theatre Corporation	E	53
Manette Theatre Corporation	E	53
Olympia Amusement Company	E	53
Osran Amusement Company	E	53
Paraport Theatre Leasing Corporation	E	53
Spokane Amusement Company	E	53
Vancouver Amusement Company	E	53
Wenatchee Amusement Company	E	27
Willamette Amusement Company	E	26
Fox Inter-Mountain Theatres, Inc	E	100
C & A Amusement Company	E	100
Fox Alliance Theatre Corporation	E	100
Fox Big Horn Theatre Corporation	E	100
Fox Billings Theatre Corporation	E	100
Fox Caldwell Theatres Corporation	E	100
Fox Denver Theatres, Inc	E	100
Fox Estes Theatre Corporation	E	100
Fox Greater Theatres, Inc	E	100
Fox Idaho Theatre Corporation	E	100
Fox Inter-Mountain Amusement Corporation	E	100
Fox Laramie Theatre Corporation	E	100
Fox Lincoln Theatre Corporation	E	100
Fox Mission Theatres Corporation	E	100
Fox Missoula Theatre Corporation	E	100
Fox Nampa Theatre Company	E	100
Fox Nebraska Theatre Corporation	E	100
Fox New Mexico Theatre Corporation	E	100
Fox Odgen Theatre Corporation	E	100
Fox Rainbow Theatre Corporation	E	100
Fox Trinidad Theatres Corporation	E	100
Fox Wyoming Theatre Corporation	E	100
The Isis Theatre Company	E	100
The K. & F. Theatres Company	E	100
Fox Michigan Corporation	E	100
Fox Midwest Theatres, Inc	E	100
Bell Amusement Corporation	E	100
Belleville Theatre Corporation	E	100
Duquoin Theatres Corporation	E	100
Fox Beatrice Theatre Corporation	E	100
Fox Cape Theatre Corporation	E	100
Fox Centralia Theatre Corporation	E	100
Fox Iowa Theatre Corporation	E	100
Fox Kansas City Corporation	E	100
Fox Kansas Theatre Company	E	100
The Turner Threatre Company, Inc	E	100
Fox Midwest Amusement Corporation	E	100
Fox Missouri Theatre Company	E	100
Fox Ozark Theatres Corporation	E	100
Muscatine Amusement Company	E	73
Fox Plains Theatres Corporation	E	100

	Industry branch	Percent of ownership
Twentieth Century-Fox Film Corporation—Continued		
National Theatres Corporation—Continued		
Fox Midwest Theatres, Inc.—Continued		
Fox Springfield Theatre Corporation	E	100
Marshall Theatre Company	E	100
Mississippi Theatres Corporation	E	100
Strand Theatre Corporation	E	73
The Miller Amusement Company, Inc	E	100
The Salina Theatre Building Company, Inc	E	100
The Sunflower Theatre Company	E	50
Fox Pacific Theatres, Inc	E	60
Fox Everett Theatres, Inc	E	30
Fox Philadelphia Building Inc	E	100
Fox West Coast Theatres Corporation	E	100
Alden Theatre Company	E	51
Anaheim Theatres, Inc	E	51
Fullerton Theatre Corporation	E	51
Avenue Fifty-Eight and Pasadena Corporation	E	100
Larchmont Theatre Venture	E	51
Beach Theatre Corporation	E	100
Broadway Theatre Company of Santa Ana	E	51
Caliego Theatre Corporation	E	100
California Building Company of San Diego	E	100
California-San Bernardino Theatre Corporation	E	100
Campus Theatre, Inc	E	100
Carlton-Rivoli Theatres Corporation	E	50
Carthay Circle Theatre Company	E	100
Citrus Belt Theatre Corporation	E	100
Riverside Joint Venture	E	51
Crenshaw Boulevard Theatre Corporation	E	51
East River Theatre Corporation	E	100
Egyptian Long Beach Theatre Corporation	E	100
Euclid & Colorado Theatre Corporation	E	100
Fairfax Theatre Co., Ltd	E	100
Far West Theatre Corporation	E	100
San Luis Obispo Theatres, Inc	E	51
Figueroa & Santa Barbara Realty Company	E	100
Fox Bakersfield Theatre Corporation	E	100
Pacific-Fox Bakersfield Venture	E	70
Fox Cabrillo Theatre Corporation	E	100
Fox De Luxe Theatres, Inc	E	100
Fox Oakland Theatre Corporation	E	100
Fox Spokane Theatre Corporation	E	100
Fox Fairmount Theatre Corporation	E	100
Fox Great Falls Theatre Corporation	E	100
Fox Imperial County Theatres Corporation	E	100
Fox Lewiston Theatre Corporation	E	100
Fox Long Beach Theatre Corporation	E	100
Fox North Park Theatre Corporation	E	100
Fox Orange Belt Theatres Corporation	E	100
Fox Paradise Theatre Corporation	E	100
Fox Riverside Theatre Corporation	E	100
Fox San Bernardino Theatre Corporation	E	100
Fox Senator Theatre Corporation	E	100
Fox Stockton Theatre Corporation	E	100
Fox Strand Theatre Corporation	E	100
Fox Sunkist Theatre Corporation	E	100
Fox Tucson Theatres Corporation	E	100
Fox United Artists Venture	E	50
Fox Vallejo Theatre Corporation	E	100
Fox West Coast Agency Corporation	E	100

	Industry branch	Percent of ownership
Twentieth Century-Fox Film Corporation—Continued		
National Theatres Corporation—Continued		
Fox West Coast Theatres Corporation—Continued		
Fox Western Montana Theatre Corporation	E	100
Glendale Theater Company	E	100
Golden Gate Theatre Corporation	E	66
Golden State Theatre Corporation	E	84
Fresno Theatre, Inc	E	92
Hanford-Tulare-Visalia Venture	E	56
Reno Theatres Venture	E	54
Sacramento Hippodrome Theatre, Inc	E	84
Golden State Theatre & Realty Corporation	E	39
T. & D. Jr. Enterprises, Inc	E	33
Golden State Theatre Corporation	E	84
Grauman's Greater Hollywood Theater, Inc	E	33
Hollyvard Theatre Venture	E	51
Huntington Park Theater Company	E	100
Fox Belmont Theatre Corporation	E	100
Towne Theatre Venture	E	51
Imperial Valley Building Corporation	E	100
Kern County Theatre Corporation	E	100
Marstrand Theatres Corporation	E	51
Mesa Investment Co	E	100
Angelus-Mesa Joint Venture	E	51
Ontario Theatre Corporation	E	100
Ontario Joint Venture	E	50
Pablo Theatres Corporation	E	100
Palo Alto Theatre Company	E	100
Paracal Theatre Leasing Corporation	E	100
Peninsula Theatres Corporation	E	100
San Francisco & San Mateo Amusement Co.	E	100
Principal Theatres, Inc	E	51
Alhambra Amusement Company	E	25
Alhambra Theatres Venture	E	16
American Amusement Company	E	25
Broadway Theatres, Inc	E	25
Metropolitan Theatres Corporation	E	33
Principal Theatres, Inc. of Arizona	E	51
Santa Maria Amusement Company	E	25
Silver Crest-Principal Theatres	E	25
Redlands-West Coast Corporation	E	100
Rubidoux Theatre Corporation	E	51
San Diego Theatre Corporation	E	100
Pacific Beach Theatres Venture	E	51
Pacific-Silver Gate-San Diego Venture	E	66
Sandorf Theatre Corporation	E	100
Santa Monica Theatre Company	E	100
Sherman Oaks Theatre Corporation	E	60
Solano Theatre Corporation, Ltd	E	100
Telenews Theatre Venture	E	50
South Pasadena Theatre Corporation	E	100
Monrovia-South Pasadena Theatres Venture	E	51
Strand-Vallejo Theatre Corporation	E	100
Sunbeam Theatre Corporation	E	66
T. & D., Jr. Enterprises, Inc	E	33
Golden State Theatre & Realty Corporation	E	39
Reno Theatres Venture	E	54
The Balboa Building Company	E	100
Theatres Holding Company	E	33
Twentieth and Mission Theatre Company	E	100
El Capitan-Rialto Venture	E	50
United West Coast Theatres Corporation	E	70

	Industry branch	Percent of ownership
Twentieth Century-Fox Film Corporation—Continued		
National Theatres Corporation—Continued		
Fox West Coast Theatres Corporation—Continued		
C-F-M Venture	E	60
Fifth Avenue-Alto Theatres Venture	E	35
Reyshire Theatre Corporation	E	35
United-Long Beach Preferred Venture	E	42
Venice Investment Company	E	100
Fox Redondo Theatre Corporation	E	100
West Los Angeles Theatre Venture	E	51
Vermont Avenue Theatre Corporation	E	100
West Coast-Compton Theatre Corporation	E	51
West Coast Hollywood Theatres	E	50
C-F-M Venture	E	60
Carlton-Rivoli Theatres Corporation	E	50
Central Van Nuys Theatres Venture	E	30
Pico Theatre Corporation	E	25
Studio City Theatres, Ltd	E	50
West Coast Leasing Corporation	E	100
West Coast Long Beach Theatre Corporation	E	100
West Coast-Santa Ana Theatre Corporation	E	51
West Coast Theatres, Inc. of Northern California	E	100
Broadway and Twentieth Properties Inc	E	100
Euclid & Colorado Theatre Corporation	E	100
Fox Salinas Theatres, Ltd	E	66
El Rey Theatre Venture	E	33
Fresno Theatre, Inc	E	92
Jefferson Realty Company	E	16
Sacramento Theatres, Inc	E	50
San Jose Theatre Corporation	E	100
T. & D., Jr. Enterprises, Inc	E	33
Transbay Theatres, Inc	E	75
West Coast-Wilmington Company	E	77
Westlake Park Theatre Corporation	E	50
Westwood Village Theatre Corporation	E	100
Fox Wisconsin Theatres, Inc	E	100
Fox Apollo Theatre Corporation	E	100
Fox Badger Theatre Corporation	E	100
Fox City Theatres Corporation	E	100
Fox Janesville Corporation	E	100
Fox Lake Shore Theatres Corporation	E	100
Fox Linthea Corporation	E	100
Fox Lisbon Theatre Corporation	E	100
Fox Milwaukee Theatres, Inc	E	100
Fox Palace Corporation	E	100
Fox Rock River Theatre Corporation	E	100
Fox Winnebago Corporation	E	100
Fox Wisconsin Amusement Corporation	E	100
Fox Wisconsin Corporation	E	100
Fox Wolverine Corporation	E	100
Valley Theatres Corporation	E	50
Natco Booking Agency, Inc	E	100
National Theatres Amusement Co., Inc	E	100
National Theatres Corporation	E	100
Wesco Corporation	E	100
Fox West Coast Theatres Corporation		
Fox Wilshire Theatre Corporation	E	100
Fullerton Building Corporation	E	51
Gateway Theatre Company	E	30
Roxy Theatre, Inc	E	100
Twentieth Century-Fox Corporation of Texas	D	100

	Industry branch	Percent of ownership
Twentieth Century-Fox Film Corporation—Continued		
Twentieth Century-Fox Distributing Corporation	D	100
Twentieth Century-Fox International Corporation	D	100

C. Loew

(Exs. 46, 47) (R. 180)

	Industry branch	Percent of ownership
Loew's Incorporated	P, D & E	
Abingdon Amusement Corporation	E	100
Ardstodel, Inc	E	50
Astoria Theatre Corporation	E	100
Broadchester Corporation	E	33
Broadrose Theatre Corp	E	21
Brooklyn Operating Corporation	E	100
Buffalo Theatres, Inc	E	50 (P)
		43 (C)
Canal Realty & Improvement Co., Inc	E	66
Capitol Theatre Corp	E	2
Cardinal Amusement Corp	E	100
Century-Parkway Corporation	E	50
Chapel State Theatre Company, The	E	50
Chateau Amusement Corporation	E	50
Cleveland Theatres, Inc	E	9 (P)
		100 (C)
Clinton-Court Corporation	E	100
Colorado-Orpheum Corp	E	50
Coney Island Theatre, Inc	E	100
Delken Theatres Corp	E	43
Delton Operating Corporation	E	100
Diamond Amusement Corporation	E	100
District Amusement Corporation	E	100
Dyckwood Amusement Corporation	E	66
Eton Amusement Corporation	E	100
Evans Theatre Corporation	E	100
Evergreen Amusement Corporation	E	50
Fairmont Theatre Corporation	E	100
Firm Amusement Corporation	E	100
Frontier Theatres, Inc	E	43
Gates Theatre Corporation	E	53
Great Lakes Theatre Corp	E	43
Hawthorne Amusement Corporation	E	66
Hemlock Theatre Corporation	E	50
International Vaudeville Company	E	100
Lance Theatre Corp	E	100
Landroll Realty Corporation	E	50
Lee-Richmond Corp	E	50
Loew-United Artists Columbus Corp	E	50
Loew's Boro Park Theatre Corp	E	66
Loew's Boston Theatres Company	E	78
Loew's Boulevard Corporation	E	100
Loew's Dayton Theatre Company	E	100
Loew's Houston Company	E	100
Loew's Indiana Theatres	E	100

	Industry branch	Percent of ownership
Loew's Incorporated—Continued		
Loew's Theatre & Realty Corp.	E	100
Louisville Operating Co., Inc.	E	50
Macon Amusement Corporation	E	50
Marcus Loew Booking Agency	E	100
Marcus Loew Indianapolis Realty Co.	E	100
Market & Taylor Building Company	E	100
Mayfair Building, Inc.	E	100
McNaughton Realty Corp.	E	43
M. G. M. International Films Corporation	P	100
Midas Amusement Company	E	100
Midland Investment Corp.	E	100
Moredall Realty Corporation	E	50
New Broad Company	E	100
North Bergen Amusement Corporation	E	100
Oak Park Realty & Amusement Company	E	100
Olthea, Inc.	E	50
167th Street Amusement Corporation	E	100
Parkchester Amusement Corp.	E	100
Penn-Federal Corporation	E	18 (P) 47 (C)
Penn-Federal Enterprises, Inc.	E	50
Poli-New England Theatres, Inc.	E	75
Putnam Theatrical Corporation	E	100
Rhodes Theatre Operating Corp.	E	50
St. Louis Orpheum Corp.	E	100
Seventh & Broadway Building Company	E	100
Sherman Amusement Corporation	E	66
Standard Evansville Realty Co., The	E	100
Suburban Theatre Corporation	E	50
Superior Theatre Corp.	E	50
Theatres Development Corp.	E	100
Toledo Operating Corporation	E	50
Valentine Theatre Corp.	E	7
Venetian Amusement Company	E	12
Victoria-Seventh Avenue Corp.	E	100
Warwick Amusement Corporation	E	100
West Reading Theatre Company	E	50
Willard Amusement Corporation	E	100
Yonkers Operating Corporation	E	66

D. Paramount

(Exs. 61, 62, 64) (R. 186–87)

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.	P, D & E	
Abbeville Theatre Corporation	E	100
Alabama Theatres, Inc.	E	50
Rebel Poster Exchange, Inc.	E	60
Southern Attractions, Incorporated	E	12.5
Bessemer Theatres, Incorporated	E	50
Kingsul Theatres, Inc.	E	100
Kingsport Broadcasting Company, Inc.	E	8⅓
Wil-Kin Theatre Supply, Inc.	E	24.16[1]
Arcade Investment Company	E	100

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.—Continued		
Arkansas Amusement Corporation	E	50
Artists Booking Bureau, Inc	E	100
Atlanta Enterprises, Inc	E	100
Augusta Amusements, Inc	E	50
Balaban & Katz Corporation	E	98.23
B and K Management Corporation	E	100
Diana Theatre Corporation	E	50
45 W. Randolph St. Theatre Corporation	E	50
Garyana Amusement Corporation	E	50
Granada Corporation	E	100
Hohman-Clinton Realty Corporation	E	100
Indiana Amusement Enterprises, Inc	E	100
Publix-Indiana Corporation	E	100
Publix-South Bend, Inc	E	100
Iris Amusement Corporation	E	50
Lund Theater Corporation, Inc	E	100
Marbro Corporation	E	100
Oak Park Amusement Corporation	E	37.5
Oak Park Theatre Corporation	E	100
Publix Great States Theatres, Inc	E	100
Auburn Amusement Company	E	50
Gale Theatre Company	E	50
L. & P. Theatres, Inc	E	50
Quincy Theatres Operating Co	E	50
Rockford Enterprises, Inc	E	50
Rockford Theatre Corporation	E	50
State Amusement Corporation	E	50
Theatre Amusement Company	E	100
Theatre Booking Office, Inc	E	100
Theatre Service Corporation	E	100
Tiffin Amusement Company	E	25
P. & N. Theatre Corporation	E	100
United Detroit Theatres Corporation	E	25.65
Alger Theatre Corporation	E	75
Detroit Capitol, Inc	E	100
Madison Theatre Corporation	E	100
Royal Theatre Co	E	50
190 North State Street, Inc	E	100
West Suburban Amusement Company	E	50
Maryland Theatre Building Corporation	E	12.15
Berklaw Realty Corporation	E	100
Birmingham Theatre Operating Company	E	60
Brevard Theatres, Inc	E	16⅔
Bristenn Theatres, Inc	E	100
Buffalo Theatres, Inc	E	43⅓
Broadrose Theatre Corporation	E	50
Delken Theatres Corporation	E	100
Kenmore Theatres, Inc	E	4.85 Com 14.1 Pfd
Great Lakes Theatre Corporation	E	100
McNaughton Realty Company, Inc	E	100
Frontier Theatres, Inc	E	100
Butterfield Michigan Theatres Company	E	33⅓
Sturgis Theatre Company	E	50
W. S. Butterfield Theatres, Inc	E	25 Com. 30 Pfd.
Consolidated Theatres, Inc	E	99.86
B & J Theatres, Inc	E	25

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.—Continued		
W. S. Butterfield Theatres, Inc.—Continued		
Carley Amusement Company	E	51
J. R. Denniston Theatre Company	E	50.2
Kalamazoo Michigan Theatre Corporation	E	50
Muskegon Theatres, Inc	E	.25
California Theatre Realty Company	E	100
Carolina Amusement Company, The	E	100
Central States Theatre Corp	E	50
Algona Theatre Company, Inc	E	50
A-Muse-U Theatre Company	E	60
Corn, Inc	E	100
Dodge Confections, Inc	E	100
Foarde Amusement Company	E	51
Palace Confections, Inc	E	100
Palace Theatre Company	E	50
Regent Theatre Company of Mason City, Iowa	E	50
Rita Building Company	E	100
Central Theatres, Inc	E	100
Clearwater Enterprises, Inc	E	50
Orange Theatres, Inc	E	100
Charlotte Amusement Company	E	100
Clearwater Enterprises, Inc	E	22.22
Cocoa Theatres, Inc	E	12.5
Concord Amusement Company	E	25
Concord Operating Company	E	25
Confidential Reports, Inc	D	20
J. H. Cooper Enterprises, Inc., of Colorado	E	
Criterion Theatre Corporation	E	50
Standard Theatres Corporation	E	50
Darlington Theatres, Inc	E	25
Dominion Theatres, Inc	E	51
Charlottesville-Perry Theaters, Inc	E	100
Lynchburg-Perry Theatres, Inc	E	100
Newport News-Perry Theatres, Incorporated	E	100
Peninsula Theaters, Incorporated	E	100
Wil-Kin Theatre Supply, Inc	E	3.37
Drive-In Theatres of Alabama, Inc	E	30
Drive-In Theatres of S. C., Inc	E	50
Eastenn Theatres, Inc	E	100
Rebel Poster Exchange, Inc	E	40
Wil-Kin Theatre Supply, Inc	E	14.5
Elizabethton Theatres, Inc	E	50
Essex Amusement Corporation	E	50
Eton Amusement Corporation	E	50
Eustis Theatres, Inc	E	60
Florence Theatres, Inc	E	25
Florida Coastal Theatres, Inc	E	95.69
Palm Drive-In Theatre, Inc	E	100
Florida Inland Theatres, Inc	E	88.09
Broward Drive-In Theatre, Inc	E	100
Florida State Theatres, Inc	E	100
Florida Theatres, Inc	E	100
Outdoor Amusements, Inc	E	100
Fulton Enterprises, Inc	E	50
Georgia Theatre Company	E	50
Greenville Enterprises, Incorporated	E	100
Greenwood Theatres, Inc	E	50

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.—Continued		
Gulf Theatres, Inc	E	96.7
Gulf Drive-In Theatre, Inc	E	100
Lakeland Theatres, Inc	E	100
Smyrna Halifax Theatre, Inc	E	100
Tampa Theatre Corporation	E	100
Volusia Drive-In Theatre, Inc	E	100
Hollywood Amusements, Inc	E	57.14
Intermountain Theatres, Inc	E	100
Menmar Theatre Company	E	50
Paramor Theatre Company	E	50
Interstate Circuit, Inc	E	50
Bowie Boulevard Drive In Theatre Co	E	50
Galveston Theatres, Inc	E	55
Glass Theatres Corporation	E	50
Isis-Horwitz Theatre Company, Inc	E	50
Horwitz-Texan Theatres Company, Inc	E	100
Preston Ausement Company	E	100
Northwest Highway Drive-In Theatre Co	E	50
South Main Drive In Theatre Co	E	50
Stude-Building Corporation	E	50
Texas San Antonio Corporation	E	100
Interstate Theatres, Inc	E	disputed
Jefferson Amusement Company	E	50
Cole Theatres, Incorporated	E	25
Eagle Lake Theatre, Incorporated	E	25
East Texas Theatres Incorporated	E	50
Greenville Theatres, Inc	E	50
Jefferson Theatres, Inc	E	100
Sullivan & Moore Theatres Inc	E	50
Yoakum Theatres, Incorporated	E	25
Johnson City Enterprises, Inc	E	50
Kansas City Operating Corporation	E	100
Knoxtenn Theatres, Inc	E	100
Lincoln Theatre Corporation (Delaware)	E	50
Lincoln Theatre Corporation (Nebraska)	E	disputed
Maine and New Hampshire Theatres Company	E	50
Allied Theatres Company	E	100
Augusta Theatre Company	E	50
Cabot Amusement Company	E	100
Capitol Augusta Company	E	50
Capitol Realty Company	E	54.29
Capitol Theatre Company	E	54.29
Concord Amusement Company	E	22.5
Concord Operating Company	E	22.5
Granite Amusement Company	E	50
Majestic Theatres, Inc	E	45
Maine & New Hampshire Theatres Co. of Mass	E	90
Queen City Realty Corporation	E	26.29 Pfd. 45 Com.
Rumford Operating Company	E	37.5
Rumford Realty Company	E	62.5
Russell Amusement Company	E	75
Union Theatre Company	E	100

Paramount Pictures, Inc.—Continued		
Maine and New Hampshire Theatres Company—Continued	Industry branch	Percentage of stock ownership by immediate parent company
Victory Amusement Company	E	50
Malco Theatres, Inc.	E	50
Film Transit, Incorporated	E	22
Malco-Memphis Theatres, Inc.	E	100
Citizens Theatre Company	E	34
Ozark Enterprises, Inc.	E	50
Van Buren Enterprises, Inc.	E	100
Minnesota Amusement Company	E	100
American Amusement Company	E	100
Fairmont Theatre Company	E	50
Madison Theatre Company	E	50
Miles Theatre Company	E	99.98
Publix Northwest Theatres, Inc.	E	100
Rochester Amusement Company	E	50
State Theatre Corporation	E	100
Welworth Theatres of Wisconsin, Incorporated	E	50
Winona Theatre Company	E	50
Nashville Theatres, Inc.	E	100
New England Theatres, Inc.	E	100
Allied Theatres of Bangor	E	25 "A" Com. 51 "B" Com.
Alliston Theatres, Inc.	E	50
Arlington Theatres, Inc.	E	50
Bayside Theatre Corporation	E	50
Black & Churchill Theatres, Inc.	E	50
Boston Metropolitan Buildings, Inc.	E	29.54
Brockton Olympia Realty Co.	E	50
Circle Company	E	66⅔
Allied Theatres of Bangor	E	30 "A" Com.
Elizabeth Theatre, Inc.	E	50
Haverhill Operating Corporation	E	50
M. & P. Theatres Corporation	E	66⅔
Standard Theatre Supply Corporation	E	100
Massachusetts Enterprises, Inc.	E	50
Massachusetts Operating Company, Inc.	E	50
Maine Enterprises, Inc.	E	100
Merrimac Square Theatre Corp.	E	100
N. E. Boston Sales, Inc.	E	100
Newton Amusement Corporation	E	33⅓
Rockland Amusement Co.	E	50 "A" and "B" Com. 60 "C" Com.
Rutland Enterprises, Inc.	E	50 "A" and "B" Com. 60 "C" Com.
Standard Candies, Inc.	E	66⅔
Stanway Realty Corporation	E	66⅔
Stanway Vending Machines, Inc.	E	66⅔
Taunton Operating Co., Inc.	E	50
Taunton Theatres, Inc.	E	50
Uphams Operating Co., Inc.	E	100

	Industry breakdown	Percentage of stock ownership by immediate parent company	
Paramount Pictures, Inc.—Continued			
North Carolina Theatres, Inc	E	50	
Bluefield Theatres, Incorporated	E	50	
Danville Enterprises, Incorporated	E	50	
Davidson Theatre Company	E	50	
Gastonia Enterprises, Incorporated	E	100	
Lenoir Theatres, Incorporated	E	50	
Monroe Theatres, Incorporated	E	50	
North State Broadcasting Corporation	E	100	
Robeson Enterprises, Incorporated	E	50	
Southern Attractions, Incorporated	E	37.5	
Twin City Theatre Corporation	E	50	
Wil-Kin Theatre Supply, Inc	E	38.65	
Wilmington Theatres, Incorporated	E	50	
Ritz-Wilmington Corporation	E	50	
Northio Theatres Corporation	E	100	
Palmetto Theatre Company, The	E	100	
Wil-Kin Theatre Supply, Inc	E	19.32	
Paramount Communications, Inc	E	100	
Paramount Enterprises, Inc	E	100	
Tivoli Operating Corporation	E	50	
Paramount Film Distributing Corporation	E	100	
Paramount Hollywood Theatre Corporation	E	50	
Paramount International Films, Inc	E	100	
Paramount Pictures Theatres Corporation	E	100	
Paramount-Richards Theatres, Inc	E	50	
Canal Realty & Improvement Co., Inc	E	33⅓	
Capital Theatres, Inc	E	50	
Helena Enterprises, Inc	E	100	
Hope Enterprises, Inc	E	100	
Kennington-Saenger Theatres, Inc	E	50	Com.
Kennington-Richards Enterprises, Inc	E	13.8	Pfd.
Pine Bluff Enterprises, Inc	E	100	
Paramount-Richards Enterprises, Inc	E	100	Pfd.
Chickasaw Amusement Corporation	E	100	
Kennington-Richards Enterprises, Inc	E	43.1	Pfd.
		50	Com.
Richards-Ehrlich Enterprises, Inc	E	50	Com.
Richards-Lightman Theatres Corp	E	50	Com.
		23.27	Pfd.
Saenger-Ehrlich Enterprises, Inc	E	50	
Richards-Ehrlich Enterprises, Inc	E	100	Pfd.
Saenger Theatres of Texas, Inc	E	100	
WSMB, Inc	E	50	
Paramount-Richards Enterprises, Inc	E	50	Com.
Chickasaw Amusement Corporation	E	100	
Kennington-Richards Enterprises, Inc	E	43.1	Pfd.
		50	Com.
Richards-Ehrlich Enterprises, Inc	E	50	Com.
Paramount Theatres Service Corporation	E	100	
Parr Realty Co., Inc	E	50	
Penn York Supply Company, Inc	E	100	
Penncom Corporation	E	50	
		100	Com "B"
Comerford-Publix Corporation	E	100	Pfd.
Forty Fort Theatres, Inc	E	50	
Lebanon Theatres Corporation	E	50	

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.—Continued		
Pennecom Corporation—Continued		
Comerford Publix Theatres Corporation	E	100
Midas Theatres Corporation	E	100
Monroe Amusements, Inc	E	100
Pennler Theatre Corporation	E	50
Pennware Theatre Corporation	E	50
Alpenn Theatre Corporation	E	66⅔
Philpitt Realty Corporation	E	100
Pine Realty Co., Inc	E	50
Publix Bamford Theatres, Inc	E	75
Bamford Amusement Corporation	E	100
Publix Lucas Theatres, Inc	E	50
Mosque, Inc	E	100
Moultrie Theatres, Inc	E	50
Publix Netoco Theatres Corporation	E	50
Allston Theatre, Inc	E	50
Allston Land Corporation	E	66⅔
Arlington Theatres, Inc	E	50
Bayside Theatre Corporation	E	50
Connecticut Theatres Operating Company	E	75.03
Dudley Amusement Company	E	57.84
Elizabeth Theatre, Inc	E	50
Egyptian Theatre, Inc	E	100
Jamaica Amusement Company	E	50.33
Liberty Operating Company, Inc	E	100
Massachusetts Enterprises, Inc	E	50
Massachusetts Operating Company, Inc	E	50
M & P Theatres Corporation	E	33⅓
Standard Theatre Supply Corporation	E	100
Modern Theatre, Incorporated	E	100
Morton Theatre Corporation	E	100
Newton Amusement Corporation	E	33⅓
Natick Amusement Company, Inc	E	100
Oriental Theatre, Inc	E	100
P. N. Boston Sales, Inc	E	100
Rivoli Theatre, Inc	E	75
Roslindale Holding Corporation	E	71.42
Massachusetts Operating Company, Inc	E	20
Stanway Vending Machines, Inc	E	33⅓
Stanway Realty Corporation	E	33⅓
Standard Candies, Inc	E	33⅓
Taunton Operating Co., Inc	E	50
Taunton Theatres, Inc	E	50
Warrenton Enterprises, Inc	E	100
Waltham Netoco Theatres, Inc	E	50.05
Embassy Realty Company, Inc	E	100
Newton Amusement Corporation	E	33⅓
Publix-Richards-Nace, Inc	E	100
Palms Theatre Corporation	E	100
Phoenix Drive-In Theatre	E	50.56
Studio Theatre, Inc	E	50
Publix Wheeling Theatre Corporation	E	50
Razorback Realty Company	E	50
Regal Theatres, Inc	E	50
Rialto, Inc	E	

	Industry branch	Percentage of stock ownership by immediate parent company
Paramount Pictures, Inc.—Continued		
Ridge Theatres, Inc.	E	60
Highland Theatre, Inc.	E	50
Saltmount Theatres, Inc.	E	100
Savannah Theatres, Company	E	50
Southern Attractions, Incorporated	E	50
Straham Theatre Corporation	E	50
423 South Broadway Corporation	E	20
Strand Leasing Company	E	100
Strand Theatre, Incorporated	E	100
Tallahassee Enterprises, Inc.	E	33⅓
Television Productions, Inc.	E	100
Telephony Corporation of America	E	34 "B" Com.
Texas Consolidated Theatres, Inc.	E	50
Albuquerque Theatres, Inc.	E	50
Brownsville Amusement Company, The	E	75
Tompkins Amusement Company, The	E	
Tompkins Theatre Company, The	E	
Tri-States Theatre Corporation	E	50
Affiliated Theatres, Inc.	E	50
A. H. Blank Theatre Co. of Nebraska	E	100
Cedar Amusements, Inc.	E	50
Commonwealth Company, The	E	100
Commonwealth Theatres Corporation	E	100
Confections, Inc.	E	100
Continental Amusement Company	E	66⅔
East Des Moines Theatre Corp.	E	50
General Theatre Corp. of Cedar Rapids	E	100
Iowa Building Corporation	E	100
King Corn, Inc.	E	100
Omaha Theatre Operating Corporation	E	100
Orpheum Theatre Corporation of Omaha	E	100
Ottumwa Theatre Company	E	33⅓
Popcorn Wholesalers, Inc.	E	100
Staak & Pierce Theatres, Inc.	E	33⅓
Strand Confections, Inc.	E	100
States Theatres of Omaha, Incorporated	E	100
United Artists Theatre Company of Michigan	E	50
United Detroit Theatres Corporation	E	74.35
Alger Theatre Corporation	E	75
Detroit Capitol, Inc.	E	100
Madison Theatre Corporation	E	100
Royal Theatre Co.	E	50
United Newsreel Corporation	E	20
United Theatre Enterprises, Inc.	E	50
Covington Amusement Enterprises, Inc.	E	25
Community Theatres Consolidated	E	100
Hal Wallis Productions, Inc.	P	50
Western Massachusetts Theatres, Inc.	E	52
Richmond Theatre Corporation	E	100
S & N Corporation	E	100
Weamas Candy Corporation	E	100
Wilby-Kincey Service Corporation	E	50
Winter Haven Enterprises, Inc.	E	16⅔

E. RKO

(Ex. 87) (R. 202)

	Industry branch	Percent of ownership
Radio-Keith-Orpheum Corporation	P & D	
Anbro Amusement Corporation	E	Not determined
B. F. Keith Corporation	E	99
Butterfield Michigan Theatres Company	E	33
W. S. Butterfield Theatres, Inc	E	10
Center Theatre Corporation	E	100
The Cino Theatre Company	E	51
Des Moines Consolidated Theatres Corporation	E	100
Eaton Theatre Corporation	E	50
Eighty First Street Theatre Corporation	E	100
Grand, Inc	E	55
Greater Huntington Theatre Corporation	E	25
Biggs Long Realty Corporation	E	25
Orpheum Operating Company	E	25
State Operating Company	E	25
K-P Theatre Corporation	E	51
The B. F. Keith Columbus Company	E	55
High Street Theatre Corporation	E	17
Keith Massachusetts Corporation	E	100
Keith Memorial Theatre Corporation	E	100
Keith Ohio Corporation	E	100
Lexington Avenue Theatre and Realty Corporation	E	50
Lowell Theatre Company	E	100
Montcalm Theatre Corporation	E	100
New Rochelle Main Street Corporation	E	50
Number Twenty Five Theatre, Inc	E	49
Number Twenty Six Theatre, Inc	E	35
Palace Theatre and Realty Co	E	51
Pansy Amusement Corporation	E	100
Queens Entertainment Corporation	E	50
Rich Hill Corporation	E	100
S. K. E. Operating Company, Ltd	E	50
Springco Corporation	E	65
Dayton Theatre Corporation	E	65
Trenton-New Brunswick Theatres Company	E	50
Blue Acre, Inc	E	50
The United Theatres Company	E	15
West Farms-Tremont Corporation	E	100
White Plains Hamilton Corporation	E	100
Palace Theatre and Realty Co	E	19
Pathe News, Inc	P	100
RKO Midwest Corporation	E	100
B. & J. Theatres, Inc	E	25
The Cino Theatre Company	E	49
Gifts, Inc	E	33
Grand, Inc	E	45
High Street Theatre Corporation	E	16
The B. F. Keith Columbus Company	E	45
RKO Orpheum Corporation	E	100
Affiliated Theatres, Inc	E	10
Champaign Orpheum Company	E	100
Chicago Orpheum Corporation	E	100
Colorado Orpheum Corporation	E	50
Hennepin Avenue Theatre and Realty Company	E	100

Radio-Keith-Orpheum Corporation—Continued	Industry branch	Percent of ownership
RKO Orpheum Corporation—Continued		
Junior Orpheum Los Angeles, Ltd	E	100
Missouri Orpheum Corporation	E	100
Orpheum Theatre and Realty Co., Ltd	E	100
St. Paul Theatres Company	E	100
Singer Cedar Rapids Corporation	E	100
Singer Davenport Corporation	E	100
Singer Dubuque Corporation	E	100
Singer Marshalltown Corporation	E	100
Singer New Orleans Corporation	E	100
Singer Omaha Corporation	E	100
Singer Sioux City Corporation	E	100
Singer Waterloo Corporation	E	100
Winston Theatre Corporation	E	100
Wotan Theatre Corporation	E	100
RKO Proctor Corporation	E	100
423 South Broadway Corporation	E	30
K–P Theatre Corporation	E	49
Lexington Avenue Theatre and Realty Corporation	E	50
New Rochelle Main Street Corporation	E	50
RKO Radio Pictures, Inc.	P & D	100
RKO Rhode Island Corporation	E	100
Union Hill Corporation	E	100

F. Warner

(Exs. 116–120) (R. 209–22)

	Industry branch	Percent of ownership
Warner Bros. Pictures, Inc.	P	
Atlantic Theatres, Inc.	E	50
Bird Theatre Corporation	E	100
Cardinal Theatre Co.	E	100
Circular Realty Company	E	50
Connecticut Theatrical Corporation	E	100
The Euclid and Jeffery Corporation	E	100
Federal Theatres Company	E	100
General Theatre Company	E	100
Mansfield Operating Corporation	E	50
Intrastate Theatre Corporation	E	100
Massachusetts Amusement Corporation	E	100
The Metropolitan Theatre Company	E	75
Milwaukee Theatre Company	E	50
Mindoro Corporation	E	100
Mt. Oliver Theatre Company	E	50
National Theatre Company	E	100
Northeastern Theatres, Inc.	E	100
Regent State Corporation	E	50
Stanley Company of America	E	99
Berks Amusement Company	E	99
Branford Theatre, Inc.	E	50
Stanley-Mark-Strand Corporation	E	99
W. F. Theatre Company, Inc.	E	50
Stanley-Shapiro Theatre Company	E	51
The Vitaphone Corporation	P	100
Warner Bros. Cartoons, Inc.	P	100
Warner Bros. Pictures Distributing Corporation (formerly Vitagraph, Inc.)	D	100

	Industry branch	Percentage ownership
Warner Bros. Pictures, Inc.—Continued		
Warner Bros. Theatres, Inc. (Calif.)	E	100
Warner Bros. Theatres, Inc. (Del.)	E	100
Harold Theatre Company	E	50
Standard Theatres Corporation	E	50
Warner Bros. Theatres, Inc. (Pa.)	E	100
Warner Bros. Theatres, Inc. (Va.)	E	100
Warner Bros. Theatres, Inc. (W. Va.)	E	100
Warner Bros. Theatres of Wisconsin, Inc.	E	100
Warner Midwest Theatres, Inc.	E	100

G. United Artists

(Ex. 140) (R. 228–30, 233)

	Industry branch	Percent of ownership
United Artists Corporation	D	
Walter Wanger Productions, Inc.	P	50

H. Universal

(Ex. 370) (R. 347)

	Industry branch	Percent of ownership
Universal Pictures Company, Inc. (formerly known as Universal Corporation)	P	
Big U Film Exchange, Inc.	D	100
Universal Film Exchanges, Inc.	D	100

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA[1]

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 3504–3563) is reported in 66 F. Supp. 323, and its findings of

[1] Together with No. 81, *Paramount Pictures, Inc., et al.*, appellants v. *The United States of America;* No. 82, *Columbia Pictures Corporation, et al.*, appellants v. *The United States of America;* No. 83, *United Artists Corporation*, appellant v. *The United States of America;* No. 84, *Universal Pictures Company, Inc., etc., et al.*, appellants v. *The United States of America;* No. 85, *American Theatres Association, Inc., et al.*, appellants v. *The United States of America, et al.;* No. 86, *W. C. Allred, et al.*, appellants v. *The United States of America, et al.*, all on appeal from the District Court of the United States for the Southern District of New York.

fact, conclusions of law and decree (R. 3659–3701) are reported in 70 F. Supp. 53.

JURISDICTION

The judgment of the district court was entered on December 31, 1946 (R. 3694). Timely motions of all defendants to amend the findings of fact, conclusions of law and judgment were ruled upon on February 10, 1947 (R. 3719–3720). Petitions for appeal were filed by Loew's, RKO, Fox and Warner Brothers on February 26, 1947 (R. 3726), by Paramount on February 26, 1947 (R. 3738), by Columbia on February 6, 1947 (R. 3751), by United Artists on February 20, 1947 (R. 3766), by Universal on February 20, 1947 (R. 3788), by American Theatres Association, Inc., et al. on February 25, 1947 (R. 3812–3813), and by W. C. Allred, et al. on February 28, 1947 (R. 3816). The appeals were allowed on the same day the petitions were filed (R. 3737, 3751, 3762, 3767, 3804, 3819) except for the appeal of American Theatres Association, Inc. et al., which was allowed on February 26, 1947 (R. 3811–3812).

The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345). In Nos. 80–84, this Court noted probable jurisdiction on June 23, 1947 (R. 3840). In Nos. 85 and 86, this Court, on the same

day, postponed further consideration of the question of its jurisdiction to the hearing of the cases on the merits (R. 3841).

QUESTIONS PRESENTED

1. Whether the trial court properly found that the defendants conspired with each other to fix admission prices and playing positions, and that each defendant distributor conspired with its exhibitors to fix admission prices.

2. Whether the trial court properly found that pooling arrangements pursuant to which theatre interests of the major defendants were combined with those of independent exhibitors violated the Sherman Act.

3. Whether the trial court properly found that Paramount, Columbia, and Universal violated the Sherman Act by conditioning the licensing of one copyrighted film upon the licensing of another.[2]

4. Whether the trial court properly held that the master agreements and franchises made by Universal and United Artists violated the Sherman Act.[3]

5. Whether the relief granted by the trial court was an appropriate means of terminating the violations referred to in the preceding questions.

---

[2] The trial court found that United Artists did not engage in this practice. The other defendants do not appeal from the court's findings and judgment in this respect.

[3] The other defendants do not appeal from the court's findings and judgment in this respect.

6. Whether the trial court properly terminated the system of arbitration established by the 1940 consent decree.

7.* Whether certain exhibitors were entitled to intervene below or here for the purpose of being heard in opposition to the competitive bidding provisions of the judgment.

STATUTES INVOLVED

The relevant provisions of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1, et seq.) and of the Copyright Act (Act of March 4, 1909, 35 Stat. 1075, 17 U. S. C. 1) are set out at pp. 3–5 of the brief for the United States in No. 79, this Term.

STATEMENT

The facts are fully stated at pp. 5–46 of the brief for the United States in No. 79, this Term.

SUMMARY OF ARGUMENT

The appeals of six of the eight defendants assume that they have violated the Sherman Act, but all eight insist that the violations found below were more extensive than those they committed and that some or all of the relief granted should be set aside. Undisputed documentary evidence supplied by them shows that all eight were guilty

* Paramount, Columbia, Universal and United Artists attack the competitive bidding provisions in the judgment below. For our argument in this respect, see pp. 54–89 of the brief for the United States in No. 79, this Term.

of the precise forms of trade-restraining conduct found by the court below. *Interstate Circuit* v. *United States*, 306 U. S. 208, shows that such conduct violates the Sherman Act and is unsanctioned by the Copyright Act. The provisions of the judgment appealed from are no broader than necessary to terminate the violations found and the only abuse of discretion below lies in the failure of the trial court to grant the relief sought on the Government's appeal.

I

All of the distributor defendants deliberately and with substantial uniformity used film licensing restrictions as a means of controlling and suppressing competition among theatres in selling the product of all to the public. This suppression was accomplished by an abuse of privileges granted by the Copyright Act. The Sherman Act would have been clearly violated by this use of copyright license restrictions even if they had not been used to give special protection to the theatres affiliated with the five major defendants. As the court below found, the net result of the conspiratorial use of these restrictions was the imposition of a system of fixed admission prices and theatre playing positions which benefited all eight distributors in all areas. However, the system also conferred special benefits upon the affiliated theatres in the areas where they operated

and upon the large independent circuits in the areas where they operated.

The theatre pooling arrangements among the major defendants and between them and others were a striking manifestation of the suppression of competition inherent in the general conspiracy, but the trial court's judgment that such arrangements alone represented illegal theatre ownership arbitrarily cut off the major defendants' liability in a manner extremely favorable to them.

The findings as to illegality of the defendants' franchises, master agreements and seasonal block booking contracts are challenged only by the non-exhibitor defendants. The findings are sustained by agreements made by these defendants which, on their face, have precisely the same trade-restraining effects as those made by the other defendants. Their complaint is really that the prohibition of the future use of such restrictions works a hardship on them because such restrictions are necessary to counter-balance the market control of the major defendants resulting from their theatre affiliations.

II

All of the defendants, except Columbia, attack the prohibitions against price-fixing, systems of clearance, and the use of clearance to do anything more than give the licensee restrictive privileges which could be justified as reasonable under Sherman Act standards. A mere statement

of the prohibitions attacked is adequate to show that they are necessary to prevent the continuance of the precise conspiracies and individual licensing practices found illegal below. Their validity therefore rests upon the validity of the findings discussed above.

The major defendants complain of the judgment against their theatre expansion, not upon the ground that it should not be subject to some judicial control, but upon the ground that the control should permit them to expand as a means of protecting their investments or entering a competitive field. To do this would be to sanction a continued expansion of the power to discriminate inherent in their vertical integration. Their assumption that their power to discriminate should be subject to continuous judicial regulation in this suit implies that continued possession of that power carries with it a continuing threat of discriminatory treatment of competitors in violation of the Sherman Act.

The complaint of the non-exhibitor defendants as to the judgment below is founded principally on their claim that since the major defendants may force their films into the market by the use of their affiliated theatres, the distributors without affiliated theatres are compelled to use franchises, block booking, and master agreements to force their films into the market. Since the judgment will terminate their privilege of securing an ade-

quate share of the market by conspiracy with the major defendants, their complaint has practical merit. However, the only way to meet this objection by any judgment in this suit is not an exemption which will permit the continued use of illegal practices by them, but the adoption of provisions which will terminate the major defendants' illegal power. The net effect of all the appellants' arguments is to show that adequate relief in this suit requires the termination of that power by divorcement and cross-licensing relief, as shown in the Government's main brief.

ARGUMENT

I

The court below correctly concluded that all of the defendants had individually and collectively violated the Sherman Act in the manner found

Introduction

The manner in which this case was tried and the limited nature of the assignments of error on which most of the defendants rely show that the issues raised by their appeals are extremely narrow. We shall therefore summarize the kind of evidence in the record and the precise nature of their attacks upon the findings before answering their arguments.

1. *How this case was tried.*—The Government's case consisted of (1) an exposition of the corporate structure of each defendant (see App. pp.

446–462);[5] (2) the general manner in which the major defendants' theatre holdings had been acquired, with a description of the extent and location of their individual and joint holdings (see App. pp. 207–255); (3) the express agreements, with each other and with other exhibitors, by which the major defendants pooled theatre operations in particular areas (see App. pp. 137–206); (4) the printed forms of agreements used by all the defendants in licensing films (see App. pp. 1–18), and representative executed written agreements by which they licensed each other and their affiliates upon terms which eliminated competition among themselves and which discriminated against others (see App. pp. 61–136); (5) tabulations of film rentals paid by theatres affiliated with the defendants to all distributors and film rentals received by the defendants as distributors from all domestic theatres showing a concentration of film receipts in the hands of affiliated theatres in the areas where they op-

[5] The Appendix filed with our main brief contains a summary of documentary evidence sufficient to show the basis for the court's findings, since the printed record was prepared under a stipulation that no exhibits need be included in such printing (R. 3825). In view of the large number of exhibits, we have in some cases printed only excerpts from or digests of documents in evidence, and where statistical exhibits have been printed which are not self-explanatory, we have added a summary or recapitulation of such exhibits intended to show their significance in the case. Wherever such excerpts, digests, or additional matter is used, that fact appears upon the face of the Appendix.

erated and in the hands of all eight defendants as film distributors from exhibition throughout the country (see App. pp. 256–284); (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the first run theatres in the principal cities of the United States (see App. pp. 299–308); (7) the particular restrictive provisions by which a substantially uniform run, clearance, and admission price structure in all of the principal cities was maintained (see Exs. 41, R. 173; 42, R. 173; 57–1—57–49, R. 185; 94, R. 203; 126–128 (R. 221, 222, 2159), 139–139B, R. 228, 2271; 144, R. 231; 365, R. 346; 369–1—369–6, R. 346, 347);[1] and (8) arbitration and appeal board decisions under the consent decree disclosing a wide variety of discriminatory effects of the defendants' licensing practice upon specific independent exhibitors (see App. pp. 403–446).

[1] These exhibits are interrogatory answers which show the clearance and admission price restrictions contained in licenses made by each distributor defendant for the exhibition of the first block of films released during the 1943–44 season by all exhibitors licensed on first run in cities of 25,000 or more, all exhibitors licensed on second run in cities of 50,000 or more, all exhibitors licensed on third run in cities of 200,000 or more, and all exhibitors licensed on fourth run in New York, Chicago, Philadelphia, Los Angeles, and Detroit. All of these exhibits are now on file with the Clerk of this Court, most in printed form. They are each so voluminous that no attempt was made to print or reprint any of them in the Appendix. An index of all the exhibits in evidence, with a general description of each, has been prepared by the Government and will be filed in printed form.

The defense consisted of extensive testimony of the defendants' executives and affiliated exhibitors intended to show that some of their theatre interests were acquired to meet competitive threats from others, that their theatre pools were created for operating efficiency or purposes other than to restrain trade in films unreasonably, and that their substantially uniform and discriminatory restrictive licensing practices were a product of business necessity rather than a specific intention to restrain trade. They also offered statistical data which did not contradict but merely amplified the plaintiff's statistical proof (see App. pp. 286–298, 339–361). Their principal executives also denied in general terms any specific intent to produce the discriminatory and exclusionary effects resulting from each distributor-defendant's individual licensing practice and also denied the existence of any unlawful combination or general conspiracy to produce these effects. They offered affirmative testimony to show that there was competition among all the defendants in their production activities and that the major defendants received substantial economic benefits from their theatre ownership.

From the foregoing summary of the evidence it will be seen that at no point was there any substantial conflict as to facts subject to objective proof. The question of whether or not the defendants violated the Act thus rests upon the

inferences to be drawn from evidence of basic competitive facts about their business largely supplied by them.

2. *Uncontested findings and conclusions.*—By their failure to assign error to many of the findings and conclusions, we must take as established on the major defendants' appeals the following facts:

Each of them has violated the Sherman Act, as a distributor, by agreeing individually with theatres affiliated with other defendants and with large circuits to grant unreasonable clearance (conclusion 8 (e), R. 3693), by making master agreements and franchises with such licensees (conclusion 8 (f), R. 3693), and by individually conditioning the offer of a license for one or more copyrighted films upon acceptance by the licensee of one or more other copyrighted films (conclusion 8 (g), R. 3693).

All five majors attack conclusion 9 (d), that as exhibitors they have violated the Sherman Act by "Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms" (R. 3693). However, the error alleged is in failing to make this conclusion read "Conspiring with the distributor-defendants to receive discriminatory license privileges as found in Finding No. 110 above" (R. 3735, 3748). The license privileges described in Finding No. 110 are contract provisions which

discriminate "against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits" (R. 3681). These privileges are suspension of contract liability while a theatre remains closed, large film selection and elimination rights, film rental deductions where double bills are played, move-over, extended run and road-show privileges, underage and overage (the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another), unlimited playing time, exclusion of foreign and independently produced pictures, and the right to question the distributors' rental classification (R. 3681).

Thus their appeals assume that each has, as an exhibitor, made license agreements with other distributor-defendants and has, as a distributor, made license agreements with other exhibitor-defendants which discriminate against competing licensees and that such discriminations violated the Sherman Act.

Columbia attacks only the findings of fact (R. 3753, 3756) and conclusions of law (R. 3759) relating to block booking and blind selling. It thus assumes upon its appeal that it was correctly found to have violated the Sherman Act by conspiring with the other distributor-defendants and with its licensees to fix theatre admission prices generally and by discriminating in favor of the affiliated circuits and large independent circuits.

United Artists (R. 3767–3786) and Universal (R. 3789–3804) attack all of the findings that show a violation of the Act by them.

Since all of the defendants except Columbia challenge the court's findings of a general conspiracy among them as distributors to fix admission prices and playing positions of competing theatres, and a conspiracy between each of them and their licensees to fix their relative admission prices, we shall first show that the conspiracy findings were correct and then show that the particular defendants challenging other findings of individual unreasonable restraints by them were also correctly found to have violated the Sherman Act in these respects.

A. Each distributor-defendant was correctly found to be a party to a horizontal conspiracy to fix admission prices and playing positions of competing theatres and to be a party to a vertical conspiracy between it and its licensees to fix admission prices.

The court below found a horizontal conspiracy among all of the eight defendants, as distributors, to fix the admission prices and playing positions of all competing theatres by restrictive license provisions which controlled the run on which each theatre was to play, the minimum admission price which it should charge for that run, and the intervals between runs in competing theatres (R. 3670–3673). The trial court also found a vertical conspiracy between each distributor-defendant and its licensees to fix the admission prices of theatres competing with each other in exhibiting each dis-

tributor's films (R. 3672). This result was accomplished by precisely the same license restrictions which were used to effectuate the horizontal conspiracy.

The court inferred the existence of the horizontal conspiracy among all distributors from their substantially uniform application of license restrictions in dealing with the same theatres (R. 3670) and a discriminatory application of those uniform restrictions in dealing with theatres affiliated with the defendants and with other large circuits (R. 3674). The eight vertical conspiracies were based upon subsidiary findings that each of the competing licensees knew the admission price restrictions which were being applied to its competitors' theatres when its license was made and was therefore a party to the maintenance by the distributor of restrictions which regulated price competition among all theatres of a particular competitive area in exhibiting its films (R. 3681–3682).

As noted above (pp. 10–12), the defendants cannot successfully challenge the accuracy of these subsidiary findings, and their effort to overturn the court's ultimate conclusions must rest upon whether or not the court was justified in drawing its ultimate inferences of conspiracy from the undisputed facts on which they were premised. *Interstate Circuit* v. *United States*, 306 U. S. 208, expressly held that a conscious uniform application of admission price restrictions against in-

dependent competitors of a large circuit was itself a proper basis for finding a horizontal conspiracy among these distributors. Since the same case also sustained a holding that Paramount alone could not impose the same restrictions against other independent competitors of the circuit in other areas where they were not imposed by any other distributor, it was also a clear holding that independently of any conspiracy among distributors, the use of admission price restrictions by a single distributor to suppress price competition between theatres was also unlawful. That case, therefore, is alone conclusive on both conspiracy issues raised here unless it can be shown that the court's subsidiary findings which demonstrate that the purpose of their license restrictions was to control price competition (and are thus not sanctioned by the Copyright Act) are erroneous.

1. *The use by each distributor of license restrictions intended to suppress admission price competition between competing theatres is substantially undisputed.*—As pointed out in our main brief at pp. 98–101, the defendants' film licenses habitually impose explicit restrictions upon the use of their films, the effect of which is to stipulate admission prices for theatrical entertainment to which their sole contribution is the supplying of a positive print on a rental basis. Since the stipulated admission price is generally the price charged by the theatre for all films, such price-fixing bears no relation to the quality of the

exhibition rights granted by any particular license. The elaborate series of restrictions on simultaneous or subsequent rental of prints of the same film to competing theatres, embodied in these licenses in the form of "run" and "clearance" or "protection" provisions are simply devices for fixing price differentials between competing theatres in order to maintain their relative playing position. Thus each series of such restrictions used by any single distributor is a system of price control in which each licensee consciously participates.

That such restrictions were used by each distributor to control admission prices of competing theatres appears on the face of clearance schedules in evidence. A clearance schedule which shows the manner in which the playing positions of all theatres in a large metropolitan area are related to their admission prices is Exhibit 369–6 (R. 347), a memorandum dated October 27, 1941, which sets out the clearance granted by United Artists to theatres affiliated with Paramount in Chicago and its suburbs. In this city, as disclosed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, and by this schedule, the playing positions of all theatres are fixed for clearance purposes as first run downtown, "A" pre-release (4th, 5th and 6th week after first run downtown), "B" pre-release (7th and 8th weeks after first run downtown), "C" pre-release (9th week after first run downtown), 1st week of gen-

eral release (10th week after first run downtown), 2nd week of general release (11th week after first run downtown), etc. The admission prices governing these playing positions are set forth on the first page of this schedule as "'A' pre-release—Matinee 30¢—Evening 50¢—children at all times 15¢", with a separate schedule of admission prices for each playing position. Such a schedule merely illustrates in concrete form an obvious use of clearance as a device for controlling price competition among theatre operators.

That, in general, clearance intervals are geared to admission price differentials was tacitly admitted by defense witnesses Kupper (R. 1212–1213), Reagan (R. 718), and Keough (R. 951–959). Even though in many first run contracts the applicable minimum prices were not inserted in the license contract, this was claimed to be inadvertent and there was still an implied agreement to maintain the established price (R. 1210–1211). The close relationship between such prices and clearance restrictions is also shown by the standard license provisions, which reduce clearance as a penalty for admission price reduction. See App. p. 2 (Columbia) Ex. 286; p. 6 (Fox) Ex. 276; p. 8 (Loew) Ex. 278; p. 18 (RKO) Ex. 282; p. 17 (Universal) Ex. 290; p. 11 (Paramount) Ex. 280.

Even if the evidence showed that each distributor had independently maintained such systems, it would have been guilty of a conspiracy with its licensees to violate the Sherman Act. See

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U. S. 373. But the evidence shows that they also maintained such systems by agreement with each other.

2. *The substantially uniform use of such restrictions by the distributor-defendants in a discriminatory manner is also demonstrated by undisputed evidence.*—There is no dispute about the substantial uniformity of the application of the price restrictions in question by all the defendants in dealing with the same theatres. The defendants do challenge the court's finding of a horizontal conspiracy, upon the ground that the uniformity was simply a product of normal business methods desired by exhibitors. But even if it appeared that the system of admission price control described above had been uniformly applied without any intent to injure competition, it would illegally deprive the theatre-going public of the benefits it is presumed to obtain from price competition. See *United States* v. *Socony-Vacuum Co.*, 310 U. S. 150, 221–222. Moreover, as applied here, it was plainly intended to injure independent exhibitors as well.

The evidence here shows a discriminatory application of such price control which is a natural consequence of the dual interest of the major defendants in protecting their theatre operating profits as well as film rentals, in areas where their affiliated theatres operate in direct competition with independents. For example, the clearance schedules

agreed to by Fox, Columbia, Loew, and RKO for the exhibition of their films in Warner theatres first run in Appelton, Kenosha, Oshkosh, Racine, and Sheboygan, Wisconsin (Exs. 42, 139, 57—49, 94, R. 173, 228, 185, 203), provide that these theatres shall have clearance of 30 days over all others in those towns charging the same admission prices. The schedules go on to provide for clearances of 50 days, in the same situations, where the competitors' admission price is 5 cents less than Warner's and proceed to step up the clearance to 142 days in the situations where the theatres charge 35 cents less than the Warner first runs. On its face, a schedule of that character is plainly calculated to discriminate against Warner's competitors in those areas by establishing extensive clearance in favor of the Warner houses even where there is no admission price differential, and by expanding that clearance proportionately in cases where admission price differentials occur.

A similar discriminatory application of admission price restrictions occurs where the affiliated theatre is left free to fix its own price while the independent is controlled by a contract price. As Mullin, a Paramount partner, and Friedl, chief executive of one of its wholly owned exhibition affiliates, testified (R. 968, 999), the Paramount affiliates fix their own admission prices; as the exchange of letters between Mochrie of RKO and exhibitor Weiss of Macon, Georgia, showed, if one of these affiliated exhibitors (in that case Lucas

and Jenkins) chooses to reduce his prior run admission price to the same price as that charged by an independent playing on a following run, the independent protests in vaid (Exs. 388, 389, R. 2236).

As shown by their interrogatory answers 6 through 11 (Exs. 41, 42, R. 173, Fox; Exs. 57–1 through 57–49, R. 185, Loew; Ex. 82, R. 196, Paramount; Ex. 94, R. 203, RKO; and Exs. 126–128, R. 221–222, 2159, Warner), in licensing their affiliated theatres the major defendants frequently enter into no formal contract, or if they do make a formal contract, the minimum admission price restrictions are frequently not filled in. Where the degree of affiliation is such that these theatres are in fact controlled by the major distributor in question, the terms of the agreements it makes with its own theatre affiliates are not decisive, in any event, but it is clear that this affiliation, in itself, provides an ever-present incentive for admission price discrimination. By leaving an affiliated theatre in a position where it could reduce first run prices to eliminate competition while independent competitors were at the same time held by their contracts to a fixed minimum price for the same films, the major defendants, as distributors, could and did protect their own affiliates from normal price competition.

Opportunities for similar admission price discriminations were extended by one major de-

fendant to the theatres of another. This is shown by the general provision incorporated in the licenses made between the Warner circuit and Loew for the 1943–44 season, which gave Warner the right to reduce its first run admission prices as much as 25 percent, providing a 15 cent evening adult minimum was maintained.[1] Similarly, in dealing with Fox in Los Angeles, Loew made an express agreement with Fox, contained in a letter agreement dated September 15, 1943, attached to the license contract for that season (Ex. 249, R. 270), which gave Fox the right to reduce its admission price "not more than (25%) or ($.10), whichever is greater," below the September 1, 1940 price, provided that it did not go below $.15 or the price charged by a competing theatre on a following run. The effect of such discriminatory application of admission price restrictions is simply to intensify in specific local situations the general discrimination implicit in a system of admission price control collectively administered by theatre-owning distributors.

The precise kind of admission price discrimination condemned in *Interstate Circuit v. United States*, 306 U. S. 208, was thus disclosed by this

[1] This privilege was granted to Warner in the following towns: Bridgeport, Bristol, Hartford, Middletown, New Britain, New London, Stamford, Torrington, West Hartford, Connecticut (Ex. 57–8, R. 185), Washington, D. C. (Ex. 57–10, R. 185); Hagerstown, Maryland (Ex. 57–21, R. 185); Chicopee, Holyoke, Lawrence, Mass. (Ex. 57–22, R. 185); Charleston, Parkersburg, West Virginia (Ex. 57–48, R. 185).

record to be inherent in the major defendants' standard practice.[8] The discrimination there resulted from compelling the independent theatres to increase their admission price to the 25-cent level maintained by Interstate's subsequent theatres, while permitting the latter theatres to maintain their run priority over the independent;[9] precisely the same adverse effect on the independent's ability to compete results from permitting the circuit operator to drop his admission price to the independent's level while maintaining run priority. In either event, the independent theatre operator is prevented from adjusting his admission price to the value of the entertainment he offers and the public is deprived of the obvious benefits derived from competitive pricing of what it buys.

Clearance arbitration under the consent decree also demonstrated a uniform use by the major defendants of restrictions which discriminated

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[8] The record in *Schine Chain Theatres, Inc.* v. *United States*, No. 10 this Term, also shows similar discrimination in favor of a large independent circuit. RKO points, at p. 63 of its brief, to a concession of Government counsel, made for the purpose of that case, that the court might assume these defendants' price-fixing restrictions to be lawful practices if employed in a reasonable manner. RKO's brief neglects to point out that notwithstanding the breadth of that concession, RKO and the other distributor-defendants here were found to have conspired with Schine to employ such restrictions in a manner which discriminated against Schine's smaller competitors.

[9] See *Interstate Circuit* record, first appeal, Nos. 709, 710, Oct. Term, 1937, Vol. 135, pp. 141, 149, 174, 185, 196.

against independent competitors. Thus, in the *Matter of Bailey*, App. Bd. No. 24 (Ex. 2), the Appeal Board found that the Bailey Theatre in affiliated hands had played with clearance from all of the major defendants over the affiliated Kensington. When the Bailey passed to independent hands and the Kensington remained affiliated, the situation was reversed by four of the major defendants and the Kensington was given clearance over the Bailey. See App. pp. 406–407. Similarly, in Overton, Texas, where a Paramount affiliate failed to serve the town adequately, the townspeople built a new theatre. When the new theatre was opened, the Paramount affiliate, Jefferson Amusement Co., opened a second old theatre, played all the major defendants' films on first run, and compelled the new independent theatre to play a second run 60 days after its first run, notwithstanding that this theatre was compelled to charge as high an admission price as Jefferson's first run theatres (see App. pp. 444–446).

The defendants offered no rebuttal of the Government's proof of discrimination except by testimony that they had no general policy or agreement to discriminate between affiliated and unaffiliated theatres, independent circuits and small independent exhibitors.

While all of them were, of course, extremely well supplied with factual data in their own files as to what their practice has been in specific situations, as disclosed by agreements they actually

made with the theatres that licensed their films, none offered any executed license agreements or any summary of the terms of a group of license agreements made with the exhibitors of any particular class in any particular area to show that their performance measured up to their professions of a non-discriminatory policy. All except United Artists [10] relied merely upon proclamations by their chief sales executives that their policy was not to discriminate. Since the policy of all of them as it affects independent exhibitors is principally carried out in the field by persons whose testimony was not offered, that is to say, the exchange managers and salesmen (R. 681–682, 839–840, 1419–1420, 1312, 1055, 1468, 1505–1506, 1728, 534), there was little to be gained by testing these generalities through cross examination of the witnesses who were offered.

Under these circumstances, the production of unverified oral generalizations as to their performance, when concrete proof in documentary form as to what their performance has been was at hand, gave rise to the inference that the primary evidence in their control which they failed to offer was unfavorable to them. See *Interstate Circuit* v. *United States*, 306 U. S. 208,

[10] United Artists offered no testimony of any person who negotiated licenses with exhibitors, large or small. Lazarus, its contract manager, merely said that the contracts taken for the exhibition of United Artists' pictures passed over his desk (R. 1406–1407).

225, 226. In any event, the concrete evidence of discriminatory licensing practices offered by plaintiff could not be overcome by general protestations of a contrary policy. *Schroble* v. *Lehigh Valley R. Co.*, 62 F. 2d 993, 996 (C. C. A. 2). Cf. *Local 167* v. *United States*, 291 U. S. 293, 298.

The evidence of the major defendants to the effect that there was no exchange of information between their respective distribution and theatre departments suggests that the conspiracy made it unnecessary to obtain information which, in a competitive industry, would be essential. Their sales executives testified that they are not advised as to data in their respective theatre department's files which is of vital interest to them as distributors in licensing their films, to wit, the terms on which their theatre affiliates deal with their so-called competitors in the film distribution field (R. 534–535, 688–689, 1109–1110, 1511, 1725).[11]

Only two defendants offered any explanation whatsoever of this odd alleged practice. Paramount attempted to show that this nonexchange of information was a consequence of a program of decentralized theatre operations, but Goldenson, the head of Paramount's theatre department and Reagan, its sales head, are not decentralized, as they are both located in New York (R. 666, 824). Their asserted nonexchange of data which would normally be vital to the efficient conduct of both

[11] Rodgers, Loew's sales manager, testified that he even sold Loew's own theatres as if he were a stranger to them (R. 436).

businesses cannot be explained in terms of decentralized theatre-operating policy, because Goldenson did receive summaries at New York of the general terms on which some of Paramount's 100% theatre affiliates licensed films from others (R. 839).[12]

Harry Warner said (R. 1559) that he operates the distribution and theatre-operating divisions of Warner Bros. Pictures, Inc. as separate departments because it is more efficient to do it that way. The record shows that he not only operates them as separate departments, but through separate corporations, which may be a more efficient form of operation than a single corporation would provide, yet it hardly explains the failure of the two "departments" to exchange data which would normally be an extremely useful guide to efficient competitive behavior.

But, assuming their complete truth, the assertions as to the way the major defendants carry on their businesses are entirely inconsistent with any claim of genuine film licensing competition among them. The sales departments of these integrated business units may only close their eyes to this vital information in their theatre departments' possession as to what their alleged competitors

[12] According to Reagan, he has tried unsuccessfully to get this data from Paramount's theatre department, but has no interest in it (R. 690). In trying to explain this inconsistency upon questioning by the court (R. 690), Reagan conceded that if he knew that his competitors were getting better terms from Paramount's affiliates he could improve his own.

are currently doing and still operate these businesses with a decent regard for their stockholders, upon the assumption that they need not concern themselves with current competitive developments.[18] Such an assumption is entirely consistent with the absence of any significant changes in the general pattern of first run distribution of the defendants' pictures among the affiliated theatres during the past ten years pointed out in our main brief at p. 18. This stable pattern and this practice both confirm a working agreement among these defendants not to compete with one another in licensing films.

Under such conditions it is clearly unnecessary for the distribution and theatre departments of the major defendants to exchange currently the license terms data in their possession. Any serious conflict among the major defendants as to the

[18] It is also true that if Loew has furnished Fox with certified statements for ten years under its Washington, D. C. franchise (Ex. 188, App. p. 76), as to the terms on which Loew licensed its films in its own first run theatres, Kupper, the Fox general sales manager, has a fairly accurate idea as to what Fox ought to get for its films for first run in Washington in the same theatres without making inquiry of the Fox theatre department as to the terms on which it is licensing Loew's films. Thus, the failure to exchange information between the theatre department and the distribution department of a single integrated business unit may also be explained in terms of past exchange of information among the various distributor affiliates of these units. None of their sales executives denied such an interchange, their general denial of receipt of information as to other distributor's terms being carefully confined to current negotiations (R. 689–690, 1725, 436, 1511, 1109–1110).

terms they ought to get from each other may, and under the circumstances disclosed by this record, normally would be settled at the presidential level as they involve substantial policy rather than competitive considerations.[14]

In short, the documentary evidence of a concerted discriminatory suppression of independent competition was unrebutted and the defendants' affirmative testimony tended to implicate rather than exculpate them. The court below was clearly correct in finding that the entire run, clearance, and admission price structure was maintained by license agreements made by the defendants with each other and with theatre operators generally which were expressly calculated to discriminate against small independent exhibitors and to deprive the public of competitive pricing of the defendants' films.

B. The major defendants restrained trade in films unreasonably by pooling theatres with independent exhibitors

The major defendants all attack the provisions of the judgment dissolving theatre pooling arrangements between them and independent exhib-

[14] Harry Warner said that "if any question should arise which affected more than one department, the question should be cleared through me directly." (R. 1559). None of the major defendants' presidents claimed that both theatre operating and film distribution data was unavailable to or not examined by them. It was thus plainly usable in determining policies of these defendants toward each other and their competitors even if it had not been exchanged by the theatre-operating and film-distributing subsidiaries.

itors which involve ownership of stock in theatre corporations, and prohibiting the creation of similar arrangements in the future. This part of the court's judgment is limited to theatre corporations in which a defendant owns an interest of more than 5 and less than 95 percent and in which a "former, present, or putative" independent exhibitor owns a similar interest (R. 3699). It is thus expressly limited to those situations where a continuance of the relationship has a necessary tendency to protect the defendants against competition from persons who might otherwise compete with them in operating theatres.

These defendants make no objection to the provisions of the judgment which prohibit the continuance or creation of similar relationships by theatre leases or operating agreements (Pars. (2), (3), (4), Section III; R. 3698–3699), but they challenge the court's findings (Fdg. 67, R. 3671; Fdgs. 112–116, R. 3682–3683) which directly support those provisions since those findings also support the dissolution of the corporate relationships here involved. The pooling arrangements maintained by express agreement were ordered dissolved by July 1, 1947, and substantial compliance with this provision has already occurred. The defendants' position here thus comes down simply to a claim that they should be able to control potential price competition between themselves and independents through maintenance of

stock interests in theatre corporations, although such control is obviously unreasonable when maintained by express lease or operating agreement.

The propriety of the remedy adopted by the court to cure the illegality inherent in these corporate relationships is discussed in Point II, *infra*, at pages 56—60. It is sufficient to note here that the defendants also seek permission to justify the maintenance of such existing relationships by showing in this suit, at some future date, that such relationships will not unreasonably restrain competition.[15] The argument which follows is limited to showing that the court's conclusion that all of the defendants' theatre pools, whether maintained through express agreement or by stock interests, were an unreasonable restraint of competition (R. 3683, 3693), is amply supported by evidence which the defendants failed to rebut at the trial, despite adequate opportunity to do so.

1. *The Government's prima facie case showed that all pooling of theatre interests between the defendants and otherwise independent exhibitors had an unreasonable trade-restraining purpose and effect.*—The complaint challenged the legality of partial interests held by the defendants in theatres in which independent exhibitors were also interested and put them on notice that the

[15] See Paramount brief, p. 27; Fox brief, p. 31.

judgment might divest them of such interests." The Government proved as part of its case in chief the number and location of all theatres in which the defendants owned interests of any kind or degree, the names of the corporations through which they were held, and the extent of the defendants' interests in such corporations. The remainder of its case in chief showed that these and all other forms of theatre pooling in which the defendants engaged did more than merely eliminate potential competition between the defendants and independents involved. This evidence showed that they were created or maintained as a direct result of the major defendants' unlawful control of the playing positions and admission price policies of all independent theatres, described in the preceding section.

The direct connection between the major defendants' power to discriminate in supplying films and the creation of such relationships was amply demonstrated by the theatre pooling agreements, digested at App. 160–206. Thirteen of these

[16] The complaint charged that each major defendant was an illegal combination which, *inter alia*, had coerced independent exhibitors into "relinquishing control of their theatres or a share of the profits thereof" by express or implied threats to deprive them of access to its films (R. 3196–3197). Part of the relief sought against such combinations was that the defendants be divested "of all interest and ownership, both direct and indirect, in any theatres" which the court should find had been used to violate the Sherman Act. (Par. 7, R. 3200.)

agreements [17] involved otherwise independent interests. They show on their face that such pools restricted the independent parties' exhibition interests to particular areas (App. pp. 123, 163, 168), established joint control of the playing positions and admission prices of their theatres (App. pp. 122, 163, 164, 165, 166, 175, 176, 177, 178, 190, 191, 192), secured a share of the profits from their operations for the defendants (App. pp. 121, 163, 164, 165, 168, 177, 190, 192), and made films available to them which could not have been otherwise licensed from the defendants involved (App. pp. 121, 163, 165, 167, 175, 176, 190, 191).

The court's finding that these corporate relationships not only suppressed competition between the theatres immediately involved but were aimed at others outside the pool (Fdg. 113, R. 3682) is further supported by the use of the pooled interests in furtherance of the general conspiracy. The evidence shows that the same discriminatory advantages extended by the defendant-distributors to their own theatres were extended to their pooled theatres. Thus the "formula deal" between Paramount and Ever-

[17] Ex. 201, App. p. 162; Ex. 202, App. p. 165; Ex. 203, App. p. 167; Ex. 204, App. p. 168; Ex. 211, App. p. 174; Ex. 212, App. p. 176; Ex. 214, App. p. 178; Ex. 220, App. p. 183; Ex. 226, App. p. 190; Ex. 227, App. p. 191; Ex. 229, App. p. 192; Ex. 386, App. p. 119, and Ex. 387, App. p. 120.

green Theatres Corporation (50 percent owned by Fox) (Ex. 241, App. pp. 45–50) follows closely in form the "formula deals" made between Paramount and its own exhibitor partners (Ex. 399, App. pp. 125–126). These "formula deals" in effect allocate film rental among the various affiliated circuits covered by them, each circuit paying an arbitrary percentage of a film's national gross unrelated to the actual performance of the film in the theatres licensed.[18]

The pooling agreements in evidence together with the use of all theatre pools in furtherance of the conspiracy were properly regarded by the court below as decisive of the purpose and competitive effect of pooling arrangements which took the form of ownership by a defendant and an independent of a theatre owning or operating corporation. The same results were accomplished through such joint ownership without further agreement, but the operating agreements in evidence made the purpose and effect of all such arrangements crystal clear. The defendants were free to show at the trial, if they could, that there were exceptional circumstances which might rebut the presumption of illegality resulting from the defendants' demonstrated illegal creation and use of similar arrangements. They were unable to do so and the assertion in their briefs that such cir-

[18] The percentages assigned to the various Paramount partners do not appear in the Appendix, but appear on the first page of Ex. 399, R. 2185.

cumstances may exist is hardly an occasion for relitigating their legality. No claim was made below that they had no fair opportunity to litigate that question at the trial and any such claim now has no support in the record.

2. *The defendants failed to rebut the Government's proof of the trade-restraining purpose and effect of these relationships.*—The defendants presented extensive testimony by some of the exhibitors involved in theatre pools with defendants which gave the complete history of these relationships (see Mullin, R. 962–985; Beatty, R. 1030–1042, 2489–2492; and Newman, R. 1999–2034). They also presented lengthy testimony of other exhibitors involved in similar relationships with them which showed the competitive position and physical characteristics of the theatres involved, but did not attempt to explain why the theatres were pooled. See Exs. P–25 (R. 1928); P–25A (R. 2492) (339 pages of affidavits, largely made by Paramount partners and their employees).

The history of all of the defendants' theatre acquisitions, of any kind, was covered by extensive testimony of defendants' theatre executives (R. 838–938, 985–1027, 1824–1826, 1966–1988, 2035–2132r), introduction of which was facilitated by a stipulation that affidavits might serve in lieu of oral testimony. No testimony offered by the defendants to justify their ownership of a total or partial interest in any theatre anywhere was excluded. The failure of this voluminous evi-

dence to show any legitimate need for the defendants' extensive joint ownership of theatres with exhibitors who might otherwise compete with them is shown by the complete lack of reliance upon such evidence in their arguments in support of their attack on the finding that such ownership constituted an unreasonable restraint. Where such evidence descended from mere statements of innocent intentions to specific reasons for the creation and maintenance of specific joint relationships, the justification was simply in terms of the obvious business advantages resulting from a cooperative operation of theatres in a particular community rather than a competitive one. The failure of the defendants to offer any evidence whatsoever to justify most of their pooling relationships, was itself a strong indication that any attempt to become explicit about the reasons for their creation and maintenance would have done the defendants more harm than good.

The trial court's conclusion that these relationships were a direct result of the defendants' power to discriminate against independents in licensing films and were intended to suppress competition of others, as well as between the parties, received affirmative support from defense witnesses. Upon cross-examination of those who gave oral testimony, the Government was able to show that, in a number of instances, the films of a major defendant were made available to an independent

theatre on first run only while a defendant owned an interest in it (R. 577–586, 955–959, 1221–1222). In one instance, the acquisition of a partial interest in an independent theatre which followed such discrimination led directly to the creation of a closed town by acquisition of the remaining independent theatres (R. 1222).

The witness Thalheimer, the only exhibitor called by any of the defendants who was not involved in a pool of some kind with one or more of them, was apparently selected to show that an independent could thrive in opposition to affiliated theatres. He owns three first run and six subsequent run theatres in Richmond, Virginia, where Loew has a first run theatre of its own (R. 1379), and an interest in two other first run theatres (R. 486) operated by Wilmer & Vincent (R. 1379). Upon his cross-examination it appeared that Loew and Wilmer & Vincent had in 1940, through a corporation in which both were interested, threatened Thalheimer's subsequent run business by building one subsequent run theatre and half completing another (R. 1403). Whereupon Thalheimer paid Loew and Wilmer & Vincent $6,800 each to abandon construction of the half-completed theatre (R. 1404). The pendency of this suit was apparently all that stood in the way of a settlement of that controversy by a transfer of an interest in Thalheimer's business instead of the payment of money.

Even as matters now stand, Loew and each of the major defendants has an accurate count of Thalheimer's receipts in all his theatres which play their films on percentage by virtue of elaborate auditing privileges specified in their licenses. See App. pp. 36–45 and Exs. 276, 278, 280, 282, and 284 (R. 273–274). In this respect they can and do obtain information, normally available only to shareholders, as to the business of every so-called independent theatre operator. The independence of any of these operators is dubious so long as they are faced with potential competition from vital sources of supply which have continuous access to the confidential details of their business."

The trial court, in any event, could not have recognized actual ownership by the major defendants of any theatre business in combination with independent exhibitors as a reasonable arrangement without ignoring completely their habitual use of advantages inherent in their vertical integration to control independent competition wherever it may exist, by all available means.

We believe that the trial court was clearly in error in failing to recognize all degrees of theatre ownership by the major defendants as continuing

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[19] In April or May of 1945, Columbia, Paramount, RKO, Universal, and United Artists formed an agency called "Confidential Reports, Inc." to perform for them this auditing and checking function (R. 1322). The entire stock of this corporation was owned by them at the time of the trial (R. 1323). It is now owned by those five defendants and Fox and Warner.

unreasonable restraints on competition, as shown at pages 90–119 of our main brief. When it restricted its findings of unlawful ownership to pooling arrangements in effect at the time of the trial it cut off liability in an arbitrary manner which was extremely favorable to the defendants. We respectfully submit that their claim that the line of demarcation between lawful and unlawful ownership was arbitrarily drawn supports the Government's argument for divorcement rather than their appeals.

C. The non-exhibitor defendants violated the Sherman Act by tying one copyrighted film to another through franchise agreements and seasonal block booking and by making master agreements.

Franchise agreements are film licenses which grant exhibition rights in a group of film copyrights which the licensor contemplates making available to the licensee over a period of more than one year (R. 3660). Block booking is the practice of licensing one copyrighted feature, or group of features, upon condition that the exhibitor shall also license another feature, or group of features (R. 3659–3660). Universal and Columbia customarily make a single license with each exhibitor for all of the films they intend to release over a one-year period, which the exhibitor contracts to exhibit. At the time either a single season agreement or a franchise is made, substantially all of the copyrights involved have not yet issued. Master agreements are film licenses which may cover exhibition rights in only

a single copyright but which fix blanket rental terms for an entire circuit of theatres (R. 3660).

The district court found that all of the distributor defendants had violated the Sherman Act by making master agreements and franchises with affiliated circuits and large independent circuits (R. 3693). It also found that each distributor-defendant, except United Artists, had violated the Sherman Act by conditioning the offer of a license for one or more copyrighted films upon acceptance by the licensee of one or more others (R. 3693). It accordingly enjoined these defendants from making franchises and master agreements and from conditioning the right to exhibit one feature upon the licensee's taking one or more other features (R. 3696).

As already noted, the only defendants which question the court's findings and injunction as to master agreements and franchises are Universal and United Artists. Universal and Columbia challenge the court's findings and relief as to block booking. Paramount objects to the block booking relief (R. 3746), but does not assign error to the findings on which it is based. Columbia and Universal insist that they did not in fact condition their film licenses in the manner found and also assert that such conditioning is not a violation of the Sherman Act.

Since a franchise is simply an extreme form of block booking, we shall treat the appeals of Universal and Columbia with respect to both franchises and block booking together and show that such practices involve not only a violation of the Sherman Act but a serious abuse of copyright license privileges as well. We shall then show the illegality of the master agreements made by Universal and United Artists.

1. *Block booking, in the form of franchises or otherwise, is a copyright licensing abuse which violates the Sherman Act.*—"The sole interest of the United States and the primary object" in granting a copyright is to receive "benefits bestowed by the genius and meditations and skill of individuals * * *" *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127. If the financial rewards to individual copyright owners are to serve their public purpose the reward of each owner must be directly related to the quality of his copyright. A single license which makes available exhibition rights in a large number of copyrights (most of which have not even been created) to an exhibitor upon restrictive terms uniformly applicable to all of them, is a form of license deliberately intended to equalize rather than differentiate the reward for the individual copyrights involved in the license.

An extreme example of a license which completely submerges the identity of a large group of miscellaneous copyrights in fixing exhibition

terms is the franchise, Ex. 261, printed at App. pp. 50–58. Interstate Circuit there agreed to pay a weekly rental of $5,000 for the use of Universal's features, westerns, serials, and short subjects to be released during a three-year period. Such an agreement ties up a substantial segment of the playing time available in the circuit's theatres for a period of years without regard to the merits of the licensor's product and thus prevents other distributors from competing for that playing time upon the merits of such films as they may have available during those years. It also commits a substantial part of the film supply to the circuit's theatres without any consideration of the merits of competing theatres as outlets for the product. It is difficult to see how a more obviously unreasonable restraint of trade in films could be created by agreement.

Both Universal and Columbia habitually made franchises with affiliates of the major defendants and large independent circuits which had the trade-restraining purpose and effects explicitly found below (R. 3681–3682). This finding is supported by the provisions of the franchises in evidence made by Columbia and Universal, which are digested at App. pp. 86–87, 103–105, 109–110, 118–119, and 127–131.[20]

[20] Both Columbia and Universal had franchises current at the time of the trial covering numerous theatres affiliated with the major defendants. The franchises themselves were

As already noted, the unreasonable purpose and effect of these agreements is unquestioned by the affiliated exhibitor parties and Columbia has also assigned no error to the finding of this purpose and effect by the court below (conclusion 8 (d), (e), (f), R. 3692–3693). Columbia apparently insists that franchises are not agreements which are

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not offered in evidence; they are, however, listed in Exs. C–9a and U–2, respectively, from which the following summary is taken:

COLUMBIA

Exhibitor	Affiliated defendants	Number theatres covered	Seasons covered
Lucas & Jenkins	Paramount	85	1943–46
Publix Comerford	Paramount	46	1944–46
Publix Comerford	Paramount	11	1944–46
Publix Kinney	Paramount	51	1944–46
Publix Great States	Paramount	32	1944–46
Jefferson Amusement Co.	Paramount	27	1944–46
Lightman Circuit	Paramount	49	1943–46
Publix Netco	Paramount	4	1944–46
Notopoleus	Paramount	5	1944–46
Intermountain	Paramount	6	1943–46
Publix (Huntz & Perry)	Paramount	5	1944–46
Total theatres affiliated with Paramount		321	
Randforce	RKO	33	1944–46
RKO	RKO	21	1944–47
Total theatres affiliated with RKO		54	
National Theatres	Fox	45	1944–46
Total theatres affiliated with Fox		45	
Loew (except N. Y.)	Loew	15	1944–46
Loew (N. Y.)	Loew	64	1944–46
Total theatres affiliated with Loew		79	
Warner (except N. Y.)	Warner	301	1943–46
Warner (N. Y.)	Warner	29	1944–46
Total theatres affiliated with Warner		330	

Total affiliated theatres covered by current Columbia franchises, 829.

Footnote concluded on following page.

intended to tie a group of copyrights together for a trade-restraining purpose, but this effect is apparent from the face of such agreements, as noted above. Universal does not appear to deny the unreasonable competitive effects of these franchises, but complains that the court's judgment prevents it from making other franchises with small independents for the purpose of enabling them to compete with affiliated and large independent circuits. Their complaint, like Paramount's against block booking, is really that the relief against franchises was too broad, rather than entirely unwarranted, and it is therefore discussed in Section II, *infra*.

The argument of both Columbia and Universal as to the legality of tying one copyright to another in licensing agreements covering a single

UNIVERSAL

Northio Theatre Corp. (4 separate licenses)	Paramount	4	1944-48
Northio Theatre Corp. (5 separate licenses)	Paramount	5	1944-48
Total situations affiliated with Paramount		9	
Fox Midwest	Fox	89	1944-48
Fox West Coast	Fox	133	1944-48
Fox Evergreen	Fox	11	1944-48
Fox Wisconsin	Fox	15	1944-48
Total situations affiliated with Fox		248	
Skouras Circuit	RKO	50	1944-47
B. F. Keith Corp.	RKO	51	1944-47
Total situations affiliated with RKO		101	
Warner Bros.	Warner	297	1944-47
Total situations affiliated with Warner		297	

Total affiliated situations covered by current Universal franchises, 655.

season or less also seems to be primarily directed at the form of the judgment rather than the finding that they had engaged in such a practice. Montague and Scully, the respective sales managers of Columbia and Universal, conceded that their general practice was to license in a single block as much of their season's product as they could and that the films were priced and the customers selected in accordance with this policy (R. 1313–1314, 1470). Their counsel also insist that this method of licensing is necessary to supply a relatively stable market for their product. Their block booking practice, of course, could not accomplish that end unless exhibitors were actually induced by this practice to make licenses for films which they did not particularly desire as a means of securing more valuable films that they had to have for profitable operation.[20a]

[20a] Under the standard block booking practice followed by Columbia and Universal, the exhibitor commits himself to take a group of films not yet produced or copyrighted—he often buys nothing more than the assurance that a well-known star will appear in a proposed picture. Under such circumstances, it has been recognized that the dramatic material involved in films makes a relatively small contribution to the total revenue received from the film. *Sheldon* v. *Metro-Goldwyn Corporation*, 309 U. S. 390. Thus, the restraint which occurs by reason of his commitment to take a block of proposed films occurs prior to and is not related to the copyright to be secured upon the films when produced. Clearly, therefore, it would not be justified by reason of the Copyright Act—whatever restraints might lawfully be imposed after the issuance of a copyright, which, in any event, includes no tying privilege. In block booking the restraint is the cause, rather than the result, of the copyright.

Thus there is a serious dispute only as to the extent to which these defendants actually insisted upon the licensing of exhibition rights under one copyright as a condition of licensing similar rights in another and as to the form of the relief. There is no doubt that the practice condemned by the court was actually used by these defendants in the conduct of their business, and the real issue raised by their appeals as to block booking, as it is with respect to franchises, is simply whether or not the relief granted against them was broader than necessary. We shall show in Point II, *infra*, that it was not.

2. *Universal and United Artists violated the Sherman Act by making master agreements.*—As we have already shown, the argument of all of the defendants, except Universal and United Artists, assumes that they have made master agreements in the past which unreasonably restrain trade and that the relief granted against a repetition of this practice in the judgment below was proper. We shall show here that both United Artists and Universal have made master agreements which had the trade-restraining effects condemned by the court below, and we shall show in Point II, *infra*, that the relief granted in this respect was proper.

A master agreement differs from a franchise in that it may apply to the exhibition of only a single feature, and both forms of agreement are

commonly used in dealing with theatre circuits. Both frequently license exhibition rights in a large number of theatres upon rental terms which bear no relation to the competitive merits of the theatres in which the particular runs licensed are to be exhibited. A master agreement, by its blanket film rental, prevents any comparison of competitive offers of a particular theatre for a particular run because it completely obscures the terms on which any particular theatre it covers is licensed. It thus arbitrarily prevents consideration of competing offers for the exhibition privileges embodied in the license, and thus unreasonably restrains the competition of exhibitors for the privilege of licensing the picture or pictures covered.

The franchise made by Universal, discussed above, was also in form a master agreement which took no more account of the diverse merits of the numerous theatres it covered than of the copyrights included. Master agreements in evidence made by United Artists, which show on their face similar trade-restraining effects are Exs. 270, 270A, App. pp. 112–113; Ex. 273, App. p. 116; Ex. 383, App. p. 117; Ex. 476, App. pp. 134–136. According to its interrogatory answers 6 through 11 (Ex. 369, R. 346), United Artists was unable to supply film rentals received for specific runs li-

censed to Warner Bros., Fox, and a number of Paramount affiliates,[21] because their master deals made no allocation of the blanket film rental involved to any of the theatres covered. Thus there is no serious dispute that either of these defendants engaged in the practices which the court found to violate the Act or that those practices had the trade-restraining effects which the court found.

II

The prohibitions of which the defendants complain are, except for competitive bidding, the kind traditionally used to prevent similar Sherman Act violations

A. The principal relief granted against the major defendants is sustained by the findings which their appeals assume to be valid

The brief of each major defendant assumes that it should be subject to a decree which will regulate its individual power both as a distributor and exhibitor to discriminate against others. The only differences among them concern the form that such regulation should take. Four of the major defendants do not object to the competitive bidding provisions of the judgment. While Paramount does object to competitive bidding as an appropriate means of such regulation, it suggests instead an injunction against an arbitrary refusal to license a run sought by an independent

[21] Interstate Circuit, Balaban & Katz, Tri-States Circuit, Kincey, and Florida Theatres, Inc., also known as the Sparks Circuit (R. 939).

exhibitor as an appropriate substitute.[22] Their dispute with the Government, in so far as their continuing individual power to discriminate is concerned, is thus largely confined to the form of the remedy.

The major defendants' appeals thus assume, as the court below found, that their power to discriminate against others has been abused in the past in a manner which violates the Act and will be so abused in the future unless a decree adequate to eliminate such abuse is entered in this suit.

While they all deny that this continuing power to discriminate is inherent in their theatre ownership, and they deny that such ownership is itself a violation of the Sherman Act, it is difficult to rationalize upon any other basis their assumption that judicial regulation in this suit is an appropriate means of dealing with their individual power to discriminate. They insist that they have been guilty of no conspiracy to violate the Act and that they have achieved no film monopoly of

[22] Paragraph 9 of Section II of the judgment (R. 3698) is modeled after a provision proposed by all of the major defendants below (R. 3624–26) and was apparently adopted by the court as an appropriate supplement to the competitive bidding relief specified in paragraph 8 of this Section. The standards which determine whether or not the defendants' refusal is arbitrary are apparently those spelled out in paragraph 8.

any kind. Thus the threat of monopoly inherent in the continuing power and incentive which their theatre ownership gives them to discriminate against others is the only conceivable basis for the relief they assume to be appropriate. Any judgment now entered in this suit is one which may only have for its basis an appropriate finding of Sherman Act violation, and their dual concession, for the purposes of their appeals, that their individual power to discriminate against competitors has been illegally abused and that such power should be continuously regulated by an appropriate decree in this case, suggests a frank recognition by them that its continuing possession by them carries with it a continuous threat of future discriminatory conduct.

All of the majors challenge the findings of a horizontal price-fixing conspiracy among them and other distributors and exhibitors, and a conspiracy between each of them and their exhibitor licensees arising out of their individual price-fixing practice. Yet the appeal of each assumes, as noted above, that it has made license agreements with exhibitors affiliated with other defendants and with other large circuits which, individually considered, violated the Sherman Act, and these agreements include agreements to impose unreasonable clearance against their independent competitors. Since this unreasonable clearance was itself a means of controlling admission price competition between exhibitors in such a way as

to protect arbitrarily the affiliated theatre and was established by agreement between two defendants in each case, the challenge to the findings of general conspiracy have a very limited significance insofar as the major defendants are concerned. The findings of concerted action which were broader than mere agreements between two defendants, affect only the validity of relief intended to end the industry-wide conspiracies. Relief required to prevent concerted action in violation of the Act by any one defendant and another defendant, or exhibitor affiliated with it, is supported by the findings not appealed from.

The prohibitions against price-fixing and against systems of clearance (R. 3695–3696), which all of the defendants except Columbia attack, were plainly necessary to prevent continuance of the precise individual illegal conduct in which each distributor was found to have engaged, as well as to prevent the more general conspiracies to which they were all found to be parties. The propriety of these provisions of the judgment as to the major defendants is therefore supported by the findings of individual illegal conduct which they do not attack, as well as the more general findings of conspiracy which they do attack.

The major defendants still insist that they be allowed to continue stipulating minimum admission price restrictions in their license agreements and maintain systems of clearance while they continue to retain and expand theatre holdings

acquired and maintained through a discriminatory use of such restrictions. They not only wish to be free, as the present judgment leaves them free, to fix admission prices in their own theatres in a manner which will most effectively control the competition of others, but they apparently desire to make such control even more effective by agreeing with other exhibitors as to the minimum prices they may charge. Each also apparently desires to continue the privilege of using clearance as a systematic means of controlling by agreement the relative playing positions of all competing theatres which play their films. These contentions add up to a candid admission of a common desire to continue the precise trade restraints found below with the benefit of a legal sanction to be created by what they regard as an appropriate judgment in this suit.

Universal and United Artists have joined in the majors' attack upon these provisions of the judgment upon somewhat different grounds, but their attack is also without merit since, as shown in Point I, A, *supra*, they made the same kind of film licenses with affiliated licensees for precisely the same trade-restraining purposes as the major defendants did. These provisions of the judgment are so obviously necessary to enjoin continuing restraints of the kind shown in Point I, A, to violate the Sherman Act, that no further discussion of their propriety is required here. In the ensuing discussion we shall deal first with the pro-

visions requiring the distributor-defendants to justify any clearance agreement made in the future as "reasonably necessary to protect the licensee," the prohibition against the major defendants' theatre expansion, and the termination of the arbitration system, since the attack on those provisions is common to all of the major defendants. We shall then show that the provisions against franchises, block booking, and master agreements, attacked principally by the three non-exhibitor defendants, were also proper.

B. The court was justified in making the defendants' clearance agreements prima facie invalid and imposing the burden of showing that such a restriction is reasonable upon the distributor granting it

Each of the defendants was correctly found to have habitually made both an individual and collective trade-restraining use of clearance agreements as shown in Point I, A, *supra*. The court might, therefore, within existing precedents, have prohibited them from making any such agreements at all for a substantial period of time, even if such agreements were otherwise lawful. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724. Instead the court merely made such agreements *prima facie* invalid, and cast the burden of justifying the reasonableness of the restriction in question upon the distributor granting it (R. 3695–96). These provisions are attacked directly only by United Artists and Universal, but the major defendants insist that the presumption established by the judgment should not be regarded

as one of illegality and that a particular clearance may be justified as reasonable by showing that it was necessary to assure "a reasonable return" to the licensor as well as by showing that it was "reasonably necessary to protect the licensee." So construed these provisions are unobjectionable to them (Warner brief, pp. 123–124), but are wholly objectionable to the Government.

Since the major defendants are both distributors and theatre owners, they apparently desire a flexible standard by which they can justify the reasonableness of clearance granted by other distributors in favor of their theatres in terms of the needs of those theatres, and at the same time justify the restrictions they impose against independent exhibitors in terms of the necessity of protecting their film rental as distributors. Cf. *Interstate Circuit* v. *United States*, 306 U. S. 208, 211–212. As shown in our main brief, prohibitions controlling the form and character of the defendants' license agreements with affiliated theatres cannot prevent continuance or recurrence of the conspiracies and discriminations found below, since such restrictions may and probably would be continued simply by the manner in which positive prints were made available to affiliated theatres and theatres competing with them, even if clearance agreements were prohibited. However, these provisions should effectively prevent the continued use of clearance by the defendants to protect large unaffiliated

circuits from the competition of smaller independents. The court's judgment of *prima facie* invalidity would compel the distributor to justify any clearance granted in terms of protection to the licensee regarded as reasonable by Sherman Act standards.[23] The restriction would have to be justified by the party in the best position to know its competitive effects and the justification would have to be in terms of an especial need by the licensee for the competitive advantages which such restriction affords. If such a need were determined by Sherman Act standards, such an advantage would have to be shown as essential to the licensee's ability to compete rather than simply a restriction of the competition of others which might seem desirable to the licensee and to the distributor.

We think it is clear, therefore, that the clearance prohibitions now embodied in the judgment are no broader than the illegal licensing restrictions employed by the distributor defendants require. As pointed out in our main brief, an assured termination of such restrictions may only be had by divorcement and cross-licensing relief.

[23] It should be noted that the consent decree standards which the court stated in its opinion might control the determination of reasonable clearance in the future R. (3533–34) were not embodied in the final judgment. By its action in this connection the trial court recognized the validity of the Government's arguments at the hearing on the judgment that the consent decree standards were wholly inadequate to prevent the use of clearance in a manner which would violate the Sherman Act.

C. The prohibition against theatre expansion in the judgment below was a less drastic provision than the major defendants' violations warranted.

As we have already shown, the major defendants have virtually conceded the existence of a continuing power and incentive to discriminate against competitors which inheres in their continued ownership of any theatres. As pointed out in our main brief,[24] the proper remedy for such a Sherman Act violation is not mere regulation, but its complete termination. However, if a prohibition against theatre expansion, rather than affirmative theatre divestiture, is thought to be a proper remedy for the attempts to monopolize found below (R. 3692–93),[25] an unqualified prohibition against theatre expansion was certainly the minimum relief required.

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[24] For an additional analysis of the economic power inherent in this integration see HUETTIG, ECONOMIC CONTROL, MOTION PICTURE INDUSTRY, Univ. of Pa. Press, 1944.

[25] The court's failure to find actual monopolization was apparently a consequence of its assumption that since no one of the eight distributor-defendants controlled another through stock ownership, their businesses could not be aggregated in determining whether their domination of the market had reached monopoly proportions. This assumption was erroneous in view of the exclusionary nature of the conspiracy which bound them together. Having made concerted use of their power to exclude competitors, they were in no position to insist that the power to exclude possessed by each should be separately evaluated. In *American Tobacco Co.* v. *United States*, 328 U. S. 781, this Court expressly sanctioned aggregating the business of the three major tobacco companies for the purpose of determining whether or not they had actually monopolized the tobacco business in viola-

It was made clear in the course of the argument below that the existing provision does not even require court approval of mere replacement of existing theatres lost or abandoned (R. 3108–3109). What each major defendant seeks here is the power to expand its theatre business "in order to protect its investments or in order to enter a competitive field."[26] While they are willing to subject their new acquisitions to court approval, they apparently believe such approval could be obtained for establishing an affiliated theatre in any

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tion of section 2 of the Sherman Act. There, as here, no one of them did enough business to give it alone a monopoly position, but there, as here, they were all found to have engaged in an exclusionary price-fixing conspiracy. The exclusionary effect here is simply illustrated by the fact that Columbia, which licensed more independent theatres on first run in cities over 100,000 than any other defendant (see App. p. 303) had fewer independent first run accounts in 1945 than it had in 1936 in those cities and in all cities over 25,000 (Exs. C–6, R. 1281, C–7, App. 318–326), notwithstanding an increase from 1935 to 1945 of more than 4,000 in the number of independent theatres (R. 3688).

The lower court was thus clearly wrong in its conclusion of no actual monopolization and our assignment of error to that conclusion should be sustained. Whether or not the court below was right or wrong in this ultimate conclusion does not, in our opinion, affect our right to the relief we seek. The findings of conspiracy and attempted monopolization, in the manner described in the subsidiary findings, are themselves sufficient to require divorcement and a ban on cross-licensing, since, as pointed out in our main brief, relief short of such measures cannot terminate the conspiracies or attempts to monopolize arising from the continued vertical integrations.

[26] See Warner brief p. 32.

location where the independents may prove reluctant to show the films of a major upon terms which seem desirable to it.[27] This was, of course, precisely the form of activity which led to the creation of the numerous theatre pools condemned by the court below and discussed in Point I, B, *supra*.

The defendants also suggest that the Government has already given the existing judgment an unreasonable construction by suggesting that a civil contempt proceeding brought against Fox by an independent exhibitor[28] was justified. In that proceeding the petitioner charged that when it sought to build a new theatre in Watsonville, California, a Fox closed town, Fox commenced construction of a new theatre there for the purpose of preventing completion of petitioner's theatre. Although the construction of the new Fox theatre would mean possession by it of three theatres in a town where it now has only two, Fox claims that this is not expansion because the new theatre is intended merely to replace an obsolete one which Fox plans later to abandon. The obsolete theatre was apparently retained in that condition on the theory that even such a theatre may be useful in keeping a closed town closed.[29] If, as the court below intended through its judgment, an

[27] See RKO brief, p. 54.

[28] See RKO brief, p. 53.

[29] Cf. situation at Lockport, New York. Brief for the United States in *Schine Chain Theatres, Inc. et al.* v. *United States*, No. 10, this Term, p. 78.

independent could compete with Fox for films, it would plainly be desirable for Fox to have a new theatre wherever new independent competition threatens to materialize. The contempt proceeding was dismissed below without a decision on the merits upon the ground that the petitioner did not have standing to maintain it, and we need not be concerned with its merits here.[30] However, its institution foreshadows a continuous litigation in this suit of justifications asserted by the defendants for specific theatre acquisitions unless such acquisitions are prohibited in unqualified terms.

The basis for prohibiting acquisitions by the major defendants in this suit is not, as they seem to assume, the mere possession by them of large theatre circuits involved in past illegal activity. The qualifications in the prohibitions against theatre acquisitions included in the *Schine* and *Crescent* judgments were plainly justified by the limited nature of their control over the film business. There is no occasion for any comparable qualification here, since acquisition by these defendants is enjoined not simply because of their dominating position and past illegal conduct as theatre operators, but because of the added power and incentive to discriminate which necessarily results from expanding the extent of their vertical integration. We submit that the

[30] See opinion filed on Jan. 20, 1948, by Judge Bright, re petition filed in this suit by *New Salinas Theatres, Inc.* v. *Twentieth Century-Fox Film Corp., et al.*, No. 266, S. D. N. Y.

only abuse of discretion involved in the court's prohibition against expansion was the exception it made in favor of acquisition by the defendants of independent pooled interests which we show to be unwarranted at pages 115–119 of our main brief.

D. The court properly terminated the arbitration established by the consent decree

No serious argument is made by any defendant that the court had power to continue the arbitration system established by the consent decree without the continuing consent of the Government. The suggestion that the arbitration system was not terminable as of right at the expiration of the three-year trial period needs no consideration, since even if it were assumed that a hearing, evidence, and judgment were required, the trial, findings, and judgment below were certainly adequate for this purpose. The consent decree was, of course, terminated because it was found inadequate to deal with the violations found. The arbitration system had no separate purpose or excuse for existence apart from this decree and was therefore necessarily terminated with it.

As shown in Part I, C of our main brief, trade practice arbitration is a form of regulation utterly inconsistent with the remedies essential to the effective elimination of the violations of law in this industry and now sought by the Government.

The cases relied on by the defendants for the proposition that Sherman Act decrees must necessarily be hand tailored in each case do not suggest that they must be hand tailored to the requirements of the principal defendants rather than to the necessities of law enforcement.[31] The fact that the five major defendants are willing and anxious to maintain such a system at their expense suggests that it has a special value for them that it does not have for general purposes of Sherman Act enforcement.

E. The prohibitions against block booking, franchises, and master agreements were no broader than required to terminate the violations found

Paramount, Columbia, and Universal are the only defendants which attack the prohibition against block booking (R 3696).[32] Only Universal and United Artists attack the prohibitions against franchises and master agreements (R. 3696). While the block booking injunction presents a difficult enforcement problem in view of the intangible means by which one film may be used to force a license for another owned by the same distributor, the form of this injunction is the only one consistent with its purpose. The evidence did not suggest that the tying of only two copyrights together for licensing purposes would necessarily have an insignificant trade-restraining effect,

[31] See Fox brief, p. 41.

[32] It does not apply to United Artists.

since a single copyright may represent a distribution business worth several million dollars. See App. pp. 260–261. In this circumstance a finding of law violation by extensive use of tying film copyrights together for trade-restraining purposes in the past, even though generally found in the form of seasonal agreements or franchises, required a prohibition against tying any two or more to give assurance against similar future violations.

The prohibitions against franchises and master agreements are directed at a very narrow aspect of trade-restraining conduct since they control only a specific form of license in each case. Nevertheless, these prohibitions serve to define the standards of conduct required of the distributor-defendants in the future and they thus serve a useful purpose.

United Artists' attack on the franchise provision is wholly academic since it says it has no present desire to employ such an agreement. Its attack on the master agreement prohibition, of course, is dependent upon a showing that the master agreements admittedly made by it had no trade-restraining effect, and it is unable to make this showing since, as pointed out at pages 47, 48, *supra*, they have such effects on their face.

Universal does not seriously dispute the illegality of either the franchises or master agreements it has made with other defendants and their affiliated exhibitors, but argues that it should be permitted to make franchises with independent

exhibitors in order to let them compete with large circuits and that it should be permitted thus to establish semi-permanent outlets by contract comparable to those affiliated with the major defendants by stock ownership.

The short answer to the contentions of both these defendants is that if either can show in the future that it has so completely reformed its licensing practice that such prohibitions are no longer appropriate, it may secure a modification of the injunction from the district court. See *International Salt Co.* v. *United States,* No. 46, this Term.

A practical objection common to all three non-exhibitor defendants to abolition of block booking, franchises, and master agreements, and the institution of the competitive bidding system on a theatre by theatre, picture by picture basis, is an asserted need to engage in the prohibited practices as a means of business survival. They assert that block booking, master agreements, and franchises are the only means they have of forcing their pictures into the preferred channels of distribution which are at all comparable to the major defendants' theatre affiliations. Therefore, they argue, they must use these devices in order to compete with the major defendants.

We do not dispute the soundness of this argument in so far as it is based upon an economic necessity arising from competing in a market dominated by the major defendants instead of

conspiring with them. We do deny their assumption that antitrust violations by some members of an industry must be countenanced because they result from more basic violations by other members. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. As shown in our main brief, the only appropriate solution of their dilemma is the divestiture of the major defendants' theatres rather than a permissive use by these distributors of trade-restraining devices intended to counter-balance that control. The relief granted by the trial court against the use of these devices, while perhaps of doubtful enforceability so long as the relief sought by the Government against the major distributors is withheld, was certainly appropriate to deal with violations of this kind in so far as they may be prohibited at all by injunctive relief.

III

Appellant-intervenors are not entitled to intervention of right below or here to litigate the form of the final judgment

In Nos. 85 and 86, certain exhibitor groups[33] appeal from orders below denying their motions for leave to intervene (R. 3718). These groups

[33] Appellant-intervenors in No. 85 are two exhibitor associations and a number of independent exhibitors. Most of the members of the associations are independent exhibitors, but some are affiliated with the defendants. It is specifically alleged that one association does not represent the interests of its affiliated exhibitors in this case, and that no part of the

also have filed original motions for leave to intervene in this Court in Nos. 79–84. The five major defendants moved to dismiss the appeals in Nos. 85 and 86. On June 23, 1947, this Court postponed consideration of the original motions to intervene and of jurisdiction to hear the appeals until hearing of the cases on their merits (R. 3840–3841).

In both instances, appellant-intervenors seek to attack the competitive bidding provisions of the decree below. They claim intervention of right under Rule 24 (a) (2) of the Federal Rules of Civil Procedure (28 U. S. C., following Sec. 723c). They assert that they are or may be "bound by a judgment in the action" on the theory that an agreement among defendants to conform to the competitive bidding system would be an antitrust violation for which they could sue, but that the lower court's decree directing such a system insulates the defendants from such actions. They contend that present representation of their interests "is or may be inadequate" because the Government does not actively oppose competitive

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expense will be borne by them. There are no such allegations with respect to the other association. (R. 3565–3567.)

Appellant-intervenors in No. 86 are a number of independent exhibitors. Their application is supported by exhibitor associations, some of whose members are affiliated with the defendants. While no defendant-owned theatres are contributing to the expense of the application, theatres held jointly by independents with defendant Paramount are making such contributions. (R. 3582–3583.)

bidding, and the defendants who attack it (Paramount, Columbia, Universal and United Artists) have interests opposed to theirs.

We do not object to appellant-intervenors' being heard here as friends of the Court. We did not object below, and they were fully heard there. We are impelled to object, however, to their becoming parties to litigate the form of the final judgment since we are of the view that they fail to meet the requirements for intervention of right.

The appellant-intervenors are in error when they say that the Government does not actively oppose the competitive bidding system. The Government has assigned error to it, and argues in its main brief (pp. 54–89) that the system is so inadequate as to amount to an abuse of discretion. We do not, of course, claim to give specific representation to the purely private interests of appellant-intervenors. Our purpose is the larger one of protecting the public interest in free competition. But that also is the scope of this suit. Thus, insofar as this action is concerned, appellant-intervenors' interests are being adequately represented. Cf. *In re Engelhard*, 231 U. S. 646, 651; *New York City* v. *New York Tel. Co.*, 261 U. S. 312, 316; Ex parte *Leaf Tobacco Board of Trade*, 222 U. S. 578.

Since these appellant-intervenors in any event may be fully heard as to the form of the judg-

ment, the requested intervention would serve no useful purpose. The appellant-intervenors' standing in this respect is no different from that of thousands of other exhibitors. In any anti-trust case of this magnitude members of the industry and of the public may be sufficiently interested to want to present their views. A number of such persons have presented their views in this case as friends of the court. To permit intervention as parties by all such persons would expand the controversy beyond all reasonable bounds, to the prejudice of both the Government and the court. Cf. *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, 141–142.

Since appellant-intervenors are not entitled to intervention of right, this Court lacks jurisdiction to set aside the denials below in the absence of an abuse of discretion. *Brotherhood of Railroad Trainmen* v. *B. O. R. Co.*, 331 U. S. 519, 524–525; *United States* v. *California Canneries*, 279 U. S. 553, 556, and cases cited. Appellant-intervenors do not assert such an abuse of discretion, and clearly there was none. Consequently, this Court should dismiss the appeals and deny the original motions to intervene here.

CONCLUSION

The judgment of Sherman Act violations should be affirmed as to all defendants and the injunc-

tive provisions sustained except as modified by the relief sought upon the Government's appeal.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

PARAMOUNT PICTURES, INC., ET AL.

LOEW'S INCORPORATED, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

PARAMOUNT PICTURES, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

COLUMBIA PICTURES CORPORATION, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

UNITED ARTISTS CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA

UNIVERSAL PICTURES COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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OCTOBER TERM, 1946.

No. [redacted] 79-84

UNITED STATES OF AMERICA, *Appellant*,
v.
PARAMOUNT PICTURES, INC., *et al.*, *Appellees*.

No. [redacted]
LOEW'S, INC., *et al.*, *Appellants*,
v.
UNITED STATES OF AMERICA, *Appellee*.

No. [redacted]
PARAMOUNT PICTURES, INC., *et al.*, *Appellants*,
v.
UNITED STATES OF AMERICA, *Appellee*.

No. [redacted]
COLUMBIA PICTURES CORPORATION, *et al.*, *Appellants*,
v.
UNITED STATES OF AMERICA, *Appellee*.

No. [redacted]
UNITED ARTISTS CORPORATION, *Appellant*,
v.
UNITED STATES OF AMERICA, *Appellee*.

No. [redacted]
UNIVERSAL PICTURES COMPANY, INC., ETC., *et al.*, *Appellants*,
v.
UNITED STATES OF AMERICA, *Appellee*.

MOTION FOR LEAVE TO INTERVENE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1348

UNITED STATES OF AMERICA, *Appellant*,

v.

PARAMOUNT PICTURES, INC., *et al.*, *Appellees*.

No. 1349

LOEW'S, INC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1350

PARAMOUNT PICTURES, INC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1351

COLUMBIA PICTURES CORPORATION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1352

UNITED ARTISTS CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1353

UNIVERSAL PICTURES COMPANY, INC., ETC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

MOTION FOR LEAVE TO INTERVENE.

NOW COME AMERICAN THEATRES ASSOCIATION, INC., *et al.*, and W. C. ALLRED, *et al.*, jointly and severally, and move this Court for leave to intervene as parties in the above-entitled actions on behalf of themselves and others similarly situated. Their purpose in intervening is limited to asserting the matters set forth in their separate intervention petitions filed in the District Court for the Southern District of New York, which intervention petitions, together

with their separate statements as to jurisdiction, are made by separate praecipae a part of the transcript of the record in their pending appeals before this Court from the final decree of the court below and from an order of the said District Court denying intervention; and which petitions, jurisdictional statements and the joint brief filed by them in opposition to the separate motions of certain defendants-respondent to dismiss their appeals they pray may be incorporated herein as a part hereof.

WHEREFORE, the premises and said documents considered, petitioners pray that they may be permitted to appear in these proceedings and be heard in these causes as intervenors, appearing herein by order of the Court under Rule 24(a) of the Rules of Civil Procedure and under the decision of *United States* v. *Terminal Railroad Assn. of St. Louis*, 236 U. S. 194, and that the plan for competitive bidding embodied in sub-paragraphs (a), (b), (c) and (d) of Paragraph 8 of Section II of the decree of said Court of December 31, 1946, may be held erroneous and said decree accordingly reversed and the cause remanded for the elimination of the aforesaid paragraphs in the decree.

Dated: May 16, 1947.

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Nos. 79-84

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UNITED STATES OF AMERICA, *Appellant*,

v.

PARAMOUNT PICTURES, INC., *et al.*, *Appellees*.

No. 1949.

LOEW'S INC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1950.

PARAMOUNT PICTURES, INC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1951.

COLUMBIA PICTURES CORPORATION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1952.

UNITED ARTISTS CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1953.

UNIVERSAL PICTURES COMPANY, INC., ETC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

REPLY OF AMERICAN THEATRES ASSOCIATION, INC., ET AL., AND W. C. ALLRED, ET AL., TO MEMORANDUM IN OPPOSITION TO THEIR MOTIONS FOR LEAVE TO INTERVENE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1348.

UNITED STATES OF AMERICA, *Appellant*,

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PARAMOUNT PICTURES, INC., *et al.*, *Appellants*,

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UNITED STATES OF AMERICA, *Appellee*.

No. 1351.

COLUMBIA PICTURES CORPORATION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1352.

UNITED ARTISTS CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 1353.

UNIVERSAL PICTURES COMPANY, INC., ETC., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

REPLY OF AMERICAN THEATRES ASSOCIATION, INC., ET AL., AND W. C. ALLRED, ET AL., TO MEMORANDUM IN OPPOSITION TO THEIR MOTIONS FOR LEAVE TO INTERVENE.

American Theatres Association, Inc., et al., and W. C. Allred, et al., respectfully submit the following in response to the memorandum filed in these proceedings by the Twentieth Century-Fox, Loew's, RKO, Paramount and Warner defendants in opposition to petitioner's joint motion for leave to intervene:

Point I.

Petitioners Should Be Permitted to Intervene Originally Under the Decision of this Court in United States v. Terminal Railroad Association of St. Louis, 236 U. S. 194.

The defendants attempt to distinguish the *St. Louis Terminal case* on the ground that in that case the petitioners were deprived of a legal right against a public utility—the Terminal Association—whereas in the present case petitioners have no legal right against the defendants which is cut off by the decree. This distinction is based on a misstatement of the facts. In the absence of the decree, the petitioners would have a clear legal right to enjoin a plan for concerted action by the distributors to enforce competitive bidding which the decree attempts to legalize. The decree, by approving that plan, cuts off petitioners' legal right as effectively as the petitioners' legal right was cut off in the *St. Louis Terminal case.*

Further, the contention made by defendants that the consent of the Attorney General to intervention is necessary is without merit since the Attorney General's action cannot affect intervention as of right. The Attorney General certainly has no power to approve of the combination in restraint of trade set up in the court's decree.

In the case of *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 121, relied on by defendants, the opposition of the Attorney General was based in part on the ground that Mokan was "not entitled to intervention of right." Moreover, when the intervention in that case came under the scrutiny of this Court[1] it was held that the

[1] *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 506.

arguments with respect to the Attorney General's guardianship of the public interest misconceived the basis of the right asserted by the intervenors and that "where the enforcement of a public law also demands distinct safeguarding of private interests. . . . the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." In other words, intervention in such cases is as of right, not permissive.

Point II.

The Spirit and Intent of Rule 24(a) Should Obtain in this Court as Well as in the District Courts of the United States.

Rule 24(a) of the Rules of Civil Procedure was approved and adopted by this Court as a rule for the protection of those whose interests were vitally affected by a suit in the District Courts to which they were not parties. Petitioners recognize that the Rules of Civil Procedure are specifically restricted to proceedings in the District Courts. However, there being no rule of this Court providing for intervention in proceedings before this Court, it is contended that the spirit and intent of Rule 24(a) should be considered by this Court in determining whether one whose rights are vitally affected may be heard.

Conclusion.

Petitioners assert that they are in a position in the pending litigation before this Court similar to that of the intervenors in the *St. Louis Terminal* and *Missouri-Kansas Pipe Line cases*; that the interests they seek to protect by intervention are of as great consequence and importance as the interests accorded protection by this Court in those cases.

WHEREFORE, petitioners respectfully pray that their joint motion for leave to intervene in the appeals therein designated be granted.

Respectfully submitted,

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Nos. 79-86

THE UNITED STATES OF AMERICA,
Appellant,
vs.
PARAMOUNT PICTURES, INC., *et al.*

JOINT BRIEF

IN REPLY TO BRIEFS OF *AMICI CURIAE*

This memorandum is submitted on behalf of the five theatre-owning defendants to record their disagreement with and opposition to the briefs submitted by certain groups as *amici curiae.**

---

*W. C. Allred, et al., who are also appellants in No. 86;
American Theatres Association, Inc., et al., who are also appellants in No. 85;
The Society of Independent Motion Picture Producers;
American Civil Liberties Union;
The Conference of Independent Exhibitors' Associations; and
The independent theatre owner and operator members of the Motion Picture Theatre Owners of America.

These defendants have sufficiently elaborated in their respective separate briefs their views as to the issues involved in these several appeals. We do not wish, however, by silence to be deemed to have acquiesced in any arguments or to have admitted any statements made in the briefs of the *amici* which were not anticipated and refuted or explained in our several briefs. The briefs of *amici curiae* depart so frequently and so far from the record as to make it as unnecessary as it is impossible to answer them completely with record references. To a large extent the briefs are devoted to an assertion of assumed facts which have no support in or bearing on the proof and findings upon which this Court is here called upon to give its decision.

The District Court said (R. 3553; 66 F. Supp. 354):

> "Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States;* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106, and *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and the other things we have criticized."

No evidence is or could be pointed to, to weaken this conclusion, and yet all the arguments of the *amici* proceed on the assumption that the five so-called "major" defendants not only may, but *must* be treated collectively as a monopoly for unless they are, the results sought by the *amici* cannot possibly follow.

We believe that what *amici* overlook is the basic fact that this case was tried on the theory that defendants had acquired a monopoly, and that the conspiracies alleged were intended to effectuate that monopoly (R. 2777-8). The Government wholly failed to prove this charge, and that failure cannot be remedied by mere *ipse dixit* of *amici*.

Finally, only a word need be said concerning the efforts of the Society of Independent Producers and the American Civil Liberties Union to inject in the case an asserted constitutional question. As the Civil Liberties Union reads the Constitution (brief, p. 20), the showing of a New York City first-run in the Times Square area, without a simultaneous or earlier showing in the Bronx, operates in some unexplained manner to deprive the Bronx and its residents of some unspecified constitutional right. We consider it unnecessary to enter into a debate as to whether the Constitution does in fact guarantee Bronxites an opportunity to see first-run films without riding the subway. For even if we were to concur in this bizarre constitutional doctrine, this Court would still require some showing as to how first-run performances in the Bronx or any other locality would be assured by the magic of divestiture.

Indeed, for similar reasons, the entire constitutional argument advanced by *amici* is quite irrelevant. It is founded upon the assumption that monopoly has been found when in fact the lower court found that no monopoly exists. It would impose a duty on defendants to insure their audiences of a "diversified" program of motion pictures. Yet it loses sight of the affirmative finding of the court below that divestiture would not accomplish that nor any useful purpose.

While we do not wish to yield to *amici* in their great regard for the command of the First Amendment, we ven-

ture to suggest that the Court would have been better served if their briefs had contained more references to the record and fewer references to the ringing phrases in which that great charter of freedom has been preserved.

Respectfully submitted,

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OCTOBER TERM, 1946

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vs.

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No. 1340

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 1360

PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 1361

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 1362

UNITED ARTISTS CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA.

No. 1363

UNIVERSAL PICTURES COMPANY, INC. (sued herein as Universal Corporation and Universal Pictures Company, Inc.), UNIVERSAL FILM EXCHANGES INC. and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS IN OPPOSITION TO THE MOTIONS FOR LEAVE TO INTERVENE FILED BY AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*

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Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, *Appellant*, *vs.* PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*	No. 1348
LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1349
PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1350
COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1351
UNITED ARTISTS CORPORATION, *Appellant*, *vs.* THE UNITED STATES OF AMERICA.	No. 1352
UNIVERSAL PICTURES COMPANY, INC. (sued herein as Universal Corporation and Universal Pictures Company, Inc.), UNIVERSAL FILM EXCHANGES INC. and BIG U FILM EXCHANGE, INC., *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1353

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS IN OPPOSITION TO THE MOTIONS FOR LEAVE TO INTERVENE FILED BY AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*

The Twentieth Century-Fox, Loew, RKO, Paramount and Warner defendants respectfully submit this memorandum in opposition to the motions filed in this Court by the petitioners, American Theatres Association, Inc., et al. and W. C. Allred, et al., jointly and severally, for leave to intervene as parties in the above entitled appeals on behalf of themselves and others allegedly similarly situated.

The petitioners pray that they may be permitted to appear in these proceedings and be heard as intervenors, claiming the right to do so by virtue of Rule 24(a) of the Rules of Civil Procedure, and the decision of this Court in *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194. The purpose of the intervention as stated in their motions is in order to enable the petitioners to urge that the plan for competitive bidding embodied in subparagraphs (a), (b), (c) and (d) of Paragraph 8 of Section II of the decree of the United States District Court for the Southern District of New York, dated December 31, 1946, is erroneous, and that the decree should be accordingly reversed and the causes remanded for elimination of these paragraphs.

Point I.

PETITIONERS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT

The Rules of Civil Procedure, including Rule 24(a) upon which the petitioners specifically rely, were adopted by the Supreme Court pursuant to authority granted it by the Act of June 19, 1934, Chapter 651 (28 U. S. C. § 723b), which act gave this Court the power to prescribe rules for the District Courts of the United States and the courts of the District of Columbia.

Rule 1 of the Rules of Civil Procedure specifically states that the rules are to govern procedure in the District Courts of the United States, and Rule 81 sets forth the proceedings in which the rules are to be applicable. It is clear, therefore, that the rules apply only to the District Courts and not to the Supreme Court (see *Mookini* v. *United States*, 303 U. S. 201, construing the applicability of the Criminal Appeals Rules).

Petitioners therefore cannot urge that Rule 24(a) entitles them to intervene by original motion in the Supreme Court as of right, even if it be assumed that their situation brings them within the terms of such rule, i.e., that they are inadequately represented and that they will be bound by the judgment. However, the opinion in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, makes it clear that they are not to be treated as being inadequately represented, and that they are not bound by the decree in the manner contemplated by the Rule.

Point II.

PETITIONERS SHOULD NOT BE PERMITTED TO INTERVENE AS A MATTER OF DISCRETION

Reliance is placed by the petitioners upon the decision of this Court in *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194, and particularly the language of the Court at page 199 where it was stated that, "* * * although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights".

It is submitted, however, that this case is not applicable. In the first place, the case involved a public utility which

the lower court had enjoined from carrying on a public transportation business. The case was before this Court upon application of the defendants for modification of the decree in order to make it clear that it was not intended to prohibit transportation incidental to the business which the Terminal Association was allowed to continue. The petitioners similarly urged modification. Had the defendant Terminal Association, a public service organization, sought voluntarily to terminate the service which it was rendering, the petitioning intervenors would have had a right to go to court to prevent that action. In the case at bar, however, had one or more of the defendants individually determined to distribute their motion pictures on a competitive bidding basis such as that provided for in the decree, and which the petitioners seek leave to attack, none of the petitioners would have possessed a similar legal right to require the defendants to license motion pictures to them in any other way or at all. This distinction is fundamental.

Furthermore, in the *Terminal* case the petitioners were not seeking reversal of the decree, but only to have it modified so as to make it clear that it was not intended to affect their rights. As this Court has clearly pointed out in *United States* v. *California Cooperative Canneries*, 279 U. S. 553 at page 556, it has long been the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree. See *In Re Veach*, 4 F. 2d 334; *Union Trust Co.* v. *Jones*, 16 F. 2d 236, and the numerous other cases cited by Mr. Justice Brandeis in the *California Canneries* case in a footnote at pages 556 to 557, cases arising under former Equity Rule 37 and cases arising prior to that rule.

Here petitioners seek to impeach the decree, and frankly state that their purpose in seeking to intervene is to persuade this Court that certain of its provisions, i.e., those having

to do with competitive bidding, are erroneous and should be reversed and the cases remanded to the District Court with directions to eliminate the portions of the decree having to do with competitive bidding.

Even if it be assumed that Rule 24(a) of the Rules of Civil Procedure is applicable, or that it states a rule of law as to when intervention may be had as a matter of right, the petitioners do not qualify. It was made amply clear in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, that their contentions must be rejected. There it was shown that Section 16 of the Clayton Act (15 U. S. C., par. 26) conferred no right to intervene, and that the petitioners would not be bound by the judgment in the sense in which the term is used in Rule 24(a). In the *Cash Register* case this Court distinguished *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U. S. 502, upon which petitioners also rely, upon the express ground that there the petitioner for intervention was named in the decree as one who should be heard in the event certain action was taken affecting its property rights. The Court pointed out that intervention in an appellate court was unusual, saying at page 506 "Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation, is, barring very special circumstances, a matter for the *nisi prius* court." (See also *Morini* v. *City of Stuart* (C. C. A. 5th) 112 F. 2nd 585.) And the Court stressed the fact, (p. 508), that there the petitioners were seeking to enforce and vindicate the decree, not to impeach it, as in the case at bar.

Furthermore, it has been held that an individual may not intervene in a suit brought under the Antitrust Laws by the Attorney General where the latter does not consent to such intervention. *U. S.* v. *Columbia Gas & Electric*

Corporation, 27 F. Supp. (D. C. Del.), appeal dismissed, 108 F. 2d 614, and cert. den. 319 U. S. 687. The Attorney General opposed intervention below, and, so far as we are presently advised, has not altered this position.

The case of *U. S.* v. *Radio Corporation of America, et al.*, 3 F. Supp. 23 (D. C. Del.), indicates the proper procedure in case petitioners feel aggrieved by the decree, i.e., to file a bill in the court which entered the decree seeking appropriate relief.

None of the undersigned would oppose applications by the petitioners for leave to file briefs *amicus curiae* provided the Court feels they would be of assistance and they accurately state the facts.

WHEREFORE the undersigned respectfully request that the motions of American Theatres Association, Inc., et al. and W. C. Allred, et al. for leave to intervene in the Supreme Court be denied.

Respectfully submitted,

.....

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Attorney for Twentieth Century-Fox Film Corporation, et al.

.....

Attorneys for Radio-Keith-Orpheum Corporation, et al.

.....

Attorneys for Warner Bros. Pictures, Inc., et al.

.....

Attorney for Paramount Pictures Inc., et al.

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Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA,
Appellant,
vs.
PARAMOUNT PICTURES, *et al.*,
Appellees.

No. 79

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER APPELLEES IN OPPOSITION TO THE MOTIONS OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS AND THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA,
Appellant,
vs.
PARAMOUNT PICTURES, *et al.*,
Appellees.

No. 79

MEMORANDUM OF THE TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER APPELLEES IN OPPOSITION TO THE MOTIONS OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS AND THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

The Twentieth Century-Fox, Loew's, RKO, Paramount and Warner appellees have declined to consent to, and now oppose, for the following reasons, the filing of briefs *amici curiae* on behalf of the Society of Independent Motion Picture Producers and the Conference of Independent Exhibitors' Associations:

1. The briefs merely present the self-interested points of view of the applicants and urge action with respect to the decree which are different from and, in some respects, in conflict with the relief sought in this Court by the parties to the cause.

2. No claims are made that the public interest is not adequately represented by the Solicitor General, nor could such claims be properly made.

3. These appeals will require this Court to consider main and reply briefs by the Government and by eight separate groups of defendants, as well as briefs submitted on behalf of certain proposed intervenors. It seems probable that other groups will seek leave to file briefs as *amici curiae*. The present briefs go so far outside the record, and so inadequately treat of the decision below, that if they were to

be accepted by this Court it would be necessary for the defendants to reply to each of them.

We do not believe that it will serve the convenience of the Court to have its record burdened with such a multiplicity of briefs by groups not directly concerned in the action.

Dated
New York, N. Y.
December 12, 1947

Respectfully submitted,

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STATEMENT AS TO JURISDICTION

FILE COPY

Supreme Court, U. S.
FILED
MAY 8. 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1349 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 1350 81

PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

STATEMENTS AS TO JURISDICTION
(With Opinions, Decree and Order)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1349
PARAMOUNT PICTURES, INC., and PARAMOUNT FILM DISTRIBUTING CORPORATION, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 1350

STATEMENTS AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL TO REVIEW THE JUDGMENT HEREIN.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above appellants severally submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the Judgment, Decree and Final Order of the United States District Court for the Southern District of New York entered in the office of the Clerk of said Court on December 31, 1946, and the Order of said Court entered February 11, 1947.

Petitions for Appeal were filed in the District Court on February 26, 1947, and were allowed by order of the same date.

The plaintiff, pursuant to an order dated February 21, 1947, appealed from the Decree entered December 31, 1946 and filed its Assignment of Errors therewith. Twenty-five specific assignments of errors are set forth in the plaintiff's appeal.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the Judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

U. S. v. *Crescent Amusement Co.*, 323 U. S. 173 (1944);

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944);

Interstate Circuit v. *U. S.*, 306 U. S. 208 (1939);

Sugar Institute v. *United States*, 297 U. S. 553 (1936);

United States v. *American Tobacco Co.*, 221 U. S. 106 (1911);

United States v. *Reading Co.*, 226 U. S. 324 (1912).

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. Sections 1 and 2), reading in part as follows:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

The Copyright Act of March 4, 1909, 35 Stat. 1075-1088 (17 U. S. C.), and particularly those portions reading as follows:

"Section 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcrip-

tion or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

* * *

§ 4. The works for which copyright may be secured under this title shall include all the writings of an author.

§ 5. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays."

The Issues and the Rulings Below

The original petition in this action was filed on July 20, 1938. It charged concerted monopolization of the domestic motion picture industry by eight of the principal units therein, five of which (Fox, Loew's, Paramount, RKO and Warner) were engaged in producing, distributing and exhibiting motion pictures, two of which (Columbia and Universal) were producers and distributors, and one of which (United Artists) was engaged only in distributing motion pictures.

The petition prayed for injunctive relief against certain trade practices existent in the distribution branch of the motion picture industry, and also demanded that the five first named companies, which were designated in the peti-

tion as the producer-exhibitor defendants, be required to divest themselves of all their theatres and theatre interests and be enjoined from thereafter acquiring new ones.

The defendants answered the petition and denied its material allegations.

The case first came on for trial on June 1, 1940, before the United States District Court for the Southern District of New York. Before any testimony was taken, negotiations were begun for the disposition of the case by consent decree.

An amended and supplemental complaint was filed on November 14, 1940. This amended and supplemental complaint prayed: (1) that each of the alleged contracts, combinations and conspiracies in restraint of trade, together with the alleged attempts to monopolize the same, be declared illegal; (2) that the defendants be perpetually enjoined from continuing to carry out the alleged attempts at monopolization and all the alleged restraints of trade in the production, distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the Court might deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices might be decreed; and (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the Court might find had been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

The defendants filed answers denying the material allegations of the amended and supplemental complaint, and thereafter the plaintiff and the five producer-exhibitor de-

fendants and their subsidiary corporations executed a written consent to the entry of a decree by the District Court.

On November 20, 1940, a decree was made and entered in accordance with such consent, upon plaintiff's motion and before any testimony had been taken, which decree among other things, enjoined the five producer-exhibitor defendants from engaging in certain trade practices, such as "block booking", "blind selling" and "forcing." In addition, the decree enjoined the five producer-exhibitor defendants from engaging in a general program of expanding their respective theatre holdings for a period of three years. The decree provided, however, that nothing contained therein should prevent any defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

The Consent Decree also provided, as prayed in the amended and supplemental complaint, for the determination by arbitration of certain disputes between exhibitors and distributors.

As a result, Arbitration Tribunals were set up in the various exchange districts in the United States for the hearing of these arbitrable complaints, and an Appeal Board was constituted and the members thereof appointed by the District Court. These Arbitration Tribunals were established and procedure was prescribed by rules and regulations set forth in an appendix to the Consent Decree. The American Arbitration Association acted as the administrator of the arbitration system.

The Decree further provided that for a period of three years after its entry the plaintiff would not seek to divorce the production or distribution of motion pictures from their

exhibition, or to dissolve any defendant or break up any circuit of theatres of any defendant, or to require any defendant to divest itself of its interests in theatres.

The Court expressly retained jurisdiction for the purpose of enabling any party to the decree to apply to it at any time more than three years after the date of the entry of the Decree for any modification thereof.

After the expiration of the three year period referred to in the Consent Decree, the plaintiff moved to amend the decree of November 20, 1940, and on June 13, 1945, filed an application, pursuant to the Expediting Act, 15 U. S. C. § 28, with the senior Circuit Judge for the appointment of a special three-judge Expediting Court to hear and determine the issues. This court was duly constituted on June 16, 1945, with Augustus N. Hand, Circuit Judge, Henry W. Goddard, and John Bright, District Judges, and hearings commenced on October 8, 1945.

The Court rendered its Opinion on June 11, 1946, and its Judgment, Decree and Findings of Fact and Conclusions of Law and Supplemental Opinion on December 31, 1946. Thereafter certain of the defendants moved to amend the Decree in certain respects, and to amend one of the Conclusions of Law. This motion was denied by order entered February 11, 1947, except that Paragraphs (2) and (4) of Section III were modified so as to provide that the arrangements therein referred to should be terminated prior to July 1, 1947, rather than within 60 days after the entry of the Decree. Copies of the Opinion, the Supplemental Opinion and the Decree, as well as the Order entered February 11, 1947 are submitted herewith.

In brief, the Court decided that the eight defendants had violated the Sherman Act by engaging in certain

trade practices, which the Court enjoined. The Court found that the illegalities and restraints were not in the ownership of theatres, but in certain trade practices and arrangements dealt with in the Decree.

As it was conceded by the plaintiff at the trial that there was active competition in the production of motion pictures, the charges in respect thereto were formally abandoned by the plaintiff and dismissed by the Court in its Decree.

The Questions Involved Are Substantial

The following questions are substantial and are fully covered by these appellants' several Assignments of Errors. These questions were properly raised before the District Court, both during the trial and on arguments before the Court relating to the formulation of Findings of Fact and Conclusions of Law and the Decree.

1.

The amended and supplemental complaint prayed, among other things, that a

> "nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

An arbitration system was established by judgment of the United States District Court for the Southern District of New York entered November 20, 1940, pursuant to this

prayer of the amended and supplemental complaint and the consent of the plaintiff and these appellants. The Court found that this arbitration system operated as follows:

> "160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money."

In view of the fact that this arbitration system for settling trade disputes was established pursuant to the prayer of the amended and supplemental complaint, pursuant to the consent of the plaintiff and the appellants, and pursuant to the formal judgment of the Court, and since the trial of this action proceeded only after a motion to modify that judgment of November 20, 1940, it is the appellants' position that the Court had ample power to continue its judgment establishing the arbitration system. It is clear that the Court would have continued the arbitration system, if it had thought it had the power so to do. It stated in its Supplemental Opinion:

> "The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

> Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that 'a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.'
>
> We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

The Court's holding that it lacked power to continue the arbitration system is contrary to the decision in *United States* v. *Swift & Co.*, 286 U. S. 106, 114-115, 117 (1931), and involves a substantial question for review.

2.

The Decree entered by the Court below prohibits the owner of a feature motion picture from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of that licensed feature. Many features are licensed under terms which reserve to the licensor as film rental a percentage of the admissions received by the licensee during the period of exhibition. During such period, therefore, the licensor has an immediate and direct interest in the admission prices charged. The Decree deprives him of the right, which he

has under the Copyright Laws and the common law, to protect his interest by contract.

The owner of a motion picture, copyrighted or not, may exhibit it to the public and charge an admission fee. The owner, without parting with his title to that picture, may authorize another to exhibit it to the public; when that other person so exhibits the picture he necessarily charges an admission price. It is submitted that there is nothing in the anti-trust laws which prohibits the owner and the person authorized (or permitted or licensed) to show the picture to the public at an admission price to agree as to what that admission price shall be.

The prohibition, imposed by the Court, has particular effect in the case of a feature of unusual cost, where it is necessary to "roadshow" the production at a specified admission price during the roadshow engagement, in order to recover the exceptional investment. The record shows that during a period of several years prior to the trial only four features, of all the releases of the eight defendants, were road shown. Each of these was an outstanding and unusual feature, costly in production, and of such importance as to warrant, if required, its exhibition as the sole item of a program, without accompanying shorts or other entertainment. The limited number of such features suitable for roadshow exhibition precludes the possibility that their continued production and exhibition as roadshows can be the basis of an unlawful monopoly. By their very nature, such unique features can not become the subject of any concerted action in unreasonable restraint of trade. The Decree as drawn will prevent the production in the future of such occasional and unusually costly features, since their production costs can only be recovered by

roadshow exhibitions. Thus the Decree not only deprives each defendant of rights which he is entitled to enjoy under the Copyright Laws and the common law, but in addition, the public will be deprived of the entertainment value of the exceptional feature motion picture.

3.

The Decree enjoins the five exhibitor-defendants from continuing to own any beneficial interest in any theatre with an independent exhibitor, unless the interest shall be 5% or less, or 95% or more (Section III, Paragraph (5) of the Decree). The Decree compels these exhibitor-defendants to dispose of many valuable theatre interests falling within the banned percentages, unless they can arrange to purchase the partial interests of their respective co-owners, and then only, if they can obtain Court approval of such purchase. The decision of the District Court prohibiting the continuation of arrangements between a defendant and an independent exhibitor for the joint ownership or operation of a theatre did not result from the trial of any issue tendered by the plaintiff or contested during the hearings. Therefore there is no justification for the portions of the Decree which condemn such theatre interests held with independent exhibitors. In this respect, the Decree is contrary to the decision in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 (1945).

4.

The Decree [Section III, Paragraph (6)] enjoins each of the theatre-owning defendants from expanding its present theatre holdings, except for the limited purpose of

acquiring, if approved by the court, a co-owner's interest in theatres, in order to carry out the injunction against the continuance of the joint interests previously mentioned. In its opinion, the Court stated:

> "But it [the divestiture provision applying to joint interests] shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor."

Notwithstanding its position thus expressed, the Court denied the motion of certain of the defendants to amend this provision of its Decree so as to permit a defendant-exhibitor to expand its theatre holdings "for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." The failure and refusal of the Court so to provide in its Decree, involves a substantial question for review. The Decree entered by the Court below in this case stands as a barrier to healthy growth on a competitive basis and does not permit future acquisitions even "after an affirmative showing that such acquisition will not unreasonably restrain competition." It is, therefore far more restrictive than the decree directed by the Supreme Court in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 187 (1944).

The foregoing are among the substantial questions raised by these several appeals. Other substantial questions are likewise raised in the Assignments of Errors herewith submitted and the defendants and each of them reserve the right to urge them upon their respective appeals.

Each of the appellants is of the belief that all questions here raised, as well as others raised by the respective Assignments of Errors, but not specifically referred to herein, are substantial and each respectfully petitions the Supreme Court to pass on them after plenary hearing.

Respectfully submitted:

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100 Broadway,
New York, N. Y.

Dated, February 26, 1947.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA,

Plaintiff,

against

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S, INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; and UNITED ARTISTS CORPORATION,

Defendants.

OPINIONS OF THE DISTRICT COURT

United States District Court

Southern District of New York

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S, INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; and UNITED ARTISTS CORPORATION,
Defendants.

Equity No. 87-273

Before:

AUGUSTUS N. HAND, *Circuit Judge*,

HENRY W. GODDARD and JOHN BRIGHT,
District Judges.

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Elliott H. Meyer, and John

R. Niesley, Special Assistants to the Attorney General; Frank W. Gaines, Jr., Gerald A. Herrick, Robert B. Hummel, Harold Lasser and Horace T. Morrison, Special Attorneys for United States of America.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants; Whitney North Seymour, Louis Phillips, Albert C. Bickford and Armand F. MacManus, Counsel.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, C. Stanley Thompson, Benjamin Melhiker and S. Hazard Gillespie, Jr., Counsel.

George S. Leisure, Ralstone R. Irvine, Granville Whittlesey, Jr., and Gordon E. Youngman, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation; Roy W. McDonald, and Donovan Leisure Newton & Lumbard, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh and Howard Levinson, Counsel.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutsman,
Attorney for the Universal Defendants;

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, *Circuit Judge:*

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of

Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th

Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh

Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation, and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defendants—Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff. The issues therefore are whether there have been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically excluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film supply.

runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attempts to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit executed a written consent to the entry of a decree by the District Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants had

violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another features or group of features, nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controveries arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which an

award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses thereafter entered into by a distributor that is party to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing agreement, or a series of licensing agreements, covering more than one motion-picture season and covering the exhibition of pictures released by the distributor during the entire

period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor is license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position, together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which, it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time of such license, and (c) in any theatre of which a company in which

the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

The three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably be-

cause of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff did not secure the entry of a decree against the three minor defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1]The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of of the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendent in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits "• • • any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that they are placed in the licenses in order to assure the distributor of a mini-

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Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

mum revenue when it licenses upon a percentage basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2] Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.*, v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C.C.A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors. Such combinations we hold to be forbidden by the Sherman Act.

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[2]That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's exhs. 275-290.

[3]The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement.

The exhibits submitted in this case contain numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "*The testimony shows that it is the general practice* of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 989, 1382-3). It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely

acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But it is plain that the distributor did more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] Moreover,

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[4]Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes sir."

* * * * *

"Q. Why would you be interested in the minimum admission price of the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5]Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare the table con-

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"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

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[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 146, 127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission

tained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U.A.	Universal
Sneicer	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	30¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
LaSalle	Niagara Falls,	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	20¢ tax excl.	22¢	25¢	none	20¢	x	25¢	x
Capitol	x 30¢	x	x	x	Cleveland, Ohio	30¢		27¢	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Ritz	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	x
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	x
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x

price was specifically stated in the contract, either thorugh inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U.A.	Univ.
Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
New Haven, Conn.	30¢	30¢	33¢	30¢	x	x	33¢	x
New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Indianapolis, Ind.	35¢	x	35¢	35¢	35¢	x	x	x
Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Appleton, Wisc.	40¢	46¢	none	none	45¢ tax incl.	none	x	46¢ plus 9¢ tax
Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Woonsocket, R. I.	40¢	40¢	x	none	x	x	x	x
	x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in

our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner— for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These

agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less.

than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's Metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a dis-

tributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum

of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C.C.A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of §2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyright Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S.

208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determin-

ing film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow v. RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns.

Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act.

Standard Oil Co. v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing

for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should

consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run

against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of a system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into

account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally

understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472, (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383, (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres

in the immediate vicinity of the Exhibitor's theatre, then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's, testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are sold by him only to Loew's and RKO. Record pp. 815-16.

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U.S. (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the

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Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record, p. 693.

Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes.

Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon re-opening, Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films, Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting road-show privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6,

383-4, 472; allowing overage and underage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable

restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step, while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to the pres-

ent methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the

requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises.

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competion on the part of independent theatre owners who would labor under a great disad-

vantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbiding one who is a party to the suit from continuing to carry out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved

in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling

For many years the distributor-defendants licensed their films in "blocks", or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block-

booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer

would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of

another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C.J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another:

> "* * * It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The

patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to

market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors,

normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under

the Sherman Act. This result is certain when some of the parties are of major statute in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of the interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and

drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities, and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves,

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[8]According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

except so far as it may be restricted by the above trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States v. The Pullman Company*, 64 F. Supp. 108, 112, (E. D. Pa., 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful

independent circuits were involved. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents

[10]The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS.

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Republic	29 features 30 "Westerns"	14.86%	8.66%
Monogram	26 features 16 "Westerns"	10.58%	7.76%
PRC	20 features 16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

which, in our opinion, calls for a divestiture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company,* 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that they

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[11]In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such aboslute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of

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THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres
Total affected by the decree according to RKO's Exhibit 11	1,292 Theatres

moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and

similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and, if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license

for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as

its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the some, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.

HENRY W. GODDARD,
U. S. District Judge.

JOHN BRIGHT,
U. S. District Judge.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*,
Defendants.

MEMORANDUM IN RE FINDINGS AND DECREE

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the

United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants.

Equity No. 87-273

DECREE

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of *amici curiae* as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipu-

lated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent

that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state

what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him

for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, and National Theatres, Inc. is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or

otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees, regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND
United States Circuit Judge

HENRY W. GODDARD
United States District Judge

JOHN BRIGHT
United States District Judge

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. PARAMOUNT PICTURES, INC., *et al.*, *Defendants.*	Equity No. 87-273

ORDER

The Court having entered its findings and judgment herein on December 31, 1946, and having heard and considered the motions to amend and clarify the findings and judgment filed by all defendants and having decided said motions on February 3, 1947, with a direction to settle the order therein upon due notice to the parties, which has now been given,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Paragraph III (2) of said judgment is hereby modified by adding at the end thereof the following: "The Pooling agreement by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of said judgment is hereby modified by adding at the end thereof the following: "The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Said motions are in all other respects hereby denied.

/s/ AUGUSTUS N. HAND
United States Circuit Judge
/s/ HENRY W. GODDARD
United States District Judge
/s/ JOHN BRIGHT
United States District Judge

Dated this 10th day of February, 1947.

(Filed Feb. 11, 1947
U.S. District Court, S. D. of N. Y.)

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 79

THE UNITED STATES OF AMERICA,
Appellant,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*,
Appellees.

No. 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

DIRECT APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SCHEDULES

SUBMITTED ON BEHALF OF APPELLEE-APPELLANT LOEW'S INCORPORATED

JOHN W. DAVIS,
J. ROBERT RUBIN,
Attorneys for Loew's Incorporated

S. HAZARD GILLESPIE, JR.,
BENJAMIN MELNIKER,
Of Counsel.

February 2, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

THE UNITED STATES OF AMERICA, *Appellant*, v. PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*, *Appellees.*	No. 79
LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, v. THE UNITED STATES OF AMERICA, *Appellee.*	No. 80

SCHEDULES

The information on the annexed schedules is from the records of Loew's Incorporated. It is not in evidence, nor is it offered as evidence on this appeal. Its purpose is stated at pages 98-100 of the brief on behalf of Appellee-Appellant Loew's Incorporated.

JOHN W. DAVIS,
J. ROBERT RUBIN,
Attorneys for Loew's Incorporated

S. HAZARD GILLESPIE, JR.,
BENJAMIN MELNIKER,
Of Counsel.

February 2, 1948

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Batavia, N. Y.	1st	Family	982	A-W	Warner Bros. Circuit	9	4/10/47
		Lafayette	939	A-W	Warner Bros. Circuit	1	6/4/47 - Dipson stopped bidding. 10/24/47 - Dipson resumed bidding.
		Batavia	1,400	IC	Dipson Theatres, Inc. - W. Dipson	2	
Bellows Falls, Vt.	1st	Opera House	930	IC	Rockingham Operating Co. - Interstate Theas. Corp.	5	3/4/47
		State	520	I	State Amusement, Inc. - John E. Voudoukis	21	
Binghamton, N. Y.	3rd	Surburban	1,014	A-P	Meco Theatre Corp. - Comerford - T. J. Walsh	5	7/2/47
		Jarvis	697	I	Danan Theatre Corp. - N. Pearlman	8	
Brandon, Vt.	1st	Brandon	521	IC	Graphic Theatres Circuit - N. B. Kurson	5	2/22/47
		Community	550	I	Community Theatre - J. P. Wilson	14	
Bridgeton, Me.	1st	Mayfair	420	IC	Graphic Theatre Circuit - N. B. Kurson	5	4/9/47
		State	584	I	Clarence F. Millet	17	
Dover, N. H.	1st	Strand	918	A-P	M & P - New England Theatres, Inc. - C. L. Stoddard	7	5/9/47
		Uptown	600	I	L. H. Bridgham	12	
		State	400	I	C. & C. Theatres, Inc. - Fred Couture	3	
Greenfield, Mass.	1st	Garden	1,877	A-P	Western Mass. Theatres, Inc. - Sam Goldstein	14	7/7/47
		Victoria	880	I	L. Rosensweig - H. Brown	6	
		Lawler	1,089	IC	Jamestown Amusement Co., Inc. - E. C. Grainger	-	
New London, Conn.	1st	Garde	1,672	A-W	Warner Bros. Circuit M'gmt. Corp.	4	5/29/47
		Capitol	1,586	A-P	M & P Theatres Corporation - C. L. Stoddard	9	
		Victory	1,110	I	Allied Management Company - Sol Edwards	8	
Union City, N. J.	1st	Lincoln	1,732	A-W	Warner Bros. Circuit Management Corp.	-	12/26/47
		Roosevelt	1,663	A-W	Warner Bros. Circuit Management Corp.	2	
		Summit	800	I	Summit Amuse. Corp. - L. Weitzman	1	
		Park	1,500	I	Mosart Amusement Co., Inc. - Chas. H. Moses	1	
White Plains, N. Y.	2nd	Colony	600	IC	Brandt Theatres - Gladpearl Inc.	2	11/5/47
		Pix	400	I	David Mavity	5	
Fall River, Mass.	1st	Durfee	2,229	I	Rialto Amusé. Co.)	-	Authorized bidding 1/16/48
		Empire	1,819	I	Atlantic Amuse. Co.) N. Yamins	-	
		Center	1,390	I	Center Theatres Co.)	-	
		Embassy	900	I	Embassy Thea. Corp. of Fall River - Wm. Purcell	-	
		Academy	1,880	I	Zeitz Theatres of Fall River, Inc. - Harry Zeitz	-	

KEY:
- A - F Fox affiliate
- A - P Paramount affiliate
- A - R RKO affiliate
- A - W Warner affiliate
- IC Independent circuit *
- I Small independent

* 5 or more theatres

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Philadelphia, Pa.	1st	Aldine	1,297	A-W	Warner Bros. Circuit Management Corp.	5	8/28/46
		Boyd	2,338	A-W	" " " " "	4	
		Stanton	1,344	A-W	" " " " "	4	
		Stanley	2,947	A-W	" " " " "	6	
		Earle	2,765	A-W	" " " " "	5	
		Mastbaum	4,387	A-W	" " " " "	1	
		Goldman	1,200	I	William Goldman Theatres Inc.	7	
		Karlton	944	I	" " " "	5	
		Erlanger	1,445	I	" " " "	1	
		Pix	500	I	Pix Theatre Company - Samuel Cummings	3	
		Fox	2,423	I	H. Seidenberg - Fox Philadelphia Theatre	-	
					Central Division		
Rolla, Mo.	1st	Ritz	680	I	Mildred Routh	16	3/11/47
		Uptown	1,000	I	R. E. Carney Theatres - C. Berutt	12	
Rolla, Mo.	2nd	Ritz	680	I	Mildred Routh	6	6/13/47
		Rollamo	746	I	R. E. Carney Theatres - C. Berutt	4	
Cape Girardeau, Mo.	1st	Broadway	1,203	A-F	Fox Midwest Am. Corp.	8	4/1/47
		Orpheum	673	A-F	Fox Midwest Am. Corp.	1	
		Esquire	765	I	Bernard Woolner	18	
		Rialto	570	I	Shirley Thea. Co. - E. J. Rosecan	-	
Cincinnati, O.	3rd	Ambassador	724	I	William Bein	17	6/3/47
		20th Century	899	I	Willis Vance	6	
Beattyville, Ky.	1st	Lee	286	I	J. F. Carnahan	14	3/13/47
		Ritz	350	I	Chas. Bowles	15	
Caldwell, O.	1st	Noble	473	I	Noble Theatre Company - C. E. Huprich & C. G. Velas	12	4/9/47
		Roxy	400	IC	Mena Fliehman Co-Op. Theatres of Ohio - Agent	5	
New Philadelphia, O.	1st	Quaker	748	IC	Shea Theatre Corp.	-	1/21/48
Uhrichsville, O.		State	801	I	Urban Anderson	-	
Detroit, Mich.	1st	United Artists	2,018	A-P	United Detroit Thea. Corp.	3	4/11/47
		Palm State	2,967	A-P	" " " "	1	
		Michigan	4,029	A-P	" " " "	2	
		Broadway Capitol	3,448	A-P	" " " "	1	
		Downtown	2,800	I	Elmer Balaban	5	
		Adams	1,600	I	Elmer Balaban	8	
Moberly, Mo.	1st	Fourth St.	900	A-F	Fox Midwest Amuse. Corp.	1	4/23/47
		Grand	920	A-F	" " " "	4	
		Dickinson	510	I	Dickinson Operating Co. Inc. - Glen Dickinson, Jr.	16	
		Sosna	510	I	Louis Sosna	4	
Siloam Springs, Ark.	1st	Spot	499	I	S. V. Eagan	11	3/28/47
		Grand	525	I	L. B. Killebrew	8	
		Rialto	490	I	-		

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Topeka, Ks.	1st	Orpheum	709	A-P	Fox Midwest Amuse. Corp.	-	4/30/47
		Jayhawk	1,358	A-P	" " " "	1	
		Grand	1,262	A-P	" " " "	6	
		Dickinson	1,180	I	Dickinson Operating Co. Inc. - Glen Dickinson, Jr.	16	
Brownsville, Pa.	1st	Plaza	750	I	Moody & Dickinson	-	1/14/48
		Strand	400	I	Laskey Bros. Amuse. Corp.	-	
Ford City, Pa.	1st	Roxy	240	I	A. F. Serrao	14	4/29/47
		Ford	490	IC	Ford City Theatres Inc.	5	
Bradford, Pa.	1st	Shea	1,239	IC	Erie Amuse. Co.	7	4/9/47
		Grand	818	IC	" " "	1	
		New Bradford	1,208	IC	Bradford Playhouse, Inc.	13	
Ambridge, Pa.	1st	State	750	A-P	Penmare Theatre Corp.	9	7/25/46
		Ambridge	1,335	A-W	Warner Bros. Thea. Inc. of Penn.	7	
		Penn	507	I	Harry Norman Ball	26	
Pittsburgh, Pa.	*	Belmar	580	A-W	Stanley Company of America	6	7/7/47
Penn Township, Pa.	*	Eastwood	628	I	Rudolph Navari	6	
					Southern Division		
Gadsden, Ala.	1st	Pitman	1,100	I	Alga Theatre Corp. - Chas. S. Pitman	6	8/14/47
		Princess	1,118	IC	Crescent Amusement Co. - Kermit C. Stengel	5	
		Gadsden	817	IC	" " " " " "	1	
		Capitol	379	IC	" " " " " "	-	
Macon, Ga.	1st	Bibb	748	I	Fred G. Weiss	16	3/19/47
		Grand	1,067	A-P	Lucas & Jenkins - W. K. Jenkins	4	
		Rialto	840	A-P	" " " " "	-	
		Capitol	908	A-P	" " " " "	1	
Savannah, Ga.	1st	Weis	1,300	I	Fred G. Weiss	22	10/9/46
		Avon	1,300	A-P	Lucas & Jenkins - John Cunningham	5	
		Lucas	1,542	A-P	" " " "	4	
		Bijou	989	A-P	" " " "	2	
		Victory	723	A-P	" " " "	-	
Tampa, Fla.	1st	State	615	I	Claughton Theas. - Mrs. Lillian Claughton	1	4/22/47
		Park	1,281	I	Harvey Fleischman	7	
		Tampa	1,381	A-P	Florida Theas. - Frank Rogers	9	
		Strand	753	A-P	" " " "	-	
		Palace	1,392	A-P	" " " "	4	
		Florida	901	A-P	" " " "	2	
Burlington, N. C.	1st	State	600	I	E. C. Qualls	20	3/6/47
		Paramount	777	A-P	Wilby-Kincey Service Corp. - H. F. Kincey	4	
		Alamance	419	A-P	" " " " " " "	-	
Graham, N. C.		Graham	777	I	A. B. Thompson	-	
Burlington, N. C.	2nd	Alamance	419	A-P	Wilby-Kincey Service Corp. - H. F. Kincey	-	4/15/47
		State	600	I	E. C. Qualls	14	

* 7 days after 1st run Wilkinsburg

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Charlotte, N. C.	2nd	Visulite	494	IC	B & L Enterprises - T. A. Little	2	10/25/47
		Manor	700	IC	H. B. Meiselman	4	
Elizabeth City, N. C.	1st	Love's State	610	IC	Exhibitor's Service - H. D. Hearn	7	9/9/47
		Carolina	900	IC	Carolina Amusement Co. - J. H. Webster	2	
		Center	550	IC	" " " " " "	1	
Greenville, S. C.	1st	Ritz	488	I	Trio Amusement Co. - Fred S. Curdts	1	10/16/47
		Fox	744	I	" " " " " "	1	
		Carolina	1,118	A-P	Wilby-Kincey Service Corp. - H. F. Kincey	3	
		Center	781	A-P	" " " " " " "	-	
Bowie, Tex.	1st	Texan	395	I	Kenneth Arnold	20	3/4/47
		Bowie-Majestic	350	I	J. H. Lutzer	8	
Brady, Tex.	1st	Texas	800	I	Bob Shanks	12	4/17/47
		Brady	721	IC	Thea. Enterprises, Inc. - Ray Higdon *	8	
		Palace	470	IC	" " " " "	1	
Bryan, Tex.	1st	Palace	675	A-P	Jefferson Amuse. Co. - Julius Gordon	2	12/1/47
		Queen	550	A-P	" " " " "	-	
College Station, Tex.		Campus	720	I	Ben Ferguson	2	
		Guion Hall	1,200	I	Thomas Puddy	-	
Dallas, Tex.	45 day avail.	Delman	1,145	I	I. B. Adelman	5	10/6/47
		Maple	800	I	Forrest White	-	
		Village	895	A-P	Interstate Theas. Inc. - R. J. O'Donnell	2	
		Esquire	1,309	A-P	" " " " " "	1	
Dallas, Tex.	52 day avail.	Delman	1,145	I	I. B. Adelman	1	11/3/47
		Maple	800	I	Forrest White	-	
		Village	895	A-P	Interstate Theas. Inc. - R. J. O'Donnell	1	
		Esquire	1,309	A-P	" " " " " "	2	
Dallas, Tex.	59 day avail.	Delman	1,145	I	I. B. Adelman	-	11/12/47
		Maple	800	I	Forrest White	3	
		Village	895	A-P	Interstate Theas. Inc. - R. J. O'Donnell	-	
		Esquire	1,309	A-P	" " " " " "	-	
Huntsville, Tex.	1st	Town	820	I	R. B. Weatherall	-	1/19/48
		Life	400	IC	Robb & Rowley Theas.	-	
Meridian, Tex.	1st	Circle	456	I	D. C. Caraway	13	4/3/47
		Capitol	554	I	R. F. Curtis	9	
New Braunfels, Tex.	1st	Capitol	360	IC	Rubin Frels, Inc. - Rubin Frels	7	4/11/47
		Brauntex	930	IC	Theatre Enterprises, Inc. - Ray Higdon *	16	
Nocona, Tex.	1st	Cona	350	I	Lester Morgan	17	3/4/47
		Ritz	330	I	J. H. Lutzer	16	
Plainview, Tex.	2nd	State	400	I	Price Holland	12	3/4/47
		Texas	639	IC	Theatre Enterprises, Inc. - Ray Higdon *	9	
		Fair	425	IC	" " " " "	9	
San Antonio, Tex.	59 day avail.	Josephine	1,000	I	Mul-Den Enterprises	-	12/24/47
		Laurel	916	A-P	Interstate Theatres, Inc. - R. J. O'Donnell	3	
Teague, Tex.	1st	Lee	387	I	Wm. Henderson	10	4/2/47
		Star	680	IC	J.G. Long Theas. - Theo. Routt	13	

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Amory, Miss.	1st	Amory	300	I	J. A. Owen	13	3/5/47
		Varsity	447	I	Flexer Theatres, Inc. - David Flexer	6	
Durant, Miss.	1st	Odom	300	I	H. W. Odom	6	1/17/47
		Strand	380	IC	Strand Enterprises, Inc. - G. W. Haynes	21	
Kosciusko, Miss.	1st	Pix	400	IC	Associated Theatres, Inc. - W. A. Prewitt, Jr.	3	4/26/47
		Strand	671	IC	Strand Enterprises, Inc. -G. W. Haynes	12	
Delhi, La.	1st	Cave	690	I	Chapman Davis	24	3/3/47
		Delhi	520	I	E. I. Hawkins	8	
Rayne, La.	1st	Bruce	700	IC	Associated Theatres, Inc. - W. A. Prewitt, Jr.	19	6/24/47
		Acadia	825	IC	Film Service Corp. - L. C. Montgomery	-	
St. Martinsville, La.	1st	Main	576	I	J. G. Broggi	7	12/1/47
		Teche	690	IC	Film Service Corp. - L. C. Montgomery	-	
Nowata, Okla.	1st	ex	609	I	Mrs. Lucille DeShazo	12	3/31/47
		Luxor	350	I	Chester Fleming	4	
		Rainbo	325	I	" "	1	
Oklahoma City, Okla.	Sub	Uptown	700	I	Charles Ferris	-	1/2/48
		Plaza	722	IC	Cooper Foundation - Pat McGee	1	
Oklahoma City, Okla.	Sub	Villa	600	I	Charles Ferris	1	1/2/48
		May	700	IC	Theatre Enterprises, Inc. - Ray Higdon (R.C. Griffith)	-	
Oklahoma City, Okla.	1st Col.	Eastside	850	I	Mrs. H. L. Miller	9	10/31/46
		Jewel	385	I	J. W. Sanford	18	
Shamrock, Tex.	1st	Liberty	400	I	J. S. Worley	9	3/10/46
		Texas	700	I	J. R. Brown	11	
Wynnewood, Okla.	1st	Sun	168	I	Irwin W. Tucker	21	11/22/46
		Deal	385	I	Frank Deal - Charles G. Kemble	12	
Baltimore, Md.	2nd Col.	Roosevelt	756	I	Lincoln Amuse. Co. - Morris Flaks	-	12/16/47 - No bids submitted to date.
		Lincoln	742	I	" " " " "	-	
		Lennox	444	I	Harry Goldman	-	
		Diane	441	I	" "	-	
Baltimore, Md.	Sub	Victory	800	I	Victory Thea. Co. - M. H. Rosen	-	1/12/48 - No bids submitted yet.
		Patapsco	650	I	S. Marcus	-	
Middle River, Md.	1st	Hiway	825	I	Edgewater Corp. - N. Schwartz	12	6/3/47
		Aero	660	I	Stansbury Eastern - E. F. Perotka	10	
Essex, Md.		New	625	I	G & R Cohen - L. Cohen	-	
Portsmouth, Va.	1st Col.	Lyric	515	I	A. E. Landreth	9	4/11/47
		Queen	315	I	S. Cummins	3	
		Capitol	835	I	District Theatres - Clark Davis	2	
		Bland	742	I	" " " "	2	

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Salisbury, Md.	1st	Boulevard	1,100	I	Ulman Thea. Corp. - R. Todd & T. Howard	10	9/18/47
		Ulmans	967	I	" " " " " " "	2	
		New	500	I	" " " " " " "	1	
		Wicomico	560	IC	Schine Theatres - G. V. Lynch	8	
		Arcade	899	IC	" " " " "	-	
Washington, D. C.	1st Sub	Atlas	993	I	Kogod & Burka - Frank M. Boucher	5	9/18/47
		Beverly	946	A-W	Warner Bros. Circuit Management Corp. - John J. Payette	6	
					Mid-West Division		
Chicago, Ill.	1st	Chicago	3,819	A-P	Balaban & Katz Corp. - W. Immerman	1	1/7/48
		Monroe	953	I	J. Jovan	1	
		Rialto	1,620	I	N. S. Barger	-	
		Roosevelt	1,535	A-P	Balaban & Katz Corp. - W. Immerman	-	
		United Artist	1,694	A-P	" " " " "	-	
		Salt Lake	2,649	A-P	" " " " "	-	
		Oriental	3,188	IC	Essaness Thea. Corp. - E. Silverman	1	
		Palace	2,529	A-R	F. Smith - R.K.O. Film Booking Corp.	-	
		Garrick	974	A-P	Balaban & Katz Corp. - W. Immerman	-	
		Apollo	1,340	A-P	" " " " "	-	
Chicago, Ill.	Sub	Harmony	300	IC	J. Kirsch - Allied Thea. Corp.	19	Approx. 1/9/47
		Vision	722	IC	S. Greiver	15	
Decatur, Ill.	1st	Lincoln	1,389	A-P	J. P. Dromey - Publix Great States Theas. Inc.	14	3/6/47
		Empress	990	A-P	" " " " " " "	2	
		Avon	965	I	Gus. Conston	16	
Kewanee, Ill.	1st	Peerless	896	A-P	J. P. Dromey - Publix Great States Theas. Inc.	13	3/3/47
		Kee	437	A-P	" " " " " " "	-	
		Wanee	890	I	Bramblett & Norton	18	
Maywood, Ill.	1st	Lido	1,840	IC	J. Rose - Manta & Rose	16	4/7/47
		Yale	600	IC	V. A. Nomikos	4	
Michigan City, Ind.	1st	Liberty	563	I	L. B. Philon	14	3/4/47
		Tivoli	1,285	IC	The Dunelake Corp. - Jack Rose	5	
		Lido	853	IC	" " " " "	7	
Michigan City, Ind.	2nd	Liberty	563	I	L. B. Philon	6	12/11/46
		Uptown	300	IC	The Dunelake Corp. - Jack Rose	-	
Ft. Dodge, Ia.	2nd	Dodge	435	I	C. C. Dunsmoor	19	4/1/47
		Iowa	700	A-P	M. Blank - Central States Thea. Corp.	2	
Waupaca, Wis.	1st	Palace	723	IC	J. P. Adler - Adler Thea. Co., Inc.	-	1/14/48 - No bids submitted to date.
		State	447	I	I. Ashe - Ashe Thea. Corp.	-	
Eau Claire, Wis.	1st	State	1,261	A-P	Minnesota Amusement Co.	4	4/15/47
		Hollywood	944	I	Sheldon M. Grengs	14	4/15/47
		Cameo	468	A-P	Minnesota Amusement Co.	2	6/9/47
		Badger	931	A-P	" " "	1	6/9/47

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
White Bear, Wis	1st	White Bear	550	I	S. Silberstein - White Bear Thea. Corp.	3	2/27/47
		Avalon	669	I	Mrs. J. I. Jensen	21	
Omaha, Nebr.	1st	Omaha	2,053	A-P	Dale McFarland - Tri States Thea.	-	4/16/47
		Paramount	2,290	A-P	" " " " "	1	
		Orpheum	2,959	A-P	" " " " "	1	
		State	850	I	R. D. Goldberg	4	
		Brandies	1,100	A-R	J. D. Redmond - R.K.O.	-	
Omaha, Nebr.	Sub	Admiral	1,000	I	H. Blank	17	3/19/47
		Avenue	800	I	R. D. Goldberg	3	3/20/47
		Dundee	591	I	" " "	2	3/19/47
		Military	953	I	" " "	1	3/20/47
					Western Division		
So. Pasadena, Calif.	1st	Rialto	1,200	A-F	Fox West Coast - P. L. Lundgren	-	12/3/47
		Ritz	700	IC	M & S. Theas. Inc. (Exhibitor's Service)	3	
Monrovia, Calif.	1st	Lyric	1,209	IC	M & S Theas. Inc. (Exhibitor's Service)	4	12/15/47
		Monrovia	700	I	Wm. Knotts Mgr. - (In Receivership)	-	
Bakersfield, Calif.	2nd	Tejon	1,000	I	Banducci & Lemucchi Thea. Co. - Dick Lemucchi	18	5/23/47
		Kern	882	A-F	Fox West Coast - Ed Zabel	3	
Bakersfield, Calif.	3rd	Granada	651	I	Banducci & Lemucchi Thea. Co.	-	No bidding on 3rd run because Ind. awarded picts. on second run.
		Kern	882	A-F	Fox West Coast	-	
San Francisco, Calif.	4th	Metro	1,240	IC	Golden State - Roy Cooper	7	3/12/47
		Marina	1,116	I	Baron & Nathan - C. A. Nathan	21	
		El Presidio	868	I	" " " "	2	
San Francisco, Calif.	5th	Empire	850	IC	Ben Levin	12	3/28/47
		Parkside	1,343	IC	Golden State - Roy Cooper	12	
Carmel, Calif.	1st	Golden Bough Playhouse	250	I	Edward G. Kuster	5	5/15/47
		Carmel	896	IC	T & D Enterprises - V. C. Taylor	-	
Fresno, Calif.	1st	Wilson	1,901	A-F	Fox West Coast - Richard Spier	18	11/15/46
		Kinema	1,400	A-F	" " "	3	
		Hardy	1,900	I	Gerald Hardy	16	
Vallejo, Calif.	1st	Senator	780	A-F	Fox West Coast - Richard Spier	-	1/9/48 - No bids submitted to date.
		Manlon	1,276	A-F	" " " " "	-	
		Rita	695	I	Raymond J. Syufy	-	
Spokane, Wn.	1st	Fox	2,251	A-F	Fox West Coast - Frank Christie	7	5/12/47
		State	972	A-F	" " " " "	4	
		Orpheum	1,295	A-F	" " " " "	2	
		Post	1,368	I	Joseph Rosenfield	9	
		Granada	600	I	" "	2	

LOEW'S COMPETITIVE BIDDING SITUATIONS

Western Division (Continued)

LOCALITY	RUN	THEATRE	SEAT. CAP'TY	TYPE OPER-ATOR	OPERATOR	NO. PICT. AWARDED BY COMP. BID	DATE OF 1st LETTER SOLI-CITING BID
Seattle, Wn.	1st	Blue Mouse	855	A-F	Fox West Coast	-	4/2/47
		Music Hall	2,850	A-F	" " "	6	Discontinued Bidding
		Fifth Ave.	2,366	A-F	" " "	5	8/1/47. Reinstated
		Music Box	846	A-F	" " "	1	Bidding 10/29/47
		Orpheum	2,600	A-F	" " "	1	
		Paramount	3,050	A-F	" " "	3	
		Liberty	1,679	I	Jenson & Von Herberg	-	
		Roosevelt	734	I	Frederic A. Danz	1	
		Palomar	2,000	I	" " "	1	
Salt Lake City, Utah	1st	Utah	1,856	A-P	Intermountain Theas. - Tracy Barham	5	9/21/46
		Centre	1,623	A-P	" " " "	5	
		Capitol	1,842	A-P	" " " "	1	
		Uptown	1,400	I	Joseph L. Lawrence Theas.- D.K. Edwards	26	
		Rialto	812	I	" " " " "	6	
Blackfoot, Idaho	1st	Roxy	500	I	A. W. Barrott	4	12/2/47
		Nuart	612	IC	DeMordaunt & Drennan - Paul DeMordaunt	2	
		Idaho	396	IC	" "	1	
Trinidad, Colo.	2nd	Rialto	388	A-F	Fox Intermountain - Rick Ricketson	7	10/1/47
		Strand	520	I	Geo. Sawaya	5	
Sandy, Ore.	1st	Sandy	498	I	C. M. Gillmore	23	3/21/47
		Sunset	300	I	Tom Moyer	6	

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 79

THE UNITED STATES OF AMERICA,

Appellant,

v.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*,

Appellees.

No. 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

DIRECT APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE-APPELLANT LOEW'S INCORPORATED

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February 2, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

THE UNITED STATES OF AMERICA, *Appellant*, *v.* PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*, *Appellees*.	No. 79
LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*, *v.* THE UNITED STATES OF AMERICA, *Appellee*.	No. 80

DIRECT APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE-APPELLANT LOEW'S INCORPORATED

OPINION AND JUDGMENT BELOW

The opinion of the District Court is reported in 66 F. Supp. 323 (1946). The opinion and judgment are printed, commencing at R. 3504 and R. 3694, respectively.

JURISDICTION AND STATUTES INVOLVED

The judgment of the District Court was entered December 31, 1946 (R. 3694). The petition for appeal in No. 79 was filed February 18, 1947, and was granted by the District Court February 21, 1947 (R. 3720, 3725). The petition for appeal in No. 80 was filed in and granted by the District Court February 26, 1947 (R. 3726, 3737). Probable jurisdiction was noted by this court June 21, 1947 (R. 3840). The jurisdiction of this court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. § 345).

The statute under which this case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. §§ 1, 2 and 4).

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. Title 17.

The pertinent provisions of the Sherman Anti-Trust Act and of the Copyright Act are set forth as Appendix I to this brief.

STATEMENT OF THE CASE

A. Nature of the Action, Description of Loew's Incorporated, and the Proceedings Below.

Nature of the Action

This action was commenced July 20, 1938 in the United States District Court for the Southern District of New

York. The original petition charged concerted monopolization of the domestic motion picture industry by eight of the principal companies therein. Five of these companies (Fox, Loew's, Paramount, RKO and Warner) were engaged in the production, distribution and exhibition of motion pictures. Two of the eight companies (Columbia and Universal) were engaged in the production and distribution of motion pictures, and United Artists was engaged solely in distribution.

In addition to injunctive prohibition against certain trade practices of the industry, the complaint demanded that Loew's and the other four defendants, engaged in production, distribution and exhibition, be permanently debarred from the exhibition field by divestiture of their theatres.

Description of Loew's Incorporated

Loew's Incorporated (a Delaware corporation) was organized in 1919 to carry on the vaudeville and motion picture enterprises, which the late Marcus Loew had previously established and developed. For more than 20 years the company has been engaged in the production and distribution of motion picture films, known as Metro-Goldwyn-Mayer pictures. In addition, through the operation of theatres, it has engaged in the exhibition of its own pictures and those of other producers (for a brief history of Loew's, see R. 1838-9).

In both ownership and management Loew's is entirely free from any connection with any of the co-defendants or any form of control by any of them. None of these co-defendants owns any stock or any form of security in

Loew's. There are no directors or officers in common. Loew's owns no stock or any other securities in any co-defendant; nor do any of Loew's officers or directors. All of this Government's counsel concedes.[1] The dissociation of Loew's from the co-defendants could not be more complete.

In producing Metro-Goldwyn-Mayer pictures Loew's has its own actors, buys its own stage material, employs its own writers, directors and other needed operators. While from time to time it lends or borrows stars and stage accessories to or from other producers in the production colony, the District Court found that there exists "active competition" among all the defendants and others in the *production* of motion pictures (Find. 59; R. 3670).

Loew's distribution of Metro-Goldwyn-Mayer pictures is carried on by 32 branch offices or exchanges, which it maintains and operates separately and apart from any other defendant in this case. These exchanges are located in the more important cities throughout the United States and serve to distribute the prints of films for use in the theatres in the area served by each exchange. A feature picture is usually prepared in 300 to 350 positive prints, which are licensed to anywhere from 7,000 to 15,000 theatres (R. 415; Exh. L-4). In the season 1943-44, Loew's distributed 33 features,[2] amounting to approximately 180,000 transactions

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[1] Government's counsel at R. 215-216:

> "* * * as between the eight groups of defendants, I think it is quite true that *there are no common officers; there is no common stock control*, although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others." But as to those, "We do not attach any significance to them."

All emphasis in this brief has been supplied.

[2] Pursuant to arrangement between the parties, the 1943-44 season was taken as a typical one for the purpose of assembling pertinent statistical information such as the number of features

which were carried out by distribution field forces costing Loew's an average of $115,000 *per week* (R. 437-444).

Loew's engages in exhibition of motion pictures to the extent of operating 131 theatres throughout the United States, where it shows films produced by itself and others (Exh. L-12).[1]

In no place where Loew's operates does it have a "closed town," or even a first-run monopoly. On the contrary, in every single city where it has a theatre there are other competing theatres on first-run as well as subsequent runs (Find. 149; R. 3689; Appendices II and III; Exh. L-15).

Loew's 131 theatres are located in 42 of the larger cities across the United States and represent 7/1000 of the 18,076 theatres operating in the United States on January 1, 1945 (Appendices II and III; Find. 145, R. 3688).

There is absolutely no evidence that the 131 theatres operated by Loew's were acquired in any other than a normal, lawfull manner or that they were acquired by purchase from a competitor, or that Loew's ever engaged in any predatory practice against any competitor, or even that any competitor of Loew's ever went out of business.

As long ago as 1932 Loew's was operating 122 theatres so that *during the thirteen years preceding the hearings in this litigation the theatres operated by Loew's increased by only 9* (Exh. L-12). During this same period the total

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distributed by the defendants, film revenue, etc. Thus, all references in this brief to the amount of product used by a particular theatre, or licensed by a particular distributor, relate to this season.

[1] This does not include 11 theatres operated by Buffalo Theatres Inc., for which Loew's does the buying and booking of films. We do not regard these theatres as actual Loew-operated theatres, but, to avoid controversy, on all revenue and product charts introduced in evidence by Loew's these theatres were included.

theatres operating in the United States *increased* by 5,471 (Exh. L-12; cf. Find. 145, R. 3688), an increase of 600 to 1 of Loew's.

Loew's proprietary interest in theatres, either through ownership or leasehold, had a book value apportionable to Loew's interest of approximately $69,000,000 as of August 31, 1944 and an assessed valuation apportionable to Loew's interest of about $57,000,000 (R. 1839).

Proceedings Below

Loew's, along with the other defendants, filed answer to the Government's petition, denying the material allegations thereof, and the case came on for trial on June 1, 1940. Prior to the taking of any testimony, negotiations were begun to determine whether the case could be disposed of by consent decree. After several months negotiation, an agreement for a consent decree was reached, and on November 14, 1940, an amended and supplemental complaint was filed (R. 3137). Loew's as well as the other defendants again answered (R. 3217) and on November 20, 1940, the District Court entered a decree on consent of the Government and the defendants Fox, Loew's, Paramount, RKO and Warner. The defendants United Artists, Universal and Columbia did not join in the consent and were not subject to this decree.

By the consent decree each of the defendants mentioned undertook to discontinue certain trade practices, hereafter considered in detail, and for a period of three years agreed not to enter "upon a *general program* of expanding its theatre holdings" (R. 3387). At the same time, however, it was specifically provided that nothing in this con-

sent decree should prevent any defendant "from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purpose of its business" (R. 3387). Each of these defendants also undertook to report immediately to the Department of Justice the acquisition by it of any additional theatre or theatres (R. 3386). The Government, on its part, undertook that for a period of three years it would not seek to divorce the production or distribution of motion pictures from their exhibition (R. 3395).

In addition, the consent decree provided, as prayed in the amended and supplemental complaint, for the establishment of a nation-wide system of arbitration tribunals to deal with certain trade disputes inherent in distributing and exhibiting motion pictures (R. 3395 *et seq.*).

Finally, the District Court retained jurisdiction of the action for the purpose, among other things, of enabling any of the parties to apply to the court after three years for modification of its decree (R. 3400).

Such an application was filed by the Government August 7, 1944. It sought modification, among other things, of the matters made subject to arbitration by the consent decree (R. 3414), and for complete divorcement by each of the defendants Fox, Loew's, Paramount, RKO and Warner, of their exhibition business from their production and distribution business (R. 3418).

This application for modification was noticed for hearing on December 5, 1944, and after a series of conferences with the court, the date for hearing was set for October 8, 1945. Prior thereto on June 13, 1945, the Government filed an application, pursuant to the Expediting Act, 15 U. S. C. Section 28, for the appointment of a special three

judge expediting court. Such court was duly constituted on June 16, 1945, with Augustus N. Hand, Circuit Judge, Henry W. Goddard and John Bright, District Judges. Hearings commenced on October 8, 1945 and continued through November 20, 1945.

The court rendered its opinion on June 11, 1946 (R. 3504) and its judgment and findings of fact and conclusions of law (together with a supplemental memorandum) on December 31, 1946 (R. 3694, 3659, and 3702). Thereafter certain of the defendants, including Loew's, moved to amend the judgment in several respects, and to amend one of the conclusions of law. This motion, except in a minor particular immaterial to this appeal, was denied by order entered February 11, 1947 (R. 3719).

It is from certain provisions of the judgment entered December 31, 1946, and the findings and conclusions, as well as the denial of the motion to amend, that the Government and the various defendants have appealed to this Court. On April 7, 1947, this Court granted a stay of certain provisions of the judgment of December 31, 1946, "pending the final disposition of the case by this court."

B. The Government's Contentions Below and the Judgment of the District Court with respect thereto.

The Government's Contentions Below and the Judgment of the District Court with Respect to Monopoly of Production.

The amended and supplemental complaint contains elaborate charges that Loew's and other defendants combined and conspired to unreasonably restrain and monopolize pro-

duction of motion pictures, in violation of Sections 1 and 2 of the Sherman Act (26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2; Appendix I).

More specifically, it was claimed that Loew's and other defendants loaned and exchanged production personnel and costly equipment on non-competitive terms and excluded independent producers from access to that personnel and property (R. 3184). At the trial the Government failed to substantiate these charges and finally on questioning by the court formally abandoned the charges as alleged (R. 1952-3).[1]

With regard to production the District Court made the following findings (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> 60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

In the judgment the District Court provided (Section I, 1; R. 3695):

> "The complaint is also dismissed as to all claims made against the remaining defendants herein based

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[1] "Judge Goddard: Do you claim there is a monopoly in production? I don't think I understand your position.
Mr. Wright: I don't think we do.
Judge Goddard: I beg your pardon?
Mr. Wright: No, we do not. * * *" (R. 1952-3).
See also R. 384-389.

upon their acts as producers, whether as individuals or in conjunction with others."

The Government's Contentions Below with respect to MONOPOLY OF EXHIBITION AND DISTRIBUTION.

Motion pictures reach the public through successive exhibitions—the first exhibition of a picture in a particular area being known as the *first-run*, the next subsequent, the *second-run*, and so on (Find. 1, R. 3660-1). All feature motion pictures are *licensed* by the distributor to the theatre operator exhibiting them. Although the expression "selling a picture" is frequently used in distribution parlance, the transaction is always a license under copyright and not a sale (Find. 61; R. 3670). The film or print is physically returned to the distributor after each engagement (R. 415, 531). The contract whereby a distributor licenses a theatre to exhibit a picture on a particular run usually stipulates a time which must elapse before that feature may again be shown in the particular competitive area or in another specified competitive theatre. This agreed interval of time is known as *clearance* (Find. 1, R. 3660).

The Government charged in the lower court that Loew's and the other four distributors who own theatres—Fox, Paramount, RKO and Warner—have a nation-wide monopoly of exhibition and distribution of motion pictures, which they have achieved and maintain by practices as to *run, clearance* and *theatre admission prices*, in violation of the Sherman Law.

The nation-wide monopoly of exhibition claimed by the Government is predicated on the fact that the number of

first-run theatres operated by Fox, by Loew's, by Paramount, by RKO and by Warner, *if aggregated,* comprise 70% of the first-run theatres in major cities across the United States; i.e., the 92 cities with over 100,000 population (Find. 148; R. 3688).

The existence of the claimed monopoly of distribution is predicated upon the *aggregating* of the *revenues* that these five companies receive as distributors from the theatres of each of them as an exhibitor. Thus, when the film rental paid by Loew's theatres to Fox, to *Loew's itself,* to Paramount, to RKO and to Warner, as distributors, is *aggregated,* the five receive 71% of the total film rental paid by the Loew's theatres; and the same is true with respect to the theatres of each of the other four, but in increasing percentages, up to 81% (Find. 127; R. 3685). However, in making up the 71% received by the five from Loew's theatres, 47 of that 71% is what Loew's as a distributor itself received from its own theatres, only the balance of 24% going to the other four producer-exhibitors (Find. 135; R. 3687).

In justification of thus *aggregating* the defendants' theatres and thus *aggregating* their revenues, and treating these five companies collectively, the Government advanced the following contentions:

— Each of these five producer-exhibitors, in distributing its pictures has the first-run of those pictures in its own theatres, but in localities where it has no theatre, it licenses the *first-run* privilege to another producer-exhibitor. When the latter occurs, Government's counsel terms the license a *cross-license* or a *diagonal-license,* alleging that the producer-exhibitor has licensed another producer-exhibitor, rather than an independent exhibitor, pursuant to a

nationwide scheme whereby the producer-exhibitor in turn will obtain *first-run* where it operates a theatre (Amended and Supplemental Complaint, Pars. 150 and 151; R. 3192; Government Brief in District Court, p. 20).

— In addition to having the first-run of their features in their own or in each other's theatres, the defendants, as distributors, according to Government's counsel, grant to those theatres excessive clearance or protection before the feature can next be exhibited in a competing theatre, thus impelling more of the theatre-going public to attend at the more profitable first-run. The distributor does this in return for similar treatment where it operates a first-run theatre (Amended and Supplemental Complaint, Pars. 125, 130, and 149(c); R. 3178, 3180 and 3186).

— It is the distributor's practice to include in license contracts a provision that the theatre exhibiting the feature will not charge less than a specified admission price during the exhibition of the feature licensed. According to Government's counsel, subsequent run exhibitors are thus prevented from reducing their admission prices, and the competition which they might otherwise give to the first-run theatre of a producer-exhibitor is also restricted (Amended and Supplemental Complaint, Pars. 130 and 149(d); R. 3183 and 3187).

In addition to the charges just outlined, upon which the Government predicated its right to *aggregate* the five defendants' theatres and revenues, counsel took the position at the hearings that clearance *per se* was unreasonably

restrictive of competition and violated the Sherman Act (R. 2572, 2591-9). This was a position directly opposed to that which Government's counsel had taken at the time of the consent decree. That decree, by agreement of the Government and the five producer-exhibitors, provided (R. 3380):

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

The Judgment Below with Respect to MONOPOLY OF EXHIBITION AND DISTRIBUTION.

The District Court refused to adopt the theory of Government's counsel that the five defendants Fox, Loew's, Paramount, RKO and Warner, as producers and as exhibitors have engaged in a mutual interchange or conditioning of first-run privileges. With this, the key to *aggregation,* gone, the charges of monopolization, built upon it, likewise had to go. And the lower court held (Opinion, R. 3553):

> "The five major defendants cannot be treated *collectively* so as to establish claims of general monopolization in exhibition."

Furthermore, the District Court did not accept the theory of Government's counsel that the defendant distributors had achieved a monopoly of distribution. Said the court (Opinion, R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust

> laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors* for the exhibition of their various pictures."

In addition, the lower court refused to hold that clearance is illegal *per se*. On the contrary, it affirmatively found (R. 3674):

> "78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business."

However, the District Court did find that all eight of the defendants engaged in distribution, aided particularly by those five also engaged in exhibition, had combined and conspired by uniform action and acquiescence to create a rigid nation-wide system of runs, clearances and admission prices in violation of the Sherman Act (Finds. 81-84; R. 3674).

It found, in addition, that all eight distributors "by the fixing of minimum prices" to be charged in subsequent run theatres attempt to give the prior-run exhibitors as near a monopoly of the patronage as possible, also a violation of the Sherman Act. (Find. 72; R. 3672.)

To remedy the condition resulting from agreement as to minimum theatre admission prices, the court prohibited henceforth the inclusion in license agreements of any provision as to the minimum price which a theatre might charge (Judgment, II, 1; R. 3695).

To remedy the claim of excessive clearance, the lower court enjoined each of the eight defendants engaged in dis-

tribution from granting *any clearance* between theatres not in substantial competition and from granting or enforcing any clearance against theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted."[1] It was further provided that whenever any clearance is attacked as not legal under the provisions of the decree "the burden shall be upon the distributor to sustain the legality thereof" (Judgment, II, 3, 4; R. 3695).

The District Court likewise took affirmative steps to eradicate any fixed condition as to run positions; that is, to put an end to the prior-run position which any theatre might possess by reason of conditions other than payment of highest film rental (e.g., favoring an "old customer" over a newcomer with a superior theatre, or favoring an "affiliated" theatre over that of an independent). The judgment prohibits each distributor from arbitrarily refusing the demand of any exhibitor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another competing exhibitor. The only exemption granted to a distributor is in the case of his own product in his own theatre (Judgment, II, 9; R. 3698). In addition, the judgment provides for picture by picture and theatre by theatre licensing, as well as a detailed procedure for so-called "competitive bidding" between competing exhibitors who may elect to use that procedure (Judgment, II, 8; R. 3696; see also Supplemental Memorandum, R. 3702).[2]

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[1]Loew's has not appealed from the injunction against granting clearance between theatres not in substantial competition and from granting or enforcing any clearance against theatres in competition "in excess of what is reasonably necessary to protect the licensee in the run granted" (Judgment, II, 4; R. 3695).

[2]Loew's has not appealed from either paragraph 8 or paragraph 9 of section II of the judgment.

The Government's Contentions Below and the Judgment of the District Court with Respect to BLOCK-BOOKING, MASTER AGREEMENTS, FRANCHISES, FORMULA DEALS *and* "POOLING" AGREEMENTS.

So far as block-booking,[1] franchises,[2] master agreements,[3] and formula deals[4] are concerned, the Government claimed and the District Court found that these methods of licensing by their nature unreasonably restrain trade. All four of these practices are prohibited henceforth by the judgment (Section II, 5, 6 and 7; R. 3696). With respect to formula deals the District Court found as to Loew's (R. 3675):

> "87. Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any 'formula deal' license agreements."

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[1]The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period (Find. 1, R. 3659).

[2]A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement (Find. 1, R. 3660).

[3]A licensing agreement, also known as a "blanket deal", covering the exhibition of features in a number of theatres, usually comprising a circuit (Find. 1, R. 3660).

[4]A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross (Find. 1, R. 3660).

As these particular trade practices here mentioned have been relatively unimportant to Loew's distribution (see Finds. 90, 94; R. 3675, 3676), it has taken no appeal with regard to the prohibition against block-booking, franchises, master agreements or formula deals.

In addition to these trade practices, the Government attacked certain agreements known as "pooling agreements", which were made in limited instances by the exhibitor defendants with each other or with an independent, by which given theatres in a particular city normally in competition with each other, were operated as a unit, or most of their business policies collectively determined by a joint committee or by one of the exhibitors. These agreements also provided for division of profits of the "pooled" theatres among the exhibitors according to preagreed percentages or otherwise (Find. 112, R. 3682).

The District Court found the "pooling agreements" to be illegal (Concl. of Law, No. 9 (a); R. 3693) and decreed the dissolution of all such agreements by not later than June 30, 1947 (Judgment, III (2), R. 3698; IX, R. 3701).

The defendant Loew's has carried out the dissolution of the only two pooling agreements to which it was a party at the time of the judgment, and has taken no appeal with regard to the provision of the judgment prohibiting pooling agreements.

The Government's Contentions Below with Respect to THEATRE DIVESTITURE.

At the time of the hearings in the District Court, the Government demanded divorcement of theatre operation from production and distribution on three grounds:

First, each of the defendants engaged in production and distribution, who also operates theatres, is individually an illegal combination, that can only be eliminated by divorcement.

Second, the five defendants, engaged in production and distribution, who also operate theatres, have collectively achieved a monopoly of exhibition, that can only be eliminated by divorcement.

Third, the illegal trade practices engaged in by the defendants can only be remedied by divorcement.

The Judgment Below with Respect to THEATRE DIVESTITURE.

The District Court denied divorcement of exhibition from distribution and production.

As to the first ground advanced by Government's counsel (i.e. that each of the producer-exhibitors, individually considered, is an illegal combination) the court stated (Opinion, R. 3553-4):

> "Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co. v. United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2)."
>
> * * * * *
>
> "Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed

great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership."

As to the second ground (i.e., that the five defendants, collectively, have achieved a monopoly of exhibition that can only be eliminated by divorcement) the District Court held that these five defendants could not be "treated collectively so as to establish claims of general monopolization in exhibition" (Opinion, R. 3554).

As to the third ground (i.e., that divorcement is the only remedy for the illegal trade practices claimed by the Government), the District Court found (R. 3690):

> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.
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> * * * * *
>
> "156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition."

While the District Court refused divorcement as demanded by the Government, it did strike down certain forms of the defendants' interests in theatres as violative of the Sherman Law. The judgment of the District Court (Section III (5); R. 3699) requires that all defendants put an end to all joint interests in theatres with either a defendant or an independent, on the theory that such joint interests eliminate putative competition between the defendant and the other operator who otherwise would be in a position to operate theatres independently[1] (R. 3556).

The District Court in its opinion (R. 3562) took the position that each of the exhibitor-defendants should be prohibited from expanding its theatre holdings, except *"to protect its investment, or in order to enter a competitive field."* In the latter case, the acquisition was to be approved by the court after due application. Although no further testimony or proof of any kind was thereafter taken, the judgment entered by the court imposed an absolute prohibition against any further growth without either of these exceptions previously authorized (Judgment, III, (6); R. 3698, 3700).

The Government's Contention Below and the Judgment of the District Court with Respect to a Ban on Producer-Exhibitors' Licensing Each Other's Product.

After the District Court had rendered its opinion, counsel for the Government made formal demand for the first

[1]Interests of less than 5% and more than 95% were not condemned—the joint character of the ownership being so small as to be inconsequential (R. 3549).

time for a prohibition against a producer-exhibitor's licensing for exhibition in its theatre the product of another producer-exhibitor (*cf.* R. 2568-70). This formal demand was contained in a proposed judgment submitted by counsel for the Government, which judgment asked that the producer-exhibitor defendants be enjoined and restrained (R. 3601):

> "8. From licensing for exhibition in any theatre owned or controlled by it films distributed or produced by another defendant named in this section which is not affiliated with it, for a period commencing one year after the entry of this decree and continuing for a period of not less than ten years. At the conclusion of said period, any party may move to modify this provision in any manner which the facts then appearing to the Court may warrant."

The District Court declined to grant this relief.

SPECIFICATION OF ERRORS, STATEMENT OF ISSUES, AND SUMMARY OF ARGUMENT

There are six appeals. Loew's is a party only to the Government's Appeal, No. 79, as appellee, and to No. 80 in which Loew's is one of four appellants. This brief presents Loew's position on these two appeals in the order in which the appeals were filed. Accordingly, Loew's argument as appellee precedes its argument as appellant.

On Appeal No. 79 the Government, as appellant, by its assignments of errors (R. 3721, et seq.), raises "four main questions", which its Statement as to Jurisdiction states as follows:

"*First*, accepting the expediting court's findings as to the extent and nature of the violations involved in their entirety, it erred as a matter of law in failing to enter a judgment which dealt adequately with these violations.

Second, the court erred as a matter of law in concluding that the major defendants [Fox, Loew's, Paramount, RKO and Warner] had not actually achieved a monopoly in exhibition, either singly or collectively and that all of the defendants had not actually collectively achieved a monopoly of distribution, in violation of Section 2 of the Sherman Act.

Third, the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition.

Fourth, the court upon proper findings as to the legal consequences of the defendants' violations, should have ordered the ultimate divorcement of the major defendants' theatre holdings from their distribution and production activities and should have restrained them from licensing films for exhibition in each other's theatres while such relief is being effectuated. It should also have enjoined all of the defendants from continuing to make clearance agreements."

Points I, II and III of this brief present Loew's response to these contentions of the Government. Thus, Point I deals with the Government's claim that the court below should have found that the defendants had achieved a monopoly of exhibition and distribution. Point II presents Loew's position with respect to the Government's demand for divestiture of the defendants' theatre properties and exhibition business and Loew's position as to the

Government's demand that pending divorcement each of the defendants, Fox, Paramount, Loew's, RKO and Warner, be prohibited from licensing its features to a theatre which is owned or operated by any of the other defendants. Point III deals with the adequacy of the relief decree by the District Court, including its upholding the legality of clearance.

These three points presented by Loew's, *as appellee*, will be followed immediately by Loew's position *as appellant* on Appeal No. 80. On Loew's appeal it will present six points which, with the assignments of errors to be urged, are:

IV. The District Court erred in finding and concluding that Loew's and the other defendants combined and conspired to restrain trade in distribution and exhibition of motion pictures (Assignments Nos. 3-13, 15-18, 20-24, 32 and 36-39; R. 3728-33, 3735-6).

V. The District Court erred in imposing a prohibition upon Loew's expanding its theatre holdings (Assignments Nos. 30, 31 and 33; R. 3735).

VI. The District Court erred in enjoining Loew's from owning any beneficial interest in a theatre with an independent (Assignments Nos. 25-29; R. 3733-4).

VII. The District Court erred in decreeing that whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof (Assignment No. 19; R. 3732).

VIII. The District Court erred in enjoining Loew's from agreeing with a licensee that the latter should charge a specified minimum admission price during the

exhibition of the feature licensed (Assignments Nos. 1 2 and 14; R. 2728, 2731).

IX. The District Court erred in failing to conclude that it had power to continue the arbitration system created by the consent decree and to provide for the arbitration of disputes between exhibitors and defendants arising under the present judgment (Assignments Nos. 34 and 35; R. 3736).

Note: The foregoing twenty-three pages of Loew's brief together with its appellant's points numbers IV-IX, were served on Government's counsel on January 16, 1948. On that occasion, Government's counsel in turn served a draft of its appellant's brief upon counsel for Loew's. We thus learned for the first time that the Government had abandoned and is not arguing the "third" of its "four main questions" just referred to; to wit, the claim that

> "the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition."

As proof of the Government's abandonment of this "main" question we respectfully refer the Court to the Government's Specification of Errors to be Urged (brief, p. 46) which omits its assignment's numbers 4, 14 and 15 (R. 3721-2) directed to legality of clearance.

In view of the Government's abandonment of this point, Loew's, contrary to our previous statement at pages 22-23, will not present argument sustaining the District Court's holding that clearance is legal *per se*.

ARGUMENT AS APPELLEE ON APPEAL NO. 79

Point I.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO CONCLUDE THAT LOEW'S INDIVIDUALLY OR COLLECTIVELY WITH THE OTHER PRODUCER-EXHIBITORS HAD A MONOPOLY OF EXHIBITION OR DISTRIBUTION OF MOTION PICTURES.

Introduction

In the District Court, in asking for a nationwide decree of divorcement against five of the principal companies in an industry (each concededly autonomous as to stock ownership, directors and officers[1]), the Government proceeded upon the theory that these five companies could be treated collectively and their separate theatre holdings aggregated so as to establish a nationwide monopoly of the exhibition business. Indeed, proof was not offered to establish illegal monopoly in any particular locality or localities.[2]

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[1]R. 215-216.

[2]The District Court held (R. 3554, 3556):

> "If in certain localities there is ownership by a single defendant of all the first-run theatres, *there is no sufficient proof* that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.
>
> * * * * *
>
> *There is no evidence* that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been

Notwithstanding their endeavor in the District Court to establish a *collective* monopoly, Government's counsel frankly conceded that the following facts had been established:

> "1. Individually considered, each distributor defendant directly controls *only a fraction* of the entire domestic distribution business.
>
> 2. Individually considered, each producer-exhibitor directly controls *only a fraction* of the entire domestic exhibition business and the local theatre situations in which their individual control is 100% are few in number when compared to the total domestic theatre market."[1]
>
> (Government's brief in the District Court, p. 2)

In view of these facts, for the Government to have proven a collective monopoly, an obvious *sine qua non* was to establish that these concededly autonomous companies could be treated *collectively* and their separate theatre holdings *aggregated* to establish a *national monopoly*.

But the District Court properly held that "The five major defendants *cannot be treated collectively* so as to establish claims of general monopolization in exhibition," and that "there is no substantial proof that any of the corporate defendants *was organized* or *has been maintained* for the purpose of achieving a *national monopoly*, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1;

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prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture."

[1] *So far as Loew's is concerned*, in no place *where it operates does it operate all the first-run theatres* (Appendices II and III).

United States v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2)." (Opinion, R. 3553)

In view of the foregoing and in view of the Court's further conclusion that the illegalities which it found were in trade practices and not in who owned the theatres concerned (Find. 154; R. 3690), it properly declined the divorcement sought by Government's counsel (Opinion, R. 3559).

In their present brief before this Court, Government's counsel have pursued a subtle but even more fallacious approach.

Once again, from the outset the Government's brief abounds with statistics of the *combined* theatre holdings and *combined* revenues of the five separate companies, without the establishment of the preliminary right to treat these separate companies collectively. And at page 11 of their brief Government's counsel state that they "challenge the court's failure to conclude that the defendants, both individually and *collectively, had monopolized* important segments of the motion picture industry."

But here, however, the similarity to the Government's District Court approach ceases.

While the Government at various places prior to the "ARGUMENT" in its brief mentions its disagreement with the failure of the lower court to find a *collective* monopoly, in its "ARGUMENT" it completely abandons this theory. No longer do Government counsel argue for the existence of *collective* monopoly. Instead, they now bottom their entire case for monopoly on a theory that each of the five separate producer-exhibitor companies, individually con-

sidered, is in and of itself a monopoly requiring dissolution to meet the requirements of the Sherman Act.[1]

As a consequence, the collective statistics, having no other purpose than such opprobrious effect as they may create, are neither validly sustained in the evidence nor relevant to the question at issue.

As proof of this complete change in theory by the Government, we point to the *only* headnote and the *only* argument in the Government's brief on the subject of monopoly warranting divestiture. The headnote reads as follows (Government's brief p. 90):

> "A. EACH INTEGRATED VERTICAL COMBINATION BETWEEN A MAJOR DEFENDANT'S PRODUCING AND DISTRIBUTING BUSINESS AND ITS AFFILIATED THEATRES CONSTITUTES A RESTRAINT AND A MONOPOLIZATION OF AN APPRECIABLE SEGMENT OF TRADE WHICH CAN BE REMEDIED ONLY BY DIVORCEMENT."

It would appear that this switching of horses in midstream by the Government from a theory of "collective monopoly" by five separate companies to one of "individual monopolization" by each of them has been inspired by a last-minute, but erroneous reliance upon *United States* v. *Yellow Cab Co.*, 332 U. S. 218, which was decided by this Court *after* the decision of the instant case by the lower court.

This is further demonstrated by the fact that two of the other three cases primarily relied upon by the Govern-

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[1] In the District Court the Government did make the argument that "each of the producer-exhibitor defendants is a combination which violates the Sherman Act *per se*." However, the entire basis of that argument was one of inter-defendant licensing and not that each integrated unit by its relations *intra se* was violating the act. Indeed, Government's counsel took the opposite position at R. 1945.

ment in support of this new theory, *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, now cited or quoted from at pp. 50, 92, 93, 95, 105 and 106 of the Government's brief and *U. S.* v. *Swift & Co.*, 286 U. S. 106, now cited or quoted from at pp. 51, 109, 111, 114 and 133 of the Government's brief, *were not even referred to or cited in the brief of the Government before the District Court.*

Particularly in view of this new approach, which the Government has taken in this Court, against the defendants, *qua individuals*, the defendant Loew's is entitled to be dealt with *on its own individual record* and not that of other defendants before this Court.

The Government cannot establish a monopoly against the defendant Loew's for four reasons:

A. Loew's, *individually*, has no monopoly of theatre holdings or of first-run exhibition, either locally or nationally.

B. Loew's, *individually*, has no monopoly of distribution.

C. Neither the *Yellow Cab*, *Lehigh*, *Reading*, *Swift* nor any other case, supports the Government's theory that Loew's integrated business as a producer, distributor and exhibitor constitutes restraint and monopolization.

D. Loew's cannot be treated *collectively*, with Fox, Paramount, RKO and Warner to establish a monopoly of exhibition or distribution.

A. Loew's, *Individually*, Has No Monopoly of Exhibition, Nationally or Locally.

(1) Loew's has no monopoly in terms of theatre holdings.

The District Court made the following finding (R. 3684):

> "119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or *individually*, have a monopoly of exhibition."

The Government takes issue with this finding by its Assignment of Error No. 20, reading as follows (R. 3723):

> "20. The Court erred in concluding that the defendants' theatre holdings are not large enough to permit them, *individually* or collectively, to have a monopoly of exhibition."

Loew's Exhibit L-2 establishes that on January 1, 1945, there were 18,076 motion picture theatres *in operation* in the United States. The lower court so found (Find. No. 145, R. 3688). Of this number, Loew's was operating 131 at the time of the hearings, which is 7/1,000 of the total theatres operating in the country (Exh. L-12; *cf.* Find. No. 118; R. 3684; Appendix to Government Brief in this Court, p. 255).

The location of *every* Loew-operated theatre throughout the country, city by city, as well as the total theatres

operating in those cities, are set forth in the table which follows:

City	Total Operating Theatres[1]	Number of Loew's Operated Theatres[2]
Akron, Ohio	34	1
Atlanta, Ga.	42	1
Baltimore, Md.	108	3
Boston, Mass.	34[3]	2
Bridgeport, Conn.	22	4
Canton, Ohio	10	1
Cleveland, Ohio	108	3
Columbus, Ohio	51	2
Dayton, Ohio	27	1
Evansville, Ind.	13	2
Harrisburg, Pa.	14	1
Hartford, Conn.	17	2
Houston, Tex.	47	1
Indianapolis, Ind.	56	1
Jersey City, N. J.	17	2
Kansas City, Mo.	52	1
Louisville, Ky.	36	1
Memphis, Tenn.	35	2
Meriden, Conn.	3	2
Nashville, Tenn.	20	1

[1]Source: Film Daily Year Book, (1945) pp. 826-932, except as to Baltimore, Md., Kansas City, Mo., New York, N. Y., New Orleans, La., Pittsburgh, Pa., St. Louis, Mo., and Washington, D. C., which are from Exhibit L-2.

[2]Source: Appendices II and III of this Brief, Exhibit L-2, Appendix to Government Brief in this Court, p. 255.

[3]Does not include metropolitan area, such as Brookline, Cambridge, etc.

City	Total Operating Theatres	Number of Loew's Operated Theatres
Newark, N. J.	41	1
New Haven, Conn.	23	3
New Orleans, La.	61	1
New York, N. Y. (Metropolitan area)	658	69
Norfolk, Va.	29	1
Norwich, Conn.	3	1
Pittsburgh, Pa.	82	1
Providence, R. I.	17	1
Reading, Pa.	10	1
Richmond, Va.	21	1
Rochester, N. Y.	32	1
St. Louis, Mo.	95	2
Springfield, Mass.	14	1
Syracuse, N. Y.	26	2
Toledo, Ohio	32	2
Washington, D. C.	64	3
Waterbury, Conn.	11	2
Wilmington, Del.	13	1
Worcester, Mass.	11	2
Yonkers, N. Y.	9	1
TOTAL ALL CITIES WHERE LOEW'S OPERATES	1,998	131 (6.6%)[1]

[1]This does not include 11 theatres operated by Buffalo Theatres Inc. (10 in Buffalo and 1 in Niagara Falls), for which Loew's did the buying and booking of films. We do not regard these theatres as actual Loew-operated theatres, but, to avoid controversy, on all revenue and product charts introduced in evidence by Loew's these theatres were included. In addition, in considering Loew's first-run situations across the country, again to avoid controversy, we have included the cities of Buffalo, New York, and Niagara Falls, New York, which are not included in the foregoing list for the reason stated. This brings the total cities to 42 as contrasted to the 40 listed here.

Summary by States

State	Total All Theatres Operating In State[1]	Number of Loew's-Operated Theatres[2]
Connecticut	196	14
Delaware	35	1
Georgia	358	1
Indiana	441	3
Kentucky	279	1
Louisiana	347	1
Maryland	238	3
Massachusetts	387	5
Missouri	575	3
New Jersey	390	3
New York	1,279	73
Ohio	910	10
Pennsylvania	1,186	3
Rhode Island	62	1
Tennessee	295	3
Texas	1,218	1
Virginia	260	2
Washington, D. C.	64	3
TOTAL ALL STATES WHERE LOEW'S OPERATES	8,520	131 (1.5%)

The foregoing tables establish three facts of decisive significance with respect to Loew's theatre operations.

First, Loew's has no "closed town," i.e. in no city where Loew's operates does it operate all of the theatres in that city;

Second, in each state where it operates it operates an infinitesimal part of the total operated theatres in that state, and

[1]Source: Exhibit L-2.
[2]Source: Summary of preceding table.

Third, in each particular locality where Loew's operates, Loew's theatres are but a fraction of the total theatres operating there.

It is to be noted that of the total number of 69 theatres operated by Loew's in the New York metropolitan area (which represent but 1/10th of the total theatres operating there), two are first-run Broadway theatres, the Capitol and the Criterion facing the competition of eight independent first-run theatres—Radio City Music Hall, Astor, Rialto, Gotham, Republic, Victoria and Ambassador (Appendix II of this brief, p. xii).

Additional first-run competition in the Broadway area is provided by the Roxy, operated by Fox, the Paramount, operated by Paramount, the Hollywood and Strand by Warner, and the Palace by RKO (Appendix II of this brief, p. xii).

The remaining 67 of Loew's theatres in the metropolitan area of New York are operated on subsequent run. That each of them meets with the severest competition is illustrated not only by the maps of the five boroughs of New York (Exh. L-15), which show every Loew theatre closely surrounded by at least three or four other theatres, but by the other very substantial circuits operating on subsequent run in this area. Those circuits, as set forth in Exhibit L-15a, are:

Circuit	Number of Theatres Within Five Boroughs of Greater New York	Number of Theatres Outside the Five Boroughs of Greater New York	Total Number of Theatres
BRANDT	79	41	120
RANDFORCE	44	None	44
SKOURAS	27	36	63
R. K. O.	34	21	55
ISLAND	28	24	52
INTERBORO	29	7	36
CENTURY	21	15	36
TOTALS	262	144	406

That Loew's has not indicated even a tendency to monopolize exhibition *in terms of theatre holdings*, is conclusively demonstrated by the very limited increase in the number of its theatres over the past 13 years.

From January 1, 1932 to the date when these hearings commenced in 1945, the total theatres operated by Loew's increased by only 9, from 122 to 131. During the same period, the total theatres operating in the United States expanded by 5,471, from 12,605 to 18,076.

This, we submit, establishes beyond question that Loew's has not used its theatres (nor, indeed, its position as a producer and distributor of films) to expand its theatre position to the exclusion of other operators. Loew's Exhibit L-12 sets forth in graphic form the increase in total theatres in operation in the United States for the period from 1932 to 1945 and the increase in the total theatres operated by Loew's during the same period. The respective figures are set forth below:

Jan. 1	Total Theatres	Loew's Theatres
		131*
1945	18,076	132
1944	17,919	133
1943	17,728	131
1942	17,919	126
1941	17,541	127
1940	17,003	126
1939	15,701	126
1938	16,251	126
1937	16,055	123
1936	14,161	124
1935	13,386	126
1932	12,605	122
Gross Increase	5,471	9

*Oct. 1, 1945.

On such a record, we submit, it borders on the absurd to assert that Loew's *individually*, has monopolized, or has power to monopolize either national or local exhibition.

(2) Loew's has no "first-run" monopoly in any city where it operates.

The Government's Assignment of Error No. 2 reads as follows (R. 3721):

> "2. The Court erred in concluding that the major defendants had not actually achieved a monopoly in exhibition, either singly or collectively."

In the court below the Government based its claim that the defendants, "singly", have achieved a monopoly of exhibition on the ground that each of them enjoys a monopoly of first-run exhibition in the larger cities across the country where they respectively operate theatres. The plaintiff's contention so far as Loew's is concerned, is conclusively rebutted by the record.

The District Court found (R. 3689):

> "149. Loew's operates first-run theatres in 36 of the 92 cities in the United States with more than 100,000 population; in every one of these 36 cities, there are other 'first-run' theatres exhibiting the features of one or more of the other defendant distributors; in 21 of these 36, one or more of the other first-run theatres are operated by independents."

The District Court, therefore, affirmatively found that in *not one of these cities of over 100,000 population where Loew's operates does it have a monopoly of first-run exhibition.* On the contrary, in every one of them there are other competing first-run theatres and in the great majority

of them (21) one or more of these first-run houses are independents.

As a basis for this Finding No. 149, defendant Loew's tendered evidence as to the detailed conditions in each of the 36 cities of over 100,000 population where it operates first-run theatres. This information has been summarized with respect to each of the cities and is included in Appendix II to this brief. The cities are listed in alphabetic order but to make clear the significant facts with regard to each of these local situations, we include as illustrative the first in the alphabet, which is Akron Ohio. Appendix II discloses the following with respect to this city:

AKRON, OHIO

Theatre1	Capacity1	Operator1	Affiliation2	Product3
Colonial	1750	Fiber & Shea	Independent	(Fox (RKO ½
Strand	1160	Warner Bros.	War	War
Palace	2083	Katz & Chatkin	Independent	(Uni (Par ½ (RKO ½ (Col
Loew's	*2986*			*Loew's 29* *UA 19* *Par 16*

Abbreviations

Loew's Metro-Goldwyn-Mayer...Loew's
20th Cent. Fox .....Fox
Paramount .....Par
RKO .....RKO
Warner Bros .....War
Columbia .....Col
Universal .....Uni
United Artists .....UA

Sources

1—Exh. L-13, L-17, 48
2—Exh. 156-163, 359-360
3—Exh. L-17, 44, 58, 84, 95, 129, 145, 147, 349 (Products listed are limited to those of 8 defendants)

In connection with Akron, Ohio, we call particular attention to two facts: *First*, Loew's clearly has no monopoly of first-run exhibition. There are two *independent first-run* theatres and another smaller theatre operated by Warner, not to mention 29 additional theatres operating on subsequent run (p. 31 of this brief). *Second*, although Loew's has outstandingly the largest theatre, it certainly has no monopoly of the exhibition of the features distributed by the other seven defendants. In the 1943-44 season, the Loew's theatre exhibited 29 of its own pictures and 19 of United Artists' (a distributor which owns no theatres) and 16 pictures of Paramount. *The Palace*, one of the independent theatres, had all of the product of Universal, all of Columbia, one-half of RKO and one-half of Paramount. The other independent theatre, *The Colonial*, had all the product of Fox, and one-half of RKO.

How unjust and unwarranted it would be to prohibit the producer Loew's and the producer Warner from exhibiting in Akron, Ohio, on any theory that they have a monopoly of first-run exhibition in this local situation. We point this out simply to demonstrate that the Government's technique of lumping nation-wide statistics as to first-run exhibition and demanding thereupon a segregation of production and exhibition is wholly unwarranted when examined in the light of local situations and specific defendants.

An examination of the balance of the 36 cities where Loew's operates first-run theatres, all set forth in Appendix II, will disclose that *Loew's has no first-run monopoly in any city where it operates.* Indeed, in virtually every one of these 36 cities, Loew's first-run theatres represent but a fraction of the first-run theatres competing in those cities.

In addition to the 36 cities with over 100,000 population, Loew's operates first-run theatres in 6 cities of less than 100,000 population bringing the total to 42. These cities of

less than 100,000 are Evansville, Ind., Harrisburg, Pa., Meriden, Conn., Niagara Falls, N. Y., Norwich, Conn., and Waterbury, Conn. In every one of the 6 cities with less than 100,000 population, Loew's has competition on first-run, similar to that in the 36 just described (see Appendix III to this brief).

On pages 21 and 55 of its brief, the Government argues that in the cities of between 25,000 and 100,000 population, the producer-exhibitor defendants own interests in 577 of a total of 978 first-run theatres; in addition, that in 135 such cities, the affiliated first-run theatres played all of the product of the eight defendants. Loew's operates in only six cities of less than 100,000 population (Appendix III to this brief). Each such city is in the category of between 25,000 and 100,000 population. The theatres operated by Loew's in these six cities are a total of 9 (Appendix III of this brief). Thus, Loew's operates only 9 theatres of the 577. In not one of these six cities does Loew's have the product of all eight distributor defendants. (Appendix III of this brief). Thus the Government's charge as to these 135 cities is in no way applicable to Loew's.

The Government also asserts at page 21 of its brief:

> "And in at least 300 additional towns, most of them with populations under 25,000, an operator affiliated with one of the major defendants has all of the theatres in the town (Exs. 371, 397; R. 359-370, 2166)."

Loew's does not operate a single theatre in any such town.

(3) Loew's first-run theatres do not monopolize the available film supply.

We have shown that in the case of Akron, Ohio, Loew's had in addition to its own, the product of United Artists and one-half the season's product of Paramount and

that the two *independent* first-run theatres, *The Palace* and *The Colonial* had between them *all of the product of Fox, all of RKO, all of Columbia, all of Universal* and *one-half of Paramount*. Loew's was certainly not monopolizing available film supply. The fact is, that Loew's first-run theatres across the country use a relatively small portion of the other four producer-exhibitors' product. In this regard the District Court found (R. 3686):

> "131. In 21 of the 36 out of the 92 cities where Loew's operates theatres *none of the other four producer-exhibitors* licensed its features in the 1943-44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers."

In the remaining 15 of the 92 cities where Loew's operates theatres, there are 5 in which Loew's used the product of only one other producer-exhibitor, 7 where it used the product of two, and only 3 where it used the product of three other producer-exhibitors. In no place does Loew's have the product of all four other producer-exhibitors (Appendix II to this brief).

The fact that Loew's did not exclude independent first-run theatre operators from the use of the majors' product is conclusively demonstrated by the situation in Indianapolis, Louisville, St. Louis and Harrisburg. In those cities Loew's operates the only affiliated first-run theatres in the city, all competing first-run theatres being independent. In not one of these cities did Loew's have the product of any one of the other four producer-exhibitors. *Instead, in each place all four, Fox, Paramount, RKO and Warner, licensed the independent first-run theatres to the exclusion of Loew's* (Appendices II and III of this brief).

B. Loew's, *Individually*, Has No Monopoly of Distribution.

The District Court made the following finding with respect to distribution (R. 3677):

> "99. During the 1943-44 season, the number of features distributed by eight distributor-defendants and the three other national distributors were as follows:

Distributor-defendants	No. of Films	Percentage of Total: With Westerns Included	Percentage of Total: With Westerns Excluded
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Sub-total	260		
Other National Distributors			
Republic (29 features, 30 Westerns)		14.86%	8.66%
Monogram (26 features, 16 Westerns)		10.58%	7.76%
PRC (20 features, 16 Westerns)		9.07%	5.97%
		100%	100%
Sub-Total.. 137	397		
Total without Westerns...	335"		

It is clear from the foregoing that at the maximum Loew's distributes but 9.85% of the total pictures distributed in the United States. The record not only negatives monopolization of distribution in terms of number of features distributed, but it is also wholly void of any indication that any of the distributors, including Loew's, has used its power either as a producer, as a distributor, or as an exhibitor, to exclude others from the distribution field.

Government's counsel conceded (R. 387):

> "But I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors."

We respectfully submit that it is idle to talk about exclusion in the distribution field, where just as in the production field, there is absolutely no evidence that anyone who wishes to spend the money on distribution facilities, cannot enter upon the business of "selling" motion pictures to the 18,076 theatres operating in the United States today (Ex. L-2). In view of this lack of proof, the lower court was altogether warranted in holding (Opinion, R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures."

C. Neither the *Lehigh, Reading, Yellow Cab, Swift* nor any Other Case Supports the Government's Theory that Loew's Individual Business as Producer, Distributor and Exhibitor Constitutes a Restraint and Monopolization.

(1) These authorities do not support the Government's legal theory.

The District Court found "active competition" in the production of motion pictures.[1]

We have demonstrated that the District Court's findings as to the competitive character of Loew's participation in both national and local exhibition are amply supported by the proof.

In distribution Loew's participates to the extent of distributing less than 1/10 of the pictures distributed in the United States in competition with all other distributors in the industry and the Court so held.[2]

Notwithstanding the competition with which Loew's is faced in each phase of its business, Government's counsel advance the theory that, individually considered, Loew's integrated business as producer-distributor-exhibitor constitutes a restraint and monopolization requiring divorcement.

Thus at pages 90-91, the Government's brief argues:

> "We contend that each vertical affiliation between a major distributor and its theatres necessarily results in a continuing restraint and monopolization with respect to that important segment of trade rep-

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[1]Finding No. 59; R. 3670. While the Government assigned error to this finding (No. 12; R. 3722) it has abandoned and is not urging this error in argument (Gov't Brief, pp. 46-53).

[2]Opinion, R. 3554.

resented by the pictures it distributes to its own theatres.

* * * * * *

"It is clear, * * *, that such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution. They were in each case a deliberate creation of a market control which would assure them of retail outlets regardless of the merits of their product."

Further explaining their theory in this regard, Government's counsel argue, pp. 91-92:

"Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres."

In furtherance of its contention the Government's brief (p. 96) points out that during the 1943-'44 season Loew's distributed 33 out of a total of 260 pictures distributed by the defendants, and a total of 335 distributed by all national distributors, and in addition that Loew's had theatre interests in "135" theatres, citing Findings 99 and 118 (R. 3677, 3684). From these facts the Government concludes that "each vertical relationship results in a restraint and a monopolization of an 'appreciable segment' of the market" (Gov't brief, p. 96).

We do not question that Loew's participation in distribution and exhibition represents "an appreciable segment of the market." However, we do challenge the Government's theory that possession of such an appreciable segment by an integrated business *per se* establishes restraint and monopolization. Market *control*—not merely possession of an appreciable segment of the market—is the key to illegality. And market control can be considered only in relation to a particular market, or of course the national market. An integrated enterprise which acquires market control with a deliberate, calculated scheme to crush competition undoubtedly constitutes illegal monopolization. But no such case exists as to Loew's.

In support of its theory the Government relies primarily upon four cases: *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, *United States* v. *Reading Co.*, 253 U. S. 26, *United States* v. *Yellow Cab Co.*, 332 U. S. 218, and *United States* v. *Swift & Co.*, 286 U. S. 106.

None of these cases support counsel's theory.

The *Lehigh, Reading* and *Yellow Cab* cases stand for or recognize the proposition that vertical integration *intentionally created to obtain market control* constitutes an illegal restraint and, where market control is obtained, monopolization.

The basic fallacy in the Government's application of this proposition to the case at bar is in the meaning which its counsel assign to "market control".

Obviously, if a manufacturer of shoes acquires one of five retail shoe stores in a community, that manufacturer is not thereby acquiring market control, notwithstanding that all other manufacturers are precluded from selling its shoes to that store, notwithstanding that the manufacturer thus acquires a retail outlet regardless of the merit of its

product, and notwithstanding that other shoe stores in the community are excluded from handling the manufacturer's product. Nor would market control result if this shoe manufacturer acquired in the course of normal expansion one shoe store in every one of a hundred similar communities where there were competing shoe stores. This is so, even though an *appreciable segment* of the shoe market is involved in the business of a hundred shoe stores.

On the other hand, if the same manufacturer bought up all or practically all of the retail outlets in the single community first mentioned, with the deliberate calculated purpose of eliminating its competition in that community, there would be the type of market control contemplated in the authorities erroneously relied upon by the Government.

In other words, when these authorities use the term "market control", they always have in mind a local market in which the defendant is operating, or of course a national market, and not that market represented by the defendant's own business. Were this not so, any integrated enterprise would be condemned, for to the extent of its own retail business, an integrated enterprise excludes other producers from utilizing that retail outlet, and by the same token excludes other competing outlets from purchasing the goods of that integrated producer.

The *crux* of the question must always be whether the integrated enterprise, through a deliberate, calculated course of conduct has acquired *control* of a *particular* market in which it is operating.

The basic fallacy in the Government's theory is well illustrated by the *Lehigh* case itself (254 U. S. 255). The market of the defendant, Lehigh Valley Railroad Company, was in the coal fields adjacent to its tracks and among the coal operators seeking carriage of their commodity to

distant cities. The particular area, the Wyoming Field in Pennsylvania was also served by a connection with The Reading Railroad, The Pennsylvania Railroad and The Jersey Central Railroad. The Lehigh commenced a systematic buying up of the coal fields adjacent to its road and in 1905 purchased the coal operating company which owned the connection with the competing railroad lines. Finally in 1908 the Interstate Commerce Commission found that the Lehigh

> "controlled 95% of the tonnage moving over its line to tide water" (254 U. S. 263).

In other words, the Lehigh went into its market and acquired virtually complete control thereof. As this Court put it at 254 U. S. 269:

> "Without further comment, this discussion of the record requires us to conclude that it is clearly established that prior to the enactment of the Anti-Trust Act, the Railroad Company, in combination with its coal company subsidiary, *deliberately* entered upon a policy of making extensive purchases of *anthracite land tributary to the Railroad Company's lines*, for the purpose of controlling the mining, transportation and sale of coal *to be obtained therefrom* and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a *practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.*"

The fact that the Lehigh Valley Railroad Company controlled 20% of the total national anthracite market was

of no significance in the decision of that case. In other words, the fact that 20% of the national market represented an appreciable segment of commerce, was in no way determinative of the legality or illegality of the integration. The decisive point was that the Lehigh Railroad Company intentionally acquired dominant control, to wit, 95%, of the market there involved.

The *Reading* case is in the same category (253 U. S. 26). There, the Schuylkill coal area of Pennsylvania was involved. The tracks of the Reading Railroad, the Pennsylvania Railroad and the Lehigh Valley Railroad companies each entered the Schuylkill region. Once again, it was a case of the defendant by a deliberate, calculated plan acquiring control of a particular market in which it was involved. Indeed, the Government's brief in the *Reading* case pointed out (p. 34):

> "* * * Reading Holding Company controls, as before stated, more than two-thirds of all the coal-bearing lands in the entire Schuylkill region."

In addition to the *vertical* integration whereby control of the Schuylkill anthracite field was obtained, the Reading Holding Company acquired the stock of a competing road, which served an adjacent coal field, and likewise there owned a large coal operating company. There was thus also effected a horizontal integration, or "complete dominion over two great competing interstate carriers and over two great competing coal companies" (253 U. S. 59).

In consequence, it is little wonder that in the *Reading* case this Court held:

> "* * * this dominating power was not obtained by normal expansion to meet the demands of a busi-

> ness growing as a result of superior and enterprising management but by deliberate, calculated purchase for control" (253 U. S. at 57).

The *Yellow Cab* case (332 U. S. 218) does not change the principles enunciated by this Court in the *Reading* and *Lehigh* cases. Since the case came to this Court on appeal from a judgment dismissing the Government's complaint on motion there was in fact no holding of monopolization of any kind. So far as relevant here, the case stands only for the proposition that the amount of commerce there involved was a sufficient segment of commerce to be the subject of a Sherman Act violation and that the complaint was not insufficient for failure to allege a monopoly of the total number of taxicabs in the country. The case also held that the defendants could not claim exemption from the anti-trust laws simply because they were affiliated by common stock ownership. There is nothing whatever in the *Yellow Cab* case which changes the cardinal rule that a monopolization can occur only with respect to the acquisition of control of a particular market pursuant to a deliberate, calculated scheme to obtain such control.

The *Swift* case (286 U. S. 106) is definitely not a precedent to be applied to the case at bar. In that case the defendants voluntarily consented to the entry of a decree under which they agreed to refrain from engaging in certain businesses, including the wholesale grocery business. Ten years later, upon application of some of the defendants, the District Court removed the prohibition in the consent decree against the defendants' participation in the wholesale grocery business. This Court in reviewing the propriety of the lower court's action plainly indicated that the only question involved was whether there was a sufficient change

in conditions as to warrant the removal of the ban to which the defendants had consented. This Court stated at 286 U. S. 119:

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.
>
> * * * * *
>
> They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall. What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing."

In this case obviously no such question is presented.

The Government's reliance upon *Interstate Circuit* v. *United States*, 306 U. S. 208, to bolster its newly adopted theory of illegality of integration is also without merit. The Government argues at pages 98 *et seq.* of its brief that integration of production, distribution and exhibition, violates the Sherman Act because it sanctions a restraint of trade outlawed by the *Interstate* decision. Counsel point to the provision of the judgment in the case at bar, which permits a distributor to exhibit its pictures in any theatre in which it has an interest of 95% or more upon any terms satisfactory to it, (Section IV, R. 3700), and argue therefrom that if Paramount owned a 95% instead of a 50% interest in the Interstate Circuit, it could impose the unreasonable restraints against independents which were held illegal in the *Interstate* decision.

This argument is fallacious because the *Interstate* case was fundamentally one of horizontal conspiracy, i.e. a conspiracy on the part of Interstate Circuit with all of the distributors to restrain the competition of independents. Consequently, even the complete integration of Paramount and Interstate would not render innocent any such illegal conspiracy as that fostered by Interstate. In the case at bar, of course, any conspiracy among distributors found by the District Court has been wholly eliminated by its sweeping injunction against minimum admission prices, unreasonable clearances, etc., as well as the requirements of competitive bidding.

The *Interstate* case in no way detracts from the right of a copyright holder to exhibit its own picture and to prevent its exhibition by others. Indeed, even the Government concedes "that under the Copyright Act, the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others * * *" (Government's brief, p. 97).

This being so, the provision of the District Court's judgment in the present case which permits a distributor to exhibit its own pictures in its own theatres, upon such terms and subject to such conditions as may be satisfactory to it in no way runs counter to the holding of the Court in the *Interstate* case.

We do not contend, however, that this copyright privilege becomes a shield for illegal restraints or monopolization. Accordingly, if a producer-exhibitor in exhibiting its pictures in a particular locality adopts a course of action with a deliberate calculated scheme to crush competition and acquires market control, there would result an illegal restraint and monopolization, notwithstanding the legality imparted by the Copyright Act to the integrated business of production and exhibition of motion pictures.

We submit, therefore, that the judgment of the District Court, in sustaining the ownership of theatres by producer-exhibitors does not sanction a "continued restraint of trade implicit in such ownership", as the Government contends (brief, p. 103), for whatever illegalities may occur, do not arise from the integration *per se*.

(2) Loew's integrated business does not come within the condemnation of the *Lehigh*, *Reading*, *Yellow Cab*, *Swift* or any other case.

So far as Loew's is concerned, there is absolutely no *factual* basis for bringing it within the condemnation of any of these decisions.

We have shown that Loew's has not monopolized theatre holdings, either on a local or a national basis and that it has not monopolized first-run exhibition in any locality where it operates. Thus, even though its business represents an appreciable segment of the motion picture industry, it has *no market control* in any place where it operates.

Although we need go no further to establish that Loew's factually does not come within these cases, there is an additional ground of distinction on the facts so far as Loew's is concerned. An essential requisite in all of those cases, and even in the Government's theory itself, is proof that the integration was brought about for the *deliberate, calculated purpose* of obtaining market control.

In two instances in the Government's brief counsel attempt to bring Loew's within this condemnation. Thus at page 54 the assertion is made:

> "Five of these defendants have entered the exhibition field on a large scale, primarily by purchasing theatre circuits from former independent operators

(Fdgs. 8, 18, 19, 21, 27-29, 30, 42, R. 3662, 3664-3665, 3667)."

Again at page 91 it is alleged:

> "Most of the major defendants' vast theatre holdings were acquired through purchase of assets or stock in, or merger with, independent theatre enterprises (Fdgs. 8, 21, 28-30, 42; R. 3662, 3664, 3665, 3667)."

None of the findings relied upon in either of these general statements makes any reference to Loew's whatsoever.

The Government's brief goes further. It argues on pages 47 and 91:

> "These vertical combinations were formed in order to acquire an assured outlet for films.
>
> * * * * *
>
> It is undisputed in the record that the other four major defendants [Loew's, Fox, RKO and Warner] also integrated theatre operations with film distribution in order to have non-competitive market outlets for their films."

Neither the general statements, charging the "five" defendants with *entering* the exhibition field by purchasing theatre circuits, nor the specific statement at pages 47 and 91 of the Government brief that these combinations were formed in order to acquire an assured outlet for films can in any way apply to Loew's. Indeed, the Government's brief itself at page 14 concedes that Loew's integrated production, distribution and exhibition unit came into being, *not* by a distributor "purchasing theatre circuits *from former independent operators*", but by Loew's, *a theatre operator*, acquiring Metro Pictures Co., a producer and distributor. Says the Government brief (p. 14):

> "In 1920, Loew was a substantial theatre operator. At that time it acquired Metro Pictures Co., a producer and distributor. In 1924, Metro was merged with Goldwyn Pictures Co. and Mayer Pictures Co., both producers and distributors, to form Metro-Goldwyn-Mayer (Ex. 48, R. 181)."[1]

Moreover, the Government brief acknowledges the exceptional position as to Loew's, for at page 15 it states:

> "In 1929 and 1930, all of the major defendants *except Loew* acquired additional theatre circuits and emerged in 1930 in substantially their present form (Exs. 45, 85, 94, 116, R. 175, 197, 203, 209)."

Of course, we do not deny that the theatres operated by Loew's *have* increased over the years, but it has been *only a very gradual, normal growth.* The record affirmatively shows, without contradiction, that over the 13 years preceding the hearings in this case, the theatres which Loew's operated increased by only 9, bringing its total to only 131[2] (Exh. L-12). During this same span of time the total theatres operating in the United States increased by 5,471, an increase of 600 to 1 of Loew's (Exh. L-12; cf. Find. 145; R. 3688).

This conservative normal growth which has characterized Loew's theatre operations is in striking contrast to

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[1]"Mayer Pictures Co." was not a distributor, only a producer (Ex. 48, P. 181).

[2]These 131 theatres operated by Loew's are but a fraction of its co-defendants' interests in theatres, with the exception of RKO which operates 109 theatres (Find. 118; R. 3684) and are less than both the Griffith and Schine circuits, each of which has 147 theatres. (Film Daily Year Book [1947] pp. 1057, 1078; appellant's brief in *Schine Chain Theatres Inc.* v. *U. S.*, No. 10, October Term 1947 at p. 28.)

the rapid expansion attendant upon illegal operations as in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. There, the District Court in discussing the expansion of the defendant Crescent Amusement Co., and its affiliates (none of which is in any way connected with any of the defendants in the case at bar) said (323 U. S. 181 [footnote]):

> "On August 11, 1934, the defendant exhibitors and their affiliates operated in *thirty-two* towns in Tennessee (excluding Nashville), Kentucky, and Alabama, in six of which they had competition. On August 11, 1939, the defendant exhibitors and their affiliates, with the exception of Strand, heretofore dismissed as a defendant, operated in *seventy-eight* towns in Tennessee (excluding Nashville), Kentucky, Alabama, and North Carolina * * *"

In view of the entirely legitimate growth of Loew's theatre operations, it is not surprising that Monograph No. 43, *The Motion Picture Industry—A Pattern of Control*, TNEC, which is relied upon and cited by the Government at page 16 of its brief, makes the following statement at page 15:

> "Loew's has *always* pursued a very conservative policy regarding theatre acquisitions."

On such a record as this there can be no support for the Government's contention, so far as Loew's is concerned, that the integration came about for the *deliberate, calculated purpose* of obtaining market control.

It follows, therefore, that there is no justification either in fact or in law for the Government's theory that Loew's integrated business of producing, distributing and exhibiting motion pictures constitutes monopolization and restraint.

D. Loew's Cannot be Treated Collectively With Fox, Paramount, RKO and Warner to Establish a Monopoly of Exhibition or Distribution.

The Government's brief in this Court does not present argument, as in the District Court, in support of a collective monopoly of exhibition and distribution on the part of the five major defendants. On the other hand, at page 11 of their brief in this Court Government's counsel point out that they "challenge the Court's failure to conclude that the defendants, both individually and *collectively, monopolize* important segments of the motion picture industry."

Because Government's counsel have noted this objection and because they constantly submit *collective* statistics throughout their brief and argue that the five defendants do not compete with each other, we are obliged to present argument that these five companies cannot be treated collectively to establish claims of monopolization and that they in fact all compete with each other.

Preliminarily, however, we shall show that the five companies even on an aggregate basis have no monopoly of exhibition.

(1) The five companies, even if aggregated, have no monopoly, either of theatre holdings or of the national exhibition business.

As we have previously shown the District Court found (R. 3684):

> "119. The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, *aggregate* little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do

not and cannot *collectively* or individually, have a monopoly of exhibition."

To this finding, as we have also previously indicated, the Government assigns error, as follows (R. 3723):

> "20. The Court erred in concluding that the defendants' theatre holdings are not large enough to permit them, individually or *collectively*, to have a monopoly of exhibition."

In thus presenting the collective picture, i.e., the *aggregated* theatre holdings and the *aggregated* exhibition business of these five companies, we do so solely to demonstrate that even on that basis, monopoly of national exhibition is non-existent. We challenge counsel's right to *aggregate* the properties and business of these five separate companies and to deal with them as though they were *one* organization. There is no legal or factual justification for that technique of proving monopoly by what amounts to an assumption of its existence. However, for the purpose of the present sub-point we shall deal, *arguendo*, with the situation produced by *aggregation* as to theatre holdings and as to the business of exhibition.

The detailed facts as to the five companies' theatre holdings are set forth in the District Court's Finding of Fact No. 118, which reads in part as follows (R. 3684).

> "118. In the year 1945 there were about 18,076 motion pictures theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35 percent [one-sixth] * * *"

Since the five producer-exhibitors collectively are interested in but 17.35%, or one-sixth of the total theatres presently operating in the United States, there should be

no question but that the District Court was correct in finding that the five major companies do not monopolize exhibition in terms of their *aggregate* theatre holdings.

Nor is the absence of collective monopoly confined to mere *numbers* of theatre holdings. It is non-existent even as to the portion of exhibition *business* carried on by these five companies.

It will be recalled that it is one of the major complaints of counsel for the Government that among them Fox, Loew's Paramount, RKO and Warner control the greater portion of the first-run theatres throughout the country and consequently develop the greatest box office receipts and pay the highest film rentals. Notwithstanding this fact, even when *all* theatres of the five companies exhibiting on *any* run *are aggregated,* they carry on collectively *less than half* of the exhibition business in the country. The Government states with apparent satisfaction at page 57 in its brief "While defendants' theatres comprise only a little over 17% of the total number of theatres in the United States, they have paid 45% of the total domestic film rental received by all eight distributor-defendants."

We submit that the fact that 17% of the theatres in the country produce 45% of the revenue does not alter the conclusion in any respect that 45% of the total revenue nowhere near approximates a monopoly of total exhibition. Whether the ability of 17% of the country's theatres to produce 45% of the revenue is based upon larger theatres, legally acquired, superior skill, enterprise and management or arises from conspiracies and illegal restraints, it is perfectly clear that the answer to that question does not change the fact that 45% (made up from five companies) is by no means the equivalent of a national monopoly.

(2) The Government's aggregation of first-run theatres and the film rentals which they pay, is without support in law or in fact.

(a) There is no legal precedent or justification for treating these five autonomous companies as a unit.

Apparently aware that Fox, Loew's, Paramount, RKO and Warner even collectively have nothing that approaches a nationwide monopoly of exhibition, the Government in the lower court restricted the scope of its claim of monopoly to but a part of exhibition, to wit, *first-run* exhibition in the larger cities of the country.[1] In so doing, of course, at least 17,500 of the 18,076 theatres[2] and well over half of the exhibition business in the country, are removed from the calculations.

While the Government in its present brief does not argue expressly for collective monopoly of first-run exhibition it states at pages 20 and 55: Fox, Loew's, Paramount, RKO and Warner, as exhibitors, have *in the aggregate* 70% of the first-run theatres in the 92 cities of the United

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[1]Government's Brief in the District Court, p. 1:

> "1. Fox, Loew, Paramount, RKO, and Warner, the producer-exhibit defendants, collectively receive as film distributors more than 70% of the total film rental derived from *first-run* theatres in the United States.
>
> 2. They collectively own, through direct or indirect stock ownership and operating agreements, a financial interest in the operation of more than 70% of the 'key city' *first-run* theatres in the United States."

[2]Exhibit L-13, set forth at pp. 327-338 of the Appendix to the Government brief in this Court, shows that there are only 512 *first-run* theatres in the 92 cities of over 100,000 population in the United States. These 512 theatres, of course, include both independent and affiliated theatres.

States with over 100,000 population. By reason of having this 70% of the first-run theatres, these five companies, as distributors, obtain *in the aggregate* at least 71% of the total film rental paid by the first-run theatres of each of them.

The purport of this presentation is plain: by *aggregating* the first-run theatres of the five producer-exhibitors, and treating them as though they were parts of *one* organization the Government sees a monopoly of first-run exhibition. Then, proceeding on this premise (which we say is false) the deduction is that since these five companies have a monopoly of first-run exhibition, the film rentals paid by the theatres of each of them to the five companies, as distributors, are to be *aggregated,* and that if this is done, it demonstrates that the five have a monopoly of distribution.

But take away this *aggregating* of the five companies' first-run theatres—consider these five autonomous companies separately, and the theory for *collective* monopoly collapses. First, goes the monopoly of exhibition and then falls the monopoly of distribution built thereon.

We respectfully ask what precedent is there for treating five wholly autonomous companies as a single unit?

We refer to them as "autonomous" with due regard for the meaning of the word. They are wholly independent, as Government's counsel conceded when he stated (R. 215), "* * * as between the eight groups of defendants, I think it is quite true that *there are no common officers; there is no common stock control,* although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others.", but as to those, "We do not attach any significance to them." (R. 216).

We know of no case where the properties and revenues of five separate companies have been *aggregated,* treated as a unit, and held to be a monopoly of a particular industry.

Furthermore, we have searched in vain among the arguments of Government's counsel for a definite statement purporting to justify what is otherwise nothing more than an assumption of the right to aggregate. The only indication of any such rationale in the Government's brief in the District Court was as follows (Gov't. brief, p. 20):

> "The constant use by most of the affiliated theatres of films distributed by two or more producer-exhibitors in important situations tends to induce them to select each other as their first run outlets. This is not because the negotiations by the theatres of A for the films of B are expressly conditioned upon similar negotiations by the theatres of B for the films of A, but because A and B *have a natural community of interest* as both distributors and exhibitors in seeing that the market for the products of both is not disturbed by outsiders interested only in theatre operations."

This theory is carried over in the Government's present brief at pages 56-57, where counsel state: "Each of the defendants selected not only its own theatres but also those of the other defendants for first-run showings * * *."

Although nowhere clearly defined the Government's contention, as we understand it, is that there exists some sort of nation-wide practice among the five producer-exhibitors whereby each of the five, as distributor, favors the theatre of a co-defendant over that of an independent in return for similar treatment where the distributor itself operates a theatre. Apparently in the desire to create a further atmosphere of opprobrium, counsel refer to this alleged practice as "cross-licensing."

corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock."

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, the principal subject organization was again a corporation, *created* to acquire the properties of five distinct concerns which manufactured, distributed and sold in the United States and abroad, 95% of all the domestic cigarette tobacco produced in the United States. It thereafter acquired ownership of other companies, thus obtaining for itself a dominant position in all branches of the tobacco industry. This Court in decreeing dissolution, pointed to the fact that "the very first organization" was created as a result of and to eliminate competitive conditions (221 U. S. at 182).

In the *Reading* cases (*United States* v. *Reading Co.*, 226 U. S. 324 and 253 U. S. 26), according to the Court's opinion in the later case, *a holding company was organized* to provide "complete dominion over two great competing interstate carriers and over two great competing coal companies" (253 U. S. at 59).

United States v. *Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2d), on the other hand, is an example of the second type of monopoly where divestiture has been held the appropriate remedy. There, a single company monopolist, Aluminum Company of America, through alleged exclusionary practices maintained a monopoly of all the virgin ingot aluminum produced in this country and a monopoly amounting to 90% of all aluminum (*i.e.* its own, second, scrap and imported). Divestiture in that case meant the fission of a single organization into competing units which had not previously been separate.

It is altogether clear that Loew's does not come within either group of cases in which the remedy of divestiture is the required relief, for the reason that neither its integrated business nor any part thereof is an illegal monopoly.

Furthermore, in the industry at bar there already exist the separate autonomous companies which the remedy of divestiture is designed to provide. The only relief, which could be warranted is a decree such as that which the District Court has rendered, guaranteeing competition among these companies as well as other units in the industry.

(b) "Cross-licensing" is but an empty catchword—the Government's claim that the producer-exhibitor defendants do not compete with each other is not applicable to Loew's.

The customary meaning of the expression "cross-licensing" as indicated by this Court in the "cracking" case, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 171, is "An *interchange* of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims" and as the Court said, "is frequently necessary if technical advancement is not to be blocked by threatened litigation."[1]

It is clear that the Government in using this term "cross-licensing" throughout the case is seeking to create the impression that there exists here the "interchange" aspects present in the customary agreement for exchange of patent or other rights. In other words, counsel seek to create a picture of a group of competitors pooling licenses either to reduce the competition between them or to advance the development of a single product from which the group will

[1] A true cross-licensing situation is that described by the Court in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 400:

> "In summary, the situation brought about in the glass industry, and existing in 1938, was this: Hartford, with the technical and financial aid of others in the conspiracy, had acquired, by issue to it or assignment from the owners, more than 600 patents. These, with over 100 Corning controlled patents, over 60 Owens patents, over 70 Hazel patents, and some 12 Lynch patents, had been, by cross-licensing agreements, merged into a pool which effectually controlled the industry. This control was exercised to allot production in Corning's field to Corning, and that in restricted classes within the general container field to Owens, Hazel, Thatcher, Ball, and such other smaller manufacturers as the group agreed should be licensed. The result was that 94% of the glass containers manufactured in this country on feeders and formers were made on machinery licensed under the pooled patents."

benefit. Such an impression, so far as this industry is concerned, could not be more completely false.

At the outset it should be made clear: the five companies *never* license each other to act as distributors of their respective motion pictures. Each is in open competition with all the other seven distributors to "sell" its features to as many theatres as possible.[1] There literally is no "cross-licensing" between the five competing companies as distributors. Each does its own distributing to the exclusion of the others, and each copyright of each defendant for each of its pictures has nothing at all to do with the copyright of any other defendant for any of its pictures.

The same is true on the exhibition level. The business of exhibiting motion pictures is obviously a local one.[2] It is carried on in thousands of segregated markets—the "Main

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[1] District Court Opinion, R. 3554:

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures.*"

Government's counsel, in attempting to establish that the theatres of the major defendants do not compete with each other for product, state twice in their brief (pp. 18, 66) that William F. Rodgers, Sales Manager of Loew's, "conceded that there was no competition among the major defendants' theatres in licensing films he sold." In support of this claimed concession the Government refers to R. 572. It is obvious from Mr. Rodger's answer to the next question (R. 573) that in stating that there was no competition for Loew's pictures, he was referring to the situation in those cities where Loew's operates theatres. In those cities, Loew's obviously exhibits its pictures in its own theatres and does not make them available for first-run exhibition to other exhibitors operating there.

[2] "The showing of motion pictures is, of course, a local affair." *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 at 183.

Streets" of the cities and towns across the country. Thus, Loew's "Colonial" in Reading, Pa. is not in the same competitive market as the "Paramount" in Springfield, Mass. The two markets of *exhibition* are wholly separate and distinct. This segregation of markets is of fundamental significance in the industry at bar.

While the five producer-exhibitors own and operate theatres across the country, in any local exhibition market where two or more of them are operating first-run theatres, two or more producer-exhibitors never license *each other's* theatres. They exhibit the first-run of their pictures exclusively in their own theatres.[1] Consequently, there is no "cross-licensing" between these five companies on the exhibition level. Whenever they are operating as exhibitors, they are in open direct competition with each other—undiminished by any license agreements between them.

In an effort to prove that the producer-exhibitor defendants do not compete with each other as exhibitors, the Government states in two places in its brief (pp. 16, 55-56) that of the 922 towns in the country in which defendants own theatre interests there are *only* 47 towns (5%) in

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[1]Loew's sales manager, William F. Rodgers, testified (R. 442-3):

> "Q. Do your theatres always exhibit your own Loew's films? Put it this way: Do Loew's theatres always exhibit Loew's films? A. With one exception.
>
> Q. What is the exception. A. The exception is in Niagara Falls where we have an interest in a theatre in Niagara Falls but our product is played in the theatre of an independent exhibitor."

Government Brief in District Court, p. 19:

> "It appears to be conceded that each distributor normally selects the theatre in which it has a financial interest as its own first-run outlet in the communities where they are located."

which the theatre interests of two or more defendants are "operating in nominal competition with each other." So far as the defendant Loew's is concerned, this statement is so inaccurate as to be absurd. Loew's operates theatres in 42 cities in the United States. (Appendices II and III of this brief.) In 32 of such cities Loew's competes with the theatres of one or more producer-exhibitors. Thus, in 71%, not 5% as the Government asserts, of the cities where Loew's operates there are theatres of one or more of the other producer-exhibitors. In the remaining 10 cities where Loew's operates, without competition from the other producer-exhibitor defendants, there are one or more competing independent first-run theatres. (Appendices II and III of this brief.)

The foregoing establishes, so far as the defendant Loew's is concerned, not only that it is in competition on the exhibition level with the other producer-exhibitors but that the Government's technique of aggregate statistics gives an entirely false picture as to Loew's own situation.

It is, of course, true that when a producer-exhibitor has no theatre in a locality and another producer-exhibitor has, the former may license its pictures for exhibition in the theatre of the latter. This, however, in no way lessens competition as among the five companies here involved. For example, if Paramount licenses a feature or features to Loew's "Colonial" in Reading, Pa., that licensing does not reduce the competition between Loew's and Paramount as exhibitors, for Paramount has no theatre competing in that area, or it would not be licensing another theatre, such as Loew's "Colonial". In this situation, however, the Government claims that there is a pattern of a mutual interchange of interest whereby one producer-exhibitor favors the the-

atre of another over that of an independent in return for the latter favoring the theatre of the former in a different locality. We shall show that as to Loew's this claimed reciprocity does not exist.

(c) There is no pattern of conduct, on the part of the defendant Loew's in dealing with the other four producer-exhibitors, evidencing a plan among them to exchange first-run privileges.

If the defendant Loew's were a party to a nation-wide scheme among the five producer-exhibitors to use each other's theatres as their first-run outlets in preference to, and to the exclusion of, more suitable *independent* theatres, one would expect to find some evidence of the results of such a reciprocal arrangement—a pattern of mutual benefit, one to another, among the five producer-exhibitors. Indeed, without some evidence of that nature there certainly can be no inference of any collective action which would sustain the Government's *aggregation* of these five autonomous companies.

However, in view of the District Court's conclusion that these companies could not be treated "collectively" (Opinion, R. 3553) it is not surprising to find that there is absolutely no proof of reciprocity. Both the testimony[1] and the documentary proof is directly to the contrary.

In the majority of the 36 cities of over 100,000 population where Loew's operates first-run theatres *none* of the other four producer-exhibitors licensed Loew's theatres to the extent of more than three features a year. In this regard, the lower Court found (R. 3686):

> "131. In 21 of the 36 out of the 92 cities where Loew's operates theatres *none* of the other four producer-exhibitors licensed its features in the 1943-

[1] R. 535, 685, 1110, 1512, 1725, 1843 and 1849.

44 season for first-run exhibition in a Loew's theatre, to the extent of more than three features, the Loew's theatres' first-run exhibition being otherwise limited to its own features and those of non theatre-owning producers."

Further proof that there is no pattern or practice of reciprocal interchange of benefit among these five competing companies is the situation in Indianapolis, Louisville, St. Louis and Harrisburg. In those cities Loew's operates the only affiliated first-run theatres. All the competing first-run theatres are independent. (Appendices II and III.) It is of compelling significance that in every one of those four cities Loew's did not have the product of a *single one* of the other four producer-exhibitors. Instead, in each city, all four, Fox, Paramount, RKO and Warner, license the independent first-run theatres to the exclusion of Loew's. (Appendices II and III.)

If there were any doubt as to the fact that Loew's is not engaged in any mutual interchange of benefits with the other four producers-exhibitors, it is conclusively determined by Loew's course of action over the past ten years. During that time Loew's has moved away steadily from the other producer-exhibitors' product toward that of non-theatre-owning distributors. The lower Court so found (R. 3686):

"132. Over the 10 years from 1935 to 1945, the total number of features licensed by the other four theatre-owning distributors to Loew's first-run houses, *decreased* from 1382 to 998 and the features of non theatre-owning distributors, *increased* from 1201 to 1879."

"133. In 1935, the other four theatre-owning distributors earned $2,611,986 from Loew's thea-

tres and the non theatre-owning distributors earned $2,205,330 ($406,656 less). In 1944, the non theatre-owning distributors earned $5,261,116 in Loew's theatres, which was $419,477 more than the $4,841,639, earned in Loew's theatres in that year by the four other theatre-owning distributors."

In view of these facts disproving a mutual interchange of first-run benefits between Loew's and the other producer-exhibitor defendants, there is no basis whatever for the Government's use of aggregated statistics and inferring therefrom a collective monopoly in exhibition (Opinion, R. 3553).

(d) With the disproof of any basis for aggregating the first-run theatres of the five producer-exhibitors, any collective monopoly of distribution must likewise fail.

Proceeding on the basis of aggregating the first-run theatres of the five producer-exhibitors, a premise which we have shown to be false, the Government's theory for a collective monopoly of distribution is that since the first-run theatres of these five companies are to be treated as a unit, the film rentals paid by the theatres of each of them to the five companies, as distributors, should be viewed in the *aggregate*.

So far as the defendant Loew's is concerned, the effect of this latter aggregation is as follows: Loew's theatres pay 71% of their total film rental to Fox, *to Loew's itself* to Paramount, to RKO and to Warner (Find. 127, R. 3685). The crux of this situation, of course, is what Loew's pays to itself. Without including this portion, Fox, Paramount, RKO and Warner, even in the aggregate, receive but a small portion of the total film rentals paid by Loew's theatres.

In view of the utter demolition of the Government's theory for aggregating the first-run theatres of these five companies, we submit that there can be no justification for lumping the film rentals which Loew's theatres pay to itself, with those that its theatres pay for licensing for exhibition the features of Fox, Paramount, RKO and Warner.

How illusory this method is for proving monopoly, is well demonstrated by the District Court's specific finding with respect to the film rentals paid by Loew's in the year 1944. The District Court found (R. 3687):

> "135. In the year 1944, of the total film rental paid by Loew's theatres, 47.9% was *to Loew's itself* for the exhibition of Loew's pictures, and 27.1% was to non theatre-owning distributors. Thus a total of 75% of all film rentals paid by Loew's theatres went to persons other than the four other defendant-producer-exhibitors."

Further indicating the absurdity of this method of establishing monopoly by mere addition, is the lower court's finding that Loew's theatres actually paid higher rentals in 1943-44 to the non-theatre-owning distributors than it did to Fox, RKO and Warner. The lower court found in this regard (R. 3686-7):

> "134. In 1944, the percentage of the total film rental paid by Loew's theatres to each of the non theatre-owning distributors, Columbia (8.8%), United Artists (8.3%) and Universal (7.4%), was *higher* than that paid to each of three producer-exhibitors, RKO (2.1%), Warner Bros. (2.1%) and Twentieth Century Fox (6.1%).

We submit that the District Court was entirely justified in finding that there is no *collective* monopoly of exhibition, and, as a consequence, refusing to find a *collective* monopoly of distribution. Under recognized authorities there is neither need nor justification for disturbing the lower court's decision in that regard. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 182-3; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477; *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

In the *Alabama Power* case, this Court said:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis* v. *Schwartz*, 155 U. S. 631, 636-637; *Adamson* v. *Gilliland*, 242 U. S. 350, 353."

Point II

THE DISTRICT COURT DID NOT ERR IN DENYING DIVESTITURE.

(On the Government's Appeal No. 79)

A. Absent Monopoly, Divestiture is Wholly Unwarranted.

We know of no case where a court has ever held that, absent monopoly, the *Sherman Act* required a completely autonomous company such as Loew's to cut off a major part of its integrated business.

Here in the case at bar, the District Court has affirmatively found that Loew's has no monopoly of exhibition *individually*, or *collectively* with the other producer-exhibitors.

As we have indicated previously, the Government in this Court has made a fundamental change in the theory of monopoly upon which it bases its claim to divorcement. Even if it were successful in establishing a collective monopoly of the five companies, the only appropriate relief, in view of the illegalities found by the District Court, would be a decree enjoining the illegal restraints found, but leaving each integrated company untouched. Apparently aware of this, counsel no longer argue for the collective theory, but only contend in this Court for the proposition that each integrated company is in and of itself an illegal monopolization.

We have shown that neither the *Lehigh, Reading, Yellow Cab, Swift*, nor any other case, supports this improvisation.

Divestiture, of course, is not a penalty specifically prescribed by statute for violations of the Sherman Law. Nor

is there any justification for its use to reduce all participants in a given field of endeavor to a level of equal competitive strength. Its sole use as a tool of equity has been to dissolve the definite recognizable monopoly. Hence, the cases where divestiture has been decreed are limited to two types, the *first*, where companies or properties have been unlawfully combined to create a monopoly, and the *second*, where a single organization has *legally* attained what amounts to a monopoly of a given industry or a part of a given industry but is actively maintaining that position in violation of the Sherman Act. In the first situation divestiture means the breaking up of the illegally created organization and the return of its units to their former separate status. In the second situation divestiture means the fission of a single organization into several units which never have been separate.[1] In either circumstance, however, the application of divestiture is limited to dividing a unified organization, comprising the monopoly, into separate units.

Typical of the former class of cases is *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173. There, it will be recalled, the Crescent Amusement Company and its subsidiary and affiliated theatre companies (none of which was related to any of the defendants at bar) were found to have created and maintained "an unreasonable monopoly of the business of operating theatres in the towns of Tennessee, northern

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[1]The restricted scope of the remedy of divestiture, thus defined, was exactly that stated by the Government in its application to this Court to obtain the deletion of the sentence from the opinion *in U. S.* v. *National Lead Company*, 332 U. S. 319, which reads:

> "Existing precedents of divestiture provide examples of the restoration of a pre-existing separate status to companies or properties which have been unlawfully combined rather than to the fission of units which have never been separate."

Alabama, and central and western Kentucky" and to have followed the practice of insisting that a distributor give them monopoly rights in towns where they had competition or else they would not give the distributor any business in the closed towns where they had no competition. This Court, in referring to the evidence of the defendant circuit's predatory practices, stated, "The mere threat would at times be sufficient and cause the competitor to sell out to the combination 'because his mule was scared.' In that way some of the [Crescent] affiliates were born" (323 U. S. at 181).

Not only is there no such evidence in the case at bar, but in affirming the District Court's judgment of dissolution of the Crescent organization this Court specifically pointed out (323 U. S. at 189):

> "The Court has quite consistently recognized *in this type* of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered *where the creation of the combination is itself the violation.*"

Another case where *the creation of the combination* was itself the violation is *Standard Oil Co.* v. *United States*, 221 U. S. 1. There the subject organization was a corporation organized to acquire and hold the stock of operating companies controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products. In affirming the lower court's decree granting dissolution, this Court pointed out at page 78:

> "It [the lower court decree] commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary

B. Divestiture Is No Remedy For the Illegalities Found.

The gravamen of the illegalities found in the case at bar are not in the ownership of theatres but in methods of doing business, in trade practices engaged in by eight of the largest companies in the industry. There is here no proof of a nation-wide effort to take over all theatre operations, nor is there any indication in the case at bar that Loew's entered upon the business of production and exhibition of motion pictures for the purpose of monopolizing either of those fields or any particular locality in which it operates. In this regard the District Court specifically found (R. 3689-90):

> "152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.
>
> "153. In localities where there is ownership by a single defendant of all the first-run theatres [1], there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.
>
> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but

[1] In no place where Loew's operates, does it own or operate all the first-run theatres (Find. 119; R. 3684; Appendix III to this brief).

in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. *These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.*"

It is clear from these findings that the arbitrary severance of production from exhibition, sought by the Government, would not remedy the trade practices found illegal by the District Court. As that Court itself found (R. 3690);

"156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition."

If, in equity, it still is "an object all sublime, to have the punishment fit the crime", there is no rational justification for the intransigent demand of Government counsel for the nation-wide breaking up of five of the principal units operating in an industry.[1]

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[1]In relying upon the past history of litigation with respect to the motion picture industry, as the Government's brief does on pages 72-89, and in claiming that this demonstrates need for divorcement, the Government completely disregards the controlling fact that until the judgment in the present case, the conduct of the defendants has never been subject to such drastic prohibitions and mandates as are imposed by this decree. Never before were there any injunctions against the insertion in licenses

In view of the findings, above quoted, the opinion of this Court in *U. S.* v. *National Lead Co., et al.*, 332 U. S. 319, 338, and 352-3, is of first importance.

> "This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, *is effective and fair enforcement, not punishment. An understanding of the findings of fact* is essential to an appreciation of the reasons for the decree.
>
> * * * * *
>
> *There is no showing* that four major competing units would be preferable to two, or * * * that six would be better than four. *Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown* vigorous and effective competition between National Lead and du Pont in this field. * * * Such competition suggests that the District Court would do well to remove unlawful handicaps from it *but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants.* It is not for the courts to realign and redirect effective and lawful competition where it already exists *and needs only to be released from restraints that violate the Anti-Trust Laws.* To separate the operating units of going concerns *without more supporting evidence than has been presented here* to establish either the need for, or the feasibility of, such separation *would amount to an abuse of discretion.*"

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of minimum admission prices or against the use of formula deals and master agreements. Nor has there ever been anything like the requirement of picture by picture and theatre by theatre licensing or the requirement of competitive bidding, or the injunction against arbitrarily refusing the demand of an exhibitor for the run demanded by him. None of these cases relied upon by the Government even purported to provide such remedies as the District Court has decreed in the present instance.

C. Prohibiting the Theatre of a Producer-Exhibitor from Exhibiting a Feature Distributed by Another Producer-Exhibitor is Divorcement by Indirection and was Properly Denied.

The Government makes the following assignment of error (R. 3721):

> "5. The Court erred in failing to prohibit the continued use by the major defendants of each other's theatres as exhibition outlets for each other's films."

This demand for an outright proscription against the theatre of a producer-exhibitor exhibiting a feature distributed by another producer-exhibitor, comes as a complete afterthought in the case at bar. It was not mentioned in the amended and supplemental complaint upon which the hearings in the District Court were held. It was not mentioned in the application for modification of the consent decree, which led to those hearings. It was not mentioned in the opening of Government's counsel in the District Court, nor during the hearings. Nor was it ever mentioned in any brief filed by the Government either before or after the hearings. It was raised by Government counsel for the first time during the *closing* arguments at R. 2568 and only after the District Court, following the completed trial and receipt of briefs, expressed the view (R. 2560):

> "Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely unlikely for this court to give. But that

is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course."

The obvious purpose of this last-minute innovation was to accomplish indirectly what was proven so overwhelmingly to be unwarranted in this case; that is, divestiture. And Government counsel acknowledged as much, on being pressed by the court as follows (R. 2570):

> "Judge Hand: Now you are arguing for this *different remedy* and really not arguing for the situation where it might well be said, as they said about Agricola, he made a desert and called it peace.
>
> Mr. Wright: I am merely suggesting that as an alternative remedy. I do not think myself that it is as adequate a remedy of dissolution. *But I point it out as simply another means of attempting to accomplish the same results;* and I say there is nothing in the defendants' attitude to indicate that they would not regard restrictions of that character as any more desirable than the more traditional method of an actual dissolution of these combinations through stock divestiture."

The devastation which this arbitrary proscription would work on this industry cannot be exaggerated.

The Government concedes (Gov't. brief, p. 99) and the District Court found (R. 3689):

> "151. Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. *Such theatres could not be operated on the product of only one distributor.*"

It is obvious, therefore, that this proposal means that Loew's will be obliged either to close up for long periods of time numerous of its theatres or to dispose of them in order to avoid bankruptcy.

The punitive effect of such a proscription is brought home with striking emphasis when it is recalled that in no place where Loew's operates does it have market control or anything approaching monopoly either of theatre holdings or of first-run product.

In those limited localities where such a directive would not compel divorcement on the part of the defendants it would have in addition a serious trade-restraining effect, that would virtually eliminate the competition which the Sherman Act is intended to promote.

In a typical town where an affiliated theatre would be competing with one or more independent theatres[1] the product of the other producer-exhibitors would be carved out of the competitive field and delivered to the independent protected by what would amount to a perpetual franchise. On the other hand, the product of the three non-theatre-owning defendants and non-defendant distributors would naturally be relegated to the theatre of the producer-exhibitor in such locality, again without any competition therefor from the independent exhibitor in that locality, for the simple reason that the independent exhibitor would have the perpetual franchise to which we have referred.

This "channelized" licensing would be nothing more than preserving the "evil" which the suit ostensibly was brought to destroy, and thus indicates the extremes to

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[1]Of the 36 cities of over 100,000 population where Loew's operates first-run theatres there are 21 with competing independent first-run theatres (Find. 149; R. 3689).

which Government's counsel are willing to go to obtain their only goal—divestiture.

In *Bigelow* v. *RKO Radio Pictures, Inc., et al.*, the District Court decreed a fixed-run position for tne theatres of the plaintiff, an independent exhibitor. In reversing, the Circuit Court of Appeals for the 7th Circuit stated 162 F. (2) 520, 524:

> "Thus the plaintiffs seek by the decree a favored fixed position in the scheme which they have sought to destroy, and this on the ground not of the illegal conspiracy but on the ground that the court found they were at an economic disadvantage with the defendant Balaban & Katz Corporation, who owned and operated the Maryland Theatre, because of this defendant's bargaining power as the operator of a chain of theatres. The decree may very properly be used to destroy the conspiracy root, branch, and all its evil fruits, but it may not be used to redress the economic balance between the plaintiffs and the said defendant without a finding that that difference was related directly to the conspiracy. It has been the plaintiffs' contention, as we understand it, that no one has a vested right in a playing position. In this we agree with the plaintiffs. The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position. If the plaintiffs find themselves at a disadvantage because the defendants are economically stronger inasmuch as they are a chain with large bargaining power, the plaintiffs may not, without any finding to support it, obtain a decree vesting them and protecting them in a privileged position ahead of the Maryland Theatre. This does not

appear to us as using the decree to destroy the conspiracy, but rather to preserve the evil in the interest of the plaintiffs."

If this proscription against a theatre of a producer-exhibitor exhibiting a feature of another producer-exhibitor is demanded by Government's counsel for any other purpose than as a subterfuge for divestiture, it can only be to obtain Sherman Act compliance, i.e., to eliminate the conspiracy and restraints of trade which have been found, and to insure competition.

But Government's counsel cavalierly proceed in their argument in support of this new-found substitute for divorcement as though the District Court had entered no decree, where, in fact, it has imposed severe restrictions and curbs on the defendant's freedom of action carefully designed to cure every illegality found and to guarantee competition.[1]

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[1]An indication of the tenuous basis upon which the Government argues for this drastic relief is given on pages 128 and 129 of their brief. In claiming that the alleged illegalities would continue, even without written agreements the Government refers to a particular incident where Paramount the distributor and Loew's the exhibitor came to a serious disagreement in their negotiations for the licensing of Paramount pictures in Loew's theatres in New York City. The Government claims that this dispute had the effect of delaying subsequent run exhibition even though there was no contract in existence. As a result of this deadlock Paramount refused to license to Loew's its pictures from sometime in January, 1945 to sometime in May, 1945, a period of four or five months. If this evidence shows anything it proves that the alleged conspirators were not conspirators at all, for the proof establishes that Paramount during this fight was making extensive surveys to procure other outlets (R. 813).

Similarly, the exhibits referred to on page 129 (Exhibits 243 and 250) as evidencing "net-profit-sharing license agreements"

The manner in which the District Court has completely eliminated the possibility of any illegality resulting from the licensing by one producer-exhibitor of its pictures for exhibition in a theatre of another and the Government's contentions to the contrary are considered in detail in the next point dealing with the adequacy of relief decreed by the District Court.

The District Court's judgment denying total divestiture should not be circumvented by the licensing prohibition now demanded. This judgment, providing injunctive remedies and denying the Government's demand for divestiture was only entered after weeks of hearings and days of argument directed both to the legality of the practices involved and to the appropriateness of the relief prescribed. Furthermore, the District Court has specifically reserved jurisdiction to modify at any time its decree (Judgment, VIII; R. 3701). In view of the care and attention which has been devoted by this District Court to the question of relief

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will on examination show that they were in fact not profit-sharing license agreements at all. In this connection, it is to be noted that Exhibit 243, as reproduced on page 59 of the Government's Appendix as "Master agreement for Paramount films in Loew theatres", under the heading "Examples of License used by Defendants in Dealing with Each Other" is absolutely incorrect because it is not a license agreement at all but merely represents an exchange of correspondence settling a dispute concerning license fees covering feature pictures previously exhibited. This settlement was arrived at after an extended audit which Paramount insisted upon and finally was successful in procuring (R. 809, 810).

This same Exhibit 243 is again summarized at page 91 of the Government Appendix. In designating this as a license agreement and so describing it, the summary is grossly misleading. It is *not* a license agreement. The Government does not refer to the two real license agreements which are in fact contained in Exhibit 243. Each such license agreement covers *one feature picture only.*

in the case at bar, this Court's recent opinion in *International Salt Company* v. *United States* (No. 46, this Term) is most apposite. There the Court said:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *United States* v. *National Lead Co.*, U. S. . *In an equity suit, the end to be served is not punishment of past transgression,* nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."

Point III

THE INJUNCTIVE RELIEF DECREED BY THE DISTRICT COURT IS ENTIRELY ADEQUATE TO ELIMINATE ANY ILLEGAL RESTRAINTS IN DISTRIBUTION OR EXHIBITION.

(On the Government's Appeal No. 79)

Loew's has appealed from the District Court's findings and conclusions of conspiracy and from most of the findings and conclusions as to unreasonable restraints. The argument in support thereof is set forth in the appellant's portion of this brief (Points IV *et seq.*, p. 113). In presenting Loew's argument that the injunctive relief decreed by the District Court is entirely adequate to eliminate any restraints in distribution or exhibition, we do so entirely on the basis that, assuming the findings and conclusions are correct, the relief is entirely adequate to cure all the illegalities.

A. Any Violation of the Sherman Act With Respect to Theatre Admission Prices Has Been Eliminated by the Judgment.

The nature of the "illegality" as to theatre admission prices.

It has been the practice in the past for all defendants including the eight distributor defendants to agree with each of its respective licensees that the licensee should charge no less than a stated admission price during the exhibition of the feature licensed. (See Find. 62, R. 3670.) The lower court found that the minimum admission prices included in the licenses of each of the eight distributor defendants for any

given theatre are in general uniform, "being the usual admission prices currently charged by the exhibitor" (Find. 63, R. 3670).

The District Court concluded that this provision as to minimum admission prices, when included in thousands of license agreements, had the effect of creating a fixed rigid structure of admission prices, not only as between the distributors and their various exhibitors, but as between all exhibitors in the area and as between the distributors themselves (Find. 71, R. 3672).

The court also took the position that the purpose and effect of this requirement of minimum admission prices is to encourage as many patrons as possible to see a feature in the prior-run theatres where they will pay higher prices than in the subsequent runs (Finds. 66, 72; R. 3671, 3672-3).

The lower court's conclusions of law (Nos. 7(a); 8(a) and (b); 9(c) and (d); R. 3691-3), followed a similar pattern, holding that these agreements of the distributor-defendants with their respective licensees violate the Sherman Law.

It should be made clear that the situation created by agreements as to minimum admission price has no relation to whether the distributor defendants should or should not own theatres. While the lower court found that Fox, Loew's, Paramount, RKO and Warner had an interest in maintaining subsequent run minimum admission prices in the areas where they owned theatres (Find. 66; R. 3671), this interest exists on the part of any prior run exhibitor, no matter who might own or operate the theatre. The prior run always has the desire to attract the greatest number of admissions away from the subsequent and into the

prior run. Thus the distributors' practice of including a provision as to minimum admission prices in license agreements is common to affiliated and independent theatres alike. As the District Court said in its opinion (R. 3518):

> "The agreements [as to minimum admission prices] are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners."

It should be obvious therefore that the separation of distribution and exhibition would work no elimination of the rigid admission price structure. Assuming such a condition to exist, this can only come through a prohibition against agreement between distributor and licensee as to the admission price which the latter shall charge at the exhibition of the feature. In this way, even where a distributor owns a prior run theatre it would be impossible for that distributor to restrict any competition as to admission prices which a subsequent run theatre might desire to exercise against the prior run house of the distributor. And this is exactly the remedy which the lower court has applied.

The remedy prescribed with respect to theatre admission prices.

Section II, paragraph 1 of the judgment (R. 3695) enjoins "each of the defendant distributors"

> "From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means."

It is respectfully submitted that this prohibition not only dissolves any "fixed system" as to theatre admission prices, but effectively takes care of every restraint or combination predicated on theatre admission price fixing.[1] Thus, every finding of fact[2] and every conclusion of law,[3] holding that the defendants, including Loew's, have acted illegally with respect to theatre admission prices, have been met completely by the decree.

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[1]The Government charges on page 67 of its brief that while the judgment prohibits price-fixing, clearance largely controls the ability to charge higher prices, and by the distributor's control of the clearance of the prior run the admission prices of the subsequent run can be indirectly controlled. The fallacy in this argument is that the distributor does not have uncontrolled discretion concerning clearance agreements. The judgment, as well as the opinion of the District Court, specify clearly the guideposts to reasonable clearance. The imposition by a distributor of unreasonclearance for the purpose of compelling a subsequent run exhibitor to lower his admission price, or for any other purpose, would clearly therefore be a violation of the decree.

[2]Findings of Fact, Nos. 64 to 72, 84 and 154 (R. 3670-3, 3674, 3690).

[3]Conclusions of Law, Nos. 7(a), 8(a) and (b), and 9(c) and (d) (R. 3691-3).

B. Any Violation of the Sherman Act With Respect to Clearance Has Been Eliminated by the Judgment.

The nature of the "illegality" as to clearance.

While the lower court sustained the legality of clearance *per se* (Opinion, R. 3530-2), it found that the distributor defendants have acquiesced in and formed a uniform system of clearances and "in numerous instances have maintained unreasonable clearances to the prejudice of independents" (Find. 79, R. 3674). The gravamen of the lower court's finding as to clearance is not unlike that with regard to admission prices; that is, the distributor defendants have utilized over-long periods of clearance, in the same manner as maintenance of minimum admission prices, to restrict the competition which subsequent runs might otherwise give to prior exhibitors. In other words, by holding back the later exhibition date and requiring the exhibitor to maintain its admission price, the District Court concluded that greater patronage is funnelled into the more profitable prior exhibition (R. 3533).

One of the principal factors which the lower court relied upon in its condemnation of unreasonable clearances was the *methods of the licensing that prevent changes* in clearances which are unreasonable in length.

As evidence of this the lower court pointed to distributors' franchises, master agreements and formula deals. In describing the stabilizing effect that these methods of licensing have upon clearances, the lower court said (Opinion, R. 3537):

> "Many of the franchises, master agreements, and so-called 'formula deals' which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. * * * Some of the agreements establish clearances for more than a sea-

son. * * * Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement."

The remedy prescribed with respect to clearance.

In the first place, the judgment enjoins all defendants from making or further performing any franchises, formula deals or master agreements. (Judgment, II, pars. 5 and 6, R. 3696.) Henceforth, features cannot be licensed on a circuit basis or on the basis of the season's output of a distributor. *Each* feature must be separately licensed to *each* theatre, "theatre by theatre and picture by picture." (Judgment, II, Par. 8, d, R. 3698.) In other words, the fixed stabilized condition of clearances maintained by means of these long term, broad-coverage agreements is dissolved.

In the second place, the judgment specifically enjoins the distributor-defendants from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances. (Judgment, II, Par. 2; R. 3695.)

In the third place, the lower court has prohibited the granting of any clearance "whatsoever between theatres not in substantial competition." (Judgment, II, Par. 3, R. 3695.)

The lower court prescribes a fourth remedy. It prohibits the distributor defendants from

> "granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted." (Judgment, II, par. 4, R. 3695-6.)

Finally, the lower court has provided that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the dis-

tributor to sustain the legality thereof." (Judgment, II, par. 4, R. 3695-6).

It is respectfully submitted that the first four injunctions, from which Loew's has not appealed, not only dissolve contractual means whereby clearances were "frozen" but assure the elimination of any fixed system of clearance or of any unreasonable clearances. The final directive, however, is wholly unnecessary to correct any of the illegalities found with respect to clearance. The defendant Loew's has assigned as error (R. 3732) this shifting of the burden of proof, and its argument with respect thereto is presented in Point VII of this brief (p. 139).

Once more it might be noted that theatre ownership on the part of distributors is not the root of this problem. Every distributor is interested in "protecting" as much as possible the more lucrative prior run, regardless of whether the distributor owns or operates theatres, for it is from the prior run that the distributor derives its larger film rentals (which are essential, if great, high-cost pictures are to be produced).

Even if distributors were compelled to give up exhibition, this powerful incentive to limit the competition for the prior run theatre would still remain. Of course, the prior run exhibitor, whether or not it is affiliated with a distributor, has a similar interest.

In other words, the same forces which make for stabilized, uniform and unreasonable clearances would still exist, regardless of who owned or operated theatres. The only effective relief, therefore, is that which prevents distributors and exhibitors from giving vent to these forces—from making the license agreements which create the fixed system of clearances and the unreasonable clearances found by the court below. This is precisely the relief prescribed in the decree.

C. Competitive Bidding and the Injunction Against Arbitrary Refusal to License The Run Demanded by any Exhibitor Will Effectively Prevent any Violation of the Sherman Act with Respect to the Granting of Run.

The nature of the "illegality" as to runs.

A further area in which the Government claimed and the lower court found restraint of trade, is in the selection by distributors of the exhibitors to whom they license the prior runs of their feature pictures. Here again, so far as the court's conclusion is concerned, the fundamental evil lies in the *stabilized, unchangeable* condition with respect to the runs granted by the defendant distributors. As in the case of clearance, a factor contributing to the fixed condition as to runs has been the long-term licensing agreements, such as franchises, and licenses on a circuit basis (e.g. master agreements, formula deals), which preclude consideration of local situations.

Said the lower court in its opinion:

> "Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other." (R. 3538).
>
> * * *
>
> "Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for

> the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we have informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres." (R. 3541)

Also making for the stabilized condition of runs is the distributors' practice of doing business on a given run with a satisfactory "old-customer" in preference to an exhibitor who may have a theatre more suitable for the run theretofore licensed to the old customer. Thus, the District Court held that exhibitors have no fair chance to license the runs to which they are entitled on the merits of the situation.

It was all of the foregoing which led the lower court to make the following findings (R. 3674):

> "82. The defendants have acted in concert in their grant of run and clearance."

> "84. Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatre or theatres to which the latter had licensed their pictures."

The remedies prescribed with respect to run.

As it did in the case of admission prices and clearance, the lower court, in its decree, has eliminated completely every means which the lower court held had contributed in any manner to the fixed system of runs that it had found. In addition it has affirmatively provided the machinery which effectuates and guarantees competition in the granting of runs to all exhibitors.

To be specific, the court has prescribed four definite remedies. The first is the prohibition against further use of formula deals, franchises and master agreements. (Judgment, II, pars. 5-7; R. 3696). Not only that, but the decree compels distributors to license their pictures theatre by theatre and picture by picture. (Judgment, II, par. 8(d); R. 3698). Thus, contractual techniques, which in the past have precluded the opening up of the run situation are eliminated both by specific prohibition against their continued use and by affirmative direction that each theatre and each picture be handled individually so as to permit comparison on the merits.

The second remedy is a specific prohibition against favoring the "old customers" or "affiliates." Paragraph 8(b) of Section II of the judgment provides:

> "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;" (R. 3696-7)

These first two remedies open up the field by laying specific prohibitions on the distributor. The third remedy, while also operating as against the distributor, in actuality gives *to every exhibitor* the affirmative means for obtaining *any* run of a distributor's picture, to which the exhibitor

as against its competitors is entitled on the merits; the only exception being that if a distributor happens to have its own theatre in the area, it can show its own pictures there without observing this requirement. Thus Paragraph 9 of Section II of the judgment enjoins each distributor,

> "From *arbitrarily* refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition *on a run selected by the exhibitor*, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand." (R. 3698)

The effect of this provision is to compel a distributor, under penalty of contempt, to recognize the written demand of an exhibitor for a run to which the latter is entitled on the merits. The exhibitor, by offering terms for any run, which are superior to those offered by any other competing exhibitor will thereby get that run. *Thus, Paragraph 9 of Section II of the judgment, in and of itself, accomplishes a fundamental change in the licensing practices of distributors.* It imposes upon them the obligation to consider the relative merits of competing exhibitors and their theatres and to license the feature accordingly.

It is highly significant, we submit, that the Government has not offered a single argument against the adequacy of this paragraph of the judgment to prevent any discrimination with respect to the granting of run. *Nowhere in its brief does it even refer to this paragraph.*

In addition to all the foregoing the lower court has prescribed "competitive bidding."

It is the view of the defendant-appellee Loew's that the competitive bidding prescribed by the judgment is a machinery laid out by the court to assure further that runs be granted on the merits and that distributors do not arbitrarily determine, on a basis of "old customer", "affiliation" and the like, which theatre shall be licensed a particular run of a particular picture.

In other words, "competitive bidding" affords an *optional* means to an exhibitor, in addition to the written demand of Paragraph 9 of Section II, whereby he can make certain that he is not being discriminated against so far as his run position is concerned. The optional aspect, which we refer to, was specifically mentioned by the lower court in its supplementary memorandum of December 31, 1946, filed with the judgment (see R. 3702). There the court said:

> "In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, *the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.*"

This machinery of competitive bidding probably is not perfect in every detail but behind it all is the clear cut principle inherent in Paragraph 9 of Section II of the judgment that the run of a feature must be granted to the exhibitor offering the best terms for it. With this in mind, it is believed that the methods prescribed by the judgment

can be put into effect. After an experimental period, it will be possible to go back to the lower court and point out *with facts derived from experience* where the machinery is weak or requires clarification and wherein it should be changed. It is to be noted that the court has specifically reserved jurisdiction for such a purpose.[1]

At such time as may be appropriate, Loew's will be prepared to offer proof as to its experience with competitive bidding. Following the District Court's proposal of competitive bidding and even though the provisions of the judgment dealing with competitive bidding have been stayed pending the outcome of these appeals, Loew's has been conducting competitive bidding on an experimental basis. The type of proof which it will be prepared to offer is summarized below and the underlying detail is submitted in a schedule under separate cover.

Loew's is licensing its pictures by competitive bidding in 96 situations throughout the United States. This competitive bidding has been and is being conducted in accordance with the principle underlying Paragraph 8, Section II of the District Court Judgment (R. 3696-8), of awarding the feature picture to the exhibitor offering the best terms, without, however, following all the detailed procedure therein set forth. In this bidding, there are 281 theatres involved. The locations of each of these situations, the theatres involved, their seating capacities,

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[1]Judgment Section VIII reads as follows (R. 3701):

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necssary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

the names of their operators, the status of the operator (i.e., affiliated, independent circuit or small independent), and the number of pictures which each theatre has obtained by this method are included in this schedule submitted under separate cover.

In 40 of the 96 situations where Loew's is licensing its features by this method, a producer-exhibitor is involved. Theatres affiliated with Paramount (which opposes competitive bidding; Paramount's Assignment No. 27; R. 3745-6) are involved in 24 of these 40 situations. Theatres affiliated with Fox, are involved in 11 of these situations, with Warner in 7, and with RKO in 2. To date the affiliated theatres have obtained **293** pictures by competitive bidding and the competing independent theatres, **414**.

In 24 of the 96 situations, where independent circuits and a small independent operator are involved, the independent circuits obtained **129** features by competitive bidding and the small independent operator, **212**.

In the remaining 32 situations the bidding occurred between two small independents in 23 situations and between two independent circuits in 9.

None of the foregoing is in evidence in this case. It has all occurred since the date of the District Court's opinion. We emphasize, however, that it represents the kind of proof Loew's will be prepared to offer at such time as it may be appropriate for the District Court to amend or to modify the details or to consider the effectiveness of its decree.

We respectfully submit that this type of evidence, when offered, will be far more useful to a court in evaluating the adequacy of this relief than the untried theories now expounded by Government's counsel in their brief.

As this Court said recently in *International Salt Company* v. *United States* (No. 46, this Term):

> The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of 'enabling any of the parties to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the judgment' and 'for the amendment, modification or termination of any of its provisions . . .' We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. *The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us.* Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below and deny the relief here, upon the present state of the record, without prejudice."

There is strong indication that much of the *intervenor-amici* objection to the machinery of competitive bidding, and to the court's decree with regard thereto, arises more from the fundamental requirement that pictures should be licensed on a basis which makes them available to all comers, picture by picture and theatre by theatre, than it does to mere weaknesses in the machinery.

In the case of would-be intervenors this criticism of the *machinery* of competitive bidding—which in truth is

an attack on the fundamental proposition of opening up the field of runs—arises from an admitted desire to continue the *status quo*.

As indication of this we respectfully refer the Court to the argument of Mr. Robert T. Barton, of counsel to some 2200 independent exhibitors located in the southern states (R. 2834).

Mr. Barton sought to intervene in the lower court on behalf of these exhibitors, *W. C. Allred et al.* (as he seeks to do in this court) and vigorously opposed the lower court's remedy of competitive bidding. After referring at some length to the problems of *"auction-selling"* (R. 2838 *et seq.*), which is not involved in any event,[1] Mr. Barton pointed out (R. 2841, 2847-8):

> "Under the present system, by the course of barter and trade and negotiation, the smaller houses do get first run pictures. They may have [built up], over a period of years, a course of dealing with some producer which has been beneficial to the producer and beneficial to the exhibitor."
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> * * * *
>
> "Mr. Barton: *As far as I know, no, sir, none of my clients have complained of the present system of doing business,* and they feel that they can by

[1] Mr. Wright for the plaintiff (R. 2879-8): "We have not understood the Court's opinion as advocating the institution of an administered system of *actual auction sales* of motion pictures. We read it merely as advocating a competitive disposition of runs by which two or more competing exhibitors might seek to exclude each other in providing that in order to prevent discrimination in awarding such runs, that the high bid, or high offer, in financial terms, should prevail."

Judge Hand (R. 2897): "We never said it should be put on an auction block anyway."

barter and trade and the sense they may put in their transactions properly and efficiently conduct their negotiations with the distributors.

Judge Hand: *Then fortunately or unfortunately you do not represent the class that objects to the status quo. They are well satisfied.* But there seems to be a very large class that does.

Mr. Barton: As to those—and there may be among my clients—these 20 representatives of two or three thousand theatres, there may be a number of whom I do not know who do object. You asked me if I personally knew. But they have said in meetings that they believe that the other strictures which the Court proposes to impose will be adequate to take care of the situation. They think more harm will result to them from auction selling than will be gained by that."

In addition to speaking for the "old-customer" theory and expressing satisfaction with the *"status quo"*, Mr. Barton disclosed that his clients had been and apparently still were, "violently opposed" to the requirement of picture by picture and theatre by theatre licensing and were in favor of block-booking (R. 2846).

Substantially similar criticism was advanced on behalf of *The American Theatres Association*, another would-be intervenor represented by Mr. Thurman Arnold (R. 2820-2833).

It is against this background of opposition to the fundamental principle of opening up the field of runs to all comers, that these vociferous criticisms to the inadequacies of *the machinery* should be viewed. While the defendant Loew's did not seek nor initiate the competitive bidding outlined in the decree of the court below, it contends that it will

assure competitive licensing of pictures, and accordingly it is willing to try it. It is to be expected that after experience the mechanics can be altered, if necessary, to accomplish the fundamental purpose which the court had in mind, which is to open the field of run to competitive conditions.

In view of the outspoken criticism of "competitive bidding" it is interesting to note that it had its origin in paragraphs 113 and 122 of the Government's amended and supplemental complaint (R. 3173, 3177). In those paragraphs it is alleged:

> "The distributor ordinarily negotiates the rental terms to be paid *without any competitive bidding* and only if an agreement is not reached with the exhibitor with whom negotiations for a certain run are started are negotiations undertaken with a competing exhibitor for that run."
>
> * * * * * * * *
>
> "By establishing the runs and protections with respect to all the theatres in the circuit, these franchises deny to other theatres, during their term, *the opportunity to bid for* or to license the runs of pictures covered by such a franchise in competition with the circuit theatres."

In other words, at the time this pleading was filed in 1940 it was the Government's view that the requirements of the Sherman Act demanded that all theatres have "opportunity to bid for or to license the runs of pictures." This relief has now been granted. Its efficacy, when taken with the other injunctive provisions of the decree, can best be determined after a period of experience.

Answering Specific Statements in the Government's Brief Re Competitive Bidding

While we believe that the appropriate time to refute the unsupported assertions included in the Government's brief in opposition to competitive bidding would be in the District Court by competent proof, we cannot permit certain of these contentions to go unchallenged. We shall consider them briefly below.

1.

> "The competitive bidding system has not been suggested or discussed by any of the parties." (Government's brief p. 40)

If the portions of the Government's amended and supplemental complaint quoted on the preceding page did not suggest competitive bidding, it defies the imagination as to what the pleader had in mind.

2.

> "* * * the affiliated exhibitor has the great advantage of the assured supply of its own distributor pictures. The independent has no assured supply and must compete with the affiliated exhibitor for the product of the other distributors." (Government's brief p. 62)

The Copyright Act which gives the right to the copyright owner to exhibit its own product to the exclusion of others is a sufficient answer to this point. Furthermore, the Government's argument is predicated upon an assumption that all competitors should be reduced to the same level. Certainly the Sherman Act was never intended to accomplish this purpose.

3.

"Independents are now in such a weakened bidding position due in large part to the defendants' long continued unlawful conduct that they cannot successfully compete with the major defendants for films." (Government's brief p. 50)

There is absolutely no proof whatsoever in this record even intimating that the independents lack the financial resources with which to bid. There is, on the contrary, affirmative proof in the record that the total number of theatres operating in the United States have increased by 5,471 in the thirteen years preceding the hearings in this case (Exh. L-12) of which approximately 4,800 were independents.[1] Furthermore, at the appropriate time, if it were necessary, Loew's would offer proof that the independent theatres have successfully bid for feature pictures against theatres affiliated with producer-exhibitors, as well as against large circuits.

4.

"'The independent will be attempting to break into a monopolized field against powerful corporations backed by great wealth and resources." (Government's brief p. 62)

In the first place, the characterization "a monopolized field" is contrary to the District Court's holding of no individual or collective monopolization and we have shown that any charges of monopolization against the defendant Loew's is wholly without support.

[1]Cf. Government's Brief, p. 17.

Secondly, the judgment specifically provides that features shall be licensed picture by picture and theatre by theatre and solely upon the merits and without discrimination in favor of affiliates, old customers or others. (Section II, 8 (b) and (d); R. 3697-8)

On the appropriate occasion, Loew's will be prepared to demonstrate by *proof* that the independent has been able to bid successfully for pictures.

5.

> "Finally, in many cities it will be difficult, if not impossible, for the independents to obtain theatres." (Government's brief p. 63)

Again, there is absolutely no proof in the record to sustain this assertion. Indeed, it is directly contradicted by the evidence of the vast increase in the number of operating theatres for over a decade preceding the hearings in this case. (Find. 145; R. 3688)

6.

> "But; undoubtedly, the majors will continue to do business with the same distributors as before and simply out-bid the independent, thereby preventing him from getting any pictures or at least any more than he formerly had. Having the pictures, the major defendants can continue with their clearance over subsequent runs and maintain the same pattern of protection and price control as was created by the conspiracy. (Government's brief, p. 68)

This charge unjustifiably assumes first that the producer-exhibitors will necessarily outbid the independent and secondly, that if a producer-exhibitor licenses pictures from other producer-exhibitors there will be continued the restraint found by the lower court.

As to the first asumption, the defendant Loew's is prepared to offer competent proof that this has not happened and is not likely to happen. As to the second assumption, the Government ignores completely the rigid injunctions imposed by the District Court against unreasonable clearances, admission price-fixing the use of formula deals, franchises and master agreements.

7.

"The competitive bidding system is unworkable." (Government's brief, p. 69)

Again, at the appropriate time Loew's is prepared to demonstrate *with proof* that competitive bidding *is working and is workable.* If the detailed procedure outlined by the District Court requires amendment or modification, the necessary adjustments can be made by the District Court on proof born of experience.

Moreover, if there is question about the workability of competitive bidding, that could readily be eliminated by continuing the arbitration system and by adapting it to settling disputes with respect to competitive bidding. The five major defendants have consented to the maintenance of the arbitration tribunals of which the District Court said: "These tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both Government counsel and counsel for other parties have conceded." (District Court Memorandum in re Findings and Decree R. 3702). We submit that it was within the power of the District Court to continue the arbitration system and to amplify its jurisdiction at least insofar as those five defendants are concerned. (See Point IX of this brief p. 142)

D. Any Violation of the Sherman Act with respect to Theatre Operation has been Eliminated by the Judgment.

Certain of the District Court's findings of fact or parts thereof and certain of its conclusions of law set forth illegalities found against Fox, Loew's, Paramount, RKO and Warner, exclusively *as exhibitors* or *theatre operators.* This point D is directed to demonstrating how those illegalities have been eliminated either by the direct injunction of the judgment or by future prohibition of the distribution practices.

(1) "Pooling" agreements have been eliminated by the judgment.

The first of these illegalities had to do with "pooling" agreements and profit-sharing leases. Both types of these arrangements were exclusively local. By "pooling" agreements, theatres of two or more exhibitors, normally in competition with each other, were jointly operated and their profits pooled and divided according to pre-agreed percentages. Profit-sharing leases, according to the District Court, accomplished the same results (Finds. 112-114; R. 3682). Both were found to violate the Sherman Act and have been henceforth prohibited (Concl. 9 (a); R. 3693; Judgment, III (2) and (3); R. 3698-9).

On December 31, 1946, when the judgment of the District Court was entered the defendant Loew's was not a party to any profit-sharing lease either with another defendant or with an independent. At the time it was a party to a pooling agreement in only two places in the United States. One was Pittsburgh, Pa., involving four

theatres, and the other was Astoria, Long Island, involving five theatres.[1] (Gov't Exhs. 213, 220)

The pooling agreements in the two localities mentioned have now been dissolved and terminated in accordance with the requirement of the judgment, from which Loew's has not appealed.

(2) "Joint Ownerships" have been eliminated by the judgment.

A second form of theatre operation which the District Court has found illegal is the so-called "joint ownership" of theatres by two or more theatre operators, either affiliated or independent. With respect to this situation, the District Court found (R. 3682-3):

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as an inconsequential investment in exhibition.

[1]The Government sets forth in the appendix to its brief at pages 208 to 255 the theatre interests of the producer-exhibitors and labels certain of them, "pools". We see no reason at this time to point out the inaccuracies of the Government in labeling certain theatre interests of Loew's as pools which under the District Court's clear cut definition are not, in fact, pools. Nor is there any need, at this time, to specify the erroneous designations at page 160, *et seq.* of the Government's appendix of certain agreements as "theatre operating agreements", most of which, as to Loew's, are not, in fact, operating agreements at all, but merely ordinary non-profit sharing leases.

116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently."

A brief examination of the District Court's finding of fact No. 117 (R. 3683) will disclose that Loew's is a participant only to a very minor degree in "joint ownerships". The judgment directs that such relationships "shall be terminated within two years"[1] (R. 3699). The defendant

[1]The Government argues at pages 115 to 119 of its brief that the District Court erred in providing that a producer-exhibitor's joint interest with an independent may be dissolved either by a sale to the independent or a third party or by purchase from the independent and, if in the latter case, only after a showing to the satisfaction of the court that such acquisition will not unduly restrain competition in the exhibition of motion pictures. The Government argues that under *United States* v. *Crescent*, 323 U. S. 173 the defendants must be compelled to sell in every case because "only by such a sale may the defendants be deprived of the fruits of their unlawful conduct." The fallacy of this argument is supplied by the Government itself at page 116: "The Court made no inquiry into the precise circumstances under which any particular interest had been acquired * * *". Thus so far as this record is concerned every joint interest between Loew's and an independent should be assumed to have occurred in a perfectly lawful manner. The example referred to by the Government on page 116 of its brief: "For example, Loew's did not license its films for a first-run moreover to independent theatres in Atlanta, Georgia, and Providence, Rhode Island, until it had acquired a 50% interest in them (R. 578-579)", is no evidence whatever concerning the legality or illegality of the interest there involved. The only manner in which the legality of any joint interest can be determined is by competent evidence which could be supplied at the time when application may be made to the court for the

Loew's has joint ownerships with defendants in only two places in the United States: Buffalo, N. Y., and Denver, Colorado. As to these joint ownerships with defendants Loew's presses no appeal. On the other hand, the defendant Loew's challenges the District Court's decision with regard to joint ownerships between a defendant and an independent, and it appeals from that part of the findings, conclusions and judgment below which hold such relations *per se* illegal. Its appeal in that regard is presented in Point VI of this brief (pp. 135-138).

(3) All trade practices wherein the defendants have been found to violate the Sherman Act as exhibitors have been eliminated by the prohibition against such practices on the part of distributors.

The trade practices wherein the defendants were found to have violated the Sherman Act, *qua* exhibitors, are the same trade practices wherein the eight defendants are held to have violated the Sherman Act, as distributors. Thus, Conclusion of Law No. 9 (R. 3693) holds:

> "The exhibitor-defendants, * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both before and after the entry of said consent decree, in violation of the Sherman Act by:
>
> * * *
>
> (c) Conspiring with each other and with the distributor-defendants to fix substantially uniform

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purchase of the interest of the independent as provided in the decree. The requirement in the judgment for prior court approval is complete assurance that no illegality can result from the acquisition from an independent of any joint interest by any defendant.

minimum motion pictures theatre admission prices, runs, and clearances;

(d) Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms."

We have heretofore shown how the District Court has eliminated all illegalities with respect to admission prices, clearance and run, by specific injunction against the distributors (Judgment, II; R. 3695). Since the eight distributor-defendants are thus prohibited from engaging in these trade practices, it naturally follows that it is impossible for the exhibitor-defendants to do so.

ARGUMENT AS APPELLANT ON APPEAL NO. 80

Point IV.

THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT LOEW'S AND THE OTHER DEFENDANTS COMBINED AND CONSPIRED *TO RESTRAIN TRADE* IN DISTRIBUTION AND EXHIBITION OF MOTION PICTURES.

The defendant-appellant Loew's assignments of errors, Nos. 3-13, 15-18, 20-24, 32, 36 and 37 (R. 3728-3736), challenge the findings, conclusions and portions of the judgment dealing with the District Court's decision that the eight defendants by certain trade practices conspired and combined *to restrain trade* in the distribution and exhibition of motion pictures.

The District Court's findings of the existence of combination and conspiracy *to restrain trade* are not predicated upon any *specific agreement* among either the eight or the five defendants. The record is utterly barren of any such proof. Indeed, there is specific testimony to the contrary on the part of each defendant (R. 535, 1843, 1849, 1110, 685, 1725, 1512). The findings of combination and conspiracy *to restrain trade* rest entirely upon *inferences,* inferences which in turn rest solely on trade practices.

We must emphasize that there is in the case at bar no evidence that any of the defendants, individually or in combination, committed any predatory act against an independent. Indeed, *the plaintiff did not offer the testimony of one single exhibitor that he had been injured by any activity of the defendants.* The entire case of combination and conspiracy *to restrain trade* rests upon the licensing

practices such as minimum admission prices in license contracts, clearances, runs, and methods of licensing, i.e. formula deals, master agreements and franchises.

It is Loew's position that none of these licensing practices or the conditions flowing therefrom warrant the drawing of an *inference* that the defendants have combined and conspired. Its argument with respect to each of these trade practices is briefly summarized below:

Minimum Admission Prices

The District Court drew the inference that the defendant distributors had combined and conspired with respect to admission prices from what it termed *uniformity of action* among the distributors. "Such uniformity of action spells a deliberately unlawful system," according to the District Court (Opinion, R. 3524).

In considering the question of admission prices it should be made clear at the outset that there is absolutely no proof of uniformity in theatre admission prices as between competing theatres. *The uniformity exists only in the case of a single theatre.* It occurs in the separate contracts made between a theatre operator and the various defendant-distributors who license their features for exhibition in that theatre. In each of these contracts there is set forth a minimum admission price which the theatre operator agrees to charge during the exhibition of the feature licensed (Find. 62; R. 3670). The court found, "There exists great similarity, and in many cases identity, in the minimum prices fixed *for the same theatres* in the licenses of all of the defendants" (Find. 66; R. 3671). However, there is not one particle of evidence that this similarity, identity or uni-

formity in the minimum admission price contained in the contracts of the various distributors licensing the same theatre is the result of agreement *between the distributors.*

In that regard, the case at bar differs decisively from the conventional price-fixing cases, such as *United States* v. *Trenton Potteries,* 273 U. S. 392, *United States* v. *Masonite Corporation,* 316 U. S. 265, or *Interstate Circuit* v. *U. S.,* 306 U. S. 208. Here, the alleged price-fixing combination is predicated solely on an inference drawn from the fact of uniformity itself. But that uniformity occurs solely because the theatre operator, as a matter of good showmanship, continues a constant admission price from day to day no matter whose feature is being exhibited, and from the fact that it is he, the theatre operator, who sets the minimum admission price which he will charge and which appears in his license agreements with the various distributors. The District Court itself found (R. 3670):

> "63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, *being the usual admission prices currently charged by the exhibitor.*"

This uniformity in the case at bar, therefore, does not establish the existence of a price-fixing system set up by the concerted action of the distributors. At most, it is evidence of exhibitors themselves catering to their steady customers to whom frequent changes in admission prices of a theatre are irritating and annoying.

While all distributors licensing a given theatre obviously know the admission price "currently charged by the exhibitor", it is the latter alone who, by the constancy of the price which he charges for admission to his theatre, is

responsible for the uniformity in the minimum prices specified in his separate contracts with the respective distributors. Indeed, it is difficult to conceive how dissimilarity could be injected into the admission prices at which the various distributors' pictures are exhibited to the public *without a distributor* actually interfering with and *determining the admission price* policy of the exhibitor against his will.

In the past the only contractual deterrent to an exhibitor's changing the admission price of his theatre at relatively short intervals was the long term license agreement, i.e. the franchise or the former practice of licensing a season's product under a single agreement. It might be argued that a provision with respect to minimum admission prices when included in these methods of licensing introduced immutability in a single theatre's admission prices and in turn created, as to a larger number of theatres, what amounted to a fixed system of admission prices, as the District Court found (Find. 64; R. 3670-1). The facts are, however, that since the time of the consent decree in 1940 Loew's had made absolutely no franchises and has followed a practice of licensing pictures in small blocks (generally not more than five), (R. 426-427, 552; Find. 94; R. 3676). And the same is true as to the other four consenting defendants (Find. 94; R. 3676). Furthermore, at the time of the trial Loew's had outstanding no franchise agreements for any theatre in which it did not have an interest (Find. 90, R. 3675). It is entirely clear, therefore, that for the five years preceding the hearings in the lower court all exhibitors to whom Loew's licensed its pictures were entirely free to alter their admission prices at relatively short intervals as they saw fit.

Since we have demonstrated the reasons why uniformity has occurred in the minimum admission prices contained in the respective license agreements of the distributors licensing a given theatre and since Government's counsel offered no proof whatsoever to challenge these lawful business reasons, we submit that the District Court's inference or presumption, which rests solely on uniformity, was improperly drawn as a matter of law.

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." *Lincoln* v. *French*, 105 U. S. 614, 617.

See also, *Pennsylvania Railroad Co.* v. *Chamberlain, Administratrix*, 288 U. S. 333, 340-341; *Fresh* v. *Gilson, et al.*, 41 U. S. 327, 331.

It was only upon the basis of this *combination* or *conspiracy* improperly inferred from uniformity, that the District Court henceforth enjoined the inclusion in license contracts of any provision with respect to minimum admission price (Judgment, II, 1; R. 3695; see Opinion, R. 3520-4). That injunction, we submit, is wholly unwarranted not only because the inference of combination and conspiracy was error, but because it is rendered unnecessary by the requirement of the judgment that henceforth all the defendant distributors must license on a picture by picture basis (Judgment, II, 1; R. 3695), a provision of the judgment to which the defendant Loew's has not assigned error.

This picture by picture licensing, unrestricted by long term agreements, will eliminate any possibility of a fixed system of prices from which the exhibitor cannot deviate.

Henceforth the inclusion of a minimum admission price in this form of license agreement will not be a fixing of the admission prices in any sense by the distributor. Its only effect will be to assure the distributor (particularly in the case of licenses based upon a percentage of the gross) of the film revenue under the license which was negotiated and granted on the basis of the admission price which the exhibitor determined to charge during the exhibition of the particular feature in question, a contractual protection to which the distributor is clearly entitled under the provisions of the Copyright Law, 17 U. S. C. Section 1; Appendix I, hereto. (As to this right of the distributor to insert a minimum admission price in a license agreement see Point VIII of this brief at pages 119-120.)

Clearance

The District Court held that "the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system." (Opinion R. 3584) Findings and conclusions of law that the defendant-distributors have combined and conspired with respect to clearance were likewise made (Finds. 79-82 and 84; Concls. 7(b), 8(c) and 9(c); R. 3674, 3692-3). To these findings and conclusions the defendant Loew's has assigned error (Nos. 15-18 and 20-24; R. 3743-3745).

As in the case of minimum admission prices, the lower court's decision that the defendants have combined and conspired with respect to clearance rests solely upon *infer-*

ence. This inference is drawn from the uniformity of the periods of clearance granted to a given theatre by the distributors licensing that theatre, and from the fact that the period of clearance for each such theatre remains constant for relatively long periods of time.

Here as in the case of admission prices there is a lawful business explanation of this uniformity and constancy, sufficient to rebut any inference of conspiracy.

The reason for uniformity as to clearance is, however, not the same as in the case of minimum admission prices. In the latter case it was due to the inclusion in an exhibitor's license agreements with his respective distributors of "the usual admission prices currently charged by the exhibitor" (Find. 63; R. 3670); in other words, the uniformity was due to the exhibitor's fixing a price for admission to his theatre and continuing that price no matter whose picture was exhibited.

Clearance, on the other hand, is not fixed by the exhibitor alone. It is determined as a result of negotiation between the prior-run operator and the distributor licensing him a feature. The theatre operator obviously seeks to obtain the maximum period over the competing subsequent runs. The distributor on his part, however, contemplates licensing his picture to other operators and for that reason negotiates with the prior-run the proper period that should elapse before the picture is again shown in that competitive area. That period is controlled by such factors as size, location, transit facilities, etc. relative to the theatres involved (Opinion, R. 3533-4). Those factors are the criteria of clearance no matter whose pictures are involved. Consequently whatever period is proper as to one distributor is proper as to others.

There are additional perfectly lawful reasons which also make for uniformity as to clearance. One of the important aspects in the operation of a theatre is the "booking" of pictures licensed. In booking his theatre, a subsequent run exhibitor finds it most difficult, if not impossible, to book his theatre if he is subject to varying clearances from different distributors. In the case of a subsequent run exhibitor playing double features and changing his program two or three times a week, there is involved the booking of two or three hundred pictures a year. Thus it is the exhibitor who insists upon being subject to the same clearance from all distributors from whom he licenses pictures so that his booking problem will be facilitated (R. 714). In the case of prior-run exhibitors, there is also an insistence upon the part of such exhibitor to obtain from every distributor the longest period of clearance which he has been able to negotiate from any of them (R. 711). It is thus clear that uniformity in clearance as to a particular theatre is not the result of any agreement or concerted action among distributors, but on the contrary, it is only the result of these practical considerations inherent in the business which impel *exhibitors and not distributors* to seek uniform clearances.

Cogent proof that these are the reasons for uniformity of clearance and not any conspiracy or combination among distributors, is found in the fact that of the hundreds of cases as to clearance tried and determined by the Arbitrators and the Appeal Board under the Arbitration System established by the consent decree, not one decision specifies a different clearance as applying to different distributors.

The action of the arbitrators and Appeal Board in making the same findings of clearance with respect to each of the consenting defendants is of particular significance.

Sitting as independent outside arbiters, over a period of years, and making their determinations only after listening to the witnesses and receiving detailed evidence underlying each situation, they have come to the conclusion in each instance that the same clearance should apply to each distributor.

Similarly the fact that clearance between two theatres remains constant over relatively long periods of time offers no basis for inferring combination or conspiracy among distributors. Because the factors or criteria determining clearance, such as size, location, transit facilities, etc., relative to the theatres in question, by their very nature usually remain constant, it is to be expected that the period of clearance once determined will not change. In this connection it should be noted that there has not been a single case since the inception of the Arbitration System under the consent decree in 1940 where an exhibitor because of changed conditions sought a modification of an award fixing the maximum clearance. This opportunity for modification of an award based upon change in conditions was afforded every exhibitor by section VIII of the consent decree (R. 3379-81).

The lower court placed reliance on the long term license agreements, i.e. franchises as well as the license agreements covering one season, as tending to impart permanency to periods of clearance (Opinion, R. 3537-8). However, in this connection it is again important to note that commencing with the consent decree in 1940, five years prior to the hearings in this case, the five major defendants discontinued granting either franchises or license agreements covering even one season (Consent Decree, IV; R. 3375). Since the consent decree Loew's practice has been to license pictures in relatively small blocks or individually as to special features (Find. 94; R. 3576; R. 552).

Further disproving any combination or conspiracy among the distributors as to clearance is the undertaking, embodied in the consent decree, by the five consenting defendants to permit the arbitration of the reasonableness of any clearance. Prior to the consent decree a distributor had entire discretion in the granting of clearance. The surrender of this prerogative in 1940 by the five consenting distributors is fundamentally inconsistent with a finding that Loew's was engaging in a conspiracy with these other four defendants to forward a uniform system of clearances.

Upon the foregoing we submit that the District Court erred in its findings and conclusions that Loew's together with the other defendants combined and conspired with respect to clearance.

Run

The District Court found that "The defendants have acted in concert in their grant of run" and that "Both independent distributors and exhibitors, when attempting to bargain with the defendants have been met by a fixed scale of clearance, *runs*, and admission prices to which they have been obliged to conform, if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendant's theatre or theatres to which the latter had licensed their pictures." (Finds. 82, 84; R. 3674). Corresponding conclusions of law that the defendants had combined and conspired with respect to *run* were made (Concls. 7(b), 8(c) and 9(c) and (d); R. 3691-3693). The appellant Loew's has assigned error to these findings and conclusions (Nos. 17, 20-22; R. 3732-3733).

Whether or not Loew's has combined and conspired with the other defendants to create a fixed system of runs

can only be determined by examining its activities as a distributor and as an exhibitor in the licensing of runs.

The defendant Loew's offered detailed, specific proof with respect to its activities as a distributor (R. 450-499), and this proof established that in licensing its product, Loew's was guided solely by the merits of the theatres involved and by the maximum revenue it could obtain from the theatres licensed. The witness Rodgers, who was the official responsible for setting the sales policy in connection with the licensing of Metro-Goldwyn-Mayer pictures testified that the theatres which received these pictures first-run in the 92 largest cities in the country, were the ones from which he anticipated greatest revenue (R. 476, 574). The Government offered not one jot of proof in rebuttal. We submit that the uncontradicted testimony in this regard rebuts any inference of conspiracy in the granting of run.

The Government's statistical presentation indicating that in the majority of the 92 largest cities Metro pictures are licensed first-run for exhibition in affiliated theatres is of no significance whatsoever to prove that these theatres were licensed pursuant to a conspiracy. In the first place, 36 of the 92 cities are accounted for by reason of the fact that Loew's operates its own first-run theatres there (Find. 149, R. 3689). As to the remaining cities, where Loew's has no theatres, Government counsel offered no proof whatsoever that any independent operator was entitled on the merits of the situation to the run that Loew's licensed to another producer-exhibitor. On the contrary, there is affirmative proof that the affiliated theatres so licensed by Loew's were better than or at least as good as any of the independent theatres (R. 450-499).

With respect to Loew's activities as an exhibitor, the District Court made specific factual findings which disprove any combination or conspiracy on its part with respect to the licensing of run. These findings, Nos. 131 to 135 (R. 3686-3687), show that the other four producer-exhibitor defendants licensed first-run of their respective pictures to Loew's competitors (including independents) to a far greater extent than to Loew's. As heretofore pointed out Loew's operates theatres in 36 of the 92 cities with over 100,000 population. In 21 of those 36 cities during the 1943-1944 season, every one of the other four producer-exhibitors regularly licensed their product first-run not to Loew's theatres, but to other theatres in direct competition with Loew's (Find. 131; R. 3686). These findings also establish that over the ten year period from 1935 to 1945, there was a decrease in the number of features licensed by the other four theatre-owning distributors to Loew's first-run theatres; and a corresponding increase in the use by Loew's theatres of the features of the non-theatre-owning distributors (Finds. 132, 133; R. 3686).

As to the District Court's finding of a *fixed* condition of runs, the same lawful business explanation applies as in the case of clearance. The factors which constitute the criteria for the selection of a given theatre as a first-run theatre do not change from day to day or from year to year. Thus, the factors which make the Radio City Music Hall in New York City the choice as a first-run theatre have not changed over the fifteen year period of its operation.

In view of the utter lack of proof as to any combination or conspiracy with respect to run and in view of the affirmative proof to the contrary offered by the defendant Loew's and other defendants it is respectfully submitted that the

District Court erred in its finding and conclusion of combination and conspiracy.

Formula Deals, Master Agreements and Franchises.

The lower court made the following conclusion of law with respect to formula deals, master agreements and franchises:

> "The formula deals, master agreements and franchises referred to in Findings 86, 88 and 89 have tended to restrain trade and violate Section 1 of the Sherman Act." (Concl. 10; R. 3693)

The defendant Loew's has not assigned error to the findings referred to or to this conclusion of law or to the portions of the judgment prohibiting the future use of formula deals, master agreements (blanket deals) or franchises, for the reason that these trade practices have played a relatively small part in the distribution of Metro pictures. On the other hand, *to the extent that the court may have inferred from these licensing practices a combination or conspiracy* among the producer-exhibitor defendants to create a fixed system of runs, clearances and admission prices, the defendant Loew's urges its assignments of errors to the findings of fact and conclusions of law in that regard (Nos. 3-13, 15-18, 20-24, 32, 36 and 37; R. 3728-3736).

An analysis of *the evidence* relating to Loew's use of franchises, master agreements and formula deals, both as a distributor and as an exhibitor is absurdly insufficient to establish any conspiracy or combination by Loew's with the other producer-exhibitor defendants and equally demon-

strates the insignificant use of these distribution practices in Loew's business.

As to formula deals the court found "Loew's is not and never has been a party, either as a distributor or as an exhibitor, to any 'formula deal' license agreements" (Find. 87; R. 3675).

With respect to franchises granted to Loew's theatres by other producer-exhibitors the evidence shows that Loew's theatres were *never* granted any franchise by RKO or Warner, only *one* franchise by Fox covering only *one* first-run situation in *one* city in the United States and only two franchises by Paramount, both of which expired over ten years ago (Gov't. Exh. 396).

With respect to franchises granted by Loew's as a distributor the undisputed facts are as follows. The consent decree in 1940 prohibited the future granting of franchises by requiring the licensing of features in blocks of no more than five pictures and the court found that "Loew's today has outstanding no franchise agreements for any theatre in which it does not have an interest and Loew's is not currently granting franchises * * *" (Find. No. 90; R. 3675).

Throughout its entire history Loew's as a distributor granted independent theatre operators more than twice as many franchises as it granted to the producer-exhibitor defendants (Find. 90; R. 3675). This proof completely defeats any inference of conspiracy or combination that might be drawn from the relatively small number of franchises granted to producer-exhibitor defendants (Find. 90; R. 3675).

So far as master agreements (blanket deals covering not more than a season's product, as distinguished from

franchises covering a longer period) with other producer-exhibitors are concerned there is evidence of only *one* such agreement between Loew's as an exhibitor and another producer-exhibitor defendant (Gov't. Exh. 243). So far as Loew's use of master agreements *as a distributor* is concerned there is in evidence only *one* exhibit showing Loew's licensing on a master deal basis. This exhibit, (Gov't. Exh. 250), consists of eleven exhibition contracts covering in all the licensing of thirty-three pictures to a subsidiary of Paramount for exhibition in subsequent-run theatres all located in one city.

There is no evidence showing that Loew's either as a distributor or as an exhibitor made any master agreements whatsoever with RKO, Fox or Warner.

In considering these trade practices and the conditions flowing therefrom, we emphasize again how very tenuous and innocuous is the proof upon which the "combination and conspiracy" in the case at bar rest. We submit that the District Court erred in finding that Loew's combined and conspired in any respect to restrain trade in exhibition and distribution.

Point V.

THE DISTRICT COURT ERRED IN IMPOSING A PROHIBITION UPON LOEW'S EXPANDING ITS THEATRE HOLDINGS.

(On Loew's Appeal No. 80)

A. *Loew's Exemplary Record* in the Exhibition Field Warrants Particular Consideration.

Section III, Paragraph (6) of the judgment provides (R. 3698, 3700):

> "Each of the defendant exhibitors * * * is hereby enjoined and restrained:
>
> * * *
>
> (6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph."

The "preceding paragraph" enjoins the defendants from continuing to own any beneficial interest in a theatre in conjunction with another defendant or an independent. To terminate such a *joint* interest, the preceding paragraph permits a defendant to acquire the interest of the other defendant or of the independent, providing it is shown to the satisfaction of the Court, and "the Court shall first find that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures" (R. 3699).

After the entry of the judgment, the defendant Loew's and others moved in the District Court to amend Paragraph (6) of Section III of the judgment, which imposes the absolute prohibition on expansion, so as to read as follows (R. 3704):

"From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or *except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures.* Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court."

This motion was denied without opinion (R. 3720).

Loew's assigned error to Section III, Paragraph (6) of the judgment as well as to the denial of the motion just mentioned (Assignments Nos. 30 and 31; R. 3735).

Loew's history as an operator of theatres presents an outstanding record of healthy anti-monopolistic development which there is no justification or reason for arresting.

These are the facts:

1) Loew's has no "closed town" and no first-run monopoly (Appendices II and III; Exh. L-15).

2) Loew's has competition from first-run theatres as well as subsequent-run theatres in every place where it operates (Appendices II and III; Exh. L-15).

3) There is independent first-run competition in 21 of the 36 cities with over 100,000 population where Loew's operates; and in the remaining 56 cities of over 100,000 population, Loew's operates no theatres whatsoever (Find. 149; R. 3689).

4) Loew's operates only 131 theatres, which constitute but 7/1000 of the total theatres operating in the United States (Exh. L-12; cf. Find. 118; R. 3684).

5) Loew's theatres are located in a total of 42 cities across the United States (Appendices II and III).

6) There has been an increase of only 9 theatres in the thirteen year period from 1932 to the date of the hearings below (Exh. L-12).

7) There has been no engrossing of the film supply by Loew's theatres (Finds. 131, 134; R. 3686).

8) There has been a consistent favoring by Loew's theatres of the product of non-theatre owning distributors over that of the other four producer-exhibitors (Finds. 132-133; R. 3684).

9) There is no evidence of Loew's buying out any competing exhibitor or of any competitor even going out of business or of any predatory practice whatsoever on the part of Loew's.

10) There is no evidence that any Loew's theatre was acquired in any other than a normal, lawful manner or that any such acquisition restrained competition in any manner.

This record, we submit, is so outstanding as to merit particular consideration being given to the defendant Loew's.

B. The Judgment Should Be Modified to Permit Loew's to Acquire Additional Theatres with Court Approval.

The District Court having recognized the fundamental right of those engaged in the production of motion pictures to operate theatres (Opinion, R. 3554), and having further found that Loew's did not have a monopoly of exhibition either individually or collectively (Find. 119; R. 3684), and that the illegalities here were in trade practices and not in theatre ownership (Find. 154; R. 3690), it defies the imagination to supply an explanation for the court's *legislative* action terminating all future growth of theatre operation by Loew's. Admitting, *arguendo*, every finding, every conclusion of law and every condemnatory statement of the opinion, there still is no support whatsoever in the record, or otherwise, for this arbitrary termination of development which has been the keystone of American industry and which in the case of Loew's has certainly never been abused.

The trade practices which the District Court found illegal consist of "admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals," etc. (Find. 154; R. 3690), and the court has now taken drastic action effectively designed to eliminate these trade practices. Loew's has taken no appeal from the prohibition against formula deals, master agreements and franchises (Judgment II, 5 and 6; R. 3696). Nor has it appealed from those provisions of the judgment requiring theatre by theatre and picture by picture licensing, or from the injunction against arbitrarily refusing the demand of an exhibitor for a run and the provision for competitive bidding (Judgment II, 8 and 9; R. 3696-7).

With these rigid controls in effect, it will be altogether impossible in the future operation of any theatre that Loew's *might hereafter acquire* to impair in any manner the competitive opportunities of independents owning theatres presently in existence or of independents who would build or acquire theatres in the future. With the additional requirement that any acquisition be subject to court approval, any law violation in connection with the acquisition itself is inconceivable.

Without permissive growth Loew's with the comparatively small number of theatres which it operates across the United States, to wit, 131, is faced with a static existence which is the very antithesis of the development that competition is designed to promote.

The present provision against normal growth, which prohibits Loew's from building or acquiring a theatre in a "closed town" of another exhibitor (independent or affiliated), or in a city where another exhibitor has a first-run monopoly, is fundamentally at variance with the underlying principle of the Sherman Act.

Moreover, in a locality where Loew's as a distributor is unable to obtain exhibition of its pictures by reason of the monopoly power exercised by the exhibitor operating in such locality, Loew's should be free, with court approval, to obtain or establish exhibition facilities of its own. This would not only afford Loew's an outlet for its product in that locality, but would make it possible for the public there to see Loew's pictures.

Finally, under the present prohibition, it will be altogether impossible for Loew's to meet changing economic trends and developments, such as shifts in population, major changes in transit facilities, etc., which are inevitable over the years.

It is thus clear that there is neither justification nor need for the *absolute arrest of Loew's further theatre development* now prescribed by the judgment.

The injunction, therefore, is wholly punitive. And its punitive character is particularly evident in the case of Loew's, where throughout its history its growth has been in only the most moderate manner. Even in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 186, where, unlike the case at bar, predatory practices were found, this Court held:

> "Where the proclivity for unlawful activity has been as manifest as is here, the Decree should operate as an effective deterrent to the repetition of the unlawful conduct and *yet not stand as a barrier to healthy growth on a competitive basis.*"

In its opinion in the case at bar the District Court recognized the principle enunciated in the *Crescent* opinion when it said (R. 3562):

> "Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the Court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interest in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. *But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this Court or other competent authority shall approve the acquisition after due application is made therefor.*"

This written expression of opinion was carried over to the oral argument with respect to the proposed judgment. At R. 3057-58, the following exchange took place between counsel and the Court:

> "Mr. Seymour: Now I will pass on, if I may to section 5 at the top of page 5. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says 'from expanding its present theatre holdings in any manner whatsoever.' Now, that is directly in the teeth of your Honor's opinion.
>
> Judge Hand: We are not going to have any such drastic provision as that. We considered that."

From the time the lower court rendered its opinion and from the time of the argument at which this colloquy took place to the date of the entry of the judgment, there was no additional evidence or even argument on this point to afford a basis for the change in the court's position.

We respectfully submit that the District Court was in error when it imposed against Loew's the absolute prohibition upon growth or development of theatre operation and that the judgment should be modified to provide for expansion subject to court approval.

Point VI.

THE DISTRICT COURT ERRED IN ENJOINING LOEW'S FROM OWNING ANY BENEFICIAL INTEREST IN A THEATRE WITH AN INDEPENDENT.

(On Loew's Appeal No. 803)

On this phase of the appeal, Loew's is not attacking that part of the District Court's judgment which prohibits Loew's from owning any beneficial interest in a theatre with a co-defendant. Its attack is directed exclusively upon the provision of the judgment whereby the defendants are directed to terminate all joint ownerships with an independent.

The judgment provides (Section III, R. 3698-9):

> "Each of the defendant exhibitors * * * is hereby enjoined and restrained:
>
> (5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with * * * an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years."

The judgment further provides that the relationships between the defendants and independents shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defend-

ants (R. 3699). In the event a defendant desires to acquire the interest of the independent it must be shown to the satisfaction of the court, and the court must first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures (R. 3699).

This portion of the judgment requiring termination of joint interests with independents as well as defendants, was based on the following findings of the District Court (R. 3682-3):

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, * * *, in some cases in conjunction with the independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as inconsequential investment in exhibition.
>
> 116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres, independently." (R. 3682-3).

With regard to these joint ownerships, the Court made the following conclusions of law (R. 3693):

> "9. The exhibitor-defendants, * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures both

before and after the entry of said consent decree, in violation of the Sherman Act by:

* * *

(b) Jointly owning motion picture theatres * * * with independents through stock interests in theatre buildings;"

The appellant Loew's assigned error to these findings, this conclusion of law and to the portion of the judgment which compels dissolution of these joint interests with independents (Nos. 25 and 26; R. 3733-4).

If these findings Nos. 115 and 116 cannot stand for lack of proof, the conclusion of law and injunction based thereon obviously must fall. Not only is there no proof whatever in this record to sustain these findings, but there was not even a scintilla of evidence tendered by either party with respect thereto. The Government on its part did not urge either in its pleadings, at the hearings or in argument the illegality of joint stock interests, and the defendants, having no knowledge that they were obliged to meet any such charge, were deprived of the opportunity to present facts to meet this phantom issue.

Consequently, the record is barren of *any* proof whatsoever as to how these joint ownerships with an independent came about.

It is wholly consistent with anything that appears in the record, that a defendant's joint interest in a theatre might be with an important employee who never had either the capital, the desire or the intent to operate independently in competition with the defendant, but who acquired his joint interest as a reward for prior years' services and as an incentive to future endeavor. Furthermore, for all that appears in this record, a defendant's joint interest in a theatre might be with a former operator who went out of

the exhibition business not because of any law violation by the defendant, but rather solely by reason of his retirement from business on account of ill health. *If an opportunity were afforded to the defendants to present facts on this issue,* any number of perfectly lawful explanations could be given as to the manner in which these joint interests with independents came about.

Thus, the record is devoid of any basis for the court's gratuitous assumption in finding No. 116 that "both joint owners wish to participate * * * in the business of exhibiting motion pictures." Furthermore, the record is also lacking in proof that anyone such as a former operator who retired on account of ill health but retained his half-interest is "directly or indirectly participating in the business of exhibiting motion pictures" (Find. 116; R. 3683). It is equally wrong to assume that a joint owner, such as an important employee or an operator retiring on account of ill health, "otherwise would be in a position to operate theatres, independently" (Find. 116; R. 3683).

The foregoing also demonstrates the fallacy of the court's statement in finding No. 115 that these "joint interests enable the major defendants to operate theatres collectively rather than competitively". If the joint owner were a former operator who retired because of ill health, or an important employee who was given a joint interest as described above, it defies logic to assume that this individual would be operating a theatre in competition with the defendant but for such joint interest.

We submit that every part of findings Nos. 115 and 116 are nothing but outright assumptions of facts, facts which were neither charged in the petition nor litigated at the trial. The conclusion of law and injunctive relief based on these findings must therefore be reversed.

Point VII.

THE DISTRICT COURT ERRED IN DECREEING THAT WHENEVER ANY CLEARANCE PROVISION IS ATTACKED AS NOT LEGAL UNDER THE PROVISIONS OF THIS DECREE, THE BURDEN SHALL BE UPON THE DISTRIBUTOR TO SUSTAIN THE LEGALITY THEREOF.

(On Loew's Appeal No. 80.)

Loew's assigned error (No. 19; R. 3732) to Paragraph 4 of Section II of the judgment below (R. 3695-6) decreeing that

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

It is Loew's position that this arbitrary transfer of the burden of proof alters one of the most fundamental principles of jurisprudence, is unwarranted and is an unconstitutional deprivation of its right to due process of law. *National Labor Relations Board* v. *Whittier Mills Co., et al.*, 123 F. (2d) 725, 727 (C. C. A. 5th); *National Labor Relations Board* v. *Knoxville Pub. Co.*, 124 F. (2d) 875, 879 (C. C. A. 6th); *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 238 (C. C. A. 8th), cert. den., 311 U. S. 699, rehearing den., 311 U. S. 730.

Point VIII.

THE DISTRICT COURT ERRED IN ENJOINING LOEW'S FROM AGREEING WITH A LICENSEE THAT THE LATTER SHOULD CHARGE A SPECIFIED MINIMUM ADMISSION PRICE DURING THE EXHIBITION OF THE FEATURE LICENSED.

(On Loew's Appeal No. 80.)

Loew's assignment of error No. 1 (R. 3728) challenges Section II, 1 of the judgment, which enjoins each of the distributor-defendants from granting any license in which minimum prices for admission to a theatre are fixed by the parties. Loew's assignment of error No. 2 (R. 3728) challenges the District Court's failure to conclude that a distributor-defendant has a lawful right under the Copyright Act and under the common law to agree with its licensee that the latter shall charge a price not less than that specified in the license agreement during the exhibition of the feature licensed. And, finally, Loew's by its assignment of error No. 14 (R. 3731) attacks the District Court's failure to find that the Copyright Act and the common law permit a provision as to minimum admission price in the license agreement during the exhibition of a feature as a "road-show".

It is Loew's position that it is essential in the conduct of its business and that it has a fundamental right under the Copyright Act and the common law to protect the value of its copyrighted motion pictures by the insertion of minimum admission prices in license agreements with its licensees. For the detailed argument with respect to this, we respectfully refer the Court to the "Brief For RKO Defendants" at pages 58-67.

As to features exhibited on a road-show basis, it is submitted that there is an even greater need to insure the film rentals from their exhibition in order to recoup the unusually large production costs, and thus, *a fortiori*, the right to provide for minimum admission prices in license agreements covering such exhibitions should be recognized. For the detailed argument with respect to this, we again respectfully refer the Court to the "Brief for RKO Defendants" at pages 68-71.

Point IX.

THE DISTRICT COURT ERRED IN FAILING TO CONCLUDE THAT IT HAD POWER TO CONTINUE THE ARBITRATION SYSTEM CREATED BY THE CONSENT DECREE AND TO PROVIDE FOR THE ARBITRATION OF DISPUTES BETWEEN EXHIBITORS AND DEFENDANTS ARISING UNDER THE PRESENT JUDGMENT.

(On Loew's Appeal No. 80.)

The appellant Loew's by its assignments of errors Nos. 34 and 35 (R. 3736) puts in issue the legal conclusion of the District Court that it did not have power to continue the arbitration system established by the consent decree of November 20, 1940, which system it found in the past has "dealt with trade disputes particularly those as to clearance and runs, with rare efficiency, as both government and counsel for other parties have conceded" (Memorandum in re Findings and Decree; R. 3702) and as to the future would be "effective and result in quick and expeditious decisions and a saving of time and money". (Find. 160, R. 3690-1).

It is Loew's position that the District Court had power to continue the arbitration system established by its decree of November 20, 1940, and to provide for the arbitration of disputes between exhibitors and defendants arising under the present judgment. *Chrysler Corporation* v. *U. S.*, 316 U. S. 556; *United States* v. *Swift & Co.*, 286 U. S. 106; *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. C. Del.).

For further argument in support of this position we respectfully refer the Court to the brief for Twentieth Century-Fox Film Corporation at pages 36-42.

CONCLUSION

The findings, conclusions and judgment of the District Court to the extent that they are appealed from by the Government on Appeal No. 79 should be affirmed.

The findings, conclusions and judgment of the District Court to the extent that they are appealed from by Loew's on Appeal No. 80 should be reversed.

Respectfully submitted,

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February 2, 1948.

APPENDIX I

Pertinent Provisions of the Sherman Anti-Trust Act (15 U. S. C. §§ 1, 2 and 4):

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor; * * *"

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Pertinent Provisions of the Copyright Act (17 U. S. C. §§ 1 and 5):

"Sec. 1. That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or; if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;

* * * * *

Sec. 5. That the application for registration shall specify to which the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays: * * *

APPENDIX II.

LOEW'S FIRST RUN THEATRES AND COMPETING FIRST-RUN THEATRES

in Cities of over 100,000 Population (36 in all)

AKRON, OHIO

Theatre[1]	Capacity[1]	Operator[1]	Affiliation[2]	Product[3]	
Colonial	1750	Fiber & Shea	Independent	(Fox	
				(RKO	⅓
Strand	1160	Warner Bros	War	War	
Palace	2083	Katz & Chatkin	Independent	(Uni	
				(Par	⅓
				(RKO	⅓
				(Col	
*Loew's**	*2986*			*Loew's*	*29*
				UA	*19*
				Par	*16*

ATLANTA, GA.

Fox	4661)			(Par	
Paramount	2475)	Lucas & Jenkins	Par	(Fox	
Roxy	2200)			(War	
Capital	2100)			(Uni	
				(RKO (except Goldwyn)	
Rialto	983	Murray	Independent	(Col	
				(Goldwyn	
				(RKO)	
Rhodes	723	Lucas & Jenkins	Loew's		
Grand	*2044*			*Loew's*	*28*
				UA	*9*

Abbreviations

Loew's Metro-Goldwyn-Mayer	Loew's
20th Cent. Fox	Fox
Paramount	Par
RKO	RKO
Warner Bros.	War
Columbia	Col
Universal	Uni
United Artists	UA

Sources

1—Exh. L-13, L-17, 48
2—Exh. 156-163, 359-360
3—Exh. L-17, 44, 58, 84, 95, 129, 145, 147, 349. (Products listed are limited to those of 8 defendants)

*Throughout this table, theatres *operated* by Loew's are set forth in italics beneath the center line ———— . In the 1943-44 season Loew's distributed a total of 33 features.

BALTIMORE, MD.

Theatre	Capacity	Operator	Affiliation	Product	
Stanley	3250	War	War	(War (Par	½
Hippodrome	2205	Rappaport	Independent	(RKO (Col	
New	1200	Mechanic	Independent	Fox	
Keiths	2400	Shanberger	Independent	(Uni (Par	½
Century	*2996*			*Loew's* *UA*	*29* *7*
Valencia	*1460*			*Loew's* *UA*	*31* *9*

BOSTON, MASS.

Metropolitan Fenway Paramount	4278) 1873) 1798)	M & P	Par	(Fox (Par (War	⅓
Keiths Memorial	2907	RKO	RKO	(Uni (RKO	
Keiths Boston	3223	RKO	RKO	(Fox	½
Majestic	1036	Brandt	Independent		
State	*3536*			*Loew's* *UA* *Col*	*29* *10* *20*
Orpheum	*2890*			*Loew's* *UA* *Col*	*27* *10* *18*

BRIDGEPORT, CONN.

Warner	1332	Warner Bros	War	(Par (RKO (War	½
Merritt	1000	" "	"	UA part	
Poli	*3642*			*Loew's* *UA* *Col* *Uni* *Fox* *RKO*	*20* *3* *20* *19* *20* *9*

BRIDGEPORT, CONN. (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
Majestic	2252			Loew's	9
				UA	7
				Col	14
				Uni	25
				Fox	8
				RKO	8
Globe	1909			Loew's	20
				UA	4
				Col	17
				Uni	16
				Fox	22
				RKO	8
Lyric	2166			Loew's	14
				UA	11
				Col	7
				Uni	5
				Fox	9
				RKO	7

BUFFALO, N. Y.

Lafayette	2988	Basil Bros.	Independent	(Uni	
				(Col	
				(UA	
				([Part]	
Century	3042	20th Century Corp.	Independent	(RKO	
				(War	
				([Part]	
Great Lakes	3028		Loew's-Par*-Ind	Loew's	9
				Par	9
				War	3
				UA	3
				Fox	7
Hipprodrome	2091		Loew's-Par*-Ind	Loew's	16
				Par	21
				War	11
				UA	5
				Fox	16
Buffalo	3488		Loew's-Par*-Ind	Loew's	17
				Par	17
				War	10
				UA	7
				Fox	19

*The joint interest of Loew's and Paramount in these theatres must be terminated pursuant to section III(5) of the judgment (R. 3698-9).

CANTON, OHIO

Theatre	Capacity	Operator	Affiliation	Product
Palace	1892	Interstate	Independent	(Fox (RKO (Col
Ohio	854	Warner Bros.	War	(War (Uni

Loew's	*2126*	*Loew's*	*31*
		UA	*17*
		Par	*30*

CLEVELAND, OHIO

Palace	3193	RKO	RKO	(Fox
Allen	3003	RKO	RKO	(Col
Hippodrome	3468	War	War	(RKO
Lake	800	War	War	(Uni (War

State	*3436*	*Loew's*	*23*
		UA	*4*
		Par	*14*
Stillman	*1813*	*Loew's*	*25*
		UA	*7*
		Par	*11*
Ohio	*1305*	*Loew's*	*16*
		UA	*4*
		Par	*9*

COLUMBUS, OHIO

RKO Palace	3013	RKO	RKO	(RKO (Fox ½ (Uni (War
" Grand	1200			

Ohio	*3079*	*Loew's*	*25*
		UA	*2*
		Par	*23*
		Col	*24*
		Fox	*9*

COLUMBUS, OHIO (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
Broad	*2393*			*Loew's*	*19*
				UA	*7*
				Par	*14*
				Col	*18*
				Fox	*7*
				War	*5*

DAYTON, OHIO

Keith's	2698)			(Fox	
RKO Colonial	1709)	RKO	RKO	(Col	
State	1000)			(RKO	
				(Par	
				(Uni	
Victory	1416	Wm. Keyes	Independent	War	
Loew's	*2305*			*Loew's*	*27*
				UA	*8*

HARTFORD, CONN.

Allyn	1995	M & P	Par	Par	
Strand	1520	Warner	War	(UA	⅓
Regal	928	Warner	War	(War	
				(RKO	⅓
				(Uni	⅓
E. M. Loew's	1250	E. M. Loew	Independent	Col	
				Uni	⅓
State	3908	Harris	Independent		
Dow's	1293	Dow	Independent		
Poli	*3061*			*Loew's*	*31*
				UA	*3*
				Fox	*27*
				RKO	*20*
				Col	*2*
				Uni	*1*
Palace	*1719*			*Loew's*	*30*
				UA	*3*
				Fox	*26*
				RKO	*18*
				Col	*2*

HOUSTON, TEXAS

Theatre	Capacity	Operator	Affiliation	Product	
Metropolitan	2320)			(Par	
Majestic	2250)	Interstate	Par	(RKO	
Kirby	1464)			(Col	
				(Uni	
				(War	
				(Fox	
				(UA	
State	*2521*			*Loew's*	*27*
				UA	*8*

INDIANAPOLIS, IND.

Circle	2624			(War	
Indiana	3131	Dolle & Katz	Independent	(Par	
Lyric	1850			(Fox	
				(RKO	
				(Uni	
Keiths	1300	Keiths Op. Co.	Independent		
Loew's	*2446*			*Loew's*	*31*
				UA	*12*
				Col	*23*

JERSEY CITY, N. J.

Stanley	4332	Warner	War	(RKO	
				(War	
State	2168	Skouras	Independent	(Fox	
				(Col	⅓
				(Uni	
				(Par	
Loew's	*3187*			*Loew's*	*32*
				UA	*14*
				Col	*20*

KANSAS CITY, MO.

Theatre	Capacity	Operator	Affiliation	Product	
Orpheum	1538	RKO	RKO	(RKO (War	 ⅓
Newman	1800	Paramount	Par	Par War	 ⅓
Esquire Uptown Fairway Tower	800) 2043) 702) 2000)	Fox Midwest	Fox	(Uni (Fox	
Midland	*3573*			*Loew's* *UA* *Col* RKO	*32* *11* *31* *1*

LOUISVILLE, KY.

Rialto Strand	3063) 1865)	Dolle	Independent	(Uni (RKO (Par (Fox	
Mary Anderson	1147	Peo. Th. Co.	Independent	War	
Brown	1499	Dolle	Loew's*		
National	2310	Ind.	Independent		
State	*3274*			*Loew's* *UA* *Col* *RKO*	*31* *12* *37* *1*

MEMPHIS, TENN.

Malco Strand	2900) 1200)	Lightman (Malco)	Par	(UA part (Par (Col (Uni (RKO part	
Warner	2000	Warner Bros.	War	War	

*Loew's interest in this theatre has terminated.

MEMPHIS, TENN. (Continued)

Theatre	Capacity	Operator	Affiliation	Product	
State	*2550*			*Loew's*	*14*
				UA	*6*
				Fox	*11*
				RKO	*7*
Palace	*2154*			*Loew's*	*16*
				UA	*3*
				Fox	*12*
				RKO	*10*

NASHVILLE, TENN.

Paramount	1862)			(Par	
Knickerbocker	1100)	Sudekum	Independent	(War	
Princess	1250)			(Fox	
				(RKO	
Vendome	*1580*			*Loew's*	*27*
				UA	*7*
				Col	*6*
				Uni	*3*
				RKO	*6*

NEWARK, N. J.

Branford	2966	Warner	War	(War	
				(Uni	
				(Col	½
Paramount	1996	Adams	Par	Par	
Proctor's Palace	2233	RKO	RKO	(RKO	
				(Fox	
Adams	1900	Adams	Par		
State	*2589*			*Loew's*	*32*
				UA	*14*
				Col	*20*

NEW HAVEN, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
Paramount	2353	M & P	Par	(Par	
				(Uni	½
Roger Sherman	2060	Warners	War	(War	
				(RKO	½
				(Uni	½
				(UA	½
Poli	*3008*			*Loew's*	*24*
				UA	*4*
				Col	*22*
				Fox	*24*
				RKO	*16*
College	*1499*			*Loew's*	*21*
				UA	*3*
				Col	*17*
				Fox	*26*
				RKO	*8*
Bijou	*1429*			*Loew's*	*9*
				Col	*17*
				Fox	*5*
				Par	*2*
				RKO	*9*
				UA	*2*
				Uni	*3*
				War	*1*

NEW ORLEANS, LA.

Saenger	3400)			(Par	
Tudor	700)	Richards	Par	(Fox	
Globe	532)			(War	½
Orpheum	2200	Singer	RKO	(RKO	
Liberty	1250	Singer		(Col	
				(War	½
				(Uni	
State	*3284*			*Loew's*	*27*
				UA	*4*
				Fox	*1*
				Uni	*2*

NEW YORK, N. Y.

Theatre	Capacity	Operator	Affiliation	Product	
Music Hall	5945	Radio City Music Hall	Ind.	(RKO (Loew's (Col, Fox	
Paramount	3664	Par	Par	Par	
Roxy	5850	Roxy Theatre Inc.	Fox	Fox	
Hollywood	1527	Warner	War	War	
Strand	2699	Stanley Mark	War	War	
Rivoli	2098	Biddle Realty Corp.	Par	(Par (Fox	
Rialto	594	Arthur Mayer	Independent		
Gotham	810	Brandt	"		
Globe	4270	"	"	Loew's	
Republic	1225	"	"		
Victoria	705	City Ent. Corp.	"		
Palace	1715	RKO	RKO	RKO	
Ambassador	1118	Siritzky	Independent		
Winter Garden	1250				
Capitol	*4560*			*Loew's*	*7*
				Uni	*2*
				Col	*1*
				UA	*3*
				RKO	*1*
*Criterion**	*1626*			*Loew's*	*1*
				Uni	*13*
				Col	*3*
				Par	*1*
				UA	*1*
*Astor**	*1135*			*Loew's*	*5*

NORFOLK, VA.

Norva	1719)	Fabian	Loew's**	Par	
Granby	1173)			Fox	
Newport	778	Wilder	Independent	(RKO	
Center	1600	"	"	(Uni	
				(Col	
Colly	780	"	"	(War	
State	*2069*			*Loew's*	*27*
				UA	*9*
				Par	*1*
				War	*1*

*Loew's interest in this theatre has terminated (L-13).

**Loew's interest in these theatres was limited to a pooling agreement with the Independent, Fabian. This pooling agreement has terminated.

PITTSBURGH, PA.

Theatre	Capacity	Operator	Affiliation	Product	
Stanley	3729)			(War	
Warner	1919)	Warner Bros.	War-Loew's*	(Par	⅓
Ritz	783)			(RKO	
Harris	2145)			(Col	
Senator	1840)	Harris	Independent	(Fox	⅔
				(Uni	⅓
Fulton	1800	Shea	Independent	Uni	⅓
				Fox	⅔
Barry	1740	Varsity Amus. Co.	Independent		

Penn	*3487*	*Loew's*	*14*
		UA	*1*
		Par	*11*
		RKO	*7*
		War	*9*

PROVIDENCE, R. I.

Fay's Majestic	2258)			(Fox	
Fay	1938)	Ed. Fay	Independent	(War	
				(Uni	⅓
Albee	2239	RKO	RKO	(RKO	
				(Uni	⅓
Strand	1500	Reed	Independent	Par	
				Col part	
Empire	1500	Independent			
Carlton	1439	Ed. Fay	Loew's		

State	*3232*	*Loew's*	*30*
		UA	*9*
		Col	*21*
		RKO	*1*
		Uni	*3*
		War	*1*

*Loew's interest in these three theatres was by way of pooling agreement. In accordance with the terms of the judgment of the District Court (Section III (2); R. 3698), this pooling agreement has been terminated. Of these three theatres Loew's today operates or has an interest in only the Ritz.

READING, PA.

Theatre	Capacity	Operator	Affiliation	Product
Embassy	2446)	Fabian	Independent	(Fox
	)			(Par
Ritz	1228)			(Col
Warner's	1261	Warner	War	War
Astor	2476)	Jay Emanuel	Independent	(RKO
Park	1561)			(Uni

Colonial	*1755*	*Loew's*	*27*
		UA	*10*
		Col	*1*
		Fox	*1*

RICHMOND, VA.

Colonial	1514)			(Par
National	1528)	Fabian	Loew's*	(UA part
				(War
State	700)			(Col
Capitol	700)	Thalheimer	Independent	(RKO
Byrd	1396)			(Uni
				(Fox

Loew's	*2197*	*Loew's*	*27*
		UA	*9*
		War	*3*
		Par	*1*

ROCHESTER, N. Y.

Keiths Palace	2951)			(War
Century	2135)	RKO	RKO	(Par
Temple	1495)	Comerford		(Fox
Regent	1592)			(Col

Loew's	*3661*	*Loew's*	*29*
		UA	*8*
		Col	*34*
		Uni	*2*

*Loew's interest in these theatres was limited to a pooling agreement with the Independent, Fabian. This pooling agreement has terminated.

ST. LOUIS, MO.

Theatre	Capacity	Operator	Affiliation	Product	
Ambassador Fox Missouri St. Louis Shubert	3000) 5000) 3000) 3788) 1550)	Harry Arthur	Independent	(Par (Col (Fox (War (RKO (Uni	⅓
State	*3162*			*Loew's* *UA* *Col* *RKO* *Uni*	*27* *11* *35* *1* *2*
Orpheum	*1904*			*Loew's* *UA* *Col* *Par*	*34* *13* *27* *1*

SPRINGFIELD, MASS.

Capitol Art	1765) 955)	Warners	War	(War (UA (Uni (RKO	½ ½ ½
Paramount	2800	Goldstein	Par	(RKO (Par	½
Bijou	1100	Independent	Independent	(Col (Uni	½
Poli	*2611*			*Loew's* *UA* *Fox* *RKO*	*31* *10* *29* *4*

SYRACUSE, N. Y.

Keiths Paramount Eckel Empire	2514) 1493) 1446) 1171)	RKO-Schine	RKO	(Par (War (Uni (RKO (Fox	
State	*2902*			*Loew's* *UA* *Col* *RKO* *Uni*	*27* *11* *35* *1* *2*
Strand	*1600*			*Loew's* *UA* *Col* *RKO*	*38* *8* *33* *1*

TOLEDO, OHIO

Theatre	Capacity	Operator	Affiliation	Product	
Paramount	3408)			(Par	
Princess	940)	Balaban & Katz	Par	(Fox	
				(War	⅓
Rivoli	2455)			(RKO	
Pantheon	920)	Skirball	Independent	(Uni	
Granada	1274)			(Col	
				(War	⅓

Valentine	*1459*	*Loew's*	*32*
		UA	*7*
		Col	*1*
		RKO	*2*
Esquire	*887*	*Loew's*	*36*
		UA	*14*
		Col	*1*
		Fox	*1*
		RKO	*1*

WASHINGTON, D. C.

Earle	2218)			(War	
Metropolitan	2000)	Warners	War	(Par	⅓
				(Col	
Keiths	1500	RKO	RKO	(RKO	
				(Uni	

Capitol	*3434*	*Loew's*	*19*
		UA	*5*
		Par	*5*
		Fox	*13*
		RKO	*1*
		Uni	*2*
Palace	*2403*	*Loew's*	*10*
		UA	*1*
		Par	*4*
		Fox	*9*
Columbia	*1210*	*Loew's*	*24*
		Fox	*13*
		Par	*6*
		UA	*4*

WILMINGTON, DEL.

Theatre	Capacity	Operator	Affiliation	Product	
Warner Queen Grand	1785) 1449) 1314)	Warner	War	(Par (Col (Uni (War (RKO	
Rialto	732	Belair	Independent	Fox	
Aldine	*1783*			*Loew's* *UA*	*28* *9*

WORCESTER, MASS.

Warners	1334	Warner Bros.	War	(UA (RKO (Uni (War	⅓ ⅓ ⅓
Capitol	1898	M & P	Par	(Par (RKO (Uni	¼ ½
Poli	*3238*			*Loew's* *UA* *Col* *Fox* *RKO*	*33* *5* *28* *22* *8*
Elm St.	*2344*			*Loew's* *UA* *Col* *Fox* *RKO*	*26* *3* *27* *26* *10*

YONKERS, N. Y.

Proctors	2043	RKO	RKO	(RKO (Fox- (War (Uni	½
Loew's	*2616*			*Loew's* *Col* *Par* *Uni* *UA*	*36* *37* *28* *27* *15*

APPENDIX III.

LOEW'S FIRST-RUN THEATRES AND COMPETING FIRST-RUN THEATRES

in Cities of under 100,000 Population (6 in all)

EVANSVILLE, IND.

Theatre[1]	Capacity[1]	Operator[1]	Affiliation[2]	Product[3]
Grand	Not in evid.	Fine Bros.	Independent	(RKO
Carlton	"			(War
American	"			(Col*

Victory	2279	*Loew's*	22
		UA	6
		Par	23
		Fox	16
		Uni	22
Majestic	980	*Loew's*	9
		UA	10
		Par	11
		Fox	17
		Uni	28
		War	6

HARRISBURG, PA.

Colonial	Not in evid.	Fabian	Independent	(War
State	"			(Par
Rio	"			(Fox
				(Col**
Senate	"	Jay Emanuel	Independent	(RKO
				(Uni

Loew's	1530	*Loew's*	28
		UA	10
		War	1

Sources

1—Exh. L-17, 41, 42, 57, 82, 94, 126, 139, 365, 369.
2—Exh. 156-136, 359, 360.
3—Exh. L-17, 41, 42, 57, 82, 94, 126, 139, 365, 369.

*R. 2396.
**R. 2397.

MERIDEN, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
Capitol	Not in evid.	Ricci	Independent	(RKO (War (Uni	½
Palace	*1666*			*Loew's* *UA* *Col* *Fox* *RKO ½* *Par*	*32* *13* *41* *29* *21* *23*
Poli	*1035*			*Operated Weekends Winter & Fall*	

NIAGARA FALLS, N. Y.

Strand Cataract	Not in evid.)	Hayman Estate	Independent	(Loew's (Col (RKO (Fox (Uni	
Bellevue	*1535*			*UA* *War* *Par* *RKO* *Loew's*	*14* *24* *31* *2* *2*

NORWICH, CONN.

Palace	1251*	Warner	War	(Col (Uni (RKO (Par (War	½
Poli	*822*			*Loew's* *Fox* *UA* *RKO*	*31* *34* *9* *20*

*Exh. RKO-11.

WATERBURY, CONN.

Theatre	Capacity	Operator	Affiliation	Product	
State	1954*	Warner	War	(Col	
				(Uni	
				(UA	
				(Par	
				(RKO	
				(War	
Poli	*3419*			*Loew's*	*28*
				UA	*5*
				Fox	*27*
				RKO	*11*
				Col	*2*
Strand	*1499*			*Loew's*	*25*
				UA	*11*
				Fox	*14*
				RKO	*5*
				Col	*4*
				Par	*1*
				Uni	*2*

*Exh. RKO-11.

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Supreme Court of the United States

OCTOBER TERM—1947

No. 79

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 81

PARAMOUNT PICTURES, INC. and PARAMOUNT FILM DISTRIBUTING CORPORATION,
Appellants,

vs.

THE UNITED STATES OF AMERICA,

On Direct Appeal from the District Court of the United States for the Southern District of New York

BRIEF FOR PARAMOUNT PICTURES, INC. AND PARAMOUNT FILM DISTRIBUTING CORPORATION

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Supreme Court of the United States

OCTOBER TERM—1947

No. 79

THE UNITED STATES OF AMERICA,
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PARAMOUNT PICTURES, INC. PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 81

PARAMOUNT PICTURES, INC. and PARAMOUNT FILM DISTRIBUTING CORPORATION,
Appellants,

vs.

THE UNITED STATES OF AMERICA

BRIEF FOR PARAMOUNT PICTURES, INC. AND PARAMOUNT FILM DISTRIBUTING CORPORATION

Opinions Below

The opinion of the District Court (R. 3504) is reported in 66 F. Supp. 323 and the Findings of Fact, Conclusions of Law and Decree and a supplemental opinion (R. 3659-3702) are reported in 70 F. Supp. 53.

Jurisdiction and Statutes Involved

This suit in equity was commenced by the United States on July 20, 1938, pursuant to Section 4 of the Sherman Act,

for injunctions and other relief against agreements and acts alleged to violate Sections 1 and 2 of said Act.*

Final decree was entered December 31, 1946 (R. 3694). Petitions for appeal were filed by and allowed to all parties (R. 3725, 3737, 3751, 3762, 3767, 3804).

Jurisdiction is conferred by Section 2 of the Expediting Act (15 U. S. C. 29; 32 Stat. 823) and Section 238 of the Judicial Code (28 U. S. C. 345).

Probable jurisdiction was noted on June 23, 1947 (R. 3840).

Proceedings in the Court Below

Suit was commenced by the filing of a petition on July 20, 1938. Answers were filed and various preliminary proceedings were had and the case first went to trial in June, 1940 before a single District Judge. At the conclusion of the opening statements, the trial was adjourned for the purpose of enabling the parties to negotiate a consent decree. These negotiations continued without substantial interruption until November, 1940 with four representatives of the Department of Justice participating. A proposed decree was formulated and presented to the District Judge who ordered a public hearing upon notice to all interested persons representing every phase of the industry. Such a hearing was held in November, 1940 and following it, an amended and supplemental complaint was filed (R. 3137), and the defendants filed their answers denying all its material allegations (R. 3201-3372). On November 20, 1940, a Consent Decree was entered to which the Government

*15 U. S. C. 1 and 2; Act of July 2, 1890, Ch. 647; 26 Stat. 209, printed in Appendix A hereto together with the pertinent provisions of the Copyright Act.

and five of the eight groups of defendants were parties* (R. 3373). The trial was adjourned as to the three non-consenting groups of defendants, Columbia, Universal and United Artists.

On August 7, 1944 the Government filed a motion for a modification of the Consent Decree (R. 3414) and on February 5, 1945, it filed a motion for a temporary injunction against continuance of certain trade practices (R. 3420). It then moved to have the case set for trial (R. 3448-9). While the motion for a temporary injunction, which was never decided, was *sub judice*, it filed an expediting certificate asking for the designation of a special court of three judges to hear and determine the case (R. 3502). Thereafter such a court was convened composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright. Trial was commenced on October 8, 1945 and was concluded November 20, 1945. The printed minutes of the trial consume some 2,500 pages, and in addition, the record consists of over 450 exhibits on behalf of the Government, and approximately 140 exhibits on behalf of the defendants.**

The Government's case was entirely documentary, no witnesses being produced except two in rebuttal for the purpose of identifying compilations which they had made from exhibits. The defendants, on the other hand, produced in the aggregate 23 witnesses, among whom were their high-ranking executives expert in the production, distribution, and exhibition branches. With the Government's consent that they should be equivalent to oral testimony, the defend-

*Paramount, Loew's, RKO, Warner and Twentieth Century-Fox.

**The exhibits were so voluminous that, by stipulation of counsel, printing of them was omitted (R. 3825-29).

ants supplemented the oral testimony with numerous affidavits of executives and other persons with personal knowledge of the facts (R. 1044, 1227, 1230, 1246, 1552, 1794, 1824, 1838, 1844, 1850, 1873, 1891, 1923, 1924, 1927, 1928, 1937, 1966-2146, 2147, 2149, 2153, 2486; Exs. P 24, 24A, 25, 25A).

The trial court rendered its opinion on June 11, 1946 (R. 3504; 66 F. Supp. 323). Thereafter proposed findings of fact, conclusions of law and proposed decrees were submitted by the Government and by the defendants and a hearing was held with respect to the proposals. The minutes of this hearing are in the printed record (R. 2873-3090). The court entered its final decree and judgment on December 31, 1946 (R. 3694) on which day it also entered its findings of fact and conclusions of law (R. 3659) and rendered a supplemental opinion (R. 3702; 70 F. Supp. 53). Motions to amend the decree were made by defendants which the court denied, except that it did amend paragraphs III (2) and III (4) so as to postpone the effective dates of the prohibitions therein contained (R. 3719-20). On April 7, 1947, an order was signed by Mr. Justice Reed staying the operation of certain sections of the decree until further order of this Court.

STATEMENT

1. The Defendants

The defendants below consist of eight of the principal companies in the motion picture industry and some of their subsidiaries or affiliated companies. Five of them, namely, Paramount, Loew's, RKO, Warner and Twentieth Century-Fox, called by the Government and the court below "the major defendants", are each engaged in all three

branches of the industry,—production, distribution and exhibition. They are also sometimes referred to as the "integrated" defendants, or the "producer-exhibitor" or "exhibitor"-defendants.* The so-called "minor defendants" Columbia and Universal, are engaged in production and distribution (Findings 44-52, R. 3667-9), and the other "minor defendant", United Artists, is a distributor only and distributes pictures produced by producers who are wholly independent of any defendant in the case (Finding 53, R. 3669).

2. The Issues

A. The Charges and Prayer for Relief

The defendants were charged in the amended complaint (R. 3137) with combining and conspiring to monopolize and unreasonably restrain trade in the production, distribution and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act, in various ways alleged.

The amended complaint demanded that each of the contracts, combinations and conspiracies, and each of the al-

---

*Paramount Pictures Inc. is a producer and distributor and owns stock interests ranging from 12½% to 100% in companies which directly or through subsidiaries own or lease and operate theatres (R. 824). Operation of the theatres is in the hands of employees of the operating companies, who generally own stock in the operating company or who, in cases where the operating company is wholly owned by Paramount, have management contracts giving them control over operations (R. 824-5, 827, 890-3). The operating companies conduct their unrelated businesses, such as, for example the licensing of pictures from all distributors, independently of each other and of Paramount (R. 824-5, 828-9, 966, 996, 1033-1034, Exs. P24 and P24A). Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is engaged solely in the distribution of films in certain states (R. 665; Ex. 85).

leged attempts to monopolize, be declared illegal, and that the defendants each be enjoined from continuing them; that the integration of the production and exhibition branches of the industry by the producer-exhibitor defendants be declared unlawful as an instrumentality to monopolize and restrain trade; that the five "major" defendants be ordered to divest themselves of all interest in theatres and theatres holdings, *or* of all interest in production and distribution facilities, and be permanently enjoined from acquiring any interest in the branch of the industry thus divested; that the exhibitor-defendants be ordered to divest themselves of all interest in any particular theatres which the court should find had been used unreasonably to restrain or to monopolize trade in motion pictures; and finally, that the court establish a nationwide system of impartial arbitration tribunals in order to secure adequate enforcement of whatever general and nationwide prohibitions the decree might contain (R. 3199-3200).

B. The Consent Decree

The Consent Decree entered November 20, 1940 (R. 3373), effected several radical changes in the pre-existing methods of licensing motion pictures. It abolished certain trade practices of which the Government had complained, such as so-called "blind selling" (licensing before the picture was produced or the licensee had an opportunity to view it), conditioning of a license for feature pictures* on the licensing of short subjects or newsreels or other features,

*A feature now is defined as any motion picture in excess of 4000 feet in length (Finding 1, R. 3660). Pictures of less length are short subjects or "shorts".

and licensing in blocks of more than five features, and contained a provision designed to protect independent exhibitors* from the arbitrary refusal of a distributor to license pictures on some run.

The Consent Decree recognized that certain other trade practices had in their operation given rise to a number of complaints and criticisms on the part of some exhibitors. One of these practices was the one whereby the distributor, in licensing a feature picture, agrees not to exhibit it or permit it to be exhibited in another's theatre in the licensee's competitive area until after the expiration of a designated number of days following the completion of exhibition by the licensee. This practice is known as the granting of "clearance" (Finding 1, R. 3660). Exhibitors do not complain of the practice as such, in fact most of them demand it, but there were disputes as to its length and the area it covered in some instances.

The Consent Decree recognized that clearance was essential in the distribution and exhibition of motion pictures (R. 3380); that the factors necessary to be considered in determining what was and what was not a reasonable clearance period or area were complicated and not capable of precise determination, and that they rested primarily on the exercise of sound business judgment. The Consent Decree, therefore, in accordance with the prayer in the amended complaint (R. 3199-3200), established a nation-wide arbitration system designed to provide an inexpensive, speedy and fair remedy for an independent exhibitor who complained that the clearance granted to a competitor over

*An independent exhibitor is sometimes defined as one not a defendant or a subsidiary or affiliate of one (Finding 1, R. 3660). Cf. note to p. 27, *infra*.

his theatre unreasonably affected his business. The American Arbitration Association was appointed as administrator of the system and, to insure proper and complete impartiality and an opportunity to review the decision of the arbitrator, provision was made for the establishment of an Appeal Board appointed by the district court. Rules of procedure were made part of the Decree.

At the public hearing prior to the entry of the Consent Decree, Government counsel stated what the parties had endeavored to do in formulating it. He said:

> "The approach on the part of all—on the part of the defendants filing the consent and on the part of the government, was an endeavor to meet through the terms of the decree a solution of the alleged evils and the alleged abuses in the motion picture industry, without resorting to the very drastic remedy of divorcement. That was arrived at rather early in the sessions." (p. 504)
>
> "Now as to the terms of the decree, I might say by way of preface that the problems of the motion picture industry are not identical to the problems of all other industries. They are peculiar, peculiar to the industry and its nature, and during the five months of negotiations every problem relating to the distribution of pictures was examined by the conferees in all its ramifications." (p. 505)
>
> "But I can say this much: that an honest endeavor has been made by those participating in the conferences to work out a method of business through prohibitions and a system of arbitration which should work and which should relieve a great many if not all of the complaints that are made against the existing operations of the industry." (p. 506)

"And I might say in that connection that it has long been felt, both by exhibitors and by distributors, that there is no fairer way to handle and dispose of complaints concerning clearance than to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII." (pp. 524-525)

"I don't believe that anybody who has participated in the five months of worry and discussion and argument considers the decree a panacea or the dawn of utopia in the movie industry. At the same time I think it fair to say that both the defendants and the government honestly believe that it is infinitely to be preferred to years of litigation with the possibility at the end of the chaos that might result from divorcement. It is the hope and the desire of all that it will bring to the industry a degree of peace and good feeling. Every human safeguard that we could think of has been thrown about the operation of the arbitration system to keep it free, efficient and impartial." (pp. 537-538)

The Consent Decree reserved the right to the Government to seek other relief, including dissolution and divestiture after the lapse of three years.

Under the Consent Decree, there had been, at the time of the trial, 416 arbitrations and 122 appeals to the Appeal Board (R. 1859-61). As the court noted in its supplemental opinion, these tribunals have functioned "with rare efficiency" (R. 3702).

C. The Government's Contentions at the Trial

At the trial the Government contended that the primary issue was one of the relief to which it was entitled, contending that admissions and undisputed facts clearly in-

dicated violations of law requiring the relief requested. It argued that the evidence showed collective control by defendants of the domestic film market, and that ownership and control of theatres by an important distributor of films was, in itself, a continuing unreasonable restraint upon competition in distribution and exhibition. It urged that the evidence showed that the required relief was (1) divestiture from the five major defendants of all their interests in theatres, and a prohibition against further acquisitions of theatre interests by them, and (2) injunctive relief against all the distributor defendants restraining them from various license practices.

The charge was made that the five integrated companies —those engaged in production, distribution and exhibition— collectively exercised arbitrary control over the industry through agreements between themselves and the three minor defendants, and that each of the five integrated units was, in itself, an illegal combination (R. 5).

It was asserted (R. 6) that operations under the Consent Decree left these defendants' collective control over the three phases of the business substantially untouched so that, after failure of new and prolonged negotiations for a new Consent Decree, the issue of divorcement (of exhibition from distribution and production) was again before the court. Accordingly, the Government sought modification of that Decree in its entirety, including the complete elimination of the arbitration system which had been established pursuant to the prayer of the amended complaint.

There was no proof of any monopolistic purpose, agreement or conspiracy in the acquisition of any theatres or of any interest in any company operating theatres by any of the defendants, or in the acquisition of the production or

distribution facilities by those who began as exhibitors and then acquired production and distribution facilities—on the contrary, the proof was of competition in acquisitions (R. 954, 1555-6, 1826; Finding 42, R. 3667). Nor was there any proof or finding that any unlawful monopoly or monopolies resulted from integration, whether defendants' theatre holdings be treated individually or collectively. The findings are directly to the contrary.

D. The Trial Court's Findings and Conclusions

The court below affirmatively found and concluded that there had been no monopolization by the defendants, either individually or collectively, of either production or distribution or exhibition. These findings and conclusions are amply supported. As to production, the record disclosed without contradiction substantial and unrestrained competition (R. 626-32, 639, 641, 652, 1263-5, 1407-8, 1527-9, 1532-3, 1544, 1547, 1551, 1795-1806), and Government counsel conceded this fact (R. 386-8, 1949, 1952-3).*

The trial court found that there had been no violation of the Sherman Act with respect to production (Findings 59, 60, R. 3670), and that the Government had formally abandoned its charges with respect thereto (R. 3509). It

---

*In addition to the 7 defendant producers, there are numerous important so-called independent producers. Some of the best known are David Selznick, Samuel Goldwyn, Alfred Hitchcock, Preston Sturgis, Sam Wood, William Wellman, Allan Dwan, Frank Lloyd, Jean Renoir, Gregory Ratoff, International Pictures, Edward Small, Lester Cowan, Hunt Von Stromberg, Eddie Golden and Borgeaus Productions (R. 637-641, 652, 1407). There are many more independent producers than there were in 1940 before the Consent Decree (R. 640, 1551, 2733).

thereupon dismissed the complaint insofar as it charged violations of law with respect to production (Decree, Section I, R. 3695).

As to distribution, the trial court stated in its opinion (R. 3554; 66 F. Supp. 354) that there was general competition among all of the defendants, as well as between them and other distributors, for the exhibition of their various pictures, which the Government had conceded (R. 1062). It found that in excess of 600 features pictures are released for exhibition each year in the United States (Finding 106A, R. 3679).* Of these pictures, the defendants in the aggregate distributed in 1943-4 only 260 (Finding 99, R. 3677), or about 43 percent.** No one defendant distributed more than 49 features or 8 percent of the total (Findings 99, 106A, R. 3677, 3679). Of the pictures distributed by defendants, many were produced by independent producers and distributed under contract by one of the defendants. Thus, 19.8 percent of RKO's releases were independently produced (Finding 101, R. 3678). All of United Artists' releases were independently produced (R. 1407-9, Finding 54, R. 3669). Some of the features released by

*In addition to the eight distributors who were made defendants, there were at the time of trial at least three other nation-wide distributors (Monogram, PRC and Republic) and a number of sectional distributors known as State's Rights distributors (R. 544-6, 659-61). No evidence was introduced to show the number of features released by the State's Rights distributors or by others than the eleven national distributors, so that no over-all industry figures are available. Since the trial, at least two other national distributors with their own exchanges have entered the field, Eagle-Lion (J. Arthur Rank) and Selznick Releasing Corporation.

**RKO Exhibit 2 (R. 1611) indicates that there were 442 features distributed, so that even on this basis the defendants' aggregate releases would be only about 59%.

the other defendants were likewise independently produced (Paramount, R. 743-4; Loew's, Am. Compl. 36,* R. 3152; Warner's, R. 1825, Am. Compl. 51, R. 3156; Columbia, R. 1260-1, Ex. C-1; Universal, R. 1458-9; Twentieth Century-Fox, R. 1568). It was conceded, as the evidence established, that any producer making a good picture could be assured of adequate distribution (R. 1266, 1949).

The uncontradicted testimony was that the distributor defendants actively compete in distribution (R. 675-678, 701-2, 743-45, 1407-8, 1466-8, 1504, 1651-3, 1687-8, 1729). They license their films to exhibitors through their own respective film "exchanges" located in various parts of the country, and each distributor's exchange is maintained entirely independently of any other's (R. 543-5, 666-668, 1053-4, 1415, 1504, 1685). Familiar merchandising promotion schemes are used by each distributor in order to create interest in its product (R. 677-8). Regular meetings are held for the purpose of acquainting each distributor's salesmen with its product and of inspiring them to license as many films as possible. Such meetings are held by each distributor with its own staff and entirely independently of any other distributor (R. 674-676). "Sales" drives are also conducted by each distributor independently (R. 677, 1061, 1467-8) and there has been no joint advertising (R. 679), nor have distributors exchanged information as to the terms of the licenses granted by them (R. 742). In short, competition is "very keen", each distributor doing his utmost to fill as much as possible of the playing time and the preferred playing time of each exhibitor (R. 701-702, 904, 969, 970, 977-978, 998). Keen competition has also always

*Reference is to the paragraphs of the Amended and Supplemental Complaint (R. 3137).

existed among distributors in their attempts to obtain the right to distribute the product of independent producers, i.e., producers who do not have distribution facilities of their own (R. 743-744, 1651, 1687-1688). Each of the national distributors which does not have theatre interests (i.e., Columbia, United Artists, Universal, Republic, Monogram and PRC) has developed in financial strength and has been able to improve the quality of its pictures during the period when the integrated defendants are alleged to have acquired and maintained a monopoly (R. 906-8, 910-11, 1255, 1257, 1457-8; Exs. 408 and 409)*.

Manifestly, therefore, the evidence points only to the conduct of separate businesses competitively and not collectively. New competitors have not been frozen out or hampered. The restraints found by the court below do not affect the essential qualities of this bitterly competitive business.

As to exhibition, the court found that the total theatre holdings of the five major defendants amounted to only 17.35 percent of the 18,076 theatres in the country (Finding 118, R. 3684). It concluded that, on the evidence, their holdings could not be aggregated for purposes of establishing a monopoly (R. 3553; 66 F. Supp. 354). Furthermore, it found that the theatre holdings of any one of the defend-

*In 1932 the Second Circuit Court of Appeals held that Paramount had no monopoly and no means of acquiring one. *Federal Trade Commission* v. *Paramount Famous-Lasky Corporation*, 57 F. (2d) 152 (C. C. A. 2, 1932). Since that time new competitors have appeared in the national distribution field and others have strengthened their positions. Paramount's income, while substantial, amounts to only about 16% of the aggregate income of the 8 defendant distributors (Ex. 425). It is an even smaller percentage of the income of all distributors in the field. It distributes about 31 features annually out of a national total of from 335 (Finding 99, R. 3677) to 600 (Finding 100 A, R. 3679).

ants alone, or, indeed, of all in the aggregate, did not and could not, constitute a monopoly (Finding 119, R. 3684). It likewise found that there was no proof that any of the defendants had been organized for the purpose of achieving a national monopoly (Finding 152, R. 3689-90) and no proof of any unlawful local monopolies (Finding 153, R. 3690). There was no community of officers or directors among the defendants and none owned any controlling stock or securities of another (Finding 57, R. 3670). Moreover, the percentage of features on the market which any of the five exhibitor defendants can play in its own theatres would be relatively small and would in no wise approximate a monopoly of exhibition (Finding 100, R. 3678). These findings are amply supported (Exs. RKO 11, L 2; R. 601-605, 609, 1554-1556, 1597-1599, 1838-1839, 1966 *et seq.*)

However, the trial court concluded that *all* defendants had unreasonably restrained trade in the businesses of distribution and exhibition, and had attempted to monopolize such trade, both before and after the Consent Decree, by acquiescing in the establishment of an admission price-fixing system by conspiring with each other to maintain theatre admission prices; and by conspiring with each other to maintain a nation-wide system of runs and clearances, which was substantially uniform in each local competitive area (Conclusions 7(a) and (b), R. 3692).

It likewise concluded that *the distributor-defendants* had similarly violated the Sherman Act by (1) agreeing individually with their respective licensees to fix minimum admission prices; (2) agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits; (3) agreeing individually with their licensees to

grant them unreasonable clearance over their competitors; (4) making master agreements and franchises;* (5) individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films (except in the case of United Artists); and (6) as to Paramount and RKO, making formula deals* (Conclusions 8(a) to (h), R. 3692-3).

The court also concluded that the five *exhibitor-defendants* had unreasonably restrained trade in the distribution and exhibition fields, both before and after the Consent Decree, by (1) jointly operating theatres with each other and with independents through operating agreements or profit-sharing leases (i.e. "pooling" operations); (2) jointly owning theatres with each other and with independents through stock interests in theatre buildings; (3) conspiring with each other and with the distributor defendants to fix substantially uniform minimum theatre admission prices, runs and clearances; and (4) conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission prices, runs, clearances and other license terms (Conclusion 9(a) to (d), R. 3693). It also concluded that certain formula deals, master agreements, and franchises had tended to restrain trade in violation of Section 1 of the Sherman Act (Conclusion 10, R. 3693), and that conditioning a license of one or more copyrighted features upon the license of one or more other features, violated the Sherman Act (Conclusion 11, R. 3694).

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*Defined in Finding 1 (R. 3660).

3. Distribution Practices

As the business of distribution and exhibition of motion pictures is largely *sui generis*, an understanding of its peculiar nature is essential background.

Films are not sold. The form and substance of the transaction which secures the reward to the owner of a feature picture is a limited license under copyright permitting the licensee to exhibit the picture (Finding 61, R. 3670), coupled with the bailment of a positive print of the picture to enable the licensee to project it upon his screen.

Since the early days of the industry, it has been the universal practice, dictated by necessities as well as experience as to the best and most profitable method of distribution, to license the exhibition of feature pictures, all of which are copyrighted (R. 529, 658, 1723), upon successive limited and often exclusive runs in each competitive area (R. 1894-5).* The first exhibition in a given area is called

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*When motion pictures are photographed, a negative is developed from which a number of positive prints are made for distribution to theatres obtaining licenses to exhibit them (R. 1895). The cost of a print varies with its length. For example, a black and white print costs from about $150 to $300, while those in technicolor cost from $600 to $850 (R. 1895-6; Finding 74, R. 3673). Many licenses for features are for license fees which are considerably less than the cost of the print bailed to the exhibitor. In fact, the majority of exhibitors pay license fees amounting to but a small fraction of the cost of a single black and white print (R. 671, 1074-5, 1898-9). There are approximately 18,076 motion picture theatres in the United States (Ex. L. 2; Finding 118, R. 3684). Paramount features, for example, are customarily licensed for exhibition in from 8,000 to 14,500 theatres annually (R. 668; Finding 130, R. 3686). Each feature which it produces and distributes costs from $200,000 to $3,000,000 or more to produce (R. 1895), and the number of positive prints which it makes of each feature varies from about 150 to 325, depending

the first run, the second exhibition is called the second run, and so on. All features are so licensed, and each theatre obtaining a license on any run, the last as well as the first, exhibits the identical picture projected from such print as may be available.

Included in many licenses is an agreement, known as a "clearance" agreement, that a certain stated number of days shall elapse between the conclusion of the particular run licensed and the beginning of the next succeeding run of the picture licensed in the particular competitive area (R. 1894-5).

License fees are either an agreed and definite amount, sometimes called a "flat rental" (R. 694, 1722-3, 1905), or an agreed percentage of the gross box office receipts of the theatre during the exhibition of the particular feature licensed (R. 694, 815, 1082, 1905).

It has likewise been a common and ancient practice to incorporate in the license a provision that the exhibitor shall continue to charge not less than a specified minimum price for admission to his theatre during the exhibition of the particular feature or features licensed. These minimum prices which are thus specified in the license are the admission prices adopted by each exhibitor and customarily being charged currently by him, and the provision is merely to prevent unusual changes which would, among

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upon the popular appeal of the particular feature (R. 670, 1896). Ordinarily each positive print must serve from 45 to 60 theatres (R. 672, 1898).

This means that staggered exhibitions are essential (Finding 75, R. 3673) and that it is economically impossible for Paramount or any other distributor to make enough prints to enable it to license all customer theatres to show a feature simultaneously (R. 1898-9).

other things, seriously affect license fee calculations (R. 433, 439-40, 583, 717-8, 916, 1083-5, 1382-3).

The foregoing practices date from the early days of the industry and were adopted individually by those engaged in the industry before there was any integration of distribution and exhibition (R. 611-12, 717, 916-917, 1080-1, 1894-5, 1904; Exs. P 5 and P 6). They are not confined to the defendants but are used by all distributors (R. 544-5, 707, 918, 1506), and affiliated and unaffiliated theatres alike are licensed pictures on runs (R. 704-5) with clearance (R. 977, 1004-6, 1086, 1270, 1506), on flat rental or percentage terms (R. 697, 814-5), and at specified minimum admission prices (R. 1723). Thus these practices are entirely unrelated to ownership of theatres by a distributor. Before the court below condemned some of them, they were universally accepted major premises of the trade as essential in it, regardless of any question of theatre ownership.

The trial court found, upon uncontradicted evidence, that clearance which was reasonable as to time and area is essential in the distribution and exhibition of motion pictures and that it was of proved utility in the industry and was necessary for the reasonable conduct of business (Finding 78, R. 3674). It found that licensing for successive exhibition dates, i.e. runs, or a license providing for clearance, benefited the public by permitting it to see a picture later in other theatres at lower prices (Finding 76, R. 3673), and it found that a proper clearance covenant afforded a fair protection to the interests of the licensor in the license fees to be derived from exhibition without unreasonable interference with the interests of the public (Finding 77, R. 3673). These findings are amply sup-

ported (R. 707-710; Consent Decree Sec. VIII, R. 3379-80).

While the court correctly appraised the imperative necessity of these practices of licensing on successive runs with clearance, it erroneously read the evidence of similarity of runs and clearances granted, and the provisions for minimum admission prices inserted in a given exhibitor's licenses by the distributors dealing with such exhibitor, and the relative stability of such provisions, as reflecting agreement and conspiracy among the defendants. The undisputed evidence amply demonstrated that the similarities in these respects were instead the natural result of independent competitive forces. We have assigned and specified this conclusion of the court as error, and maintain that it was wrong, but we shall not argue the error assigned at length, merely noting in the footnote some of the factors which emphasize the error, and relying on the arguments in the briefs of other defendants.*

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*The court inferred concert and conspiracy merely from the fact that certain provisions in the licenses granted by each distributor to the same theatre, whether affiliateed or not, provided for similar runs and clearances and provided for similar minimum admission prices. The Government had called no witnesses on its direct case to show that the similarities arose out of unlawful agreement or conspiracy between any of the defendants. The defendants, on the other hand, called their top executives who explained that such similarities were in fact not the result of agreement or conspiracy (R. 422, 425, 710-11, 1708, 1715), but came about by reason of the fact that each exhibitor who dealt with two or more distributors desired the same run and clearance from each (R. 717, 1708-9), and that the similarity of minimum admission price provisions in the licenses resulted from the fact that the prices were the admission prices that the exhibitor himself fixed and was charging currently (R. 723-4; Finding 63, R. 3670), and that each exhibitor chose not-

The court also concluded that various other practices in distribution were illegal and should be enjoined. As to these, we argue in Point II of this brief that the court erred in its mandatory directions requiring competitive bidding in future licenses (Decree II(8)).

4. Summary statement as to reasons for and history of integration of exhibition and distribution by the exhibitor-defendants (including Paramount).

There were 18,076 motion picture theatres in this country in 1945, an increase of 4,790 over 1935 (Findings 118, 145, R. 3684, 3688) and of 12,000 from the period of 1908-1919 (Pet., 28).*

Originally theatres where motion pictures were shown were mostly remodeled stores with only a few hundred seats (R. 596), but with the advent of the feature picture, vaude-

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to vary those admission prices as between pictures of the various distributors as such a course would have injured his good will with his patrons (R. 722-3, 1382-3). The testimony was that competitive forces compelled similar provisions as to runs, clearance and minimum admission prices and that such similarity as appeared was inevitable (R. 711, 717, 725). The defendants' witnesses were experts in their field (R. 411, 665-6, 1684). If what they testified to was erroneous or untrue in any respect, there were many thousands of exhibitors available as witnesses to the Government to rebut the testimony, yet none were called. The testimony, not being irrelevant or contradicted or opposed to the probabilities or incredible, could not properly be disregarded. *Kelly* v. *Jackson*, 31 U. S. 622, 632 (1832); *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291, 299 (1930); *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-1 (1932); *Chesapeake and O. R. Co.* v. *Martin*, 283 U. S. 209, 214 (1930).

*Reference is to the paragraphs of the original complaint, called Petition.

ville theatres showed pictures and new theatres were built for pictures exclusively (R. 600). Circuits of theatres under the same management grew up early in the business as existing circuits of vaudeville houses turned to pictures (R. 601). Motion picture theatre operation became a specialized business requiring skill in management, showmanship and the art of attracting patrons and establishing and maintaining a clientele (R. 828). Motion picture theatre average weekly attendance increased from 40,000,000 in 1922 (Pet. 54) to 95,000,000 in 1945 (R. 1611; Ex. RKO 2).

Prior to about 1917, with a few minor exceptions, there was no affiliation between production and distribution of motion pictures, on the one hand, and exhibition of them on the other (Pet. 40, 56). Producers and distributors, such as Paramount's predecessor (Pet. 43; Am. Compl. 18-26, R. 3146-9) owned no theatres, while certain exhibitor organizations, such as Loew's (Pet. 48; Am. Compl. 27-37, R. 3149-3152), and the theatre owning predecessors of RKO, owned no production or distribution facilities (Am. Compl. 56-66, R. 3158-61).

The evidence in this case, much of which is summarized in the findings below, established that integration in this industry began in about 1917. At that time a powerful group of exhibitors, ultimately comprising some 3,500 members representing as many or more theatres, formed First National Exhibitors' Circuit (R. 601-4).* This corporation was initially organized to function as a,

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*The Petition alleges that there were only about 6000 theatres in the period from 1908-1919 (Pet. 28). If this figure is accepted as correct, First National represented about 58% of the then existing outlets for films.

film buying combine to exert its buying power toward getting lower license fees (R. 601). It evolved into a film producing company, first, by financing the production of pictures by others for exhibition in the theatres of its members and in those of their licensees, and finally, by producing its own motion pictures (R. 601-2; Finding 4, R. 3661).

First National soon began to negotiate for and obtain the services of well known stars and directors in the employ of other producers, including Famous Players Company, the predecessor of Paramount (R. 601-2; Finding 6, R. 3661-2). Members of First National refused to exhibit Paramount films (R. 602-3, 644-5) and the growth of First National gradually cut down the number of Paramount pictures exhibited in theatres belonging to the combine (R. 605).

By 1919 Paramount's predecessor, then the leading company in the industry (R. 904-5; Pet. 15; Am. Compl. 97, R. 3167), faced a situation where the owners of the best theatres in the leading cities of the United States, many of whom had been its customers in the past, had combined together for cooperative buying of pictures, and had grown into a strong organization which was distributing its own pictures and threatening to supply its members and licensees with enough pictures to permit them to operate without using those of Paramount or any outside producers (Am. Compl. 98-9, R. 3167; Finding 7, R. 3662). Paramount's markets were thus being seriously threatened and curtailed (R. 601-606, 642-5; Pet. 38).

In these circumstances Paramount determined, as a competitive measure, to acquire interests in theatres of its own to which its pictures could be licensed and where they

could be shown in competition with those of the First National group as well as of others (R. 605-7). Between 1917 and 1919 it acquired interests in two theatres in New York City to insure the display of its pictures in that city as a medium of exploitation for the United States (R. 602-3), and it formed Southern Enterprises, Inc., which acquired various theatre interests in the south (R. 606, 643-645; Ex. 85). At about the same time Paramount acquired a 50% stock interest in a chain of theatres in New England (R. 606-7; Finding 8, R. 3662; Ex. 85).* A subsidiary was formed in 1920 to acquire a theatre in St. Louis to provide an outlet for Paramount pictures which had been lost because of the activities of First National (R. 607; Ex. 85). Meanwhile, other producers were acquiring theatres in competition with Paramount (R. 607-8).

The entry of Paramount into the exhibition field by the acquisition of theatres or interests in companies operating them was thus caused by competition and not by conspiracy or an attempt to monopolize. It created rather than restrained competition (R. 607-9). Many of its later acquisitions were in competition with others (R. 937-40).

In about 1920 Loew's, which was then a company owning a chain of vaudeville and motion picture theatres (Ex. 48; R. 1839), acquired Metro, a producing company, and later in 1924 Metro merged into Metro-Goldwyn-Mayer, a subsidiary of Loew's (Ex. 48). This move was caused by competition (Pet. 48) and resulted in a stronger company to compete with Paramount's predecessor and other producers and exhibitors.

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*The remaining 50% of the stock was later acquired by Paramount (R. 606-7; Ex. 85).

A predecessor of Twentieth Century-Fox, namely Fox Film Corporation, likewise acquired theatre interests in competition with Paramount's predecessor (R. 937-8, 2041-2).

In about 1928 Warner, which was pioneering sound pictures, needed outlets which could be equipped with the necessary and expensive installation to permit their exhibition (R. 953-4, 1554-5). As a means to this end it acquired in 1928 an interest in a number of theatres in Pennsylvania and New Jersey through the acquisition of the stock in an existing circuit, the Stanley Company of America (R. 1555-6; Findings 24-30, R. 3665). Warner was the first company to introduce sound pictures, and its entry into the exhibition field was likewise a competitive measure to enable it to exploit its sound pictures in competition with producers and distributors of silent pictures.

The Warner pictures were made and its theatres were equipped with sound equipment made by Western Electric Company. (R. 1554). A competing type of equipment was being developed by Radio Corporation of America. That company organized RKO in 1928 for the purpose of obtaining an effective means of developing the use of its sound equipment in the motion picture production and exhibition fields (R. 1597; Finding 18, R. 3664). At the time of its organization RKO obtained production and distribution facilities by merger with a small company, in which it invested substantial sums to modernize its facilities (Finding 19, R. 3664). It likewise acquired interests in a number of companies operating circuits of vaudeville theatres, which it equipped for its type of sound pictures (Finding 21, R. 3664). The formation of RKO produced a new and substantial competitive factor in the field and increased compe-

tition in each of the three branches of the industry (Findings 22, 23, 121, R. 3664, 3684-5).

Thus, the integration by each of the defendants of production and distribution on the one hand, and exhibition on the other, was caused by competition and resulted in increased competition. Each of the defendant companies which integrated its business did so for competitive reasons and not for monopolistic purposes. Each had its own compelling reasons for integrating. Some did so by entering the exhibition field, and others did so by entering the production and distribution fields (R. 601-5, 609, 642-5, 1554-5, 1556-8, 1597; Pet. 47-8; Exs. 48, 109). All resulted in increased competition with ensuing public benefits of better pictures and better theatres.

The ways in which the defendant-exhibitors individually integrated their business of exhibition and distribution were different in each case, and no pattern is discernible. Sometimes new theatres were erected to compete with existing ones; sometimes existing theatres were acquired in fee or by lease but continued to compete in their respective areas. In other instances existing circuits or interests therein were acquired through the acquisition of all or part of the stock of an operating company or of a holding company which owned all or part of the stock of an operating company (R. 601-9, 642-645, 890, 905-908, 988, 2038-40, 2078-9; Ex. 85; R. 1838-9; Ex. 48; R. 1597-1599; Exs. 91, 98, 101, 107, 109; R. 1247-8, 1250-3; Ex. 45, R. 1553-8).

The genesis of integration set out above strongly supports the conclusion below that such integration was and is lawful, and emphasizes the undesirability of removing the integrated defendants from competition in exhibition which the Government demands.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED

As to Exhibition and Distribution

Paramount assigns and will here urge error to so much of Section III of the decree (R. 3698) as enjoins it as an exhibitor

(1) from continuing to own or acquiring any interest in a theatre with an independent,* unless the defendant's interest be 5% or less, or 95% or more, Assignments 31-34, 45, 46, R. 3746-47, 3749-50; and

(2) from expanding its present theatre holdings in any manner except as permitted by Section III (5), Assignments 34-35, 45, 46, R. 3748-50.

Paramount likewise assigns, and will here urge, error to the failure and refusal of the court

(3) to decree that defendant Paramount Pictures Inc. might apply to the court for permission to retain any present partial interest in a theatre or group of theatres upon a showing to, and a finding by the court, that the retention thereof did not and would not unreasonably restrain competition, Assignment 39, R. 3749; and

(4) to decree that in any case where it is shown that a joint relationship between Paramount or a subsidiary thereof and another person resulted from the

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*An independent here is defined by the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." Decree III (5) R. 3699-3700. *Cf.* Note to page 7, supra.

sale, transfer or other disposition by Paramount or its subsidiary (or by the trustee in bankruptcy or other legal representative of either of them) of the partial interest to such other person, Paramount might apply to the court for permission to continue such relationship to the extent to which, and in the place in which, the parties were not in competition at the time of such sale, transfer or other disposition of such partial interest, Assignment 40, R. 3749; and

(5) to decree that defendant Paramount Pictures Inc. might expand its present theatre holdings for the purposes of acquiring interests in theatres in order to protect its investments or in order to enter a competitive field upon a showing, as to each new theatre, that such acquisition would not unduly restrain competition in the exhibition of feature motion pictures in the competitive area where such theatre was to be acquired, Assignment 36, R. 3748; and

(6) to grant the motion of these defendants to amend and modify Paragraph (6) of Section III of the decree so as to permit the acquisition of new theatres for the purpose of protecting investments or entering a competitive field upon a showing to the satisfaction of the court, and a finding by the court, that such acquisition would not unduly restrain competition in the exhibition of feature motion pictures, Assignment 37, R. 3748.

The two Paramount defendants also assign error to

(7) the findings that they or either of them were parties to or engaged in or acquiesced in any system

in violation of the Sherman Act, or that they or either of them conspired to violate the Sherman Act, and to so much of the conclusions and decree as are based upon such findings, Assignments 6-11, 13, 14, 16-19, 21, 22-24, 29, 30, 44-46, R. 3741-46, 3750.

These defendants also assign error to so much of Section II of the decree (R. 3695) as enjoins each of them as a distributor

(8) from granting any license in which minimum admission prices are fixed or agreed upon, Assignments 1-13,15, 45, 46, R. 3739-43, 3750;

(9) from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features, Assignments 25, 26, 28, 45, 46, R. 3745-46, 3750; and

(10) from licensing their features in any way except as prescribed by Section II (8) of the decree which, among other things, requires the novel procedure sometimes referred to as "competitive bidding", Assignments 27, 45, 46, R. 3745-46, 3750;

(11) and also to so much of the decree as places the burden of proving reasonableness of a clearance agreement upon the distributor, Assignments 20-24, 45, 46, R. 3744-45, 3750.

In this brief we shall argue assigned errors (1) to (6) above, having to do with the trial court's injunction against the continued ownership by Paramount of joint interests in theatres with independents, and the injunction

against future theatre acquisitions, together with the court's refusal to correct these errors when timely requests that it do so were made. We shall also argue in this brief that the court erred in enjoining the defendants from licensing their features in any other way except as prescribed by Section II (8) of the decree. (Assigned error (10), *supra*).

We shall rest our argument as to the other assignments upon the arguments made in the briefs of other defendants and thus will not attempt to cover in this brief our assigned errors relating to the finding of conspiracy, to the injunction against minimum admission prices, to the conditioning of a license for one feature upon the licensee's taking one or more other features, and as to that provision which places the burden of proof of reasonableness of clearance upon the distributor.

As to Arbitration

These defendants likewise assign error to Section V of the decree (R. 3700) in so far as it abolishes arbitration of disputes relating to runs and clearance substantially in the manner, and under a system such as that which was asked for in the amended complaint and which, with the Government's consent, was established and which functioned under the Consent Decree. (Assignments 41, 42, 45, 46, R. 3749-50). As to this error also, we shall avoid duplication and rely on the presentation of the matter in briefs of other defendants to which we respectfully refer.

SUMMARY OF POINTS TO BE ARGUED AS APPELLANTS

I. The court erred in Section III of the decree in enjoining the exhibitor-defendants from continuing to own or acquiring theatre interests with independents, and in enjoining them from expanding their theatre interests.

A. The court was clearly right in denying the Government's demand for divestiture of the exhibitor-defendants' respective theatre interests.

B. The court erred in directing the termination of partial theatre interests held by defendants with independents, as defined by Section III(5) of the decree.

C. The court erred in enjoining the exhibitor-defendants from expanding their theatre interests as provided for in Section III(6) of the decree.

II. The court erred in directing that licenses may be granted only after "competitive bidding" and in enjoining defendants from licensing their pictures in any manner other than that prescribed in Section II(8) of the decree.

ARGUMENT AS APPELLANTS

POINT I.

THE COURT ERRED IN SECTION III OF THE DECREE IN ENJOINING THE EXHIBITOR-DEFENDANTS FROM CONTINUING TO OWN OR ACQUIRING THEATRE INTERESTS WITH INDEPENDENTS, AND IN ENJOINING THEM FROM EXPANDING THEIR THEATRE INTERESTS.

The Government charged the defendants with obtaining and maintaining a *collective* monopoly of exhibition and also charged that the ownership and control of theatres by a defendant-distributor *individually* was unlawful. The court below correctly concluded that neither basis for the Government's intransigent demand for divorcement had been made out. On this record such relief would have been a grotesque *non sequitur*. The findings below, fully supported, preclude the existence of any collective or individual monopolies. They also fully support the court's view that nothing about the motion picture business puts defendants in a category which forbids them alone and individually from enjoying the advantages of integration permitted to business generally.

However, the court below did invent a new theory for stripping away certain partial interests in theatres, not embraced in the charges and not tried, viz., that there was necessarily some unlawful restraint where a defendant owned more than 5% but less than 95% of the beneficial interest in a theatre because it thought that then "putative" competition by the holders of the remaining interests was thereby somehow restrained. Our chief argument in this

brief on this point is that this unprecedented conclusion was clearly legal error, aggravated by the court's refusal to permit an opportunity to be reserved to present facts to lay bare the error. These errors have an especially heavy impact upon Paramount as they may affect over one-half of all its theatre interests which are estimated to be valued at approximately $63,000,000 (R. 824).

But before discussing these errors, it seems desirable to outline the basis for the court's correct conclusion that it is lawful for a defendant individually to engage in the exhibition business in its own wholly-owned theatres. Against this background, the treatment of ownership of partial interests in theatres with non-defendants appears quite unjustified.

A. The court was clearly right in denying the Government's demand for divestiture of the exhibitor-defendants' respective theatre interests.

The court below rejected the Government's request for a judgment holding that it was unlawful *per se* for a distributor to own or operate theatres or to own stock in corporations owning, leasing or operating theatres, and decreeing divestiture of such ownership. Instead it expressly held that a distributor or owner of pictures was lawfully entitled to own theatres. The court said (R. 3554; 66 F. Supp. 354):

> "Each defendant had a right to build and to own theatres and to exhibit pictures in them, * * *"

This conclusion was inescapable since there is nothing *per se* illegal in vertical integration of the manufacturing and sell-

ing functions of an industry. *United States* v. *Winslow*, 227 U. S. 202, 217 (1913); *Eastman Kodak Co.* v. *Federal Trade Commission*, 7 F. (2d) 994 (C. C. A. 2, 1925), aff'd 274 U. S. 619 (1927), *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931); see *United States* v. *United States Steel Corporation*, 223 Fed. 55 (D. C. N. J., 1915), aff'd 251 U. S. 417 (1920), and there was no proof to warrant findings and conclusions justifying a decree of divestiture.*

The court below made findings, supported by substantial proof, which conclusively negative the existence of any state of facts which would make divestiture a proper remedy. The major findings may be summarized as follows:

1. No monopoly.

In 1945 there were about 18,076 motion picture theatres in this country of which the five theatre-owning defendants altogether had interests in only 3,137 or about 17.35% (Finding 118, R. 3684). Nearly 15,000 theatres in the country, therefore, were wholly independent of any defendant. The court found:

> "119. The present theatre holdings of the five defendant-exhibitors, Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot, collectively or individually, have a monopoly of exhibition." (R. 3684)

*In the motion picture industry the right to integrate is given added support by the Copyright Law (17 U. S. C., quoted in part in Appendix A) which grants the exclusive right to exhibit to the copyright proprietor, which is ordinarily the producer or distributor of the picture. This necessarily includes the right to exhibit in the copyright proprietor's theatres and to license others to do so in their theatres.

It is, of course, apparent that the holdings of any defendant individually are relatively so small that they could not possibly be considered monopolistic on a national scale, which is the scale in question in this case. There was no showing of any unlawful monopoly in any individual locality and the court found none (R. 3554; Finding 153, R. 3690). Paramount, the largest single holder of theatre interests, has an interest in less than 9% of the theatres in the country and all the other defendants in the aggregate hold interests in less than 10%. Paramount's theatre interests are represented in only 516 out of 16,752 incorporated cities or towns (R. 1935).* Moreover, the evidence disclosed that there are at least 1,149 places in the country with populations of over 5,000 where all of the theatres are independent (Ex. P. 26).

The non-monopolistic character of Paramount's theatre holdings is further emphasized by the diverse nature of its holdings. It holds stock interests ranging from 12½% to 100% in various companies owning, leasing or operating about 1,550 theatres directly or through subsidiaries. Its stock interest amounts to control, (i.e. over 50%), of

*In a large majority of the cities and towns throughout the country with populations of less than 25,000, all of the theatres are independent (R. 1180). There are 92 cities with a population of 100,000 or more (R. 751). There are independent theatres in all of them and independent first-run theatres in 54 of them (R. 752-762, 844-867; Ex. 428). There are 320 cities with a population of 25,000 to 100,000 (Ex. 82). In 196 of these the first-run theatres are all independent and in 71 there are independent and affiliated first-run theatres. (Exs. 41, 42, 57, 82, 94, 126, 127, 128). There are 1,630 cities with a population of 5,000 to 25,000. In 1,090 all the theatres are independent (*cf.* Ex. P. 26) and in 222 there are both affiliated and independent theatres, and in 108 there are no theatres at all. There are 4,627 towns with a population of 1,000 to 5,000. In 24 of these there are both affiliated and independent theatres, and in such of 4,483 as have any theatres at all they are all independent.

companies directly or indirectly owning, leasing or operating only about 500 of these theatres, (about 3% of the national total), and its interests in the balance are represented by 50% or less of the stock of the operating companies (R. 824). In fact, it operates only three theatres, the "Paramount" in New York, the "Paramount" in Brooklyn and the "Newman" in Kansas City, Missouri (R. 827), all of which are operated by wholly owned subsidiaries. As to all other theatres, local companies—over whose officers and employees Paramount exercises no control—conduct the actual operations of their respective theatres, including the negotiations for and the "buying" of all pictures from all distributors, as well as all matters of policy, problems concerning booking, license fees to be paid, and play dates (R. 828-9, 831-2, 964-6, 986-7). These local companies are operated completely independently of each other and of Paramount (R. 891-2).*

There is no evidence in the record as to the gross license fees received annually by all of the distributors in the field, since the Governments' proof was confined to showing the license fees received by the defendants in the case. As we have pointed out, there are important distributors who are not defendants, but even disregarding the license fees which they receive, and dealing only with license fees received by defendants, including Paramount, all of the theatres in

*It will be recalled that the charge was that ownership *and control* of theatres restrained competition and that it was not claimed that mere ownership of an interest not amounting to control had that effect. In Paramount's case, as we have shown, it has stock control of no more than about 500 theatres or about 3% of the national total. There is no single "Paramount Circuit" which could, even if it would, exercise its "buying power", and there is no "cooperative buying" among the separate operating companies in which Paramount is either wholly or partially interested.

which Paramount has any interest whatsoever pay to all of the eight defendant-distributors only about 16.8% of the license fees received by all of them. This is far short of a monopoly of exhibition.

2. No intent warranting divestiture.

The court below found that there was no substantial proof that any of the defendants was organized or had been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition of motion pictures (Finding 152, R. 3689-90).

It concluded that even in those places where a single defendant owned all of the first-run theatres there was no sufficient proof that this situation had been brought about

> "* * * for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants." (Finding 153, R. 3690)

As the court below expressed it

> "* * * Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. * * *" (R. 3554).

Paramount's intention in acquiring theatres in the first place was to obtain outlets, meet competition and market its pictures (*supra*, pp. 21-26).

3. No conspiracy or agreement warranting divestiture.

The court below was unable to find any substantial proof which would call for a finding that the defendants had entered into an agreement or conspiracy to monopolize production, distribution or exhibition. On the contrary it concluded, as to production, that there had been no violation of the Sherman Act whatsoever (Conclusions 3, 5 and 6, R. 3678, 3691). It determined, as to distribution, that with the exception of the trade practices and agreements which it disapproved, there was "general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures" (R. 1062, 3554; 66 F. Supp. 354).

It examined the exhibition field as well and saw that there too the defendants competed with each other and with independents for the patronage of the movie-going public. It had before it data respecting the 92 cities in the country having populations over 100,000, a fragment quite arbitrarily plucked from the national scene by the Government and stressed in an attempt to gerrymander the defendants into a monopoly of some segment of the market. Even there it found that in the majority of those cities, there was competition in exhibition between the defendants or between one or more of them and independents (Finding 146-150, R. 3688-89). The court noted that there was independent theatre competition in all of them on some run (Finding 147, R. 3688), and that in a few of those cities there are no affiliated theatres at all (Finding 148, R. 3688). In the 38 of the 92 cities (Finding 148, R. 3688-9), in which there were no independent first run theatres, the evidence showed that the affiliated theatres in those cities were the best

theatres there (R. 751, 763).* There was no evidence and no finding that this situation had been brought about or was maintained unlawfully, or that independents had been unlawfully excluded from building or acquiring theatres suitable for first run in any of the cities.

The court below was well aware of the fact that during the ten-year period from 1935-1945, the number of theatres operated in the United States grew from 13,386 to 18,076 (Finding 145, R. 3688), an increase of 4,690 theatres, a very large majority of which were independent. The fact that there was such an increase in the number of independently operated theatres, is quite inconsistent with any suggestion that the defendants, alone or in conspiracy, sought to monopolize the exhibition field. The increases and decreases in the theatre holdings of the respective defendants show no pattern of consistent action which could even suggest monopolization; they strongly refute any such inference (Exs. 151, 153, L. 12; Findings 31 and 32, R. 3665; Finding 22, R. 3664; R. 1556-8; R. 1599-1600).

4. Divestiture unwarranted.

After its study of the industry, the court considered that divestiture would be injurious to the defendants and damaging to the public (Finding 155, R. 3690) and would

*The Government's claim that each of the defendants received all of its first run revenue in these 38 cities from theatres affiliated with a defendant is wholly without significance. Of more significance is the fact that 69% of Paramount's film revenue (exclusive of that received from its own affiliated theatres) comes from independently operated theatres (Ex. P. 23). RKO receives 56.9% of its gross revenue and Warner 61.6% of its gross domestic revenue from independent theatres, (Finding 136, R. 3687; Finding 138, R. 3687). Independents pay Fox 60.8% of its film revenue (Finding 1144, R. 3688) and the eight defendant distributors in the aggregate receive 54.8% of their total film revenue from independents (Finding 128, R. 3686).

only withdraw the defendants from competition in exhibition (R. 3551, 3556, 2559; 66 F. Supp. 353, 356, 357). It found that the practices of which it disapproved and which it held created the illegalities and unlawful restraints were not caused by, or the result of, ownership of theatres by the defendant distributors (Findings 154, R. 3690). It thus rejected the Government's claims that divestiture of theatres was necessary or appropriate.

In the light of the obviously correct conclusion that it is not unlawful for a distributor to acquire and own theatres outright, and in the absence of proof of illegal acquisition, it was, however, inconsistent for the court to hold that less than complete ownership *per se* restrains competition unlawfully without any inquiry into the facts of each co-ownership to determine whether, in fact, competition between the parties has been eliminated or unreasonably restrained. The court made no such inquiry and, indeed, refused to provide in the decree for such an inquiry, at some future time. So, while the court was right in refusing the divestiture requested by the Government, it was, we maintain, wrong in creating a new theory which forbids partial interests in theatres, especially when it refused to provide any procedure by which the true facts as to the effect of such holdings could be established.

B. The Court Erred in Directing the Termination of Partial Theatre Interests Held by Defendants and Independents, as defined by Section III (5) of the Decree.*

The conclusion that co-ownership between an exhibitor defendant and an "independent" is, without more, illegal, and that such relationships should be enjoined, is contained

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*The error of which we complain here, and in this brief, solely concerns the court's treatment of joint interests between a defendant and an "independent" as set forth in Section III (5) of the decree and in the findings and conclusion quoted in the text of this sub-point.

Our argument does not concern joint interests between defendants, nor does it concern the "pools" and profit-sharing arrangements which pools and arrangements were the subject matter of

in a few paragraphs of the Findings, Conclusions and Decree, which, so far as pertinent, are here quoted:

Findings

115. "* * * When a defendant or an independent* owns an interest of 5% or less, such an interest

Findings 112, 113, 114 and the first two sentences of 115, and also of Conclusion 9(a) and Section III (2), (3) and (4) of the decree. Nor are we concerned with Section III (5) of the decree insofar as it relates to joint interests involving at least two defendants. Paramount does not attack the decree with respect to such arrangements and relationships because it had dissolved many of them long before trial, and has now dissolved all of the remainder of those with other defendants and with non-defendants to the full extent of its ability to do so, and does not intend to continue, or hereafter enter into, such arrangements. Accordingly Paramount does not object to the implementation by the decree of a policy which it has already adopted in connection with such arrangements and relationships.

This Court should know, however, as respects the arrangements the propriety of which, as above stated, will not be argued, that some of the relatively few agreements pooling the operation of theatres in specific cities stemmed from reorganization plans authorized by Bankruptcy Courts as a means of settling claims of one company against another, and others were entered into in the depression years as a means of effecting economies in operation to prevent bankruptcy. The evidence was that the agreements did not result in a decrease in the flow of films or have any other effect on interstate commerce, and that in no case did they result in increased admission prices, but that in fact, in some cases, admission prices were reduced (R. 989-91, 1037-9, 1930-3, 2114-7). As this evidence was not contradicted, we assert that there was no proof of intent to violate nor of violation of the antitrust laws.

While we believe that the distinction between the situations the legality of which we will argue, and those which we will not, is clear, the conjunction of the situations in the findings suggests that the court below did not perceive the distinction and, instead, assimilated joint interests between a defendant and non-defendants with the pools and joint interests between two or more defendants of whose banning by the decree we do not now complain, and thus swept lawful interests into the category of those which it condemned chiefly because they involved agreements between defendants.

*The term "independent" is defined in Finding 1 as "a producer, distributor or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate or a defendant". (R. 3660)

is *de minimis* and only to be treated as an inconsequential investment in exhibition."

116. "When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." (R. 3683)

Conclusions of Law

9. "The exhibitor-defendants * * * have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures * * * in violation of the Sherman Act by: * * *

(b) Jointly owning motion picture theatres with each other and with independents through stock interests in theatre buildings; * * *" (R. 3693)

Decree

III. "Each of the defendant-exhibitors * * * is hereby enjoined and restrained:

(5) From continuing to own or acquiring any beneficial interests in any theatre whether in fee or shares of stock or otherwise, * * * in conjunction with an independent* [meaning any former, present or putative motion picture operator which is not owned or controlled by the defendant holding the interest in question,] where such interest will be greater than 5% unless such interest shall be 95%

*It is not clear whether the definition of "independent" as set forth in the bracketed material in the decree is intended to be coextensive with the definition of "independent" appearing in Finding 1.

> or more * * * the relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. * * * (R. 3698-3699)

It is to be noted that, except for the finding of the simple fact that there are co-ownerships, Finding 116 is merely an argument or contention as to their effect and is not a genuine finding of fact. *Cf. Stuyvesant Fire Ins. Co.* v. *Sussex Fire Ins. Co.*, 90 F. (2d) 281, 283 (C. C. A. 3, 1937), cert. den. 302 U. S. 742 (1937).

We believe that the court below erred in at least the following respects: in decreeing the termination of 5% to 95% partial interests without a hearing; in reaching Conclusion 9(b) (R. 3693) without findings adequate to support it; in indulging in and relying upon the blanket assumptions set forth in Finding 116 (R. 3683) the validity of which is contradicted by the record; and in concluding, in substance, that joint ownerships of motion picture theatres between an exhibitor-defendant and independents, through stock interests in theatre buildings, are illegal *per se*. In the light of those errors, the drastic injunction imposed by Section III(5) against the continuance and creation of such co-ownerships is incongruous and unjustified.

1. The court below erred in holding 5% to 95% co-ownerships with independents illegal and in decreeing their dissolution, both without a hearing

The complaint did not charge, and the proof was not directed to a showing that the ownership by any defendant with an independent of a partial interest had any unlawful purpose or any effect upon competition between the co-owners, much less that any "putative" competition of the

other co-owners was thereby illegally eliminated.* Since the issue was not raised at the trial and not mentioned during its course, the defendants had no occasion or opportunity to offer evidence to meet it.

The first intimation that defendants had of the wholly new line which the court below was to take in condemnation of their respective partial interests in theatres was when the court handed down its opinion on June 11, 1946, more than six months after the close of the trial. Then, for the first time, it appeared that the ownership by a distributor of a partial interest in a theatre or in a company operating theatres was considered unlawful because it was thought to restrain competition in exhibition between the defendant owner and "independent" co-owners.

On being confronted with the court's opinion, the defendants promptly submitted proposed findings of fact and a proposed decree to the court and directed its attention to its manifest error. A decree was proposed by defendants which, while conforming to the opinion in respect to the injunction against continuing to hold partial interests with an independent or with another defendant, would have per-

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*The complaint did not charge that mere co-ownership of theatres by an exhibitor-defendant and a non-defendant was illegal *per se*. Section D of the complaint, which contains numbered paragraphs 170 to 177 (R. 3196-7) concerns "Combinations of Which Each Producer-Exhibitor Defendant is a Member Which are Illegal Per Se." There appears to be no suggestion of a claim that such co-ownership is illegal *per se*. There is a charge in paragraph 176 that the producer-exhibitor defendants and their subsidiaries used coercion in acquiring interests in some theatres, but this charge was abandoned and not pressed or proved at the trial and there is no finding which lends it support.

The proof in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) of predatory acquisition by Crescent and its subsidiaries is wholly lacking here.

mitted a defendant in any case to apply to the court for permission to retain a given interest, if, after hearing, the court should find that its retention would not result in an unreasonable restraint of competition in exhibition within the particular competitive area in which the theatres affected were situated (Defendants' Proposed Decree R. 3610).*

These proposals would have enabled a defendant to show to the court situations where its ownership of a partial interest with another person in fact did not have the effect upon competition which the court assumed was inherent in these less than total ownerships, and would have enabled defendants to show the reasonableness of and justification for a given partial interest. The court below, however, rejected the proposals and thus deprived the defendants of any opportunity to present the facts in any particular situation. It entered a decree containing the blanket injunction in Section III (5) (R. 3699-3700).

Defendants promptly moved to amend the decree to permit applications to the court similar to those provided for in their proposed decree (R. 3704). The court below denied the motions (R. 3719-20).

The action of the court in granting this injunctive relief upon an unpleaded and unlitigated issue, long after the

*Defendants also suggested in their proposed decree, as a facet of the more general right of application, that they also be permitted to apply to the court for permission to retain certain partial interests where the existing relationship had resulted not from the purchase by a defendant of its partial interest, but by a sale of a partial interest in a previously wholly owned operating company, and where the sale had occurred as a result of and during bankruptcy or reorganization proceedings (Defendants' Proposed Decree, R. 3619-20). This would enable a defendant to show that there was no restraint in any such relationship.

proofs had been closed, does not comport with the court's usual standards of fair hearing and procedure. Even a court naturally anxious to close its part in a long case conducted under an expediting certificate, should have made some provision in its decree to provide an opportunity for hearing of particular applications on particular facts after the need for a three-judge court had expired.

This was not unlike the action that was condemned by this Court in *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937) where an order declaring appellant's rates excessive was reversed as being a denial of due process. At the hearings, the issue had been the value of the company's property as of a date certain, June 30, 1925. "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted," the Commission, in its decision and report some years later, in 1934, fixed a valuation for the property for each year from 1926 to 1933, inclusive, relying upon judicial notice of price trends to supply the deficiencies in the record. "The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and rebut them. The response was a curt refusal." Mr. Justice Cardozo for a unanimous Court, held (301 U. S. at 300):

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.
>
> "* * * This is not the fair hearing essential to due process. It is condemnation without trial."

Paraphrasing from *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1)*, 294 U. S. 63, 70 (1935), Mr. Justice Cardozo said (301 U. S. at 306):

> "There was no suitable opportunity through evidence and argument . . . to challenge the results."

To the same effect, see *Saunders* v. *Shaw*, 244 U. S. 317 (1917), wherein the Louisiana Supreme Court on rehearing had reversed a judgment, relying on evidence which had been offered by the plaintiff, but which the defendant had not had an opportunity to rebut because of its rejection by the trial court. The defendant successfully raised in this Court his claim that due process had been denied him. Mr. Justice Holmes said for the Court, at page 319:

> "He [defendant] now presents his writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view."

In the present case there was no intimation, up to the time that the court handed down its opinion, that the ownership of a partial, rather than a total, interest in a theatre or operating company was considered unlawful. Accordingly, the defendants were not called upon to produce evidence on this question not in issue. They took advantage of the first

available opportunity, that is when they submitted their proposed decree, to assert that they had been deprived of their right to present evidence which would refute the court's conclusions as to the effect of partial ownership. The trial court exceeded its powers when it denied defendants the right to make such a showing. *Ohio Bell Tel. Co.* v. *Public Utilities Commission* (*supra*); *Saunders* v. *Shaw* (*supra*); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930).

The procedure proposed by defendants would have involved no delay in the termination of the decisive phase of the litigation. They asked merely that they be afforded a later opportunity to apply to the court to be relieved in specific situations. As the court was reserving jurisdiction, this was a procedure which would have given the defendants the very minimum of protection and, without regard to its precise form, it was certainly grave error to deny this or any other opportunity to present evidence on a subject of such importance to defendants.

Quite aside from considerations of a fair hearing, the court below reached a wholly unwarranted conclusion, as we now show.

2. The Findings are Inadequate to Support Conclusion 9(b)

Conclusion 9(b) brands as violative of Section 1 of the Sherman Act all situations wherein an exhibitor-defendant and an "independent" jointly own motion picture theatres through stock interests in corporations owning the buildings. Such a broad conclusion requires, to support it, findings that in all, or even in enough to justify an inference that in all, of those situations the co-owners had entered into agreements or understandings to do or refrain from doing something, the purpose or effect of which was

to restrain trade unreasonably. That is the factual substance of a violation of Section 1. Yet, there was no such finding.

3. The blanket assumptions contained in Finding 116 are contradicted by the record

Finding 116 is in essence nothing more than a series of conclusory assumptions based upon the single fact shown that the major defendants owned interests in theatres jointly with non-defendants. The court assumed from that fact alone that "both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures"; then assumed that "the major defendant thereby eliminates putative competition between itself and the other joint owner", and finally further assumed that each such joint owner "otherwise would be in a position to operate theatres independently." It will be noted that the last assumption is based upon the further assumption that by owning a more than 5% interest in a theatre in which Paramount, for example, is interested, a non-defendant is thereby necessarily precluded from operating theatres independently, and that such a result is necessarily a violation of Section 1 of the Sherman Act as a matter of law. None of these assumptions was supported by any proof whatever. There was no testimony as to the effect on competition of such co-ownerships. There was no proof that but for such co-ownership the parties would have competed in exhibition. The evidential basis for such broad assumptions was wholly lacking.

Furthermore, the conclusion implicit in the decision, that in each instance of co-ownership, competition is necessarily unreasonably restrained, is inconsistent with the

facts and the evidence as to the genesis of Paramount's joint interests, for the record does show that certain existing co-ownerships had such diverse origins that there are no factual common denominators present upon which such overall assumptions could have been rightly predicated.

Paramount owns stock interests amounting to between 12½% and 95% with non-defendants in companies directly or through subsidiaries owning, leasing or operating about 975 theatres. In many cases where it now owns less than all of the stock of an operating company, it once owned it all, but was forced by financial difficulties, which resulted in its bankruptcy and reorganization and the bankruptcy or reorganization of some of the operating companies during the period between 1933 and 1935, to dispose of a portion of its interest in an operating company. This disposition of part of the stock of the operating company, in accordance with a plan of reorganization under the Bankruptcy Act which was approved by the District Court for the Southern District of New York, resulted in the present division of the stock between Paramount and its co-owner in a number of instances (Findings 9-11, R. 3662-3). For example, in 1929 Paramount owned all of the stock of the A. H. Blank Circuit of about 19 theatres. As a result of reorganization and in those proceedings Tri-State Theatre Corporation was formed which was owned 50% by A. H. Blank interests and 50% by Paramount (Ex. 85; R. 898). Paramount once owned all of the stock of the Saenger Circuit of about 104 theatres and in 1935 it sold a 50% stock interest therein to E. V. Richards (Ex. 85; R. 894-5, 898). In its reorganization proceedings Paramount was forced to return 50% of its original 100% interest in the Comerford Circuit of about 60 theatres to the original owners, as it also did in the cases of the Interstate Circuit and Texas Consolidated Circuit, involving together about 90 theatres (Ex.

85; R. 898).* Paramount's 100% interest in the G. B. Circuit of about 15 theatres in western Massachusetts was reduced to about 52% (Ex. 85; R. 898). Its partial interests in Dominion Theatres, Inc. in Virginia and in Pennware Theatres in Pennsylvania were created by sale of a part of the stock to their present co-owners. It has been held in the last mentioned instance that the sale did not result in an unreasonable restraint of trade. *Ball* v. *Paramount Pictures, Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946).

Details of this kind point up the incongruity and error of the conclusion below that partial interests are unlawful *per se*. If Paramount had not had financial difficulties, its 100% ownership in these various theatre circuits would have been lawful under the court's conclusion that a distributor may lawfully own theatres if the interest exceeds 95%. When Paramount was constrained to sell a portion of its interest, what possible restraint on competition or other illegality was introduced? No considerations that appeal to reason suggest that this is a logical penalty for the consequences of financial distress. Not only did the court refuse to give defendants a general opportunity to present evidence to show that such transactions involved no unlawful restraints, but it rejected a paragraph in their proposed decree which would have permitted consideration of just such cases of post-reorganization partial interests (R. 3619-20).

Furthermore, there was no finding as to the purpose for which, or the manner in which many of Paramount's

*Paramount had originally bought the entire interest in the Comerford Circuit. When it was unable to meet its payments and was in default, a settlement of its obligations was made under which the Comerford interests re-acquired a 50% interest represented by prior preferred stock giving them control of the management of the theatres (Ex. 58).

other partial interests were created except those findings that it had acquired interests in theatres in order to obtain outlets for Paramount pictures which were being frozen out of the market by the activities of First National, referred to above (Findings 4-8, R. 3661-62). It had no policy of acquiring partial rather than complete ownership when it made these acquisitions, each one being determined according to the merits of the particular situation (R. 608). Paramount's theatre interests are all represented by stock in operating companies. Theatres operated by these companies are scattered over the country in large cities and in small ones (Ex. 161). In the majority of places there are competing theatres, but some places are too small to support more theatres (R. 870-1). Many of the theatres were constructed by the operating company or its predecessors, others were existing theatres acquired in fee or by lease (Ex. 85). Some old theatres have been completely remodeled, enlarged and modernized (Ex. P. 25). Since the time when Paramount originally obtained its present partial interest, or it was created by a sale by Paramount of part of its holdings, many changes have occurred in the theatre holdings of particular operating companies. Theatres have been destroyed or sold, or leases have been lost and not renewed, and new theatres have been built or acquired by the operating companies (Exs. 8, 65). Some of the original co-owners of stock in the operating companies have died and their interests have devolved upon their widows or heirs who now own the stock of their decedents as investments. Other former co-owners have voluntarily sold their stock to Paramount so that it now owns it all (R. 606-7, 871, 890; Ex. 85). Changes have presumably occurred in the competitive situation in towns where the theatres were situated when Paramount acquired its in-

terest or the joint interest was created. New independent theatres have been built or old ones have been modernized (Ex. P 25). Despite these indications that the origins of co-ownership are so diverse that generalizations are impossible and each co-ownership must be examined on its own facts before any conclusion as to its legality can rightly be drawn, there was no finding as to what the actual competitive situation was in the large majority of the cities or towns where Paramount's affiliates or any other defendants have theatres or theatre interests. It was expressly found that Paramount was not a monopoly and that no monopolies had been shown even in any locality where Paramount or some other defendants owned all of the theatres or all of the first run theatres.

Not only do the absence of relevant findings, the evidence as to the diverse origins of co-ownerships, and the deficiencies in proof point to the incorrectness of the assumptions indulged by the court below, but additional facts can be pointed out which flatly contradict certain of those assumptions.

In *Ball* v. *Paramount Pictures Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946) a private anti-trust case involving a theatre in Pennsylvania which had been operated by a wholly owned subsidiary of Paramount and in which subsidiary it had sold a 50% interest to a non-defendant, the court held, after hearing, and after the opinion below had been rendered, that such sale did not result in an unreasonable restraint of trade. Yet, under the decree in this case, it appears that that very joint ownership would be subject to dissolution on the theory that, contrary to the actual facts, such sale created an unreasonable restraint of trade as a contract, combination or conspiracy in violation of Section 1 of the Sherman Act. All this the court below has concluded

upon a record which shows nothing more than that Paramount owns 50% of the stock of the company operating that theatre and that the balance of the stock is owned by a non-defendant. The result reached in the *Ball* case shows that the assumption of the court below with respect to that particular situation was wrong, or at least ill considered, since if it had had before it all of the facts which were before the court in Pennsylvania, or analogous facts with respect to similar situations it might well have reached the same conclusion that that court reached.

4. Joint ownerships of theatres are not illegal *per se*.

Even if Paramount and a present part owner of a present operating company had been in competition in exhibition prior to the creation of the co-interest, the resulting co-ownership would not *per se* be unlawful any more than would be the ordinary creation of a partnership, or the creation of a corporation to carry on as a unit the businesses of two former competitors.

This is clear from *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416 (Special Statutory Court, 1945) in which Alcoa had purchased a 50% share in the stock of a corporation formed by the combination of five of Alcoa's competitors in the manufacture of aluminum castings. The corporation later leased all its property to Alcoa for 25 years. Nevertheless, the Court held that the transactions did not violate either section 1 or 2 of the Sherman Act. It said (at p. 435):

> "We cannot see that in all this the plaintiff has proved anything relevant to the action. If it means that there was a monopoly of the castings market as such, there is no support whatever in the record for such an assertion. If it means that 'Alcoa's' inter-

> vention in the castings business helps to support its claim that 'Alcoa' monopolized the ingot market, the inference is extremely weak. Finally, there was nothing in the transactions themselves which indicated that they were independently unlawful, or that they served to make 'Alcoa's' legal position as to the ingot industry less vulnerable than it would otherwise have been."

And see similar comments made by Judge Learned Hand with respect to Alcoa's 31% ownership in a combination of three corporations engaged in the aluminum cooking utensil business. Such ownership was held to be no support whatever for "the conclusion that here was a practice or manoeuvre merely to suppress or exclude competitors" (148 F. (2d) at 435-6).

Since Alcoa, which had an unlawful monopoly in aluminum ingot, could, without further violation of the Sherman Act, acquire a part interest in a group of corporations which had been its competitors in the manufacture of a finished aluminum product, then *a fortiori*, the defendants here, which have no monopoly of production, distribution or exhibition, had the right to acquire part interests in theatres not even shown to have been their competitors and, likewise, to sell part interests in theatres, without running afoul of the Act. This is merely corollary to the well established rule that the Sherman Act interdicts neither integration *per se* nor merger *per se*. *United States* v. *Winslow*, and other cases cited *supra*, p. 34. See, also *United States* v. *Columbia Steel Co.*, C. C. H. Fed. Trade Reg. Serv. (9th Ed.) par. 57,639 (D. C. Del., Nov. 7, 1947), not yet officially reported.

As Mr. Chief Justice Hughes wrote for this Court in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344 (1933):

(p. 360) "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains'. *Chicago Board of Trade* v. *U. S., supra* (246 U. S. 231). The familiar illustration of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. * * * (p. 377) The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agent to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be permitted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize".

5. The inadequacies of the Findings and the invalidity of Conclusion 9 (b) render insubstantial the purported basis for the drastic provisions of Section III (5) of the decree.

In spite of the absence of any claim or finding that the creation of the interests ordered dissolved was itself violative of the Sherman Act, or of any finding of unlawful agreement or conspiracy between the companies the fission of whose affiliation is decreed,* and despite the invalidity of

*It should be noted that no claim was made by the Government that ownership by a defendant of stock in a theatre operating company constituted a violation of those provisions of the Clayton

Conclusion 9 (b), the court below entered a decree which, in Section III (5), is far more drastic than any heretofore approved by this Court.

In *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), this Court refused a request by the Government to add a provision to the decree requiring divestiture of a plant by each of the principal defendants found guilty of unlawful patent pooling and of making agreements restraining interstate and foreign commerce. This Court said:

> "We believe there is neither precedent nor good reason for such a requirement. The violation of the Sherman Act is found in these cases in the patent pooling and in the related agreements restraining interstate and foreign commerce. There is neither allegation in the complaint nor finding of fact by the District Court that the physical properties of either National Lead or du Pont have been acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to the agreements above mentioned. The cancellation of such agree-

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Act relating to acquisitions of stock of competing corporations (15 U. S. C. 18). If such a charge were made, it would, of course, have been necessary for the Government to allege and prove that the acquisition unreasonably and substantially lessened competition. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291 (1930); *Pennsylvania R. Co.* v. *Interstate Commission*, 66 F. (2d) 37, (C. C. A. 3, 1933), aff'd 291 U. S. 651 (1934)). And even in a Sherman Act case there must be allegation and proof that a combination unreasonably restrains trade. It should not be conclusively assumed, as it was by the court below, that in every case where a defendant holds more than 5% of the stock of a theatre operating company this *ipso facto* unreasonably restrains competition.

ments and the injunction against the performance of them by the appellant companies eliminate them.

* * *

* * * It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

U. S. v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), and *Standard Oil Co.* v. U. S., 221 U. S. 1, (1911) each involved judicial restoration of a pre-existing separate status to properties whose combination was found to have been the unlawful act, and where it was found that the continuation of the combination of properties would result in the continuation of the unlawful condition, thus making necessary the separation of the properties in order to restore competition and insure its continuance. But in each of those cases there were findings as to the unlawful purpose of combining the properties and of the unlawful effect of continuance of their combination. Where such findings are absent, as in the case at bar, there is neither need nor warrant for a dissolution of property rights.

Here, as in *National Lead*, there was no allegation, proof or finding (1), that any theatre interest, or any interest in any theatre operating company of more than 5% but less than 95% had been acquired or was maintained to prevent competition between the defendant and the co-owner or anyone else, or (2) that specific theatres or companies in which a defendant presently owned more than 5% but less than

95% had been separately owned or operated, or (3) that the co-owners, if bought out under the decree, would re-enter the exhibition business in any place in competition with the defendant purchasing the interest. Divestiture, as the court observed, would simply "withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners * * *" (R. 3551; 66 F. Supp. 353).

Likewise, as in *National Lead*, there was "no showing of the necessity for this divestiture * * * or of its practicability and fairness", no complaint or showing having been made as to the effect of the co-ownership *per se*, or the result of the dissolution which the court directs.

Also, as in *National Lead*, the opinion and findings showed the existence of competition except in so far as the court thought it was restrained by the licensing practices of which it disapproved, and which have been adequately dealt with by specific injunction in the decree. (Findings 18, 20, 23, 59, 121, 146-8, R. 3664, 3670, 3684-5, 3688-9).

No factual justification is present for the dividing line adopted by the court between what theatre interests may be retained and what must be divested. Why 95% instead of 90%, or 80% or 50% or less? None was suggested by the Government, and none is supported by the evidence or findings.

The right to acquire property and to engage in business is a property right, *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918), and there is no requirement that a business must be 100% or 95% or 50% owned, or that the right to engage in business exists only if the business is owned 95% or more. Paramount, in investing in less than 95% of stock in a theatre operating

company is exercising a lawful right to profit from a lawful enterprise, and it has not been charged or found to have been guilty of unlawful conduct with independents owning more than 5% of any theatre enterprise in which it is also financially interested.

The court below has simply adopted an arbitrary line to which it seeks to compel defendants to hew if they are to continue to be interested in the exhibition business.

The Government urged in its argument for divestiture based upon the claim that ownership and control of theatres by a defendant-distributor was unlawful *per se* that Paramount's corporate structure, that is, its ownership of stock of various companies operating theatres in different parts of the country, permitted it to control competition between the operating companies. However, it offered no proof from which this fact could be inferred, and there was no finding, that any of these companies would have competed with each other but for their common ownership or but for the fact that Paramount owned a part of their stock. There could be no inference that competition would have existed, for example, between the North Carolina Theatres, Inc. operating in North Carolina and the Minnesota circuit operating in Minnesota and North Dakota, or between the New England Theatre Circuit, operating in the New England states, and the Tri-States theatre operations in Iowa and Nebraska. The undisputed testimony was to the effect that each of these circuits was operated independently of any of the others in the licensing of films from all defendants including Paramount, and none of them combined their "buying power" with that of any other circuit, and none of them in any way conditioned its licensing of films from any distributor upon what deals any other circuit made with that distributor (R. 832-3, 966, 996; 1034-5).

This charge as to the effect of Paramount's structure was wholly unproved. Certainly since Paramount is permitted by the decree to retain interests in scattered groups of theatres where it owns them completely, the court below rejected this whole theory. It would be fanciful to try to justify dissolution of partial ownerships by assuming competition and its restraint, where geography, like the proof, clearly refutes the possibility of it.

The evidence does not disclose any agreements between affiliated operating companies such as those present in the *Crescent* case, *supra*, and those alleged in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In the *Crescent* case, it was expressly found that the violations of law were in part effected by agreements between the theatre operating subsidiaries, pursuant to which they had divided territories in which theatres might be operated by any of them, and agreements pursuant to which they had combined with each other for the purpose and with the effect of eliminating, suppressing and preventing independents from competing in the territory in which each of the operating subsidiaries had theatres (323 U. S. at 179). In the *Yellow Cab* case it was alleged that the operating subsidiaries had agreed with each other not to compete, and that there were contracts and understandings between the common owner of their stock and the subsidiaries which prevented them from competing with each other and, in addition, prevented them from purchasing cabs from manufacturers other than the common owner.

Neither of these elements is present in the case at bar. There was no finding that there had been any agreements between Paramount, for example, and any operating company owned less than 95% by it which prevented the operating company from licensing films from any other dis-

tributors, or which prevented the operating company from competing with any other theatre operator. In fact, each operating company deals separately in licensing its films from all distributors, and without dictation from Paramount (R. 828-29, 833, 891-92, 966, 996, 1035).

No operating company is at all concerned with what deals any other operating company may make with any distributor nor with its failure to make any deal at all. No deal is conditioned upon the making of any other deal between a distributor and any other operating company. Each operating company is desirous of making the best deal it can for itself for its is concerned only with the success of its own operation. There is therefore no business inter-relationship between one operating company and another. Each of them is separate, distinct and entirely independent of one another (R. 824-5, 828-9, 966, 996, 1033-4, Exs. P24 and P24A).

While the court below was correct in refusing complete divestiture and divorcement, it erred in decreeing compulsory sale or purchase of partial interests held with independents without any inquiry into the purpose and effect of the acquisition or retention of interests falling within the banned percentages. As we have shown, when this error was pointed out upon the settlement of the decree and motions to amend, the court erred, and, indeed, departed seriously from traditional conceptions of fair procedure, in not giving them an opportunity to present evidence as to the true competitive situation created and continued by particular partial interests. Such evidence, when offered on such application as might be made under a right reserved, would, it must be assumed, destroy any basis for the court's unsupported assumption that these partial interests have *per se* unreasonably restrained competition between co-owners.

C. The Court erred in Enjoining the exhibitor-defendants from engaging in new competition in exhibition as Provided for in Section III(6) of the Decree.

Section III(6) of the decree enjoins each of the five defendant-exhibitors forever from "* * * expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph". The only acquisition referred to in the preceding paragraph, namely, Section III(5), is the acquisition with court approval of a present co-owner's partial interest. The effect of the two sections, therefore, seems to be a complete ban upon the acquisition of additional interests in theatres and, therefore, upon fresh competition by these defendants.

In this respect the decree departs from the decree ordered in the opinion of the court below. It was there stated (R. 3562; 66 F. Supp. 359) that the decree to be entered should not

> "* * * prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other competent authority shall approve the acquisition after due application is made therefor."

The decree thus directed by the opinion was more in harmony with the analogous provision in the Consent Decree wherein it was provided (Consent Decree, Section XI, R. 3387) that

> "Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business."

In the proposed decree which the defendants submitted, a provision was inserted to carry out the directive contained in the opinion which would have permitted future acquisitions upon a showing that they were to enter new competitive fields or to protect existing investments, and the court indicated that it would not accept the Government's counter-proposal which would have enjoined the defendants from acquiring new theatre holdings in any manner whatsoever (R. 3057-8). When the court came to enter the final decree, however, it appears to have adopted without comment or finding or conclusion to support it, substantially what the Government had proposed.

In its opinion (R. 3558; 66 F. Supp. 356-7), the court stated that it thought that the remedy it was giving against the infractions found was much less drastic than that granted by this Court in *Interstate Circuit v. U. S.*, 306 U. S. 208 (1939) and less severe than this Court imposed in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944). On the contrary, the relief finally granted was, as we have shown, far more drastic in restricting competition than this Court has sanctioned. Even in the *Crescent* case, the decree permitted the defendants individually to acquire new theatres upon a proper showing to a court that the acquisition would not unduly restrain competition.* This Court said (323 U. S. 186) that the decree should "not stand as a barrier to healthy growth on a competitive basis", and

*The Government in the *Crescent* case argued that the effect of an acquisition upon competition should be the test of its legality (R. 2553). The decree in the case at bar gives the defendants no opportunity to show the effect upon competition of any of its theatre holdings or proposed acquisitions. The Government did not appeal from a decree in *Schine Chain Theatres Inc.* v. *U. S.* (argued Dec. 15, 1947 in this Court) which was analogous to the decree in the *Crescent* case in this respect.

the decree on the mandate of this Court permits the defendants to acquire theatre interests upon a showing that no unreasonable restraint will result.

The *Interstate Circuit* case involved no divestiture or divorcement, but merely the simple remedy of injunction against the specific conduct held to be unlawful.

Here the decree appealed from, in its provision enjoining future acquisitions, is far more drastic than any heretofore approved by this Court. Even in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1 (1911), there was no provision in the final decree against future acquisitions of properties by the companies found to have violated the law. The decree was subsequently construed as not preventing the acquisition by one of the companies of the assets and properties of another by a merger when, upon application to the court for approval, it was shown that the merger would not unreasonably restrain competition either between the parties to the proposed merger or between the combination and others. *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931). So, too, the decree in *United States* v. *E. I. Du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. Del., 1911) has been construed so as to permit Hercules Powder Co.—one of the corporations created by that decree—to acquire the physical assets and other properties of Aetna Explosives Company. *United States* v. *E. I. Du Pont de Nemours & Co.*, 273 Fed. 869 (D. Del., 1921).*

*More recent decrees, like the *Crescent* decree, have expressly reserved to defendants the right to acquire additional properties upon approval of the District Court, granted after a showing by the defendant that the acquisition does not and is not intended to have the effect of unreasonably restraining trade or of creating a monopoly. See, for example, paragraph 27 of the decree in

In no case have we found a litigated decree containing a blanket perpetual injunction against future acquisitions such as was entered below. Even in *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) where the defendant packers agreed in a consent decree to be enjoined permanently from owning retail stores, etc., this Court recognized that the court might, in a proper case, permit such acquisitions, but such relief was not directed because of the failure of the packers to prove that the conditions which led to the prohibition had so changed at the time the application for relief from it was made as to make the prohibition no longer necessary to insure free competition.

On the argument of the motion to amend the decree, the trial court suggested with respect to this injunctive provision, that the provision retaining jurisdiction to amend would protect defendants sufficiently (R. 3102). But, obviously, this is not so. In the light of the *Swift* case, it would be almost an insuperable task for the defendants to succeed in amending the decree at some future time, whereas they might very well, on an application to the court under an express provision providing for such application, be able to convince it that a particular acquisition should be permitted in order to enable the defendant to enter a competitive field or to protect an existing investment, while at the same time being under a general injunction against undue general expansion of its theatre holdings.

Not only is the present injunction without precedent and inconsistent with the court's own opinion, but it is inconsistent with the policy of the Sherman Act. That Act

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United States v. *Pullman Co.*, 55 F. Supp. 985 (E. D. Pa., 1944); for full text of decree, see C. C. H. Fed. Trade Reg. Serv. (9th Ed.) par. 57, 242, at p. 57, 374.

contemplates that decrees under it shall remove illegal fetters on competition, *not* that they shall themselves shackle competition. It has been contended that the effect of this injunction is to prevent a defendant from acquiring any interest in any theatre in which it is not presently interested and thus to deny to the public the benefits of theatre competition by the defendants in any area where they do not now own theatres. Yet it is there that their competition would be most stimulating. And, in the absence of an opportunity to satisfy the court that some new acquisition might merit its approval, the court below certainly erred in confining defendants' theatres arbitrarily to their present locations. If, as it correctly held, they are lawfully entitled to own theatres, they should not be alone denied the right to protect an investment in a theatre or to exercise their lawful right in some new locale where to do so would promote rather than restrain competition.

To decree that under no circumstances or conditions may a defendant-distributor acquire a new theatre is equivalent to slow strangulation and ultimate destruction and loss of those theatre interests which the decree permits a defendant to retain. Being permitted to retain interests in wholly owned theatres, a defendant must be permitted to exist as a going concern and to acquire new theatres where it can establish to the satisfaction of the court that the acquisition would not unduly restrain competition in the place where the theatre is located.

POINT II.

THE COURT ERRED IN DIRECTING THAT LICENSES MAY BE GRANTED ONLY AFTER "COMPETITIVE BIDDING" AND IN ENJOINING DEFENDANTS FROM LICENSING THEIR PICTURES IN ANY MANNER OTHER THAN THAT PRESCRIBED IN SECTION II(8) OF THE DECREE.

Section II(8) of the decree (R. 3696-7) enjoins each of the defendant-distributors from licensing any of its features for exhibition in any theatre not its own in any manner except as therein prescribed. This section contains the so-called "competitive bidding" directive.

It will at once be noted that by this provision of the decree the court below prescribes the sole method by which the defendants are mandatorily and perpetually enjoined to do business with all other theatre operators with whom they deal, and restrains defendants from dealing with their customers in any other manner, however lawful it may otherwise be. Under 8(a) each distributor is mandatorily enjoined to make its respective features available to all who desire to exhibit them upon any run which the theatre operator may select. All offers must be on "uniform" terms.* 8(b) requires that each license shall be granted "solely on the merits" and without discrimination in favor of affiliates, old customers or others.

8(c) requires notification to all exhibitors in a competitive area of the distributor's willingness to receive bids,

*If "uniform" terms means that a distributor must offer a picture to everyone for the same license fee, then this means that each theatre operator must pay the same amount regardless of his ability to do so, and regardless of the size, location, attractiveness and potential drawing power of his theatre.

requires that the offer shall stipulate a minimum flat rental acceptable to the distributor, and shall state the number of days of exhibition, the time when it is to commence and the availability and clearance, if any, which will be granted for each run, and compels licensing to the highest responsible bidder having a theatre of a size, location and equipment adequate to yield a "reasonable return" to the licensor. After the distributor has made the offer in these terms, any exhibitor desiring an exclusive run may bid, and in his bid, is allowed to set out his own terms as to license fees, run, clearance time and days of exhibition and any other terms which he wants to make.

As the defendants are enjoined from doing business in any other way, the impact of this provision of the decree upon the right of each of them to exercise the ordinary attributes of ownership of property and to control its disposition as well as the right of each to choose its customers and its right, and the right of its customers, to bargain for mutually satisfactory terms, is obvious and severe. Although the distributor is the owner and copyright proprietor of the picture, under the decree as it now stands, it has neither right of selection nor right to fix the terms upon which its property is to be used. The decree in effect makes the distributor a public utility where by statute its copyrights are supposed to assure it of exclusive rights and the right to share in those exclusive rights on such lawful terms as it as the owner may demand. Such a result appears to be properly a legislative, not a judicial function.

The right to choose customers and to state the terms on which sales will or will not be made has long been recognized by this Court. *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944); *United States* v. *Colgate & Co.*, 250 U. S. 300,

307 (1919); *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573 (1924); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452-3 (1922); *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-6 (1923); *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582 (1923).

These rights are of particular importance in the motion picture industry because of the influence which exhibition in some theatres has on subsequent exhibitions of the picture in the area as well as throughout the country.*

Regardless of the question of the power of a district court to prescribe an exclusive method under which several (although by no means all) of an industry must "sell" their respective products, and all must "buy" their products, the question of the permissible scope of the exercise of the court's discretion at once arises.

There can be no doubt that the trial court has a wide discretion to mold its decree to the needs of the case. *U. S.* v. *Crescent Amusement Co., supra.* It may, in a proper case, "* * * prohibit acts which in another setting would be unobjectionable". *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 409 (1945). But its discretion is not unlimited, and this Court may, and on many occasions has, modified a decree of a lower court where the terms of the relief exceeded the limits imposed by law or amount to an

*An initial exhibition in Radio City Music Hall or one of the large Broadway houses, for example, is worth infinitely more in prestige, publicity value, word of mouth advertising, etc. than an initial exhibition in a smaller, less well-known theatre (R. 1296). And even though the latter might be able to outbid the larger houses on some pictures, and pay more by playing the picture longer or at higher prices, the ultimate revenue of the distributor would suffer from loss of the prestige and advertising that the Radio City or Broadway showing affords.

abuse of discretion. *Hartford-Empire Co.* v. *U. S., supra* and 324 U. S. 570, 571-575 (1945). Modifications or deletions are made where the decree goes further than is needed to prevent future violations. A decree in a civil anti-trust suit must not be punitive in nature or create "* * * new duties, prescription of which is the function of Congress, or place defendants, for the future 'in a different class than other people', * * *" (323 U. S. 409). "The purpose of the decree, therefore, is effective and fair enforcement, not punishment". *United States* v. *National Lead Co.*, 332 U. S. 319 (1947). And in attempting to frame a decree adequate to prevent violations of the statute, the court must have in mind that "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 78, (1911).*

In *Hartford-Empire*, this Court held that the trial court had gone beyond what was required to dissolve the illegal combination and prevent future combinations of like character, by forbidding any disposition or transfer of possession of machinery by any means other than an outright sale, and by requiring Hartford-Empire to offer to sell all machinery presently under lease and to continue to offer to

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*This Court in *Standard Oil* took pains to construe the decree as permitting defendants to make normal and lawful contracts and agreements, and not as depriving them of the "right to live under the law of the land" (221 U. S. at 80-81). The decree was subsequently construed as not prohibiting the subsequent merger of two of the companies which it separated, where the merger was found by the court not to threaten to restrain competition unreasonably. *United States* v. *Standard Oil Co. of New Jersey*, 47 F. (2d) 288 (E. D. Mo., 1931). See, also, *United States* v. *E. I. Du Pont de Nemours & Co.*, 273 Fed. 869 (D. Del., 1921).

sell machinery to any manufacturer of glassware. The decree was modified by this Court to permit disposal of machinery in other ways than sale, i.e., by leases and patent licenses. This Court held that the decree, as drawn, amounted to a confiscation of patent rights and forfeiture of the patents.

In *National Lead,* this Court held that to compel the issuance of licenses on a royalty free basis, or to issue a permanent injunction prohibiting the patentees from enforcing their patent rights, was not necessary in that case in order to enforce the antitrust laws effectively. It likewise refused a request by the Government to require the defendants to furnish to any applicant technical information desired by the applicant relating to the methods or processes for manufacture, holding that such a provision, which would, in effect, have thrown open to the world the field of technical knowledge in the industry, would discourage rather than encourage competitive research and would be contrary to, rather than in conformity with, the policies of the patent law.

Similarly, the present decree in effect confiscates, in important respects, rights given to the defendants under the copyright laws, the policy of which is similar to that of the patent laws. The copyright laws give to the proprietor of the copyright (in the case of a motion picture) the exclusive right to exhibit the copyrighted picture (17 U. S. C. 1, quoted in Appendix A). Co-existent with the right to exhibit is the right to prohibit others from doing so or to permit them to exhibit the copyright feature upon payment for such fees and terms as may be bargained for and which will give the copyright proprietor his reward. A requirement that he must offer every picture released by

him for exhibition to everyone who applies for it on such run as the applicant selects, and must license it to the highest bidder for each run, effectively curtails his right to prohibit exhibition, and takes away from the copyright proprietor the exclusive right to exhibit or permit exhibition which he is given by the law. His right to exercise the common attributes of ownership and to choose his customers is effectively curtailed because, if he wants to license the picture at all, he must offer it to every applicant and is compelled to accept the highest bid for each picture on each run, regardless of any consideration other than the amount of the particular bid.

The proper reward of the copyright may depend upon a great many factors other than the amount of a particular bid for a particular feature upon a particular run. All these considerations, however, are banned by the decree. The distributor, for example, is not permitted to license a feature to the operator of a theatre with whom it has had long-established and satisfactory business relations and who experience has taught the distributor can, over the years, pay completely satisfactory film rentals. Nor can the distributor take into account the fact that a showing of a particular picture or series of pictures in a particular theatre, with the prestige that such a showing or showings gives to the product, will prove more advantageous in enabling the distributor to get better rentals upon subsequent runs than if the initial showing is in an obscure and inferior theatre which happens to submit the highest bid.

Nothing in the recent decision in *International Salt Co.* v. *United States*, 92 L. Ed. 55 (1947) would have justified the mandatory injunction here under consideration. There the decree dealt with certain patented machines; the patentee

had abused its patent monopoly by entering into lease agreements which were unreasonable *per se* in that they tied unpatented salt products to patented machines and thus foreclosed competitors from a substantial market in salt products. Here the decree applies to licenses under copyrights on works not yet conceived, the licensing of which is already effectively regulated by various negative injunctions in the decree. The future copyrights affected by the mandatory provisions would no longer be subject to abuse in the light of these injunctions.*

The violations of law which the trial court found, and toward which this provision was presumably directed, was a conspiracy and concert among the defendants to maintain a substantially uniform system of runs, clearances and minimum admission prices (Conclusions 7, 8(a), (c) and 9(c), R. 3691-3), and among the defendants and their licensees to discriminate against small independent operators (Conclusions 8(b), (d), (e) and 9(c), R. 3692-3).

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*Moreover, in *International Salt*, the Court recognized that the sixth paragraph of the decree was properly subject to amendment and limitation and, therefore, its denial of relief from it was *without prejudice*. It was thought that under the District Court's general reservation of jurisdiction, any amendment of the decree in the light of a concrete problem would necessarily lead to "a provision that will avoid repetitious applications." But, here, the problem is quite different. To suggest an instance which is not only obvious but which, in the nature of things, would have to occur frequently under this decree: suppose two bids for a given picture proposed terms as to license fees, clearance, length and time of run, and other particulars which were so different as to make it impossible for a defendant to determine who would be "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." Even assuming that, in such a case a sufficiently expeditious decision interpreting the decree could be obtained from the court below, it is obvious that such decision would be *sui generis*, would not avoid repetitious applications, and, therefore, would not meet the test of the *International Salt* case.

The court felt that in the situation which it believed was shown by the evidence, some theatre operators found it difficult to negotiate for and obtain desired pictures upon desired runs, that non-defendant distributors were obliged to conform to the "system" if they wished to get their pictures shown upon satisfactory runs, and that non-defendant exhibitors were obliged to conform in order to compete with the theatres to which the defendants licensed their pictures (Finding 84, R. 3674). Here we confine the argument to the question of the necessity or propriety of *mandatorily* prescribing an *exclusive* method of "selling" to prevent continuation of the conspiracy thought to exist.

If the facts are as found by the court, it would seem obvious that the violations of law could be terminated and effectively prevented by the usual injunctions prohibiting the continuation of the unlawful conduct in the future. Such injunctions, in the most sweeping forms, are included in the decree. Furthermore, Section II(9) of the decree (R. 3698) (from which we do not appeal) is sufficient in itself for this purpose as it prohibits the arbitrary refusal to license features to an exhibitor who wants them and believes he, rather than his competitor, should have them on a particular run.

The following language of this Court in *National Lead, supra,* is applicable here:

> "It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. * * *"

See also *United States* v. *Pullman Co.*, 64 F. Supp. 108, 110 (E. D. Pa. 1945).

In *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944) this Court refused to direct defendant Soft-Lite to sell its product in the future to anyone offering to pay cash for it, on the ground that it would unreasonably interfere with that company's right to select customers. It was pointed out that such a right might be the "most essential factor in the maintenance of the highest standards of service" (321 U. S. 728-9). This consideration applies with even more force in the motion picture business, since the proper selection of theatres to exhibit a picture can make or break the picture (R. 1621-4, 1634-5). Also in *Bausch & Lomb* this Court refused to enjoin Soft-Lite permanently from suggesting re-sale prices and executing re-sale price maintenance contracts under the Miller-Tydings Act, the rationale being that after a reasonable interim to dissipate the illegal practices, Soft-Lite should be permitted to attempt to act lawfully by use of methods expressly permitted by Congress. And so the defendants here should be permitted to attempt to act lawfully under the sweeping injunctions granted and not also be permanently enjoined from doing business in any other way than by the untried, complex and undeniably confusing system devised by the lower court.

Section II(8), in addition to placing defendants in a class by themselves *vis-a-vis* other present and future distributor competitors not bound by the decree, in fact restrains competition between them as it requires each to follow the same course, and prohibits each of them from gaining or attempting to gain a legitimate competitive advantage over any of the others by superior service, reasonable assurance of a supply of product and other proper business methods. It seems likely that if the defendants had agreed among themselves to license their pictures only to the highest bidder in accordance with the method pre-

scribed by the decree, such agreement would have been attacked under the anti-trust laws. Yet the court enjoins each to follow the same method as is prescribed for each of the others. It is submitted that the method devised bears no relation to the supposed evil and that it is unnecessary and impracticable for that purpose.

With respect to the merits of the licensing system devised by the court, it has been strongly urged by exhibitors (R. 2820-48), that its burdens will fall most heavily on the operator of a small theatre who is in competition with a larger one. It is said that the theatre able to produce the largest revenue will normally be able to make the highest bid for each of the pictures of each of the distributors which it wants to exhibit. If this is true, it is asserted, the theoretical right of the small operator to bid is illusory. The small theatre operator might be tempted to overreach himself on occasions and to outbid his larger rival. If he does this, he might find that he could profit on a particular picture or he might find that he has bid so high that his prospective profits disappear. He can not expect consistently to be able to pay more than the larger theatre can and he, therefore, loses the assurance of a supply of product. While such considerations are necessarily speculative and the court below apparently did not find them persuasive, they are not so extreme as not to merit consideration. In any event it seems unwarranted and unwise for the court to attempt to prescribe an exclusive system of doing business which it is claimed may well have such an adverse impact on the exhibitors whom the suit was ostensibly designed to protect.

The differences of opinion reflected upon these appeals among the defendants subjected to the competitive bidding requirements emphasize the undesirability of any such

shackling requirements for the future. None of the exhibitor-defendants other than Paramount assigned these provisions of the decree as error. It may be assumed that this action reflects a belief that the consequences envisioned by many exhibitors are not certain to ensue and confidence that the lower court will revise the provisions as experience may require. But the possibility that the exhibitors' prognosis may prove to be correct may well suggest the desirability of eliminating the present provision.

It is submitted that the injunctions contained in Section II(8) of the decree, are wholly unnecessary to accomplish what the court below thought that it was necessary to accomplish. That was to prevent the continuance of what the court felt was a system under which theatres competing with theatres which were part of a large circuit (whether or not the circuit was affiliated with a defendant) found it difficult to negotiate for and obtain desired films upon desired runs, and found that they were subjected to terms and conditions which discriminated against them in favor of the circuit theatres. Section II(9), (R. 3698) will, it is submitted, accomplish this purpose. That section enjoins defendants, as distributors, from arbitrarily refusing the demand of an exhibitor to license a feature to him on a run selected by him instead of licensing it to a competing exhibitor. This in itself is a drastic curtailment of the right of a trader to choose his own customer and exercise the ordinary incident of the ownership of his property. Thus, in every competitive situation, an exhibitor would be assured of a fair opportunity to negotiate for a license of a desired feature on a desired run, and any arbitrary refusal by a distributor to license under those conditions would constitute a violation of the decree, subjecting the defendant distributor to punishment for contempt.

To implement further this portion of the decree, and to give exhibitors an additional and speedy remedy in the case of a claim of an arbitrary refusal to negotiate with him, the defendants submitted with their proposed decree a proposal under which claims by an exhibitor that he had been arbitrarily refused a license could be arbitrated. (R. 2971-5, 2985-7.) The remedy of arbitration was not offered as an exclusive remedy, but it was proposed as an alternative and additional remedy so that the complaining exhibitor could, at his option, avail himself of the arbitration procedure or of the remedies afforded him at law (R. 2974, 2992, 2998-9). Nor was the arbitration procedure suggested as a means of insulating the defendants against contempt proceedings; it was expressly conceded that the Government would still have this remedy should there be a violation of the decree by the arbitrary refusal of a demand of an exhibitor for a license (R. 2895, 2974, 2980). The proposal of the defendants which, if accepted by the court would have taken the place of the present Sections II(8) and (9), is set forth in full in Appendix B hereto annexed.

Although this proposal of the defendants was acceptable to the same exhibitor groups who were heard by the court at the time of the settlement of the decree (R. 3032-3), as being preferable to the provisions of Section II(8), it was not adopted by the court. It is submitted that the court erred in this respect and that Section II(9) or defendants' proposal, either with or without the additional remedy of arbitration, is all that is necessary or proper to accomplish the result desired by the trial court. Section II(8) of the decree should be stricken. Section II(9) is sufficient to insure adequate opportunity to compete, but if it thought that this is in doubt, something like the defend-

ants' proposal might well be substituted in lieu of the present Sections II(8), and (9).

While it may be difficult for this Court to attempt any detailed revision of the decree in these respects, it is evident that there were areas for the exercise of the lower court's discretion which did not involve the possibility of unfortunate consequences with which its own competitive bidding requirement is fraught. Since that requirement exceeded the bounds of its proper discretion, this Court should, at the very least, remand this portion of the decree for consideration of alternatives which do not involve (a) a permanent restraint on the method of doing business which precludes normal competitive activity, and (b) possible injury to small independent exhibitors who should be free to negotiate upon the best terms that they can get, having their past record as good customers an element not to be overlooked in the course of negotiations.

This is not an argument for the retention of the status quo. It is safe to assume that the court below will be able to find some acceptable alternative which will further change the status quo in material respects without depriving reputable former customers of the right to use their reputation as one argument in their favor. The balance of the decree already insures that substantial changes in the status quo are inevitable, but the desirability of change does not indicate that the appropriate remedy is unalterable rigidity.

ARGUMENT AS APPELLEES

In No. 79 the Government appeals from the decree and urges (1) that it is so inadequate as to constitute an abuse of discretion; (2) that the court below should have ordered divorcement by compelling divestiture of the defendants' respective theatre holdings; and (3) that pending divestiture the court should have prohibited each major defendant distributor from licensing its pictures for exhibition in any other defendant's theatres.

These contentions rest, in large measure, upon the Government's misinterpretation of facts and findings of fact, not supported by the record. We regret to note that in its statement of purported facts appearing in the brief at pages 11 to 34, many of the facts as there stated are distorted, and that the brief contains many inaccuracies and omissions, so that the statement cannot be accepted as a basis for this Court's decision of the issues. In the course of this reply, we will point out some of these errors and omissions but it would unduly extend this brief to deal with all of them.

While protesting that they "do not challenge any of what we consider to be the evidentiary findings" and asserting that they will "rely largely" on the facts found by the district court, except to refer to facts about which they believe there is no dispute. (Br. 11-12), the writers ignore some basic findings, directly attack others and proceed as though they had not been made, and base arguments on assumptions of fact nowhere to be found in this record. By rearrangement, or quotations of only part of findings, and constant repetition of findings out of context, the writers of the Government brief attempt to portray a situation not disclosed by the record or found by the court.

The brief as a whole reflects a determination to wreck the defendants and the industry regardless of any other consequences. The brief subordinates everything else in favor of a fixation for stripping defendants of their theatre interests and destroying their value in the course of that major surgical operation.

An attack is made (Br. 119-125) upon the court's conclusion and finding that divestiture would serve no useful purpose (R. 3559) and would, in fact, be injurious to the public as well as to the defendants (R. 3551, 3554-5). This attack is based upon the erroneous premise that the court thought theatre ownership was an evil but that the cure would be worse for the public and the defendants than the disease. But it is plain that this was not the rationale of the court's refusal to direct complete divestiture. The court had found that the supposed injury to the public came from the effect of trade practices in distribution which it ordered enjoined, and not from theatre ownership by defendants, and it pointed out clearly that divestiture would not remedy or alleviate the situation which it supposed was created by the existence and continuation of those distribution practices, but would leave the public, as well as the defendants, at the mercy of powerful independent circuits or of distributors controlling most of the best pictures and not competing in distribution (R. 3554-5). Thus the basis of the court's denial of the extreme relief sought by the Government was quite different from that upon which the present attack on its action seems to be predicated.

The court's conclusions are clearly sound in the light of past events. The inability of Paramount to market its films in the face of the powerful First National combine was al-

leged in the complaint (R. 3167) and found by the court (R. 3661-2). The proclivities of large independent circuits to monopolize and restrain competition by their smaller competitors was noted (R. 3555), and the correct conclusion was reached that divestiture and divorcement would only remove defendants (found to have been skilled operators of the best equipped theatres), from competition (R. 3551) which they had created and maintained by their entry into the field of exhibition (R. 3661-2; Findings 20 and 23, R. 3664).

It is said, in an attempt to answer the court's conclusion, that there was nothing in the record to suggest that independent interests could not give the public as good service as the defendants, (Br. 120), and, of course, they can, and we do not urge the contrary, but defendants are not to be deprived of lawful property interests merely because someone else wishes to and is qualified to own them. The other provisions of the decree assure that no qualified independent operator will be deprived of films; it should not also insulate him from competition from defendants with its resulting benefits to the public.

The findings are that there are nearly fifteen thousand independently operated theatres, and that they have increased in number more rapidly than affiliated theatres have (Finding 145, R. 3668); that independents actively compete in all places where a defendant operates except in a relatively few towns where all the theatres are affiliated (Findings 146-150, R. 3688-9), and that in those few situations, there was nothing inherent in theatre ownership by a defendant which prevented independent theatres from operating, and that the proof did not show that those situations had been brought about or maintained by wrongful action on the part of defendants (Finding 153, R. 3690).

The paradox which the Government sees in the court's conclusion (Br. 121-2) is unreal. The argument rests on the premise, held to be erroneous, that the distribution practices enjoined by the decree flow from the integration of distribution with exhibition, and that they cannot be eliminated except by wholesale punitive and confiscatory disintegration. The court, on substantial evidence, found to the contrary, and held that these practices did not flow from integration, (Findings 154-156, R. 3690). This premising of argument upon factual contentions found erroneous below hardly comports with a claim that the writers have accepted evidentiary findings and rely only on undisputed facts.

An attempt to create a prejudicial setting is made by the Government in its argument that experience, as purportedly shown by past litigation, shows that "No judgment which merely regulates defendants' trade practices can give adequate relief" (Br. 72-89). Aside from the obvious impropriety of attempting to lead this Court to determine issues framed by this record upon opinions based on entirely different records,* even the past cases and the administrative rulings referred to in the Government's brief (which by no means represent a fair cross-section of past cases) do not add up to the desired conclusion—that the restraints found in some of those cases are inherent in ownership of theatres by these defendants, whether their holdings be considered individually or in the aggregate, and therefore that this Court should disregard the findings below and conclude that the courts cannot give

Mackey v. *Easton*, 86 U. S. 619 (1873); *Ball* v. *Paramount Pictures, Inc.*, 67 F. Supp. 1 (W. D. Pa. 1946).

effective relief without divorcement. Indeed the argument suggests an almost unprecedented departure from proper conceptions of due process.

The Government's argument here, as in most of its brief, depends upon the assumption that the defendants' businesses can be aggregated, which the court below has expressly held cannot be done (R. 3553). In spite of its failure of proof justifying a contrary conclusion, the Government seeks to accomplish and justify aggregation by showing the licensing of some of each defendant's pictures for exhibition in some of the theatres of the other defendants, (which the Government erroneously calls "cross-licensing"), and the joint operation in the past of some theatres by two defendants, i.e., the few "pools". But the Government fails to show why, if these circumstances have led to abuses, a decree enjoining the abuses would not be all that is necessary, and why the only remedy appropriate for a court of equity is to destroy the ability of able competitors to compete, by permanently enjoining them from the exhibition field and making it impossible for them to operate pending forced sales of their present holdings. The Government concedes—indeed openly declares—the fact that the relief asked, of a ban on licensing between defendants, would result in forced sales of some theatres (Br. 131-2). Such relief is concededly without precedent (Br. 132-3) and is clearly of a punitive, and, in fact, vindictive nature.*

*"Pools" between defendants are, of course, effectively banned by the decree. Their existence in the past cannot form a basis for divestiture of *all* theatre holdings, and there appears to be no valid basis for a claim that the injunction granted against them is not adequate.

Since nothing in the findings or record warrants either the interim or final relief demanded, the Government resorts to an unrepresentative sampling of past cases against the industry in an attempt to justify it. But even if those cases in fact showed a past proclivity to violate the law, in certain particulars, which could properly be considered here, and past ineffective attempts to dispel the proclivity (which they do not, as we shall demonstrate), this Court will, of course, act only upon the proof before it, and not act on suspicion or facts found in other cases, and it will consider relief accordingly without prejudice and without undue injury, permitting the defendants to live under the law of the land. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386; 324 U. S. 570 (1945); *U. S.* v. *Bausch & Lomb Co.,* 321 U. S. 707 (1944).

Comments Upon the Government's Statement of Purported Facts

Under the heading "The theatre acquisitions of the five major defendants" (Br. 14), the Government states that in 1919 Paramount decided to acquire theatres of its own so that it might assure itself of outlets for Paramount productions. Later the Government urges that these acquisitions were "in order to have non-competitive market outlets for their films" (Br. 91). Such statements and conclusions are a distortion of the findings and ignore undisputed evidence in the record. As we have pointed out, at pages 22 to 24, *supra,* Paramount's initial acquisitions were competitive measures and were entirely lawful in purpose. We do not attempt to justify them on the ground that the members of the First National combine were violating the Anti-Trust Laws, as the Government suggests (Br. 103-4),

and they were not in any way analogous to the "deliberate, calculated purchase for control" condemned in the *Reading* cases and the *Yellow Cab* case (Br. 104).* They constituted a legitimate and lawful method of enabling Paramount to sell its products when potential customers, lawfully or unlawfully, refused to buy them, and the exercise of the right to go into a business open to all. Since the initial acquisitions, Paramount or its subsdiaries have built new theatres, thus creating markets where none before existed, and Paramount has not confined itself to the acquisition of existing theatres or circuits (R. 608; Exs. P. 25 and P. 25A).

The omission of the actual facts disclosed by this record cannot serve to strengthen the current Government argument that integration in this industry is unlawful because it enables a defendant to monopolize and restrain trade in that alleged segment of business represented by its own copyrighted pictures (Br. 90 *et seq.*). We will expose the fallacy of this contention at a later point. When all of the facts are considered, the emptiness of the argument appears clear.

Again under the heading "Geographical Pattern of the Major Defendants' Theatre Holdings" (Br. 15-17), the Government seeks to create the impression that the defendants have agreed not to compete with each other in exhibition, except possibly in some forty-seven cities, most of which have populations of 100,000 or more, and that even in those cities the defendants who "nominally" compete

*Anyone who purchases property does so with the intent to control it, but that does not make him a law-breaker. There was no showing that Paramount had any intent or power to exclude competitors, as in the cases which the Government cites.

in theatre operations do not compete with each other in the licensing of films (Br. 17-19). The facts do not support the claim.

The undisputed testimony establishes that there were no agreements among defendants to divide territory or not to compete generally with each other in exhibition (R. 608, 1601, 1826); and the court below failed to find any such agreements. Nor was there any evidence of, nor is there in fact, any "pattern" of theatre holdings, geographical or otherwise. Some theatres or circuits were acquired by one defendant in competition with another (R. 607-8, 937-40, 2041-2). Some theatres formerly owned by one defendant were acquired by another in the former's bankruptcy proceedings (R. 2090).

There was no proof that cities and towns, where one or more of the defendants had theatres, were capable of supporting more theatres or more theatres capable of operating as first run theatres. The Government makes a point of the fact that the downtown theatrical districts in large cities are already well supplied with theatres (Br. 63, 103).

Different policies governing the theatre operations of each defendant explain in good measure why they are not all found in the same places. Loew's, for example, apparently likes to operate a large theatre in a limited number of large cities. It started as an exhibitor after converting its existing large vaudeville houses into motion picture theatres when the vaudeville entertainment they were supplying lost its public appeal, and it thereafter acquired a production and distribution business competing with Paramount and others. Paramount, on the other hand, believes in operating in smaller places as well. It is not strange, therefore, that Loew's is not found in more places in competition with

Paramount. Warner acquired many of its theatres through acquisition of an existing localized circuit (as of course some others did also). Warner, having no policy of general expansion, it is not strange that it, (or any defendant), is not found in competition with other defendants in places remote from its main operations where another defendant by a prior acquisition had obtained theatres.

RKO's predecessor, like Loew's, already had theatres in certain cities in which it was offering vaudeville which were converted for the exhibition of pictures, and the formation of RKO and its acquisition of production and distribution facilities created new competition for Paramount and others in all branches of the industry (Findings 20, 23, R. 3664).

Fox, in some cases, likewise acquired theatres already in existence in certain cities, sometimes in competition with Paramount or other defendants, who, when defeated by Fox in their efforts to acquire the circuit, were able to get other theatres in other cities. These circumstances account for the present geographical locations of many of defendants' theatres.

The facts show that Paramount competes in exhibition with one or more of the defendants in at least forty-five cities, and there was a complete lack of proof that it had agreed with anyone to stay out of a single town or area where another defendant operated.

The Government's comment that expansion by defendants has been subject to control by their respective home offices (Br. 17), if intended to raise a suspicion that there were agreements, is not substantiated by the proof. In Paramount's case that "control" was only the result of the fact that Paramount, as a stockholder in a subsidiary, re-

quired that it be consulted when the subsidiary desired to make a substantial capital expenditure such as, but not being limited to, the acquisition of a new theatre (R. 829, 886). Such a requirement is only a normal and prudent one to protect an investment. There was positive testimony that there were no agreements between defendants to stay out of areas where another defendant had theatres (R. 608, 1601, 1826). This case shows a pattern of such diversity as to be completely inconsistent with any claim of pattern or agreement with respect to theatre locations.

In support of its argument that the defendants, when operating in the same city, do not compete with each other for products (Br. 17-19), the Government asserts that in the ninety-two cities of more than 100,000 population, during the period 1937-1944 the product of the defendant distributors "continued to flow" to the defendant exhibitors with virtually no shift from one to the other, and it is asserted that defendants offered no evidence to prove such competition (Br. 19). Here again, by not disclosing the complete facts, the Government seeks to draw unwarranted inferences of agreements not to compete in licensing films. It ignores for example the finding by the court, amply supported, that in some cases Paramount theatres, though desirous of doing so, were unable to get licenses to exhibit another defendant's pictures, because they were licensed to competitors of the Paramount theatres (Finding 129, R. 3686). In some cases, the competitor was another defendant which had succeeded in licensing the desired product.

In a limited number of cases where two or more defendants have theatres, each theatre is able to fill its screen time with only its own or its parent company's pictures, and there is no occasion for it to compete for those of other distrib-

utors. In other places, the theatres can get along with a few other pictures or the products of one other distributor. The success of that one distributor in licensing its pictures to such a theatre necessarily excludes other distributors from doing so to the extent that the needs of the theatre are satisfied. The other distributors, as a result of the first one's successful competition for the available screen time of the theatre, naturally seek and obtain another licensee, who may or may not be one of the defendants. "Switches" thereafter do not occur frequently, simply because the circumstances which cause the original selection of licensee or product do not change frequently.

The Government's argument also ignores the findings that the defendant distributors, other than Loew's, in twenty-one out of the thirty-six large cities where Loew's operates theatres, licensed their pictures to competitors of the Loew's theatre, and that over the years they have licensed less and less products to the Loew's theatres (Findings 131-2, R. 3686). It ignores the findings and proof as to the great fluctuations year to year in the amount of film rentals paid by the theatres of one defendant to each of the other defendants, indicating variations in number of pictures licensed (Findings 134-44, R. 3686-8).*

Furthermore, if in some places there was little or no shifting of product from one defendant's theatre to an-

*It is true that where defendant has a theatre, it usually exhibits its pictures there first, and to that extent does not put those pictures on the market for competing exhibitors until it has run the picture in its own theatres or decided not to do so, and this is all that the witness Rodgers was referring to when he testified, (R. 572, Government Brief 18-19), that defendants did not compete for the licensing of Loew's products. It cannot be blown up into a concession of a general lack of competition as the Government's brief attempts to do.

other defendant's theatre, that fact alone is not indicative of anything unlawful, and certainly is no proof of a general conspiracy among defendants to obtain a monopoly for one or all. There was no showing, for example, that conditions had changed in any of those cities so as to make a Paramount theatre dissatisfied with the product of Loew's, and desire to replace it with Warner product and, therefore, to induce the Paramount theatre to compete against an RKO theatre for that product. Many reasons more consistent with legitimate business considerations than unlawful conspiracy suggest themselves and appear in the record as to why theatres, whether affiliated or not, continue to show the pictures of the same producers rather than to change producers frequently and constantly. And there are equally valid reasons why a distributor does not try to "peddle" its product, but prefers a more steady customer (R. 735-6, 823, 1391, 1701). Theatres, whether affiliated or not, need a steady flow of product, and naturally can be assured of such a steady flow better by continuing to deal with a given distributor than by shopping around among all.

Clearly there is no law which brands unlawful *per se* normal continuance of business relations between a buyer and seller or a principal and agent, and the fact that these relations continue is not a suspicious circumstance justifying an inference of unlawful agreement. An illustration makes the matter clearer. Suppose exhibitor A for years has had satisfactory results from playing the pictures of distributors X and Y. These pictures supply A with enough product to operate his theatre. He does not need more pictures and he cannot do with less. His competitors, exhibitors B and C, need and deal for the product of the

remaining distributing companies and succeed in obtaining their respective needs. They likewise need no more pictures and cannot do with less. If A should then also license the product of one of the distributors theretofore supplying B or C, he would have available more pictures than he could use, and his competitors, B and C, or one of them, would have less than needed and would be forced to attempt to get a product away from A. With this prospect in mind, A concludes that he would not benefit from trying to acquire products other than those distributed by X and Y, and is therefore content to deal with those distributors and not raid the suppliers of B and C. Distributors X and Y, on the other hand, enjoying satisfactory business relations with A, are content to deal with him so long as he continues to have a good theatre, pay reasonable license fees and meet his obligations. There is no reason in business, law or morals to expect that there would be frequent changes under these circumstances and that exhibitors A, B or C or the distributors would seek to create destructive competition in such circumstances. The Sherman Act does not compel competition—it only outlaws unreasonable restraints of it. *U. S. v. United States Steel Corporation*, 251 U. S. 417, 451 (1920). Neither independent operators nor these defendants as exhibitors are required by the Sherman Act to disregard normal self-interest.

The fact that Ford sells its cars to or through the same distributor from year to year and may not offer distributorships to competing distributors frequently, or the fact that General Motors may not try to solicit Ford's dealers to give up selling its cars in favor of those of General Motors, are not circumstances which require an inference of an agreement between Ford and General Motors not to compete, or

of an agreement between the dealers to divide the market rather than to compete for a product to sell. Nor does the fact that a retailer of Firestone and Goodrich tires continues as such, and does not frequently give up those brands or try to take the product of Goodyear away from his neighbor, mean that he and his neighbor have agreed not to compete in obtaining products to sell. There is no more reason on this record for construing any absence of shifts of product between defendants' theatres as itself indicative of conspiracy, than in the above illustrations.

Furthermore, if and to the extent that normal shifts have been impeded by long-term contracts or by master agreements, these impediments will be removed by the injunctions in the decree against the making of franchises and master agreements, from which we do not appeal.

Under the heading "The Defendants' Position in the Industry" (Br. 19-22), the Government gives statistics intended to show the aggregate theatre holdings of the separate defendants and the aggregate license fees received by all of them as distributors. Aggregation is resorted to because it has been necessary for the Government to concede that if each defendant is considered individually, the statistics are not significant. They are clearly irrelevant in the absence of some legal justification for treating defendants as one theatre operating combination. The defendants collectively have no "position" in the industry—each has its own position and strives to better it. The Government conceded below that "1. Individually considered, each distributor defendant directly controls only a fraction of the entire domestic distribution business" and "2. Individually considered, each producer-exhibitor directly controls only a fraction of the entire domestic exhibition

business * * *." (Government's Trial Brief, p. 2). In the absence of evidence and finding of some vast national agreement not to compete in the licensing of products, a conclusion that there was one rests solely on inference from the bare fact that one defendant distributor over a given period of time has licensed its product to a certain exhibitor defendant and not to another defendant operating a theatre in the same city, an inference which was for the trial court and which it refused to draw. The inference cannot be drawn here since many lawful considerations are at least equally probable and the Government failed to sustain its burden of proof. *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. (2d) 991, (CCA 3, 1943); *Pennsylvania Railroad Co.* v. *Chamberlin*, 288 U. S. 333, 339 (1933).

Since there is no proper basis for treating defendants in the aggregate, the statistics as to their aggregate theatre holdings and aggregate film rentals are mere exercises in arithmetic. When Paramount's individual business is examined, its "position" in the industry presents an entirely different picture.* It owns interests in only about 1550 theatres or about 9% of those in operation. Those theatres pay no more than 11% of the total domestic film rental received by each of the 7 distributor defendants other than Paramount, and no more than 16.8% of such film rental received by all (Ex. 425). Its theatre holdings are not confined to large cities of the United States, but it has theatres in smaller places as well, and its theatres are the only ones supplying motion picture entertainment to the inhabitants of some of those smaller places. It has first run theatres

*Compare its present position with the allegation that in 1916 it was the dominating influence in the industry (Compl. par. 97, R. 3167).

in only 47 of the 92 cities with populations of over 100,000, and it owns interests in all of the currently operating first-run theatres in only 11 of those cities.* It has no monopoly or "virtual monopoly" of first run theatres in the legal sense in any of these cities, as the court below found (Finding 153, R. 3690) and has competitors in all of these cities. It has theatre interests in only 139 of the 320 cities with populations of 25,000 to 100,000. It has no monopoly in the legal sense of the exhibition business in any of the towns where it has the only theatre or theatres. As the court below pointed out, unlawful monopolization cannot be shown merely by proof of ownership of the only theatre or store in a town (R. 3554, 3556).**

Paramount annually distributes not more than about 9% of the features distributed in the aggregate by the 8

*The term "first-run theatre" is really a misnomer. Any theatre obtaining a license for the first showing of any picture in any competitive area is a "first-run theatre" as to that picture in that area (R. 23). As a convenient descriptive phrase, however, it generally denotes the best theatre in an area. Paramount theatres are generally the best or comparable to the best in their respective areas (R. 751, 869, 1926, Exs. P-24 and P-24A) and distributors license them for the first showing of their pictures because of that fact and not because they belong to Paramount (R. 1514, 1699, 1973, 2043). Similarly, Paramount as a distributor attempts to license the first showing of its pictures to the best theatres regardless of who owns them (R. 763), although sometimes where Paramount has no theatre it is not successful because its distributor competitors have succeeded in filling the needs of the best theatres (R. 704-5, 753).

**See *United States* v. *Pullman Co.*, 64 F. Supp. 108, 112 (E. D. Pa. 1945) where it was said "If there is only one store in the town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by the devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

defendants and 3 of the other national distributors, Republic, Monogram and PRC (Finding 99, R. 3677). It receives no more than 15.6% of the annual film licensing revenue paid to the 8 defendants distributors and, of course, a much smaller percentage of the film revenue received by all distributors.

Statistics for the other defendants, individually, will undoubtedly be found in their separate briefs, and will indicate, as do the above, that the statistics used by the Government, when properly viewed, show the absence of monopoly or the ability to monopolize in any of the defendants. The trial court's findings, that there is no basis for treating the defendant's separate businesses as one, require that the elaborate statistics put together on an opposite basis be treated as irrelevant. *Maple Flooring Association* v. *United States*, 268 U. S. 563, 577 (1925).

Under the heading "The Conspiracy to Fix Prices, Clearances, and Runs" (Br. 22-29), we find the Government seeking to convert the actual agreements found below into agreements justifying aggregation of the defendants contrary to the interpretation of those findings by the court which made them. Here the Government sets out the findings of the lower court with respect to the licensing practices pursuant to which films have been licensed to *all theatres*, whether affiliated or not, and the findings that in general the runs and clearances granted, and the minimum admission prices inserted in the licenses of all the defendants individually with *all* their licensees, have been substantially similar. From this similarity the court below inferred a conspiracy between the defendant distributors and *all* of their licensees, independent and defendants, to maintain a fixed system of runs, clearances and

minimum admission prices. The Government asserts (Br. 24) that "this conspiracy has been effectuated mainly by means of film-licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors" (Citing Finding 64 at R. 3670). But that finding does not support the statement. It is a general finding that the defendants' licenses are in effect price-fixing arrangements among *all* of the distributor defendants as well as between the distributor defendants individually and *all* their various exhibitors, and that they show a general price fixing arrangement in which both the distributors and *all* their licensees were involved.* The finding shows on its face that it has nothing to do with the ownership or operation of theatres by the defendant distributors, and there is no justification in the record for treating the erroneous conclusion of conspiracy based only on similarity of licensing practices used by *all* distributors with *all* exhibitors, as stemming from theatre ownership by defendants. The court found to the contrary (Finding 154, R. 3690), and the Government points to no evidence to justify disregard of that finding. Continued repetition of the simple fact that in many instances each of the five major defendants as an exhibitor has been licensed by other defendants as distributor under license agreements providing for runs, clearance and minimum admission prices cannot serve to change the character of the conspiracy as found or obscure its application to *all* situations. The findings show that these practices have been followed by *all* distributors, whether defendants or not, with *all* licensees whether affiliated or not, and there is no basis to conclude that the

*Of course, the number of licenses which Paramount (and other defendants as well) makes with independents far outnumber those which it makes with defendants' theatres (R. 668, 1072, 1266, 1416).

conspiracy was effectuated mainly by the licenses of one defendant to another defendant's theatres, or that ownership of theatres by defendants was its root. And, if the licenses contain matters which are objectionable, or their terms are imposed by unlawful conspiracy, the remedy is by injunction against all who participated, not amputation of some upon a complete misdiagnosis of the ailment.

Reciting findings out of context in an effort to develop its thesis, the Government finally arrives at its conclusion, entirely synthetic, that the "obvious purpose and effect of this system was to increase the profits of the major defendants, both as distributors and exhibitors and to produce greater profits for the non-exhibitor defendants in their capacity as distributors" (Br. 26). Of course, there is nothing heinous in the pursuit by an American business concern of a policy which has the purpose and effect of increasing its profits. It is unlawful only if an illegal agreement or combination is involved or the motive or effect is to monopolize.

The evidence shows that the licensing practices were designed and followed by *all* distributors to enhance their revenue and adopted by *all* exhibitors, whether affiliated or independent, to further their respective businesses. Legitimate self-interest of all members of the industry induced the practices prior to and regardless of integration by defendants (R. 423, 439-40, 665, 705, 717, 916-8, 934, 1080-1, 1269, 1506, 1904).* Accordingly, relief (if appropriate

*The Government fails in its attempt to show that the supposed conspiracy to fix runs, clearances and minimum admission prices which were substantially uniform in each competitive area originated only after integration (Br. 28-9). The proof showed that these practices originated with the feature picture before even Paramount acquired theatres (R. 423, 439-40, 665, 705, 717, 916-8, 934, 1080-1, 1269, 1506, 1904). They, of course,

at all) was properly addressed to the practices and it would have been an abuse of discretion to strike at unrelated lawful activities.

If it is unlawful for a distributor to stipulate minimum admission prices in areas where it operates theatres for the purpose of safe-guarding the box office receipts of these theatres, or if the distributors have conspired to fix prices or otherwise unreasonably restrained competition they should be enjoined, but they should not be dismembered.

The Government relies heavily upon Finding 72 (R. 3672-3) to the effect that admission price differentials between runs in competitive areas heretofore prevailing in licenses were calculated to encourage as many patrons as possible to see pictures at the higher priced first-run theatres, and that in effect the distributors, in fixing minimum prices, attempt to give the prior run exhibitors as near a monopoly of the patronage as possible (Br. 26-27). But if such a view of motive be accepted, this record shows that the attempt never approaches success, nor is it expected to.

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existed long before Twentieth Century-Fox acquired theatres in 1925 and before Warner and RKO did so in 1926 and 1928 respectively. To the extent that the current licenses evidence a "steadily increasing control by the distributor over the exhibitor's business" (Br. 28), the statement, if true, is not shown to be due to integration. One would suppose, on the contrary, that the defendant exhibitors, if obsessed with the motives which the Government ascribes to them, would have seen to it that those controls would be relaxed, not extended, and, the evidence shows that *all* distributors limit their licenses to all theatres whether they belong to a distributor or not (R. 697, 707, 715, 1483, 1506). Similarity in detail in the contracts is accounted for by the fact that a more or less standard form of contract was evolved at the request of independent exhibitors, and when NRA was functioning, which has been continued by the individual distributors with variations since these times (R. 923, 925, 927, 929, 931).

The fact is that the minimum admission price provisions have not been confined to subsequent licenses; these provisions have also been inserted in the licenses of all prior runs (affiliated or not) in order to protect the value of the subsequent run (affiliated or not), and to protect his patronage in the lower priced theatre.* Thus the conception of motive contained in Finding 72 is more extreme than the facts warrant. Price differentials likewise reflect the depreciated value of the picture resulting from its prior exhibition, and the lower price is the inducement used by the subsequent run operator to attract patronage to his theatre. If, contrary to the uncontradicted evidence that the price is the theatre's normal price at the time (Finding 63, R. 3670), it can properly be said that the distributor fixes the price, and if it can be said that it does so to attract patronage to the theatre, then logically it should be said that the distributor fixes the differentials and the lower prices in subsequent run theatres in order to attract patronage away from the higher priced earlier run theatres. The plain fact is that the distributor's revenue depends on exhibition in as

*The Government's position with respect to minimum admission prices is subject to wide variations. In *United States* v. *Schine Chain Theatres, Inc.* (No. 10 this Term), in discussing the run clearance and minimum admission terms and licenses, Government counsel said "That is it [a distributor] will fix a run and give a clearance protection and provide admission prices which will to a great extent directly determine the terms on which the film can be played by the competitor. And, as I say, each contract that is made, of course, does restrain competition in that sense. Now, we do not here attack those restraints as such. Whatever may have been the position originally this method of licensing films through clearance and minimum admission prices has been established in the industry and it is the way in which the industry operates and so long as those restraints are reasonable, as far as we are concerned, there clearly is no conflict with the Sherman Act." (*Schine* Record, 493-94).

many theatres as possible, on as many runs as possible and to as many theatre patrons as possible. There is little room for inferring a motive to monopolize in such a projected market. It is well known that the greater the business done by a picture on earlier runs the better it does on subsequent ones (R. 817-8; 1387-8). In the light of the foregoing, Finding 72, if true, is only a half-truth, and cannot have any of the sinister implications which the Government sees in it.

At page 27 of its brief the Government concludes that "as a result of the control over both distribution and exhibition exercised by the defendants the conspiracy has been so successful * * *" that exhibitors and distributors have been met by a fixed scale of clearances, runs and admission prices, if they wish to get their pictures shown upon satisfactory runs or were to compete in exhibition (citing Finding 84, R. 3674). But that Finding shows that the situation which the court supposed existed, had nothing to do with ownership of theatres by defendants. The "fixed scale" was found to exist throughout the industry, and the supposed effect was upon competition by *all* distributors and exhibitors to compete with *all* of defendants licensees, or to get their pictures shown in theatres of *all* licensees, whether affiliated or not. Citation of Finding 84 to support the Government's conclusion is misleading, and to accept the conclusion requires the ignoring of Finding 154 (R. 3690) that the illegalities and restraints found by the court were not due to ownership of theatres by the defendants, but were in the trade practices and pooling agreements, and the court's conclusion in its opinion that outside of the trade practices and agreements which it thought violated the anti-trust laws and which it abolished by the decree, there was competition among the defendants and between them and

independents for the exhibition of their pictures (R. 3554). These views as to the wide areas of competition and the narrow areas of restraint ought not to be disregarded in appraising so complicated an industry.

Under the heading "Theatre Pooling Arrangements" (Br. 29-31), the Government, unjustifiably assimilates partial ownership of theatres with pools and percentage leases, and treats them all as "pools of theatres which otherwise would be independent". The two types of relationship are easily distinguishable, and, as we have shown in Point I *supra*, they merit separate treatment. There is certainly a difference between an agreement between two competitors for the joint operation and sharing of profits of separately owned theatres in the same competitive area, and the ownership of stock in a company owning, leasing or operating theatres in several places in which no competitor is involved. As we have shown in Point I *supra*, neither the Government in its proof nor the court considered the facts in any of the partial ownership situations. The Government did not assert that they had the effect which a pooling by competitors of competing theatres had on competition between the parties, to fix prices, etc., upon which the court found and concluded that pools were unlawful (Finding 112, R. 3682; Conclusion 9(a), R. 3693). In Point I *supra*, we have adequately demonstrated that the court's disposition of partial interests, virtually without giving us an opportunity to be heard, was erroneous and the Government's reliance on that portion of the decision is, therefore, misplaced.

At pages 31 to 34 of its brief the Government refers to other trade practices such as "block-booking," "blind selling," master agreements, formula deals and franchises, and to certain discriminations in licenses between small the-

atre operators and large ones, affiliated and independent. Their use bears no relationship to theatre ownership by defendants. Furthermore, master agreements, franchises, formula deals and unlawful discriminations are adequately eliminated by the decree. "Block booking" and "blind selling" are simply bogeys disposed of in the briefs of other defendants.

The Government's Reliance Upon Earlier Litigation Concerning the Industry

About 13% of the Government's brief is consumed by a dissertation on a few selected cases brought against defendants in this industry under the anti-trust laws, and a statement with respect to prior administrative attempts under the NRA and under the Consent Decree to regulate industry practices (Br. 72-90). There is no claim that the decrees in these suits were not followed to the letter, except perhaps for the recitation of the contempt proceedings brought in Chicago in the Balaban & Katz matter, but there, as the footnote at page 79 of the brief shows, the violation of the consent decree ultimately found by the Master was of "a general provision against monopolization in the terms of Section 2 of the Sherman Act" and "none of the defendants were found guilty of violating the more specific provisions of the decree * * *". The Government neglects to add that the pleas of *nolo* to dispose of the matter were made as part of the agreement resulting in Consent Decree of November 19, 1940 in the present case (R. 2763-4).

These earlier cases are apparently relied upon by the Government as showing their ineffectiveness to prevent *all* law violations. Of course, if a court could (and would) depart far enough from the normal judicial function as to

make a decree which would thereafter prevent all law violations by the members of an industry so that the industry would be entirely governed by the court on citations for contempt, we might have a more simple form of government—certainly it would be a different one. But that is not our system, and courts properly limit themselves to dealing with issues tendered by pleadings and competent evidence presented to them. The suits brought by the Government against local circuits (West Coast Theatres, Inc. and Balaban & Katz Corporation, (Br. 78-9)) involved local issues (R. 5). There is no evidence that the decrees were ineffective, and the Government was satisfied in 1940 to have them amended to conform to the Consent Decree in this case (R. 2763-4).

In the two suits brought in 1928 (Br. 79-80), the Government chose to present very narrow issues as to the legality of contract terms (R. 5) concededly adopted openly by the distributors by agreement in an effort to find ways to prevent fraud against distributors (*United States* v. *First National Pictures Inc.*, 282 U. S. 44) and to provide fair and inexpensive methods of determining disputes by arbitration. (*Paramount Famous Lasky Corporation* v. *United States*, 282 U. S. 30.) The distributors were held to have violated the law because of their joint action, but the courts did not condemn their motives. In fact the Court conceded that the purpose and the effect was to benefit the industry, but held the joint action made them unlawful. There is no suggestion that the decrees were not honored or that they were ineffective to accomplish what the Government asked for. They have no bearing on any issue involved in this appeal or to the relief that the Government is here demanding.

The *Youngclaus* case discloses nothing sinister. It involved an effort to reduce clearances by formulating a

uniform maximum clearance scale which was openly arrived at by a Film Board of Trade and adopted by the distributors and all exhibitors in the area except Youngclaus, in the belief that their action was lawful. When it was discovered that they were in error, that ended the matter, and the Government's possible preference for the pre-Youngclaus clearances over those granted individually by the distributors at the time of this trial is hardly significant. There is no finding here that any of those particular clearances were unlawful.

The *Interstate* case presented another narrow local issue of a violation of Section 1 of the Sherman Act. The situation disclosed by the record was an unusual one as this Court noted in its opinion (306 U. S. 208, 222). The decree terminated the practices to which the Government had confined its complaint, and this Court could hardly be criticized for not providing a universal nostrum.

The Government's suggestion that Paramount disregarded a part of the Federal Trade Commission order in 1927 is unfounded. The Commission apparently felt so unsure of its grounds with respect to Paramount's theatre acquisitions that it decided not to attempt to make its order effective and, therefore, did not ask the Circuit Court for the necessary enforcement order.* The Government's quotation from the opinion of the Circuit Court of Appeals at page 75 of its brief is completely out of context. The court was referring only to block booking in combination among distributors and was not discussing anything else. It expressly found that Paramount had not combined with others to do the things charged as unlawful.

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*At that time orders of the Commission were not effective unless it obtained an enforcement order from the court. Now, of course, its orders are effective unless set aside by the Circuit Court of Appeals. The Federal Trade Commission Act was amended by the Walter-Lea Act (52 Stat. 111) in 1938.

The complaint that the NRA Code was only partially successful in mitigating discrimination (Br. 85-7) is not based on any evidence in the record, and we would have supposed that the place to meet that ghost, if anywhere, was on the record. It apparently rests on hearsay information of writers for the Government, many of whose statements of fact were gleaned from the complaint in this suit prior to a trial of the issues.* The court found that arbitration under the Consent Decree was of real benefit to this complex industry and recommended its continuance (R. 3558, 3702).

Finally, the Government cites three private damage suits won by theatre operators (Br. 87-8). It seems clear that these suits are no more relevant to the questions presented here than would be an exposition by us of the numerous private anti-trust suits which have been won by the defendant distributors and exhibitors.** In every such suit the questions of conspiracy and monopolistic action have been closely contested, and the triers of the facts have sometimes resolved the questions against defendants and sometimes in their favor. Here the court below has, from similarities, inferred conspiracy to fix runs, clearances and minimum admission prices, and has found that partial ownerships of theatres restrained competition between the co-owners. We think both conclusions are wrong, but we are here simply pointing out that defendants should be judged upon this

*See, for example, the reliance of the T. N. E. C. Monograph 43 (Br. 16) on the amended complaint in this action.

**Equally irrelevant would be reliance upon suits won by a distributor against unlawful conduct of a large number of exhibitors who combine to boycott its films to force the distributor to grant them concessions, such as in *Paramount Pictures Inc.* v. *United Motion Picture Theatre Owners*, 93 F. (2d) 714, (C. C. A. 3, 1937).

record and not upon another one. Past history indicates that defendants will win a fair share of the pending suits referred to in the footnote at page 72 of the Government's brief—the mere pendency of these suits cannot be taken as proof of guilt demanding that the defendants be barred from the exhibition business.*

The statement at pages 37 to 38 of the Government's brief that the court "said nothing concerning the Government's claim of a collective distribution monopoly, or its contention that each vertically integrated combination between a major distributor and its theatres violated both Sections 1 and 2," (of the Sherman Act), is hardly fair. The fact is that the court refused to hold that there was any distribution or exhibition monopoly, individual or collective, as the Government recognizes, (Br. 11), and held that outside of the trade practices which it thought were illegal there was competition in distribution (R. 1554). The court had no occasion to consider and reject the argument now made as to why the Government now urges that integration is unlawful for its present argument is made here for the first time. It was conceded that a distributor had the right

*Some of the private anti-trust cases successfully defended by one or more of the defendants are as follows: *Westway Theatres, Inc.* v. *Twentieth Century-Fox Film Corporation*, 30 F. Supp. 830, 113 F. (2d) 932; *Rembusch* v. *MPPDA, Inc.*; D. C. N. Y.; *Quittner* v. *MPPDA*, D. C. N. Y.; *Colonial Theatrical Enterprises, Inc.* v. *Cooperative Theatres of Michigan, Inc.*, E. D. Mich.; *Frels* v. *Jefferson Amusement Company, et al.*, D. C. Tex.; *Gary Theatre Co.* v. *Columbia*, D. C. N. D. Ill.; *E. M. Loew's* v. *Twentieth Century-Fox Film, et al.*, D. C. Mass.; *Miami Drive In* v. *Loew's*, D. C. Mass.; *Winchester Theatre Co.* v. *Twentieth Century-Fox, et al.*, D. C. Mass.; *Schad* v. *Twentieth Century-Fox*, D. C. Pa.; *Ball* v. *Paramount Pictures Inc.*, 67 F. Supp. 1 (W. D. Pa., 1946); *Schubert* v. *Metro*, D. C. Minn. There are many others.

to show its own pictures (R. 1945) and it was not asserted that licensing films to or exhibiting them in a wholly or partially owned theatre necessarily resulted in a continuing restraint and monopolization with respect to "that important segment of trade represented by the pictures it distributes to its own treatres" (Br. 90-1).

A change of the forum and of the lance-bearers has brought a change in front, and we now find ideas advanced for the first time which were not presented, and perhaps not even shared, by the counsel who prepared the case before 1938, lived with it in the interim and presented it to the court in 1945. We will now discuss the new theory that ownership of a place to exhibit his picture is *per se* a violation of Sections 1 and 2 of the Sherman Act because it enables the owner of property or the holder of a monopoly guaranteed by a statute designed to carry out a mandate of the Constitution (the Copyright Law) to *restrain competition in and to monopolize his own property*, and that therefore the court should have ordered ultimate divorcement (Br. 90 *et seq.*).*

The Government's Theory That Each Integrated Company Constitutes an Unlawful Restraint and a Monopolization of the Pictures it Exhibits in or Licenses to its Own Theatres

The Government rests this novel proposition on the following statements (Br. 90-1):

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*Paramount's position with respect to the mandate of Section II(8) of the Decree enjoining any method of licensing except by the so-called competitive bidding system devised *sua sponte* by the trial court is sufficiently set forth above in Point II and need not be repeated. We, of course, disagree that the conclusion of the Government, namely, that since the method devised by the court is no good that *ergo* divestiture is the only remedy open to a court of equity.

> "It is not our contention that each major defendant has a national monopoly of distribution, or that its film product alone would give its theatres a national monopoly of exhibition. We contend that each vertical affiliation between a major distributor and its theatres necessarily results in a continuing restraint and a monopolization with respect to that important segment of trade represented by the pictures it distributes to its own theatres".

and (Br. 91-2):

> "Each vertical relationship thus has two serious trade-restraining consequences. First, to the extent that the motion picture requirements of each group of affiliated theatres are satisfied by the pictures of its distributor, all other distributors are excluded from that important segment of the market. Second, wherever a distributor has theatres, the other exhibitors are excluded from the opportunity of licensing the exclusive runs reserved for the distributor's own theatres."

The Government's argument appears to be that integration is unlawful because, for example, Paramount pictures preempt some of the playing time in Paramount's theatres, but for which fact competing distributors' pictures might be shown at that very time in the Paramount theatre, and competing theatres might be showing those Paramount pictures at that time. It is claimed that this is an illegal restraint of trade requiring dismemberment as a matter of law.

The record shows that Paramount's theatres do not show Paramount pictures exclusively, and, in fact, that only a few of them could not exist on them alone. Pictures of other distributors must be and are regularly shown by

Paramount's theatres. There was no evidence that because and while Paramount pictures were shown in Paramount's theatres, competing distributors did not have an adequate theatre market outside of Paramount's theatres, or that theatres competing with Paramount's theatres had not sufficient other product to show at that time or were forced to shut their doors or even limit their programs.

The practice of showing Paramount pictures in Paramount's theatres is hardly exclusionary in any legal sense, and it certainly serves as no basis for holding that it involves an unreasonable or substantial restraint of trade. The findings show that Paramount pictures are shown in 8,000 to 14,500 of the 18,000 theatres in the United States (Finding 130, R. 3686) and that intense sales efforts are made to license as many theatres as possible (*supra*, pp. 13-14). This wide distribution of Paramount features is the antithesis of exclusion. The simple fact is that two pictures can not be shown at the same time on one screen in one theatre and whatever consequences arise from that fact will arise whether or not the theatre is owned by a distributor. It involves no more than the common experience that while any property is being enjoyed, there is ordinarily no room for duplication. But the consequences of that elementary fact can hardly offend the Sherman Act while it remains lawful to own and enjoy private property.

The Government relies for the novel proposition now advanced chiefly on the recent decision in *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). It, of course, does not say explicitly that integration *per se* is unlawful, and no such conclusion would find support in the *Yellow Cab* decision, but its argument, amounts to that, as we shall presently demonstrate.

The *Yellow Cab* case tested the sufficiency of a complaint which alleged in paragraph 20 (*Yellow Cab* Record, p. 8) that defendant Markin and others had commenced negotiations to merge certain cab operating companies. According to the complaint: "One of the principal purposes of the proposed merger was to insure that these cab operating companies would thereafter purchase all of their motor vehicles for use as cabs from CCM and would not buy them from competitors of CCM." The brief of the Government relied heavily on this allegation as to the purpose of the merger (Govt. *Yellow Cab* brief, pp. 6, 28), stating that the elimination of competitors from the market there in question "was not only effected by combination but was the direct object of the combination. Defendants obtained their 'dominating power' over the cab companies 'by deliberate, calculated purchase for control.' See *United States* v. *Reading Co.*, 253 U. S. 26, 57."

In reversing, this Court adopted this argument of the Government and emphasized the fact that: "The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States* v. *Reading Co.*, 253 U. S. 26, 57, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'"

One may well ask what findings there are in this record which can be considered comparable to the allegations in the *Yellow Cab* complaint. The Government suggests (Br. 90), that it is somewhat surprised by the absence of any "explicit" findings on this subject in view of the

claim—asserted without record references—that it has "consistently maintained" the position which is now developed in its Point II A. Without further controversy on that score it suffices to note that the findings of the court are complete and are directly contrary to the facts alleged and assumed to be true in the *Yellow Cab* case.

The court found on uncontroverted evidence that in 1916 or 1917, a group of exhibitors which controlled many of the then best theatres throughout the country organized First National Exhibitors Circuit, Inc. as a film buying combine. Shortly thereafter, First National, then in control of 3500 or more theatres, including the largest and best ones in the principal cities, entered the production and distribution fields, and embarked on a two-pronged campaign to entice away Paramount's acting and directing talent, and to bar its theatres to Paramount's productions (Findings 4-7, R. 3661-62). "In these circumstances Paramount determined to acquire interests in theatres of its own so that it might assure itself of outlets for Paramount productions" (Finding 8, R. 3662). The purpose thus was to compete and not, as the Government says, to acquire market control which would assure it of outlets regardless of the merits of its pictures.

These findings are, of course, a far cry from the charge in the *Yellow Cab* case, and rather exemplify what this Court meant when it suggested in the *Reading* case and reaffirmed in the *Yellow Cab* case that integration "obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management," would not violate the Sherman Act.

Paramount's integration, far from constituting "deliberate, calculated purchase for control", of exhibition, was in fact dictated by the growth of its enterprising production and distribution business which had found itself

deprived of an outlet for its product. It was confronted with the Hobson's choice of either (1) continuing to produce without a substantial number of customers to whom to sell; or (2) permitting its business to continue to grow by purchasing theatres where it might place its pictures in competition with those of other producers. (See Complaint par. 99, R. 3167).

The Government says that Paramount was guilty of "unlawful conduct" when it chose the latter course and yet it characterizes First National's exclusionary policies as "honest competition" (Br. 104). We know of no authoritative interpretation of the Sherman Act which sanctions a deliberate campaign—such as First National's—to deprive a competitor of its raw materials, its personnel, and to exclude it from the market; and yet makes it unlawful for that competitor to acquire its own outlets in order to survive. But however First National's tactics be described, unless the Court is prepared to hold that integration is unlawful *per se*, the conclusion below must be affirmed.

The "necessary consequence" (Br. 91) or the "natural consequence" (Br. 95) or the "necessary effect" (Br. 103) which the Government seems to find simply from the fact of the integrations now before the Court are common to all integrations in the sense that subsidiary corporations tend to purchase the product of their parents. But even if that natural tendency raised questions—which it does not, the defendants here could still not be found guilty of having monopolized any appreciable segment of the market.

Except for a very limited number of theatres in the very largest cities, no theatre can be operated on the product of only one distributor (Finding 151, R. 3689). Paramount, during the typical 1943-1944 season produced 31 features (Finding 99, R. 3677) and it is evident on the face of it that Paramount therefore could not fully supply even a theatre

which changed features only once a week and played on only a single-feature policy. Necessarily the great bulk of the nation's theatres in general, including Paramount's theatres, are in the market for the many additional features necessary to keep operating. They have not been withdrawn from the market as were the subsidiaries in the *Yellow Cab* case. By the same token, Paramount, by licensing or showing its features for exhibition in its own theatres did not take them out of the market as were the cabs manufactured by CCM. In order to stay in business and to operate profitably, Paramount must license its features to many others and as the court below said (R. 3554):

> "Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, *there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures.*" (Emphasis supplied.)

These considerations, which show the sharp distinction which must be drawn between the *Yellow Cab* case and the case at bar, *a fortiori* effectively destroy the basis for finding any analogy in *United States* v. *Lehigh Valley R. Co.* and *United States* v. *Reading Co.* on which the Government also relies. At the outset of the opinion in the *Reading* case, the Court emphasized the necessity for determining the intent and purpose with which the combinations assailed had been formed (253 U. S. 43-44). It then reviewed the annual reports of the Reading Railroad Company which showed that it had embarked on a policy of attempting to control the anthracite tonnage of the Schuylkill anthracite field by acquiring extensive ownership of coal lands. Such acqui-

sitions were followed by the purchase of competing railroads and by the utilization of the Holding Company to take control of a vast network of properties *"solely* because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies" (*id.*, at p. 47, emphasis supplied). Considerations like these led the Court to characterize the process by which the integration was accomplished as "deliberate, calculated purchase for control" (*id.*, at p. 57).

In both the *Reading* and *Lehigh Valley* cases, the chief object of the effort at control was a large area of coal-producing land, control of which by its very nature led to monopoly, in the light of the fact that the known coal-producing lands in the United States were extremely limited in area. On the other hand, there is no natural limit to the number of feature motion pictures which can be produced; and certainly "control" of less than 10% of them is not comparable to the control which was achieved in those two railroad cases.*

It is thus clear that the attempt to find an analogy in the *Yellow Cab, Lehigh Valley* and *Reading* cases must fail for two major reasons: (1) There is here no proof or finding that the integration of the theatre-owning defendants was the result of "deliberate, calculated purchase for control" within the meaning of those words as used in the cited cases; the proof and findings are to the contrary and

*The *Lehigh Valley* case, like the *Reading* case, involved an avowed plan to monopolize a large share of the anthracite-producing territory of the United States and revealed a 25-year history which "cast an illuminating light upon the intent and purpose with which the combination * * * was formed and continued" (254 U. S. at 269).

that failure of proof cannot be supplied by the surprising statement by the party with the burden of proof, that: "The court made no inquiry into the precise circumstances under which any particular interest was acquired * * *" (Br. 116). And (2) the relationship between these defendants and their subsidiaries does not lead to control of a "appreciable segment" of interstate commerce in motion pictures.

As we have pointed out *supra*, pp. 33-34, *United States* v. *Winslow*, 227 U. S. 202 (1913) and *United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920) are still unquestioned authority for the proposition that there is nothing *per se* illegal in vertical integration of the manufacturing and selling functions of an industry.

The Government has not distinguished those cases here, as it tried to do at page 38 of its *Yellow Cab* brief, simply by calling them "merger cases." Instead it here cites *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 376-377 (1933) for the statement that "restraints which are unlawful when accompanied by a horizontal conspiracy must be equally unlawful when they follow as a natural consequence of a vertically integrated combination" (Br. 95). But the specious nature of this argument springs from the fact that what the Government is really urging is that unlawful restraints *always* follow from the mere existence, without more, of a vertically integrated business. The *Appalachian* case, of course, supports the directly opposite conclusion. It was there said (at p. 377):

> "The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the foundation of a huge corporation bringing

various independent units into one ownership. *Either may be prompted by business exigencies,* and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. * * * As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint." (Emphasis supplied).

The "natural consequence" or "necessary effect" argument was rejected specifically and explicitly in the *Steel* case* and inferentially in the *Winslow* case when this Court noted (227 U. S. at 217) that: "On the face of it the combination was simply an effort after greater efficiency." Our discussion *supra* (pp. 54-55) of *United States* v. *Aluminum Co. of America,* 148 F. (2d) 416 (Special Statutory Court, 1945) shows that that decision is to the same effect. And

*251 U. S. at 450; "The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, "the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose." "A wrongful purpose," the Government adds, is "matter of aggravation." The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly."

there is nothing in the Government's brief which shows any reason, or indeed any desire, that those cases should now be overruled.

Certainly, nothing in *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) which the Government cites and so elaborately discusses (Br. 109-13), suggests a basis for such a conclusion. The basic distinction between that case and this is, of course, the very one that the Government so lightly brushes aside (Br. 109), i.e., that the *Swift* case involved a consent decree. That decree was based on a complaint "that by concert of action the defendants had succeeded in suppressing competition both in the purchase of live stock and in the sale of dressed meats, and were even spreading their monopoly in other fields of trade. They had attained this evil eminence through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled; through the acquisition and control of stockyards and stockyard terminal railroads; through the purchase of trade papers and journals whereby cattle raisers were deprived of accurate and unbiased reports of the demand for live stock; and through other devices directed to unified control" (286 U. S. at 110). They had already "set about controlling the supply" of many other foods (ibid).

This Court expressly refused "to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they [the defendants] chose to consent, and the injunction, right or wrong, became the judgment of the court" (id., at 116-117).

The question before this Court was not whether these allegations of the complaint had been proved, but whether the Court "should leave the defendants where we find them,

especially since the place where we find them is the one where they agreed to be" (id., at 119). It was held that defendants had failed to make "a clear showing of grievous wrong evoked by new and unforeseen conditions" and that therefore the consent decree could not be changed (ibid).*

In short, in the *Swift* case, the burden of proof was on the defendants and they failed to sustain it. Here, the burden of proof was on the Government and nothing has been proved which was comparable to the facts alleged there.

The difficulty in the Government's position becomes apparent when it is finally compelled to concede (Br. 103), that:

> "Any manufacturer has the right to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize."

If the Court is to assume that this is a correct statement of the law, it will then wish to examine the findings below to determine whether there is to be found in them any warrant for the conclusion that Paramount or any other defendant used "the advantage resulting from integration to restrain unreasonably the competition of others or to monopolize." The findings of course are directly to the contrary. The court did find violations in license agree-

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*Contrary to what the Government says (Br. 110), the defendants failed to prove their main thesis, i.e, that A & P and others of defendants' competitors had become vertically integrated and therefore fully able to compete (286 U. S. at 118). In the case at bar, each of the integrated companies actually does compete with every other in every branch of the industry.

ments which included stipulations as to minimum prices and in other practices which it thought ran afoul of the Sherman Act. But these violations did not spring from the fact of integration and the court's finding is specific in this respect:

> "154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producers-exhibitors, but in admission price-fixing, [etc.] * * *. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which defendants' pictures have been exhibited" (R. 3690).

The opinion stated that "there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures" (R. 3554).

We do not understand the Government to contend that these findings are erroneous, and the recent decision in *United States* v. *National Lead Co.*, 332 U. S. 319 (1947) is a definitive holding that they preclude divestiture here. It was there said (at pp. 352-353):

> "The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field. The general manager of the pigments department of du Pont characterized the competition with Zirconium and Virginia Chemical as 'tough' and that with National Lead as 'plenty tough.' Such competition suggests that the District Court would do well to remove unlawful handi-

caps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

The Government concedes the axiom that "under the Copyright Act the copyright owner has the right to exhibit its own pictures and to prevent their exhibition by others" (Br. 97). Since, as we have demonstrated, the defendants have the right to own theatres, it must follow that they—both as copyright owners and under general law—have the right to exhibit pictures in their own theatres. The Government contrives an elaborate argument upon the premises that the defendants are here claiming some additional "special privilege" arising out of copyright ownership and that the trial court "assumed that such a privilege was granted by the Copyright Act" (Br. 98).

Nothing in this record supports the conclusion that the court labored under any such impression. From a reading of the court's opinion (R. 3528-29), the contrary would seem to be the fact. Nor have the defendants ever made any such claim. Our position is simply that the defendants have the right to own theatres and to exercise their rights as copyright owners by exhibiting pictures in them.

Section IV of the decree (R. 3700), with which the Government takes issue, grants no special privilege and there is no warrant for suggesting that it is founded solely

on the Copyright Law.* The court concluded, entirely correctly as we have demonstrated, that the defendants had the right to own theatres. That conclusion was based upon the absence of any proof which could properly justify divestiture or any other deprivation of defendants' right to treat their own theatres as their own, although that right continues to be subject to the anti-trust laws. The court therefore directed that "Nothing contained in this Decree shall be construed to limit" that right. Such a provision was entirely proper and necessary and does not deprive the rest of the decree of any of its force or effect.**

The Government's Contention that the Court in Any Event Should Have Compelled Defendants to Sell Their Partial Interests in Theatres.

At pages 115 *et seq.* of its brief, the Government emphasizes the unreasonableness of its whole position, when it argues that the trial court should have ordered compulsory sale of defendants' partial interests and not have left it open for them to apply for permission to buy out the other interests upon a proper showing to the court that competition would not thereby be unreasonably restrained.

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*Section IV of the present decree was derived from Section XVII of the Consent Decree (R. 3392-93). The Government originally assigned error to its inclusion in the decree (Assignment 9, R. 3722) but that assignment is not included in the Government's specification of the errors to be urged (Br. 46).

**The suggestion that the decree in *Interstate Circuit* v. *U. S.*, 306 U. S. 208 (1939) will somehow be diluted by Section IV (Br. 98) deserves no additional comment. Section IV limits only "this Decree" and approves nothing which was disapproved in the *Interstate* case. The defendants must still obey the law of the land, whether that law is to be found in statutes or in decrees of courts of competent jurisdiction.

Using a finding of the lower court which has to do only with "pools" of competing theatres as a fulcrum, the Government attempts to excuse its failure to prove the illegality of partial ownerships, and tries to assimilate them all to pools of competing theatres (Br. 115-116); thus falling into the same error as did the trial court elsewhere.

The fact is, as we have stressed in Point I, *supra*, that the Government offered no proof of the origin and effect of partial interests in theatres and, therefore, the court "made no inquiry" with respect thereto. The Government apparently thought such proof immaterial but, as we have shown, if it had presented it the court below might properly have reached the conclusion that many, if not all, of the situations involved no restraint of competition. The error which we claim the court made, as shown in Point I, is that it erred in its assumptions that *all* of these situations were unlawful, and in its failure to provide any opportunity to have the facts as to their purpose and effect examined.

The extent to which (if at all) the joint interests of any defendant were held with an actual or putative competitor was never shown by the Government, and even if it be assumed that all Paramount's partial ownerships were with actual or putative competitors, Paramount's total partial ownerships—816 out of 18,076 theatres—about 4½% (Finding 117, R. 3683-4) of the country's total—can hardly be said to be so significant as to be a consequence of extraordinary control of feature pictures, especially when it is remembered that Paramount's features amount to only about 9% of those released by all distributors annually. Since, under the decree, all purchases by a defendant of the outstanding interests are subject to the control of

the court and are dependent upon a proper showing, there can be no fear that more serious consequences will result in a purchase than a sale.

As the Government argued in the *Crescent* case, the test of legality of an acquisition should be its effect upon competition (R. 2553), and this is the test which this Court approved in that case and the statutory court here has followed in requiring applications in connection with proposed purchasers of the balance of partial interests.

The Government urges that retention of control by the court over acquisitions of the outstanding stock in these partial ownerships does not cure the decree's deficiency because, it says, "If joint operation or ownership is illegal *per se*, as the trial court found, that illegality can, under no circumstances, be terminated by a defendant's acquisition of its partner's interest. * * *" (Br. 118). But, as we have shown, the error of the court was in considering all partial ownerships unlawful *per se*, without proof of their origin, purpose or effect. There is no justification for the Government's statement (Br. 119) that "* * * any proposal to buy or sell at a fixed price would result in the purchase by the defendants instead of by the non-defendant", since the district court under the decree would have to inquire as to whether a proposed purchase would unduly restrain competition in the area where it would occur.

As far as deadlocks are concerned—the supposititious situations where neither the defendant nor the independent desires to sell (Br. 119)—a proposal made by the defendants in their suggested decree that they be permitted to divide assets in such an event (R. 3618-9), was designed to, and would, obviate this supposed impasse. The remedy in such situations should be left to the lower court, if any

part of the decree relating to partial interests is allowed to stand. Certainly it would be a strange result to deny all discretion to it because some of the problems may involve ingenuity in its exercise.

At pages 123-126 of the brief the Government somewhat belatedly makes an extremely tenuous argument that complete divestiture should have been granted on the theory that an integrated manufacturer of films could deprive the public of its constitutional right to freedom of thought, expression and opinion. The production and distribution fields, being open to all, as the Government conceded (R. 1949) and as the court found (R. 3554, 3559), this argument has no relevancy to Judge Hand's remark in the *Associated Press* case quoted at page 125 of the brief or to any other issue here. And Mr. Justice Frankfurter's remarks in the same case clearly apply to a situation not found in the present record. Where, as in this industry, anyone can produce any picture and procure distribution for it, and where there is no proof that any defendant's theatre refused to play any particular picture, the supposed restraints on freedom of expression are chimerical.

The Government's Contention That the Court Should Prohibit a Theatre Owning Defendant From Licensing Its Pictures For Exhibition in the Theatres of Any Other Theatre Owning Defendant

This relief is asked by the Government as interim relief pending divorcement and is based upon the assertion that there is unlawful "cross-licensing" between the integrated defendants. In the trial court the Government explained

what it meant by cross-licensing as follows (Gov't Trial Brief, 21):

> "By cross-licensing we do not mean the execution of a single agreement by two distributor members of these combinations with two or more exhibitor members. *What happens is that Loew, for example, as a distributor, licenses its films to Paramount, as an exhibitor, by agreements which are generally separately executed by nominally different corporate entities than those involved in the license agreements made by Paramount as a distributor with the theatres controlled by Loew.* However, the competitive effect of these arrangements is the same as though all parties involved had made a single agreement, in view of the unified control of the distributing and theatre operating members of each combination." (Emphasis supplied).

The fallacy of this claim arises from the fact that there is no proof in the record of any interchange of mutual benefits or of any conditioning of one license agreement upon the granting of another. The evidence is all directly to the contrary (R. 436, 535, 539, 543, 685, 687, 1110, 1041, 1659, 1843, 1852).

A true case of "cross-licensing" is that exemplified by *Standard Oil Co.* v. *United States*, 283 U. S. 163 (1931), as an interchange of rights. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 is also an example of true cross-licensing. No such practices were established here.

Furthermore, in its trial brief the Government likewise admitted that negotiations between a Paramount theatre, for example, and Loew as a distributor were not conditioned upon similar negotiations by Loew as an exhibitor and

Paramount as a distributor (Gov't Trial Brief, 20). The evidence showed that in cities where one defendant had no theatre of its own and was thus required to make a choice of customers, it chose its first-run account on the basis of the ability of the theatre to pay the highest revenue among all the theatres in the city which were willing and able to "buy". In some of those cities some defendants selected theatres belonging to another defendant, and in others they selected independents as their first-run accounts. There is no discernible pattern for the selections made by any two defendants in those cities of their first-run accounts. This absence of pattern is fatal to the entire conception.

The argument for the interim relief is quite frankly for relief which does not provide divestiture in terms but does so in effect. The trial court having rejected its prayer for divorcement, the Government then devised this method of accomplishing the same result in many cases, immediately and by instant strangulation, without even a vestige of hope of salvaging even their fair value. There is no precedent whatever under the Sherman Act for outright confiscation.* Of course, if dismemberment had been decreed and competition in the exhibition business by the defendants had been banned, the question of this relief would be academic. And, since that relief is tantamount to divestiture at least of some theatres, as the Government acknowledges, it is equally academic in the absence of a basis for that drastic relief. The prohibition asked is not, as the Government would have this Court believe, simply "directed at the very agreements by which the defendants

*Even in the *Hartford-Empire* cases, the receivership (which this Court later held to have been an abuse of discretion) was a device to conserve, not destroy, property values.

effectuated their conspiracy" (Br. 127), because any objectionable terms of the agreements, can be, and are, banned by the decree. The relief asked is directed toward enforced sale of theatres, as counsel for the Government stated in court (R. 2574-5, 3001, 3007) and admit in the brief (Br. 131).

In short, the Government's conclusion that this Court should reverse, as an abuse of discretion, the decree of the court below, and direct a decree of divorcement with immediate consequences designed to kill,—not cure, should be rejected *in toto*.

Conclusion

The decree below should be reversed to the extent set forth in our specification of errors and argument as appellants, and otherwise affirmed.

Dated, January 30, 1948.

Respectfully submitted,

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APPENDIX A

Pertinent Portions of the Sherman Act.

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court, 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937); 15 U. S. C. §§ 1, 2 (1940).

Pertinent Portions of the Copyright Act.

"SECTION 1. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic

work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) * * *.

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * *" (35 Stat. 1088).

APPENDIX B

Provisions of Decree Proposed by Defendants in Lieu of Section II (8) and (9).

7 (a) From arbitrarily refusing the request* of an exhibitor that the distributor defendant license a feature to him for exhibition in his theatre on any run licensed by the distributor instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. A distributor defendant shall not be deemed to have arbitrarily refused any such request if it has granted the license for the feature for such run theatre by theatre; feature by feature; solely upon the merits, and without discrimination as between the competing theatres, whether in favor of a theatre in which any other defendant has an interest; of a circuit theatre; of an old customer, or of any person whatsoever. In determining which of two competing exhibitors is entitled on the merits to the license for a particular feature for his theatre, the distributor defendant shall take into consideration the following factors, among others, and accord to them the importance and weight to which each is entitled regardless of the order in which they are listed.

(1) The film revenue which the distributor defendant will derive from each theatre for the exhibition of such feature on the run in question, and upon the terms offered by the exhibitor. In estimating such film revenue, the distributor defendant should take into consideration, among other things:

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*For the purposes of this subdivision a request by an exhibitor must be made in writing to the distributor defendant at its home office, by registered mail and such demand shall be deemed to have been refused by the distributor defendant either upon the receipt by the exhibitor of the distributor defendant's refusal in writing, or upon the expiration of days after such mailing of the exhibitor's request.

The number of days for which and the particular days of the week or year or other playing arrangements upon which each exhibitor plans to play the feature; the character, location and size of each theatre; the type of entertainment which each exhibitor intends to present with the feature involved and which the exhibitor in the past has customarily offered the public; the appointments and equipment of each theatre; transit facilities; the admission prices of each theatre as set by each exhibitor for the period of the exhibition of the feature; the distributor defendant's actual experience with each of the exhibitors in fulfilling its obligations in past contracts; each exhibitor's reputation generally in the industry and in the community for honesty, fair dealing and showmanship; and the financial responsibility of the exhibitor operating each of the theatres involved;

(2) The comparative suitability of the theatres for the advantageous exhibition of the distributor defendant's feature on the run in question; and

(3) The effect which the exhibition of the feature in each of the theatres would have upon other exhibitions of the feature.

7 (b) From refusing to license its features for exhibition in an exhibitor's theatre on some run (to be designated by the distributor) upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of this subdivision 7 (b), if the exhibitor can satisfy reasonable minimum standards of theatre operation and .. reputable and responsible, unless the granting of a run on any terms to such exhibitor for said theatre will have the effect of reducing the defendant distributor's total film revenue in the competitive area in which such exhibitor's theatre is located.

C. Arbitration Under Section II 7 (a)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has failed to comply with the provisions of Subdivision 7 (a) of Section II of this Decree shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the arbitrator finds in favor of the distributor defendant, he shall dismiss the complaint.

If the arbitrator finds that the distributor defendant has arbitrarily refused to license the feature or features to the complainant on the run requested, and has instead licensed it or them to a competitor of the complainant on such run, he shall make an award against the distributor defendant, which award shall not affect any license to exhibit any features then under license to the complainant's competitor, but shall direct the distributor defendant thereafter in good faith to afford the complainant as well as such competitor the opportunity to negotiate for such run of any features thereafter released by the distributor defendant, for exhibition on such run, for which they desire to negotiate, and the arbitrator may in addition, in his discretion, direct the distributor defendant to pay to the complainant his actual pecuniary loss resulting from the distributor defendant's failure to comply with subdivision 7 (a) of this Section II, which damages shall be in the sum of not less than $100 nor more than $5,000.

After a final award in favor of a complaining exhibitor has been made under this section, such exhibitor may institute a further arbitration proceeding (to be held before the arbitrator who made the original award, if available) upon the ground that such award has not been complied with in good faith by the distributor defendant against which it was entered, and in any such proceeding, if the arbitrator shall find that the distributor defendant has not complied in good faith with the original award, he may award further damages to the complaining exhibitor for his actual pecuniary loss resulting from the defendant distributor's failure

to comply with the original award, which damages shall not be less than $100 nor more than $5,000.

An exhibitor shall have no right to assert such claim unless the arbitration shall be commenced within thirty (30) days after the refusal constituting the claimed non-compliance with Subdivision 7 (a) of this Section II.

D. Arbitration Under Section II 7 (b)

Controversies arising upon the complaint of an exhibitor that a distributor defendant has not complied with the provisions of subdivision 7 (b) of this Section II, shall be subject to arbitration in the manner provided in the Rules of Arbitration.

If the Arbitrator finds in favor of the distributor defendant, he shall enter an award dismissing the complaint.

If the Arbitrator finds in favor of the complainant, he shall make an award directing the distributor defendant thereafter in good faith to offer its features for license to the complainant for exhibition in said theatre on a run to be designated by the distributor and upon terms and conditions fixed by the distributor defendant which are not calculated to defeat the purposes of said subdivision 7 (b) of this Section II. The burden of showing that granting a run on any terms to the complainant will have the effect of reducing the distributor's total film revenue in the competitive area in which the complainant's theatre is located shall be upon the distributor.

Any distributor defendant affected by such an award may institute a further arbitration proceeding to be relieved therefrom on the ground that since the making of the award the granting of a run in compliance therewith has had the effect of reducing the distributor defendant's total film revenue in the competitive area in which the complainant's theatre is located, and, in the event that the Arbitrator finds that the granting of a run in compliance with the award has had the effect of reducing the distributor defendant's total film revenue in said area, he shall vacate the award.

E. Election of Remedies

Any exhibitor shall be free to avail himself of the right (1) to file a complaint under the arbitration provisions of this subdivision 9 of this Section II of this Decree or (2) to pursue remedies at law or in equity, but his election of one remedy or the other as a particular controversy shall be final.

10. Nothing contained in this Decree, affording to exhibitors the right to proceed by Arbitration, as in this Decree provided, shall impair or affect the right of the plaintiff to take any proceedings which it otherwise could to enforce the provisions of this Decree or to punish wilful violation.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 79.

THE UNITED STATES OF AMERICA, *Appellant*,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 80.

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*,

vs.

THE UNITED STATES OF AMERICA.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF THE WARNER DEFENDANTS.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 79.

THE UNITED STATES OF AMERICA, *Appellant*,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

No. 80.

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*, *Appellants*,

vs,

THE UNITED STATES OF AMERICA.

BRIEF OF THE WARNER DEFENDANTS.

Opinion Below.

The main opinion below is reported in 66 F. Supp. 323, and the findings, decree and memo. thereon in 70 F. Supp. 53.

Jurisdiction.

Jurisdiction of this Court to review by direct appeal the judgment and decree entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 USC, Sec. 29), and Section 238

of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 USC, Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

The Appeals.

Cross appeals (on a record consolidated by stipulation, R. 3823) by plaintiff and each of the defendants from a judgment of a statutory court for the Southern District of New York (Augustus Hand, *Ct. J.*, Goddard and Bright, *Dt. JJ.*) in an action under the Sherman Act for injunctive relief against certain allegedly illegal trade practices and against ownership or operation of motion picture theatres by the five theatre owning or operating defendants, *i. e.*, Paramount, Fox, Loew's, RKO and Warner. Warner's petition for appeal is found at R. 3726. The other petitions for appeal are at R. 3726, 3738, 3751, 3766, 3788.

This is primarily a respondent's brief.

Since Warner appellants' arguments involve practices common to the industry as a whole, therefore the convenience of this Court may best be served by simple cross-references here to pertinent arguments in such other briefs as it has been our privilege to read. Such cross-references are found in connection with the specifications of error which follow.

By our failure to repeat pertinent arguments in this brief, we do not waive any assignment of error.

Specification of Assigned Errors to Be Urged.

Our specifications of error are:

1.) The injunction against theatre expansion in the Decree, III (6) [R. 3700] (Error no. 30, R. 3735) and the failure to modify said injunction so as to permit such expansion if the Court shall first find that such acquisition will not unduly restrain competition in exhibition (Error no. 31, R. 3735). See Point Second of Twentieth Century-Fox Brief; Point I of RKO Brief; and Point I (h) of this Brief, p. 31, *infra*.

2.) The injunction against part ownership of theatres or an interest therein in the Decree, III (5) [R. 3699] (Errors nos. 29, 33, R. 3734), and the findings and conclusions on which it is based (Errors nos. 25-27, R. 3733). See Point First of Twentieth Century-Fox Brief; Point II of RKO Brief; and Point I, (g) (2) of this Brief, p. 26, *infra*.

3.) The termination of the arbitration proceeding and machinery as in V of the Decree provided [R. 3700] (Error no. 34, R. 3736) and the failure to provide for arbitration of disputes (Error no. 35, R. 3736). See Point Third of Twentieth Century-Fox Brief.

4.) The injunction against granting any license in which minimum prices for admission to a theatre are fixed by the parties in the Decree, II (1) [R. 3695] (Error no. 1, R. 3728), and the findings and conclusions on which it is based relating to fixing of minimum admission prices (Errors nos. 2-5, 8, 10, 13-14,

22, 37-38; R. 3729, *et seq.*) and relating to price-fixing (Errors, nos. 6, 8-12, 20, 37-38; R. 3729, *et seq.*). See Points III and IV of RKO Brief and Point IV of Loew's Brief.

5.) The injunction "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances" in the Decree, II (2) [R. 3695] (Error no. 18, R. 3732) and the provision that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof" [R. 3696] (Error no. 19, R. 3732), and the findings and conclusions on which they are based relating to a system of clearance and run (Errors nos. 15-18, 20-22, 37-38; R. 3731, *et seq.*). See Loew's Brief, Point IV and Point V of this Brief, p. 123, *infra*.

6.) The finding that various contract provisions set forth in finding no. 110 (R. 3681) discriminated in favor of large circuits and against small independent exhibitors (Error no. 23, R. 3733) and the conclusion of law no. 8 (d) [R. 3692], based thereon that this was a violation of the Sherman Act (Error no. 24, R. 3733).

7.) The failure to grant the Warner defendants' motion to modify conclusion of law no. 9 (d) [R. 3693] by limiting it to the "discriminatory license privileges as found in Finding No. 110 above" (Error no. 32, R. 3735), and the holding in said conclusion insofar as it may be broader (Error no. 22, R. 3733).

8.) The denial and failure to grant the Warner de-

fendants' motions to strike exhibits and evidence upon the grounds set forth in Error no. 36, R. 3736.

9.) The finding and conclusion that the Warner defendants or any of them violated the Sherman Act in any of the respects hereinabove assigned as error (Error no. 38, R. 3736).

10.) The injunction against continuing to perform existing "pooling" agreements as defined in the Decree, III (2) [R. 3698] (Error no. 28, R. 3734). See Point I (g) (1) of this Brief, p. 25, *infra*.

Short description of the Warner companies.

The brothers Warner started in this business as exhibitors of motion pictures (R. 1553). In 1906 the brothers Warner operated a theatre (R. 1553). Subsequently, they went into the business of distributing motion pictures (R. 1553). By 1916 they were in the business of producing pictures, distributing pictures and operating a few theatres (R. 1553). This business was incorporated in 1923 as Warner Bros. Pictures, Inc. (Finding 25, R. 3665). This company successfully pioneered the development of the talking motion picture (Finding 26, R. 3665). By 1928 it became necessary rapidly to acquire a large number of theatres in order to have those talking pictures exhibited (R. 1555). The minimum cost of installing talking equipment in theatres at that time was $25,000, and very few theatre owners were willing to make such investment on such a gamble (R. 1555). The initial acquisition of Warner was the Stanley Company of America, with 250 theatres situated prin-

cipally in and around Pennsylvania and New Jersey. This transaction, consummated late in 1928, gave Warner 250 theatres which could be immediately equipped with sound installation (Findings 27-29, R. 3665). Warner acquired several other circuits of theatres, and by 1931 had an interest in 591 theatres (Findings 30-31, R. 3665).

Since 1931 there has been no policy by Warner for the expansion of theatre holdings (R. 1557, 1826).

Today the Warner companies have an interest in 547 theatres, a net reduction of 44 from its peak holdings in 1931 (Finding 32, R. 3665).

During this same period the total number of theatres in the U. S. grew from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688).

Warner as an exhibitor now operates less than 3% of all of the theatres in the United States (Finding 118, R. 3684).

Warner, as a producer and distributor, produces and distributes approximately 19 pictures a year, or less than 5% of the total pictures produced and distributed in the United States (Finding 99, R. 3677).

30% of the revenue received from the licensing of these pictures came from the foreign market. The Court found (R. 3687):

> "139. Of its total domestic and foreign rentals Warner received about 30% from abroad, about 43% from theatres in which none of the defendants had an interest, about 10% from Warner's own American theatres, and the balance, about

16%, from American theatres in which one or more of the defendants had an interest."

As to the domestic revenue, the court found that (R. 3687):

"138. In the 4 pre-war seasons of 1937-1940, Warner derived about 61 6/10% of its domestic gross rentals from theatres not affiliated with any of the defendants, about 14% from theatres in which it had an interest, about 4% from theatres in which Twentieth Century-Fox had an interest, about 6% from theatres in which RKO had an interest, and less than 1% from theatres in which Loew had an interest."

Effect of decree below.

The effect of the judgment below may prevent five defendants from owning or operating 1,292 theatres presently partially owned by any of the five of them, the court having found such partial ownerships to be in restraint of trade (Finding 117, R. 3683). It, moreover, enjoined each of them from further expanding its theatre holdings, although Warner had had no policy of expanding its theatre holdings in the last 17 years.

It also decreed injunctions against the trade practices held to be illegal, and directed competitive bidding as an additional remedy against defendants' tendency to favor "old customers", but retained jurisdiction to decree different remedies, should the remedies directed prove inadequate (as in *United States* v. *National Lead Co.*, 332 U. S. 319; and in *International Salt Co.* v. *United States*, No. 46, this Term).

2) That the courts lack ingenuity to fashion adequate relief short of amputation even by and after a pragmatic test of remedies ordered (Pltff.'s Br., Point I, B);

3) That "extensive experience" shows that any adequate relief short of amputation must be ineffective, and that the courts will be helpless to deal with inevitable violations when they occur (Pltff.'s Br., Point I, C);

4) That amputation is a necessary and inevitable remedy where Warner's 3% of this nation's theatres pay approximately 8% of the total film rentals paid to all of the distributor defendants and collect approximately 6% of the total dollars paid at the box offices for admission to the nation's theatres (Pltff.'s Br., Point II, A);

5) That the prospective injury to the public by the relief of amputation (or its equivalent of an injunction against so-called cross-licensing [Pltff.'s Br., Point III]) is a factor which may not influence the exercise of discretion as to the form and extent of relief (Pltff.'s Br., Point II, C).

Our position.

Each of these assumptions and arguments will be answered in detail in the Points that follow.

Our position is simply:

1.) That no arithmetic computations are substitutes for a finding of conspiracy to monopolize;

2.) That no finding of conspiracy to restrain relating to trade practices is a substitute for a

finding of conspiracy to monopolize, when the only relief sought is amputation;

3.) That on the findings (and the supporting evidence) here there is no basis for amputation, either from the conspiracy found or the alleged effect thereof; and

4.) That the remedies prescribed below are so far-reaching in their probable effect on the entire industry as to preclude the possibility of a holding that the statutory court abused discretion in directing a pragmatic test of its remedies.

POINT I.

The decree destroys the trade practices found illegal. These trade practices are wholly unrelated to integration, making it impossible for this Court to hold that divorcement, which the Court below found would be "injurious to the corporations concerned and damaging to the public", is required.

Nature of Alleged Illegalities.

The Court found: "The illegalities and restraints herein found are not in the ownership of many or most of the best theatres by the producer-distributors, but in" the trade practices held to be in restraint of trade (Finding 154, R. 3690).

"Total divestiture would not remedy the * * * practices which have been found unreasonably to restrict competition" (Finding 156, R. 3690).

"Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding 155, R. 3690).

The Court then proceeded to strike at the very root of these trade practices and decreed basic and drastic changes in the method of distributing motion pictures.

It decided that divestiture would not cure the evils which the Court found (Finding 154, R. 3690):

> "The illegalities and restraint herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited."

On the basis of this finding it squarely enjoined every one of these trade practices.

To make assurance doubly sure, it did two other things:

a) Required a system of competitive bidding which would further make these trade practices impossible and would tend to make more fluid the distribution of features; and

b) reserved jurisdiction to follow up, on the basis of the experience in this complicated industry, the effectuation of its purpose to abolish these practices and to render distribution more fluid.

The Court will note in the following discussion of these trade practices:

a) Their origin ante-dated theatre ownership by Warner and were common throughout the industry;

b) Warner did not impose illegal trade practices on the industry; and

c) Thus the Court was abundantly right in holding that there was no basis in these practices for an inference of combination or conspiracy to monopolize the exhibition business, or for a finding that the theatre-owning defendants had monopolized the exhibition business.

It appropriately defined the illegalities and required the entire industry to change basically and drastically its trade practices which we now take up seriatim.

(a) Block booking enjoined.

Block-booking, the licensing of a season's product (Finding 1, R. 3659), is a practice older than the feature motion picture. Indeed, the complaint alleges that the practice existed "in the early stages of motion picture distribution" before the feature was first produced (Par. 106, R. 3170).

It was held valid in 1932 by the Second Circuit Court of Appeals (Augustus N. Hand, *Ct. J.*, par-

ticipating) in *Federal Trade Com'n.* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 152).

It was held illegal below. (Decree II, 7, R. 3696) "particularly because of recent decisions of the Supreme Court" (66 F. Supp. at 349 [R. 3545]), which we claim were improperly applied to the facts of this case.

The five defendants who signed the consent decree of 1940 have since licensed in blocks of no more than five features (66 F. Supp. at 348 [R. 3543]; see also R. 2753).

Most producers who had no theatres continued, however, to block-book (R. 2717).

Warner discontinued the practice entirely soon after said consent decree, voluntarily selling feature by feature (R. 1504).

The practice did not flow from a producer's ownership of theatres, but from the desire of any theatre owner to be assured of continuity of product. This is a natural inference from plaintiff's counsel's statement (R. 2754): "I concede that as far as exhibitors are concerned, many of them, or perhaps most of them, want the security that comes from having as many pictures as they can, tied up with a maximum privilege of elimination."

Obviously, this allegedly illegal restraint is not related to theatre ownership, did not grow out of theatre ownership, and was not an intentional violation of the Act.

Finally, in any event, whatever the illegality of the practice or its effect, it has been made academic as a result of the injunction below (Decree II, 7, R. 3696).

(b) Formula deals, master agreements and franchises enjoined.

These practices are defined in the footnote.*

The Court found that (Finding 87, R. 3675):

> "Loew's is not, and never has been, a party either as a distributor or as an exhibitor, to any 'formula deal' license agreements".

Moreover, the Court found that only Paramount and RKO had as distributors made formula deals (Finding 86, R. 3675; Conclusion 8 [h], R. 3693).

It is thus obvious that such deals had no relation to integration.

Similarly franchises (licenses for more than a year's product) had no relation to integration. There is no evidence which limits franchises to the theatre

---

* Formula deal defined (Finding 1, R. 3660):

"A licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross."

Master agreement defined (Finding 1, R. 3660):

"A licensing agreement, also known as a 'blanket deal', covering the exhibition of features in a number of theatres, usually comprising a circuit."

Franchise defined (Finding 1, R. 3660):

"A licensing agreement, or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement."

owning defendants; the evidence is to the contrary. The amended complaint itself alleges that long-term franchises were made with both unaffiliated and affiliated circuits (Par. 121, R. 3176), and the opinion below recognized that divestiture would not remedy the alleged evil as to the many independent circuits (Finding 154, R. 3690; 66 F. Supp. at 355 [R. 3555]) such as the Schine circuit which the amended complaint alleges to have come into being when after 1929 Universal divested itself of its theatres (Par. 78, R. 3163).

That franchises have no relation to integration appears further from the fact that whenever a distributor, affiliated or not affiliated, granted franchises, it granted those to both affiliated and non-affiliated theatres, and when a distributor discontinued its practice of granting franchises it discontinued as to both affiliated and non-affiliated theatres. Thus, the Court found that "Fox has not granted any franchises since June 6, 1940" (Finding 91, R. 3675), that "Loew's is not currently granting franchises" (Finding 90, R. 3675), and that most of the franchises were granted to independents, by Loew's during its entire history (Finding 90), by Universal during the period in question (Finding 92, R. 3676), and by Fox in 1938-39, the season in which it had most franchises outstanding (Finding 91, R. 3675). Plaintiff offered no evidence that Warner had granted any franchises which existed at the time of the trial.

That the making of franchises could not have been an intentional violation of the Act is conclusively established by the fact that plaintiff insisted, as late as 1936, that 10-year franchises be granted in St.

Louis as a condition to discontinuance of a local suit by plaintiff in equity under the Act (R. 936-937).

Master agreements were found to "allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best and leaves other terms to the circuit's discretion" and therefore held to be unreasonable restraints (Finding 88, R. 3675). They are patently not related to integration. Not even the harsh and destructive divestiture sought would remedy the alleged evil as to the many independent circuits (Finding 154, R. 3690; 66 F. Supp. at 355 [R. 3554-3555]).

In any event, any illegality or restraint arising from the misuse of combined purchasing power of several theatres is not something arising out of theatre ownership by a producer-distributor, but out of misuse by anybody of more than a single theatre.

Formula deals and master agreements were not condemned *per se* in the *Crescent* (323 U. S. 173) or *Interstate* (306 U. S. 208) cases. If they have now become illegal, they can hardly be condemned as evidence of intentional violation of the Act.

But whatever the legality of such agreements or their effect, they have now become academic as a result of the specific injunctions below (Decree, II, 5 and 6, R. 3696) and the additional requirement of the decree that each theatre must bid separately for each feature (Decree, II, 8, d, R. 3698).

(c) Unreasonable clearance enjoined.

That clearance is a practice as old as the feature motion picture* is alleged in the amended complaint (Par. 114, R. 3173):

> "Prior to the advent of the feature picture, films were licensed generally on the basis of age * * *. There was evolved during this period the concept of 'run' * * *. From about 1915 or 1916 * * * exhibitors * * * sought to obtain and frequently did obtain long periods of protection [later called clearance] over all other theatres in the city and surrounding territory where they were located.
>
> 115. From about 1915 to about 1931 it was frankly conceded by distributors and exhibitors generally that uniform runs and clearances were desirable * * *."

The beneficial effect of clearance or a license for successive dates to the public was found by the Court (R. 3673):

> "76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.
>
> "77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensor in the rental to be derived from the exhibition of the feature licensed, without unreasonably interfering with the interest of the public."

* See also R. 1080-1081, 1894-1895, Ex. P-5, part of which is printed on page 22 of plaintiff's Appendix.

In the Consent Decree plaintiff recognized clearance as "essential" if reasonable as to time and area (66 F. Supp. at 342 [R. 3531]). Indeed, plaintiff's brief on a motion to modify the consent decree so as to extend the scope of arbitration and to effect total divestiture of theatres, filed only 8 months before the trial, recognized that "reasonable" clearance does not violate the Act under decisions of this Court (R. 3423):

> "As the agreement is one which restrains interstate commerce in films it is a violation of Section I of the Sherman Act unless the restraint is a *reasonable one. Interstate Circuit* v. *United States,* 306 U. S. 209." (Italics by plaintiff's counsel.)

Divestiture of theatre ownership would not solve the problem of whether any particular clearance was or was not reasonable. That, as the Court pointed out, "should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry" (66 F. Supp. at 342 [R. 3533]).

The Court below wrote "we cannot find sufficient evidence to support an inference that the major defendants * * * have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances" (66 F. Supp. at 342 [R. 3532]). There is nothing to support an inference that, but for theatre ownership by producer-distributors, the clearances would have been different from what they were.

The history of this case shows that the theatre-owning defendants did not intend to use unreasonable clearance as an attempt to monopolize. By the Consent Decree, they consented to have the clearances of their own theatres and of the clearances which they granted independent theatres reviewed and fixed by disinterested parties. On the trial, they offered to continue arbitration of clearance and to extend it to run. They repeat that offer here.

The Court below held existing clearance practices illegal solely because defendants had "acquiesced in and forwarded a uniform system of clearances" (66 F. Supp. at 342 [R. 3532]) and enjoined such uniformity.

If such uniformity be illegal, it was not due to theatre ownership by a producing defendant.

It was due to the *insistence* by the owner of the theatre—independent or defendant alike—that each of the distributors *grant the longest period of clearance which any one of the distributors was willing to grant the theatre owner*—independent or defendant alike.

Competition, not conspiracy, was the cause of uniformity.

Such uniformity has no relation whatsoever to integration.

Divestiture of theatres from distributors could not, however, affect this tendency toward uniform pressure on distributors, even though they owned no theatres, as in the case of Universal, Columbia, United Artists,

or such other distributors as were not made parties defendant.

However, to the extent that uniformity may have been the result of conspiracy, it has been rectified by injunction (Decree, II, 2-4, R. 3695).

(d) Admission price-fixing enjoined.

The practice of inserting a minimum admission price restriction in each license dates back to the origin of feature motion pictures (R. 717, 917, Ex. P-6) and was believed justified by the Copyright Law.*

The uniformity of such restrictions by each defendant as to any particular theatre was the result, as defendants contended, merely of inserting in the license the price actually charged by the exhibitor. As plaintiff's counsel stated, "the testimony * * * is that

* Plaintiff's brief (on a motion to amend the consent decree by extending the scope of arbitration and to effect total divestiture) recognized this in discussing provisions for minimum admission prices, clearance and run (R. 3423):

> "Clearance restrictions have *traditionally* been imposed by distributors in this industry on the theory that their ownership of copyrights on the films distributed entitled them to impose such restrictions on the exhibition of the films in theatres as are necessary and appropriate to realize maximum revenue from the exploitation of the copyright. Upon this theory, distributors have customarily undertaken to fix the minimum admission prices at which their films should be exhibited to the public in all of the theatres they license * * * *Obviously* the first-run exhibitors would not ordinarily be expected to pay film rentals based upon the receipt of the highest admission price in a competitive area unless there were some assurance that the films they exhibited would not be exhibited elsewhere in the area at substantially lower prices until after the lapse of some reasonable period of time." (Italics ours.)

Holdings below.

Apart from certain industry-wide trade practices, all of which antedated Warner's theatre acquisitions, the Court below completely acquitted us of charges of basic conspiracy or combination to monopolize. It found (R. 3689-3690):

"Finding 152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.

"Finding 153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.

"Finding 154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. * * *"

It further found (R. 3690):

> "Finding 155. Total divestiture would be injurious to the corporations concerned, and would be damaging to the public."

It adjudged us guilty only of industry-wide trade practices set forth in this finding 154. We shall show

a) that every one of these industry-wide trade practices was utterly uprooted by the decree below;

b) that every one of these industry-wide trade practices was wholly unrelated to and not caused by theatre ownership by producer-distributors, or integration, and therefore

c) that the Government's claim that this industry should be destroyed by divorcement is baseless both in fact and in law.

Comment on plaintiff's brief.

Plaintiff's brief is essentially based on the following fallacious assumptions and arguments:

1) That amputation is a necessary and inevitable remedy for any concerted violation of the Act, even though "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition" (Finding 152, R. 3689) and even though they "cannot be treated collectively so as to establish claims of general monopolization in exhibition" (66 F. Supp. at 354 [R. 3553] (Pltff.'s Br., Point I, A);

the distributor merely inserts the going admission price of the exhibitor or a price suggested by the exhibitor" (R. 2583) and the Court found (R. 3670):

> "63. The minimum admission prices included in licenses of each of the eight distributor-defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor."

Any uniformity in such price restrictions obviously arose in the same way as in the case of uniform clearance, *i. e., out of the acceptance by the distributor of the exhibitor's price which by the exhibitor's own choice was the same for all pictures which he exhibited.*

Any uniformity in this negligible area* was not the result of an intentional violation of the Act, even if its effect should now be held illegal.

The appropriate remedy is a simple injunction against such price-fixing, not divestiture.

The prices were not fixed *because* theatres were owned. They were fixed in what may have been a mistaken belief that the owner of a copyrighted feature

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* There was no evidence that the minimum admission prices sometimes specified in Warner licenses did in fact hamper any exhibitor in his free choice of the admission price which any exhibitor chose to charge for the exhibition of a Warner feature.

The only evidence (Exhibit W-22, summarized in a footnote on p. 108, *infra*) showed marked variations of the actual admission prices charged from the minimum admission prices sometimes stipulated in Warner licenses.

There is no evidence whatsoever that any exhibitor was threatened or coerced for such variations from the stipulated minimum, or that the sanctions in some of the licenses against violation of the stipulated minimums were ever enforced.

had such a right when the minimum price restriction was not for some ulterior purpose. That such a provision was not an intentional violation of the Act and that such a belief might well have been held is inescapable from the *Interstate* case (306 U. S. 208) where the type of price restriction there used was condemned solely because used for ulterior purposes.

In any event, such price-fixing will become academic by the injunction below (Decree, II, 1, R. 3695).

(c) Discrimination among licensees.

The Court below stated (R. 3550) that provisions most frequently found in franchises and master agreements made with the larger circuits, affiliated or unaffiliated, accorded these circuits certain advantages over the small independents (66 F. Supp. at 352 [R. 3550]). It was careful to add (66 F. Supp. at 353 [R. 3551]):

> "The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

What in effect it held was that the small independent exhibitor suffered certain contractual disadvantages as against the circuits, either affiliated or nonaffiliated.

It may fairly be questioned whether any such discrimination, based on purely business considerations, and not tending to unreasonable restraint and monopoly, was in any sense a violation of the Sherman Law.

But assuming *arguendo* that it was, the injunction against franchises and master agreements destroyed any such discrimination.

Surely, such discrimination was not inherent in theatre ownership by producing companies or even in the ownership of a circuit of theatres.

And surely there is no reasonable answer to the position taken by the Court below that, by the abolition of formula deals, master agreements and franchises and under the new selling system decreed, these discriminations have become academic. In the words of the opinion below (66 F. Supp. at 353 [R. 3551]):

> "* * * we believe will not exist in future licenses under the bidding system for which we are providing."

(f) Remedy as to runs.

The Court below sought to decree some remedy more specifically directed against that portion of the "fixed scale of clearances, runs and admission prices" which related to runs, in order to promote freer bargaining (Finding 84, R. 3674).

In its opinion, it had indicated that the plaintiff's suggestion of competitive bidding (R. 2556) was a proper solution, in one sentence over-stating that such bidding was "the only way competition may be introduced into the present system" (R. 3540).

After hearing the protests of *amici* and plaintiff's shift of position so as to approve competitive licensing only as between independents and then in some

more general form, the Court carefully omitted the word "only" in its findings of fact (R. 3674):

> "85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring" licenses to be granted "to the highest bidder."

and inserting supplementary injunctive provisions in its decree to accomplish that result.

II (9) enjoined defendants (R. 3698):

> "From arbitrarily refusing the demand of an [independent] exhibitor, who operates a theatre in competition with another [independent] theatre * * * to license a feature to him for exhibition on a run selected by the exhibitor * * *"

and II (8) of the Decree (R. 3696) required competitive bidding limited to whoever desires such an opportunity in a competitive area (R. 3702).

This additional remedy directed to so much of the system as related to runs is fully considered in Point II (p. 41, *infra*).

(g) In the two instances where the court below found restraints in the exhibition business, not related to integration ("pools" and joint ownership of theatres), more than adequate relief was granted.

(1) *Joint operation ("Pools") enjoined.*

The Court found that in those instances in which the exhibitor defendants pooled their theatres with those of other exhibitors, the result was to eliminate competition between those theatres in such situations. The Court directed the termination of all such pooling agreements and enjoined the making of any others (Decree, III, 2-4, R. 3698).

Compared with the total number of theatres and competitive situations in this country, Warner was in a negligible number of "pools". These "pools", now terminated, were only 22 in number,* of which four involved Warner and a defendant; one Warner, a defendant and an independent; and seventeen Warner and an independent. Only 9 of these pools involved any first run theatres in the 92 largest cities.

As a result of the decree below, all 22 Warner "Pools" have been terminated and the injunction against their revivor, not assigned as error by Warner,** renders the whole subject academic.

"Pools" obviously had no relation to integration, since theatre owners have "pooled" their theatres from time immemorial, regardless of whether they produced or distributed pictures or plays.

(2) *Partial ownership of theatres enjoined.*

The Court found that many theatres were held jointly by an exhibitor defendant together with another exhibitor and that in those situations the "de-

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* We have no means of ascertaining the total number of pools in the country. Page 255 of plaintiff's appendix lists the total pooled theatres in which any defendant was involved at 437.

** Warner has assigned as error the injunction against performing existing pooling agreements with exhibitors who are not defendants in this action (Error no. 28, R. 3734). As to those exhibitors, the court below said "While our decision will not be *res adjudicata* as to those not parties to the litigation, the parties are necessarily bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce" (66 F. Supp. at 347 [R. 3541-2]). Warner has been sued by one and is threatened with suit by another exhibitor to compel Warner to perform in violation of this injunction.

fendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently" (Finding 116, R. 3683).

The Court enjoined each defendant from owning an interest in any theatres of less than 95% (Decree, III, 5, R. 3699).

Each defendant is required to divest itself of any such interest unless "such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures" (Decree, III, 5, R. 3699).

This finding and injunction are assigned as error (Errors, nos. 25-27, 29, 33, 37, R. 3733 *et seq.*).

The fallacy of this holding is discussed in Point First of Twentieth Century-Fox Brief and Point II of RKO Brief.

Obviously, ownership of less than 95% of a theatre has no relation to integration, *i. e.*, where the part owner may also be producing and distributing pictures.

Except to the extent that the Court expressly permits on a proper showing the purchase of these outstanding interests, the incidental effect of this portion of the decree will be to deprive defendants of the right to operate approximately 1,292 theatres (Finding 117, R. 3683) which will be added to the 14,578 theatres already independently owned (Finding 118, R. 3684).

On such an assumption* there would thus be 15,780 theatres independently owned as against 2,206 operated by all of the defendants together, an aggregate of only 12% of the total,—a result which would unjustifiably deprive defendants in the aggregate of about ⅓rd of their theatres.

Yet the holding with such disastrous consequences has no relation to any specific evils found below other than the erroneous conclusion that partial ownership was *ipso facto* a restraint of trade.

If this erroneous holding should be sustained, the radical changes resulting in the exhibition business and the first run theatre market in the 92 cities with populations of over 100,000 make obsolete the statistical information relied upon by the plaintiff.

The following statistical information makes abundantly clear the radical consequences which its enforcement might have industry-wide.

These statistics show only a possibility of the effect of the decree because it may well be that if either this portion of the decree is reversed or if the Court should permit defendants to purchase outstanding partial interests, the results set forth would not necessarily follow. They are given, however, to show the

* All calculations relating to the possible effect of that portion of the Decree relating to partial ownerships of theatres are based on RKO exhibit 11 on which the Court based its Finding 117 relating to partial ownerships. Any calculations based thereon are necessarily approximate and subject to possible error, since that exhibit, prepared hastily at the request of the Court, was no more than an attempt to give the Court a composite picture and was not vouched for as mathematically accurate. Error is also possible because of honest differences of opinion as to what constitutes partial ownership in certain situations.

possible extreme effects of adverse rulings of the statutory court on its reservation of control of this part of the decree.

A.

Heretofore the five defendants had in the aggregate interests in 3,114 theatres located in 942 cities in 48 states.

This holding may affect 710 of these 942 cities (75.2%), including 66 of the 92 large cities (71.7%).

Every state in the Union may be affected.

In 10 states, including one with 243 affiliated theatres, every theatre in which a defendant has an interest may be affected. In 10 other states, there might be left only 1, 2, or 3 theatres in which any defendant had an interest. In 7 additional states, including many populous states, there might be lost 80 to 90% of the theatres in which any defendant had an interest.

B.

Not counting "pools" terminated, the defendants might lose first run theatres in all but 22 of the 88 large cities where any defendant has an interest in any first run theatre.

C.

The dollar volume of business done by the defendants with each other might be substantially affected nationally and in the 92 large cities first run.

Under the new decree such dollar volume will be substantially affected if each of the defendants lose their less than 95% owned theatres to independents.

D.

A graphic illustration of this is to recast Warner's revenue first run in the 92 large cities, from the picture "Princess O'Rourke" (taken by plaintiff as a typical picture at the trial) on the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres.

Exclusive of the business which Warner as distributor did with its own theatres, the amount of business first run in the 92 large cities which Warner would do on the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres is (Appendix, p. 135, *infra*):

Independents	$264,275	74%
Loews	0	0%
Fox	0	0%
RKO	31,894	9%
Paramount	59,428	16%

On the assumption that defendants were not permitted to acquire the outstanding interests in partially owned theatres, independent theatres (not the other four theatre owning defendants) would become our chief market first run in the 92 cities.

With such a drastic change, where Warners had heretofore licensed Loew's theatres or Fox theatres in any of these 92 large cities, those theatres would

be in the hands of independents. In 5 of those 6 cities where Warner licensed theatres in which RKO had an interest, those theatres would be in the hands of independents. In 4 of the 15 cities where Warner licensed theatres in which Paramount had an interest, those theatres would be in the hands of independents. In 3 other of these 15 cities, the theatres of other defendants would compete with the Paramount theatres as a result of the termination of "pools".

E.

A similar result would follow with respect to Warner as a theatre owning exhibitor.

As a result of the termination of pools and loss of all theatres less than 95% owned in these 92 cities, Warner theatres would have substantial competition from independent theatres in 21 of the 28 cities where there are Warner theatres and from one or more of the other defendants in the others.

In every one of the 92 cities Warner theatres has competition first run.*

(h) The additional sweeping injunction against theatre expansion was far more drastic than warranted.

The unqualified injunction against theatre expansion would so disastrously and vitally affect our business that Warner assigns it as error (Nos. 30-31, R. 3735).

* The situation in Philadelphia and Albany has changed since the trial, as a result of termination of a pool in Albany and the opening of a newly built Goldman theatre in Philadelphia.

Our objection against an unqualified injunction against expansion should be evaluated against the background of Warner's theatres since 1931:

a) In the last 16 years, Warner has not increased the number of its theatres. It now owns 44 less than it did in 1931 (Findings 31-32, R. 3665).

b) Since the consent decree which enjoined a program of general expansion, Warner has not increased the number of its theatres, has filed reports of any changes in its theatre ownership with the plaintiff, and at no time did plaintiff object to any replacement or acquisition which Warner made.

The reason why an injunction against expansion requires some limitation within reason appears from the testimony of Bernhardt in connection with his statement that Warner has "had no policy for the expansion of theatre holdings" (R. 1826):

> "Any theatres acquired * * * were to protect our business and meet the varying economic conditions, shifts of populations or needs caused by obsolescence which had arisen with the changes over the years."

The ban upon expansion departs from the decree ordered in the opinion below which stated that the decree to be entered should not (66 F. Supp. at 359 [R. 3562]):

> "* * * prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other

competent authority shall approve the acquisition after due application is made therefor."

This went much further than the Consent Decree (XI, [5], R. 3387) which had merely forbidden "a general program of" expansion with the unrestricted qualification that "Nothing herein shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purpose of its business."

Such a sweeping injunction as ultimately granted below would be the equivalent of slow strangulation or divorcement.

Such a sweeping injunction was not granted by this Court against a circuit found to have grown largely as a result of "predatory practices" (*United States* v. *Crescent*, 323 U. S. 173, 186):

> "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct *and yet not stand as a barrier to healthy growth on a competitive basis.*"

The Court is respectfully referred, for a fuller discussion of this question, to Point Second of the Twentieth Century-Fox Brief and to Point I of the RKO Brief.

The intent to prevent undue growth can adequately be achieved without destruction of Warner's business by an injunction against expansion *unless permission be granted* on an application at the foot of the decree and *after a finding that the proposed acquisition does not unduly restrict or restrain competition.*

No basis for claiming that "extensive experience shows" decree below inadequate. None of its remedies against industry-wide trade practices had ever before been tried and found ineffective.

There is no truth in plaintiff's claim that the decree below bears "resemblance in impact and method to past systems of regulation which have been already tried and found wanting" (Pltff.'s Br., p. 89), and that therefore no decree short of amputation can give adequate relief.

None of the remedies decreed below against industry-wide trade practices had ever before been tried:

1.) Block-booking had actual judicial sanction (*Fed. Trade Com'n.* v. *Paramount, etc. Co.*, 57 F. 2d 152) until the decree below. The consent decree of 1940 left three of the distributor defendants free to continue block-booking as to all theatres, affiliated and independent, and sanctioned the other defendants as distributors to book in blocks of five after trade showing.

2.) Formula deals, master agreements and franchises had never been enjoined or regulated, except that the consent decree enjoined the consenting defendants as distributors from granting franchises.

3.) Fixing minimum admission prices had never been enjoined or regulated. *Interstate Circuit* v. *United States*, 306 U. S. 208, merely held illegal a conspiracy to cause some subsequent-run exhibitors in Texas "to increase their admission price to 25 cents." The consent decree of 1940 in no way affected the then existing

practice of inserting *minimum* admission prices in the licenses.

4.) Joint operation of theatres ("pools") had never been enjoined or regulated. The consent decree of 1940 left unaffected this industry-wide practice.

5.) Partial ownership of theatres had never been enjoined or regulated. The consent decree of 1940 left unaffected this industry-wide method of ownership.

6.) Theatre expansion had never been prohibited or regulated. The consent decree of 1940 prohibited the consenting defendants from "a general program of" theatre expansion; and in the cases of *Crescent* (323 U. S. 173) and *Schine* (63 F. Supp. 229) the United States was content with injunctions against theatre acquisition without consent of the court.

7.) Competitive bidding had never been decreed. Two decisions since the decree below have, however, adopted a modified form of competitive bidding to remedy local grievances. (*Bigelow* v. *RKO Radio Pictures*, 162 F. 2d 520, 524; unreported decree in *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738).

8.) Clearance: Whether a particular clearance was reasonable or unreasonable has always been a subject of dispute, no matter who owned the theatres involved. Industry boards sought to set up clearance schedules in local areas under the NRA. The United States does not purport to show that where such clearances went into operation, they were unreasonable.

The consent decree of 1940 made clearance arbitrable, but sanctioned as a criterion of reasonableness the "old customer" and certain other criteria (Pltff.'s Appendix, pp. 373-374) abolished by the decree below (R. 3533-3534).

Disputes as to clearance are bound to exist even if every theatre in the country were owned by a separate and different individual. Amputation of theatres from production is no panacea for clearance disputes.

Plaintiff's admission that the very limited relief of the consent decree mitigated "the discriminations inherent in the major defendants' ownership of theatres" (Pltff.'s Br., p. 86) merely serves to underline the probable efficacy of the present decree.

Never has a decree so drastically and radically changed the sales practices of an entire industry.

Never has a decree established a method to resolve disputes over run, as this decree does by competitive bidding.

Never has a decree or code required each license to be "offered and taken theatre by theatre and picture by picture" (Decree II, 8(d), R. 3698), "solely upon the merits and without discrimination in favor of affiliates, old customers or others" (Decree II, 8 (b), R. 3697).

That the decree provides no simple and direct method of enforcement is not the fault of the Court (which urged a continuance of an expanded system of arbitration) or of the theatre-owning defendants (which offered to consent to such an expanded system

as a remedy in addition to contempt proceedings and private anti-trust litigation). We hope that plaintiff's failure to consent to an expanded arbitration system may have been influenced by its desire to have a declaration by this Court as to whether there should be amputation, and that, if the decree below be affirmed in that respect, plaintiff will reconsider its present position.

None of the cases cited remotely tend to show "extensive experience" of the inadequacy of any remedy short of amputation.

Plaintiff's reference, at page 72 of its brief, to the numerous pending private anti-trust suits is disingenuous. No analysis is presented to show, as plaintiff would have this Court believe, that the restraints there alleged will not be prevented by this decree. These private suits, in the main, involve differences of opinion between exhibitors as to which theatre was entitled to a designated run. In some suits, an affiliated exhibitor is the defendant exhibitor. In other suits, an independent exhibitor is the defendant exhibitor. In all suits, those distributors which had licensed the desired run to the defendant exhibitor are of course made parties defendant. The *Bigelow, Goldman,* and *Theatre Investment* cases, described at pages 87 and 88 of plaintiff's brief, involved such disputes over run. No litigation would have been necessary, had the decree below been in effect. The surprising thing is, not that 40 odd suits have been brought, but that so few have been fomented by the sweeping nature of the decision below.

All that *Federal Trade Commission* v. *Paramount, etc., Co.*, 57 F. 2d 152 (Pltff.'s Br., pp. 73-75) held was the validity of block-booking by Paramount in

1926. The Commission sought to make no other order enforcible as the opinion states.

All that *Paramount, etc. Co.* v. *United States*, 282 U. S. 30, and *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (Pltff.'s Br., p. 80) held was the illegality of an agreement among distributors to insert in all licenses requirements for compulsory arbitration and for assumption of debts of prior theatre owners.

Vitagraph, Inc. v. *Perelman*, 95 F. 2d 142 (Pltff.'s Br., pp. 84-85), involved a conspiracy by distributors to refuse to license pictures on a double feature program in Philadelphia. It was decided in 1938. The consent decree of 1940, however, specifically recognized as a factor in determining the reasonableness of a clearance "The policy of operation of the theatres involved, such as the showing of double features" (R. 3534). Thus, the United States itself recognized a clear distinction between the impropriety of a refusal to license for a double bill and the propriety of taking double billing into consideration in determining proper clearance. It therefore comes with ill grace for the plaintiff to suggest that the *Perelman* case was disregarded because clearance in Cleveland, Ohio, was "graduated in length according to the * * * double feature policy of the" subsequent run theatre (Pltff.'s Br., p. 85).

Youngclaus v. *Omaha Film Board of Trade*, 60 F. 2d 538 (Pltff.'s Br., p. 80), held invalid a Board of Trade clearance schedule as against an exhibitor at Norfolk, Neb. Plaintiff's lengthy footnote 10, pages 81-82, fails to show the subsequent clearance over Norfolk and hence fails to show that the relief was in-

adequate. Nor does it in our opinion show any basis for comparing the clearance set forth in the schedule with the clearance existing in the 1943-44 season. In no event did that case pass upon the propriety of the clearance fixed, merely holding improper clearance fixed by express agreement among distributors. The case obviously does not show that an injunction against unreasonable clearance will be ineffective.

Interstate Circuit v. *United States*, 306 U. S. 208, merely held invalid an agreement between distributors and dominant exhibitor which fixed the admission price of subsequent-run theatres at 25 cents and forbade double billing.

This, and the *West Coast Theatres* case (Pltff.'s Br., pp. 76-79) merely involved local circuits' activities of a kind similar to those in the *Schine, Griffith* and *Crescent* suits. The complete absence of any reference to the *Schine, Griffith* and *Crescent* litigations is significant. For, to disprove the Court's finding that the evils found lie in industry-wide trade practices and not in theatre ownership by producers, plaintiff must distinguish between the conduct of affiliated circuits and independent circuits.

If plaintiff seeks divorcement because of integration, it must at least show that the restraints found below were a result of integration.

It does not show this by mentioning only cases involving affiliated circuits and ignoring all those cases involving individual circuits.

The cases described by plaintiff, show, at most, the necessity for a decree which must have its initial im-

pact upon the distributors if it is to be effective in preventing the undue advantages which the trade practices have been held to give to the circuits or the old customers; that integration was not the cause of these trade practices; that before integration occurred circuits and old customers were receiving these undue advantages; and that outlawing integration will not prevent circuits and old customers from continuing to secure these undue advantages.

Summary of Point I.

The following has been demonstrated:

The trade practices held illegal arose from no attempt to monopolize.

They grew up historically from the complicated nature of this business and bore no relation to integration of production, distribution and exhibition.

They evidenced no moral turpitude and no intent to violate the law.

They are adequately cured by the basic and drastic changes in the marketing of motion pictures, as required by the provisions of the decree.

They have no logical relationship to the drastic remedy of divestiture.

In themselves they constitute no reason at all for inviting what we shall hereafter show are the dire consequences to all of these defendants, to the owners of the now independently owned 14,578 theatres out of the 18,076 theatres of the country, and to the public.

POINT II.

A more fluid method of marketing by competitive bidding decreed as an additional remedy.

A.

Plaintiff urged competitive bidding as an appropriate remedy consistent with the Act.

The initial suggestion of competitive bidding came from the United States when its amended complaint criticized the absence of competitive bidding in this industry (Par. 113, R. 3173; Par. 122, R. 3177; Par. 124, R. 3178).

In summation, plaintiff's counsel, in response to questioning by all three judges, said (R. 2556):

> "Mr. Wright: I see no reason why they [pictures] should not be sold competitively.
>
> Judge Bright: What do you mean by that?
>
> Mr. Wright: Well, putting pictures on the auction block does not appeal to me as anything which is inconsistent with the purposes of the Sherman Act. I do not see why they should not go on the auction block."

This was merely a repetition of the Government's position in response to exhibitor objections to the consent decree. Mr. Sher then said for the Government (pp. 468, 469 of the printed transcript of that hearing):

> "One of the objectives of the anti-trust law, as I see it, is to bring about competition. Now competition in the motion picture industry, the ideal competitive system, would be to have every pic-

ture individually sold to the highest bidder. * * * We did not quite get there, but we approached it, and it seems to me what most of the objections that have been presented here today involve is the objection to competition, and not an objection to the decree."

"It does hurt him if he doesn't want to compete for pictures, but we are as much anxious to have exhibitors compete as we are in having distributors compete."

After the opinion herein had been filed and the *amici* had vigorously protested the relief suggested to inject additional competition into the existing "fixed scale of clearances, runs, and admission prices" which it had found a deterrent to free bargaining (Finding 84, R. 3674), plaintiff's counsel modified his position so as to limit his approval of competitive bidding among and between independents (R. 3009):

"Judge Hand: * * * I don't know quite what your own position is—but about everybody more or less mildly or strongly objects to—

"Mr. Wright: Well, we believe in it as a method of solving controversies between people of relatively equal bargaining strength such as the independent elements of the industry. If two independents want to exhibit the same pictures on the same run which excludes the other one, I don't know any better way to settle that problem than by saying that the one who bids the most money for the run gets the picture, gets the run. Now that, it seems to me, is implicit in any kind of system of competitive distribution that I envisage."

Accordingly, the Court below in a subsequent "Memorandum in re Findings and Decree," interpreted the decree as merely affording "an opportunity to bid for any exhibitor in a competitive area who may desire to do so" (R. 3702), thereby affording the independent theatres the option of whether to invoke competitive bidding in any competitive area.

But *plaintiff's counsel's admission that such bidding would be a good way of settling disputes between independents carries with it an implied admission that competitive bidding is workable,*—or to paraphrase Judge Hand's words, "the technical administrative objections" urged "might be troublesome. I do not imagine that they are insuperable" (R. 2897).

Nor does the decree place unduly burdensome regulations on the Southern District of New York.

Certainly, the statutory court would not have done as it did, if it felt it was assuming too burdensome a duty.

It knew that it could, if requisite, appoint a standing master to decide such controversies as the Department of Justice thought of sufficient merit to require contempt proceedings.

And any exhibitor, dissatisfied with the Department's decision, retains the undoubted right to prosecute a private antitrust suit in which it could urge violation of the decree.

Moreover, there is always the remedy of arbitration as an alternative remedy, if, as and when the Court or the Department of Justice finds existing remedies

too cumbersome. The excuse for the Department's failure to negotiate a broadened arbitration system that the non-theatre owning defendants refused their assent to arbitration, has little force when the Department's primary objection to competitive bidding is that the theatre-owning defendants may have an undue advantage by such bidding.

B.

Opposition thereto merely emphasizes that the practices criticized below were industry-wide, not the consequence of integration, and that disintegration would not inject additional competition into the industry's methods of distribution.

The opposition to competitive bidding voiced here by such divergent units of the industry is the most eloquent proof that the illegalities found below are not inherent in integration, but are industry-wide and require an industry-wide remedy if it be desirable to inject greater competition into the industry's methods of distribution.

The effort of the statutory court to inject greater competition into the existing industry-wide methods of distribution appears to be resisted equally by:

1.) A distributor which neither produces nor exhibits pictures, defendant United Artists.

2.) Distributor-producers who do not exhibit pictures, like defendants Universal and Columbia, and an *amicus curiae* allegedly representing certain self-styled independent producers.

3.) An integrated company with circuits, some of which are 50% or more independently owned, defendant Paramount.

4.) Circuits and individual theatres independently owned, represented here by associations whose membership may include affiliated circuits and other independent circuits.

The straight-forward attempt of the statutory court to "pry open to competition a market that has been closed by * * * illegal restraints" (*International Salt Co.* v. *United States,* No. 46, this Term) is not resisted by four of the theatre-owning defendants (part of whose theatres may be lost by the decree) who are willing to try the new marketing method (even though some of their remaining theatres may be adversely affected).

Plaintiff, after urging it on the court (p. 41, *supra*), now seeks to straddle, recognizing its propriety for every one except the five theatre-owning defendants (Plaintiff's assignment of error, no. 10, R. 3722).

The very nature of the opposition to even a trial of competitive bidding serves again to emphasize:

1.) The industry-wide nature of the distribution practices criticized below;

2.) That such industry-wide practices were not created by integration and are not inherently bound up with integration; and

3.) That separation of exhibition from production and distribution would not tend to inject into the existing industry-wide marketing practices that additional competition which it was the aim of the court to promote.

C.

Facts found below which prompted the court to try out competitive bidding.

The statutory court found (R. 3674):

> "85. Competition can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant-distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license."

There were no facts which compelled any other finding in the record, although in making this finding the Court below had in mind specifically the pressure of "independent" circuits on distributors (Finding 154, R. 3690), the failure of plaintiff in this case which has been pending since 1938 to adduce similar evidence as to any affiliated circuit, and the obvious fact that self-interest would be a greater deterrent of maltreatment of prospective customers to an integrated company than to an independent circuit.

D.

Hypotheses and argumentation no substitute for facts found and provision for modification after trial.

The statutory court, having found as a fact that competition "can be introduced into the present system" by the provisions of the decree below (Finding 85, R. 3674), reserved jurisdiction to modify its decree (Decree, VIII, R. 3701) if actual trial should prove its finding incorrect.

Those who resist such a trial—whatever their motives—merely ask this Court to substitute their fears, hopes, or arguments for the facts found below and the pragmatic device decreed to prove the correctness of those facts.

As so recently said by a majority of this very Court in *International Salt Co.* v. *United States,* No. 46, this Term, (reiterating a statement of a majority thereof in an earlier case, hereinafter quoted, p. 115, *infra*):

> "We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it comes before us."

E.

Such hypotheses and arguments without substance.

The gravamen of the opposition to a trial of competitive bidding, both below and here, was and is that competitive marketing would leave a large circuit with some competitive advantage over a smaller circuit (or any unit of more than one theatre with such advantage over a single theatre).

The essence of these hypotheses is that—

1.) The statutory court ignored the possibility that competitive bidding might be abused by a larger circuit and that

2.) Despite the deliberate reservation of power to modify its provisions to meet conditions as they developed, the statutory court would be helpless to remedy any abuse which might develop.

We need not discuss—as not here directly involved—the question as to whether this Court should hold that the Act intended to level all industrial units so that no unit more favorably situated could possibly have any advantage over a less favorably situated unit.*

The statutory court, however, did not ignore the possibility of such abuse of competitive bidding. Indeed, in its Opinion (66 F. Supp. at 346 [R. 3540]),

* This in effect is what certain *amici* urge when they protest that an independent theatre which has no money invested in a film produced will bid at a competitive disadvantage against a theatre owned by Warner, for example, which has first call on its own 19 features in which Warner has invested 19 × $1,350,000.

repeated in Finding 85 just quoted, it emphasized that "if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license". Not only is that philosophy repeated in II, 8 (c) of the decree (R. 3697): subdivision (d) of that section provides specifically that (R. 3698):

> "(d) Each license shall be offered and taken theatre by theatre and picture by picture".

and subdivision (b) thereof provides specifically that (R. 3697):

> "(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

The requirement of offer and acceptance picture by picture and theatre by theatre, without discrimination in favor of affiliates, old customers or others, coupled with its reservation of jurisdiction to amend the decree, was fair warning to the entire industry that it intended to enforce *fair* competitive bidding.

That independent circuits and theatres had no illusion on that score is amply shown by the opposition to any interference with the "old customer" practice. Heretofore, as the defendant distributors testified, when there was competition for the grant of a run, and all competitive factors were deemed equal, the distributor granted the run to its old customer when that old customer was a satisfactory customer. The decree below upsets the prevalent view that a satisfactory old customer was entitled to such consideration.

Much of the objections to competitive bidding is basically no more than the wolf of the "old customer"

theory dressed in sheep's clothing of impracticality* and alleged fear of abuse thereof by those who wish to remain as favored customers.

There is however no substance to the fear that defendants will abuse the new marketing system.

The Court below pointed out that "we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances" (66 F. Supp. at 342 [R. 3532]), "film rentals, clearances, or minimum admission prices" (66 F. Supp. at 353 [R. 3551]).

That defendants did not voluntarily heretofore resort to this method of marketing is the best evidence that it will not be used oppressively now that it has been directed by a court. Warner has been free to require competitive bidding during the last 19 years since Warner first acquired theatres and in all of the 24 years since Warner's incorporation. During all this time Warner received about 60% of their domestic film revenue from independent theatres when it could have resorted to competitive bidding, had it so chosen.

A distributor's own self-interest, now buttressed by authoritative judicial decision, will prevent abuse of the new marketing method prescribed.

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* The reservation of the power to amend takes care of the possibility that actual operation may require some modification in the technique of competitive bidding in order to make it more fluently workable.

And that same self-interest, now reinforced by the sanctions of the decision below, will tend to restrain its abuse by independent circuits at the expense of individual theatres. Indeed, the real fear of the independents is not of the defendants who must do business with them, but of the large independent circuits that have in the past attempted coercive measures against both independents and the defendants, as the opinion below indicated. The decision below for the first time offers defendants a sanction for resisting such sporadic attempts at oppression by independent circuits, as were found in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, and *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229, argued here this Term.

Thus, the claim of some exhibitor organizations that the defendant exhibitors will overbid in order to keep a picture from a competitor is merely their opinion without factual basis. The record is barren of any such evidence. The same arguments were made to the lower Court, and after due consideration the lower Court nevertheless inserted provisions for competitive bidding in the decree, including the prohibition against "discrimination in favor of affiliates", and the retention of jurisdiction to take any action required in the event that it be demonstrated in the future that the competitive bidding system is being abused.

The competitive bidding system will also throw on the five defendant-exhibitors the necessity of open competition for first run licenses in the 92 cities of the United States with population of more than 100,000.

Plaintiff has charged that in 38 of the 92 cities, one or more of the defendants operated all of the first run theatres, and that this was true of more than 100 cities of between 25,000 and 100,000. With the injection of the competitive bidding system into the marketing of film, no independent theatre owner desiring a first run in those cities and operating a theatre suitable for first run exhibition will be excluded from that first run market. No circuit, whether affiliated or independent, can use its buying power to secure the privilege of an unjustified first run.

A few additional comments will serve to answer such additional arguments against competitive bidding as are raised by the alleged Petitioners-Appellants, American Theatres Association, Inc. et al., in appeal No. 85.

These Associations object to competitive bidding as ineffectual to accomplish the relief sought by the Court, because such increased competition may tend to raise the prices of film rentals. They thereby incorrectly assume that the Court sought to control the prices of film rental.

Whatever the incidental effect of increased competition on the prices of film rentals, competitive bidding will remedy the primary evil of which the plaintiff complained and which the Court sought to remedy. This had nothing to do with the price of film rentals as is obvious from the "Conclusion" of the brief of these Associations, which describes (p. 28):

> "The evils found to exist are a combination by the defendants to exclude independent exhibitors from preferred runs * * *. To meet that situa-

tion, the Court has devised an assumed remedy by competitive bidding."

More accurately stated, the primary evil sought to be remedied was the dificulty of any theatre, actual or potential, to break into or change the existing system of run and clearance. That evil will be cured by competitive bidding, whatever the incidental effect of increased competition for film and preferred runs on rentals paid. If the result of additional competition for film of theatres, actual and potential, has an incidental effect on the prices of the rentals paid, it is merely an incidental result of the greater competition which the Sherman Act was designed to promote.

The philosophy of the Sherman Act is based on a price structure which is the result of competition.

Where competition is keen,—as here, for the very best of the pictures on preferred runs,—the price in a free market will be what the traffic will bear, no matter what form the selling takes.

The only new element which competitive bidding injects into the situation is the opportunity of a theatre to secure something better than its competitor if it thinks the risk worth the gamble.

It is true that in the long run "Auction bidding does not in any way remove the handicap of those bidders who are in an inferior bargaining position" (Br., p. 13). In the long run, the inferior theatre will not—and should not—be preferred to the superior. All that competitive bidding—and the Sherman Act—seek to accomplish is so to release the forces of competition that each of the 18,000 odd theatres in

this country may reach its own competitive level, "in fair mercantile battle",—to borrow a phrase from page 11 of the brief of these Associations.

Throughout their brief, there is implicit and explicit insistence upon "stability", "continuous supply of products", "assurance of a continued supply" (Br., p. 16). Unfortunately, however, neither the Court, plaintiff nor the Sherman Act can assure both "stability" of product and freedom of competition. Theatres cannot have their cake and eat it too.

The suggestion that anything in the decree sanctions defendant's theatres engrossing the market (Br., pp. 15-17) is indeed an argument of desperation. An injunction against licensing except on competitive bidding is not a sanction that competitive bids may be so used as to violate the Act. If Warner should engross the market in Lawrence, Massachusetts, for example (Br., p. 19), the independent Capital Theatre would have the same rights whether or not it were afforded the privilege of competitive bidding. However, despite the alleged conspiracy, the brief concedes that "At the present time, the Capital Theatre is able to obtain sufficient quality product to operate" (Br., p. 19). It is idle to speculate that the Capital would fare worse after than before the injunctions contained in the decree below.

The same comment applies to the claim that "The decree gives the defendants a further advantage by allowing them to preempt their own pictures" (Br., p. 17). The decree "gives" defendants nothing. It merely fails to compel defendants to bid competitively for their own pictures in their own theatres. The decree "gives" them neither their pictures nor their

theatres: They paid for both in the hope and expectation of profit.

A good portion of the brief (and especially pages 20-24) purports to show that no objective criteria of the best bidder are possible in this industry, and that, therefore, competitive bidding is unworkable. Plaintiff's counsel did not think so (p. 41, *supra*). And it cannot be seriously claimed that the theatres of these Associations have been licensed their films on the runs they now enjoy with no objective criteria establishing their right thereto. For that would be an implied admission that their present successful operation is solely the "result of well established business relationships", the "old customer" theory.

The claim that bidding is "unworkable" and "will create substantial unnecessary difficulties in operations" (Br., pp. 24-27), should also be appraised against protests of unworkability, when it was suggested at the time of the formulation of the consent decree that licenses be limited to blocks of five features after trade showing.* Actual operation in that way in the eight years since 1940 exploded that myth. Indeed neither Warner nor its customers have experienced difficulty or hardship in selling picture by picture subsequent to 1940.

It is obviously true that it is easier and simpler for "those who have" if they can be assured from year

* Mr. Sher said for the Government, in response to the fears voiced at the hearing on the consent decree (p. 474 of the printed transcript of the hearing):

> "But these dire predictions as to what will come before the new method of selling has had a chance, do not seem to be justified."

to year of "a continuous supply of product sufficient to operate their theatres" (Br., p. 17) presumably on a run satisfactory to them. But if it be desirable to have greater fluidity instead of the alleged existing "stability", some slight additional inconvenience to both theatres and distributors should not be too big a price to have to pay for increased competition.

It is not, we submit, too much to ask the industry to suffer some slight additional inconvenience in making an honest attempt to secure that greater degree of competition which the Court below and the Sherman Act sought to promote.

If, in fact, any of the competitive bidding provisions create too great confusion or hardship where they are invoked, the Court has reserved jurisdiction to make appropriate modifications; and our thousands of clients throughout the country such as members of these Associations may rest assured that, if undue inconvenience or hardship ensues, Warner will make appropriate representations to the Court to remedy any such result.

POINT III.

There was no monopolization of production, distribution or exhibition by any or all of the defendants.

A.

No monopolization of production.

The Court found there was no monopolization or restraint of trade in production (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> 60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

Indeed, not only was this conceded below (R. 1952, quoted on pp. 104-105, *infra*): plaintiff's counsel conceded that any feature suitable for first run exhibition was assured of and secured adequate distribution (R. 387, 388, 1949, quoted on pp. 104-106, *infra*).

B.

No monopolization of distribution.

The Court found no monopolization of distribution (Finding 152, R. 3689):

> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a na-

tional monopoly either in * * * distribution * * * except as found in findings 153 and 154 below."

Finding 153 related to alleged first-run monopolies in a single locality, as to which the Court found "there is no sufficient proof that it has been for the purpose of creating a monopoly" (R. 3690).

Finding 154 referred to the industry-wide trade practices found as "illegalities and restraints", including "admission price-fixing" and "non-competitive granting of runs and clearances", heretofore quoted on page 8, *supra*.

Thus, the Court below obviously did not find or intend to find monopolization by "an exclusionary conspiracy" as plaintiff claims (Br., p. 56).

It merely found that certain uniform trade practices were restraints such as the Act condemned and such as might simply be remedied by declarations of illegality and injunctions.

It found merely a conspiracy as to "a price-fixing system" (Finding 70, R. 3672), concert of action in "a uniform system of clearance and run" (Findings 81-83, R. 3674), and a resultant "fixed scale of clearances, runs, and admission prices" which was a deterrent to free bargaining (Finding 84, R. 3674).

That the conspiracy found was in no sense exclusionary is obvious from the fact that the system affected all theatres, independent or affiliated, as the Court found (66 F. Supp. at 346 [R. 3539]).

Indeed, in discussing discrimination among licensees, the Court specifically stated (66 F. Supp. at 353 [R. 3551]):

> "The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices."

Moreover, the Court found the necessity and desirability of run and clearance (Findings 74-78, 83, R. 3673) and the advantage to the public of such a system (Findings 74-76), even though run and clearance by definition involve some measure of exclusivity, just as every contract of purchase necessarily excludes the possibility of someone else buying the very same article.

And it was only because the result was uniform as to all pictures in any given theatre that the Court found concert of action and a uniform system (Findings 81-83, R. 3674).

The Court therefore did not find that the system of runs and clearances was "an exclusionary conspiracy".

It merely found that the "fixed scale of clearances, runs, and admission prices" was a deterrent to free bargaining (Finding 84, R. 3674), and that (R. 3674):

> "85. Competition can be introduced into the present system * * *."

by competitive bidding.

Restrictions as to minimum admission prices (Findings 62-72, R. 3670), were found illegal despite the

finding that those included in licenses were "the usual admission prices currently charged by the exhibitor" (Finding 63, R. 3670). With block-booking and franchises covering long periods, this may well have been such a restraint as to have caused the Court to find the intent to maintain prices at artificial levels (Finding 67, R. 3671), "an effective system of price control" (Finding 71, R. 3672) and an attempt to channel patronage into prior-run theatres by such "differentials in admission price" (Finding 72, R. 3672).

But with bulk licensing prohibited, no such consequences could flow from inserting in each separate license for a single picture "the usual admission prices currently charged by the exhibitor" (Finding 63, R. 3670), and in any event even the remote possibility thereof no longer survives the injunction against minimum admission prices.

There is thus nothing in the conspiracy found remotely resembling "an exclusionary conspiracy".

Nor is there any reason why such evils as have been found to exist may not be simply and adequately cured by the injunction against uniformity and price fixing.

That the effect of the conspiracy found has been negligible is obvious from the fact that the Warner theatres have only taken in 6% of the total dollars paid at the box offices of this country (p. 138, *infra*), a small enough percentage for 3% of the total theatres to collect when it is remembered that Warner's total investment was $89,369,896 in theatre properties (Ex. W-14) and approximately $26,000,000 for the 19 features produced in 1945 (Ex. W-10).

C.

Warner alone did not monopolize exhibition.

In 30 states with 1,429 cities of over 2,500 population, Warner has no theatres.

In the remaining 15 states with 1,933 such cities, Warner has theatres in only 178, as follows:

State	Number of Cities where Warner has one or more theatres	Number of Cities where Warner has no theatres
Oklahoma	1	74
Tennessee	1	56
Oregon	1	33
Illinois	1	210
Indiana	1	98
Delaware	1	7
Washington	2	38
Maryland	4	21
Virginia	5	48
West Virginia	6	39
California	6	159
Wisconsin	8	85
Massachusetts	10	177
New York	12	189
Connecticut	16	16
Ohio	16	168
New Jersey	43	132
Pennsylvania	43	206
District of Columbia	1	0
	178	1,756

The Court found no monopolization of exhibition (Finding 152, R. 3689):

> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in * * *, distribution or exhibition of motion pictures, except as found in findings 153 and 154 below."

The exception in finding 154 related to the restraints in distribution by trade practices heretofore discussed, "not in the ownership of many or most of the best theatres" (Finding 154, R. 3690).

Finding 153 related to "localities where there is ownership by a single defendant of all the first-run theatres", as to which the Court found "there is no sufficient proof that it has been for the purpose of creating a monopoly" (R. 3690).

At the present time Warner does not own all of the first run theatres in any of the 92 cities with populations exceeding 100,000, nor did plaintiff claim that Warner had the only theatre or all of the theatres in any one of the 320 towns of population between 25,000 and 100,000.

Plaintiff did contend that Warner had the only theatre or all of the theatres in 58 of the 6,257 towns with populations of less than 25,000 (R. 359). Of the 58 towns which plaintiff listed as having only Warner theatres:

> 7 are suburbs of Philadelphia, Pittsburgh, and Boston (Ambler, Pa.; Bala Cynwyd, Pa.; Elkins Park, Pa.; Etna, Pa.; Jenkintown, Pa.; Prospect Park, Pa.; Willow Grove, Pa.) (R. 378).

6—By reason of lease, contract, and pool termination, Warner no longer has any interest in theatres in Amesbury, Mass.; Newburyport, Mass.; Waverly, Mass.; Lansdowne, Pa.; Lake Geneva, Wisc.; Delavan, Wisc.

10 will be subject to the order for disposal under court supervision as joint interest theatres (Beverly, Bordentown, Bridgeton, Clementon, Moorestown, Pennsgrove, Riverside, Swedesboro, Woodbury, and Mt. Holly, all in N. J.) (R. 378-379).

There is now operating an independent first run theatre in Batavia. There is no town of Collin, N. J. (R. 378).

As to the remaining 33 of these towns in which Warner has the only theatre or theatres, the plaintiff did not contend that those theatres were illegally acquired to stifle competition or that the operation of those theatres resulted in driving competitors out of business or that those theatres were operated in a manner to prevent competitors from entering those towns. The plaintiff merely introduced a list of towns in which Warner had the only theatre or theatres.

In any event, plaintiff asked no relief as to any such specific locality (R. 2769, 2777-8).*

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* "Mr. Wright: * * * I agree that the mere fact of sole possession of physical facilities in any location does not mean a monopoly" (R. 2769).

"Judge Hand: * * * you do not seem to pay any attention to local situations except as evidence of something larger. I do not know whether you do or not. I do not know whether you make any real complaint about Albany and other places, or whether you merely think they are sort of malignant symptoms.

"Mr. Wright: I think that the latter is a more correct description" (R. 2777-8).

D.

The Warner defendants, as an integrated unit, do and did not constitute a restraint or monopolization of trade.

As we have heretofore shown, the activities of Warner as producer, distributor and exhibitor did not and do not result in any restraints or monopolizations of trade, other than in conformance to trade practices, 21 pooling agreements and the joint interests banned by the decree below.

Plaintiff, at page 91 of its brief, claims that even under the decree there will remain a restraint of trade and monopolization "with respect to that important segment of trade represented by the pictures it distributes to its own theatres". Plaintiff then proceeds to attempt to establish this conclusion by charging that other companies (and stating without evidence that Warner similarly), acquired theatres for an illegal purpose, *i. e.*, that other companies (and Q. E. D. Warner) "integrated theatre operations with film distribution in order to have non-competitive market outlets for their films"; that "such integrations were in no sense an effort to meet an expanding business demand resulting from superior skill in film production or distribution"; that such integration was "a deliberate creation of a market control" which would assure "retail outlets regardless of the merits of product". Then, at page 104, plaintiff concludes that theatres were acquired "by deliberate, calculated purchase for control".

Plaintiff refers to no evidence or no findings as to Warner to support these statements of fact. The evidence is to the contrary.

Warner started as an exhibitor of motion pictures and by 1916 was in the business of producing pictures, distributing pictures and operating a few theatres (R. 1553).

When Warner had successfully pioneered the development of the talking motion picture and was unable to find theatres equipped to play those pictures, because the minimum cost of installing talking equipment in theatres was $25,000, and very few theatre owners were willing to make such investment on such gamble, Warner was able to acquire in 1928 a circuit of 250 theatres (Finding 26, R. 3665; R. 1555), largely because the principal manager of the circuit had died and the circuit needed trained management (R. 1555). This transaction gave Warner 250 theatres which could be immediately equipped with sound installation (Findings 27-29, R. 3665). The talking motion picture was here to stay, but theatre owners either did not have the money to equip their theatres for talking motion picture exhibition, or did not want to take the gamble, or did not want to invest where the supply of talking motion pictures was so small as not to permit of a full year's program. Warner had the alternative of either abandoning the talking motion picture,—that it did not is the only reason why there is today any such business,—or acquiring theatres and equipping theatres for the exhibition of those pictures.

Clearly these theatre acquisitions were "an effort to meet an expanding business demand resulting from superior skill in film production" and were in no sense "a deliberate creation of market control which would assure them of retail outlets regardless of the merits of their product" (Br., p. 91).

Since 1931 there has been no policy by Warner for the expansion of its theatre holdings, so that today it has an interest in 44 less theatres than it had in 1931, although the total number of theatres in the United States grew from 13,386 in 1935 to 18,076 in 1945 (R. 1557, 1826; Findings 32, 145, R. 3665, 3688). This further negates plaintiff's implied innuendo that Warner sought theatres to insure an outlet for its talking pictures regardless of their merit. Indeed, any such express claim would be so palpably incredible that it has not even been attempted.

Plaintiff next contends that the use given Warner pictures in Warner theatres constitutes monopolization and restraint of trade because "all other distributors are excluded from that important segment of the market" and other exhibitors "are excluded from the opportunity of licensing the exclusive runs" (p. 92). In plain Anglo-Saxon, this means that Warner by licensing its own theatres to exhibit its own pictures unduly engrosses the market.

Plaintiff, since it must, recognizes "the right [of a manufacturer] to use his own product in his own outlets, so long as he does not use the advantage resulting from integration to restrain *unreasonably* the competition of others or to monopolize" (p. 103), and hence concedes that integration *per se* is legal though necessarily resulting in some restraint of trade, but that in determining whether such restraint is in violation of the Sherman Act, the test of reasonableness is to be applied.

Contrast the facts of the *Lehigh* case (254 U. S. 255) upon which plaintiff so heavily relies, where there had been deliberate monopolization of all the

anthracite coal which it was humanly possible to produce from the field adjacent to this and other railroads, both in transportation and resale of about 20% of the entire country's supply, actual or potential, with the case of Warner as an alleged integrated monopoly:

1.) Unlike Lehigh, Warner does not monopolize the supply. Warner has no control whatsoever over the potential supply, and produces only 5% of the present supply of the very best pictures.

2.) Unlike Lehigh, Warner does not monopolize the distribution of a monopolied supply. Warner distributes its 19 pictures to any of the 18,000 odd theatres now in successful operation and to any more that are building or may be built. It uses its own theatres as an outlet for its 5% of the present supply in only 3% of the national total of theatres (5% of 3% is 15/100 of 1%), and continues to license those pictures on the next run to competitors of its own theatres.

These statistics already reflect any restraint assumed to flow from the illegalities found below.

3.) Unlike Lehigh, Warner does not monopolize the sale of a supply, monopolized in production and distribution. The Warner theatres in exhibiting their own 19 pictures and any other pictures which it is desirable and feasible to exhibit merely collect 6% of the admissions paid at the box offices of this country (p. 138, *infra*).

Warner theatres are not claimed to be the

sole outlet today (either first run or on all runs) anywhere other than in approximately 60 small towns as to which there is no evidence that any of them could have supported other theatres.

With regard to the effect on exhibitors of the preference given Warner pictures in Warner theatres, only the exhibitor in competition with a Warner theatre can possibly be affected. Warner distributes 19 pictures or about 5% of the total number of pictures distributed. Exhibitors who compete with those Warner theatres are free to license these 19 pictures on the next run.

There is no showing that any exhibitor who competes with a Warner theatre reasonably requires the 19 Warner pictures, in addition to the remaining 240 or more pictures available, in order to operate successfully. In the absence of such showing, plaintiff can not contend that Warner as an integrated unit unreasonably restrains the trade of exhibitors.

With regard to the effect upon distributors of the use made of Warner pictures in Warner theatres, the so-called "important segment of the market" is 3% of the theatres in the United States (Finding 118, R. 3684). There is no showing that any distributor whose pictures are available to a Warner theatre has been excluded from that theatre because of its use of Warner pictures. "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor" (Finding 151; R. 3689). It follows that all Warner theatres (except one or two in the very largest cities)

require more than the 19 Warner pictures in order to operate. How then can it be contended that other distributors are excluded from the Warner theatres? In exceptional areas, such as New York City and Los Angeles, Warner operates with Warner pictures alone. There has been no showing of any scarcity of first run Broadway or Los Angeles outlets which would warrant plaintiff in claiming that thereby other distributors are excluded from securing first run Broadway or Los Angeles exhibitions.

In the few towns where Warner has the only theatre or all the theatres (discussed at pages 62-63, *supra*), there has been no showing that only Warner pictures are exhibited, or that the Warner pictures exhibited constitute so large a segment of all pictures exhibited as to lead to the conclusion that other distributors have been excluded.

To recapitulate. Warner did not acquire its theatres to secure an exclusive outlet for its pictures. Nor were those theatres acquired to achieve a market control of retail outlets. As an integrated unit, its pictures are preferred in exhibition at its own theatres. There has been a complete failure of proof that competing exhibitors or competing distributors are thereby unreasonably restrained.

With regard to plaintiff's claims of monopolization of trade by reason of integration, there has been no showing that exhibitors have been driven out of business or have been prevented from successfully operating theatres because Warner pictures are given prior

runs in Warner theatres. There has been no showing that distributors have been driven out of business or have been prevented from successfully engaging in business because Warner pictures are given preference in Warner theatres. There can be no monopolization where the Warner pictures constitute at most 5% of all pictures distributed, and where Warner theatres constitute 3% of all theatres in the United States.

The entry of about 5,000 more theatres into the field since 1935; the decrease of Warner theatre holdings by 44 since 1931; the entry of many more independent pictures (R. 2797); the entry of more distributors and the success of smaller distributors (discussed at pages 83, 106, *infra*); and the decrease in the number of pictures distributed by Warner from 58 in 1936-37 (R. 3156) to 19 in 1943-44 (Finding 99, R. 3677), completely negative any claim that the integration by Warner as a distributor and exhibitor constitutes monopolization.

The inter-company payments by Warner theatres to Warner as a distributor are of no import, since they do not represent substantial exclusion, as in the *Lehigh Valley* or *Yellow Cab* cases where *exclusive* dealing arrangements were made for all of the anthracite coal along a line exclusively serving 20% of all anthracite coal, or where taxicab monopolies in three large cities agreed to deal only with one taxi manufacturer.

The complete inability of outsiders to get any of the business in those areas, and not the money involved, was the factor.

Here no exclusive dealing arrangements are involved, and there is no evidence and can be no evidence that the integration of Warner as distributor and exhibitor rendered it impossible for any distributor to have its picture shown in a Warner theatre, or rendered it impossible for any exhibitor to secure sufficient product to operate successfully on the run desired.

Integration does permit Warner as a distributor and Warner as an exhibitor to agree as to the admission prices which Warner will charge as an exhibitor when showing Warner pictures. The public and the forces of competition make that determination. However, as plaintiff admits, a single trader always has the right to fix the price which it will charge absent an agreement with competitors, so long as others are not excluded from the market (Br., p. 103).

The *General Motors* case (121 F. 2d 376) does not hold otherwise. Nothing in that opinion held it illegal for General Motors to operate its own retail outlets and use the services of its own finance affiliate company. What was held illegal was General Motors' coercion of its 15,000 independent dealers by insisting that those dealers choose the General Motors finance affiliate in preference to independent finance companies. "In the instant case the coercion practised upon General Motors dealers assumed the form of various restrictions in the nature of tying limitations" (121 F. 2d at 398). Tying contracts are always illegal unless satisfactorily justified as reasonable.

Although plaintiff admits that integration is not *per se* illegal, it argues that there is "no economic justification for the integration here involved" (p. 105). Plaintiff produced no evidence in proof of this conclusion. Its arguments that these defendants have used their integrated positions to conspire with each other and that integration therefore has provided the means for the accomplishment of those conspiracies is directly contrary to the finding below, that the trade practices of the defendant distributors and not theatre ownership were the cause of the illegalities.

The *Swift* case (286 U. S. 106) does not even remotely support plaintiff's position. The limits of that decision are twice stated, at the beginning and near the end of the discussion:

> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. * * * Whatever persuasiveness the reasons then had, is their with undiminished force today" (p. 115).
>
> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. * * * Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us

to change what was decreed after years of litigation with the consent of all concerned."

That consent decree involved five companies alleged to have achieved "an unlawful monopoly of a large part of the food supply of the nation" (p. 111), suppressing competition in the purchase of live stock and in the sale of dressed meats "* * * through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled" (p. 110).

E.

Warner cannot be treated collectively with other defendants to establish monopolization of exhibition.

The opinion below states that (66 F. Supp. at 354 [R. 3553]):

> "The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition"

and the Court found that (R. 3684):

> "119. The present theatre holdings of the five defendant-exhibitors * * * aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or individually have a monopoly of exhibition."

These findings are too amply supported by undisputed facts for this Court to be able to hold, as a matter of law, that defendants' theatres may be treated collectively.

The heart of plaintiff's claim below was that because defendants individually do business with each

other and because the arithmetic sum of all their business is large, a conspiracy or combination to monopolize exhibition must be inferred (by arithmetic) sufficient to compel divestiture.

We marshal the evidence which caused the Court to reject this alleged mathematical monopoly.

Collective treatment of separate companies would be improper where, as here:

1.) Each separate company acquired differing numbers of theatres for varying reasons at different times, paid varying sums for film exhibited, and collected divergent sums at the box office;

2.) Each separate company did a different percentage of its business with independent theatres in any one year and from year to year; and

3.) Warner's business, as licensor and licensee, with each of the other defendants differed in each year, from year to year, both nationally and in the 92 large cities first run, and there was no relationship between what Warner licensed to and licensed from any other defendants.

Nor is there anything which compels collective treatment of separate companies (or a finding of illegality) in the fact that one theatre-owning defendant licenses some of its features to a co-defendant's theatres for exhibition and that said co-defendant licenses some of its own features for exhibition in said theatre-owning defendant's theatres (so called "cross" or "diagonal" licensing).

We urge that the divergence in business practice among the defendants, the complete absence of any

backscratching (accommodating licenses from a defendant for licenses to a defendant), and the sharp competitive character of the business, dispel any possibility that Warner could be arbitrarily lumped together with other defendants as a monopoly.

1.) Differences between the theatres of each separate company (the manner of, reasons for, number of, times of acquisition, amounts paid for film, and sums collected at the box office) all negative collective treatment.

Columbia and United Artists have never had theatres.

Universal disposed of its theatres in 1926, that voluntary divestiture resulting in the independent Schine and Griffith circuits (Amended Complaint, Par. 78, p. 3163).

Loew's theatres were vaudeville houses many years before nickelodeon films were first shown (R. 1838-9), probably 20 years before Warner first acquired theatres from the Stanley Company in 1928 (Findings 27-29, R. 3665). Loew's now has 135 theatres or less than 1% (0.74%) of all theatres in the country (Finding 118, R. 3684).

RKO's theatres were the Keith-Orpheum theatre circuit for a generation before they were acquired by RKO in 1928 (Findings 18, 21, 121, R. 3664, 3684) for the purpose of obtaining an effective means of developing the use of its motion picture sound recording and reproduction devices (Finding 18, R. 3664). RKO now has interests in 109 theatres or less than 1% (0.60%) thereof (Finding 118, R. 3684).

Paramount began to acquire theatres between 1917 and 1919 in order to find an outlet for its features which had been closed by a group of theatres which

had gone into production under the name of First National (Findings 5-8, R. 3661). Before the decree below becomes effective, it and its affiliates had 1,395, a little less than half of all the theatres owned by defendants and 7.72% of all theatres in the nation. (Finding 118, R. 3684).

Warner acquired its theatres in 1928-1931 in order to realize on its development of talking motion pictures (Finding 25, R. 1555-6). "Today the Warner Companies have an interest in 547 theatres,—a net reduction of 44 from its peak holdings of 591 in 1931" (Finding 26, R. 3665; and R. 1557-8). This is only 2.77% of the theatres in this country (Finding 118, R. 3684).

While Warner thus effected a net reduction of its theatre holdings, "some of the independent competitors of Warner [not defendants here] have increased their theatre holdings * * * and have acquired theatres which Warner had formerly operated" (R. 1558).

While the total number of theatres in the United States grew from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688),* Warner effected a net reduction in its theatre holdings.

Compared to the phenomenal growth of theatres in the country,—from 13,386 in 1935 to 18,076 in 1945 (Finding 145, R. 3688), the growth of theatres affiliated with all of the defendants since 1935 has been negligible.**

---

* "Mr. Wright: * * * There have been 5,000 more theatres in the last ten years, and of course there are many more independent pictures * * *" (R. 2797).

** These actually had fewer theatres in 1945 than in 1935:
Warner (Finding 32, R. 3665)
RKO (Finding 22, R. 3664)
Loew's (Findings 120, 118, R. 3684)

All of the defendants account for only 3,137 out of the 18,076 theatres in the country (Findings 117-119, R. 3683).

The number of new independent theatres since 1935 is thus 4,690—1,553 more new independent theatres than the total of defendants' theatres.

The amount each theatre-owning defendant collects at the box offices of its theatres likewise differs. The five theatre-owning defendants collected varying percentages of the gross theatre admissions of the 18,076 theatres in the country in the 1945 season, ranging from Paramount's 13.74% to RKO's 3.01%. Warner theatres collected 6.19% (Appendix, p. 138, *infra*).

Similar divergences appear in that part of the cost of theatre operation represented by film rentals paid (Pltff.'s Appendix, p. 256).

2.) Differences in the percentages of the business of each separate company with independents negative collective treatment.

In such a conspiracy or combination as is claimed to justify collective treatment, there would be probability of some uniformity of pattern with respect to the volume of business done by each separate defendant with independent theatres.

There is no such uniformity of pattern here.

According to plaintiff's own exhibit 425 relating to the 1943/44 season, the percentage of total domestic film rentals received from independent theatres varied from Columbia's and Fox's 65% to Paramount's 46%.

Warner's percentage varied from year to year in every one of the last 16 seasons, ranging from a low of 52% to a high of 66% (Ex. W-4).

Excluding Warner intercompany payments to Warner, the percentage of Warner's total domestic film rentals received from independent theatres also varied from year to year in the last 16 seasons, ranging from approximately 65% to 77% (computed from Ex. W-4, reprinted in part on page 126, *infra*).

It is inconceivable that Warner would engage in a conspiracy or combination to destroy the independent theatres whose patronage is its life blood and to secure whose patronage it spends millions in distribution costs in competition with its alleged conspirators (p. 109, *infra*).

These percentages would, of course, be substantially increased by the effect of the decree below,

Contrast these facts with allegations in a complaint on a demurrer of a deliberate and intentional conspiracy to monopolize the taxicab manufacturing business through a monopoly of the taxicab business (86% in Chicago; 100% in Pittsburgh), the *Yellow Cab* case (332 U. S. 218), where a group of monopolist taxicab companies agreed not to buy their cabs from any manufacturer other than one manufacturer which was a party to the conspiracy.

We deal here with motion pictures which anyone may produce and market, which are copyrighted mainly to prevent piracy, not with any device to throttle production. Furthermore, we deal here with 5 theatre-owning distributors which sell and license their pictures to all exhibitors and have not entered into a conspiracy to license only each other and boycott all other exhibitors.

In the *Yellow Cab* case, this court, had to decide the validity of a demurrer against allegations of conspiracy in restraint of trade and to monopolize where a group of conspirators, each engaging in the taxicab business in some city, and most of the conspirators having a monopoly of the taxicab business in their respective cities, agreed that they would boycott the taxicab manufacturing industry and buy their taxicabs only from a party conspirator. There it was charged that the monopoly was acquired by the "dominating power" of a single family of companies, secured "by deliberate, calculated purchase for control" and not "by normal expansion". The conspiracy, it was alleged, had been effected by causing subsidiaries to secure a monopoly of cab operating licenses in these various cities and then purchasing their cabs only from the parent manufacturer.

Here, any exhibitor is eligible to purchase from the theatre-owning distributors, the other distributors and any prospective distributor, and the theatres of any single defendant buy not only from the theatre-owning distributors but from all other distributors. There is no monopolistic restraint on production or on theatre ownership: purchases or lack of purchases result from business considerations, not from necessity, as in the *Yellow Cab* case. And no single family of companies acquired its fraction of control of theatres (Warner 3%), as in the *Yellow Cab* case, "by calculated purchase for control", but "by normal expansion to meet the demands of a business growing as a result of superior and enterprising management" (Findings 26-30 [R. 3665], 152-154 [R. 3689], quoted on p. 8, *supra*).

3.) Differences in Warner's business as licensor and as licensee with each of the other separate companies (from year to year, nationally, and in the 92 large cities first run) negative collective treatment.

To sustain any inference that the business which Warner did with each of the defendants and which each of them did with Warner was an incident of a confederacy to monopolize exhibition, one would expect some showing that the defendants gave and took on the basis of a pattern from which a reasonable man could infer that they had impliedly agreed on monopolizing exhibition or that a concerted attempt to monopolize exhibition had been effectuated.

The evidence shows no discernible pattern of Warner's dealings with each of the other defendants either in terms of dollars or percentages in any year or from year to year in the last 16 years; no similarity in the length of the terms of licenses; and no uniformity in the business done both as distributor and exhibitor in the so-called first-run market in the 92 large cities.

(1)

The Court made the only finding conceivable under the evidence, that (Finding 141, R. 3688):

> "The dollars paid by Warner to each of the other defendants and by each of the other defendants to Warner show no uniformity of pattern from company to company from year to year."

Thus, just as an example, the Warner theatres were paying rentals for Loew's features of $4,574,114 in 1939/40, though the Loew's theatres were paying

rentals for Warner features of only $179,204 (Ex. W-6), or less than 4% of what the Warner theatres had paid Loew's in the same season.

Again, the rentals paid by Warner theatres for Paramount features ranged from $916,000 in 1930/31 to $3,477,000 in 1944/45, while the theatres affiliated with Paramount paid rentals for Warner features ranging from $2,600,000 in 1935/36 to $6,993,000 in 1944/45 (Ex. W-7).

In each of four seasons (1936/37, 1940/41, 1941/42, 1944/45), theatres affiliated with Paramount paid as rentals for Warner features *over $1,000,000 more* than in the season immediately preceding, although in not one of those same seasons did the Warner theatres pay Paramount rentals which even remotely approximated the tremendous increases which theatres affiliated with Paramount had paid Warner (Ex. W-7).

The same startling variations appear between each company in any particular season or between Warner and any other company in the last sixteen seasons (Appendix, pp. 128-134, *infra*).

(2)

In the exhibits and appendix, we have anticipated a possible claim that dollar comparisons might not tell the whole story, and for that reason have also made comparisons percentage-wise.

Thus, we have shown the striking divergences in the 1943/44 season (chosen by plaintiff as illustrative) in terms of what percentage of each of the

producer-exhibitors' total film distribution revenue was received from each of the other producer-exhibitors and what percentage of each of the producer-exhibitors' total payments for film was made to each of the other producer-exhibitors (pp. 142-143 of Appendix).

The variances are too striking to be ignored.

(3)

The Court also found marked variances in the business which Warner did with the three non-theatre owning defendants (R. 3688):

> "142. There were marked variances from year to year in the sums paid as rental by the theatres in which Warner had an interest to United Artists, Universal, and Columbia, the non-theatre owning defendants."

and the record shows the growth of these three non-theatre owning defendants at the expense of the five theatre owning defendants, as we shall show.

The possibility of a conspiracy or combination is negatived by the growth of and variances of Warner's business with each of these three non-theatre owning defendants.

Thus, the Warner theatres paid Universal as little as $742,352 in 1937, and as much as $2,518,722 in 1944, in which year Warner's payments to Universal were greater than its payments to Fox, RKO, United Artists or Columbia (Ex. W-3). Such figures refute

the insinuation that theatre ownership results in "back-scratching".

Indeed, the three non-theatre owning defendants have grown from 1937 to 1944 at the expense of the theatre owning distributors. The percentage of the total rentals paid by Warner theatres to these three non-theatre owning defendants and to each of the theatre owning defendant distributors is (Ex. W-3):

	Universal United Artists Columbia	Paramount	Loew's	Fox	RKO	Warner
1937	13.94%	15.33%	19.88%	10.94%	9.19%	28.00%
1944	19.46%	12.93%	17.25%	10.08%	9.94%	26.50%

Thus, while the three non-theatre owning defendants substantially increased their business with Warner theatres, the Warner theatres did less business with Paramount, Loew's, and Fox; and Warner did about the same percentage with RKO (Finding 143, R. 3688).

(4)

Any inference of conspiracy between Warner and the other defendants is further dispelled by the undisputed fact that the Warner theatres made agreements to license features from the other defendants as distributors for different periods of time than the periods of time Warner as distributor made agreements to license its own features to theatres of other defendants.

The length of the terms of the licenses in any season which the Warner theatre department made for the features of each of the other distributors which also operated theatres and which the Warner distribu-

tion department made with each of the other theatre owning defendants show no uniformity of pattern (Appendix, pp. 140-141, *infra*).. The appendix just mentioned shows how Warner used to license its features to the Loew's New York theatres and the reason why Warner shifted to the RKO New York theatres, based not on any business or lack of business of Loew's or RKO with Warner theatres, but on the increasingly small revenue which Warner received for its features from those Loew's theatres and the increasingly large revenue which Warner received for its features from those RKO theatres to which Warner shifted its product.

In some seasons, 1930/31 for example, Warner licensed the theatres affiliated with Paramount, though most of the Warner theatres did not exhibit Paramount pictures (Ex. W-15); whereas in other seasons, 1939/40 for example, Warner did not license many theatres affiliated with Paramount, though the Warner theatres exhibited Paramount pictures (Appendix, p. 141, *infra*).

Again, in the 1934/35 and 1936/37 seasons Warner theatres entered into contracts to exhibit Fox pictures for two or three years though the Fox theatres were contemporaneously agreeing to exhibit the Warner pictures for only one year (Appendix, pp. 140-141, *infra*).

(5)

To bolster its claim of a monopoly of exhibition, plaintiff carved out of the 18,076 theatres in this country a special category which it felt would more readily support its claim of an exhibition monopoly, *i. e.*, plaintiff first limited itself to the 92 cities with

populations of over 100,000, and then limited itself further to the first run exhibitions of the very best features in those cities.

The artificiality of such a category (the 92 largest cities with populations of over 100,000) appears from the fact that such a category excludes 40 metropolitan districts with populations of over 101,000 whose aggregate metropolitan district populations total over 7,661,000,—while it includes 47 cities which have aggregate metropolitan district populations of only 6,506,000. Wilkes-Barre, Pa., with 629,000 is for example thereby excluded, while Somerville, Mass., with 102,000 is included. The average of the population of these 40 metropolitan districts excluded is thus 191,525 as against 138,425 of the 47 cities included.*

The amended complaint alleges that defendants "established first-run outlets" by 1930 because they were "necessary to make the production of such features [at a cost of more than $250,000] profitable" (Par. 101, R. 3168). *A fortiori*, are such first run outlets "necessary" for profitable production today when such a feature costs over $1,300,000 to produce (Ex. W-10).

The facts, however, disprove any possibility of a Warner theatre monopoly in this limited market,

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* In the 15 largest of these 40 excluded metropolitan districts, each with a population of over 170,000 and with average populations of over 300,000 (total populations of 4,525,000), Warner has theatres in only 3 such districts, the New Britain district (Conn.), the Schenectady-Troy district (N. Y.), and the Haverhill-Lawrence district (Mass.).

Similarly in the remaining 25 of these metropolitan districts, Warner has theatres in only five; Waterbury, Conn.; Johnstown, Pa.; Lancaster, Pa.; Charleston, W. Va.; and Kenosha, Wis.

These figures as to metropolitan districts are from the World Almanac.

and the lack of uniformity of Warner's business with each of the other defendants even in this limited market negatives any inference of such joint conduct as to constitute a conspiracy or combination.

Warner had no first-run theatres in approximately 70% of these 92 large cities, operating theatres in only 28 of the 92 cities.

In all these 28 cities (30%), Warner theatres have competition first run (Finding 147, R. 3688).*

Warner theatres did not exhibit first run, in equal or relative proportions, the features of the other distributor defendants in these 28 cities in the 1943/44 season, the season chosen by plaintiff as illustrative (Ex. 428).

Of the features of the other defendants which the Warner theatres exhibited first run, almost half were those of the non-theatre owning defendants. Thus in 20 cities, a Warner theatre exhibited the product of Universal, United Artists or Columbia, and in 18 others a Warner theatre exhibited one-half of the product of these non-theatre owning defendants.

Truly, a queer conspiracy or combination to monopolize first-run exhibition in the 92 cities where Warner operated first run in only 30% of said cities, where in the 30% of said cities in which it operated first-run theatres approximately half of the product of other defendants came from the non-theatre owning defendants (Universal, United Artists, and Columbia), and where the remainder of the product of the theatre-owning defendants was licensed in ap-

* Just before the trial, Warner had no competition first run in Philadelphia and Albany.

proximately equal proportions from Fox, Loew's, Paramount and RKO,* although the theatres of said four companies used strikingly different amounts of Warner product (Appendix, p. 126, *infra*).

Warner as distributor in the 1943/44 season licensed first run in these 92 cities (Ex. 428):

To no Loew's theatre in the 39 cities where Loew's operated (Finding 140, R. 3687).

To RKO as its regular account in only 4 RKO theatres and ½ of its product in 13 other RKO theatres.

To Fox as its regular account in only 4 Fox theatres and ½ its product in 6 other Fox theatres.

To Paramount as its regular account in 20 theatres affiliated with Paramount and ½ its product in 13 other theatres affiliated with Paramount.

The absence of pattern in the 92 cities first run is further evidenced by contrasting the film rentals received from "Princess O'Rourke" (the feature which plaintiff chose as representative) first run from theatres other than Warner's own in these 92 cities (calculated in Appendix, p. 135, *infra*).

The significance of these figures is this: Exclusive of Warner's intercompany business, Warner as distributor got almost as much from independents

* All of the Fox product was exhibited in only 3 such Warner theatres, one-half of the Fox product in 5 others. All of the Loew's product was exhibited in only 5 such Warner theatres, one-half of the Loew's product in 5 others. All of the Paramount product was exhibited in only 6 such Warner theatres, one-half of the Paramount product in 7 others. And all of the RKO product was exhibited in only 6 Warner theatres, one-half of the RKO product in 13 others (Ex. 428, printed on page 299 of plaintiff's Appendix).

(28.6%) as it did from RKO, Fox and Loew's combined (38.3%) from first run in the 92 large cities. Warner's revenue from independent theatres was greater than its revenue from Fox, greater than its revenue from RKO, and of course greater than its absence of revenue from Loew's; and was but slightly less than its revenue from Paramount's affiliates (See Appendix, p. 135, *infra*). This was not a picture which gave the slightest basis for an inference of conspiracy.

Therefore the Court below found that the separate companies could not be collectively treated and that there was no monopolization (Finding 119, R. 3684; Finding 152, R. 3689).

4.) There is nothing which compels collective treatment of separate companies (or a finding of illegality) in the fact that a theatre-owning defendant licenses some of its features to a co-defendant and that said co-defendant licenses some of its own features to said defendant's theatres. "Cross" or "diagonal" licensing considered.

(a) *Such licensing has not the faintest resemblance to cross-licensing in patent pools.*

Plaintiff's catchwords to describe such licensing, namely "cross licensing" or "diagonal licensing", serve no function but to suggest to the unwary that such licensing has something in common with patent pools.

This is exactly what such licensing is not and in no wise resembles.

In the cases which condemn cross-licensing, there has usually been a "pool" of all patents, present and prospective, which "pool" controls from a single

common guiding source all licenses to manufacture similar goods, and through such licenses usually directly dictates the resale price of all such manufactured goods (see for example, the *Hartford-Empire* case, 323 U. S. 386, 406). In other cases cross-licensing is condemned where the parties to the cross-licensing agreement dictate the resale price of all such manufactured goods and agree to license no one other than the parties to the cross-licensing agreement.

Nothing is further from the facts at bar. Here, none of the five (or eight) defendants has "pooled" any of its features or entered into any agreements as to features which anyone (or any of them) may hereafter produce. And concession and evidence here show that anyone may (and that many others do) produce good features which have no trouble in getting distribution, *i. e.*, a market (p. 105, *infra*).

(b) *Such licensing as plaintiff labels as "cross-licensing" merely means that two theatre-owning distribution companies do business with each other.*

The simple business fact on which plaintiff seeks to cast opprobrium by the use of these catchwords is no more than this: defendant B exhibits in its theatres some of A's features and defendant A exhibits in its theatres some of B's features.

The perfect normality, and necessity, of such simple business intercourse between competitors in an industry will become even clearer as we proceed.

(c) *Why they must do business with each other.*

The public taste was such as to force exhibitors generally to require the product of several distributors. Accordingly, the court found that generally

theatres "could not be operated on the product of only one distributor" (Finding 151, R. 3689):

> "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor." (See also Finding 102, R. 3678).

(d) *Such business is not illegal and involves no illegal price-fixing.*

The Court below made no finding of fact or conclusion of law that such licensing was illegal, and recognized that an attack on such licensing was either no more than relief *pendente* divorcement (as plaintiffs argued at times below and in a brief to this Court) or a substitute remedy for divorcement itself.

The provisions of the decree below against any restriction as to minimum admission price (Decree, II, 1 [R. 3695]) and as to agreements as to a system of clearness (Decree, II, 2 [R. 3695]) make untenable even a colorable argument that such licensing will involve illegal price-fixing.

The price-fixing illegality enjoined below cannot be claimed to have anything to do with the simple business fact of doing business with a co-defendant wherever that happens to be necessary and desirable.

Since under the decree, each theatre is free to charge whatever admission price it chooses, no matter who owns the theatre or whose picture it is exhibiting, all that is left of plaintiff's claim of illegal price-

fixing in "cross" or "diagonal" licensing is simply this.

Any theatre which exhibits a feature necessarily has to—and will—fix its own admission price.

Plaintiff's brief on a motion to amend the consent decree so as to effect divestiture of all theatres correctly stated this obvious necessity (R. 3425):

> "The exhibitor, who possesses the theatre, determines the program of entertainment to be offered and collects the admission fees which make the exhibition of the film profitable, *would normally determine independently the price at which that entertainment should be made available to the public.*"

If a Loew's theatre in Boston exhibits Warner's "Gold Dust Twins", that Loew's theatre necessarily fixes its own admission price. Similarly, if a Warner theatre in Youngstown exhibits Loew's "Moonbeams", that Warner theatre necessarily fixes its own admission price.

The situation finds many analogies in business.

Thus, the Washington Baseball Club sends its "Senators" team to play in the Yankee Stadium in New York (where the New York Baseball Club fixes admission prices), while the New York Baseball Club sends its "Yankee" team to play in the Washington baseball park (where the Washington Baseball Club fixes admission prices).

Similarly, [before the publisher was authorized by statute to fix resale prices] Scribner's New York book-

shop fixed the retail resale price of Gunther's "Inside Europe" which it had bought from its Boston publisher Harpers, while Harpers' Boston bookshop fixed the retail resale price of Pyle's "Pacific War" which it had bought from its New York publisher Scribners.

No case has intimated that it is illegal for the buyer of a patented article to determine the resale price of that article merely because the seller has bought a *different* patented article from the buyer of said other article and will accordingly have to determine the resale price of that *different* article.

Hence, even if a license for limited exhibition of a copyrighted feature be assimilated to a sale for the purposes of the Sherman Law, it cannot be illegal for Loew's to fix the admission price at Loew's Arcadia Theatre in New York during the exhibition of Warner's "Yankee Doodle Dandy", merely because Warner's Stanley Theatre in Youngstown fixes its own admission price while it exhibits Loew's "Scarlet Lady".

There can be no price fixing under the Sherman Act where an exhibitor of motion pictures is under no restraint with regard to the admission price which that exhibitor charges. Where there is no restraint placed upon the exhibitor by the distributor, and where there is no restraint placed upon himself by the exhibitor in concert with his competitors, any price charged by that exhibitor is legal.

Therefore, where a distributor has placed no restraint upon the exhibitor in the latter's determination of an admission price, there can result no price fixing and hence no violation of the Sherman Act,

where at another time and place the exhibitor's affiliated distributor licenses the distributor's affiliated exhibitor.

The Act does not prohibit a man from licensing to X for limited exhibition a copyrighted motion picture because he may at some other time and place license from X for limited exhibition some other copyrighted motion picture from that same person.

This is *a fortiori* true, where, as here under the decree, each copyrighted feature must be offered to any putative licensee under competitive bidding, and no licensor may, directly or indirectly, prescribe the price which the successful licensee may charge for admission thereto.

Indeed, even before the decree below, such "diagonal" or "cross" licensing as existed could not have been *per se* a violation of the Act.

Where Warner operates a theatre on a particular run, Warner does not license its own features to another theatre on the same run, whether the theatre is owned by a defendant or an independent; and similarly no other defendant licenses its features to a Warner theatre on a particular run on which such other defendant operates a theatre.

This makes it mathematically impossible to have so-called "cross licensing" in direct competition on the same run.

This leaves the high-sounding phrase "cross" or "diagonal" licensing with no more content than this: that a Warner theatre may be licensed to exhibit a

feature of another defendant where such other defendant is not exhibiting said feature on the same run, and that some other defendant's theatre may be licensed to exhibit a Warner feature where Warner is not exhibiting said feature on the same run.

Thus, there is nothing remotely resembling illegal price-fixing by such business between defendants.

That the remedy sought of limiting defendants' theatres to their own films and those of non-theatre owning producers is no more than a means to compel self-amputation of theatres is obvious from the very first paragraph of plaintiff's Point III, which ingenuously states (p. 127):

> "This relief is also required independently of divorcement as a means of inducing a prompt divestiture of theatres in those towns where the defendants have a monopoly position."

Moreover, the reasons stated for a "one-year waiting period" before the prohibition takes effect reveal the certainty that such a prohibition would compel self-amputation. The waiting period is merely stated "to permit the defendants to make necessary adjustments" (p. 126):

(a) "through increased film production or"

(b) "through selling theatres in areas where they could not operate all of their theatres with their own product plus that of the three non-exhibitor defendants."

It cost Warner approximately $26,000,000 to produce 19 pictures in 1945. Unless it substantially cuts the quality of its product (and thereby decreases the

revenue-producing capacity of its pictures), it is obviously impossible for Warner sufficiently to increase its film production for profitable operation of its theatres, especially if it were unable to license such films to those theatres having the greater grossing potentiality.

And it is equally obvious that, except in rare instances, the Warner theatres could not operate profitably on the lesser quality pictures produced by those who own no theatres plus Warner's own pictures which, for lack of proper outlets (R. 3015), would also tend to become of inferior quality.

In a city where among a number of theatres, the Warner theatre is operating on first run, it will be unable to continue on its own product or the product of the "little three". Yet it cannot operate on second or even last run, because of the insufficient number of pictures available. The net result would be to deprive the public of an additional run in that city.

Or take a town which can support only two theatres, a Warner first run and a subsequent run. If the Warner theatre is enjoined from showing most of the best product, it must operate (if at all) on second run product of the "little three" and first run Warner product. The net result would be that the public would be deprived of seeing the product of the "big five" on a subsequent (and cheaper) run.

The Court below apprehended these and other consequences of this alternative method of amputation.

Thus, it pointed out on argument, for example, that in many of the smaller towns unable to support more than one theatre the result might be that the public would be deprived of seeing the product of four of the best companies unless Warner sold its theatre (R. 2886-7).

> "Judge Hand: Of course if Paramount had the only theatre in a place and that was all that was necessary to supply the demand, it would really prevent that place from having any of the shows, the good shows, of Warner, Loew's—any of these people.
>
> Mr. Wright: * * * There would be another theatre there in very short order * * *.
>
> Judge Hand: * * * On my hypothesis, * * * I said one theatre was enough for the town. * * * I am by no means clear that the mere inability to see some shows would build up another business if there wasn't material for it in the population to make it pay."

The Sherman Act was surely not designed to have the courts deprive a community of the privilege of seeing the best pictures.

F.

Assuming arguendo the possibility of collective treatment, there is no evidence of collective monopolization (or the possibility thereof under the decree below) sufficient to justify divestiture of theatres.

(a) *None of theatres.*

There can be no claim of a monopoly of the bricks, mortar and land which constitutes a theatre or of

operating theatres, because of the defendants' interest in only 3,137 of the 18,076 theatres in the country or 17.35% thereof (Finding 118, R. 3684), which may be reduced by another 1,292 by the divestiture provisions of the decree,—especially when set against the phenomenal growth of theatres from 13,386 in 1935 to 18,076 in 1945 (Finding 118, R. 3684; Finding 145, R. 3688).

4,690 new independent theatres do not spring up in 10 years if 3,137 of defendants' theatres have been monopolizing exhibition at the expense of the already operating 13,386 independent theatres.

(b) *None of theatre patronage.*

There can be no claim that defendants' theatres monopolized theatre patronage, because plaintiff offered no evidence of the box office receipts of the 14,939 independent theatres which reflect theatre patronage.

Though its amended complaint charged a theatre monopoly based on engrossing theatre patronage,* a claim inconsistent with the healthy and phenomenal growth of successfully operating independent theatres, plaintiff made no attempt to show what percentage of the annual patronage (or box office dollars paid as admissions) of all 18,076 theatres was collected by defendants' theatres.

The evidence was available to plaintiff in the form of the monthly amusement tax returns of each theatre, independent or affiliated. But the only evidence which

* The amended complaint charged exhibition monopoly through "total theatre admissions" collected (Par. 130, R. 3180; par. 132, R. 3181), alleging for example that in 73 of the 92 largest cities the defendants received "a substantial majority of the total theatre admissions paid" (Par. 2, R. 3181).

the plaintiff offered was that furnished by the defendants as to their own theatres.

Defendants offered the best evidence available to them of the admissions collected by all the theatres, including the 14,578 independent theatres. This was an estimate of total admissions from the Film Daily Year Book (Ex. RKO-2).*

Defendants' theatres took in only 34.27% of the dollar total of all theatres in the country, based on this estimated total gross in the 1943/44 season and defendants' actual grosses for the same season (Appendix, p. 138, *infra*).

34% of the exhibition done in the country is no monopoly thereof.

(c) *None of film rentals paid.*

There is no other evidence from which a national monopoly of exhibition can be inferred, or on which to lay the basis for a claim of nation-wide divestiture.

The only other nation-wide evidence on which plaintiff relied was on that part of the cost of theatre operation reflected by film rentals paid.

Plaintiff showed no more than that defendants'

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* Though plaintiff questioned its accuracy (R. 1608), Exhibit RKO-2 was received as the only evidence of industry totals offered (R. 1609), since the Film Daily Year Book was "used constantly in your industry and regarded as a reliable book" (R. 1610). That its estimate of total admissions paid in the 1943/44 season is reasonably accurate appears from the note appended in the 1945 Year Book (p. 47):

"Note: Annual U. S. theatre gross was formerly based on a Treasury Department estimate that 90 percent of admission tax collections were from theatres. Recently, however, the Treasury reduced that estimate to 87 per cent and the above annual grosses are based on that estimate with allowances for taxes collected on passes and for 'breakage'".

theatres paid to all eight defendants 45.2% of the total rentals thus paid by all theatres (Findings 126 and 128; R. 3685).

To pay 45% of the film rentals paid in the country does not show a monopoly of the theatre business thereof.

Moreover, that 45% has no relevance to prove a monopoly of the theatre business, because it represents nothing more than a part of the cost of operation of defendants' theatres as against a similar partial cost of operation of independent theatres. Since many of defendants' theatres are among the largest and most expensive in the country, with huge overhead charges, operated in part as "show-cases" for the promotion and advertisement of new features, it is understandable if they pay a larger film rental than many independent theatres.

Plaintiff claimed that film rentals reflected admissions collected at the box office, since films are often licensed on a percentage of their gross receipts.

Though true of most of defendants' first run theatres in the very largest cities, it is definitely false when it is sought to be applied to most of the theatres in this country. Most of them license film on a flat fee, presumably because it is more profitable for them to pay a flat rental. Thus, of the 14,090 bookings of Princess O'Rourke, in 12,926 theatres the average film rental per booking was $78 (Ex. W-12), a return so small as not to have been based on a percentage of their gross.

The independent theatres paid a dollar film rental which consisted of a much smaller percentage of their

box office receipts than the percentage paid by the theatres affiliated with defendants.

Whereas the affiliated theatres paid 27.33% of their theatre admissions to the eight distributor-defendants as film rental for their features, independent theatres paid only 15.51% of their theatre admissions to the eight distributor-defendants as film rental for their features (Appendix, p. 138, *infra*).

Monopoly of theatre operation is not proved by showing what percentage of a part of the cost of operating theatres was paid by defendants' theatres, especially when that percentage is only 45%.

Nor can any claim of nation-wide exclusion be validly based on an averaging of the film rentals received by defendants. Even under such collective treatment, the defendants in the 1943/44 season in the aggregate received 54.8% of their total domestic film revenue from independents (Finding 128, R. 3686).

(d) *None in the 92 cities.*

The evidence adduced as to the first run theatres in the 92 cities with populations of over 100,000 failed to establish a collective monopoly and did not warrant total divestiture of all defendants' theatres in this country.

There is no evidence of what percentage of total theatre patronage was represented by defendants' first run theatres in these 92 cities, because plaintiff offered no evidence of the box office receipts either (a) of all the 18,076 theatres in the country, (b) of any of the 13,286 independent theatres, or (c) of any or all of the defendants' first run theatres in these 92 cities. [Indeed, there is not even evidence of box office re-

ceipts of theatres of independents and defendants first run in these 92 cities.]

Assuming arguendo only that film rentals paid are some evidence of patronage, we recall no computation by plaintiff which discloses the relation of the film rentals paid by said defendants' theatres to those paid by all similar theatres.

Assuming further, arguendo on arguendo, that the Warner statistics as to its most booked picture in 1943/44, "Princess O'Rourke", would reflect the situation as to all five defendants for all their features in said season, the first run market in these 92 cities is only 27.4% of the total national market, and defendants' theatres' portion thereof only 60.8%, so that defendants' first run theatres in said 92 cities is only 16.6% of the national market, based on film rentals paid.* (Computed from Warner's answers to 1945 interrogatories.)

(e) *No propriety in segregating these 92 cities.*

But there is no factual or legal justification for segretating first run theatres in said 92 cities from the national market of this industry.

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* There is no finding, nor evidence to support a finding, that operation of first run theatres in most of the 92 cities carried with it monopolization of any additional theatre patronage. Indeed, the percentage of actual attendance at these first run theatres necessarily included such control of attendance as might be implied by Findings 71-72 (R. 3672) relating to the system of runs, clearances, and fixed admission prices. And whatever divergence of attendance to first run there may have been will not continue with the injunction against continuance of the system.

It hardly needs argument to establish that the controlling factor in attendance as between runs is determined by admission pric[illegible] actually charged (not theoretical minimums) and the p[illegible], convenience, and pleasure of the prospective theatregoer.

The operation by each defendant of a first run theatre in a sufficient number of large cities is a business necessity if its features are to be adequately promoted and advertised for the benefit of the national market (Findings 122-123, R. 3685; see also R. 681, 1693). No one defendant, however, operates such show-cases in more than 48 of the 92 cities (Paramount). Other defendants operate in a lesser number of cities ranging from RKO's 18 (RKO Ex. 1) to Loew's 36. In many of these cities more than one defendant owns or operates a theatre primarily used as show-case, that is, for the proper advertising and promotion of its own pictures. The presence of these show-case theatres in these cities of the theatre-owning defendants in competition with one another is the best evidence of their intensive competition in order to properly promote and advertise their pictures for the nation-wide market.

The operation of first run theatres in some of these 92 cities is, therefore, a business necessity.

If the features of each of them are to be adequately promoted and advertised for the benefit of the national market of each of the defendants, including the 14,578 independent theatres, operation of first run theatres by each of the defendants in some of these 92 cities is a business necessity to each of them. There is no contrary evidence in the record.

Without such adequate promotion and advertisement first run in these centers of population, the 14,578 independent theatres could not operate.

Where business necessity requires "show-case" theatres for adequate development of the entire market, ownership of such theatres is not monopolization,—

especially when they represent collectively at most 1/6th of the entire national market.

It cannot be that the very instrument which creates the larger national market can be segregated from the national market in order to be condemned as such monopolization as requires destruction.

Undoubtedly this was one of the many factual considerations which impelled the statutory court to find as a fact that (R. 3690):

> "155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public."

Plaintiff below and here asks that defendants be divested of all their theatres throughout the nation because of alleged monopolization of that small segment of theatres which have the function of making pictures more valuable for their producers and for all theatres throughout the nation (and plaintiff declined to request any relief as to any specific first run theatre in any one or more of said 92 cities [R. 2769, 2777-8, quoted in footnote on page 63, *supra*]).

There is no rhyme or reason for Warner to be deprived of all of its theatres, wherever situated and whatever their run, because other defendants like Warner felt the business necessity of operating theatres first run in the largest 92 cities,—especially when their number may be reduced substantially as the probable result of the provisions below for sale of partial ownerships and when the result of the new marketing provisions will enable any independent theatres to bid for first run features in such cities.

POINT IV.

The Court properly exercised its discretion in refusing to decree relief inappropriate under the circumstances.

Nationwide drastic relief of divestiture would have been improper where, as here,—

1.) The Court found (R. 3670):

> "59. There exists active competition among the defendants and others in the production of motion pictures.
>
> "60. None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures."

supported by undisputed testimony (for example, Joy, R. 1521-1552) and by concessions of plaintiff's counsel:

> "Judge Hand: Why don't you answer the query? As a producer there is no case against it?
>
> Mr. Wright: That is correct, yes, sir. * * *
>
> Judge Bright: Well then your case is aimed at distribution and exhibition in combination?
>
> Mr. Wright: Quite so" (R. 388).
>
> "Judge Goddard: Do you claim there is a monopoly in production? I don't think I understand your position.

Mr. Wright: I don't think we do.
Judge Goddard: I beg your pardon?
Mr. Wright: No, we do not" (R. 1952).

2.) There was express admission that any feature suitable for first-run exhibition was assured of first-run exhibition in suitable theatres, *i. e.*, secured adequate distribution:

"Mr. Wright: * * * I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors.
Judge Bright: Or has not?
Mr. Wright: Or has not, yes" (R. 387).

"Judge Bright: If I understand you, if I wanted to produce I would hesitate to do it, anticipating that I might not get a market for my films; is that the idea?

Mr. Wright: I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of these companies to release that film for you" (R. 388).

"Mr. Wright: Insofar as the production end of the business goes, I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed. In other words, what Mr. Raftery says about 'there isn't anything wrong with the industry that more good pictures would not cure' is probably largely true in the sense

> that * * * these defendants * * * want to do whatever they can to have as many good pictures made as possible because, in exploiting them through their theatres, they profit from good pictures, no matter who makes them" (R. 1949).

Indeed, the rapid growth of non-defendant producers like P. R. C., Republic and Monogram (R. 910-911), of the non-theatre owning defendants like Universal (p. 83, *supra*; R. 1263-65, 1350-52), and since the trial itself of Companies like Eagle Lion controlled by J. Arthur Rank made the concession inevitable.†

3.) It was undisputed that independent theatres had increased by well over 4,000 in the last ten years (Finding 145, R. 3688; R. 2797; Ex. L-12), an increase of over 68%, that independent circuits had also increased (R. 738), and that Warner, Loew's and RKO had not expanded their theatre holdings since 1935 (Findings 22, 31-32, 120, 118; R. 3664, 3684).

4.) There was no evidence of abuse of power such as has occasionally been found to have been

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† Since the trial, Selznick, which formerly distributed through a defendant, has organized its own distribution company, The Selznick Releasing Organization, represented by an *amicus curiae*.

For ten years before the trial the number of independent producers and productions had been increasing (R. 639, 1263). A list of successful features produced independently during the years prior to the trial is in Columbia's Exhibit C-4. At the time of the trial there were about 40 independent producers in Hollywood alone (R. 639-641). Those who do not have their own studios make extensive use of the studio facilities, equipment and talent of the defendants and others, which are available for reasonable rentals (R. 637-39, 651, 1529-34, 1801-03, 1261-62). Thus independent producers have been and are able to compete successfully without high overhead either in fixed investments or talent contracts.

exercised by theatre circuits interested solely in their exhibition revenue, as was found in the *Shine* and *Crescent* cases. On the contrary, the theatre-owning defendants consented to a decree which made arbitrable any clearance in favor of any theatres, including their own, and offered below to consent to broaden such right to arbitrate to runs and to certain aspects of competitive bidding. That offer we repeat here.

5.) There were affirmative findings that none of the defendants was organized or maintained for the purpose of achieving a national monopoly (66 F. Supp. at 354 [R. 3553]; Findings 152-154, R. 3689-3690).

6.) There was no evidence or claim that the public had to pay more for what it received from an affiliated theatre than from a comparable independent theatre.

7.) Each member of the public could see each feature at whatever admission price he preferred and, subject to the number of theatres in any given locality, under whatever surroundings he preferred.* This was primarily due to the system of run and clearance which tended to afford the exhibitor a wide selection of the film rental he chose to pay* and accordingly offered the public a wide selection of

* The wide range of film rentals is sufficiently indicated in Exhibit W-12 which shows that, of Warner's most popular feature in 1943-1944, the average film rental per booking was $78 in 12,926 theatres out of the total bookings of 14,090. The exact sum paid by each of these 14,090 theatres is set forth in Warner's answers to 1945 interrogatories numbered 2 and 6 to 11 inclusive.

admission prices (Findings 76-77, R. 3673)—sometimes even on the same run.*

8.) There was no price-fixing or uniformity of price except as to minimum admission prices, which practice has been enjoined by the decree below. There was, however, no evidence that the minimum admission prices sometimes specified in Warner licenses did in fact hamper any exhibitor in his free choice of the admission price to be charged for any Warner feature.**

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* The range of admission prices sometimes overlaps on successive runs so that a first and second, or second and third run theatre will charge similar admission prices (Exs. W-22, 126), in spite of stipulations as to different minimum admission prices. A striking, though somewhat unusual example is the fourth run independent little Plaza Theatre in Manhattan, which charges more than most of the big neighborhood affiliated second run theatres.

** Exhibit W-22 shows the actual admission prices charged and the minimum admission prices if stipulated in Warner licenses for "Princess O'Rourke" in every one of the 14,090 theatres which played that Warner feature.

Appendices H and I show the same thing for the first run theatres in the 92 largest cities. They show:

In 75 of the 92 cities no minimum was inserted in the license, so that there is no basis for comparison.

In the remaining 17 cities ranging in size from Chicago (pop. 3,396,808) to Tampa (pop. 108,391), where a comparison is possible because a minimum was inserted in the license, the facts are these:

In 8, more than the minimum was charged;
In 6, less than the minimum was charged;
In 3, the minimum was charged.

12 of these cities involved independent exhibitors:

In 2 of these 12, the exhibitor charged the minimum specified;

In 3 of these 12, the exhibitor charged less than the minimum specified;

In 7 of these 12, the exhibitor charged more than the minimum specified, to wit:

27 cents more in Fall River and New Bedford
25 cents more in Buffalo
22 cents more in Providence
21 cents more in Cambridge
15 cents more in Dayton.

9.) There was express admission that the defendants compete with each other in their efforts to license their features to the greatest number of theatres (Wright, R. 1062). It was undisputed that the defendants (including Warner) maintain enormous sales organizations divided into exchanges where they spend millions competitively seeking the patronage of unaffiliated and affiliated theatres (R. 414, 437, 444, 660-670, 1257, 1410, 1415-16, 1452-53, 1456, 1467-8, 1504, 1685, 1729). There was no compulsion, however, for any theatre to license any Warner feature. The number of theatres booked varied with each feature. Thus, in the 1943-44 season, "Princess O'Rourke" had the highest number of Warner bookings, 14,090, and "Adventures in Iraq" the smallest, 3,933. Eight others had over 12,000, five over 10,000 and four over 7,000 bookings (Ex. 125). The film rentals received from licensing these 19 features ranged from $132,367 for "Adventures in Iraq" to a high of $2,806,909 for "Destination Tokyo". Though "Princess O'Rourke" had the largest number of bookings, six other features yielded more film rentals. The variations which often occur between revenue and bookings find illustration in "Mrs. Skiffington" with only 10,371 bookings yielding $2,286,121 in film rentals and "Uncertain Glory" with 11,651 bookings yielding only $1,274,682 (Ex. 125). There was therefore (a) competition in the prices for which Warner features are licensed, (b) no compulsion on the 18,076 theatres to pay uniform prices for each of Warner's features and (c) no regularity of pattern in their pricing.

10.) There was no proof of inordinate profits by any defendant and there was affirmative proof that Warner's integrated business as a whole had, over the last sixteen years, earned an annual average of only 1.25% of its assets (Ex. W-20), only 2.74% of its net worth (Ex. W-19), and only 2.19% of its total income (Ex. W-18).

11.) There was evidence that divestiture of theatres might seriously jeopardize, under existing conditions of the foreign markets, the ability of the defendants to maintain their present standard of production, with consequent damage to the public (Findings 155, 158, 159, R. 3690; and R. 1560 quoted on page 121, *infra*).

Amputation of theatres was found "damaging to the public" (Finding 155, R. 3690) in an industry where there was active competition in production; assistance rendered to independent producers of one or more pictures; assurance of adequate distribution and exhibition of the pictures so produced by independents; rapid growth of independent and non-theatre owning producers; rapid growth of independent theatres; no intent to achieve either national or local monopolies; no evidence that the public has to pay more for what it receives from a defendant than from an independent (be he producer, distributor, or exhibitor); and an industry structure which permits each member of the public to see each feature produced at whatever admission price he prefers and, subject to the number of theatres in any given locality, under whatever surroundings he prefers.

Other considerations which may have influenced this finding, and the consequent reluctance to disturb the structure of an industry further than to eliminate such existing restraints as were found illegal, may briefly be mentioned.

Since "The basic requisite for successful theatre operation [by a suitable theatre with suitable management] is access to good pictures" (Pltff.'s Br., p. 121), and since such good pictures in adequate quantities for successful theatre operation have in the past primarily flowed from the theatre-owning defendants who could better afford the risks inherent in such large-scale production because of revenue from theatre operation and foreign distribution, amputation of these theatres at a time when substantial revenue from foreign distribution has been cut off (p. 121, *infra*) may well involve serious "risk of injury to the public interest" (p. 118, *infra*).

Moreover, the Court may not have been unmindful of the necessity for adequate advertising in defendants' "showcase" theatres if both the producers and the 15,000 odd other theatres are to receive adequate returns on their investments (p. 102, *supra*).

We do not suggest that such considerations affect the primary questions of whether and to what extent the Act has been transgressed.

We do suggest that they cannot be ignored in deciding whether discretion as to the pragmatic form of relief decreed has been so abused as to compel a reversal in the form of amputation.

The Court below correctly exercised its discretion as to the form of relief (cf. *United States* v. *National Lead Co.*, 332 U. S. 319, hereinafter quoted; and *Hartford-Empire Co.* v. *United States*, 324 U. S. at 575) by adapting that relief to remedy alleged evils in the *distribution* of features where it was claimed that there was insufficient competition and restraints, declining to extend relief to the highly competitive field of exhibition further than to order divestiture wherever there were restraints on competition by pooling or joint ownership of otherwise competing theatres, and retaining jurisdiction to order different or further relief should the circumstances warrant in the light of actual performance under its present decree.

No case or rule of law requires this exercise of judgment to be upset.

(1) In the *Oil*, the *Tobacco* and the *Pullman* cases, the defendants were solitary monopolists.

No such claim is even suggested here. Indeed, it is conceded that the Warner corporations, as an entity, do not monopolize the industry. The make-weight suggestion that there should be a decree divorcing the Warner corporations from one another just has no point in the evidence either with respect to the evils complained of or the attempt to remedy them.

(2) In the *Oil* (221 U. S. 1), *Tobacco* (221 U. S. 106), and *Pullman* (330 U. S. 806) cases, the Court found that because a solitary monopolist had violated both Sections 1 and 2, dissolution was an appropriate remedy. There the solitary monopolist was found to have acquired and maintained his position as a solitary monopolist through persistent preda-

tory practices. It was thought necessary, therefore, to dissolve the solitary monopolist. Here, there is no evidence of any degree of control over exhibition that any defendant, either singly or collectively, has secured through predatory practices. Indeed, the Court below pointed out (66 F. Supp. at 354 [R. 3553]):

> "* * * there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly * * *." (See also Findings 152-154, R. 3689.)

(3) In the *Oil* and *Tobacco* cases where dissolution was thought necessary, the Court dissolved the *solitary monopolist into separate integrated companies so that each of the resulting integrated companies would be in a position to compete with each other as integrated companies.* Here, the Government seeks to amputate each of five separate integrated companies by making each of them a non-integrated company.

What plaintiff demands is, not the dissolution of the monopoly, but amputation and an interdict that five of the present competitors shall not compete in exhibition. *Under the guise of removing certain minor restraints on competition, the Court is urged to enjoin competition by and between all integrated units in the industry.*

The two *Reading* cases are even less in point (226 U. S. 324 and 253 U. S. 26).

There, in the first case the Court left intact the holding company's control over six otherwise inte-

grated companies, merely enjoining their contractual agreement with each other to maintain anthracite prices at the mine of not less than 65% of the average tidewater prices.

Eight years later, when it was found that their collective control had remained unchanged despite said injunction, the Court dissolved the holding company and separated the railroad companies from the mining companies, relying in part on the then recently enacted statute prohibiting railroads to own mines.

Apposite are the words of Mr. Justice Burton in the recent case of *United States* v. *National Lead Co.*, 332 U. S. 319:

> "* * * The findings show vigorous and apparently profitable competition on the part of each of the four producers, including an intimation that the smaller companies are gaining ground rather than losing it.* * * * * The competition between National Lead and du Pont has been carried into this Court.** * * * * (pp. 347-348).
>
> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order

* Compare the phenomenal growth of independent theatres in the last ten years and of the non-theatre owning defendants and other producers and distributors, heretofore noted (p. 106, *supra*).

** Compare the divergent attitudes of Universal, United Artists, Columbia on the one hand, and the theatre-owning defendants on the other. Note the divergent views on competitive bidding among the theatre-owning defendants themselves.

to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements" (p. 348).

"* * * Finally, the District Court, under * * * the decree, will retain sufficient jurisdiction to enable it to vacate or modify its orders * * * if it finds such action to be necessary or appropriate* (p. 351).

* * * *

"We believe there is neither precedent nor good reason for such a requirement [*i. e.* divestiture of one of defendants' two titanium plants]. The violation of the Sherman Act is found in these cases in the patent pooling and in the related agreements restraining interstate and foreign commerce. There is neither allegation in the complaint nor finding of fact by the District Court that the physical properties of either National Lead or DuPont have been acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to the agreements above mentioned.† The cancellation of such agreements and the injunction against the performance of them by the appellant companies eliminate them.‡ * * * the decree goes further. It requires National Lead and its subsidiary, Titan Inc., to present, within one year, a plan for divesting themselves of their stockholdings and

* Compare VIII of the decree below (R. 3701).

† Compare Findings 152-154 (R. 3689) quoted on page 8, *supra* and 66 F. Supp. at 354 (R. 3553), quoted on page 73, *supra*.

‡ Compare II, 1-9 and III, 1-4, 7 of the decree below (R. 3695).

other financial interests in certain foreign corporations, or for the purchase of the entire stockholdings and other financial interests * * * in such corporations or any of them.†† Such a plan * * * will go as far toward divestiture as the findings of fact indicate should be necessary to make the decree effective.‡

"There is no finding of fact, and apparently no evidence, showing that the respective principal titanium plants of National Lead or du Pont were acquired in violation of law,** that they ever were separately owned or operated,† or that they are adapted to such operation.* Presumably, the requested divestiture would be for the purpose of providing four instead of two inde-

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†† Compare Decree, III, 2-4 and especially III, 5 and 6 (R. 3698).

‡ Compare Findings 152-156 (R. 3689) and the Opinion below (66 F. Supp. at 357 [R. 3559]):

> "The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time."

** The holding here is that the theatres were not acquired or maintained for the purpose of a national monopoly (66 F. Supp. at 354 [R. 3553]; see also Findings 152-154 [R. 3689]).

† Compare the way theatres have been operated, when controlled by a circuit whose *sole* interest is in theatre operation (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173). As the Opinion below noted (66 F. Supp. at 355 [R. 3555]:

> "These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved [citing the *Crescent* and *Interstate* cases]."

* Compare Finding 155 (R. 3690) and 66 F. Supp. at 353 (R. 3551), and the evidence as to the necessity of theatres for adequate production (p. 102, *supra*).

pendent major competing plants in the titanium pigment industry. However, there is no showing whether or not the two [existing] licensees * * * may not be able to develop, under the decree, even more substantial competition against National Lead and du Pont than would new concerns operating the divested plants.* No comparable precedents have been presented.

"There is no showing that four major competing units would be preferable to two, or, including Zirconium and Virginia Chemical, that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field. * * * Such competition suggests that the District Court could do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting such of the two largest competitors of one of its principal plants. *It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.*"

* "We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting" (66 F. Supp. at 353 [R. 3551]).

The harsh and drastic relief of divorcement is additionally inappropriate here where the consequences to the industry and to the public might be disastrous.

Illuminating in the instant case are the concluding words of the Court in *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 457:

> "In conclusion we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion *a risk of injury to the public interest*, including a material disturbance of, and, it may be *serious detriment to the foreign trade*. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard." (Italics supplied.)

The "serious detriment to the foreign trade" is apparent here where the total domestic film revenue barely covers costs before distribution expense (Exs. W-11, W-13, R. 444), where there is no evidence that any profits have been earned by any defendant solely from production and distribution in the domestic market, and where there is affirmative proof that Warner over most of eight years would have operated at a loss but for its foreign distribution and domestic exhibition (Ex. W-13).

The usefulness of our first run theatres both as "show cases" and to subsequent run exhibitors in advertising the pictures to the public is elaborately described in other briefs and need not be repeated here.

Apposite are the words used by the statutory court in *United States* v. *Standard Oil Company*, 47 F. 2d 288, 309, in approving a proposed merger of the *Standard Oil Company of New York* and the *Vacuum Oil Company* as not violative of the decree of dissolution entered in the *Standard Oil* case, 221 U. S. 1:

> "The industry, as a whole, is thoroughly into the stage of integrated companies, which means that such a company owns or controls crude production, pipe lines, and tank cars, refineries to work up the crude and marketing organizations to sell the refined products—with special emphasis, as to marketing, upon the operation or control of retail automobile outlets. The superior business position of such an integrated company is evident. Among these advantages are the *ability to make up temporary losses in one stage of the business by profits in another;* to be independent of outside supplies and operations; to *have a consistently sustained business; and to secure the ultimate profits of the entire business from the raw production all the way to the retail of the finished products.*" (Italics supplied.)

The serious "risk of injury to the public interest", movie-goer and non-integrated theatre owner alike, from speculative experiments in disintegration was nowhere better stated than by counsel for the plaintiff before Judge Goddard on the hearing at the time of the adoption of the Consent Decree:

> "I think it fair to say that both the defendants and the Government honestly believe that [the consent decree] is infinitely to be preferred to

years of litigation with the possibility at the end of the *chaos that might result from divorcement.*" (Italics supplied.)

Indeed, one of the consequences of divorcement which both the Court below and said plaintiff's counsel may have preferred to avoid is the increase of predatory independent circuits interested solely in theatre aggrandisement,—like the foundation of the Shine circuit after 1929 when Universal disposed of its theatres, as alleged in the amended complaint herein (Par. 78, R. 3163).

This industry brought into this country millions of dollars annually for which it exported nothing more than a few thousand feet of celluloid of nominal cost (Ex. W-12). Approximately 30% of Warner's total film rentals came from abroad (Ex. W-5). This foreign business resulted solely from the high quality of American pictures which in turn rests on mounting production costs (Ex. W-10). Yet the cold statistics indicate that domestic film rentals without profits from theatre operation and foreign distributions do not cover negative costs of the magnitude of a company like Warner (Exs. W-11, W-13).

Any "chaos that might result from divorcement" will have repercussions not only in enhanced film rentals for the small independent exhibitor (Ex. W-12) but a direct effect upon the foreign business which has so successfully carried and popularized the American way of life to the farthest confines of the globe.

Indeed, if defendants are forbidden to compete with independent circuits and booking combines

(R. 738 *et seq.*), the effect upon their film revenue might be disastrous, since defendants would be left at the mercy of predatory exhibition combines interested solely in revenue from theatre operation.

The present difficulties of the foreign business and the interdependence of domestic and foreign film revenue and profit from theatre operations were succinctly summarized by Mr. H. M. Warner (R. 1560):

> "In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened (and did for a time) block our funds derived from exhibition in England and was only dissuaded from doing so by being convinced that the American companies could not continue to supply England with quality productions if their England revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing.* The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production.

* Since the trial, England has so heavily taxed American pictures as to make their distribution in England unprofitable.

In this industry the public may see within a comparatively short time every picture at whatever price it prefers to pay and every exhibitor we license may exhibit the same pictures in its theatre at whatever price it prefers to charge depending upon its policy of operation and the price level to which it caters.

Most of the seventeen thousand-odd theatres in the United States are able to license the same product within a comparatively short space of time at rentals below the cost of the positive print which they project on to their screens. * * *

This structure of the industry will, in my opinion, be jeopardized by the divorcement of theatres from production, with hardship not only to our company but to the attendance of many millions who go to the motion picture theatres in the United States, and the approximately 15,000 independent theatres in this country."

POINT V.

II, 4 of the Decree, properly construed, is not objectionable.

II, 8 (c) of the Decree provides that (R. 3697):

> "* * * the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment *adequate to yield a reasonable return to the licensor.*"

It therefore contemplates that, in granting a license, the licensor shall take into consideration the "reasonable return to the licensor".

It is in the light of this express recognition of the licensor's right to a reasonable return that II, 4 of the Decree must be construed, which enjoins any clearance "in excess of what is reasonably necessary to protect the licensee in the run granted" (R. 3696).

We construe this to mean that, once the licensor has been assured "a reasonable return", any clearance is enjoined which is "in excess of what is reasonably necessary to protect the licensee in the run granted".

If, however, II, 4 of the Decree is to be construed as enjoining the licensor from considering its own "fair return" in granting clearance, it should be modified as inconsistent with II, 8 (c) of the Decree and as depriving the owner of the copyright of a fair return on his copyright.

The second sentence of II, 4 of the Decree provides (R. 3696):

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree,

the burden shall be upon the distributor to sustain the legality thereof."

We construe this as shifting to the distributor the burden of going forward with the evidence as to the reasonableness of the clearance granted,—not with affecting the nature of the legality or illegality of the clearance which is elsewhere defined in the Decree, Decision, and Opinion.

So construed, it is unobjectionable.

If, however, it be construed as making illegal a clearance otherwise legal, it should be eliminated as a gross departure from all recognized concepts of judicial administration.

CONCLUSION.

On appeal No. 79 the judgment appealed from should be affirmed.

On appeal No. 80 the judgment appealed from should be modified as herein indicated.

Appeals from orders denying intervention should be dismissed or affirmed.

Respectfully submitted,

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TOTAL FILM RENTALS PAID

By Warner Theatres

(From Ex. W-3)

Fiscal Year Ended August	Companies to Whom Paid									Grand Total
	Warner	Paramount	Loew's	20th Century-Fox	R.K.O. and Pathe	United Artists	Columbia	Universal	All Others	
1931.....	36.51%	5.63%	14.51%	11.23%	10.54%	8.17%	3.22%	6.19%	4.00%	100%
1932.....	32.09%	14.88%	10.36%	11.15%	9.92%	2.79%	5.52%	8.01%	5.28%	100%
1933.....	34.49%	15.84%	12.17%	9.73%	8.20%	4.96%	3.73%	6.54%	4.34%	100%
1934.....	32.18%	17.65%	17.61%	2.83%	10.87%	5.00%	4.00%	7.58%	2.28%	100%
1935.....	29.55%	17.31%	16.35%	6.65%	10.51%	6.22%	4.84%	5.31%	3.26%	100%
1936.....	26.71%	16.46%	18.16%	10.05%	10.52%	6.19%	4.07%	5.30%	2.54%	100%
1937.....	29.00%	15.33%	19.88%	10.94%	9.19%	5.82%	3.63%	4.49%	2.72%	100%
1938.....	25.72%	13.05%	18.97%	11.11%	10.37%	9.31%	4.05%	4.94%	2.48%	100%
1939.....	27.69%	12.45%	21.41%	9.98%	8.69%	7.32%	4.06%	5.96%	2.44%	100%
1940.....	24.14%	11.74%	24.91%	8.55%	9.59%	6.80%	4.79%	7.09%	2.39%	100%
1941.....	27.56%	12.95%	21.37%	7.95%	7.75%	7.35%	5.01%	7.62%	2.44%	100%
1942.....	30.09%	12.28%	18.15%	9.84%	8.23%	4.82%	5.37%	8.88%	2.34%	100%
1943.....	28.74%	11.72%	16.98%	9.83%	10.58%	4.20%	5.78%	9.43%	2.74%	100%
1944.....	26.50%	12.93%	17.25%	10.08%	9.94%	3.09%	5.62%	10.75%	3.84%	100%
1945.....	29.28%	13.12%	16.66%	8.60%	10.67%	5.58%	5.02%	7.56%	3.51%	100%

NOTE: Represents Film Rental for features, shorts and newsreels paid by Warner Theatres for fiscal year indicated.

The Film Rental paid "Warner" does not include the Rental paid for the picture "This Is The Army". This Rental is also excluded from the grand total.

Film Rentals for the Following Non-Consolidated Companies Are Included Above

Atlantic Theatres, Inc.	50%	Owned by Warners
Mansfield Operating Company..	50%	" " "
Mt. Oliver Theatre Company...	50%	" " "
Regent State Corporation.....	50%	" " "
Standard Theatres Corporation.	50%	" " "
W. F. Theatre Company.....	50%	" " "
Stanley Shapiro Theatre Co....	51%	" " "

Film Rentals for the Following Theatres Owned or Leased by Others, Included in Operating Agreements Are Included Above

Paramount Theatre, Hammond, Ind.
Frankfort and Nixon Theatres, Philadelphia, Pa.
Tower and Roosevelt Theatres, Philadelphia, Pa.
Oriental and Tower Theatres, Milwaukee, Wisc.
State and Strand Theatres, Harrisonburg, Va.
Regent Theatre, Kearny
Elwood Theatre, Newark
Palace Theatre, Orange
Royal and Broadmoor Theatres, Bloomfield
Bellevue Theatre, Upper Montclair
Rio Theatre, Appleton (Became 100% owned by Warners 4/30/44)

TOTAL FILM RENTALS RECEIVED BY WARNER FROM UNITED STATES and CANADA

(From Ex. W-4)

Fiscal Year Ending August	Film Rentals Received from Theatres Owned, Operated, or Affiliated With: Paramount	Fox	Loew's	R.K.O.	Total	All Other Accounts	Warner	Grand Total
1945	16.8%	6.4%	0.5%	5.0%	28.7%	52.6%	18.7%	100%
1944	16.5%	6.4%	0.6%	4.6%	28.1%	54.6%	17.3%	100%
1943	16.9%	6.0%	0.6%	4.6%	28.1%	54.1%	17.8%	100%
1942	16.9%	4.6%	0.5%	4.9%	26.9%	57.2%	15.9%	100%
1941	15.5%	4.8%	0.5%	5.8%	26.6%	58.4%	15.0%	100%
1940	13.1%	3.8%	0.6%	5.7%	23.2%	61.9%	14.9%	100%
1939	13.4%	4.8%	0.8%	5.5%	24.5%	60.7%	14.8%	100%
1938	12.8%	4.7%	0.7%	5.7%	23.9%	62.1%	14.0%	100%
1937	12.8%	4.7%	0.7%	5.2%	23.4%	61.8%	14.8%	100%
1936	9.8%	4.1%	1.1%	4.4%	19.4%	66.1%	14.5%	100%
1935	11.9%	3.9%	2.9%	3.6%	22.3%	62.8%	14.9%	100%
1934	11.[illegible]%	3.7%	4.8%	1.5%	21.3%	62.5%	16.2%	100%
1933	13.1%	4.4%	4.3%	1.1%	22.9%	59.2%	17.9%	100%
1932	12.3%	3.6%	3.2%	3.6%	22.7%	58.0%	19.3%	100%
1931	10.1%	5.2%	1.7%	3.1%	20.1%	59.2%	20.7%	100%

NOTE: Film Rentals received include receipts for Features, Short Subjects, Trailers and Advertising Accessories. Receipts from "This Is The Army" are excluded.

All figures for years prior to 1940-41 are compiled on basis of collections. Figures shown for 1940-41 and subsequent years are compiled on basis of Net Billings with the exception of Warner Theatres which are on a collection basis for all years.

TOTAL FILM RENTALS RECEIVED BY WARNER FROM DOMESTIC AND FOREIGN

(From Ex. W-5)

UNITED STATES AND CANADA

Film Rentals Received by Warner from Theatres Owned, Operated, or Affiliated With

Fiscal Year Ending August	Paramount	Fox	Loew's	R.K.O.	Total	All Other Accounts United States and Canada	Warner	Total United States and Canada	Foreign Other Than Canada	World Total
1945	11.9%	4.4%	0.4%	3.5%	22.2%	37.1%	13.1%	70.4%	29.6%	100%
1944	11.4%	4.4%	0.4%	3.2%	19.4%	37.5%	11.8%	68.7%	31.3%	100%
1943	11.7%	4.2%	0.4%	3.2%	19.5%	37.7%	12.4%	69.6%	30.4%	100%
1942	12.4%	3.4%	0.4%	3.5%	19.7%	41.8%	11.7%	73.2%	26.8%	100%
1941	11.5%	3.5%	0.4%	4.3%	19.7%	43.2%	11.1%	74.0%	26.0%	100%
1940	9.5%	2.7%	0.4%	4.1%	16.7%	44.7%	10.7%	72.1%	27.9%	100%
1939	9.4%	3.4%	0.6%	3.9%	17.3%	42.4%	10.3%	69.8%	30.2%	100%
1938	8.5%	3.2%	0.6%	3.9%	16.2%	42.0%	9.6%	67.8%	32.2%	100%
1937	8.9%	3.2%	0.5%	3.7%	16.3%	43.0%	10.3%	69.6%	30.4%	100%
1936	6.6%	2.8%	0.7%	2.9%	13.0%	43.9%	9.6%	66.5%	33.5%	100%
1935	8.2%	2.9%	2.0%	2.5%	15.6%	43.4%	10.2%	69.2%	30.8%	100%
1934	7.5%	2.6%	3.2%	1.0%	14.3%	41.7%	10.8%	66.8%	33.2%	100%
1933	10.1%	3.4%	3.3%	0.8%	17.6%	45.6%	13.8%	77.0%	23.0%	100%
1932	9.4%	2.7%	2.4%	2.8%	17.3%	44.3%	14.7%	76.3%	23.7%	100%
1931	6.7%	3.4%	1.1%	2.1%	13.3%	39.0%	13.5%	65.8%	34.2%	100%

NOTES: Film Rentals for the United States and Canada are receipts for Features, Short Subjects, Trailers and Advertising Accessories. Film Rentals for "Foreign other than Canada" are receipts for American Made Features, Short Subjects and Trailers. Receipts from "This Is The Army" are excluded from all figures.

All figures for the United States and Canada for years prior to 1940-41 are compiled on basis of collections. Figures shown for 1940-41 and subsequent years for the United States and Canada are compiled on basis of net billings with the exception of Warner Theatres which are on a collection basis for all years. All figures for "Foreign other than Canada" are compiled on basis of net billings.

Figures for the year 1944-45 for "Foreign other than Canada" and "World Total" are tentative.

TOTAL FILM RENTALS PAID TO
and
RECEIVED FROM LOEW'S AND ITS AFFILIATES

(Excludes Film Rental for "This Is The Army")

(From Ex. W-6)

Fiscal Year		Increase or *Decrease Over Previous Year	
		Amount	Percentage
1931–32	Paid to Loew's	*$964,598	*40.88%
	Received from Loew's	212,943	43.90%
1932–33	Paid to Loew's	23,698	1.70%
	Received from Loew's	278,947	39.96%
1933–34	Paid to Loew's	646,246	45.55%
	Received from Loew's	141,699	14.50%
1934–35	Paid to Loew's	65,782	3.19%
	Received from Loew's	*353,482	*31.60%
1935–36	Paid to Loew's	484,204	22.73%
	Received from Loew's	*479,446	*62.65%
1936–37	Paid to Loew's	673,769	25.77%
	Received from Loew's	*51,578	*18.05%
1937–38	Paid to Loew's	*73,781	*2.24%
	Received from Loew's	*5,880	*2.51%
1938–39	Paid to Loew's	426,094	13.25%
	Received from Loew's	50,290	22.03%
1939–40	Paid to Loew's	933,124	25.63%
	Received from Loew's	*99,406	*35.68%
1940–41	Paid to Loew's	*729,218	*15.94%
	Received from Loew's	15,469	8.63%
1941–42	Paid to Loew's	*236,424	*6.15%
	Received from Loew's	13,936	7.16%
1942–43	Paid to Loew's	266,285	7.38%
	Received from Loew's	17,822	8.54%
1943–44	Paid to Loew's	170,683	4.40%
	Received from Loew's	*23,147	*10.22%
1944–45	Paid to Loew's	370,556	9.16%
	Received from Loew's	13,516	6.65%

*Italic figures are red in original.

TOTAL FILM RENTALS PAID TO
and
RECEIVED FROM PARAMOUNT AND ITS AFFILIATES

(Excludes Film Rental for "This Is The Army")
(From Ex. W-7)

Fiscal Year		Increase or *Decrease Over Previous Year	
		Amount	Percentage
1931–32	Paid to Paramount	$1,086,755	118.60%
	Received from Paramount	*164,612	*5.65%
1932–33	Paid to Paramount	*156,602	*7.82%
	Received from Paramount	188,886	6.87%
1933–34	Paid to Paramount	222,204	12.03%
	Received from Paramount	*306,580	*10.43%
1934–35	Paid to Paramount	186,382	9.01%
	Received from Paramount	455,883	17.32%
1935–36	Paid to Paramount	116,224	5.15%
	Received from Paramount	*470,808	*15.25%
1936–37	Paid to Paramount	164,322	6.93%
	Received from Paramount	1,385,180	52.94%
1937–38	Paid to Paramount	*324,704	*12.81%
	Received from Paramount	*129,122	*3.23%
1938–39	Paid to Paramount	*93,030	*4.21%
	Received from Paramount	436,769	11.28%
1939–40	Paid to Paramount	37,674	1.78%
	Received from Paramount	*399,572	*9.27%
1940–41	Paid to Paramount	172,436	8.00%
	Received from Paramount	1,207,651	30.89%
1941–42	Paid to Paramount	113,675	4.88%
	Received from Paramount	1,253,301	24.49%
1942–43	Paid to Paramount	233,025	9.54%
	Received from Paramount	*194,681	*3.06%
1943–44	Paid to Paramount	356,027	13.31%
	Received from Paramount	*197,538	*3.20%
1944–45	Paid to Paramount	447,039	14.75%
	Received from Paramount	1,014,807	16.97%

* Italic figures are red in original.

TOTAL FILM RENTALS PAID TO and RECEIVED FROM 20TH CENTURY-FOX AND ITS AFFILIATES

(Excludes Film Rental for "This Is The Army")

(From Ex. W-8)

Fiscal Year		Increase or *Decrease Over Previous Year	
		Amount	Percentage
1931–32	Paid to 20th Century-Fox	*$325,095	*17.80%
	Received from 20th Century-Fox	*683,610	*45.91%
1932–33	Paid to 20th Century-Fox	*367,621	*24.49%
	Received from 20th Century-Fox	193,681	24.04%
1933–34	Paid to 20th Century-Fox	*803,226	*70.86%
	Received from 20th Century-Fox	*140,514	*14.06%
1934–35	Paid to 20th Century-Fox	535,706	162.16%
	Received from 20th Century-Fox	171,768	20.00%
1935–36	Paid to 20th Century-Fox	581,186	67.11%
	Received from 20th Century-Fox	39,533	3.84%
1936–37	Paid to 20th Century-Fox	362,676	25.06%
	Received from 20th Century-Fox	373,082	34.86%
1937–38	Paid to 20th Century-Fox	72,632	4.01%
	Received from 20th Century-Fox	13,781	.95%
1938–39	Paid to 20th Century-Fox	*184,378	*9.79%
	Received from 20th Century-Fox	38,994	2.68%
1939–40	Paid to 20th Century-Fox	*127,291	*7.50%
	Received from 20th Century-Fox	*392,015	*26.21%
1940–41	Paid to 20th Century-Fox	*140,335	*8.93%
	Received from 20th Century-Fox	486,051	44.03%
1941–42	Paid to 20th Century-Fox	526,107	36.78%
	Received from 20th Century-Fox	109,183	6.87%
1942–43	Paid to 20th Century-Fox	286,249	14.63%
	Received from 20th Century-Fox	498,202	29.32%
1943–44	Paid to 20th Century-Fox	120,957	5.39%
	Received from 20th Century-Fox	134,320	6.11%
1944–45	Paid to 20th Century-Fox	*84,316	*3.57%
	Received from 20th Century-Fox	263,026	11.28%

* Italic figures are red in original.

TOTAL FILM RENTALS PAID TO
and
RECEIVED FROM R. K. O. AND ITS AFFILIATES

(Excludes Film Rental for "This Is The Army")

(From Ex. W-9)

Fiscal Year		Increase or *Decrease Over Previous Year	
		Amount	Percentage
1931–32	Paid to R.K.O.	*$378,537	*22.09%
	Received from R.K.O.	*73,495	*8.17%
1932–33	Paid to R.K.O.	*379,323	*28.41%
	Received from R.K.O.	*583,694	*70.68%
1933–34	Paid to R.K.O.	317,995	33.26%
	Received from R.K.O.	101,585	41.96%
1934–35	Paid to R.K.O.	96,229	7.55%
	Received from R.K.O.	583,255	169.71%
1935–36	Paid to R.K.O.	144,375	10.54%
	Received from R.K.O.	254,158	27.42%
1936–37	Paid to R.K.O.	5,833	.39%
	Received from R.K.O.	411,182	34.81%
1937–38	Paid to R.K.O.	237,248	15.60%
	Received from R.K.O.	176,066	11.06%
1938–39	Paid to R.K.O.	*278,895	*15.87%
	Received from R.K.O.	*732	*.04%
1939–40	Paid to R.K.O.	281,914	19.06%
	Received from R.K.O.	*77,045	*4.36%
1940–41	Paid to R.K.O.	*365,872	*20.78%
	Received from R.K.O.	207,686	12.28%
1941–42	Paid to R.K.O.	241,788	17.34%
	Received from R.K.O.	*97,765	*5.15%
1942–43	Paid to R.K.O.	778,075	47.54%
	Received from R.K.O.	*127,560	*7.08%
1943–44	Paid to R.K.O.	*84,469	*3.50%
	Received from R.K.O.	*12,045	*.72%
1944–45	Paid to R.K.O.	499,292	21.43%
	Received from R.K.O.	428,818	25.82%

*Italic figures are red in original.

FILM RENTALS PAID BY WARNER THEATRES

to

UNITED ARTISTS

(Source: Exhibit W-3)

Fiscal Years Ending August	Increase or *Decrease Over Previous Year		% of Total Rentals Paid by Warner Theatres
	Amount	%	
1932	*$953,490.	*71.7%	2.79%
1933	202,609.	54.0%	4.96%
1934	8,178.	1.4%	5.00%
1935	224,485.	38.3%	6.22%
1936	80,225.	9.9%	6.19%
1937	72,206.	8.1%	5.82%
1938	614,496.	63.8%	9.31%
1939	*332,708.	*21.1%	7.32%
1940	3,144.	0.3%	6.80%
1941	73,855.	5.9%	7.35%
1942	*365,603.	*27.7%	4.82%
1943	2,643.	0.3%	4.20%
1944	*233,469.	*24.3%	3.09%
1945	753,299.	103.83%	5.58%

* Italic figures are red in original.

FILM RENTALS PAID BY WARNER THEATRES

to

UNIVERSAL

(Source: Exhibit W-3)

Fiscal Years Ending August	Increase or *Decrease Over Previous Year		% of Total Rentals Paid by Warner Theatres
	Amount	%	
1932	$ 70,722.	7.02%	8.01%
1933	*315,922.	*29.30%	6.54%
1934	126,098.	16.54%	7.58%
1935	*195,873.	*22.05%	5.31%
1936	72,433.	10.46%	5.30%
1937	*22,467.	*2.93%	4.49%
1938	95,062.	12.80%	4.94%
1939	177,045.	21.14%	5.96%
1940	285,183.	28.11%	7.09%
1941	71,772.	5.52%	7.62%
1942	393,179.	28.66%	8.88%
1943	388,550.	22.01%	9.43%
1944	365,579.	16.97%	10.75%
1945	*513,399.	*20.38%	7.56%

* Italic figures are red in original.

FILM RENTALS PAID BY WARNER THEATRES

to

COLUMBIA

(Source: Exhibit W-3)

Fiscal Years Ending August	Increase or *Decrease Over Previous Year		% of Total Rentals Paid by Warner Theatres
	Amount	%	
1932	$219,966.	42.0%	5.52%
1933	*308,759.	*41.5%	3.73%
1934	34,124.	7.8%	4.00%
1935	160,943.	36.6%	4.84%
1936	*44,522.	*7.0%	4.07%
1937	15,666.	2.6%	3.63%
1938	84,194.	14.0%	4.05%
1939	5,449.	0.7%	4.06%
1940	187,759.	27.1%	4.79%
1941	21,721.	2.4%	5.01%
1942	167,176.	18.5%	5.37%
1943	249,704.	23.3%	5.78%
1944	*734.	*0.05%	5.62%
1945	14,772.	1.1%	5.02%

* Italic figures are red. in original.

Warner's First Run Revenue in the 92 Large Cities, Now and As It May Be Affected by Loss of Theatres Partially Owned.

(Computed from Ex. RKO-11 and Warner answers to 1945 interrogatories nos. 2 and 6-11 inclusive, Ex. 126)

In the 1943/44 season Warner licensed "Princess O'Rourke" first run in the 92 cities with populations of over 100,000 to theatres other than Warner's own, as follows:

To theatres owned in whole or in part by:	Number of cities licensed first run	Dollar rentals received		Percentage of total
Independents	in 20 cities	for $100,955.99	or	28.6%
Paramount affiliates	in 24 other cities	for $117,074.58	or	33. %
War.-RKO pools	in 4 other cities	for $ 11,299.42	or	3.2%
RKO	in 8 other cities	for $ 38,265.84	or	10.8%
Fox	in 8 other cities	for $ 85,812.37	or	24.3%
Loew's	in 0 cities	for 0.	or	0. %
	64 cities	$353,408.20		100 %

If defendants should have to sell their interests in theatres less than 50% owned, in accordance with the Decree, III, 5 (R. 3699), these figures would be:

To theatres owned by:	Number of cities licensed first run	Dollar rentals received		Percentage of total
Independents	in 43 cities	for $264,275.89	or	74.3%
Loew's	in 0 cities	for 0.	or	0. %
Fox	in 0 cities.	for 0.	or	0. %
RKO	in 6 other cities	for $ 31,894.90	or	9. %
Paramount	in 15 other cities	for $ 59,429.64	or	16.7%
	64 cities	$355,600.43		100 %

The same computations, inclusive of Warner's own theatres; would show:

In the 1943/44 season Warner licensed "Princess O'Rourke" first run in the 92 cities with populations of over 100,000 to theatres, including Warner's intercompany payments to its own theatres, as follows:

To theatres owned in whole or in part by:	Number of cities licensed first run	Dollar rentals received		Percentage of total
Independents	in 20 cities	for $100,955.99	or	17.4%
Paramount affiliates	in 24 other cities	for $117,074.58	or	20. %
Par.-RKO pools	in 4 other cities	for $ 11,299.42	or	2. %
RKO	in 8 other cities	for $ 38,265.84	or	6.6%
Fox	in 8 other cities	for $ 85,812.37	or	14.8%
Loew's	in 0 cities	for 0.	or	0. %
Warner	in 28 other cities	for $227,336.88	or	39. %
	92 cities	$580,745.08		100 %

If defendants should have to sell their interests in theatres less than 95% owned, in accordance with the Decree, III, 5 (R. 3699), these figures would be:

To theatres owned by:	Number of cities licensed first run	Dollar rentals received		Percentage of total
Independents	in 43 cities	for $264,275.89	or	45.3%
Loew's	in 0 cities	for 0.	or	0. %
Fox	in 0 cities	for 0.	or	0. %
RKO	in 6 other cities	for $ 31,894.90	or	5.5%
Paramount	in 15 other cities	for $ 59,429.64	or	10.2%
Warner	in 28 other cities	for $227,336.88	or	39. %
	92 cities	$582,937.31		100 %

COST OF AMERICAN MADE WARNER FEATURE PICTURES

and

AVERAGE THEATRE ADMISSION PRICES AT WARNER THEATRES

(Ex. W-10)

Fiscal Year Ending; August	(1) Average Cost of American Made Warner Pictures	(2) Average Theatre Admission Price At Warner Theatres
1931	$ 337,000	35.0¢
1932	272,000	31.5¢
1933	241,000	28.0¢
1934	255,000	27.0¢
1935	280,000	27.0¢
1936	303,000	27.0¢
1937	315,000	27.9¢
1938	415,000	28.2¢
1939	403,000	28.0¢
1940	448,000	28.5¢
1941	411,000	28.9¢
1942	621,000	30.9¢
1943	976,000	33.3¢
1944	1,032,000	35.4¢
1945	1,371,000	36.9¢ (3)

(1) Negative cost plus royalties and participations payable in connection therewith.

(2) The average admission price is determined by dividing the box office receipts by the attendance. Data given exclude admission taxes.

(3) Based on data for 39 weeks ending May 26, 1945.

The Ratios of Film Rentals Paid to Theatre Admissions Collected in the Case of Independent and Affiliated Theatres

Estimated gross theatre admissions as per Film Daily Year Book (1945), R. K. O. Exhibit 2		$1,350,000,000
Total theatre admissions received by 5 major companies as reported in producer-exhibitor responses to additional Interrogatory No. 13		
Warner	$ 83,622,000	
Loew's	61,596,000	
Paramount	185,499,000	
20th Century-Fox Film	91,411,000	
R. K. O.	40,642,000	
		462,770,000
Estimated gross theatre admissions collected by all others		$ 887,230,000
Total film rentals received by 8 major companies, based on answers to Interrogatory No. 3 (as per Exhibit No. 425)	$264,131,000	
Film rentals paid to 8 major companies by 5 major companies, based on answers to Interrogatory No. 12 (as per Exhibit No. 424)		
Warner	$ 22,543,000	
Loew's	19,497,000	
Paramount	49,829,000	
Fox	24,210,000	
R. K. O.	12,400,000	
		126,479,000
Film rentals paid to 8 major companies by all other exhibitors	$137,652,000	

27.33% of their theatre admissions was paid by the affiliated theatres to the eight distributor defendants as film rental for their features.

(Computed by dividing the total film rentals of the affiliated theatres [$126,479,000] by their total theatre admissions [$462,770,000].)

15.51% of their theatre admissions was paid by all other exhibitors, to the eight distributor defendants as film rental for their features.

(Computed by dividing the total film rentals paid by all other exhibitors [$137,652,000] by their total theatre admissions [$887,230,000].)

COMPARISON
COST OF ONE POSITIVE PRINT OF WARNER'S "PRINCESS O'ROURKE" TO AVERAGE FILM RENTAL PER BOOKING

(Ex. W-12)

Approximate cost of one positive print....$130.

Based on information compiled from Warner answers to 1945 Interrogatories numbered 2 and 6 to 11 inclusive.

	Number Of Bookings	Film Rental Received	Average Film Rental Per Booking
Bookings enumerated in answers to Interrogatories 6 to 11 inclusive—the so-called "Preferred Runs"			
Total of such Bookings	1536	$1,130,302.05	$735.89
Bookings of $130 or less	372	26,251.21	70.57
Bookings of over $130	1164	$1,104,050.84	$948.50
Total All Bookings given in answer to Interrogatory 2	14090	$2,118,050.01	$150.32
Deduct Bookings of over $130 enumerated in answer to Interrogatories 6 to 11 inclusive—see above	1164	1,104,050.84	948.50
Total Bookings other than those over $130 enumerated in answer to Interrogatories 6 to 11 inclusive	12926	$1,013,999.17	$ 78.45

Instances of (1) Where Warner Theatres Licensed Film from Another Company Whose Affiliated Theatres Did Not License Warner Pictures;

(2) Where Warner Theatres Did Not License Film from Another Company Whose Affiliated Theatres Did License Warner Pictures;

(3) Where the Term of a License for Warner Theatres from Another Company Was Different from the Term of the License of Warner Pictures for Such Company's Affiliated Theatres.

(Exhibit W-15)

1930–31

Distribution Dept. did not license RKO New York metropolitan theatres.
Theatre Dept. licensed RKO pictures generally.

Distribution Dept. licensed Paramount affiliates.
Theatre Dept. did not license Paramount pictures in most of the Warner theatres.

1931–32

Distribution Dept. licensed Loew New York metropolitan theatres.
Theatre Dept. did not license Loew pictures until late in the season when it licensed all or part of Loew pictures in approximately 150 of the 250 theatres which had played Loew pictures the previous year.

1932–33

Distribution Dept. did not license RKO metropolitan theatres.
Theatre Dept. licensed RKO pictures.

1933–34

Distribution Dept. did not license RKO metropolitan theatres.
Theatre Dept. licensed RKO pictures for a term of 2 years.

Distribution Dept. licensed Fox Theatres.
Theatre Dept. did not license Fox pictures except for the season in five cities and except for occasional local bookings.

Distribution Dept. licensed Loew metropolitan theatres for a term of one year.
Theatre Dept. licensed Loew pictures for a term of 3 years.

1934–35

Distribution Dept. licensed Fox theatres for a term of one year.
Theatre Dept. licensed Fox pictures for a term of 2 years.

935–36

Distribution Dept. licensed RKO metropolitan theatres for a term of our years.

Theatre Dept. licensed RKO pictures for a term of two years.

936–37

Distribution Dept. licensed Fox theatres for a term of one year.

Theatre Dept. licensed Fox pictures for a term of 3 years.

Distribution Dept. licensed some of the smaller Loew metropolitan eatres for a term of one year.

Theatre Dept. licensed Loew pictures for a term of three years.

Distribution Dept. licensed Paramount affiliates.

Theatre Dept. licensed Paramount pictures for 2 years.

939–40

Distribution Dept. licensed some of the smaller Loew metropolitan eatres for one year.

Theatre Dept. licensed Loew pictures for a term of 3 years.

Distribution Dept. did not license Sparks Circuit, affiliated with Paramount in Florida.

Theatre Dept. was under existing license to purchase Paramount film.

940–41

Distribution Dept. did not license Sparks Circuit, affiliated with Paramount in Florida until on December 1, 1941 some film was licensed for me theatres.

Theatre Dept. licensed Paramount pictures for a term of one year.

The Percentage Of Warner's Total Film Rental Payments Paid To Each Of The Other Producer-Exhibitors

Compared With

The Percentage Of Each Of The Other Producer-Exhibitor's Total Film Rental Payments Which Each Producer-Exhibitor Paid To Warner.

(Source: Page 256 of Appendix of Government Brief)

	Percentage of Total Paid to All Distributors
Warner Theatres Paid To Loew	17.3%
Loew Theatres Paid To Warner	2.0%
Warner Theatres Paid To Fox	10.1%
Fox Theatres Paid To Warner	9.6%
Warner Theatres Paid To Paramount	12.9%
Paramount Theatres Paid To Warner	11.4%
Warner Theatres Paid To R K O	9.9%
R K O Theatres Paid To Warner	15.7%

The Percentage Of Warner's Total Film Rental Receipts From Each Of The Other Producer-Exhibitors

Compared With

The Percentage Of Each Of The Other Producer-Exhibitor's Total Film Receipts Which Each Producer-Exhibitor Received From Warner.

(Source: Page 258 of Appendix of Government Brief)

	Percentage of Total Received From All Theatres
Warner Received From Loew Theatres	0.5%
Loew Received From Warner Theatres	6.8%
Warner Received From Fox Theatres	7.8%
Fox Received From Warner Theatres	4.6%
Warner Received From Paramount Theatres	17.9%
Paramount Received From Warner Theatres	6.9%
Warner Received From R K O Theatres	6.0%
R K O Received From Warner Theatres	8.3%

Admission Prices Charged and Minimum Admission Price (Where Specified in License Agreement) in First Run Theatres in the 92 Large Cities for Princess O'Rourke

By Population

(Source: Exhibits W-22, 126 and Census)

Population	City	Highest Admission Price Charged	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
7,454,995	New York	$1.65	$1.65–.45	$
3,396,808	Chicago	.85	.85–	.55
1,931,334	Philadelphia	.75	.75–.68	
1,623,452	Detroit	.75	.75–.65	
1,504,277	Los Angeles	.90	.90–.75	
878,336	Cleveland	.60	.60–	
859,100	Baltimore	.60	.60–.50	
816,048	St. Louis	.49	.49–.24	
770,816	Boston, Mass.	.65	.65–	
671,659	Pittsburgh	.60	.60–	
663,091	Washington	.90	.90–.50	
634,536	San Francisco	1.00	1.00–.60	
587,472	Milwaukee	.65	.65–	
575,901	Buffalo	.80	.80–.60	.55
494,537	New Orleans	.50	.50–	
492,370	Minneapolis	.55	.55–	
455,610	Cincinnati	.54	.54–.44	
429,760	Newark	.90	.90–.65	
399,178	Kansas City, Mo.	.60	.60–	
386,972	Indianapolis	.50	.50–.40	
384,514	Houston, Texas	.50	.50–.40	
368,302	Seattle, Wash.	1.00	1.00–.70	

Population	City	Highest Admission Price Charged	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
324,975	Rochester, N. Y.	$ .55	$ .55–50	$
322,412	Denver, Col.	.74	.74–.39	
319,077	Louisville, Ky.	.75	.45–.36	
306,087	Columbus, Ohio	.49	.49–.44	
305,394	Portland, Ore.	1.00	1.00–.50	
302,288	Atlanta, Ga.	.50	.50–.40	
302,163	Oakland, Cal.	1.00	1.00–.50	
301,173	Jersey City	.85	.85–.55	
294,934	Dallas, Texas	.50	.50–.40	
292,942	Memphis, Tenn.	.50	.50–.40	
287,736	St. Paul	.55	.55–	
282,349	Toledo, Ohio	.55	.55–	.60
267,583	Birmingham, Ala.	.39	.39–.33	.44
253,854	San Antonio	.50	.50–.40	
253,504	Providence	.50	.50–.44	.28
244,791	Akron, Ohio	.65	.65–.50	
223,844	Omaha, Neb.	.55	.55–	
210,718	Dayton, Ohio	.55	.55–.40	.40
205,967	Syracuse, N. Y.	.50	.50–	
204,424	Oklahoma City, Okla.	.50	.50–.24	
203,342	San Diego	.64	.64–.44	.60
193,694	Worcester, Mass.	.50	.50–	
193,042	Richmond, Va.	.44	.44–	.44
177,662	Ft. Worth, Texas	.50	.50–.40	
173,065	Jacksonville, Fla.	.44	.44–.39	
172,172	Miami, Fla.	.70	.70–.55	
167,720	Youngstown, Ohio	.50	.50–	
167,402	Nashville, Tenn.	.44	.44–.33	
166,267	Hartford, Conn.	.60	.60–.50	

Population	City	Highest Admission Price Charged	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
164,292	Long Beach	$ .60	$ .60–.40	$
164,292	Grand Rapids	.40	.40	
160,605	New Haven	—	—	
159,819	Des Moines, Iowa	.55	.55–	
151,543	Flint, Mich.	.44	.44–	
149,934	Salt Lake City	.58	.58–.39	
149,554	Springfield, Mass.	.50	.50–	
147,121	Bridgeport, Conn.	.50	.50–	
144,332	Norfolk, Va.	.50	.50–	.44
142,598	Yonkers, N. Y.	.60	.60–.55	
142,157	Tulsa, Okla.	.44	.44–.25	
140,404	Scranton, Pa.	.65	.65–.50	
139,656	Paterson, N. J.	.75	.75–.55	
130,577	Albany, N. Y.	.55	.55–.50	
128,163	Chattanooga, Tenn.	.44	.44–.33	.44
124,697	Trenton, N. J.	.65	.65–.44	
122,001	Spokane, Wash.	.80	.80–.60	
121,458	Kansas City, Kan.	.29	.29–	.30
118,410	Ft. Wayne, Ind.	.50	.50–.35	.50
117,536	Camden, N. J.	.75	.75–.44	
116,955	Erie, Pa.	.60	.60–.50	
115,428	Fall River, Mass.	.55	.55–.40	.28
114,966	Wichita, Kans.	.58	.58–.39	
112,504	Wilmington, Del.	.50	.50–	
111,719	Gary, Ind.	.44	.44–	
111,580	Knoxville, Tenn.	.44	.44–	.44
110,879	Cambridge, Mass.	.65	.65–.44	.44
110,568	Reading, Pa.	.50	.50–	
110,341	New Bedford, Mass.	.55	.55–.28	.28

Population	City	Highest Admission Price Charged	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
109,912	Elizabeth, N. J.	$ .55	$ .55–.50	$ .28
109,408	Tacoma, Wash.	.70	.70–.46	
108,391	Tampa, Fla.	.44	.44–	.44
108,401	Canton, Ohio	.50	.50–	
105,9[illegible]	Sacramento, Calif.	.85	.85–.65	
105,087	Peoria, Ill.	.50	.50–	
102,177	Somerville, Mass.	.40	.40–	
101,389	Lowell, Mass.	.50	.50–	
101,268	South Bend, Ind.	.50	.50–	
101,065	Duluth	.44	.44–	
100,899	Charlotte, N. C.	.44	.44–.33	
100,518	Utica, N. Y.	.55	.55–.50	

Admission Prices Charged and Minimum Admission Price (Where Specified in License Agreement) in First Run Theatres in the 92 Large Cities for Princess O'Rourke

By Highest Price Charged

(Source: Exhibits W-22, 126 and Census)

Highest Price Charged	City	Population	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
$1.65	New York, N. Y.	7,454,995	$.44–1.65	$.
1.00	San Francisco	634,536	.60–1.00	
1.00	Oakland, Calif.	302,163	.50–1.00	
1.00	Seattle, Wash.	368,302	.70–1.00	
1.00	Portland, Ore.	305,394	.50–1.00	
.90	Washington, D. C.	663,091	.50– .90	
.90	Newark, N. J.	429,760	.65– .90	
.90	Los Angeles, Cal.	1,504,277	.75– .90	
.85	Jersey City, N. J.	301,173	.55– .85	
.85	Sacramento, Cal.	105,958	.65– .85	
.85	Chicago, Ill.	3,396,808	– .85	.55
.80	Buffalo, N. Y.	576,901	.60– .80	.55
.80	Spokane, Wash.	122,001	.60– .80	
.75	Detroit, Mich.	1,623,452	.65– .75	
.75	Paterson, N. J.	139,656	.55– .75	
.75	Philadelphia, Pa.	1,931,334	.68– .75	
.75	Camden, N. J.	117,536	.44– .75	
.74	Denver, Colo.	322,412	.39– .74	
.70	Miami, Fla.	172,172	.55– .70	
.70	Tacoma, Wash.	109,408	.46– .70	
.65	Boston, Mass.	770,816	– .65	
.65	Cambridge, Mass.	110,879	.44– .65	.44
.65	Milwaukee, Wisc.	587,472	– .65	

Highest Price Charged	City	Population	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
$ .65	Scranton, Pa.	140,404	$.50– .65	$.
.65	Trenton, N. J.	124,697	.44– .65	
.64	San Diego, Cal.	203,341	.44– .64	.60
.60	Cleveland, Ohio	878,336	– .60	
.60	Akron, Ohio	244,791	.50– .60	
.60	Kansas City, Mo.	399,178	– .60	
.60	Long Beach, Calif.	164,292	.40– .60	
.60	Hartford, Conn.	166,267	.50– .60	
.60	Yonkers, N. Y.	142,598	.55– .60	
.60	Pittsburgh, Pa.	671,659	– .60	
.60	Erie, Pa.	116,955	.50– .60	
.60	Baltimore, Md.	859,100	.50– .60	
.58	Wichita, Kan.	114,966	.39– .58	
.58	Salt Lake City, Utah	149,934	.39– .58	
.55	Albany, N. Y.	130,577	.30– .55	
.55	Utica, N. Y.	100,518	.50– .55	
.55	New Bedford, Mass.	110,341	.28– .55	.28
.55	Fall River, Mass.	115,428	.40– .55	.28
.55	Rochester, N. Y.	324,975	.50– .55	
.55	Cincinnati, Ohio	455,610	.44– .55	
.55	Dayton, Ohio	210,718	.40– .55	.40
.55	Toledo, Ohio	282,349	– .55	.60
.55	Des Moines, Iowa	159,819	[illegible]	
.55	Minneapolis, Minn.	492,370	– .55	
.55	St. Paul, Minn.	287,736	– .55	
	New Haven, Conn.	160,605		
.55	Elizabeth, N. J.	109,912	.50– .55	.28
.55	Omaha, Neb.	223,844	– .55	
.50	Atlanta, Ga.	302,288	.40– .50	

Highest Price Charged	City	Population	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
$ .50	Springfield, Mass.	149,554	$ – .50	$.
.50	Lowell, Mass.	101,389	– .50	
.50	Worcester, Mass.	193,694	– .50	
.50	Providence, R. I.	253,504	.44– .50	.28
.50	Syracuse, N. Y.	205,967	– .50	
.50	Peoria, Ill.	105,087	– .50	
.50	South Bend, Ind.	101,268	– .50	
.50	Canton, Ohio	108,401	– .50	
.50	Youngstown, Ohio	167,720	– .50	
.50	Dallas, Texas	294,734	.40– .50	
.50	Ft. Worth, Texas	177,662	.40– .50	
.50	Houston, Texas	384,514	.40– .50	
.50	San Antonio, Texas	253,854	.40– .50	
.50	Memphis, Tenn.	292,942	.40– .50	
.50	Bridgeport, Conn.	147,121	– .50	
.50	New Orleans, La.	494,537	– .50	
.50	Oklahoma City, Oklahoma	204,424	.24– .50	
.50	Reading, Pa.	110,568	– .50	
.50	Wilmington, Del.	112,504	– .50	
.50	Norfolk, Va.	144,332	– .50	.44
.50	Indianapolis, Ind.	386,972	.40– .50	
.50	Ft. Wayne, Ind.	118,410	.35– .50	.50
.49	Columbus, Ohio	306,087	.44– .49	
.49	St. Louis, Mo.	816,048	.24– .49	
.45	Louisville, Ky.	319,077	.36– .45	
.44	Chattanooga, Tenn.	128,163	.33– .44	.44
.44	Jacksonville, Fla.	173,065	.39– .44	
.44	Knoxville, Tenn.	111,580	– .44	.44
.44	Nashville, Tenn.	167,402	.33– .44	

Highest Price Charged	City	Population	Range of Admission Prices Charged	Minimum Contract Admission Price Where Specified
$ .44	Tampa, Fla.	108,391	$ – .44	$.44
.44	Gary, Ind.	111,719	– .44	
.44	Flint, Mich.	151,543	– .44	
.44	Duluth, Minn.	101,065	– .44	
.44	Tulsa, Okla.	142,157	.25– .44	
.44	Richmond, Va.	193,042	– .44	.44
.44	Charlotte, N. C.	100,899	.33– .44	
.40	Somerville, Mass.	102,177	– .40	
.40	Grand Rapids, Mich.	164,292	– .40	
.39	Birmingham, Ala.	267,583	.33– .39	.44
.29	Kansas City, Kan.	121,458	– .29	.30

Contract Minimum Admission Prices* and Actual Minimum Admission Prices* of Exhibitions of "Princess O'Rourke" Listed in Warner Answers to 1945 Interrogatories 6 thru 11

(Ex. W-23)

RECAPITULATION

I. Total Number of Exhibitions of Princess O'Rourke Covered by Interrogatories 6 thru 11 1,568

II. Total Number of Exhibitions where Contract Minimum Admission Price was not Specified in License 846

1.	Actual	minimum	admission	prices	were	from	.20	to	.30	in	146 instances
2.	"	"	"	"	"	"	.31	"	.40	"	321 "
3.	"	"	"	"	"	"	.41	"	.50	"	238 "
4.	"	"	"	"	"	"	.51 and over				107 "
											812

III. Total Number of Exhibitions where Contract Minimum Admission Price was Specified in License 722

1.	Actual	minimum	admission	prices	were	from	.20	to	.30	in	241 instances
2.	"	"	"	"	"	"	.31	"	.40	"	279 "
3.	"	"	"	"	"	"	.41	"	.50	"	123 "
4.	"	"	"	"	"	"	.51 and over				28 "
											671

A. Total Number of Situations where Actual Minimum Admission Price was Equal to Contract Minimum Admission Price 219

B. Total Number of Situations where Actual Minimum Admission Price was Greater than Contract Minimum Admission Price 395

1.	from	.01	to	.04	more	101 instances
2.	"	.05	"	.09	"	171 "
3.	"	.10	"	.14	"	68 "
4.	"	.15	"	.19	"	34 "
5.	"	.20 and over				21 "
						395

C. Total Number of Situations where Actual Minimum Admission Price was Less than Contract Minimum Admission Price 57

1.	from	.01	to	.04	less	25 instances
2.	"	.05	"	.09	"	7 "
3.	"	.10	"	.14	"	16 "
4.	"	.15 and over				9 "
						57

IV. Total Number of Situations where Actual Minimum Admission Price was not Available 85

A. Specified 51

B. Not Specified 34

* All prices are evening adult admission including tax.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 80

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 79

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, *et al.*

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR TWENTIETH CENTURY-FOX FILM CORPORATION AND NATIONAL THEATRES CORPORATION

JAMES F. BYRNES,
Attorney for Twentieth Century-Fox Film Corporation and National Theatres Corporation.

OTTO E. KOEGEL,
JOHN F. CASKEY,
FREDERICK W. R. PRIDE,
DONALD RUSSELL,
Of Counsel.

February 2, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

No. 80

BRIEF FOR TWENTIETH CENTURY-FOX FILM CORPORATION AND NATIONAL THEATRES CORPORATION

This brief is submitted on behalf of the defendants, Twentieth Century-Fox Film Corporation and its wholly owned subsidiary, National Theatres Corporation, who appeal from Sections III (5), III (6), and V of a decree (R. 3699-3700) of a district court for the Southern District of New York, convened under the Expediting Act of February 11, 1903, entered December 31, 1946 (R. 3694-3701). These defendants are appellees in the plaintiff's appeal herein (No. 79), and in their brief on that appeal, which is bound herein, ask for affirmance of all the other provisions of the decree.

History of This Litigation

This action, under the Sherman Act, was begun July 20, 1938, against the then eight principal producers and distribu-

tors of motion pictures, five of whom operated theatres. The petition sought injunctions against various distribution and sales practices alleged to be maintained by contracts and conspiracies in restraint of trade, and to compel the five theatre-owning companies to divest themselves of their theatres.

An amended and supplemental complaint was filed on November 14, 1940 (R. 3137-3201). In this amended and supplemental complaint, the plaintiff criticized the lack of competitive bidding by competing exhibitors in the licensing of motion pictures (R. 3173, 3177, 3178). On November 20, 1940, by consent of the plaintiff and the five theatre-owning defendants, a decree was entered (R. 3373-3402). This consent decree, among other things, enjoined each distributor from offering a motion picture for license until after it had been completely produced and trade shown (Sec. III); prohibited each distributor from licensing its trade-shown pictures in groups of more than five at a time (Sec. IV); required each distributor to license its pictures to any exhibitor on some run (Sec. VI); specified standards for clearance (Sec. VIII), and enjoined each distributor from arbitrarily refusing to license a run (Sec. X). The plaintiff agreed that it would not, for a period of three years after the entry of the consent decree, either in this action or other proceeding, seek to compel the theatre-owning distributors to divest themselves of their theatres, or to dissolve or break up any circuit of theatres of such defendants (Sec. XXI, R. 3395). A comprehensive arbitration system for determination of controversies arising under the decree was established under the auspices of the American Arbitration Association (Sec. XXII, R. 3395-3400).

On August 7, 1944, the plaintiff filed an application for a radical modification of the decree (R. 3414-3419). It requested a decree enjoining any defendant from thereafter acquiring any

financial interest in any theatre, and requiring each defendant, within three years, to "completely divorce its exhibition business from its production and distribution business to the end that no defendant directly or indirectly engaged in producing or distributing films shall then own any financial interest in theatres" (R. 3418).

It sought to eliminate Section XVII of the consent decree, which affirmatively stated each distributor's right to license its pictures to exhibitors on such runs as it might negotiate.

The application for modification did not ask for the abolition of the arbitration system; rather, it provided not only for arbitration of clearance and the other disputes arbitrable under the consent decree but sought the inclusion of a new section, to replace old Sections IX and X, which the plaintiff suggested should read as follows:

> "No distributor defendant shall license or make available for exhibition in theatres any films released by it upon terms which have the effect of unreasonably restraining competition between two or more theatres in exhibiting said films. Controversies arising on a complaint by an exhibitor thereby affected that a distributor has so licensed or made available such films for exhibition in the complainant's theatre or in a theatre competing with his theatre *shall be subject to arbitration* in accordance with the terms of this decree. If the arbitrator finds that this section has been so violated, he shall make an award which will describe the specific course of conduct found by him to violate this section and will require the payment of an amount by such defendant or defendants as he finds have engaged in such conduct which in his judgment will compensate the complainant for any pecuniary loss sustained as the result of such a violation or violations and discourage the recurrence of such violations" (R. 3417-3418). (All emphasis in this brief is supplied.)

On February 5, 1945, the plaintiff moved for the entry of an order enjoining the five theatre-operating companies "from granting unreasonable clearance in licensing for exhibition in theaters feature films distributed by them, pending the entry of a final decree herein" (R. 3420-3421).

A hearing on that application was had on March 5, 1945. Before the motion for injunction was determined, plaintiff filed its certificate for an expediting court (R. 3502-3503), which deprived the district judge of jurisdiction.

Hearings before the expediting court, consisting of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright, began on October 8, 1945, and were concluded November 20, 1945. The plaintiff did not call any witnesses and relied wholly on what it called a "paper" case. Oral arguments were had in January, 1946 (R. 2545). The opinion herein was filed June 11, 1946 (R. 3504-3563). It is reported in 66 F. Supp. 323. Proposed findings of fact and conclusions of law were submitted by all parties and extensive hearings thereon were had in October, 1946 (R. 2814-3090). The findings of fact, conclusions of law and decree of the court were filed December 31, 1946 (R. 3659-3702). They are reported in 70 F. Supp. 53. Timely motions were made by the defendants to amend certain of the findings of fact, conclusions of law and provisions of the decree, and hearings were had thereon on January 22, 1947 (R. 3091-3135). An order was entered February 11, 1947, denying these motions in all substantial respects (R. 3719-3720).

These defendants filed their petition for appeal on February 26, 1947 (R. 3726-3727), with their assignments of error and prayers for reversal (R. 3727-3737). An order was that day entered allowing their appeal (R. 3737-3738). This Court noted probable jurisdiction by order dated June 23, 1947 (R. 3840).

Jurisdiction

The jurisdiction of this Court to review by direct appeal the decree herein is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. Sec. 345).

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2, 4):

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *
>
> "§2. Monopolizing trade a misdemeanor; penalty
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> * * * * * *
>
> "§4. Jurisdiction of courts; duty of district attorneys; procedure
>
> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title; * * *"

STATEMENT

Motion Picture Business

The motion picture business falls into three successive steps—production, distribution and exhibition.

The end result of production is a master negative representing the final photographic version or edition of the screen play. The motion picture which one sees in the theatre is projected from a positive print developed from this master negative.

At the time this proceeding was begun in 1938, there were, in addition to the eight defendants, numerous individuals and corporations engaged in producing motion pictures (R. 1263-1265, 1350-1352). The number of domestic producers has substantially increased during the succeeding decade (R. 1521-1552, 626-631) and many foreign-made pictures are being imported. The cost of producing pictures has increased substantially. Picture production is a highly speculative business. This is particularly so with respect to companies which produce many pictures each year as compared with producers who make only one or two specially selected productions.

A steady volume of quality feature productions is required for the successful operation of theatres. The ordinary American theatre, with its frequent program changes and double billings, requires approximately 208 to 312 feature productions annually.

There are thirteen nation-wide distributors of motion pictures engaged in licensing pictures to the 18,000 American theatres. All eight of the defendants are such distributors. In its own distributing business Twentieth Century-Fox, for instance, maintains branch offices—or exchanges, as they are known in the trade—in 31 of the principal cities of the United

States. In each exchange there are salesmen and sales supervisors, bookers, cashiers, billers and other clerks. Twentieth Century-Fox's exchanges are separate from those of every other distributor and it uses no facilities in common. It distributes both its own films and some pictures made by independent producers (R. 1053-1055).

In the licensing of films by the distributor to the individual theatre, certain business practices developed. Many of them are as old as the industry itself. In large part, they owe their origin to economic necessity. Illustrative of this development is the system of runs and clearances. In 1944 the average film rental received by Twentieth Century-Fox on its most successful picture, Sweet Rosie O'Grady, was $201.89; yet the cost of a single positive print of that picture was $344.29. Thousands of theatres paid less than $50 film rental. And some theatres paid many times over the rental paid by the smaller theatres, as they must, if pictures are to be profitably produced.

This the court below recognized:

> "The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance." (R. 3531; *cf.* Finding 74, R. 3673)

Generally, a picture is first exhibited in the first-run theatres in the large cities; then in the first-run theatres in smaller communities; then in the neighborhood theatres in the larger cities and so on until the picture has been exhibited in 15,000 to 16,000 theatres in the United States.

Thus, when Twentieth Century-Fox licenses its picture "Captain from Castile" for exhibition in the Capitol theatre in Washington, no one else exhibits that picture in the Washington area during its performance at the Capitol, and for a limited number of days after the close of that engagement. That period of time which must elapse before the next showing of the picture, and which is usually specified in the contract, is called "clearance".

About the same time as "Captain from Castile" is exhibited for the first time or on first run in Washington, it is exhibited first run in Baltimore, Wilmington and Richmond. Exhibition in the more important smaller cities follows. Upon the expiration of a reasonable clearance period after the close of the first run showing in Washington, the picture comes to some of the neighborhood theatres and for many weeks thereafter is shown in different theatres throughout the city. For a period of two or three months, it can be seen at some theatre in Washington.

As a result of this method of licensing pictures, each theatre in the United States has a constant flow of pictures to it and every person has an opportunity to see every picture at an admission price he can afford to pay.

The exclusivity in the motion picture business is only temporary. The print, including all the sound effects, used at the Roxy theatre in New York and the Capitol in Washington, is exactly the same as the print used by a small theatre charging 15¢, some months later.

The necessity for runs and clearances is acknowledged by theatre operators. Usually a distributor licenses its pictures to a particular first-run exhibitor in an area. If this relationship proves to be satisfactory, it often continues from year to year (Thalheimer, R. 1379).

Of the 18,000 motion picture theatres in America, the five producer-distributors, Loew's, RKO, Paramount, Warner Bros. and Twentieth Century-Fox own or have an interest in only 3,137 (Finding 118, R. 3684). These theatres were acquired by the producers to prevent the boycotting of their productions, to provide regional "show cases" for the better advertisement of their productions, and to stimulate development of the industry.

From 1935 to 1945, 4,690 new theatres were opened (Finding 145, R. 3689). During that period Twentieth Century-Fox, for illustration, increased its total but 25 theatres. Thus, while the number of theatres greatly increased during the decade, Twentieth Century-Fox added an insignificant number.

Twentieth Century-Fox Film Corporation

Twentieth Century-Fox Film Corporation is a New York corporation organized in 1915. It produces motion pictures of high quality and distributes them, and some produced by others, in the United States and throughout the rest of the world, except where prohibited or restricted by foreign governments. The number of pictures which it has distributed during the ten motion picture seasons preceding the hearings varied each season and ranged from 61 in the 1936-1937 season to 25 in the 1944-1945 season (Ex. F-5).

These pictures are approximately 9% in number of those produced in the United States, and a somewhat lesser percentage of those distributed here (Finding 103, R. 3678; Exs. 40, 50, 80, 93, 125, 137, 362).

Twentieth Century-Fox is owned by the public. No other motion picture company has any interest in it. None of its officers or directors is an officer or director of any other motion

picture company. No officer or director of any other company is an officer or director of Twentieth Century-Fox (R. 216, 1253). Its pictures are produced in its own studio in Los Angeles, California, and distributed in this country from its 31 branches or exchanges located in the principal centers of population (R. 1053). It serves its more successful pictures to some 15,000 theatres in the United States, which is approximately the maximum number it could serve (R. 1072). Of the total film rental bill paid by all theatres in the United States, the part which Twentieth Century-Fox receives does not exceed 15% or 16%.

By far the largest source of its income is from film rentals paid by theatres which are unaffiliated with any producer or distributor. In 1944, such theatres paid to it 60.8% of its domestic revenue (Exs. F-18, F-27). Its own theatres account for 14.1%; the Loew's theatres, for 1.26%; the RKO theatres, for 5.52%; the Warner theatres, for 4.82%; and the theatres in which Paramount has an interest, for 13.46% (Finding 144, R. 3688; Exs. F-18, F-27).

Roxy Theatre, Inc.

Since 1937, Twentieth Century-Fox has owned all of the common stock of Roxy Theatre, Inc., which owns the Roxy theatre and the leasehold upon which it is erected at 50th Street and 7th Avenue in New York. This is one of the outstanding theatres in America and is used as a show case for Twentieth Century-Fox product. It is also a profitable investment. For some years, no pictures except those released by Twentieth Century-Fox have been exhibited therein (R. 1120-1121). It pays large film rentals (Exs. F-12, F-21). For statistical convenience it is treated as a theatre of National. Twentieth Cen-

tury-Fox has no interest in any other theatre except through its ownership of National Theatres Corporation.

National Theatres Corporation

Twentieth Century-Fox owns all the capital stock of National Theatres Corporation. National has five principal subsidiaries which own, lease and operate motion picture theatres in various parts of the United States, mostly in the western states (R. 2100-2101). The stock of National, formerly known as Wesco Corporation, was originally held by the public and was acquired by Twentieth Century-Fox in 1928 (R. 2104).

In 1933, the principal subsidiaries of National became bankrupt and their affairs were administered by trustees (R. 2105). In 193[illegible] reorganizations of these subsidiaries were completed. The ultimate result was that The Chase National Bank of the City of New York, which had been the largest creditor of National, became the controlling stockholder, owning 58% of the stock, and Twentieth Century-Fox, 42%. For eight years, the Chase National Bank continued to be the majority stockholder until, in 1943, Chase sold its stock to Twentieth Century-Fox for $13,000,000 (R. 1253).

Each of the five principal subsidiaries of National operates in a different part of the country and is separately managed by its own board of directors and officers (R. 2100). Fox Midwest has its home office in Kansas City; Fox Wisconsin in Milwaukee; Fox Inter-Mountain in Denver; Evergreen State Amusement in Seattle, and Fox West Coast Theatres in Los Angeles. Theatre policies, admission prices and methods of operation are determined upon and conducted separately by the management of each. Each of the five subsidiaries has its

own film licensing department and the respective officers of the companies have complete authority to enter into all contracts relating to the operation of the theatres and particularly film license agreements (R. 2009, 2015, 2052, 2100, 2107).

Acquisition of Theatres

Fox Film Corporation was organized in 1915 by William Fox, then already engaged in producing motion pictures and owning a few theatres and a booking agency.

In 1926, Fox Film Corporation acquired an interest in theatres on the West Coast by buying a one-third stock interest in West Coast Theatres, Inc.

The remaining two-thirds stock interest in that corporation was shortly thereafter acquired by Hayden, Stone & Co., bankers, who organized National Theatres Corporation (then known as Wesco Corporation) and sold its stock to the public. In 1928, Fox Film Corporation acquired the stock of National by issuing its own stock therefor and thus became the holder of all the stock of West Coast Theatres, Inc., the name of which it changed to Fox West Coast Theatres (R. 2104).

At that time Fox West Coast Theatres had a number of less than wholly owned subsidiaries and was associated with various individuals in the ownership and operation of motion picture theatres in different localities. These partial interests it has continued to hold. The other stockholders or "joint owners" were various: some were theatre operators who had formerly sold a part of their interest; some were heirs of former theatre operators; and some were simply members of the general investing public. Thus, a number of the partially owned theatre interests of National as they stand today came into existence prior to the time when Twentieth Century-Fox or National had any interest whatsoever in the theatres involved.

At the time of trial, National had an interest in 636 theatres out of a total of 18,076 in the country (Finding 118, R. 3684). It had one in Philadelphia and one in Detroit. It had first run theatres in Kansas City, Missouri, and in Kansas City, Kansas, in Wichita, Kansas, in San Diego, Oakland, Sacramento, San Francisco, Long Beach and Los Angeles, California, in Denver, in Spokane, in Seattle, in Portland, Oregon, and in Milwaukee. In none of the other 75 of the 92 cities in the United States having a population of 100,000 or more, did Twentieth Century-Fox or National have any theatre, first run or otherwise. In all of the 17 larger cities in which they had first-run theatres, they had first-run competition except in Wichita, Kansas.

There are 320 cities in the United States which have a population of between 25,000 and 100,000. In only 38 of them has National any theatres, and, as to these 38, it should be said that 7 of them are, in fact, part of metropolitan Los Angeles.

There are 1,630 towns in the country which have a population of between 5,000 and 25,000. National has theatre interests in only 102. These theatres of National are about one-half of one per cent. of the total number of theatres in the country. They were either acquired in 1928 as a part of National, as it was then constituted, or are theatres built or leased better to serve the communities in which National was then operating, or are theatres in communities adjacent to those in which National did have theatres (Finding 42, R. 3667).

Summary of Position in Industry

To sum it up: Twentieth Century-Fox produces about 9% of the feature motion pictures produced in this country and distributes a somewhat lesser percentage. As a distributor it

receives between 15% or 16% of the film rental paid by all theatres in the United States. Sixty percent of its revenue comes from unaffiliated, independent, exhibitors. It has an interest in only 636 theatres out of a total of 18,076. It has first run theatres in only 17 out of the 92 largest cities in the United States and has first run competition in every one of those cities except Wichita, Kansas.

National's Use of Other Distributors' Pictures

Twentieth Century-Fox does not make enough pictures to operate its own theatres exclusively with its own pictures. Nor does the revenue it receives from exhibiting its own pictures in its theatres begin to meet production costs.

As the court below found, except for a very limited number of theatres in the very largest cities, the 18,000 theatres in the United States exhibit the product of more than one distributor, and those theatres could not be operated on the product of only one distributor (Finding 151, R. 3689). This, indeed, is obvious. While the very largest theatres in the very largest cities may exhibit one picture on a single feature policy for several weeks, the ordinary theatre operates on a double feature policy, changes its program two or three times a week, and uses 208 to 312 pictures a year. A theatre, regardless of who its owner is, which changes its program two or three times a week and "double-features", uses substantially all of the quality motion pictures produced in this country.

National therefore licenses pictures distributed by the seven other distributor defendants and by other distributors, not defendants, both for exhibition in its first-run theatres in the larger cities and in its other theatres. Thus, in Kansas City, Missouri, it presently requires only the pictures of one other

distributor, first run, to supplement its own, but in its neighborhood houses it uses pictures of all distributors. In Denver, it uses the product of several other companies first run, and in its neighborhood houses it uses pictures of all distributors.

What is true of National is true, in general, of the theatres of the other four theatre-owning defendants. Each supplements its program by exhibiting pictures of the other producers. Twentieth Century-Fox licenses its pictures for exhibition in some, but by no means all, of the theatres of the other four theatre-owning defendants.

There is, however, no condition imposed by National that when it licenses, for example, Warner pictures for exhibition in some of its theatres, Warner theatres shall license Twentieth Century-Fox pictures for exhibition in Warner theatres. The same is equally true as to Loew's, RKO and Paramount (R. 2107).

Nor is there any pattern of combination, conspiracy or restraint of competition discernible from the use of the pictures of other companies, as is shown below.

Loew's

In the 92 cities of more than 100,000 population, National exhibits Loew's pictures first run in 11. It does not license Loew's pictures in Portland, Oregon, Philadelphia or Detroit, although Loew's does not have theatres in those cities. National is in direct competition with Loew's first run in New York, Kansas City, Missouri, and Denver.

Loew's has first-run theatres in 36 of the cities. It uses Twentieth Century-Fox pictures, first run, in only 9 of them.

RKO

In those 92 cities, National exhibits RKO pictures first run in 8. It does not license RKO pictures in Long Beach,

Philadelphia, Milwaukee or Detroit, although RKO does not have theatres in those cities. National is in direct competition with RKO first run in New York, Kansas City, Missouri, Denver, San Francisco and Los Angeles.

On the other hand, RKO has first-run theatres in 18 of these cities. Yet RKO theatres license most of Twentieth Century-Fox pictures first run only in 5 and some of them in 4 of these cities.

Paramount

In those 92 cities, National exhibits Paramount pictures first run in 10. It does not license Paramount pictures first run in Philadelphia, Denver or Kansas City, Kansas, although Paramount does not have any interest in theatres in those cities. National is in direct competition with Paramount first run in New York, Detroit, Kansas City, Missouri, and Los Angeles.

On the other hand, Paramount has an interest in theatres in 47 of these cities. Yet its subsidiaries license Twentieth Century-Fox pictures in only 22.

Warner

In those 92 cities, National exhibits most of Warner pictures first run in 6. It exhibits part of Warner pictures in 4: Long Beach, Oakland, San Diego and Sacramento. A non-affiliated exhibitor in those four cities is licensed the other Warner pictures. National does not license Warner pictures first run in Detroit, Kansas City, Kansas, or Kansas City, Missouri, although Warner does not operate theatres in those cities. National is in direct competition with Warner in New York, Los Angeles, Milwaukee and Philadelphia.

On the other hand, although Warner has theatres in 28 of the cities, it licenses Twentieth Century-Fox product in only 5, and, in two of these 5, only a part of the product.

Summary

National exhibits:

Loew's pictures in 11 of the 92 cities
RKO pictures in 8 of the 92 cities
Paramount pictures in 10 of the 92 cities
Warner pictures in 6 and a part in 4 of the 92 cities.

Twentieth Century-Fox licenses:

Loew's to exhibit its pictures in 9 of the 92 cities
RKO to exhibit its pictures in 5 and a part in 5 of the 92 cities
Paramount's subsidiaries to exhibit its pictures in 22 of the 92 cities.
Warner to exhibit its pictures in 3 and a part in 2 of the 92 cities.

Film Payments Received by Twentieth Century-Fox and Paid by National

A comparison of the film payments made to Twentieth Century-Fox by the four other theatre-owning defendants and the payments made by theatres of National to the four other theatre-owning defendants, likewise negatives the existence of any combination or conspiracy. It shows that there is not the slightest relationship between the payments made to Twentieth Century-Fox by the theatres of any other distributor and the payments made to any other distributor by the theatres operated by National.

Thus, during the last twelve years, the revenue which Twentieth Century-Fox has received from the Loew's theatres has never exceeded 2.1% of its domestic total; currently, it is somewhat less (Exs. F-18, F-27). During the same period, the revenue which it has received from the RKO theatres has never exceeded 5.74% of its domestic total; currently, it is 5.52% (Exs. F-18, F-27). The revenue which it has received from the Warner theatres has never exceeded 5.35% of its domestic total; it has been as low as 1.98%; currently, it is 4.82% (Exs. F-18, F-27).

Twentieth Century-Fox also licenses its pictures to some of the theatres operated by the many separate operating groups in which Paramount has an interest. During the last twelve years, the revenue received by Twentieth Century-Fox from those theatres in the aggregate has never exceeded 14.23% of its domestic total. It has been as low as 8.70%; currently, it is 13.46% (Exs. F-18, F-27).

Contrast this with National's payments during the last ten years. It has paid Twentieth Century-Fox from 16.72% to 27.47% of National's annual film bill; in 1944-1945 it was 20.01%. It has paid Loew's from 21.14% to 34.75%; in 1944-1945 it was 23.51%. It has paid Paramount from 12.71% to 18.19%; in 1944-1945 it was 15.61%. It has paid Warners from 8.87% to 12.47%; in 1944-1945 it was 9.62%. It has paid RKO from 7.04% to 10.24%; in 1944-1945 it was 9.52% (Ex. F-18, F-23).

In the 1943-1944 film releasing season (the test year generally used at the hearings) the same disparity of payments and receipts existed as is shown by the following table which has been compiled from defendants' answers to plaintiff's interrogatories.

Twentieth Century-Fox received from the theatres of

Loew's	2.1%	of its domestic film rental which was 6.6% of the Loew's theatres total film bill
RKO	5.2%	of its domestic film rental which was 17.0% of the RKO theatres total film bill
Warner	4.6%	of its domestic film rental which was 10.1% of the Warner theatres total film bill
Paramount	12.7%	of its domestic film rental which was 14.6% of the Paramount theatres total film bill
National	10.6%	of its domestic film rental which was 20.0% of the National theatres total film bill
Independents	60.1%	of its domestic film rental
	100.%	

National Theatres paid the following percentages of its total film bill to

Loew's	23.5%	which was 9.5% of Loew's domestic film rental
RKO	9.5%	which was 7.6% of RKO's domestic film rental
Warner	9.6	which was 7.8% of Warner's domestic film rental
Paramount	15.6%	which was 8.4% of Paramount's domestic film rental
Twentieth Century-Fox	20.0%	which was 10.6% of Twentieth Century-Fox's domestic film rental
Other distributors	21.8%	
	100. %	

The utter lack of relationship during the last decade between payment and receipt for films wholly refutes any claim that the theatre interests of the defendants have been used to control the distribution of their pictures.

Moreover, during this period there have been significant increases in both the dollar volume and the percentage of the whole which National has paid to the non-theatre-owning dis-

tributors. Thus, in 1935, National paid to Columbia 2.60% of its total film rental, and in 1944, 4.59%. In 1935 it paid to Universal 2.99% of its film rental; in 1944, 8.11%. In 1936 it paid to Republic .98% of its total film rental; in 1944, 2.27%.

Opinion, Findings, and Decree

The court below held that there was no monopoly or restraint of competition in the production of motion pictures (Findings 59, 60, R. 3670, 3695). The plaintiff, moreover, conceded that at the exhibition level each picture was in competition with every other picture for public patronage (R. 1062).

> "Mr. Wright: In so far as pictures themselves are concerned, I suppose every picture that plays, whether it plays in theatres owned by the same exhibitor or in others, it is in competition for public patronage with every other picture, and that each distributor wants to get the most that he possibly can out of every picture that is exhibited, wherever it is exhibited. I do not think there can be any question about that." (R. 1062)

Thus, at the beginning of the process—the production of a picture— and at the other end—the seeking of public patronage—there was found to be competition and no violation of the anti-trust laws.

The court held, however, that in the distribution of pictures the defendants by concert had maintained admission prices, uniform clearances and fixed runs. These it held to be violations of the anti-trust laws. Refusing to follow *Federal Trade Com'n* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, it assumed that the simultaneous sale of two or more pictures

was the conditioning of the license of one motion picture on the licensing of another, and illegal.

The conspiracy or concert of action which the court below found with respect to distribution practices as to runs, clearances and admission prices was based entirely upon inferences from similarity of action. What was found and condemned was a rigidity in the selection of customers, the licensing of runs, the granting of clearances and the specification of admission prices. These similar trade practices grew out of competition rather than out of restraints of competition and, in fact, were encouraged by governmental agencies such as the Federal Trade Commission in 1927 and the NRA in 1933-1935.

The principal executives of the defendants testified and categorically denied conscious conspiracy or combination. There was no countervailing testimony by the plaintiff and it is submitted that the testimony of these responsible officials that the offenses found did not originate in actual agreements or conscious conspiracies should have been accepted. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333.

The court below held that there was no illegality in the ownership of theatres by a distributor, that the defendants neither individually nor collectively had any monopoly of theatres or of the business of exhibiting motion pictures, and that the illegalities and restraints found were not in the ownership of many or most of the best theatres by the producer-distributors but in admission price-fixing and non-competitive granting of runs and clearances (Finding 154, R. 3690). The statutory court concluded that total divestiture of theatres would not remedy the distribution and sales practices found unreasonably to restrict competition and would be damaging to the public (Findings 155, 156, R. 3690).

The controlling findings are as follows (R. 3689-3690):

"152. There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution, or exhibition of motion pictures, except as found in findings 153 and 154 below.

"153. In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants.

"154. The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited.

"155. Total divestiture would be injurious to the corporations concerned and would be damaging to the public.

"156. Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agree-

ments and the other practices which have been found unreasonably to restrict competition."

The decree is in two principal parts. The first, Section II, deals with distribution practices. Each distributor is enjoined

1) from fixing the minimum admission price which the exhibitor charges the public (Decree II (1), R. 3695);

2) from granting clearances fixed by agreement with other distributors, or between theatres not in substantial competition, or in excess of that necessary to protect the licensee in the run granted (Decree II (2), (3), (4), R. 3695-3696);

3) from performing or making any franchise, formula deals or master agreements (Decree II (5), (6), R. 3696);

4) from conditioning the licensing of one picture on the exhibitors' licensing another (Decree II (7), R. 3696);

5) from licensing any feature as between competing exhibitors who desire to show it on the same run except on a competitive basis under which license is granted to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor (Decree II (8), R. 3696-3698); and

6) from arbitrarily refusing to license one exhibitor a picture on the run desired, and then licensing that same picture on the same run to his competitor (Decree II (9), R. 3698).

The second, Section III, deals with exhibition. National, and each theatre-owning company, is required to terminate existing pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit

or whereby profits of "pooled" theatres are divided among the owners according to pre-arranged percentages (Decree III (2), R. 3698). In fact, National, although not conceding the validity of this requirement, has terminated all such arrangements and has so reported to the district court in accordance with the decree (III, (5), R. 3699-3700). It has also terminated its arrangement with Paramount in San Francisco and Paramount is now operating its own theatres in that city exhibiting therein its own and other distributors' pictures in competition with National.

Twentieth Century-Fox and National are enjoined from owning in conjunction with another (who is a former, present or putative motion picture theatre operator), any interest in a theatre unless its interest is 95% or more. Where National has a lesser interest, it must either divest itself thereof or acquire from its co-owner an additional interest so as to increase its interest to 95% or more. But National is permitted to acquire such an additional interest only if it secures the approval of the court upon a showing that such acquisition will not unduly restrain competition in the exhibition of motion pictures (Decree III (5), R. 3699-3700).

National is enjoined from expanding its present theatre holdings (Decree III (6), R. 3700).

The consent decree was terminated, and with respect to the arbitration system the decree provided (Decree V, R. 3700):

> "But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves."

The court retained jurisdiction for the purposes of enabling any of the parties to the judgment, and no others, to apply

for such orders or direction as may be necessary or appropriate for the construction, modification or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof (Decree VIII, R. 3701).

QUESTIONS PRESENTED

Points to Be Argued

On this appeal, Twentieth Century-Fox and National Theatres argue only their assignments of error Nos. 25, 26, 27, 29, 30, 31, 33, 34, 35 and 39. The other assignments, however, are not abandoned in so far as they bear upon these defendants' arguments as appellees. Stated generally, these two defendants are not urging on this appeal any error in connection with Section II of the decree which enjoins various distribution and sales practices and which sets up a new method of distributing motion pictures on a bidding or competitive negotiation basis. They do urge that two paragraphs of Section III of the decree, namely, paragraph 5, dealing with holdings in less than wholly-owned subsidiaries, and paragraph 6, prohibiting the expansion of theatre holdings, be deleted. They also submit that the arbitration system created pursuant to the consent decree be retained, with appropriate modifications to deal with the problems which will arise under the decree.

ARGUMENT AS APPELLANTS

FIRST: THE DECREE SHOULD BE MODIFIED BY DELETING THOSE PROVISIONS OF PARAGRAPH 5 OF SECTION III WHICH PROHIBIT THE CONTINUED OWNERSHIP BY NATIONAL OF PARTIAL INTERESTS IN THEATRES IN CONJUNCTION WITH NON-DEFENDANTS.

After a painstaking review of the voluminous record in this case, the court below found:

(1) that the acquisition of theatres by Twentieth Century-Fox was legal and did not violate the anti-trust laws (R. 354; *cf.* R. 1945);

(2) that by such theatre holdings Twentieth Century-Fox does not and cannot individually or collectively with other defendants, have a monopoly of exhibition (Finding 119, R. 3684; *cf.* R. 3553);

(3) that the ownership of such theatres did not create or cause the illegal restraints of trade found by the court (Finding 154, R. 3690; *cf.* R. 3554-3555);

(4) that the illegal restraints found by the court involved primarily certain distribution practices, common to all distributors and applied to all exhibitors, restraints which could be effectively eliminated by the ordinary injunctive processes without resort to the harsh and extreme remedy of divestiture (Finding 156, R. 3690);

(5) that divestiture would be injurious to Twentieth Century-Fox and damaging to the public (Finding 155, R. 3690).

In spite of these categorical conclusions, abundantly justified by the record, the court below proceeded to decree that where National owns less than all of a theatre, it must acquire from the other owner or stockholder an interest sufficient to bring its holdings to 95%, or dispose of its partial interest in the theatre. In so far as these provisions of the decree apply to theatres in which the other owner or stockholder is a non-defendant, we contend that they are unsupportable and should be deleted.

Apart from the propriety of such requirement, it must be obvious that it places National in a most inequitable position. As the other owner or stockholder cannot be compelled to

sell, National may have no alternative but to divest itself of its partial interest if he should refuse to sell at a reasonable price.

This ruling came as a surprise to all the parties. The plaintiff, in its pleadings, did not claim that any illegality resulted from relationships between a single defendant—such as National—and an independent. The plaintiff did not, during the hearings, tender any issue with respect to that subject. It introduced no evidence except as to the fact that each of the defendants had some wholly-owned subsidiaries and some partially owned. The exhibits referred to in the court's opinion (R. 3548) were introduced to prove relationships between one defendant and another defendant or an alleged affiliate of such other defendant. The plaintiff's claim of illegality was in the joint ownership of theatres by defendants. None of those exhibits was offered to establish any basic illegality in the joint ownership of theatres by a defendant and another person not a defendant. Nor does any of them furnish any support for the court's decision in this respect. Moreover, no evidence was introduced concerning the mannet of acquisition, the intent or purpose of the acquisition, or the present effect upon competitive conditions of such partially-owned interests.

The inadequacy of the record to support the court's decision on this point is strikingly illustrated when applied to National. There are approximately 50 situations in which National and a non-defendant are interested in theatres, either through the ownership of stock in corporations or the ownership of a direct interest in the theatres themselves (Exs. 21-24). Some of these situations involve only one theatre. Others involve a substantial number of theatres. Yet there is evidence in this case with respect to only 2 of these 50 situations. And, with respect to these 2, the evidence simply consists of the documents and agreements reflecting the joint interest (Exs. 238,

239). Furthermore, as stated above, even this documentary evidence was introduced by the plaintiff solely for the purpose of establishing that the relationship between National and the other parties thereto was a relation between National and another defendant—a factual point contested by the defendants and not determined by the court.

Nor was it urged by the plaintiff in argument, or otherwise, that illegality existed in the ownership of less than all of an interest in a theatre. Because of this, and because the court had indicated that it was not concerned with the origin or development of these relationships (R. 105), no evidence was offered by National as to these situations. We therefore think it fair to state that the record is barren of any evidence to justify the judgment of the court below on this issue.

We think that the court below reached its decision concerning these partially owned theatres by resorting to an unjustifiable analogy. The court had determined that the pooling of competing theatres by a defendant and another was an improper restraint of competition. It then apparently concluded that in every other instance in which some other person was interested in a theatre with a defendant the relationship was tantamount to a pool. Because of this assumption it made Finding 116 and included in the decree the blanket condemnation of these joint ownerships.

We contend the court erred in the assumptions which it made and in the conclusions which it drew from them. In Finding 116, the court said (R. 3683):

> "116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other

joint owner, who otherwise would be in a position to operate theatres independently."

It is perfectly true that the other owners of the stock in corporations in which National has an interest wish to participate in the business of exhibiting motion pictures in the sense that they wish to participate in the profits of the enterprise. But it does not at all follow that such persons would have entered the motion picture business on their own, or would have built or operated theatres in competition with National. The record does not disclose whether these other stockholders are exhibitors, putative or otherwise. There is nothing to show that in fact their original investment with National was a restraint of competition or that but for the investment with National they would have operated competing theatres.

We therefore submit that it is not a *per se* violation of the anti-trust laws for National to own less than all the stock of a subsidiary which owns or operates a theatre. We further submit that to determine illegality in such a case there must be established: monopoly, the improper union of theretofore competing theatres, or the illegal operation of the theatres in some manner which restrains trade.

Furthermore, from what little evidence there is in the record on the subject, it appears that there is substantial competition in the communities where some of these partially owned theatres are located. For example, the competitive conditions in Los Angeles, where a number of National's less than wholly owned subsidiaries are located, are described in the record at pages 2125-2130. If there is already competition, this Court in *United States* v. *National Lead Co.*, 332 U. S. 319, made it clear that divestiture will not be authorized just to secure an additional competitor.

The principal restraints of trade found by the court, and the only restraints with respect to which direct evidence was introduced by the plaintiff, can all be effectively prevented by injunction. Where this is so, this Court has made it plain, in the *National Lead* case that the extreme remedy of divestiture will not be granted. In that case, the Government sought divestiture of property lawfully acquired—a situation quite analogous on the record in the present case. The restraints charged consisted of agreements between competitors which restricted the trade in the product manufactured in the plant, divestiture of which was prayed. With those restrictive agreements enjoined, the ownership of the physical plants was held legal and divestiture unnecessary. In summing up its conclusions, this Court said (332 U. S. 319, 353):

> "It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

We think the above language is particularly appropriate here. We emphasize that the record contains no evidence whatsoever with respect to the great majority of these jointly held theatre interests. Nothing is shown as to their origin, their purpose or their effect. There is nothing upon which this Court could predicate a determination that it was necessary to realign these existing operating units. There is no evidence that effective and lawful competition does not exist in the communities where these theatres are located.

The court below has indicated that all objectionable restraints in distribution can be effectively prevented by injunction. It found no monopoly in exhibition. There is no evidence that the great majority of the theatre interests affected represent improper joinder of theretofore competing units. Consequently divestiture is not an appropriate remedy here.

While not receding from the position taken above, we submit that at least the provisions of paragraph 5 of Section III of the decree should be modified to permit the retention by National of its less than wholly owned subsidiaries where it can show to the court that its retention would not unlawfully restrain competition. The option granted by the decree that National may "buy or sell" outstanding partial interests is somewhat illusory, as the court did not undertake, as it could not have undertaken, to compel the other stockholder to "buy or sell." It must be apparent that in many instances it may be impossible for National to buy and that a retention of its partial interest,—where that interest represents no unreasonable restraint of competition,—is the only just solution.

SECOND: THE DECREE SHOULD BE MODIFIED BY DELETING PARAGRAPH 6 OF SECTION III WHICH ENJOINS THE DEFENDANTS FROM EXPANDING THEIR PRESENT THEATRE HOLDINGS.

We respectfully submit that the court below erred in incorporating in the decree the provisions contained in paragraph 6 of Section III which enjoin the defendants from expanding their present theatre holdings. Nothing in the record, in the opinion or in the findings of fact furnishes any basis for the inclusion of this injunction.

As stated, the court has found that it is legal for Twentieth Century-Fox and National to own and operate theatres (R.

3554). It has found that Twentieth Century-Fox and National have no monopoly in the exhibition field either nationally or in particular localities. It has found that there is no evidence indicating that anything done by these defendants constitutes an attempt to monopolize exhibition.

The illegality which the court found in the ownership of partial interests in conjunction with another was not in the number of such interests or because they constituted monopolization but rather that they were restraints of competition.

The court has found that in 1945, Twentieth Century-Fox and National had an interest in only 636 theatres, or about 3.52% of the then 18,076 motion picture theatres in the United States (Finding 118, R. 3684). The court did not criticize or find anything illegal in any of the activities of these defendants in acquiring those theatres. Nor did it intimate that the position of these defendants was so substantial in the exhibition field that its enlargement might bring about unlawful restraints. Moreover, it has not found, nor would there be any support in the record for a finding, that Twentieth Century-Fox or National has indicated any intention or desire to expand in any substantial way.

We submit that the only justification for the injunction against expansion of theatre interests would be that the acquisition of additional theatres would result in monopolization or restraint of trade. Yet the court, in its opinion, expressly stated that this was not the case. It said that there was no basis for injunctions against these defendants as exhibitors by reason of any monopolistic practices in the exhibition field (R. 3553):

> "The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. *They can only be restrained from the*

> *unlawful practices* in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized."

Indeed, the court, in its opinion, in outlining the decree to be entered, indicated that it recognized the propriety of permitting certain types of theatre acquisitions in the future, coupled in certain instances with approval by the court. It said (R. 3562):

> "But it [the decree] shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor."

Despite this statement, however, the court, when it finally entered the decree, incorporated the injunction against expansion, and denied the defendants the right to apply to the court for relief in specific instances.

We urge that this provision of the decree running counter, as it does, to the opinion, and without support in the record, should be eliminated. In view of the insignificant position which these defendants have in the exhibition field, it is clear that the acquisition of additional theatres would not, *per se*, result in any monopoly or other violation of the anti-trust laws.

Twentieth Century-Fox and National have no theatres in 29 states. Moreover, in the 92 largest cities of the United States, those having a population of 100,000 or more, these defendants have theatres in only 17 of such cities. For example, they have no theatre in Chicago, Boston, St. Louis, Baltimore, Washington, Minneapolis, St. Paul, Dallas, Atlanta, Louisville, Indianapolis, Birmingham, Fort Worth, Houston, San Antonio, New

Orleans, Cleveland, Columbus, Oklahoma City, Tulsa, Omaha, Des Moines, or 53 other cities having a population of 100,000 or more.

It is manifest that the acquisition of new theatres in areas where they do not now operate, and particularly where other defendants or large circuits have theatres, would promote and stimulate competition rather than restrain it. Certainly the erection by Twentieth Century-Fox of a new theatre in Washington would be in the public interest and would stimulate, rather than restrain, competition.

Apart from this consideration, however, the injunction in question seriously affects the normal business operations of the defendants. The court has held that it is proper for National to continue its operations in the areas in which it now has theatres. Yet, the restrictions contained in the decree effectively imperil even that business. In serving the communities where it now has theatres, National must be permitted to develop its business in line with the needs of those communities. It is obvious that in order to maintain its business it will be necessary from time to time to build or otherwise acquire other newer and more modern theatres in order to keep pace with the growth of these communities and changing factors in the theatre field. Shifts of population and new building developments may likewise require additional theatres. If National is to serve the territory which is contiguous to the community now served by it, it must be permitted to construct new theatres.

These are considerations which are wholly unrelated to any issue of "expansion" as the term has been used by the plaintiff in this case. They are but incidents of normal business development and growth. No reason exists to deny them to these defendants.

There is nothing in the history of the acquisitions by National during the last decade which would indicate any purpose on its part to acquire a substantial number of additional theatres. As above stated, the district court found that National had an interest in 636 theatres at the time of trial. This we think erroneous and that the accurate number was 581. But be that as it may, the net increase in the number of its theatres from 1938 to 1945 was but 25, which is at the average rate of a little more than 3 a year. In that same period the net increase of all theatres in the United States was over 4,000 (Finding 118, R. 3684).

While no injunction against the acquisition of additional theatres should be contained in the decree, we submit that, if the present language be retained, provision should be made to permit a defendant to come to court for approval of any acquisition upon a showing that the proposed acquisition would not unduly restrain competition in exhibition. We contend that the very least to which these defendants are entitled is a qualification along these lines. We see no justification for denying to the defendants the opportunity of demonstrating *to the satisfaction of the court* that a proposed theatre acquisition would not restrain competition and therefore should be permitted. To carry this provision, which is obviously punitive, to the extent of condemning theatre acquisition, without regard to its purpose or effect, can, we submit, find no support in authority. See *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 726; *Labor Board v. Express Pub. Co.*, 312 U. S. 426.

While we do not contend that the precedent is controlling, we point out that in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, the United States appealed from that part of the decree dealing with future acquisition of theatres and asked this Court to substitute for the lower court's decree a provision

restraining future acquisitions "except after an affirmative showing that such acquisition will not unreasonably restrain competition". That was done (323 U. S. 173, 185, 187). We also suggest that in *United States* v. *Schine*, recently argued here, Section III of the decree entered July 2, 1946, provided:

> "No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition. Such showing shall be made before this court upon reasonable notice to the Attorney General at Washington, D. C."

The United States did not appeal.

THIRD: THE DECREE SHOULD BE MODIFIED SO AS TO PROVIDE FOR THE CONTINUANCE OF THE ARBITRATION SYSTEM ESTABLISHED PURSUANT TO THE CONSENT DECREE AND FOR THE ARBITRATION OF DISPUTES UNDER THE DECREE.

The pleadings upon which the hearings were held are the amended complaint filed November 14, 1940 (R. 3137-3201), and the motion to modify the decree, filed August 7, 1944 (R. 3414-3419).

The amended complaint filed after substantial discovery proceedings, both by way of examination of officers of the defendants on oral depositions and answers to searching and voluminous interrogatories (R. 3199-3200), prays that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree. In the decree entered on consent on No-

vember 20, 1940, an arbitration system was established and the American Arbitration Association was made administrator of that system (R. 3373, 3376, 3377, 3378, 3379, 3382-3386, 3392, 3395-3400, 3402-3413).

The system worked well. Tribunals were established in each of the 31 exchange cities and a panel of 1065 outstanding citizens nominated by the American Arbitration Association to serve as arbitrators. At November 1, 1945, 416 proceedings had been begun—approximately three-fourths related to clearance. Legitimate grievances were corrected. There had been 283 awards. In 177 some relief was granted (Ex. W-16, Schedule III), thus demonstrating the effectiveness of arbitration to solve exhibitors' grievances.

In its application for a modification of the decree filed August 7, 1944, the plaintiff not only did not ask for a discontinuance of the arbitration system but rather sought an extension of it so as to make arbitrable a claim by an exhibitor that motion pictures had been licensed by a distributor upon terms which had the effect of unreasonably restraining competition between two or more theatres in exhibiting such pictures. The plaintiff proposed that the arbitrator should be authorized to make an award which would proscribe the specific course of conduct found by him to violate the decree and require the payment of an amount of money which would compensate the complainant for any pecuniary loss sustained as a result of a violation, and discourage the recurrence of such violations.

Yet, at the trial, the Special Assistant Attorney General who was trial counsel for the plaintiff was unwilling to consent to a continuance of the arbitration system at all. The district court apparently considered consent of the plaintiff necessary, and, lacking it, regretfully decreed the termination of the

arbitration system. In this respect, we think it underestimated its power.

In its opinion the court said:

> "Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits '* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof.' That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct." (R. 3516)

Finding 160 is as follows:

> "160. The arbitration system created by the Consent Decree of November 20, 1940, has demonstrated its usefulness in dealing with exhibitors' complaints of unreasonable clearance and if extended to cover differences which may occur under the system to be established by the Decree herein, will be effective and result in quick and expeditious decisions and a saving of time and money." (R. 3690-3691)

In its supplemental opinion of December 31, 1946, the court said (R. 3702):

> "The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.
>
> "Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that 'a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein.'
>
> "We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree."

In the first place, the consent given by the plaintiff in 1940 was not limited to the three year trial period referred to in Sections XXI or XXIII (R. 3395, 3400). That period was primarily related to the time during which the plaintiff was not free to seek divestiture of theatres. While, of course, the arbitration system could be modified or even abolished by the court under the modification clause in Section XXIII of the decree,

that only could be done by evidence and for cause. *Chrysler Corporation* v. *U. S.*, 316 U. S. 556; *United States* v. *Swift & Co.*, 286 U. S. 106; *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. C. Del., 1942). Certainly, at the end of three years the district court would not have been *required*, contrary to its own judgment, to terminate the arbitration system because the plaintiff withdrew its consent.

The court below found, as a fact,

(1) that arbitration was a particularly appropriate and efficient remedy;

(2) that actual use of arbitration, following the entry of the consent decree, had demonstrated the effectiveness of that remedy; but

(3) concluded that, in the absence of consent of the plaintiff, it was without power to impose what it had found to be an appropriate remedy for meeting the situation.

The need for this proper remedy is even more imperative under the final decree of the court below. That decree necessarily speaks in general terms, particularly with respect to the distribution procedures enjoined. Unreasonable clearance is prohibited. Clearances between theatres not in substantial competition are prohibited. But, practically, as between a theatre in Arcadia, and one fourteen miles distant in Dodge City, what does that mean?. Is fourteen day's clearance reasonable? Are the theatres in substantial competition? Who is to decide?

Under Section II 8 of the final decree, pictures are required to be licensed to the highest bidder having an adequate theatre. But, since license terms for the better pictures in the larger theatres are not expressed in specific dollars but in percentages of prospective income, there is considerable room

disagreement as to which exhibitor in fact offered the best terms. As the district court pointed out, arbitration of those disputes is the best and cheapest procedure (R. 3558).

Of course, use of an arbitration system is not to be mandatory. Rather it is to be auxiliary. The exhibitor who feels aggrieved may bring suit under the Sherman Act, or may persuade the Department of Justice to favor his cause in a contempt proceeding.

If it should be deemed that the plaintiff never consented to a permanent arbitration system, or that the Special Assistant Attorney General had the power to revoke the plaintiff's consent, nevertheless, we submit that the district court had the power to authorize the maintenance by consenting defendants of an appropriate arbitration system under rules and procedures approved by the district court as a convenient, cheap, expeditious, auxiliary enforcement procedure.

Decrees in Sherman Act cases must necessarily be hand-tailored. *International Salt Company* v. *The United States of America*, decided November 10, 1947; *United States* v. *National Lead Co.*, 332 U. S. 319; *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173; *Siegel Co.* v. *Trade Comm'n.*, 327 U. S. 608.

Where, as here, at least five of the defendants are willing to arbitrate alleged breaches of the decree and to support for that purpose an arbitration system maintained under the control and supervision of the American Arbitration Association, we submit that the district court had the power, as it certainly had the inclination, to include such a system within its decree.

ARGUMENT AS APPELLEES

We here reply to the plaintiff in No. 79.

Before discussing the specific arguments which we think erroneous, we direct attention to the general philosophy and structure of the plaintiff's brief.

The facts concerning the individual status of these two defendants, Twentieth Century-Fox and National Theatres Corporation, are fully set forth, *supra*, and the plaintiff's brief does not controvert them.

We contend that both with respect to the matters covered in our argument and those relevant to a determination of the adequacy of the decree entered by the court below, those are the only controlling facts which should enter into the judgment of this Court. These two defendants cannot be "lumped" together with all other defendants to the end that the statistical results of such a joinder can be used as a basis for a hypothetical "monopoly" argument.

Though the plaintiff states, in the preface to its brief (p. 11), that it does not challenge the evidentiary findings of the court below and will rely upon them, its argument and its entire concept of the issues wholly negate that statement. The court below held that "the five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553). Yet the plaintiff's argument, in the main, completely ignores this basic finding. It proceeds as though its claims of monopolization in the exhibition field had been sustained, rather than specifically rejected.

Space does not permit us to call attention to every one of the many instances in which the plaintiff has resorted to this "collective approach" in its presentation of what it calls the "Facts." Nor can we advert to every instance where the plaintiff attempts to prove its point by catchphrases and character-

izations. These run throughout its brief. Their persistent use, we contend, is improper and meaningless.

We therefore point out that our restraint from exposing each instance of the impropriety of this "collective approach" and each use of such phrases as "cross-licensing," "vast theatre holdings," "established proclivity," "integrated vertical combinations," and "market control,"[4] indicates no acceptance of plaintiff's technique.

The plaintiff, in the preface to its brief (p. 11), also states that its appeal is to be confined largely to the adequacy of the relief granted by the court below. This statement would lead to the expectation that the plaintiff would analyze the various trade practices, which the court below determined to be illegal, and demonstrate how the specific injunctions and other affirmative relief, granted with respect thereto, were inadequate. No such presentation is made. We will show that none is possible.

Upon analysis, we submit that all that the plaintiff's brief offers in this respect is: (a) A blanket condemnation of the decree below; (b) an unreasoned prophecy that the court's injunctions will be ineffective; (c) a dissatisfaction with the refusal of the court to accede to the plaintiff's plea for divorcement; and (d) a plea for more severe injunctions (what the plaintiff calls a ban on "cross-licensing"). This last approach, we shall demonstrate, has been injected with the thought that even though this Court would affirm the court below on the divorcement issue, it could be led into framing a decree which, by injunction, would impose such severe restrictions upon these defendants as to force upon them theatre divestiture as a practical matter.

In this reply we will first deal with the adequacy of the decree and then consider the plaintiff's arguments as to divorcement.

FIRST: THE INJUNCTIONS CONTAINED IN THE DECREE, TOGETHER WITH THE AFFIRMATIVE RELIEF GRANTED BY THE COURT, ARE ADEQUATE TO BRING THE CONDUCT OF THE DEFENDANTS INTO HARMONY WITH THE ANTI-TRUST LAWS.

We have already referred to the trade practices which the court below found illegal and described generally the injunctive provisions which were directed to each one of them. We also summarized the additional relief granted by the court, namely, the requirement of the competitive licensing of runs, which was designed to eliminate any rigidity in the playing position of theatres or the availability of product.

The plaintiff in its brief has also enumerated the practices which the court below determined to be illegal, but leaves the impression that the court below did nothing whatsoever to eliminate them. Therefore, despite our prior reference to the decree, we here list the practices which the court criticized and analyze the relief contained in the decree with respect to each of them.

Our discussion of the relief granted, against the background of the court's opinion, does not, however, carry with it any concession that these defendants have, in fact, violated the Sherman Act. As stated in our appellants' brief, there was no direct proof of conspiracy or combination, and the finding of law violations is based upon inferences and implications from similarity of conduct, which, in our belief, were unjustified.

Admission Price Fixing.

We believe that the condemnation by the court below with respect to the fixing of admission prices was occasioned because of contracts and conspiracies which it found to exist

among distributors and exhibitors to maintain a rigid system of runs, clearances and prices. We do not think that the record in this case presented the issue of the right of a single producer of a motion picture to agree with its non-exclusive licensee as to the admission price it will charge the public for witnessing the exhibition of the picture. On such a limited issue we think there could be no denial of the producer's right.

But be that as it may, the injunctive remedy in this decree is against all forms of price fixing. It is sweeping and unequivocal. It would be difficult to phrase a prohibition in more comprehensive language.

Clearance.

The court below, while sustaining the legal validity of agreements for clearance between runs, struck down all clearance systems (which had resulted in uniformity and rigidity) and prohibited clearances between theatres not in competition with each other. It made the distributor responsible for the length of clearance, as to time and area, by placing on the distributor, who is a party to the decree, the burden of justifying any clearance attacked.

This is certainly adequate relief. Short of prohibiting the distribution of motion pictures on runs with contractual clearance between them, which is unthinkable, the relief granted is comprehensive and complete. We say unthinkable because, as the court below found, clearance is essential in the distribution of motion pictures (Findings 75-78, R. 3673-3674), and has made possible motion picture entertainment in nearly every community in the country, at admission prices within the reach of all.

Franchises.

The decree prohibits any licensing agreements for pictures to be released over a period of more than one year. Again, the relief is sweeping. While it may be, as the court below seemed to believe, that some franchises had been used by exhibitors to attempt to monopolize the supply of motion pictures, that could not have been true of the great bulk. Nevertheless, to avoid classification into the good and the bad, the decree prohibits all. And in addition to this, it was established that none of the defendants who were parties to the consent decree had entered into any franchise since June 1940—almost eight years ago.

Master Agreements—Formula Deals.

Here, too, the decree prohibits all. We believe that, in the main, master agreements were used by a distributor and an exhibitor operating a number of theatres primarily as a matter of convenience, and that the essential terms for each theatre, as they appeared on the "deal sheets" annexed to the master agreement, were negotiated theatre by theatre. But be that as it may, there must be a separate contract for each theatre in the future.

So, too, formula deals, which were primarily a labor saving method of negotiating arising out of a distributor's effort to secure higher film rentals based on its assertion of the superior quality of its pictures, are absolutely prohibited.

Conditioning.

By the decree, a distributor is prevented from conditioning the licensing of one of its pictures on the exhibitor's agreeing to license another. While there is considerable proof that each of the distributors licensed many of its pictures together on a single contract—either a season's output in the case of

some of the companies, or in small blocks as in the case of others—there is no proof of conditioning. And if there were, it is difficult to see the inherent illegality.

But again the injunction here is complete. Each individual picture must be offered individually—the buyer (the exhibitor) is to have his choice of those he will license.

And, as a complement to this requirement, the distributor must offer the pictures theatre by theatre. It is not only that a circuit exhibitor may not demand that the pictures be licensed to *all* of its theatres, as a condition to licensing them in some of its theatres, but that the distributor cannot say to an exhibitor, "If you want to exhibit my pictures in one of your theatres, you must exhibit them in all."

Pooling Agreements.

The joint operation of two or more competing theatres, one owned by a defendant and the other by another, defendant or stranger, is prohibited by the decree (III, 2). This provision has been complied with (Report filed July 1, 1947). It is inconceivable that there will be any violation of this specific prohibition against making like agreements in the future.

Rigidity in the Run and Clearance Structure.

As its remedy against the rigid system of runs and clearances found to exist, the court below established a system of licensing which has come to be called competitive bidding—or, by its more articulate opponents, auction block selling.

There is a considerable divergence of attitude among the defendants toward it. Four of the defendants—Twentieth Century-Fox, Loew's, RKO and Warner—are quite willing to try it. Twentieth Century-Fox does not endorse the prophecies of ruin and destruction voiced by some of the other defendants.

True, it has difficulty in wholly comprehending the precise requirements of the controlling paragraph (Decree II, 8) but it has faith in its ability, with the assistance of the district court, to establish a fair and workable system.

In addition to this specific remedy, the decree (II, 9) establishes a general standard that an exhibitor who seeks a specific run may not be arbitrarily refused it.

(a) Plaintiff fails to establish that the decree is inadequate.

What does the plaintiff offer to convince this Court that this judgment below was erroneous or would be ineffective? Its brief, it is true, contains repeated prophecies that the decree will be inadequate. But such unsupported prognostication is scarcely an answer to its apparent effectiveness. It is also suggested that in the eyes of the plaintiff, the defendants have a "proclivity" for contumacious conduct and there is the intimation that they might violate the decree. We are sure that this Court has adequate confidence in the efficacy of the power of the district court to deal with any such conduct, if, contrary to our belief, it should develop.

(1) Plaintiff's references to prior proceedings and regulation are irrelevant.

Next, the plaintiff points to a number of other anti-trust proceedings which, over the years, have been instituted by it and private individuals against companies formerly in the motion picture business or against one or several of these defendants. We think it clear that these proceedings have been referred to solely to create prejudice. It is, of course, true that the motion picture industry has been, from its very beginning, a litigious one. But it is a far cry to say, for example, that the efforts of unidentified persons thirty years ago to enforce

or invalidate patents on motion picture equipment, can be used as an indictment of the conduct of the present responsible officers of these defendants.

Moreover, it is significant that plaintiff in its references to prior litigation in this field has seen fit to ignore those cases in which the decisions have been in favor of the defendants, such as *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830; aff'd 113 F. 2d 932; *Gary Theatre Co.* v. *Columbia Pictures Corp., et al.*, 3 C. C. H., Fed. Trade Reg. Serv., p. 26,210; aff'd 120 F. 2d 891; and *Rolsky* v. *Fox Midwest Theatres*, C. C. H., Fed Trade Reg. Serv., p. 6442, to name a few.

The varying decisions in these prior anti-trust proceedings, if they have any bearing on this case, disprove the existence of any national pattern or any overriding conspiracy. In some of them, one or more defendants have been found to have violated the Sherman Act, while co-defendants have been absolved. In some local situations it has been adjudged that no basis existed for a finding of conspiracy or wrongful conduct on the part of any of the defendants. In others, involving some of the same trade practices in a different setting, the defendants have been held liable. Such disparity in the outcome of these cases would not exist if these defendants had been parties to any conspiracy on a national scale.

Thus, we say that plaintiff's references to this history of litigation in nowise advance its argument that "experience shows that no judgment which merely regulates defendants' trade practices can give adequate relief" (Brief, p. 72). We will not analyze those cases in detail. Suffice it to say, they represent, over the span of thirty years, litigation involving many and varied issues and many differing local factual situations. It is interesting to note, however, that though these

defendants have owned theatres ever since the first one of these proceedings was commenced in the '20s, it was not until the case now before this Court was instituted that the plaintiff advanced the claim that the ownership of theatres was illegal.

In describing steps taken in the past to regulate trade practices, the plaintiff has referred to the NRA Code which was in effect from December 1933 to May 1935 (Brief, p. 85). As plaintiff says, during that period local clearance and zoning boards were set up by the Government for the purpose of establishing reasonable periods of clearance. The plaintiff fails, however, to set forth the full experience flowing from the activities during this period when the NRA was effective,—an experience which has had a far-reaching effect upon some of the issues in this case, and requires amplification.

The local clearance and zoning boards were composed of representatives of all branches in the industry. They were established to secure impartial, unbiased determinations. Plaintiff's suggestion that they were dominated by the distributors is unworthy and finds no support in this record or elsewhere. When codes were promulgated by these local boards they were required to be submitted for approval by the Code Authority in Washington, which certainly was entirely independent of the distributors and their affiliated theatres.

With respect to the Los Angeles area, the local clearance and zoning board did establish a Code which set forth the determinations of that board as to reasonable clearances. This was approved by the Code Authority in Washington. There was thus put into practical operation the determination of this representative board in the industry as to clearance. Naturally, all of the distributors, as they were required to do, then licensed their pictures in accordance with this determination. Necessarily the result was that the clearance applicable to the pictures of each distributor was uniform.

Then the NRA was declared unconstitutional. Thereafter, although there was no law compelling the distributors to adhere to the clearance set up under the Code, nevertheless, those clearance schedules did represent an objective determination as to what was fair and reasonable. In consequence, each distributor in the main continued to license its pictures on that same basis. It, indeed, would have been extraordinary had they not done so. If any radical changes had been made, if there had been any significant departures from such schedules, the distributors would then have been accused of discrimination and arbitrary action.

We refer to this history because it shows how certain aspects of uniform conduct in this industry came into existence. It does not, we submit, furnish any support for plaintiff's argument that regulation by decree is inadequate.

(2) Plaintiff's criticism of affirmative relief is unfounded.

In commenting on the affirmative remedy of the competitive licensing of pictures, the plaintiff does attempt to become specific in belittling its effectiveness. While no one can prophesy with certainty that this new method of distributing motion pictures will be effective, we submit that the plaintiff's indictment of it is unjustified.

Plaintiff suggests that the independent exhibitor will be at a disadvantage because a defendant, having an opposition theatre, has greater resources and will be able to pay higher prices for desired pictures. If the plaintiff means that a defendant, in such a bargaining for product, will outbid his competitor over and above any fair value of the picture, solely for the purpose of keeping it away from his rival, it is, without reason, imputing conduct which would border on the contumacious. On the other hand, if it means that in a competi-

tive market a defendant might have greater resources and thus, in some instances, be better equipped to compete, we ask, "Is that unlawful?" We know of nothing in the anti-trust laws which requires that every competitor for motion picture films or any other commodity, be placed upon an equal financial footing.

If the market is open, if the ability fairly to compete is unrestrained, every requirement of law is met.

What this decree does—its plain and apparent effect—is to break up what the plaintiff has condemned, and the court has found, to be a rigid system. It eliminates the "old" or "regular" customer philosophy in this industry. Any independent, competing with one of these defendants in the exhibition field, will now have complete freedom to bargain for product. Any exhibitor, wishing to enter into business in any community where a defendant today has the only theatres or the better theatres, can do so and have available to him such product as he desires. This, we say, is all that he is entitled to under the anti-trust laws or, indeed, under any concept of fair business practice in a free society.

The plaintiff also urges that this so-called competitive bidding system is unworkable (Brief, pp. 69-71). That argument boils down to the contention that many controversies will arise in connection with the practical administration of this system and that the determination of these controversies would be burdensome to the Department of Justice and to the district court.

The first answer is that the court below was fully aware of the administrative problems incident to its decree. It did not consider them to be insurmountable and wisely retained the power to modify the decree in the light of experience.

The second answer to this argument of inconvenience is that the court below recommended, and five of the defendants

advocated, the continuance of an arbitration system which would provide an effective, inexpensive and expeditious determination of such controversies. And it is highly likely, we believe, that the other three defendants would also join in such a system. It is the plaintiff itself which is the bar to the establishment of that system. It is responsible for the present decision which has terminated the system which has worked so effectively since 1941. It comes with poor grace for plaintiff here to magnify administrative difficulties which, but for its own intransigence, could be so easily resolved.

SECOND: THE OWNERSHIP OF THEATRES BY TWENTIETH CENTURY-FOX IS LAWFUL AND PLAINTIFF HAS ESTABLISHED NO BASIS FOR A DECREE OF DIVESTITURE.

(a) The Plaintiff's Contentions When Applied to Twentieth Century-Fox and National, Independently, Provide No Justification for Divorcement.

In Point II A of its brief (pp. 90-114) plaintiff argues that the ownership by Twentieth Century-Fox of theatres is illegal, even when that company is considered separate and apart from the other defendants. It is only in this section that it actually treats with the individual defendants as such, and comes to grips with any really relevant issue on this appeal.

Even under this point, however, the plaintiff cannot forego its propensity to characterize. It refers to the simple situation in which Twentieth Century-Fox, a producer and distributor of motion pictures, owns theatre interests through its wholly owned subsidiary, National Theatres Corporation, as an "integrated vertical combination." But this exercise in semantics does not advance its case. Its argument must be judged against the facts with respect to any actual monopolization or control

of the market which arises from, or because of, that integration. The record is barren of any evidence of this and the court below expressly found that it did not exist.

We pass to a consideration of the claims of the plaintiff with respect to what it calls the "two serious trade-restraining consequences" (Brief, pp. 91-92) of the ownership by Twentieth Century-Fox of theatres. The first is that, to the extent that Twentieth Century-Fox as a producer can supply the exhibition needs of its theatres, the market is *closed* to other distributors. The facts concerning the theatre position of Twentieth Century-Fox demonstrate how unsubstantial is the argument. Obviously, the only segment of the market over which this fancied control could exist is that in which Twentieth Century-Fox has theatre interests. As we have heretofore stated, its theatre holdings represent only about 3.52% of the country's theatres. Again, as we have emphasized, in the special so-called "market" which the plaintiff has artificially created, consisting of the 92 largest cities with populations of over 100,000, Twentieth Century-Fox has theatres in only 17. In each of these 17 cities, there are competing theatres and in all except one there are theatres which compete on first-run. In each of the great cities of New York, Philadelphia and Detroit, Twentieth Century-Fox has only one theatre.

In the 320 cities of the United States which have populations between 25,000 and 100,000, Twentieth Century-Fox has theatre interests in only 38; and in the 1,630 communities with populations between 5,000 and 25,000, it has theatre interests in only 102. On such a record, it is preposterous to maintain that the ownership of these theatres could represent control of a substantial segment of any market.

But more than this, plaintiff does not even urge that there is any complete control, even in this restricted segment. The

exclusion which is claimed to exist is not a complete exclusion of the product of other distributors from these theatres, but only the limited partial exclusion which comes from the fact that Twentieth Century-Fox itself supplies varying proportions of their film requirements. This is apparent from other portions of plaintiff's brief where it concedes—and indeed argues—that in the great majority of communities, theatres cannot exist on the product of one company but require, for the most part, the product of a number of distributors.

The shallowness of the plaintiff's argument can best be appreciated by considering it in reference to a typical situation, such as Long Beach, California. There are 20 motion picture theatres in that community, only seven of which are theatres in which Twentieth Century-Fox is interested. Two of these seven theatres are operated as first-run theatres. An independent operator in the community also operates two first-run theatres (R. 2131-2132a). Leaving out of consideration the subsequent run "market" in Long Beach which requires the product of all distributors to supply the numerous policy changes which are in effect in subsequent run operation, a study of the first-run situation shows how ephemeral is the plaintiff's contention of market control. The two first-run theatres operated by the independent were, at the time of the trial, generally exhibiting the product of RKO, of Columbia and about one-half the product of Warner and Universal, together with other product offered by non-defendant distributors. The two theatres in which Twentieth Century-Fox is interested were exhibiting the product distributed by Twentieth Century-Fox and, generally, the product distributed by Loew's, Paramount and about one-half of Warner and Universal.

In the light of these facts, what is this "market control" of which the plaintiff complains? It is simply this: Though the

theatres in which Twentieth Century-Fox has no interest furnish exhibition facilities for substantially one-half of the available motion picture product, and though the product of other distributors consumes about 75% of the playing time of the theatres in which Twentieth Century-Fox has an interest, the fact that the product distributed by Twentieth Century-Fox itself occupies about 25% of the playing time of the Fox theatres and about 15% of the playing time of all first-run theatres in Long Beach, justifies the charge that there has been such an "exclusion" of other distributors as to constitute the illegal control of a "substantial segment of the market." The statement of the point is its best refutation.

The second alleged serious trade-restraining consequence (Brief, p. 92) is simply the reverse of the foregoing argument. Plaintiff says that where Twentieth Century-Fox has theatres, other exhibitors in that community are excluded from the opportunity of licensing Twentieth Century-Fox pictures on those runs which are "reserved for Fox's theatres." Applying this argument again to the situation existing in Long Beach, California, it comes down to this: Naturally, Twentieth Century-Fox wishes to exhibit its own pictures first run in its own theatres. Therefore, its competitors in Long Beach cannot secure those pictures on that particular run. But as we have heretofore pointed out, and as the court has found, the pictures produced by Fox are only approximately 9% in number of those produced in the United States.

Thus, at most, the plaintiff's argument is reduced to the claim that because the competing theatres in Long Beach are "excluded from access" to 9% of the product, though having available to them 91%, there is an improper restraint. Such a contention is supported by neither precedent nor reason. The plaintiff's position, as stated in its brief, is that

> "But no manufacturer, whether of a copyrighted or an uncopyrighted article, has the right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of the market." (p. 103)

We need not debate the soundness of this argument. When applied to this case, the foregoing facts demonstrate its irrelevancy. The ownership of theatres by Twentieth Century-Fox has neither the purpose nor effect of excluding others from any important segment of the market.

(b) Corporate Relationship of Twentieth Century-Fox and National Furnishes No Basis for Divestiture.

The plaintiff seeks to buttress its argument with respect to the claimed illegality of theatre ownership by urging that because the theatres in which Twentieth Century-Fox is interested are owned by a subsidiary corporation, all of the stock of which is owned by Twentieth Century-Fox, an unlawful "combination" exists. In other words, the argument is that by owning theatres through a wholly owned subsidiary, rather than directly, an additional element of law violation exists.

With respect to this argument, it should be noted that no such issue was tendered on the trial of this case. No evidence was introduced to show that Twentieth Century-Fox and its wholly owned subsidiary were engaged in any separate conspiracy or combination. The court below made no finding even remotely indicating that any of the improper agreements and practices to which it referred were between this defendant and its subsidiary, or arose out of the intercorporate relationship. The court below properly regarded theatres owned by Twentieth Century-Fox, through its wholly owned subsidiary,

as the theatres of the parent company for the purpose of determining whether there had been a violation of the Sherman Act.

We submit that the argument of the plaintiff, based upon the existence of these two separate corporate entities, is nothing but an unfounded attempt to avail itself of the decision in *General Motors Corp. et al.* v. *United States*, 121 F. 2d 376; *cert. den.* 314 U. S. 618, which it cites. In that case the violation of law was the suppression of competition among credit companies for the business of financing General Motors dealers and customers. What was done would have been just as illegal if done by General Motors itself rather than by it and its subsidiary, General Motors Acceptance Corporation. Nor is there any resemblance to *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, where the separate corporate entities in the combination were separately owned and controlled.

Thus, we urge that the plaintiff's endeavor to support its argument by urging that the corporate structure brings about a "continuing conspiracy among each group of affiliated corporations" (Brief, p. 103) is without substance. The nature of the ownership is unimportant. Only its purpose, scope and effect are significant. We borrow a phrase used in plaintiff's brief (p. 95) and taken from the opinion in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227: ". . . the Sherman Act looks to substance rather than form . . ."

(c) No Illegality in the Origin or Purpose of Theatre Ownership.

The plaintiff also asserts that illegality attached to the original acquisition of the theatres. Here, again, an argument is advanced which is in direct conflict with the findings of the court below (Finding 152, R. 3689-3690). No evidence was

introduced by the plaintiff on the trial of this action to establish that the acquisition by any defendant of theatres was accomplished by improper activities or motivated by improper purposes. On the contrary, these defendants introduced evidence showing that their theatre acquisitions were a natural and normal business development; that many of these theatres were secured in a highly competitive market; and that the development of these theatre interests had been in nowise affected by the distribution activities of Twentieth Century-Fox. The record is barren of any evidence to support a claim that the original acquisitions were the result of any conspiracy, concert of action or intent to monopolize.

In inveighing against the purpose of this theatre ownership, the plaintiff arrogates to itself the role of economist. It condemns such ownership because it says that there is no "economic justification" for it (Brief, p. 105). It cavalierly avers that there is no reason why independents cannot operate theatres as well as the defendants and that there is no "saving to the patron" in integration. Plaintiff's argument is built upon the unsupported and erroneous premise that, "assuming two theatres of equal quality and location, a picture will attract as many patrons in one as in the other" (Brief, p. 105). Certainly the picture is important. Certainly the theatre building and location are important. But successful exhibition is also controlled by the calibre of management, its ability in exploitation and advertising, its solicitude for patrons, and its capacity to furnish public service.

But even if it be assumed that plaintiff's "economic" argument is sound, we are at a loss to understand what it proves. We had not supposed that the law required a business organization, which entered a field in a perfectly lawful and proper way, because it believed that its overall business

could be better and more profitably conducted, to demonstrate to the satisfaction of the Department of Justice that the results would be "economically" beneficial.

Apart from this, however, the basis of plaintiff's contention is fallacious. The record amply supports the conclusion that the operation of theatres by these defendants has been beneficial to the public. It shows that those theatres have been managed by skilled and experienced operators; that the facilities afforded to the public through the defendants' theatres have been the finest available; that the public has been well served; and that the experience of these defendants in the entire motion picture field peculiarly qualifies them, through their officers and employees, to provide theatre facilities of the highest standards. While we recognize that this would be no defense to a claim of monopoly or illegal combination, it is an ample answer to the plaintiff's argument that no public benefit comes from theatre ownership by Twentieth Century-Fox.

Plaintiff has attempted to link the origin and development of the trade practices, which were criticized by the court below, to integration (Brief, pp. 27-29). It says that what it terms "licensing restrictions", namely, provisions in license agreements dealing with runs, clearance, admission prices, etc., did not come into existence until after integration commenced. This is completely contrary to fact and is abundantly disproved by the record. Indeed, plaintiff's amended and supplemental complaint, on which the action was tried, expressly alleges (paragraphs 114, 115) that runs, clearances and advanced admission prices were practices which came into existence as far back as 1915 or 1916—prior to the time when any defendant owned theatres. The initial acquisition of theatres by Twentieth Century-Fox was in August 1925 (paragraph 42). Plaintiff's brief recognizes that these provisions in license agree-

ments were in existence in 1923. Thus, from its brief and its pleadings, it affirmatively appears that the trade practices to which plaintiff refers antedated the acquisition of theatres by Twentieth Century-Fox. In addition, there is testimony in the record that these practices have been in use since the beginning of the production of feature motion pictures. Neither their origin, development or use has any relation whatsoever to integration.

In concluding our discussion of this point, one further argument by excoriation on the part of the plaintiff should be noted. The plaintiff says:

> "This persistent use of their theatres as a means of arbitrary suppression of the competition of others is itself conclusive evidence of the unlawful purpose of the major defendants' vertical integrations." (p. 105)

This statement is made in spite of the fact that there is no evidence and no finding that the defendants, or any of them, have used their theatres, persistently or otherwise, as a means of suppressing theatre competition. There is no evidence that any potential theatre operator has been kept out of business because of anything done by these defendants. And as the record so convincingly shows, if there were any efforts directed at the suppression of competition, they assuredly were most inept and ineffectual. In the last seven years the number of theatres in this country has increased over 4,000. Well over 90% of these 4,000 theatres have been built and are operated by independents and the defendants have no interest in them.

The authorities to which plaintiff has referred in its discussion of integration are plainly distinguishable. For example, *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255, to which plaintiff frequently refers, was one of a series of cases in-

volving the ownership by railroads of coal mines and their unsuccessful attempt to avoid the prohibitions of the commodities clause of the Hepburn Act (34 Stat. 585) by the organization of coal and sales companies owned by the stockholders of the railroad but dominated by the management of the railroad. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, the sufficiency of a petition against a motion to dismiss was upheld which alleged that a monopoly of the cab business in certain large cities had been acquired which had as its express purpose the elimination of all competition among cab manufacturers in the sale of taxicabs to the principal taxicab operators in those cities. In the petition it was alleged that the monopoly had accomplished its purpose, with the end result that "the public is charged higher rates for the transportation services rendered." *United States* v. *Swift & Co.*, 286 U. S. 106, involved applications for modifications of a consent decree entered in 1920. As the Court repeatedly remarked in its opinion, that decision did not purport to adjudicate the appropriateness of the remedy consented to by the defendants, but dealt only with the question of whether a sufficient showing had been made to justify modification over the opposition of the Government and the parties who were protected by the consent decree.

THIRD: THE RECORD FURNISHES NO JUSTIFICATION FOR AGGREGATING THE THEATRE INTERESTS OF THE DEFENDANTS, AND PLAINTIFF'S ARGUMENTS FOR DIVESTITURE BASED UPON SUCH AGGREGATION ARE WITHOUT MERIT.

We believe that all of the plaintiff's arguments, which are based upon statistics and other material resulting from an aggregation of the theatre interests of all of the defendants, are completely irrelevant and unimportant on this appeal. The

judgment of the court below that the plaintiff's "collective approach" was unjustified; and that in any event it furnished no proof of monopoly, is abundantly sustained by the evidence.

We deem it unnecessary, therefore, for us to demonstrate here what has effectively been done in the brief for Loew's, that even on the basis of such aggregation and collective treatment no monopoly or other restraint exists which would justify theatre divorcement.

Furthermore, we think that the record convincingly sustains the finding of the court below that the "illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors. . . ." (Finding 154, R. 3690). This conclusion applies whether the defendants are treated collectively or regarded individually.

There are, however, certain broad statements in plaintiff's brief in support of its effort to "collectivize" these defendants, which must be challenged.

1. Plaintiff asserts that there is a "geographical pattern" (Brief, p. 15) with respect to the theatre holdings of the various defendants. This, if it means anything, implies that there is some underlying agreement to which the defendants are parties which parcels out the country and assigns to each a particular sphere. Though plaintiff, in its petition, did allege such an agreement, it presented no evidence on the trial in support of such an allegation. And, of course, the court below did not find that any such agreement or pattern existed.

Despite the plaintiff's unequivocal language in asserting the existence of such a "pattern," we find that the only evidence to which it refers are its compilations with respect to the actual location of the defendants' theatres. This proves nothing. The fact that the theatres in which Twentieth Century-Fox

is interested are mostly located west of the Mississippi River comes about by no conspiracy. It simply reflects the fact that when Twentieth Century-Fox entered into the theatre business twenty years ago it purchased theretofore existing circuits of theatres which were located in the western states (R. 1971, 2001-2003, 2041-2042, 2078, 2103-2104).

Moreover, the existence of any pattern, in so far as Twentieth Century-Fox is concerned, is quickly disproved by a glance at the largest cities in which it has theatres. In Los Angeles, Paramount, RKO and Warner are in competition with it. In San Francisco, RKO and Paramount compete with the Fox theatres. In Kansas City, Missouri, Loew's, Paramount and RKO compete. In Denver, Loew's and RKO are in competition. In Milwaukee, Warner has competing theatres. In addition, Twentieth Century-Fox has a single first-run theatre in New York, Philadelphia and Detroit. In each of these cities these theatres are in first-run competition with theatres of other defendants. We submit that this is hardly the sort of evidence to sustain the claim that there is an implied agreement among the defendants not to compete with each other in the theatre field.

As other examples of the plaintiff's loose treatment of the facts in this respect, we also point out that its statement that there are no towns in Michigan in which two or more major defendants separately operate theatres (Brief, p. 16), is not only wrong, but is shown to be so on plaintiff's own schedule which appears on page 228 of the appendix to its brief. As there shown, Fox, Paramount and RKO operate theatres in Detroit. Plaintiff's statement that prior to the dissolution of pools in San Francisco there was no theatre competition between any defendants (Brief, p. 17) is also incorrect and shown to be so by plaintiff's own compilations, appearing on page

212 of the appendix to its brief. It is there indicated that Fox and RKO separately competed in San Francisco. Plaintiff's list of towns of less than 100,000 population, which its says names the only ones in which the defendants compete with each other (p. 16) is inaccurate in that it omits Huntington Park, San Bernardino, Beverly Hills and San Pedro, California.

2. Plaintiff says:

> "Each of the five major defendants as an exhibitor has been licensed by all of the other defendants as distributors at the fixed admission prices." (Brief, p. 24)

This statement seems to us to be misleading and to suggest conclusions which are not in accord with the facts. The language implies that each defendant distributor licenses its product to each theatre of a theatre-owning defendant to the exclusion of independents. The record shows that this is not the case. In 72 of the 92 cities with populations of more than 100,000, one or more defendants, other than Twentieth Century-Fox, have theatres. Yet, in 23 of these 72 cities, Twentieth Century-Fox product is not licensed to the theatre of any defendant, but is licensed to independent exhibitors (Exs. F-12, F-21, F-30).

Similarly, with respect to the theatres in which Twentieth Century-Fox is interested, the facts show that there is no "pattern" pursuant to which they receive licenses to the product of other distributors. We have analyzed this aspect of the distribution of product on pages 15 to 20 of our appellants' brief. The facts show that in a great many instances the product of one or more of these defendants is not licensed to the Fox theatres.

The foregoing facts completely disprove the implication contained in the above quoted sentence. They also disprove

similar statements, such as: "At the same time, they have protected the theatres of the five major defendants from the competition of independents" (Brief, p. 107), which appear at various places in plaintiff's argument.

3. Plaintiff states:

> "This conspiracy has been effectuated mainly by means of film licensing agreements between all eight defendants as distributors and the five major defendants as exhibitors" (Brief, p. 24).

It cites, in support of this statement, Finding 64 (R. 3670) which certainly does not support it. That finding contains nothing which indicates that the court below found that any activities of the theatre-owning defendants, as exhibitors, had "effectuated" any conspiracy.

FOURTH: THERE IS NO JUSTIFICATION FOR AN INJUNCTION PROHIBITING A PRODUCER-EXHIBITOR FROM LICENSING ITS PICTURES TO THE THEATRES OF ANOTHER PRODUCER-EXHIBITOR.

Plaintiff strongly presses for an injunction prohibiting any theatre in which Twentieth Century-Fox is interested from licensing for exhibition the product of any other theatre-owning distributor. Conversely, it would also prohibit Twentieth Century-Fox from licensing its pictures for exhibition in any theatre owned by another defendant. This is what the plaintiff refers to as a ban on "cross-licensing."

Here, again, the plaintiff has coined a phrase in an effort to attach some opprobrium to normal and necessary business transactions in this industry. Because cross-licensing in the patent field has been the subject of attack for some years, plain-

tiff has used those words here. But the use of the term is patently inappropriate and inaccurate. There is nothing resembling a "pool of patents" as is so often found in the typical cross-licensing case. For example, there is no agreement between copyright owners restricting licenses to the parties to the cross-licensing agreement.

The unique suggestion by the plaintiff that normal business transactions between defendants be enjoined, was injected into this case after the trial and after the court had handed down its opinion. No such issue was raised by the plaintiff in its pleadings or in the presentation of its case. No evidence was introduced directed to such an issue. It was only after the court below had denied the plaintiff's plea for divorcement, that this suggestion was advanced.

Plaintiff has presented its arguments here as though it considers this relief as something of an incidental, technical nature which should complement the injunctions which the court below has issued against the trade practices which it condemned. Yet such is not the case. Plaintiff fully understands that at most only two or three of the theatres in which Twentieth Century-Fox is interested can be operated with the product distributed by Fox alone, and that in many situations the product of Fox and the other non-theatre-owning defendants is not enough. It knows that with respect to the great majority of the Fox theatres, the product of some of the other theatre-owning distributors is necessary for their effective operation. It knows that the ban it seeks would make it impossible for Twentieth Century-Fox to continue the operation of many of its theatres.

Therefore, this suggestion is simply divorcement under another name. Under this severe handicap Twentieth Century-Fox could not stay in the theatre business. It would

be forced to divest itself of its theatres. This becomes self-evident when consideration is given to the situation of a typical town in this country where the theatres operated by National use 104, 156, 208 or 312 pictures a year. Those theatres could not operate under the restraints proposed by plaintiff. Competing theatres would be able to license the product of the other distributors without competition. The net effect would be to subsidize every independent competitor of National and assure such competitor of pictures of four of the leading distributors in the industry on a non-competitive basis. Plainly, the removal of National from the competitive field, would lessen, rather than enhance, competition. This is certainly not consonant with the spirit or purpose of the Sherman Act.

But the impact of such an injunction would not be confined to the theatre business. Twentieth Century-Fox as a distributor would find arbitrarily closed to it the theatres of other defendants located in many communities in which it has no theatres. Twentieth Century-Fox pictures could not be exhibited in many of the best theatres in the country. Moreover, in the smaller communities where some of these defendants have the only theatres, it would mean that Twentieth Century-Fox pictures could not be exhibited at all. And, paradoxically, with the existing prohibition against expansion which the plaintiff argues should be retained, Twentieth Century-Fox never could exhibit its product in those communities.

Plaintiff fully appreciates the disastrous consequences which would flow from the injunction which it seeks. Its counsel admitted this when he first proposed such a remedy in the court below:

> "I am merely suggesting that as an alternative remedy [alternative to divorcement]. I do not think myself that

it is as adequate a remedy of dissolution. *But I point it out as simply another means of attempting to accomplish the same result;* . . . (R. 2570).

Thus, upon analysis, it is apparent that such an injunction would be solely in the nature of a penalty. It is not required to terminate any of the trade practices which the court below found illegal. This Court should reject it.

FIFTH: NO QUESTION OF "PUBLIC INTEREST" IS INVOLVED.

In what reads as the peroration to its brief (pp. 119-126), the plaintiff comments on what it terms the "public interest" in this case. This is sheer window-dressing.

As plaintiff well knows, this case was never instituted or tried on the theory that the general public interest was involved. On the contrary, this case was prosecuted as a "class action," in the sense that the plaintiff has claimed that restraints in the industry operated to the detriment of that class in it which consisted of independent theatre owners.

No evidence was introduced by the plaintiff—and there is none in the record—that the motion picture-going public has been injured in any way by the trade practices which the court below condemned. There is no evidence that the public has been the victim of inflationary prices, or that it has been gouged at the box office, or that any different system would reduce prices. On the contrary, such evidence as there is in the record with respect to admission prices shows that there has been no noticeable increase. The absence of enhanced prices, which are the usual consequence of monopoly, demonstrates

that there has been no monopolization or restraint of competition. This is forcefully demonstrated by an exhibit introduced by the Warner defendants (Ex. W-10, R. 1816-1817). This exhibit contained a comparison of the average admission prices charged by Warner theatres in the year 1931 and the year 1945. The computation was arrived at by dividing the gross box office receipts in each year, exclusive of admission taxes, by the number of theatre patrons in each year. This showed that the average theatre admission price in 1945 was only 1.9% higher than it was in 1931. The foregoing statistics—and they are the only ones in the record with respect to theatre admission prices—thus not only disprove any claim that advantage has been taken of the public, but strikingly show that if cost to the public is to be considered, the current method of distributing and exhibiting motion picture films has been greatly in the public interest.

There is also specific evidence that the public has received the best in theatre accommodations, service and facilities. There is the finding of the court below, amply sustained by the evidence, that every potential motion picture patron has the opportunity of seeing every worthwhile film at a price which meets his individual pocketbook.

The plaintiff also seeks to color its argument by quoting expressions, lifted without relevance, from pronouncements of this Court in cases involving freedom of speech and freedom of the press. It implies that the quality of motion picture production and the scope of subject matter is limited and deficient. It says:

> "Certainly such a past gives little hope that they [the defendants] will in the future encourage production of the wide variety of films needed to satisfy the wide variety of tastes possessed by the potential American

film audience, rather than a standardized mass product adapted to profitable exhibition in a controlled market." (Brief, p. 124)

We ask, "What basis exists in this record for such a statement?" Who has said that today's motion picture production is stereotyped and standardized? Who has testified that the tastes of the American film audience, however wide in variety, are not adequately satisfied? Where is there any evidence that any control exercised by these defendants has limited either the subject matter or number of motion picture productions?

Not only is this arrogance on the part of the plaintiff without foundation, but the court below has found to the contrary. It has found that there are no restraints in the production of motion pictures; that a free opportunity exists for anyone to make a picture on any subject and for any purpose and, more than that, there are no restraints which prevent the producer of such a picture from securing proper distribution and exhibition thereof.

This controversy, which is essentially one between competing elements in this industry, cannot be magnified into a "public cause." The only issues here tendered, and the only ones which this Court should pass upon, concern a decree to remove any restraints in trade adversely affecting those who wish to engage in the motion picture business.

Conclusion

It is respectfully submitted that paragraphs (5) and (6) of Section III of the decree should be deleted, that Section V, relating to arbitration, should be modified in the particulars above requested and that, in all other respects, the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

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LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, *et al.*,
Appellants,
against
UNITED STATES OF AMERICA,
Appellee.
No. 80

UNITED STATES OF AMERICA,
Appellant,
against
PARAMOUNT PICTURES, INC., *et al.*,
Appellees.
No. 79

ON APPEAL FROM JUDGMENT, DECREE AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RKO DEFENDANTS AS APPELLANTS IN NO. 80 AND AS APPELLEES IN NO. 79

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IN THE

Supreme Court of the United States

October Term 1947

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, *et al.*, *Appellants*, *against* UNITED STATES OF AMERICA, *Appellee.*	No. 80
UNITED STATES OF AMERICA, *Appellant*, *against* PARAMOUNT PICTURES, INC., *et al.*, *Appellees.*	No. 79

ON APPEAL FROM JUDGMENT, DECREE AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RKO DEFENDANTS AS APPELLANTS IN NO. 80 AND AS APPELLEES IN NO. 79

Opinion and Judgment Below

The Opinion of the District Court (R. 3504)[1] is reported at 66 F. Supp. 323; the Decree (R. 3694) is reported at 70 F. Supp. 53.

[1] In this Brief, the abbreviation "R" refers to the printed Record.

Jurisdiction

Jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. §29), and Section 238 of the Judicial Code, as amended (43 Stat. 938; 28 U. S. C. §345).

Statutes Involved

Sherman Act (26 Stat. 209, 15 U. S. C.):

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> * * * * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Copyright Act (35 Stat. 1075, 17 U. S. C.):

> Section 1. Any person entitled thereto upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> (b) To translate the copyrighted work into other languages or dialects, make any other version thereof, if it be a literary work; to dramatize it

if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

* * * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. * * *

Statement of the Case

This is a suit in equity[2] under Section 4 of the Sherman Anti-trust Act to enjoin an alleged combination to restrain and monopolize the production, distribution and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act (R. 3137). The defendants are eight motion picture organizations:[3] RKO, Fox, Loew's, Para-

[2] The original complaint filed on July 20, 1938, was superseded by an amended and supplemental complaint filed November 14, 1940 (R. 3137).

On November 20, 1940, a consent decree was entered as to the five theatre owning defendants. The case at bar arises upon motion by the plaintiff to modify the consent decree (R. 3373).

[3] In this brief the United States will be referred to as "the plaintiff." The defendants, unless otherwise indicated will be referred to by abbreviated titles as follows:

"RKO"—Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation;

mount and Warner, each of which produces, distributes and exhibits; Columbia and Universal, each of which produces and distributes; and United Artists, which distributes feature motion pictures. "As between the eight defendants • • • there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants" (Finding of Fact No. 57, R. 3670).

After the filing of an Expediting Certificate (R. 3502) under the Act of February 11, 1903 (32 Stat. 823, 15 U. S. C. §28), the case was tried before a Court composed of Circuit Judge Augustus N. Hand and District Judges John Bright and Henry W. Goddard (R. 3504).

The Court filed Findings of Fact and Conclusions of Law (R. 3659) and entered a Decree (R. 3694) which enjoined certain trade practices and required the termination of certain local agreements and the dissolution of certain joint interests. The Court refused the plaintiff's request that each theatre owning defendant be compelled to divest itself of all interests in theatres or in the alternative

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"Paramount"—Paramount Pictures, Inc. and Paramount Film Distributing Corporation;

"Loew's"—Loew's Incorporated;

"Warner"—Warner Bros. Pictures Inc., Vitagraph, Inc. and Warner Bros. Circuit Management Corporation;

"Fox"—Twentieth Century-Fox Film Corporation and National Theatres Corporation;

"Columbia"—Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc. and Screen Gems, Inc.;

"Universal"—Universal Corporation, Universal Film Exchanges, Inc. and Big U Film Exchanges, Inc.;

"United Artists"—United Artists Corporation.

Paramount, Loew's, Warner, Fox and RKO are at times referred to as the "theatre-owning defendants" or as "distributor-exhibitor defendants."

be enjoined from exhibiting in its theatres any feature distributed by another theatre-owning defendant.

RKO joined with certain of the other defendants in a motion to amend the Findings and Conclusions and the Decree (R. 3703). This motion was overruled February 11, 1947 (R. 3719).

All parties appealed, and six docket numbers have been assigned. The plaintiff's appeal was assigned No. 79; the respective defendants' appeals, Nos. 80 (Loew's, RKO, Fox, Warner); 81 (Paramount); 82 (Columbia); 83 (United Artists); 84 (Universal).

Questions Presented

This Brief combines RKO's Brief as Appellant in cause No. 80 and its Brief as Appellee in cause No. 79.

The questions presented by RKO as Appellant in No. 80 are:

I. Whether the provision of the Decree, Part III, Paragraph 6, which absolutely prohibits this defendant from expanding its theatre holdings, is necessary or appropriate to prevent or restrain the violations of the Sherman Act found to have existed.

II. Whether the provision of the Decree, Part III, Paragraph 5, which requires RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies either by selling its interest or by acquiring (with court approval) the interest of others, is a necessary and appropriate exercise of the court's discretion to prevent or restrain the violations of the Sherman Act found to have existed.

III. Whether the provision of the Decree, Part II, Paragraph 1, which prohibits RKO from setting the minimum admission price to be charged during the exhibition of the feature licensed, deprives it of a legitimate right to contract for the exhibition of the ordinary copyrighted feature motion pictures distributed by it in its routine operations.

IV. Whether the provision of the Decree, Part II, Paragraph 1, which prohibits RKO from setting the minimum admission price to be charged during the exhibition of the feature licensed, deprives it of a legitimate right to contract for the exhibition of the unusual copyrighted feature motion pictures distributed by it for special pre-release road show engagements.[4]

V. Whether the District Court erred in failing to Decree that disputes between one or more of the defendants and exhibitors arising under the decree should be determined by arbitration under the Rules of Arbitration provided in the Consent Decree (R. 3373) pursuant to the prayer of the Plaintiff's Amended and Supplemental Complaint (R. 3137).

The other questions raised by RKO's assignments of error have been thoroughly briefed by other appellants, and will not be discussed herein. They are not, however, waived by RKO.

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[4] A road show is defined by the Court as:

> "A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located" (Finding of Fact No. 1, R. 3660).

The questions discussed by RKO as Appellee in No. 79, which fully cover all propositions advanced by the United States as Appellant therein, are:

VI. Whether the District Court was correct in its refusal to find that RKO through the use of its theatres was engaged with the other theatre operating defendants in a nationwide conspiracy to monopolize the distribution and exhibition of motion pictures, and hence was correct in its refusal to treat the theatre operations of the five defendants as an aggregate in considering the plaintiff's general charge of monopoly in exhibition.

VII. Whether the District Court was correct in refusing to hold that RKO, when considered alone as an integrated company producing, distributing, and exhibiting motion pictures, is in itself an unlawful combination.

VIII. Whether, in view of the adequate relief granted by the Decree of the District Court, that Court was correct in its refusal to order RKO to divest itself of its theatres or its production and distribution facilities, and was correct in its refusal to enjoin RKO from licensing its features to theatres affiliated with other defendants and to enjoin other producer-exhibitor defendants from licensing features for exhibition in RKO theatres.

The Facts

A. The industry prior to the organization of RKO.

By 1927 seven of the eight defendants were active. Five were engaged in production and exhibition: Paramount (R. 606, 894, 964), Fox (R. 1247), Loew's (R. 906, 1839), Warner (R. 1556), and Universal (R. 1969-70, 2078). A sixth, United Artists, organized in 1919 (R. 1407), was distributing features, and certain of its controlling stockholders were interested in United Artists Theatre Circuit, Inc., which had a relatively small circuit of theatres (R. 1233). Columbia was producing features (R. 906), and would shortly, in 1929, organize its national distribution system (R. 1256).

B. Organization of RKO, 1928-1932.

The organization of RKO stemmed directly from the introduction of sound pictures between 1925 and 1927. In 1925 Warner, under license from Electrical Research Products, Inc. (ERPI), a subsidiary of Western Electric Co., had undertaken the development of sound pictures (R. 1554). Fox also interested itself in sound recording and reproduction. By 1927 both companies, using ERPI equipment, were able to produce and exhibit pictures which indicated that this was to be the next major development in the industry (R. 1597). ERPI thereupon proceeded rapidly to place its equipment in most studios and in many of the leading theatres (R. 1597).

In 1928 Radio Corporation of America (RCA) perfected sound recording and reproduction equipment for motion pictures. It thus became the only company in a position to challenge the dominance of ERPI, but it was faced by the fact that ERPI's equipment was already established, installed, and in successful use. Against this handicap, RCA

determined to form a new company capable of entering the market and demonstrating by actual performance the competitive merits of its own product (R. 1597).

Radio-Keith-Orpheum Corporation, organized October 25, 1928, was the outgrowth of this decision (Gov. Ex. 87). The Court found:

> *"The organization of RKO did increase competition in each of the three branches of the industry"* (Finding of Fact No. 23, R. 3664).

Production and distribution facilities were acquired by RKO through FBO Productions, Inc., which was a small, inconspicuous, and relatively weak producing company with a national distributing organization. Seven million dollars were invested in modernizing, enlarging and equipping its properties for sound (R. 1599). The Court found:

> *"The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures"* (Finding of Fact No. 20, R. 3664).

Between 1928 and 1932 RKO acquired, by purchase or lease, and operated approximately 200 theatres. These theatres were located in 48 cities of over 100,000 population and 14 smaller cities (Gov. Exs. 89, 91, 97-101, 105-107, 158, 159).[6] The locations of the cities are shown on Figure 1, page 11.

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[6] The evidence does not reflect all of RKO's interests during the organization period, but it furnishes sufficient data to indicate their general scope. In 1928 and 1929 RKO acquired a number of vaudeville theatres, which had been owned or operated by Keith-Albee-Orpheum, the Orpheum Circuit, and F. F. Proctor Holding Corp. These theatres were located in the East and the Mid-West. In 1929 through 1931 theatres were added in new areas as widely separated as Georgia and Washington, Texas and Wisconsin, Utah and Rhode Island.

Most of these theatres were large houses suitable for first-run operation. Many of them were vaudeville theatres which were rapidly being outstripped by newer and finer theatres constructed primarily for the exhibition of motion pictures. RKO met the competitive challenge by investing some $8,000,000 in rehabilitating and modernizing its theatres and equipping them for sound (R. 1599).

There is no contention that RKO in acquiring these theatres was guilty of any predatory or improper practices. As to the effect of the acquisitions, the Court found:

> *"The formation of RKO * * * introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located"* (Finding of Fact No. 121, R. 3684).

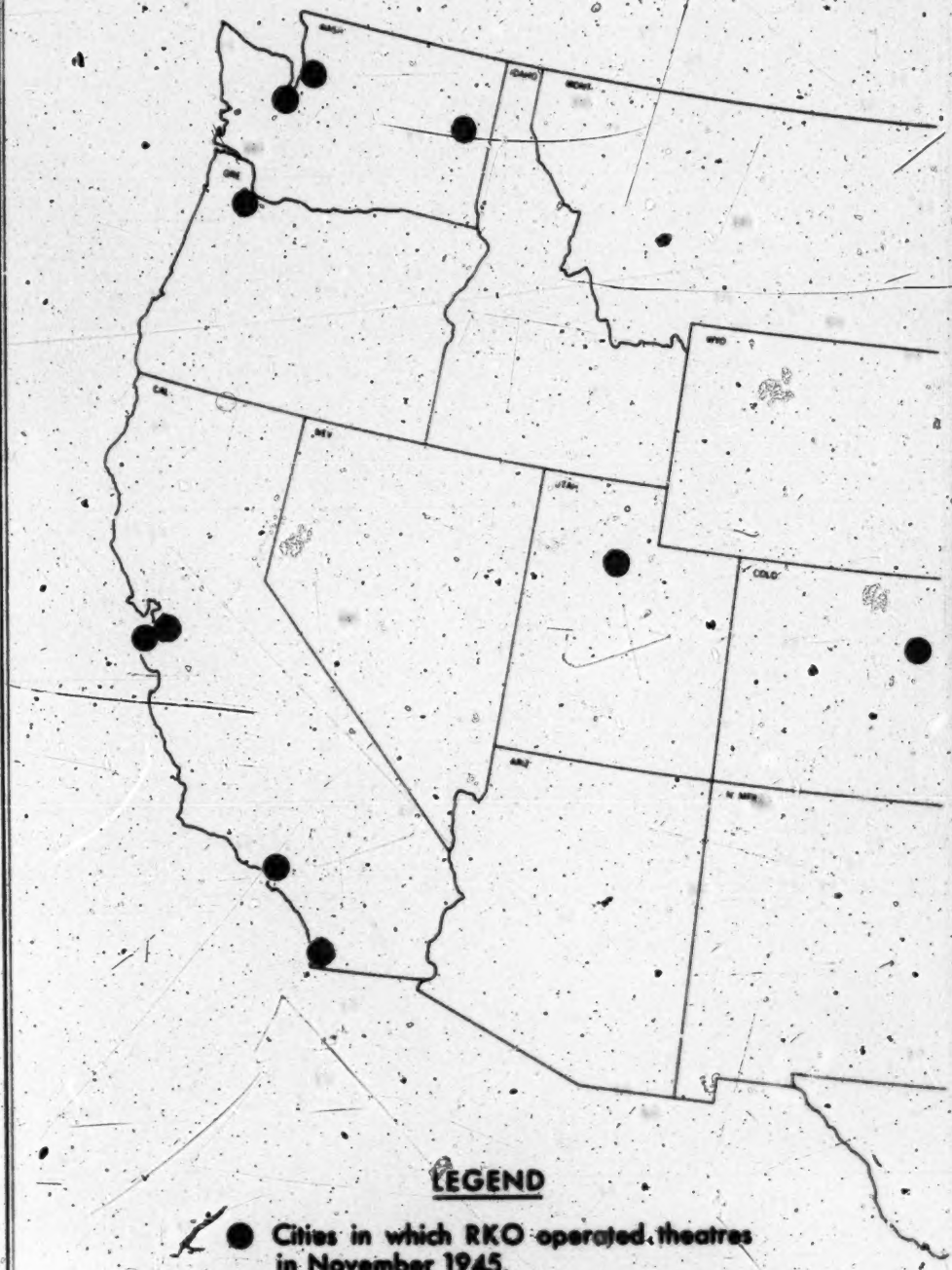
C. RKO's financial difficulties.

In 1933 RKO went into receivership. This was followed by reorganization proceedings under Section 77B of the Bankruptcy Act. The company was not freed of these proceedings until 1940 (Gov. Ex. 91). Some 57 of its theatres were lost during the receivership and reorganization (Gov. Exs. 158, 159, R. 1600). Another 60 theaters had been eliminated from its operations before the trial, most of these before 1933. Plaintiff concedes that there has been virtually no expansion of RKO's theatre holdings since 1935 (R. 1600). In the same period, however, the total number of theatres in the United States increased from 13,386 to 18,076 (Finding of Fact No. 145, R. 3688).

D. RKO's theatre holdings at the date of trial.

RKO's theatre holdings at the date of the trial were of three types:

LOCAT



LEGEND

- Cities in which RKO operated theatres in November 1945.
- Cities in which RKO formerly operated theatres, operation lost prior to November 1945.

1. Theatres operated by RKO.

At the date of the trial RKO was operating 106 theatres located in 38 cities (RKO Ex. 1). Of these, RKO owned in fee only 32. Of the remainder, 51 were leased; 3 were held in part in fee and in part under lease; and 20 were joint interests of the type condemned by the Decree (RKO Exs. 1, 11; Gov. Ex. 158). RKO owned, but did not operate eight additional theatres located in seven cities (Gov. Ex. 158). The locations of the cities wherein RKO operated theatres at the time of the trial are shown on Figure 1.

2. Beneficial interests with defendants and independents.

At the time of the trial, RKO held beneficial interests in a number of local theatre operating or holding companies, most of these being minority interests. Specifically, RKO held the following interests:[7]

10% interest in 2 companies having 96 theatres
15% interest in 1 company having 1 theatre
20% interest in 1 company having 136 theatres
25% interest in 2 companies having 8 theatres
30% interest in 1 company having 1 theatre
33-1/3% interest in 3 companies having 24 theatres
35% interest in 1 company having 3 theatres
49% interest in 1 company having 1 theatre
50% interest in 5 companies having 16 theatres
65% interest in 1 company having 3 theatres

[7] Finding of Fact No. 117 (R. 3683) shows RKO as having joint interests with other exhibitors in 318 theatres. This Finding, however, is predicated on RKO Exhibit 11 which made no distinction between beneficial interests falling within Paragraph (5) and "pooling situations" coming within Paragraph (2) of Part III of the decree. See Government Exhibits 87, 96, 99, 105.

The majority of such interests were owned by predecessor companies or were acquired shortly after RKO was organized. The record shows the lawful purpose for which RKO was formed. The plaintiff introduced no evidence to show either the purpose or the effect of RKO's ownership of such interests. Under the Decree, if it remain in its present form, RKO will be compelled to terminate these joint interests by December 31, 1948. It may do so by disposing of its interest or by acquiring (with court approval) the interest of its co-owner.[8]

No evidence was offered by the plaintiff to support any finding that such interests were improperly acquired or had in any locality any adverse effect upon competition.

3. Pools and leases.

At the time of the trial RKO had 14 theatres, located in 9 cities, which were parties to "pools."[9] All such operating agreements have been terminated.

At the date of the trial RKO owned the fee of three theatres and a leasehold on two theatres which had been leased and subleased, respectively, to Fast Theatres, Inc. in January, 1935 for a flat rental, plus a percentage of profits (Gov. Ex. 204). These theatres were located in Albany, Troy, and Schenectady, N. Y. RKO has never licensed features for them (R. 588). To comply with the

[8] RKO has already sold its interest in Affiliated Theatres and in The United Theatres Company (Report of Compliance, July 1, 1947).

[9] The court refers to "pooling agreements" as "agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages" (Decree, Part III, paragraph 2; R. 3600).

Decree, RKO has sold these owned and leased theatres (Report of Compliance, dated July 1, 1947).

E. RKO as producer, distributor and exhibitor.

The plaintiff in its appeal demands that RKO be compelled to divest itself of all its theatres. RKO in its appeal asks that it be allowed to expand its theatre holdings where justified by an affirmative showing that such expansion will not unlawfully restrain or monopolize trade.

Pertinent to the issues presented on both appeals, therefore, are the facts as to: 1. The increased efficiency and economy resulting from the operation by RKO as an integrated unit; and, 2, the evidence as to the ability of others to compete with RKO at each level.

1. RKO's operation as an integrated unit results in increased efficiencies and economies.

a. *Show-case theatres.*

The theatres operated by RKO serve an unique and useful function in the advertising of features distributed by RKO. It is significant that this advertising function redounds not only to the advantage of RKO but also of subsequent run exhibitors in areas in which such RKO theatres are located. As found by the Court,

> "The ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres" (Finding of Fact No. 122, R. 3685).
>
> "The successful exhibition of a feature in its initial runs in any area is widely publicized and

closely observed by subsequent run exhibitors in that area and success in exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors" (Finding of Fact No. 123, R. 3685).

The significance of these Findings will appear from a brief description of the mechanics of motion picture distribution.

The fundamental fact is that it is not feasible to exhibit the feature in all theatres simultaneously.[10] Hence the

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[10] An outstanding feature will be exhibited in from 8,000 to 14,000 theatres (R. 668, 1696-97). At the date of trial each black and white print cost $150 to $300, each color print $600-$800 (Finding of Fact No. 74, R. 3673).

Few theatres could afford to pay a license fee of $500, which would be the minimum amount necessary to recover the cost of production and distribution on an average feature if 10,000 prints were made. This is shown by the record on RKO's most widely exhibited feature in 1943-44, LADY TAKES A CHANCE. The following table shows the number of exhibitions at stated license fees in the larger cities.

	First Run, Cities of 25,000 and over	Second Run, Cities of 50,000 and over	Third Run, Cities of 200,000 and over	Fourth Run, Cities of 1,000,000 and over
Over $10,000	7	0	0	0
$5,000-10,000	22	1	0	0
2,500-4,999	58	6	1	0
1,000-2,499	160	21	2	8*
500- 999	113	31	9	2
250- 499	53	60	36	8
100- 249	42	153	66	50
50- 100		78	88	64
Less than 50		31	39	28
Total	455	381	241	160

* Seven of the eight fourth run situations paying in excess of $1000 were in Philadelphia, Pa.

Source: Gov. Ex. 94

distributor must determine the number of prints which, by rapid shuttling between theatres, can most efficiently service the exhibitors without unduly magnifying the expense to be paid, ultimately, by the theatre patron. Each additional print, on the one hand, will permit more rapid circulation, and, on the other, will increase the investment to be recovered. The number of prints depends on the anticipated demand (R. 668, 670). The present practice is to make 200 to 350 prints (R. 415, 670),[11] each of which is circulated as rapidly as possible to some 30 to 40 theatres (R. 417).

Because of this limited number of prints, a feature cannot possibly show on the same day in more than 300 to 350 theatres. "[L]icensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures" (Finding of Fact No. 75, R. 3673). In accord with logical business judgment, the distributor licenses runs in the order of importance (R. 415). Initial showings should be, and where possible are, in the largest theatres in the largest cities. These theatres have greater capacity and can accommodate more patrons than first-run theatres in smaller towns, or neighborhood theatres in the same city. Out of their substantially higher box office receipts, without undue burden on the patron, these larger theatres can, should and do pay higher rentals than theatres in small towns (R. 705). The fact that these initial runs pay higher license fees is of course reflected in the lower fees which can be and are charged to smaller first-run theatres in smaller cities and towns

[11] On a very unusual picture the number of prints may be larger. Thus there were some 500 prints of the feature GONE WITH THE WIND (R. 415); on less attractive features the number may be as small as 150 (R. 670).

and to subsequent runs everywhere. Indeed, the license fees progressively decrease, until the majority of the theatres actually pay less than the print cost (R. 671).[12] "Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs * * * is adopted * * *" (Finding of Fact No. 74, R. 3673).

After the initial engagements, a feature is circulated as rapidly as physically possible to other theatres, usually to first-run theatres in smaller communities before returning to the larger city for second and subsequent run engagements. No print is kept idle during this period: except for the minimum of time required in shipment, handling and inspection, each is constantly in use for the first 12 to 14 months (R. 670). The bulk of the revenue from a feature is concentrated in the first few months, and the life expectancy of a print is 18 to 24 months (R. 672). This system "permits the public to see the picture in a later exhibiting theatre at lower than prior rates" (Finding of Fact No. 76, R. 3673).

As a result of this system of staggered engagements, characteristic of and essential to all film distribution, a lapse of some period is unavoidable between the opening of the first exhibition in a trade area and the availability of a print for every exhibitor in that area. This time lag, an inherent factor in motion picture distribution, exercises an unusual influence upon the habits of exhibitors and motion picture patrons. Each feature, after all, differs from all which have gone before and all which will come after.

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[12] For example, Warner's PRINCESS O'ROURKE, its feature with the greatest number of exhibitions in 1943-44 had 14,090 bookings, 12,926 of which were for an average fee of $78.40 (R. 1560).

A distributor can roughly classify a feature as to its probable attractiveness on the basis of the talent employed and the investment committed, but he knows, as plaintiff's counsel conceded at the trial, that he "cannot attempt any evaluation of these films in any other terms than what they actually produce at the boxoffice. There are no standards * * * by which any of us can judge them aesthetically * * *" (R. 14).

Because it is impossible to determine in advance the probable public appeal of any particular feature, exhibitors perforce rely upon the impersonal test of the competitive market as shown by the ability of a feature to attract patronage in the early runs in the larger cities. Subsequent-run exhibitors in the city and all exhibitors in smaller cities and towns follow closely trade journal reports, newspaper reviews, and other sources of information as to the features' acceptance at the large city first-runs. Thus they are able to judge the box-office value of the feature often before they license it, and in any event before they "book" it for their theatres.[18] "In general, trade shows, which are designed to prevent blind selling, are poorly attended by exhibitors" (Finding of Fact 98, R. 3677).

So it is that in a market of this type the producer-distributor recognizes that the success of any feature, no matter how artistic and expensive, is directly related to the public reception of its initial exhibition in the "showcase" theatre of each commercial trade center. First-run advertising and word-of-mouth advertising benefit the first-run exhibition in the adjacent territory and the subsequent-run exhibition everywhere (R. 681, 1387, 1513).

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[18] The term "book" refers to the setting of a date on which a given feature will be exhibited in a particular theatre (R. 559, 669).

Wherever possible, RKO as a distributor times this initial exhibition in close correlation with the results of widespread public surveys. These surveys indicate the period during which the opening of the exhibition will have the maximum public interest. The entire national advertising campaign is pointed toward this date. Local advertising campaigns are timed to coincide. This local campaign, to contribute most significantly to the success of the feature, must be varied in extent and nature depending on the needs of the particular feature (R. 1634-35). In Manhattan, for example, RKO's local advertising in support of its "showcase" theater almost invariably equals or exceeds its film rentals, so that the feature goes to the second-runs before RKO begins to earn revenue (R. 1646). Thus the support and cooperation of the exhibitor is of the utmost importance and is most effective when the exhibition is in an RKO "show-case" theatre (R. 1625-26, 1634-35, 1693).

The Findings quoted above give recognition to these factors.

b. *Financial stability*

Its theatre operations contribute to RKO's over-all financial stability. RKO has had financial difficulties. The depression which followed shortly after its organization caused RKO disastrous losses. Without its theatres RKO probably never could have emerged from its reorganization, and in the early years after its release from the courts could not have continued to operate (R. 1618).

The business of producing motion pictures necessarily entails substantial financial risks (R. 611, 1619). A large studio capable of producing a steady flow of quality features must have numerous departments, staffed by experts,

to handle such diverse subjects as talent, story, scenario, music, casting, research, design, makeup, costume photography and sound (R. 622, 1795). Such studios represent investments of millions of dollars (R. 622). The cost of producing features has increased tremendously during the past thirty-five years (Tr. 611, 672, 1261). Typical average cost per feature have been, in 1935-36, $376,014; in 1940, $430,000; in 1943-44, $1,250,000; and in 1945, $1,350,000 (Tr. 1548, 1550, 1570). These contrast sharply with the $40,000 to $60,000 production cost which was customary about 1915 (R. 611). Furthermore, these are average costs. A so-called "A" feature will frequently cost $3,000,000, as against $1,500,000 ten years ago (R. 611, 625-26).

To the production cost must be added the distribution expense. The cost of prints is treated as a part of the distribution expense. The total cost of black and white prints prior to the trial was from $25,000 to $97,500 per feature; for color prints, from $100,000 to $250,000 (R. 671, 1895-96). When all expenses are added, distribution cost will total one-half or more of the production cost (R. 1568-69).

Large sums are thus invested in recording an idea which cannot be tested in advance and which may not win public favor. An independent producer normally makes only one feature at a time. He usually rents studio space, borrows or hires talent, and has little fixed investment. He can enter production in boom years and withdraw when business is bad (R. 1619). The companies like RKO on which the individual exhibitor depends for a day-to-day supply must plan a program which will produce a continuous flow of pictures. This program is scheduled a year to eighteen months in advance (R. 673, 1619). Thus their total investment is pyramided upon producers such as RKO, who must build an inventory of finished features (R. 1619). Fre-

quently a high cost production grosses substantially less than its cost (R. 647, 742-43). The history of the industry has many examples of box office failures which certainly were expected, and often seemed entitled artistically, to win box office acceptance. Any producer who undertakes to underwrite a continual output of features, therefore, is likely from time to time to be faced with unprofitable pictures (R. 1619).

Added to the risks of the domestic market are the unforeseeable hazards of the international situation. Upwards of 30% of RKO's total revenues has come from foreign markets, and features are produced in expectation of this revenue (R. 1620). Over a long period of time the foreign market has contributed the bulk of the profit (R. 1569-1571; 1620). In the present condition of world commerce, of which this Court can take judicial notice, no producer can plan with assurance upon a free flow of funds from the foreign to the domestic bank account. The recent confiscatory tax of 75% of revenues imposed by England is only the most publicized instance of trade barriers which have been erected, often without warning, to destroy the profit potential of a producer.

The theatre business, on the other hand, is relatively stable and predictable. In no year between 1935 and 1945 did the attendance at RKO theatres vary 5% from the average (R. 1617, 1618). While RKO lost $5,000,000 in its production and distribution operations between 1938 and 1942, it made $9,000,000 on its theatre operations during the same period (R. 1618). Ultimately, of course, the success of any producer depends "on his ability to create a box office picture, to build something that the public is interested in, and will pay to go to see" (R. 657). But the assurance of a stable revenue offsets some of the produc-

tion risks and makes possible experimentation with new types of features (R. 1613-23, 1624).

2. RKO's operation as an integrated unit does not effect a restraint upon competition at any level of the industry.

The fact that RKO can operate more efficiently and serve the public more effectively as an integrated unit having an interest in the production, distribution, and exhibition of feature pictures does not impair the ability of its non-integrated rivals to compete successfully at each level of the industry. The Court below concluded that certain trade practices in distribution and certain local exhibition arrangements and investments violated the Sherman Act. These conclusions are assigned as error. But even if such conclusions were not challenged, the fact is clear that such violations were not the result of integration. The Court found:

> "In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants" (Finding of Fact No. 153, R. 3690).
>
> "The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations

among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited" (Finding of Fact No. 154, R. 3690).

"Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding of Fact No. 155, R. 3690).

"Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition" (Finding of Fact No. 156, R. 3690).

The record fully sustains these Findings:

a. *Production*

Independent producers have demonstrated their ability to compete successfully with the integrated producer-exhibitor companies. For ten years prior to the trial the number of independent producers and productions had been increasing (R. 639, 1263). A list of successful features produced independently during the years before the trial is in evidence (Columbia Ex. C-4). At the time of the trial there were some 40 independent producers in Hollywood alone (R. 639-41). Those who do not have their own studios make extensive use of the studio facilities and equipment of the defendants and others, which are available for reasonable rentals (R. 651, 1533, 1534, 1802, 1803). Established stars, feature players, and other production personnel are amply available in the free lance market (R. 797-99). Where

particular personalities are under contract and are peculiarly suitable for certain roles, there is a wide loan of talent in which independent producers freely share (R. 1801-02, 1261-62, 1529-30, 637-39). Thus independent producers have been and are able to compete successfully without high overhead either in fixed investments or talent contracts.

Distribution of independently produced features is normally handled through one of the eleven national distributors. No worthwhile independently produced feature has failed to secure such distribution (R. 1263-66). RKO relies heavily on independent producers to fill out its supply of product, and in the five seasons prior to the trial from 15.7% to 41.3% of the features it distributed were independently produced and yielded from 30.9% to 40.6% of its gross distribution revenue (R. 1649, RKO Ex. 5).

On this showing the plaintiff conceded that it could not show any monopoly in the field of production (R. 1952), and the Court found:

> "There exists active competition among the defendants and others in the production of motion pictures" (Finding of Fact No. 59, R. 3670).
>
> "None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures" (Finding of Fact No. 60, R. 3670).

b. *Distribution*

At the time of the trial there were eleven national distribution organizations (R. 544). Of the total of 442 features released through all distributors in 1944, RKO dis-

tributed 28 produced by itself and 9 produced by others (RKO Ex. 2). The 37 features handled by RKO represented but 8.4% of the total. No one can seriously contend that RKO has the power to dominate or control the market in distribution.

Furthermore, the integrated structure of RKO does not deny any distributor access to its theatres. As found by the Court below, it would be financially impossible for RKO to operate its theatres on RKO features alone (Finding of Fact No. 102, R. 3678). RKO theatres therefore must license features from other distributors to fill the time not used in exhibiting RKO's own features.

Naturally RKO, like every other exhibitor, seeks to license the best product available (R. 1655). This policy necessarily limits it largely to the eleven distributors with national release organizations, since the features distributed by the so-called "states rights" exchanges are low-cost, low-quality productions (R. 660).

The source of the features exhibited by RKO reflects the fact that its theatres look to the product of the non-integrated companies for almost one half of their supply. During the 1943-44 motion picture season RKO's 93 theatres which operated on first-run and (in the New York metropolitan area) first-neighborhood-run played 10,376 feature engagements[14] (RKO Ex. 8). Of these, a little less than one-fourth (23.1%) were exhibitions of RKO's own releases, and nearly one-half (47.3%) were exhibitions of features released by distributors which did not operate theatres. If Fox, Warner, Loew's and Paramount, the other theatre owning defendants, are aggregated, less than

[14] In this tabulation, each engagement of a feature in each theatre is counted separately. Thus, if a Columbia feature is exhibited in five RKO theatres, this would be tabulated as five feature engagements.

three feature exhibitions in each ten in these RKO theatres (29.6%) were licensed from them (Finding of Fact No. 137, R. 3687). In licensing the product of a distributor which is affiliated with theatres, RKO has no understanding, express or implied, that such distributor's theatre operating executives will give RKO features any preference for such theatres (R. 1659).

c. *Exhibition.*

In 1945 there were approximately 18,000 theatres operating in the United States: RKO operated 1 in each 167. The estimated weekly theatre attendance was 95,000,000 customers: about 1 in 50 went to an RKO theatre. The estimated weekly box office receipts were just under $25,000,000: about $1 in each $40 went to an RKO theatre (Tr. 1611, RKO Ex. 2).

RKO operates first-run theatres in 25 of the 92 cities of the United States with a population of 100,000 or more (RKO Ex. 7). There are 175 first-run theatres in these 25 cities, of which RKO operates only 47. In every city where RKO operates such a first-run theatre, with one exception, there are competing first-run theatres in which it has no interest[15] (Appendix A), and in all such cities there is additional competition from theatres operating on other runs (Finding of Fact No. 147, R. 3688).

In the four largest boroughs of New York City RKO operates 36 theatres. The Palace is a relatively small first-

[15] At the time of the trial RKO operated in Cincinnati, Ohio seven first-run theatres and had a minority interest of 15.4% in the United Theatre Corp. which operated the Keith, a first-run theatre. The minority interest in the Keith has since been sold to an operating company in which RKO has no interest (Report of Compliance, July 1, 1947).

The exception is Grand Rapids, Michigan, where the competing first-run theatres are operated by W. S. Butterfield Theatres, Inc. in which RKO has a 10% interest. See Appendix A.

run theatre in the highly competitive Times Square theatre area.[16] The remainder, scattered over the metropolitan area, are surrounded by theatres competing on the same or subsequent runs. Using a radius of one-half mile to embrace the area of most intense competition, the number competing with each RKO theatre averages 6.4 theatres. Only one of RKO's theatres is without competition within this distance, and only four have but one theatre competitor in this area; whereas the number rises as high as 18 in one case, and 17 in another. If the radius is extended to one mile, to cover an area of substantial competition, the average number of theatres competing with each RKO theatre rises to 15. No RKO theatre has less than two competitors within this distance, and the maximum rises to 36.[17] For a summary tabulation, see Appendix B.

Nor do the RKO theatres in New York dominate their respective competitive areas in seating capacity. Only seven of the 35 theatres have as much as one-half the seating capacity in a competitive area defined by a half mile radius, only one has as much as half the capacity in an area defined by a one mile radius. At the other extreme, fifteen have 10% or less of the seating capacity in the one-mile radius area where they are located (See Appendix B).

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[16] Seating capacities of representative first-run theatres in the Times Square area:

Music Hall	5949 seats	Palace	1707 seats
Roxy	5886 seats	Hollywood	1587 seats
Capitol	5486 seats	Globe	1416 seats
Paramount	3664 seats	Winter Garden	1350 seats
Rivoli	9092 seats	Astor	1141 seats

[17] In some instances, the competitive areas thus outlined will overlap where two RKO theatres are less than two miles apart. The resulting duplications are not sufficiently numerous to affect the figures materially.

F. Minimum admission price provisions in film license contracts.

The above fact statement is directed to RKO's theatre holdings and operations, pertinent to Points I and II of its Argument as Appellant, dealing with the Decree's prohibition of expansion and of joint interests; and to Points VI, VII and VIII of its Argument as Appellee, dealing with the plaintiff's demand for divestiture. Additional facts pertinent to the material in the Government's Brief are stated in RKO's Argument as Appellee.

Points III and IV of RKO's Argument as Appellant consider the legality of license contract provisions as to the minimum admission price to be charged during the exhibition of the feature licensed. The relevant facts are subdivided into those related: 1. To the distribution of ordinary features; and 2. To the roadshowing of unusual features.

1. Minimum admission prices in licenses of ordinary features.

Feature motion pictures may be classified as "ordinary" and "extraordinary" features. Extraordinary features include the small number of productions which, because of outstanding cast, unusual cost, extra length, and similar distinguishing characteristics, are "roadshown," often with reserved seats. Ordinary features are those which are handled in the normal routine of distribution.

All features distributed by RKO are copyrighted (R. 658). "In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed" (Finding of Fact No. 61, R. 3670). The

practice of licensing film, as shown above, is the logical and economical way to distr bute a feature film.

Long prior to 1920 distributors began to provide in the license agreement that the licensee should not charge less than a specified minimum admission price during the exhibition of the feature licensed (R. 439-40, 612, 717, 1723). Neither in origin nor in continued use did this practice have any relation to the fact that some distributors owned or operated theatres. It originated, indeed, before any defendant owned theatres (R. 612, 717-28, 916-17; P. Ex. 6).

The distributor has a direct and substantial interest in the minimum admission price to be charged during the period while the distributor's picture is being exhibited. The distributor's commercial problem is to license the feature on terms which will produce from each theatre a fair license fee and which will, in the aggregate, recoup the costs of production and distribution and a reasonable profit. The task requires the application of judgment to a complicated set of facts. The negotiation of a license fee for a particular feature for exhibition in a particular theatre involves the evaluation of numerous factors: for example, the location and seating capacity of the theatre, the quality of its housing and equipment, the exhibitor's playing policy, the sequence of runs in the competitive area, the box office attractiveness of the feature, the admission price to be charged, and the age of the picture.[18]

With the possible exception of the factor of admission price policy, the relation of the enumerated factors to the license fee is obvious. But the relevancy of the admission

[18] The age factor is illustrated by the fact that during the week ending Oct. 13, 1945, Fox product billings were:

Features released in	1945-46 season	1,642	billings
" "	" 1944-45 "	4,547	"
" "	" 1943-44 "	493	"

(R. 1118)

price is equally indisputable. The relationship is clearest, of course, where the license fee is set as a stipulated percentage of the exhibitor's gross receipts. On the more attractive features such percentage terms are employed for two reasons. First, such a feature will normally be in the upper bracket of production cost, and it is difficult if not impossible to distribute it profitably on flat rentals (R. 430). Secondly, the percentage arrangement affords the distributor an opportunity to participate in the outstanding business which an exhibitor may do on the basis of the unusual excellence of the feature (R. 431). When features are distributed on a flat rental, however, the negotiation of its amount must turn, in part at least, on the parties' estimates of the probable gross (R. 725, 726).

The distributor can make his necessary estimates on any admission price the exhibitor may set for the period during which the feature is to be shown, but no distributor could form any intelligent guess as to the reasonable and fair license fee if the distributor had no idea of the admission price to be charged by the theatre when the feature was to be exhibited.

Accordingly, RKO in its negotiations has asked the exhibitor what admission he proposed to charge during the exhibition of a feature licensed and has incorporated this representation in a license provision specifying that during such exhibition he shall not charge less. Further, RKO's license form in use at the time of trial provided that if no higher admission price was written in, the exhibitor should charge not less than 10 cents in the afternoon and 15 cents in the evenings during the exhibition of the feature licensed (R. 1723). This was a nominal provision, since substantially all exhibitors charged more, and was looked upon as

a matter of self-protection, since the charging of admission prices below 10¢ and 15¢ would debase motion picture entertainment and ultimately would hurt both the exhibitor and RKO (R. 1723).

The undisputed evidence shows that exhibitors have found, as a matter of good business practice, that they can best operate their theatres upon an admission price policy which does not vary from picture to picture or day to day. To see-saw prices would be unworkable and unsatisfactory both to the exhibitor and the public (R. 723, 969). Hence, an exhibitor normally continues on an established policy until conditions warrant a change, and then raises or lowers his price to set a new policy which he follows until another general change is indicated. It is also undisputed that the minima specified were the exhibitors' established scales of prices (R. 433, 718, 968, 999, 1382-83, 1723). Frequently the exhibitor established prices in excess of the minima (R. 725, 1001).[19] There is no evidence that RKO, or any other distributor, ever suggested a change of admission prices on ordinary features, or ever made any agreement as to the admission price to be charged at any time other than during the exhibition of its own feature then being licensed.

In specifying a minimum admission price to be charged during the exhibition of the feature licensed, RKO did not take into consideration whether or not the exhibitor was affiliated with any of the defendants in this case (R. 1723). Furthermore, the evidence shows affirmatively that RKO by the stipulation of admission prices in subsequent-run

[19] For example, Loew's made a study of the price policy followed in 3237 theatres exhibiting one of its better features, and found that in 346 instances, or nearly 11%, the prices exceeded the minima specified (R. 434).

license contracts did not discriminate in favor of prior-run theatres affiliated with any of the defendants.[20] RKO had no understanding or agreement, written or oral, with any exhibitor concerning the admission prices which RKO would require any other exhibitor to charge on features licensed to such other exhibitor (R. 1724).

2. Minimum admission prices in licenses of extraordinary features.

From time to time producers have created unusual features which have been licensed for a limited number of "roadshow" engagements at advanced admission prices prior to general release (R. 720, 952). The roadshow practice is characterized by the following attributes: (a) the feature involved has an unusually high production cost and is generally much longer than the ordinary feature; (b) the feature involved is exhibited as a roadshow in only a limited number of theatres and not on the usual run and clearance basis; (c) the license fee is based on a percentage of gross receipts; (d) each license contract for the feature stipulates a minimum admission price to be charged by the licensee during the exhibition of the feature which is higher

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[20] The RKO feature in the 1943-44 season which had the greatest number of domestic billings, LADY TAKES A CHANCE, was exhibited on first-run in *affiliated* theatres and on subsequent-run in *unaffiliated* theatres in 62 cities of over 50,000 population. Only 2.3% of the subsequent-run license contracts with the unaffiliated theatres stipulated an admission price of 40¢ or more (RKO Exs. 20, 21). On the other hand, the same feature was exhibited on first-run in *unaffiliated* theatres in 71 of the cities with over 100,000 population and in 4.6% of the subsequent-run exhibitions in *unaffiliated* theatres an admission price of 40¢ or more was stipulated in the license contracts with the subsequent-run exhibitors (RKO Exs. 22, 23).

than the usual admission price; (e) a considerable period of time elapses between the conclusion of the roadshow exhibition and the time when the feature is made available for general release; and (f) due to the unusual cost and character of the feature, it cannot be distributed as advantageously by resort only to the normal method of distribution (R. 720-21, 1125-26, 1203, 1725).

The use of roadshow licenses is not a frequent practice, but is of importance to producers who wish on occasion to attempt more ambitious releases than are possible on ordinary production budgets. During the five years before the trial only six such features were roadshown by defendants. The six were *For Whom the Bell Tolls, Northwest Mounted Police, Reap the Wild Wind, Gone With the Wind, Wilson,* and *Song of Bernadette* (R. 720, 1124, 1125, 1927). None of these pictures was distributed by RKO.

There is no evidence which suggests that the defendants have combined or conspired concerning the distribution or exhibition of such unusual features.

ARGUMENT FOR RKO APPELLANTS IN CAUSE NO. 80

Specification of Errors to be Urged

The following errors are urged herein:

1. The Court erred in Section III, Paragraph (6) of the Decree in enjoining RKO from expanding its present theatre holdings in any manner whatsoever except as permitted in Section III, Paragraph (5) of the decree.

2. The Court erred in denying Paragraph I of RKO's Motion to Amend and Modify the Decree so as to make Paragraph (6) of Section III thereof read as follows:

> "'From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court.'"

3. The Court erred in Section III, Paragraph (5) of the Decree in requiring RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies either by selling

its interest or by acquiring (with court approval) the interest of others.

4. The Court erred in Section II, Paragraph (1) of the Decree in enjoining RKO:

> "1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration or upon the happening of any event or in any manner or by any means."

5. The Court erred in failing to provide for a nation-wide system of impartial arbitration tribunals to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in its decree, as prayed in the Amended and Supplemental Complaint and as provided in the Consent Decree of the parties of November 20, 1940.

Other errors assigned by RKO are covered in the Briefs of the other appellant defendants. Though they are urged, RKO will not separately brief or comment on them.

I.

The District Court erred in enjoining RKO from expanding its present theatre holdings.

Paragraph (6) of Part III of the Decree (R. 3700) enjoins RKO and the other four exhibitor-defendants "From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph." The "preceding paragraph" enjoins the own-

ership by a defendant of a beneficial interest in a theatre in conjunction with another exhibitor, affiliated or independent, unless such interest is 5% or less or 95% or more; and provides that a defendant, in dissolving such relationships, may acquire his co-owner's interest upon showing to the Court's satisfaction that the acquisition will not unduly restrain competition in exhibition.

The three defendants who were not operating theatres at the date of the trial are left free to build up theatre circuits, perhaps from some of the sales forced on their co-defendants.

The exhibitor defendants moved the Court to amend Paragraph (6), Part III, to read as follows:

> "From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court" (R. 3704).

The Court denied this Motion (R. 3719), and appeal was taken from this Order as well as the Decree (R. 3726).

The RKO defendants contend that the absolute prohibition upon expansion is an abuse of discretion, because:

A. It is unnecessary and inappropriate in view of the type of conduct of RKO which the Court found violative of the Sherman Act.

B. It decreases rather than promotes legitimate competitive activity of the RKO defendants, and thus is inconsistent with the objectives of the Sherman Act.

It is RKO's position that the Decree should not prohibit the expansion of its theatre holdings; but that if any provision on the subject is warranted, it should be substantially in the form as quoted from the Defendants' motion to amend the Decree.

A. The prohibition upon theatre expansion is unnecessary and inappropriate in view of the type of conduct of RKO which the Court found violative of the Sherman Act.

1. The appropriate function of a decree in an antitrust case is to grant such relief, and only such relief, as will prevent and restrain the continuance or the repetition of violations of the Act of the type which have occurred.

The District Court has jurisdiction to "prevent and restrain" violations of the Act (Sherman Act, §4). The Court exercises this jurisdiction "according to the general principles which govern the granting of equitable relief." *DeBeers Mines* v. *United States*, 325 U. S. 212, 218-219 (1945). In framing a decree the "fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statutes rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." *Standard Oil Company* v. *United States*, 221 U. S. 1, 78 (1911).

While precedents in antitrust cases "cannot be much more than guides," nevertheless this Court has formulated the criterion to be applied: "The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case." *United States* v. *National Lead Co.*, 332 U. S. 319, at 335 (1947).

The test of propriety of a decree provision under Section 4 is "whether or not the required action reasonably tends to dissipate the restraints and prevent evasions." *United States* v. *Bausch Lomb Co.*, 321 U. S. 707, 726 (1944). "Past unlawful competition does not deprive the parties of the right to conduct lawful competition." *United States* v. *Standard Oil Co. of New Jersey*, 173 Fed. 177, 192 (C. C. E. D. Mo., 1909) aff'd 221 U. S. 1 (1911). The court may not "impose penalties in the guise of preventing future violations," or "create, as to the defendants, any duties, prescription of which is the function of Congress," or "place the defendants, for the future, in a different class than other people," or "enjoin all possible breaches of the law," or "cause the defendants hereafter not to be under the protection of the law of the land." *Hartford Empire Co.* v. *United States*, 323 U. S. 386, 409, 410 (1945); *Swift and Co.* v. *United States*, 196 U. S. 375, 396 (1905). See also *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941). Accord: *United States* v. *National Lead*, 332 U. S. at 338: "This is a civil, not a criminal proceeding. The purpose of the decree • • • is effective and fair enforcement, not punishment."

It is not argued that a decree must deal only with the precise type of unlawful acts found to have existed. But when the special facts of the particular case justify a some-

what broader scope for the injunction, judicial discretion is not left wholly unfettered. The decree can only "forbid the doing in the future of acts *like those* which we have found to have been done in the past which would be violative of the statute." *Standard Oil Company* v. *United States*, 221 U. S. 1, 77-78 (1911) (italics supplied). It should enjoin only "acts of the *sort* that are shown by the evidence to have been done or threatened in furtherance of the conspiracy." *Local 167* v. *United States*, 291 U. S. 293, 299 (1934) (italics supplied). The recent decision in *International Salt Co. Inc.* v. *United States* (Docket No. 46, Opinion Nov. 10, 1947) is not inconsistent in any way with the principle of these cases. Discrimination in leases of patented machines in the past was taken as proved, and the majority of this Court determined that a prohibition upon discriminations in future sales or leases was sufficiently closely related to be sustained. "The usual ways to the prohibited goal may be blocked against the proven transgressor," said Mr. Justice Jackson for the majority. This does not even approach an infringement of the doctrine that the relief must be fitted and limited to "effective and fair enforcement, not punishment."

2. The relief granted by the Decree adequately and effectively remedies the illegalities found without the necessity of prohibiting absolutely any theatre expansion.

It is not conceded here that any of RKO's acts violated the Sherman Law, but, even assuming *arguendo* that the trial court was correct in its various conclusions, it is clear that the absolute prohibition upon any future expansion is both unnecessary and inappropriate, and hence is an abuse of discretion.

RKO's acts which were deemed violative of the Sherman Act were of three general types:

First, *the eight distributor defendants* (*three of whom had no theatres*) were found to have conspired with each other and with their respective licensees (*both affiliated and independent*) to establish a nationwide system of fixed theatre admission prices, runs and clearance (Findings of Fact Nos. 64, 65, 70, 71, 79, 81, R. 3671, 3672, 3674; Conclusions of Law Nos. 7(a)(b), 8(a)(b)(c), 9(c)(d), R. 3692, 3693). The Court further found that certain license agreement terms, *whether made with affiliated or independent exhibitors*, constituted illegal restraints, such provisions being enumerated in Finding of Fact No. 110[21] (Findings Nos. 79, 86, 88, 89, 93, R. 3674-6; Conclusions Nos. 8(d)-8(h), 9(d), 10 and 11, R. 3693-4).

The violations, if any, embraced in this general type of activity were specifically enjoined. The following tabulation sets forth each violation found and the corresponding relief granted in the Decree and shows in detail the manner in which the Decree deals with each practice found to have been unlawful:

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[21] The Court's Finding of Fact No. 110 (R. 3681) reads as follows:

"110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: . . . [enumeration omitted] These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of *affiliated and unaffiliated* theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors" (Italics added).

Violations	*Relief Granted*
(a) All the defendants violated Section 1 and Section 2 of the Sherman Act by	
1. Aequiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices.	Distributors enjoined from granting any license in which minimum admission prices are fixed by the parties (Part II, Par. 1 of the Decree).
2. Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area. (Conclusion of Law No. 7)	Distributors enjoined from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances (Part II, Par. 2 of the Decree) and from licensing in the future in any manner except pursuant to a prescribed procedure under which any exhibitor may, if he so desires, bid for any picture on any run he chooses (Part II, Par. 8 of the Decree).
(b) The distributor-defendants violated Section 1 and Section 2 of the Sherman Act by	
1. Conspiring with each other to maintain a nation-wide system of fixed minimum motion picture theatre admission prices.	Same as (a)1 above.
2. Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices.	Same as (a)1 above.

Violations	*Relief Granted*
3. Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area.	Same as (a)2 above.
4. Agreeing indiyidually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110 above.	Distributors enjoined from licensing in the future in any manner except pursuant to prescribed procedure under which any exhibitor may, if he so desires, bid for any picture on any run he chooses (Part II, Par. 8 of the Decree).
5. Agreeing individually with such licensees to grant unreasonable clearances against theatres operated by their competitors.	Distributors enjoined from granting any clearance between theatres not in substantial competition and from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted (Part II, Pars. 3 and 4 of the Decree).
6. Making master agreements and franchises with such licensees.	Distributors enjoined from making and further performing master agreements and franchises (Part II, Pars. 5 and 6 of the Decree).

Violations	*Relief Granted*
7. Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation.	Each license must be offered and taken, theatre by theatre, and picture by picture (Part II, Par. 8(d) of the Decree).
8. The defendants Paramount and RKO making formula deals. (Conclusion of Law No. 8)	Distributors enjoined from making or further performing any formula deal (Part II, Par. 6 of the Decree).
(c) The exhibitor-defendants violated Section 1 of the Act by	
1. Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion pictures theatre admission prices, runs, and clearances.	Same as (a)1 and 2 above.
2. Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms. (Conclusion of Law No. 9)	Same as (b)4 above.

The second type of violation related to the joint operation of certain theatres—so-called "pooling" arrangements and percentage leases (Findings of Facts Nos. 112, 113, 114, R. 3682; Conclusion of Law No. 9(a), R. 3693).

Full relief was given on this aspect by the Decree's requirement that all such pools be dissolved and all such leases be terminated by July 1, 1947, the final date set by the Decree as modified (R. 3720), plus an injunction against any future such pools or leases. Pursuant to the Decree, RKO has dissolved the few "pool" situations in which it was interested and has terminated—at the expense of having to sell the theatres involved—the five percentage leases it had at the time of the trial.

The third type of violation related to the joint ownership of theatre operating companies (Findings of Fact Nos. 115, 116, 117, R. 3682-3; Conclusion of Law No. 9(b), R. 3693).

These Findings and this Conclusion are questioned in Point II below, but in any event full relief was accorded here by enjoining future investments of the type involved, and directing RKO to increase its interest (with court approval) to 95% or more, or to decrease its interest to 5% or less, within two years.

Clearly the prohibition upon expansion has no relation to any of the violations found.

3. The absolute prohibition on theatre expansion improperly restrains a lawful act merely because the Court found that unrelated unlawful acts had been committed in the past.

Prior decisions of this Court make it clear that a *lawful* act cannot properly be restrained in the future merely because unrelated *unlawful* acts have been committed in the

past. True, an act which, though *per se* legal, is a part or instrumentality of a conspiracy violative of the statute or which would be a "usual road" for continuing a past illegality may be enjoined if necessary to restrain the continuance of such conspiracy. *International Salt Co., Inc.* v. *United States, supra; Swift & Co.* v. *United States, supra.* But the injunction must be aimed at the illegal conduct and cannot broadly prohibit unrelated acts which, in the absence of conspiracy, are perfectly lawful. In *Hartford-Empire Co.* v. *United States, supra,* the lower court's decree prohibited the defendants from disposing of, or transferring the possession of, glass making machinery other than by an outright sale. This Court stated (p. 413):

> "* * * The injunction as drawn is not directed at any combination, agreement or conspiracy. It binds every defendant forever irrespective of his connection with any other or of the independence of his action."

The force of these guiding principles cannot be deflected, in the present case, by an argument, grounded perhaps on the *International Salt* case, and based on the particular theatre activities condemned below. True, RKO has made certain investments in companies operating theatres, and has in a few instances entered into operating agreements relating to two or more theatres. True, also, the lower Court declared these investments and operating agreements to be unlawful. But the lower Court specifically found that "the illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors" (Finding of Fact 154, R. 3690, quoted in full, *supra*).

The Court made no Finding or Conclusion, and there is no evidence which indicates, that RKO violated the Sher-

man Act in the acquisition of a 100% interest in any theatre in any locality or by acquiring a partial interest in any theatre in conjunction with a person who is not an exhibitor. On the contrary, the Court specifically found that RKO's exhibition activities increased competition in the cities in which its theatres were located (Finding of Fact No. 121, R. 3684), and by the Decree permitted, when approved by the court, the acquisition of additional interests in theatres in which RKO at the time of trial had any beneficial interest between 5% and 95%.

There is no evidence and no Finding or Conclusion that RKO ever acquired any theatre interest through predatory practices. Indeed, the plaintiff specifically excluded from the issues below any claim of improper acquisitions. It contended that "Whether or not particular theatres were originally acquired by tactics sometimes described as predatory or by more conventional means is of no moment, in view of the clearly illegal character of the producer-exhibitor combinations that have resulted, in and of themselves" (Plaintiff's Trial Brief, p. 25).

There is no evidence and no Finding or Conclusion that RKO through its theatres monopolized or conspired or attempted to monopolize trade or commerce in exhibitions either nationally or in any locality.[22] RKO's ownership of

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[22] The only Conclusion relating to monopolization by the exhibitor defendants is that they attempted to monopolize by (a) acquiescing in the establishment of a theatre admission price-fixing system and (b) conspiring to maintain a nation-wide uniform system of runs and clearances (Conclusion of Law No. 7, R. 3693). Even the joint ownership and operation of theatres with other exhibitors was condemned by the Court not on the basis that it was an attempt or conspiracy to monopolize but on the theory it constituted an unreasonable restraint of trade (Conclusion of Law No. 9, R. 3693).

0.6% of the theatres in the United States, with a weekly average attendance of 1.9% of the total attendance of all theatres, and receiving 2.6% of the estimated gross admissions of all theatres, would not support a finding of monopoly in exhibition. The fact that RKO during the period of the alleged conspiracy lost a large number of its theatres and that during the same time the number of independent theatres was increasing by several thousand is itself persuasive proof that RKO has no power to dominate in the field of exhibition.

There is no evidence, or any Finding or Conclusion, which indicates that RKO through its theatre operations has monopolized "any part" of interstate commerce. In each city in which RKO operates theatres there is competition from theatres in which RKO has no interest operating on the same or other runs. The facts as to competition are summarized in the Statement of the Case. Certainly the acquisition of a single theatre in some city in which it presently has none, especially when preceded by a hearing and court approval, could not possibly give RKO a local monopoly or unreasonably restrain trade in the area.

In its Opinion the Court recognized that "Each defendant had a right to build and to own theatres and to exhibit pictures in them" (Opinion p. 55, R. 3554). The denial of this right by the Decree is difficult to justify, particularly in view of the specific statement in the Opinion that the Decree should not "prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this Court or other competent authority shall approve the acquisition after due application is made therefor" (Opinion p. 65, R. 3562). This intention clearly

remained unchanged at the time of argument upon the proposed Decree, as shown by the following colloquy (R. 3057-63):

> "Mr. Seymour: Now I will pass on, if I may to section 5 at the top of page 15. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says 'from expanding its present theatre holdings in any manner whatsoever.' Now, that is directly in the teeth of your Honor's opinion.
>
> Judge Hand: We are not going to have any such drastic provision as that. We considered that."

That the lower Court's original view correctly stated the maximum relief appropriate, and that the provision challenged here is improper, is clear from the analogy of prior decisions. In the *Hartford Empire* case, cited *supra*, the lower court's decree contained a prohibition upon expansion. It prohibited the defendants from acquiring, otherwise than through direct issue from the Patent Office, a patent right or a restricted license under any patent relating to glass making machinery. The Supreme Court held that this provision was inappropriate and should be eliminated. In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) the lower court placed a ban upon expansion, prohibiting the defendants from acquiring any financial interest in any additional theatre outside Nashville in any town where there was already a theatre "unless the owner of such theatre should voluntarily offer to sell same * * * and when none of said defendants * * * are guilty of" predatory practices. See 323 U. S. at 185. The

United States, desiring a more restrictive provision, asked that the decree be modified to prohibit expansion "except after an affirmative showing that such acquisition will not unreasonably restrain competition." This Court granted the requested modification. Noting that the growth of the defendants had "been the result of predatory practices condemned by the Sherman Act" (323 U. S. at 186), this Court said: "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis" (*Ibid.*). RKO, though operating a smaller number of theatres than the Crescent defendants,[28] and though specifically exonerated from any finding of predatory practices in theatre acquisitions and operation, is subjected to a more drastic decree than the court approved in the *Crescent* case.

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[28] See Findings and Conclusions, *United States* v. *Crescent Amusement Co.*, reprinted in Supreme Court Cause No. 662 (October Term, 1943) Record pages 1357-1363, tabulating the number of theatres operated by the Crescent defendants in 1939 as follows:

Crescent Amusement Co.	49	theatres
Muscle Shoals Theatres, Inc.	5	"
Lyric Amusement Co.	3	"
Cumberland Amusement Co.	13	"
Strand Enterprises*	21	"
Rockwood Amusement Co.	12	"
Cherokee Amusements, Inc.	11	"
Newport Amusement Co.	2	"
Kentucky Amusement Co.	1	"
	117	

*The Bill of Complaint was dismissed as to Strand. See Crescent Record, 1484.

Further analogy is to be found in the *National Lead* case, *supra*, wherein the government asked this Court to strike down the provision for compulsory patent licenses on reasonable royalties, and to substitute either an injunction against the enforcement of certain patents or a provision for compulsory royalty free licenses. The following quotation of the Court's language would, with a slight paraphrase involving no change of substance, fit the facts of the present case:

> "Assuming * * * that violation of the Sherman Act in this case has consisted primarily in the misuse of patent rights placing restraint upon interstate * * * commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of future performance of the unlawful agreements. Further assurance against continued illegal restraints upon interstate * * * commerce * * * is provided through the compulsory granting * * * of licenses at uniform reasonable royalties * * *
> On the facts before us, neither the issuance of such licenses on a royalty free basis nor the issuance of a permanent injunction prohibiting the patentees and licensees from enforcing those patents has been shown to be necessary in order to enforce effectively the Antitrust Act * * *"

B. The absolute prohibition of theatre acquisitions by RKO restrains, rather than promotes, lawful competition and is inconsistent with the objectives of the Sherman Act.

It has been shown that the prohibition of future theatre acquisitions is inappropriate and unnecessary since it has no relation to the type of misconduct found by the court

below, and recurrence of such misconduct will be prevented by other provisions of the Decree. We consider now the impact of such a provision upon competition within the industry.

The Court found that at the time of the trial:

Paramount owned independently of the other defendants approximately	1395	theatres
Fox approximately	636	"
Warner approximately	501	"
Loew's approximately	135	"
RKO approximately	109	"

(Findings of Fact No. 118, R. 3684)

After all joint interests are dissolved, RKO will have substantially fewer theatres than any other exhibitor defendant with the possible exception of Loew's. There is, of course, no assurance whatever that RKO will be able to negotiate fair terms for the purchase of a co-owner's interest in any theatre, or if successful in such negotiations will receive the approval of the lower court. Furthermore, of the 106 theatres operated by RKO at the time of the trial, 51 were mere leases which RKO may or may not be able to renew at fair terms. Already, as noted below, controversy has arisen as to the rights of a defendant confronted by the loss of present theatre operations through such causes.

The result is that RKO by the flat prohibition upon expansion will be permanently frozen in an inferior position vis-a-vis the other theatre owning defendants and the large independent circuits. This is the very antithesis of competition. Moreover, the defendants Universal, Columbia and United Artists remain free to acquire theatres wher-

ever and whenever they may choose to do so. The closely held circuits involved in *United States* v. *Griffith*, now pending in this court, aggregated over 175 theatres. Even an independent circuit which had been convicted of predatory practices—practices of which RKO is not even accused—and which had more theatres than RKO, was left free to expand its theatre holdings with court approval. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944). The pattern set in that case has been followed by Judge Knight in *United States* v. *Schine*, in his order of July 5, 1946 (printed in the Statement of Jurisdiction, p. 38, in *Schine Chain Theatres* v. *United States* now pending in this Court). This case also involved a circuit of theatres much larger than that of RKO,[24] and a judicial finding of practices without parallel in the RKO record. Yet the lower court's decree also provided that: "No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition." This is a reasonable pattern intended to preserve competition.

It is believed that the Decree does not prohibit the acquisition of a theatre in a new territory to replace a theatre disposed of or lost elsewhere, since on balance there would be no expansion. The plaintiff urges, however, that such an acquisition would violate the Decree. The failure of the Decree to deal specifically with this problem is an admirable example of a failure to meet the requirement suggested by the *International Salt* case, *supra*, that "It is desirable, in

[24] On May 19, 1942 the Schine circuit included 148 operating and 18 closed theatres, a total of 166. See Brief for Appellants, p. 4, in Cause No. 10, *Schine Chain Theatres, Inc.* v. *United States*, now pending.

the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that the parties may know their duties * * *". RKO's dilemma is illustrated by the fact that during the pendency of this appeal the Government has asserted in open court (on an attempted civil contempt proceeding initiated by a local exhibitor) that a theatre owning defendant would violate the prohibition upon expansion if it erects a theatre structure with the intention of substituting it for an obsolete theatre which it plans to abandon in the same town. The prohibition in its present form is sure to lead to misunderstandings, disputes and possible contempt hearings burdensome alike to the defendants in their day-to-day operations, to the personnel of the Department of Justice, and to the Court below.

The prohibition upon expansion is peculiarly incomprehensible in the light of the plaintiff's charge in its complaint, reiterated during the trial, that the exhibitor-defendants had conspired to divide the territory of the United States. The evidence showed that this charge was unfounded, and there is no Finding or Conclusion tending to sustain the accusation. It is true, however, that the vaudeville houses which were acquired by RKO during its organization period, and which now constitute the bulk of its theatre operations, were principally in the north and east. RKO's early efforts to obtain geographical spread by operating theatres in a number of the larger cities of the south and west were partly successful, but most of these theatres were lost during its reorganization (see Figure 1). Now the Decree restricts, if it does not wholly prevent, RKO's entry into territory where it has no present representation. And this despite the fact that it is reasonable to infer that the result would be the same as the Court

found flowed from RKO's prior exhibition activities: an increase in competition.

Moreover, the absolute prohibition against expansion arbitrarily places RKO as a distributor at the mercy of dominant exhibitor chains in any area where it has no present showcase outlet. It would be a mistake to think of a circuit of theatres only in the sense of a closely controlled business unit operating a number of theatres. Equally powerful as market factors are the voluntary theatre chains which lodge in a single booking agent the authority to license features for all the otherwise independent exhibitors who thus concentrate their buying power. Historically, it was just such a combination of "independent" exhibitors which originally threatened to boycott Paramount product and thus led Paramount to secure its own theatres (Findings of Fact Nos. 5-8, R. 3061-2). The affirmance of the absolute prohibition on expansion thus would be equivalent to a judicial notice to all exhibitors in every state where RKO now is without theatres that they could boycott RKO's product unless it was licensed to them at any terms they might set, with complete confidence that RKO could not protect itself by acquiring its own outlets, save perhaps—and this, as above indicated, not beyond argument—by abandoning a competitive operation elsewhere.

The result is a judicial locking of the whole competitive picture in the industry. This Court is familiar with those risks of industry which arise from external changes which impair the values of fixed investment: for example, shifts of population among the states as well as in local areas; changes in the income characteristics of particular regions, cities and neighborhoods; alterations in public tastes as to location, size or types of theatres and programs; and technological developments which may render

existing theatres inadequate or obsolete. An outstanding example at the present time is the growing preference of many theatre patrons for outdoor drive-in theatres. Active and successful competition calls for flexibility. By the Decree, the District Court would permanently bar RKO from making such adjustments. Such a ban goes beyond the appropriate function of the Courts in an anti-trust proceeding. "It is not for the courts to realign and redirect effective competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion." *United States* v. *National Lead Co., supra,* 332 U. S. at p. 353.

II.

The District Court erred in compelling RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies.

The Decree, in Part III, Paragraph 5, directed RKO within two years to terminate certain beneficial interests in theatres (R. 3699).[25] At the time of the trial RKO had

[25] Part III, Paragraph 5 of the Decree enjoins RKO and the other exhibitor-defendants: From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent (meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in

stock interests falling within this paragraph in companies owning or operating some 289 theatres. In only 20 of these theatres was the interest 49% or more.[25]

The plaintiff introduced no evidence to show the circumstances under which RKO made these investments or their competitive effect. The plaintiff did not charge in the complaint and did not undertake to prove at the trial that RKO acquired any such interest for the purpose of restraining trade, or that the effect of any such acquisition or holding was to restrain or monopolize trade in the competitive area in which the theatre was located.

The undisputed evidence offered by RKO shows that its interests in 254 of the 289 theatres (1) was acquired at the time of its organization or shortly thereafter; (2)

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question), where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years (R. 3699).

[25] RKO's interests in all such companies may be classified as follows:

65% interest in 1 company having 3 theatres
50% interest in 5 companies having 16 theatres
49% interest in 1 company having 1 theatre
35% interest in 1 company having 3 theatres
33-1/3% interest in 3 companies having 24 theatres
30% interest in 1 company having 1 theatre
25% interest in 2 companies having 8 theatres
20% interest in 1 company having 186 theatres
15% interest in 1 company having 1 theatre
10% interest in 2 companies having 96 theatres

Finding of Fact number 117 shows RKO as having joint interests with other exhibitors in 318 theatres (R. 3683). This Finding, however, is predicated on RKO Exhibit 11 which made no distinction between beneficial interests falling within Paragraph (5) and "pooling situations" coming within Paragraph (2) of Part III of the Decree. Government Exhibits 87, 96, 99, 105.

was held solely as an investment; (3) did not give it any advantage in licensing its pictures in the theatres concerned; and (4) did not give it any control over the policy and management of any company or any theatre of any such company. As to the remaining 35 theatres, the record merely shows the extent of the interest of RKO (Gov. Exs. 158, 159, R. 1611-1617).

The Court made no finding that any interest of RKO in any such company was acquired for an unlawful purpose or that in fact such acquisition had restrained trade in any competitive area. The Court did find, however:

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as inconsequential investment in exhibition.
>
> 116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently."

Insofar as these constitute Findings of Fact, they are unsupported by the Record; insofar as they are Conclusions of Law, we submit they are erroneous.

Without exception, the decisions of this Court have held that an acquisition of a competitor or of an interest in a

competing enterprise is not illegal unless undertaken for the purpose or with the direct and necessary effect of restraining interstate trade and commerce unreasonably.

Standard Oil Company v. *United States*, 221 U. S. 1, 75 (1911);
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 (1934);
United States v. *The United States Steel Corporation*, 251 U. S. 417 (1920);
United States v. *International Harvester Company*, 274 U. S. 693 (1927);
United States v. *Shoe Machinery Company of New Jersey, et al.*, 247 U. S. 32 (1918).

The applicable law is fully discussed in the brief of the Paramount appellant in Cause No. 81. The required showing of illegality is entirely lacking in the record in this case. In the absence of such a showing, we respectfully submit that the court committed reversible error in ordering a dissolution of these partial interests.

III.

The District Court erred in enjoining RKO from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of the feature licensed.

The Decree, Part II, Paragraph 1, enjoins the distributor defendants from "granting any license in which minimum prices for admission to a theatre are fixed by the parties * * * in any manner or by any means" (R. 3695). This injunction is based on the Court's conclusion that the

distributor defendants had unreasonably restrained trade by "Agreeing individually with their respective licensees to fix minimum motion picture theatre prices" (Conclusions of Law 8(b), R. 3692). This prohibition is considered in this Brief: first, as applied to a license contract relating to an ordinary feature (Part III of Argument); secondly, as applied to a license contract relating to an unusual feature which is roadshown (Part IV of Argument).

A. A license provision stating the minimum admission to be charged during the exhibition of the feature licensed is normally and reasonably adapted to secure the pecuniary reward of the owner of the motion picture feature licensed, and hence is not illegal per se.

The facts clearly demonstrate that the minimum admission price provision in a film license agreement is normally and reasonably adapted to secure the pecuniary reward of the owner of the feature. This becomes evident when one considers the inherent nature of the motion picture industry.[27] A producer-distributor, owner of a so-called "A" feature, in order to recover his costs and a reasonable profit, must circulate each of his prints to a number of theatres, deriving his profit from the *aggregate* fees. In every area of any substantial size he will serve two or more competing theatres on simultaneous or successive runs. He knows, as a matter of common business sense, that the first-run exhibitor in a given area will have the largest gross receipts, and hence will be able to pay the highest license fee.

The additional value which a print has on its first-run exhibition does not derive from a conspiracy but from

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[27] Record references on the following analysis will be found in the summary of the facts above.

the appeal of the first showing. It is no more subject to legislative, judicial, or administrative control than is the popular preference for any fresh product, whether it be a book, a fashion, or a motion picture. At the time of the first run, the market is untouched. The trade paper, newspaper and magazine stories and the radio commentators' remarks about, and the national and local advertising of, the feature are fresh in the potential patrons' minds. In the smaller cities, such national sources are supplemented by the reviews and advertisements which appear in the large city newspapers reporting on the earlier exhibitions in the metropolitan hub of the particular trade area. So it is that when a feature is first shown in a given competitive area it has its maximum income-producing potential to both the distributor and the exhibitor.

To exploit the inherent values of the feature at the moment of first showing in a competitive area, the distributor normally grants an exclusive license permitting an exhibitor, for a limited time, the right to exhibit the print to the public in a specified theatre. The distributor does not part with his property in the print or in the copyright thereon. He sells neither. He licenses the print for use in a theatre, and both he and the licensee understand that he will license it for later use in competing theatres.

The distributor clearly has two legitimate interests when he makes the license contract. His contractual protection of these two interests is a reasonable restraint which does not violate the Sherman Act.

His first interest is to protect the license fee to be received from the *individual theatre licensed*. The distributor's interest here coincides with the interest of the ex-

hibitor licensed. When the feature is licensed for a specified percentage of the gross receipts of the theatre during its exhibition, the distributor's return depends *directly* upon the admission price charged *during the period of the exhibition of his feature*. As stated by Mr. Wright, of plaintiff's counsel, "Of course, the film rental that any of these theatres can pay is dependent on the length of time that the picture plays, *and the admission price charged by the* theatre" (R. 11). A distributor is not compelled by the Sherman Act, or by any other law, to license his picture without *asking* the exhibitor what price policy the exhibitor *intends* to follow. Such blind (to the distributor) selling would not be required even under the auction bidding technique imposed by the Decree below. The Decree, Section II, paragraph 8(c) authorizes the exhibitor to bid "a flat rental, or a percentage of gross receipts, or both, or any other form of rental, • • •" and directs the distributor, if it accepts any offer, to "grant such license to the highest responsible bidder • • •." If one exhibitor bids $300 flat rental and another bids 35% of gross receipts, a distributor can obey the Decree only if he knows the admission price which the latter bidder intends to charge. By the Decree, he is merely forbidden to translate this representation as to intention into a binding contract that, during the period of the exhibition, the exhibitor will not dissipate the distributor's expected revenue by violating the representation.

Where the license fee is a flat rental, the figure is set upon an estimate of the amount the exhibitor will probably gross on a stated admission price policy. In no other way can the exhibitor intelligently decide what he is willing to pay, or the distributor intelligently decide what he is willing to accept.

The distributor's second interest is in the protection of the *aggregate license fees from the competitive area.* Here the interest of the distributor is *not* coincident with that of any one individual exhibitor but is coincident with the interests of the exhibitors of the area *in the aggregate.* Implicit in the Opinion below appears the view that there is something vicious in the fact that a distributor, faced with the necessity of licensing a limited number of prints in successive runs in competing theatres, keeps the whole playing sequence in mind when he licenses each theatre. It would be unrealistic to argue that a competent distributor does not see the exhibition area as a whole.

In a typical city of 150,000 people, probably 100,000 theatre admissions are sold weekly.[28] The distributor has an interest in seeing that his feature is made available, in competition with features released by his rivals, to these patrons. To afford the maximum variety of facilities, in time, location, and quality of appointments, the distributor subdivides his total market in each area, and licenses numerous theatres. He desires, however, to insert in each license contract a minimum admission provision which in effect constitutes a covenant by the exhibitor not to destroy the value of the rights which the distributor retains.

Such a negative covenant, essential to the protection of the distributor's retained property interest in other licenses, is not an unreasonable restraint of trade. It is a fair and reasonable safeguard for his total revenue from the area. As recognized by Mr. Wright of plaintiff's counsel, an exhibitor "cannot get more, and probably not as

[28] The estimated theatre attendance in 1944 in the United States was 95,000,000 out of a (1940) population of approximately 132,000,000 (RKO Exhibit 2).

much, for a later exhibition of the same area as [another exhibitor] has gotten for the prior exhibition" (Tr. 16).[29] It follows that a change in the admission price policy of an exhibitor "would not only affect the film rental income in" the theatre making the change, "but it would also affect . . . the film rental income in the subsequent theatres, because if the prior-run theatres reduce their admission prices, then the subsequent theatres could not continue to charge the admission prices that they have been charging" (R. 726).

It is interesting to note, also, that in the case of *United States* v. *Schine Chain Theatres Inc.*, now pending on appeal in this Court, the government's counsel stated in the trial court:

> "Whatever may have been the position originally, this method of licensing films through clearance and minimum admission prices has been established in the industry and it is the way in which the industry operates and so long as those restraints are reasonable, as far as we are concerned there clearly is no conflict with the Sherman Act" (Schine Record, p. 494).

No one urges that for this reason there should not be full flexibility of prices at the exhibitor level. What is argued, however, is that there is no violation of law when an exhibitor contracts to charge a certain minimum during the exhibition of a particular feature. The distributor, to

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[29] Mr. Wright was referring to Warner as the prior run exhibitor, but his remark evidences his understanding of the fundamental business reality which has no relation to whether either the prior-run or subsequent-run exhibitor is affiliated.

protect his interest in the revenue from the license under negotiation, and from the several runs in the area, does, of course, have "in contemplation" the several exhibitors who in a given area are going to exhibit his picture (Opinion, p. 27).

But it is a far, indeed an impossible, step from the fact that the distributor has in contemplation the several exhibitors who will license his picture, to the conclusion that each individual license agreement is a price fixing combination which violates the Sherman Act. The distributor is not selling a commodity which bears his trade-mark or name. If he were, he could, under the Fair Trade Acts of forty-five states, prevent such destruction of the value of his property. Selling nothing, but granting merely a license, he is to be barred from the protection afforded by a reasonable covenant which has merely the effect of preserving his retained property right: the revenue in future licenses.

The decisions of this Court do not support the conclusions of the trial court. This Court has upheld a provision in a patent license agreement which allowed the licensee to make and vend a patented product and specified the retail price. *United States* v. *General Electric Company*, 272 U. S. 476 (1926). The *General Electric* case, though vigorously attacked from time to time, has not been overruled or limited by this Court.[30] Rather, it has been cited with approval. In *Carbice Corp.* v. *American Patents Develop-*

[30] The Court was requested to overrule the *General Electric* case in *U. S.* v. *Univis Lens Co.*, 316 U. S. 241, and *U. S.* v. *Masonite Corp.*, 316 U. S. 265, but did not do so. It is now being requested to overrule the case in the appeal in *United States* v. *Line Material Co.*, reported below at 64 F. Supp. 970 (1946).

ment Corp., 283 U. S. 27 (1931), this Court recognized that a patent owner "can grant licenses upon terms consistent with the limited scope of the patent monopoly," citing with approval the *General Electric* case. In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938), the court cited the *General Electric* case with approval as establishing that the patentee may grant a license upon any condition the performance of which is reasonably related to the reward which the patentee by the grant of the patent is entitled to secure. In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940), the court again cited the *General Electric* case with approval. See also, *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902).

Each feature motion picture is copyrighted. The owner of a copyrighted feature has, under the copyright law, "the exclusive right . . . [to] perform or represent the copyrighted work publicly if it be a drama . . . and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever" (17 U. S. C., §1). A copyrighted motion picture is a "drama" within this provision and its exhibition by projection on a screen constitutes a performance of the drama. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911); *Patterson* v. *Century Productions*, 93 F. (2d) 489 (C. C. A. 2d 1937). The Sherman Act does not abridge rights conferred by Copyright Law. Hence a contractual provision which constitutes merely the exercise of the statutory monopoly does not fall within the condemnation of the Sherman Act. Cf. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 32 (1913).

The position of the distributor is clearly different from that of the publisher who sells outright a copyrighted book for a satisfactory price. In *Bobbs-Merrill* v. *Straus*, 210

U. S. 339 (1907) it was held that after such a sale the publisher, having parted with all title, dominion, and control, could not fix the resale price of the book. That case has no significance on the issue here, where the license passes no title whatsoever and only a limited privilege of exhibition.

Moreover, factually the motion picture copyright owner may reasonably assert an even stronger right to protect his interest than can the owner of the usual patent. Only a limited number of exhibitions of the unique copyrighted feature are practical in each area. No sale of any product is involved. Instead a mere license to exhibit a motion picture is granted. The distributor reserves the right to issue other licenses. Even if the feature were not copyrighted, the property in the film is unique and the facts above clearly demonstrate that the owner of the feature has a legitimate interest in the admission price to be charged by the licensee.

B. The minimum price provision is not invalidated by the fact that the feature licensed is usually not the sole item on the theatre program.

The attack upon minimum admission provisions has yet another string to its bow. It is observed that usually the feature licensed is but one part of the theatre's program. From this fact it is argued (even assuming *arguendo* validity were the feature the sole item on the program) that a license stipulation as to the admission price must be illegal. An effort to secure aid and comfort for this argument is sometimes made by citation of the dictum in *Interstate Circuit* v. *United States*, 306 U. S. 208, at 228 (1939) wherein Mr. Justice Stone said: "Because a patentee has

power to control the price at which his licensee may sell the patented article, it does not follow * * * that the owner of a copyright can dictate * * * the admission price which shall be paid for an entertainment which includes features other than the particular picture licensed." The issue was not posed or litigated in the *Interstate* case, and the language quoted was a mere passing disclaimer of any intention to prejudge the question when it should be presented directly.

It is now presented directly to this Court for the first time, and the superficially attractive argument which is launched from the shaky foundation of a passing aside must be tested against the realities disclosed by a record in which the issue has been directly litigated. The fact is that the minimum price provision applies solely to the exhibition of the feature licensed. That feature constitutes the backbone of the entertainment.

The distributor has no control over the manner in which the exhibitor plans a program of entertainment. The exhibitor is licensed to exhibit the feature. Whether the feature is to be presented alone, or as a part of an elaborate program including short subjects, other features, or even stage shows, is within the unrestricted discretion of the exhibitor. As a good salesman, he may elect to package the feature in the way he considers most appealing to the public. The distributor has only the right to specify the minimum admission price at which the particular feature owned by the distributor is to be exhibited. How this right can be lost because the exhibitor elects to license other films and exhibit them on the same bill defies legal analysis. After all, the provision is for *minimum* admis-

sion prices, and the exhibitor is free to charge any higher amount that he may believe justified by the quality of the additional entertainment offered.

IV.

The District Court erred in enjoining RKO from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of an unusual feature roadshown in advance of general release.

Part III of the Argument deals with the minimum admission price stipulation in the license of an ordinary feature. Part IV deals with those unusual features which are roadshown at advanced admission prices prior to general release.

In the Consent Decree special treatment was accorded the roadshow situation by Section XIV, reading as follows:

> "Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing of such picture upon such terms and conditions as may be fixed by the distributor." [Note: Roadshow was defined as "an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar."] (R. 3391)

After the Opinion in this cause, the major defendants proposed a form of decree which, in Section V, would have authorized distributors to lease or otherwise to contract

for the temporary use of a theatre for the road showing of a particular feature (R. 3261). This would have continued the provision contained in Section XIV of the Consent Decree.

At the time of the hearing on this proposal, the defendants offered to limit its scope to features having a production cost of $3,000,000 or more (R. 3074). The Court failed to include in the Decree any provision which would permit the continuance of the practice under any circumstances. Furthermore, by its absolute prohibition upon expansion, the Court cast doubt upon the propriety of a distributor's leasing for temporary periods a theatre to be used for roadshowing its own productions.

The problem was forcefully presented at the argument below upon the form of the decree. Vanguard Films, an independent non-defendant producer, presented an application to file a brief *amicus curiae* (R. 2584). Vanguard was not controlled, directly or indirectly, by any defendant, but it released through United Artists (R. 2586). For more than a year before the Opinion below, Vanguard had in production a very costly feature, and at the time of the argument on the decree it had invested therein some $6,500,000 (R. 2855). Vanguard "planned to do something that was traditional in the industry": to roadshow the feature (R. 2855). The reason which Vanguard gave was simple: "We want to get our money back." This was the same reason for the roadshowing of other unusual pictures (R. 721).

The reaction of plaintiff's counsel to the Vanguard plea was somewhat amorphous. He was "opposed to any road show exemption" (R. 2876). But he observed that "insofar as these independents may release their film through

non-defendant distributors, they are not subject to any of the Decree's restrictions" (*ibid.*). And "as far as the particular picture *'Duel in the Sun'*, which apparently gives rise to that petition, is concerned, we believe that the provisions of the Decree ought not to be made to apply to that picture * * *" (R. 2876-77). And in any event, "United Artists, which is to release the picture, * * * proposes to appeal from the price-fixing provisions of the decree * * * and we assume that a stay of such provisions during such appeal would probably take care of whatever special hardship might be presented by that picture * * *" (R. 2877).

If any thread of consistency can be found in these expressions, it is that plaintiff's counsel fully realized that roadshow licenses were not *per se* violative of the Sherman Act, but that in his zeal to penalize these defendants, he was unwilling to yield even one concession. Can it be seriously argued that six roadshown features in five years by the eight outstanding distributors evidence a conspiracy? The inference is clear: plaintiff's counsel fully realized that such license provisions are lawful.

During the five year period, a total of six features were roadshown: three by Paramount, two by Fox, and one by Loews. None of the other five defendants roadshowed a feature. There is no evidence in this case which would support a finding that fixing a minimum admission price in a roadshow license for an occasional feature picture has any effect whatsoever upon competition in the licensing of motion pictures, either among the same or other exhibitors for other contracts, or among distributors. It is apparent, also, that such a provision, employed only exceptionally, in roadshow licenses, can have no substantial effect on the

general pattern of admission price competition among exhibitors for the patronage of movie-goers. The commerce involved in that competition is wholly intrastate. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *Federal Club* v. *National League*, 259 U. S. 200 (1922).

The inevitable effect of the prohibition will be to obstruct, if not wholly to end, the production of outstanding features of the type which have been roadshown in the past. Many of these have been considered landmarks in the industry. The prohibition clearly runs counter to the admonition of this Court that the Decree should not place the defendants under a restriction "which may do more harm than good." *Sugar Institute* v. *United States*, 297 U. S. 553, 605 (1936).

The argument in Part III, though directed to ordinary features, is equally applicable to the roadshow exhibition license, with the added weight that frequently a roadshown picture is the only item on the program during its run.

Unless a roadshow license contract stipulating a minimum price is illegal *per se*, the Decree below which by its broad provisions proscribes such licenses cannot stand. This is true because the very nature of the roadshow distribution makes it impossible for it to be used as an instrumentality in a nationwide conspiracy of the type charged against these defendants. Even if the District Court's inference of conspiracy concerning the distribution of ordinary feat res were justified on the Record, there would be no basis for an inference that such conspiracies exist or are threatened with respect to the occa-

sional licensing of features for roadshow exhibitions. In the first place, there is no evidence from which any inference can be drawn that in licensing roadshow exhibitions two or more distributors stipulate the same admission prices in their separate contracts. In the second place, roadshow exhibitions do not take place in all theatres in any given area. It can hardly be said that the licensing of six features on this basis in the past five years or more has created a "national system to fix prices" which "regulates the licensees' ability to compete against one another in admission prices" (see Opinion of Court p. 25, R. 3527) or that the erection of such a system is threatened in the future by the occasional licensing of roadshows.

No public purpose will be served by outlawing roadshows entirely. On the contrary, the public may well be deprived of extraordinary pictures for which in the past it has willingly paid a higher than usual admission price.

V.

The District Court erred in concluding that it lacked power to continue the arbitration system established in the Consent Decree pursuant to the prayer of Plaintiff's Amended and Supplemental Complaint.

This point is briefed by the appellant Fox. To avoid repetition the Fox brief is adopted insofar as it deals with the power and propriety of the Court's continuing the existing arbitration system.

Conclusion as appellant

It is respectfully submitted that the judgment of the District Court in the respects herein complained of should be reversed.

Dated: January 15, 1948.

ARGUMENT FOR RKO APPELLEES IN CAUSE NO. 79

The Brief for the United States as appellant (here cited as Pl. Br.) concentrates on the five defendants engaged in the production, distribution and exhibition of features. The plaintiff describes its "attack on the action below" as being "confined largely to the adequacy of the relief granted" (Pl. Br. 11). It disclaims any intention to "challenge any of what [it] considered to be the evidentiary findings," but it does "object to the court's failure to conclude that the defendants, both individually and collectively, had monopolized important segments of the motion picture industry" (*ibid*). It asks this Court to rewrite the Decree so that each integrated defendant shall be split into two companies, one to produce and distribute feature pictures,[1] and the other to operate theatres.

The contention that the refusal of the District Court to order RKO to divest itself of all interests in any theatre necessarily rests on the basic contentions that:

(1) The District Court erred in refusing to find that RKO through the use of its theatres is engaged with the other four theatre-operating defendants in a nationwide conspiracy to monopolize the distribution or exhibition of motion pictures, and hence to conclude that the separate theatre operations of all defendants may be treated as an aggregate (discussed in Point VI); or

(2) The District Court erred in refusing to find and conclude that RKO as an integrated company producing,

[1] Plaintiff recongnizes that a company engaged in production and distribution is "integrated" (Pl. Br. 6).

distributing, and exhibiting feature pictures is an unlawful combination (discussed in Point VII).

In addition to convincing this Court that it is correct on either point (1) or (2), plaintiff, to secure a reversal of the Decree, must also establish:

(3) That the District Court erred in rendering the Decree appealed from, because the same is so inadequate as to constitute an abuse of discretion (discussed in Point VIII).

All of the plaintiff's arguments fall within these three propositions, and will be so discussed.

VI.

The District Court correctly refused to find that RKO through the use of its theatres is engaged with the other theatre-operating defendants in a nation wide conspiracy to monopolize the distribution or exhibition of motion pictures, and to find that its theatre operations may be aggregated with those of the other defendants for the purpose of establishing general claims of monopoly in exhibition.

The District Court found that the defendants had conspired to establish a nationwide system of clearance, run and minimum admission prices. It was the Court's view that this conspiracy in general operated for the benefit of prior-run theatres, whether affiliated or unaffiliated. We have demonstrated that this illegality, if any existed, has been completely corrected by the injunctive provisions discussed in Point I A, at page 39, *supra*.

The illegalities found arose not from the fact that certain defendants owned theatres, but from the fact that all the distributors—those with no theatres as well as those with theatres—followed certain distribution practices which the Court considered illegal and which "if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants * * * have owned or controlled * * * theatres * * *" (Finding of Fact No. 154, R. 3690).

The District Court concluded, moreover, that "the five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553). The Court also found:

> "The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or individually, have a monopoly of exhibition" (Finding of Fact No. 119, R. 3684).
>
> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition * * *" (Finding of Fact No. 152, R. 3689-90).[2]
>
> "In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of finan-

[2] The court added "except as found in Findings 153 and 154 below" (*ibid.*). This limitation is meaningless, since there is no contrary Finding in either 153 or 154.

cial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants" (Findings of Fact No. 153, R. 3690).

Hence, plaintiff's argument, in so far as it attempts to draw inferences from aggregate figures, is built upon a premise which the District Court expressly repudiated. The plaintiff's brief nowhere undertakes to set forth any factual or legal justification for thus lumping together RKO and the other companies and ignoring their numerous differences in origin, development, size and operating policy.

The District Court's refusal to treat the theatre holdings of the defendants as a composite aggregate is supported by the evidence and wholly consistent with its Findings of Fact. To prevail, therefore, the plaintiff must convince this Court that it should overturn the District Court's Findings. "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" (Fed. R. Civ. Proc. 52(a)).[3]

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[3] In this case plaintiff offered over 400 exhibits, called no witnesses, and rested. The defendants introduced witnesses whose testimony is recorded in some 1800 pages of the Record and was supported by numerous exhibits. The judges considered this Record for over a year before making their Findings of Fact. As Judge Hand said in *United States* v. *Aluminum Co.*, 148 F. (2d) 416 (C. C. A. 2d, 1945) at p. 433:

> "Rule 52(a) in substance merely carried over the earlier practice in equity to all trials before a judge. State Farm Mutual Automobile Insurance Co. v. Bonacci, 8 Cir., 111 F. 2d 412, 415; Petterson Lighterage & Towing Corporation v. New York Central R. Co., 2 Cir., 126 F. 2d. 992, 995; Katz

In an effort to discharge this burden, the Government employs composite figures throughout its argument, and urges that these figures disclose a combination and conspiracy by the integrated defendants through the use of

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Underwear Co. v. United States, 3 Cir., 127 F. 2d 965, 966; 3 Moore's Federal Practice, §52.01 * * * [A]n appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded * * * His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a [large] record * * * it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. Consumers Import Co. v. Kawasaki, 2 Cir., 133 F. 2d 781, 787. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance. The impossibility of that at once appears * * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable,' Davis v. Schwartz, 155 U. S. 631, 636; 15 S. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; Alabama Power Co. v. Ickes, 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

their theatres to create a nationwide monopoly of the distribution and exhibition of motion pictures. The District Court repudiated this contention. We shall examine these aggregate figures in the light of the activities of RKO. Such an examination will demonstrate, as the Court below found, that the theatres of RKO have been in active and vigorous competition with both affiliated and independent theatres, and that the composite figures form no sound basis for the inferences which the plaintiff asks this Court to substitute for those of the District Court.

1. Plaintiff urges that "together" the defendants distribute a large number of features (Pl. Br. 21, repeated 54). The defendants distribute no features "together." In 1943-1944 the eleven national distributors, of which eight are defendants, separately released a total of 397 features, including 137 features released by the three non-defendant distributors (Finding of Fact No. 99, R. 3677).[4] Separately each of the eight distributor-defendants released from 4.04 to 12.34 per cent. of the 397 features distributed by the eleven national distributors. RKO distributed 9.57%, of which a substantial number were handled for independent producers. There is no more basis for lumping RKO's percentage with that of United Artists (which distributes only), or Columbia (which produces and distributes), or Warner (which produces, distributes and exhibits), than there is for lumping RKO's theatres with those of any other circuit, independent or affiliated.

[4] The Finding refers to 62 of the features distributed by non-defendants as "Westerns." The attempted distinction between so-called "Westerns" and other features is of no real significance, since most, if not all, of the producers release a substantial number of low cost productions (Pl. Exs. 40, 56, 80, 93, 125, 136, 143).

2. The Government next urges that one or the other of the defendants has some interest in a total of 3,137 theatres (Pl. Br. 19, repeated 54). The District Court's choice of language in its Finding of Fact No. 118 (R. 3684) is precise. It states that of the 3,137 theatres, RKO owned "*independently of the other defendants*" 109 theatres, or 0.6% of the total. In 82.65% of the theatres in the United States *no* defendant had *any* interest. Plaintiff tacitly concedes (Pl. Br. 17), and on the trial openly conceded (R. 1600), that there has been no expansion of RKO's theatre holdings since 1935, although in the same period the total number of theatres increased by nearly 5,000 (Finding of Fact No. 145, R. 3688). Indeed, the number of theatres which RKO operates is now substantially less than in the past (See Figure 1, p. 11). The mere fact that other defendants own numerous theatres is no basis for adding all the separate interests into a single figure.

3. Plaintiff refers to the 92 cities having populations of over 100,000 and asserts that "the five major defendants together own interests in at least 70 per cent. of all the first-run theatres" in such cities (Pl. Br. 20, repeated 55). The word "together" thus again suggests joint operations. The fact is that RKO operates 9.2% of the first-run theatres in these cities. In 67 of the cities RKO operates no first-run theatre. In the remaining 25 cities there are 175 first-run theatres, of which RKO operates 47. In all except one it is actively competing with first-run theatres in which it has no interest;[5] and in all is competing

[5] The exception is Grand Rapids, Michigan, where RKO operates two first-run theatres and has a 10% minority interest in the theatre operating company which operates the other three first-run theatres.

with theatres operating on other runs (Appendix A; Finding of Fact No. 147, R. 3688).

When plaintiff turns (Pl. Br. 21, repeated 55) to cities of 25,000 to 100,000 population, the complete lack of any pattern to which RKO conforms again appears. RKO operates thirteen (or 1.5%) of the 978 first-run theatres in cities of this bracket,[6] and all of them have first-run competition (Appendix A). In the thousands of urban centers below 25,000, RKO has only 5 theatres—a number so small as to be described by Mr. Wright, plaintiff's counsel, as inconsequential (R. 371).

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[6] Both confusion and incompleteness mark plaintiff's factual discussion of these cities. It says (Pl. Br. 21) that there were 978 first-run theatres in these 320 cities, *of which 401 first-run theatres (or 41%) were independent*, i.e., theatres in which no defendant has any interest. It says that in 135 of the 320 cities affiliated theatres played all the product of the eight distributors on first-run (Pl. Br. 21). Plaintiff omits the fact, proved at the trial, that *in 93 of the 320 cities independent theatres played all the product of the defendants on first-run; that in the remaining 92 cities independent theatres played a part of the product of the defendants; and that plaintiff's own witness admitted that "no independent theatre in these 313 [320] towns went without films"* (R. 2390). Plaintiff says (Pl. Br. 21) in the next sentence that "in at least 300 *additional* towns [i.e., additional to the 135 where affiliated theatres played all products], most of them with populations under 25,000, an operator affiliated with one of the major defendants had all of the theatres in the town." This statement is in part false, in part meaningless. It implies that some of the "additional" towns were over 25,000, yet plaintiff's own witness shows that in all the cities of 25,000 to 100,000 other than the 135 some independent theatre played product, hence must have existed. As to towns under 25,000, the plaintiff has stipulated that *in approximately 6200 towns between 2,500 and 25,000, no defendant has any interest in any theatres* (R. 358, 365). Hence it is utterly meaningless to say without more that in some 300 towns some unidentified defendant or defendants have all the theatres. Are these one- or two-theatre villages, or are they cities of significant size? Plaintiff omits to say.

4. Plaintiff also urges that the "defendants' theatres are so located that there is practically no competition between them" (Pl. Br. 55, figures repeated from 16 to 21). It asserts that there are at present only 47 towns of the 922 in which the defendants own some theatre interests in which "the theatre interests of two or more majors are operating in nominal competition with each other" (Pl. Br. 55-56). Is this generalization true as to the theatres of RKO?[7] RKO operates first-run theatres in 39 cities and towns, and in over 30 of these is competing with theatres operated by other defendants and in all of them is competing with theatres operated by other defendants or independents or both (Appendix A).

Plaintiff would have this Court conclude that this competition is nominal rather than real, but plaintiff—which says it attacks no Findings—is confronted with the fact that the District Court specifically found that there was competition on first-runs

> "In about 91 per cent. of the 92 cities with over 100,000-population * * * between independent theatres and theatres of one or more of the defendants, or among the defendants themselves, except so far as it may be restricted by the trade practices found to have unreasonably restrained competition. In the remainder of the 92 cities there is always competition in some run" (Findings of Fact No. 147, R. 3688).

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[7] At Pl. Br. 15 it is erroneously stated that the defendants "operate" theatres in 922 cities. As shown at Pl. Br. 16 and 55, the 922 towns and cities are those in which a defendant has some interest in a theatre. The undisputed evidence establishes that in many of these towns such interests are small minority investments and that the interested defendant does not operate or control the operation of the theatre or theatres involved. As to RKO, see R. 1611-1617.

This Finding is fatal to plaintiff's theory that RKO has participated in conduct which justifies its aggregation with other defendants to establish charges of general monopolization.

Lack of precision is found in the conversion of the statement (Pl. Br. 16) that in 100 towns "two or more defendants pool * * * *all or some* of their theatre interests," into the statement (Pl. Br. 55) that in such towns "two or more defendants have pooled their theatre interests." At any rate, the Decree required all "pools" to be terminated before July 1, 1947, RKO has done so, and no contempt proceeding has been brought against any other defendant. This past conduct, if improper, has thus been fully remedied by the Decree.

5. Plaintiff urges (Pl. Br. 18) that there has been no competition between defendants' theatres for product, and claims as evidence thereof a failure to show large shifts in customers in the years prior to the trial. Not a single exhibitor, and not one of the officers or agents of the fifty or more buying combines which dominate the licensing of films for many so-called independent theatres (R. 738), was called by plaintiff to testify that he had ever sought to license features from RKO and been refused, either arbitrarily or for good reason. It is not inapposite to recall that in *Interstate Circuit* v. *United States,* 306 U. S. 208 (1939) the United States made much of the failure to produce witnesses other than those who testified, and that this Court observed (p. 226): "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

Reckless shifting of exhibitor outlets is not a necessary or desirable aspect of a fully competitive society. Manufacturers and distributors of all commodities which are sold through a limited number of local outlets tend to retail through the same agency, store, or firm from year to year. A high turnover of outlets, like a high turnover of labor, is a sign of unnecessary friction in the economic mechanism. Such fluctuation of outlets is not in the interest of the manufacturers, the retailers, or the public. A motion picture distributor or an exhibitor which attempted weekly, monthly, or annually to shift its product completely would soon be in bankruptcy.

But if one of RKO's regular customers becomes unsatisfactory, either because he is not willing to pay the license fees RKO thinks its product justifies, or because he does not faithfully perform his contracts, or for any other business reason, RKO seeks a new outlet (R. 1703-04). For example, in Buffalo, Salt Lake City, and Oklahoma City it shifted from affiliated theatres with which it was dissatisfied to independent exhibitors who could offer it better outlets (R. 1700, 1705). These are typical of the frequent occasions when RKO has left affiliated for independent exhibitors (R. 1703-04). While the evidence did not emphasize shifts from independent to affiliated theatres, no doubt for similar business reasons such shifts have on occasion been made.

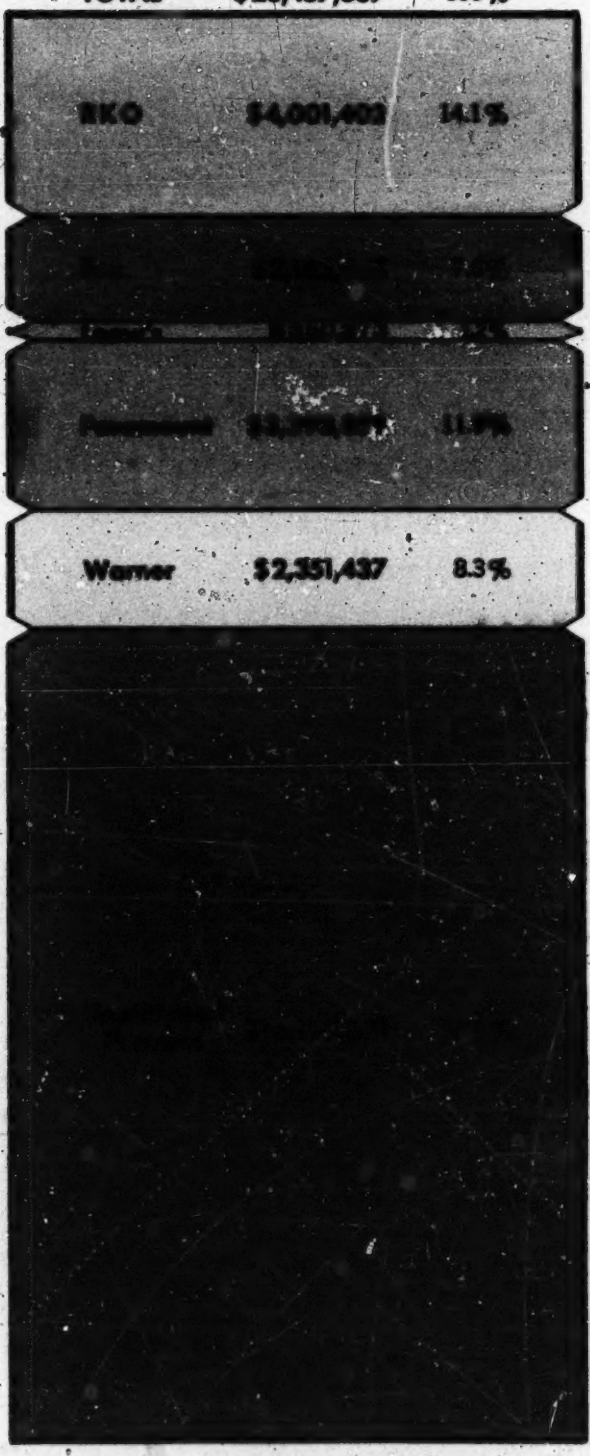
6. Plaintiff argues that the "conspiracy to fix runs" was an exclusionary conspiracy (Pl. Br. 56). By this plaintiff apparently contends that the defendants conspired (a) to exclude independent theatres from access to features distributed by the defendant, and (b) to exclude in-

dependent producers from access to affiliated theatres. The undisputed evidence shows that RKO does not fit any pattern of exclusion on either theory.[8]

(a) RKO as a distributor relies heavily upon the independent theatres for the exhibition of its features. Of each dollar of domestic rental received by RKO in 1943-44, 57¢ came from independent theatres, 14¢ came from theatres affiliated with RKO. Only 29¢ was paid RKO by the theatres affiliated with the other defendants (RKO Ex. 7, reproduced).

[8] Indeed, in its opinion, the District Court specifically stated:

"The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of theatre appointments, of the patrons, operating policies, locations, and responsibilities of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard * * *" (R. 3551)



Source: RKO's Answer to the Government's Interrogatories 2 and 3, 1945.

The Wheeler Chart Co., N. Y.

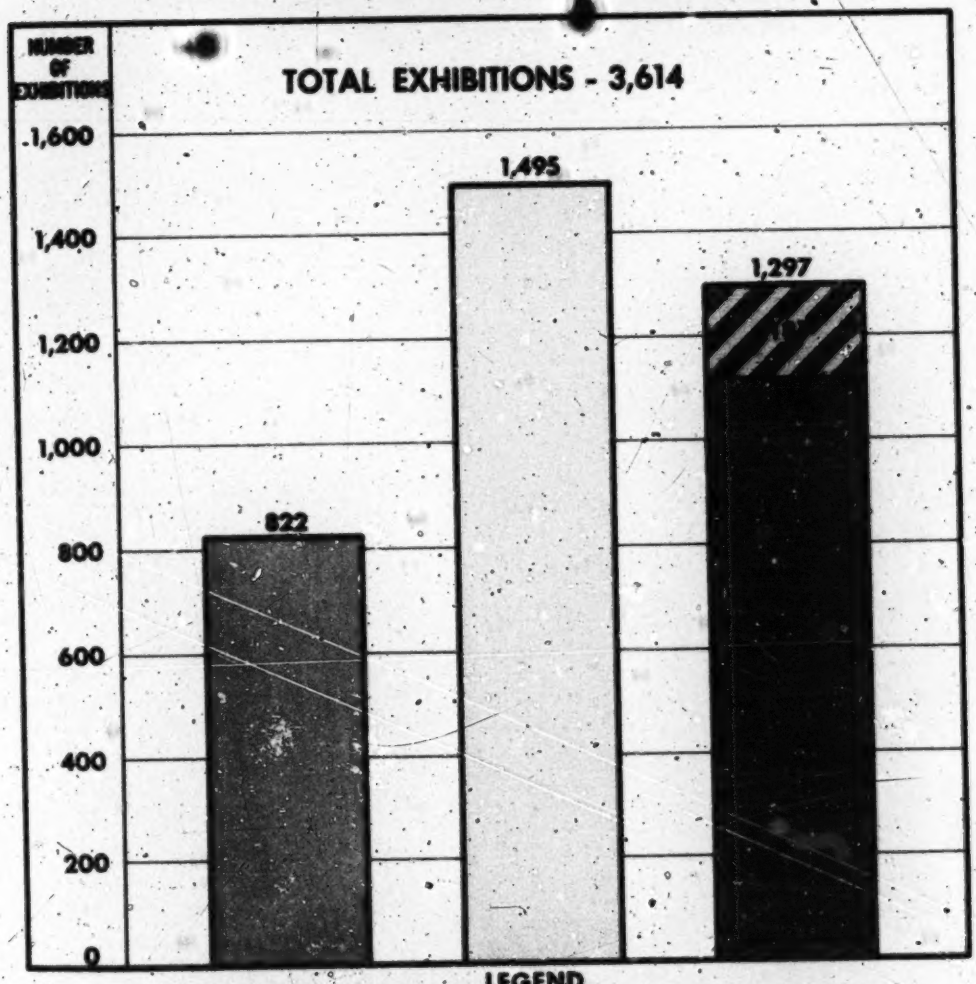
RKO relies heavily on the independent theatres for its first runs. This is true both as to the large and the smaller cities, and, of course, is undisputed as to the small towns.

In the 92 large cities with a population of 100,000 or more, the 38 features RKO distributed during 1943-44 played 3,614 first-run engagements, of which 1,097 were in theatres in which RKO had some interest[9] and 1,116 were in theatres in which no defendant had any interest (RKO Ex. 12, reproduced).

[9] RKO Exhibits 14, 17 and 19 used plaintiff's test of affiliation to include all theatres in which any defendant had *any* interest, however indirect or however small.

RKO Ex. 12
In Evidence
Witness - Miller

FIRST RUN
EXHIBITION OF FEATURES DISTRIBUTED BY RKO RADIO PICTURES, INC., DURING 1943-'44 SEASON IN CITIES OVER 100,000 POPULATION



Source: RKO's Admission of Facts (1945)

In these 92 cities were 511 theatres which plaintiff treated as first-run. RKO had some interest in 71, although it operated only 47. Plaintiff treated as affiliated with other defendants approximately 291, and as independent approximately 149. The following table shows RKO's choice of first-run customers:

	Number of First-Run Theatres	Per cent. of Total First-Run Theatres	Per cent. RKO First-Run exhibitions	Difference
Treated as affiliated with RKO	71	13%[10]	27.8%	Plus 14.8%
Other theatres treated as affiliated	291	58%	41.2%	Minus 16.8%
Aggregate		71%	69.0%	Minus 2.0%
Theatres treated as unaffiliated	149	29%	31.0%	Plus 2.0%
Totals	511	100%	100.0%	

Plaintiff conceded that RKO properly could prefer theatres affiliated with it (R. 1945). Excluding such first-run theatres, this table shows that other affiliated theatres, constituting 58% of the total, received only 41.2% of the first-run licenses of RKO's pictures, while unaffiliated theatres, constituting 29% of the total, received 31% of such licenses. This is not a picture of discrimination.

But was the 41% of RKO's product which *did* go to affiliated theatres contracted to them because of discrim-

[10] In the 92 cities RKO *operated* only 47 first-run theatres, under 9% of the total (RKO Ex. 1).

ination in their favor? The evidence answers: No. In these 92 cities RKO licensed its product as follows:

To its own theatres	24 cities
(Where the RKO theatres lacked sufficient playing time fully to utilize RKO's product, the surplus—amounting to 107 exhibitions in the 24 cities—was licensed 56 to affiliated theatres and 51 to independent theatres.)	
To theatres operated independently but in which RKO had a minority interest	3 cities
To independent theatres	24 cities
Roughly one-half to independent theatres and one-half to affiliated theatres[11]	6 cities
(The average was 20 to affiliated, 18 to independent theatres.)	
To affiliated theatres in	35 cities
Total	92 cities

[11] Though RKO licensed a substantial part of its product to unaffiliated theatres in these six cities, the evidence is undisputed that the affiliated theatres were at least as good as, if not better than, the independent first-runs; Akron, R. 450; Birmingham, R. 844-45, Par. Ex. 25, pp. 1-4; Cambridge, R. 852-3; Houston, R. 465, 865; Kansas City, R. 2068-9, cf. R. 757; Pittsburgh, R. 484-5, 760, 763, 1141.

The great majority of the 41% licensed to affiliated theatres obviously was in the 35 cities of the last category. Detail as to these 35 cities is given in Appendix D, with full record references. The record shows the seating capacities of the first-run theatres in 28 of these cities. In 23 of the 28 cities the affiliated theatre playing the high grossing features in RKO's first block, which of course are the ones on which dispute would center, exceeded the seating capacity of the largest competing unaffiliated theatre by at least 22.6%. In most of the cities the seating capacity difference was even greater, in many being at least 75% and in some as much as 175 to 190%. Seating capacity, while not determinative, is an important factor in the selection of a first-run outlet, since it has a direct bearing on revenue potentialities (R. 1697, 1902). The record establishes that business factors were dominant in the selection of the first-run theatres in the other seven cities.

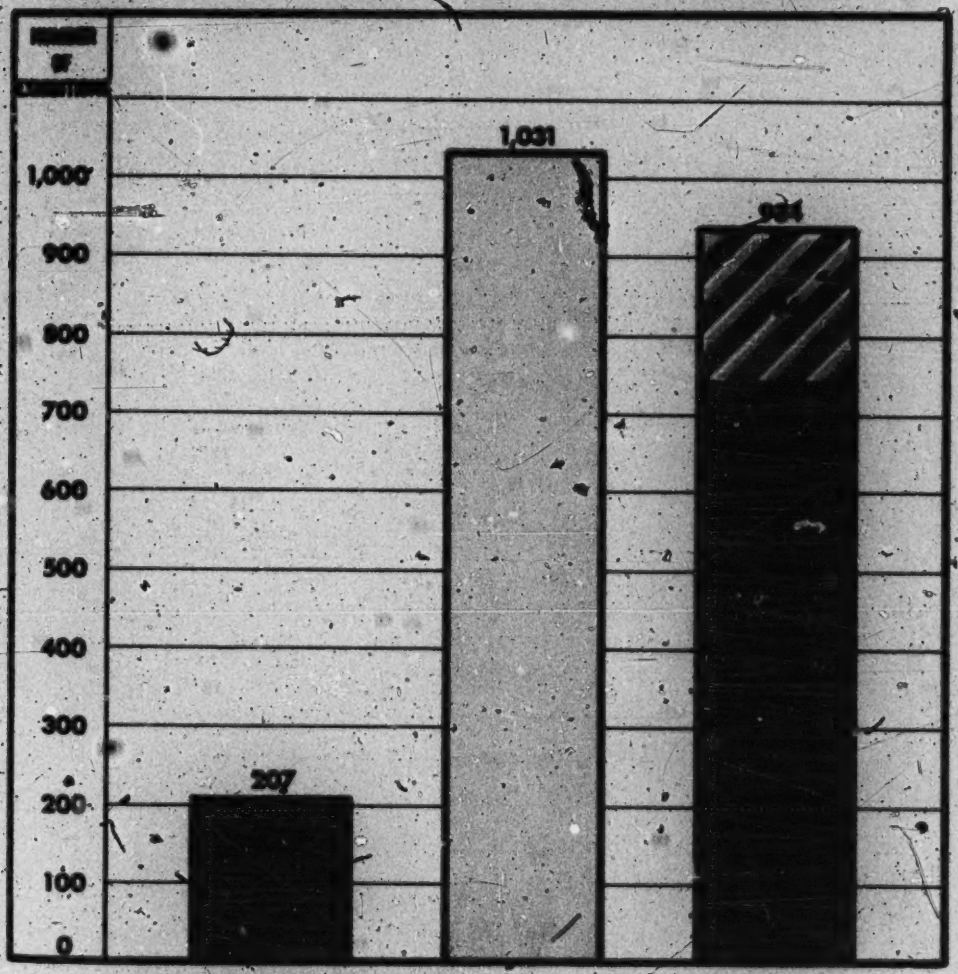
In the 412 cities of 25,000 or more population, the record is equally clear. The aggregate number of first-run exhibitions of RKO's first 1943-44 block, and the division between affiliated and independent theatres, is shown by RKO Ex. 15, reproduced on page 93.

As to the 320 cities of 25,000 to 100,000 population, Plaintiff's Appendix (pp. 308-317) shows 92 cities in which plaintiff concedes there is first-run competition between affiliated and independent theatres: in 48 of these 92 cities all or some of RKO's features were shown in the independent theatres, although such theatres numbered only 133 of a total of 336 theatres in such cities.

From RKO Ex. 15
In Evidence
Witness-Miller

RKO: U. S. v. PARAMOUNT PICTURES, INC., ET AL.

Distribution of first run exhibitions of RKO's 1943-1944 first block features between affiliated and unaffiliated theatres in cities over 25,000 population



LEGEND

Exhibitions in theatres in which RKO has an interest of 50% or more, and in theatres controlled by RKO in which RKO and another defendant have an aggregate interest of 50% or more.

Exhibitions in theatres in which one or more of the defendants (other than RKO) have an interest of 50% or more.

Exhibitions in theatres in which one or more of the defendants have interests of less than 50%.

Exhibitions in theatres in which no defendant has any interest.

Source: RKO's Admission of Facts (1945)

More precise analysis of the basic data from which plaintiff made its appendix table shows that these exhibitions occurred:

In theatres operated by RKO	11 cities
In theatres independently controlled and operated, but in which RKO had a minority interest	14 cities
In independent theatres	107 cities
In part in independent theatres and in part in affiliated theatres	35 cities
In theatres in which another defendant had minority interest	20 cities
In affiliated theatres in cities where there were no independent theatres	19 cities
In affiliated theatres which were larger than the largest unaffiliated theatre	58 cities
Two highest grossing pictures shown in affiliated theatres larger than any unaffiliated theatre, three less desirable features shown in smaller affiliated theatre	43 cities
	307 cities

There were thus only 12 cities out of 319 where the RKO first block showed first-run in an affiliated theatre smaller than the largest independent theatre. In six of these the

undisputed evidence showed the superiority of the affiliated theatres, and as to the other six there was no evidence.[12]

These tabulations reveal the high percentage of RKO's first-run exhibitions in independent theatres in the 412 cities of 25,000 or more. The soundness of RKO's business judgment in selecting these theatres is shown by the fact that its first-run affiliated outlets in the 412 cities paid it on an average of 16.6% more per theatre than the independents (RKO Ex. 16). This was not due, as has sometimes been charged, to a policy of licensing the best pictures to affiliated and the less successful ones to independent theatres. Excluding first-runs in RKO's theatres, there were, in these 412 cities 1,965 first-run exhibitions of the first block of RKO's product in 1943-44. 52.47% were in theatres in which some defendant, other than RKO, had an interest of 50% or more; 9.86% were in theatres in which such a defendant had an interest of less than 50%; and 37.66% were in theatres in which no defendant had any interest (See RKO Exhibit 15, reproduced opposite p. 92). Appendix G, page 193 of this Brief, based on RKO Exhibits 13 and 14, makes a feature-by-feature comparison of the proportion of exhibitions of each feature shown in affiliated and unaffiliated theatres. The outstanding feature was *Lady Takes a Chance*, the least attractive was *So This is Washington*. Between the licenses of good and poor box office attractions to the affiliated theatres, the extreme difference was 6.03%. This hardly suggests a concerted plan to discriminate.

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[12] See Appendix E for tabulation of all cities of 25,000 to 100,000 in which RKO features were licensed to affiliated theatres in which RKO had no interest, together with summary of all Record data as to the local competitive situation in each such city.

The plaintiff offered no evidence concerning the comparative quality of the competing theatres in any of the 412 cities, and in its brief ignores the great volume of undisputed evidence offered by the defendants. The first-run status of any theatre is a contractual recognition of its suitability for first-run operation. Not all theatres are suitable for such a run (R. 1900). The size and location of a theatre, its general physical equipment and appointments, its available playing time, and the reliability and ability of its operator, are among the factors which must be evaluated in determining which theatre is best qualified for first-run exhibition[18] (R. 419-20, 1697).

(b) The record is equally clear that RKO does not fit into any purported conspiracy of exclusion whereby independent and non-integrated producers have been shut out of RKO's theatres. In an obvious effort to imply that RKO's affiliated theatres do not afford the features of non-integrated producers a fair proportion of playing time, plaintiff argues (Pl. Br. 56 footnote) that from 35% to 50% of a feature's total domestic gross comes from 3%

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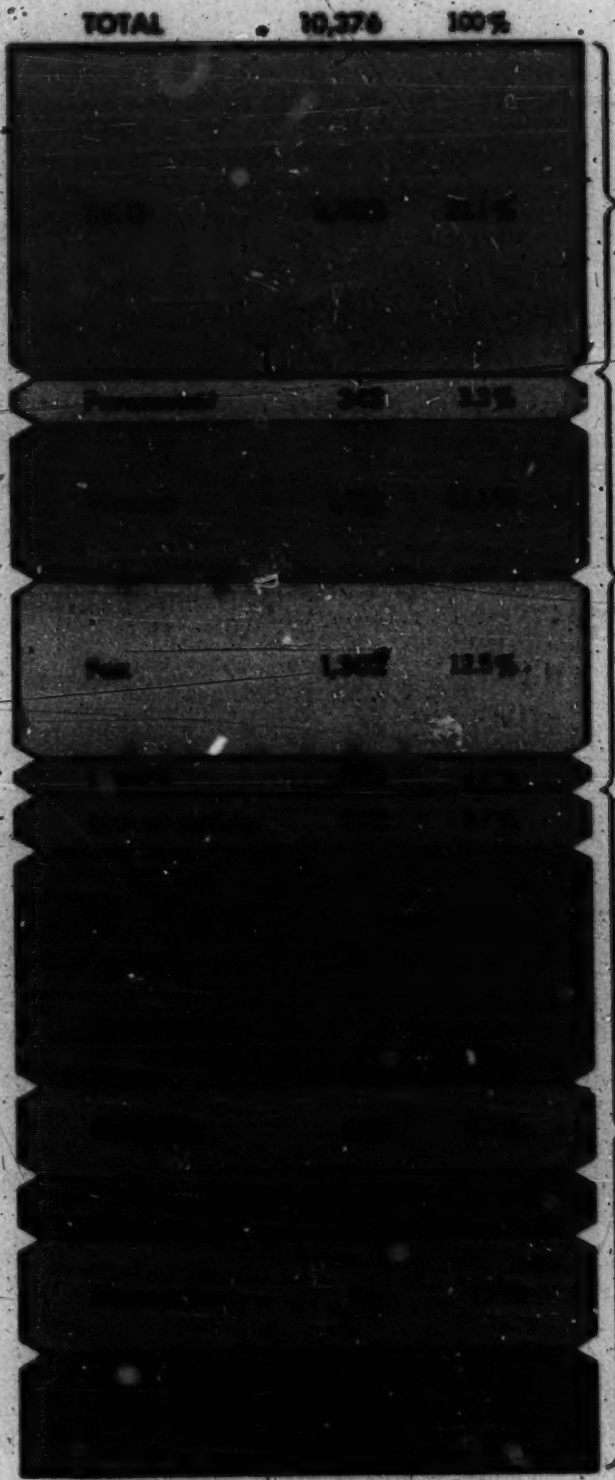
[18] This is well illustrated by Mr. Mochrie's testimony regarding Atlanta, Georgia. In 1943-44 six affiliated theatres (5 affiliated with Paramount and 1 with Loew's) licensed most of the product of seven distributors. One independent operator licensed Columbia's 41 features and 14 features from integrated distributors. These figures are meaningless in a vacuum. The undisputed evidence shows that the independent (the Rialto) is a small theatre of 700-800 seats which licenses certain of RKO's most popular pictures, and runs each four to five weeks (R. 1698). With this product, 41 Columbia, and 9 other features, this theatre's playing time is fully occupied with good product (R. 1739-40) and no complaint by the independent exhibitor is shown. Yet this is supposed to be an example of discrimination, and is so counted in plaintiff's reference to its Exhibit 428, 428A (Pl. Br. 29).

to 4% of its total domestic exhibitions. This is not a recent phenomenon, for at page 75 of its Brief plaintiff points out that in 1927 [*one year before RKO was organized*] "approximately 50% of the revenue from a film [was] derived from first-run showings within six months from the date of its release," *In the Matter of Famous-Players-Lasky Corp.*, 11 F. T. C. 187, at 197 (1927). But in any event, since an outstanding feature normally will show in well over 10,000 theatres (see p. 15 *supra*), the footnoted statistic is merely an observation that 35% to 50% of its gross comes from some 350 to 400 exhibitions—most of which will be first-runs in the 412 larger cities (see tabulation on *Lady Takes a Chance, supra*, page 15). This would seem a reasonable expectation on any market analysis: 77.8% of the people living in cities of 2,500 or more reside in these 412 cities. These cities have the largest theatres playing the longest runs to a population normally having the highest per capita income. Naturally, the best theatres in the larger cities should, and do, contribute a substantial percentage of total rentals (see p. 16). A ten-week exhibition at the 6,000-seat Music Hall in New York's Rockefeller Center (an independent theatre) yields more film rental to the producer than a thousand one-night double-feature showings in tiny theatres such as those in Hawesville, Kentucky. Certainly plaintiff would be quick to attack if RKO attempted to charge the same rental to every theatre. Literally hundreds of theatres would be unable to license at such a figure (see *supra* p. 17).

RKO's theatres cannot operate (with the possible exception of the Palace in New York City) on the product of one distributor (Finding of Fact No. 151, R. 3689). "The percentage of features on the market which any of the five

major defendants could play in its own theatre would be relatively small and in nowise approximates monopoly" (Finding of Fact No. 100, R. 3678). RKO theatres must license features from other distributors, and they consistently accord a large proportion of their playing time to those of non-integrated distributors. RKO Exhibit 8, reproduced here, shows that 47.3% of the exhibitions of features in RKO's first-run theatres and in its New York neighborhood first-run theatres in 1943-44 were from non-integrated companies.



Source:- RKO Film Booking Corp. Records.

At page 348 of the Appendix to the plaintiff's brief, the effort is made to argue that the RKO theatres, although using a large amount of non-integrated products, discriminated against such non-integrated producers by paying therefor an excessively low film rental. This inference is clearly not justified by the record. It is true, of course, that the larger amount of RKO's film rentals is paid to those distributors who on the undisputed evidence released the best features. RKO's theatres paid to RKO in 1943 $3,916,743 for film rental (*of which a substantial amount accrued to the accounts of the independent producers for whom RKO acted as a distributor*). They paid $3,303,206 in the same year to non-integrated distributors, both defendants and non-defendants; and $5,592,611 to the other four integrated defendants. But rental depends in large measure on the box office attractiveness of product. Better features reflect this directly through percentage license terms, others indirectly in flat rentals. The average rental per feature per billing paid by RKO theatres varied widely between the non-integrated defendants: Universal, $1158; Columbia, $1099; United Artists, $510; Monogram, $248; Republic, $231; PRC and all others, $120 (RKO Exs. 8, 9).

The only reasonable inference is that such differences are due to variations in quality. Though absolutes are dangerous, there is truth in the epigram, used by Mr. Wright and adopted by a witness for a non-integrated defendant: "There is no evil in this business that good pictures won't cure" (R. 1297).

Plaintiff called no representative of any independent producer or any non-integrated distributor as a witness. A number of highly prosperous independent producers, who did not appear as witnesses during the trial, have come

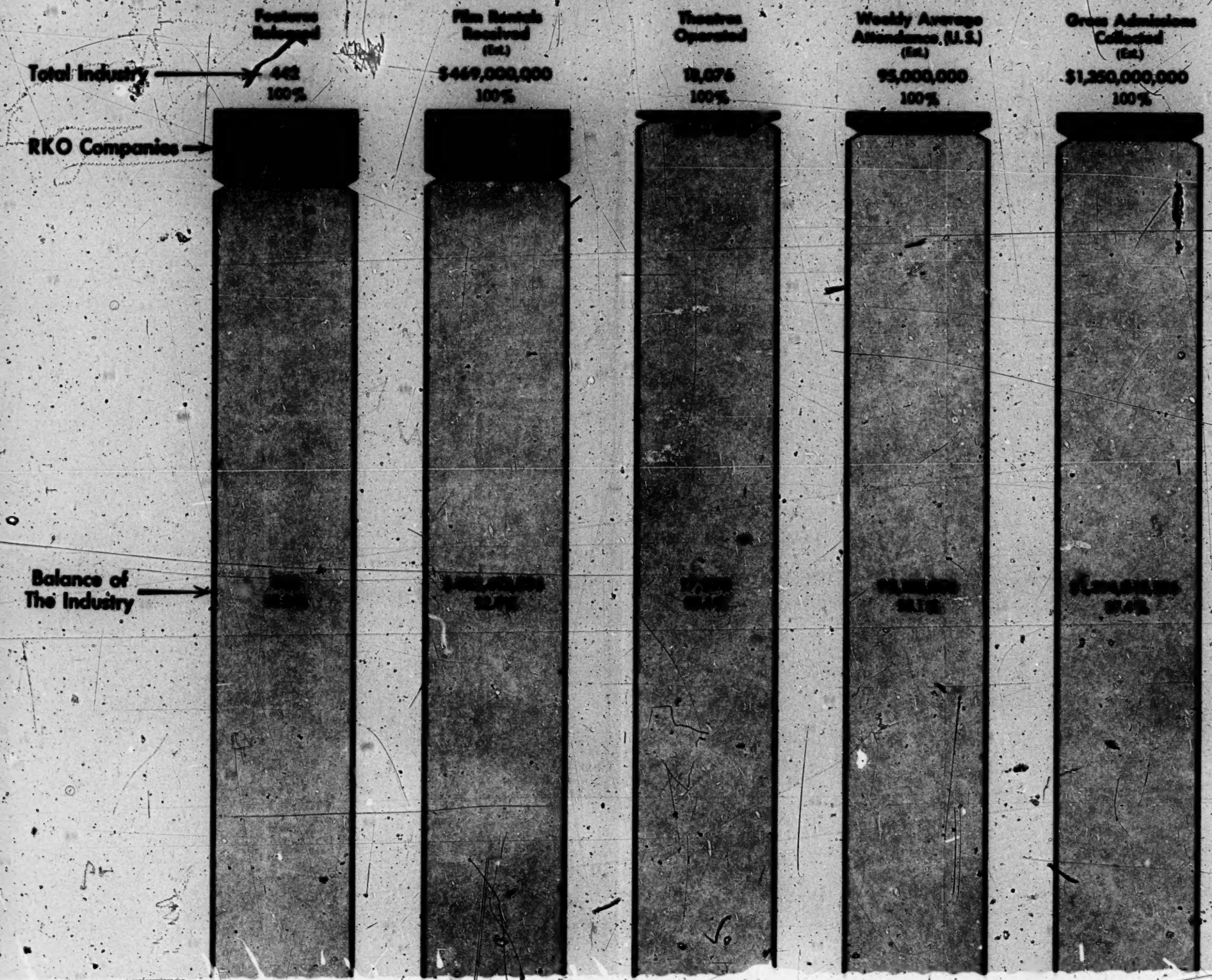
forward in this Court to argue as *amici curiae* on the basis of matter largely outside this record. Representatives of non-integrated distributors having knowledge of the facts were also easily available to testify if plaintiff had wanted them. From plaintiff's failure to call such witnesses the inference would be justifiable that, if called, their testimony would not have supported the plaintiff's thesis. This likelihood is strengthened by the fact that the plaintiff conceded that "the evidence * * * does not show that any particular independent producer who wanted to make a picture could not get it released by one of these [eleven national] distributors * * * I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of the companies to release it for you" (R. 387, 388).

7. As evidence that "The conspiracy has been extremely successful" the plaintiff urges (Pl. Br. 57, repeated from 19) that 17% of the theatres in the United States pay 45% of the total domestic film rentals received by all eight distributor defendants.

In this connection it should be emphasized that plaintiff's consistent effort to picture RKO as a financially powerful conspirator disregards the facts as to RKO's relative size in the industry. RKO is by no means the giant which the plaintiff would have this Court envisage. RKO Exhibit 2 reproduced here, shows graphically its proportion of five important industry aggregates.

RKO Ex. 2
In Evidence
Witness - Rathvon

PERCENTAGE RELATIONSHIP OF RKO COMPANIES TO THE MOTION PICTURE INDUSTRY IN 1944



Moreover, insofar as profits may be evidence of monopoly power, RKO Exhibit 26, reprinted as Appendix C, reveals the fact that such power has not been reflected in RKO's financial results. In the sixteen years prior to the trial RKO, on gross receipts of $950,000,000, realized a net profit for its shareholders of $3,818,087.31—less than 4¢ of profit out of each $10 of gross receipts. This is not the traditional picture of a monopolistic company whose power has been exerted to oppress the public and to harvest excessive returns.

The abstract statement that 45% of the domestic film rental is paid by 17% of the theatres can in itself furnish no basis for sound inference. The rental paid by any theatre must (and, regardless of the identity of the owner or operator, always will) depend upon the basic factors which, as a matter of sound business judgment, determine its playing position: its size, location, appointments, general characteristics and the ability of its manager, all weighted according to its admission price policy, which in turn is affected by the average *per capita* income of its patrons. Not one of these factors is reflected in the plaintiff's evidence.

Furthermore, analysis shows the close correlation between first-run rentals paid by all theatres regardless of affiliation. The unaffiliated theatres which showed such a large proportion of RKO's product first-run in the 412 cities averaged smaller in size than the affiliated houses, and on the average paid a smaller rental, but the correlation of rental to seating capacity was striking; on three features the rental per seat was identical; on one the rental per seat varied by 1¢ between the two classes of theatres; and on one the variance was 3¢ per seat (see Appendix F). There is no pattern of discrimination in these rentals.

In the preceding subdivisions RKO has met each aggregate figure urged by the plaintiff. In each, the question has been: do the aggregate figures suggest any sort of plan or pattern, and if so does RKO fit into it? The District Court's answer is written into its Findings that RKO's theatres can not be aggregated with those of its competitors to establish general claims of monopolization, and that the net effect of RKO's operations has been to increase competition. We have, we are confident, adequately shown that those Findings are supported by the record.

The plaintiff's contention, put in its strongest frame, comes to this: that RKO, though engaged in the most intense competition at the production, the distribution, and the exhibition levels and though its organization increased competition at each of these levels, and though it acquired its facilities without any predatory practices, must be split because in its distribution contracts it is said to have included certain provisions (no different in substance from those used by the six national distributing organizations which have no theatre affiliates) which the Court has declared violative of law, and because in a few localities it "pooled" theatres or invested in theatre operating companies; and this despite the judicial determination of the trial court that the illegalities found can be effectively eliminated by the system of relief granted.

On the basis of the Findings of Fact and their supporting evidence, we confidently submit that the plaintiff has wholly failed to establish this contention.

VII.

The District Court correctly refused to hold that RKO as an integrated company producing, distributing and exhibiting motion pictures is an unlawful combination.

Plaintiff contends that RKO, *in and of itself*, constitutes "a[n unreasonable][14] restraint and a monopolization of an appreciable segment of trade in violation of Sections 1 and 2 of the Sherman Act" (Pl. Br. 90). The trade which is thus restrained, says plaintiff, is that "represented by the pictures [RKO] distributes to its own theatres" (Pl. Br. 91).

When the plaintiff asserts that each defendant, in and of itself, constitutes an unlawful combination, it converts this law suit into five separate controversies and each defendant must be considered on its own merits. Hence all contentions of combination or conspiracy between the various defendants are abandoned by the plaintiff in so far as this argument is concerned, and RKO must be judged solely upon its own facts.

On this count, also, the District Court disagreed with the plaintiff. It recognized that "Each defendant had a right to build and to own theatres and to exhibit pictures in them" (Opinion, R. 3554). It characterized this as "the ordinary rights of ownership" (*Ibid.*). This was carried into the Decree by the Court's refusal to order the disintegration of RKO and the other exhibitor defendants, and

[14] Plaintiff consistently omits the "unreasonable" in this portion of its argument, but we assume that it does not seriously contend that the "rule of reason" is no longer applicable in anti-trust cases.

by the provision that each might license its own features to its own theatres on terms, satisfactory to itself (R. 3700).

In the Consent Decree of 1940 plaintiff recognized the propriety of RKO exhibiting its features in its own theatres (See Paragraph XXVII, R. 3392). At the trial, plaintiff conceded:

> "Let us assume that you have two distributors of a commodity, two national distributors, and each of them controls a group of retail outlets; and each of these distributors makes agreements with his outlets, under which the outlets act as agents for the sale of his product to the ultimate consumer, and under which agreements he stipulates the price, or a minimum price, at which the product is sold.
>
> "Now, up to this point you have no Sherman Act violation * * *" (R. 1945).

These concessions are directly at variance with the plaintiff's present position. Now it contends that the creation and operation of RKO as an integrated company was unlawful because, it claims, RKO's theatres were acquired "not to meet an expanding business demand resulting from superior skill in film production or distribution" but for the deliberate purpose of obtaining an assured retail outlet for its features regardless of their merits (Pl. Br. 91). It is urged that two unlawful trade restraints result: first, pictures of other distributors are excluded from RKO theatres to the extent that such theatres show RKO features; and, secondly, other theatres are excluded from licensing the RKO features at the time they are shown in the RKO theatres (*Ibid.*).

Plaintiff's argument amounts in essence to the assertion that a producer or a manufacturer can never lawfully acquire retail outlets for the primary purpose of marketing his products because the necessary effects are (a) to exclude other producers or manufacturers from access to such outlets to the extent that they handle their owner's product; and (b) to exclude other retail outlets from access to the producer's products to the extent that the particular items are handled by its own retail outlets. This doctrine finds no support in any decided case. The restraints mentioned are necessarily incident to the lawful ownership and operation of any business. They are not different, for example, from the restraints resulting from a lawful contract for the purchase and sale of particular commodities. As Mr. Justice Douglas said in *Associated Press* v. *United States*, 326 U. S. 1, at 23 (1945):

> "Every exclusive arrangement in the business or commercial field may produce a restraint of trade. A manufacturer who has only one retail outlet for his produce may be said to restrain trade in the sense that other retailers are prevented from dealing in the commodity * * *. But *Standard Oil Co.* v. *United States*, 221 U. S. 1 * * * construed the Sherman Act to include not every restraint but only those which were unreasonable * * *."

Moreover, in this case we are dealing with a copyrighted feature. The right to exhibit its features is specifically granted to RKO as the producer and copyright owner by statute. As the court stated in *Interstate Circuit* v. *United States*, 306 U. S. 208, at p. 227 (1939):

> "Under §1 of the Copyright Act, 35 Stat. 1075, 17 U. S. C. §1, the owners of the copyright of a mo-

tion picture film acquired the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it.'

Even without regard to the Copyright Act, however, the anti-trust laws do not prevent RKO from acquiring retail outlets for the purpose of marketing its products. It is true that an unreasonable restraint of trade may exist within a vertically integrated industrial complex, but this must rest on proof beyond the mere fact that the enterprise operates at two or more levels of the production-distribution-exhibition process. Whether vertical integration violates the anti-trust laws depends upon whether its purpose or necessary effect is unreasonably to restrain or to monopolize trade in the various business levels in which the enterprise is engaged. Vertical integration in essence is nothing more than a union of non-competing complementary enterprises. The courts have consistently held that the union of such enterprises for business purposes unconnected with any design to monopolize or restrain the trade in which the constituent enterprises are engaged is not violative of the Act. *United States* v. *Winslow*, 227 U. S. 202 (1913); *United States* v. *United Shoe Machinery Company*, 247 U. S. 32 (1917); *United States* v. *Standard Oil Company, of New Jersey*, 47 F. (2d) 288 (E. D. Mo. 1931); *Alexander Milburn Company* v. *Union Carbide & Carbon Corp.*, 15 F. (2d) 678 (C. C. A. 4, 1926) cert. den. 273 U. S. 757 (1927). See also *Eastman Kodak Co.* v. *Federal Trade Commission*, 7 F. (2d) 994 (C. C. A. 2d, 1925) affd. 274 U. S. 619 (1927); *United States* v. *United States Steel Corporation*, 251 U. S. 417 (1919), affirming 223 Fed. 55 (D. N. J., 1915).

In support of its theory that a producer cannot market its own products through its own retail outlets, the plaintiff

relies primarily on *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920) and *United States* v. *Reading Co.*, 253 U. S. 26 (1920). These cases are clearly distinguishable. In each case the Court found that the combination had already acquired a dominant control of the anthracite coal land served by the carriers involved, and of the railroads over which the coal had to pass to reach its market. The Court also found that such lands were acquired with the intent to monopolize and in fact had monopolized the production, transportation and sale of coal. There are no Findings of Fact and there is no evidence here that RKO acquired any theatre for the purpose or with the effect of eliminating competition in the distribution or exhibition of motion pictures. The Court found the direct opposite: it found that RKO's organization increased competition at each of the three levels of the industry (Findings of Fact No. 20, 23, 121, R. 3664, 2684, quoted *supra* pp. 9-10).

The Government also refers to *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In that case the Court had before it a motion directed to the pleadings. The basic allegation was that the combination there considered was for the express purpose of unduly restraining and monopolizing an important segment of interstate commerce. The case stands merely for the proposition that unreasonable restraints of trade can be effected by vertical combinations as well as by horizontal combinations. The form of combination is immaterial. If the "primary object" of a vertical combination is to eliminate and unduly restrain competition, the Act, of course, is violated. As previously shown, there is no evidence and there are no Findings that RKO acquired theatres with the object, primary or otherwise, of unduly restraining or monopolizing trade either in

distribution or exhibition. All the Findings are that the contrary object motivated RKO and that the contrary result followed.

In *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) the sole question involved was whether the Court should revise a consent decree under which the defendants had voluntarily agreed to an injunction barring them from certain fields of activity. This Court made clear the limited nature of the issue: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify our changing the decree" (p. 119). Since the Court found that there had been no change in the conditions which would warrant a modification, the defendants were left subject to the injunction to which they had consented.

Neither of the other cases cited by the plaintiff, *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923) or *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) has any relevancy to the legality of vertical integration.

VIII.

Since the Decree of the District Court is adequate to prevent the continuance or repetition of all acts which the Court deemed violative of the Sherman Act, its refusal to order RKO to divest itself of its theatres or its production-distribution facilities was not an abuse of discretion.

Plaintiff demands the dissolution of RKO together with a supplementary injunction against RKO licensing its features to other affiliated theatres and against RKO's theatres exhibiting features distributed by other integrated defendants. To prevail, the plaintiff must establish (A)

that the refusal of the District Court to grant such relief was an abuse of discretion; and (B) that the particular relief demanded is so clearly the only appropriate remedy that this Court should substitute it for the relief granted below.

The analysis in Point I-A, p. 39, *supra*, demonstrates that the Decree adequately meets every violation of the Sherman Act which the District Court concluded existed in this case. The Decree rested upon the District Court's findings that competition

> "* * * can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license * * *" (Finding of Fact No. 85, R. 3674).
>
> "The discriminations referred to in Finding 110 would appear to be impossible under a system where the exhibitors competing for a license to exhibit a given feature on a given run do so on a parity since the same offer must be made to all prospective exhibitors in each competitive area" (Finding of Fact No. 111, R. 3682).
>
> "Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding of Fact No. 155, R. 3960).
>
> "Total divestiture would not remedy the * * * practices which have been found unreasonably to restrain competition" (Finding of Fact No. 156, R. 3690).

Accordingly, the Court framed a Decree (R. 3694ff) which attacked the problems of the industry constructively:

It ordered that each feature be individually offered and licensed "theatre by theatre and picture by picture" (II-8-(d)), and each "license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or others" (II-8-(b)). Provisions fixing minimum admission prices were (erroneously, we believe, see Points III and IV) prohibited, as was clearance between theatres not in competition and unreasonable clearance between those in competition. Franchises, formula deals, master agreements, and block booking were outlawed.

Each distributor was enjoined from arbitrarily selecting one of two or more exhibitors to play a feature on a run desired by both (II-9). This provision, which is nowhere mentioned by the plaintiff, in one sentence demolishes any fixed pattern of runs which may have existed. The District Court wisely recognized that neither it, nor anyone else, could by any form of Decree assure every one of the 18,000 theatres in the United States that it could have any run which it demanded.

If the Decree had stopped at this point, it would have accorded full relief against all the violations found. It would have provided that no exhibitor shall be arbitrarily denied the right to exhibit any picture on the run he desires, and it would have assured that all licenses shall be granted picture by picture and theatre by theatre.

But the District Court went further. It provided for the situation where a run "is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres" (II-8-(c)). Here the distributor is to offer to all competing exhibitors, 30 days in advance of the

date "bids" are to be received, each individual feature, stating "knockdown terms" as to run, clearance, time of exhibition, and minimum flat rental. Each exhibitor may then make the offer which, considering the quality of his theatre and patronage, and his estimate as to the attractiveness of the picture, constitutes in his judgment a fair rental if it be exhibited on the run in question at his theatre. The distributor may reject all offers but if he accepts any, must "grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor."

This is in brief outline the constructive system of competition which the Decree substitutes for the present distribution practices. It is attacked by the plaintiff and others. The Amended and Supplemental Complaint (R. 3173, 3176) complained of the lack of competitive bidding and it was Mr. Wright, chief trial counsel for the plaintiff, who said he did "not see why [features] should not go on the auction block" (R. 2556).

The Decree's system of competitive selling varies in a number of respects from that proposed by Paramount, Loew, Fox, Warner and RKO and set forth at R. 3613. It is not RKO's contention that the system substituted by the Court for this proposal is better or worse, or that it is perfect. But RKO believes it does establish the basis of a workable system of free competitive negotiation. It may be assumed that the District Court will freely exercise its reserved jurisdiction either to modify the system if it be found procedurally inept in any way, or to strengthen it if it proves inadequate in any detail.

A. The adequacy of the Decree is not impugned by prior experience in the motion picture industry.

The plaintiff contends that the District Court ignored certain historical material which it now presses on this Court (Pl. Br. 72-89). It is unlikely that this is true. 'At the trial plaintiff proposed to offer in evidence twenty-five exhibits dealing with various court and Federal Trade Commission proceedings. Of the first item offered, a special master's report in a District Court case in Chicago, Judge Hand remarked: "We won't receive any such thing as that. This is absurd" (R. 297). Of an indictment on which the jury had found the defendants not guilty, his comment was equally positive: "I think it is absurd. You cannot put such stuff in" (R. 300).

Thereupon all the proposed exhibits were withdrawn, with the observation that these "may be referred to by this Court" (R. 300), to which Judge Hand's comment was illuminating: "You can do that with anything" (R. 302).

Despite the fact that it referred freely to these items, the plaintiff signally failed to convince the judges of the District Court, who said:

> "* * * The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than 'those eighteen upon whom the tower in Siloam fell' have been 'sinners above all men', yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful" (R. 3558).

The District Court, in its Finding of Fact, also denied any "'inherent vice' on the part of these defendants" (Finding of Fact No. 153, R. 3690).

We cite the Opinion and Finding only as indicative that the District Court, after careful study, could not agree with plaintiff's insistence that the defendants were inherently vicious. We turn now briefly to the "past experience":

1. *Federal Trade Commission* (Pl. Br. 73-78). Neither RKO, nor any of its predecessor companies, nor any of its officers or executives, has ever been charged before the Federal Trade Commission with unfair competition or any other offense within the Commission's jurisdiction. Both of the proceedings cited by the plaintiff, *In the Matter of Famous-Players-Lasky Corporation, et al.*, 11 F. T. C. 187, and *In the Matter of West Coast Theatres, Inc.*, 12 F. T. C. 383, were instituted prior to RKO's organization and dealt with the industry as it then existed. RKO therefore has no occasion to discuss the merits of the complaints.[15]

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[15] One example of the carelessness of plaintiff in comparing figures may be noted. The footnote on p. 75 of plaintiff's Brief incompletely recites the finding of the Commission regarding revenue from first-runs. The full finding was that "approximately 50% of the revenue from a film is derived from first-run showings within six months from the date of its release, and the remaining revenue from second and repeat runs in other theatres, extending over a period of two or three years (11 F. T. C. at 197)." Plaintiff submits as comparable the assertion that 80% of the total rental earned *in large cities* comes from the first-run theatres. The proportion of *the domestic gross from all theatres* the F. T. C. statistic) is obviously not comparable with the proportion of *the revenue from a large city paid by first-run theatres* (the second asserted statistic).

2. *Government Antitrust Suits* (Pl. Br. 78-85). The plaintiff cites *United States* v. *West Coast Theatres, Inc.*; *United States* v. *Balaban & Katz Corp.*; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930) and *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (1930), all of which were instituted in 1928. That was the year in which the organization of RKO "increase[d] competition in each of the three branches of the industry"—production, distribution and exhibition (Finding of Fact No. 23, R. 3664; see also Finding of Fact No. 121, R. 3684).

RKO was not named as an original defendant in any of these cases, and none of them involved any activities of the theatres which it later acquired.

RKO was not a defendant in the later equity proceedings in *United States* v. *West Coast Theatres*, which resulted in the Consent Decree of August 21, 1930. In January, 1931, RKO acquired a part of the assets of the Pathe Exchange, which had been a defendant therein; and hence was named in the contempt proceedings instituted in August 1939. The contempt charge was never determined by the Court, and the mere accusation certainly does not convict RKO.

Similarly, although not an original defendant, in *United States* v. *Balaban & Katz Corp.* (N. D. Ill.), RKO was named as a defendant in the contempt information of November 9, 1938. In the course of the hearing before the Master, counsel for the government entered into a written stipulation reading in part as follows:

> *"It has conceded that in any view of the case evidence does not establish a violation of any paragraph of the decree against the defendants, RKO and Universal."* See Master's Report, cited by plaintiff at Pl. Br. 79, paragraph IV, italics added.

The only other government case mentioned by the plaintiff is *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939). Nothing in this case even suggests any impropriety in RKO's relations with its theatres.[16]

Thus not one of these cases casts the slightest doubt on the trial court's conclusion that the appropriate way to remove the impact of distribution practices it deemed improper was to prohibit them and affirmatively to outline a system of competitive negotiation.

3. *NRA Code and Consent Decree of 1940* (Pl. Br. 58-87). There is no evidence in this record as to the NRA Code of Fair Competition, or the activities of the various local boards set up under such Code. There is not the slightest intimation that the fact that RKO had theatres contributed either to the success or failure of that program.

The Consent Decree can hardly be used to taint RKO. The plaintiff agreed to that Decree. RKO entered into it in good faith, RKO observed it in letter and spirit, and the only inference to be drawn from this fact is that it will similarly observe any decree entered in this cause.

4. *Private Antitrust Suits* (Pl. Br. 87-88). RKO Radio Pictures, Inc. has been named in most of the private antitrust suits filed in recent years, though in some no RKO company is a defendant. Many resulted in judgments for the defendants; a number have been determined in favor of the plaintiffs. Not one which has been determined in favor of any plaintiff has involved an RKO theatre or an RKO theatre operating company.

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[16] The plaintiff's reference to RKO in connection with a claim that clearance in Sioux City, Iowa, is related to double billing (Pl. Br. 85) is evidently a misprint, since Gov. Ex. 94, cited in support, makes no reference to any such restriction.

We believe that this Court has a sufficient task in deciding the present appeal without undertaking to investigate the peculiar local issues of a number of private suits. It would be impossible, for instance, to go into details concerning such cases as *Duluth Theatres Corp.* v. *Paramount, et al.*, No. 2335, District of Minnesota, which resulted in 1946 in summary judgment for RKO; or *Ball* v. *Paramount*, 67 F. Supp. 1 (W. D. Pa. 1946), which resulted on August 30, 1946, after trial, in judgment for the defendants; or *Momand* v. *Universal*, No. 7024, District Court of Massachusetts, which resulted on February 13, 1947, in an instructed verdict for the defendants. Each suit involves its own unique local issues, and it may be assumed that the trial courts are capable of handling them as they are reached on the dockets.

5. *Conclusion.* Nothing in "history" as recited by the plaintiff suggests any intention, much less any effort, on the part of RKO to use its 106 theatres to injure its competitors, or to combine so as to abuse them. The significant fact is that plaintiff has cited no case, and there is no case, where theatre abuse has been found against RKO. It has cited no instance where RKO has failed to live up to any decree entered in any case where it, or a predecessor company, was a distributor defendant.

B. The authorities fully sustain the refusal of the District Court to order the dissolution of RKO.

1. The violations found do not establish a situation where dissolution is the appropriate remedy.

The authorities of the past half century establish that dissolution of a corporate defendant who has violated

the Sherman Act is not the normal remedy, though it will be granted when necessary. Such necessity is shown only when the gravamen of the offense is the creation of the corporation dissolved, and where the dominant position of the corporation results from the acquisition of competitors with the intent or the necessary effect of unduly restraining and monopolizing commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904); *Standard Oil* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. Del., 1911); *United States* v. *Union Pacific R. Co.*, 226 U. S. 61 (1912); *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922); *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (D. W. N. Y. 1915), 230 Fed. 522 (1916); *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y. 1916), app. dism. 249 U. S. 621 (1919); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920).

Even in cases where a corporation is unlawfully formed or monopoly is unlawfully maintained, dissolution is not granted as of course. It is used sparingly, and only when relief short of dissolution is clearly inadequate. The courts have repeatedly refused to order dissolution in cases where violations of the Act could be met adequately by less drastic remedies. *United States* v. *Terminal Railroad Association*, 224 U. S. 383 (1912); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N. D. Ohio 1913), 217 Fed. 656 (N. D. Ohio 1914); *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E. D. Pa. 1915), app. dism. 257 U. S. 664 (1921); *United States* v. *American Can Co.*, 230 Fed. 859 (D. Md., 1916); *United States* v. *Quaker Oats Co.*, 232 Fed. 499 (N. D. Ill., 1916), app. dism. 253 U. S. 499 (1920);

United States v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Aluminum Co.*, 148 F. (2d) 416 (C. C. A. 2nd 1945); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

The present case is not one in which dissolution is appropriate. The District Court found a conspiracy of eight separate defendants, and by its Decree ended that conspiracy. RKO, as a separate entity, was found to have been created for a lawful purpose and to have had the effect of creating new competition in each field in which it operated. In such a setting, divorcement would go far beyond the restraint of violations and would be an effort by judicial fiat to rebuild the industry.

As the Court stated in *United States* v. *National Lead Co.*, *supra*:

> "There is no showing that four major competing units would be preferable to two, or * * * that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition * * * in this field * * *. Such competition suggests that the District Court could do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

2. The District Court correctly took into consideration, in exercising its discretion, the injury to the corporate defendants and to the public which would result from divestiture.

The plaintiff criticizes the District Court (Pl. Br. 119) because, as one factor in the determination of the remedy which it fitted to the illegalities it found, that Court took into consideration the harm which would result to the defendants and the public from what it described as "the harsh remedy of complete divestiture" (R. 3551, 3559).

In adopting this constructive approach the District Court followed a principle laid down by numerous decisions. *Standard Oil* v. *United States*, 221 U. S. 1, 77-78 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911); *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, 411 (1912); *Sugar Institute* v. *United States*, 297 U. S. 553, 604 (1936); *United States* v. *Great Lakes Towing Co., supra*, at 217 Fed. 656 (N. D. Ohio 1914).

Upon consideration of the record, the Court found (Finding of Fact No. 155, R. 3690):

> "Total divestiture would be injurious to the corporations concerned and would be damaging to the public."

In its Opinion the Court stated that divestiture would "withdraw the defendant distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded in general as the largest and best equipped theatres" (R. 3551).

Plaintiff argues that there are two answers to the Court's concern over damage to the public: first, that there is nothing in the record to suggest that independent interests cannot give the public as good service as the defendants; and secondly, that if the violations found can be eliminated only by divestiture, it would be paradoxical to deny the relief on the ground of public injury, since Congress has decided that competition is to the greater public advantage.

Regarding the plaintiff's first contention, the Court was eminently justified in concluding that divestiture would be injurious to the public. For example, subsidiary findings, based on the undisputed evidence, were made by the court to the effect that the ownership and operation of theatres by RKO enables it, through the use of such theatres, to plan and direct more effectively the first exploitation of the features it distributes than is possible in the areas where it does not operate theatres, which results not only in greater revenue for it, but also for the subsequent-run exhibitors (Findings of Fact Nos. 122, 123, R. 3685). There is also undisputed evidence that the quality of the motion pictures made by the five theatre-owning defendants would be jeopardized by divorcement (R. 1827), that, for example, the ownership of theatres has enabled RKO to take the risk of experimenting with new types of pictures, which have advanced the art (R. 1623-24).

The short answer to the plaintiff's second contention is that it is based upon a hypothetical proposition which the Court below expressly repudiated. *If* improprieties can be eliminated only by divorcement, plaintiff says, *then* the court's position is contradictory. The Court below concluded that they can and will be eliminated by the relief

given. The plaintiff's attempted answer is but an assignment of error.[17]

C. The District Court correctly refused the plaintiff's demand that RKO be enjoined from licensing theatres affiliated with other defendants, and that the other producer-exhibitor defendants be enjoined from licensing RKO theatres.

Plaintiff seeks to have this Court rewrite the Decree so that each producer-exhibitor shall be enjoined for a ten year period from licensing any feature it distributes to any theatre affiliated with another defendant. This relief was demanded first some two months after the trial ended. Prior to the arguments on January 15, 1946, the idea had not been mentioned.[18] It was first suggested by plaintiff, not as a demand for relief but as an "example" of an "alternative" remedy for which "these defendants might conceivably argue" (R. 2568). But, faced by the District Court's re-

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[17] It is interesting to note that plaintiff refers to a legislative determination that divorcement is in the public interest (Pl. Br. 133, f.n. 5a). It is true that North Dakota in 1937 passed a statute making it unlawful for any motion picture theatre in which a producer or a distributor had an interest, to be operated in the state (Chapter 165, Laws of North Dakota, 1937). It repealed the law in 1939 (Chapter 203, Laws of North Dakota 1939). Apparently the legislature soon discovered that divorcement was not in the public interest. But in any event, the courts are not legislative organs.

[18] Plaintiff's Brief (p. 9) filed December 15, 1946, called for divestiture and for interim relief, pending divestiture, "which will prevent the use by any of them of licensing restrictions or other agreements between any two or more of them which have the effect of fixing, directly or indirectly, the admission prices in affiliated theatres or other theatres competing with such theatres, or which have the effect of excluding such competitor from any part of the theatre operating business" (Pl. Br., p. 9).

fusal to order divestiture, plaintiff evidently found the idea increasingly seductive. By October, 1946, it achieved maturity: the plaintiff's second proposed decree urged the ten year ban (R. 2601). By October 24th, it became the plaintiff's "key proposal" (R. 3000).

The strange aspect of this demand is that it bears most oppressively on the smallest defendants, RKO and Loew's. So long as RKO retained a single theatre, say in Marshalltown, Iowa, its features would be shut out of every affiliated theatre in the United States.

Plaintiff's argument rests upon its theory that RKO, as a distributor, will discriminate in favor of theatres affiliated with another defendant as against independent competitors for the purpose of inducing the other defendants to discriminate elsewhere in favor of the RKO theatres (Pl. Br. 128). We have demonstrated above the fact that RKO has not so discriminated in the past, and there is no reason to assume it will in the future. Here we show that the proposed ban on "cross licensing" is but an indirect method of compelling RKO to divest itself of all its theatres. Plaintiff concedes there is no precedent for such relief (Pl. Br. 133).

The ban proposed by the plaintiff would bar an integrated defendant "from licensing for exhibition in any theatre owned or controlled by it, films *distributed* or *produced* by" another integrated defendant (R. 3601). It must be considered from two angles: (1) the effect on RKO as a distributor; and (2) the effect on RKO as an exhibitor.

(1) *The effect on RKO as a distributor*

The ban on so-called "cross-licensing" would deprive RKO as a distributor of the income derived from the distribution of the productions of independent producers. Dis-

tribution of independently produced features has been an important part of RKO's business. "Continuously since its organization RKO has distributed features for independent producers. The particular independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of features was derived from such independently produced features" (Finding of Fact No. 101, R. 3678). No independent producer could utilize the distribution facilities of RKO if thereby he was barred from some 3000 of the largest and finest theatres in the United States.

Had such a ban as the government now proposes been in effect during the first five motion picture seasons after RKO emerged from its reorganization, it would have deprived RKO of its service fees on the $55,000,000 of receipts it collected for these independent producers (RKO Exs. 5, 6).

Furthermore, a ban on so-called "cross licensing" would materially impair RKO's revenue as a distributor of its own productions. An injunction which would bar RKO from licensing its features for exhibition in theatres affiliated with any other defendant would shut RKO out of some 3,000 theatres, including "many or most of the best theatres" in the United States (Finding of Fact No. 154, R. 3690). In 1943-44 RKO's fees for features produced by it included approximately $5,750,000 from theatres affiliated with other defendants (RKO Exs. 5, 7).

The *immediate* result on RKO as a distributor, therefore, would be to reduce its gross receipts from rentals by

over 50%, i.e., using 1943-44 as a sample year, from $28,457,337 to $13,923,287.[19]

RKO as a producer and distributor obviously could not successfully operate with its own features barred from 3,000 theatres, including the largest and best in the country, and its distributing organization blocked from its traditional reliance on independent producers. From the standpoint of its effect on RKO as a producer-distributor, *the so-called ban on "cross-licensing" is but a veiled form of compulsory divorcement.*

(2) *The effect on RKO as an exhibitor.*

The blow to RKO as an exhibitor would be only slightly less severe. The product which played during the 1943-44 season in RKO's 93 principal theatres is tabulated in RKO Exhibit 8A. "It would be financially impossible for RKO to operate its theatres on features produced by RKO alone" (Finding of Fact No. 102, R. 3678). Indeed, found the Court "except for a limited number of theatres in the very largest cities, the 18,000 * * * theatres * * * in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor" (Finding of Fact No. 151, R. 3689). In the year in question, RKO relied far more heavily on the features of the non-integrated distributors than upon those

[19]

Gross receipts from film rentals		$28,457,337
Receipts for independent productions	$8,802,780	
Estimated receipts for RKO product in theatres affiliated with other defendants	5,731,270	14,534,050
Source: RKO Exs. 5 and 7.		$13,923,287

of its integrated competitors.[20] Now it would be compelled to rely upon them exclusively. Most of the attractive features come from the five producer-exhibitor defendants and United Artists. The product of the other seven national distributors, though including some outstanding box office features, is in general of substantially lower cost and of less attractiveness to the patron (R. 543, 873, 910, 1293, 1300, 1945; Pl. Exs. 426, 427).

RKO's theatres could not maintain their positions in the artificially restricted environment which the proposed ban would create. No justification has been shown for the shackling of their ability to compete on a fair and equal basis which would justify barring them from access to the fine features which may be produced by Fox, Warner's, Loew's or Paramount.

It is, of course, hardly surprising to find the non-integrated defendants favoring the proposed ban on "cross licenses." The creation of a wholly artificial demand for their product, and at the same time the creation of an artificial scarcity by blocking off their more able competitors, all to be accomplished by judicial fiat, would obviously appeal to them as an outcome highly desirable.

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[20] In the year in question RKO's 93 leading theatres exhibited:

Universal features	1,718	engagements
Fox "	1,302	"
Warner "	1,153	"
MISCELLANEOUS MINOR PRODUCERS' features	883	"
MONOGRAM "	817	"
Columbia "	643	"
REPUBLIC "	455	"
United Artists features	378	"
Paramount "	343	"
Loew's "	283	"

(Source: RKO Ex. 8, reproduced at p.).
(Italics: non-integrated defendants; capitalized italics: non-integrated distributors who are not defendants.)

It is equally clear that the same motive is to be found in the support given by the independent producers to the demand for a ban on "cross-licenses." There is no evidence to support their contentions, so they have gone freely outside the record for their arguments. But it does not take any great perspicacity to appraise their motives. No doubt they envisage with consummate satisfaction the bonanza which could be opened to them by securing a judicial ban which would bar the features of integrated producers from theatres affiliated with other distributors. With their superior competitors artificially blocked from the market, and with the best theatres in the country strangling under the proposed ban, the independent producers would reap the harvest of exorbitant fees.

And the same motive, of course, underlies the assault of the so-called "independent" exhibitors. Banned together frequently in circuits and buying combines, these operators are naturally eager to secure a further leverage in their negotiations for product. What more fortunate windfall could come to them than a decree which would bar RKO and other major product from "many if not most of the best theatres," and would force its exhibition in inferior theatres for such bargain license fees as the exhibitor chose to dole out on his judicially created buyers' market?

The only person who has not been heard from is the very one whose interest should be paramount: the theatre patron. What is the profit to this unrepresented consumer if the best theatres in his city are thus shut off from the best features produced in the country? The District Court looked upon this question with understanding based upon a year of study of this record, and correctly denied the plaintiff's demand for this unprecedented type of relief.

CONCLUSION

It is respectfully submitted that the assignments of error of the United States to the Decree of the District Court are not well taken, and that insofar as it is challenged by the United States such Decree should be affirmed.

Dated, February 2, 1948.

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APPENDIX A

Table Showing Competing Affiliated and Unaffiliated Theatres Operating on First-Run Policy in Cities Where RKO Operates First-Run Theatres

A. In cities of over 100,000 population[1]

City	RKO Theatres	Affiliated Theatres[2]	Unaffiliated Theatres[3]
Los Angeles, Cal.[4]	1—Hillstreet	6—Los Angeles (F) Orpheum (F) Paramount (P) State (F) United Artists (F) Warner (W)	2—California Music Hall
San Francisco, Cal.	1—Golden Gate	5—Fox (P & F) Paramount (P & F) Warfield (P & F) St. Francis (P & F) State (P & F)	4—Orpheum United Artists Esquire Tivoli
Denver, Col.	1—Orpheum[5]	5—Denver (F) Paramount (F) Esquire (F) Aladdin (F) Rialto (F)	1—Denham
Chicago, Ill.	2—Grand Palace	7—Apollo (P) Chicago (P) Garrick (P) McVickers (P) State-Lake (P) United Artists (P) Roosevelt (P)	3—World Playhouse Oriental Woods

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Des Moines, Iowa	1—Orpheum	3—Des Moines (P) Paramount (P) Roosevelt (P)	
New Orleans, La.	2—Orpheum Liberty	4—Saenger (P) Globe (P) Tudor (P) Loew's State (L)	1—Center
Boston, Mass.	2—Keith's Memorial RKO Boston	5—Metropolitan (P) Paramount (P) Fenway (P) Loew's State (L) Loew's Orpheum (L)	2—Majestic Translux
Lowell, Mass.	1—RKO Keith's	2—Strand (P) Merrimac Square (P)	
Grand Rapids, Mich.	2—Keith[6] Regent[6]	3—Center (R & P)[6, 7] Kent (R & P)[6, 7] Majestic (R & P)[6, 7]	
Minneapolis, Minn.	1—Orpheum[6]	6—Radio City (P)[6] State (P)[6] Aster (P)[6] Century (P)[6] Gopher (P)[6] Lyric (P)[6]	1—World
St. Paul, Minn.	1—Orpheum[6]	4—Paramount (P)[6] Riviera (P)[6] Tower (P)[6] Strand (P)[6]	1—World

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Kansas City, Mo.	1—Orpheum	5—Uptown (F) Esquire (F) Tower (F) Midland (L) Newman (P)	
Omaha, Neb.	1—Brandeis	3—Orpheum (P) Paramount (P) Omaha (P)	
Newark, N. J.	1—Proctor's[5]	4—Paramount (P) Adams (P) Branford (W) Loew's State (L)	
Trenton, N. J.	5—Lincoln[5] Capitol[5] State[5] Palace[5] Trent[5]		2—Stacy Mayfair
Brooklyn, N. Y.[8]	1—Albee	4—Paramount (P & W) Fox (P & W) Strand (P & W) Metropolitan (L)	
New York City, Manhattan, N. Y.	1—Palace	9—Victoria (L) Criterion (L) Loew's State (L) Hollywood (L) Capitol (L) Rivoli (P) Paramount (P) Strand (W) Roxy (F)	8—Globe Gotham Rialto Music Hall Astor Republic Ambassador Winter Garden

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Rochester, N. Y.	2—Palace[6] Temple[6]	3—Century (P)[6] Regent (P)[6] Rochester (L)	
Syracuse, N. Y.	2—Keith[6] Empire[6]	1—Loew's State (L)	2—Eckel[6] Paramount[6]
Yonkers, N. Y.	1—Proctor's	1—Loew's Yonkers (L)	
Cincinnati, O.	8—Albee Capitol Grand Palace Lyric Shubert Family		1—Keith[5]
Cleveland, Ohio	2—Allen[6] Palace[6]	5—Lake (W)[6] Hippodrome (W)[6] State (L) Stillman (L) Ohio (L)	
Columbus, O.	2—Palace Grand	2—Ohio (L) Broad (L)	
Dayton, O.	3—Keith Colonial State	1—Loew's (L)	1—Victory
Providence, R. I.	1—Albee	2—Carlton (L) State (L)	3—Majestic Fays Strand

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Washington, D. C.	1—Keith's	5—Loew's Palace (L) Capitol (L) Columbia (L) Earle (W) Metropolitan (W)	1—Little

[1] Based upon RKO Ex. 1, Loew's Ex. 13 and RKO Ex. 11.

[2] Affiliated theatres are considered to be those in which one or more of the defendants have an interest. Where two companies are shown as interested in the same theatre, this information is as of the date of trial.

[3] Unaffiliated theatres are considered to be those in which no defendant has any interest.

[4] R. 2125.

[5] RKO has 50% interest.

[6] These theatres were at or prior to the time of the trial subject to a local operating agreement which is no longer in effect.

[7] RKO has a 10% stock interest in the company operating these theatres.

[8] Based upon RKO Ex. 4.

[9] At the time of the trial the Keith Theatre was operated by the United Theatre Corporation, in which RKO had an interest of 15.4%. RKO has sold this interest (Compliance Report, July 1, 1947).

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Cedar Rapids, Iowa	1—Iowa	2—Paramount (P) State (P)	
Davenport, Iowa	1—Orpheum	2—Esquire (P) Capitol (P)	
Dubuque, Iowa	1—Orpheum[2]		2—Avon[2] Grand[2]
Sioux City, Iowa	1—Orpheum	2—Capitol (P) Princess[2]	
Waterloo, Iowa	1—Orpheum	2—Paramount (P) Strand (P)	1—Iowa
New Brunswick, N. J.	3—Albany[4] Rivoli[4] State[4]		1—Opera
Union City, N. J.	1—Capitol	2—Lincoln (W) Roosevelt (W)	
Mount Vernon, N. Y.	1—Proctors	1—Mount Vernon (L)	

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City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
New Rochelle, N. Y.	1—Proctors	1—New Rochelle (L)	
White Plains, N. Y.	1—Keiths	1—State (L)	

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[1] Based upon Gov. Ex. 126, 163, 432, RKO Ex. 8-A, 11, and Par. Ex. 25.

[2] These theatres were at the time of the trial subject to a local operating agreement which is no longer in effect.

[3] Controlled by Affiliated Theatres, Inc. in which RKO had 10%, Paramount 25% intrest (RKO Ex. 11), but to which RKO did not regularly license features (R. 1616). RKO has sold its interest in this company (Compliance Report, July 1, 1947).

[4] RKO has 50% interest.

C. In cities under 25,000 population

Plaintiff concedes that RKO is not involved in any "consequential situations" in these cities (R. 371). RKO does operate 5 theatres on a first-run policy in 3 cities having populations of less than 25,000: the Orpheum and Virginia theatres in Champaign, Ill., the Reade Theatre in Highland Park, N. J. (in which RKO has a 50% interest) and the Capitol and Strand theatres in Marshalltown, Iowa.

APPENDIX B

COMPETITIVE POSITION OF RKO THEATRES IN NEW YORK CITY

RKO theatre	Seats	Competing theatres within ⅛ mile	Competing theatres within 1 mile	Seats in competing theatres within ⅛ mile	Seats in competing theatres within 1 mile
MANHATTAN					
Alhambra	1,545	11	26	12,376	27,279
Coliseum	3,125	6	8	8,140	12,620
Colonial	1,330	8	37*	7,261	58,436
Hamilton	1,857	4	8	4,921	10,087
Jefferson	1,857	18	36	17,248	35,066
Palace	1,757	Times Square area.			
Regent	1,764	14	34	15,519	32,529
23rd St.	1,831	3	34	1,947	34,885
58th St.	3,163	12	40*	8,098	58,047
81st St.	2,062	6	14	8,900	18,214
86th St.	3,127	8	20	8,490	19,689
125th St.	1,585	10	24	8,650	25,104
BROOKLYN					
Albee	3,272	17	28	32,588	40,525
Bushwick	2,045	11	23	10,956	27,259
Dyker	2,147	2	6	1,656	8,664
Greenpoint	1,667	4	7	3,626	5,325
Kenmore	3,017	7	10	12,202	16,873
Madison	2,771	5	16	4,891	13,968
Orpheum	1,741	15	26	27,617	39,294
Prospect	2,381	5	11	2,908	10,174
Republic	2,691	9	20	6,593	17,779
Shore Road	1,474	2	6	1,656	8,663
Tilyou	2,270	2	5	3,055	6,578

* Excludes 1 RKO theatre within distance.

RKO theatre	Seats	Competing theatres within ¼ mile	Competing theatres within 1 mile	Seats in competing theatres within ¼ mile	Seats in competing theatres within 1 mile
Bronx					
Castle Hill	1,600	1	3	599	4,462
Chester	2,571	4	11	4,618	15,305
Fordham	2,357	11	16	14,975	22,039
Franklin	2,951	6	21	7,143	26,028
Marble Hill	1,649	1	2	599	1,698
Pelham	1,762	0	2	0	2,330
Royal	2,067	6	18	8,101	24,374
Queens					
Alden	1,888	6	9	14,177	16,039
Columbus	1,350	1	2	599	1,399
Flushing	2,929	2	2	3,148	3,148
Midway	1,931	3	6	2,835	5,311
Richmond Hill	2,254	2	11	1,579	14,738
Strand	1,716	1	2	599	1,399

Detail

Manhattan

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
Alhambra		1545	.0
	Harlem's Opera House	1532	0.1
	Victoria	2348	0.1
	Apollo	1744	0.1
	Orient	585	0.1
	Sunset	600	0.2
	West End	1100	0.3
	Franklin	560	0.3
	Columbia	600	0.5
	Lincoln	330	0.5
	Jewel	751	0.5
	116th Street	1726	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Morningside	600	0.6
	Regun	867	0.6
	Teatro Hispano	1372	0.6
	Harlem Grand	1432	0.6
	Renaissance	863	0.6
	Triboro	571	0.7
	Reo	588	0.7
	Cosmo	1246	0.8
	Municipal	540	0.8
	Teatro Latino	854	0.8
	Delmar	2250	0.9
	Palace	599	0.9
	Manhattan	900	0.9
	Odeon	863	1.0
	Roosevelt	1358	1.0
Coliseum		3125	.0
	Heights	592	0.1
	Lane	1430	0.1
	Empress	599	0.2
	Gem	575	0.2
	175th Street	3444	0.3
	Uptown	1500	0.5
	Audubon	2607	0.7
	Inwood	1873	1.0
Colonial		1330	.0
	Arcade	542	0.1
	Lincoln	1546	0.15
	Alden	492	0.3
	Filmarte	800	0.4
	Town	1568	0.4
	Little Carnegie Playhouse	460	0.5
	55th St. Playhouse	253	0.5
	Broadway	1600	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Beacon	2673	0.6
	Tivoli	1443	0.6
	Winter Garden	1350	0.6
	Hollywood	1587	0.6
	Republic	1225	0.6
	Gotham	922	0.6
	Ambassador	1118	0.7
	World	299	0.7
	Rivoli	2092	0.7
	Capitol	5486	0.7
	Roxy	5886	0.7
	Music Hall	5949	0.75
	77th Street	600	0.8
	Plaza	520	0.8
	48th Street	300	0.8
	Belmont	512	0.8
	Royal	540	0.8
	Palace (RKO 1st run)	(1757)	0.85
	Strand	2720	0.85
	Normandie	590	0.9
	Bijou	600	0.9
	Victoria	811	0.9
	State	3339	0.9
	Astor	1141	0.9
	Criterion	1600	0.9
	Mayfair	1735	0.9
	Globe	1416	0.9
	Squire	558	1.0
	Paramount	3664	1.0
	Miami	499	1.0
Hamilton		1857	.0
	Dorset	692	0.1
	Lido	580	0.1
	Washington	1399	0.2

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.- Mile
	Delmar	2250	0.4
	Costello	599	0.6
	Odeon	863	0.6
	Rio	2346	0.7
	Roosevelt	1358	0.7
Jefferson		1857	.0
	Star	240	0.1
	Arrow	599	0.1
	Comet	556	0.1
	Edison	594	0.1
	Academy	3515	0.1
	Century	1082	0.1
	Irving Place	710	0.1
	City	1855	0.2
	St. Marks	485	0.2
	Orpheum	567	0.3
	Gramercy	540	0.3
	Commodore	2694	0.3
	Art	599	0.4
	Fifth Ave. Playhouse	279	0.4
	Bijou	598	0.5
	Hollywood	1261	0.5
	Lucky Star	475	0.5
	Gramercy Park	599	0.5
	8th St. Playhouse	490	0.6
	National	1800	0.6
	Regent	525	0.6
	Luxor	560	0.7
	Roosevelt	963	0.7
	Avenue B	1738	0.7
	American Movies	579	0.7
	Palestine	1270	0.8
	Waverly	580	0.8
	Sheridan	2304	0.8

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Superior	940	0.8
	Delancey	1788	0.9
	Peoples	800	0.9
	Greenwich	590	0.9
	Clinton	1095	0.9
	Hudson Playhouse	597	1.0
	Elgin	600	1.0
	34th Street	599	1.0
Regent		1764	.0
	116th Street	1726	0.1
	Jewel	751	0.1
	Morningside	600	0.1
	Regun	867	0.2
	Teatro Hispano	1372	0.3
	Manhattan	900	0.3
	Teatro Latino	854	0.4
	West End	1100	0.5
	Sunset	600	0.5
	Apollo	1744	0.5
	Victoria	2348	0.5
	Harlem Opera House	1532	0.5
	Municipal	540	0.5
	Orient	585	0.5
	Cosmo	1246	0.7
	Star	2296	0.7
	Madison	530	0.7
	Arden	593	0.7
	Olympia	1294	0.7
	Nemo	950	0.7
	Columbia	600	0.7
	Triboro	571	0.8
	Harlem Grand	1432	0.8
	Park West	598	0.8
	Studio	456	0.8

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Edison	599	0.8
	Franklin	560	0.8
	Reo	588	0.9
	Progress	532	0.9
	Carlton	592	0.9
	Midtown	580	0.9
	Palace	599	1.0
	Eagle	1294	1.0
	Rex	1100	1.0
New 23rd Street		1831	.0
	Terrace	597	0.1
	Chelsea	750	0.1
	Elgin	600	0.2
	Greenwich	590	0.6
	Sheridan	2304	0.6
	Savoy	735	0.6
	Fifth Ave. Playhouse	279	0.7
	Gramercy Park	599	0.75
	8th Street	490	0.8
	Arena	800	0.8
	Stanley	621	0.85
	Regent	525	0.9
	Irving Place	710	0.9
	Academy	3515	0.9
	City	1855	0.9
	Hudson Playhouse	597	0.9
	Times	554	0.9
	Anco	572	0.9
	Laffmovie	840	0.9
	Liberty	1155	0.9
	Harris	1024	0.9
	New Amsterdam	1727	0.9
	Bryant	537	0.9
	Pix	850	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Rialto	600	0.95
	Victory	982	0.95
	Lyric	1370	0.95
	Times Square	1056	0.95
	Apollo	1277	0.95
	Selwyn	1012	0.95
	Superior	940	0.95
	New York	600	1.0
	Squire	558	1.0
	Paramount	3664	1.0
58th Street		3163	0.0
	Sutton	569	0.1
	Arcadia	480	0.1
	Clifton	560	0.2
	Plaza	520	0.2
	Normandie	590	0.3
	Lexington	2418	0.3
	Trans-Lux	539	0.3
	Beverly	465	0.3
	York	510	0.4
	Art	598	0.4
	68th St. Playhouse	389	0.4
	Little Carnegie Playhouse	460	0.4
	72d Street	2672	0.6
	Granada	599	0.7
	Monroe	2228	0.7
	42nd Street	1119	0.7
	Filmarte	800	0.7
	Music Hall	5949	0.7
	55th St. Playhouse	253	0.8
	Tudor	601	0.8
	Annex	599	0.8
	State	3339	0.9
	Mayfair	1735	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Palace (RKO 1st run)	(1757)	0.9
	Miami	499	0.9
	Strand	2720	0.9
	Belmont	512	0.9
	Ambassador	1118	0.9
	World	299	0.9
	Rivoli	2092	0.9
	Capitol	5486	0.9
	Roxy	5886	0.9
	Hollywood	1587	0.9
	Winter Garden	1350	0.9
	Republic	1225	0.9
	Gotham	922	0.9
	Broadway	1600	0.9
	Criterion	1600	1.0
	Globe	1416	1.0
	48th Street	300	1.0
	Tivoli	1443	1.0
81st Street		2062	.0
	83rd Street	2634	0.1
	77th Street	600	0.1
	Schuyler	567	0.3
	Beacon	2673	0.3
	Yorktown	953	0.4
	Stoddard	1473	0.5
	Alden	492	0.6
	Symphony	1411	0.7
	Thalia	299	0.7
	Lincoln	1546	0.8
	Arcade	542	0.8
	Jap Gardens	1495	0.8
	Riviera	1694	0.9
	Riverside	1835	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
86th Street		3127	.0
	Orpheum	2214	0.1
	86th Street	1410	0.1
	Grande	492	0.1
	86th St. Casino	599	0.1
	Translux	588	0.15
	Modern Playhouse	300	0.25
	Park Lane	2001	0.5
	Colony	886	0.5
	Europe	306	0.6
	Photoplay	885	0.6
	Monroe	2228	0.7
	Annex	599	0.7
	Granada	599	0.7
	72nd Street	2672	0.7
	Eagle	1294	0.7
	68th St. Playhouse	389	0.9
	Madison	530	0.9
	Progress	532	0.9
	Art	598	1.0
	Schuyler	567	1.0
125th Street		1585	.0
	Harlem Grand	1432	0.1
	Triboro	571	0.1
	Reo	588	0.2
	Palace	599	0.3
	Cosmo	1246	0.4
	Orient	585	0.4
	Lincoln	830	0.5
	Franklin	560	0.5
	Regun	867	0.5
	Teatro Hispano	1372	0.5
	New Liberty	400	0.6
	Municipal	540	0.6
	Jewel	751	0.6
	116th Street	1726	0.6

RKO Theatre	Competing Theatres	Capacity Seating	Approx. Dist.-Mile
	Victoria	2348	0.6
	Harlem Opera House	1532	0.6
	Apollo	1744	0.7
	Teatro Latino	854	0.7
	Morningside	600	0.8
	Renaissance	863	0.8
	Sunset	600	0.8
	West End	1100	0.8
	Star	2296	0.8
	Rex	1100	0.9
	Brooklyn		
Albee		3272	.0
	Paramount	4156	0.05
	Fox	4060	0.05
	Duffield	890	0.05
	Melba	225	0.15
	Star	1495	0.2
	Metropolitan	3570	0.2
	Subway	580	0.2
	Momart	600	0.2
	Strand	2911	0.2
	New United	1600	0.25
	Majestic	1708	0.3
	Oxford	685	0.35
	Academy of Music	3500	0.35
	Tivoli	1848	0.4
	Towne	485	0.4
	Boro Hall	585	0.4
	Terminal	1660	0.5
	Gold	498	0.6
	Flora	500	0.6
	St. George	978	0.65
	Atlantic	997	0.65
	Lido	515	0.65
	Heights	885	0.7
	Paras Court	593	0.7

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Mile Dist.
	Scott	474	0.75
	Peerless	520	0.8
	Carlton	1383	1.0
	Gloria	594	1.0
Bushwick		2045	.0
	Monroe	592	0.05
	Gates	3011	0.
	Century	800	0.1
	Imperial	440	0.15
	Halsey	2108	0.2
	Empire	1189	0.35
	Marvin	443	0.4
	Eagle	500	0.4
	Decatur	565	0.45
	Bobby	416	0.5
	Grove	892	0.5
	Colonial	2222	0.55
	Comet	598	0.55
	Howard	1373	0.6
	New Casino	1600	0.6
	DeKalb	2600	0.6
	Alhambra	1611	0.7
	Rivoli	900	0.7
	Capitol	1781	0.8
	Mozart	589	0.8
	Parthenon	1499	0.9
	Wyckoff	600	1.0
	Sumner	930	1.0
Dyker		2147	.0
	Harbor	1089	0.3
	Stanley	567	0.5
	Electra	620	0.65
	Alpine	2150	0.8
	Bay Ridge	1905	0.8
	Fortway	2332	1.0

RKO Theatre	Theatres Competing	Seating Capacity	Approx. Dist.- Mile
Greenpoint		1667	.0
	American	556	0.1
	Meserole	1978	0.15
	Nassau	499	0.3
	Midway	593	0.4
	Winthrop	580	0.55
	Vernon	594	1.0
	Idle Hour	525	1.0
Kenmore		3017	.0
	Flatbush	1648	0.1
	Astor	584	0.1
	Albemarle	2656	0.15
	Kings	3609	0.2
	Parkside	600	0.3
	Rialto	1542	0.35
	Granada	1563	0.4
	Patio	2616	0.55
	Linden	1491	0.6
	Venus	564	0.9
Madison		2771	.0
	Parthenon	1499	0.15
	Wyckoff	589	0.3
	Mozart	600	0.3
	Alhambra	1611	0.4
	Grove	592	0.5
	Eagle	500	0.6
	Majestic	550	0.6
	Ridgewood	1966	0.6
	Imperial	599	0.65
	Wagner	550	0.65
	Rivoli	900	0.7
	Grandview	550	0.8
	Willoughby	600	0.85
	Glenwood	1285	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Monroe	592	1.0
	Starr	985	1.0
Orpheum		1741	.0
	Strand	2911	0.05
	Momart	600	0.1
	Majestic	1708	0.1
	Academy of Music	3500	0.15
	Paramount	4156	0.15
	Fox	4060	0.2
	Oxford	685	0.25
	New United	1600	0.3
	Melba	2255	0.3
	Subway	580	0.4
	Duffield	890	0.45
	Peerless	520	0.5
	Star	1495	0.5
	Atlantic	997	0.5
	Terminal	1660	0.5
	Metropolitan	3570	0.6
	Towne	485	0.7
	Tivoli	1848	0.7
	Carlton	1363	0.7
	Gold	498	0.8
	Boro Hall	585	0.8
	Plaza	450	0.9
	Flora	500	0.9
	Lido	515	1.0
	Heights	885	1.0
	St. George	978	1.0
Prospect		2381	.0
	Avon	572	0.05
	Globe	904	0.25
	Sixteenth Street	441	0.3
	Minerva	398	0.5
	Garfield	593	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.- Mile
	Sanders	1535	0.7
	Plaza	450	0.9
	Carlton	1383	0.9
	Gloria	594	0.9
	Clinton	644	0.9
	Terminal	660	1.0
Republic		2691	.0
	Nassau	460	0.15
	Commodore	1419	0.25
	Marcy	716	0.25
	Williamsburg	600	0.25
	Square	388	0.3
	Metro	930	0.4
	Wilson	966	0.45
	Graham	575	0.5
	Model	539	0.5
	Rainbow	1746	0.55
	Lindy	600	0.6
	Sun	772	0.65
	Grand	600	0.65
	Grace	421	0.8
	Folly	1750	0.85
	Echo	560	0.9
	Winthrop	580	0.9
	Nassau	499	0.9
	Meserole	1978	1.0
	Alba	1680	1.0
Shore Road		1474	.0
	Harbor	1089	0.3
	Stanley	567	0.5
	Electra	620	0.6
	Bay Ridge	1905	0.75
	Alpine	2150	0.8
	Fortway	2332	1.0

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
Tilyou		2270	.0
	Coney Island	2500	0.2
	Mermaid	555	0.5
	Surf	1277	0.7
	Tuxedo	1800	0.95
	Lakeland	446	1.0
	Bronx		
Castle Hill		1600	.0
	Circle	599	0.5
	American	1998	0.6
	Square	585	0.7
	Rosedale	1280	0.85
Chester		2571	.0
	Elsmere	1542	0.2
	Vogue	1392	0.2
	Ritz	1085	0.25
	Dover	599	0.35
	Fairmount	2504	0.6
	DeLuxe	1400	0.75
	Radio	550	0.9
	Ward	1831	0.9
	Freeman	1604	1.00
	Parkway	1700	1.00
	Dark	1098	1.00
Fordham		2357	.0
	Concourse	587	0.05
	Valentine	1224	0.1
	Windsor	1600	0.15
	Paradise	3840	0.2
	Lido	599	0.25
	Grand	2472	0.25
	Kingsbridge	1099	0.35
	Ascot	599	0.4
	University	575	0.4

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Decatur	900	0.5
	Metro	1450	0.5
	Oxford	1926	0.6
	Savoy	1000	0.75
	Avalon	1440	0.95
	Kameo	550	0.95
	Burnside	2178	1.00
Franklin		2951	.0
	Empire	1744	0.05
	Prospect	1423	0.1
	Burland	1817	0.1
	President	975	0.2
	Jackson	590	0.4
	Tiffany	594	0.4
	Star	599	0.55
	Tower	1693	0.6
	Art	599	0.65
	Ace	1099	0.7
	Victory	1712	0.7
	Boro	599	0.8
	McKinley	1200	0.8
	Freeman	1604	0.85
	Radio	550	0.9
	Rex	600	0.9
	Blenheim	1862	1.00
	Bronx	1457	1.00
	National	2333	1.00
	Boston Road	1578	1.05
	Central	1400	1.05
Marble Hill		1649	.0
	Dale	599	0.05
	Kingsbridge	1099	1.00

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
Pelham		1762	.0
	Park	1098	0.7
	Allerton	1232	0.9
Royal		2067	.0
	Rex	600	0.05
	Bronx	1457	0.1
	Central	1400	0.1
	National	2333	0.1
	Victory	1712	0.25
	Boro	599	0.35
	Jackson	590	0.6
	Casino	2210	0.7
	Forum	2320	0.75
	Osceola	566	0.75
	Heaven	562	0.75
	President	975	0.75
	Ace	1099	0.8
	Prospect	1423	0.85
	Empire	1744	0.9
	Fleetwood	1699	0.95
	Earl	1268	1.00
	Burland	1817	1.00
	Queens		
Alden		1888	.0
	Mesrick	2566	0.1
	Valencia	3544	0.1
	Jamaica	1677	0.2
	Savoy	1750	0.3
	Carlton	1973	0.35
	Hillside	2607	0.5
	Plaza	600	0.55
	Linden	820	0.9
	Hollis	502	1.0

RKO Theatre	Theatres Competing	Seating Capacity	Approx. Dist.- Mile
Columbia		1350	.0
	Gem	599	0.1
	Eldgemere	590-800 open air	0.65
Flushing		2929	.0
	Town	899	0.15
	Prospect	2249	0.3
Midway		1931	.0
	Kew Gardens	1287	0.45
	Forest Hills	949	0.5
	Trylon	599	0.5
	Inwood	1278	0.55
	Austin	599	0.7
	Main St. Playhouse	599	0.8
Richmond Hill		2254	.0
	Steinway	980	0.15
	Austin	599	0.45
	Jerome	872	0.6
	Willard	2300	0.6
	Kew Gardens (cl)	1287	0.7
	Inwood	1278	0.7
	Casino	901	0.8
	Lefferts	1613	0.8
	Roosevelt	1379	0.9
	Hillside	2607	0.9
	Ace	922	1.0
Strand		1716	.0
	Gem	599	0.1
	Edgemere	590-800 open air	0.75

APPENDIX C

RKO's Total Income, Net Income After Taxes, and Percent of Net to Total Income, 1929-1944

(From RKO Exhibit 26)

Year	Total Income (a)	Net Income or Loss After Taxes (b)	Percentage of Net Income or Loss to Total Income
1929	$53,261,719.50	$2,523,558.59	4.7380%
1930	72,976,264.38	4,173,210.16	5.7186
1931	80,445,488.13	*5,199,397.44*	*6.4631*
1932	61,078,722.94	*10,695,503.20*	*17.5110*
1933	45,040,791.85	*4,384,064.09*	*9.7335*
1934	42,533,027.59	*310,574.67*	*.7302*
1935	45,959,717.76	684,732.96	1.4899
1936	49,933,655.48	2,485,911.03	4.9784
1937	53,711,261.67	1,821,165.98	3.3907
1938	57,336,806.67	18,604.43	.0324
1939	52,194,963.99	*228,608.38*	*.4380*
1940	55,026,431.85	*695,416.30*	*1.2638*
1941	54,091,381.24	591,467.04	1.0935
1942	62,057,961.17	788,786.88	1.2710
1943	79,736,241.79	7,015,420.21	8.7983
1944	86,049,805.93	5,228,694.01	6.0764
Total	$951,434,241.94	$3,818,087.31	.4013%

[Figures in Italics are red figures]

Notes:

(a) The above figures are those appearing on the books of the companies and include income from miscellaneous sources shown under the caption "Other Income" on the annual operating statements.

(b) Before deduction of dividends paid on capital stocks of subsidiary companies in the hands of the public.

APPENDIX D

Record as to the 35 Cities of Over 100,000 Population in Which RKO Licensed Product First-Run to Affiliated Theatres (1943-44).

(Initials in parentheses indicate company with which theatre was affiliated.)

1. *Oakland, Cal.*

RKO licensed 36 features to Fox, Paramount, and Orpheum theatres (F) (Ex. 95). Their seating capacities are 3,335, 3,434, and 2,561, respectively (R. 2132b; *Cf.* R. 759-60). These theatres are "the superior houses of the city" and have "excellent locations in downtown Oakland" (R. 2132b). They are better operated and give greater playing time on good pictures (R. 478, 480). The Fox is one of the finest theatres in the country and the Paramount is among the best. (*Ibid.*)

Three unaffiliated theatres, T&D, Esquire, and Roxy operate first-run (R. 477-80). The T&D, seating capacity, 2,760, is the largest (R. 2132c; RKO Ex. 28). It is older, not so well equipped, and is a few blocks out of the better downtown amusement section (R. 2132c). The other two theatres have seating capacities of only 1,075 and 1,300 (R. 759-60). These theatres cannot compete from the standpoint of gross with either the Fox or Paramount (R. 760), though Columbia gets satisfactory revenues and playing time from them (R. 1291-2). RKO licensed 3 features for first-run exhibition in the Roxy during the 1943-44 season (Ex. 95), and apparently these theatres

obtain part of United Artists' and substantially all of Universal's product (Ex. 428 and 428a).

2. *Sacramento, Cal.*

RKO licensed 35 features for exhibition in the Capitol, Senator and Hippodrome Theatres (Ex. 95). Fox has a minority interest in these theatres (RKO Ex. 11). Their seating capacities are 1,178, 2,105, and 1,7[illegible], respectively (RKO Ex. 11). The Senator is the finest theatre in the Sacramento Valley (R. 2132f). The Senator, Capitol, and Fox's Alhambra are the best theatres in the city (R. 761). Loew's considers Fox the most desirable outlet and "by far the best operation" (R. 489). The Hippodrome is now operated as second-run (R. 2132f).

The only unaffiliated theatres operating first run are the Esquire and the Times Theatres with seating capacities of 998 and 500 respectively and the new neighborhood Tower with 1,100 seats (*Ibid.*). Apparently the Tower was not open during the 1943-44 season, for RKO licensed three features for exhibition in only the downtown theatres (Ex. 95). These theatres showed on first-run product of Columbia, Universal, PRC, and one-half Warner's (R. 2132f). There is no evidence that these theatres are comparable in location, physical condition, or earning power with the Fox theatres.

3. *San Diego, Cal.*

RKO licensed 37 features for exhibition in the following theatres: Fox (F) 2878 seats, California (F) 2027, State (F) 1012, Adams (F) 684, and Orpheum (F) 1952 (Ex. 95; R. 2130-31; RKO Ex. 11). The Fox theatre is one of the largest and finest on the Pacific Coast, the California,

Orpheum and State are de luxe theatres, and the Adams has excellent appointments (R. 2131). These theatres are by far the best in the city (R. 490).

Metzger operates three unaffiliated theatres on first-run, Spreckles 1800 seats, Broadway 800, and Tower 600, one of which plays continued first-run or moveovers (R. 2130-31). The Spreckles is the largest unaffiliated theatre (RKO Ex. 28). The Metzger theatres are in good condition (R. 2131). They show product of Universal, Columbia, and part of Warner (Exs. 428 and 428a).

4. *Bridgeport, Conn.*

RKO licensed 20 features for exhibition in Poli (L) 3,641 seats; Majestic (L) 2,240; and Lyric (L) 2,166. RKO licensed 17 features for exhibition in Warner (W) 1,332; and Merritt (W) 997 (Exs. 95 and 95a; RKO Ex. 11). The Merritt Theatre apparently plays RKO's highest grossing features day-and-date with the Warner (Ex. 94).

There is no evidence respecting appointments, location or general characteristics of any unaffiliated theatres in this city. The largest is the Park City, 1,090 seats (RKO Ex. 28).

5. *Hartford, Conn.*

RKO licensed 20 features for exhibition in Regal (W) and Strand (W) and 18 features in Poli (L) and Palace (L) (Ex. 95). Paramount has an interest in the Allyn which plays all of its product on first run policy (R. 846-7; Ex. 428).

The unaffiliated Dow's, State, and E. M. Loew operate on first run (R. 465), one or more of them probably using product of Universal and Columbia (Ex. 428). While the

State and E. M. Loew are comparable in seating capacity to three of the four affiliated theatres playing RKO product (RKO Ex. 28), there is no evidence that they are comparable in location, appointments or operating efficiency.

6. *New Haven, Conn.*

RKO licensed 20 features to the Poli (L), 3007 seats, and Bijou (L), 1499, and 17 features to the Rodger Sherman (W), 2060 (Ex. 95; RKO Ex. 28). In addition, Paramount is interested in the Paramount with 2348 seats, which plays its product on first run (R. 847; Exs. 428 and 428a).

There are 2 unaffiliated theatres comparable in seating capacity to the smallest affiliated theatre which licensed RKO product (RKO Ex. 28), but there is no evidence that they or any other unaffiliated theatre are comparable in other important respects.

7. *Wilmington, Del.*

RKO licensed 38 features to the Queen (W) 1449 seats, Warner (W) 1761, Ritz (W) 1024, and Grand Opera (W) 1322 (Ex. 95; RKO Exs. 11 and 28). Apparently the Ritz does not operate on regular first run (R. 498; R. 762). In addition, the Aldine (L) operates on first run (R. 498).

The largest unaffiliated theatre is the Edgemoor, 850 seats, but Blair's Rialto is the only one operating on first run (*Ibid.*). Fox licenses exclusively to the Rialto which gives long runs (R. 1142). However, Kupper conceded that the Warner theatre could throw off greater revenue (*Ibid*). Fox consumes all of the Rialto's playing time (*Ibid.*), so

RKO could not have licensed any part of its product to that theatre.

8. *Jacksonville, Fla.*

RKO licensed 35 features to Florida (P) 2185 seats, Palace (P) 1314, Arcade (P) 1115, and Temple (P) 889 which operates on a first run policy (Ex. 95; R. 466, 847). These theatres are "most superior", the largest and best in the city (R. 466, 847).

The largest unaffiliated theatre is the St. Johns with 815 seats (R. 847; RKO Ex. 28). It operates on first run. RKO licensed 2 features for exhibition in the St. Johns, but there is no evidence that this theatre is comparable to the affiliated theatres or that it could pay satisfactory rentals for most RKO features.

9. *Miami, Fla.*

RKO licensed 37 features for exhibition in the Olympia (P) 2125 seats and Paramount (P) 1134 and 4 other theatres affiliated with Paramount which are presently on a subsequent run policy (Ex. 95; R. 848). These theatres are better than any others (*Ibid.*; R. 471).

Wometco's unaffiliated Capitol with 1234 seats and Miami 472 compete with the affiliated theatres (*Ibid.*). Apparently Fox, United Artists, Universal, and Columbia license the Wometco houses first run (Exs. 428 and 428a), so they have ample product. RKO licensed one feature to Wometco's Ritz for first run exhibition (Ex. 95).

10. *Tampa, Fla.*

RKO licensed 36 features to the Tampa (P) 1554 seats, Park (P) 1281, Strand (P) 742, and Florida (P) 901 (Ex. 95; R. 495).

The only unaffiliated theatres operating on first run are the State with 604 seats and the Lincoln 800, the latter catering to colored patrons (R. 848). The affiliated theatres are much larger and better than the State (*Ibid.*). The State apparently uses all of Warner's product (Exs. 428 and 428a), which, in view of its size, probably exhausts its playing time. RKO licensed one feature for exhibition in the State (Ex. 95).

11. *Atlanta, Ga.*

RKO licensed 32 features for exhibition in Fox (P), 4500 seats, Paramount (P) 2476, and Capitol (P) 2100, and 3 other theatres affiliated with Paramount (Ex. 95; R. 849). The Grand (L), 1850 seats, operates in competition (*Ibid.*). In addition, Murray's unaffiliated Rialto and, perhaps, one or two unidentified unaffiliated theatres operate on a first run policy (*Ibid.*) (*Cf.* R. 451).

RKO licensed two features to the Rialto (Ex. 95) and regularly licenses all of its Goldwyn pictures to that theatre (R. 1698). The Rialto has only 700 to 800 seats, plays each Goldwyn picture for five or six weeks, and pays a better rental than the theatres affiliated with Paramount (*Ibid.*). However, it plays all of Columbia's product and could not take 25 or 30 RKO features and, perhaps, not even 1 or 2 more (*Ibid.*).

12. *Peoria, Ill.*

RKO licensed 38 features to the Madison (P) 1797 seats, Palace (P) 1816, and Rialto (P) 1560 (Ex. 95; R. 850).

The largest unaffiliated theatres have capacities of only 750 seats (RKO Ex. 28). The affiliated theatres are the best in Peoria (R. 850).

13. *South Bend, Ind.*

RKO licensed substantially all features for exhibition in the Colfax (P), Palace (P) and Granada (P) theatres (Ex. 95). Their seating capacities are, respectively, 2069, 2977, and 2387 (R. 851).

The largest unaffiliated theatre has only 800 seats (RKO Ex. 28). The Paramount theatres are the best in the city (R. 851) and no other theatres "by their quality, location or equipment, would be entitled to first-run" (R. 493).

14. *Wichita, Kansas*

RKO licensed 37 features for exhibition in the Miller (F), Orpheum (F), Palace (F), and Wichita (F) Theatres (Ex. 95). These have seating capacities of 1930, 1659, 1234, and 906 respectively (R. 2067). The Boulevard (F), 972 seats, runs day-and-date with the Orpheum or Miller. The Sandra (F), 640 seats, is a moveover theatre (*Ibid.*). These theatres are the most suitable for first run exhibition (R. 2068).

The largest unaffiliated theatre is the Civic, with 900 seats (RKO Ex. 28). RKO licensed one feature to the Civic for first run exhibition (Ex. 95), but there is no evidence that it or any other unaffiliated theatre would serve as a regular and satisfactory outlet for first run of RKO product.

15. *Somerville, Mass.*

RKO licensed 29 features to the Capitol (P) and Ball Square (P) Theatres (Ex. 95). Their seating capacities are 1735 and 1248 respectively (R. 854). They are much larger and better than unaffiliated theatres (*Ibid.*; R. 493).

The remaining theatres operating on a first run policy are Viano's Broadway, Teele Square, and Somerville (R. 492-3). The largest is the Somerville, with 1100 seats (RKO Ex. 28). Apparently they regularly play Columbia's product on first run (Ex. 428). During the 1943-44 season, RKO licensed 3 features for first run in Viano's theatres and 5 features to Peterson's Orpheum (Ex. 95). There is no evidence that they, or any other unaffiliated theatres, are comparable to the Paramount theatres as first run outlets for RKO product.

16. *Springfield, Mass.*

RKO licensed 19 features for exhibition in the Paramount (P) and Broadway (P), (Ex. 95). Their seating capacities are 2758 and 1765 respectively (R. 854). According to a Paramount witness, the Paramount Theatre is the largest, has the best appointments, has as good location as any theatre, and is the best in the city (*Ibid.*).

RKO licensed 1 feature for exhibition in the Palace (L), (Ex. 95). According to a Loew witness, the Palace is by far the best theatre in the city (R. 494).

RKO licensed 17 features for exhibition in the Capitol (W) and Art (W) Theatres (Ex. 95). Their seating capacities are 1777 and 936 respectively (RKO Ex. 28). Apparently, the Art is used as a moveover house (Ex. 94).

The only identified unaffiliated theatre playing on run is Ander's Bijou, with a seating capacity of less than 1000 (R. 493-4; RKO Ex. 28). This theatre apparently plays the product of Columbia and part of Universal (Ex. 428). The largest unaffiliated theatres are comparable in size only to the Art (W) (RKO Ex. 28).* There is no evidence

* RKO Ex. 28 erroneously lists the Art (W) as an unaffiliated theatre.

that the Bijou, or any other unaffiliated theatre, is comparable to any of the affiliated theatres in terms of quality, appointments, operating efficiency, or location.

17. *Worcester, Mass.*

RKO licensed 16 features for exhibition in the Warner (W) Theatre (Ex. 95), which has a seating capacity of 1290 (RKO Ex. 11).

RKO licensed 11 features to the Poli (L) Theatre (Ex. 95), the largest in the city with 3239 seats (RKO Exs. 11 and 28).

RKO licensed 7 features for exhibition in the Capitol Theatre (P), 884 seats (Ex. 95; R. 855). The Capitol is not as large as the Poli (L) and Elm St. (L), but is comparable in appointments and has a better location than any other theatre playing first run (R. 855).

E. M. Loew's Plymouth Theatre is the only unaffiliated theatre comparable in size to any affiliated houses operating on a first run policy (RKO Ex. 28). RKO licensed three of its features for exhibition in this theatre. However, there is no evidence that it or any other unaffiliated theatre is comparable in location, physical condition, or operating efficiency to any of the affiliated theatres.

18. *Detroit, Mich.*

RKO licensed 37 features for exhibitions in the Palms-State (P), Michigan (P), United Artists (P) and Broadway Capitol (P) theatres (Ex. 95), with seating capacities of 2967, 4029, 2018 and 3367, respectively (R. 855). Together with the Fox (F) and Adams, they are the best theatres in the city (R. 461).

The Fox (F) theatre, 5041 seats, is the largest and finest in the city. Fox has a minority interest in the Adams, 1545 seats, which exhibits the pictures of the same distributors who license the Fox Theatre (R. 2134).

RKO licensed one feature for first showing in the unaffiliated Paradise. However, there is no evidence that any unaffiliated theatre is comparable in any respect with the affiliated theatres mentioned above.

19. *Elizabeth, N. J.*

RKO licensed 33 features for exhibition in the Regent (W), Ritz (W) and Liberty (W) Theatres (Ex. 95) with seating capacities of 2495, 2791, and 1692, respectively (RKO Ex. 11).

RKO licensed three features for first showing in the unaffiliated State and Strand theatres (Ex. 95). However, there is no evidence that these or any other unaffiliated theatres are comparable in location or facilities with any of the above named theatres.

20. *Paterson, N. J.*

RKO licensed 35 features to the Fabian (W), Garden (W) and Rivoli (W) Theatres (Ex. 95) with 3263, 1193 and 1623 seats respectively (RKO Ex. 11).

The only other theatre in the city operating first run is the United States (P), with 1487 seats (R. 481-2, 859). It is comparable in quality and location with the above theatres (R. 859).

The largest unaffiliated theatre is the State, with 1000 seats (RKO Ex. 28). RKO licensed two features to the unaffiliated Majestic for first run (Ex. 95). However, there is no evidence that the State, Majestic, or any other un-

affiliated theatre is comparable with the above theatres as a regular first run outlet for RKO product.

21. *Utica, N. Y.*

RKO licensed 38 features for exhibition in the Avon (W) and Stanley (W) Theatres (Ex. 95), with seating capacities of 1562 and 2959 respectively (RKO Ex. 28). Both operate on a regular first run (R. 497).

The largest unaffiliated theatre in Utica is Gordon's Olympic, 1500 seats (RKO Ex. 28). This theatre operates on first run (R. 497) using product of Fox and apparently Columbia (R. 1131; Ex. 428). Loew's witness testified that the Avon and Stanley are superior in every way (R. 497). Fox transferred its product to the Olympic after a disagreement (R. 1131), but there is no evidence that it is comparable to the Avon and Stanley as a first run outlet.

22. *Charlotte, N. C.*

RKO licensed 38 features to the Carolina (P), Imperial (P), Broadway (P) and State (P) theatres (Ex. 95) with seating capacities of 1450, 946, 1103 and 645 respectively (R. 862).

The largest unaffiliated theatre has only 500 seats (RKO Ex. 28). The four theatres which license RKO product are the best in the city and there are no others comparable to them (R. 862).

23. *Portland, Oregon*

RKO licensed 38 features for exhibition in the Paramount (F), Orpheum (F) and Mayfair (F) Theatres

(Exs. 95 and 95a). The Paramount, 3054 seats, built in 1928, has always shown first run product (R. 2027). The Orpheum, 1732 seats, built in 1912, before Fox acquired its interest, consistently has operated first run (R. 2028). The Mayfair, 1498 seats, operates on a moveover policy, and was re-equipped in 1943 (R. 2026, 2028).

The J. J. Parker interests operate the unaffiliated Broadway and United Artists theatres first (R. 485). Unaffiliated exhibitors license the product of Loew's, United Artists, Universal and one-half of Warner for first run exhibition, and charge the same admission prices as affiliated first run theatres (R. 2039). There is no evidence that any unaffiliated theatres are comparable to the affiliated theatres. In any event, the Parker theatres are well supplied with first run product and there is no evidence that they or others could use RKO product.

24. *Erie, Pa.*

RKO licensed 38 features to the Warner (W) and Columbia (W) theatres (Ex. 95) with seating capacities of 2584 and 961 respectively (RKO Ex. 28). The Warner is the largest and best theatre in the city (R. 756) and plays RKO's best pictures (Ex. 94).

The largest unaffiliated theatre operating on first run is the Shea, seating 1189 (R. 462; RKO Ex. 28). Apparently the Shea plays the product of Fox, United Artists, Universal, Columbia, and part of Loew (Ex. 428).

25. *Philadelphia, Pa.*

RKO licensed 38 features for exhibition in ten theatres affiliated with Warner (Ex. 95).

The only unaffiliated theatres operating on first run in Philadelphia are Goldberg's Studio, which is very small, and Goldman's Erlanger with 1800 seats (R. 482-3). The Erlanger is "badly off location" (R. 484). There is no evidence that any unaffiliated theatre is comparable to the Warner houses as first run outlets for RKO's product. Warner's lease on the Fox (F) expired on October 5, 1945, and it is now operated as the first run outlet for Fox product in competition with the Warner theatres (R. 2135).

26. *Scranton, Pa.*

RKO licensed 36 features for exhibition in the Strand (P), Comerford (P), Capitol (P) and State (P) theatres (Ex. 95), seating capacities 1542, 1600, 1770 and 920 respectively (R. 863). They are the best theatres in Scranton (R. 863).

The largest unaffiliated theatre is the Orient with 720 seats (RKO Ex. 28). RKO licensed one feature for first run in the Bullshead and one in the Favini theatre (Ex. 95). However, there is no evidence that these or any other unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO product.

27. *Chattanooga, Tenn.*

RKO licensed 32 features to the Tivoli (P), State (P) and Rialto (P) (Ex. 95), with seating capacities of 1781, 856 and 800 respectively (R. 864). These are by far the best theatres in Chattanooga (*Ibid.*). The Tivoli was built in 1920, approximate cost $500,000, and was remodeled and refurnished at a cost of $30,000 in 1939. It has air-conditioning, and is "an outstanding theatre and the pride of Chattanooga" (Par. Ex. P-25, p. 6). The State was

built in 1928 at a cost of $100,000 and was refurnished at a cost of $20,000 in 1938; next to the Tivoli, it is considered the best theatre (*Ibid.*).

RKO licensed two features for first exhibition in the American and Capitol theatres (Gov. Ex. 95). The Capitol, with 550 seats, is the best unaffiliated theatre (Par. Ex. P-25, pp. 1, 6). It was built in 1937 as a broadcasting studio but converted in 1940; it is a make-shift arrangement but produced a fair theatre at a cost in the neighborhood of $25,000 (*Ibid.*).

28. *Knoxville, Tenn.*

RKO licensed 37 features for exhibition in the Tennessee (P), Riviera (P) and Strand (P) theatres (Ex. 95a) with seating capacities of 1996, 1012, and 799 respectively (R. 864). The Tennessee is an $800,000 theatre and was opened in 1928; it is air conditioned and is known as the "showplace of East Tennessee" (Par. Ex. P-25, p. 7). The Riviera has an excellent location, is in fine physical condition, and is regarded as the city's second best theatre (*Ibid.*). These theatres are by far the best in the city and there are no others which are adaptable to first run (R. 468, 1864).

The best unaffiliated theatre is the Roxy, 800 seats (P-25, pp. 1, 7). It has an inferior location, is not attractive and has never been well maintained (*Ibid.*). There is no evidence that any other unaffiliated theatre is comparable in appointments, operating efficiency or location with the affiliated theatres.

29. *Memphis, Tenn.*

RKO licensed 18 features for exhibition in the State (L) and Palace (L) theatres (Ex. 95) with seating capacities of 2550 and 2154 respectively (RKO Ex. 11). They are the best theatres in the city (R. 471).

RKO licensed 12 features for exhibition in the Strand (P), 1086 seats (Ex. 95; RKO Ex. 11).

RKO licensed four features for exhibition in the Warner (W), 1982 seats (Ex. 95; RKO Ex. 11).

RKO licensed one feature each for showing in the Airways (900 seats) and Luciann (1014 seats) theatres, and two features to the Lamar (1000 seats) (Seating capacities: RKO Ex. 27). There are several unaffiliated theatres in Memphis comparable in size to the Strand, the smallest of the affiliated theatres (See RKO Ex. 27). However, "So This Is Washington," a low-grossing picture, was the only picture of the 1943-44 first block which was exhibited in the Strand (Exs. 93-94). This indicates that it plays some of RKO's lower-grossing features.

There is no evidence that any unaffiliated theatre is comparable in appointments, operating efficiency or location with the other affiliated theatres mentioned above, or could use RKO's product on first run and pay satisfactory rentals therefor.

30. *Dallas, Texas*

RKO licensed 35 features for exhibition in the Majestic (P), Palace (P), Capitol (P), Rialto (P), Melba (P), and Village (P) theatres (Ex. 95a). The Village, with 1309 seats, apparently operates in a suburb (RKO Ex. 11). The Majestic has 2415 seats, the Palace 2332, the Capitol 1052,

the Rialto 1332 and the Melba 1841 (R. 864-65). The above theatres are the largest and best in Dallas (*Ibid.*).

The largest unaffiliated theatre is the Arcadia with 1042 seats (RKO Ex. 28). RKO licensed one feature to the Arcadia and two features to the Queen (Ex. 95), but there is no evidence that these theatres or any other unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO product in Dallas.

31. *Fort Worth, Texas*

RKO licensed 35 features for exhibition in the Worth (P), Hollywood (P), Palace (P) and Parkway (P) theatres (Ex. 95). The seating capacities of the first three of these theatres are 2358, 1700 and 1468 respectively (R. 865). Parkway, 1021 seats (RKO Ex. 11), apparently operates on a subsequent run policy (R. 464, 865). These theatres are by far the largest and best in Fort Worth (R. 865).

The only unaffiliated theatre comparable in size is the Liberty (RKO Ex. 28; but see R. 865). RKO licensed four features for first showing in the Holton and one in the White (Ex. 95), but there is no evidence in the record that any unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO's product.

32. *San Antonio, Texas*

RKO licensed 37 features for exhibition in the Majestic (P), Empire (P), Prince (P), Aztec (P) and State (P) theatres (Ex. 95a). The Majestic, with 3703 seats, the Aztec, with 2433, the Empire, with 1497, and the Texas (P), with 2752 are presently operated on a first run policy (R.

866; *cf.* R. 489). These theatres are by far the best in San Antonio (R. 866).

There are 8 unaffiliated subsequent run theatres in the city (*Ibid.*). RKO licensed one feature for first showing in Lucchese's Zaragoza (Ex. 95). There is no evidence that any unaffiliated theatre is comparable to the affiliated theatres in location, size, or appointments.

33. *Seattle, Washington*

RKO licensed 37 features for exhibition in the Fifth Avenue (F), Blue Mouse (F), Paramount (F), Music Hall (F) and Orpheum (F) theatres, and one feature to the Palomar in which Fox is interested (Ex. 95). All of these operate on first run, except the Blue Mouse, which plays moveovers (R. 2017). The Fifth Avenue, with 2366 seats, was built in 1926 and is one of the outstanding theatres in Seattle (R. 2018). The Blue Mouse, with 851 seats, was built in 1920 by an independent exhibitor, and has always played first run or moveover (R. 2019). The Paramount, with 3049 seats, is the largest theatre in Seattle and was built in 1928 to show pictures on first run (R. 2018). The Music Hall, with 2282 seats, was built about 1927 by an independent exhibitor and has always operated on a first run or moveover policy (R. 2018-19). The Palomar, with 1437 seats, was built around 1915 and from about 1938 has played first run product with stage shows (R. 2019). All of these theatres are centrally located in the downtown district and in the main theatre section (*Ibid.*). Reagan stated that it improves Paramount's revenue to play a picture in as fine a theatre as the Fifth Avenue in Seattle because of the advertising and publicity value of the theatre (R. 769-770). Rodgers regards these theatres as far superior to unaffiliated operations (R. 492).

The only unaffiliated theatre playing first run is the Liberty, 1650 seats. There is also a newsreel house (R. 2019). The Liberty is poorly located, plays first run the product of Columbia, one-half of United Artists, and the product of certain non-defendant producers (R. 2019-20). There is no evidence that the Liberty or any other unaffiliated theatre could serve as a satisfactory first run outlet for RKO product. There is no evidence that the Liberty is not supplied with all the product it needs.

34. *Spokane, Wash.*

RKO licensed 38 features for exhibition in the Fox (F), Orpheum (F) and State (F) theatres (Ex. 95). The seating capacity of the Fox is 2251. It was built in 1931 and is the largest and best theatre in the city (R. 2022-24). The Orpheum has 1272 seats and was built in 1918 (*Ibid.*). The State, with 954 seats, was built in 1916, has always played first run irrespective of ownership, and is larger than any unaffiliated theatre (*Ibid.*; but see RKO Ex. 28).

The only unaffiliated theatre operating on a first run policy is the Granada with 550 seats (R. 493, 2022-4). The Granada was built in 1912 and it began to operate on a first run policy in 1942 when it acquired the product of Universal, part of Republic and part of Columbia (R. 2022-4). The revenue possibilities of the Granada are not equal to the Fox (R. 537). There are no other unaffiliated theatres which by their quality, character and location could serve as a satisfactory first run outlet (R. 493).

35. *Milwaukee, Wis.*

RKO licensed 17 features for exhibition in the Warner (W) theatre and 19 features for exhibition in the Alhambra

(W) and Riverside (W) theatres (Ex. 95). The theatres in Milwaukee which operate on first run are, the Wisconsin (F) 2778 seats, Palace (F) 2438, Strand (F) 1200 (moveover), Warner (W) 2000, Riverside (W) 2300, and Alhambra (W) 1400 (moveover) (R. 1987).

The Warner and Wisconsin theatres are showcases and the best in the area betwen Chicago and Minneapolis (*Ibid.*). The Palace and Riverside are fine, luxurious theatres (*Ibid.*).

The affiliated theatres which operate first run are substantially larger than any unaffiliated theatre (RKO Ex. 28). One of the larger unaffiliated theatres, the Avalon, 1200 seats, is a first run neighborhood theatre (R. 1992). RKO licensed one feature for first showing in the Colonial theatre (Ex. 95), but there is no evidence that the Colonial or any other unaffiliated theatre could serve as a regular satisfactory first run outlet for RKO product in this city.

APPENDIX E

RECORD AS TO THE 187 CITIES OF 25,000 TO 100,000 POPULATION IN WHICH RKO LICENCED PRODUCT FIRST-RUN TO THEATRES NOT AFFILIATED WITH RKO BUT AFFILIATED WITH DEFENDANTS OTHER THAN RKO (1943-44)*

A. RKO product was exhibited first run in theatres in which other defendants have minority interests in 20 cities

In 14 of these cities the theatres in which RKO exhibited (Ex. 94) were those in which Paramount had a minority interest (RKO Ex. 11). The individual superiority of the theatres in these 14 cities is concisely summarized in Exs. P-25 and P-25A, at the pages indicated:

City	Exs. P-25 and P-25-A
1. Quincy, Ill.	pp. 77-79
2. Rockford, Ill.	81-83
3. Clinton, Iowa	103-104
4. Mason City, Iowa	108-109
5. Baton Rouge, La.	119-120
6. Shreveport, La.	125-126
7. Bangor, Me.	128-129
8. Jackson Miss.	200-201
9. Concord, N. H.	340
10. Wilmington, N. C.	231
11. Lebanon, Pa.	251-252
12. Danville, Va.	312
13. Burlington, Vt. (The unaffiliated Strong theatre played "Rookie" and "Lady" on first run.)	342
14. Fitchburg, Mass. (The unaffiliated Shea's played 4 of First Block first run.)	338

* For this Appendix, RKO has used the test of affiliation urged by the plaintiff, i.e., theatres in which a defendant has any interest, however small.

In the remaining 6 cities the Record either fails to show the existence of unaffiliated theatres herein or shows that they played part of RKO's first block:

15. Alhambra, Cal.
16. Ottumwa, Iowa
17. Waltham, Mass.
18. Aliquippa, Pa.
19. Everett, Wash.
20. Allentown, Pa.

B. RKO product was exhibited first run in theatres affiliated with other defendants in 19 cities where Record does not show existence of any unaffiliated theatre

1. Tuscaloosa, Ala.
2. Norwalk, Conn.
3. West Hartford, Conn.
4. Elgin, Ill.
5. Owensboro, Ky.
6. Newton, Mass.
7. Rochester, Minn.
8. Belleville, N. J.
9. Hackensack, N. J.
10. Kearny, N. J.[1]
11. Montclair, N. J.
12. Jamestown, N. Y.
13. Eau Claire, Wis.
14. Fond du Lac, Wis.
15. Beaumont, Tex. (except 1 Negro theatre)
16. Wilkensburg, Pa.
17. West Palm Beach, Fla.[2]
18. Santa Barbara, Cal.[3]
19. Bakersfield, Cal.

There can be no showing of "discrimination" where the Record does not show there is an alternative unaffiliated exhibitor.

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[1] The Regent Theatre in Kearny, which played three of the four RKO first block exhibited in that city, is leased by RKO to a non-defendant. However, the Government classifies it as affiliated with Warner.

[2] R. 364; RKO Ex. 28.

[3] R. 2132-o. Cf. RKO Ex. 28.

C. RKO product was exhibited first run in part in theatres affiliated with other defendants, in part in unaffiliated theatres in 35 cities

Except in 13 instances, the Record contains no evidence as to the comparative merits of the theatres involved. In these 13 cities, indicated by Record citations, the undisputed evidence shows that the affiliated theatres are superior. In the absence of any evidence as to their respective sizes, locations, quality of equipment, and ability and reliability of management, it is impossible to draw any inference of discrimination from the licensing of certain features to X theatre and others to Y theatre.

City

1. Glendale, Cal.
2. San Jose, Cal. (R. 2132h).
3. Santa Ana, Cal.
4. Santa Monica, Cal. (R. 2132j-k).
5. Meriden, Conn.
6. New Britain, Conn.
7. Berwyn, Ill.
8. Evanston, Ill. (Ex. P-25, pp. 65-7).
9. Springfield, Ill. (Ex. P-25, pp. 87-9).
10. Hammond, Ind.
11. Council Bluffs, Iowa
12. Arlington, Mass. (Ex. P-25, pp. 133-4).
13. Brockton, Mass.[4] (Ex. P-25, pp. 135-40).
14. Taunton, Mass.[5] (Ex. P-25, pp. 161-7).
15. Atlantic City, N. J.
16. East Orange, N. J.

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[4] Exhibit P-25 shows that the unaffiliated Colonial theatre regularly uses one-half of RKO's product on first run.

[5] Exhibit P-25 shows that the unaffiliated Strand theatre now plays all RKO features on first run.

City

17. Irvington, N. J.
18. Orange, N. J.
19. Passaic, N. J.
20. Asheville, N. C.
21. Lorraine, Ohio
22. Massillon, Ohio
23. Steubenville, Ohio
24. Chester, Pa.
25. Westport, Ky. (Ex. P-25, pp. 257-61).
26. Pawtucket, R. I. (Ex. P-25, pp. 267-71).
27. Woonsocket, R. I.[6] (Ex. P-25, pp. 272-78).
28. Amarillo, Tex. (Ex. P-25, pp. 290-2).
29. El Paso, Tex. (Ex. P-25, pp. 296-8).
30. Waco, Tex. (Ex. P-25, pp. 305-7).
31. Charleston, W. Va.
32. Clarksburg, W. Va.
33. Appleton, Wis.
34. West Allis, Wis.
35. Oak Park, Ill.

D. RKO product was exhibited first run in affiliated theatres substantially larger than largest unaffiliated theatre in 50 cities

In each of these cities the smallest affiliated theatre showing an RKO feature from the first Block exceeded the seating capacity of the largest unaffiliated theatre by at least 300 seats. In addition, the superiority of several of the affiliated theatres in such other respects as furnishings, location, projection equipment, etc. is demonstrated by testimony or exhibits in the Record.

[6] Exhibit P-25 shows that the unaffiliated Park and Bijou theatres regularly license one-half of RKO's product for first run exhibition.

City	Seating Capacity of Smallest Affiliated Theatre[7]	Seating Capacity of Largest Unaffiliated Theatre[7]

With respect to the first 21 cities, Paramount's Ex. P-25 demonstrates the superiority of its theatres over the best unaffiliated theatre in each city. Because of the length of the statements in that exhibit, the comparisons are not repeated here.

1.	Fort Smith, Ark.	Temple (P) 870	Fort 500
2.	St. Petersburg, Fla.	La Plaza (P) 1685	Reno 800
3.	Bloomington, Ill.	Castle (P) 893	Ewing 400
4.	Danville, Ill.	Palace (P) 986	Time 560
5.	E. St. Louis, Ill.	Majestic (P) 1788	Avenue 1100
6.	Marion, Ind.	Paramount (P) 1196	Lunalite 376
7.	Burlington, Iowa	Capitol (P) 682	Avon 350
8.	Monroe, La.	Capitol (P) 1014	Ritz 600 (negro)
9.	Lewiston, Me.	Auburn (P) 1169	Ritz 500
10.	Chelsea, Mass.	Olympia (P) 1420	Strand 900
11.	Chicopee, Mass.	Rivoli (P) 1261	Victoria 750
12.	Greensboro, N. C.	National (P) 1486	Criterion 550
13.	High Point, N. C.	Broadhurst (P) 758	Ritz 400
14.	Winston-Salem, N. C.	State (P) 1536	Ardmore 496[8]
15.	Fargo, N. D.	Grand (P) 739	Princess 352
16.	Hamilton, Ohio	Palace (P) 846	Linden 449
17.	Middletown, Ohio	Strand (P) 1762	State 400
18.	Hazelton, Pa.	Grand (P) 896	Alton and Family 500 each
19.	Columbia, S. C.	Ritz (P) 730	State 374
20.	Johnson City, Tenn.	Majestic (P) 989	Sevier 650
21.	Galveston, Texas	Queen (P) 756	Isle 300 (except Carver 650, negro)

Except as otherwise noted, RKO's Ex. 28 comparing seating capacities appears to be the only evidence in the record respecting the suitability of theatres as first run outlets in the following cities.

22.	Anniston, Ala.	Ritz (P) 1216	Rialto 350
23.	Tucson, Ariz.	Rialto (F) 1084	Plaza 700

[See Ex. P-25, pp. 15-16.]

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[7] RKO Ex. 28.

[8] From P-25, p. 233; cf. RKO Ex. 28.

	City	Seating Capacity of Smallest Affiliated Theatre	Seating Capacity of Largest Unaffiliated Theatre
24.	Huntington Park, Calif.[9]	California (F) 1500	
25.	Stockton, Calif.	California (F) 2172	Roxy 750
	[The California Theatre is "much the finest" in the City (R. 2132f-g).]		
26.	New London, Conn.	Garde (W) 1602	Empire 1117
27.	Torrington, Conn.	Warner (W) 1854	State 999
28.	Waterbury, Conn.	State (W) 1951	Cameo 1041
29.	Belleville, Ill.	Lincoln (F) 1514	Ritz 500
30.	Hutchinson, Kan.	Midland (F) 965	State 400
31.	Hagerstown, Md.	Academy (W) 1142	Henry's 400
32.	Everett, Mass.	Capitol (W) 1955	Park 820
33.	Lynn, Mass.	Warner (W) 1789	Capitol 1300
	[See Ex. P-25, pp. 154-7.]		
34.	Joplin, Mo.	Fox (F) 1779	Hippodrome 1317
35.	Springfield, Mo.	Gilloiz (F) 1438	Granada 650
	[The Fox theatres are superior in every respect and the most suitable for first run exhibitions (R. 2070-71).]		
36.	Bayonne, N. J.	DeWitt (W) 2736	Victory 1100
37.	Bloomfield, N. J.	Broadmoor (W) 960	Savoy 400
38.	Hoboken, N. J.	Fabian (W) 3000	Rivoli 500
39.	Springfield, Ohio	Majestic (W) 735	Hippodrome 400
40.	Lower Merion Twp., Pa.	Ardmore (W) 1282	Suburban 800 Liberty 1400
41.	McKeesport, Pa.	Memorial (W) 2060	Nuluna 450
42.	Sharon, Pa.	Liberty (W) 1207	Mayfair 1100
43.	Upper Darby, Pa.	69th St. (W) (P) 1615	Basle 700
44.	Washington, Pa.	State (W) 1318	Criterion 350
45.	Spartanburg, S. C.	Palmetto (P) 813	Industrial School 200
46.	Ogden, Utah	Ogden (F) 813	
47.	Bellingham, Wash.	Mt. Baker (F) 1637	Grand 832
48.	Kenosha, Wis.	Gateway (W) 1442	Roosevelt 780
	[See R. 1995-6, Tr. 2709-10]		
49.	Oshkosh, Wisc.	Strand (W) 1165	Grand 857
50.	Sheboygan, Wisc.	Rex (W) 918	Butterfly 437

[9] RKO Exhibit 28 listed the Warner Theatre as the largest unaffiliated theatre. It subsequently appeared that this was an inadvertent error (RKO Ex. 11). However, *a priori*, any unaffiliated theatre would be smaller, but the Record does not show precisely how much smaller. With this *caveat*, the city is listed in this group.

E. RKO product was exhibited first run in affiliated theatres larger than largest unaffiliated theatres in 8 cities

These cities are analogous to those in section D, but are listed separately because the difference in seating capacity is, in absolute terms, smaller. They are generally smaller cities. In each, the smallest unaffiliated theatre which played an RKO feature from the first block had less than 1000 seats, but was 200 to 300 seats larger than the largest unaffiliated theatre. In comparing theatres under 1000 seats, a difference of 200 is substantial. These cities are:

City	Seating Capacity of Smallest Affiliated Exhibitor	Seating Capacity of Largest Unaffiliated Theatre
1. Bristol, Conn.	Bristol (W) 815	Carberry 600
2. Orlando, Fla.	Grand (P) 720	Rex 500
3. Macon, Ga.[10]	Rialto (P) 766	Bibb 500
4. Alton, Ill.	Princess (P) 700	State 500
5. Galesburg, Ill.[10]	West (P) 644	Grove 394
6. Salem, Ore.	Brand (W) 727	Hollywood 496
7. Wilkes-Barre, Pa.	Orpheum (P) 796	Crystal 500
8. Greenville, S. C.[10]	Rivoli (P) 744	Paris & Branwood 500 each

F. RKO product was exhibited first run in affiliated theatres in cities where highest grossing RKO features were shown in theatres larger than any unaffiliated theatre in 43 cities

In these cities RKO licensed its first block to affiliated theatres, and the two highest grossing features, *Lady Takes a Chance* and *Fallen Sparrow*, played first run, ex-

[10] See Exhibit P-25 for a detailed comparison of the first-run theatres affiliated with Paramount and the best unaffiliated theatres in respect to other important requirements of a first-run outlet.

clusive of moveovers, in affiliated theatres which were larger than the largest unaffiliated theatres in such cities. Plaintiff defines a first-class feature as one which grosses $450,000 in domestic film rentals (Complaint, Paragraph 15e), and the other three features in RKO's first block fell far short of this amount.[11] RKO is entitled to license a block of five features to an exhibitor who can show its high grossing pictures in larger theatres and exhibit the smaller grossing pictures in smaller theatres. The following schedule includes Record citations demonstrating the superiority of affiliated theatres in certain specific situations:

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[11] Exhibit 93 shows that as of April 26, 1945 the domestic gross rentals earned by the first block features were:

Lady Takes a Chance	$1,955,781
The Fallen Sparrow	1,170,032
Adventures of a Rookie	339,908
So This Is Washington	308,327
Seventh Victim	201,776

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
1. Mobile, Ala.	Saenger (P) 2,655	Azalea 750 Pike 750 Lincoln 750 (Col.)	Ex. P-25, p. 11
2. Montgomery, Ala.	Paramount (P) 1,525	Charles 800	Ex. P-25, pp. 4-5
3. Phoenix, Ariz.	Fox (F) 1,796 Rialto (P) 811	Phoenix 700	Ex. P-25, pp. 13-14
4. Belvedere, Twp., California	Golden Gate (F) 1,456	Strand 900	
5. Berkeley, Calif.	United Artists (F) 1,646	Rivoli 1,410	R. 2132e
6. Beverly Hills, Calif.	Beverly (F) 1,318	Elite 824	
7. Fresno, Calif.	Wilson (F) 1,899 Tower (F) 930 (d/d)	White 1,400[12]	
8. Inglewood, Calif.	Academy (F) 1,190	Seville 766	
9. Riverside, Calif.	Riverside (F) 1,528 DeAnza (F) 978	Del Rio 48[illegible]	
10. San Bernadino, Calif.	Fox (F) 1,854	Rialto 700	

[12] RKO Exhibits 28 and 11 classify the Warner (2400 seats) as unaffiliated. This appears to be erroneous (R. 2132g).

	City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
11.	Miami Beach, Fla.	Beach (P) 1,615 Sheridan (P) d/d 1,343	Biscayne Plaza 1,400	
12.	Augusta, Ga.	Miller (P) 1,656	Lenox 800	Ex. P-25, p. 33
13.	Columbus, Ga.	Bradley (P) 1,640	Pastime 800	Ex. P-25, p. 33 pp. 35-36
14.	Savannah, Ga.	Lucas (P) 1,480	Savannah 900	Ex. P-25, pp. 41-46
15.	Anora, Ill.	Paramount (P) 2,016 Tivoli (P) 1,015	Isle 750	Ex. P-25, pp. 51-52
16.	Joliet, Ill.	Rialto (P) 2,087 Princess (P) 813	Mode 750	Ex. P-25, pp. 72-73
17.	Waukegan, Ill.	Genessee (P) 1,865 Academy (P) 943	Time 800	Ex. P-25, pp. 91-92
18.	Topeka, Kansas	Jayhawk (P) 1,344	Coed 600	R. 2069-70
19.	Alexandria, La.	Paramount (P) 1,014	Don 800	Ex. P-25, p. 117
20.	Holyoke, Mass.	Victory (P) 1,680 Strand (P) 1,129	Majestic 1,000	Ex. P-25, pp. 152-153
21.	Lawrence, Mass.	Palace (W) 1,781 Broadway (W) 1,204	Majestic 1,000	
22.	Pittsfield, Mass.	Capitol (P) 1,332 Palace (P) 1,658	Kameo 900	Ex. P-25, pp. 159-60

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
23. Meridan, Miss.	Temple (P) 1,633	Royal 450	Ex. P-25, p. 203
24. Albuquerque, N. M.	Kimo (P) 1,278	El Rey 750	Ex. P-25, pp. 208-209
25. Elmira, N. Y.	Keeney's (W) 2,366	Capitol 1,500	
26. Newburgh, N. Y.	Ritz (P) 1,303 Broadway (P) 1,240	Academy 1,217	Ex. P-25, pp. 211-12
27. Raleigh, N. C.	Ambassador (P) 1,471	Wake 800	Ex. P-25, pp. 226-27
28. Rocky Mount, N. C.	Center (P) 1,014	Cameo 580	Ex. P-25, p. 229
29. Mansfield, Ohio	Ohio (W) 1,630 Madison (W) 1,512	Park 1,300	
30. Marion, Ohio	Palace (P) 1,540	Ohio 800	Ex. P-25, pp. 241-3
31. Portsmouth, Ohio	Columbia (W) 1,022 LaRoy (W) 1,374	Garden 700	
32. Johnstown, Pa.	State (W) 1,646 Cambria (W) 1,144	Embassy 1,000[12]	

[12] RKO Exhibit 28 shows "University of Wisconsin 1300". This is not a commercial theatre (R. 1994-5). The superiority of the two affiliated theatres is shown at R. 1994, but the size of the Eastwood, presently a third and fourth run theatre, is not stated.

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre.	Record Citations Demonstrating Superiority of Affiliated Outlets
33. Abilene, Tex.	Paramount (P) 1,409 Majestic (P) 928	B. Walker 675	Ex. P-25, pp. 288-9
34. Austin, Tex.	Paramount (P) 1,419 State (P) 997	Ritz 800	Ex. P-25, pp. 294-5
35. Port Arthur, Tex.	Strand (P) 1,046	Groves 504	
36. Tyler, Tex.	Tyler (P) 1,085 Liberty (P) 749	Joy 584	Ex. P-25, pp. 303-4
37. Wichita Falls, Tex.	Wichita (P) 1,204 Majestic (P) 1,184	Tower 874	Ex. P-25, pp. 309-10
38. Newport News, Va.	Paramount (P) 1,241	Warwick 800	Ex. P-25, p. 315
39. Parkersburg, Va.	Smoot (W) 913	Virginia 900	
40. Madison, Wis.	Orpheum (F) 2,246 Capitol (W) 2,242	Eastwood	R. 1994-5
41. Racine, Wis.	Venetian (W) 1,963 Rialto (W) 1,279	Mainstreet 1,100	R. 1993-4
42. Wausau, Wis.	Wausau (F) 797 Grand (F) 1,424	Hollywood 700	
43. Pensacola, Fla.	Saenger (P) 1,883	Ritz 600	Ex. P-25, pp. 27-8

G. RKO product was exhibited first run in affiliated theatres smaller than largest unaffiliated theatre in 12 cities

In 12 cities of the 320, RKO licensed four or five of its first block for first run exhibition in affiliated theatres which were smaller than the largest unaffiliated theatres in such cities. However, both exhibits and testimony justify licensing to affiliated theatres in most of these cities:

	City	Affiliated Theatres[14]	Larger Unaffiliated Theatres[15]
1.	Little Rock, Ark.	Arkansas (P) 1284 Pulaski (P) 1053 Capitol (P) 1233 Royal (P) 1164	Robinson Auditorium 3000
2.	Pasadena, Calif.	Academy (F) 1673 Tower (M) (F) 747 Pasadena (M) (F) 894	Raymond 1900 Colorado 1709
	[These Fox theatres are "well maintained modern houses" (R. 2132h-i, Tr. 2894-95).]		
3.	Decatur, Ill.	Empress (P) 991 Lincoln Sq. (P) 1389	Avon 1014
	[Exhibit P-25, pp. 61-2, shows that the unaffiliated Avon is poorly maintained, has uncomfortable seats and is poorly ventilated. Another unaffiliated theatre, the Varsity Theatre with 996 seats, is modern but is a neighborhood theatre and does not have good transportation facilities.]		
4.	Butte, Mont.	Rialto (F) 1238 American (F) 851	Montana 1426 Park 880
5.	Great Falls, Mont.	Liberty (F) 1694 Towne (F) 725	Civic Center 1882

[14] (M) signifies moveover theatre.

[15] RKO Ex. 28.

City	Affiliated Theatres	Larger Unaffiliated Theatres
6. Poughkeepsie, N. Y.	Stratford (P) 1359 Bardavon (P) 1190	Rialto 1600

[Ex. P-25, pp. 217-18, shows that the Liberty, with 715 seats, is the best unaffiliated theatre in this city, but that it cannot compare with the Bardavon or Stratford in location or physical condition.]

7. Durham, N. C.	Center (P) 1254 Rialto (P) 638 Carolina (P) 1700	Quadrangle Pictures 1500 Criterion 800

[Ex. P-25, pp. 219-20 shows that the Uptown with 500 seats is the best unaffiliated theatre in this city, that the Center Theatre is an excellent, modern, fireproof house and is outstanding in this area and that the Carolina is well constructed and well maintained.]

8. Lancaster, Pa.	Capitol (W) 1161 Hamilton (W) 1014 Grand (W) 853	Colonial 1500 Fulton 1350
9. York, Pa.	Capitol (W) 848 Rialto (W) 798	York 935
10. Haverhill, Mass.	Colonial (P) 1255 Paramount (P) 1738	Strand 1400

[Ex. P-25, pp. 147-50, shows that the Strand has 1250 seats, that although it is in good condition, its stage, ventilating, and rest room equipment are inferior to those of the Colonial and Paramount.]

11. Lima, Ohio	Sigma (W) 891 Ohio (W) 1804	Quilna 1000
12. Lynchburg, Va.	Isis (P) 731 Paramount (P) 1530 Trenton (P) 950	Academy 800

[Ex. P-25, pp. 313-14, shows that the Academy with 1,000 seats is inferior in every respect to the Paramount.]

APPENDIX F

Comparison Rentals Paid by Affiliated and Unaffiliated First-Run Theatres in Cities Over 25,000 Population for RKO's First Block of Features, 1943-44

(Excluding theatres in lump-sum or national gross deals, theatres in which RKO had interest of 50% or more, and theatres controlled by RKO in which RKO and another defendant had aggregate interest of 50% or more)

Source: RKO Exhibits 14, 17

	Number of Theatres Playing First-Run	Average Seating Capacity	Average Rental	Average Rental Per Seat of Capacity
Lady Takes A Chance				
Affiliated Theatres	278	1635	$1,671.57	$1.02
Unaffiliated Theatres	153	1231	1,255.46	1.02
The Fallen Sparrow				
Affiliated Theatres	260	1493	929.08	.62
Unaffiliated Theatres	147	1233	767.57	.62
So This Is Washington				
Affiliated Theatres	211	1311	177.97	.14
Unaffiliated Theatres	144	1077	151.54	.14
Adventures of a Rookie				
Affiliated Theatres	250	1372	171.78	.12
Unaffiliated Theatres	147	1156	124.29	.11
Seventh Victim				
Affiliated Theatres	226	1325	120.20	.09
Unaffiliated Theatres	149	1053	129.92	.12

Unaffiliated Theatres: Theatres in which no defendant had any interest.

Affiliated Theatres: All other theatres.

DISTRIBUTION OF FIRST RUN EXHIBITIONS OF RKO's 1943-1944 FIRST BLOCK FEATURES BETWEEN AFFILIATED AND UNAFFILIATED THEATRES IN CITIES OVER 25,000 POPULATION, EXCLUDING EXHIBITIONS IN RKO THEATRES.*

(Source: RKO Exhibits 13 and 14)

	The Fallen Sparrow	Adventures of a Rookie	The Seventh Victim	So This is Washington	Lady Takes a Chance	Total First Block
TOTAL Number	407	397	375	355	431	1965
Number in Affiliated Theatres**	220	212	190	173	236	1031
Percent of TOTAL	(54.05)	(53.40)	(50.67)	(48.73)	(54.76)	(52.47)
Number in Minority Affiliated Theatres***	40	38	36	38	42	194
Percent of TOTAL	(9.83)	(9.57)	(9.6)	(10.71)	(9.74)	(9.87)
Number in Unaffiiliated Theatres****	147	147	149	144	153	740
Percent of TOTAL	(36.12)	(37.03)	(39.73)	(40.56)	(35.50)	(37.66)

* This Table does not include 207 exhibitions in theatres in which RKO has an interest of 50% or more, and in theatres controlled by RKO in which RKO and another defendant have an aggregate interest of 50% or more.

** "Affiliated theatres" are those in which one or more of the defendants (other than RKO) have an interest of 50% or more.

*** "Minority Affiliated Theatres" are those in which a defendant (other than RKO) has an interest of less than 50%.

**** "Unaffiliated theatres" are all other theatres.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 84

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 79

THE UNITED STATES OF AMERICA,

Appellant,

vs.

PARAMOUNT PICTURES INC., *et al.*,

APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNIVERSAL PICTURES COMPANY, INC., *ET AL.*, APPELLANTS

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Supreme Court of the United States

OCTOBER TERM, 1947

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC., *Appellants*, *vs.* THE UNITED STATES OF AMERICA, *Appellee*.	No. 84
THE UNITED STATES OF AMERICA, *Appellant*, *vs.* PARAMOUNT PICTURES INC., *et al.*, *Appellees*.	No. 79

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNIVERSAL PICTURES COMPANY, INC., *ET AL.*, APPELLANTS

Opinion Below

The case below is reported in 66 Fed. Supp. 323 and 70 Fed. Supp. 53 (R. 3504; 3659-3702).

Jurisdiction

The jurisdiction of this Court to review by direct appeal the judgment and decree entered in this cause is conferred by Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15

U. S. C. Sec. 29), and Sec. 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

The Statutes Involved

The United States Statute under which the case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *"
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"
>
> "Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;

* * * *

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays: * * *

Statement

These are appeals (R. 3788) from a final decree (R. 3694) of a Statutory Court in and for the Southern District of New York, in a proceeding in equity (R. 3137) brought by the United States under Sec. 4 of the Sherman Anti-Trust Act, to enjoin five corporations, which, taken with their subsidiaries, are completely integrated businesses, and are the largest factors in all three branches of the motion picture business, i.e., production, distribution and exhibition, as well as the three corporations, which, taken with their subsidiaries, are next in line in respect of size, but are much smaller (pp. 15-20, *post*) and are not engaged in the exhibition business (G. X.* 146, F.F. ** 58, R. 3670).

The five largest defendants, together with their subsidiaries, will be referred to herein as Paramount, Loew's, RKO, Warner's and Fox, or collectively as the "major defendants" or "the producer-distributor-exhibitor defendants" or "the Big 5."

The three medium-sized corporations, taken with their subsidiaries, are not fully integrated, in that they have no theatre interests, but merely produce and/or distribute motion pictures (G. X. 146; pp. 19-20, *post*). The Universal appellants are in this category. They are completely independent of the other defendants, having no interlocking directors or officers or ties through security ownership (R. 215-217). The other such defendants are United Artists and Columbia. These three are collectively referred to herein, as they were upon the trial, as the "minor defendants", or the "little three".

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*Government exhibits are thus designated.
**Findings of Fact are thus designated.

Violation of Sections 1 and 2 of the Sherman Act were originally charged in respect of production, distribution and exhibition, but the charges in respect of production were abandoned (Government's Jurisdictional Statement,* p. 8).

1. The motion picture theatre.

There are over 18,000 motion picture theatres in the United States (F. F. 118, R. 3684). They may be broadly divided, in respect of function, into (1) first-run theatres, and (2) subsequent-run theatres. If affiliated with the major defendants, they are known as "affiliated theatres". If not so affiliated, as "independent theatres" or "independent circuit theatres".

First-run theatres qualify as such because they are the best-equipped, largest, best-located, best-managed, have the most responsible operators, and are most suitable for the first exhibition of the best feature pictures (R. 419-20, 702-3, 1510-11, 1697-1700, 1901-2, 2043-4). They are of the most importance, of course, when strategically located in the large metropolitan centers with the best box office potentialities (R. 1634-8, 1644-8).

It is in the first-run theatres that those feature motion pictures which are deemed to be of the best quality, in that they promise to be the best revenue-producers, are first shown (R. 561, 1698, 1907). In the 1943-44 season the number of high revenue-producing pictures ran from 100 to 150 at the most (G. X. 426).

The highest admission prices are, of course, charged to view such pictures in such theatres (R. 419, 1091, 1901-2).

The total number of first-run theatres does not appear in the record, but in 1945 there were approximately 522

*Hereinafter sometimes referred to as Gov. Juris. St. or G. J. S.

thereof in the 92 cities over 100,000 population in the United States, of which some three-fifths were affiliated with the major defendants, and the rest independent (Ex. L-13). In 38 of these cities there were no independent first-run theatres. In 4 there were no affiliated first-run theatres, and in 50 there was competition between affiliated and independent theatres (Ex. L-13). In these 50 cities Universal licensed independent first-runs nearly as often as it did affiliated first-runs* (Ex. U. 1).

There are numerous classes of subsequent-run theatres, exhibitions in which follow in order after those in the prior-runs, with clearance intervals of varying length in between. These clearance intervals give the prior-runs protection in respect of their exclusive rights. During such intervals the subsequent runs, which obtain without cost the benefit of the advertising and exploitation engaged in by the prior-runs, may further advertise and exploit the pictures which they will later show. Second-run theatres, generally speaking, are the second-best theatres. They charge the next highest admission prices. The succession may continue down as far as the seventh or eighth runs, or even further. These are the poorest theatres which charge the lowest admission prices (R. 416, 706-7, 1901-2, 1907-8).

A great many of the 18,000 motion picture theatres in the United States are grouped in circuits under common ownership and/or management (R. 738). The Amended and Supplemental Complaint (para. 17, R. 3145) defines a "circuit theatre" as a member of a "theatre circuit", which

*There was no showing whatsoever that in any of the cities in which Universal licensed the affiliated first-runs in preference to the independents, the latter should have been licensed "on the merits", because possessing better or more effectively operated theatres.

in turn is defined as "a group of more than five theatres, owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". An "independent theatre" is defined as any theatre which is not a member of a "theatre circuit".

2. The feature motion picture.

This case has to do with the licensing and exhibition of feature motion pictures, all of which are copyrighted (R. 658-9, 1460). Upon the Government's concession that the licensing and exhibition of "shorts", and "newsreels" was an unimportant part of the business, evidence in connection therewith was excluded (R. 190-196). Any motion picture which is over 4,000 feet in length is termed a feature motion picture, as contrasted with a "short", "newsreel", etc. (F. F. 1, R. 3660).

The cost of producing feature motion pictures ranges from a few hundred thousand dollars to several million dollars (R. 625-6, 672, 1895). Some types of feature motion pictures, such as the so-called "Westerns" (i.e., adventure or action pictures, so named because often dealing with activities in the Western part of the United States) are made at comparatively low cost. These are shown in the lower-class motion picture theatres (R. 1698, 910-11).

Features are classified by distributors as "top bracket", "second bracket", "third bracket", "fourth bracket" and "fifth bracket", depending upon their expected ability to draw at the box office as measured by test runs (R. 429).

Many theatres exhibit two features, often a high-bracket picture and a low-bracket picture, upon a program, and this is known as "double-featuring" (R. 1277, 1293).

Universal and Columbia, and Republic, Monogram and P. R. C., the three principal non-defendant national distributors, have specialized in producing lower-bracket features or program pictures (G. X. 426, 427), many of which are used as the second pictures in double-featuring (R. 1293-8, 1300-1, 1495, 543-6, 873-4, 910-11), instead of following the major defendants in producing mainly high and medium-bracket features. Thus out of an average of 45 to 50 feature pictures a year (exclusive of Westerns) produced and/or distributed by Universal (R. 1457), it was able to obtain a percentage of the gross receipts on an average of only ten (R. 1495). This is the usual method of licensing quality pictures (R. 430-1).

Many of the problems of the industry are due to the fact that quality feature pictures,* which are the money-makers, are in short supply relative to demand (R. 971, 1753-4). One of the principal reasons for this is the cost of producing such quality feature motion pictures. This runs as high as $3,500,000 (R. 625-6, 672, 1895), and the cost of producing feature pictures has increased to from 2 to 2½ times of what it was in 1937-8 (R. 625-6). If a motion picture theatre changes its program only once a week, but operates on a double-feature policy, it will require 104 feature pictures a year. If it changes its program two or three times a week, as a great many theatres do, it will require 208 or 312 feature pictures a year. Some theatres, indeed, change their programs every day (R. 1275, 1277, 1303).

The Government's interrogatories and requests for admissions were directed to two motion-picture seasons, to

*In its brief in *Schine Chain Theatres Inc.* v. *U. S.*, argued at this Term, the Government conceded that there was no scarcity in "inferior" films (p 45).

wit, September 1, 1936—August 31, 1937, which was the last season before the Petition was filed (July 20, 1938), and the season of 1943-44. The case was tried on an Amended and Supplemental Complaint filed November 14, 1940. Hence we are primarily, if not exclusively, concerned with conditions prior to the latter date. During the 1936-37 season there were 101 feature pictures in the three highest brackets released by the eight defendant distributors, of which Universal released only 4, all in the third bracket (G. X. 427). During the 1943-44 season, these eight distributors released 140 features in the three highest brackets, of which 99 were in the two highest brackets. No Universal picture was in the highest bracket, and it had nearly twice as many in the two lowest brackets as in the second and third highest brackets (G. X. 426).

Thus whenever two or more first-run theatres were in competition, as was usual in important situations, the demand for the limited number of successful pictures was bound to be great. Though the number of lower-bracket features released by the eight distributor defendants has been 3 to 5 times as many as top-bracket features, the top-bracket features collectively produce several times as much at the box office in the aggregate as do the much more numerous lower-bracket features (G. X. 426).

Prior to the filing on November 14, 1940, of the Amended and Supplemental Complaint, upon which the case was tried, the production and distribution of quality feature pictures, as among the eight distributor defendants, was almost completely in the hands of the "big five", except that United Artists distributed a substantial number thereof on behalf of independent producers (G. X. 427). During the season preceding the trial, although there had been some improvement in the quality

of their pictures, it still remained true that Universal and Columbia had few pictures in the higher revenue-producing brackets, whereas most of the feature pictures produced and distributed by the "big five" were, even more emphatically, in such brackets (G. X. 426).

3. The first-run theatre as a show-window for quality feature pictures.

The box-office success of a feature picture which has cost a great deal to make depends upon the kind of exploitation it gets in the important first-run theatres in the larger cities. If a pictures does well in such theatres, it has long runs therein, and its prestige becomes established throughout the country, because people who have seen the picture talk about it, and the gross receipts are published in the trade papers and picked up all over the country by exhibitors (R. 654, 1515, 1624-7, 1646-8, 1634-8, 443-4). Thus the over-all success of a feature picture is mainly dependent upon the length of its runs in the first run houses.

In order to properly exploit a picture in the first and subsequent-run theatres, extensive national and local advertising is employed. The important pictures are the only ones which are extensively advertised nationally (R. 678-81, 1624-7).

In order to obtain proper exploitation in the first-runs, stable relationships* between the distributor and exhibitor are necessary to obtain proper cooperation in advertising

*The Government's claim that our relationships with affiliated theatres in the larger cities were wholly stable during a four-year period is not borne out by the evidence (G. X. 147), which only shows that they were "for the most part" stable. Since such theatres were among our best customers, and only very infrequently would a better one, independently operated, come along, shifts initiated by us could hardly be expected.

and other matters necessary to the best exploitation (R. 1986-90, 2110, 1700-2, 1391).

4. The Government's complaint.*

(a) THE BASIC COMPLAINT.

The Government's basic complaint in this proceeding is that unreasonable restrictions of interstate commerce, in respect of admission prices, and in the granting of prior exhibition rights, detrimental to the public and/or to the small independent exhibitors, who were the competitors of the affiliated theatres in which the major defendants were interested, were imposed by the major defendants, through the exertion of monopolistic power flowing from their control of first-run theatres in most of the important domestic situations, particularly in the metropolitan centres, supplemented by their control of the great preponderance of the best revenue-producing feature pictures. Government's Closing Argument, R. 2546-2579, particularly R. 2576, 2556, 2549, 2547; Gov. Juris. Statement, pp. 7-8 (para. 2, 3, 5, 6), 17-19; Gov. brief in No. 79, page 131.** In companion cases argued at this term, *Schine Chain Theatres, Inc. et al.* v. *U. S.* and *U. S.* v. *Griffith Amusement Co. et al.*, the Government argued that large independent theatre chains had restrained and monopolized interstate com-

*Amended and Supplemental Complaint, para. 105, 124-5, 128, 129-132, 146, 150-165, 170-7, 178, 179, 180-8; R. 3137 *et seq.*; Government's Opening Statement, R. 5-32; Government's Jurisdictional Statement, pp. 3-4, 7-8, 17-23; Opinion, R. 3505-3511, 3549-50; Government's Closing Arguments, R. 2547-2602.

**"The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply, which enables them to set a pattern of run priority to which other distributors conformed in selling in any market in which the defendants' theatres are located."

merce by means of their great buying power, but in our case introduced no evidence in this connection.

In the present proceeding it emphasized the charge that the theatre chain of each major defendant constituted a monopoly in and of itself,* and that such monopolies, together with the power acruing from control of the large number of best-selling feature pictures produced and distributed by each major defendant, were combined through concerted action to impose the restrictions heretofore referred to.

The major form of relief which the Government demanded was that the major defendants be divested of their theatres, or in the alternative that licensing of feature pictures by a major defendant to any other major defendant be banned for 10 years. Injunctive relief against specific practices alleged to be illegal was also requested, but less insistently.

The Government's theory as to the complicity of the major defendants in a combination and conspiracy to violate the Sherman Act was along the following lines:

The distribution department of each major defendant can offer to the theatre chain of each other major defendant a large number of those quality feature pictures which promise to be the best revenue-producers. Each such theatre chain, greatly desiring such pictures, is in a position to induce its affiliated distribution department to refuse to license independent exhibitors desiring to license its pictures, and to license instead the theatre chain of a major defendant whose distribution department has quality feature pictures to offer. This because the independent exhibitor has no feature pictures to offer any distributor's affiliated theatres

*Universal, having no theatres, was, of course, not involved in this charge.

in return for the distributor's agreement to license its feature pictures to be exhibited by it.

This opportunity, involved in the possession of great buying power by the major theatre chains and in control of the disposition of such a large proportion of the best-selling feature pictures by their affiliated distribution departments, was alleged by the Government to have been taken advantage of, and to have resulted in a monopolizing of interstate commerce by the major defendants, and in unreasonable restrictions thereof. No such opportunity was open to Universal, which, possessing no theatres, needed no pictures, and had no incentive to favor an exhibitor with an affiliated distribution department over an independent exhibitor.

The Government accordingly claimed that the major defendants, through their control of first-run theatres and of such a large proportion of the best-selling feature pictures, were able, through concerted action, to control admission prices in a great majority of the thousands of motion picture theatres in the United States located in cities and towns of over 25,000 population, and in nearly all of those located in cities of over 100,000 population, to the detriment of the public, and to obtain for themselves, at the expense of independent exhibitors, prior exhibition rights,* i.e., prior runs protected by unreasonably long clearances, to the best-selling feature pictures.

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*The main bone of contention in respect of prior exhibition rights concerns clearance, i.e., the time interval which the distributor agrees with the exhibitor shall elapse between the completion of one run and the beginning of the next run, and the asserted requirement that it be "reasonable".

(b) THE CHARGE AGAINST UNIVERSAL AS DISTINGUISHED FROM THE CHARGE AGAINST THE MAJOR DEFENDANTS.

The basic charge against the Universal appellants, who possessed no theatres, on the basis of which the Government seeks to implicate them in the alleged conspiracy among the major defendants, and in like alleged conspiracies or monopolizing on the part of large independent theatre chains, is that, in licensing their feature pictures under copyright, they granted exclusive and restrictive licenses for limited times to exhibitors constituting the best, when not the only available, markets (which, by reason of the number and importance of the theatres in which the major defendants and the large independent theatre chains were interested, very frequently were chain theatres), accepted in such dealings admission price and clearance conditions which they had no power to alter, and, in so-called "franchises", committed their feature pictures, for a number of years to affiliated theatre chains by licensing contracts containing some provisions alleged to be more favorable* than those usually granted in similar contracts with the small independent exhibitor (pp. 21-22, 24-31, 94-99, *post*).

The Government also charged that in dealing with any exhibitor, however small, a distributor, whether integrated or non-integrated, and whatever its size, might not, in licensing copyrighted motion pictures upon successive runs for limited periods of time (1) require an exhibitor, on pain of losing run and clearance privileges, to maintain its current admission price, on the faith of which a film rental

*No serious attempt was made to demonstrate that such contracts over-all were not more advantageous to the distributor, *i.e.*, that the exhibitor did not pay for any advantages it obtained.

had been accepted, and by which it was frequently measured, and in accordance with which run and clearance terms had been granted, in order that it might not be free to decrease its film rental or to depreciate or destroy the valuable opportunity reserved by the distributor of obtaining further reward from the making of subsequent-run licenses, or (2) agree with a prior licensee that its license should be something less than exclusive for the duration of the copyright, in that after the lapse of a specified period of time thereafter the licensor might deliver the picture to a subsequent-run, or (3) measure royalties by a percentage of the charge made to the public to view the exhibition under copyright, or (4) offer to license its feature pictures in groups.

As against the major defendants, however, the Government claimed much more than the illegality of licenses under copyright, restrictive in respect of minimum admission price, which were exclusive for a limited time, and were protected by clearance provisions, and the measuring of royalties by a percentage of the gross receipts. Assuming the legality of all these provisions, it contended that since the major defendants had a vested interest in protecting their theatre-operating profits, they were extending their copyrights through such provisions, to protect such profits. This argument did not apply to the non-theatre-owning defendants such as Universal.

5. The defendants.

(a) PARAMOUNT

In 1944 Paramount had consolidated gross income of 150 million dollars (G. X. 405) and consolidated gross assets of 148 million dollars. (Moody's Manual of Investments, Industrials, 1946).

In 1945 Paramount and its subsidiaries had an interest in 1590 first and subsequent-run theatres (FF 117-118, R. 3683-4). It owned, operated or had an interest in first-run theatres in the following cities, among others: Atlanta, Boston, Canton (Ohio), Charlotte (N. C.), Chicago, Dallas, Detroit, Duluth, Hartford, Houston, Kansas City (Mo.), Minneapolis, New Orleans, New York, Omaha, St. Paul, Salt Lake City and Toledo. The number of such first-run theatres which it had in cities over 100,000 population in the United States was around 100. It was also interested in first-run theatres in a great number of smaller cities and towns throughout the country. In varying numbers the theatres in which it had an interest were located in nearly every State in the Union. In Chicago it was interested in 47 theatres. In New York it had theatre interests in New York City, Buffalo and Rochester, among other localities. In California it had them in San Francisco and Los Angeles. In Massachusetts it had them in Boston, Springfield, Worcester, and dozens of other places. It had an interest in 27 theatres in St. Paul and Minneapolis. In each of the States of Michigan, Pennsylvania, Florida, Texas, North Carolina and Iowa it had an interest in theatres in dozens of different localities (Ex. L 13, G. X. 64, G. X. 161).

During the 1943-44 season Paramount released 31 feature pictures (not including any Westerns) out of the 335 such features released that year by all national distributors (F.F. 99, R. 3677). 5 of these grossed over 2 million dollars, and 14 over 1 million dollars. Only 1 grossed less than one-quarter million dollars (G. X. 426).*

*In this exhibit and G. X. 427 (for the 1936-37 season) the gross receipts brackets are as follows: (1) $2,000,000 and over; (2) $1,000,000 to $2,000,000; (3) $500,000 to $1,000,000; (4) $250,000 to $500,000; (5) less than $250,000.

(b) Fox

In 1944 Fox had consolidated gross income of 172 million dollars (G. X. 404) and consolidated gross assets of 145 million dollars (Moody, op. cit.).

In 1945 Fox and its subsidiaries were interested in 642 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or was interested in first-run theatres in Denver, Detroit, Kansas City, Los Angeles, San Francisco, Milwaukee, Omaha, Sacramento, San Diego and Spokane, and in many smaller localities. The number of such first-run theatres in cities over 100,000 in the United States was 70 or more. It was interested in 250 theatres in California, 19 in Kansas City, 9 in Portland (Ore.), 11 in Seattle, and 30 in Milwaukee (Ex. L-13, G. X. 160, G. X. 24).

During the 1943-44 season Fox released 33 features (not including any Westerns) out of 335 such pictures released by all national distributors (F.F. 99, R. 3677). More than half of these grossed over a million dollars (G. X. 426).

(c) Loew's

In 1944 Loew's had consolidated gross income of 145 million dollars (G. X. 407) and consolidated gross assets of 190 million dollars (Moody, op. cit.).

In 1945 Loew's and its subsidiaries were interested in 157 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or was interested in first-run theatres in Akron, Canton, Cleveland, Dayton, Toledo and Columbus, Ohio; Baltimore, Md.; Bridgeport, Hartford and New Haven, Conn.; Boston, Mass.; Denver, Colo.;

Indianapolis, Ind.; Pittsburgh, Harrisburg and Reading, Pa.; Houston, Texas; Jersey City and Newark, N. J.; Louisville, Ky.; Kansas City and St. Louis, Mo.; Memphis and Nashville, Tenn.; New Orleans, La.; Providence, R. I.; Richmond, Va.; Washington, D. C.; Wilmington, Del.; and Atlanta, Georgia. It was interested in over 70 such theatres in New York City, including many first-runs. The number of its such first-run theatres in cities over 100,000 populations in the United States was about 50 (Ex. L-13, G. X. 163).

During the 1943-44 season Loew's released 33 features (not including any Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). 23 of these grossed over a million dollars (G. X. 426).

(d) Warner

In 1944 Warner had consolidated gross income of 141 million dollars (G. X. 403) and consolidated gross assets of 183 million dollars (Moody, op. cit.).

In 1945 Warner and its subsidiaries were interested in 541 first and subsequent-run theatres (F.F. 117-118, R. 3683-4). It owned, operated or had an interest in first-run theatres in Akron, Albany, Baltimore, Bridgeport, Camden, Cleveland, Hartford, Jersey City, Los Angeles, Memphis, Milwaukee, Newark, N. J., New Haven, New York City, Philadelphia, Pittsburgh, Washington, D. C., Wilmington, Worcester and Youngstown, Ohio. Its such first-run theatres in cities with over 100,000 population in the United States numbered over 50. It was interested in 78 theatres in Philadelphia, 24 in Pittsburgh and 19 in Washington, D. C. (Ex. L-13, G. X. 156).

During the 1943-44 season Warner released 19 feature pictures (not including any Westerns) out of the 335 such

pictures released by all national distributors (F.F. 99, R. 3677). 9 of these grossed over 2 million dollars, and 13 grossed over a million dollars (G. X. 426).

(e) RKO

In 1944 RKO had a consolidated gross income of 84 million dollars (G. X. 406) and consolidated gross assets of 80 million dollars (Moody, op. cit.).

In 1945, RKO and its subsidiaries were interested in 273 first and subsequent-run motion picture theatres (F.F. 117-118, R. 3683-4). They were interested in first-run motion picture theatres in Boston, Chicago, Cincinnati, Cleveland, Columbus, Dayton, Kansas City (Mo.), Los Angeles, Indianapolis, Newark, Omaha, Providence, San Francisco, Rochester (N. Y.), and Washington, D. C. They were interested in over 40 first-run theatres in cities over 100,000 population in the United States (Ex. L-13).

During the 1943-44 season RKO released 38 feature pictures (not including any Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). 13 of these grossed over a million dollars (G. X. 426).

(f) United Artists

United Artists' consolidated gross income for 1944 does not appear in the record. It apparently does not make public its consolidated gross assets.

It had no theatres and produced no motion pictures, being exclusively a distributor for feature pictures produced by independent distributors (F.F. 58, 53, R. 3670, 3669).

During the 1943-44 season United Artists released 16 feature pictures, not including any Westerns, out of the 335

such pictures released by all national distributors (F.F. 99, R. 3677). 4 of these grossed over a million dollars and 10 grossed over one-half million dollars (G. X. 426).

(g) Columbia

In 1944 Columbia had consolidated gross income of 37 million dollars (G. X. 413) and consolidated gross assets of 25 million dollars (Moody's, op. cit.).

It had no theatres, confining its operations to the production and distribution of motion pictures (F.F. 58, 44, R. 3670, 3667).

During the 1943-44 season Columbia released 41 feature pictures, exclusive of Westerns, out of the 335 such pictures released by all national distributors (FF 99, R. 3677). 6 of these grossed over a million dollars, but 30 grossed under half a million dollars (G. X. 426).

(h) Universal

In 1944 Universal had consolidated gross income of 51 million dollars (G. X. 408) and consolidated gross assets of 33 million dollars (Moody's, op. cit.).

It had no theatres, confining its operations to the production and distribution of motion pictures (G. X. 146, F.F. 58, 47-52, R. 3670, 3668-9).

During the 1943-44 season it released 49 feature pictures (exclusive of Westerns) out of the 335 such pictures released by all national distributors (F.F. 99, R. 3677). Half of these grossed under one-quarter million dollars, and none as much as 2 million dollars. In the 1936-37 season its gross consolidated income was only 14 million dollars (G. X. 408), and 32 out of the 40 features it released grossed less than $250,000 (G. X. 427).

6. The nature and character of the Government's evidence.

The Government called no witnesses, except two in rebuttal to collate statistical evidence. Its evidence consisted exclusively of documents and data obtained from the defendants through interrogatories and demands for admissions (Gov. Opening Statement, R. 6-7).

As recited in its Jurisdictional Statement, the plaintiff considers its case to rest mainly upon the following categories of evidence allegedly contained in the record (1) an exposition of the corporate structure of each defendant; (2) the general manner in which the major defendants' theatre holdings had been acquired, with an accurate description of their individual theatre holdings by name, location, and size; (3) the precise manner in which the major defendants jointly controlled, with each other and with other exhibitors, specific theatre operations; (4) the general forms of agreement used by all the defendants in licensing films and representative executed agreements by which they had licensed each other and their affiliated theatres; (5) tabulations of film rentals paid by their theatres to all distributors and received by the defendants as distributors from all theatres; (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the principal theatres in the principal cities of the United States, and the restrictive provisions therein; and (7) arbitration and appeal board decisions (G. J. S., pp. 7-8).

The conclusions drawn in the Government's Jurisdictional Statement from the foregoing, upon which it founds its case against the non-theatre-owning defendants, were (1) that such defendants had "discriminated" in their licensing against small independent exhibitors, through do-

ing the greater proportion of their business with affiliated exhibitors, by means of contracts allegedly containing certain more favorable provisions and (2) that the effect of the employment of "restrictive provisions" in licenses under copyright by such defendants was to maintain a uniform system of runs, clearances and admission prices in all areas, as had been fixed by the theatre-owning defendants acting in concert (G. J. S., pp. 7-8).

No exhibitor testified that he had been in any way injured by any of the activities of any of the defendants, much less by those of any of the three minor defendants.

The various defendants called as witnesses certain of their officers, agents and directors, together with officers and representatives of some of their subsidiaries. The only witness called by Universal was Scully, its Sales Manager. We believe that it can be fairly said that no evidence of any real consequence in support of the Government's case came in upon the defendants' cases.

The presiding judge at the trial, Circuit Judge Augustus N. Hand, remarking upon what the Government had said in its opening about the three minor defendants, said: "It seems to me it is pretty slim" (R. 154). When the case was being summed up, he was still of this opinion, saying to Columbia counsel (R. 2725): "I never could see much of a case against you. I said so in the beginning, but in considering it further, I may yet be convinced that you are in it". In its opinion (R. 3517), after remarking that the control of distribution it had found closely resembled that appearing in *Goldman Theatres v. Loew's*, 150 Fed. 2nd 738 (C. C. A. 3rd, 1945), it said: "The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement".

In *U. S.* v. *Crescent Amusement Co.*, in this Court, 323 U. S. 173, in which the plaintiff proceeded against all eight distributors who are here, the lower court dismissed as against the major distributors because of the Government's undertakings in the Consent Decree, and as Mr. Justice Douglas in his opinion, at p. 176, said of the remaining three defendants: "The lower court found that only one had violated the Sherman Act", and that one was not Universal.* Nor was Universal involved in *Bigelow, et al.* v. *R. K. O.*, 327 U. S. 251. In *U. S.* v. *Schine Chain Theatres Inc., et al.*, 63 Fed. Supp. 229, now here on appeal, all of the distributors were dropped as defendants, and the Court said at p. 240: "We are not called upon in this suit to decide whether there were any violations by these defendants of the law as laid in the complaint. Paramount et al. are not parties here." Likewise in *U. S.* v. *Griffith Amusement Company, et al.*, 68 Fed. Supp. 180, now here on appeal, all of the distributor defendants were dismissed prior to trial.**

Finally it is important to note that reversal of the judgment as against Universal does not require a weighing of conflicting evidence bearing upon any of what we consider to be the evidentiary findings of fact, but only the determination of the proper ultimate legal conclusions to be drawn from such evidentiary facts. Thus the basic facts with respect to minimum admission price-fixing are undisputed.

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*F.F. 148-163, which appear at pp. 1462-4 of the record in that case in this Court, discuss Universal's activities in detail, and find that they were either non-discriminatory against small independent exhibitors or favorable to them.

**The five major defendants were dropped by reason of the Consent Decree. The three minor defendants, who did not consent, were presumably dropped in both these cases by reason of the fact that it was believed by the Government that the evidence was insufficient to justify asking a decree against them.

(F.F. 61, 62, 63, R. 3670). Only the ultimate legal conclusions drawn therefrom are contested (F.F. 64, 65, 66, 69, 70, 71, 72, R. 3670-3). So also as to clearances and runs the basic facts are undisputed, or there is no conflicting evidence with respect thereto. (F.F. 73, 74, 75, 76, 78, R. 3673-4). The ultimate legal conclusions properly to be arrived at therefrom are, however, in dispute (F.F. 81, 82, R. 3674). What are labelled findings with respect to franchises and master agreements (F.F. 88, 89, R. 3675) are clearly conclusions of law, the facts in this connection being uncontested (F.F. 92, R. 3676). The "block-booking" findings F.F. 93, 94, R. 3676), insofar as Universal is concerned, are supported by no evidence at all, as respects the critical element of conditioning. The "discrimination" findings (F.F. 110, 111, R. 3681-2) which resulted in no decretal provision, merely recite contractual provisions, and conclude as a matter of law that they unreasonably restrain trade. Lastly, there is an observation or argumentative conclusion, which is not a true finding of fact at all,* that the evils in the industry are attributable to non-competitive distribution practices and not to the ownership of theatres (F.F. 154, R. 3690). The findings contain many other such argumentative statements.

7. The salient facts relied upon as against Universal.

(a) Admission Prices.

In licensing feature motion pictures to an exhibitor the distributor makes a temporary bailment, for the period of the exhibition, of a positive print of the feature, to enable

*Obviously the government agrees with us here, because it states (br., p. 11) that it does not challenge "any of what we believe to be evidentiary findings," and thereafter strongly challenges this finding.

the exhibitor to exercise the intangible exhibition rights under copyright which are licensed to him (F.F. 61, R. 1460, G. X. 289-90).

The better quality features are generally licensed for a royalty measured by a certain percentage of the exhibitor's gross receipts. This percentage may increase as the gross receipts go up, and there is frequently a guaranteed minimum to be paid. The poorer quality pictures are licensed for a flat rental. In fixing this flat rental, however, the distributor is generally, if not always, aware, through past experience, of what gross receipts have accrued to the particular theatre-owner in exhibitions of others of his pictures, and the flat rental, therefore, is necessarily based to a considerable extent upon what gross receipts are expected from the picture (R. 430-1, 570-2, 694-9, 1495, 1722-3, 1982-3, 725-7).

Exhibitors have found that it is impractical to vary their admission prices from day to day in accordance with their estimates of the comparative quality* of the pictures being shown. The public expects a consistent admission price, and would resent being asked on Wednesday to pay a higher price than on Monday, merely because the exhibitor believed that a better picture was being shown.** Indeed,

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*A few exceptional features which have cost exceptionally large amounts to produce, such as 'Gone With the Wind", "For Whom the Bell Tolls", "Song of Bernadette" and "Wilson", have been exhibited in recent years, prior to general release, at advanced prices, under what are known as "road-show" arrangements (R. 720-2). *None of these pictures were distributed by Universal.*

**Admission prices in the evenings may differ from the daytime prices, or those on Saturdays, Sundays or holidays may differ from week-day prices, but the point is that prices for comparable playing time cannot, as a practical matter, be changed, depending upon what the exhibitor believes is the quality of the picture, or what distributor released it.

it is clear that the public might emphatically disagree with the exhibitor's judgments as to comparative quality (R. 722-3, 969, 1382-3).

From an exploitation standpoint, the conditions under which the first-run showing of any feature picture takes place are of great importance to its success in the first-runs and its future career in the subsequent-runs. In order to have the best conditions and to properly advertise the picture, the best theatres must be selected for the first-run showing, which theatres naturally charge the highest prices (pp. 5-7, *ante*).

Since the distributor, by reason of a continuing interest in the proper exploitation of his picture, upon which depends what film rental he gets in the aggregate for his picture, including subsequent-run licenses, is vitally interested in the maintenance of the exhibition conditions, and in the price differentials between runs, upon which he relies in the licensing of his pictures and in the granting of clearances, he generally requires a covenant from the exhibitor that the admission price shall not be reduced during the run of the particular picture licensed, so as to draw upon subsequent-run patronage, thereby depreciating, or perhaps destroying, the valuable opportunity reserved by the distributor of obtaining further reward from the making of subsequent-run licenses. In other words, a breach of such covenant results in the licensee's engaging in competition with the licensor, which the latter under its statutory monopoly has the right to prohibit (pp. 64-83, *post*).

The result of the foregoing practice, which is general among distributors, including all independent distributors (R. 544-5, 918), is that the minimum admission price specified is generally the same in the contracts of all distributors,

it being the usual admission price currently charged by the exhibitor (F.F. 63, R. 433-4, 718, 968, 999, 1083-4).

(b) Clearance.

It is not customary in the motion picture business for distributors to exercise their full legal rights under their statutory copyright monopolies in order to give exhibitors exclusive licenses. Instead they license their feature pictures in a series of runs, with time intervals between the runs (R. 705-7, 418-23, 1895, 1908). Generally speaking, and up to a certain point at least, the longer the time interval between a prior and subsequent run, the more valuable the prior run is, and the more the prior licensee will have to pay for it in the way of film rental. Therefore, the prior licensee, who is interested only in his own run, wants the largest clearance he can obtain over subsequent runs, without paying too much for it. The licensor, however, is interested in the total aggregate revenue he can obtain from all runs. Under such circumstances it is obvious that a licensee must have an agreement from a licensor for clearance, since the film rental he pays is to a very considerable extent based on the amount of the clearance he gets (R. 422-3, 707-9, 712-13, 948, 150-2, 1376, 1707-9, 1895-1923).

Clearances given by the various distributors, including the so-called independent national distributors (R. 997, 1003, 1376), tend to be more or less uniform. The tendency toward uniformity is readily explicable without having to assume any illegal action among the major defendants, or on the part of large independent circuits, to employ their alleged monopolistic power in order to fix clearances which

Universal would have no alternative but to adhere to. As has been heretofore pointed out, the amount of film rental paid by a prior-run exhibitor is a function of clearance, i.e., the longer and broader the clearance, the higher the film rental. The reward accruing to the prior-run exhibitor is correspondingly a function of clearance, because the longer and broader the clearance the more complete is his opportunity to induce all of the potential patronage, which is ready, willing and able to pay his admission price, to view the exhibition in his theatre. A clearance of definite length and breadth is therefore something of very concrete advantage to an exhibitor, which advantage is necessarily the same whatever distributor supplies the feature picture. On the other hand it is impossible for an exhibitor to buy feature pictures, from the various distributors, on a comparable price basis. Each feature picture is different from every other. Thus whereas standardized articles, for competitive reasons, tend to be sold at the same price, feature motion pictures, for the same reasons, tend to be sold on the same clearance, since one distributor, particularly a medium-sized one, anxious* to license a particular theatre cannot afford to offer less clearance than another thinks it fair to give.

It is also obvious that if a particular distributor gives a clearance longer than those of its competitors, it will be handicapped in licensing subsequent-runs in competition with such competitors, particularly as a difference in clear-

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*As hereinafter pointed out (p. 102, *post*) theatres without competition, or having ineffective competition, which the Government claims is a very common situation (Gov. br., pp. 15-19), can virtually dictate their own terms to a distributor anxious to deal with the best outlet.

ances may interfere with an even flow of pictures to subsequent-runs* (R. 713-17, 948, 950-2, 1715, 1895-1908).

Likewise, each distributor is confronted with the same business factors and conditions in determining the clearance he desires to give (R. 423-4). With relatively few exceptions, therefore, the clearances granted by the different distributors to a particular theatre are uniform (R. 707-11, 977, 1003, 714-17, 1376, 1707-9, 1715).

That clearances ought to be uniform is an inarticulate major premise of the arbitration system set up by the District Court under the Consent Decree, and neither the arbitrators nor the Appeal Board ever prescribed different clearances for different distributors or for different pictures of one distributor (G. X. 1-5). They always prescribed one reasonable clearance, which thereupon appertained to the particular *theatres involved*. True, they prescribed it as the maximum allowable clearance, but they necessarily knew that it was inevitable that, as a practical matter, it be taken as *the* reasonable clearance, not only by the parties to the arbitration but by all other distributors (R. 712, 1447-9).

(c) Other Trade Practices.

Since Universal customarily produced from 45 to 50 feature pictures a year (R. 1456-7), and since there are 18,000 motion picture theatres in the United States, with

*This is particularly plain when a subsequent-run theatre, which must, of course, plan its programs in advance, double-features, showing, as is customary, a feature picture of two different distributors, such as Loew's and Universal. If the clearances were different, the pictures would not be available at the same time for complementary showing.

a large percentage of which on the average Universal had dealings (R. 1468, 1457-8), many hundreds of thousands of transactions would have been involved had it licensed its feature pictures theatre by theatre and picture by picture. Instead of doing this, it offered its entire season's product at one time by title and description, prior to production, and, if unable to license its entire line of motion pictures to an exhibitor, obtained a commitment for as many thereof as possible from such exhibitor or some other exhibitor (R. 1468-73). It frequently contracted to license the same to exhibitors operating chains of theatres, and it is claimed that these wholesale buyers got better terms in some respects than small buyers. The arrangement under which a distributor commits its pictures to an exhibitor operating such a theatre chain is known as a "master agreement".* Prior to the Consent Decree the major defendants "block-booked" (R. 547-9). Columbia also "blocked-booked" (R. 1272), but United Artists did not, because its deals with independent producers required each producer's pictures to be sold separately. Independent exhibitors desire to purchase their pictures in large groups, as it gives them assurance of product (R. 427-8, 1257-9, 1272, 1275-7).

Many theatres and chains of theatres, particularly independents, wanted to be assured of Universal product over a period of years (R. 1469, 427-8). Universal, therefore, entered into franchise arrangements, and at the time of the trial had 727 of these with independent exhibitors, 43 with affiliated exhibitors (R. 1472-84). Very few of these franchises were over two or three years in length (Ex. U-2).

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*This has to be supplemented by "deal sheets" containing the provisions governing the exhibition of particular feature pictures in each particular theatre.

(d) First-run Licensing

The Government directed much of its evidence to the licensing of first-run theatres in 92 cities in the United States having a population of 100,000 or over. In 38 of these cities there were no independent first-run theatres. In 4 there were no affiliated first-run theatres. In the remaining 50 cities Universal licensed nearly as many independent theatres as it did affiliated theatres (Ex. U-1).

8. The decree.

Sec. II of the Decree (R. 3695-8) deals with the sanctions imposed upon distributors. They are forbidden to require exhibitors to maintain current admission prices (sub-div. 1). They are forbidden to agree among themselves to maintain a "system of clearances". They are restrained from agreeing with exhibitors to maintain a "system of clearances", but it is not made clear what "system of clearances" means (sub-div. 2). Clearances between theatres not in substantial competition are banned (sub-div. 3). The test of the validity of a clearance granted to a theatre in substantial competition with another is stated to be whether it is "in excess of what is reasonably necessary to protect the licensee in the run granted" (sub-div. 4). The burden of proof of sustaining the legality of any clearance is placed upon the distributor (sub-div. 4).

Distributors are restrained from making or further performing franchises, formula deals and master agreements (sub-divs. 5 & 6). They are further restrained from making or further performing any license in which the

right to exhibit one feature is conditioned upon the licensee taking one or more other features (sub-div. 7). In the event that any features have not been trade-shown prior to the granting of a license for more than one feature, the licensor is required to permit the licensee to reject 20% of such features (sub-div. 7).

The sole and exclusive method to be followed by all defendant distributors in licensing their features in the future is laid down in substance as follows (sub-div. 8):

(a) Every exhibitor is to have an opportunity to exhibit a feature picture upon some run, and the picture must be offered upon uniform terms to all who would exhibit it upon such run;

(b) Licenses shall be granted without discrimination in favor of old customers, affiliated theatres or others, and shall be granted solely "upon the merits". What "the merits" means is not defined, except as forth in the next sub-division;

(c) Where a distributor desires to offer his feature picture in accordance with the usual run system, he must ask for bids from all exhibitors in the competitive area. In asking for such bids, a distributor must state the flat rental acceptable to it for a specified playing time, the time when the exhibition is to commence, the availability, and clearance, if any, which will be granted for each such run. Exhibitors may bid in terms of flat rentals, percentage of gross receipts, or other form of rental, and shall specify the clearance and playing time desired. The distributor may reject all offers, but if he accepts any, must grant the

license "to the highest responsible bidder,* having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor".

(d) Each license shall be taken theatre by theatre and picture by picture.

A distributor may not arbitrarily refuse to license a feature on a particular run to a particular exhibitor (subdiv. 9).

Questions Presented

1. Whether a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures violates the Sherman Act by granting restrictive licenses to small exhibitors, which are exclusive for limited periods of time, and the exclusivity of which is protected by agreement not to license others during further limited periods of time, when the restriction is against a reduction in the current admission price of the exhibitor, upon the basis of which the license fee is negotiated, and is frequently measured, and reduction in which would depreciate or destroy the value of the unlicensed subsequent runs remaining in the hands of the licensor.

2. Whether such a licensor may, instead of exercising its full legal right to agree with licensees to grant them exclusive licenses limited only by the duration of the copy-

*In fact the identity of the "highest responsible bidder" cannot be determined until after the run-off of the picture, when any bid is in percentage terms. Thus a bid of $1,000 cannot be compared with a bid of 40% of the gross receipts. Nor is a bid of 50% of the gross receipts by theatre A necessarily higher than 40% by theatre B. The latter may have more seats, a better location, physical appointments and management. Moreover, through experience, the distributor may know that B is responsible and have no adequate knowledge as to A.

rights, agree with them for exclusive licenses for shorter terms, and, in the aid of the exclusivity of such licenses, further agree that it will not license others for given lengths of time thereafter.

3. Whether such a licensor may properly provide for royalties measured by a percentage of what the licensee charges the public to view the exhibition of the pictures under copyright.

4. Whether such a licensor, requiring well-established show-windows for its pictures, may commit itself to an exhibitor operating a number of theatres, and requiring a well-established source of supply for feature pictures, to grant such exclusive licenses for limited periods of time, protected by clearance periods, upon all its copyrighted pictures released during a given period of years, i.e., grant what are known as "franchises".

5. Whether the legality of a specific clearance depends upon its "reasonableness", and if so, whether the licensor ought to determine the "reasonableness" of a clearance in the light of the need of the licensee for protection against subsequent-runs, or in the light of the economic desires of the subsequent runs, and not in the light of the normal and reasonable relationship thereof to the right of the licensor to obtain pecuniary reward in exploiting his copyright monopoly.

6. Whether or not a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures may legally offer the same in a group and license such pictures to the exhibitor among competing exhibitors who is willing to take the greatest number thereof.

7. Assuming that the major defendants, each of whom is interested in a large number of motion picture theatres, first-run and subsequent-run, located in various parts of the United States, and who in the aggregate distribute most of the best revenue-producing feature pictures, or large independent circuits, were engaged in combinations and conspiracies to monopolize and restrain interstate commerce, pursuant to which they were able to fix and determine priorities in run, and to fix and determine clearances and admission prices, not only for their own theatres but for substantially all the important motion picture theatres in the United States, did this compel a medium-sized non-theatre-owning distributor to choose between (1) refraining from licensing its feature pictures to such theatres in the manner heretofore described, or (2) becoming implicated in such alleged combinations and conspiracies.

8. Under the conditions assumed in the last preceding question, was a medium-sized non-theatre-owning distributor legally entitled to negotiate film rentals with chain theatres, on the basis of runs, clearances and admission prices fixed by them, and which it had no power to alter.

9. Under the conditions assumed in question No. 7, does the fact that the major defendants have obtained franchises from a medium-sized non-theatre-owning distributor, which franchises it is assumed were legally granted to secure firm outlets for the product of such distributor, but, it is further assumed, were made use of by the major defendants in the effectuation of a combination and conspiracy, mean that the injunction against enforcing such franchises must run against the licensor as well as against the licensee.

10. Is it proper to draw an inference of participation in such a combination and conspiracy against such a distributor, from the fact that the admission prices and clearances which it specifies in dealing with particular licensees are, by and large, similar to those specified by other distributors, when such similarity can be reasonably accounted for (1) by the business necessity which requires the licensee exhibitors to charge a consistent admission price from day to day, irrespective of what distributor's pictures are being shown, which admission price all the distributors require, in the exercise of their rights under copyright, shall not be reduced, and (2) by the business convenience or necessity which suggests or dictates to an exhibitor that he operate on the same clearance from all distributors, and the inability of such a distributor, desiring to license its feature pictures to a particular exhibitor, to refuse to grant as great a clearance as has proved acceptable to the other distributors.

11. Is a licensor of feature motion pictures, which has no theatres, and which distributes a very small proportion of the best-drawing pictures, employing legal licensing methods, properly to be implicated in an alleged conspiracy among the five largest companies in the industry, who collectively are interested in most of the best theatres and control most of the best-drawing pictures, by reason of the fact that such licensor does a high proportion of its business with such companies.

12. Does the Sherman Act and the Constitution authorize a court of equity, instead of confining itself to injunctive relief and/or ordering the dissolution of any existing monopolies, to impose a mandatory system of competitive bidding, regulating in detail the operations of non-theatre-owning distributors, who are not public utilities.

13. Assuming that some sort of decree should be made against the appellants, are the provisions of the decree entered by the Court below with respect to trade practices legally authorized.

Specification of Assigned Errors to be Urged

In their Assignments of Error the Universal appellants have specified in detail the respects in which they contend that the Court below erred in making its findings of fact (Assignments of Error, 1-28, R. 3789-93); in making its conclusions of law (Assignments of Error, 29-33, 92, 103, R. 3793-4, 3802-3); in framing its decree (Assignments of Error, 34-61, 93-99, 102, R. 3794-3797, 3802-3); in failing to make findings proposed by Universal which ought to have been made in order to arrive at proper conclusions of law (Assignments of Error, 62-91, R. 3797-3802); in failing to conclude that the Universal appellants did not participate in any combination and conspiracy, and that a decree of dismissal should be entered as to each of them (Assignments of Error, 104-105, R. 3804); and in failing to grant motions to dismiss the Petition and Amended and Supplemental Complaint made by the Universal appellants (Assignment of Error, 101, R. 3803).

Such assignments of error, all of which the Universal appellants regard as material to the issues presented in this brief, are discussed under appropriate headings herein.

Summary of Argument

A non-theatre-owning licensor of copyrighted feature motion pictures is entitled, by virtue of its statutory monopoly, to grant restrictive and/or exclusive licenses, in which the royalties payable are measured by a percentage of what the licensee charges the public to view the exhibiton under

copyright. Such licenses, when granted to small independent exhibitors, admittedly not engaged in any combination or conspiracy to restrain or monopolize interstate commerce, certainly do not involve the licensor in any violation of the Sherman Act.

In such licenses, the licensor may forbid the licensee to compete with it except to a limited extent, and is not required to permit the licensee to compete with it to the fullest extent or not at all. Thus when a licensor exploits his statutory monopoly by a series of exclusive licenses which are limited in time, and which are protected in their exclusivity by agreements not to license others during further periods of time, and the value of the subsequent-run licenses remaining in the hands of the licensor, after the granting of a prior-run license, depends to a large extent on the differential between the admission price charged on the prior run and the admission prices charged by the subsequent-runs, the licensor may properly provide in the prior-run licenses against a reduction in the current admission price of the licensee, which reduction would depreciate or destroy the value of the unlicensed residue remaining in the hands of the licensor. The fact that film rental is to a large extent based on the admission price charged also justifies the restriction.

Such a licensor, in exploiting his statutory monopoly under copyright, is not limited to granting an exclusive license for the duration of the copyright. It may grant a series of exclusive licenses for limited times, and, in aid of the exclusivity of such licenses, further agree that it will not license others for given lengths of time thereafter. In so doing it is not exceeding its legal rights but is, on the contrary, refraining from fully exerting the right to exclude which belongs to it by virtue of its statutory monopoly.

Such a licensor, granting restrictive and exclusive licenses, may properly provide for royalties measured by a percentage of what the licensee charges the public to view the exhibition under copyright, this being a fair and customary method of measuring royalties.

Such a licensor may properly commit itself to an exhibitor, operating a number of theatres, to grant it restrictive and exclusive licenses under its copyrights, for limited times, protected by clearance periods, for all copyrighted pictures released during a given period of years, this amounting to no more than dealing on a wholesale basis with a customer as one finds him, and the obtaining of firm outlets for the distributor's pictures. If the licensee, by reason of the fact that it is involved in a combination and conspiracy to monopolize, is able to employ, and does employ, such franchises in effectuating its illegal aims, the franchises it has been granted should certainly be cancelled, but no injunction should issue against the licensor unless it has actually joined mind and hand with the licensee in its illegal activities.

Clearance is not a restriction upon the licensee, and hence its legality does not depend upon whether it is normally and reasonably adapted to secure pecuniary reward for the licensor. In agreeing to grant exclusive licenses for limited periods separated by agreed-upon clearance periods, the licensor is refraining from exercising to the fullest extent the rights granted to him to exclude all others for the duration of his copyright, and he is not required to limit himself to what may be considered to be "reasonable" clearances in the light of the necessities of the licensee for protection against subsequent-runs, or in the light of the economic desires of the subsequent runs. Were it other-

wise, there is nothing to show that Universal granted any "unreasonable" clearances.

The right of a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures to grant restrictive and exclusive licenses on percentage terms is not diminished by the fact that theatre chains who are its licensees may be engaged in combination and conspiracies to monopolize and restrain interstate commerce, pursuant to which runs, clearances and admission prices, not only for their own theatres, but for substantially all the important motion picture theatres in the United States, have been fixed. To hold otherwise would mean that such a medium-sized non-theatre-owning distributor would be deprived of its best, if not its only available, markets, or at the least of the right to license its copyrighted feature motion pictures in such markets in accordance with its legal rights.

In thus licensing its pictures, the obvious fact that such a medium-sized non-theatre-owning distributor may have to negotiate film rentals on the basis of runs, clearances and admission prices it is unable to alter, does not change the situation. Nor is it any evidence of participation in any such assumed combination and conspiracy that such medium-sized non-theatre-owning distributor receives a large proportion of its film rentals from theatres which are affiliated with the members of such an assumed combination and conspiracy. Obviously those who are assumed *arguendo* to dominate the exhibition business in particular localities will control the theatres which will afford the best, and sometimes the only, available markets, for the feature pictures of such a distributor.

If it be assumed that there were no such combinations and conspiracies, then it is obvious that the Universal

appellants were not guilty of participation in any combination or conspiracy.

If such a distributor has the right, as we think it clear that it has, to require its licensees under copyright to maintain their admission prices, to protect its own interests, then the business necessity which requires an exhibitor to charge a consistent admission price from day to day, irrespective of what distributor's pictures are being shown, makes it inevitable that there be uniformity in the admission prices specified in the licenses of all distributors embodying such a legally permissible clause in their contracts.

Likewise the similarity of the clearances specified by Universal to those specified by other distributors, in licensing particular theatres, to the extent that it exists, is readily explained. Exhibitors, for reasons of business convenience and necessity in arranging their programs, do not want different clearances from the various distributors. Universal, if it desires to license its feature pictures at all to a particular exhibitor, cannot refuse to grant a clearance thus required by the exhibitor for practical operating reasons, and which has proved acceptable to the other distributors. As a matter of sheer competitive necessity it can do no less, the exhibitor being in a position to enforce its demands.

Such a medium-sized non-theatre-owning distributor of copyrighted feature motion pictures is not restricted to offering such pictures one at a time, but may legally offer all of the same in a group and license that exhibitor, among competing exhibitors, who is willing to take the greatest number thereof. Even if such a distributor did condition the licensing of one feature motion picture upon the licensee's willingness to accept others, of which there is no proof

as against the Universal appellants, this would not be contrary to the Sherman Act, in view of the non-monopolistic situation of the licensor and the lack of any showing of unreasonably restrictive effects upon competition.

Assuming that a decree of some sort should issue against the Universal appellants, the imposition of a mandatory system of competitive bidding, regulating in detail the operations of a non-theatre-owning distributor which is not a public utility, is unauthorized by statute or the Constitution. The Court should confine itself to injunctive relief and/or ordering the dissolution of any existing monopolies, and not usurp legislative power by prescribing administrative regulations.

The various provisions of the decree with respect to minimum admission prices, clearances, franchises, master agreements and block-booking require revision in any event.

ARGUMENT

Part One

UNIVERSAL, IN LICENSING ITS FEATURE MOTION PICTURES UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE BEEN ENGAGED IN A COMBINATION AND CONSPIRACY TO VIOLATE THE SHERMAN ACT, WAS ENTITLED TO GRANT RESTRICTIVE AND EXCLUSIVE LICENSES OF THE CHARACTER HERETOFORE DISCUSSED, WHICH PROHIBIT THE REDUCTION OF CURRENT ADMISSION PRICES, SPECIFY CLEARANCES, AND PROVIDE FOR ROYALTIES MEASURED BY A PERCENTAGE OF THE ADMISSION PRICE.

1. In General.

All of the feature motion pictures licensed by Universal are copyrighted (R. 658-9, 1460, 1723). When they are licensed for exhibition, no title passes to any physical thing, since the positive print which is furnished to the licensee to run through his projector, is temporarily bailed, and remains at all times the property of the licensor, who thereafter will furnish it successively to numerous subsequent-run licensees (G. X. 289-90, R. 1460). Such cases as *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 337 and *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, condemning as illegal attempts by copyright-owners and patentees to fix the resale prices of articles to which title had passed are therefore entirely inapplicable.

Article I, Section 8, paragraph 8 of the United States Constitution reads as follows: "To promote the progress of science and useful arts by securing for limited times to

authors and inventors the exclusive right to their respective writings and discoveries". Patents and copyrights are thus dealt with *pari passu*.

Under the Copyright Act of March 4, 1909, 35 Stat. Part 1, pp. 1075-88, as amended August 24, 1912, 37 Stat. Part 1, pp. 488-90, the owner of a copyright of a motion picture is given the exclusive right, *inter alia*, to "*publish*" it, and "to *exhibit, perform,* represent, produce or *reproduce,* it in any manner or by any method whatsoever". (Emphasis ours.) In exhibiting the copyrighted feature picture the exhibitor also "*performs*" a drama and "*reproduces*" the original performance. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55; *Patterson* v. *Century Productions*, 93 F. (2d) 489; *M. G. M.* v. *Bijou Theatre Co.*, 3 Fed. Supp. 66.

The nature of the copyright monopoly is discussed by Chief Justice Holmes, speaking for an unanimous court, in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, at p. 127, where he says:

> "A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects' ". *Kendall* v. *Winsor*, 21 Howe, 327, p. 328; *Grant* v. *Raymond*, 6 Pet. 218, 241.

He further says at page 130:

> "Copyright is a right exercised by the owner during the term, *at his pleasure*, and *exclusively for his own profit*, and forms the basis for extensive and profitable business enterprises". (Emphasis ours.)

And at page 131:

> "Royalties from copyrights stand in the same position as royalties from the use of patent rights,

> and what we have said as to the purposes of the Government in relation to copyrights applies as well *mutatis mutandis* to patents which are granted under the same constitutional authority to promote progress of science and useful arts".

In *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8, this Court pointed out that *"the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it."* (Emphasis ours.)

Speaking, in a recent case, of the right of a patentee to grant limited or restrictive licenses, this Court said in *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, p. 456:

> *"He (the patentee) may grant licenses to make,* use or vend, *restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege,* save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give." (Emphasis ours).

2. The minimum admission price restriction.

The only restriction contained in Universal's licenses under copyright with respect to which the Government makes any serious contention is that relating to the minimum admission price to be charged by the exhibitor for viewing an exhibition of the copyrighted picture under the license.* The minimum admission price thus specified is invariably the current admission price usually

*Clearance, as hereinafter explained, is not a restriction upon the licensee or upon anyone else who is entitled to complain about it. If it were, its legality would not be affected, since it is normally and reasonably related to the licensor's pecuniary reward.

charged by the exhibitor (F. F. 63, R. 433-4, 718, 968, 999, 1083-4). This admission price is the same, irrespective of what distributor's pictures are being shown, and must necessarily be, since public acceptance for varying admission prices cannot be obtained (pp. 25-26, *ante*). Universal, a medium-sized distributor, does not and cannot possibly set its own price, even in the case of a small independent exhibitor—much less in the case of a large theatre chain, and is therefore content to protect itself against change in an existing price on the faith of which it has accepted a film rental, frequently measures its film rental, and has granted clearance and run. No limitation is placed upon the exhibitor's right to charge more than this price, and thus to fix his own terms for any additional entertainment provided or other motion pictures shown (G. X. 289-290). *There is thus no attempt whatsoever to extend the scope of the statutory monopoly.*

If the exhibitor does reduce his admission price below the minimum, the distributor is given the right (a) to terminate the license; or (b) to reduce the amount of clearance; and (c) if no clearance has been granted, he may delay notice of availability for not more than a specified time, and any run which has been granted is deemed revoked. All that these provisions enable the licensor to do is to compensate for the changed situation, by withdrawing wholly or partially privileges granted on the faith of the admission price being charged.* If the distributor does not terminate the license, the exhibitor is required to account for all admis-

*A change in the admission price policy of an exhibitor "would not only affect the film rental in" the theatre making the change, "but it would also affect . . . the film rental in the subsequent theatres, because if the prior-run theatres reduce their admission prices, then the subsequent theatres could not continue to charge the admission prices that they have been charging" (R. 726).

sions on the basis of the minimum admission prices specified or any higher admission prices actually charged (G. X. 289-290). In other words, the royalty which he has to pay the distributor is measured by a percentage of the admission price charged at the time the license is made.

The minimum admission price provision in Universal's licenses is, therefore, a covenant against change of position, and the remedy given to the distributor is not damages for breach of contract, but, at his election, the power to terminate the license, or to adjust its terms to what they would have been had the licensor been advised of the licensee's intention prior to the making of the license.

In exhibiting the copyrighted motion picture through the use of the positive print which has been bailed to him, the exhibitor performs the very acts he is licensed to perform. The restriction against reducing his regularly charged admission price is, therefore, in the strictest sense a limitation upon the grant.

In asserting that such limitation is wholly legal,* Universal relies upon *Bement* v. *Harrow*, 186 U. S. 70 (1902), *U. S.* v. *General Electric*, 272 U. S. 476, and the numerous cases which follow them, but in view of the fact that the licensor in those cases, unlike our case, was permitted to fix the price on articles to which the licensee at all times had title, in view of the further fact that Universal's licensees do not compete with it so long as they conform to the terms of their licenses, in view of the further fact that Universal merely provided against change in a price position already

*It is important to note that despite the fact that the Consent Decree was intended to correct the licensing practices in the industry deemed by the Government to be forbidden by the Sherman Act, it contains no restriction whatsoever against the licensor's prescribing minimum admission prices (R. 3373 *et seq.*).

assumed by the licensee, and the still further fact that Universal's copyrights completely cover the feature picture licensed, Universal believes that its position is very much stronger. It is in fact merely exercising its right to license in such a way as to exclude competition from its licensees engaged in a separate branch of the business.

The *Bement* and *General Electric* cases involved patent licenses to make, use and vend. This Court held that it was legal for the patentee to forbid its licensee to undersell it, when disposing of articles it, the licensee, had itself made, and therefore at all times had title to. The rationale thereof was that the patentee might require of a licensee, even a competitor, that he stipulate not to compete with him, except to the extent authorized, e.g., that he would not compete in respect of price.

3. Clearance.

It is well settled that a patentee may transfer the "exclusive right" given to him by the statute, by assigning the same to another, or by licensing the exclusive exercise of the same to another. *Bement* v. *National Harrow Company*, 186 U. S. 70, 94; *Virtue* v. *Creamery Package Company*, 227 U. S. 8, 36-7; *Independent Wireless Telegraph Company* v. *Radio Corporation of America*, 269 U. S. 459, 469-73; *United States* v. *General Electric Co.*, 272 U. S. 476, 489; *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267 (C. C. A. 6th), certiorari denied 300 U. S. 667.

It has never been questioned, so far as we know, but that a copyright owner may do likewise, and, as heretofore pointed out, this Court has definitely approved the validity of an exclusive license under copyright in *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8.

The exclusive license, whether under a patent or under a copyright, is an agreement with the licensee that no others will be licensed, and that he alone may exercise the rights licensed to him under the statutory monopoly. *Overman Cushion Tire Co.* v. *Goodyear*, 59 Fed. (2d) 998 (C. C. A. 2nd), certiorari denied *Kelly-Springfield Tire Co.* v. *Overman*, 287 U. S. 651.

It is likewise well settled that the owner of a patent or copyright monopoly may refrain from exercising his rights thereunder, or from licensing others to do so. Thus Chief Justice Holmes, speaking for an unanimous court in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, p. 127 said:

"The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co.* v. *Eastern Bag Co.*, 210 U. S. 405, pp. 422, 424."

In *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, this Court said:

> "A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others. If he discloses the invention in his application so that it will come into the public domain at the end of the 17 year period of exclusive right he has fulfilled the only obligation imposed by the statute. This has been settled doctrine since at least 1896. Congress has repeatedly been asked, and has refused, to change the statutory policy by imposing a forfeiture or by a provision for compulsory licensing if the patent is not used within a specified time. The governing rule is quoted in *Chapman* v. *Wintroath*, 252 U. S. 126, at 137, 64 L ed 491, 495, 40 S Ct 234:

'A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.' *United States* v *American Bell Teleph. Co.*, 167 U. S. 224, 247 42 L ed 144, 156, 17 S Ct 809."

In licensing its copyrighted feature motion pictures in a series of exclusive runs, followed by clearance periods agreed upon with the licensee, in aid of the exclusivity, Universal was clearly within its legal rights, since such arrangements diminish the exclusivity it is legally entitled to give, i.e., exclusive rights for the duration of the copyright. If, by reason of its statutory monopoly, it can properly agree with its licensee that it will never license anyone else, it can certainly agree that following an exclusive right for a limited time, and in aid thereof, it will not license anyone else for a further limited period of time, particularly since it is, at no time, required to license anybody.

4. Royalties measured by a percentage of the licensee's selling price.

This was the method of measuring royalties employed by General Electric in its license to Westinghouse (15 F. (2d) 715, 718) which was approved by this Court in *U. S. v. General Electric Company*, 272 U. S. 476. It is a widely used method of measuring royalties, and is particularly

appropriate to the motion picture business in view of the impossibility of estimating the public appeal of a feature picture. Likewise it is the fairest method for both the distributor and the exhibitor, since the royalty paid is in proportion to the success of the picture.

5. Long term agreements to grant exclusive licenses for limited periods on all Universal feature pictures made with exhibitors operating a number of theatres.

Exclusive licenses under patents and copyrights, which may include a number of patents or copyrights, frequently run for the duration of the statutory monopolies. In the case of an exclusive license, the licensor is thus committed to the licensee to exclude all others for a long period of years in respect of the patents or copyrights.

In licensing its copyrighted pictures, Universal frequently made agreements committing its numerous statutory monopolies, produced over a period of years, to the exclusive use of particular licensees, for relatively short periods of time in successive runs. There is, we submit, no logical basis for differentiating between the two situations. Restraint and legally permissible discrimination are the essence of both. *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57.

Likewise a patentee may legally license his patent or patents to a manufacturer who has numerous factories in which he proposes to manufacture the patented article, or even to such a one who completely dominates the business. Such manufacturer may have a great competitive advantage over other licensees who have only one factory, in being enabled to manufacture more cheaply, etc. It is submitted, however, that the patentee's action is perfectly legal, and that there is no logical basis for differentiating between it

and the practice of Universal in licensing an exhibitor who operates a number of theatres.

6. Block-booking.

As defined by the court below "block-booking" includes the connotation of conditioning the licensing of one picture upon the acceptance of others (R. 3696, 3515, 3659-60). There is no evidence that Universal indulged in any such practice. It merely licensed that exhibitor who was willing to take the greatest part of its pictures at a satisfactory price (R. 1468-1473). Assuming the contrary, however, its action would be legal since it is a non-monopolistically situated distributor, and the practice was not shown to have any unreasonably restrictive effects. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428; *Federal Trade Commission* v. *Paramount Famous Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2nd, 1932).

I.

A LICENSOR OF COPYRIGHTED FEATURE MOTION PICTURES, INSTEAD OF EXERCISING HIS FULL LEGAL RIGHT TO GRANT AN EXCLUSIVE LICENSE UNDER COPYRIGHT, LIMITED ONLY BY THE DURATION OF THE COPYRIGHT, MAY LEGALLY GRANT AN EXCLUSIVE LICENSE FOR A LIMITED PERIOD OF TIME, AND AGREE, IN AID THEREOF, THAT IT WILL NOT GRANT ANY FURTHER LICENSE DURING A GIVEN PERIOD OF TIME THEREAFTER.

1. An agreement for clearance is legal.

Despite the contention of the Government to the contrary, the above stated proposition would appear to be axiomatic. The owner of a copyright monopoly is not con-

fronted with an all or nothing option. He may, it is true, agree with a particular licensee that he shall have a completely exclusive license for the duration of the copyright monopoly, i.e., that he, as the licensor, will license no one else during the term of the copyright. *Overman* v. *Goodyear, supra.* This is the most he can give. On the other hand, the simplest logic dictates that the owner of a copyright monopoly may choose to exploit his statutory grant through a series of exclusive licenses, each limited in time, and separated by time intervals during which it is agreed, in aid thereof, that no one be licensed. The agreement with the licensee here is no different in character than in the case of a completely exclusive license. It is merely more limited.

That such arrangements are legal has been uniformly* held. *Westway Theatre* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md. 1940), affirmed on opinion below in 113 F. (2d) 932 (C. C. A. 4th, 1940); *Gary Theatre Co.* v. *Columbia Pictures Corporation*, 180 F. (2d) 891 (C. C. A. 7th, 1941); *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. (2d) 600; and Opinion below, R. 3531. The Government, moreover, agreed in Sec. VIII of the Consent Decree (R. 3380) that "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

The Government apparently does not contend that the owner of a copyright to a motion picture cannot grant an exclusive license under his statutory monopoly, as is standard practice in the case of a patent. Approval of such practice, under Sec. 1 of the Copyright Act, is explicit in *Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208, pp. 227-8,

*The government's references (bf., pp. 84, 98) to clearance restrictions "prohibited" by the *Interstate Circuit* case (306 U. S. 208) find no support in that decision.

wherein it is said that *"the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it."* (Emphasis ours.)

If a copyright owner may grant an exclusive license, it is obvious that he may grant something less than such an exclusive license, to wit, an exclusive license for a limited time, with protection thereafter, in respect of licenses to others, for a limited time. In granting an exclusive license, either for the duration of his copyright or for a limited time, the licensor agrees with the licensee that he will not license the motion picture, under the copyright, during the duration of the license, to any competitor of the licensee. In the case of the exclusive license for a limited period of time, it is denied by the Government that the licensor may agree with the licensee that he will not license a competitor of the licensee until after the lapse of a given period of time after the end of the limited period of time for which the license is granted. Since, however, as above explained, the licensor may agree with the licensee never to license anyone else under the copyright, the logical absurdity of the Government's argument is evident. The agreement attacked as illegal is palpably less restrictive and discriminatory than the exclusive license agreement which, it must be admitted, is legal. As was said by this Court in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57:

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely *or on the terms the patentee chooses to impose.* This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act." (Emphasis ours.)

The owner of a copyright monopoly has a legal right to exploit it to the best advantage. Unlike the owner of a patent monopoly, who frequently makes use of exclusive licenses, the owners of copyright monopolies in feature motion pictures have found that the most advantageous way of exploiting their legal monopolies is through granting a succession of licenses for limited times, first to the higher-class theatres, then to the next best theatres, and so on down the line until the poorest theatres are reached, with agreed-upon time intervals in between each run to protect the exclusivity of the prior-run theatres.

Although the use of this method is to some extent dictated by consideration of the prohibitive expense,* running into the millions of dollars, which would be involved if thousands of positive prints (instead of the hundreds that are presently made) had to be made of each negative in order to service all of the many thousands of theatres which might desire to exhibit the picture at one time, if thus released, (R. 1895-9), the principal reason for licensing in a sequence of runs is proper exploitation of the picture to yield the most revenue.

The largest revenue-producing theatres are the first-run theatres, to which the highest admission prices can be charged. These theatres are the best appointed and most luxurious playhouses, and therefore cost the most to build and operate (pp. 5-6, *ante*). That a premium price is in order for the first opportunity to view a motion picture after release is evident (R. 418-9). For later exhibitions, a lesser price has to be charged in any event. No apology need be made for the obvious fact that the more people

*The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800 (R. 670-1).

who can be induced to view a particular picture in the first-run theatres at the highest prices, the greater the revenue of both the distributor and the exhibitor. The exclusive right to show a motion picture immediately after release is a valuable right, and by virtue of the copyright monopoly a distributor is entitled to set up his licenses in such a way as to make his aggregate revenue from all showings of the picture as great as possible. He endeavors to do this by inducing as many patrons as possible to view the picture in first-run theatres, and clearance is one of the principal means employed (R. 422-3, 705-7, 1091, 1085-6, 2011, 1899-1923).

The advertising value of a first-run exhibition to subsequent-run exhibitors is very great. If a motion picture is a success in the leading first-run metropolitan theatres, its success is assured in the subsequent runs. The distributor and the first-run exhibitor, therefore, spare no effort and expense, through advertising and exploitation, to induce as many persons as possible to view the picture in the first-runs. This not only augments the revenue of the first-runs but greatly benefits the subsequent-runs, whose box-office receipts are increased by advertising and exploitation which costs them nothing (p. 10, *ante*).

The subsequent-run exhibitor, naturally enough, wants to pay as little as possible for his pictures, to benefit as much as possible from first-run advertising and exploitation before it is dissipated, and to draw as much as possible on the patronage counted upon by the first-runs. The shorter the clearance the more successful he will be. Hence it is apparent that his demand for "reasonable" clearance, about to be discussed, is based upon economic, not legal considerations.

2. Clearance, in conjunction with an exclusive license for a limited time, is a diminution of exclusiveness, and need not be "reasonable".

The Court below conceded the propriety of clearance agreements, overruling the contentions of the Government in this respect (F. F. 78, R. 3674). It held, however, that clearance must be "reasonable," although it did not indicate what criteria of reasonableness should be, except that the clearance granted "should not be in excess of what is reasonably necessary to protect the licensee in the run granted." (Decree II, 4, R. 3695-6). This concept of "reasonableness," as applied to clearance, contradicts the basic concept of the right to grant an exclusive license under copyright for the term of the copyright, and we believe it to be completely untenable. So far as we are aware, no other judicial decision gives credence to the idea that a clearance, viewed by itself and apart from the exclusive license for a limited time which it is granted to protect, must be reasonable, particularly that it must be reasonable in the light of the licensee's requirements, or those who expect to be licensed later on, not those of the owner of the copyright. In so holding, the Court below relied upon cases approving agreements under the general law, by vendors of income-producing property not to compete with the vendees for a given time within a given area, but not involving copyright or patent monopolies, such as *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179. (Opinion below, R. 3530-1). Obviously a purchaser of property has much more limited rights in obtaining protection from his vendor against competition than the licensor under a statutory monopoly has to restrict his licensee from competing with him, since the last-named restriction may clearly be absolute.

Clearance, as heretofore pointed out, in conjunction with an exclusive license for a limited time, represents a diminution of the usual rights of the one who grants an exclusive licensee, not an expansion. Those subsequent-run exhibitors who protest against "unreasonably" long clearances have no standing to protest, because the only rights they have, or may have, emanate from the copyright owner, who can divide his statutory monopoly as he sees fit with whom he sees fit. Their protests arise out of economic considerations, and have no legal basis. Clearance is not a restriction upon the prior-run licensee, although it cuts down the rights which *may* be given him by an exclusive license. It is likewise not a restriction upon subsequent-run licensees, who always take subject to what has been given to the prior-run licensees. If, however, it was a restriction, the only judicial criterion of which we know to test its legality would be that all types of restrictions may be imposed under statutory monopolies which are "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," and clearance obviously is. *General Talking Pictures Corporation* v. *Western Electric Co.*, 305 U. S. 124, p. 127, approving *U. S.* v. *General Electric Co.*, 272 U. S. 476. If the type of restriction is justified, we know of no limitations upon the degree to which it may be employed. The subsequent-run exhibitor is no more entitled to complain than any member of the public who may be refused a license under a patent or copyright. His complaint amounts to nothing more than that he thinks he has paid too much for the picture in view of the prior-run's clearance. He is asserting his belief that he ought to pay less or that the clearance should be less.

Nor, aside from the legalities of the situation, does the subsequent-run exhibitor have any justifiable complaint.

He gets precisely what he pays for. Instead of paying the large film rentals, often running into thousands of dollars, which the prior runs have to pay, he may pay as little at $10 to $15 flat rental, and generally pays very much less than the cost of striking a positive print of the picture (R. 1898, 671). At the same time he gets the benefit, without cost, of the extensive advertising and exploitation engaged in by the prior runs, and need therefore himself expend very little if anything on advertising.

3. The idea that clearances must be "reasonable" originated in a waiver of legal rights by the major defendants (but not Universal) in the Consent Decree.

This idea of the Court below concerning the required reasonableness of clearances evidently had its origin in the Consent Decree, one of the chief purposes of which was to settle the complaints of independent exhibitors. In summing up Government counsel contended that clearances were "principally in the hands of theatre operators rather than distributors" (R. 2574). While the Government contended that clearances had been fixed by combinations and conspiracies among such theatre-operators, both major and independent, which would, of course, be illegal, whether reasonable or unreasonable, the decision of the major defendants to settle the complaints by arbitration under the Consent Decree is otherwise readily explicable. These complaints were essentially economic, not legal, in nature. Having licensed a picture at a particular price the independent exhibitor naturally desired: (1) to cut in on the prior-run business as much as possible; and (2) to participate as much as possible in the benefits of the exploitation and advertising of the picture by the prior-runs before it became dissipated.

His complaints about "unreasonably" long clearance therefore really were nothing more than complaints that his bargain was not good enough.

This proceeding was instituted by the Government through the filing of a petition in 1938. In 1940 the five major defendants entered into a Consent Decree with the Government (R. 3373). Universal was not a party to these arrangements (R. 3373). This Consent Decree was, of course, a compromise between the contentions of the Government and those of the major defendants. In Sec. VIII thereof (R. 3379-80) provision was made for the settlement of clearance disputes between the major distributors and independent exhibitors. Clearance agreements were recognized as "essential in the distribution and exhibition of motion pictures," but the parties to the Consent Decree agreed that clearances should be reasonable "as to time and area," and as to the factors to be taken into consideration in determining such reasonableness.

The Consent Decree set up an arbitration system under the supervision of the United States District Court with an Appeal Board. It was provided that when any clearance was questioned as unreasonable, the arbitrator should have the power to make findings as to whether or not it was unreasonable, and if found to be such, to make an award fixing the maximum clearance between the theatres involved.

Among the factors to be considered by the arbitrators in the determination of reasonable clearances (R. 3380) were (1) the historical development of clearances in the particular area wherein the theatres involved are located; (2) the admission prices of the theatres involved; (3) character, location and operating policy of the theatres involved; (4) the status of the theatres involved as revenue-producers

to the distributors; (5) extent of competition between the theatres; and (6) all other business considerations except affiliation with a distributor or with a circuit of theatres.

The Decree appealed from does not lay down any such criteria for the determination of reasonable clearance. Indeed, it lays down as its sole criterion (R. 3695-6) the requirements of the licensee for protection (a matter which would appear to be inadmissible as the exclusive guide for a distributor under the holding of this Court in *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208), and not normal and reasonable adaptation to the securing of reward by the copyright owner.

In the Petition which it filed in 1938, and in the Amended and Supplemental Complaint (R. 3137) the Government claimed, *inter alia*, that the major defendants were monopolizing the exhibition of motion pictures, and were dominating the motion picture industry through concertedly imposing unreasonable restrictions of interstate commerce upon independent exhibitors and the public. Among such restrictions claimed to have been illegally imposed through concerted action were clearances. The Consent Decree provisions respecting clearance represent, therefore, a compromise between the Government and the major defendants. What is incorporated in the Consent Decree with respect to clearance has, therefore, no necessary relation at all to what the law actually is. The major defendants were willing, for reasons best known to themselves, perhaps no more than to get the very numerous independent exhibitors off their necks, to consent to the determination by arbitrators of "reasonable" clearances, thus waiving the right each had under copyright to independently fix, in negotiations with exhibitors, such clearances as it might see fit.

The Consent Decree, therefore, by agreement between the major defendants and the Government, established an arbitration tribunal to function in much the same manner as the Interstate Commerce Commission, through Congressional edict, functions in the determination of reasonable rates. The principal function of the Interstate Commerce Commission is to determine what is reasonable in the way of rates, taking into consideration the varying interests of the railroads, the shippers and the public. The arbitration tribunals set up under the Consent Decree, considering the various factors specified therein, determined what, *in their opinion*, was reasonable in the way of clearance, in respect of the varying interests of the distributor, exhibitor and public. Their powers were solely derived from the agreement between the Government and the five major defendants, embodied in the Consent Decree, and cannot, we submit, be applied by the Court, without Congressional sanction, to a non-consenting defendant.

Under Article V of the Decree issued by the Court after trial, which abandons the arbitration system (R. 3700), no impartial tribunal can function to determine the reasonableness of clearance as among the distributor, exhibitor and public. Thus, even assuming that it were the law that a distributor is limited to reasonable clearance, which we think it clearly is not, the concept is impossible of practical administration except by an administrative agency created by Congress. Under the Decree, as laid down by the Court, the distributor and exhibitor deal at arm's length. Neither can be expected to impartially consider the relative needs of the other, or of the public. The law is, we submit, that the distributor who possesses a statutory monopoly is required to consider only his own needs, provided he acts independently.

4. There is no proof that Universal granted any "unreasonable" clearances.

Only one exhibitor testified in the case, and he was called by a defendant. He did not complain of "unreasonable" clearance (R. 1379-1404).

The decisions of the Appeal Board in arbitrations, which reduced various clearances, and which were admitted in evidence with considerable hesitation against the major defendants, were not admitted against Universal, since it was not a party to the Consent Decree (R. 308).

Thus there is no evidence at all binding upon Universal that any Universal clearance was unreasonable, even in the opinion of some arbitrator or the Appeal Board, much less by admeasurement in accordance with legally prescribed criteria. Even as against the major defendants there is nothing more than the opinion of the members of the Appeal Board to that effect, employing criteria agreed upon between the Government and major defendants only, and not incorporated into the final decree.

The Decree (II, 4) requires that a distributor justify the "reasonableness" of any clearance attacked. Owing to the lack of prescribed standards, and the fact, as heretofore pointed out, that "reasonable clearance" is an economic, not a legal concept, such justification is, we submit, impossible,* aside from the fact that it would seem clear that Congress alone can relieve a plaintiff of the burden of proof which is ordinarily his.

*At the hearing upon the Government's motion for a temporary injunction the following colloquy took place between Judge Goddard and Government counsel:

> The Court: I wish one of the first things you would do is to define affirmatively what unreasonable clearance is.
>
> Mr. Wright: That is something that most of us have been struggling with for years without getting very satisfactory results (R. 3453).

II.

UNIVERSAL'S LICENSES UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE PARTICIPATED IN ANY CONSPIRACY TO MONOPOLIZE OR RESTRAIN INTERSTATE COMMERCE UNDER THE SHERMAN ACT, LEGALLY RESTRICTED THE GRANT IN REQUIRING THE LICENSEES TO REFRAIN FROM COMPETITION WITH THE LICENSOR WHICH WOULD RESULT IN DEPRECIATING OR DESTROYING THE VALUE OF THE LICENSOR'S RESIDUARY INTEREST IN MAKING SUBSEQUENT-RUN LICENSES.

1. **While the decree recognizes the right of large distributors, who own theatres, to control the admission prices charged therein, it inconsistently prevents Universal, a medium-sized distributor without theatres, from protecting its revenue by a covenant against the lowering, during the run of a feature picture licensed by it, of admission prices fixed by exhibitors.**

Paragraph IV of the Decree (R. 3700) reads as follows:

> "Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and *upon such terms, and subject to such conditions as may be satisfactory to it*, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries." (Emphasis ours.)

Under this provision of the Decree the major defendants as distributors, may license their pictures to their subsidiary exhibition companies for exhibition in any of the theatres which they own, and may freely specify the admission prices

to be charged therefor to the public. The Decree, however, prohibits a non-integrated medium-sized distributor, such as Universal, from licensing its copyrighted pictures, even to an independent theatre not claimed to be implicated in any monopolizing, on condition that such theatre shall not reduce its current admission price during the run of the picture.

Thus Universal, a medium-sized distributor without theatres and no potentialities for monopolizing by itself, cannot, in contractual dealings with a small exhibitor, and in order to protect its revenue and to prevent the depreciation or total destruction of the value of its residuary interest in respect of the making of subsequent-run licenses, do the same things which the five largest distributors in the business, in their dealings with their controlled exhibition units, may freely do—and, absent conspiracy or monopolizing, should have the right to do. This despite the fact that neither the non-integrated distributor nor the small exhibitor, or both combined, can, by any conceivable stretch of the imagination, impose their will upon competition.

2. A licensor under copyright, having the right to exclude all others completely, may let down the bars and permit competition against himself to the extent he sees fit, and, in requiring the maintenance of current admission prices, Universal so acted.

In exploiting its copyrighted feature motion pictures, Universal elected, as it was entitled to do, to license the same in a series of runs, with agreed-upon time intervals in between runs, instead of granting simultaneous non-exclusive licenses to many theatres, or exclusive licenses for the duration of its copyrights to one or more theatres. The amount of revenue drawn to the box office in each of these runs,

and consequently the film rental Universal receives, obviously depends upon the admission price charged and the number of people paying that admission price during the run. It is, of course, highly important to Universal that the showings of its feature pictures first-run should be successful, and it could therefore be expected to select the best-equipped and best-managed theatres for that run. These theatres were, of course, those which could successfully charge the highest admission prices. Universal would naturally give to these theatres clearance over succeeding runs, sufficient to permit them to recoup their film rentals and make a reasonable profit, at their regularly charged admission prices. The gross receipts at such first-run theatres being the greatest, it followed that Universal would obtain the largest film rentals therefrom. Such film rentals were necessarily based upon the expected revenue-producing capacity of such first-run theatres, at the admission prices which they had been charging prior to the making of the license, and, in the case of percentage contracts, upon the actual box-office receipts.

Following the first-run, Universal, of course, contemplated the licensing of second, third and fourth-run theatres, and other subsequent runs. In each successive run, as heretofore explained (pp. 5-7, *ante*), the quality of the theatres licensed would depreciate, and with such depreciation of quality, the admission price charged would decrease. Thus in licensing a first-run theatre, and in agreeing to accept a certain amount of film rental therefrom, Universal necessarily had in mind the licensing of many other theatres on many other runs.* Its first-run

*The income from such runs "may mean the difference between black or red ink on his ledgers." T. N. E. C. Monograph No. 43.

license, being limited in time, expressly reserved the right to grant subsequent-run licenses following the first-run, after the expiration of the clearance period (pp. 5-7, *ante*, G. X. 289-290).

The first-run theatre had, in each instance, set its own admission price, which it believed to be appropriate, in view of its appointments, policy of operation, etc. (F. F. 63, R. 3670; 433, 718, 968, 999, 1382-3). Such admission price is necessarily always a very important factor in inducing any distributor to license a particular theatre first-run as against competing theatres, and properly so, in view of the distributor's clear legal right to exploit its statutory monopoly to the best advantage. Reduction of such admission price would mean instant depreciation of the value of the subsequent-run licenses remaining for disposition in Universal's hands, or even destruction thereof. This for the reason that the price differential existing between the admission prices of the first-run theatre and each of the subsequent-runs was of the greatest importance to such subsequent runs, for with any lessening in the disparity between such admission prices, the first or prior-run theatre would invade to a greater or less extent the lower-price patronage counted upon by the subsequent-run theatres (R. 726-7, 1984, 2112). It is to a considerable extent on the basis of such disparities that clearances are fixed (R. 1085-6, 1091).

It is, therefore, clear that when Universal required prior-run theatres to maintain their current admission prices as a minimum, during the run of the licensed picture, it was entitled, as a licensor under copyright, to do so, in order to prevent such licensees from competing with it *pro tanto*,

and depreciating or destroying the value of the subsequent-run licenses it planned to make.*

As this Court pointed out in *General Talking Pictures Co.* v. *Western Electric Co.*, 305 U. S. 124, p. 127, and as the *Bement, General Electric,* and multitudinous other cases cited later herein, show, a restrictive license is clearly legal, so long as the conditions upon which it is granted are not inconsistent with the scope of the monopoly. The restrictions here in question are palpably consistent therewith. The essential quality of any monopoly is the power to fix the price, which in a legal monopoly becomes the right to fix the price. When, therefore, a licensee is granted permission to share in the legal monopoly, it is plain that his participation can be limited *pro tanto* by a price restriction.

One who gives a license under a monopoly is not required to permit the licensee to compete with him to the fullest extent possible, but for the most obvious reasons may restrict the licensee's competition with him to any extent he pleases, just as he may elect to totally forbid all competition with him; or to relax such prohibition in respect of particular persons.** It is foolish to contend that the prohibition against competition with the owner of the copyright may be relaxed in respect of particular persons and not as to others, but must be relaxed, if at all, in the case of a particular licensee, to the fullest extent. This is plainly not so.

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*In *Schine Chain Theatres Inc.* v. *U. S.* (No. 10, Oct. Term, 1947), Government counsel conceded at the trial that "there is clearly no conflict with the Sherman Act" in licensing pictures with minimum admission prices, so long as the restraint is reasonable (Schine Record, R. 493-4).

**In addition it is clear enough that the exhibitor's ability to pay the film rental bargained for may be seriously impaired by a reduction in his admission price, while at the same time the reputation of the picture being shown may be seriously injured.

The foregoing argument is directly supported by *Bement* v. *National Harrow Co.*, 186 U. S. 70 and *U. S.* v. *General Electric Co.*, 272 U. S. 476, which 25 years after the decision in the *Bement* case unanimously approved it.

3. The licensor does not extend the scope of its monopoly because it does not interfere at all with the price charged for entertainment it does not supply.

The admission price fixed by the exhibitor, and required to be maintained by the distributor, is a *minimum price*. In other words, the distributor requires that at least as much as this be charged to view the exhibition of its copyrighted picture, irrespective of what other pictures are shown or entertainment provided. The exhibitor is entirely free to add to this *minimum price* any amount he sees fit to compensate him for the additional pictures or entertainment provided. The Government, however, treats the case as though a definite price had been fixed by the licensor for all the entertainment provided, which is clearly contrary to fact.*

4. Limited licenses under copyrights, the purpose of which is to restrict the licensee from competing in some specified manner with the licensor, are legal.

Licensing of this character under patents has been uniformly approved by the Courts, and never disapproved, so far as we know, in respect of copyrights. The controlling principles are obviously no different, as heretofore pointed out (p. 41-3 *ante*).

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*In *Interstate Circuit* v. *U. S.*, 306 U. S. 208, 228, this Court said "we have no occasion now to pass upon these or related questions."

(a) IN GENERAL:

General Talking Pictures Corp. v. *Western Electric Co.*, 305 U. S. 124, 127; *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267, 268-270 (C. C. A. 6th), certiorari denied 300 U. S. 667; *Owens Bottle Co.* v. *Libbey Glass Co.*, 9 F. (2d) 564, 565 (C. C. A. 6th); *Innis, Speiden & Co.* v. *Food Machinery Co.*, 2 F. R. D. 261, 262-264 (D. Del.); *Wilson* v. *Rousseau*, 16 U. S. 225 (1845); *Burr* v. *Duryee*, Fed. Cas. No. 2190 (C. C. D. N. J., 1862); aff'd. 68 U. S. 531 (1863); *Steam Cutter* v. *Sheldon*, Fed. Cas. No. 13,331 (C. C. D. Vt., 1872); *Dorsey* v. *Bradley*, Fed. Cas. No. 4015 (C. C. N. D. Ill., 1886); *American Refining Co.* v. *Gasoline Products Co.*, 294 S. W. 967 (Tex. Civ. App. 1927).

(b) DELIMITATION OF TERRITORY IN WHICH LICENSE IS OPERATIVE:

See *Hobbie* v. *Jennison*, 149 U. S. 355, 363-4; *Cincinnati Siemens-Lungren Gas Illuminating Company* v. *Western Siemens-Lungren Company*, 152 U. S. 200, 205; *St. Louis Street Flushing Machine Co.* v. *Sanitary Street Flushing Machine Co.*, 178 Fed. 923, 926-927 (C. C. A. 8th).

(c) LIMITATION OF QUANTITY WHICH MAY BE MADE;

Mitchell v. *Hawley*, 16 Wall. 544, 546, 548-9; *Aspinwall Manufacturing Co.* v. *Gill*, 32 Fed. 697, 698 (C. C. D. N. J.); and *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431, 432 et seq. (C. C. A. 7th).

(d) RESTRICTION TO ARTICLES OF PARTICULAR TYPE OR CHARACTER:

Bement v. *National Harrow Company*, 186 U. S. 70, 72-75, 90; *Cinema Patents Co., Inc.* v. *Columbia Pictures Corporation*, 62 F. (2d) 310, 311-312 (C. C. A. 9th); *Pope Manufacturing Co.* v. *Owsley*, 27 Fed. 100, 104 (C. C. N. D. Ill.); *George Close Co.* v. *Ideal Wrapping Mach. Co.*, 29 F. (2d) 533, 534-535 (C. C. A. 1st); and *Good Humor Corporation of America* v. *Popsicle Corporation of United States*, 59 F. (2d) 344 (D. Del. 1932).

(e) RESTRICTION AS TO USE FOR WHICH ARTICLES MAY BE MANUFACTURED:

Rubber Company v. *Goodyear*, 9 Wall. 788, 799; *Vulcan Mfg. Co.* v. *Maytag Co.*, 73 F. (2d) 136, 138-139 (C. C. A. 8th), appeal dismissed 294 U. S. 734; and *Sinko Tool & Mfg. Co.* v. *Casco Products Corporation*, 89 F. (2d) 916-918 (C. C. A. 7th).

(f) RESTRICTION TO PARTICULAR TYPES OF MARKETS:

See cases cited, *supra*, under (d) and (e), and also *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179-182, and 305 U. S. 124, 127; *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628, 630-631 (C. C. A. 8th); *Libbey Glass Co.* v. *McKee Glass Co.*, 216 Fed. 172, 176 (W. D. Pa.), affd. 220 F. 672 (C. C. A. 3rd), certiorari denied 238 U. S. 624; and *Radio Craft Co.* v. *Westinghouse Electric & Mfg. Co.*, 7 F. (2d) 432 (C. C. A. (3rd)).

(g) RESTRICTION OF SELLING PRICE OF ARTICLES MANUFACTURED UNDER LICENSE TO VEND, USE AND SELL:

Bement v. *National Harrow Co.*, 186 U. S. 70 (1902); *U. S.* v. *General Electric Co.*, 272 U. S. 476 (1926); *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7th, 1907); *Indiana Mfg. Co.* v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365 (C. C. A. 7th, 1907); *Goshen Rubber Works* v. *Single Tube A. & B. Tire Co.*, 166 Fed. 431 (C. C. A. 7th, 1908); *Massie* v. *Asbestos Brake Co.*, 123 Atl. 155 (Ct. of Chancery, N. J., 1922); *Casco Products Corp.* v. *Kenny*, 24 U. S. P. Q. 171 (S. D. N. Y., 1935); *Straight Side Basket Corp.* v. *Webster Basket*, 82 F. (2d) 245 (C. C. A. 2nd, 1936); *American Lead Pencil Co.* v. *Musgrave Pencil Co., Inc.*, 170 Tenn. 60; 91 S. W. (2d) 573 (1936); *Ceramic Process Co.* v. *Cincinnati Advertising Prod. Co.*, 28 F. Supp. 794 (S. C. Ohio, 1939); appeal dismissed, 116 F. (2d) 497 (C. C. A. 6th, 1940); *General Electric Co.* v. *Willey's Carbide Tool Co.*, 33 F. Supp. 969 (W. D. Mich., S. D., 1940); *United States* v. *Wayne Pump Co.*, 44 F. Supp. 949 (N. D. Ill., 1942); appeal dismissed, 317 U S. 200 (1942); *United States* v. *Line Material Co.*, 64 F. Supp. 970 (E. D. Wisc., 1946); *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397 (Statutory Court, D. C., 1946).

Nearly all of the foregoing cases involved plural licenses.* Particular reference is made to the *U. S. Gypsum*

*In its opinion (R. 3528) the Court below, while conceding that a single license of this kind might be legal, condemned the method of licensing because "other licensors and exhibitors are always in contemplation." Apparently it meant that Universal knew that other licensors were also employing the restriction, and that Universal was licensing many exhibitors. The legal significance of this, however, we are unable to understand, since Universal cannot prevent the former and cannot avoid the latter.

and *Line Material* cases. The well-settled rule is stated in the Restatement of the Law of Contracts by the American Law Institute as follows:

> "A, a proprietor of a patent, licenses C, D, and E to manufacture the patent article and to sell it for not less than a stated price. The condition of the license fixing the price is not illegal." (Illustration 12, Section 515).

5. The doctrine of the *Bement* and *General Electric* cases.

In *Bement* v. *National Harrow Co.*, 186 U. S. 70 (1902), a case decided after the enactment of the Sherman Act, this Court held in a unanimous decision that a patent licensor might legally prohibit his licensee from selling at a lower price than the licensor's.

At p. 88 this Court pointed out that the plaintiff was the absolute owner of a monopoly recognized by the Constitution and by the statutes of Congress, and that the Sherman Act clearly did not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon a licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and price to be demanded therefor (p. 92).

It held at p. 93 that the provision in regard to price was "an appropriate and reasonable condition", *since the owner of the patented article might charge such price as he chose and could license another on condition that he sell at a specified price.* (Emphasis ours.)

In 1926, in *U. S.* v. *General Electric Co.*, 272 U. S. 476, the doctrine of the *Bement* case was attacked by the Government, and unanimously sustained.

In this case the General Electric Company, which owned three important improvement patents on the making of the modern tungsten incandescent lamp, licensed the Westinghouse Electric and Manufacturing Company to make, use and vend incandescent lamps under such patents. It restricted Westinghouse from selling such incandescent lamps, however, for more than it, the licensor, might charge. Westinghouse manufactured and sold incandescent lamps under this license, and the United States brought a proceeding to restrain General Electric and Westinghouse on the ground that they were violating the Sherman Act.

This Court held that the restriction contained in the license was valid, after pointing out that it was well settled that where a patentee makes the patented article and sells it, he can exercise no further control over what the purchaser may do with the article after his purchase. It noted, however, that the question before it was a different one "which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in exercising the right to sell". In this connection it said that if the licensor went further than to grant a license to make and use, and granted a license to make, use and sell, he might limit the selling price, because such a condition of sale would be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" since "one of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory" (pp. 489-90).

Thus "when the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will

necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself' " (p. 490).

It was claimed in the *General Electric* case that the *Bement* case had been in effect overruled. It was expressly held, however, that the overruling of *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, by *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, and the disapproval of the so-called *Button Fastener* case* in the *Motion Picture Patents* case, did not carry with it the overruling of the *Bement* case, and said that "The price at which a patented article sells is certainly a circumstance having a more direct relation and is more germane to the rights of the patentee than the unpatented material with which the patented article may be used. Indeed, as already said, price-fixing is usually the essence of that which secures proper reward to the patentee" (pp. 491-4).

6. Subsequent decisions of this Court cast no doubt on the Bement and General Electric doctrine.

The unanimous decisions in *Bement* v. *Harrow*, and *United States* v. *General Electric* have not been limited or questioned by this court. The *Bement* case was referred to in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 338, 345 (1908), but it was distinguished as not involving any question of resale prices; it was referred to with apparent approval in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373,

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*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288.

401 (1911); it was referred to with approval by Mr. Justice White in his dissenting opinion in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 61 (1912); it was distinctly reaffirmed in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 39-40 (1912); and its doctrine was applied in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 58 (1918).

The *General Electric* case was cited with approval in *Carbice* v. *American Patents Development Corp.*, 283 U. S. 27, 31 (1931), and it was expressly approved and applied in *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124, decided in 1938, where the Court stated at page 127:

> "That a restrictive license is legal seems clear. *Mitchell* v. *Hawley*, 16 Wall. 544. As was said in *United States* v. *General Electric Co.*, 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.'"

It was also cited with apparent approval and distinguished in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 228 (1939), and in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456 (1940), where the Court again stated the well recognized rule as follows:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using or selling his invention. R. S. § 4884, 35 U. S. C. § 40, * * * He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by

> attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give."

In the *Ethyl* case the Court held that the effort to fix the resale price of jobbers was improper, but no question was raised as to the provision in the licenses to the refining companies by which the licensees were required to sell their ethyl gasoline "at a certain fixed price differential above the average net sales price of the licensees' best non-premium grade of gasoline" (309 U. S. at 448).

Similarly, in two recent cases involving situations which were held to amount to resale price maintenance, this Court was careful to distinguish such situations from the right of a licensor to fix the original sale prices of its licensees. Thus, in *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252 (1942), the Court stated:

> "There is thus no occasion for our reconsideration, as the Government asks, of *United States* v. *General Electric Co., supra*, on which appellees rely. The Court in that case was at pains to point out that a patentee who manufactures the product protected by the patent and fails to retain his ownership in it cannot control the price at which it is sold by his distributors (272 U. S. at 489)."

And in *United States* v. *Masonite Corp.*, 316 U. S. 265, 277, 278 (1942), the Court again said:

> "We do not have here any question as to the validity of a license to manufacture and sell, since none of the 'agents' exercised its option to acquire such a license from Masonite. Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the

> *General Electric* case which dealt with the license to Westinghouse Company. * * * As Chief Justice Taney said in *Bloomer* v. *McQuewan*, 14 How. 539, 549, when the patented product 'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.'"

Thus, it can be seen that this Court has carefully distinguished the *Bement* doctrine from the illegality found in such cases as the *Carbice* and *Mercoid* cases, in which unpatented devices, processes or materials were tied in to the use of the patented device or process, and from the cases above cited in which the control of the resale prices of patented articles was condemned, and from such situations as those involved in the *Standard Sanitary* case and the *Masonite* case, in which there was concerted action among competitors.

Since 1925, the Government has in a number of recent cases urged this Court to overrule the *General Electric* case; for example, in *U. S.* v. *Univis*, *U. S.* v. *Masonite*, and the *Line Material* case, *supra*, but so far without success. It has also unsuccessfully urged Congress on a number of occasions to abolish the right to grant limited licenses; for example (Senate Document No. 95, 76th Congress, July 17, 1939). The National Planning Commission in its report submitted to Congress by President Roosevelt on June 18, 1943, stated that the proposal to outlaw such limitations in patent licenses "would not be a beneficial innovation in our patent system." (House Document No. 239, 78th Congress, First Session; see page 9.)

It has sometimes been suggested that the doctrine of the *General Electric* case is to be restricted to a single license

from the patent owner, since only a single license to Westinghouse from General Electric was involved in that case. Numerous cases, as above pointed out, hold this contention to be unsound. Yet it is apparently approved in the Decree of the Court below which forbids a defendant to engage in a system of clearances with exhibitors, it being admitted that the granting of clearance is valid.

It is also to be noted that in the Court's opinion (R. 3528), it declined to decide "whether a copyright owner might lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation." It seems to conclude that it is the making of many licenses which is illegal, but in its decree enjoins the fixing of any minimum admission price (R. 3695).

But Judge Stephens stated for the statutory court in *U. S.* v. *U. S. Gypsum Co., supra,* at pages 431-2:

> "It can make no difference so far as the Sherman Act is concerned whether the patentee licenses no one, or licenses one, two, three, four, five, or six or a dozen, others. Putting this otherwise, if the patent laws, despite the Sherman Act, do not legitmatize a monopoly in the manufacture and sale of a patented product by a patentee-licensor and several licensees, they cannot legitimatize a monopoly by the patentee-licensor and one licensee or by the patentee alone, because in each instance the exclusion of the public from manufacture, use or sale within the field marked out by the patent is exactly the same, i.e., complete. Once it is recognized that a patentee may divide his monopoly, no limit can reasonably be put upon the number of persons he may see fit to license, provided always the terms and conditions of the licenses do not go beyond those which normally and

reasonably secure the rewards of a patent monopoly. If in the *General Electric* case the Court had held that the patent laws do not permit any division of his monopoly by a patentee and had therefore stricken down the Westinghouse license (and the additional non-price-fixing licenses), General Electric itself would then have been in control of all of the manufacturing, using and selling of the electric lamps covered by the patents. Although but one price fixing license happened to be involved in the *General Electric* case, it would be an irrational fixation to construe the decision of the Court as limiting licensing under price fixing restrictions to one competitor, since the public is equally excluded and equally subjected to the patentee's price whether there is no license, one licensee or many. Cf. *United States* v. *Line Material Company*, 64 F. Supp. 970 (D. C. Wis. 1946); Laurence I. Wood, Patents and Anti-Trust Law (C. C. H. 1942) 182-3."

7. This is an a fortiori case.

In the *Bement* and *General Electric* cases the licensor was permitted to regulate the sales price of articles made by a licensee, and consequently at all times owned by it. In our case the licensee never owns anything. That which is regulated is the exercise *per se* of the intangible rights licensed under copyright.

In the *Bement* and *General Electric* cases the licensor enforced his own price. In our case all that the licensor does is to ban a change in the licensee's price, which transforms the licensee from a non-competitor into a competitor with the licensor.

Nor can any question arise in this case as to the price being fixed on an article not completely covered by the statu-

tory monopoly, which was one of the points made by the Government in its argument in the *Line Material* case. 9

8. The arrangement would be lawful even if the feature pictures were not copyrighted.

In *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64, this Court said:

> "In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business, or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as to not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding."

The decisions in *Fowle* v. *Park*, 131 U. S. 88; *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6th, 1898), decree modified and aff'd 175 U. S. 211, and *Cincinnati Packet Co* v. *Bay*, 200 U. S. 179, are of similar purport, and these principles apply with special force to dealings in feature motion pictures which are the originations of the licensor, and would not exist save for his efforts. That he temporarily bails a positive print of the picture in order to permit the exercise of the intangible exhibition rights, instead of selling the print, makes the case considerably stronger for the application of these principles, and the fact that the licensor grants exclusive licenses limited in time, thus reserving the right to make subsequent-run licenses,

clinches the case, we submit, for the licensor's right to protect himself.

That the law is well-settled to the effect that he has such right clearly appears from Sec. 516 of the Restatement of the Law of Contracts of the American Law Institute, which provides that "The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: * * * (b) a bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor."

III.

THE ROYALTY FOR A LICENSE UNDER COPYRIGHT IS PROPERLY MEASURED BY A PERCENTAGE OF THE GROSS RECEIPTS.

When an exhibitor pays a flat rental for a license under copyright to exhibit a feature picture which may or may not be a success in his theatre, he assumes a fixed charge which may exceed his overhead and expenses for additional entertainment for the period of exhibition. Percentage contracts relieve him from this danger. He pays in accordance with the picture's success. This is eminently fair both to the distributor and the exhibitor.

Such percentage contracts are frequently used in connection with the rental of store properties, and no method of measuring royalties would seem to be more equitable or appropriate than a specified percentage of the licensee's selling price. While it gives the licensor an interest in the success of the licensee's business, any royalty arrangement dependent upon the quantity of business done by the licensee

would do likewise, e.g., a provision for the payment of some flat amount per unit of sales, which undoubtedly is one of the standard methods of measuring royalties under patents. Indeed, in view of the fact that the minimum admission price is pegged, that is what the percentage arrangements in our case amount to.

So obviously proper is this arrangement that the Government conceded the fact in the *General Electric* case, as shown by the following statement in the lower court's opinion (*U. S. v. General Electric Co.*, 15 Fed. (2d) 715, 718):

> "The other provisions of the license are not unusual, except the exaction of 10 per cent. royalty on all sales above 15 per cent. of the total sales of electric lamps having tungsten filaments, and only of 2 per cent. royalty on a total business of 15 per cent. or less. As to this provision, government counsel conceded on the hearing that it is only reasonably necessary to the protection of the business of the owner of the patent."

Moreover the arrangement upheld in *Standard Oil Co. v. U. S.*, 283 U. S. 163, at pp. 172-175, would seem to make ours an *a fortiori* case. There it was held that it was legal for three of the largest integrated oil companies and a patent holding company, owning patents for the "cracking" of gasoline, but not dominating the production of the total supply of gasoline, to cross-license each other and to provide for the division of royalties accruing to each from their licensing of third parties.

IV.

IT IS CLEAR THAT UNIVERSAL, WHEN LICENSING UNDER COPYRIGHT TO INDEPENDENT EXHIBITORS, NOT CLAIMED BY THE GOVERNMENT TO HAVE PARTICIPATED IN ANY COMBINATION OR CONSPIRACY TO MONOPOLIZE OR RESTRAIN INTERSTATE COMMERCE, WAS ENTITLED TO LICENSE AS MANY OF ITS PICTURES AT ONE TIME UNDER ONE CONTRACT, TO AN EXHIBITOR OPERATING ONE OR MORE THEATRES, AS A LICENSEE WAS WILLING TO TAKE; OR EVEN TO CONDITION THE LICENSING OF ONE PICTURE UPON THE ACCEPTANCE OF OTHERS (OF WHICH THERE WAS NO EVIDENCE AGAINST UNIVERSAL), AND WAS LIKEWISE ENTITLED TO COMMIT ITS PICTURES TO SUCH LICENSEES FOR A TERM OF YEARS.

We later herein discuss the legality of a non-monopolistically situated distributor's conditioning the licensing under copyright of one feature picture upon the licensee's willingness to take one or more other copyrighted feature pictures. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (C. C. A. 2). Since it is our contention, and we believe it to be entirely clear, that there is no evidence in the record that Universal followed such a practice, we presently confine the discussion to the group-selling procedure actually followed by Universal, as shown by the evidence. This was to offer all of its pictures in a group, and to license that exhibitor among competing exhibitors, who, other things being equal, was willing to accept the greatest number thereof (R. 1468-73). Moreover lots of exhibitors obtain selective contracts, which means that they need only accept a certain specified number of the pictures in the group, and most exhibitors obtain the right to cancel a certain proportion of the pictures licensed (R. 1469).

1: It is mutually advantageous for non-integrated distributors and independent exhibitors to make wholesale deals in feature pictures.

As heretofore pointed out, the great majority of Universal's feature pictures have been in the medium and lower-quality brackets. The demand for such pictures is naturally greatest among the rank and file theatres, which are preponderantly independent. Such theatres are in competition with the theatres affiliated with the major defendants, and with theatres in the large independent chains possessing great buying power. The uncontradicted testimony is that the buying and selling of feature pictures in groups is advantageous alike to the distributor and the exhibitor who does not possess the buying power to command a wide choice of product.

Montague, Columbia's sales manager, testified (R. 1258-59): "It is my belief that it (group-selling) is the most satisfactory method of distribution to the exhibitor. By that means the exhibitor knows that he has a certain program that is his, he knows what price the pictures are coming to him at, and he feels that he is having some insurance as against his investment in brick and mortar. We are quite certain that the majority of the exhibitors in the United States desire to buy that way."

He further testified (R. 1275): "A lot of these exhibitors would like not only to buy 44 (feature pictures) but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, be-

cause they feel that is their measure of protection and they want it."

Rodgers, Loew's sales manager, testified (R. 427) as follows concerning the same subject: "Well, in the first place they seem to think, I believe, that they can buy them cheaper, No. 1; and secondly, and of equal importance, is that it permits them to have a sort of a sense of security; if they would have a year's product at one time it would relieve them of the necessity for buying each month or each two months."

Scully, Universal's sales manager, testified (R. 1470) that "the exhibitors like to be assured of a constant flow of pictures. Sometimes they cannot get all of the good pictures or buy all of the good pictures, and they like to buy as many pictures as they can, so if sometimes they didn't have a good picture they might play one that is not so good, and they generally like to buy as many as they can, and they generally contract for all your pictures, with the right to select what they think they can absolutely use."

There was no contradiction of any of this testimony.

Likewise group-selling is "absolutely vital and absolutely necessary" to distributors situated like Columbia and Universal. Montague testified in this connection (R. 1258), "If we were to change our method of distribution to the so-called small group-selling which is used under the consent decree,* we would find it absolutely necessary to change the whole financial base of our company. We would not have—we do not have enough money to keep pictures in inventory, such as we would have to do, for any period of time. We find it absolutely necessary to turn our pictures over as rapidly as possible, to send that money back to California, so California can again invest it in pictures."

*Not more than 5 feature pictures at a time (R. 3375).

2. Offering to license and licensing pictures in groups is entirely legal.

There is no evidence at all in this record that any exhibitor asked Universal for the privilege of licensing fewer pictures than it did license, and was refused. In response to questions from the Court, Government counsel in summation admitted that a distributor has the right to prefer a licensee who wants several pictures over a licensee who wants only one (R. 2755-7). He claimed that legality depended upon the method used in getting the particular customer to take more than one (R. 2756), but, in so far as Universal is concerned, had offered no evidence as to the method used, to wit that there was any conditioning. Moreover, as Judge Hand observed, when there is the right to reject a certain number of pictures "that is not really block-booking" (R. 2736).

The contention that conditioning is illegal was rested by Government counsel on the contention "that a copyright-owner in dealing with copyrights does not have the same freedom of contract that somebody dealing in uncopyrighted material would have," when Judge Bright suggested that his argument "would prohibit any merchant from selling to a big buyer on better terms than he does to a small buyer" (R. 2756).

It is certainly strange doctrine that a copyright owner, who possesses statutory monopolies is more limited in his rights than he would be without them. If he could not offer several copyright licenses at the same time, or even at different times not very far apart, without being charged with conditioning, he would be in a sorry fix indeed. The Federal Trade Commission, indeed, in the *Paramount Famous-Lasky* case, *post*, pp. 88-90, did not question the right to do this.

3. The conditioning of the licensing of one picture upon the licensing of another is legal in the case of a non-monopolistically-situated distributor.

The Court below analogized this practice to that of tying in unpatented materials to the use of process and machine patents, and held it a violation of the Sherman Act on the authority of the *Carbice, Morton Salt, Motion Picture Patents* and *Mercoid* cases (R. 3543), without any showing that it substantially lessened competition or tended to create a monopoly.

This holding of the court below was in direct conflict with *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428 wherein the majority thought the practice so clearly lawful that it dismissed the Commission's complaint. Mr. Justice Brandeis, dissenting, however, held that the particular circumstances should be controlling, and noted that the most important fact would be the extent to which the seller dominated the market. Obviously Universal cannot dominate the market.

The *ratio decidendi* in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 132, (C. C. A. 2) is the same, and this case absolved the defendant in connection with the precise practice complained of here, despite Paramount's far greater importance in the business than Universal's.*

In the *Paramount Famous-Lasky* case the only point at issue was the legality of "block-booking", and there was a carefully reasoned opinion concurred in by the whole Court.

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*The Commission found that the Paramount corporation was "the largest and strongest competitor in the trade," and that its power was so great that all competitors followed its trade practices.

The Federal Trade Commission had taken a great deal of evidence on the practice, and the Court therefore had full and complete data on the exact nature of what was done and with respect to its effects upon exhibitors and the public. The record relating to this subject was 669 pages long. Many witnesses testified that they had been refused the right to buy less than all the pictures. Others testified that the prices of pictures wanted by them were increased 50, 75 or even 100% over the price *en bloc*. In contrast the subject received little or no attention in the evidence in our case, in which no witnesses testified that they were refused the right to buy only such pictures as they wanted.

Although the Court below states (R. 3542), "In many cases licenses for all the films had to be accepted in order to obtain any", it gives no record references, and support in the record is definitely lacking as to Universal. All that appears is that Universal customarily offered its pictures in groups in the first instance. That it was frequently unsuccessful in selling the entire group is obvious, and Scully, Universal's sales manager, testified (R. 1469): "A lot of exhibitors buy half of our product and some buy a little more". He further testified that: "Quite a lot of exhibitors have selectivity. Most of the exhibitors insist upon right of cancellation of a certain group of our product".

That the offering of feature pictures in blocks does not necessarily by any means result in all of them being sold can also be seen from Montague's testimony (R. 1272): "We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we succeed in doing that. It usually ends up with the exhibitor having a selective contract".

Mochrie, RKO sales manager, testifying concerning his experience in selling blocks of five feature pictures under

the Consent Decree, stated that he sold them all if he could and less if he could not, saying (R. 1691): "In the case of the best picture I was successful in selling 14,000 theatres. In the case of the poorest of that block I was successful in selling only 6,250 theatres. So there were many, many theatres that I did not sell that poor picture to".

All of this means that Universal sold as many pictures at one time as an exhibitor was willing to buy.

But even if it did more than this, of which there is no evidence, and conditioned the licensing of one picture upon the acceptance of others, reason, as well as authority, suggests that there is no extension of the statutory monopoly when no more is done with two or more copyrights than can be legally done by a non-monopolistically situated distributor with non-copyrighted articles. If this were not so, George Bernard Shaw could not legally sell a book containing more than one of his copyrighted plays.

The cases relied upon by the court below, in which patent monopolies were extended by requiring unpatented materials supplied by the patentee to be used in conjunction therewith, merely denied the patentee the right to sue others supplying like materials to the licensees, for contributory infringement. They leave open the question of whether under the particular circumstances of each case violation of the Sherman or Clayton Acts took place, by reason of a substantial lessening of competition or tendency toward monopoly. Clayton Act, Sec. 3 (15 U. S. C. A., Sec. 14). *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3. Thus they did not at all justify the court below in concluding that the mere fact of the conditioning resulted in a violation of the Sherman Act. In *International Salt Co.* v. *U. S.*, No. 46, October Term, 1947, decided November 10, 1947, this

court found that the Sherman and Clayton Acts had been violated in the particular situation, in which the largest domestic manufacturer of salt required its licensees of salt-utilizing machines to use its salt only. The Court acted, however, only upon the express finding that there had been action to foreclose competitors from a substantial market, that the volume of business affected by the tie-in contracts was substantial, and that the tendency of the arrangement to the accomplishment of a monopoly was obvious.

Our case is totally different. Universal is by no means the largest producer and distributor in the industry. It does, on the contrary, only a small part of the business, and very little of that in the high-quality feature picture field. There has been no lack of run-of-the-mine pictures such as Universal has specialized in. Its business reasons for endeavoring to license its season's product as a block, before production, are obvious, since the licensing of run-of-the-mine pictures one by one, after production, would be exorbitantly expensive and highly speculative.* Equally obvious are the business reasons for its customers wanting to stock up for an entire season so that they will not run short of pictures.

No claim can be made that Universal "block-booked" in combination or conspiracy with any of the other defendants, and the Court's conclusion of law is expressly limited to concluding that Universal violated the Sherman Act by "inviddually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, * * *" [R. 3693]. "Block-booking" is not part of the combination and conspiracy found to fix minimum admission prices, runs and clearances.

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*We can think of no other industry which produces articles costing hundreds of thousands of dollars each without orders in advance for the same. It would in fact be foolhardy to do so.

The major defendants, indeed, have been operating for years under the restrictions of the Consent Decree authorizing them to license in blocks of not more than five feature pictures. United Artists sells picture by picture. Hence Columbia is the only other defendant concerned in the charge of "block-booking." Certainly it will not be claimed that Universal conspired with Columbia in this connection. On the contrary, it is obvious that both of these companies by offering a season's product at one time enabled the small exhibitors to satisfy their requirements and more effectively compete with their larger rivals.

In the case of a patented machine or process, it is easy to see that its use may be so important, in respect of the saving of time and money, that processors cannot effectively compete without having a license to use the machine or process. The patentee, therefore, if permitted to require its licensees to use its unpatented materials as a condition of a license to use its patented process or machine, is in a strategic position to monopolize the sale of such unpatented materials. In the case of copyrighted feature pictures, however, the copyright owner has no such power. His statutory monopoly extends only to the particular productions which he has copyrighted. The number of such productions which may be created is unlimited. He is in the same position, therefore, as is an owner of particular chattels, who necessarily has a monopoly over the particular chattels, but not over the production and sale of any other chattels of like kind.

The Court below wrongly thought that conditioning in the case of copyrights differed from conditioning in the sale of chattels which it impliedly conceded to be legal, "because it extended a monopoly which the owner of chattels is not assumed to have" [R. 3545]. In fact, however, as hereto-

fore pointed out, this is exactly what the owner of particular chattels does have. "All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property. * * * The monopoly, so-called, amounted to nothing more than the attaching to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law." *Interstate Circuit* v. *U. S.*, 306 U. S. 208 at p. 236.

The Opinion below relies (R. 3545) upon a statement in *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, at p. 459; but it is not in point. There the defendant made its only profit by selling to refiners a patented fluid for incorporation into gasoline, the treated gasoline being in turn sold by them to jobbers. It attempted to keep up the price obtained by it for the patented fluid by maintaining, primarily and directly for the benefit of the refiners, the resale price charged by the jobbers for treated gasoline which it had licensed the refiners to make and sell to licensed jobbers and the jobbers to sell under another of its patents. This was held to be illegal price-fixing in that the patentee, having reaped its reward by selling the patented fluid was attempting to augment it by restricting its licensees, who paid no royalties, in exercising dominion over treated motor fuel which they had lawfully made or acquired, not in its own interest but in that of the refiners.

It is sometimes contended that block-booking leads to the placing of bad pictures along with the good, and should be prohibited because thus constituting an injury to the public. No evidence was taken on this subject. All of the evidence was to the effect that the exhibitors wanted the

pictures they licensed, undoubtedly for the reason that they were the kind of pictures their audiences wanted to see. We believe this Court ought not to and will not concern itself with esthetic, intellectual or cultural standards in the production of motion pictures, when considering a charge of Sherman Act violation. Nor is the claim by any means to be taken as necessarily true, for it is equally arguable that the licensing of pictures in groups makes it possible for producers, who have the means, to experiment with a certain number of pictures conforming to high cultural standards, which they would not otherwise do if their pictures had to be licensed one by one to exhibitors, who would judge each of them strictly in accordance with box-office possibilities.

4. Master contracts are legal.

Nor can there be anything illegal under the Sherman Act, insofar as Universal is concerned, in licensing its feature pictures to an exhibitor who operates a chain of theatres, which are not engaged in a combination and conspiracy to monopolize and restrain interstate commerce, any more than it is illegal to sell supplies to a corporation operating numerous factories in competition with corporations operating only one factory. Ability to buy at wholesale may, it is true, give certain advantages to the large theatre chain, but this cannot be something with which the law should concern itself, as far as the licensor is concerned. He is merely dealing with the market as he finds it, and obtaining for himself good outlets for his pictures for at least a few years. His situation, after making such contracts, is distinctly less favorable than that of the major distributors, who have permanent controlled outlets.

To hold otherwise would mean that any supplier or licensor in deciding whether or not to deal with a user would

have to determine at his peril whether or not the user could possibly use the materials supplied or the copyrights licensed to the disadvantage of his competitors.

5. Franchises are legal.

When feature pictures are committed for more than one season to a licensee, the contract is known as a franchise. This differs only in degree from the licensing of a season's product. The vast majority of Universal's franchises are made with independent exhibitors, some 727 of such franchises being in existence at the time of the trial as against 43 franchises with affiliated exhibitors. (R. 1472-84, Ex. U-2.)

In attempting to place its feature pictures against the competition of five major distributors and five other national distributors, Universal is very often unable to obtain the representation it would like in particular places. (R. 1472-1483.) In situations in which a large theatre chain was dealing with its competitors and not with it, Universal encouraged competing exhibitors to expend moneys in improving their theatres to convert them from second or subsequent-runs to first-runs. Such theatres sought franchises from Universal in order that they might be assured of its product over a period of years, without which assurance their new investment could not have been justified (R. 1480, 1483). In granting such franchises, it is obvious that Universal's action was counter-monopolistic.

Even where no copyrights are involved, it is thoroughly established that long-term supply contracts, whether to dispose of the entire output of a producer, or to supply the entire requirements of a purchaser, or for the supplying of exclusive agents in particular territories, are not illegal, certainly not illegal *per se*, under the Sherman Act. *Match Corpora-*

tion of America v. *Acme Match Corporation*, 285 Ill. App. 197, 1 N. E. 2nd 867; *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933);* *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *Moon Motor Car Co. of N. Y.* v. *Moon Motor Car Co.*, 29 F. (2d) 3 (C. C. A. 2d, 1928); *Kelly-Springfield Tire Co.* v. *Bobo*, 4 F. (2d) 71 (C. C. A. 9th, 1925), cert. denied, 268 U. S. 694; *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439 (C. C. A. 6th, 1898); *Great Western Distillery Products* v. *John A. Wathen Distillery Co.*, 10 Cal. (2d) 442, 74 P. (2d) 745 (1937); *New York Bank Note Co.* v. *Kidder Press Co.*, 192 Mass. 391, 78 N. E. 463 (1906); *Southwest Kansas Oil & Gas Co.* v. *Argus Pipe Line Co.*, 141 Kan. 287, 39 P. (2d) 906 (1935); *American Sand & Gravel Co.* v. *Chicago Gravel Co.*, 184 Ill. App. 509 (1914); *Heimbuecher* v. *Goff, Horner & Co.*, 119 Ill. App. 373 (1905); *Over* v. *Byram Foundry Co.*, 37 Ind. App. 452, 77 N. E. 302 (1906); *Excelsior Quilting Co.* v. *Creter*, 36 Misc. 698, 74 N. Y. Supp. 361 (Sup. Ct. N. Y. Co. 1902); *Blauner* v. *Williams Co.*, 36 Misc. 173, 73 N. Y. Supp. 165 (Sup. Ct. N. Y. Co. 1901); *English Hop Growers* v. *Dering*, (1928) 2 K. B. 174.

Indeed, exclusive agency arrangements are one of the leading categories of reasonable restraints of trade set forth in the Restatement of the Law of Contracts, Ch. 18, Sec. 516, and in Williston on Contracts, Sec. 1645. The reasons for considering such restraints to be reasonable are well stated by Judge Rifkind in *U. S.* v. *Bausch & Lomb Optical Co.*, 45 Fed. Supp. 387, at pp. 388-389, aff'd 321 U. S. 707.

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*In this case 137 competing coal producers granted exclusive selling rights to a selling agency. Yet no illegality was found.

If a supplier may legally enter into a requirements contract with another, or contract to dispose of his entire output, or make an exclusive agency agreement with him, without violating the Sherman Act, even when no rights under a statutory monopoly are involved, it is obvious that a copyright owner may *a fortiori* enter into an exclusive licensing arrangement covering a term of years for its copyrighted feature pictures. Such an arrangement, indeed, is the regular practice in connection with patents when an exclusive license is entered into for the duration of the patent or a lesser term.

The Government contended throughout the case that small exhibitors were at a great disadvantage *vis-a-vis* the theatres in large circuits, whether affiliated or independent, and one of the principal objects of this proceeding was to remedy, to the extent possible, the patent inequalities existing between the bargaining positions of the circuit theatres and that of the small exhibitors. In extending the prohibition against future franchises to those with small exhibitors, the decree frustrates a principal objective of the Government's.

The Amended and Supplemental Complaint (hereinafter sometimes called the complaint) at the very out-set, paragraph 17 (R. 3144-5), draws a sharp distinction between a "circuit theatre" and an "independent theatre". The former is defined as a member of a "theatre circuit" which in turn is defined as "a group of more than five theatres, owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". An "independent theatre" is any theatre which is not a member of a "theatre circuit" as thus defined.

The issue presented by the Government in respect of the legality of franchises is solely with respect to franchises made by distributors with large "theatre circuits". It points to such franchises, indeed, as one of the outstanding methods by which discriminatory privileges have been obtained by the theatres in large theatre circuits to the prejudice of the small exhibitor.

The decree, nevertheless, condemns franchises of any length, however free of restrictive characteristics and irrespective of whether or not they are granted to the smallest exhibitor or the largest theatre circuit. This provision goes far to defeat the purposes of the Government in instituting this proceeding, since the small exhibitor urgently needs commitments of pictures if he is to have any hope of competing with circuit theatres. If the small exhibitor has to bid picture by picture in competition with circuit theatres, having much greater buying power, and, in the case of the affiliated chains, having assurance of a large amount of good product, he can, to say the least, have no assurance of product whatsoever with which to run his theatre. While we can see no reason at all why a distributor which owns theatres should not be permitted to license its pictures thereto, the privilege thereby accorded is nothing less than the right to grant a permanent franchise, and it is most unjust that a medium-sized distributor, without theatres, should not be able to franchise competitors of the major defendants, who, unlike them, have no assured source of product. Thus instead of bettering the competitive position of the small exhibitor, the broad provisions of the decree with respect to franchises greatly worsen it.

The issue presented by the Government on the legality of franchises is set forth in paragraphs 121, 122 and 123 of

the Amended and Supplemental Complaint (R. 3176-7). These allegations deal exclusively with the abuse of franchises by the distributors "in their dealings with circuits", both affiliated and unaffiliated. It is alleged that "these franchises often discriminate against independent theatres whose buying power is small".

There is not a word of complaint about the granting of franchises of reasonable length to small exhibitors. The entire complaint concerns the prejudicing of small exhibitors by the granting of franchises to large circuits. It is thus plain that the Government does not complain about the franchise as an institution. In other words, what it really complains of is the ability of the large theatre circuits to obtain franchises from distributors by means of their great buying power.

Producers and distributors who have great financial resources can freely purchase and operate theatres in which to show their pictures. Producers and distributors with lesser resources must by and large achieve effective distribution of their pictures through contractual arrangements in the nature of franchises. In no other way can they be assured of the necessary "show-cases" for their pictures, and in no other way can the independent exhibitors be assured of the vitally necessary product with which to operate their theatres. Consider the position of a small business man who desires to borrow money from a bank to invest in an independent theatre. Could he possibly do so without some distributor's commitment of its pictures to him for a reasonable term of years? Would the bank be satisfied with his ability to get pictures bidding picture by picture against the members of the large theatre chains, with their great resources? We thing the answer is evident.

Part Two

ASSUMING *ARGUENDO*, THAT LARGE CIRCUITS OF THEATRES, AFFILIATED OR UNAFFILIATED WITH PRODUCER-DISTRIBUTORS, WERE ENGAGED IN COMBINATIONS AND CONSPIRACIES TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, PURSUANT TO WHICH, BY VIRTUE OF THEIR DOMINANT POSITIONS, THEY WERE ABLE TO DETERMINE WHAT THEATRES SHOULD RECEIVE PRIOR RUNS, AND TO FIX CLEARANCES AND ADMISSION PRICES, NOT ONLY FOR THEIR OWN THEATRES BUT FOR SUBSTANTIALLY ALL OTHER IMPORTANT MOTION PICTURE THEATRES IN THE UNITED STATES, THIS DID NOT COMPEL UNIVERSAL TO CHOOSE BETWEEN (1) REFRAINING FROM OFFERING ITS FEATURE PICTURES TO SUCH THEATRES ON THE ONLY CLEARANCES AND AT THE ONLY ADMISSION PRICES POSSIBLE, AND, IN SO DOING, EXERCISING ITS ORDINARY RIGHTS UNDER COPYRIGHT AND THE GENERAL LAW, OR (2) BECOMING IMPLICATED IN SUCH ALLEGED COMBINATION AND CONSPIRACY.

In Part One of this brief we have dealt with the legality of Universal's licensing practices *per se*, and have therefore discussed these practices in connection with Universal's dealings with independent exhibitors, not alleged by the Government to have been engaged in any combination and conspiracy to monopolize or restrain interstate commerce, in order to disassociate the discussion of the legality of these transactions between a medium-sized non-theatre-owning distributor and small independent exhibitors, contracting parties not in competition with each other, from the consideration of what evidence there may be, if any, of the existence of a combination and conspiracy among such non-theatre-owning distributor and either the five major companies, who were engaged in production,

distribution and exhibition, or the large independent theatre chains.

In this Part Two of the brief we consider the legal effect of Universal's employing such licensing practices, heretofore shown to be legal in and of themselves, in its dealings with exhibitors affiliated with the major defendants, and in its dealings with large independent theatre chains, and of its licensing its feature pictures to either the best available markets, or the only available markets.

As heretofore pointed out, the Government's case against Universal, aside from the claimed illegality of its licensing practices, rests upon the following foundations: (1) that Universal did a high proportion of its business with theatres operated by the major defendants, and the large independent theatre chains, who were allegedly engaged in combinations and conspiracies to monopolize and restrain interstate commerce, and had thus allegedly obtained control of the best and most successful theatres, in which they had allegedly fixed runs, clearances and admission prices; (2) that Universal's failure to forego the use of such licensing practices, even assuming their legality *per se*, resulted in uniformity of action among the distributors, and "maintained" the runs, clearances and admission prices fixed by the circuits, to the detriment of independent exhibitors (Gov. Juris. St., p. 8).

The basic contention made herein is that Universal cannot be deprived of its legal right to license its pictures in the best, or only available, markets, in accordance with its right under the copyright statutes to make restrictive licenses, granting exclusive rights for limited periods, protected by clearance agreements, and its right thereunder, and under the general law, to license all of its pictures for a term of years to exhibitors operating chains of theatres, by

reason of the fact that such licensees may now be found to have been engaged in combinations and conspiracies to monopolize and restrain interstate commerce, pursuant to which they determined what theatres should have prior runs, and fixed clearances and admission prices in the domestic motion picture theatre market.*

The Court below found (F. F. 84, R. 3674) that "independent distributors", i.e., non-defendant distributors, "when attempting to bargain with the defendants, have been met by a fixed scale of clearances, runs and admission prices, to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs * * *". It did not explain why a non-theatre-owning defendant distributor such as Universal, differing from the "independent distributors" only in being somewhat larger, was in any different position, and we contend that it was not.

Even if it be assumed that Universal ought to have known that there was reason to believe, prior to this Court's so holding, that the major defendants, or large independent theatre chains, were engaged in combinations and conspiracies to violate the Sherman Act, it would not have become implicated in such combinations and conspiracies unless it "joined mind and hand" with the members thereof.

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*In the nature of things even a single theatre, engaged in no conspiracy, can fix its own admission price and dictate clearance and priority of run to a distributor, if it be the only high-class theatre in the locality, or the best one, as is very frequently the case. (See claims made in Gov. Bf., pp. 15-19). The R. K. O. brief expressly recognizes this power in the exhibitor when it says (p. 27) "The affirmance of the absolute prohibition on expansion thus wuld be equivalent to a judicial notice to all exhibitors in every state where R. K. O. now is without theatres that they could boycott R. K. O.'s product unless it was licensed to them at any terms they might set, with complete confidence that R. K. O. could not protect itself by acquiring its own outlets, * * *".

Licensing its pictures to such members in accordance with its legal rights is not such cooperation. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 33-4; *U. S.* v. *Falcone*, 311 U. S. 205; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, 709-713

To hold otherwise, Universal submits, would mean that the existence of such a combination and conspiracy, or combinations and conspiracies, concertedly fixing the runs, clearances and admission prices of substantially all the important motion picture theatres in the United States, would effectively deprive Universal of its legal right to license its pictures to the best, or only available markets, in accordance with its well-established statutory rights under copyright and the general law, or permit the exercise thereof only at the certain risk of being implicated in such violations of law.*

The foregoing being true, it is plain that any uniformity of action on the part of Universal *vis a vis* the major distributors lacks significance, for, even absent conspiracy the admission price clauses heretofore discussed, requiring

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*How essential it is for Universal to deal with the affiliated theatres of the five major defendants, if the Government's claims are correct, appears from statements in the Government's brief. At page 47 it says:

> "No producer or distributor can succeed without access to a substantial number of the affiliated theatres of the five majors",

and claims (p. 56) that from ⅓ to ½ of a feature film's total domestic gross comes from exhibitions, ⅔ of which occur in affiliated theatres.

At page 61 it says: "These major theatre circuits are so powerful, so concentrated in the larger cities and so distributed geographically that no distributor can succeed without access to the markets which they represent."

the maintenance of current admission prices, would automatically create uniformity in the specification of admission prices, while the programming requirements of exhibitors and forces of competition would inevitably tend to produce uniform clearance.

V.

UNIVERSAL WAS FREE TO GRANT EXCLUSIVE AND RESTRICTIVE LICENSES OF THE CHARACTER HERETOFORE DISCUSSED, TO EXHIBIT ITS COPYRIGHTED FEATURE PICTURES, TO EXHIBITORS AFFILIATED WITH THE MAJOR DEFENDANTS, OR TO EXHIBITORS OPERATING LARGE INDEPENDENT THEATRE CHAINS, ASSUMED *ARGUENDO* TO HAVE BEEN ENGAGED IN COMBINATIONS AND CONSPIRACIES TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, AND WAS LEGALLY ENTITLED TO NEGOTIATE FILM RENTALS, ON THE BASIS OF RUNS, CLEARANCES, AND ADMISSION PRICES FIXED BY THE LICENSEES, AND WHICH IT WAS UNABLE TO ALTER.

1. The large theatre circuits were basically responsible for any fixed system of runs, clearances and admission prices which may have existed, and Universal's position relative thereto was no different than that of non-defendant "independent" distributors.

The Court below found (F. F. 84, R. 3674) that "independent distributors", i.e., non-defendant distributors "were obliged to conform to a fixed scale of runs, clearances and admission prices if they wished to get their pictures shown upon satisfactory runs", and definitely implied; if it did not hold, that they were not co-conspirators. It nevertheless held that Universal, a non-theatre-owning defendant distributor was a co-conspirator, although employing the same practices as the so-called "independent distributors" (R.

918, 544-5), and selling the same markets, the sole difference being that it did a larger gross business.

If in fact, runs, clearances and admission prices in the domestic motion picture exhibition field were fixed, it is obvious that the large circuits, affiliated or independent as the case may be, were basically responsible therefor. This the Court below concedes (F. F. 69, R. 3672).

It found (F. F. 66, R. 3671) that "All of the five major defendants have a definite interest in keeping up prices in any given territory in which they own theatres, and this interest they were safe-guarding by fixing minimum prices in their licenses when distributing films to exhibitors in those areas".

It further found (F. F. 79, R. 3674) that "The *major defendants* have acquiesced in and forwarded a uniform system of clearances, and in numerous instances have obtained unreasonable clearances to the prejudice of independents". It further found (F. F. 88, R. 3675) "Clearances are given to protect a particular run against a subsequent-run", thus again viewing the matter from the standpoint of the self-protection of those having exhibition interests.

The case is no different in respect of the determination of first-run status. In 38 out of the 92 cities in the United States, having a population of over 100,000, all of the first-run theatres were operated by one or more of the major defendants. In 4 of such cities there were no affiliated first-run theatres, and in 50 of such cities there was competition between first-run affiliated theatres and first-run independent theatres (Ex. L-13).

Rodgers, Loew's sales manager, defined first-run theatres upon cross-examination by Government counsel (R. 561) as "The theatres which played the best pictures on the

first-run". No other witness disputed this definition, and it seems to be plainly the correct one. As we have heretofore pointed out, the distributors of the best pictures select as first-run theatres, for obvious reasons, those which are the best equipped, best managed, best located, having the most responsible operators, are most suitable for the exhibition of the best feature pictures, and therefore are able to charge the highest admission prices (pp. 5-7 *ante*).

It, therefore, inevitably follows that the determination as to the first-run status of a theatre is necessarily made by the joint or several decisions of those owning or operating the best theatres and controlling the distribution of the best pictures. Universal has no theatres at all, and distributes only a very small proportion of the quality pictures.* It is plain, therefore, that it cannot either make or materially influence such decisions.

It is, therefore, apparent from the foregoing that if, as asserted by the Government and denied by the defendants, runs were determined, and admission prices and clearances were fixed, in concert, the responsibility therefor is basically that of the large circuits, independent and affiliated. If such combinations and conspiracies existed, there was no necessity for bringing Universal into it, which in itself makes it highly unlikely that Universal was brought into it.

2. Universal was in no position to dictate admission prices to motion picture theatres.

Motion picture theatres require the product of several distributors upon which to operate (G. X. 428a, 432). As heretofore pointed out, it is not at all feasible as a practical

*"The major defendants as distributors have collectively controlled and still control the major part of the first-class film supply." Gov. bf, in No. 79, p. 130.

matter for theatre operators to change their admission prices from day to day, since the public would resent anything but a consistent admission price policy (p. 25, *ante*). What distributors seek to guard against, and as we have heretofore shown they are entitled to guard against, is a reduction in admission price after the license is made. It is out of the question for a non-theatre-owning distributor such as Universal, whose feature pictures are in keen competition for desirable playing time in particular theatres with the feature pictures of the other distributors, to seek to dictate to a theatre what admission price it should charge, not only for Universal's pictures, but, in view of the necessity of a consistent admission price, for the pictures of all other distributors. Thus whether or not admission prices in the domestic motion picture theatre market were fixed pursuant to combinations and conspiracies among large circuit operators and/or their affiliated producer-distributors, it is idle to suggest that Universal, having no theatres and releasing but a very small proportion of the quality pictures, could have had any material influence in the determination of such admission prices.

On the other hand, if the admission prices in the domestic motion picture theatre market were fixed pursuant to a combination and conspiracy to monopolize and restrain interstate commerce among the major defendants having aggregate assets totaling 25 times those of Universal (pp. 15-21 *ante*) and proportionate power, or by powerful independent chains, it is *a fortiori* clear that if Universal was to license its pictures at all in the best, or only available, markets, it would have no option but to accept their current admission prices as minimums. This being so, it is clear, we submit, that Universal, in exercising its legal right to make a restrictive license under copyright, was entitled to exact a

covenant from affiliated or independent chain theatres that the current admission price should not be reduced, to the injury or destruction of the value of the subsequent-run licenses it planned to make.

3. Uniform clearance is to be expected as a result of the programming requirements of exhibitors and competitive forces, and, to the extent it exists, furnishes no proof against Universal of participation in a combination and conspiracy.

We turn now to clearance. The licensed prior-run exhibitor has a vital interest in the extent of the clearance which the licensor grants to him, because it has a very direct bearing upon the number of people who will view the exhibition of the feature pictures in his theatre at the higher admission price he charges.

As heretofore pointed out, the distributor has the full legal right to grant under copyright a fully exclusive license for the duration of the copyright. In granting an exclusive license for a limited time, and in providing by agreement for a clearance period thereafter prior to the granting of a subsequent-run license, the distributor agrees to a much smaller degree of exclusivity than he is entitled to grant.

In deciding whether it is willing to grant a clearance requested by the exhibitor, the distributor naturally takes into consideration the fact that a long clearance will diminish the value to him of the subsequent-run licenses he plans to make, by delaying a prompt play-off and depriving the subsequent runs of some of their expected patronage. This is the same sort of thing that the distributor seeks to protect himself against when he exacts a covenant from the exhibitor not to reduce his current admission price.

It thus is evident that the only interest which the distributor has in the degree of clearance is in connection with the obtaining of the largest aggregate film rental from both prior and subsequent runs. This, of course, involves a question of judgment. Since, however, the distributor is legally entitled to grant a completely exclusive license for the duration of the copyright, his judgment as to what is best for his own interest is, we submit, not properly subject to attack.

The amount of clearance which a particular theatre requires over another theatre is influenced by a number of factors, such as their comparative admission prices, size, location, appointments, entertainment policy, extent of competion with each other, etc. These of course are the same whatever distributor it licenses from. Just as a theatre must, for practical reasons, maintain a consistent admission-price policy whatever distributor's pictures it is showing, there is an obvious practical reason why it should desire to buy its feature pictures on some uniform clearance basis from all distributors, to wit, the difficulty making up its programs if it did not.* In any event, since the prior run benefits by a larger clearance, it will certainly not willingly accept a shorter clearance from one distributor than another is willing to give.** Likewise non-uniform clearance

*The Government itself recognizes the fact that the exhibitor wants uniform clearance for it says in the amended and supplemental complaint (paragraph 119 R. 3176):

> "The dominant circuits in every exhibition area, whether they be affiliated or unaffiliated, in purchasing products *generally request* and secure *the same runs and the same protections from all distributors* * * *". (Emphasis ours).

**R. 1709.

would prejudice subsequent-run exhibitors against the pictures of those distributors granting clearances longer than their competitors against such exhibitors, and deprive them of an even flow of pictures. If therefore a distributor wants to license his pictures to a favorably situated theatre, as he invariably is anxious to do, he must necessarily meet his competition in respect of clearances.

It is, therefore, apparent that reasons quite apart from combination and conspiracy, to wit, ordinary business reasons and the necessities of competition, tend to induce uniformity in clearance, and it is settled law, of course, that combination and conspiracy ought not to be deduced from the mere fact of uniformity when the fact is fully explained by ordinary business considerations.*

The question of the inferences which may be drawn from evidence of uniformity in selling terms was first considered by this Court in *U. S. v. U. S. Steel Corporation*, 251 U. S. 417. The Government brought suit to dissolve the Steel Corporation and the various units whose stock it had acquired several years before, on the ground that they were "engaged in illegal restraint of trade and the exercise of monopoly". (*ibid.*, p. 436). It appeared that the Steel Corporation upon its organization had acquired over 50% of the total domestic and foreign business in its field, and that it had been organized for the purpose of monopolizing and restraining trade, but that it had never, in fact, attained monopoly power, and that its percentage of the steel business at the time of suit was approximately 41% of the total

*The Government offered no evidence to supplement the showing of uniformity, while top executives of the defendants testified that it was fully explained by ordinary business considerations (R. 422, 425, 710-11, 1708, 1715, 717, 1708-9, 723-5, F. F. 63, R. 3670).

volume (*ibid.*, pp. 438-9, 442). It also appeared that "Competitors * * * followed the Corporation's prices because they made money by the imitation"* (*ibid.*, p. 447).

Both opinions in the District Court (*U. S. v. U. S. Steel Corporation*, 223 Fed. 55, 160, 176 (D. N. J., 1915)) and the opinion in this Court found that these prices had been, since the formation of the Corporation in 1901, the subject of agreements between the Corporation and competitors by means of pools, associations, and finally, the celebrated "Gary Dinners" (251 U. S., pp. 444, 445).

The opinions also found that the last of these various types of agreements had ceased nine months before the Government brought the suit (223 Fed., pp. 161, 176; 251 U. S., p. 445). However, as pointed out by Mr. Justice McKenna, the District Court offered to retain the Government's bill so that if the illegal agreements were resumed they could be restrained.

It will thus be seen that both the District Court and this Court, in the absence of other evidence of price agreement, refused to infer an agreement from mere price uniformity. In this connection, this Court stated (at pp. 447-9):

> "* * * Competitors, it is said, followed the Corporation's prices because they made money by the imitation. Indeed the imitation is urged as an evidence of the Corporation's power. * * *
>
> "* * * the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics * * *. His deduction was that when prices

*Assuming *arguendo* that conspiracy to fix prices (or clearances) may be deduced as against those whose economic power is great enough to bring about the result, from mere uniformity, it is plain that such uniformity has no significance in the case of a relatively small company which must meet competition in order to survive.

> are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, something more than a deduction equivocal of itself even though the facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution."

Later that year in *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208, this Court was compelled to appraise with great precision the inference which might be drawn from circumstantial evidence, including (but not limited to) evidence of uniformity of conduct. The basic issue presented in that case was whether the defendant Packing Company had merely exercised its privilege of dealing only with customers who maintained resale prices recommended by it (see *U. S.* v. *Colgate & Co.*, 250 U. S. 300), or had entered into an agreement or combination with its jobbers to maintain such resale prices. The Court's ruling appears from the following extract from its opinion:

> "Among other things the trial court charged:
>
> "'I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent

> from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act.'
>
> "The recited facts, standing alone, (there were other pregnant ones) did not suffice to establish an agreement or combination forbidden by the Sherman Act. * * *." (pp. 210-11).

Because of this error in the instruction given by the trial court, this Court affirmed the decision of the Circuit Court of Appeals, reversing the judgment for the plaintiff below.

In *U. S.* v. *International Harvester Co.*, 274 U. S. 693, where the Government petitioned for dissolution of the Harvester Company (doing some 64% of the business in its field) under a consent decree giving the Government "the right to such further relief * * * as shall be necessary to restore * * * competitive conditions and to bring about a situation in harmony with law" (p. 697) in the harvester industry, it appeared that many of the competitors of the Harvester Company had "been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines" (p. 708). The Court held, nevertheless, "that competitive conditions have been established in the interstate trade in harvesting machinery bringing about 'a situation in harmony with law'" (p. 710). In so holding, Mr. Justice Sanford, speaking for a unanimous Court, stated (pp. 708-9):

> "* * * the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not estab-

lish any suppression of competition or show any sinister domination."

In *Cement Manufacturers Protective Association, et al.* v. *United States,* 268 U. S. 588, the question was directly posed. There, it was charged that the members of a trade association had combined and conspired to restrain trade by controlling prices and production of cement, through the Association's activities. It appeared, *inter alia,* that, in accordance with its constitution, the Association gathered from its members and promptly reported thereto information with reference to production, price of cement in closed transactions, freight rates from chief points of production, and other matters. It further appeared that there was "a substantial uniformity of price of cement." Variations of price by one manufacturer were "usually promptly followed by like variation throughout the trade. * * * and uniformity * * * resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers" (p. 605). The Government did not charge that there was an agreement on prices among the defendants. Rather the Government contended that the necessary effect of that which defendants had agreed to do was to restrain trade by fixing prices. This was the equivalent, however, of argument that the defendants had entered into a tacit agreement.

This Court refused to so find, reversing the decision of the lower court and stating (per Mr. Justice Stone):

> "* * * this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price

and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action" (p. 606).

We respectfully submit, therefore, that the *Cement* case (where, in addition to uniformity of price, closely related concerted action was concededly involved) *a fortiori* establishes that the inference of agreement or understanding may not permissibly be drawn from mere proof that the same prices are charged by competitors.

Decisions of the lower Federal and State courts are in accord with the views expressed in the cases above.

In *U. S.* v. *American Can Co.*, 230 Fed. 859 (D. Md., 1916), the facts were very similar to those in the *Steel* case, *supra*. The Government charged that the American Can Company had been formed and maintained in violation of Sections 1 and 2 of the Sherman Act; that its influence in fixing the price of packers' cans was so great that it dominated the market, and asked that it be dissolved. In refusing the dissolution, the Court noted that, in the cases urged by the Government as precedents, the defendants "had, not long before proceedings against them were instituted, done things which evidenced their continued intent to dominate and restrain trade by the use of methods which interfered * * * with the reasonable freedom of their customers or their competitors" (p. 902). And, dissolution was refused by Judge Rose on the ground, *inter alia*, that "As has been shown, defendant for a number of years past has done nothing of the sort" (p. 902).

Considering the evidence of price similarity between the Can Company and its competitors, the Court said (p. 892):

> "* * * There is no question that since 1901 the defendant [American Can Company] has very largely

> fixed the price at which packers' cans have been sold throughout the United States. It has competitors who now sell approximately one-half the cans which are sold in the country. There is no evidence of any price agreement between it and them. There is no reason to think that there is on this subject any understanding of any kind * * *. Nevertheless, the prices it fixes are the standard prices from ocean to ocean and from the lakes to the gulf, * * * They [competitors] never name their prices for the year until the defendant's have been made public * * *".

So, too, in *U. S.* v. *Standard Oil Co. of N. J.*, 47 F. (2d) 288 (E. D. Mo., 1931), the Court*—in dismissing the Government's petition to prevent a contemplated merger of the Standard Oil Company of New York (Socony) and Vacuum Oil Company (Vacuum), because, assertedly in violation of the old *Standard Oil* decree (221 U. S. 1), which forbade any of the defendants in that case, including Socony and Vacuum "from entering or performing any like combination or conspiracy * * * to restrain commerce * * *"—made the following statement concerning the Government's argument that all the other oil companies in the area in which Socony and Vacuum did most of their business followed the prices for gasoline set by Socony, thus evidencing Socony's power for evil:

> "* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every com-

*The opinion was rendered for a unanimous three-Judge Court by Judge Stone.

> munity in the country by retail competitors in all lines. * * * Grocers, butchers and all other lines in the same markets generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices. * * *" (pp. 316-317).

The cases dealing with uniformity of conduct in other matters than prices are to a like effect. When explained by similarity in the conditions with which businessmen are faced, no justifiable inference of concerted action is permissible.

Thus, in *Anderson* v. *Shipowners' Association of the Pacific Coast, et al.*, 27 F. (2d) 163 (N. D. Cal., 1928), aff'd 31 F. (2d) 539 (C. C. A. 9th, 1929), cert. den. 279 U. S. 864, plaintiff, a seaman, sued to enjoin the defendant shipowners' associations, their members and agents, from maintaining an alleged combination in restraint of commerce, and to recover damages. It appeared that the two defendant associations had organized an employment bureau through which seamen might be hired for the members. Plaintiff charged, *inter alia*, that the associations fixed the wages paid to seamen employed by all the members, and in support of that contention apparently introduced evidence that all of the defendant shipowners paid similar wages. The District Court, in dismissing this charge, stated:

> "* * * Each member of defendants pays such wages as are necessary in the current economic situation. Similarity of wage scales is due to similarity of conditions, rather than to any agreement among defendants or their members. * * *" (27 F. (2d) 163, 165).

In affirming this conclusion the Circuit Court of Appeals for the Ninth Circuit stated:

> "The allegation in the bill that 'the associations fix the wages which shall be paid the seamen', is wholly unsupported by the record." (31 F. (2d) 539, 542).

Nissen v. *Andres, et al.*, 63 Pac. (2d) 47 (Okla., 1936) is a highly significant State court decision. There, plaintiff, a retail ice dealer, sued defendants, manufacturers and distributors of ice at wholesale and retail, from one of whom plaintiff had obtained ice for a number of years, for damages for alleged destruction of plaintiff's business by defendants pursuant to a conspiracy among them for that purpose. It appeared that the defendant, who had previously supplied plaintiff, became involved in a controversy with plaintiff over plaintiff's methods of competition in retailing ice. It further appeared that, thereafter, all defendants refused to sell ice to plaintiff at wholesale prices, the reasons for the refusals varying slightly but the gist of each being that plaintiff's methods of competition in the retailing of ice were not approved. Plaintiff sold ice at retail, in many instances, at lower prices than defendants. He predicated his claim of conspiracy on the above-mentioned similar refusals of defendants. A judgment for defendants on demurrer to plaintiff's evidence was affirmed, for the reason that (p. 51):

> "While the similarity of the refusals is consistent with a prior agreement to so act in concert, yet it is equally consistent with independent action, since each defendant had ample opportunity to know of the plaintiff's competitive methods, and it was to the interest of each to know and be advised thereof, and in the natural course of business each would ordinarily obtain and have such information without any kind of prior agreement between themselves."

To the same effect is *Commonwealth* v. *Hatfield Coal Co.*, 193 Ky. 229.

These cases make it abundantly clear that mere proof of like or similar action among competitors does not establish a *prima facie* case of conspiracy or agreement.

4. Assuming *arguendo* that runs and clearances were fixed by the large theatre circuits and/or their affiliated producer-distributors, Universal's involuntary acquiescence therein did not implicate it in any such combination and conspiracy.

Let us assume, however, that, as found by the Court below, runs and clearances in the domestic motion picture market were fixed pursuant to combination and conspiracy to restrain interstate commerce among the five major defendants, possessing the best theatres and controlling the best pictures, which the Government claims was also a combination and conspiracy to monopolize, and the consummation of which is alleged to have resulted in actual monopolizing. Or let us assume that the large independent theatre circuits likewise violated the Sherman Act. Under such assumptions, it becomes *a fortiori* true that the clearances granted by Universal must be uniform with those thus fixed and determined by the assumed combinations and conspiracies, if it is to license its pictures at all.

Certainly the existence, as assumed, of combination and conspiracy pursuant to which clearances have been effectively fixed, beyond all power of Universal to change them, does not prevent Universal from exercising its legal right to grant licenses under copyright with a less degree of exclusivity than it is legally entitled to grant. If it has no choice as to this degree of exclusivity, if it is to license its pictures in the best or only available markets, that does not make illegal what is otherwise perfectly legal.

The same arguments which are applicable to the granting of clearances are applicable to the recognition of

theatres as first-run theatres, assuming *arguendo* the existence of a combination and conspiracy among the major defendants or monopolizing by the large independent theatre circuits. As heretofore pointed out, Universal's influence in the designation of such theatres is necessarily negligible. The question is pre-determined for it. Once it is thus pre-determined, such theatres, which have been designated or agreed upon by others as first-run theatres, become, by virtue of that fact, the best, indeed the only first-run, markets for Universal's feature pictures. It either licenses them or not at all.

The governing principles in this connection have been laid down in this Court in *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 33-4; *U. S.* v. *Falcone*, 311 U. S. 205, and *Direct Sales Corporation* v. *U. S.*, 319 U. S. 703. Stated in simple terms they are that one may deal with the members of a combination and conspiracy without becoming implicated therein, even though he knows of such combination and conspiracy, provided he does not join mind and hand therein and thus cooperate with the co-conspirators. To license one's feature pictures in the best or only available markets under the only conditions possible in respect of runs, clearances and admission prices, and to grant restrictive and less than exclusive licenses under copyright in connection therewith, which are legal *per se*, is not to join mind and hand in any combination and conspiracy which may be in existence among one's customers.

If, as assumed *arguendo*, a combination and conspiracy to monopolize* and restrain interstate commerce was being

*The Government contends that there was a combination and conspiracy to monopolize, which resulted in actual monopolizing, as well as a combination and conspiracy to restrain trade, which the Court below found. While finding an attempt to monopolize it refused to find that there was a combination and conspiracy to monopolize or any actual monopolizing.

carried on by the major defendants, or large independent theatre chains, pursuant to which priority in runs, clearances and admission prices were fixed in the domestic motion picture theatre market, the Government's duty was to break up such combination and conspiracy, and to restore competitive conditions so that licensors under copyright would not be compelled to accede in respect of such matters as runs, clearances and admission prices, to conditions determined by the co-conspirators.

As heretofore pointed out, the sole contentions made by the Government, upon which it bases its conclusion that the non-theatre-owning defendants were implicated in such assumed combinations and conspiracies are (1) that they sold their feature pictures in the best or only available markets, which to a great extent were controlled by such large theatre circuits, and (2) that the provisions in their licenses, even if assumed to be legal, "maintained" the run, clearance and admission prices fixed by such large theatre circuits in the course of such combinations and conspiracies, and are more favorable to them in some other respects than licenses made with independent theatres having small buying power (Gov. Juris. St., p. 8).

For the reasons above set forth such non-theatre-owning defendants had the right to sell in the best or only available markets, and are not to be implicated in any combination and conspiracy or any monopolizing, carried on by others to dominate such markets, merely because they exercised their legal rights to make restrictive and less than exclusive licenses under copyright, which necessarily accepted the runs, clearances and admission prices assumed to have been fixed by such theatre chains. Nor because the great buying-power of such theatre chains may have obtained for them better terms in certain respects than were obtainable by the small independent theatre.

5. Supporting authorities.

In the last analysis the case against Universal (assuming the validity of its restrictive and exclusive licenses under copyright, which we believe we have clearly demonstrated), depends, as the Government admits (Gov. Juris. St., pp. 7-8), upon two contentions: (1) that it licensed its feature pictures to a greater extent* on prior runs to the large theatre circuits than to independent theatres, on the basis of the admission prices which they currently charged, and (2) that in order to successfully compete with the major and other distributors, it had to grant clearances as great as those granted by the major distributors, and thus to license on much the same clearance basis.**

On the foregoing basis the Government seeks to put Universal in the same basket with the major defendants and large independent chains. It is plain, however, that Universal merely accepted the market as it found it, having no power to change it. Naturally, the theatres affiliated with the major defendants and large independent chains were on the whole the best, when not the only available, prior-run markets for its pictures (R. 1697-1700), if the Government's charge that these circuits dominated the industry is true. It is preposterous to suggest that Universal, a relatively small distributor without theatres, could alter their pre-determined admission prices. As respects clearance, it is in no different position from one who follows a price-leader which dominates an industry. That the com-

*According to GX 425 Universal received 42.1% of its feature film rentals from the five major defendants, 2.4% from the five independent theatre chains paying it the next highest rentals, and 55.5% from other theatres.

**Clearances granted by distributors to independent theatres exhibited like uniformity.

petitive necessity which impels a smaller competitor to meet the terms of the dominant factor in the industry results in no combination and conspiracy on his part is excellently demonstrated in the recent decision of the Circuit Court of Appeals for the Seventh Circuit in *Aetna Portland Cement Co. et al.*, v. *Federal Trade Commission*, 157 F. (2d) 553.

In that case the Commission had found a combination and conspiracy among 74 cement companies, made effective by the employment of a multiple basing-point system of pricing, resulting in the quoting of an identical delivered price by all producers who sought business at a given destination.

In reversing the Commission's order, the Court spoke in part as follows (p. 564):

> "We would think that in all forms of industry, particularly those of great magnitude, irrespective of the pricing system employed, that there would be found price leaders and price followers. We would suppose further that the leaders are those who occupy a commanding position, perhaps because of their size and strength, and that the followers would be those of less vitality. It may be a fact, we suspect that it is, that a price follower does not become such of his own free choice but that he is forced into such a position by a larger and perhaps dominating competitor. And it may also be a fact, again we suspect that it is, that in many instances those who are capable of exercising price leadership impose upon their less fortunate competitors. If such be the case, however, we do not see how this could create any inference of conspiracy or concerted action between the two groups, and neither do we see how it has any bearing upon the pricing system under attack."

It likewise pointed out that when one cement mill had a freight advantage over another cement mill distantly

located, as it would have in its adjacent territory, the more distantly located cement mill would have to absorb the difference in freight if it were to sell in its competitor's adjacent territory. On this subject it said (p. 557):

> "* * * Thus these two competing mills are faced with a simple business proposition which can be solved in one of two ways, as their individual judgment may dictate. Each can confine its sales to the territory in which it has an advantage or can extend its business into the territory of the other. If they follow the former course, as the Commission would require them to do by its order, each will have a monopoly in its own territory and competition will be at an end. On the other hand, if the other course is pursued and they go into the territory where they are at a disadvantage freightwise, they necessarily must meet the price which they find there in order to sell. To enable them to do this, they absorb an amount of freight necessary to enable them to meet the price which they find. The same necessity which impels them to do this requires a reduction in their mill net in an amount equivalent to the freight which has been absorbed.
>
> Under the decision of the Supreme Court in the old Cement case (see also *Maple Flooring Mfrs. Assn.* v. *United States*, 268 U. S. 563), this pricing method employed by Mills A and C is not in restraint of competition, even though it results in uniformity of price at each destination."

Referring to the old *Cement* case (*Cement Manufacturer's Protective Association* v. *U. S.*, 268 U. S. 588), the Court quoted therefrom as follows, p. 598:

> "* * * When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, *in order to compete in*

> *that territory* (italics ours) * * must sell at a mill price which will permit them to deliver cement at a price which will enable them to compete with the mill or mills located at the basing point * *."

The same considerations obviously apply with respect to the acceptance of clearances, which Universal, by reason of its position in the industry, can have no real influence in determining. It must meet competition or not do business.

Nor can it be properly argued that the large amount of business done by Universal with the theatres affiliated with the major defendants and with the large independent chains should be given any weight in determining whether Universal was implicated in any combinations or conspiracies engaged in by them.

In *U. S. v. Bausch & Lomb Optical Company*, 321 U. S. 707, an exclusive relationship, not merely a good-customer relationship, between a supplier and user, was held to be free from objection, by an equally divided vote of this Court. In that case the supplier, Bausch & Lomb, had agreed with the user, Soft-Lite, to an exclusive-dealing arrangement in respect of pink-tinted lenses for eyeglasses. Soft-Lite was found to have engaged in an unlawful combination and conspiracy with its wholesalers and retailers, and to have fixed the prices charged by them for such lenses.

The exclusive-dealing arrangement had been made in 1924, and the relations between Bausch & Lomb and Soft-Lite had been close and intimate for twenty years. As disclosed in the opinion, Bausch & Lomb, through stock control, dominated a number of the wholesalers who had participated in the combination and conspiracy with Soft-Lite. Bausch & Lomb thus profited in two ways from the Soft-Lite business, first from profits made by manufacturing and selling to Soft-Lite, and second by sharing

through stock ownership in wholesale distributors of Soft-Lite's goods in the profits which lay between the Soft-Lite selling price and the consumer purchase price (pp. 711, 713-4).

Bausch & Lomb "concerned itself with prices charged to wholesalers by Soft-Lite, discussed each step of the price mark-up from Soft-Lite up to the consumer, insisted that reductions in its prices to Soft-Lite should be passed along the distribution line, and through its affiliated corporations cooperated in the price arrangements and the elimination of undesirable retailers" (p. 714).

Despite all this, Bausch & Lomb was exonerated, even though it was tied to Soft-Lite by an exclusive-dealing arrangement.

Universal's relationship to the major defendants and large circuits, on the other hand, is merely that of one of their many suppliers. They were its customers, nothing more.

VI.

IF THE MAJOR DEFENDANTS, OR LARGE CHAINS OF INDEPENDENT THEATRES, ALLEGED BY THE GOVERNMENT TO HAVE COMBINED AND CONSPIRED TO MONOPOLIZE AND RESTRAIN INTERSTATE COMMERCE, EMPLOYED LONG-TERM LICENSE CONTRACTS OBTAINED FROM A NON-INTEGRATED DISTRIBUTOR SUCH AS UNIVERSAL, FOR ALL ITS FEATURE PICTURES, TO BE SHOWN IN ALL THEIR THEATRES, TO EFFECTUATE SUCH COMBINATIONS AND CONSPIRACIES, THE REMEDY IS TO ENJOIN SUCH THEATRE CHAINS FROM ENFORCING SUCH CONTRACTS, NOT INJUNCTION AGAINST THE GRANTOR THEREOF, WHICH DID NOTHING MORE THAN DEAL WITH THE BEST OR ONLY AVAILABLE CUSTOMERS ON A WHOLESALE BASIS.

If this Court sustains the decree of the Court below enjoining Universal, the decree as affirmed will constitute

prima facie evidence of violation of the Sherman Act in treble damage suits. (Title 15, U. S. C., Sec. 16, 38 Stat. 731.) Such treble damage suits by independent exhibitors already run into many millions of dollars, and an affirmance by this Court would undoubtedly multiply them many times.

Yet as heretofore shown, the case against Universal (aside from the legality of its licensing practices *per se* which we think to be clear) rests exclusively upon the fact that it unavoidably did a high proportion of its business with the prior-run theatres of the major defendants, and the large independent theatre circuits, which were its best, when not, as was very frequently the case, its only available markets, and the further fact that it necessarily had to deal with them on the basis of the admission prices and clearances determined by them, independently or in concert, if it were to license its feature pictures at all.

1. Franchises with theatre chains.

The Government claims that contracts, pursuant to which the feature pictures of a non-integrated distributor such as Universal are committed, sometimes for a term of years, to a major theatre chain, or to a large independent circuit, are *per se* in violation of the Sherman Act, because of their potentialities for abuse by the licensee.* For

*Examination of such Universal contracts of this type as are in evidence discloses that they specify film rental terms, or provide for their specification, in each individual theatre situation, and do not contain that provision which the Government particularly objected to in *U. S.* v. *Griffith Amusement Co.*, 68 F. Supp. 180, i.e. the privilege of playing features out of the order of release. G. X. 198, G. X. 259-263, G. X. 384, G. X. 470, G. X. 473.

The characterizations by the Government, in the index to its Appendix, of certain provisions of these contracts as "arbitrary", when lacking adequate explanation, are themselves arbitrary.

example, it is said that the film rental can be allocated among the various theatres of the licensee chain so as to permit its theatres in the weakest competitive position to more strongly compete with their competitors, i.e., by allocating relatively small film rentals to them and larger film rentals to those theatres in the chain which are in better competitive position. This, of course, is nothing but a matter of bookkeeping. It is also said that the licensee chain can distribute the feature pictures around among its theatres in the most advantageous way to meet the competition of independent theatres.

Since it is plain that such franchises to single independent theatres are legal (pp. 95-99, *ante*), the only objection thereto can be that they are made with exhibitors operating a great many theatres. But what such a licensee can do is nothing more than any large integrated business, with many operating units, can do, *vis a vis* small competitors, with operating assets supplied it under output, requirements or other long-term supply agreements by distributors. The fault is not with the suppliers, who have to do business in the markets as they exist, and thereby secure good outlets for their pictures for at least a brief term of years,* but plainly lies in the abuse of power by great business combinations making wrongful use of the operating assets supplied them. The supplier does not have to determine at its peril whether or not it is dealing with lawbreakers, i.e., monopolists. *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 33-4, *U. S.* v. *Falcone*, 311 U. S. 205. He restrains noobody by dealing with them, for the only restraint is in the exclusivity of the franchise contracts, which, as we have shown, is analogous to the reasonable

*Cf. this with the permanent outlets possessed by the major defendants for their pictures.

restraint inherent in exclusive-dealing contracts, and in any event is entirely proper in respect of licensing under copyrights.

If, as charged by the Government, the five major defendants, or large independent chains, were engaged in combinations and conspiracies to monopolize and restrain interstate commerce, and, in the course of effectuating such conspiracies, they made use of long-term contracts obtained from non-integrated distributors, such arrangements should be terminated by injunction against the conspiring licensees, but not against the licensors, unless they were in fact members of such combination and conspiracy, i.e., "joined mind and hand" therein. The mere making of such wholesale contracts, which were made with all types of licensees, by no means makes them such. They must take the market as they find it, even though they might well prefer to deal theatre by theatre, in that they might well obtain larger revenue in this way by dealing with licensees with less buying-power.

That there is not the slightest necessity to restrain the non-theatre-owning distributor, in order to abrogate illegally-used contracts, is to be seen from the decision of this Court in *U. S.* v. *Crescent Amusement Company*, 323 U. S. 173. In that case the complaint had charged a group of exhibitors who operated a chain or chains of theatres, together with the 8 largest distributors, with a combination and conspiracy to violate the Sherman Act. In the Court below the five major distributors were dismissed after the Consent Decree in this case was entered in 1940 (p. 176). Of the other three distributors the Court found that only one had violated the Sherman Act, and this was not Universal (p. 176). Only the exhibitors and three individual defendants appealed. The five major distributors who had

been dismissed, and the distributor found to be implicated in the conspiracy, were necessarily treated by this Court as alleged co-conspirators, they having become non-defendants against whom no injunction could issue.

The use of franchises, i.e., long-term contracts, in competitive warfare against independent exhibitors by the combination of exhibitors was one of the principal elements in the case. After pointing out that the District Court found that some of the distributors (not including Universal) were co-conspirators on certain phases of the program (p. 183), this Court put that circumstance to one side, stating that it was immaterial whether or not the distributors technically were or were not members of the conspiracy, in view of the fact that it found a conspiracy to monopolize and restrain interstate commerce among the exhibitors. It was argued by the appellants that the injunction directed by the Court below against franchises should be directed against the distributors. This Court, however, upheld the injunction in respect of franchises against the exhibitors, and thus abrogated existing franchises, although it could not in the posture of the case issue any injunction against the non-defendant major distributors who had granted the franchises. It expressly conceded that franchises might be lawfully used (p. 188).

If, therefore, there was illegality in the manner in which the long-term contracts granted by Universal were employed by the major defendant licensees or large independent theatre chains, it was due to monopoly which the Government through inaction has suffered to exist, not to the normal every-day business action of Universal in making wholesale deals with such aggregations of theatres on the only basis open to it.

2. Alleged discriminations contained in such franchises.

A monopolistic combination is, of course, by reason of its power, in a position to secure more favorable contracts from distributors or suppliers than smaller businesses may be able to obtain. If, in order to license or sell their products, such distributors or suppliers have to give way before such superior bargaining power, to a certain extent, this does not make them participants in the illegal activities of the buyers or licensees. No such thing, we are confident, was held by this Court in the *Interstate Circuit* case, and in citing this case and the *Crescent* case for the general proposition that any "discriminating contract constitutes a conspiracy between the licensor and licensee" (R. 3550), the Court below went far afield. Indeed, since a licensor under copyright, in granting an exclusive license, very emphatically discriminates—and does so legally, it is difficult to understand how anything can be made out of far less important provisions which are allegedly discriminatory.

In dealing with great numbers of licensees, whose buying power greatly varies, and whose businesses are differently situated, it is certainly impossible to treat them all exactly alike in respect of each term of the contract. Their situations are different, and some insist upon privileges in which others may or may not be interested. In any event the superior bargaining power of a large unit can be expected to enable it to obtain favorable treatment.

Despite these rather obvious considerations, the court below in its Opinion (R. 3549-51) attached considerable importance to what it termed discriminatory provisions in the licenses made by Universal with the large theatre chains. Relying exclusively upon testimony (R. 1432-3) given by Lazarus, United Artists' sales-manager, concerning its practices, the Court improperly concluded, without any evi-

dence to support it, that Universal's practices were the same. Even as to United Artists the testimony was not all to the effect stated by the Court. All Lazarus said was that generally speaking his company "wrote up" the deal on the standard form of agreement when dealing with small independents. The Court concluded from this that provisions, favorable to the large theatre chains, were written into the contracts with them because certain clauses were made part of such contracts. It overlooked the fact that the standard contract is always part of the contracts with the large theatre chains also, as the very exhibits it cites show (R. 3549-50). It further overlooked the fact that when a distributor "wrote up" a contract on its standard form, it could easily add by riders or interlineation any clause agreed upon between the parties, and this was in fact customary (R. 1471).

Thus there is no proof that Universal denied any of the privileges relied upon to any small independent. There is affirmative proof, on the contrary, that it granted those in which independents were interested. Indeed, the very standard contracts, upon which the Court relies as excluding them, actually grant a number of these privileges, to wit, the right to exclude foreigns, G. X. 289, clause Eighth (2)(b), the exclusion of pictures of outside independent producers, G. X. 290, clause Twentieth, and large privileges in the elimination of films, G. X. 289, clause Fifteenth; G. X. 290, clause Fourteenth. Moreover, Scully, Universal's sales-manager, testified that substantial selection and elimination privileges were granted alike to affiliated and independent theatres (R. 1469-71).

Of the exhibits cited by the Court only seven have to do with Universal (G. X. 259, 260, 262, 263, 384, 470, 473). None grant the right to change the bracket in which a picture has been placed by Universal. None grant "unlimited

playing time". None grant "extended playing time", though a few appear to recognize its existence. "Extended playing time" simply means that when a picture has done well for the period originally licensed, the exhibitor is permitted to continue to exhibit it for an additional period on payment of an additional agreed film rental. It is wholly incorrect to suggest that this right is not freely granted to small independent exhibitors, formally or informally, as with film rental concessions (R. 1273).

There remain out of the "discriminations" found by the Court only a few which are of no interest to the small exhibitor. Permission to deduct for double-bills, as an examination of the exhibits cited by the Court will show, is granted only in respect of percentage deals. Dealings with small independents are almost always on a flat rental basis.

Universal's standard contract is drawn for use with 18,000 theatres, few of which can qualify as top houses suitable for road-shows at advanced admission prices. In any event Universal has released no road-shows. Hence the road-show priority clause proves nothing as to it.

The right to move over a picture from one theatre to another is of very limited application, inasmuch as few situations present the proper opportunity for a continued first-run in a smaller but suitable first-run theatre. Obviously only an exhibitor with more than one first-run theatre could avail itself of the opportunity, which, in any event, a distributor has the full right to grant to whomever it pleases. The right to make up in another theatre a deficiency in playing flat rental pictures by playing the pictures not played in the first theatre in some other theatre in the same Exchange area, likewise is of interest only to chains. The eight weeks' suspension clause is something which Universal insists on having to get its pictures free from a closed theatre.

Finally it is to be said that if in fact some licensees received more favorable terms in some respects than others who also wanted them did, of which there is no evidence, it does not appear that they were not paid for in increased film rental. It does appear, however, that the non-theatre-owning distributor is very liberal in making adjustments in film rental with the independent exhibitor, giving him much more leeway in this respect than is given to affiliated exhibitors (R. 1273). There is nothing to show that the independent exhibitor is not satisfied with such adjustments, or that he wants anything more.

In any event, it is no violation of the Sherman Law for a distributor to *independently* grant more favorable terms to one buyer than to another. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 605; *Terminal Warehouse Co.* v. *Penn R. R. Co.*, 297 U. S. 500, 511, 515. The Robinson-Patman Act applies only to discrimination in price in the sale of commodities of like grade and quality, having a specified restrictive effect upon competition. (Title 15, Sec. 13 *et seq.*, U. S. C. A.) *A fortiori*, a copyright proprietor does not have to treat all licensees alike.* *Buck* v. *Hillsgrove*, 17 Fed. Supp. 643 (D. Ct. R. I. 1937); *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424 (C. C. A. 7, 1903); *Dr. Miles Medical Co.* v. *Platt*, 142 Fed. 606 (N. D. Ill., 1906).

The Court below apparently came to this conclusion ultimately, for it did not enjoin what it had condemned in its conclusions of law (R. 3692, C. L. 8d). Moreover, it expressly found that the evidence was insufficient to justify a conclusion that there had been any discrimination in

*Especially is this true of motion picture theatres which differ greatly in their characteristics.

respect of film rentals, clearances or minimum admission prices, which as it pointed out were the alleged discriminations "especially" relied upon by the Government. (R. 3550-1).

If the law were otherwise than as above argued, every supplier who made a wholesale or long-term exclusive-dealing contract with a large user would do so at the peril of being implicated in a violation of the Sherman Law, by reason of the potential or actual ability of the user to capitalize upon the contract to the disadvantage of its smaller competitors. Obviously this cannot be the law. Obviously the task of policing monopoly is the Government's, not the small business man's, since the latter, in order to live, must frequently deal with monopolies, if the Government permits them to exist.

Part Three

THE REMEDY PRESCRIBED BY THE DECREE DEPARTS IN A NUMBER OF RESPECTS FROM WELL-ESTABLISHED LEGAL PRINCIPLES, AND IN IMPOSING A MANDATORY SYSTEM OF COMPETITIVE BIDDING, REGULATING IN DETAIL THE OPERATIONS OF NON-THEATRE-OWNING DISTRIBUTORS WHO ARE NOT PUBLIC UTILITIES, IS UNAUTHORIZED BY STATUTE AND UNCONSTITUTIONAL, IN THAT IT CONSTITUTES A JUDICIAL USURPATION OF LEGISLATIVE POWER.

Universal contends that on the whole of the evidence it is entitled to a decree of dismissal. It contends that the injunctive provisions of any decree to be entered herein should run only against those who are found upon adequate evidence to have joined mind and hand and cooperated in any combination and conspiracy to restrain interstate commerce which may have existed, and not extended to those who dealt therewith on the only terms possible. It further contends that under no circumstances, whatever its findings, was the Court below entitled to prescribe a system of competitive bidding, regulating in detail the operations of non-theatre-owning distributors which are not public utilities.

In imposing such a system of competitive bidding the Court does not act judicially but administratively, and thereby usurps the legislative power. It is authorized neither by statute nor, we submit, by the Constitution to act, so as to minutely regulate and in detail supervise the everyday business operations of a distributor, carried on in a lawful manner, and is moreover ill-equipped and unfitted to so act to supervise *in perpetuo* the detailed operations of a far-flung industry. Only an administrative body which can

issue *quasi*-legislative rules and regulations can possibly possess the necessary personnel and expert familiarity with the industry to properly administer such a task, if anyone could. We know of no case in which anything like it has been attempted by a court.

Other less important provisions of the decree require revision, assuming that any injunctive provisions in respect of minimum admission prices, clearances, franchises, master agreements and block-booking are proper as against Universal, which Universal, of course, denies.

As to the minimum admission prices, although the opinion and findings of fact seemingly do not condemn the mere granting of a license in which minimum admission prices are specified, the decree does so (II, sub-div. 1, R. 3695). That which is apparently condemned by the Opinion and by the Findings of Fact is engaging in a system, pursuant to which minimum admission prices are fixed (F. F. 62-73, R. 3670-3).

Likewise in respect of clearance, although the findings of fact approve the institution of clearance (F. F. 78, R. 3674), Universal is forbidden "to maintain a system of clearances" with any exhibitors (II, sub-div. 2, R. 3695). If Universal grants more than one license, and it must necessarily grant thousands, it will certainly be accused under this provision of maintaining a "system of clearances" with exhibitors. Yet it is difficult to understand what illegality there would be therein, if the individual clearances are legal.

The burden of proof of sustaining the validity of any clearance provision, when attacked, is placed upon Universal. Yet the test of the validity of the clearance is whether it is "in excess of what is reasonably necessary

to protect the licensee in the run granted", a matter which is exclusively the concern of theatre operators, and of which Universal obviously can have no direct knowledge (II, sub-div. 4, R. 3695-6). It is moreover absurd to place this burden upon a non-integrated distributor which has no power to do anything but deal with the market on the terms which the market is willing to accept.

Universal is enjoined from performing any existing franchises and from making any franchises in the future, even with small independent exhibitors (II, sub-div. 5, R. 3696). As heretofore pointed out, such franchises are not only legally unobjectionable, but are plainly anti-monopolistic. A "franchise", moreover, is defined without reference to the exclusivity of the arrangement. In other words, any commitment of Universal's pictures for more than one year, would, under this definition, be a "franchise", even if completely non-exclusive. This condemns any non-exclusive license for a term of years, an everyday institution in the patent law at least. Universal is thus deprived of the elementary right to maintain "show-windows" so necessary for the proper exploitation of its pictures, and freely permitted to the major defendants (Decree, V, R. 3700).

Likewise, in the case of master agreements, Universal is enjoined from making the same, even with small groups of independent exhibitors (II, sub-div. 6, R. 3696). It is further enjoined from making or further performing any formula deals, although the only findings of the Court relating to formula deals were in respect of RKO and Paramount (F. F. 86, R. 3675).

The provision of the decree relating to "block-booking" assumes that all deals in which a number of features are sold at the same time are infected with the vice of conditioning,

which is obviously not a fact, and requires that in all such cases, in which features have not been "trade-shown" prior to the granting of the license, the licensee shall be given the right to reject 20% thereof. This in the face of the fact that Universal presently grants to its licensees the right to reject a considerable number of such features, whether or not there has been any conditioning (R. 1468-71).

VII.

THE IMPOSITION OF A SYSTEM OF COMPETITIVE BIDDING, REGULATING IN DETAIL THE OPERATIONS OF NON-THEATRE-OWNING DISTRIBUTORS, WHICH ARE NOT PUBLIC UTILITIES, IF NECESSARY IN THE PUBLIC INTEREST, IS A MATTER FOR CONGRESS, OR AN ADMINISTRATIVE TRIBUNAL CREATED THEREBY, NOT THE COURTS. THE RECOGNIZED JUDICIAL SANCTIONS TO RESTORE COMPETITIVE CONDITIONS IN A SHERMAN ACT CASE ARE TO ENJOIN UNREASONABLE RESTRAINTS OF TRADE AND TO DISSOLVE MONOPOLIES OR MONOPOLISTIC COMBINATIONS.

One of the Government's assignments of error—No. 10—reads as follows:

> "The Court erred in decreeing competitive bidding as appropriate relief in situations where the defendants' theatres were in competition with independent theatres."

This is a direct attack upon the legality of the competitive bidding relief granted in the decree, since it goes to the heart of the Government's basic contention in the case that affiliated theatres were favored by distributors over independent theatres.

If, as found by the Court below, prior runs, clearances and admission prices in the important domestic motion pic-

ture theatres were fixed by combination and conspiracy, the proper remedy was to restrain and prohibit the continuance thereof by appropriate means. Instead, the Court resorted to a hitherto unheard-of form of relief, when it imposed a mandatory system of competitive bidding to regulate in detail the operations of distributors who are not public utilities.

It seems to us plain that such a remedy, if appropriate at all in the circumstances, is exclusively for the determination of Congress, which, if it sees fit, can create an administrative agency to govern the industry through *quasi*-legislative rules and regulations. The judicial power, we think it is clear, does not extend to such manner of relief, through which the operations of a non-public utility industry are closely regulated *in perpetuo* without Congressional sanction.*

Instead of forbidding the defendants to continue the use of practices found to be illegal, and/or employing the remedy of dissolution, insofar as appropriate, the Court forbade the defendant-distributors to license their pictures (except in the case of a major defendant licensing its pictures to its own theatres), "in any manner except" as prescribed.

The gist of the prescription, as applied to Universal, is (1) that it must offer to license every theatre which

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*In *Hartford Empire Co.* v. *United States*, 323 U. S. 386, this Court struck down the lower court's prohibition against dealing with patented machinery in any way but sale, and restored the right to license and lease. At page 409, after discussing the broad range of relief available to control Sherman Act violations, it said:

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, in a different class than other people."

desires to exhibit a feature picture distributed by it upon some run and upon uniform terms, and (2) that, when Universal desires to select a particular theatre for exclusive license on a particular run, it must award such license after competitive bidding conducted in accordance with certain detailed specifications in the Decree, and must base the award solely upon the considerations set forth in the Decree, to the exclusion of all other considerations, however important to the distributor.

The specific restrictions contained in the Decree as to the methods of licensing to be employed are as follows:

1. The distributor must offer to license for a flat rental as distinguished from a percentage of the gross receipts;

2. The distributor must specify, in advance, the number of days for the exhibition to be licensed, and the time when the exhibition is to commence;

3. The distributor must specify precisely when the picture will become available;

4. The distributor must specify the clearance, if any, which it is willing to grant; and

5. The exhibitor's counter-offer must specify: (a) the run he desires to have; (b) the rental he will pay, either as a flat rental, or a percentage of the gross receipts or both, or any other form of rental; (c) the clearance the exhibitor is willing to accept; (d) the playing time the exhibitor desires to have; and (e) any other offers which the exhibitor cares to make.

The distributor is permitted to reject all offers, but is required, in the event he accepts any, to grant the license

upon the run bid for "to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor".

Under this prescribed system of competitive bidding, the primary duty of the distributor, after he has satisfied himself that a theatre is of the "size, location and equipment adequate to yield a reasonable return" to him, is to determine the highest responsible bidder. But under the system prescribed such distributor will necessarily be confronted with various bids having no common denominator, in that some may be flat bids, some percentage of gross receipts bids, some a combination of both, and some in other forms of rental. The distributor, therefore, must determine, on peril of being held in contempt, who is the "highest responsible bidder". Yet, it is plain that he will be unable to do so.

Even, however, were the bids such that the distributor could determine who was the highest responsible bidder, the objective considerations prescribed in the Decree fall far short of being adequate to protect the legitimate interests of a distributor.

In the Consent Decree negotiated between the Government and the five major defendants (Article X, R. 3384-5), an arbitrator, in adjudicating upon the propriety of a refusal to license, is required to take into consideration, among other things, the following factors, and to accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

> "The terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each of said theatres; the capacity of each for producing revenue for the distributor; the character,

appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability for exhibition of the distributor's features on the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres; and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."

Among the very important factors omitted from the final Decree are:

1. Comparative suitability of the competing theatres for the exhibition of the distributor's features on the run requested;

2. Character and ability of the exhibitor operating each of the competing theatres, and their respective reputations generally in the industry and in the community for showmanship, honesty and fair dealing;

3. The policy under which each of the competing theatres has been operating, and the policy under which they respectively propose to operate if the run requested is obtained;

4. The distributor's prior relations with each of the competing theatres involved, and with their owners and operators, and any equities arising therefrom;

5. Competitive conditions in the area in which the competing theatres are located;

6. Character and extent of the area and population which each of the competing theatres serve.

In other respects the system decreed is unworkable. It is, for example, wholly impractical for either a distributor or exhibitor to determine, at the time of the licensing, exactly how long a picture shall be run without any leeway for extended runs. This for the reason that public demand determines the length of the run. Yet under the licensing system prestribed no leeway is possible, because competing bids must necessarily be compared on the basis of the same playing time. If bids should be made for different playing times, it would not be possible to compare them, since, as in the case of film rental, there would be no common denominator. For example, one bid might be for 5 successive weekdays, another might be for 3 successive week-days followed by Saturday and Sunday, and still a third might be for 4 week-days and a holiday. Since attendance is ordinarily far greater on Saturdays, Sundays and holidays, any strict comparison of the bids would be impossible.

Nor is it possible, as a practical matter, for a distributor, when licensing a picture, to contract to make it available at a specified time. The exchanges of the defendant-distributors are and must be run like circulating libraries, in the operation of which it is impossible to determine just when an exhibitor will complete a run and return a print to the

booking office. Everything depends upon public demand in particular theatres to see the picture.

The foregoing clearly indicates that a wholly unworkable system of administrative regulation is imposed upon Universal by the judicial arm of the Government, which we submit is not authorized to so act, either by statute or under the Constitution.

An equity decree in a Sherman Anti-Trust proceeding should be confined to its legitimate purpose, i.e., "to suppress the unlawful practices and to take such reasonable measures as will preclude their revival". *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 426, p. 461. The Sherman Act does not confer legislative or administrative powers on the Courts, but confers jurisdiction only to "prevent and restrain" violations of the Act. Under well-established law this includes the dissolution of monopolies or monopolistic combinations*—*Northern Securities Co.* v. *U. S.*, 193 U. S. 197; *Standard Oil* v. *U. S.*, 221 U. S. 1; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106; *U. S.* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *U. S.* v. *Reading Co.*, 253 U. S. 26; *U. S.* v. *Lehigh Valley R. R. Co.*, 254 U. S. 155; *U. S.* v. *Southern Pacific Co.*, 259 U. S. 214. There is no authorization to impose a comprehensive regulatory system upon a non-public utility such as Universal, thereby putting it in a perpetual straight jacket. On the contrary the Act intended that decrees thereunder should be directed solely to the end of restoring free competition.**

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*The reasons are stated by Judge Learned Hand in *U. S.* v. *Corn Products Refining Co.*, 234 Fed. 964, 1018.

**"One of the fundamental purposes of the statute is to protect, not to destroy, rights of property". *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 78. Yet here we are stripped of our rights under copyright in a manner analogous to that which was disapproved by this Court in respect of patents in *Hartford Empire Co.* v. *U. S.*, 323 U. S. 386.

The clearly legislative nature of such affirmative prescriptions has been pointed out in a number of cases reaching this Court, among them *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U. S. 667, 675, 686; *U. S.* v. *New York Coffee and Sugar Exchange Inc.*, 263 U. S. 611, 621; and *Daniels et al.* v. *Portland Gold Mining Co. et al.*, 202 Fed. 637, 639, 641, cert. den. 229 U. S. 611. In all of these cases it was expressly held that the prescription of rules and regulations to govern the carrying on of private businesses, in order to correct abuses therein, was the prerogative of the legislature under the police power, and not that of the courts in exercising equity powers.

More recently a relatively mild attempt to place a non-public utility industry in the straight-jacket of judicial regulation has been repulsed by this Court. *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707. In that case the Soft-Lite Lens Company Inc., had been found guilty of violating the Sherman Act, and an injunction had issued against it. Upon appeal the Government asked the inclusion of a requirement that Soft-Lite file with the District Court "a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor". Pointing out that Soft-Lite deals in a specialty of a luxury or near-luxury character, and that the right to select its customers might well be the most essential factor in the maintenance of the highest standards of service, this Court refused the Government's request, saying at p. 728: "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices". Among the cases relied on by this Court was *U. S.* v. *Colgate & Co.*, 250 U. S. 300, p. 307, wherein it was unanimously held that "The (Sherman) Act does not restrict the long recognized

right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal". Yet here we are forbidden to deal with our oldest customers or others whom we may rightly regard as our best ones.*

If the right to select customers cannot be denied to one engaged in the business of selling lenses for eye glasses, it certainly ought not to be denied to one engaged in the business of licensing feature motion pictures, costing from hundreds of thousands up to millions of dollars to produce, wherein the relations between distributor and exhibitor are of the highest importance, in view of the peculiarly specialized nature of the business, and the great importance of proper exploitation.

CONCLUSION

A judgment dismissing the complaint as against each of the Universal appellants, should, we submit, be entered, or, in the alternative, the decree should be modified as to them in the respects herein suggested.

Respectfully submitted,

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ADOLPH SCHIMEL,
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Of Counsel.

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*Other cases in this Court recognizing the inviolability of such rights are *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *Same* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452-3; *Same* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-6; *Same* v. *Curtis Publishing Co.*, 260 U. S. 568, 582.

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Supreme Court of the United States

October Term, 1946
No. [redacted] 82

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, INC.,

Appellants,

against

UNITED STATES OF AMERICA,

Respondents,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants.

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR APPEAL

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Counsel for Appellants.

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APPELLATE LAW PRINTERS, NEW YORK CITY

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No.

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, INC.,

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Defendants.

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR APPEAL

In Compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, defendants-appellants, Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of

the District Court entered in this cause on December 31, 1946. A petition for appeal was filed in the District Court on February 6th, 1947, and was allowed by order of the same date.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903; as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, *15 U. S. C.*, § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., § 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707;

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208;

Paramount Famous Lasky Corporation v. *United States*, 282 U. S. 30;

United States v. *American Tobacco Co.*, 221 U. S. 106;

United States v. *Reading*, 226 U. S. 324.

Statutes Involved

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., §§ 1, 2):

"§ 1. Trust, etc. in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful, as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or

corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Constitution of the United States—5th Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Copyright Act of March 4, 1909 (35 Stat. L. Pt. 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. L. Pt.

1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production;

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

* * *

"Sec. 4. That the works for which copyright may be secured under this Act shall include all the writing of an author.

"Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * *

(l) Motion picture photoplays;

(m) Motion pictures other than photoplays."

The Issues and the Rulings Below

The original complaint in this action was filed on or about the 20th day of July, 1938. An amended complaint was filed on November 14th, 1940. In these complaints the Government sued eight of the principal producers and distributors of motion pictures in the United States (including appellants), claiming a violation of Sections 1 and 2 of the Sherman Anti-Trust Act and charging the defendants with having combined and conspired with each other in the production, distribution and exhibition of motion pictures in the United States. Five of the defendants, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, and Loew's, Incorporated, are engaged in the production, distribution and exhibition of motion pictures—that is to say, in addition to producing and distributing motion pictures, they own and operate respectively chains of theatres and are occasionally referred to as "major" defendants.

The three other defendants (which include appellants), Columbia Pictures Corporation, Universal Pictures Company, Inc. and United Artists Corporation, do not own or operate theatres.

Plaintiff alleged that the illegal restraints were brought about by reason of (1) franchise agreements, under which

the defendants granted exhibitors the right to exhibit pictures of more than one season's product; (2) pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties; (3) block booking, under which defendants sold a season's product in advance of production; (4) preferential run, by which defendants' theatres were favored with respect to first run exhibitions and obtained a monopoly of the playing time in the better theatres; (5) unreasonable clearance, by means of which defendants' theatres obtained more protection than was necessary in the exhibition of their pictures as a consequence of which independent theatres were relegated to an inferior and unprofitable run; (6) minimum admission prices, under which the defendants compelled independent exhibitors to keep up admission prices, thereby resulting in a favored position to the affiliated theatres. By their answer appellants denied each and every conclusory allegation of wrong-doing and each and every allegation of fact in support thereof.

While complaining of all of these practices in the industry and seeking injunction, the Government also demanded that the five major defendants be divested of their holdings in their theatres, and that they be compelled to confine themselves in the future only to the production and distribution of motion pictures.

The first trial of this case was commenced on June 3, 1940, and lasted a week. Before any testimony was taken, however, the parties got together at the suggestion of Judge Henry Goddard, who presided, and a consent decree was finally agreed upon between the five major defendants and the Government and was filed November 20, 1940. The three minor defendants (Columbia, United Artists and Univer-

sal) refused to be a party to such consent decree. Under that consent decree the consenting defendants agreed to trade-show their pictures, and to license them in blocks of no more than five. A system of arbitration was instituted under which exhibitors complaining of unreasonable clearance were given an opportunity to arbitrate that question. That decree was to be in effect for three years, after which the Government was at liberty to go on with the trial. Columbia and Universal continued to license their season's product in advance as heretofore. (United Artists, merely acting as an agency for independent producers, has never block-booked.)

At the expiration of the three year period the Government decided to continue with the trial. It asked for and obtained an order for an Expediting Court, and Circuit Judge Augustus N. Hand together with District Judges Henry Goddard and John Bright, were appointed as such court and have acted as such ever since.

On October 8th, 1945, the trial of the case was resumed before the Expediting Court. It lasted until November 20, 1945. The Government abandoned any attempt to prove a monopoly in production of motion pictures. In attempting to prove the other allegations of its amended complaint the Government confined itself to the production of statistics, data, contracts and correspondence theretofore furnished to it for the most part by the defendants themselves pursuant to interrogatories. It called no witnesses whatever. There are approximately 400 exhibits in the case.

Appellants were not involved in the issue of divestiture. They were and are primarily concerned with block booking and with the freedom to license their pictures without restriction. In support of those two issues appellants pro-

duced their General Manager, Abe Montague, who testified at great length to the propriety of block booking and the manner in which it had originated; that it was an economic necessity for appellants to sell its pictures at the commencement of the season to each exhibitor in block, and, of course, long before they had been produced; that the exhibitors throughout the country required and demanded block booking as an economic necessity for maintaining an adequate supply of motion pictures for their theatres; that appellants in dealing with over 10,000 of the 18,000 theatres in the country for over twenty years had acquired good will and many old and satisfied customers, and that appellants indeed favored its customers even as against the theatres affiliated with the five major defendants; and appellants amply proved a long history of fair dealing and good business relations with its customers and with the independent exhibitors.

The trial having concluded on November 20, 1945, briefs were thereafter submitted by the parties in January, 1946.

On June 11, 1946, the District Court handed down its opinion, in which it found each and all of the defendants to have violated Sections 1 and 2 of the Sherman Act. In effect it held that all of the usages and customs heretofore enumerated and of which the Government complained (including block-booking) were illegal and should be restrained. The Court, however, stated that it felt that divestiture was too drastic a remedy, and it refused the Government's plea in that respect. This opinion is annexed hereto as Appendix "A".

Thereafter appellants, the Government and the other defendants submitted proposed findings and decree. Appellants submitted thirty-four findings and two conclusions of

law. Hearings were held by the Court on the proposed findings and decree, and on December 31, 1946, the Court made and filed its findings of fact and conclusions of law and its decree. Concurrently with the filing of the Findings and Decree on December 31, 1946, the Court filed a supplementary opinion, a copy of which is hereto annexed as Appendix "B". The decree substantially follows the Court's June opinion (Exhibit "A"). Among other acts it prohibits the appellants and the other defendants from licensing their pictures in block at the commencement of the season by imposing such restrictions thereon that, as a practical matter each of appellants' pictures must be licensed one by one as and when it is produced. It compels appellants to disregard old customers. It sets up a method of regulation under which exhibitors in competitive areas have the right to bid against each other for each of appellants' pictures. Appellants are compelled to accept the highest bidder. These provisions are contained in Paragraphs 7, 8 and 9 of Section II of the decree, and are the provisions which these appellants complain of on appeal and have assigned as error.

Under Section VII of the decree, Subdivisions 7 and 8 of Section II of the judgment were not to become effective until July 1, 1947. On January 10th, 1947, appellants filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure to grant an additional stay of Paragraphs 7 and 8 as well as of Paragraph 9 of Section II until ninety days after the coming down of a mandate from this Court. In that month the other defendants filed various motions to amend the findings and decree. On February 3rd, 1947, these motions were denied in part and granted in part, as appears by the short memoranda opinions handed down

by the Court and hereto annexed as Appendix "C". Appellants' motion was denied in toto.

In their brief to the District Court, submitted prior to the hearings on the proposed findings and decree, the appellants pointed out that block booking as the term is known in the motion picture industry, is nothing more nor less than selling a season's product of motion pictures in advance; and that the testimony on the trial showed clearly that there was no tying-in of pictures or conditioning the licensing of one group of pictures upon the licensing of another; that the Government had signally failed to prove any such tie-up or conditioning; that a producer and distributor of motion pictures has as much right to sell his season's product as a manufacturer of shoes or soap; that economically it was necessary to appellants' existance to operate in that manner, because only by the sale of its product in advance could it be determined how many contracts there would be for each picture which was to be made and the potential license fees; and that such determination was necessary in order to obtain finances, particularly from banks, for budget production for the ensuing season; that this practice was similar to the practice of wholesalers and manufacturers generally, and that a prohibition against block booking would interfere with appellants' financial arrangements and cripple them in their business.

It was pointed out that in addition to the three minor defendants in this case there were three other distributors of motion pictures of substantial size, to wit: Monogram Pictures Corporation, Republic Pictures Corporation and Producers Releasing Corporation, each of which has been engaged in block booking. None of these companies were parties to this suit nor are they subject to this decree, and therefore are free of the regulation of this decree. Each of

these companies is a substantial competitor of appellants and has thereby obtained an economic advantage over them.

Appellants also pointed out that in addition to this general interference with ordinary business procedure, the attempted regulation of the industry by means of a prohibition against block booking and the provisions for competitive buying and selling were an illegal interference with plaintiff's copyrights both past and prospective. Under the decree and findings, appellants' pictures must be put up on the auction block, singly and after production. Appellants are required to sell them to the highest bidder, disregarding their customers and the good will built up for over twenty years. It was pointed out particularly that this kind of auction selling was a hardship upon the three minor defendants, who owned no theatres, because the five major defendants owning their own theatres, would be permitted by the findings and decree to license the pictures produced by them to their own theatres without any restriction. This placed the three minor defendants, including appellants, at a terrific disadvantage. It furthermore destroyed the rights given to them by their copyrights. The appellants strongly emphasized that the proposed findings and decree were a destruction of copyrights under the guise of an enforcement of the Sherman Act, and that nothing in the Sherman Act warranted the District Court in exercising its jurisdiction in that manner; and the appellants directly questioned the jurisdiction of the District Court to make such decree.

Appellants' arguments were disregarded by the District Court, and the findings and decree as filed on December 31, 1946 have embodied those provisions which appellants deem error and to which they object and which they shall ask this Court to reverse.

The Questions Are Substantial

The questions raised by this appeal relate primarily to the propriety of the relief granted by the District Court and the want of jurisdiction of that Court. All the questions which are here stated to be substantial were properly raised before the District Court by appellants' request concerning findings of fact and conclusions of law as well as by briefs. All the points here stated to be substantial are fully covered by appellants' Assignment of Errors.

1. The first substantial question raised by this appeal concerns the prohibition against so-called block-booking. Although there was no evidence to support it, the Court made a finding of fact in which it purported to define block-booking as the practice of licensing or offering for license one feature or group of features upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period (Finding No. 1). That is not block-booking as known in the industry. Block-booking is the licensing of pictures in groups or blocks at the commencement of the season. There is no support in this record by any proof whatever for the definition which the Court has placed upon block-booking. In the brief submitted with their proposed findings, these appellants pointed out to the Court that block-booking as known in the industry and as practiced by the appellants and other distributors was an ancient custom going back over a quarter of a century, and that it had received the sanction of the courts as being a perfectly legal and proper method of selling pictures; and it called the District Court's attention to the case of *Federal Trade Commission* v. *Para-*

mount, 57 Fed. (2d) 152, which was decided by the Second Circuit, of which Judge Augustus N. Hand was then a member and who sat in that case; and also *Westways Theatre, Inc.* v. *Twentieth Century-Fox Film*, 30 Fed. Supp. 830, aff'd. 113 Fed. (2d) 932.

It also pointed out that in *U. S.* v. *Crescent*, 323 U. S. 173, in which the Government was successful, the practice of Columbia and Universal, who were defendants in that case and who were dismissed out of it, was to sell their pictures by block-booking, and that practice had been upheld by the Court and the Government in that case did not make an attack upon block-booking, as such.

Here there was not a scintilla of evidence in the case that the selling of pictures in block at the beginning of the season was injurious to anybody, that any exhibitor was harmed thereby or that block-booking in any way restrained interstate trade or commerce; and this method of selling had been encouraged by the courts themselves in the decisions mentioned.

2. The second substantial question raised on this appeal concerns the propriety of making regulations and restrictions with respect to the licensing of appellants' pictures on the broad principle that such provisions of the decree go beyond the jurisdiction of the Court under the Sherman Act; that under that Act the Court is empowered only to enjoin and restrain illegal conduct on the part of defendants which is contrary to the Sherman Act; that there is nothing in that Act which empowers the District Court to go beyond injunction and to lay down a system of policing and regulation which either directly or indirectly places a defendant in a strait-jacket and compels him to do business in the manner outlined by the Court or to get out of

business. This regulatory system is set out in great detail in Paragraphs 7, 8 and 9 of Section II of the decree. It is to be borne in mind that this system goes into effect concurrently with the injunction provisions of the decree under which appellants are no longer in combination and conspiracy but are acting singly in conformity with the other injunctive provisions, and are dealing with a single exhibitor at arm's length making a deal for the licensing of their pictures. Acting in this lawful manner they are told by the decree that they may only license their picture within the restrictions and limitations contained in Paragraph 8, and that for all purposes their pictures must be put upon the auction block, opened up to the highest bidder; that they cannot choose their customer; that they cannot even make their own terms for the licensing of their product. We believe this to be contrary to the jurisdiction of the District Court, contrary to the spirit, the letter and intent of the Sherman Act, and completely destructive of the principles of free enterprise and of the right of a producer to market his property in a lawful manner in any way that he sees fit, with whomever he sees fit, and upon such terms as he thinks desirable. This section is a complete attack upon every principle of free enterprise, and places it within the power of the District Court to take over and conduct business according to its own conceptions and lights.

The third substantial question involved in this appeal is whether appellants have been deprived of their property without due process of law in violation of the Fifth Amendment to the Constitution. The decree virtually transforms appellants, as well as the other defendants in this action, into public utilities. There was no evidence in this case that any of these defendants, including appellants, were

engaged in a business affected with a public interest, nor is there any finding to that effect. Yet the decree proceeds as if appellants were so engaged, and imposes a system of regulation which may only be imposed upon public utilities by legislation. Public utilities may be told to sell their property to anyone who applies for it, and the terms and conditions of the sale, the rates charged and the manner in which they are to be fixed and determined may be the subject of regulation by the Legislature. But there is no warrant for imposing those restrictions upon these appellants who are engaged in a business enterprise which is purely private and not affected with a public interest, and who are at liberty to dispose of their property in any manner they see fit and upon any terms satisfactory to them. This decree tells them that they must sell their property at public auction in the manner prescribed by the Court, or not at all. It does not permit appellants to choose their customers and to arrange their own terms, or otherwise engage in the lawful activities of a merchant who is exploiting his merchandise. In that respect appellants are deprived of their property without due process of law. It is a complete confiscation.

The District Court usurped powers which it did not possess. Even Congress or any other legislative body could not constitutionally impose the restrictions set forth in this decree on the business in which appellants are engaged. Even if Congress were to legislate with respect to a business affected with a public interest, it could only do so in the interest of the public at large, and not in the interest of any special or favored group. Under this decree the appellants have been turned into a public utility in the interest of the operators of 18,000 exhibitors of motion pic-

tures in the country, and the lawful use of appellants' property has been improperly restricted for the benefit of that favored and special group, and not for the public at large. This we believe is a violation of appellants' constitutional rights as heretofore set forth.

3. The fourth substantial question involved in this appeal is whether the District Court, sitting to enforce the Sherman Act, has the right to impinge upon appellants' copyrights and the exclusive rights that are vested in them by such copyrights. The final decree undoubtedly restricts the copyrights already existing of which appellants are proprietors and all copyrights in motion pictures of which appellants may in the future become proprietors. It was pointed out below that the patent and copyright laws and the Sherman Act exist side by side, each being entitled to full recognition and application by the courts (*U. S. v. U. S. Gypsum Co.*, 70 U. S. Pat. Q. 49), and that the monopoly inherent in patents and copyrights was not the monopoly condemned by the Sherman Act. We called attention to the recent decision of this Court in *Hartford-Empire Company* v. *United States*, 323 U. S. 386, in which provisions in a decree which had enjoined a violation of the Sherman Act were stricken therefrom because they amounted to a form of compulsory license of the patents involved or to a confiscation of the patents; and that this Court had held there that the District Court should have limited itself to enjoining the defendants from setting up illegal pools, but that it went far beyond that, and that the restrictive provisions in the *Hartford-Empire* case were similar to the restrictive provisions contained in the final decree in the instant case. We prayed that the District Court limit its relief to in-

junction only and not attempt a system of regulation which had been condemned by Judge Goodrich in *U. S.* v. *Pullman Company*, 50 Fed. Supp., 123, 136. (See also *U. S.* v. *Reading Company*, 183 Fed. 459, aff'd and mod. 226 U. S. 324.

We urged then and do here that appellants as copyright proprietors had the unqualified right to either part with their copyrights in any manner they saw fit (*Parton* v. *Prang*, 3 Cliff. 535), or that they had the right to license the use of their works upon any terms and to any one they saw fit. (*Black* v. *Henry G. Allen Co.*, 42 Fed. 618.) The District Court rejected that contention.

By Paragraphs 7, 8 and 9 of the final decree it is quite clear that the vested exclusive rights in the copyrights owned by appellants may no longer be exercised in the unrestricted manner contemplated by the Copyright Act of 1909.

The extent to which the Court's findings and judgment rest on these erroneous rulings raises substantial questions which should be reviewed by this Court. Appellants are of the belief that all the questions here raised are substantial and respectfully petition this Court to pass on them after plenary hearing.

Respectfully submitted,

SCHWARTZ & FROHLICH,
Counsel for Appellants.

Dated, February 6th, 1947.

LOUIS D. FROHLICH,
of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Equity No. 87-273

UNITED STATES OF AMERICA,

Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants.

Opinion

Before:

AUGUSTUS N. HAND, *Circuit Judge,*

HENRY W. GODDARD and JOHN BRIGHT,
District Judges.

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

Appendix "A"—Opinion

Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Elliott H. Meyer, and John R. Niesley, Special Assistants to the Attorney General; Frank W. Gaines, Jr., Gerald A. Herrick, Robert B. Hummel, Harold Lasser and Horace T. Morrison, Special Attorneys for United States of America.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants; Whitney North Seymour, Louis Phillips, Albert C. Bickford and Armand F. MacManus, Counsel.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, C. Stanley Thompson, Benjamin Melniker and S. Hazard Gillespie, Jr., Counsel.

George S. Leisure, Ralstone R. Irvine, Granville Whittlesey, Jr., and Gordon E. Youngman, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation; Roy W. McDonald, and Donovan Leisure Newton & Lumbard, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh and Howard Levinson, Counsel.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, *Circuit Judge*:

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York,

New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corpora-

tion organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation, and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defend-

ants—Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff. The issues therefore are whether there have been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically ex-

cluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film supply, runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attempts to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3)

that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit, executed a written consent to the entry of a decree by the District Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants had violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another features or group of features,

nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which an award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses thereafter entered into by a distributor that is part to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing agreement, or a series of licensing agreements, covering more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor to license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrariiy refused to license its features for exhibition on the

run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position, together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which, it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time of such license, and (c) in any theatre of which a company in which the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with

or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

The three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably because of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff did not secure the entry of a decree against the three minor defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree

was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1] The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of of the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits "* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that

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Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

they are placed in the licenses in order to assure the distributor of a minimum revenue when it licenses upon a percentage basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2] Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C.C.A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

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[2] That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's Exhibits 275-290.

[3] The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement.

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors. Such combinations we hold to be forbidden by the Sherman Act.

The exhibits submitted in this case contain numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3). It is the practice of exhibitors to charge the same scale of ad-

mission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibits were involved. But it is plain that the distributor did more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would re-

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[4] Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

* * * * * *

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

fuse to grant licenses unless the prices were raised.[5] Moreover, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent ex-

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[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to under-

hibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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stand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Appendix "A"—Opinion

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U.A.	Univ.
Sneicer	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	30¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
LaSalle	Niagara Falls	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	20¢ tax excl.	22¢	25¢	none	20¢	x	25¢	x
Capitol	Cleveland, Ohio	30¢ tax	27¢	30¢	x	30¢	x	x	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Ritz	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	30¢	30¢	33¢	30¢	x	x	33¢	x

Appendix "A"—Opinion

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U.A.	Univ.
Whalley	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	35¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appelton, Wisc.	40¢	46¢	none	none	45¢ tax incl.	none	x	46¢ plus 9¢ tax
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Gloria or Riviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket,	40¢	40¢	x	none	x	x	x	x
Bijoux	R. I.	x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensess must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independnt theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburg—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and inde-

pendent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake

City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of con-

spiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the

general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C.C.A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of §2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-

run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyrighted Act. But that act has never been held to sanction a conspiracy among licensors and licensees artifically to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film; if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment

to that act, 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253; 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are rea-

sonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported

cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for

the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior

to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is

pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an indepedent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc, operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been

pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clear-

ance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265,

472 (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383 (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened. See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run, Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are sold by him only to Loew's and RKO. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record p. 693.

"Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes."

been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U.S. (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with indepedent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor

to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling

For many years the distributor-defendants licensed their films in "blocks", or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a

certain number of pictures. Because of complaints of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consent distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licenser may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch*

Mfg. Co. v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*,

243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C.J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in

the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield Co., 105 F. 2d 207, or for the exploitation or promation of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more

other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals,

master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to

reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major statute in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theatres with those of a competing exhibitor, independent or affili-

ated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating booking, or film buying through agents,

provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon re-opening. Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films. Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting roadshow privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and undertage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders

will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view

of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the pro-

posed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above

[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States v. The Pullman Company,* 64 F. Supp. 108, 112 (E. D. Pa., 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between

defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS.

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates put-

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Universal	49	12.34%	14.63%
Republic	(29 features (30 "Westerns"	14.86%	8.66%
Monogram	(26 features (16 "Westerns"	10.58%	7.76%
PRC	(20 features (16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

ative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that they must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the

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[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance,

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Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177	
RKO	32	
Total		209 Theatres
Total affected by the decree according to RKO's Exhibit 11		1,292 Theatres

we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the

adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of

one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of

such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition

of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.

HENRY W. GODDARD,
U. S. District Judge.

JOHN BRIGHT,
U. S. District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*,

Defendants.

Memorandum In Re Findings and Decree

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the

prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

APPENDIX "C"

MOTION OF COLUMBIA DEFENDANTS

"Motion denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNITED ARTISTS

"Motion denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNIVERSAL DEFENDANTS

"The within motion is denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF PARAMOUNT, TWENTIETH CENTURY-FOX, LOEW, R. K. O. AND WARNER DEFENDANTS

"Motion denied as to 1, 3 and 4; granted as to 2 (a) and (b) by extending the time of dissolution and termination to July 1, 1947. To this end, Paragraph III (2) of this decree is modified by adding at the end the following:

"The Pooling agreements by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the end the following:

> "The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Settle order on Notice.

Feb. 3, 1947

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CLERK

IN THE

Supreme Court of the United States

October Term, 1947
No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC.,
Appellants,

against

UNITED STATES OF AMERICA,
Respondents,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., AND UNITED ARTISTS CORPORATION,
Defendants-Appellants.

REPLY BRIEF ON BEHALF OF APPELLANTS, COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., REFERRED TO AS COLUMBIA

SCHWARTZ & FROHLICH,
Attorneys for Appellants Columbia.

LOUIS D. FROHLICH,
ARTHUR H. SCHWARTZ,
of Counsel.
New York City, N. Y.

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REPLY BRIEF ON BEHALF OF APPELLANTS, COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., REFERRED TO AS COLUMBIA

The Government in its Appellees' Brief (p. 39) attempts to sustain the District Court finding on block-booking by pretending that block-booking is tied up with franchise agreements; and since franchise agreements have been held illegal, block-booking must also be illegal.

This is merely an attempt by the Government to evade the issues presented on block-booking. Unable to find any proof in this record which would stamp block-booking as an illegal practice, the Government takes refuge in attempting to classify block-booking with franchise agreements, knowing of course that appellants are not questioning the decree with respect to franchise agreements.

At the time of the trial appellants had in force *four* franchise agreements, and reference was made to them in four of the Government exhibits as follows:

> *Gov. Ex. 265*—A three year agreement between Columbia and the Fox Theatres in Spokane, Washington.
>
> *Gov. Exs. 266-266a*—An agreement between Columbia and Warner's in Philadelphia, Pa.; this is a one year franchise with a two year renewal.
>
> *Gov. Ex. 471*—A three year agreement between Columbia and Loew's for the Metropolitan area in New York City.
>
> *Gov. Ex. 472*—A three year agreement between Columbia and Fox Inter-Mountain for certain of the Western States.

Columbia had never entered into any long term franchise agreements. It had a small number of four year agreements, but the great majority of its franchise agreements were for two or three years.

There is in evidence (Ex. C-9a) an available list of Columbia franchises from 1937 to date. This shows that in a ten-year period Columbia gave franchises to 46 affiliates and to 468 independents.

In its Appellees' Brief (p. 44), the Government, adding up the number of theatres which had been affected by Columbia franchise agreements, comes to a total of 829. But those theatres are only affiliated theatres. From the same exhibit it is disclosed that Columbia franchise agreements in the ten-year period also affected independent theatres to the number of 1,182. Taking these two figures together it is clear from the statistics alone that Columbia gave franchises more liberally to independents than it did to affiliates.

In any event, the District Court held that franchises were illegal. From that much of the decree appellants have not appealed.

The District Court defined a franchise agreement as follows (Finding No. 1, R. 3660):

> "*Franchise*—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement."

In other words, a franchise agreement was an undertaking to give the franchise holder the distributor's pictures for more than one season.

The restraint of trade as found by the Court could only be interpreted as a holding that the distributor by means of such an agreement prevented himself from selling his product to any other distributor *after the expiration* of the first season.

There was no intimation either in that finding, in the decree or in the opinion of the District Court that fran-

chise agreements were tied up with block-booking. The proof is, and the fact is, that they are not so tied up. There could be franchise agreements without block-booking. What appellants object to is a decree which enjoins them from selling their pictures in block for *one* season.

Franchise agreements were stricken down by the District Court primarily because they tied up a substantial number of pictures for an unreasonable length of time. Finding No. 89 (R. 3675) indicates that clearly:

> "89. Franchises have been entered into by the distributor defendants, and unreasonably restrain trade, because they cover too long a period (more than one season), and also because they embrace all the features released by a given distributor."

The opinion of the District Court even makes that clearer (R. 3541):

> "Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture theatre by theatre, to the highest bidder."

It is manifest that the District Court primarily objected to franchises because they were for too long a period—for more than one season—and that it objected to all the pictures released by a given distributor for that period because that tied up all of the distributor's pictures for a long time—practically took them off the market for three or four or five years. From the limited holding the Govern-

ment seeks to make the deduction that the distributor could not sell all of its pictures for a limited period of one season. The District Court did not so find. Its reason for holding block-booking illegal was based upon the tying-in or conditioning of pictures, as set forth in Finding No. 93 (R. 3676):

> "93. Block-booking, when the license of any feature is conditioned upon taking of other features, is a system which prevents competitors from bidding for single features on their individual merits."

And of course, the District Court had previously found block-booking to be a tying-in or conditioning of pictures (Finding No. 1 R. 3659-60).

To illustrate the difference: Columbia could give an exhibitor a franchise agreement for one Rita Hayworth picture a year for five years. That would involve no block-booking, but would tie up this kind of a picture and keep it away from other exhibitors for five years. It would be a pure franchise agreement and nothing more. Indeed many of the franchise agreements which were stricken down by the decree were for considerably less than the season's product of each distributor, or they gave the exhibitor the choice or selection of a number of pictures only for each season during the franchise period.

Gov. Ex. 472 is a franchise agreement between Columbia and Fox Inter-Mountain Amusement Corporation for a three year period. That document provides (Article X, Subdivision b):

> "In all theatres where the exhibitor has agreed to exhibit *part* of the product only, such commitments shall be *selected* by the exhibitor from the total product. * * *"

Columbia's franchise contract (Gov. Ex. 265), which was made with Evergreen Theatres Corporation for a three year period, likewise contains the identical language.

Gov. Ex. 259 is a franchise agreement between Universal and Warner Bros. for a three year period. In the Appendix to the Government's brief (pp. 103-104) the commitment of the exhibitor is shown to be a *selection* of 30 pictures out of 43.

In the same Appendix there is digested at pages 70-1-2 the franchise agreement for Loew pictures in the Warner theatres (Gov. Ex. 181). The digest states:

> "Right of selection as indicated in deal sheets" (p. 72).

Manifestly it was not the *number* of pictures involved which brought about the restraint. It was the *time element*—the keeping of pictures, whether one or all, off the market for an unreasonable period.

Appellants contend that they have a perfect right to sell a season's product in advance without showing the pictures. The Government assumes that this is a conditioning of product as well as a serious abuse of copyright license privilege, and keeps on distorting appellants' claim. For example, in its Appellees' Brief (p. 45), it says:

> "Columbia apparently insists that franchises are not agreements which are intended to tie a group of copyrights together for a trade restraining purpose. * * *"

That is not appellants' claim.

Let us make it as plain as we know how. Appellants insist that the injunction against franchises was granted to prevent any distributor's product, block-booking or no block-booking, from being tied up for more than one season. And that this has nothing to do with block-booking.

The Government has not pointed out any proof in this record which would justify the District Court in holding block-booking illegal. It hints (Appellees' Br., p. 46) that exhibitors were actually induced by this practice of block-booking to make licenses for films which they did not particularly desire as a means of securing more valuable films that they had to have for profitable operation. That is purely a figment of the Government's imagination. Where in this record is there the slightest proof of such a claim by exhibitors?

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1947

No. 82

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, INC.,

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Defendants-Appellants.

BRIEF ON BEHALF OF APPELLANTS COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC. (REFERRED TO AS "COLUMBIA")

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IN THE

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Appellants,

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Reference to Opinions Below

The opinion of the District Court was handed down June 11, 1946. That opinion appears at pages 3504, *et seq.* of the Record, and is reported officially (*U. S.* v. *Paramount*, 66 Fed. Supp. 323). A supplementary opinion (unreported) was filed on December 31, 1946, and appears at page 3702 of the Record.

Grounds of Jurisdiction

This is an action in equity brought by the United States of America involving the Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., Sections 1 & 2). The jurisdiction of this Court to review by direct appeal the judgment entered below is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The decree was entered on December 31, 1946 (R. p. 3694).

The following decisions sustain the jurisdiction of this Court to review the judgment below on direct appeal.

U. S. v. *California Co-operative Canneries*, 279 U. S. 553;
Swift & Co. v. *U. S.*, 276 U. S. 311;
U. S. v. *Crescent Amusement Co.*, 323 U. S. 173;
U. S. v. *Bousch & Lomb Optical Co.*, 321 U. S. 707;
Interstate Circuit, Inc. v. *U. S.*, 306 U. S. 208;
Paramount Famous-Lasky Corporation v. *U. S.*, 282 U. S. 30;
U. S. v. *American Tobacco Company*, 221 U. S. 106;
U. S. v. *Reading Company*, 226 U. S. 324;
U. S. v. *National Lead Co.*, 332 U. S. 319;
U. S. v. *Yellow Cab Co.*, 332 U. S. 218.

On February 6, 1947, appellants filed a petition for appeal, assignment of errors and prayer for reversal and citation, and the District Court made an order allowing the appeal upon filing of a bond for $2,000 for costs, which bond was filed.

On April 7, 1947, this Court made an order staying certain sections of the decree pending the determination of the appeal. On May 8th, 1947, the record was filed with the Clerk of this Court, and on May 13, 1947 appellants filed their statement of points relied on and designation of parts of the record necessary for the consideration thereof (R. p. 3830).

On June 23rd, 1947, this Court noted probable jurisdiction (R. p. 3840).

Statement of the Case

1.

Proceedings Below

This suit was commenced by the filing of a summons and complaint on July 30, 1938 against appellants and the remaining defendants, all of whom may be divided into eight groups, five of them being known as the Major defendants and their subsidiaries, which produce, distribute and exhibit pictures (*i.e.* Paramount, Loew, RKO, Warner, and Twentieth Century-Fox), and the remaining three being known as the Minor defendants and their subsidiaries, which either produce and distribute or merely distribute pictures but do *not* exhibit them or own any theatres (*i.e.* Columbia, United Artists, and Universal). These eight groups are the principal producers and distributors of motion pictures in the United States.

The Government claimed a violation of Sections 1 and 2 of the Sherman Anti-Trust Act, charging appellants and the other defendants with having combined and conspired with each other in the production, distribution and exhibition of motion pictures in the United States. Upon the trial the

charge of conspiracy with respect to *production* of pictures was withdrawn by the Government, leaving allegations of restraint only with respect to distribution and exhibition.

The Government alleged that the illegal restraint was brought about by means of:

(1) Franchise agreements, under which by a single contract the defendants granted exhibitors the right to exhibit more than one season's product of pictures;

(2) Pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties;

(3) Block-booking, under which defendants sold all or a portion of a season's product in advance of production;

(4) Preferential run, under which major defendants' theatres were favored with first run exhibitions and obtained a monopoly of the better playing time in their own theatres;

(5) Unreasonable clearance under which the major defendants' theatres obtained more protection over subsequent run theatres than was necessary, as a consequence of which independent theatres were relegated to an inferior and unprofitable position; and

(6) Minimum admission prices under which the defendants compelled independent exhibitors to maintain admission prices, thereby resulting in a favored position to the affiliated theatres.

While complaining of all these practices in the industry and seeking injunctive relief, the plaintiff also demanded that the five major defendants be divested of their theatre

holdings and that they be compelled to confine themselves in the future only to the production and distribution of motion pictures, or only to exhibition.

There were two trials of this case. The first trial was commenced on June 3, 1940, and lasted a week. Before any testimony was taken, however, the parties conferred at the suggestion of District Judge Henry W. Goddard, who presided, and a consent decree was agreed upon between the five Major defendants and the Government, which was filed on November 20, 1940. The three Minor defendants (Columbia, United Artists and Universal) refused to be a party to such consent decree.

Under that decree the consenting defendants agreed to trade-show their pictures and to license them in blocks of no more than five. A system of arbitration was instituted under which exhibitors, complaining of unreasonable clearance, and under certain circumstances, of run, were given an opportunity to arbitrate that question. The decree provided that after three years the Government could, if it so desired, be at liberty to proceed with the trial. Columbia and Universal continued to license their season's product in advance as heretofore. (United Artists, merely acting as an agency for independent producers, has never block-booked).

At the expiration of the three year period the Government decided to continue with the trial. It asked for and obtained an order for an Expediting Court, and Circuit Judge Augustus N. Hand together with District Judges Henry W. Goddard and John Bright, were appointed as such Court and have acted as such ever since.

On October 8th, 1945, the trial of the case was resumed before the Expediting Court. It lasted until November 20, 1945. The Government abandoned any attempt to prove a monopoly in production of motion pictures. In attempting to prove the other allegations of its amended complaint the Government confined itself to the production of statistics, data, and contracts theretofore furnished to it for the most part by the defendants themselves pursuant to interrogatories. It called no witnesses whatever except two Government employes who compiled tabulations. There are approximately 400 exhibits in the case.

Appellants were not involved in the issue of divestiture. They were and are primarily concerned with block-booking and with the freedom to license their pictures without restriction.

On those two issues appellants produced their General Sales Manager, Abraham Montague, who testified at great length as to the propriety of block booking and the manner in which it had originated; that it was an economic necessity for appellants to sell their pictures at the commencement of the season to each exhibitor in block, and, of course, long before they had been produced; that the independent exhibitors throughout the country required and demanded block booking as an economic necessity for maintaining an adequate supply of motion pictures for their theatres; that appellants in dealing with over 10,000 of the 18,000 theatres in the country for over twenty years had acquired a good will and many old and satisfied customers, and that appellants indeed favored their independent customers even as against the theatres affiliated with the five major defendants. Appellants amply proved a long his-

tory of fair dealing and good business relations with their customers among both affiliated and independent exhibitors.

The trial having been concluded on November 20, 1945, briefs were thereafter submitted by the parties in January, 1946.

On June 11, 1946, the District Court handed down its opinion, in which it found each and all of the defendants to have violated the Sherman Act. In effect it held that all of the usages and customs heretofore enumerated and of which the Government complained (including block-booking), were illegal and should be restrained. The Court, however, stated that it felt that divestiture was too drastic a remedy, and refused the Government's plea in that respect. Its opinion is reported in 66 Fed. Supp. 323.

Thereafter appellants, the Government and the other defendants submitted proposed findings and decrees. Appellants submitted thirty-four findings and two conclusions of law (R. pp. 3641-8). Hearings were held by the Court on the proposed findings and decrees and on December 31, 1946, the Court made and filed its Findings of Fact and Conclusions of Law and its Decree. Concurrently with the filing of the Findings and Decree on December 31, 1946, the Court filed a supplementary opinion, a copy of which (unreported) appears at page 3702 of the Record.

The Decree substantially follows the Court's June 1946 opinion. Among other acts, it prohibits the appellants and the other defendants from licensing their pictures in block at the commencement of the season by imposing such restrictions thereon that, as a practical matter, each of appellants' pictures must be licensed one by one as and when

it is produced. It compels appellants to disregard old customers. It sets up a method of regulation under which exhibitors in competitive areas have the right to bid against each other for each of appellants' pictures. Appellants are compelled to accept the highest bidder. These provisions are contained in Paragraphs 7, 8 and 9 of Section II of the decree, and are the provisions which these appellants complain of on appeal and have assigned as error.

Both in its pleading and upon the trial the Government referred to the licensing of pictures in groups or wholesale as a pernicious form of activity. It sought to create an evil by definition alone—a new technique in the trial of cases. After weeks of this atmosphere the District Court fell into the trap, and it also began to speak of this method of selling with bated breath. But nobody thought it necessary to *prove* illegality, and that formality was entirely dispensed with. And so "block-booking" became another violation of the Sherman Act by the Government's *ipse dixit*.

The appellants claimed below that "block booking", as the term is known in the motion picture industry, is nothing more nor less than licensing all or part of a season's product of motion pictures in advance; and that the testimony on the trial showed clearly that there was no "tying-in" of pictures or conditioning the licensing of one picture or one group of pictures upon the licensing of another picture or another group of pictures; that the Government had signally failed to prove any such "tying-in" or conditioning, although a producer and distributor of motion pictures had as much right to sell all or part of his season's product in advance as a manufacturer of shoes or soap; that economical-

ly it was necessary to appellants' existence to operate in that manner, because only by the sale of its product in advance could it be determined how many contracts there would be for each picture to be made and the potential license fees; that such a determination was necessary in order to obtain finances, particularly from banks, for production for the ensuing season; that this practice was similar to the normal practice of wholesalers and manufacturers generally, and that a prohibition against block booking would interfere with appellants' ability to make financial arrangements and might cripple their business.

It was pointed out that in addition to the three minor defendants in this case there were three other distributors of motion pictures of substantial size, to wit: Monogram Pictures Corporation, Republic Pictures Corporation and Producers Releasing Corporation, each of which has been engaged in block-booking. These companies were not parties to this suit nor are they subject to this decree, and therefore they are free of the regulation of block-booking imposed by this decree. Each of these companies is a substantial competitor of appellants and would thereby obtain an economic advantage over appellants, because they would be free to license a season's product at one time, instead of offering pictures one at a time.

Appellants also contended that in addition to this general interference with ordinary business procedure, the attempted regulation of the industry by means of a prohibition against block-booking and the provisions for competitive buying and selling would constitute an illegal interference with plaintiff's copyrights both past and prospective and a taking of its property without due process.

Under the Decree and Findings, appellants' pictures must be put upon the auction block, singly and after production. Appellants are required to sell them to the highest bidder, disregarding their old customers and the good will built up for over twenty-seven years. It was pointed out particularly that this kind of auction selling was a hardship upon the three Minor defendants, who own no theatres, because the five Major defendants owning their own theatres were permitted by the Findings and Decree to license the pictures produced by them to their own theatres without any restriction whatsoever. This places the three Minor defendants, including appellants, at a terrific economic disadvantage. It furthermore destroys the rights given to them by their copyrights.

Appellants strongly emphasized that the Decree was a destruction of copyrights under the guise of an enforcement of the Sherman Act, and that nothing in the Sherman Act warranted the District Court in exercising its jurisdiction in that manner; and appellants directly questioned the jurisdiction of the District Court to make such Decree. (See Appellants' Memoranda at pages 3636 and 3650 of the Record.)

Appellants' arguments were disregarded by the District Court, and the Findings and Decree as filed on December 31, 1946 have embodied those provisions which appellants have assigned as error and to which they object and which they ask this Court to reverse.

2.

Specification of Errors

Specifically appellants assign error to Findings numbered 1, 93, 94, 97, 154, 156, and Conclusions numbered 8(g) and 11 (R. pp. 3659-3694). (Assignment of Errors 1, 2, 3, 4, 5, 6, 7, 8 and 9, at pp. 3752-3762 of the Record.)

The Decree in effect tears this industry apart, and holds illegal practically every custom and usage and every type of contract which has crystallized over a period of thirty years. Appellants have not appealed from the restraints upon pooling agreements, franchise agreements, minimum admission prices, etc., because they feel that they can successfully operate their business in spite of those injunctive provisions. They have appealed, however, from two things: (1) the injunction against block booking, and (2) the imposition of so-called competitive bidding, or as we prefer to call it, the provisions for auction selling. Those two provisions of the Decree, if sustained by this Court, would work incalculable injury upon appellants.

With respect to block booking, we contend that the evidence does not warrant any finding condemning this as an illegal practice. With respect to auction selling, we contend that the District Court has no jurisdiction to include such a provision in its Decree.

We confine ourselves solely to those provisions which are contained in Paragraphs 7, 8 and 9 of Section II of the Decree, and we ask this Court to reverse the decree in that respect, and to strike such provisions from the Decree.

ARGUMENT

POINT I

Block-booking is a lawful practice, and does not violate the Sherman Act.

Findings Nos. 1, 93, 94, 97, 154 and 156, and Conclusions Nos. 8(g) and 11 are unsupported by proof.

[Assignment of Errors 1, 2, 3, 4, 5, 6, 7, 8.]

The Government had imputed some sinister and conspiratorial motive to licensing motion pictures in a group or a season's output, and in its amended and supplemental complaint it alleged this to be a wholly illegal practice. (Amended Supplemental Complaint, pars. 145, 181, R. pp. 3185, 3198.)

When this action was brought all eight defendants as well as other distributors in the trade made it a practice to license their full season's product of pictures or a substantial part of it to exhibitors at the commencement of each licensing year (from June to September). This was usually done by each company by means of a single contract; the pictures were described by title or story or star or director (or all four items), and as and when the pictures were produced and made available for exhibition during the ensuing season they were furnished to the exhibitor. That practice prevailed in the industry for over twenty years and was an economical method of licensing pictures, not only giving an advantage to the distributor, in that he knew at the commencement of the season how many customers he could rely upon, how much he could budget his pictures for,

how much capital he would require, or how much he would have to borrow from the banks, but also giving the exhibitor an assurance of product for the season and relieving him of the worry and labor of constantly seeking product and negotiating therefor. The simplicity of the method is of course obvious.

However, when the consent decree was negotiated between the Government and the five Major defendants in June, 1940, the Government exacted as one condition a provision that henceforth those five Major defendants would license their pictures only in blocks of five as and when they became available (R. p. 3375). This was of course a modified form of block booking. Instead of licensing pictures in a block of say forty pictures, at the commencement of the season, each Major defendant could license no more than five pictures at various times during the season. The Government by entering into the consent decree in November, 1940 obviously placed its stamp of approval upon this modified system of block booking. The difference was merely one of degree.

The appellants and Universal, as well as all other distributors who are not parties to this suit, continued to license their pictures at the beginning of each season in groups or a season's output. From 1940 on the five Major defendants have been licensing their pictures in blocks of five and the Minor defendants and other distributors have been licensing their pictures as theretofore. Upon this trial, however, the Government claimed that *all* methods of block booking were illegal. In view of this change of position it might have been expected that the Government would offer some proof of the alleged illegality of that practice.

But this the Government failed to do. It did not call a single exhibitor or any other witness, nor did it offer in evidence a single document among all of the hundreds of exhibits in this case, which would justify the District Court in making a Finding that block booking as practiced by these appellants and others violated the Sherman Act. There was no proof that any exhibitors had suffered any injury by this practice or that exhibitors were forced to deal in this manner against their will.

Indeed, the exhibitors generally seem to have operated their business with a large measure of success (R. pp. 1305, 1270-1).

To the Major distributors it is perhaps no hardship to market their pictures either singly or five at a time. It is different however with appellants. Economic necessity for licensing a season's product at one time finds its roots in the limited capital of the smaller companies like appellants. In its eagerness to secure a sweeping decree and to revolutionize the industry, the Government brushed aside this important economic consideration, and deliberately turned a deaf ear to the plea of the little fellow.

When we come to a consideration of the evidence on block booking which was offered by appellants and by Universal, we believe that the Court will be convinced that not only was the Government wrong in insisting upon the abolition of that practice, but that block booking was something which the exhibitors themselves wanted. At least "block-booking" has been a protection to them, because they receive an assurance of product and as a result of it know in advance of each season how much they will

have to pay for their pictures. That consideration was likewise ignored by the Government.

Block-Booking Has Had the Legal Sanction of the Courts

Federal Trade Commission v. *Paramount Famous-Lasky Corp.*, 57 Fed. (2d) 152.

The Federal Trade Commission at one time had found block booking to be an unfair method of competition, and had issued an order against defendant Paramount's predecessor to cease and desist from engaging in that practice. The Commission made an application by petition to enforce the order, and the respondent raised the point that it had not been guilty of any violation of law. The Circuit Court of Appeals (2nd Circuit) upheld the respondent and dismissed the petition. (Circuit Judge Augustus N. Hand who was a member of the Expediting District Court, sat on that case.) The court based its decision in part upon a finding that the exhibitor's freedom of choice had not been impaired. The Court found that selling in block did not constitute "tying in" one picture with another and it concluded its opinion with the following statement (p. 159):

> "* * * The means and methods employed in marketing its leases of films to prospective customers are matters within the business judgment of a private producer of films and carries with it the legal right to bargain and negotiate as the respondent did. The method of negotiation which has been condemned by the Commission does not disclose a dangerous tendency unlawfully to hinder competition, nor does it create a monopoly. * * *"

The block-booking contracts of Columbia and Universal were received in evidence in *U. S.* v. *Crescent*, 323 U. S. 173 (to which appellants were a party and dismissed out of the case), so that it was apparent in that case that Columbia's practice as well as the practice of Universal was to sell by block-booking. That practice was not condemned by the District Court or by this Court.

If block-booking was held legal all through these years, what suddenly made it illegal in this case? The record fails to show.

The Government's Failure to Make Proof on Block-Booking

In the early days of the industry the system of selling pictures had been by "state-righters" who were located in key cities in various territories throughout the country. Some had the distribution rights to one state, some to a number of adjacent states. The producer would sell his product to the "state-righter" for the particular territory in which the latter operated (R. pp. 1255-6), and he in turn would license the exhibitor for his own account.

That system proved unprofitable, and failed to give satisfactory revenue to the producer. Abraham Montague, General Sales Manager of Columbia, was himself an exhibitor and later a "state-righter" (R. pp. 1254-5). Speaking from his long experience he testified that Columbia could not operate under that system, and was compelled to open its own distribution exchanges just as the other defendants had been compelled to open their exchanges and distribute by direct contact with the exhibitor (R. pp. 1255-6).

The Government charged that block-booking was combined by Columbia with "blind selling", that invidious

expression being intended to hold block-booking up as an evil practice. It sought to connote that the method fails to give the exhibitor a fair opportunity to ascertain what he is buying, and puts him at a disadvantage.

Nothing could be further from the truth. There is no such thing as "blind selling." That is another one of the Government's definitions which failed to stand up. Montague testified that before his campaign each season he contacted the exhibitors and described as accurately as he could the pictures that Columbia proposed to produce and distribute for the following season. He said that the exhibitors were familiar with his product (as they are no doubt with the product of other companies), and that on their past experience with Columbia they had no hesitation in entering into contracts for the season's product in advance. They were told what stars would appear in a picture, they knew the box office drawing power of the stars, and they were not misled nor kept in the dark as to the quality of the product which they were about to purchase (R. pp. 1257-8, 1274, 1314-6).

Other witnesses testified that pictures are still sold today as they have been for years—on *the star, the story, the director and similar elements* (R. pp. 1177-9).

Trade showing, which was incorporated into the consent decree, proved to be more or less of a farce. The exhibitors did not require it. The best proof of that is that they did not attend these trade showings; the witness Kupper, General Sales Manager for 20th Century-Fox, so testified. He said that he was greatly disappointed in the failure of exhibitors to attend these trade showings (R. pp. 1178-9).

Montague testified that his company needs block-booking because it has to have some assurance of a market in order to hazard its capital in producing many pictures at a substantial cost. *Appellants own no theatres,* and may not look to such source for their market (R. pp. 1258-9). At least, with these exhibition contracts in their possession they may venture spending substantial figures in production (in 1928-1929 they spent $1,632,300, which has been gradually increased, so that in 1944-1945 they were spending an estimated $16,689,700) (C-2).

If Columbia were not able to sell its season's product at one time it could not operate profitably.

Montague stated that block-booking was absolutely vital and necessary to Columbia for its very existence (R. pp. 1258-9):

> "Q. Please state why. A. If we were to change our method of distribution to the so-called small group selling, which is used under the consent decree, we would find it absolutely necessary to change the *whole financial base of our company.* We wouldn't have—we do not have enough *money to keep pictures* in inventory, such as we would have to do, for any period of time. We find it absolutely necessary *to turn our pictures over as rapidly as possible, to send that money back to California so California can again invest it in pictures.*
>
> "Q. Does the making of block contracts or bulk contracts insure a market for your product? A. We feel it does, sir.
>
> "Q. Does it give you something on which you can base the gamble that you take in making pictures? A. It makes more certain the gamble, sir."

Later Montague pointed out that to sell pictures in small groups or blocks would mean keeping pictures on the shelf, delaying their release, and *freezing Columbia's capital;* so that it would require more capital to operate, which Columbia could not readily obtain. He made that very clear (R. p. 1271):

> "Judge Hand: Why do you say block booking is so necessary for you? Is it because you do not own any theatres?
>
> The Witness: Well, it could be one of the reasons, sir, and it is necessary because our type of program is the type of program that runs from the most expensive pictures down to what we call the B grades, the commercial grades of film. We would find it most difficult because of the numbers and the type of quality, and so forth, to continuously go back. We sell so many of these pictures to the small villages and hamlets all throughout the United States who cannot come to the market as often as they would like to. Now, we could not get there fast enough unless we augmented our sales force considerably; *we would not have the money to wait, to hold this inventory on the shelves, so-called inventory, meaning these pictures, on the shelves, while we are waiting to get in there.* Our particular company's success has been on the rapid turnover of its pictures."

The effect of block-booking from the producer's standpoint is that it takes away some of the risk and hazard of production, and enables appellants to venture substantial capital on which at least some return is assured in advance (R. pp. 1258-9).

Appellants sell about 11,000 accounts domestically each year (R. pp. 1266-7). They have their annual sales convention in March or April (R. p. 1267). Montague testified that if appellants had to sell in small blocks he would have to go through with eight or nine campaigns a year at a tremendous increase in expense (R. pp. 1267-8). If compelled to sell picture by picture, there would practically be as many campaigns as pictures.

Manifestly, block-booking is both advantageous and necessary for appellants. However, it is also necessary from the viewpoint of the exhibitors. They want it. It gives them an assurance of product (R. pp. 1258, 1275, 1470). Montague testified that since the consent decree, exhibitors, both affiliated and independent, at conventions at which, he, Montague, was present, demanded the restoration of block-booking, and voiced great dissatisfaction with the sale of pictures in blocks of five or less (R. pp. 1275-7, 1297-9).

The witness Rodgers, General Sales Manager of Loew's Inc., testified that since 1940 he had had many bitter complaints from exhibitors because of the sale of pictures in blocks of five or less (R. p. 549).

Appellants' product is used as part of double feature programs, particularly in the larger cities (R. p. 1293). It is obvious that operating on a double feature policy as the great bulk of the exhibitors presently do in the United States, and having need for a large number of pictures, exhibitors are exceedingly anxious to provide themselves with an assured supply; that is one explanation of why the exhibitor desires to buy in large blocks rather than in groups of one, two or three pictures at a time.

The evidence fails to support the Government's allegation that the sale of pictures by so-called block-booking was a violation of the Sherman Act. It does not restrain trade or commerce. It is at least one practicable way in which pictures may be marketed to the mutual satisfaction of both producer and exhibitor. It is the outcome of many years of experiment, of trial and error, and had been working very satisfactorily even after the Government in its consent decree in 1940 insisted on its restriction to five pictures with respect to the Major defendants. The record clearly shows that the new method of selling under the consent decree did not work out to the exhibitors' advantage. The witness, Kupper, testified that he could go back to block-booking (R. p. 1178). The exhibitors seem to be in favor of it (R. pp. 1275-6).

With this proof in the record it can hardly be claimed that the Government proved that block-booking is a pernicious or illegal method of selling pictures, and should be abolished and enjoined. *As a matter of fact, selling in blocks of five or selling in blocks of forty is still block-booking.* Mere numbers do not change the system. If one is illegal, so is the other. Apparently the Government saw no illegality in block-booking when it signed the Consent Decree.

The instant Decree is tantamount to telling a manufacturer or producer that he may not sell his product wholesale or in quantities. It is an indirect method of regulating an industry, which is not the function of a Court sitting in a Sherman Anti-trust suit. From the viewpoint of the exhibitors, some of whom exhibit as many as 400 and 600 pictures a year (R. p. 1275) (and most exhibit at least 200 pictures

a year), it means that each exhibitor is compelled to negotiate a new deal for every picture in his theatre. That would hardly seem to be to his advantage; and insofar as appellants are concerned it imposes a tremendously increased selling cost in sales organization without any corresponding benefit (R. pp. 1267-8, 1271).

A glance at the Government's Exhibit 409, which gives Columbia's net profits for the period from 1934 to 1944, shows how harmful the abolition of block-booking would be to Columbia. Any substantial increase in its selling cost must affect its profits. In 1938 the profits were $183,000; in 1939 the company just about broke even; in 1940 and 1941 the profits were approximately half a million each year. They went up in the three succeeding years because of the unusual war conditions. There is no assurance that they will remain anywhere near that high in the years to come. It is manifest that this company is operating on a modest scale, and cannot afford to be saddled with any extraordinary additional expenses. The abolition of block-booking and the compulsion to sell each picture separately would undoubtedly be a great financial hardship to this company.

As Montague testified, block-booking is still in use by the following companies (R. p. 1258):

Columbia
Universal
Monogram
Republic
Producers Releasing Corporation

Here are five producers with their own national distribution agencies, who sell their pictures in block. All

undoubtedly have the same problems in this connection. To take away from these smaller non-theatre-owning companies the right to sell pictures in block places them at a competitive disadvantage with respect to the larger theatre-owning Majors, and might conceivably result in putting out of business an important portion of the moving picture producing industry, which the Government professes to protect and encourage.

As Montague testified, block-booking is not only a convenient method of selling the product, but at the same time the exhibitor's rights are protected. He is given a liberal right of selection—the right to reject a certain number of pictures (R. p. 1268).

The Government's charge in this respect was most sweeping. *Paragraph 149 of the Amended and Supplemental Complaint* (R. p. 3187) *alleges*, in part:

> "(f) SELECTIVITY OF DEALS
>
> "In contracting with such a circuit of theatres, each defendant distributor ordinarily gives it the right to select a certain number of the feature pictures released by it each season for exhibition at the circuit's theatres. In contracting with independent theatres, however, each such defendant has ordinarily refused to license any of its product unless the independent exhibitor contracts for all of the features pictures released by it. Or, in the event that independent exhibitors are granted selective privileges in licensing pictures, the selection granted to them has ordinarily not been as great as that granted to competing circuit theatres."

The Government failed to prove that charge.

It appears *without contradiction*, that Columbia gives exhibitors generally the right to reject a substantial part of the product. This is given both to independents as well as to affiliates (R. p. 1268). In fact, *"the independent"* said Montague *"has a little edge on the affiliated."* The affiliated run in the main more important pictures, and we try to be quite a bit more definite on those contracts". (R. p. 1268).

This practice (selectivity) protects the exhibitor against having poor pictures forced upon him. As Montague testified, the extent of the commitment made by the exhibitor is normally related to the amount of available playing time in his theatre. Exhibitors who need a large number of pictures generally commit themselves to a larger percentage of the program, and independent exhibitors who play on first or prior runs and who do not use a large number of pictures naturally have a greater degree of selection (R. pp. 1275-8).

Montague testified that Columbia gives less film rental adjustment to affiliates than to independents, and *indeed gives the independents "all the breaks"* (R. p. 1273). *This is of particular importance in view of the fact that much of Columbia's product is sold to the great mass of theatres in the small towns* (R. p. 1273).

In addition to this contractual protection, exhibitors invariably come around during the season for adjustments (R. p. 1273). They have either been disappointed in the receipts of this or that picture, have failed to make enough money, or feel that they have made too high a commitment

financially for a particular picture. Montague testified that it is his policy to give such exhibitors an adjustment which satisfies and pleases them (R. pp. 1272-4, 1324-5). He said that this was good business for Columbia (R. p. 1273). In fact, this adjustment is almost in the nature of a discount (R. p. 1274); obviously Columbia wants the exhibitors to make money with its product.

Montague testified (R. p. 1272), that on an overall basis and all over the United States the average selectivity on all contracts made by appellants was 32 pictures out of 44.

With this uncontradicted testimony in the record, it is clear that the Government failed to prove Paragraph 149 (f) of its complaint. Yet the District Court proceeded on a contrary basis.

The District Court found (Finding No. 1, R. p. 3659):

> "*Block booking*—the practice of licensing or offering for license one feature or group of features upon condition that the exhibitor shall also license another feature or a group of features released by the distributor during a given period."

There is no proof whatever in this record to justify a finding that Columbia ever engaged in such practice.

There was no proof of "tying-in" or "conditioning" on the part of Columbia. Not a single exhibitor was called to the stand by the Government to give such evidence. Nor did the Government call any other witness for that purpose. Indeed, there wasn't a scintilla of proof that any exhibitor had ever suffered the slightest injury because of block-booking.

Since there was no such proof, we have the right to attack the Findings and Conclusions set out at the head of this Point.

> "The consideration of such a question involves not an issue of fact but one of law which it is the duty of the courts to examine and decide."

Chief Justice White in *Florida East Coast Line* v. *U. S.*, 234 U. S. 167, 185.

The proof was that at the beginning of each season Montague tried to sell as many pictures as he could to each exhibitor.

Montague, appellants' sales manager, testified (R. p. 1239):

> "Q. Tell the Court, please, how large a block of pictures you sell each year, approximately. A. Well, for the last few years it has numbered between 40 and 44 pictures, that we call features; we also sell westerns; we also sell short subjects, and we have serials.
>
> Judge Bright: How many in a block?
>
> The Witness: We try to sell all of the pictures that we have to all exhibitors. It is either all or part thereof.
>
> Judge Goddard: That numbers some 40, you say?
>
> The Witness: So-called features, as we call them, there are between 40 and 44.
>
> Judge Bright: During what period?
>
> The Witness: Between the period of September and October 1st we expect to produce and release that number. Sometimes we fall a little short."

And again at pp. 1271-2:

"Q. Have you ever compelled an exhibitor to take your short pictures in order to obtain your features? A. No, sir.

Judge Goddard: I do not quite understand that. If you tell us that you sell your entire product at one time, that would include shorts and everything else, would it not?

The Witness: We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we suceed in doing that. It usually ends up with the exhibitor having a selective contract. He may or may not buy any shorts at all.

Judge Goddard: On an average how many pictures does the contract include, a block?

The Witness: Sir, on our feature program, meaning 44 pictures in that form, which excludes the Westerns, we average about 32 across the United States to an account.

Q. You do not condition the selling of features upon the taking of shorts, do you? A. No, sir.

Q. And if an exhibitor does not want your shorts you will sell him your features just the same? A. Yes, we will try to sell him the shorts; we will use all the salesmanship that we have, if he uses shorts.

Q. But you have never withheld your features from an exhibitor because he would not use your shorts, have you? A. We could not afford to do so, sir."

And at pp. 1274-7:

"Judge Bright: Where you sell a block of pictures to one exhibitor, that is at the beginning of your season, isn't it?

The Witness: Yes.

Judge Bright: They buy blind as to some of them?

The Witness: Yes, sir, we got only a few films produced, he can see. The rest of them are on description, and he really and truly buys on what we call past performance—what has Columbia's past performance been with that exhibitor over the period of years that we trade with him.

Judge Bright: Do you sell to these so-called majors, five majors, by block licenses?

The Witness: We sell them by block, sir.

Judge Hand: Right along?

The Witness: Right along. We have since our beginning and still do, sir.

Judge Goddard: Just the same, same as to the independents?

The Witness: I did not get your question.

Judge Goddard: Are blocks sold comparatively the same size as those sold to the independents?

The Witness: Comparatively. In some of their big theatres we cannot sell as many. In some of the smaller theatres we can sell more because they can use some of what we call our B-grade films. If the theatre is such it does not use B-grade films, of course, we cannot sell them or license the film—that would be a better expression.

Judge Hand: If I understand the thing at all, to sell to an exhibitor a lot of 40 plays would be a perfect gamble as far as he is concerned as to half of the plays submitted?

The Witness: Well, sir, from your seat I can understand that you could think so, but a lot of these exhibitors would like not only to buy 44 but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—

some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, because they feel that is their measure of protection and they want it.

Judge Hand: That is because, I suppose, then, that they have so many different theatres they can place them. Supposing, for example, Paramount or Loew or Fox or any of these defendants, had but one theatre, one big theatre. They certainly wouldn't do it then unless they went into an absolutely blind gamble, would they?

The Witness: They wouldn't do it unless they needed the films that I had to offer. If they only had one theatre in a situation and they played only 52 pictures a week, I wouldn't have a chance, sir, to get in my group of pictures.

Judge Goddard: 52 a year?

The Witness: 52 a year. Pardon me. Correction. Thank you.

Judge Bright: You mean these men that want the block buying most are those that change their program oftenest?

The Witness: Yes. I think they want them most, probably, but the larger exhibitor needs it just as bad as the small one. He wants to know, because of competition, what pictures he is getting. At least we find it so from our own distribution. We have no trouble at all in distributing through block selling. In fact, we have attended meetings back there sometime ago where the exhibitors as a whole were meeting from all over the country, trying to get all these companies to plead—to get away from this so-called small group selling. They wanted to buy all; they wanted to buy their season's product from all the companies. They called them the umpty (sic)

meetings at the time. I have forgotten just what umpty stood for, but it was a whole series of meetings, whereby they actually made a very strenuous plea—

Judge Bright: Exhibitors?

The Witness: Yes, sir. (Continuing) —to do away with this consent decree form of selling.

Mr. Wright: I think he means independent exhibitors, is that right?

The Witness: Independent exhibitors were there, and also affiliated, Mr. Wright.

Judge Bright: That demand or suggestion, you say, comes from the small town exhibitor more than the large one?

The Witness: It would come from small towns, and it would come from large ones, depending on the need of the film to the exhibitor, whether he had a competitor, whether he had a double feature policy, whether he had a single feature policy, whether he run three shows a week, changed three times a week, or whether he changed seven times a week. There are so many things that come into the individual situation as to why that particular exhibitor wants to buy that particular way."

And on cross-examination he testified (at pp. 1313-4):

"Q. And I say in the course of those conversations and negotiations it is sometimes suggested to the exhibitor, is it not, either directly or indirectly, that if he wants to buy certain of the product it would be advisable for him to buy some of the other which may not appear to him to be so desirable, because he may not have such an acute need for it; is that right? A. That is quite true. The exhibitor may want to buy less and we may want to sell more. He may want to buy just two or three pictures of the

top, and we may think he has room in his theatre and we are seeking representation for more.

Judge Goddard: Suppose he says he won't take more than three or four, do you turn him down altogether?

The Witness: In some cases, yes, sir. It would depend on whether we had opposition or not. If we had some place that we thought we could do better by going across the street or in the adjacent town, or some place, the chances are we would go and try to sell that one, or more of it to the other fellow. If we did not have any opposition we would still try to talk him up to take some more film than just the top, because we would not afford to sell him just the top film.

Judge Goddard: Suppose you had none who would take them, and he would not take more than seven, or four or five, would he get them or not?

The Witness: In rare cases, yes. In general cases I would say no, sir."

Montague's attempt to sell each exhibitor as many pictures as possible at the beginning of each season has now been tortured into a "tying-in" or conditioning.

In *U. S.* v. *U. S. Gypsum Company*, 67 Fed. Supp. 397 (appeal argued in this Court November 13-14, 1947), Mr. Justice Stephens, in speaking for the District Court of the District of Columbia which dismissed a complaint of the Government in a Sherman anti-trust suit, said at pages 448-449:

"The basis for injunctive relief under Section 4 of the Sherman Act must be definitely and satisfactorily proved by the Government. * * * It has been repeatedly held in suits brought under this stat-

> ute that there must be a definite factual showing of illegality in the conspiracy, combination, or monopoly charged. (Citing cases.) We hold that this properly includes, in the instant case, the duty of proof, by the Government, of the allegations of paragraph 46 of the complaint as well as of all other allegations of the complaint which are in aid of said paragraph. * * *"

And at p. 451:

> "By substantial evidence is meant more than a mere scintilla; it must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citing cases.) In the Federal courts substantial evidence rather than a mere scintilla is necessary to support a judgment."

See also:

> *Johnson* v. *J. H. Yost Lumber Co.*, 117 Fed. (2) 53, 61.

The record is barren of any proof to sustain Findings No. 1, 93, 94, 97, 154, 156 or Conclusions No. 8 and 11.

From the total lack of proof to support the District Court's aforesaid Findings and Conclusions it becomes clear that the Court's Findings on block-booking were made solely *to enable it to provide for the auction selling method of licensing pictures.*

The District Court could not make such a provision for auction selling and still leave block-booking as a lawful practice, because those two methods of selling are completely

inconsistent. It was obviously mandatory to do away with block-booking, if pictures were to be sold on the auction block; and that explains the presence of these unsupported Findings and Conclusions.

The auction block method of selling and the system of regulation implicit therein were apparently the ultimate aim of the District Court. To reach that objective it brushed aside block-booking as an illegal practice without the slightest proof of illegality.

There is Nothing Illegal *per se* About "Tying-in" or Conditioning the License of a Number of Copyrighted Works Upon the Taking of a License for Other Copyrighted Works.

While there was no proof here that there was any "tying-in" or conditioning by appellants (and we claim that there was none), the District Court held that block-booking *per se* was an illegal practice because in essence it amounted to a "tying-in" or conditioning.

We challenge the existence or legality of any such doctrine.

The District Court manifestly relied on cases such as *Morton Salt Company* v. *Suppiger*, 314 U. S. 488; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch* v. *Barber Co.*, 302 U. S. 458; *Motion Picture Patent Co.* v. *Universal*, 243 U. S. 502; and *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661 (Opinion, R. p. 3543). But those cases held that the owner of a patent could not exploit an *unpatented* article with his patented article because by doing so he was enlarging his monopoly. The District Court posed an imaginary situation where the copyright

owner who had licensed the printing of his book only in connection with paper supplied by him, would come within those cases (R. p. 3543). That might be true. But it is non-existent here. We have no books and we have no paper.

The District Court, perhaps realizing that the aforementioned cases might have no application, proceeded to place great reliance upon a statement of the late Justice Stone in *Ethyl Gas Corp.* v. *U. S.*, 309 U. S. 436, 459, and particularly that part of it reading as follows (Opinion, R. p. 3545):

> "The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another * * * than for the exploitation of an unpatented article."

It overlooked the important fact, however, that the groups of patents which were being licensed in the *Ethyl Gas* case and in *Standard Sanitary Manufacturing Company* v. *U. S.*, 226 U. S. 20 (cited therein), were being directly used in the exploitation of a monopoly and for the purpose of suppressing trade and commerce. It was the unity of those patents which there gave strength to the defendants and permitted them to accomplish a premeditated unlawful result.

In every sale of property there is of course an element of restraint of trade. In the licensing of one picture alone there is some restraint of trade. Chief Justice Hughes in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, said (p. 360):

> "* * * Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate

> competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' "

But here we have appellants offering their separate copyrights in a season's product or less, when there is no conspiracy involved to restrain trade and commerce; where there is no monopoly or attempt to monopolize;* when they are acting alone, dealing at arm's length with each one of 11,000 licenses (as these appellants do); when it is simply done for convenience and economy, and even, if you please, for the purpose of helping the sales of their less important pictures. (In the eyes of the Government and the District Court that was a heinous crime.)

The argument may be advanced that it would be a great hardship to an exhibitor if appellants, for example, came to him and said, "You must take our entire season's product or nothing." The answer to that is that in this record there is no evidence of any such action on the part of appellants. Montague's testimony clearly shows that he tried

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* In its opinion the District Court said (R. p. 3555):

> "The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in no wise approximates a monopoly of film exhibition."

This of course applies as well to the pictures of the three minor defendants. Columbia, for example, produced 41 features and Westerns in the 1943-44 Season, or 10.32% of the total of such pictures produced by all eight defendants that year (R. p. 3555). On the question of monopoly this Court has held that the size and extent of a business may be considered. *U. S.* v. *Eastman Kodak*, 255 U. S. 578.

to sell as many of his pictures as he could; and if an exhibitor did not want all he could take less. There is no proof in this record that a single exhibitor in the United States ever suffered loss or damage by the manner in which appellants' licensed their product.

The District Court said that it may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another (Opinion, R. p. 3544). If that be so, then that common-law right may only be abrogated by a statute. (Second Employers Liability Cases, 223 U. S. 1, 50), and there is nothing in the Copyright Law or any other statute which takes away that right. Moreover it seems to us that this right of conditioning is a right which is given to every owner of a chattel. For example a jobber of hosiery may decline to sell one dozen pair of hose to a retailer, and he may say, "You will have to take an entire gross. I will not break up my lot. You cannot pick the cream, and leave the less desirable hose on my hands." Every merchant has the right to tie-in and condition his merchandise and sell it as is most convenient and economical to him.

But that is exactly what this Decree has done. It has placed the owners of literary property upon a lower footing than the owners of merchandise and manufactured goods. Not only does this Decree destroy the monopoly given by the copyright statutes, but it reduces the literary property in appellants' films to a form far below that of a chattel. The very incidents of the ownership of property of all kinds—the right to sell, mortgage, transfer, and license, upon the owners terms—is taken away from these copyright proprietors by the arbitrary provisions of this

Decree. Far from enjoying the statutory monopoly which the Copyright Act gives them, these proprietors may not even enjoy the very rudimentary and elementary incidents of ownership of property which is enjoyed by everyone else in the land in his own property, real or personal.

Since when does the creator of a literary work lose that right when he obtains a copyright? Is that one of the common-law incidents of ownership which he must give up to acquire the statutory monopoly? We have yet to find any precedent which holds that way.

It is that very reasoning, however, which motivated the District Court to hold that "tying-in" or conditioning of separate copyrights was illegal. But a different situation is presented here. This Court indeed has recognized the distinction and commented upon it only recently in *Transparent-Wrap Machine Corp.* v. *Stokes & Smith*, 91 Law. Ed. 451, which involved a patent on a machine for the packaging of candy, and a license agreement under which the Licensee undertook to assign improvement patents to the Licensor.

The Court held that the license agreement was not *per se* illegal, and that it did not come within the doctrine of the *Morton Salt* case and similar cases. At page 455:

> "An improvement patent, like the basic-patent to which it relates, is a legalized monopoly for a limited period. The law permits both to be bought and sold. One who uses one patent to acquire another is not extending his patent monopoly to articles governed by the general law and as respects which neither monopolies nor restraints of trade are sanctioned. He is indeed using one legalized monopoly to acquire another legalized monopoly."

Judge Bright, who was a member of the Expediting District Court, quite recently himself upheld the validity of transactions in which a patentee, both of the product and of the method, compelled a licensee who purchased the patented article to avail himself of the patented method; and he held that this was not an extension of the monopoly granted by the patent on the article. *Libbey-Owens-Ford Glass Co.* v. *Sylvania*, 64 Fed. Supp. 516, affd. 154 Fed. (2d) 814. The following part of the opinion of the Circuit Court of Appeals is significant (p. 815):

> "It has both product and method claims, covering a molding composition, or powder, made and sold by plaintiff, which, upon the application of heat and pressure according to the methods stated, may be shaped and hardened into plastic articles. Purchasers of the composition receive an implied license to use the process, while the grant of licenses under the method claim (of which two are now outstanding) is confined to those persons who purchase the composition. The legal claim is that this extends the monopoly of the method claim beyond its scope and to the products made by the process; and there is cited the well-known series of cases culminating in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661, 64 S. Ct. 268, 88 L. Ed. 376, that the monopoly of a patent cannot be pressed to include an unpatented article. But Judge Bright, below, following Judge Leibell in General Electric Co. v. Hygrade Sylvania Corp., D. C. S. D. N. Y., 61 F. Supp. 531, did not see how this doctrine could apply, because the product itself was patented and there was no extension of the patent beyond what the patent grants."

Licensing in bulk is an ancient and respected practice in the entire entertainment field with respect to copyrights. Following are a few examples:

(a) Somerset Maugham has written many short stories which appeared originally in various magazines, and on which separate copyrights were obtained. His publishers recently published a volume of those short stories. If we want to read one of the stories and are unable to obtain it because the old magazines are either out of print or unavailable, we must purchase the entire volume in which the particular story appears.

(b) Phonograph records usually contain two different copyrighted compositions, one on each side. The purchaser may only want the composition on one side of the record. He is nevertheless compelled to pay for the cost of the preparation of both compositions, including the compulsory license fee.

(c) The members of the original cast in "Oklahoma", a very successful dramatical musical work, gave their services to a record company and reproduced ten of the leading musical compositions in that play. These compositions appear on both sides of five records. If we desire to purchase a record containing one of those compositions as sung by the original member of the cast, we cannot do so because the record company sells those records only in an album of five records; we must pay for the full album in order to obtain that one composition.

(d) Music publishers for generations have published folios in which separate copyrighted compositions appeared, frequently the collected works of a single composer.

Many of those compositions have been out of print for years and are unobtainable in any form except through the purchase of the folio.

(e) Book publishers compile sets of famous authors' works. Because they are out of print, it is often impossible to buy single volumes of the novels of authors who have been dead for forty years or more but whose copyrights are still valid. (Twenty-eight years plus a renewal of twenty-eight years). If we want to buy a novel of Richard Harding Davis or Rudyard Kipling, in all likelihood we will have to buy the entire set in which such novel appears.

(f) Motion picture exhibitors themselves sell to the public in package and block. The great majority of theatres throughout the country have double features, and usually each picture is produced and copyrighted by a different company. In addition to this they have as a rule a news-reel and a "short," also owned and copyrighted by different companies. For each one of these pictures the exhibitor has to pay a rental. This expense is figured in the price of admission. But the public has to pay the admission price so figured, even though many of them might want to see only one of the pictures. Indeed, an attempted restriction on the right to show double-features has been held to be restraint of trade.

Vitagraph, Inc. v. *Perelman*, 95 Fed. (2) 142.

If the so-called "tying-in" or conditioning implicit in the District Court's definition of block-booking is illegal, then each and every one of the practices referred to in the illustrations given above is illegal.

The Copyright Act nowhere provides that the proprietor of the work must vend, arrange, publish, etc. his work singly. No restriction is placed upon him. Congress certainly must have contemplated that many copyrighted works would be created and owned by one man (an author) and that many copyrighted works would be acquired by one man, such as a publisher. With that in mind Congress could have made an attempt to forbid the exploitation of those works in bulk, or package deals, or in block. But it did not do so. The Congressional intent is to give to the copyright proprietor the utmost freedom in the exploitation of his works. Appellants therefore, if they wished, had a right to unite their separate copyrighted works and license them in bulk. As long as appellants exercised no monopoly, or made no attempt to restrain trade, they could "tie-in", or condition their pictures to their heart's content, that being one of the incidents of their respective copyright monopolies. They could condition the licensing of one picture or group of pictures upon the licensing of another picture or group of pictures.

> "He * * * may annex various conditions upon which the possession shall be held." (Curtis on Copyright, p. 5).

To deprive appellants of that right is to deprive them of their statutory and constitutional monopoly, as this Decree has done.

POINT II

The Court below was without jurisdiction to regulate or prescribe the manner in which appellants may license their pictures for exhibition. For all practical purposes appellants are required to put their pictures upon the auction block. That is not the function, nor is it within the power, of an equity court sitting in a Sherman anti-trust suit.

[Those provisions are contained in Paragraphs 8 and 9 of Section II of the Decree (R. pp. 3696-8).]

[Assignment of Errors 9.]

The Sherman Act does not provide for regulation of industry by imposing new and untried methods and devices for licensing copyrighted works.

The Act has a self-imposed limitation. (15 U. S. C.): (Italics ours)

> "§4. Jurisdiction of courts; duty of district attorneys; procedure:
>
> "The several district courts of the United States are invested with jurisdiction to *prevent* and *restrain* violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to *prevent* and *restrain* such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be *enjoined* or otherwise *prohibited*. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hear-

> ing and determination of the case; and pending such petition and before final decree, the court may at any time make such *temporary restraing order* or *prohibition* as shall be deemed just in the premises. July 2, 1890, c. 647 § 4, 26 Stat. 209 Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Federal courts are courts of limited jurisdiction and have only such powers as are expressly conferred upon them by statute. There is no presumption of jurisdiction; on the contrary, it is lack of jurisdiction which is presumed. In *Danks* v. *Gordon*, 272 Fed. 821 (p. 823):

> "The jurisdiction and powers of federal courts are derived from the Constitution and the acts of Congress. They possess only such powers as have been conferred upon them. In an action in such courts it is presumed that the court is without jurisdiction until the contrary affirmatively appears."

The District Court, therefore, was strictly bound by the express limitations of Section 4 of the Sherman Act to "prevent" and "restrain".

The want of power of a court of equity to regulate business was ably commented upon in *Daniels et al.* v. *Portland Gold Mining Co. et al.*, 202 Fed. 637 (1912; cert. den. 229 U. S. 611).

In that case suit was brought by three mining companies on behalf of themselves and others similarly situated, to enjoin a number of persons from operating assay offices and purchasing ore. The complaint alleged that gold ore was being systematically stolen in small quantities but of large aggregate from the neighboring mines and that

this criminal practice was encouraged and facilitated by defendants, who conducted an assay office where they received and purchased the stolen property. Plaintiffs sought a decree enjoining defendants from conducting assay offices or from purchasing or receiving ore from any person in the mining district.

The trial court granted an injunction restraining defendants from purchasing ore from mines in the District without first notifying the superintendent of one of the three companies bringing the suit of the fact that the ore had been offered for sale, and giving the name of the person who offered it, the name of the mine from which it purported to come, the owner thereof, the number of pounds, and a statement that its original condition, when first offered, had not been altered. It further provided that if either of the superintendents of the mining companies should, within twenty-four hours after receipt of such notice, advise the person furnishing the same that the ore had been stolen, then that defendant must hold it for forty-eight hours before purchasing it or agreeing to do so, and defendants and each of them were enjoined from dealing in ore of any kind or description, except under the foregoing conditions and restrictions. On appeal this decree was reversed on the ground that it constituted a usurpation of legislative power. At page 639 Judge Hook said:

> "We think the injunction was an inadmissible exercise of the judicial power. Consistently with the fullest recognition of the progressive and flexible character of equity jurisprudence and its continuing adaptability to the increasing magnitude and complexity of modern affairs, care must nevertheless be taken not to transgress its fundamental limita-

tions. Though the writ of injunction may be properly employed to protect rights of property, however great or small, complicated or simple, it should not be made a vehicle for invading the legitimate legislative province of government or a means of establishing a system of rules for the regulation of the business of a community."

Holding that it was not the function of a court of equity to regulate and supervise a business, Judge Hook further said at page 641:

"Ordinary business callings may be attended by conditions, or may offer temptations that threaten the public welfare or the lives, health, morals, or property of those who come in contact with them. There is a stage at which the state will take cognizance and prescribe rules and regulations to prevent or lessen the evil. If the evil is deemed greater than the good, the calling may be wholly prohibited; if less, regulated. But, whatever course is taken, it is the exercise of the police power of the state, of which a multitude of illustrations may be found in the statute books, *and its expression as a rule of conduct is a legislative function.* Thus in many states the business of bucket shops and ticket scalpers is prohibited, and in Colorado there is a statute regulating the business of assayers and designed to prevent the very practice complained of here. *Legislative regulations may be inadequate, but a court in a suit between private parties must act within much narrower lines and cannot make others.*"

The case of *United States* v. *New York Coffee and Sugar Exchange, Inc.*, 263 U. S. 611 (1924), which is to a similar effect, arose under the Anti-Trust Laws. In that case the Government sought to enjoin the Exchange from engaging

in certain practices alleged to be monopolistic. In affirming the decree dismissing the suit, Chief Justice Taft held that no infraction of the Anti-Trust Laws had been made out. Concluding his opinion, the Chief Justice pointed out that it was not a judicial function to impose rules and regulations for the conduct of a business, saying at page 621:

> "The Government in effect asks this Court to enforce rules and regulations for the conduct of the Sugar Exchange which shall prevent the future abuse of its lawful functions. *This is legislative and beyond our power.*"

Likewise, in *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U. S. 667 (1884), the Court expressly held that it was the function of the legislature and not of the courts to regulate and supervise the conduct of business affairs. In that case the D. & N. O. Railroad brought a suit in equity to compel the A. T. & S. Railroad to unite with it in forming a through line of railroad transportation to and from Denver, with all the privileges which the A. T. & S. Railroad might grant to any other company owning and operating the railroad between Denver and Pueblo. The Circuit Court entered a decree requiring the A. T. & S. to stop all its passenger trains at the platform built by the D. & N. O. Railroad, where the two roads joined, and to remain there to take on and let off passengers and to receive and deliver express matter and mails. It also required the A. T. & S. to keep an agent there, to sell tickets, check baggage and bill freight. Freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered. The A. T. & S. was required to carry freight and passengers going to or coming from the D. & N. O., at the

same price it would receive if the passenger or freight were carried to or from the same point on a through ticket or through bill of lading issued by any competitor of the D. & N. O. In short, the decree established in detail rules and regulations for the working of the A. T. & S. and D. & N. O. roads.

In reversing the decree, Chief Justice Waite pointed out that the Court had made an arrangement for the business intercourse of the companies such as, in its opinion, they ought in law to have made for themselves (675). He further said at page 682:

> "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

and added at page 686:

> "The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy."

That the Court must restrict its relief to injunction has been repeatedly emphasized.

In *Hartford-Empire Company* v. *U. S.* 323 U. S. 386, this Court said (pp. 409-10):

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which

is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested."

In a case where this Court sought to apply the most stringent remedies, it nevertheless realized the limitations of the Statute. (*Standard Oil* v. *U. S.*, 221 U. S. 1, at p. 77):

> "* * * it may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalities which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

But even there this Court did not grant relief other than by way of injunction and dissolution.

In *U. S.* v. *Reading Co.*, 226 U. S. 324 (1912) the Court, by Mr. Justice Lurton stated (p. 369):

> "It is, of course, obvious that the law may not *compel* competition between these independent coal operators and the defendants, but it may at least remove illegal barriers resulting from illegal agreements which will make such competition impracticable."

In that same case (183 Fed. 427) Circuit Judge Gray in the District Court had stated (p. 459):

> "The injunction or restraining order specifically prayed for in the petition should be granted, so far as it will serve 'to prevent and restrain' the future or continuing violation of the act. *This is the only jurisdiction conferred upon the court in such a proceeding as the one before us,* and there can be no injunctive relief granted, unless it tends to restrain some specific future or continuing violation of the act."

In the language of Judge Goodrich in *U. S.* v. *Pullman Company*, 64 Fed. Supp. 108, at p. 110:

> "We take it that the judgment of a court under the Sherman law is not to substitute the judicial judgment for that of the proprietors of the country's business enterprises."

The instant Decree goes so far as to compel appellants to disregard their old customers, and thus wipe out their good will. (Sec. II, Paragraph 8(b), R. p. 3697). This is not the function of the Sherman Act. In *Camfield Mfg. Co.* v. *McGraw Elec. Co.*, 70 Fed. Supp. 477, Judge Leahy hold-

ing insufficient in law allegations of boycott in a complaint said (p. 481):

> *"The complaint simply is defendant will not do business with plaintiff's distributors. In general, it seems a necessary part of our business mores for a manufacturer to have free selection in dealing with its distributors.* Upon the recognition of this fact, why may he not refuse to do business with one who deals in a closely *competitive product?* Looking at the reality of our economy, I have never seen *a distributor of Ford automobiles, for example, also distribute a car of another competitor within the same price range, such as the Chevrolet; nor does McKesson & Robbins distribute the drug supplies of Park-Davis; etc. It has been said* (under circumstances which have exceptions) *the anti-trust laws do not restrict the right of a manufacturer freely to exercise its own judgment as to the parties with whom it shall deal. U. S.* v. *Colgate,* 250 U. S. 300, 307; *U. S.* v. *Parker Rustproof Co.,* 61 F. Supp. 805, 812." (Italics ours.)

This Court has frequently reiterated that doctrine. In *Fed. Trade Comm.* v. *Raymond,* 263 U. S. 565, 573:

> "It is the right, 'long-recognized', of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal.' (Citing cases.) Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.' *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 614; *United States* v. *Colgate & Co., supra,* p. 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manu-

facturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. *Eastern States Lumber Assn.* v. *United States*, *supra*, p. 614; *United States* v. *Colgate & Co.*, *supra*, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain."

In *U. S.* v. *Bausch & Lomb Company*, 321 U. S. 707, Mr. Justice Reed said, at p. 728:

"* * * In a business, such as Soft-Lite, which deals in a speciality of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Federal Trade Comm'n* v. *Raymond Co.*, 263 U. S. 565, 573."

And only quite recently Judge Knight applied that rule in *U. S.* v. *Schine*, 31 Fed. Supp. 270, 274, where he found for the Government in an anti-trust suit.

The Decree Here Involved Strikingly Resembles a Code for the Regulation of the Motion Picture Industry.

Such regulation can only be accomplished through the Legislative branch of the government. If, as was held in *Schechter Corp.* v. *United States*, 295 U. S. 495, at pp. 537-538, the Legislature may not confer upon the Executive the power to regulate industry, certainly the Judiciary cannot usurp such power.

> "It is Congress, and not the Judicial Department, to which the Constitution has given power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."
>
> *Transportation Company* v. *Parkersburg*, 107 U. S. 691, 701.

Perhaps mindful of this limitation, the Court below purports to decree the sale of pictures by the auction block plan in the *form* of an injunction. The Decree states in the opening paragraph of Section II (R. p. 3695).

> "Each of the defendant distributors • • • is hereby enjoined • • •"

Then follow nine paragraphs, the eighth of which reads as follows:

> "8. From licensing in the future any feature for exhibition in any theatre not its own in any manner except the following • • •"

then come the affirmative regulatory provisions contained in (a), (b), (c), (d) and (e), and in paragraph 9.

This is merely paying lip service to so-called injunctive relief. These are affirmative provisions for a specific and exclusive method of selling pictures—a method which has never been tried before. To argue that these provisions are merely an extension of the injunctive process of the Court is to play upon words.

Appellants Are Placed at a Competitive Disadvantage By This System

The practical aspects of competitive bidding may also be questioned. Who is to determine which of a group of bids represents the *highest responsible one?* No two ex-exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license? If these decisions are left entirely to the distributor, the situation will be no different than at present.

Opposition of exhibitors to the bidding system has been unanimous. In order to assure product for continuous operation, the exhibitor will have to make bids on many more features than he needs. If he bids on just one film, and his competitor outbids him, he is without film. If he bids on two or three, and is successful in all, he has more film than he can use. Moreover, he will not be able to arrange his program to vary the type of entertainment offered. He will find it necessary to take what he can get.

There is a limit to what any theatre may bid for a feature without raising its admission price. Size, location,

and present theatre-going habits will play a large part in determining what each theatre can afford. Exhibitors may find they must make the choice between raising prices in order to obtain a better position or accepting the later runs and poorer films. Neither possibility guarantees any advantage to the public.

Appellants Have Built Up a Substantial Good Will Among Independent Exhibitors. This is Destroyed at One Blow.

Appellants have been in business since 1920. They own no theatres. Their good will consists of 11,000 satisfied exhibitor-customers, a great many of whom are independents, having no affiliation whatever with the Major defendants.

The history of appellants' dealings is that they made it a practice to sell to these independent exhibitors and away from the affiliated exhibitors even at a substantial loss of rental. The Government's as well as appellant's exhibits, substantiate this statement. A brief analysis of both groups of exhibits follows:

The Government took the 92 cities in the United States which have a population of 100,000 or over, and presented data with respect to the period from 1936-37 (the year before this action was commenced) down to 1943-44 (the year before which this action was tried). With respect to the 1943-44 season, the Government put in evidence (Gov. Ex. 428) a master chart showing to whom each particular defendant licensed its pictures in those cities on first run, indicating also whether the pictures were licensed to an

independent exhibitor or to an affiliated exhibitor, and if the exhibitor was affiliated, the particular defendant with which such affiliation was made.

A similar chart was put in evidence by the Government with respect to the approximately 300 cities with populations of 25,000 up to 100,000 (Gov. Ex. 432). That chart indicated, first, those cities in which all of the defendant's pictures were licensed on first run to independent theatres, and, secondly, those cities in which all of defendant's pictures were licensed on first run to affiliated theatres. Thirdly, in the remaining cities where the product was licensed in part to independents and in part to affiliates, the chart indicated which product was licensed to these respective groups of theatres.

Columbia put in evidence a comprehensive tabulation, which lists for each and every season beginning with the 1936-37 season up to and including the 1944-45 season, its regular first run accounts in each of the approximately 400 cities with populations of 25,000 or more (C-6).* Since this chart (C-6) reflects both the 92 cities over 100,000 in population and the remaining 300 odd cities over 25,000 population, it should be read in conjunction with C-7 and C-8 (the colored charts) which indicate the regular first run independent accounts and affiliated accounts in those two groups of cities respectively for that entire nine year period. What do these charts show, both Government and Columbia exhibits? We shall consider each group of cities

* Columbia exhibits are referred to as "C" followed by numbers.

separately, always bearing in mind that the affiliated theatres as a general rule are the largest, most modern and best located in their respective cities.

The 92 Cities

Exhibit C-7 shows that during the above period Columbia sold its regular first run accounts to independent and affiliated exhibitors in the following proportions:

Season	*Independents*	*Affiliated*
1936-37	38½	53½
1937-38	37	55
1938-39	37	55
1939-40	37	55
1940-41	36½	55½
1941-42	37	55
1942-43	37	55
1943-44	36	56
1944-45	36	56

(The fraction indicates a split of the product.)

The foregoing is simply a numerical comparison of the number of independent first run accounts as compared with the number of affiliated first run accounts. The true significance of these figures, however, must be read in connection with the *competitive* situations in these 92 cities.

Government's Exhibit 428 indicates that one or more of the Major defendants in this case operate theatres on first run in 88 of these 92 cities. That chart also indicates that all of the first run theatres in 40 of these cities are operated by the Major defendants, and that all first run

theatres in 4 other cities are operated by independent exhibitors. This means that out of the 92 cities, 48 contain theatres operated on first run both by affiliates and independents.

For the 1943-44 season (a comparison of the exhibits will indicate that said season is typical of other seasons) Columbia licensed its pictures in these 48 cities (where independents and affiliates operated) as follows:

30 cities to independents
16 cities to affiliates
2 cities split between the independent and the affiliates.

In other words, out of the 48 competitive situations Columbia licenses its products to 32 independents, or a percentage of 66⅔%.

And out of the entire 92 cities Columbia licenses its product to 36 independents, or a percentage of 39%.

Let us give a brief analysis of the theatre situations in those 32 cities where Columbia licenses its pictures to an independent who is in competition with an affiliate. The names of the Major defendant-owned exhibitors who operated first run theatres in competition with Columbia's independent accounts in each of these cities are as follows:

Affiliated Opposition in Cities Where Columbia Sells to Independents

City	*Competing first-run theatres and their affiliated ownership*
New York City	Loew's, Paramount, RKO, Warner, Fox
Pittsburgh	Loew's, Warner
San Francisco	Loew's, Fox, Paramount, RKO
Buffalo	Loew's, Paramount
Seattle	Fox
Oakland	Fox
Atlanta	Paramount, Loew's
Birmingham	Paramount
Oklahoma City	Paramount, Warner
San Diego	Fox
Richmond	Loew's
Miami	Paramount
Youngstown	Warner
Hartford	Warner, Paramount, Loew's
Long Beach	Fox
Springfield	Warner, Loew's, Paramount
Norfolk	Loew's
Reading	Warner, Loew's
Sacramento	Fox
Utica	Warner
Duluth	Paramount
Baltimore	Warner, Loew's
St. Louis	Loew's (50% split)
Toledo	Paramount, Loew's
Akron	Warner, Loew's
Kansas City, Kansas	Fox
Cambridge, Mass.	Paramount (50% split)
Gary, Ind.	Paramount
New Bedford	Paramount
Canton	Loew's
Somerville	Paramount
Erie	Warner

It is to be noted that not only does Columbia sell away from one affiliate in many of those cities, but in some cities it sells away from a number of affiliates.

Exhibit C-10 indicates that in three cities where Columbia previously sold to one affiliated exhibitor it now sells to another.

Not only that, but in *twelve* cities Columbia at one time or another left its first run affiliate account and switched to an independent for its first run account.

The foregoing changes as they appear on C-10 are listed below:

SWITCHING FROM ONE AFFILIATED EXHIBITOR TO ANOTHER AFFILIATED EXHIBITOR.

City	*Previous Account*	*Present Account*	*Change*
Chicago	RKO	B & K (Paramount)	1934-5
Houston	RKO	Interstate	1933-4
Syracuse	RKO	Loew's	1934-5

SWITCHING FROM AFFILIATED EXHIBITOR TO AN INDEPENDENT EXHIBITOR.

City	*Previous Account (Affiliate)*	*Present Account (Independent)*	*Change*
Akron	RKO	Chatkin & Feld	1933-4
Duluth	Paramount	S. J. Blackmore	1932-3
Erie, Pa.	Fox	Weschler	1934-5
Long Beach	Warner	Milton Arthur	1933-4
Miami	Par.	Wometco	about 1929

City	Previous Account (Affiliate)	Present Account (Independent)	Change
Oakland, Cal.	Fox	Blumenfeld	1935-6
Okla. City	Par.	Louis Dent	1936-7
Pittsburgh	Warner	J. Harris	1935-6
Sacramento	Fox	Blumenfeld	1935-6
Seattle	RKO	Von Herberg	1932-3
San Diego	Fox	Metzger	1934-5
San Francisco	RKO	Milton Arthur	1935-6

Here, as Ex. C-10 indicates, Columbia has sold away (changed accounts) from the affiliate to the independent in 12 out of these 92 cities *and has never come back to the affiliates.*

73 Cities

While the Government itself prepared a chart of the 92 cities (Gov. Ex. 428) it went behind those cities and reduced the number to 73, claiming that these 73 cities showed a complete monopoly of exhibition by the Major defendants.

In paragraph 165 of the Amended and Supplemental Complaint the 73 cities are set out in detail, together with a column which purports to enumerate the various individual Major defendants who have a monopoly in the respective cities (R. pp. 3194-5).*

In this smaller group of 73 large cities Columbia licenses its pictures on first run to independents in the following 22 cities (Ex. C-6):

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*At first glance, this schedule would seem to indicate 92 cities. But what the government did was to eliminate from the chart (Gov. Ex. 428) those 19 cities which the government did not consider a complete monopoly; so that the list shown in Paragraph 165 of the Amended and Supplemental Complaint is, by actual count, only 73.

New York	Youngstown
San Francisco	Hartford
Buffalo	Long Beach, Calif.
Seattle	Springfield, Mass.
Atlanta	Norfolk
Oakland, Calif.	Erie
Birmingham, Ala.	Reading
Oklahoma City	Sacramento
San Diego	Duluth
Richmond	Pittsburgh
Miami	Utica

In this supposedly sacred circle of monopolized cities, Columbia sells its product to independents in 30% of the cities.

413 Cities

These are the cities of 25,000 inhabitants and over. (They, of course, include the 92 cities and the 73 cities above mentioned, as well.) Exhibit C-6, specifies each and every first run account which it has had in these cities from the seasons 1936-1937 down to and including 1944-1945. In conjunction with this exhibit we should like the Court to examine Exhibit C-8 (a colored chart), which specifies the number of cities in which Columbia sold to the independents and those in which it sold to the affiliates. Below is a summary of what these charts illustrate:

Season	*Independents*	*Affiliated*
1936-37	177	207
1937-38	177½	212½
1938-39	171½	216½
1939-40	172½	218½

Season	*Independents*	*Affiliated*
1940-41	171½	221½
1941-42	172	222
1942-43	171	221
1943-44	166½	226½
1944-45	167½	226½

(The fraction indicates a split of the product.)

The percentage of independent accounts sold by Columbia in these cities is approximately *42%*.

The true significance of the number of independent accounts which Columbia has in these cities can best be understood in connection with an examination of Government's Exhibit 432 which is an analysis of how the product of all of the defendants is licensed on first run in each city with a population between 25,000 and 100,000. (In other words, in getting up the analysis the Government ignored the 92 cities which it had already dealt with in Government's Exhibit 428, and confined itself to the remaining cities in the 413 group.) This exhibit specifies first, those cities in which all of the pictures are licensed first run to independent theatres; secondly, the cities in which all of the pictures are licensed first run to affiliated theatres; and thirdly, the cities in which the product is licensed first run to both independent and affiliated theatres. It is important to examine those situations in which some product is licensed first run to independent theatres and other product is licensed first run to affiliated theatres. These may be deemed the *competitive* first run situations.

A computation of this Government Exhibit 432 shows that the total number of towns listed is 321, and that there

are within this group 92 competitive situations. (This figure 92 has nothing to do with the chart of 92 cities in Gov. Ex. 428). The Government has entered information regarding Columbia on 87 of these competitive situations, showing that Columbia licenses its pictures to independents in 52 of these 87 competitive situations; and in the remaining 35 competitive situations to affiliates. Thus Columbia licenses to independent exhibitors in approximately 60% of these competitive cities in the 25,000 to 100,000 group.

On an overall basis the foregoing Exhibit 432 shows that in all of the 413 cities with populations of 25,000 or over, Columbia, out of a total of 137 competitive situations sells to the independent in 82, or approximately 65%.

Montague explained his reason for doing this (R. p. 1292):

> "Q. What is your general custom and practice throughout the country in respect to these affiliates and independents? Whom do you prefer to sell and to whom do you sell most of your pictures to? A. We prefer to sell the accounts that we think we can get the most out of for our overall program.
>
> Q. Who are these accounts? A. In many situations they are the independent; in others they are the affiliates."

And again (R. p. 1363):

> "A. We have a definite policy that at no time do we negotiate with two people. We find it absolutely necessary to have a continuity of releasing in a definite theatre, wherever we can possibly get it. That is not only for the benefit of Columbia but for the benefit of subsequent runs in that situation.

They too are interested in where you play your picture first-run. And what we have practiced over a period of years, and our records prove beyond a question of a doubt—and it is what we like, is to continue to play with the same accounts that we have played with over a period of years, if those accounts have been satisfactory to us. If they are responsible, and their responsibility has stood up over a period of years, we think that is good enough to go along with.

"Your Honors, in many cases we play in houses where we know we could get more money from an opposition, but because we have been playing in that house for a number of years, and we have sturdy friendship, we feel it is best to continue there, but we don't feel we have lost by that—maybe we do get a little less on a picture or two, but over all our program we feel that is much the better policy: And we change our accounts—so few accounts are changed, I would say, rather, in a period of years, it is hardly noticeable on our records, and our records will support that beyond a question of a doubt."

The proof is thus overwhelming and uncontradicted that Columbia had built up a good-will, particularly with independent exhibitors.

Since the Government at no time charged that COLUMBIA was in conspiracy with any of the independent exhibitors, it cannot be argued that its good-will was built up on a conspiracy. But this company, owning no theatres and relying upon its satisfied exhibitor-customers, is told by the Decree that it must throw these old customers overboard and thus give up all the good-will established in twenty-seven years of business (Decree, R. p. 3697).

"(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, *old customers* or otherwise."

The Good Will of Appellants' Business is a Valuable Property Right.

"There never was a time, in all likelihood, when good-will (which is only another name for favorable reputation, credit, honesty, fair name, reliability) has played a more important part in commercial life than it plays today. There never was a time when a good name was more to be desired, for purely business reasons, regardless of any other consideration, than today. There never was a time when the means and instruments designed for the creation of a good name for one's self were so highly developed as today. There never was a time when there were so many effective means available to the trade pirate to aid him to purloin the good-will of others to his own profit."

Nims on Unfair Competition (4th Ed. 1947), page 73, *et seq.* and cases cited.

"The relations of a dealer to his customers and to the trade generally is called good will, and is property which the law is bound to protect."

Albro J. Newton Co. v. *Erickson*, 126 N. Y. Supp., 950, 951.

"Men will pay for any privilege that gives reasonable expectancy of preference in the race of competition."

Cardozo J., *Matter of Brown*, 242 N. Y. 1, 6.

"Good will is property recognized and protected by law as such."

38 C. J. S. 950.

See also: *Societe Vinicole De Champagne* v. *Mumm*, 10 Fed. Supp., 289, 294; *Metropolitan Bank* v. *St. Louis Dispatch*, 149 U. S. 436, 446; *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626, 629.

The Exemptions Granted to Appellants' Competitors

While purporting to regulate the licensing of pictures by means of competitive bidding (auction block) the Decree nevertheless provides in Section IV (R. p. 3700) as follows:

> "Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries."

This simply means that a Major defendant may license its own pictures to its own theatres without any restrictions as to competitive bidding, and upon any terms it sees fit.

Let us see what that signifies. The affiliated theatres have access to the pictures of at least one distributor for each season. They have a definite source of supply. They do not have to scramble for pictures like the independent exhibitor. This leaves them in a powerful bargaining position for the balance of their product, and makes it difficult if not impossible for the independent theatres to compete with them for the better pictures.

It is obvious that the affiliated is in a position to take away from his independent competitor the cream of the good pictures of all the distributors, and leave the latter with the poorer product only available for his screen.

Columbia, unable to sell its better pictures to the independent because of this unfair competition, may only offer the independent its poorer pictures, which means that it destroys its good will and gradually loses its old independent customers. The result of this whole arrangement is discriminatory against both the independent exhibitors and Columbia, and works only to the advantage of the affiliated exhibitor and the five Major defendants.

At the same time appellants, who own no theatres and have no ready-made outlet, must compete with the five Major defendants for playing time. In that competition they are restrained by Section IV, as approximately three thousand of the best theatres are made independent of appellants' entire product, and need bid only for appellants' outstanding pictures (which they can do successfully as shown in the preceding paragraph) and appellants are forced to license the bulk of their product to independent theatres, still competing in that limited field with the pictures of the five Majors.

Moreover what is to prevent exhibitors in any competitive area from agreeing among themselves as to how high they will bid. Human nature being what it is, such things as collusive bidding have been known to happen. This Decree invites it. Must appellants, investing their capital in this hazardous enterprise, be left to the tender mercies of the exhibitors under a system by which the exhibitors *alone* fix the price of the commodity?

Far from opening up competition this Decree suppresses it, and restrains trade and commerce far worse than any of the contracts and practices which it enjoins.

POINT III

The injunction against block booking and the provisions for placing appellants' pictures upon the auction block destroy appellants' exclusive rights in their copyrights and violate a basic public policy.

[Assignment of Errors 4.]

1. Appellants have a monopoly in their copyrights which is given to them by the Constitution of the United States and by the Copyright Act. The Constitution provides in Article 1, Section 8:

> "The Congress shall have power: * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries."

The consolidated Copyright Act of 1909 (U. S. C. Title 17) provides (Section 1):

> "Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: * * *"

"Copyright in any form, whether statutory or at common-law, is a monopoly; * * *" Learned Hand, C. J. in *RCA Mfg. Co. Inc.* v. *Whiteman*, 114 Fed. (2) 86, 88. But it is a monopoly which is not condemned by law.

"The patent laws and the Sherman Act exist side by side, each being entitled to full recognition and application by the courts."

Stephens, J. in *U. S.* v. *U. S. Gypsum Co.*, 67 Fed. Supp. 397, 426.

For the monopoly recognized by the patent law is not the monopoly condemned by the Sherman Act.

U. S. v. *Motion Picture Patents Co.*, 225 Fed. 800; *U. S.* v. *U. S. Gypsum Co., supra.*

Copyrighted works have all the benefits and incidents of personal property.

Defendants have the right, in licensing their copyrighted product, to impose any terms they see fit. That right is one of the incidents of ownership of property, including literary property.

In Morgan on Literature (1875) the author says (Vol. II, p. 624):

"Literary property can only be a source of profit to its author, *according to his power of parting with it*, either in whole or in part, for value, and of specifying the uses for which it is so alienated; and these rights the ownership of literary property, as of all other, involves. We have seen that in the eye of the law such property, either before or after copyright, is personal property, and subject to all the rules of personal property as to its alienation, transfer, and descent. In general, therefore, all contracts relating to such alienation or transfer will be governed by the familiar principles of the law of contracts. * * *" (Italics ours.)

Davis v. *Vories*, 141 Missouri 234, was an action on some promissory notes, the consideration for which was a contract with respect to the copyright in a published book. In discussing the extent and validity of that contract the Court considered the unlimited extent and manner in which the owner of the copyrighted book could confer a license. It said (p. 239):

> "Copyright in the United States is the 'exclusive right of printing or otherwise multiplying copies of a published literary work, and publishing and vending the same, with the right of preventing all others from doing so.' 4 Am. and Eng. Ency. of Law, 147; R. S. U. S., sec. 4952. It is not disputed that Root was the owner of the copyright of the book in question. As such owner he had the exclusive right to sell his book *in any manner anywhere* in the United States. This right he could transfer to another, as to the whole or any particular part of the country. As was said by Clifford, J., in *Parton* v. *Prang*, 3 Cliff. 537: 'Sales may be absolute or conditional, *and they may be with or without qualification, limitation and restriction*, and the rules of law applicable in such case to other personal property must be applied in determining the real character of a sale of literary property.' The right was a valuable one, specially protected by the law of the land. R. S. U. S., sec. 4964. * * *
>
> "That the legal title to the copyright remains in the owner, and the instrument whereby he conveys a beneficial use therein is nothing more than a license, detracts nothing from the title or value of the beneficial interest conveyed. As was said in *Black* v. *Henry G. Allen Co.*, 42 Fed. Rep. 618, by Shipman, J.: 'Under section 4964, a license in writing, by instrument duly witnessed, may be given by the pro-

prietor to any other person to the extent described in such license; *and there is no restriction upon the power of the proprietor to assign or transfer in equity an exclusive right to use the copyrighted book in a particular manner or for particular purposes upon such terms and conditions as may be agreed upon.*" (Italics ours.)

In *Buck* v. *Hillsgrove Country Club, Inc.*, 17 Fed. Supp. 643 the District Court stated (p. 645):

"It is clear that the rights under the copyright laws are exclusive. To permit this paragraph in respondent's answer to exercise its force and effect is to destroy the exclusiveness given by the Constitution and the laws thereunder to the petitioners' copyright.

"In the case entitled Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 547, 76 L. Ed. 1010, it is held that:

" 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. * * * A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.' * * *

" 'Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the government has in

the use of the property which is the subject of the grants.'

"In Dr. Miles Medical Co. v. Platt (C. C.) 142 F. 606, 610, the court said:

"'The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the Victor Talking Machine case [(C. C. A.) 123 F. 424], above cited, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required to give reasons or deal fairly with purchasers.'"

In *Buck* v. *Gibbs*, 34 Fed. Supp. 510, modified on other grounds, 313 U. S. 387, Circuit Judge Hutcheson practically said the same (p. 517):

"A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another."

In *Buck* v. *Swanson*, 33 Fed. Supp. 377 (reversed on other grounds, 313 U. S. 406), the Court stated (p. 387):

"The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms."

It must be borne in mind that appellants are not selling their copyrights; they are merely licensing them for short periods.

The Copyright Act directly protects appellants in the *story* as it appears on the film, and the owner has all the nine exclusive rights given by Section 1 including the right of public performance [Sec. 1(d)]; the licenses issued by appellants to exhibitors are confined merely to that right of public performance. Obviously, all the other exclusive rights given to appellants under Section 1 (such as the right to multiply copies, vend, translate, adapt, etc., etc.) are retained by appellants; and since the one right to publicly perform is granted for a short period, this amounts to a license merely (*Widenski* v. *Shapiro, Bernstein & Co., Inc.*, 147 Fed. [2] 909; *Waterman* v. *Mackenzie*, 138 U. S. 252, 255).

Of course there is a vast difference between a license and a sale. "* * * a license is only a personal permission to the grantee to infringe the grantor's right" (*MacGillivray, The Law of Copyright*, p. 81) equivalent to a bare covenant not to sue (*Heap* v. *Hartley* (1889), 42 Ch. Div. 461, 470) and is "merely the grant of a privilege which protects the licensee against a claim for infringement" (*Ball, Law of Copyright and Literary Property* (1944), 530); "a dispensation or licence properly passes no interest (*Copinger, The Law of Copyright*, 7th Ed. p. 107); and is nothing more than "a mere exemption from suit" (*Moto Meter Co. Inc.* v. *National Gauge & Equipment Co.*, 31 Fed. (2) 994, 996); or "leave to do a thing which the licensor would otherwise have a right to prevent". (*Western Elec. Co.* v. *Pacent Reproducer Corp.*, 42 Fed. (2) 116, 118).

There is no provision in appellants' license agreements which requires the licensee to use the physical film in any particular manner. He may put it on any projec-

tion machine that he has available; he is not limited to any particular make of machine; he may employ any one or more projectionists of his own choice; he may run the film as often as he pleases within the term of his license period; in fact he is free to do anything with that film which will enable him to project the successive scenes upon his theatre screen. While it is true that a copyright owner in contradistinction to a patent owner, may not restrict the use of his work (*Bauer* v. *O'Donnell*, 229 U. S. 1), there is no proof in this record that appellants ever attempted or threatened to restrict the *use* of their physical copyrighted films.

Section 41 of the Copyright Act (17 U. S. C.) makes a distinction between the physical work itself and the subject matter of the copyright.

If appellants had *sold* the films and then made an attempt to control the use of the physical films in some way they would have gone far beyond their copyrights just as the copyright owners did in *Bobbs-Merrill Co.* v. *Strauss*, 210 U. S. 339 and in *Strauss* v. *American Pub. Ass'n*, 231 U. S. 222, where it was sought to control the price of books *after* they had been sold and had passed out of the hands of the copyright owners, and the statutory right to vend had been exhausted.

Consequently, licensing and not selling, appellants may license their works to licensees of their own choice and upon their own terms. That right has been taken away from them.

2. Moreover there is a public policy involved here.

Basically and fundamentally, copyright is given for the primary benefit of the public at large. The incidental

protection given to the author is merely the *inducement* by which that objective is attained. Chief Justice Marshall pointed that out in *Grant* v. *Raymond*, 6 Peters 218, where he said (p. 243):

> "The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensations made to those individuals for the time and labour devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

And only recently, the late Chief Justice Stone re-stated that doctrine with approval in *Scott Paper Co.* v. *Mercalus Mfg. Co.*, 326 U. S. 249.

In dealing with copyrights and patents the Courts make a marked distinction between the wide powers of the owners to *license* their works, and the limits imposed upon them when they come to *sell* their works.

In *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7) [cert. granted 207 U. S. 589; Cert. den. by stipulation 210 U. S. 439], a licensee under certain patents who had been limited by his contract as to the price of the article, defended a suit for the license fee, alleging violation of the Sherman Act by the patent owners, the licensors. The Court reversed a judgment for the defendant in an opinion by Circuit Judge Baker and a concurring opinion by Circuit Judge Grosscup. Judge Baker said (p. 361):

> "Under its constitutional right to legislate for the promotion of the useful arts, Congress passed

the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substanial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: Deed us your property, possession to be yielded at the end of 17 years, *and in the meantime we will protect you absolutely in the right to exclude everyone from making, using, or vending the thing patented, without your permission* (citing cases). *Congress, put no limitations, excepting time, upon the monopoly. Courts can create none without legislating.* The monopoly is of the invention, the mental concept as distinguished from the materials that are brought together to give it a body. Use of the *materials* as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. *Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them,* provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson. * * *" (Italics ours.)

Circuit Judge Sparks said in *Mid-Continent Investment Company* v. *Mercoid Corporation* (133 Fed. [2] 803, 810):

"Congress by authority of our Constitution, has pledged the public faith to each patent owner to exclude others from practicing his invention for a

limited time, and the anti-trust laws do not forbid contracts between the owners of patents and their licensees which are legitimate and within the scope of the patent. Bement v. National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058."

And in *U. S. v. Vehicular Parking*, 54 Fed. Supp., 828, the Court pointed out that the restraints of trade arise from the *combination* of patent owners and not from the exercise of the right granted by the patent to exclude others (p. 837).

See also:

U. S. v. General Elec. Co., 272 U. S. 476.

The Decree therefore, takes away from appellants their exclusive rights in their copyrights, prevents them from licensing their works to licensees of their own choice singly or in combination with other copyrighted works, compels them to accept license fees fixed by the users, and in many respects destroys and nullifies the monopoly of appellants' copyrights.

It thereby discourages the creation and publication of copyrighted works, and thus violates a settled public policy that goes back to Colonial days.

The Provisions of Paragraphs 8 and 9 of Section II of the Decree Amount to a Species of Compulsory License.

The Copyright Act of 1909 has a compulsory license feature in Section 1-e with respect to the manufacture of phonograph records. That was a compromise provision put in by reason of the fact that in 1908 this Court had decided in *White-Smith Music Pub. Co.* v. *Appollo Company*, 209 U. S. 1, that a piano-roll or other mechanical

record was not a writing and therefore its unauthorized manufacture and sale did not infringe the copyright. In order to give authors some relief and yet encourage the industry to manufacture piano rolls and phonograph records, it was provided in Section 1-e of the Act of 1909 that if the owner licensed one recording company to make a mechanical reproduction of his musical composition, any other mechanical company had an equal right to do so upon the payment of a two cent royalty. By this method no one company may build up a monopoly of records.

Standard Music Roll Company v. *F. A. Mills, Inc.*, 241 Fed. 360, 363.

There is no other compulsory license provision in the Copyright Act, and none whatever in the Patent Statutes.

This Court pointed out in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, at pp. 412-8, that certain provisions of the decree there involved should be modified. The Court held that a patent was protected against appropriation either by individuals or by the Government, and that in enjoining violations of the Sherman Act the Court refrained invariably from action which amounted to a forfeiture of the patents, (p. 415). It also analyzed the various attempts that had been made by Congress from 1877 down to adopt a system of compulsory licensing of patents, and it showed that Congress had never taken such action. It was our understanding of the Hartford-Empire case that the Court had rejected those provisions of the decree which provided for the compulsory licensing of defendants' patents free of royalties, although it did provide for a compulsory license upon reasonable royalties.

A provision for compulsory license upon payment of reasonable royalties was again arrived at and upheld in the more recent case of *U. S.* v. *National Lead Company*, 332 U. S. 319. There the Court seemed to base its decision largely upon the rule that in patent infringement suits the Court frequently grants the patent owner damage by way of an established or reasonable royalty. While that rule is true in a patent case, it has never been applied to a copyright case, for the simple reason that the provisions of the patent statutes governing damages provide only for actual damage or an account of profits, whereas the copyright statutes provide for actual damage, an account of profits and also for *statutory* damage. Giving a successful plaintiff a reasonable royalty in a patent infringement suit is simply a device to give him something where he is unable to prove either damages or profits. That distinction has been clearly recognized and commented on, particularly in the case of *Widenski* v. *Shapiro, Bernstein & Company, Inc.*, 147 Fed. (2d) 909, where Judge Woodbury said (p. 911):

> "It is indicated in the case last cited and established in *Enterprise Mfg. Co.* v. *Shakespeare Co.*, 141 F. (2d) 916, 919, and the cases cited therein, that proof of either established or reasonable royalties may be resorted to in patent cases only when the patentee is unable to make satisfactory proof of his actual damage and the actual profits of the infringer. That is to say, a plaintiff in a patent case, if he prevails on the issue of infringement, may recover upon the basis of an established or reasonable royalty only after he has failed to prove satisfactorily his own loss and the infringer's profits. Thus the royalty rule provides successful plaintiffs in patent suits who have been harmed but cannot

prove either their actual damages or the defendant's actual profits with a means to escape the hollow victory of an award of purely nominal damages. But the Copyright Act itself makes provisions for similiarly situated plaintiffs in copyright cases in the 'in lieu' clause of § 25 (b), a provision not found in the corresponding section of the Patent Law, (35 U. S. C. A. § 70) and from this we conclude that is a substitute for the established or reasonable royalty rule applied in patent cases."

Since there is no rule of damages by way of reasonable royalty in a copyright infringement suit, the basis for compulsory licensing which existed in the *National Lead* case does not exist in respect of a Sherman anti-trust suit affecting copyrights.

Consequently there is no basis for a compulsory license of appellant's copyrights, whether such license is to be upon the price offered by the highest bidder or any other price.

In that respect the Decree likewise violates appellants' exclusive rights in their copyrights, both in those existing, and those that will be acquired in the future.

The Decree makes no distinction between copyrights that existed up to the time of the trial and copyrights that would be created or acquired in the future.

Even the *Hartford-Empire* case and the *National Lead* case confined themselves solely to patents which were in existence at the time of the suit and which were the subject of the suit. The Court did not attempt to impose a reasonable license fee upon patents which might be obtained in the future. This Decree does that very thing.

In short, the Decree penalizes appellants in property which they would acquire in the future for acts committed in the past. It is the severest form of penalty conceivable, and so far as we know has never been invoked before.

The Decree Violates the Fifth Amendment of the Federal Constitution in That it Deprives Appellants of Their Property Without Due Process of Law. This Property Consists of Copyrights and Good-will.

In Curtis on Copyright, the author says (p. 5):

> "In the second place, all property possesses two uses, or qualities. First, it implies the right of possession and use, which constitutes a part of the ownership, or appropriation of the individual. This right of possession and use is full and exclusive. The object may be enjoyed by the individual in any mode consistent with the general welfare; a limitation which does not arise from any inherent defect in the right itself, but is imposed upon it from without. Secondly, property implies the faculty of transmission, by exchange, or sale, or gift. Transmission, is unrestrained, carries with it the full and exclusive right of possession and use of the original owner, indefinitely, so that the object remains forever separated from a community of goods. But, as the original owner may grant the whole unrestricted right of possession and use, so it follows that he may grant a less right than he himself enjoyed, by restricting or qualifying the use. He may thus specify the uses for which he does or does not grant the possession, and may annex various conditions upon which the possession shall be held."

See also, *Parton* v. *Prang*, 18 Fed. Cas. #1873, at p. 1278.

To destroy appellants' right to license their literary property upon their own terms is to deprive them of the aforementioned incidence of ownership. As Drone said in his famous work on Copyright (p. 6):

> "The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived—*proprius*—is 'one's own'."

And further on, the author (p. 13), says:

> "* * * The exclusive right of using and transferring property is a necessary consequence of the recognition of the right of property itself."

Pointing out that there should be no distinction in that right between literary property and other kinds of property, the author said as far back as 1879 (pp. 52-3):

> "The progress of legislation and jurisprudence is constantly uprooting bad laws. The light of to-day shows the mistakes of yesterday. The errors of to-day will be exposed by the enlightenment of to-morrow. Progress is fatal to wrong. Time alone will show whether the grand principles governing literary property so well expounded by Lord Mansfield and other great jurists will again prevail; whether the judgment proclaimed by the Court of King's Bench in 1769 will again be recognized as the true law; whether the truth will again become clear to all, as it was to Mr. Justice Thompson when he said, 'Every principle of justice, equity, morality, fitness, and sound policy, concurs in protecting the literary labors of men to the same extent that property acquired by manual labor is protected; and as it was

to Mr. Justice Baldwin when he maintained, that 'to place the proprietors of literary property on a worse footing in courts of equity than the owners of other property would not only be subversive of all principles of justice, but in direct repugnance to the spirit of the Constitution and laws.' But, until these things shall come to pass, an inviolable right will be denied to men of letters."

Mr. Justice Roberts in his dissenting opinion in *Interstate Circuit* v. *U. S.*, 306 U. S. 208, said, at p. 236:

"* * * The exhibition of a photoplay, were it not for the copyright law, would amount to a public disclosure and the use of the material would thereafter be open to the public. All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the production with consequent exclusive enjoyment in the vendee; another is the right to license others to use the product as one might lease or bail real or personal property. The monopoly, so called, amounts to no more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as in here in other property under the common law. Therefore, the standing of the distributor defendants toward their customers, as respects the productions proposed to be licensed, differs in no way from that of the owner of any other property toward those to whom he leases or licenses its use or sale."

And at page 239:

"Once the property rights conferred by the Copyright law are recognized it must follow that the prin-

ciples governing the right to use, sell, or turn to account other forms of property are equally applicable here."

We believe that in that respect the Court did not differ with Mr. Justice Roberts.

In *Buck* v. *Gibbs*, 34 Fed. Supp. 510 (modified on other grounds, 313 U. S. 387) Circuit Judge Hutcheson, referred to a statute which required copyright owners to furnish schedules giving the prices of the compositions so licensed and permitting anyone desiring to do so to perform any piece at the price so fixed. He said:

> "This is a taking of plaintiffs' property in its copyright without due process."

The instant Decree treats the appellants as if they were a public utility, indeed, a public utility in the interest of 18,000 motion picture exhibitors, that being the "public". We know of no decision which has ever held that the motion-picture business is affected with a public interest to the extent that gas, electricity or railroads are affected with such interest.

Even were Congress to attempt such a regulation of this business, it would be unconstitutional.

Not only do appellants suffer the loss of their copyright monopoly, but the Decree deprives them as well of their valuable good-will in violation of the Fifth Amendment.

The Decree has enjoined the furtherance of a conspiracy. Whatever may be said of their conduct heretofore, each of the defendants, including the appellants, is now bound un-

der penalty of contempt to act alone and not in unison with others. Acting in this way and not in combination, this Court had said (*Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312):

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99; *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191."

So that in the instant case we have a taking of property which is not being used in the furtherance of a conspiracy, as was the case in *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208 or in the *Binderup* case *supra*.

Those portions of the instant Decree which relate to "clearance" and "run" amply protect the exhibitors against any illegal action by appellants; exhibitors do not require paragraphs 7, 8 and 9 of Section II as a safeguard. Not only are those provisions illegal, but they are unnecessary.

CONCLUSION

The injunctive provisions against block-booking and the requirement for auction selling contained respectively in Paragraph 7 and Paragraphs 8 and 9 of Section II of the decree should be reversed and stricken from the decree.

Findings Nos. 1, 93, 94, 97, 154 and 156 and conclusions Nos. 8 and 11 should likewise be reversed and stricken for failure of proof and want of jurisdiction.

The decree should be modified in the above respects.

Respectfully submitted,

SCHWARTZ & FROHLICH,
Attorneys for Appellants Columbia.

LOUIS D. FROHLICH,
ARTHUR H. SCHWARTZ,
of Counsel.

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No. 79

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IN THE

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OCTOBER TERM, 1947.

UNITED STATES OF AMERICA, *Appellant*,

v.

PARAMOUNT PICTURES, INC., ET AL., *Appellees*.

Appeal from the District Court of the United States for the Southern District of New York.

PETITION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN BEHALF OF THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS.

ABRAM F. MYERS,
Counsel for the Conference of Independent Exhibitors' Associations,
729 Fifteenth Street, N.W.,
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN BEHALF OF THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS.

To the Honorable,
The Supreme Court of the United States:

Comes now the Conference of Independent Exhibitors' Associations, by its counsel, and respectfully petitions the Supreme Court of the United States for leave to file a brief

[1] The proffered brief has a bearing on all of the several appeals from the decree of the District Court, namely, Nos. 79, 80, 81, 82, 83, 84, 85 and 86 and copies of this petition and of the brief have been sent to counsel for all parties. Because the several appeals are to be heard together, and constitute one case, it was deemed sufficient to entitle the petition and brief only in No. 79, the Government's appeal.

as *amicus curiae* in the above-entitled cause; and in support of its petition it informs the Court as follows:

I. DESCRIPTION OF THE PETITIONER.

1. The Conference of Independent Exhibitors' Associations, for the purposes of this petition, represents 26 national and regional associations, with a combined membership of upwards of 4,000 independent motion picture theatres; that is to say, motion picture theatres which are not owned, controlled or operated by, or affiliated with, any producer or distributor of motion picture films.[2]

2. The Conference of Independent Exhibitors' Associations was formed primarily to represent the interests of the exhibitor members of its constituent associations in this litigation. The need for such action arises from the fact that those constituent associations constitute all or nearly all of the exhibitor associations which are exclusively composed of independent motion picture exhibitors, or which are exclusively under independent management or control.

3. All other exhibitor associations including those involved in Nos. 85 and 86, which are seeking to intervene, include among their officers and members affiliated exhibitors (i.e., theatre operators employed by or in partnership with one or more of the producer-distributors) and affiliated theatres (i.e., theatres owned or controlled by the producer-distributors). (Stenographer's minutes, Oct. 21, 1946, pp. 2873-2874.) Should the petitions of these putative intervenors be allowed, and there is an alignment according to interest, their affiliated members would necessarily be joined as parties defendant. The independent exhibitors cannot entrust their interests to such representation.

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[2] The national and regional associations comprising the Conference of Independent Exhibitors' Associations are set forth in Attachment A, *infra* p. 7.

II. REASONS FOR GRANTING PETITION.

4. Although the Government in its original complaint sought to divest the appellees (hereinafter called "defendants") of their theatre holdings and to enjoin certain monopolistic practices, all of which would have been beneficial to the independent exhibitors, the lower court saw fit to ignore those traditional Sherman Act remedies and to substitute therefor a burdensome, complicated and unworkable system of judicial regulation for which there is no authority in law and which bears more heavily upon the independent exhibitors than it does upon the defendant producer-distributors and their affiliated theatre chains.

5. An extraordinary feature of the regulatory system imposed by the District Court is that it applies not only to situations where defendants' theatres compete with one another for films, or to situations where defendants' theatres compete with independent theatres, but actually extends to competitions between independent theatres which theatres are not parties to the suit or implicated in the charges of wrongdoing.

6. The independent exhibitors thus stand in the position of innocent bystanders. The Government has charged them with no wrong-doing and they are not implicated as willing participants in any of the unlawful actions denounced by the lower court. Yet under the lower court's decree the defendants' theatre monopoly, against which the Government complained, has been left virtually intact and there has been saddled upon the independent exhibitors a high degree of regulation which is not only burdensome in itself but will actually handicap them in their efforts to compete with the producer-owned chains.

7. In tendering its brief the Conference of Independent Exhibitors' Associations acts in subordination to the Attorney General who is charged by law with the duty of enforcing the Sherman Act. Act of July 2, 1890, 26 Stat. 209, Sec. 4; 15 U.S.C.A., Ch. 1, Sec. 4. The Conference by for-

mal action has approved and now supports the purpose of the Attorney General to secure the principal relief prayed for, namely, the complete, permanent and effectual separation of the production and exhibition branches of the motion picture industry. Such relief, in the opinion of the Conference, will open the screens of the great first-run affiliated theatres to new producers and distributors and thus restore competition in the motion picture industry; and will end the incentive to discriminate and thus halt the discrimination practiced by the defendants in favor of their own theatres and those of one another and against the independent theatres.

8. The pressing need for the submission of a brief in behalf of the independent exhibitors is not merely to support the Government's case—that is in competent hands—but to point out to the Court the impractical and unworkable features of the lower court's decree and how they adversely and unfairly affect the independent exhibitors. This need is emphasized by the fact that the Government rested its case upon documentary evidence and called no independent exhibitors as witnesses, the only oral testimony being that presented by the defendants in behalf of themselves and their affiliated chains. Thus while the record is teeming with testimony giving the defendants' version of industry conditions as revealed by the Government's exhibits, there are no interpretations or explanations to show affirmatively how those conditions affect the independent exhibitors.

9. More important than that is the fact that this Court is called upon to review a decree which sets up an elaborate system for regulating the entire motion picture industry, including the independent exhibitors. The production, distribution and exhibition of motion pictures is a complicated and peculiar business quite unlike any other. Films are leased (not sold) to different classes of theatres, for staggered runs, with varying time lapses between runs and upon a wide variety of terms and conditions, especially

as to the amount and methods of computing film rentals. Only the independent exhibitors, acting through their own associations and their own counsel, have the requisite experience and stimulus to point out to the Court wherein the lower court's decree bears unfairly and unjustly upon them.

10. Finally, in the event that this Court should decide that some measure of regulation similar to that provided by the lower court is justified as interim relief or otherwise, the Conference of Independent Exhibitors' Associations desires to offer concrete suggestions for making the decree as workable from a practical standpoint, and as little burdensome upon the innocent independent exhibitors, as possible.

III. SERVICE OF PETITION AND BRIEF AND ATTITUDE OF COUNSEL.

11. On December 10, 1947 a copy of the proffered brief was sent by registered mail to counsel in all eight appeals with the request that they consent to the filing thereof. Such counsel are listed in Attachment B, page 9 of this petition.

(a) Those Consenting.

Hon. Philip B. Perlman, Solicitor General of the United States, has consented in writing to the filing of the brief.

Hon. Thurman Arnold, counsel for the appellants in No. 85, advises that he has no objection to the filing of the brief and that he will so notify the Clerk.

(b) Those Not Consenting.

Simpson, Thacher & Bartlett, Esqrs., counsel for Paramount Pictures, Inc., appellant in No. 81, advise that their client is not willing to consent to the filing of the brief.

No word has been received from other counsel. Since counsel for the producer-distributor defendants opposed the filing of a brief in behalf of the independent exhibitors

in the District Court, it is presumed that they will also oppose the filing of such a brief in this Court.

A copy of this petition has been sent by registered mail to each counsel listed in Attachment B with notice that the petition and brief have been filed with the Clerk for presentation to the Court.

Respectfully submitted,

ABRAM F. MYERS,
Counsel for the Conference of Independent Exhibitors' Associations,
729 Fifteenth Street, N.W.,
Washington 5, D. C.

ATTACHMENT A.

List of Associations Constituting the Conference of Independent Exhibitors' Associations.

---

1. Allied States Association of Motion Picture Exhibitors, 729 15th St., N.W., Washington, D. C., a federation of independent exhibitor associations, with the following constituent bodies:

(a) Independent Exhibitors, Inc. (of New England), 36 Melrose St., Boston, Mass., with members in Massachusetts, Maine, New Hampshire, Vermont and Rhode Island.

(b) Allied Theatres of Connecticut, Inc., 902 Chapel Street, New Haven, Conn.

(c) Allied Theatre Owners of New Jersey, Inc., 234 W. 44th Street, New York, N. Y.

(d) Allied Independent Theatre Owners of Eastern Pennsylvania, Inc., 219 N. Broad St., Philadelphia, Pa.

(e) Motion Picture Theatre Owners of Maryland, Inc., 531 N. Howard St., Baltimore, Md.

(f) Allied Motion Picture Theatre Owners of Western Pennsylvania, Inc., 84 Van Braam Street, Pittsburgh, Pa.

(g) West Virginia Theatre Managers' Association, 1632 Central Parkway, Cincinnati, Ohio.

(h) Independent Theatre Owners of Ohio, 55 E. State St., Columbus, Ohio.

(i) Allied Theatres of Michigan, Inc., Fox Theatre Building, Detroit, Michigan.

(j) Associated Theatre Owners of Indiana, Inc., 444 N. Illinois St., Indianapolis, Indiana, with members in Indiana and Kentucky.

(k) Allied Theatres of Illinois, Inc., 1325 S. Wabash Avenue, Chicago, Illinois.

(l) Independent Theatre Owners of Wisconsin and Upper Michigan, 709 N. 11th Street, Milwaukee, Wis.

(m) North Central Allied Independent Theatre Owners, Inc., 253 Loeb Arcade, Minneapolis, Minn., with members in Minnesota, North Dakota and South Dakota.

(n) Allied Independent Theatre Owners of Iowa-Nebraska, Inc., Eldora, Iowa.

(o) Allied Rocky Mountain Independent Theatres, 921 21st St., Denver, Colorado, with members in Colorado and Wyoming.

(p) Allied Theatre Owners of the Gulf States, 223 S. Liberty St., New Orleans, La., with members in Louisiana, Alabama, Florida and Mississippi.

(q) Allied Theatre Owners of Texas, 2011½ Jackson Street, Dallas, Texas.

2. Pacific Coast Conference of Independent Theatre Owners, 1914 S. Vermont Avenue, Los Angeles, Cal., a federation of independent exhibitor associations, including the following:

(a) Independent Theatre Owners of Southern California and Arizona, 1914 S. Vermont Ave., Los Angeles, Cal.

(b) Independent Theatre Owners of Northern California and Nevada, 369 Turk Street, San Francisco, Cal.

(c) Independent Theatre Owners of Washington, Northern Idaho and Alaska, 101 Battery St., Seattle, Wash.

(d) Independent Theatre Owners of Oregon, 1931 N.W. Kearney St., Portland, Ore.

(e) Montana Theatre Owners Association, Wolf Point, Mont.

(f) Independent Theatre Owners of Utah and Southern Idaho, Salt Lake City, Utah.

3. Unaffiliated Independent Exhibitors (of New York City), 625 Eighth Avenue, New York, N. Y.

ATTACHMENT B.

List of Counsel to Whom Copies of This Petition and the Proffered Brief Were Mailed.

1. Philip B. Perlman, Esq., Solicitor General, Department of Justice, Washington, D. C., for the United States of America.
2. John W. Davis, Esq., 15 Broad Street, New York, N. Y., for Loew's, Inc.
3. Simpson, Thacher & Bartlett, Esqrs., 120 Broadway, New York, N. Y., for Paramount.
4. Donovan, Leisure, Newton & Lombard, Esqrs., 2 Wall Street, New York, N. Y., for R-K-O.
5. Joseph M. Proskauer, Esq., 11 Broadway, New York, N. Y., for Warner Bros.
6. Dwight, Harris, Koegel & Caskey, Esqrs., 100 Broadway, New York, N. Y., for 20th Century-Fox.
7. O'Brien, Driscoll & Raftery, Esqrs., 152 W. 42d St., New York, N. Y., for United Artists.
8. Schwartz & Frolich, Esqrs., 1450 Broadway, New York, N. Y., for Columbia.
9. Charles D. Prutzman, Esq., and Adolph Schimmel, Esq., 1250 Sixth Avenue, New York, N. Y., for Universal.
10. Thurman Arnold, Esq., Bowen Building, Washington, D. C., for American Theatres Association.
11. Paul Williams, Esq., 1914 S. Vermont Ave., Los Angeles, Cal., for Southern California Theatre Owners Association.
12. Robert T. Barton, Mutual Building, Richmond, Va., for Allred and others.

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SUBMITTED IN BEHALF OF THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS.

ABRAM F. MYERS,
Counsel for the Conference of Independent Exhibitors' Associations,
729 Fifteenth Street, N. W.,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUBMITTED IN BEHALF OF THE CONFERENCE OF INDEPENDENT EXHIBITORS' ASSOCIATIONS.[1]

I.

INDEPENDENT EXHIBITORS HAVE A VITAL INTEREST IN THE OUTCOME OF THIS CASE.

1. Their vulnerable position. The independent motion picture exhibitors (i.e. independent of producer-distributor ownership, operation or influence) have a stake in this litigation second to none.

[1] The Conference consists of 26 national and regional associations of independent motion picture exhibitors. It was formed primarily to represent the independent exhibitors in this litigation. The constituent associations are listed in the petition for leave to file this brief.

It is not going too far to say that whether or not they remain in the motion picture business depends largely upon the outcome of this case and the nature of the final decree to be entered.

While large in number, the independent exhibitors nevertheless occupy a vulnerable position. They are dependent upon the eight major producer-distributors—the defendants herein—for necessary supplies of quality films with which to operate their theatres. To the extent that they operate in the same competitive areas with the affiliated theatres,[2] they are competitors as well as customers of the theatre-owning producer-distributors and are treated as such. And even where the independents do not now compete with the affiliated chains, they must live in dread that their areas may be invaded. Moreover, the pattern of conduct of all the defendants, whether or not they now operate theatres, is to discriminate in favor of the affiliated theatres and against the independents, as revealed by the opinion and findings of the lower court.

To fully appreciate the precarious position of the independent exhibitors, it is necessary to distinguish between the methods by which the motion picture business is conducted and those which prevail in other industries. Each film is copyrighted, it can be obtained only from the distributor releasing it, it cannot be duplicated elsewhere. An independent exhibitor cannot walk into one of the defendants' film exchanges, select the films he wants and exhibit them at his pleasure. Whether he may have a film for exhibition on first, second, third, or fourth run in a competitive area, the amount of time that shall elapse between the preceding run and the one granted him, and many other details including when and how he may advertise and how much he shall charge, rest in the discretion of the distributor. And the distributor is under no compulsion to license

[2] Theatres owned, controlled or operated by one or more of the five theatre-owning defendants, or in which they have an interest.

a film to the exhibitor on any run or on any terms, unless it is so minded.

2. Impact of defendants' theatre monopoly. Under these conditions the five theatre-owning defendants (Paramount, Loew's, 20th Century-Fox, Warner Bros. and RKO) have been able to acquire and maintain a virtual monopoly of the large city first-run theatres, and to acquire and maintain a virtual monopoly of all classes of theatres in certain areas. As an illustration, we cite the situation in Washington with which the Court may possibly be familiar. There are six downtown theatres which exhibit major company feature length films on a first run policy. Of these the ~~Capitol,~~ Palace and Columbia[3] are operated by defendant Loew's, Inc.; the Warner (formerly Earle) and Metropolitan[3] are operated by defendant Warner Bros.; and RKO Keith's is operated by defendant RKO. In addition, Warner Bros. operates 20 neighborhood theatres in Washington and its environs.[4]

The lower court sought to minimize this monopoly condition by comparing the total number of affiliated theatres with the total number of independent theatres. This indicated that the defendants together control only about 17.35 per cent of the motion picture theatres in the United States. But such a comparison can have relevancy only upon the theory that every theatre in the United States competes with every other theatre—a patent absurdity. The court passed over lightly the numerous territorial monopolies re-

[3] The Columbia and Metropolitan are sometimes used for move-overs. A move-over is an extended first-run, the film being transferred from the first-run to the move-over theatre without any intervening time lapse. (Rodgers, Steno. Minutes, Oct. 23, 1945, pp. 553-555.)

[4] Ambassador, Apollo, Avalon, Avenue Grand, Beverley, Calvert, Central, Colony, Home, Kennedy, McArthur, Penn, Savoy, Seco, Sheridan, Silver, Takoma, Tivoli, Uptown and York. (Warner Bros. Theatres' advertisement regularly appearing in the Washington Post and the Washington Evening Star.)

vealed by the Government's proof and which are illustrated by the decisions in *Goldman* v. *Loew's, Inc. et al.* (D. C. En. Pa.), 54 Fed. Supp. 1101, (C. C. A. 3d) 150 Fed. 2d 738; and *Bigelow* v. *RKO Radio Pictures et al.* (C. C. A. 7th), 150 Fed. 2d 877, 162 Fed. 2d (Adv.) 520, (U. S. Sup. Ct.) 327 U. S. 251, 90 Law Ed. 652. And it failed to apply to defendants' territorial monopolies the principles of *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 89 Law Ed. 160 and *United States* v. *Schine Chain Theatres et al.* (D. C. Wn. N. Y.), 63 Fed. Supp. 229.

Moreover, the lower court in shrugging off defendants' theatre monopoly gave no weight to the superior size, importance, influence and earning power of the prior-run affiliated theatres in contrast to most independent theatres. All first-class films must filter through the prior-runs to the subsequent-run theatres. If there is delay in exhibiting the pictures on first-run, the subsequent-runs must wait for the product. Thus when a dispute arose between Paramount as a distributor and Loew's as an exhibitor in New York City, Paramount's releases were withheld from the subsequent-runs in that area for a period of eight months while the difficulty was being adjusted. (Reagan, Sten. Min. Oct. 24, 1945, pp. 776-777.) Hence, the subsequent-runs in a very real sense operate by sufferance of the prior-runs.

Finally, the lower court in holding that it is "unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly . . . that they should be subjected to the drastic remedy of complete divestiture," overlooked one of its most important findings of fact. Defendants' theatres by reason of their size, location, priority of run, high admission prices and other advantages, provide almost one-half of the total film revenue derived from the domestic market. Finding No. 126 reads, in part, as follows:

The 17.35 per cent of theatres which comprise the five circuits of the major defendants[5] pay from 35 to 54 per cent of the total domestic film rental respectively received by the eight distributor defendants and 45 per cent of the total domestic film rental received by all of said distributor defendants.

It is against these powerful circuits that the widely scattered and individually weak independent exhibitors must bid for films, runs and clearance if the Government's plea for divestiture is denied and the lower court's regulatory system is affirmed. Moreover, new producers and distributors without the stimulus of free access to this tremendous prior-run revenue cannot be expected to enter the field in competition with the eight major producer-distributors.

The continuance in business of the independent exhibitors can be assured, and the way opened for new sources of product, only by the complete separation of production and distribution from exhibition.

3. Impact of defendants' film monopoly. In *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 75 Law Ed. 145, decided by this Court in 1930, the finding was that the ten companies there involved were "producers and distributors throughout the Union of 60 per cent of the films used for displaying motion pictures by some twenty-five thousand theatre owners" (p. 36).[6]

The opinion of the lower court in the present case shows that "during the 1943-1944 season the eight defendants dis-

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[5] In the lower court the five theatre-owning defendants became known as the "majors" and the other three defendants as the "minors." This is at variance with the parlance of the trade in which the defendants are all known as major companies and are sometimes called the "Big Eight." The terms "minor" and "independent" are reserved for such small organizations as Monogram and Republic.

[6] These companies were Paramount, First National, M-G-M (Loew's), Universal, United Artists, Fox, Pathe, FBO, Vitagraph, Educational.

tributed about 77.6 per cent of all features nationally distributed except 'westerns' and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5 per cent." The court further said that "The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.* v. *Loew's Inc.* (C. C. A. 3d), 150 Fed. 2d 738," and quoted the following from the opinion in that case:

> Defendants control the production and distribution of more than 80% of feature pictures in the country, and no exhibitor can successfully operate without access to defendants' product.[7]

The lower court's findings do not account for the shrinkage in the total number of major distributors since 1930. Notwithstanding the accession to the ranks of the majors of Columbia (which was not involved in the *Paramount Famous Lasky Case*), the total has shrunk from 10 to 8. However, Findings Nos. 35 to 37, inclusive, show that defendant Warner Bros. acquired First National Pictures, Inc. and Finding No. 38 shows that Vitagraph is a wholly-owned subsidiary of the same defendant. Finding No. 19 shows that defendant RKO absorbed FBO Productions, Inc. and we do not believe it will be disputed that RKO also absorbed Pathe Exchange, Inc.

Neither do the findings reflect the gradual reduction in the number of feature films annually released by the defendants. Finding No. 99 shows that during the 1943-1944 season the eight defendants together released 260 feature films, exclusive of "westerns." The affiliated first-run and key neighborhood theatres by reason of extended runs (a "smash hit" will sometimes be held over for three or four weeks) and move-overs, do not require as many feature pictures as the independent subsequent-run and small town theatres. Theatres of the latter class commonly change

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[7] Actually the *Goldman Case* involved only seven of the eight major distributors, Universal having been eliminated by agreement.

their programs two or three times a week, thus requiring from 104 to 156 features a year. Most of them are compelled by competitive conditions or custom to show double features; that is two feature pictures on every program. And in many instances the exhibitor must split the available product with a competitor having the same run.

It is apparent, therefore, that so far as the independent subsequent-run and small town theatres are concerned, there is a serious product shortage. This has the effect largely to destroy the bargaining power of the independent exhibitors in licensing film from the defendants. If an independent exhibitor does not like the terms demanded and conditions imposed by one of the defendant distributors for its products, he is in no position to reject the offer and apply to another distributor in hopes of securing a better bargain. That is why the defendants have been able to foist upon the independent exhibitors their onerous, one-sided and well-nigh uniform contract forms, to insist upon percentage deals which make the distributors partners in the theatre for the duration of the engagement, and to fix the admission prices to be charged, check the box office receipts and generally to exercise dominion over the independent theatres.[8]

With their own theatres adequately supplied with films, the theatre-owning defendants have no incentive to produce more in order to strengthen the position of the independent exhibitors. The non-theatre-owning defendants, which derive so large a part of their total film rentals from the affiliated theatres, are reluctant to jeopardize that revenue by catering to the independents. With approximately 50 per cent of their domestic film rental assured by their affiliated accounts, all defendants can out-last the independent exhibitors whenever a stalemate is reached in bargaining for films.

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[8]Defendants' uniform contracts and forced percentage playing will be dealt with elsewhere in this brief.

The establishment of an elaborate system of competitive bidding for films, as proposed by the lower court, will not relieve but will aggravate the impact of the film monopoly upon the independent exhibitors. The true remedy is theatre-divorcement, thereby opening the screens of the affiliated theatres to new producers and new distributors, with new ideas, skills and talents to enter into competition with the Big Eight. The requirement of the Sherman Law and the function of the courts, we submit, is to restore competitive conditions and permit free enterprise to have its sway; not to erect complicated machinery for the regulation of competition.

4. Impact of the lower court's decree. The court below did not find the ownership and operation of theatres by the defendant producer-distributors to be inherently wrong or illegal. But it did find it illegal for the defendants to own or operate theatres jointly with one another or with others. And thus it arrived at the extraordinary conclusion that greater evil resides in the partial ownership of theatres than in total ownership. Accordingly, the court ordered that such joint ownerships be terminated in all cases where defendants' interest is more than 5 per cent and less than 95 per cent, leaving a 5 per cent tolerance at each end.

Had the requirement been that the defendants dispose of all such joint interests to third parties or to the independent interests involved, it would have been moderately impressive. But the order merely was that the relationships be terminated "by a sale to, or *purchase from* the co-owner or co-owners, or by a sale to a party not one of the defendants." (Decree, Sec. III, Par. (5), italics ours.) As hereinafter explained, such dispositions are to be made pursuant to the direction of the court.

And so the decree in conformity with the opinion is directed not at the ownership and operation of theatres *per se*, but is merely aimed at joint ownership.

Even if we indulge the assumption that the District Court, despite the sentiments expressed in its opinion, will

take a strong stand against permitting the defendants to buy out their independent partners, the defendants nevertheless will retain a majority of their present theatres including most, if not all, of their metropolitan first-runs, which are "wholly-owned."

By Sec. IV of the decree it is provided that the defendants shall have the unlimited right "to license, or in any way arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of 95 per cent or more either directly or through subsidiaries."

If the defendants owned their theatres in fee and operated them directly, thereby assuming all the hazards of theatre operation, there might be some justification for the District Court's ruling that they are entitled to play their own films in their own theatres on whatever terms they please. But the defendants rarely, if ever, own or operate theatres directly; that is done through subsidiary corporations. Sec. IV of the decree, above-quoted, nullifies the doctrine of separate corporate identity—not to give effect to a clear legislative purpose, but to defeat the will of Congress as expressed in the Sherman Act. "It leads nowhere to call a corporation a fiction", said Mr. Justice Holmes in *Klein* v. *Board of Tax Supervisors*, 282 U. S., 19, 24, 75 Law Ed. 140, 143. And he continued:

> If it is a fiction, it is a fiction created by law with intent that it should be acted on as true. The corporation is a person, and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members.

The law on this subject was summed up in the *Per Curiam* opinion in *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 436-437, 90 Law Ed. 181, 184:

> While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose; they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the state lays upon it for the protection of the public.

It is noteworthy that the decree entered by the District Court for the Northern District of Illinois in the *Bigelow Case* subsequent to the decision of this Court (327 U. S. 251, 90 Law Ed. 652), which decree was affirmed by the Court of Appeals for the 7th Circuit (162 Fed. 2d (Adv.) 520, and which this Court declined to review on certiorari by an order entered November 10, 1947 (Law Ed. Adv. Vol. 92, No. 2, p. 79), contained, *inter alia*, a provision restricting the run of pictures in the distributors' downtown first-run theatres to two weeks, and made no exception as regards the playing of their own pictures in their own theatres.

As a substitute for the obviously effective remedy of complete divestiture,[9] and as a judicial cure-all for the evils set forth in its opinion and findings, the court provided that all theatres, whether distributor-owned or independent, shall bid competitively for films, theatre by theatre and picture by picture, in all competitive areas. (Decree Sec. II, Par. (8).)

The utter unworkability of the bidding system as blue printed by the District Court will be dealt with under a subsequent heading. For the time being it will suffice to point out that it would pit the lone independent exhibitor

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[9] The lower court in its opinion conceded that "Undoubtedly such a step (divestiture) while not *ipso facto* preventing price-fixing agreements or unreasonable clearance, would terminate the Government's most urgent objections to the present methods of conducting the motion picture business."

against the marshaled strength of the distributor-owned chains, with their backlogs of parent company products, in bidding for films; that while this would enable the independent to bid for runs and clearances now enjoyed by the affiliated chains, it also would invite those chains to bid away the favorable runs and clearances which a few independents now receive from non-theatre-owning distributors; that the final and inevitable result would be to run up the price of film, if not, indeed, to enlarge the defendants' theatre monopoly.

5. The independent exhibitors are rendering a valuable public service and should be protected. Under the conditions outlined under the four preceding subheads, the independent exhibitors, with a few exceptions, have been relegated to neighborhood and suburban subsequent-runs in the large cities and to the small towns and rural communities.[10] Even so, they are rendering an important service, catering to the "family trade" and especially to child theatre-goers. They bring entertainment and relaxation to those who need it most, through a medium that combines drama, literature, music and scenic beauty, and at a price they can afford to pay.

In selecting pictures—to the extent that selectivity is vouchsafed to him—the independent exhibitor, as a member of the community in which he operates, is best qualified to know and meet the needs and preferences of his patrons. "Community preference" in motion picture entertainment which is the goal of numerous public groups interested in prohibiting the block-booking and blind-selling of films, can best be achieved through the local independent exhibitors.[11]

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[10] This excludes the large so-called independent circuits such as Crescent, Schine and Griffith, whose power and business practices are not unlike those of the affiliated chains. This Court already has ruled upon Crescent (323 U. S. 173) and cases involving Griffith and Schine are now pending before it.

[11] Report of Senate Interstate Commerce Committee on Neely Anti-Block-Booking and Blind-Selling Bill, dated June 15, 1938, S. Rep. No. 2378, 74th Cong., 2d Sess. "The logical and only readily available point of contact between the motion picture industry and the community is the exhibitor."

That ideal is impossible of attainment through chain operated theatres, where the ultimate responsibility for film buying and other operating policies affecting the public is vested in home office executives often far removed from the communities served.

The Government did not see fit to offer oral testimony to dramatize the effects of the defendants' business policies and practices upon the independent exhibitors. The record is silent as to how many independent exhibitors sold out voluntarily to the affiliated chains or how many sold out reluctantly because the favored runs, clearance protection and many other advantages were being conferred upon the affiliated theatres and they realized that they could not compete under those conditions. Nevertheless, the lower court in its opinion found that "both independent distributors and independent exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs and admission prices to which they have been obliged to conform . . . ." And under the heading "Discrimination Among Licensees" it found that the competitive advantages conferred upon the affiliated theatres constituted "an unreasonable discrimination against small competitors in violation of the anti-trust laws."

These findings are amply justified by the proof and establish that defendants have the power to exclude independent distributors and independent exhibitors from the more lucrative runs and ultimately from the business. They also show that defendants' policies and practices are adapted to bring about such exclusion. It is only a question of degree; possibly a matter of time. In the meantime, the growth of existing independents is stunted and there is little encouragement for new ones to come in. Such conditions, we submit, are contrary to the purpose and ideals of the Sherman Act. In Mr. Justice Peckham's philosophical opinion in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 41 Law Ed. 1007, written when the statute was fresh upon the books, we find a passage which,

despite its age, is peculiarly appropriate to the circumstances of this case. Speaking of combinations having the power to eliminate competitors through the medium of price control, he said (p. 324):

> In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avennes to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transfering an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

II.

THE COMPETITIVE BIDDING SYSTEM PRESCRIBED BY THE DISTRICT COURT IS UNAUTHORIZED, UNWORKABLE, INEFFECTIVE AND MISCHIEVOUS.

1. It is unauthorized by the Sherman Act. One utterance of the late Justice McReynolds in which all may join is that "judicial legislation is a hateful thing."[12] The decree in this case presents a glaring example of usurpation of the power of Congress. The constitutional grant of power to regulate commerce among the several states was to Congress, not to the courts.[13] Enactment of the Sherman Act[14]

[12] Separate opinion in *Federal Trade Commission* v. *Klesner*, 274 U. S. 145, 71 Law Ed. 972.

[13] Constitution, Art. I, Sec. 8.

[14] Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Ch. I.

was an exercise by Congress of the power thus vested in it. By Sec. 4 Congress conferred upon the Federal Courts "jurisdiction to prevent and restrain violations of this Act." That marks the extent of the Court's authority to remedy violations of the law in civil actions brought by the Government.

Of course, jurisdiction to prevent and restrain violations implies the exercise of discretion in the choice of an appropriate remedy. But the remedies chosen must be found within the boundaries of the judicial function and must be consistent with the language and purposes of the statute. This Court in *Standard Oil Company* v. *United States*, 221 U. S. 1, 77, 55 Law Ed. 619, 652, delimited the appropriate measures of relief in civil actions by the Government under the Sherman Act, as follows:

> . . . the application of remedies two-fold in character, becomes essential:
>
> 1st. To forbid the doing in the future of acts like those which have been done in the past which would be violative of the statute.
>
> 2d. The extension of such measure of relief as will effectually dissolve the combination found to exist . . .

The express provisions of the act, the foregoing precepts and a due regard for constitutional limitations called for a decree divesting the defendants of their theatres and enjoining them from further employing the unfair, restrictive and discriminatory practices which the District Court had denounced. Instead, that Court, *sua sponte*, conceived and prescribed a plan requiring all exhibitors in all competitive areas, independent and affiliated alike, to bid competitively for films desired for exhibition on any particular run. The defendants were enjoined from hereafter licensing any feature film for exhibition in any theatre not its own, otherwise than in accordance with that plan. Operation of this provision of the decree was suspended by Mr. Justice Reed pending disposition of these appeals.

The plan is set forth in Sec. II, Par. 8 of the decree of the District Court. It is difficult to grasp without a background of experience in the motion picture business. The following outline, for purposes of clarity, is broken down into short paragraphs the designations of which, however, do not correspond to those of sub-paragraphs of the decree.

(a) A license to exhibit each feature released by a defendant for public exhibition in any competitive area shall be offered to the operator of each theatre in the area who desires to exhibit it on some run[15] selected by such operator and upon uniform terms.[16]

(b) Where a run is desired or is to be offered upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify the exhibitors in the area not less than 30 days in advance of the date when bids will be received, offering to license the features on one or more runs,[17] and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run.

(c) Within 15 days after receiving such notice, any exhibitor in the area may bid for such license, and in his bid

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[15] Except, of course, a run pre-empted by the distributor for its own "wholly owned" theatre.

[16] This paragraph apparently contemplates simultaneous exhibition by all theatres in the area, without distinction as to run.

[17] The following definitions are from Finding No. 1 of the District Court:

Runs—The successive exhibitions of a feature in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on and shall include also successive exhibitions in different theatres, even though such theatres may be under a common control and management.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

shall state what run he desires and what he is willing to pay for such feature, *"which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental,* and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, *and any other offers which such exhibitor may care to make."* (Italics ours.)

(d) *"The distributor may reject all offers made for any such feature,* but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for *to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor."* (Italics ours.)

(e) Each license shall be granted solely upon the merits without discrimination in favor of affiliates, old customers, or others.

(f) Each license shall be offered and taken theatre by theatre and picture by picture.

By Section II, Par. 9 of the decree the defendants were enjoined from *arbitrarily* refusing the demand of an exhibitor who is in competition with another theatre (not owned by defendant, or its affiliate or subsidiary), dispatched by registered mail, to license a feature to him for exhibition on the run selected by him, instead of licensing it to the competing exhibitor on such run. Presumably if an exhibitor believes he has been arbitrarily refused a picture on the requested run, and the distributor accords him no satisfaction, he can complain to the Attorney General in the hope that the latter will initiate a contempt proceeding.

While the plan is couched in the language of an injunction, and the defendants are enjoined from doing business in competitive areas except in accordance with it, the plan manifestly is not an appropriate Sherman Act remedy but is a regulatory system applicable to the guilty and innocent

alike, which, under our form of government, only Congress is empowered to impose. Had the Congress intended that the motion picture industry should be regulated in this way, it would have so provided by special legislation, and it doubtless would have provided for the administration of such legislation by an appropriate agency such as the Federal Trade Commission. No such legislative intent can be gleaned from the Sherman Act.

2. **It is utterly unworkable.** The slogan of the entertainment business is, "The show must go on." As applied to the movies this means that the theatres must be assured of a steady flow of films, they must be booked well in advance of their opening dates, advertising trailers must be run while preceding attractions are shown and newspaper and other advertising must be arranged for in advance. Exhibitors, like publishers, are governed by deadlines. The "hurry, hurry, hurry" of the old tent show barker is the rule of life of the modern exhibitor.

Prior to the abortive and now lapsed provisions of the consent decree, the defendants other than United Artists[18] offered their films, with a few exceptions, in yearly "blocks." Under this block-booking system the exhibitor was required to license the distributor's output for a year, sight unseen. These practices were known as compulsory block-booking and blind-selling. Under the consent decree, the five consenting defendants[19] were required to license their features in blocks of not more than five. That provision was in effect only for the 1941-1942 season. But since then those defendants, for the most part, have continued to hold trade shows and to follow the five-picture plan.[20] Co-

[18] This is purely a distributing organization and it did not usually link together the productions of different producers. It sometimes "blocked" the productions of the same producer. Lazarus, Sten. Min. Nov. 1, 1945, pp. 1410-1414.

[19] Paramount, Loew's, 20th Century, Warner Bros. and RKO.

[20] Rodgers, Sten. Min. Oct. 23, 1945, pp. 550-552.

lumbia and Universal have continued to sell on a yearly basis.[21] Under the lower court's competitive bidding plan all defendants will have to offer their products, in competitive areas, "theatre by theatre and picture by picture."

Charles M. Reagan, Vice-President in Charge of Sales for defendant Paramount, testified that subsequent-run theatres sometimes make two or three changes a week, and use double bills, requiring 156 to 204 pictures a year.[22] Under the lower court's plan, the offers to receive bids must go out 30 days in advance of the bidding, and the award must be made within 15 days thereafter; so that the harrassed exhibitor would have to bid for pictures anywhere from 156 to 204 times a year and would endure in each instance a "sweating out" period of 45 days in which he would not know whether he was going to get the picture or not. Thus would the normal operations of the industry be completely bound up in red tape.

If the plan would, as the lower court believes, eliminate discrimination and the other evils revealed by the proof, it is probable that the exhibitors would endeavor with hearty good will try it out. But the plan is as full of holes as a yard of mosquito netting. In the first place, it permits exhibitors to bid in terms of "a flat rental, or a percentage of the gross receipts, or both, or any other form of rental . . . and any other offers such exhibitor may care to make." It is obvious that the affiliated chain theatres will take advantage of the latitude thus given them to offer bids which could not possibly be compared with others in the amount of revenue to be derived and thus open the way for the perpetuation of the very discriminations which the plan is designed to cure. There are too many speculative factors to permit of an exact comparison of bids.

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[21] Montague, Sten. Min. Oct. 31, 1945, pp. 1257-1259; 1312-1320. Sometimes for more than a year. Scully, Do., pp. 1458-1459; sometimes for two or three seasons p. 1485.

[22] Reagan, Oct. 25, 1945, p. 820. Even first-runs sometimes use 52 or more a year (id.).

For example, there are numerous complicated combinations of percentage playing, but for present purposes we may take the relatively simple case of a straight percentage deal. Theatre A might offer to pay 35 per cent of the gross receipts, Theatre B 40 per cent, for the same picture; but there would be no assurance that Theatre B's bid would yield a larger film rental than A's. The size and location of the respective houses, the admission prices charged, the extent to which the theatre advertised the picture, the caliber of the exhibitor's showmanship, and the suitability of the picture for the theatre's type of audience—these and many other factors would enter into the equation.

In any case, the amount of the film rental to be paid could not be ascertained until after the run of the picture. The plan makes no provision for post mortems. Even if it did, such investigation could not heal the hurt that had been done the disappointed bidder.

Other unworkable aspects of the plan will be considered under the next succeeding heading.

3. It is wholly ineffective. The District Court apparently recognized the weakness in its plan discussed under the preceding heading and sought to remedy it by reserving wide discretionary powers to the defendants. Thus the distributor, with respect to any picture, may make the award to the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." All this is to be decided by the distributor in the exercise of its uncontrolled discretion, except as the remedy implied by Sec. II, Par. 9 of the decree may be invoked. In that event, the court would be called upon to pass upon these conditions while the film remained unplayed in the area, while public interest in it languished and it became outmoded due to style changes or otherwise.

The defendants at the trial contended that the theatres now enjoying the preferred runs are the largest, best located and equipped and yield the highest revenue and their

operators are responsible.[22] Since such testimony was necessary to minimize as far as possible the charges of discrimination, it is not surprising that it was forthcoming and, to a certain extent, it undoubtedly was accurate. But the point is that the defendants are committed to the idea that the affiliated theatres to which they have heretofore accorded the preferred runs meet all the tests of the lower court's selling plan—that they are the only ones which meet those tests—and, consequently, all questions would necessarily be resolved in their favor and against the independents in a contest for films on a preferred run.

Although the defendants are required to specify in their offers a minimum flat rental, there is no requirement that a bid of such minimum flat rental, or any bid for that matter, shall be accepted. The provision is that "the distributor may reject all offers made for any such feature." Thus the specification of a "minimum" or "upset" price is made meaningless, except as it may enable the defendants to start the bidding at a high figure in the hope that it will reach the stratosphere. Not only is the way left open for continued discrimination in favor of the great theatre circuits, but in competitions for film between independent exhibitors, the distributors by rejecting all bids offered, over and over again if they choose, can run up the price of pictures beyond anything ever before dreamed of in the fabulously opulent film industry.

But even if these loopholes were to be closed and the system patched up so that it would be workable, it still would be ineffective to accomplish its declared purpose.

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[22] Rodgers, Sten. Min. Oct. 22, 1945, pp. 420-421, 443, 453, 457, 461, 476. Characteristic of Rodgers' testimony is the following:

Q. How does your theatre compare with all the others you have named?

A. I think it is the best theatre there. I think they are all the best theatres, generally speaking, except when I say there are some of them that are on a par.

Judge Bright: Even then you are being modest.

The Witness: Slightly, yes, sir. (P. 474.)

In situations in which one of the defendants owns all of the theatres which can reasonably aspire to a particular run, the situation would be unchanged. In situations where two or more of the defendants own all the theatres eligible for a particular run, it cannot be expected that they will suddenly depart from their long-continued behavior pattern and begin to compete with one another for product and runs. In situations where there are independents which might wish to bid against the distributor-owned theatres for a run, the latter, fortified by their back-logs of parent company products, will be in such a strong position that the independents cannot cope with them. The distributor-owned chains, if threatened with independent competition, will be able to over-bid for films and the losses so incurred can be recouped at points where they enjoy a monopoly. Such losses also can be offset by the simple expedient of jacking up the price of films to the independent exhibitors.

4. It will be mischievous in its effects. The most serious vice of the competitive bidding plan is that as an abortive cure-all for the evil practices of the defendants, it will have the effect to immunize their underlying monopoly and remove the legal clouds from the titles to their theatres. It should be borne in mind, although since the decision in the *Steel Case*[24] it appears to have been forgotten, that corporate combinations, not mere trade agreements, were the primary target of the Sherman Act.[25] The ineffectiveness of the decrees in the *Standard Oil* and *Tobacco Cases*[26] plus the rebuff in the *Steel Case* evidently discouraged further attacks on such combinations and caused attention to be

[24] *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 64 Law Ed. 343; followed in *United States* v. *International Harvester Co.*, 274 U. S. 693, 71 Law Ed. 1302.

[25] See brief reference to legislative history in *Trans-Missouri Case*, 166 U. S. 290, 319, 41 Law Ed. 1007, 1020.

[26] *United States* v. *Standard Oil Company*, 221 U. S. 1, 55 Law Ed. 619; *American Tobacco Co.* v. *United States*, 221 U. S. 106, 55 Law Ed. 662.

centered upon loose combinations through trade associations, patent and copyright licenses and other forms of trade agreements.

The present case affords an excellent opportunity to get back to first principles. The motion picture trust is a shining example of the kind of combination at which the Sherman Act was aimed. The District Court's attempted differentiation between total ownership and joint ownership of theatres carries to a ridiculous extreme the notion that the law applies to loose combinations and not to compact corporate combinations. It seems to imply that while the sands may be scattered the monolith is impregnable. Actually the disintegrating processes of the Sherman Act can be applied to the motion picture trust without doing violence to the bases of the decision in the *Steel Case*, because defendants' theatre chains were not forged by normal processes of integration in order to lower costs and reduce prices. By their discriminatory and monopolistic practices the defendants have made their theatres the very instruments of monopoly. The theatres have been used by defendants to reserve to themselves the playing time on the lucrative prior-runs and thus to gain a commanding advantage over all others in the production and distribution of films. By the same tactics defendants have used their theatres to stunt the growth of and to exclude independent exhibitors from such runs.

If the District Court's competitive bidding system is approved as a substitute for the traditional Sherman Act remedies of dissolution, divestiture and injunction, then defendants' distribution and theatre monopolies will be given an effective judicial immunity bath. Their retention of their "wholly-owned" theatres will bear the stamp of judicial approval. To the extent that the District Court approves the purchase by defendants of the interests of their co-owners, existing unlawful combinations will be sanctified by court action. The decree of the District Court and its subsequent approval of purchases by the defendants will constitute defendants' muniments of title.

In that event the future Bigelows, Goldmans and other independent exhibitors seeking redress for injuries inflicted upon them will find the defendants safely ensconced behind the decree. Their only remedy will be the dubious one conferred by Sec. II, Par. 9 of the decree, for arbitrary action in refusing to license a picture on the desired run; and in view of the latitude conferred upon the defendants in making awards, such arbitrary action will be difficult if not impossible to prove. And even the Government will be estopped from launching a basic attack against defendants' regional monopolies of wholly-owned theatres, whatever their future conduct may be.

III.

THE COMPETITIVE BIDDING PLAN IF RETAINED FOR ANY PURPOSE OR ANY LENGTH OF TIME SHOULD BE FORTIFIED BY ADDITIONAL REMEDIES AND MADE MORE WORKABLE BY AMENDMENTS.

1. If the plan has any value, it is only as interim partial relief pending divestiture. We have no means of knowing, at this stage, what position the Government will take in this Court with respect to the competitive bidding plan. In the District Court it filed a memorandum in which it said:

> A divorcement judgment would, in our view, make unnecessary most of the provisions of the judgment with respect to the manner in which films should be licensed, except as interim relief to be in effect pending complete execution of a divorcement plan.[27]

In this view we heartily concur. The competitive bidding system should not be saddled upon the motion picture industry as a perpetual regulation. But even if continued during the period of divestiture, the system should be but-

[27] Government's Memorandum in Support of Plaintiff's Proposed Supplemental and Amended Findings.

tressed by additional measures and so amended that it will be as workable as possible.

2. In order to make immediately available the benefits of divestiture, the bidding system should be accompanied by a ban on cross-licensing. "Plaintiff's Proposed Judgment" submitted by the Government to the District Court contained a paragraph looking to immediate effective relief. The proposal, however, was rejected by that Court. It asked that the five theatre-owning defendants be enjoined—

> (8) From licensing for exhibition in any theatre owned or controlled by it films distributed or produced by another defendant named in this section which is not affiliated with it, for a period commencing one year after the entry of this decree and continuing for a period of not less than ten years. At the conclusion of said period, any party may move to modify this provision in any manner which the facts then appearing to the Court may warrant.

This would effectually prevent the theatre-owning defendants from monopolizing the available products on the runs which they now enjoy. At the same time it would reserve to the theatres of each the products of the parent company plus an open field in which to compete for the products of the three non-theatre-owning defendants and existing independent and minor company products and the products of new companies which may enter the field. It would pave the way for new sources of product and would allow a more equitable distribution among all classes of exhibitors of the products presently available.

The Conference of Independent Exhibitors' Associations respectfully submits that an injunction against the cross-licensing of films, similar to that above quoted, is a necessary concomitant of any competitive bidding system. Without it, the competitive market envisioned by the District Court as a result of the bidding system can never be attained. Only by such measure can the great disparity in

strength of the affiliated chains and the independent exhibitors be equalized for bidding purposes.

More important than this from the standpoint of the public interest, a ban on cross-licensing would open the screens of the prior-run theatres to new producers and distributors and provide the incentive for them to engage in the business. A major fallacy of the District Court is the implicit assumption that a product shortage is the normal state of the motion picture industry—that exhibitors must always engage in a life and death struggle for the limited supply. The normal state of any healthy industry is that the supply is equal to the demand. The Sherman Act fosters competition among producers and sellers as well as among buyers. The purpose and value of such competition is that it serves to improve the quality of the products and to hold down prices.

A ban on cross-licensing for a period of ten years would provide substantial relief even though imposed as a substitute for complete divestiture. Any claim by the theatre-owning defendants that they cannot operate their theatres without cross-licensing one another must stand as an admission (a) of the magnitude of their distribution monopoly and (b) the feebleness of the competition of the independent prior-runs in the metropolitan areas which rarely have more than one of the Big Five products and often have none.

3. Competitive bidding to be comparable must be on a flat rental basis. The District Court, in its opinion, held that its ruling against price-fixing "does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means." And, as we have already seen, an exhibitor in bidding for films may specify whatever pricing formula he sees fit. Under Chapter II, Section 2 of this brief, *supra*, pp. 18-19, we have demonstrated the

utter impossibility of comparing bids on a percentage basis in order to ascertain which is highest.

The District Court unwittingly admitted this fatal defect in its competitive bidding plan. In explanation of its failure to find discrimination on the part of the defendants with respect to film rentals, clearances or minimum admission prices, the Court said: "They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions, such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of the operators." At another point, the Court declared against so-called "overages" and "underages" in the adjustment of film rentals between the defendants and the affiliated theatres because "under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed"—overlooking for the nonce the patent fact that the amount payable under a percentage engagement cannot be determined until the completion of the run.

Without yielding any of the positions heretofore taken in this brief, and against the contingency that the bidding system might be put into operation, the Conference of Independent Exhibitors' Associations respectfully requests that the words of Sec. II, Par. 8 (c) of the decree permitting bidding in terms of percentages be stricken and that there be included in that paragraph the following sentence:

> Each bid considered and each license granted shall be for a flat sum and not upon a percentage basis.

4. Bidding on a flat rental basis will eliminate the evil incidents of percentage playing. Inclusion of the above-suggested provision in the decree will render unnecessary certain provisions of the bidding plan which are pertinent only to percentage deals. Since flat rentals are payable on the barrel head no fiduciary relationship is created and there is

no occasion to weigh the "responsibility" of the bidders. Also it is a matter of no consequence whether the highest bidder has a theatre "adequate to show the picture on such run." The injection of such considerations almost certainly will serve as a cloak for the perpetuation of defendants' discriminatory practices.

While the lower Court condemned and ordered terminated the joint ownership of theatres between the theatre-owning defendants and other exhibitors, it took no notice of the forced partnerships with independent exhibitors resulting from defendants' insistence upon percentage playing. This practice is not confined to the theatre-owning defendants, it is engaged in by all. Elimination of percentage playing would make really effective the provisions against joint ownerships by terminating defendants' other theatre partnerships which are secured and enjoyed without any investment in the theatres and without sharing the hazards of the venture. The exhibitor, not the distributor, must carry the overhead on percentage engagements.

In addition, adoption of the foregoing suggestion would eliminate from the business a number of monopolistic and vexatious practices which the defendants have imposed upon the independent exhibitors as adjuncts of the percentage system. The extent of the control over the independent theatres which the defendants enjoy as the result of percentage playing are set forth in the well-nigh uniform provisions of the license agreements (exhibition contracts) of the defendants, numerous copies of which were received in evidence. Among these are the fixing of admission prices, the checking of box office receipts, the auditing of exhibitors' accounts and records, and the designation of the day or days of the week on which the pictures shall be played.

Defendants' general sales managers were frank in stating their reasons for preferring percentage arrangements to flat rental deals. It enables them to get higher film rentals and affords them an insight into the exhibitors' busi-

ness.[28] Motion picture films admittedly are not priced so as to recoup production and distribution costs and earn a reasonable profit. It is a question of what the traffic will bear, and the checking of receipts and auditing of accounts tell the defendants all they need to know to accomplish their purpose. It must be remembered that the independent theatres over whose business such strict surveillance is maintained quite frequently are in competition with defendants' theatres. This lends point to a fact brought out during the cross-examination of the witness Montague: That five of the defendant distributors—Columbia, RKO, Paramount, Universal and United Artists—have formed and now employ a jointly owned agency, called Confidential Reports, Inc., for checking the exhibitors' box office receipts.[29]

5. Additional amendments are required to make the system workable. Again without yielding our position, we respectfully propose the following amendments to the bidding plan with a view to enhancing its workability against the day that it might possibly go into effect.

(a) *Time and manner of bidding.* To prevent uncertainty and manipulation, the bids should be submitted within 10 days after the offer has been made. They should be opened at 2 p. m. on the 11th day thereafter (excluding Sundays and holidays) and made available to the inspection of the bidders on that day. This will reduce the "sweating out" period and conduce to a freer flow of product.

(b) *National release date.* In order to overcome territorial discriminations and otherwise to add definiteness to

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[28] Reagan, Sten. Min. Oct. 23, 1945, pp. 698-699; Kupper, Sten. Min. Oct. 29, 1945, pp. 1082-1083; Montague, Sten. Min. Oct. 31, 1945, pp. 1321-1322; Mochrie, Sten. Min. Nov. 2, 1945, pp. 1722-1723.

[29] Montague, Sten. Min. Oct. 31, 1945, p. 1322. We do not think it will be disputed that since that time 20th Century and Warner Bros. have joined in the arrangement.

the system, it is respectfully suggested that the distributors be required to announce a national release date for each picture they intend to license and to offer the picture in all territories within a definite uniform time thereafter.

(c) *Successive licensing of runs.* Unless successive runs are licensed successively, a subsequent-run exhibitor who is the unsuccessful bidder for a prior-run may be deprived of the opportunity to bid on that picture for his customary run. The alternative to offering the runs successively would be to permit an exhibitor to submit alternate bids; but this might result in clogging the system with infirm bids or, worse yet, saddling upon an exhibitor binding contracts for two or more runs for the same picture.

IV.

DEFENDANTS DEAL WITH THE INDEPENDENT EXHIBITORS ONLY UPON LONG, COMPLICATED AND WELL-NIGH UNIFORM CONTRACT FORMS, DEVISED IN THEIR OWN INTEREST AND ALMOST WHOLLY LACKING IN MUTUALITY.

1. Defendants' license agreements taken together and in their entirety constitute a uniform method of doing business. Between May 1, 1928 and the date of the final decree in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30, 75 Law Ed. 145 the major motion picture distributors (enumerated in a footnote on p. 5 of this brief) used a standard form of license agreement. The history of that standard form is set forth in the opinion of District Judge Thacher in that case. *United States* v. *Paramount Famous Lasky Corp.*, 34 Fed. (2d) 984. For present purposes it will not be necessary to search out the genesis of the standard exhibition contract. It will suffice to quote the following from the decision of this Court:

> The record discloses that ten competitors in interstate commerce, controlling 60 per cent of the entire film business, have agreed to restrict their liberty of

> action by refusing to contract for display of pictures except upon a standard form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any distributor, all with the manifest purpose to coerce the exhibitor and limit the freedom of trade. (P. 41.)

However, that case turned upon the compulsory arbitration clause of the standard agreement and the uniform rules of arbitration, and the result was merely to eliminate from the standard form the arbitration clause. A companion case, *United States* v. *First National Pictures, Inc. et al.*, 282 U. S. 44, 75 Law Ed. 151, condemned only a system adopted by the major distributors for enforcing the observance of contracts by the purchaser of a theatre; *i.e.* the assumption of his predecessors' obligations. And the District Court in the present case merely held illegal the price-fixing clauses of the exhibition contracts (now called license agreements) and made no finding or ruling in reference to the numerous uniform and restrictive provisions of the forms now in use. Under "Discrimination Among Licensees" the lower court did, however, enumerate the many preferences and advantages granted by the defendants to the affiliated theatres and withheld from the independents, and said:

> These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres . . . Small independents are usually licensed, however, upon the standard forms of contract which do not include them.

While defendants deny that they today use a standard license agreement, the resolution of the question depends not upon their protestations but upon a comparison of their contract forms. These were offered in evidence but were not reprinted in the record, presumably because of their great bulk. While admittedly a laborious task, we strongly feel that the Court cannot adequately grasp the full extent

and effect of defendants uniform tactics in dealing with the independent exhibitors without, first, a comparison of the contract forms used by the several defendants in licensing their pictures to the independents, and second, a comparison of the form used by each for the 1936-1937 season with the form used by it for the 1943-1944 season.

These contract forms are identified as follows:

Defendant	Form No.	Season	Received	Gov't. Ex. No.
20th Century	La. 838	1936-1937	Vol. I, p. 273	275
20th Century	E. 901	1943-1944	Vol. I, p. 273	276
Loew's	851-D	1936-1937	Vol. I, p. 273	277
Loew's	1177	1943-1944	Vol. I, p. 273	278
Paramount	3640-D-5-36	1936-1937	Vol. I, p. 273	279
Paramount	A340 A3	1943-1944	Vol. I, p. 273	280
RKO	5352 B	1936-1937	Vol. I, p. 273	281
RKO	5456 Rev.	1943-1944	Vol. I, p. 274	282
Warner	90 WF 36-37	1936-1937	Vol. I, p. 274	283
Warner	90 CDT	1943-1944	Vol. I, p. 274	284
Columbia	S-14-A	1936-1937	Vol. I, p. 274	285
Columbia	S-14-F	1943-1944	Vol. I, p. 274	286
United Artists	220 B-1-37-U	1936-1937	Vol. I, p. 274	287
United Artists	220 B-3-44	1943-1944	Vol. I, p. 274	288
Universal	E-5	1936-1937	Vol. I, p. 324	289
Universal	E-5	1943-1944	Vol. I, p. 274	290

2. Defendants' license agreements are uniform and non-competitive in virtually all particulars.

The license agreements consist of (a) a schedule, which is a series of blank spaces in which are entered the terms of the particular deal—the film rental, the number of days of the engagement, the run and clearance and the admission prices to be charged; and (b) the printed terms and conditions which are not subject to negotiation. It is with these printed terms and conditions that we are now concerned.

(a) The license covers only the theatre named therein—no blanket licensing as in the case of the affiliated circuits.

(b) Without exception the forms require that all fixed sums (*i. e.*, flat rentals) payable to the distributor shall be paid at least three days in advance of delivery of the film, unless otherwise specially agreed upon.

(c) With respect to percentage engagements it is provided that payment shall be made immediately after the last exhibition date, or at the end of each day if requested by the distributor.

(d) Prior to the consent decree all defendants except United Artists sold a full season's output on a single contract form; that is, all pictures "generally released" during the season. However, roadshows, try-outs, previews and releases are declared not to constitute a "general release" and, hence, do not entitle the exhibitor to the picture.

(e) There are elaborate uniform provisions with respect to roadshows.

(f) Exhibitors are required to play pictures in the order of release unless they make special arrangements for playing all the pictures under contract with the same distributor or pay the license fees therefor in advance.

(g) No matter what promises in the way of pictures to be delivered or other inducements may have been made to the exhibitor, they are of no avail to him in case of a dispute, because each license recites either in identical language or in substance that "This license agreement is complete and all promises, representations, understandings and agreements in reference thereto have been expressed herein."

(h) Transportation charges on the reels and containers, both coming and going, must be paid by the exhibitor.

(i) Exhibitors are liable for the loss or damage to prints unless they can prove that the loss or damage occurred in transit.

(j) There are uniform provisions in reference to selecting playdates and rigid rules governing exhibitors in that regard.

(k) There is a uniform general provision in reference to clearance and run; and elaborate uniform provisions defining the respective rights of 1st-run, 2d-run and subsequent run exhibitors.

(l) A circuit dealing directly with the general sales manager or other company official (Rodgers, Sten. Min. I, 414-415, 417-418, 421-422; Mullin, II, 965; Kupper, III, 1187; Montague, III, 1311) knows when the negotiations are concluded that he has a firm contract. The forms show that the deal negotiated by the independent exhibitor with the film salesman or subordinate official is a mere "application for a license" subject to acceptance or rejection by the distributor's home office.

(m) The distributors shove onto the exhibitors the burden of all taxes imposed or based upon the delivery or exhibition of the films; and if the taxes are levied upon the distributor, the exhibitor must hold him harmless.

(n) The exhibitor remains liable on his contracts after the sale or transfer of his theatre even though his successor assumes the same, unless released by the distributor in writing.[30]

(o) A subsequent-run exhibitor may not advertise a picture before or during its first run or during the immediately preceding run.

(p) There is a clause forbidding an exhibitor to cut or alter a print of any picture except a newsreel.

(q) Advertising accessories must be leased from and returned to the distributor, and newspaper advertising must feature the name of the distributor.

(r) An exhibitor may not start his show at mid-night on the first day for which the picture is licensed but must wait until 6 a. m. for the first show.

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[30] Formerly this burden was saddled upon the successor and had to be assumed in order to license additional films. *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, 75 Law Ed. 151.

(s) Distributors have protected themselves with ample remedies in case of a breach or default by the exhibitor, including special remedies in case an exhibitor reduces his admission price below the minimum fixed by the agreement.

(t) In some forms (but not all) it is provided that a default by the exhibitor with a particular distributor on one contract may be treated by the latter as a default on all existing contracts between it and the exhibitor.

(u) Most distributors retain the right in case of a default to deliver pictures with a C.O.D. order for all sums due. Thus an exhibitor may be compelled to yield in an honest dispute over a sum due or miss out on a booked and advertised attraction.

(v) Some require the exhibitor to hold the distributor's share on percentage engagements "in trust," segregated from other moneys.

(w) Distributors reserve the right to "designate" or "allocate" pictures to the different price brackets contained in the contract, after the contract has been signed and, usually, after the returns from the first runs have come in. This practice is known in the parlance of the trade as "blind pricing."

Of course, some of the provisions noted are merely routine and are not objectionable in themselves. As regards the provisions fixing the time within which exhibitors shall book pictures, or within which applications may be approved, or otherwise requiring the attention of the exhibitors and film exchange bookers, mere uniformity is not a vice. These substantially uniform provisions, both routine and harsh, are cited to show that defendants pursue unified tactics in dealing with the independent exhibitors; and to refute the defendants' claims that the contracts are not standardized—that there is no cooperation or understanding among them with respect to contracts. Also—and mainly—to show the harsh terms imposed upon the independent exhibitors, the lack of mutuality in their dealings

with that class of exhibitors, as contrasted with the treatment accorded the affiliated theatres under the master contracts, franchises and formula deals described by the District Court.

3. The continuing conspiracy among the defendants is shown by substantially uniform revisions of the contract forms. Of course, there could be no stronger evidence of the conspiracy among the defendants to confer monopoly privileges upon the affiliated theatres and to discriminate against the independent theatres than the master contracts, franchises and formula deals by which they license films to the affiliated theatres. These plus defendants' theatre pools were the very foundation of the decision and findings of the District Court and constitute conclusive proof of the conspiracy to monopolize the distribution and exhibition of motion pictures by granting exclusive rights and special privileges to their own theatres and the theatres of one another. But the conspiracy also is shown by the initial collusion among the defendants and others in drafting the standard license agreement[31] and by their carefully synchronized action in amending the contract forms from time to time.

Independent exhibitors in common with the affiliated circuits (See Goldenson, Sten. Min. II, 842-843) do not relish having the intimate details of their business operations broadcast to the public. The distributors, all of them, have provisions in their contracts permitting them to station representatives in the theatres to check the box office receipts on percentage engagements. The employment of local checkers (i.e. persons residing in the same community as the exhibitors) was a sore spot with the exhibitors, and at the so-called 5-5-5-Conference[32] the distributors agreed to insert a clause in their contracts which would eliminate

[31] *United States* v. *Paramount Famous Lasky*, 34 Fed. (2d) 984.

[32] See Keough, II, 929-930. It consisted of 5 distributors, 5 affiliated exhibitors and 5 independent exhibitors.

local checkers unless they were regularly employed by the distributors or were engaged as accountants. This provision will be found in the 1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO, Universal and Warner Bros.

Since the records available to us do not show the contracts for the intervening years, it is not possible to place the exact year in which that clause was dropped by the defendants, except as we may infer it from a circumstance heretofore mentioned, namely, the formation of Confidential Reports, Inc. as a joint checking agency. Suffice it to say that the clause is missing from the 1943-1944 contracts of all the defendants.

Again, in the 1936-1937 forms the defendants reserved the right to examine the exhibitors' books and records on percentage engagement for only a limited time after completion of the engagement—usually four months. (See 1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO (60 days), United Artists (one year), Universal, Warner). In the 1943-1944 forms this limitation is omitted, and the right is reserved to make an audit "at any time" after the conclusion of the engagement in the forms used by Columbia, 20th Century, Loew's, Paramount, RKO and Universal.

The 1936-1937 forms of all except Columbia contained the so-called "Confidential Clause," which was highly regarded by exhibitors. It provided that any information obtained by the distributor in the checking or auditing of percentage engagements shall be treated as confidential "excepting in any arbitration proceeding or litigation in respect to this license." The clause is missing from the 1943-1944 forms used by Loew's, Paramount, RKO and Warner.

In addition, provisions detrimental to the exhibitors have been added. The forms have long carried this clause: "If hereunder it is provided that the exhibitor make certain expenditures and/or deductions, the distributor shall have the right to examine all entries relating to such expenditures

and/or deductions." (1936-1937 forms of Columbia, 20th Century, Loew's, Paramount, RKO, Universal, Warner.) In the 1943-1944 forms of certain of the defendants (20th Century, Loew's, Paramount, RKO, Universal) this provision has been added to as follows (using 20th Century as an example):

> It is further agreed that in computing Exhibitor's operating expenses any and all income (such as amounts payable to Exhibitor from renting or sub-renting space in the building where the Exhibitor's theatre is located and for screen advertising of any kind on the screen, in the theatre, etc.) during the period of the engagement of any motion picture on a participating basis shall be deducted from the Exhibitor's operating expenses.

We have heretofore shown that the distributors shove onto the exhibitors the burden of all taxes imposed or based upon the delivery or the exhibition of the films, no matter on which party the taxes are levied. A comparison of these clauses in the 1936-1937 forms with those in the 1943-1944 forms will disclose how the distributors have enlarged the same to cover new forms of taxation such as sales, gross income, storage, use, consumption, gross receipts, license, privilege, excise and compensating taxes.

The inference is irresistible that the defendants, or most of them, in eliminating from the contracts clauses favorable to the exhibitors and adding clauses favorable to themselves, were acting in concert and agreement. This uniform course of action could not have been mere coincidence —it was planned that way. It sometimes happens that two horses run a dead heat; but if from five to eight horses should come in nose-to-nose, we would suspect dirty work among the jockeys. It taxes the credulity that the defendants could so manipulate their contract forms, making uniform additions and deletions from time to time, without collusion among them.

The situation is not unlike that dealt with by this Court in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 83

Law Ed. 610, which involved a demand by an affiliated circuit of a number of distributors that they refuse to license pictures to the circuit's subsequent-run competitors except upon the condition that the latter charge a fixed minimum admission price. The same written demand was sent to all companies, and all that sold subsequent-run theatres in the cities affected complied with the demand, but there was no proof of conspiracy among the distributors except such as could be inferred from their uniform conduct. This Court held that this was sufficient, saying:

> It takes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance. (P. 223.)

V.

OUTLINE OF AN EFFECTIVE FINAL DECREE, CONSISTENT WITH THE SHERMAN ACT, RESPECTFULLY SUBMITTED FOR CONSIDERATION IN FRAMING THE MANDATE TO THE DISTRICT COURT.

1. "The extension of such measure of relief as will effectually dissolve the combination found to exist."[33]

(a) *Divestiture.* Dissolution of the combination, we respectfully repeat, can only be accomplished by an order requiring the five theatre-owning defendants—Paramount, Loew's, 20th Century-Fox, Warner Bros. and RKO—to dispose of all their theatre holdings. The only precedent or passage that could be cited against complete divestiture was removed when this Court, on October 17, 1947, entered an order deleting from its opinion in *United States* v. *Na-*

[33] From the *Standard Oil Case*, 221 U. S. 1, 77, 55 Law Ed. 619, 652, *supra*, p. 14.

tional Lead Company et al., No. 89, October Term, 1946, the following passage:

> Existing precedents of divestiture provide examples of the restoration of a pre-existing separate status to companies or properties which have been unlawfully combined rather than to the fission of units which never have been separated . . . (Order, Adv. Ops., Law Ed., Vol. 92, No. 1, p. 26.)

This passage might have militated against an order of divestiture including such theatres as the defendants may have built, although it had no bearing on the defendants' many acquired theatres. With its deletion, the way is open for an order of complete divestiture without the necessity for distinguishing or overruling the seeming authority.

(b) *The remedy is not extreme.* Divestiture is not punitive, as the defendants argued in the District Court. It is the traditional Sherman Act remedy which has been applied to numerous other industries. Conceding, *arguendo,* that a forced sale of defendants' properties within a short space of time might inflict considerable financial loss, that is but a straw man contention, since the precedents and the experience in dissolution proceedings are against such drastic action. The practice is to allow ample time, usually stated in terms of years, in which to dispose of properties, and to make way for competition and protect the public in the meantime by appropriate injunctive provisions.

While the defendants urge their arguments of inconvenience and loss upon the Court, it will be well to bear in mind the lengths to which the courts have gone in order to insure the effective dissolution of other combinations, and to consider whether there is anything in the record in this and the numerous other cases coming before this Court involving the major motion picture producer-distributor-exhibitors which warrants unprecedented leniency toward them.

As an example, we cite *United States* v. *Reading Company et al.*, 253 U. S. 26, 64 Law Ed. 760, in which the District Court ordered certain restrictive clauses in mining

leases to be terminated and also that the combination between the Reading Coal Co. and the Wilkes-Barre Coal Company be dissolved. Upon appeal, this Court greatly enlarged the relief to be granted and by its mandate ordered the District Court (pp. 64-65)—

> . . . to enter a decree in conformity with this opinion dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained through Reading Company, with such provision for the disposition of the shares of stock and bonds and other properties of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies, to the end that the affairs of all these new combined companies may be conducted in harmony with the law.

One might suppose that this sweeping order was sufficiently drastic, but in the proceedings in the District Court pursuant to mandate, a controversy arose between the different classes of stockholders of Reading Company and that dispute was carried to this Court. *Continental Insurance Company et al.* v. *United States et al.*, 259 U. S. 156, 56 Law Ed. 871. Upon the first argument a question arose as to whether the decree was a sufficient compliance with the opinion of this Court and the case was set for re-argument on that question and the Attorney General's attention was directed to the order. 257 U. S. 622-623, 56 Law Ed. 402.

This court found that while proper disposition had been made for divesting Reading Company of its stock interest in the several companies named, and for separating the Reading and Jersey Central railroads, and separating the Jersey Central from the Lehigh & Wilkes-Barre Coal Company, no provision had been made for breaking up the Reading Company's general mortgage which was a lien on the Reading properties, both rail and mine, and it ordered that the mortgage be broken up. Thus this Court in its zeal to insure an effective dissolution treated the general mortgage bondholders not as mere creditors, but as a cementitious element in binding the combination together.

Certainly nothing is now proposed in reference to the defendants in the present case that is nearly so drastic as was imposed by this Court, of its own motion, in the Reading Case.

(c) *The defendants possess and have exercised the power to dictate runs, clearances, admission prices and other details of theatre operation, and that power has been exercised to the detriment of the public and the injury of the independent exhibitors.* The opinion and findings of the lower court abundantly show that the defendants possess and exercise the power to dictate runs, clearances and admission prices. The well-nigh uniform exhibition contracts, to which reference already has been made, show that this control extends to virtually all theatre operating policies. It is not going too far to say that, on the basis of the evidence, defendants' entire method of doing business is illegal. In the circumstances, it is unnecessary to argue that the organization of the five theatre-owning defendants, and the business methods of all defendants, are contrary to the public interest. Detriment to the public is inherent in monopoly and monopolistic practices.

In *Paramount Famous Lasky* v. *United States*, 282 U. S. 30, 42-43, 75 Law Ed. 145, 150, this Court made this plain in a series of propositions, most of them being quotations from earlier decisions. Omitting the quotation marks and

citations, and stating each proposition in a separate paragraph, that decision gives effective answer to the plea of the defendants in the present case that their organization and operations are not harmful to the public—that the public will not be benefited by the application of an effective remedy.

> 1. Founded upon broad conceptions of public policy, the prohibitions of the statute (Sherman Act) were enacted to prevent not mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public . . .
>
> 2. The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce; in a word, to preserve the right of freedom in trade.
>
> 3. The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantages called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.
>
> 4. The fact that the standard exhibition contract and rules of arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations.
>
> 5. . . . Congress has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. (Pp. 42-43.)

In the present case no exhibitor witnesses were called and consequently the complaints and views of the independent exhibitors are not represented in the testimony. But in the *Paramount Famous Lasky Case, supra,* this court rejected the distributors' contention that "the manner in which the contract and rules have worker out in

practice, and the significant absence of complaints, reflect their reasonable character"; hence the omission is by no means fatal. In this connection, the attention of the Court is respectfully invited to the decision of the United States District Court for North Dakota, consisting of Circuit Judges Sanborn and Thomas and District Judge Sullivan in *Paramount Pictures, Inc., et al.* v. *Langer, Attorney General, et al.*, 23 Fed. Supp. 890, in which the position of the independent exhibitors is accurately set forth. That case involved the constitutionality of a State statute making it unlawful for any producer or distributor of motion pictures to own, operate or control theatres in North Dakota. The statutory District Court, in a unanimous decision, upheld the legislation. While the case was pending in this Court on appeal, and before it could be heard, the statute was repealed. The case then being moot, and following the routine procedure, a motion was granted to reverse the judgment and to remand the case with instructions to dismiss the complaint without prejudice (306 U. S. 619, 83 Law Ed. 1025).

This development deprived the District Court's judgment of validity as between the parties but did not impair the standing of the opinion and findings as the expressions of a distinguished court in a proceeding that was very much alive at the time they were handed down. The court had held a lengthy hearing and had heard the testimony of the independent exhibitors as well as the denials of the theatre-owning producer-distributors. In its opinion the court said:

> The independent exhibitors have resented and protested against the entry of the producers into the exhibition field, and have regarded their acquisition of theatres as unfair and unjust competition. The independent exhibitors believe that the acquisition and operation of motion picture theatres by the major producers has created a situation which, if permitted to continue, may eventually destroy the independent theatre operators, and leave the theatres affiliated with producers in virtually complete possession of the field

of exhibition. The defendants introduced evidence showing the extent and nature of the controversy which has existed between the independent exhibitors and the producer-distributors owning theatres, which tends to prove that the independent theatre owner is at a disadvantage in competition with affiliated theatres. The producers, on the other hand, deny that they have been guilty of any unfair practices in the distribution of their films, or of any attempts to acquire a monopoly in the business of exhibition either in North Dakota or elsewhere; and their evidence tends to sustain their contentions in that regard.

And as regards the extent of the power held by the theatre-owning producer-distributors and their exercise of that power, the court said:

> A producer having affiliated theatres has the power to grant to its theatres the right to exhibit first run all pictures produced by it. It has the power to grant to its theatres greater clearance than to their competitors. Its bargaining power for the pictures of other producers which have affiliated theatres is greater than that of a competing independent exhibitor, because producers operating theatres must purchase pictures from each other, and each of such producers owns many theatres. A producer which owns theatres has the power to make it impossible for the independent exhibitor to procure films from it, and difficult to procure them from other major producers in case the producer-exhibitor desires those films for itself. There is evidence tending to show that producers with affiliated theatres have exercised the powers possessed by them for their own advantage and to the detriment of their independent competitors.

(d) *All connection between the producer-distributors and their theatres should be terminated and the future independence of the theatres assured.* While this Court in the *Reading Case* adopted extreme measures to insure the complete separation and future independence of the combined properties, this was in reality a logical outgrowth of the dissatisfaction with the abortive decree in the *Standard*

Oil Case, which dissatisfaction was first judicially expressed by this Court in rejecting the proposed decree in *United States* v. *Union Pacific Railroad Company*. This Court ordered the combination brought about by Union Pacific's acquisition of stock in the Southern Pacific dissolved. 226 U. S. 61, 57 Law Ed. 124. The Attorney General then offered a motion as to the form of the mandate to insure that there would be no attempted dissolution by merely distributing the stocks of the subsidiary among the stockholders of the parent company, thus leaving both corporations under the control of the same individuals. 226 U. S. 670, 57 Law Ed. 306. This Court upheld the Attorney General, saying:

> We are of opinion, however, and now hold, that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this Court to be entered.

Therefore, it is respectfully suggested that the mandate to the District Court in this case should emphasize that the divestiture shall be total and complete and that the future independence of the now affiliated theatres shall be assured. It is possible that the proceedings on mandate in the District Court may disclose that the defendants are dominated by a comparatively few powerful personages, some closely connected by consanguinity or affinity, some engaged in production and distribution and others in operating theatres. This condition, if developed, will call for the exercise of the greatest care in formulating an effective decree.

(e) *Defendants should be required to dispose of their holdings in jointly-owned theatres and should not be permitted to buy out their co-owners.* Section III, par. 5, will be unnecessary and inappropriate if complete divestiture is granted. However, if total divorcement is not granted, and this provision is retained, then it surely should be

amended by striking out the language which would allow a defendant, with the approval of the District Court to terminate a joint ownership by buying out its co-owner.

The notion that a violation of the Sherman Act resulting from the joint ownership of property by a member of the trust and an independent can be cured permitting the trust to buy out the independent surpasseth understanding. It cannot be the purpose of the Sherman Act to require that the partial ownership of property by a violator shall be transformed into total ownership by judicial order. In offering this proposal, we disclaim any purpose to attribute bias to the District Court (notwithstanding its rather warm defense of theatre ownership) or to predict that it would permit the defendants to buy out their independent co-owners in any considerable number of cases. We merely wish to point out (a) that the order is contrary to the theory and purpose of the Sherman Act and (b) that the District Court, in passing upon the defendants' applications to buy out their partners, would be deciding upon the merits of each separate situation standing alone and not on the acquisition in its relation to the general combination.

(f) *Pending disposition of defendants' theatre interests provision should be made for adequate interim relief in the form of a ban on cross-licensing.* This point already has been developed on pages 23-25 and is mentioned under the present general heading because a ban on cross-licensing is necessary to bring immediately into play the forces of competition and hence to provide effective relief during the time required to effect divestiture. It is an essential part of any effective order in the present case.

2. "To forbid the doing in the future of acts like those which have been done in the past which would be violative of the statute."[34]

---

[34] From the Standard Oil Case, *supra*, p. 14.

(a) *An injunction against the practice of discrimination in the licensing of films should be included.* The District Court's findings are adequate to support a sweeping injunction against discrimination in the licensing of film. Such an injunction is the simple, direct, effective solution of the problem created by defendants' favoritism toward the affiliated theatres and other large buyers and their discrimination against the independent exhibitors. The inclusion in the decree of such an injunction would make unnecessary the elaborate competitive bidding plan put forward by the District Court. Ample precedent for an injunction of this kind is found in the recent decision of this Court in *International Salt Company* v. *United States*, No. 46, decided November 10, 1947, Adv. Ops., Law Ed., Vol. 92, No. 2, p. 55, more especially the passages dealing with Par. VI of the decree there involved. A similar provision, fashioned to conform to the peculiarities of the motion picture business, would cure the more flagrant violations set forth in the District Court's opinion and findings without saddling upon the entire industry, guilty and innocent alike, a burdensome, unworkable and ineffective competitive bidding system.[35]

(b) *All injunctive provisions of the lower court's decree except Sec. II 8 and Sec. III 5 are appropriate and should be affirmed.* Sec. II 8, relating to competitive bidding should be stricken for reasons hereinbefore set forth; and Sec. III (5), if retained, should be amended in the manner proposed on pages [illegible]. All other injunctions contained in the decree are appropriate, will be effective and should be affirmed. Certain of the injunctions provided in Sec. III, especially Paragraphs (2), (3), (4), (6) and (7) will be-

[35] For example, a paraphrase of Par. VI of the *Salt Decree* would read as follows: "Each distributor defendant is directed to offer for license any feature motion picture which is then being or about to be offered by such defendant in the United States to any exhibitor applying therefor on non-discriminatory terms and conditions." The provisos to Par. VI are inapplicable to the licensing of films.

come academic once complete divestiture is accomplished. However, they should be in effect during the process of divestiture. This is especially true of Par. (6), enjoining the defendants from expanding their theatre holdings in any manner whatsoever (except as permitted by the District Court under Sec. III (5)). In the absence of total divestiture, this provision is vital to the protection of the independent exhibitors.

3. The burden of enforcing compliance with the decree should not be cast upon the independent exhibitors by arbitration or otherwise. The improvident consent decree entered in the District Court on November 20, 1940, gave the independent exhibitors a limited right to institute arbitration proceedings for the redress of certain grievances. The provisions were so restricted and inadequate that the system was practically useless except in clearance cases; and even here, under the rulings of the Appeal Board, the remedy was doubtful and uncertain. But we do not deem it appropriate to enter into a discussion of the several arbitrable provisions of the consent decree or to analyze the decisions of the Appeal Board. Such arbitration system could not be imposed by the Court without the consent of the parties to the suit, and in the District Court the Government withdrew its consent.

Arbitration as provided by the consent decree is dead, and we earnestly hope it will remain that way.

Nevertheless, the District Court insisted to the end that the arbitration system be retained by consent of the parties. It is our hope that this Court will not be influenced by the lower court's views on this point. Wholly aside from the inadequacy of the system to afford relief, and without reference to the rulings in arbitration cases, we feel that the final decree should be enforced (if enforcement is necessary) by the Attorney General and the Courts, not by the independent exhibitors.

The Temporary National Economic Committee, in its Investigation of Concentration of Economic Power issued a

series of Monographs dealing with the motion picture monopoly. In Monograph No. 21 "Competition and Monopoly in American Industry," pp. 172-173 there is a passage dealing with motion pictures and in Monograph No. 26, "Economic Power and Political Pressures," pp. 182-183 there is another. Monograph No. 43, "The Motion Picture Industry—A Pattern of Control" is entirely devoted to motion pictures.[36]

Appendix III to Monograph 43 treats of the Consent Decree in this case and says, in part:

> Ordinarily, enforcement of a consent decree is assumed by the Department of Justice. When the Department feels that a provision of a decree has been violated, the Department can ask that the violator be adjudged in contempt of court and request that an appropriate penalty be imposed. It appears that in this case the Department has specifically resigned these powers. Enforcement of the decree is instead imposed on the members of the industry and to a considerable extent on the weaker members of the industry. (P. 84.)

Respectfully submitted,

ABRAM F. MYERS,
Counsel for the Conference of Independent Exhibitors' Associations
729 Fifteenth Street, N. W.,
Washington 5, D. C.

December 15, 1947.

[36] These references are to the Senate Committee prints which bear a foreword by Chairman O'Mahoney to the effect that the views expressed are those of the author and not necessarily those of the Committee. The Committee, however, was ably staffed and the reports are based on painstaking investigation and research. Their findings and conclusions are cited for their intrinsic merits.

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IN THE

Supreme Court of the United States

October Term, 1947.

Nos. ~~59 and~~ 79.

UNITED STATES OF AMERICA,
Appellant,

AGAINST

PARAMOUNT PICTURES, INC. *et al.*,
Appellees.

PARAMOUNT PICTURES, INC. *et al.*,
Appellants,

AGAINST

UNITED STATES OF AMERICA,
Appellee.

ON APPEALS FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion for Leave to File Brief as Amicus Curiae and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 50 and 79.

UNITED STATES OF AMERICA,

Appellant,

AGAINST

PARAMOUNT PICTURES, INC. *et al.*,

Appellees.

PARAMOUNT PICTURES, INC. *et al.*,

Appellants,

AGAINST

UNITED STATES OF AMERICA,

Appellee.

ON APPEALS FROM UNITED STAT. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion for Leave to File Brief as Amicus Curiae.

May It please the Court:

The undersigned as counsel for the American Civil Liberties Union respectfully move this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.* The consent of the Solicitor General to the filing of this brief has been obtained. Counsel for appellees-appellants have failed to give their consent.

Copies of the accompanying brief, together with this motion have been served upon all parties.

Special reasons in support of this motion are set out in the accompanying brief.

HAROLD J. SHERMAN and
H. WILLIAM FITELSON,
Counsel, American Civil Liberties Union, Amicus Curiae.

January 19, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 50 and 79.

UNITED STATES OF AMERICA,

Appellant,

AGAINST

PARAMOUNT PICTURES, INC. *et al.*,

Appellees.

PARAMOUNT PICTURES, INC. *et al.*,

Appellants,

AGAINST

UNITED STATES OF AMERICA,

Appellee.

ON APPEALS FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of American Civil Liberties Union, Amicus Curiae.

Statement.

Plaintiff, United States of America, appeals from so much of the decree of a statutory three-judge court convened in the Southern District of New York, as denies such plaintiff's prayer for divestiture of the ownership interests of the five major defendants, Paramount, Loew's, RKO, Warner, and Fox, in motion picture theatres throughout the United States. Defendants cross-appeal from all

other parts of such decree which grant injunctive and certain other relief to plaintiff.

The gravamen of the complaint is that defendants have established an unlawful monopoly in the field of production, distribution, and exhibition of motion pictures to the detriment of the public interests. As indicated in plaintiff's charge, and as established by the evidence, the closely inter-related factors largely responsible for such usurpation by defendants of monopolistic control over substantially the entire motion picture industry, are basically two. These are:

1. The acquisition and operation by five of such major defendants of the finest and the largest first-run motion picture theatres strategically located in the key cities and metropolitan areas of the United States, and

2. Certain illegal and discriminatory trade practices by all defendants which have unquestionably frustrated, limited, and even destroyed competition, with the concomitant impairment of the rights of the movie-going public to enjoy the benefits of the widest possible diversity in the production and the exhibition of motion pictures.

The American Civil Liberties Union is a non-partisan and non-sectarian organization with a membership of thousands of persons in the United States. For the past twenty-five years it has striven to effectuate its object as expressed in its charter—to wit: "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage, and other civil rights, and to take legitimate action in furtherance of such purposes".

The issues of this case, concerning as they do so extraordinary a medium of communications, are of para-

mount social importance and vitally affect the general public. At stake in the final resolution of these issues by this Tribunal is nothing less than the foremost constitutional freedom of the people to see and hear, at a fair price of admission, timely talking motion pictures of their own selection from a reasonably diversified supply.

POINT I.

The liberties and rights of the General Public to enjoy the benefits of maximum diversification in the production and the exhibition of motion pictures are guaranteed by the First Amendment.

The motion picture of today is a first-line dynamic conduit of thought on a par with the press and the radio. It is in some respects far more striking in its power of stimulating and captivating the human imagination and mind than any book-literature, the daily press, and the radio. Its predominantly visual character endows its moving and expressive language of imagery with the quality of universality. And its wonderful, magical, continuous telescoping of images and ideas in rapid motion, whether imparting entertainment or a serious message concerning the morals, the social mores, and the institutions of our times, renders it peculiarly capable of exerting an impressionable force on its viewers. So powerfully magnetic is its appeal that its patrons in the United States now number more than 95,000,000, in terms of weekly paid admissions, at motion picture theatres.[1]

It is through the medium of motion pictures that many millions of people are given social, economic, and political

1. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, 1946, page 9.

notions. Such notions may be good or bad. They may be accurate or inaccurate. They may tend to inspire the people to attain a higher or lower level of culture. In short, motion pictures are vitally important factors in shaping the emotional habits, the intellectual knowledge, the artistic taste, the social mores, and the morals of the public, as well as their convictions on current questions in the community, the state, the nation, and the world.

Thus, as is recognized in "The Annals of the American Academy of Political and Social Science" ("The Motion Picture in Its Economic and Social Aspects"), November, 1926 issue, Vol. 128, No. 217, p. 66:

> "The production of the cinema has greatly contributed to that which in its accumulative influence is the most priceless of all human possessions—knowledge. As an educator it is catering daily to the intelligence of millions. Unparalleled in their power to almost spontaneously flash before the entire civilized world the happenings, opinions, events of great magnitude, appeals, indeed of all things that are of interest to mankind, stand two recently developed agents: the cinema through the eye, the radio through the ear. • • •
>
> "The importance of the cinema in the social, economic and intellectual life of the world can scarcely be realized."

Thus, in their comprehensive report to the United States Senate[2] on their investigation of monopolistic conditions prevailing in the motion picture industry, Evans and Bertrand say:

> "• • • the motion picture industry commenced as a novel and pleasing type of entertainment, but

2. The Motion Picture Industry: A Pattern of Control, T.N.E.C. Monograph 43, p. 56.

it has evolved into an important social and cultural force.[3] In some sense, it provides a common denominator to the feelings and aspirations of an entire people. Its importance must then be measured in terms other than the conventional ones of dollars and cents."

To allow the Five Theatre-Owning Majors[4] and the Little Three[5] to exercise dominion by means of their concentrated economic powers over such a powerful social instrumentality is to seriously damage our democratic institutions. Our fundamental interests and reasons for reasonably freeing it of the restraint now firmly gripping it are precisely identical with those[6] for maintaining the

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3. The social and cultural value of motion pictures as an instrumentality of communications is also emphasized by Zechariah Chafee, Jr., Professor of Law at Harvard University, in his treatise "Free Speech in the United States" (1942 Ed., p. 547), and by Norman Woelfel of the Bureau of Educational Research of Ohio State University, in his exposition on the American Communicative Networks entitled "Radio-Movies-Press", published in 1946, pp. 2-3, 7-9, 13.

4. Paramount, Loew's, RKO, Warner and Fox.

5. Columbia, United Artists and Universal.

6. Particularly apposite is the illuminating statement on the desirability and wholesale power of free trade and ideas of Mr. Justice Oliver Wendell Holmes, appearing in his dissenting opinion reported in *Abrams et al. v. U. S.*, 250 U. S. 616, 630. Mr. Justice Louis D. Brandeis concurred in such statement and there appears to be no disagreement with it on the part of the majority justices. Vide *Cantwell et al.* v. *State of Connecticut*, 310 U. S. 296, 310, and *Thornhill* v. *State of Alabama*, 310 U. S. 88, 95, where the doctrine of civil liberties under the First Amendment is expounded.

freedom of the other two important media of communications, the press and the radio.

But, as is demonstrated by the proofs in the record, the Big Five, through their monopoly ownership in the finest, the largest, and the strategically situated first-run motion picture theatres of the United States, and the illegal, discriminatory and monopolistic trade practices furthered by them in concert with the Little Three, have effectively frustrated and even destroyed competition of ideas in the production and the exhibiting of motion pictures. In consequence of this, the general public has been deprived of its rights of selectivity. Thus the Eight Monopolistic Film Majors have, in effect, established an economic dictatorship over *one of the world's three greatest media for the dissemination of ideas and materials of persuasion and public opinion.* These defendants stifle the freedom of expression of diverse minds which wish to produce and exhibit motion pictures designed to be most responsive to the real needs and tastes of the general public. These defendants, in effect, have usurped and exercised powers of censorship over the vital stuff which the minds of the general public absorb. They have arrogated to themselves exclusively the power of determining *what* movie patrons shall see and hear. They have even presumed to fix arbitrarily the occasions *when*, if at all, their own motion pictures might be shown in unaffiliated motion picture theatres in different areas.

If our fundamental guarantees of free speech, free assemblage, and free press, under the First Amendment, could not be invoked to arrest such control over so basic a medium of communications as motion pictures, then, indeed, it will not be long before they may become illusory.

Presumably mindful of the continual evolutionary character and advent of new communicative media and the social importance of their uses, Mr. Chief Justice Hughes in *Lovell* v. *City of Griffin*, 303 U. S. 444, 452 said:

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"* * * The liberty of the press is not confined to newspapers and periodicals. * * * *The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.*" (Emphasis ours.)

And Professor Zechariah Chafee, Jr.,[7] in his treatise "Free Speech in the United States" (1942 Ed.) pointed out:

"* * * (P. 534) All the objections to a press censorship apply as well to film censorship, especially in an age when more persons probably go to the movies than read books."

It is significant that, as early as 1915, in the very first anti-trust case brought by the Government to break the patents monopoly in the motion picture industry,[8] the United States District Court of Eastern Pennsylvania stressed the fundamental constitutional civil-liberties basis of the Sherman Act. Said the Court (P. 802):

* * * * *

"* * * The beginnings of this controversy are found in the age-long struggle 'to secure the blessings of liberty', to obtain which is stated to be one of the objects of our Constitution. There is deep-grained in human nature the impulse to influence, and, so far as it can be done, control, the actions of others. It is too much to expect that this con-

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7. The author is Professor of Law at Harvard University. At page 545 of his treatise he stresses the flexible character of the Constitutional terms "liberty" and "freedom of speech" as being such as to embrace "new media for the communication of ideas and facts".

8. *U. S. v. Motion Picture Patents Co. et al.*, 225 Fed. 800, 802 (1915); appeal dismissed in 247 U. S. 524.

trol, when secured, will always be exerted for altruistic ends. Out of this condition has arisen the need of a power of government to check the restraints which the strong would otherwise impose upon those whom they could control. * * *

"* * * The particular phase of liberty with which this law concerns itself is the freedom or free flow of commerce. * * * It secures this 'blessing of liberty' to all by making it unlawful for any to conspire to bring about 'restraint of trade or commerce'. This is the genesis and motive of the act of July 2, 1890."

The views concerning radio, as expressed by Mr. Justice Murphy[9] of this Tribunal, just 28 years later, are equally pertinent to motion pictures. Paraphrasingly and analogously quoted these are:

"Although radio broadcasting [the motion picture], like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio [the motion picture] has assumed a position of commanding importance rivalling the press and the pulpit. * * * because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the Government is a matter of deep and vital concern." (Bracketed insertions supplied.)

9. Part of the dissenting opinion of Mr. Justice Murphy in *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 228. With this particular observation there was no disagreement on the part of the majority of this Court.

And emphatically apropos of the motion picture as a medium of communications is the juristic philosophy of Circuit Court Judge Learned Hand, as promulgated in 1943 with reference to the daily press in *U. S.* v. *Associated Press et al.*, 52 Fed. Supp. 362, 372, aff'd in 326 U. S. 1:

* * * * *

> "* * * However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from *as many different sources*, and with *as many different facets and colors* as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (Italics supplied.)

In an opinion concurring[16] in the affirmance by this Court of the decision and decree of Circuit Court Judge Hand, Mr. Justice Frankfurter condemned as the worst evil in the Associated Press monopoly, the exercise of censorship powers by private enterprise over so important an instrumentality of communications as the press in the following language (PP. 28-29):

* * * * *

> "* * * But the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of

16. 326 U. S. 1, 28-29.

ordinary commercial pursuits. The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. *A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.*" (Emphasis ours.)

In terms of the modern instrumentalities of communications such as the radio, the daily press, and the motion picture, the constitutionally guaranteed rights of free speech and free press must be viewed as being dual in character. Obviously, they relate not merely to the primary freedom of the speaker, the writer, or the pictorial artist. They also refer implicitly, but nonetheless very definitely, to the correlative liberty of the listener, the reader, and the viewer—the ultimate consumer of ideas, opinions and propaganda.

The duality of the character of such constitutional rights has been pointedly recognized in *Martin* v. *City of Struthers*, 319 U. S. 141, 143. In that case, this Court declared as invalid a municipal ordinance which purported to outlaw the ringing of doorbells as an incident of distributing religious literature to the general public. In the course of his opinion, Mr. Justice Black pronounced succinctly (P. 143):

* * * * *

"The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful

> ignorance. This freedom embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U. S. 444, 452, 82 L. Ed. 949, 954, 59 S. Ct. 666, and *necessarily protects the right to receive it.*" (Italics supplied.)

This constitutional freedom of every individual to *receive* communications is the most important of all his freedoms. Comprehended in it, of course, is his undeniable and inalienable right to education in every sphere of ideas and the full enjoyment of all his faculties.[11]

To the extent that the arbitrary censorial monopolistic economic power wielded by the "Big Eight" infringes upon the Constitutional freedom of expression of independents in the production and the selection of motion pictures, it at the same time encroaches upon the vitally important Constitutional rights of the general public to see and receive ideas in motion pictures of its choice.[12]

Generally speaking, the message of the motion picture can reach the public only in theatres. Because of the huge monetary investment required for their construction and

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11. *Meyer* v. *State of Nebraska*, 262 U. S. 390, 399-400; *Grosjean* v. *American Press Co., et al.*, 297 U. S. 233, 244, 250.

12. Indeed, such constitutional rights of the general public serve to emphasize strongly the "public interest" aspects of the Sherman Act, controlling the decisions in several recent motion picture monopoly cases. *William Goldman Theatres, Inc.* v. *Loew's Inc. et al.*, 150 Fed. 2d, 738, 743 (August 2, 1945, C. C. A. 3rd) rehearing denied September 21, 1945; *U. S.* v. *Schine Chain Theatres Inc. et al.*, 63 Fed. Supp. 229, 241 (1945, Dist. Ct. W. D. N. Y.) appeal dismissed in 329 U. S. 686, rehearing granted in 329 U. S. 817-818; *Paramount Famous Lasky Corp. et al.* v. *U. S.*, 282 U. S. 30, 42; *White Bear Theatre Corp.* v. *State Theatre Corp. et al.*, 129 Fed. 2d 600-605 (1942, C. C. A. 8th).

maintenance, motion picture theatres are limited in number. In various areas of the country there are no more than one or two theatres for the simple reason that the patronage of such areas can support no more. If a producer releases for theatrical exhibition a feature motion picture whose dramatic story tends to sustain the thesis that under certain circumstances of late American frontier history, lynching was justifiable or excusable,[13] it would probably take many weeks or months and an expenditure of from $500,000 to $1,000,000 or more before another film dramatically presenting the other side of that question could be made and put on the theatrical market. And, even under the most ideal competitive conditions, such film would of necessity have to await its regular turn for some reasonable time before any available theatre, which books in advance its movie fare, exhibited it. By reasons of such factors peculiar to the motion picture industry, *it is not quite possible to present to the general public controversial films embodying all conceivable diverse points of view at one and the same time, or, in sequence, at reasonable intervals apart.*

The radio, even with its own peculiar physical limitations in the number of wave lengths available for broadcasting purposes, is a medium which leads directly into the homes of the people substantially everywhere. Many different ideas and opinions can be quickly transmitted through it at reasonably short intervals on any one day or during any single hour. The cost of each broadcast is far less than that required for the production and the exhibition of a motion picture.

The greatest advantage which the daily press enjoys is its ability to present multifarious thoughts and atti-

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13. Such a motion picture, under the title "The Virginian", starring Joel McCrea, Brian Donlevy, Barbara Britton and Sonny Tufts, was produced, released for exhibition, and distributed by Paramount Pictures, Inc. in 1946.

tudes simultaneously and even side by side. In this respect it is not hampered by any of the difficulties inherent in the radio and the motion picture.

As hereinafter demonstrated,[14] the aforementioned "natural" handicaps of the motion picture are multiplied and worsened more than a thousand times by the various artificial impediments to the free flow of intellectual and artistic communications which characterize the pattern of monopolistic control in the motion picture industry. It is precisely against the evils of this condition—*i. e.*, restrictions on the freedom of reasonable diversity of expression of ideas and thoughts in motion pictures—*that the rights of the general public must be accorded realistic and permanent protection under the First Amendment.*

POINT II.

Defendants' monopolistic combination and control over the largest and the finest theatres in various strategic centres of the United States and their predatory trade practices constitute an illegal and detrimental interference with the constitutional liberties and rights of the general public.

The huge multi-million dollar motion picture industry[15] rests principally upon a tight monopolistic control directly and indirectly over our nation's motion picture theatres. To be sure, the five major defendants, Paramount, Loew's, RKO, Fox, and Warner's, own only approximately 3,137 theatres—about 17.35%—of an aggregate of 18,076 theatres operating throughout the United States. But these 3,137 theatres embrace the largest and the finest in the country.

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14. Vide, pp. 13 to 22, *infra*, of this brief.

15. Money Behind the Screen—an analytical report on film finance published by the Farleigh Press, 1937, P. 63.

They also include 71% of the first-run theatres strategically located in the various important metropolitan centres of the United States. Although they represent 25% of the aggregate seating capacity of 11,700,000 for all theatres in America, *they yield at least 45% of the entire country's box office receipts.* In this connection it is significant to note that *such five major defendants collectively receive as film distributors more than 70% of the total film rental derived from first run theatres in the United States.*[15a]

The qualitative significance of the Big Five's affiliated theatres derives chiefly from their unusual size, unique physical quality, and strategic location. Whereas the average seating capacity for all theatres in the nation is 620, the average affiliated theatre, it is estimated, seats about 1,000. Indeed, such affiliated theatres as are in the category of de luxe metropolitan theatres run up an average in excess of 1,400 seats. Not only are such theatres the largest, but they are the most elegant in their physical appointments. And what is of very considerable importance, they are strategically established so as to render easy the exercise of dominion over the various thickly populated urban centres throughout the United States. Out of 92 American cities with populations exceeding 100,000, *73 of them, by virtue of such dominion over such first-run theatres exclusively, yield to the Theatre-Owning Big Five more than half of the nation's box office receipts.* And in all cities of 1,000,000 or more in population *the Big Five are the proprietors of the more lucrative neighborhood motion picture houses.*

Moreover, in the final analysis, the most important fact of all is that such affiliated theatres exhibit almost

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[15a] Source: Defendants' answers to Interrogatory No. 3, 1945. Exhibits: 95—R.K.O.; 40—Fox; 125—Warners; 81—Paramount; 56—Loew's; 138—Columbia; 144—United Artists; 362—Universal; and Exhibits F-21, F-21-A, 425, 467, 468, 469; 93—RKO; 43—Fox; 125a—Warner; 83—Paramount.

entirely the movie fare consisting of films produced and distributed by the Big Five and their satellites, the Little Three.[16] This fact assumes strong significance when it is realized that the Big Eight control 70% of all motion pictures and 95% of the so-called quality films,[17] and 100% of the news films.

The business policy of these monopolists is designed so as substantially to exclude the independent producers' films from such affiliated theatres. The occasions when they permit the showing in their theatres of an independent's motion picture are conspicuously rare. And, what is more, the substantial exclusion of independents from the affiliated theatres automatically operates to discourage and effectively bar them from the rest of the theatrical exhibition markets.[18] For no independent would risk his personal resources in the making of motion pictures unless he had assured access to the affiliated theatres which produce *at least 45%* of the entire country's box office receipts *and more than 70% of our national first run theatre box-office receipts.*[18a] Nor would any bank, as a rule,

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16. Universal, Columbia, and United Artists. Of these three satellites, United Artists Corporation is solely in the business of distributing films produced by its own stockholders and, on very rare occasions, by an independent.

17. In Hollywood parlance, the term "quality film" is generally used to denote a motion picture whose production cost is in the neighborhood of $500,000 or more. It is not necessarily indicative of dramatic, artistic, and cultural excellence.

18. Bertrand and Evans in their investigatory report to the U. S. Senate pointedly comment: "* * * the control of the more important exhibition outlets by the producer-distributors is probably a more important factor in limiting the entrance of new producers of quality pictures into the market than is block booking." T.N.E.C. Monograph 43 P. 25, "The Motion Picture Industry—A Pattern of Control."

18a. Source: Vide footnote 15-a, p. 14, *supra.*

undertake to finance his productions without some commitment or guarantee by the majors to distribute and exhibit them in their affiliated theatres.

The immediate effect of this monopolistic control of our largest and finest first-run theatres is to deny to the general public their constitutionally guaranteed rights to reasonable diversity in the production and the exhibition of motion pictures and freedom of selectivity. The general public, who contribute every single dollar of the overwhelming majority of our national first-run theatre box office receipts—as high as 70%—and at least 45% of the national box office receipts generally—directly to the theatre-owning defendants, have a vital interest in seeing and hearing, without artificial barriers of any kind, as many competitively produced films as possible. Only in that way can they enjoy the full benefits from the diversified artistic and cultural ideas and messages presented in such films. They should not be restricted, as they are now, to the movie fare of the Eight Majors. Such movie fare, generally speaking, is not responsive to the real tastes and desires of the general public, nor, for that matter, to their needs for the furtherance of their moral, intellectual and esthetic development.[19]

The deleterious character of the theatre-ownership monopoly of the Majors is substantially aggravated in another important respect. Invariably, the Majors prolong the exhibition of their films in affiliated first-run theatres as long as possible—frequently for many weeks or

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19. An interesting critical article on the movie fare of the Majors entitled Hollywood's Terror Films, by Siegfried Kracauer, is contained in the August, 1946 issue of COMMENTARY, Vol. 2, No. 2, pp. 132-136. In discussing the serious question, "Do They Reflect the American State of Mind?"—the author, who is a member of the staff of the Museum of Modern Art Film Library, states: "Films saturated with terror and sadism have issued from Hollywood in such numbers recently as to become commonplace."

months. They do this for two principal reasons. The first is that in this way they can skim off for themselves the cream of the box office potentialities of each film. This is accomplished simply by compelling millions of movie-goers interested in seeing and hearing the newest and most timely talking pictures to pay the exorbitantly high prices of admission to affiliated theatres. The second reason is that the Majors, in furtherance of their monopoly in the distribution of films, use their affiliated theatres as show windows for their film wares. Long exhibition runs simultaneously in various key affiliated theatres, together with customarily lavish and sustained publicity campaigns, have been found to be effective devices for injecting "prestige value" in even inferior films of the Majors so as to attract unsuspecting unaffiliated exhibitors and many, many thousands of movie-goers. Obviously, the longer the exhibition run of any film at any theatre, the shorter or more limited does the available screen time for the showing of other motion pictures become.

As a result of this artificially created bottleneck in affiliated first-run theatres, there is constantly accumulating a backlog of finished films on the shelves of the Majors and their public exhibition is delayed many months, a year or two or even longer. Translated into terms of injurious consequences to the general public, this means that they are denied their constitutional freedom of opportunity to see and to hear the newest motion pictures as promptly as is reasonably possible after their completion. It also means that they are precluded from enjoying the immediate benefits of the esthetic and cultural contributions, if any, of the various writers, actors, directors, cameramen and other screen technicians whose composite labors are impressed in each film.

But what considerably worsens all the more the evils of such theatre-ownership monopoly of the Majors are the predatory trade practices which grip firmly all branches

of the motion picture industry in a stranglehold. Several of the salient illegal trade practices imposed and maintained by the concerted acts of such Majors are these: (1) fixing of minimum admission prices to various motion picture theatres affiliated and unaffiliated; (2) coercive block booking of motion pictures; (3) blind selling of motion pictures; (4) forced selling of newsreels, travelogues and other short subjects; (5) unreasonable clearance; and (6) unfair discrimination in favor of large circuits of theatres, affiliated and unaffiliated. Sufficient descriptions and illustrations of these monopolistic activities are contained in the record and in the opinion of the court below.[20] Manifestly, then, any delineation of such evils would serve no useful purpose within the scope of this brief.

These discriminatory and various other unfair trade practices are complements of the monopoly maintained by the Majors horizontally and vertically, throughout the motion picture industry. By them many vestiges of free competition have been eliminated from the market place. And it is with their aid that defendants have arrogated to themselves dangerous censorial powers over what moviegoers of America, estimated at more than 95,000,000 paid admissions per week,[21] shall see and hear.

Let us suppose the Big Eight acquired and maintained the same stifling discriminatory monopolistic control over our radio broadcasting and reception facilities so that no one could hear and enjoy radio programs except in certain strategically situated affiliated stores for indefinitely long periods, and thereafter in designated local neighbor-

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20. 66 Fed. Supp. 323, 334-352.

21. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, page 9.

hood places. Certainly in that situation the frustration of the constitutional liberties of the general public to receive and enjoy at their convenience timely and variegated radio communications, would be undeniable. This conclusion would be inescapable particularly in view of what this tribunal said in *National Broadcasting Co. Inc. et al.* v. *U. S. et al.*, 319 U. S. 190, 216:

> "The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio', * * *. 'An important element of public interest and convenience affecting the issue of the license is *the ability* of the licensee to render the *best practical service to the community* reached by his broadcast." (Italics ours.)

If the Big Eight transposed their discriminatory monopolistic stranglehold on films and theatres to the sphere of the press, and if, as a consequence, one could not buy a newspaper except from distantly located affiliated newsstands during preempted periods of indefinite duration, and subsequently from certain local neighborhood newspaper vendors, the public evils would be substantially identical with those in the hypothetical radio situation, and would be just as condemnable. In this connection it should be noted that even in the *Associated Press* case,[22] the public in various areas had access to at least a single paper featuring Associated Press service, and in addition to other papers with competitive news services in such areas. It was also possible for readers to have Associated Press newspapers mailed to them. Yet, the monopolistic practices of Associated Press were judicially declared invalid and prohibited because they restricted diversity and se-

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22. *U. S.* v. *Associated Press et al.*, 52 Fed. Supp. 362 (1943, D. C. S. D. N. Y.) aff'd in 326 U. S. 1.

lectivity in communications on which "we have staked * * * our all".[23]

But the public evils stemming from the unwholesome conditions in the motion picture industry are far more serious. This is so principally because motion pictures are capable of more subtle and persuasive influences on the mind and the imagination than either the radio or the press.[24]

The pivotal issue of importance in this case concerns the constitutional freedom of the population in any small community, as well as of the public in the large metropolitan centers, to see and to hear at their convenience the more recent and reasonably diversified films as early as possible after general release. There can be no valid reason why those living, say, in the Borough of Richmond, or The Bronx, in New York City, should be compelled to travel distances to the Great White Way in Manhattan to see a first-run exhibition of a film at the Roxy Theatre, owned by defendant Fox, or at the Capitol Theatre, controlled by the defendant Loew's. They should be just as free to see, hear, and enjoy the very same film in their local neighborhood theatres at a reasonably prompt time after its general release as they are to go to their neighborhood newsstands for the latest newspapers or book stores for the most timely books.

The question of the unimpeded flow of films to the small community was directly involved in the recent case

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23. Opinion of Circuit Court of Appeals Judge Learned Hand in *U. S. v. Associated Press et al.*, 52 Fed. Supp. 362, 372 (1943, D. C. S. D. N. Y.) aff'd in 326 U. S. 1.

24. For discussion of social importance of the motion picture as a medium of communications, see pages 2 to 5, *supra*. In this connection see also comments of Mr. Norman Woelfel of Bureau of Educational Research of Ohio State University in brochure entitled "Radio-Movies-Press", at page 9.

of *White Bear Theatre Corporation* v. *State Theatre Corporation et al.*, 129 Fed. 2d, 600, 604-605 (1942 C. C. A., 8th). There plaintiff charged defendants with conspiring and attempting to obtain a monopoly upon all procurable first-run feature films for a certain local community for the purpose of driving plaintiff, a competing exhibitor, out of business. Said the Court (PP. 604-605):

"* * * The result of the conspiracy and attempted monopoly, in addition to the injury to plaintiff, was *to deprive the populace* of White Bear Lake and its environs *of having exhibited to them locally, during the current season* a number of 'first-run' productions which they would otherwise have had the opportunity to see. A further result was that this substantial number of films which would otherwise have moved in the channels of interstate commerce through the distributing offices at Minneapolis to White Bear Lake, was artfully blocked in its flow at Minneapolis.

"Strangling the competitive forces of the interstate market on 'first-run' films for White Bear Lake * * * *depriving the populace of White Bear Lake and environs of the privilege of seeing productions at the times and in the manner that they would have otherwise been exhibited to them*, if the competitive forces of the interstate market had not thus been improperly strangled; and artfully blocking at Minneapolis the flow of interstate commerce which * * * would otherwise have moved into White Bear Lake—these were all matters of sufficient general public interest to bring the situation within the operation of the Sherman Act.

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"In principle and within the intendment of the Sherman Act public interest is as much concerned

with the improper control of the interstate market on the buyer's or seller's side *for the little town* of White Bear Lake as for the great metropolis of New York City or for any State, or for the country as a whole." (Italics supplied.)

POINT III.

Divestiture of the ownership interests of the five majors in motion picture theatres should be decreed by this Court to preclude a recurrence of the monopolistic evils and accord realistic permanent protection to the rights of the general public under the First Amendment.

A.

The General Public's Affirmative Case for Divestiture.

The relief[25] granted by the Court below includes, *inter alia*, abolition by injunction of the various illegal trade practices as referred to under Point II hereof, and dissolution of defendants' ownership interests, jointly with one another or with any independent, in certain motion picture theatres.

Such relief, however, does not suffice to meet the necessities of the situation. No matter how efficacious it in the aggregate may be, every single feature of it is but an incidental auxiliary to a remedy designed to accord complete justice, but conspicuously lacking in the case at bar. That remedy is divestiture of the ownership interests of the Five Majors in motion picture theatres.

Unless such divestiture is decreed, it will not be possible realistically to recreate the conditions of free competition so as to assure to the public reasonable diversity in the production and the exhibition of motion pictures.

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25. 66 Fed. Supp. 323, 357-359.

With the decree as it now stands, the market place for the distribution and the exhibition of motion pictures is still substantially dominated by the Majors. The most important and the most lucrative segments of the exhibition market in particular are those where the Majors own and operate the finest and the largest first and subsequent-run theatres. Their first-run theatres alone represent 71% of all metropolitan first-run theatres throughout the United States. And these theatres alone yield at least 45% of the entire country's box-office receipts. Their owners, the Five Majors, as distributors, collect in excess of 70% of the total film rental derived from first-run theatres in the United States.[25a] Furthermore, their owners, the Five Majors, together with the Little Three, happen to constitute substantially the entire source of supply of motion pictures for the nation's moviegoers, estimated at more than 95,000,000 paid admissions per week.[26] With the exception of United Artists, the Big Eight are the nation's most opulent film producers. And all also constitute eight of the nation's eleven distributing organizations. As recognized in *Goldman Theatres Inc.* v. *Loew's, Inc. et al.*, 150 Fed. 2d 738, 744-745 (1945, C. C. A., 3rd):

> "• • • Defendants control the production and distribution of more than 80% of the feature pictures in the country, and no exhibitor can successfully operate without access to defendants' product."

In their present dominant position of towering financial strength and control in all branches of the motion picture industry, they would no more be disposed to open up the

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25a. Source: Vide footnote 15-a, p. 14, *supra*.

26. The Film Daily Year Book for 1945, page 47; Radio-Movies-Press, a brochure on the American Communicative Networks by Norman Woelfel of Bureau of Educational Research of Ohio State University, page 9.

choice and strategic affiliated theatres to independent film productions than they were before. And if independent film productions—the greatest maximum number possible—cannot be accorded access to these affiliated theatres, the general public, who contribute 70% of the entire country's first-run theatre box-office receipts and at least 45% of our country's box office receipts generally, directly to the Five Majors, will still remain deprived, in substantial measure, of the cultural and esthetic benefits of the widest selectivity possible in movie-fare.

Without independent producers in the film markets, it must follow that unaffiliated theatres will still remain helplessly dependent on the limited movie-fare of the producer-distributor-exhibitor defendants.[27] Since such unaffiliated theatres cannot exist without the films of the Big Eight, they will of necessity continue to be at their mercy. To expect these unaffiliated theatres to compete freely or to resist strongly any of the Majors in that kind of a film market is unrealistic. For, as was aptly remarked in *U. S. v. Motion Picture Patents Company*, 225 Fed. 800, 809 (E. D. Pa., 1915) appeal dismissed in 247 U. S. 524, "* * * It is too clear for comment that the mere

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27. It is of interest to note that in *Paramount Pictures, Inc. v. Langer*, 23 Fed. Supp. 890, 899 (1938, D. C. N. D.), reversed only for mootness in 306 U. S. 619, the United States District Court stated the following: "* * * a producer which owns theatres has the power to make it impossible for the independent exhibitor to procure films from it and difficult to procure them from other major producers in case the producer-exhibitor desires these films for itself. There is evidence tending to show that producers with affiliated theatres have exercised the powers possessed by them for their own advantage and to the detriment of their independent competitors." The *Langer* case was cited with approval in *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 106 F. 2d 667, 678 (September 1939, C. C. A. 3rd) cert. den. in 308 U. S. 694.

possession of the power here shown would make its assertion seldom necessary."

Moreover, under the existing conditions, large numbers of people who would be interested in building and operating new and attractive motion picture theatres in the various parts of the country, are discouraged from doing so. They cannot be assured of having access to the first-run films of the Majors. Nor can they hope to get a sufficient quantity of feature films of independent producers.

In other words, the traditional equitable remedy of divestiture should be decreed in order to eradicate realistically and permanently all the monopolistic evils existing in the motion picture industry. Once the Majors are divorced from their theatres—and not until then—various independent producers will be encouraged to produce more films for what will be an assured free competitive market. When this happens, there will undoubtedly be erected and opened many additional competing motion picture theatres to serve the public. And of necessity, the Majors will then be obliged to vie with independents in a salutary race to produce diversified films of higher qualitative stature, greater public appeal, and considerably augmented value as contributions to the moral, intellectual, and esthetic development of the nation's many millions of movie-goers.

B.

Analysis of Salient Features of Statutory Courts' Opinion on Divestiture.

(a) Quantitative Cold Brick and Mortar of the Five Majors' Theatres Are Outweighed in the Scales by Their Qualitative Significance and Economic Influence in the Motion Picture Industry.

In refusing to grant the remedy of divestiture, the lower Court stressed the superficial fact that the Five Majors own only 17.35%, or 3,137 of an aggregate of

18,076, motion picture theatres in the United States.[28] Clearly, here the grievous error of the lower Court was in failing to give greater weight and due regard to the qualitative, as distinguished from quantitative, significance of the Big Five's affiliated theatres.[29] The judges of the statutory court, it appears, attached more importance to cold brick and mortar than to such highly influential psychological and economic factors as the unusual size, the unique physical character, and the strategic location of such Majors' choice theatres—to say nothing of the extraordinary circumstance that these theatres alone yield more than 70% of the *first-run theatre* box-office receipts of the entire country. In this connection, the judges below apparently failed to evaluate properly the significance of the triune status of the Big Five as producers, distributors and exhibitors of motion pictures and the highly important fact that the Big Five and the Little Three constitute substantially the entire source of our country's motion pictures.

(b) The Historical Background of Defendants' Film Monopoly.

The court below committed another grievous error in finding that "there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly * * *."[30] Here the Court below has disregarded important facts not only in the record at bar, but in the records of other motion picture cases relating to the monopolistic history of defendants. Adolph Zukor, for instance, and his organization, Famous Players Lasky Corporation, now known as Paramount Pictures, Inc., never even concealed

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28. 66 Fed. Supp. 323, 353.

29. Detailed discussion of the qualitative significance of the Big Five's affiliated theatres appears on pages 13 to 22, *supra*.

30. 66 Fed. Supp. 323, 354.

their monopolistic purpose in embarking upon a national theatre acquisition program in 1919.[31] Nor, for that matter, did any of the other corporate defendants and their founders. All the fair inferences from their activities in the film industry impel the conclusion that such corporate defendants were in fact maintained for the purpose of furthering and sustaining a national film monopoly.[32]

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31. In 1927, the Federal Trade Commission in 11 F.T.C. 187, 205 found Adolph Zukor and Famous Players Lasky Corporation guilty of furthering and possessing a monopoly. As the Federal Trade Commission said (p. 205): "It was the openly and publicly avowed purpose of said respondents by said policy of theatre ownership and operation, to dominate the entire motion picture industry * * *" Subsequently, when the Federal Trade Commission petitioned the United States Circuit Court of Appeals in the Second Circuit for an enforcement order (57 Fed. 2d 152 [1932], C. C. A., 2nd) the theatre acquisition issue was eliminated.

32. The history of monopolistic purposes and activities of defendants in combination with affiliates and other parties is reflected in the following cases: *Re: West Coast Theatres, Inc.*, (1929), 12 F.T.C. 436, 470, 476-77, 480-89 (Case No. 2); *Re: West Coast Theatres, Inc., et al.* (1929), 12 F.T.C. 383, 421-431 (Case No. 1); *Paramount Famous Lasky Corporation* v. *U. S.*, 282 U. S. 30; *U. S.* v. *First National Pictures, Inc.*, 280 U. S. 44; *U. S.* v. *West Coast Theatres, Inc.*, a criminal proceeding, No. 4902-M., Sept. 28, 1928, and an equity proceeding No. S.-10-C. Aug. 21, 1930, U. S. District Court, Southern District for California; *Youngclaus* v. *Omaha Film Board of Trade et al.*, 60 Fed. 2d 538, 539-540 (D. C. D. Neb., 1932); *Binderup* v. *Pathe Exchange et al.*, 263 U. S. 291; *U. S.* v. *Interstate Circuit Inc.*, 306 U. S. 208; *U. S.* v. *Crescent Amusement Co. et al.*, 323 U. S. 173; *Paramount Pictures Inc.* v. *Langer*, 23 Fed. Supp. 890 (1938, D. C. N. D.) reversed only for mootness in 306 U. S. 619; *William Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 Fed. 2d 738 (1945, C. C. A. 3rd); *Bigelow et al.* v. *RKO Radio Pictures, Inc. et al.*, 327 U. S. 251, 262-266.

(c) Rights of Private Property Vis-a-Vis Transcendental Public Welfare.

The statutory court fell into further error in concluding that "each defendant had a right to build and to own theatres and to exhibit pictures in them".[33] Such determination utterly ignores the overwhelming weight of the evidence demonstrating the qualitative significance of the Majors' strategically located first-run theatres as the bedrock for the maintenance of the dominant position of the Majors in all branches of the motion picture industry.[34] It by-passes the established fact that defendants have utilized their theatres as instrumentalities to exclude independent producers and new theatre operators from substantially the entire exhibition market to the great detriment of the interests of the general public.[35]

Generally speaking, the legal right of any person to acquire, own, and operate private property will be sustained by the courts. That right, however, is not supreme. It is subject to important exceptions in our jurisprudence. One of these exceptions is that "One cannot use his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health, or peace, and good order."[36] And this is all

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33. 66 Fed. Supp. 323, 354.

34. See discussion of qualitative significance of defendants' strategically situated first-run theatres at pages 13 to 22, *supra*.

35. See pages 13 to 22, *supra*, for discussion of effect of operation of defendants' theatres as limiting the constitutional rights of general public to maximum diversity in the production and the exhibition of motion pictures.

36. *People* v. *N. Y. Carbonic Acid Gas Co.*, 196 N. Y. 421, 440. Accord: Broom's Legal Maxims (10th Ed. 1939) P. 238; 58 C.J. 708; *The China* v. *Walsh*, 7 Wall. (U. S.) 53, 68; *The Marianna Flora*, 11 Wheat. (U. S.)

the more true where, as in the case at bar, the property is a public forum of the screen and directly relates to so important a medium of communications as the motion picture. As has been previously shown, its use has a strong influence on the moral, intellectual, and esthetic development of our country's millions of movie goers. It may even play a powerful part in preserving our democracy.

Besides, even if the acquisition, the ownership, and the operation of theatres by the Five Majors should be regarded as legal elements of the Majors' vast unlawful combination and monopoly in the motion picture industry, it is an established principle that the courts are empowered to enjoin the legal, as well as the illegal, segments of such entire evil combination and monopoly.

Thus, as succinctly stated in *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 724:

> "* * * Equity has power to eradicate the evils of a condemned scheme *by prohibition of the use of admittedly valid parts of an invalid whole.*" (Emphasis ours.)

And as strongly emphasized by this tribunal in granting divestiture relief to plaintiff in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 188 (1944):

1, 42; *Paramount Pictures, Inc.* v. *Langer*, 23 Fed. Supp. 890, 896 (1938, D. C. N. D.) reversed only for mootness in 306 U. S. 619. The juridical basis of this doctrine is variously expressed by other authorities. Thus, Broom's Legal Maxims, p. 1, states: "*Salus Populi Est Suprema Lex.* (XII Tables—Bacon, Max., reg. 12)—Regard for the public welfare is the highest law." Thus, Benjamin N. Cardozo, in The Nature of the Judicial Process (1921 Ed.), at page 66, declares: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence * * *."

"* * * The duty of the Court in these cases is 'to frame its decree so as to suppress the unlawful practices and to take such reasonable measures *as would preclude their revival*'." (Emphasis ours.)

In the case at bar, nothing short of complete divestiture of the Majors' ownership interests in motion picture theatres will constitute assurance of permanently precluding the resuscitation of the Majors' monopolistic evils.

Upon the record before this tribunal, legal niceties concerning private property rights should not be permitted to transcend considerations of general public welfare.

As pointedly promulgated in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519:

"* * * *public interest* * * * *is more a favorite of the law* than is the promotion of private fortunes." (Emphasis ours.)

Nor should the seeming harshness of the remedy of divestiture or any inconvenience resulting therefrom to defendants be considered as a deterrent to decreeing such relief. Having enriched themselves very considerably over a period of many years as a consequence of the film monopoly which defendants furthered through the acquisition and the operation of their motion picture theatres, defendants are in no position to bar the separation of the good from the bad of their unlawful enterprises.

In *U. S.* v. *Crescent Amusement Co., et al.*, 323 U. S. 173, 189-190, this tribunal granted divestiture relief and said (PP. 189-190):

"* * * Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture * * * The proclivity in the

past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future.".

Besides, particularly in the light of the historical background of their monopolistic existence and operations,[37] defendants can no longer be expected to initiate and maintain permanently any required effective reforms for the recreation of freedom of trade and ideas in the marketplace. It is highly significant that whenever one of their evil illegal practices in the motion picture industry was eliminated, it was invariably done through the compulsion of judicial decree.[38] Accordingly, the towering financial stature and strength of defendants and their past proclivities to use their extraordinary economic powers to promote the ends of their monopoly, may not now be disregarded.[39]

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37 and 38. See cases on monopolistic history of defendants cited in footnotes 31 and 32 at page 27, *supra*.

39. Even during the very period of four years following the entry of the consent decree in 1938 in this action, and while such action was awaiting trial, the Theatre-Owning Majors were avariciously preoccupied with effectuating an unlawful conspiracy and discriminatory stratagem in withholding films from an independent motion picture theatre in Chicago. In *Bigelow et al.* v. *RKO Radio Pictures Inc. et al.*, 327 U. S. 251, 262-266, petitioners, the owners of the Jackson Park Motion Picture Theatre, complained that RKO, Loew's, Fox, Paramount, Vitagraph Warner Bros., and others, unlawfully conspired and discriminated against petitioners in withholding feature motion pictures for as long as ten weeks after they were exhibited by favored affiliated theatres in the Chicago District. This conspiracy and discrimination occurred in the period "(p. 254) from some date prior to November 1, 1936 to the date that suit was brought, July 28, 1942". It was claimed by petitioners that

As stated by Mr. Justice Benjamin N. Cardozo in *U. S. v. Swift & Co.*, 286 U. S. 106, 116-117:

> "* * * *size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.*" (Emphasis ours.)

And as pronounced in *Paramount Pictures Inc. v. Langer*,[40] 23 Fed. Supp. 890, 900 (1938, D. C. N. D.), reversed only for mootness in 306 U. S. 619:

* * * * *

> "* * * * there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and the temptation of such producers to engage in practices promotive to monopoly and restraint of trade.

"(P. 254) in consequence they had been subjected to loss of earnings in excess of $120,000 during the five year period from July 27, 1937 to July 27, 1942." This Court found "(P. 256) There was evidence that respondent distributors and exhibitors conspired to give to the distributor-controlled or affiliated theatres preferential playing positions in the release system over the positions allotted to independent competing theatres including that of petitioners with the result that petitioners' theatre was unable to obtain feature films until the first week of 'general release' or ten weeks after the end of the Loop run." Accordingly, this Court sustained a verdict in favor of petitioners for treble damages amounting to $360,000.

40. The *Langer* case was cited with approval in *Great Atlantic & Pacific Tea Co. v. Federal Trade Com'n*, 106 Fed. 2d 667, 678 (September 1939, C. C. A. 3rd) cert. den. in 309 U. S. 694.

"It is our opinion that the existence of the unusual power to deal with competitors unfairly, when coupled with the opportunity and the temptation to use that power is probably a sufficient basis for legislative action to prevent the possibility of its exercise. This must certainly be so where there is, in addition, evidence of past aggressions."

(d) The Auction-Bidding System Is No Effective Substitute for Divestiture.

The auction bidding system for pictures and runs as prescribed in the decree of the statutory court[41] is no real effective substitute for divestiture. It is an intricate and cumbersome procedure which is not calculated to place the little independent theatre owner on a real equal competitive plane with the big independent theatre owner or any of the Five Theatre-Owning Majors.

To begin with, no provision is made for the requirement of a fixed ceiling price for each motion picture in accordance with established industry standards as regards the grade of such motion picture and its production cost. Without such a fixed price ceiling for each such picture, the result will be a frenzied race among exhibitors to outbid each other. Of necessity, the highest bid will be a price considerably out of proportion to the intrinsic value of the picture, and that price will most likely be passed on to the general public in the form of exorbitant prices of admission to theatres.

Whenever it suits their purpose, the Five Theatre-Owning Majors will always be in a strong position to outbid any competition of the independents. If the Five Majors incur any losses in the bidding process, they can easily recoup such losses at points where they enjoy mo-

41. 66 Fed. Supp. 323, 353-354.

nopoly and also by the simple expedient of marking up the price of pictures to independent exhibitors.

And, in the final analysis, the effect of the monopolistic ownership of the Five Majors will remain unchanged. Independent producers will still be excluded from the strategic theatres of the Five Majors and just as certainly from those in surrounding areas of any exhibitors who have been made dependent on these Five Majors as producers and distributors of films. In short, no system of auction bidding is capable of realistically recreating free competitive conditions *so that the general public can be assured of enjoying the widest possible diversity in the production and the exhibition of motion pictures.*

As has been demenstrated herein,[42] the most effective way of breaking all shackles of dictatorial restraint on the market price of motion pictures is by decreeing divestiture.

(e) Under Recreated Conditions of Free Competition the Strong Likelihood Is That the Independent Successors to the Ownership of the Majors' Theatres Will Give to the General Public Greater Service Than the Majors Ever Did at Any Time.

The statutory Court, however, doubts the ability of a new group of theatre owners to give the general public "as good service as the exhibitors they would have supplanted,"[43] in the event of divorcement.

This misgiving is an absolutely unfounded *non sequitur.* One of the basic tenets of our American social economy is that freedom of competition is the highest guarantee that those able to survive competition in the market place will furnish to the public satisfactory, if not the best, service and goods. This underlies the purpose of the Sher-

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42. See pages 22 to 26, *supra,* of this brief.

43. 66 Fed. Supp. 323, 353.

man Act.[44] In all Anti-Trust cases, the function of the Courts is to destroy unhesitatingly unlawful monopolies and to recreate conditions of free competition and diversity. The Courts may not speculate on the results which might ensue once the forces of competition are set free. They must assume that free competition, in the true American way of life, will operate for the ultimate welfare of the general public.

As aptly stressed by this tribunal in *Paramount Famous Lasky Corporation et al.* v. *U. S.*, 282 U. S. 30, 44:

> " * * * *The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of parties, and it may be of some good results'.* * * " (Emphasis ours.)

Moreover, once the Majors are permanently divorced from their theatres, their independent successors, together with the remaining independent theatre owners, will be truly free to bid for films of independent producers. As a consequence of this, more and more independent producers will be encouraged to enter the exhibition mart without economic fear. And it is precisely the actual entry of more and more of such independent producers which will serve to maintain realistically free competitive conditions throughout the motion picture industry. Of necessity, such free competition will bring greater and greater diversity and qualitative content in the production and the exhibition of movie fare and wider selectivity to the general public. And of necessity it will in turn compel the Majors to produce and distribute better and more diversified films to survive such fair competition. If the

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44. 15 U. S. C. A. Sec. 1, *et seq.*, 26 Stat. at L. 209, Chap. 647 as amended.

successors to the ownership of the affiliated theatres bring about such salutary conditions as they—and not the Majors—are very likely to do, their service to the general public will be inestimable and will certainly surpass that of the Majors at any time.

Conclusion.

In view of all the foregoing considerations, and in the light of the record, the refusal of the statutory court to grant divestiture clearly constitutes an abuse of its judicial discretion. This equitable remedy is an efficacious complement to the auxiliary relief contained in such statutory court's decree. This alone, and no others, separately or combined, will truly serve to bring about a realistic recreation of diversity in filmfare and permanent protection to the rights of the general public under the First Amendment. It should, therefore, be granted in the interests of justice.

The appeals at bar should be disposed of by this tribunal accordingly.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 79

UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, ET AL.,
Appellees.

MOTION OF THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* (WITH BRIEF ANNEXED)

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IN THE

Supreme Court of the United States

October Term, 1947

No. 79

UNITED STATES OF AMERICA,
Appellant,

vs.

PARAMOUNT PICTURES, ET AL.,
Appellees.

Motion for Leave to File Brief on Behalf of *Amicus Curiae*

May it please the Court:

The undersigned, as counsel for the Society of Independent Motion Picture Producers, respectfully moves this Honorable Court for leave to file the annexed brief *amicus curiae* in this case.

1. The United States of America brought this suit against eight defendants and their affiliated companies, charging them with violations of Sections 1 and 2 of the Sherman Act. The Statutory Court below rendered an opinion and made findings of fact and conclusions of law, and final judgment was entered in accordance therewith on the 31st day of December, 1946.

2. The Government filed a petition for appeal in No. 79, which was allowed on February 21, 1947.

3. The members of the Society of Independent Motion Picture Producers are:

Constance Bennett,
Benedict Bogeaus,
Sidney Buchman,
William Cagney,
California Pictures, Inc.
(Howard Hughes),
Charles Chaplin,
Bing Crosby,
Walt Disney,
Federal Films, Inc.
(Boris Morris-William LeBaron),
Edward A. Golden,
Samuel Goldwyn,
Seymour Nebenzal,
Rainbow Productions, Inc.
(Leo McCarey),
Hal Roach,
Charles R. Rogers,
Edward Small,
Andrew Stone,
Story Productions Inc.
(Armand Deutsch),
Hunt Stromberg,
Vanguard Films, Inc.
(David O. Selznick),
Walter Wanger.

4. The members of the Society are all independent producers and are persons or entities who not only dominate financially the production of their own pictures but who have the right to control the distribution thereof. Mr. Keough, a principal officer of the defendant Paramount,

testifying in this action, said: "The independent producer usually is the best and most talented man, whether he be a producer or a director or sometimes a writer or sometimes a star, man or woman, and for one reason or another, good to themselves, they go into independent production and nobody has any interest in their venture except as they perhaps provide financing for them." (Record, p. 910; Sten. Minutes, 1269.)

Reference herewith is made to the Society's proposed brief wherein the Society's position has been set forth in full and the effect of the decree on its members as independent producers of motion pictures has been set forth.

5. In the spring of 1945 the Society of Independent Motion Picture Producers made application before Judge Goddard, then presiding alone, to file a brief *amicus* on the motion brought by the Government for a preliminary injunction against unreasonable clearances pending the trial. This application so to file was opposed by the defendants and after oral argument Judge Goddard granted leave to the Society to file a brief *amicus* and such brief was filed.

6. On or about the 21st day of October, 1946, after the opinion of the Statutory Court below had been handed down and on a day set for argument on the decree the Society was granted leave among others to file a brief *amicus* setting forth its position on the proposed decree. Such brief was duly filed and counsel for the Society argued thereon in open court.

7. On or about March 3, 1947 counsel for the Society wrote to the attorneys for all of the defendants and to the Department of Justice representing the United States

of America, requesting consent to file a brief *amicus* in connection with this appeal, and thus more than eight months notice has been given.

8. The Department of Justice, under date of March 5, 1947, responded immediately, granting consent to the filing of a brief by the Society as *amicus curiae*.

9. On October 17, 1947 page proof of the Society's proposed brief was sent to each of the attorneys for the defendants, again requesting consent on behalf of the Society to file a brief.

10. On November 20, 1947 the final brief was mailed to the attorneys for all of the defendants. This brief differed from the page proof previously sent to the attorneys for the defendants only in very minor respects, mostly typographical. The advices we received from all of the parties are as follows:

As to the United States of America—
Consented on March 5, 1947.

A. The following defendants declined:

(1) Paramount Pictures, Inc. and its subsidiary, Paramount Film Distributing Corporation.

(2) Radio-Keith-Orpheum Corporation and its subsidiaries R.K.O. Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, R.K.O. Proctor Corporation, R.K.O. Midwest Corporation.

(3) Loew's, Incorporated, by its attorneys, declined and wrote:

"After carefully considering the brief which you have prepared, I am forced to conclude

that it is not limited to the facts and argument presented on the present record. Therefore I regret that on behalf of the defendant Loew's, Incorporated whom I represent, I cannot consent to the filing of this brief."

There was no indication by counsel for Loew's, Incorporated as to what part of the Society's proposed brief in its judgment goes outside the record. We respectfully submit that such judgment is invalid.

(4) Columbia Pictures Corporation and its subsidiaries Screen Gems, Inc., Columbia Pictures of Louisiana, Inc.

(5) Universal Corporation and its subsidiaries Universal Pictures Company, Inc., Universal Film Exchanges, Inc., Big U Film Exchange, Inc.

(6) United Artists Corporation.

B. The following defendants have declined by failure to respond to the Society's request:

(1) Warner Brothers Pictures, Inc. and its subsidiaries Warner Brothers Circuit Management Corporation.

(2) Twentieth Century-Fox Film Corporation and its subsidiary National Theatres Corporation.

(3) On information and belief, the American Theaters Association has intervened in this proceeding.

11. The Statutory Court in its opinion and decree laid its emphasis on the effect of the defendants' practices upon the independent exhibitor. The Society of Independent Motion Picture Producers believes that the defendants'

concentration of power constitutes a peril not only to the independent exhibitor but to the independent producer as well and, furthermore, that such concentration of power constitutes a menace to the motion picture industry as a whole, impinging upon the rights of the movie-going public, protected by the First Amendment. It is the contention of the Society that the decree as shaped by the court below is not adequate to restore competition in that it fails to go to the root of the evil, namely, theater ownership by the five major defendants. The Society additionally maintains that the independent producer is entitled to a clarification of the decree so that independent producers, not parties to the action and not guilty of any monopoly practices, will be permitted to distribute their pictures without carrying the burden of the restrictions in the decree directed only to the defendants.

These impacts on the independent motion picture producers and upon the movie-going public are discussed in the attached *amicus* brief. Although imbedded in the record in this action, neither the Government nor the defendants have heretofore touched upon them more than incidentally. Accordingly, we believe that the attached brief will be of assistance to the Court to the extent that it illuminates aspects of the litigation which are not developed in the briefs of the parties directly affected.

12. Although by reason of the foregoing circumstances, consent of all parties to the litigation has not been obtained as provided in Rule 27, subd. 9 of the Rules of this Court, it is respectfully submitted that the present case affords an appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the Society's *amicus* brief annexed hereto.

We therefore respectfully urge that the Court grant leave to file the annexed brief which is made part of this motion, on behalf of the Society of Independent Motion Picture Producers as *amicus curiae*.

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IN THE

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No. 79

UNITED STATES OF AMERICA,
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PARAMOUNT PICTURES, INC., ET AL.,
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BRIEF FOR THE SOCIETY OF INDEPENDENT MOTION PICTURE PRODUCERS AS *AMICUS CURIAE*

Opinion Below, Jurisdiction, Statute Involved

The Court's attention is respectfully directed to the Government's brief, which fully sets forth the above.

Statement

This brief is filed on behalf of the Society of Independent Motion Picture Producers to present the position of the independent producers, in aid of this court in reviewing the decision and decree of the court below. The

Society appeared before the District Court as *amicus curiae* in connection with the framing of the decree and on a previous preliminary proceeding before Judge Goddard.

A. *The Society*

The Society of Independent Motion Picture Producers, hereinafter referred to as the "Society" or the "Independent Producers," is a membership corporation organized under the laws of California for the purpose of furthering the art of motion picture production, and protecting the interests of the independent (as opposed to the majors and their subsidiaries) producers of motion pictures. The president of the Society is Donald M. Nelson, and its membership includes: Constance Bennett, Benedict Bogeaus, Sidney Buchman, William Cagney, California Pictures, Inc. (Howard Hughes), Charles Chaplin, Bing Crosby, Walt Disney, Federal Films Inc. (Boris Morris-William LeBaron), Edward A. Golden, Samuel Goldwyn, Seymour Nebenzal, Rainbow Productions, Inc. (Leo McCarey), Hal Roach, Charles R. Rogers, Edward Small, Andrew Stone, Story Productions, Inc. (Armand Deutsch), Hunt Stromberg, Vanguard Films, Inc. (David O. Selznick), Walter Wanger.

Generally speaking, the Society's members are engaged in independently and separately producing motion pictures. Excluding those made by the eight defendants, the independent producers make substantially the balance of all features in the United States. Their productions are normally individually financed either by their own personal capital or by private financing from banks or other lending institutions or individuals.

B. *The Independent Producer*

The District Court defined an independent producer (in exclusionary terms) as a producer who is not a defendant, or a subsidiary or affiliate of a defendant.[1] Affirmatively, however, and more realistically, an independent producer is one who not only dominates financially the production of his own pictures, but who has the right to control the distribution thereof, and does not restrict the market by either the ownership of theaters or by acting in concert with others.

Because of the domination by the defendants of the market, the independent producers have had no alternative but to distribute their product through the defendants—any one of the five who have been found to have endangered the market by theater ownership, or one of the three who, although they do not own theaters, have been found guilty of restricting the market by patterns of behavior stemming from horizontal combinations. The independent producer has generally distributed through United Artists and in some few instances through R.K.O.

The unique position of the independent producer in the motion picture industry has been accurately described by Mr. Keough,[2] a principal officer of the defendant Paramount: "The independent producer usually is the best and most talented man, whether he be a producer or a director or sometimes a writer or sometimes a star, man or woman, and for one reason or another, good to themselves, they go

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[1] 66 F. Supp. 323, 333.

[2] Austin C. Keogh, a member of the Board of Directors, Vice President, Secretary and General Counsel of Paramount Pictures, Inc. gave the above testimony in open court in response to a question by counsel for Paramount.

into independent production and nobody has any interest in their venture except as they perhaps provide financing for them." (Record, p. 910; Sten. Minutes, 1269.)

As Mr. Keough indicated, the independent producer has come to represent the best in the motion picture industry. He is in a real sense the best product of a competitive system, for it must be remembered that the independent cannot rely either on the ownership of vast retail outlets for the marketing of his pictures, or on monopolistic accords such as were found to exist among the defendants. Obviously, therefore, the independent producer of two or three pictures a year has a deeper concern with the merits of his products and a keener eye to public opinion and public acceptance than does the producer of twenty or more pictures, who not only can average out his profits and losses, but who is cushioned against potential production losses by the income from the theaters he owns.

Furthermore, since advances and innovations in the motion picture art are more likely to flow from the studios engaged in producing "custom made" films than from those producing films of a more "mass production" character, the economic health of the independent producer becomes a matter of real concern to the public.

On a quantitative basis, the total number of pictures independently produced by members of the Society is approximately equal to the total production of any one of the "majors".

Finally, to the extent that the independent producers are surviving at all in marketing their product despite the restrictive trade practices and attempts at monopolization of the defendants, they represent a real—perhaps the only real—competitive force in the film industry as contrasted with the defendants who have been found in substantial respects to be acting in monopolistic accord.

C. *The Stake of the Independent Producers in this Decree*

None of the Society's members is a party to the instant suit. None of them exercises any actual or potential power over the motion picture market by ownership or leasing of theaters. None of them has been accused or found guilty of engaging in any unlawful trade practices or attempts to monopolize.

Since the defendants dominate the distribution and the five major defendants dominate the exhibition of motion pictures in the United States, the decree of the court below necessarily deals with the functioning of the industry as a whole, and serves as a blueprint for its operation. Although the strictures made applicable to the defendants by reason of their theater holdings and horizontal trade practices ought, therefore, not to be applicable to non-theater owning independent producers free of guilt, the independent who must of economic necessity distribute through one of the defendants will be affected by all such restrictive provisions in the decree.

Because of the broad scope of the decree, the court below by silence has thus caused irreparable injury to independent producers. Actually, the court's failure affirmatively to protect the independent producers places them in even a worse competitive position vis-a-vis the defendants than they had occupied prior to the institution of the present action in that some in the industry will not bother to differentiate between defendants who alone are bound by the decree and innocent parties as are the independent producers.

The Society believes that in order to avert unintended and grave injury to its members, and in order effectively to re-establish the conditions of an open competitive mar-

ket for motion pictures and obtain adequate screen playing time for all worthwhile products and in the interests of the consuming public, the modifications and clarification of the decree it requests should be granted.

D. The Position of the Independent Producer

The independent producer requests modification or clarification of the decree in three essential respects:

(1) The decree should be modified so as to provide for an order directing divestiture of all theaters owned by defendants, and their sale on the open market, that is, dissolution of theater chains by sale to such buyers and in such a manner as will be consistent with the antitrust laws, and will restore competition to the industry.

(2) The decree should be clarified so as not to cast any shadow of doubt on the right of bona fide independents to market their pictures on terms acceptable to exhibitors and to include provisions for clearance, run and price maintenance in the licensing of their own products through the defendants where the independent producer is not guilty of horizontal accords, and does not own any theaters.

(3) The decree should affirmatively state that road shows are free from any restrictions thereon, at least so as to make it clear that the rights of independent producers with respect thereto shall not be interfered with.

POINT I

Nothing short of complete divorcement of exhibition from distribution and dissolution of defendants' exhibition chains will suffice to restore an open competitive market.

The court below found that the defendants' distributor-exhibitor combinations were guilty of monopolization, were destructive of competition, and restrained trade in violation of Section 1 of the Sherman Act. It is the contention of the Society that nothing short of divestiture of theater ownership and dissolution of defendants' exhibitors' chains will restore competition and a free market to the industry.

The District Court rejected "total divestiture" as a remedy on the grounds: (1) It "would be injurious to the corporations concerned"; (2) it was unnecessary "at the present time", since the public interest could be protected by mere injunctive relief against the objectionable trade practices and by setting up under the aegis of the court an entirely novel and untried system of marketing of films; and (3) because the defendant exhibitors operated their theaters with "experience and skill" and new supplanting independent exhibitors would be "unlikely for some years" to equal that experience and skill.

(1) *The "Injury" to Defendants*

The statutory court's concern with the argument that divestiture might prove injurious to these defendants, condemned by it for violating the Sherman Act, is based upon a fundamental misconception of the duty of a court of

equity to grant adequate relief for infringement of the antitrust laws. Whether or not such relief would be injurious to guilty defendants is irrelevant. The primary consideration is to fashion a decree which will effectively serve to carry out the purpose of the Act, i. e., to restore competitive conditions to the industry.

If divestiture will be a burden to the defendants, it is a burden which they who violated the law must carry. They cannot now be heard to complain.

In the *Crescent Amusement* case, 323 U. S. 173, the same argument was advanced by the defendants against the divestiture provisions of that decree. This court there held that (p. 189):

> "Those who violate the act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. * * * Hence, we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. There is no reason why the protection of the public interest should depend solely on that somewhat cumbersome procedure when another effective one is available."

The fact situation before the Court in the *Crescent* case was, of course, strikingly analogous to one facet of the situation presented by the instant case, and the language of the Court above may fully and accurately be applied in that respect to the instant case.

More recently, in the *National Lead* case, (June 1947), 91 L. Ed. (S. Ct.) 1438, 1463 (1947), Mr. Justice Douglas observed in a dissenting opinion that:

> "The task of putting an end to monopolistic practices and restoring competition is one of magnitude and complexity; Congress has authorized use of the broadest powers of equity to cope with it. * * * And its powers under the antitrust laws, though not spe-

cifically enumerated, are ample to thwart the plans of those who would build illegal empires, no matter how imaginative their undertakings or subtle their techniques. *The power of the court is not limited to the restraint of future transgressions. The impairment of property rights is no barrier to the fashioning of a decree which will grant effective relief. United States* v. *Union P. R. Co.*, 226 U. S. 470, 476, 477, 57 L. ed. 306, 308, 309, 33 S. Ct. 162. *Divestiture or dissolution may be ordered in spite of hardship, inconvenience, or loss. United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189, 89 L. ed. 160, 171, 65 S. Ct. 254. Devices or instrumentalities which may be used for legitimate ends may nevertheless be outlawed entirely where they have been employed to build the monopoly or to create the restraint of trade. *United States* v. *Crescent Amusement Co., supra* (323 U. S., pp. 187, 188, 89 L. ed. 170, 171, 65 S. Ct. 254). *For the aim of the decree is not only to prevent a repetition of the unlawful practice but to undo what was done, to neutralize power unlawfully acquired, to prevent the defendants from acquiring any of the fruits of the condemned project. Standard Oil Co.* v. *United States*, 221 U. S. 1, 78, 55 L. ed. 619, 652, 31 S. Ct. 502, 34 LRA NS 834, Ann. Cas. 1912D 734." (Italics added.)

Mr. Justice Douglas went on to say:

"But beyond that is the effect on the industry. Here defendants have been in a commanding and impregnable position. They have dominated the field and suppressed competition. If competition is to be restored strong measures must be adopted to provide the maximum opportunity for new ventures to compete with the established giants of the industry."

Although in the *National Lead* case the District Court refused to grant divestiture as a remedy, this Court expressly rested its refusal on the theory that, under the

particular facts of that case, divestiture would not improve the competitive pattern of the industry.

> "Presumably, the requested divestiture would be for the purpose of providing four instead of two independent major competing plants in the titanium pigment industry. However, there is no showing whether or not the two licensees * * * may not be able to develop, under the decree, even more substantial competition against National Lead and Dupont than would new concerns operating the divested plants * * *" (at 1456).

The Court pointed out that divestiture in that particular case would amount only to divesting each of the two largest competitors of one of its principal plants.

The defendants can thus find no comfort in attempting to analogize the *National Lead* case to the case at bar. It would seem that the opinion of Mr. Justice Douglas is clearly appropriate here and it is submitted that the majority of the Court would adopt the rationale of the dissent of Mr. Justice Douglas as applied to the facts in the instant case.

We now turn to the second reason advanced by the court for refusing to grant divestiture, *i.e.* that divestiture was not a "necessary" remedy "at the present time", and that the public interest could adequately be protected by mere injunctive relief against certain specified trade practices when coupled with auction bidding as superimposed on the industry by the court below.

(2) *The "Necessity" of Divestiture and the Public Interest*

The record demonstrates a compelling need for relief by way of divestiture. The adequacy of a decree in an antitrust suit is measured by its effectiveness in restoring

competition, in dissipating the consequences of restraint and monopolization, and in thereby serving and protecting the public interest.

In the instant case, the statutory court has found the defendants guilty of attempting to monopolize, of erecting artificial barriers to free and open competition, and of engendering predatory practices which stifled competition. The industry in which these illegal acts were committed is a "communication of ideas" industry,—an industry charged not only with the function of entertaining but of enlightening, educating, and informing the people as well.[3] The peril to our continued existence as a democracy springing from the threat of control of so vital an industry by an aggregate of economic power in the hands of a few is obvious. Certainly if we are to be zealous in protecting freedom of the press and of the radio, we must be no less vigilant in assuring a free, open and competitive movie industry. The significant character of the industry here involved and the deep public interest constitute a graver threat than in the case of almost any other industry. In the words of Mr. Justice Frankfurter we are dealing not with "peanuts and potatoes" but with ideas and opinions —with the very life-stream of a democracy—and the courts in such a case, as distinguished from all others, are doubly charged with the positive duty of granting complete and stringent and effective relief.

The only remedy that will serve the purpose, the only relief that will effectively restore economic freedom to this

[3] "The motion picture commenced as a novel and pleasing type of entertainment but it has evolved into an important social and cultural force. In some senses it provides a common denominator to the feelings and aspirations of an entire people. Its importance must then be measured in terms other than the conventional one of dollars and cents". Evans & Bertrand, **The Motion Picture Industry: A Pattern** of Control, T.N.E.C. Monograph 43, at p. 56.

important industry, is divestiture. In concerning itself with the inconvenience to the defendants (discussed *supra*) and with the defendants' qualms about the "necessity" for divestiture, the court below not only overlooked the vital character of the industry involved, but also misconceived the import of the evidence presented by the government. For the record amply demonstrates that the trade practices outlawed by the court's decree were but symptomatic of a deeper fault—the fusion of highly integrated horizontal and vertical combinations of the defendant distributor-exhibitors, arising out of their theater-ownership. Common control, unity of purpose, and unity of action, springing from ownership of theaters made the conspiracy efficient and dangerous.

It follows, therefore, that because (a) the highly significant character of the motion picture industry makes it doubly important to keep it a free industry, both for statutory and constitutional reasons, and (b) the root of the threat to competition in that industry lies in the ownership of the theaters by defendants, the only adequate remedy is divestiture. The statutory court, in refusing to grant such relief, after finding infringement of the Sherman Act, failed thereby to grant the only sufficient, and necessary, remedy.

(a) The Vital Character of the Industry and the First Amendment

As has been indicated above, we are dealing here with a "First Amendment commodity". Motion pictures cannot be treated differently from the radio or the press when the Sherman Act is involved. There can be little doubt that today this Court would apply the First Amendment to pro-

tect the freedom of the screen as well as the freedom of the air and the freedom of the press.[4]

The Court has already indicated its great concern as to the standards to be applied to two "First Amendment commodities," namely, radio and the press, when threatened with monopoly and restrictive trade practices. Thus, Mr. Justice Black, writing for the majority in *United States of America* v. *Associated Press*, 326 U. S. 1, 20, said:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of opinion from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. *Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combines a refuge if they impose restraints upon that constitutionally guaranteed freedom.*" (Italics added.)

In that same case, Mr. Justice Frankfurter observed that (p. 28):

> "Truth and understanding are not wares like peanuts and potatoes. And so, *the incidence of restraints upon the promotion of truths through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.* I find myself entirely in agreement with Judge Learned Hand that 'neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news

[4] Professor Chafee in his treatise "Free Speech in the United States" (1942 Ed.) said (p. 534): "All the objections to a press censorship apply as well to film censorship, especially in an age when more persons probably go to the movies than read books." (See also, page 535.)

from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" (Italics added.)

The words of Mr. Justice Murphy, in the radio monopoly case, appraising the importance of radio broadcasting (with which appraisal the majority, of course, was not in disagreement) may be applied in *haec verba* to motion pictures:

"Although radio broadcasting [*the motion picture*] like the press is generally conducted on a commercial basis, it is not an ordinary business activity like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion, radio [*the motion picture*] has assumed a position of commanding importance, rivalling the press and the pulpit * * * because of its vast potentialities as a medium of communication, discussion and propaganda the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern." *National Broadcasting Company* v. *United States*, 319 U. S. 190, 228 (1943).

Surely no court can find a significant distinction between Bob Hope over the radio, Bob Hope in the movies and Bob Hope between the covers of the book, I Never Left Home; between the weekly summary of the news in Time Magazine as compared with the motion picture March of Time and the same March of Time over the air; between Life With Father as a best selling magazine story and Life With Father as a best selling motion picture;

between the story of Woodrow Wilson as it appears between the covers of a book and the story of Woodrow Wilson as it is depicted on the screen; between a newscast, a newspaper, and a newsreel.

There is, therefore, no justification, in logic, reason or law, for treating motion pictures any differently from radio and the press. And where there is danger of monopolistic control over any one of these media of communication, not only are the antitrust laws brought into play, but the Constitution as well.

For in terms of the radio, the press, and the movies, the constitutional guarantees of free speech and free press have meaning only if there exists the greatest possible diversity of control over these three pipe-lines into the national market-place of thought. Concentrated control of these opinion-forming information-disseminating sources may well, as here, frustrate the vital guarantees of the First Amendment. For these reasons, those who traffic in ideas must be held to the highest standards of competitive behavior and no regard should be given in this day and age to the argument that the movies are merely entertainment as if such entertainment could ever be divorced from its educational impact.

It must be remembered that the primary public interest lies not in the direction of bigger and better equipped theaters but rather in greater diversification, and in a greater choice of motion pictures. As in radio and the press, the public interest can best be served by maintaining free and open channels carrying new, diverse, antagonistic, and more ideas to the market-place. This is the valid essence of free enterprise.

The court below, therefore, erred in denying the remedy of divestiture. Especially is this so, since the record amply demonstrates that such relief would be the only effective relief.

(b) The Root of the Evil Is the Economic Power Stemming from Theater Ownership.

The court below, apparently convinced of the existence of a monopoly but only in the form of monopolistic horizontal trade practices which it thought could be excised from the industry pattern, misconceived the import of some of the evidence offered by the Government. The Statutory Court said (66 Fed. Sup. 323, 353):

> "In the year 1945 there were about 18,076 motion picture theatres in the United States, of which the five major defendants had interests in 3,137, or 17.35%."
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> "It would seem unlikely that theatre owners having an aggregate interest of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree to free competition. It is only in certain localities, and not in general, that an ownership of even first run theatres approximates monopolistic existence."

Despite the above, the fact (as supported by the record) remains that the dominant position of the defendants is the result of a geometric cumulation of power flowing from (1) their ownership of key theaters; (2) their domination of the distribution level, and (3) their horizontal agreements and other restrictive trade practices. It is, however, the ownership of theaters which plays the decisive role in the entire pattern of controls and is the springboard for accords on distribution. The deals made at distribution levels take on reality only because the deals relate to theaters owned by the defendants. Any independent who wishes to survive can do so only on defendants' terms, and even then, only as a "second-class

citizen" in the industry. That the independent producer survives at all is a great compliment to his product which can only be exhibited in today's market controlled by the defendants.

The most important item of evidence in the record[5] which must be considered in connection with the court's hypothesis and which was completely overlooked, thereby rendering the court's conclusion fallacious, is that the 3,137 theaters owned by the five major defendants produce more than 45% of the United States' gross return of a given picture. (See Appendix for complete chart, Table A, supporting the foregoing facts and constructed from record evidence.)

In other words, the five major defendants themselves, in one-sixth of all the theaters in the United States, have obtained a superior economic strategic position over all other producers by thus assuring to themselves playing time in theaters substantially guaranteeing more than 45% of the entire domestic return of the picture. The facts become even more significant when further broken down. For the most part the five major defendants have confined their theater holdings to the larger populated cities, where they generally control the first run theaters. In all but five of the forty-nine cities with populations from 100,000 to 200,000 (for the 1943-1944 season) first run rentals accounted for as high as from 70% to 90% of the total theater rentals in the city (Exhibit F-21). *This is the real power of the five major defendants.* They control the big theaters of this country, producing the lion's share of the gross return of most pictures. This power remains, assuming that every monopolistic horizontal trade practice struck down by the statutory court is sustained by

[5] Source: Defendants' answers to interrogatory No. 3, 1945. Exhibits: 95—R.K.O.; 40—Fox; 125—Warners; 81—Paramount; 56—Loew's; 138—Columbia; 144—United Artists; 362—Universal.

this Court. This power goes even beyond the startling test of dollars because these theaters owned by the five major defendants are the choice theaters in the land and are looked upon as setting the national pattern of exhibition of all motion pictures in the United States, the influence of which is carried down through exhibition at all subsequent runs and at all prices.

The independent producer does not own theaters nor does he have a distribution system. He exists as the only creative force competitive to the defendants. He will continue to operate under a constant burden so long as the defendants continue to own and run their own theaters. For without divestiture, the defendants will be left with as much power to control the market as they possessed before the decree. In the *Schine* and *Crescent* cases, the courts have condemned analogous power through theater ownership even though not wedded to distribution controls. We, of course, are not concerned with the so called "show case" theater where a producer may legitimately show his own product exclusively at first run.

Whether there be future horizontal agreements or not, the simple fact remains that if the major defendants are permitted to retain ownership of theaters which form a part of the bloc of 3,137, each defendant will inevitably, as in the past, use its part of that bloc for the benefit of itself and the four other theater-owning defendants; in this way each will obtain assured playing time within the 3,137 theaters owned by the five major defendants. For example in the 1943-44 season the five major defendants in the operation of their theaters each paid in excess of 71% of its total annual rental payments in its own theaters to itself and the four other theater-owning defendants for features. The totals in each case paid to all five major defendants were: R.K.O. 74.3%; Fox 78.2%; Warners 76.6%; Paramount 81.8%; and Loew's 71.4%.

(See Appendix for complete chart, Table B.) In this way, each defendant will be enabled to rid itself of its inferior pictures by licensing to the defendants' own theaters; in this way, each of the five defendants is given a "cushion", a guarantee against the risks of competition, and an enormous strategic advantage over all other producers. The president of R.K.O., Mr. N. P. Rathvon, in his frank testimony amply demonstrates the accuracy of these conclusions when he testified (Record page 1622; Sten. Minutes 2224):

> *"In the first place, if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution and that is very important, because if you have an unsuccessful picture and your first-run exhibitor has no responsibility to you, you are foreclosed from that whole territory if you fail to get it into first-run theaters. So it is, for your unsuccessful pictures, it gives you a chance to get some revenue back because you forced it into the flow of distribution."* (Italics added.)

The word "forced" used by Rathvon in his testimony is no accident. It means the power obtained by R.K.O. through its ownership or control of 103 choice theaters in the United States.[6] No one denies that R.K.O., if it

[6] The testimony of Mr. Rathvon indicates the purpose for which R. K. O. controls its theatres. The creation of vertical power through control of consumer outlets was considered by this Court with respect to such expansion to meet normal business needs as distinguished from vertical control expansion for purposes of domination of the market. See United States of America v. Yellow Cab Co., et al., 91 L. Ed. 1594, page 1601, where it was said: "The theory of the complaint, to borrow language from United States v. Reading Co. 253 US 26, 57, 64 L ed 760, 778, 40 S Ct 425, is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred. Cf. United States v. Crescent Amusement Co. 323 US 173, 189, 89 L ed 160, 171, 65 S Ct 254."

so desired, could properly use its own theaters for its own product exclusively, but that it would not or could not do because it does not have enough product to service its own theaters and the revenue from the theaters would then not be sufficient. When Mr. Rathvon says "forced into distribution" he means that R.K.O. uses its 103 theaters so as to force a position for R.K.O. pictures, good, bad or indifferent, into some or all of the theaters owned by the four other theater owning defendants who all use their theaters similarly. R.K.O.'s position as put by Mr. Rathvon obviously is the same as the four other major defendants as evidenced by their interrogatories heretofore referred to, which showed that in the 1943-1944 season in the operation of their theaters, each paid in excess of 71% of the total rental paid by the theaters owned by each of the defendants to itself and the other theater-owning defendants.

The bloc of theaters, numbering 3,137, owned by the five major defendants produces the cream of the motion picture income in the United States. It is situated so as to control the key cities and market. It, therefore, gives the five defendants the power to dominate the industry; it gives the defendants the power to exclude ideas from the market-place;[7] it gives the defendants the power to exclude competitors from the market-place, for any inde-

[7] In **Marsh v. Alabama**, 326 U. S. 501, 507-9 (1946), this Court held that: "* * * certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce." The Court further observed that: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. * * * In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties, and the enforcement of such restraint by the application of a state statute.

pendent producer must necessarily show his pictures in some, if not a substantial number, of the defendants' theaters to come out whole on a picture; most important it has taken away from the public its right to select which picture it thinks is best and which picture it wishes to see, and the court's decree leaves this concentration of power unimpaired.

Thus, a free competitive market cannot be restored to the industry until exhibition has been divorced from distribution; until the superior economic position accruing to defendants from their ownership of theaters, is dissipated.

Finally, even assuming for the purposes of this argument that there were no proof of monopoly in ownership of theaters, alone, this court has stated that the Sherman Act requires the removal of an innocent part of an industry if tied in with illegal restraints. In the *Associated Press* case, Mr. Justice Douglas said (p. 24):

> "For it is well settled that a feature of an illegal restraint of trade, which is innocent by itself and which may be lawfully used if independently established, may be uprooted along with other parts of an illegal arrangement" (citing the *Ethyl* and *Univis* cases).

Here, even assuming arguendo that ownership of theaters by defendants was "innocent by itself", the fact remains that the illegal restraining trade practices were made possible and effective as a result of theater ownership, and that the two are so inextricably interwoven that the one—theater ownership—should be "uprooted along with the other parts of [the] illegal arrangements"—the enjoined trade practices.

(c) The Defendants' Efficiency Argument

One of the factors impelling the court below to accept the position that divestiture was unnecessary at this time to protect the public interest was the argument that the majors run their theaters efficiently; they "have demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theaters." The court's conclusion against divestiture because of the efficiency shown by the defendants in their operations of theaters is irrelevant. Monopolists always claim to be efficient.

An examination of the voluminous record here reveals no substantial evidence to support the contention that out of a total of 18,076 theaters in the United States, the 3,137 owned by the major defendants are "larger, best equipped", more skillfully and efficiently operated or that others do not do as good or better social jobs tested on this meager level. However, even assuming this to be true, the court itself, with an eye cocked in the direction of public interest, stated that divestiture would create "a new set of theater owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted * * *". Nowhere does the record afford support for this latter assertion either, nor is there any evidence which measures service in terms of variety of pictures exhibited.

The court thus implies that independent exhibitor competition could in a few years render as good service as that provided by the majors, but it again assumes the unproven contention that independent exhibition does not do so today. The statutory court seemed to appraise the public interest in terms of the physical appointments in defendants' theaters. It is an extremely narrow view that permits an unhealthy restricting power to remain alive in the market-place of ideas, in return for the assumed physi-

cal convenience of the public for a few years. This defense of monopoly, which may be called the "plush seat defense" should have been disregarded completely. In any event the court should have balanced off the superior (if such they are) brick and mortar of defendants' theaters against the danger of continuing the power of the major defendants to restrict and limit the number and quality and kind of pictures. It is dubious whether this finding—a finding based on physical convenience or even efficiency—can be said to have any validity in the absence of a finding of a greater offer by defendants of diversity of product to movie audiences. Plush seats or rococo walls cannot make up for limitations of the product shown in theaters; wide lobbies are a poor substitute for a narrowed area of selectivity for consumers.

(d) "Competitive Bidding"

The court below sought to dispose of the plight of the independent exhibitor by the imposition of a new method of doing business in the motion picture world—the so-called "competitive bidding" system. The independent exhibitor has in the court below strenuously objected to this method of doing business.

This device is basically objectionable because it places the operations of a large business under the aegis of the court.[8] It is further objectionable because it harms the in-

[8] See **U. S. v. Pullman Co.**, 64 F. Supp. 108, 110 where the court stated:

"We take it that the judgment of a court under the Sherman Law is not to substitute the judicial judgment for that of the proprietors of the country's business enterprises. We think it is the court's task to strike at monopolistic practices when it finds them to exist and then leave it to competitive business freed from monopoly, to take advantage of the freedom to profit itself and incidentally benefit the public."

See also **Hartford Empire v. U. S.**, 323 U. S. 386; **U. S. v. Bausch & Lomb**, 321 U. S. 707, 728.

dependent exhibitor, the very one whom it seeks to protect. No independent can out-bid the concentrated economic power represented by any one of the defendants who, too, will be bidding for product for its theaters and the independent exhibitor may thus well be frozen out of the market. Furthermore, in permitting the defendants to retain their theaters, they are given a ready market for their own pictures and a source of supply which the independent exhibitor does not have.

Motion pictures are a rare commodity. Over the past few years the annual production by all producers in the United States has averaged between 300 and 400 feature films. Many theaters running double features and requiring more than one change a week need upwards of 200 of these pictures annually. Where one of the major defendants has to bid for outside pictures, it goes without saying, that with its virtually unlimited resources it can easily afford to make a more substantial bid for a questionable picture, and take a loss in case of bad judgment; the independent exhibitor can ill afford any such losses. The defendants, however, can afford to further stifle competition by buying up the more popular product in order to put competitive theaters at a disadvantage. The theater owner who does not produce pictures cannot average out a theater loss against a non-existent production profit.

The proposed bidding system and the criteria set down by the court for its operation, will create constant dispute between the major defendants and the independent exhibitors. Arbitration is suggested but, of course, cannot be compelled, and endless litigation seems to be indicated and inferentially invited.

The court below apparently admits that its own concept of the marketing of films—by the auction block principle—is less than self-operating. It admits that prices and terms

of marketing will not find their proper levels by the free play of bids and offers. It admits that arbitration—influenced by court enforcement practices—is needed to carry into effective use the novel auction plan conceived.

Finally, "competitive bidding" cannot be competitive in a true sense where a concentration of economic power, arising from theater ownership, continues to exist. Inevitably, the market will be dominated by "unequal", or strategically superior, buyers—the theater-owning defendants.

(e) Conclusion and Summary

The touchstone of effective enforcement of the antitrust laws lies in the granting of effective remedies and adequate relief. In many of the complex industrial situations which seem to characterize modern economic life—where the infringement of the antitrust laws goes to the heart of the industrial organization in the particular market—basic changes cannot be accomplished by ordinary injunctive or "cease and desist relief".[9] This is especially so where as in the instant case the continuing threat to competition lies in the size and integration of the units involved, and their relationship to each other and the market.

If the Sherman Act is to be made effective in those cases where the fault lies with the highly integrated organization of the industry, as here, then adequate relief by the courts must be directed against such integration. There is no merit in the ceremony of finding an infringement of

[9] It has come to be widely recognized that the Department of Justice, and the courts, have had great difficulty in framing and enforcing effective decrees. Where the courts have surrendered to caution and entered decrees merely containing prohibitions against specific trade practices, subsequent difficulties have revealed that such measures are rarely successful since they do not attack the source of the evil (see 56 Yale L. J. 77, 78-81).

ants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3). It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But

it is plain that the distributor did more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] More-

[4] Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

. . . . . .

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs

over, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
Strand	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	29¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
Lafayette	Niagara Falls	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	30¢ tax excl.	22¢	25¢	none	30¢	x	25¢	x
Capitol	Cleveland, Ohio	30¢	27¢	30¢	x	30¢	x	x	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Rits	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	30¢	30¢	33¢	30¢	x	x	33¢	x
Whalley	New Haven, Conn.	30¢	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	35¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appleton, Wisc.	40¢	46¢	none	none	45¢ tax incl.	none	x	46¢ plus 9¢ tax
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Gloria or Riviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket, R. I.	40¢	40¢	x	none	x	x	x	x
Bijoux		x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's

Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 326a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered dis-

tribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the Theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724; 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's Metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven

defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by enter-

ing into price-restricting contracts is thereby created. That the combination is made up of a sum of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C. C. A. 3).

This practice of stipulating minimum admission prices in the contracts of licenses is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyright Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are

always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's

receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable re-

strictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many

of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported

cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. — (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price; for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may there-

fore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations be-

tween individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and

generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record, p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subse-

quent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he find it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Paintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472, (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383, (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre, then, unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened; not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's, testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particu-

lar run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are sold by him only to Loew's and RKO.. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record, p. 693.

Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes.

licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrange-

ments whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlaw-

ful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling.

For many years the distributor-defendants licensed their films in "blocks," or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints

of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consenting distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had

licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc. v. United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in

Federal Trade Commission v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C. J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch-Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield

Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We, however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who chose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such

right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e. g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool." See, *e. g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-

exhibitor reduces to a minimum opposition between its own and other theatres in the "pool." Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e. g.*, Plaintiffs' Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool." Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major statute in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e. g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies

its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e. g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of the interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films

for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon re-opening, Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films, Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting road-show privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and underage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent procers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The com-

petitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence is an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provisions for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a comumnity.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer

that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding sytem for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objection to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system have been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1935—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes

theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities, and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have

criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C.C.A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not

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[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112, (E. D. Pa., 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents

would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States v. Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit, Inc., v. United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	33	8.31%	9.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
Universal	49	12.34%	14.63%
Republic	(29 features (30 "Westerns"	14.86%	8.66%
Monogram	(26 features (16 "Westerns"	10.58%	7.76%
PRC	(20 features (16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that they

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[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition

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THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177	
RKO	32	
Total		209 Theatres

Total affected by the decree according to RKO's Exhibit 11 ..... 1,292 Theatres

in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States,* 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men," yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the

adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and, if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or

through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform

agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the latter case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers, or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.
HENRY W. GODDARD,
U. S. District Judge.
JOHN BRIGHT,
U. S. District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*,
Defendants.

MEMORANDUM IN RE FINDINGS AND DECREE

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure

adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

APPENDIX "C"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,
Defendants

Equity No. 87-273

Decree

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of *amici curiae* as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Picutres, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equip-

ment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation,

Twentieth Century Fox Film Corporation, and National Theatres, Inc., is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest

of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permtited in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant as its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice,

except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND
United States Circuit Judge
HENRY W. GODDARD
United States District Judge
JOHN BRIGHT
United States District Judge

United States District Court

SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES INC., et al.,
Defendants.

MEMO. ENDS

MOTION

SIMPSON THACHER & BARTLETT
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FILED
FEB 8 1947
S. D. OF N. Y.

Motions denied as to 1, 3 and 4 granted as to 2(a) and (b) by extending the time of dissolution and termination to July 1 1947. So that paragraph III (2) of the decree is modified by adding at the end thereof the following:

"The Pooling agreement by one or more defendants with others not parties to this action which violates the provisions shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the said thereof the following:

"The leases agreed to herein between a defendant and independents which violates the provision shall be terminated prior to July 1 1947.

February 3 1947 Settle order on notice

Augustus N. Hand U.S.D.J.
Harold Medina D.J.
John Bright D.J.

Page

United States v. *Reading*, 226 U. S. 324 ..... 2, 10
Westway Theatres v. *Twentieth Century-Fox*, 30 Fed. Supp. 830 7
Westway v. *Twentieth Century-Fox*, 113 F. (2d) 932 9

STATUTES

Constitution of the United States:
Fifth Amendment 2
Copyright Act of March 4, 1909 (17 U. S. C. A., Secs. 4 and 5 2
Expediting Act of February 11, 1903 (15 U. S. C., Sec. 29) 1, 2
Judicial Code, Section 238 (28 U. S. C., Sec. 345) 2
Sherman Act of July 2, 1890 (15 U. S. C., Secs. 1, 2, 4 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1352

UNITED ARTISTS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, defendant-appellant United Artists Corporation submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on December 31, 1946. A petition for appeal was filed in the District Court on February 20, 1947, and was allowed by order of the same date.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903 as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15

U. S. C., § 29), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., § 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707;

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208;

Paramount Famous Lasky Corporation v. *United States*, 282 U. S. 30;

United States v. *American Tobacco Co.*, 221 U. S. 106;

United States v. *Reading*, 226 U. S. 324.

Statutes Involved

The Sherman Act of July 2, 1890, 27 Stat. 209, as amended (15 U. S. C., §§ 1, 2, 4).

Constitution of the United States—Fifth Amendment.

The Copyright Act of March 4, 1909 (35 Stat. L. Pt. 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. L. Pt. 1, pp. 488-490) (U. S. C. A., Title 17, § 4 and § 5).

The Issues and the Rulings Below

The original complaint in this action was filed on or about the 20th day of July, 1938. An amended complaint was filed on November 14, 1940. In these complaints the Government sued eight of the principal producers and distributors of motion pictures in the United States (including appellant), claiming a violation of Sections 1 and 2 of the Sherman Anti-Trust Act and charging the defendants with having combined and conspired with each other in the production, distribution and exhibition of motion pictures in the United States. Five of the defendants

(Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation and Loew's Incorporated) are engaged in the production, distribution and exhibition of motion pictures; that is to say, in addition to producing and distributing motion pictures they own and operate respectively chains of theatres and occasionally referred to as "major" defendants.

The three other defendants (which includes appellant) (Columbia Pictures Corporation, Universal Pictures Company, Inc. and United Artists Corporation) do not own or operate theatres.

Plaintiff alleged that the illegal restraints were brought about by reason of (1) franchise agreements, under which the defendants granted exhibitor the right to exhibit pictures of more than one season's product; (2) pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties; (3) block booking, under which defendants sold a season's product in advance of production; (4) preferential run, by which defendants' theatres were favored with respect to first run exhibitions and obtained a monopoly of the playing time in the better theatres; (5) unreasonable clearance, by means of which defendants' theatres obtained more protection than was necessary in the exhibition of their pictures as a consequence of which independent theatres were relegated to an inferior and unprofitable run; (6) minimum admission prices, under which the defendants compelled independent exhibitors to keep up admission prices, thereby resulting in a favored position to the affiliated theatres. By its answer appellant denied each and every conclusory allegation of wrongdoing and each and every allegation of fact in support thereof.

While complaining of all of these practices in the industry and seeking injunction, the Government also demanded

that the five major defendants be divested of their holdings in their theatres, and that they be compelled to confine themselves in the future only to the production and distribution of motion pictures.

The first trial of this case was commenced on June 3, 1940, and lasted a week. Before any testimony was taken, however, the parties got together at the suggestion of Judge Henry Goddard, who presided, and a consent decree was finally agreed upon between the five major defendants and the Government and was filed November 20, 1940. The three minor defendants (Columbia, United Artists and Universal) refused to be a party to such consent decree. Under that consent decree the consenting defendants agreed to trade-show their pictures and to license them in blocks of no more than five. A system of arbitration was instituted under which exhibitors complaining of unreasonable clearance were given an opportunity to arbitrate that question. That decree was to be in effect for three years, after which the Government was at liberty to go on with the trial. Columbia and Universal continued to license their season's product in advance as theretofore. (United Artists, merely acting as an agency for independent producers, has never block-booked.)

At the expiration of the three-year period the Government decided to continue with the trial. It asked for and obtained an order for an Expediting Court, and Circuit Judge Augustus N. Hand, together wtih District Judges Henry Goddard and John Bright, were appointed as such court and have acted as such ever since.

On October 8, 1945, the trial of the case was resumed before the Expediting Court. It lasted until November 20, 1945. The Government abandoned any attempt to prove a monopoly in production of motion pictures. In attempting to prove the other allegations of its amended complaint the Government confined itself to the production of sta-

tistics, data, contracts and correspondence theretofore furnished to it for the most part by the defendants themselves pursuant to interrogatories. It called no witnesses whatever. There are approximately 400 exhibits in the case.

The trial having concluded on November 20, 1945, briefs were thereafter submitted by the parties in January, 1946. On July 11, 1946, the District Court handed down its opinion, in which it found each and all of the defendants to have violated Sections 1 and 2 of the Sherman Act. In effect it held that all of the usages and customs heretofore enumerated and of which the Government complained were illegal and should be restrained. The Court, however, stated that it felt that divestiture was too drastic a remedy, and it refused the Government's plea in that respect. This opinion is annexed hereto as Appendix "A".

Thereafter appellant, the Government and the other defendants submitted proposed findings and decree. Appellant submitted forty-four findings and two conclusions of law. Hearings were held by the Court on the proposed findings and decree, and on December 31, 1946, the Court made and filed its findings of fact and conclusions of law and its decree. Concurrently with the filing of the findings and decree on December 31, 1946, the Court filed a supplementary opinion, a copy of which is hereto annexed as Appendix "B". The decree substantially follows the Court's June opinion (Exhibit "A").

On January 10, 1947, appellants filed a motion pursuant to Rule 52(b) of the Rules of Civil Procedure:

1

To strike out the last sentence of paragraph 4 of Section H, and that said paragraph shall read as follows:

> "4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of

what is reasonably necessary to protect the licensee in the run granted."

2

To amend Section VII to read as follows:

"Paragraph 7 of Sect. II of this Judgment shall not become effective until July 1, 1947.

Paragraphs 8(a) and 8(c) of Sect. II of this Judgment shall not become effective until July 1, 1947, but in the event of an Appeal to the Supreme Court by any party from these Paragraphs, such Paragraphs shall not become effective until ninety (90) days after the entry of final Judgment upon the mandate of the Supreme Court."

In that month the other defendants filed various motions to amend the findings and decree. On February 3, 1947, these motions were denied in part and granted in part, as appears by the short memorandum opinions handed down by the Court and hereto annexed as Appendix "C." Appellant's motion was denied in toto.

The Questions Involved Are Substantial

The questions raised by this appeal relate to the sufficiency of the evidence upon which the Court made its findings of fact and conclusions of law to support the conclusions that the appellant United Artists Corporation violated the Sherman Act, and the propriety of the relief granted by the District Court and the power of the Court to grant such relief.

1. The first substantial question raised by this appeal involves the propriety of an injunction which deprives the appellant United Artists Corporation from granting any license for the exhibition of its motion pictures in which the minimum admission price to be charged by such license is stipulated in the license agreement.

The appellant United Artists Corporation as the copyright proprietors of its motion pictures does not at any time in its license agreement with the licensee part with title. In the case at bar no commodity is sold, no resale price is fixed. The exhibition license is in the nature of a performing right; that is, the *res* is a copyrighted motion picture. To protect the reward the distributor, the proprietor of the copyright, has stipulated with the licensee the minimum admission price to be charged for the exhibition of the copyrighted motion picture in the exhibitor's theatre. The Court has held this to be illegal, despite the fact that the undisputed evidence is that the exhibitor determined the actual admission price charged at his theatre and that such admission price did not vary with the particular picture exhibited, and no inference should have been drawn that the stipulation of a minimum admission price in the license agreement made the defendants guilty of a conspiracy to fix theatre admission prices.

The Court, in enjoining the making and performances of such licenses, has deprived the appellant of well established property rights as well as rights conferred by the Copyright Law.

Black v. *Henry G. Allen Co.*, 42 Fed. 618;
Bement v. *National Harrow Co.*, 181 U. S. 70;
U. S. v. *General Electrical Co.*, 272 U. S. 476;
Interstate Circuit, Inc., v. *U. S.*, 306 U. S. 208;
Westway Theatres v. *Twentieth Century-Fox*, 30 Fed. Supp. 830.

2. The second substantial question involved relates to the propriety of the finding of this Court on the evidence before it, that the appellant United Artists Corporation has acted in concert with the distributor defendants in the formation of a uniform system of clearances for the theatres to which it licensed its films. The Court inferred a conspiracy

among the distributor defendants from similarity of clearance granted to a given exhibitor by the various defendant exhibitors. The undisputed evidence showed that this similarity was due entirely to competitive factors rather than to any agreement or understanding amongst the distributor defendants.

3. The third substantial question involved in this appeal is the propriety of the Court's enjoining clearance which was reasonably calculated to protect the licensor's revenue and confining clearance agreements in the future to those calculated to protect the licensee in the run granted. The undisputed evidence is that the distributor has a legitimate interest of its own to protect. The Court specifically found in its Findings of Fact Nos. 77 and 78 that clearance reasonable in time and area was essential in the distribution as well as in the exhibition of motion pictures.

It was erroneous for the Court to decree that, whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden of proof shall be upon the distributor to sustain the legality thereof. This completely changes the fundamental rule of evidence that the one who alleges should have the burden of proving. There is no evidence in this case to warrant such a change in the rules of evidence by judicial fiat and such attempts by the Court to place the burden of proof upon one of the parties to a decree has been rejected by the Supreme Court (*Hartford Empire Co. v. U. S.*, 323 U. S. 386, 432).

4. The fourth substantial question involved in this appeal is the propriety of a decree enjoining the appellant United Artists Corporation from taking into consideration as one of the factors in determining to whom to license its pictures the fact that the appellant United Artists Corporation has had satisfactory relationships with such exhibitor in the past, and which deprives those old customers

of competitive advantages legitimately acquired through longstanding satisfactory business relationships.

The effect of this is to take away from the appellant United Artists Corporation, the copyright proprietor of motion pictures, the right to designate the goods it is willing to sell, and to choose its own customers, and the right of those customers to continue business relations with the appellant (*United States* v. *Colgate*, 250 U. S. 300; *Great Atlantic and Pacific Tea Co.* v. *Cream of Wheat*, 227 Fed. 46; *Westway* v. *Twentieth Century-Fox*, 113 F. (2d) 932; *Federal Trade Commission* v. *Grate*, 253 U. S. 421; *Greater N. Y. Film Rental Co.* v. *Biograph*, 203 Fed. 39).

5. The fifth substantial question involves the propriety of a decree enjoining the defendants from performing any existing franchises to which it is a party or from making any franchises in the future.

The Court erred in concluding such agreements to be illegal *per. se.* The evidence shows as to franchises that this type of licensing agreement or series of licensing agreements entered into with an exhibitor for more than one picture season covering the exhibition of pictures released by one distributor during the entire period of the agreement, insured the independent exhibitor product for his theatre, did not restrain trade, and provided the non-theatre-owning defendants additional outlets for their product.

6. The sixth substantial question involved in this appeal concerns the propriety of making regulations and restrictions with respect to the licensing of appellant's pictures by setting up what it has described as a system of competitive bidding. This regulatory system is set out in detail in paragraphs 7, 8 and 9 of Section II of the decree.

The Sherman Act provides for injunctions against the continuance of practices found unlawful; it does not author-

ize the Court to prescribe affirmative ways of doing business. This is a legislative function, not a judicial one.

United States v. *Pullman*, 50 Fed. Supp. 123, 136;
United States v. *Reading Company*, 183 Fed. 459, aff'd and md. 226 U. S. 324;
Hartford Empire Company v. *United States*, 323 U. S. 386.

The extent to which the Court's findings and judgment rest on these erroneous rulings raises substantial questions which should be reviewed by this Court. Appellant United Artists Corporation is of the belief that all the questions here raised are substantial and respectfully petitions this Court to pass on them after plenary hearing.

Respectfully submitted,

O'Brien, Driscoll & Raftery,
Counsel for United Artists Corporation,
Appellant.

T. Newman Lawler,
Of Counsel.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff*,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants*

Opinion

Before Augustus N. Hand, Circuit Judge; Henry W. Goddard and John Bright, District Judges

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

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Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New

York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New

York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign companies.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation, and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defend-

ants—Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff. The issues therefore are whether there has been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically excluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film supply, runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attemp's to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of enforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit, executed a written consent to the entry of a decree by the District Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants had violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another feature or group of features, nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation

and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which an award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses thereafter entered into by a distributor that is party to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing

agreement, or a series of licensing agreements, covering more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor to license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which, it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time of such license, and (c) in any theatre of which a company in

which the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

The three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably because of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff

did not secure the entry of a decree against the three minor defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1] The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement also known as a "blanket deal", covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position is consistent with the language of Section XXIII (d), which permits "* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties: and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that they are placed in the licenses in order to assure the distributor of a minimum revenue when it licenses upon a percentage basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2]

[2] That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses

Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C. C. A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors. Such combinations we hold to be forbidden by the Sherman Act.

The exhibits submitted in this case contain numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants

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of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's Exhibits 275-290.

[3] The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement.

and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3.) It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibitors were involved. But it is plain that the distributor did more than accede to exist-

ing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] More-

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[4] Regan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

. . . . . .

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the dis-

over, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given territory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to indpendent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[8] The exhibits used to prepare the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

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tributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[8] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126, 127, 128, 139, 365, 369. In most of the exhibits there was an indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

Theatre	City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
Sneicer	Akron, Ohio	30¢ tax excl.	27¢	30¢	30¢	x	x	30¢	x
Bailey	Buffalo, N. Y.	30¢	x	30¢	none	27¢	29¢	none	x
Liberty	Covington, Ky.	28¢ tax excl.	x	33¢ tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28¢ tax excl.	28¢	x	none	28¢	x	x	x
LaSalle	Niagara Falls	30¢ tax incl.	27¢	x	none	27¢	x	x	x
Paramount	Akron, Ohio	30¢ tax excl.	22¢	25¢	none	20¢	x	25¢	x
Capitol	Cleveland, Ohio	30¢ tax	27¢	30¢	x	30¢	x	x	x
Shaker	Cleveland, Ohio	35¢ tax excl.	x	35¢	x	35¢	x	35¢	x
Heights	Cleveland, Ohio	30¢ tax excl.	27¢ tax incl.	30¢	none	30¢	x	x	x
Senate	Detroit, Mich.	x	37¢	35¢	none	35¢	x	none	x
Rits	Baltimore, Md.	x	25¢	28¢ tax incl.	none	25¢	x	none	25¢
Vilma	Baltimore, Md.	x	25¢	28¢	none	25¢	x	none	x
Centre	Baltimore, Md.	x	30¢	33¢ tax incl.	x	30¢	x	x	30¢
Hampden	Baltimore, Md.	x	x	x	x	27¢	x	27¢	25¢
Columbia	Baltimore, Md.	x	25¢	28¢	none	25¢	x	x	25¢
Broadway	Baltimore, Md.	x	27¢	x	x	27¢	x	27¢	25¢
Apollo	Baltimore, Md.	x	25¢	x	x	27¢	x	25¢	25¢
Irvington	Baltimore, Md.	x	x	28¢	25¢	25¢	x	x	25¢
Montevista	Cincinnati, Ohio	30¢	30¢	x	33¢	x	x	30¢	x
20th Century	Cincinnati, Ohio	29¢ tax excl.	30¢	x	30¢	x	x	30¢	x
Jackson	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Esquire	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Sunset	Cincinnati, Ohio	29¢ tax excl.	x	x	x	x	x	30¢	x
Westwood	Cincinnati, Ohio	29¢ tax excl.	x	x	x.	x	x	30¢	x
Lawrence	New Haven, Conn.	27¢	27¢	33¢	27¢	27¢	x	25¢	x
Westville	New Haven, Conn.	[redacted]	30¢	33¢	none	30¢	x	30¢	x
Pequot	New Haven, Conn.	[redacted]	30¢	33¢	30¢	x	x	33¢	x
Whalley	New Haven, Conn.	[redacted]	30¢	33¢	none	30¢	x	30¢	x
Hamilton	Indianapolis, Ind.	35¢	x	35¢	35¢	45¢	x	x	x
Sunshine	Albuquerque, N. M.	none	40¢	x	42¢	40¢	30¢	x	x
Rio	Appelton, Wisc.	40¢	46¢	none	none	35¢ tax incl.	none	x	46¢ plus 0¢ tax
Rex	Beloit, Wisc.	36¢	27¢	40¢	35¢	36¢ tax incl.	35¢	x	42¢ plus 8¢ tax
Capitol	Charleston, W. Va.	x	40¢	x	40¢	x	x	x	x
Albee	Huntington, W. Va.	40¢	40¢	34¢	35¢	40¢	x	x	40¢
Reed	Alexandria, Va.	35¢	35¢	39¢ tax incl.	none	35¢	37¢	x	35¢
Rosna	Norfolk, Va.	27¢	27¢	x	x	x	x	x	x
Flynn	Burlington, Vt.	25¢	36¢	x	35¢	40¢	x	x	x
Gloria or Riviera	Charleston, S. C.	40¢	40¢	44¢	27¢	40¢	15¢	x	35¢
Stadium	Woonsocket,	40¢	40¢	x	none	x	x	x	x
Bijoux	R. I.	x	x	x	44¢	35¢	35¢	x	30¢

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e. g.*, Plaintiff's Exh. 229 (Warner and

independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States. Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres owned by a Paramount subsidiary, Balaban & Katz 369 (6). Similarly, Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox

theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified

minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum of separate

licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme to control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738 (C. C. A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyrighted Act. But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices. We do not question that the Coypright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Company—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rentals; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of the Sherman Act is not the distributors' devices for measur-

ing rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run

Among provisions common to the licensing contracts of all the distributor defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30¢ theatres, 28 days over 25¢ theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not

agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to the present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The costs of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable

protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconsciously long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7). We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to nego-

tiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet; or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to

qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, giveaways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the dis-

tributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsequent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing corporation which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before this time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All

defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural that it should remain that way; that it protects his first-run against his own sub-runs and against his competitor's sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theatres in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts

in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opinion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city, from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp.1714-15.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his com-

pany grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 (Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472 (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383 (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox,

Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

> "If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatres then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened." See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[7] In the New York area, second runs are

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[7] "Q. And some negotiations are conducted on the basis of a first-run of a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

sold by him only to Loew's and RKO. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U. S. — (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C.C.A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D.C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the

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The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record p. 693.

"Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes."

one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises

Formula deals, certain master agreements, and franchises have tendered to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor under a great disadvantage in attempting severally to

match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191, 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to cary out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which

give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling

For many years the distributor-defendants licensed their films in "blocks," or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block-booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known—Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-

shown. While this restriction in the consent decree has now ceased by time limitation, the consent distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licensor may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 670, a decree for an injunction against a contributory infringer would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not

tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be

taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C.C.A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C.J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—When dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*,

320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the licensee shall take all the pictures included in it,

or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool." See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less

than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors, but were all wholly independent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major stature in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determind by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theatres with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major

defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Approximate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees

The amended and supplemental complaint alleges that in licensing films each of the distributor- defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given

contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening. Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films. Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472; allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting roadshow privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and undertage, Plaintiff's Exhibits, 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee of licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in

order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unneccessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 percent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monop-

cly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to affect a proper degree of free competition. It is only in certain localities and not in general that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be aggregated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized.[8] In about 91 per cent of these cities there is competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above

[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus, Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of finacial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and inde-

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

pendent distributors for the exhibition of their various pictures. Record p. 1962.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112 (E. D. Pa. 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in

which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The precentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

There has however been restraint of competition in exhibition by the five major defendants through ownership of theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of

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[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS

	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Fox	33	8.31%	9.85%
Loew's	31	8.31%	8.85%
Paramount	31	7.81%	9.25%
RKO	38	9.57%	11.34%
Warner	19	4.79%	5.67%
Columbia	41	10.32%	12.24%
United Artists	16	4.04%	4.78%
	No. of Films	Percentages of Total	
		With "Westerns" included:	With "Westerns" excluded:
Universal	49	12.34%	14.63%
Republic	(29 features (30 "Westerns"	14.86%	8.66%
Monogram	(26 features (16 "Westerns"	10.58%	7.76%
PRC	(20 features (16 "Westerns"	9.07%	5.97%
Totals	397	100%	100%
	335 without "Westerns"		

such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States v. Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that

[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25

they must be terminated by a sale to, or purchase from the co-owners or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition in its tendency that it should be modified to comply with the terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought

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Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres

Total affected by the decree according to RKO's Exhibit 11 ..... 1,292 Theatres

to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit* v. *United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have

arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to theatres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition a

excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendants from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not require other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases

of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be enjoined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provisions as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Department of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.
HENRY W. GODDARD,
U. S. District Judge.
JOHN BRIGHT,
U. S. District Judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT

Southern District of New York

United States of America,

against *Plaintiff,*

Paramount Pictures, Inc., *et al.*,

Defendants.

Memorandum In Re Findings and Decree

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.
HENRY W. GODDARD,
United States District Judge.
JOHN BRIGHT,
United States District Judge.

APPENDIX "C"

MOTION OF COLUMBIA DEFENDANTS

"Motion Denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNITED ARTISTS

"Motion Denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF UNIVERSAL DEFENDANTS

"The within motion is denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U. S. C. J.
HENRY W. GODDARD D. J.
JOHN BRIGHT D. J."

MOTION OF PARAMOUNT, TWENTIETH CENTURY-FOX, LOEW, R. K. O. AND WARNER DEFENDANTS

"Motion denied as to 1, 3 and 4, granted as to 2 (a) and (b) by extending the time of dissolution and termination to

July 1, 1947. To this end, Paragraph III (2) of this decree is modified by adding at the end the following:

"The Pooling agreements by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the end the following:

"The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Settle order on Notice.

Feb. 3, 1947.

(648)

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Supreme Court of the United States

OCTOBER TERM 1947

No. 83

UNITED ARTISTS CORPORATION,

Appellant;

against

UNITED STATES OF AMERICA,

Respondent,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants-Appellants.

ON DIRECT APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON APPEAL OF APPELLANT UNITED ARTISTS CORPORATION

EDWARD C. RAFTERY,
ARTHUR F. DRISCOLL,
GEORGE A. RAFTERY,
Counsel.

O'BRIEN, DRISCOLL, RAFTERY & LAWLER,
Attorneys for United Artists Corporation.

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Section 262 30

15 U. S. C. A. 1 6
15 U. S. C. A. 2 6
15 U. S. C. A. 4 ..... 6, 30
17 U. S. C. A. 1 7
17 U. S. C. A. 5 8

United States Constitution:
Fifth Amendment 7

TEXT

Richardson on Evidence, 6th Ed., Sec. 171 33

Supreme Court of the United States

OCTOBER TERM 1947

No. 83

UNITED ARTISTS CORPORATION,

Appellant,

against

UNITED STATES OF AMERICA,

Respondent,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants-Appellants.

BRIEF ON BEHALF OF UNITED ARTISTS CORPORATION, APPELLANT

Opinions Below

The opinion of the District Court (R. 3504) is reported in 66 F. Supp. 323 and the Findings of Fact, Conclusions of Law and Decree and a supplemental opinion (R. 3659) are reported in 70 F. Supp. 53.

Jurisdiction

The jurisdiction of this Court to review by direct appeal the judgment and decree entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 U. S. C., Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C., Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

Specification of Assigned Errors To Be Urged

The appellant United Artists Corporation has specified in detail in its assignment of errors in what respect it contends that the Court below erred in making its findings of fact (Assignment of Errors 39-56; R. 3775-3779); in making the conclusions of law (Assignment of Errors 57-60; R. 3779-3781); in framing its decree (Assignment of Errors 61; 62, 63 and 64; R. 3781-3785); in not including in its findings, proposed findings by the appellant United Artists Corporation, which should have been made in order to arrive at proper conclusions of law (Assignment of Errors 1-36; R. 3768-3775); in not concluding that the appellant United Artists Corporation did not at any time, during the period involved, combine with the defendant exhibitors or any of their affiliates unreasonably to restrain interstate trade or commerce in motion picture films, to monopolize or attempt to monopolize the distribution or exhibition of motion picture films in the United States of America, and that a decree of dismissal should be entered as to the appellant United Artists Corporation (Assignment of Errors 37, 38; R. 3775).

The appellant United Artists Corporation regards the above assignment of errors as material to the issues presented in this brief.

Statement

This is an appeal (R. 3766) from a decree (R. 3694) of a statutory court in and for the Southern District of New York in a proceeding in equity (R. 3137) brought by the United States of America under Sections 1, 2 and 4 of the Sherman Anti-Trust Act to enjoin the eight appellant corporations.

Five of the appellants, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, and Loew's, Incorporated, are engaged in the production, distribution and exhibition of motion pictures. Two of the appellants, Columbia Pictures Corporation and Universal Pictures Company, Inc., are engaged in the production and distribution of motion pictures. The appellant, United Artists Corporation, is engaged solely in the distribution of motion pictures. All through the litigation the Government referred to the first five defendants (those engaged in production, distribution and exhibition) as the "Big Five", or the major defendants. Columbia, Universal and United Artists were characterized by the Government as the "Little Three", or the minor defendants.

The Government in its petition (R. 3200, subds. 5, 6 and 7 of Prayer for Relief) asked the Court to declare the integration of production and exhibition unlawful as an instrumentality of monopoly and restraint, and that the "Big Five" be directed to divest themselves of all interest and ownership in theatres. On page 3199 of the record, in three catch-all provisions of prayer, the Government asked for general relief against all the defendants. On page 3198 the Government refers to the alleged illegal contracts made by each defendant exhibitor with distributors generally.

These paragraphs of the petition, and the proof offered by the Government, clearly show that this charge of illegal practices is subordinate to the main relief the Government sought in the petition. These governmental afterthoughts are that illegal restraints were brought about by reason of (1) franchise agreements, under which the defendants granted exhibitors the right to exhibit pictures of more than one season's product; (2) pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties; (3) block booking, under which defendants sold a season's product in advance of production; (4) preferential runs, by which defendants' theatres were favored with respect to first run exhibitions and obtained a monopoly of the playing time in the better theatres; (5) unreasonable clearance, by means of which defendants' theatres obtained more protection than was necessary in the exhibition of their pictures as a consequence of which independent theatres were relegated to an inferior and unprofitable run; (6) minimum admission prices, under which the defendants compelled independent exhibitors to keep up admission prices, thereby resulting in a favored position to the affiliated theatres.

The statutory court did not order divestiture or divorcement as requested by the Government, but in effect stated that if the practices referred to in the preceding paragraph were enjoined, and the statutory court's auction block method of selling substituted, that in its opinion the abuses complained of would be eliminated.

The Government has appealed from the Decree of the statutory court and has assigned as error (pp. 3721 to 3723 inclusive) the statutory court's failure to order divorcement and divestiture; and has assigned as further error, the conclusion that competitive bidding would afford appropriate relief from the abuses complained of; in fact, has assigned as error practically every provision of the decree.

The record herein shows that there are over 18,000 motion picture theatres in the United States (R. 3684), and

that motion pictures are played in these theatres on runs. Theatres which generally exhibit motion pictures first, in a competitive area, are referred to as "first-run" theatres. Generally, these are the best theatres in the localities, either by appointments or seating capacity or location (R. 419-420, 702-703, 1510-1511, 1697-1700, 1901-1902, 2043-2044).

Theatres which follow first-run theatres in exhibition in point of time, are referred to as "subsequent run" theatres.

United Artists Corporation was formed in 1919 (R. 1406, 1407) by Mary Pickford, Charles Chaplin, Douglas Fairbanks, and D. W. Griffith, as an outlet for the distribution of feature motion pictures made by independent producers (R. 1409). It generally distributes—when it has a good year—twenty to twenty-six feature pictures, and has handled as low as four in a season (R. 1409), and at no time has it ever distributed as much as five percent of the feature pictures distributed in the United States of America by the eight different distributors (See Findings of Fact 108; R. 3679).

The Government in this case called no witnesses. Its evidence consisted exclusively of documents and data obtained from the defendants through interrogatories and demands for admission. No exhibitor testified that he had been in any way injured by any of the activities of any of the defendants.

United Artists' Corporation's position in this lawsuit is unique. It produces no pictures; neither owns nor operates any theatres; has licensed its pictures from the inception of the company, individually and separately, and, generally on separate contracts for each picture for each theatre. The Court's findings of fact as to United Artists (R. 3676; Findings of Fact 95, 96) read as follows:

> "95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

"96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre."

In addition, the defendant United Artists Corporation used an entirely different provision in its license agreements in connection with minimum admission prices (Gov. Ex. 288, R. 274), that is, a mere warranty that on the day the license agreement was signed the exhibitor was charging a certain admission price—with no agreement that he maintain that admission price for the run of the picture. Notwithstanding this varied evidence, the Court in its decree made no exception as to United Artists Corporation, but included it in all the regulatory provisions relating to distribution.

The Statutes Involved

The United States Statutes under which the case was prosecuted were the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal; * * *"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the

several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also directly involved is the Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or repro-

duced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever.

* * * * *

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;
(m) Motion pictures other than photoplays; * * *"

Summary of Argument

1. The Government did not prove a prima facie case against United Artists Corporation, and its petition should have been dismissed, either at the close of the Government's case or at the close of the whole case.

2. The uniformities from which the Statutory Court inferred conspiracy and combination, completely negate any idea of conspiracy and combination and are affirmative proof of competition.

3. The Statutory Court had no power by statute or otherwise to legislate the future manner and method of marketing motion pictures in the United States of America. II, Sections 1 to 9 inclusive, Final Decree, R. 3695 to 3698.

4. The Statutory Court erred in finding illegal the following trade practices whether indulged in or not by the defendant United Artists Corporation:

a. franchises;
b. formula deals;
c. licensing of runs including clearances;
d. clearances;
e. availabilities;
f. insertion of admission prices in license agreements.

ARGUMENT

The Statutory Court wrongly inferred combination and conspiracy from certain uniformities found in the evidence.

It is appellant's contention that the uniformities found are inevitable because of the keenness of the competition in the motion picture business. Being inevitable because of that competition, they cannot furnish the basis on which to conclude that there had been combination and conspiracy.

Further, if either an innocent or guilty inference may be drawn from the facts proven, the statutory court is legally bound to accept the innocent inference.

The Government offered no direct evidence of combination or conspiracy as to any of the distributors, and particularly as to the United Artists Corporation.

The principal uniformities relied upon were, first, that wherever *minimum admission prices* were found in any contracts, these minimum admission prices were generally the same; second, that a specific theatre would generally license the same run of exhibition from each distributor, and, third, if *clearances* were specified, the clearance with each distributor would be the same.

From these uniformities the Court inferred combination and conspiracy.

The only direct evidence offered on these matters was offered by the defendants and this evidence abundantly shows that like other businesses there are certain uniformities that will of necessity result from competition rather than from combination and conspiracy.

The fact that United Artists solely through competition accepts the standard practices of the business in order to license its pictures to exhibitors, does not prove that United Artists was in combination and conspiracy to stifle competition.

Every distributor testified that the admission prices inserted in license agreements, were the admission prices charged by the exhibitor at the time of the making of the license.

The Court so found, R. 3670, Finding 63: "The minimum admission prices included in license of each of the eight distributor defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor."

As to runs being uniform, any theatre operating in any competitive neighborhood or non-competitive neighborhood would of necessity seek the same run from each distributor. It is important to the exhibitor that a patron attending that theatre shall know that that theatre operates on the same run week after week and season after season. Uniformity proves nothing.

As to uniformity of intervals of time between runs, or clearance, a distributor is required by the exhibitor to allow the same clearance as that which exhibitor receives from the distributor's competitors; in other words, the distributor must meet competition.

If competition is met uniformity follows. The same uniformities may be found in department stores. It is a well known fact that every department store employs professional shoppers to visit competing stores so as to make sure that they are not over-selling any particular piece of merchandise.

There is nothing new or novel in uniformity resulting from competition. Examples ad infinitum of uniformities in commercial business are known to this Court. The record discloses the keenest competition between the eight distributors to license as many runs as possible in as many theatres as possible on the best terms available.

A distributor like United Artists which has no theatre outlets of its own must sell the market as it finds it.

It did not create the market. It could not create a market because as the undisputed evidence shows, during the twenty-six years of its existence the minimum number of pictures it released in one year was as small as four and the maximum approximately only twenty-five. See R. 1409; see also R. 154.

It could not with the exception of possibly two cities (New York and Los Angeles) in any year of its existence, keep one first run theatre supplied with a sufficient number of pictures to operate fifty-two weeks in any year.

It had no steady supply of motion pictures at any time. In fact, the evidence shows that one year, to-wit: 43-44, it had a first class feature for release on Labor Day and not another first class feature until January of 1944 (R. 1409).

It maintained its individual selling policy at all times, and because of its peculiar set-up, nothing could have been offered by the Government to indicate directly or indirectly that it combined or conspired with another distributor or exhibitor to violate any provision of either the Sherman or Clayton Acts (R. 1411-1414).

If uniformities resulted from licensing any United Artists picture to any exhibitor, whether run, clearance, availability, or admission price, these uniformities were the direct result of the competition that the United Artists must meet if it wishes to sell any part of the market it found for its product.

The exhibitor says, if you want to sell me you must sell me this run, this availability, this is my admission price, this is the clearance that I insist upon, this is the clearance I am able to obtain on my other licenses. You either sell me on this basis or I am not interested in your product. And a product so unimportant as United Artists Corporation (numerically) either will be shown or not shown in a particular theatre or theatres depending upon the will of the exhibitor.

If United Artists Corporation is compelled to adopt the regulations set up by the Statutory Court for the licensing of motion pictures, it cannot license its product in any theatre

1. for the same run other distributors license product, because the inevitable result would be uniformity;
2. on the same availability, result uniformity;
3. with the same clearance, result uniformity;
4. with the same provisions as to admission prices, result uniformity.

United Artists Corporation, which owns no theatres and is engaged solely in the distribution of motion pictures produced by independent producers, would be in the unfortunate position of being unable to license any of the fine pictures referred to in Mr. Lazarus' testimony (R. 1409), for exhibition in any theatres.

POINT I

A. The inclusion of a minimum admission price in exhibition license agreements does not constitute a violation of either the Sherman or Clayton Acts and is not price fixing. On the other hand it is essential in determining a fair license fee.

The licensing or distribution of motion pictures is in effect the licensing of "make-believe". No tangible, personal property is sold. In the positive print which is delivered to the exhibitor as an incident to the license there is found a successive series of photographic images that come to life on the screen. Along the edge of the positive print is a sound track. This sound track is synchronized with the photographic images. Reels of this positive print are placed in a projection booth, generally found in the rear of the theatre, and by some magic or wizardry which we cannot explain the photographic part is projected on the screen at the front of the theatre and the sound from the sound track, in synchronization with the photographic images, is broadcast from horns in back of the screen. The result is a dramatic performance, more or less entertaining, depending upon the quality of the picture. This, even in the days of silent pictures, was held to be a dramatic performance. See *Kalem* v. *Harper*, 222 U. S. 55.

The distributor of a picture is interested not only for its reward as stipulated in the license agreement, but for future business dealings with the licensee, upon the admission fees paid by the public for admission to each public performance. At page 1460 of the printed record, as well as at many other points therein, it was incontrovertibly shown that there is no sale of tangible property involved in an exhibition license agreement.

Each exhibition license agreement is in reality the right publicly to perform a dramatic composition on the screen before an audience who paid an admission to get into the

theatre to see the public performance. The print of the picture is not sold, but licensed. It is a non-assignable license, and upon completion of the limited engagement of the particular photoplay in the particular theatre, the print must be returned to the licensor.

In the price-fixing cases in which the Courts have condemned price fixing we find an entirely different set of facts.

In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, this Court laid down the rule on price fixing which has been followed right down to the present time.

At page 349 Justice Day, who delivered the unanimous opinion of the Court, in referring to the copyright statute, writes as follows:

> "What does the statute mean in granting 'the sole right of vending the same'? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject matter of copyright *after the owner had parted with the title* to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyright article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it." (Italics ours.)

In the case at bar United did not sell a copyrighted article. It retained title to the article at all times.

Paraphrasing the preceding language of the Supreme Court, the exhibitor, licensing the right to exhibit, could only publicly perform on the days specified. He could not make a sale of the article, as he never had title to the article. He could not assign the exhibition license because it was non-assignable. He could not print or publish a new edition of the copyrighted article because he had no right to do so.

The Court then goes on at page 350:

"In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of $1 per copy. The precise question, therefore, in this case is, Does the sole right to vend (named in § 4952) secure to the owner of the copyright the right, after a sale of the book to the purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case *of contract limitation,* nor license agreement controlling the subsequent sales of the book.

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, *by notice,* such as is disclosed in this case, *a limitation at which the books shall be sold at retail by future purchasers, with whom there is no privity of contract.* This conclusion is reached in view of the language of the statute read in the light of its main purpose to secure the right of multiplying copies of the work,—a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and *at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose*

so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." (Italics ours.)

See also:

Scribner v. *Straus*, 210 U. S., p. 352.

Government counsel below cited a number of tying-in cases involving the patent law which clearly have no application to the case at bar.

It would seem that a condition precedent to illegality, in a price-fixing situation, is that the vendor must exercise the right to vend and part with title.

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, a divided Court condemned the method used by the Victor Talking Machine Co. to control resales. In referring to the deceptive notice that appeared on the talking machine the Court, at page 500, says:

"It thus becomes clear that this 'License Notice' is not intended as a security for any further payment upon the machine for *the full price called a 'royalty' was paid before the Plaintiff parted with the possession of it* • • •

"Courts would be perversely blind if they failed to look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price and yet to place restraints upon its further alienation such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

Again in the case at bar the same prints are leased time and again. The evidence indicates that 300 prints served 12,000 customers, so at no time does any one customer pay the cost of the production of the device that is licensed—

that is, the cost of the negative from which the print is taken, plus the cost of each particular print. The customer merely pays a license fee for the right to perform, and the license fee is based upon the admission price the particular theatre charges.

Judge Chestnut in the case of *Westway Theatres* v. *20th Century Fox*, 30 Fed. Supp. 830, in effect says:

> "The legal effect of a copyright is to create in the owner an exclusive property right with the incidental power to lease or license the use thereof by others *on stipulated terms.*" (Italics ours.)

In *Interstate Circuit* v. *United States*, 306 U. S. 208, there were two opinions. There was a prevailing opinion by Justice Stone, in which four of his colleagues concurred, and a dissenting opinion by Justice Roberts, in which two of his colleagues concurred, Justice Frankfurter taking no part in the case.

We will confine our discussion to the prevailing opinion:

At page 219 Justice Stone says:

> "The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of

these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry'; and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

"The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying of the agreements into effect with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor, that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act."

At page 222 Justice Stone continues:

"There was a risk, too, that without agreement diversity of action would follow. Compliance with the proposals involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. *While as a result of independent negotiations either of the two restrictions without the other could have been put in effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate,* the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate." (Italics ours.)

In other words, the majority of the Court affirmatively says that one distributor, acting independently, could have placed either of the restrictions in any license agreement it made with any exhibitor.

In discussing the rights granted to a copyright owner, Justice Stone at page 228 states:

> "We have no occasion now to pass upon these or related questions. *Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor.* Interstate was able to acquire the control and impose its will by force of its monopoly of first-run theatres in the principal cities of Texas and the threat to use its monopoly position against copyright owners who did not yield to its demands. The purpose and ultimate effect of each of its contracts with the distributors was to restrain its competitors in the theatre business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.
>
> "The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season,

competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of the terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals." (Italics ours.)

It will be seen therefore that the Supreme Court in the *Interstate* case did not, as the Government contends, take away the right of each distributor, acting separately, to insert a minimum admission price.

As to the forms of the contracts put in evidence in this case, Circuit Judge Hand compared them to the standard provisions of an insurance contract. As a matter of fact, there are many differences between the various forms. The essential details are written in blank spaces in the contract, i.e., the picture or pictures licensed, the license fees—

whether percentage, guarantee against percentage, guarantee against overage or flat rental. These are clearly matters of negotiation. Likewise, the specific run or runs licensed, the various clearances, if any, the minimum admission prices to be charged for the specific engagement, etc. All these are typed either in the blank spaces in the printed form or on riders attached to the form.

The printed provisions of the agreement might be described as administrative provisions or mechanical provisions. For instance, manner of delivery of the print, what happens if the print is damaged or destroyed, the return of the print, requirements as to advertising the photoplay in the manner directed by the distributor. All these provisions are administrative or mechanical and have never been condemned in any litigation tried either by the Government or by private parties.

Now, as to United Artists:

1) The Government has put in evidence two forms of exhibition license agreements used by United Artists (G. Exs. 287-288, R. 274).

2) It has put in evidence an agreement made with Publix Theatres Corporation which expired in 1933.

3) It has put in evidence several hundred contracts without any supporting evidence of any kind or character that any of these contracts affected a competitor adversely, or the public adversely, or that any of them, in any way, violates either the Sherman Act or the Clayton Act.

As pointed out in the early part of this division of the argument, the United Artists Corporation depends upon its reward from each license from each theatre, whether these licenses be measured by a percentage of the gross receipts or a flat rental,—which are the two ordinary methods of doing business. As to the first manner, to wit:

percentage, a distributor and an exhibitor sit down and negotiate as to the amount of percentage the distributor will receive and the exhibitor will pay for the license granted. The admission price to be charged is not only an important element in the negotiation but is absolutely essential in determining the percentage to be charged. For instance, if a theatre will charge 50¢ admission fee for each performance that a particular picture is to be exhibited, then 35% of the gross receipts might be the negotiated satisfactory percentage that the distributor would accept. On the contrary, if a theatre charged 10¢, 35% would be wholly inacceptable to the distributor.

The Statutory Court in its opinion, page 3533 of the record, in discussing clearance, says:

1. "The admission price, as set by the exhibitors, of the theatres involved, * * * *"

The Court would have been equally accurate if it said that in determining the percentage to be charged for a percentage engagement, the admission price is the all-important factor.

Likewise, in determining flat rentals, the admission price is equally important. A salesman or a distributor when he agrees to a flat rental clearly has percentage in mind. He bases that flat rental upon the ability of that theatre to gross, and to gross at the present admission price, and he seeks to get the highest flat rental he can secure, always keeping in mind the gross of that particular theatre.

The Statutory Court has laid down many other rules for the determination of clearance, commencing on page 3533 of the record. If these rules of negotiation for clearance are sound the same rules must apply to either the percentage or the flat rental to be charged for each license.

Resuming the discussion of the Statutory Court's erroneous finding on price fixing we now cite *Bement* v. *Harrow*, 186 U. S. 70, *General Electric* v. *United States*, 272 U. S. 476, and *United States* v. *U. S. Gypsum Co.*, 67 Fed. Supp.

397. In *United States* v. *General Electric Company,* the Court held, among other things:

a. "Conveying less than title to the patent, or part of it, a patentee may grant a license to make, use, and vend articles under the specifications of the patent, for any royalty, or upon any condition, the performance of which is reasonably within the reward which the patentee by grant of the patent is entitled to secure."

b. "After a patentee sells the patented article he can exercise no further control over what the purchaser may wish to do with the article."

c. "A patentee in granting a license to another to make and sell the patented article may limit the method of sale and the price, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."

This case is cited with approval in *United States* v. *United States Gypsum Co.* (supra).

These authorities are in direct line with the argument advanced that there is no sale of a tangible or intangible article. In this case, there is a mere license of a performing right and a regulation of the price to be charged the public to see the performance.

As pointed out in the argument on uniformities, the admission price inserted is the admission price generally charged by the exhibitor (f.f. 63)—3670R—and the price fixed for exhibition, whether flat rental or percentage, is based upon the admission price.

The Statutory Court in its decree in completely eliminating the right of the distributor to insert admission prices in its contracts, went much further than its opinion. In its opinion it found conspiracy from the uniformities above referred to, notwithstanding its own finding of fact that the admission prices generally were those charged by the exhibitor at the time of the making of the license. It completely legislated this right to insert admission prices from all contracts made by United Artists Corporation for

future licensing of its product, and by so doing overruled or disregarded *United States* v. *Interstate*, 306 U. S. 208, which expressly held that the owner of the copyright had this particular right in connection with the use of his copyrighted property.

B. Road shows.

During the past thirty years a limited number of motion pictures starting with the "Birth of a Nation" have been "road-showed" as the term is theatrically understood (R. 3660). This generally means that the pictures were exhibited in quite the same manner as the legitimate theatre is operated, that is, advanced admission prices ($2, for the evening performances generally), reserved seats, and generally only two or three shows in a day.

Before the Statutory Court an effort was made to exempt road shows from the provisions of the decree.

The Statutory Court completely ignored this economic necessity in its decree and made no provision for road shows. This is a complete disregard of the property rights of the producer of this type of picture. These pictures are produced at terrific cost; there can be no violation of the Sherman Act or interference with interstate commerce in any way by this type of exhibition.

Irrespective of the other conclusions reached by the Statutory Court, it should have made some provision to take care of this type of exhibition.

POINT II

The Statutory Court erred in including in its decree, subdivisions 7, 8 and 9 of II, that is, in setting up a prescribed manner and method which completely regulates the licensing of motion pictures for exhibition in theatres in the United States, which system completely disregards the rights of the owner of the copyright of each motion picture involved.

A feature motion picture is a copyrighted work. In the case of the United Artists Corporation, these feature motion pictures are produced by independent producers who use their own funds to finance production, then enter into a license agreement with the United Artists Corporation, granting the United Artists Corporation a percentage of the gross receipts to distribute said motion pictures to theatres in the United States of America and elsewhere (R. 1409).

Certain restrictive provisions are contained in the agreement between the producer and United Artists Corporation. For instance, each motion picture must be licensed separately and apart from the motion pictures of other producers (R. 1411).

Secondly, the producer retains the right to appoint a representative at the home office of the United Artists Corporation in New York City, for the purpose of approving or rejecting each separate license agreement for the exhibition of said motion picture. The pertinent excerpts of these distribution license agreements were introduced in evidence before the Statutory Court and may be found in the record, Volume 3, pages 1411 to 1414 inclusive. Since the foundation of the company, for the most part, the United Artists Corporation has licensed its pictures individually on separate contracts—one picture, one theatre.

The Statutory Court, however, is not satisfied to allow the United Artists Corporation to continue doing business in this manner.

The Court says, in subdivision 7, that United Artists is enjoined and restrained from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee taking one or more other features. There is no evidence in the record that United Artists Corporation ever committed such an act.

Let us assume for the sake of argument that it did commit such an act. Where is there any illegality? United Artists Corporation may have a half dozen feature motion pictures ready for showing in a given theatre.

It controls the selling or licensing of the public performing rights of these six attractions. The Court, by injecting this provision, says in effect that the licensee or exhibitor or theatre owner shall have the right to say to the United Artists, "You have offered me six motion pictures, I will only license one."

In other words, the Court by decree destroys the right of the United Artists to select its own customer and license or not license, as in its judgment it deems best, for the best interest of its producers, and completely turns over to the exhibitor the entire negotiating advantage.

The Court in the same paragraph grants the exhibitor the right to reject twenty percent of any features licensed which were not "trade shown" prior to the granting of the license. In other words, if United Artists Corporation sat down with an exhibitor and, separately and independently, negotiated a license agreement which included five motion pictures, the minds of both parties meeting on terms,—notwithstanding the completed agreement, the exhibitor could eliminate from such license agreement at least one of the five motion pictures and neither play the picture nor pay the license fee. It is submitted that this is judicial legislation and completely destructive of the rights of free trade and enterprise.

Paragraph 8 of subdivision 2, page 3696 of the transcript of record, is even worse. This is the so-called competitive bidding provision. Under what law has the Statutory Court any right to single out one industry, in fact one branch of an industry, to wit, distribution of motion pictures, and in effect say you may own the distribution rights of these motion pictures but we are going to tell you exactly how you are going to license them in distribution—not how you must *not* license them where a law violation has been found—but how you must license them. You may no longer select your own customers, deal or not deal as you see fit—from now on pictures will be licensed only on the auction block, and at that on a very frail and contradictory auction block.

Paragraphs a, b, c, d and e of subdivision 8 of Section 2 are mandatory in form and a "must" to be followed.

These paragraphs are full of inconsistencies. For example, consider paragraphs a and c. If United Artists Corporation should attempt to license its pictures to an exhibitor in any particular area claimed to be competitive, any other exhibitor may invoke the provisions of subdivision c which does not include simultaneous exhibitions and immediately it is impossible to go forward under subdivision a.

Under c, United Artists Corporation must establish what in its opinion are competitive areas, and if there be any clearance provisions in any license, made on the auction block under subdivision c, the distributor then must meet the tests of clearance in subdivision 4, and be prepared to sustain the burden of proof as to the legality of any clearance granted in any license agreement, even though subdivision 4 says only such clearance as the exhibitor reasonably needs shall be granted on any run.

It is respectfully submitted that subdivision 8 and its various sub-subdivisions are far more drastic examples of judicial legislation even than 7. There is nothing in the Sherman Act or the Clayton Act, or any reported decisions, that bestows on any Court of this land the power minutely

to prescribe the entire manner and method that a company, operating in so-called free trade and enterprise, shall use in order to engage in competitive business.

The distributors of motion pictures have been singled out from all industry to test the selling theories of this Statutory Court.

This Court may take judicial notice of such famous brand names as Hickey Freeman clothes for men, Johnson Murphy shoes, Chevrolet automobiles, and many others which sell through exclusive channels.

Hickey Freeman may be found generally in only one clothing store in each competitive area. Likewise Johnson Murphy shoes.

Chevrolet cars are generally handled by only one dealer in each competitive area.

Examples, ad infinitum, of exclusive handling are within the knowledge of every member of this learned Court. This is made possible because the manufacturer or distributor has the right to select his own channel of merchandising. There should be no different rule in the licensing of motion pictures. The law is well settled on this point.

The Sherman Act provides against the continuance of practices found unlawful, and does not authorize the Court to prescribe affirmative ways of doing business. This is a legislative function, not a judicial one.

Hartford Empire Co. v. *U. S.*, 323 U. S. 386. The Court in this case was faced with the difficult problem of awarding an injunction which would insure the desired need without imposing punishment or other obligations for past misconduct. The problem was especially difficult in view of the status and relationship of the parties. Mr. Justice Roberts, who delivered the opinion of the Court, at page 409, stated:

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by

violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties (Standard Oil Co. v. United States, 221 U. S. 1, 77, 78, 55 L. ed. 619, 652, 653, 31 S. Ct. 502, 34 LRA (NS) 834, Ann Cas. 1912D 734) in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed (Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461, 84 L. ed. 852, 863, 60 S. Ct. 618) or that the court should not, in framing its decree, resolve all doubts in favor of the Government (Local 167, I. B. T. v. United States, 291 U. S. 293, 299, 78 L. ed. 804, 809, 54 S. Ct. 396) or may not prohibit acts which in another setting would be unobjectionable. *But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,'* as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt;' enjoin 'all possible breaches of the law;' (Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 S. Ct. 276; National Labor Relations Bd. v. Express Pub. Co., 312 U. S. 426, 433, 435, 436, 85 L. ed. 930, 935-937, 61 S. Ct. 693) or cause the defendants hereafter not 'to be under the protection of the law of the land.' (New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 S. Ct. 272; Standard Oil Co. v. United States, supra (221 U. S. 80), 55 L. ed. 653, 31 S. Ct. 502, 34 L. R. A. (NS) 834, Ann. Cas. 1912D 734.) • • •." (Italics ours.)

In the case of *U. S.* v. *Pullman*, 50 Fed. Supp. 123, the plaintiff suggested that in the case of a finding of violation, the question concerning relief might be referred to a Master, or one of the regulatory commissions, to hold hearings at which experts, governmental or private, could state their views regarding proper organization of the business of passenger transportation in the United States.

In respect to this suggestion, Mr. Justice Goodrich at page 136 in his opinion, stated:

> "The court is not inclined to view favorably so ambitious a program. It does not regard itself as a legislative committee nor a regulatory commission."
>
> "The object to be sought for the convenience of the parties as well as the court is a decree which will omit the necessary elements of suitable equitable relief and require a minimum of supervision by the Court."

Section 4 of the Sherman Act confers jurisdiction on District Courts "to prevent and restrain violations of this act". This jurisdiction is to be exercised according to the general principles which govern the granting of equitable relief. It confers no new or different power than those traditionally exercised by courts of equity. Section 262 of the Judicial Code has not enlarged those powers, merely granting the right to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

DeBeers Consolidated Mines v. *United States*, 89 L. Ed. 1566, 325 U. S. 212.

Appalachian Coal Co. v. *United States*, 77 L. Ed. 825, 288 U. S. 344.

The function of a court of equity has traditionally been to enjoin, but has never been to prescribe methods for the conduct of business, which is solely within the province of the legislature. The court is not a legislative committee nor a regulatory commission.

U. S. v. *Pullman*, 50 Fed. Supp. 123.

An injunction against unlawful trade practices was contemplated by Congress when it passed the Sherman Act,—jurisdiction was given to the Federal Court to enjoin violations. There are liberal provisions made to enforce these

anti-monopoly statutes. "But in no instance has it indicated an intention to interfere with ordinary commercial practices". Choosing theatres and arranging a selection of their customers may be considered the most essential factor in the maintenance of the highest standards of service.

When a decree has been handed down enjoining unfair trade practices the courts will assume that the defendants will comply with the decree. When it is shown to a court that there is not compliance with the decree, then further orders may issue.

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707.

United States v. *Univis Lens Co.*, 41 Fed. Supp. 258, 316 U. S. 241.

In *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U. S. 565, 573, the court holds forth at length on the right of a manufacturer to deal with persons of his own choosing, backing up this statement with continuous citations. This policy is referred to with approval in later cases, such as the *Bausch & Lomb* case (supra).

It would appear that a decree framed to preclude the revival of unlawful practices had been enlarged beyond the old and fixed doctrine of the courts as expressed in the *Hartford-Empire* case (supra).

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, in a different class than other people as the government has suggested."
>
> *Hartford Empire Co.* v. *United States*, 323 U. S. 386 at 409.

In two instances decrees were noted which regulated business practices. Both these instances are easily distinguishable from the instant decree. In *U. S.* v. *Crescent*

Amusement, 323 U. S. 173, the coercion of theatre owners was enjoined and further theatre purchases forbidden unless an affirmative showing could be made that there was no restraint on competition. This is truly a preventative measure against further infringements, and not the establishment of an entirely new system of business.

In the case of *Associated Press* v. *United States*, 326 U. S. 1, after enjoining the enforcement of offending by-laws, the court pointed out that the decree should not be considered as enjoining new by-laws which did not reinstate the practices which had been forbidden.

In formulating this drastic theory of compulsory licensing, it is interesting to note there is not one word, sentence or paragraph in the Statutory Court's mandates that requires an exhibitor or licensee to license the exhibition of any picture that is offered by a distributor. The entire compulsion is on the side of the licensor or seller, with no compulsion of any kind on the licensee or exhibitor or customer. It is respectfully submitted that the provisions of 7 and 8 violate every known principle of American freedom, and have no precedent either in law or fact which even tends to justify their inclusion in the decree of the United States District Court.

Subdivison 9 is equally objectionable for all of the reasons set forth as to 7 and 8.

The decree of the Statutory Court provides that each of the defendants is enjoined "* * * 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

In the first sentence of this paragraph 4, the Statutory Court enjoins United Artists (and every other distributor) from granting or enforcing any clearance in excess of what is reasonably necessary to protect the licensee in the run

granted. No provision is made to protect the licensor in the reward it expects from the license granted. Notwithstanding this failure to give the licensor what it is clearly entitled to under its copyright, the Court then shifts the burden of proof to the licensor or distributor to sustain the legality of any clearance it may grant to any exhibitor. This is contrary to every rule of procedure in American jurisprudence. See Richardson on Evidence, Sixth Edition, Section 171. When clearance is challenged, it should be the duty of the challenger to prove the illegality of the clearance. He who asserts a proposition should have the burden of establishing it. There are many statements of the rule. See *Reliance Life Insurance Company* v. *Burgess*, 112 F. (2d) 234; cert. denied, 311 U. S. 699, rehearing denied, 311 U. S. 730; *Cowen Co. v. Houck Mfg. Co.*, 249 F. 285; *Kohlsaat* v. *Parkersburg & Marietta Sand Co.*, 266 F. 283; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237; *Cochran* v. *Pittsburgh & L. E. R. Company*, 31 F. (2d) 769; *Barnett* v. *Kunkel*, 259 Fed. 394, 401.

It is clear that the Statutory Court, by its decree, is attempting to upset one of the most firmly imbedded principles of procedure. The provisions in the decree shifting the burden are clearly contrary to the principles of law as enumerated by the authorities.

POINT III

The Statutory Court erred

(a) In holding franchises illegal per se (R. 3696; subd. 5 of II of Decree);

(b) In directing United Artists to disregard the rights of its old customers (R. 3697), as well as the right to select its own customers;

(c) In enjoining clearance which was reasonably calculated to protect United Artists' revenue;

(d) In finding that United Artists acted in concert with distributor defendants in the formation of a uniform system of clearances;

(e) In finding that United Artists Corporation in any manner violated any of the provisions of the Sherman or Clayton Acts.

(a) At the time of the trial, United Artists Corporation had no franchises. (Government counsel intimated that United Artists had a franchise with Paramount which had expired in 1933, and did in fact offer it as an exhibit.) Notwithstanding the fact that it has no franchises, United Artists will not subscribe to the proposition that a franchise is illegal per se. Changing times and changing conditions might require United Artists Corporation to change its entire method of doing business and it may desire, separately and independently, to enter into franchise agreements with theatres.

What is a franchise? It is a contract with an exhibitor that extends over a period of more than one year, generally either two years or three years. Mr. Scully, testifying for Universal, in effect showed that his company made franchises for the most part with independent exhibitors—"727 with independent exhibitors as against 43 with affiliated exhibitors" (R. 1455-1484, Ex. U-2).

In all the patent cases, the exclusive right to use a patent has never been held invalid where the patent license did not exceed the life of the patent. On the contrary, the right to make exclusive grants for periods of years has been recognized in all licenses as a matter of law. Why is it illegal for a distributor, which controls less than five percent of the feature pictures made, to make a contract for two years rather than for one year?

In the cases involving the licensing of the right to vend and dispense Coca-Cola and other soft drinks, franchises for long periods of years have been held legal and enforceable. Even in instances where the franchise was indefinite as to period, it was held as non-cancellable by the licensor.

Coca-Cola Bottling v. *Coca Cola*, 269 Fed. 796.

No evidence was produced by the Government to show that any franchise put in evidence in any way tended to create a monopoly in any exhibitor licensee. The only inference that may be drawn from Scully's testimony is that franchises tended to stimulate and create competition. It insured independent exhibitors product for their theatres and provided the non-theatre owning distributor with assured outlets for its product. The finding of the Statutory Court was a gratuitous finding, wholly unsupported by the evidence, and contrary to all existing law, and an absolute restriction of free American trade and enterprise.

(b) United Artists has been deprived in this decree of the right to select its own customers, and must completely disregard the rights of its old customers.

A distributor of motion pictures may select the customer with whom it wishes to deal for any reason or no reason. The customer likewise has the concomitant and correlative right and may exercise its full economic power in connection with such choice.

Greater N. Y. Film Rental v. *Biograph*, 203 Fed. 39.
Federal Trade Commission v. *Paramount*, 57 F. (2d) 152, 156.
Rembush v. *M. P. P. D. A.*, unreported, S. D. N. Y., 1934.
Federal Trade Commission v. *Curtis*, 260 U. S. 568.
Federal Trade Commission v. *Raymond*, 263 U. S. 565.
Grenada Lumber Co. v. *Miss.*, 217 U. S. 433.
Locker v. *American Tobacco*, 218 Fed. 447.
United States v. *Colgate*, 250 U. S. 300.
Great A. & P. Tea Co. v. *Cream of Wheat*, 227 Fed. 46.
Rolsky v. *Fox Midwest, etc.*, unreported, C. C. H. Fed. Trade Reg. Serv. p. 6442 (1936), 93 F. (2d) 1014 (memo.).
Westway v. *20th Century Fox*, 30 F. Supp. 830, aff'd 113 F. (2d) 932.
Gary Theatre Co. v. *Columbia Pictures Corp.* (C. C. A. 7th, 1941), 120 F. (2d) 891.
Hood Rubber v. *U. S. Rubber*, 229 Fed. 583.
Green v. *Victor*, 24 F. (2d) 378.
Virtue v. *Creamery*, 227 U. S. 8.
Federal Trade Commission v. *Gratz*, 253 U. S. 421.
Johnson v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53.
Midwest Theatres Co. v. *Co-operative Theatres of Michigan, Inc.*, 43 Fed. Supp. 216.

This Court has explicitly and expressly recognized the right of a seller "to select his own customer" which the plaintiff now asks this Court to declare illegal. It has in so many words recognized the right of a buyer, in effect, to say to the seller "Either you sell to my competitor or you sell to me, but not both."

> "He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Miss.*, 217 U. S. 433, 440 * * *. Or he may stop dealing with a wholesaler who he thinks is acting

unfairly in trying to undermine his trade. *Eastern States Retail Lumber Dealers' Asso.* v. *United States*, supra, p. 614; *United States* v. *Colgate & Co.*, supra, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain."

Federal Trade Commission v. *Raymond Co.*, 263 U. S., p. 573.

See also:

U. S. v. *Colgate*, 250 U. S. 300.
Moore v. *N. Y. Cotton Exchange*, 270 U. S. 593, 605.

This is merely the identical principle applied to the converse state of facts in *Federal Trade Commission* v. *Paramount*, 57 F. (2d) 152, in which the Circuit Court of Appeals, Second Circuit, held that the presentation of the alternative of "all or nothing" imposed no restraint upon the freedom of choice.

"A distributor of films * * * has the right to select his own customers and to sell * * * or to refuse to sell at all to any particular person for reasons of his own." (Citing cases at p. 156.)

In *Midwest Theatres Co.* v. *Co-operative Theatres of Michigan, Inc.*, Judge Picard said at page 221:

"On the contrary, our courts have held many times that the distributor may sell to whom he desires and that he may provide for clearance or even not to sell to any other competing exhibitor at all until after the clearance period."

Westway Theatre, Inc. v. *Twentieth Century Fox Film Corporation*, 30 Fed. Supp. 830.

Arthur v. *Kraft-Phenix Cheese Corporation*, 26 Fed. Supp. 824.

Gary Theatre Company v. *Columbia Pictures Corporation et al.*, 120 F. 2d 891.

United States v. *Colgate & Co.*, 250 U. S. 300, 307.

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441.

Great Atlantic and Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46, 250 U. S. 300, 224 Fed. 566.

See also:

Baran v. *Goodyear, etc.*, 256 Fed. 571.

Becton, Dickinson, etc. v. *Eisele & Co.*, 86 F. (2d) 267.

Bement v. *National Harrow Co.*, 186 U. S. 70.

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436.

The Sherman Act was not designed to reduce every competitor to equality. The purpose of the Sherman Act is simply to eliminate interstate *"restraints of trade"* and nothing more.

> "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair. Fed. Trade Comm. v. Curtis Pub. Co., 260 U. S. 568, 43 S. Ct. 210, 213, 67 L. Ed. 408; Fed. Trade Comm. v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746. From the tables referred to above, it is apparent that the respondent did not have a monopoly in the film industry" (*Fed. Trade Comm.* v. *Paramount*, supra, at p. 157).
>
> * * * * * * *
>
> "The national will has not declared against elimination of competitors when they fail from their inherent industrial weakness" (*U. S.* v. *Corn Products, etc.*, 234 Fed. at 1015).

In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat*, 227 Fed. 46 (C. C. A. 2nd, 1913), the Circuit Court of Appeals for the Second Circuit said at page 49:

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet reached the stage where the selection of a trader's customers is made for him by the government.*" (Italics ours.)

And that same court in *Green* v. *Victor Talking Machine Co.*, 24 F. (2d) 378 (C. C. A. 2nd, 1928), reaffirmed this doctrine in the following language at page 382:

> "But no case has decided, so far as we are aware, that the refusal of one individual to deal with another requires justification. A private trader is privileged to exercise his own pleasure as to parties with whom he will deal. *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, 573. * * * *Great Atlantic & Pac. Tea Co.* v. *Cream of Wheat Co.* (D. C.), 224 F. 566, 574, aff'd 227 F. 46, 48 (C. C. A. 2). To make his motive in exercising this privilege the subject of judicial inquiry would be a step beyond what the courts have yet done, or what we think they can wisely do in the present stage of our economic order."

In *Rolsky* v. *Fox Widwest Theatres, Inc.* (W. D. Mo., 1936), C. C. H. Fed. Trade Reg. Serv., p. 6442 (1936), the Court said:

> "Now, if we have, for example, three distributors, 'A', 'B' and 'C', and two exhibitors, 'X' and 'Y', and the business of 'X' is ten times as valuable to the distributors, 'A', 'B' and 'C', as the business of 'Y', and if 'X' demands of 'A', 'B' and 'C' a certain type of contract different from that which 'Y' demands, and if

the type of contract which 'X' demands is the type which generally is used, and which generally is looked upon by distributors as more advantageous than the type that 'Y' demands, if, with all of those facts and circumstances, 'A', 'B' and 'C' do enter into contracts with exhibitors 'X' and 'Y' of the type which 'X' demands, rather than of the type which 'Y' demands, the explanation of that fact, the sensible explanation of it, the reasonable explanation, *the plausible explanation of it that they have done so because the more important customer has demanded it of each of them, because it is more advantageous to them, from a pecuniary standpoint,* rather than that they have entered into an agreement with each other that they will enter into that type of contract with exhibitor customers. The explanation which is consistent with innocence and with that which is lawful is so much more reasonable than the explanation which imputes illegality to the producers, that apart from any presumption in favor of lawful conduct, the first explanation should be accepted. * * *"

"3. During the argument of the case, what I think was a new theory was advanced by learned counsel for the plaintiffs. I do not know that it was a theory that was new in his mind just at the time it was advanced by him. I do not think it was present in his mind when the bill was drawn. Certainly it is not clearly presented by the allegations contained in the bill, although they may be sufficient to embrace it. That new theory is this: Even if no concert of action has been proved against the distributor defendants, no conspiracy, nevertheless, it has been proved that each of the distributor defendants entered into a contract with the defendant, Fox Midwest Theatres, Inc., by which that defendant was given a priority of run as to pictures sold it over some, at least, of the plaintiff exhibitors. The theory is that a contract of that character violates the Sherman Anti-Trust Statute, provided it has the effect of restraining interstate commerce. I do not think the theory is sound.

"The evidence in the case is that moving picture films are copyrighted. When a given distributor sells or licenses a given picture to a given exhibitor it does that by virtue of the ownership of the copyright and

of the rights conferred by law on him who owns a copyright. I think there cannot be any doubt whatever but that a distributor of motion pictures, owning a copyright upon a given picture may sell to an exhibitor in a given area the exclusive right to exhibit that picture, either for a short period or for a long period, provided it is not longer than the life of the copyright, without regard to whether that exhibitor is one who charges the same or a different admission price from that which is charged by another exhibitor or other exhibitors in the same area."

The selection of one buyer and the exclusion of another, even though it severely handicaps the excluded buyer in his competitive position, does not make such selection a violation of the Sherman Act.

In *Arthur* v. *Kraft-Phenix, etc.* (supra) plaintiff alleged that defendant terminated its position as distributor of Kraft-Phenix products, because it refused to obey the dictates of the defendant and buy out a competitor distributor. But this did not save the complaint from dismissal.

In *Green* v. *Victor, etc.* (supra) plaintiff alleged that the defendant ceased to do business with her corporation in order to coerce her into selling out her stock.

In the *Raymond* case (supra) the defendant was alleged to have committed acts and practices, the purpose and effect of which was to cut off the supplies purchased by a competitor from the T. A. Snider Preserve Company and thereby stifle and prevent competition of such competitor and to interfere with the right of the competitor to deal freely with the Snider Company. The Raymond Company used its buying power by threatening to withdraw its trade from the Snider Company in order to coerce the Snider Company into refraining from selling Snider Company products to a competitor. "In threatening to withdraw its trade from the Snider Company" the Raymond Company "exercised its lawful right" (p. 574). We assume that the Snider Company in succumbing or submitting to the "buying power" of the Raymond Company did not violate the Sherman Act.

In *Locker* v. *American Tobacco Co.* (supra) the complainant complained because the defendant tobacco companies had placed all their jobbing business for New York City with one jobber, thereby excluding plaintiff from his former market and working apparently irreparable harm to him. The Circuit Court of Appeals (2nd Cir.) found nothing illegal about this, declaring at page 450:

> "The laws of trade are not wholly altruistic, they may often be hard and selfish, but it is no part of the duty of courts to attempt to enforce the precepts of the decalogue. In the struggles engendered by fierce competition, losses must occur and injustice may be done, but this is frequently inevitable and cannot be prevented so long as the parties keep within the law."

Examples from the above cited cases could be multplied to demonstrate that the right to exclude is not diminished because the excluded party is thereby injured. This may be a consequence of the legal use of a legal right.

So long as we still have private property, and so long as the motion picture industry is not a public utility required by law to sell to everyone through a Public Service Commission which will grade pictures and fix prices, select dates, allocate preferred playing time, establish clearances, etc., etc., etc., it is the right of United Artists, acting separately and independently, to sell its pictures to the customer it considers will return to it the largest revenue.

(c) The right of United Artists Corporation to grant clearance in an exhibition agreement is legal.

Westway Theatres, Inc. v. *20th Century Fox,* 30 Fed. Supp. 830, aff'd 113 Fed. (2d) 932.

Gary Theatres Co. v. *Columbia,* 120 Fed. (2d) 891.

Peoples' Theatre Co. v. *Minneapolis Film Board of Trade,* U. S. District Court, Minnesota, not officially reported.

Shubert v. *Metro,* U. S. District Court, Minnesota, not officially reported.

The statutory court in particular recognized this principle, but in Section 4 of II of the decree it whittled this right to such a degree that the distributor cannot grant such clearance as the distributor needed for the protection of the distributor's revenue, but limits the grant to such as will reasonably protect the exhibitor. This is expressly contrary to the finding of this Court in *Interstate* v. *United States* (supra). The copyright owner, producer or distributor is entitled to place the necessary restrictions to protect its reward under the *Interstate* case, and not limited to what the exhibitor needs for its reward. This argument has been fully developed heretofore in the brief in discussing the other assignments of error.

POINT IV

The decree of the Statutory Court instead of correcting alleged wrongs will ultimately destroy this industry.

The Statutory Court refused the Government's prayer that the major defendants be required to divest themselves of their theatres which, as heretofore pointed out, was the principal demand of the Government in its Bill of Complaint and on the trial.

Since this decree was entered, the eight distributing defendants have been deluged with a flood of litigation by exhibitors claiming to have been aggrieved because (a) the distributors had previously inserted minimum admission prices in their license contracts, or (b) had licensed exhibition rights on specific runs or availabilities, or (c) had granted clearances between runs, or (d) had made franchise agreements, or (e) had made formula deals, or (f) had recognized the rights of old customers, or (g) had failed to recognize the rights of old customers.

A series of lawsuits by theatre operators has been started based entirely on these alleged violations of law.

In those lawsuits, through depositions, the plaintiffs are endeavoring to establish the above practices with the hope that upon trial they may establish a prima facie case for treble damages by showing the decree of the Statutory Court as per the provisions of Section 16 of the Clayton Act, plus some evidence of the local situations.

The flood gates are open. Under this decree the entire production and distribution side of the motion picture industry is doomed to destruction, as no industry can survive the flood of damage suits that theatre operators have begun and are bound to institute.

This decree to the Government's contention, instead of solving the problems of the industry, may well be the instrument to destroy the entire economic structure of the industry, an industry, which the record shows, has been built from the cheap nickelodeon to a magnificent achievement, where every city and town has its own Radio City Music Hall, or its small edition thereof, offering worthwhile entertainment weekly to over eighty million theatregoers in the United States alone.

The Statutory Court and these litigating exhibitors overlook the fact that no theatre can survive unless it has motion pictures to exhibit. If this decree remains nothing can save the distribution business.

The Government did not call a single witness to establish that any theatre owner suffered in any degree as a result of either block selling, runs, availabilities, clearances, minimum admission prices, franchises, formula deals, or any of the distribution trade practices condemned by the Statutory Court in Section II of the decree.

The Government produced charts, records, and the accountants who prepared the charts, as a substitute for exhibitors because exhibitors would substantiate the testimony of the distributors that these uniformities and these trade practices grew out of many years of competition rather than out of combination or conspiracy.

The Government substituted inferences placed upon inferences instead of factual testimony.

The Government sought to confuse the Statutory Court, and did actually succeed in confusing the Court, that great privileges and priorities were given to so-called affiliated exhibitors while different treatment was afforded the so-called independent exhibitors.

The undisputed evidence shows that United Artists dealt with the independents in the same manner in which it dealt with affiliates. The same form of contract was generally used. The same rights were granted, both affiliate and independent alike, as to run, clearances, availability, admission prices and otherwise.

Nothing was shown that required the Statutory Court to strike down the manner and method of doing business and to substitute its own formula.

The evidence disclosed that during the period of the suit all theatres enjoyed the greatest prosperity known to the amusement business (see p. 1180, R.).

The evidence showed that every branch of the public had an opportunity to see pictures, and the best pictures, at an admission price suitable to every pocketbook.

Pictures under the run, clearance and availability system, are shown at the higher admission prices in the Radio City Music Hall and then, in exactly the same manner, all the way down to the last run theatre in the City of New York,—and in like manner in every other city,—with admission prices growing progressively lower as the picture travelled from theatre to theatre, so that the individual with the smallest pocketbook may see the same picture in the same manner as when it was first exhibited at the high admission prices in the Radio City Music Hall.

In like manner, as the runs progress the license fees to the distributor progressively decrease.

The Government introduced contracts that showed a theatre paying as low as $10 for the right to exhibit a particular picture, while a theatre in the same community, for the first run, paid thousands of dollars.

Runs, clearances and availability are not new, novel or original in the motion picture business. They are a fundamental part of all show business.

In the legitimate theatre, Ziegfeld Follies would play in the New Amsterdam Theatre in New York City and in no other theatre in that city. Because of the tremendous cost of movement, it might later play Boston, Philadelphia, Chicago, Detroit, Cleveland and a few other large cities. The public, if it wished to see Mr. Ziegfeld's show, would have to journey to these particular cities.

A legitimate play of a dramatic nature, such as "Turn To The Right" or "Lightnin' ", would play in one theatre in New York City. Because of the small size of the dramatic offering, touring companies might be organized and four or five companies of "Turn To The Right" or "Lightnin' " might tour the whole United States, but would play in only one theatre in each city.

These tours might last two or three years; then the play would become available for stock and stock companies could rent the plays on a royalty basis. But even then these stock companies only operated in a limited number of towns and cities and generally for a short season.

Vaudeville of yesterday and burlesque of yesterday used the run and clearance system with the same exclusivity as the legitimate theatre.

The name of B. F. Keith was a household word in the eastern half of the United States in the days of "big time" vaudeville. Outside of New York City there was only one "big time" B. F. Keith vaudeville theatre in a city, and then only in the larger and more important cities. This show house would feature an orchestra, nine or ten acts of big time vaudeville and a newsreel. Acts played in this type of theatre would not be booked elsewhere in that city or community during that particular season. There were so-called vaudeville houses of lesser importance in each of the cities and these theatres featured acts which did not headline on the "big time".

In burlesque we had the Columbia Wheel. One theatre in each city played each of these shows one week during their forty-week season.

The motion picture distributors, following the pattern of show business and enlarging upon it, have made it possible for every branch of the public in every city boasting more than one theatre, by a system of multiple runs to see every picture produced and released for exhibition in the United States.

Every small town or hamlet that has any kind of a motion picture theatre or school or hall equipped to show motion pictures, has the opportunity to see "Gone With The Wind", "Henry The Fifth", "Abbott & Costello", or any other form of motion picture entertainment.

There is no need to journey to Buffalo or Cleveland to see "Ziegfeld Follies" in motion pictures, as it may be seen in Cambridge, Ohio, or Attica, New York, in exactly the same technicolor as when it was exhibited in the largest and best theatre in those towns.

In the present case the Court arrived at its conclusion of conspiracy and that the trade practices which it condemned were unlawful on examination only of the practices themselves, holding them illegal on their face in disregard of testimony as to their actual purpose and with no proof of their effect. The result is that certain practices have been held *per se* unlawful, and from the mere similarity of contractual provisions, caused, as the uncontradicted testimony of those who made the contract showed, by the inevitable forces of competition which compels similarity, the Court below has inferred that the defendants have combined and conspired in violation of the Sherman Act. The serious consequences to the defendants, to the industry and the public of such a judgment is apparent.

These countless treble damage suits have been instituted by exhibitors who now feel that the decree gives them opportunity for a windfall. The amounts demanded in these suits already instituted aggregate many millions of dollars damage, a staggering amount for eight members of an industry (and especially United Artists), already hard pressed because of increasing trade barriers and confiscatory taxation threatening to bar their products from

the markets of the world. Thus it is the duty of this Court to hold on this record that no illegality of the trade practices and unlawful conspiracy have been established.

The foregoing is not intended as a plea to permit any defendant to escape the penalty prescribed by Congress for unlawful conduct, but rather to point out that when the consequences of a holding of conspiracy and that a practice or contract is unlawful are so serious and far reaching, the Courts should be particularly zealous to discover the actual facts before passing judgment and doubly reluctant to declare them unlawful without proof as to their real purpose and effect, and that where the lower Court has made such decree without such an inquiry, this Court should not permit it to stand as *prima facie* evidence of illegality.

CONCLUSION

It is respectfully submitted that the decree of the Statutory Court as to the United Artists Corporation should be reversed and that a decree of dismissal should be entered as to the appellant United Artists Corporation.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 53 84.

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee,

and

PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (sued herein as Vitagraph, Inc.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, COLUMBIA PICTURES OF LOUISIANA, INC., SCREEN GEMS, INC., and UNITED ARTISTS CORPORATION,

Defendants.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OR DECREE HEREIN

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Supreme Court of the United States

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Defendants.

No.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OR DECREE HEREIN

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Universal Pictures Company, Inc., (sued herein as Universal Corporation and

Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange Inc., defendants-appellants herein, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment and decree of the District Court of the United States for the Southern District of New York, specially constituted under Title 15, Section 28 of the United States Code, entered in this cause on the 31st day of December, 1946, on which day the said District Court also filed its findings of fact and conclusions of law.

The defendants-appellants filed timely motions for substantial amendment of the Court's' findings, conclusions and judgment or decree. The Court denied these motions on the 3rd day of February, 1947. A petition for appeal is presented to the District Court herewith.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment and decree entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

Interstate Circuit Inc. v. *United States*, 306 U. S. 208;

Sugar Institute, Inc. v. *United States*, 297 U. S. 553;

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707.

Statutes Involved

The United States Statute under which the case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

> "That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> (b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; * * *
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;
>
> * * *
>
> Sec 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> * * *
>
> (l) Motion-picture photoplays;
>
> (m) Motion pictures other than photoplays: * * *

Nature of the Case, Rulings of the Court, and Substantial Questions Involved

This was a proceeding in equity brought by the United States of America under Section 4 of the Sherman Anti-Trust Act to enjoin the defendants from contracting, combining and conspiring to restrain interstate commerce in motion pictures, and from monopolizing, attempting to monopolize and combining and conspiring to monopolize such interstate commerce, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. Venue was laid in the Southern District of New York.

The original petition was filed on July 20, 1938. Defendants answered the petition and denied the material allegations thereof. The case first came on for trial on June 1, 1940. Before any testimony was taken, negotiations were begun between the Government and the so-called "major defendants" for the disposition of the cause by Consent Decree. An amended and supplemental complaint was filed on November 14, 1940, and the defendants filed answers denying material allegations thereof. On November 20, 1940, a Consent Decree was entered into between the Government and the "major defendants", pursuant to which they subjected their businesses to regulation as agreed, in respect of certain trade practices in the licensing of motion pictures, and consented to the establishment of an arbitration system to enforce the provisions of the Decree.

Dissatisfied with the operation of the Consent Decree, the Government moved on March 5, 1945, to set the case for trial and filed an application pursuant to the Expediting Act, 15 U. S. C. Sec. 28, for the appointment of a special three-judge Court to hear and determine the issues raised

by the amended and supplemental complaint and the answers thereto. This Court was duly constituted with Judges Augustus N. Hand, Circuit Judge, and Henry W. Goddard and John Bright, District Judges, and the trial proceeded before the Court as so constituted, commencing on the 8th day of October, 1945, and concluding on November 20, 1945, except for argument. The Government introduced over 400 exhibits, but called no witnesses whatever. Several thousand pages of testimony were taken from witnesses called by the defendants, who also offered a considerable number of exhibits. The case was argued the middle of January, 1946, and the Court rendered its opinion on June 11, 1946. On October 20th and 21st, 1946, it heard argument as to the form of its finding of fact, conclusions of law and judgment or decree. On December 31, 1946, it filed its finding of fact and conclusions of law and entered its judgment or decree with supplemental opinion. Copies of the opinion and supplemental opinion are annexed hereto as Exhibits A and B. Timely motions to amend made by all of the defendants were denied on February 3, 1947, except that the effective dates of certain provisions of the decree were extended.

The plaintiff requested injunctive relief against the violations charged, and prayed that the five major producer-distributors be required to divest themselves of their theatres which had allegedly been employed to monopolize interstate commerce. As it was conceded by the plaintiff at the trial that there was active competition in the production of motion pictures, the charges in respect thereto were formally abandoned by the plaintiff and dismissed by the Court in its decree.

Those defendants, who were referred to by the Government as the "major defendants" or the "big five", were five

integrated businesses, engaged in all three phases of the motion picture industry, to wit, the production of motion pictures (mainly in the State of California), the distribution thereof (i.e., the licensing under copyright to an exhibitor of the intangible exhibition rights to a picture accompanied by a temporary bailment of a positive print of the negative film) among some 18,000 theatres located throughout the United States, and the exhibition of said motion pictures to the public in return for the payment of an admission charge.

The "major defendants" (hereinafter sometimes referred to as Paramount, Loew's, RKO, Warner's and Fox) were: Paramount Pictures Inc. and a subsidiary, Loew's Inc., Radio-Keith-Orpheum Corporation and its subsidiaries, Warner Bros. Pictures Inc. and its subsidiaries, and Twentieth Century-Fox Film Corporation and its subsidiaries. The foregoing defendants are sometimes referred to as the integrated defendants, or the producer-distributor-exhibitor defendants, or the producer-exhibitor defendants.

In addition to the "major defendants" the Government named as defendants, Columbia Pictures Corporation and its subsidiaries (hereinafter sometimes called Columbia), Universal Corporation and its subsidiaries (hereinafter sometimes called Universal) and United Artists Corporation (hereinafter sometimes called United Artists). None of these companies possessed any theatres, the operations of Columbia and Universal being confined to the production and distribution of motion pictures, and the operations of United Artists being confined to the distribution thereof. These defendants were referred to by the Government as the "little three".

Producer-distributors other than the defendants were referred to by the Government as "independents", and the

largest of these are Monogram Pictures Corporation, Republic Pictures Corporation and Producers Releasing Corporation.

Motion pictures are classified into features, short subjects and news reels. A feature is a motion picture which is over 4,000 feet in length. The case was mainly concerned with the production, distribution and exhibition of features, by all odds the most important part of the business.

Each of the defendant-distributors maintains so-called exchanges suitably located throughout the United States, in order to solicit license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange, and for the physical distribution of positive prints throughout this territory.

The 18,000 motion picture theatres in the country are divided into "affiliated theatres" (which are theatres owned, controlled or managed by a major distributor, or in the ownership, control or management of which a major distributor has a financial interest) and unaffiliated theatres. These unaffiliated theatres are in turn divided into independent circuit theatres and independent theatres. A circuit theatre is a theatre which is a member of a theatre chain, which is defined in the amended and supplemental complaint (hereinafter sometimes called the complaint), upon which the case was tried, as "a group of more than five theatres owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". Any theatre which is not a "circuit theatre" or an "affiliated theatre" is defined in the complaint as an "independent theatre".

Motion picture theatres are also classified in accordance with the run upon which, *i.e.*, the order in which, they are licensed to show pictures which have been released. First-run theatres are those which are given the first opportunity, after release, to exhibit a motion picture; second-run theatres are those which receive the second opportunity to exhibit the released picture; and third-run theatres are those which receive the third opportunity to exhibit the released picture. All theatres subsequent to the first-run are known as subsequent-run theatres. Of the first-run theatres, the so-called "metropolitan" theatres in the larger cities are, of course, much the most important.

A motion picture season is the period from September 1st of one year to August 31st of the next.

Instead of licensing their product picture by picture and theatre by theatre, wholesale licensing by distributors has been a very general practice in the industry, not only because it is advantageous to the distributor, but also because it is advantageous to the exhibitor. Such selling is not only economical, but permits both buyer and seller to know where they stand at the earliest possible time, and to plan accordingly. The seller knows what income he can reasonably count on, and the buyer knows that he has a commitment for a supply of pictures to last him a season or more. Thus licenses were entered into with all types of exhibitors, including the smallest, for an entire season's product of features, and distributors often entered into franchises with exhibitors, assuring such exhibitors of their entire output of pictures for a number of years. Such franchises were made with all types of exhibitors. They were of great value to independent theatres in their efforts to compete with large theatre chains. Only when they were

made with large theatre chains, and contained provisions considered to be unreasonably restrictive of small exhibitors, did the complaint allege that they were illegal. In dealing with theatre circuits, or a number of theatres, so-called master contracts or "blanket deals" were made covering all of the theatres in one agreement. Formula deals were also made with theatre circuits, and these measured the film rental by a certain percentage of the national gross receipts of the particular feature licensed.

Although the defendant-distributors concededly granted "considerable" rejection rights to exhibitors when licensing wholesale, the Decree required them to grant a specified 20% in every case, permitting no flexibility whatever to accord with differing circumstances.

The number of feature motion pictures produced and distributed each motion picture season is limited. Excluding so-called "Westerns" (which are low-cost wild-west adventure pictures), there were 335 feature pictures distributed during the 1943/44 season, which was the season preceding the trial. Of these Fox released 33, Loew's 33, Paramount 31, RKO 38, Warner 19, Columbia 41, United Artists 16, Universal 49, Republic 29, Monogram 26 and Producers Releasing Corporation 20. The cost of producing a feature picture is very large, and has greatly increased in recent years, ranging from hundreds of thousands of dollars to millions.

Excluding theatres jointly owned by a major defendant with another major defendant or with an independent (totaling 1,501 theatres), the number of theatres comprised in the theatre chains of the five major defendants in the year 1945 were as follows: Paramount 1,395, Warner 501, Loew's 135, Fox 636 and RKO 109. These defendants,

taken together, controlled nearly three-fourths of the metropolitan first-run theatres, and their holdings were mainly in first-run theatres. There were several large independent circuits, none of which, however, was as important as the least important of the affiliated circuits.

Each of the "big five" was several times as large as Universal, which possessed no theatres.

The "big five", considered collectively, receive a lion's share of the film rental paid in the United States, and they distribute a very high proportion of the pictures which produce the largest receipts at the box office.

The burden of the Government's complaint, and that part of it upon which it laid the greatest stress in evidence and argument, was that the competition of independent exhibitors had been suppressed by a combination and conspiracy having the objective of dominating the exhibition business, the dominant members of which were the producer-distributor-exhibitors. It claimed that the major defendants, who as a group produced and distributed a very high proportion of the best-drawing pictures, could, as exhibitors, successfully command each other's pictures, and those of other distributors, by reason of the great buying-power of their large theatre chains, and that through them they had dominated the first-run theatre situation, particularly the metropolitan first-runs, which in turn dominated the subsequent-run theatres in the respective competitive areas.

The Government further alleged that abuse of the great buying-power which this Court has found is inherent in large circuits of theatres (as exemplified in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 in the case of an independent circuit) was markedly accentuated in the case of affiliated circuits to which the feature pictures of their parent pro-

ducer-distributors were permanently assured, in that the factor of affiliation introduced into film-licensing negotiations an inducement to favor affiliated theatres at the expense of unaffiliated theatres. It thus alleged (in its amended and supplemental complaint) that a "producer-exhibitor-defendant, in negotiating for the licensing of films released by it for exhibition in theatres owned and controlled by another producer-exhibitor-defendant must take into consideration the terms demanded by the other producer-exhibitor in licensing its films for exhibition in theatres owned or controlled by such first producer-exhibitor. The granting of certain terms and privileges with respect to the exhibition of one producer-exhibitor-defendant's films in another producer-exhibitor-defendant's circuit is necessarily conditioned upon the granting of similar terms and privileges by the latter with respect to the exhibition of its films in the circuit of the former".

The Government further alleged that, in consequence of their power and pre-eminence in the production, distribution and exhibition fields, the major defendants, acting in concert with each other and with the minor defendants, had been able to fix and stabilize the statuses, not only of their own motion-picture theatres, but of those of all other motion picture theatres in the same competitive areas, in respect of run to be enjoyed, admission prices to be charged, time intervals (clearances) between runs, and other less important matters, to the great detriment of independent exhibitors, who were not in a position, by reason of their small buying power, to obtain favorable runs upon which the higher admission prices could be charged, or favorable clearance as against subsequent runs, or other favorable provisions in their licensing contracts.

In support of their contentions the Government relied upon (1) the practice generally followed by motion-picture theatres of charging the same admission price for the pictures of all distributors, and the practice followed by distributors of requiring the maintenance during the run of a licensed feature of the currently-charged admission price, resulting in uniformity in the minimum admission prices specified in the licenses of all distributors; and (2) the alleged fact that over the years those motion-picture theatres which had become established in their enjoyment of particular prior runs, and as to the extent of the time interval (clearance) to follow such runs before the next showing of the picture, had usually been able to eventually obtain such runs and clearance from all or nearly all distributors in particular situations.

On the other hand Universal contended (1) that a distributor, licensing under copyright, without passing title to any tangible object, might properly obtain from the licensee a covenant against change in position in respect of admission price, to the detriment of the licensor, during the run of the copyrighted picture; (2) that similarity between the minimum admission prices specified in its license agreements and those specified by other defendant-distributors proved nothing more than that all followed the legal practice of obtaining covenants against change in position in respect of admission price during the run, to the detriment of the licensor; (3) that the run to be enjoyed by a motion-picture theatre, and the clearance to follow that run, were not matters upon which a non-theatre-owning defendant, distributing an insignificant proportion of the

best-drawing pictures, could have any substantial influence, such matters being determined, *inter alia*, by the licensed theatre's position relative to competing theatres in respect of (a) the admission price charged, (b) the nature and character of the theatre, its location and entertainment policy, and (c) its film-rental paying ability; (4) that motion-picture theatres, for practical operating reasons, and in view of their policy of charging the same admission prices, irrespective of whose pictures are being shown, and of what they cost, desire the same run and the same clearance from all distributors serving them; and (5) that when other distributors have accorded a prior run and a certain amount of clearance, to a particular theatre, Universal cannot refuse to do as well, if it is to maintain its competitive position.

The District Court found, on the basis of such similarities in action among the defendants, that the major defendants had fixed and stabilized runs, clearances and admission prices, pursuant to combination and conspiracy, as had been charged, and that the minor defendants, possessing no theatres and distributing but a small proportion of the best-drawing pictures, had participated in such combination and conspiracy. It attributed this illegal condition, however, to collective control by the defendant distributors, including the non-theatre-owning distributors, of most of the best-drawing pictures, and their practices in licensing the same, and not at all to restrictions imposed through the buying-power of the affiliated theatre chains, as condemned by this Court in the case of a much smaller independent circuit (*U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173).

Universal possessed no theatre circuit with which to influence exhibition conditions. The proportion of the best-drawing pictures which it distributed was far less than its relative size might suggest, and far too small to give it any substantial voice, by reason of its position as a distributor, in exhibition conditions, save in such exceptional situations as those in which it might be able to encourage the launching of new competitive enterprises, and in which it would obtain show-windows for its pictures through the granting of franchises.

At the end of its case and at the end of the whole case Universal moved to dismiss the Petition and Amended and Supplemental Complaint.

Thus whether or not there was a conspiracy among the theatre-owning defendants, such as the Government charges, the similarity of Universal's action, in respect of minimum admission prices, runs and clearances specified in its licenses, to that of the other defendant distributors, to the extent that it was similar, was not a proper basis upon which to hold it. The District Court specifically held that "independent distributors" were "obliged to conform" to a "fixed scale of clearances, runs and admission prices" in order "to get their pictures shown upon satisfactory runs". Yet Republic Pictures Corporation, one of these "independent distributors", is larger relative to Universal than Universal is relative to any of the "big five".

Substantial questions are thus presented which turn upon the proper inferences to be drawn from similar action under the particular circumstances and upon the distinction between dealing with members of a conspiracy, if one in fact existed, and joining "mind and hand" with them. *Cement Manufacturers' Protective Association* v. *U. S.*,

268 U. S. 588, 605-6; *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417, 447-9; *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708-9; *U. S.* v. *American Can Co.*, 230 Fed. 859, 902 (D. Md., 1916); *U. S.* v. *Standard Oil Co. of N. J.*, 47 F. (2nd) 288 (E. D. Mo., 1931); *Anderson* v. *Shipowners' Association*, 27 F. (2nd) 163 (N. D. Col., 1928), aff'd 31 F. (2nd) 539 (C. C. A. 9th, 1929), cert. den. 279 U. S. 864; *Nissen* v. *Andres, et al.*, 63 Pac (2nd) 47 (Okla. 1936); *Commonwealth* v. *Hatfield Coal Co.*, 193 Ky. 229; *U. S.* v. *Falcone*, 311 U. S. 205; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703.

The second branch of the Government's case against Universal consisted of the claim that its licensing contracts with exhibitors (whether or not they were affiliated with major defendants, were circuit theatres, or were independent theatres) were in violation of the Sherman Act in various respects.

In this connection the District Court concluded that the Universal defendants violated Section 1 of the Sherman Act (Conclusion of Law, No. 8) by "agreeing *individually* with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits". In other words, even though Universal was without power to resist the demands of affiliated and large independent circuits with great buying power for favorable license terms, it was to be considered guilty of violating the Sherman Act merely by reason of the fact that it may have granted more favorable terms in certain respects (but not necessarily overall) to one licensee then to another. Such a conclusion, we submit, wrongly applies the principles of the Robinson-Patman Act, to a situation completely without its scope, and presents a substantial question.

Licensing contracts generally required that the admission prices currently being charged by the exhibitors licensed not be reduced during the run of the licensed picture. In the licensing for exhibition of a motion picture under copyright, no title passes to the positive print, which is temporarily bailed to the exhibitor in order that he may exercise the intangible rights under copyright which have been licensed to him. Upon the conclusion of the run, the positive print is returned to the distributor or shipped at his direction to another exhibitor. The most important film-licensing contracts measure the film rentals by a percentage of the gross receipts, sometimes with a minimum guarantee. Flat rental fees bear a close relationship to expected gross receipts. If the exhibitor were free to lower his current admission price, after agreeing to pay a film rental based upon gross receipts, or closely related thereto, the reasonable expectation of reward held by the licensor would be defeated.

The licensor does not prescribe any maximum admission price, and the exhibitor, if he shows other pictures or furnishes other entertainment in addition to the feature licensed, may charge what he pleases therefor.

This situation, it is submitted, presents novel and substantial questions concerning the right to specify prices in connection with copyright licenses when no title to any physical article passes. In *U. S.* v. *General Electric Co.*, 272 U. S. 476, at p. 488, and *Bement* v. *National Harrow Co.*, 16 U. S. 70, licenses to make and vend patented articles at fixed prices were upheld as legal, in view of the continuing interest of the licensor in not having his licensees compete against him, despite the fact that the title to the articles sold was at all times in the licensee. It is believed

that the continuing interest of a copyright owner entitle him to insist upon a covenant against reduction in a current admission price, upon the faith of which he has agreed to accept a specified film rental, no right of the licensee to sell a tangible article owned by him at his own price being involved.

The legality of completely exclusive licenses under copyright, as of the common-place exclusive license under a patent, would not seem to be open to doubt (*Interstate Circuit* v. *U. S.*, 306 U. S. 208, at pp. 227-8). In the motion picture industry, however, distributors have not granted, and exhibitors have not insisted upon, completely exclusive licenses. Prior runs, with clearances between runs, have sufficed to meet the needs of both distributors and exhibitors. This custom seems to have suggested to subsequent-run exhibitors the idea that they are entitled to receive a picture at some "reasonable" time after the preceding run, whereas the true principle must be, as in the case of a patent, that such restrictions as are imposed are for the benefit of the licensor, and are valid if reasonably related to the reward he is entitled to secure under his legal monopoly. *General Electric Co.* v. *U. S.*, 272 U. S. 475; *General Talking Pictures Corp.* v. *U. S.*, 305 U. S. 124, 127.

The District Court recognized that clearance might be granted to an extent reasonably necessary to protect the licensee's run, but either overlooked the fact that greater clearance might sometimes subserve the licensor's legitimate interests (as with an exclusive license), or diminished the licensor's rights as a species of punishment, which is inadmissible. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386. It placed upon Universal the impossible and illegal burden of sustaining the reasonableness, from the stand-

point of the exhibitor's interests, not the public's or its own, of all clearances granted, without prescribing any adequate standards for the determination of what would be reasonable. Yet under the competitive bidding system prescribed by the Court the exhibitor is the one who fixes the clearance. Decree, II 8(c).

Universal believes that the District Court thus seriously erred in encroaching upon its legal rights under its copyright monopolies to grant exclusive licenses, with any restriction normally and reasonably related to the reward to which its copyrights entitled it.

At the same time that the District Court permitted the protection of the licensee's run by clearance, it held illegal the specification by the licensors of differentials in minimum admission prices, calculated to encourage as many patrons as possible to see their pictures first-run at the highest admission prices. Yet both license provisions are patently directed to the same end. Universal contends that such action is legal, and does not violate either Section 1 or 2 of the Sherman Act.

Although approving clearance as a necessary institution, the District Court enjoined each distributor from agreeing *with exhibitors* "to maintain a *system* of clearances". (Emphasis ours). Since in the ordinary course of business a distributor granting clearances would necessarily grant them to many exhibitors, and since in the case of minimum admission prices the Court had clearly regarded such dealings as an illegal *system* of fixed prices, petitioners submit that a substantial question is involved as to the propriety of this injunction, and as to its validity in view of its vagueness.

Franchises, in which a distributor commits its pictures for periods longer than one year to an exhibitor, are con-

siderably less restrictive than the ordinary exclusive agency arrangement, which is one of the most common methods of doing business, and as a result of the law having been settled by numerous authoritative cases, obtains throughout all industry. The exclusive feature in a franchise is limited to the particular run on which the exhibitor operates, and subsequent run exhibitors can thereafter obtain the pictures. Of Universal's nearly 800 franchises, less than 1% are for longer than three years, and all but 43 are with independent exhibitors.

If franchises were availed of by the producer-exhibitor defendants as a means to effectuate a combination and conspiracy, the Decree may, of course, properly suppress such franchises, whether or not granted by innocent or participating parties. It may, indeed, properly go further and prohibit the accepting of such franchises in the future by such defendants, pending the dissipation of the effects of the assumed conspiracy. The District Court, however, broadly condemned the franchise *as an institution*. As we later point out, it ordered all feature pictures to be sold picture by picture and theatre by theatre through competitive bidding. The combined effect of the prohibition against franchises as an institution and the affirmative direction of picture by picture selling is to prevent the small independent exhibitor from obtaining any commitment of pictures whatever from any distributor for any period of time, no matter how short, and to force him into the hopeless position of attempting to live from hand to mouth by bidding in the open market for each picture desired, against the powerful competition of affiliated and independent circuit theatres. Although such franchises were declared invalid, their validity was not an issue in the case, since the only

complaint about franchises was concerned with those made with large circuits. These, it was claimed, discriminated against small exhibitors.

Thus, we submit, a substantial question is presented as to whether the decree properly enjoins exclusive-dealing arrangements, in the form of licenses under copyright, with the alleged victims of a conspiracy.

At the same time this unrestricted condemnation of franchises crippled Universal, a relatively small distributor, in its efforts to compete with the large integrated companies. Paragraph IV of the Decree specifically saved to the integrated companies the right to freely show the motion pictures produced by them in their own theatres. Yet by reason of the condemnation of franchises with small exhibitors, and the requirement of picture-by-picture selling, Universal is prevented, unless it is able and willing to buy theatres outright, from arranging to have its pictures regularly shown in theatres strategically located throughout the country, i.e., from having and obtaining show-windows for its pictures.

It is submitted that Universal has just as much right under the Sherman Act, if indeed not much more right, to obtain show-windows for its pictures by long-term contractual arrangements with small exhibitors as the powerful integrated companies have to retain such show-windows through ownership of the theatres involved, and that the denial of this right presents a substantial question.

This Court approved the legality of exclusive agencies in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568. In *Restatement of the Law of Contracts*, c. 18, Sec. 516, exclusive agency contracts are listed as one of the well-established categories of reasonable restraints of trade. Many cases to this effect are cited in *Williston on*

Contracts, Section 1645. This is particularly true, we submit, where a medium-sized distributor is dealing with a small exhibitor, and the exclusive agency is limited in time and area. *A fortiori* is it true where the exclusive agency is granted by license under copyright.

It is likewise submitted that the injunction against Universal's entering into master agreements, irrespective of circumstances, and of the status and purposes of the other contracting party, is unwarranted.

In imposing upon Universal the duty of selling its pictures picture-by-picture and theatre-by-theatre to the highest bidder having an adequate theatre, and the duty of serving applicants for non-exclusive runs on uniform terms, and in prescribing the many other features of the competitive bidding system as set forth in the Assignments of Error, the District Court has, we believe, gone beyond anything heretofore approved by this Court as a proper remedy for violation of the Sherman Act. In both *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 at p. 728, and *Associated Press* v. *U. S.*, 326 U. S. 1, at p. 25, it is to be noted that the Supreme Court deliberately refused to approve requests of the Government for relief tending in the same direction as the competitive bidding and service upon uniform terms decreed in this case, but going not nearly as far. The fact that competitive bidding or non-discriminatory service requirements may be, under some circumstances, appropriate regulatory devices, when imposed by an administrative commission under authority of an Act of Congress, does not mean that they are authorized judicial sanctions, taking away as they do "the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *U. S.* v.

Colgate Co., 250 U. S. 300, at p. 307, *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565 at p. 573. Were they authorized by statute, as they are not, we submit that such sanctions would violate the due process clause of the Fifth Amendment. We contend that imposition by a Court likewise violates such clause. Similar considerations apply to the requirements that Universal may not "discriminate" in favor of old customers, and must not "arbitrarily" refuse a run, especially in view of the failure to prescribe adequate standards in the latter respect.

The foregoing is entirely aside from the many patent deficiencies in the competitive bidding method set up by the Decree. To cite only one, it is provided that the exhibitor may offer to license a picture upon a flat rental or for a percentage of the gross receipts, and that the distributor is to accept the bid of the highest bidder. Yet it should be plain that if one exhibitor offers $1,000 for a picture and another offers 25% of his gross receipts, it will be impossible to determine which is the highest bidder. The distributor, moreover, is forbidden to offer its pictures on a percentage basis, a wholly normal method of doing business.

Thus a number of substantial questions are presented by these provisions of the Decree.

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court held that the required purchase of articles in combination by a seller having no power to control or dominate the market was not an unfair method of competition. In a dissenting opinion protesting the dismissal, as a matter of law, of the Federal Trade Commission's complaint, Mr. Justice Brandeis said, page 438, "It is *obvious* that the imposition of such a condition (that cotton bagging be bought in order to get steel ties to bind cotton bales) is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear."

(Emphasis ours.) He then pointed out that the ability of the seller to dominate the business was a crucial consideration. Universal, of course, does not by any stretch of the imagination possess any such power.

In *Federal Trade Commission* v. *Paramount Famous-Lasky Corporation*, 57 Fed. 2nd 152 (C. C. A. 2, 1932), the practice of block booking was held to be legal, largely on the ground that the evidence did not show that the defendant dominated the business, although in fact it was then one of the largest factors, if not the largest factor, in the business. Universal is now indisputably a relatively small factor in the business. In the *Gratz* and *Paramount Famous-Lasky Corporation* cases the sole matter at issue was the legality of combination sales under the particular circumstances, and a large amount of evidence dealing with the practice and various aspects thereof was considered. In the instant case the record with relation to so-called "block-booking" is so fragmentary as to be virtually non-existent. Indeed, there is not even any evidence in the record that the sale of one picture was conditioned upon the sale of others. All that appears is that Columbia and Universal generally sold a season's product at one time. It is of great importance to the smaller distributors and exhibitors that they be able to sell and buy a season's product at one time, since this enables them to better compete with their much larger competitors. It is respectfully submitted that a substantial question is here involved.

Respectfully submitted,

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February 19, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 84

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 79

THE UNITED STATES OF AMERICA,

Appellant,

vs.

PARAMOUNT PICTURES INC., *et al.*,

APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR UNIVERSAL PICTURES COMPANY, INC., *ET AL.*, APPELLANTS

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OCTOBER TERM, 1947

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR UNIVERSAL PICTURES COMPANY, INC., *ET AL.*, APPELLANTS

The only answer which the Government attempts in opposition to our fully elaborated and documented argument demonstrating that Universal's feature film-licensing is conducted in an entirely legal manner, in all of its phases, and that we were no part of any conspiracy, horizontal or vertical, is (1) to claim that *Interstate Circuit* v. *U. S.*, 306 U. S. 208, is controlling, under the findings of the

Court below, and (2) to assert that it was incumbent upon us to license our films, picture by picture and theatre by theatre, in order to avoid unreasonable restraint of interstate commerce. We discuss these contentions in order.

1. The *Interstate Circuit* Case and the Relevant Findings of the Court Below.

This case, and the findings of the Court below with respect to admission prices, runs and clearances, claimed to bring us within it, are the sole reliance of the Government in its brief, in respect of its basic claim that Universal was implicated in an alleged combination and conspiracy among the major defendants to fix admission prices, runs and clearances in the domestic motion picture theatre market. (Gov. bf., pp. 16, 52, Point I (A), pp. 14-19).

Since Universal had no theatres, it was not at all interested in differentials in admission prices between prior-run and subsequent-run theatres *as a means of sustaining theatre-operating profits*, the protection of which, the Government claims, in respect of the major defendants, cannot be justified by the possession of copyright monopolies. Universal was, however, concerned that the admission prices which were being charged by its licensee theatres, whether prior or subsequent-run, should not be reduced while—and only while—its pictures were being shown therein, for a wholly different reason, *i.e.*, the legitimate purpose of obtaining for itself the maximum rewards under its copyright monopolies..

It was pointed out in our opening brief (pp. 106-8) that Universal never attempted to interfere in any way with the admission prices respectively charged by its prior and subsequent-run licensees, and indeed could not as a practical

matter have interfered, if it had wanted to. All that it did was to require a covenant from each of its licensees not to reduce its admission price during the run of the pictures licensed to it by Universal. At any time any licensee was not running Universal pictures, it could do anything it pleased with its admission price. This covenant, as we fully explained in our opening brief (pp. 64-81), was vitally necessary to protect the aggregate reward accruing to Universal from the showing of its copyrighted pictures on all of the various runs.

The Government's argument under the following heading is illuminating as to the Government's theory in this connection (Gov. bf., p. 16): "The use by each distributor of license restrictions intended to suppress admission price competition between competing theatres is substantially undisputed". In support of this contention, it says (Gov. bf., pp. 16-17): "The defendants' film licenses habitually impose explicit restrictions upon the use of their films, the effect of which is to stipulate admission prices for theatrical entertainment to which their sole contribution is the supplying of a positive print on a rental basis. Since the stipulated admission price is generally the price charged by the theatre for all films, such price-fixing bears no relation to the quality of the exhibition rights granted by any particular license". Thus it claims that run and clearance are "simply devices for fixing price differentials between competing theatres in order to maintain their relative playing position".

This argument is completely fallacious insofar as Universal is concerned. As pointed out in our opening brief, p. 69, it is completely untrue that the covenant against reduction of admission price fixes the admission price for the

theatre in which other pictures or entertainment, in addition to Universal's features, may be shown. The exhibitor is completely free to charge anything he pleases for such additional entertainment. Thus the minimum admission price covenant is for the sole purpose of protecting Universal's reward under its copyrights, and is not for the purpose of fixing the admission price of the licensed theatres, to protect theatre-operating profits. It is entirely immaterial that the theatre-owner may regard only part of his admission price as appertaining to Universal's picture. Universal regards all of it as thus appertaining, and having the right to select any minimum price it sees fit, can select this price.

Despite these obvious facts, the Government would have it that the Court below found that the purpose of this covenant in Universal's licenses was to protect theatre-operating profits (Gov. bf., p. 16), for it argues that the *Interstate Circuit* case is conclusive "unless it can be shown that the Court's subsidiary findings which demonstrate that the purpose of *their* license restrictions was *to control price competition* are erroneous."* Neither here or any other place in its brief does it cite any finding made by the Court to support this contention with respect to Universal, and we think it is clear that such a finding does not in fact exist.

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*In two respects this statement is vague. "Their" may or may not mean all the defendant distributors. The phrase "to control price competition" may or may not mean for the purpose of sustaining theatre-operating profits. When Universal licenses a feature picture to a first-run theatre charging 50 cents, and thereafter to a second-run theatre charging 25 cents, and in each case requires a covenant not to reduce the admission price, *while Universal pictures are running*, it is of course obvious that the two theatres cannot compete by reducing their respective prices, unless they are willing to risk the cancellation of their Universal licenses or the withdrawal of the run and clearance privileges extended them by Universal.

Under the Government's express admission, unless such a finding exists and there is evidence to support it, the case is taken out from under what the Government says is the doctrine of the *Interstate Circuit* case.

But even if there was such a finding, as the Government claims, and evidence to support it, the *Interstate Circuit* case would not, under any possible construction, be authority for the Government's position, either in respect of its claim that Universal was implicated in a horizontal conspiracy with the major distributors, or in respect of its claim that Universal was implicated in vertical conspiracies with the affiliated exhibitors it licensed.

The horizontal conspiracy in the *Interstate Circuit* case was inferred from the fact that the distributors, therein concerned, followed what were found to be parallel courses of action, after being confronted with the express written demand of the manager of two large circuits that each distributor agree with these circuits that it would impose restrictions upon subsequent-run theatres which were in competition with the subsequent-run theatres of the circuits.

The restrictions which the circuit manager demanded were: (1) that each distributor make an express agreement with his circuits that it would require competing subsequent-run theatres which had been charging considerably less than 25¢ admission to raise their admission price to 25¢; and (2) to abstain from their customary practice of double-featuring. Otherwise the circuit manager advised the distributors that he would not continue to show their Class "A" feature pictures at a 40¢ admission price. This Court found that the agreements demanded were in substance made by the distributors with the circuits.

This Court held that there was a horizontal conspiracy among the distributors and vertical conspiracies between

each distributor and the circuits. Three of the justices thought that the action of the distributors in both respects was entirely legal under the Copyright Laws. Great emphasis was placed by the majority upon the fact that a radical change was compelled in the admission-price policies of the competing subsequent-run exhibitors, and also upon the fact that the distributors were interfering, by express agreement with the circuits, with something which was none of their concern, i.e., the right of the subsequent-run exhibitors to show the pictures of others in double-feature programs along with the features of the defendant-distributors.

Although this Court expressly pointed out (p. 229) that "the case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and the subsequent showing of the same film by a licensee of the copyright owner," the Government claims that the case holds exactly that, for it says, (p. 16) that this Court held that "the use of admission price restrictions by a single distributor to suppress price competition between theatres was also unlawful," quite evidently intending to convey the idea that the use of the covenant against reduction of the admission price with theatres in successive runs, in respect of copyrighted pictures, was unlawful, even if exclusively in the distributor's interest.

Since, as explained in our opening brief (pp. 48-50), an exclusive license under copyright is clearly legal, as was conceded by this Court in the *Interstate Circuit* case itself (pp. 227-8), and its very purpose is to prevent others from competing with the exclusive licensee, in the licensor's interest, the Government's argument is not only not supported by the *Interstate Circuit* case, but is definitely contradicted thereby.

For like reasons, the run and clearance provisions, by which Universal licensed its feature pictures so as to reap the maximum reward from the various prior and subsequent-run theatres, in accordance with such playing positions as they had attained, are entirely legal, as has been demonstrated in our opening brief.

There is no similarity whatsoever between this case, insofar as Universal is concerned, and the *Interstate Circuit* case, in respect of the charge of horizontal conspiracy. In that case the focus producing similar action among the distributors was the blunt demand of the manager of the two dominant circuits in the Texas and New Mexico territory for parallel action *in making express agreements with his circuits whereby competing subsequent-run exhibitors were forced to change in a radical way admission price and double-feature policies.* In our case the focus producing uniformity of action in respect of admission price is the obviously reasonable consistent admission-price policy of the exhibitor, plus the use by all distributors of the wholly legal and obviously indicated covenant against reduction of such admission price during the runs of their respective feature pictures. In the case of clearance, as fully explained in our opening brief, the programming requirements of the exhibitor, together with the competitive forces operating in the market against a relatively small distributor, bring about uniformity.

In respect of vertical conspiracy the distinction is even more evident. We made no agreements whatsoever with prior-run exhibitors that we would impose any restrictions of any kind upon subsequent-run exhibitors, and there was no finding or evidence to this effect. The only restriction we did impose upon each of our licensees (for as shown in

our opening brief (p. 57-9) clearance is not a restriction upon them) was the legal covenant against admission price-reduction, and no one dictated our imposition of that.

The transactions with which the *Interstate Circuit* case were concerned took place in 1934, and since that time the financial control and executive management of Universal have shifted to entirely new hands.

2. The Contention that Universal Must License Its Copyrighted Motion Pictures Picture by Picture and Theatre by Theatre.

There are about 18,000 motion picture theatres in the United States, and each is a potential market for Universal's pictures, whether features, Westerns, short-subjects or news-reels. Universal licenses its pictures to the great majority of these theatres. As heretofore pointed out, its regular practice has been to produce about one feature picture a week, many Westerns and so-called short subjects, and a weekly news picture. The number of pictures listed in G. X. 261 (the franchise particularly referred to by the Government and printed in its Appendix at pp. 50-58) is 185 per year, counting each news-release as one picture. If it had to license these pictures, one by one, to the many thousands of theatres with which it deals, something like a million transactions or more would be involved.

Yet the Government would have it that this is the only legal way for Universal to license any of its copyrighted pictures. Since the same reasoning which it advanced to condemn the group-selling of features also condemns the group-selling of weekly news-releases and short subjects, the number of salesmen it would have to have to accomplish this task is food for the imagination.

In making this contention that the only legal kind of licensing for Universal is picture by picture and theatre by theatre, the Government refers to no legal authority whatsoever. In claiming that we condition the licensing of one picture upon the licensing of another, the Government offers no record reference to combat the flat assertion in our opening brief (p. 52) that there was no evidence that such a practice was followed by us.

There is no reason to discriminate against copyrighted articles in respect of bulk sales. As was said in the *Interstate Circuit* case by one of the Justices (p 236), "All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. * * * The monopoly, so called, amounts to nothing more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law". An owner of a bushel of wheat does not have to offer each grain separately, because they may vary in quality, nor does the owner of many copyrights, in order that someone may have satisfaction of knowing exactly how much each brings, and that the reward is in direct relation to the quality of the copyright.

The Government argues, however, that our complaint as to the judgment below is founded principally upon our claim that "Since the major defendants may force their films into the market by the use of their affiliated theatres, the distributors without affiliated theatres are compelled to use franchises, block-booking and master agreements to force their films into the market." It then goes on to say that it does not dispute the soundness of this argument,

insofar as it is based upon an "economic necessity arising from competing in a market dominated by the major defendants" (Gov. bf., pp. 7-8, 63).

At one and the same time the Government argues that by means of block-booking, (1) we force feature pictures upon exhibitors who do not like them, and (2) that we license our pictures in a block before they are made, and hence before they can judge them. It is not abashed by the fact that the undisputed evidence shows, as pointed out in our opening brief (pp. 85-6), that independent exhibitors insist upon Universal's committing itself to license its pictures to them before they are produced, so that they may be assured of grist for the mill, which operates continuously day in and day out, frequently several shows a day.

Nor is it abashed by the fact that if Universal produced feature pictures ranging in cost from several hundred thousand dollars each to several million dollars each, and made the necessarily large capital expenditures incident thereto, without having an assured market for its pictures for at least a few years ahead, it would not likely be in business very long.

Articles costing these tremendous amounts to produce, particularly those whose success is largely a matter of public taste, cannot be produced upon the mere hope that exhibitors will take to them sufficiently to commit themselves to pay film rentals sufficient to recoup the expenditure plus a reasonable profit. This is one of the main reasons why a distributor finds it advantageous to control theatres, and the reason that makes it obligatory for a non-integrated distributor to make franchises if it is to compete on anything like equal terms with integrated companies.

In the late 1920's the Government attacked block-booking as practiced by Paramount, then the largest company

in the industry. As pointed out in our opening brief (pp. 88-94), this attack, made on a comprehensive record, failed, and the Circuit Court of Appeals for the Second Circuit unanimously held that Paramount had not acted illegally in the premises. *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. (2d) 152 (CCA 2nd, 1932). The Government did not apply for certiorari in this case, and the industry, with good reason, has ever since considered it to be the law, particularly in view of the like general holding, in respect of conditioning by a non-monopolistically situated supplier, by this Court in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.

In *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, this Court found no illegality in the activities of the U. S. Steel Corporation, which did some 41% of the steel business at the time of suit (pp. 438-9, 442), one of the most evident things about which was the fact that *it was an integrated business.* This the Court carefully noted more than once in its opinion, saying for example, at p. 438: "The tendency of the industry and the purpose of the corporation in yielding to it was expressed in comprehensive condensation by the word 'integrated' which signifies continuity in the process of the industry from ore mines to the finished product".

No case in this Court decided since the *Steel* case, of which we are aware, has condemned integration as a method of providing outlets for products manufactured by affiliated concerns. That section of the Government's brief as Appellant which deals with this question (pp. 90-114) cites no case which we believe can be fairly held to have such significance.

At the time this case was instituted in 1938 integration had obtained in the industry for 20 years, and the major defendants had been integrated for periods ranging from

10 to 20 years. (Paramount bf., pp. 22-26). Prior to 1938, so far as we know, the Government never made the claim that integration in the motion-picture industry was illegal. At any rate it never succeeded in putting the idea over. Integration has, of course, been a commonplace thing in many other industries, including oil and motors.

In making franchises with theatre chains, we obviously achieve a much less fixed relationship with the theatre chain than each of the major distributors has with its affiliated theatre chain. Our relationship is for a few years at the most. By means of the relationship which they have, each of their theatres is assured of a permanent franchise for their first-class product. The Court below held that such a relationship was legal, and yet held that our much more fragile relationship involved in our franchises was illegal *per se*. This simply does not make sense.

It is asserted by the Government (Gov. bf., p. 42) that the reason why franchises with theatre chains which are known as master contracts are illegal *per se* is that such an agreement (1) ties up a substantial segment of the playing-time available in the circuit's theatres for a period of years, without regard to the merits of the licensor's product, and thus prevents other distributors from competing for that playing-time upon the merits of such films as they may have available during those years; and (2) commits a substantial part of the available film supply to the circuit's theatres without any consideration of the merits of competing theatres as outlets for the product.

It thus makes the argument that exhibitors do not know what they are doing, when they commit themselves to licensing our pictures over a period of years, and have no comprehension in respect of the merits of our pictures.

If by past experience the exhibitors did not know pretty well what they would get in our pictures, and did not feel that it was to their advantage to commit themselves to license them, as against the mere hope of more suitable competitive pictures arriving on the scene, it is quite plain that they would not enter into the franchises with us.

Likewise the Government's argument that when we license a chain of theatres, we do so completely unaware of what we might obtain from the theatres in competition with them is wholly unrealistic. Our long experience in the business obviously makes us well aware of the film-rental paying capacities of every theatre in the country. No attempt was made by the Government moreover to prove that in the aggregate, or even in some instances, better offers were made by the theatres in competition with the various theatres in the licensed chain. It simply assumes that we might have made a better deal with them or some of them.

As "an extreme example" of an illegal franchise with a theatre chain, the Government refers to our Interstate Circuit franchise, G. X. 261, printed at pp. 50-58 of the Appendix to its brief.

This agreement expressly provides in Item 12 that "All first-run product is to be dated and played within availability period, otherwise product will be considered automatically available for subsequent-run bookings". In the *Griffiths* case* the Government made two main objections to master agreements. The failure to include this clause was one of them. The other objection was to a lump-sum film rental. In this franchise the lump-sum payment of

*U. S. v. *Griffiths Amusement Co. et al.*, 68 Fed. Supp. 180.

$260,000, payable at the rate of $5,000 a week, is only a tentative basis determined upon in order to assure us of being paid in something like proper weekly amounts as we supply the pictures. It is nothing but a financing device. As item 3 in the franchise shows, each of the 44 features is valued at $3,750, and the three Frank Lloyd productions at $8,000. These are the principal pictures licensed.

The number of pictures in each category to be delivered to each theatre in each town is stated, and these vary somewhat in number. The varying number of days each theatre is to have the pictures is stated. For the second season, a review and revision is provided for to determine whether the $5,000 weekly payment should be revised upward or downward (item 15). A like review and revision is provided for in respect of the third season (item 16). The exhibitor agrees to play the product on substantially the nationally designated percentage terms, as set up by the distributor, which designations are to be mutually agreed upon, based on performance. Thus specific film rental terms are contemplated for each feature picture. If such terms result in film rentals in excess of $260,000, then the exhibitor is required to pay the distributor one-half the excess.

From the foregoing it can be readily seen, since we have heretofore shown that the quantity of pictures dealt with and the number of theatres dealt with are not legally objectionable, the Government's criticism of this franchise is ill-conceived. It is the only one of our seven franchises in evidence which even mentions a tentative lump-sum film rental.

It is thus evident that when we made franchises, indiscriminately with independent exhibitors and affiliated exhibitors, whether single theatres or chains, in order to secure

as firm outlets as possible for our pictures, with as wide a theatre coverage as possible, we were fully justified in believing these agreements to be lawful, and, contrary to the Government's artful suggestion, do believe that they are fully lawful. If any of the theatre chains were, as the Government claims, engaged in conspiracies against their smaller competitors, and were aided therein by having the use of the pictures which we supplied, this is not a consequence which can be charged to anyone but those who were engaged in such conspiracies. The remedy, of course, would be to enjoin them from enforcing such franchises as was done in the *Crescent* case. We are no more responsible for any abuse thereof than we would be if we were an independent power company, and had made a contract with the *Aluminum Company of America* to supply it with our output of power for its electrolytic installations at many of its plants over a period of years, thus enabling it to make aluminum for sale to the public at monopolistic prices.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 54 85

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; JOSEPH MORITZ; SOUTHERN CALIFORNIA AMUSEMENT COMPANY, INC.; EXHIBITORS' SERVICE, INC.; LAWRENCE CAPITOL, INC.; BIJOU AMUSEMENT COMPANY and PAUL REALTY COMPANY; ANDY ANDERSON; ARCH and MILAS L. HURLEY; RAYMOND and WILLARD GERVERS; GAMBLE ENTERPRISES, INC.; and ST. LOUIS AMBASSADOR THEATRE, INC.; EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., and FANCHON & MARCO SERVICE CORPORATION, Petitioners-Appellants,

against

UNITED STATES OF AMERICA, Plaintiff-Respondent,

and

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; and UNITED ARTISTS CORPORATION, Defendants-Respondents.

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR APPEAL.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1946.

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against

UNITED STATES OF AMERICA, Plaintiff-Respondent,

and

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION; LOEW'S INCORPORATED; RADIO-KEITH-ORPHEUM CORPORATION; RKO RADIO PICTURES, INC.; KEITH-ALBEE-ORPHEUM CORPORATION; RKO PROCTOR CORPORATION; RKO MIDWEST CORPORATION; WARNER BROS. PICTURES, INC.; VITAGRAPH, INC.; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION; TWENTIETH CENTURY-FOX FILM COPORATION; NATIONAL THEATRES CORPORATION; COLUMBIA PICTURES CORPORATION; SCREEN GEMS, INC.; COLUMBIA PICTURES OF LOUISIANA, INC.; UNIVERSAL CORPORATION; UNIVERSAL PICTURES COMPANY, INC.; UNIVERSAL FILM EXCHANGES, INC.; BIG U FILM EXCHANGE, INC.; and UNITED ARTISTS CORPORATION, Defendants-Respondents.

STATEMENT AS TO JURISDICTION SUBMITTED WITH PETITION FOR APPEAL.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, American Theatres Association; Inc.; Southern California Theatre Owners Association; Joseph Moritz; Southern California Amusement Company, Inc.; Exhibitors' Service, Inc.; Lawrence Capitol, Inc.; Bijou Amusement Company and Paul Realty Company; Andy Anderson; Arch and Milas L. Hurley; Raymond and Willard Gervers; Gamble Enterprises, Inc.; and St. Louis Ambassador Theatre, Inc., Eden Theatre Company, St. Louis Missouri Theatre, Inc., and Fanchon & Marco Service Corporation, petitioners for intervention in

the above entitled cause (hereinafter called petitioners), submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the judgment of the District Court.

The above entitled action was brought by the United States in a special statutory Three-judge District Court in the Southern District of New York pursuant to 15 U.S.C. §28. The suit was brought to enjoin violations of the anti-trust laws. An opinion was published by that court on June 11, 1946. On October 21, 1946, your petitioners moved for leave to intervene in the proceedings because they believed that they would be bound by a provision of the decree requiring licensing of film by competitive bidding and would be inadequately represented. On December 31, 1946, the court entered its decree modifying its opinion in some respects but nevertheless imposing a system of competitive bidding. On January 21, 1947, the court denied your petitioners' Motion for Leave to Intervene.

A. Statutory Provisions on which Jurisdiction Rests.

The statutory provision which confers jurisdiction upon the Supreme Court to review the judgment is Section 29 of Title 15 U.S.C., 32 Stat. 823, which reads as follows:

> "In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

B. The Statute of the United States Involved in this Appeal.

This appeal challenges (1) the propriety of Paragraph 8(c) of Part II of the decree of the court entered on December 31, 1946, imposing competitive bidding requirements in certain cases and (2) the denial by the court on January 21, 1947, of the petitioners' Motion for Leave to Intervene. The decree is based upon the Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2, which read as follows:

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The Motion for Leave to Intervene was brought under Rule 24 (a) of the Federal Rules of Civil Procedure, 28 U.S.C. following §723c. Said Rule 24 (a) reads as follows:

"Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

C. Dates of Judgments and Petition for Appeal.

The dates of the final judgments of the District Court here sought to be reviewed are December 31, 1946, and January 21, 1947. Petition for allowance of appeal was presented on February 26, 1947.

D. Substantial Nature of the Question Presented.

1. The Nature of the Proceedings and Parties.

This is an action instituted by the United States to enjoin violations of the Sherman Act in the motion picture industry. The court found violations of the Act by the defendants who are the major motion picture distributors and their exhibitor affiliates. The violations of the Sherman Act involved relate largely to discriminatory and restrictive practices of the defendants acting in concert directed against independent exhibitors. The substance of the violations found was a consistent and concerted course of conduct by defendant distributors to protect theatres owned or controlled by such defendants against the competition of independent exhibitors. Generally independent exhibitors were "syste-

matically excluded from the opportunity to procure preferred runs of pictures distributed by defendants in the localities in which defendants' theatres operate . . ." 66 F. Supp. 323, 330. In order to prevent certain of these practices the court adopted an extensive decree. This appeal is directed against a single provision of that decree, Section 8(c) of Part II thereof. This provision requires distributors to lease pictures to exhibitors only by competitive bidding, wherever more than one theatre desires to exhibit pictures under arrangements which exclude simultaneous exhibition in competing theatres.

Your petitioners are an association of exhibitors and various members of such an association who are engaged in showing motion pictures at theatres throughout the country. Their interests were not represented in the action and the requirement concerning competitive bidding will bind them and will adversely affect their business. Under the leadership of the American Theatres Association, which has an extensive membership of over 6,000 theatres throughout the country consisting of exhibitors of all types, the petitioners gathered together to seek intervention in order to point out to the court the effect of the proposed system of competitive bidding upon their business and to urge the court not to adopt such a provision.

2. The Effect of the Decree and Petitioners.

The petitioners assert that a system of competitive bidding will drastically restrict their access to the films necessary to operate their theatres and the value of their property. It will likewise impair the competitive positions which many of these theatres hold in the industry.

The restrictions of the decree are imposed directly only on the defendants. But by prescribing the terms on which the defendants may license films, the District Court has also prescribed the terms upon which petitioners must secure the rights to the sole product upon which they rely for the operation of their theatres.

The plan for competitive bidding imposed by the court's decree regulates the dealings between petitioners and the major distributors from whom they buy their feature pictures. It authorizes and requires these major distributors to follow a preconceived plan of uniform and concerted action which substantially controls the buying of film and restricts the independent competitive activity which any one of the major distributors would otherwise be free to undertake. It is obvious that if the major distributors were to limit each other's action in this way by voluntary agreement, they would be guilty of a violation of the antitrust laws. The court's decree attempts to legalize an otherwise illegal plan for concerted action to regulate the market for film. At the same time the court denies the buyers in the market so regulated by it their right to intervene and object to the combination set up by the court to control their methods of buying feature pictures.

This is not a case, as the court seems to assume, where persons, not parties to an antitrust action, are indirectly and incidentally affected by a decree introducing competition into a formerly closed market. The competitive bidding plan instead of restoring competition, affirmatively directs a combination to restrict freedom of competitive action on the part of the individual distributor defendants. It attempts to make legal a course of concerted action which would otherwise be illegal. In so far as the decree accomplishes that purpose it necessarily takes away from petitioners legal rights which they could have pursued against the combination in the absence of the decree. In other words, if the plan of competitive bidding stands, it binds petitioners in the following ways:

1. It compels the buyers in the market for films to submit to market regulations imposed by the concerted action of sellers who control a substantial part of the supply.

2. It takes away from petitioners their present right to enjoin such concerted action on the part of the defendants.

3. It takes away from petitioners their present right to recover damages under the antitrust laws on a showing that the operation of the plan has caused them injury.

4. It authorizes and compels the major distributors to break off established relationships with independents which have no taint of illegality whatever.

No doubt, the court is moved by the belief that the limited type of competition involved in enforced competitive bidding will be fairer than uncontrolled free competitive activity. But this is an economic judgment which the court has no power to make. Congress has not, and indeed it could not, delegate the broad power to make competition fairer by restricting competitive activity. *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

3. The Impropriety of the Decree.

The competitive bidding plan is bad both as a matter of law and in practice, as set forth below.

(a) *The decree is bad as a matter of law because it affimatively restricts competition.* The term competitive bidding has a deceptive sound, which has led the court to confuse it with actual competition. It is true that in many markets, competition is accomplished by competitive bidding. In the grain market for example, most purchases are made on a competitive exchange. But this does not mean that competition, even in the grain market, would be furthered by preventing the existence of private deals and established relationships between buyer and seller. Competitive bidding is often the result of a free market because, in competition with other methods equally available to the buyer, it happens in most instances to be more convenient. Such a situation occurs, as in the grain market, when the supply is not controlled by a few concerns in a few hands. Where, however, a few sellers control the supply, competitive bidding by the unorganized buyers destroys competition instead of creating it. In motion picture exhibition the record establishes

that the supply of pictures is closely controlled. And in no event is there either economic or legal justification in any market to close the doors to the competitive possibility of private deals.

Making competitive bidding the sole permissible method of buying or selling does not promote competition; it restricts it. The decree ignores the fact that there are other ways of competing for a scarce product than by making the highest bid. Thus, the defendants have wide-spread outlets in principal cities to which they may give their own pictures without competitive bidding. These outlets compete with the independents. The independents have no bargaining power comparable with that of the affiliates of the defendants who have greater resources, and also their own pictures to rely on. The competitive position of independents must depend on their ability to make individual deals on the basis of good will, assurance of long-continued relationships, better service and other inducements unrelated to price. Yet the decree prevents independents from using that kind of bargaining power, or that type of competitive effort.

(b) *The plan of competitive bidding in practice will cause irreparable damage to petitioners.* Under the decree a defendant, who might otherwise desire to continue to furnish pictures to an independent, either because of the assurance given by long-continued relationships, or because it might think it advantageous from a public point of view to preserve some little independent competition in the area, is compelled to break off that relationship and sell to the affiliate of another defendant who makes a higher bid. Thus the last protection of independents without sufficient resources to make the highest bid for each separate picture is gone. Their assurance of a supply of pictures at a price they can afford to pay is destroyed. A way for the piecemeal destruction of independents is provided by the decree.

Petitioners buy in a market where the supply is in the hands of a few. The principal suppliers have been found guilty of a conspiracy to dominate the market and eliminate

competition in exhibition. By this conspiracy independents have been weakened and destroyed. The relief offered by the court is to induce the wrongdoers in control of the supply to charge all the traffic will bear. At the same time the weakened independents are required to compete with each other in paying the highest possible price to the defendants.

Presumably the court thought that the highest bid system would prevent favoritism by the defendants toward individual buyers of films. The fact is that the peculiar character of the product sold will create new opportunities for favoritism under competitive bidding. The sale of the right to exhibit a film in a theatre is not like the sale of an ordinary commodity. The factors which determine the best bid for the exclusive right to show the picture for a limited period of time are highly uncertain. Their relative value depends solely on a business judgment which cannot be reviewed unless it is so bad that it can be called arbitrary and capricious. There is the location of the theatre, the type of people who patronize it, the good will of the exhibitor in the community, the length of run which he offers, the clearance over other theatres, the time of exhibition, the type of exhibition, the ability of the exhibitor successfully to advertise the picture, and so on. The normal procedure of renting feature films for a percentage of the gross receipts adds other factors such as the size of the theatre. Where and how a picture will net the most money for a defendant who offers it for competitive bidding on all these factors is only a guess. Hence the court allows the defendants to reject all bids if it desires. It allows the selection of the successful bidder to depend on the uncontrolled business judgment of the very parties whom it has found guilty of discrimination in the past. Thus, the effect of the plan is to enable any defendant to favor any exhibitor, including affiliates of other defendants, and receive protection from the decree unless its business judgment is so obviously bad it can be called capricious.

The decree sets up a defendant-controlled scheme of regulations of the industry. We submit that if a regulated market for films is to be set up by depriving independents of their present remedies against concerted action by the major distributors, it must be done by Congress, and not by judicial fiat.

4. Petitioners' Right to Intervene.

All the requirements for intervention as of right appear in this case. The facts set out in the foregoing statement establish that petitioners and the independent exhibitors which they represent are bound by the decree imposing on them a system of competitive bidding. If the other requirements for intervention are satisfied we think that the right of the petitioners to present their objections to this Court as intervenors can hardly be disputed. The other requirements are: that the petition be timely, and that the interests of the petitioners are not adequately represented.

On the timeliness of the petition there can be no doubt. It was filed before the decree was signed, immediately after petitioners learned from its opinion that the court contemplated imposing on them a scheme for competitive bidding. This was the first occasion on which intervention for the purpose of opposing competitive bidding was possible.

The inadequacy of the representation of petitioners' interest is equally clear. Some mild dissent to the plan was voiced by the defendants, but it can scarcely be held that petitioners' interests are adequately represented by those found guilty of conspiring to discriminate against them. The government would be the natural party to protect petitioners. It has not only voiced no objection but actually indicated before the court its willingness to try out the plan. At the same time it has attempted to prevent intervention by petitioners.

It is important that this Court should decide that persons immediately and directly affected, as are the petitioners, do have a right to be heard when their fate is being decided

and to present their case on appeal to this Court. Their interests are sufficiently substantial so that they should not be relegated to a position of informal advisers whose voices may be heard only as a matter of grace. They have petitioned the court below and this Court not because of any general interest in the form of decree adopted by the court but because of the specific contemplated imposition upon them of a method of doing business which will bind them and which threatens the value of millions of dollars which they have invested.

E. Cases which Sustain Jurisdiction on this Appeal.

United States v. *Terminal Railroad Assn. of St. Louis*, 236 U. S. 194, 199;

Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502, 506-509.

Cf. Evens & Howard Fire Brick Company, et al., v. *United States* 236 U. S. 210; *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 556.

In the *St. Louis Terminal* case certain provisions of a decree under the Sherman Act reorganizing a combination of railway terminal facilities had the effect of discontinuing the public service transportation of workers employed by and materials used by business firms not parties to the proceeding. This Court held that these third parties were entitled to be heard concerning the settlement of the anti-trust decree "in so far as it might operate prejudicially to their rights." The competitive bidding provisions of the instant decree set up a combination among the major producers designed to prevent petitioners from using normal methods of competition in buying their product. In approving such a combination the court attempts to take away petitioners' right which would otherwise exist to attack under the anti-trust laws concerted action of the defendants to regulate the market. It thus requires drastic revision

of petitioners' business practices and threatens them with destruction or substantial damage. As the court said in *Missouri-Kansas Pipe Line Co.* v. *United States, supra,* "But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." Petitioners' legal right to a market uncontrolled by concerted action of major distributors cannot be cut off without giving them the standing of parties to defend that right.

In the case of *United States* v. *California Co-operative Canneries, supra,* is found a dictum to the effect that the court below "did not refer to the decisions which hold that an order denying leave to intervene is not appealable . . . except where he who seeks to intervene has as direct and immediate interest in a res which is the subject of the suit, ..." Nothing in this dictum is in derogation to the right of appeal in this case. In the first place, Rule 24 of the Federal Rules of Civil Procedure permits intervention of right under the following separate circumstances: "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof." The *California Co-operative Canneries* dictum above cited refers only to situation (3) in the above Rule and not to situation (2) which is before the court here. Furthermore, even under the situation referred to in the California Co-operative Canneries case petitioners here would have a right of intervention. The court below has attempted to control the theatre business of petitioners by imposing on them rules and regulations which are as effective as a mortgage or a covenant impairing the value of the threatre and taking away freedom to operate it under existing laws. In other words, the

court has seized and is attempting to control "a res" to wit: petitioners' theatres.

List of Exhibits.

Copies (1) of the opinion of Augustus N. Hand, Circuit Judge, for the statutory District Court, filed on June 11, 1946, (2) of the decree of that court filed on December 31, 1946, and memorandum supplement thereto of the same date, (3) of the order of the court denying petitioners' motion for leave to intervene on January 21, 1947, and (4) of the modification of the decree of December 31, 1946, made on February 3, 1947, are affixed hereto as Exhibits 1, 2, 3 and 4 respectively.

Conclusion.

It is clear that these appeals are within the exclusive jurisdiction of the Supreme Court and that substantial questions of widespread importance are involved requiring the review of the judgment of the statutory court in a full hearing on the merits.

Respectfully submitted,

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Association
Attorneys for Appellants

Date: February 26, 1947.

EXHIBIT 1

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Equity No. 87-273

UNITED STATES OF AMERICA, *Plaintiff,*

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants.

Opinion

Before:

AUGUSTUS N. HAND, *Circuit Judge,*

HENRY W. GODDARD and JOHN BRIGHT,

District Judges.

This is a suit to secure equitable relief against the alleged domination and control by the defendants and their affiliates of the motion picture industry in contravention of Sections 1 and 2 of the Sherman Anti-Trust Act. Decree granting partial relief to plaintiff.

Wendell Berge, Assistant Attorney General; Robert L. Wright, Philip Marcus, Elliott H. Meyer, and John R. Niesley, Special Assistants to the Attorney General; Frank W. Gaines, Jr., Gerald A. Herrick, Robert B. Hummel, Harold Lasser and Horace T. Morrison, Special Attorneys for United States of America.

Simpson Thacher & Bartlett, Attorneys for Paramount Defendants; Whitney North Seymour, Louis Phillips, Albert C. Bickford and Armand F. MacManus, Counsel.

Davis Polk Wardwell Sunderland & Kiendl; J. Robert Rubin, Attorneys for Defendant Loew's, Inc.; John W. Davis, J. Robert Rubin, C. Stanley Thompson, Benjamin Melniker and S. Hazard Gillespie, Jr., Counsel.

George S. Leisure, Ransone R. Irvine, Granville Whittlesey, Jr., and Gordon E. Youngman, Attorneys for Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation; Roy W. McDonald, and Donovan Leisure Newton & Lumbard, Counsel.

Joseph M. Proskauer and Robert W. Perkins, Attorneys for the Warner Defendants; Joseph M. Proskauer, Robert W. Perkins, J. Alvin Van Bergh and Howard Levinson, Counsel.

Dwight, Harris, Koegel & Caskey, Attorneys for Twentieth Century-Fox Film Corporation and National Theatres Corporation, Defendants; John F. Caskey and Frederick W. R. Pride, Counsel.

Schwartz & Frohlich, Attorneys for Defendant Columbia; Louis D. Frohlich, Arthur H. Schwartz, Irving Moross and Max H. Rose, Counsel.

Charles D. Prutzman, Attorney for the Universal Defendants.

O'Brien, Driscoll & Raftery, Attorneys for the Defendant United Artists Corporation; Edward C. Raftery, Arthur F. Driscoll, Chas. D. Prutzman, George A. Raftery and Adolph Schimel, Counsel.

AUGUSTUS N. HAND, *Circuit Judge*:

The United States brought suit under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, in order to prevent alleged violations by the defendants of Sections 1 and 2 of that Act.

The following is a general description of the defendants:

1. (a) Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 1501 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Paramount Film Distributing Corporation, a wholly owned subsidiary of Paramount Pictures, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1501 Broadway, New York, New York, and is engaged in the distribution branch of the industry.

2. Loew's, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1540 Broadway, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

3. (a) Radio-Keith-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) RKO Radio Pictures, Inc., a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the production and distribution branch of the industry.

(c) Keith-Albee-Orpheum Corporation is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures. Approximately 99% of its common stock and 33% of its preferred stock are held by Radio-Keith-Orpheum Corporation.

(d) RKO Proctor Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of New York, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

(e) RKO Midwest Corporation, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, is a corporation organized and existing under the laws of the State of Ohio, with a place of business at 1270 Sixth Avenue, New York, New York, and is engaged in the business of exhibiting motion pictures.

4. (a) Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of Dela-

ware, having its principal place of business at 321 West 44th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Vitagraph, Inc., a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and is engaged in the business of distributing motion pictures.

(c) Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 321 West 44th Street, New York, New York, and, among other things, acts as booking agent for the exhibition interests of the said Warner Bros. Pictures, Inc.

5. (a) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, having its principal place of business at 444 West 56th Street, New York, New York, and is engaged in the business of producing, distributing, and exhibiting motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) National Theatres Corporation is owned and controlled by Twentieth Century-Fox Film Corporation, and is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 2854 Hudson Boulevard, Jersey City, New Jersey, and is a holding company for the theatre interests of the said Twentieth Century-Fox Film Corporation.

6. (a) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States and in foreign countries.

(b) Screen Gems, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of California, with a place of business at 700 Santa Monica Boulevard, Hollywood, California, and is engaged in the business of producing motion pictures.

(c) Columbia Pictures of Louisiana, Inc., a wholly owned subsidiary of Columbia Pictures Corporation, is a corporation organized and existing under the laws of the State of Louisiana, with a place of business at 150 South Liberty Street, New Orleans, Louisiana, and is engaged in the business of distributing motion pictures.

7. (a) Universal Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States and in foreign countries.

(b) Universal Pictures Company, Inc., a subsidiary controlled by Universal Corporation, is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 1230 Sixth Avenue, New York, New York, and is engaged in the business of producing motion pictures.

(c) Universal Film Exchanges, Inc., a wholly owned subsidiary of Universal Pictures Company, Inc., is a corpora-

tion organized and existing under the laws of the State of Delaware, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

(d) Big U Film Exchange, Inc., a wholly owned subsidiary of Universal Corporation and Universal Pictures Company, Inc., is a corporation organized and existing under the laws of the State of New York, with a place of business at 1250 Sixth Avenue, New York, New York, and is engaged in the business of distributing motion pictures.

8. United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 729 Seventh Avenue, New York, New York, and is engaged in distribution of motion pictures in various parts of the United States and in foreign countries.

The five major defendants—Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation, and their subsidiaries—were charged in the amended and supplemental complaint with combining and conspiring unreasonably to restrain trade and commerce in the production, distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act. The three minor defendants—Columbia Pictures Corporation, Universal Corporation, and their subsidiaries, which are producers and distributors, and not exhibitors, and United Artists Corporation, which is a distributor only, were likewise charged with combining and conspiring with the five major defendants and with each other unreasonably to restrain and to monopolize trade and commerce in motion pictures. As it appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formal-

ly abandoned by the plaintiff. The issues therefore are whether there have been illegal restraints or monopolization in the distribution and exhibition of motion pictures.

The plaintiff contends that an illegal conspiracy and monopoly were effected by: (1) concertedly fixing the license terms before the licensees have had a fair opportunity to estimate the value and character of the films licensed and before such films were completed or shown; (2) concertedly fixing the run, clearance, and minimum admission price terms on which an exhibitor may show pictures through license agreements covering periods of a year or more; (3) concertedly conditioning the licensing of one film or group of films upon the licensing of another film or group of films and by conditioning the licensing of films in one theatre or group of theatres upon the licensing of films in other theatres or group of theatres; (4) concertedly discriminating with respect to the license terms granted to theatres in large circuits because such theatres are part of a circuit. The means of such discrimination are said to be the licensing for exhibition in theatres of the five defendant exhibitors of runs ahead of those granted to competing independent exhibitors, and the continuance of these prior runs from season to season to the prejudice of independent exhibitors. As a result independent exhibitors are systematically excluded from the opportunity to procure preferred runs of pictures distributed by the defendants in the localities in which defendants' theatres operate and at times refused any run at all in order to protect defendants' theatres from competition.

It is further charged by the plaintiff that the distributor-exhibitor defendants have combined with each other: (1) by conditioning the licensing of film distributed by one defendant in theatres operated by another upon the licensing of films distributed by the latter in the theatres operated by the former; (2) by excluding independently produced films from affiliated theatres and by excluding unaffiliated exhibitors from competing with first run or other run theatres in

cities and towns where affiliated theatres are located; (3) by excluding unaffiliated exhibitors from operating theatres on the same run as affiliated exhibitors; (4) by using the first and early runs of affiliated theatres to control the film supply, runs, clearances and admission prices of operators of competing unaffiliated theatres in cities and towns in which affiliated theatres are located; (5) by pooling or otherwise sharing with each other the profits of affiliated theatres owned or controlled by two or more exhibitor defendants located in the same competitive area and frequently by together operating on the same run in cases where they would be in competition with one another except for such pooling or profit sharing agreements; (6) by effecting a division of the territory of the entire United States among them for theatre operating purposes.

The amended and supplemental complaint prays: (1) That each of the contracts, combinations and conspiracies in restraint of trade, together with attempts to monopolize the same, be declared illegal; (2) that the defendants and their subsidiaries be perpetually enjoined from continuing to carry out attempts at monopolization and all restraints of trade in distribution and exhibition of motion pictures; (3) that a nation-wide system of impartial arbitration tribunals, or such other means of efforcement as the court may deem proper, be established in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in the decree; (4) that the five major defendants and their subsidiaries be directed to divest themselves of all interest and ownership, both direct and indirect, in any theatres which the court shall find to have been used by one or more of them unreasonably to restrain trade and commerce in motion pictures.

After the amended and supplemental complaint was filed, the plaintiff and the five major defendants and their subsidiary corporations that were parties to the suit, executed a written consent to the entry of a decree by the District

Court, signed November 20, 1940. A decree was made in accordance with the consent reciting that no testimony had been taken, that no provision of the decree should be construed as an admission or adjudication that any of the plaintiff's charges were true, or that the consenting defendants had violated any law, or that the doing or the failure to do any of the acts or things enjoined or directed to be done would constitute a violation of law.

The decree enjoined the consenting defendants as follows:

(1) No distributor defendant shall license feature motion pictures for public exhibition within the United States at which an admission fee is to be charged until the feature has been trade shown within the exchange district in which the exhibition is to be held.

(2) No distributor defendant shall offer for license or shall license more than five features in a single group. The license of one group of features shall not be conditioned upon the licensing of another feature or group of features, nor shall any distributor defendant require an exhibitor to license shorts, reissues, westerns, or foreigns as a condition of licensing other features. Disputes as to violation of these provisions shall be subject to arbitration. The power of the arbitrator shall be limited to a determination of whether the offer to license or the license was conditioned and, if found to be conditioned, to imposing a penalty against the distributor of not to exceed $500.

(3) No license for features to be exhibited in theatres located in one exchange district shall include theatres located in another exchange district.

(4) No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run to be designated by the distributor upon terms and conditions fixed by the distributor, if the exhibitor can satisfy reasonable minimum standards of theatre operation

and is reputable and responsible, unless the granting of a run on any terms will have the effect of reducing the distributor's total film revenue in the competitive area in which such exhibitor's theatre is located. Controversies arising from a complaint by an exhibitor for violation of the foregoing provision shall be subject to arbitration under which an award based on a finding of violation shall direct the distributor to offer its pictures to the complainant on a run to be designated by the distributor, and upon terms fixed by the distributor, which are not calculated to defeat the purposes of this subdivision.

(5) Controversies arising from the complaint of an exhibitor that a feature licensed by a distributor defendant for exhibition in a particular theatre is generally offensive in the locality on moral, religious, or racial grounds shall be subject to arbitration, and, if the feature shall be found to be thus offensive, an award shall be made cancelling the license in so far as it relates to the exhibition of the feature in that theatre.

(6) Controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. Reasonable clearance as to time and area was stipulated and held by the consent decree to be essential to the distribution and exhibition of motion pictures. In determining whether a clearance complained of is unreasonable the arbitrator should consider the historical development of clearance in the area, the admission price of the theatres involved; their character, location, and type of entertainment; the rental terms and license fees paid by them; the extent to which they compete for patronage, and all other business considerations except affiliation of the theatres with a distributor or with a circuit of theatres. If the clearance be found unreasonable, the award shall fix the maximum clearance between the theatres involved, which may be granted in licenses thereafter entered into by a distributor that is party

to the arbitration. The award may also fix, subject to the provisions of Section XVII of the consent decree, such maximum clearance under any existing franchise, i.e., a licensing agreement, or a series of licensing agreements, covering more than one motion picture season and covering the exhibition of pictures released by the distributor during the entire period of the agreement. Nothing contained in this subdivision, nor any award in arbitration, shall restrict the exhibitor's right to license for any theatre any run which it is able to negotiate, nor shall restrict the distributor's right to license any run which it desires to grant, nor to license the exhibition of any special feature under a contract the terms of which, including provisions for clearance, are applicable only thereto.

(7) Controversies arising upon a complaint by an independent exhibitor that a distributor defendant has arbitrarily refused to license its features for exhibition on the run requested by the exhibitor in one of the latter's theatres shall be subject to arbitration, but the making of any award is to be subject to certain specified conditions and no award made shall affect the license to exhibit any features then under license, but only future licenses.

(8) For three years after the entry of the decree, the consenting defendants are to notify the Department of Justice of any legally binding commitment for the acquisition of any theatre or theatres. During such period, each defendant is to report monthly the changes in its theatre position, together with a statement for the reason of such changes. For three years following the entry of the decree, no consenting defendant shall enter upon a general program of expanding its theatre holdings. Nothing shall prevent any such defendant from acquiring theatres or interests therein to protect its investment or its competitive position or for ordinary purposes of its business.

(9) The decree shall not be construed to limit, impair or alter the right of a distributor to license the exhibition of

motion pictures, subject to such terms as may be satisfactory to it, (a) in any theatre in which, or in the proceeds of which, it is directly or indirectly interested; (b) in any theatre an interest in which of not less than 50% is acquired after the date of the decree and which it owns at the time of such license, and (c) in any theatre of which a company in which the defendant owned not less than 42% of the common stock at the date of the decree and at the time of such license acquires after the date of the decree and owns at the time of such license a financial interest of not less than 50%.

(10) Except as otherwise expressly and specifically provided in the decree, nothing therein shall be construed to limit the right of any distributor to select its own customers, bargain with them in accordance with law, or negotiate with or license to or accept any offer from any exhibitor to license its motion pictures or any number thereof, upon such terms and conditions as it deems advisable or to its best interests.

(11) For a period of three years after the entry of the consent decree the plaintiff shall not seek either in this or any other action against the consenting defendants to divorce the production or distribution of motion pictures from their exhibition or to dissolve any defendant or any corporation in which it has directly or indirectly a substantial stock interest and which is engaged in the exhibition of motion pictures, or holds directly or indirectly a substantial stock interest in any corporation so engaged, or to dissolve or break up any circuit of theatres of any such defendant or of any such corporation, or to require any such defendant, corporation or circuit to divest itself of its interests or any thereof in motion picture theatres in which it had an interest at the time of the entry of the decree.

(12) The method and conditions of and the procedure for the arbitration of controversies and the powers of an appeal board created by the court to entertain appeals from the arbitration tribunal are set forth in the decree.

(13) Jurisdiction is retained by the decree for the purpose of enabling any parties to apply to the court at any time more than three years after the date of the entry for any modification thereof.

The three minor defendants and their subsidiaries did not consent to the decree of November 20, 1940, presumably because of their opposition to the provisions requiring trade-showing and prohibiting block-booking of groups of more than five films. It was provided that if the plaintiff did not secure the entry of a decree against the three minor defendants before June 1, 1942, the consenting defendants were to be released from those provisions. Such a decree was in fact not entered by the specified date, and accordingly the sections of the decree regarding trade-showing and block-booking have lapsed. Nevertheless, according to the testimony, the consenting defendants have continued to comply with them.[1]

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[1] The following are definitions of terms used in this opinion:

Block-booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres.

Exchange District—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory.

Feature—Any motion picture, regardless of topic, the length of the film of which is in excess of 4000 feet.

Formula Deal—A licensing agreement with a circuit of theatres in which the rental price of a given film is measured for the circuit as a whole by a specified percentage of the picture's national gross.

Franchise—A licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of the agreement.

Independent—A producer, distributor, or exhibitor, as the context requires, which is not a defendant in this action or a subsidiary or affiliate of a defendant.

Master Agreement—A licensing agreement, also known as a "blanket deal", covering the exhibition of films in a number of theatres, usually comprising a circuit.

Motion Picture Season—A one-year period beginning about September 1 of each year.

Counsel for the five major defendants and their subsidiaries contend that the consent decree has, in some respects at least, the effect of a final judgment which may not be modified. But we cannot see how such a position in consistent with the language of Section XXIII (d), which permits "* * * any of the parties to this decree to apply to the Court at any time more than three years after the date of the entry of the decree for any modification thereof." That period has expired, and therefore everything relating to rights under and remedies for violation of the Sherman Act is, therefore, open for consideration, even as between consenting parties; and certainly nothing has hitherto been decided which affected the non-consenting parties. It would seem to follow that we cannot bind any parties to subject themselves to the arbitration system or the board of appeals set up in aid of it without their consent, even though we may regard it as desirable that such a system, in view of its demonstrated usefulness, should be continued in aid of the decree which we propose to direct.

The evidence has established various infractions of the Sherman Act on the part of each of the defendants which we shall proceed to discuss.

Price-fixing.

The defendants who have granted moving picture licenses have fixed minimum admission prices which the exhibitor agrees to charge irrespective of whether it is to pay a flat rental or a percentage of the theatre receipts. It is said that these minimum admission prices are in general only those currently charged by the exhibitors and that they are

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Road-show—A public exhibition of a motion picture in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located.

Runs—The successive exhibitions of a motion picture in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on.

Trade-showing—A private exhibition of a film prior to its release for public exhibition, as required by Section III of the consent decree.

placed in the licenses in order to assure the distributor of a minimum revenue when it licenses upon a percentage basis, and also to assure a continuation of the conditions which moved it to grant a given run to the exhibitor.[2] Whatever the reason, the various licensing defendants have agreed with their licensees to a system which determines minimum admission prices in all theatres where motion pictures licensed by them are exhibited. In this way are controlled the prices to be charged for most of the motion pictures exhibited either by the defendants, or by independents, within the United States. That the eight defendants distribute most of the features is evident from the record. For example, during the 1943-44 season the eight defendants distributed about 77.6% of all features nationally distributed except "westerns" and low cost productions, and even if the latter inferior and non-competitive pictures are included, they distributed 65.5%. See Plaintiff's Exh. 426; Record p. 2400. The control of distribution closely resembles that appearing in *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. 2d 738, 744-5 (C.C.A. 3), where the court said:

> "Defendants control the production and distribution of more than 80% of feature pictures in this country, and no exhibitor can successfully operate without access to defendants' product."[3]

The licenses are in effect price-fixing arrangements among all the distributor-defendants, as well as between such defendants individually and their various exhibitors.

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[2] That the distributor-defendants have more than merely a passive interest, as they claim, in the maintenance of specified minimum prices is shown by their inclusion in the licenses of provisions for severe penalties if less than those prices are charged. Some licenses provide that if the schedule of minimum prices is violated, all existing licenses of the distributor for that theatre may be cancelled at the option of the distributor; other licenses provide that the particular license may be cancelled or that the exhibitor's clearance over subsequent runs be greatly reduced. See Plaintiff's Exhibits 275-290.

[3] The defendants in the *Goldman* case were substantially the same as those here, except that Universal Corporation was there eliminated by agreement.

Such combinations we hold to be forbidden by the Sherman Act.

The exhibits submitted in this case contain numerous express agreements between the various distributing defendants and their licensees stating the minimum admission prices which licensees are required to maintain in showing the distributors' pictures in the areas concerned. The agreements are not only between the distributor-defendants and other defendants owning theatres, but also between the distributor-defendants and independent theatre owners. A correlation of these agreements shows that in many instances the minimum prices set forth in the license agreements by the various defendants are in substantial conformity. Indeed, it is conceded in the joint brief filed on behalf of Loew's, Paramount, Warner, RKO and Twentieth Century-Fox that the admission prices included in licenses of the various distributor-defendants are in general uniform, being the usual admission prices currently charged by the exhibitors. At pages 31-2 of the joint brief it is stated:

> "The testimony shows that it is the general practice of all the distributors, whether dealing with independent exhibitors or affiliated ones, to include a provision in the license agreement that the exhibitor shall not charge less than a specified minimum admission price during the exhibition of the particular picture or pictures licensed. * * * The minimum admission price included in the license is not one which the distributor dictates, but is the usual admission price currently charged by the exhibitor. (R. 433, 718, 968, 999, 1382-3). It is the practice of exhibitors to charge the same scale of admission prices over a period of time and not to change them according to whose pictures are being exhibited or according to any fluctuations in the type of picture."

A similar statement is made at page 18 of the brief of Columbia, and the brief of United Artists and Universal appears to argue on the same assumption at pages 24-39.

It does not seem important whether the distributor was the more controlling factor in determining the minimum admission prices. Whether it was such a factor or merely acceded to the customary prices of the exhibitors, in either event there was a general arrangement of fixing prices in which both distributors and exhibits were involved. But it is plain that the distributor did more than accede to existing price schedules.[4] The licenses required them to be maintained under severe penalties for infraction, and the evidence shows that the distributors in the case of exceptional features, where not satisfied with current prices, would refuse to grant licenses unless the prices were raised.[5] More-

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[4] Reagan, vice-president in charge of distribution and sales for Paramount, testified as follows:

"Q. Well, does that (the admission price) fix his right to a particular run or to clearance? A. It would have an influence upon the run and clearance, yes, sir."

* * * * *

"Q. Why would you be interested in the minimum admission price or the admission price charged by the exhibitor in connection with determining what run you would negotiate for? A. Because the admission price that he charges determines the film rental that I can earn for my pictures." Record pp. 718-9.

See also testimony of Kupper in charge of distribution organization of RKO. Record p. 1084.

[5] Testimony of John J. Friedl, president of Minnesota Amusement Company—the stock of which is owned by Paramount, was as follows:

"Q. Are there occasional instances of special attractions where there is a negotiation as to a higher admission price with the distributor? A. That has come up on several occasions. In the case of the picture 'Woodrow Wilson', and several other pictures, they have been released by the distributors as road show attractions, and in those cases the distributors insisted upon road show prices, and it was the option of the purchaser, or the theatre, to buy or not to buy those pictures at those prices; but if he expected to play the picture at that time, he would have to charge such admission price.

"Q. And if he was not willing to advance his admission price to meet the distributor's terms, he had the opportunity to play this picture on regular run, is that right? A. At a later date, that is correct.

"Q. Is the provision for that minimum admission price included not only in license contracts for first-run exhibition but also for subsequent-run exhibition? A. Yes, I think it applies in all cases.

"Q. Is it included in license contracts for percentage pictures and also for flat rental pictures? A. Yes, sir.

over, the distributors, when licensing on a percentage basis, were interested in the prices charged and even when licensing for a flat rental were interested in admission prices to be charged for subsequent runs which they might license on a percentage basis. Likewise all of the five major defendants had a definite interest in keeping up prices in any given terirtory in which they owned theatres, and this interest they were safeguarding by fixing minimum prices in their licenses when distributing their films to independent exhibitors in those areas. Even if the licenses were at a flat rate, a failure to require their licensees to maintain fixed prices would leave them free by lowering the current charge to decrease through competition the income in the licensors' own theatres in the neighborhood. The whole system presupposed a fixing of prices by all parties concerned in all competitive areas.

The similarity of specified minimum prices prescribed for the same theatres in the distributor-defendants' contracts of license is shown by the following table collated from exhibits in evidence.[6] The exhibits used to prepare

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"Q. Where the admission price is included for subsequent-run exhibition, does your answer with respect to who determines the admission price apply to that as well? A. That is correct. But, of course, it is reasonable to assume, to understand, that in setting our admission prices, we do not do that on an arbitrary basis because it is reasonable to expect that the larger theatres playing the first-runs would get the maximum price for the protection of the distributor and the producer. And in the secondary houses the prices are less.

"Q. That is, generally speaking, the first-run houses charge a higher price than subsequent-run, and then the prices step down among the runs? A. That is correct." Record p. 1000.

[6] This table is derived from Plaintiff's Exhibits 41, 42, 57 (1-49), 82, 94, 126,-127, 128, 139, 365, 369. In most of the exhibits there was no indication as to whether the admission price given included or excluded taxes. When this information was given in the exhibits, it is stated in the table as "tax incl.", or "tax excl." The word "none" is used to mean that though a license was in evidence, no admission price was specifically stated in the contract, either through inadvertence or on the understanding that the admission prices currently being charged or contained in previous licenses would be continued. Record pp. 433, 724, 782, 1082, 1211. The symbol "x" is used to indicate that no license of that distributor for that particular theatre was in evidence.

the table contained answers of the defendants to plaintiff's interrogatories about the first block of five features licensed for the 1943-44 season by each of the five major distributor-defendants, and about the first five pictures licensed by each of the three minor defendants, and about that picture of each defendant which during the season received the most billings in the United States.

Theatre	*City, State*	*Paramount*	*Loew's*	*Warner*	*RKO*	*Fox*	*Col.*	*U. A.*	*Un*
Sneicer	Akron, Ohio	30c tax excl.	27c	30c	30c	x	x	30c	x
Bailey	Buffalo, N. Y.	30c	x	30c	none	27c	29c	none	x
Liberty	Covington, Ky.	28c tax excl.	x	33c tax incl.	none	x	x	x	x
Madison	Covington, Ky.	28c tax excl.	28c	x	none	28c	x	x	x
LaSalle	Niagara Falls	30c tax incl.	27c	x	none	27c	x	x	x
Paramount	Akron, Ohio	20c tax excl.	22c	25c	none	20c	x	25c	x
Capitol	Cleveland, Ohio	30c tax	27c	30c	x	30c	x	x	x
Shaker	Cleveland, Ohio	35c tax excl.	x	35c	x	35c	x	35c	x
Heights	Cleveland, Ohio	30c tax excl.	27c tax incl.	30c	none	30c	x	x	x
Senate	Detroit, Mich.	x	37c	35c	none	35c	x	none	x
Ritz	Baltimore, Md.	x	25c	28c tax incl.	none	25c	x	none	2
Vilma	Baltimore, Md.	x	25c	28c	none	25c	x	none	x
Centre	Baltimore, Md.	x	30c	33c tax incl.	x	30c	x	x	x
Hampden	Baltimore, Md.	x	x	x	x	27c	x	27c	2
Columbia	Baltimore, Md.	x	25c	28c	none	25c	x	x	2
Broadway	Baltimore, Md.	x	27c	x	x	27c	x	27c	2
Apollo	Baltimore, Md.	x	25c	x	x	27c	x	25c	2
Irvington	Baltimore, Md.	x	x	28c	25c	25c	x	x	2
Montevista	Cincinnati, Ohio	30c	30c	x	33c	x	x	30c	x
20th Century	Cincinnati, Ohio	29c tax excl.	30c	x	30c	x	x	30c	x
Jackson	Cincinnati, Ohio	29c tax excl.	x	x	x	x	x	30c	x
Esquire	Cincinnati, Ohio	29c tax excl.	x	x	x	x	x	30c	x
Sunset	Cincinnati, Ohio	29c tax excl.	x	x	x	x	x	30c	x
Westwood	Cincinnati, Ohio	29c tax excl.	x	x	x	x	x	30c	x
Lawrence	New Haven, Conn.	27c	27c	33c	27c	27c	x	25c	x
Westville	New Haven, Conn.	30c	30c	33c	none	30c	x	30c	x
Pequot	New Haven, Conn.	30c	30c	33c	30c	x	x	33c	x

City, State	Paramount	Loew's	Warner	RKO	Fox	Col.	U. A.	Univ.
New Haven, Conn.	30c	30c	33c	none	30c	x	30c	x
Indianapolis, Ind.	35c	x	35c	35c	35c	x	x	x
Albuquerque, N. M.	none	40c	x	42c	40c	30c	x	x
Appelton, Wisc.	40c	46c	none	none	45c tax incl.	none	x	46c plus 9c tax
Beloit, Wisc.	36c	27c	40c	35c	36c tax incl.	35c	x	42c plus 8c tax
Charleston, W. Va.	x	40c	x	40c	x	x	x	x
Huntington, W. Va.	40c	40c	34c	35c	40c	x	x	40c
Alexandria, Va.	35c	35c	39c tax incl.	none	35c	37c	x	35c
Norfolk, Va.	27c	27c	x	x	x	x	x	x
Burlington, Vt.	25c	36c	x	35c	40c	x	x	x
Charleston, S. C.	40c	40c	44c	27c	40c	15c	x	35c
Woonsocket, R. I.	40c	40c	x	none	x	x	x	x
	x	x	x	44c	35c	35c	x	30c

It is apparent from the foregoing that there was great similarity and in many cases identity in the minimum prices fixed for the same theatre in the licenses of all the defendants. Where there was a marked difference in price, as for example in the admissions specified by RKO, Columbia and Universal, in a theatre in Charleston, South Carolina, it is likely to have been due to the showing of a picture of a different class from the others, or upon a different run.

Such uniformity of action spells a deliberately unlawful system, the existence of which is not dispelled by the testimony of interested witnesses that one distributor does not know what another distributor is doing; and there can, in our opinion, be no reasonable inference that the defendants are not all planning to fix minimum prices to which their licensees must adhere. See Record p. 1322.

In addition, several of the exhibits disclose operating agreements between the five distributor-defendants who are also theatre owners, or between them and independent theatre owners in which joint operation of the theatres covered by the agreements is provided and minimum admission prices to be charged are either stated therein, or are to be

jointly determined by other means. Apparently those particular price-fixing agreements do not involve the three minor defendants or their subsidiaries. For example, in Plaintiff's Exh. 220 there are agreements between subsidiaries of Loew's and Warner, covering the period of May 5, 1938 to August 31, 1947, according to which the admission prices for three theatres in Pittsburgh—two of Warner and one of Loew's—are to be fixed by a joint committee. In Plaintiff's Exh. 218, an agreement between Warner and Paramount provides that from March 1, 1936, to August 31, 1953, two theatres previously operated by Warner, and one theatre previously operated by Paramount in Hammond, Indiana, should be managed by Warner Bros. Circuit Management Corporation and the then present scale of admission prices maintained. By other agreements in Plaintiff's Exh. 219, RKO and Warner provided for joint operation from August 27, 1937, to August 31, 1950, of five theatres in Cleveland—three of RKO and two of Warner—for which minimum prices are to be determined by a joint operating committee. See also, *e.g.*, Plaintiff's Exh. 229 (Warner and independent); Exh. 213 (Loew's and independents); Exh. 202 (RKO and independent); Exhs. 226, 226a (Paramount, Warner, and independent); Exh. 223 (Warner and independent); Exh. 386 (Paramount, RKO and independent); Exhs. 238, 239 (Fox and independents); Exh. 387 (Paramount, RKO and independent); Exh. 206 (RKO and Paramount); Exh. 221 (Warner and Paramount); Exh. 209 (RKO and Paramount); Exh. 205 (Paramount and independent). These agreements show the express intent of the major defendants to maintain prices at artificial levels.

As further evidence of a conspiracy among the distributors to fix prices, we find master agreements and franchises between various of the defendants in their capacities as distributors and various of the defendants in their capacities as exhibitors. These contracts stipulate minimum admission prices often for dozens of theatres owned by an exhibitor-defendant in a particular area of the United States.

Loew's as distributor, for example, fixed minimum prices for nearly all of Paramount's 133 theatres in Florida in an agreement covering the 1943-44 season. Plaintiff's Exh. 57 (11). In the Chicago area Loew's again as distributor specified prices in a single agreement for upwards of 50 theatres owned by a Paramount subsidiary, Balaban & Katz Corporation. Plaintiff's Exhs. 250, 173. United Artists as distributor also specified prices for the Balaban & Katz theatres in Chicago for the 1941-42 season. Plaintiff's Exh. 369 (6). Similarly Loew's specified prices for the entire Warner circuit of theatres for the 1943-44 season, Plaintiff's Exh. 57 (8-10, 21-2, 30, 32, 35, 38, 48); for the same season United Artists specified prices for five RKO theatres in Cincinnati, Plaintiff's Exh. 274; Paramount for seven RKO theatres in Cincinnati, Plaintiff's Exh. 240; Loew's for the same seven RKO theatres in Cincinnati, Plaintiff's Exh. 248; Warner for forty or more RKO theatres in Greater New York, Plaintiff's Exh. 126; Loew's for six Fox theatres in Los Angeles County, Plaintiff's Exh. 249; Warner for subsequent run Paramount theatres in Detroit and Birmingham, Michigan, Plaintiff's Exh. 244.

A master agreement between United Artists as distributor and Fox as exhibitor for the season 1938-39 covered distribution of pictures of five independent producers in Fox theatre circuits in Los Angeles, San Francisco, Salt Lake City, St. Louis, Milwaukee, Omaha, Denver, and other cities, all on a percentage basis. It contained the following clause:

> "Where pictures are licensed on a percentage rental basis the scale of admission prices to be not less than the scale of admission prices charged to view pictures of comparable quality exhibited by the exhibitor and distributed by distributors other than United Artists."

The foregoing quotation shows an acquiescence of United Artists in admission prices fixed by any other distributor and an adherence to those prices in its own licenses. Plaintiff's Exh. 199.

A franchise agreement between Universal Corporation as distributor and Interstate Theatres, Inc., and Texas Consolidated Theatres, Inc., for the seasons 1941-44 is similar. Plaintiff's Exh. 261. In each of the two latter companies Paramount had a 50% interest. The franchise covered pictures distributed by Universal to the theatres of the two licensees and contained the ordinary provisions for penalties if minimum admission prices were not maintained. See note 2 *supra*. While no minimum prices were specified in the agreements it is not really questioned that in such circumstances the current prices were implied as part of the contract. See Record pp. 433, 724, 782, 1082, 1210-11.

There is also in evidence a franchise agreement between Columbia Pictures Corporation as distributor and Marcus Loew Booking Agency, a Loew's subsidiary, for the seasons 1944-46 covering pictures distributed to Loew's metropolitan New York Circuit. Plaintiff's Exh. 471. Minimum admission prices were not specified, but, as in other cases, were implied.

Licenses granted by one defendant to another for exhibition in only one theatre, while less striking evidence of conspiracy than the above master agreements and franchises, disclose the same inter-relationship among the defendants. Each of the five major defendants as a theatre-owning exhibitor has been licensed by the other seven defendants as distributors to exhibit the pictures of the latter at specified minimum prices. RKO, for example, as a theatre-owner, has been granted licenses with price restrictions by the other defendant-distributors. In turn, RKO, being itself a distributor, has granted similar licenses to the other four exhibiting defendants. We think that RKO, Loew's, Warner, Paramount and Fox, in granting and accepting licenses with minimum prices specified, have among themselves engaged in a national system to fix prices, and that Columbia, Universal and United Artists, in requiring the maintenance of minimum prices in their licenses granted to these exhibitor-defendants, have participated in that system.

It is a reasonable inference from all the foregoing that the distributor-defendants have acquiesced in the establishment of a price-fixing system and have conspired with one another to maintain prices. Such a conspiracy is *per se* a violation of the Sherman Act. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Masonite Corp.*, 316 U. S. 265.

Moreover, irrespective of the conspiracy among distributors to which we have referred, each distributor-defendant has illegally combined with its licensees, for in agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices. Each licensee knows from the general uniformity of admission price practices that other licensees having theatres suitable for exhibition of a distributor's picture in the particular competitive area will also be restricted as to maintenance of minimum prices, and this acquiescence of the exhibitors in the distributor's control of price competition renders the whole a conspiracy between each distributor and its licensees. An effective system of price control in which the distributor and its licensees knowingly take part by entering into price-restricting contracts is thereby created. That the combination is made up of a sum of separate licensing contracts, individually executed, does not affect its illegality, for tacit participation in a general scheme of control prices is as violative of the Sherman Act as an explicit agreement. *Interstate Circuit* v. *United States*, 306 U. S. 208; *United States* v. *Masonite Corp.*, 316 U. S. 265; *Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F. 2d 738 (C.C.A. 3).

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible. This, we believe, to be in violation of §2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.

It is argued that the practice of minimum admission price-fixing is permitted under the Copyright Act. But that act has never been held to sanction a conspiracy among licensors and licensees artifically to maintain prices. We do not question that the Copyright Act permits the owner of a copyrighted picture to exhibit it in its own theatres upon such terms as it sees fit, nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. *Interstate Circuit* v. *United States*, 306 U. S. 208; cf. *United States* v. *General Electric Co.*, 272 U. S. 476. As other licensors and exhibitors are always in contemplation, so far as we can see, the question would appear academic.

This does not contravene the rule announced in *United States* v. *General Electric Co.*, 272 U. S. 476, for there a license to only a single licensee—the Westinghouse Com-

pany—was involved, and, therefore, no conspiracy which sought to amplify the rights of the licensor under the Patent Act. The other question involved in that case was whether a patentee might lawfully require its bona fide agents to maintain minimum prices in selling the former's patented articles. The court held that it could. There is no claim here, however, that the exhibitors as licensees under the distributors' copyrights are agents in any sense, and we do not see that such a claim could be made. In any event, *United States* v. *Masonite Corp.*, 316 U. S. 265, involved facts closely analogous to those here and affords ample basis for our decision.

Some argument has been made that the defendants' fixing of minimum admission prices is exempted from operation of the Sherman Act by the Miller-Tydings Amendment to that act, 50 Stat. 693 (1937), 15 U.S.C.A. §1 (1940). The amendment pertains, however, only to "contracts or agreements prescribing minimum prices for the resale of a commodity", and the undisputed evidence is that the distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors. Furthermore, the distributor-defendants have engaged in a conspiracy, and the amendment explicitly states that despite its other provisions, contracts or agreements between "persons, firms, or corporations in competition with each other" to establish or maintain minimum prices remain illegal. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707; *United States* v. *Univis Lens Co.*, 316 U. S. 241.

The foregoing holding that the defendants have all engaged in unlawful price-fixing does not prevent the distributors from continuing their present methods of determining film rental; they may measure their compensation by stated sums, by a given percentage of a particular theatre's receipts, by a combination of these two, or by any other appropriate means. What is held to be violative of

the Sherman Act is not the distributors' devices for measuring rentals, but their fixing of minimum admission prices which automatically regulates the ability of one licensee to compete against another for the patron's dollar and tends to increase such prices as well as profits from exhibition.

If the exhibitors are not restrained by the distributors in the right to fix their own prices, there will be an opportunity for the exhibitors, whether they be affiliates or independents, to compete with one another. This is because one exhibitor by lowering admission prices will be able to compete with other exhibitors in obtaining patrons for his theatre—a competition which may well benefit both exhibitors and the public paying the admission fees.

Clearance and Run.

Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed. This so-called period of "clearance" or "protection" is stated in the various licenses in differing ways: in terms of a given period between designated runs, as for example in the Chicago area, Plaintiff's Exh. 369, see *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C.C.A. 7), affirmed 326 U.S.—— (February 25, 1946), and as in Washington and New York, Plaintiff's Exhibits 244, 471; in terms of admission prices charged by competing theatres, as "20 days over 30c theatres, 28 days over 25c theatres," Plaintiff's Exhibits 57, 173, 178, 189; in terms of a given period of clearance over specifically named theatres, Plaintiff's Exhibits 94, 181, 242, 253, 259; in terms of so many days' clearance over specified areas or towns, Plaintiff's Exhibits 126, 175, 182, 182A, 183, 194, 244, 250, 255, 470, 476; in terms of clearances as fixed by other distributors, Plaintiff's Exhibits 188, 417; or in terms of combinations of these formulae.

It appears to be plaintiff's contention that clearance practices inherently operate to produce unreasonable restrictions of competition among theatres and are therefore *per se* violative of the Sherman Act. With this we do not agree, for it seems to us that a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. At common law a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179; see *Rogers* v. *Parry*, 2 Cro. 326 (K. B. 1613); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6). It is true that licenses of property rather than sales are here concerned and that the distributors covenant not only not to exhibit the films themselves, but also not to license them to others. Nevertheless, we believe these are not differences which affect the applicability of the common-law rule to present case, for licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common-law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F.

Supp. 830, affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4); see *United States* v. *Masonite Corp.*, 316 U. S. 265; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

The cost of each black and white print is from $150 to $300, and of a technicolor print is from $600 to $800. Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs with a reasonable protection for the earlier runs is adopted in the way of clearance.

In Section VIII of the Consent Decree, moreover, there is the explicit statement to which all parties, including the plaintiff, consented.

> "It is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

While, as previously stated, we do not deem ourselves bound by any provision of the consent decree, if we now find that it violates the Sherman Act, the forcefulness of the phrasing of this sentence indicates the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business. Indeed, it is practically conceded that exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income—perhaps on the basis of which he agreed to the specified rental—would be greatly diminished. Moreover, we understand the plaintiff to concede that the licensor may license its pictures for different successive dates. A reasonable clearance is in practical effect much the same. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later-exhibiting theatre at lower than prior rates.

Several courts have previously considered the validity of clearances under the Sherman Act and have concluded that in the absence of an unconscionably long time or too extensive an area embraced by the clearance, or a conspiracy of distributors to fix clearances, there was nothing of itself illegal in their use. *Westway Theatre, Inc.* v. *Twentieth Century-Fox Film Corp.*, 30 F. Supp. 830 (D. Md.), affirmed on opinion below, 113 F. 2d 932 (C. C. A. 4), and unreported cases therein cited; *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (C. C. A. 7), We find the reasoning of these cases persuasive.

It is true that in some instances large theatre circuits by use of their great film-buying power have been able to negotiate successfully with the distributor-defendants for grants of unreasonable clearances or unjustified prior runs for their theatres. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 887 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's*, 150 F. 2d 738 (C. C. A. 3); *United States* v. *Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y.). While we cannot find sufficient evidence to support an inference that the major defendants here, though controlling some of the largest circuits of theatres in the country and thus possessing potential weapons of great strength, have either collectively or severally entered upon a general policy of discriminating against independents in their grants of clearances, yet they have acquiesced in and forwarded a uniform system of clearances and in numerous instances have maintained unreasonable clearances to the prejudice of independents and perhaps even of affiliates. The decision of such controversies as may arise over clearances should be left to local suits in the area concerned, or, even more appropriately, to litigation before an Arbitration Board composed of men versed in the complexities of this industry.

In determining the reasonableness of the specific clearances which may come before these tribunals, they should

consider whether the clearance has been set so as to favor affiliates or control the admission prices of the theatres involved. A distributor will naturally tend to grant a subsequent run to and clearance over a theatre for which the owner of his own volition sets a low admission price, for the distributor will be inclined to seek out the higher priced theatres first where the revenue is likely to be greater and consequently in case of licenses on a percentage basis where a percentage share will be higher. This, however, would seem the inevitable result of the competition for the distributor's films from theatres which are the larger or better equipped, and for which higher admission prices may therefore be charged by their operators. Such competition the lower priced theatres must be prepared to meet, or else be content with subsequent runs and grants of clearance over them. The temptations to the distributor to use clearance grants to force a theatre to raise its prices and thus to qualify for prior runs having less clearance over it, and more clearance over competitors are nevertheless obvious and the courts or arbitration board should guard that this is not done. Clearance should be granted on the basis of theatre conditions which the exhibitor creates, not the distributor. The line to be drawn is indeed indistinct, but its existence is no less real.

In determining whether any clearance complained of is unreasonable, the following factors should be taken into consideration and accorded the importance and weight to which each is entitled, regardless of the order in which they are listed:

(1) The admission prices, as set by the exhibitors, of the theatres involved;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The foregoing has been directed to the validity of clearance provisions resulting from separate negotiations between individual distributors and exhibitors in free and open competition with other distributors and exhibitors, and, as stated, we believe their reasonable use to be lawful. It is here claimed by plaintiff, however, that the distributor-defendants have acted in concert in the formation of a uniform system of clearances for the theatres to which they license their films and that the exhibitor-defendants have assisted in creating and have acquiesced in this system. This we find to be the case and hold to be in violation of the Sherman Act.

The following testimony warrants the inference that the defendants, as we found to be the case in the fixing of admission prices, have acted in concert in their grants of run and clearance. William F. Rodgers, general sales manager and vice-president of Loew's, testified that the field managers determine whether a theatre shall be licensed to exhibit on a first or on a subsquent run, that the clearance of a given theatre is more or less historical, except for that of new theatres, and that there has been very little change in clearance over a period of years. Record pp. 542-3. Prior to 1943-44 Loew's license agreements provided that the clearance granted therein should apply to any theatre thereafter opened. Record p. 556.

Charles M. Reagan, vice-president of Paramount in charge of sales, stated that once clearance is agreed upon, it remains the same unless either exhibitor or distributor wants to change it. Record pp. 710-11. There is a difference between a distributor's and an exhibitor's interest in the period of clearance granted. The distributor wants to get the most possible in film rental from all the runs, the exhibitor to get as much clearance over a succeeding run as possible, because he has no interest in any succeeding run. The distributor, however, has a definite interest. Record p. 710. Clearances as granted apply to all pictures regardless of their quality. Record p. 715.

Martin J. Mullen, vice-president of M & P Theatres, a managing co poration which operates a group of New England theatres affiliated with Paramount, said that clearance is generally negotiated each time a license contract is made, but is actually carried along from year to year and generally understood when once established; that originally, before his time, clearance was established as a result of individual negotiations and followed along the same lines as they were with some changes. Record p. 968. All defendants grant the same clearance to the same theatre. Record p. 977.

John J. Friedl, president and general manager of the Minnesota Amusement Company, a wholly-owned subsidiary of Paramount, said that he generally got from the various distributors the same clearance for the particular theatre for which he is negotiating; that while clearance is negotiated with each license, it generally remains the same, and the same clearance is granted by distributor-defendants and non-defendants alike, Record p. 1003; that clearance is pretty well established, and it is definitely followed in all cases. Record p. 1013.

Morton J. Thalheimer, an independent theatre exhibitor in Richmond, Virginia, called as a witness by Fox, testified that clearance was in effect in Richmond when he first went into business, and it seemed perfectly normal and natural

that it should remain that way; that it protects his first-run against his own sub-runs and against his competitors' sub-runs. Record p. 1384. To his knowledge, the system of clearances had existed in Richmond for over nineteen years, during which time there had not been any change. Record p. 1401.

Harold J. Fitzgerald, president of Fox Wisconsin Theatres, Inc., operating sixty-six motion picture theaters in Wisconsin and Michigan, a wholly owned subsidiary of the defendant National Theatres Corporation, testified by affidavit that the situation with respect to the licensing of films, and the runs and clearances involved, were much the same in 1928 as they are today, Record p. 1973; that licensing arrangements were vital to distributor and exhibitor and that clearance obviously had a definite effect upon the capacity of his corporation to secure patronage at its top admission price. If Fox Wisconsin undertook to pay a distributor the film rental based upon a high percentage of gross, it would be interested in clearance over any neighborhood theatre which the distributor might license on a competing subsequent run. Generally negotiations as to clearance do not take place with respect to each block of pictures licensed because once a fair and reasonable clearance has been determined by the distributor and exhibitor it tends to become fixed, and ordinarily will be the same in a series of contracts in the absence of any unchanged circumstances and conditions. Record p. 1983.

Benjamin Kalmenson, sales manager of Warner Bros. Distributors Corporation, testified that clearances have been pretty well set through the country for a great many years, and are "acquiesced in by exhibitors, producers, independents, affiliates and everybody, until there has grown up a kind of system of clearance." Record p. 1506.

Robert Mochrie, general sales manager of RKO Radio Pictures, Inc., stated upon his examination that RKO in determining the length of clearance between theatres, takes into consideration the amount of clearance which in its opin-

ion will yield it the largest revenue, taking all theatres into account as a whole and subject to a clearance condition that has built itself up in the city over a period of time. In negotiating licenses, there is frequent occasion to give consideration to the existing clearance between theatres, but they do not consider it anew each time because the factors which determined it originally at some past time remain stable from year to year. He said there are no general or frequent instances in his practice of clearances different in some particular city from those granted by a co-defendant. He usually knows what clearances other distributors are granting. His customer usually tells him what clearance he wants, which is what he is getting from other distributors. He has no agreements with other distributors that he will adopt the same clearance, and his explanation as to why in some instances the clearances granted by RKO to a prior run theatre is the same as a clearance granted by one or more other distributors serving the same theatre is that clearance has been the outgrowth in time between those two theatres, and the exhibitor buys such products on such a clearance basis and offers the witness the same. Record pp. 1714-5.

Abraham Montague, general sales manager of Columbia, testified that in negotiating deals, the "clearance is something we usually find when we arrive there, and we usually negotiate our deal within the clearance we find"; that it would be impracticable and impossible to set up new clearance. Record p. 1268. His company keeps a record of clearances in the community. Record p. 1347. Where his company grants clearance to one theatre over another, it usually follows the pattern set by clearance that is given by other major distributors as well as those which are not majors. He usually does not make any independent determination of whether the clearance is reasonable or unreasonable. He takes it as he finds it, and finding it in most cases standardized, his company does not feel that it is strong enough to change it. Record pp. 1376-7.

Paul N. Lazarus, manager of the contract department of United Artists, testified that clearances are "generally understood, and they follow along their established custom." Record p. 1440. For testimony of other witnesses to the same effect as the foregoing, see Record pp. 2012, 2043, 2049, 2086, 2110-11.

The fixed character of clearances and the uniformity of the distributor-defendants' practice with reference thereto are shown by the exhibits, as well as the testimony. Many of the franchises, master agreements, and so-called "formula deals" which are in evidence provide that clearances shall be the same as those in effect on the date of the agreement. See Plaintiff's Exhibits 419A (RKO and independent); 419B (RKO and Paramount); 241 (Paramount and Fox); 172 (Paramount and Loew's); 473 (RKO and Universal); 245 Warner and Fox); 251 (Fox and Paramount); 254 (Fox and RKO). Some of the agreements establish clearances for more than a season. See Plaintiff's Exhibits 181 (3 years, Loew's and Warner); 187 (3 years, Loew's and Fox); 249 (9 years, Loew's and Fox); 259 (3 years, Warner and Universal). Others provide that the clearance is to be no less favorable to the exhibitor than that which had been granted by the distributor for the previous season or in the preceding agreement. See Plaintiff's Exhibits 265, 472 (Columbia and Fox); 190 (RKO and Fox); 199, 272A, 383 (United Artists and Fox).

In some of the agreements, the clearance therein stated was also to be granted to all theatres which the exhibitor-party to the contract might thereafter own, lease, control, manage, or operate. See Plaintiff's Exhibits 172 (Paramount and Loew's); 266, 266A (Columbia and Warner); 471 (Columbia and Loew's); 192 (Fox and Warner). Moreover, the license forms for 1936-7 of Paramount, Fox, Loew's, Warner, RKO, Columbia and Universal, and for 1943-44 of Paramount, Warner, Columbia and Universal, each contain a provision identical or similar to the following:

"If clearance is granted against a named theatre or theatres indicating that it is the intention of the Distributor to grant such clearance against all theatres in the immediate vicinity of the Exhibitor's theatre then unless otherwise provided in the schedule, such clearance shall include any theatre in such vicinity thereafter erected or opened. See Plaintiff's Exhibits 275, 277, 279-81, 283-6, 289-90.

It is clear that the purpose of these two types of clearance agreements was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location, and other competitive factors normally entering into such a determination, but rather upon the sole basis of whether it were operated by the exhibitor-party to the agreement.

Much that has been said about clearances is applicable also to runs; the two are practically alike. Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with that of run as to make comment on the one applicable to the other.

Rodgers, of Loew's testified that a run usually remains static for a given theatre, Record p. 421, and he determines what runs shall be "offered" to an exhibitor. Record p. 418. The size of the theatre does not necessarily determine whether it is satisfactory for operation on a first run. Record p. 566.

Reagan, of Paramount, said that negotiations with an exhibitor are "usually conducted on the basis of a particular run." In the case of a new theatre, the distributor usually considers whether it wants to do business on the run the theatre would like.[1] In the New York area, second runs

[1] "Q. And some negotiations are conducted on the basis of a first-run or a product, some second, some subsequent? A. Yes, sir.

Judge Bright: You mean the particular run is established before the negotiation with the exhibitor?

The Witness: Sometimes it generally is established, although that has been the result of years of experience that we have had in negotiating with our customers.

Judge Bright: How about a new theatre or new exhibitor?

are sold by him only to Loew's and RKO. Record pp. 815-16.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (C. C. A. 7), affirmed 326 U. S. (February 25, 1946); *Goldman* v. *Loew's, Inc.*, 150 F. 2d 738 (C. C. A. 3); *Youngclaus* v. *Omaha Film Board of Trade*, 60 F. 2d 538 (D. C. Neb.). The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding and are fairly comparable the one offering the best terms shall receive the license. Thus price fixing among the licensors or between a licensor and

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The Witness: There is nothing established there, and we consider all the factors there and make a decision on whether we want to do business with him on the run that we would like to have.

Q. Now, how is the matter of terms upon which Paramount films will be licensed, determined? A. Determined by negotiations based upon experience we have had with the particular theatre with whom we are negotiating." Record p. 693.

"Q. You do not mean that each time there is a negotiation the whole question of run is opened up again? A. No, it is not.

Q. The policy on which the theatre is operated has usually been established over a long period of time? A. Yes."

its licensees as well as the non-competitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.

Formula Deals, Master Agreements, and Franchises.

Formula deals, certain master agreements, and franchises have tended to restrain trade in the distribution and exhibition of motion picture features and in view of the history and relation to the moving picture business of the various parties to this action have exercised unreasonable restraints. In our opinion these restraints will be obviated or at least sufficiently mitigated by requiring a distributor wishing its pictures to be shown outside of its own theatres to offer to license each picture to all theatres desiring to show it on a particular run and, if the theatres are responsibly owned and otherwise adequate, to grant the desired run to the highest bidder.

Formula deals have been entered into by Paramount and by RKO with independent and affiliated circuits. By such agreements a particular circuit has been licensed to exhibit a certain feature in all its theatres at a specified percentage of the national gross receipts realized from that feature by all theatres in the United States. The circuit may allocate playing time and film rentals among the various theatres as it sees fit. See Plaintiff's Exhibits 241, 419A, 419B. Arrangements whereby all the theatres of a circuit are included in a single agreement, and no opportunity is afforded for other theatre owners to bid for the picture in their several areas, seriously and as we hold unreasonably restrain competition. These formula deals have been negotiated without, so far as we are informed, any competition on the part of independent theatre owners who would labor

under a great disadvantage in attempting severally to match or outbid the offers of a circuit that was making offers for all of its theatres.

Certain master agreements are open to the same objection as formula deals, for they cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and also to exhibit the features upon such playing time as it deems best, and leaves other terms to the circuit's discretion. See, *e.g.*, Plaintiff's Exhibits 196, 251, 267, 270, 270A, 273, 476. These are different from some other master agreements in which there are separate provisions covering the licensing of the picture for each particular theatre. See, *e.g.*, Plaintiff's Exhibits 182, 182A, 189, 190, 191 248. These later agreements in effect only combine in one document a number of theatres with proper licenses for each. This may be done if there is an opportunity for exhibitors to bid for the same runs at an offered price.

Franchises which so far as the five major defendants are concerned were forbidden by the consent decree are also objectionable because they cover too long periods (more than one season) and also because they embrace all the pictures released by a given distributor. They necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder.

It is true that a prohibition of formula deals, master agreements and franchises will interfere with certain contracts which have been made in the past but their formation was a restraint upon trade which was unlawful at the time they were made, and therefore should not be continued. We see no reason to hold that the failure to bring in to this suit one of the contracting parties prevents the issue of an injunction forbidding one who is a party to the suit from continuing to carry out an arrangement which causes unlawful restraints. While our decision will not be res judicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is

a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce.

In our opinion it follows from the foregoing that provisions in license agreements known as moveovers which give to a licensee the privilege of exhibiting a given picture in a second theatre as a continuation of a run in a first theatre are incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre. The same would seem to be true of so-called overage-and-underage provisions which are often inserted in licenses to permit an exhibitor owning a number of theatres to apply a deficit in the playing time in one or more others. Under such provisions it is not possible to determine the amount payable for the account of one theatre until the performances in the others have been completed, or practically to apply the bidding system we are establishing. But provisions in licenses for "extended" or "repeat" runs in the same theatre, though apparently criticized by the government, would not seem to be objectionable if reasonably limited in time when other exhibitors are given the opportunity to bid for similar licenses. Likewise, any other license provisions which may be called to our attention that would substantially interfere with the effectiveness of the bidding system would have to be revised and perhaps may have to be specially dealt with in the decree to follow this opinion.

Block-booking and Blind-selling.

For many years the distributor-defendants licensed their films in "blocks", or indivisible groups, before they had been actually produced. In such cases the only knowledge prospective exhibitors had of the films which they had contracted for was from a description of each picture by title, plot, and players. In many cases licenses for all the films had to be accepted in order to obtain any, though sometimes the exhibitor was given a right of subsequent cancellation for a certain number of pictures. Because of complaints of block-

booking and blind-selling based upon the supposed unfairness of contracts which often included pictures—the inferior quality of which could not be known. Sections III and IV of the consent decree required the five consenting distributors to trade-show their films before offering them for license and limited the number which might be included in any contract to five. More than one block of five however could be licensed where the contents of any had been trade-shown. While this restriction in the consent decree has now ceased by time limitation, the consent distributors have continued to observe the restriction. The non-assenting distributors have retained up to the present time their previous methods of licensing in blocks, but have allowed their customers considerable freedom to cancel the license as to a percentage of the pictures contracted for.

The plaintiff argues that the Sherman Act forbids block-booking in toto. This is said to be because it is illegal to condition the licensing of one film upon the acceptance of another, and it therefore can make no difference whether the group of films involved in a license be two or forty. In our opinion this contention is sound, and any form of block-booking is illegal by which an exhibitor, in order to obtain a license for one or more films, must accept a license for one or more other films.

A patentee who has granted a license in consideration that the patented invention shall be used by the licensee only with unpatented material furnished by the licenser may not restrain as a contributory infringer one who sells to the licensee like materials for like use. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680; *Morton Salt Co.* v. *G. S. Suppiger*, 314 U. S. 488, 491; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458. Moreover, as was said in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S 661, 670, a decree for an injunction against a contributory infringer

would sanction both "a misuse of the patent privilege and a violation of the anti-trust laws." The same rule would appear to apply to copyrights and prevent a suit for contributory infringement by a copyright owner who had licensed the printing of his book, only in connection with paper supplied by him, against a third party supplying paper to the licensee in violation of the agreement. See *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Straus* v. *Am. Publisher's Ass'n*, 231 U. S. 222.

It is true that a copyrighted motion picture when united with another copyrighted picture by block-booking is not tied to an uncopyrighted article. Nevertheless the objections to conditioning the licensing of one picture upon the licensing of another are the same, for the result is to give the copyright owner not only the reward which is his due from the licensing of a single copyrighted film, but to extend his monopoly by requiring his licensee to accept one or more other films and to pay royalties therefor as an additional consideration. We cannot see that this differs in principle from requiring the licensee to purchase uncopyrighted articles in connection with the license of a copyright. In either case the copyright owner is obtaining something which the decisions have forbidden as beyond the grant of his limited monopoly. Justice Holmes in his dissenting opinion in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 519, argued persuasively that the right of the owner of a patent to keep his device out of use included the right to condition its use. Such a doctrine would contravene the rule we are laying down, but his views were rejected by the majority of the Supreme Court in that decision, as well as in *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and have proved to be contrary to a long line of subsequent decisions of that court—indeed to have been supplanted by the general trend of authority ever since the days of *Henry* v. *Dick*, 224 U. S. 1.

It may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another—that it is as though the owner of ordinary chattels refused to sell a lot to A unless the latter would purchase in a larger quantity than he desired. The question whether such a contract involving patents or copyrights was good at common law was apparently left open in *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 503, and *Keeler* v. *Standard Folding Bed Co.*, 157 U. S. 659, and in *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152, the Court of Appeals for the Second Circuit sustained contracts of block-booking.

Block-booking, when the license of any film is conditioned upon taking of other films, is a system which prevents competitors from bidding for single pictures on their individual merits and adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first. It differs from such a sale of chattels as we have mentioned because it extends a monopoly which the owner of the chattels is not assumed to have. We are not inclined to follow *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.*, 57 F. 2d 152 (C. C. A. 2), for the reason we have given and particularly because of recent decisions of the Supreme Court. As Stone, C.J., said in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459,—when dealing with the use of one patent to exploit another:

> "• • • It [Ethyl Gasoline Corporation] has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of treated fuel by the jobbers accrue primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the

commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, see Standard Sanitary Mfg. Co. v. United States, supra, than for the exploitation of an unpatented article, United Shoe Machinery Co. v. United States, supra; Carbice Corporation v. American Patents Corp., supra; Leitch Manufacturing Co. v. Barber Co., supra; American Lecithin Co. v. Warfield Co., 105 F. 2d 207, or for the exploitation or promotion of a business not embraced within the patent. Interstate Circuit v. United States, supra, 228-230."

See also *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 415, 452-3; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U. S. 680, 684; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277-8; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 227-230; *Stokes & Smith Co.* v. *Transparent-Wrap Machine Corp.*, decided by Second Circuit Court of Appeals May 1, 1946.

We however declare illegal only that aspect of block-booking which makes the licensing of one copyright conditional upon an agreement to accept a license of one or more other copyrights. A distributor may license to an exhibitor at one time as many films as the latter wishes to receive, but the distributor may not constitute groups of pictures which it refuses to license separately. The distributor may of course not license his pictures at all, but if he does license them, he must do so severally and, in accordance with the bidding procedure previously indicated, must license them to the exhibitor or exhibitors who are qualified and offer the best terms for the various runs.

Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practise a distributor could promise a picture of good quality or of a certain type which when

produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designed to prevent such blind-selling, are poorly attended by exhibitors. Record pp. 1178-9. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection. Such right of rejection has been incorporated in numerous licenses given by the defendants and should be afforded whenever licenses of unproduced films and films not trade-shown are secured by an exhibitor who has made the best competitive bid for them.

The only group licensing we are prepared to sanction is licensing by which the group is not offered on condition that the license shall take all the pictures included in it, or none, but in which the pictures are separately priced, and each picture is to be sold to the highest duly qualified bidder. As we have already indicated in discussing formula deals, master agreements, and franchises, the offering of pictures should be theatre by theatre, and if more than one picture is included in a license agreement, it will be only because of business convenience and to the extent that each picture so included has received the best bid.

"Pooling" Agreements.

It is claimed by plaintiff that the theatre-owning defendants have combined with each other and with independent theatre-owners by "pooling" their theatres through operating agreements, leases, joint stock ownership of theatre-operating corporations, or through joint ownership of theatres in fee. We are asked to determine the validity of these various means of joining interests.

By far the most numerous type of agreement in evidence is that by which given theatres of two or more exhibitors, normally in competition with each other, are operated as a unit or most of their business policies collectively determined by a joint committee, or by one of the exhibitors, and by which profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. See, *e.g.*, Plaintiff's Exhibits 9, 100, 200, 206, 213, 218, 220-1, 223, 226, 226A, 232. Some of the agreements provide that the parties thereto may not acquire other theatres in the competitive vicinity without first offering them for inclusion in the "pool". See, *e.g.*, Plaintiff's Exhibits 201, 205-6, 219.

These operating agreements we hold to be in clear conflict with the Sherman Act, for through them a defendant-exhibitor reduces to a minimum opposition between its own and other theatres in the "pool". Cooperation, rather than competition, characterizes their operation, and in view of the exhibitor-defendants' financial strength, control of first-class film distribution, ownership of concentrated numbers of first-run theatres, and especially their combination to reduce competition in exhibition through systems of price-fixing and clearances, such restraints as these agreements impose upon free commerce in motion pictures are far less than reasonable. The result is to eliminate competition *pro tanto* both in exhibition and in distribution of films which would flow almost automatically to the theatres in the earnings of which they have a joint interest.

Other forms of operating agreements are between major defendants and independent exhibitors rather than between major defendants, see, *e.g.*, Plaintiff's Exhibits 97, 118, 208, 238-9, 358, but we are not of the opinion that this renders them legal. The effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition against theatres not members of the "pool". Even if the parties to such combinations were not major film producers and distributors, but were all wholly inde-

pendent exhibitors, such agreements might often be regarded as beyond the reasonable limits of restraint allowance under the Sherman Act. This result is certain when some of the parties are of major stature in the movie industry and have in other ways imposed unlawful restraints upon it, as we have found to be the case upon the record before us.

In certain other cases the operating agreements are accomplished by leases of theatres, the rentals being determined by a stipulated percentage of profits earned by the "pooled" theatres, see, *e.g.*, Plaintiff's Exhibits 9, 106, 118, 204. This appears to be but another means of carrying out the illegal objection discussed above. While a theatre-owner may of course remove itself from the business of operating theatres by leasing them to anyone it deems fit upon a fixed rental basis, so long as a monopoly in exhibition is not thereby achieved by the lessee, any arrangement whereby one of the exhibitor-defendants in this case allies its theaters with those of a competing exhibitor, independent or affiliated, and yet itself remains in the trade of exhibiting motion pictures by retaining an interest in the profits earned by the allied theatres, is unlawful under the anti-trust acts.

Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, in some cases in conjunction with independents. See, *e.g.*, Plaintiff's Exhibits 8, 9, 46, 48, 62, 164, 355, 387; RKO's Exhibit 11. As these joint interests enable the major defendants to operate theatres collectively, rather than competitively, we find them illegal for the reasons above stated. Appropriate steps should be taken so that no exhibitor-defendant will own theatres (whether represented by fee, beneficial, or stock interests) jointly with other exhibitor-defendants, regardless of the size of interests involved. Appropriate steps should also be taken so that no exhibitor-defendant or defendants will jointly own a theatre or stock interest therein with any independent exhibitor, except when a defendant or an independent owns an interest of five per cent

or less, which we deem *de minimis* and only to be treated as an inconsequential investment in exhibition. See *infra* p. 71. This result may be reached in situations like Florida, Texas, Minnesota and Michigan by a sale, purchase, or exchange of interests in jointly-owned theatres so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area. To this end the court will control the manner in which rearrangements of these joint interests are effected.

It seems impracticable to do more than lay down general rules as to the foregoing situations. If further details are required to cover specific provisions of the various pooling agreements, they should be set forth in the decree to be hereafter entered.

It should be added that in our opinion there can be no objection to operating, booking, or film buying through agents, provided the agent is not also acting in respect to theatres owned by other exhibitors, independent or affiliated, and provided that in case the agent is buying films for its principal he does this through the bidding system, theatre by theatre.

Discrimination Among Licensees.

The amended and supplemental complaint alleges that in licensing films each of the distributor-defendants has discriminated against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits. Of the various contract provisions by which such discriminations are said to have been accomplished, plaintiff sets forth the following in its brief: suspending the terms of a given contract, if a circuit theatre remains closed for more than eight weeks, and reinstating it without liability upon reopening. Plaintiff's Exhibits 188, 265-6, 383-4, 472-3; allowing large privileges in the selection and elimination of films. Plaintiff's Exhibits 172, 177, 192, 263-6, 383-4, 472;

allowing deductions in film rentals if double bills are played, Plaintiff's Exhibits 183-4, 190, 199, 242, 245, 247, 258-9, 262, 264-6, 271-2a, 274, 382-3, 473; granting moveovers and extended runs, Plaintiff's Exhibits 182-2a, 199, 260, 262, 265, 267, 274, 383-4, 474, 476; granting roadshow privileges, Plaintiff's Exhibits 187-8, 199, 232, 265-6, 383-4, 472; allowing overage and underage, Plaintiff's Exhibits 190-1, 194, 259, 265-6, 383; granting unlimited playing time, Plaintiff's Exhibits 241, 267, 269, 471; excluding foreign pictures and those of independent producers, Plaintiff's Exhibits 173-4, 181, 190-1, 194, 199, 262, 265-6, 272a, 383-4, 395, 470-2; granting rights to question the classification of features for rental purposes, Plaintiff's Exhibits 187, 232, 259, 265, 472-3; and especially, discriminating in film rentals, clearances, and minimum admission prices, see Plaintiff's Brief pp. 56-70, 75-85.

These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of affiliated and unaffiliated theatres. Record pp. 1432-3; Columbia's Exhibit 9a; Universal's Exhibit 2; Plaintiff's Exhibits 195, 198, 259, 261, 265-6a, 384, 396, 470-3. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. Record pp. 1432-3; Plaintiff's Exhibits 275-90. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors in violation of the anti-trust laws. It seems unnecessary to decide whether the record before us justifies a reasonable inference that the distributor-defendants have conspired among themselves to discriminate among their licensees, for each discriminating contract constitutes a conspiracy between the licensee and licensor. *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173.

The defendants argue that these privileges granted to the circuits flow from their negotiations with the individual

theatre-owners rather than from a standard policy of discrimination deliberately pursued by them. This is perhaps true, but the result is the same whether the bargaining power of the large exhibitors forces upon the distributors a discriminatory policy, or whether the latter voluntarily carry such a policy into effect. Acquiescence in an unreasonable restraint, as well as the creation of such a restraint, violates the Sherman Act. Under the bidding system we are requiring such discriminations would appear impossible. Those provisions which are not compatible with the operation of this system, or which are inherently unreasonable, such as a provision for clearance between theatres where there is no substantial competition, will no longer be includible in licenses, as mentioned elsewhere, but otherwise the bidders will compete for licensing contracts on a parity, in that the same offer will be made to all prospective exhibitors in a community.

The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard, but any discriminations in the other ways noted above in favor of affiliated licensee or licensees connected with independent circuits as against individual independents must be enjoined, and we believe will not exist in future licenses under the bidding system for which we are providing.

Divestiture of Theatres.

We cannot accede to the prayer of the plaintiff that the major defendants should be divested of their theatres in order that no distributor of motion pictures shall be an exhibitor. Undoubtedly such a step while not *ipso facto* preventing price-fixing agreements or unreasonable clearance would terminate the government's most urgent objections to the present methods of conducting the motion picture business, but it would also withdraw the defendant-distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they would have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres. We think that the opportunity of independents to compete under the bidding system for pictures and runs renders such a harsh remedy as complete divestiture unnecessary, at least until the efficiency of that system has been tried and found wanting.

In the year 1945 there were about 18,076 motion picture theatres in the United States of which the five major defendants had interests in 3,137 or 17.35 per cent. Of the latter, Paramount or its subsidiaries owned independently of the other defendants 1,395—a little less than half, or about 7.72 per cent; Warner 501, or about 2.77 per cent; Loew's 135, or about .74 per cent; Fox 636, or about 3.52 per cent, and RKO 109, or about .60 per cent. There were 361 theatres, or about 2.00 per cent, in which two or more of these defendants had joint interests, whether held directly or indirectly through stock ownership in the same corporation or through a lease or operating agreement. This tabulation excludes theatres connected with one or more of the defendants through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest. It includes all theatres in which each defendant otherwise owns a direct or indirect interest of any

amount. See Loew's Exhibit 2; RKO's Exhibit 11; Plaintiff's Exhibits 8, 9, 12-3, 22, 47-8, 64, 87-8, 97, 100, 118-20, 156-64, 360.

It would seem unlikely that theatre owners having aggregate interests of little more than one-sixth of all the theatres in the United States are exercising such a monopoly of the motion picture business that they should be subjected to the drastic remedy of complete divestiture in order to effect a proper degree of free competition. It is only in certain localities and not in general, that an ownership even of first-run theatres approximating monopoly exists. Under the proposed system, the only theatres the competition of which in exhibition even Paramount—the largest owner—would in anywise control are the 7.72 per cent which it now owns. Each of the other four major defendants would control a far smaller percentage of the theatres. Even in places like Philadelphia and Cincinnati, where Warner and RKO have owned all the first-run theatres, their theatre interest cannot properly be exaggerated to establish a conspiracy in restraining exhibition, for in such localities there would seem to be nothing to prevent other persons from building theatres of a similar type if the market for the distribution of films should be opened to the highest bidder and the builder of a new theatre could compete with the other theatre owners in obtaining pictures for exhibition in the theatre he had built. The only pictures that the present sole exhibitors in such localities could control would be their own, which they can always exhibit freely in their own theatres.

In about 60 per cent of the 92 cities having populations of over 100,000 on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants except so far as it may be restricted by the trade practices we have criticized.[8] In about 91 per cent of these cities there is

[8] According to Loew's Exhibit 13 and RKO's Exhibit 11, there are independent first-run theatres in all but the following 38 cities: Albany, Bridgeport, Charlotte, Chattanooga, Cincinnati, Cleveland, Columbus,

competition in first runs between independents and some of the major defendants or among the major defendants themselves, except so far as it may be restricted by the above trade practices.[9] If the bidding system we propose to set up, minimum admission prices in licenses eliminated, and the other restrictive agreements which we have discussed terminated, it is our opinion that adequate competition would exist. Indeed in all of the 92 cities, even where there is no present competition in first runs there is always competition in some run.

Moreover, there is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, and *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2). The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each

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Dallas, Dayton, Des Moines, Elizabeth, Erie, Flint, Fort Worth, Grand Rapids, Houston, Jersey City, Kansas City, Mo., Knoxville, Lowell, Memphis, Milwaukee, Minneapolis, Newark, New Haven, Norfolk, Omaha, Paterson, Peoria, Rochester, San Antonio, Scranton, South Bend, Syracuse, Toledo, Wichita, Worcester, Yonkers.

[9] Upon the termination of "pooling" agreements a major defendant may control all of the first-run theatres in only the following 8 cities: Charlotte, Chattanooga, Cincinnati, Erie, Knoxville, Peoria, South Bend, Wichita. Loew's Exhibit 13; RKO's Exhibit 11.

defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in *United States* v. *The Pullman Company*, 64 F. Supp. 108, 112 (E. D. Pa. 1945):

> "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable."

In the case at bar, as we have reiterated, many of the objections are to the trade practices we have alluded to, and not to the ownership of theatres either by the major defendants or by their wholly-owned subsidiaries. If those theatres were all owned by entirely independent corporations, the distributing-producing defendants, if not in competition in the distribution of their films, would control competition in the exhibition business by in the aggregate controlling the distribution of most of the best pictures in the United States and imposing restrictions upon their use. The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if

employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States v. Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc. v. United States*, 306 U. S. 208. If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.[10]

There has however been restraint of competition in exhibition by the five major defendants through ownership of

[10] The following table is derived from Plaintiff's Exhibit 426 and Record pp. 2400-1:

FEATURE FILMS RELEASED DURING THE 1943-44 SEASON BY ALL DISTRIBUTORS.

	No. of Films		*Percentages of Total*	
			With "Westerns" included:	*With "Westerns" excluded:*
Fox	33		8.31%	9.85%
Loew's	33		8.31%	9.85%
Paramount	31		7.81%	9.25%
RKO	38		9.57%	11.34%
Warner	19		4.79%	5.67%
Columbia	41		10.32%	12.24%
United Artists	16		4.04%	4.78%
Universal	49		12.34%	14.63%
Republic	(29 features (30 "westerns"		14.86%	8.66%
Monogram	(26 features (16 "Westerns"		10.58%	7.76%
PRC	(20 features (16 "Westerns"		9.07%	5.97%
Totals	397			
	335	without "Westerns"	100%	100%

theatres jointly with one another or if their interests be more than five per cent even where jointly held with independents which, in our opinion, calls for a divestiture of such interests whether such partial interest is in fee or through stock ownership or otherwise.

There is no evidence that in a city such as Cincinnati, in which a major defendant owns all of the first-run theatres, other exhibitors, affiliated or unaffiliated, have been prevented from also owning theatres for exhibition on first-run and there consequently is no monopoly in the legal sense, see *United States* v. *Pullman Company*, 64 F. Supp. 108, 112, and no reason for directing a divestiture. But when theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. In such case their joining of interests is illegal under the anti-trust laws for the reason that the major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently. Such an elimination of competition is unreasonable in view of the defendant's being a powerful factor in the industry capable of exerting vast influence to its ends, and of the methods it has employed to restrain and control normal competition in distributing and exhibiting motion pictures through price-fixing, system of clearances, block-booking, pooling and the other practices we have alluded to.

We find such joint interests in a great number of theatres, a summary of which is set forth below,[11] and hold that

[11] In so far as information could accurately be obtained from RKO's Exhibit 11, the numbers of theatres jointly owned by the defendants are approximately as follows:

THEATRES JOINTLY OWNED WITH INDEPENDENTS:

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21

they must be terminated by a sale to, or purchase from the co-owner or owners, or by a sale to a party not one of the other defendant-exhibitors. The decree or subsequent orders to be entered in conformity with this opinion will control sales or exchanges of such fractional interests for the purpose of restoring or creating a reasonable competition in the areas in question.

General Considerations.

It may be said that such restrictions in commercial dealings as we would impose will interfere with the right of a copyright owner to choose his customers or contract for the disposition of his own property. The answer is that no such absolute right exists where its exercise will involve an extension of a copyright monopoly or an unreasonable interference with competition in the distribution and exhibition of moving pictures. A system of fixed admission prices, clearances and block-booking is so restrictive of competition in its tendency that it should be modified to comply with the

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THEATRES JOINTLY OWNED BY TWO DEFENDANTS:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	1,501 Theatres

Of the above theatres jointly owned with independents, the following numbers will not be affected by the decree, since the defendant or co-owning independent owns less than a 5% interest:

Paramount	177
RKO	32
Total	209 Theatres
Total affected by the decree according to RKO's Exhibit 11	1,292 Theatres

terms of the Sherman Act. The modifications in practices we have indicated will relieve conditions that have grown up through the years. Indeed the practices are defended on the ground that business convenience and long usage ought to sanction them. But, in spite of their long continuance, we cannot escape the conclusion that in various ways the system stifles competition and violates the law and that business convenience and loyalty to former customers afford a lame excuse for depriving others of rights to compete and for perpetuating unreasonable restrictions. The remedy we are giving against the infractions is certainly no more drastic in effect than the one the Supreme Court granted in *Interstate Circuit v. United States*, 306 U. S. 208, nor more severe than the one it imposed in *United States v. Crescent Amusement Co.*, 323 U. S. 173. The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than "those eighteen upon whom the tower in Siloam fell" have been "sinners above all men", yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful.

It is argued that the steps we have proposed would involve an interference with commercial practices that are generally acceptable and a hazardous attempt on the part of judges—unfamiliar with the details of business—to remodel its delicate adjustments which have hitherto provided the public with what is a new and great art. But we see nothing ruinous in the remedies proposed. Disputes which may arise under the bidding system are likely to relate to questions whether the bidder has a theatre adequate for the run for which he bids, whether the clearance requested is reasonable as regards his own theatre and those of others, and similar matters generally involved in comparing bids. If the defendants will consent to an arbitration system for the

determination of such disputes of the kind that has worked so well under the consent decree, they will facilitate the adjustment of most of the differences that are likely to occur, with a large saving of time and money as compared with separate court actions.

A suit in the district court for violation of the Sherman Act is doubtless an awkward way to cure such ills as have arisen, but it is perhaps the best remedy now available to the government. There surely are evils in the existing system, and the Sherman Act provides a mode of correction which is lawfully invoked. At all events, that which is written is written, and is controlling on us.

It does not follow from the foregoing that we should wholly break up the exhibition business of each of the major defendants even though a "root and branch" decree might be legally possible. Such total divestiture would be injurious to the corporations concerned, and if we are right in our analysis of the situation, we should still have to give relief against price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements, and other agreements we have held invalid. The relief proposed we believe should suffice, while total divestiture would be damaging to the public as well as to the defendants and not accomplish any useful purpose at the present time.

The Decree.

A decree is granted in accordance with the views expressed in the foregoing opinion to be settled on ten days' notice. It should provide for the dismissal of all claims asserted by the plaintiff against any of the defendants which act only as producers of motion pictures and for the dismissal of claims against any other defendants based on their acts as producers, whether as individuals or in conjunction with others.

The granting of licenses by any of the defendant-distributors which fix minimum prices for admission to thea-

tres either of the defendants or of any other exhibitor should be enjoined in which such minimum admission prices are fixed by the parties either in writing, or through a committee, or through arbitration, or upon the happening of any event, or in any other wise.

The defendants should be enjoined from concertedly agreeing to maintain a system of clearances as among themselves or with other exhibitors, and no clearances should be granted against theatres in substantial competition with the theatre receiving a license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Existing clearances in excess of what is reasonably necessary to protect the licensees in the runs awarded to them shall be invalid pro tanto. In determining what is a reasonable clearance the following factors should be taken into consideration:

(1) The admission prices of the theatres involved, as set by the exhibitor;

(2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

(3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

(4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;

(5) The extent to which the theatres involved compete with each other for patronage;

(6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and

(7) There should be no clearance between theatres not in substantial competition.

The further performance by any of the defendants of existing formula deals, master agreements to the extent that we have previously found them invalid, or franchises should be enjoined, and the defendants should also be enjoined from entering into or carrying out any similar agreements in the future.

Defendants owning a legal or equitable interest in theatres of ninety-five per cent or more either directly or through subsidiaries may exhibit pictures of their own or of their wholly owned subsidiaries in such theatres upon such terms as to admission prices and clearances and on such runs as they see fit.

No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included. To the extent that any of the pictures have not been trade-shown prior to the granting of a license for more than a single picture, the licensee shall be given by the licensor the right to reject a percentage of such pictures not trade-shown prior to the granting of the license to be

fixed by the decree. But that right to reject any picture must be exercised within ten days after there has been an opportunity afforded to the licensee to inspect it.

The defendants shall be enjoined from entering into or continuing to perform existing pooling agreements whereby given theatres of two or more exhibitors, normally in competition, are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee, or by one of the exhibitors, or whereby profits of the "pooled" theatres are divided among the owners according to pre-agreed percentages. They shall also be enjoined from making or continuing to perform agreements that the parties may not acquire other theatres in the competitive area without first offering them for inclusion in the pool. The making or continuance of leases of theatres under which defendants lease any of their theatres to another defendant or to an independent operating a theatre in the competitive area in return for a share of the profits shall be enjoined.

Each defendant shall cease and desist from ownership of an interest in any theatre, whether in fee or in stock or otherwise, in conjunction with another defendant-exhibitor. Each defendant shall cease and desist from ownership, jointly with an independent, of an interest in any theatre, greater than five per cent, unless such defendant's interest is ninety-five per cent or more; and where the interest of such defendant is more than five per cent and less than ninety-five per cent, such joint interests shall be dissolved either by a sale to, or by a purchase from, such co-owner or co-owners. Rearrangements of such joint interests with an independent, if by purchase, shall, however, be subject to the direction of this court so that their effectuation may promote competition in the exhibition of motion pictures. Where a defendant owns a ninety-five or greater per cent interest in any theatre, such theatre may be considered as its own so far as this opinion and the decree to be entered hereon are concerned. Each of the defendants shall be en-

joined from expanding its theatre holdings except for the purpose of acquiring a co-owner's interest in jointly owned theatres, and this only in cases where the court shall permit such acquisition, instead of requiring an outright sale of the undivided interest of the defendant in question. The foregoing provision as to divestiture of partial interests in theatres shall apply both to interests held in fee and beneficially and to those represented by shares of stock. But it shall not prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this court or other competent authority shall approve the acquisition after due application is made therefor.

Each defendant shall be enjoined from operating, booking or film-buying through any agent who is also acting in such matters for any other exhibitor, independent or affiliated.

The decree shall also provide for arbitration of disputes as to bids, clearances, runs, and any other subjects appropriate for arbitration in respect to all parties who may consent to the creation of such tribunals for adjustment of such disputes. It shall also provide for an appeal board generally similar to the one created by the consent decree as to any parties consenting thereto. It shall make such disposition of the provisions of the existing consent decree signed November 30, 1940, as may be necessary in view of the foregoing opinion.

In order to secure compliance with the decree to be entered, duly authorized representatives of the Departmnt of Justice shall on the written request of the Attorney General or the Assistant Attorney General in charge of anti-trust matters, and on reasonable notice to the defendant or defendants affected, be permitted reasonable access to all books and papers of the defendants and reasonable opportunity to interview their officers or employees, as provided in Section XVIII of the Consent Decree.

Proceedings under the decree to be entered shall be stayed pending appeal or for the purpose of enabling the parties

to adjust their business without an unfair burden or as practice may require upon such terms as the decree shall provide.

Jurisdiction of this cause shall be retained for the purpose of enabling any of the parties to the decree to apply to the court at any time for such orders or directions as may be necessary or appropriate for the construction or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

Findings should be proposed by the parties for the assistance of the court, but such proposed findings will form no part of the record.

Dated June 11, 1946.

AUGUSTUS N. HAND,
U. S. Circuit Judge.

HENRY W. GODDARD,
U. S. District Judge.

JOHN BRIGHT,
U. S. District Judge.

EXHIBIT 2.

United States District Court

Southern District of New York

EQUITY No. 87-273.

UNITED STATES OF AMERICA,

Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants.

DECREE.

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of *amici curiae* as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It is hereby ordered, adjudged and decreed, as follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pic-

tures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such

license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corpora-

tion, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, and National Theatres, Inc. is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragraphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to pre-arranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between

the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Each of the defendants shall submit to this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books,

ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and, if an appeal is taken, for thirty days thereafter in order to enable any appellant to move

before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND
United States Circuit Judge

HENRY W. GODDARD
United States District Judge

JOHN BRIGHT
United States District Judge

(Exhibit 2 Continued).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

PARAMOUNT PICTURES, INC., *et al.*,

Defendants.

MEMORANDUM IN RE FINDINGS AND DECREE.

In order to meet some of the objections raised at the hearing to the system of bidding for features described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so.

The arrangement for arbitration and an appeal board has been terminated except as to unfinished litigations and other matters referred to in the decree, because of the unwillingness of some of the parties to consent to their continuance. Nevertheless, as we have indicated in the opinion, these tribunals have dealt with trade disputes, particularly those as to clearances and runs, with rare efficiency, as both government counsel and counsel for other parties have conceded.

Indeed, the arbitration system set up under the consent decree of November 20, 1940, was created pursuant to the

prayer of the amended and supplemental complaint by the United States filed November 14, 1940, in which, among other things, the plaintiff prayed that "a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the court may deem proper be established pursuant to the final decree of this court in order to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained therein."

We strongly recommend that some such system be continued in order to avoid cumbersome and dilatory court litigation and to preserve the practical advantages of the tribunals created by the consent decree.

Dated: December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

EXHIBIT 3.

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EQUITY No. 87,273.

UNITED STATES OF AMERICA,

Plaintiff,

v.

PARAMOUNT PICTURES, INC., *et al.*,

Defendants.

ORDER DENYING INTERVENTION.

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; JOSEPH MORITZ; SOUTHERN CALIFORNIA AMUSEMENT COMPANY, INC.; EXHIBITORS' SERVICE, INC.; LAWRENCE CAPITOL, INC.; BIJOU AMUSEMENT COMPANY AND PAUL REALTY COMPANY; ANDY ANDERSON; ARCH AND MILAS L. HURLEY; RAYMOND AND WILLARD GERVERS; GAMBLE ENTERPRISES, INC.; AND ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., AND FANCHON & MARCO SERVICE CORPORATION having filed in this Court a Motion for Leave to Intervene and Intervening Petition which came on before this Court for argument on October 21, 1946, and this Court having heard argument thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the said Motion for Leave to Intervene is

hereby denied but said moving parties are hereby authorized to be heard in oral argument before this Court and to file briefs as amicus curiae.

AUGUSTUS N. HAND,
Circuit Judge.

HENRY W. GODDARD,
District Judge.

JOHN BRIGHT,
District Judge.

January 21st, 1947.

EXHIBIT 4.

MOTION OF COLUMBIA DEFENDANTS

"Motion denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U.S.C.J.
HENRY W. GODDARD D.J.
JOHN BRIGHT D.J."

MOTION OF UNITED ARTISTS

"Motion denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U.S.C.J.
HENRY W. GODDARD D.J.
JOHN BRIGHT D.J."

MOTION OF UNIVERSAL DEFENDANTS

"The within motion is denied.
Feb. 3, 1947.

AUGUSTUS N. HAND U.S.C.J.
HENRY W. GODDARD D.J.
JOHN BRIGHT D.J."

MOTION OF PARAMOUNT, TWENTIETH CENTURY-FOX, LOEW, R. K. O. AND WARNER DEFENDANTS

"Motion denied as to 1, 3 and 4; granted as to 2 (a) and (b) by extending the time of dissolution and termination to July 1, 1947. To this end, Paragraph III (2) of this decree is modified by adding at the end the following:

"The Pooling agreements by one or more defendants with others not parties to this action which violate this provision shall be dissolved prior to July 1, 1947."

Paragraph III (4) of the decree is modified by adding at the end the following:

"The leases referred to herein between a defendant and independents which violate this provision shall be terminated prior to July 1, 1947."

Settle order on Notice.

Feb. 3, 1947

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1354

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRES OWNERS ASSOCIATION, JOSEPH MORITZ, *et al.*,
Petitioners-Appellants,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF AMERICAN THEATRES ASSOCIATION, INC., ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1946.

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRES OWNERS ASSOCIATION, JOSEPH MORITZ, *et al.*, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*

No. 1354

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF AMERICAN THEATRES ASSOCIATION, INC., ET AL.

The Twentieth Century-Fox, Loew's, RKO, Paramount and Warner defendants-respondents move pursuant to the Rules of the Supreme Court of the United States for an order dismissing the attempted appeal of American Theatres Association, Inc., *et al.* herein with costs. In support of such motion, these defendants present this counter-statement as to the jurisdiction of this Court asserted by the appellants in their Statement of Jurisdiction filed February 26, 1947 and served March 3, 1947.

The attempted appeal is from an order denying the appellants leave to intervene in a suit brought by the United States against Paramount Pictures *et al.* to enjoin alleged violations of the anti-trust laws (15 U. S. C. Sections 1 et seq.). Intervention was not only opposed by the defendants, but also by the plaintiff, upon the ground that the effect of making the appellants parties, as plaintiff's counsel stated, "* * * would simply be to hopelessly confuse the litigation without in any way aiding the solution that the Court has to arrive at".

1. THE JURISDICTIONAL STATEMENT DOES NOT SUSTAIN THE ATTEMPTED APPEAL.

This Court has consistently held that it lacks jurisdiction of an appeal from an order which does not possess the finality required by the statutes regulating its appellate jurisdiction.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
United States v. *California Cooperative Canners*, 279 U. S. 533, 556;
Arnold v. *Guimarin & Co.*, 263 U. S. 427;
Collins v. *Miller*, 252 U. S. 364.

The statute relied upon by the appellants herein to sustain the appellate jurisdiction of the Supreme Court, namely, 15 U. S. C. Section 29, (32 Stat. 823), is not applicable to their appeal for the reason that the order sought to be appealed from is not a final decree as required by that statute.

Since it appears from the jurisdictional statement that the order in question is not a final decree, this Court should dismiss the appeal summarily for want of jurisdiction.

In this very suit this Court has already dismissed a previous attempted appeal by an unsuccessful applicant for leave to intervene:

> *St. Louis Amusement Co. et al.* v. *United States*, 326 U. S. 680.

In so doing, the court followed its established rule in such cases:

> *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137;
> *Jewel Incandescent Lamp Co. Inc.* v. *General Electric Company*, 318 U. S. 746;
> *Mississippi Central Railroad Co.* v. *Smith*, 295 U. S. 718;
> *Hinderlider* v. *La Platta River & Cherry Creek Ditch Co.*, 291 U. S. 650.

The cases cited by the appellants do not support their contention that this Court has jurisdiction of their appeal. *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194, did not concern an appeal from an order of the District Court denying leave to intervene, but was an original motion in the Supreme Court for leave to intervene. The appeal by the intervenors in the *Terminal* case appears *sub nom Evans and Howard Fire Brick Co.* v. *United States*, 236 U. S. 210. The questions of appealability and of jurisdiction were not raised and the order denying intervention was affirmed, since the relief that the intervenors sought had been accomplished by the Supreme Court decision in the main suit upon the appeal of the St. Louis Terminal Co. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, does not support the contention of the appellants, since there the intervenor was named in the decree which expressly provided that if action

were taken affecting the intervenor's rights it should be permitted to be heard, as Mr. Justice Roberts pointed out in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, at 141.

2. THE ORDER IS NOT APPEALABLE.

An order denying leave to intervene is not appealable, at least unless the applicant for intervention has a direct and immediate interest in a *res* which is the subject of the suit and which will be lost if intervention is denied.

United States v. *California Cooperative Canners*, 279 U. S. 553, 556;
Creditors Commutation Co. v. *U. S.*, 177 U. S. 131;
Ex-Parte Leaf Tobacco Board of Trade, 222 U. S. 578;
In re Engelhard & Sons Co., 231 U. S. 646;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellants in this case, American Theatres Association, Inc., *et al.*, have no such interest in the subject matter of the present suit.

Furthermore, in the case at bar, it is clear beyond question that the appellants do not have any legal interest in this litigation which is affected by the judgment herein. In other words, if one or more of the defendants had happened to distribute their motion pictures in the manner that is now required by the judgment, none of the appellants would have been possessed of the right to compel such defendants to sell in any other manner. The mere fact that the judgment directs the defendants to sell in this manner does not provide the appellants with any status to complain.

The order denying leave to intervene did not finally determine any right or claim which appellants may possess. Their right, if any, to institute independent suits to enforce whatever rights they may possess is not affected by the order sought to be appealed from (15 U. S. C. Section 15).

3. APPELLANTS WERE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT AND DID NOT CLAIM INTERVENTION AS A MATTER OF DISCRETION. REFUSAL OF LEAVE WAS CORRECT AND NOT AN ABUSE OF DISCRETION.

Appellants seek to bring themselves within subdivision (2) of paragraph (a) of Rule 24, Federal Rules of Civil Procedure, which permits intervention of right "when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Under this rule both inadequacy of representation and the fact that the applicant will be bound by the judgment must appear. See *MacDonald* v. *U. S.*, 119 F. (2d), 821, 827 (C. C. A. 9th, 1941), modified on other grounds, 315 U. S. 262.

Appellants are not "inadequately represented" within the meaning of Rule 24. *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137. That rule applies to representative action such as class actions, stockholders' derivative suits, etc. *United States* v. *Columbia Gas & Electric Corporation*, 27 F. Supp. 116; app. dism. 108 F. (2d), 614; cert. den. 309 U. S. 687; 2 *Moore Federal Practice* (1938 Sec. 24.07).

These appellants are therefore not entitled to intervene as a matter of right. They do not urge that they come

within the provisions of the Rule permitting intervention as a matter of discretion, but even if they did make such claim, they would fail.

Paragraph (b), Subdivision 2, of Rule 24 permits the District Court to allow intervention as a matter of discretion "when an applicant's claim or defense and the main action have a question of law or of fact in common." It further provides that "in exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The appellants assert no claim or defense having questions of law or fact in common with the main action. And it is apparent that to permit the intervention might unduly delay or prejudice the adjudication of the rights of the original parties. There was ample ground for the denial of intervention as a matter of discretion and the exercise of that discretion may not be reviewed in the absence of clear abuse.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
Creditors Commutation Co. v. *United States*,
177 U. S. 311.

It is therefore respectfully submitted that this Court is without jurisdiction thereof and that this appeal should be dismissed summarily.

WHEREFORE, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), Warner Bros.

Circuit Management Corporation, Twentieth Century-Fox Film Corporation, and National Theatres Corporation move pursuant to the Rules of the Supreme Court of the United States for an order dismissing the appeal of American Theatres Association, Inc., et al. herein with costs.

Dated, New York, N. Y., March 13, 1947.

Respectfully submitted,

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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM—1946

No. ~~1354~~ ~~1355~~ 85-86

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; JOSEPH MORITZ; SOUTHERN CALIFORNIA AMUSEMENT COMPANY, INC.; EXHIBITORS' SERVICE, INC.; LAWRENCE CAPITOL, INC.; BIJOU AMUSEMENT COMPANY and PAUL REALTY COMPANY; ANDY ANDERSON; ARCH and MILAS L. HURLEY; RAYMOND and WILLARD GERVERS; GAMBLE ENTERPRISES, INC.; and ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., and FANCHON & MARCO SERVICE CORPORATION, *Petitioners-Appellants,*

and

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT and MRS. E. P. THOMPSON, partners trading as BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE and FRANK V. MERRITT, partners trading as CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS and E. L. HARRIS, trading as J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC.; THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED and SIDNEY WHARTON; *Petitioners-Appellants,*

vs.

UNITED STATES OF AMERICA, *Plaintiff-Respondent,*

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG-U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants-Respondents.*

E-87-273

JOINT BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*, INTERVENORS, OPPOSING THE SEPARATE MOTIONS OF TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER DEFENDANT-RESPONDENTS, FOR AN ORDER DISMISSING APPEALS OF AMERICAN THEATRES ASSOCIATION, INC., *ET AL.* AND W. C. ALLIED, *ET AL.*

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Supreme Court of the United States

OCTOBER TERM—1946

No. _____

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; JOSEPH MORITZ; SOUTHERN CALIFORNIA AMUSEMENT COMPANY, INC.; EXHIBITORS' SERVICE, INC.; LAWRENCE CAPITOL, INC.; BIJOU AMUSEMENT COMPANY and PAUL REALTY COMPANY; ANDY ANDERSON; ARCH and MILAS L. HURLEY; RAYMOND and WILLARD GERVERS; GAMBLE ENTERPRISES, INC.; and ST. LOUIS AMBASSADOR THEATRE, INC., EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., and FANCHON & MARGO SERVICE CORPORATION, *Petitioners-Appellants*,

and

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT and MRS. E. P. THOMPSON, partners trading as BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE and FRANK V. MERRITT, partners trading as CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS and E. L. HARRIS, trading as J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED and SIDNEY WHARTON; *Petitioners-Appellants*,

vs.

UNITED STATES OF AMERICA, *Plaintiff-Respondent*,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants-Respondents.*

E-87-273

JOINT BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., *ET AL.*, AND W. C. ALLRED, *ET AL.*, INTERVENORS, OPPOSING THE SEPARATE MOTIONS OF TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER DEFENDANT-RESPONDENTS, FOR AN ORDER DISMISSING APPEALS OF AMERICAN THEATRES ASSOCIATION, INC., *ET AL.* AND W. C. ALLIED, *ET AL.*

Statement of the Issues Involved

On December 31, 1946, the Court below entered its final decree in the above entitled proceedings. Paragraph 8 of Part II of that decree

authorized and directed the defendants herein, who distribute approximately 70% of the feature pictures sold to independent theatres, to institute a program of uniform action confining the market in feature pictures to a competitive bidding system. At the hearing prior to the entrance of said decree, American Theatres Association, Inc., *et al.* and W. C. Allred, *et al.*, hereinafter called *intervenors*, filed their separate motions for intervention in the Court below opposing competitive bidding as directed by the Court in its opinion.

Intervenors have appealed to this Court asking:

1. That the provision in this final decree requiring competitive bidding by uniform action of the defendants be reversed; and

2. That orders which the District Court entered after its decree had become final, denying intervenors leave to intervene, be reversed.

In connection with their appeals, intervenors filed in this Court two separate jurisdictional statements. The sufficiency of both of these statements is now attacked by defendants in joint motions to dismiss intervenors' appeals. The objections made to each of the jurisdictional statements are the same. For that reason intervenors file this joint brief in reply.

The allegations set out in both jurisdictional statements may be summarized as follows:

The decree of the Court has authorized and directed to the irreparable damage of intervenors the program of joint uniform concerted action to be taken by the major distributors of the pictures which intervenors must buy. That program in effect sets up, authorizes and approves a combination among the major distributors which would be unques-

tionably in restraint of trade if self-imposed without authorization by the Court. By the Court's approval of this judicial combination, the Court attempts to take away the legal rights of petitioners to enjoin the combination. Thus, the Court effectively denies intervenors in competitive areas access to a market in which they may purchase their feature films free from the plan of uniform control to be instituted by the defendants acting in reliance on the Court's decree.

The basis of intervention in the Court below is Rule 24 (a), subsection (2), Federal Rules of Civil Procedure. That rule provides for intervention of right "when the representation of the applicants' interest by existing parties is or may be inadequate, and the applicant is or may be bound by the judgment in the action." The jurisdictional statements filed by intervenors show that all of the requirements for intervention of right under the above quoted rules are satisfied, to wit:

The Representation of Intervenors' Interests in Opposing the Combination Restricting Their Market for Films Is Inadequate

The only party which could theoretically represent the interests of intervenors in establishing a free and unrestricted market for films was the Government. The Attorney General has voiced no objection to the enforced system of competitive bidding, as such. He presented no argument against the irreparable injury which such a system will impose on intervenors. Counsel for the Government indicated its willingness to try out a plan of competitive bidding in the event that it is unable to obtain the specific relief of divorcement. Intervenors are inadequately represented because the Attorney General has declined to permit or argue their objections to the plan.

The Requirement for Intervention as of Right, *i. e.*, That "The Applicant Is or May Be Bound by a Judgment in the Action", Is Satisfied by the Jurisdictional Statements

It is apparent that the intervenors will be bound by the decree because:

1. They will be compelled to submit to the market regulations imposed by the uniform action required of distributors who control the greater portion of their supply of feature pictures.

2. Their present right to enjoin a combination controlling the market for feature film and compelling competitive bidding as the sole means of distribution, will be taken away; they will be unable to sue for damages on account of injury caused by the Court plan.

It can scarcely be argued that this will not be the effect of the decree, because any independent action taken by intervenors will be met by the defense that the defendants are acting in accordance with the directions of the District Court. It should be noted that the rule not only covers cases where the intervenors are bound as a matter of law, but also cases where they "may be bound".

Two Decisions of This Court, Both Directly in Point, Sustain Intervenors' Jurisdictional Statments

The principal cases on which intervenors rely in their jurisdictional statements are *Missouri Kansas Pipe Line Co.* v. *U. S.*, 312 U. S. 502, 506-509, and *U. S.* v. *Terminal R. R. Assoc. of St. Louis*, 236 U. S. 194, 199.

In the *Missouri Kansas Pipe Line* case, the Court allowed intervention on the ground that Rule 24 covered those

situations "where the enforcement of a public law * * * demands distinct safeguarding of private interests * * * the power to enforce rights thus sanctioned is not left to the public authorities, nor put in the keeping of the District Court's discretion". In that case intervention was permitted on the broad ground that the intervenors' "right to economic independence was at the heart of the controversy". This precise ground is spelled out in detail in both of the jurisdictional statements filed by intervenors. These statements show, and the brief in opposition does not controvert the fact that the entire business of petitioners is endangered if their access to the market is limited by a system imposed upon them which destroys all established relationships on which intervenors now depend for their pictures, and compels them to bid against each other and the major distributors for the benefit of the major distributors. All competition between sellers of pictures is eliminated. The jurisdictional statements further show that there are no reviewable criteria possible by which the successful bidder can be selected. The choice must, therefore, lie entirely within the uncontrolled business judgment of the defendants, who have already been held guilty of discrimination in violation of the Sherman Act.

The *St. Louis Terminal* case, above cited, is equally in point. The right of the intervenors in that case which this Court adjudicated on appeal was the same, in substance, as the right urged by intervenors here.

The only difference between the *St. Louis Terminal* case and the situation before the Court here is the technical one that in the *St. Louis Terminal* case, petitioners intervened directly in the Supreme Court of the United States. This difference is relied on by defendants. We consider it without substance. However, for the purpose of removing possible doubt, intervenors ~~have filed~~ intend to file an original motion to

intervene in this Court similar to the one approved in the *St. Louis Terminal* case.

Analysis of Defendants' Objections to Intervenors' Jurisdictional Statements

1. It is argued that the order denying intervention is not a final decree, and hence may not be appealed to the Supreme Court under 15 U. S. C., Section 29.

The obvious answer is that intervenors appealed from the final decree entered by the Court on December 31, 1946, and from the order denying intervention made after the entry of that final decree, which bound intervenors and took away rights against the combination which they would otherwise have had. These facts make all of the cases cited by defendants on this point irrelevant. The cases principally relied on are cases of permissive intervention sought by parties not bound by a final decree. For example, in *Allen* v. *Cash Register Co.*, 322 U. S. 137, the leading case cited by defendant, the intervenor in an anti-trust suit opposed the acquisition of the business of a competitor by the defendant. Such acquisition did not control or destroy intervenor's market. It did not affect him, except incidentally. The Court held there was no intervention of right under these circumstances. The Court further held that intervenor was adequately represented by the Government, which also opposed the acquisition. In its opinion this Court cited the *Missouri Kansas Pipe Line Co.* v. *U. S.* case, on which we relied, clearly implying that had the situation been as it was in that case, the action of the District Court on petitioner's intervention would have been subject to appeal. The situation of the intervenors here is the same as the intervenors in the *Missouri Kansas Pipe Line* case.

Defendants, in their motions to dismiss, attempt to distinguish the *Missouri Kansas Pipe Line* case on the ground that in that case the intervenors were designated by name in the Court's decree, while in the case before the Court their names are not given. There can be no substance to such a distinction. There was no doubt that the Court's decree binds all independent theatres in competitive areas because they are the only buyers of feature film in the market, aside from the defendants themselves. Furthermore, the opinion in the *Missouri Kansas Pipe Line* case is based, not on narrow technical considerations of names in the decree, but on the broad ground that persons whose rights are adversely affected by an anti-trust decree are entitled to protect them through intervention as of right.

U. S. v. *California Cooperative Canneries*, 279 U. S. 553, the second case cited, is not a case on appeal from an order denying intervention. It simply determines the lack of jurisdiction of the United States Court of Appeals of the District of Columbia under the Expediting Act. The dictum in the case on which defendants apparently rely refers to the old equity rule in force prior to the present Rule 24 of the Federal Rules of Procedure. Regardless of the accuracy of that dictum, there is no question today that Rule 24 has enlarged the former right to intervene. In a recent case, *Cameron* v. *President & Fellows of Harvard College*, 157 F. (2d) 993, C. C. A. 1st, Nov. 7, 1946, analyzing the appealability of an order denying an intervention of right, the Court of Appeals for the First Circuit said:

> "Certainly decisions denying applications to intervene as of right under paragraph (a) of the Rule are final (see *Burrow* v. *Citizens' State Bank*, 5 Cir., 74 F. (2d) 929, 930), since they purport ultimately to decide questions of substantive legal right. . . . The statement is made in some of the older cases that an order denying an application for leave to intervene

> *addressed to the discretion* of the District Court is 'not of that final character' which furnishes 'the basis for appeal.'' *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, 221, 40 S. Ct. 511, 512, 64 L. Ed. 870 and cases cited. See also *City of New York* v. *New York Tel. Co.*, 261 U. S. 312, 316, 43 S. Ct. 372, 67 L. Ed. 673; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188. Perhaps this statement may be warranted for the reason that only rarely, if ever, could it be shown that a District Court abused its discretion *in denying permissive intervention*. . . . However, we venture to question its verbal accuracy. Decisions reached by an exercise of judicial discretion ordinarily are reviewable, if they are final, although, of course, on appeal the scope of review is limited to the question of abuse of discretion.'' (Emphasis supplied.)

The Court went on to say, however, that an order refusing intervention is not a final and appealable order unless the applicant for intervention has no other adequate means of asserting his rights, citing *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.*, 143 F. (2d) 1012. That intervenors' position meets this test is amply demonstrated by the jurisdictional statements.

In the *Cameron* case the Court considered the intervenor's position with respect to each paragraph of Rule 24(a) separately and in the disjunctive and found that the intervenor was not entitled to relief under any one of them. Similarly, Sections 24.07 and 24.08, 2 Moore's Federal Practice, demonstrate clearly that the effect of Rule 24(a) is not to require an interest in a *res* as the sole ground for absolute intervention but rather is to designate it as one of three distinct grounds, any one of which gives intervention as of right. See also *Mullins* v. *DeSoto Securities Co.*, 2 F. R. D. 502 (W. D. La., 1942), app. dismissed 136 F. (2d)

55 (C. C. A. 5th, 1943); *Mack* v. *Passaic Nat. Bank & Trust Co., et al.*, 150 F. (2d) 474 (C. C. A. 3d, 1945) holding that one who has an absolute right to intervene under Rule 24(a) has an absolute right to appeal from an order denying intervention; *Wolpe* v. *Poretsky*, 144 F. (2d) 505 (App. D. C. 1944), cert. den. 323 U. S. 777, 65 S. Ct. 190 (1944), in which adjoining property owners in a suit to vacate a zoning order were held to have such a vital interest in the suit as to be entitled to intervention as of course even though they had applied for permissive intervention. Cf. *Blumgart* v. *St. Louis-San Francisco Ry. Co.*, 94 F. (2d) 712 (C. C. A. 8th, 1938), cert. den. 304 U. S. 567, 58 S. Ct. 1041 (1938); *Palmer* v. *Guaranty Trust Co. of New York*, 111 F. (2d) 115 (C. C. A. 2d, 1940); *U. S.* v. *American Surety Co. of New York*, 142 F. (2d) 726 (C. C. A. 2d, 1944); *Jenkins Petroleum Process Co.* v. *Credit Alliance Corp.*, 83 F. (2d) 532 (C. C. A. 10th, 1936); *State of Washington* v. *U. S.*, 87 F. (2d) 421 (C. C. A. 9th, 1936).

The other cases cited by the defendants in an attempt to support dismissal of intervenors' appeals all involve situations which are not relevant here. They are either cases where there was no final judgment entered by the Court below, or cases where the right to intervene was permissive, and the Court did not abuse its discretion, or cases where the Court held that the intervenor was adequately represented and, therefore, did not satisfy this requirement of Rule 24. For example, *St. Louis Amusement Co., et al.* v. *U. S.*, 326 U. S. 680, is a previous attempt at appeal in these same proceedings. The St. Louis Amusement Company intervened just after the former consent decree had been reopened. The purpose of the proceeding brought by the Government at that stage was to restore competition in the distribution of films. At the time there was no intimation by anyone that independent theatres would be injured or

bound by the final decree. For that reason representation of independents by the Government was adequate at that time, and the Court so held. The Supreme Court dismissed the appeal on the authority of the *California Canneries* and *Allen* cases, *supra*, since there was not only no final decree at the time, but none was even in prospect.

2. The second contention of defendants is that intervenors have no direct and immediate interest in any *res* which is the subject of the suit.

In a technical sense, there is no *res* in any anti-trust action to break up a combination in restraint of trade. The effect of this argument is, therefore, that no intervention is ever possible in an anti-trust action. Such an argument flies directly in the face of Rule 24 (a) (2). It is also contrary to the only case directly in point prior to the rule, the *St. Louis Terminal* case. In a broader sense, as we pointed out above, the Court has subjected the entire business of intervenors to its order, and has to that extent taken control over the operation of their theatres in a most vital and essential respect.

Moreover, as pointed out above in discussing the *Cameron* case, the requirement of a direct and immediate interest in a *res* which is the subject of the suit is limited to intervention as of right under Rule 24 (a) (3) and need not be demonstrated in perfecting the right to intervene under Rule 24 (a) (2).

3. Defendants urge that the orders denying leave to intervene does not prevent intervenors from instituting independent suits to enforce whatever rights they may possess.

This statement is in contradiction to the facts stated in petitioners' jurisdictional statements. The intent and purpose of the Court's order was to set up a plan of action

common to all distributors to enforce competitive bidding. Clearly, if any intervenor seeks to enjoin that combination or to collect damages from defendants on account of their activities pursuant to the plan authorized by the Court, he will be met with the defense that defendants are required by the Court to carry out this system of uniform action.

For example, suppose that through the enforcement of the uniform competitive bidding system, film rentals are forced so high that many of these intervenors find their profits destroyed. Or suppose that on account of the exercise of the uncontrolled business judgment of the defendants in selecting successful bidders, many of these intervenors find their theatres unable to operate for lack of features. Or suppose through the operation of the system, a theatre is unable to assure itself of a future supply of features, which assurance is necessary for its financial solvency. In these situations any independent who brought a suit would be barred by the decree from a recovery.

The only answer would be that the Court below exceeded its jurisdiction. But certainly the District Court intends its decree to be a bar to any action by an independent which seeks relief inconsistent with its provisions—and there can be no question of the jurisdiction of that Court.

For example, in *St. Louis Amusement Co., et al.* v. *Paramount Pictures, Inc., et al.*, 61 F. S. 854 (E. D. Mo. 1945), the District Court in St. Louis upheld the decree of the New York Court with some reluctance, but as a matter of comity. Even though the decree of the District Court could immediately be reversed by another Court, the defendants would have a complete defense for all their interim activities taken on the authority and order of the Court below.

4. In their motions to dismiss defendants argue that intervenors are not inadequately represented within the meaning of the rule because Rule 24 applies only to the class actions, stockholders' derivative suits, etc.

It is sufficient to say that no support for such an argument can be found in the rule or in the cases cited. Furthermore, the Supreme Court of the United States has held directly to the contrary in the *Missouri Kansas Pipe Line* case above cited, where Mr. Justice FRANKFURTER, speaking for the Court, said:

> "Where the enforcement of a public law . . . demands distinct safeguarding of private interests . . . the power to enforce rights thus sanctioned is not left to the public authorities, nor put in the keeping of the District Courts' discretion."

5. Finally, defendants argue that intervenors have no claim or defense having questions of law or fact in common with the main action, and that to permit intervention might unduly delay or prejudice the adjudication of the rights of the original parties.

This contention is contrary to the facts of the jurisdictional statements. We need not argue the point, however, because this ground of objection can relate only to permissive intervention. It has nothing to do with the provision of Rule 24 (a) (2), relating to intervention as of right.

6. Defendants argue that if any single defendant, acting by itself, and not in pursuance of a plan adopted by all defendants, sold pictures on competitive bidding, intervenors would have no complaint.

This may be true. But in such a case independents could induce other major distributors to sell on other terms. And if they were free to do so, it is scarcely conceivable that all of them would uniformly refuse, in the absence of collusive action. It is the enforced uniform plan, adopted by all de-

fendants on order of the Court which is the essense of both the wrong and the injury to intervenors. Even if voluntary competitive bidding were invoked by a number of defendants acting individually, necessary alterations and concessions could be made as occasions arose to meet changing economic conditions. The court system imposes a rigid strait-jacket on the industry for the entire future so long as the decree stands.

Conclusion

To deny intervention in the present case is to subject intervenors to irreparable injury resulting from the Court's decree without an opportunity to be heard. The defendants who are objecting to giving intervenors an opportunity to defend their rights in court are the very persons who will benefit by a plan of united action sanctioned by the Court which would be illegal without that sanction. The united front which the decree directs the defendants to take against the intervenors destroys intervenors' power to bargain individually to protect themselves against the enhanced prices which defendants will be able to obtain through competitive bidding after the destruction of existing commercial relationships with independents. No reason, apart from technicalities which we believe we have sufficiently answered, is advanced by the defendants to support the grave injustice of denying a hearing to intervenors. Defendants' statement that intervention will delay or complicate the litigation is obviously specious. Intervenors do not seek to introduce new evidence. They ask no part in the litigation except to protect their rights against the unlawful and harmful provisions of the decree.

It is, therefore, respectfully submitted that this Court have jurisdiction of the intervenors' appeal and of the order denying intervention and that the motions to dismiss the separate appeals of these intervenors should be denied.

April 1, 1947.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 85.

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; ET AL., PETITIONERS-APPELLANTS,

v.

UNITED STATES OF AMERICA, PLAINTIFF-RESPONDENT,

and

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS-RESPONDENTS.

No. 79.

The United States of America, Appellant,

v.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's Incorporated, et al.

No. 80.

Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants,

v.

The United States of America.

No. 81.

Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants,

v.

The United States of America.

No. 82.

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants,

v.

The United States of America.

No. 83.

United Artists Corporation, Appellant,

v.

The United States of America.

No. 84.

Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures Company, Inc.), et al., Appellants,

v.

The United States of America.

BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., ET AL.

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Supreme Court of the United States

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The United States of America.

BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., ET AL.

OPINIONS BELOW.

The opinions delivered in the court below from which the appeal in No. 85 is taken are reported in 66 F. Supp. 323 and 70 F. Supp. 53. The petition to intervene in Nos. 79-84 is an original petition now pending before this Court.

GROUNDS OF JURISDICTION.

The appeal in No. 85 is taken pursuant to 15 U. S. C. § 29. The original petition to intervene in this Court is based on *U. S.* v. *Terminal Association of St. Louis*, 236 U. S. 194.

STATEMENT OF THE CASE.

American Theatres Association, Inc., Southern California Theatre Owners Association, and a number of exhibitors of motion pictures, have appealed from the decision of the District Court denying its right to intervene in that court and from the provisions of Part II, Paragraph 8, of that court's decree of December 31, 1946, instituting a system of competitive bidding for the distribution of motion picture films. They have also filed an original petition in this Court to intervene in Nos. 79-84 for the purpose of presenting their objections to the provisions relating to competitive bidding.

In Part II, Paragraph 8, of the decree of December 31, 1946, defendants are enjoined as follows:

> 8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:
>
> (a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;
>
> (b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;
>
> (c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competi-

tive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

Our principal objections go to sub-Paragraph (c) of the injunction quoted above.

QUESTIONS PRESENTED.

A. Did the court below err in refusing to grant appellants intervention as of right?

B. Should this Court grant appellants' intervention as of right in Nos. 79-84?

C. Is the requirement of auction bidding imposed by the court below an invalid exercise of that court's power?

ARGUMENT.

I.

THE STANDING OF APPELLANTS TO INTERVENE AND TO MAINTAIN THIS APPEAL.

The standing of American Theatres Association, Inc., et al, to intervene in the court below and to take this appeal has been questioned by a motion to dismiss, the determination of which has been postponed to the hearing on the merits (——— U. S. ———, 67 S. Ct. 1752).

The motion for leave to intervene was brought under Rule 24 (a) of the Federal Rules of Civil Procedure which provides that "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" there shall be intervention of right.[1] The following cases support intervenors' right to appeal from the order denying their motion to intervene:[2]

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[1] Said Rule 24 (a) reads as follows:

> "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

[2] See also *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173; *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707.

Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502;
U. S. v. *Terminal Assn. of St. Louis*, 236 U. S. 194;
Brotherhood of Railroad Trainmen v. *Baltimore & Ohio Railroad Company*, —— U. S. ——, 67 S. Ct. 1387. Decided June 9, 1947;
Wolpe v. *Poretsky*, 144 F. 2d 505.

Rule 24 (a) providing for intervention of right applies to the situation of the appellant-intervenors for the following reasons: Intervenors include both associations of motion picture theatres and individual motion picture exhibitors. They are compelled to buy the pictures produced by the defendants in order to stay in business because, as the court found, these defendants distribute over 70% of the feature films. The section of the decree from which we appeal (Section 8 (c) of Part II) authorizes and requires these major distributors to engage in a preconceived program of uniform and concerted action which regulates and controls the selling of films to appellant-intervenors, and restricts the independent competitive activity which any one of the major distributors would otherwise be free to take.

It is obvious that if the defendants themselves undertook to combine in order to carry out the preconceived plan of uniform and concerted action suggested by the court in order to control the market for film, any one of the appellant-intervenors would have a remedy against the major distributors under the antitrust laws. In other words, the Court is attempting to legalize an otherwise illegal plan for concerted action to regulate the market for films. Appellant-intervenors are more than incidentally affected by the decree. It takes away their existing legal remedies against concerted action by those who dominate the market. The decree if affirmed will, therefore, be binding on them as a matter of law.

As the Court said in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co., supra*, at 1390:

"Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene

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where intervention is a permissive matter within the discretion of the Court. United States v. California Co-op. Canneries, 279 U. S. 553, 556, 49 S. Ct. 423, 424, 73 L. Ed. 838. *The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case.* He is at liberty to assert and protect his interests in some more appropriate proceeding." (Emphasis supplied.)

The other cases cited above go even further than required to support appellant-intervenors' right to intervene and appeal. For example, in *U. S.* v. *Terminal Association of St. Louis, supra,* this Court said that third parties were entitled to be heard on intervention in connection with an antitrust decree "insofar as it might operate prejudicially to their rights." In *Missouri-Kansas Pipe Line Co.* v. *U. S., supra,* the Court said "But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion."[3]

The inadequacy of the representation of the interest of appellant intervenors is equally clear. Some mild dissent to the plan has been voiced by the defendants, but it can scarcely be argued that appellant intervenors' interests are adequately represented by those found guilty of conspiring to discriminate against them. The government which is the natural party to protect appellant intervenors has not only voiced no objection but actually indicated its willingness to try out the plan.

Further, no proof has been introduced into this record showing the economic problems with which independent exhibitors are confronted in the licensing of motion pictures.

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[3] *Cf. Evens & Howard Fire Brick Company, et al.* v. *United States,* 236 U. S. 210; *United States* v. *California Co-operative Canneries,* 279 U. S. 553, 556.

The absence of any such proof in this record would seem to show beyond peradventure of a doubt that the interests of exhibitors have not been adequately represented in this case, thus making obvious the right of intervention which is here being sought.

II.

OUR STANDING ON OUR PETITION FOR DIRECT INTERVENTION IN THIS COURT.

Appellant intervenors have also filed a petition for intervention in this Court conforming exactly to the precedent set by *U. S.* v. *Terminal Association of St. Louis,* 236 U. S. 194, 199. That case held that third parties were entitled to be heard by intervention in this Court concerning the settlement of an antitrust decree "insofar as it might operate prejudicially to their rights". Here, as we have shown, the decree below approving an otherwise illegal combination has cut off appellant intervenors' legal right to proceed under the antitrust laws against such a combination as effectively as the legal rights of the intervenors were cut off in the *St. Louis Terminal* case.

III.

THE REQUIREMENT OF AUCTION BIDDING IS AN INVALID EXERCISE OF THE COURT'S POWER AND WILL, IF ENFORCED, CAUSE IRREPARABLE INJURY TO APPELLANT INTERVENORS AND ALL OTHER INDEPENDENT EXHIBITORS OF MOTION PICTURES.

A. The Failure of the Decree to Accomplish the Purpose the Court Intended.

The purpose of the lower court in setting up competitive bidding for films is clear from the opinion. It had found a number of discriminatory and restrictive practices on the part of the defendant producers and distributors and their exhibitor affiliates which were directed against inde-

pendent exhibitors. It desired to prevent this discrimination without at the same time requiring divestiture of the defendants' theatres. The court apparently thought that if everyone were given a chance to bid and films were sold in no other way than by auction bidding discrimination would be impossible.

The court of course could not give direct orders to the independent exhibitors who were not parties as to how they should buy. It could nevertheless control this buying by controlling the defendants who produced over 70% of the feature films. Since no exhibitor can survive without buying a major portion of his product from these defendants, an order against them can in practical effect substantially control and regulate not only the defendants but also the exhibitors who had no voice in these proceedings. The court took advantage of this situation to impose judicial regulation over the entire industry. Its decree affects appellant intervenors in the following way:

1. It compels the buyers in the market for films to submit to market regulations formulated by the court and enforced by the concerted action of sellers who control the major part of the supply.

2. It takes away from appellant intervenors their former right to enjoin such concerted action on the part of the defendants.

3. It takes away from appellant intervenors their former right to recover damages under the antitrust laws on a showing that the operation of the plan has caused them injury.

4. It authorizes and compels the major distributors to break off established relationships with independents which have no taint of illegality whatever.

No doubt, the court was moved by the belief that the limited type of competition involved in enforced auction bidding would be fairer than uncontrolled free competitive activity. But this is an economic judgment which the court had no power to make. Congress has not, and in-

deed it could not, delegate the broad power to make competition fairer by restricting competitive activity. *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

Not only was the economic judgment of the court invalid as a matter of law; it was equally faulty as a practical solution for the evils existing in the industry. Instead of decreasing the monopoly power of the defendants it increases it. Instead of putting independents in a better bargaining position it leaves them worse than they were before. The primary impact of the decree is not upon the defendants who receive the bids but upon the independents who are required to bid against one another. If auction bidding were possible or appropriate in this industry—which we do not believe—the court's purpose could be carried out only by compelling the *defendants* to bid against each other for the playing time of independent exhibitors. Only in this way could mandatory auction bidding operate against the wrongdoers and in favor of their innocent victims. The decree will in practice be a requirement that independent exhibitors struggle and compete among themselves for the scarce supply of pictures produced and controlled by a few industrial giants.

An illustration from another field may be helpful. Sometime ago, great financial houses in New York, of which Morgan Stanley was a leader, effectively controlled the underwriting of utility securities. The utility companies had little bargaining power in the sale of their own securities. Financial houses which had a special position with the various utilities absolutely determined which houses would purchase or underwrite the securities; the prices at which they would be sold; the spreads or profits to the banking houses, etc. For the purpose of correcting these abuses competitive bidding was made mandatory. But the persons who were guilty of the restraints—the banking houses—were required to compete among themselves for the securities, and the victims—the utility companies—were the beneficiaries of the higher prices and better terms

which were obtained by the competitive bidding. The remedy in that situation was adapted to the evil; and the persons upon whom the impact of the regulation was most severe were the persons whose restrictive practice came under governmental condemnation. Cf. Rule U-50, S. E. C., and *Morgan Stanley & Co.* v. *S. E. C.*, 126 F. 2d 325 (C. C. A. 2d, 1942).

Competitive bidding is not new. It has been tried before in many contexts. But it has always been used as a device to protect the recipient of the bids against the bidders. Thus, competitive bidding on government projects is designed to prevent the Government from being imposed on by the bidders. And this is true whether it is the disposal of surplus property owned by the Government or the procurement of property by the Government. It is the Government which receives the bids. Thus, to take contrasting examples, when the purchasing agent of the Treasury asks for sealed bids for a specified number of automobile tires, he is trying to secure the requisite supply as cheaply as possible. And when the War Assets Administration attempts to dispose of a lot of automobile tires by auction sale, it is attempting to secure as high a price as possible. The present proposal is the first which has come to our knowledge which attempts to protect a weaker party by requiring the weak to bid against the weak for the favor of the strong.

As applied to the motion picture industry the effects of the practice stand out sharply. The exhibitors, by competing against each other, bid up the price of the rights which are being sold. The producer-distributors, by calling for the bids, attempt to extract from each license all the traffic can be made to bear. The scheme moves towards raising the floor under prices rather than lowering the ceiling over them. It is a device which obtains for the already powerful producers a price which is the utmost the weaker exhibitor can be made to pay.

The practices of the defendants which have been attacked before this Court are monopolistic and discriminatory

practices designed primarily to aid and promote the theatre interests which are owned or controlled by the defendants. The Court has not seen fit to decree dissolution of the defendants' ownership of theatres. On the propriety of this decision, these intervening petitioners take no position and make no suggestions. But we do insist that the alternative selected by the court is neither appropriate nor permissible. It assures the very instruments of monopoly—the theatres owned or controlled by defendants—a basic supply of pictures and at the same time deprives the independent exhibitor of any possibility of securing for himself by orderly and historic negotiations and contract arrangements the supply of pictures which he needs.

B. Auction Bidding in the Motion Picture Industry Will Not Restore Free Competition But Will Lead to Its Further Destruction.

1. *The purposes of the Sherman Act.*

The Sherman Act, under which this suit was brought, has been declared by Mr. Chief Justice Hughes to be a "charter of freedom." See *Sugar Institute, Inc.* v. *U. S.*, 297 U. S. 553, 600 (1936). In specific terms it seeks to outlaw every monopoly, and every contract, combination, and conspiracy in restraint of trade. Its aim is to impose a legal ban upon economic tyranny, to prevent the domination of the weak by the strong, to insure to industrial rivalry a fair field and no favors, to put an end to industrial vassalage in all its forms. It is, as Mr. Justice Stone has put it, the very "power" to fix prices, to dictate the terms of the bargain, to compel a result which could not be won in fair mercantile battle which is the test of restraint. See *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). See also *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

These are the general objectives of public policy in this litigation to be realized, within the concrete operation of the motion-picture industry, by protecting independent exhibitors and breaking the hold of the combination by the defendants. In its desire to prevent discrimination in the sale of feature pictures, the Court below has, we contend, unwittingly suggested a form of decree which will not meet the purposes of the antitrust laws because it will not and cannot create an open market in the distribution of pictures. It will rather increase the monopoly power of the defendants and weaken the position of the independent exhibitor.

2. *The relation of Bidding to Competition.*

There is a deceptive assurance in the resort to auction bidding. It is based on the assumption that competition is created where open bidding is required. Actually competition and auction bidding are not identical. In most situations they have little relationship with each other. The ordinary purpose of competitive bidding is to prevent a person in a fiduciary capacity from favoring some individual contractor to the detriment of the public or the persons whom he represents. The device is a safeguard to prevent persons who act, not for themselves, but for others from betraying their trust.

But this is as far as it goes. It does not of itself—and cannot—create a competitive market. It has in practice repeatedly proved itself to be an invitation to collusion among the parties from whom bids are sought. The large cigarette companies have for years been accustomed to use the auction market to depress the price paid to the growers for leaf tobacco. *American Tobacco Co.* v. *U. S.*, 147 F. 2d. 93, aff'd. 328 U. S. 781. The federal government has complained to the courts that on numerous occasions the bids submitted to it were collusive bids. *U. S.* v. *Cooper Corporation*, 312 U. S. 600. And the State of Georgia, voicing similar allegations, has been permitted to go into court to seek triple damages. *Georgia* v. *Evans*, 316 U. S. 159.

Auction bidding does not in any way remove the handicap of those bidders who are in an inferior bargaining position.

3. *The Inequality of Bargaining Power between the Defendants and Independent Exhibitors.*

In the situation before the Court we are faced with a gross inequality in bargaining position. The defendants have great economic power. The exhibitors are largely weak and unorganized. This inequality is aggravated by the fact that exhibitors must buy in a seller's market where the amount of product is declining and the demand for it greater than the supply.

Furthermore, the tendency in the industry as it is now organized is toward even greater scarcity. As the record of this case shows, the business of producing motion pictures is not open to all who wish to take its chances. It requires large capital but more important is the fact that newcomers may expect to have great difficulty in distributing their product because of the present producer control of distribution.

The effect is apparent from the production figures. In 1937 a year of depression when purchasing power was low some 437 pictures were released by all producers. In the season 1945-46, a year of tremendous purchasing power and packed houses, only 445 pictures were released by all producers which in no way caught up to the increased demand. In the comparable season of 1946-47 the pictures released were reduced to 426. As is pointed out in the brief amicus curiae submitted on behalf of the Conference of Independent Exhibitors Associations the Court's findings do not reflect the gradual reduction in the number of films annually released by the defendants. This brief goes on to say:

> "Finding No. 99 shows that during the 1943-1944 season the eight defendants together released 260 feature films, exclusive of 'westerns.' The affiliated first-run and key neighborhood theatres by reason of extended

runs (a 'smash hit' will sometimes be held over for three or four weeks) and move-overs, do not require as many feature pictures as the independent subsequent-run and small town theatres. Theatres of the latter class commonly change their programs two or three times a week, thus requiring from 104 to 156 features a year. Most of them are compelled by competitive conditions or custom to show double features; that is two feature pictures on every program. And in many instances the exhibitor must split the available product with a competitor having the same run.

"It is apparent, therefore, that so far as the independent subsequent-run and small town theatres are concerned, there is a serious product shortage."

Under these circumstances the freedom of the exhibitor to shop around and to deal with the major producers on any sort of an equal bargaining basis is severely limited. He must, whatever his run—first, move-over, second, third, revival or nondescript—depend for his "features" upon a small number of major companies which in the near past, as the court below has found, have been operating in close accord. The major companies, however, are under no such compulsion to deal. However indispensable they are to the exhibitors, the patronage of no exhibitor is indispensable to any one of them. The conditions under which competition insures a "charter of freedom" do not—and under the Court's decree as now written—cannot prevail in the motion-picture industry. Within the framework of such a situation competitive bidding will perpetuate the very inequities it is meant to correct.

For the belief that auction bidding will itself break restraints revealed in this litigation there is neither warrant or authority. Competitive bidding instead of removing the coercive use of power by the defendants will force the weaker units of the industry into ruinous competition with each other. It will not compel competition among the sellers except when they are dealing with large chains of exhibitors. This means the progressive elimination of in-

dependent exhibitors. The decree will thus defeat rather than correct the objectives which it is invoked to secure.

4. Auction Bidding Will Strengthen the Defendants' Monopoly Position and Weaken the Position of Independent Exhibitors by Destroying Existing Relationships.

Examination of the consequences of the decree in operation make it clear that what was intended by the court below as a system to protect the exhibitor against the massed economic power of the distributor-exhibitor defendants will instead be a weapon in the hands of the distributor-exhibitor defendants for further concentration of power and monopolization of the industry to the detriment of the independent exhibitor.

Independent motion picture exhibitors operating one or two theaters seek, need, and desire, just as any other merchant, a known supply or inventory of products upon which they can rely as the need for it arises. Thus if he were permitted to buy a season's supply of product from producers, the quality of whose product is generally known, this need would be substantially met. Having thus acquired the right to needed product upon terms settled in advance as to playing, position, clearance, source, run and the like, the independent exhibitor could then proceed to devote himself to the more efficient operation of his theater and to those qualities of showmanship which constitute the very heart of his business. As a result of the present litigation an independent exhibitor's right and opportunity to so operate his theater and his business has been completely removed.

The only existing restraints upon the monopoly pressure of the major defendants to absorb all exhibition into their orbit are: (1) The moral pressure of long established business relationships and the condemnation of the business community which would result from disruption of such relationships; and (2) the threat of prosecution under the antitrust laws. The decree requiring auction selling will remove

both these obstacles to complete monopoly. Auction selling specifically requires disregard of established business relationships. *Cf.* the decree below II(8)(b) and II(8)(c). Taking product away from independents by use of buying power and high bids in accordance with the Court's decree would carry out the monopoly objectives of the defendants but the decree would effectively immunize them against prosecution or civil suit under the antitrust laws.

The present status of the industry involves many situations in which independent exhibitors and independent chains have, by long custom, been able to find partial shelter from the monopolistic practices of the defendants. They have made arrangements with the defendants which assure them of a continuous supply of product sufficient to operate their theatres. Many of them have suffered serious disadvantages as a result of the restraints imposed by the defendants, but they have so far been able to operate. Instead of freeing them from the restraints now in existence the proposed form of sale of film would result in destroying whatever stability remains in the industry. An independent theatre with established sources of supply cannot, under the decree, insist on the continuance of those sources of supply. It is at the mercy of the economic power of its competitors to cut off that source of supply or to buy up the most desirable film. This is true particularly where the competition is a theatre owned by the defendants. It may be true to a lesser extent where the competition is that of a stronger chain or other independent. (See infra, p. 19.)

It is true that at present established business relationships do not constitute an assurance of a continued supply of products. However, they have the sanction of the mores of the industry and, should those fail, are reinforced by the sanction of the antitrust laws. Thus, should a defendant company now attempt to deprive a competing independent first run theatre of its product by interfering with its established business relations, there is no question that an

antitrust suit could be successfully prosecuted to restrain the practice and for damages. Thus, business mores and the antitrust laws have combined to permit the independent exhibitor to continue operation under serious disadvantages as a result of defendants' restraints but nevertheless to continue in business. Under the proposed decree the defendants would not only not be restrained from attempting to take desirable product away from independent competitors, they would be encouraged to do so. Distributors supplying independents would now be required under the decree to attempt to sell their product to defendant-owned theatres if such threatres should outbid the independent; and if complaint were made that the defendants were enhancing their monopoly by use of the competitive bidding process, there would be available to them the defense that what they have done is sanctioned if not compelled by court decree.

Thus what has been an illegal conspiracy imposing restraints on independent exhibitors will now operate openly and with full sanction of law. The result will be deterioration of the position of the independent exhibitor. An assured supply of product and economic power will tend to make defendant-owned theatres or large chains the only theatres which can operate at a profit under the bidding system. A situation will be created in which a theatre operating as an independent is unprofitable while, if owned by a defendant or a large chain, it would prove to be a valuable money making property. Competitive bidding is not, as the Court supposed, a method of introducing competition in the industry; rather it is a highway to a new and further concentration of economic power.

5. *The Decree Gives the Defendants a Further Advantage by Allowing Them to Preempt Their Own Pictures.*

The program of auction bidding also imposes other competitive disadvantages on independents as against theatres owned by the defendants. Individual exhibitors will be

required to bid for every picture and can show only such pictures as they have obtained by successful bidding. The theatres owned by the defendants will not be under the same handicap. Rather, they will be free to take their own pictures and exhibit them without giving any independent an opportunity to obtain them. Under present conditions the defendants exhibit their own pictures for about 20% to 50% of the playing time in their own theatres. (R. 3687, 3688; Findings No. 135-138, 144). Under the bidding system they can, if necessary, extend the use of their own pictures substantially.

Furthermore, with a backlog of pictures of their own to assure them that their theatres are in no danger of standing idle, as are the theatres of the independents, the theatres owned by the defendants will be in a strong position to use the great financial power of their entire producer-exhibitor combination to bid for the best pictures of other producers and to pay higher prices than independent exhibitors can afford. Even the largest independent chains will have difficulty coping with the massed economic power of the majors.

6. The Hardships the Decree Will Impose on Independents.

The situation of the ordinary exhibitors is more precarious than that of the chain. He must have at least 104 pictures to keep his theatre running if he changes his bill twice a week. In subsequent runs, it is frequently essential that bills be changed three times and even more a week. In many places, such as Boston, Los Angeles, and New York, the public expects double features and with two or three changes a week, a theatre requires between 208 and 312 pictures a year. Competitive bidding will accentuate the struggle for product and strengthen the hand of the producer while further weakening the position of the exhibitor. A graphic example of the power given the majors can be seen in Lawrence, Massachusetts. The situation in that city can be duplicated in many other places,—Bayonne, New Jersey, Buffalo, New York, for example.

In Lawrence, Massachusetts, the Capitol is an independent theatre owned by one of your intervening petitioners. It is a first-run theatre operating in competition with four theatres owned by Warner Bros., two of which are first-run houses—one a move-over first-run house and one a second-run house. All of these theatres are larger than the Capitol theatre. At the present time the Capitol theatre is able to obtain sufficient quality product to operate. This is a result of well established business relationships and perhaps in part to the fear that any other course would subject Warner Bros. to the sanctions of the antitrust laws. Under a bidding system, however, the result would be that the massed buying power of Warner Bros. would deprive the Capitol theatre of first-run rights in all pictures which Warner Bros. felt had any chance of success. It would leave the Capitol theatre only those pictures believed fated to be failures. As a result the Capitol theatre would become a second-run house at best, and even on second-run the Capitol theatre could not compete with Warner's second-run house for the more desirable pictures produced by the defendants.

Competitive bidding will have a substantially similar effect where the individual independent exhibitor or small chain is in competition, not with a defendant-exhibitor, but with a large chain. For the buying power of a large chain would have the same effect as the buying power of the defendant exhibitor in depriving the independent of first-run product and leaving him only with such subsequent runs as the large chain could not use. This is an invitation to the extension of chains to the point of monopoly, a result not only not desirable under the antitrust laws but a result which it is the object of those laws to prevent. See *Interstate Circuit* v. *U. S.*, 306 U. S. 208; *U. S.* v. *Schine Chain Theatres, Inc.*, 63 Fed. Supp. 229 (W. D. N. Y. 1945), appeal pending, No. 10 this term.

The Court apparently believes that some of these objections which have been advanced against competitive bid-

ding would be removed by the provision that it may be that if is necessary "only where it is desired by the exhibitors." However this fails to take into account the fact that many exhibitors are affiliates of the defendants and that "where it is desired by the exhibitors" is the equivalent of "where it is desired by the defendants." Furthermore, even where a defendant-affiliated exhibitor is not the one who makes a request for such bidding, the defendants have sufficient influence even among independents as a result of the great power they possess over the business of each exhibitor that it would be an extremely simple matter in almost every competitive area for a request for competitive bidding to be initiated by an ostensibly independent exhibitor whenever the defendants so desired.

In this connection it is highly significant that every association of exhibitors of importance is opposed to the Court's program for auction bidding. They appeared before the court below and have appeared in this Court amicus curiae to protest. Likewise the Society of Independent Motion Picture Producers has filed its brief against the plan.

C. Under the Decree the Court Will be Under a Duty to Hear Complaints Arising From the Sale of Pictures Which Amount to a Pervasive Supervision of Details of Motion Picture Selling. Yet the Standards Determining the Best Bid Are so Vague and General that it Will Be the Defendants Who Actually Control the Administration of this Judicially Regulated Market.

It needs the citation of no authorities to support the proposition that courts should be reluctant to regulate the detailed operation of an industry under the guise of enforcing the antitrust laws. Yet such constant supervision of thousands of transactions relating to the sale of pictures would be necessary if the decree is to be any real protection against discrimination. There are so many factors which the court has indicated are proper considerations to deter-

mine the best bid that every transaction is a potential cause for judicial action.

Yet in administering the auction selling provision of the decree the court will in effect be compelled to accept the business judgment of the defendants on the question of whether they are actually accepting the best bids because the standards which determine the best bids are too vague and general to permit effective review. We have here that worst of combinations: unwarranted judicial interference, without the possibility of an effective judicial remedy.

Presumably the court thought that the highest bid system would prevent favoritism by the defendants toward individual buyers of films. The fact is that the peculiar character of the product sold will create new opportunities for favoritism under auction bidding. The sale of the right to exhibit a film in a theatre is not like the sale of an ordinary commodity. The factors which determine (under the court's plan) the best bid for the exclusive right to show the picture for a limited period of time are highly uncertain. Their relative value depends solely on a business judgment which cannot, as a practical matter, be reviewed unless it is so bad that it can be called arbitrary and capricious. There is the location of the theatre, the type of people who patronize it, the good will of the exhibitor in the community, the length of run which he offers, the clearance over other theatres, the time of exhibition, the type of exhibition, the ability of the exhibitor successfully to advertise the picture, and so on. The normal procedure of renting feature films for a percentage of the gross receipts adds other factors such as the size of the theatre. Where and how a picture will net the most money for a defendant who offers it for competitive bidding on all these factors is only a guess. Hence the court allows the defendants to reject all bids if it desires. Thus, the effect of the plan is to enable any defendant to favor any exhibitor, including affiliates of other defendants, and receive protection from the decree unless its business judgment is so

obviously bad it can be called capricious. In other words the decree sets up a defendant-controlled scheme of regulations for the industry.

For example the decree states that a picture is to be leased to "the highest responsible bidder." But "highest" depends upon a standard, and can be determined against dispute only if all offers are "spot" and for "cash." If the price is to be a percentage of the gross receipts of the successful bidder, in accordance with prevailing custom in the industry, the cash equivalent cannot be known until after the picture is shown. A procedure for commuting percentage of take into cash involves an advance estimate of the drawing power of the film. And the ordinary motion-picture is far too uncertain in its popular appeal to allow even an approach to precision. A minor complication is that the price of admission is for a composite of a feature, a comic, a news reel, and in certain localities a second feature, and expectations and receipts must alike be allocated between the offerings.

The "responsibility" of the bidder is likewise not beyond dispute. A minimum norm might be fixed and all exhibitors excluded from the bidding who did not measure up. But responsibility is usually a relative matter depending upon the importance or the value of the thing at stake. In respect to motion pictures it would seem reasonable to set different standards of responsibility for first, second, and third run exhibitors. If, however, that were done, the demand for responsibility would result in a classification of theatres. Or a bidder might be allowed to make up in responsibility for the deficit in his bid over that of his competitor. Nor can the question of by whom responsibility is to be judged be escaped. It is a common practice within the business community to allege the lack of responsibility of a party with whom one does not choose to deal.

A host of kindred questions attend the exact definition of the right which is being "sold." The right to show a picture is of little account; value derives from the character

and degree of exclusiveness with which the right is endowed. This is usually an affair of priority, length of run, period of clearance, and competitive area. And, since these privilege-making conditions have no common unit of measurement, a choice between bids will become largely an affair of someone's—presumably the seller's—unimpeded judgment. An escape from such caprice or favoritism can be effected only by a standardization of all the factors upon which the value of the franchise to show depends. Thus first, move-over, second, and other runs would have to be separately sold; the length of run and the period of clearance would have to be fixed; and the area within which no competitor would be permitted to put the picture on would have to be given precise boundaries.

Such a vast and intricate system of understandings and rules is utterly unsuited to judicial administration.

One example of the type of problem with which the court will be faced will suffice: An independent producer may have a picture of great drawing power. Under those circumstances advantage would lie rather in a longer run than a high percentage rental. In this view a bid for a one-month run at 25% is preferable to a bid for a one-week run at 40%, since the return would be much greater. Theatres owned by the defendants usually have adequate product and would be reluctant to agree to an extended showing while an independent exhibitor with inadequate product would be eager to have a long run. However, the independent producer is in most cases forced to release his product through a major distributor. It may be expected that the majors with their great number of theatres and their varying quality of product will arrange the bidding rules so that percentage rental shall be given greater weight than length of run in determining which is the highest bid. The probable result is that the independent producer will be required to lease his picture for the shorter period to a theatre owned by a major for one week rather than, as he desires, to an independent exhibitor who will give it a longer run. What

answer a court will give to this problem which will be a legal and expedient solution is difficult to know.

Since it is the intention that defendant's methods of selling be uniform, a single body of trade practices will standardize the factors, fixing the character and degree of exclusiveness of the right which is licensed. The rules of the game will be drawn for the assumed protection of the independent by the very parties who have been found guilty of discriminating against the independent.

D. Bidding is Unworkable in the Motion Picture Industry.

In many areas of the economy a system of bidding is a factor of importance in maintaining a competitive market. The markets for corn, wheat, cotton, and other "staple" commodities present the neatest illustrations. There the article is constantly in trade. A common unit makes measurement and comparison an exercise in mathematics.

But the motion picture industry lies far removed from this area. What the exhibitors have to offer is playing time which like labor cannot be held back during the bargaining process. What the producer offers is public entertainment, the value of which depends upon the type of audience and the kind of distribution, something which must be planned in advance to secure the maximum public acceptance of the offering. It makes no financial difference to the seller of wheat who buys it. But the question of who first exhibits a motion picture may be of paramount importance. Each picture may loosely be called a separate commodity. But even separate feature pictures cannot be sold as commodities are sold.

The thing, then, that is bought and sold is not the product of studio and factory. It is instead such a fraction of all-the-rights to show the film as the conventions of the industry decree. There are no obvious or natural answers to such questions as the area within which the licensee of a particular picture is to be protected against competition,

how long a period is to elapse before there is to be another showing in the neighborhood, what conditions must be satisfied to quality for first, second or third run. As the competitive area is enlarged and as the period of clearance is lengthened, the value of the license to show a feature picture is enhanced. As area contracts and time is shortened, the value of the license falls.

There can be under these conditions not even an approximate objective guide to sound business judgment in placing bids. The exhibitor is engaged in a continuous operation and must make secure his source of supplies for a whole season. Thus the price he can afford to pay for any picture depends upon the availability of other pictures he would like to show. If his business is to be kept going, he must find a substitute for the feature for which he strives and which he fails to get. No picture can be bought alone; his purchase is of a feature which has a distinctive place in a season's program.

A series of practical difficulties are certain to attend the operation of the system. An exhibitor, under the necessity of keeping his theatre going, is not going to limit himself to bidding for a single picture for a certain run. He will put in bids for a second, a third, or even a fourth choice, in case he is not successful on his first. There is likely to be a plague of overbidding with its attending confusions. If an exhibitor is successful in two or more bids, and can show only one picture, there must be a second contest or else a rule must specify who is to get the feature passed up. The handling of such difficulties will almost certainly result in the elaboration of a code. And the standards, procedures, rules making up the code are likely to prove so complicated as to overlay competitive bidding with a formal government of the industry.

It is, therefore, submitted that the conditions upon which the efficiency of competitive bidding is predicated do not exist in an industry so distinctive as motion-pictures. There is here no common unit by which product is to be

made commensurable. The output of the studios cannot be classified even by type. Without a common unit, a standardized product, an access to information, a market into which transactions are merged, competitive bidding, we submit, is unworkable in the industry.

E. Auction Selling Will Create Substantial Unnecessary Difficulties in the Operation of the Exhibitor's Business.

If in fact auction bidding showed substantial promise of alleviating the monopoly conditions in the motion picture industry, there might well be justification for the unsettling of trade practices which have developed through the years. But since competitive bidding will serve no such beneficial purpose, the revolutionary changes which it will make in the business of exhibitors are further reasons why such a system should not be attempted. We shall briefly catalog such changes.

(a) At present most exhibitors have access to film and can schedule pictures sufficiently in advance to be assured that their theatre will be in continuous operation throughout the year. The new system will create uncertainty as to the availability of pictures. Independent exhibitors will be required to bid on every picture which is offered which they do not affirmatively feel would be unprofitable. They will have to bid for substantially more than they need because there is no assurance of what will be available to them. They will operate on a feast or famine system which in the case of independent exhibitors, as we have seen, will be more famine than feast. During the periods when they are unable to bid enough to obtain the pictures they desire they must close, show inferior product, or accept later or last run showings.

(b) At the present time the purchasing of film is time consuming but of manageable proportions. Under the proposed new system, judgments would have to be made as to each picture and separate bids made on those pictures.

It would require the hiring of additional personnel able to handle the great burden of administrative detail and judgment which can be expected to result from the bidding system. This might well be prohibitive when added to the higher cost of pictures under a competitive bidding system.

(c) Present trade practices are fairly well crystallized. Under the new system, hundreds and hundreds of disputes may be expected on the issues mentioned above, i.e., responsibility, competitive area, highest bid, proper size and equipment. This will be not only confusing but expensive.

(d) At present pictures whose value is in doubt often are sold without a fixed arrangement as to the lease rental. Others which make a disappointing showing result in an adjustment by agreement under which the distributor rebates part of the rental. Under the bidding system neither of these procedures would be possible because open pricing is specifically forbidden and adjustment might result in a final payment of rental less than the amount bid by the next highest bidder.

(e) The emphasis on price and the highest bidder will tend to concentrate desirable runs in the larger theatres with higher admission prices and shorter shows, thus decreasing the amount of entertainment which the consumer obtains for his dollar.

(f) Competitive bidding will impair the effectiveness of the exhibitor's function in the community. The exhibitor has the distinctive function of offering entertainment to the people of his area. It is his task to study, to cater to, and even to elevate the taste of his community. Such an endeavor cannot be realized by securing his pictures one by one through competitive bidding. Instead of a hand to mouth procedure, he must look ahead, select his offerings in terms of his distinctive needs and fit the items into a program. To neither exhibitor nor producer is the best bargain item by item as advantageous as playing for long-

time and enduring gains. It is never good policy to make price alone the guide to business judgment. A good will, which requires a long-time vision, is to be built up. As the exhibitor must never forget his distinctive audience, so his interest commands that he should look ahead to make secure his source of supply. The motion picture exhibitor, in his concern for features, is not to be denied a precaution which is elementary to the automobile manufacturer in respect to steel and to the steel manufacturer in respect to coal and iron.

CONCLUSION.

The issue presented by this intervention is the effectiveness of the competitive bidding procedure for the objectives of the anti-trust laws and the evils found to exist by this Court. The evils found to exist are a combination by the defendants to exclude independent exhibitors from preferred runs to the advantage of their own controlled or affiliated theatres. To meet that situation the Court has devised an assumed remedy by competitive bidding. We have shown that the remedy will not be effective; that it will strengthen the defendants who are already strong and pit the weak independents against each other for the benefit of the defendants. It would give new and unprecedented powers to regulate the industry to the major defendants. Free of present restrictions due to business morality and immune from prosecution under the anti-trust laws, it creates a highway to greater concentration in monopoly

and erects even greater barriers to the entry of independents into the business or to their progress to the place to which they are entitled in a free competitive society.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. [redacted] 86

W. C. ALLRED; CHARLES B. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. P. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT AND MRS. E. P. THOMPSON, PARTNERS TRADING AS BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM B. GRIFFIN, SALLIE M. WISE AND FRANK V. MERRITT, PARTNERS TRADING AS CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS AND E. L. HARRIS, TRADING AS J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVES; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED AND SIDNEY WHARTON;

Appellants

against

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1355

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH, *et al.*,

Appellants,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF W. C. ALLRED, ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1946

W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH AND BEACH, *et al.*, *Appellants*, vs. THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,	No. 1355

STATEMENT BY THE TWENTIETH CENTURY-FOX, LOEW, RKO, PARAMOUNT AND WARNER DEFENDANTS OF THEIR GROUNDS OF OPPOSITION TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL OF W. C. ALLRED, ET AL.

The Twentieth Century-Fox, Loew's, RKO, Paramount and Warner defendants-respondents move pursuant to the Rules of the Supreme Court of the United States for an order dismissing the attempted appeal of W. C. Allred *et al.* herein with costs. In support of such motion, these defendants present this counter statement as to the jurisdiction of this Court asserted by the appellants in their Statement of Jurisdiction filed and served February 26, 1947.

The attempted appeal is from an order denying the appellants leave to intervene in a suit brought by the United States against Paramount Pictures *et al.* to enjoin alleged

violations of the anti-trust laws (15 U. S. C. Sections 1 et seq.). Intervention was not only opposed by the defendants, but also by the plaintiff upon the ground that the effect of making the appellants parties, as plaintiff's counsel stated, "* * * would simply be to hopelessly confuse the litigation without in any way aiding the solution that the Court has to arrive at".

1. THE JURISDICTIONAL STATEMENT DOES NOT SUSTAIN THE ATTEMPTED APPEAL.

This Court has consistently held that it lacks jurisdiction of an appeal from an order which does not possess the finality required by the statutes regulating its appellate jurisdiction.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
United States v. *California Cooperative Canners*, 279 U. S. 533, 556;
Arnold v. *Guimarin & Co.*, 263 U. S. 427;
Collins v. *Miller*, 252 U. S. 364.

The statute relied upon by the appellants herein to sustain the appellate jurisdiction of the Supreme Court, namely, 15 U. S. C. Section 29, (32 Stat. 823), is not applicable to their appeal for the reason that the order sought to be appealed from is not a final decree as required by that statute.

Since it appears from the jurisdictional statement that the order in question is not a final decree, this Court should dismiss the appeal summarily for want of jurisdiction. In this very suit this Court has already dismissed a previous attempted appeal by several unsuccessful applicants for leave to intervene:

St. Louis Amusement Co. et al. v. *United States*, 326 U. S. 680.

In so doing, the court followed its established rule in such cases:

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
Jewel Incandescent Lamp Co. Inc. v. *General Electric Company*, 318 U. S. 746;
Mississippi Central Railroad Co. v. *Smith*, 295 U. S. 718;
Hinderlider v. *La Platta River & Cherry Creek Ditch Co.*, 291 U. S. 650.

The cases cited by the appellants do not support their contention that this Court has jurisdiction of their appeal. *United States* v. *Terminal Railroad Association of St. Louis*, 236 U. S. 194, did not concern an appeal from an order of the District Court denying leave to intervene, but was an original motion in the Supreme Court for leave to intervene. The appeal by the intervenors in the *Terminal* case appears *sub nom Evans and Howard Fire Brick Co.* v. *United States*, 236 U. S. 210. The questions of appealability and of jurisdiction were not raised and the order denying intervention was affirmed, since the relief that the intervenors sought had been accomplished by the Supreme Court decision in the main suit upon the appeal of the St. Louis Terminal Co. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, does not support the contention of the appellants, since there the intervenor was named in the decree which expressly provided that if action were taken affecting the intervenor's rights it should be permitted to be heard, as Mr. Justice Roberts pointed out in *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, at 141.

Neither *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, nor *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, cited by appellants W. C. Allred, *et al.*, as sup-

porting their right to appeal have any application, since they did not involve motions for leave to intervene, but were simply ordinary cases under the Expediting Act where the parties to the actions appealed directly to the Supreme Court from final decrees entered by the District Court.

2. THE ORDER IS NOT APPEALABLE.

An order denying leave to intervene is not appealable, at least unless the applicant for intervention has a direct and immediate legal interest in a *res* which is the subject of the suit and which will be lost if intervention is denied.

United States v. *California Cooperative Canners*, 279 U. S. 553, 556;
Credits Commutation Co. v. *U. S.*, 177 U. S. 131;
Ex-Parte Leaf Tobacco Board of Trade, 222 U. S. 578;
In re Englehard & Sons Co., 231 U. S. 646;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellants in this case, W. C. Allred, et al., have no such interest in the subject matter of the present suit.

Furthermore, in the case at bar, it is clear beyond question that the appellants do not have any legal interest in this litigation which is affected by the judgment herein. In other words, if one or more of the defendants had happened to distribute their motion pictures in the manner that is now required by the judgment, none of the appellants would have been possessed of the legal right to compel such defendants to sell in any other manner. The

mere fact that the judgment directs the defendants to sell in this manner does not provide the appellants with any status to complain.

The order denying leave to intervene did not finally determine any right or claim which these appellants may possess. Their right, if any, to institute independent suits to enforce whatever rights they may possess is not affected by the order sought to be appealed from (15 U. S. C. Section 15).

3. APPELLANTS WERE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT NOR AS A MATTER OF DISCRETION. REFUSAL OF LEAVE WAS CORRECT AND NOT AN ABUSE OF DISCRETION.

Appellants seeks to bring themselves within subdivision (2) of paragraph (a) of Rule 24, Federal Rules of Civil Procedure, which permits intervention of right "when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Under this rule both inadequacy of representation and the fact that the applicant will be bound by the judgment must appear. See *MacDonald* v. *U. S.*, 119 F. (2d), 821, 827 (C. C. A. 9th, 1941), modified on other grounds, 315 U. S. 262.

Appellants are not "inadequately represented" within the meaning of Rule 24. *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137. That rule applies to representative action such as class actions, stockholders' derivative suits, etc. *United States* v. *Columbia Gas & Electric Corporation*, 27 F. Supp. 116; app. dism. 108 F. (2d), 614; cert. den. 309 U. S. 687; 2 *Moore Federal Practice* (1938 Sec. 24.07).

These appellants are therefore not entitled to intervene as a matter of right. Nor do they come within the provi-

sions of the Rule permitting intervention as a matter of discretion.

Paragraph (b), Subdivision 2, of Rule 24 permits the District Court to allow intervention as a matter of discretion "when an applicant's claim or defense and the main action have a question of law or of fact in common." It further provides that "in exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The appellants have no claim or defense having questions of law or fact in common with the main action. And it is apparent that to permit the intervention might unduly delay or prejudice the adjudication of the rights of the original parties. There was ample ground for the denial of intervention as a matter of discretion and the exercise of that discretion may not be reviewed in the absence of clear abuse.

Allen Co. v. *Cash Register Co.*, 322 U. S. 137;
Credits Commutation Co. v. *United States*, 177 U. S. 311.

It is therefore respectfully submitted that this Court is without jurisdiction thereof and that this appeal should be dismissed summarily.

WHEREFORE, Loew's Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation (sued herein as Vitagraph, Inc.), Warner Bros. Circuit Management Corporation, Twentieth Century-Fox Film Corporation, and National Theatres Corporation move

pursuant to the Rules of the Supreme Court of the United States for an order dismissing the appeal of W. C. Allred, *et al.*, herein with costs.

Dated, New York, N. Y., March 13, 1947.

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Supreme Court of the United States

October Term, 1946

No. 86

W. C. ALLRED; CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT AND MRS. E. P. THOMPSON, PARTNERS TRADING AS BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE AND FRANK V. MERRITT, PARTNERS TRADING AS CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS AND E. L. HARRIS, TRADING AS J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED AND SIDNEY WHARTON;

Appellants

against

THE UNITED STATES OF AMERICA, ET AL.

APPELLANTS' BRIEF

(Intervenors)

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United States Code Annotated, Title 15, Section 13	33, 37
United States Code Annotated, Title 15, Section 29	2

Rules

Federal Rules of Civil Procedure, Rule 24 (a) and (b) (28 U. S. C., following Sec. 723c)	3, 4, 5, 13, 15, 25

Supreme Court of the United States

October Term, 1946

No. 86

W. C. ALLRED; CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT AND MRS. E. P. THOMPSON, PARTNERS TRADING AS BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE AND FRANK V. MERRITT, PARTNERS TRADING AS CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS AND E. L. HARRIS, TRADING AS J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED AND SIDNEY WHARTON;

Appellants

against

THE UNITED STATES OF AMERICA, ET AL.

APPELLANTS' BRIEF

(Intervenors)

Grounds Upon Which Jurisdiction is Invoked.

This is an appeal from an order of the District Court for the Southern District of New York denying intervention to these appellants (hereinafter called Intervenors) and from the decree of that Court insofar as it directs the method by which feature films are to be marketed, generally

referred to as "competitive bidding". A motion for leave to intervene in this Court is also now pending. The opinions of the Court below are reported in 66 F. Supp. 323 and 70 F. Supp. 53 and 76.

The jurisdiction of this Court is invoked pursuant to 15 U. S. C. A., Section 29, known as the Expediting Act, and reading as follows:

> "*Sec. 29. Appeals to Supreme Court.*
>
> In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167."

The decree was entered in an action brought by the United States under that section of the Act of July 2, 1890 commonly called the Sherman Antitrust Act which provides:

> *Sec. 1.* Trust, etc. in restraint of trade illegal; exception of resale price agreements; penalty
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are law-

ful; as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The motion for leave to intervene in the District Court was brought under Rule 24 (a) and (b) of the Federal Rules of

Civil Procedure, 28 U. S. C. following Section 723 (c). Federal Rule 24 (a) and (b) reads as follows:

> "(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."
>
> "(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Cases supporting Intervenors' rights to appeal to this Court from the order denying their motion to intervene are as follows:

Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502;

U. S. v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194;

Brotherhood of Railroad Trainmen v. *Baltimore & Ohio Railroad Company*, 91 L. E. 1301. Decided June 9, 1947;

Wolpe v. *Poretsky*, 144 F. (2d) 505.

Cases supporting Intervenors' right to appeal to this Court from the final decree of December 31, 1946 are as follows:

U. S. v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194;

U. S. v. *Crescent Amusement Co.*, 323 U. S. 173;

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707.

The jurisdiction of the Court to consider and pass upon the motion to intervene in this appeal is based on Rule 24 (a) of the Rules of Civil Procedure as above set forth, the inherent power of the Court and the precedent of *United States* v. *Terminal Railroad Association of St. Louis, supra.*

Orders of this Court were entered June 23, 1947 stating that the jurisdiction of the Court to consider this appeal and consideration of the motion to intervene were postponed to the hearing of the cases on the merits.

Statement of the Case.

This statement is confined to matters material to the consideration of the questions presented by the appeal of these Intervenors.

The action was instituted by the United States pursuant to the Sherman Antitrust Act charging defendants with combining and conspiring to restrain and monopolize interstate trade in the production, distribution and exhibition of motion pictures. Intervenors are independent exhibitors of motion pictures or representatives of operators of over 2000 theatres in some twelve different states of the Union cooperating for their mutual benefit as a nonprofit association known as The Confederacy of Southern Associations. They have been accustomed to rent (license) motion picture films for exhibition in their theatres through defendants,

who distribute about 80% of the available supply of feature pictures in this country. No exhibitor can successfully operate without access to their production. *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. (2d) 738, 744-5. (Also R., p. 3517.)

On June 11, 1946 the Court rendered its opinion finding plaintiff's charges to be true in a number of respects (R., pp. 3504-3563). The opinion directed the entry of a decree carrying out its findings and, among other things, directed that such decree should provide as follows (R., pp. 3560-3561):

> "No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included."

Such a method of marketing had not been suggested by the parties or discussed in their briefs (see plaintiff's State-

ment as to Jurisdiction, p. 14) and had only been mentioned casually during the trial by counsel (R., pp. 2304, 2618, 2747-49) and in the testimony of witnesses (R., pp. 737-8, 1363, 1394-5). No witness favored it.

As promptly as possible after being advised of the opinion of the Court, Intervenors caused to be prepared and filed a petition to intervene (R., pp. 3578-96) for the purpose of eliminating from the decree the provisions above quoted. This petition, in addition to the allegations of inadequacy of representation, timeliness of application and the binding effect of the judgment, set forth in detail the various characteristics of the exhibitor Intervenors, the conditions necessary for profitable operation of their theatres, conditions material in the procurement of licenses, advantages of the present system of licensing, rental value considerations and necessity of adjustments after exhibition, methods of booking and the disastrous results to Intervenors and their property interests, of the selling system directed by the opinion, to all of which this Court is respectfuly referred.

No allegation of fact in the petition to intervene was controverted by any of the parties. The Intervenors' motion to intervene was argued by counsel and leave to file a brief in support of their contentions was granted. Other exhibitors and exhibitor associations made the same or like objections to the quoted provisions of the opinion so that, among the exhibitors of the nation operating some 15,000 theatres, there was substantial unanimity of opposition to any form of the decreed auction selling or competitive bidding.

On December 31, 1946, the Court made and filed its findings of fact and conclusions of law and its decree (70 F. Supp. 53). Concurrently with the filing of the findings

and decree, the Court filed a supplementary memorandum opinion (R., p. 3702, 70 F. Supp. 76). On January 21, 1947 the Court made its order denying the motion to intervene (R., p. 3718). In the decree of December 31, 1946 the Court decreed as follows (R., pp. 3695, 3696-7, 3700-1):

II.

"Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

• • • • • • • • • • •

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in

which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

* * * * * * * * * * *

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant as its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other

records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

* * * * * * * * * * *

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

While the provisions of the decree somewhat modified the competitive bidding procedure outlined in the opinion, Intervenors still believe they and their property interests will suffer irreparable damage if the decree stands as written, and, accordingly, have appealed from the order denying intervention and from the provisions of the decree directing competitive bidding. The defendant Paramount

and the non-exhibitor defendants, Columbia, Universal and United Artists, have also appealed from the competitive bidding provisions of the decree (R., pp. 3745-6, 3760-1, 3797, 3783-4). Plaintiff has assigned error (R., pp. 3722-3) on the ground that the competitive bidding decreed would not be effective to eliminate unreasonable discrimination.

By order of this Court dated June 23, 1947 consideration of the appeal and of the motion to intervene was postponed until the hearing on the merits.

Specification of Assigned Errors Relied Upon.

1. The United States District Court for the Southern District of New York erred in refusing to grant Intervenors' application to intervene as of right in the above-entitled action.

2. The said Court erred in making the order, entered January 23, 1947, denying Intervenors' application to intervene.

3. The said Court erred in holding (if so held) that its judgment of December 31, 1946 is not binding on these Intervenors.

4. Said Court erred in holding (if so held) that representation of Intervenors' interests was adequate.

5. Said Court erred in holding (if so held) that Intervenors' application was not timely.

6. The said Court erred in including in its final decree entered December 31, 1946 and more particularly in Section II thereof, the portions of paragraph 8 quoted above (pp. 8-10).

7. The said Court erred in holding that it was empowered and authorized under the provisions of the Sherman Anti-Trust Act to include in its decree the above quoted paragraphs.

SUMMARY OF ARGUMENT.

I. Intervenors should have been permitted to intervene in the District Court and should now be permitted to intervene in this Court for the following reasons:

A.

They are bound by the Decree.

Due to the perishable character of the product dealt with and its limited useful life to the buyer-exhibitor; the necessity for a supply assuring continuous operation; the large number of features required each year; the necessity of offering the public a variety of attractions as well as the many other complexities of the exhibition business, the competitive bidding provisions of the decree can only bring about hopeless chaos in the business of the exhibitors. They will be irreparably damaged and they have no remedy except through intervention in this case. Under the authorities this is sufficient to make the decree binding upon them under the provisions of Rule 24 (a).

B.

The representation of Intervenors' interests was and continues to be inadequate.

An examination of the record shows that the interests of the independent exhibitor were completely disregarded. Counsel for the Government, who would naturally be expected to protect the independent exhibitor's interests, concentrated his efforts, and still concentrates his efforts, in seeking to bring about divestiture of the theatres of the major defendants. His objections to the competitive bidding features of the decree are based only on his contention that these provisions are not an adequate substitute for divestiture. The three "minor" defendants who now attack competitive bidding make their attack from the point of view of their own interests, which are in many respects diametrically opposed to those of the independent exhibitor.

C.

The application to intervene was timely made.

This has been in effect conceded by the Court below and counsel.

D.

The motion to intervene in this Court should be granted.

The authorities sustain the right to intervene directly in an appeal to this Court and the same should be allowed for the same reasons that it should have been allowed by the District Court as above set forth.

II. The dissolution and trade practice reliefs other than the competitive bidding requirement will terminate the restraints found to be unlawful.

An analysis of the various trade practices which the District Court found were used in restraint of trade and of the effect thereon of the provisions of the decree other than the provisions of Section II, paragraph 8, shows that the latter provisions are unnecessary to effect the purposes of the decree. The other injunctive provisions coupled with the visitorial power of the Attorney General and the reservation of jurisdiction is adequate.

III. The directions as to competitive bidding are not authorized under the Sherman Act but are directly contrary to the spirit of the Act.

It is conceded, as it must be, that the District Court has reasonable discretion in molding a decree so as to make it completely effective in eliminating abuses found to exist. Its discretion does not, however, extend to the inclusion of

provisions, unnecessarily destructive of the property and interests of innocent parties. Certainly a decree directing the inauguration of a system which, as here, brings about a restraint of trade for the benefit of those against whom relief is sought, cannot be justified.

Conclusion.

For the reasons above stated, intervention should be allowed and the competitive bidding provisions of the decree should be eliminated.

THE ARGUMENT.

POINT I.

Intervenors should have been permitted to intervene in the District Court and should now be permitted to intervene in this Court.

As long as Intervenors are permitted to intervene it is of no moment whether intervention is based upon the original motion in the statutory court or on the motion filed in this Court. While Rule 24 (a) of the Rules of Civil Procedure is specifically restricted to the District Courts, since there is no rule in this Court dealing with intervention it is submitted that the spirit and intent of Rule 24 (a) should be applied in determining whether persons whose rights are vitally affected should be heard.

All the requirements for intervention as of right under Rule 24 (a) were satisfied, namely, (a) the Intervenors are bound by the judgment in the action, (b) the representation of Intervenors' interests by existing parties was and continues to be inadequate, and (c) the motion was timely made.

A.

Intervenors are bound by decree.

(1) *Nature of Business.*

The Court has postponed consideration of this appeal and of the pending motion to intervene until the hearing on the merits. We understand that if it be shown that the decree has an adverse effect on the applicant and the practical necessities grant him a right to intervene, the order denying the intervention is appealable. (*Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio*, 91 L. E. 1301.) The adverse effect and the practical necessities can only be tested by a consideration of the nature of the business and the impact upon it of the decretal provisions complained of.

Over a period of years experience has established certain trade practices growing out of the specialized nature of the business of motion picture exhibition and by reason of the perishable character of the product which has a very limited useful life to the individual buyer-exhibitor. For this reason considerations which justified decrees fixing sales methods in cases of heavy equipment as in the *International Salt*, 16 Law Week 4005, November 10, 1947; *Hartford-Empire*, 323 U. S. 386 and *Pullman Company*, 64 F. Supp. 108 cases are not applicable.

First, it is absolutely essential that the purchaser (exhibitor) shall be assured of a supply of features sufficient to maintain continuous operations. The exhibitor must look to the defendants for this continuous supply of features as the defendants control 80% of the pictures. *Goldman Theatres, Inc.* v. *Loew's Inc., supra.* If a picture is changed once a week, the exhibitor must license 52 pictures in a year, and if twice a week, 104 pictures. These figures are doubled if double (two) features are shown at each performance.

A second consideration is the location and suitability of the theatre; the reputation the theatre enjoys in the community for showing a certain type of picture or the features of a certain producer; the efficiency of the management; and all the other factors that enter into the success of any commercial enterprise.

A third consideration relates to the variety of attractions offered. At present, a first run theatre is allowed to exhibit all of the features of one or more distributors which it desires to exhibit. The theatre can offer its patrons assorted and balanced programs at a uniform price, although some features cost millions to produce and other pictures cost a lesser amount. An exhibitor who showed nothing but animal pictures week after week would be obliged soon to close his doors. He must ever be careful in the selection of the star performers because their popularity varies with localities.

Upon obtaining a license to exhibit a film only the first and in many respects the least important step had been taken. The second step and the one necessary to take care of the above requirement is the "booking". For details of this operation and the highly specialized duties of a "booker" we respectfully refer to pages 3588-90 of the Record.

Another pre-exhibition step is the publicity in which the exhibitor and distributor ordinarily join forces.

Some idea may be gained of the complexity of the operation by examination of a typical contract annexed hereto Exhibit F-10 (Adm. R., p. 1067).

The final important feature of the business vital to anyone engaged therein is that it is, to use a colloquial term, a "show" business. The mysterious, unpredictable but all-governing factor is the public taste. Over the years dis-

tributors and exhibitors have come to recognize the element of probable error in fixing by the bargaining process the compensation to be paid for exhibiting a film and a universal trade practice has become effective under which, if a film failed to meet expectations, an equitable adjustment is made in favor of the exhibitor. These adjustments are justified from the interest of the distributor because they have maintained his outlets and induced the exhibitor to accept and show films of uncertain appeal with a reasonable assurance of protection against loss and complete assurance of receiving the better films.

As a result, under the existing method of licensing films, an exhibitor has been enabled to have available for exhibition in his theatre or theatres all of the pictures distributed by one or more of the defendants over a period of years, either under agreements made annually, or under agreements made with respect to individual pictures or with respect to small blocks of pictures.

The essential requisites from an exhibitor's standpoint of this established method of buying and selling (licensing) features will be done away with if the competitive bidding provisions of the decree are permitted to stand, with disastrous results to Intervenors and their property interests. In order to demonstrate the truth of this statement it is necessary first to analyze the provisions of the decree and then apply these provisions to the exhibition business.

(2) *Analysis of Competitive Bidding Provisions of Decree.*

In the memorandum (R., p. 3702) handed down simultaneously with the decree the Court said:

> "In order to meet some of the objections raised at the hearing to the system of bidding for features

described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The opinion of June, 1946 extended auction selling to all pictures, features, news reels and shorts. The final decree limits competitive bidding to feature films (films in excess of 4000 feet in length) and to competitive areas, defining such an area as "the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of pictures on any run" (R., pp. 3697-8).

The very definition of a "competitive area" is pregnant with litigation. Who is going to decide when two theatres are in a competitive area and the competitive bidding provisions of the decree become effective; the producer or the exhibitor? By what yardsticks will this decision be reached? If an agreement cannot be reached, inevitably the courts will have to decide the issue. This definition is so broad that its application may result in the elimination of all clearances, despite the fact that reasonable clearance is necessary for the successful operation of a theatre and was so found by the Court in the June, 1946 opinion (R., pp. 3530-1). Suppose theatre A competes with theatre B, and theatre C competes with theatre B but not theatre A—B must bid against both A and C but A need bid only against B. Any number of additional theatres and overlapping areas of competition could be included in this example but the simple illustration given makes clear the unfairness to exhibitors of the requirement of competitive bidding.

Assuming that a competitive area has been established, the decree would seem to provide for two methods of licensing features.

The first method is found in sub-paragraph (a) of paragraph 8, Section II, where the distributor is directed to offer the feature available for exhibition to every exhibitor who desires to exhibit the feature on some run selected by the exhibitor and upon uniform terms. The run selected must be different from the run in the distributor's own theatre, if any; meaning no doubt subsequent to the exhibition in the producer's theatre because under the decree the producer is given the right to show his own pictures in his own theatres. How the exhibitor makes known his desire to exhibit a feature or when the distributor makes his offer after receiving notice of an exhibitor's desire to show a feature and what happens after the exhibitors receive and reject an offer were left by the Court in a realm of conjecture and future court regulation. In any event, the practical application of this method would appear to be extremely limited.

It is when one undertakes to apply the second method which is prescribed in sub-paragraph (c) that the impracticability and harmful effects of competitive bidding more clearly appear. In considering this provision of the decree it must be borne in mind throughout that the independent exhibitor in an area where he competes with a producer-owned (major defendant) theatre (and this includes every major city and town), starts off under a most serious handicap because the producer-owned theatre is assured of months of features each year without bidding for them, and then is free to bid against the independent for all other available features in accordance with the prescribed method.

Sub-paragraph (c) invokes a complicated and confused system of offers and counter offers on an impracticable time

schedule and then directs the distributor to accept the offer made by the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the distributor". This sub-paragraph requires the distributor, unless the feature is to be run simultaneously in competing theatres in an area (an unheard of practice), to notify the exhibitors that the feature is available for license, and specifies the time in which bids shall be made by the exhibitors. Each exhibitor for his own protection must bid, as he cannot know that his competitor is not making a bid. The practical effect of this provision of the decree is to remove any optional feature which the Court may have intended. Since the decree requires that an offer must state (a) the run desired, (b) the amount the exhibitor is willing to pay either as a flat rental or on a percentage basis, or both or in any other form, (c) the clearance desired, (d) the time and days for exhibition and (e) any other "offers", by which the Court may have meant any other terms or even several offers, an equitable application of the yardstick quoted above is impossible. The obvious result will be that the producer can pick at will the offer he wants to accept without fear that a disgruntled exhibitor can successfully seek court relief on the ground that his offer should have been accepted, because there are too many variables for even a court to formulate and apply a workable yardstick for the purpose of making such determination.

In addition to the items which the Court requires shall be stated in each offer, there are many other items which also must be stated in order that there may be a meeting of minds. See Exhibit F-10 hereto annexed. Competitive bidding is clearly futile and the complications of such a system defeat its own end.

(3) *Disastrous Results to Independent Exhibitors.*

Other obvious disastrous results which will flow from the decreed competitive bidding are explained in detail in the motion to intervene in the District Court (R., p. 3578 ff.) and are summarized as follows:

1. The District Court specified in paragraph 8 that "each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others", destroying thereby the recognized policy in all industry founded upon years of experience that for business, moral, social and other reasons, where one outlet for a product has proved satisfactory, it should not be changed merely because someone else may temporarily offer a better price or promise other advantages. The Court, by this direction, has said that a distributor must not lean towards an old and satisfactory customer, who knows better how to market a picture, who is known to be honest in his dealings, who has built up a reputation for showing the distributor's pictures in his theatre over a period of years, who has become a prominent and valued citizen and who possesses other desirable attributes.

2. The larger theatres, with the larger resources, many of which are owned or operated by distributor-defendants, in the long run will be able to outbid independents operating smaller theatres having smaller resources, and so will obtain the bulk of the most desirable product. The smaller theatres will become mediocre theatres, exhibiting only features on a second and subsequent run basis, or cheaper and poorer features on a first run basis. Eventually they may be forced to close or sell out to competitors, thus fostering and encouraging monopolistic practices. Nor may this economic disparity be adjusted by Court decree. *Bigelow* v. *R K O Radio Pictures*, 162 F. (2d) 520, 522, certiorari denied November 10, 1947; 16 Law Week 3150.

3. The decreed method of licensing will increase admission prices to the detriment of the public and the exhibitor through the increase in film rentals due to (a) the increased cost of distribution, and (b) the inevitable result that exhibitors, in order to secure feature films, will bid more for them than they now pay through the existing system of negotiated licenses. It is simply a Court protected license to the producer to exact the highest possible price for his features from exhibitors.

4. The decreed method forbids and prevents the necessary post-exhibition adjustments, an accepted trade practice, by means of which film rentals are equitably adjusted in keeping with the results of exhibition, and proper allowances are made for errors in evaluation and for conditions affecting exhibition beyond the control of exhibitors and distributors.

5. Material loss will result to Intervenors under the proposed system, because of the uncertainty as to the result of bids for features, the delay in arranging programs, and the fact that an exhibitor may bid for too few or too many features, not knowing how many of his bids will be successful.

6. The provisions of sub-paragraph (c) of Paragraph 8 are impracticable as to the timing of bids and acceptances and the basis on which bids are to be submitted, and the respective rights of distributors and exhibitors thereunder are uncertain.

7. An independent exhibitor-owner or operator of two theatres equal in seating capacity to one larger theatre of a defendant or another exhibitor cannot successfully bid against such defendant, since the decree provides that each license must be offered and taken theatre by theatre and picture by picture.

(4) *The Authorities Support This Position.*

We have discussed above the factual situation and have demonstrated the damage which will be suffered by Intervenors and their property interests if the provisions complained of are included in the decree. We now discuss the legal principles applicable to these facts.

Judgment in the sense it is used in Rule 24, does not mean an actual judgment against Intervenors. It is enough that from a practical standpoint the effect of the judgment will be binding upon and prejudicial to Intervenors, and that they cannot secure relief to which they are entitled through other means. This was recognized by the District Court in its opinion (R., pp. 3541-2) when it is said:

> "While our decision will not be res adjudicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce."

We have shown that Intervenors cannot conduct their business without the product of one or more of the defendants. Intervenors by reason of the decree will be compelled to submit to the market regulations imposed by the uniform action required of the defendants who control the supply of feature pictures. The decree deprives Intervenors of their present right to enjoin a combination controlling the market for feature film; they will be unable to sue for damages on account of injury caused them by the Court directed plan of competitive bidding.

It can scarcely be argued that this will not be the effect of the decree, because any independent action taken by Intervenors will be met by the defense that the defendants

are acting in accordance with the directions of the District Court. It should be noted that the rule not only covers cases where the Intervenors are bound as a matter of law, but also cases where they "may be bound". The Court retains jurisdiction for the purpose of further regulation of the business, should that be necessary. Intervenors will unavoidably have a direct interest in that further regulation from which the District Court has excluded them.

Nor is it necessary that Intervenors have a direct and immediate interest in the res. In a technical sense, there is no res in any anti-trust action. If interest in a res were necessary, there could never be intervention in an anti-trust suit. While such an interest is required under Rule 24 (a) (3), it is not required where intervention is sought as here under Rule 24 (a) (2). Such a requirement is contrary to the holdings of this Court in *Missouri-Kansas Pipe Line Co.* v. *U. S., supra* and *U. S.* v. *Terminal R. R. Assoc. of St. Louis, supra.*

This later case involved an appeal from the District Court from a denial of an application for leave to intervene made by persons and corporations conducting businesses along the lines of the Terminal R. R. Company. The effect of the decree was to enjoin the Terminal R. R. Company from conducting its transportation business in a manner which would permit it to serve the business of the Intervenors. The petition was denied on jurisdictional grounds, and there was a further appeal to the Supreme Court. Certain of those who had sought to intervene in the lower Court petitioned to intervene in the Supreme Court, seeking the same relief. The Government challenged their right. The Court stated at page 199:

> "The challenge by the United States of the right to hear the intervening petitioners is without merit, since even, although the petitioners were not parties,

> they are entitled to be originally heard concerning the settlement of the decree insofar as it might operate prejudicially to their rights."

As stated above, the effect of the decreed competitive bidding will be to endanger the entire business of Intervenors in that their access to the feature film market is limited by a system imposed upon them which destroys all established relationships on which Intervenors now depend for their pictures, and only benefits the major distributors (defendants). All competition between sellers is eliminated. No reviewable criteria are possible by which the bidder can be selected. The choice must, therefore, lie entirely within the uncontrolled business judgment of the producer-distributors (defendants) who have already been held guilty of discrimination in violation of the Sherman Act.

Inevitably and inescapably Intervenors are bound by the decree.

B.

The representation of Intervenors' interests by existing parties was and continues to be inadequate.

We have already shown (pp. 6-7) that no party sought competitive bidding, and that the few expert witnesses who were questioned in regard to a system of auction selling were unanimous in stating that such a system will be harmful to producers, distributors and exhibitors alike. The position of the plaintiff-Government in the proceedings in the District Court appears in the following statement of counsel (R., p. 2800):

> " • • • I do not think with all due respect that the Court in the time that it has to study the indus-

> try, is in a position to evolve for the defendants any new system as such to replace an existing system. We find that we get into trouble and we lead the courts into trouble when we try to do that."

And in the following quotation from the plaintiff's brief below:

> "Until the Court has decided that question and determined the general form that the dissolution of these combinations is to take, we do not believe that any final form of trade practice relief against all of the distributor defendants may be satisfactorily determined."

And in the final argument of Government's counsel (R., p. 2878):

> "Therefore it seems to us that the choice now before the Court, assuming that divorcement is unacceptable, is between the restricted system of competitive disposition of exclusive runs, including the ban on cross-licensing offered by the Government, or no so-called auction selling or competitive bidding system at all, unless the Court is prepared to adopt a system of selling films which only the major defendants desire."

Plaintiff now takes the position (R., p. 3722, assignment of error 10) that competitive bidding will not introduce competition into the present system of licensing pictures and that the Court erred in concluding (R., p. 3723, assignment of error 18) that competitive bidding will "make it impossible for the defendants to discriminate unreasonably in favor of circuit theatres and against the independents." The Government's assignment of error number 10 is in effect substantially the same as number 18. These assignments of error must be read in the light of the statements quoted above and of assignment number 25 (R., p. 3723)—that the Court erred in failing to decree divestiture.

cess to all books and papers of the defendants and the right to interview their officers or employees in order to secure compliance therewith. It has also by Section II, paragraph 9, of the decree enjoined defendants from an arbitrary refusal to grant an exhibitor a license to exhibit a feature on a run selected by him instead of granting such license to a competitor.

The Court says of the *present* system (unaffected by its correctives) that "the only way competition may be introduced into" it is by the directed competitive bidding plan (R., p. 3540). But it is submitted that the dissolution and trade practice reliefs proposed by the Court, other than the competitive bidding requirement, plainly will effect an alteration of "the present system", adequate to terminate any unlawful restraint of commerce by the defendants. This is demonstrated by a consideration of the several practices found to be illegal and which the Court seeks to remedy through competitive bidding, and of the effect of the other provisions of the decree upon the same.

Minimum admission prices, clearances and runs.

The charge in this respect by the Government was that these practices in the business of exhibiting motion pictures were controlled by a concert of the defendants. No discrimination was found. The injunctive relief directed as to clearances and runs simply relates to concerted action. Concerted action obviously could continue even under competitive bidding system, and it is difficult to see how any more can be done than to issue the injunction and leave any correction that may be required to the Attorney General under his visitorial powers, and to the legal remedies of any person injured.

As to minimum prices for admission, although the charge is only against the concerted fixing of the same, the decree does not limit the injunction simply to concerted action. However, the fixing of such minimum prices would necessarily be a matter of contract, and ample protection is afforded through the fact that such contracts are at all times open to inspection. The Court itself has partially recognized this in its Opinion (R., pp. 3529-30) by saying that the elimination of the fixing by distributors of admission prices will create an opportunity for exhibitors to compete as to admission prices, and may well benefit both exhibitors and the public.

Formula deals, master contracts and franchises.

These, again, are all matters of contract and have been forbidden. The injunction in these respects is practically self-executing, and is sufficiently implemented by the interest of the independent and his reliance on the substantial body of case law which would permit him not only to institute contempt proceedings in this Court, but also to institute treble damage suits against any distributor violating the injunction.

Move-overs, extended and repeated runs.

Any breach of the injunctions against these practices would be so overt as to make such a breach practically impossible.

Block booking.

In this case, written contracts would, again, govern the situation, and any contract which sought to tie in the purchase of one license with the purchase of another would be illegal and unenforceable. The visitorial power of the

Attorney General would operate as well as the remedies open to the exhibitor.

In all of the above instances, the decree of the Court could be substantially carried out without competitive bidding, and would permit a system of private negotiation between supplier and customer, a system which has been approved in almost innumerable cases and is expressly protected by Congress in the Robinson-Patman Act. See *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127. Any exhibitor believing he was being discriminated against could avail himself of paragraph 9.

If time shall prove these expectations to have been ill-founded, then, the Court having reserved jurisdiction, additional remedies may be considered and invoked in the future.

POINT III.

The directions as to competitive bidding are not authorized under the Sherman Act but are directly contrary to the spirit of the Act.

While the wording of the decree is in the reasonable discretion of the District Court, it is felt that if the Statutory Court had been furnished with sufficient information as to the inevitable effects of competitive bidding on independent exhibitors, it would not have directed that this trade practice be made compulsory. But having fathered it, there was nothing the court could do except to try to eliminate some of its obvious difficulties and still retain the plan.

Section 4 of the Sherman Act, 15 U. S. C. A. § 4, invests the district courts with jurisdiction to "*prevent and re-*

strain" violations of the Act. Injunctive action is specifically authorized. In order to make the restraints effective, the Courts have held that positive directions are authorized to the end that the means used to effect the illegal acts be destroyed. Thus, in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, the Supreme Court held valid the decree dissolving the combination, pointing out, however, that "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property". The decree should not be needlessly destructive. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 219; *Jacob Siegel* v. *Federal Trade Commission*, 327 U. S. 608.

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, the Court stated:

> "In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

and further in dealing with the question of whether there should be a permanent injunction or a receivership, the Court said:

> "* * * we do not think we can now direct the immediate application of either of these remedies. * * * to at once stay the movement in interstate commerce of the products which the combination or its cooperating forces produce or control might inflict in-

finite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people."

In *Sugar Institute* v. *United States*, 297 U. S. 553, 604, the Court denied certain affirmative relief, saying that it

> "* * * might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners."

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, the Court generally sustained the District Court in directing remedial steps, but pointing out that

> "* * * we may not impose penalties in the guise of preventing future violations" (p. 409).

and

> "* * * the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people', as the Government has suggested" (pp. 409-10).

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 729, the Court said:

> "The Sherman Act is intended to prevent unreasonable restraints of commerce. * * * The federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices."

From all of the above certain principles may be deduced.

1. A Court can enjoin the acts found to be illegal and take necessary and reasonable steps to prevent future recurrences.

2. The measures must be remedial rather than punitive. The defendants cannot be put in a class by themselves.

3. Private rights may not be invaded except to the extent necessary in the interests of the public.

4. The Court may not assume legislative functions.

In dealing with the several trade practices found to be illegal, and which the Court seeks to correct, not only by injunction, but by the application of the competitive bidding plan, the test of legality has been compatibility with this plan, rather than the terms of the Sherman Act. Thus, in dealing with master agreements containing separate provisions for licensing pictures for each particular theatre, the Court finds no illegality "if there is an opportunity for exhibitors to bid for the same runs at the offered price" (R., p. 3541). As to franchises, a reason given for illegality is that they "necessarily contravene the plan of licensing each picture theatre by theatre to the highest bidder" (R., p. 3541). As to "move-overs", the Court finds them illegal because they are "incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre" (R., p. 3542). As to "overage-and-underage" provisions, they are forbidden because it would not be possible to "practically apply the bidding system we are establishing" (R., p. 3542).

It is submitted that to make this particular device the test of illegality is, in effect, to write it into the Sherman Act and thus to assume a legislative function.

We do not find a case in which a court has forbidden private negotiation between buyer and seller, nor is any such Congressional intent indicated. It is especially provided in the Robinson-Patman Act (15 U. S. C. A. Sec. 13) that nothing therein contained "shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade". If the Congress believes that discriminations in price between different purchasers of commodities of like grade and quantity do not require the remedy of requiring sales to be made only by public auction, is it not clear that it must take a similar view of such a restriction in a Sherman Act case in which the Court is dealing with the licensing of motion pictures? While conflicts between the Sherman Act and the Copyright Acts are inescapable, there seems no occasion in this instance for creating one by judicial direction. The danger of this precedent when applied to other industries and the damage it would cause to all forms of business is self-evident.

It is submitted that the direction for competitive bidding exceeds the authority of the Court in that it destroys a normal and legal method of dealing without promoting the public interest.

As previously stated and again reiterated, the result of the decree is to eliminate all competition between distributors and thus establish a combination in restraint of trade which the producer-distributors could not voluntarily establish because of the Sherman Act. It is no answer to this argument that a single producer, acting by itself, and not in pursuance of a plan adopted by all producers-defendants, can sell pictures by competitive bidding, and under such circumstances Intervenors would have no complaint. This

may be true. But in such a case independent exhibitors could induce other major distributors to sell on other terms. And if they were free to do so, it is scarcely conceivable that all of them would uniformly refuse, in the absence of collusive action. It is the enforced uniform plan, adopted by all defendants on order of the Court which is the essence of both the wrong and the injury to Intervenors. Even if voluntary competitive bidding were invoked by a number of defendants acting individually, necessary alterations and concessions could be made as occasions arose to meet the practicabilities of the situation and changing economic conditions. The court system imposes a rigid strait-jacket on the industry for the entire future so long as the decree stands.

Again it may be argued that Intervenors are still free, despite the decree, to institute independent suits to enforce whatever rights they may possess. But the intent and purpose of the Court's order was to set up a plan of action, common to all distributors to enforce competitive bidding. Clearly, if any intervenor seeks to enjoin that combination or to collect damages from defendants on account of their activities pursuant to the plan authorized by the Court, he will be met with the defense that defendants are required by the Court to carry out this system of uniform action.

For example, suppose that through the enforcement of the uniform competitive bidding system, film rentals are forced so high that many of these Intervenors find their profits destroyed. Or suppose that on account of the exercise of the uncontrolled business judgment of the defendants in selecting successful bidders, many of these Intervenors find their theatres unable to operate for lack of features. Or suppose through the operation of the system, a theatre is unable to assure itself of a future supply of

features, which assurance is necessary for its financial solvency. In these situations, any independent who brought a suit would be barred by the decree from a recovery.

The only answer would be that the Court below exceeded its jurisdiction. But certainly the District Court intends its decree to be a bar to any action by an independent which seeks relief inconsistent with its provisions—and there can be no question of the jurisdiction of that Court.

Conclusion.

1. Intervenors have not been adequately represented and their interests and property are adversely affected by the decree. They can only be restored to their rights by intervening in this proceeding and they are entitled to do so.

2. The provisions of Section II, paragraph 8, of the decree complained of should be eliminated. They set up a system which not only was not asked for by any of the parties but was affirmatively opposed by them on the few occasions that it was discussed and is unanimously opposed by the independent exhibitors who (presumably) were to benefit by the decree. There is no adequate evidence in the record justifying the Court in its conclusion that this system would either cure the ills sought to be cured or that it would not have serious harmful effects on the rights of innocent parties. Its impracticability has been clearly demonstrated. The modification of the provisions of the opinion by the later memorandum of the Court and the provisions of the decree is a tacit admission that the original directions were made without any real knowledge of their effects or any real comprehension of the complexities of the business involved. With competitive bidding eliminated the rights of any aggrieved exhibitor and of the public are amply protected by the reserved rights of the Attorney General, the

reservation of jurisdiction, the provisions of Section II, paragraph 9, of the decree, and finally by his unquestioned right to recover triple damages in a proper case.

3. The net result of the inclusion of these provisions is to punish the independent exhibitors who are innocent parties and to create a legally protected combination in restraint of trade for the benefit of the major defendants who were the persons against whom relief was sought.

If due weight is to be given to the lesson afforded by exhibitors' well founded fears in respect to the Consent Decree (R., p. 2750), and it is submitted that such weight should be given to them, then their present expectations and objections alone justify the elimination of competitive bidding.

Respectfully submitted,

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In short, the position of the Government is that if there is not to be divestiture, competitive bidding is an acceptable substitute. This is borne out by the concluding paragraph of the plaintiff's jurisdictional statement at page 22 thereof:

> "* * * If the District Court is right in its assumption that the untried and unenforceable competitive bidding relief is an adequate substitute for the traditional divestiture relief and complete prohibition of further agreement among the guilty defendants, traditionally applied in situations of this character, then a proceeding under Section 4 of the Sherman Act has become an instrument for protecting an established monopoly from either judicial or legislative correction."

Whomsoever the plaintiff may be said to have represented up to the time the June, 1946 opinion was rendered, since that time, as long as the Government does not actively oppose competitive bidding, it does not represent the Intervenors.

In the District Court one of the defendants (Universal) voiced opposition to competitive bidding but not on the grounds which Intervenors advance (R., p. 2978). The three so-called minor defendants, Universal, United and Columbia, have assigned as error the competitive bidding provisions of the decree (R., pp. 3802, 3782, 3760) but their position as producers or producer-distributors is so different from and in most ways so diametrically opposed to the position of Intervenors that in no sense can it be fairly said that they represent Intervenors.

It therefore clearly appears that the Intervenors have not been, are not now and will not be adequately represented by any of the existing parties. Indeed it is not a case of adequacy of representation for the Intervenors'

interests are not represented at all. This contention is fully supported by the decisions on facts which we believe to be far less persuasive.

Missouri-Kansas Pipe Line Co. v. *U. S.*, *supra*;

Wolpe v. *Poretsky*, 144 F. (2d) 505;

Mack v. *Passaic National Bank & Trust Co.*, 150 F. (2d) 474.

C.

The application to intervene was timely made.

The history of the facts leading up to the filing of the application to intervene is given in the original petition (R., p. 3578). That the petition was timely filed under the circumstances and has not delayed the rendition of the final decree so clearly appears from the record, and since no party has raised the question and the District Court said the point need not be argued (R., p. 2834), the point will not be further discussed.

D.

The motion to intervene in this Court should be granted.

Intervenors moved to intervene directly in this Court on the authority of the decision in *United States* v. *Terminal Railroad Assn. of St. Louis*, *supra*. In the case just cited, the petitioners were deprived of a legal right against a public utility. In the case at bar, except for the provisions of the decree of which Intervenors complain, they could have a clear legal right to enjoin a plan for concerted action by the distributors to enforce competitive bidding which the decree attempts to legalize. The decree, by approving that plan, cuts off Intervenors' legal right

as effectively as the intervenor's right was cut off in the *St. Louis Terminal* case.

The purpose of this suit is to safeguard private interests. As this Court said in *Missouri-Kansas Pipe Line Co. v. United States, supra,* in commenting upon the companion case of *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, arguments with respect to the Attorney General's guardianship of public interest misconceive the basis of the right asserted by the intervenors as "where the enforcement of a public law also demands distinct safeguarding of private interests * * * the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion".

It would be a travesty of justice if intervention must be denied in a case as here where the Attorney General is not opposing the competitive bidding plan as such and therefore can be said to approve the combination in restraint of trade set up by the decree.

All of the arguments advanced above supporting the assertion that Intervenors should have been permitted to intervene in the District Court are equally applicable to intervention directly in this Court.

POINT II

The dissolution and trade practice reliefs, other than the competitive bidding requirement, will terminate the restraint of commerce by defendants found to be unlawful.

The Court in addition to the specific injunctive directions as to trade practices has provided that jurisdiction be retained in order to enforce compliance with its decree and has provided that the Attorney General have ac-

First. Restraint of Trade—(1) Price Fixing.

No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed. The District Court found that the defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge, whether the rental of the film was a flat amount or a percentage of the receipts. It found that substantially uniform minimum prices had been established in the licenses of all defendants. Minimum prices were established in master agreements or franchises which were made between various defendants as distributors and various defendants as exhibitors and in joint operating agreements made by the five majors with each other and with independent theatre owners covering the operation of certain theatres.[4] By these later contracts minimum admission prices were often fixed for dozens of theatres owned by a particular defendant in a given area of the United States. Minimum prices were fixed in licenses of each of the five major defendants. The other three defendants made the same requirement in licenses granted to the exhibitor-defendants. We do not stop to elaborate on these findings. They are adequately detailed by the District Court in its opinion. See 66 F. Supp. 334–339.

[4] A master agreement is a licensing agreement or "blanket deal" covering the exhibition of features in a number of theatres, usually comprising a circuit.

A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

An independent as used in these cases means a producer, distributor, or exhibitor, as the context requires, which is not a defendant in the action, or a subsidiary or affiliate of a defendant.

The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit* v. *United States*, 306 U. S. 208, 226–227; *United States* v. *Masonite*, 316 U. S. 265, 275. That was shown here.

On this phase of the case the main attack is on the decree which enjoins the defendants and their affiliates from granting any license, except to their own theatres, in which minimum prices for admission to a theatre are fixed in any maner or by any means. The argument runs as follows: *United States* v. *General Electric Co.*, 272 U. S. 476, held that an owner of a patent could, without violating the Sherman Act, grant a license to manufacture and vend, and could fix the price at which the licensee could sell the patented article. It is pointed out that defendants do not sell the films to exhibitors, but only license them and that the Copyright Act (35 Stat. 1075, 1088, 17 U. S. C. § 1), like the patent statutes, grants the owner exclusive rights.[5] And it is argued that if the patentee can fix the price at which his licensee may sell the patented article, the owner of the copyright should be allowed the same privilege. It is maintained that such a privilege is essential to protect the value of the copyrighted films.

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is

[5] See note 12, *infra*.

EXECUTIVE OFFICES
444 WEST 56th ST.
NEW YORK 19, N. Y.

TWENTIETH CENTURY-FOX FILM CORPORATION
FEATURE PRODUCTIONS

20

Reel Two

F&10

SCHEDULE

EXCHANGE _____ DATE _____ SALESMAN _____

THEATRE	EXHIBITOR	LOCATION OF THEATRE

PROD. NO.	TITLE OF PICTURES	CONSECUTIVE NO. OF DATE AND EXACT DATE OF WEEK WHEN RELEASED	EARNINGS GUARANTEED EXHIBITOR PER	DISTRIBUTOR'S SHARE OF GROSS RECEIPTS	GROSS RECEIPTS IN EXCESS OF WHICH DISTRIBUTOR'S SHARE IS DUE
	BLOCK NO.		$	%	$

ADMISSION PRICES PER PERSON — EXCLUDING TAXES

EVENINGS: Adults, Orchestra _____ Balcony _____ Children, Orchestra _____ Balcony _____

MATINEES: Adults, Orchestra _____ Balcony _____ Children, Orchestra _____ Balcony _____

RUN _____

CLEARANCE _____

[illegible]

IN WITNESS WHEREOF, the parties hereto have duly executed these presents this _____ day of _____, 19__.

Exhibitor: _____
An Individual—A Partnership—A Corporation
(strike out two)

By _____
Partner—Officer
(strike out one)

TWENTIETH CENTURY-FOX FILM CORPORATION

By _____

LICENSE AGREEMENT

AGREEMENT made between [illegible] and [illegible], hereinafter referred to as Exhibitor, and the Exhibitor, hereinafter referred to as Exhibitor.

WITNESSETH: The parties hereto agree as follows:

1. LICENSE—[illegible] hereby grants to and Exhibitor accepts a limited license under the separate exhibition of the motion picture photoplay in the Schedule hereof (each motion picture being hereinafter referred to as "picture") for the purpose of exhibiting the same at the theatre specified in the Schedule hereof (hereinafter referred to as the "theatre") and for the period of time specified in the Schedule hereof (hereinafter referred to as the "license period"), upon the terms and conditions hereinafter set forth. Exhibitor shall not exhibit or permit the exhibition of any picture at any theatre other than the theatre specified in the Schedule hereof, nor shall Exhibitor exhibit or permit the exhibition of any picture at the theatre specified in the Schedule hereof during any period of time other than the license period specified in the Schedule hereof, without the written consent of [illegible] first had and obtained. Exhibitor shall not exhibit or permit the exhibition of any picture at the theatre specified in the Schedule hereof during the license period specified in the Schedule hereof except in accordance with the terms and conditions of this agreement. Exhibitor shall not exhibit or permit the exhibition of any picture at the theatre specified in the Schedule hereof during the license period specified in the Schedule hereof except in accordance with the terms and conditions of this agreement. Exhibitor shall not exhibit or permit the exhibition of any picture at the theatre specified in the Schedule hereof during the license period specified in the Schedule hereof except in accordance with the terms and conditions of this agreement.

2. (a) [illegible] Exhibitor shall pay a sum equal to the [illegible] in which the Exhibitor's theatre(s) is located and hereinafter referred to as the "[illegible]" [illegible] Exhibitor shall pay a sum equal to the [illegible] upon the date or dates specified in the Schedule, upon the date or dates specified in the Schedule, upon the date or dates specified in the Schedule,

[illegible]

SUPREME COURT OF THE UNITED STATES

Nos. 79–86.—October Term, 1947.

The United States of America, Appellant,

79 *v.*

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated et al.

Loew's, Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants,

80 *v.*

The United States of America.

Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants,

81 *v.*

The United States of America.

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants,

82 *v.*

The United States of America.

United Artists Corporation, Appellant,

83 *v.*

The United States of America.

Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures, Company, Inc.), Universal Film Exchanges, Inc., and Big U. Film Exchange, Inc., Appellants,

84 *v.*

The United States of America.

Appeals from the District Court of the United States for the Southern District of New York.

American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz et al., Appellants,

85 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

W. C. Allred, Charles E. Beach and Elizabeth L. Beach et al., Appellants,

86 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

[May 3, 1948.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on appeal [1] from a judgment of a three-judge District Court [2] holding that the defendants had violated § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53.

The suit was instituted by the United States under § 4 of the Sherman Act to prevent and restrain violations of it. The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or af-

[1] Sec. 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code; as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

[2] The court was convened pursuant to the provisions of the Act of April 6, 1942, 56 Stat. 198, 199, 15 U. S. C. § 28.

filiates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporation and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artist Corporation, which is engaged only in the distribution of motion pictures. The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.

The complaint charged that the producer defendants had attempted to monopolize and had monopolized the production of motion pictures. The District Court found to the contrary and that finding is not challenged here. The complaint charged that all the defendants, as distributors, had conspired to restrain and monopolize and had restrained and monopolized interstate trade in the distribution and exhibition of films by specific practices which we will shortly relate. It also charged that the five major defendants had engaged in a conspiracy to restrain and monopolize, and had restrained and monopolized, interstate trade in the exhibition of motion pictures in most of the larger cities of the country. It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants violated § 1 and § 2 of the Act. It charged that each distributor-defendant had entered into various contracts with exhibitors which unreasonably restrained trade. Issue was joined; and a trial was had.[3]

[3] Before trial, negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period the United States moved for trial against all the defendants.

illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Masonite Corporation*, *supra*. We recently held in *United States* v. *Gypsum Co.*, 333 U. S. —, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

Nor can the result be different when we come to the vertical conspiracy between each distributor-defendant and his licensees. The District Court stated in its findings:

> "In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices."

That consequence seems to us to be incontestable. We stated in *United States* v. *Gypsum Co.*, *supra*, p. —, that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in

contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that *United States* v. *General Electric Co., supra,* as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See *Interstate Circuit* v. *United States, supra,* p. 230.

(2). *Clearances and Runs.*

Clearances are designed to protect a particular run of a film against a subsequent run.[6] The District Court found that all of the distributor-defendants used clearance provisions and that they were stated in several different ways or in combinations: in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; or in terms of clearances as fixed by other distributors.

The Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here. In its view their justification was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly

[6] A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

diminished. A clearance when used to protect that interest of the exhibitor was reasonable, in the view of the court, when not unduly extended as to area or duration. Thus the court concluded that although clearances might indirectly affect admission prices, they do not fix them and that they may be reasonable restraints of trade under the Sherman Act.

The District Court held that in determining whether a clearance is unreasonable, the following factors are relevant:

> (1) The admission prices of the theatres involved, as set by the exhibitors;
>
> (2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;
>
> (3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;
>
> (4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;
>
> (5) The extent to which the theatres involved compete with each other for patronage;
>
> (6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and
>
> (7) There should be no clearance between theatres not in substantial competition.

It reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343–346, that many clearances had no relation to the competi-

tive factors which alone could justify them.[7] The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances.

The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted.

Some of the defendants ask that this provision be construed (or, if necessary, modified) to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor.

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[7] Thus the District Court found:

"Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

We reject that suggestion. If that were allowed, then the exhibitor-defendants would have an easy method of keeping alive at least some of the consequences of the effective conspiracy which they launched. For they could then justify clearances granted by other distributors in favor of their theatres in terms of the competitive requirements of those theatres, and at the same time justify the restrictions they impose upon independents in terms of the necessity of protecting their film rental as licensor. That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked. It plainly should not be allowed so long as the exhibitor-defendants own theatres. For in its baldest terms it is in the hands of the defendants no less than a power to restrict the competition of others in the way deemed most desirable by them. In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords.

Whether the same restrictions would be applicable to a producer who had not been a party to such a conspiracy is a question we do not reach.

Objection is made to a further provision of this part of the decree stating that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724. The court

certainly then could take the lesser step of making them *prima facie* invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188.

(3) *Pooling Agreements; Joint Ownership.*

The District Court found the exhibitor-defendants had agreements with each other and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages. Some of these agreements provided that the parties might not acquire other competitive theatres without first offering them for inclusion in the pool. The court concluded that the result of these agreements was to eliminate competition *pro tanto* both in exhibition and in distribution of features,[4] since the parties would naturally direct the films to the theatres in whose earnings they were interested.

The District Court also found that the exhibitor-defendants had like agreements with certain independent exhibitors. Those alliances had, in its view, the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool. The court found that in some cases the operating agreements were

[4] A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet.

achieved through leases of theatres, the rentals being measured by a percentage of profits earned by the theatres in the pool. The District Court required the dissolution of existing pooling agreements and enjoined any future arrangement of that character.

These provisions of the decree will stand. The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.

There was another type of business arrangement that the District Court found to have the same effect as the pooling agreements just mentioned. Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent.[9] The result

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[9] *Theatres jointly owned with independents:*

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1287

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214

Of the 1287 jointly owned with independents, 209 would not be affected by the decree since one of the ownership interests is less than 5 per cent, an amount which the District Court treated as *de minimis*.

is; according to the District Court, that the theatres are operated "collectively, rather than competitively." And where the joint owners are an exhibitor-defendant and an independent the effect is, according to the District Court, the elimination by the exhibitor-defendant of "putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." The District Court found these joint ownerships of theatres to be unreasonable restraints of trade within the meaning of the Sherman Act.

The District Court ordered the exhibitor-defendants to disaffiliate by terminating their joint ownership of theatres; and it enjoined future acquisitions of such interests. One is authorized to buy out the other if it shows to the satisfaction of the District Court and that court first finds that such acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." This dissolution and prohibition of joint ownership as between exhibitor-defendants was plainly warranted. To the extent that they have joint interests in the outlets for their films each in practical effect grants the other a priority for the exhibition of its films. For in this situation, as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

The District Court also ordered disaffiliation in those instances where theatres were jointly owned by an ex-

hibitor-defendant and an independent, and where the interest of the exhibitor-defendant was "greater than five per cent unless such interest shall be ninety-five per cent or more," an independent being defined for this part of the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." The exhibitor-defendants are authorized to acquire existing interests of the independents in these theatres if they establish, and if the District Court first finds that the acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." All other acquisitions of such joint interests were enjoined.

This phase of the decree is strenuously attacked. We are asked to eliminate it for lack of findings to support it. The argument is that the findings show no more than the existence of joint ownership of theatres by exhibitor-defendants and independents. The statement by the District Court that the joint ownership eliminates "putative competition" is said to be a mere conclusion without evidentiary support. For it is said that the facts of the record show that many of the instances of joint ownership with an independent interest are cases wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. Some are said to be rather fortuitous results of bankruptcies; others are said to be the results of investments by outside interests who have no desire or capacity to operate theatres, and so on.

It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful

practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. *United States* v. *Crescent Amusement Co.*, *supra*, p. 189; *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p.—. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United States* v. *Crescent Amusement Co.*, *supra*, pp. 189–190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that no monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership

by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause.

(4) *Formula Deals, Master Agreements, and Franchises.*

A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross. The District Court found that Paramount and RKO had made formula deals with independent and affiliated circuits. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit. The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. The District Court found some master agreements[10] open to the same objection. Those are the master agreements that cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leave other terms to the discretion of the circuit. The District Court enjoined the making or further performance of any formula deal of the type described above. It also enjoined the making or further performance of any master agreement covering the exhibition of features in a number of theatres.

The findings of the District Court in these respects are supported by facts, its conclusion that the formula deals and master agreements constitute restraint of trade is valid, and the relief is proper. The formula deals

[10] See note 4, *supra*.

and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations. The reasons have been stated in *United States* v. *Griffith*, *ante*, p. —, and *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. —, and need not be repeated here. It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. See *United States* v. *Crescent Amusement Co.*, *supra*, p. 183.

The District Court also enjoined the making or further performance of any franchise. A franchise is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement. The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors. At least that is the way we read its findings.

Universal and United Artists object to the outlawry of franchise agreements. Universal points out that the charge of illegality of franchises in these cases was restricted to franchises with theatres owned by the major defendants and to franchises with circuits or theatres in a circuit, a circuit being defined in the complaint as a group of more than five theatres controlled by the same

person or a group of more than five theatres which combine through a common agent in licensing films. It seems, therefore, that the legality of franchises to other exhibitors (except as to block-booking, a practice to which we will later advert) was not in issue in the litigation. Moreover, the findings on franchises are clouded by the statement of the District Court in the opinion that franchises "necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder." As will be seen hereafter, we eliminate from the decree the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.

We can see how if franchises were allowed to be used between the exhibitor-defendants each might be able to strengthen its strategic position in the exhibition field and continue the ill effects of the conspiracy which the decree is designed to dissipate. Franchise agreements may have been employed as devices to discriminate against some independents in favor of others. We know from the record that franchise agreements often contained discriminatory clauses operating in favor not only of theatres owned by the defendants but also of the large circuits. But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. The findings do not deal with the issue doubtlessly due to the fact that any system of franchises would necessarily conflict with the system of competitive bidding adopted by the District Court. Hence we set aside the findings on franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

We do not take that course in the case of formula deals and master agreements, for the findings in these instances seem to stand on their own bottom and apparently have no necessary dependency on the provision for competitive bidding.

(5) *Block-Booking.*

Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, 459; *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 491; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U. S. 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.[11]

We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286

[11] Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it. To remedy the problems created by that practice the District Court included the following provision in its decree:

"To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release

U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monop-

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within ten days after there has been an opportunity afforded to the licensee to inspect the feature."

The court advanced the following as its reason for inclusion of this provision:

"Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designated to prevent such blind-selling, are poorly attended by exhibitors. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."

We approve this provision of the decree.

oly of the copyright in violation of the principle of the patent cases involving tying clauses.[12]

It is argued that *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not *per se* illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here.

Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the anti-trust laws receive judicial sanction.

We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

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[12] The exclusive right granted by the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1 includes no such privilege. It provides, so far as material here, as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

(6) *Discrimination.*

The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers [13] and extended runs; granting road show privileges; [14] allowing overage and underage; [15] granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices

[13] A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre.

[14] A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas.

[15] Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental committment defaulted by another.

because they were thought to be impossible under the system of competitive bidding adopted by the District Court.

These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. See *Interstate Circuit v. United States, supra*, p. 231; *United States v. Crescent Amusement Co., supra*, pp. 182–183. It will be for the District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.

There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Second—Competitive Bidding.

The District Court concluded that the only way competition could be introduced into the existing system of fixed prices, clearances and runs was to require that films be licensed on a competitive bidding basis. Films are to be offered to all exhibitors in each competitive area.[16] The license for the desired run is to be granted to the highest responsible bidder, unless the distributor rejects

[16] Competitive bidding is required only in a "competitive area" where it is "desired by the exhibitors." As the District Court said, "the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The details of the competitive bidding system will be found in 70 F. Supp. pp. 73–74.

all offers. The licenses are to be offered and taken theatre by theatre and picture by picture. Licenses to show films in theatres, in which the licensor owns directly or indirectly an interest of ninety-five per cent or more, are excluded from the requirement for competitive bidding.

Paramount is the only one of the five majors who opposes the competitive bidding system. Columbia Pictures, Universal, and United Artists oppose it. The intervenors representing certain independents oppose it. And the Department of Justice, which apparently proposed the system originally, speaks strongly against it here.

At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken.

Each film is to be licensed on a particular run to "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." The bid "shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when

such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make." We do not doubt that if a competitive bidding system is adopted all these provisions are necessary. For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash of tobacco, wheat, or other produce. Columbia puts these pertinent queries: "No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?"

The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining "a reasonable return to the licensor" would seem necessary.

We mention these matters merely to indicate the character of the job of supervising such a competitive bidding system. It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business

management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals, could be done only with the greatest reluctance. At least such choices should not be faced unless the need for the system is great and its benefits plain.

The system uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause. If a premium is placed on purchasing power, the court-created system may be a powerful factor towards increasing the concentration of economic power in the industry rather than cleansing the competitive system of unwholesome practices. For where the system in operation promises the advantage to the exhibitor who is in the strongest financial position, the injunction against discrimination [17] is apt to hold an empty promise. In this connection it should be noted

[17] The competitive bidding part of the decree provides: "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

that even though the independents in a given competitive area do not want competitive bidding, the exhibitor-defendants can invoke the system.

Our doubts concerning the competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own features. They thus start with an inventory which all other exhibitors lack. The latter have no prospect of assured runs except what they get by competitive bidding. The proposed system does not offset in any way the advantages which the exhibitor-defendants have by way of theatre ownership. It would seem in fact to increase them. For the independents are deprived of the stability which flows from established business relationships. Under the proposed system they can get features only if they are the highest responsible bidders. They can no longer depend on their private sources of supply which their ingenuity has created. Those sources, built perhaps on private relationships and representing important items of good will, are banned, even though they are free of any taint of illegality.

The system was designed, as some of the defendants put it, to remedy the difficulty of any theatre to break into or change the existing system of runs and clearances. But we do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strengthen their hold in the industry. We are reluctant to alter decrees in these cases where there is agreement with the District Court on the nature of the violations. *United States* v. *Crescent Amusement Co.*, *supra*, p. 185; *International Salt Co.* v. *United States*, 332 U. S. 392, 400. But the provisions for competitive bidding in these

cases promise little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective. They vest powerful control in the exhibitor-defendants over their competitors if close supervision by the court is not undertaken. In light of these considerations we conclude that the competitive bidding provisions of the decree should be eliminated so that a more effective decree may be fashioned.

We have already indicated in preceding parts of this opinion that this alteration in the decree leaves a hiatus or two which will have to be filled on remand of the cases. We will indicate hereafter another phase of the problem which the District Court should also reconsider in view of this alteration in the decree. But out of an abundance of caution we add this additional word. The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated.

Third. Monopoly, Expansion of Theatre Holdings, Divestiture.

There is a suggestion that the hold the defendants have on the industry is so great that a problem under the First Amendment is raised. Cf. *Associated Press* v. *United States*, 326 U. S. 1. We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted.

The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.

The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business.

The five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076.[18] Those theatres paid 45 per cent

[18] The theatres which each of the five majors owned independently of the others were: Paramount 1,395 or 7.72 per cent; Warner 501 or 2.77 per cent; Loew's 135 or .74 per cent; Fox 636 or 3.52 per cent; RKO 109 or .60 per cent. There were in addition 361 theatres or about 2 per cent in which two or more of the five majors had joint interests. These figures exclude connections through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

These theatres are located in 922 towns in 48 States and the District of Columbia. For further description of the distribution of theatres see Bertrand, Evans, and Blanchard, The Motion Picture Industry—A Pattern of Control 15–16 (TNEC Monograph 43, 1941).

of the total domestic film rental received by all eight defendants.

In the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors. In 4 of those cities the five majors have no theatres. In 38 of those cities there are no independent first-run theatres. In none of the remaining 50 cities did less than three of the distributor-defendants license their product on first run to theatres of the five majors. In 19 of the 50 cities less than three of the distributor-defendants licensed their product on first run to independent theatres. In a majority of the 50 cities the greater share of all of the features of defendants were licensed for first-run exhibition in the theatres of the five majors.

In about 60 per cent of the 92 cities having populations of over 100,000, independent theatres compete with those of the five majors in first-run exhibition. In about 91 per cent of the 92 cities there is competition between independent theatres and the theatres of the five majors or between theatres of the five majors themselves for first-run exhibition. In all of the 92 cities there is always competition in some run even where there is no competition in first runs.

In cities between 25,000 and 100,000 populations the five majors have interests in 577 of a total of 978 first-run theatres or about 60 per cent. In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town.

The District Court held that the five majors could not be treated collectively so as to establish claims of general monopolization in exhibition. It found that none of them was organized or had been maintained "for the purpose of achieving a national monopoly" in exhibition. It found that the five majors by their present theatre

holdings "alone" (which aggregate a little more than one-sixth of all the theatres in the United States), "do not and cannot collectively or individually, have a monopoly of exhibition." The District Court also found that where a single defendant owns all of the first-run theatres in a town, there is no sufficient proof that the acquisition was for the purpose of creating a monopoly. It found rather that such consequence resulted from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the five majors, or the preference of the public for the best equipped theatres. And the percentage of features on the market which any of the five majors could play in its own theatres was found to be relatively small and in nowise to approximate a monopoly of film exhibition.[19]

[19] The number of feature films released during the 1943-44 season by the eleven largest distributors is as follows:

	No. of Films	*Percentages of Total*	
		With "Westerns" included	*With "Westerns" excluded*
Fox	33	8.31	9.85
Loew's	33	8.31	9.85
Paramount	31	7.81	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.32	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Republic	–29 features –30 "Westerns"	14.86	8.66
Monogram	–26 features –16 "Westerns"	10.58	7.76
PRC	–20 features –16 "Westerns"	9.07	5.97
Totals	397 335 without "Westerns"	100.00	100.00

Even in respect of the theatres jointly owned or jointly operated by the defendants with each other or with independents the District Court found no monopoly or attempt to monopolize. Those joint agreements or ownership were found only to be unreasonable restraints of trade. The District Court, indeed, found no monopoly on any phase of the cases, although it did find an attempt to monopolize in the fixing of prices, the granting of unreasonable clearances, block-booking and the other unlawful restraints of trade we have already discussed. The "root of the difficulties," according to the District Court, lay not in theatre ownership but in those unlawful practices.

The District Court did, however, enjoin the five majors from expanding their present theatre holdings in any manner.[20] It refused to grant the request of the Department of Justice for total divestiture by the five majors of their theatre holdings. It found that total divestiture would be injurious to the five majors and damaging to the public. Its thought on the latter score was that the new set of theatre owners who would take the place of the five majors would be unlikely for some years to give the public as good service as those they supplanted "in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres." Divestiture was, it thought, too harsh a remedy where there was available the alternative of competitive bidding. It accordingly concluded that divestiture was unnecessary "at least until the efficiency of that system has been tried and found wanting."

It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, *i. e.* it was

[20] Excepted from this prohibition was the acquisition of interests in theatres jointly owned, a matter we have discussed in a preceding portion of this opinion.

designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible."

It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five majors through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly.

An example will illustrate the problem. In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States* v. *Griffith*, *ante*, p. —, and see *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. —, even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the prob-

lem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. —, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution. What findings would be warranted after such an inquiry in the present cases, we do not know. For the findings of the District Court do not cover this point beyond stating that monopoly was an objective of the several restraints of trade that stand condemned.

Moreover, the problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. That is the position we have taken in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. —, in dealing with a projection of the same conspiracy through certain large circuits. Parity of treatment of the unaffiliated and the affiliated circuits requires the same approach here. For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors.

The findings of the District Court are deficient on that score and obscure on another. The District Court in its

findings speaks of the absence of a "purpose" on the part of any of the five majors to achieve a "national monopoly" in the exhibition of motion pictures. First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of "any part" of trade or commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225. Second, we pointed out in *United States* v. *Griffith*, *ante* p. —, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of "purpose" the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States* v. *Griffith*, *ante*, p. —), for as we stated in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809, 811, the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not

address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question.

Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 269–270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416), will consitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in *United States* v. *Griffith*, *ante*, p. —, n. 10, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See *United States* v. *Swift & Co.*, 286 U. S. 106, 116; *United States* v. *Aluminum Co. of America*, *supra*, p. 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (*United States* v. *Aluminum Co. of America*, *supra*, p. 430), and the lever-

age on the market which the particular vertical integration creates or makes possible.

These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand.

It follows that the provision of the decree barring the five majors from further theatre expansion should likewise be eliminated. For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem. We in no way intimate, however, that the District Court erred in prohibiting further theatre expansion by the five majors.

The Department of Justice maintains that if total divestiture is denied, licensing of films among the five majors should be barred. As a permanent requirement it would seem to be only an indirect way of forcing divestiture. For the findings reveal that the theatres of the five majors could not operate their theatres full time on their own films.[21] Whether that step would, in absence of competitive bidding, serve as a short range remedy in cer-

[21] The District Court found, "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor."

tain situations to dissipate the effects of the conspiracy (*United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *United States* v. *Bausch & Lomb Co.*, *supra*, p. 724; *United States* v. *Crescent Amusement Co.*, *supra*, p. 188) is a question for the District Court.

Fourth.

The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs "with rare efficiency." But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.

We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court.

Fifth—Intervention.

Certain associations of exhibitors and a number of independent exhibitors, appellant-intervenors in Nos. 85 and 86, were denied leave to intervene in the District Court. They appeal from those orders. They also filed original motions for leave to intervene in this Court. We postponed consideration of the original motions and of our jurisdiction to hear the appeals until a hearing on the merits of the cases.

Rule 24 (a) of the Rules of Civil Procedure, which provides for intervention as of right, reads in part as follows: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these anti-trust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. *United States* v. *St. Louis Terminal*, 236 U. S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the anti-trust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency

proposed the idea of competitive bidding in the District Court.

We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed. Now that the provisions for competitive bidding have been eliminated from the decree there is no basis for saying that the decree affects their legal rights. Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared.

The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 79–86.—October Term, 1947.

The United States of America, Appellant, 79 v. Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated et al. Loew's, Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants, 80 v. The United States of America. Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants, 81 v. The United States of America. Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants, 82 v. The United States of America. United Artists Corporation, Appellant, 83 v. The United States of America. Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures, Company, Inc.), Universal Film Exchanges, Inc., and Big U. Film Exchange, Inc., Appellants, 84 v. The United States of America.	Appeals from the District Court of the United States for the Southern District of New York.

American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz et al., Appellants,

85 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

W. C. Allred, Charles E. Beach and Elizabeth L. Beach et al., Appellants,

86 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

[May 3, 1948.]

MR. JUSTICE FRANKFURTER, dissenting in part.

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." On this guiding consideration, the Court earlier this Term sustained a Sherman Law decree, which was not the outcome of a long trial involving complicated and contested facts and their significance, but the formulation of a summary judgment on the bare bones of pleadings. *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401. The record in this case bespeaks more compelling respect for the decree fashioned by the District Court of three judges to put an end to violations of the Sherman Law and to prevent the recurrence, than that which led this Court not to find abuse of discretion in the decree by a single district judge in the *International Salt* case.

This Court has both the authority and duty to consider whether a decree is well calculated to undo, as far as is

possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition. But it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Law cases. It could not be fairly claimed that this Court possesses greater experience, understanding and prophetic insight in relation to the movie industry, and is therefore better equipped to formulate a decree for the movie industry than was the District Court in this case, presided over as it was by one of the wisest of judges.

The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measureable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

The crucial legal question before us is not whether we would have drawn the decree as the District Court drew it, but whether, on the basis of what came before the District Court, we can say that in fashioning remedies it did not fairly respond to disclosed violations and therefore abused a discretion, the fair exercise of which we should respect and not treat as an abuse. Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout

purpose on the part of that court to enforce its thoroughgoing understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors.

How did the District Court go about working out the terms of the decree some of which this Court now displaces? The case was before that court from October 8, 1945, to January 22, 1947. A vast body of the evidence which had to be considered below, and must be considered here in overturning the lower court's decree, consisted of documents. A mere enumeration of these documents, not printed in the record before us, required a pamphlet of 42 pages. It took 460 pages for a selection of exhibits deemed appropriate for printing by the Government. The printed record in this Court consists of 3,841 pages. It is on the basis of this vast mass of evidence that the District Court, on June 11, 1946, filed its careful opinion, approved here, as to the substantive issues. Thereafter, it heard argument for three days as to the terms of the judgment. The parties then submitted their proposals for findings of fact and conclusions of law by the District Court. After a long trial, an elaborate opinion on the merits, full discussion as to the terms of the decree, more than two months for the gestation of the decree, the terms were finally promulgated.

I cannot bring myself to conclude that the product of such a painstaking process of adjudication as to a decree appropriate for such a complicated situation as this record discloses was an abuse of discretion, arrived at as it was after due absorption of all the light that could be shed upon remedies appropriate for the future. After all, as to such remedies there is no test, ultimately, except the wisdom of men judged by events.

Accordingly, I would affirm the decree except as to one particular, that regarding an arbitration system for controversies that may arise under the decree. This raises a pure question of law and not a judgment based upon facts and their significance, as are those features of the decree which the Court sets aside. The District Court indicated that "in view of its demonstrated usefulness" such an arbitration system was desirable to aid in the enforcement of the decree. The District Court, however, deemed itself powerless to continue an arbitration system without the consent of the parties. I do not find such want of power in the District Court to select this means of enforcing the decree most effectively, with the least friction and by the most fruitful methods. A decree as detailed and as complicated as is necessary to fit a situation like the one before us is bound, even under the best of circumstances, to raise controversies involving conflicting claims as to facts and their meaning. A court could certainly appoint a master to deal with questions arising under the decree. I do not appreciate why a proved system of arbitration, appropriate as experience has found it to be appropriate for adjudicating numberless questions that arise under such a decree, is not to be treated in effect as a standing master for purposes of this decree. See *Ex parte Peterson*, 253 U. S. 300. I would therefore leave it to the discretion of the District Court to determine whether such a system is not available as an instrument of auxiliary enforcement. With this exception I would affirm the decree of the District Court.